Limitation of Liability for Damages in European Contract Law

Limitação da responsabilidade por danos no direito contratual europeu

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Resumo: Este artigo faz uma abordagem crítica, sob uma perspectiva histórica e comparativa, das regras contidas no capítulo sobre danos na proposta de *Common European Sales Law – CESL*. Chega-se às seguintes conclusões: (i) a regra de previsibilidade, contida em vários ordenamentos jurídicos, tem-se perpetuado no plano europeu, ainda que sem questionamento crítico, se é idealmente adequada para os propósitos segundo os quais foi projetada. (ii) O art. 161 do *CESL* não contém previsão específica para inadimplemento doloso ou realizado mediante culpa grave, o que se torna necessário. (iii) As normas relativas a "perda atribuível ao credor" e "redução de perda" são problemáticas em vários aspectos. Deve-se abandonar tal distinção e ser criado um dispositivo uniforme intitulado "perda atribuível ao credor". Podem ser incorporadas concepções do direito holandês, direito alemão, dos *Principles of International Commercial Contracts/Unidroit* e do Grupo Acquis.

Palavras-chave: Contrato – Danos – Danos hipotéticos – Direito comparado – Direito europeu.

Abstract: The present paper provides a critical assessment, in historical and comparative perspective, of the rules contained in the Chapter on Damages of the proposed Common European Sales Law. It arrives at the following conclusions: (i) The foreseeability rule, entrenched in a number of national legal systems, has been perpetuated on a European level without critical enquiry as to whether it is ideally suited for the purpose for which it was designed. (ii) That Article 161 CESL does not contain a special provision relating to intentional and grossly negligent non-performance is to be welcomed. (iii) The rules on "loss attributable to creditor" and "reduction of loss" are problematic in several respects. The distinction should be abandoned and one uniform rule be drafted under the heading "loss attributable to creditor". Inspiration can be gained, in particular, from Dutch law, German law, the PICC and the ACQP.

Keywords: Contract – Contract law – Damages – Remoteness of damages – Comparative law – European law.

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I. THE COMMON EUROPEAN SALES LAW IN PERSPECTIVE[(*)]

Over the past two decades a number of texts have appeared in quick succession which have attempted to consolidate, and eventually also to coordinate, the European *acquis commun* (ie the traditional private law as it can be found today in the national legal systems) and the *acquis communautaire* (ie the rules of European Community private law, particularly in the field of consumer contract law).[1] Apart from, and following upon, the PECL,[2] these are: Acquis Principles (ACQP),[3] Principles of European Law (PEL),[4] Draft Common Frame of Reference

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1. For an overview, see Reinhard Zimmermann, 'The Present State of European Private Law', (2009) 67 *American Journal of Comparative Law* 479 ff; idem, 'Europäisches Privatrecht – Irrungen, Wirrungen', in *Begegnungen im Recht, Ringvorlesung der Bucerius Law School zu Ehren von Karsten Schmidt* (2011) 321; idem, '"Wissenschaftliches Recht" am Beispiel (vor allem) des europäischen Vertragsrechts', in Christian Bumke and Anne Röthel (eds), *Privates Recht* (2012) 21 ff. For the distinction between *acquis commun* and *acquis communautaire*, see Nils Jansen, 'European Private Law', in Jürgen Basedow, Klaus J. Hopt, and Reinhard Zimmermann (eds), *The Max Planck Encyclopedia of European Private Law* (2012) 637 ff.
2. Ole Lando and Hugh Beale, *Principles of European Contract Law*, Part I (1995); Ole Lando and Hugh Beale, *Principles of European Contract Law*, Parts I and II (2001); Ole Lando, Eric Clive, André Prüm, and Reinhard Zimmermann, Principles of European Contract Law, Part III (2003).
3. Research Group on the Existing EC Private Law (ed), *Principles of the Existing EC Contract Law (Acquis Principles), Contract I* (2007); *Contract II* (2009); see Hans Christoph Grigoleit and Lovro Tomasic, 'Acquis Principles', in Jürgen Basedow, Klaus J. Hopt, and Reinhard Zimmermann (eds), *The Max Planck Encyclopedia of European Private Law* (2012) 10 ff.
4. Many volumes covering, *inter alia*, specific contracts, non-contractual obligations, trust and transfer of property with regard to movables; for present purposes, see Study Group on a European Civil Code/Ewoud Hondius, Viola Heutger, Christoph Jeloschek, Hanna Sivesand, and Aneta Wiewiorowska, *Sales* (2008); generally, see Martin Schmidt-Kessel, 'Study Group on a European Civil Code', in Jürgen Basedow, Klaus J. Hopt, and Reinhard Zimmermann (eds), *The Max Planck Encyclopedia of European Private Law* (2012) 1611 ff.

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(DCFR; first in an Outline Edition and subsequently in a Fall Edition),[5] *Principes Contractuels Communs* (PCC),[6] Feasibility Study (FS),[7] and the proposed Common European Sales Law (CESL),[8] mentioned above.

In the course of time what had originally been an academic project had also become a political one, as is apparent from a number of communications by the Commission of the European Union, issued from 2001 onwards.[9] Two more documents must be mentioned in the present context; for even though they are aiming at global rather than merely European legal harmonization, they have been of considerable importance also for the development of European contract law: the United Nations Convention on Contracts for the International Sales of Goods (CISG) of 11.04.1980 and the Unidroit Principles of International Commercial Contracts (PICC) which have first appeared in 1994 and then, in amended versions, in 2004 and 2010.[10]

5. Christian von Bar, Eric Clive, and Hans Schulte-Nölke (eds), *Principles, Definitions and Model Rules of European Private Law: Draft Common Frame of Reference (DCFR)*, Outline Edition (2009); Christian von Bar and Eric Clive (eds), *Principles, Definitions and Model Rules of European Private Law: Draft Common Frame of Reference (DCFR)*, Full Edition (2009); see Reinhard Zimmermann, 'Common Frame of Reference', in Jürgen Basedow, Klaus J. Hopt, and Reinhard Zimmermann (eds), *The Max Planck Encyclopedia of European Private Law* (2012) 261 ff.
6. Association Henri Capitant des Amis de la Culture Juridique Française and Société de Législation Comparée, *Principes Contractuals Communs* (2008) (constituting a proposed revision of the PECL).
7. Commission Expert Group on European Contract Law: Feasibility study for a future instrument in European Contract Law 3 May 2011, for the text of which, see Reiner Schulze and Reinhard Zimmermann, *Europäisches Privatrecht: Basistexte*, 4th ed. (2012) sub III.30.
8. The text of the Common European Sales Law constitutes Annex I to the Proposal for a Regulation on a Common European Sales Law: COM(2011) 635 final. For comment, see Horst Eidenmüller, Nils Jansen, Eva-Maria Kieninger, Gerhard Wagner, and Reinhard Zimmermann, 'The Proposal for a Regulation on a Common European Sales Law: Deficits of the Most Recent Textual Layer of European Contract Law', (2012) 16 *Edinburgh LR* 301 ff.; and the contributions to Gerhard Wagner and Reinhard Zimmermann (eds), 'Sondertagung der Zivilrechtslehrervereinigung zum Vorschlag für ein Common European Sales Law', (2012) 212 *Archiv für die civilistische Praxis* 467 ff. In this paper the text of the proposed Common European Sales Law will be abbreviated CESL, while the Proposal for a Regulation will be cited as PR CESL.
9. For details, see the Reinhard Zimmermann, 'European Contract Law: General Report', in *4th European Jurists' Forum: Proceedings* (2008) 185 ff; cf also the other contributions to Section 1 on European Contract Law, particularly, on the political intentions of the EC, those by Stephen Weatherill, Michael Joachim Bonell and Thomas Wilhelmsson.
10. Unidroit (ed.), *Unidroit Principles of International Commercial Contracts* 2010 (2011). On the CISG, see Ulrich Magnus, 'Sale of Goods, International (Uniform Law)', on the PICC, see Jan Kleinheisterkamp, 'Unidroit Principles of International Commercial Contracts

What we are faced with are thus a number of different 'Textstufen',[11] or layers of text, genetically and hermeneutically intimately related to each other. This makes it both worthwhile and necessary to compare and analyze these texts in historical sequence and to ask how they have been transformed in the process. Two studies have previously been devoted to the topics of formation of contract, mistake and contract interpretation.[12] One of the difficulties encountered in any such study lies in the fact that comments have only been published to some of these model rules. Most important for present purposes (and for purposes of the two previous studies) are the comments to PECL and PICC, the former of which have largely been taken over, in a somewhat unsatisfactory manner,[13] into the DCFR. No comments have been published to the FS and the CESL, ie to the two most recent textual layers. Thus, we do not know why certain changes have been made to previous texts. But even where we do have comments (as in the case of PECL and PICC) they are often not very helpful for our enterprise. For they merely tell us what a specific rule is intended to mean. They do not tell us why that rule was chosen from among the various regulatory options available.[14] Thus, its specific profile and the policy arguments favouring it remain unclear: both vis-à-vis the other model rules and vis-à-vis the historical and comparative context.

With the proposed CESL the development appears to be heading towards a (perhaps preliminary) conclusion, for this is a text which the European Union intends to enact. It will no longer be just a set of academic model rules but it will be invested with statutory authority (albeit in the form of an optional instrument). At the moment, it is impossible to assess what practical relevance it is likely to have. But even if the practical relevance may be very limited, the CESL is set to establish itself as *the* reference text for European contract law. There is thus the danger that it will be looked at in isolation, that what preceded it will be forgotten – and that

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(PICC)', both in Jürgen Basedow, Klaus J. Hopt, and Reinhard Zimmermann (eds), The Max Planck Encyclopedia of European Private Law (2012) 1507 ff, 1727 ff.

11. On the concept of 'Textstufen', normally used in Roman law scholarship, see Reinhard Zimmermann, 'Textstufen in der modernen Entwicklung des europäischen Privatrechts', [2009] *Europäische Zeitschrift für Wirtschaftsrecht* 319 ff; Nils Jansen and Reinhard Zimmermann, 'Contract Formation and Mistake in European Contract Law: A Genetic Comparison of Transnational Model Rules', (2011) 31 *Oxford JLS* 625 (626).

12. Jansen/Zimmermann, (2011) 31 *Oxford JLS* 625 ff; Reinhard Zimmermann, 'Die Auslegung von Verträgen: Textstufen transnationaler Modellregelungen', in *Festschrift für Eduard Picker* (2010) 1353 ff.

13. See, eg, Jansen/Zimmermann, (2011) 31 *Oxford JLS* 642, 655, 661.

14. Cf also Nils Jansen and Reinhard Zimmermann, '"A European Civil Code in All But Name": Discussing the Nature and Purposes of the Draft Common Frame of Reference', [2010] *Cambridge LJ* 98 (104 ff, 111: 'Comments and illustrations are designed to elucidate the rules but they do not offer legal arguments').

an arid *école de l'exégèse* may be in store for us, attempting to suck the odd drop of honey from the words of the CESL's rules. These words, however, must be seen in a context, and that context must be made visible. What appears to be called for, then, is a historical as well as critical commentary[15] elucidating the specific profile of the CESL and thereby providing the basis for its proper understanding and critical assessment. This should be done by comparatively analysing the texts that have led up to the CESL ('Textstufenforschung') and by situating these texts within the more general European legal development. Do they represent, as the draftsmen of the PECL, the PICC and also the DCFR have claimed,[16] a restatement of European contract law? Or are they based upon a choice between different solutions encountered in the national legal systems? In the latter case, why has this choice been made? Does it appear to be reasonable? And if the draftsmen of CISG, PECL or PICC have chosen the one or other solution, and drafted a corresponding rule, why and in which way has it been changed and further developed by the draftsmen of the subsequent texts? Can that development be regarded as an improvement or must it be criticized as a deterioration? In this respect also the large body of comparative, historical, and genuinely European legal literature has to be taken into account that has hitherto been largely neglected. For, in the meantime, a considerable number of textbooks, casebooks, commentaries, handbooks and encyclopedias, monographs and journal articles have been published which help to analyse to what extent the texts contained in the model rules reflect historical experiences: common European ones or those of certain EU member states, good ones or bad ones. The present paper is intended to illustrate the approach that may thus be adopted. It focuses on three rules contained in chapter 16 of the CESL.

II. The Damages Rules within the System of the Common European Sales Law

Chapter 16 of the CESL is devoted to damages and interest. Its systematic position indicates that it refers to sales contracts (as defined in Art. 2 k PR CESL) as well as to related service contracts (as defined in Art. 2 m PR CESL). Chapter 16 comprises three sections the first of which is devoted to damages. It contains seven provisions (Arts. 159-165), which correspond to Art. 74-77 CISG, Art. 9:501-

15. For the concept of a historical and critical commentary, see the foreword to Mathias Schmoeckel, Joachim Rückert, and Reinhard Zimmermann (eds), *Historisch-kritischer Kommentar zum BGB*, vol. I (2003); and see the review by Alan Rodger, (2005) 9 *Edinburgh LR* 176 f.

16. See Ralf Michaels, 'Restatements', in Jürgen Basedow, Klaus J. Hopt, and Reinhard Zimmermann (eds), *The Max Planck Encyclopedia of European Private Law* (2012) 1464 ff; Jansen/Zimmermann, [2010] *Cambridge LJ* 98 (100 ff).

507 PECL; Art. 7.4.1.-7.4.8 PICC, Art. III.-3:701-707 DCFR and Art. 163-169 FS[17]. The PCC propose a number of modifications to the provisions of the PECL (Art. 10:501-507). In addition, Art. 8:401-403 ACQP,[18] have provisions on damages. These provisions are not very helpful for present purposes. In view of the fact that the *acquis* has, traditionally, been 'somewhat reluctant as regards remedies for breach of contractual duties', 'is not exactly explicit' on a number of issues, or is 'underdeveloped',[19] Art. 8:401-403 ACQP rules are based on a generalization of some individual cases, or inspired by CISG, PECL and PICC.

Systematically, the view appeared to gain acceptance that damages, being just one out of a number of 'remedies' available to an aggrieved party, were to be dealt with as part and parcel of a chapter on 'Remedies for non-performance' (DCFR), 'Particular Remedies for Non-Performance' (PECL), or 'Non-performance' (PICC). The draftspersons responsible for the FS and the CESL, however, have essentially returned to the structure adopted in the CISG: at its most basic level, the law relating to non-performance is structured not according to remedies in general (nor, of course, to types of non-performance)[20], but according to the obligations incumbent upon, and remedies available to, *the buyer* or *the seller*. But the remedy of damages has been 'factored out': it has been separated from the other remedies and forms a key component of a general part on sales law (CISG, CESL), or contract law (PECL, PICC, ACQP, FS).

Modern continental legal systems usually adopt a uniform approach towards contractual and delictual damages,[21] no matter whether they locate the relevant

17. Like the CESL, the CISG and FS devote different sections to its provisions on damages and interest; the PECL, PICC and DCFR deal with both issues in one and the same section (entitled 'Damages and Interest' in the PECL and DCFR; and 'Damages' in the PICC).

18. As part of a section dealing with damages and interest (entitled 'Damages').

19. Acquis Group (n 3) 429, 432, 434; Ulrich Magnus, 'The damages rules in the acquis communautaire, in the Acquis Principles and in the DCFR', in Reiner Schulze (ed), *Common Frame of Reference and Existing EC Contract Law* (2008) 205 ff ('(…) reluctant to impose specific rules on the assessment of damages').

20. As was the case under pre-2002 German law; see Reinhard Zimmermann, *The New German Law of Obligations* (2005) 39.

21. The general concept of damages has been developed, in various stages, by the writers of the *ius commune*, largely on the basis of the Roman concept of 'quod interest'; see Nils Jansen, in Mathias Schmoeckel, Joachim Rückert, and Reinhard Zimmermann (eds), *Historisch-kritischer Kommentar zum BGB*, vol. II/1 (2007) §§ 249 – 253, 255, nos 31 f in connection with nos 6 ff; for the Natural law theories, see Helmut Coing, *Europäisches Privatrecht*, vol. I (1985) 442. Nineteenth century pandectist textbook writers tended to deal with 'damages' (*interesse*) as part of their chapter on obligations in general, see Carl Georg von Wächter, *Pandekten*, vol. II (1881) § 172; Bernhard Windscheid and Theodor Kipp, *Lehrbuch des Pandektenrechts*, 9th ed. (1906) §§ 257 f; or even of the general part of the

rules in their law of delict,[22] in their law of contract[23] or, more happily from a systematic point of view, in their general part on obligations.[24] Art. III.-3:701-3:703 DCFR were, likewise, designed to cover not only damages for breach of contract but also for 'Non-contractual liability arising out of damages caused to another' (a neologism for delict / torts). That is why these rules had been included in Book III on 'Obligations and corresponding rights'. In the CESL, however, the law of delict / torts is not dealt with; its draftsmen have thus given up the ambitious attempt to formulate rules relating to the law of obligations in general.

Section 1 of Chapter 16 commences with two provisions establishing under which circumstances a creditor is entitled to damages (Art. 159) and the general measure of damages (Art. 160). These two provisions will not be dealt with in this paper.[25] For while they are also remarkable in a number of respects, by and large, they reflect what is generally accepted today in international legal discourse. This is the reason why there are no significant differences between the various textual layers leading up to Art. 159 and 160 CESL. Instead, this paper will discuss the three subsequent provisions (Art. 161-163), all of them for one reason or another limiting the debtor's liability: foreseeability of loss, loss attributable to the creditor, and mitigation.

III. Foreseeability

1. *Other tests for limiting liability*

It is generally accepted that it would be unreasonable to make the non-performing party liable for every loss that would (in all likelihood) not have occurred had that party duly performed his contractual obligations. The *conditio sine qua non*-test, in other words, casts the causal net too widely.[26] Cases often discussed in this context

system of pandectist law, see Anton Friedrich Justus Thibaut, *System des Pandekten-Rechts*, vol. I, 2nd ed. (1805) §§ 271 ff. For a comprehensive discussion of the basic principles of responsibility in private law (both under the law of contract and delict/torts), see Martin Schermaier, in Mathias Schmoeckel, Joachim Rückert, and Reinhard Zimmermann (eds), *Historisch-kritischer Kommentar zum BGB*, vol. II/1 (2007) vor § 276, nos 1 ff; cf also Wolfgang Wurmnest, 'Damages', in Jürgen Basedow, Klaus J Hopt, and Reinhard Zimmermann (eds), *The Max Planck Encyclopedia of European Private Law* (2012) 444 ff.

22. §§ 1293 ff Austrian General Civil Code (ABGB); Art. 42 ff Swiss Law on Obligations (OR).

23. Art. 1.146 ff *Code civil*.

24. §§ 249 ff German Civil Code (BGB); Art. 1.223 ff *Codice Civile*; Art. 6:95 ff Dutch Civil Code (BW).

25. On Art. 159, see Reinhard Zimmermann, 'Right to Damages', in *Essays in Memory of Michael Blackman* …

26. See, eg, H.L.A. Hart and Tiny Honoré, *Causation in the Law*, 2nd ed (1985) 109 ff; Guenter H. Treitel, *Remedies for Breach of Contract* (1988) nos 136 ff; Jaap Spier (ed), *Unification*

are those of the tailor who fails to deliver travelling clothes to his customer at the appointed time the customer, therefore, having to take a later train than the one originally envisaged and being injured in a crash in which that later train is embroiled;[27] of the 'bowling boy' who is injured by a bowling ball when being made to work late at night, contrary to working hour regulations, in a bowling hall;[28] or of the stamp collector who is unable to sell his very valuable stamp collection because a stamp dealer has failed to deliver a set of stamps still lacking in that collection.[29] A number of devices have been employed to effect a reasonable limitation of the debtor's liability in cases such as these. For it conforms to a general intuition that the tailor, the employer of the 'bowling boy' and the stamp dealer should not be liable for these specific consequences of their non-performance. General devices for limiting the debtor's liability such as, in some legal systems, the requirement of fault[30] do not usually help, in view of the fact that fault has to relate to the act of non-performance rather than to the resulting loss.[31] Of the special devices restricting the range of consequences for which a debtor is liable two may be quite easily dismissed. One of them can be found in the *Code civil*, the other in German and Austrian court practice and legal doctrine.

According to Art. 1.151 *Code civil* the recovery of loss is limited to what constitutes an 'immediate and direct consequence' of the non-performance of the contract. This applies even in cases involving *dol* or *faute lourde* on the part of the debtor.[32]

of Tort Law: Causation (2000) 130 ff; Hugh Beale, Bénédicte Fauvarque-Cosson, Jacobien Rutgers, Denis Tallon, and Stefan Vogenauer, *Cases, Materials and Text on Contract Law*, 2nd ed (2010) 1002 ff; Ingeborg Schwenzer, Pascal Hachem, and Christopher Kee, *Global Sales and Contract Law* (2012) nos 44.85 ff; Jens Kleinschmidt, 'Causation', in Jürgen Basedow, Klaus J. Hopt, and Reinhard Zimmermann (eds), *The Max Planck Encyclopedia of European Private Law* (2012) 156 f.

27. Treitel, *Remedies* (n. 26) no 137; cf. also Reichsgericht of 15.02.1913, *RGZ* 81, 359.

28. LG Hannover, [1910] *Recht* 36.

29. Lando and Beale I and II (n. 2) 441.

30. See, for German law, Ulrich Huber, *Leistungsstörungen*, vol. I (1999) 78 ff; *HKK*/Schermaier (n. 21), §§ 276 – 278, nos 76 ff; Filippo Ranieri, *Europäisches Obligationenrecht*, 3rd (2009) 605 ff; Treitel, *Remedies* (n. 26) no 9 ('The theory [that fault is a requirement for the availability of contractual remedies] finds its clearest and most explicit expression in § 276 of the German Civil Code').

31. For Germany, see §§ 280 (1), 437 no 3 BGB. Sometimes, however, the degree of fault determines the extent of the non-performing party's liability; for Austria, see § 1324 ABGB; for France (and Italy), see Art. 1.150 *Code Civil* (and Art. 1.225 *Codice Civile*). For a general discussion of the various methods of limiting damages, see Treitel, *Remedies* (n. 26) nos 122 ff; Helmut Koziol, *Basic Questions of Tort Law from a Germanic Perspective* (2012) 269 ff; Ole Lando, 'Foreseeability and Remoteness of Damages in Contract in the DCFR', (2009) 17 *European Review of Private Law* 619 ff; Kleinschmidt (n. 26) 159 f.

32. For Italy, see Art. 1.223 *Codice Civile*.

Since in these latter situations the debtor does not enjoy the protection of the foreseeability rule in Art. 1.150,[33] it must be assumed, somewhat counter-intuitively, that Art. 1.151 draws a distinction between unforeseeable loss that is direct and immediate, and unforeseeable loss that is not.[34] The illustration provided by Pothier,[35] and mentioned by just about every author discussing the issue,[36] takes up a well-known Digest text. A farmer sells a piece of cattle which he knows to be infected by a contagious disease. According to Ulpian, he is liable not just for the difference between the price paid by the purchaser and the price the purchaser would have paid had he known about the disease, but for 'onmia detrimenta, quae ex ea emptione emptor traxerit': for all the loss suffered by the creditor on account of the sale including, in particular, the value of the purchaser's other animals who, having caught the infection, have perished.[37] In Pothier's conceptualization this is an immediate and direct consequence and must be distinguished from the loss the purchaser may have suffered as a result of having been unable, without these animals, to cultivate his land, including his subsequent inability to pay his debts so that his creditors seize up and sell his property. Why the chain of causation should have to be cut off at this precise point and why the latter consequences of the seller's defective performance are thus to be dubbed 'indirect' is not immediately obvious. Pothier, in fact, attempts to explain this by stating that non-cultivation is 'not a wholly necessary consequence' of the loss of the purchaser's cattle resulting from the seller's deceit. This raises the suspicion that the real reason for the limitation of the seller's liability may be the one insinuated in Art. 163 CESL: the debtor is not liable for the loss suffered by the creditor to the extent that the latter could have reduced the loss 'by taking reasonable steps';[38] in fact, Pothier specifically states that the purchaser could have avoided the non-cultivation of his land by using other cattle. But be that as it may, French courts and legal writers have failed to give contours to the 'elusive' criterion of directness.[39] It is probably

33. Below …

34. See Philipppe Malaurie, Laurent Aynès and Philippe Stoffel-Munck, *Les obligations*, 5th ed. (2011) nos 963 f; cf also Schwenzer/Hachem/Kee (n. 26) no 44.141.

35. Robert Joseph Pothier, 'Traité des obligations', in *Traités de droit civil et de jurisprudence française*, vol. I, 2nd ed. (Paris and Orléans, 1781) nos 166 f.

36. See, eg, Ernst Rabel, *Das Recht des Warenkaufs*, vol. I (1936) 478; Treitel, *Remedies* (n. 26) no 140; Barry Nicholas, *The French Law of Contract*, 2nd ed. (1992) 229; Beale/Fauvarque-Cosson/Rutgers/Tallon/Vogenauer (n. 26) 1004 f.

37. Ulp. D. 19, 1, 13 pr; see Reinhard Zimmermann, *The Law of Obligations: Roman Foundations of the Civilian Tradition* (paperback edition 1996) 831 f.

38. See below …

39. Nicholas (n. 36) 229; François Terré, Philippe Simler, and Yves Lequette, *Les obligations*, 10th ed. (2009) no 703; Malaurie/Aynès (n. 34) no 963.

even impossible to do so;[40] and also, perhaps, unnecessary in view of the scarcity of cases in which it can be said that a certain type of loss, though unforeseeable, can still be said to be direct.[41]

German and Italian courts and legal writers, on the other hand, have attempted to limit the debtor's liability by applying a doctrine of 'adequate causation': a non-performing party is not to be liable for what cannot, according to common experience, be regarded as a normal or natural consequence of the non-performance.[42] Since this is to be gauged from the point of view of an experienced observer, the practical utility of the theory of adequate causation can be – and often is – severely doubted. The criterion of 'adequacy' does not disclose a material reason for deciding a case one way or the other and has often, therefore, been used as a convenient cloak legitimating a result regarded as fair or reasonable.

2. The emergence of foreseeability in France and England

The device for limiting the debtor's liability that has internationally gained the greatest acceptance is the notion of foreseeability.[43] It has a curious history.[44] Justinian, dissatisfied with the intricacies surrounding the concept of *quod interest* in the classical case law,[45] issued a ruling (C. 7, 47, 1, ie the so-called *lex Sancimus*) according to which the interest was not to exceed 'quantitas dupli', ie twice the value.[46]

40. Rabel, *Warenkauf* I (n. 36) 479.
41. See Treitel, *Remedies* (n. 26) no 140.
42. For Germany, see Rabel, *Warenkauf* I (n. 36) 486 ff; Hart/Honoré (n. 26) 465 ff; Treitel, *Remedies* (n. 26) nos 137 ff; Ulrich Huber, 'Leistungsstörungen', in *Gutachten und Vorschläge zur Überarbeitung des Schuldrechts*, vol. I (1981) 727 f; Nils Jansen, in Mathias Schmoeckel, Joachim Rückert, and Reinhard Zimmermann (eds), *Historisch-kritischer Kommentar zum BGB*, vol. II/1, §§ 249 – 253, 255, nos 66 f; Hartmut Oetker, in *Münchener Kommentar zum Bürgerlichen Gesetzbuch*, vol. II, 6th ed. (2012) § 249, nos 109 ff. For Italy, see, e.g., Cass civ (11.01.2008), no 576, [2008] *Il Corriere del Merito* 694; Massimo D'Auria, 'Il nesso di causalità', in Vincenzo Cuffaro (ed.), *Responsabilità*, 'Il nesso di causalità' (2007) 51. For Austria, see Koziol (n. 31) 272 ff.
43. Rabel, *Warenkauf I* (n. 36) 483 ff; Treitel, *Remedies* (n. 26) 150 ff; Florian Faust, *Die Vorhersehbarkeit des Schadens gemäß Art. 74 Satz 2 UN-Kaufrecht (CISG)* (1996) 73 ff; James Gordley, *Foundations of Private Law* (2006) 395 ff; Schwenzer/Hachem/Kee (n. 26) 44.85 ff; Athina Xynopoulou, *Die Voraussehbarkeit als Voraussetzung des Schadensersatzes in der Vertragshaftung* (2013).
44. Zimmermann, *Law of Obligations* (n. 37) 828 ff; Coing I (n. 21) 439 ff; Gordley, *Foundations* (n. 43) 398 f; *HKK*/Jansen (n. 42) §§ 249 - 253, 255, no 28; Ranieri (n. 30) 793; Xynopoulou (n. 43) 3 ff.
45. 'Cum pro eo quod interest dubitationes antiquae in infinitum productae sunt (…)': C. 7, 47 pr.
46. C. 7, 47, 1 (the so-called *lex Sancimus*).

He thus introduced an arbitrary cap on the damages to be awarded that was based on a clumsy generalisation. Since, moreover, the relevant text was poorly drafted, it presented considerable challenges to the interpretation skills of generations of lawyers. Twice the value of what?: that was merely one of the issues that needed to be resolved.[47]

But while the *quantitas dupli* remained accepted, as far as contractual damages claims were concerned, by the authors of the German *usus modernus* as well as by pandectist doctrine,[48] an interesting twist was given to the discussion of C. 7, 47, 1 in French legal literature. It appears to have been Carolus Molinaeus (Charles Dumoulin) who for the first time attempted to rationalize the statutory limitation in terms of foreseeability.[49] Pothier generalized this idea and detached it from the Justinianic rule: '(...) le débiteur', he stated,[50] 'n'est tenu que des dommages et intérêts qu'on a pu prévoir, lors du contrat, que le créancier pourrait souffrir de l'inexécution de l'obligation'. The *Code civil*, of course, followed suit,[51] and so did courts and legal writers in 19th century England. Damages, according to Alderson B in the celebrated case of *Hadley v. Baxendale*,[52] can be recovered when they are 'such as may reasonably be supposed to have been in the contemplation of both parties, at the time they made their contract, as the probable result of the breach of it'. If they do not satisfy this test, damages are generally held to be 'too remote'.[53]

47. Another major problem arose as a result of the fact that the limit of *quantitas dupli was* confined to cases 'which have a certain quantity or nature'. In cases 'which appear to be uncertain', however, the loss that was truly incurred had to be paid for. How was this distinction to be drawn? But it was also sometimes argued that the limitation imposed by C. 7, 47, 1 also had to be observed in the latter type of situation 'ex aequitate et mente huius legis': Carolus Molinaeus, *Tractatus de eo quod interest* (Venetiis, 1574) no 60. Reason: '[u]t enim ratio decidendi totius legis est odium immensitatis'.

48. See, eg, Georg Adam Struve, *Syntagma jurisprudentiae secundum ordinem Pandectarum concinnatum* (Jenae, 1702), Exerc. XLIV; Lib. XLII, Tit- I, V; Windscheid/Kipp (n. 21) § 258, 1.

49. Molinaeus (n. 47) no 60 ('quia verisimiliter non fuit praevisum'). ('No treatise on damages has perhaps had a more profound influence on the development of the law of damages than the *Tractatus de eo quod interest* of Molinaeus': H.J. Erasmus, 'Aspects of the History of the South African Law of Damages', (1975) 38 *Tydskrif vir Hedendaagse Romeins-Hollandse Reg* 116 f. Erasmus has translated this treatise into Afrikaans (1973)).

50. Traité des obligations (1761) no 160.

51. Art. 1.150 *Code Civil* ('Le débiteur n'est tenu que des dommages et intérêts qui ont été prévus ou qu'on a pu prévoir lors du contrat, (…)'); see Faust (n. 43) 104 ff; Xynopoulou (n. 43) 13 ff; Malaurie/Aynès (n. 34) no 964; Terré/Simler/Lequette (n. 39) nos 563 f.

52. (1854) 9 Exch 341 (354); cf also Beale/Fauvarque-Cosson/Rutgers/Tallon/Vogenauer (n. 26) 1005 ff.

53. Strictly speaking, this is the second branch of the rule in *Hadley v. Baxendale*, for Alderson B starts by stating that damages are recoverable when they are 'such as may fairly and

3. *The international instruments*

In view of the fact that the foreseeability test is entrenched not only in the English common law but also in the *Code civil*, as well as in other legal systems of the Romanistic legal family,[54] it was bound to be attractive for the draftsmen of the instruments aimed at the harmonization of contract law on a supranational level. Via Art. 82 of the Uniform Law on the International Sale of Goods (ULIS) it became part of CISG whose Art. 74 determines that the damages to be awarded to the creditor 'may not exceed the loss which the party in breach foresaw or ought to have foreseen at the time of conclusion of the contract, in the light of the facts and matters of which he then knew or ought to have known, as a possible consequence of the breach of the contract'.[55] The point of departure for

reasonably be considered as arising naturally, ie according to the usual course of things'. Since however everyone, as a reasonable person, can be taken to know the ordinary course of things, this first branch of the rule can be subsumed under the second one. On *Hadley v. Baxendale*, on the subsequent decision in *Victoria Laundry (Windsor) Ltd v. Newman Industries Ltd*, [1949] 2 KB 528 (substituting the term 'reasonably foreseeable' for 'reasonably contemplated'), and for further case law based on *Hadley v. Baxendale*, see Treitel, *Remedies* (n. 26) nos 128 ff; Beale/Fauvarque-Cosson/Rutgers/Tallon/Vogenauer (n. 26) 106 ff; Schwenzer/Hachem/Kee (n. 26) nos 44.87 ff; Faust (n. 43) 76 ff; Jack Beatson, Andrew Burrows, and John Cartwright, *Anson's Law of Contract*, 29th ed. (2010) 543 ff; Xynopoulou (n. 43) 35 ff; cf also Richard Danzig, 'Hadley v. Baxendale: A Study in the Industrialization of the Law', (1975) 4 *Journal of Legal Studies* 249 ff; Florian Faust, 'Hadley v. Baxendale – An Understandable Miscarriage of Justice', (1994) 15 *Journal of Legal History* 41 ff.

54. See, eg, Art. 1.225 *Codice Civile* which, however, merely limits liability as to the amount of damages and not with respect to their existence: see, eg, Fabrizio Criscuolo, 'La risarcibilità dei danni imprevedibili: tra nesso di causalità e quantificazione del pregiudizio', in *Studi in onore di Nicolò Lipari* vol. I (2008) 637 ff; D'Auria (n. 42) 98; Alessandra Mari, in Luisa Antoniolli and Anna Veneziano, *Principles of European Contract Law and Italian Law: A Commentary* (2005) 454. – For a comprehensive analysis of all the issues connected with the foreseeability rule in comparative perspective (England, USA, France), see Faust (n. 43) 111 ff; cf. also Treitel, *Remedies* (n. 26) nos 129 ff; Sieg Eiselen, 'Specific Performance and Special Damages', in Hector MacQueen and Reinhard Zimmermann (eds), *European Contract Law: Scots and South African Perspectives* (2006) 270 ff; and the overview in Schwenzer/Hachem/Kee (n. 26) nos 44.91 ff, 44.101 ff. On the foreseeability rule in the light of an economic analysis, see Faust (n. 43) 238 ff; Xynopoulou (n. 43) 53 ff; and see the references in Thomas Ackermann, 'Beyond Expectation? – An Assessment of the DCFR Rules on Contractual Damages', in Gerhard Wagner (ed.), *The Common Frame of Reference: A View from Law and Economics* (2009) 62.

55. On the history (including the drafting history) of Art. 82 ULIS and Art. 74 CISG, see Faust (n. 43) 45 ff. On the way in which the foreseeability criterion in Art. 74 CISG is interpreted today, see Ulrich Magnus, 'Wiener UN-Kaufrecht (CISG)', in *J. von Staudingers Kommentar zum Bürgerlichen Gesetzbuch* (revised edition 2013) Art. 74,

the rule that can be found today in Art. 161 CESL is Art. 9:503 PECL (which, for all practical purposes is identical with Art. 7.4.4 PICC): 'The non-performing party is liable only for loss which it foresaw or could reasonably have foreseen at the time of conclusion of the contract as a likely result of its non-performance'.[56] Both CESL and PECL differ from English law[57] insofar, as they focus on the non-performing party rather than on what both parties should have foreseen. The PECL differ from both the CESL and the English contemplation doctrine in that they require the consequences of the non-performance, that must have been foreseeable, to have been 'likely' rather than merely 'possible'. Finally, the PECL differ from the CISG and effectively revert to the approach adopted in English law when they confine liability to loss that the non-performing party 'could reasonably have foreseen' rather than 'ought to have foreseen'. The latter formulation implies a duty, on the part of the non-performing party, to foresee the loss that is likely to arise, which is an odd idea.

The Comments to Art. 9:503 PECL are silent on all these issues. They also do not say why Art. 9:503, unlike Art. 74 CISG, does not specifically state that the issue of foreseeability must be assessed 'in the light of the facts and matters of which [the non-performing party] then knew or ought to have known'. The draftsmen of the PECL probably took this to be too clumsy and, at the same time, self-evident. Art. III.-3:703 DCFR further refines the foreseeability formula chosen in the PECL in that the phrase 'could reasonably have foreseen' is extended to 'could reasonably be expected to have foreseen'. This does indeed encapsulate more precisely what Art. 9:503 PECL also intends to state.

The next textual layer is Art. 165 FS where the word 'reasonably' has been dropped. Ultimately, in Art. 161 CESL the point of reference for what must have been foreseeable has been changed from loss which is likely to result from the non-performance to loss which results from the non-performance. This has led to the following text:

"The debtor is liable only for loss which the debtor foresaw or could be expected to have foreseen at the time when the contract was concluded as a result of the non-performance."

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nos 31 ff; Ingeborg Schwenzer, in Schlechtriem and Schwenzer, *Commentary on the UN Convention on the International Sale of Goods* (CISG), 3rd ed. (2005) Art. 74, nos 45 ff; Xynopoulou (n. 43) 65 ff. It seems to be widely recognized that we are dealing here with an 'objective' standard; the foreseeability-concept, in other words, has a normative character and necessitates inquiries relating to the contractual risk allocation and the purpose of the contract.

56. For comments, see Xynopoulou (n. 43) 76 ff.

57. Which the draftsmen of Art. 82 ULIS and Art. 74 CISG had, and the commentators to Art. 74 CISG have, primarily in mind; see Faust (n. 43) 74 f.

Of all the versions of the foreseeability rule this is the most succinct one.[58] The criterion of reasonableness is arguably inherent in determining what a person can be expected to have foreseen; and if what matters is what a non-performing party foresaw or could (reasonably) be expected to have foreseen, it is quite sufficient to say that that party 'foresaw or could be expected to have foreseen loss resulting from the non-performance' (rather than 'possibly' resulting from, or 'likely to result' from, the non-performance).

The rationale for the foreseeability rule is usually taken to be that the non-performing party, in determining whether to enter into the contract and, if so, on which conditions, whether to bargain for a limitation of his liability, or to take out insurance, had not been able to take account of not reasonably foreseeable consequences of a non-performance.[59]

4. Protective scope

Yet, focusing on the notion of foreseeability may not be the best way of capturing the normative nature of the inquiry that is necessary in order to limit the debtor's liability.[60] The real reason for not holding the debtor liable for all consequences of his non-performance causally related to it in terms of the *conditio sine qua non*-test was intimated already in the 16th century by Molinaeus when he discussed the following case:[61] A carpenter sells a box for the transportation of fruit. He is not liable for the loss arising as a result of the purchaser having used the box to fill in a quantity of wine which subsequently leaked out, the reason being: 'periculum tacite non suscepit'.[62] We are dealing here with a question of allocating the liability risk. How that risk has to be allocated does not, however, necessarily depend on what one of the parties could reasonably foresee but on what the parties have, or can be taken to have, agreed upon in their contract. It is a matter of interpreting the contract and of determining what interest the contractual duty that has been infringed was designed to protect.[63]

58. The development has also been traced by Eva-Maria Kieninger, in Hans Schulte-Nölke, Fryderyk Zoll, Nils Jansen, and Reiner Schulze, *Der Entwurf für ein optionales europäisches Kaufrecht* (2012) 214 f; for the development up to the DCFR, Lando, (2009) 17 *European Review of Private Law* 619 ff.

59. See the detailed discussion by Faust (n. 43) 198 ff; further cf, eg, U. Huber, *Gutachten* (n. 42) 727; Staudinger/Magnus (n. 55) Art. 74, no 31; Hein Kötz, *Vertragsrecht*, 2nd ed. (2012) 439; Gordley, *Foundations* (n. 43) 396 ff; *HKK*/Jansen (n. 42) §§ 249 – 253, 255, no 28.

60. See above …

61. Molinaeus (n. 47) no 60.

62. Cf also Pothier, *Traité des obligations* (1761) no 160: '(…) car le débiteur est censé ne s'être soumis qu'à ceux-ci' (following immediately onto the passage quoted above (…)).

63. Of course, foreseeability (for both parties; see the English rule in *Hadley v. Baxendale*!) plays an important role in this context (just as, vice-versa, normative elements are

The carpenter, in the example just mentioned, cannot reasonably be taken to have accepted the risk that the box was unsuitable as a wine barrel in view of the purpose for which the box had been sold. It is exactly in this spirit that Ernst Rabel took the entire set of rules on non-performance to be governed by the purpose of the contract;[64] and, on that basis he developed the theory that the purpose of the relevant duty undertaken in the contract determines the extent of the debtor's liability. All consequences not within that duty's protective scope are not considered to be attributable to the debtor.[65] This theory, further elaborated by Ernst von Caemmerer[66] and usually taken to be part and parcel of the causation inquiry[67] today prevails in German law.[68] The case involving the 'bowling boy'[69] provides a good illustration: the regulation prohibiting the employment of young persons late at night in bowling halls is supposed to

crucial for determining the issue of foreseeability; see supra (…)). Foreseeability is also an important factor within the broader inquiry whether loss can be imputed ('(…) kan worden toegerekend') to the debtor under Art. 6:98 BW; see Harriët Schelhaas, in Danny Busch, Ewoud Hondius, Hugo van Kooten, Harriët Schelhaas and Wendy Schrama, *The Principles of European Contract Law and Dutch Law: A Commentary* (2002) 407 f.

64. Rabel, *Warenkauf I* (n. 36) 495 in conjunction with 452 f and 509. See also the Comment to Art. 7.4.4 PICC ('The limitation [of foreseeability of harm] is related to the very nature of the contract: not all the benefits of which the aggrieved party is deprived fall within the scope of the contract'); U. Huber, *Gutachten* (n. 42) 727, 731 f.

65. Rabel, *Warenkauf I* (n. 36) 495 ff.

66. 'Das Problem des Kausalzusammenhangs im Privatrecht', in *Gesammelte Schriften*, vol. I (1968) 395 ff.

67. For a critical discussion, see Reinhard Zimmermann, 'Herausforderungsformel und Haftung für fremde Willensbetätigungen nach § 823 I BGB', [1980] *Juristenzeitung* 10 ff.

68. See Treitel, *Remedies* (n. 26) no 139 ('[t]his theory comes very close indeed to the common law rule of foreseeability'); U. Huber, *Gutachten* (n. 42) 728 f; Beale/Fauvarque-Cosson/Rutgers/Tallon/Vogenauer (n. 26) 1.011 ff; Schwenzer/Hachem/Kee (n. 26) 44.50; *HKK*/Jansen (n. 42) §§ 249 – 253, 255, nos 69 ff; Münchener Kommentar/Oetker (n. 42) § 249, nos 120 ff; Xynopoulou (n. 43) 135 ff, 156 ff. For Austria, see Koziol (n. 31) 276 ff. – German law does not recognize the foreseeability rule; its adoption had been proposed in the course of the deliberations leading up to the BGB but was ultimately rejected; see *HKK*/Jansen (n. 42) §§ 249 – 253, 255, nos 43 f; Xynopoulou (n. 43) 103 ff; cf also Gordley, *Foundations* (n. 43) 402. However, a second paragraph was added to § 254 BGB determining that the debtor is not liable as far as the creditor has failed to call his attention to the danger of unusually high loss of which the debtor was unaware and could not be expected to be aware. German law thus, in a somewhat roundabout way, also provides an incentive for the creditor to give the kind of information required by the debtor for assessing the risk associated with his decision to enter into the contract as does the foreseeability rule; see Kötz (n. 59) 439 f; Xynopoulou (n. 43) 141 ff.

69. Above …

protect them against overexertion and not against the dangers of being hit by a bowling ball.[70]

It is interesting to see that similar ideas are now being floated in England. In *Transfield Shipping Inc v. Mercator Shipping Inc, The Achilleas*[71] (a decision that 'has arguably … altered'[72] the law on remoteness), Lord Hoffmann held that 'a party may not be liable for foreseeable losses because they are not the type or kind for which he can be treated as having assumed responsibility'.[73] This has been confirmed and expanded in *Supershield Ltd v. Siemens Building FE Ltd*,[74] where it was held that *Hadley v. Baxendale* can be displaced 'if, on the proper analysis of the contract against its commercial background, the loss was within the scope of the [contractual] duty'.[75]

Dissatisfaction with the foreseeability test has also been expressed by others. Jim Gordley, in particular, has pointed to its origins. The rule grew out of a 'conjecture about a Roman rule that was not framed in terms of foreseeability but dealt with disproportionately high loss. It may have been adopted in England more out of a concern for disproportionate loss than out of a concern for foreseeability'.[76] Disproportionality between the loss claimed by the creditor and the price he was charged may be a recurrent feature of foreseeability case law but not a necessary one. Thus, for example, in the stamp dealer case[77] the relationship in value between the purchase price and the damage is without relevance for the decision, and in the 'bowling boy' case[78] the issue of disproportionality does not arise either.

While, therefore, in view of the long tradition of texts based on the foreseeability criterion it is hardly surprising that it was chosen also for Art. 161 CESL, its replacement by, or perhaps fusion with, a protective scope doctrine should seriously be considered. This would not entail any change on the level of

70. Of course, the owner of the bowling hall would be liable if the bowling boy, because of sheer exhaustion, had fallen asleep in a place where he was exposed to bowling balls.

71. [2009] AC 61 (HL).

72. *Anson's Law of Contract* (n. 53) 547.

73. [2009] AC 61 (HL) at 21.

74. [2010] EWCA Civ 7.

75. [2010] EWCA Civ 7 at …

76. Gordley, *Foundations* (n. 43) 398. In addition, Gordley argues that it is difficult to find a rationale for the foreseeability rule, and that the courts have found it difficult to apply the rule straightforwardly. Gordley's argument comes close to the approach adopted in Italian law (above …) focusing on the extent of the damage, ie intending to exclude disproportionately high loss. But, according to Italian law, the issue is not one of disproportionality between the loss and the purchase price.

77. Above …

78. Above …

practical results but would constitute a more felicitous doctrinal formulation of the test applied in practice.

5. Non-performance intentional or grossly negligent

There is one further issue that needs to be noted. Art. 9:503 PECL, inspired by French law,[79] contains a special rule for cases where the non-performance was intentional or grossly negligent: the loss for which the debtor is liable is not limited by the foreseeability criterion and thus full compensation has to be paid, even for loss that was unforeseeable. A very similar rule can be found in Art. III.-3:703 DCFR[80] but not in the other instruments, or in English law.[81] The exception for fraud and gross negligence does not appear to be well-founded;[82] at the very least, it can be said that the decision not to include it in Art. 161 CESL cannot be faulted. The exception derives from an attempt to reconcile two apparently conflicting Roman sources with each other and refers to liability for what we would call

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79. Art. 1.150 *Code civil*, quoted above …, carries on '(…) lorsque ce n'est point par son dol que l'obligation n'est point executée'. 'Dol' is taken by French courts and legal writers to include gross negligence ('faute lourde'): Treitel, *Remedies* (n. 26) no 125; Faust (n. 43) 119 f; Schwenzer/Hachem/Kee (n. 26) no 44.98; Xynopoulou (n. 43) 23 f; Malaurie/Aynès (n. 34) nos 951 and 967; Terré/Simler/Lequette (n. 39) no 565; Cass com, 25 March 1963, Bull civ III, no 171. Art. 1.225 *Codice Civile* also does not apply the foreseeability test in cases of 'dolo'; this is predominantly not extended to cases of gross negligence: Mari, in Antoniolli/Veneziano (n. 54) 452; Alessio Zaccaria, in Giorgio Cian and Alberto Trabucchi (eds), *Commentario breve al Codice Civile*, 6th ed. (2010), Art. 1.225, I.

80. The DCFR excludes the application of the foreseeability rule not only in cases of intentional and grossly negligent, but also of 'reckless' non-performance.

81. For a comparative analysis of French, English and US-American law on the point, see Faust (n. 43) 117 ff. – For Dutch law, see Schelhaas, in Busch/Hondius/van Kooten/Schelhaas/Schrama (n. 63) 408 f; for Germany, see *Münchener Kommentar*/Oetker (n. 42) § 249, no 113.

82. A different view is taken by Gordley, *Foundations* (n. 43) 407 ff; cf. previously also idem, 'Responsibility in Crime, Tort, and Contract for the Unforeseeable Consequences of an Intentional Wrong: A Once and Future Rule?', in *The Law of Obligations: Essays in Celebration of John Fleming* (1998) 175 ff, 198 ff; cf also Helmut Koziol, 'Europäische Vertragsrechtsvereinheitlichung und deutsches Schadensrecht', in Jürgen Basedow (ed.), *Europäische Vertragsrechtsvereinheitlichung und deutsches Recht* (2000) 202 who regards the rule contained in Art. 9:503 PECL as 'a step in the right direction' which needs to be criticized only because it is insufficiently flexible. – According to Faust (n. 43) 314 ff, the recognition of an exception to the foreseeability rule is not required. Its adoption was indeed specifically rejected by the draftsmen of CISG (Faust (n. 43) 49 f) and of Art. 7.4.4 PICC (Gordley, *Essays Fleming* 203). For criticism, see also Xynopoulou (n. 43) 82 f and 25 ff (on the – highly questionable – rationale which French legal writers attribute to the exception to the foreseeability rule).

today consequential loss.[83] And it was in line with liability for breach of contract generally being based on fault.[84] It looks odd within systems of law where liability for non-performance does not depend on fault.[85] Moreover, if the range of the non-performing party's liability depends on the (explicit or implicit) contractual allocation of risk, this allocation is not affected by whether the (subsequent) act of non-performance is intentional or not. There is, in other words, no necessary relation between the non-performing party's fault and the question of foreseeability; nor indeed between the non-performing party's fault and the protective scope of the duty that has been infringed. Even if the tailor, in the example mentioned above,[86] was intentionally late in delivering the travelling clothes because he wanted to cause embarrassment to a customer whom he disliked, it would still be unreasonable to hold him liable for the injury sustained by the latter when he had to take a later train. The agreement to deliver travelling clothes at a specific time does not intend to protect the customer from personal injury resulting from a train crash. Or, to put it differently: non-performance and injury are only accidentally related to each other.[87]

IV. Loss Attributable to Creditor

1. *The development of the idea of contributory negligence*

An itinerant barber puts up his shaving chair next to a sports ground. While he is shaving a customer, his hand is hit by a ball with the result that he cuts his customer's throat.[88] This case was much discussed in Roman law[89] (as well as in

83. See Zimmermann, *Law of Obligations* (n. 37) 831 f.

84. Above …

85. This is the case with regard to both PECL and DCFR: see Art. 9:501 PECL and Art. III.-3:701 (1) DCFR; Zimmermann, *Essays Blackman* (n. 25) (…) The same point is made by Konstanze Brieskorn, *Vertragshaftung und responsabilité contractuelle* (2010) 386 f; Dirk Looschelders, 'Das Allgemeine Vertragsrecht des Common European Sales Law', (2012) 212 *Archiv für die civilistische Praxis* 662.

86. (…)

87. This may be the reason why Art. 1.151 *Code civil*, even in the case of 'dol' (and 'faute lourde') excludes liability for loss which is not 'une suite immediate et directe de l'inexécution de la convention'. This limitation has not been taken over in either Art. 9:503 PECL or Art. III.-3:703 DCFR.

88. Mela/Proc./Ulp. D. 9, 2, 11 pr.

89. Zimmermann, *Law of Obligations* (n. 37) 1.008, 1.011 f; on contributory negligence in Roman law cf also Klaus Luig, 'Überwiegendes Mitverschulden', (1969) 2 *Ius Commune* 187, 192 ff; Christian Wollschläger, 'Das eigene Verschulden des Verletzten im römischen Recht', (1976) 93 *ZSS* (RA) 114 ff, 124 ff; Bénédict Winiger, *La responsabilité aquilienne*

subsequent centuries). Liability under the *lex Aquilia* depended on whether it was the barber or the ball player who could be blamed for the incident.[90] But what about the customer? Since he had entrusted himself to a barber in such a dangerous place he could, arguably, blame no-one but himself.[91] Interestingly, the Roman lawyers did not ask, as we would do today: Was there fault on both sides? They merely inquired whether the injury was due to the fault of either the wrongdoer or the victim. If the latter had suffered harm through his own fault, he was denied recovery, unless the person inflicting the injury had acted intentionally (in which case the victim could recover his entire loss).[92] They thus adopted an all-or-nothing approach (which was predetermined by the procedural formula: the judge only had the alternatives to condemn the defendant to pay the full amount, or to absolve him). It is unclear, however, whether *any* contributory negligence made the victim loose his remedy, or whether it had to have been comparatively more serious than the tortfeasor's negligence.

Or did the Roman lawyers perhaps solve these cases by applying a theory of causation? It was, after all, the customer who had had the last opportunity of avoiding the accident by not availing himself of this specific barber's services. His intervention, in a way, 'broke' the chain of causation linking the barber's fault and the injury. The Roman approach would then have been very similar to the one adopted in the English common law where, by the early nineteenth century, contributory negligence had come to be treated as a complete defence, barring recovery except against an intentional wrongdoer. This was justified on the basis that the victim had to be regarded as the author of his own wrong.[93] Subsequently, this harsh rule

romaine: damnum iniuria datum (1997) 119 ff; Dirk Looschelders, *Die Mitverantwortlichkeit des Geschädigten im Privatrecht* (1999) 6 ff; *HKK*/Jansen (n. 42) § 254, nos 2 ff; E.G.D. van Dongen, *Contributory Negligence: A Hikstorical and Comparative Study* (2013) 13 ff.

90. '(...) in quocumque eorum culpa sit, eum lege Aquilia teneri': Mela/Proc./Ulp. D. 9, 2, 11 pr.

91. '(...) quamvis nec illud male dicatur, si in loco periculoso sellam habenti tonsori se quis commiserit, ipsum de se queri debere': Mela/Proc./Ulp. D. 9, 2, 11 pr.

92. Ulp. D. 9, 2, 9, 4 *in fine* (this is the equally well-known case of the javelin-thrower); Paul. D. 9, 2, 31.

93. *Butterfield v. Forrester*, (1809) 11 *East* 60 at 61 (*per* Lord Ellenborough); here the defendant had obstructed the highway while engaged in repairing his house; the claimant, vehemently spurring on his horse, came riding through that highway, collided with the obstruction and was injured. Cf also *Cayzer, Irvine & Co v. Carron Co*, [1884] 9 AC 873 (HL) at 881 (*per* Lord Blackburn): 'The rule of Common Law says, as each occasioned the accident, neither shall recover at all, and it shall be just like an inevitable accident; the loss shall lie where it falls.' For 19th century German law, see Friedrich Mommsen, *Beiträge zum Obligationenrecht*, vol II: Zur Lehre von dem Interesse (1855) 157: nothing is more natural than that everybody has to bear the consequences of his own negligence.

was mitigated by the 'last opportunity' test: the entire loss was thrown on whoever had had the last clear chance of avoiding the injury.[94] Today, as far as claims brought in tort are concerned, the Law Reform (Contributory Negligence) Act 1945 leads to an apportionment of damages. But as regards breach of contract, the old all-or-nothing approach still prevails (as long as the breach of contract does not also constitute a tort).[95] Even in England, this is regarded as 'most unsatisfactory'.[96]

Continental legal scholarship also, for a long time, stuck to the all-or-nothing approach; it was guided by the Roman case law as well as by the *regula iuris antiqui* that, if anyone incurs loss which is his own fault, he is not regarded as incurring loss.[97] The problem was often conceived in terms of a kind of set-off of the defendant's fault against that of the plaintiff; hence the notion of 'compensatio culpae', or compensation (in the Scottish sense of the term) of the parties' relative faults against each other. Mommsen, Windscheid and many other pandectist authors embraced this approach, as did the German courts.[98] The BGB, however, broke with the pandectist tradition by determining that if the creditor's fault has

94. See *Davies v. Mann*, (1842) 10 M & W 546: The defendant had negligently run into and injured the claimant's donkey even though the latter may have been improperly tethered on the street. On the development of contributory negligence in the 19th century, see Charles H. Burr, *The Doctrine of Contributiory Negligence* (no year; 1890's?) 5 ff, 31 ff; David Ibbetson, *A Historical Introduction to the Law of Obligations* (1999) 177; Looschelders (n. 89) 93 ff.

95. See, eg, *Forsikringsaktieselskapet Vesta v. Butcher*, [1989] AC 852 (CA); *Anson's Law of Contract* (n. 53) 561 ff; Beale/Fauvarque-Cosson/Rutgers/Tallon/Vogenauer (n. 26) 1022 f; Ewan McKendrick, in Stefan Vogenauer and Jan Kleinheisterkamp (eds), *Commentary on the Unidroit Principles of International Commercial Contracts (PICC)* (2009) Art. 7.4.7, no 2.

96. Burrows, 'Judicial Remedies', in *idem* (ed.), *English Private Law*, 2nd ed. (2007) 21.47; cf. also Mindy Chen-Wishart and Ulrich Magnus, 'Termination, Price Reduction, and Damages', in Gerhard Dannemann and Stefan Vogenauer (ed.), *The Common European Sales Law in Context* (2013) 677 f ('(…) with clear potential for unfairness'). On the last opportunity rule see, eg, A.M. Honoré, 'Causation and Remoteness of Damage', in *International Encyclopedia of Comparative Law*, vol. XI/1 (1983), Chapter 7, no 177: 'The rule is to be condemned as an over-complex and arbitrary attempt to mitigate the harshness of the Pomponian rule which has had the unfortunate effect of delaying the introduction of apportionment statutes in some of the common law systems where it is applied'. But see Law Commission, *Contributory Negligence as a Defence in Contract Law*, Law Com no 219 (1993), parts III and IV in defence of the traditional English approach.

97. Pomp. D. 50, 17, 203: 'Quod quis ex culpa sua damnum sentit, non intellegitur damnum sentire'. On the original significance of this rule within the law relating to legacies, see Wollschläger, (1976) 93 *ZSS (RA)* 118 ff; *HKK*/Jansen (n. 42) § 254, no 3; van Dongen (n. 89) 16 ff.

98. Mommsen, *Interesse* (n. 93) 158; Windscheid/Kipp (n. 21) § 258, 2; on the concept of *compensatio culpae*, particularly in 19th century German law, cf also Zimmermann, Law of

contributed to the loss, the claim for damages, and the extent of such claim, depends on the circumstances, in particular on the extent to which the loss was caused predominantly by the one or the other party.[99] This usually leads to an apportionment of damages, ie to a reduction of the creditor's claim.[100] The same solution had previously already been espoused in 18th century Natural law theory[101] and had found a statutory manifestation in § 1304 ABGB.[102] French legal scholarship also followed suit, in spite of the fact that the *Code civil* was silent on the matter.[103] According to Art. 1.227 (1) *Codice Civile*, if the creditor's fault has contributed to causing the damage, his damages claim is reduced, the extent of the reduction depending on the relative seriousness of the debtor's and the creditor's fault 'and on the extent of the consequences arising from it'.[104] Similar rules can be found in the other continental codifications.[105]

Obligations (n. 37) 1047 f; Looschelders (n. 89) 20 ff; HKK/Jansen (n. 42) § 254, nos 12 ff; van Dongen (n. 89) 319 ff.

99. § 254 (1) BGB; for an analysis of the *travaux préparatoires*, see Looschelders (n. 89) 299 ff; *HKK*/Jansen (n. 42) § 254, nos 24 ff – It is generally recognized that § 254 (1) BGB applies not only to situations where the creditor, while not having been co-responsible for the non-performance, contributes to the loss resulting from the non-performance, but also to situations where he contributes to the loss *by being* co-responsible for the non-performance. This is not in line with the systematic position of the rule within the regulation on *damages* (§§ 249 ff BGB); see Looschelders (n. 89) 167.

100. As in many other civilian systems (see below …), the process of balancing that is required can also lead to a claim for the entire loss being granted (this is the case if the debtor had acted intentionally) or to a reduction of the claim to zero; see *Münchener Kommentar*/Oetker (n. 42) § 249, nos 105 and 112.

101. Christian Wolff, *Jus naturae methodo scientifica pertractatum*, Pars II (Halae Magdeburgicae, 1742) § 632; cf. also Pars IV (Halae Magdeburgicae, 1744) § 591, on the following case, relating to contractual liability: 'Si deponens rem custodiendam committit homini negligenti, quem negligentem esse novit, vel nosse poterat, et res deposita negligentia depositarii vel perit, vel deterioratur; damnum inter deponentem et depositarium dividendum in ratione culpae utriusque'. See Zimmermann, *Law of Obligations* (n. 37) 1048; Looschelders (n. 89) 16 ff; *HKK*/Jansen (n. 42) § 254, nos 20 ff; van Dongen (n. 89) 295 ff.

102. § 1.304 ABGB; on which, see Looschelders (n. 89) 66 ff.

103. For details, see Terré/Simler/Lequette (n. 39) no 584; Malaurie/Aynès (n. 34) no 958; Looschelders (n. 89) 79 ff; *HKK*/Jansen (n. 42) § 254, no 23; van Dongen (n. 89) 312 ff, 348 ff.

104. '(…) secondo la gravità della colpa e l'entità delle conseguenze che ne sono derivate'. For details, see Masi, in Antoniolli/Veneziano (n. 79) 454 f; Natalino Sapone, *Il concorso di colpa del danneggiato* (2007) 95 ff; Zaccaria, in Cian/Trabucchi (n. 79), Art. 1.227; Looschelders (n. 89) 90 ff.

105. For a general comparative overview relating to contributory negligence, see von Christian von Bar, The Common European Law of Torts, vol. II (2000) nos 517 ff; Looschelders

While, therefore, it can indeed be stated that the replacement of the old all-or-nothing approach by an apportionment of damages constitutes a genuine progress in adjusting the law in line with the precepts of distributive justice,[106] guided by the idea of an equal treatment of the parties and the notion of proportionality between the extent of a person's liability and his contribution to the loss,[107] it is also true that the general rules contained in the codifications have left many questions open. It has thus been the task of legal scholarship and the judiciary to deal with these questions, most of them relating to the law of delict/torts.[108] By and large, the development of the law relating to contributory negligence mirrors the development of liability law in general.[109]

2. The international instruments: Conduct contributing to the non-performance

This is also true as far as the foundation of the non-performing party's liability is concerned. Wherever that liability is not based on fault, both the terminology and the concept of 'contributory negligence' appear to be inappropriate.[110] It is a

(n. 89) 65 ff; Athina Kontogianni, 'Gemeinsame Prinzipien des Europäischen Privatrechts zum Mitverschulden des Geschädigten im Schadensersatzrecht', in Reiner Schulze and Gianmaria Ajani (eds), *Gemeinsame Prinzipien des Europäischen Privatrechts* (2003) 145 ff; Ulrich Magnus and Miquel Martín-Casals (eds), *Unification of Tort Law: Contributory Negligence* (2004); Nils Jansen, 'Contributory Negligence', in Jürgen Basedow, Klaus J. Hopt, and Reinhard Zimmermann (eds), *The Max Planck Encyclopedia of European Private Law (MaxEuP)* (2012) 401 ff; Schwenzer/Hachem/Kee (n. 26) 45.120 ff; Anna Keirse, 'Why the Proposed Optional Common European Sales Law Has Not, But Should Have, Abandoned the Principle of All or Nothing: A Guide to How to Sanction the Duty to Mitigate the Loss', (2011) 19 *European Review of Private Law* 954 ff; van Dongen (n. 89) 303 ff.

106. Franz Bydlinsky, *System und Prinzipien des Privatrechts* (1996) 201.

107. See Looschelders (n. 89) 113 f; *HKK*/Jansen (n. 42) § 254, no 23; *MaxEuP*/Jansen (n. 1) 402.

108. For Germany, see Looschelders (n. 89) 37 ff; *HKK*/Jansen (n. 42) § 254, nos 32 ff; for Italy, see Mari, in Antoniolli/Veneziano (n. 79) 454 f (note, however, that Art. 2.043 ff *Codice Civile* alleviate this problem by containing a number specific rules for delictual liability); for the Netherlands, see Schelhaas, in Busch/Hondius/van Kooten/Schelhaas/Schrama (n. 63) 411 f; for a comparative discussion, see Kontogianni (n. 105) 149 ff; van Dongen (n. 89) 303 ff, 339 ff.

109. *MaxEuP*/Jansen (n. 1) 402.

110. But the concept of 'contributory negligence' is questionable anyway. '[T]he value basis of the reduction of recovery does not consist in the violation of genuine duties. The relevant standards of conduct are not determined with regard to reasonable behaviour in one's own interest.' Rather, it must be asked what sacrifices or precautions the law could expect the aggrieved party to make in the reasonable interest of the tortfeasor, or non-performing party: *MaxEuP*/Jansen (n. 1) 402; cf. also, as far as German law is concerned, *Münchener*

precept of natural fairness to determine the responsibility of the debtor and the creditor according to the same criteria ('Symmetriepostulat').[111] That is why in Dutch law the basic liability rule requiring the non-performance 'to be attributed' to the non-performing party[112] is complemented, or mirrored, by a rule according to which the obligation to pay damages is diminished if the loss also results from a circumstance which 'can be attributed' to the creditor, the apportionment having to be based on the degree to which the circumstances which can be imputed to the debtor and the creditor have contributed to the loss.[113] The rule contained in Art 162 CESL thus also does not refer to contributory 'negligence'; it reads:

"The debtor is not liable for loss suffered by the creditor to the extent that the creditor contributed to the non-performance or its effects."

This rule can be traced back, in direct line, via Art. 166 FS and Art. III.-3:704 DCFR, to Art. 9:504 PECL. It has two branches, one of them relating to conduct contributing to the non-performance, the other to conduct contributing to the effects of non-performance. The first branch is reminiscent, and can be taken to be an attempt to improve upon, Art. 80 CISG: 'A party may not rely on a failure of the other party to perform, to the extent that such failure was caused by the first party's act or omission.' The rule in the CISG thus deals with the case that the creditor's conduct has *caused* the non-performance, and it is intended to state that the creditor, under these circumstances, loses all his remedies for non-performance including, of course, his claim for damages.[114] Whether it can also be understood as covering cases where both the debtor and the creditor have caused the non-performance is subject to dispute.[115] But on the basis of whatever reasoning, it is widely held that the loss has to be apportioned between the parties.[116] Those who

Kommentar/Oetker (n. 42) § 254, no 3; *HKK*/Jansen (n. 42) § 254, nos 38 ff, 48 ff (the term [contributory] 'fault' in § 254 BGB cannot be understood in the same sense as it is normally understood); for comparative discussion, see Kontogianni (n. 105) 152 ff. German law, in this context, employs the concept of an 'Obliegenheit' (= *incumbency*, *incombance*).

111. See *HKK*/Jansen (n. 42) § 254, nos 46, 55; cf. also *MaxEuP*/Jansen (n. 1) 402.

112. Art. 6:98 BW.

113. Art. 6:101 (1). The same language is used in Art. 5 (2) first indent of the Package Travel Directive and Art. 6 (3) of the Cross Border Credit Transfer Directive.

114. See Schwenzer, in Schlechtriem/Schwenzer (n. 55) Art. 80, no 8 ('loosely worded').

115. Looschelders (n. 89) 109 ff; Claus-Wilhelm Canaris, 'Die von beiden Parteien zu vertretende Unmöglichkeit', in *Kontinuität und Wandel des Versicherungsrechts: Festschrift für Egon Lorenz* (2004) 147, 181 f; Schwenzer, in Schlechtriem/Schwenzer (n. 55) Art. 80, no 7; Staudinger/Magnus (n. 55) Art. 80, nos 13 f; Schwenzer/Hachem/Kee (n. 26) no 45.127.

116. All the authors just quoted are *ad idem* in that respect.

come out in favour of applying Art. 80 CISG usually take the phrase 'to the extent that' as a cue in that direction.[117]

This phrase was also used by those who drafted Art. 9:504 PECL. At the same time, they substituted the word 'caused' by 'contributed to', thus implying that the creditor's act did not constitute the sole cause of the non-performance. Two situations are imaginable, in that respect. (i) The creditor has only caused a specific part of the non-performance, ie he has partly prevented the performance from occurring. Art. 9:504 PECL clearly states that the debtor's liability is reduced 'to that extent'. (ii) Predominantly, however, the draftspersons of Art. 9:504 PECL appear to have had in mind the situation that both the debtor and the creditor have contributed to the non-performance in its entirety. This is demonstrated by Illustration 1.[118] The computer system fails to work properly because of a design defect *and* because the creditor's instructions to the debtor have been incomplete. For a situation such as this Art. 9:504 PECL can be read as stating that the debtor's liability is excluded.[119] This, obviously, is not what is intended, for the way in which Illustration 1 is presented implies that the loss has to be split. Oddly, however, Art. 9:504 PECL fails to provide criteria which can guide the process of balancing the creditor's contribution against that of the debtor. The only criterion mentioned in Art. 9:504 PECL is each party's causal contribution.[120] But the idea of balancing one cause for the non-performance against the other, and of attributing predominant weight to the one or the other is logically questionable.[121] (This is why even in German law, which does indeed – in this respect![122] – primarily focus on causation, other circumstances are taken into account, especially the relative degree of fault[123]).

117. See, eg, Canaris (n. 115) 181; Schwenzer, in Schlechtriem/Schwenzer (n. 55) Art. 80, no 7. *Contra*, eg, Looschelders (n. 89) 110. Looschelders, however, focuses too much on the German version of the rule ('soweit').

118. Lando and Beale I (n. 2) 444 (= Christian von Bar and Eric Clive, *Principles, Definitions and Model Rules of European Private Law: Draft Common Frame of Reference (DCFR)*, Full Edition, vol. I (2009) 934).

119. Kontogianni (n. 105) 173; cf also Koziol, in Basedow (n. 82) 203.

120. Cf. also Koziol, in Basedow (n. 82) 204; Schelhaas, in Busch/Hondius/van Kooten/Schelhaas/Schrama (n. 63) 412.

121. Koziol, in Basedow (n. 82) 204 rightly draws attention to this; cf. also Looschelders (n. 89) 569; *HKK*/Jansen (n. 42) § 254, no 64; *Münchener Kommentar*/Oetker (n. 42) § 254, no 108. Thus, the loss might always have to be split 50:50 between the debtor and the creditor because both have provided a cause.

122. § 254 BGB, while generally focusing on the aggrieved party's fault when conceptualizing contributory negligence, emphasizes the parties' causal contributions when it comes to the process of apportioning the loss; but § 254 (1) BGB specifically allows other circumstances to be taken into account.

123. *Münchener Kommentar*/Oetker (n. 42) § 254, nos 105 ff, 110 ff. – The criterion of 'causation' in terms of § 254 (1) BGB is predominantly understood as entailing

Another odd feature of Art. 9:504 PECL is that its first branch merely repeats what is already stated in Art. 8:101 (3) PECL, particularly if it is kept in mind that 'caused' in the latter rule must be read in the sense of 'contributed to'.[124]

Art. III.-3:704 DCFR, Art. 166 FS and Art. 162 CESL perpetuate the unclear rule of Art. 9:504 PECL.[125] And while the ACQP do not deal with the problem of the *non-performance* being caused by both the creditor and the debtor at all,[126] Art. 7.4.7 PICC provides considerably more clarity.[127] Firstly, it specifically states that 'the amount of damages shall be reduced', thus avoiding any possible misunderstanding about the consequences of the creditor contributing to the non-performance.[128] Secondly, it brings out clearly that rules on apportioning the loss between the creditor and the debtor involve a distribution of risks. (This point also clearly emerges from the terminology employed in Art. 6:101 (1) BW

an examination of the debtor's and the creditor's conduct under the auspices of comparative likelihood for the resulting damage; for details, see Looschelders (n. 89) 568 ff; *Münchener Kommentar*/Oetker (n. 42) § 254, no 109; cf. also *HKK*/Jansen (n. 42) § 254, nos 63 f. This is in tune with the 'adequate causation' test of German and Italian law; see above …

124. This is clear from Comment B (iii) ('Non-performance wholly or partially caused by the creditor') to Art. 8:101 PECL (Lando and Beale I and II [n. 2] 360 f; taken over in von Bar and Clive I [n. 118] 773 f). Cf also Comment B to Art 9:504 PECL ('This may be regarded as a particular application of the general rule set out in Art. 8:101 (3)') (cf. also von Bar and Clive I (n. 118) 934). However, the wording of Art. 8:101 (3) PECL ('to the extent', 'caused') is reminiscent of Art. 80 CISG (on which see above (…)).

125. Cf. also Art. III.-3:101 (3) DCFR, Art. 108 (6) and 133 (3) FS, as well as Art. 106 (5) and 131 (3) CESL, perpetuating the rule in Art. 8:101 (3) PECL. As in the PECL, therefore, the first branch of the 'loss attributable to creditor' – rule is merely 'a particular application' of the more general rule. The same is true with regard to Art. 7.4.7 ('Harm due in part to aggrieved party') as compared to Art. 7.1.2 ('Interference by the other party'). The ACQP, on the other hand, draw a clear distinction between Art. 8:102 ('The creditor is precluded from exercising remedies against the debtor to the extent that the non-performance is attributable to the creditor') and Art. 8:403 (which is merely dealing with cases where the creditor contributed to the loss, but not to the non-performance); see the explanation in Acquis Group, *Contract II* (n. 3) 439.

126. Above …

127. 'Where the harm is due in part to an act or omission of the aggrieved party or to another event for which that party bears the risk, the amount of damages shall be reduced to the extent that these factors have contributed to the harm, having regard to the conduct of each of the parties'. That this rule (merely) deals with the situation covered by the first branch of Art. 9:504 PECL is clear from the use of the term 'harm' in contradistinction to 'damages' (see, eg, Art. 7.4.5 PICC *in fine*); and see Comment 4 to Art. 7.4.7 PICC (*Unidroit Principles of International Commercial Contracts* (n. 10) 277).

128. See above (…), concerning Art. 9:504 PECL.

– 'een omstandigheid die aan de benachdeelde kan woorden toegerekend' – and in Art. 10:504 PCC – '[l]e créancier ne peut pas prétendre à l'indemnisation de la part du préjudice dont la réalisation lui est imputable'.[129]) Thirdly, Art. 7.4.7 PICC names the criteria determining the extent to which the creditor's claim must be reduced, focusing squarely on the question of risk distribution and on the conduct of each party. In the latter respect, Comment 3 to Art. 7.4.7 PICC clearly states: 'The more serious a party's failing, the greater will be its contribution to the harm'.[130] The PICC thus rightly move away from the focus on causation. At the same time, it is openly acknowledged – in line with the national codifications[131] – that the judge unavoidably has considerable leeway in the process of apportioning the loss.

Neither Art. 7.4.7 nor any of the other rules dealing with cases of a non-performance to which both the debtor and the creditor have contributed says anything about *the further consequences* resulting from its application. Thus, the same questions that are discussed in the context of Art. 80 CISG are also bound to arise under Art. 162 CESL.[132]

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129. On the relevance of risk distribution, in the present context, cf. also, for Germany, Arndt Teichmann, in *Jauernig: Bürgerliches Gesetzbuch*, 14th ed. (2011) § 254, no 5; for Italy, Mari, in Antoniolli/Veneziano (n. 79) 455. For the Netherlands, see Schelhaas, in Busch/Hondius/van Kooten/Schelhaas/Schrama (n. 63) 411. – Impediments covered by Art. 8:108 PECL – Art. 7.1.7 PICC, Art. 88 CESL and the respective provisions in the other instruments – have to be attributed to the creditor; insofar the principle of *casum sentit dominus* applies: see Bernhard A. Koch, 'Schadensersatz und Rückabwicklung (Teile VI und VII CESL-Entwurf)', in Christiane Wendehorst and Brigitta Zöchling-Jud (eds), *Am Vorabend eines Gemeinsamen Europäischen Kaufrechts* (2012) 233; Stefan Lorenz, 'Das Kaufrecht und die damit verbundenen Dienstverträge im Common European Sales Law', (2012) 212 *Archiv für die civilistische Praxis* 802; concerning the CISG, see Schwenzer, in Schlechtriem/Schwenzer (n. 55) Art. 80, no 3; Staudinger/Magnus (n. 55) Art. 80, no 7. Cf. also Comment 3 to Art. 7.4.7 PICC (*Unidroit Principles of International Commercial Contracts* (n. 10) 276).

130. *Unidroit Principles of International Commercial Contracts* (n. 10) 276.

131. For a comparative discussion, see Kontogianni (n. 105) 169 ff.

132. To take illustration 1 to Art. 9:504 PECL (Lando and Beale I and II [n. 2] 444, taken over in von Bar and Clive I [n. 118] 934) as an example: B cannot recover his loss to the extent that it results from his own inadequate instructions. But does he have to pay the (entire) purchase price? That would seem to depend on whether, under these circumstances, he can terminate the contract. If he can, the seller would appear to lose too much and may thus, in turn, have to be granted a damages claim against the buyer; for a clear exposition, see Canaris, Festschrift E. Lorenz (n. 115) 181 f. – In Germany, cases of impossibility attributable to both parties ('beiderseits zu vertretende Unmöglichkeit') have given rise to intense discussion; see Looschelders (n. 89) 375 ff; *HKK*/Schermaier (n. 21) § 326, nos 20 f; Ulrich Huber, *Leistungsstörungen*, vol. II (1999) § 57; Canaris, *Festschrift E. Lorenz* (n. 115) 147 ff.

3. Conduct contributing to the effects of non-performance

Even less clear is the significance of the second branch of Art. 9:504 PECL, Art. III.-3:704 DCFR, Art. 166 FS and Art. 162 CESL.[133] By referring to the creditor's contribution to '[the] effects [of non-performance]', the rule focuses on his contribution to the loss. Comment C to Art. 9:504 PECL, in fact, specifically states that this branch of the rule is supposed to cover cases where the creditor, though in no way responsible for the non-performance, 'exacerbates its adverse effects', ie the loss resulting from non-performance.[134] Again, the solution envisaged under the second branch of the rule is a reduction of the creditor's claim: he cannot 'recover damages for the additional loss which results'. Of course, a party can also be seen to 'contribute to the loss' if he fails to mitigate it. The rule contained in Art 162 CELS would thus appear to cover all cases traditionally discussed under the labels 'duty to mitigate', or 'avoidable loss'. This would also be quite in line with the heading chosen for Art. 162 CESL: 'Loss attributable to creditor'.

V. Mitigation

1. All or nothing

Surprisingly, however, there is another provision in the CESL (Art. 163 (1), headed 'Reduction of loss') specifically dealing with this latter situation; it is identical to Art. 9:505 PECL, Art. III.-3:705 DCFR and Art. 167 FS (as well as practically identical to Art. 8:403 ACQP and Art. 7.4.8 PICC):

"The debtor is not liable for loss suffered by the creditor to the extent that the creditor could have reduced the loss by taking reasonable steps."

The doctrinal disposition underlying the division between Art. 162 and 163 CELS is, essentially, that of the English common law which draws a distinction between contributory negligence and mitigation.[135] The authoritative statement concerning the latter can be found in the case of *British Westinghouse*: 'The fundamental basis is thus compensation for pecuniary loss naturally flowing from breach; but the first principle is qualified by a second which imposes on a plaintiff the duty of taking all reasonable steps to mitigate the loss consequent on

133. Art. 7.4.8 PICC does not have an equivalent for this second branch, while Art. 8:403 ACQP only has an equivalent for the second branch but not for the first. The addition of the words 'wilfully or negligently' in the ACQP appears to be inappropriate in view of the fact that the creditor does not infringe a genuine legal duty when he contributes to his own loss (above …) and also because it is in conflict with the 'Symmetriepostulat' (above …).

134. Lando and Beale I and II (n. 2) 444 (= von Bar and Clive I [n. 118] 935).

135. Lando and Beale I and II (n. 2) 444 (the relevant passage has been deleted from von Bar and Clive I (n. 118) 934); generally, see Treitel, *Remedies* (n. 26) no 145.

the breach, and debars him from claiming any part of the damage which is due to his neglect to take such steps.'[136] It is generally acknowledged that the language of 'duty' is imprecise in that breach of the duty to mitigate does not give rise to legal liability but merely to the claimant being deprived of his damages claim insofar as he could have avoided the loss.[137] However, the statement by Viscount Haldane LC clearly sets out the characteristic consequences of the failure, on the part of the claimant, to take reasonable steps to mitigate the loss caused by the defendant's non-performance: the avoidable loss is not apportioned between the parties but has to be borne by the claimant in its entirety. The rule relating to mitigation is thus 'all or nothing'. This may be justified on account of the fact that, once the damaging event, ie the non-performance, has taken place, the further development of the loss occurs within the aggrieved party's sphere of influence. It is typically only the latter, rather than the non-performing party, who can do something about it; and an apportionment of the loss would not, therefore, constitute the most efficient incentive towards a minimization of the loss.[138] If it may, therefore, be said that the avoidable loss rule of the common law reflects the archaic thinking pattern of a *compensatio culpae,*[139] it must also be remembered that the failure to take reasonable steps to mitigate the loss does not wipe out the creditor's entire damages claim: it is only the avoidable loss that is attributed (in its entirety) to the aggrieved party. What does not come out so clearly from Viscount Haldane's statement – or indeed from the designation 'mitigation', or 'duty to mitigate' – is the fact that there are two aspects to it: the creditor has to take reasonable steps to minimize his loss, and he has to forbear from unreasonable steps increasing his loss.[140] Obviously, if a creditor is made to feel the harsh consequence of the mitigation rule in cases of an omission, this

136. *British Westinghouse Electric and Manufacturing Co Ltd v. Underground Electric Railways Co of London Ltd.*, [1912] AC 673, at 689, *per* Viscount Haldane LC (also printed in Beale/Fauvarque-Cosson/Rutgers/Tallon/Vogenauer (n. 26) 1.015); further, see *Anson's Law of Contract* (n. 53) 555 f; Burrows, *Judicial Remedies* (n. 96) 21, 41; Treitel, *Remedies* (n. 26) nos 145 ff; Looschelders (n. 89) 102 f.

137. *Anson's Law of Contract* (n. 53) 555; Edwin Peel, *Treitel: The Law of Contract*, 13th ed. (2011) 20-115; McKendrick, in Vogenauer/Kleinheisterkamp (n. 95) Art. 7.4.8, no 1; Beale/Fauvarque-Cosson/Rutgers/Tallon/Vogenauer (n. 26) 1.015.

138. See Looschelders (n. 89) 168 f., 562 ff; *HKK*/Jansen (n. 42) § 254, no 66; *MaxEuP*/Jansen (n. 1) 403; Ackermann, in Wagner (n. 54) 63.

139. See, generally, on this type of rule Helmut Koziol, 'Rechtsfolgen der Verletzung einer Schadensminderungspflicht – Rückkehr der archaischen Kulpakompensation?', (1998) 6 *Zeitschrift für Europäisches Privatrecht* 593 ff; Koch, in Wendehorst/Zöchling-Jud (n. 129) 234.

140. Treitel/Peel (n. 137) 20-116; cf. also Beale/Fauvarque-Cosson/Rutgers/Tallon/Vogenauer (n. 26) 1.015.

must be all the more so where he has actively increased the loss. Apart from that, these two forms of conduct, were they to be treated differently, would be notoriously difficult to tell apart.

A clear distinction between contributory negligence (resulting in the apportionment of the loss) and failure to take reasonable steps to mitigate the loss (no apportionment concerning the avoidable loss) is also drawn by some civilian systems; Italian law presents a good example.[141] Art. 77 CISG also clearly states that, if the aggrieved party fails to take 'such measures as are reasonable in the circumstances to mitigate the loss', the damages claim is reduced 'in the amount by which the loss should have been mitigated'.[142] All the international rules from Art. 9:505 PECL and Art. 7.4.7 PICC onwards and down to Art. 163 CESL have followed this lead.

At the same time, they all contain an identically worded second paragraph:

"The creditor is entitled to recover any expenses reasonably incurred in attempting to reduce the loss."

It provides the natural corollary to the mitigation rule and is recognized even under the CISG in spite of not specifically having been laid down in its Art. 77.[143] It is obvious that the aggrieved party cannot be expected to reduce the loss inflicted on him by the other party at his own expense. The expenses, as far as they are reasonable, can be seen to constitute part of the foreseeable loss resulting from the debtor's non-performance.

2. Apportionment

The authors of Art. 9:504 and 9:505 PECL (which provide the foundation for Art. 162 and 163 CESL) proceeded from the assumption that the legal

141. Art. 1.227 (2) as compared to Art. 1.227 (1) *Codice Civile*; for details, see Mari, in Antoniolli/ Veneziano (n. 79) 457 f.; Zaccaria, in Cian/Trabucchi (n. 79), Art. 1.227, III. For France, see Terré, Simler and Lequette (2009) no 899-1 with further references; Looschelders (n. 89) 80; Keirse, (2011) 19 ERPL 961 f.

142. On Art. 77 CISG see Helmut Koziol, 'Reduction of Damages according to Art. 77 CISG', (2005-06) 25 *Journal of Law and Commerce* 385 ff; Staudinger/Magnus (n. 55) Art. 77, no 19 (envisaging an apportionment under Art. 77 CISG in spite of the rule's wording to the contrary). – Art. 77 CISG is understood not only to impose a duty on the creditor to take reasonable steps to mitigate loss but also to prevent loss that is imminent; see Schwenzer, in Schlechtriem/Schwenzer (n. 55) Art. 77, no 3; Staudinger/Magnus (n. 55) Art. 77, no 8. Art. 163 CESL is likely to be interpreted along the same lines. Cf also § 254 (2) BGB and the general phrases used in Art. 1.227 (2) *Codice Civile* ('(…) i danni che il creditore avrebbe potuto evitare (…)') and in Art. 6: 101 (1) BW.

143. Schwenzer, in Schlechtriem/Schwenzer (n. 55) Art. 77, no 11; Staudinger/Magnus (n. 55) Art. 77, no 20.

consequences for the situations regulated in these articles are the same.[144] That is why originally they dealt with these situations in one and the same article: 'The non-performing party is not liable for loss suffered by the aggrieved party to the extent that: (a) the aggrieved party contributed to the non-performance or its effects; or (b) his loss could have been reduced by taking reasonable steps.'[145] But the correspondence of the legal consequences is apparent rather than real. For, in terms of (a), the application of the *chapeau*-rule leads to an apportionment of the loss, whereas in terms of (b) it entails an all-or-nothing (as far as the avoidable loss is concerned). Real correspondence between the legal consequences would have meant that, just as under (a), the avoidable loss under (b) would have had to be apportioned between the parties. The reason for such apportionment also of the avoidable loss is that but for the non-performance neither the loss as such nor the need to mitigate it would have arisen. Both the aggrieved and the non-performing party can thus be seen to be responsible also for the avoidable consequences of the non-performance.[146]

This is the policy to which Art. 6:101 (1) BW gives effect. That rule no longer draws any distinction between cases where the creditor contributes to the non-performance and where he fails to mitigate the loss: it provides for an apportionment in both cases.[147] The same policy underlies § 254 BGB, even if that rule distinguishes between contributory negligence (§ 254 (1) BGB) and failure to mitigate the loss that has arisen (§ 254 (2) BGB). But when § 254 (2) BGB commences by stating 'This also applies (…)', it is clear that reference is made to the principle of apportionment laid down in § 254 (1) BGB and that the BGB regards both rules as nothing more than individual manifestations of one and the same overarching idea.[148] If, none the less, some writers want to attribute the avoidable loss in its entirety to the creditor,[149] this is hardly in line with the structure and the wording of the rule[150] – unless, of course, we are dealing with situations where the creditor's behaviour is such that its consequences cannot be attributed to the debtor in the

144. This is specifically stated in Comment A to Art. 4:504 PECL in the original version of the PECL from 1995: Lando and Beale I (n. 2) 205.

145. Art. 4:504 PECL (original version of 1995).

146. Koziol (1998) 6 *Zeitschrift für Europäisches Privatrecht* 593 ff; Looschelders (n. 89) 561 ff; Keirse, (2011) 19 *European Review of Private Law* 971 f.

147. For background, concerning the old law, see Keirse, (2011) 19 *European Review of Private Law* 957 f, 963 f.

148. Looschelders (n. 89) 561; *HKK*/Jansen (n. 42) § 254, nos 6, 29; cf. also *Münchener Kommentar*/Oetker (n. 42) § 254, no 68.

149. Hans Stoll, *Haftungsfolgen im bürgerlichen Recht: Eine Darstellung auf rechtsvergleichender Grundlage* (1993) 250 ff; *Münchener Kommentar*/Oetker (n. 42) § 254, no 76.

150. BGH, 24.07.2001, [2001] *NJW* 3257 (3258); Koziol, in Basedow (n. 82) 205.

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first place.[151] § 1304 ABGB on contributory negligence does not contain a rule corresponding to § 254 (2) BGB and thus the legal consequences of a failure, on the part of the creditor, to mitigate the loss are disputed.[152] According to the better view, the apportionment principle laid down in § 1304 ABGB applies.[153]

By dividing what used to be a single rule with two sub-rules into two rules dealt with in two different articles, the drafters of the PECL have not, in fact, brought about any substantive change. But by retaining the heading suitable for the combined rule ('Loss attributable to Aggrieved Party') for just one of the new articles they have created the misleading impression that Art. 9:504 PECL deals with all cases where the loss is attributable not only to the non-performing but also to the aggrieved party; while by placing the mitigation rule (Art. 9:505) under the new heading 'Reduction of Loss' they have created the equally misleading impression that its characteristic feature is some kind of apportionment (which, in fact, is the characteristic feature of Art. 9:504). In the Comments, it is now stated that '[t]he reason for the division' between the two articles is that some legal systems distinguish these situations. Reference is made, in particular, to English law while, it is further said, most continental European legal systems do not draw such distinction.[154] The latter remark, too, is misleading since it throws together legal systems which apply the apportionment principle also to mitigation cases and others which do not. This is particularly obvious if, in the comparative Notes, Art. 1.227 *Codice Civile* and Art. 6:101 (1) BW are placed side by side.[155]

3. Once again: Conduct contributing to the effects of non-performance

What, then, in view of this, is the significance of the second branch of Art. 9:504 PECL (which does not find a model in either Art. 80 CISG or any of the national legal systems)? Does it cover all the cases also covered by Art 9:505 PECL? Or only

151. See Stoll (n. 149) 256; *HKK*/Jansen (n. 42) § 254, no 66; for the Netherlands, before 1992, see Keirse, (2011) 19 *European Review of Private Law* 963. – Koziol, (2005-06) 25 *Journal of Law and Commerce* 390 f, points to another reason why even those subscribing, in principle, to an apportionment approach for mitigation will often reduce the creditor's claim by the avoidable loss in its entirety: the non-performing party will often be liable without having been at fault. If there was negligence on the part of the aggrieved party, it may be arguable that the negligence 'is prevailing to such an extent that he has to bear the whole loss'.

152. Looschelders (n. 89) 71 f.

153. Koziol, (1998) 6 *Zeitschrift für Europäisches Privatrecht* 593, 597; Keirse, (2011) 19 *European Review of Private Law* 962 f.

154. Comment A to Art. 9:504 PECL: Lando and Beale I and II (n. 2) 444.

155. Note 1 (b) to Art. 9:504: Lando and Beale I and II (n. 2) 448.

those where the creditor is not aware of the breach?;[156] or where he acts rather than fails to act?;[157] or where he causes not just some additional loss but the entire loss?[158] The only sensible, and pragmatic, answer to the question would appear to be that it does not matter. The legal consequence of the aggrieved party contributing to the effects of the non-performance would then have to be the same under Art. 9:504 PECL as they are under Art. 9:505. That, however, is only the case if the words 'liable (…) to the extent that the aggrieved party contributed to (…) the effects [of the non-performance]' (Art. 9:504) must be read as meaning the same as 'liable (…) to the extent that the aggrieved party could have reduced the loss by taking reasonable steps'. That, however, is not beyond doubt. For, arguably, by failing to mitigate the loss, the aggrieved party does not 'contribute' to the avoidable loss in its entirety.

4. Suggested revision

Thus, the rules contained in Art. 162 and Art. 163 CESL are problematic in several respects. They are both unclear and misleading. Above all, however, they perpetuate a distinction that is regarded as unsatisfactory even in its country of origin.[159] The draftspersons of Art. 9:504 and Art. 9:505 PECL (which have been taken over into the CESL) appear to have aimed at a somewhat half-hearted compromise between what they perceived to be the English and the dominant continental European tradition: they decided to distinguish these situations and, eventually, even to draft two separate rules. At the same time, they proceeded from the assumption that the legal consequences for both situations were to be the same. That is not, however, the case under Art. 162 and Art. 163 CESL (and their

156. But see Treitel/Peel (n. 137) 20-116, stating that there is no compelling reason why normal mitigation cases and cases 'where the claimant had, but failed to take, clear opportunities of discovering the breach' should not be treated alike; the example then given is remarkably similar to Illustration 2 to Art. 9:504 PECL: Lando and Beale I and II (n. 2) 444.

157. But see above (…)

158. But see above (…)

159. Treitel, *Remedies* (n. 26) no 145 ('(…) it is of doubtful merit'); A.M. Honoré, 'Causation and Remoteness of Damage (1969)', in *International Encyclopedia of Comparative Law*, vol. XI (1983), no 153 ('There is no real justification for having two separate doctrines of contributory negligence and failure to mitigate damage in common law systems (…) The explanation for their existence is historical. The contributory negligence doctrine grew up in connection with the law of tort (…) and the mitigation doctrine in the sphere of contract, though it has also been extended to tort'); W.V. Horton Rogers, in Magnus and Martín-Casals (n. 105) 59. The same view is often expressed in modern comparative discourse; see, eg, Koziol, (1998) 6 *Zeitschrift für Europäisches Privatrecht* 599; Keirse, (2011) 19 *European Review of Private Law* 961; Ackermann, in Wagner (n. 54) 63 ('overly complicated').

predecessors). Since a relapse to an all-or-nothing for the first of these situations (ie the creditor contributing to the non-performance) is inconceivable today, a correspondence of the legal consequences for both situations can only be achieved on the basis of an apportionment of the loss. Under these circumstances, however, it is no longer necessary to maintain the distinction between the two situations (a distinction which is 'a difficult one to draw in borderline cases');[160] rather the rules contained in Art. 162 and 163 CESL should be reformulated as follows:

"1. If the loss is attributable to both the debtor and the creditor, the creditor's claim for damages is reduced in proportion to the extent to which the loss is attributable to the one or the other party. All circumstances of the case have to be taken into consideration, in particular the conduct of each of the parties. If the loss is attributable only to a comparatively insignificant extent to the one or the other party, the claim may either be excluded entirely, or remain unaffected.

2. The creditor is entitled to recover any expenses reasonably incurred in attempting to reduce the loss."

The second paragraph of this rule can be found in all the international instruments presently under consideration[161] and it also corresponds to what is recognised in the national legal systems.[162] The first two sentences of the first paragraph are inspired, particularly, by Art. 6:101 (1) BW but also contain elements of Art. 7.4.7 PECL and § 254 (1) BGB. The third sentence of the first paragraph spells out something that is specifically mentioned in Art. 6:101 (1) BW and taken for granted in other continental legal systems;[163] partly, at least, it is also expressed in Art. 8:403 ACQP.[164] The one substantive difference between the rule proposed here and Art. 162 and 163 CESL relates to cases where the creditor could have reduced the loss by taking reasonable steps. Under Art. 163 the avoidable loss is attributed in its entirety to the creditor while this is not necessarily – though it will often be[165] – the case under the rule proposed here.

160. Treitel, *Remedies* (n. 26) no 145.

161. Above …

162. See Art. 96 (2) (a) BW; Looschelders (n. 89) 494 ff; Mari, in Antoniolli/Veneziano (n. 79) 458; Burrows, *Judicial Remedies* (n. 96) 21.83.

163. *Münchener Kommentar*/Oetker (n. 42) § 254, no 105; Kontogianni (n. 105) 169; cf. also Mari, in Antoniolli/Veneziano (n. 79) 454; Ernst Karner, in Helmut Koziol, Peter Bydlinski, and Raimund Bollenberger (eds), *Kurzkommentar zum ABGB*, 3rd ed. (2010) § 1.304, no 4.

164. Art. 8:403 ACQP ('Damages are reduced or excluded to the extent (…)'). Matters are different in England, as far as the contributory negligence defence is concerned; which is probably why McKendrick, in Vogenauer/Kleinheisterkamp (n. 95) Art. 7.4.7, no 7, reads the position of English law into the term 'reduced' in Art. 7.4.7 PICC.

165. See above …

VI. Conclusion

All in all, no uniform assessment of Arts. 161-163 CESL can be given. (i) The foreseeability rule, entrenched in a number of national legal systems, has been perpetuated on a European level without critical enquiry as to whether it is ideally suited for the purpose for which it was designed. (ii) That Art. 161 CESL does not contain a special provision relating to intentional and grossly negligent non-performance is to be welcomed. (iii) The rules on "loss attributable to creditor" and "reduction of loss" are problematic in several respects. The distinction should be abandoned and one uniform rule be drafted under the heading "loss attributable to creditor". Inspiration can be gained, in particular, from Dutch law, German law, the PICC and the ACQP.

Pesquisas do Editorial

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