

Private law (Cluster 2) Contract

Paul Halliday <P.R.Halliday@tilburguniversity.edu>

Contents

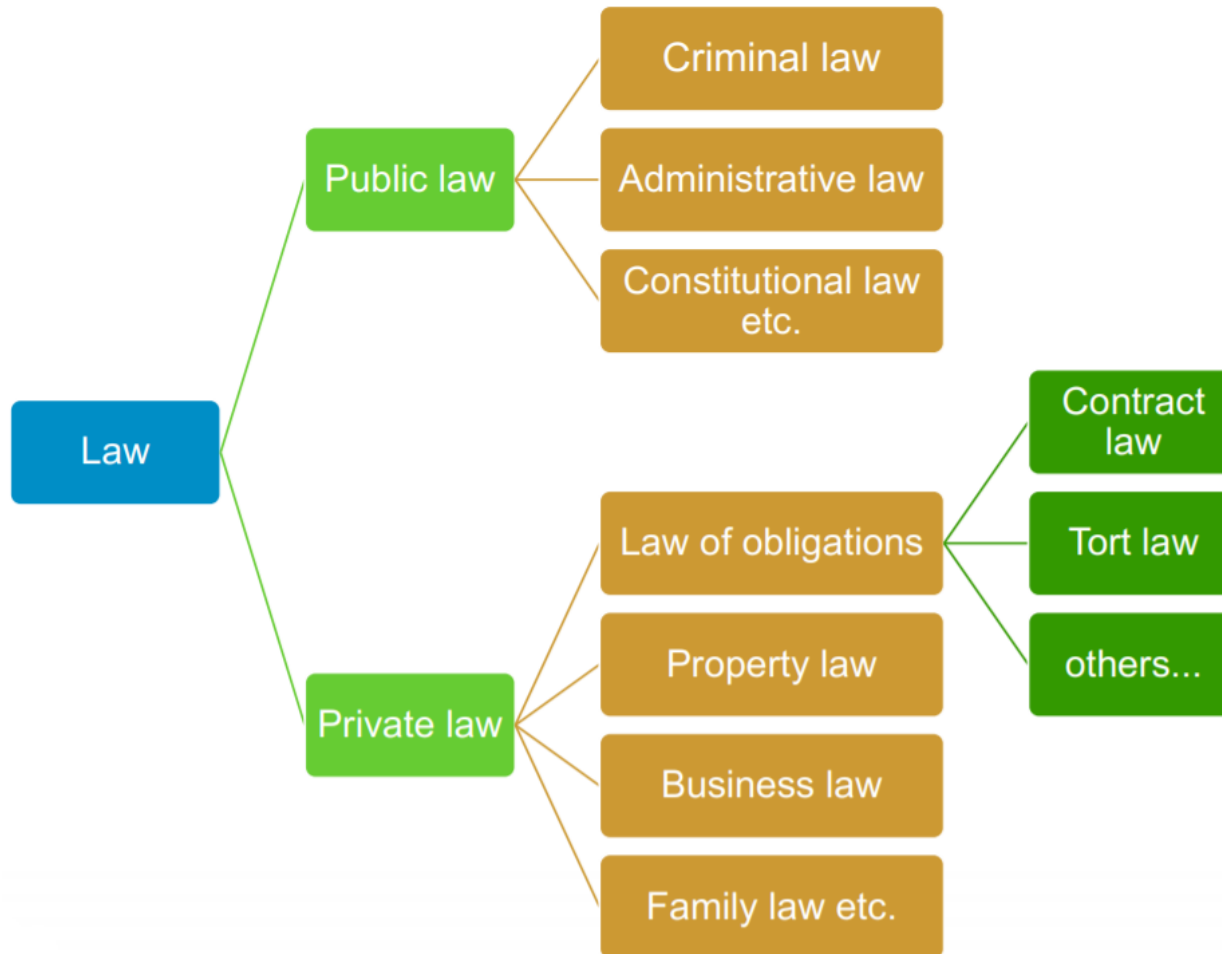
1. Private law, sources of law, and Obligations
2. Contract in general
3. Formation of contract
4. Content of contract
5. Remedies

Our approach

- Global
 - Common law: England and former colonies
 - Civil law: the rest of the world
- Practical



Private law, obligations, sources of law



2. Contract in general

What is a contract?



What is a contract?

- Agreement between the parties?
- Offer and acceptance?
- Signed document proving agreement?

3. Formation

- Offer and acceptance, or agreement
 - Consideration?
- Obstacles (exceptions)
 - Defects of will



Defects of will

- Mistake (mainly civil law)
 - Implies a duty to disclose!
- Misrepresentation (mainly common law) – ‘Buyer beware!’
 - Explicit representations
 - Warranties?



Information obligations

- Directives
 - For example: Consumer Rights Directive 2011/83/EU
 - Particularly relevant for e-Commerce
- Consequence of violation?

4. Content of the contract

Common clauses

- Warranties
- Limitation of remedies (sole remedy..)
- Liquidated damages
- Penalties? (Prohibited in some countries)
- Termination clauses
- IP clauses
- Jurisdiction clause/choice of law

Importance of clauses

- Tedious....but can have important or expensive consequences.

Interpretation

- Objective (literalism, text)
- Subjective (intentions behind text, context)

Good faith

- Supplementation (gap-filling)
- Interpretive (intentions/subjective)
- Corrective (estopping unreasonableness)

Unfair terms

- Standard terms
- EU Directive 93/13: unfair clauses → not binding!
- U.S. approach: mandatory terms in U.C.C.
- Also: public policy

5. Remedies

1. Breach of contract
2. Specific performance
3. Damages
4. Termination
5. Time limits

5.1 Breach of contract

- Non-performance of what?

Common
law

warranties
only

clauses spell
out
consequences

Civil law

all obligations

differentiation
with specific
clauses

Steps to invoking a remedy



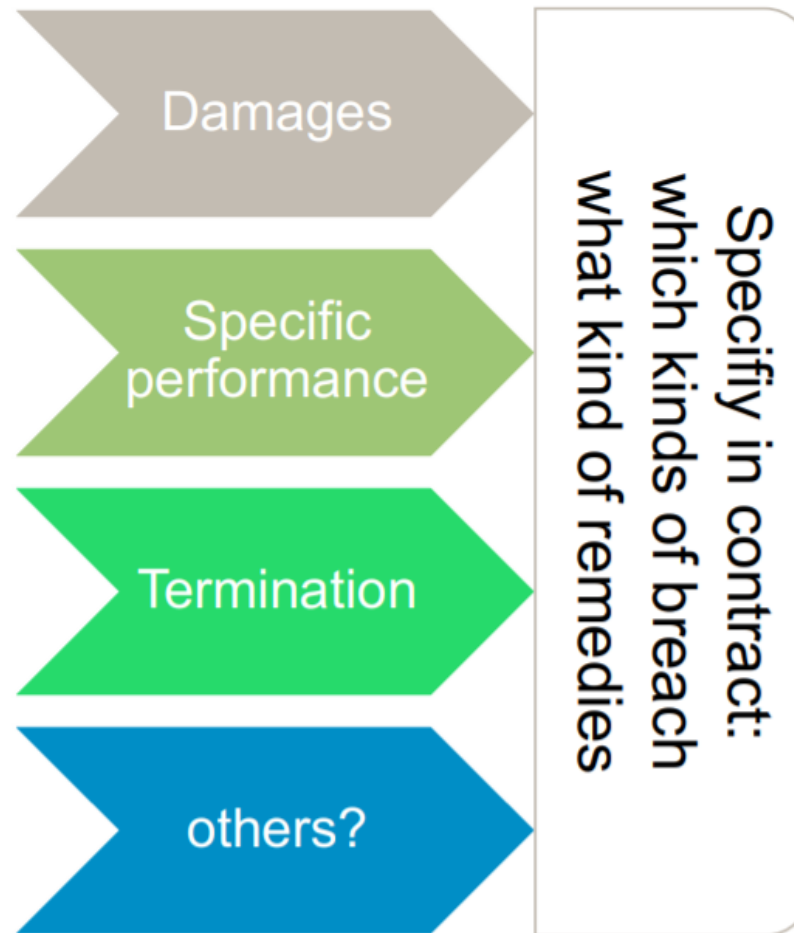
Default

- Breach
- Notice of default

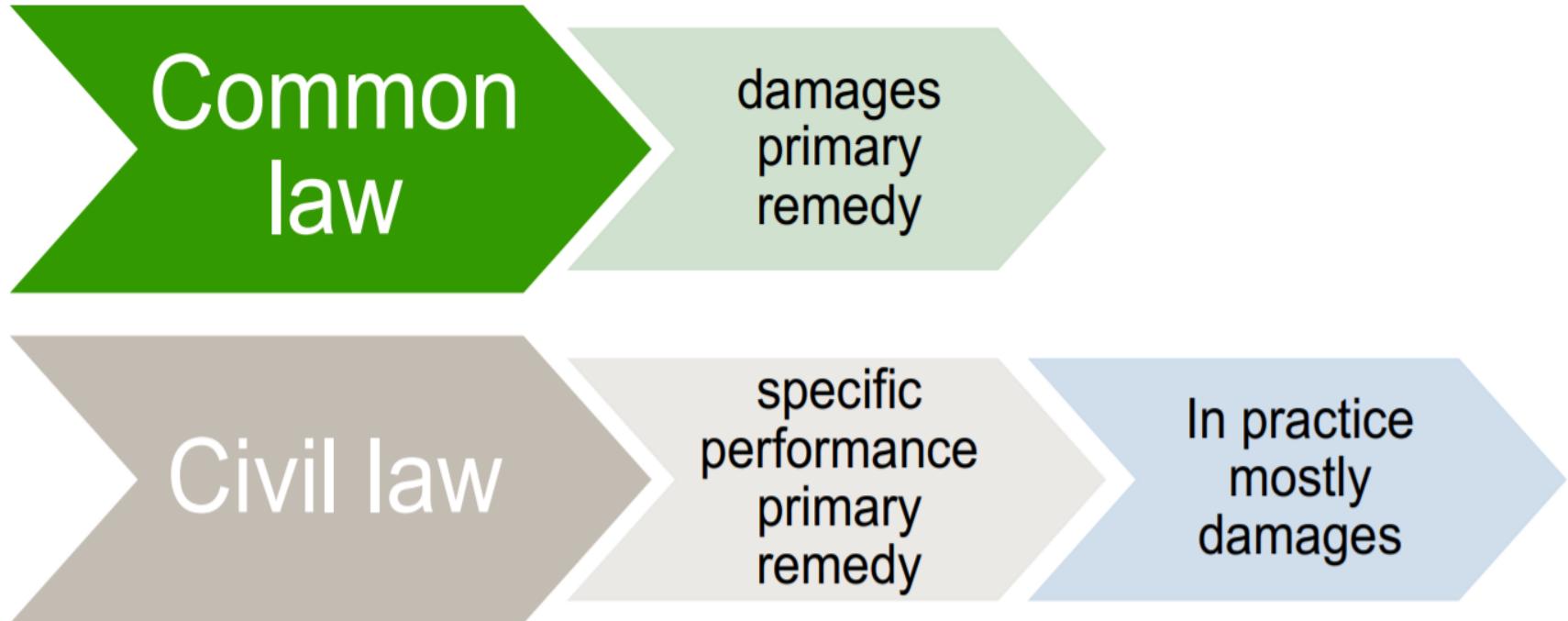
Attributability/blame

- Cause of non-performance?
 - Force majeure?
- Obligations of means
- Obligations of result

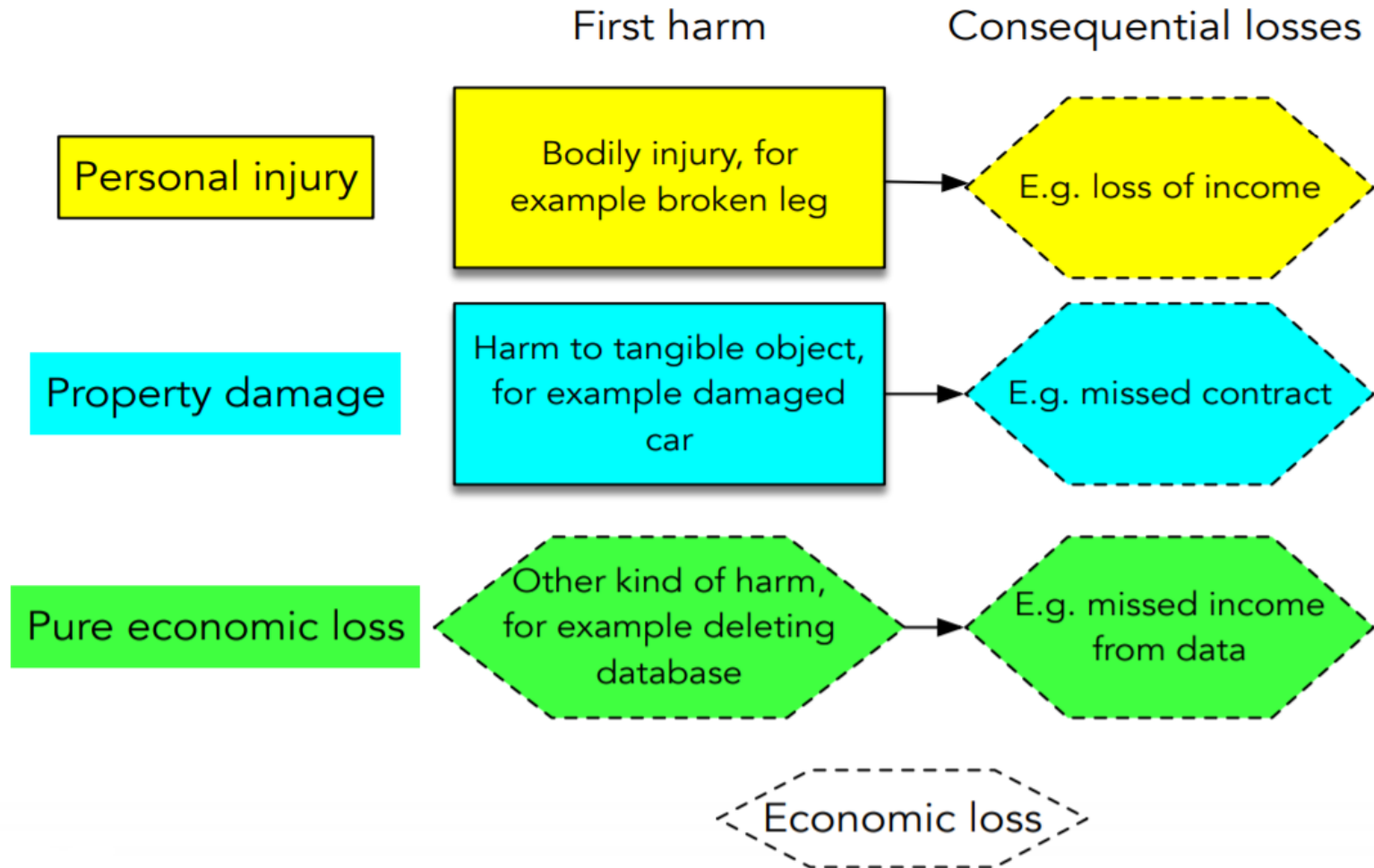
Kinds of remedies



5.2 Specific performance



5.3 Damages



Limitation of remote damages

- Causality requirement
 - Too many causal steps = not recoverable.
- Remoteness
 - It must be foreseeable, ie. someone could anticipate the harm.

Damage clauses

- Limitation clauses
 - Amount
 - Kind of damages
- Liquidated damages (fixed damages)

5.4 Termination

- For breach
- For specific conditions
- In order to end the contract

Common requirements for termination

- Notice period
- Damages/compensation?
- By notice or by court

Consequences of termination?

- Retroactive or not?
 - Obligation to restore/restitution?
- Termination clauses
 - What has to be done in detail?
- Survival clauses

5.5 Time limits

- Prescription / Statute of limitations
- Limited period to complain

Contract law analysis

- Is this about contract law?
 - Or is it perhaps to do with property?
- In which phase does the problem occur?
 - Eg. difference of will has to do with formation of the contract. Breach of contract occurs after the agreement exists leading to remedies specified in the contract.
- What do you want to achieve (uphold the contract/obtain remedy)?
- Examine various possibly applicable tools to see whether you get the relevant result or not
 - Remedies or obstacles to remedies (for example default).

Example

- You are asked by Greatdelivery (a transportation company) to provide an analysis based on data collected by their vehicles in transit. They wish to see if there are ways in which they might decrease expenditure and improve on their delivery time. They advise you that they want your analysis to ensure that they decrease their current expenditure by 30%. You warrant that you have the necessary qualifications and hardware/software for the task. The contract states that should this not be the case Greatdelivery may terminate the agreement.
- You agreed that you would work from their premises. One day one of Greatdelivery's employees accidentally spilled their coffee onto your computer. The result is that it needs to be repaired and you lose time to provide your analysis meaning that you fail to meet the deadline specified in the contract.
- Greatdelivery wishes to terminate the contract based on you having breached the contract.

Questions

- 1. Will Bestdelivery be able to terminate the contract on this basis?
- 2. Do you have a claim for the repair cost to you computer? How would you go about recovering this if you do?
- 3. Are there any issues regarding the formation of the contract and the contract terms? If so, what are they and why is it an issue?

First question

- Requires you to look at the requirements for breach:
 - Breach?
 - Notice of default?
 - Is time of the essence? Default not required?
 - Attributable?
 - What about warranties? Clear or unclear? Possible interpretation issue.
 - Difference between common law and civil law.
 - Defenses?
 - Remedies

Second question

- Recognize that while it is a property right which needs to be protected, your action would most likely be a tort action.
 - Vicarious liability?
- Also possibly a contractual counter-claim
 - Requiring you to work from their premises, but not ensuring that the your property is protected/safe.
 - You would then have to explain why there is a breach and why you can claim or what you would have to do in order to claim.
- What remedy do you have or want?
 - Damages most likely, either for repair or replacement.

Third question

- Requirements for formation
 - Intention to be bound
 - Sufficient agreement between the parties.
- Obligations of result vs means?
- Possibly the vagueness of the warranty.