BRIEF INTRODUCTION TO PRIVATE LAW v 1.1

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Chapter 1. What is Private Law?

1.1. Introduction

This textbook provides an introduction to private law. This is the part of law that covers private relationships. To ensure that you approach this subject from the correct perspective, we start with a few brief introductory remarks about the concept of private law.

1.2. The concept of law

A well-known problem of the study of law is that it is difficult to explain what is meant by the word 'law'. For the purposes of this course we can provisionally define law as the body of authoritative *rules* that determines the outcomes of court cases, i.e. provides instructions to judges as to how to handle cases. These rules are primarily found in

- statute law (*wetgeving*)[1] and
- case law (*rechterlijke uitspraken, jurisprudentie*).[2]

These are the rules that the legislator and courts are primarily interested in and which are being interpreted, modified and applied by the courts. This is to distinguish these rules from other rules that may be relevant to court cases, such as rules of mathematics, physics or bookkeeping which may have to be applied in a specific case to resolve a factual dispute.

These rules are *authoritative* in the sense that courts and citizens are supposed to simply follow them, even if they do not agree with these rules. The fact that they have legal authority cuts off further discussion in legal debate. They are rules of *positive law*, rules that describe the law as it is, not how you might want the law to be.

> This principled view is not entirely correct, as rules are regularly (and sometimes successfully) contested in court. However, such a debate is normally presented as a discussion about the interpretation or content of a specific rule, not as a debate against the entirety of law.
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> Rules only have value as we have knowledge about their interpretation and application. They operate in an environment of legal knowledge, where experts are able to guide practice. This knowledge is not exactly part of the law as usually understood, but it does form the indispensable background against which the law operates. The scholarly literature about the detailed interpretation of the law is also called 'doctrine'.

The law has various functions, among which:

- providing final decisions in contested cases,
- providing compensation,
- regulation for government/social policy purposes,
- providing guidance to individual behaviour,
- facilitating the proper operation of markets,
- enforcing moral rules or rules of natural law,
- promoting justice.

For this text we can concentrate on the fact that legal rules allow us to predict the outcome of court cases, and thereby also allow us to determine what would be a recommended course of

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[1] These are also called Acts, or if they are comprehensive for a particular area, Codes (such as the French *Code civil*, a large law that contains most of the rules of private law).

[2] Case law is the entire body of decisions by the courts. Particularly the decisions by the highest court (such as the Supreme Court, Cour de cassation) may determine the law. In England and other common law countries, those decisions are called *precedents*, and the body of those cases is called *precedent law*. In France, the decisions by the Cour de cassation are formally only interpretations of the French *Code civil*, but in practice the Cour de cassation can create new rules with only a small basis in the *Code civil*.

action. For example, it allows us to decide whether we would need an explicit contract clause stating that something we buy has a certain characteristic, whether we should claim damages in case a contract is not fulfilled to the letter, whether we should refrain from operating a website because of the risk of being held liable.

An important aspect of private law is that it is principally *national*. States generally insist on their sovereignty, i.e. the power of a nation-state to regulate its own affairs and to make its own rules. As a consequence, it is impossible to speak in the abstract about the specific legal rules that apply in a given case. You have to examine which legal system governs your case before you can determine which specific rules apply.

> The body of law that determines which legal system applies (as regards private law) is called Private International Law, or Conflict of Laws. The guiding principle is that the legal system applies which is most closely connected to the case. However, there may be considerable discussion as to which system is most closely connected.

Furthermore, the law is *time-dependent*. The law changes over time due to new statutes or new authoritative court decisions. Therefore you cannot rely on an existing text or earlier analysis without also checking whether the legal rules have changed afterwards.

> For example, the French *Code civil* was enacted in 1804 and remained virtually unchanged, until it was significantly modified and renumbered in 2016. If you read a legal text about French law from before 2016 you may therefore have an invalid impression of current French law, even if the text at the time of appearance was correct. You can't tell this from the text on its own.

In order to keep this reader manageable, we will discuss the legal rules at a somewhat abstract level, that will allow you to analyse cases in outline similar to how a lawyer would do it, albeit missing a lot of the finer details. I will present a few examples of actual legal rules, but the focus is mainly on the abstract outline that is common to the respective rules around the world. In some instances, however, the differences between countries are so significant that we will point out several alternative approaches.

The most important distinction in legal systems is that between common law and civil law. Common law is a system of law that developed in England (and Wales),[3] and through the colonizing power of the British Empire spread over a large portion of the world.[4] Most former English colonies have retained common law as their legal system, including the U.S.A. Over time the law in those countries deviated from common law in England, but the main outlines and concepts are broadly similar. When we speak of common law, we usually mean the broad outlines of the law in those countries.

Civil law can be traced back to Roman law, the legal system as laid down in legal texts in the late Roman Empire. Roman law was rediscovered in Europe in the Middle Ages and became an important source of law in Western continental European countries, besides older traditional law. In early modern times Roman law was systematised and further developed, and that system formed in 1804 the basis for the French Code civil, a law that codified the entirety of private law. The Code civil proved to be a model for many other countries in Europe which all enacted their own codes (sometimes closely modelled on the French example, sometimes based on

[3] The law covers England and Wales (and is therefore also simply called English law), not Scotland, which has a different legal system (albeit influenced heavily by English common law.

[4] Many former colonies also have retained customary law. In this course we cannot discuss the interaction between common law and customary law in former colonial states, as that is far too complicated a topic.

newer insights, such as the German *Bürgerliches Gesetzbuch* of 1900), which were imposed also onto their colonies. After decolonization, again, most countries retained these codes, but over time often updated them. Other countries which were not colonized or where no code was imposed have since the 1950's created codes on the Western model: prime examples are most east-Asian countries and eastern and middle European countries. Civil law refers to systems with a codified private law based on a systematic structure, derived (in)directly from the French model and the Roman law tradition.

By now the vast majority of countries has either a common law or civil law system.[5] The reason for distinguishing between common law and civil law is that these systems differ to a large degree in concepts and terminology. Hence, to describe the law even at a general level, it is often necessary to mention both the common law and the civil law terminology as alternatives. There are further practical differences, in particular in the main sources of the law. Common law is mainly formed in precedents (binding case law) supplemented with statutes that cover parts of the law, while civil law typically starts from a code that purports to cover the entirety of private law which is modified or interpreted piecemeal by case law.

1.3. Private law

Private law can be distinguished from public law (encompassing criminal law and administrative law). Criminal law consists mostly of the material rules that state actions that are punishable ('thou shalt not kill'), as well as the procedural rules that state the way in which suspects are to be prosecuted. Administrative law mostly states the rules by which the government is bound when acting in administrative affairs, such as when deciding on an application for a permit. Public law mostly involves disputes between citizens and the state about the way in which the state exercises its power.

Private law on the other hand provides rules that govern relationships between private parties (individuals, groups, or companies), without the involvement of a public body. Furthermore, private law is different from public law in that it is not primarily aimed at providing absolute commandments. Many rules of private law describe formalities (rules that have to be followed conditionally, if one wishes to achieve a certain effect) or default rules (rules that apply if parties have not made other arrangements). Private parties are principally free to regulate their own affairs, and private law only provides restrictions in extreme cases. The primacy of freedom (or autonomy) is an important principle of private law.[6]

The rules of private law can broadly be divided in three groups, according to three well-known moral maxims:

- promises have to be kept,
- property must be respected,
- harming others is not allowed.

The first is the subject of contract law, the second of property law (which also treats how property is acquired). The last is the subject of tort law.

> There are several other areas of private law. Most important are:
> - family law: this regulates relations between spouses, parents and children, etcetera.
> Inheritance law may be considered a separate part of law, or may be part of family law (this depends on the jurisdiction).

[5] There are only a handful of exceptions, such as Bhutan or North-Korea.

[6] Although, as we will see in the property law chapter 7, the degree to which such autonomy is provided differs depending on the area of private law.

- company law: this is the part of law devoted to legal persons, i.e. corporations and similar entities. This area may also be considered to be part of business law.

1.4. Sources of obligations

Central to private law (in particular contract and tort law) is the concept of *obligation*. An obligation in the legal sense is similar to obligation in common parlance: it means that you have to do (or refrain from doing) something. In law we are primarily concerned with *legal* obligations, which means obligations that are legally recognised, will have some legal effect. [7]

The most important consequence of an obligation is that performance of the obligation can be enforced, either by requesting what is called specific performance, or indirectly through a claim of damages when the obligation is breached. These are called *remedies*, which will be discussed later.

Legal analysis mostly aims to determine whether someone does or does not have an obligation to do something. Lawyers need to determine whether there is a basis or *ground* for an obligation. In civil law this issue is viewed as examining whether one of the *sources* of obligations applies. Obligations chiefly arise from a *contract* or from a *wrongful act* (an act which leads to liability under a specific tort).[8] These are the two most important sources of obligations.

There are three further sources of obligations: *restitution, negotiorum gestio, and unjust enrichment*. Not all jurisdictions recognize all three of these sources separately.

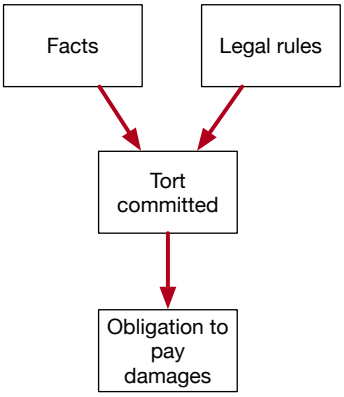
Restitution: If for example a contract has been annulled after one party has already paid a sum of money under the contract, it is obvious that there is an obligation to return the money. The legal basis of this obligation is restitution.
Negotiorum gestio occurs when someone voluntarily, without being obliged, acts (with reasonable ground) in your interest without your prior consent. Examples are: putting out a fire in your house while you are at work, taking you to the hospital when you are unconscious after being hit by a car. Negotiorum gestio means that the person who helped you may, under certain conditions, be compensated for costs he incurred while helping.
Unjust enrichment is a catch-all source of obligations in cases where there is no unlawful behaviour (hence no tort) but general considerations of justice still make it desirable to intervene. An example is that someone asks you to build a house on his land, but once it is built refuses to pay and reveals that he doesn't own the land. Because he is bankrupt you cannot get payment from him. However, it turns out that he deliberately acted like this in order to have the real owner of the land (who turns out to be his sister) profit from the building, as the owner of the land by law becomes owner of the house built on it (this is a principle of property law). Indeed, the sister subsequently sells the land plus the house at a considerable profit. In such a case, it is possible that the sister would have to compensate you on the basis of unjust enrichment, as she profited by the house while you suffered a loss consisting of the costs of building the house.

Why is this terminology of sources of obligations important? Reasoning in private law means that you need to determine whether the facts of the case, combined with the relevant rules, lead to an obligation or not. To do so, you generally start with identifying whether one or more sources of obligations might be applicable. If there is no contract, you can forget about contract as a source and would instead focus on tort law. If there is a contract, you would primarily look at contract law and only examine tort law incidentally. The other three sources described above do not usually show up, except restitution, but that one is mostly easy to apply.

[7] Hence we are not concerned about moral obligations as such, only insofar moral notions obtain legal effect such as by influencing what counts as negligent behaviour.
[8] This will be explained in Chapter 5.

Given that you know which source of obligations you are focusing on, the subsequent question is whether this source does or does not provide a basis for an obligation in this specific case. Law consists of a large collection of rules that tell us the answer to that question. If you have identified the relevant rule for the facts of the case, you need to check whether all requirements or *elements* of the rule are met by the facts of the case. You therefore must focus on these elements: how many are there, what do they mean?

> A simple example. If someone commits a tort, this leads to an obligation to pay damages. Whether in a specific case you have an actual obligation to pay damages to someone else therefore depends on whether you have committed an action that fulfils the requirements of a tort. In order to determine whether that is the case, you need to check the requirements that the law says are part of the tort: a fault, harm, and causality (see chapter 5). Hence you check for each of these requirements whether they are fulfilled, which provides you with the answer whether you do or do not have an obligation to pay damages.



> In reality there are various torts, and the requirements are more detailed than these three, but the principle remains the same. Furthermore, in practice you often need to check alternative grounds for an obligation. For example, it is possible that there are various torts that might apply. You would have to check each tort in turn, as it suffices that one single tort provides a ground for an obligation to pay damages.

There may also be *exceptions* to the rule. An example is that you are bound to a contract, except if it is contrary to public policy. Whether an exception applies is also informed by a rule, for which again it is important to know the criteria for when the rule applies.

The set of rules that constitute a coherent part of law are called a *doctrine*.[9] An example is the doctrine of vicarious liability: which regulates under what conditions you can be liable for torts committed by employees.

1.5. Personhood and legal persons

An obligation is characterised by the fact that one party has to perform the obligation, while another party can claim performance of the obligation. Who can be party to an obligation? First of all, *natural persons* (human beings) can be party to an obligation. This also includes children: a child is often not legally allowed to conclude a contract, but can still be obliged to do something or have a claim on someone else. The issue that some persons may be incapable of fully looking after their own interests and may therefore not always be bound to contracts is the issue of *capacity*. That may also influence tort liability. We will not discuss this further. The notion of personhood is important. A person can conclude contracts and own property. The

[9] The term 'doctrine' therefore (unfortunately) has two distinct meanings: the complete body of legal scholarship (see § 1.2), and a specific coherent set of rules regulating a certain issue. The context usually makes clear which meaning is intended.

entire collection of 'things' (assets) that a person owns[10] is also called the *patrimony* (civil law) or *estate* (in common law). The estate can be used by a creditor of the person to collect a claim, such as a claim for damages for unlawful behaviour or breach of contract.

There are also so-called *legal persons*, corporate bodies, who can also be party to an obligation. Examples are corporations, nation states, local authorities. Legal persons have rights and obligations similar to natural persons. The legal person or corporate body may *own property*, and indeed that is an important function of such entities. The technical term used is *assets*. A legal person is usually represented in law by natural persons who act on behalf and in name of the corporation. This is the typically the board of the corporation and/or the chief officers (CEO, CFO etcetera). Corporations can be liable on the basis of tort, just like natural persons can be: claims on the corporations can be recovered from all the assets by the corporation.

There are different kinds of legal persons. Corporations typically are formed by the capital which was collected from investors in the company; societies are usually formed by their members.

The Vietnam Civil code 2015 provides an example of rules on legal persons. Notice the variation in terminology (juridical person instead of legal person) which is readily understandable once you know about legal persons.

Article 74. Juridical persons

1. An organization shall be recognized as a juridical person if it meets all of the following conditions:

a) It is legally established as prescribed in this Code and relevant laws;

b) It has an organizational structure prescribed in Article 83 of this Code;

c) It has property independent from other natural and juridical persons and bears liability by recourse to its property;

d) It participates independently in legal relations in its own name.

2. Every natural or juridical person has the right to establish a juridical person, otherwise provided for by law.

(...)

Article 87. Civil liability of juridical persons

1. Each juridical person must bear civil liability for the civil rights and obligations established and performed in the name of the juridical person by its representative.

The juridical person shall bear the civil liability for obligations assumed by its founder or founder's representative to establish and/or register the juridical person, unless otherwise agreed or prescribed by law.

2. Each juridical person must bear civil liability by recourse to its property; shall not bear civil liability for its members with respect to civil obligations established and performed by such members not in the name of the juridical person, unless otherwise prescribed by law.

3. A member of a juridical person shall not bear civil liability of the juridical person for the civil obligations established and performed by such juridical person, unless otherwise prescribed by law.

(Translated text: https://www.wipo.int/edocs/lexdocs/laws/en/vn/vn079en.pdf).

Notice that legal persons need to be represented. The notion of representation (also called *agency*) means that the supposed will of the person is expressed by someone else (the

[10] Depending on the context you also may need to take into account the debts or claims on the person.

representative or agent). The representative gets the power to represent (also called power of attorney, in English) from a mandate by the principal (the person who is represented) or some other legal basis (often a statute, such as a parent who may represent a child, a director who may represent a legal person, an insolvency trustee who may represent the insolvent).

> The notion of representation is an important one in practice, but is also complicated because many things may go wrong. A person may claim to be a representative while actually not having power of attorney: in some cases the pseudo-principal may still be bound (called apparent authority). A representative may overstep their power of attorney (for example, by entering into a contract beyond their mandate): is the principal bound?

An important characteristic of legal persons is that in principle only the legal person is liable for actions by the legal person, and not the shareholders or directors of the legal person. A claim is paid from the funds of the legal person. This is the 'limited liability' that is implied in the concept of a LLC (limited liability company). Shareholders thereby can invest in a company without having to fear that they will be exposed to limitless liability. At most they will lose the value of their shares.

A complication is that multinational corporations actually consist of several legal persons. The mother company is majority shareholder and/or director of national subsidiary companies. The rules of limited liability apply within such a structure, too. Consequentially the mother company is in principle not liable for torts committed by the subsidiaries, or the damages that the subsidiaries may have to pay. It is possible to hold the company liable for actions of its employees on the basis of vicarious liability, but a subsidiary is not an employee. In specific instances there are possibilities to hold directors and/or majority shareholders liable for torts committed by a company (§ 6.7 discusses a few possibilities).

> You might wonder why we even allow corporate bodies a separate existence. One reason is that they provide a very beneficial separation between individuals and functions. A problem in earlier societies such as the Frankish Empire was that the sovereign emperor was identified as a kind of 'owner' of the empire and the state finances were simply his personal finances. This led to an undesirable confusion of the state financial health and the individual wealth of the sovereign, as well as problems of inheritance: the death of Louis the Pious led to the Frankish empire being split into three parts, because all three of Louis' surviving sons had a right to part of the inheritance. Recognition of the fact that the state was a separate entity which was only governed in function by the sovereign was an important step in the development of modern statehood.
> Similarly, the finances of corporations and their directors or shareholders should not be confused; it doesn't seem fair that a corporation should have to pay the personal debts of their directors. Conversely an employee does not expect to have to contribute to debts of the corporation. Hence there are good reasons underlying the idea of separating corporate bodies from their employees (and managers, who often are employees). However, one can also argue that the separation only holds up to a certain extent. The persons that have a significant influence on the actions of a corporate body could arguably be held accountable on the basis of the normal rules of tort law.

1.6. Effecting rights in court

As mentioned in § 1.3, private law has an important role in providing an aggrieved party with a venue to obtain what they feels is their right. The way to do so in societies with a legal system is to file a claim in court.[11] The court then renders a decision in the dispute, and if the claim is granted, the decision can be enforced with the help of state officials, such as bailiffs and police. This regulates the use of force in society, on the basis of law.

[11] We focus here on the notion of a court in western legal systems, which has spread to most countries in the world. There are other forms of dispute resolution, which we will not discuss here.

One way of looking at private law is that it consists of the rules that tell the court how to decide cases between private parties. For a proper understanding of how private law works in practice it is important to have a basic understanding of how such a procedure works.

The basic set-up of a court procedure is that there are two parties. The procedure is started by the party who files the claim (*claimant, plaintiff*).[12] The claim has as objective to obtain a decision against the other party, such as an award of damages or an injunction. The other party, the *defendant*,[13] defends against the claim. Claimant has to explain the factual grounds of their claim,[14] which should fulfil the legal criteria for granting the claim. The claimant usually also explains which applicable rules lead to the conclusion claimed. Defendant usually argues that the factual grounds indicated by claimant are not correct or at least not proven, that the legal criteria are not fulfilled (or the law has to be interpreted differently), that certain exceptions apply (and the factual grounds are present on which these exceptions are based), or other reasons why the claim cannot be granted.

Insofar as parties are in disagreement about certain facts, the court has to decide who bears the burden of proof. In case the court has insufficient evidentiary materials to decide clearly whether a certain fact is true or not, the court decides that the party who has the burden of proof of the relevant fact has not proven that fact. That may mean that this party loses their case. Normally the claimant has to prove the facts on which the claim is based, while the defendant has to prove the facts on which the exceptions they invoke are based. In certain cases the court may *reverse the burden of proof*, which means that the burden of proof rests on the other party than the party on whom it normally would rest. This makes it easier for the claim to succeed.

> The rules on how a court case are litigated are the subject of procedural law, in particular the *law of civil procedure* (for private law court cases).

1.7. Applying the law in practice

If you are working as a lawyer, the core part of your job is probably going to be to provide an assessment of a case, as part of an advice, legal strategy, or so. Quite similar is an advice regarding a policy, which involves assessment of a group of cases. The usual way of approaching such a task is to do this in two steps:

- description of the relevant part of the law
- application of the law to the case or cases.

Knowledge of the law is often related to the possible relevance of the law in a court procedure. As explained in § 1.6, in such a procedure the claimant and the defendant have opposing standpoints: whereas the claimant tries to build up the case, the defendant attempts to destroy it. The claimant attempts to prove that all requirements of the ground of their claim are met, because if even a single necessary requirement remains unfulfilled, there is no ground for the claim and it will be dismissed. In practice, you would therefore posit several alternative grounds in the hopes that at least one of them will succeed.

The defendant tries to ensure that the claim is dismissed, and therefore will usually focus their attack on the weakest link of the argument of the claimant: arguing that this or that criterion is not fulfilled. Alternatively, the defendant may have to invoke exceptions[15] and defences, and tries to prove that the requirements for these exceptions and defences are fulfilled.

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[12] Both terms are used. Usually this is the victim, the person who actually suffered the harm.

[13] In tort law we also use the term 'tortfeasor' for the person who committed the tort. However, the defendant is not always the tortfeasor, as will become clear when discussing vicarious liability.

[14] This is usually based on a purported obligation (§ 1.4).

[15] Such as the exception in German law to liability for employees, that the employer took sufficient care in selection and management of the employee.

An exception is what it says, a part of a more general rule or an addendum to that rule: if the exception holds, the general rule does not apply. For instance, you are not allowed to drive over the speed limit, except if you are in an emergency. An exception may be added explicitly to the rule, or can be listed separately (in a civil code the exception is often found in a provision following the provision containing the original rule: this is why you should always read a bit further in the code to ensure that you do not miss relevant exceptions and amendments).
A defence (also called ground of justification) is principally used in tort law. It functions like general exception for liability. The principal difference is that defences are quite general and may apply to several torts, while an exception is usually understood as relating to a specific rule. An example of a general defence is contributory negligence: the harm was also partly due to negligence on the part of the victim.

Both parties have to be aware of all the criteria that are required for the grounds of liability that seem relevant and/or are invoked, as well as possible exceptions.

To test your knowledge of the law it is therefore important that you are able to recite the relevant rules (particularly all elements), and check for each element whether it is fulfilled or not, and finally to conclude whether the rule leads to the desired conclusion or not.

1.8. Contents of this reader

In this reader we discuss key topics of private law. The aim is to provide non-lawyers with a basic understanding of the main doctrines of private law.

Given this focus, the approach of this book is somewhat different from what is common amongst legal textbooks. The focus is not on knowledge of detailed rules of statutory law and/or case law, but rather on rules at an abstract level, in particular the general outline which is commonly shared in various jurisdictions (countries). There will be references to rules of positive law, but these are not exhaustive, rather illustrative. The student should be able to work in a practical manner with the applicable rules, to recognise points of attention, and be able if necessary to search for more detailed knowledge or consult a lawyer. The examples are taken from all over the world to give some idea of what actual legal rules may look like. This is no replacement for actual legal training, where you would familiarize yourself with an entire code and understand its systematic structure. Furthermore, law students learn to read case law, which is not provided for in this reader.

A part of knowing the law is knowing legal concepts. We will therefore discuss a lot of legal jargon. Because we do aim for a more global perspective, we will often introduce several variants of a legal concept, as there is no single neutral term. Legal scholarship finds itself in the situation in which medical science would be (with national names for all parts of the body) if doctors would not have adopted Latin as a common basis. By introducing you to different names you may hopefully find it easier to connect what you learn with the actual concepts you encounter in practice. As this reader is used in a Dutch university, there is particular attention for Dutch terminology.

In common with many materials for legal studies, this book distinguishes between text in normal font and in small font. The text in normal font forms the core content of the book. The text in small font is mostly intended for further explanation, examples, or adding some nuances. When studying for an exam, the focus should be on the text in normal font.

Chapter 2. Formation of contract

2.1. Introduction

Our first topic is contract law. In the following paragraph (§ 2) we will begin by discussing the meaning of contract. Then we will examine the way in which contracts are concluded (§ 3). Subsequently we will look into the dominant way of formation of contracts: offer and acceptance (§ 4). This is followed by a discussion of formalities and other requirements (§ 5), and defects of will (§ 6). We finish with a brief conclusion that serves as a summary (§ 7).

2.2. The meaning of contract

2.2.1. The basis of binding force of contract

A basic notion in private law is contract. Parties are bound to obligations that they have voluntarily accepted. This can be justified on the ground that promises have to be kept: a moral maxim that is generally accepted and is deeply ingrained in popular consciousness. It is the reverse side of the liberal principle of party autonomy, which assumes that individuals are free to do as they please except where there is good reason to limit their freedom. A consequence of party autonomy is that where parties voluntarily choose to restrict their freedom, that choice should be respected as well.

Although the principle seems clear enough, there are numerous problematic questions that cannot easily be answered solely on the basis of that principle. We will go into some of these shortly. First, however, we will discuss a technical or systematic problem; how contracts have to be defined.

2.2.2. The formal definition of contract

If we accept the principle that promises have to be kept, how do we translate it in legal terms? This is accomplished through the concept of *contract*. A contract in essence is a mutual promise by parties to be bound. Each party promises on the condition that the other party also promises (this is the mutuality), furthermore parties intend to be legally bound.

> See for example art. II.1:101(1) DCFR:[1]
> "A contract is an agreement which is intended to give rise to a binding legal relationship or to have some other legal effect. (…)"

The contract is therefore an intangible social construct: it is the agreement that exist between the contracting parties. In practice 'contract' is also often used to refer to the signed paper document that proves that parties have concluded a contract (reached an agreement), such as 'May I have a copy of the contract?', 'Can you send me the contract?'. You should not confuse these two meanings. Here we concentrate on the first meaning: the legal agreement.

2.2.3. Issues of contract law

What kind of issues should be regulated? Generally speaking we can distinguish three phases in the 'life' of a contract:

[1] A set of model rules (The Draft Common Frame of Reference) that encompasses a broad commonality between rules of European states.

1. formation
2. consequences
   - content of contract (interpretation of contract, good faith)
   - remedies in case of non-performance
3. termination

The division is not strict; certain remedies are in fact ways to terminate the contract. In this textbook we will discuss the formation of contracts (chapter 2), the content of contracts (chapter 3), and contractual remedies and termination (chapter 4). Each issue leads to several detailed questions.

2.2.4. Legal transactions

At this point a brief aside is necessary in order to explain an alternative approach to contract law and the law of obligations. This is the topic of legal transactions. The German BGB introduced this concept and it is found in quite a lot of codifications around the world. It is, however, mostly a concept for lawyers that is not easily recognized by lay persons, and furthermore many legal systems can do without it.

A legal transaction[2] is in essence is an expression of will, having legal effect. The concept of legal transaction builds on the intuition that when a person expresses what they want (and accept to be bound by it), other persons can rely on it. In several modern codifications the legislator has chosen to systematically build the conceptual framework of the law from the most basic elements to more detailed elements and rules. This means starting with 'legal transaction' and its consequences, and only later defining 'contract' as a specific construct built from legal transaction. This is the approach of German law.

> In this approach you might expect that 'offer' and 'acceptance' (see below) would be legal transaction. In German law an offer (*Angebot*) is however not considered to be an actual unilateral legal transaction, rather it is conceived as an expression of the will to be bound upon acceptance. Only the contract is seen as an actual (bilateral) *Rechtsgeschäft*.
> It is not evident that we should think in terms of juridical acts, and not rather view a contract as a kind of promise. The notion of juridical acts has come under fire for being too abstract, reason why the most recent legislative proposals seem to shy away from this concept.[3]Note that the concept of legal transaction does solve some issues that other jurisdictions need to tackle with other instruments such as the concept of *promisory estoppel* in common law (the court refuses, stops, a claim because it would be unfair in the circumstances of the case, particularly due to expressions of the claimant that the other party could rely on).

A consequence of using the more fundamental concept of 'legal transaction' is that doctrines like capacity and defects of will (see § 2.6) relate not to contracts, but to the more fundamental concept of legal transactions. The practical relevance is that you will need to look up those doctrines in the part of the code devoted to legal transactions, and not in the part dedicated to contracts.

> See for an example the German BGB.
>
> BGB
> Division 3 Legal transactions

[2] This is a translation; there are many alternatives such as juridical act.
[3] F. Ranieri, *Europäisches Obligationenrecht*, 3rd ed., Springer: New York 2009, p. 146-151.

Title 1 Capacity to contract
§ 104 Incapacity to contract
A person is incapable of contracting if
1. he is not yet seven years old,
2. he is in a state of pathological mental disturbance, which prevents the free exercise of will, unless the state by its nature is a temporary one.
(...)
Title 2
Declaration of intent
§ 116 Mental reservation
A declaration of intent is not void by virtue of the fact that the person declaring has made a mental reservation that he does not want the declaration made. The declaration is void if it is to be made to another person who knows of the reservation.

§ 117 Sham transaction
(1) If a declaration of intent that is to be made to another person is, with his consent, only made for the sake of appearance, it is void.
(2) If a sham transaction hides another legal transaction, the provisions applicable to the hidden transaction apply.

§ 118 Lack of seriousness
A declaration of intent not seriously intended which is made in the expectation that its lack of serious intention will not be misunderstood is void.

§ 119 Voidability for mistake
(1) A person who, when making a declaration of intent, was mistaken about its contents or had no intention whatsoever of making a declaration with this content, may avoid the declaration if it is to be assumed that he would not have made the declaration with knowledge of the factual position and with a sensible understanding of the case.
(2) A mistake about such characteristics of a person or a thing as are customarily regarded as essential is also regarded as a mistake about the content of the declaration.
(...)
§ 123 Voidability on the grounds of deceit or duress
(1) A person who has been induced to make a declaration of intent by deceit or unlawfully by duress may avoid his declaration.
(2) If a third party committed this deceit, a declaration that had to be made to another may be avoided only if the latter knew of the deceit or ought to have known it. If a person other than the person to whom the declaration was to be made acquired a right as a direct result of the declaration, the declaration made to him may be avoided if he knew or ought to have known of the deceit.
(...)
§ 138 Legal transaction contrary to public policy; usury
(1) A legal transaction which is contrary to public policy is void.
(...)

2.3. Formation of contract in general

If we start from the principle that contracts are based on promises by the parties, we are still left with the question how contracts come about. The easiest way would seem to simply state something like 'contracts are formed by agreement between parties'. However, this simple approach leaves out a lot of details. If we consult the DCFR, we find that art. II.4:101 states:

> A contract is concluded, without any further requirement, if the parties:
> (a) intend to enter into a binding legal relationship or bring about some other legal effect; and
> (b) reach a sufficient agreement.

(a) means that parties really wanted to conclude a contract with legal effect, which is meant to exclude jokes, friendly gestures, exaggerations and moral adhesion ('I will not rest until ...').

> It is not always clear whether there is an intention to be bound, and what the content of that intention is. This leads to the question of subjective or objective interpretation, how declarations can be made, and whether tacit expression of an intention is possible or recognised.
> It is useful to distinguish between the fact that there is an intention to be bound, and the quality of that intention. In other words, it is possible to have a defective intention. Put differently: the intention may be defective because it was not based on a free choice. This leads to the topic of defects of will (as it is called in civil law countries) or ways of setting the contract aside (as it is in common law): the concepts of mistake, misrepresentation, duress, undue influence. See § 2.6.

(b) means that parties actually wanted the same, they agreed, and not only formally but about an actual substance of the contract (sufficient content). If you agree with someone about selling something, without making clear what object you will sell and for what price, that is not a valid agreement.

> There is considerable discussion as to whether or when this requirement actually is satisfied, for example if parties agree that they want to buy/sell a certain item for a certain price, but haven't yet agreed on the specific details of the delivery.

The phrase 'without any further requirement' refers to two issues: the absence of formalities, and the absence of a general requirement of consideration.

I. No formalities

In popular view a contract is mostly identified with a piece of paper containing the rights and obligations of parties, which is signed by both parties. However, legally speaking it is also long understood that a contract, in the sense of an agreement, does not necessarily have to be made in the form of a signed document, even though this may be preferable from the point of view of proof of the contract.

> In general, modern legal systems adopt the principle that no formalities are required except in specific cases. One example of such an exception is the prenuptial agreement, which usually has to be concluded in writing and often with the assistance of a solicitor or notary public. Some other formalities will be discussed in § 6.

Hence contracts can be formed in writing as well as by other actions, such as nodding, or signifying assent in other ways. An example is the practice at auctions, where raising a hand or even nodding is taken to indicate an offer to buy at a certain price. In some cases it is possible

to assume so-called tacit consent (assent by not protesting); this may in certain circumstances lead to acceptance of a contract. An example is a person accessing a website, thereby accepting the terms and conditions of use of the website.

> This does not imply that *all* conditions will bind: in private law we solve this by stating that the person does have a contract with the website, but that specific terms of the contract may be invalid (for example, because they are unfair). See § 3.4.

II. No general requirement of consideration

The requirement of *consideration* derives from English law and is accepted in common law systems. The general idea is that a mere intention to be bound is not sufficient; also required is a kind of 'bargain' in return for the promise to assume certain obligations. The most common consideration is money.[4]

Under the doctrine of consideration a mere unilateral promise has no legal effect, as nothing has been paid or offered in return for this promise. This has legal repercussions in the case of several kinds of on-line phenomena. In particular when software, information or other services are offered for free it is not always clear whether there is sufficient consideration, hence whether the user can claim the presence of a contract with the software producer or service provider.. Thereby the user has only limited claims to the provider as regards the quality of what has been provided.

These consequences may be undesirable, for example in the case of Open Source software or a website offering free information, where the person offering the software or website may still require the user to accept certain limitations on use or liability. These consequences may be mitigated because consideration need not always consist of money. It can also consist of *promises* or *forbearances*. Thereby the provider may, if so desired, on his part claim the existence of a contract. For example, the provider of Open Source software can claim that the user of the software is bound to the Open Source license, because the license to use the software is conditional upon acceptance of the license and promise to abide by its terms.

Similarly, many Internet services and apps require consent to allow the other party to access and use your personal data. This presumably is sufficient consideration.[5]

In conclusion: there are in principle two conditions for a contract:

1. intention to be bound, and
2. agreement between parties,

In common law systems there is a further requirement of consideration.
In specific cases there may further be formalities to follow (see § 5).

Note: you should create such miniature summaries for every section of this textbook, these will help you studying for the exam. At the exam you should be able to reproduce the various conditions for every doctrine/topic discussed in this textbook.

[4] Although money is the most common consideration, it is not the only one. Consideration can be as simple as a candy wrapper, it has to be *something*, not something of equal value as the corresponding obligation. *Chappell & Co Ltd v Nestle Co Ltd* [1959] UKHL 1.

[5] This may be concluded from art. 3(1) Directive (EU) 2019/770 on certain aspects concerning contracts for the supply of digital content and digital services, which mentions the possibility of a contract for digital content where the consumer "provides or undertakes to provide personal data to the trader".

2.4. The primacy of offer and acceptance

The intention to be legally bound (or more simply, to conclude a contract) can be expressed in many different ways, such as through the nod of a head at an auction, by clicking on an 'OK' button on a website. The general form that such a procedure takes can be described in the form of *offer and acceptance*.

> Note that contract formation is not limited to strictly following the stages of offer and acceptance (cf. art. II.4:211 DCFR). Contract negotiations between professional organisations often take the form of a lengthy discussion in which parties exchange various draft contracts. In other cases parties simply express tacit agreement to a certain state of affairs.

The notions of offer and acceptance are recognised in all of the legal systems we discuss in this chapter. The precise theoretical definition and place in the legal system may, however, differ.

> The analysis in terms of offer and acceptance is not undisputed; many authors at least mention that in commercial practice it often is hard to distinguish clear phases of offer and acceptance.[6] For English law, the House of Lords explicitly accepted the primacy of an analysis in terms of offer and acceptance in *Gibson v Manchester City Council*.[7]

A prime example of an offer is a specific proposal made to a specific person. However, it is also quite common to have offers made to the general public.[8] An example is the offer on a website for the sale of a television. Such an offer is assumed to lead to a valid contract once accepted by a visitor of the website.

Secondly, the consequence of an offer is that upon acceptance it leads to a contract. Among a number of possible questions, we can discuss the question until what moment acceptance is possible, which is the reverse of the question until what moment an offer may be withdrawn or revoked.

> The DCFR (comment A to art. II.4:202) explains the difference: an offer is *withdrawn* before it has reached the other party, and thereby never becomes effective (i.e. can never be accepted). If an offer is *revoked*, that means that the offer had already reached the other party but has not yet been accepted. Once that party has received the revocation and the revocation becomes effective, he can no longer validly accept.

Interesting questions arise with certain applications of the model of offer and acceptance.

> One possible issue is when we can conclude that there is an offer or an acceptance. For example, is the act of putting a house for sale an offer, or merely an invitation to negotiate? And can a person force acceptance by stating that the offer is accepted except where the other party explicitly refuses to accept within a certain time-frame (the issue of tacit acceptance or acceptance by silence)?

Such specific questions make clear that the issue is one of a just and fair distribution of risks and duties. On the one hand we do not want parties to be bound without a real acceptance, which means that we would prefer that there is a more or less explicit acceptance. On the other hand, we find it undesirable that a party can too easily repudiate acceptance in cases where he has given the impression that he was in agreement or allowed misunderstandings to arise.

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[6] See for English law J. Cartwright, *Contract Law*, Oxford: Hart 2007, p. 93-98.
[7] [1978] 1 WLR 520 (CA).
[8] See for English law *Carlill v Carbolic Smoke Ball Company* [1893] EWCA Civ 1.

In legal practice a common issue is to decide when offer or acceptance are actually effective. Generally speaking, offer and acceptance have to reach the other party to have effect. There are some exceptions, which we will not discuss here.

> The position that an acceptance is effective only upon receipt is called the *receipt theory.* The alternative is that the acceptance may be effective once it has been posted (the *postal rule,* or *emission theory*). The latter rule is accepted in English law for communication through classic paper mail, but not for e-mail or 'immediate' communication such as telephone.

2.5. Formalities and precontractual issues

As stated in § 3, generally speaking there are no formalities required for contracting. Contracts can be concluded in writing on paper, as well as orally, over the telephone or in person, or electronically through e-mail or clicking on a button on a website, and by other actions and means. Only in specific cases are further formalities required.

> An example is a prenuptial agreement, which usually needs a written signature to be valid.

In the European Union there are further requirements in the case of distance contracts (contracts not face to face) and e-commerce. In such cases, if the contract is between a business and a consumer (private person not operating for commercial purposes), the business has to provide the consumer with precisely defined information.

> See for Dutch law art. 3:15d and 15e BW, art. 6:227a-227c BW, as well as for certain cases art. 6:230a through 230m BW. These information duties derive from EU Directives, in particular art. 5-6 and 10 E-commerce Directive 2000/31/EC, art. 5-8 Consumer Rights Directive 2011/83/EU and art. 22 Services Directive 2006/123/EC.

As an example, see art. 5 Consumer Rights Directive 2011/83/EU, which states:

> 1. Before the consumer is bound by a contract other than a distance or an off-premises contract, or any corresponding offer, the trader shall provide the consumer with the following information in a clear and comprehensible manner, if that information is not already apparent from the context:
> (a) the main characteristics of the goods or services, to the extent appropriate to the medium and to the goods or services;
> (b) the identity of the trader, such as his trading name, the geographical address at which he is established and his telephone number;
> (c) the total price of the goods or services inclusive of taxes, or where the nature of the goods or services is such that the price cannot reasonably be calculated in advance, the manner in which the price is to be calculated, as well as, where applicable, all additional freight, delivery or postal charges or, where those charges cannot reasonably be calculated in advance, the fact that such additional charges may be payable;
> (d) where applicable, the arrangements for payment, delivery, performance, the time by which the trader undertakes to deliver the goods or to perform the service, and the trader's complaint handling policy;
> (e) in addition to a reminder of the existence of a legal guarantee of conformity for goods, the existence and the conditions of after-sales services and commercial guarantees, where applicable;
> (f) the duration of the contract, where applicable, or, if the contract is of indeterminate duration or is to be extended automatically, the conditions for terminating the contract;
> (g) where applicable, the functionality, including applicable technical protection measures, of digital content;

(h) where applicable, any relevant interoperability of digital content with hardware and software that the trader is aware of or can reasonably be expected to have been aware of.

These extensive *information duties* are imposed based on the reasoning that consumers have to be properly informed about their rights and obligations before contracting. You should, if relevant in practice, look up the precise requirements. Such information duties appear more suitable to a civil law approach, as they seem dangerously close to a duty to disclose which is generally rejected under common law (see § 7).

The desire to protect consumers by obligating businesses to be open and honest about their products has found expression in another directive, the *Unfair commercial practices* directive 2005/29/EC (UCP Directive). This directive prohibits not only clearly undesirable practices such as using threatening language to intimidate a consumer into entering into a contract, but also requires businesses to be fully honest about their products and the rights of consumers. For example, a business has to precisely represent the extent as to which a consumer has a mandatory guarantee in case of defects (art. 6(1)g UCP Directive). Up to then, it was quite common that businesses gave incorrect information, claiming that the consumer has only limited guarantees, and counting on most consumers not knowing their legal rights.

Incidentally, there is also a doctrine called *precontractual liability* (also called *culpa in contrahendo*). Although a contract only comes to exist upon agreement between parties, it is possible that even in the absence of a contract, the negotiations between parties may have reached such an advanced stage that a party that breaks off negotiations may be held liable. Civil law jurisdictions are more open to this form of liability than common law countries.

2.6. Defects of will and nullity

In an introduction the subject of defects of will (*wilsgebreken*)[9] should not be forgotten. As a contract is based on the intentions of parties, the justification for being bound disappears where the intention of a party has not been arisen in a proper manner. In other words, the will to be bound was defective. It is unfair for such a party to be bound: the defect of will may lead to the contract being invalid or void.

We can distinguish four grounds for voidness (*nietigheid/vernietigbaarheid*) of a contract.[10]

1. Mistake (*dwaling*), see art. 6:228 BW: one party or both parties agreed with the contract under mistaken assumptions that are so significant that the contract cannot be upheld.
2. Fraud (*bedrog*), see art. 3:44(3) BW: one party by devious means caused the other party to agree to the contract.
3. Threat (*bedreiging*), see art. 3:44(2) BW): one party threatened the other party in order to have that party agree to the contract. In common law this is also called duress. Duress may consist of physical threats (as in the case of robbery) or economic threats (for instance a large corporation threatening to leave their bills unpaid which would cause a small supplier to go bankrupt).

[9] Note that common law systems do not speak of a general doctrine of defects of will.

[10] A related common law concept is *unconscionability*: contractual terms that are extremely unjust (see in particular Uniform Commercial Code § 2-302(1)). They can be due to to fraud or threat or undue influence and could therefore be considered cases of defect of will. If they are part of standard terms, they could be void under the doctrine of unfair terms (§ 3.5).

4. Undue influence.[11] This involves taking advantage of another person, particularly in a relationship of trust, such as caregivers (nurses and doctors) who secure expensive gifts from their patients.

In practice the first defect is in civil law systems the most important one and the one most often invoked. It should be pointed out that mistake can occur without any blame; it is possible that both parties suffered under the same mistaken assumption (for example, assuming that a painting was original instead of a copy). A mistake can also be caused by one party breaching his *duty to disclose* relevant information. Furthermore, the existence of mistake does not always lead to the contract being voidable. It is possible that the mistake has to be attributed to, or comes to the risk of, the party who would wish to void the contract: in such a case that party cannot avoid the contract or at least cannot profit from the voidness. Finally, specific jurisdictions may in certain circumstances allow the other party to seek adaptation of the contract to bar avoidance.

The general result of finding a defect of will is that the contract becomes voidable (*vernietigbaar*). A party can avoid the contract by rescission (*vernietiging*), which means that it is as if the contract has never been closed, and any performance under the contract has to be undone.[12] Goods and payments have to be returned. Sometimes compensation in the form of damages may have to be paid; this depends on the circumstances, in particular which party should bear the risk of the mistake.

In common law, a different approach prevails. English law is the most restrictive. English law does recognise threat/duress and fraud, and to some extent undue influence. However, mistake is recognised only to a limited extent. Under English law the general principle is that there is no duty to disclose. *Caveat emptor*, buyer beware: the buyer should look after his own interests. If a party finds that specific characteristics of the product are of the essence to him, he should explicitly contract about these characteristics. This means that he should convince the other party to explicitly *represent* that these characteristics hold. Such contractual clauses are called *representations*. If such a representation is found to be incorrect, a party can instigate an action for *misrepresentation*, which allows him to rescind the contract, or claim damages. The essential difference between misrepresentation and mistake is that mistake can occur without an explicit representation.

In other common law systems, such as U.S. law, there may be more room to assume mistake.

2.7. Conclusion

We can briefly summarise the main elements of this chapter.

A contract is a mutual promise to be bound to certain obligations.

Contracts are usually formed by offer and acceptance. Both are constituted by certain actions and/or communications in words. However, the agreement can also be found in other ways than a specific offer followed by acceptance of the offer.

Some further conditions may apply.

[11] In Dutch law duress and undue influence are combined as *misbruik van omstandigheden*), see art. 3:44(4) BW.
[12] Rescission and avoidance may in this introductory context be considered to be, by and large, synonymous. In some jurisdictions there may be technical differences which need not concern us here.

- In English law (and to a certain extent French law), there is also a requirement of *consideration*: there has to be something that the other party provides in return of the obligations undertaken by the first party. This may be a negligible amount of money, but it has to be something. This provides protection against too freely undertaken contracts.
- Some formalities may apply. An example is the formalities in case of distance contracts and on-line contracts: see the relevant EU directives.
- A contract is supposed to be based on free consent of both parties. If the consent, the will, is defective, this may make the contract voidable. This can occur merely by a lack of information by the other party, but not if the lack of information is attributable to the first party. This is the doctrine of mistake (*dwaling* in Dutch). Common law systems are more strict: these rarely allow a successful appeal to mistake. A party who finds certain qualities of the object decisive has to arrange that the other party provides explicit *representations* regarding these qualities, and if these qualities are absent, can act on the ground of *misrepresentation*.

Chapter 3. Content of contract

3.1. Introduction

This chapter deals with some aspects of the content of contracts. § 2 discusses the different kinds of clauses, § 3 deals with how to interpret a clause, whereas § 4 concerns itself with good faith, and § 5 closes the chapter with elaboration on standard terms and invalid terms based on public order exceptions.

3.2. Kinds of clauses

In contracts, there are many kinds of clauses that may be present. Generally speaking we see the following kinds of clauses.

- Clauses that describe the obligations of parties, including possible conditions.[1]
- Clauses regulating whether certain outside events are attributable to a party (force majeure, see chapter 4).
- Clauses regulating the kinds of remedies that are available, and limitations to and conditions of these remedies. In particular remedies limiting damages are common (limitation clauses, liquidated damages).
- Clauses regulating the termination of the contract: under what conditions can the contract be terminated, and what are the consequences?
- General clauses regulating issues such as formalities for sending notice, applicable law, competent jurisdiction and court, rights after termination or ending of the contract.

In practice, businesses often work with standard contractual terms, also called *boilerplate*. On websites this may be called Terms & Conditions (T&C), Terms of Use. Quite often websites reserve a specific page for the terms covering privacy (Privacy policy). Contractual terms can also be part of a license.

Besides these general kinds of clauses, you may in practice encounter some other distinctions. In commercial practice parties may insist on the presence or absence of guarantees or *warranties*. This may be due to particular common law contractual doctrines. We will discuss this in some detail, as this may be important in practice. However, for the exam we will not require you to know all of the following details.

1. Under *English law* there is a strict distinction between *terms* and *representations*. As we've seen in § 2.6, representations give rise to an action of misrepresentation. These represent a certain state of facts that is supposed to be true. Terms, on the other hand, are promises that the party has to fulfil. If a term is violated, this gives rise to an action for breach of contract (see chapter 4). A further distinction in terms is made between conditions, warranties and intermediate terms. Breach of a condition is always cause for termination; the problem is when a specific term is a condition. Breach of a warranty is never cause for termination, it can only give rise to damages.[2] For intermediate terms a breach gives rise to damages, but only a serious breach gives rise to a right to terminate the contract.

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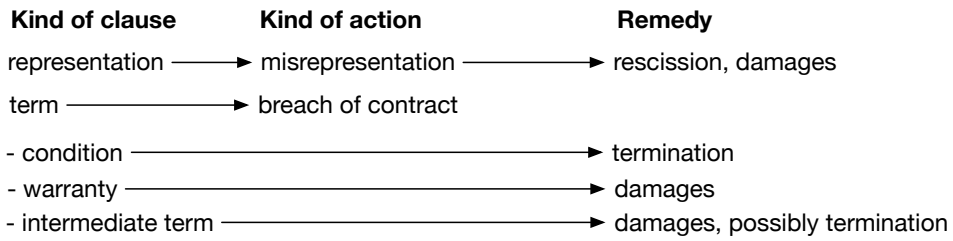
[1] A common distinction is between obligations of result and obligations of means: the latter only require the party to perform to its best effort.

[2] A warranty therefore is also not a representation, it does not give rise to a claim of misrepresentation and cannot lead to rescission. See for example *Sycamore Bidco Ltd v Sean Breslin & Others* [2012] EWHC 3443 (Ch).

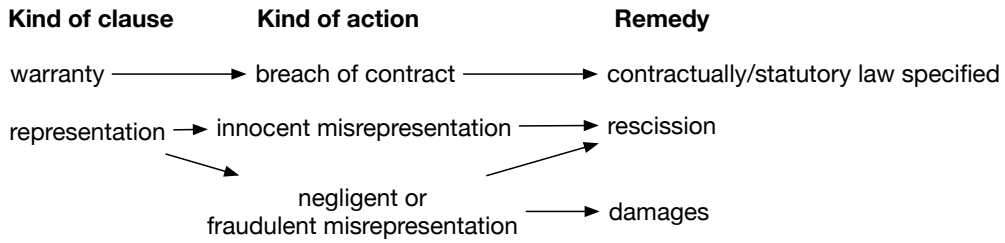
2. U.S. law also makes several distinctions, but these differ somewhat from English law. One particular kind of clause is the *warranty*. Warranties can be express or implied; implied warranties usually derive from mandatory statutory law, express warranties are included (expressed) by the parties themselves. Warranties, if breached, give rise to a remedy. Under U.S. law warranties are not as a matter of law connected to specific remedies; it is up to parties to regulate which remedies are offered to specific warranties. Remedies may involve a right to replacement or repair, a right to damages (usually limited, for example consequential damages may be excluded and damages may be liquidated). If a clause is not a warranty, it will in principle not allow a remedy.

U.S. contract law also recognises representations which may lead to rescission of the contract (if innocent or negligent/fraudulent) or even give rise to a tort-based action of negligent or fraudulent misrepresentation. There are differences between the law in various U.S. states. Furthermore under U.S. law the distinction between warranty and representation is not as clear-cut as in English law.

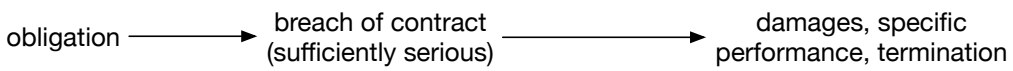
English law



U.S. law



3. In civil law countries there generally is no strict division between kind of clauses as regards remedies.[3] Contract terms are usually interpreted as a whole to determine the obligations of parties. Any breach of obligation is treated as breach of contract, which may give rise to remedies if sufficiently serious. Hence there is in principle no need to *a priori* categorisation of contractual terms in order to ensure that specific remedies are available or not.



From the above you should remember the following:

- in common law systems you often need specific terms (warranties, representations) in order to have a remedy. Furthermore you may need to add clauses to explicate which remedy applies in case of violation of such specific terms.

[3] There are some specific clauses, such as conditions, but these do not involve breach of contract and are therefore not relevant as regards remedies.

- in civil law systems, generally all clauses that impose an obligation allow a remedy in case the obligation is breached. It is not necessary to explicate the remedies as they follow from general contract law. It is possible to add clauses regarding remedies in order to deviate from the general rules.

These remarks make clear that for understanding a contract it is very important to ascertain which legal system is applicable, as this determines among others whether it is relevant that a specific term is called a 'warranty' or condition or representation (and so forth), and what remedies are available in case such a term is not fulfilled.

The contract can contain a clause that specifies which legal system is applicable (choice of law). Whether such a clause is valid, and which legal system is applicable in the absence of such a choice, is the subject of Private International Law.

3.3. Interpretation

Every contract, whether written or not, has to be interpreted. This means that it has to be determined which obligations and conditions flow from the contract.

There are two approaches to interpretation when considering written contracts.

- *Objective interpretation*. In this approach the content of the contract is to be determined solely on the basis of the text of the contract.[4] External evidence as to the intentions of parties is in principle not allowed. This exclusion is in common law called the *parol evidence rule*.[5] There are, however, exceptions to this rule.
- *Subjective interpretation*. Here the intention of parties is primary. The text may serve as an indication, albeit an important one, of this intention, but is not decisive. For example, it may be proven that parties meant something else with a specific phrase than what it means in normal parlance. In civil law systems generally the text is taken as the basis for interpretation, but other evidence is usually admitted.

In common law there is a preference for a more objective approach, as this is supposed to be more predictable. Parties are required to take care that the words of the contract (the document) adequately reflect their intentions and that the contract is complete. Civil law systems seem to be more comfortable with subjective interpretation, which has the advantage that the court may make the agreement match the actual intentions of parties even where they were not worded correctly, but has the disadvantage that the court may actually have incorrect ideas of what parties originally intended and thereby violate those intentions. In practice, of course, it is recommended to always take care that the text reflects your intentions, even if other evidence is allowed.

3.4. Good faith

In civil law systems the relations between parties are usually described as being relations governed by good faith (*redelijkheid en billijkheid*).[6] Parties have to behave as reasonable and fair persons. This principle of good faith has several aspects or functions:

[4] Technically there is a difference between formalist (looking only at the text of the contract) and literal interpretation (taking the text literally), here we lump those two together.
[5] More precisely it disallows evidence external to a signed contract to supplement or contradict the written text. Evidence may be allowed to resolve an ambiguity.
[6] Cf. art. 6:2 and 248 BW.

- a supplementary function by which possible gaps in the contract can be filled in by the court on the basis of what is reasonable,
- an interpretative function, whereby the interpretation of the contract is guided by what reasonable parties are supposed to have intended,[7]
- a restrictive function whereby unreasonable behaviour is disallowed, even where the contract literally taken does allow this.

An advantage may be that unreasonable consequences of a contract are disallowed. A disadvantage is a loss of certainty: it is not possible to fully rely on the precise text of the contract, as vague notions of good faith can override the text.

In common law systems good faith is generally repudiated as governing the relation between parties.[8] Nonetheless there are some aspects of contract law that bear some relation to good faith, such as the recognition of *implied terms*: terms that are not explicit in the contract but are read into it. Such terms may be mandatory; they are based on either specific statutory provisions or precedents. An example is the implied warranty of merchantability in U.S. law:[9] this means among others that a product is warranted to be fit for its ordinary purpose. In general, however, common law courts tend to look nearly exclusively to what the contract states and do not like to deviate from the text on the basis of such a vague principle as good faith.

3.5. Standard terms, unfair terms, and public policy

As mentioned in § 2, corporations almost without exception use standard business conditions. The widespread use of such terms, and the practical impossibility for most consumers to negotiate different terms, in practice meant that the notion of free consent to the contractual conditions became pure fiction for b2c-relationships. Abuses in such terms led to the adoption of review of standard terms. This is achieved by checks on unfair terms in contracts between businesses and consumers.

One form of control is exercised by supervisory agencies such as the U.S. Federal Trade Commission. Another route is by legal restrictions to the kind of terms that can be agreed upon in standard terms and conditions. This is the chosen solution in Europe, laid down in the Unfair Terms Directive 93/13/EEC. Art. 3(1) states:

> A contractual term which has not been individually negotiated shall be regarded as unfair if, contrary to the requirement of good faith, it causes a significant imbalance in the parties' rights and obligations arising under the contract, to the detriment of the consumer.

This directive furthermore contains a non-exhaustive list of terms that may be regarded as unfair (Annex to the Directive).

> (a) excluding or limiting the legal liability of a seller or supplier in the event of the death of a consumer or personal injury to the latter resulting from an act or omission of that seller or supplier;
> (...)
> (c) making an agreement binding on the consumer whereas provision of services by the seller or supplier is subject to a condition whose realization depends on his own will alone;
> (d) permitting the seller or supplier to retain sums paid by the consumer where the latter decides not to conclude or perform the contract, without providing for the consumer to

[7] Compare with § 3, above.
[8] It is only recognised for particular contractual relationships such as the *uberrimae fides* in insurance.
[9] U.C.C. § 2-314. The U.C.C. is the Uniform Commercial Code.

receive compensation of an equivalent amount from the seller or supplier where the latter is the party cancelling the contract;
(e) requiring any consumer who fails to fulfil his obligation to pay a disproportionately high sum in compensation;
(f) authorizing the seller or supplier to dissolve the contract on a discretionary basis where the same facility is not granted to the consumer, or permitting the seller or supplier to retain the sums paid for services not yet supplied by him where it is the seller or supplier himself who dissolves the contract;
(g) enabling the seller or supplier to terminate a contract of indeterminate duration without reasonable notice except where there are serious grounds for doing so;
(h) automatically extending a contract of fixed duration where the consumer does not indicate otherwise, when the deadline fixed for the consumer to express this desire not to extend the contract is unreasonably early;
(i) irrevocably binding the consumer to terms with which he had no real opportunity of becoming acquainted before the conclusion of the contract;
(...)

You will probably agree that these terms obviously are unfair, by severely curtailing the consumer's rights, allowing the business to get out of its obligations unfairly, imposing obligations on the consumer unfairly. An unfair clause is not binding on the consumer, it is void: the court will act as if the clause was no part of the contract whatsoever.

Another form of control of contracts is the doctrine that terms or contracts that violate *public policy* (also called public order) are void. An example is a contract to sell yourself as a slave to the other party, or a contract to kill a third party. Furthermore, it is possible that the content of the contract is found to violate human dignity. Examples in case law of various countries (Germany, France) are laser-gaming or the practice of 'dwarf tossing'.[10] Contracts against public policy are void from the start:[11] they have no legal effect and cannot be enforced.

[10] See for example ECJ 14 October 2004, case C-36/02 (Omega).
[11] To be distinguished from voidable contracts, which are effective until they are rescinded.

Chapter 4. Remedies and termination of contract

4.1. Introduction

A detailed study of remedies is not in order in this textbook. However, remedies are important as these are what is invoked when a contract is not fully performed. This chapter briefly discusses common aspects of remedies. It is not a full description, as that is impossible given the amount of detail and the differences between jurisdictions. In case of actual legal problems you should always obtain concrete legal advice.

4.2. Remedies and breach of contract

If a party fails to perform its obligations under the contract (this situation is called *breach of contract* or *default,* in Dutch: *wanprestatie*), the other party can invoke remedies.[1] These serve to offer the other party compensation for the breach and/or provide an incentive on a party to perform.
Common remedies are:
- specific performance,
- an award of damages,
- termination.

Most legal systems do not allow a claimant to immediately start a court procedure when a contractual obligation was not fulfilled (non-performance). Usually, the defendant must be informed of the breach, and given an opportunity to remedy the breach. This translates as the requirement of giving *notice* of the breach with a term for remedying the breach.[2] Once this term has passed, the defendant is *in default*, and remedies can indeed be claimed. It is possible that the contract already contained a final term for the performance, in which case default may occur without notice.[3]

Furthermore, not every non-performance leads to breach of contract. If the non-performance is caused by a factor that is not attributable, does not come at the risk and account of the other party, the non-performance is caused by *force majeure*.[4] If that happens, the aggrieved party cannot claim a remedy. Parties may make contractual arrangements about what counts as force majeure and what not.

As this is a brief introduction, we cannot go into the many intricate complications for determining whether there is an actionable breach of contract. A party may have reason to withhold performance, in particular if the other party is not performing (the *exceptio non adimpleti contractus*) or even in anticipation of breach by the other party (anticipatory breach); a party may not actually make a payment due because they can compensate the payment with a payment that the other party must make. These doctrines are only mentioned to make you aware of the richness of contract law, and the fact that there is much more to law than the bare outlines covered in this introduction.

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[1] But see chapter 3, explaining for English and U.S. law that certain remedies can only be invoked on the basis of certain kind of clauses.
[2] In Dutch this notice is called *ingebrekestelling*.
[3] This is assumed to be the normal situation in English law, wherefore English law has no general requirement of default. However, in England it is also advised to send a prior notice before claiming damages.
[4] In the past the term ‘act of God’ was also commonly used.

4.3. Damages

The most important remedy is the award of damages[5] (*schadevergoeding*). Damages serve the aim of compensation of the aggrieved party: the award of damages is in principle assessed at the amount of damage (without 's') suffered. In order to obtain damages, the party in breach must be in default (§ 4.2).

Furthermore, there must be a sufficiently close causal connection between the breach and the damage.[6] In English law there is a requirement of foreseeability: the damage must be foreseeable. Other jurisdictions have similar requirements, for example in France the damage must be 'certain and direct' (art. 1231-4 Code civil 2016). There often is a distinction made between direct losses,[7] which are assumed to be recoverable, and consequential losses,[8] which may not be. Loss that is not directly caused by the breach (such as lost profit because a computer was defective) is not always recoverable as this may be considered not to be foreseeable. Moreover, contracts often contain clauses explicitly declaring that consequential losses are not compensated.

Usually several kinds of damage are distinguished; the precise distinctions may vary according to jurisdiction. There are further limitations as to the kinds of damage that may be recovered.

One important division is between

1. personal injury,
2. property damage, and
3. pure economic loss.

The first is damage to a person's body or health,[9] the second involves harm to physical property. These kinds of damages are commonly recoverable, including the consequential economic losses deriving from the primary injury or damage. Damage that does not fall into the first two categories (hence does not start with injury or physical harm) is called pure economic loss. To determine whether damage is pure economic loss you therefore need to take a two-step approach. First check whether it is economic loss (i.e. in itself is not bodily injury or damage to property). Examples are loss of profit, wasted time, stock market losses, damage to a database or data file. Secondly check whether this economic loss flowed from prior personal injury or property damage to the victim:[10] if it did, it is lumped together with that injury or damage. If it did not, it is *pure* economic loss.

In case of breach of contract, some jurisdictions do not always allow recovery of pure economic loss.[11] This is an important restriction to the possible remedies you may obtain. In order to avoid this, you would have to add a clause for liquidated damages for certain breaches

[5] Note: it is the 'award of damages', with final 's', versus the 'damage' (without 's') suffered. Damage is factual (harm, loss, injury), damages is a legal term for the monetary compensation offered for damage suffered.
[6] In tort law this is the requirement of legal causation (see § 5.2).
[7] Such as a repairman who accidentally breaks a vase: the damage to the vase is direct loss.
[8] Such as time lost by an employee because he has to obtain a new vase, in which time he was not able to generate profit.
[9] Including the further economic losses following from this damage, such as loss of income.
[10] This is important: if another person (but not the claimant) was injured, the loss of the claimant is still pure economic loss. Example: Katisha is deliberately injured by Heim to frustrate the business of Katisha's employer, Bodine. The loss of income of Bodine is still pure economic loss even though it was caused by Katisha's injury. The reason is that Bodine did not suffer personal injury. The loss of income of Katisha is categorized as personal injury as it is a consequence of her own personal injury.
[11] Most importantly, under U.S. law the 'Economic Loss Rule' applies, which disallows recovery of pure economic loss in tort (including negligence), and also disallows recovery on the basis of breach of contract if the breach also constitutes a tort, unless the tort is separate and independent from the claimed contract breach. However, some U.S. states make exceptions.

(see below). In practice the opposite often happens: businesses add limitation clauses that exclude damages for pure economic loss.

Hence *limitation clauses or exemption clauses*[12] may result in that there is only a very limited possibility of obtaining damages. An example is the common clause in software license contracts, that only damage from personal injury or physical property damage is compensated. As software usually cannot cause injury or property damage, this effectively means that the producer of the software will never have to pay damages (unless the clause is found to be unfair and can be set aside). Such clauses may also limit the *amount* of damage that may be awarded, for example a maximum of € 100.000.[13] This ensures a party that he will never have to pay more than this amount of damage.

Another possibility are so-called *liquidated damages clauses*: clauses that fixate the amount of damages awarded for specific kinds of breach. This may be in the interest of both parties: the aggrieved party hereby knows that he will obtain damages to this amount, the breaching party knows that damages will only have to be paid to this amount. If the amount is clearly much higher than the actual loss suffered, such a clause in fact is a *penalty clause*. In many jurisdictions, in particular in most common law systems,[14] penalty clauses are not enforceable.[15]

Limitation clauses and liquidated damages clauses may be subject to supervision as being possibly unfair (see § 3.4).

The precise calculation of damages can be quite complicated. We will discuss some details in § 5.6.

4.4. Specific performance

Another important remedy is specific performance (*nakoming*). A court can give an order or an injunction (*gebod/verbod*) for specific performance. This means that the defendant has to act or refraining from acting in a certain way, in order to fulfil (perform) the obligation that they had undertaken. In civil law systems, specific performance can be obtained as a matter of course.

In common law systems there is a general reluctance to awarding specific performance. In the past is was assumed that the principal remedy was damages, while specific performance could only be obtained in very specific circumstances, in particular where damages were no adequate remedy, such as where the contract involved the sale of a unique good. Nowadays common law courts are somewhat more open to providing the remedy of specific performance. Still it is considered to be an exceptional remedy.

4.5. Termination

Besides damages and specific performance there is also the possibility to terminate the contract. Termination may mean several things.[16]

- Termination for breach (*ontbinding*). Termination is a response to breach of contract by the other party.
- Termination for cause (*ontbinding/opzegging*). This means that the termination is based on a ground that justifies terminating the contract. Examples are death or insolvency of a party, behaviour that justifies termination.

[12] In Dutch called *exoneratiebedingen*.
[13] This may or may not be contractually connected only to specific kinds of breach.
[14] In Belgium a *strafbeding* is only enforceable up to the actual damage suffered.
[15] I.M. Garciá, 'Enforcement of Penalty Clauses in Civil and Common Law: A Puzzle to be Solved by the Contracting Parties', EJLS vol. 5 (2012), p. 98-123. See however *Cavendish Square Holding BV v Talal El Makdessi* [2015] UKSC 67, where this rule appears to be softened for English law.
[16] There is no consistent terminology: other terms that are used are rescission and revocation.

- Termination at will (*opzegging*). This means that a party is free to terminate without having to provide any reasons.

Whether termination is allowed depends on the applicable legal rules, which may differ for specific kinds of contracts.[17] In particular termination is usually only allowed if the breach is sufficiently serious. Contracting parties can in many cases devise their own rules to regulate the precise cases when termination is or is not allowed. For certain kinds of contracts, such as labour contracts, there are limitations as to what can be contractually agreed upon.

Termination may be subject to further conditions and requirements. A common requirement is *notice*, warning the other party of the termination and giving him a period of time to prepare for the termination. Termination may also give the other party a right to damages or compensation.

The effect of termination depends again on the legal system and the kinds of termination. It may have retroactive effect or only be operative for the future. We will not discuss this further in this introductory text. Termination usually does not mean that the contract is completely annulled; often there are clauses that remain in force after termination. Sometimes a contract explicitly specifies which clauses survive termination (*survival clause*).

4.6. Other issues

Generally speaking, an aggrieved party is free to choose which remedy to invoke. However, there are limitations as to this right. Some jurisdictions give preference to less intrusive remedies before allowing stronger remedies. Art. 3 EU Directive 1999/44 on certain aspects of the sale of consumer goods and associated guarantees provided an order of remedies.

There are some other possible actions in certain cases, such as the possibility of withholding performance during breach of the other party (*opschorting*), or the right of withdrawal in case of Internet sale.[18] Here we will not discuss these other possibilities extensively.

Of practical importance is the existence of time limits in which you have to invoke remedies. These may vary from short periods in which you have to bring your complaints, to longer periods after which you cannot bring any claim on a specific ground. The latter kinds are called *prescription* (*verjaring*), in common law referred to as *statute of limitations*. This is usually a number of years (typically 2-5 years in contractual cases). It is often possible to lengthen this period by sending a clear notice or by starting a court procedure (depending on the jurisdiction). A contract can further stipulate that shorter periods apply for certain kinds of complaints.

[17] See for example the discussion in chapter 3, § 2 on the English distinction between conditions, intermediate terms and warranties.
[18] Art. 9-16 Consumer Rights Directive 2011/83/EU.

Chapter 5. Fault liability

5.1. Introduction

All societies have rules that prohibit people from harming others. Criminal law enforces such rules by threatening with punishment such as fine and prison sentences. However, criminal law is only suitable for crimes and misdemeanors, intentional actions that are generally and clearly undesirable. For example, unintentional damage to property is usually not a crime. Furthermore, criminal law focuses on punishment of the criminal, without regard for the victim. If the victim wants compensation, private law provides the means to obtain damages.

The part of private law that deals with harm not based on contractual obligations is called tort law. In this chapter we will first discuss the notion of tort law itself (§ 2). Next we will provide an analysis of fault liability in general (§ 3). We will concentrate on the structure of fault liability, with particular stress on open norms regarding negligence. Next we will briefly look at English law (§ 4) and possible defences (§ 5).

5.2. Definition and aims of tort law

Tort law is the part of private law concerned with non-contractual liability.[1]

> This distinguishes it from contract law, as well as parts of law that are not concerned with liability (such as property law, the law of restitution).

From this definition follow two characteristics.

- Firstly, tort law has to do with liability *outside* contract. This means that liability cannot be based on consent to contractual obligations; instead it must be based on human conduct or other facts that justify holding the defendant liable.
- Secondly, tort law has to do with *liability*. The tortfeasor (the person who committed the tort) has to provide compensation to the person who suffered damage as a consequence of the tortious action. Compensation usually takes the form of damages (payment of money as compensation for losses).

The central issue of tort law is one of *liberty* versus *accountability*. On the one hand individuals should be to the largest possible extent free to do as they want, on the other hand they may be liable for the consequences of their acts, which in effect sets boundaries to individual freedom. The interests of individuals to act freely must be balanced against the interests of others not to be harmed. Different legal systems choose various ways to find a balance. It is this variety that obscures the underlying common policy considerations, which is the subject of this chapter.

As regards the aims of tort law, the primary aim of tort law was and is the *compensation* of the victim for the consequences of the tort. This is the notion of *restitutio in integro*, restoring the victim into the state of affairs that applied before (or without) the tortious act. This usually takes the form of a so-called *award of damages*, i.e. the judge orders the defendant to pay of a sum of money that is supposed to more or less fully compensate for the harm inflicted on the victim. An important secondary aim is *prevention*: the threat of having to pay damages may provide an incentive against harmful behaviour.

The distinction between these aims may be highlighted by the difference between fault liability and strict liability.

- *Fault liability* is liability for one's own fault (wrongful conduct).

[1] In this chapter 'tort law' refers to the law of liability outside contract, for English law as well as other countries.

- *Strict liability* is liability for damage caused in the absence of any fault by the defendant. Examples are liability for animals, dangerous substances, buildings. Other examples are This is usually based on a certain relation between both persons, such as parent-child, employer-employee.

Fault liability clearly has a preventive effect by the threat of having to pay damages for wrongful conduct, which may on its own justify holding the defendant liable. In the case of strict liability, such a preventive effect is much less clear: a justification for strict liability could be found in the goal of providing compensation to the innocent victim. Nonetheless even here there may be some preventive justification, as these forms of liability mostly assume that the person held liable was also in a position to take preventive measures to reduce the risk of harm.

5.3. Fault liability in general

Given the general definition of tort law provided in § 2, and the concept of fault liability, we can try to elaborate how fault liability should be conceived. This is quite hard, as any knowledgeable author in this field will unavoidably have been exposed to a lot of examples. Hence we can do no more than present a sketchy argument of how such liability might be defined in the abstract.

If we try to distil the essence of fault liability, we seem to end up with at least three elements:
- a fault (by a tortfeasor[2]),
- harm (to the victim), and
- causality between fault and harm.

This is quite like the main rule for tort liability in the French Code civil.

Art. 1240 Tout fait quelconque de l'homme, qui cause à autrui un dommage, oblige celui par la faute duquel il est arrivé, à le réparer. Art. 1240 Any human act that causes harm to another obliges the person by whose fault it occurred to repair it.

The three main elements need some further consideration.

A. The concept of fault

A fault is an act by a tortfeasor that should not have been committed. The concept of fault encompasses two further elements that some systems (such as German and Dutch law) explicitly separate,
(i) the wrongfulness of the act, and
(ii) the culpability of the act.
Culpability (i.e. the person is 'guilty' of the act, it is his act and he could have avoided it) is usually presumed and therefore functions rather like an exception. See below, s. 5.3.D.

With respect to what counts as unlawful or wrongful conduct, different jurisdictions take various approaches to categorize the possibilities. To give you an idea, we briefly discuss two approaches: the civil law approach of Dutch law which is representative for most civil law systems, and (in § 4) the approach of common law (torts).

Art. 6:162(2) Dutch Civil Code (BW) states (in translation):

[2] I will variously speak of tortfeasor and defendant.

> The following acts are unlawful: the infringement of a right, violation of a statutory duty, or violation of a rule of unwritten law pertaining to proper social conduct. These acts are not unlawful if there is a justification for the act.

This implies three kinds of unlawful acts:[3]
- infringement of a right,
- violation of a statutory duty, and
- violation of a rule of unwritten law.

The first category is quite clear: you have to refrain from infringing other people's rights, such as property rights, right to health, or liberty. This is generally accepted.

> In certain jurisdictions these rights are spelled out (for example in Germany the specific interests that are protected are listed explicitly in § 823 BGB), or various forms of infringement are categorized as specific torts (for example in England there are specific torts such as trespass to the person, trespass to land).
> Infringment of a right assumes that the defendant intended this infringement or at least knowingly acted while there was a serious risk that the right would be infringe. If there was only an unintentional risk that the right might be harmed as a conseqence of the act, the wrongfulness of the act has to be assessed by the other two categories: violation of a statutory duty and violation of unwritten law.

The second category is also clear: if someone disobeys a certain statutory duty, this is clearly unlawful. An example is the duty to abide by the speed limit in traffic. Violation of the speed limit is therefore also wrongful.

> The legislator can use the instrument of statutory duties to provide protection against specific kinds of undesirable behaviour where it is not appropriate to speak of a 'right', or where the legislator also wishes to protect against risks.
> In some cases a statutory duty may be intended to protect a right. An example are IP-rights, which are protected by specific rules. In such a case we tend to qualify an infringement as infringement of a right, and do not focus on the fact that it is also violation of a statutory duty.

The third category may appear extremely vague: violating unwritten law. In practice this is the most important category. It is comparable to the tort of negligence in common law (§ 4). It implies that people have to follow standards of social conduct that serve to protect others from harm. Persons are not completely free to act, but have to take the interests of others also into account. It is allowed to hinder or harm others to a limited extent, or create risks, but too much hinder or harm or too risky activities are not allowed.

As it is impossible to provide rules for all conceivable cases of harm, the law unavoidably has to rely on a relative open norm, and leave it to the courts to fill in the details.

> In practice these standards are determined in a variety of ways: case law in which courts made clear that certain behaviour is or is not allowed, reference to norms determined in practice or in specific business domains (soft law), reference to safety rules, and ultimately reference to what a reasonable person would do. Albeit theoretically this could lead to uncertainty, in practice this is hardly so, as courts strive to keep in touch with what is socially considered to be allowed or undesirable behaviour.

[3] In French law, the legal literature on art. 1240 Cc also proposes subcategories similar to these.

It should be pointed out that under civil law systems *omissions* may be unlawful as well as positive acts. There may be a duty to act to prevent harm. This can also apply in case of pure omissions, cases where the person has no prior involvement with the person at risk, such as in the case of seeing someone drowning. However, in common law systems there is usually no liability for pure omissions.

B. Harm

Harm means injury to some interest. This is not very problematic when there is harm to material interests, such as damage to a car or injury to a person. Harm can also consist of injury to immaterial interests, as occasioned by slanderous statements, violation of privacy by publication of private photographs, and other acts that are generally found undesirable but do not involve a clear material harm.

C. Causality

Causality means that the harm is caused by the fault: it is the consequence of the act that forms the basis of the action in tort. This element consists of two cumulative requirements:

I. *Factual causation*, also called *condicio sine qua non* (c.s.q.n.) causation. This means you have to assess what would have happened if the wrongful conduct or act had not occurred: if the harm would still have happened, the harm is not caused by the conduct and there is no factual causation. English lawyers speak of the 'but for' test: the harm occured 'but for' the wrongful conduct.
II. *Legal causation*. The criterion of factual causation is insufficient on its own, as for example there is also a c.s.q.n. connection between the birth of the victim and the harm, but you would obviously not want to hold the parents liable for harm suffered by their child where it was primarily caused by another person.[4] Hence the law generally imposes a restriction to the harm or damage that must be compensated: that is the requirement of legal causation. The tortfeasor is only liable for the harm that is sufficiently close or related[5] to the wrongful conduct. 'Sufficiently close or related' is not the actual legal term used: it is variously called remoteness or foreseeability (England), direct and immediate consequence (France), or attributability of damage to the fault (Germany/The Netherlands).

> A topic related to legal causality is called *scope of the rule*: the act or harm must be within the scope of the rule that was violated. A rule is often assumed to only protect certain kinds of interests and a certain group of individuals. Victims outside this group or where a different interest is harmed cannot claim protection on the basis of this rule. An example is violation of the speed limit: this is intended to safeguard against accidents. Someone living close to the road probably cannot act against noise caused when driving over the speed limit, as this rule is not intended to protect against noise. Scope of the rule is often applied as part of legal causality. It is different in that it refers to the kind of harm or victim, instead of the nearness of the harm to the conduct.

Both kinds of causality, factual and legal, are required in order to fulfil the requirement of causal connection.

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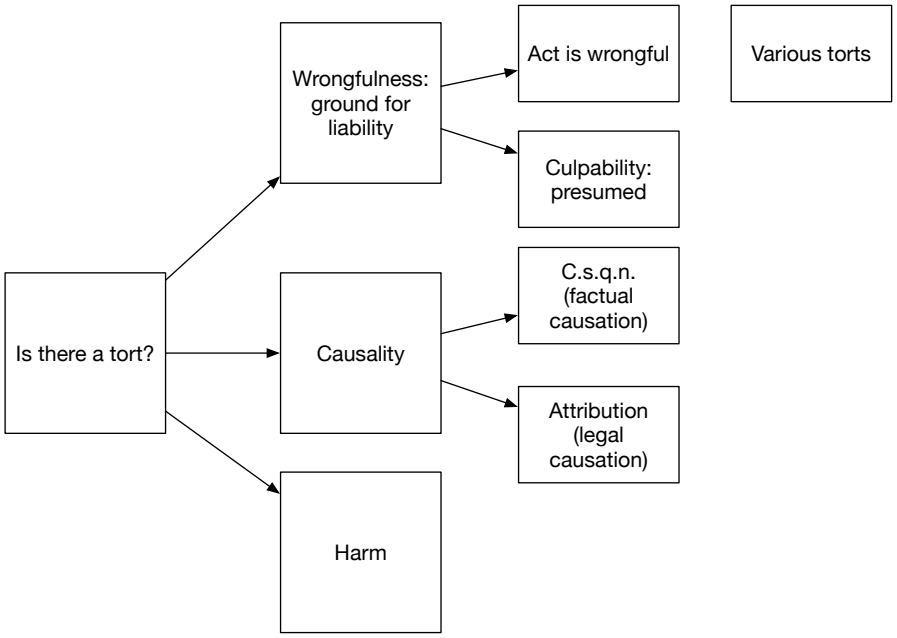
[4] Of course there would also need to be a wrongful act on the side of the parents relating to the birth, which is not usual. But even if there would be a wrongful act, there is insufficient reason to hold the parents also liable for any harm to the victim in their later life, even if primarily caused by another person. Incidentally, cases with multiple liable parties (tortfeasors) are the subject of specific rules on multiple causality.
[5] This boils down to the notion of scope of the rule, discussed below.

D. Conclusion

The elements of fault liability as discussed in more detail can be summarized as:
- fault: wrongfulness
- causality
  - factual causality
  - legal causality
- harm



The overview shows a second sub-element as part of the element of fault: the notion of culpability. The law usually requires that the tortfeasor can be blamed for the conduct, is culpable. Since persons are normally well aware of what they do and in control of their actions, culpability is presumed to be present. Only in exceptional circumstances is this absent, so you do not normally need to check this separately. German law does explicitly require culpability (*Verschulden*). Culpability could also be absent in case the tortfeasor was a very young child or was mentally disturbed. Many systems have specific rules for such cases.

5.4. English tort law[6]

The English approach to tort law does not look at all like the approach codified civil law systems. The main difference is that there is no general rule for fault liability. Instead there is a collection of disparate so-called torts. These torts may be viewed as ways to categorise the different kinds of wrongfulness. For example, there is a tort of trespass to land which covers infringement of the property right to land by persons who have no permission to enter the land. The tort of battery is defined as 'intentional and direct application of force to another person'. An important difference with torts in common law and general rules of wrongfulness in civil law is that in civil law the rules of causality and harm and damage apply to all forms of

[6] See generally Van Dam, European Tort Law, chapter 5. Detailed treatises are *Clerk & Lindsell on Torts*, 23rd ed., London: Sweet & Maxwell, J. Goudkamp & D. Nolan, Winfield & Jolowicz on Tort, 20th ed., London: Sweet & Maxwell 2020.

wrongfulness. In tort law, each tort has its own rules for causality (in particular foreseeability versus remoteness) and compensable damage.

English law recognises a wide range of torts, each having its own characteristics and scope. The various torts have developed historically by a gradual recognition of specific ways in which a victim could be harmed and where compensation would be in order. A claimant will have to state and prove that the facts of the case meet the requirements of one of these torts.

Some torts are suggestive of an agrarian society where only clearly unlawful acts are actionable, such as *trespass*. Trespass is divided in *trespass to person* (which amounts to infringement of bodily integrity, including assault, battery, false imprisonment), and *trespass to land* and to *chattels* (movable goods such as cars, computers). The notion of trespass is similar to the civil law category of infringement of a right, for property rights and the right to bodily integrity. Other examples of torts are *defamation*, and economic torts such as *interference with a subsisting contract*, *conspiracy* and *passing off*. There is the tort of *breach of statutory duty* that is the equivalent of the civil law category of violation of a statutory rule.

The most important tort is *negligence*.[7] Negligence functions mostly like the category of 'violation of a rule of unwritten law' in Dutch law: it is a general norm that courts apply to keep up with new kinds of wrongful behaviour, by looking at the interests that are harmed and whether defendant should have refrained from infringement. Lawyer apply this tort mostly by looking at earlier cases (precedents) to see whether similar behaviour was or was not found wrongful in the past. Occasionally the courts have to decide a new kind of case on their own. Negligence has three elements:

- there is a duty of care of the defendant towards the victim
- the defendant breached the duty of care
- the breach caused harm to the victim

You can see that those requirements overlap with the three elements of fault liability discussed above. A duty of care and breach of the duty encompass the requirement of fault, while the third requirement (breach caused harm) includes the requirements of causation and harm. Most English torts can be analysed in a similar manner.[8]

While negligence does allow courts to assume liability in new cases, there is an important limitation, in that an award of damages for negligence can only compensate for injury or property damage. Pure economic loss is usually *not* compensated in case of negligence (see § 5.6).[9]

The standard of behaviour is the ‘reasonable person’, as mentioned in *Blyth v. Company Proprietors of the Birmingham Water Works*.[10]

It should be noted that under common law omissions may lead to violation of a duty of care if it is established that the defendant owes such a duty towards the victim. Such a duty is usually based on a prior relationship, or on an assumption of a duty of care by the defendant. If there is no prior relationship that gives rise to such a duty, lawyers speak of a *pure omission.* An example is the case that a pedestrian strolls along a canal and hears screams for help from a person drowning in the water. If the pedestrian does not do anything, that is a pure omission. Since there is no duty of care, according to common law, they are not liable on the basis of negligence. However, this conclusion is found hard to accept, and several common law

[7] Charlesworth & Percy on Negligence, 11 ed., Sweet & Maxwell: London 2006.

[8] There is a complicated issue with trespass in that it does not require harm; we cannot go into the reason for this as it takes too long too explain.

[9] There are some exceptions to this (such as in the case of professional negligence). In the U.S. similarly negligence usually does not allow compensation of pure economic loss, but some U.S. states have different rules.

[10] *Blyth v. Company Proprietors of the Birmingham Water Works* (1856), 11 Ex. Ch. 781. See also Van Dam, European Tort Law, no. 804-1.

jurisdictions have adopted specific statutes to provide for liability in cases of extreme danger where an easy rescue would be feasible. Civil law systems usually have similar rules.

5.5. Defences

The tortfeasor/defendant may mount several defences against an action based on tort. We will only briefly mention a few of them.

- Consent: an action is not wrongful if the victim consented to the action (*volenti non fit injuria*).
- Contributory negligence (*eigen schuld*): the damage was caused primarily or at least partly by the plaintiff. This leads to a reduction of the award of damages, and may even lead to a complete absence of unlawfulness hence no damages at all.

Furthermore, tort claims can extinguish on the basis of *prescription* (also called *statute of limitations*), similar to contractual claims. The statute of limitations can stand in the way of an action on the basis of tort. Different periods apply in different jurisdictions (countries) and for several kinds of torts. At the lower end are three years for many English torts and German law, at the higher end ten years for French law. These periods start from the moment that the victim (briefly put) has the necessary knowledge to start a court action.

5.6. Remedies for tort

In the case of a tort, several remedies may be demanded. The most important remedy is an *award of dam*ages. Besides, in some cases it is possible to obtain a *court order* or an *injunction*[11] to act in a certain way (to avoid an unlawful omission) or to refrain from specific unlawful activity.

The award of damages is subject to the requirement of causality (see § 3. C.): there has to be a c.s.q.n. connection, while also the harm (and resulting damage) should not be so remote that it is not recoverable.

An important restriction in tort law is that *pure economic loss* is not always compensated.[12] We have discussed the concept of pure economic loss already in § 4.3. This kind of damage can also exist in the case of tort.

Certain torts or grounds of liability do not compensate for pure economic loss (this varies among jurisdictions). In particular *common law systems generally*[13] *do not allow recovery of pure economic loss for negligence*, except in specific cases.[14] This means that when someone for example negligently destroys your database, it is uncertain whether you can obtain an award of damages, as the damage from such a negligent act seems to consist solely of pure economic loss. If you do want to obtain compensation, you will either have to litigate on the basis of a different tort that does allow compensation of pure economic loss, or you will have to find that the case involves a specific case that requires an exception to the general exclusion of pure economic loss. Civil law systems are more amenable to compensation of pure economic loss, even though there is a general trend to restrictive compensation of that kind of loss.[15]

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[11] The precise difference between order and injunction is complicated and varies among jurisdictions. Generally speaking an injunction is an order, for a specific action. Civil law jurisdictions generally do not make this distinction.

[12] English lawyers say that pure economic loss is not 'recoverable'.

[13] There are exceptions, for example various U.S. states have adopted a different approach whereby pure economic loss is compensable in case of negligence.

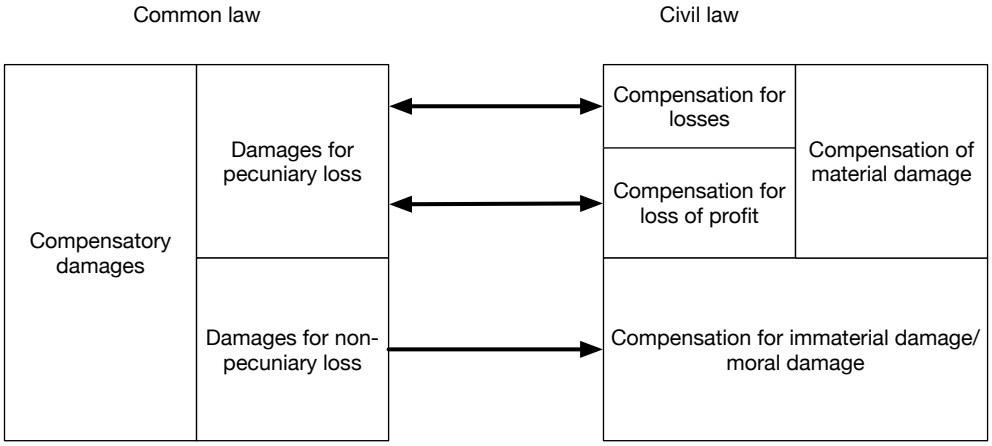
[14] For example professional negligence.

[15] For instance, in Germany certain grounds of liability do not allow recovery of pure economic loss.

Within the aforementioned limitations the calculation of damages can be described briefly as follows.

Damages are primarily intended to *compensate* the claimant for the damage that was suffered. This is reflected by the common law concept of compensatory damages. In civil law, all damages are presumed to be compensatory in nature, therefore those are simply called damage.

Within this general category a general distinction is between material damage (common law: pecuniary loss) and immaterial or moral damage (common law: non-pecuniary loss). The first category covers losses to material interests: the loss of income due to an injury, medical costs, loss of value of an object. These are clearly related to financial losses and can be valuated in a straightforward manner, even if the actual assessment may be complicated. The second category comprises harm to immaterial interests such as reputation, privacy, or mental health. Compensation for pain and suffering is also a form of moral damage. There is no clear relation between such damage and any amount of money. The assessment of this kind of damage is therefore typically performed by comparison with amounts awarded in similar cases.



In common law there are also several kinds of damages that are not compensatory. Those are punitive damages, gain-based damage, aggravated damages, nominal damages, contemptuous damages. It would go too far to discuss these in detail. These kinds of damages are intended for cases where compensatory damages would be an inadequate response to the wrongful action, either because the compensatory damages would be negligible, because the defendant had gained much more profit than he has to pay in compensatory damages, or because the action was particularly grievous and requires a serious award of damages. In civil law systems such cases are typically solved by a fairly liberal award of compensation for immaterial damage, or by the instrument of disgorgement of profit which operates similar to gain-based damage (the defendant has to hand over the profit obtained from the wrongful action, thereby not profiting from their tort).

The actual assessment of damages relies on the facts of the case, which require support from evidentiary materials and may lead to issues of proof. Furthermore, several corrections may also be necessary. An example is contributory negligence, the presence of collateral benefits,[16] mitigation of damage.[17]

[16] This means that the claimant also gained some benefits from the tort: should those lead to a reduction in the award of damages?

[17] The claimant could have taken action after the tort to reduce the damage: this can lead to a reduction of the award of damages.

Chapter 6. Liability for other persons, objects and activities

6.1. Introduction

Following the previous chapter on fault liability, we will discuss a different kind, to wit strict liability: liability not based on a personal fault by the defendant. We will first discuss strict liability in general (§ 2), then focus on vicarious liability for employees (§ 3). Next we will discuss strict liability for objects (§ 4). Finally we will examine the liability of Internet Service Providers (§ 5).

6.2. Categories of strict liability

As explained in chapter 5, while tort law primarily starts from the principle that liability is based on a personal fault by the defendant, most jurisdictions also recognize the possibility to hold someone liable without having acted wrongfully. This form of liability is called *strict liability*.

> Strict liability is a relatively new form of liability. In the nineteenth century, lawyers, under the influence of theories of will and individual accountability, built their systems of law on the assumption that liability should in principle rest on an individual fault. Liability for other persons or objects was conceived primarily as a species of fault liability: it was to be determined whether the accident was indeed the result of a fault in the supervision of the person or object that caused the damage. However, it was quickly realised that this approach led to unsatisfactory results. Consequently, lower courts sought ways to provide additional protection to victims, mostly by setting high requirements to the disculpating proof of absence of a fault. Modern codifications have explicitly accepted the possibility of strict liability. However, this is generally still conceived as an exception to the general rule of fault-based liability.

The justification of imposing strict liability in general can be found in a mixture of reasons. Among these stand out:
- the actual possibility of the defendant to prevent or at least reduce the risk of damage, and
- the benefit that the defendant gained from the activity in the course of which the risk of such damages are created.

These considerations influence the question to whom liability is allocated. Generally speaking liability in law is imposed on the person who is responsible for the risk, who could contain it, who *controlled* the person or object that caused the harm. A general term for such a person would be ‘supervisor’. Actual legal rules use other terms, as we will see shortly.

> The allocation of liability is in particular problematic when several persons might conceivable be seen to be responsible for the risk in question.

For strict liability there are always three issues that have to be regulated:
- what is the *relation* between the person that is held liable, and the actual cause of the harm?
- to what kinds of acts or events does the strict liability extend?
- which defences apply?

For this course we will not go into full detail about all aspects of strict liability. Instead we will briefly discuss a few important kinds of strict liability. Generally we distinguish between:
- liability for torts committed by other persons.
- liability for harm caused by objects.

6.3. Liability for other persons, in particular vicarious liability (liability for employees)[74]

As a rule, persons are only responsible for their own actions. Nonetheless, certain relationships may lead a person to be liable for torts committed by another persons. One such relationship that generally does incur liability is employment.

It is long accepted that employers may be liable for torts committed by their employees (called *vicarious liability* in English law).[75] However, at first this was considered to be due to negligence in the supervision by the employer of his employee. This would require a fault, a lack of care, by the supervisor. In due course this requirement was found to limit liability too much. Also in other ways the boundaries of this specific kind of liability have been pushed outward. This form of liability gives rise to a number of questions regarding its limits and consequences.

a. When is there an employer-employee relation, and can this liability also extend to certain classes of non-employees?
b. For what kind of torts by the employee is the employer liable?
c. Is the employee also personally liable and/or can the employer take recourse to the employer for an award of damages?

An example is French law:

> *art. 1242(5) Cc*
> *Les maîtres et les commettants, du dommage causé par leurs domestiques et préposés dans les fonctions auxquelles ils les ont employés (...)*
> art. 1242(5) Cc
> The masters and the principals [are responsible] for the damage caused by their domestic servants and their subordinates in the functions in which they have employed them.

Regarding a: generally speaking, liability exists not only for employees but also for other persons in a situation similar to an employee (such as a temp). In English law, vicarious liabiolty extends to persons 'akin' to an employee. In the case *Various Claimants v Catholic Child Welfare Society* [2012] UKSC 56, at 35, the test was stated by looking as to whether the relationship is like an employee relationship, according to five criteria that justify vicarious liability of employers:

> "There is no difficulty in identifying a number of policy reasons that usually make it fair, just and reasonable to impose vicarious liability on the employer when these criteria are satisfied:
> i) The employer is more likely to have the means to compensate the victim than the employee and can be expected to have insured against that liability;
> ii) The tort will have been committed as a result of activity being taken by the employee on behalf of the employer;
> iii) The employee's activity is likely to be part of the business activity of the employer;

[74] See also Zweigert/Kötz, chapter 41, Van Gerven c.s., chapter 5, Van Dam, *European Tort Law*, no. 1606-1607, P. Giliker, *Vicarious Liability in Tort. A Comparative Perspective*, Cambridge: Cambridge University Press 2010.
[75] See Zweigert/Kötz, p. 643-645 on justification for this kind of liability. In Germany, however, the employer is not strictly liable: if he proves that he observed sufficient care in supervision of the employee, he can escape liability (§ 831 BGB).

> iv) The employer, by employing the employee to carry on the activity will have created the risk of the tort committed by the employee;
> v) The employee will, to a greater or lesser degree, have been under the control of the employer."

Regarding b: generally speaking, employers are found liable if the tort has some connection to the employment. Only purely private matters in which no tools of the employer were used and the employment was not involved in any way are outside the scope of vicarious liability for employees. In English law, the test is whether the acts had a sufficiently 'close connection with the employment'.[76] In France, the employer is liable unless the employee was acting "outside the functions for which he was employed, without authority and for purposes alien to his role".[77] Liability may therefore extend not only to the tasks entrusted to the employee, but also unauthorized actions, if the employment contributed to the conduct by providing means or opportunity.

Regarding c: generally speaking, the employer has to bear the damages and the employee does not have to compensate the employer. This is fair, as many torts are simply business risks. However, in case of an intentionally wrongful act this may be different.

If the elements of vicarious liability are not fulfilled, the employer may still be liable on a different basis, such as negligence, or one of the grounds discussed in § 6.7.

Many jurisdictions also have strict liability for other relationships, particular the parent-child relationship. In France, there is a general liability of persons or organisations who have the power to 'organise, direct and control' the conduct of another person.[78] This covers cases of an institution that is liable for a minor who escaped, or a sports club that is liable for misconduct of its members.

6.4. Strict liability for objects

The rules of liability for objects exhibit less uniformity than vicarious liability. Although many jurisdictions recognize strict liability for animals and motorized vehicles, this is not accepted everywhere. A noteworthy exception is England where no general rule of strict liability exists for these categories.[79] In Germany, there is a general liability for the keeper of a car, and a negligence-based liability with a reversed burden of proof for the driver of the car.[80] In France the driver and the custodian (*gardien*) of the care are strictly liable.[81] For animals, both Germany (§ 833 BGB) and France (art. 1243 Cc) hold the keeper strictly liable.[82] French law

[76] *Lister v Hesley Hall* [2001] UKHL 22.
[77] C.Cass. plén. 19 May 1988, D. 1988.513. The case involved an insurance salesman who ran a fraudulent financial scam on the side, without the knowledge of the insurance company, that nonetheless was found to be liable.
[78] C.Cass. (plén.) 29 March 1991 (Blieck), D. 1991, Jur. p. 324, extended in later case law.
[79] There is the Animals Act 1971 for a few specific animals and kinds of behaviour by the animal, but no general rule.
[80] § 7 and 18 Strassenverkehrsgesetz.
[81] Loi Badinter, in full: *La loi n°85-677 du 5 juillet 1985 tendant à l'amélioration de la situation des victimes d'accidents de la circulation et à l'accélération des procédures d'indemnisation*..
[82] The German rule makes further distinctions which we cannot go into at this place.

furthermore has a general strict liability for movable objects.[83] The advantage of that rule is that it provides a simple basis for liability for robots.[84]
For both kinds of liability an important question is: who is held liable. This is usually someone like the owner or the keeper (the person having the object under control).[85] French law uses the term custodian (*gardien*), which is quite similar to the notion of keeper.

If strict liability does not apply to harm caused by an object, it may be possible to obtain damages on the basis of negligence. This applies in particular to intangible objects. Liability for algorithms may therefore already be assumed without specific rules, as the developer or producer of the algorithm may be found to be negligent. However, a limitation of negligence in such cases is that the typical damage caused by algorithms may be pure economic loss, which is often not compensable on the ground of negligence.

Strict liability for objects is usually limited by allowing certain defences, such as force majeure, contributory negligence. These may be explicated in the provisions on strict liability, or may be implicit (and recognized in case law).

An particularly important kind of liability for objects is *product liability*. This is recognized nowadays in most countries. It has developed out of an extensive application of the rules of negligence (or comparable torts), and in the second half of the twentieth century was codified in most legal systems in the form of strict liability of the producer for harm suffered by consumers. Generally speaking, product liability applies to products, meaning tangible objects. It does not apply to intangibles such as software. In case of product liability, the manufacturer is liable for the harm caused by defects in the product, but usually other parties in the production chain (such as the importer and reseller) can also be liable besides the manufacturer, which helps the consumer who may prefer to sue the local retailer instead of a foreign manufacturer. Product liability may exclude compensation for pure economic loss, and is restricted by several defences (in particular the defence of state of the art, meaning that the defect could not be known at the time of production given what was known in science at the time).

6.5. ISP liability

Finally a few remarks on ISP liability. An Internet Service Provider, such as a website hosting company, a telecommunication company offering Internet access, a website forum, search engine, social network, may in principle be liable because the publication of information or data on its website (or data it communicates) is found to be infringing on someone's rights. Examples are slanderous communication (defamation), data consisting of trade secrets, personal pictures (such as private nude photographs), data containing copyrighted works (such as music, video, books). Such making available or communicating of data can therefore in principle form the basis of an action in tort.

However, with the advent of the Internet in the 1990's it was felt that the risk of tort actions would stifle the growing Internet community and industry. Therefore the solution was devised that ISP's would not be liable if they merely transmitted data without being aware of the

[83] Based on an extensive interpretation of art. 1242 Cc in C.Cass. (Chambre réunie) 13 February 1930, DP 1930.I.57 (Jand'heur II).
[84] T.F.E. Tjong Tjin Tai, 'Liability for (semi-)autonomous systems', in V Mak, TFE Tjong Tjin Tai and A Berlee (eds.), *Research Handbook in Data Science and Law*, Cheltenham: Elgar Publishing 2018, p. 55-82.
[85] Keeper may be different from the driver of a car, in that the keeper may be the person who legally has the right of control at the time, even if they are not actually in direct control. For a leased car, the keeper is the person who leased th car, which need not be the actual driver. However, legal systems may use slightly different interpretations of terms like keeper, so be aware of nuances of meaning.

unlawful nature of the data. Only if they were notified of a claim of unlawfulness could they be held liable: the practice started in which a notice usually led to taking down the data, after which the ISP could start communication with the claimant and the person having put the data on the website. This procedure is in U.S. law called Notice-and-Take-Down.

This practice has been adopted as a model for the rules of the European Union regarding ISPs. In the European Union the relevant rules are found in art. 12-14 E-commerce Directive 2000/31. As long as the ISP is purely passive regarding the data, he cannot be held liable. In case law this has been interpreted to mean that the activity of the ISP should only be 'of a mere technical, automatic and passive nature'.[86] If the ISP does not follow this requirement, the national court has to decide whether the ISP is in fact liable under tort law; it does not mean that the ISP is automatically liable. It should be noted that it is possible that the ISP has to follow an injunction or order (such as to provide name and address of the individual that posted infringing content): such an injunction or order does not assume liability.

6.7. Organizational liability

To complement the various forms of organizational liability, there are quite often rules on organizations that may result in liability if harm occurs as a result of behaviour by the organization. This is a complicated area as it may involve rules of business law, the liability of directors, and 'piercing the corporate veil'.

There are several instruments that are regularly found that help to complement the liability of an organization. We will discuss a few of those.

- Liability of a corporate body for actions by by the board. An example is § 31 BGB:

> ***§ 31 Haftung des Vereins für Organe***
> *Der Verein ist für den Schaden verantwortlich, den der Vorstand, ein Mitglied des Vorstands oder ein anderer verfassungsmäßig berufener Vertreter durch eine in Ausführung der ihm zustehenden Verrichtungen begangene, zum Schadensersatz verpflichtende Handlung einem Dritten zufügt.*
> **s. 31. Liability of an association for organs**
> The association is liable for the damage to a third party that the board, a member of the board or another constitutionally appointed representative causes through an act committed by it or him in carrying out the business with which it or he is entrusted, where the act gives rise to a liability in damages.[87]

- Negligence liability of directors and managers for actions by the corporate body. This is the principal ground for holding multinational corporations subject to claims for abuses by national subsidiaries. An example is *Vedanta Resources Plc and Konkola Copper Mines Plc v Lungowe and Ors.* [2019] UKSC 20. Formally the case is only about the jurisdiction issue, but the decision already provides indications about when the parent company could be liable.

> 49. (...) Direct or indirect ownership by one company of all or a majority of the shares of another company (which is the irreducible essence of a parent/subsidiary relationship) may enable the parent to take control of the management of the operations of the business or of the land owned by the subsidiary, but it does not impose any duty on the parent to do so. (...) Everything depends on the extent to which, and the way in which, the parent availed

[86] ECJ 23 March 2010, cases C-236/08-C-238/08 (Google Adwords), nr. 113.
[87] Translation © 2008 juris GmbH, Saarbrücken, from the translation made available officially by the German Ministry of Justice.

itself of the opportunity to take over, intervene in, control, supervise or advise the management of the relevant operations (including land use) of the subsidiary. All that the existence of a parent subsidiary relationship demonstrates is that the parent had such an opportunity.

- A corporation may also be liable in negligence for not organizing it business appropriately. In Germany this is the category of *Organizationsverschulden*, which is simply based on § 823 BGB. This differs slightly from ordinary application of negligence, where we tend to focus on a lack of care towards a specific, directly foreseeable incident. Organizational negligence tends to focus more on general organizational issues. For example, an organization may have neglected to set up an adequate information structure to ensure that customer requests are processed quickly and sent through to appropriate departments. On the basis of organizational negligence the court may find the organization liable because it should have acted differently if it would the responsible department would have known about certain information. Even though the information was never passed on to that department, the knowledge is attributed to that department.

Chapter 7. Property law

7.1. Introduction

Property law is the area of the law that deals with property and ownership.[88] In this chapter we discuss the concept of property and several related concepts (§ 2), the kinds of property that are distinguished (§ 3), the various relations that persons can have regarding property (§ 4), the ways of obtaining ownership (§ 5), the transfer of property (§ 6), limitations on property rights (§ 7) and the way property is treated in the case of insolvency (§ 8).

7.2. What is property?

Property implies a kind of exclusive relation with an object. Property and ownership appear to be based on deeply rooted intuitions regarding the concept of possession: young children and even animals can already act possessive towards objects and locations. However, if we look at how the law deals in detail with possession and property, we can observe a striking diversity of rules and approaches. In common law systems, there is no clearly defined area of property law. Instead, common law works with rules regarding objects in different areas that use different concepts (such as possessor, occupier). It is therefore posited by some that property is no more than a bundle of rights. In civil law systems, there is usually a well-demarcated body of property law based on a fairly coherent conceptual framework.

The core notion of property involves the idea that a person, the owner, has a particular legal relationship to an object that provides the owner with an exclusive right to the object in all its aspects. This exclusivity is normally related to the control of the owner over the object: the law provides the owner with a right to control the object. The French art. 544 Code Civil states this unabashedly:

> Art. 544 Code civil
> *La propriété est le droit de jouir et disposer des choses de la manière la plus absolue, pourvu qu'on n'en fasse pas un usage prohibé par les lois ou par les règlements. (...)*
> Art. 544 Code civil
> Ownership is the right to enjoy and dispose of things in the most absolute manner, provided that one does not use it in a way prohibited by laws or other official rules. (...)
> (Translation ETTT)

Exclusivity, however, is not absolute. In practice the exclusivity of many property rights is limited. In case of national necessity, a country may commandeer private property for the general use. The exclusive right to land may be limited by a public right of way; in Sweden (and similarly in other Nordic countries) this is recognised as a fundamental *allemansrätten* (everyman's right) or right to roam. In the past, particularly outside the Western world, land was often considered communal and not subject to notions of private exclusive property.

We can identify at least two aspects of property that are particularly important.

- Enjoyment (use)
- Value

Arguably the primary reason to allocate ownership is that people like to have some part of the world that they can call their own, some objects that they can rely on to be there for their enjoyment. A squirrel may set aside a hoard of nuts, a dog may have a dedicated place to sleep.

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[88] S. van Erp & B. Akkermans, *Cases, Materials and Text on Property Law*, Oxford and Portland: Hart Publishing 2012.

The idea of a home refers to a place you can call your own. Of course, this doesn't mean that you have to be the owner of your home in the sense of legal ownership (you may for instance rent the house), but it does show the need for protection of exclusive rights of use over objects.

A second aspect is the value that objects have. This is a disputed issue, in the sense that some find this good (particularly mainstream economists), while others (such as Rousseau and Marx) decry this. However, both defendants and detractors are in agreement about the relevance of objects having value to the constitution of modern Western market society. Objects have value above and beyond their enjoyment to their owner if they can be sold. This implies that the ownership is transferred to someone else in return for money. Hence the value of property implies the possibility of legal transfer of ownership (see the 'dispose' in art. 544 Code civil).

These interests are protected by the law, through what we call property rights. Property rights are special in that they work against everyone, they have *erga omnes* effect. A contract only can lead to a claim to other parties to the contract, torts normally are invoked primarily against people who act wrongfully. A property right, in contrast, can be invoked against anyone, regardless of conduct. If a thief throws your empty wallet over a fence onto someone else's land, you have a right to retrieve your wallet from the owner of the land.

The law protects mainly by prohibiting infringement of property rights. In case of infringement the owner can demand compensation, retrieve their property, order persons to vacate property. In case of threatened infringement, an owner may obtain an injunction. Some forms of infringement can also lead to liability under tort law. Indeed, although common law typically does not recognize property law as a distinct body of law, it offers similar protection as civil law systems by prohibiting actions (such as trespass to goods and conversion) that amount to infringement of property rights, and offering particular remedies such as ejectment (removing trespassing persons from your land) that are well suited to protect those interests.

A definite benefit of legal recognition of ownership is that this ensures (relative) permanence of the value and enjoyment of your possessions. Legal recognition implies that you can also ask the state to enforce your rights where they are violated. In the absence of legal property, you would never be certain of future enjoyment of your property or of having sufficient money or other assets in the future.

Admittedly, the reasons given here for having property and property law are not indisputably decisive. You could argue for having a society with limited or no property rights. However, this reader is not the place for an extensive debate about the merits of the law as it stands. Here we try to describe and explain the current state of the law, which is based on those aspects of property and attempts to regulate and protect them. Understanding how the law works does not mean that we should uncritically accept these rules. But if you wish to change the rules, you implicitly acknowledge that they do exist, otherwise there is nothing to change. And surely you cannot change them effectively if you do not know what they are and how they function. Hence we will focus on a description of the rules, including a justification of the rules, an explanation why they exist like they do. But the justification is not complete and does not imply that there are no counterarguments against those rules or concepts.

7.3. Kinds of property

Now we have discussed the background of property law, we need to clarify what kinds of property we distinguish. Property relates primarily to tangible objects, such as land, houses, cars, apples, bread, clothing, furniture, computers. Objects that are subject to property law may also be called *goods*. Such objects may serve human needs, may indeed be indispensable (in the case of food). Owning a good provides you with the right to *use* the object as you deem fit: to consume it, to keep it in a collection. You may enjoy the freedom of sitting on your own lawn, to sleep in your own bed. Property furthermore has value: it can be sold or leased, it can also be stored for future consumption or sale. The law protects the interests of the owner, and

part of that protection is found in tort law. More abstractly, property rights can be conceived as a balance that the legislator achieved between the interests of individual citizens: the freedom to do what you want, versus the security of the owner that certain of their needs will be met in the future (and being secure in enjoyment).

The protection that tort law provides primarily deals with infringement of property rights, including damage to the property. Damage is not essential: the thief of your bicycle infringes your property right in your bicycle but does not damage it (indeed he has an interest in not damaging it needlessly). Damage to property, such as breaking a smartphone, can however be conceived as infringement to property.

Property is in common law divided into real property and personal property. Real property means primarily land (including objects more or less permanently affixed to the land, such as houses, fences, trees). Personal property includes tangible objects that are not real property (such as cars, books, computers, jewellery: physical objects that you can touch), and also certain intangible objects (such as the copyright in a novel, a patent, software). Alternative terms are chattels versus choses in action: this division corresponds broadly to that between tangible and intangible property.[89]

In civil law systems lawyers speak of goods: you may own a good, the good is your property. The main division is between incorporeal and corporeal goods. Incorporeal goods correspond by and large to intangible property in common law. Corporeal goods are divided into movables and immovables. Immovables correspond by and large to what common law calls real property. Movables are like tangible personal property.

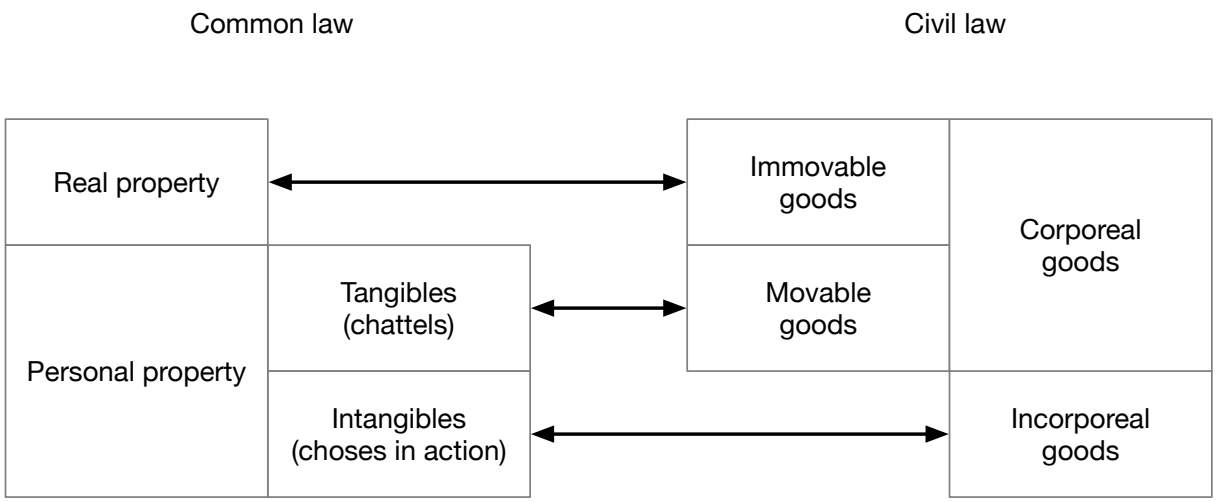


Figure 7.1. Comparison of kinds of goods in common law and in civil law

See for an example the Vietnam Civil Code

Article 105. Property
PROPERTY
1. Property comprises objects, money, valuable papers and property rights.
2. Property includes immovable property and movable property. Immovable property and movable property may be existing property or off-plan property.
Article 106. Registration of property

[89] The terms chattels and choses in action are used in a slightly different context and may have additional elements; in the present introduction we can ignore these details. It is useful to know these terms as you may encounter them in case law and literature.

> 1. Ownership and other rights to immovable property shall be registered in accordance with this Code and law on registration of property.
> 2. Ownership and other rights to movable property shall not be required to be registered, unless otherwise prescribed by law.
> 3. The registration of property must be public.
> Article 107. Immovable property and movable property
> 1. Immovable property includes:
> a) Land;
> b) Houses and constructions attached to land;
> c) Other property attached to land, houses and constructions;
> d) Other property as prescribed by law.
> 2. Moveable property is property which is not immovable property.
> (…)
> Article 115. Property rights
> Property rights are rights which are able to be valued in money, including property rights to subjects of intellectual property rights, right to use land and other property rights.

A few remarks are needed about intangible/incorporeal goods.

First of all, there is a complicated debate as to whether these include claims such as a claim on payment of damages, a bank account (which is essentially a claim on the bank), licenses. Many legal systems refuse to speak of ownership of a claim, instead preferring alternative names for the relationship to a claim.[90] This can be explained by the fact that many rules of property law do not work well for claims. Take the idea of possession; it is fairly clear how to physically possess a tangible good, but how can you take possession of a claim? The same applies to other kinds of intangible goods, like intellectual property rights (copyright, patent, trade mark) and licenses. Because they are intangible, they do not require the same kind of protection as tangible goods. Nonetheless they are important for the same reasons as tangible goods: they can be enjoyed (in the case of copyright, to obtain income through licensing) and have value.

The approach to these objects differs. Conceptually we can call them intangible goods, while being aware that the law may not always apply the rules of property law to them. But in many instances the applicable rules are very similar to the rules for tangible goods. For instance, you can transfer or assign a claim to another creditor (which is called 'cession'). Appropriate modifications may apply, such as that transfer of a claim typically also requires notification of the debtor. We will not discuss intangible goods in detail, but the discussion of tangible goods in the following will give you an idea of how the law treats intangible goods.

Nowadays there are other kinds of intangible phenomena such as data, bitcoin, Facebook accounts, avatars in MMORPGs and so on. There is considerable debate as to whether these are or should be objects of property law as well. Without going into detail we can say that the law is slowly moving in the direction of offering more protection to those objects, while hesitating to admitting a general category of virtual or digital objects. One reason for such hesitation is that digital objects can often be duplicated easily without loss to the original, and a duplicate may not immediately detract from enjoyment of the original (hence does not require intervention from the viewpoint of enjoyment). Another is that it is hard to prevent duplication, hence enforcement may be complicated through the traditional instruments of property law, while other areas of law (such as privacy law and intellectual property law) may be better suited

[90] Van Erp & Akkermans 2012, p. 365-423. If the claim has been embodied in a tangible good like a legally recognised piece of paper ('title', an example is a bearer bond), there is no objection to calling that a tangible good.

to effective enforcement. In the meantime, tort law can go a long way to protect interests in these kinds of objects.

As a side note: some objects cannot be subject to property law. Human beings cannot be property at all. Some legal systems say that animals cannot be property, even though usually they also state that the rules of property law do apply as if the animals are property (so the difference appears to be more symbolic).

Take for example the German BGB:

§ 90a BGB
Animals are not things. They are protected by special statutes. They are governed by the provisions that apply to things, with the necessary modifications, except insofar as otherwise provided.

7.4. Owner, possessor, keeper

Before going into the specific rules of property law, we need to discuss a few fundamental concepts. The basic idea of property is that it presumes someone who owns the property, an *owner*. The intuition is that the owner is the person who normally has control over the property, legal control (being allowed to transfer the property or decide what to do with it) as well as factual control. This aspect of factual control is usually referred to as *possession*. You possess the clothes you wear (presuming they are your own), as you have direct physical control over them; someone can only take that control away by force. Now the person who possesses a good is also called a possessor. Usually the possessor is also the owner, but that is not necessarily the case. The thief of your bicycle is the possessor of the bicycle but clearly not the owner. This shows the need to distinguish these concepts; the appearance of ownership versus the actual legal reality.[91] The law does recognize the importance of possession: usually it is presumed that the possessor is owner unless someone else can prove they are the owner. Furthermore the law attempts to make the physical reality match the legal state of affairs; if the possessor has lost factual possession against their will, they can invoke the law to be restored in the possession.

We are not done yet. Possession implies a claim to ownership: you have the control over the good for yourself. But what if you borrow an object, such as a car? You do not claim to be the owner, but are in direct control. That relationship is called ‘keeper’ or ‘holder’.

See for example Brazil

Codígo Civile Brasileiro 2002
Art. 1.196 Considera-se possuidor todo aquele que tem de fato o exercício, pleno ou não, de algum dos poderes inerentes à propriedade.
Art. 1.197. A posse direta, de pessoa que tem a coisa em seu poder, temporariamente, em virtude de direito pessoal, ou real, não anula a indireta, de quem aquela foi havida, podendo o possuidor direto defender a sua posse contra o indireto.
Art. 1.198. Considera-se detentor aquele que, achando-se em relação de dependência para com outro, conserva a posse em nome deste e em cumprimento de ordens ou instruções suas.
Parágrafo único. Aquele que começou a comportar-se do modo como prescreve este artigo, em relação ao bem e à outra pessoa, presume-se detentor, até que prove o contrário.
Art. 1.196 A possessor is considered to be anyone who actually exercises, full or not, any of the powers inherent to the property.

[91] The law may also attach further consequences, such as holding the possessor (and not the owner) liable for harm caused by an animal.

> Art. 1,197. Direct possession, by a person who has the thing in his possession, temporarily, by virtue of a personal or real right, does not cancel the indirect possession, from whom it was taken, and the direct possessor can defend his possession against the indirect.
> Art. 1,198. A holder is considered to be one who, finding himself in a dependent relationship with another, retains possession in his name and in compliance with his orders or instructions.
> Single paragraph. Anyone who has begun to behave in the way prescribed by this article, in relation to the good and the other person, is presumed to be the holder, until proven otherwise.
> (Google Translate)

In tort law these distinctions may be important as legal systems may hold different persons liable for objects such as animals.

In English common law these concepts do not apply in the same way. We can explain this by looking at the treatment of land first, and chattels next. Formally all land is owned by the Crown: everyone else has a derived right of use, as in feudalism. Individual parties may have a 'title' to land, meaning they are entitled to it, and this title functions just like ownership in civil law countries.[92] As a consequence, though, is that English law often works with the notion of possessor instead of owner. For instance, if a person is dispossessed of their land, they only need to prove prior possession to be restored in possession, while in civil law systems the tendency is to fall back on the 'owner' of land. For chattels (tangible goods) similarly the law focuses on the possessor. If two parties dispute who should be restored in possession, the law does not look at who is owner but rather as to who has 'a better title'.[93]

Besides the concepts of owner, possessor and keeper, you may also find others, such as 'occupier' in the English Occupiers' Liability Act 1984, the 'guardian' (*gardien*) in the case of French liability for animals or 'driver' in the case of liability for motorized vehicles. These concepts may have some overlap with notions like possessor and keeper, but tend to refer more to the actual control and may not clearly link to the concepts of possessor and keeper.

A note about how to prove ownership. We discussed that possession is presumptive proof of ownership for movable objects. It is possible to disprove the presumption of ownership by showing, for instance, by witnesses or a sales slip that you were the owner beforehand and that it was stolen. If the possessor cannot prove how they legally become owner, you may win the case.

For land, the registration of the deed (see below, s. 7.6) would normally accomplish the requisite proof. But in common law jurisdictions without a land registry, the only way to prove that you are owner is to prove that you received it from the previous owner, and you than need to prove that they got it from the owner before that, and so on. You need to check the entire chain of deeds.[94] Land transactions in those jurisdictions require a lot of research to ensure ownership. This is simplified in two ways: the current owner should already have the paperwork from when they become owner, which would only need to be checked. And in practice, when you have done your research and are factually in control, the courts will presume that you are

[92] Van Erp & Akkermans 2012, p. 306-309, 315. They also point out that for these reasons a 'lease' of land can in English law mean a title that is just as strong as ownership in civil law countries. This may lead to confusion, as a lease in civil law is clearly distinguished from ownership, while furthermore in English law there are also more limited forms of lease of land.
[93] Van Erp & Akkermans 2012, p. 347-348.
[94] In practice, you would stop when you have a sufficiently lengthy chain of deeds.

the owner unless someone else can prove to have a better title (for example by proving that one of the deeds in the chain is a forgery).

A further simplification of proof of ownership is the existence of the statute of limitations. If a person by all appearances has been owner for decades, the law will presume they are owner, and if they originally were not, the possession for such a long time can be converted to actual ownership. This helps to avoid disputes that would be near-impossible to resolve fairly.

7.5. Becoming owner

Now you have some idea of what property is, and what kinds of property we recognise, we can move on to the finer details of property law. The first question is how you become owner.

There are three main ways to become owner:

- creation
- acquisition
- transfer

First of all, you may create a new object, and that normally makes you owner.[95] The prime example is artistic creation. An artist who creates a bronze statue is the owner of that statue. Note that this occurs even if he was not the owner of the bronze that he used to make the statue![96] The reason for this is that the statue is considered to be a new object (due to its artistic merit), whereby the form is more important than the material. If on the other hand a thief breaks a bronze statue into fragments, the thief does not become owner as the fragments are not considered a new object. Furthermore, if a tree bears fruit or an animal has young, the owner of the tree or animal also becomes owner of the fruits or descendants. Creation is particularly important for immaterial rights: the creator of a work of art also 'owns' the copyright to that work.[97]

Secondly, you may become owner by acquisition. The idea is that you may appropriate an object that does not yet have an owner. This is nowadays not a very important way of become owner, as most objects are already owned by someone else. But it is possible for an owner to renounce ownership (abandonment), in which case someone else may acquire the object legally. For instance, you are moving to a new house and want to get rid of an old chair. You carry the chair out onto the street, and leave it in a pile together with other old objects with a note that anyone may take it. In The Netherlands this is customarily interpreted as that you renounce ownership and leave it for anyone interested – or for the garbage collector to remove. A related form of acquisition – which we cannot delve into at this place – is acquisition by *acquisitive prescription*.[98] The idea is that you gain ownership by laps of time: if you take possession of a good such as a plot of land and manage to keep it in possession for a sufficiently long period (decades), the original owner loses the right to repossess the object, and you eventually may become the owner.

See for example South Korea:

Civil code
Article 245 (Period for Acquiring Ownership of Immovables by Possession)

[95] Van Erp & Akkermans 2012, p. 617-701 discuss other forms of what they call creation, such as 'accession' (if you build a house on land, it normally becomes the property of the owner of land unless you have an appropriate servitude that allows you to build on someone else's land). 'commingling' (mixing two loads of indistinguishable goods such as oil or grain). The example of creating a new object is called 'specificatio'.

[96] The original owner of the bronze, though, is entitled to compensation by the artist for the loss of bronze.

[97] In the past some jurisdictions, in particular the U.S.A., had additional requirements such as registration, but those requirements have been mostly abolished due to the TRIPS treaty that prohibited additional requirements for copyright.

[98] Van Erp & Akkermans 2012, p. 702-782. Sometimes also referred to as *usucapio*; English law refers to 'limitation of actions'.

(1) A person who has for twenty years peaceably and openly held possession of an immovable with an intention to own it, shall acquire the ownership by making registration thereof.
(2) A person, who has made registration as the owner of an immovable and has for ten years peaceably and openly held possession of an immovable with the intent to own it, shall acquire the ownership of such immovable if his possession is in good faith and without negligence.
Article 246 (Period for Acquiring Ownership of Movables by Possession)
(1) A person who has for ten years peaceably and openly held possession of a movable with the intent to own it, shall acquire the ownership of such a movable.
(2) Where the possession under the preceding paragraph was commenced in good faith and without negligence, ownership shall be acquired after five years have elapsed.
(https://elaw.klri.re.kr/eng_service/lawView.do?hseq=29453&lang=ENG)

Thirdly, and most importantly, you can become owner by transfer of ownership (also called 'assignment' in common law). This means that the owner of an object transfers ownership to you: you thereby become the new owner. As this is important but has some intricate details, we will devote a separate paragraph to transfer.

7.6. Transfer of property

The rules regarding transfer of property (also called 'assignment') are quite complicated and varied.[99] To explain this area of the law, we focus on the three requirements that are found in Dutch law and several other systems, as other systems can be understood as variations on those requirements.

- power to dispose
- title
- delivery

An example of the second and third of those requirements can be found in Argentina.

Código Civil y Comercial de la Nación (2015)
ARTICULO 1892.- Título y modos suficientes. La adquisición derivada por actos entre vivos de un derecho real requiere la concurrencia de título y modo suficientes.

Se entiende por título suficiente el acto jurídico revestido de las formas establecidas por la ley, que tiene por finalidad transmitir o constituir el derecho real.

La tradición posesoria es modo suficiente para transmitir o constituir derechos reales que se ejercen por la posesión. No es necesaria, cuando la cosa es tenida a nombre del propietario, y éste por un acto jurídico pasa el dominio de ella al que la poseía a su nombre, o cuando el que la poseía a nombre del propietario, principia a poseerla a nombre de otro. Tampoco es necesaria cuando el poseedor la transfiere a otro reservándose la tenencia y constituyéndose en poseedor a nombre del adquirente.

La inscripción registral es modo suficiente para transmitir o constituir derechos reales sobre cosas registrables en los casos legalmente previstos; y sobre cosas no registrables, cuando el tipo del derecho así lo requiera.
(…)
ARTICLE 1892.- Title and sufficient ways. The acquisition derived from inter vivos acts of a real right requires the concurrence of a sufficient title and mode.

[99] Van Erp & Akkermans 2012, p. 783-909.

> Sufficient title is understood as the legal act covered by the forms established by law, whose purpose is to transmit or constitute the real right.
>
> The possessory tradition is a sufficient way to transmit or constitute real rights that are exercised by possession. It is not necessary, when the thing is held in the name of the owner, and the latter, through a legal act, passes ownership of it to the person who owned it in his name, or when the person who owned it in the name of the owner begins to own it in the name of other. Nor is it necessary when the possessor transfers it to another, reserving possession and becoming the possessor in the name of the purchaser.
>
> Registration is a sufficient way to transmit or establish rights in rem over things that can be registered in the cases provided for by law; and on non-registrable things, when the type of law so requires.
>
> (...)
>
> (Google Translate)

Power to dispose means that the person who authorizes the transfer is legally empowered to transfer ownership to someone else.[100] Normally that means that this is the owner. But it can also be a representative of the owner, as in the case of a store clerk. This requirement is often implied, as in the case of the Argentine provision quoted above.

Title means that there is a legally valid reason for transferring ownership. An obvious example is a contract of sale.[101] If the title would not be necessary, you could easily lose ownership without your consent, which is undesirable. The requirement of title also helps to distinguish a transfer of ownership from simply temporary handing over an object (as in the case of renting). Note that the title usually also requires consent from the recipient. Otherwise someone could burden someone else to get rid of undesirable property, such as an elephant, a yacht or nuclear waste which are expensive to feed, maintain or store. Besides contract there are other forms of title, such as a merger, inheritance.

Note that some legal systems do not, or not always, have further requirements (in particular delivery) for transfer of a good. Notably French law only requires consensus (i.e. a contract) to transfer a specific movable good. However, for the sale of generic goods (such as ten light bulbs from a large stock) this doesn't work: the seller has to pick the goods that are to be transferred, hence here also the actual handing over is usually considered as the moment of transfer of the good.[102]

Delivery means the actual transfer of the property. In the case of sale of a tangible good this is usually accomplished by handing over the object: the physical control is proof of the delivery. You give the new owner *possession* of the object (in the Argentine provision: 'possessory tradition'). But it is also possible to accomplish delivery without actually handing over an object: you can, for instance, deliver the ownership of an object in storage by a legal notice that informs the custodian that another person has become owner.[103]

See for instance the South Korea code

[100] E.g. the Vietnam Civil code Article 192: "Right of disposal means the right to transfer ownership rights, renounce ownership rights, right to use, or destruct the property."

[101] A complicated issue is what happens if the title is defective, for eaxmple the contract is void. In some systems ownership automatically reverts back to the original owner (the 'causal system'), in other systems the original owner must ask for return of the object (the 'abstract system'). See Van Erp & Akkermans 2012, p. 823-844.

[102] Van Erp & Akkermans 2012, p. 799-813.

[103] Van Erp & Akkermans 2012, p. 813-823.

> Article 188 (Effect of Changes in Real Rights over Movables, Summary Assignment)
> (1) The assignment of real rights over movables takes effect by delivery of the Article.
> (2) When an assignee [*i.e. the person who becomes owner*] possesses a movable, the assignment takes effect by a mere declaration of such intention by the parties.
> Article 189 (Agreement on Possession)
> If real rights in movables are to be assigned and the assigner is to continue possessing the Articles in accordance with a contract concluded by the parties, it shall be regarded that the Articles have been delivered to the assignee.
> (https://elaw.klri.re.kr/eng_service/lawView.do?hseq=29453&lang=ENG)

In the case of land or intangible property, it is hard or impossible to give physical control to another person: the delivery is accomplished primarily with a particular document, what in English is called a *deed* (in Dutch: *akte*). This looks a bit like a contract, but instead of listing obligations, a deed constitutes the delivery by stating that the original owner transfers the property to the new owner.[104] The deed also *proves* that this is the new owner.

For some kinds of objects, there is a further requirement, namely registration (of the deed).[105] The transfer may be accomplished between parties without registration, but in order to have effect to others, the transfer (in particular the deed of transfer) needs to be registered with an official registry. Many civil law countries have registries for land, ships, airplanes, cars. In common law jurisdictions such registries are less common (although there are registries for e.g. patents and trademarks).

See for instance the South Korea Civil code

> Article 186 (Effect of Changes in Real Rights over Immovables)
> The acquisition, loss of, or any alteration in, a real right by a juristic act over an immovable takes effect upon its registration.
> (https://elaw.klri.re.kr/eng_service/lawView.do?hseq=29453&lang=ENG)

As a quick overview of how to accomplish delivery, the following may be helpful.
- tangible movable objects: possession. Only in some instances (such as airplanes, boats, cars)[106] are there further formalities, such as a deed and registration.
- land: deed and registration
- claims: notification of the debtor and deed, possibly also registration
- IP rights: deed (and usually also registration of the deed)

To summarize:
There are in the main three requirements for transfer: power to dispose, title, and delivery. Some systems to not always require delivery, but for a general analysis it is useful to presume that you also need delivery. For certain kinds of goods there are additional requirements such as a deed and registration.

[104] Here we gloss over a highly complex topic in property law: do you also need a separate act aiming at transfer of ownership, a 'real agreement'? See Van Erp & Akkermans 2012, p. 797.
[105] Van Erp & Akkermans 2012, p. 844-902.
[106] This may not apply to all jurisdictions.

7.7. Limitations on property rights

Up to now we have discussed property rights as an indivisible whole. The owner is in principle the person entitled to the full enjoyment and value of the property. In practice it is desirable to be able to allow others the use of your property. The owner may borrow a good to a friend. The concept of keeper or holder was introduced to allow for those kinds of relationships, based on contractual agreements.

In some instances another person may wish to have a more permanent or certain right onto the property, without wishing to become owner. We can distinguish two main categories of cases.

7.7.1. Use rights

Particularly in the case of landed property there are reasons why another person may wish to have a claim on the use of the land, or restrict the rights of the owner in some other way.[107]
- a neighbour would like to be allowed to always take a shortcut over the land
- a company would like to erect a windmill on the land
- a neighbour would like to build a house near the border of the land, which would overlook the land too closely.

In cases such as these, the owner may grant the other person a right of way, right of superficies or other such right. The general term for such rights is servitudes (civil law) or easements (common law). These rights are usually obtained in return to payment (lump sum or periodic payment) and are also usually registered with a land registry (if one exists). Thereby someone else obtains a right that normally is only a right of the owner, while conversely the owner loses the right to prohibit this use. The right of superficies also may have further consequences, such as that the building legally does not become the property of the owner of the land (as would be the general rule, as it is attached to the land), but instead remains the property of the leaseholder.

7.7.2. Security rights

Another restriction to ownership are security rights. Property has value. This has several consequences. Besides the fact that you may convert goods to money (i.e. sell them, which implies transfer of the goods), you can also offer them as *security*. This means that you use the good as a security towards an obligation you have, typically repayment of a loan. If you loan money you can *pledge* (Dutch: *verpanden*) a tangible good like a bracelet or musical instrument, which means that the person who lent you the money (who is the creditor of the claim for repayment) is entitled to sell the good if you are in default of paying back the loan and interest. In that way the creditor has more certainty that they will recover the loan and interest: you have an incentive to pay it back, and if you don't, they can retrieve (part of) the outstanding sum by the proceeds of the sale.[108] In case of an intangible good (land), the construct is called *hypothec* or *mortgage*. In commercial law there are many other forms of security with names like collateral, bank guarantee and so on. We will not discuss those here. The operation of security rights is particularly important in case of insolvency (s. 7.8).

7.8. Property in insolvency

Another important aspect of the value of property becomes clear when a person or corporation is declared bankrupt, becomes *insolvent*. The idea is that a person should pay their debts. If a person doesn't pay debts despite repeated requests, a creditor may request the court to declare that person bankrupt, meaning that the person apparently is unable to pay all their debts. When

[107] Van Erp & Akkermans 2012, p.. 243-285, 319-329.
[108] There is usually a prohibition to keep the lender from appropriating the good as their own, as that would tempt the lender to appraise the good at too low a value.

that happens, the court appoints an insolvency trustee (this is an advocate, accountant or other professional, dependent upon the legal system) who is tasked with wrapping up the bankruptcy. This is done by simply inventorising all outstanding debts and selling everything of value, then paying all debtors a share of the proceeds.

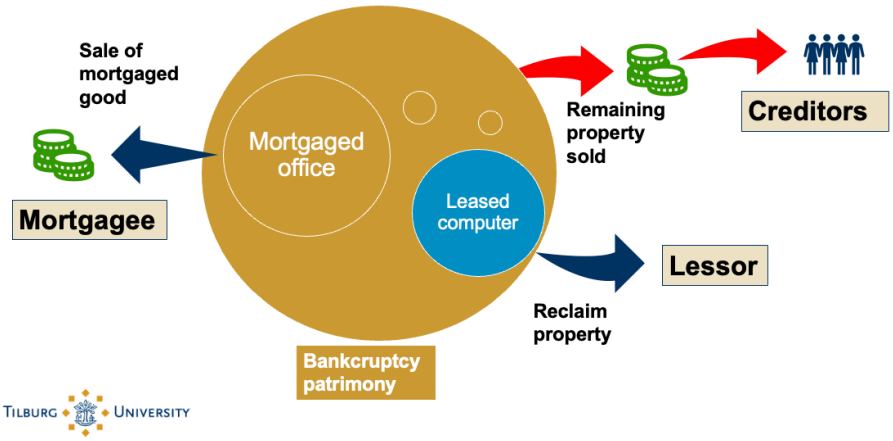
In more detail, and using the formal terms: the effect of the bankruptcy is that the debtor loses control over all their property, including claims on others: those are called the total *assets*. Similarly, the debtor does not need to answer requests to pay outstanding debts. The totality of debts/obligations and assets is called the insolvency estate (in Dutch: *faillissementsboedel*), and the insolvency trustee is empowered to manage that estate. Once all assets have been converted to money (*liquidated*, made *solvent*), the trustee lists the debts and orders them. Although in principle all debts are equal, there may be some preferential debts, which take precedence for pay out from the proceeds. If we disregard preferential debts, the principle of equality among creditors (*paritas creditorem*) means that all creditors get an equal share from the proceeds.

Take an example. There is one creditor A with a claim of € 1.000, another creditor B with a claim of € 200. The estate, when liquidated, leads to a net sum of € 600. This is not enough to pay the total outstanding claims of € 1.200, as € 600 is 0,5 of € 1.200. Now A gets 0,5 of their claim of € 1.000 = € 500, and B gets 0,5 of the claim of € 200 = € 100.

A you can see, the creditors are at risk of not getting all their money. Creditors may therefore wish to obtain a better position to retrieve more of their claim if the debtor becomes insolvent. They may try to do so in several ways.

a. security rights
b. retaining ownership.

(a) To explain this, we need to discuss what happens to security rights and ownership during bankruptcy. In case of a pledge or mortgage, the claim of the creditor of the loan for which the pledge or mortgage was offered is in principle treated just like any other claim. However, the good that is mortgaged or pledged is treated differently. The trustee may – regardless of the wishes of the creditor and the debtor – sell the good with the aim of using the proceeds for the insolvency estate. However, the creditor has a priority towards the proceeds of the sale: the creditor has a right to get their entire claim paid from the proceeds, and only once the creditor is entirely paid, is the remainder given to the insolvency estate. In that way the claim of the creditor gets effective priority with respect to the proceeds of the mortgaged/pledged good. If the claim is higher than the proceeds, the proceeds are entirely used to pay the claim, and the remainder of the claim is filed with the other claims in the bankruptcy.



(b) The second way to protect your claim is to ensure that a good remains your property. Although you may be inclined to think that all goods in the hands or on the premises of the insolvent are part of the insolvency estate, that idea is incorrect. Bankruptcy does not break the

rules of property law. Hence the goods on the premises that are someone else's property remain outside of the insolvency estate. Their owner can 'separate' them from the insolvency, take them out. This is fairly self-evident in case of goods that were temporarily borrowed (library books, a borrowed sweater or car). In commercial practice there are other arrangements. One example is lease, which is close to renting but often with the aim that at the end of the lease the object becomes the property of the lessee. Another example is retention of title/reservation of ownership, a construct where the seller remains owner of a good until receipt of the payment for the sale, even though the buyer is allowed to already receive the object in their inventory. Only when the buyer actually pays for the good is the ownership transferred.[109] Again this is a useful construct for commercial parties to limit their exposure to insolvency risks.

You can imagine that such constructs make the job of the insolvency trustee harder, as they cannot assume that all goods on the premises are part of the insolvency estate. Normally the trustee notifies all creditors (and the public at large) of the bankruptcy, and the lessors/sellers are quick to come and retrieve their property. The trustee can often rely on the administration of the insolvent to see who to inform (as there are contracts and bank receipts showing relevant companies).

[109] As we discussed, this is possible by delivery.