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BLAB

# DISPENSA

# COMPARATIVE PRIVATE LAW

## -SECONDO PARZIALE-

A CURA DI
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*16 ottobre 2024 – lezione 1*

# Legal facts and legal acts

What methods can be used to recognize events or activities that have **legal consequences**? How can we determine if such events or actions no longer hold any legal significance?

- it's impossible to establish a criterion for distinguishing what is inherently legal from what is not
- when a specific situation is prescribed by a **regulation**, we encounter an occurrence or an act that has **legal consequences**.

If a **state of affairs** comes into being then someone will be burdened with a **sanction**:

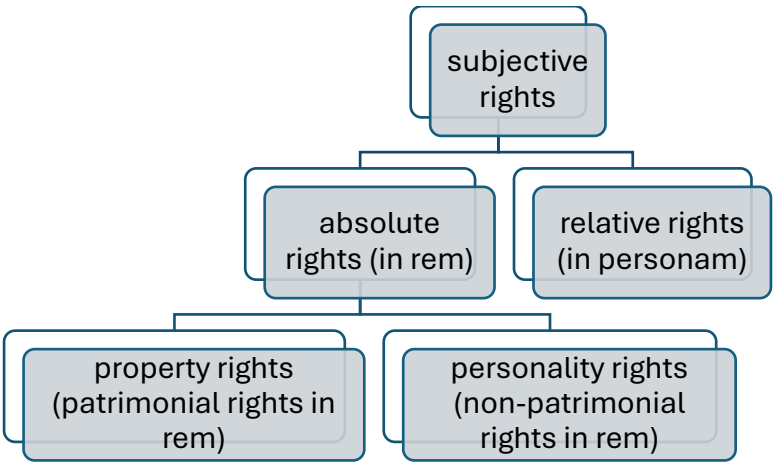
- a norm is shaped as a **hypothetical independent period**, whose protasis consists of a state of affairs and whose apodosis of a sanction
- the norm attaches a (negative) **reaction** of the State to a possible event or behavior.

The scope of norms = a norm is marked by two characteristics:

- **generality**
  - a norm is applicable to anybody who finds himself in the state of affairs envisaged by the if-clause
  - a norm is addressed not to individuals identified as such but to a class of individuals who happen to find themselves in the state of affairs envisaged by the IF-clause
- **abstractness**
  - a norm is applicable to whatever event or behavior matches the state of affairs envisaged by the IF-clause.

Mandatory and default rules:

- **mandatory rules** → may not be set aside by an agreement between their addressees
  - most public law consists of mandatory rules
  - paramount for public law is the supremacy of public interest over individuals' interests
- **default rules** → may be set aside through an agreement between their addressees
  - nearly the entirety of private law consists of default rules
  - a major role is played by default rules which supplement agreements entered into by the parties.



Autonomous legal acts: **legal acts** are concluded through a declaration of will (be it through language, or by conduct), which is intended to perform a change in rights and duties of who is acting (the party) = **legal acts → private autonomy**.
Any legal subject is given the power to produce a **legal effect** on her/his own **patrimony** or personality, to the extent to which the law does not pose any mandatory prohibition on doing so.

**Draft common → frame of reference** = II. - 1:102: Party autonomy
(1) Parties are free to make a contract or other juridical act and to determine its contents, subject to any applicable mandatory rules.
(2) Parties may exclude the application of any of the following rules relating to contracts or other juridical acts, or the rights and obligations arising from them, or derogate from or vary their effects, except as otherwise provided.
(3) A provision to the effect that parties may not exclude the application of a rule or derogate from or vary its effects does not prevent a party from waiving a right which has already arisen and of which that party is aware

# Taxonomy

In the **German tripartite taxonomy**:

- pandectists began the process of categorizing legal facts into different groups for **comprehensive classification**
- the concept of **Rechtsgeschäft** significantly influences this categorization
- a legal action, as understood in the German context of Rechtsgeschäft, is an act of **individual self-determination** (or a self-determined legal act).

The legal consequences associated with an **autonomous legal act** are the ones that the party/parties executing such **transaction** intend → as long as their intent is sincere and not influenced by any **irrational factors**, such as lack of judgment or discernment, mistakes, etc. = the legal consequences of an autonomous legal act are not primarily dictated by the law itself but are instead chosen by the **party/parties** involved in such a **transaction** (eg. contract).
In contrast regulations can assign legal consequences to **certain actions** regardless of whether the author intends for any legal effects to occur or not (**heteronomous legal or juridical, or jurist acts**).
Ultimately, certain legal circumstances are governed by a **regulation** without regard for the **individual judgment** or **discernment** of those responsible for them, or they may purely involve natural occurrences → these can be referred to as **material facts**.

**Heteronomous legal acts**: "a legal subject can freely decide whether or not to undertake certain action, but she cannot elect the legal effects attached thereto, which are stipulated by the relevant norms" → these acts must be done by their author with sufficient judgement and discernment of her own action.
**Material facts**: some legal facts are addressed by a norm irrespective of the particular judgment or discernment of their authors, or they simply consist in natural events.

*21 ottobre 2024 – lezione 2*

The **French bipartite taxonomy** = the French Civil Code lacks any regulation explicitly referring to **autonomous legal acts** in contrast to **heteronomous legal acts** → any fact that holds legal significance is categorized as either an **acte juridique** or as a **fait juridique**.

In the Civil Code, the term **actes juridiques** has effectively been employed to refer to autonomous legal acts → juridically **significant facts** (faits juridiques) encompass:

- **physical occurrences** (evénements)
- **material facts** (des événements)
- **heteronomous legal acts** (des agissements)

→ in these instances, the legal outcome is determined by the relevant rules, regardless of the author's intent to bring it about.

The **eclectic Italian taxonomy** = in the Italian Civil Code, the differentiation between **fatti giuridici** and **atti giuridici** parallels the distinction between faits juridiques and actes juridiques found in the French Civil Code → Italian legal scholarship follows a primarily **German-influenced approach**, where it predominantly recognizes the concept of **negozi giuridici** (meaning autonomous legal acts), as opposed to the narrower category of **atti giuridici in senso stretto** (meaning heteronomous legal acts). The main difference between the two is: in the first case the act is **voluntarily produced** and so are the **legal effects**, meanwhile in the second case the act is **voluntarily produced**, but the **legal effects are not**.

| **The European taxonomy** | | |
|---|---|---|
| *Unilateral* | *Bilateral* | *Multilateral* |
| (e.g., wills) | (e.g., sale contracts) | (e.g., companies) |
| These actions are carried out through the unilateral declaration of intent by a single party (e.g. the withdrawal from a contract) | It necessitates the expression of mutual agreement between two parties (as is the case with the majority of contracts) | It comprehends all the acts in which the parties involved are more than two |

| **The European taxonomy** | |
|---|---|
| *Patrimonial* | *Non-patrimonial* |
| The interest of the party or parties is driven by an interest that can be evaluated in economic terms | The intent of the party or parties is directed towards an interest that cannot be financially valued |
| e.g. contract | e.g. marriage |
| A contract is the exemplary form of a legal transaction where the content inherently involves economic aspects | It also contains an economic aspect, but this aspect is quite restricted and doesn't fully define its nature |

- **inter vivos acts** → typically designed to govern the concerns of the involved parties during their lifetimes
- **mortis causa acts** → conducted to arrange for the distribution of the author's assets that will come into effect after the death.

# Comparative contract law

For an extended period, legal rights obligations were determined by an **individual's affiliation** with their family, kin-group, or tribe of origin, rendering **contracts** in the modern connotation **unnecessary** → even in instances where transactions occurred, there was no requirement for an intricate body of **contract law** = the progression of advanced societies has thus far involved a shift from a state of fixed social positions to one characterized by contractual relationships (as said by Sir Henry Maine).

What is a **contract**?

- contracts allow **consumers** to **purchase** goods and services
- contracts allow **businesses** to organize themselves and to **trade** goods and services both with other businesses and with consumers.

Definition of contract:

- **roman law** → contractus = cum-traheremeant "to bind" the parties
- **civil law jurisdiction** → contract = an agreement
- **common law jurisdiction** → contract = a bargain, i.e. an exchange
  - gratuitous promises are not contracts (if not made by deed)
  - gratuitous bailments are not contracts
  - a bailment occurs when a person (the bailor) transfers possession of a chattel to another (the bailee)

  → common law recognizes a promise to be **enforceable** if it is contained in a deed under seal = a seal may be affixed to a contract by placing a red sticker on the paper or simply drawing a circle with «LS» (**loco sigilli**) stamped on it → the deed then takes effect upon delivery
  - **consideration** in common law jurisdiction → consideration as the mechanism that the common law uses to distinguish promises that are to be enforced from promises which are not to be enforced
  - the **doctrine** of consideration is based on the idea of **reciprocity** → "something of value in the eye of the law" must be given for a promise in order to make it enforceable as a contract = the consequence is that an **informal gratuitous promise** does **not** amount to a **contract**
  - the **purpose** of this doctrine is to put some **legal limits** on the enforceability of agreements even where they are intended to be legally binding and are not vitiated by some factor such as mistake, misrepresentation, duress or illegality → courts do not judge adequacy, they do not concern themselves with the question whether adequate value has been given, or whether the agreement is harsh or one-sided.

*22 ottobre 2024 – lezione 3*

Definition of contract:

- II-1:101 meaning of "**contract**" and "**juridical act**" → contract is an agreement which is intended to **give rise to a binding legal relationship** or to some **other legal effect** = it is a bilateral or multilateral **juridical act**
- art. 1321 codice civile → a **contract** is an **agreement** between two or more parties to establish, regulate or extinguish their patrimonial legal relationship
- art. 1101 (as amended in 2016) → **contract** is a **concordance** of wills of two or more persons intended to create, modify, transfer or extinguish obligations
- art. 1103 (as amended in 2016) → **contracts** which are lawfully formed have the force of **legislation** for those who have made them.

→ contract is essentially a **source of obligations** = e.g. contract of sale (the contract having as its object the transfer of the ownership of a thing or the transfer of other rights in exchange for a price):

- obligations of the **seller**
  - to deliver the thing to the buyer
  - to warrant the buyer against eviction and defects in the thing sold
- obligation of the **buyer**
  - to pay the price within the time and in the place fixed by the contract.

The **formation of contract** = **offer** and **acceptance** are perceived as statements of intent, generated by both parties and dispatched to each other:

- **offeror**
  - art. 1113 (1) Code Civil → "a contract is formed by the meeting of an offer and an acceptance by which the parties demonstrate their will to be bound"
  - art. 2:201 (1) PECL → a proposal amounts to an offer if it is intended to result in a contract if the other party accepts it, and it contains sufficiently definite terms to form a contract
- **offeree**
  - art. II-4:201 DCFR → "any form of statement or conduct by the offeree is an acceptance if it indicates assent to the offer" = silence or inactivity does not it itself amount to acceptance.

Newspaper advertisement? Announcements of items for sale at an auction? Invitations to submit tenders? Display of goods in shop windows or on supermarket shelves?

- II-4:201 (3) DCFR → a proposal to supply goods from stock, or a service, at a stated price made by a business in a public advertisement or at a catalogue, or by a display of goods, **is treated, unless the circumstances indicate otherwise, as an offer** to supply at that price until the stock of goods, or the business's capacity to supply the service, is exhausted
- art. 2:201 (3) PECL→ a proposal to supply goods or services at stated prices made by a professional supplier in a public advertisement or a catalogue, or by a display of goods, **is presumed to be an offer** to sell or supply at that price until the stock of goods, or the supplier's capacity to supply the service, is exhausted.

Offer and acceptance → art. 1113 (as amended in 2016) =a contract is formed by the **meeting** of an **offer** and an **acceptance** by which the parties demonstrate their will to be bound. Civil law jurisdictions tend more easily to acknowledge **offers made to the public at large**.

*4 novembre 2024 – lezione 4*

**Irrevocable offer**:

- jurisdictions which generally allow the **withdrawal** of an offer, stipulate, however, that the offeror can voluntarily bind herself/himself to her/his own offer (which thus turns irrevocable)
- in the **civil law** → it suffices that the offeror unilaterally promises to keep open the offer (for a given time)
- in the **common law** → a proper contract shall be concluded between the negotiating parties, which is called option (if gratuitous, it must be made by a deed).

**Contract of option** = an option is a preliminary contract through which one party (**option issuer or writer**) binds herself/himself to her/his own offer and the other party (**option holder**) is given the right to close unilaterally the deal:

- **call options** → give the holder the right to purchase an underlying asset at a specified price (**strike price**)
- **put options** → give the holder the right to sell an underlying asset at a specified price (**strike price**).

**Acceptance**: II-4:201 acceptance → any form of statement or conduct by the offeree is an acceptance if it indicates assent to the offer = **silence** or inactivity does not it itself amount to acceptance.

Time when a contract is **closed** = in commercial practice, a **significant matter arises** → individuals must determine precisely when they become bound to a contract and, as a result, assume their contractual rights and obligations:

- under **English common law** when the acceptance is dispatched by post, the contract is formalized at the moment the acceptance is posted, as per the postal rule
- across numerous **civil law jurisdictions**, the contract is concluded when the acceptance is notified to the offeror (**knowledge rule**).

The **postal rule**, Adams v. Lindsell (1818) → a contract for the sale of wool fleece was at issue. Here is the timeline:

- 9/2: Lindsell wrote to Adams offering to sell him wool fleeces. In the letter, Lindsell required expressed acceptance (by 9/7) in the form of a mailed response
- 9/5: Adams received the offer letter, accepted in writing and quickly mailed the offer back to Lindsell
- 9/8: Lindsell did not receive the written acceptance in the mail and decided to sell the wool to another party
- 9/9: Lindsell received Adam's acceptance, but the wool was already sold Lindsell argued that there was never a valid contract because acceptance was not received by the specific date of September 7th

- ! **in the common law the offeree bears the risk of revocation only for the extra period between the arrival of the offer and the dispatch of the acceptance**.

Holwell Securities Ltd. v Hughes, [1974] 1 WLR 155, [1974] 1 All ER 161

- Hughes (the defendant) granted Holwell (the claimant) a six month option to purchase a property, clarifying that the option had to be exercised "by notice in writing to the intended vendor"
- before the six months expired, Holwell's attorney wrote to Hughes' attorney stating that his client was exercising his option
- Holwell's attorney sent a copy of the letter to Hughes by e-mail, but it was never delivered
- Holwell sued for specific performance of the option → Hughes argued that since they had never received the notice, the claimant had not exercised their option = meanwhile, the period for exercising the option had expired
- according to Holwell, the postal rule applied to this case, thereby arguing that the notice was effectively communicated to the defendant the moment it was posted
- Hughes was successful at the lower court and Holwell appealed
- the appeal was dismissed

→ **ratio** = the **postal rule does not apply** when a notification of **acceptance** has been **agreed** upon. Same idea is true in Italian civil law (art 1326 (4) cc.).

**Freedom of contract**:

- men of full age and competent understanding shall enjoy the highest degree of freedom in contracting and their **contracts**, when entered into **willingly and without coercion**, shall be considered sacred and **upheld by the legal system**
- permitting economic forces to operate without restraint can result in unfairness when there is an imbalance in bargaining power between the parties involved (ex. **consumer contracts**).

How to guarantee **contractual fairness**?

- by requiring the **stronger** party a **mandatory duty** to offer precise and punctual **information**
- by granting the **weaker** party to terminate the contract or within a **cooling-off period**
- through the implementation of **mandatory rules** that offer robust safeguards for the weaker party → employment contracts, residential leases, insurance contracts, consumer credit arrangements and consumer purchases (the so called "**regulated contracts**").

Civil law vs common law:

- within a **civil law** system, the fundamental principles of contract law are typically outlined in the civil codes → well-known **principle of good faith** (in making and carrying out contracts)
- in **common law** jurisdictions, the fundamental principles of contract law are typically established through the accumulated body of **judicial decisions** or **case law** → the **principles of contract law** are established based on **numerous legal precedents**, with a significant number dating back to the nineteenth century = this is why, in common law, a contract is seen as an **arm's length transaction**, and it falls to the Parliament to implement

measures to safeguard a broader spectrum of consumers and other vulnerable contractual parties.

**Good faith** in the civil law:
- § 242 performance according to good faith → the debtor shall render the performance in the way it is necessary to comply with the requirement of good faith settled in usage.
- art. 1104 (as amended in 2016)
  - contracts must **be negotiated**, formed and **performed** in good faith
  - this provision is a matter of public policy

  → **mandatory provision**.

We have to identify the relevance of the principle in three moment: negotiation, formation/conclusion and performance. In all three the parties should follow the good faith.

*5 novembre 2024 – lezione 5*

**Good faith** in the common law:
- **English** common law
  - no general principle of good faith in general law of contract
  - adversarial position of the parties when involved in negotiations and performing their contractual obligations, **except for cooperative (commercial) contracts and fiduciaries** → good faith
  - "the concept of a duty to carry on negotiations in good faith is inherently repugnant to the adversarial position of the parties when involved in negotiations … [and] unworkable in practice. Each party to the negotiations is entitled to pursue his own interest, so long as he avoids making misrepresentations."
  - "some elements of the common law (including aspect of our contract law) already probably correspond – if only approximately – to the general duty of good faith which is acknowledged as a foundation principle of the continental civil codes. It may be that over time some further developments of the common law will ensure that this correspondence is even closer."
- **American** common law
  - significant role played by the requirement of good faith, especially with regard to the performance of a contract
  - the same applies to other common law jurisdictions (as Australia, etc.).

The significance of **good faith** has increased considerably over the 30 years since Lord Ackner expressed that hostile view → this can be seen in three main ways:
- **good faith in EU Law** → a number of EU directives have used the concept of good faith in the legislation to be implemented by Member States; good faith as a distinctive element both in the general test of the (un-)fairness of contract terms, and in the general test of the (un-)fairness of commercial practices by traders to consumers

- **express Terms requiring good faith** → courts have been increasingly willing to give effect to express contract terms requiring the parties to negotiate (or renegotiate) a contract in good faith
- **implied Terms requiring good faith** → Courts have proved increasingly willing to imply terms requiring good faith (see Lagatt, infra)
- **UCC** → section 1-203 = every contract or duty within this Act imposes an obligation of good faith in its performance or enforcement
- **restatement of contracts second** → § 205 Duty of Good Faith and Fair Dealing = every contract imposes upon each party a duty of good faith and fair dealing in its performance and its enforcement.

Sheikh Tahnoon Bin Saeed Bin Shakhboot Al Nehayan v Ioannis Kent (AKA John Kent), [2018] EWHC 333 (Comm) **22 February 2018**: in 2008, two friends (Sheikh Tahnoon and Kent) entered into an oral joint venture and became equal shareholders in Kent's luxury Greek hotel business, which later expanded to include an online travel business. Sheikh Tahnoon provided significant amounts of money to the business, which suffered from numerous cash-flow issues. From April 2012, Sheikh Tahnoon refused to invest any additional funds. The companies were restructured in order for Kent to repay Sheikh Tahnoon. The Parties entered into a promissory note by which Kent agreed to pay Sheikh Tahnoon a sum of €5.4 m in annual instalments. Sheikh Tahnoon claimed the value of the promissory note which remained unpaid.

**Al Nehayan v Kent [2018] EWCH 333**

Kent claimed that his consent to the agreement and the promissory note has been obtained in breach of fiduciary duties and/or a contractual duty of good faith owed to him by Sheikh Tahnoon.

**L.J. LEGATT (since 21 April 2020 Justice of the UK Supreme Court)**

"it is sufficient to identify two forms of furtive or opportunistic conduct which seem to me incompatible with good faith in the circumstances of this case. First, [...] for one party to agree or enter into negotiations to sell his interest or part of his interest in the companies which they jointly owned to a third party covertly and without informing the other beneficial owner. Second, while the parties to the joint venture were generally free to pursue their own interests and did not owe an obligation of loyalty to the other, it would be contrary to the obligation to act in good faith for either party to use his position as a shareholder of the companies to obtain a financial benefit for himself at the expense of the other" (para 176).

Principle of **good faith** in common law:

- **American common law** → the requirement of acting in good faith, particularly in relation to carrying out a contract, holds a substantial importance (Section 1-203 UCC; § 205 Restatement of Contracts Second)
- **English common law**
  - there has been no room for a broad overarching principle of good faith within the general realm of contract law = this is due to the **strict adversarial stance** taken by parties during negotiations and in fulfilling their contractual duties

- recent legal decisions demonstrate a **more flexible** and evolving perspective that is receptive to the concept of good faith, particularly in **cooperative** or **commercial contracts** and fiduciary relationships (Wood v Capita Insurance Services Ltd [2017] UKSC; Walford v Miles [1992]).

**Interpretation**:

- the vast majority of parties **cannot envision** every conceivable **circumstance** that might arise during the duration of the **contract**
- the mere interpretation of the **parties' agreement** is seldom sufficient to determine the **obligations** that the parties must fulfill according to the contract
- parties might have varying **interpretations** of the precise significance of the **language** they employed.

**Supplementation**:

- in many instances, it is **not practical** to engage in **negotiations** and draft contracts that attempt to anticipate every conceivable contingency
- **legal systems** offer remedies for addressing contracts that **lack completeness**.

**Construing a contract** = opposing premises:

- **intention** → intention per se is the only important and effective thing = principle of **self-determination** → **subjective** theory
  - interpretation involves determining the meaning that the parties intended to convey through their statements
  - priority should be given to recognizing the presence of a shared intention
- **expression** → any promise binds the promisor, whether or not intended by her/him = principle of **reliance** on someone else's promise legal certainty → **objective** theory
  - the external expression of the parties' intention should take precedence
  - the interpretation of the words used would be based on how a reasonable person would understand them
- **subjective test** → it aims at seeking out the parties' subjective understandings and is thus based solely on the inner intention of their communications or conduct
- **objective test** → it aims at seeking out the objective assessment of an external, detached observer and is thus based solely on the outspoken meaning of the parties' communications or conduct.

**Udall v Hill Ltd (1972) AC 441, 502** → Hill (feeding stuff compounder) vs. Udall (mink breeder)

- contract for the supply of an animal foodstuff
- the contract described the basic expected "nutrition facts" of that foodstuff
- "ingredients of the foodstuff are to be of fair average quality of the season, expected to analyze not less than 70% protein, not more than 12% fat and not more than 4% salt"
- an ingredient of the supplied foodstuff contained a toxic agent which, though not unfit to animals in general, caused thousands of Udall's minks to die
- Udall sued Hill for breach of contract → Udall's claim for damages was dismissed
- what the seller promised is determined by ascertaining what his words and conduct would have led the buyer reasonably to believe that he was promising. That is what is meant in the

> English law of contract by the common intention of the parties. The test is impersonal. It does not depend upon what the seller himself thought he was promising, if the words and conduct by which he communicated his intention to the buyer would have led a reasonable man in the position of the buyer to a different belief as to the promise; nor does it depend upon the actual belief of the buyer himself as to what the seller's promise was, unless that belief would have been shared by a reasonable man in the position of the buyer.

Civil law vs common law jurisdiction:

- **civil law jurisdiction** → are generally keen to strike a balance between the objective and the subjective test
  → there is a desire to find a middle ground between the objective and subjective tests
- **common law jurisdiction** → are generally keen to acknowledge solely an objective test, albeit variously moulded
  - "interpretation is the ascertainment of the meaning which the document would convey to a reasonable person **having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract**"
  - "the court's task is to ascertain **the objective meaning of the language which the parties have chosen to express their agreement**"
  - "if detailed semantic and syntactical analysis of words in a commercial contract is going to lead to a conclusion that flouts business commonsense, **it must be made to yield to business commonsense**"

  → there is a tendency to recognize only an objective test, even though it may be adapted in various ways.

Interpretation in common law jurisdiction:

- the law **excludes from admissible background the previous negotiations of the parties and their declarations of subjective intent**
- interpretation is the ascertainment of the meaning which the document would convey to a reasonable person **having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract**
- the ascertainment of the meaning which the document would covey to a **reasonable person having all the background knowledge** which would reasonably have been available to the parties
- the court's task is **to ascertain the objective meaning of the language** which the parties have chosen to express their agreement
- if detailed semantic and syntactical analysis of words in a commercial contract is going to lead to a conclusion that flouts business commonsense, it must be made to yield to **business commonsense**.

Civil law:

- **§ 133 interpretation of a promise** → in interpreting a promise, the effective intent shall be investigated, whilst the literary meaning of its expression is not binding

- **art. 1188 (as amended in 2016)**
  - a contract is to be interpreted according to the common intention of the parties rather than stopping at the literal meaning of its terms
  - where this intention cannot be discerned, a contract is to be interpreted in the sense which a reasonable person placed in the same situation would give to it.

*6 novembre 2024 – lezione 6*

**PICC**:

- art. 4.1 → a contract shall be interpreted according to the common intention of the parties = if such an intention cannot be established, the contract shall be interpreted according to the meaning that reasonable persons of the same kind as the parties would give to it in the same circumstances
- art. 4.2 → he statements and other conduct of a party shall be interpreted according to the party's intention if the other party knew or could not have been unaware of that intention = if the preceding paragraph is not applicable, such statements and other conduct shall be interpreted according to the meaning that a reasonable person of the same kind as the other party would give to it in the same circumstance.

→ we can saw how the PICC follows the **civil law approach**, in fact the drafters were formed in civil law countries and they believed that this was the most appropriate solution.

**Express terms** → those expressly contained in the parties' agreement.

**Implied terms** in the civil law:

- the parties' will cannot generally set out all contractual rights and obligations under the contract
- parties only discuss those elements of the contract which they deem essential (e.g. price and time of delivery)
- often, it is not established what will happen if one party does not perform the contract

→ most contract law consists in **default rules** (or **rules of thumb**), which are per se applicable, have the parties not agreed otherwise. Contract law provided for by civil and commercial codes (and additional statutes):

- **general part** → one body of norms which are applicable to any contract, notwithstanding its type
- **special part** → additional sets of norms particularly applicable to single and most relevant types of contract = they consist quite often in default rules which serve as gap-fillers of contractual agreements → **terms implied by law**
- there are some default rules that applies only if the **parties expressively agree on them**
- **art. 1510, place of delivery** → lacking an agreement or usage to the contrary, a chattel shall be delivered at the place where it was located at the time of its sale, if the party knew of that place, or otherwise at the place where the seller had his domicile or where her/his enterprise was headquartered.

**Common law** jurisdiction = classification of **special contracts** plays a **minor role** (if any) → implied terms are only rarely provided for by statutes and mostly desumed through proper interpretation of the parties' agreement. The **contra proferentem rule**:

- this principle means that if there is uncertainty in a written contract, it must be interpreted against the person who drafted it
- the rule cannot be found in national codes only, but it is also laid down in **European Directive 93/13 on Unfair Terms in Consumer Contracts** → art. 5 (2), in the case of contracts where all or certain terms offered to the consumers are in writing, these terms must always be drafted in plain, intelligible language = **where there is doubt about the meaning of a term, the interpretation most favorable to the consumer shall prevail**.

**Supplementation**: merely addressing **ambiguities** in the explicit terms agreed upon by the parties is **inadequate** → in certain situations, it might be essential to **supplement** the contract when an issue arises that the parties did not account for in their **agreement**, or because the parties did **not foresee the issue** = either because the parties anticipated it but neglected to address it → furthermore, in numerous cases, the process of bargaining over specific contract terms can incur significant expenses.

Implied terms in civil law → some traditional **special contracts**:

- **sale** (emptio-venditio)
- **lease** (locatio-conductio)
- **loan** (mutuum)
- **deposit** (depositum).

A peculiar case → **constitution and civil law Englaro case**:

- Eluana Englaro was born on 25 November 1970 and entered a persistent vegetative state on 18 January 1992, due to a car accident
- afterwards, Eluana was nourished by medical staff though a feeding tube, but her father wanted it to put an end to her life
- Eluana's father claimed that, prior to the accident, she had visited a friend laying in a coma and told him that, had she found in the same situation, her will was not to kept artificially alive

→ Italian constitution:

- art. 2 = duty to solidarity
- art. 13 = personal liberty is inviolable
- art. 32 = the Republic safeguards health as a fundamental right of the individual and as a collective interest.

Corte di Cassazione, I section 16 October 2007, n° 21748: the court may authorize the legal guardian to interrupt medical treatments (hydration and artificial feeding) that keep an incapacitated person lying in a persistent vegetative state artificially alive, provided that: a) the condition of the vegetative state is ascertained as irreversible, according to recognized scientific parameters, b) the application reflects the patient's will, drawn from his/her previous statements or by her/his personality, lifestyle or beliefs → on 2 February 2009 Eluana was moved to a private nursing home in Udine, Friuli, and feeding was discontinued.

Supplementation by **default rules** = default rules (régles supplétives, dispositives Recht, aanvulled recht) offer **standard solutions** for issues commonly encountered in specific categories of contracts:

- **civil law jurisdiction** → gaps in the contractual agreement will be filled by referring to legal rules and the precedents established by the courts
- **common law jurisdiction** → gaps in contractual agreements are filled by recourse to **terms implied by law**.

*11 novembre 2024 – lezione 7*

**Ad hoc** gap filling = the gap filled with terms that are essential for the **functioning** of the **contract** and would have been mutually accepted by the **parties** had they considered them:

- in common law jurisdictions, this method of addressing gaps is accomplished through the use of **implied-in-fact terms**
- under the civil law jurisdictions, courts will make reference to what is called **constructive interpretation** (interpretation créatrice; ergänzende Vertragsauslegung).

**Implied terms** in common law:

- obvious, regular and **customary terms**
- terms necessary to give the contract **business efficacy**
- terms implied at **common law**
- terms implied by **statute**.

**Contract drafting** in the common law:

- absence of a principle of special contracts and limited role of implied terms at statutes
- absence of general principles of good faith (however consider recent trends) and co-operation between the contracting parties
- limited role for the court in case of serious supervening circumstances
- parties tend to draft their agreement in as much detail as possible, to **limit the scope of judicial interpretation**
- the content of the bargain shall be set out explicitly as far as possible, **in the interests of certainty**
- parties shall conduct **due diligence exercises and allocate risks as far as possible in the contract itself**.

Drafting international (commercial) contracts → **boilerplate clauses**:

- standardized clauses, generally put at the end of contracts, which govern the way in which they operate (e.g. notice procedures, amendment procedures, interpretation issues, dispute resolution mechanisms, etc.)
- that way, parties must not rely on the general system of law applicable to the contract they have concluded
- therefore, that contract is autonomous and severed from any single jurisdiction and, thus, truly international.

# Invalidity of contracts

**Contractual** invalidity = voidness and avoidance → a contract is invalid when it is impacted by a **significant flaw**, which impairs its legal enforceability:

- **avoidance/rescission** → invalidity is meant to protect private interests (e.g., contract concluded by a minor)
- **voidness/nullity** → invalidity is meant to protect general/public interests (e.g., contract contrary to mandatory rules) = the contract is invalid and is **never capable** of producing any **legal effect**.


Effects of an invalid contract:

- **avoidance** → the contract is invalid but it is capable of producing its legal effects till the moment when the interested parties present a **claim** in court in order to avoid it.


**Validation** of an invalid contract:

- **nullity** → null contracts cannot be validated by anyone (invalidity is meant to protect general/public interests)
- **avoidance** → avoidable contracts may be validated by the party entitled to claim the avoidance (invalidity is meant to protect private interests).

General grounds of voidness/nullity may be categorised as follows:

- **defectiveness of the agreement between the parties**
  - it is merely apparent, lacking the parties' actual consent
  - it does not meet the formality requirement, if any (want of form)
  - its subject-matter does not exist, or is not possible
- **illegality and immorality** (illicit contracts)
  - infringement of a mandatory rule, which prohibits both parties from entering into a contract
  - the agreement contravenes public policy (ordre publique), including morality (contra bonos mores)
  - the judge's ruling regarding the consequences of violating the statutory rule 'depends on considerations of **public policy** in the light of the mischief which the statute is designed to **prevent**, its language, scope and **purpose**, the consequences to the innocent party and any other relevant consideration.

Lack or impossibility of the **subject-matter**: contracts whose specific performance is impossible are generally not enforceable in **civil law jurisdictions** → **common law jurisdictions** tend to enforce such contracts = if a party has undertaken to do something which is physically impossible, it is bound to pay damages for breach of contract. Art. 1163 (as amended in 2016):

- an obligation has as its subject-matter a present or future act of performance
- the latter must be **possible and determined or capable of being determined**.

Mc Rae v Commonwealth Disposals Commission[1951] HCA 79: the owner of a tanker wrecked on the Jourmand Reef, near Samarai, and containing oil, sold it. The buyers went to Samarai and found that there was no such place as a Jourmand Reef. Later on, it became clear that the seller incurred in a 'reckless and irresponsible' mistake, in thinking that it had a tanker to sell (it had relied on mere gossip). Nonetheless, **the High Court of Australia sentenced the seller to compensate damages for breach of contract**.

The **view of the common law** is taking root in **civil law jurisdictions** as well → it has been adopted by the German BGB after its reform of 2001-2002 = § 311a Hurdle to perform at the time the contract is concluded:

- a contract is not devoided of its effects for the fact that one of the parties' performance is impossible already at the time when the contract has been concluded
- the other party can claim (expectation) damages or reimboursement of expenses [...] general **grounds** of **avoidance** may be categorised as follows:
- **incapacity of one of the contracting parties**
- **vitiating factors**
  - mistake
  - deceit or fraud
  - duress.

**Mistake**:

- **civil law** jurisdictions → tend to favour an **intention approach** to contract, which leaves more room for its avoidance based on a vitiating factor, particularly a mistake = the mistaken party can claim avoidance of contract in case
  - the mistake is **material** (or **essential**) → it must not be based on ancillary terms, but concern a main point of the contract
  - the **other party knew of the mistake, or could have known of it**, had she/he acted in good faith
- **common law** jurisdictions → tend to follow an **expression approach** to contract, which immunizes it from **unilateral** mistakes incurred by each party, unless they have been caused by a misrepresentation
  - a unilateral mistake does not affect the validity of the contract, however fundamental to the mistaken party's decision to **enter into the contract**
  - an equitable remedy of avoidance (rescission) of the contract is granted in case the mistake was created by a **misrepresentation** made by the other party, or her/his agent, or a third party whose misrepretation the other party had knowledge of.

Spice Girls LTD v Aprilia World service BV:

- **March 4, 1998** → heads of agreement were reached between SGL and Aprilia for the latter to sponsor the Spice Girls tour of Europe and, on a more limited basis, the tour of the United States
- **May 6, 1998** → Aprilia agreed to pay or provide a sponsorship fee, guaranteed royalty fee and a royalty on each Spice Sonic scooter sold = promotional material featuring the Spice Girls and the scooters was approved by SGL
- **September 1998** → Ms Alliwell told the others that she wanted to leave the group
- AWS informed SGL that it did not consider the departure of Ms Halliwell to constitute a breach of contract = nevertheless AWS refused to make any further payment in favour of SGL
- Ms Alliwell disclosed that on both 3rd and 9th March 1998 she had informed the other four members of the Spice Girls that she intended to leave
- a fax of 30th March 1998 contained express representations by SGL as to the commitment of each of the Spice Girls to the future implementation of all the terms of the heads of agreement as subsequently incorporated into the formal agreement
- the Spice Girls participated in a commercial shoot on 4th May 1998, which gave rise to a continuing representation by conduct that Aprilia had no reasonable ground to believe that any of the Spice Girls had an existing declared intention to leave
- **May 6, 1998** → the final Agreement has been concluded.

**Is SGL liable to AWS under s.2(1) Misrepresentation Act 1967?**

- ".. If A with a view to inducing B to enter into a contract makes a representation as to a material fact, then if at a later date and before the contract is actually entered into, owing to a change of circumstances, the representation then made would to the knowledge of A be untrue and B subsequently enters into the contract in ignorance of that change of circumstances and relying upon that representation, A cannot hold B to the bargain"
- ".. inducement and reliance may be inferred from the purpose of the representor, the nature of the statement and the fact that the contract was entered into"
- it is sufficient that the misrepresentation is a **material inducement**. "...I think that if it is proved that the defendants with a view to induce the plaintiff to enter into a contract made a statement to the plaintiff of such a nature as would be likely to induce a person to enter into a contract, it is a fair inference of fact that he was induced to do so by the statement...".

**Judgment delivered by the Court of Appeal**:

- The Court of Appeal concluded that the representations, express or implied, in both the fax of 30th March 1998 and participation in the commercial shoot on 4th May 1998 were material inducements to AWS to enter into the Agreement on 6th May 1998. It is inconceivable that AWS would have entered into those commitments had it been told of Ms Halliwell's declared intention to leave in September 1998. It might have entered into some other agreement with a view to cutting its losses.
- **SGL is liable to AWS under s.2(1) Misrepresentation Act 1967.2**.

*13 novembre 2024 – lezione 9*

**Deceit** (fraud) = occurs when one of the contracting parties is intentionally induced into a mistake as to the prospective contract:

- **fraudulent misrepresentations** → both in civil and common law jurisdictions
- **silence** (non-disclosure of an information) → solely in (most) civil law jurisdictions (and as a recent development).

If correctly informed, the mistaken party would not have concluded the contract (**dolus causam dans**) → **claim for avoidance** = contract is not avoidable in case of laudatory puffery that no reasonable man would have taken literally (dolus bonus).

If correctly informed, the mistaken party would have concluded the contract, although on better terms (**dolus incidens**) → **claim for damages** = damages are to be assessed along the better terms which the mistaken party would have bargained, if correctly informed (expectation damages).

**Avoidance for deceit** (fraud) = is granted when the fraud is committed by the other contracting party (or her/his agent) → if it is committed by a **third party**, avoidance is granted when the other **contracting party knew** or must have known it.

**Duress** → consists in **threats of a harm** to a would-be party's or her/his family's life and limb, honor or property or to a would-be party's **economic interests** (economic duress) which do induce that would-be party to **enter into a contract** (in order to avert the danger thus faced). Does the legitimate threat of something that one is entitled to do amount to duress? → **art. 1141** (as amended in 2016) = threat of legal action does **not constitute duress**, except where the legal process is deflected from its own purpose or where it is invoked or exercised in order to obtain manifestly excessive advantage. In most civil law jurisdictions, avoidance is granted not only when the threats are made by the other contracting party (or her/his agent), but also when they are made by a **third party, even if the other contracting party was in good faith**.

# Breach of contract

**Breach of contract**:

- **anticipatory** breach of contract → one party announces its intention not to fulfill the contract before the performance becomes due
- **actual** breach of contract → it happens either on the scheduled performance date or while the performance is in progress.

**Remedies** = contractual expectations are satisfied when both parties fulfill their respective commitments → a remedy is a **legal directive** aimed at protecting an individual's rights or rectifying the illegal actions of another party:

- **specific performance** → in the event of non-performance by a party, a court of law may compel them to fulfill their obligation
- **termination of contract** → the non-breaching party can request contract termination, decline to fulfill its obligations, or seek a refund of any payments made

- **damages** → a monetary compensation that can restore the injured party to the same level of benefit or utility as if the contract had been executed correctly

→ the **availability** of remedies for breach of contract depends on **rely on how a legal system defines the role of contract law**:

- **moral approach** to contract law → promises must be kept (pacta sunt servanda) = in the event of non-fulfillment, the legal system initially enforces the debtor's obligation as a corrective measure
- **economic approach** to contract law → rather than carrying out the performance, the debtor may choose to compensate the other party to restore their financial position as if the contract had been correctly executed
- **civil law** approach → **enforcing specific performance is a typical remedy** = only in rare cases is it prohibited
  - **impossibility to perform** → regardless of whether it is caused by the debtor's fault or not
  - **disproportionate costs** → performance remains feasible but would result in the debtor incurring excessive effort or costs
  - **contracts involving personal services** → not only could specific performance infringe upon the debtor's personal freedom, but if compelled, the debtor might not perform to the best of their capabilities
- **common law** approach → the general remedy is providing **monetary compensation for damages**, with specific performance being a rare occurrence
  - **efficient breach of contract** → a party should have the option to terminate the contract and provide compensation for damages if it proves to be a more economically efficient choice than fulfilling the contract
  - in common law jurisdictions, courts may issue a specific performance order when the innocent party's claim for damages **fails to adequately address its interests**
  - damages are considered "**inadequate**" when the debtor pledged to provide a distinctive asset, one that is exceptionally rare or possesses sentimental value that is **challenging to quantify in monetary terms**.

**Art. 13, DIR. 2019/771/UE** → "In the event of a lack of conformity, the consumer shall be entitled to have the goods brought into conformity or to receive a proportionate reduction in the price, or to terminate the contract, under the conditions set out in this Article".

**Art. 45 CISG** → if the seller fails to perform any of his obligations under the contract or this Convention, the buyer may:

- exercise the rights provided in articles 46 to 52
- claim damages as provided in articles 74 to 77
- the buyer is not deprived of any right he may have to claim damages by exercising his right to other remedies.

**Termination** = the innocent party might opt for contract termination → if this remedy is permissible under the law, neither party is obligated to perform, and **if performance has**

**already occurred, it must be returned by the recipient** → **fundamental** or **material** breach of contract:

- **art. 25 CISG** → the harm experienced by the innocent party, as well as whether this harm ”substantially" denies that party of what they were “entitled to expect under the contract”
- **common law** approach → to make a distinction between substantial and breaches which are not so significant, English law frequently depends on the distinction between **warranties** and **conditions**
  - **conditions** → major terms of the contract = when violated, the innocent party has the right to terminate the contract (and seek damages too)
  - **warranties** → minor terms of the contract = if violated, the innocent party is entitled to seek damages but is not allowed to terminate the contract
  - **innominate (intermediate) terms** → the criteria are not based on whether the terms are considered major or minor = instead, if the breach of those terms results in the other party being completely deprived of the contract's benefits, termination is permitted → otherwise, only damages can be sought
- under French law, the injured party has the right to unilaterally terminate the contract if the other party’s non-performance is **suffissament grave**
- **art. 6:265 BW** affirms that a party cannot ask for contract termination if‘the non-performance, considered its peculiar nature or trivial significance, does **not justify the remedy**
- German law **doesn't necessitate** a fundamental or material breach → the standard principle is that if the debtor didn't carry out the performance as per the contract, the injured party can terminate the contract only when it meets certain conditions = the innocent party **has fixed, to no avail, a reasonable period for performance or cure**.

Agreed **rights of termination** = termination can happen regardless of a significant breach in certain situations, related to a specific agreement made by the parties:

- **explicit dissolution clause** → the parties entering into a contract can expressly stipulate that the contract will be terminated if a particular obligation is not fulfilled = this provision enables the contractual parties to assign significant importance (regarding the termination of the contract) to an obligation, which otherwise might be considered of minor significance
- **time essential for one of the parties** → the agreement is terminated if the agreed-upon time for performance has been expressly defined as essential for the benefit of the other party.

*18 novembre 2024 – lezione 10*

In case of:

- **non-performance**
- **defective performance**
- **delay in performance**

→ the creditor might be able to seek **compensation** for **damages** = the injured party should be restored to a financial position as close as possible to what it would have been if the contract had been executed correctly → the so called **positive interest**. Claim for damages:

- **civil law approach** → if the debtor is capable and willing to rectify the breach, there should be **no contract termination** or a **demand for damages** instead of performance = the standard procedure involves the injured party setting a reasonable timeframe for the debtor to **either fulfill the contract or rectify a defective performance**
- **common law approach** → the mere occurrence of nonperformance or breach is enough on its own to **initiate a claim** for compensation = the debtor will be held responsible **without exception** if the promised outcome is not achieved.

**Obligations de Moyens**: the debtor simply committed to taking all the required actions that a rational individual facing similar circumstances would take in order to accomplish their objective → the injured party needs to demonstrate that the other party didn't exercise the level of care that a reasonable person in a similar situation would have taken.

**Obligations de Résultat**: the debtor will be responsible for paying damages without exception, unless they can **prove** that **execution** was **prevented by a force majeure event** → "**force majeure**" = circumstances outside the debtor's control, which were not reasonably foreseeable when the contract was concluded, and unavoidable by reasonable measures.

Doctrine of **frustration** = contract comes to an end under the following circumstances:

- the debtor is unable to perform due to factors beyond their control, rendering it **impossible**
- if unforeseen circumstances arise that significantly increase the **difficulty** of performance and neither party assumed the associated risks.

The **common law approach**:

- the mere occurrence of nonperformance or breach is enough on its own to initiate a **claim for compensation**
- the debtor will be held **responsible without exception** if the promised outcome is not achieved.

The **civil law approach**:

- if the debtor is capable and willing to rectify the breach, there should be **no contract termination or a demand for damages instead of performance**
- the standard procedure involves the injured party setting a **reasonable timeframe** for the debtor to either fulfill the contract or rectify a defective performance.

→ a debtor will incur liability for damages resulting from a breach of contract only if the breach is **attributable** or **imputable** to him. Compensation encompasses and covers:

- the **damages incurred by the injured party**
- the **gain it has been denied**

→ general principle = **complete reimbursement** for the damages resulting from a contract breach. When one party experiences a loss due to a contract breach, she/he should, to the extent that monetary compensation can accomplish it, be restored to the same financial position, in terms of damages, as if the contract had been fulfilled → the so called **expectation damages**.

**Foreseeability**: when granting damages, the courts provide compensation to the injured party solely for the losses that were **foreseeable** or within the contemplation of the **parties** when the **contract** was **concluded** → foreseeability does not necessitate actual foresight but only a reasonable **expectation** of the event or outcome. Two types of injuries are deemed to be foreseeable:

- injuries which will flow naturally from the **breach** in the **ordinary course** of events
- injuries which arise from the aggrieved **party special needs** or circumstances of which the other contracting party has knowledge or reason to know.

Duty to **mitigate damages** = a cardinal rule of contract damages is that the aggrieved party cannot recover those losses which the party could have avoided by **reasonable effort** and without undue expense by virtue of opportunities that the party would not have had but for the breach:

- consequences of failure to **comply with the duty** → the gains that the aggrieved party could have made by reasonable effort are deducted from the amount that it could otherwise recover
- what is meant by **reasonable effort**?

> • X enters into a contract with Y, a licensed nurse, under the terms of which Y will live with and take care of X's aged father for a three month period while X goes on vacation. Y is to be paid 4.000 Euro for his services. X repudiates the contract before Y performs any services or is paid any money. In an attempt to mitigate damages, Y places an advertisement in two local newspapers indicating that his private nursing services are available. No one responds to his ad; and consequently Y is unemployed for the entire three month period. Y sues for 4.000 Euro plus the cost of advertisements. X argues that Y did not fulfill his duty to mitigate damages = Y may recover the entire amount
>
> → only a reasonable effort to mitigate damages is required. The doctrine does not require that his efforts be successful

→ the profits that the injured party could have earned through reasonable efforts are **subtracted** from the amount they could otherwise claim as compensation.

**DCFR**:

- **foreseeability** → the debtor in an obligation which arises from a contract or other juridical act is liable only for loss which the debtor foresaw or could reasonably be expected to have foreseen at the time when the obligation was incurred as a likely result of the non-performance, unless the non-performance was intentional, reckless or grossly negligent
- **reduction of loss** → the debtor is not liable for loss suffered by the creditor to the extent that the creditor could have reduced the loss by taking reasonable steps = the creditor is entitled to recover any expenses reasonably incurred in attempting to reduce the loss.

**Liquidated damages clauses**: parties to a contract agree, as one of the terms of their agreement, that, in the event of breach, the culpable party should pay a **specified amount to the injured party**:

- in contrast to the more usual post-breach approaches to assessing damages, a liquidated damages provision **anticipates a breach**, setting the amount to be recovered before any party fails in his obligation under the contract
- because the actual damages which will result from the potential breach are often unknowable at the time of contracting, l.d. represent the **parties pre-estimate of the extent of probable damages**
- often this pre-estimate will turn out to be an inaccurate forecast of the harm actually caused by the breach

→ are contracting parties free to determine the **amount of liquidated damages**?

**Liquidated damages clauses** = parties to a contract agree, as one of the terms of their agreement, that, in the event of breach, the culpable party should pay a specified amount to the injured party → **functions**:

- convenient method of determining the **amount** to be paid in the **event of breach** (good faith pre-estimate of the probable actual damages)
- coercing a party to perform its **obligation** (liquidated sum will generally provide for a liquidated damages which is in excess of the probable actual damages)
- diminish the **amount of loss** to be borne by a party in breach (the sum will be less than the probable amount of damages).

*19 novembre 2024 – lezione 11*

**Civil law approach**:

- clauses that do not involve the pre-estimation of damages are legally enforceable
- in civil law legal systems, there is often no clear distinction between **penalty** and **liquidated damages** clauses

→ in civil law jurisdictions, it's common for the judge to have the authority to **reduce the amount** determined by the parties if it is clearly excessive or in cases of partial fulfillment of the contractual obligation.

**Common law approach**:

- liquidated damages clauses are enforceable because their purpose is to estimate in advance the likely extent of damages
- penalty clauses **are not enforceable**, and their primary purpose is to pressure the defaulting party into fulfilling their obligation.

The essence of a penalty is a payment of money stipulated **in terrorem** of the offending party → the essence of liquidated damages is a genuine covenanted pre-estimate of damage.

The **Dunlop test** (common law approach) = Dunlop v New Garage (1915) → principles that may assist the court in its task:

- the sum will be held to be a penalty clause if the sum stipulated for is extravagant and unconscionable in amount in comparison with the greatest loss that could conceivably be proved to have followed from the breach
- the sum will be a penalty if the breach consists only in paying a sum of money, the sum stipulated being greater than the sum which ought to have been paid

- there is a presumption that a clause is penal when a single lump sum is payable on the occurrence of one or more or all of several events, the events occasioning varying degrees of loss
- if the consequences of breach are difficult to estimate in financial terms this, far from being an obstacle to the validity of the clause, will point in favor of upholding it, the courts tasking the view that it is better for the parties themselves to estimate the damages that will result.

# Tort law

**Tort law**: the area covered by tort law covers situations where a victim **suffers a loss** - relevant in economic terms – and wants someone else to **compensate** for that loss:

- tort law consists of **remedies** granted to the injured persons by those who have caused the harm
- in basic private law terms torts are considered among the **sources of legal obligations**
- the fundamental content of the relationship between the tortfeasor (wrongdoer) and the injured party (victim) is the duty to provide **relief for the harm suffered by the latter**.

**Common pattern**:

- before the damage actually occurs, the parties are not linked by any formal legal relationship (e.g. of a contractual nature)
- tort liability is commonly referred to as **non-contractual liability**, which distinguishes it from liability arising from non-performance (breach) of previously defined contractual duties/obligations
- an act by one person linked to a harm suffered by another person.

The starting point of any **tort system** is that the victims themselves **bear the loss**, unless there is a good reason to allocate these costs to another natural or legal person → traditionally, three main functions:

- **compensation** (distributive justice)
- **sanction/reaction** of public authorities (retributive justice)
- **deterrence/prevention** of future damages (efficiency).

**Distributive justice** requires that the allocation of goods among people is organized and secured in accordance with the relative merits of the parties → it would be **unjust** not to ensure the restoration of an original allocation of wealth in favor of a party who has been deprived of resources after the damage has occurred (**ex post approach**).

**Retributive justice** requires that those who commit wrongful acts should be **punished proportionally**, even if no other good would result from punishing them → the concept was developed in relation to serious crimes, but it can also be applied to civil wrongs = the obligation to make good the damage caused is the **proportionate reaction** of the legal system to the tort committed by the tortfeasor (**ex post approach**).

**Deterrence**, it is possible to think of legal rules as instruments to guide the behavior of individuals → by imposing liability, tort law seeks to influence the conduct of **rational agents** =

it is efficient for the overall system to **prevent** the occurrence of accidents by imposing the expected cost of damage on potential tortfeasors (**ex-ante approach**).
The debate on the rationale of tort law is not merely theoretical, but it is intimately linked to the fundamental regulatory choices that each legal system implements in order to concretely define the scope and conditions for the **assessment** of **liability** and **related duties**:

- **retributive justice** → if the goal of tort law is to punish the tortfeasor, a basic principle of the system should be the requirement of fault (nullum crimen, nulla poena sine culpa)
- **distributive justice/deterrence** → if the goal of tort law is to compensate the victim or to create incentives to avoid accidents, then liability may operate despite the absence of any subjective element of intent or negligence underpinning the injurer's conduct.

Is any kind of interest worthy of protection by the law of torts?:

- **general clause** → the **French Code Civil** mandates the presence of **dommage** (harm) but does not necessitate the violation of a **protected interest** = it appears to lack a foundation for distinguishing between **economic losses** resulting from the violation of bodily integrity and **tangible property** on one side, and purely economic losses on the other
- according to the English common law perspective, an individual actor is not required to prevent every form of loss experienced by third parties → the obligation is to refrain from causing **specific types of harm**, thereby incorporating the question of the extent of protection within the concept of the **duty to take care**
- **specific interests** → according to **German law**, the liability for negligence is confined to the violation of protected interests = purely financial interests and intangible personality interests such as honor, dignity, and privacy may only be safeguarded.

Grounds for liability:

- **fault** → cases in which a tortfeasor has acted wrongfully and must compensate for the damage that resulted from the wrongful behavior (liability for one's own fault)
- **vicarious liability** → cases in which someone is liable for the damage that was wrongfully caused by another tortfeasor (liability for a tortfeasor's fault)
- **strict liability** → cases in which a tortfeasor is liable for the damage caused by an animal or by an object for which the tortfeasor is responsible (strict liability).

Subjective elements - fault:

- **intentional behavior** → the harmful event which results from the act or omission is foreseen and **desired** by the agent as a consequence of his own act or omission
- **negligence** → the event, although foreseeable, is not desired by the agent and occurs as a result of carelessness, imprudence, lack of skill or failure to comply with laws, regulations, orders or regulations = in common law is typically used the **Hand Formula**

→ what are the criteria relevant for assessing fault?

- **breach of a duty of care** (common law tradition = case made law)
- **statutory interpretation** (civil law tradition).

*20 novembre 2024 – lezione 12*

The civil law approach to torts differs from the common law approach in that the **basic rules** of tort liability are set out in statute and that these rules appear to be **relatively uniform** → **liability for one's own fault** = civil law approach:

- there must be an act or an omission which unlawfully violates a legally protected interest
- the unlawful act or omission must have caused damage of a kind that qualifies for compensation.

**Vicarious liability** → cases where someone is liable for damage wrongfully caused by a different tortfeasor = basic elements:

- relationship between the **tortfeasor** and the **vicariously liable person**
- connection between that **relationship** and the **tort** committed.

**Strict liability**: sometimes the victim suffers harm **without anyone deserving blame for it** → normally, that victim has to bear the damage personally, but sometimes there are reasons to shift the damage from the victim who suffered it in the first place to someone else = movement towards strict liability:

- rise of accidents in the course of **industrialization**
- **fairness**
- possibility to **recover damages**
- prevention of **damages**
- **economic efficiency**.

The **Italian Civil Code** provides for special rules in certain cases, introducing forms of tort based on the principle of risk and strict liability, most notably:

- **art. 2050 c.c.** → liability for the exercise of dangerous activities
- **art. 2052 c.c.** → liability for damage caused by animals
- **art. 2054 c.c.** → liability arising from circulation of vehicles.

**Strict liability** = common law:

- **case law** → in UK common law, strict liability cases are rare
- **statutory law** → in UK statutory law, cases of strict liability are relatively common.

*25 novembre 2024 – lezione 13*

**Objective elements**:

- **injurer** → activity/behavior (intentional or negligent)
  - in tort law, legal effects are associated with conducts which are **conscionably** and **voluntarily** carried out by a person
  - **art. 2046 c.c.** → he who caused a damage is not liable, when he acted unconscionably and involuntarily, unless his unconscionableness and involuntarily were due to his own negligence
- **causation** → linking the event triggering the liability of the defendant with the damage suffered by the victim = two main approaches to the problem

- **"but for" causation** (conditio sine qua non) → it requires that the damage would not have occurred in the absence of a certain activity or event = but by applying this parameter, the scope of the causal chain could be extended almost ad infinitum
- **"adequate cause theory"** → the conduct of the injurer is adequate cause of the damage if it is generally likely to produce a result such as that which occurred or significantly increased the likelihood of that result occurring (case of the two ships)
- the conduct of the injurer is generally likely and probable to produce a given damages such as the result that took place → the second idea is that the court indagate if the conduct adopted by the tortfeasor could increase the negative result suffered by the victim.

- **damage** → compensable losses relevant in tort liability do not cover any kind of harm
  - **compensable damage** = "firm A deliberately avoids installing the technical measures prescribed by law in order to control pollution. This creates an emission of toxic pollutants which spoils the field of a neighboring farm"
  - **non-compensable damage** = "Mr. Johns is very idle and postpones the renovation that his property would need. This creates protests by his neighbors who complain that his spoiled building ruins the decorum, and the public view, of their street

  → the understanding of the legal notion of **damages** gives us the idea of the exact scope of **tort liability**.

Scope of tort liability = different tort law **systems**:

- **rules-based (typical)** approach to tort law → legal systems characterized by a set of causes of action defined by law (e.g. common law tradition/German system)
  - the limitation of the legal interests that can be protected by tort law is set ex ante by the law
- **principle-based (atypical)** approach to tort law → formulation of an abstract rule providing a comprehensive discipline of tort liability (e.g. French/Italian systems)
  - the limitation of the legal interests results from the interpretation of the general clause introducing tort liability by the courts (i.e., case-law).

Notwithstanding the differences in the approach to tort law, all Western legal systems allow for compensation for (e.g.):

- physical injuries
- personality and privacy rights
- damage to property

→ **absolute rights** in the civil law tradition.

Scope of **protection** = compensable damages → **tort liability in Italy has been progressively extended** over the last half century in a number of ways, including the award of damages for economic loss arising from relative rights.

# Unjustified enrichment

What is the **law of restitution** about? → the law of restitution is concerned with the award of a generic group of remedies which arise by operation of law and which have one common function, namely, to deprive the defendant of a gain rather than to compensate the claimant for loss suffered. **Restitutionary remedies** = the aim of these remedies is to reverse the defendant's gain → this has been called the restitution interest.

**Personal restitutionary remedies**: to restore to the claimant the value of a benefit which the defendant has received → they are said to operate **in personam** = the defendant is liable to pay the value of the benefit to the claimant rather than transfer the benefit itself.

*26 novembre 2024 – lezione 14*

**Proprietary restitutionary remedies**: to enable the claimant to assert their proprietary rights in an asset which is held by the defendant → these remedies are said to operate **in rem** = these remedies relate to the res (i.e., the good). Two types of remedies:

- **remedies by virtue** → the claimant can recover the asset which is held by the defendant
  - benefit = the claimant can gain the benefit of any increase in the value of the asset and can claim it from third-party recipients
  - benefit = the claimant's claim to the asset ranks above other creditors of the defendant
- **remedies** which recognize that the claimant has a **security interest** in an asset which is held by the defendant
  - benefit = the claimant has a proprietary interest in an asset which is held by the defendant, the claimant's claim to the asset ranks above other creditors of the defendant, with the result that the claimant is more likely to recover the asset or its value if the defendant becomes insolvent.

**Unjustified enrichment** as a source of **obligations**:

- **civil law tradition** → unjustified enrichment is but a source of obligations and therefore it gives always and only rise to a personal right (or action in personam) to restitution
- **common law tradition** → unjustified enrichment is a source of obligations

→ unjustified enrichment is related also to **real rights** (actions in rem) = examples, constructive trust and equitable lies that belong to equity. These remedies are in rem and can be exercised against **third parties** (i.e., creditors and purchasers from the defendant):

- **constructive trust** gives the plaintiff the full equitable proprietary interest, so that he becomes the owner in equity
- an **equitable lien** gives the plaintiff only a security interest, without ownership or possession.

The award of restitutionary remedies to the claimant is justified on the ground that, where the defendant has inappropriately received a benefit from the claimant, **justice** demands that this should be **restored** to the claimant → corrective justice = many scholars assert that a claim in **unjust enrichment** can be **established** when there is evidence that:

- the defendant was enriched

- at the claimant's expense
- a recognized ground of restitution is engaged
- there was no valid legal basis for the defendant's receipt
- there is no defense to the claim.

| Civil law → **condictio sine causa** | Common law → **mistake** |
|---|---|
| if a payment is made without the cause, it must be returned | |
| this interpretation seems to be compliant with a system of transferring property which is causal, notwithstanding if the transfer is an effect of the simple contract or it requires also the delivery of the transferred good or the conveyance of the transferred land: if a cause is required to transfer the property, it is clear that without that cause the payment is undue | claims against the recipient have been granted only in presence of an unjust factor which affected the payment, the most typical of such unjust factors being a mistake of the payer on his liability to pay |

→ Lipkin Gorman vs. Karpnale (Casino case)

**Execution of valid contracts** → the difference between mistake approach (i.e., common law jurisdiction) and the lack of legal basis approach (i.e., civil law jurisdiction) has had little practical relevance when a valid contract has been executed, because under both points of view the payment was obviously not to be given back = what if a **void contract** is **executed**? → if the contract turns out to be void and was executed by both parties, common law and civil law approaches traditionally diverge:

- **civil law tradition** → there is generally no good reason to deny each giver's claim
- **common law tradition** → the doctrine of consideration has led the traditional common law of England to the opposite rule (no restitution when a void contract has been performed by both parties), unless some specific unjust factor of the enrichment were existing, like duress or fraud.

Performance in case of **contract termination** :

- **civil law** jurisdictions usually include restitutionary obligations in the category of restitutions based on the contract
- **common law** jurisdictions (in part. English common law) → **law of restitution** = it treats all restitution following on winding up as part of the law of restitution, which is not part of contract law

→ performance in case of a **contract turns out to be null and void**:

- **civil law** tradition → unjustified enrichment
- **common law** tradition → law of restitution.

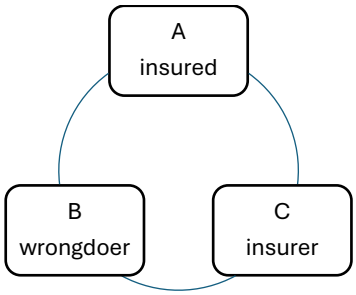
*27 novembre 2024 – lezione 15*

Is the institution of **subrogation** related to **unjustified enrichment**? → when subrogation is available by operation of law (and not by contract), law of **unjustied enrichment** may be relevant. **Subrogation** = the law states that a claim will pass directly and automatically to

another person:

- **English common law** → the basis of subrogation (by law) is commonly identified as unjust enrichment, as it nips in the bud any ambition to obtain double enrichment on the part of the insured who, but for subrogation, would otherwise be able to sue the wrongdoer despite having been paid by the insurer.

According to the German scholars, there is no moment when the claims and contract claims that A can potentially bring are overlapping → subrogation is aimed at **preventing** what would otherwise have amounted to unjustied enrichment (i.e., it is not unjustified enrichment in itself).




**Disgorgement of profits**: disgorgement is the giving up to a claimant of a gain made by a defendant, as a consequence of a wrongdoing committed against the claimant, but received from a third part → in cases where a defendant's gain was received from a third party as a consequence of a wrong done to the claimant by the defendant, the claimant's ability to reach that gain is determined as a response to the wrong, an while it may be called "restitution", it cannot mean "**restitution by restoration**" (ie, restitution by unjust enrichment). It is better called "restitution by disgorgement" = the **disgorgement** may encompass:

- **profit positively acquired** (in effect from a third party) by the defendant as a consequence of wrongdoing (met historically to pay over the accounted amount of the profit to the claimant
- to **expenditure** saved by a defendant as a consequence of wrongdoing.

Justice demands that the defendant should disgorge gains obtained as a result of breach of a duty because of a fundamental principle of the law of restitution that no defendant should profit from their wrongdoing → **deterrent or distributive function of disgorgement**.

Since the defendant's gain was made through the commission of a wrong against the claimant, there is an imbalance between them which needs correcting through the award of a gain-based remedy → **corrective function**.

*2 dicembre 2024 – lezione 16*

# Property law

What is **property law**?

- the owner of a car who sells it has a **right against the buyer** of the car to be paid the price for which the car was sold
- the owner of a car that has been unlawfully damaged by someone else has a **right against the tortfeasor** to be compensated

→ finally, the owner of a car has a right to the car itself = this last right is different from the first two. It is not a right against a specific person such as the other party to the contract or the tortfeasor = it is a right on a tangible object (**in rem**), valid against the rest of the world (**erga omnes**). An economic view → **common goods**:

- **rivalrous in consumption** → their use by one consumer prevents simultaneous consumption by other consumers
- **non-excludable** → it is not possible to prevent people who have not paid for them from having access to them.

Experiment = grazing cows in a free-access parcel of land (common):

- every herder can take his cattle to the field
- constant and repeated use of land spoils it and prevents its future use
- free access gives no incentive to any user to protect this future value, although its protection is socially desirable

→ tragedy of the commons indicates the **inefficient outcome** determined by the overuse of (partially) **rival resources** when freely accessible to every individual in each given moment.

**Legal rules** for the allocation among individuals of exclusive rights of use and disposal of resources:

- incentive to **work**
- incentive to maintain and **improve things**
- avoidance of **disputes** and of efforts to protect things
- property rights and the **market economy** → property and contracts as the basis for voluntary exchange of goods between individuals.

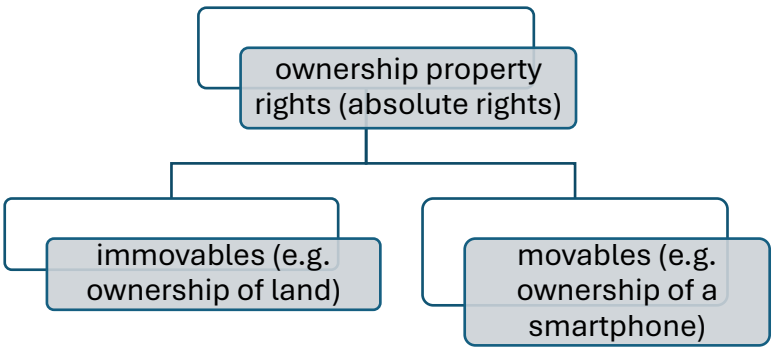
**Property rights** are valid **erga omnes** (as opposed to mere relative rights) → basic features of property rights:

- the right-holder is assigned an exclusive **right to her objects**
- the right-holder can **exclude** anyone from interfering with her peaceful enjoyment
- the right-holder is given a specific **recovery action** for her goods
- anyone wishing to **deprive** the holder of the right must buy it from her in a voluntary transaction.

**Objects** of property → property rights as rights **in rem** = regulate how individuals can use and dispose of things/goods. Objects of property rights → **things/goods** = what is the legal scope of this notion?

- **movable/immovable goods**
  - **movable** property is any property that can be moved from one place to another without being altered
  - **immovable** is any property that cannot be moved from one place to another without being destroyed or altered

**Civil law tradition** → unified field of property law = unitary system of property, covering all types of assets → both movable and immovable things represent the **potential objects** of the absolute right of ownership




- based on the absolute right of ownership
- **full-fledged power over goods** → unless the law provides otherwise, an owner is free to do as he pleases = the law does not tell the owner what he can do with the "thing", but it does specify what he must or must not do
- **exclusive power over goods** → the owner of the "thing" has an absolute right, i.e. a claim against any other person not to interfere with the enjoyment of the "thing" granted to him
- the definition of "thing" is given by 90 BGB → the characteristic of something is connected to the possibility to touch

**Common law tradition** → two separate branches of law = the enduring influence of the feudal tradition, based on **interpersonal relationships** between landlords and vassals in relation to land, has had a tremendous impact on the evolution of the common law, **preventing** the emergence of a **unitary/unified property regime** encompassing different categories of assets

- **land law (real property)** → absolute rights of individual over **immovables** = based on the fictitious presumption that the Crown is the residual owner of all the land
- **personal property** → absolute rights over **movables** (chattels) = mainly developed in different areas of law (tort law, commercial law, intellectual property law).

*3 dicembre 2024 – lezione 17*

- **tangible/intangible goods** → property law (in particular in civil law tradition) formally refers to tangible goods.

**Intellectual property law** = is generally regarded as an autonomous area of law that regulates the exclusive rights to use and dispose of **intangible resources**:

- **copyright law** → exclusive rights of use and distribution of an original work of art, granted to its creator
- **patent law** → exclusive rights to use and distribute a novel invention, granted to its inventor
- **trademark law** → exclusive rights to recognizable signs, designs, or expressions that identify products, granted to entrepreneurs and companies.

Exclusivity of **ownership** is created by the legal remedies by which the owner can be protected → ownership is an absolute right = protection **erga omnes**:

- **recovery action** (rei vindicatio) → the right of the owner to assert his right and claim the return of the object from any third party
- **injunctive relief** (actio negatoria) → the right of the owner to prevent or remove any interference with his property interests.

**Property interests**:

- **primary property rights** → these rights include the full bundle of powers that the holder can have over goods
  - ownership
  - intellectual property
- **secondary (lesser) property rights** → these rights include only some of the powers that the owner may have over goods
  - secondary right of use
  - secondary security rights.

**Limited property rights** are property rights with erga omnes effect derived from a right of ownership over a movable or immovable thing = two categories:

- **limited property rights of enjoyment** → grant their holders specific, albeit limited (as compared to ownership), rights to use the object
  - servitudes (easements in common law)
  - usufruct (comparable to the term of years in common law)
  - use-habitation
- **limited property rights of security** → are created to secure the payment of a claim/debt = they are usually created by the debtor/owner over an object in favor of his creditors
  - hypothec/mortgage
  - pledge.

Common features:

- **protection erga omnes** → absolute rights = they can be enforced against anyone else in the world
- **run with the asset** → if ownership is fragmented, limited property rights bind subsequent owners of the (remaining rights in) the asset
- **numerus clausus (numbered by law)** → limited property rights are only provided by law = individuals cannot create new types of property rights.

*4 dicembre 2024 – lezione 18*

**Servitudes** = a predial servitude consists of a burden imposed on one piece of land (**servient**) for the benefit of another piece of land (**dominant**) belonging to a different owner:

- **dominant land** → the piece of land that benefits from the establishment of a servitude
- **servient land** → the land subject to the servitude, i.e. on which the "burden" is imposed

→ servitudes as rights **in rem**, they insist on the land / do not bind the owner personally = if the owner of the servient land sells it, the servitude remains with the land and binds the purchaser = it is a right in rem (**servitudes run with the land**).

- **affirmative servitudes** → the owner of the dominant land can do something on the servient land
- **negative servitudes** → the owner of the dominant land can prevent something being done on the servient land

→ the duty imposed on the servient land cannot be an obligation on the owner to do something.

# PER DUBBI O SUGGERIMENTI SULLA DISPENSA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