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COMPARATIVE PRIVATE LAW (II PARTIAL)

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COMPARATIVE PRIVATE LAW — PART TWO

CONTRACT LAW

I. THE STRUCTURE OF CONTRACT LAW

1. Civil law

Since Romans had not a general law of contract, but rather a **law of particular contracts**, the rules governing a contract depended on the type of the latter. Apropos of that, some distinctions can be made (that progressively disappeared throughout civil law history).

- **contracts *consensu*** or **consensual contracts** = contracts formed by the consent of the parties alone. They were sale, lease, partnership and mandate;
- **contracts *re*** or **real contracts** = contracts becoming binding only when the object was delivered. They were **gratuitous loan for an object** (*commodatum* — the borrower had to return the *same object* he was lent), **gratuitous loan of an object for consumption** (*mutuum* — the borrower had to return as much of the *same kind and quality* as he had borrowed but not the very same object), pledge (*pignuus*) and deposit (*deposituum*).
- ***stipulatio*** = contracts requiring a formality to be completed in order to become binding, and *stipulatio* was the most popular formality at that time. Initially carried out by means of the promisee's question and the promisor's answer, this formality was then reduced to writing, and accordingly could be overcome only by proving that parties weren't in the same town the day of its execution. In medieval and early modern times, the safest and most accepted way to complete this formality was to go before a **notary**. Another formality to mention was the so-called *insinuatio*, required for all those gifts of a certain amount.
- **innominate contracts** = contracts outside all the above-mentioned recognized types. Initially, they were not enforceable, yet the party who has performed could claim its restitution in case the other party had refused to perform; later, it was given a choice to the party who performed, namely either to claim its restitution or to withhold the other party's performance. The key point here is, overall, that the contract was unenforceable at all if none of the parties had performed, since **no action raised on a bare agreement or *naked pact*** (ie a pact constituted only by a promise).

Nowadays, civil law countries boast well-structured civil codes, providing for categories of contracts and encapsulations of contents in certain definitions and institutions.

Another distinction to be made, stemming from Aristotelian philosophy, is the one between:

- acts of *voluntary commutative justice*, in which parties exchanged resources voluntarily, provided that their value is equaled;
- acts of *involuntarily commutative justice*, in which one party took or injured another's resources, and equality was restored by requiring him to pay their value.

Aristotle also discussed the virtue of **liberality**, in which the liberal person disposed of his money wisely, giving to the right people the right amounts and at the right time. The late scholastics concluded that a party might enter voluntarily into either two types of contract:

- **gratuitous contracts**, in which he enriched the other party at his own expenses. Here, the donor must actually *intend* to benefit the other party, otherwise the contract is no way a gratuitous one;
- **onerous contracts**, in which he exchanged his performance for one of equivalent value. Here, a party must receive a counter-performance of *equivalent value*.

The late scholastics consequently asked when, in principle, a contract should be **enforceable**. According to Cajetan (17th century), when the promise was gratuitous, the promisee could not demand it be enforced as a matter of commutative justice, nevertheless he could recover from

potential suffered damages. The popularity of this theory in Continental Europe disclosed the American doctrine of **promissory reliance**, but it was rejected by some other scholars, rather objecting that gratuitous premises should be binding as long as the promisor *intended* to transfer a right to the object to the promisee. Moreover, considering a gratuitous premise that does not concern a transfer of property **(ex. gratuitous loan for use/consumption)**, the late scholastics thought that, effectively, these gratuitous contracts were binding on *consent* if the promisor *intended* to be bound, yet he could nonetheless claim the restitution of the object.
As far as **German and French civil codes** are concerned, on the one hand, when formally performed before a notary, a promise of gift is *enforceable*, and on the other hand parties can bind themselves i advance of delivery to make a gratuitous loan, to care for another's goods or to give a pledge.
Notably, Germany was the land in which the so-called **will theory of contract** fertilized: accordingly, contract is an expression of the will of the parties, and the job of contract law was simply to enforce their will. Instead, the element of *causa* was firstly implemented in French civil code, notwithstanding losing its relevance during the 19th century: in particular, *cause* appeared as a tautology and as physiologically omnipresent within contracts, since naturally the party's reason for contracting was to get or not to get something. That is why this element was later eliminated by French Civil Code and never appeared in the German one.

[*Code Civil*] "A liberality is an act by which a person disposes gratuitously of all or part of his goods/rights for the benefit of another person. All gifts *inter vivos* must be made before a notary in the ordinary form of a contract and an original copy shall remain with the notary, otherwise the gift is void.

[*BGB Code*] ***Concept and form of a gift***. "A gift is a disposition by which one person enriches another out of his own property if both parties agree that the disposition is made gratuitously. Notarial authentication is required for the validity of a contract by which a performance is promised as a gift".

2. Common Law

Common law was not organized in terms of contracts and torts, but rather according to distinct **forms of action**, among which we originally remember:

- *covenant* = the disappointed promisee could recover in covenant only if the promise was made under **seal**, ie a formality performed with an impression in wax on the document containing the promise itself;
- *assumpsit* = the disappointed promisee could recover in assumpsit only if the promise had **consideration**. It is disputed whether common law constructionists got inspired by the civil element of *cause* in onerous contracts to formulate the concept of consideration: widespread this opinion though it may be, it is worth noting that common law jurists acknowledge consideration even in contracts that are not bargains or exchanges *stricto sensu*, for instance in some gratuitous loans and bailments. Moreover, this juxtaposition could be deemed deceptive since *causa* identifies the reason, the purpose of a promise, instead consideration aims at limiting the enforceability of a promise, constituting its *condicio sine qua non* to be enforced.

But what do "contract" and "consideration" really mean? Common lawyers of 18th and 19th centuries transplanted the definitions given in civil law respectively to contracts and cause.

- Contracts were conceived as grounded on agreements, promises, engagement, assent. In particular, in Common law the contract is intended as a **promise for the future**, and not as an instant exchange (c.d. *promissory nature of contract*), it is binding and thus has to be enforced.
  It is highly debated whether a promise should be enforced or not. In the affirmative answer, in case of **detrimental reliance** the damaged party can get, in some instances, **reliance damages** (wasted expenditure in preparing a contract that then was not concluded or was breached) or, in

other ones, **expectation damages** (loss of profit because of the non-conclusion or the breach of the contract).
In civil law, the contract is an agreement between parties which may cause a bargain, and it may be even simultaneous. In common law, if there's not an *exchange*, the agreement is not enforceable; the contract is promise but just for the future; moreover, a contract needs to be enforced because the legally binding force engenders a *moral obligation* to keep the promise, thus creating a societal benefit.
In the 19th century, the **will theory of contract** was prophesied, meaning that contract has to be interpreted according to what parties *intended* when making the contract, so as to regulate their personal interests. Nevertheless, some doubts naturally emerge: if it is all about what parties wanted when making a contract, why do we have general and technical contract rules? And how could we imply contract terms if parties have never expressed them? And again, what would happen if the contract intended by the parties is an unfair one? In the US, it is commonly believed that society shouldn't care about the potential fairness of a contract.
Another popular theory within contract law field is the **efficiency theory of contract**: a contract need to be interpreted according to the efficient effects and solutions it can cause, thus a contract needs to be enforced insofar as it is efficient. However, the efficiency must not be taken to be a good criterion to set forth the enforceability of a contract: indeed, a contract produces gambling consequences, namely a winner party and a loser party, so how can a contract be deemed as efficient from the loser's point of view?
For all things considered, we can't deduce a philosophical reason according to which a contract should be legally binding and enforceable.

- Consideration was identified with the cause in contracts of exchange, assuming that the reason or sole motive of each party was to **receive an equivalent**.
  Then, the given significance of consideration was reformulated. Pollock stated that "whatever a man chooses to bargain for, must be conclusively taken to be of some value for him": in this sense, consideration could be traced in a promise even if the promisor received nothing, because in this consideration has moved to a third party; accordingly, saying that a promisor entered into a bargain simply means he was induced to give his promise by some change in the position of the promisee. Even though modern authors still explain consideration in terms of *bargain* or *reciprocity*, collecting Pollock's heritage they define bargain in terms of something, of **whatever value**, sought by the promisor which induced him to promise; still, that does not mean that the only promises that lack consideration are those to give gifts or do favors in any ordinary sense **(ex. if A promises to hold an open offer and does not receive anything in return for his commitment, there is no consideration)**.
  Today, Anglo-American jurists are less stick to the the formalistic elaboration of the theory, rather trying to apply it by asking whether any useful purpose is served by refusing to enforce a promise. When the promise is a gift or favor, the purpose may be to encourage a person to act deliberately; when the promise is business-based, the purpose is completely different. But if that is so, the doctrine of consideration is a blunt instrument since not all such promises are unfair; consequently, in those cases we do not need the doctrine of consideration, but rather we should review the *fairness* of a contract directly by applying a doctrine called **unconscionability**.
  We can state that consideration exists when it succeeds at a **2-step verification**: (1) the promisee have given up a legal right for the future; (2) the promisee did so because it was induced, or at least partially induced by the promisor. **Consideration is found only in contract of exchange**, because the promisor needs to gain something in return for his promise (ex. "if you give up drinking whisky for 6 months, I'll give you 100$" has no consideration, because the promisor is getting nothing in return for his promise, consequently it is not a contract of exchange). Since a promise needs to be supported by consideration so as to be enforced, **contracts of gift** can't be enforced, unless we following three exceptions:

a) promissory estoppel = typical of the USA, this doctrine states that a party may recover on the basis of a promise made when the party's reliance on that promise was reasonable, and the party attempting to recover detrimentally relied on the promise. The party can thus get *reliance damages* so as to compensate his loss, but not *expectation damages*, since there's no consideration in this case.
Originally, the doctrine of promissory estoppel was invoked as a substitute for consideration, rendering a gratuitous promise enforceable as a contract. In other words, the acts of reliance by the promisee to his detriment provided a substitute for consideration.

b) charitable subscription = donations are not supported by consideration, however the law allows their enforcement in exchange to a small symbolic gift;

c) marriage gifts.

In civil law, instead, gift contracts are enforceable.

Opinions on **consideration** were formulated by Pollock, stating that it has not be adeguate, nor economically fair, but rather *sufficient* in terms of value given by the parties to the things exchanged. Now, let's take into account the following example: "I promise to sell you my house for 500.000$ in 3 years". It has no sufficient consideration, since why should the offeror leave his offer open for so much time, without receiving anything in exchange for this long-lasting offer? The risk is also linked to fluctuations of market values, since within those three years the offeree could even take advantage of the moment of best devaluation of prices.

It must now be specified that in England there is the so-called **nominal consideration**, ie an offer from one party of an agreement to another party that doesn't have any value in relation to the consideration being offered by the other party. In this sense, it is considered as *consideration* in name only, and it is so insignificant that it has no relation whatsoever to the actual value of what is being exchanged under the contract (ex. Party A wants to enter a contract to give Party B $5,000 and requests that Party B gives them a pencil in return; ex. I give you $1 for the offer of your house). In US, instead, theoretically adequate consideration is not required, but practically it is.

No general law of contract arose up until the 16th century, when two categories were formalized: **contracts of exchange** (whereby *equality* was required) and **contracts of gift** (whereby *formality* was required). Afterwards, when the interpreter's intention shifted to the autonomy and will of the parties, while formality was maintained, equality was abandoned, since any object can have a subjective value for one party, and it is thus up to him to decide whether it is worth it to conclude the contract or not. However, it is highly debated whether a party can be bound by a contract concerning a price that is over the *reasonable* one. On the one hand, contract is provided with *essential terms* (included the prince of a thing transferred/sold) that parties can't assert to have been unaware of; moreover, the potential determination of a threshold of acceptability of the price could appear contradictory with respect to private autonomy; again, equality was canceled as requirement in contracts of exchange. However, on the other hand, according to an economic theory it is the **market price** to dictate the contract price, and the former changes according to the supply-demand relationship.

II. VOLUNTARY COMMITMENT

1. The moment at which a Commitment is binding

Adams v. Lindsell case (Common Law)

The defendants, who were wool dealers in St. Ives, wrote to the plaintiffs, who were wool manufacturers in Bromsgrove, Worcester: 'We now offer you eight hundred tods of whether fleeces, of a good fair quality of our country wool. This letter was misdirected by the defendants, in consequence of which it was not received by the plaintiffs in Worcestershire till 7 p.m. on Friday, September 5th. On that evening the plaintiffs wrote an answer, agreeing to accept the wool on the terms proposed. This answer was not received by the defendants till Tuesday, September 9th. On Monday, September 8th, the defendants not having, as they expected, received an answer on Sunday, September 7th (which in case their letter had not been misdirected would have been in the usual course of the post), sold the wool in question to another person." The defendants argued: "Till the plaintiffs 'answer was actually received there could be no binding contract between the parties; and before then the defendants had retracted their offer by selling the wool to other persons". The Court stated that if that were so, no contract could ever be completed by the post. As to the delay in notifying the acceptance, that arises entirely from the mistake of the defendants.

Issue: whether the offer was binding or not for the offeror.
Rule: First of all, an offer has to be communicated to the other party, in order to put the latter in the conditions of being able to accept it. However, here the letter was misdirected by the defendant and the delay of the acceptance arises only by his mistake. In common law there is the law of **free revocation**, stating that it is always possible to revoke the offer before the acceptance. Yet, in the case at hand the offer was not revoked, but rather the offeror concluded the contract with a third party: not revoking an offer means that the other party is formally still entitled to accept it.
Arguments: it could be argued that offer will lapse after a *reasonable time period*, yet being an extremely undetermined expression. At any rate, in these case just four days are undeniably within a reasonable interval of time. The problem here is exacerbated by the fact that the defendant didn't specify any time limit within which the acceptance should have been brindled.
Conclusion: the provision to apply is the so-called **mailbox rule**, dictating that when the acceptance is out of party's possession and control, then the contract is binding; therefore, since the offer has not been revoked before directing it to others, and since the delayed acceptance is nonetheless binding pursuant to mailbox rule, there is actually a **contract** and the plaintiff must be awarded with **expectation damages**. In fact, free revocation rule grants the offeror with the *right* to revoke the offer, but he *must* do it in situations like the one at hand, otherwise the offer keeps being binding. The offeree, indeed, deserves to know when an offer expires, whether it is expired or it is stale.
In Common law jurisdiction, it can be deduced that the offeror is in the strongest position until the contract is made, that is when the acceptance is rendered, whereas from this moment onward the offeree covers the strongest position.

[*Restatement II of Contracts*] ***Time when acceptance takes effect***. "Unless the offer provides otherwise, an acceptance made in a manner and by a medium invited by, an offer is operative and completes the manifestation of mutual assent as soon as **put out of the offeree's possession**, without regard to whether it ever reaches the offeror".

Dickinson v. Dodds case (Common Law)

The defendant John Dodds signed and delivered to the plaintiff, George Dickinson, a memorandum, of which the material part was as follows: "I hereby agree to sell to Mr. George Dickinson the whole of the dwellinghouses, garden ground, stabling, and outbuildings thereto belonging, situate at Croft, belonging to me, for the sum of £800. As witness my hand this tenth day of June, 1874." The plaintiff was later informed that Dodds had been offering or agreeing to sell the property to Thomas Allan, the other defendant. On the following morning, at about seven o'clock, Berry, who was acting as agent for Dickinson, found Dodds at the Darlington railway station, and handed to him a duplicate of the acceptance by Dickinson, and explained to Dodds its purport. He replied that it was too late, as he had sold the property. A few minutes later Dickinson himself found Dodds entering a railway carriage, and handed him another duplicate of the notice of acceptance, but Dodds declined to receive it, saying: 'You are too late. I have sold the property'.

> The court said: "The document, though beginning 'I hereby agree to sell, 'was nothing but an offer, and was only intended to be an offer. Unless both parties had then agreed, there was no concluded agreement then made. The plaintiff, being minded not to complete the bargain at that time, added this memorandum: 'This offer to be left over until Friday, 9 o'clock a.m. 12th June, 1874. 'That shows it was only an offer. There was no consideration given for the undertaking or promise. This promise, being a mere nudum pactum, was not binding. The plaintiff knew that Dodds was no longer minded to sell the property to him as if Dodds had told him, 'I withdraw the offer. ' This is evident from the plaintiff's own statements in the bill."

Issue: whether the offer was binding or not. Dodds made an offer to Dickinson but then sold the property to a third party.
Rule: in Common law there is the rule of **free revocation**, thus the offeror has the right to revoke until the acceptance is made, but he *must* revoke if he wants to, otherwise the offer keeps being binding. The promise can be enforced if there's consideration. **Mailbox rule** has to be applied has well.
Argument: the Court told the offer was not binding because it was a **naked pact**, and that the offer should be deemed to be revoked because it was not accepted immediately. Apropos of the latter argument, judges stated that there is neither principle nor authority for the proposition that there must be an express and actual withdrawal of the offer, or what is called **retraction**. But actually Dodds has never revoked its offer: he just turned around and sold the property to someone else. The contradiction is patent.
The difference between this case and *Adams v. Lindsell* one is that in the former the offeree was aware that the offeror had changed his mind, instead in the latter the offeree had not this kind of knowledge because of offeror's mistake in offer delivery. Moreover, in *Adams v. Lindsell* case the offer was made via e-mail, instead in the case at hand it was made in person: the judge thus argued that the acceptance had to be immediate, but actually it is the German law, and not common one, to require such a form of acceptance. It seems that the Court here pointlessly tried to copy-paste german approach, consequently giving rise to a patent contradiction and an unconvincing argument to support his case.
Conclusion: if a time up until which one can accept was legislatively set out, the issues of both cases would be solved and in the same way, since they have in common the same goods yet, contradictorily, judicial outcomes are distinct. In fact, it does not make any sense that in *Adams v. Lindsell* case the offer has not lapsed whereas in the case at hand it did.

[*Restatement II of Contracts*] ***Option contracts***. "An option contract is a promise which meets the requirement for the formation of a contract and limits the promisor's power to revoke an offer.
An offer is binding as an option contract if it: (a) is in **writing** and **signed by the offeror**, recites a **purported consideration** for the making of the offer, and purposes an **exchange on fair terms** within a reasonable time; or (b) is made irrevocable by statute.
An offer which the offeror should reasonably expect to **induce action or forbearance** of a substantial character on the part of the offer **before acceptance** and which does induce such action/forbearance is binding as an option contract to the extent necessary to prevent injustice.

[*Uniform Commercial Code*] ***Firm offers***. "An offer by a merchant to buy or sell goods in a **signed writing** which by its terms gives assurance that it will be held open is **not revocable**, for lack of consideration, during the time stated or, if no time is stated, for a reasonable time, but in no event may such period of revocability exceed **3 months**; but any such time of assurance of a form supplied by the offeree must be separately signed by the offeror".

[*BGB code*] ***Binding force of an offer***; ***the lapse of an offer***; ***time to accept***. "One who has offered to conclude a contract with another is bound by that offer **unless he states that he is not bound**". The offer lapses if the **offeror is refused** or if he is **not given an acceptance within due time**, apropos of which:

(a) an offer made to a person who is **present** can only be accepted **immediately**. This is so as well when an offer is made by one person to another by telephone. (b) an offer made to a person who is **absent** can be accepted only within **the time that an answer would be expected under ordinary circumstances**".

[*Code Civil*] "An offer may be **withdrawn freely as long as it has not reached the person to whom it was addressed**.
An offer may not be withdrawn before the **expiry of any period fixed by the offeror**, or, if no such period has been fixed, the **end of a reasonable period**. The withdrawal of an offer in contravention of this prohibition prevents the contract being concluded. The person who thus withdraw an offer incurs **extra-contractual liability** under the condition set out by the general law, and has **no obligation to compensate the loss of profits** which were expected from the contract.
An offer lapses on the **expiry of the period fixed by the offeror** or, if no such period has been fixed, at the **end of a reasonable period**. It also lapses in case of incapacity/death of the offeror.
An acceptance is the **manifestation of will** of the offeree to be bound on the terms of the offer. As long as the **acceptance has not reached the offeror**, it may be withdrawn freely, provided that **the withdrawal reaches the offeror before the acceptance**. An acceptance which does not conform to the offer has no effect, apart from constituting a new offer".

In civil law, the offer is binding. In particular, German law provides that one can't revoke an offer, but just wait for the offer time to lapse: in the event that the revocation is anyway made, then the other party will have to be awarded with **expectation damages**. Instead, in French law revocation is admitted, but if the other party has relied on the offer, then it deserves to be compensated with **reliance damages**, in light of *extra-contractual liability*.
In common law, there is the rule of **free revocation** but you can use an option contract to bind yourself. In case of revocation, the offeror causing reliance on the offer can be liable (sec. 87(2), Restatement).

2. Culpa in contrahendo (liability before a final commitment is made)

[*BGB code*] ***Liability for vicarious agents***. "A person who uses another person to perform a task is liable to make compensation for the damage that the other unlawfully inflicts on a third party when carrying out the task. Liability in damages does not apply if the principal exercises reasonable care when selecting the person deployed and, to the extent that he is to procure devices or equipment or to manage the business activity, in the procurement or management, or if the damage would have occurred even if this care had been exercised."

[*BGB code*] **Section 241. *Duties arising from an obligation***. "(1) by virtue of an obligation, an obligee is entitled to claim performance from the obligor. The performance may also consist in forbearance.
(2) An obligation may also, depending on its contents, oblige each party to take account of the rights, legal interests and other interests of the other party."

[*BGB code*] ***Obligation created by legal transaction and obligations similar to legal transactions***.
"(1) In order to create an obligation by legal transaction and to alter the contents of an obligation, a contract between the parties is necessary, unless otherwise provided by statute.
(2) An obligation with duties under section 241 (2) also comes into existence by: (1) the commencement of contract negotiations; (2) the initiation of a contract where one party, with regard to a potential contractual relationship, gives the other party the possibility of affecting his rights, legal interests and other interests, or entrusts these to him, or (3) similar business contacts."
(3) An obligation with duties under section 241 (2) may also come into existence in relation to persons who are not themselves intended to be parties to the contract. Such an obligation comes into existence in particular if the third party, by laying claim to being given a particularly high degree of trust, substantially influences the pre-contract negotiations or the entering into of the contract."

[*Code Civil*] "Contracts must be negotiated, formed and performed in **good faith**. This provision is a matter of public policy.
The commencement, continuation and breaking-off of pre-contractual negotiations are **free from control**. They must mandatorily satisfy the requirement of **good faith**. In case of fault committed during the negotiations, the reparation of **resulting loss** is not calculated so as to compensate the loss of benefits which were expected form the contract that was not concluded".
n.b. These articles have been introduced in 2016. Before then, courts gave relief for breaking off contractual negotiations in bad faith under what are now the following articles 1240-1241:

> [*Code Civil*] **art. 1240 dealing with *fault as intentional tort*** "any act of a person which causes harm to another obligates the person through whose fault the harm occurred to make compensation for it."
>
> [*Code Civil*] **art. 1241 dealing with *fault as negligence*** "A person is liable for the harm that he causes not only by his acts but by his negligence and imprudence."

In civil law, there is a **duty to negotiate in good faith**. The nature of pre-contractual liability has always been discussed to be part of either tort or contractual liability.
Let's make an example: if I fell into a supermarket because of a random bottle of water rolling on the floor and I broke my ankle, which would be the subject to sue, the employee for **direct responsibility** or the supermarket for **indirect responsibility**? It depends on the considered jurisdiction.

- Within German Law, there is the so-called **vicarious responsibility**, ie a situation in which one party is held partly responsible for the unlawful actions of a third party. It descends from the provision that in German law jurisdictions **negotiations start as soon as you step into the supermarket**. Therefore, a german supermarket would be entitled to argue and prove they were not *negligent* and, consequently, not liable, and that was employee's fault, on which thus the liability will fall upon.
  The BGB code does not contain any provisions on **strict liability** (responsabilità oggettiva), that are rather included in special legislative provisions: it has thus a feature of *exceptionality*. Accordingly, one can escape liability by proving he was not negligent/at fault. To compensate this absence into the BGB code, something new was invented and placed next to vicarious liability (but outside the BGB): **as soon as one enters into a premise, negotiations commence**.
- Contrariwise, in Italian and French law, it would not be a good defense for the supermarket to argue that it is not liable since it has done everything possible in its capacity and power in order to avoid the damage. In fact, the supermarket would be liable for *culpa in eligendo*.
  In French law, before the 2016 reform, *culpa in contrahendo* didn't exist by itself: the situations that it regulates in French law now where before 2016 disciplined under *tort law.* The difference between French tort law and German tort law which allowed the former to internally regulate pre-contractual liability, in a dissimilar way from the latter's, is grounded on a principle: <u>each tort law system needs to perimeter the scope of the rights protected by provisions</u>. In this sense:
  - German tort law prophesies that an harm needs to be physical to be restored by the law, that is to say it has to concern the human body. This is why situations of fault in contrahendo, concerning the protection of **future economical interests**, were impossible to regulate under German tort law, thus being necessary to make the artifact of culpa in contrahendo.
  - French tort law prophesies that an harm does not necessitate to be physical to be restored by the law. It is sufficient that it concerns one's patrimony of rights, economic interests or future expectations. An harm can thus be considered as such even if it consists in an economic loss. This is why situations of fault in contrahendo, concerning the protection of **future economical interests**, could be regulated under tort law.

In common law, there is **no duty to negotiate in good faith**, but just a **duty to perform the contract in good faith**. Therefore, there is no pre-contractual liability and consequently damages for the moments before a contract is made are not granted, except for cases in which the doctrine of *promissory estoppel* is applied.
In fact, in front of a common law case, so as to establish the damages recover, we should ask ourselves whether there is a contract or not: in the first case, the plaintiff will recover damage for *breach of contract*; in the second one, the plaintiff could recover damage for *promissory estoppel*.

When referring to pre-contractual liability, the real distinction is between German law and all other legal systems.

Walford v. Miles case (English law)

> It's about the sale of a company - if you buy my company, you will make profit. The seller asked for a comfort letter from the buyer as a warranty for the presence of funds to pay the property. (it's not a promise to sell but a promise to withdraw from negotiations with other potential buyers). The seller got sued by the buyer because he sold to a third buyer (if you sue him for breach of contract, seeing the promise to withdrawn from other negotiations as a contract, you can obtain expectation damage). The seller won since "a bare agreement to negotiate has no legal content". [a naked promise is not enforceable; you need to have consideration to enforce a promise]. "the agreement upon which he relies does not contain a duty to complete the negotiations."

Issue: whether an agreement to negotiate in good faith, if supported by consideration, is an enforceable contract, and whether a party can walk away from a contract without submitting to liability.
Rule: a legal transaction failed to go through, but since there is **no duty to negotiate in good faith**, one can walk away from negotiations up until the contract is made. Evidence supports the claim that at the beginning of the negotiation there is a **promise to negotiate in good faith** between the parties, that is to say a *contract* provided with an offer and an acceptance. It is thus enforceable and the damaged party can potentially succeed before the court and obtain *expectation damages* (in this case $300.000) for breach of contract.
However, we had better said that **it could be a contract**, since it is not mandatorily enforceable owing to **public policy**, ie an institutionalized proposal or a decided set of elements like laws, regulations, guidelines, and actions to solve or address relevant and real-world problems, guided by a conception and often implemented by programs. In a nutshell, it is what the government chooses to do or not do about a particular issue or problem. In this sense, English public policy advocates a **total freedom to walk away from negotiations**, since the principle of *freedom of contract* empowers parties to decide whether or not to contract, whether or not to conclude a contract, with whom to contract. Nevertheless, freedom of contracts has limits:

a. legality = a contract can't be illegal. It has to be *legally enforceable*;
b. capacity = *contractual capacity* is needed so as to conclude a valid contract;
c. morality = freedom of contract can't be restricted in light of *social morality* and *public policy*.

Therefore, in the case at hand, we cannot talk about a contract as such pursuant to English social morality and public policy, even though technically talking it could be identified as a contract, as presenting all the essential elements.
Conclusion: For all things considered, in England there is **no need to excuse for having walked away from negotiations**, instead in Italian legal system, when dealing with *culpa in contrahendo*, both the reason why a party has walked away and the potential reliance by other party have to be taken into consideration. In the case at hand, despite not mandatory, a justification by Miles was provided, excusing that he could not warrant the profit to the plaintiff, thus risking to affect the selling price.
If we applied the German provisions to the case at hand, the latter would be differently decided in favor of Miles as not liable, since he provided for a good excuse for having walked away from negotiations.

Lacey v. Davis case (English law)

D. which had suffered war damage to his building, obtained bids from 3 builders, in order to rebuild the building as a shop with residential flats above. The plaintiffs 'bid was the lowest and he was led to believe they would receive the contract. He undertook a considerable amount of work in preparing their revised estimate; as a result the amount receivable by D. from the War Damage Commission increased. After they had complied with these requests, they were informed that D. intended to employ another builder to rebuild the premises. Subsequently D. sold the premises instead of having them rebuilt.

Issue: even if there was not a purely technical contract, can we still talk about an existing promise?
Rule: the defendant didn't say anything about a promise to pay or hire him, so there's no formal room for the presence of a contract.
Argument: it could be argued that the plaintiff was led to rely on his potential and future payment or hiring. The plaintiff asked for a *reasonable price* to cover the costs of the service which benefitted the defendant; it thus constitute a fraction of the total price the defendant should have given to the plaintiff if the contract was concluded. The Court thus tried to frame a distinction:

a. on the one hand, there is a contract, namely a promise to pay and hire, entailing a sort of initial **free trial**;
b. on the other hand, there is no contract because parties didn't express common intentions nor expectations that the contract would have come to being. There are hence **sufficient reasons to bar compensation**.

Conclusion: there was an **unjustified and unjust enrichment** of the defendant. The Court stated that in these situations there is an **implied obligation** to pay the party that has done a huge amount of work, overcoming the consuetudinary threshold of pre-contractual preparation: in this sense, the plaintiff deserves to be awarded with damages because he has done much more work than what people normally do in situations of free trial.
Indeed the defendant, when committing so much work to do to the plaintiff, has instilled a sort of **social conviction**, that the contract — involving either a payment or a hiring — would have come to being. Therefore, the defendant should be compensated for the service made.

Channel v. Grossman case (US law)

This diversity case presents the question whether, under Pennsylvania law, a property owner's promise to a prospective tenant, pursuant to negotiate in good faith with the prospective tenant and to withdraw the lease premises from the marketplace during the negotiation, can bind the owner for a reasonable period of time where the prospective tenant has expended significant sums of money in connection with the lease negotiations and preparation and where there was evidence that the letter of intent was of significant value to the property owner. Grossman wanted Channel to sign: '[t]o induce the Tenant [Channel] to proceed with the leasing of the Store, you [Grossman] will withdraw the Store from the rental market, and only negotiate the above described leasing transaction to completion'. Frank Grossman notified Channel that 'negotiations terminated as of this date 'due to Channel's failure to submit a signed and mutually acceptable lease for the mall site within thirty days of the December 11, 1984 letter of intent. The initial phase of negotiation is not necessarily binding as a contract. By unilaterally terminating negotiations with Channel and precipitously entering into a lease agreement with Mr. Good Buys, Channel argues, Grossman acted in bad faith and breached his promise.

Issue: whether there is liability before a commitment is made.
Rule: differently from English law, whereby public policy can prevent a contract from being enforceable, in US law an agreement is enforceable when meeting some criteria. Under Pennsylvania law, the **test for enforceability of an agreement** implies that we must ask:
(1) whether both parties manifested an *intention* to be bound by the agreement;
(2) whether the terms of the agreement are *sufficiently definite* to be enforced;
(3) whether there was *consideration*.
Conclusion: in the case at hand, we *may* have a contract: it all depends on how the jury addresses this factual issues, assessing the fulfilling or dissatisfaction of the afore-mentioned requirements.

Hoffman v. Red Owl Stores inc. case (US law)

The complaint alleged that Lukowitz, as agent for Red Owl Stores, represented to and agreed with plaintiffs that Red Owl would build a store building in Chilton and stock it with merchandise for Hoffman to operate in return

for which plaintiffs were to put up and invest a total sum of $18,000; that in reliance upon the above mentioned agreement and representations plaintiffs sold their bakery building and business and their grocery store and business; also in reliance on the agreement and representations Hoffman purchased the building site in Chilton and rented a residence for himself and his family in Chilton; plaintiffs 'actions in reliance on the representations and agreement disrupted their personal and business life; plaintiffs lost substantial amounts of income and expended large sums of money as expenses. Plaintiffs demanded recovery of damages for the breach of defendants ' representations and agreements. Hoffman was reluctant to sell at that time because it meant losing the summer tourist business, but he sold on the assurance that he would be operating in a new location by fall and that he must sell this store if he wanted a bigger one. Eventually, Red Owl presented Hoffmann with a statement which he interpreted to require "a total of $34,000 cash made up of $13,000 gift from his father-in-law, $2,000 on mortgage, $8,000 on Chilton bank loan, $5,000 in cash from plaintiff, and $6,000 on the resale of the Chilton lot." Hoffman informed Red Owl he could not go along with this proposal, and particularly objected to the requirement that his father-in-law sign an agreement that his $13,000 advancement was an absolute gift. This terminated the negotiations between the parties.

Issue: whether the plaintiff should be awarded with reliance damages for the breach of defendants' representations and agreements.
Rule: the promise can be summarized as "if you come up with $18.000, I'll sell you the store". The problem is that it is **not so concrete** as a promise, given that the conclusion of the contract depends entirely on plaintiff's future financial situation.
Hoffman has spent several energies, time, money and opportunities because of the reliance on this promise (he sold a grocery store, he moved to another town, exc.). However, at the end, the defendant has asked him almost double the amount of money, thus **breaking the promise**.
In this case, although there is **no duty to negotiate in good faith**, liability falls upon the defendant thanks to the application of **promissory estoppel**: this doctrine indeed allows one party to be compensated even if the broken promise had no consideration and thus, in principle, couldn't be enforced. In the case at hand, in fact, we could not talk about a real contract, since the promise was devoid of any offer, acceptance and — as a consequence — consideration, nonetheless **reliance damages** will be paid to the promisee, as he incurred in some costs because of having relied on the future contract. Negation of damages in alike situations would mean opening to *injustice*.
Promissory estoppel necessitates of three requirements to be applied:
1. one party has made a *promise*;
2. the other party has put *reliance* on the promise, precisely a *detrimental reliance*;
3. party's reliance was *reasonable* and not illusionary.

Promissory estoppel can thus be intended as an *alternative* to consideration, that is usually needed to enforce a promise. However, the law provides for situations in which a promise can be enforced even if it didn't originate from a contract of exchange, but rather from a gratuitous one (that is normally not enforceable as not supported by consideration).
Conclusion: the plaintiff must be awarded with reliance damages.

Cour de cassation, 1972 (French law)

Gerteis entered into negotiations in April with the VL,, the sole distributor in France of machines, used for the manufacture of cement pipes made by the American firm Hydrotile Co. After Gerteis made a trip to the United States in order to observe the operation of these machines, Gerteis requested from the VL, further information before making its choice among several types of machines manufactured by the Hydrotile company. The VL did not reply to this letter. Gerteis learned later that in June, the American manufacturer had sent an estimate to VL which it had not transmitted to Gerteis. Later VL signed a contract with the company B, a competitor of Gerteis, for the sale of a Hydrotile machine. The contract contained a clause obligating VL not to sell a similar ordered by the company B. The court below "found that VL had deliberately withheld the final estimate of the American firm intended for Gertais and had broken off the negotiations it had entered into with Gervais brutally, unilaterally and without a legitimate reason and VL had kept Gerteis for a long time in a state of uncertainty. VL therefore did not live up to the rules of good faith in commercial relations. The Court de cassation held that there had been "an abusive breaking off of negotiations." Noting that although VL "did not furnish the slightest justification for breaking off negotiations and, in any event, such extended negotiations could not be terminated by a simple telephone call whose occurrence was more than problematic." Relief should only be given when the defendant deceived the plaintiff, made and broke a promise, or unjustly enriched himself during negotiations.

Issue: whether Vilber-Lourmat company was liable in contrahendo or not.
Rule: it is a **tort-based case**. Even if Gerteis company sent a letter to Vilber-Lourmat company without receiving an answer, the latter didn't have any duty to respond if they hadn't any on-going relationship. The total absence of an answer also stresses that the defendant didn't promise at all, although a respond could have been deemed as due in light of good faith principle. Actually, it is even unclear if before 2016 there was the duty to negotiate in good faith. Moreover, there is not a legal but only a **moral obligation** to tell the other party that negotiations with a competitor are in progress. The defendant didn't give any excuse to have walked away from negotiations, but we reiterate that he had no obligation to inform the other party he was negotiating with a competitor.
Argument: the plaintiff bore useless expenses (e.g. he went to America) and consequently suffered from an *economic loss* that has to be compensated. However, it could be objected that between companies there was **no binding commitment**, the ones borne by the plaintiff were just the **costs of doing business**.
Alan Farnsworth claimed that one could be found liable and thus must grant relief only in the following cases: (a) the defendant deceived the plaintiff; (b) the defendant made and broke a promise; (c) the defendant unjustly enriched himself during negotiations. Paradoxically, even though in the case at hand the defendant neither had an unjustified enrichment, nor he awakened in the other party reasonable expectations on the contract be concluded, nor again he disclosed confidential information of the plaintiff, the Court dictated that the given case constitutes an exception to the case in which relief is usually rendered.
Conclusion: the Court found the defendant as *liable*, but since it is a case of 1972 and pre-contractual liability was introduced only in 2016, then we should rather talk about **tort liability** for the case at hand.
In French law, after 2016, we can list 3 scenarios in which a person could be liable for fault in contrahendo:

1. one party brutally breaks off negotiations at their final stage, when the other party reasonably relied on and expected the contract was about to be concluded;
2. one party negotiate with another without the real intention to make a contract with her, but just to disadvantage her;
3. there is a disclosure of confidential information during the negotiations.

The process of negotiation can be divided into three stages:
(1) an initial stage, in which either party can break off negotiations;
(2) a middle stage, in which he can do so only if he compensates the other party for expenses incurred;
(3) a final stage, in which breaking off negotiations would be a violation of good faith, and a party who does so is responsible for what a common law lawyer would call *expectation damages*. He is liable to the same extent that he would be had a final contract be signed.

Comment: this case was highly criticized because it seems to allude to a form of *pre-contractual liability* that was completely nonexistent before 2016.

<u>*Cour d'Appel*, 1969 (French law)</u>

Muroiterie Fraisse was a society that sold and installed mirrors; the defendant invited Fraisse to the site to discuss the installation of some mirrors in its apartment building. Muroiterie Fraisse installed mirrors in a model apartment and was paid for doing so. After being invited back to the site and receiving exact measurements, Muroiterie Fraisse submitted an estimate for the entire job of 30,800 francs. The defendants rejected it without informing him of the offers of competing firms or giving him a chance to bid a lower price for the job." Muroiterie Fraisse made a claim for fault in contrahendo (in the negotiation stage anterior to the agreement) but the Court rejected the claim because: firstly, certain obligations, such as good faith, rest on the parties in relation to the negotiation phase; secondly, the negotiation phase is based on analysis of risks and advantages; thirdly, merchant cannot be liable for not having dealt with a competitor: any fault in contrahendo must be patent beyond discussion. The fact that Muroiterie Fraisse had installed mirrors in a model apartment was irrelevant as another, entirely separate, contract was involved, which had been performed, for which the A had received normal compensation and which did not imply any obligation for the building as a whole.

Issue: whether the defendant society was liable in contrahendo.

Rule: the society Muroiterie Fraisse made a claim for fault in contrahendo (in the negotiation stage anterior to the agreement) but the Court rejected the claim, because: firstly, certain obligations (such as good faith) rest on the parties in relation to the negotiation phase; secondly, the negotiation phase is based on analysis of risks and advantages; thirdly, a merchant cannot be liable for not having dealt with a competitor.
Argument: the fact that the plaintiff has installed mirrors in a model apartment was irrelevant as another, entirely separate, contract was involved, which had been performed, for which the plaintiff had received normal compensation and which did not imply any obligation for the building as a whole.
Conclusion: the defendant had no obligation to accept that estimate if he found it too high or to communicate to the plaintiff the offers of concurrent firms. The Court decided in a way that is really close to English law's approach, by allowing the defendant to walk away from negotiations in light of the pursuit and safety of its own economical interests.

Cour d'Appel, 1984 (French law)

A. was hired by S. in order to perform in a movie. The contract was ultimately rescinded by the company which paid her an indemnity. Later on, the company sent a new proposal to A. [the provisions that concerned her compensation were left blank, whereas the starting date of the film was present]. In response, she sent them another proposal which indicated the amount of her remuneration but not when the filming was to start. The company returned her proposal with a check as first payment which was to be made on signing the contract; she did not cash it. S. sued A. for 18 million francs in damages claiming breach of contract and a wrongful breaking off of negotiations.

Issue: whether Mlle Adjani was liable in contrahendo.
Rule: even thought Mlle Adjani and the company had, in principle, reached an agreement, it is not sufficient to have a contract if all other essential elements are missing. In fact, they have just agreed on important points.

Reichsgericht, 1934 (German law)

The plaintiff claimed 64711.40 Reichsmarks for the delivery of newsprint to the H.B. Corporation in H. in April, 1931. On April 21, 1933, it sought security and payment from the defendant, who was the sole shareholder and manager of the Corporation. Thereafter, it delivered more newsprint to the Corporation for 47,878.45 Reichsmarks. The plaintiff, who has sued the defendant because it is unable to get satisfaction from the Corporation, claims [that] on April 21, 1931, the defendant told its agent M. that he would provide adequate security for the Corporation's debt out of his own assets. This statement also concerned the future delivery of newsprint to the Corporation [But adequate security was never provided.].

In these cases, it is showed the borderline between fault in contrahendo and contractual liaability, as well as the one between the former and tort liability.
The defendant, being the sole shareholder of his corporation, has **promised** to pay with its own assets for the delivery of newspapers. However, it is worth noting that the plaintiff had a contract with the *corporation*, and not directly with the *defendant* as a shareholder; the contract thus binds the plaintiff to the corporation, but not to the promisor. **The plaintiff did not sue directly the corporation**, routing instead for suing its shareholder, because the former has already proved insolvent, hence resorting to shareholder's satisfaction of the debts was inevitable.
Rule: between the plaintiff and the shareholder there is no contract, because the promise was sufficiently certain and detailed, however the plaintiff *relied* on the misrepresentation given by the promisor (**fraud**) and incurred in useless expenses. Nonetheless, the Court stated that the defendant made an *innocent statement*, he didn't have the intention of harming the plaintiff, so he is not liable in tort. Notwithstanding, the Court alleged that the defendant *negligently* harmed the plaintiff by giving him an indication which outwardly considered meant that he agreed to provide security, thereby causing him to make a further delivery (useless expenses).
Argument: we should analyze in a separate way the first and the second delivery:

- regarding the first delivery, the plaintiff was not paid at all despite being bound to the corporation under an enforceable promise, ie an actual contract. Therefore, there was a **breach of contract** and the defendant should be compensated with expectation and reliance damages. But the compensation does not fall upon the defendant, that is not liable at all, since the contract for the first delivery was between the plaintiff and the *corporation*;
- regarding the second delivery, there was no contract at all because the promise to pay by the defendant was neither concrete nor definite enough to be an enforceable promise of exchange. Moreover, thanks to fact-finding, we also know that the defendant is neither liable under *tort*, since the Court declared that he didn't have the *intention* of harming the plaintiff (no *fraud*). At the end, actually, we cannot neither talk about a presence of negotiations: there was just a non-concrete promise!

Conclusion: during the negotiation phase, there is a line between liability and not liability, and the defendant places himself in the latter party when "he awakens in the other an **objectively unfounded hope** that a transaction will be concluded, and thereby causes him in a discernible manner to incur expenses which would be of use had the transaction been concluded, but are useless otherwise" [*BGB code*, art. 276]. In such cases the **needs of commerce** require that the negligent party be held liable for the harm caused: here, for the useless expense. **This liability can be traced neither to contract nor tort** since a contract did not come to exist and liability in tort could arise only under Art. 826 of the Civil Code whose requirements (intention) are not met here.
If this case was decided under American law, **promissory estoppel** would have been applied, as all the relative requirements would have been met and the same discipline as German *culpa in contrahendo* would have been provided.

<u>*Reichsgericht*, 1934 (German law)</u>

"The first defendant published two newspapers. It was a partnership in which the second and third defendants were partners. Negotiations began between the plaintiff and the third defendant, acting on behalf of the first defendant. After a number of conversations plaintiff's manager and the third defendant agreed that negotiations would take place on the transfer to the plaintiff of both newspapers instead of the participation of the plaintiff in the first defendant. The plaintiff needed the agreement of the administrative board of its Swiss parent corporation. To make this decision possible, the first defendant prepared a 'detailed offer. 'On April 17, 1986, the plaintiff's legal representative produced a second draft of the contract. On April 18, 1986, negotiations took place between plaintiff's manager and accountant, on the one hand, and the defendant on the other, in which agreement was reached on the most important points concerning the conclusion of the contract. On April 28, 1986, the plaintiff informed the defendant in writing that it accepted its offer of March 3, 1986. Nevertheless, the same day the third defendant notified the plaintiff by telephone that a transfer of the two
newspapers could no longer be considered.

The defendant is *not liable* since after the plaintiff signed the first offer it was changed again with a second offer, neither a *preliminary contract* was signed. Nevertheless, the plaintiff made some *expenses* for the negotiations. In principle, each party must bear the costs incurred in the expectation that a contract will be concluded. **The risk that a contract will not come to be later on and that the expenses will be useless falls on each party to the negotiations himself**.
The 'detailed offer 'contained only those written provisions for the conclusion of the transaction on which the defendant was willing to agree. The 'offer 'did not deal with all the questions on which, according to the will of the parties, provision had to be made. It was *left open* who was to be the contract partner of the defendant, the plaintiff itself or a corporation that it was to organize.
The court concluded that the plaintiff could not recover for expenses incurred before the conversation of April 18th, as for those incurred thereafter it is not sufficient that the plaintiff could have the *impression*, because all the essential points were agreed upon, that a contract would ultimately be concluded.
After April 8th conversation, the plaintiff relied on the conclusion of the contract; However, this finding is not enough to justify a claim for compensation for fault in contractual negotiations.

Conclusion: no reliance damage awarded. The Court states that there was no contract because the promises were too vague, meaning that not all essential points of the contract were decided, and up until all the points have been set forth a party can freely walk away from negotiations. However, this gives rise to an absurd situation: if contractual terms have not been defined in total way, one can escape negotiations and won't be liable for fault in contrahendo; if contractual terms have been integrally defined, then we have an actual contract and one party can be liable for the breach of it, but not for fault in contrahendo. The scope of applicability of fault in contrahendo seems thus frustrated. Moreover, it has to be stressed the contradiction the Court gave rise as to the previous German case, whereby it stated that even if the promise was vague, the defendant was liable in contrahendo.
For all things considered, we can state that at the end German law and American law are not so distinct: if there's a *fraud*, one will be liable in tort in both systems, regardless of any fault in contrahendo; if there's *detrimental reliance*, one can recover reliance damages thanks to promissory estoppel in the USA or to fault in contrahendo in Germany.
It is worth remembering that when there is a breach of contract in German law, the plaintiff can recover damages also pretending the *specific performance* to be rendered (if it was what the contract provided for), instead in case of fault in contrahendo the plaintiff can be given just *monetary damages*.

Lifecycle of a transaction

The lifecycle of a transaction is composed of the following steps:
1. **commencement of negotiations**;
2. **non-disclosure agreement** (**NDA**) = legally binding contract that establishes a confidential relationship between parties, so as to avoid the mutual leak of sensitive information. It thus allows the parties to share sensitive information without fear that it will end up in the hands of competitors;
3. **discussion on terms** of the contract to be = information on the counterpart, potential liability, price of the thing to be sold, and so on;
4. **letter of intent** (**LoI**) = document declaring the preliminary commitment of one party to do business with another. The letter outlines the chief terms of a prospective deal. It is a contract by itself, but has **no binding force** because there are certain conditions to be met according to due diligence; otherwise, one party can back out, even if he could be burdened with the duty of compensating the other party with reliance damages;
5. **due diligence** of the parties;
6. **contract of sale** = legal contract, with **binding force**, for the purchase of assets (goods or property) by a buyer (or purchaser) from a seller (or vendor) for an agreed upon value in money (or money equivalent). It can include a **material adverse change clause** (**MAC**), ie a contractual clause which acts as a "catch all" provision that aims to allow the lender to call a default if there is an adverse change in the borrower's position or circumstances. In a nutshell, it is a clause allowing one party to back out after the contract was signed for a change in circumstances;
7. **additional conditions** to be met before the closing day = one example could be the notary publics in case of sale of estate;
8. **closing day**.

It is worth noting that one can be liable in *contrahendo* from the **commencement of negotiations** (1) to the **contract of sale** (7).

3. Mistake

Each legal system faces the problem of **when a contract is void for mistake**: indeed, starting from the premise that a contract is formed by the *consent* of the parties, can the latter ones truly consent even if one of them is mistaken? As far as Romans were concerned, they dealt with this topic but, as usual, trying to extract solutions for particular cases, and not general principles. In the Digest, Ulpian stated that in contract of sale there must be a consent, viceversa, if there is *disagreement* on the identity of

the thing sold (*error in corpore*), the contract is void. Contrariwise, whether the error rests on the essence of the substance of the thing (*error in substatia*) it depends on the thing itself: if vinegar is exchanged for wine that went sour, then the contract could be nonetheless valid, since there has been *agreement* as to the specific thing (on its *essence*), though mistake as to the material (*error in materia*); yet, if vinegar is exchanged for wine that didn't go sour, that won't be at all a good contract.
It was Accursius to assign names to the errors identified by Ulpian, listing errors in (1) whether there was a sale, (2) price, (3) *corpore*, (4) *substantia* and (5) *materia*.
The late scholastics thought that through a contract, a party *voluntarily* and alternatively entered into two basic kinds of arrangements: a *gratuitous contract* (in which he enriched the other party at his own expense) or an *onerous contract* (in which he exchanged his own performance for one of equivalent value), both of which had to be *voluntary*, yet when was a decision truly *voluntary*?
Aristotle said that one action is **involuntarily** if a person was mister as to what he was doing, and that a thing is what it is because it has a certain *substance*; therefore, when losing its substance, the thing is no longer what it was before. For all these premises, late scholastics inferred that to make a contract *involuntarily* and, thus, void was a **mistake as to the substance** (or **substantial form** or **essence**) **of what one was doing**.
However, what is precisely the **substance of a thing**? We should make a distinction between:

- *man-made things* (or *artifacts*) = in this case the problem of substance identification is not that hard, since — according to Aristotelian philosophy — the essence of a thing was captured by its *definition*, and an artifact was *defined* in terms of the *purpose* for which it was made;
- *natural things* = they do not have a purpose for which they have been made, as they originated *naturally*. Bartolus and Pufendorf suggested that what matters is not necessarily what a biologist or a geologist would take to be their essence: in fact, the same thing is taken in different ways according to a difference in the way it is considered, meaning that what mattered was the *substance* of a thing as it would be considered from the standpoint of the parties.

However, recalling a previous example, why should it matter whether the vinegar bought for wine was wine that accidentally soured or wine that was deliberately soured in order to make vinegar? By the way, Ulpian said that the sale was valid in the first case but not in the second one.
Today, it is a civil law principle that if there be a **misapprehension** as to the *substance* of the thing there is no contract, but if it be only a *difference in some quality* or *accident*, even though the misapprehension may have been the **actuating motive** to the purchaser, yet the contract remains binding.
The concepts of *error in substance* and *essence* have been recalled by French and German civil codes, but almost no-one knows actually what these expressions clearly mean. So as to cushion, if not outright circumvent, the problem, in the US it is not spoken of mistake in *substance*, but rather of an **error in basic assumption**.

When dealing with mistake in contracts, we should make a distinction between:

- *unilateral mistake* is where only one party to a contract is mistaken as to the terms or subject-matter. it is sufficient to avoid the contract in French and German law (if you do not get what you wanted from the contract, there is mistake and you can get out of it and get relief), whereas it is only exceptional in common law. Apropos of American law, if the unmistaken party knew the other party's mistake, or should have reasonably known it, then the contract can be invalidated for *unilateral mistake*. Instead, in English law the mistake must be mutual so as to give relief, yet it is not clear whether the institution of mistake places himself: in fact, within English legal system, if one party is *negligent* because of an *innocent misrepresentation*, then he will be deemed as innocent; if one party is *intentionally lying* to the other one, then he is in fraud; the middle line between these two institutions would be theoretically occupied by mistake.
  Moreover, the matter of **good faith** is therein intertwined: in fact, one party can be considered as acting in bad faith, to a certain extent, solely if he is behaving like a psychopath, otherwise he's staying within the perimeter of good faith;

- *mutual mistake* is when both parties of a contract are mistaken as to the terms. Whereas in the US there is the restatement to indicate what is the general rule as regards to contractual mistake, the same cannot be said concerning English law, that is devoid of any general rule on this topic. At any rate, in English law a contract can be voided in presence of a mutual mistake intended as the face-off between two different understandings of the state of affairs by the parties — in a nutshell, they got mistaken in diverse ways.
  In general, common law tendency is the one of disliking remedies for mistake: their rationale is mostly grounded on the fact that, in a contract of sale, it is the purchaser to bear the risk, because he should behave according to the due diligence (public policy). At the end, English law in particular reveals to be incoherent, based on experience and not on logic.

Naturally, not every mistake is able to impair a contract and provoke its voidability. So as to get the latter result, in German and French law it is required that the mistake falls on the **essential qualities** of the contract, intended as the features being fundamental, substantial, material. However, they are so undetermined as expressions that we actually don't know which qualities can be deemed as essential or not. In fact, the **standard for what is essential is subjective** to each party, since each of them use contracts in order to fulfill some purposes which, when not achieved, allow the promise to be set aside or terminated. The thing is that a quality can be essential to one party even if it is not the same for the other one, or if it is minor comparing to other terms of the contract.
Under section 119, the German civil code states that:

[*BGB code*] ***Voidability due to error***. "(1) One who was in error as to the **content of his declaration of will** or did not wish to make a declaration of will with this content can void the declaration when it is established that he would not have made it with **knowledge of the state of affairs** and **intelligent appreciation of the case**. (2) A mistake over any **characteristics of the person** or **thing** that are regarded as **essential in ordinary dealings** counts as an error in the content of the declaration."

This article wants to convey that any mismatch between the intention and the declaration of one party entails a mistake, no matter how little it is. In this sense, **you should get what you wanted from the contract, otherwise there is a mistake**. This was the principal idea, but in practice a needed *qualifier* was added, namely the requirement that the mistake falls onto essential qualities of the contract so as to avoid the contract.
However, if one party was allowed to escape from the contract only because it didn't get what he wanted, then the other party would suffer from **economic unfairness**. In fact, premising again that contracts are used by parties so as to achieve some purposes, if the latter ones are **general** and common to parties, then in case of mistake parties either would have nothing to discuss on: the contract must be voided. Conversely, whether parties are contracting so as to fulfill **specific** purposes the situation turns more irksome: indeed, if those particular goals were not expressed by one party, there would be nonetheless a mistake, but he won't be allowed to get out of the contract, nor to get relieved, in light of a policy of economic fairness — that is contrariwise always objective — in favor of the counterpart. It should be pointed out as well that for 'declaration' we do not intend only what a party outwardly announces, but also the real state of affairs, what the reality has revealed to be.

[*Code civil*]
"Mistake, fraud and duress **(coercizione)** vitiate consent where they are such of a nature that, **without them, one of the parties would not have contracted or would have contracted on substantially different terms**. Their decisive character is assessed in the light of the **person** and of the **circumstances** in which consent was given."

"**Defects in consent** are a ground of **relative nullity** of the contract."

"**Mistakes of law** or **of fact**, as long as it is **not excusable**, is a ground of **nullity** of the contract where it bears on the **essential qualities** of the act of performance owed (1) or of the other contracting party (2)."

(1) "The essential qualities of the act of performance are those which have been **expressly or impliedly agreed** and which the parties **took into consideration on contracting**. Mistake is a ground of nullity whether it bears on the act of performance of one party or of the other. **Acceptance of a risk** about a quality of the act of performance rules out **(escludere)** mistake in relation to this quality."

(2) "Mistake about the essential qualities of the other contracting party is a ground of **nullity** only as regards contracts entered into on the basis of **considerations personal** to the party."

"Mistake about **mere motive**, extraneous to the essential qualities of the act of performance owed or of the other contracting party is not a ground of nullity unless the **parties have expressly made it a decisive element of their consent**. However, mistake about the motive for an **act of generosity** is a ground of nullity where, but for the mistake, the donor would not have made it."

[*Restatement II of Contracts*] ***When mistake of both parties make a contract voidable***. "Where a mistake of both parties at the time the contract was made as to a **basic assumption** on which the contract was made has a **material effect** on the agreed exchange of performances, the contract is **voidable** by the adversely affected party, unless that party bears the risk."

Rationale → Before making a contract, a party ordinarily evaluates the proposed exchange of performances on the basis of a variety of assumptions with respect to existing facts. Many of these assumptions are shared by the other party, in the sense that the other party is aware that they are made. The mere fact that both parties are mistaken with respect to such an assumption does not, of itself, afford a reason for avoidance of the contract by the adversely affected party. Relief is only appropriate in situations where a mistake of both parties has such a material effect on the agreed exchange of performances as to upset the very basis for the contract.
Thus, a mistake of both parties does not make the contract voidable unless it is a basic assumption on which both parties made the contract; **market conditions** and the **financial situation** of the parties are ordinarily not such assumptions, as the parties may have had such a "basic assumption", even if they ere not conscious of alternatives. **Where, for example, a party purchases an annuity on the life of another person, it can be said that it was a basic assumption that the other person was alive at the time, even though the parties never consciously addressed themselves to the possibility that he was dead.** For all things considered, an assumption must be basic, although it need not be basic even if it is of great importance to the parties, and parties must have made an assumption even if they never did so consciously.

Leaf v. International Galleries, 1950 (English law)

In 1944 the defendants sold to the plaintiff for £ 85 a picture which they represented to have been painted by J. Constable. In 1949 the plaintiff tried to sell it at Christies and was then informed that it had not been painted by Constable." It was found at trial that the painting was not by Constable, but that the defendant had believed that it was.

Issue: whether the contract can be void under the doctrine of **mistake in authenticity**, in authority.
Rule: if there is a mutual mistake of the parties, then the contract can be voided.
Argument: the Court stated that parties actually have gained what they bargained for, ie a painting, therefore there's no room to acknowledge a mistake. In this case, the mistake was not *mutual*, meaning that parties had different understandings of the contractual terms and of state of affairs, but rather *common* to both parties.
Nevertheless, the seller *promised* that the picture was authentic in a term of the contract as to the person by who the picture was painted. He thus provides the other party for a warranty, a condition, a representation on the precise person as author of the painting, causing the reliance of the counterpart.

It seems like the seller was the only one to cause the mistake, that might hence be intended as even *unilateral*. Yet, assuming this term was a **condition**, the right to reject for breach of condition has always been limited by the rule that, once the buyer has accepted the goods in performance of the contract, then he cannot thereafter reject but it is related to his claim for damages. Apropos of this, a buyer is considered to have accepted the goods when, after the lapse of a reasonable time, he retains the goods without intimating to the seller that he rejected them.
Conclusion: the Court stated that there was no mistake, because neither the seller knew the picture wasn't authentic: he gives an **innocent representation**.
In English law, in fact, if the unmistaken party has **almost defrauded** the mistaken party, then relief is granted; if parties got mistaken **innocently**, then the contract is binding; if the unmistaken party **lied** to the mistaken one, the first was is liable for fraud.
In English law, it is a **social policy** that risks fall on the vendees who are thus not granted with relief, given that when the transaction is down, the purchaser actually bears a risk. In the case at hand, it seems that the buyers paid the seller for a warranty, thus shifting the forbearance of risk to the seller himself. But there was no breach of contract (it was still a piece of art to be sold), it was a unilateral mistake and relief were not granted, since the seller give an innocent misrepresentation.
There is no coherent discipline of mistake within English Law, nevertheless we can distinguish between three categories:

1. mistake on identity = parties have figured two totally different intentions, it is a **cross-purpose contract**. If the mistake was mutual, then in this case relief is granted;
2. mistake on quality = when mutual, the mistake rests on a basic assumption on the essential quality of the contract, ie the first thing that comes to parties' mind when thinking to the contract, namely in turn the **performance terms of the contract**.
   When unilateral, the mistake is applicable in the middle line between **negligence** (ie the party doesn't act as a reasonable person) and **fraud** (ie the party lied to the other with the intention of harming him). This middle line of mistake can be identified with **quasi-fraud**, ie a miscellany between gross negligence and recklessness, that nevertheless is still a behavior in good faith;
3. mistake causing the commercial impossibility = in this case, parties are excused from nonperformance and relief is granted.

Regarding, instead, American law, there is a mutual mistake when there is an erroneous basic assumption on essential qualities of the contract, whereas there is a unilateral mistake when the unmistaken party knew or could have reasonably known the other party's misrepresentation.
Here it is an useful formulary on mistake:

- fitness for purpose = within any legal system, if you didn't get what you have pursued by the contract, you are not bounded in principle by the latter;
- assumption of risk = if there is no express warranty that shifted the risk to the seller, it is the buyer to bear it;
- evaluating mistake = it is still a mistake, but relief is not granted for it within any legal system.

Smith v. Zimbalist, 1934 (US law)

Zimbalist, an internationally known violinist, agreed to pay $8,000 for two violins from Smith, a collector, calling one a *Stradivarius* and the other a *Guanerius*. It turned out that the violins were not made by Stradivarius or Guanerius but were cheap imitations worth not more than $300. Zimbalist sued successfully to avoid the contract on the grounds of both mutual mistake and breach of express warranty.

Issue: whether the contract can be void under the doctrine of **mistake in authenticity**.
Rule: the plaintiff aimed at buying arts, as a collector, but he didn't achieve his purpose because he purchased imitated violins. In general, if a piece of art turns out to be realized by a different artist, the contract may still be binding, but now it is not the case simply because those goods were no art at all: the object of contract has completely changed.
Mostly in artistic market, the buyers are burdened with the risk of purchasing a painting whose author is not certain, since these kinds of transaction entail such **risk assumption** but without avoiding the

contract in case of further revelations on author's identity. Notwithstanding, in the case at hand the plaintiff was not bound to the contract anymore because the thing sold was no art at all, but rather an imitation, and no artistic buyer assumes the risk of buying a counterfeited object: it clearly overcomes any threshold of risk the purchaser had accepted to bear; **it falls out of the area of risk assumption**.
Conclusion: Zimbalist sued successfully to avoid the contract on the grounds of both mutual mistake and breach of **express warranty**. There is thus a breach of contract because warranty was actually granted and accordingly, whether it was a *mutual* mistake originating from a basic assumption or a *unilateral* one, relief are awarded at any rate. Moreover, the performance of the contract was neither fitted with the purpose of collecting artistic works.

Firestone & Parson, Inc. v Union League of Philadelphia, 1987 (US law)

> The Union League Club sold Firestone and Parson an oil painting for $500,000 which was generally believed in art circles to be by Albert Bierstadt, an American landscape painter. In 1986, an article published in Antiques magazine ascribed it to another artist, John Ross Key. If it had been painted by Key, it was worth only about $50,000. In 1988, the Firestone & Parsons company sued to rescind the contract. The court held that it could not."

Issue: whether the contract can be void under the doctrine of **mistake in authenticity**.
Rule: Where a mistake of both parties at the time the contract was made as to a basic assumption on which the contract was made has a material effect on the agreed exchange of performances, the contract is voidable by the adversely affected party, unless that party bears the risk.
Argument: the defendant gave **no warranty** to the plaintiff as to the painter's identity, the latter just relied on professors' opinions. The purchaser thus **assumed the risk** that the professors were wrong and, consequently, that the picture had been made by someone else and that it revealed to be less valuable than expected.
Conclusion: In this case there is an **evaluative mistake** (ie a mistake as to the value), the paintings turned out to be less valuable but the party cannot get out of the contract because of that. As the Court herself stated, post-sale fluctuations in generally accepted attributions do not necessarily establish that there was a mutual mistake of fact at the time of the sale.
When dealing with mistake in American law, we should consider most of all three aspects:

a. **suitability for a purpose** = whether the performance is fitted for the purpose of the contract. Consequently, you can get out as long as it is economically fair to the other party;
b. **assumption of risk** = what risk one or more parties have assumed when entering the contract. In fact, if the risk is outside the ordinal assumption, then there can be mistake;
c. **evaluative mistake** = an evaluative mistake doesn't allow one party to get out of the contract because it is not a mistake at all. In fact, making a profit is not guaranteed. Example: a discreet author sells to me a signed copy of his new book for $20: we decided to make this transaction because for me, the book is more valuable than $20 are, thus I exchanged them; conversely, for the author the price I paid for the book is more valuable than the book itself, so he chooses to exchange it. However, as time passes, the book price fluctuates and increases because the author has become a celebrity. He thus comes to me and asked the return of the book because the sum I paid at the time to purchase it was not adequate: the seller claims to have made an evaluative mistake. Yet, there's no room for any mistake — neither for error in substance, since the book as a thing stays the same — because the seller assumed the risk of market variations when vending his book to me. The fact is, **if you didn't get what you wanted, then there is a mistake, but if it is an evaluative one you can't get relieved, owing to assumption of risk and potential economic unfairness for the other party**.
   It should be specified that **economic fairness does not explain whether there is a mistake or not, but rather when you can or cannot get relieved because of mistake**: in fact, not every mistake entails the payment of damages.
   Contract law is a **blackletter law** (or *hornbook law*), ie well-established legal rules that are certain and no longer disputable; the legal concepts that are ancient, important, and indisputable. One of this legal rule states, on the topic we are dealing with, that evaluative mistake is claimed on the ground of willed profit, thus relief is barred.

Cour de Cassation, 1970 (French law)

Chalom bought two chairs described as "marquises" of the Louis XV period at a public auction. After they were dismantled and scraped, they proved to be chairs of another type which had been reconstructed with pieces from the period of Louis XV and of the period following." The Court held that the lower court was correct to annul the sale for mistake, noting that "the sale can be declared invalid although the object has preserved its individuality and specific qualities.

Issue: whether the contract can be void under the doctrine of **mistake in authenticity**.
Rule: if one didn't get what he wanted, then there is a mistake.
Argument: in this case, chairs were not authentic. The buyer does not have to assume the risk of purchasing chairs that are not "marquises", being it an essential quality. These pieces of art revealed to be fake and not valuable, they were not the pieces of art Chalom agreed on when entering into the contract.
Moreover, the plaintiff bought the chairs in a public auction, where pieces of art at stake are supposedly prestigious and original, and the offered sums of money are extremely elevated. That is why Chalom deserves even more protection, he relied on the authenticity of the chairs without contemplating any risk they could be counterfeited.
Conclusion: the court was correct to void the contract for mistake.

Cour de Cassation, 1987 (French law)

"In 1933, before his death, Sean-André Vincent sold a painting at a public auction entitled Le Verrou as being "attributed to Fragonard." After it had been recognized that the painting truly was by Fragonard, the heirs of Vincent sued to have the sale annulled on the ground that Vincent had been in error as to its authenticity. The Cour de cassation refused to annul the sale. It said that the court below had found "that in 1933, in buying or in selling a work attributed to Fragonard the contracting parties had accepted the risk as to the authenticity of the work."

Issue: whether the contract can be void under the doctrine of **mistake in authenticity**.
Rule: acceptance of a risk about a quality of the act of performance rules out mistake in relation to this quality.
Argument: "attributed" is such a vague expression that it implied both the probability that the picture was made by the mentioned author and the one that it was made by someone else. Heirs can't make such a claim because, if the likelihood that the picture was realized by Fragonard was completely excluded, then the piece of art would have neither been *attributed* to him. Moreover, an artistic *attribution* does not constitute at all a warranty, rather expressing a mere general though: therefore, in the case in which it was the buyer to claim for damages because the picture was actually authored by someone else, it couldn't get relieved because there would not have been any breach of contract. Thus, both the seller and the buyer **assumed the risk** of correspondence between the attributed author and the actual one.

Cour d'Appel, 1988 (French law)

The buyer of a used car discovered that it was first sold in 1955 although the sales catalog described it as a "Rolls Royce, 26 CV, 1954 Silver Wraith model." The court refused to annul the sale for error, since the error was not essential.

Issue: whether the contract can be void under the doctrine of **mistake in authenticity**.
Conclusion: the contract should not be voided because the age of a car is not one of its *essential quality*. Actually, it is a **confusing case**, since the standard of what is substantial is extremely subjective, even more so when concerning a collector!

Reichsgericht, 1929 (German law)

A couple decided to deliver 2 Chinese vases to a modern store to be sold on commission. These vases turned out to be from the Ming Dynasty, thus being very valuable.

Issue: whether the contract can be void under the doctrine of **mistake in authenticity**.

Rule: under section 119 of BGB code, it is stated that mistake occurs when it impairs the content of one's declaration of will.
Argument: the vases keep being arts, but they are actually more valuable than though. Sellers can't get out of contract because we are in presence of an **evaluative mistake** that does not grant any relief. This case was not decided, so everything depends on fact-finding. In particular, the needed thing to discover is whether there was a **mismatch** between the intention of parties (intended as their state of mind) and their declaration (that must not be intended in a narrow sense as to what parties explicitly declared, but rather as the reality, as the actual state of affairs). At this point, fact-finding activity could lead to two solutions:

a. the sellers had contemplated the possibility that the vases could be antique, but they sold them as modern = there is a mismatch between intention and declaration, therefore there is no mistake, because the sellers had assumed the risk that the vases could not be so modern as thought;
b. the sellers had *not* contemplated at all the possibility that the vases could be antique, rather being convinced they were modern, so they sold them as modern = there is no mismatch between intention and declaration, therefore there is an evaluative mistake, because the sellers did not assume the risk that vases could not be so modern as thought. Being this the most straight-forward solution to the case at hand, the sellers, so as to get relieved, should prove that the potential antiquity of the vases have never remotely popped into their minds.

Reichsgericht, 1932 (German law)

The plaintiff brought an oil painting from the defendant, 'Ice on Water, 'which was indicated to him as an original painting of Jacob I. (Isaakson) van Ruysdael and accompanied by an opinion by the late museum director B. attesting, as the parties understood, that the work originated with this painter. The picture was immediately delivered and the purchase price of 15,000 Reichsmarks was paid. The plaintiff claims that the work was done not by 'the famous master 'Jacob I. van Ruysdael but by his 'much less famous cousin and imitator 'Jacob S. (Solomonsson) van Ruysdael. He claimed that the contract of sale was void for mistake and demanded the return of the purchase price with interest. Both lower courts rejected his claim.

Issue: whether the contract can be void under the doctrine of **mistake in authenticity**.
Conclusion: no warranty was given. The buyers assumed the risk.

Reichsgericht, 1932 (German law)

At 11:00 A.M., June 24, 1902, plaintiff agreed to rent a flat from defendant for one day to view the coronation procession of King Edward VII, and paid £100. The parties were unaware that an hour earlier a decision had been made to operate on the king, which made the procession impossible. Held: the contract was void, and plaintiff is entitled to rescission: "The agreement was made on the supposition by both parties that nothing had happened which made performance impossible. This was a missupposition of the state of facts which went to the whole root of the matter.

Issue: whether the contract can be void under the doctrine of **mistake in suitability for a purpose**.
Rule: if you didn't get what you wanted and what you contracted for, then there is a mistake.
Argument: the decision of this case depends on the time the cancelation of the procession occurred. In fact, the text states that it was canceled one hour *earlier* the parties concluded their agreement: the cancellation was thus precedent to the contract, and that is why there is a mistake, ie a vitiating factor, a **defect in consent**, intended as occurring *anteriorly* to the contract itself. Instead, if the cancellation was occurred *after* the contract was made, then there would have been no mistake (because there would be no defect in consent), but rather the **frustration of the purpose** of the contract. In fact, the cancellation as a *future event* with respect to the contract would have made the contract performance as unsuitable for the purpose of the agreement, meaning that performing the contract would have been utterly useless, and consequently either parties would have been excused for non-performance or the contract would have terminated.
When one enters into a contract of exchange, his purpose is to give up something that is less valuable than the thing is getting in return.

The performance of the lease contract has then turned *impossible*. In the case at hand, we cannot talk about **real objective impossibility** because contractual performance is still possible, however the lessee can get out of the contract because it is not suitable for his purpose, ie watching a procession that was subsequently canceled.
It must also be pointed out that in this case, escaping from contract is allowed because the lessor won't find himself in an economically unfair position: since the procession has been canceled and, on that day, the rent of the flat was conditioned to the possibility of assisting to this celebration, the lessor won't have found any other potential lessees at any rate. Therefore, it could be alleged that he didn't suffer from any economic loss because he wouldn't have gained money anyway.

Amalgamated Investment & Property Co. v. John Walker and Sons, 1977 (US law)

In July 1973, the plaintiff purchasers agreed to purchase the free- hold of a warehouse from the defendant vendors for £1,700,000 subject to contract. The warehouse had been advertised as being suitable for redevelopment. The Department of Environment wrote to the vendors informing them that the property had been selected for inclusion in the statutory list of buildings of 'special architectural or historic interest'.

Issue: whether the contract can be void under the doctrine of **mistake in suitability for a purpose**.
Rule: there is actually an error but it occurred *after* the contract was signed, so we have here a **frustration of the purpose**. Yet, the biggest mistake was made by purchasers' lawyer, who claimed for mistake instead of suing for frustration of the purpose.

Sherwood v. Walker case, 1887 (US law)

Both parties believed that the cow was barren and would not breed; after they discovered it would also breed. In this case it would be worth up to 10 times the price paid. The court decided there was a mistake because both parties believed the cow could only barren.

Issue: whether the contract can be void under the doctrine of **mistake in suitability for a purpose**.
Conclusion: the majority declared that there was a mutual mistake in quality, because the purchase of a barren cow or of a breeding cow aims at different purposes (livestock or milk production). Since the cow is substantially a different creature, then the contract is voidable.
The minority, instead, denied the existence of a mistake because of a mutual assumption of risk: parties were not convinced of the animal's sterility, nevertheless the buyer invested in the supposedly barren cow and in doing so he assumed the risk that he could breed. In this sense, the dissenting opinion moves from the presumption that the mistake at hand is only *unilateral*, as the buyer contemplated the possibility of the cow to be fertile. However, it could be counter-argued that the buyer was actually in the impossibility to acquire such an information differently from the vendor, upon whom the assumption of risk actually falls.

Lenawee v. Messerly case, 1982 (US law)

☐Ca☐rl and Nancy☐ Pickles☐ bought a 600 square foot tract of land from William and Martha Messerly on which was a three-unit apartment building. Shortly after, the Lenawee County Board of Health condemned the property and obtained a permanent injunction prohibiting human habitation on the grounds that the sewage system violated the sanitation code. The Pickles agreed to pay $25,500 for the land. Because of its condition, the land had no value at all. The Court of Appeals concluded that equity does not justify the remedy sought by the couple since there is an AS IS clause that state☐s "Purchaser has examined the property and agrees to accept it in its present condition.

Issue: whether the contract can be void under the doctrine of **mistake in suitability for a purpose**.
Rule: the contractual purpose of *suitability for human habitation and source of rental income* has been frustrated, however in this case there's no room for mistake because the buyers have **assumed the risk** by means of an explicit clause. Thus, they must have done diligent research so as to discover possible defects in the land. As we can notice, common law is more market-oriented than civil law, that in turn is more protective than the former.

Cour d'appel, 1989 (French law)

The couple D. contracted to buy real estate belonging to the couple B for a price of 645.000 francs. They claimed that they later learned that a highway was to be built 50 meters away. The court granted their request that the sale be avoided for error considering the discovery by the buyers of the construction project and the potential for noise, which manifestly changed the possibility of normal enjoyment of a habitation.

Issue: whether the contract can be void under the doctrine of **mistake in suitability for a purpose**.
Rule: since the contractual price was visibly high, the Court presumed the contractual purpose of the buyers to be the normal enjoyment of their house to be. In fact, an elevated price evidences the presence of a certain *warranty*.
Argument: it could be argued that, differently from the seller, vendees actually didn't know about the imminent construction of a highway in the proximity, otherwise they would have probably walk away from negotiations, since an highway would have lowered the property value.
Conclusion: the Court held that there was a mistake and the contract thus has to be avoided.

Kennedy v. The Panama, 1867 (Australian law)

Plaintiff was induced to buy shares of stock from defendant company by a statement in its prospectus that it had a contract with the government of New Zealand to carry mail. While the company believed it had such contract, in fact it did not, since the agent that had signed on behalf of the government had no authority to do so, and the government refused to ratify the contract, although it eventually agreed to a contract on somewhat different terms. The plaintiff sued for rescission, but the court held that the latter is not authorized unless the innocent misrepresentation is such as to shew that there is a complete difference in substance between what was supposed to be and what was taken. It was not an intentional misrepresentation. There is only a difference in some quality or accident, even though the misapprehension may have been the actuating motive to the purchaser, yet the contract remains binding. The misstatement in this case did not affect the substance of the matter, for the applicant actually got shares in the very company for shares in which he had applied; and that company has got the benefit and is now carrying the mails on terms, not the same as those they supposed, but still on profitable terms,

Issue: whether the contract can be void under the doctrine of **mistake in value**.
Rule: the mistake is here *unilateral*, as only the defendant was aware of the absence of a government contract. Be it mutual, it would have fall on an essential quality, and actually it did not according to Court's point of view: the utility of investment didn't change, the plaintiff still got shares and still got profit, to a certain extent. It should be specified that the essential quality of a contract is **the first thing that comes to one's mind when signing a contract**, ie the performance terms. Here the quality can't be deemed as essential indeed because the contractual performance is not affected by the mistake: the contract remains useful and the profit still probable.
Moreover, whether contemplating a mutual mistake, we should have considered also the potential mental capacity of the defendant.

Bell v. Lever Brothers, 1932 (English law)

☐Lever Brothers hi☐red ☐the defendants to be chairman and vice chairman of a subsidiary for a period of years. When the subsidiary merged with another company, and it became necessary to terminate them, Lever Brothers agreed to pay them ☐20,000 a☐d ☐30,000 respectively, i☐n compensation. It then discovered that they had violated their duties by secretly speculating and that it would have had the right to terminate their contracts without compensation because of this breach of duty. The Court held that the contracts for compensation are valid.☐

Issue: whether the contract can be void under the doctrine of **mistake in value**.
Rule: There is a *unilateral mistake* that does not grant any relief to the plaintiff, which viceversa would have been given whether the defendant had lied and defrauded the plaintiff. The latter, in fact, should have better used due diligence in order to discover the evolution of defendants' corporate activity. Again, English law has shown to be extremely resistant in giving relief.
Argument: it could be argued that it was a mutual mistake, but nonetheless relief would not be granted, because the parties get exactly what they wanted so there is no ground for mistake even if another party could have got it in another way.

Conclusion: in this case is not a mutual mistake even if the defendant is not innocent (they knew they broke t☐he law☐ and the company did☐☐☐n't have to pay them, but they accepted anyway the compensation☐☐). The mistake is unilateral because the defendants knew they had broken the law and thus compensation was not deserved, yet the mistake does not rests on essential quality because contractual terms on performance have not been affected. Also in this case, there is an application of English public policy which tends to restrict the application of mistake, so as to encourage the buyer's due diligence, since the **assumption of risks** encumbers on him unless he paid for a warranty. In the latter and opposite case, in fact, the risk shifts to the seller.

Cour d'Appel, 1988 (French law)

The Société d'Equipment d'Auvergne sold land for which a building permit had been obtained to the Société H.L.M. Carpi. During construction work, a shifting of the earth was observed. After a geological study was made, it appeared that only 22 individual houses could be built instead of the 32 which the Société Carpi had intended. The Court refused to annul the contract for mistake. It noted that the sale was concluded among companies which were professionals quite aware of problems of land and of construction, and the parties stipulated that the buyer "will take the land sold in its state as of the day he enters into enjoyment of it without power to have any recourse or rescission against the seller for any reason whatever, and in particular, on account of the bad state of the soil or subsoil, digging or excavation.

Issue: whether the contract can be void under the doctrine of **mistake in value**.
Rule: there is an *evaluative mistake* because it is actually possible to build less house than the expected number. Yet, it should be remembered that mistake has nothing to do with *economic fairness*; in fact, even if the contract reveals to be less profitable than predicted, it keeps binding the parties as long as they are fairly compensated for the respective risks assumed.
Conclusion: **i**n the case at hand, there is not a mistake which law attaches the grant of relief to. The buyers had assumed the risk through a specific clause and, be they professional, should have checked the state of affairs.

III. FAIRNESS

1. Fairness of the price term

It is usually disputed whether we should care about the economic fairness of a contract. Regardless of the answer, it is undeniable that, within every legal system, a reference to fairness is at any rate made. Modern legal systems conceive a contract law that is immune from government intervention, thus upholding the principles of liberalism and freedom of contract. The radical and ancient idea was that assessments on contractual fairness should be excluded and paternalism should be demonized.
Afterwards, the theory of *just price* was formulated, identifying the latter with the *market price*. Including a just price within ones' agreement would have meant to have stipulated a just contract. It is the same art. 1448 c.c. to state that there is no contract in case of significant unbalance between parties' performances.
At this point, the question about the reason why contracts should be binding comes to mind once again. According to a number of scholars, legal systems usually refuse to enforce a promise because it is **too harsh**: in this sense, these constructionists are barred a promise from being applied neither because it is *unfair*, nor because it is devoid of *consideration*; absurdly, without making any assessment of the latter kinds, they just prevent a promise from being binding insofar as it appears to be *too harsh*.
Nowadays, we can state that a contract is enforced insofar as it is *fair*, meaning that parties are justly compensated for the risks they have assumed. Market price is identified with the just one because it is likely and used to going up and down; in this sense, when you place a bet at a market price, it is always a fair bet.

civil law

As far as civil law is concerned, classical Roman law did not require that a price be fair: in fact, in a sale it was permitted by nature for one party to buy for less and other to sell for more, and thus each was allowed to outwit the other. In the late empire, however, a text attributed to Diocletian gave a remedy to one who sold land for **less than half the 'just price'**, obliging the buyer either to rescind the transaction or to make up the difference between the *price paid* and the *just price*. Then, this rule was extended to all buyers as well as to all sellers and analogous contracts. So, they created a generalized remedy for a **very unfair price** (c.d. *laesio enormis*, literally a very large hurt).
They identified the just price with the **price for which goods were sold commonly**, a price that **differed from day to day and region to region**. As Accursius noted, one who sold an object for less than half the amount he paid for it might not be entitled to *relief* since it could be that, when the sale of the object to him occurred, it was worth more that when he now sells. However, they had no theory to explain why the market price was fair. An explanation to this regard was instead developed by 16th-century scholastics based on the ides of Aristotle and Thomas Aquinas: *commutative justice* preserved the distribution of wealth among citizens; in the case of *voluntary commutative justice*, the parties exchanged **resources of equal value so that neither was enriched**. According to Thomas Aquinas, this principle explained the remedy for *laesio enormis*. While in principle, every deviation from the just price was *wrong*, relief was given only for *large deviations*, because the law cannot remedy every evil.
In this sense, it was acknowledged that **exchange required equality** and the just price was identified with the one which preserves **equality with the market price**: consequently, if no price is set by public authorities, the just price is the price for which goods are *commonly traded* as long as there are no monopolies. Therefore the just price varies from day to day and region to region, and it depends not only on the **cost of production**, but also on the **need for the goods** and on their **scarcity**. On account of the interplay between these three factors, an exchange at the market price preserved equality even though they knew that the seller would sometimes recover more or less than his costs of production; such price was as equal as possible given that prices must fluctuate to take account of need and scarcity.
Any inequalities caused by the market price thus have to be tolerated, unless one party take advantage of another's *ignorance* or *necessity* to sell him for more than the market price or to buy from him for

less. Also, the seller who lost if market prices had fallen could just as easily have gained if they had risen. Hence that transaction would be equal insofar as each party has an **equal risk of gain and loss**.
In the 17th and 18th centuries, French and German positivists herd — like the naturalists — that **a contract must be made at a just price**, but without explaining the potential remedies. Some jurists were becoming skeptical about whether one could ever say that a price was unjust, seeming to them to involve mystical notions about economic value. It was in fact argued that to speak of a just price was to imagine that value is an *intrinsic property* of things, but actually value depends on the **mere judgement of men**.
French jurists preserved a traditional French rule which, like the original Roman text, limited relief to the seller of land, yet requiring that the seller receives less than **25%** its value, rather than less than half. The reason relief was limited to the seller of land was not dismantling the principle of equality in exchange (which conversely was constantly upheld even by Napoleon himself), but rather could be explained in pragmatical terms: land was more important than other things sold, its price is more stable, the buyer is less likely than the seller to be the victim of necessity or mistake and more likely to seek to avoid the transaction because his plans had changed.
With the rise of the *will theories of contract*, the terms of the latter could have no other source that the intentions of agents, and most French writers doubted that a remedy should be given at all. It was argued that value was **subjective**, **variable** and **relative**. Others claimed that disparity in price constituted evidence of fraud, mistake, duress, or a sort of moral constraint, and that although relief violated the *principle of freedom of contract*, it was justified for reasons of *humanity*.
In Germany, relief for unjust price was abolished in various regions, in light of the *relativity of the price*. In all other regions, relief for unfairness constituted an **exception**, based on equity, to the principle that contracts are binding. The initial drafts of the German Civil Code abolished the traditional remedy, instead the final draft included the below-mentioned **section 138(2)**, which voids a transaction in which one person exploits certain enumerated weakness of another to obtain a *striking disproportion* in the value of the performances exchanged. The rule seemed to be a fair one even though no one had a theory of why a 'striking disproportion' should matter.

common law

As far as common law is concerned, traditionally a promise was enforceable in *assumpsit* whether the consideration given in return was **adequate** or not. Courts of equity, however, could give relief if a bargain was so harsh to be *unconscionable*. The **doctrine of unconscionability** provides for a defense against the enforcement of a contract or portion of a contract. If a contract is unfair or oppressive to one party in a way that suggests abuses during its formation, a court may find it unconscionable and refuse to enforce it. A contract is most likely to be found unconscionable if both unfair bargaining and unfair substantive terms are shown.
Nevertheless, the common law courts had not rejected the *principle of equality in exchange*, nor had the courts of equity accepted it.
It was criticized that the judges who fashioned the rule against examining the **adequacy of consideration** were not facing the problem of what to do about **hard bargains**, but rather were just deciding what promises to enforce. As we have seen, they found consideration for certain gratuitous arrangements (such as gifts to prospective sons-in-law and gratuitous loans and bailments); to demand that consideration be equal would have prevented the judges from achieving the goal of enforcing certain promises for which the consideration was not adequate.
Conversely, the courts of equity gave relief from hard bargains without espousing the principle that each party to an exchange should receive something equal in value to what he gave. In absence of court opinions on this topic, there was a general talk to supplement about whether a bargain is *unreasonable*, *unjust*, *hard* or *unequal*, or entered into for *inadequate consideration* or through *imposition*. This led the court of equity, in most of the cases, to help not those who paid more than the market price, but rather those who bought when the market price was high due to external circumstances; thus, giving relief may actually have contradicted the natural lawyers' position that the just price is the market one.

In the 19th century, however, Anglo-American jurists, like their continental brethren, claimed that, in principle, **there could be no relief for an unfair price**. They said that the reason the common law courts would not examine the adequacy of consideration was because, in principle, **the fairness of an exchange did not matter**, and moreover to give relief would be to interfere with the decision of the parties themselves. The important thing is that consideration is *sufficient*.
The jurists then explained away the doctrine of unconscionability by giving it a new rationale: a disparity in price came to be considered as **evidence of fraud**. Courts of equity, instead, continued to give relief, perhaps as generously as they would have if the theory had not changed.
Notwithstanding, in the last half of the 20th century, the doctrine of unconscionability has seen a renaissance. In fact, the Uniform Commercial Code allows a judge to remedy *unconscionable contracts* without any distinction between law and equity, and the Restatement II of Contracts contains a similar provision applicable to contracts in general.
Unconscionability is deemed to have:

- a *procedural* aspect, alternatively manifested by: (a) **oppression**, which refers to an *inequality of bargaining power* resulting in *no meaningful choice* for the weaker party; (b) **surprise**, which occurs when the supposedly agreed-upon terms are hidden in a *prolix document*;
- a *substantive* aspect, which refers to an **overly harsh allocation of risks or costs which is not justified by the circumstances** under which the contract was made.

Presumably, both procedural and substantive unconscionability must be present before a contract or clause will be held unenforceable. However, there is a **sliding scale relationship** between the two aspects: the greater the degree of substantive unconscionability, the less the degree of procedural unconscionability that is required to annul the contract or clause.
Regarding English law, it deals with unconscionability in a way that is different from American law, to the point that the former neither has a formal doctrine on it. Yet, in England the Court of Chancery developed the doctrine of unconscionability and was traditionally the only one in the country to concern itself with the fairness of a bargain. So as to apply this theory within English law, we should consider:
(a) whether the plaintiff is **poor and ignorant**;
(b) whether the sale was at a **considerable undervalue**;
(c) whether the vendor had **independent advice**;
(d) in some cases, whether there were **circumstances of oppression** or **abuse of confidence**.

A discourse on fairness can be made referring to **performance terms**, which are made to be understood by the contracting parties. However, it frequently happens that one party signs the contract without having read all the terms, and the arising question is to which extent the party is actually bound by them.
All these terms we never read are nonetheless included in the contract so as to give to the other party the opportunity to become aware of them, and they are usually needed so as to prevent the liability of the seller for defects in the thing sold, thereby shifting the assumption of risk to the buyer. In this sense, inferably, performance terms are included with the aim of **distributing the burdens of risks** between the parties; it is a matter of **allocation of risks in a way that is fair for both contracting agents**. Even if potentially the party who is entitled to draft the contract could shift all the risks to the buyer, he can't manage to do it and the buyer won't be bounded because of a matter of *fairness*: in fact, a contract is binding insofar as it is *fair*, consequently all those terms we usually disregard are binding as long as they allocate risks in a proportionate and fair way between the parties. Otherwise, they are not enforceable.

Cresswell v. Potter case, 1978 (English law)

While plaintiff and defendant were married, plaintiff had a half interest in the house in which they lived. She had contributed, indirectly at least £65 and perhaps £200 towards its purchase price. It was bought for £1500 of which £1200 was raised by a mortgage. The plaintiff left the defendant after admitting to adultery. The defendant obtained an uncontested divorce. The plaintiff signed a release of her rights in the house. She claimed that she did not read

it but thought it would enable the defendant to sell the house without affecting her rights in it. Later, he sold it for £3350. Plaintiff sued to set aside the release. Held, for plaintiff.

Issue: whether the contract was **unfair**. the case at hand regards a **contract of release of liability** of the wife (plaintiff), but then the husband (defendant) sold the house in profit.
Rule: In English common law *stricto sensu* there is no doctrine allowing one party to escape an unconscionable contract and to get relieved because of it: in this case, in fact, the plaintiff was given relief because it was decided by the Court of Chancery, presiding the Equity judiciary before it was merged with the Common one.
The plaintiff got relieved because the contract was unconscionable, given that the wife was deemed as *poor and ignorant* as well as devoid of any *independent advise*. Moreover, the contract of release was made at a *considerable undervalue*, meaning that the exchange was undervalued due to either an excessive or too paltry price. In fact, the wife initially gave up £30, but once the house fetched £3350 it was like we had just giving up £150 (a price that is over any threshold of assumption of risk of price fluctuation, it was not a fair price at all).
In this case, therefore, there are both **substantive unconscionability**, as there is a gross disparity between parties' performances (the wife didn't get anything in return for having signed the release of her rights), and **procedural unconscionability**, since there is an exploitation by the defendant, who took advantage of plaintiff's inexperience, innocence and lack of judgement.
In English law, in fact, so as to get relieved because of an unconscionable contract, both **unequal bargaining** and **gross disparity** are needed.

[*Uniform Commercial Code*] ***Unconscionable contract or clause***.
"(1) if the court as a matter of law finds the contract or any clause of the contract to have been **unconscionable** at the time it was made, the court may **refuse to enforce** the contract, or it may enforce the remainder of the contract without the unconscionable clause to avoid any unconscionable result.
(2) When it is claimed or appears to the court that the contract or any clause thereof may be unconscionable, the parties shall be afforded a reasonable opportunity to present evidence as to its **commercial setting**, **purpose and effect** to aid the court in making the determination."

[*Restatement II of Contracts*] ***Unconscionable contract or term***.
"If a contract or term thereof is unconscionable **at the time the contract is made** a court may refuse to enforce the contract, or may enforce the remainder of the contract without the unconscionable term, or may so limit the application of any unconscionable term so as to avoid any unconscionable result."

<u>*Toker v. Westerman case*, 1970 (American law)</u>

☐On November☐ 7, 1966, plaintiff's assignor, People's Foods of New Jersey, sold a refrigerator-freezer to the defendant under a retail installment contract. The cash price for the unit was $899.98. With sales tax, group life insurance and time price differential the total amount was $1,229.76, to be paid in 36 monthly installments of $34.16 each. Defendants made payments over a period of time but resist payment of the balance in the sum of $573.89, claiming that the unlit was so greatly overpriced. At the trial defendant presented an appliance dealer who had inspected the refrigerator freezer in question and estimated the reasonable retail price at the time of sale as between $350 and $400.☐

Issue: whether the retail installment contract was **unfair**.
Rule: differently from English law, the American one applies the doctrine of unconscionability in a heavy way. We should thus look at the gross disparity, so as to establish unconscionability at a *substantive* level, and at exploitation, so as to establish it at a *procedural* level.
Argument: the plaintiff got relieved because the price for the refrigerator was too high, amounting to 2.5 times the market price: there is thus a **substantive unconscionability**. As to the procedural one, we cannot say that there was actually exploitation: although the seller was a door-to-door one and the information asymmetry was positively inclined towards him, the buyer even sought for welfare

assistance to buy the fridge; since he behaved in an imprudent way by entering in such a stupid transaction, he should not be able to get out from it (so as to avoid paternalism).
As a matter of fact, just because one party is smarter than the other one, it doesn't mean that there is exploitation, otherwise no contract would be binding, as the coexistence of a stringer and weaker party is, to variable extents, omnipresent. In this sense, exploitation would concretize only if one party acts in an exaggeratedly smarter way than the other one, taking advantage of the latter's weakness.
Conclusion: there is substantive but not procedural unconscionability.

Carboni v. Arrospide case, 1991 (American law)

☐Ge☐☐orge Arrospide Jr. signed a $4,000 note ☐☐and deed ☐of trust ☐☐☐☐☐on behalf of his father, Jorge Arrospide, Sr. The note was made in favor of Michael Carboni, a licensed real estate broker. It carried an interest rate of 200 percent per annum, was due in three months.The parties originally intended the note would be paid off in a single lump sum payment of $6,000 after three months. However, over the next four months, Carboni continued to make cash advances to Jorge Sr. which were secured by the original note and deed of trust. By November 25, 1988, the principal amount of the note had ballooned to $99,346, all of which was carried at an interest rate of 200 percent per annum. Carboni testified that the money was advanced directly to George Jr. to be used to refurbish residential property which he intended to resell at a profit. The Arrospides, on the other hand, claimed the money was us☐☐ed by☐ J☐☐orge S☐r. to pay☐ medical expenses for his parents.☐

Issue: whether the contract was **unfair**.
Rule: the market interest rate is 20% but Carboni agreed on a 200% rate. There is a gross disparity between the contractual price and the market value, therefore there is **substantive unconscionability**.
As to the procedural side, the plaintiff resorted to such an unfair contract because, being registered as *bad payer*, no banks could have given him a loan. Therefore, it could be argued that the defendant took an **oppressive** behavior towards Carboni. Yet, the latter in principle had the opportunity to have a loan at 20% interest rate, and as long as one have options for contracting, then there is no oppression by the counterpart.
Argument: one could doubt about the presence of *substantive* unconscionability by analyzing banking calculations of interest rates to apply in specific cases. In fact, when allocating a loan, the creditor is assuming the risk not to be paid back, a risk which grows in intensity according to debtor's insolvent attitude. Therefore, the lender is used to raise the interest rate so as to compensate the risk of insolvency he is assuming, and it is totally fair according to **social policy** **(the latter is a tool whose common courts frequently make use of, differently from Continental European courts which prefer discussing the law as it formally is)**.
Moreover, economically speaking, we never know how market will move and consequently which the market price will be, since the likelihood of the latter to raise or to drop is 50% in both cases. Since individuals base their behaviors and acts on their expectations of market prices, if a bad payer like Carboni had requested to all the banks to make a contract of loan, all the banks, influenced by their expectations, would have established the interest rate at 200% and tantamount would have been the market price.
As to *procedural* unconscionability, no exploitation can be actually traced because the creditor has fairly raised the interest rate so as to compensate his assumption of risk of debtor's insolvency. Furthermore, there is no exploitation because Carboni could reject such an unfavorable loan on a *take it or leave it* basis.
Conclusion: arguments from substantive and procedural unconscionability are contradictory.

[*BGB code*] ***Transaction contrary to good morals***. "(1) A legal transaction that violates good morals is **void**. (2) A legal transaction is also void when a person takes advantage of the **distressed situation**, **inexperience**, **lack of judgement ability**, or **grave weakness of will** of another to obtain the grant or promise or financial advantages for himself or a third party that are obviously **disproportionate** to the performance given in return."

→ note on *usury*: whereas in the Middle Ages *usury* meant taking any interest on a loan, and in modern English it refers to taking excessive interest, in modern German it means **taking excessive**

advantage. Therefore, section 138(2) is said to be a **remedy for usury**, since are therein enumerated all the elements that concretize usury itself.

→ not on *door-to-door sales*: **section 312** of the BGB code now provides that if a consumer enters into a contract of exchange with someone who has come to his home or his place of work, he has the **right to cancel** it. According to **section 355**, he must do so **within two weeks**. He can cancel for **any reason or no reason**, not simply if the price is unfair.

Section 138 of the BGB code is not explicitly grounded on fairness, considering that Germna law traditionally does not care about whether a price is fair or not, but rather on a social policy of decency. It in fact makes reference to good morals, and paragraph (2), resembling to US unconscionability doctrine, avoids a contract whereby a party has taken *excessive advantage* of the other (ex. if the market interest rate is at 10% and you contract at 25%, then the contract is against good morals and thus void). German law provides for two possibility:

a) if a contract is found to be, using the US terminology, as substantially or procedurally unconscionable, then we should refer to section 138(2) and, be the requirements therein listed satisfied, the contract will be deemed to be against good morals, thus avoided under 138(1);
b) if a contract is patently unfair, namely clearly against good morals, the interpretation under section 138(2) can be skipped and the contract could be directly voided under 138(1).

Reichsgericht, 1921 (German law)

The defendant leased certain property from the plaintiff in March 1918. In April, the defendant sought to withdraw fro the contract and to have it set aside for error and fraud, and also argued that it was void under section 138. The plaintiff brought an action to establish that the lease was valid. Judgements below and on appeal were for the plaintiff. The defendant's appeal revision was successful.

Issue: whether the contract was **unfair**.
Rule: there is a disproportion in price, firstly because the lump-sum of 8000 is not refundable. However, the defendant acted with indiscretion, when entering into such a stupid and unfavorable contract, impaired with highly disputable clauses.
Argument: there is no evidence to certify the lessee's exploitation, nor that he was in special difficulties at the time the lease was concluded.
Conclusion: the court, instead of resorting firstly to section 138(2) and secondly to 138(1), directly declared the contract as void under the latter paragraph.

Reichsgericht, 1936 (German law)

The 5th Civil Senate of the Reichsgericht brought a question before the Great Senate for Civil Matters of the Reichsgericht, whose answer is below-explained.

*"A juristic act in which performance and counter performance are **strikingly disproportionate** but in which the remaining **elements of usury*** [§138(2)] *are not present, is invalid under section 138(1) when, in addition to the disproportion, the party claiming the disproportionate advantage exhibits such a character that — given its content, motive and purpose — **offends healthy national and popular feeling**. Under some circumstances, such a character may be inferred from the disproportion. When one party, through **malice or gross negligence**, ignores the fact the other has consented to **hard terms** to escape a difficult situation, this consideration can make the juristic act invalid".*
The Court here indicates that when all the elements of usury are not present, the transaction is to be declared *invalid* if, in addition to the **magnitude of what is promised**, some other circumstance is also present which, taken into consideration with the **disproportion**, makes the juristic act appear **contrary to good morals**, given the entire form of the juristic act as shown by the combination of its content, motive and purpose.
As a rule, the party who will be *harmed* if the transaction is declared to be *invalid* must have been *aware* of the *factual circumstances* that make his action appear **offensive to proper conduct**, although he need *not* have been *aware* that his action offended good morals. The Reichsgericht has thus

abandoned the **narrower view** according to which the disproportion between performance and counter-performance is *sufficient* of itself to prove the *invalidity* of the transaction under section 138(1), without the conjunction of any additional circumstances, and in particular without **consideration of the character** of the party interested in the transaction, and thus by a **purely objective evaluation**.
Moreover, the Court considers a legal transaction which includes a **striking disproportion** of performances but not the elements of usury to be *invalid* if, in addition to the disproportion, the party claiming the disproportionate advantage exhibits such a character that the juristic act, given its content, motive and purpose, **offends the healthy national and popular feeling** (ie natural feeling for law of all fair and right thinking national comrades). The concept of an '*offense to good morals*' must, by its nature, receive its content from the feelings of the people dominant since the revolution.
The whole of the content of §138 shows that a disproportion alone does not lead to the invalidity of a legal transaction: indeed, for paragraph (1) to be applied, some other circumstances must be added in the place of the **elements of exploitation** which are not present, a circumstance which, together with the disproportion, gives the transaction the mark of an offese to good morals.
When the question arises of whether a transaction is to be countenanced or not, *all* circumstances must be taken into account, and it is precisely the **character** of the interested party and his **motive and purpose** that contribute to giving an individuality to each individual transaction. Participation in a legal transaction which offends good morals stigmatizes the party who seeks a profit from it in a manner consistent with healthy national and popular feelings and exposes him to the **contempt of honest national comrades**. The judge should only take the responsibility for exposing a party to contempt by rendering a decision when that party has truly deserved it, when the party himself is to blame. This is the only case when the character which the party has displayed is **reprehensible and worthy of reproach**. Moreover, one must look beyond the content of the contract which indicated a disproportion to the motives of the interested party and the purpose he pursued; one must accordingly ask the question whether the legal transaction **offends the sense of decency of all fair and right-thinking persons**.
A transaction which leaves the channels of lawful fair exchange in which both parties' interests are correctly reflected will only come into being where wholly particular and irregular circumstances are present, which trick the weaker party into entering such an unfair contract. Whoever in commercial life knowingly uses the **weaker position** of another to obtain **excessive profit** displays an impermissible **self-interestedness** and thereby **acts reprehensibly**. However, one also offends healthy national and popular feeling when he **maliciously or through grossly negligent indiscretion** ignores the fact that the other party is consenting to **harsh conditions** only because of the **difficulties of his situation**.
The contemporary conception of social and commercial life moves against a self-interest of an individual national comrade which is **disadvantageous to the whole**. Moreover, a proof limited to the objective content of the contract, which did not consider the character of he interested party and particularly that of the party seeking the advantage, would not only contradict the existing law of §138, but would also be incorrect by reason of its **incompleteness** and a **false application of the general principle of proper conduct**.
For commercial life, the **careful and prudent conduct** which is an *essential condition of welfare*, and the **security** of commercial legal transactions are imperatively required. Moreover, an effective device in the struggle against **reprehensible self-interestedness** is indicated by the consideration that not only knowing the exploitation of the other contracting party, but also malicious or grossly negligent ignorance of the existence of a critical situation by the contracting party who enjoys the advantage may, in conjunction with the disproportion, lead to the invalidity of the legal transaction.

Bundesgerichtshof, 1961 (German law)

The conclusion of a contract of loan for over 20000 DM provided the lended with an 'agreed profit' of 750 DM per month. This profit was, in reality, an interest rate on the loan of 45 percent annually. Because of the amount of the agreed interest rate, a striking disproportion did exist between performance and counter-performance. However, an offense to good morals and hence the invalidity of the contract ☐☐under 138(1) of the Civil Code

> can only be found where, in addition to the objective disproportion of the two performances, the reprehensible character of the lender at the conclusion of the contract can be established.

Issue: whether the contract was **unfair**.
Argument: differently from Carboni, the plaintiff here knew that he could get out of this disproportioned contract (*harsh terms*) and seek for another lender around the market. Since he had options, it is difficult to claim that he was exploited by the creditor.
One can make reference to potential **economic duress** as well, which occurs when one party forces the other to sign an overpriced contract jeopardizing his financial situation. Yet here, no coercion can be found: the creditor made his offer and the plaintiff could just move away, but he didn't.
Conclusion: according to the court, the borrower could have received normal credit terms elsewhere because he could offer security, but without investigating the value of this security.
At any rate, the court does not pronounce herself on exploitation but again, resorting to **public policy**, declares the contract as void under 138(1) because it is contrary to **good morals**: allowing people to fix the interest rate at 45% although the market one is 20%, will make the market collapse.
Here, the difference between American law and German law is patent: whilst within the latter substantive or procedural unconscionability must be proved so as to avoid a contract, without appealing to public policy, within German law a contract can be invalidated simply by resorting to public policy.

[*Code Civil*] "A contract is **synallagmatic** where the parties undertake reciprocal obligations in favor of each other. It is **unilateral** where one or more persons undertake obligations in favor of one or more others without there being any reciprocal obligation on the part of the latter".
"In synallagmatic contracts, a **lack of equivalence** in the acts of performance of the parties is **not a ground of nullity** of the contract, unless legislation provides otherwise".
"If the seller receives **less that 25%** of the value of immovable property, he can have the sale set aside if he has **expressly renounced** this right in the contract and stated that he was making a **gift of the excess value**".
"In the event that an **action in rescission** is permitted, the buyer has the choice either to return the object and recover the price which he paid, or keep the estate and pay the rest of the just price, deducting 1/10 of the total price".

[*Code Civil*] "A **mistake as to value** is not a ground of nullity where, in the absence of a mistake about the essential qualities of the act of performance, a contracting party makes only an inaccurate valuation of it".
"**Fraud** is an act of a party in obtaining the consent of the other by scheming or lies. The **intentional concealment by one party of information**, where he knows its decisive character for the other party, is also fraud".
"There is **duress** where one party contracts under the influence of a constraint which **makes him fear** that his person or his wealth, or those of his near relatives, might be exposed to **considerable harm**".
"A **threat of legal action** does not constitute duress, except where the legal process is deflected from its proper purpose or where it is invoked or exercised in order to obtain a **manifestly excessive advantage**".
"Duress is a **ground of nullity** regardless of whether it has been applied by the other party or by the third party".
"There is also duress where one contracting party exploits the other's **state of dependence** and obtains an undertaking to which the latter would not have agreed in the absence of such constraint, and gains from it a **manifestly excessive advantage**".

Regarding fairness, French doctrinal implications are quite irksome. From the outset, the Roman institution of *laesio enormis* was absorbed, becoming the French *lesion* and changing in its features: in fact, whilst the Roman one allowed the contract to be voided when the price amounted to less than

50% or more than 200% the market value, the French provision declared a contract as *unfair* when the price of **real estate** is lower than 5/12 of its market value.
France inherited the element of *cause* as well, that was maintained over the 19th century even though in the same period it was established that the contract of exchange will have need no more to be *fair*. The *causa* was eliminated only in 2016, even if actually noting has changed at all, and we will explain why.
Nature and functions of *causa* are traditionally obscure, yet doubts may be clarified by taking four different cases into account:

1) there is a contract of long-term lease having as object an hotel. The rent amounts only to €700 even if the lessee expects a profit of thousands of euros. There is thus an *unfair exchange* between the parties, there is no balance between the rights and obligations allocated upon both parties. The cause can be deemed to be *absent* in this case because the rent paid by the lessee is too paltry, consequently opening to a **gross disparity**;
2) there is a contract of employment between the university board and a professor, with a predetermined wage. However, the professor asks to the employer to be paid for each lecture he takes, although the payment of his lesson is already included in the preexisting contract. There is thus an *unfair exchange*, since the university is receiving nothing in return for potentially increasing the professor's compensation, nor it can receive just a paltry symbolic price for his promise. Therefore, the causa is here absent because the **reciprocal benefit was illusory and derisory**;
3) there is a tourism contract between a travel agency and a couple, which would allow the latter to spend the holiday on a remote island. The contract was signed and everything was planned. Then, unforeseeably, the pandemic branched out and the couple claimed the contract to be voided. It was held by the court since, owing to the pandemic which has occurred after the signature of the contract, the **purpose of the latter is frustrated**. Specifically, the purpose of the contract was parties' enjoyment of the travel and the destination, that is no more possible. Parties are therefore not bond by the contract because the *causa* is absent, and a contract can be defined as such only in presence of a cause;
4) in a remote and small village of just 1300 inhabitants, one opened a video-rental store and provided it with DVDs that he in turn had leased thanks to a supply contract. However, he claimed the contract to be voided because he couldn't have hopes of profit in such a demographic-limited area. It was held by the Court, in a paternalistic way, and the contract was voided.

Now, a formulary on *causa* can be drawn and it regards all legal systems. First of all, the **voluntary commutative justice** prophesies that contracts must serve to fulfill the purposes parties have envisaged when contracting. Yet:

- if there was *unfairness* even before the contract was made, then we have **mistake** and the contractual purpose can't be achieved. The contract can thus be voided in light of different doctrines, such as *consideration*, *unconscionability*, *lesion* and *usury*. This situation occurred within the 1st, 2nd and 4th cases, in which *causa* lacks at all;
- if *unfairness* falls upon the contract after he was made, then we have **frustration of purpose**. The contract can thus be voided in light of the doctrine of **hardship**: according to the latter, a contract should be invalidated because its performance has become too expensive and overcomes the normal scope of risk assumption. This situation occurred within the 3rd case. In Italy and France there is no doctrine regarding the frustration of purpose, therefore in these countries cases in which the contractual objective can't be achieved anymore are voided because of **absence of the cause**, which hence acts as *gap-filler*.

After 2016, French law has **eliminated the element of the cause**, yet it will live forever, because all its functions remains. The latter are maintaining *economic fairness*, serving the *purpose* of the contract, remedying to derisory returns (art. 1169) and to significant unbalance between parties' right and obligations (artt. 1170-1171). Nowadays, *causa* could deal with mistake, frustration of purpose, duress, fraud, and so on.

Cour de Cassation, 1887 (French law)

On September 22, 1886, Fleischer, captain of the steamship Rolf, whose ship was stuck in the sands of the Bay of the Seine, was about to lose both his ship and cargo. He agreed to pay 18,000 francs for the services of a tug boat, which was the amount that the captain of the tug fixed as the value of salvage. He only escaped a total loss by agreeing to this amount. The Tribunal de commerce of Rouen held that Fleischer only had to pay 4,190 francs for the services he had received. The Cassation court upheld that decision."

Issue: whether the contract was **unfair**.
Argument: one could claimed the application of *duress* doctrine, since the plaintiff was forced by the defendant to enter into an unfavorable contract. The defendant, on the point, objected that the plaintiff perfectly received the service he was looking for. Indeed, it is quite difficult to stand for coercion here: there is no evidence that the plaintiff's consent was strip-mined by the defendant, rather it appeared to be voluntary; plus, the defendant didn't force the plaintiff to contract with him and didn't put him in danger.
The plaintiff needed to be saved and thus would have probably accepted whatever offer, yet the defendant has not the right at all to fix whatever amount of money as price. Many economic theories prophesy that if needed to make both parties better off, we should not care about the the level the price was fixed at, because the contract will be efficient anyway. These theories have been demolished by the Court in the case at hand, where she recognized the presence of **economic duress**, moving from the assumption that the defendant didn't have the right to *overcharge* the plaintiff, who instead was trusting the market. With such a decision, the Court wanted to avoid the market failure.
Even if in real life, when dealing with necessities, we usually do not care a lot about overpricing, it must be pointed out that it is the competitive market itself to avoid overpricing thanks to price fluctuations.
Conclusion: the Court acknowledge just a sort of economic duress, meaning that the defendant takes advantage of the plaintiff because he knew the bad situation in which the latter had found himself, but since this coercion does not fall upon consent, no relief is granted. Economic duress must be distinguished from real duress, which instead entails a physical danger inflicted to the other party.
In fact, the court of Cassation said that according to art. 1108 of the civil code, the *consent* of the person who obligates himself is an essential condition for the validity of an agreement; as, when the consent is not free, when it is only given because of fear inspired by a considerable and present evil to which the promisor's person or fortune is exposed, the contract is infected with a defect that renders it voidable.
The court decided not to strike down the contract, but rather only to lower the price of transaction.

Cour de Cassation, 1919 (French law)

Antoine Duvoisin, a paralyzed old man, weakened by illness, confined to bed, and abandoned by the members of his family, was at the mercy of Mr. and Mrs. Vigneron, the tenants of a farm who pay rent in kind, and that the threat they made not to continue their services to him unless he consented to give them his goods was of a kind to inspire such a fear in him that he found it impossible to resist their demand.☐

Issue: whether the contract was **unfair**.
Rule: there is no duress at all because the defendants has not forced him, in an irrefutable way, to make a will in favor of them. They just threatened that they would have stopped being his caretakers if he hadn't transferred his goods to them. In fact, there was a patent **disproportion** between the high care the couple served to the plaintiff and the modest rent the latter paid them.
Argument: the plaintiff is an old man who needs some who takes care of him. He is visibly a weak person. One could therefore argue that there was actually duress: the defendants are exploiting his state of dependence and have obtained an undertaking which the man would have not agreed on without such constraint, and gained from it a manifestly excessive advantage; moreover, Duvoisin contracted under the influence of a constraint which made him fear that his person could be exposed to a considerable harm. Evidence of his duress can be found in what he alleged to the notary ("I must agree on making this will")

Cour d'Appel, 1930 (French law)

L. has taken an appeal from the decision of the court which ordered him to pay the sum of 60,000 francs to H for damages on account of an accident for which L was adjudged liable. He demands this decision be modified, claiming that H, in a contract dated July 3, 1930 and signed by the parties, declared him to be discharged from the consequences of the accident, this being pursuant to a settlement which set 1,500 francs as the amount receivable by the said Hautmont for all damages. It is certain that H, without taking leave of his senses, would not have given up for 1,500 francs the benefits of a judgement which entitle him to□□ 60,000 francs.

Issue: whether the contract was **unfair**.
Rule: fraud is here just *presumed*, there is no real evidence about it. We shouldn't be concerned about *disproportion*, unless it is patently huge, because competitive market will avoid it and because small disproportion keeps the contract as binding.
Argument: one could argue that there is fraud because the plaintiff's consent was extorted with lies or scheming, and the plaintiff's weakness was also assessed by experts.
Conclusion: the contract must be binding.

Cour d'Appel, 1953 (French law)

D. sold three paintings to S. for 250,000 francs each, guaranteeing they are valuable (you cannot guarantee value). At trial, experts valued the paintings at 40,000 francs, 45,000 francs, and 55,000 francs. The Tribunal civil de la Seine declared the sale void and ordered D to restore the amount he had been paid by S. (400,000 francs) and to pay him 100,000 francs as damages. The court of appeal upheld this deci□sion.

Issue: whether the contract was **unfair**.
Rule: the court states that there is a mistake as to the substance, but actually it was only an **evaluative mistake**.
Argument: one could argue the presence of **fraud** in the case at hand, because fraud is a basis for invalidating the contract when it has produced an error in value. In this sense, the evaluative mistake produces the voidness of the contract because it was caused by fraud, and not simply by an inaccurate assessment of painting's worth. The presence of fraud is credited by the fact that the seller boasted his reputation to the buyer so as to persuade him to conclude the contract.
Conclusion: the Court states that, even if the buyer has obtained from the contract what he actually desired, ie the paintings, the disproportion between the price paid and the market value is huge.

Cour d'Appel, 1953 (French law)

The contractor wanted to get out of contract, he was asked to demolish some concrete tasks for 100 francs per cubic meter. Nevertheless, this turned out to be more expensive because the materials of tanks were hard to smash.

Issue: whether the contract was **unfair**.
Rule: the defendant told to the plaintiff they could demolish whatever kind of material, but then it revels to be harder than expected. There was an **impossibility to perform the contract**, and the the purpose of the latter can't be fulfilled.
Argument: one could argue that the defendant made a unilateral evaluative mistake, because of an inaccurate assessment.
Conclusion: so as to decide the case at hand, we should consider two possibilities: (a) if it was a **fixed price contract**, then the risk rests on the contractor (ie the defendant), which had thus no possibility to make profit by asking more money to do such a job; (B) if it was a **cost plus (profit) contract**, then the risk of the demolition to be more expensive shifts to the hirer (ie the plaintiff).
In the case at hand, it was a **fixed price contract**, and hence there was a disproportion between the price fixed and fair price that would have been established for such an irksome demolition. The latter in fact required really expensive costs to be carried out, thus the defendant should have been paid in a major way so as to make actually a profit, namely to achieve the purpose he contracted for.

Cour de Cassation, 1956 (French law)

The plaintiff thought he was renting a property that has an agricultural value but it turns out to be in a dilapidated state, having vast amounts of uncultivated land not mentioned in the contract. The court states that there was a failure of the lessor to give an objective initial presentation of the circumstances. If the latter were known to the plaintiff, the contract would have never been accepted.

Issue: whether the contract was **unfair**.
Rule: so as to state whether there was an *error in substance* or not, we should look at whether the buyer had a warranty for defects in the thing or not. In the negative answer, the risks encumber on him.
Argument: it all depends on the price paid for renting the property: if it was paltry, it was predictable that the property was not in perfect state.
The Court states that the lessor failed in giving an objective initial presentation of the circumstances, but it could be objected that it was the buyer not to be diligent enough; he should have checked personally the condition fo the property before signing the contract.
Conclusion: the Court held that there was an error in substance, and the affected essential quality in the case at hand is its 'agricultural value'. However, we should conclude that there was no error at all.

Cour de Cassation, 1968 (French law)

Vander-Borre leased a villa for one month from its owner, paying a rent of 6000 euros plus additional charges. The lower court held that the lease was void for an error in substance. The villa, in fact, turned out to be lacking in maintenance and surrounded by noise. It ordered the lessor to return the rent paid in advance and to pay damages, The court of cassation upheld this decision.

Issue: whether the contract was **unfair**.
Rule: the high price fixed for the renting surely included a warranty for the lessee. In fact, it was the owner of the villa himself to told him that it was a comfortably equipped villa. The assumption of risk thus shifted from the plaintiff to the defendant.
Conclusion: there was an error in substance, the contract must be voided.
Remember that French law has no provision at all on economic fairness. Within it, so as to tackle fairness issues, institutions of mistake, duress, fraud or cause are rather used.

2. Fairness of the auxiliary terms

Performance terms are all those terms that parties have to understand when forming a contract. All those auxiliary terms that parties never read are binding as long as they are *fair*, being it the orientation of all legal systems. The rationale of this thought is that these auxiliary terms are the one **allocating risks and burdens**: therefore, if they appears to be weird, unreasonable, surprising, outrageous, then they should be considered as a separate contract needing our consent to bind us; not by chance, under section 307 of the BGB code the prohibition of including surprising clauses has been expressly formalized.

English Law — [*Consumer Rights Act*, 2015]. Part 2. 'UNFAIR TERMS'

Contracts and notices covered by this part. "This part applies to a contract between a *trader* and a *consumer*. This does not include a contract of employment or apprenticeship".

Requirement for contract terms and notices to be fair.
"An *unfair term* of a consumer contract is **not binding** on the consumer. An *unfair notice* is **not binding** as well on the consumer.
This does not prevent the consumer from **relying** on the term or notice if the consumer chooses to do so.
A term is *unfair* if, contrary to the requirement of **good faith**, it causes a **significant imbalance** in the parties' rights and obligations under the contract to the detriment of the consumer.

Whether a term is *fair* is to be determined: (a) taking into account the **nature of the subject matter** of the contract, and (b) by reference to all the **circumstances existing** when the term was agreed and to all of the **other terms** of the contract or of any other contract on which it depends".

Weaver v. American Oil Co., 1971 (US law)

American Oil Company (appellee) presented to Weaver (appellant) a contract of lease to be signed, which contained a 'hold harmless clause'. The latter provided that the lessee would hold harmless and also indemnify the oil company for any negligence of the latter occurring on the leased premises. The litigation arises as a result of the oil company's own employee spraying gasoline over Weaver and his assistant, causing them to be burned and injured on the leased premises. This action was initiated by the American Oil so as to declare the liability of the appellant Weaver, under the clause of the lease.
The Court decided that the contract was impaired with superior bargain inequality of American Oil.

Issue: whether the *hold harmless clause* was **unfair**. It is an issue concerning contract law and the doctrine of unconscionability shall be applied.
Rule: this lease clause not only exculpated the lessor oil company from its liability for its negligence, but also compelled Weaver to indemnify them for any damages or loss incurred as a result of its negligence.
A contractual clause is binding insofar as it is **fair**.
Argument: as the Court did, the presence of **bargain inequality** is patent to the extent that, had it be a contract of sale of goods, it would have been termed as *procedurally unconscionable contract*. In fact, the exploitation of the appellant can be motivated by looking at his condition as 'poor and ignorant' (low-educated person) as well as at the fact that the contract was made at a 'considerable undervalue' (the contract can in fact cost to Weaver thousands of dollars in damages for negligence of which he was not the cause). In fact, arguable Weaver consented to this unfair contract because of his poor education, and hid disadvantaged position didn't allow hi to renegotiate contractual terms, also because of information asymmetry. Nonetheless, it would have been problematic for Weaver had he declared not to have understood the contract in its entirety, since the misunderstanding of the *nature* of the contract could have been proved problematic. He should rather have stated that he didn't understand the sole auxiliary terms.
As to *substantive unconscionability*, it is present as well because has assumed a high risk without a fair compensation in return. So as not to be a harsh allocation of risks nor a gross disparity, indeed, Weaver should have asked for a **reduction in the rent** so as to assume that risk, or to one of the following alternatives: (a) Weaver has a lowering in rent, and the net gain will be invested by him in a group insurance, so as to prevent such a risk; (b) the rent is not lowered but American Oil Company will get a group insurance for the lessee.
Nevertheless, none of these options was held: rather, American Oil Co. has patently cheated on Weaver, who has assumed the risk without a fair compensation, and in this sense he was victim of substantive unconscionability.
Another argument can be made regarding the **printed form**, as it could be claimed that the contract was only presented by the lessor and not discussed, nor explained to the lessee, thus crediting the hypothesis that he didn't even read the contractual clauses. Yet, a counter-objection can move from the fact that the lessee should have used the **due diligence** and sounded out the contents of the contract autonomously, given that no duty of explanation of the contract falls on the other party.
However, many legal systems impose that particular clauses must be highlighted in the contract and specifically signed, so as to guarantee the signatory's consent: in the case at hand, the clause was in *fine print* and contained *no title heading* which would have identified it as an **indemnity clause**.
Conclusion: the court acknowledged as a **deplorable abuse of justice** to hold a man of poor education to a contract prepared by the Attorneys of the lessor and for the benefits of the lessor, which nonetheless was a presented on a *take it or leave it* basis: therefore, no duress can be found here.
The Court also specified that parties can surely make contracts exculpating one of his negligence and proving for indemnification, but it must be done *knowingly* and *willingly* as in insurance contracts made for that very purpose.

[*Code Civil*] "Any contract term which **deprives a debtor's essential obligation of his substance** is deemed to be **not written**".

→ this article faces the limited liability clauses and allows a sort of *contractual justice*, by penalizing the party that contract on *essential obligations* and set them aside, totally or partially, by means of an accessory clause which deprive the aforementioned obligation of its substance.

Cour de Cassation, 1996 (French law)

Banchereau hired Chronoplast to deliver envelopes containing its response to a tender offer, but Chronoplast failed to deliver them within the time agreed. A term of the contract limited Chronoplast's liability to the price for carrying the envelops.
The Court has here overturned the previous decision in favor of Chronoplast made by the Court of Appeal.

Issue: whether the contract term limiting Chronoplast's liability to price for carrying envelopes was **unfair**. The issue concerns contract law.
Argument: Art. 1170 of the French civil code states that, so as to be non-binding, a clause must deprive the debtor's essential obligation of its *substance*: accordingly, it could be argued that the substance of Chronoplast's obligation was *delivering the thing* in the absolute, and not *delivering the thing within the time agreed*. Moreover, the hirer had arguably the **burden of communicating** to Chronoplast his specific need of having an in-time delivery, given the urgency and importance of the enveloped thing. However, it could be counter-objected that the defendant had guaranteed the reliability and speed of his service, thus undertaking to deliver the envelops in time.
Problems in the delivery of a tender office could effect astronomical damages. The plaintiff actually didn't get what he wanted from the contract and had relied on defendant's speedy service. If on the one side it could be argued that the carrier can't be held liable because he can't be blamed for the late, on the other it could be counter-objected that the plaintiff has paid to shift the risk on the deliverer (who was also in a better position to shoulder such a risk because of a more complete knowledge on shipping procedure). For all things considered, since Chronoplast has got a compensation in return for his assumption of risk, the limited liability clause deprived his essential obligation of his substance, hence is deemed not to be written.
Conclusion: given the breach of that essential obligation, the Court acknowledges that the clause limiting liability has deprived it of its substance, and therefore is deemed not to be written.

Cour de Cassation, 2010 (French law)

Oracle contracted to deliver the final version of a software to the manufacturer Faurecia, but Oracle failed to perfect the software. A term in the contract limited its liability for damages.

Issue: whether the contract term limiting Oracle's liability for damages was **unfair**.
Rule: a limitation of liability clause is deemed not to be written only if it contradicts the essential obligation undertaken by the debtor.
Argument: it is undeniable that the substance of Oracle's obligation was *delivering a perfected software*, and thus he has breached it. However, the parties agreed that the prices of the contract reflected both the **allocation of risks** and the **limitation of liability**: in fact, they were fair and not derisory at all. In this sense, even if the clause seems to be depriving Oracle's essential obligation of its substance, actually he paid an adequate sum to be limited in liability and to shift certain risks to the hirer. In fact, Faurecia, receiving that price, has assumed the risk of not having the software perfected within the time agreed, in exchange of respectable benefits (protagonist in European committee, preferential treatment, etc.).
There was surely a risk that Oracle had problems in delivery, but it was legit for him to attempt to limit his exposure to such a risk with a limited liability clause: it was legit because he's paying for shifting this risk, in form of money and additional benefits to the other party, among which a discounted rate of 49%.

Conclusion: the limited liability clause did not empty Oracle's obligations of any substance and thus legally justified its decision.

[*Code Civil*] "Any term of a **standard-form contract** which creates a **significant imbalance in the rights and obligations** of the parties to the contract is deemed **not written**".

→ this article is based on the following one of the commercial code. Regarding its scope of application, it is considered to be limited to **contracts of adhesion**, ie contracts whose general conditions are unilaterally determined and advanced by just one party, with no room for any negotiation.

[*Code de commerce*] Art. L. 442-6 ***Law on consumer practice***. "Any producer, merchant, manufacturer or person registered in the trades directory is **liable** for the following acts and is required to **compensate the loss** caused thereby: […] (2) subjecting or attempting to subject a trading partner to obligations which create a significant imbalance in the rights and obligations of the parties".

Cour de Cassation, 2018 (French law)

The forfeiture guarantee on which the insurance company SMA prevailed is drafted as follows: 'if the insured **makes false declarations**, and in particular exaggerates the amount of damages, claims the distraction of goods that did not exist at the time of the accident, dissimulates or conceals all or part of the goods insured, knowingly fails to disclose or claims the existence other insurance covering the same risks, **uses in support documents that are inaccurate or means that are fraudulent**, the insured completely forfeits all right to an indemnity on all of the risks of the accident'.
The company Etablissement Y submitted to the commercial court a liability claim against its insurer for business losses, but with documentation of a kind to deceive the insurance company concerning the economic and financial situation of the insured.

Issue: whether the forfeiture clause was **unfair**. Economic fairness is still a function of *causa*, which thus restores the balance between parties' rights and obligations.
Rule: (a) every clause that deprives the debtor's obligation of its substance is deemed not to be written. (b) an act that subjects a trading partner to obligations that create a significant imbalance in the rights and obligations of the parties makes the author liable and obligates him to repair the damage caused. A significant imbalanced is caused by economic unfairness, ie by the assumption of a risk with our a fair compensation in return.
Argument: (a) in the case at hand, the forfeiture clause deprives the insured of **all rights to indemnification** on the entirety of the risks, because he **made false declarations** and used **inaccurate documents** and **fraudulent means**. The potential unfairness of the clause is linked to the fact that he loses complete indemnification even if the insured made false declarations or used incorrect means regarding just one of all the risks insured. That is why the Cassation court demonized the decision of the court of appeal to apply such a clause, "which attached *excessive consequences*" to the insured's behavior. However, it could be argued that the plaintiff actually defrauded the insurance company, acquiring her consent to contract on terms that she would have contracted differently or not contracted at all, had she known the real financial situation of the counterpart. One might also claim that the contract was vitiated by unilateral mistake.
(b) first and foremost, it appears paradoxical to me that the plaintiff asks damages for business losses after having lied on his financial situation. Yet, apart from this, it could be argued that the forfeiture clause, instead of having caused a disequilibrium between parties' rights and obligation, has rather balanced them again. In fact, they would have been allocated in an unfair way if the insurance company had to indemnify the insured for a sum that is disproportionate to his economical situation. It should be pointed out that the clause at hand didn't limit the warranty forfeiture to the case of fraud, ie to the intentional lie and harm by the insured party to the insurance company: rather, it harshly states that even the slightest of the incorrect behavior can make the plaintiff lose all his rights to indemnification. It is patently a huge risk that the insured has assumed without any compensation in return. Therefore, it could be anything but a deprival of the substance of insurer's essential obligation.
Conclusion: the Court acknowledges the liability of the insurer.

n.b. all these cases are coming out from the same rationale, that is, these terms are not concerned about economic fairness. Yet, there is a difficulty in qualifying all these cases within a univocal doctrinal frame: rather, in American law we should use *unconscionability* to address these cases; in Continental Europe, we should resort to fairness, good faith, exc.

[*BGB code*] ***Control of the content***. "(1) Provisions in *standard form terms* are **ineffective** when they **disproportionately disadvantage** the contract partner of the party who employs them in violation of the commands of **good faith**. A disproportionate disadvantage may be shown when the provision is **not clear and understandable**.
(2) When in doubt, a disproportionate advantage is to be found when a provision: (a) is not in accord with the **underlying ideas** of statutory provisions from which it derivates, or (b) so **limits essential rights and duties** which arise from the **nature of the contract** so as to **endanger the attainment of the purpose of the contract**".

→ for 'standard form terms', we intend the general conditions of a contract of adhesion;

→ a clause is *disproportionate* in the sense of section 307(1) when the party who employs the other formulates the contract **solely with his own view in end** and seeks **his own interests unfairly at the expense of the other party** by without adequately taking the other party's interests into account by providing appropriate compensation.

Bundesgerichtshof, 2012 (German law)

On April 17, 2007, the parties entered into a contract for the use of a fitness center beginning May 1. The contract was to last for 24 months and, unless 3-months notice, for an additional 12 months. The monthly payment for use was 45 euros. Paragraph 7 of the contract allowed the used to terminate by giving notice "if he could not use the center of the remainder of the term of reasons of illness. For the notice to be effective, it must be given promptly, at the latest within 2 weeks after the user becomes aware of the legal grounds for termination and the notice must be accompanied by a medical certification which fully sets forth the illness/health impairment that prevents the use". The user gave notice on July 24, 2008, that he would be unable to use the fitness center for health reasons, accompanied by medical certification, but the fitness center refused it because the medical certification was too unspecific, consequently suing for the fees due for the remainder of the term ending in April 2009. The defendant claimed that the clause was invalid under section 307 of the BGB code.
This court and the lower court agreed that the user had not given notice as required by the contract.

Issue: whether paragraph 7 of the contract was **unfair**.
Argument: paragraph 7 appears to violate section 307(1) of the Civil code first of all because the expression of "*fully set forth*" was so undetermined to prove to be **unclear and not understandable**, therefore it would be difficult, for the fitness center, to deem vaguely the medical certification as "*too unspecific*". The plaintiff contends that notice is dependent on a medical certification which describes the kind and the extent of the illness. Certainly, the management of a fitness center has a legitimate interest in recognizing in principle the production of a medical certification in a notice based on illness from its users in order to prevent a misuse of the right of notice permitted him. Nevertheless, as the appeal observed as well, the interest of the plaintiff is already served by a medical certification which states that the athletic activity by the user is no longer possible. The interest of the plaintiff in protecting itself against unjustified notice does not justify requiring from the user **information about the concrete nature of the illness**. In principle, trust can be placed in the certification of a doctor.
Moreover, the fitness center has acquired from this contract a **disproportionate advantage** because she clearly have limited the other party's right to terminate the contract. In fact, the circumstance allowing the termination of the contract can't be only the illness of the user, since there may be other unforeseeable grounds which would prevent further use of the center (ex. pregnancy).
The fitness center requires the provision of a medical certificate so as to prevent unjustified termination of contract, so as to deter clients from stopping to pay them.
Conclusion: the Court assessed that a not super detailed medical certification was enough, but it could be argued that the court had better have stated that no justification was needed so as to terminate the membership.

IV. EXCUSES FOR NONPERFORMANCE

1. Impossibility and *force majeure*

Suppose you hire a doctor or a lawyer: in USA, France and Germany he is normally *liable* only if he is *negligent*; if he is not negligent, he is not liable even if he fails to cure you or win your lawsuit.
Now, suppose you hire someone to transport your goods to a certain destination by a certain date: if he *fails to perform*, sometimes he is *liable* even if he was *not negligent*, for ex. if his financial resources are insufficient to hire the crew, but he would *not* be *liable* if for instance a war is declared and no ships are allowed to sail.
The language used by French, German and American law derives from the Roman one yet differs from the matter because of the diverse ways they are receipted it. Roman law denied enforcement to *some* but not all contracts in which **performance is impossible**. The Digest contained the maxim "*there is no obligation to the impossible*".
A number of texts excuses a party when performance was **impossible at the time the contract was made**. Nevertheless, if performance was *initially impossible*, a party cannot escape only if performance was merely *beyond his own power* (c.d. **subjective** or **personal impossibility**), but only if it was *beyond anyone's power* (c.d. **objective** or **absolute impossibility**).
Other texts excused a party's performance if it became impossible **after the time the contract was made**, and in this case a party, to escape liability, had to prove that he was *not at fault*, yet not intended as fault in ordinary sense. One who borrowed property gratuitously for his own use is liable if he failed to exercise the *most scrupulous diligence*. He was not liable for *vis maior*, ie accidents that no one could have prevented. The medieval jurists classified this fault as the most light one (*culpa levissima*), from which one ascended through *culpa levis*, *culpa lata*, *culpa latior* and *dolus* (ie intentional wrongdoing). The type of fault for which one was liable depended on for whose *benefit* the contract was made.
The medieval canon lawyers, however, turned impossibility and fault into basic principles of **moral responsibility** which the late scholastics then defended on Aristotelian principles. The canonists concluded that one could *not* be *morally obligated* to do the impossible, because he was not at fault. In the 13th century, Thomas Aquinas explained canonists' orientation by prophesying that choice was an act of will, and one could only choose what was possible, therefore a promise to do the impossible was *not binding*. Once impossibility and fault had been interpreted as principles of moral responsibility, it was difficult to harmonize them with the Roman rules
The late scholastics concluded that one cannot be obligated to keep an impossible promise. Pufendorf claimed that the seller was never liable for failing to do the impossible but, if he were *at fault* in making the promise, the buyer could *recover* any loss suffered.

Nowadays, a party is excused for nonperformance in three cases:

1. **impossibility**. Recalling Roman law, one is not liable if performance was impossible at the time the contract was made; if instead performance has become impossible *after* the time that the contract was made, the excuse for nonperformance is conditioned to the total absent of fault of the party owing the performance;
2. **change in circumstances**. One party is excused for nonperformance in case of changed circumstances when performance appears to be not useful anymore. It is said, therefore, that such change has provoked a **frustration of purpose** of the contract;
3. **hardship** (or *commercial impracticability*). One party is excused for nonperformance when performance has become *excessively onerous* for the party owing it.

Dealing with excuse for nonperformance implies that we are considering the moment *after* the contract is made. We should thus imagine a dividing line between the time before the contract his made and the time after. Regarding the former, it includes the situation of *mistake*, be it formally considered as such when it is preexistent to the contract itself; instead, if a mistake occurs after the conclusion of the contract, then the doctrine to apply is that of frustration of purpose. Apropos of the

latter, it must be specified that a contract can have a *general purpose* (ie common to the parties) and *specific purposes* (prior to each party): if the former fails, then the doctrine of frustration of purpose is applied; if it is the latter to fail, the doctrine of frustration is not applied and you can't get relieved unless you paid for shifting the risk to the other party.
Still regarding the moment before the contract is made, together with mistake it contains the situation of *unfairness* which, if occurring instead *after* the contract is formed, the doctrine to use is the one of *hardship*. Nonetheless, both in cases of fairness and hardship a compensation for risk assumption, be it made by one of the parties, is needed.
Remember that excuse for nonperformance does not involve any vitiating factor, because we are ow considering a moment that *follows* the conclusion of the contract, during which you are theoretically obliged to perform, unless, indeed, it is impossible to do so. In that case, the contract could be either renegotiated, adapted or terminated. Remember also that neither impossibility, nor frustration, nor again hardship cause the '**voidance**' of the contract, as it is not impaired with any defect: you are just excused for non performing!

Taylor v. Caldwell, 1863 (English law)

The plaintiff and the defendant had entered into a contract by which the latter agreed to let the former have the use of his gardens and halls on 4 days (£100 per day), for the purpose of giving concerts and parties. After the contract was made but before the first day of use, the hall was completely destroyed by a fire without the fault of either party. The concerts could not be given as intended.

Issue: whether the loss which the plaintiff has sustained is to fall upon the defendants.
Rule: where there is a positive contract to do a thing, not in itself lawful, the contractor must perform it or pay damages for not doing it, although in consequences of **unforeseen accidents** the performance of his contract has become **unexpectedly burdensome** or even **impossible**. In 1863, the doctrine of impossibility didn't exist yet, thus the court appealed to the presence of an *implied condition* that the thing must continue to exist so as to keep the contract alive.
Argument: in English and American law, impossibility, be it initial or subsequent, allows you not to perform, but it can't be abused as rule: for instance, in case that the plaintiff has paid so as to shift the risk of perishing of the thing to the defendant, then impossibility has been warranted and no presence of implied condition can be claimed.

It is hard to speak of a common law rule before the 19th century. Sometimes, English courts excused a party who could not perform, for example when the performance was *illegal*, or the obligated party had *died*, or the object bailed had been destroyed by an 'act of God', or a *plague* suspended construction work.
Scholars have shaped two different lines of continental authority, and one is the **doctrine of changed circumstances**: for centuries, continental lawyers had said that every contract is subject to an *implied condition* that 'matters remain in their present state' (c.d. *rebus sic stantibus clause*); this doctrine can excuse a party even when performance has not become impossible. Scholars have recalled also the Roman rule on impossibility: a contract was *void* if it was impossible to perform although the defendant could not escape liability for *subjective impossibility*, but in Common law there was no reception of the Roman distinction between *initial* and *subsequent* impossibility (the latter making a party liable unless he could prove *vis maior*).

[*Code Civil*] Article 1218. "In contractual matters, there is *force majeure* where an event **beyond the control of the debtor**, which could **not reasonably** have been **foreseen at the time of the conclusion of the contract** and whose *effects* could not be **avoided by appropriate measures**, prevents performance of his obligation by the debtor. If the prevention is *temporary*, performance of obligation is **suspended** unless the delay which results justifies termination of the contract. If the prevention is *permanent*, the contract is terminated by operation of law and parties are discharged from their obligations under the conditions provided by art. 1351".

→ unlike Roman law, the French civil code does not distinguish between situations in which performance is excused by *impossibility* and those in which it is excused by *force majeure*.

[*Code Civil*] Article 1351. "The impossibility of making a performance frees the debtor from doing so when it results from an occasion of *force majeure* and when it is **final**, at least when he has not agreed to be responsible".

→ In 19th century, french jurists explained that to constitute *force majeure*, an event must be **irresistible**, yet they either stated or implied that absent *force majeure*, a party who fails to perform is not at fault: a party would be liable only if it *intentionally* or *negligently* breached the contract. A french jurist today would explain liability for breach of contract more clearly by using the distinction between:
  - **contracts of efforts**, ie contracts that entail a duty to use the best efforts. In this case, a party is liable only if he is *at fault* **(ex. contract with the lawyer, for whom it will be illegal to promise the victory of lawsuit; he can just promise to put his best efforts in the hope of a victory)**;
  - **contracts of results**, ie contracts that entail a duty to achieve a specific result. In this case, a party is liable for breach of contract, unless he can prove *force majeure* **(ex. contract for the delivery of goods)**.

As far as German law is concerned, before the reformation the BGB code actually followed Roman law by distinguishing initial from subsequent liability, thus liability for an impossible performance depended on whether a party was *responsible* for the fact that performance became impossible: namely, he was liable only for 'willful default or negligence'. What drafters wanted to uphold was that, if a performance was impossible and it was not the fault of the person who was supposed to perform, then why should he be held liable?
For several years, many jurists had been insisting that a party who did not perform a contract should only be liable for fault in the ordinary sense. The late scholastics and natural lawyers did not understand strict liability in contract for much the same reason that they did not understand it in tort. If a party had behaved like a **reasonable person** should, any event that made performance impossible for hi was deemed to be a mere *accident*. In this sense, liability that went beyond fault was *liability for chance*.
However, even before the reforms of 2002, the German courts were unable to live with that position. As a result, cases in Germany come out in much the same way as in France, England and USA: in some contracts, a party can escape liability if he was not at fault; instead, in contracts as source of obligations of results, he is liable even if he was not at fault, if the performance became impossible of an event that is normally between a person's control (ex. if he failed to perform because of lack of financial resources). Moreover, the event that prevents performance must be one that the parties would **not foresee or take into account at the time the contract was formed**.

1. Changed circumstances

The Romans did not have a doctrine of changed circumstances, that was rather invented by medieval canon lawyers and reduced to the condition 'if matters remain in the same state' which all contracts were subjected to. The curious thing is that canon lawyers did not have a theoretical explanation for this theory, it just seemed to them as *reasonable*.
An illustration was then displayed by Thomas Aquinas on the basis of Aristotelian theory on *equity*. According to the latter, since laws are made to *serve purposes*, **circumstances** can always arise in which obeying the law will no longer serve the purpose it was made for, and the lawmaker himself would not want it to be obeyed: therefore, as a **matter of equity**, it should not be obeyed. Aquinas, starting from the idea that a promise is like a law that a person makes for himself, a promise is *not binding* in circumstances where the promisor would not have intended to be bound. In this sense, the promisor is not bound if the change in circumstances concerns the *unique reason* or *unique cause* for his promise or the *presumption of some fact* on which his consent was conditioned.

Afterwards, with the rise of the **will theories of contract** (19th cent.) this doctrine went to eclipse, since to most jurists enforcing the will of the parties meant enforcing what the parties had *consciously* and *expressly* willed. Nevertheless, a few defenders of the doctrine explained relief by saying that **the existence of certain circumstances was a tacit or implied condition of the contract**, meaning that the continuation of certain circumstances could be an *undeveloped condition* of the contract (ie not expressly willed by the parties).
For most 19th-century jurists, the obvious objection to the doctrine was that such a tacit condition was one that the parties never consciously willed. They had never thought about the change in circumstances, let alone agreed on what should happen if the change occurred. The judge said the contract was subject to such a condition in order to obtain what he thought was a 'sensible and fair result': indeed, it was popular that any qualification of the promise is based on the unfairness or unreasonableness of giving it the absolute force which its words clearly state.
French courts in the 19th century refused to give relief for change of circumstances and they still refuse to do so. The drafters of the BGB code did not include such a doctrine and yet, in Germany and USA, the doctrine of changed circumstances, like relief for fairness, has seen a renaissance.

Krell v. Henry, 1903 (English law)

The plaintiff sued the defendant for £50, being the balance of a sum of 75£, for which the defendant had agreed to hire a flat for two days of June, for the purpose of viewing the processions to be held in connection with the coronation of King Edward VII. The defendant denied his liability, and counterclaimed for the return of the sum of £25, which had been paid as a deposit, on the ground that, the processions not having taken place owing to the serious illness of the King, there had been a total failure of consideration for the contract entered into by him.

Issue: whether the defendant can be excused for nonperformance for changed circumstances. We do not address this case according to impossibility of performance because the latter, regardless of the view of processions, is still possible.
Rule: we have to ascertain, not necessarily from the terms of the contract but, if required, from necessary interferences, drawn from surrounding circumstances recognized by both contracting parties, what is the *substance* of the contract, and then to ask the question whether that substantial contract needs for its foundation the assumption of the existence of particular circumstances.
Argument: if the procession was canceled before the conclusion of the contract, then we would have applied the doctrine of *mistake*, but here the cancellation occurred after the contract was made, thus there is a *frustration of purpose*. Yet the rationale is the same in both cases: in the former you can get out of the contract, in the latter you are excused from performing, because the contract has become useless to its purpose and the plaintiff wouldn't suffer from any financial loss, since no one would have leased his flat anyway but to watch the procession.
In this case, the alternative in order to avoid the nonperformance was that the plaintiff wisely fixed an higher rent and provided for an insurance policy, 'just in case', to the defendant.
The general rule, as we know, is that contract must serve the purpose, otherwise you can escape from it, provided that your exit does not provoke *economic unfairness* to the other party.

Tsakiroglou v. Noblee, 1962 (English law)

The appellants agreed to sell to the respondents 300 tons of Sudanese groundnuts to ship to Hamburg between November and December. At the date of the contract, the usual and normal route for the shipment entailed passing through the Suez Canal. Sufficient groundnuts were held at Port Sudan to the appellants' order to fulfill the contract, and space was booked on ships for them. Following the military operations against Egypt by British and French armed forces, the Suez Canal was blocked to shipping until April. No shipment took place.

Issue: whether the contract was ended by frustration of purpose.
Rule: the performance is not *impossible*, but just **inconvenient**.
Argument: for the Court there is no frustration of purpose because performance remains possible, as goods won't be damaged. The plaintiff had just to pay more money so as to deviate from the original route.

Conclusion: it should be stressed that this is a straight-forward case because, be English law devoid of any doctrine on commercial impracticability, so as to decide this case and cases alike courts resort to the doctrine of frustration of purpose.

Transatlantic Financing Corp. v. United States, 1966 (US law)

The plaintiff contracted with the US to carry a full cargo of wheat to Iran, intending to cross Suez Canal. After the departure, the Canal was closed by the Egyptian government because of the war. A Transatlantic employee asked an employee of US to agree to additional compensation for a voyage around the Cape of Good Hope, but the request was refused. The ship changed the course and reach anyway Iran by sailing around the Cape.

Issue: whether the performance was excused for changes in circumstances.
Rule: the construction of a condition of performance based on changed circumstances requires three aspects to consider. Unless the court finds these three requirements satisfied, the plea of impossibility must fail:

1. a contingency (something unexpected) must have occurred.
2. the risk of the contingency must not have been allocated either by agreement or by custom;
3. the occurrence of contingency have rendered performance commercially impracticable. US law is in fact provided with both **frustration of purpose** and **commercial impracticability** doctrines.

Argument: the requirement (1) is met. As to requirement (2), it is not met. The risk of the Canal's closure may be deemed to have been allocated to Transatlantic because it was, to a certain extent, predictable. Even if foreseeability or even recognition of a risk does not necessarily prove its allocation, the surrounding circumstances indicate a willingness by Transatlantic to assume abnormal risks. As to requirement (3), it is not met neither. Transatlantic was no less able than US to purchase insurance to cover the contingency's occurrence. The plaintiff are in the best position to calculate the cost of performance by alternative routes. Even if it is something unexpected, we can't say that hardship is here present because the risk was impliedly allocated to the plaintiff.
Conclusion: the court is arguing that the risk should be put on the Transatlantic because they should have anticipated this situation, be it inherent to its business and not US government's one. The latter has in fact paid the plaintiff to assume such a risk.

Mineral Park Land Co. v. Howard, 1916 (US law)

Defendants made a contract with public authorities to build a concrete bridge across a ravine on land owned by the plaintiff. They made a contract with the plaintiff in which he granted them the right to haul gravel and earth from his land, and the defendants agreed to take from the land all the gravel and earth necessary for the fill and cement work on the bridge. Defendants used 101.000 cubic yards for this work but obtained 50.869 cubic yards from persons other than plaintiff, because only 50.131 of the plaintiff were above water.

Issue: whether the defendant's performance was excused for changes in circumstances.
Rule: the doctrine of hardship is here applied. To take more plaintiff's cubic yards, the cost for the defendant would have increased of 1000%. Therefore, even if performance was still possible, if was not advantageous nor practical: it was too onerous for the defendant, and such an increase in costs couldn't be assumed by the defendant as a risk, because it is an **abnormal risk**.
Argument: the contract is here affected by commercial impracticability because it is a **fixed price contract**, that thus would not have entailed any additional compensation for the defendants in case of raising costs. If it had been, conversely, a cost plus contract, then the defendant would have had no problem in bearing such additional cost of 1000%, because in any case they would have been remunerated by the plaintiff, having the latter assumed the risk of raise in defendant's profit.

[*Code Civil*] Article 1195. "If a change of circumstances that was **unforeseeable at the time of the conclusion of the contract** renders performance **excessively onerous** for a party who **had not accepted the risk** of such a change, that party may ask the other party to **renegotiate** the contract. The first party must **continue to perform his obligations** during renegotiation. In the case of refusal or failure of the latter, parties may agree to **terminate** the contract from the date and on the conditions which they determine, or by a common agreement ask the court to set about its adaptation. In the absence of an

agreement within a **reasonable time**, the court may, on the request of a party, **revise** the contract or **put an end** to it, from a date and subject to such conditions as it shall determine".

→ Article as amended in 2016. Before that year, French courts refused to give relief for changed circumstances even in extreme cases.

[*BGB code*] ***Performance in good faith***. "The party owing a performance is bound to perform in the way which is required by **good faith** having regard to the **ordinary usage**".

[*BGB code*] ***Destruction of the basis of the transaction***.

(1) if **circumstances that formed the basis of the transaction** have **seriously changed** thereafter and the parties would not have entered into the contract or one with the same content had they foreseen the change, then the **adaptation of the contract** can be required insofar as for one of the parties, taking into account all of the circumstances of the particular case, and especially the **division of risks** provided for by the contract or by statute, **adherence** to the contract no longer can be expected.
(2) it is equivalent to a change of circumstances when **essential conceptions** which formed the basis of the contract have **proven false**.
(3) if an adaptation of the contract is **not possible** or **unreasonable in part**, then the disadvantaged party can **withdraw** from the contract.

Reichsgericht, 1923 (German law)

The plaintiff is the owner of real property entered on the land registered of the former German court in Africa. The defendant has been, since 1913, the holder of a mortgage for 13.000 Reichsmarks, which was noted on the land register. The mortgage debt fell due on April 1, 1920. The plaintiff, in payment of the principal obligation and of overdue interest, paid the defendant 18.980 Reichsmarks through a bank. The plaintiff seeks a judgement ordering the defendant to turn over the mortgage papers and to agree to the extinguishing of the mortgage. The defendant refused to do this on the ground that the debt must either be paid in the hard currency of the former German protectorate in Africa or in money of the corresponding value.

Issue: whether the defendant's performance was excused for changes in circumstances, and whether the defendant, as mortgage-creditor, can demand a revaporization of the claim secured by the mortgage in view of the heavy inflation in German paper money.
Rule: this is a case of **unpredictable hyperinflation**. When you enter a mortgage, the lender surely assumes the risk that purchasing power of currency can fluctuate, but not to such an abnormal extent. In extreme inflation, money becomes just invaluable pieces of paper.
Conclusion: there is **frustration of purpose** of the transaction and the bank must be paid differently from Reichmarks.

Bundesgerichtshof, 1973 (German law)

The plaintiff became a director of the defendant company in 1926 and, after 20 years' service, his annual pension should have amounted to 15.000 DM. In 1969, plaintiff asked for an increase which was refused. He claimed an additional pension at the monthly rate of 805 DM on the ground that wages and salaries and the general cost of living had increased considerably.

Issue: whether the contract was affected by a change in circumstances.
Rule: the doctrine of **frustration of purpose** must be applied, otherwise *good faith* would have been violated. It should be specified that German law entails the doctrines of both frustration of purpose and commercial impracticability, and courts usually tend to enforcing contracts even in presence of frustration or hardship, unless they violate good faith
Argument: the purpose of the contract of pension was the one of assuring for the plaintiff-beneficiary a standard of living commensurate to his position, that was thus frustrated because of the fall in purchasing power of DM.

V. REMEDIES

When talking about remedies, we place our reasoning in a moment that is *subsequent* to the time that the contract was made. If a party is non excused for nonperformance, then he is in *breach* and must compensate the other party, through two main alternative forms of remedies:

- specific performance, which in numerous jurisdiction is merely exceptional. In fact, the creditor usually does not have the right to insist for having the performance rendered;
- damages, that coincide with *expectation damages*, granting recovery for both the loss suffered (ie the loss of the value of a good bargain) and the loss of profit (ie the gain not obtained). The two components thus identify the overarching value of the bet.

In US law, there is no a determined right to ask for specific performance, but only for damages, yet provided that the latter are *adequate* (sufficient) to compensate the creditor. Inferably, damages prove instead to be *inadequate* when the subject matter of the contract is a thing a party is affectioned to, is not a commodity and thus can't be substituted within the market.
In German law, one has always the right to ask for specific performance, unless the cost of performance is *excessive*. In the latter case, the party owing the performance will be excused for nonperforming and will have to compensate the other party in *damages*. However, the concretization of the right to specific performance actually does depend on the *nature of the obligation*:

a. if the thing is a commodity, then it will be better for both parties to ask for damages, but specific performance could be asked as well;
b. if the promised thing is something *personal in nature*, implying a **personal service**, the party owing performance can't be forced to render it. The creditor will be allowed to seek performance in kind, but the latter can't be granted for matter of *public policy* (for instance, if the personal service owed by the debtor is excessively costly to perform).

1. Specific performance

In England, law was administered by two sets of courts:

- the *common law courts*;
- the *court of equity*, presided over by the Chancellor, whose role was to help parties whose cause was deemed to be *just* but who could not get *relief* from a court of common law. The latter, in fact, could award damages when a promise was broken, but they could not order the promise breaker to perform (*specific performance*); instead, a court of equity could do so because he *acted on the conscience*, namely the court could order a party to be imprisoned until he was prepared to do as the court ordered. Nevertheless, the role of the court of equity was only to provide the remedy of **specific performance** when the award of damages provided by common law courts seemed not to be *adequate*.

In countries which have adopted Roman law, a crucial role was played by two texts, respectively declaring that:

a. "if an object sold is *not delivered*, there is an **action for damages**, that is, for the damages suffered by the buyer by not having the object";
b. "as he did not do as he promised, he is to be adjudged to **pay a sum of money**, as is the case in all obligations to do something".

Given the inferable unclearness of these statements, some jurists claimed that a court could *never* order specific performance in such cases and others claimed it could. What **art. 1142 of the French civil code** states today is that when a party defaults on an obligation to do or not to do something, the only remedy available against him is an action for damages; it is a provision that can be subverted only by the courts.
The late scholastics and the natural lawyers took the position that, whatever Roman law might be, as a matter of *natural law*, the party owing a performance should have to do so if he can.

Regarding specific performance, in English law there are multiple aspects to analyze:

1. specific performance is granted only when **damages are not adequate**. The adequacy of damages shall be assessed according to the following parameters:
   (a) *availability of satisfactory equivalent* = damages are an adequate remedy when the claimant can get a satisfactory equivalent of what he contracted for from some other source. For this reason, specific performance is not generally ordered of contracts for the sale of *commodities*, or of *shares*, as the claimant can buy in the market and is adequately compensated by **recovering the difference between the contract and the market price** by way of damages. Indeed, he is required to make the substitute purchase in performance of the duty to mitigate his loss; if he fails to do so, he cannot recover damages for extra loss suffered because the **market has risen** after the date when the substitute contract would have been made. To award him specific performance in such a case would, in substance, conflict with the **principle of mitigation** as well as being **oppressive** to the defendant. Similar reasoning seems to underlie the rule that a contract to lend money cannot be specifically enforced by either party, being assumed that damages can easily be assessed by reference to current rates of interest.
   Instead, damages will not be regarded as an adequate remedy when the claimant cannot obtain a satisfactory substitute **(ex. purchase of land or house)**;
   (b) *hardness in damages quantification* = given the frequent difficulty of assessing and recovering damages, specific performance is usually ordered of contracts of sale of *annuities*, or of *debts* proved in bankruptcy, the value of such rights being uncertain;
   (c) *appropriateness of the remedy* = the availability of specific performance depends on the appropriateness of that remedy in the **circumstances** of each case. The question is not whether damages are an adequate remedy, but whether specific performance will do **more perfect and complete justice** than award of damages.
2. **Discretionary**. Specific performance is a discretionary remedy: the court is not bound to grant it merely because the contract is valid at law and cannot be impeached on some specific equitable ground such as misrepresentation or undue influence. The discretion is, however, not an *arbitrary discretion*, but rather governed as far as possible by **fixed rules and principles**;
3. **Contracts not specifically enforceable**.
   (a) *contracts involving personal service* = as a general rule, equity will not enforce a contract of personal service, since specific enforcement against the employee was thought to **interfere unduly with his personal liberty**. The equitable principle applies to all contacts involving personal service, even though they are not strictly contracts of service: for instance, to contracts of sale at auction, to agreements to enter into a partnership, and so not. But, it applies only where the services are of a **personal nature**.

US law

[*Restatement II of Contracts*] ***Effect of adequacy of damages***. "Specific performance or an injunction will not be ordered if damages would be adequate to protect the **expectation interest** of the injured party".

Factors affecting adequacy of damages. "In determining whether the remedy in damages would be adequate, the following circumstances are significant:
(1) the difficulty of **proving damages with reasonable certainty**;
(2) the difficulty of **procuring a suitable substitute performance** by means of money awarded as damages;
(3) the likelihood that an award of damages **could not be collected**."

In American law, a court will not grant specific performance of a contract to provide a **service of personal nature**, given, on the one hand, the difficulty of passing judgement on the *quality* of performance and, on the other, the *undesirability* of compelling the continuance of personal relations after disputes have arisen and confidence and loyalty have been shaken. Otherwise, it would all traduce in the imposition of *involuntary servitude*.

French law

[*Code civil*] Article 1217. "A party towards whom an undertaking has not been performed or has been performed imperfectly, may:

a) **refuse** to perform or **suspend** performance of his own obligations;
b) seek enforced **performance in kind** of the undertaking;
c) request a **reduction in price**;
d) provoke the **termination** of the contract;
e) claim **reparation of the consequences** of nonperformance."

[*Code civil*] Article 1221. "A creditor of an obligation may, having given notice to perform, seek **performance in kind** unless **performance is impossible** or if there is a **manifest disproportion** between its *cost to the debtor* and its *interest for the creditor*."

German law

[*BGB code*] ***Obligation to perform***. "The effect of an obligation is that the person owed performance is **entitled to claim performance** from the person who owes it".

→ in German law, a creditor has the right to bring a claim for performance of a contract or to obtain a judgement ordering the debtor to fulfill it. For this purpose, the nature of debtor's obligation doesn't count: the view is that an obligation, by its essence, just be actionable, and the words of the aforementioned article imply that actual performance may be demanded before a court.
Yet, a judgment ordering the debtor to perform is contract in kind can be issued only if performance by the debtor is **still possible**, otherwise the creditor could only bring a claim for damages.
It is clear that BGB's draftsmen believed that a disappointed contractor who decided to sue would always choose to claim performance, but this is not what happens in practice. A plaintiff who has actually obtained a judgement for performance may, instead of executing it, wish to proceed immediately to a judgement for damages.
The creditor who has obtained judgement for performance can fix a time within which performance from the debtor must be forthcoming. On the expiry of this period the plaintiff can forthwith institute a claim for damages, against which the only admissible defense is that performance has been rendered impossible by circumstances not entailing the defendant's responsibility and arising after the judgement for performance has handed down. However, these provisions are rarely used today, since now commercial men usually grant the debtor an additional period for performance in accordance with section 326 of the Civil Code and, if this period elapses without result, they forthwith institute a claim for damages.
Claims for performance may not be very frequent in practice, since creditors bring them only when their interest in performance cannot easily be reckoned in money, but it remains the theory that, in a case where performance is still possible and the creditor so elects, the courts are bound to deliver judgement ordering the debtor to perform. If the claim on which the creditor has obtained judgement is that the debtor should take some positive action other than handing over property, a distinction is made:

a. if the act in question is one which could be equally well performed by someone else (ex. manual tasks which call for no special talent), then the method of execution is for the creditor, on the authority of the court granted at his request, to have the act performed by a third party at the expense of the debtor;
b. if the act to which the creditor lays claim is one which can be performed only by the debtor himself, the method of execution provided by the Code of Civil Procedure is to threaten the unwilling debtor with a fine or imprisonment.

These means on execution cannot be used against a debtor whose obligation is to do something which calls for special artistic or scientific talent, since here the performance of the act does not depend exclusively on the debtor's will, but also on his right inspiration, mood, energy, and other preconditions of great spiritual creativity.

2. Damages

English law

The object of damages for breach of contract is to put the victim, so far as money can do it, in the same situation as if the contract had been performed. In other words, the victim is to be **compensated for the loss of his bargain**, so that his expectations arising out of or created by the contract are protected.

> *Ruxley & Laddingford v. Forsyth,* 1994 (English law)
>
> The defendant contracted with the two plaintiffs to build a swimming pool in his garden and a building to enclose it for a total price of £70,178. The contract expressly provided that the maximum depth of the pool should be 7 foot and 6 inches. After the work had been completed, the owner discovered that the maximum depth was only 6 foot and 9 inches and that at the point where people would dive into the pool the depth was only 6 foot. Although it was accepted that the failure to provide the required depth was a breach of contract, the trial judge found that the shortfall in depth had not decreased the value of the pool, and awarded the owner £2,500 general damages for loos of amenity on his counterclaim. The Court of Appeal allowed the defendant's appeal, holding that it was not reasonable to award as damages the cost of replacing the swimming pool in order to make good the breach of contract, even though the shortfall in the depth of the pool had not decreased its value. The court awarded the owner £21,560 damages.

Issue: which kind of remedies must be rendered to the defendant.
Rule: in a building contract there is no admissible head of damages capable of assessment by reference to concepts such as *loss of amenity*, *inconvenience* or *loss of aesthetic satisfaction*, otherwise chaotic uncertainty will be introduced into the law. Damages should be now assessed be reference to **diminution in value** or **cost of reinstatement**, but in this case the former is *nil*.
In English law, one usually can't seek for specific performance, but just for damages under reach of contract, differently from German law within which you can seek performance in kind as a matter of your right.
Argument: the cost of reinstatement was quantified by the court at a sum of £21,560, but it was patently an **excessive cost** for the plaintiffs to bear. Therefore, the plaintiffs are not required to perform specifically, even more so considering that the loss in value for the defendant was zero.
Here the breach of contract was minimum. The performance was slightly defective, and in fact there was no decrease in value to the thing and accordingly the plaintiff didn't suffer any financial loss.
When the cost of performance is excessive, the plaintiff can insist on specific performance, he could just recover damages, but since in this case the diminution to the value was zero, they are not granted either.

Conclusion: the Court added that □'consumer surplus'□□□ is usually incapable of precise valuation in terms of money, exactly because it represents a personal, subjective and non-monetary gain. Nevertheless, where it exists the law should recognize it and compensate the promisee if the misperformance takes it away.

American law

[*Restatement Second of Contracts*] ***Measure of damages in general***. "The injured party has a right to damages based on his **expectation interest** as measured by: (a) the **loss in the value** to him of the other party's performance caused by its failure or deficiency, plus (b) any other loss, including **incidental** or **consequential loss**, caused by the breach, and (c) any **cost or other loss** that he has avoided by not having to perform."

→ the *expectation interest* is defined as a party's interest in having the **benefit of his bargain** by being put in **as good a position** as he would have been in had the contract been performed.

French law

[*Code Civil*] Art. 1231-2 "The damages due to the person owed the performance are, in general, the **loss** which he has incurred plus the **gain** of which he was deprived with the exceptions and qualifications to be described."

German law

[*BGB Code*] ***Nature and extent of compensation***. "One who is obligated to make compensation must bring about the condition that would have existed if the circumstance which gave rise to his duty to compensate had not arisen".

Excessive cost of performance

American law

[*Restatement Second of Contracts*] ***Alternative to loss in value of performance***. "If a breach results in **defective or unfinished construction** and the loss in value to the injured party is **not proved with sufficient certainty**, he may recover in damages based on: (a) the **diminution in the market price** of the property caused by the breach, or (b) the **reasonable cost of completing performance** or of **remedying the defects** if that cost is **not clearly disproportionate** to the probable loss in value to him."

Peevyhouse v. Garland Coal & Mining Co., 1924 (US law)

The plaintiff owned a farm containing coal deposits, and leased the premises to defendant for a period of 5 years for coal mining purposes. A strip mining operation was contemplated in which the coal would be taken from pits on the surface of the ground, instead of from underground mine shafts. The defendant specifically agreed to perform certain restorative and remedial work at the end of the lease period; it would involve the moving of many thousands of cubic yards of dirt, at a cost estimated by expert witnesses at about $29,000. However, plaintiff sued only for £25,000.

Issue: which kind of remedies must be rendered to the plaintiff.
Rule: the cost of performance is the proper measure of damages if it is possible and does not involve *unreasonable economic waste* (***cost of performance rule***). The diminution in value caused by the breach is the proper measure of damages if construction and completion in accordance with the contract would involve *unreasonable economic waste* (***value rule***).
Argument: plaintiff contented that the true measure of damages in this case is what it will cost him to obtain performance of the work that was not done because of defendant's fault. The defendant argues that the measure of damages is the cost of performance limited to the total difference in the market value before and after the work was performed: the performance will increase the value of the mine only of £300.
In the case at hand, there is an **excessive cost of performance**. The plaintiff should have communicated to the defendant his special need, his purpose of accomplishing the economical recovery and marketing of coal from the premises, to the profit of both parties. As we have read, here the performance would have caused just a slight change in value, therefore the plaintiff should have communicated to the other party his necessity of having the contract precisely performed, so that the defendant could make an insurance policy. In fact, if one is seriously concerned about a minor disparity in value, he should tell it to the other party so that the latter can deflect such risk and make a certain arrangement. In this sense, the defendant deserves to be informed that such a risk encumbers on him, because he must be compensated for bearing it.
In US law, if performance involves a **clearly disproportionate cost** (£29,000 as cost of performance vs £300 as increase in value), you are not obliged to specifically perform but, since in the given case the defendant was actually **negligent**, he must compensate the plaintiff, though in *damages*, for breach of contract.
It must be specified that hardship and excessive cost of performance are not the same:

a. in case of *hardship*, the party is excused for nonperformance;
b. in case of *excessive cost of performance*, it means that one party has already performed yet partially, there is just a minor and non fundamental breach of contract. Therefore, the party must not have to pay such a high cost to repair the performance.

French law

[*Code Civil*] Art. 1221 "A creditor of an obligation may, having given notice to perform, seek **performance in kind** unless performance is **impossible** or if there is a **manifest disproportion** between its cost to the debtor and its interest for the creditor".

→ the issue of 'manifest disproportion' is an innovation of the ordinance of 2016. This new exception seeks to avoid certain very contested judicial decisions; when specific performance is **extremely onerous** for the debtor without the creditor having a **true interest** in obtaining performance, it would appear to be *inequitable* and *unjustified* that he can require it, when **liability in damages** can provide him with an **adequate compensation** at a **much lower price**.
This new limit on specific performance has been the object of conflicting opinions. Although some have praised the merits of a solution that prevents specific performance of a contract that is too onerous and leads to the **ruin** of the debtor at the mercy of an 'obstinate creditor', others have denounced an **undermining of contractual rights** of the creditor.

German law

[*BGB Code*] ***Damages in money***. "To the extent that performance is **impossible** or is **insufficient** to compensate the party who is owed performance, the other party has the duty to compensate him in money. Compensation can be made in money also when performance is only possible with **disproportionate expense**".

Liquidated damages

Parties can forfeit in advance, before the contract is made, an amount of damages to pay in case of subsequent breach, so as to avoid further problems of quantification. However, these liquidated damages can't depart grossly from *actual damages* (ie actual loss suffered by the injured party because of the breach of contract), otherwise the court will assess damages by looking at the *actual* loss.

English law

A contract may provide for the payment of a **fixed sum** on breach, or some other sanction. Such a provision may serve the perfectly proper purpose of enabling a party to **know in advance** what his liability will be, and of avoiding difficult questions of *quantification*. On the other hand, the courts have been reluctant to allow a party, under such a provision, to recover a sum which is *obviously* and *considerably* greater than his loss. They have therefore divided such provisions into two categories:
(a) **penal clauses**, which are *invalid*;
(b) **liquidated damages clauses**, which will generally be upheld.
It must be specified that the difference between penal clauses and liquidated damages clauses is not extremely clear, if not outright inexistent. Some think the former to be invalid because they are believed to put a penalty on the potential injurers, but actually civil law has no *punitive* purposes, it does not trigger *punitive damages*.

American law

[*Restatement Second of Contracts*] ***Liquidated damages and penalties***. "Damages for breach by either party may be liquidated in the agreement but only at an amount that is **reasonable** in light of the anticipated or actual loss caused by the breach and the difficulties of proof of loss. A term fixing **unreasonably large** liquidated damages is **unenforceable** on ground of **public policy** as a penalty".

French law

[*Code Civil*] Article 1231. "When a contract provides that the party who fails to execute an obligation will pay a certain sum as damages, the other party will not be allowed a **greater sum or less sum**. Nevertheless, the judge can, even on his *own initiative*, **moderate** or **augment** the penalty thus agreed if **manifestly excessive or derisory**".

German law

[*BGB Code*] ***Promise of a penalty for failure to perform***. "If the debtor has promised a penalty in the event he fails to fulfill the obligation, the creditor may desmans the penalty in lieu of fulfillment".

[*BGB Code*] ***Reducing the penalty***. "If the forfeited penalty is **disproportionately high**, the debtor may obtain a **judicial decree** reducing it to a **reasonable amount**. In the determination of reasonableness every **legitimate interest of the creditor** shall be taken into consideration, not only his *economic* interest".

Recovery for non-economic harm

The recovery for non-economic harm is rendered not specifically because one party is liable for breach of contract. They are rather additional and aim to compensate the *mental distress* the injured party suffered from.

Jarvis v. Swans Tours Ldt., 1973 (English law)

The defendant, a firm of travel agent, organized a trip and advertised it through a brochure, in which the plan was illustrated and enjoyment was granted. The total cost of the holiday was £63,45. The plaintiff went, so as to take his annual fortnight's holiday, but was very disappointed.

Issue: whether the plaintiff shall recover for non-economic harm.
Rule: in some precedents, the courts stated that on a breach of contract damages cannot be given for mental distress, for the mere disappointment of mins, without **real physical inconvenience** resulting. But these limitations are pretty out of date. In a proper case, damages for mental distress can be recovered in contract, just as damages for shock can be recovered in tort. It is probably difficult to assess such damages in money, but it is no more difficult than the assessment which the courts have to make everyday in personal injury cases for loss of amenity.
Therefore, we can state that generally, in English law you can't recover for a *psychological harm*, but you can be compensated for having wasted your paid holidays because the latter have an economic value.
Argument: in English law, in the absence of bodily harm no damages are granted. After all, no firm of travel agent could be required to assure that it will make people happy during the journey, However, in this case, relief are granted and the reason is that the plaintiff has wasted his work holiday: the latter are paid, they have an **economic value**, therefore the injured party deserves compensation for his paid holidays if he didn't enjoy them.

American law

[*Restatement Second of Contracts*] "Recovery for **emotional disturbance** will be **excluded** unless the breach also caused **bodily harm** or the contract or the breach is such a kind that **serious emotional disturbance** was a particularly likely result".

Deitsch v. The Music Company, 1983 (US law)

Plaintiff and defendant entered into a contract, whereby defendant was to provide a band at plaintiff's wedding. The reception was to be from 8 pm to midnight and the wage agreed upon was $295, with a deposit of $65, which plaintiff paid upon the signing of the contract. However, the band failed at arriving, despite plaintiff's attempts to contact them. At the end, plaintiff were able to send a fried to obtain some stereo equipment to provide music.

Issue: whether the plaintiff shall recover for non-economic harm.
Rule: mental distress can't be remedied, unless you suffered also from a physical harm or from a serious mental disturbance that is the result of nonperformance.
Argument: if the plaintiff were compensated just by having the deposit back, they wouldn't be happy enough.
Conclusion: the court held that the **out-of-pocket loss**, which would be the security deposit, would not be sufficient to compensate the plaintiff, who are entitled with compensation for their distress, inconvenience, and the diminution in value of their reception. The compensation should be $750.

French law

The element of damage which are *recoverable* are the same in the area of contracts as in the area of torts:

1) **material damage**, that is to say the loss that was suffered and the gain that was missed under art. 1231 of the Civil Code;
2) **injury to physical integrity** and life in contracts that carry with them an *obligation of safety*;
3) **non-economic harm** (*dommage moral*, a category which includes *pain* and *suffering*), in the different senses of his term;
4) **loss of a chance**;
5) harm that occurs because of **harm to another**.

Tribunal de commerce de la Seine, 1932 (French law)

The plaintiff engaged Mlle Devillers to shoot a film with Victor Boucher as a partner, as stated in contractual conditions. One of the clauses provides that Mlle Devillers would have been the female lead and and that, in all publications in which Victor Boucher was mentioned, she would have letters 2/3 the size of those with his name. Resisting the claim for the payment of the sum of 15000 francs and an additional sum of 1000 francs per day of delay until the wall posters and placards are modified to conform to the contract, the plaintiff claims that this demand is unjustified.

Issue: whether the plaintiff shall recover for non-economic harm.
Rule: French law usually doesn't allow to ask for specific performance.
Argument: from the beginning of the public campaign, the plaintiff violated the aforementioned contractual clause, having numerous omissions occurred in the posters. Because of the failure of the plaintiff to perform its obligation, Mlle Devillers suffered **commercial disturbance** and a **certain non-economic harm** for which the plaintiff should be held to make compensation.

German law

[*BGB code*] Article 253(1) ***Non-physical harm***. "In the case of **harm that is not economic**, compensation in money can be demanded only in the **cases specified by the statute**".

[*BGB code*] Art. 847 no longer in force. "In the case of **injury to body or health** or **deprivation of liberty**, the injured party may also demand **fair compensation** in money for **non-economic harm**." Substituted in 2002 by the following article 253(2): "In the case of injury to body, health, liberty or **sexual self-determination**, fair compensation in money **can be required** for non-economic harm".

→ in Germany, recovery is usually granted only for bodily harm, unless you shows relevant documents which establish proof that the mental harm was also physical. A more exhaustive documentation is required so as to imbue the mental harm occurrence with more *certainty*, so as to make it more definite. These damages are granted under *contract law*. Instead, in American law this connection between mental harm and bodily harm is more loosened, since it is allowed to recover for the former also if it stands alone, with no complementary physical harm, as a *serious mental distress*.

Oberlandesgericht, 1998 (German law)

The plaintiff had contracted for a room with a fireplace in defendant's hotel that could accommodate 12 people for the evening of her marriage. Due to a mistake of the defendant, that room had already been reserved for that night by another party. Because an appropriate alternative was not available, the evening celebration of her marriage did not take place. The plaintiff declared of having suffered a psychological shock and claimed damages for pain and suffering of 3000 DM. The trial court dismissed her request for assistance because she had suffered no physical harm.

Issue: whether the plaintiff shall recover for non-economic harm.
Rule: a psychological harm shouldn't be recovered unless it is tainted with a physical harm as well.
Argument: it is true that a person who harms another must answer for the psychological effects of the conduct for which he is responsible; but the type, intensity and duration of the psychological

interference must so clearly surpass the reactions normally present in life to disagreeable events that one can at least compare them to the effects of an *illness*.
However, at any rate, even if by using the appropriate degree of care the hotel keeper could predict that his negligence would have had a negative impact on the plaintiff, he nonetheless could not not foresee such a severe reaction, therefore remedies should not be granted.

Recovery for unforeseeable harm

Justinian placed a limit on the damages that a party could recover in contract: in all cases which have a certain quantity or nature, damages are not to exceed **twice the quantity**; however, in other cases which appear to be uncertain, judges are to require that the damages which was truly incurred be paid for.
There was much dispute about what it meant to speak of 'cases which have a certain quantity or nature' or 'cases which appear to be uncertain'. Probably the rationale behind this rule is that, all the law is based on the dislike of enormity and so the particular rationale of the limitation in the cases of what is certain is that most likely it was **not foreseen** or thought that greater damage would be suffered or that there was a risk beyond the principal object than the principal object itself. Therefore, it would be equally equitable to limit the damages recoverable in the cases that concern what is uncertain. It was in fact noted subsequently that the person who owes a performance is only *liable* for the damages that one could have *foreseen* at the time of the contract that the party owed a performance would suffer.
Ex. if I sell a person a horse which I am obliged to deliver in a certain time but I cannot deliver it accordingly, if in the meantime horses have increased in price, it is a damage for which I am obliged to indemnify the other party, since I could have foreseen it. After all, the price of horses like that of all other things are subject to variation. But if this purchaser was a canon, who wanted the horse so as to arrive at the place of his benefice in time to be entitled to his revenue, and was thus prevented from doing it, it is a damage which is foreign to the obligation, which was not contemplated at the time of the contract, and to which it cannot be supposed that I had any intention to submit.
The only recognized exception is that **full damages** can be recovered if the non-performance was due to **willful misconduct** (*dolus*).

Foreseeability thus constitutes another limitation to damages recovery. In fact, expectation damages are granted whether you prove to have suffered from loss of profit, otherwise only reliance damages, as to the loss incurred, are provided. Yet, in almost any case one can recover damages for *unforeseeable harms*, but only the predictable ones: this is the standard rule in force in England and in the US, whereas in Germany the use more the doctrine of contributory fault in lieu of foreseeability of a harm.
Let's make a clear example: Bill Gates lands at New York airport and has an urgency in reaching the Empire State Building as soon as possible because he has to sign a 10 billions contract with Elon Musk. He thus stops a taxi and asks him to deliver him to the willed destination, exhaustively informing the taxi driver about his need of arriving on time and about his purpose of signing such contract. The taxi driver accepts, but he makes a delay. Should Bill Gates recover his 10 billions because, for taxi driver's fault, he arrived late and couldn't sign the contract with Musk? Was it a foreseeable harm?
One could argue that the taxi driver was informed by Bill Gates about his necessity, and he has even accepted, so the harm to the plaintiff (the lost of 10 billions of dollars) was *foreseeable* by him. However, it could be objected that such a harm was not foreseeable at all because it was *not certain*: first of all, Bill Gates wanted to reach the ESB because he was *expecting* to sign the contract, but there is no certainty that he would have signed it for sure, have it arrived on time; secondly, the harm was unforeseeable for the defendant because he couldn't envisage that such an important contract would have failed only for a slight delay.

Undoubtedly, Bill Gates should have been more prudent, because he shouldn't have taken a taxi if he had such an urgency; he had better charter a private car or an Uber. On the other hand, the taxi driver should have been more prudent too, because he should have asked for a higher price to bear such a risk: indeed, Gates is imposing a severe risk on the defendant without compensating him for such an assumption.
For all things considered, the output of this case is an **unforeseeable course of events**. The bar from recovering unforeseeable harm is omnipresent in all legal systems, thanks to the influence of *probability theory* which has prophesied that implying the possibility of getting relieved for unpredictable harm would have impaired the contract with unfairness. Nevertheless, it is only American law to entail, as limitation to *foreseeable* damages, the hypothesis of **disproportionate compensation** with respect to the *contract price*. This provision [section 351 of Restatement II of Contracts] is thus used to reduce *expectation* damages to the sole *reliance* damages.
By the way, every legal system must weight damages in such situations of likely unforeseeability. In French law, the latter is present, therefore one is in principle bond only to compensate harms that are foreseeable; but with some exception: one could recover even unforeseeable harm, if and only if the injurer acted with *willful misconduct*, evolved after 2016 as *gross or dishonest fault*. French law thus looks mostly at the injurer's **mental capability**, and even if unforeseeable harm is astronomical you have to pay for it if you were in *dolus*.

French law

[*Code Civil*] Article 1231-3. "A debtor is bound only to damages which were either **foreseen** or which could have been foreseen at the time of the conclusion of the contract, except where non-performance was due to a **gross or dishonest fault**".

→ this article modified Article 1150 which provide that the exception must be due to 'willful misconduct'. In this previous sense, the party who does not fulfill his obligation is held, if he was in good faith, to the integral reparation of the harm as long as the cause of the harm could have been foreseen.

Cour de Cassation, 1982 (French law)

The defendant was held contractually liable on account of his negligence for a fire caused by the use of a blowtorch which partially destroyed a chateau belonging to the plaintiff whose roof the defendant was engaged in repairing. The plaintiff asked for various indemnities, including an amount of 60000 francs representing the interest on a loan that the proprietor contracted to undertake the initial expenses of putting the building that burned into shape, and a sum of 70000 francs for loss of rent of the premises on the first floor of the chateau.

Issue: whether the harm was foreseeable.
Rule: the previous article 1150 of the French Civil Code is here applied, however no willful misconduct, nor gross negligence could be imputed to the defendant. His harm was not just *unforeseeable*, but also unintentional. Therefore, he should not be held liable for such unpredictable damages.
Argument: in French law, if you harmed intentionally, you are liable for all harms caused; if you harmed unintentionally, you are liable just for a part of them.

Cour de Cassation, 1913 (French law)

The plaintiff was carrying a box weighing 30 kg containing three cans of essence of neroli worth 725 francs per kilogram. This box, left in the station where the train arrived, was stolen and the day after, it was found but with 5 kg 650 g less. The plaintiff demanded from the railroad a payment of 4096 francs, reflecting the price of the essence, and 2000 for other damages. The company responded with an offer of compensation of 100 francs, maintaining that there was no way it could foresee the valuable contents of the baggage.

Issue: whether the harm was foreseeable.
Rule: the previous article 1150 of the French Civil Code is here applied.

Argument: the plaintiff argued that the baggage was ordinary and bore no indication as regards to its fragile contents. Moreover, the defendant could be claimed as negligent too, as he abandoned hi luggage in the baggage storage of the station, without any notice given to the employees.
However, it could be objected that no provision in the list of changes and fees imposes an obligation on passengers to declare the content of the baggage which accompanies them and, as a result, railroad companies must foresee that certain travelers will be carrying objects of a more or less considerable value in their baggage.
Conclusion: the reason why here plaintiff shouldn't get relieved is that he didn't pay the defendant so as to assume such a risk of theft. He should have inform the defendant, pay him more and buy an insurance policy, so as to deflect such risk. But he didn't. It would be really unfair on the part of the plaintiff to seek for damages without compensating the defendant for shifting the risk on him.

Cour de Cassation, 1926 (French law)

When plaintiff's merchandise was shipped, its value was declared to be 475 francs. It was lost. Plaintiff sued for 16685 francs which, they claimed, was 70% of its true value. The Court below awarded 475 francs.

Issue: whether the harm was foreseeable.
Rule: the previous article 1150 of the French Civil Code is here applied.
Argument: the Court argues that compensation must be in accord with the *real* value and not the **presumed value** of the merchandise.
Conclusion: as in the other previous French cases, it is all a matter of **risk assumption**. The plaintiff can't recover for such harms because he didn't pay the defendant so as to bear it.

Hadley v. Baxendale, 1854 (English law)

The plaintiff carries on a business as a miller, and his mill was stopped by a breakage of the crank shaft by which the mill was worked. It became necessary to send the shaft as a pattern for a new one to Greenwich, committing the defendant to do it, which was a well-known carrier. The defendant delayed in carrying it. The plaintiff didn't receive the new shaft for several days after they would otherwise done and the working of their mill was thereby delayed, and they thereby lost the profits. The court held the plaintiff could not recover lost profits.

Issue: whether the harm was foreseeable.
Rule: the rule used is taken from French law. The damages due to the creditor consist in general of the loss he had sustained and the profit which he has been prevented from acquiring. The debtor is only liable for the damages foreseen or which might have been foreseen, at the time of the execution of the contract, when it is not owing to his fraud that the agreement has been violated.
When two parties have made a contract which one of them has broken, the damages which the other party ought to receive should be such as may *fairly* and *reasonably* be considered either arising naturally, according to the **usual course of things**, from the breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties at the time of the contract conclusion.
Argument: one could argue that there was ample evidence of the defendant's knowledge of such a state of things as would necessarily result in the damages the plaintiffs suffered through the defendants default. The defendant was in breach of contract by his fault, he was negligent.
It could be argued that the plaintiff should have **communicated** to the defendant his special need. In fact, if the special circumstances under which the contract was made were communicated to the defendant, the damages resulting from the breach, which they would have reasonably contemplated, would be the amount of injury which would ordinarily follow from the breach itself, according to the usual course of things. But, in case of no communication, the defendant could only be supposed to have had in mind the amount of injury which would arise *generally*. In fact, had the special circumstances been communicated, the parties might have specially provided for the breach of contract **special terms** as to the damages in that case.
In the case at hand, the loss of profit was more than 10 times greater than the contract price. If the contract is so important to the plaintiff, the latter should have done more than just entrusting the

delivery of the shaft to the carrier, he should have taken more precautions. In this sense, the defendant can't be blamed for a risk he hasn't been paid to assume.

Koufos v. Czarnikow, 1967 (English law)

The respondents chartered the appellant's vessel to proceed to Constanza, there to load a cargo of 3000 tons of sugar, and to carry it to Basrah. The vessel left Constanza on Nov. 1 and arrived at the destination on Dec. 2, although a reasonable accurate prediction of the length of the voyage was 20 days. But the vessel had in breach of contract made deviations which caused a delay of 9 days. The sugar was nonetheless sold but at a lower price, because before the time of arrival fo the vessel the market price had fallen because of the increase of supply in the market. The charterers claim that they are entitled to recover the difference as damage for breach of contract. The shipowner admits that he is liable to pay interest for 9 days on the value of the sugar and expenses, but denies that fall in market value can be taken into account in assessing damages.

Issue: whether the harm was foreseeable.
Rule: it is not clear whether English law has the same provision on intention (*willful conduct*) as French law.
Argument: one could argue that damages are recoverable because the harm was foreseeable, since price fluctuations are omnipresent in market deals. It could be counter-argued that the defendant expected the price would fluctuate, but rather that they would have *raised*, rather than *dropped*. Moreover, the shipowner was given no information about the necessity for the plaintiff of selling sugar on a precise day: he just know that the destination hosted a market and that the sugar was meant to be sold there.
Conclusion: here the argument of 'risk allocation' and 'adequate compensation for risk assumption' doesn't stand up. The defendant *intentionally* took a detour despite knowing they would have been late. Even if it is not clear if English law allows recovery for unforeseeable damages in case of intentional breach of contract, here damages should be granted to the plaintiff.

American law

[*Restatement II of Contracts*] ***Unforeseeability and related limitations on damages.*** "Damages are not recoverable for loss that the party in breach did *not* have **reason to foresee** as a probable result of the breach when the contract was made.
Loss may be foreseeable as a probable result of a breach because it follows from the breach: (a) in the **ordinary course of events**; or (b) as a result of **special circumstances**, beyond the ordinary course of events, that the party in breach had **reason to know**.
A court may limit damages for **foreseeable loss** by excluding recovery for **loss of profits**, by allowing recovery only for loss incurred in **reliance**, or otherwise if it concludes that in the circumstances **justice so requires** in order to avoid **disproportionate compensation**".

German law

[*BGB Code*] ***Contributory fault***. "If the fault of the injured party contributed to causing the injury, the obligation to compensate the injured party and the extent of the obligation depend upon the **circumstances**, and especially on the **extent** to which the injury was caused by one party or the other. This provision also applies if the fault of the injured party consisted of an **omission to call the attention** of the party owing the performance to the **danger of an unusually serious injury** of which that party neither knew nor should have known, or of an **omission to avert or mitigate** the injury."

→ the **duty to warn** of the injured party presupposes that the injurer neither knew nor must have known about the danger. If the injurer and the injured had **equally good possibilities of knowing**, then a warning need *not* be given. If through **negligence** neither the injurer nor the injured party know of the danger, then the injurer bears the **risk**. The harm is not to be divided as in section 254.
The duty to warn is supposed to give the injured party the **opportunity to take counter measures**. If such measures are **no longer possible**, then the duty to warn *disappears*.

Oberlandesgeright, 1989 (German law)

The plaintiff entrusted the defendant with the task of translating a brochure into 5 different languages. Claiming that the printed brochures were unusable due to faulty translation, the plaintiff seeks damages in the amount of 21,398 DM.

Issue: whether the harm was foreseeable.
Rule: contributory fault.
Argument: one could argue that the plaintiff contributed to the harm with his fault because he failed in informing the defendant that the brochures were going to be printed without any other supervision and proofreading. However, it could be objected that the defendant was hired by the plaintiff so as to *translate* a brochure: how could the plaintiff make a linguistic check-up, or why should he have hired another translator for just a supervisory task? Even if the argument on the burden of communication doesn't stand up, damages are here not granted because the defendant was not paid enough so as to bear such risk.

Bundesgerichtshof, 1969 (German law)

The plaintiff was a jewelry salesman who stayed in the defendant's hotel. He gave his car to the night porter so that his car could be left in a garage, not owned by the hotel, but which the defendant used to provide parking for his guest. A valuable collection of jewelry contained in plaintiff's trunk was stolen in the night. Plaintiff sued for the value of jewelry. The Court remanded for a finding on contributory fault.

Issue: whether the harm was foreseeable.
Rule: contributory fault.
Argument: one could argue that the plaintiff contributed to the harm with his fault because, fir of all he was negligent in leaving his car, full of valuable goods, in a garage that was not completely secured, being not owned directly by hotel but just used as praxis. Moreover, he didn't inform the defendant of its value.
Conclusion: damages should not be granted because the plaintiff didn't pay the hotel enough so as to bear such a risk.

VI. TORT LAW

In contract law, the basis of liability is the existence of a contract between the parties, which creates rights and obligations upon them. In tort law, the aspects to consider all essentially four:

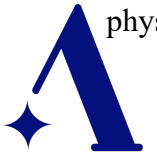
1. the **scope of rights** = we have rights, usually listed in the codes, that are protected. Yet, not every jurisdiction will protect all your single rights. For instance, tort law is not the right channel so as to claim the infringement of a constitutional right, because in this case the claimant would be making a course of action between *peers*, ie equal private citizens.
   Hence, not every right will be protected by tort law. Germany provides directly, through legislation, by a panoply of rights that the law will protect, thereby formalizing a definite lists of protected rights under tort law, that is consequently not expandable; France and Italy's list of protected rights is conversely broader and more indeterminate, giving the impression that one could get damages in any situation of harm;
2. **intention** and **negligence** = you are liable only if you acted intentionally or negligently, otherwise you are not liable, unless it is **strict liability**, meaning that it is the legal system which has decided like that, because you are involved in a by nature *risky activity*;
3. **causation** = to assess liability causation should be established. There are two kinds of causation:
   - factual causation. It is actual evidence, or facts of the case, that prove a party is at fault for causing the other person's harmBut for your *conduct*, there would have been no harm;
   - proximate causation (as opposed to *remote causation*). The link between what you did and the harm is not remote, and it is established with a *but-for test*.
4. **damages** = they are granted if the harm was *certain*.

Tort law is different between Common Law and Civil Law.

- in **civil law**, tort law is more structured. One must be **in fault** (ie he must act intentionally or negligently) for being liable, or in **quasi-tort** (that is strict liability).
- in **common law**, tort law is more complicated. Courts invented *special torts* that are **intentional**: battery (occurring solo as if one touches another in an offensive way); assault (occurring if one tries to touch another placing the latter under the fear that there would be assault); trespass to land (occurring solo as one stepped in another's land); false imprisonment (occurring when a person intentionally restricts another person's movement within any area without legal authority); emotional distress. Next to these intentional torts, there is **negligence**, that is established by assessing whether the injurer didn't act as a *reasonable person* would have done given such circumstances. In Germany, for instance, a legal and economical analysis is carried out so as to assess if one acted reasonably or not.
  Therefore, if one infringes *intentionally* another's legal rights, he committed an *intentional tort*; if one infringes *negligently* another's legal rights, he was in *negligence*.
  It is worth noting that in common law there is no general idea on intentional tort: what common jurists intend for *intention* is "did you intend to **do that fact** to the other party?", rather than "did you intend to **cause an harm** to the other party?" as civil jurists by contrary mean. Therefore, in common law intention attaches the *conduct*, whereas in civil law it attaches the *consequences*.

4. Purely Economic Harm

In France, so as to get damages a harm must be certain, whether economic or not. Therefore, a purely economic loss is recoverable, by arguing that the harm is not certain but rather hypothetical, or that the causation is not proximate. Indeed, French law does not care about the *nature* of the harm, differently from German law and the Anglo-American one.
In Germany, so as to get damages a harm must be *physical* as the ones listed under section 823 of the BGB code, inflicted either to a person or to a property; therefore contractual rights are not protected, in fact you can't normally recover for purely economic loss. Accordingly, *mental distress*, being a physical harm to a person, is recoverable under German and Anglo-American tort law; making, by



tort, a property *unusable* is a physical harm as well, because owners (and third parties) won't be able to access it nor to employ it for the prefixed purpose and function.
In the US, in parallel with Germany, it is not understood at all why a person should be relieved for having incurred in a purely economic loss. The latter must, in this sense, be also and primarily physical.
For all things considered, we can infer that the general rule is that one can't recover for purely economic harm, yet there is an exception: if you cause the tort **intentionally**, the nature of the loss doesn't count anymore, thus you can recover from the harm suffered, whether physical or not, though being just purely economic. And it is so even under German law, thanks to **section 826** of the BGB code, which recites:

[*BGB code*] ***Intentional damage contrary to public policy***. "A person who, in a manner contrary to **public policy**, **intentionally** inflicts damage on another person is **liable** to the other person to make **compensation** for the damage".

It is popularly believed that this limitation in recovery for purely economic loss is given to the fact that, if otherwise recovery was granted, then liability and litigation would have been too extensive, depriving them of efficiency.
So as to formalize a unifying principle on purely economic harm, let's start from hypothesizing that the defendant — a construction company — cuts some power cable of an electricity company and causes a blackout in a hospital, which thus suffered from canceled surgeries and many hospitalized people pass away. The hospital sues the defendant.
The German-, English- and American-oriented decision would be denying the recovery of damages because the one suffered by the hospital was a mere financial loss, a *purely economic harm*. In this sense, the Hospital can't be compensated by the construction company because the latter couldn't fairly contemplate the contingency that the blackout could provoke deaths and surgery cancellations. It is hence a matter of **disproportionality** and **risk compensation**: the plaintiff can't burden the tortfeasor of such a severe risk without adequately compensating him for such assumption. It would be straight-forwardly easier for the plaintiff as hospital to buy a back-up plan, thereby taking the proper precautions and preventing, or at least amortizing, such events.
The French-oriented decision would be, in principle, allowing the damages to be recovered, yet they could be likewise denied, with the justification that the Hospital should have prevented such an ordinary situation and take in time accurate precautions. After all is said and done, given such a scenario, it would be difficult also for French law to award damages to the plaintiff.
So as to conclude, we can state that recovery of sole financial loss can be denied in France by arguing that the harm was not certain or that the causation was too remote, whereas in England and USA simply by arguing that it was a purely economic harm. Even if arguments are different, the output can hence be the same.

Liability in principle for purely economic harm

French law

[*Code Civil*] Art. 1240-1. The defendant is liable for harm, whether it is economic or not, but the harm itself must be *certain*, and not *hypothetical* nor *indirect*. Solo as you can prove your harm, the latter is certain.

Cour de Cassation, 1970 (French law)

A gas pipe of the French Company of Methane which supplied the factory of the plaintiff was broken by the bulldozer of the defendant while he was working. The Court held the defendant liable because the harm suffered by the plaintiff appeared to be the direct consequence of the break in the pipe, since this damage had caused the interruption of the activity.

Issue: whether the defendant should compensate the plaintiff for its harm suffered, and which is the nature of the harm.

Argument: there was the interruption of plaintiff's business activity because of the breakage of a gas pipe. The problem here is that the defendant committed a tort towards the French Company of Methane, because he caused a physical harm to his property (the gas pipe), but the plaintiff, who by consequence had to interrupt his business activity, has sued the defendant. But it was not the plaintiff's property to be harmed: the plaintiff thus suffered no physical harm, just a purely economic loss, and therefore under German law he would have got no relief.
Moreover, power loss can happen anyway and suddenly, thus a company should be prepared for this. The plaintiff should have taken more precautions.
Conclusion: the plaintiff can get relieved, under French law.

Cour de Cassation, 1984 (French law)

Plaintiff company contributed capital to N. company after examining the financial statements prepared by defendants who were accountants. The financial statements were incorrect: company N. in fact had a deficit in assets of 480000 francs. Company N. became insolvent. The court held plaintiff could recover from defendant.

Issue: whether the defendant should compensate the plaintiff for its harm suffered, and which is the nature of the harm.
Argument: the plaintiff asked the defendant to prepare a financial statement on the company the former was going to make business with. The company relied on such documents, hired the company and then the latter became broken. Therefore, the defendant was **negligent** in preparing the documentation.

Cour d'Appel, 1955 (French law)

Kemp was under contract to play for the defendant's Football Club. When he was killed in a traffic accident by the defendant, the Club sued to recover the financial loss it had incurred: fall in the ranking, lost offers, etc. The Club could recover because the harm was certain.

Issue: whether the defendant should compensate the plaintiff for its harm suffered, and which is the nature of the harm.
Rule: the Court stated that every person, even an organization recognized by the law as a person, who is the victim of harm, whatever be its nature, has the right to obtain compensation from one who caused it by his fault or by the act of an object that he has in is custody.
Argument: the player was killed, but his body must not necessarily be considered as a financial asset of the football club: why should the latter recover from the tortfeasor? Arguably, owing to the offers the club could have got for the transfer of that player. Noting that the latter are **future contractual rights** that are not protected under German law. Under the French one, instead, they are recoverable, as the Court in fact held. Yet, the decision of the judges can be criticized.
First of all, the causation is missing: it is not proved that, whether the player's death would not have occurred, the club would *not* have fallen in the ranking anyway; there's no room for assessing the accident as a direct consequence of the club's retrocession. Secondly, the harm is not certain, but rather hypothetical: it is not sure that the player, whether not harmed, would have been sold to another club and thus accrue profit for the seller club. Thirdly, the club actually suffered no financial loss because, due to Kemp's missing, it has quit paying a wage that was due to him beforehand, and it will start paying it again when it will hire another player. His cash flow stays the same.
Conclusion: the plaintiff can get relieved, under French law.

Cour de Cassation, 1965 (French law)

Certain buses of the plaintiff were delayed because of a traffic accident the defendant was responsible of. The plaintiff sued to recover the fares it had lost because its potential costumers, tired of waiting, have gone away from bus stops. The court, recognizing the harm as certain, awarded damages in the amount of 37 francs.

Issue: whether the defendant should compensate the plaintiff for its harm suffered, and which is the nature of the harm.

Argument: it would be actually hard to object the certainty of the harm, that was evidently neither hypothetical nor indirect. However, the court awarded a really paltry amount of damages.
Conclusion: the plaintiff got compensation.

Cour de Cassation, 1987 (French law)

The plaintiff was a partnership whose director was injured in an accident for which the defendant was responsible. The plaintiff sued to recover for the financial harm that it had suffered, because the injured man was unable to consummate deals which were then under negotiation on behalf of the partnership. The court held for the defendant.

Issue: whether the defendant should compensate the plaintiff for its harm suffered, and which is the nature of the harm.
Argument: the plaintiff argues that he deserves is financial loss to be compensated because the partnership had a serious chance to conclude the aforementioned contracts.
Conclusion: the court was right in denying recovery because the harm was patently uncertain, being rather merely hypothetical. There is no certainty that the contract would have been put in place at the end, since negotiations still needed to be carried out. Therefore, the financial loss is not certain because perhaps the partnership would have failed in such deals.

Cour de Cassation, 1979 (French law)

The plaintiff had loaned money to a husband and wife who were both killed in an accident for which the defendant was responsible. Plaintiff could not recover the debt from their estate because it was insufficient, nor from the heirs of the couple, since they had renounce the inheritance. The plaintiff sued to recover from the defendant, but it was denied.

Issue: whether the defendant should compensate the plaintiff for its harm suffered, and which is the nature of the harm.
Argument: causation here is missing: the connection between the missing payment of the loan and the accident was too remote.
Conclusion: the court was right in denying recovery, stating that the causal relationship between the accident and the loss was insufficiently direct. The loss was in fact also due to the decision of the heirs to renounce the right to inheritance, as well as to the failure of the creditor to insist that the debtors buy a life insurance policy.

No liability in principle for purely economic harm

In the late 19th century, a rule emerged, first in Germany and then in England and in the US, that the defendant was not liable for *pure economic harm*, ie an harm unaccompanied by physical damage to the plaintiff's person or property, caused to the plaintiff. Most jurists concluded that the defendant should be liable only for harm to defendant's person and property. Others argued that liability would be too extensive unless limited in some way.
Nevertheless, by the end of the century, it seemed as though this approach would be abandoned for a broader one more like the French. Some jurists argued that the defendant should be liable for the violation of a panoply of rights that concerned plaintiff's freedom of action and personality. In 1888, the *Reichsgericht* (the highest German court for civil matters) allowed a plaintiff to recover whose person and property had *not* been injured. He had been temporarily unable to sell a product because the defendant had been *negligent* at least in raising a claim of patent infringement.
Indeed, in their first draft, the First Commission charged with drafting the German Civil Code proposed the following provision: "one who has caused another harm by *intention* or by *negligence* by an *unlawful act or omission* is obligated to make him compensation". The reason, according to the Commission, was that any act is not permitted in the sense of the civil law by which anyone impinges and violates the sphere of rights of another unlawfully in an unauthorized manner; therefore, the sphere of rights of each person must be respected and left untouched by all other persons; whoever acts contrary to this general command of the law without there being any special grounds for justification has by that alone committed a tortious act.

Nevertheless, then, the German Civil Code allowed the plaintiff to recover only for the types of harm enumerated in what is now **section 823** of the BGB code:

[*BGB Code*] ***Duty to compensate for harm***. "A person who intentionally or negligently unlawfully injures the life, body, health, freedom, property or *similar right* of another is bound to compensate him for any damages that thereby occurs".

At one of its early meetings, the First Commission discussed what is to be understood as the *violation of a right*:

a. only the violation of a right which receives an absolute protection, or
b. any violation of the legal order by an act prohibited by law as contrary to the legal order for the sake of himself.

The commission at the end opted for the **first alternative** (a). For the Commission, it seemed to follow that the violation of rights such as person and property is tortious because such rights are *absolute*, in the sense that they could be asserted against anyone. In contract, a right of obligation such as a contract right was a right only against the other party to the contract. The Commission noted that a tort was not committed by the violation of such a right because it cannot be violated by anyone except the debtor. Consequently, the Commission added a final sentence to clarify the type of right that must be violated, the paradigm case of a violation of a right was an **interference with property**, and section 823 finally came to light. The phrase '*or similar right*' was added because it had prove impossible to enumerate all of the ownership-like *absolute rights* that a defendant could violate.

The drafters had not been discussing *pure economic harm*. But if one could not recover against a third party for interference with relative rights, then it followed that one could not recover for what we now call pure economic harm. The German courts reached that conclusion soon after the Civil Code came into force. In 1901, it held that a defendant who interfered with the plaintiff's economic freedom of action had not violated his *freedom* within the meaning of section 823. In 1904, it held that economic harm was not in itself harm to a right protected by section 823.

In Germany, then, the rule against recovery for pure economic harm originally rested on what today would seem a conceptualistic argument: if A interferes with B's performance of a duty that B owes to C, then C cannot recover against A because C was owed the duty by B, not by A. The same argument surfaced in England in several legal treatises, and in some cases English courts had denied recovery for what we today would call *pure economic loss*. It was then generalized as a principle that "He who does a wrongful act is liable only to the person whose rights are violated".

Today, the argument that had influenced the German drafters, the English treaties writers, and the English and American courts seems conceptualistic. It draws a conclusion about who should be liable for what from abstract definitions of the persons to whom rights are owed. Judges and legal scholars today prefer to think functionally, about what the law should be trying to accomplish. Nevertheless, German, English, and American courts still say that in many situations, one cannot recover for pure economic harm.

So as to provide for some definition and to make clarifications, **purely economic loss** is a loss that is *unrelated* to the physical harm. **Loss of profit** is instead *related* to the physical harm.

Spartan Steel Ltd v. Martin & Co., 1973 (English law)

The plaintiff manufactured stainless steel alloys at a factory which was directly supplied with electricity by a cable from a power station. The factory worked 24 hours a day. Continuous power was required to maintain the temperature in a furnace in which metal was melted. The defendants' employees, who were working on a nearby road, damaged the cable whilst using an excavating shovel. The electricity board shut off the power supply to the factory for 15 hours. There was the danger that a melt in the furnace might solidify and damage the furnace's lining, so the plaintiffs poured oxygen on to the melt and removed it, thus reducing its value by £368. If the supply had not been cut off, they would have made a profit of £400 on the melt, and £1767 on another four melts, which would have been put into the furnace. They claimed damages from the defendants in respect of all 3 sums. The defendants admitted their employees had been negligent, but disputed the amount of their liability.

Issue: whether the defendant should compensate the plaintiff for its harm suffered, and which is the nature of the harm. In this case, the harm was purely economic, thus it should be established whether, as a matter of policy, it is recoverable or not.
Rule: in Anglo-American law, one is denied from recovering a purely economic loss because he didn't do enough so as to avoid it: it refers to *comparative* or *contributory* negligence. In the case at hand, it would be proper for supplied companies and consumers to precautionary get a back-plan supply, a stand-by system, or an insurance policy against the breakdown of the supply, even if the company has granted continuous power, since it is frequent that power suddenly goes and suddenly comes. Otherwise, in case of no precaution taken, consumers take the risk on themselves.
Argument: the court made some considerations:
(1) the position of the statutory undertakers. They are under a *statutory duty* to maintain supplies of electricity in their district. If the electricity board does not keep up the voltage or pressure of electricity, gas or water, and thereby cause an economic loss to their consumers, they are *not* liable in damages, not even if negligent.
(2) the nature of the hazard, ie the cutting of the supply of electricity. It may be due to a contingency or to the negligence of someone, and when it happens it affects a multitude of persons, not in *physical* but rather in a *purely economic* way. The supply is usually promptly restored, so the economic loss is not so large. Such a hazard is regarded by most people as a thing they must put up with, without seeking compensation from anyone. This is a healthy attitude that should be encouraged.
(3) if claims for economic loss were permitted for this particular hazard, there would be no end of claims. It is better to disallow economic loss when they stand alone, independent of any physical damage.
(4) the law provides for deserving cases. If the defendant is guilty of negligence which cuts off the electricity supply and causes *actual physical damage* to person or property, that physical damage can be recovered and also any consequential economic loss.
Conclusion: the plaintiff can recover for the physical damage to the one melt (£368) and the consequential loss of profit (£400), but not for the loss of profit on the 4 melts, because that economic loss was independent of the physical damage: in fact, the 4 melts still have to be put in the furnace, they suffered from no physical damage.
The plaintiff demanded compensation for the loss of profit deriving from the 4 melts, because in case of continuous supply he would have sold them and thus make profit. Yet, these are **future contractual rights** that grant no compensation.

Bundesgerichtshof, 1964 (German law)

Defendants were felling trees along a public street, one of them fell against a power line owned by a German company, cutting off the electricity to plaintiff's incubator for 6 hours. As a result, the 3600 eggs that plaintiff was incubating produced only a few unsalable chickens instead of the 3000 chickens which would otherwise have hatched. The court held that the plaintiff could recover for the loss of the chickens.

Issue: whether the defendant should compensate the plaintiff for its harm suffered, and which is the nature of the harm.
Argument: the Court makes here a difference between:

- the *destruction* of some property = it is a **tort**, as it caused a physical harm to property, and thus recover is granted, as it was in this case;
- the *interruption* of the *accomplishment* of certain results = there is the sole loss of profit, unrelated to any physical damage, it is a **purely economic loss**. Therefore, in this case, no recover should be granted.

False information

Hedley Byrne & Co. v. Hellers & Partners, 1964 (English law)

A bank inquired by telephone of the respondent merchant bankers concerning the financial position of a customer for whom the respondents were bankers. The bank said they wanted to know in confidence and without responsibility on the part of the respondents the respectability and standing of the defendants. and whether its financial situation would have stood an advertising contract for £9000.The respondent replied that the defendant was respectably constituted and considered good. Relying on these replied, the appellants started business with the defendant, which later however went into liquidation. The appellants sued the respondents for the amount of the loss of payments made in reliance of such information.

Issue: whether the defendant should compensate the plaintiff for its harm suffered, and which is the nature of the harm.
Argument: the plaintiff argued that the respondents' replies were given *negligently*, in the sense of *misjudgment*, by making a statement which gave a *false impression* as to the defendant's credit.
The plaintiff surely can't sue the defendant for *breach of contract* because no contract was in progress between them. That is why respondents could have defensed themself in an effective way just by stating that they were not sharing a contractual relation, thereby the plaintiff wasn't put in the position for reasonably relying on information given by the defendant; plus, the plaintiff has suffered just a *purely economic loss*, that is unrecoverable under English law.
Yet, such a simple and victorious argument was not the one used by the defendant. He rather opted for stressing the absence of responsibility upon them about the reliability of the given information, responsibility that was expressly excluded by parties from the outset.
The key fact here is that the defendant discharges an information to the plaintiff without being paid for doing it. The information was rather disclosed for free, that is why parties do not share any contractual relationship. Had the defendant been paid for communicating such information, the risk would have been shifted to him, thus creating upon him a *duty* to serve authentic and reliable information to the bank.
In absence of a contract, the plaintiff sued the defendant under tort law, but it is actually irksome to hold the defendant liable, considering that he was under no duty of supplying authentic information.
Conclusion: damages were not awarded.

Ultramares Corporation v. Touch, 1934 (US law)

Defendants were a firm of public accountants hired to prepare and certify the balance sheet of Fred Stern & Co. They knew the balance sheet would be shown to banks, creditors, stockholders, purchasers and sellers. They did not know it would be shown to the plaintiff in particular. At the end, the balance sheet showed Fred Stern & Co. to have net worth of 1 million, but in reality it was insolvent. The plaintiff sued for money it lost by dealing with Fred Stern & Co. in reliance on the balance sheet. The Court denied recovery.

Issue: whether the defendant should compensate the plaintiff for its harm suffered, and which is the nature of the harm.
Argument: the defendant was patently *negligent*, since he knew that the balance sheet would have been shown to third parties. Nevertheless, the defendant is assuming such a risk because he was paid by the hirer company, therefore he has a *contractual duty* to make their certificate without fraud, with the care and caution proper to their calling, only towards his hirer-payer. It is doubtless that he does not owes such a duty towards people — in the case at hand, the plaintiff — he didn't know to be part of the group of beneficiaries. Accordingly, if you are not a part of the benefitted group an information was prepared for, you can't go after the accountant, because this duty comes from a contract you are not a part of.

Glanzer v. Shepard, 1922 (US law)

Defendants, who were engaged in business as public weighers, were requested by sellers of beans to weigh them and certify the weight. The beans were accepted and paid for on the faith of the certificates. Plaintiffs then found that the actual weight was less than the weight certified in the return, and sued defendants for the amount they overpaid. The court held defendants liable.

Issue: whether the defendant should compensate the plaintiff for its harm suffered, and which is the nature of the harm.

Argument: the plaintiffs' use of certificates was not an indirect or collateral consequence of the action of the weighers. It was a consequence which, to the weighers' knowledge, was the end and aim of the transaction. The defendants held themselves out to the public as skilled and careful. They knew that the beans had been sold, and that on the faith of the certificate payment would be made.
The defendant had the duty to provide authentic information on the beans to the sellers, with whom they shared a contractual relationship, but the plaintiff sued the defendant. The latter could do it, and in fact recovered damages, because the *duty* to weigh carefully for the benefit of all whose conduct was to be governed does not arise from the contract, but rather it is **imposed by law** (being the defendants *public weighers*).

White v. Guarente, 1977 (US law)

Defendants did the accounting for a limited partnership. Defendants were alleged to have been negligent in failing to discover that the general partners had withdrawn their own funds from the partnership in violation of the partnership agreement. The court held that, if so, they were liable to the limited partners.

Issue: whether the defendant should compensate the plaintiff for its harm suffered, and which is the nature of the harm.
Argument: the accountant were hired by the *partnership*, yet, in order to meticulously understand how this contractual relationship worked, we should explain how a **limited partnership** is structured and functions. There are, on the side, **general partners**, ie the ones running the business and, therefore, the only ones to shoulder an *unlimited liability* for business loss. On the other side, there are **limited partners**, ie the ones not managing business but who have as well *business interests*, and are burdened with a *limited liability* for business loss, namely limited to the amount they have contributed with to the company.
Therefore, being the general partners in change with business issues, they were the ones to hire the accountants with the purpose of satisfying limited partners' business interests. As a consequence, even though the contract is in principle between the accountants and the partnership as such, limited partners are claiming not the violation of a *direct contractual duty* (since the defendants were, indeed, hired directly by general partners): in that case, it would have been undoubtedly a **breach of contract**. They are rather stressing the violation of an *indirect contractual duty*, since accountants were hired and *paid* by the general partners to assume a *risk* in limited partners' interests; in particular, the duty to audit and prepare carefully for the benefit of those fixed, definable and contemplated group whose conduct was to be governed. That is why defendants are liable.

Credit Alliance Corp. v. Andersen & Co. 1985 (US law)

The court decided two companion cases. In both, lenders sought to hold accountants liable for negligence in preparing financial statements on which they had relied. In the first case (*Credit Alliance*) the court dismissed the action, in the second one (*European American Bank*) the court permitted the action.

Issue: whether the defendant should compensate the plaintiff for its harm suffered, and which is the nature of the harm.
Rule: if someone pays you to make a good job in supplying information to someone else, you have contract with the former and not with the latter. You could be thus liable in tort, whether providing not authentic information.
Argument: the court argues that in the first case, although the lender had relied on the statement, the accountants had not been employed to prepare the reports with the loan in mind. However, why should we speculate on what the accountants had in mind? We shall rather look at whether they have assumed a risk or not.
In the second one, the court states that the accounting firm was instead well aware that a primary if not the exclusive, end and aim of auditing its client was to provide the lender with the financial information it required.

Oberlandesgericht, 1956 (German law)

An enterprise had the defendants, a credit report company, prepare the statement of its financial worth so that, as the defendant knew, it could obtain a loan from the plaintiff, a bank. The bank granted the loan and cannot now recover it from the borrower. The statement was false. The bank recovered from the defendant.

Issue: whether the defendant should compensate the plaintiff for its harm suffered, and which is the nature of the harm.
Argument: in giving the information, the defendant knew that, as a matter of **good faith**, he was assuming the liability for its correctness to the bank, which he shared a contractual relation with.

Bundesgerichtshof, 1979 (German law)

U., a third party, built a hotel, financed by a 2.5 millions DM loan from defendant bank. It decided to raise a further 3.5 millions DM from private investors. The defendants prepared a description of the deal that was to be proposed to these investors, listing the supposed qualities and facilities of the hotel. The court found that this statement gave a false impression, since it did not mention that the hotel and sanatoria had not been paid for, and that U. was no longer in a position to pay the bills. The court held the defendant liable.

Issue: whether the defendant should compensate the plaintiff for its harm suffered, and which is the nature of the harm.
Argument: all factual presuppositions are present for the defendant to be liable in damages for culpably preparing false information. The information the bank supplies is known to be important to the other party and to be the basis of substantial measures as regards to its assets. Here the bank addressed a quite clearly defined group of interested persons, namely, the private lenders who were interested in granting a loan for the project of the hotel. The information was directed at this group which defendant had an interest in attracting and which he knew would be making substantial financial decisions on the basis of this information.

2. Harm to dignity

The problem of Common Tort Law is that, in order to get remedies, the harm suffered by one person must pigeonhole into the list of special, intentional torts.
In principle, in civil law every insult is actionable, differently from what common law entails, and this is so also as regards to dignity: even when the most outrageous things have been said, unless such bad act fits into the aforementioned list of torts, it is extremely hard that remedies would be granted within Common law.

Before the enactment of the statute on **harassment** in England, and the recognition of a new tort of **intentional infliction of mental distress** in the US, plaintiff had to bring his case within one of the traditional torts.
Any contact with the body of the claimant (or his clothing) is sufficient to amount to a **battery**. However, law must place limits on the types of bodily conduct that are actionable. First of all, the conduct must be **offensive**, in the sense that it infringes the claimant's right to be physically inviolate, to be 'let alone'. But the presence of something **offensive to dignity** is not mandatory to have a conviction of battery.
Furthermore, we appoint that touching another in the course of a conversation to *gain his attention* is not, obviously, battery.

Leichtman v. WLW Jacor Communications, Inc., 1994 (US law)

Plaintiff (an anti-smoke advocate) was invited to appear on a radio talk show to discuss the evils of smoking. While he was in the studio, a talk show host with a different show, who was an employee of the defendant, lit a cigar and repeatedly blew smoke in his face "for the purpose of causing physical discomfort, humiliation and distress". The court held that defendant's act was battery.

Issue: whether the defendant should compensate the plaintiff for its harm suffered, and which is the tort supposedly suffered by the plaintiff.

Rule: the Court held for *battery*, but it is a bit difficult to agree with her: the defendant didn't act either offensively or intentionally, even more so considering that he didn't even touch the plaintiff.
In Anglo-American law, it is unclear whether the infliction of such things as heat, light or smoke on a person constitutes a battery, although they probably do not. Smoke is, from a scientific point of view, particulate matter but for the purpose of trespass to land it has been treated as intangible and therefore as falling into the realm of nuisance.
Argument: the court argued that *contact requirement* was met because tobacco smoke, as a particular matter, has the physical properties capable of making contact. However, it could be objected that such smoke is not an extension of defendant's body, and this makes it really difficult to define such event as *contact*. Herein, the capability of the act to offense is really doubtful.
Moreover, plaintiff accused the defendant of having acted with *intention*, for the specific purpose of harming him, yet there is no evidence that the defendant, being a host of another talk show, knew the idiosyncrasy that the lawyer had towards smoke and thus acted inconsistently so as to bother him.
Conclusion: smoking is undeniably negative for *physical integrity*, but it can't be defined as a way to commit battery. We infer that the court, being devoid of any suitable course of action for the case at hand, has resorted to battery.

Western Union Telegraph Co. v. Hill, 1933 (US law)

Sapp was in charge of a telegraph office. When the plaintiff's wife entered on business, he offered to "love and pet her" and reached for her with his hand. The court held that whether he committed an assault depended on the width of the counter, and left the question to the jury.

Issue: whether the defendant should compensate the plaintiff for its harm suffered, and which is the tort supposedly suffered by the plaintiff.
Rule: there is assault when one tries to touch another in such a way to put him under the fear of being harmed. Although traditionally in England, as in the US, a plaintiff could recover for *insult* if he could bring his case within one of the traditional torts, it is not clear that either of these cases would have come out in the same way in England or in other American states. In fact, the requirement that the victim of an assault must apprehend **imminent harm** has been interpreted differently, more or less strictly, in various cases.
Argument: the court, using a *factual argument*, explained that if, as some evidence indicated, the counter was so wide that he could not have touched her, there was no assault; if he could have reached from 6 to 18 inches beyond the counter to where she was standing, then there was assault.
Contrarily to what the court stated, the width of the counter actually proves nothing. Even though the furniture was kilometric, it is not an insurmountable barrier: the defendant could have overcome it and reached the plaintiff anyway. In this sense, the defendant's attempt to touch the plaintiff undoubtedly instilled in her some *fear* regardless of the width of the counter.
Conclusion: I hold there is assault, as the plaintiff was patently sexually aggressive.

English law

Wilkinson v. Downton, 1897 (English law)

The defendant, in the execution of a reportedly practical joke, represented to the plaintiff that he was charged by her husband with a message to her to the effect that her husband was smashed up in an accident. All this was false. The effect on the plaintiff was a violent shock to her nervous system, producing vomiting and other more serious and permanent physical consequences, entailing weeks of suffering and incapacity to her as well as expense to her husband for medical attendance. The court held for the plaintiff.

Issue: whether the defendant should compensate the plaintiff for its harm suffered, and which is the tort supposedly suffered by the plaintiff.
Rule: the harm suffered in the case at hand doesn't fit any traditional tort. The court simply recognized the defendant to be redhanded and qualified his act as generally *outrageous*.
So as to fill this gap, US law has subsequently created he tort of **intentional infliction of mental distress**, whereas English law has introduced the prohibition of **harassment**, though no mention to *dignity* has been made.

In this case, a deliberate lie destroyed the plaintiff's peace of mind and caused her *physical harm*. These facts did not, however, quite fit the form of any established tort. Although the appropriate interest (peace of mind) was affected, it was not quite *assault* (since the defendant did nothing but speak, and *trespass* requires an act. It was not quite *deceit*, since the plaintiff took no detrimental action. Nor was *negligence* appropriate, since shock damage resulting from unreasonable behavior was not compensable in 1897. However, the defendant's behavior was not just **unreasonable**, it was **willful**; the harm was not just **foreseeable**, it was the **calculated result**; and there was a **special relationship** between the parties, which were *face-to-face*. So it was completely right to held for liability.
Argument: the court argued that the defendant has *willfully* done an act calculated to cause physical harm to the plaintiff. This **willful injuria** is in law *malicious*, although no malicious purpose to cause the harm which was caused nor any motive of spite is imputed to the defendant. The court acknowledged that the defendant's act was *plainly calculated* to produce some effect of the kind which was produced that an **intention to produce it** ought to be imputed to him, regard being had to the fact that the effect was produced on a person who proved to be in an *ordinary state of health and mind*.
Conclusion: it is doubtful whether the case really imposes liability for intentionally caused harm given that it is most unlikely that the defendant in that case intended to produce the result which he did or even foresaw it.
Moreover, the phrase '*calculated to use harm*' is ambiguous. It could refer to harm that is actually contemplated or intended by the defendant or to harm which a reasonable person would foresee as a *probable result* and it is the latter which fits the facts. If '*calculated to cause harm*' merely refers to *negligence*, it is doubtful whether the action really establishes a separate tort.

[*Protection from Harassment Act*, 1997] Section 1. ***Prohibition of harassment***. "(1) A person must not pursue a course of conduct: (a) which amounts to harassment of another, and (b) which he **knows** or **ought to know** amounts to harassment of the other.
(2) For the purposes of this section, the person whose course of conduct is in question ought to know that it amounts to harassment of another if a **reasonable person in possession of the same information** would think the course of conduct amounted to harassment of the other.
Subsection (1) does not apply to a course of conduct if the person who pursued it shows: (a) that it was pursued for the purpose of **preventing or detecting a crime**; (b) that it was pursued **under any enactment or rule of law** or to comply with **any condition or requirement imposed** by any person under any enactment; (c) that in the particular circumstances the pursuit of **the course of conduct was reasonable**."

[*Protection from Harassment Act*, 1997] ***Offense of harassment***. "A person who pursues a course of conduct in breach of section 1 is **guilty of an offense**. A person guilty of an offense under this section is liable on summary conviction to imprisonment for a term not exceeding 6 months, or a fine not exceeding level 5 on the standard scale, or both."

[*Protection from Harassment Act*, 1997] ***Civil remedy***. "An actual or apprehended breach of section 1 may be the subject of a claim in civil proceedings by the person who is or may be the **victim** of the course of conduct in question. On such a claim, damages may be awarded for (among other things) any **anxiety** caused by the harassment and any **financial loss** resulting from the harassment".

[*Protection from Harassment Act*, 1997] ***Putting people in fear of violence***. "A person whose course of conduct causes another to fear, on **at least two occasions**, that **violence** will be used against him is guilty of an **offense** if he knows or ought to know that his course of conduct will cause the other **so to fear** on each of those occasions.
For the purpose of this section, the person whose course of conduct is in question ought to know that it will cause another to fear that violence will be used against him on any occasion if a **reasonable**

person in possession of the same information would think the course of conduct would cause the other so to fear on that occasion".

[*Protection from Harassment Act*, 1997] ***Interpretation of this group of sections***. "This section applies for the interpretation of sections 1 to 5. References to harassing a person include **alarming the person** or causing the person **distress**. A '*course of conduct*' must involve conduct on **at least two occasions**. '*Conduct*' includes **speech**".

The **Equality Act 2010** provides for further statutory cause of action for harassment, altogether with a detailed definition of the latter tort, analyzable in two parts:

- the first part requires that there must be an **unwanted conduct related to a protected characteristic**. These characteristics are age, disability, gender reassignment, race, religion or belief, sex and sexual orientation;
- the second part requires that the conduct has the **purpose or effect of violating the victim's dignity** or **creating an intimidating**, **hostile**, **degrading**, **humiliating or offensive environment for the victim**.

A major point of distinction between the action provided by the Equality Act and the Protection from Harassment Act is that whereas the latter is available against **all persons**, the former lies against only **certain persons**, including employers, providers of public services, those who perform public functions, people who dispose of or manage premises, and providers of education.
Another difference is that behavior can constitute harassment under the Equality Act even though it does not constitute a *course of conduct*, therefore even a **one-off act** is capable of triggering liability under that act.

American law

[*Restatement II of Torts*] ***Outrageous conduct causing severe emotional distress***. "(1) One who by **extreme and outrageous** conduct **intentionally or recklessly** causes **severe emotional distress** to another is subject to liability for such emotional distress, and if **bodily harm** to the other results from it, for such bodily harm.
(2) Where such conduct is directed at a **third person**, the actor is subject to liability if he intentionally or recklessly causes severe emotional distress: (a) to a **member** of such person's **immediate family** who is **present** at the time, **whether or not** such distress results from *bodily harm*; (b) to **any other person** who is **present** at the time, if such distress results in bodily harm.

<u>*Halio v. Lurie,* 1961 (US law)</u>

Plaintiff, a native of Turkey and a citizen of his country, is an unmarried young woman, who had been keeping company with defendant for about two years with a view to their ultimate marriage. While they were still doing so, defendant married another woman without plaintiff's knowledge, and concealed the marriage from the plaintiff, who discovered it only by accident. The relations between the parties then ceased, but thereafter the defendant mailed to plaintiff a communication in which he referred to her as 'the Tortured Turk', tasted her with her unsuccessful efforts to marry him, intimated that she had made a false claim that he was under an obligation to marry her, declared that he had avoided marriage to her because he was 'wise to her game', and expressed the view that through the coming years she would be the object of derision and the subject of amusement, on the part of his wife and himself, by reason of her 'phone calls galore'. The plaintiff recovered for emotional distress.

Issue: whether the defendant should compensate the plaintiff for its harm suffered, and which is the tort supposedly suffered by the plaintiff.
Rule: the plaintiff got remedies because the harm at hand pigeonholed within the tort of **intentional infliction of mental distress**.

<u>*Flamm v. Van Nierop,* 1968 (US law)</u>

Defendant has maliciously caused him and is now causing him and will continue to cause him mental and emotional distress by the following course of conduct: dashing at plaintiff with threatening gestures and malign looks accompanied by derisive laughter, walking closely behind or beside or in front of plaintiff on the public streets, telephoning plaintiff at his home and place of business and then either hanging up or remaining on the line

in silence, and driving his automobile behind that of plaintiff at a dangerously close distance. The court held it to be a cause of action for damages for the intentional infliction of emotional and physical harm, and for an injunction.

Issue: whether the defendant should compensate the plaintiff for its harm suffered, and which is the tort supposedly suffered by the plaintiff.
Rule: the plaintiff got remedies because the harm at hand pigeonholed within the tort of **intentional infliction of mental distress**.
Argument: if a man finds himself perpetually haunted by an enemy, he is being subjected to the extreme and outrageous conduct which gives rise to a cause of action in tort.
Conclusion: the Court held, also, that no special damages must be awarded, and this can be also a cause of action for *assault*.

[*Restatement II of Torts*] ***Special liability of public utility for insults by servants***. "A common carrier or public utility is subject to liability to patrons utilizing its facilities for **gross insults** which **reasonably offend** them, inflicted by the utility's servants while otherwise acting in the scope of their employment."

French law

Cour de Cassation, 1970 (French law)

Defendant was convicted of insult and ordered to pay damages to Zylberberg who was a civil party to the criminal action. His magazine had printed an article condemning what it called a *decline in morals*, entitled 'why are our children no longer safe? Too many fools at liberty". It was illustrated by a photograph of the complainant in the company of a third party with the caption: "Snobism and hysteria. Zylberberg receives Sammy Davis, the talented American showman deserves better". The court held for plaintiff.

Issue: whether the defendant should compensate the plaintiff for its harm suffered, and which is the tort supposedly suffered by the plaintiff.
Rule: the term '*hysteria*' is an **outrageous expression**, therefore it is actionable under French law (and under German law as well).
Argument: the defendant argued that the term *hysteria* did not constitute a **term of disdain or invective**, but rather indicated a sickness or, at the most, a disorder of the nervous system. Contrarily, the court of cassation stated that the word *hysteria* is used to connote the plaintiff as part of a corrupt circle of snobs and hysterics whose activities are condemned in the article, therefore in this association of ideas **no medical significance** should be given to this word which can only be understood in its common meaning as indicating a penchant to debauch.

German law

The German Criminal Code also contains provisions on **interference with reputation and dignity**, distinguishing in particular:

a) insult = a statement is an insult if it affects a person's **good reputation**. An insult need *not* be a statement of fact;
b) wrongful dissemination = it is committed by making a **statement of fact** which brings another into *contempt* or *lowers* him in *public opinion*. To constitute wrongful dissemination, the statement must be one which is **not demonstrably true**;
c) defamation = it is committed by making a **statement of fact** which brings another into *contempt* or *lowers* him in *public opinion*. To constitute defamation, the statement must be one which is **demonstrably untrue** and made **against one's better knowledge**.

The drafters of the German Civil Code did not want people to be liable for the types of harm covered by the auction for *iniuria*. Section 823(1) says that the plaintiff can only recover for injury to the 'life, body, health, freedom ownership or similar right of another'. Originally, *similar right* was not supposed to include **personal dignity**. Section 823(2) said that the obligation to make *compensation* also rests 'on a person who infringes a statute intended for the protection of others'. As we have just seen, people are protected against defamation and insult by the German Criminal Code. But to prevent them from recovering damages in tort, the drafters added the following provisions:

[*BGB code*] Article 253(1) ***Non-physical harm***. "In the case of **harm that is not economic**, compensation in money can be demanded only in the **cases specified by the statute**".

[*BGB code*] Art. 847 no longer in force. "In the case of **injury to body or health** or **deprivation of liberty**, the injured party may also demand **fair compensation** in money for **non-economic harm**." Substituted in 2002 by the following article 253(2): "In the case of injury to body, health, liberty or **sexual self-determination**, fair compensation in money **can be required** for non-economic harm".

Those provisions made it as clear as possible that, at the time the Code was enacted, the plaintiff was *not* supposed to recover for injuries to his *dignity* or *privacy*. But today the German courts allow him to recover anyway. In 1954, the *Bundesgerichtshof* declared that **personality** was a 'similar right' within the meaning of section 823(1), in light of the fact that Articles 1 and 2 of the German Constitution (*Grundgesetz*) protect **human dignity** and **personal freedom**, and without a civil action, this protection would be *incomplete*.

[*German Constitution*] Article 1. ***The worth of a human being***. "The worth of a human being is **unassailable**. It is the **duty of all state power** to attend to it and protect it.
The German people accordingly acknowledges that **inviolable and inalienable human rights** are the basis of every human community, of *peace*, and of *justice* in the world.
The following basic rights are **binding** upon legislation, executive power, and judicial decisions as the law in force."

[*German Constitution*] Article 2. ***Freedom of the person, right to life and physical integrity***. "Each person has the right to the **free development of his personality** insofar as he does not **injure the rights of others** and does not **violate the constitutional order** or **moral law**.
Each person has the right to **life** and **physical integrity**. The freedom of a person is inviolable. **Incursion** on these rights can *only* occur on the **basis of a statute**."

[*German Constitution*] Article 3. ***The right to free expression of opinion***. "Each person has the right freely to **express and disseminate his opinion** through **word**, **writing**, or **image** and to disseminate and **inform himself** without hindrance through generally accessible sources.
These rights are *limited* by the provisions of general statutes, statutory provisions in the protection of the young, and in the right to **personal honor**.
Art and science, research and teaching are free. The **freedom of teaching** does not release one from loyalty to the constitution."

Bundesgerichtshof, 1951 (German law)

Defendant put his hand under the skirt of Frau C. who was a stranger, and she brought charges of rape and lewd behavior against him. The court dismissed these charges but held that the defendant was guilty of insult.

Issue: whether the defendant should compensate the plaintiff for its harm suffered, and which is the tort supposedly suffered by the plaintiff.
Rule: an **insult** is the manifestation of disrespect for the injured party. The manifestation of disrespect must be **unlawful** to legally justify condemnation for insult. The insult is not unlawful if and so long as an adult woman **consented** to the lewd contact with her body.
Argument: it could be argued that the defendant didn't intend his behavior to be insulting because he expected consent on the part of the plaintiff. However, it is undeniable that his conduct toward the woman, in the circumstances of the case in general, is to be understood as a *manifestation of disrespect*.

Oberlandesgericht, 1989 (German law)

Defendant used the German word '*du*' instead of '*sie*' to refer to the plaintiff: both of them mean '*you*', but the former is used with friends, whereas the latter in more formal relationships. The plaintiff sued for insult, since he was in tense, and not friendly, relation with the defendant.

Issue: whether the defendant should compensate the plaintiff for its harm suffered, and which is the tort supposedly suffered by the plaintiff.
Rule: for the question of whether there has been an **injury to honor**, one must take into account not only the **surrounding circumstances** but also the **views**, the **customs of life** and the **social circumstances** of the parties, as well as the **linguistic and social place** where the expression occurred.
Argument: given the *tense relationship* now tying the parties, it could be argued that the use of *du* could only have meant **disrespect**. After all, *du* is an extremely informal word, if not outright **offensive** if referred to the 'wrong' person that is different from a friend.
Yet, evidence showed that there was a *close relationship* between the parties before their quarrel, when they lived in the same house and **usually called themselves *du***. Therefore, just because the plaintiff has forbidden the defendant to call her *du*, it doesn't mean that the defendant's act was a manifestation of disrespect.
Conclusion: the defendant was held *not liable*. The case at hand is an **exception to insult** because the parties shared a preexistent relationship that justifies, to some extent, the use of the informal word *du*, since it can also be used *unintentionally*, *spontaneously*, given the previous habit to do it mutually.

Oberlandesgericht, 1989 (German law)

When an acquaintance of the defendant, E.M., was on trial for fraud, the defendant sent a letter to the presiding judge under the heading of 'circle of friends' of E.M., saying that, in the case regarding his friend, law has been massively bent and the health of a man has been trampled under foot by the legal authorities in a manner once known only in totalitarian states"; he was protesting the removal of E.M. from a clinic to stand trial. Feeling offended, the judge convicted the defendant of insult. The court overturned the conviction.

Issue: whether the defendant should compensate the plaintiff for its harm suffered, and which is the tort supposedly suffered by the plaintiff.
Argument: the defendant claimed that he merely wanted to call attention to the inappropriate treatment of E.M., and that he had not known the judge would be so **sensitive**.
Yet the court, when overturning this conviction, said that the relevant question is not how the sender understood the letter, rather in evaluating a possibly injurious statement attention must rather be paid to how the statement in its context would be read by a naive and unsophisticated reader, a **reasonable third party**. We should not look exclusively at its **literal sense**. Therefore, for the court the statement considered in itself is **insufficient to deprecate the honor of the judge**.
Conclusion: I think that the fact here relevant is that the defendant didn't refer specifically to the judge at hand, but rather expressed its opinion about the justice *in general*.

Oberlandesgericht, 1990 (German law)

The defendant told two state criminal system employees who were trying to escort her from her cell that they were '*shit bulls*'. When they asked her what she had against them, she said that she would kick them in a vulnerable part of their anatomy to which she indelicately referred, and that then they would see what she hd against "bulls, star attorneys, and judges". She was convicted of insult along with other charges and sentenced to 2 years and 3 months in prison, then the appeal overturned the decision, and finally the cassation reinstated it.

Issue: whether the defendant should compensate the plaintiff for its harm suffered, and which is the tort supposedly suffered by the plaintiff.
Argument: the appeal reversed the conviction of insult, basing on the conception that there are no expressions which are **simply insulting** and that the judge have to examine the **meaning of the specific expression** under all the **specific circumstances** to see if the expression in question constituted **abuse** of another. This conception is correct in principle even though with kinds of expressions, their character as **intentionally abusive** can be seen more easily than with others.

What appears to me as an *unsound* argument is the one made by the court of appeal, when stating that a general decline in the linguistic culture of people from the social group to which she belonged may have taken away the **pejorative significance** of the expression *bull*, even when used in conjunction with the word *shit*.
The appeal also argued that an expression which comes *very close* to carrying on insulting meaning is to be seen in a particular case as a simple **expression of displeasure** over an *unlovable place* and a *protest* against the treatment directed against the speaker, and *not* an **abuse of an individual** standing near her. But these consideration cannot apply here: the employees had gone to the cell of the defendant and **explained the purpose** for which they came; in such a situation, the **use of abusive words** directed at the *class of persons* to whom the listeners belong cannot be seen simply as an **expression of dissatisfaction**.
Moreover, it must be taken into account that, in answering the question of what she had against them, she **threatened a physical mistreatment** of both employees which, aside from the **feeling of pain** attached to it, must normally be regarded as in a certain measure *insulting*. As to this point, it doesn't matter whether the defendant began to perform such an act or merely intended to.
Conclusion: I think it was correct to convict the defendant of *insult* because the expression he used was **patently outrageous**.
This case has similarities with the previous one: both of them regard the use of expressions coming from an **offensive language**. By penalizing such expressions, on the one hand individual dignity is preserved, but on the other one the freedom of speech is limited: just to think that in the previous case, the defendant was convicted by the judge just for having expressed his general expression on American justice.
In the US law, freedom of speech is highly protected, as constitutionalized in the First Amendment, yet simultaneously the American legal system strictly punishes whoever causes, with his words, physical harms to some others.

3. Invasion of privacy

Privacy can be invaded in many different ways. We will only consider the dissemination of pictures and of true information about the plaintiff.
There is a dividing line, regarding privacy law, between Continental Europe and the Anglo-American world.

- in France and Germany, there is a **right to privacy** and it is actively protected, mostly because people are used not to craving for privacy, they are not cold with each other, therefore it is the law to feel the need of protecting them.
- in the US and England, you can't really expect your right to privacy to be protected. In England, there was no cause of action for breach of privacy until 1998, when ECHR was enforced and made pressure over European Member States. Instead, in the US there is actually a **general right to privacy** but it is *rarely* protected because it conflicts with the prioritized **freedom of expression** protected under the First Amendment. Moreover, contrarily to European population, the American one tends naturally to keep distance from each other, upholding autonomously a layer of individual privacy.

Dissemination of pictures

English Law

Kaye v. Robertson, 1991 (English law)

Plaintiff is a well-known actor who was hospitalized after a bad accident. Defendants (an editor and a publisher) entered the hospital and, disregarding any prohibition of entering Plaintiff's room unless you were listed, they met the Plaintiff and took photos of him. Plaintiff recovered.

Issue: whether the plaintiff should recover for violation of privacy.

Rule: in English law there is no right to privacy, and accordingly there is no right of action for breach of a person's privacy. However, many cases have shown the desirability of the Parliament to consider whether and in what circumstances statutory provision can be made to protect the rights of individuals. In the absence of such a right, many have sought to base their claims upon other well-established rights of action. In the case at hand, the plaintiff sued for libel and malicious falsehood, where we can distinguish between *libel* (ie untrue defamatory statement made in writing) and *slander* (ie untrue defamatory statement that is spoken orally).
Argument: the question now arising is why is there here a litigation if no right to privacy exists in English law. Actually, the plaintiff sued for **libel and malicious falsehood**: it is a tort committed by one saying something untrue about another thereby putting him in a bad light.
The plaintiff argued that he gave no informed consent to be interviewed nor photographed. However, it could be objected that he was a public figure, so his consent wasn't needed.
Conclusion: the Court granted for an injunction.

American Law

[*Restatement II of Torts*] ***Publicity given to private life***. "One who gives publicity to a matter concerning the private life of another is subject to liability to the other for **invasion of his privacy** if the matter published is of a kind that:
(a) would be **highly offensive** to a **reasonable person** (*offensiveness*), and
(b) is not of a **legitimate concern to the public** (*newsworthiness*)."

→ this article of the Restatement states the **general right to privacy**, even if privacy is *de facto* not granted because of the impact of sentence (b), thanks to which every information that is deemed to be *newsworthy* can be published so as to nourish public interest, and no cause of action is granted.

Cape Publications, Inc. v. Bridges, 1983 (US law)

The appellee Bridges claimed for invasion of privacy, intentional infliction of emotional distress and trespass, alleging that appellant's conduct in publishing a photograph of the appellee was actionable. The news published by the appellants regarded the injury suffered by the plaintiff by her estranged husband, which kidnapped her and forced her to disrobe. When she was rescued by the police, she came out of the apartment wearing only a towel around her, given the patent situation of danger. The defendant took photo of the event and published them, but they revealed nothing more than what appellee's photo in bikini could have done. The Court denied damages.

Issue: whether the plaintiff should recover for violation of privacy.
Rule: in Continental Europe, the consent of the portrayed person is needed, unless he is a public figure exercising his functions. Therefore, were it a French case, it would have come out differently, with damages granted to the plaintiff. But in US law, not only vips are exempted from being asked to consent before taking photos of them. The Restatement II of Torts is herein applied.
Argument: the defendant argued that his was more a depiction of grief, fright, emotional tension and flight than it is an appeal to other sensual appetites.
Nevertheless, although the violation of privacy is patent, the photos could actually be published because they were not offensive and, most of all, they were *newsworthy*: pictures were able to improve the article, to imbue it with more information than the text and language sole could give.

Howell v. New York Post, Inc., 1993 (US law)

Plaintiff Pamela Howell was a patient in a private psychiatric facility, and in her affidavit she declared that her hospitalization must have to remain a secret from all but to her family. She was hospitalized with Hedda Nussbaum, which was suffering for having lost her child, who was killed by her husband. The defendant, as publisher, trespassed the hospital property and took photos of Hedda, so as to show the comparison between her past and present psycho-physical situation, that had extremely and luckily improved. So as to show her improvements, he published a photo where Hedda was next to Pamela and they were happy, without making any mention of Pamela's name. Plaintiff couldn't recover.

Issue: whether the plaintiff should recover for violation of privacy.

Argument: the plaintiff argued her privacy was violated because she was photographed next to the *protagonist* of the article, whose story attracted the audience. But the decision of the Court in this case has the same rationale as the one in Cape case: the photo improves the article, therefore no right to privacy will be protected even though such general right is formalized. In fact, the Court stated that the **visual impact** would have not been the same had the publisher cropped plaintiff out of the photograph; the photo of a visibly healed Nussbaum, interacting with her smiling companion offers a stark contrast to the adjacent photo of Hedda's disfigured face. So the article and the photo had actually a relation, a connection.

French Law

[*Code Civil*] Article 9. "Each person has the **right to respect for his private life**. Judges may, without prejudice to compensation for the damage suffered, prescribe all measures, such as *sequester*, *seizure*, and others, appropriate to prevent or terminate an **incursion on the intimacy of private life**."

→ in French law, attention is paid to the usefulness and necessity of a photo accompanying an article, as well as to the place (private or public) where a person was photographed.

Cour de Cassation, 1987 (French law)

Plaintiff was a well-known actress, which was photographed by the defendant, as publisher, with her glasses on but with a face showing signs of suffering, as well as the effects of her illness. The plaintiff prevailed.

Issue: whether the plaintiff should recover for violation of privacy.
Rule: in French law, it is allowed to take photos of public figures without asking for their consent, but only if the photo concerns their office. Outside their function, also public figures have expectations of privacy that must be protected, and it is so under both French and German laws. In French law, so as to derogate from the right to privacy, the photo must be *necessary* and taken under *consent* of the portrayed person.
Argument: the defendant argued that the story showed good will toward the actress, he said that he used the photo to establish the reality or an actual moment or to illustrate. However, the court stated that the photo was *unnecessary* and it was taken without the other party's consent.

Cour de Cassation, 1981 (French law)

The defendant (newspaper) published a picture of a famous singer being in a public place with a young woman on his arm, but without suggesting anything about their relationship. The court held for plaintiff.

Issue: whether the plaintiff should recover for violation of privacy.
Rule: in French law, the photo of a public figure can't be published simply because he gives no *consent* on it. If the publication of the photos of a *public figure* even without his express authorization does not constitute, in principle, an injury to his right to his image, that is only upon condition that the photos in question concern exclusively his profession and not his private life. Moreover, if the reproduction of the image of a public figure in the conduct of his professional life is not, in principle, subject to obtaining his express permission, nevertheless it is necessary that the interested party be considered as having **tacitly authorized** the reproduction of his image.
Argument: the court noted that some of the photos were taken in *private places*, and that the plaintiff manifested an evident desire to be extremely discreet.

German Law

[*Law concerning the Rights of Authors to Works of Pictorial Art and Photography*] Section 22. ***Right to one's own image***. "Images shall be disseminated or publicly displayed *only* with the **consent** of the person portrayed. In cases of *doubt*, consent is deemed to have been given when the person portrayed accepts **payment** to allow himself to be portrayed. For **ten years** after the death of the person portrayed, the **consent of his relatives** is necessary. Relatives in this sense include the surviving wife and children of the person portrayed, and, if neither the wife nor children are available, the parents of the person portrayed."

[*Law concerning the Rights of Authors to Works of Pictorial Art and Photography*] ***Exceptions to Section 22***. "(1) It is permitted to disseminate of publicly display **without the consent** required by section 22:

1. images in the area of **contemporary history**;
2. images in which the people appear only as an **incident** in a landscape or similar locale;
3. images of **gatherings**, processions and similar events, in which the person in question was a **participant**;
4. images that are not made upon order insofar as their dissemination or displays serves an **important artistic interest**.

(2) Nevertheless, this authority does *not* extend to a dissemination and display by which a **legitimate interest** of the person portrayed is *violated* or, in the event of his death, the interest of his relatives."

→ criterion of seclusion

→ debate of general interest

[*Law concerning the Rights of Authors to Works of Pictorial Art and Photography*] ***Exceptions in the public interest***. "Public officials may duplicate, disseminate or publicly display images for purposes of the **administration of justice** and **public security without the consent** of the person entitled, that is, the person portrayed or his relatives."

Bundesgerichtshof, 1965 (German law)

The defendant published a photo of the plaintiff, with its caption and accompanying text, next the picture of SS General Wolff the plaintiff resembled to. The plaintiff sued for violation of the general right of personality and of his right to his own image. The Court held for the plaintiff.

Issue: whether the plaintiff should recover for violation of privacy.
Rule: in German law, the right to privacy involves also exceptions: for instance, if you are a prominent political public figure, photos of you can be taken without your consent if they portray you while carrying on your functions. Otherwise, in case that the photos concern scenarios that are external to the public figure's office, consent is at any rate needed.
The freedom to publish a picture without the consent of the person pictured does *not* extend to the publication of pictures that violate a **legitimate interest** of the person pictured.
Argument: the court found that the use of the picture along with the text was sufficient to **lower the human dignity** of the plaintiff in two ways: (a) he was pointed out as an example and prototype of the 'satisfied Germany'; (b) the hasty reader would have been likely to transfer to the plaintiff the enumeration of the outer characteristics of the former SS General Wolff.
Moreover, the plaintiff did give consent, but that consent was not to the manner and kind of the publication of the picture together with its demeaning caption and in proximity to an article about the former SS General Wolff. Here, the publication of the picture in its totality is to be evaluated, and not in isolation from its accompanying text.
The question of what kind of publication of an image is covered by the authorization of the person pictured that is not expressly limited is to be answered by interpreting what he said in giving permission, taking into consideration the **circumstances** of the particular case. Since here **no payment** was made for the picture, the **burden of proving the consent** and its *scope* falls on the person who is claimed to have violated the right to one's own image.

Bundesgerichtshof, 1995 (German law)

Princess Caroline of Monaco claimed that her right to privacy had been violated by the publication of three types of photographs by various German publishers: (1) photos showing her with the actor Victor Lindon in a restaurant; (2) photos showing her in public with her children; (3) photos showing her in public on horseback, going shopping, eating at restaurants, riding and skiing.

Issue: whether the plaintiff should recover for violation of privacy.

Rule: pictures that fall within the *history of the times* can be circulated and displayed without consent of the person affected unless the **legitimate interest** of the person depicted is thereby injured. To 'history of the times' belong all persons who are to be regarded as a part of history, and the plaintiff belongs to such class of persons. Therefore, in such situation the criterion is that the picture made public is *significant* and the *attention* paid to the person in question has *value* so that the public has a *legitimate interest* in **clear information** and the pictorial representation of it is to be approved.
Nevertheless, the use of pictures of persons belonging to the history of the times **without their consent** is not without limits. It must be determined, by a weighing of values and interests in the individual case, whether the **interest of the public in information**, protected by the *freedom of the press* (art. 5 of the Constitution), should be placed above the **interest in the right to personality** (art. 2 of the Constitution).
The plaintiff would like these photos to be eliminated both in France and Germany: yet, while in France this injunction would be possible as the publication of such pictures is permissible **only with the permission** of the person portrayed (unless he is involved in exercising his official function), in Germany the law is not applied that way.
Argument: the appellate court argued that *legitimate public interest* **ends with the house door** of the person affected. A person belonging to the history of our times can, as anyone else, reserve a place outside how own home for himself or at least from which the larger public is excluded. Photographs can be taken in places which are accessible to anyone.
On the other hand, the plaintiff, as a person who belongs to the history of the time, must *accept* that the public has a legitimate interest in knowing how she behaves and what she does in public place.
It is common to all these pictures that they do not portray the plaintiff taking part in an **official function**, but concern the private life in a *larger sense*.

Bundesverfassungsgericht, 1999 (German law)

It is the continuation of Princess Caroline of Monaco case.

Rule: general personality rights do not require publications that are not subject to prior consent to be limited to pictures of figures of contemporary society in the exercise of their function in society **(in other words, rights to personality do not exempt from asking the consent to take photos to the person portrayed only when they are vips)**. Very often the public interest aroused by such figures does not relate exclusively to the **exercise of their function** in the strict sense. The public has a *legitimate interest* in being allowed to judge whether the personal behavior of the individuals in question, who are often regarded as *idols*, convincingly tallies with their behavior on their official engagements.
If the right to publish pictures of people considered to be figures of contemporary society were to be *limited* to their official functions, **insufficient account** would be taken, favoring a *selective presentation* that would deprive the public of certain necessary judgmental possibilities in respect of figures of *socio-political life*.
The privacy meriting protection that must also be afforded to figures of history of the times presupposed that they have retired to a *secluded place* with the *objectively perceptible aim of being alone* and in which, confident of being alone, they behave *differently* from how they would do in public. The **criterion of a secluded place** takes account of the aim, pursued by the general right to protection of personality rights, of allowing the individual a sphere, including *outside* the home, in which he does not feel himself to be the subject of permanent public attention. This criterion does not excessively *restrict* **press freedom** because it does not impose a blanket ban on pictures of the daily or private life of vips, but allows them to be shown where they have appeared in public.
Argument: there is nothing unconstitutional, when balancing the *public interest in being informed* against the *protection of private life*, in attaching importance to the **method** used to obtain the information in question. It is doubtful, however, that the mere fact of photographing the person *secretly* or catching them unawares can be deemed to *infringe* their privacy outside the home. Even more so considering that, in the case at hand, the plaintiff was not in a secluded place.
However, the constitutional requirements have not been satisfied insofar as the decisions of which the appellant complains did not take account of the fact that the right to protection of personality

rights is herein strengthen by **section 6 of the Constitution** regarding the person's intimate relations with their **children**.
Conclusion: the court banned photos showing the applicant in a restaurant garden, because it was a secluded place. The fact that the photos in questions were evidently taken from a distance shows that the applicant could legitimately have assumed that she was not exposed to public view.
The court didn't ban the photos of the third categories, because the mere fact that the plaintiff 'manifest her *desire* of being alone' is not relevant anyway.

Dissemination of true information

English Law

Stephens v. Avery, 1988 (English law)

Mrs Stephens sued Mrs Avery for having communicated certain information in confidence to the other two defendants, an editor and a publisher, who posted such delicate information regarding the relationship between the plaintiff and Mrs Telling, who was just killed by her husband.

Issue: whether the plaintiff could recover for **breach of duty of confidence**.
Rule: in England there is no right to privacy; were it present, the defendant couldn't disclose such information because he would have violated it. But since in English law it is absent, in this case plaintiff sued for **breach of duty of confidence**.
The court deciding the case was a **Chancery Court**, which stated that three requirements have to be satisfied before a court will protect information as being *legally confidential*:

1. the information itself must have the **necessary quality of confidence**;
2. the information must have been imparted in **circumstances** importing an **obligation of confidence**;
3. there must be an **unauthorized use** of that information to the detriment of the party communicating it.

Argument: the defendant argued that it is not possible to impose a legal duty of confidence on the recipient of the information in the total absence of either a **legally enforceable contract** or a **preexisting relationship**, merely by saying that information is given in confidence. In fact, even if the information is of a confidential nature, parties haven't formed any contract at all by respectively communicating and receiving it. When we go to the doctor and disclose him personal information, even if we didn't expressly pay him, he is under an **ethical duty**, which translates in a deontological **legal duty**, not to divulge such information. But none of the parties here is a professional as a doctor is instead, they are just friends and thus it is really argue to hypothesize the breach of a concrete legal duty. Nevertheless, the deciding court herein was *equity*, ie a Chancery Court, which does not require the presence of a legal duty in order to accrue a cause of action. That is why it was possible, for the plaintiff, to sue for an undetermined 'breach of duty of confidence'.
Moreover, here there was **no libel**, since no untrue things were revealed, therefore it is **truth of information** to act as a defense for libel or slander.
However, it could be objected that the basis of *equitable* intervention to protect confidentiality is that is **unconscionable** for a person who has received information on the basis that it is confidential subsequently to *reveal* that information; the relationship between the parties is *not* a determining factor.
The key problem here is that the disclosure of such information provoked a manslaughter.
Conclusion: it must be stressed that there are fundamental difficulties in balancing *privacy* and *freedom of information*: indeed, if on the one hand the aggressive intrusion of sectors of the press into the private lives of individuals is unpalatable, on the other hand the ability of the press to obtain and publish for the public benefit information of genuine public interest may be impaired if information obtained in confidence is too widely protected by the law.
Moreover, it is highly controversial whether the press is to be liable in damages for publishing **what is true**.
In English law, there is nothing that can be found under the name or, at least, about a presumed topic of '*confidence*', therefore the Court justified her decision simply by saying that such disclosure was

bad. They expressly alleged the occurring of a 'breach of duty of confidence' even if parties were under no duty at all!

[*Human Rights Act*, 1998] "(1) It is unlawful for a **public authority** to act in a way which is *incompatible* with a Convention right.
(2) Subsection (1) does not apply to an act if:
a. as the result of one or more provisions of primary legislation, the authority could **not have acted differently**; or
b. in the case of one or more provisions of, or made under, primary legislation which cannot be read or given effect in a way which is *compatible* with the Convention rights, the authority was acting so as to **give effect to or enforce** those provision.
(3) In this section '*public authority*' includes a **court or tribunal**, and any person certain of whose functions are **functions of a public nature**, but does *not* include either House of Parliament or a person exercising functions in connection with proceedings in Parliament."

Campbell v. MGN Ltd., 2004 (English law)

Naomi Campbell sued the newspaper Mirror for having written an article describing her as a drug addict who "is attending Narcotics Anonymous meetings in a courageous attempt to beat her addiction to drink and drugs", coming with a photo of her attending this circle. The House of Lords held the defendant liable. the Court agreed that the plaintiff had a right of action if the newspaper revealed too much: thus, the newspaper didn't violate this right by revealing that she was a drug addict since she had publicly stated she was not, and the newspaper had a right to set the record straight; yet, the newspaper had disclosed more than necessary to accomplish this purpose.

Issue: whether the plaintiff could recover for **breach of confidence** and **misuse of private information**.
Rule: in England, unlike in the US, there is no over-arching cause of action for *invasion of privacy*.
The case involves the competition between **freedom of expression** and **respect for an individual's privacy**: both are vital rights to the point that neither has precedence over the other.
The common law or, more precisely, **courts of equity** have long afforded protection to the wrongful use of private information by means of the cause of action which became known as **breach of confidence**, ie a form of *unconscionable* conduct akin to a breach of trust. Today this nomenclature is misleading. The breach of confidence label harks back to the time when the cause of action was based on improper use of information disclosed by one person to another in confidence. To attract protection the information had to be of **confidential nature**. But the gist of the cause of action was that information of this character had been disclosed by one person to another in circumstances **importing an obligation of confidence**, even though no contract of non-disclosure existed. The confidence referred to in the phrase 'breach of confidence' was the confidence arising out of a **confidential relationship**.
This cause of action has now firmly shaken off the limiting constraint of the need for an initial confidential relationship. Now the general law imposes a **duty of confidence** wherever a person receives information he *knows* or *ought to know* is **fairly** and **reasonably** to be regarded as confidential. The essence of the tort is encapsulated now as a **misuse of private information**.
The ECHR has undoubtedly had a significant influence in this area of the common law for some years. The provisions of **article 8** (*respect for private and family life*) and **article 10** (*freedom of expression*) have prompted courts of England to identify more clearly the different factors involved in cases where one or other of these two interests in present. The time has come to recognize that the values enshrined in articles 8 and 10 are now part of the cause of action for breach of confidence.
As we can see, English law does not care at all about privacy, to the point that it eagerly escapes from giving protection for it.
Argument: the following is the minority's opinion. We can divide the information published by the newspaper into 5 categories: (1) Miss Campbell's drug addition; (b) the fact that she was receiving treatment; (3) the fact that she was receiving treatment at Narcotics Anonymous; (4) the details of the treatment; (5) the visual portrayal of her leaving a meeting.

First of all, Miss Campbell's **public lies** precluded her from claiming protection for categories (1) and (2) since, by repeatedly making these assertions in public she could no longer have a *reasonable* expectation that this aspect of her life should be private. Public disclosure that, contrary to her assertions, she did in fact take drugs, was not disclosure of private information. When a public figure chooses to present a *false image* and make *untrue pronouncements* about his or her life, the press will normally be entitled to put the record straight.
As to category (3), Treatment by attendance at Narcotics Anonymous meetings is a form of therapy for drug addition which is **well-known**, widely used and much respected. It was also a way for the magazine to prove what it was asserting.
Miss Campbell's emotional distress is understandable, even more so considering that she is already *fragile* as to her health, regarding the torments from paparazzis who always surround her. Yet, this is not the subject of complaint, since Miss Campbell, **expressly**, makes no complaint about the taking of the photos. Hence, the fact that the photos were taken *surreptitiously* adds nothing to the only complaint being made. For these things considered, the visual portrayal added nothing of an essential private nature, they conveyed no private information beyond that discussed in the article.
Conclusion: The majority orientation was that Miss Campbell couldn't complain about the publication of her photos because she had already declared publicly she was no a drug addicted, but at the same time the defendant was held *liable* because the article said *too much*.
On the contrary, from minority's point of view, photos actually didn't add anything to the article, therefore they can be published and the editor can go in detail.
It is worth specifying that England has implemented the right to privacy solely because of the pressure exercised by the European Court of Human Rights. Therefore nowadays, with the Brexit, we actually don't know if it is still — at least in theory — still protected.

American Law

Diaz v. Oakland Tribune, 1983 (US law)

Diaz is transsexual, she made the necessary documental changes but she kept her surgery as a secret. She was elected student body president as the first woman to hold that office, but she became embroiled in a controversy in which she charged the College administrators with misuse of student funds. Shortly after, Jones was informed that she was a man, and thus wrote on his newspaper: "More educational stuff: the students will be surprised to learn that their student body president is not a lady". The Court held for Diaz.

Issue: whether the plaintiff could recover for **violation of the right to privacy**.
Rule: the Restatement II of Torts grants the protection of the right to privacy when an information is highly offensive and objectionable to a reasonable and person, and it is not of legitimate public concern.
The specific right which we are concerned is the right to be free from public disclosure of private embarrassing facts, in short, the right to be let alone.
Whether the fact of Diaz's sexuality identity was newsworthy is measured along a scale of competing interests: the individual right to keep private facts from the public's gaze versus the public's right to know. American courts have settled on a three-part test for determining whether matter published is *newsworthy*:
(1) the **social value** of the fact published;
(2) the **depth of the article's intrusion** into *ostensibly private affairs*;
(3) the **extent** to which the party *voluntarily* acceded to a position of *public notoriety*.
Argument: defendant urged that Diaz was a public figure and the fact of her sexual identity was a newsworthy item as a matter of law. But it could be objected that, even if Diaz is, to some extent, a *public figure*, she is still entitled to enjoy some privacy, prohibiting her life to be opened to public inspection. Undeniably, she is lesser famous than a politician, yet she can be still considered as a public figure within the locality. But irrespectively of the magnitude her fame has, every public figure deserves a splinter of right to privacy.

The key point herein is that Diaz's sexuality didn't concern her function nor affected it, it was not newsworthy *per se*. Furthermore, the fact that Diaz didn't disclose her sexuality did not compromise at all her honesty.
For last but not least, it should be stressed that Jones' attempt at humor at Diaz's expense removes all pretense that the article was meant to educate the reading public.

Florida Star v. BJF, 1989 (US law)

Appellant The Florida Star was found liable for publishing the name of a rape victim which it had obtained from a publicly released police report. In printing BJF's full name, the Florida Star violated its internal policy of not publishing the names of sexual offense victims.

Issue: whether the plaintiff could recover for **violation of the right to privacy**.
Rule: Florida statute makes it unlawful to print, publish, or broadcast in any instrument of mass communication the name of the victim of a sexual offense.
Argument: the victim has suffered from emotional distress and received threats of future rapes.
Initially, the defendant was found liable because he broke Florida law by publishing BJF's name. Then, the decision was reversed in favor of the defendant, because Florida statute was found to be **unconstitutional** as contrary to the First Amendment, which crystallizes the freedom of expression and press. The defendant was therefore held to have committed nothing *unlawful*, since he has just reposted an already public information that was stored in a police room. At this point, one question arises about whether, even if an information is already public, there is a right to disseminate such information, considering the consequences it could effect.
Conclusion: we have here confirmed again that England and US have no right to privacy even if they say that there actually is and it is protected.

French Law

Cour de Cassation, 1989 (French law)

A magazine wrote an article about the 100 richest Frenchmen which mentioned the amount of plaintiff's net worth even though he had written a letter asking the magazine not to do so. He lost on appeal.

Issue: whether the plaintiff could recover for **violation of the right to privacy**.
Rule: in French law, the disclose of financial information doesn't fall under a violation of privacy. One can talk about financial statements of another.
Argument: a person private life is not invaded by publishing information of a *purely financial order* that excludes any allusion to the life or personality of the interested party.

Cour de Cassation, 1988 (French law)

The plaintiff was a judge who was temporarily relieved of his functions. The defendant, a journal, published an article with his photograph describing his removal as a 'serious sanction', adding that reportedly he had taken a vacation for nervous depression. The Court held for the plaintiff.

Issue: whether the plaintiff could recover for **violation of the right to privacy**.
Rule: in French law, one can't talk publicly about the health of person.
Argument: the court argued that while temporary removal was not a 'serious sanction', any claim plaintiff had for defamation was barred by the statute of limitation to which such claims are subject. Moreover, it recited that the use of the photo was *permissible* because of the **public character of his function**, yet divulging information on the health of a person without his consent violated his right to a private life even if the information was presented *decently* and *succinctly*.

Cour de Cassation, 1979 (French law)

The defendant (newspaper) published an article under the title 'Violence' which described the altercation between the widow of the President of Indonesia and the former wife of Eddie Barclay, for the "handsome eyes of a Parisian playboy".The defendant was held liable for violation of privacy.

Issue: whether the plaintiff could recover for **violation of the right to privacy**.
Argument: the defendant argued that he was *entitled* to describe the facts and give his interpretation, but the Court objected that his article actually discussed the emotional life of the plaintiff in disclosing the personal and intimate motives of the parties said to be the origins of the altercation.

Cour de Cassation, 1975 (French law)

The defendant (newspaper) ran an article on Charlie Chaplin (Plaintiff), adding numerous details relative to his private life. The court held the defendant liable.

Issue: whether the plaintiff could recover for **violation of the right to privacy**.
Argument: even if disclosure of such details would not violated Chaplin's right to privacy if published in an **historical study**, it does here because the defendant's one is not an historical journal.
The defendant objected that he has just repeated something already disclosed in previous works all around the world, but the court stated that, everyone having the right to respect for his private life, it matters little that books and periodicals had already treated the same facts, and whoever, without a *legitimate interest*, publishes facts of this nature is liable if he cannot prove he was specifically authorized.

German Law

Oberlandesgericht, 1970 (German law)

The plaintiff, the wife of Prince Friedrich William of Prussia, claimed for culpable publication of her intention to divorce in a newspaper. The court held the defendant liable.

Issue: whether the plaintiff could recover for **violation of the right to privacy**.
Rule: under German law — differently from what would have been decided from an American court — the plaintiff can recover because she, as princess, is not a public figure *stricto sensu*, therefore her consent was needed.
The defendant can't invoke art. 5 of the Constitution in its defense. Certainly, **freedom of the press** does include **freedom of information**, but this right is limited by articles 1 and 2 of the constitution.Therefore, by weighing them, the private sphere has *preference*, and it moves to the second place only when the public has a **serious need for information**.
Argument: undoubtedly, the private sphere of the person concerned, protected under articles 1 and 2 of the Constitution, is invaded. The defendant is not entitled, without the permission of the person concerned, to report even *true facts* about her divorce and the discussions and actions relating to it.
The key point here is that the Plaintiff is not considered as a *public figure*, precisely not a *figure of current history* whose private life the press can report without her consent. Her husband is not a figure of contemporary history because he does not play a role in public life nor has he aroused general interest in art, science or sport.

About historical events

English law

Haynes v. Alfred Inc., 1993 (English law)

The defendant wrote a book of social and political history, *The Promise Land*, in which he talked about the plaintiffs life relating to Urban Ghettos, adding private details. The plaintiff claimed that the book libeled the, and invaded their right to privacy. Court rejected.

Issue: whether the plaintiff could recover for **violation of the right to privacy**.
Rule: the criteria of *offensiveness* and *newsworthiness* are herein applied.
Argument: English law is really crude when deciding such cases. Even if the publication of this book ruined plaintiffs' life, owing to the massive private information therein contained, the court does not care about such consequences. Rather, it stated that photos, names instead of pseudonyms and details were necessary to make the story better.

Cour de Cassation, 1990 (French law)

Defendant was the writer of a book on the Nazi occupation of the French Compte, describing the historical truth down to its smallest details. He mentioned a man who was tried and condemned as a traitor with her Mistress. She sued for infringement on her private life. The court held for the plaintiff.

Issue: whether the plaintiff could recover for **violation of the right to privacy**.
Argument: it can be argued that the defendant, as an historian, had the right to present the evidence of facts, without the consent of the interested parties, even if they touch on one's private life if: (*i*) they have a **definite relation** to the subject; (*ii*) they are related with **objectivity** and without an **intention to injure**; (*iii*) they were already brought to **public awareness by** the reports of judicial debates.
However, even an historian doesn't have the right to bring the private life of a person without necessity. The key point here is that the plaintiff talked, in his book, about the conviction of the plaintiff but he didn't update such information: she was indeed subsequently pardoned.

German law

Oberlandesgericht, 1980 (German law)

The defendant published a series on Nazi experiments on children in concentration camps, and in an article he accused the plaintiff of responsibility for the death of 20 children. The court held that the plaintiff could not recover.

Issue: whether the plaintiff could recover for **violation of the right to privacy**.
Rule: When constitutionally important interests are at stake, as in the instant case, the usual **burden of proof** is *reversed*, so that the plaintiff had the burden of proving that the statement was false. He had failed to do so.
Argument: the press has a legitimate interest in making the contentions to which the plaintiff objects public, in reporting concretely the facts that are essential for evaluating a former period of time. Therefore the case law recognizes such an extensive right for the press in the public interest.
The key point is that here the defense is **truth**, because the plaintiff was not able to prove that the article stated false information.

For all things considered, we can allege that:

- in France and Germany, right to privacy is prioritized over freedom of expression and press. In fact, it is really seldom that one person is barred from recovering for violation of privacy, which is highly protected;
- in England and in the US, freedom of expression and press are prioritized over the right to privacy. Even if they boast with words their granted protection for privacy, actually it is not.