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ASTRA

COMPARATIVE PRIVATE LAW

2°CLMG

2nd Partial

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SOMMARY

13. LEGAL ACTS AND LEGAL FACTS

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

(i) It's impossible to establish a criterion for distinguishing what is inherently legal from what is not ;

(ii) When a specific situation is prescribed by a regulation, we encounter an occurrence or an act that has legal consequences.

STRUCTURE **OF NORMS**

- A norm is shaped as a '***hypothetical independent period***', whose protasis (= **the IF-clause**) consists of a state of affairs and whose apodosis (= **the THEN-clause**) of a sanction.
- The norm attaches a (*negative*) reaction of the State to a possible event or behavior (e.g. **IF** a contract is breached by one of the parties which have entered into it, **THEN** that party will be deprived of her/his rights towards the other).

THE SCOPE OF NORMS

A norm is marked by two characteristics:

a) ***generality:***
   - ***A*** norm is applicable to anybody who finds herself/himself in the state of affairs envisaged by the IF-clause ;
   - A norm is addressed not to individuals identified as such but to a class of individuals who happen to find themselves in the state of affairs envisaged by the IF-clause ;

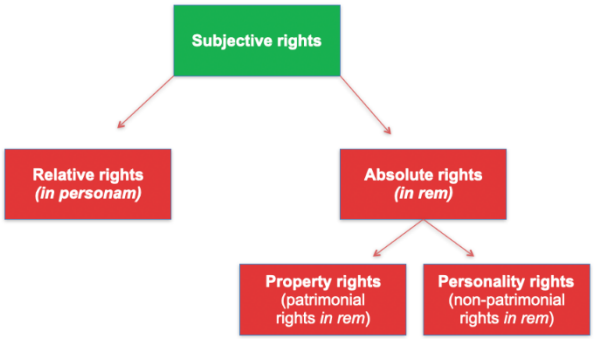
b) ***abstractness***:
   - ***A*** norm is applicable to whatever event or behavior matches the state of affairs envisaged by the IF-clause.

—> '*treat like cases alike*'

MANDATORY RULES AND DEFAULT RULES

1) **Mandatory rules** (*zwingendes Recht, règles impératives, norme inderogabili*) may not be set aside by an agreement between their addressees.
   - Most public law consists of mandatory rules;
   - Paramount for public law is the supremacy of public interest over individuals 'interests.
2) **Default rules** (*dispositives Recht, règles supplétives, norme dispositive*) may be set aside through an agreement between their addressees:
   - Nearly the entirety of private law consists of default rules;

- A major role is played by default rules which supplement agreements entered into by the parties.



We distinguish between:

- **Autonomous** acts;
- **Heteronomous** acts;
- **Material facts**: connected to natural events.

AUTONOMOUS LEGAL ACTS

Legal acts are **concluded through** a **declaration of will** (be it through language, or by conduct), which is intended to perform a change in rights and duties of who is acting (the party).

These legal acts can be concluder *orally* or in *written*.
Any legal subject is given the power to produce a legal effect on her/his own patrimony or personality, to the extent to which the law does not pose any mandatory prohibition on doing so.

The notion of private autonomy is present in several states; one definition that represents the common core of this notion is that of **DCFR**: **II. – 1:102: Party autonomy**:

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

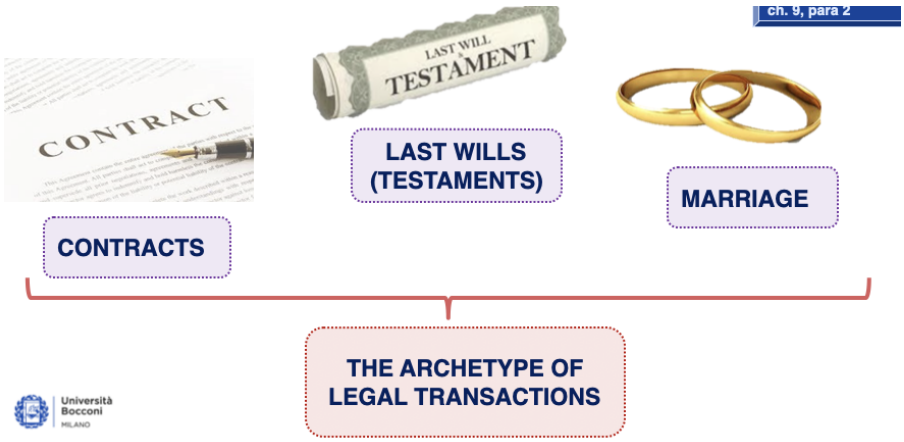
HETERONOMOUS LEGAL ACTS

« A **legal subject** can freely decide whether or not **to undertake certain action**, but she cannot elect the legal effects attached thereto, which are stipulated by the relevant norms» => "These acts **must be done** by their **author with sufficient judgment** and discernment of her own action".

Example: the legal consequences of a tort are **not conditional** upon its **author's would-be** intention to produce or not produce some legal effects.

MATERIAL FACTS

Some **legal facts** are addressed **by a norm irrespective** of the particular judgment or discernment of their authors, or they simply consist in natural events.



THE GERMAN TRIPARTITE TAXONOMY

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

Germany does not accept the subdivision into legal acts and legal facts; it distinguishes between 3 categories:

1. **Autonomous legal act** => parties are free to decide the specific act hey want to conclude; they can also choose the legal effect standing from that particular act, so the power of parties can be grasped in 2 dimensions:
   a) Type of act they want to conclude;
   b) Legal effects arising from that act.
   Ex. Contract or testament
2. **Heteronomous legal act:** parties are not free to decide the effect of legal act (ex. If they do something, they are not then free to elect the effect from that behavior => «a legal subject can freely decide whether or not to undertake certain action, but she cannot elect the legal effects attached thereto, which are stipulated by the relevant norms».
   Ex. Tort: the legal consequences of a tort are not conditional upon its author′s would-be intention to produce or not produce some legal effects.
3. **Material facts**: certain legal circumstances are governed by a regulation without regard for the individual judgment or discernment of those responsible for them, or they may purely involve natural occurrences.
   => without the involvement of individuals.
   Ex.″ When a person dies, title to her property vests in the heirs, subject to administration. That is, the right to possession of an intestate′s property and the right to take through intestate succession accrue on the death of the ancestor, whatever event or action may have caused it – be it a murder, a heart attack, etc. In this respect, death is regarded by the law as a material fact" => death: typical example.

THE FRENCH BIPARTITE TAXONOMY

The French approach knows the distinction between **juridical facts** (fatti giuridici) and **juridical acts**; the category of juridical facts embraces material facts (natural events) and heteronomous legal acts => in fact the **French Civil Code** lacks any regulation explicitly referring to autonomous legal acts in contrast to heteronomous legal acts.

So, according to **art. 1100(1) Code civil**, any fact that holds legal significance is categorized as either:

- An ***acte juridique*** => this category has effectively been employed to refer to autonomous legal acts;
- As a ***fait juridique.***

NB. Conversely, pursuant to the new **Art 1100-2 Code civil** «*[l]es faits juridiques sont des agissements ou des événements auxquels la loi attache des effets de droit. Les obligations qui naissent d'un fait juridique sont régies, selon le cas, par le sous-titre relatif à la responsabilité extracontractuelle ou le sous-titre relatif aux autres sources d'obligations*».

Juridically significant facts (*faits juridiques*) encompass:

1) **Physical occurrences** (*événements*);
2) Also **material facts** (*des événements*);
3) **Heteronomous legal acts** (*des agissements*): in these instances, the legal outcome is determined by the relevant rules, regardless of the author's intent to bring it about.

THE ECLECTIC ITALIAN TAXONOMY

''***Eclectic***'' because based on the distinction between ***fatti giuridici*** and ***atti giuridici***. The latter is very similar to the French distinction, but the Italian legal context was strongly influenced by the German scholarship. For this reason it is commonly accepted the category of ***negozi giuridici***, which is from a comparative point of view, identical to the category of autonomous legal acts.

NB. Negozi giuridici are opposed to the narrower category of "***atti giuridici in senso stretto***" (meaning heteronomous legal acts).
Comparison between German approach and Italian one: atti giuridici in senso stretto means heteronomous legal acts.

THE EUROPEAN TAXONOMY

The distinction between the categories is based on the ***structure*** of the contracts. We distinguish between:

A) **Unilateral acts** (E.g. wills)
   —> These actions are carried out through the **unilateral declaration** of **intent** by a single party (eg the withdrawal from a contract);
   —> We could also have **juridical acts**, which are **unilateral** from the structure because they derive from one party => the effect are specifically elected by one party.
B) **Bilateral acts** (ex. Sale contracts)
   —> It necessitates the expression of mutual agreement between two parties (as is the case with the majority of contracts).
C) **Multilateral acts** (ex. companies acts)

We can make another distinction based on the ***content*** of the juridical acts; they may be:

1) **Patrimonial**: the intent of the party or parties is driven by an interest that can be evaluated in economic terms.
   —> E.g. **Contract (art. 1321 Italian Codice Civile)**: A contract is the exemplary form of a legal transaction where the content inherently involves economic aspects. **NB**. This is the reason why in many countries we distinguish between marriage and contract because the marriage is not provided with this patrimonial content; some jurisdictions believes that because of this lack it is not considered a contract.
2) **NON-patrimonial**: the intent of the party or parties is directed towards an interest that cannot be financially valued.
   —> E.g. **Marriage**: it also contains an economic aspect, but this aspect is quite restricted and doesn't fully define its nature => the patrimonial element is absent.

One last disctinction can be made between:

I) ***Inter vivos* acts** : typically designed to govern the concerns of the involved parties during their lifetimes;

II) ***Mortis causa* acts** : conducted to arrange for the distribution of the author's assets that will come into effect after the death.

14. CONTRACT AND CONSIDERATION

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

The contract is based on an agreement between 2 or more parties => bilateral or multilateral contracts.
NB. In some countries contracts we talk also about the notion of **contratto unilaterale**. In Italy we discuss about the ***contratto con obbligazioni del solo proponente***: we talk about a contract concluded between two parties, but the obligations arising from the contract bind only one party: so is it a unilateral or bilateral contract ?

Contracts allow:

- **Consumers** to purchase goods and services;
- **Businesses** to organize themselves and to trade goods and services both with other businesses and with consumers.
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The notion of contract is related to **roman law** (*cumtraere* = to bind the contracting parties).
First distinction from a comparative law prospective:

- In the civilian tradition **contracts mean agreement;**
- In the common law tradition **contracts** (in particular in the English common law) **amount to an exchange**; a *bargain*, a world used in a technical meaning, but that still means exchange:
  —> Gratuitous ***promises*** are not contracts (if not made by **deed**); what is a deed ? Common law recognizes a promise to be enforceable if it is contained in a deed under seal. A seal may be affixed to a contract by placing a red sticker on the paper or simply drawing a circle with «LS» (loco sigilli) stamped on it. The deed then takes effect upon delivery;
  —> Gratuitous ***bailments*** are not contracts. A bailment occurs when a person (*the bailor*) transfers possession of a chattel (a good that can be move from a place to another) to another (*the bailee*).
  NB. Possession ≠ property:

CONSIDERATION IN COMMON LAW JURISDICTIONS

When a promise in English common law can be considerate enforceable? **Consideration** is used as the mechanism to distinguish promises that are to be enforced from promises which are not to be enforced.

Definition of *consideration*: «An act of forbearance of the one party, or the promise thereof, is the price for which the promise of the other is bought, and the promise thus given for value is enforceable».

- The doctrine of consideration is based on the idea of ***reciprocity***: «Something of value in the eye of the law» must be given for a promise in order to make it enforceable as a contract —> consequence: an ***informal gratuitous promise*** does not amount to a contract.
- So **consideration** is somehow **similar** to the notion of ***causa***, but it is **not the same** because **consideration refers to the concept of exchange between the two parties** (=> without the benefits for the parties, no consideration would be recognized).
- **The ratio/purpose** behind consideration: to put limits on the enforceability of agreements even where they are intended to be legally binding and are not vitiated by some factor such as mistake, misrepresentation, duress or illegality.
- Courts do not judge ***adequacy***: they do not concern themselves with the question whether «adequate» value has been given, or whether the agreement is harsh or one-sided => they only ascertain that consideration is put on the contract, but they do not evaluate the content of that consideration.

DEFINITION OF CONTRACT:

(1) **DCFR:II-1:101**: Meaning of 'contract' and 'juridical act': Contract is an agreement which is intended to give rise to a binding legal relationship or to some other legal effect. It is a bilateral or multilateral juridical act => why a ''juridical act''?

a) They want to stipulate a given act (a contract);

b) They can elect the legal effect rising from the contract.

=> ratio: freedom of parties

NB. Apparently there is no mention about the patrimonial feature

(2) **Italian Codice Civile:** Art. 1321: A contract is an agreement between 2 or more parties to establish, regulate or extinguish their patrimonial legal relationship (matrimony: NOT a contract).

(3) **Code Napoleon**:

- Art. 1101 (as amended in 2016): A contract is a concordance of wills of two or more persons intended to create, modify, transfer or extinguish obligations.
- Art. 1103 (as emended in 2016): contracts which are lawfully formed have the force of legislation for those who have made them => a provision that we do have also in the Italian codice civile; in fact the only chance that the parties have to dissolve the contract effects is to stipulate another agreement called in the Italian codice civile ***mutuo dissenso***.

CONTRACT AND OBLIGATIONS

Contract is essentially a source of obligations.

E.g. Contract of sale (the contract having as its object the transfer of the ownership of a thing or the transfer of other rights in exchange for a price); here derives:

a. **The obligations of the seller:**
   - To deliver the thing to the buyer;
   - To warrant the buyer against eviction and defects in the thing sold;

b. **The obligation of the buyer**: to pay the price within the time and in the place fixed by the contract —> the payment of the price refers to the performance of the contract; it is not part of the formation of the contract => so we should **distinguish between** the **formation** of the contract and the **execution** of the **contract** (we may have a contract well formed, but if it is not well executed the contract is not concluded).
   - So in the stage of negotiation parties decide to discuss the price that must be paid, but when we consider the payment of the price; this comes after the conclusion of the contract; the conclusion of the contracts specifically revolves around the agreement which requires offer and acceptance => these are considered from an Italian/French prospective *atti giuridici* because the parties are free to decide. If they are provided with the same content (es. Ti voglio vendere l'orologio a 20 €; Marco risponde accettando di voler comprare l'orologio a 20€).

Typically obligations must be put in the stage of performance => if these obligations are not respected , one of the parties or both of them will be preach => this paves the way to remedies in contract law, but this does not affect the validity of the contract. **The lack of respect will not affect the formation of the contract**.

THE FORMATION OF CONTRACT

In order to reach the conclusion of the contract and connect to the negotiations we should identify the ***offer*** and ***acceptance***: they are perceived as statements of intent, generated by both parties and dispatched to each other.

E.g.:

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

OFFER VS INVITATION TO TREAT

Which is the main difference between offer and invitation to treat? The latter is an invitation to negotiate and from a legal point of view it does not contain all the typical elements of the contract. While the offer, typically contains all the elements of the contract.

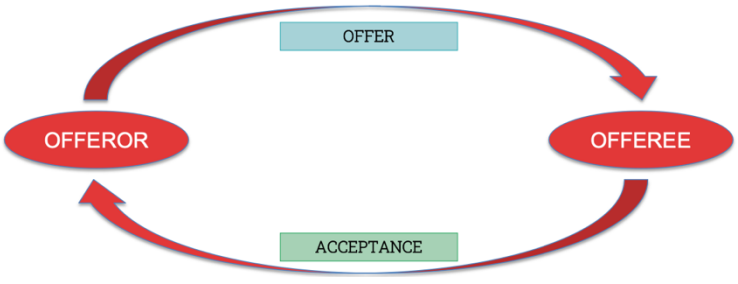
NB. **Display on Supermarket Shelves**: if me and my friend are interested to buy a shampoo in the supermarket and there is only one shampoo, from a legal point of view this situation is and offer to the public, but there is a particular aspect: when is the contract concluded? We need here ***facta concludentia***; the fact that we can put the shampoo again on the shelf is a particular of this contract because if I put it back there is a sort of withdrawal.

Display of goods in shop windows or on supermarket shelves-Definition of offer **Art. 4:201 (3) PECL**: A proposal to supply goods or services at stated prices made by a professional supplier in a public advertisement or a catalogue, or by a display of goods, is presumed to be an offer to sell or supply at that price until the stock of goods, or the supplier's capacity to supply the service, is exhausted => there is a presumption, that the good on the shelf amounts to an offer.
— >NB. Civil law jurisdictions tend more easily to acknowledge offers made to the public at large

OFFER & ACCEPTANCE

Code Napoléon: Art. 1113 (as amended in 2016): A contract is formed by the meeting of an offer and an acceptance by which the parties demonstrate their will to be bound.

« ***Offer*** and ***acceptance***» are conceived as declarations of willingness, issued by each party and dispatched to the other.



It is well known that, according to the Italian legislature and the elaboration of Italian scholars, offer and acceptance should be provided with **same content** in order to have a contract concluded => so in the Italian legal background the intention of the contracting parties is less relevant because what typically matters is the content.

Example of offer: Francesco texts Pietro that, were someone ready to pay him some 500,00 euro for his wrecked car, he would be glad to give it away. Does Francesco's utterance amount to an offer (of a contract)?

—> Is Francesco's actual intention that of selling his car? Or is he simply kidding, using humor or irony, etc.? In the latter case, it is not an offer, but possibly an invitation to treat

—> Is the car to be sold identified, either in Francesco's utterance or because of Pietro's previous awareness of it? If it is not possible to understand which car (e.g. among many he owes) Francesco is referring to, it is not an offer.

—> Is the price of the sale specified in Francesco's utterance? Or is such price intended to be afterwards negotiated? In the latter case, it is not an offer, but possibly an invitation to treat.

IMP: without an object, we do not have a contract.

IRREVOCABLE OFFER

Civil law jurisdictions, and also common law, sometimes recognize that **the offer can be** in some cases **irrevocable**, if the parties want to do so.

—> ***Civil law***: it suffices that the offeror unilaterally promises to keep open the offer (for a given time). NB. The option in civl law can be gratuitous and need no other elements (simile al contratto di donazione);

—> ***Common law***: a proper contract shall be concluded between the negotiation parties, which is called option (if gratuitous, it must be made by a deed).

Which is the difference between the option and the irrevocable offer? In the latter case we have a **unilateral act** which has the effect of the irrevocable offer, and the commonality can be found relatively to the legal effects.

CONTRACT OF OPTION

It is a preliminary contract through which one party (option ***issuer*** or ***writer***) binds herself/himself to her/his own offer and the other party (***option holder***) is given the right to close unilaterally the deal.
=> so preliminary contract + final contract.

We have **2 main type of options**:

1) **Call options**: give the holder the right to purchase an underlying at a specified price (*strike price*) => there is the chance to say yes or no;
2) **Put options**: give the holder the right to sell an underlying asset at a specified price (*strike price*).

Silence without behavior is not acceptanc

ACCEPTANCE

According to **DFCR (II-4:201)** acceptance is:

1) Any form of statement or conduct by the offeree is an acceptance if it indicates assent to the offer;
2) Silence or inactivity does not it itself amount to acceptance;
    —> **Example of acceptance made by conduct**: the party who receives the offer immediately starts executing or performing the contract itself;
    —> **Conduct ≠ silence** => in the first case there is the consent (even if silent); so the party demonstrate his clear intention to execute the contract, so his will to be bound; while in the second case there is no consent.

TIME WHEN A CONTRACT IS CONCLUDED

In commercial practice, a significant matter arises: individuals must determine precisely when they become bound to a contract and, as a result, assume their contractual rights and obligations. There is a significant difference between civil law and common law because they opt for divergent rules (*knowledge rule* VS *postal rule*):

a. **Civil law**: the ***knowledge rule*** is adopted***:*** the acceptance must be sent and additionally must reach the address of the offeror (the person who made the offer) => there is a 'presumption of knowledge' that the offeror is aware of the notified acceptance.
   —> E.g. **II-4:205 DCFR**: If an acceptance has been dispatched by the offeree the contract is concluded when the acceptance reaches the offeror.

b. **Common law**: here he have an opposite rule (postal ***rule***) because the contract is deemed to be concluded when the acceptance is sent (in the past by post). There is no need of the offer to be aware of the acceptance (so no need of the notification); the contract is stipulated in a valid form if the contract is **despatched**.

In common law jurisdiction one of the leading case is **Adam v. Lindsell (1818):**
A contract for the sale of wool fleece was at issue. Here is the timeline:

- **9/2**: Lindsell wrote to Adams offering to sell him wool fleeces. In the letter, Lindsell required expressed acceptance (by 9/7) in the form of a mailed response;
- **9/5**: Adams received the offer letter, accepted in writing and quickly mailed the offer back to Lindsell;
- **9/8**: Lindsell did not receive the written acceptance in the mail and decided to sell the wool to another party;
- **9/9**: Lindsell received Adam′s acceptance, but the wool was already sold.

Lindsell argued that there was never a valid contract because acceptance was not received by the specific date of September 7th.

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

Another case is that of **Holwell Securities Ltd. v Hughes, [1974] 1 WLR 155, [1974] 1 All ER 161.**
This case shows an ***exception*** => when the party requires an express notification of the acceptance => in this case the postal rule DOES NOT apply because a notification of acceptance has been agreed upon.

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

INEQUALITY OF BARGAINING POWER

The specific aspect of B2C contract is that the parties are not put on the same ground; on the contrary , in case of B2B or C2C contracting parties are put on the same ground => we should understand how the previous principles apply to B2C contracts.

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

So the first principle that seems to be endangered is the ***freedom of contract***: civil codes has been elaborated based on the assumption that the contracting parties are provided with the same power (=> put on the same level); so the traditional rules provided by national courts were deemed to be inadequate when this issue of inequality of bargaining power came to be relevant in the realm of contract law.

The regulation of the consumer contract is related to the area of **competition law** because there is the need to guarantee the rule of the game; the EU wanted to regulate this field because the position of the consumer needed to be protected. The 2 main purposes of consumer law are:

1. Protect the consumer, the wea party in a negotiation (=> specific aim);
2. Need to guarantee the well-functioning of the market, in order to avoid the market failures (=> general aim).

=> if the consumer is not protected there are negative consequences in a largest scale.

How to guarantee contractual fairness between the parties?

1. Oblige the stronger party (so the business) to provide all the necessary information to the weaker party (the consumer) => NB. Many B2C contracts are concluded in distance (=> another element that determines the weakness of the consumer);
2. Give to the consumer the power to freely and gratuitously redraw from the contract in a given period of time.
    - **NB.** Here we can grasp a difference between the **withdrawal from the contract in consumer law** and the **classical withdrawal from the contract contained in the civil code** (=> recesso dal contratto): in several civil codes the withdrawal can be gratuitous or given to benefiting party for a given price; this is not true for a B2C because the consumer can redraw gratuitously, being the weaker party of the contract.

Many rules of consumer law must be considered ***mandatory rules;*** this is in contrast with the classic rules of contract law in the civil codes, which typically are ***default rules*** (= the parties, based on their freedom, can decide to set aside standard default rules and opt for other rules decided by them) => this is not a possibility in consumer contracts because they are mainly governed by *mandatory rules* which have a specific characteristic: they **cannot be set aside**.

Why mandatory rules cannot be set aside and why default rules can ? Which is the ratio ? Because mandatory rules connect private and public interest; when they are enacted they serve the function to protect public interests (to govern the market) and private ones (to protect the weak party). While default rules govern private interest; so the parties are free to decide whatever they want.

EXAMPLE:
Francesco decides to buy a vacuum cleaner manufactured and sold by the company "Alfa." The contract is concluded through Amazon. The price is not negotiated and is therefore determined in advance by Alfa.
Information (example): information about the right to withdrawal of the consumer (Dir. 83/2011/EU). This right can be freely exercised by the consumer.
Consumer: ″any natural person who (...) is acting for purposes which are outside his trade, business or profession" (Directive 1993/13/EEC).

NB. *Consumer* is only the individual who acts outside the professional activity; for this reason the **rules protecting consumers** are **not applicable** to entities, subjects other than individuals => there is a discussion among scholars about the possibility to extend rules protecting consumers among other legal subjects.

GOOD FAITH

Traditionally a *clear separation* exists between common law and civil law with regard to the good faith principle:

a) **Civil law jurisdictions** recognize the relevance of this principle because the principle of good faith is frequently mentioned in several continental civil codes.

— > it includes how this principle is mentioned in the stage of the conclusion of the contract, of execution… this is a **all embracing principle** because it influences, governs, inspires all the realm of contract law.

b) **Common law jurisdiction**: we should distinguish:

- **The English common law**: this principle historically was not recognized and this lack traces back to the origin of the common law => this principle is not rooted in the customary law underlying English common law;
- **The US common law**: this principle is, or tends to be, more relevant in the US common law, in particular in the stage of performance (so the execution of the contract).

GOOD FAITH IN THE CIVIL LAW

Examples of the approach of some civil law systems:

- **§ 242 of BGB: Performance according to good faith**: The debtor shall render the performance in the way it is necessary to comply with the requirement of good faith settled in usage. There is a relation between usage (technically ≠ from customs) and good faith.
  - Typically, the good faith principle is determined *case by case* by courts based on the usage spread in a given sector => a given court will identify the principle of good faith, and his content based on a specific case using as a parameter the usage.
  - ***Usage*** here is similar to the *behaviors* typically adopts in a given environment; similar to the distinction that we have also in Italy between usage and customs (usi **vs** *costumi*).

- **Art. 1104 (as amended in 2016) of French Civil Code**:
  (1) Contracts must be negotiated, formed and performed in good faith.
  (2) This provision is a matter of public policy.

  NB. 1. This is a mandatory rule.

  NB.2. In one single provision we can grasp the relevance of this principle in 3 stages: negotiation, formation/conclusion and performance of the contract.

  NB.3. Difference from the Italian Codice Civile: we have 3 distinct articles for this principle.

GOOD FAITH IN THE COMMON LAW

A) ENGLISH COMMON LAW:

- No general principle of good faith in the general law of contract.
- Adversarial position of the parties when involved in negotiations and performing their contractual obligations, **except for *cooperative (commercial) contracts and fiduciaries*** => goof faith.
- « *The concept of a duty to carry on negotiations in good faith is inherently repugnant to the adversarial position of the parties when involved in negotiations ... [and] unworkable in practice. Each party to the negotiations is entitled to pursue his own interest, so long as he avoids making misrepresentations.* » (Lord Ackner (Walford v Miles: 1992, 2 A.C. 128, 138) – House of Lords. => This means that the contracting parties are put on a divergent point of view; each of them is allowed to pursue they own interest so any good faith principle is not relevant => **NO GOOD FAITH PRINCIPLE RECOGNIZED.**
- Basically common law follows a different path compared to civil law jurisdictions, however the UK common law recognizes some **behaviors that are similar to the principle of good faith**, even though it is not formally recognized => «some elements of the common law (including aspect of our contract law) already probably correspond – if only approximately – to the general duty of good faith which is acknowledged as a foundation principle of the continental civil codes. It may be that over time some further developments of the common law will ensure that this correspondence is even closer» Hogan J Flynn v. Breccia [2017].

- The significance of good faith has increased considerably over the 30 years since Lord Ackner expressed that hostile view; **SO TODAY THINGS STARTED TO CHANGE BECAUSE OF 3 ELEMENTS**:
    1. **Good faith in EU**: because the English common law was a component of the Eu structure, Eu legislature enacted several laws resting on the Good faith principle. Because these laws were mainly directives, that must be implemented, this implantation led to the increasing relevance of the principle of Good faith in the Uk common law (example of Eu directive of Unfair Terms (1993));
    2. **Express Terms requiring good faith**: courts have been increasingly willing to give effect to express contract terms requiring the parties to negotiate (or renegotiate) a contract in good faith —> related to the practice (to how the courts started to use good faith and with which relevance);
    3. **Implied Terms requiring good faith**: Courts have proved increasingly willing to imply these.

B) AMERICAN COMMON LAW:

- Significant role played by the requirement of good faith, especially with regard to the ***performance*** of a contract => more relevant than that in the UK one, but less relevant than that in the civil law one;
- The same applies to other common law jurisdictions (as Australia, etc.);
- The violation of good faith principle has some **legal consequences**, but if we want to recognize them we should identify the very nature of this principle; we have to identify:
    a. If they are mandatory rules or default rules;
    b. If they are rules of validity or behavioral rules => the typical consequence of behavioral rules is the compensation of damages.

CASE: Sheikh Tahnoon Bin Saeed Bin Shakhboot Al Nehayan v Ioannis Kent (AKA John Kent), [2018] EWHC 333 (Comm) 22 February 2018

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

Al Nehayan v Kent [2018] EWCH 333: Kent claimed that his consent to the agreement and the promissory note has been obtained in breach of fiduciary duties and / or a contractual duty of good faith owed to him by Sheikh Tahnoon. L.J. LEGATT (since 21 April 2020 Justice of the UK Supreme Court).

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

SO, in order to recap what we have said about the principle of good faith:

- **English common law**: historically, there has been no room for a broad overarching principle of good faith within the general realm of contract law. This is due to the strict adversarial stance taken by parties during negotiations and in fulfilling their contractual duties.
    - Recent legal decisions demonstrate a more flexible and evolving perspective that is receptive to the concept of good faith, particularly in cooperative or commercial contracts and fiduciary relationships.(Wood V Capita Insurance Services Ltd |2017| UKSC; Walford v Miles 1992).

- **American common law** (the same applies to other common law jurisdictions as Australia etc..): The requirement of acting in good faith, particularly in relation to carrying out a contract, holds a substantial importance. (Section 1-203 UCC; § 205 Restatement of Contracts Second).

15. INTERPRETATION AND SUPPLEMENTATION OF A CONTRACT

1) **INTERPRETATION OF THE CONTRACT**: the vast majority of parties cannot envision every conceivable circumstance that might arise during the duration of the contract. The mere interpretation of the parties ′ agreement is seldom sufficient to determine the obligations that the parties must fulfill according to the contract. Parties might have varying interpretations of the precise significance of the language they employed.
2) **SUPPLEMENTATION**: in many instances, it is not practical to engage in negotiations and draft contracts that attempt to anticipate every conceivable contingency.Legal systems offer remedies for addressing contracts that lack completeness.

CONSTRUING A CONTRACT

How a contract is built ? Two main approaches:

1. **SUBJECTIVE THEORY** (Willenstheorie) => ***INTENTION***: Intention per se is the only important and effective thing" (Friedrich Von Savigny, System des heutigen römischen Rechts, 1840). According to this theory, in building a contract, intention is the only relevant that must be considered for the interpretation=> in order to construe the contract we should look at the subjective intentions of the parties.

   => **PRINCIPLE OF SELF- DETERMINATION**

   - If there is a contrast between the intention and the text of promise ? According to the subjective theory the governing element is the intention;
   - It aims at seeking out the parties ′subjective understandings and is thus based solely on the inner intention of their communications or conduct => ''Did the parties want to be legally bound ?''.

2. **OBJECTIVE THEORY** (Erlärungsstheorie) => ***EXPRESSION***: any promise binds the promisor, whether or not intended by her/him" (Otto Bähr). A promise is binding if the text of that promise shows it is a promise => how we recognize that a promise is a promise? Because we have a text.

=> PRINCIPLE OF RELIANCE ON SOMEONE ELSE′S PROMISE

=> LEGAL CERTAINTY (VERKEHRSSCHUTZ): legal certainty because it is traditionally linked to the text: we can be sure that a promise is enforceable because there is a text that clearly demonstrates this

The notion of legal certainty is less strong in case the judges are called to determine the intention behind the text, because in order to ascertain this intention

- It aims at seeking out the objective assessment of an external, detached observer and is thus based solely on the outspoken meaning of the parties ′communications or conduct

How the subjective text came into play in common law jurisdictions ?

In common law jurisdiction (ex. UK common law) is typically used the ***objective text*** => intention is not relevant. This have some consequences that we can see in the case: **Udall v Hill Ltd (1972) AC 441, 502; Hill (feeding stuff compounder) vs. Udall (mink breeder):**

- Contract for the supply of an animal foodstuff. The contract described the basic expected ″nutrition facts" of that foodstuff.
- ''Ingredients of the foodstuff are to be of fair average quality of the season, expected to analyze not less than 70% protein, not more than 12% fat and not more than 4% salt"
- An ingredient of the supplied foodstuff contained a **toxic agent** which, though not unfit to animals in general, caused thousands of Udall′s minks to die.
- Udall sued Hill for breach of contract because he suffered a damage (the death of his animals because of a toxic agent provided by Hill).

- However his claim for damages was dismissed because here the objective text was applied: there was a mention of all the foodstuff => Udall was aware of the nutrition facts of the foodstuff.
- *What the seller promised is determined by ascertaining what his words and conduct would have led the buyer reasonably to believe that he was promising. That is what is meant in the English law of contract by the common intention of the parties. The test is impersonal. It does not depend upon what the seller himself thought he was promising, if the words and conduct by which he communicated his intention to the buyer would have led a reasonable man in the position of the buyer to a different belief as to the promise; nor does it depend upon the actual belief of the buyer himself as to what the seller's promise was, unless that belief would have been shared by a reasonable man in the position of the buyer*.

=> **NO RELEVANCE OF INTENTION**

BUT why the objective text led to the dismissal of the Udall's claim and why the subjective text could have determined another result ?

CIVIL LAW AND COMMON LAW JURISDICTIONS

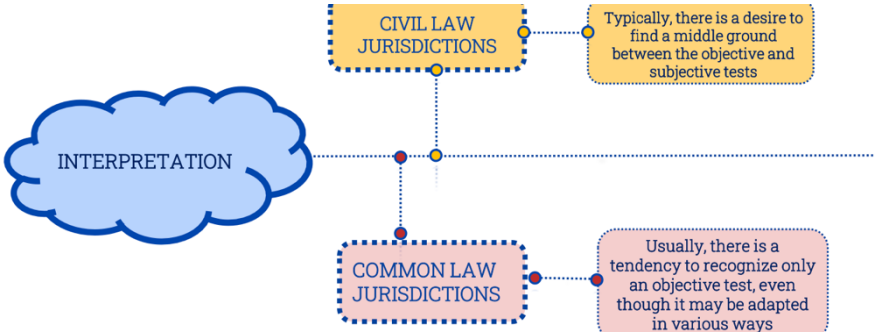
Civil law jurisdictions are generally keen to strike a balance between the objective and the subjective test, while ***common law jurisdictions*** are generally keen to acknowledge solely an objective test, albeit variously molded.

A very famous sentence by **Lord Hoffmann** demonstrates the interpretation in common law => based on the text, NO relevance of the intentions: «*Interpretation is the ascertainment of the meaning which the document would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract*».

Another sentence: «*The court's task is to ascertain the objective meaning of the language which the parties have chosen to express their agreement*» **Lord Hodge JSC**.

Furthermore, we can grasp the relevance of the background of the **UK common law** in the sentence of ***Lord Diplock***: «If detailed semantic and syntactical analysis of words in a commercial contract is going to lead to a conclusion that flouts business commonsense, it must be made to yield to business commonsense» => the judge will typically use the meaning adopted in the business background; if there is a semantic ambiguity, the business common sense typically used in the English common law will solve the ambiguity itself.

RECAP



INTERPRETATION OF A PROMISE IN THE CIVILIAN TRADITION

- **BGB: § 133** Interpretation of a promise: In interpreting a promise, the effective intent shall be investigated, whilst the literary meaning of its expression is not binding.
  => an opposite approach: the primary element that comes into play here in order to interpret a given promise is the intention
- **French civil code: art. 1188 (as amended in 2016)**:

(1) A contract is to be interpreted according to the common intention of the parties rather than stopping at the literal meaning of its terms.

3) Where this intention cannot be discerned, a contract is to be interpreted in the sense which a reasonable person placed in the same situation would give to it.

INTERPRETATION OF A PROMISE IN THE SOFT LAW PROJECTS

PICC:

- **Art. 4.1**:
  (2) A contract shall be interpreted according to the common intention of the parties.
  (3) If such an intention cannot be established, the contract shall be interpreted according to the meaning that reasonable persons of the same kind as the parties would give to it in the same circumstances.
  => Strong influence of the civilian tradition;
  => In the second paragraph the literary sense seems to be less relevant than in the civilian tradition, because apparently there is no mention of the document;
  => The need to base the interpretation on the wording of the text. This is in contrast with the Italian tradition (article 12 of disposizioni preliminari del CC).

- **Art. 4.2:**
  (1) The statements and other conduct of a party shall be interpreted according to the party's intention if the other party knew or could not have been unaware of that intention.
  (2) If the preceding paragraph is not applicable, such statements and other conduct shall be interpreted according to the meaning that a reasonable person of the same kind as the other party would give to it in the same circumstance.
  —> When the first paragraph is not applicable? When is ascertained that the other party is not aware or is not in the position to be aware of => circumstance that must be ascertained by the court, because it is based on facts (so it is not a legal circumstance, but is based on fats).

TERMS IN THE CONTRACT:

A) **EXPRESS TERMS**: they describe all the terms are expressly written down/drafted in the document => those expressly contained in the parties 'agreement

B) **IMPLIED TERMS**: describe a wide category of terms not expressly put in the contract; nevertheless, if there is a gap in the contract it is possible for the courts to imply them in order to fill the gaps.
  —> The parties 'will cannot generally set out all contractual rights and obligations under the contract; parties only discuss those elements of the contract which they deem **essential** (e.g. price and time of delivery).
  —> When the parties, drafting a contract, do not regulate some aspect of the contract, the judge must fill the gap in order to decide how to solve the situation not regulated under the contract.
  —> Often, it is not established what will happen if one party does not perform the contract => most contract law consists in '***default rules*** '(or rules of thumb), which are per se applicable, have the parties not agreed otherwise. **They are used by courts in order to fill gaps because they can decide to resort them**.
  —> Example of *default rule* expressly related to the contract of sale included in the special part of contract law: **Italian Codice Civile: Art. 1510**: ***Place of delivery***: *Lacking an agreement or usage to the contrary, a chattel shall be delivered at the place where it was located at the time of its sale, if the party knew of that place, or otherwise at the place where the seller had his domicile or where her/his enterprise was headquartered.* => when parties do not have specified the place of delivery this article can be used by courts in order to define it
  —> In **common law jurisdictions** implied terms are only rarely provided for by statutes and mostly desumed through proper interpretation of the parties 'agreement.

CONTRACT LAW PROVIDED FOR BY CIVIL AND COMMERCIAL CODES (AND ADDITIONAL STATUTES)

We distinguish between ***general*** *part* and ***special part*** because default rules are typically included in the special part of the norms governing contract law:

1) **GENERAL PART**: body of general norms governing the function of the contract (formation, interpretation, negotiations before the conclusion, performance) => so general norms that apply to all contracts.
   —> When a general rule does not apply to some specific contracts?
      - When we talk about some specific contracts that require some specific ***formalities*** (E.g. written form);
      - When we talk about some contracts that, in order to be concluded, need the ***delivery*** of the good (ex. in Italy we have the pegno, which is a real guaranty rooted in roman law and is a contract a contract based on the delivery of the good => a *real contract* => without the delivery of the good, the contract is not concluded).

2) **SPECIAL PART**: additional sets of norms particularly applicable to single and most relevant types of contract => so they refer to specific norms related to specific contracts.
   —> These rules are specifically linked to the contract we are discussing (ex. to understand the specific norms of sale contracts we have read the norms about sale contract), while the norms governing the general apply indifferently to the contract on sale, to the deposit, to the loan;
   —> In common law jurisdictions the classification of special contracts plays a minor role (if any).

THE *CONTRA PROFERENTEM* RULE

Is another rule that governs the interpretation of the contract. It is typically not expressly provided for by the traditional civil code. This rule became relevant in the European private law when it (in particular European contract law) started to be shaped => in fact this rule cannot be found in national codes only, but it is laid down in European Directive 93/13 on Unfair Terms in Consumer Contracts.

This principle means that **if there is uncertainty in a written contract, it must be interpreted against the person who drafted it**.

Why ***contra proferentem***? Because who drafts the contract is basically who conceives and makes the offer => unilateral contract.

This principle is contained in the **art. 5 (2)**: In the case of contracts where all or certain terms offered to the consumer are in writing, these terms must always be drafted in plain, intelligible language. Where there is doubt about the meaning of a term, the interpretation most favorable to the consumer shall prevail.

SUPPLEMENTATION

Supplementation is based on default rules => rules provided by courts. Sometimes the need of filling gaps extends beyond the civil code and here we grasp the importance of the intersection between civil law and constitutional principle because in some cases constitutional principles are used by the courts in order to fill the gaps.

A peculiar case that shows this is the **Englaro Caso**: Eluana Englaro was born on 25 November 1970 and entered a persistent vegetative state on 18 January 1992, due to a car accident. Afterwards, Eluana was nourished by medical staff though a feeding tube, but her father wanted it to put an end to her life. Eluana′s father claimed that, prior to the accident, she had visited a friend laying in a coma and told him that, had she found in the same situation, her will was not to kept artificially alive.
Here the problem is that the court did not have a specific norm authorizing the interaction; the court did not have an instrument to put an end to Eluana's life.

The final decision was elaborated by the **Corte di Cassazione**, I section 16 october 2007, n° 21748: The court may authorize the legal guardian to interrupt medical treatments (hydration and artificial feeding) that keep an incapacitated person lying in a persistent vegetative state artificially alive, provided that:

a) The condition of the vegetative state is ascertained as irreversible, according to recognized scientific parameters;
b) The application reflects the patient's will, drawn from his/her previous statements or by her/his personality, lifestyle or beliefs.

So on 2 February 2009 Eluana was moved to a private nursing home in Udine, Friuli, and feeding was discontinued.

This decision is based on some **articles of the Italian Constitution**:

- **Art. 2**: Duty to solidarity;
- **Art. 13**: Personal liberty is inviolable;
- **Art. 32**: The Republic safeguard s health as a fundamental right of the individual and as a collective interest.

From a legal perspective we see how constitutional principle apply directly into private relation. This represents a **revolution** in the realm of private law because traditionally jurists have always stated that is not possible to apply directly a principle of the Constitution into private law.

SUPPLEMENTATION BY DEFAULT RULES

Default rules (régles supplétives, dispositives Recht, aanvulled recht) offer standard solutions for issues commonly encountered in specific categories of contracts:

=> **Civil law jurisdictions**: in most instances, gaps in the contractual agreement will be filled by referring to legal rules and the precedents established by the courts;

=> **Common law jurisdictions**: gaps in contractual agreements are filled by recourse to ′terms implied by law′.

AD HOC GAP FILLING

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

=> In common law jurisdictions, this method of addressing gaps is accomplished through the use of ***implied- in-fact terms***;

=> Under the civil law jurisdictions, courts will make reference to what is called ′***constructive interpretation*** ′(′interpretation créatrice′; ′ergänzende Vertragsauslegung′). NB. Courts may also resort to the ′*hypothetical will* ′of the parties.

FOCUS ON COMMON LAW JURISDICTIONS

- The classification of special contracts plays a minor role (if any); implied terms are only rarely provided for by statutes and mostly derived through the correct interpretation of the agreement between the parties,
- **Implied terms**:
    1. Obvious, regular and customary terms;
    2. Terms necessary to give the contract ‘’business efficacy’’;
    3. Terms implied at common law;
    4. Terms implied by statute.

CONTRACT DRAFTING IN THE COMMON LAW

- Absence of a principle of «special contracts» and limited role of implied terms at statutes;
- Absence of general principles of good faith (however. things started progressively to change) and co-operation between the contracting parties;
- limited role for the court in case of serious supervening circumstances.

For these reasons:

- Parties tend to draft their agreement in as much detail as possible, to limit the scope of judicial interpretation;
- The content of the bargain shall be set out explicitly as far as possible, in the interests of certainty;
- Parties shall conduct due diligence exercises and allocate risks as far as possible in the contract itself.

FOCUS on *supervening circumstances*: in case of supervening circumstances (=> if after the contract is concluded, some circumstances change) common law courts are not empowered to intervene => so their role is very limited

- **≠ from civil law courts**: they are provided with power in case of supervening circumstances. Why this difference, since usually common law courts are provided with stronger powers ? Basically common law courts are not interested in assessing the adequacy or the economic aspects of the contract; they want to ascertain if the formality are respected for ex., but hey do not want to assess the economic convenience of the contract stipulated by parties. Parties are entirely free to do what they want in a stronger sense: they also bear with the fact that if some factual circumstances change, they may face the eventual supervening circumstances.

Another difference from the civilian jurisdiction: the parties do not regulate all the aspects of the life of the contract so when a gap occurs (something that is not regulated must be regulate) judges tend to opt for the implied terms in order to fill the gaps. The typical approach of the common law jurisdictions is to **mention all the aspects in the contract in order to reduce the scope of judicial interpretation**; this is also connected to the objective approach of the common law jurisdiction (if we mention everything in the contract, based on the contractual document, we can find whatever we are looking for ***in*** the contract)

DRAFTING INTERNATIONAL (COMMERCIAL) CONTRACTS

The need to put all the elements in the contract is also reflected in the international contracts (concluded between parties located in ≠ countries) => realm of ***international contract law***. The tendency of international contract is to follow the common law jurisdictions (so the objective test is highly significant in order to guarantee the certainty).

This need is also reflected in the expression '' **BOILERPLATE CLAUSES**'', which are standardized clauses, generally put at the end of contracts, which govern the way in which they operate (e.g. notice procedures, amendment procedures, interpretation issues, dispute resolution mechanisms, etc.).

Example: If there is any ambiguity in the interpretation of a given sentence, the clause states that the judge or the parties will primarily opt for the literal criteria; then, if this criteria cannot solve the ambiguity we can opt for another criteria => so they typically state all the rules to solve the ambiguities, in order to not give this power to the judge, who will only follow the rules included in these clauses.

Because this clause rest on the rules chosen by the parties, they are referred to as ***autonomous*** => autonomous from the jurisdiction. Because these clauses do not specifically follow the national rules or a specific jurisdiction => they are ***international***: they are detached from the jurisdiction we consider or potentially connected to the contract.

NB. What if a boilerplate clause is in contrast with a mandatory rule ? Of course, the mandatory rule prevails.

16. INVALIDITY OF CONTRACTS

We distinguish between ***voidness*** (or *nullity*) and ***avoidance***. (NB. Nullity and voidness are synonyms).

A contract is **invalid** when it is impacted by a significant flaw, which impairs its legal enforceability.

The general category of invalidity, in the **civilian tradition**, 3 subcategory (so we talk about tripartition):

a. ***Nullity***
b. ***Avoidance***
c. ***Rescission***

The tripartition is less known in common law jurisdictions because the difference between avoidance and rescission is less clear.

NB. We should carefully distinguish the invalidity from the case of termination of the contract (=> risoluzione del contratto).

TYPES OF INVALIDITY

A) ***Nullity* of the contract**: invalidity is meant to protect general/public interests

- e.g., absence of an essential element of the contract (unlawfulness of subject matter, contract contrary to mandatory rules, public order, policy or moral);
- Genetic problem (vizio genetico) => genetic because it refers to the structure, to the very first part of the formation of the contract.
- **French context**: after the reform of the French legislature the reference to *causa* was abolished from the code Napoleon; however we still have this element in Italy. Contract sale of an immovable or donazione are examples of cases in which contracts must be stipulated with a precise form.
- **NB.** There is a problem about the distinction between default rules and mandatory rules => for this reason parties are not entitled to set aside mandatory rules and comes into. The general distinction between public and private interest may be relevant in relation with the discussion about invalidity of the contract because there is a general interest of the authority for the contract to be concluded in a given form; the rules on the form cannot be set aside because there is a public interest behind this requirement.

B) ***Avoidance* of the contract**: invalidity is meant to protect private interests —> e.g., legal incapacity, incapacity de facto, defects of consent.

EFFECTS OF NULLITY

If the contract is null it is never capable of producing any legal effect => **null contracts do not produce any legal effect**.

NB. If in the light of the contract that turn out to be null and void some performance was given, what was given must be given back => **'*restitutionary*' effect** of the contract.

EFFECT OF AVOIDANCE

In case of avoidance the contract is invalid, but it is capable of producing its legal effects till the moment when the interested parties present a ***claim*** in court in order to avoid it. Why? Because this reflects the private interests of the parties; they should be interested in raising the claim because avoidance is aimed at protecting private interests.

What happens after the court recognize this avoidance? The effects of the contract are treated as **if they have never been produced**, so ***restitution*** comes into play again.

VALIDATION OF AN INVALID CONTRACT

In the **civilian tradition** the contracts that turn out to be null and void cannot be validated. The art. 1424 of the Italian civil code: it is possible to have the "***conversione** del contratto nullo*'' => it is basically transformed in another contract and this operation is done on the **effects** of the contract.

The possibility to validate an invalid contract is feasible only **with regard to avoidable contracts** and can be validate by the party interested in doing so (potentially the injured party). Why this party has this power ? Because avoidance is aimed at protecting the victim/ the injured party.

- While, because of the fact that nullity is aimed at protecting general/public interests, null contracts cannot be validated by anyone.

VOIDNESS AND AVODAINCE

In the general category of invalidity we may distinguish some subcategories or ground of voidness or nullity:

5. **DEFECTIVENESS OF THE AGREEMENT BETWEEN THE PARTIES:**
   - It is merely apparent, lacking the parties ′actual consent;
   - It does not meet the formality requirement, if any (want of form);
   - Its subject-matter does not exist, or is not possible.
6. **ILLEGALITY AND IMMORALITY** (illicit contracts):
   - Infringement of a mandatory rule, which prohibits both parties from entering into a contract;
   - The agreement contravenes public policy (*ordre publique*), including morality (*contra bonos mores*).

ILLEGAL OR IMMORAL CONTRACTS

Illegality or immorality is strictly intertwined with the breach of a mandatory rule: the judge's ruling regarding the consequences of violating the statutory rule ′depends on considerations of public policy in the light of the mischief which the statute is designed to prevent, its language, scope and purpose, the consequences to the innocent party and any other relevant consideration —> Phoenix General Insurance Co. of Greece S.A. v. Administratia Asigurarilor de Stat [1987] 2 All ER 152.

LACK OR IMPOSSIBILITY OF THE SUBJECT-MATTER

Difference between common law and civil law jurisdictions:

- **In civil law jurisdictions** if the performance of the contract is not feasible civil law jurisdiction considers the contracts not enforceable;
- **In common law tradition** these contracts are somehow enforced => if a party has undertaken to do something which is physically impossible, there is a sanction which is compensation for damages: the party is bound to pay damages for breach of contract => the compensation is rooted in the contract that was not followed.

The **French code Napoleon** approach is reflected in the Italian codice civile and similarities exist with the German BGB: **Art. 1163 (as amended in 2016):**

(1) An obligation has as its subject- matter a present or future act of performance.

(2) The latter must be possible and determined or capable of being determined.

NB. The subject-matter could also be predetermined in advance.

To better understand the common law approach here we have an example from Australia:

Mc Rae v Commonwealth Disposals Commission [1951] HCA 79

The owner of a tanker wrecked on the ′Jourmand Reef′, near Samarai, and containing oil, sold it. The buyers went to Samarai and found that there was no such place as a ′Jourmand Reef′. Later on, it became clear that the seller incurred in a ′reckless and irresponsible ′mistake, in thinking that it had a tanker to sell (it had relied on mere gossip). Nonetheless, the High Court of Australia sentenced the seller to compensate damages for breach of contract.

This is a case of impossibility of the subject-matter because there was nothing to sell => the contract could not be performed. It clearly illustrates the distinction between common law and civil law. The final result in civil law jurisdiction would be **nullity** of the contract; while a common law court reaches a different conclusion. Here the problem is not the nullity the contract, but the fact that the party, who bound himself to do something that was not possible to do, **must compensate**.

Sometimes we have ***hybridation***; the view of common law is rooted in civil law jurisdiction as well => this is the case of Germany. The view of the common law is taking root in civil law jurisdictions as well. Particularly,

it has been adopted by the German BGB after its reform of 2001-2002. The rules governing the legal obligation in the BGB were reformed. The modern rules: **§ 311a.** ***Hurdle to perform at the time the contract is concluded:***

(1) A contract is not devoided of its effects for the fact that one of the parties' performances is impossible already at the time when the contract has been concluded.
(2) The other party can claim (expectation) damages or reimbursement of expenses […].

This is particularly significant because it marks an ***exception*** of the civilian tradition: the German case is exceptional compared to the civilian tradition because in civil law countries typically the consequence is nullity and voidness. Here, in case of impossibility of the subject-matter, the consequence is the compensation for damages.

GENERAL GROUND OF AVOIDANCE

General grounds of avoidance may be categorized as follows:

1) **INCAPACITY OF ONE OF THE CONTRACTING PARTIES** => not in the physical or mental conditions to stipulate a contract
2) **VITIATING FACTORS** (Willensmängel, vices du consentement, vizi del consenso):
   - Mistake (Irrtum, erreur, errore);
   - Deceit or fraud (arglistige Täuschung, dol, dolo);
   - duress (Drohung, violence, violenza).

MISTAKE

We have to distinguish:

a) **Civil law jurisdictions**: tend to favor an ′intention approach ′to contract, which leaves more room for its avoidance based on a vitiating factor, particularly a mistake.
   —> The mistaken party can claim avoidance of contract in case:
   i) The mistake is material (or essential): it must not be based on ancillary terms, but concern a main point of the contract (objective element because directly linked to the contract);
   ii) The other party knew of the mistake, or could have known of it, had she/he acted in good faith (subjective element).

b) **Common law jurisdictions**: tend to follow an ′expression approach ′to contract, which immunizes it from ′unilateral ′mistakes incurred by each party, unless they have been caused by a misrepresentation (so misrepresentation is an exception).

A unilateral mistake does not affect the validity of the contract, however fundamental to the mistaken party′s decision to enter into the contract. An equitable remedy of avoidance (rescission) of the contract is granted in case the mistake was created by a misrepresentation made by the other party, or her/his agent, or a third party whose misrepresentation the other party had knowledge of.
=> There is less space for mistakes.
=> This assumption is not true in civil law tradition.

NB. Avoidance ≠ rescission: in common law jurisdiction avoidance and rescission are treated similarly => they do not formally recognize these 3 categories in a separate way.

The main difference between the 2 systems is the fact that the approach of common law is ***narrower*** => there are less possibilities to resort to avoidance or mistake in the ground of avoidance.

NOTION OF MISREPRESENTATION: SPICE GIRLS LTD V APRILIA WOLRD SERVICE BV

- **March 4, 1998**: Heads of agreement were reached between SGL and Aprilia for the latter to sponsor the Spice Girls tour of Europe and, on a more limited basis, the tour of the United States.

- **May 6, 1998**: Aprilia agreed to pay or provide a sponsorship fee, guaranteed royalty fee and a royalty on each Spice Sonic scooter sold. Promotional material featuring the Spice Girls and the scooters was approved by SGL.
- **September 1998**: Miss Alliwell told the others that she wanted to leave the group => so AWS informed SGL that it did not consider the departure of Miss Halliwell to constitute a breach of contract. Nevertheless, AWS refused to make any further payment
- Miss Alliwell disclosed that on both **3rd and 9th March 1998** she had informed the other four members of the Spice Girls that she intended to leave => so they knew in advanced that she would have abandoned the group;
- A fax of **30th March 1998** contained express representations by SGL as to the commitment of each of the Spice Girls to the future implementation of all the terms of the heads of agreement as subsequently incorporated into the contract;
- The Spice Girls participated in a commercial shoot on **4th May 1998**, which gave rise to a continuing representation by conduct that Aprilia had no reasonable ground to believe that any of the Spice Girls had an existing declared intention to leave the group.
- **May 6, 1998**: The final Agreement has been concluded.

NB. There is a clear distinction between the final agreement and the agreement reached in march => because Aprilia was not informed => misrepresentation took place.

In order to have misrepresentation it is sufficient to have a material inducement in this conduct => this was the case: because Aprilia entered into the contract based on the facto circumstances that all members of the group would have participated in the agreement itself.

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

1. **".. If A with a view to inducing B to enter into a contract makes a representation as to a material fact, then if at a later date and before the contract is actually entered into, owing to a change of circumstances, the representation then made would to the knowledge of A be untrue and B subsequently enters into the contract in ignorance of that change of circumstances and relying upon that representation, A cannot hold B to the bargain"**
   Romer LJ in With v O'Flanagan [1936]
2. **".. inducement and reliance may be inferred from the purpose of the representor, the nature of the statement and the fact that the contract was entered into"**

It is sufficient that the misrepresentation is a material inducement.
"...I think that if it is proved that the defendants with a view to induce the plaintiff to enter into a contract made a statement to the plaintiff of such a nature as would be likely to induce a person to enter into a contract, it is a fair inference of fact that he was induced to do so by the statement..." **Smith v Chadwick (1884)**

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DECEIT (FRAUD)

A ***deceit*** (or ***fraud***) occurs when one of the contracting parties is intentionally induced into a mistake as to the prospective contract. We distinguish between:

a) **Fraudulent misrepresentation**: both in civil and common law jurisdictions;
b) **Silence (non-disclosure of an information)**: solely in (most) civil law jurisdictions (and as a recent development). This is a particular kind of silence because it is connected to a lack of disclosure information; so one of the contracting parties decides to not reveal essential information that induce the other party to conclude a given contract (which bases his decision on the basis of the absence of information).

When deceit may justifies avoidance?

If correctly informed, the mistaken party would not have concluded the contract (***dolus causam dans***) => basically the mistaken party would not have concluded the contract if he has been correctly informed => **claim for avoidance**.

—> Contract is not avoidable in case of laudatory puffery that no reasonable man would have taken literally (***dolus bonus***); in Italia parliamo di bonaria millantazione.

—> Avoidance is granted when the fraud is committed by the other contracting party (or her/his agent). If it is committed by a third party, avoidance is granted when the **other contracting party knew** or must have known it.

BUT, if correctly informed, the mistaken party would have concluded the contract, although on better terms (***dolus incidens***) => in this case we talk about **claim for damages**.

—> Damages are to be assessed along the better terms which the mistaken party would have bargained, if correctly informed (*expectation damages*).

DURESS

Duress consists in threats of a harm; to a would-be party′s or her/his family′s life and limb, honour or property or to a would-be party′s economic interests (economic duress). This behavior is duress when **it induces** that would-be party **to enter into a contract** (in order to avert the danger thus faced).

Does the legitimate threat of something that one is entitled to do amount to duress? When duress justifies a claim for avoidance ?

Approach of civilian tradition: example of the **French Code Napoleon**: according to **art. 1141** (as emended in 2016), a threat of legal action does not constitute duress, except where the legal process is deflected from its own purpose or where it is invoked or exercised in order to obtain manifestly excessive advantage.

In most civil law jurisdictions, avoidance is granted not only when the threats are made by the other contracting party (or her/his agent), but also when they are made by a **third party**, even if the other contracting party was in good faith.

NB. ***Genetic invalidity*** (included in the formation of the contract;; ex. lack of agreement) **VS** ***functional invalidity*** (it refers to problems occurring after the conclusion of the contract).

17. BREACH and TERMINATION OF the CONTRACT

In Italy it's the case of ***inadempimento***.

The distinction is between:

1) ***Anticipatory breach of contract***: one party announces its intention to not fulfill the contract before the performance becomes due.
2) ***Actual breach of contract***: it happens either on the scheduled performance date or while the performance is in progress.

Remedies and conditions for remedies:

a) **SPECIFIC PERFORMANCE**: in the event of non- performance by a party, a court of law may compel them to fulfill their obligation;
b) **TERMINATION OF CONTRACT** (risoluzione del contratto) => the non-breaching party can request contract termination, decline to fulfill its obligations, or seek a refund of any payments made;
c) **DAMAGES** (the damages must be proved by the injured party) => a monetary compensation that can restore the injured party to the same level of benefit or utility as if the contract had been executed correctly.
d)

Breach of contract is related to the correct or incorrect performance fo the contract; so here we refer to the third stage of the contract (trattative, formazione del contratto ed esecuzione del contratto).

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

➡ **Moral approach to contract law**: promises must be kept (***pacta sunt servanda***). In the event of non-fulfillment, the legal system initially enforces the debtor's obligation as a corrective measure. It is called ***moral*** approach because there is this emphasis on the need.

➡ **Economic approach to contract law**: rather than carrying out the performance, the debtor may choose to compensate the other party to restore their financial position as if the contract had been correctly executed

CIVIL LAW APPROACH

Enforcing specific performance is a typical remedy. Only in rare cases it is prohibited. The aim of civil law jurisdictions is that to preserve the agreement made by the contracting parties => need to respect the contract that has been stipulated.

Cases in which the specific performance is not feasible:

1) Some performance may become impossible and, for this reason, the only chance of the court is that to opt for other remedies, because the performance is not feasible => we talk about ***impossibility to perform*** (regardless of whether it is caused by the debtor's fault or not).
2) ***Contracts involving personal services***: not only could specific performance infringe upon the debtor's personal freedom, but if compelled, the debtor might not perform to the best of their capabilities.
3) ***Disproportionate costs***: performance remains feasible but would result in the debtor incurring excessive efforts or costs (ex. art. 1221 Code Civil).

COMMON LAW APPROACH

Common law jurisdictions typically are not interested in preserving the agreement; so, the power of the parties is weaker.
The general remedy is providing **monetary compensation for damages**, with specific performance being a rare occurrence => the important is to restore the financial position of the injured party.

This approach is embraced by English common law, US common law, Canadian common law (exception of Quebec), and Australian common law.

It is an example of the US common law: "The only universal consequence of a legally binding promise is that the law makes the promisor pay damages if the promised act does not come to pass. In every case it leaves him free to break his contract if he chooses" - Justice Oliver Wendell Holmes jr. - 1881 => common law jurisdictions fully recognize ***efficient breach of contract***: a party should have the option to terminate the contract and provide compensation for damages if it proves to be a more economically efficient choice than fulfilling the contract; so, paradoxically the party can freely decide not to fulfill the contract when the party itself decides that is not economically convenient to perform the contract.

The important element, when compensation is granted, is that the monetary sum set by the court should be capable of fulling restoring the financial position of the injured party; for this reason, courts may issue a **specific performance order** when the innocent party's claim for damages fails to adequately address its interests. SO, when compensation does not fully restore that position, other remedies can be resorted to by the court to guarantee that the damages suffered by the injured party are restored.

N.B.: Damages are considered "***inadequate***" when the debtor pledged to provide a distinctive asset, one that is exceptionally rare or possesses sentimental value that is challenging to quantify in monetary terms.

Art. 13, DIR. 2019/771/UE: «In the event of a lack of conformity, the consumer shall be entitled to have the goods brought into conformity or to receive a proportionate *reduction* in the price, or to *terminate* the contract, under the conditions set out in this Article» —> case of a good which is not conform to the standard qualities of the good sold or traded in the market.

Art. 45 CISG (Vienna convention):

(1) If the seller fails to perform any of his obligations under the contract or this Convention, the buyer may:
    (a) exercise the rights provided in articles 46 to 52.
    (b) claim damages as provided in articles 74 to 77.
(2) The buyer is not deprived of any right he may have to claim damages by exercising his right to other remedies.

TERMINATION

The innocent party might opt for contract termination. If this remedy is permissible under the law, neither party is obligated to perform, **and if performance has already occurred, it must be returned by the recipient**.

In the civilian tradition (with one exception), typically, the claim for termination, in order to be justified, must be related to a breach of contract; when the breach of contract is not material, is not crucial, the claim for termination will be dismissed by the court => reason why we talk about '' **fundamental or material breach of contract**''.

—> The exception is the German legal system, which does not mention this tradition: the standard principle is that if the debtor didn't carry out the performance as per the contract, the injured party can terminate the contract only when it meets certain conditions. The innocent party "has fixed, to no avail, a reasonable period for performance or cur" => ***nachfrist model***.

The assessment of the material character of the breach is **determined by the court**, which ascertains based on the facto circumstances, if the breach is highly relevant for the life of the contract; if it is a major or minor breach.

Common law approach to termination

In English common law the distinction between the fundamental breach and not fundamental breach refers to the distinction between ***warranties&conditions***, which are typically included in the contract. In some cases, *conditions* are typically considered the major terms in the contract; so, when violated, the victim has the right to terminate or to ask for termination because a major term of the contract is infringed. This is not an option when *warranties* are infringed because they are minor clauses/terms of the contract. To sum up, we can make this distinction:

a) **conditions** => major terms of the contract: when violated, the innocent party has the right to terminate the contract (and seek damages too).
b) **warranties** => minor terms of the contract: if violated, the innocent party is entitled to seek damages but is not allowed to terminate the contract.
c) **innominate (intermediate) terms** => the criteria are not based on whether the terms are considered major or minor. Instead, if the breach of those terms results in the other party being completely deprived of the contract's benefits, termination is permitted; otherwise, only damages can be sought.

Agreed rights of termination

Termination can happen regardless of a significant breach in certain situations, related to a specific agreement made by the parties. It is possible to tak about:

A) **Explicit dissolution clause**: the parties entering a contract can expressly stipulate that the contract will be terminated if a particular obligation is not fulfilled. This provision enables the contractual parties to assign significant importance (regarding the termination of the contract) to an obligation, which otherwise might be considered of minor significance => *ratio*: the parties do not want to bear the risk that a given potential breach will not be considered material => to avoid risks.
B) **Time essential for one of the parties**: the agreement is terminated if the agreed-upon time for performance has been expressly defined as essential for the benefit of the other party.

18. CLAIM FOR DAMAGES

When is a contract breached?

In case of:

(i) non-performance: the performance is not rendered in full (ex. the car must be delivered by dec 20; the seller decides to not deliver the car at all)
(ii) defective performance (ex. the car has specific characteristics; the seller delivers the car with defects)
(iii) delay in performance (I bought the car, the car must be delivered by the December 20, but the seller delivers the car on December 28) => we should ascertain if this delay is fundamental or not: if it is fundamental?

P.S.: If we accept that breach should be intentional to have damages, what if the breach is unintentional? The important aspect is not what refers to the intention, but the fact that the breach can be attribute to the behavior of one contracting parties; in addition to this, let's analyze an example.

—> Example: The car must be delivered by dec 20; however, it is delivered on dec 21. The buyer brings the case before the court: which are the consequences? Is this a case of compensation? The court will, firstly establish whether or not there was breach of contract => this is a factual condition: something that must ascertained by the court base on the circumstances of the case. If the court decides that no damages were caused there is no need for compensation. If the loss occurs, then there is ground for compensation.

The creditor might be able to seek compensation for damages. The injured party should be restored to a financial position as close as possible to what it would have been if the contract had been executed correctly => this is the so-called **POSITIVE INTEREST**.

CLAIM FOR DAMAGES

A) CIVIL LAW APPROACH:

- **i.** The primary remedy chosen by civil law courts is ***specific performance*** that depends on the concrete possibility to execute the contract; if it is not possible, they will opt for another remedy (for ex. *termination* could be a possibility).
- **ii.** If the debtor is capable and willing to rectify the breach, there should be **no contract termination or a demand for damages instead of performance**.
- **iii.** Typically, the standard procedure involves the injured party setting a reasonable timeframe for the debtor to either fulfill the contract or rectify a defective performance.

B) COMMON LAW APPROACH:

- **i.** The ***monetary sum***, typically, is the first remedy when there is a breach of contract.
- **ii.** The mere occurrence of nonperformance or breach is enough on its own to initiate a claim for compensation.
- **iii.** The debtor will be held responsible without exception if the promised outcome is not achieved.

When we examine the possibility to avoid damages, or any loss suffered by parties we may take in consideration the French distinction between:

1) ***Obligations de moyens*** (obbligazioni di mezzo): revolves around the idea that the result is not the final parameter is examined by the court in order to say " we should avoid damages " => the debtor simply committed to taking all the required actions that a rational individual facing similar circumstances would take in order to accomplish their objective. The injured party needs to demonstrate that the other party didn't exercise the level of care that a reasonable person in a similar situation would have taken
   - Typical example: lawyer who defends a given party has no obligation to achieve the final result, so to have success.
2) ***Obligation de résultat*** (obbligazioni di risultato): they bind the party to reach a given result: if the final result is not correctly fulfilled, that will be a breach of contract and the debtor will be responsible to pay damages with only one exception => The debtor will be responsible for paying damages without exception, unless they can prove that execution was prevented by a force majeure event:

   ➡ The exception is the so called '' ***force majeure***'': circumstances outside the debtor′s control, which were not reasonably foreseeable when the contract was concluded, and unavoidable by reasonable measures.

COMMON LAW APPROACH

Two main points:

1) The **mere occurrence of nonperformance or breach** is enough on its own to initiate a claim for compensation. So, in the ordinary hypothesis the lack of performance is enough to initiate a claim for compensation => ≠ from the civilian tradition; why? Because in the latter typically we need the event, and emphasis is put on the consequences of the loss.

➡ **PS.** Last year there was a judgement of the Italian supreme court (Corte **di Cassazione a sez. un.**) about this topic; this judgement basically confirmed the majority point of view.
N.B.: there was a debate among scholars about art. 2023: some of them argued that, based on this article, the only element that is needed is the event to award damages; but this is a minority view. The traditional point of view was that the loss must be suffered to compensate.

2) The debtor will be held responsible without exception if the promised outcome is not achieved

Doctrine of **FRUSTRATION**: a contract comes to an end under the following circumstances:

(i) The debtor is unable to perform due to factors beyond their control, rendering it impossible.
(ii) If unforeseen circumstances arise that significantly increase the difficulty of performance and neither party assumed the associated risks.

CIVIL LAW APPROACH

To award compensation in the civilian tradition the breach should be ***attributable*** or ***imputable*** to one of the contracting parties; nevertheless, there are exception to this principle.

Typically, compensation is based on 2 components:

1) the actual damage or loss suffered by one of the contracting parties.
2) one of the contracting parties has been denied => the victim did not receive what he/she should have obtained if the contract would have been correctly concluded.

General principle: ***complete reimbursement*** for the damages resulting from a contract breach.

When one party experiences a loss due to a contract breach, she/he should, to the extent that monetary compensation can accomplish it, be restored to the same financial position, in terms of damages, as if the contract had been fulfilled.

➡ When one party experiences a loss due to a contract breach, she/he should, to the extent that monetary compensation can accomplish it, be restored to the same financial position, in terms of damages, as if the contract had been fulfilled => the so-called **expectation damages**.

FORESEEABILITY

Another condition that must be met for awarding compensation: the loss considered by the courts must be ***foreseeable***, so predictable in advance, or should be within the contemplation of the contract.

Two types of injuries are deemed to be foreseeable:

a) Injuries which will flow naturally from the breach in the ordinary course of events.
b) Injuries which arise from the aggrieved party special needs or circumstances of which the other contracting party has knowledge or reason to know.

N.B.: Of course, in many cases foreseeability should be present, but we can also have a potential foreseeability, so there is a reasonable expectation of the event => foreseeability does not necessitate actual foresight but only a reasonable expectation of the event or outcome.

DUTY TO MITIGATE DAMAGES

Foreseeability is a legal condition that must be met to avoid damages, however there is also a complementary rule that must be considered => the so-called ***duty to mitigate damages***. It is a cardinal rule of contract damages is that the aggrieved party cannot recover those losses which the party could have avoided by **reasonable effort** and without undue expense by virtue of opportunities that the party would not have had but for the breach.

➡ **N.B.:**The injured party takes the measure to avoid the damage; of course this must be not disproportionate, this must be consistent with the life of the contract. This duty must be observed by the injured party in any case, even if the breach takes place. If this duty is not observed, then the victim itself will not be entitled to be compensated. If the victim observes this duty, the victim could be compensated.

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

➡ **Consequences of failure to comply with the duty**: the gains that the aggrieved party could have made by reasonable effort are deducted from the amount that it could otherwise recover.

➡ When is the victim compensated?

1) When the duty is observed.
2) When the damage occurred.

➡ What is meant by ***reasonable effort***?

An example: X enters a contract with Y, a licensed nurse, under the terms of which Y will live with and take care of X′s aged father for a three-month period while X goes on vacation. Y is to be paid 4.000 Euro for his services. X repudiates the contract before Y performs any services or is paid any money. To mitigate damages, Y places an advertisement in two local newspapers indicating that his private nursing services are available. No one responds to his ad; and consequently, Y is unemployed for the entire three-month period. Y sues for 4.000 Euro plus the cost of advertisements. X argues that Y did not fulfill his duty to mitigate damages. Y may recover the entire amount.

N.B.: Only a reasonable effort to mitigate damages is required. The doctrine does not require that his efforts be successful.

NB. 2. The loss is about the 4000€ and we do not know if other interests come into play.

1) Is this breach material?
2) Is the duty to mitigate respected?

Apparently, there is a breach of contract because X repudiates the contract before Y execute the contract itself; so, performance and counter performance were not rendered by the two parties. There is a claim for compensation brought by Y because he wants to be compensated.

There is a reasonable effort of Y because he apparently tries to search for other job opportunities, but the behavior of Y was based on the needs to look for other job opportunity => potential intention to mitigate the loss and to avoid damages.

If we accept the idea that the attempt of Y is reasonable, so consisting with the general doctrine of the duty to mitigate, then Y is entitled to be compensated.

N.B.: Of course, this effort might not be successful, but why can be considered legitimate to compensation because she/he made reasonable efforts.

APPROACH OF DFCR

III. – 3:703: Foreseeability:

The debtor in an obligation which arises from a contract or other juridical act is liable only for loss which the debtor foresaw or could reasonably be expected to have foreseen at the time when the obligation was incurred as a likely result of the non-performance, unless the non-performance was intentional, reckless or grossly negligent.

III. – 3:705: Reduction of loss:

1) The debtor is not liable for loss suffered by the creditor to the extent that the creditor could have reduced the loss by taking reasonable steps.
2) The creditor is entitled to recover any expenses reasonably incurred in attempting to reduce the loss.

Which is the difference between common law and civil law?

If this predetermination is truly or evident should not be excessive compared to the actual damage; if there is a disproportion this clause will be classified.

LIQUIDATED DAMAGES CLAUSES

A clause which pre-estimates the amount of money what will be paid by one party in case a given breach occurs => parties to a contract agree, as one of the terms of their agreement, that, in the event of breach, the culpable party should pay a specified amount to the injured party.

This approach is based on an ex-ante approach to compensation, while the standard approach is based on an ex-post approach because the monetary sum is decided by the court after the breaching event, while in this case the monetary sum is made in advance by the parties.

- ➡ In this respect we see the difference between common law and civil law: if this predetermination is evidently excessive this clause will turn out to be a penalty clause; penalty clause that is clearly excessive is not enforceable in **common law jurisdictions**. So, it is true that contracting parties are free to do what they want, but in this case this predetermination should not be excessive compared to the actual damage.

Because the actual damages which will result from the potential breach are often unknowable at the time of contracting, i.d. represent the parties pre-estimate of the extent of probable damages. Often this pre-estimate will turn out to be an ***inaccurate*** forecast of the harm caused by the breach.

The fact that the parties decide to put this clause **bears 2 risks**:

1) the breach results in an amount of money greater than that determined in the clause.
2) the actual breach taking place is lower than the amount of money set by the clause.

NB. The most significant ***benefit*** is the fact that the parties will not need to bring the case before the court asking, in other words, to the court to make this assessment.

So, the **functions** of this clause are:

1. Convenient method of determining the amount to be paid in the event of breach (good faith pre-estimate of the probable actual damages)
2. Coercing a party to perform its obligation (liquidated sum will generally provide for a liquidated damage which is more than the probable actual damages)
3. Diminish the amount of loss to be borne by a party in breach (the sum will be less than the probable number of damages)

Common law approach to this clause

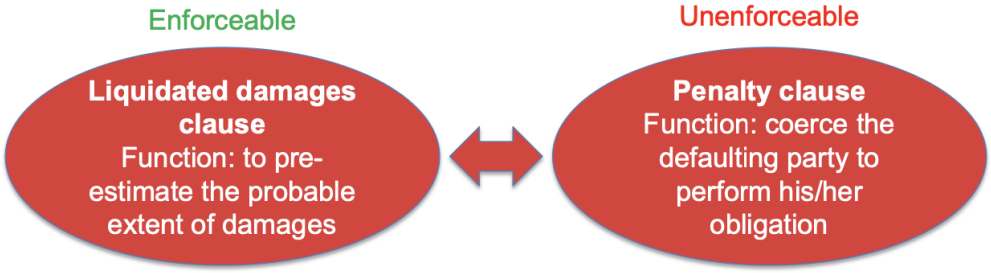
The emphasis is put on the need that this pre-estimation of the future damage, that potentially may occur, should be proportionate to the damage that takes place and in the light of the contract stipulated by parties.

If there is no proportion a common court will state that this clause non proportionate is not enforceable => there is a clear distinction between clauses that are enforceable (defined as ***liquidated damages clauses***) and clauses that prove not enforceable (defined as ***penalty clauses***), that clearly manifest disproportion.
NB. What is relevant is not the label; what is relevant is whether there is proportion or not.

Functions of these clauses:

a) liquidated damages clause => **to pre- estimate the probable extent of damages.**
b) penalty clause => **to coerce the defaulting party to perform his/her obligation.**

NB. They are labels that the court affixes **after** it has decided as to whether the stipulated sum represents a good-faith pre-estimate of potential damages



So, to recap:

(i) Liquidated damages clauses are enforceable because their purpose is to estimate in advance the likely extent of damages.

(ii) Penalty clauses are not enforceable, and their primary purpose is to pressure the defaulting party into fulfilling their obligation.

Civil law approach to this clause

1) Clauses that do not involve the pre-estimation of damages are legally enforceable.
2) The previous distinction in civilian jurisdiction is not always clear; additionally in these jurisdictions there is also the possibility for the judge to **reduce the amount of money** set in the clause if it is proved to be excessive or in cases of partial fulfillment of the contractual obligation.
3) Civil law jurisdictions provide only for one type of clause which is called in different ways: *clause pénale*, ***clausola penale***, *Vertragsstrafe*.

THE DUNLOP TEST

In common law jurisdictions they felt the need to search a criterion for distinguishing; this was set by the court and one of this is ***the Dunlop test***.

What is relevant is the concrete assessment on the amount of money; if and only if the monetary sum proves proportionate, the clause will be enforceable.

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

Dunlop v New Garage (1915)

Common law courts elaborated some principles to determine the proportionality of the amount of money typically set by the clauses. Some of the principles that may assist the court in its task are:

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

3) There is a presumption that a clause is penal when a single lump sum is payable on the occurrence of one or more or all several events, the events occasioning varying degrees of loss => it is the so-called "pagamento in un'unica soluzione".
4) If the consequences of breach are difficult to estimate in financial terms this, far from being an to the validity of the clause, will point in favor of upholding it, the courts tasking the view that it is better for the parties themselves to estimate the damages that will result.

U.S. v BETHLEHEM STEEL CO. (1907)

The government contracted with Manufacturer to supply gun carriages. Haste was extremely important to the government, and it had therefore passed up lower bids on the gun carriages because Manufacturer had promised the fastest delivery. Government and Manufacturer agreed that for each day a given delivery of the gun carriages was delayed, a sum of $35 would be imposed on Manufacturer, payable to Government. This sum was reached by a computation based on the average difference in price between Manufacturer and cheaper, but slower, suppliers. Manufacturer delayed the delivery of some of the gun carriages.

- *Is the clause enforceable?* **Yes**, the aim of the clause was to compensate the government, by means of a reasonable formula (losses sustained: higher price for a speedy delivery).
- *Is this clause a liquidated damages clause or a penalty clause?* **It was a liquidated damages clause** => was deemed to be enforceable. And it was a tool for compensating the party based on the delay.

19. FUNCTIONS OF TORT LAW, GROUNDS FOR LIABILITY

WHAT IS TORT LAW?

Why is tort relevant in this course and why do we examine tort law after contract law? Of course they are part of private law, but from a technical point of view they are **sources of obligations**.

WHAT IS TORT LAW?

The area covered by tort law covers situations where a victim suffers a loss – relevant in economic terms – and wants someone else to compensate for that loss. Tort is a source of obligations, as well as contract (because there is an agreement between two parties).

—> P.S.: "***Contratto con obbligazioni del solo proponent"*** (contracts that set obligations only for one of the parties) => typical contract from which we have obligation only for one party (ex. suretyship).

When we analyze tort law, we recognize the existence of some obligations without contract => typical example: phenomenal event or a natural event that is ground to obligation (ex. car accident).

- In essence, tort law consists of **remedies** granted to the injured persons by those who have caused the harm.
- In basic private law terms, "***torts***" are considered among the sources of legal obligations (see, for example, Art. 1173 of the Italian Civil Code: where they are numbered together with contracts and any other act or fact provided for by law).
- The fundamental content of the relationship between the "***tortfeasor***" (wrongdoer) and the "***injured party***" (victim) is the duty to provide relief for the harm suffered by the latter (by paying a pecuniary sum or by materially restoring the status quo.

Common pattern:

- Before the damage occurs, the parties are not linked by any formal legal relationship (e.g. of a contractual nature).
- **Tort liability** is commonly referred to as non-contractual liability, which distinguishes it from liability arising from non-performance (breach) of previously defined contractual duties/obligations.
  —> **NB.** We talk about ***non contractual liability*** because we have a given consequence because a given event or a given tort occurs.
- An act by one person linked to a harm suffered by another person.

To analyze the ratio behind tort law we may think about **four main questions**:

A) *Why shift the costs of harm from one individual to another?* => function(s) of tort law.
B) *Under what conditions?* => the elements of liability in tort.
C) *What kind of ʻharm ʼcan be compensated?* => the scope of tort law (this question regards economic and non-economic loss).
D) *How to get compensation?* => remedies.

THE FUNCTIONS OF TORT LAW

To regulate this sector of private law the legislature and the philosophical inspiration of the legislature typically face the problems of the function of tort law: why do we want to grant remedies for the victim? Which is the ratio?

1. **COMPENSATION** => ***idea of distributive justice***: the primary aim is not to sanction the injured, but to compensate the victim => the focus is on the legal position of the victim.
2. **SANCTION / REACTION OF PUBLIC AUTHORITIES** => ***retributive justice***: the ratio is about the sanction.
3. **DETERRENCE / PREVENTION OF FUTURE DAMAGES** => ***idea of efficiency***: the function of tort law would be to warren individuals; to prevent individual from doing some actions (an idea elaborated by Guido calabresi).

FIRST FUNCTION: COMPENSATION

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

➡ We talk about an ex-post approach because these rules are destined to be applied after the tort takes place.

We need to provide a remedy for the victim because the victim has unjustly suffered a loss that must be compensated —> example: if the actual damage is 20, the only possibility is to pay 20; the emphasis is put on the victim => the only chance.

SECOND FUNCTION: SANCTION

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

➡ If we want to discover similarities and differences between the two approaches, we should recognize that both are provided with this ex-post emphasis.

Possible consequences from the embracement of this approach: it is possible that the sanction proves greater than the actual loss suffered by the actual victim. The sanction would be economically more significant than the actual damage suffered by the victim (ex. actual damage is 20€; with a retributive justice approach the injurer may be condemned to pay more than 20).

THIRD FUNCTION: DETERRENCE

The main difference between the previous functions and this one is that the latter is based on an "***ex ante approach***'' because it is aimed at preventing individual from adopting given behaviors.

This theory was elaborated by G. Calabresi, professor at Yale University => The Costs of Accidents 1970.

It is possible to think of legal rules as instruments to guide the behavior of individuals. By imposing liability, tort law seeks to influence the conduct of rational agents (both potential tortfeasors and victims) => **it is efficient for the overall system to prevent the occurrence of accidents (and associated damages) by imposing the expected cost of damage on potential tortfeasors** (ex-ante approach).

The debate on the rationale of tort law is not merely theoretical, but it is intimately linked to the fundamental regulatory choices that each legal system implements to concretely define the scope and conditions for the assessment of liability and related duties —> e.g. subjective elements of tort liability.

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

IS ANY KIND OF INTEREST WORTHY OF PROTECTION BY THE LAW OF TORTS?

A) SPECIFIC INTERESTS —> Typically **BGB** adopts very important criteria; in cases that may give ground to liability are listed => there is a list encompassing the cases that may justify claim for compensation => the liability for negligence is confined to the violation of protected interests explicitly listed in **§ 823 (1) BGB**.

- ➡ Purely financial interests and intangible personality interests such as honor, dignity, and privacy may only be safeguarded under the provisions of § 823 (2) and § 826 of the German BGB.
- ➡ NB. This is not true in **Italy** in which this list is absent. We have the so-called General Clause provided for by **art. 2043 of cc**.

B) GENERAL CLAUSE —> The **French Code Civil** mandates the presence of damage (harm) but does not necessitate the violation of a protected interest. Consequently, it appears to lack a foundation for distinguishing between economic losses resulting from the violation of bodily integrity and tangible property on one side, and purely economic losses on the other

* According to the **English common law** perspective, an individual actor is not required to prevent every form of loss experienced by third parties. Instead, the obligation is to refrain from causing specific types of harm, thereby incorporating the question of the extent of protection within the concept of the duty to take care.

GROUNDS FOR LIABILITY

a) ***Fault***: cases in which a tortfeasor has acted wrongfully and must compensate for the damage that resulted from the wrongful behavior (liability for one′s own fault).
b) ***Vicarious liability***: cases in which someone is liable for the damage that was wrongfully caused by another tortfeasor (liability for a tortfeasor′s fault)
c) ***Strict liability***: cases in which a tortfeasor is liable for the damage caused by an animal or by an object for which the tortfeasor is responsible (strict liability).

- Strict liability is basically defined as a liability without fault, without the wrongful behavior of the injurer => the damage is caused not because the tortfeasor was in fault or acted negligently, but the damage was caused by another source.
- For a long period of time strict liability was deemed to be an exception to the fault- based rule —> ex. Art. 2043 of cc revolves around the fault-based rule (the individual who would obliged to compensate is because he or she acted negligently); but now it is becoming more and more relevant (because of AI; ex: Tesla cars).

NB. Basically, both in common law and civil law, tort law is governed by the first ground of liability, so fault => accepted as the main ground for liability.

1- FAULT

General rule: **Fault based system of torts** => fault consists in a **wrongful act for which the agent can be blamed**.

P.S.: The parameter of fault has been considered for many centuries an essential condition for liability in tort (the opinion of the famous jurist von Jhering is often quoted: ″Nicht der Schaden sondern die Schuld verpflichtet zum Schadenersatz" – Not the damage but the fault obliges to compensate).

Subjective elements: fault can consist into two types of behavior:

1) ***Intentional behavior*** (case of dolo): the harmful event which results from the act or omission is foreseen and desired by the agent because of his own act or omission => the behavior is adopted intentionally.
2) ***Negligence***: the event, although foreseeable, is not desired by the agent and occurs because of carelessness, imprudence, lack of skill or failure to comply with laws, regulations, orders or regulations => negligence is not a consequence of intention.

WHAT ARE THE CRITERIA RELEVANT FOR ASSESSING FAULT?

a) Common law approach: the standard parameter is the breach of duty of care (particularly in the UK common law).
b) Civil law approach: based on the statutory interpretation (particularly the civil codes).

Common law

Breach of a duty of care: United States v Carroll Towing [1947]

The case arose from the sinking of the barge Anna C in New York Harbor on January 4, 1944. Prior to the accident, the Anna C, along with several other barges, was moored at Pier 52 on the North River. On the day of the accident, the tug Carroll was sent to remove a barge from the Public Pier.
In the process of removing the barge, the line between the barges at Pier 52 and the barges at the Public Pier was removed. After the line was removed, the barges at Pier 52 broke free. This resulted in the sinking of the Anna C. The United States, the Anna C′s lessee, sued Carroll Towing Co., the Carroll′s owner, for damages.

Judge Learned Hand formula:

Which is the approach taken here by the common law court? Since the behavior becomes an obstacle
″Since there are occasions when every vessel will break from her moorings, and since, if she does, she becomes a menace to those about her; the owner′s duty, as in other similar situations, to provide against resulting injuries is a function of three variables:

(1) The probability that she will break away.
(2) the gravity of the resulting injury, if she does.
(3) the burden of adequate precautions (to prevent the event from occurring)".

These three elements are combined to ascertain if compensation here is a feasible remedy.

➡ If (Burden < Cost of Injury × Probability of occurrence), then the defendant **has not met** the required standard of care.

➡ If (Burden ≥ Cost of injury × Probability of occurrence), then the defendant may **have met** the standard of care.

N.B.: This case is important because we can grasp how common law courts will assess the decision about damages awarding.

Civil law

Statutory interpretation

The civil law approach to torts differs from the common law approach in that the basic rules of tort liability are set out in statute and that these rules appear to be relatively uniform.

Liability for one′s own fault:

(i) there must be an **act or an omission** which unlawfully violates a legally protected interest the tortfeasor should have acted negligently (action or omission).

(ii) the unlawful act or omission must have caused damage of a kind that qualifies for compensation => ***causa nexus*** => the link between the behavior, which can be action or omission, and the result (the damage suffered by the victim).

Few provisions in the Italian Civil Code on tort liability. Relevant role of case law interpretation.

When tort law (ex. art. 2043 of cc in Italy) comes into play? Traditionally this art. can be involved in case of violation of absolute rights.

PS: Important is the **distinction between absolute rights** (property) **and relative right** (credit). Around sixties there was a significant discussion: '' Is tort law related only to absolute rights?''. The widespread opinion argued that if a relative right was violated the relative right could not be protected at a tort law level => approach taken by courts in the civilian tradition and by scholars. This point of view started to change in the sixties because some scholars argued that the scope of application of tort law was and is wider than absolute right => there was an extension of tort law to the area of relative rights and this represented a sort of revolution, after the decisions made by the corte di Cassazione in the realm of tort law.

Art. 2043 c.c.: *any willful or negligent conduct that causes an unjust damage to another obliges he who has caused the damage to compensate it.*

- Here we see 2 types of behavior: intention vs non intention, action vs omission.
- The causa nexus.

We should also consider that this article is combined with **art. 1223 c.c.** because we need something more: if we simply read this article there is no mention to the fact that we need the suffer of a concrete damage by someone; and the damage must be a ***direct effect*** of the action/omission => this latter requirement is provided by art. 1223 of cc which states that: ''*Il risarcimento del danno per l'inadempimento o per il ritardo deve comprendere cosi' la perdita subita dal creditore come il mancato guadagno, in quanto ne siano conseguenza immediata e diretta''*.

N.B.: So, it is not sufficient that a *mere violation of the right* takes place; additionally, we need a concrete loss suffered by the victim.
Ex.1. You are the owner of a plant, and I decide to access you plant without your consent: this seems to be the violation of the property right, but there is not a concrete damage so is it a violation of property right or not?
Ex.2: If a person touches my shirt without my consent, do I have the possibility to bring this to the court because of tort law? This depends on a statutory interpretation of art. 2043 of c.c.
Ex.3. ***Sine titulo* occupation**: an immovable is occupied without *titulo* by a third individual —> is this a cause of damage? Only in the case the owner suffers a concrete loss.

2- VICARIOUS LIABILITY

We talk about vicarious liability in cases where **someone is liable for damage wrongfully caused by a different tortfeasor**.

The basic elements are:
a) Relationship between the tortfeasor and the vicariously liable person
b) Connection between that relationship and the tort committed

NB. In common law and civil law is commonly treated as a case of *exception* to the fault-based rule, considered as a standard rule in both jurisdictions.

Examples of vicarious liability:

- Liability of employers.
- Liability of parents.
- Liability of schoolteachers.

- Liability of subjects who control activities of mental handicapped persons.

=> It is clear the relationship between the tortfeasor and the damage, over the behavior of the tortfeasor.

Approach of BGB: **Section 832** that treats ***Liability of a person with a duty of supervision***:

(1) A person who is obliged by operation of law to supervise a person who requires supervision because he is a minor or because of his mental or physical condition is liable to make compensation for the damage that this person unlawfully causes to a third party. Liability in damages does not apply if he fulfils the requirements of his duty to supervise or if the damage would likewise have been caused in the case of proper conduct of supervision.

—> This paragraph is related to the possibility of the employer to be exempted from liability.

(2) The same responsibility applies to any person who assumes the task of supervision by contract.

Approach of DCFR: **VI. – 3:201:** ***Accountability for damage caused by employees and representatives***:

(1) Person who employs or similarly engages another is accountable for the causation of legally relevant damage suffered by a third person when the person employed or engaged:
   (a) Caused the damage in the course of the employment or engagement.
   (b) Caused the damage intentionally or negligently or is otherwise accountable for the causation of the damage.

The common law emerges from the case Lord Sumption, Woodland v Swimming Teachers Associations [2013] UKSC 66: "In principle, liability in tort depends on proof of personal breach of duty. To that principle there is at common law only one true exception, namely vicarious liability. Where a defendant is vicariously liable for the tort of another, he commits no tort himself and may not even owe the relevant duty but is held liable as a matter of public policy for the tort of the other".

—> **N.B.:** the liability of employers for their employees is the main type of vicarious liability in English common law.

—> Here we can see that the justification is also rooted in a public policy matter because there is an interest wider than the private one in the case of vicarious liability.

Driver of Petrol Tanker

(Century Insurance Co. Ltd v. Northern Ireland Road Transport Board [1942] AC 509)

Davison was driving a petrol tanker for his transport company. While pumping petrol from his truck into the underground tank of a petrol station, he lit a cigarette and threw the match on the ground. The match ignited some material left on the ground. The fire caught up with the tanker and the resulting explosion caused significant damage to property.

Has Davison acted in course of his employment in lighting his cigarette? The case should be considered based on the circumstances; based on the context.

The act was committed in the course of the employment. The conduct must be considered in the light of the surrounding circumstances and must not be taken in isolation.

"The duty of the workman to his employer is so to conduct himself in doing his work as not negligently to cause damage either to the employer himself or his property or to third persons or their property, and thus to impose the same liability on the employer as if he had been doing the work himself and committed the negligent act" (Lord Wright).

3- STRICT LIABILITY

Also, strict liability has traditionally been considered an ***exception*** to the fault-based rule and for a long period of time it has been considered a *secondary* ground of liability; that because is rarer.

It's a case of **liability without fault** in which there is a **predetermination *ex ante*** of the legislature which decides in advance that a given individual or entity will be liable in case something goes wrong => the rule that establishes the liability in advance.

N.B.: This ground of liability is called ***liability without fault***: the damage is basically suffered by someone who did not take the behavior causing the damage => there is a person who is bound to compensate even though he/she/it did not cause the damage.

Sometimes the victim suffers harm without anyone deserving blame for it. Normally, that victim must bear the damage personally, but sometimes there are reasons to shift the damage from the victim who suffered it in the first place to someone else.

The legislature decides to provide in advance cases of strict liability for many reasons:

- Rise of accidents during industrialization => public policy because industrialization has increased accidents.
- Fairness = > to avoid the possibility that the injured party remains without compensation for that damage.
- Possibility to recover damages (Best insurer).
- Prevention of damages.
- Economic efficiency (Internalization of Externalities).

Civil law approach

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

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

Common law approach

We must distinguish:

a) **Case law**: If we examine decisions rendered by common law courts, cases base upon strict liability are rare (compared to that rendered in civil law).
b) **Statutory law**: We find several examples of strict liability; this liability is mentioned within statutes. Examples:
   - Nuclear Installations Act 1965.
   - Animals Act 1971.
   - Product Liability (in Consumer Protection Act 1987).

NB. So we see how, when we analyze common law, the trend is reversed: the main source of law is represented by judgments; while here the main source is represented by statutory law.

20. OBJECTIVE ELEMENTS, SCOPE OF PROTECTION

Contracts, torts and unjustified enrichment are intertwined because they are sources of law.

1 - INJURER

Injurer: activity or behavior (intentional or negligent).

In ***tort law***, legal effects are associated with conducts which are conscionably and voluntarily carried out by a person => we can see how the fault-based rule typically works through the **art. 2046 of c.c**.: ''*He who caused a damage is not liable, when he acted unconscionably and involuntarily, unless his unconscionableness and involuntarily were due to his own negligence*''.

—> so basically, if there is a kind of involvement (which refers to the lack of intention is generated by his or her negligence) the injurer will be bound to compensate.

2 - CAUSATION

Causation: linking the event triggering the liability of the defendant with the damage suffered by the victim.

We should consider two main theories elaborated by jurists in order to understand causation:

a) ***"but for" causation*** (*conditio sine qua non*): it requires that the damage would not have occurred in the absence of a certain activity or event => the damage would have not occurred in the absence of a certain activity: so this activity connected to the behavior is essential for the damage => without the event no damage.

—> But: By applying this parameter, the scope of the causal chain could be extended almost ad Infinitum.

b) ***"adequate cause theory"***: the conduct of the injurer is adequate cause of the damage if it is generally likely to:

- Produce a result such as that which occurred.
- Or significantly increased the likelihood of that result occurring.

The ≠ between the two theories: the first one is more strict because it is aimed at ascertaining that without a given event the damage would not have occurred; while, in the second case the court is interested in ascertaining if the behavior adopted by the tortfeasor was capable to increase the probability of the damage suffered by the victim => so two different types of reasoning.

Civil law approach to causation: an example

Two ships (Edelweiss and HH9) moored side by side in a lock. The ships ′operators were asked to report the width of their vessels before the water level in the lock was lowered, so that the harbor staff could safely organize the mooring operations. The operator of HH9 mistakenly understated the width of the ship, resulting in the two ships becoming stuck in the lock during the subsequent operation. The rescue operation was improperly executed by the lock personnel and as a result the Edelweiss was submerged and sank.
The insurer of the Edelweiss sued the insurers of the HH9 for damages in tort. (The incorrect width information was the «but for» cause of the accident).

Accordingly, the Plaintif′s claim was dismissed on the ground of the «adequate cause» theory => (The mistake by the lock personnel was the adequate cause for the damage).

The assumption that the fault of the HH9 operator directly caused the injury is not correct. «**But for causation**» goes too far in placing the full burden of the consequences of each such cause on the person who initiated it.
« **Adequate causation** » is meant to allow individual events that are conditions for a result – in the logical sense that the result would not have occurred but for them – to be excluded from causation in the legal sense.

3 - DAMAGE

Compensable losses relevant in tort liability do not cover any kind of harm. Only some specifici harms can be protected.

➡ **Compensable damage**: Firm A deliberately avoids installing the technical measures prescribed by law in order to control pollution. This creates an emission of toxic pollutants which spoils the field of a neighboring farm.

➡ **NON-compensable damage**: Mr. Johns is very idle and postpones the renovation that his property would need. This creates protests by his neighbors who complain that his spoiled building ruins the decorum, and the public view, of their street. WHY is this a non-compensable damage? Because the decorum is something that depends on the assessments made by the individuals; it is about a personal evaluation.

NB. The understanding of the legal notion of damages gives us the idea of the exact scope of tort liability.

Ex. If I enter into your land without permission, but I do not cause any damage, is there a violation of property right? The only condition to award compensation is the damage. If we opt for the theory that we should compensate even though there is not a concrete damage, should I pay a sum of money for what? What am I trying to restore? => First, we must clarify if it is a damage and then, if and only if it is a *causa* of damage, we must calculate the ***quantum*** to be compensate.

Last year the Italian supreme court (Corte di Cassazione) was interested in the so-called ***sine titulo* occupation** => clarified how the traditional theory is still dominant so must be accepted. This was related to the general debate about *sine titulo* occupation —> **theories elaborated: '' when this occupation is justified?''**

1) The *sine titulo* occupation per se would justify the compensation because the property right is violated
2) The sine titulo occupation we cannot ground compensation from a mere occupation; we need something more (the suffer) => theory embraced by the corte di Cassazione.

SCOPE OF TORT LIABILITY

Different tort law system:

A) **Rules-based (typical) approach to tort law**: Legal systems characterized by a set of causes of action defined by law —> E.g. Common law tradition / German system.
B) **Principle-based (atypical) approach to tort law**: formulation of an abstract rule providing a comprehensive discipline of tort liability —> E.g. French / Italian systems (we have a general clause that governs tort law, as the article 2043 of cc).

Comparison between two typical provisions:

German Civil Code	French Civil Code (after the 2016 reform)
Section 823(1)	Articles 1240, 1241
A person who, intentionally or negligently, unlawfully injures the life, body, health, freedom, property or another right of another person is liable to make compensation to the other party for the damage arising from this. 	Any act whatever of man, which causes damage to another, obliges the one by whose fault it occurred, to compensate it. Everyone is liable for the damage he causes not only by his intentional act, but also by his negligent conduct or by his imprudence. 

NB. The employee is liable if he or she causes a given damage during the employment, so during the performance of the contract.

Liability torts depend on proof of a personal breach of duty, so the breach of duty revolves around a fault-based liability —> there is an exception, which is vicarious liability.

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

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

SCOPE OF PROTECTION

Traditionally tort law was related to thew protection of absolute rights; there was no space for rights other than absolute. **Today things have changed**: the scope of application of tort law has expanded significantly. Tort liability in Italy has been progressively extended over the last half century in several ways, including the award of damages for economic loss arising from relative rights.

Two final decisions issued by the Italian corte di cassazione that show us how the situation changed:

a) **First decision: Court of Cassation, Third Civil Division, 4 July 1953, n. 2085**
On 4 May 1949, a plane (Italian Airlines) carrying the entire Torino football team, crashed into the walls behind of the Basilica of Superga, on the hill above Turin, killing 31 people. The Torino football team sued the airline for compensation for the extinction of its credit rights to the footballers because of their death in the crash.

➡ The legal relationship between Torino and its players was based on contractual/relative rights. As the plaintiff did not claim injury to an asset falling within the protected category of "absolute subjective rights", liability was denied.

b) **Second decision** that marked a revolution in realm of tort law: **Court of Cassation, Joint Civil Divisions, 26 January 1971, n. 174:**
Luigi Meroni was a famous Italian professional footballer who played as a winger for Torino. On 15 October 1967, at the age of 24, Meroni was killed by a car driven by Mr Romero. The Torino football team sued Romero for compensation for the extinction of their credit rights with the footballer.

➡ After 18 years separating the two cases, which present strikingly similar issues and facts, the Court of Cassation reverses itself.

➡ Relative rights can be protected by tort law.

NB. The third party caused the accident => for the first time relative rights started to be protected under tort law => leading case.

21. UNJUST (OR UNJUSTIFIED ENRICHMENT)

—> Another source of obligation.
—> The emphasis is put on the individual who gain/ receives the benefits without justification.

NB. The ≠ between the civil law and common law, which followed different path about this aspect: unjustified enrichment is used commonly in the civilian tradition, while unjust enrichment is used in common law jurisdictions.

FUNCTION OF THE LAW OF RESTITUTION ABOUT?

The Law of Restitution is concerned with the award of a generic group of remedies which arise by operation of law and which have one common function, namely to deprive the defendant of a gain rather than to compensate the claimant for loss suffered.

The main justification of unjustified enrichment in the civilian tradition is the lack of the **common bases,** while in common law jurisdiction the **mistake** and the **performance rendered by mistake**.

The law of restitution is additionally related to the concept of remedies => we are talking about ***remedies*** because restitutions amount, or may amount, to remedies. The **aim** of these remedies is to reverse the defendant's gain; this has been called the '*restitution interest*': (this legal relationship can be understood in the light of a legal interest); this also explains why the emphasis is on the defendant.

Two main types of restitutionary remedies:

a) remedies *in personam*
b) remedies *in rem*

PERSONAL RESTITUTIONARY REMEDIES

Personal restitutionary damages (remedies *in personam*): the aim is that to restore to the claimant the value of a benefit which the defendant has received. They are said to operate in personam

➡ Why *in personam*? Because the defendant is liable to pay the value of the benefit to the claimant rather than transfer the benefit itself.

➡ Example: the claimant pays 10,000 euro to the defendant by mistake; the defendant will be liable to repay the amount of 10,000 euro to the claimant, even if the defendant no longer has the money which they had received from the claimant (NB. Notion of mistake, which is a distinctive element fo common law tradition) => that specific good/benefit cannot be returned; what is given back is the value. The consequence: the award of a personal restitutionary remedy creates a relationship between creditor and debtor between the parties, since the defendant owes money to the claimant.

The remedies in personam are always related to the **need to return a monetary sum**, but what does this sum of money reflect? This sum of money is equal to the benefit that the defendant has unduly received; **the object of this remedy is this value** (N.B.**: the value of the benefit ≠ the benefit itself**, and this difference allows us to understand the difference between remedies in personam and remedies in rem).

➡ Es. When u receive a sum of money for buying something what you give back would be equal to the benefit you have received; the benefit that you will return is equal to the benefit that you have received. So, what you give back would be equal to the benefit you have received. For example, if the good is worth 10, you should give back 10, not the good => main difference.

PROPRIETARY RESTITUTIONARY REMEDIES

Proprietary restitutionary damages (remedies *in rem*): the emphasis is put on the material/concrete good because this remedy follows specifically the good that has been unjustly received => the aim: to enable the claimant to assert their proprietary rights in an asset which is held by the defendant. These remedies are said to operate *in rem*.

➡ Why *in rem?* These remedies relate to the res (i.e., the good), they follow the good.

We have to make another distinction:

i) **Remedies by virtue of which the claimant can recover the asset which is held by the defendant:**
   - Benefit: the claimant can gain the benefit of any increase in the value of the asset and can claim it from third-party recipients
   - Benefit: the claimant′s claim to the asset ranks above other creditors of the defendant
   - NB. In the period in which the defendant possesses the asset that he or she unjustly received, if there is an increase of value, this **increase of value** can be returned to the claim.
   - If the defendant has transferred the possession and the material contact with the good is given to a third party, the claimant will be entitled to assert the same rights against any third party who unjustly received the good by the defendant.

ii) **Remedies which recognize that the claimant has a security interest in an asset which is held by the defendant:**
   - Benefit: the claimant has a proprietary interest in an asset which is held by the defendant, the claimant′s claim to the asset ranks above other creditors of the defendant, with the result that the claimant is more likely to recover the asset or its value if the defendant becomes insolvent => thanks to this remedy the claimant will be preferred in case more creditors will claim a credit from the defendant => so if there is a conflict between two claims of two creditors, the creditor who holds this security interest prevails over other creditors.

UNJUSTIFIED ENRICHMENT AS A SOURCE OF OBLIGATIONS

We must distinguish between the common law approach and civil law one.

A) **Civil law tradition**: unjustified enrichment is but a source of obligations and therefore it gives always and only rise to a personal right (or action in personam) to restitution; so, the second type of remedies are not contemplated.

   ➡ N.B.: Remedies in rem are not specifically connected to the law of unjustified enrichment => WE ARE NOT SAYING that remedies in rem DO NOT exist in the civilian tradition.

B) **Common law tradition**: unjustified enrichment is a source of obligations + unjustified enrichment is related also to real rights (actions in rem)

Commonality: in both cases unjustified or unjust enrichment amount to a source of obligation, however in common law tradition both types of remedies are contemplated.

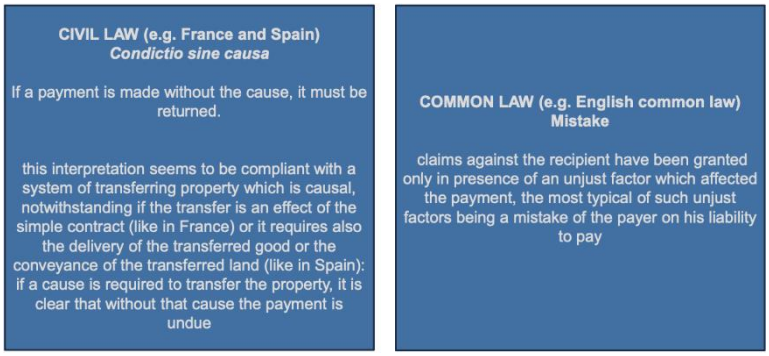
These remedies are connected to the notion of fairness/justice —> example: constructive trust and equitable lies that belong to equity. These remedies are *in rem* and can be exercised against third parties (ie, creditors and purchasers from the defendant):

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

One of the main distinctions is the ***justification***:

- common law typically refers to unjustified enrichment as a ***mistake***.
- traditionally this is not true in the civilian tradition that refers to a lack of a legal basis, called also ***causa*** (ex. If I give a sum of money to someone else, I need a *causa* justification for a transfer of something be it a sum of money, be it a movable, be it a general good => we need causa in the civilian tradition). When the causa lacks, we enter in the realm of unjustified enrichment (if a given transfer is made without a justifying causa, unjustified enrichment comes into play).
  - **NB.** France has abandoned formally the reference to '*causa*'; legal scholars discuss about this topic because it is implicitly present in the contract.

The opposite approach is taken by common law jurisdiction in which the strong presence of causa is less present compared to the civilian tradition. Historically unjustified enrichment has been connected to the notion of ***mistake***. Here the emphasis is not put on the fact that the payment has been done without causa, but the fact is somehow more subjective => it entails a more subjective notion than the civilian one (=> mistake is more subjective than causa).



LIPKIN GORMAN (A FIRM) V KARPNALE (LEADING CASE - HOUSE OF LORDS)

An example is that leading case in the English common law because it has traditionally been considered the leading case of unjustified enrichment, even if it is relatively recent. Here the unjustified enrichment has been formally recognized by the House of Lords for the first time.

Norman Barry Cass, a partner in the solicitors' firm Lipkin Gorman, was an authorized signatory on the firm′s Lloyds Bank account. Between March and November 1980, Cass took £220,000 from the firm′s account and used the money for gambling at the Playboy Club (located at 45 Park Lane, London), which was owned by Karpnale Ltd. Over several visits, the club won £154,695 of the stolen money, while the remaining funds were returned to Mr. Cass as ′winnings. Cass later fled to Israel but was eventually extradited, tried, and sentenced to three years in prison for theft in 1984. The solicitors' firm, Lipkin Gorman, then sued Karpnale Ltd, seeking the return of the stolen money. At the time, gambling contracts were considered contrary to public policy and void under the Gaming Act 1845, Section 18. The case focused on whether the firm could recover the stolen funds from the casino, despite the gambling contract being void.

This company wants the money that has been stolen by the partners of the law firm => Norman used a sum of money that was owned by the firm, so the firm claims the restitution of this money.

The House of Lords held that the defendant casino should make restitution because the money stolen from the client's account belonged to the plaintiff law firm.

Lord Templeman: ′in a claim for money had and received by a thief, the plaintiff victim must show that money belonging to him was paid by the thief to the defendant and that the defendant was unjustly enriched and remained unjustly enriched′.

However, the claim is more precisely based on the vindication of the firm′s property rights. "Lord Goff emphasized that the claim for money had and received did not depend on the club′s retention of any money; it was a personal claim which turned on whether the club had received money in which the firm had a continuing proprietary interest at the time of the defendant′s receipt. Lord Goff acknowledged that the firm needed to establish a basis on which it was entitled to the money, and it could do so by showing that the money was its legal property".

The claim was ′founded simply on the fact that (...) the third party cannot in conscience retain the money—or, as we say nowadays, for the third party to retain the money would result in his unjust enrichment at the expense of the owner of the money′.

Nb. If u are deprived of a sum of money you become a creditor; for example, according to the civilian tradition (codice civile), in case of irregular deposit, if I take money from you, justly or unjustly, I become the owner of the money, but I'm obliged to give you back non THOSE money, but that some of money.

So, is this a real case of unjustified enrichment or not? Mr. Cass was the real owner of the money? Was Mr. Cass the debtor of the law firm? Do we have here a legal relationship, after the money was stolen, between the law firm and Mr. Cass? Nb. According to some point of view this would be a claim in property; there is the indication of a proprietary right, but the court believed and argued that this was case of unjustified enrichment.

RESTORING WHAT THE CLAIMANT LOST

The award of restitutionary remedies to the claimant is justified on the ground that, where the defendant has inappropriately received a benefit from the claimant, justice demands that this should be restored to the claimant => we talk about ''***corrective justice***''.

Unjustified enrichment is intertwined with corrective justice because we must correct a wrong result that has been produced in reality (ex. the plaintiff who holds a given right is deprived of that right).

In roman law there was no reference to unjustified enrichment so the principle characterizing these topics has been progressively shaped in the old ius commune. Even though, we have some reference given by some thinkers —> example of ***Pomponius***: «*aequum est neminem cum alterius detrimento fieri locupletiorem*».

CONDITIONS FOR UNJUSTIFIED ENRICHMENT

Many scholars assert that a claim in unjust enrichment can be established when there is evidence that are:

(a) **the defendant was enriched**.

- ➡ The focus is on the defendant which receives something he was not legally entitled to receive => is this sufficient? NO, the mere gain of the defendant is not sufficient; we cannot know why he received a given benefit => we need further elements.

(b) **at the claimant′s expense** => there is a strict connection between the legal position of the defendant and the legal position of the creditor; there is a relation because the enrichment of one party depends on the loss suffered by the other party.

(c) **a recognized ground of restitution is engaged**; the positive consequence should be deprived of reason (if we want to use a common law term, typically a *mistake*).

(d) **here was no valid legal basis for the defendant′s receipt**: it is the only possibility for the claimant to ascertain his claim because there is no chance to base a claim on contract (because there is no contract) or

on tort; this remedy is *subsidiary*, so NO other remedies are available. If this enrichment is not rooted in tort or in contract, then the plaintiff will be fully entitled to base his request upon unjustified enrichment (this is the reason why, according to art 2042 cc, it is qualified as a subsidiary mechanism; true in France, but not in Germany where there is no reference on the subsidiary mechanism).

(e) **there is no defense to the claim**.

COMMON LAW, CIVIL LAW AND UNJUSTIFIED ENRICHMENT

Another difference between civil law and common law jurisdiction is that around the case of contract execution.

In case there is the **execution of a valid contract**, the difference between the mistake approach and the causal approach has no significant relevance because the result is the same => because under both points of view the payment was obviously not to be given back.

But what happens if a void contract is executed? If the contract turns out to be void and was executed by both parties, common law and civil law approaches traditionally diverge:

- ➡ Civil law tradition: there is generally no good reason to deny each giver′s claim.
- ➡ Common law tradition: the doctrine of consideration has led the traditional common law of England to the opposite rule (no restitution when a void contract has been performed by both parties), unless some specific unjust factors of the enrichment were existing, like duress or fraud. Do not oblige parties to give back what they have received unless some vitiating factors impacting on the formation of the contract. Apparently, there is no legal justification, though performance is not given back.

COMMON LAW, CIVIL LAW: UNJUSTIFIED ENRICHMENT AND RESTITUTIONS BASED ON CONTRACT

Performance in case of contract termination:

- ➡ Civil law tradition: usually include restitutionary obligations in the category of restitutions based on the contract.
- ➡ Common law tradition (in part. English common law): they are not specifically included in the realm of contract law because law of restitution is an autonomous area of law => ***law of restitution*** treats all restitution following on winding up as part of the law of restitution, which is not part of contract law.

Performance in case of a contract turns out to be null and void:

- ➡ Civili law tradition: Unjustified enrichment
- ➡ Common law tradition: Law of Restitution

SUBROGATION IN CIVIL LAW AND COMMON LAW JURISDICTIONS

Is the institution of subrogation related to unjustified enrichment?

When subrogation is available by **operation of law** (and not by contract), law of unjustified enrichment may be relevant.

=> **Subrogation**: the law states that a claim will pass directly and automatically to another person (N.B.: Azione surrogatoria, which comes into play according to art. 2900, ≠ surrogazione). Pay attention, it is a mechanism provided in advance, operated by law.

But why subrogation is here mentioned? Thinking about the suretyship case, we can grasp the relevance of the connection between suretyship and unjustified enrichment: in some way, **subrogation seems to be a mechanism that aims at preventing unjustified enrichment**.

In the case of suretyship, the *fideiussore* is responsible for the debt of another one; which would be the situation here without the mechanism of subrogation? The main debtor, if the surety pays, would enrich unjustly because the main debtor would become the owner of the apartment for example => thanks to subrogation the surety is entitled to receive money from the main debtor.

A typical case of suretyship: the main debtor buys an apartment for himself; in order to buy that apartment, he needs a sum of money because he has not the total sum of money. The creditor accepts to give the money to the main debtor, however the creditor asks for the guarantor, so the surety.

There is a trilateral relationship:

- creditor
- main debtor
- insurer

The only interest in this trilateral operation is the interest of the main debtor, and if we want that of the creditor to receive the money back; this happens because the main debtor becomes the real owner of the apartment => the surety allows the main debtor to buy the apartment.

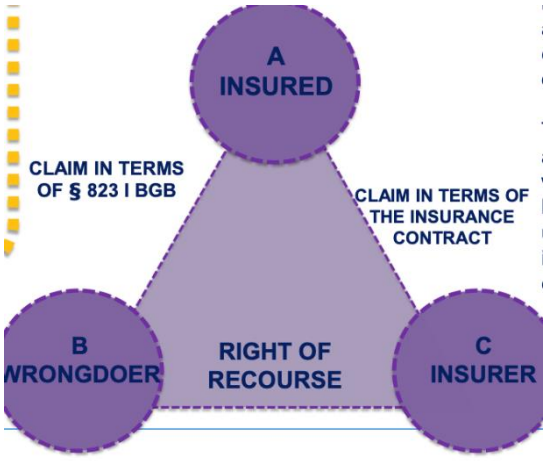
About unjustified enrichment, we grasp the distinction between:

a) **English common law**: typically subrogation is put in the realm of unjustified enrichment because it prevents the main debtor form receiving a double enrichment => basis of subrogation (by law) is commonly identified as unjust enrichment, as it nips in the bud any ambition to obtain double enrichment on the part of the insured who, but for subrogation, would otherwise be able to sue the wrongdoer despite having been paid by the insurer.

b) **German law**: German Legalzession is "the functional equivalent of the English doctrine of subrogation"; subrogation is considered a tool aimed at preventing unjustified enrichment —> basically when the insurer pays, subrogation operates by law.

NB. Is Subrogation about Unjustified Enrichment?

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



The mechanism of the suretyship is similar to that of the ***insurance***: we have a damage caused by the B wrongdoer, A is insured so we have a relationship based on tort between A and B; once the damage takes place; if the insurer pays, because want to repair the damage, than the insurer becomes the new creditor, who is entitled to sue the wrongdoer.

EX: In case B wrongfully and negligently damages A′s car. The damage costs €10,000 to repair. A now has a claim in tort. A claims this amount from the insurer C and C pays. The moment that C pays, A′s claim in delict is transferred to C (example in the book)

DISGORGEMENT OF PROFITS

Disgorgement is the giving up to a claimant of a gain made by a defendant, because of a wrongdoing committed against the claimant, but received from a third part.

EXAMPLE: the defendant may have obtained some money from a third party in breach of duty to the claimant. *In such circumstances, the claimant may be able to make a claim in respect of the money, but, since it has not been taken from the claimant, it is inappropriate to describe the remedy which enables the claimant to obtain this money as literally restitutionary, because it is not possible to restore to the claimant what they never had in the first place. It is more appropriate, therefore, to describe the function of such remedies as requiring the defendant to disgorge benefits to the claimant.*

In cases where a defendant's gain was received from a third party because of a wrong done to the claimant by the defendant, the claimant′s ability to reach that gain is determined as a response to the wrong, an while it may be called "restitution", it cannot mean "***restitution by restoration***" (ie, restitution by unjust enrichment). It is better called "***restitution by disgorgement***"—> the defendant receives an unjust profit (ex. Receives a sum of money by a third party).

➡ **SO:** it is not precisely considered a restitution by unjust enrichment —> we are considering a very specific case of restitution called ***restitution by disgorgement***: restitution by unjust enrichment is focused on the corrective justice, while restitution by disgorgement is also based on the distributive function of disgorgement => so the two types of restitution must be distinguished.

The disgorgement may encompass:

(i) **profit positively** acquired (in effect from a third party) by the defendant because of wrongdoing (met historically to pay over the accounted amount of the profit to the claimant).

(ii) to **expenditure** saved by a defendant because of wrongdoing.

Functions of t:

a) **Deterrent or Distributive Function of Disgorgement**: justice demands that the defendant should disgorge gains obtained because of breach of a duty because of a fundamental principle of the Law of Restitution that no defendant should profit from their wrongdoing.

b) **Corrective Function**: since the defendant′s gain was made through the commission of a wrong against the claimant, there is an imbalance between them which needs correcting through the award of a gain-based remedy.

SUBSIDIARITY OF UNJUSTIFIED ENRICHMENT

This is a **specific feature** of unjustified enrichment; it is controverse because it is expressly mentioned by some specific civil codes of given countries but it is not mentioned in other civil codes and it is not expressly recognized in common law.

What does subsidiarity mean? This means that the **claim in unjustified enrichment is allowed only when no other claims are available**.

➡ **FRENCH CIVIL CODE**: **Art. 1303-3**: *"The impoverished person has no action on this basis if another action is available to him or if he is faced with a legal obstacle, such as prescription*" —> The main remedies that comes into play are the main tool that must be used by the claimant; in case this are not available, the plaintiff is entitled to use this other tool => meaning of subsidiarity.

- Therefore, a claim in unjustified enrichment is ousted by any other remedy that is afforded to the claimant by the law, notwithstanding whether this other remedy is obtruded by a legal impediment (obstacle de droit), such as prescription. This reflects a traditional line of French authorities, according to which an action for unjustified enrichment is disallowed by the availability of an alternative claim, even if this is barred by statute of limitations (prescription) or by statute of repose (*déchéance*), or by debarment (*forclusion*), and res iudicata (*autorité de la chose jugée*), and even if it does not determine the case because the claimant has failed to prove her or his allegations on the merits.

➡ **ITALIAN CODICE CIVILE**: **Art. 2042**: *"A claim in enrichment cannot be brought when the injured party can bring another action to obtain compensation for the harm suffered*".

- There was an ambiguity about the interpretation of this subsidiary feature of unjustified enrichment (N.B.: the Italian supreme court decides with the involvement of the *sezioni unite* when there is an ambiguity about the interpretation of the law) => ambiguity about how this subsidiarity feature should be solved. The corte di cassazione clarified that the subsidiarity feature must be interpreted in the traditional way.

- Interpretation given by the Italian Corte di cassazione (Extended Bench) in 2023: "a claim in unjustified enrichment is allowed when other remedies are flawed from the outset (*ab origine*), as it happens when no contract is found to exist between the parties or when the contract exists, but it is null and void (unless it violates mandatory rules or contravenes public policy). Conversely, the subsidiary remedy is denied in cases where for e.g. a valid contract is found, but the claimant fails to prove damages resulting from the defendant's breach''.
- **NB.** Why did the Italian Supreme Court feel the need to make a distinction between category of the existence and the ''in-existence'' of the contract and the category of nullity? The case of existence or in-existence of the contract does not allow the court to analyze the case of nullity since the legal issue is solved in advance because basically it is not possible to talk about contract => so two separate cases: **in-existence** and **nullity**.
- Conversely, if a contract exists and is valid, the claim in unjustified enrichment is not available.

➡ **GERMAN BGB**: We do not find explicit reference in the BGB, even though the notion of subsidiarity is well known by the German scholars, and it is commonly applied thanks to the interpretation given by jurists. This feature is deemed to be existing especially in the so-called ***three-party cases based on the nullity or annulment of a contract of sale*** and is basically resorted to by jurist itself to limit the restitution claims by the transferor against the transferee.

➡ **ENGLISH COMMON LAW**: The reference to this subsidiarity (so related to unjust enrichment) basically lacks; the courts historically do not intend unjust enrichment as a subsidiary mechanism (the difference that we have analyzed between the English common law and the civilian tradition is related to legal requests of the unjustified enrichment remedy). In the books of common law scholars this feature is analyzed, but at the end it is not embraced by common law scholars.

22. PROPERTY LAW

Why do we discuss property? And which is the main (philosophical) inspiration of property law?

We refer to **rights *erga omnes***, so rights against everyone, which are in contrast with **relative rights**, that can be raised only against the specific person (so we consider the relationship debtor-creditor) ; here the existence of a proprietary right **does not** allow us to refer to a relationship between two individuals => it is an **ABSOLUTE RIGHT**: the owner of a given good is entitled to defend his right against everyone.

Here we refer to the so-called **rights *in rem***, because traditionally property law refers to the connection between the person (the holder of the absolute right) and a given good. In case of relative rights this is less true (ex. If I claim a sum of money, I am not the owner of that specific sum of money).

An example: the owner of a car who sells it has a right against the buyer of the car to be paid the price for which the car was sold. The owner of a car that has been unlawfully damaged by someone else has a right against the tortfeasor to be compensated. Finally, the owner of a car has a right to the car itself.

➡ This last right is different from the first two. It is not a right against a specific person such as the other party to the contract or the tortfeasor; it is a right on a tangible object (***in rem***), valid against the rest of the world (***erga omnes***).

WHY PROPERTY LAW? AN ECONOMIC VIEW

Hardin, The Tragedy of the Commons, *Science* (1968): this book is based on two main assumptions: common gods are:

1. **Rivalrous in consumption**: their use by one consumer prevents simultaneous consumption by other consumers => the same good can be used at the same time by many persons.
2. **Non-Excludable**: it is not possible to prevent people who have not paid for them from having access to them.

Based on these characteristics, an experiment has been made to demonstrate the need of adopting some specific property rule: **grazing cows in a free-access parcel of land** (common good):

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

This experiment was aimed at demonstrating that the free access to common good gives no incentive to any to protect the value of the good we are analyzing; so, the assumption of these goods contained in this book allows us to understand the philosophical point of view of the property law => tragedy of the commons indicates the **inefficient outcome** determined by the overuse of (partially) rival resources when freely accessible to every individual in each given moment.

CHARACTERISTICS OF PROPERTY LAW

Legal rules for the allocation among individuals of **exclusive rights** of use and disposal of resources.
So, **the right holder**:

- Has an exclusive rights.
- Can exclude everyone from interfering with the enjoyment of the same good.
- Is given a specific a specific recovery action for his/her good.

Pay attention to:

i) Incentive to work.
ii) Incentive to maintain and improve things.
iii) Avoidance of disputes and of efforts to protect things.

PROPERTY INTERESTS

Property law is conceived as the field of **absolute rights**. Property rights are valid ***erga omnes*** (as opposed to mere relative rights).

Basic features of property rights:

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

OBJECTS OF PROPERTY

Property Law as the Law of Things

Property rights as **rights *in rem*:** regulate how individuals can use and dispose of things/goods.
Objects of property rights —> things/goods.

What is the legal scope of this notion?

- **Movable / Immovable Goods:**
  a) **Movable property** is any property that can be moved from one place to another without being altered
  b) **Immovable** is any property that cannot be moved from one place to another without being destroyed or altered

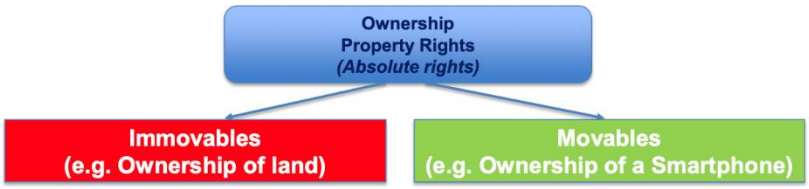
- **Tangible / Intangible Goods**

The distinction between ***movable*** and ***immovable*** is so relevant because, based on this distinction, common law and civil law followed different paths:

- Civil law: grounded on a **unified field of property law**; the ground for this unification is the right of ownership => property law revolves around the fact the good is movable or immovable.
- Common law: two separate branches of law
  (i) **Land Law** (Real Property): immovables
  (ii) **Personal Property**: movables

CIVIL LAW

The fact that civil law tradition is based on a ***unitary system*** does not mean that movable and immovable share the same identical rules, but these different rules are all put in the same field => unitary system of property, covering all types of assets.
Both movable and immovable things represent the potential objects of the absolute right of ownership.



Ex. Different rules on the circulation fo movable and immovable: ''*possesso vale titolo*'.

Ownership as the primary property right over goods:

a) **Full-fledged power over goods**: unless the law provides otherwise, an owner is free to do as he pleases. The law does not tell the owner what he can do with the "thing", but it does specify what he must or must not do.
b) **Exclusive power over goods**: the owner of the "thing" has an absolute right, i.e. a claim against any other person not to interfere with the enjoyment of the "thing" granted to him.

➡ **FRENCH APPROACH**: **Art. 544 of the French Code civil**: *Ownership is the right to enjoy and dispose of things in the most absolute manner, provided they are not used in a way prohibited by statutes or regulations.*

- It is a source of inspiration for the Italian civil code.
- **N.B.**:There is a specific relation that we should consider between the power of the owners and the incidence of that power on the public interest; in this sector this conflict may be particularly strong.

➡ **GERMAN APPROACH**: **Section 903 BGB**: *The owner of a thing may, to the extent that a statute or third-party rights do not conflict with this, deal with the thing at his discretion and* ***exclude*** *others from every influence.*

- We find also here that specific relation present in the French civil code.

➡ **ITALIAN APPROACH**: **Art. 832 of the Italian Civil Code:** *The owner has the right to enjoy and dispose of things fully and exclusively, within the limits of and observing the obligations established by law.*

- The same characteristics are found in the rule of the Italian codice civile => from a comparative pov how the civilian tradition is based on the interaction between these two types of interests.

➡ **DCFR APPROACH - VIII. – 1:202**: *"Ownership" is the most comprehensive right that a person, the "owner", can have over property, including the exclusive right, to the extent consistent with applicable law or rights granted by the owner, to use, enjoy, modify, destroy, dispose of, and recover the property*.

COMMON LAW

There is a shift between the owner of the land and the individuals who basically stay at the land; why is there this shift ? This can be explained in the light of the ***feudal tradition*** existing in that environment.

The enduring influence of the feudal tradition, based on **interpersonal relationships between *landlords* and *vassals*** in relation to land, has had a tremendous impact on the evolution of the common law, preventing the emergence of a unitary/unified property regime encompassing different categories of assets => this relationship prevented the creation of a unique system.

"*Crown as the residual owner of land*" :this reflects the principle that the Crown remains the ultimate owner of all land in England. Even if someone holds freehold title to land (the strongest form of ownership in common law), they only have an interest in the land, not absolute ownership. The fact that the crown is considered the residual owner of the land represents a fundamental assumption to be considered when we talk about immovables.

Common law is typically based on the separation between the area of immovables (fee simple and term of years) and movables. There are two separate branches of property law:

A) **Immovable Property (Land)**: land law is complex, dealing with long-term interests, multiple rights (e.g., leases, easements), and a deep connection to feudal traditions.
B) **Movable Property (Chattels)**: personal property law is simpler, with a focus on possession and absolute ownership. It is often governed by general principles of contract or tort law.

So, there is a ***fictitious presumption*** that immovables do not belong to individuals => **NO FORMAL RIGHT OF OWNERSHIP.** Under the rules of common law, the Crown is still regarded as the owner of all land; all others hold land in tenure. In the feudal system of land tenure, the king could originally determine the content of the right granted to others in return for services. These property rights in land, held for different periods of time, were called ***ESTATES in land*** (title that justify individuals to use these immovables).

➡ This expression reflects the split between formal ownership belonging to the crown and the possibility for individuals to use these immovables based on the tenure.

IMMOVABLE: PROPERTY ACT (1925)

This Property Act should be understood in the light of distinction between movable and immovable and in the light of that split we were talking about.
N.B.: This act was considered a modernization of English land law.

To limit and standardize the property rights available in land. Under common law, there are only two types of (feudal) rights in land:

1. **Fee Simple**: entitles the holder to exclusive possession for an unlimited period (functionally like civil law ownership).
2. **Term of Years** gives exclusive someone else exclusive possession for a limited period.

NB. Property ≠ possession: here we specifically refer to possession because the property belongs to the Crown. **Pay attention:** property, as conceived in the civilian tradition, is unknown in common law => reason: the crown.

MOVABLE: PERSONAL PROPERTY

Personal property law applies to:

1. **Movable goods** (chattels)

2. **Choses in action** (among others : claims, credits, shares, etc.)

NB: in civil law tradition credits typically do not belong to the category of property; they are part of the *law of obligations*. Traditionally we do not refer the very notion of credits in area of property law.

In personal property law, the primary right is called "***title***" => indicates the right, the primary right related to the movable; so, a specific right in rem where the res is the movable;

- If you are the owner of this title, you are entitled to possess the good.
- ***Title*** is the right of exclusive possession to a chattel.
- It is the most extensive entitlement to a chattel a person can have.

INTANGIBLE GOODS

Historically the qualification of something as goods was connected to the possibility to have the material appearance of the good itself. This was historically reflected in the **Section 90 BGB – Concept of thing**: ''*Only corporeal objects are things as defined by law.*''

This is not true anymore because the legal area of things expanded over time and the legal scope of things/goods now includes other kinds of objects (also intangible goods).

INTELLECTUAL PROPERTY LAW

Property law in the very beginning of its conception was only related to tangible good; because the scope of good expanded, another area of law (intertwined with property law) came to be relevant: ***intellectual property law***. It is considered in both civil and common law an autonomous area of law, despite being clearly connected to property law. This area came into play because it addresses the way for disposing of intangible goods or resources.

Three subareas can be identified in the realm of *intellectual property law*:

A) **Copyright Law**: exclusive rights of use and distribution of an original work of art, granted to its creator —> there is a specific relation between the creator and the thing created.
B) **Patent Law**: exclusive rights to use and distribute a novel invention, granted to its inventor —> the ≠ between a novel invention and the work of art is that the first one may potentially have an impact on the society; so, they typically serve different functions.
C) **Trademark Law**: exclusive rights to recognizable signs, designs, or expressions that identify products, granted to entrepreneurs and companies.

CASE: PROPERTY OVER INTANGIBLES

To see how property law connects to intangible resources.

- **Myriad Genetics** was founded in 1994 as a start-up company by scientists involved in the search for the BRCA genes (DNA sequences associated with certain types of cancer).
- In August 1994, Myriad isolated the BRCA1 sequence and patented it in the US. The following year, in collaboration with the University of Utah, Myriad isolated and sequenced the BRCA2 gene, and the first BRCA2 patent was filed in the US.
- In 1996 myriad launched its BRAC Analysis product, which detects certain mutations in the BRCA1 and BRCA2 genes that put women at high risk of breast cancer and ovarian cancer.
- Since 1996, Myriad's business model has been exclusively to provide diagnostic testing services for the BRCA genes.
- In 2012, Myriad – which was founded in 1994 - employed around 1,200 people, had revenues of around $500 million and was a publicly traded company => changes it structures because at the beginning was a start-up, then it became a company.
- In 2010 the Association for Molecular Pathology challenged the validity of gene patents in the United States: ***is it possible to have private property on human DNA?*** Is it possible to imagine private property in human DNA? It is not possible to patent something that already exists in nature; however, it should be admitted to

patentee the final product. (N.B.: According to someone's point of view, the process to lead to the isolation of that gene must be necessarily of public knowledge because it is something that serves public interests).

Position of the court: because this gene already exists in nature, there is not the possibility to patente this ''good''. On the contrary, the process used to elaborate this gene can be protected => NB. The distinction between what be qualified a ''novel invention'' and the idea of ''original work of art''.

ACTIONES

To ensure this exclusivity, property law typically recognizes some actions which are available to the owners of the rights; this action connects to the fact that property rights are absolute so this specific action can be raised against everyone; everyone who impacts property. These actions are provided with different functions.

This structure is very known in the civilian tradition because roman law is the very foundation of its history; as we know, common law followed different paths.

We distinguish between two "*actiones"*:

a) **RECOVERY ACTION** (REIVINDICATIO): two functions:
   (1) the right of the owner to assert his right.
   (2) claim the return of the object presently possessed by any third party.

b) **INJUNCTIVE RELIEF (ACTIO *NEGATORIA*)**: the right of the owner to prevent or remove any interference with his property interests.

   ➡ **NB.** The legal issue at stake is not the right of property but is interference because interference may limit the exclusivity of ownership, interference. The dispute does not revolve around the fact that two individuals both asserts to be the owner of the object; here there is the need to remove the interference.

An example of recovery action: *Cour de cassation, 22 April 1823 - Hellot v. Leclerc*
Hellot and Leclerc owned two neighbouring buildings separated by a wall. In 1819, Leclerc demolished the wall and built a new building. Hellot sued Leclerc, claiming that the new building encroached on his property by 14 inches, and destabilised it. Leclerc did not deny the allegations, but replied that:

(i) Hellot's building had collapsed and could not be repaired due to legal restrictions.
(ii) Hellot had suffered only minor losses, whereas the obligation to remove his building would cause him substantial damage.

Hellot has the righ to demand the removal of the encroaching building and the return of his property, regardless of the state of the property and of the actual harm suffered.

- We have an encroachment recognized by both the parties; does this encroachment justify the demolishment fo the building encroaching on the Hellot's property? The court should consider how property law has been conceived based on the exclusive right of the owner; is this encroachment significant?
- We are only interested in ascertaining if property law has been violated or not.
- For this reason, technically speaking there was a violation of the property right => this justifies the demolishment of the new building. In the end, the French supreme court stated that the encroaching building had to be removed; the ratio standing behind this decision is that property must been understood as an exclusive right. When the court recognizes that the building must be removed, this also means that there is a restitution of what has been stolen.

Another example of recovery action: *Cour de cassation, 20 March 2022 - Houssin v. Legrasse*
Lagrasse built a fence that extended 0.50 cm into his neighbor's property. The neighbor, Houssin, sued him. The Paris Court of Appeal dismissed the case on the grounds that the encroachment was negligible.
No one may be deprived of their property.

- According to the old view of property law, the encroachment causes a violation of a proprietary right; because a violation is ascertained, this means that the claim must be accepted. But if we consider the decision of the court of the Paris, the opposite view was supported, since the court of appeal considered the relevance of the encroachment. The court of appeal took a specific point of view (an evolutionary one) because the exclusive right can coexist with a small encroachment. Actually, this view was reversed because the court of apple did not embrace this view in the final decision => the degree of encroachment is not relevant => if there is a violation of an exclusive right, this violation must be sanctioned, and this sanction is the acceptation of the claim (the *actio*).

An example of injunctive relief: *German Supreme Court, 1.12.1995*

The claimants bought a plot of land situated next to the defendant′s factory premises to build an underground car park. The construction company discovered significant chemical contamination. The disposal of the excavation waste resulted in high costs. The claimant demanded payment of additional disposal costs. In the meantime, the defendant company had gone bankrupt and was being managed by a liquidator. The operator of a facility that has caused soil contamination on neighboring land remains responsible after closure and can be ordered to remove the contaminants that interfere with the owner′s peaceful enjoyment of his property.

Here we grasp the relevance of interference.
—> This is how injunctive relief is used in the civilian legal systems.
—> The legal issue at stake is not property (as in the previous case, where the right of property was somehow limited); here there is an interference that must be removed.

Another example of injunctive relief: *German Supreme Court, 12.8.1985*

The claimant owned a plot of land with a house. The defendant, his neighbor, let his property to a married couple and allowed them to run it as a brothel. The claimant believed that his underage daughter was being morally endangered and that the value of his property was being devalued. The claimant demanded that the defendant stop the commercial sex work in his house. The claim was dismissed. Injunctive relief does not cover property interferences of a genuine moral nature.

—> Is this a case of injunctive relief? How does this relate to property law? If I give you something and u freely use this, even if I don't appreciate this activity, is this something that justifies a claim of injunctive relief?

PROPERTY INTERESTS

Primary Property Rights: these rights include the full bundle of powers that the holder can have over goods

- Ownership
- Intellectual Property

Secondary (Lesser) Property Rights: these rights include only some of the powers that the owner may have over goods

- Secondary Right of Use
- Secondary Security Rights

LIMITED PROPERTY RIGHT

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

Limited property rights as ***fragmentation of ownership***: French theory of *démembrement de la propriété* => the creation of limited rights by the owner can be understood as a process of subtracting certain rights from his original bundle and franking them to third parties.

In the light of this fragmentation property, we may single out two types of limited property right:

a) **Limited property rights of enjoyment** grant their holders specific, albeit limited (as compared to ownership), rights to use the object. In particular:

- **servitudes** (EASEMENTS in common law)
- **usufruct** (comparable to the TERM OF YEARS in common law)
- **use-habitation**

b) **Limited property rights of security** are created to secure the payment of a claim/debt. They are usually created by the debtor/owner over an object in favor of his creditors:

(1) **hypothec / mortage** —> refers to immovables
(2) **pledge** —> refers to movables

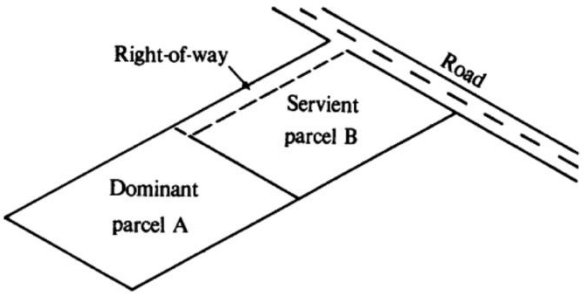
➡ **NB.** The limited property rights are ≠ from ***suretyship***, which is a personal guarantee, while here we are considering a limitation to a property right that is related to a specific good; suretyship is not related to a to a specific good, but to the entire patrimony of the *surety/fideiussor*.

Common features of limited property rights:

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

SERVITUTEDES

Servitude is an example of limitation referring to property. A **predial servitude** consists of a burden imposed on one piece of land (***servient***) for the benefit of another piece of land (***dominant***) belonging to a different owner.



Ex. Right of way allows the owner of the one piece of land to walk across the other piece of land, usually the neighbors.

We may distinguish between:

a) ***dominant land***: the piece of land that benefits from the establishment of a servitude (N.B.:The dominant benefits from the existence of this right of way => benefits from the servitude);
b) ***servient land***: the land subject to the servitude, i.e. on which the "burden" is imposed.

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

We may distinguish between:

a) **affirmative servitudes**: the owner of the dominant land can do something on the servient land
—> ex. *Servitude of way*: the owner of the dominant land may pass through the servient land to access a public road.
b) **negative servitudes**: the owner of the dominant land can prevent something being done on the servient land (ex. Servitude)
—> ex. *Servitude not to build on land*: the owner of the servient land may be prevented from erecting new buildings that would obstruct the dominant land's view.

N.B.: The duty imposed on the servient land cannot be an obligation on the owner to do something.

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