The case for contractual solutions in third party pure economic loss. - A comparative review of the law in Germany, Greece, the United States, Scotland, England, Australia, Canada and New Zealand.

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Thesis for the degree of the Ph.D submitted to the University of Edinburgh,

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I confirm that this thesis is my own work, has been composed by myself, and does not include work submitted for any other degree or professional qualification.

Στην Μνήμη του πατέρα μου.

Thesis abstract.

The purpose of this thesis is to examine third party loss in a number of jurisdictions. Third party loss is the loss suffered by persons not party to a contract as a result of the violation of a contractual obligation. Compensation poses a problem when the violation is careless as opposed to intentional and the loss that is caused is purely economic.

The starting point of this work is German law where, in order to protect third parties, two contract-based mechanisms have been judicially developed, because the law of delict, based on a system of restrictively enumerated, statutory delicts, provides no protection for pure economic loss. The two mechanisms are *Drittschadensliquidation* and contract with protective effects *vis-á-vis* third parties. The former concerns cases where performance duties are violated and the performance, in which the injured party has an interest, is not realised. The contract with protective effects *vis-á-vis* third parties concerns the violation of protective duties which do not concern performance, affecting personal, property, and/or financial interests of the third party not related to the performance. The mechanisms were developed mainly in the course of the present century and have expanded to numerous applications, for instance: indirect agency; expert opinion, including valuators' and auditors' liability; attorney liability; liability for services, works, medical treatment. The mechanisms, debated vigorously by theorists, are remarkable examples of judicial law-making. The mechanisms of German law, their applications, the theoretical bases, the relationship between them and the judicial activism that led to their formulation are presented and analysed.

In Greek law, where the law of delict is based on a general clause and not on enumerated delicts, protection in delict for pure economic loss probably exists. Therefore, as in a similar system, that of France, third party loss is not a distinct, pressing problem. On the other hand, there are certain doubts whether delictual protection is certain or whether it is the best option. Thus the possibility of contractual solutions is worth examining, even if only to reject their relevance to Greek law.

In American law, in comparison to other common law jurisdictions, more efficient protection for third parties exists. The third party beneficiary rule, a contractual mechanism to confer benefits to non parties, has expanded impressively. Moreover, liability in tort for pure economic loss is more extended than elsewhere in the common law world but, nevertheless, is substantially deficient. It is argued that contract could expand to cover cases of third party (pure economic) loss and that this is the most viable and preferable way for improvement.

Despite the existence of a general clause in delict and the *jus quaesitum tertio* (a means to confer benefits on non parties by contract), Scots law is seriously handicapped in dealing with pure economic loss cases due to the influence of English law. It is argued that the Scots law of pure economic loss is not identical to the English law and that reform by increasing the role of the contract is desirable and manageable, provided the necessary judicial determination is present.

Among Commonwealth major systems, Canadian, Australian, New Zealand and English laws, the latter stands as an exception, clinging to traditional doctrines and applying, with few exceptions, an exclusionary rule to pure economic loss claims. In the other jurisdictions, otherwise so closely connected, the law is distinctly different. It is difficult to evaluate this different approach to pure economic loss. Commonwealth systems should also contemplate reform tending towards encouraging contract-based approaches. Most likely, this reform will require more than judicial law-making.

The conclusion focuses principally on the desirability of an increased role for contract in third party loss cases, on the advantages of a more unified civil liability system -- a system with greater intechangeability between contract and delict -- and on the importance of judicial assertiveness in the process of keeping the law up-to-date and responding to new social needs.

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Abbreviations.

AcP	Archiv für die civilistische Praxis
AIA	American Institute of Architects
AID	Αρχείον Ιδιωτικού Δικαίου
AK	Αστικός Κώδικας (Greek Civil Code)
ALJ	Australian Law Journal
AllER	All England Law Reports
AmJComL	American Journal of Comparative Law
BGB	Bürgerliches Gesetzbuch (Civil Code)
BGH	Bundesgerifhtshof
BGHZ	Entscheidungen des Bundesgerichthofes in Zivilsachen
CamLJ	Cambridge Law Journal
CanBarRev	Canadian Bar Review
CLP	Current Legal Problems
CLR	Commonwealth Law Reports
ColLR	Columbia Law Review
ConLJ	Construction Law Journal
DLR	Dominion Law Reports
ED	Ελληνική Δικαιοσύνη
FamRZ	Zeitschrift für das Gesamte Familienrecht
FCC	French Code Civil
FordhamLR	Fordham Law Review
GG	Grundgesetz
GWD	Green's Weekly Direst
HarvLR	Harvard Law Review
HGB	Handelsgesetzbuch (Commercial Code)
HL	House of Lords
HUD	Department of Housing and Urban Development
IntCLQ	International and Comparative Law Quarterly
IntEncCompL	International Encyclopedia of Comparative Law
JBL	Journal of Business Law
JCL	Journal of Contract Law
JMLC	Journal of Maritime Law and Commerce
JQT	jus quaesitum tertio
JR	Juridical Review
JuS	Juristische Schulung
JZ	Juristenzeitung

LC	Law Commission
LG	Landesgericht
LIMCLQ	Lloyd's Maritime and Commercial Law Quarterly
LQR	Law Quarterly Review
LSt	Legal Studies
MLR	Modern Law Review
NJW	Neue Juristische Wochenschrift
NomB	Νομικόν Βήμα
NYSE	New York Stock Exchange
NYULR	New York University Law Review
NZLR	New Zealand Law Reports
OLG	Oberlandesgerightshof
OxfJLSt	Oxford Journal of Legal Studies
QB	Queen's Bench Division
Restatement first	Restatement of the Law of Contracts 1932
Restatement second	Restatement of the Law of Contracts 1979
SC	Seccion Cases.
SCR	Supreme Court (Canada) Reports
SEC	Securities and Exchange Commission
SLC	Scottish Law Commission
SLT	Scots Law Times
SLT	Scottish Law Times
StanfLR	Stanford Law Review
Stathopoulos I and II	Σταθόπουλος
TexasLR	Texas Law Review
TulLR	Tulane Law Review
UCC	Uniform Commercial Code
UTLJ	University of Toronto Law Journal
UWALR	University of Western Australia Law Review
VaLR	Virginia Law Review
WLR	Weekly Law Reports
YaleLJ	Yale Law Journal
ZEP	Zeitschrift für Europäisches Privatrecht
ZPO	Zivilprozeßordnung

Chapter 1: Introduction.

1. The problem.

The present research examines the problem of third party loss in German, Greek, American, Scots, English, Canadian, Australian and New Zealand law. The problem concerns damages caused to non parties due to the violation of contractual obligations. The defendant is the debtor who violates his obligations. The damage is caused carelessly; there is no intention to injure the third party. To give a few examples, third party loss can involve the case of an attorney who negligently drafts a void will and injures the intended beneficiary; the subcontractor who violates his contract with the contractor and injures the third party owner/employer of the contractor, if the latter bears no responsibility for the effects of the violation; the auditor whose mistaken report leads investors, shareholders or his client's creditors to the wrong decisions; violated insurance contracts where the third party beneficiary suffers the loss; or contracts concluded by undisclosed representatives that result in the loss of the undisclosed principal if violated. The third party might be linked to a contract in a variety of ways. The violated transaction might be necessary to fulfil contractual obligations to the third party, as with the contract of carriage that the seller concludes for the transportation of the sold item, or when various relationships are interrelated in the process of achieving a single ultimate purpose such as in the construction of a building or other project. The third party might be in a position almost identical to that of the creditor, as is the case with the member of a group in a restaurant where someone else is ordering a meal, or derive a benefit through the creditor, as with a lessee's family members injured due to the lessor's breach of the lease agreement.

The identification of the problem is based on the commonplace observation that in any society, due to the specialisation of labour and the interrelation of economic interests, the effects of contracts are not restricted to the parties. Non parties come regularly in contact with contractual relationships and are affected by the latter whether this is within the intention of

the parties or not. The expansion of the contractual effects beyond the parties can have various expressions. The most common involves the parties (debtor/promisor and creditor/promisee) contracting for the purpose of offering a benefit to a non party -- the contract for the benefit of a third party, which is not accepted in (traditional) common law. This study is concerned with cases where there is, in principle, no such intention; then the third party loss becomes a problem. The effects of a contract beyond the parties might be remote, as with a business agreement affecting competitors, or a violation of a contract affecting the members of the creditor's family. It can be said in advance that a basic concern in third party loss involves the identification of a normative link between the injuring behaviour and the loss in order to justify the protection of certain but not all of those affected. The problems of causality and proximity are not as prominent.

In modern times, more than ever before, non-parties are likely to suffer loss, as a result of developments in transactions between others. Reasons for this include the increasing volume, intensity, and variety of transactions (with the aid of modern technology); the concentration of economic power; the mass-scale, standardised character of many transactions[1]; and, most importantly, the unprecedented specialisation of labour evidenced in the expansion of services. Interdependence is more than ever the rule in social and economic life[2]. In no other area is the example of interdependence more evident than in the field of projects with different participants: employers, contractors, subcontractors, sub-subcontractors, suppliers etc. Apart from construction, most other industries involve synergy of operation and interrelated relationships as, for example, investment or the running of a company (involving bankers, auditors, company directors, investors, shareholders). The roles of the middle man and of the specialist are central in transactions. Expert advice, opinion or services, increasingly dominate modern economies and potentially concern great numbers of third persons. Moreover, an increasing number of transactions, such as insurance contracts and documentary credits, specifically concern third parties.

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1 As with those involving standard term contracts.

2 See Walker speaking of the position of contract law in a society of "division of labour and... multifarious commercial transactions" Walker, D.M. *The Law of Contract*, 12.

Affected by events they cannot control, and often not qualified to understand the relative risks, third parties are in a weak position. Their loss can often be understood as someone else's benefit, as when someone other than the intended will beneficiary inherits, or when the contractor is not liable for the subcontractor's fault that injured the employer, or when the carrier is liable not to the injured consignee but to the seller/consignor who has suffered no loss. The lack of protection for non parties is unacceptable both in terms of fairness and the need for confidence in economic transactions[3]. The behaviour causing the harm might be negatively evaluated in the legal order, as typically delictual behaviour is, and it would thus seem fair to compensate those harmed. Typically the loss is caused by professionals or experts in their field or generally by debtors who at least could have been aware of the fact that third party interests are related to the contract, although indirectly so, -- through the creditor for instance -- and that they would be injured by the violation of the contract. From an economic policy point of view, third party loss corresponds to an imbalance in economic life which cannot be attributed to the normal, lawful operation of transactions but to exceptional facts. The law's intervention is required on the basis of other examples of corrective intervention aimed at protecting weaker parties and restoring unfair economic advantages, as in labour or consumer legislation.

As will be discussed, the protection of third parties is linked to the principle of the freedom of contract and the relativity of obligations -- privity of contract in common law terms -- as the defendant will find himself liable to non parties for what is essentially a contractual violation. Contemplating the compensation of third parties, and especially compensation on a contractual basis, is one more example of the vast changes in civil law and doctrine that took part in the last two centuries with, among others, the retreat of the freedom of contract and the rise of equity principles.

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3 In circumstances where "co-operation has led to a massive sophisticated system of credit" (Atiyah An Introduction , 9), where "wealth in a commercial age, is made up largely of promises", (Roscoe Pound Introduction to the Philosophy of Law, 1961, 236, quoted by Atiyah An Introduction 8) in situations of growing and complex interdependence, it seems fair to provide for the satisfaction of a wider circle of persons that might be affected by the contract.

2. The legal question.

The study is concerned with instances where third party loss is a problem in the jurisdictions examined. These instances will be examined in detail in the corresponding chapters. However, a brief reference is made here.

A basic aspect of the legal problem involves the very issue of protection of third party interests. Third party loss would naturally be considered a question of delict. The question then is whether the behaviour constituting the violation of the contract is a delict against the third party. However a delictual action for carelessly inflicted loss[4] cannot be established. The loss caused is in most cases purely economic -- a basically Anglo-American law concept indicating that the damage is not physical (personal or material) or consequent upon material damage. In traditional common law[5] doctrine, negligently inflicted[6] pure economic loss is compensated in contract only; in principle therefore there is no compensation for third party loss[7]. Scots law is hardly distinguishable from English law. The German law of delict does not provide for the protection of unintentional, negligently inflicted[8] pure economic loss

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4 If the harm is caused with intention there is probably delictual protection in all the systems discussed here and third party loss is not a problem.

5 The classification of the legal systems is a contentious comparative law issue. See on the question Malström, Åke, "The System of Legal Systems - Notes on a problem of Classifications in Comparative Law" in 13 (1969) *Scandinavian Studies in Law*, 129-149. The author notes that René, David's classification where under the *systéme du droit occidental*, both the *groupe français* and the *groupe anglo-américain* are placed, the former including the *droit de pays latins* and the *droit de pays germaniques* (Scandinavian and Latin American systems also belong to the *groupe français*) is probably correct (p. 136). The division made by Zweigert and Kötz on the basis of historical style is to be followed in this work, because the civil law systems included are the German and a similar one, the Greek, and because a basic feature of the German systems that of enumerated delicts, not found in the French system or those inspired by the latter (Romanistic family), was crucially important for the development of contractual mechanisms. The common-civil law division is undisputed.

6 If the loss is caused intentionally there third party will possibly be awarded compensation, through for example the tort of deceit or the tort of trespass to goods. In any case as can be seen from the diagram and the explanation provided in Tort law by Markesinis and Deakin, 1994, p.19 et seq., the third party will be protected in delict. The same applies for American law. Most likely some tort involving intentional interference with person or property, in the latter case the trespass to land or to chattels for example, will be fulfilled. See Keeton (ed) *Prosser and Keeton on Torts*, 5th edition, 1984, 33 et seq, and 67 et seq. In Scots law as well some of the intentional delicts, whether those affecting person and property, or the economic delicts or fraud, will be fulfilled. See Thomson *Delictual liability*, 11 et seq, 32 et seq.

7 The actual state of the law is considerably different.

8 As will be seen later, if the harm is caused intentionally there is possibly protection on the basis of §826BGB, which imposed compensation for harm caused intentionally and *contra bonos mores*.

either. In Greek law (as in French law) compensation under delict for (unintentional[9]) pure economic loss is possible. There is doubt, however, whether the requirement of unlawfulness of the injuring behaviour will be fulfilled in all cases when the loss is purely economic, or if the courts will be convinced by the degree of the defendant's culpability.

The reason for which compensation for pure economic loss is problematic in common law jurisdictions is that the damages might be expanded excessively, in which case a large number of claims might arise. In economies with increased specialisation of labour and interdependence, any event -- the violation of a contract in our case -- can have ripple effects reaching a large, sometimes potentially unprecedented, number of people even remotely related to the cause of damage[10]. It is profoundly unfair, in proportion to the wrongfulness of the defendant's behaviour, to allow the defendant be exposed to a large number of claims. From the point of view of transactions, such a prospect would discourage economic activity. There is a need to identify a convincing link between the injuring behaviour and the loss in order to limit the defendant's exposure by selecting the injured parties that deserve compensation. It seems that, by its nature, the law of delict is not suitable to accomplish such a limitation. The special circumstances of loss caused to non parties due to a contractual violation cannot easily be acknowledged in delict. The contractual context in which the injuring behaviour of the defendant occurs, his culpability is assessed and the claim is logically explained, is generally not taken into account under delict. The problem of limiting liability is more subtle in civil law orders, where it is presented as a causation issue and not as a general policy question. However, there as well, protecting the defendant from excessive

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9 In the Greek system in the case the loss is caused intentionally not only the basic delictual clause will be fulfilled but, possibly, the special §919AK as well giving the right to compensation for damage caused intentionally and *contra bonos mores* (as §826BGB).

10 One example is the case of an auditor's mistaken report leading to the injury of a large number of people, shareholders or investors for instance. Typical of the compexity of transactions of the interdependence of interests are examples from the contracting and transport instances. With certain caution one could refer to product liability. A far reaching example could involve the situation where after damage of an environmental character, oil polution in a coastal or river area, as is the usual example from American case law, a vast number of claims is possible from fishermen, businessmen in the tourist industry, freighters, farmers, residents etc. Such damage could for the sake of the argument here be attibuted to a contractual violation, mistakenly performed repairs on the ship which sunk.

exposure is a real concern and courts need to develop sufficient mechanisms or practices to tackle the issue.

The contractual context in instances of third party loss creates further questions regarding the protection of the defendant, apart from the possibility of excessive claims for damages. One such issue involves the possibility of the defendant raising defences from the contractual relationship. As previously indicated, the wrongfulness of the defendant's behaviour and his culpability are defined within the context of the violated contract. Contractual liability might be limited on the basis of exclusion or limitation clauses and in certain cases, as when non parties are aware of such clauses; arguably, the wrongfulness of the injuring behaviour should be judged accordingly. The defendant might be reasonably expecting that he would not be liable for the particular behaviour, and it might seem just to consider the defence valid. The third party might be in a position so similar to the creditor's or deriving his claim from the latter -- a member of a group in a restaurant, where another member orders the meal, the lessee's family members -- so as to seem fair to have contract-based defences raised validly against the third party as well. It would seem reasonable therefore at least to consider allowing the defendant's contractual defences. This has proven particularly problematic under delict: the defences do not affect the defendant's culpability or the causal link between the injuring behaviour and the loss, while it might be difficult to establish the contributory negligence of the third party. Unless the contractual context is effectively taken into account, a convincing pattern for the treatment of the defendant's contract-based defence can hardly be found.

Moreover, in a contractual context, following transaction's ethics, the defendant should not be liable for what would have been acceptable behaviour, nor should he be held liable to any other but his contracting party if, for instance, the violated relationship is one of confidence (litigant-attorney relationship) where special duties of loyalty are owed, duties that conflict with any obligation to a non party. The third party can often understand, from his position towards the violated relationship, that in the context of the particular contract or, more likely, according to transaction morals, the defendant's liability is limited. This is

possibly the case of an investor referring to an auditor's report or of a purchaser in a sale transaction who is required to have his own attorney and not to rely on the seller's attorney. The third party might be aware of the exclusion or limitation clauses in the contract, or of the fact that it is common practice in certain contracts for debtors to place such clauses as in the construction or carriage industries. Certain at least of these latter defences could possibly be taken into account in decisions based on delict. However, delict is definitely a blunt instrument to deal with delicate questions of transaction practices and ethics for example, and generally of balancing contradicting interests, which in the case of third party loss has reasonably to involve the contractual context.

Finally, it seems that the fair safeguarding of the defendant's position is difficult under delict, the seemingly natural solution for third party loss, as it is generally difficult to balance competing interests in delict.

In sum, a convincing and consistent pattern for third party loss under delict, the seemingly natural solution for third party loss, appears problematic, both from the point of view of providing protection and, especially, from the point of view of protecting the defendant from excessive exposure. It is particularly difficult under delict to take account of the underlying contract and to balance competing considerations. This study looks into developing contract-based protection in the selected jurisdictions, whether that involves applying contract law outright or taking account of the contractual context in decisions based in delict, starting from the unique example of German law, where two contractual mechanisms have been developed.

3. Methodological questions.

3.1. Introduction.

Given the continuing uncertainty over the definition, methods and purposes of the relatively modern area of comparative legal studies, this study is comparative[11] in nature, in

11 Comparative law, a "fashionable" topic (Tallon, D. "Comparative Law: Expanding Horizons", 10 (1969) *Journal of the Society of Public Teachers of Law*, 265) is a rather recently developed area of legal studies and there is still considerable disagreement over its definition, its character as a 'science' or not, over its method and function. For a comprehensive account

of the development of comparative law see Zweigert and Kötz *Introduction to Comparative Law*, 1992, Gutteridge, H. C. *Comparative Law; An Introduction to the Comparative Method of Legal Study and Research*, 1974, Kamba, W. J. "Comparative Law: A Theoretical Framework", 23 (1974) Int&ComLQ, 485-519, Rheinstein, Max "Comparative Law and Legal Systems", in *International Encyclopaedia of the Social Sciences*, vols. 9-10, Stills, D. L. (ed), 204-210, Watson *Legal Transplants*, 1974, Kahn-Freund, O. "Comparative Law as an Academic Subject", 82 (1966) LQR, 40 and "On Uses and Misuses of Comparative Law", 37 (1974) MLR 1-27, Pound, R. "Comparative Law in Space and Time", 4 (1955) AJComL 70-84, and the more recent work by Frankenberg, Günter "Critical Comparisons: Rethinking Comparative Law", 26 (1985) *HarvardIntLJ*, 411-456.

Comparative law developed as a separate branch of juridical science relatively recently and to some extent it is still unformulated. The aims, methods and the very purpose of comparative approaches are often doubted. See Watson *Transplants*, Rheinstein, Zweigert and Kötz, and Gutteridge, for an outline of the historical development of comparative law, its definition-related deliberations and methodological uncertainties.

The methodology of comparative law especially is still developing. As Watson observes comparative law is largely unsystematic (16). See also Zweigert and Kötz 29, and Kampa who noted that "the process of comparison is, perhaps, the most difficult aspect of comparative law to clarify and there is little assistance to be derived from extant comparative literature", (511). Frankenberg refers to the view that "for comparative law proper theoretical guidance is either not needed or not heeded." (416). He offers paradigms of methodologies; encyclopaedic- constructive comparison, comparative historical reconstruction, juxtaposition-plus, and comparative functionalism. The array of categories and the critique on their objectivity evidence the methodological quagmire of comparative law.

It is doubtful whether this study would qualify as a comparative law at least under the meaning given to the term by certain authors. The study concentrates on a very specific aspect of civil liability and on individual jurisdictions. The very object of the study does not enable in depth, far-reaching comparison between the systems, nor does it shed new light on the distinctions between common and civil law. The study is neither as ambitious in scope nor as comprehensive as certain at least authors would like a comparative study to be For instance Watson considers that the aim of comparative law is the study of the relationships of one legal system and its legal rules with another (*Legal Transplants* ,15). This work does not have such a wide scope. Indeed it does not express "the logical reaction to global development and interdependence, to the transanational structure of law or to the intensified economic, social and military relationships" that in Frankenberg's view comparative law involves (Frankenberg 418). The research is not dedicated to comparison as such. It has a very specific purpose to discuss the advantages of contractual solutions in the situations involved.

On the other hand, to use Rheinhard's approach ("Teaching Comparative Law" 5, 1937-8, UnChiLR, 615-624) this work is not 'monographic' or 'synoptic' of different systems' provisions and does more than a "taxonomic or analytical description or technical application of one or more systems of positive law" (617). Moreover the work has potential practical use. It is not thus, in Guttridge's terms, a form of "Abstract or Speculative Comparative Law" (p.9). Similarly, the work does not include some "casual reference to, say, German law in a course of the English law of contract" (Kamba, 489).

that several jurisdictions are examined, and specifically microcomparative, i.e. focusing on a particular legal problem[12] and its treatment in different jurisdictions[13].

This study will not consider variations in the socio-economic background of the systems discussed[14]. Although there are differences in economic development[15], the overall socio-economic reality is similar, as is the socio-political orientation of these societies[16]. The focus is thus not on overarching ideals but on the techniques that the systems employ[17].

The term 'third party loss' is based on the approach in German law and is chosen because it is descriptive and thus more accurate and coherent, and applicable to all the legal

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12 A legally significant social problem as Rheinstein (208) put it. The very definition of a legally interesting social problem, entails difficulties because it is itself an evaluative judgement. Comparative law has often to rely on other social sciences for this evaluation. Kamba notes that "in terms of the definition, the subject matter of comparative law is two or more legal systems; or parts, branches or aspects of two or more legal systems..." (505). The dividing line between microcomparative and macrocomparative approaches is of course flexible (Zweigert and Kötz 5).

13 This form of research represents the earlier version of comparative law. At first focussed on a particular legal, contract for instance. It was realised however that the same terms rarely had the same meaning in different legal systems, and that the same or seemingly same legal institution might perform different functions in different surroundings. Comparatists took progressively a function-oriented approach, seeking to identify social problems and the rules and institutions employed by the different legal orders to resolve these problems. (Rheinstein 208 and Zweigert, K. and Kötz, H. 5). See Kamba who notes that the emphasis of comparative law is on "functional and problem solving approaches" (517), and Rheinstein (*Teaching*) who speaks of a functional comparison, that involving the social function of the rules (620). In a macrocomparative approach entire legal systems are compared. The delimitation between the two is often difficult to make but the subject of the thesis is clearly microcomparative.

14 A prerequisite for comparative research is said to be that a similar socio-economic background exists between the systems discussed. See Guttridge, 73, referring to Pollock and Pound. What Pound noted is that the systems in question must have reached a similar level of development, for instance, they must all be mature as common or civil law systems are. See also Kamba 507 and Schmitthof "The Science of Comparative Law", 7 (1939) CambLJ 96. Kamba finds that these views are unnecessarily restrictive. In the light of the ambiguity of the level of legal development, it makes sense to refer to a similar socio-economic background as a factor which will at least facilitate comparison. It would be an unfavourable constraint on comparative approaches, were they to be limited to comparisons between systems of a similar socio-economic and accordingly historical background as well. There are remarkable studies transcending differences in socio-economic development. (See Watson, *Legal Transplants*).

15 These are reflected in the volume of case law in each jurisdiction.

16 In the sense that they all refer to private economies, liberal democracies and welfare states.

17 Pound focuses on ideas and techniques as aspects of comparison (70-84). The comparison is, in Kamba's words, an 'intra-cultural' one from the point of view of the jurisprudential outlook and the relative social context (515). There seems to be little risk of an 'unequal equation' in this comparative approach (Stone, Ferdinand "The End to be served by Comparative Law", 25 (1951) *Tulane LR* 325- 335 at 329).

orders included in this study. Being a legal concept, the definition is somewhat artificial, however its descriptive character renders it less biased doctrinally[18]. Moreover the definition bears the implication of the potential for contract-based solutions[19] which is a basic object of this study. It also highlights a fundamental suggestion of this thesis, i.e. the breaking up of pure economic loss and the separate treatment of third party loss cases. The concept 'third party pure economic loss' is largely equivalent; but locates the problem more accurately.

The language used is, it is hoped, plain and raises little difficulty so as to reduce the inherent superficiality[20] of comparative views. Many English language sources are referred to[21] in order to diminish the risk of misunderstanding foreign systems and to facilitate verification.

The study of the case law[22], necessary to offer an accurate picture of the law, poses special difficulties due to differences in style, form, legal technique and the degree of authority case law enjoys in each system[23]. This work focuses on case law together with its academic assessment; case law is often looked at through the lenses of academic consideration. The commentaries offer credible interpretations of the courts' perceptions, cover longer periods of development, and, mainly, assist in rounding the corners of differing judicial style and tradition without being absorbed into the study of the latter.

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18 See Kamba referring to the problem of "expressing legal systems, their institutions and concepts in comparable terms and categories" (517). See also Gutteridge 117 who underlines the problem of legal terminology. Differences in the latter might cause confusion while they might have considerable practical importance as well. See also Frankenberg speaking of a need for distance and difference needed for acquiring new knowledge (414).

19 See Kamba on the choice of topics for a micro-comparative view. These could be "a) the various characteristics of a legal system: the structures, sources of law, judicial system and the judiciary, the legal profession and so on; b) the various branches of national law; c) institutions or concepts; d) the historical development of the legal systems." (509). The topic of this thesis, as defined with the combination of common and civil law elements, falls under c).

20 Watson, *Transplants*, 10.

21 Watson, *Transplants*, 10.

22 As Stone puts it one of the reasons that prompts us to know foreign systems, is to compare our methods of analysing and resolving(326).

23 Gutteridge, 88 et seq. Markesinis ("Comparative Law" A Subject in Search of an Audience", 53 (1990) MLR 1-21), underlines the value in presenting foreign law through case law than codified law, in that it is a more effective means for correcting or improving national law, or shape the development of national law. Foreign case law completes the picture that emerges from doctrinal writings and "can reveal what the law really is and why it is what it is" (7).

The work generally draws heavily on the related academic accounts[24] in order to assess not only the position in the law, but also the level of satisfaction with the law, the need for change and the direction and prospects of a possible reform.

These preliminary points concentrate on certain basic issues involved in a comparative study. The most contentious, as in any comparative view, is the selection of the systems examined as well as the research approach chosen (here the in-depth examination of each jurisdiction[25]). It is argued that the topic's character weighed heavily on the selection and the choice of technique. Apart from the challenge seen in research that stretches from the unique German law mechanisms to the complex pure economic loss issue in common law, the selection of jurisdictions and the research approach have been influenced by personal affiliation with certain systems and the possibility of a more meticulous analysis[26]. Important in opting for in-depth accounts of each jurisdiction was the need to avoid, as much as possible, repeating known statements, approaches or conclusions found in various comparative works, whether comparing common law to civil law or referring to issues relevant to the topic, as the treatment of similar cases, solicitors' or accountants' liability for instance, in English and German law. However, due to the very specific character of the study it is necessary to offer information on the systems involved, often from a comparative point of view. This is done briefly , and mainly in the footnotes.

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24 Whenever this is possible of course.

25 With the exception of the Commonwealth jurisdictions, meaning England, Canada, New Zealand, Australia, which are examined together as the particular chapter is concerned with recent developments in the more traditional common law countries. There is no separate, in depth examination of traditional common law. Extensive references to English law are made in the chapter on Scots law. Apart from reasons of space, it was thought that possible readers from the UK will be familiar with the situation in English law. In any case the problem of pure economic loss and third party rights in English law has been the object of many extensive studies and this work could add little to these.

26 This option reflects the writer's personal inclination towards analysis. The latter view could of course have been influenced by the topic and the microcomparative character of the study.

See Kamba (509) speaking on microcomparative studies. See also Rheinstein, and Zweigert and Kötz, 30-32, who note that the question posed in a comparative study might stem from a feeling of dissatisfaction.

3.2. Is there a legal question?

To be meaningful, the study should concern a legal problem, a legal question, common or largely equivalent[27] in the jurisdictions examined. The criteria for the existence of a problem are based on the unsatisfactory nature of the solution in the systems discussed[28].

Despite differences in appearance, a common problem for all the systems involved in this study seems to exist, defined deductively here as third party loss problem. First of all, the situations where third party pure economic loss emerges (professional advice and construction cases for example) raise legal issues in all the jurisdictions examined[29].

There is no distinct concept of third party loss in common law. Third party loss is basically a part of the question of pure economic loss[30], but it could involve other problems such as remoteness of damage. However, the existence of a contractual context has been occasionally pointed out and there have been suggestions for the separate treatment of certain groups of pure economic loss cases, most notably those where this contractual context is more evident. The term third party loss, based on German law, is again inaccurate if the reason for which no compensation is available in delict in German law is taken into consideration. The term contains connotations for the circumstances of the loss and the injuring behaviour, but the reason for the absence of protection is that this type of loss, i.e. pure economic loss, is not protected delictually. At least as loss for which no delictual protection is provided, pure economic loss as a concept makes sense in German law[31] and in the Germanic family[32] of

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27 Rheinstein 208, Zweigert and Kötz, 5. "It is essential that the topics selected to be compared be comparable in the sense that they relate to equivalent institutions, concepts and so on." (Kamba 509).

28 Keeping in line with comparative law methodology, at this stage a working hypothesis on the existence of a problem is given, to be confirmed in the study. Zweigert and Kötz, 31-32

29 There is some dissatisfaction with the solutions on third party economic loss in all the jurisdictions examined. Only a handful of academics have spotted worrying signs in Greek law. In Germany there are opinions against contractual solutions.

30 Meaning not personal or other physical harm or their consequences, but a deterioration of the financial position of a party. See at that stage Zweigert and Kötz 654 et seq. The issue will be discussed later on.

31 See generally Lawson and Markesinis *Tortious Liability for Unintentional Harm in the Common and the Civil Law*, 1982, 37-43. In Germany economic loss raises questions of remoteness of damage mainly. However, the difficulties are multiplied with pure economic loss (*reiner Vermögenschaden*). Academic opinion is against this rigid anti-compensation regime of the law of delict. However, the choice for restrictively enumerated delicts is

systems, even if, as in Greek law[33], the law of delict differs from the German one. In the mixed Scots law system, the law of delict on the particular issue is hardly distinguishable from English law[34], although Scottish principles of delict could, in theory, cover pure economic loss.

Similarly deceptive are the supposed differences regarding the priorities of each system. It could seem that, while in German law the priority is to establish protection[35], in the other systems the overall concern is one for a balanced approach whereby third party loss is compensated while the defendant's legitimate concerns are taken into account. However, in all jurisdictions the problem is for a convincing and flexible response to a systemic weakness. In common law protection is not only tied to doctrine but to policy concerns as well. Protection has been refused for fear of fuelling a large number of claims and in principle there is no tort protection for negligently inflicted pure economic loss; in other words the question concerns protection as well. On the other hand, in German law there seems to be no way to provide protection in delict. Once the contractual mechanisms are applied their qualities in balancing competing interests, and in protecting the defendant from unjustified exposure are duly noted. The differences, therefore, are more in style than in essence[36]. In all the jurisdictions the quest is for convincing and balanced solutions.

In none of the jurisdictions can the problem be concentrated in either the law of contract or delict. It was accurately said that the legal problem emerged from the rigidity of contract in common law and of delict in the German system, but the question transcends their limits and concerns their relationship; it is a problem of civil liability as a whole, and the

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fundamental in the system of the German Civil Code (BGB). In contrast, in French law pure economic loss is not a distinct problem, in principle at least (85, 88).

32 According to the division on the basis of style made by Zweigert and Kötz. These are the systems which have been basically influenced by the model of German law.

33 In Greece pure economic loss could be a part of the debate on whether the general delictual clause requires an unlawful act, since pure economic loss might not always be considered unlawful.

34 See Thomson *Delictual liability*. 59 et seq.

35 In Germany the need is to establish third party protection as there is no protection in delict.

36 As has been said the differences between civil and common law systems are not so much differences in content as differences in method and tradition. Rheinstein, 209

contract-tort relationship is central to this study. Moreover, the study is consolidated in the examination of the potential for contract-based solutions in all the jurisdictions. This is a hypothetical and yet real concern that has been partially debated already, especially in common law legal literature[37]. In Scots law the examination of a latent potential for improved treatment of third party loss is related to the application of dormant Scottish principles[38]. Finally, in all the systems the use and limits of judicial innovation is an issue raised in relation to the acceptance of contractual solutions[39].

The term can be accepted since the problem it refers to exists in all jurisdictions. As stated, the term is descriptive and thus less burdened by doctrinal implications; thus the explanation that would be required were a legally laden concept such as pure economic loss to be used can be avoided. More importantly the term makes the contractual implication more evident and reflects a particular rationale with regard to the direction of the study in examining the prospect of an increased role for contract law in these situations. Deductive and artificial as it might be, the term is effective in focusing on a common concern of all the systems in this work.

In conclusion, it can be provisionally said that the study is justifiably embarking upon the discussion of third party loss.

3.3. The selection of systems discussed.

Comparative studies demonstrate the risks involved in the selection of the systems to be studied. Apart from limitations related to access to materials, language capacity, time,

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37 See the work of Markesinis and Fleming for common law jurisdictions and of Sourlas and Kefalas in relation to Greek law.

38 In Commonwealth legal systems third party protection in tort is uncertain, due to the overall uncertainty over liability for pure economic loss; the need to restrain the financial exposure of the defendant being a major concern. American law faces the same problems to a lesser extent; there the need is for a more rational organisation of compensation in the system of civil liability. Scots law shares the problems of common law systems, but by developing relevant but dormant Scottish principles better solutions might be reached. In Greek law there is a need for a more effective and flexible response to third party loss situations.

39 Even in France it was suggested that in the case of a 'group of contracts' (usually involving subcontracting) the claims by third parties should be based on contract. See Whittaker, S. "Privity of Contract and the Law of Tort: the French Experience", 15 (1995) *OxfJLSt* 328-369.

space etc., there is a strong element of personal preference in deciding which jurisdictions to examine.

One empirical suggestion is to examine as many systems as possible[40]. It has been argued, on the other hand, that an expansion of the comparison to a great number of jurisdictions might diminish the returns of the comparative approach[41]. For the purposes of this work, if not of microcomparative works in general, the first opinion is considered more prudent.

The topic, by nature is related to broader important issues of civil liability such as the contract-delict relationship and the character of either delict or contract. However, the topic is very specific in order to offer substantial but limited background for a convincing comparison of such general issues. In any case substantial comparative works exist on the overall character of civil liability which picture accurately the situation in different legal families in a comparative and comprehensive manner. Moreover, the possible solutions to the specific problem of third party loss, meaning delictual or contractual liability, are largely known. As a result, there is little scope for a comparison of general civil liability questions.

More importantly, the overall situation on issues overlapping with third party loss has been discussed comparatively in studies of a more limited scope, comparing German, English and American law[42]. In these works, basic assessments, for example, on the inadequacy of the German law of delict leading to the development of contractual protection, were already made.

It seems that information and analysis from a larger number of jurisdictions indicating the variety of circumstances and approaches is necessary to reinforce the pervasiveness of the comparison and to set the background for the more demanding aspect of the study: the discussion of reform. It thus makes sense to extend the specimen of the study to a fairly large number of jurisdictions. As could be understood from the previous paragraphs, comparisons involving broader civil law questions or an overall account of the problem

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40 As suggested by my supervisor, Professor George Gretton.

41 Zweigert, K. and Kötz, H. 39

42 See the works of Markesinis and Fleming.

would predominantly concentrate on fewer systems that are representative of legal families. It is not for this work to repeat such an approach. Rather its advantages are detail and information and this is better accomplished on a wider range of orders.

The choice of the systems is not coincidental; each system presents special challenges that improve the quality of the sample and the credibility of the research. The problem of third party loss is presented differently in each system, and in each there is a varying degree of need for reform or for the improvement of existing solutions. The Greek system, seemingly a controversial choice[43], enables a view of the 'Romanistic' family of laws[44] (those following French law), regarding delict[45] where, it seems, no distinct third party or pure economic loss problems exist. Scots law, another choice away from the mainstream[46], is a mixed system (combining elements from the civil law and the common law), where the (third party) pure economic loss problem seems to be the product of English influence, and where an alternative way forward on the basis of dormant principles seems possible, or, at least, worth examining. Not only are systems from different legal families[47] included in the study, but also 'major' and 'minor' systems, in terms of the size of the jurisdiction and the legislative and case law production, are juxtaposed with the intention to give a picture of the third party loss variations and the seriousness of the problem in each jurisdiction. The relative academic debate is referred to in order to offer a doctrinally credible account of the situation. The juxtaposition further enriches the perspective and comparative insight of this work.

In sum, the extension to a fairly large number of jurisdictions enhances the credibility of the research without risking the focus of its conclusions.

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43 This choice was influenced by the writer's familiarity with the law and personal affiliation.

44 According to the division of the basis of style by Zweigert and Kötz.

45 It is different from the German provisions but not identical to the French Civil Code The examination of the Greek law of delict, enables an insight into Swiss law as well, as the delictual provisions in the two systems are similar, having received the same influences.

46 The choice if of course influenced by the fact that the host university is Scottish.

47 See previous references to Malmström and Zweigert and Kötz on the question of classifying legal systems.

3.4. Focus on individual jurisdictions.

The examination of the third party loss problem is fragmented, concentrating separately on the individual national jurisdictions[48] instead of a thematic (subject-based) structure examining certain aspects of the problem across jurisdictions[49]. Focusing on each system is more effective for such a microcomparative study where the problem is presented differently in the different systems. Third party pure economic loss is defined as a single subject in this study; its very conceptualisation is less usual especially when considering common law systems. Studies by certain common and civil law lawyers[50], that are related to the topic and apply a thematic approach, focus on only some of the problem's expressions (for example, on certain kinds of contracts -- in the construction industry or in the case of attorneys' preparing wills for instance[51] -- or on some particular aspect of judicial attitudes -- the degree of attachment to doctrinal orthodoxy[52]). The thematic approach is not particularly useful to an examination concerning a large number of systems and civil liability as a whole.

Moreover, focusing on comparisons under a subject-based view, could detract from the presentation. First, regarding the restricted topic in question, the comparison involves broader aspects of civil liability, already studied comparatively[53], leaving little ground for a

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48 Thus the reference to the Commonwealth jurisdictions, England, Canada, Australia and New Zealand is exceptional. However due to the strong links between the systems involved and the purpose to focus on recent tendencies it made sense to put these systems in one chapter. Moreover only a brief account is made due to shortage of space but mainly because it is presumed that the reader is more familiar with the law in these systems and there has been a considerable number of easily accessible, related studies, and an overall account of traditional common law principles, the original Commonwealth law, is presented in the chapter on Scots law.

49 Those referring to the possibility for third party beneficiary claims in each jurisdiction or to the defendant's defences in a third party loss claim for instance.

50 See Kötz, *Tel Aviv University Studies In Law* 10 (1990), 194-213, Markesinis, 103 (1987) LQR, 355, 25 (1991),*The International Lawyer*, 953-965, 106 (1990) LQR 556-561, in *Conflict and Integration: Comparative Law in the World Today*, from the 40th Anniversary of the Institute of Comparative Law in Japan Chuo University, 1988, 93 (1977) LQR 78-123. Markesinis and Deakin, 55 (1992) MLR 619-646, Markesinis, and Lorenz, 56 (1993) MLR 558-563, Cristian von Bar, in *The Gradual Convergence: Foreign Ideas, Foreign Influences and English Law on the Eve of the 21st century*, 1994, Markesinis (ed), 98-127, Fleming 4 (1984)*OxfJLSt*,, 235-243.13 (1993) OxfJLSt 430-439, 5 (1993) *Canterbury Law Review*, 269-279, 12 (1992) OxfJLSt 558-563, 105 (1989) LQR 508-511, 111 (1995) LQR 362-366, 109 (1993) LQR, 344-349

51 See Markesinis 103 (1987) LQR, 355, 25 (1991), Markesinis and Lorenz 56 (1993) MLR 558-563, Lorenz, and Fleming.

52 Markesinis and Deakin, 55 (1992) MLR 619-646.

53 The nature of contract the tort-contract relationship, for instance.

somewhat different focus. Secondly, each jurisdiction, even from the same family, poses different description and analysis requirements. Merging them together would require concessions to the accuracy of the account. Accuracy is a specific goal of the thesis since the general outline of the problem in German, Scots, English and American law can be found in English language literature[54]. Thirdly, a subject-based view requires simplification of detail and is thus naturally best suited for the examination of fewer legal orders, preferably representative of their legal families and major in terms of legal production, which in the present case would lead to the exclusion of at least Scots and Greek law, if not of those Commonwealth jurisdictions other than England as well.

As said, a systematic attempt is made to avoid focusing again on differences between common law and civil law. Such differences explain only some of the variations between the legal orders regarding the issue at hand. Emphasis is laid on how the particular national, legal and institutional circumstances lead to different approaches, while the common law - civil law divide is referred to when this seems useful.

Although the term 'third party loss' is chosen, in part, because it is doctrinally 'neutral', doctrinal aspects are examined in detail in the national context where they acquire their specific meaning. In order to target effectively the crucial issues that produced the present state of law, a contextual view of the problem and its solutions is provided[55]. The proper venue for this contextual approach is the individual jurisdictions. A detailed account is necessary, as the factors affecting the law are subtle, involving the systems' rationale, processes and the overall legal environment. The consideration of the potential for reform

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54 See Markesinis, Lorenz, Fleming and Weir in the English language literature. In Greek, see Sourlas, Kefalas, Stathopoulos. The broad outline of the jurisdictions involved is also known. Even for Greek law a basic outline can be found in Fraggistas, Ch. "Greece", in the *International Encyclopedia of Comparative Law*, v.I (national reports), chapter 6. See also Kerameus, K.D., Koziris, P.J. (eds.), *Introduction to the Greek Law*, 1993.

55 As Kahn-Freund, MLR 1974, points: "any attempt to use a pattern of law outside the environment of its origins continues to entail the risk of rejection." (27).

The presentation of the legal and institutional background, is a requirement for the accuracy of the comparative view and for overcoming doctrinal bias. It is in each system, for instance, that issues, related to the topic, but not strictly speaking a part of the latter, will be referred to in order to clarify the perception of the topic in each jurisdiction, the position it holds in the law.

should again reasonably focus on the context where this potential exists, the national legal order.

Historical references, fundamental to many comparative law studies[56], are restricted to the national orders in most cases[57]. The historical account of the problem covers predominantly the short span of this century and the comparison would only confirm the similar evolution of the historical-legal background towards socially minded, interventionist policies[58].

Academic references are limited to the individual jurisdictions, especially if theoretical views[59] have a direct impact on case law[60]. There is little point in comparing largely incompatible[61] theoretical views, as the purpose here is not to identify such converging or diverging currents (if that is possible at all).

Nonetheless, it is not argued here that comparative insights are less useful in analysing the current state of affairs and the potential for reform. Indeed they can offer valuable input and are made whenever this is possible, by drawing parallels between the systems when examining each jurisdiction. However the purpose of the study is not comparison as such but the efficient discussion of the problem, following its detailed informative presentation.

In conclusion, laying emphasis on the individual jurisdictions not only provides a more manageable framework but is justified by the nature of the study, as this is determined by the very specific character of its subject.

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56 Watson, *Transplants*, 6-7, Zweigert and Kötz, 8.

57 There are certain exception such as the development of the privity doctrine and the rejection of third party beneficiary contracts in common law where American law was receiving the doctrines of English law, the German law influence on the Greek law, and the effect of certain decision of the House of Lords on Scots law.

58 See generally Atiyah, *The Rise and Fall of the Freedom of Contract*, 1979, Coing, Helmut's *Epochen der Rechtsgeschichte in Deutschland*, 1967. The tendency for unification of laws and the expansion of international legal arrangements should also be taken into account.

59 Moreover, the scope of the subject does not enable extensive analysis from a social or philosophical point of view. See Pound speaking of analytical, historical and philosophical views of comparative studies (70-71).

60 In Germany basically.

61 They refer to different systems and have varying scope and aims, as they either infer judgments from existing phenomena or express suggestions for the future development.

3.5. Study purposes[62].

The purposes of comparative work, namely to provide information regarding foreign systems, to suggest alternative solutions to particular problems, to improve the perspective and analytical capacity of lawyers, etc., are dependent upon the nature of the topic -- its significance for the legal systems involved, its doctrinal connotations, its practical importance -- and vary considerably between different studies. The aims of this study are determined by the narrowly defined topic, its very specific expression in transactions, and the overall difficulties involved in comparative approaches.

In the context of comparative law purposes, the study aims involve, first, the supply of information on the different systems, as well as the presentation of their doctrine, rationale and processes in relation to third party pure economic loss[63]. The discussion of the relative problems of foreign legal orders in existing English legal literature concerns few major systems and does not extend to great detail[64]. Therefore, this study aims to provide a more detailed account of the jurisdictions on which general information already exists as well as information on less well known legal orders[65].

Since the possible solutions are broadly known (delict or contract[66]), the purpose of this study is to assess critically their function[67] and the satisfaction with the solutions in

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62 See Stone's reference to the reasons prompting us to know foreign systems. The desire to know and understand laws of other countries; to compare our solutions to those in other on common problems; to compare our methods in analysing and resolving; to discover common principles and methods (Stone, 326).

63 Zweigert and Kötz, 15. As Watson (*Transplants* 16) describes, one of the comparative law virtues is the systematic or unsystematic study and knowledge of foreign law. See also Stone, 335.

It could be argued that comparative law is meaningful only when there is a specific problem and only when the relative work has practical effects. It is difficult to give a consistent account of this "practical" element.

64 In England for instance, the German mechanisms discussed in this thesis have been the object of consideration in the House of Lords, by Lord Goff in the *Leigh and Sillivan v. Aliakmon Shipping*, 2 [1986] 2 All ER 145, [1986] AC 785, *Henderson v. Merrett Syndicates Ltd* [1994] 3 All ER 506 and *White v. Jones*, [1995] 1 All ER 691 (HL). See also previous references to academic comments on these mechanisms.

65 Not only the Greek but the Scottish order as well. There are references to Swiss law and other Continental systems as well.

66 Exceptionally there have been different suggestions, unjust enrichment for example.

67 See Zweigert and Kötz 31.

different systems. This will enable a comparison of the approaches in the different systems on the delict-contract relationship and, particularly, an assessment of the qualities in a more unified approach to civil liability.

Both this detailed information and critique form the background for the evaluation of the potential for change and specifically the promotion of contractual/contract-like solutions. The benefits of this exercise are more abstract and difficult to measure, as they are based on speculative judgments. The search for an 'inherent' potential, indicates that the burden to exploit this potential will fall on the judiciary. The need to speculate on judicial attitudes necessarily adds a further element of uncertainty to the study's assessments and expectations.

In light of the significant differences between the systems[68] the improvements discussed (contract-based solutions) are only generally outlined. However, once contract reasoning is encouraged, the results are likely to be similar; the operation of the solutions is thus not examined in detail. Moreover there can be no analytical prediction of the reform process; the study is limited to focusing on the doctrinal and institutional factors that should play a role in a possible reform. Conclusions and suggestions made will not concern all jurisdictions necessarily; some might be applicable to only one or some jurisdictions.

It is hoped that this study could be of use to the national lawyer, enhancing his/her power of analysis and, detaching him/her from national doctrine, in order to view civil liability in perspective and focus on functional solutions. The information provided can lead to a more thorough and consistent knowledge of the problem in the national system and to a clearer, critical and less biased account of the national and foreign law. In a more limited manner, the study can, in principle, be useful to judges or legal practitioners, and in addition, can be used in the preparation of legislative measures or transnational law unification projects[69].

The benefit from this work lies perhaps more in the individual parts, which involve critical evaluation of existing law and speculation over reform in the individual jurisdictions,

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68 It has anyhow been shown by comparative legal studies that similar concepts or mechanisms might operate differently in different jurisdictions. Watson, *Transplants*,

69 Zweigert and Kötz 23, Gutteridge 145

than in the abstract overall conclusion and suggestions. There is uncertainty in speculating over future development and only a broad outline of suggestions will be applicable for all jurisdictions.

It is arguable, on the basis of the choice to examine each system separately, that the study aims at informing on foreign law, and is therefore a study of foreign but not comparative law. However, the complex character of comparative law and the uncertainty surrounding comparative studies mitigate the force of this argument. The topic of the thesis, arguably, does not facilitate comprehensive comparison. It is hoped that, comparative or not, this work will be of use to comparativists, and can contribute to the debate on the issues raised.

4. Contractual protection: Basic implications.

Contract-based protection for third parties is an option that needs to be examined in the light of the likely unsuitability of delict. A brief reference is therefore necessary to place the question of the contract-based solutions in its doctrinal context.

Third party considerations[70] became more prominent in private law in the wake of the vast social and economic transformations of the industrial and post-industrial age. The law had to adjust its doctrines to preserve social and economic continuity. The question of establishing a contract in favour of third parties in Western legal systems as a general mechanism (rather than exceptional as it was in Roman law) is a matter of the last two centuries[71]. Compensation for third party loss[72], and especially the extension of the

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70 One example that does not concern the protection of third parties can be found in the recent United Nations' Convention for the International Sale of Goods, (Vienna Convention) that for the obligation of the seller to deliver goods free from any third party claims based on industrial or intellectual property (Article 42) ["(1) The seller must deliver goods which are free from any right or claim of a third party based on industrial property or other intellectual property, of which at the time of the conclusion of the contract the seller knew or could not have been unaware, provided that the right or claim is based on industrial property or other intellectual property"]. See Enderlein, F. & Maskow, d. and Eberstein et al for commentaries.

71 See the reference in the chapters.

72 Limited overtones of German law will be given at this stage. An outline of the relevant German law background will be provided later on, focusing on the organisation of odligational duties, in an attempt to offer some insight of the German lawyers' understanding of the structure and rationale of their law of obligations which is a prerequisite for the examination of the contractual protection for third parties, namely the mechanisms of

application of contract law[73] are opposed by two basic doctrines of 'Western' legal systems[74]: freedom of contract and relativity of contractual obligations[75] (privity of contract for common law[76]).

4.1. Freedom of contract[77].

Freedom of contract, an expression of the freedom of the individual to take part in economic life[78], is indispensable to societies determined by economic liberalism and market economy[79]. In German law terms it is a basic implication of the prevailing will theory (or the

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Drittschadensliquidation (compensation for third party loss) and of the *Vertrag mit Schutzwirkung für Dritte*, (contract with protective effects *vis-a-vis* third parties). A degree of generalisation is inevitable to the approach to the German law in the light of the increased conceptualisation of the particular system especially as far as academic approaches are concerned. The latter enjoys considerable prestige and wields substantial influence on the development of the law. The categorisation of obligational duties is a product of academic work. See Markesinis *A Comparative Introduction to the German Law of Torts*, 1990, and Zweigert and Kötz.

73 The problem of extending the boundaries of the contract has been the object of systematic concern in the context of German law and legal studies. Special reference will be made later on. Regrettably the particular considerations are fraught with academic abstractions and conceptualisation that might seem disturbing.

74 Historical, social and economic context is explored whenever this seems useful. A massive reference work is Coing Helmut 's (ed) *Handbuch der Quellen und Literatur der neueren europäichen Privatrechtsgesichte*, 1973. On the particular subject it would be useful to look at the chapter on the contract in favour of third parties in Zweigert, K. and Kötz, H. 1992, 124-138. The older book *Stipulations for a Third Party - A Comparative Study with Special Reference to Continental Law*, 1948, by Dold, Gilbert W. is also worth mentioning. A short overview of German legal history is Coing, Helmut's *Epochen der Rechtsgeschichte in Deutschland*, 1967. See the relevant parts in Cooke, P.J. & Oughton, D.N. in Atiyah P.S. *An Introduction to the Law of Contract*, 1989, and *The Rise and Fall of the Freedom of Contract*, 1979.

75 This expression ('relativity') was preferred because it is in use in the majority of the jurisdictions discussed including Scots law, and because 'relativity of obligations' is important for the doctrinal understanding of the contractual solutions to third party loss in the context of German law. In practice however relativity is more readily understood for the case of contracts.

76 See the relevant parts in Cooke, P.J. & Oughton, D.N. *The Common Law of Obligations*, 1989, in Atiyah P.S. *An Introduction* and *The Rise and Fall of the Freedom of Contract*, 1979.

77 This is only a brief reference with the purpose of indicating the doctrinal context of expanding contractual liability. It is indeed far from a precise view.

78 Itself an expression of the freedom to take part in social activities. The freedom of contract is the most important feature in private law with respect to the power of the individual for self development. Horn, Kötz and Leser *"German Private and Commercial Law; An Introduction"*, p.84.

79 See Cook & Oughton, Atiyah *An Introduction*, Wolf M. "Die Privatautonomie", in Vahlens Rechtsbücher, *Reihe Zivilrecht- Band 1*, 1974. See also, Alvarez A., Duguit L., Chamont J., Ripert E. and others, *The Progress of Continental Law in the nineteenth century*, 1969. The freedom of contract an indispensable instrument of a free economy, *"makes private enterprise possible"*. (Horn, Kötz and Leser, p.84.) The principle is related historically to the rise of the

Privatautonomie idea[80]), on which civil law systems largely rest[81]. It includes the freedom of the individual to organise his legal relationships according to his will, to enter into contracts, acquire rights and undertake duties, and to create new forms of contracts and contractual rights.

The freedom of contract is significant for this study, since the possibility of holding an individual liable in contract to a third party seems to contradict the doctrine: A basic aspect of the doctrine is the individual's legal commitment, which should be based on his freedom of will. In situations of third party loss usually no such expression can be inferred.

The freedom of contract has undergone a spectacular transformation[82] since its culmination in the first half of the 19th century[83]. The importance of the parties' intentions,

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(entrepreneurial) middle class in power, in an era hallmarked by events such as the "Glorious Revolution" (1689), in England and Scotland, (Atiyah *An Introduction* p6.), and by the influence of major intellectuals (Hobbes, Locke, Descarte's). As said "the *18th and 19th centuries were the heyday of theories of natural law and the philosophy of laissez-faire...*" (Atiyah, p. 8). The freedom of contract is a corner stone to the legal background of western socio-economic systems. (The same is of course true for the relativity of obligations).

80 The latter is a basic concept of the German legal system and of those systems related to it, and has a far more consistent and specific legal meaning than the autonomy of will, which is essentially a philosophical construction. See the references under the following footnote.

81 The French theory supporting the freedom of contract principle, (in the latter part of the previous century and the first part of this), has been that of the autonomy of the will; a philosophical theory essentially, *"reinforced by the economic doctrine of laissez-faire and by the moral argument that the individual is the best judge of his own interest"*. The theory was the foundation of contractual doctrine in all civil law countries imposing, among others that the agreement is freely made. See Nicholas Barry *The French Law of Contract*, 1992, 323. See also Wolf Manfred "Die Privatautonomie". A textbook definition of *Privatautonomie* is provided by Koziol and Welsen, who focus on the freedom of the individual to organise his legal relationships according to his will. Fikentscher underlines as the essence of the freedom of contract, an expression of the *Privatautonomie;* the possibility of concluding (entering into) contracts and through these binding oneself and others legally (73). The freedom of contract was first expressed statutorily in §305 BGB. It is generally thought today that its legal justification lies in article 21 of the Constitution (Basic Law -- Grundgesetz - GG) as part of the general freedom of action, based on the principle of the freedom of personality. It can be argued, therefore, that it has been upgraded, and that under the current status limitations might be more readily provided for. See Fikentscher 71 et seq. A brief account of the freedom of contract principle is given by Schöllner Alfred Dr. , in his comments on §305 BGB.

82 The transformation of the freedom of contract and subsequently of contract law have been the object of brilliant academic works to which reference will be made. This transformation comes in a process of adjustment necessary for the survival of the capitalist system. Although the freedom of contract has never been unlimited it has been qualified and restricted in various instances, along with the other basic institutions of economic liberalism in the last two centuries, in an unprecedented manner. Pressures existed for the treatment of the social and economic problems created by the rise of the capitalist system, problems that became acute as a result of the industrial revolution, such as poverty, child labour, exploitation of labourers, congested cities and increasing housing needs, bad hygiene

and the significance of promise-based liabilities is diminishing[84] in the face of the advance of socially minded interventionist approaches of the 20th century welfare state[85]. This change is aptly reflected in the German Civil Code (Bürgerliches Gesetzbuch, BGB)[86].

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conditions, or, later, unemployment, etc. There were also needs generated by events such as the last world wars which caused major social and economic transformations. As Atiyah notices, economic and social developments *"had largely destroyed any lingering faith in laissez-faire by the end of the first world war". The Rise and Fall* 625. Germany, in particular, experienced 12 years of Nazi power (1933-1945) that countermanded the legal achievements of the liberal Weimar Republic.

As a whole there is a steady move from individualism to collectivism from the second half of the 19th centuries. (Cooke & Oughton, 23. See also the chapter "Individualism and the new social order" in Atiyah's *The Rise and Fall* 627), expressed by developing state intervention, which the market economies accept in order to sustain security and competition in transactions.

The freedom of contract is subsequently transformed with the rise of the welfare state in the 20th century. (In Germany the hallmark of the creation of the welfare state is the establishment of the Weimar Republic in 1918. Coing, *Epochen* , 113.). Atiyah refers to the simple change of political values, (*"collectivist even socialist ideas became widespread"*) as probably the main reason for this change in beliefs (*An Introduction* 19). A more comprehensive overview would suggest *".....the growing expansion of the state, the development of the idea of association in all lines of activity, the spread of moral and social doctrines which have led to widening of the concept of justice".* (Alvarez A., and others, The *Progress of Continental Law in the nineteenth century"* p.45.).

Furthermore, in the emerging consumer society the purpose is to curtail threats to the essence of contractual freedom, from organised interests, dominance of the market, standardised forms of contracts etc.

As regards legislative activity, labour and social security laws, as well as measures protecting tenants are promoted against the unrestricted freedom of the parties. Atiyah (*An Introduction*), recalls a 1831 Truck Act and a 1845 Gaming Act at the early stages, (p.15). He notices that, as law became gradually more standardised, the intentions of the parties became less important. See Wolf, M. "Die Privatautonomie", 53, on labour and lease laws. Such legislation, as well as that on consumer protection, aims at the improvement of the position of the weaker (in economic terms at least) party. In the 20th century, priority, motivated by the unequal bargaining position of the parties involved, is given to consumer protection. Atiyah *The Rise and Fall* 592 et seq.

83 In Atiyah's view the culmination was at the beginning of the 20th century. This is true from the point of view of the prevalent doctrines. However, the transformation of the freedom of contract was under way already for the second half of the 19th century and Atiyah, did take account of this development. He notes that from the late 19th century onwards, there was *"a gradual decline in belief in freedom of contract". (The Rise and Fall* 18) and refers to the increasing role of standardised forms in contracts, and to the declining role of the free choice, (21-23). From the end of the 19th century, economists had outlined the current of changes referring to three groups of examples against the philosophy of *laissez-faire;* monopoly problems, market failures and consumer ignorance. (Atiyah, 616).

As regards doctrine and legal education, in the case of English legal studies for example contract law as an academic topic, in contrast to particular contracts, is becoming the object of observation after 1870. By the end of the 19th century although contract law books were in favour of the classical liberal model and the courts were thinking on the same terms, the Parliament *"was busy intervening with paternalistic legislation"* in the forms of Factors Acts, Passengers Acts, Truck Acts. Cooke and Oughton, 26.

84 The function of contract law until the late 19th century, was mainly to provide for the smooth enforcement of private arrangements, in order to assist a classical free market economy system; judges laid emphasis on the parties' (actual or presumed) intentions and

The role of the contract as a means of allocating resources or of calculating risks, has thus been undermined[87] and it can no longer be seen as a strictly private affair. In contract law, benefit and reliance-based liabilities are now emphasised instead of promise-based

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agreements. Atiyah criticises bitterly the attitude of the judiciary in England. In respect of cases on trade practices he notices that until the first part of the 20th century (culminating in 1942) *"...the courts assisted in the destruction of freedom of trade by their pursuit of freedom of contract"*. Atiyah ,*The Rise and Fall* 701.

85 The freedom of the individual has been limited by the advance of more socially oriented considerations. The state , for example, apart from serving the preservation of order has the duty to promote social welfare and to administer welfare. Coing, *Epochen* . 113.

Esser and Schmidt note that the principle of the social state (*Sozialstaatprinzip*) gave a new content to private autonomy. (p. 4) A consideration for the position of third parties develops accordingly. Wolf M. "Die Privatautonomie", 37. Although it would be exaggerating to say that social cooperation was imposed on the parties as the goal of obligational transactions, it is important to consider that individuals' aspirations need to take into account the social and economic context where they operated, apart from taking the initiative to create the respective rights and duties. See Atiyah *The Rise and Fall of the Freedom of Contract*, especially for Scots and English laws.

86 As said, in German law today the freedom of contract is guaranteed by the Basic Law (Grund Gesetz) as part of the general freedom of action (article 2 para. 1). German law distinguishes two forms of the freedom (§305BGB); the freedom to form contracts (*Abschlussfreiheit*) and the freedom to give content to them (*Inhaltsfreiheit*). The freedom to enter a contract is limited when there is a legal or factual monopoly (a publicly owned company supplying electrical power can be both a legal and a factual monopoly). More important is the freedom to arrange the contents of a contract. In civil law the rules of the General Part of the BGB and of the Law of Obligations *"are dispositive rather than imperative"*, and allow the fullest scope of innovation. (Horn, Kötz and Leser, 84.) In family law, property law and the law of succession the number of possible forms of contract is limited to the interest of legal security.

The freedom of contract exists however only within the limits of constitutionality and legality. In BGB characteristic provisions that limit the freedom of contract are; § 134 BGB, which declares the prevalence of statutory provisions, §138 BGB which declares void all the contracts which are against good morals or are usurious, § 242 BGB, which declares void the contracts that are violating the principle of good faith. Certain other contracts are specifically forbidden. § 248 BGB declares void an agreement made in advance that the interest of a loan shall bear interest. The written contracts that do not fulfil the formalities of §126 BGB, (signature), are similarly void. Other exceptions of prohibited contracts are: A contract the performance of which is impossible is void (*"impossibilium nemo obligatur"*, §306 BGB), contracts by which one party promises to transfer or to charge with a usufruct the whole or a fraction of his property in favour of another party are void, if they refer to the future property of such a party (§310 BGB), and, contracts relating to the estate of a third party who is still alive including contracts relating to the compulsory portion or to a legacy, are, in principle, void, (§312 BGB). See Cohn, E.J. *Manual* 112-113. (The *pactum illicitum* of Scots Law can also be recalled as an example of the limitations to the freedom of contract. See Gloag, *The Law of Contract* 628 et seq., who refers to similar terms; "void", "illegal", "unlawful agreement".)

87 Atiyah *The Rise and Fall* , 701.

liabilities[88]. In this context, the contract becomes a matter of wider social concern[89], and in this light one can possibly assume that the interests of a wider circle of persons affected by the contract could be taken into account by contract law.

4.2. Relativity of contractual obligations[90].

The relativity of contracts[91] (privity in common law), one expression of the Roman law principle[92] of the relativity of obligations, is a corollary of the freedom of contract[93] and a

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88 Atiyah *The Rise and Fall,* 592 et seq. The restriction of anticompetitive practices is a common example of legislative intervention in the freedom of contract. A particular type of contract might be imposed on the parties as a public law requirement. See Cohn, E.J. *Manual,* 113, referring among others to contracts with entities offering public utilities.

89 See the reference to the social function as a central aspect in the modern law of contract. Alvarez and others, The *Progress of Continental Law in the nineteenth century,* 45. Social solidarity, justice and economic efficiency are directing legal reasoning towards accepting the possibility of an expanded contract. (*"Social interdependence by reason of division of labour (became) a main factor of social cohesion"*, -- Alvarez and others 76--). See also the reference to equalitarianism, that concentrated on the deprived social classes, in Atiyah *The Rise and Fall of the Freedom of Contract,* 631.). As there is social concern for the protection of the contractual relationship from third party interference, there are arguments justifying the protection of (certain) affected third parties on the basis of the contract, as socially-economically sound and legally possible. See in Burrows, A.S. *Remedies for Torts and Breach of Contract,* 1987, the reference on the argument of the economists that, for example, prefer compensation to other remedies, (pp. 6-8).

90 The relativity of obligations' problem is usually presented as a problem of the relative effects of contracts (*Relativität von Vertagswirkungen*) See Kramer *Einleitung* on §241BGB. The rule is valid for all obligations; in civil law classification those that stem from statute law (as unjust enrichment or delictual liability; §§ 812, 823, 831 BGB, and 904, 914, of the Greek Civil Code) and those that stem from contracts. In the former case the legislator can define the criteria that he considers important for the creation of the obligational bond and that will each time lead to the identification of the debtor and the creditor.

91 The term 'relativity' was preferred in this context because it is used in Scots law as well and because, in its use in civil law systems it embraces any relationship of the law of obligations.

92 The traditional Roman law doctrine, considered contract as a *"vinculum juris"*, (a legal bond), that could give rights to, or bind, only the parties to it; *"alteri stipulari nemo potest"*. Zimmerman, "Stipulatio alteri", 34-45. The maxim is Ulpian's. See also Dold. Relativity has been adopted by the civil law systems. Scots law adopts the doctrine as it was recognised in Roman law. (*"Where an obligation exist a person is legally bound to do or refrain from doing something to or for the other party to the obligation. "*, Walker, *The Law of Contract* 1979, 4.). (More reliable authorities on Scots Law are; Gloag, W.M. *The Law of Contract:* 1985, and McBryde, *The Law of Contract,* 1987.) The doctrine of the privity of contract was formulated in the middle of the 19th century, by common law judges. *"No one, they declared, may be entitled to or bound by the terms of a contract to which he is not an original party"*, Walker, *Principles of Scottish Private Law* (vol.II The Law of Obligations.) , 1988, 404.). This subsequent conservativism of the common law can be related to the time the development of the doctrine took place. This occurred, oddly, at a time when the state was beginning to expand its interventionist role. An authoritative work in the area is Attiyah's *The Rise and Fall* 592 et.seq., who sets 1870 as the point of culmination of the freedom of contract doctrine. He observes that although

fundamental aspect of private economy systems[94]. Relativity, an expression of the personal character of obligations[95], limits the effects of contractual relationships to the contractual parties. Obligations create rights that are valid, effective, and enforceable only against particular persons. In other words, they are relative and not protected *erga omnes* rights, as would for instance be real rights[96]. The relativity of contracts is the main doctrinal obstacle to the expansion of contractual limits. To give a civil law definition, a person's will is bound towards another person's will, while third persons cannot acquire rights or be burdened with duties that stem from that obligational relationship[97] .

There are, however, cases in which third parties can acquire rights from a contract. The most profound example is the mechanism of the contract in favour of third parties[98],

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economists started disputing traditional doctrines, lawyers, cutting their links from both economics and politics, remain attached to a classical free market economy model (745.). On Roman law and exceptions to relativity see latter in the study.

93 It is the logical consequence of the freedom of the parties to formulate, within the limits provided by the legal order, whichever relations they desire with whomever they desire.

94 It limits the exposure of those participating in the transactions to the intended extend. It seems to be a working concept of the law of obligations in the sense that reality might be different and an obligational relationship might concern third parties. As described, the principle contributes to the obligational rights' flexible and adjustable character that serves the trend in transactions (*"die 'Dynamik' des Warenverkehrs"*). Esser - Schmidt, 11.

95 Obligations create a personal bond between the creditor and the debtor. As has been said, relativity attributes to the obligation the character of a two poles relationship between specific or specifiable persons. Esser - Schmidt, 34.

96 The effects of the relationship are relative (Fikentscher, 47); they develop *inter partes* only (Esser-Schmidt, 1975, p.34) and create relative rights; applied only against the contracting parties Real rights or the right to inherit are absolutely, (*erga omnes*) protected rights. They effective against anyone affecting those rights. Kramer, Einleitung, §§ 241-432, 11 and Horn, Kötz and Leser, 68.

97 §241 BGB, AK287. See Fikentscher, 47. The creditor can claim from the debtor only and the debtor owes to he creditor only. *"The relationship exists between them and between them alone."*. Horn Kötz and Leser 68.

98 The influence of canon law in the middle ages and of the moral judgement the latter advanced, namely that promises must be kept, led to a first breach of relativity. (See Zimmermann, R. on the discussion between medieval logists and canonists, (p.41). See also Smith "Bare Promise in Scots Law", in *Studies Critical and Comparative*, 1962 (39-50) and Smith "Jus Quaesitum Tertio; Remedies of the "Tertius" in Scots Law", 1 (1956) JR, pp. 3-21, and Millner M.A. "Jus Quaesitum Tertio: Comparison and Synthesis", 16 (1967) IntComLQ 446-463). This was the possibility of two contracting parties to confer certain benefits to a third person. *"Especially in Italy France and Germany contracts for the benefit of third persons were in most common use from the Frankish period onwards."* Hueber *A History of Germanic Private Law*, reprinted 1968, 519. The Frankish period; the period of the Frankish Empire, as it was reproclaimed at the name of Charlmange in the 800's, commences in the 7th century A.D. In this period the codification of the German tribal customs, leads to the adoption of the German Popular Codes. See *A General Survey of Events Persons & Moments in Continental Legal History*,

accepted in American law[99], in Scots law[100] (and other mixed systems[101]), and in civil law jurisdictions[102]. In English law no such mechanism exists[103], but privity has been

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Alvarez and others, 1912, (Continental Legal History Series). See finally Kortmann, B. and Faber, D. "Contracts and Third Parties" in Hartkamp, 223-236.

99 In American law the third party beneficiary principle, was first accepted as early as 1859 with the decision of the New York court, in *Lawrence v. Fox,* (20 NY 268) and has been expanded ever since. Starting . On U.S.'s law see, generally, Jaeger (ed) *Williston on Contracts* (1979), vol.2; "Third Party Beneficiaries", 790 et. seq., *Second Restatement of the Law,* The American Law Institute, 1981, §304, Eisenberg, M. A. "Third Party Beneficiaries" in *ColLR* 1992, 1358-1435. For a comparison with English law see Simpson "Promises without Consideration and Third Party Beneficiary Contracts in American and English law", 15 IntComLQ 1966, 835-862.

100 It is the mechanism of the *jus qaesitum tertio.* See the relative chapters in Smith, Studies *Critical and Comparative,*. See also: See also: Gloag, *The Law of Contract* 68, McBryde, The *Law of Contract,* 1987, 428, Rodger, A. F. "Molina Stair and the Ius Quaesitum Tertio", 1969, JR, 34, McBryde, "Ius Quaesitum Tertio', JurR 1983, 137, MacCormick, D.N. "Jus Qaesitum Tertio - Stair v. Dunedin ", 15 (1970) JR, 228-242. See also Smith, "Ius Quesitum Tertio: Remedies of the Tertius in Scottish Law", 1 (1956) JR, 3-21., and A.F.N. "Contracts-jus qaesitum tertio-*Beswick v. Beswick*", 11 (1966) JR, 258-260. It is characteristic that, contrary to Grotius ideas, Stair and subsequently Scottish law do not require the acceptance of the beneficiary for the contract in favour of third parties to be effective. At that point Scottish law differs from other mixed jurisdictions of Roman-Dutch origins namely South Africa and Sri-Lanka.

101 There are differentiations between jurisdictions. On the law of South Africa see Lee, R. W. & Honore, A.M. *The South African Law of Obligations* , 1950, and Christie, R.H. *The Law of Contract in South Africa,* 1981, (Contracts for the Benefit of a Third Party, pp. 254-266). On the law of Sri-Lanka, (ex Ceylon), see Weeramanda, G. E. *The Law of Contract* , vol 1, General Principles, 1967, (Contracts binding or benefiting Third Parties, pp. 544-551). On the law of the Philippines, see Gamboa M.J. *An Introduction to the Philippine Law,* 1969, (Contract for the Benefit of a Third Party p.241.). The Louisiana Civil Code provides for the contract for the benefit of third parties, in its articles 1978-1982. (See the 1989 edition of the Code; editor Yiannopoulos, A.N.). On the Province of Quebec law, see Castel Jean-Gabriel *The Civil Law system of the Province of Quebec,* 1962, (Stipulations for Another, 333-344 on the articles 1023-1029 of the Quebec Civil Code.).

102 In civil law systems, the contract for the benefit of third parties found its way in the codifications. Article 1121, of the Code Civil, in France, §328 of the BGB, in Germany. From the wave of the great codifications effected in Germany in the 1700's and 1800's, the Prussian *Allgemeines Landrecht* (The General or Territorial Code) of 1794, provided that "a contract may have as its object the benefit of a third party"(§74). It required though, the acceptance of the beneficiary, for the contract to be valid. The Saxon Civil Code of 1863, required the acceptance of performance. The Bavarian Territorial Law, demanded ratification and acceptance by the beneficiary. These acceptance or ratification requirements, contradicted the previous law, and decreased the effect of the mechanisms. (The Prussian General Land Law provided for the case where two successive sales of the same thing occurred and the item was surrendered to the second purchaser, that the first purchaser could claim the thing directly from the second, if the latter was acting in bad faith, but this was considered a provision on property rights. The General German Commercial Code of 1861, provided (§405) for a right of the consignee to ask directly from the carrier to deliver the things carried.). See Zweigert and Kötz, 125-126., and Hueber *A History* 23-26, 518-520. Some German lawyers discussing the tendency to loosen the firm grip of the relativity doctrine, have even spoken of a gradual assimilation of contractual rights to real ones. There will be further reference to the issue later in the text.

sidestepped in a number of instances[104]. In civil law terms, the contract in favour of third parties is an exception to the relativity of contracts but not to obligational relativity, since the mechanism is based on a relative bond created by the law[105]. In the case of the contracts in favour of third parties, (and in any similar mechanism in English law) the intention of the debtor/promisor to allow a third party claim on his promise is essential. This intentional element is not fulfilled in the third party loss problem.

The relativity of contract has been repeatedly undermined by legislative measures aimed at protecting third parties; consumer and labour legislation are the most prominent examples. Concern for the protection of third parties continues as illustrated by major European Community regulatory measures protecting third parties, namely consumers[106], employees[107], and people contracting with companies in cases where there is doubt as to the

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103 English law is hindered by its privity and consideration doctrines. Numerous critiques have been written on the issue. See, for example, indicatively, Dowrick, F.E. "Jus Quaesitum Tertio by way of Contract in English law", 19 (1956) MLR, 374-391, Rose, F.D. "Return to the Antipodes"(contract for the benefit of third parties), 44 (1981) MLR, 340., Furmston, M.P. "Return to *Dunlop v. Selfridge*" (Contract for the benefit of Third Parties), 23 *MLR* 1960, 373-398, Millner, "Jus Quaesitum Tertio: Comparison and Synthesis", 16 (1967) IntComLQ, (446-463). See also in Walker *Principles of Scottish Private Law*, on the attempts made to evade the privity of contract obstacle and on the cases where these have proven successful. Critics underlined, among others, that by persisting on this point of view English law refutes the doctrine of the freedom of contract. (Dowrick, 19 (1956) MLR , and Eisenberg, M. A. 1992 *ColLR* , 1358-1435)

104 See Dowrick, 19 (1956) MLR.

105 For civil law, Scots law included, the principle that a unilateral promise is binding is central to the concept of the relativity of contracts. No bilateral agreement is required for a person's will to be bound towards another person. (Horn, Kötz and Leser, 76 et seq.). Scots Law has the corresponding doctrine of *pollicitatio*; a unilateral promise separate from a contract which operates *inter vivos* and binds the declarant by his own act of will. This is not the case with common law.*Pollicitatio* is essential to the development of *jus qaesitum tertio*.). (Smith *Studies* , 169-172).

106 Directive 87/102/EEC from 20.12.85, (OJ L42/48, 12.2.1987), as amended by Directive 90/88/EEC, from 22.2.90, (OJ L61/14, 10.3.1990), "for the approximation of the laws, regulations and administrative provisions of the Member States concerning consumer credit", allows the recipient of a consumer loan to sue the crediting bank for the purchasers breach of contract The consumer can turn against the creditor (third party) provided the goods are not provided or are not provided in accordance with the contract, if there was a contractual relationship between the creditor and the goods provider and the consumer has previously turned judicially against the goods provider (article 11§2). These are not cases this study deals with, as there is no violation in a contract where the plaintiff is not a party causing the loss. (The Directive also specifies that if the creditor assigns his rights to a third party the consumer has against him any defence avialable to him against the original creditor, including set of; article 9.)

107 Directive 77/187 form 14.2.1977, (OJ L61/26, 5.3.77) 'on the approximation of the law of the Member States relating to the safeguarding of employee's rights in the event of

company's authority to contract[108]. Third party protection is a real and current issue in modern transactions.

4.3. Conclusion.

The issue of protecting third parties is a sign of the change in the legal doctrines of the freedom of contract and obligational relativity. This brief reference to the doctrinal implications of third party loss is followed by more specific references in the context of the individual jurisdictions. Third party protection is a contemporary and demanding question with significant practical implications and important educational value, as it is related to a changing civil liability.

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transfers of undertakings, businesses or parts of businesses", provides (article 3) that in the case of a transfer of a business the rights and obligations of the transferor from the employment relationships are also transferred to the new employer.

108 According to directive 68/151 from 9/3/1968, a company is bound by the acts of its bodies that go beyond its purposes unless these acts violate legislative restrictions or the third parties are bad faithed. Third parties in these case are typically person contracting with a another company to which the defendant extended a guarantee.

Chapter 2: German law.

1. Introduction.

1.1. Obligational duties.

The single undisputed source of law in the German system is legislation. According to statute law, obligations stem from two sources; contract or statute. Contractual relations can, in principle, take any form, as intended by the parties, unless statute law provides otherwise[1].

The focal aspect in the discussion on widening the limits of contract and extending protection to third parties, concerns the duties under the contract. The idea seems to be that the personal limits of the relationship are expanding; no new duties are imposed upon the debtor apart from those he has undertaken in the contract[2].

The expansion is explained from the point of view of the various categories of duties[3] stemming from obligational[4] relationships, the categories[5] often being disputed[6],

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1 §305BGB et seq.

2 The imposition of new responsibilities might be understood as a form of expansion of the contract's range of application. Such a prospect would contradict the autonomy of the will and the principle of fairness. The problem, therefore, was to review known forms of liability in order to provide compensation for third parties.

3 The German term "Pflichten", could be translated as 'obligations' or 'liabilities', apart from 'duties'. The main concern is to describe the acts or omissions to which performance is analysed. 'Duties' is a more precise term for that purpose. The term 'liabilities' will be used in relation to the distinction between primary and secondary liabilities, because the term refers to the obligation as a whole instead of the duties to which it can be analysed into. Primary and secondary liabilities as expressed by Larenz I (*primär Leistungplflicht*, and *sekundar Leistungplflicht*, pp.7-9) are distinguished from the basic duties (*Hauptplflicten*) which define the fundamental concept of the performance (and by Larenz are presented as basic performance duties -- *Hauptleistungspflichten* ,292 et seq, -- as well), or subordinate duties (*Nebenpflicten*). The definitions and subdivisions of liabilities, duties etc, are admittedly confusing. It is attempted here to often a brief overall account along simplified lines.

The discussion of obligational duties and of considerable part of the introduction might seem to be losing the focus on third party loss as such or on the contractual solutions achieved by the German judiciary. It is necessary however to offer an outline of the relative context in order to prepare the background of the discussion of the German mechanisms. It is attempted to underline basic, recurring issues surrounding the problem. Thus, as can be seen from the first paragraphs, the outline is directed to the practical question of expanding the ambit of contract, tries to take account of the influential theoretical perceptions on the related issues, and of the doctrinal complexity. These issues

theoretical abstractions. What is of importance for one of the contractual mechanisms examined here is the performance; the particular acts or omissions the creditor can claim from the debtor[7]. Third parties might have an interest in either the primary[8] or secondary[9] liabilities ('obligations' in common law terms[10]), a distinction based on the

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concerned the German judiciary and theory when tackling the third party loss problem. Moreover, it is hoped that this introductory reference could serve the following chapters on the other legal orders as well, especially as regards the definition of the question.

4 The term "obligational", is certainly not usual in English language legal texts. The purpose for this choose was to cover with one term both contractual and delictual relations, and also to offer an approach nearer to the one German academic teachers usually take. In two, at least, works on German Law translated in English, the term "obligational" is used; in Horn, Kötz and Lesser and in Serick *Securities in Movables in German Law: An Outline* 1988, (translated by Tony Weir). The term "obligational" is used here in a broad sense so as to correspond to the whole of the law of obligations.

5 See any major textbook, particularly, Larenz I, Esser-Schmidt, Fikentscher, although they differ, among others, in the view taken or the significance attributed to the duties' categorisation. The overall view is valid for jurisdictions influenced by the German system. See for example, Koziol-Welsen on Austrian law, Guhl, on Swiss law, and Litzeropoulos, Al. *Aspects of the law of Obligations*, 1960, on the Greek law.

6 A brief comparison between basic textbooks (Larenz I, Esser-Schmidt, Fikentscher), can provide evidence to this argument. There are fewer contradictions as regards the content of duties, *de lege lata*. The situation is particularly unsettled with respect to the so called "protection duties" (*Schutzpflichten*).

7 A presumption that is underlying obligational relationships, distinguishes between an obligational right and the object of the obligational performance. The obligational right is not violated, altered, or transformed if the object of the performance is differentiated, if, for example, the thing owed is destroyed and compensation is owed instead. The essence of the obligational right is the authority to ask for the performance (§241 BGB). However, the distinction between the right and the object of performance is of little practical importance.

8 They are created directly after the obligation comes into existence and do not have to be related to a pre-existing obligation. They are the initial, original liabilities of the parties (the liability of the seller to transfer the property to the object and of the buyer to pay the price for instance). Primary liabilities can consist of a mere duty to compensate, if this is the one created with the birth of the obligation as in the case of a delictual claim (§823 BGB). This latter statement is likely to be disputed if it is argued that in the case of delicts there is a pre-existing obligation not to harm; the duty to compensate would thus be always secondary. It is doubtful though whether such a duty not to harm can suffice for the acceptance of an obligational bond. See Larenz I, 7, and Esser - Schmidt 59, 68.

9 Secondary liabilities are likely to be created in the process, particularly if the relationship evolves in an unprescribed manner. These liabilities are called secondary because they presuppose, require, the existence of another primary liability. (Larenz I (p.7), and Esser-Schmidt, 59, 68.) Primary liabilities are thus transformed to secondary liabilities; are substituted by the latter, for some legal reason -- the non fulfilment of the primary liabilities usually. Secondary liabilities can exist already from the conclusion of a contract in a somewhat dormant situation. They are often limited to a duty to compensate (Esser-Schmidt, 59, Larenz I, 7) or might exist simultaneously with the primary ones. In the case of delay of execution the debtor, apart from his primary liability is liable for compensation for the delay as well. See also §538 BGB, where the lessor might be

point in time the liabilities are created[11]. The secondary liabilities are substituted in the place of the primary ones due to a legal reason such as non performance.

In terms of the duties (acts or omissions) by which performance can be analysed[12], the third parties might be concerned with the basic duties (*Hauptpflichten*)[13], those which are essential to the relationship and contain its purpose[14], or subordinate duties[15] which are supplementary to the latter[16].

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simultaneously liable for the discharge of his primary duties, and for compensating the lessee if he has not removed a defect from the leased thing.

10 Common law lawyers, are more familiar with the terms primary and secondary obligations, where the primary obligation concerns the principal object of the contract while the secondary obligation is borne when the primary is not fulfilled. (Black's Law Dictionary, 1979 ed., p.970) The expression 'liabilities' which is based on the debtor's point of view, was considered as more suitable for the purposes of this distinction as it is rather detached from particular acts or omissions of the parties.

11 Meaning the time that according to the law an obligation is created.

12 All duties, serve directly or indirectly the fulfilment of the obligation.

13 See generally Heinrichs on§241 BGB. They aim at the fulfilment of primary liabilities usually but they might satisfy secondary ones also , were the latter to constitute the purpose of the relationship; if compensation is owed for a breach of contract. The relative concept in English terms is *"principal obligation"*, meaning the behaviour that aims at the realisation of the principal object of the obligation. Black's Law Dictionary, 1979 ed., 970.

14 These duties characterize the kind, form of legal transaction involved. Such duties are the transfer of ownership to a thing in a sale (§433 BGB) or an exchange (§515 BGB) contract, the offer of the use of the leased thing in a lease contract (§535 BGB) . They partly reflect the *essentialia negotii*, of Roman Law (distinguished from *accidentalia negotii* -- see Esser-Schmidt 40). Fikentscher, commenting on the contract of sale (§433 BGB), notes (p.29) that the form -- type (*"der Typ"*) of an obligation is determined from these basic duties. Esser - Schmidt note that only an arrangement that provides for the, exchange of goods against money can be called sale in the meaning of §433 BGB. See Koziol & Welsen, 176. The term 'form' is preferable for the purpose of indicating obligations of a different origin or of a different content. The term is used by Horn, Kötz and Lesser.

15 See Larenz I, 7, Esser-Schmidt, 39-40, Guhl, 41, Fikentscher, 29, Roth on § 242 BGB, 100, and Wolf, Ernst *Allgemeiner Teil des BürgerlichernRechts*, 122.

16 They exist parallel to the basic duties, subordinate to the former, by their nature (content) and are of secondary importance in the context of the obligational relationship, (the duty to pay interest for a loan -- §608 BGB, the works contractor's duty of warranty -- §633 BGB for instance). They are not necessary for the definition, description of the forms of obligations to which they relate, (the duty to inform on the thing leased or sold, or to take precautions to avoid dangers for example). They are often ancillary, supplementary, to the basic duties. See for example the duty of the seller to provide information concerning the legal relationships affecting the thing sold, as well as to deliver to the purchaser all document that can be used as evidence of the right of property (§444 BGB), and the duty of the recipient of the unjust enrichment to return the emoluments delivered and whatever he obtained by virtue of a right he obtained, or as compensation for the object, (§818BGB). Secondary duties could give rise to a right of rescission, (§ 346 BGB), or to a plea of an unperformed (wholly or in part) contract (§320 BGB). They might however, serve independent purposes, (as the duty of the service contractor to take protective measures -- §618 BGB). Also the provision of additional security offered in the context of a contract for

When basic duties are involved the third party's interests are similar to those of a creditor. The third party is in a position equivalent to a third party beneficiary of the performance. Such is the position of the undisclosed principal, discussed later. Third parties with an interest in the performance form one of the groups of third parties suffering loss as a result of a contractual violation.

1.2. Secondary duties: protective duties.

Secondary (subordinate but not supplementary) duties[17] construed by modern theory[18] on the basis of judicial developments in this century, constitute a special case. Crucially, they are not specifically provided for in the legislation. They are usually based on general clauses of the BGB[19], for instance §157 BGB, on the interpretation of contracts in

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works, involving the undertaking of special risks. It is possible though that a duty which seems to be of secondary importance might be the basic duty of another contract; if for example there is a contract for works, for the construction of a sky scaper of offices and of a small cottage. Subordinate duties (*Nebenpflichten*), might be found in contract (the provision for additional guarantee for the timely execution for example) or in the legislation. They are judicially enforceable, as the basic duties. These duties are defined as *"accessory duties"*, in comon law parlance, meaning the duties which depend upon or are collateral to the principal ones. Black's Law Dictionary, 1979 ed., 970. (For the translation of the BGB articles *The German Civil Code*, 1975, by Forester, Goren, Ilgen was relied upon.)

17 They are presented with a confusing terminology by different authorities. A basic reason for this confusion is that there is no clear division of these duties from those subordinate duties that serve the realisation of basic duties. There is a tendency in theory towards a clear division between subordinate duties that are specially provided for in contracts or statute law) and those that are not. These attempts are confusing and possibly inaccurate. The duties that are founded on the good faith principle are often termed as protection duties *(Schutzpflichten)* as they were first referred to by Stoll, Heinrich, in 1936, *Die Lehre von den Leistungstörungen*, (quoted particularly by Fikentscher 29.). Larenz speaks of further behaviour (conduct) duties *(weitere Verhltanspflichten)*. Esser and Schmidt speak of a division between subordinate performance duties *(Nebensleistungspflichten)*, and protection duties *(Schutzpflichten)*.. Writers face the problem from different angles. Stoll notifies the basic, posibly, function of these duties. Larenz notes the element of behaviour imposed, but hesitates to produce some other generic term.

18 Starting from Stoll, Heinrich, in 1936, *Die Lehre von den Leistungstörungen*, See Fikentscher 29.

19 These clauses might not be found in the legislation at all; they might be based on broad values expressed through 'Treu und Glauben' -- (loyalty and) good faith -- 'gute Sitten',-- public policy, morality -- , Billigkeit' -- equity, reasonableness -- and its opposite 'Umbilligkeit', 'Tummultbarkeit' -- the possibility of causing disturbance -- 'sozialadäquanz ', social adequacy --, 'sozialtypish' -- socially typical--. Wolf, 226, Fikentscher, thinks §242 BGB, can serve as their legal basis. For the translation of these

accordance to good faith, or §133 BGB on the search for the true intention of the parties, and especially §242 BGB, on good faith[20]. These clauses reflect fundamental principles. The secondary duties are by nature abstract in content, usually described in terms of an overall behaviour[21] and do not necessarily differ between obligations. As their content is not specified in statute law, attempts were made to regard these obligations as not enforceable judicially[22]. The fact is that enforceability depends on the description of the obligations;

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terms the legal dictionary consulted was *Wörterbuch für Recht, Wirtshaft und Politik*, Dietl, C.F. (ed), München -- New York, 1983, the most complete of those available

20 This fundamental provision imposes on the parties the burden to discharge their respective duties, and in general to behave, taking into account the interests of the other party that might be affected, and to avoid any form of behaviour that could infringe upon these concerns. Roth on § 242 BGB, Heinrichs on §§241,242, BGB, Alff Richard in *Großkommentare der Praxis*, on §242 BGB (14 et.seq.), and Esser-Schmidt, *"Leistungs- und Schutzpflichten"*, 38-39. The good faith principle is the ground of *"Verkhersmoral"*, the morality that should prevail in transactions. Thiele, "Leistungssrtörung und Schultzpflichtverletzung", JZ, 1967, 649-657, (650). §242 BGB, which can affect the construction of other general rules on the time for performance (§272 BGB) or the choice of the thing owed out of a particular class (§243 BGB) for instance.

21 A way of behaviour, that is, irrespective, in principle, of the final result. See the French concept of *obligation de moyen*, in Barry, Nicholas, *The French Law of Contract*, 1992, 50-56. This behaviour can certainly be specified in a contract.

22 A popular division has been between independent duties, and dependent ones. The criterion for the distinction is based on the aim (*Zweck*) of the duties. The independent duties are only loosely related to the realisation of the basic duties, serving distinct, special aims, while dependent duties serve the realisation of the basic duties; they support and secure the fulfilment of the relationships' objectives. See Heinrichs, H. in Pallandt-Heinrichs, *Bürgerliches Gesetztbuch*, 201-202. Koziol and Welsen note that the creditor has a special interest that the independent duties are fulfilled, an interest deriving from the performance, while dependent duties have functions that aim at the preparation and fulfilment of the performance (177). See also Wolf, "Die Privatautonomie", 226. The independent duties gave the creditor a claim for their execution and for their enforcement when violated. The non independent ones gave a right to ask for compensation. The reasons for this, as will be discussed later, are not limited to the special interest the creditor had in the realisation of the former duties.
Thus, from the point of view of the respective claims of the creditor the independent duties which are generally these specially provided for, are judicially enforceable, while for the dependent duties, which are those based on general clauses such as the good faith principle there is only a claim for compensation for deficient performance. The dependent subordinate duties are satisfied not through performance claims but through compensation claims. Kramer on §241 BGB, 65.

Another distinction, focusing on the purpose of the duties in question, spoke of duties serving fulfilment interests, serving performance, that become irrelevant if the latter is void or does not exist legally. (Thiele, JZ, 1967, 650.) In the case of impossibility of performance in a sales contract, for example, the duty to provide information on the sold item has no meaning. These duties which serve fulfilment interests *(Erfülungsinteresse)* usually imply some positive behaviour (to provide information, to take precautionary measures, to make substantial security provisions for example). They are similar in essence with subordinate duties that are provided for certain forms of obligations. It is possible to

if they are defined adequately they are judicially enforceable[23]. In any case, secondary duties have legal effects; they can for example give rise to a plea of unperformed contract (§329 BGB).

The distinctions made and the terms used for these secondary duties reflect common but not systematic differences between the various instances where they occur. Their most important aspect is expressed through their definition as protective duties *(Schutzplflichten)*[24]. Protective duties are not closely related to the performance of an

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consider that they are deduced by analogy. They might relate to the security and guarantee of the relationship. Thiele, JZ 1967, 650. The main difficulty in accepting them in the context of a contract has to deal with whether they can be taken as included in the parties' agreement.

23 Enforceability is related to the desription and content of the duties; they are enforceable if their content is specific and clear enough (§241 BGB). Roth makes a distinction on the basis of whether it is possible to claim execution of subordinate duties or not, but in effect he reaches the same conclusion with the opinion that execution can be asked for the duties that serve a particular interest, and are adequately clarified. Roth thus distinguishes between *selbständig einklagbaren Nebenpflichten* and *nicht selbständig Nebenpflichten*. In the first category he tries to identify again those duties the execution of which can be ordered (duties to inform are enforceable, *klagbar* for example). Roth, on §242 BGB, 109.

A generally described behaviour cannot be the object of performance. Sirp on §241 BGB, 449. The duties which are based on general clauses are by nature not defined adequately in advance. Lack of enforceability is thus caused from the lack of a clear and handy definition in statute law (which is the source of this duties). The use of general clauses as the legal bases of the duties, makes judicial imposition of their content difficult. Enforceability might be obstructed for other reasons as well. The creditor might become aware of the duty owed to him only after the latter has been violated and have an interest in recovering his loss only. This is the case of preparatory measures needed for the timely execution of a contract, the defects of which will be realised after delay in performance, or where a danger originating from the thing sold is noticed after damage has occurred. The time limits for the creditor to ask for execution might be unfavourably narrow.

24 The term was established by Stoll in 1936, and has earned some acceptance. (See Fikentscher 29). As referred to before, various other names are also used: Larenz uses *"weitere Verhaltenspflichten"* further duties of behaviour, to describe their overall character (Larenz I, 8). He is proposing the terms *Schutzpflichten* and *Loyalitätpflichten*. (p.8). The latter is interesting in that it identifies a number of relationships, (labour, or services contracts for instance) where this expression of the principle of good faith might be applied. A variation of particular duties are being discussed by other commentators focusing on their applications. Roth in the *"Münchner Kommentar"* speaks of Schutzpfichten -- protection duties --, Mitwirkungspflichten -- duties to cooperate --, Aufklärungspflichten -- duties to explain --, Auskunfts -- duties to inform -- and Recheschaftspflichten -- duties to give account. Esser-Schmidt state that a variety of secondary duties can stem from §242 including Treu- und Rücksichtspflichten (loyalty and consideration duties), Anzeige- und Auskunftspflichten (duties to report and inform), Fürsorge- und Obhutspflichten (welfare and care duties) etc.....", (40), Thiele, JZ, 1967, 650, refers to the protection duties (*Schutzpflichten*) through which a host of other duties are summarily described; Fürsorge-, Obhuts-, Anzeige-, Aufklärungs- und Unterlassungspflichten (duties not to act, omission duties).

obligation but they involve the personal and the property interests of the parties[25]. Their primary aim is not the realisation of the obligational purposes, but the preservation and security of the parties' current and future condition[26]; they serve *Erhaltungsinteresse* or *Intergritätsinteresse*[27]. Through protective duties, expressed as a general commitment of care and a duty not to act negligently in the discharge of obligational relationships, the parties' interests are assured[28].

Certain academics, emphasise the distance of these duties from performance[29] and underline their independence from a particular relationship[30]. To some extent, these duties challenge the fundamental concept that a person should be held liable on the basis of his expressed will or intentional conduct. In that sense, they are expressions of a transformation of contractual obligations. A considerable theoretical debate has emerged over these duties[31] as traditional concepts could not suffice to explain them[32]. Different theories focus on private transactions and voluntary relationships.

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25 They can exist alongside other unspecified subordinate duties. See generally Berg "Zur Abgrenzung von vertraglicher Drittschutzwirkung und Drittschadensliquidation", NJW, 1978, 2018, Thiele, JZ, 1967, 649.

26 See Esser-Schmidt, 40. These duties do not therefore promote actively the economic function of contract; the realisation of transactions. See in the same work the reference to the function of the law of obligations in the exchange of goods, p.8. Protection duties play an important role in the changing pattern of civil liability in Germany, exactly because they were pivotal to the protection of third parties.

These duties aim therefore at the preservation of a *status quo,* at safeguarding a satisfactory present and future condition of the parties' situation. Essential is their objective and purpose (*"Ziel und Zweck"* -- Thiele, JZ, 1967, 650) and not their description (what specific from of behaviour they can be analysed into). Various approaches have been taken in an attempt to describe the way these duties are established and operate. (See Larenz I, 93, et seq., Fikentscher, 56.) The practical question is whether they are contractual or *quasi*-contractual duties. From a contractual point of view the acceptance of the duties is related to the idea that the position of the parties should not be worsened against their free will.

27 Literally, 'preservation', or 'integrity' interests respectively. Roth on §242 BGB 104.

28 See in Barry *The French Law of Contract,* 1992, on the *obligation de guarantie* in French law (50-56).

29 They are loosely related to its performance and to the basic duties it implies. See Berg H. NJW, 1978, 2018, Thiele, JZ, 1967, 649.

30 Meaning that they can be owed independently from the performance.

31 These duties are explained as signs of a growing tendency to establish new ways for the generation of obligations. Theories explain protection duties on the basis of the liability arising out of "factual" contractual relationships (*faktische Vertragsverhältnisse* - Fikentscher (56-59), or of social or business conduct (*sozialer oder geschäfts Kontakt* - Esser-Schmidt 97, refering to the general condition of a particular activity (commerce) as a

Interests of third parties that are similar to those of contracting parties, related to the preservation of their current and future condition, might be affected by the violation of protective duties. The violation of safety measures in services contracts, or the expert's incorrect advice on which third parties rely are ready examples. The extension of protective duties to third parties is a basic expression of third party protection in German law, an expression of the changing nature of contractual obligations.

1.3. Imposing contractual duties: §242 BGB.

Protective duties are expressions of the tendency to modernise civil law. The basic force in this tendency in the German civil law system is the general clauses. The most prominent, §242 BGB on good faith, a public order principle[33], constitutes *"one of the most astonishing phenomena in the Code"*[34]. It has guided jurisprudence to the development of a number of particular concepts and mechanisms[35]. It has also proved a flexible tool to fill in the gaps in legislative provisions and has improved the responsiveness of the law to social and economic developments and its adaptability to changing conditions. Good faith *"has grown to a 'super control' norm"* [36] functioning in a corrective manner on the existing provisions[37]. Its usefulness in developing general principles from particular cases, is

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factor affecting the relationships created, Larenz I, 116 et seq and 292, et seq. Similarly the concepts of an obligational relationship in a wider sense, or without basic duties are employed. Larenz I, 93-97;. Analogies are drawn from the liability for negotiations. See for a brief reference Thiele, JZ, 1967, and also Berg H. NJW, 1978, 2018.

32 The concept of *culpa in contrahendo*, for instance would not suffice for the establishment of liability in the case of protection duties, since their precise content and their legal justification are uncertain. Different theories focus on private transactions and voluntary relationships.

33 Meaning that it cannot be side-stepped by agreement of theparties.

34 Horn, Kötz and Leser 135. See also Cohn 193. Good faith is the basis for, the legal expression of equity (*Billigkeit* -- fairness) in German law. Larerz I, 111, 123, Esser-Schmidt 24.

35 See Cohn 98 et seq.

36 Horn, Kötz and Leser 135.

37 See the more recent reference by Ebke, W.F. and Steinhauer, B.M. "The Doctrine of Good Faith in German Contract Law" in Beatson and Friedman 171-190.

comparable to the case law of Anglo-American systems[38]. The development of good faith is unprecedented in any other common or civil law jurisdiction[39].

Good faith, which gave *"legal force to broad ethical values"*[40], is one of the basic means to safeguard justice requirements and introduce social considerations in the contemporary application of contract law[41]. It has been used successfully for the creative construction of contracts; it provides a vehicle for the establishment of various contractual duties, such as duties of care, duties to supervise the manner and form of performance etc.[42]

Good faith's greatest force is in balancing competing interests according to social values. In the case of third party loss, balancing involves protecting the usually weaker third party without disadvantaging the debtor[43] by exposing him to unpredictable and/or excessive liability, undermining thus legal certainty and confidence in transactions. By focusing on socially understood transactions' standards, the defendants' financial exposure

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38 Horn, Kötz and Leser 136.

39 Good faith is according to some views, a principle of Scots law, albeit its effect is doubtful. See T.B.Smith "Bare Promise in Scots Law" in T.B.Smith *Studies Critical and Comparative,* 39-50. This opinion is not generally accepted (McBryde, *The Law of Contract,* 1987.). As wiil be seen again there are calls for expanding the use of good faith in American law. See Farnsworth, in Beatson and Friedman 153-170. There is support for the introduction of a good faith principle in the Commonwealth. (See Farnsworth 156-158, Lücke, H.K. "Good Faith and Contractual Performance", in Essays on Contract, 1987 - on Australian law). "Fairness" is the basic equity principle in the English law. Allegedly, courts would have great difficulty to attribute a meaning to good faith (Goode quoted by Farnsworth). Recently the concept was indirectly introduced through the European Community directive on Unfair Terms in Consumer Contracts. (Beatson, J. and Friedman, D., 14.). See also Powel, R. "Good Faith in Contracts", 9 (1956) CLP 16, Brownsword, R. "Two Concepts of Good Faith", 7 (1994) JCL 917-244.

40 Horn, Kötz and Leser 137.

41 *"§ 242 BGB has served as a vehicle for judicial development of private law and as a way of keeping the law receptive to additional elements of order."*, Horn, Kötz and Leser, .136. See Esser-Schmidt who, examining the contract in its social dimension, make extensive references to the good faith clause. For a view of the practical effects of the principle see Guhl who identifies a duty of faith (loyalty) -- *Treupflicht* -- and points at various of its applications, in labour contracts (390) , in a society (712), in the administration of funds, (456), in mandate (432), or in the relationship between the member of the board of directors and the administration of a public limited company (634).

42 Horn, Kotz, and Leser 137.

43 This would be the case if the defender were to find himself burdened excessively in financial terms, if for example a large number of third party claims is accepted. The limitation of the defender's financial exposure is a basic deterent against allowing compensation for cases of third party pure economic loss in common law.

can be limited to that which is socially and economically reasonable: a basic concern regarding third party pure economic loss.

1.4. Compensation law and third parties.

Third parties in the context of the cases discussed here seek acknowledgement of a duty to compensate that involves the availability of the defendant's property for execution[44].

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44 Described in German law terms as *Haftung*, meaning the availability of the debtor's property to the creditor's attachment (*Zugriff*), for the purposes of execution (*Zwangsvollstreckung*), than *Schuld* - the duty to fulfil an obligation. (Liability in general can be presented as both *Schuld* and *Haftung* in German doctrine. See Kramer,*Einleitung* on §§241-432 BGB, 25 et seq. and Esser-Schmidt, Larenz I, 19, 225.). *Haftung* is the potential subjection of the debtor's property to execution; it permits the creditor to invade the debtor's property in order to satisfy his claims (Esser-Schmidt, 25). Other authorities take a broader view and consider as *Haftung* the liability of the debtor to bear the effects of the non fulfilment of an obligation. In that sense a duty to compensate or the possibility of a rescission of the contract can be examples of *Haftung*. (Kramer *Einleitung* §§ 241-432 BGB,25, Esser-Schmidt, 56-57. See also Beck C.H. *Rechtswörterbuch*, 3rd ed., 1975, and Thiedig, Klaus on *Haftung* in *Handlexikon zur Rechtswissenschaft*, 1972,178-182.). In common parlance and in juridical usage *Haftung* is understood as the duty of a person to bear the consequences of his (or, exceptionally, someone else's - as in the case of vicarious liability in contract §278 BGB, or delict §831 BGB) behaviour. In that sense *Haftung* applies in different fields of law. *Haftung* is a central concept of the law of obligations in that it enables the satisfaction of the creditor who is the injured party. Different terms that are used for *Haftung* such as *'Verschuldenshaftung'* -- fault, negligence -- ,*'Gefährdungshaftung'*, -- strict liability in tort without fault --, *'Gehilfehaftung'* - liability for an assistant --, or accountability in general (*Verantwortlichkeit'*), cause a degree of confusion. (Larenz I, 19, Kramer*Einleitung* §§ 241-432 BGB, 25, Beck C.H. *Rechtswörterbuch*, 3rd ed., 1975 under *Haftung*). *Haftung* can have different meaning in accordance with the context where it is used (Larenz I, 19). In the vocabulary edited by Dietl responsibility is tranlated as *Haftbarkeit*.

Haftung in the narrower sense of the availability of the debtor's property (often presented as *"Vermögenshaftung"*) for the purposes of execution and realisation of the debtor's claims. It corresponds to the judicial enforcement of claims, especially compensation ones. As regards compensation, the various differentiations of *Haftung* are of limited practical importance. The potential subjection of a person's property to some enforcement procedure that will lead to the satisfaction of a claim against this person, is a necessary definition of liability. (*Vermögenshaftung* -- liability of the property -- is used in contrast to *"Schuldnerhaftung"* -- liability of the person. Larenz I, 225.) A usual classification of this property liability (*Vermögenshaftung*), is that between unlimited liability (*"unbeschränkte Haftung"*) whereby the debtor is liable with all the elements of his property apart from the non attachable ones (often presented as personal liability; *"persönliche Haftung"*; and limited liability (*"beschränkte Haftung"*) whereby the debtor is liable with only part of his property, up to a certain extent that is; as is the case of the limited partner; § 171 HGB. In the latter category one variation is defined as the real limited liability (*"echte beschränkte Haftung"*), whereby only particular objects from the debtor's property are subject to the executions procedure; as in the case of claims against the liability of the heir of an estate, which is limited to the latter for the obligations of the estate §1975 BGB et seq.). There are exceptions to the judicial enforceability of *Haftung*.

Compensation in the BGB is based on the idea of personal liability, fault being an element of both delictual and contractual liability[45]. Loss (*Schaden*), a basic compensation prerequisite, is any injury to the material or immaterial interests of a person; any negative change of these interests[46]. The purpose of compensation is restorative[47] and the relative considerations focus on the injured person's loss[48]. A legal reason for compensation,

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(Beck *Rechtswörterbuch*, 3rd ed., 1975 under *Haftung*) albeit with exceptions. Such exceptions are the non actionable claims e.g. natural or moral obligations *"Naturalobligationen", "Moralobligationen"* etc. -- imperfect obligations (*obligatio naturalis*). They are not enforceable but money paid under them are not recoverable. (Kramer *Einleitung* §§ 241-432 BGB, 26, Beck *Rechtswörterbuch*, 3rd ed., 1975 under *Haftung*. See the concept of natural obligation in common law, an obligation *"which cannot be enforced by action, but which is binding to the party who makes it in conscience and according to natural justice"*; Black's Law Dictionary, 1979 ed., 969.) An action on the basis of a claim for which the prescription period has passed can be made, but it will be objected successfully. The civil obligation which is enforceable is extinguished. Such a claim can be raised in a judicial set off.

45 Horn, Kötz and Leser, 111. There is a distinction between cases of intentional or negligent misconduct and cases of objective (strict) liability. § 276 BGB renders the debtor liable for harmful conduct that is intentional, (when protected interests are invaded on purpose), or careless, negligent, (Horn, Kötz and Leser, 147). Exceptionally, circumstances other than fault can induce liability; as the liability for the assistants and employees: §278 BGB; *"A debtor is responsible for.the fault of his legal representatives or of persons whom he employs in performing his obligation, to the same extent as for his own fault..."*; *The German Civil Code,*. Strict or objective liability is imposed when a person had control of a particular activity from which harm arose (§833 BGB; liability of the keeper of an animal). Legal reasons establishing liability require commonly a) an act (or omission) objectively opposite to the legal order -- a violation of an obligation or any other act; b) the wrongdoer's responsibility for the act. Responsibility is subjective where a degree of culpability is required and objective where there is no need for some intentional element.

46 Larenz, I "Der rechtlich ersatzfähige Schaden und seine Arten", 346.

47 The purpose of the liability to compensate, is to restore the loss suffered. (Larenz I, 343. See also Honig "Die Zwecke des Haftungsrechts", JZ, 1971, 244.) Restoratory and not punitive (as in criminal law) is thus the aim of the duty to compensate. On this basis, compensation is, in principle, to be effected in kind and not by payment of money, contrary to English law. (Cohn,105.) In German law *"nominal and vindictive damages are unknown"*(Cohn, 108).

48 Compensation is usually provided for a reduction to the value of the property that already belongs to a person (*damnum emergens*) An exception is the possibility to ask compensation for a reduction of opportunities to increase a person's property (*lucrum cessans*). A ceasing gain is distinguished from *damnum datum*, an actual loss. From a contractual point of view *lucrum cessans* accounts for lost profits. Black's Law Dictionary, 1979, 855. "*Abstract*" damages are compensated in this case (Cohn, 108). Exceptionally only is compensation offered not in order to restore damages but in order to comfort the injured party, as in the case of compensation for the injury to the body or health of another, (§823 BGB). Compensation considerations therefore focus on the injured person. According to the prevailing *"Dogma vom Gläubigerinteresse"*, doctrine of the credtor's loss (reflecting the so-called subjective value of loss approach to the calculation of compensation), (Lange, 275), the focus is on the creditor's interests. The overall financial position of the injured

ultimately a statutory provision[49], should be describing the cause of the damage. A causal link must exist between the loss and the legal reason.

The relativity doctrine limits compensation to those who are linked to the debtor/defendant by an obligational bond, whether in contract or in delict[50]. This is an expression of the somewhat obscure idea that only those directly injured are to be compensated; in practice, the parties to a previous obligation or those entitled to one of the interests which are delictually protected[51]. Third parties are not covered by contractual relativity and it is presumed that legislation cannot cover all specific instances of third party loss[52]. The problem in the last extent is to find a statutory basis defining the legal reason for compensation which must be linked causally to third party loss[53].

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person before and after the occurrence of loss should be examined. The difference is the loss, the measure for compensation.

49 *"The cause of the duty to pay compensation may be a breach of contract, a delictual act, or any other act or fact to which the law has attached a duty to pay compensation."*, Cohn, 104.

50 The creditors of the infringed performance, (when compensation is a secondary liability), or the persons specifically defined by legislation (when compensation is a primary liability). (There can of course be a contract with the offer of compensation as its content.). The doctrinal position is that the right to claim compensation is not held by anyone suffering the negative effects of unlawful behaviour. This right is limited to the creditors of the infringed duty. Grunsky on §249 BGB, 360. In the case of a violation of a contractual duty it is the party to whom performance, or other contractual duties are owed. In the case of a delict it is the person entitled to the rights and interests protected each time. Relativity expressed through the contractual relationship in the first case and the decision of the legislator in the second, define the circle of the people entitled to claim compensation.

The case of compensation being a primary liability, based on legislation should not be confused with the statutory exceptions to relativity, that will be discussed later, where a new obligational bond is created between the third party and the debtor. See for instance §§571, 613a BGB. Obligational duties are thus owed to the third party. If these duties are violated the third parties are entitled to claim compensation. See later on the distinction between 'real' and 'not real' exceptions to relativity, the first being practically those which are not specifically provided for in the legislation, where that is the sidestepping of relativity does not lead to the creation of a new obligational bond as in the case where specific legislation provides for the exceptions. As will be seen, the contractual mechanisms discussed in this study, involve 'real' exceptions from relativity.

51 The case for delict will be examined after this discussion on compensation.

52 As indicated before, the developments in modern transactions make it difficult for the legislator to adjust to the changing needs. The request for exceptions to relativity not specifically provided for in the legislation is urged by this fact as well as by the need to establish flexible institutions to deal with third party loss.

53 Speaking from the point of view of the causal link between the third party loss and the legal reason for establishing liability, it is reasonable to say that the third party loss will undergo a stricter scrutiny as to the existence of a satisfactory link.

The causal link between the loss and the legal reason for compensation is a particularly contentious civil liability issue. Lange 52, Larenz I, 351. It has been questioned in Germany whether a causal link is an exclusively legal concept (in which case it will be conceived in accordance to legislation's guidelines), or a non-legal, that can be understood logically for instance. (Lange, 52 et seq., Larenz I, 351 et seq.) The fact is that issues of causation on law call for *"value judgements that can not be answered just by applying logical and abstract standards"* (Horn, Kötz and Leser,147). Various methods have been employed in different jurisdictions in order to avoid liability for a behaviour's far-reaching effects.

In France for instance only the damages that could have been predicted are compensated, with the exception of the damages that have been caused intentionally (§1150 French Civil Code). In Switzerland, judges are empowered to specify the kind and extent of restitution in accordance to the gravity of the wrong committed (§ 43 of the Swiss Code of Obligations). In England and Scotland the criterion of *"reasonable foresight"* or *"reasonable contemplation"* is crucial. (Zweigert and Kötz, 310-315).

The causality link is specifically important for third party loss since on that basis it is attempted to limit the financial exposure of the debtor (Lange, 56.). It is reasonable to expect stricter causality requirements whether under contract or under delict, the third party loss seems a remote consequence of the injuring behaviour.

Various causality theories have been advanced in Germany, where not only the question of whether damages have to be compensated but the issue of the extent of compensation might depend upon the rule of causation (Cohn, 106). Grunsky on §241 BGB, 320 et.seq. offers a brief but satisfactory reference to these theories as well as to the terminology used.

The theory that accepted as a cause to the loss any factor which could not have been absent without the absence of the loss (*conditio sine qua non*), has been abandoned because it led to the excessive extension of liability. Grunsky on § 241 BGB, 320. This theory, sometimes referred to as *"Bedingungstheorie"* (Lange, 55), was an expression of a general attempt to apply methods of logic and natural sciences to social sciences.

According to the *Adäqvanztheorie*, which cannot be specifically based in the legislation causal are the acts (or omissions) that had the tendency, as it can logically be understood, to bring about, in the normal course of things, the loss. The theory is criticised, on the grounds that it does not delimit liability in a meaningful manner. The supporters of *Adäqvanztheorie* emphasized on its potential to exclude the liability for accidental events and to restrict the circle of liable persons on the basis of the perspective an objective third person would have. (Lange, 57, Larenz I, 354). The theory often focuses on the statistical possibility of the frequency of certain losses. It was thus, applied in a mechanical manner, failing to provide sufficient criteria for distinguishing those losses which were worthy to receive compensation. Like proximate cause of Anglo-American law, *Adäqvanztheorie* does not lead to a satisfactory delimitation of the liable persons. (Horn, Kötz and Leser, 113). The theory is based on the predictability of the loss, which, in cases of third party loss, involving often professionals and services, is easy to assess. However, the theory is inherently uncertain and lacks normative justification. See Krammer *"Schutzgesetze und adäquate Kausalität"*, Juristenzeitung JZ, 1976, 338-346, and Lange *"Adäquantstheorie, Rechtswidrigkeitzusammenhang, Schutzwecklehre und selbständige Zurechnungsmomente"*, JZ, 1976, 198-207.

The newer *Normzwecktheorie*, lays emphasis upon the purpose of the rule establishing liability. Grunsky prefers a division involving a theory of the protective scope of the relative norm (*"Schutzzweck der Norm"*) which he places near the *Adäquanztheorie*, and a theory of the link of unlawfulness (*"Rechtswidrigkeitszusammenhang"*). The latter was based on the observation that the undesirability of particular forms of behaviour was based on the fact that they entdangered particular legally protected goods or they made possible certain forms of damages. The former considers that contractual duties and liability imposed by law impose duties of behaviour that aim at the protection of particular interests. See also Lange 73-

However, the fact that statutory protection seems to be the most plausible solution, since contractual relativity is so central to the system of private law, naturally brings forward the law of delict where typically the obligations are provided for in statute law. Compensation, when no previous obligation exists, naturally encapsulates a delictual logic[54].

Relativity in compensation, along with the reminder of the causality problem should, in conclusion, indicate the significance of the link between third party and the debtor/defender as central in the justification of the specific instances of third party loss where compensation should be awarded. It is this bond, as experienced in transactions, that

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76.). The view is far from certain in its effect. Defining the historical, or proper, or authentic or contemporary purpose of the law is a much debated issue. *Normzweckttheorie* is undoubtedly based on legislation; the problems it creates are problems of construction. Different purposes can be inferred from a particular rule. Losses which fulfil the requirements of *Adäqvanztheorie* will not lead to compensation unless the legal rule under which compensation is payable, offers protection against the type of damage in question.

Delimitation appears in practice as an attempt to restrict the circle of damages worthy to be compensated as defined by the application of the *conditio sine qua non* theory which is logically sound but normatively unacceptable. The causal prerequisite the other theories set, have restrictive effects on the range of compensationable damage. A combination of theories is often discussed, for the various stages of establishing liability, or in relation to different rules. It is usually questioned, for example, whether the *Normzweckttheorie* should be applied alone or in accordance with *Adäqvanztheorie*. Both views are supported in Germany. (Larenz I, 357-358) In certain cases it is argued that *Adäqvanztheorie* can offer more equitable results. It could for instance facilitate the proof of the wrongdoer's fault.

The protection of the third parties on the bases of the stricter theory of the purpose of the rule of law (*Normzweckttheorie*) would require the determination of lawyers', (especially judges') to protect third parties. Certain hypothetical situations would involve, the liability of a company constructing a building and violating relevant statutes or of a bank that in the course of its conduct with a client offers to the latter mistaken advice, or of a producer that omits to control the electrical safety of all his products, could be taken to extend to the protection of third parties, if the purpose of the norm establishing the liability can be taken as encompassing them too.

54 This is the case even for the German legal order where contractual mechanisms such as *Drittschadensliquidation* or the *Vertrag mit Schutzwirkung für Dritte* have evolved and where developed insurance and social provisions systems exist. Compensation for damages is often expressed under a delictual logic. The generally accepted idea is that only those directly injured (*unmittelbar Geschädigte*) have the right to claim recovery for the loss they suffered. Those indirectly injured cannot claim compensation from the defaulting party. The expressions directly or indirectly injured, (*"unmittelbar"* and *"mittelbar Geschädigt"*), are usually referred to when delicts are discussed. See Koziol-Welsen, 401-402., Lange, 274-275.

has attracted the efforts of the courts in their attempts to delimit cases of third party pure economic loss in Germany[55] and in common law jurisdictions[56].

1.4.1. The case for delict.

A focal aspect of the German law of delict[57] is the principle of enumeration (*Enumerazionprinzip*), according to which delicts are restrictively and exclusively defined in statute law. The drafters of the BGB made this fundamental choice for the purpose of controlling the expansion of liability for civil wrongs[58]. This is not the case with most other civil law systems[59]. The common law of torts defines particular civil wrongs that entail compensation[60]. However, the independent[61] tort of negligence[62] has expanded in

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55 The various attempts to found theoretically *Drittschadensliquidation* and *Vertrag mit Schutzwirkung für Dritte* focus, to a considerable extend, on the evaluation of this bond.

56 In several decisions on pure economic loss, where liability was accepted it was duly observed that the plaintiff-defendant relationship was similar, close to a contractual relationship. See for instance the basic *Hedley Byrne v. Heller*, [1964] AC 465, [1963] All ER 575, HL, *Junior Books v. Veitchi*, [1983] 1 AC 520, [1982] 3 AllER 201, [1982] 3 WLR 477 (HL), and the recent *Henderson v. Merret Syndicates Ltd*, [1994] 3 AllER 908, [1994] 3 WLR 761. The concept of a 'voluntary assumption of responsibility' by the defendant was often relied upon to justify the award of compensation. See the reference under "Third party pure economic loss: Contractual Approaches" in the chapter on Scots law.

57 See generally Zweigert and Kötz, 299-315. See also Horn Kötz and Meser, 147.

58 The purpose was of course to limit the potential financial dimension of delictual claims and to avoid burdening economic activity with such costs. It was also important to avoid having the courts flooded with claims in delict. Zweigert and Kötz, 298.

59 French law employs a general clause (FCC §1382). In principle the clause could, based on the perception of *faute*, a mistaken and negligent behaviour, including objective elements of illegality and subjective elements of culpability (Zweigert and Kötz, 313 et seq.) involve any case of damage. General clauses are employed by the Greek Civil Code (914AK, a "blank" rule of law; *Blankettnorm* - Stathopoulos-II, 109), the Swiss Code of Obligations (§41), the Italian Civil Code (§2043) where an unlawful and wilful or negligent behaviour renders the actor liable. See on the various codes Zweigert and Kötz, 311, The Prussian General Land Law , §§ 1 ff I 6, contained a general clause (ibid, 293), as well as the Austrian BGB, of 1811, §1295, (ibid 293). The Polish Civil Code (§415) establishes liability on *faute* as the French Civil Code.The Civil Code of the Peoples' Republic of Germany established a general duty not to cause damages (§ 323), while it founded liability on an illegal breach of promise. Stathopoulos II, 104. Scots law also employs a general provision; *culpa*, a concept equivalent to *faute* (See Thomson, J. *Delictual Liability*). See Markesinis in Hartkamp *Towards a European Civil Code*, 285.

60 *" Anglo-American lawyers have adhered to the separate types of case and separate torts which developed under the writ System"*, Zweigert, and Kötz, 299.

61 *"Each of these separate torts is regarded as independent"*, Zweigert and Kötz, 299.

62 Negligence is one of the different delicts/torts. It has been established judicially and it is the main vehicle for the expansion of delictual (tortious) liability to different circumstances. See Zweigert - Kötz, 299 et seq.

such a manner that it covers almost every tort; arguably Anglo-American law enumerates particular torts but only in theory[63].

The cornerstone of the enumeration of delicts is the requirement of unlawfulness, roughly equivalent to the violation of a duty in common law. Unlawfulness is based on specific legally protected interests; only if these are invaded can a delict be established. Unlawfulness based on any legislative provision such as a general BGB principle would not suffice. (In contrast, although unlawfulness is a requirement in the Greek and Swiss Codes, there are no enumerated protected interests[64].)

The difficulty in establishing delictual protection for third parties, can be seen by a brief account of the main BGB provisions[65]. Third party loss is usually economic - pure economic loss most of the time -- not associated with *erga omnes* protected rights[66], nor likely to be the object of special legislation. It is generally accepted that the somewhat 'general' clause of §823(I)[67] concerns *erga omnes* protected rights only[68]. §823(II) BGB, refers to special statutes and special provisions intended for the protection of others (*Schutzgesetzdelikte*[69]). Moreover, third party loss is usually the result of mere

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63 Yet, as will be seen, common law of delict remains a system of enumerated delicts, and this is a basic reason why the development of the law of delict seems less promising as regards third party loss. See "Improving tort?" in Chapter 4, on American law and "Revitalising culpa" in Chapter 5 on Scots law. The fact that the Greek system of delict is not one of enumerated delicts is a basic reason why in the Greek system (as in teh French there is the potential to deal with third party loss (and pure economic loss) in delict. See "Delict's potential" in Chapter 3, on Greek law.

64 As a rule of thumb, systems, where unlawfulness can be based on any provision in law have general clauses. As *faute* in French order, these systems are not limiting protection to restrictively protected interests. The unlawfulness requirement distinguishes on the other hand the Greek and Swiss Codes' general clauses from the French Code Civil clause.

65 See Horn, Kötz and Leser, 147-157. Three main heads of delictual liability are provided in the BGB, §§823(I), 823(II), and 826 BGB.

66 Not associated to property damage that is, but rather is loss of profits or expectations, or an overall deterioration of the financial situation and prospects.

67 The requirement of unlawfulness *"is satisfied by any invasion of a legal interest specified in § 823 BGB, which is not specified by any special privilege"* Horn, Kötz and Leser, 148. See also Zweigert and Kötz, 293.

68 Apart from those specifically enumerated, "*sonstigen Rechte*", (other rights) do not include contractual ones; economic loss is compensated only if it falls in the ambit of *erga omnes* protected rights. (Zweigert and Kötz, 297)

69 Fikentscher, 266. Protective statutes might include *"all rules of public and private law."*, Zweigert and Kötz, 296.

carelessness rather than intention and, arguably, in many cases it hardly entails the moral blame usually associated with delict[70]. Thus §826BGB on the intentional cause of damage in a manner contrary to good morals, is of no use[71]. Third party loss will probably not fall under a delictual provision.

Negligence, it should be emphasized, is an element of culpability in German law, distinguished from unlawfulness[72] which is related to the violation of one of the restrictively enumerated duties. Negligent behaviour could constitute a delict only if there were a general duty to protect others from damage in the BGB[73]. In common law, careless behaviour violating a duty of care[74] constitutes the tort of negligence; in French law every careless behaviour causing loss constitutes *faute*[75].

Furthermore, third party loss often occurs as a result of an omission to act, for instance to take protective measures[76]. There is an ongoing dispute in Germany over delict caused by omission[77]. A specific social or legal duty to act must have been violated, and this is not easy to establish regarding third parties. Even though such a duty can be based

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70 It often involves professional services and the loss seems to be a result of market reality or/and the choices the third party itself made.

71 The conduct in third party loss will most likely be careless (negligent) but not intentional.

72 Zweigert and Kötz, 298.

73 Lange, 103. See on the relevant dispute Zweigert and Kötz, 293, et seq. . The debate on the existence of such a duty is related to the dispute whether unlawfulness is to be judged by the result of the behaviour or by the behaviour itself. The need to show diligence and care in transactions will have to be combined with a particular negative effect in the first case while in the second a mere violation of a duty of care would be considered illegal. The major problem with establishing the tort of negligence in common law is to justify the existence of a duty of care. Consequently this is the basic problem in dealing with pure economic loss in delict. See any relevant textbook, and especially for pure economic loss, Felsthussen *Economic Negligence.*

74 The duty of care is usually described as a mode of behaviour. Zweigert and Kötz, 304.

75 See §1383 of the French Code Civil, which specifies *faute. "French lawyers draw no clear distinction between unlawfulness and fault.... both are contained in the concept of faute"* (Zweigert and Kötz, p.313) which is, in general, a culpable behaviour. It seems that in French law there is a general duty not to cause damage to others.

76 As, for instance, the case of an employer or a producer with regard to the hygiene or safety conditions in his premises.

77 See on omissions §241 BGB; "The obligation may consist of refraining from acting.". See Larenz I, "Die Schadenszurechnung im Fall einer Unterlassung", 368, and Lange 103"; "Kausalität der Unterlassung".

on a general clause such as good faith[78], it is unlikely that a delictually protected interest will have been violated.

Modern transaction needs have urged German courts to expand the application of delict. However, there is limited scope for such an expansion in the light of the restrictive character of the *Enumerazionprinzip*. The protection of §823(I)BGB for instance, was expanded to cover the right to the very existence of a business enterprise[79]. Furthermore, §823 BGB is applied in cases of violations (due to omissions usually) of general obligations of security and protection in the course of a person's social and economic conduct[80]. Judging from the fact that the third party loss is usually economic and that there is often a weak causality link between injury and loss (as, for example, with damage in the context of interrelated contracts); it is unlikely that any possible expansion could cover convincingly the third party loss problem since this would possibly require 'outlawing' any careless behaviour.

In any case, expanding delict would require judicial activism, undermining the rationale and purposes of enumeration and clearly contradicting a basic BGB policy. It seems that the expansion of delictual liability has reached its limits; further expansion would stand against the basic doctrine that a delictual claim should be based in legislation[81]. In fact, the expansion of delict is likely to be unstable and uncertain, relying

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78 It could also be based on an illegal harm of absolute rights, on some previous dangerous behaviour. Lange, 103. See also Sirp on § 241 BGB, 449, and Cohn, 156-159, on delictual liability.

79 See Lawson, F.H. & Markesinis, B.S. *Tortious Liability for unintentional harm in the Common Law and the Civil Law, vol. I*, 1982, 100-105. See also Lange, 277.

80 These duties which are described as *Verkehrsicherungspfhlichten* or *Verkehrspflichten*, specify, in part, a general rule of care in transactions. (The terms are traditionally related to traffic, transportation and communication and involved the duty to safeguard traffic, the duty of the occupier to make land or premises available for persons or vehicles. See Mertens on § 823 BGB and LarenzII, §72, Lange, 277, Fikentscher, 629. Thus the differences between the German system and those accepting negligence as illegal, with respect to the difficulty of the former to establish a delicts have been reduced. The unlawfulness of a behaviour in Germany can be examined on the basis of its opposition to a particular rule or to the spirit and the deliberations of the legal order as a whole. The contribution of § 242 BGB, was central to this process. (Horn Kötz and Leser 135 et seq.)

81 In order to cover the third party loss a number of profoundly acceptable forms of behaviour would have to be treated as legally wrong.

on the interpretation of abstract general clauses, or on the forced extension of concepts such as 'other rights' in §823(I)BGB, which stands little chance in the light of existing case law.

Legislation has more or less dealt with civil wrongs which were deemed serious enough to give rights to compensation. As will be seen, the legislative intervention in favour of third parties in third party loss cases does not take the form of a delict-like provision. The model is more of a voluntary relationship.

1.4.2. Obligations and third persons.

The relativity of obligations is fundamental in German private law[82]. As explained previously, as a result of relativity, only relative rights and personal bonds are created by the law of obligations. However, this is not the full picture. In a number of ways third parties are affected by or affect an obligational relationship to which they are not parties. German theory has been particularly concerned with the position of non-parties.

1.4.2.1. Exceptions to relativity: Third parties affecting obligational rights[83].

This situation, not the object of this work[84], might seem self-contradictory since obligational rights do not, like real ones, offer direct and absolute[85] authority, but only relative power, directed against particular persons. Obligational rights give only indirect authority on the object of performance which should be respected by the debtor alone; only the debtor can therefore violate this right. Third parties are not obliged to respect relative rights[86].

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82 The relativity of obligational rights is a prerequisite for the development of the principle of abstraction in German doctrine whereby although the contract leading to transfer of rights and the transfer constitute a single event they are nevertheless treated separately. See Horn, Kötz and Leser 69. The same approach is taken in Scots law too.

83 Esser - Schmidt, 34.

84 The reference is given here in order to offer a comprehensive account of the issue of third parties and obligational relationships.

85 Directed against anyone interfering with the right; anyone affecting the right in any manner.

86 Esser-Schmidt, 34-35.

A third party does not infringe an obligational right if he invades the object of the performance materially or otherwise (for example, by destroying it or by becoming creditor of the same performance). The third party can affect the relative right if he affects the bond between the right and the bearer[87]. The third party would thus be affecting the inclusion of the obligational right in the creditor's property. A mere claim against the validity or the existence of the bond would not suffice. A creditor does not lose his right because it is disputed; instead, a change or transfer of the bond will make him lose his right. This bond can be invaded in two ways by a third party; first, by disposing (for instance, assigning), and, second, by exercising the right (for example, collecting a debt)[88].

In principle, neither of these two ways will prove to be legally effective[89]. There are exceptions[90] where the bond between the right and its bearer is abolished and the claim is then lost for the creditor. In these cases the debtor performs in good faith to a person presenting some sort of legitimation, usually in the form of entitling documents[91].

Even if the infringement is successful, the third party acts unlawfully[92] (except if there are reasons that defy unlawfulness, such as approval or authorisation by the creditor, §362BGB, §185BGB). It is questionable, though, whether §823(I)BGB applies. It probably does. The third party's act is likely to be unlawful for another reason; for example, theft or

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87 Larenz I, 125-134.

88 Stathopoulos I, 85-93.

89 Stathopoulos I 85-93. The disposal of the obligational right from the party not entitled to dispose of the right is not valid. See §185 BGB; disposition by an unauthorised person; "A disposition affecting an object which is made by a person without a title, if made with the approval of a person entitled, is valid". (Forrester *The German Civil Code.*) The person to whom the disposal was made does not obtain the right even if he is of good faith. The collection of the debt does not relieve the debtor from his liability, §362 BGB, that refers to §185 BGB. The creditor retains his right which has not been violated by this disposal; no aquisition of obligational rights in good faith is recognised in the German BGB, as in the transfer of movables (§ 932 BGB, § 929 BGB).

90 Stathopoulos I 85-93.

91 Such are the cases of performance in favour of the bearer of a receipt who is presumed to be authorised to receive the performance (§370 BGB); the release of the issuer of a bearer bond if he performs in favour of a bearer who is not entitled to dispose the bond (§ 793 BGB); the release of the person liable if he compensates in delict the person who was in possession of the damaged thing at the time of taking or damaging of the moveable, (§ 851 BGB).

92 On the basis of §242 BGB possibly.

embezzlement of the legitimating documents. However, often some other basis for compensation will exist, such as unjust enrichment (§812 BGB).

In any case, the obligational bond and the obligational relationship cannot be disputed as facts by third parties. Anyone with a legitimate interest can refer to their existence or absence. In this sense the obligation develops an absolute function. If the debtor cannot perform[93] and there is an insurance contract by favour of which the debtor will be compensated, the creditor is entitled to ask for this compensation (§281 BGB)[94]. The situation with contracts by which a legal person is established is similar. Those involved in transactions with the legal person have to undergo the consequences of the establishing contracts[95].

1.4.2.2. Exceptions to relativity: Extending the effects of an obligation to third parties.

The focus in this brief reference will be on cases where contractual limits expand beyond the parties to the contract. These exceptions to contractual relativity in German law are similar to the exceptions in other civil law jurisdictions[96].

The contractual expansion is likely to refer to all possible effects of a contract. Thus a third party may demand the execution of a contractual duty or ask for the recovery of damages caused from the violation of a contractual duty.

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93 Due to the destruction of the object of performance for example.

94 See Larenz I, 12-16. §281(1) BGB reads "If, in consequence of the circumstance which makes the performance impossible, the debtor acquires a substitute or a claim for compensation for the object owed, the creditor may demand delivery of the substitute received or assignment of the claim for compensation. ", *The German Civil Code* Forrester.

95 See §21 BGB, on the creation of a non-economic association, § 22 BGB on the creation of an economic association. Larenz I, 12-16

96 Barry *The French Law of Contract,* distinguishes a number of exceptions to the relativity of obligations; *représentation* (agency); *cession de créance* (assignment); *promesse pour autrui; stipulation pour autrui;* (promise or stipulation for another), *action oblique* (indirect action of the creditor availing himself of the rights of his negligent debtor -- also referred to as *action indirecte,* or *action subragatoire*), *action Pauliene,* (otherwise *paulienne* -- revocatory action) *action directe; simulation,* (simulation, feint), 177 et seq. The transation of the terms was taken from *Dictionnaire Economique Juridique,* by Baleyte, Kurgansky, Larache, Spindler, except *simulation* taken from *Dictionnaire Commerce Finance Droit,* 1958, by Herbst, R.

The relative exceptions are presented in two forms in German theory: in the first exception, a new obligational bond between one of the parties to the original relationship and the third party is created while, in the second, no new obligation is established[97].

The criterion of whether a new obligation is created or not, is a product of the doctrine that an obligational bond can be created by either contract or statute law[98]. In the first category of exceptions, the third party becomes also a subject of an obligation. The new obligation, derived from the initial one, is also subject to the relativity principle[99]. These are exceptions to the relativity of contracts but not to obligational relativity; the original obligation is created by a contract while the new one is authorised by legislation[100]. In contrast to the previous category, the second category is described in German theory, as that of 'real' exceptions to the relativity principle[101]. The third party does not become a party in a relationship with the debtor.

In fact, any exceptions to relativity and any contractual expansion has a certain basis in legislation, (meaning that the courts can at least refer to a legitimising statutory basis for side-stepping relativity). The criterion for the distinction between the two forms is whether a specific legislative provision exists for the protection of third parties. In the case of 'real' exceptions, the object of this study, there is no such specific provision.

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97 See Larenz I, 68 et seq.

98 The prevalence of enacted law as a source of German law is beyond dispute. It would not be imprecise to quote that *"German Lawyers recognise no alternative source of law outside legislation, even though they accept that the decisions of courts amend and change the substance of the codes and statutes.* " (Horn, Kötz and Leser, 60. They also give an outline of the changes in perceptions that have taken place in the last decades.). The creation of an obligational bond therefore can take place in the manner the legislation prescribes; by reason of contract or by way of the legislation itself. (Delicts for example have to be specifically provided for by statute law in the absence of a general clause.).

99 A documentary credit transaction is one example. A new relation is created between the seller and the issuing bank from the time the latter accepts to pay.

100 See later in the text the Tripartite Relationships. See also in Larenz *Besonderer Teil,* 68 et seq., and Thiele JZ, 1967, 649.

101 See Gottwald on §328, and Esser-Schmidt 34. The criterion for the definition of actual or not exceptions refers to the fact of whether a new obligational relationship is created without reference to its source; new delictual provisions can also create such exceptions (§844 BGB).

1.4.2.2.1. Specifically authorised exceptions to relativity[102].

1.4.2.2.1.1. 'Tripartite' relationships.

These are cases where an obligational bond exists between two parties, only one of whom is related to another person by another obligational bond. These cases are often called tripartite relationships in Germany, although some authorities prefer other terms[103].

Such are the cases of a lease contract where the lessee sub-leases the leased thing[104], or of a contract of bailment where the entrusted thing is the object of sub-bailment, or of a contract for works where the (main) contractor contracts with other contractors (subcontractors)[105].

Only the in-between party (the *"Leistungsmittler"*[106]) is contractually related to the other two. The legislature, considering that complete independence between these two contracts would not be socially or economically justifiable, allows in certain cases the third persons to exercise rights that would normally derive from the contractual relationship; it creates a direct obligational bond between two persons who are not parties to a contract.

Thus the BGB authorises the lessor to demand the return of the thing leased from the third party (sub-lessee) after the termination of the lease (§556(3) BGB[107]) and the

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102 As discussed, they are not 'real' exceptions, in terms of German theory, in the sense that they involve the creation of a new relationship subject to the relativity principle. This category should not be confused with the cases of multipersonal obligational relationships, where three or more persons are parties to a single relationship do not constitute exceptions to the relativity principle; all are parties to the obligation, whether as debtors or creditors. Esser-Schmidt, 34.

103 As, for example , Larenz, who prefers the term , *"Dreiecksverhältnis"*, (three-corner relationship). See also Gottwald on §328 BGB, (1005 et seq.). The term "tripartite" is preferable as it embraces a range of differing relationships. The term *"Dreiecksverhältnis"* could be taken to imply that a new relationship is created between the persons not related so far. This implication is difficult to justify for all the possible situations at least. When the existing two bonds are contractual the relationships are defined as tripartite contractual relationships.

104 On lease in general see Gitter, : "Die Wohnungsmiete", in the collective work *Vertragsverhältnisse (ohne Kaufrecht), Band 3, Vahlens Rechtbücher* 1974, 1-50

105 See Huhn, "Probleme des Werkvertragsrechts" and "Der Bauvertrag" in *Vertragsverhältnisse (ohne Kaufrecht), Band 3, Vahlens Rechtbücher,* 1974.

106 Larenz *Besonderer Teil,* 412.

107 Esser-Weyers, 168. See also Larenz, *Besonderer Teil,* 168-172. Voelskow on §556(3) BGB, 898. Schopp on §549 BGB,1223.

lender of a gratuitous loan for use to demand the thing back from the third party after the termination of the loan (§604(4) BGB[108]).

The return of these objects could have been made on the basis of §985 BGB that gives the owner the right to ask for the transfer of the possession of his property[109]. (There is obviously no exception from obligational relativity in such a case. Real rights can be raised against anyone.) This option presents serious disadvantages from the point of view of evidence[110]. Moreover the lessor might not be the owner[111]. §556(3) BGB, and §604(4) BGB, are preferable; it is relatively easy to prove the existence of an obligational bond.

It is reasonable to argue that the BGB is less protective of third parties in the situations in question than more modern civil codes of the same family of systems. There is a presumption against permitting sub-lease[112] or sub-depositing[113] in the BGB, despite the contrast with social and economic reality[114]. The Greek Civil Code creates a presumption in favour of a sub-lease[115] and the provision of the Austrian Civil Code on sub-tenure[116] is similar. In a number of other instances the Greek Code is more protective[117]. The later time

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108 Esser-Weyers, 216, Kollttower on § 604 BGB. See also Larenz *Besonderer Teil,* 188-189.

109 This action is often referred by German lawyers as *rei vindicatio,* because it resembles the remedy performed in Roman law. Cohn, 179. §985 BGB, is directed against the direct possessor alone while *rei vindicatio* could be used against direct and indirect possessors.

110 In the case of a claim for the return of immovable property, on the basis of a real right, the lessor might face the challenge of *probatio diabolica,* if his right is disputed. He will have to prove the validity of his right and of the right of those before him in the line of previous transfers which will bring him in quite a disadvantaged position with respect to the judicial handling of his action.

111 He will not have the action of § 985 BGB that entitles the owner to demand from the possessor the delivery of the thing.

112 § 549 BGB. Esser-Weyers, 185, Schopp on §549 BGB, 1223.

113 §695 BGB.

114 Schopp on §549 BGB 1207.

115 577AK, (Greek Civil Code).

116 It is permitted if there is no disadvantage to the owner; §1098 ABGB *"The General Civil Code of Austria"*, Baeck Paul L (ed), Parker School of Foreign and Comparative Law, 1972.

117 The lessor, the depositor, and the lender can claim return directly from the third party (articles 599(2) AK, 825(2) AK , 819 AK, respectively). Furthermore, the employee has a claim for his salary from the person who contracted with his employer, in a contract for works concerning immobile constructions, for the purpose of which the employee offers his services (702 AK). See Kardaras, on 702 AK.

of introduction of the Greek Code can offer some explanation for these differences[118]. Apart from other reasons[119] the Greek Code exploited the experience of the judicial adjustment of the BGB. The German courts, in the absence of other tripartite relationship provisions in the BGB, extended considerably the application of the contracts for the benefit of third parties (§ 328 BGB).

1.4.2.2.1.2. Special succession in obligational rights.

A special group of tripartite contractual relationships consists of §571 BGB[120] and the recently inserted[121] §613a BGB, which are of great practical importance. These paragraphs are distinguished because, in effect, they establish a special category of succession in contractual rights and duties[122]. The person acquiring ownership of (or another real right on[123]) a leased property and the person purchasing or leasing a business unit[124] are entering[125] (under certain conditions[126]) into the rights and duties of the contracts of

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118 The BGB was first introduced in 1900, whereas the Greek Civil Code, which had the former as a prototype, became law in 1946

119 While, for example, all the other provisions for the contracts for works or for services in the Greek Civil Code are based on the BGB, article 702 AK was inspired from article 1798 of the French Code Civil.

120 See Larenz *Besonderer Teil*, 159-161, on the protection of the lessee which he described on the basis of real property concepts, as the lessee is protected against whoeve is the owner of the leased property.

121 The provision was inserted in 1972. See *The German Civil Code*, where a 'Table of Changes' is provided.

122 Stathopoulos comments on 614 AK, which is similar to § 571 BGB, in Stathopoulos I, 82. See Schaub, on §613a BGB, 1472, stating that transfer is not to be understood as a change to the enterprise. (*"Der Betriebsbübergang ist keine Betriebsänderung"*, 1472). Gitter "Die Wohnungsmiete", 23, thinks that the provision does not express some sort of assimilation of the lessee's right to a real one, but that the statute created a legal relationship in favour of the lesee.

123 Esser-Weyers, 200 recall the case where a heir does not become owner but instead obtains a more limited real right on the leased property. See §571 BGB.

124 Schaub on §613a BGB, 1472. See Esser-Weyers, 235 et.seq. noticing that the transfer of the business has as a consequence the transfer of the employment relationship. See §613a BGB.

125 Gitter "Die Wohnungmiete", 23, referring to the heir enforcing the provisions of a testament.

126 In addition to the conditions found in the relative provisions, it has been argued that the non-gratuitous character of these transactions is a prerequisite for the application of these provisions. Voelskow notes that §571 BGB is not applicable in real rights to use (*dingliche Nutzungsrechte*), preliminary agreements of lease (*Mietvorverträge*), gratuitous permission to use (*unentgeltiche Gebrauchüberlassung* -- it falls under the povision for

lease and employment respectively. The lessees and employees can therefore direct their claims against the purchaser or lessee[127]. §613a BGB in particular corresponds to modern employment and transaction needs and precedes the similar European Community measures[128]. Different arrangements are of course possible[129]. The fact that the provision was included in the Civil Code, instead of special labour or commercial legislation, is evidence of its significance. It was an attempt to ensure that it applies to all kinds of business organisations, including all forms of employment[130].

1.4.2.2.1.3. 'Real' contract for the benefit of third parties.

The most common case of exceptions to contractual relativity is the so-called 'real', 'pure' or 'genuine'[131] contracts for the benefit of third parties (*echte Verträge zugunsten Dritten*[132], §328 BGB) which give the right to the third party to demand performance

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gratuitous loan, *Leihe* §598 BGB), permision, as in the case of a newspaper stall in a hotel (*Gestattungsverträge*), and contracts for financial contribution (*Finanzierungsbeiträge*). Voelksow, on §571 BGB, 1054.

127 The situation might be different in other legal systems; in Scots law a lease of immovables offers a real right to the lessee.

128 See in the introduction the reference to Directive 77/187 (OJ L61/26, 5.3.77) providing (article 3) that in the case of a transfer of a business the rights and obligations of the transferor from the employment relationships are also transferred to the new employer.

129 The lessee might accept that the business's direction should continue to be in the hands of the lessor. Schaub on §613a BGB, 1472.

130 The Greek Civil Code includes 614AK which is taking the view of §571 BGB. As regards Swiss law Guhl notes that the purchaser (Erwerber) of the object of lease or loan for use can enter in the rights and duties of the relative agreements. The purchaser promises to the seller to free him from his obligations under the contract. The sale contract operates as a contract in favour of third parties as far as the lessee and the borrower are concerned. Guhl 355.

131 This is the term prefered by Zimmerman 34.

132 German theory distinguishes among the contracts for the benefit of third parties between those which give to the beneficiary the right to demand performance directly from the promisor, and which are called 'real', 'pure' (*echte*) contracts for the benefit of third parties, and those where the recipient of the promise only can claim performance to the third party, and which are called 'not real', 'impure' (*unechte*). The distinction is based on § 328 (2) BGB where it is considered that in the absence of express provisions it is to be deduced from the circumstances, especially from the object of the contract whether the third party shall acquire the right and under which conditions and whether the right shall be reserved to the contractual parties.

directly from the promisor[133]. The third party *"need not make any declaration of adherence or participate in any way"*[134].

The Pandectists[135] accepted the possibility of conferring rights to a third person as a general mechanism, in contrast to Roman law which only exceptionally accepted such a prospect[136]. The right to a direct claim distinguishes the 'real', 'pure'[137] contracts for the benefit of third parties from those where only the creditor has a compensation claim[138].

In case of doubt, the courts have to infer from the parties' intentions and from the nature and purpose of the contract whether the beneficiary was meant to be permitted to

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133 The promisor (*Versprechende*) promises in his contract with the promisee (*Versprechenempfänger*), to perform for the benefit of a third person, who acquires the right to claim the execution of the contract directly from the promisor.

134 Zweigert & Kötz, 127.

135 The Pandectist school is a product of the Historical School of law which appeared dominantly in Germany in the 19th century, with Savigny as it undisputable head, suggesting that law is a historically determined product of civilisation, instead of a product of planned legislation guided by reason as Enlightment views supported. The Historical school focused on the 'inner secret powers' and the 'spirit of the people' working though history. The law-bearers were the people "and, as the peoples representatives the lawyers". The Pandectist school's only aim was the dogmatic and systematic study of Roman law, which they treated on an exaggeratedly dogmatic manner. The legal system was considered "a closed order of institutions ideas and principles developed from Roman law: one only had to apply logical or 'scientific' methods in order to reach the solution of any legal problem." (Markesinis *A Comparative Introduction*, 1994, at 145 and 146).

136 See Zimmermann *The Law of Obligations* 42-44. A more detailed account will be provided in the chapter on Greek law in the "Introduction".

137 *Der echte Vertrag zugunsten Dritter; der unechte Vertrag zugunsten Dritter.* See generally Gottwald on § 328 BGB, 1007-1008.

138 The creditor can claim compensation on behalf of the beneficiary and the latter has to turn against the creditor in order to be compensated. The person intended to be benefited has no direct claim (§281BGB).

claim directly from the promisor[139]. In certain cases in the BGB[140], there are presumptions favouring a direct claim although they are not conclusive or exhaustive. The general approach in the BGB[141], (and in the Greek[142], the Austrian[143], and the Louisiana Codes[144]) favours accepting the existence of direct claims in doubt[145]; in contrast to the French[146] and the Swiss[147] Codes, which take a more conservative view[148]. In the latter two codes, although the contract for the benefit of third parties is not forbidden, it is treated as an exception.

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139 See §328(2) BGB, 411 AK, §881 of the Austrian Bürgerliches Gesetzbuch (ABGB). In Scots law the debate on the existence of a *jus quesitum tertio* (a beneficiary right to claim the fulfilment of the promise), focused on the irrevocability of the right, not only the 'equivalent to delivery' of the title was required but some aditional element as well. (See "The *jus quesitum tertio* -- Introduction" in Chapter 5). See in the chapter on American law that according to Restatement second the 'intended beneficiaries' are allowed to sue (§302 I), A direct claim should be allowed if it would be an appropriate means to effectuate performance. ("Restatement second, 1979" in Chapter 4). The situation is more complex in the English and the other Commonwealth systems. See under "Third party beneficiary claims" in Chapter 6, on the means traditionally employed to sidestep the constrains of privity. The (English) Law Commission in a 1991 consultation paper suggesting the abolition of privity for intended beneficiaries of contracts, suggests a double intention test, that the parties intended to benefit the third party and that they intended to allow that third aprty enforce this benefit with a direct claim against the promisor. (LC, Consultation Paper No 121, 65 et seq)

140 See §330 BGB, setting presumptions for a right to claim directly from the promissor in the cases of annuity, insurance and graduitious transfer of property.

141 As one can deduce from the contrary provisions in §329BGB. Opposite arguments can also be employed, refering, among others, to the limited number of special contracts for which a presumption in favour of a right to claim directly is established. These arguments cannot alter the overall predisposition of the BGB.

142 Articles 410-415AK, especially, article 411 AK.

143 ABGB - §§881 - 883. §881(2) ABGB, reads; *".....In case of doubt the third party acquires a direct right if the performance is principally for his advantage.", The General Civil Code of Austria.*

144 The Louisiana Civil Code (§1978 et seq.), promotes the direct claim of the beneficiary against the promisor. Article 1981 of the Louisiana Civil Code, inserted in 1984, provides *"The stipulator gives the third party beneficiary the right to demand performance from the promisor"*. Although article 1981 is new, it did not change the law. The right of the beneficiary to demand direct performance had been recognised already since 1818 by the courts. See *Louisiana Civil Code,* 1989 edition , Yiannopoulos (ed).

145 Possibly the view is the same in american law, but not in Scots law. The LC proposals take a conservative approach.

146 §1121 FCC

147 §112 Swiss Civil Code.

148 See Zweigert & Kötz, 130. Although the contract for the benefit of third parties is not forbidden, it is treated as an exception.

The contract for the benefit of a third party is *sui generis* [149], based on the doctrine of contractual freedom and is distinguished from contracts such as agency or the assignment of claims[150]. It does not involve a distinct transaction but is a mechanism[151], a vehicle for the realisation of particular purposes of the parties[152] and has numerous applications such as in contracts of insurance, of annuity, of deposit, of carriage, for services (for example between a surgeon and the relatives of an injured person), etc.[153]

Transaction needs are facilitated by 'real' contracts for the benefit of third parties. The third party acquires the right directly from the contract and not as a successor of the creditor. The benefit does not pass through the latter's property, does not become part of his insolvency property and cannot be claimed by the debtor's heirs. The promisor can raise against the tenderee of the benefit counterclaims or objections deriving from the contract only, and not from some other source (a compensation claim against the creditor for instance)[154]. If no direct claim is allowed, an unnecessary, legally and economically

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149 See Zweigert & Kötz, 128.

150 See generally Gottwald on §328, 1007-1008. The contract for the favour of a third party resembles agency in that a third party is benefited, but while the promissee acts in his own name, the agent acts in the name of someone else. Compared to the undisclosed agency, the contract fot the benefit of a third party differs in that in the latter case the third person is mentioned in the contract as the receiver of the benefit at least. In the case of the assignment of claims, on the one hand, a new contract is required between the old and the new creditor, and, on the other hand the new creditor enters the relationship as a successor to the particular right and not in his own right as the third party.

151 Gottwald on §328 BGB, 1006.

152 In the BGB and the civil codes following the latter it is usually placed in the general part of the obligations' provision.

153 See the extensive reference by Gottwald on §328, where he offers a general view of the relative regulation in different areas of law as for example insurance law. He considers, however that the contract for the benefit of third parties does not apply in a number of transactions between clients and banks. See also Reimer-Schmidt on §328 BGB in 1008 et seq. See under "Development and Applications" in Chapter 5, the reference on the central role of insurance contracts as regards the *jus quaesitum tertio*.

154 Litzeropoulos (The Greek language sources will be referred to in chapters other than the one on Greek law in latin characters). See also Gottwald on §328 BGB, 1005 et seq.

The situation is unclear in Scots law. Possibly however the treatment will be the same. See under "Defences" in Chapter 5. In the relative Memorandum of the Scottish Law Commission, (SLC Memorandum No:38, p. 38) this very point is made plain and suggested for the future development of the *jus quaesitum tertio*.

Similar is the approach in American law based on the idea that the beneficiary should not have greater rights than the parties. See under "Promisor's defences" in Chapter 4, and Calamari & Perillo, 711).

unjustifiable multiplicity of claims and elaborate legal constructions will be required for the satisfaction of the beneficiaries, that will, nonetheless, remain uncertain.

1.4.2.2.1.4. Other cases.

The regulation of order (*Anweisung*), in §§783, 784 BGB[155] is similar to the 'real' contract in favour of third parties.

The concept of authorisation is similar to that of the order. On the lines of the order provisions (§§783,784, BGB; 876, 877 AK) some Greek theoreticians[156] have supported the view that other cases of tripartite relationships, less important in practice, are the cases of authorisation for the collection of a debt (§239(1)AK; §185(1) BGB, and §417 AK; §362 BGB) or for undertaking an obligation[157], where the authorised person acts in his own name. In these situations either a third party intervenes in an alien relationship or the authorising party is bound by a contract between others.

Tripartite relationships might occur in the case of contracts concerning a thing that does not belong to one of the parties but to a third person. They bind the latter if he has authorised the transaction, or if he consents to the transaction after it has taken place, according to (§185(1)BGB), §239(1)AK; the latter's legislative purpose is taken to contain a general principle[158].

So far, reference has been made to exceptions from contractual relativity only. A new obligation is created between the third party and one of the original parties and

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The same approach is taken by the Law Commision in its Consultation Paper No121, 132 et seq. albeit provisionally, as the issue of defences is left open. (See at the end of the "Third party beneficiary claims " in Chapter 6).

155 The articles contain a twofold authorisation (*doppelte Ermächtigung* -- Esser-Weyers, 334.), to the payee of the order to ask for payment and to the drawee to pay the payee. Similar are the 876, 877AK. The legal basis of the third party's entitlement to the performance of the order, the 'cover relationship' *(Deckungsverhältnis)* , can vary kinds; Esser-Weyers, 334. See Larenz *Besonderer Teil,* 394.

156 See Stathopoulos I, 82-83.

157 See also Larenz *Besonderer Teil,* who takes a similar view on the "Leistung auf Kosten Dritten", (412)

158 Stathopoulos I, 82-83.

relativity applies in this new obligation. This is not the case with the following category of cases.

1.4.2.2.2. 'Real' exceptions from obligational relativity.

According to German lawyers, in these cases[159] the third person acquires rights from an alien obligation although no new obligation is created between the third party and the original parties[160]. A third party claims compensation for damages suffered due to a contractual violation although he was not an intended beneficiary of the contract.

A solution under delict is not likely or preferable; the question is for the third party to be compensated on the basis of the contract, to the exception of the relativity principle[161]. The position of the third party suffering the loss is in many cases similar to that of the creditor.

It is generally accepted in Germany that, in such cases, third persons should at least be empowered to claim the proceeds of a compensation claim by the creditor (§281 BGB)[162]. Two groups of possibilities are usually distinguished. In the first of the relative groups of cases, the third party is injured due to the debtor's violation of a basic performance duty. In such circumstances the third party suffers loss because he has an interest in the performance. In the second category of cases the debtor violates a subsidiary duty, a duty of behaviour, worsening the position of the third party who has no concern for the performance.

1.4.2.2.2.1. Damage caused from the violation of performance duties.

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159 See before under "Exceptions from relativity: Extending the effects of an obligation to third parties", on the distinction between 'real' exceptions where no new obligatio is created and not real ones where the third party enters a new obligational relationship.

160 See generally Gottwald on §328 BGB, 1003-1008.

161 It is possible to have such a clause inserted in, or implied from a contract; See "Vereinbarte *Drittschadensliquidation*", in Lange, 279.

162 It is doubtful whether the third party can oblige the creditor to raise a compensation claim on the third party's behalf, on the basis of the same provision (§281 BGB).

In this case, the violation of the debtor's performance duties causes damage to third persons and not to the creditors. A usual example involves contracts concluded by an undisclosed agent. If the contracting party violates his obligation (for example the seller destroys negligently the sold item before delivery[163]) the loss is suffered by a third party, the undisclosed principal[164].

Another typical example, (a problem notoriously familiar to British lawyers, treated after *The Aliakmon*[165], by the 1992 Carriage of Goods by Sea Act[166]), is the case of a contract for carriage where the seller (or consignor) contracts for the transport of the sold item to the buyer (consignee) who has not acquired ownership (or any other property right) and the carrier negligently damages the item in question.

The creditor (seller, consignor) of the violated contract will normally be entitled to claim compensation for the violation of contractual duties. However, the creditor will have suffered no loss and would have no interest to claim compensation. He could not have suffered loss for the violation of performance in the first place. The economic value, the benefit related to the performance, had already been transferred to another person[167]. The creditor is released from liability since he cannot be held responsible for the negligent conduct of his debtor (for example, the carrier). The third person who suffered the loss will have no compensation claim from his relationship to the creditor. This is not the case of a

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163 Lange, 283

164 Similarly a third party suffers loss if a party contracts for the repair of a gadget which he has promised to donate to the third person. and the gadget is negligently destroyed by the repairer. See Koziol and Welsen, 401-402, and Esser, J. *Fälle und Lösungen zum Schuldrecht*, 1963, 46-48, which is too elaborate for the purposes of this reference.

165 *Leigh and Sillivan v. Aliakmon Shipping Co.*, [1986] 2 All ER 145. The case is an example of the failures of the traditional approach taken by the courts that denied third parties the right to ask for compensation.

166 The Law Commission and The Scottish Law Commission produced a common report on these carriage problems: Law Com No 196, Scottish Law Commission No 130) "Rights of suit in respect of carriage of goods by sea", 19/3/1991. The Carriage of Goods by Sea Act 1992, gives the right to the holder of the bill of lading to sue the carrier for culpably inflicted damages, something which was not possible under the 1855 Bills of Lading Act. See in Chapter 6, under "Third party beneficiary claims" the devices used in Commonwealth systems to avoid privity; for example inferring a collateral contract between the beneficiary and the promisor, invoking a trust principle in favour of the third party beneficiary, extending the concept of specific performance to protect third party beneficiaries.

167 Stathopoulos I, 88-89.

mutual contract[168] (§320 BGB) where the third party would have a plea for an unperformed contract and could refuse to perform his part. The creditor has fulfilled his obligation. However, the prospects for a claim in delict are low[169].

These cases are characterised by the fact that the third party bears the risk from his relation to the creditor, that is, from the transfer of the economic value[170]. These cases are typical of the third party loss problem (*"Drittenschadensproblem"*[171]) which has been discussed since at least 1855[172]. They are often described as cases of transfer of danger or damage[173]. The second term should be preferred since it embraces more effectively cases of undisclosed representation.

It seems fair and economically reasonable in these cases for the debtor to be liable to compensate the injured party as he would have been liable to his creditor. Responsibility for compensation is a necessary corollary of the original contractual duty of the debtor. The creditor is entitled to claim compensation as he is usually entitled to the economic value of the transaction. In this category of cases, the unity between the claim for performance and the (substituting) claim for compensation has been disrupted because a third party is entitled to the economic value involved in the contract. The debtor should not be released from liability if the creditor cannot claim compensation. The amount of damages is the same whether the creditor or the third party is injured.

It is the prevailing opinion in Germany that compensation is owed to the creditor who exercises his right on behalf of the third party[174]. This is the mechanism of

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168 A contract creating rights and liabilities for both parties.

169 See Lange 174. Moreover, compensation under delict might be lower than the value of performance.

170 The element of danger is usually emphasised upon in Germany, as the reason for extending contractual limits; other worth protecting interests might be mentioned, such as the reliance shown by the third party.

171 *"Drittenschadensproblem"* is rather a term of art. See the outline of the theories on the rationale of the contract with protective effects *vis-á-vis* third parties, in Thiele JZ 1967, 651-655.

172 See Koziol and Welsen "das Drittschadensproblem", 401-402. See also Lange who refers to the first reported case, in 1855 (before the introduction of the BGB), that concerned an undisclosed agency relationship.

173 See Lange on "Obligatorische Gefahrenlastung" -- compulsory risk bearing -- 285.

174 See Lange and Berg NJW 1978, pp.2018-2019. The latter can claim the amount of compensation awarded on the basis of §281 BGB.

Drittschadensliquidation, discussed later. Recognition of a direct claim for the third party has also been suggested[175], the idea being that the debtor owes compensation to the person entitled to the economic value of the performance.

1.4.2.2.2.2. Damage caused by the violation of subsidiary duties.

The debtor, apart from his basic duties, is also burdened with subsidiary duties[176], (to provide information, to take measures for the protection of the life and property of his contractors etc.) generally thought to derive from the good faith principle[177]. Violation of these (variously named) duties might cause damages to third persons. This could occur in the case of contracts that by their nature (but not by the intention of the parties) result in benefit to third persons[178] or involve third persons as well[179]. The third party suffers loss due to his proximity to the creditor[180].

Such are the contracts of lease of a building or equipment which will not be used by the creditor, or will not be used by the latter alone, but by other people (or by others as well) who are related to the creditor; the lessee's members of family[181], or his employees. A violation of the duty of the debtor to inform of possible dangers that might occur from using the leased thing can result in loss to these third persons.

Similar situations might arise in the discharge of a contract of services (for example, repairs) in a building where employees or family members of the employer of the

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175 It would constitutes a reasonable departure from relativity principles. This departure could be justified for a number of situations. See generally Lange, 274-290. Lange delimits for example *"Treuverhältnisse"*, (realationships of loyalty and good faith) from other cases of *Drittschadenslquidation.* The *"Treuverhältnisse"*, include both cases of indirect agency and agency, they resemble delictual cases and can refer to contracts such as deposits by banks. Authors differ in their definition of the categories.

176 It should be borne in mind that the very establishment of protection duties, as duties owed independently of the performance, has been heralded as evidence of the expansion of contractual liability.

177 Thiele, JZ, 1967, 649-657, at 649.

178 In these cases the parties did not intend to create a contract for the benefit of third parties.

179 See Thiele, JZ, 1967, who notes that the difference between the *Nebenleistungspflichten* and *Schutzpflichten*, lies in their objective and purpose and not in their content. (650). See also Larenz *Besonderer Teil*, 68 et seq.

180 See Larenz *Besonderer Teil*, 68, and Thiele, JZ 1967.

181 Esser-Weyers 199.

services, work or reside and who might suffer loss if the serviceman violates his duties to take safety precautions. Similarly, in a restaurant where one person from a group orders the dishes for everyone else, violation of the duties to provide food of adequate quality, might lead to injuries to non-parties to the contract.

Duties of care are certainly created towards the creditor in these examples[182] but damage is caused to the third persons or to the creditors and the third persons, as these third persons are in practice on an equal footing with the creditor as far as the subsidiary -- protective -- duties are concerned[183], judging from the relationship of these third persons to the creditor and to the contract. The third persons are on an equal footing with the creditor also due to the nature of these duties that aim to protect the other party's interests in his current and future condition and are not related to the performance. The debtor has not intended to perform for the benefit of a third party, but he could predict that his behaviour would affect others than his contracting parties and this knowledge might specifically involve a small group of people or the injured person himself. It seems justified to extend such a duty to those third parties.

Good faith is a plausible basis for extending these duties[184]. Neither their character as duties deriving from a voluntary transaction is changed, nor their content; the circle of people concerned becomes wider. It could be argued that the duties were owed to these non parties from the outset. Practically, however, they become of some importance once their violation leads to third party harm.

In advance it can be stated that good faith's contribution in defining the circle of those protected can be comprehensive. The principle could indicate that the circle of persons that can be entitled to claim compensation should be limited to those that have a

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182 See Thiele, JZ, 1967, 649.

183 Larenz examines the question in Larenz I, 184-185.

184 The good faith in transactions is a fundamental public order concept promoting morality in transactions - *"Verkehrsmoral"*. Thiele JZ, 1967, 649, and 657.

The protective ambit of subordinate duties can benefit the debtor too, since the creditor is similarly responsible. Failure of the creditor to take proper measures in his store and protect the debtor or his employee performing a contract of services might render him liable for compensation if injury occurs for example. Stathopoulos I, 88.

close relationship to the contract, according to its nature and purpose[185]. The members of the family of the lessee should for example be included in this circle, as should his employees but not guests or visitors unless they are specifically predictable users of the premises[186]. The prescribed or actual knowledge by the debtor of the potentially injured persons could be a criterion to justify and delimit his liability[187].

In this line of cases it is frequently possible that the debtor's conduct would have constituted a delict, had the loss not been purely economic. Apart from the difficulty in establishing a delict, as will be seen, in many third party loss cases the bond between the third party and the contractual relationship, as well as the social and economic purpose of the latter indicate that contract is the optimal liability basis[188].

The situations that involve the violation of protective duties have been dealt with in German law on the basis of the contract with protective effects *vis-á-vis* third parties.

1.4.3. Product liability[189].

Like the objects of many transactions, products are destined to be used by parties other than the purchaser from the manufacturer or from another seller down the retail chain; they are to be used by the final consumer. If the latter suffers damages due to a defect of the product that is attributable to the producer's negligent behaviour, he cannot claim compensation against the producer on contract, but on delict only[190]. The consumer cannot claim successfully against the seller either. The latter will not usually have been careless as to the defect of the product[191].

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185 Thiele, JZ, 1967, 657, speaks of protection duties being created on the basis of a factual special relationship (*faktisch bestehenden Sonderverbindung*).

186 Not thus accidental visitors, for the purpose of advertising a product for example.

187 Stathopoulos I, 88-90.

188 See Thiele JZ, 1967, on the distinction between the different bases of liability (653-657).

189 See the example on purchase of the electric wire in Lange 275, and Weitenauer "Die Haftung Des Warensteller", NJW, 1968, 1593.

190 Kozziol and Welsen, 405. Esser-Weyers, 95. See on German product liability Bungert, Hartwin "Compensating harm to the defective product itself - A Comparative Analysis of American and German Products Liability", 66 (1992) TulLR, 1179-1266. See also Ferrari ZEP 1 (1993) 354.

191 As referred before fault is an element of both contractual and delictual liability.

However, in terms of social conduct, the consumer - producer relationship is a close one; the basic purpose of the production and distribution of the product is to serve the consumer[192]. It has been argued that the producer owes subordinate duties of protection to the consumer from his contract with the purchaser-distributor[193]. The consumer should therefore be allowed to ask for compensation in case of a violation of these duties. Such a prospect is however likely seriously to challenge legislative and judicial policy in all the jurisdictions examined in this study[194], and it is not easily accepted by academic opinion[195]. The consideration of contractual applications in product liability is, as will be seen, more informative and educational than conclusive. In none of the jurisdictions discussed are contractual claims a plausible means of general application for the complex issue of product liability.

1.5. Contract and delict -- Advantages of contract.

The regulation of the position of third parties in the BGB is inspired by the treatment of contractual or at least voluntary relationships. Third party loss seems to linger between delict and contract and, as said, there seems to be little prospect for pursuing delictual solutions.

An overall perspective of third party loss would require an account of the delict-contract relationship. This, along with the more unified view of civil liability in the civil law systems, is not one of mutual exclusiveness as in (traditional) common law. In German

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192 Koziol and Welsen, 405. This close character of the consumer-producer relationship is often underlined by German lawyers. Other considerations such as equity in transactions might be examined. See Weitenauer, NJW, 1968, 1593.

193 *Herrsteller* -- basic purchaser -- according to Esser-Weyers, 94. They stress that it is the user of the product -- *Produktverwender* -- who is protected, and not only the purchaser only.

194 See especially in Chapter 4 on American law under"Examples: Misrepresentation and product liability', where two basic alternatives exist, the, less likely, strict tortious liability, and liability based on an implied warranty established by the Uniform Comercial Code, introduced by statute that is. The liability for implied warranty is not contractual in American law. For a comprehensive comparison see Bungert, Hartwin "Compensating harm to the defective product itself - A Comparative Analysis of American and German Products Liability", 66 (1992) TulLR, 1179-1266.

195 A comparative study is Fleming's "Drug Injury Compensation Plans", 30 (1982) *AmJComL*, 297.

law the violation of a contract can be a delict at the same time and the creditor can choose one or the other claim[196]. In some views there is one compensation claim supported on two bases[197].

Arguably, delictual liability, being statute-based and restricted, stands as an exception in the context of civil liability. According to the rationale of enumeration, delict law deals only with what is specifically allocated to it, in contrast to systems where a general clause exists[198]. As unjust enrichment does not seem suitable for third party loss relationships, contract law in the German system[199] could deal with the rest of civil liability especially when (or, at least, if) there is a strong element of voluntariness in the transactions in question[200].

German courts, unlike common law courts[201], have shown readiness to infer the existence of a contract when some closer voluntary relationship exists[202]. It is difficult, however, to infer the existence of a contract in third party loss cases. Nevertheless, it seems that the structure of the BGB in its allocation of functions directs third party loss to the law of contract[203]. On the one hand, typical third party loss situations have been dealt

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196 See Swanton "Concurrent liability in Tort and Contract: The problem of defining the Limits", 10 (1996) JCL 21-52, arguing for the possibility of concurrent liability, for the possibility of tortious liability for a contractual breach, which seems more likely now than before in common law, suggesting that the supposed differences between the two forms of liability are not not as great as they seemed to be.

197 Stathopoulos I, 99-101.

198 See under "Delictual protetion" and "Delict's potential" in Chapter 2, on Greek law, and the reference to the greater flexibility of those systems in the concluding Chapter 7, under "Suggested reform: Increased contractual input".

199 This is not the rule as is argued in Chapter 7. Actually a natural reaction to cases of liability not involving a contractual relationship, even for systems with enumerated delicts is to look into delict, as it covers a potentially more extensive area of unlawfulness. See under "Suggested reform: Increased contractual input" in Chapter 7.

200 As can be inferred from the reference to the law of delict, the criteria for compensation should focus on the relationship between third party and the debtor of the obligation, resembling of a voluntary context.

201 Fleming "Tort in a Contractual Matrix", 5 (1993) *Canterbury LR* 269-279.

202 Banakas, E. *Tortious Liability for pure Economic Loss*, 1989. 197-205. One of the means to sidestep privity in common law was to infer a collateral contract between the beneficiary and the promisor. However as Fleming argued the relative record of English courts at least in infering the existence of a contract is indeed poor. See Fleming *Canterbury LR* 269-279, and Chapter 6, under "Third party beneficiary claims" and "Judicial considerations".

203 This would have not been the case had there been a general delictual clause in the BGB. See Chapter 7, under "Suggested reform: Increased contractual input".

with by legislation on a contract-like basis. On the other, contract law applies to all situations where a private transaction is a central element, as are third party loss cases. The suitability of contractual solutions for third party loss within the logical structure of the BGB could further be evidenced in the advantages contract law offers[204] in comparison to delict.

There is a rebuttable presumption concerning the fault of the wrongdoer in contract; fault is taken for granted[205]. Thus, instead of requiring the plaintiff to prove the arguments in support of his claim, the defender bears the burden of proof[206], having to offer evidence of his lack of carelessness in order to avoid liability[207].

Admittedly, the prescription period for contractual liability does not seem to be advantageous for the claimant, from the point of view of duration and commencement[208]. It

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204 See Markesinis *A Comparative Introduction,* 72 et seq.

205 The same applies for Greek law. In all the systems examined evidence is generally facilitated under contractual liability. See under "Is the contractual approach advantageous' in Chapter 3, on Greek law, "Benefits from contractual solutions: An improved perpective", in Chapter 4, on American law, "Advantages" in Chapter 5, on Scots law, and "Advantages of th contractual solutions" in Chapter 6, on Commonwealth laws.

206 In delictual liability the burden of proof falls on the person that suffered the damage. Horn Kötz and Leser, 153. Exceptionally a presumption like that in contractual liability exists for the producer liability in delict.

207 In the case of impossibility of performance (§275 BGB), if it is disputed whether impossibility can be attributted to circumstances for which a defender/debtor is responsible, the burden of proof falls upon the defender (§282 BGB). Similar is the allocation of the duty to provide evidence with respect to the time of the execution(§285 BGB).

208 In German law prescription or time-bar is treated as a matter of substance (Horn Kötz and Leser, 144). The normal as well as longest prescription period for contractual claims (§195 BGB) is thirty years in contrast to a three years period (§852 BGB) for delictual ones. However there are numerous special provisions for particular forms of voluntary obligations, (§§195-197 BGB). In sale, for example, there is an one year time-bar in the case of movables, and a three years time-bar for immovables commencing upon delivery (§477 BGB). In fact the time-bars for contractual claims are shorter than the ones in delict (especially if the provisions on commencement are taken into account). A thirty years prescription period is irrational in economic terms and unfair in law, as it undermines the security of transactions and the predictability of the debtor's liability.

According to §198 BGB the prescription period begins from the time the claim comes into being , while according to §852 BGB the period for claims in delict begins at the time the injured party first had knowledge of the injury and of the identity of the injurer, (otherwise it expires 30 years after the injuring behaviour). Although the difference might not be significant in practice, the prescription period under contract law might be more easily predictable and thus equitable for the debtor. It could be argued however that the existence of a variety of specifically provided for prescription periods hampers the position of the potential claimant, who would be better of being aware of the single delict

would be more accurate to say that contractually provided limitations of liability are attached to the rationale of the particular transactions as seen in the legislation and that the difference in commencement and duration are of little practical significance[209]. Contractual prescription is presumably sound from a normative point of view and makes sense in the context of transactions. The loss is the result of a contractual behaviour and is understood as such by the defender. The need for fairness towards the defender would suggest the predictable contractual prescription of liability[210].

Fairness arguments and economic rationale would support the validity of agreed limitations of liability in favour of the defender, towards the third party as well, on numerous occasions[211]. This is possibly easier under the terms of contract[212]. Furthermore, the financial terms of the contract can be more easily set as limits to the defendant's financial exposure on the basis of contractual liability with the application of general clauses, especially §242 BGB. This restriction of liability can be justified on the basis of the description of the injuring behaviour, considering the injuring event in its socio-economic meaning and context, with an intention to limit the exposure to what seems socially fair and reasonable.

An example of the weakness of the delict option can be seen in the treatment of vicarious liability (§831 BGB) which might give rise to third party compensation claims[213]. In contrast to §278 BGB, §831 BGB allows the vicariously liable to evade

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law prescription period. On the other hand the specific prescription periods for contractual claims reflect the evaluations of the legislature.

Similar is the situations in American law see "Limitation period" in Chapter 4.

209 Moreover, the special circumstances of third party loss situations, such as the plaintffs unawareness, might lead to special arrangements as regards the prescription period, on the basis of good faith for instance.

210 See the similar arguments made in "Benefits from contractual solutions: An improved perpective", in Chapter 4, on American law

211 This is a basic advantage of contractual solutions especially for common law jurisdictions. See especially "Defences" in Chapter 4, on American law, and "Advantages of th contractual solutions" in Chapter 6, on Commonwealth laws.

212 In contrast, as will be discussed, under delict, the courts would likely have to undergo dubious interpretational exercises.

213 Markesinis *A Comparative Introduction* 77.

liability if he proves that he had not been negligent[214] in the selection of the person he assigned to the action. The inadequacies of §831 BGB led the Greek legislator to organise delictual vicarious liability in a different manner (§922 AK)[215].

Considering that delict offers no answers and that a contractual relationship cannot be established, one may then wonder whether third parties should receive compensation for pure economic loss only when the legislation so provides. True, the question which needs to be answered provisionally, before deciding on the optimal vehicle for compensation, is whether damages should be awarded at all, and the answer could draw upon the rationale of the BGB as a whole. Third party compensation seems fair and economically reasonable; leaving third party pure economic loss with no remedies would contradict fundamental principles of fairness and undermine the role of law in easing social tensions. The operation of general clauses in the context of a contract, as they link fairness to specific contractual duties seems to offer convincing answers to this question, indicating the suitability of a contractual regime.

Contractual solutions seem to be preferable to delictual ones, given the rationale and structure of civil liability. The German courts were sensitive to exploit their advantages from an early stage[216].

1.6. Conclusion.

The purpose of this introduction has been to show the legal background to the third party loss problem. The review so far brought the focus more clearly on the nature of the problem, identified as that of third parties who suffer pure economic loss by careless

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214 The liability of the vicariously liable is based on a rebuttable presumption of negligence as to the choice of the equipment or the directions given to the wrongdoer. I

215 According to he prevailing opinion, no implication of any culpable behaviour of the debtor is required. § 922 AK, is a clear exception from the principle of personal liability; it clearly replenishes the fault of another person. Stathopoulos II, 99 et seq.

216 The problem of expanding contractual limits towards third party protection has been dealt with by German theoreticians and courts long before the introduction of the BGB, since at least 1855, as will be discussed

(anti)contractual behaviour[217]. It is a complex issue. Relativity is a major obstacle and delict does not seem a viable option. Contractual compensation would, in theory, need to satisfy a strict causality scrutiny (to attribute the loss to the violation). The statutory exceptions to contractual relativity treat third party issues on a contract-like basis. The balance of the BGB structure seems to favour contract as the vehicle to deal with third party loss. In fact, it will be argued, this is the case in both Scots law and American law[218].

As the BGB gives no answer to the third party loss problem, any solution would imply a change in civil liability, in the law of either contract or delict and in their relationship within the BGB structure. The discussion of delict shows that changing contract law would cause a far lesser upheaval in the civil liability system than expanding enumerated delicts[219]. This change in civil liability seems to match the trend of transformation of contract law in recent years. The trend is expressed through the restriction of the freedom of contract, the increased role of equity principles, the demise of relativity and the establishment of additional contract duties[220]. The quest could be for a more integrated view of civil liability aiming at a flexible, adjustable system. The German courts, confronted with third party pure economic loss, turned to contract as their only possible solution which is the best possible solution as well.

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217 Contractual violations are, as a rule, not intentional. In any case the injury of the other party is not the primary aim of a calculated contractual breach.

218 See under "Tort v. Contract: Third parties and pure economic loss", in Chapter 4 on American law, where despite the flexibility of the approach in tort, an improvement of tort to cover third party loss instances seems less likely, and "The balance between contract and delict' in Chapter 5 on Scots law. This is not the case with Greek law. See "Delict's potential' in Chapter 3. In Commonwealth systems the situation is more complex yet contract seems a credible option. See "The case for contract' in Chapter 6.

219 It is not the same when general delictual clauses are employed. See "Suggested reform: Increased contractual input" in Chapter 7.

220 The tendency in German law has been described as an extension (*Erweiterung* -- See Gottwald on § 328 BGB, 1025, et seq.) of the contractual relationship and has been propelled by judicial activism. This tendency gave the opportunity to certain theoreticians in Germany to speak of an assimilation of contractual (obligations') rights to real ones (*Verdinglichung*). Kramer on §241 BGB. See also Gschnitzer, Franz *Schuldrecht, Besonderer Teil und Schadensersatz*, 1965, discussing the provisions of lease and usufructary loans(60). However the legal bases of these exceptions from relativity cannot alter the content of the obligational bond as promissory, creating rights between persons (and not between persons and objects, as real rights). An obligational right is effective against one or more specific or specifiable third parties, not as real rights against everyone Esser-Schmidt, 12, 34, Fikentscher, 47. Kramer *Einleitung*, on §§241, 11.

2. *Drittschadensliquidation.*

Both the mechanisms examined in this study (*Drittschadensliquidation* and *Vertrag mit Schutzwirkung für Dritte*[221]) are *"judge made"*[222]. Their definition and delimitation have been the object of extensive academic concern[223]. *Drittschadensliquidation* (usually referred to as the theory of transferred loss[224]) is rather settled; the theoretical disputes over its character and justification having been significantly reduced[225].

Drittschadensliquidation was launched decades before the introduction of the BGB. According to the prevailing opinion, the first reported case was a decision of the Court of Appeal of Lübeck in 1855[226] which permitted an undisclosed agent to sue for the damages his principal had suffered. Frequent at the first stages were cases where the third party was the recipient of goods culpably damaged during transport[227].

Drittschadensliquidation is an exception to contractual relativity. It would not lead to the exclusion of delictual liability were the latter to be found applicable[228] and

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221 See before the references under "Real exceptions from obligational relativity" for an initial approach to the circumstances where these mechanisms emerge.

222 Markesinis *A Comparative Introduction*, 47. There is no overall doctrine of precedent in German law. Certain decisions of the Reichsgeright (before 1945) and of the Bundesgeright (after 1950) have highly persuasive authority but precedents, apart from certain exceptions have no binding effect. See Cohn 4-7. See later on the judicial organisation in Germany.

223 The description of these mechanisms will be more complete after they are compared. See Grunsky on § 249 BGB, 360 et seq.

224 See the dissenting opinion by Goff L.J. in the well known House of Lords case *Leigh and Sillvan Ltd v Aliakmon Shipping Co.* [1986] 2 All ER 145, where he refers to the theory of transferred loss. Lord Goff makes extensive references to the German contractual mechanisms in the recent cases of *Henderson v. Merret Syndicates Ltd*, 1994] 3AllER 506, {1994] 3 WLR 761, and *White v. Jones* [1995] 2 WLR 187. See "Recent developments" in Chapter 5 on Scots law.

225 See Grunsky on § 249 BGB, 362.

226 Lange 281, Lorenz "Some Thoughts about Contract and Tort", in p.89.

227 See Fikentscher 266.

228 Grunsky on § 249 BGB, 374.

functions predominantly where the acceptance of delictual liability is difficult or uncertain[229].

Drittschadensliquidation involves cases where damage caused by the breach of a basic contractual duty[230] that in law is expected to be suffered by a particular person, is suffered by someone else[231] due to a transfer of risk that has intervened[232], and aims at the recovery of this loss. The third person suffers loss because he has an interest in the performance[233].

The mechanism is justified on the idea that if no remedy is available to the third party, then, in view of the creditor's lack of interest to sue, the wrongdoer will evade any consequences for his behaviour. This contradicts fairness and economic reason[234]. As far as the wrongdoer is concerned, it is accidental that a third party suffers the loss[235] and he should gain no benefit. The mechanism also aims at preventing circuitry of actions[236].

The wrongdoer's liability does not increase in volume nor does it change in content[237]. *Drittschadensliquidation* links the wrongdoer to the loss, the latter being the

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229 As mentioned before, only the directly injured person is entitled to ask compensation for the loss he suffered. In the case of contractual relationships this person can only be the co-contractor of the defaulting party and not the former's debtors for example. (Fikentscher, 265 et seq.) It would similarly be difficult to establish delictual liability for affecting obligational rights; § 823 (I) BGB, involves absolute rights only.

230 One concerning performance

231 Larenz I, 372.

232 The person that is, in law, 'directly' injured has no interest in claiming compensation; he might have been acting on behalf of another person or might bear no risk; the risk of the transaction might have already been transferred to the injured person. The transfer of danger or damage is a central concept in the *Drittschadensliquidation*'s rationale. See Fleming John G. "Comparative Law of Torts", in *OxfJLSt* 1984, p.239.

233 This was the case with *Leigh and Sillivan Ltd v Aliakmon Shipping Co.* [1986] 2 All ER 145. Lord Goff thought that *Drittschadensliquidation* should apply in *White v. Jones* [1995] 2 WLR 187, involving a claim by a dissappointed will beneficiary. Such claims are dealt with under the mechanism of The contract with protective effects is applied in such cases in German law. The issue will be looked at by the end of this chapter when the two mechanisms will be compared.

234 Shaw, JBL 1987, 56-57, Fikentscher, 265.

235 Grunsky on §249 BGB, 361-362.

236 Markesinis *A Comparative Introduction,* 47

237 Koziol-Welsen, 402. He is contractually liable for the particular loss, as he would have been if the loss had been suffered by his contracting party.

legal reason for compensation[238]. The wrongdoer can raise against the third party the defences he had against his creditor[239].

The mechanism is based on the all-pervading concept of good faith[240] (§242 BGB) which is an expression of equity and in which a duty of care in transactions is founded. Although the contract in favour of third parties[241] was thought of as a possible solution to the problem of third party loss, only a minority of decisions or academic opinions treated it as the basis of the mechanism[242] since it is difficult to infer an intention to benefit the third party.

However, *Drittschadensliquidation* does not lead to a direct third party claim[243]. The creditor will sue for the recovery of the third party loss and the injured party can possibly claim from the creditor what he obtained on the basis of §281 BGB. If the creditor refuses to sue and to transfer his claim he might be held liable towards the third party for unjust enrichment (§812 BGB)[244].

By and large, as a judicially created mechanism, *Drittschadensliquidation* is inferred from a number of varying cases grouped in categories by theory. Common elements[245] are that only particular, known persons are likely to suffer the loss (and not an

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238 The loss and compensation are connected to the interests in the performance (Shaw, 1987 JBL, 58).

239 Agreed limitations of liability will possibly be valid against the third party.

240 Lorenz "Some Thoughts about Contract and Tort", 110.

241 See generally Eisenberg "Third Party Beneficiaries", in 1992 *ColLR*, p.1358, and the references therein.

242 Shaw, in JBL, 1987, makes a similar notice although she does not lay emphasis upon the interpretation issue. See also Markesinis *A Comparative Introduction*, 47, Lorenz "Some Thoughts about Contract and Tort" pp. 89-90, and Larenz I, 372. Were there a contract for the benefit of third parties to be accepted the third person would have a direct claim against the defaulting party or at least the creditor could be made to sue on the third persons behalf. (§ 281 BGB). This is not the case with *Drittschadensliquidation*.

243 Grunsky on § 249 BGB, 363.

244 The question of the enforceability of a third party compensation claim will be dealt with at a later stage.

245 Markesinis *A Comparative Introduction* 48.

unpredictable number of people) and that the third party has no other effective means of protection[246].

2.1. Areas of application

It is difficult to group the relative cases as *Drittschadensliquidation* has been applied in a variety of situations[247]. The applications most usually identified[248] are examined in this work.

2.1.1. Indirect agency (*mittelbare Stellvertretung*).

In indirect agency cases a party enters a contract in the interests of another person but in his own name and without disclosing the fact that he acts for a principal[249]. Usual examples[250] are forwarding or commission agency[251].

In fact, indirect agency gave the opportunity for developing *Drittschadensliquidation*, already from the period of the *"gemeines Recht"*[252]. In 1855 the

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246 See Markesinis noticing that the wrongdoer should receive no benefit from the fact that it is not the creditor who suffers the loss. (*A Comparative Introduction* 48), speaking of *"an unexpected and undeserved windfall"*. See also Grunsky on §249 BGB, 361-362.

These elements have been emphasised upon in Germany especially by the transfer of danger or transfer of loss (*"Schadensverlagerung"* or *"Gefahrverlagerung"* -- risk transfer) approach which is prevalent. See Schmidt on §§249-253, 932-934. See also Larenz I, 373.

247. The contractual relationships in question are varying in form and in content. The criteria for these groupings are no limited to the kind of legal relationships involved, but are ofter focused on some other characteristic of the situations, the transfer of loss for instance. See Grunsky on §249 BGB, 362.

248 One suggestion would be to limit the division to two basic groupings. The first would involve situtations where a person is contracting in his own name but on behalf of an undisclosed representative where only the latter suffers loss. The second category would refer to contractual relationships involving an element of care, in safeguarding, keeping a thing delivered to a person for the purpose of use (lease), repair (contract for works), keeping (deposit) etc. The loss from culpable destruction or damage of the thing is suffered by the third party/owner.

249 Cohn 106-107.

250 In common law one of the techniques used by the courts to circumvent privity was to 'discover' an agency relationship in which the beneficiary was the principal and the promisee was his agent. *Scrutton Ltd. v. Midland Silicones Ltd.* [1962] AC 446. See the footnote references in "Third party beneficiary claims", in Chapter 6.

251 See Lange 281, Cohn 107, Crunsky on §249 BGB, 363,

252 See Horn, Kötz and Leser in their brief historical reference. See also Coing. As Markesinis puts it *"gemeines Recht"*, the *usus modernus Pandectarum*, with Roman law at

Upper Appeal Court (*Oberappelationsgericht*) of Lübeck[253], allowed undisclosed agents of cork traders to claim compensation from the defaulting shippers with whom they had contracted for their principals[254].

The opinion that the indirect agent should recover the damages of the party on whose behalf he acted had been accepted by the *Reichsgericht*[255] before the introduction

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its basis prevailed in large parts of Germany during the pre-codification era. Markesinis *A Comparative Introduction* 1994, 64 and 693.

253 Lorenz "Some Thoughts about Contract and Tort", 89, Lange 281.

254 Cork traders from Delmanhorst bought a quantity of cork in Oporto, and contracted with a forwarding agents' firm for the transportation of the cork. The carriage contract between the agents and a shipper provided, among others, that the shipper could unload upon arrival at Cuxhaven. The shipper did not do so; instead he unloaded at Hamburg later, and the cork traders suffered loss because of the delay. The agents' firm was allowed to claim damages for its undisclosed principal. Markesinis *A Comparative Introduction* 47.

255 The Supreme Court of the German Reich, the so-called imperial territory (*Reichsland*), was the Supreme court of Germany unified under Bismark, in 1871. The *Reichsgericht* succeded the *Reichskammergericht* of the Holy Roman Empire established in 1495, which sat in Frankfurt. It came into being on October 1879 and sat in Leipzig. It survived until the end of the second world war (1945). At 1 October 1950 a year after the enactement of the Basic Law (Constitution) of Bonn, the *Bundesgerichtshof*, (BGH) was established in Karlsruhe. The BGH is the highest court in civil and criminal matters, sitting in panels designated senates (ten civil and five criminal senates). Each Senate specialises in particular matters. Certain important decisions are published in official reports. There are no federal courts at the first and second level of jurisdictions -- the Patent Court being an exception. The lowest court on civil matters is the *Amtsgericht*. They have a limited and specifically ascribed jurisdiction involving specific kinds of disputes of a statutorily defined value. The *Landesgericht*, the state court, equivalent to the English High Court, is a court of general jurisdiction sitting as either a court of review from any *Amtsgericht* of its district or as a trial court. It is sitting in panels of three, one presiding and two associate judges. From these courts an appeal (*Berufung*) lies to one of the nineteen Courts of Appeal (known as *Oberlandesgericht* with the exception of the one sitting in Berlin known as *Kammergericht*). Quite exceptionally an appeal to a Landesgerich can bypass the Courts of Appeal and be heard by the BGH directly. The BGH hears cases from all courts of the unified Germany. As an additional element of the decentralisation of the administration of justice in Germany, it should be added that each state has its own Constitutional Court which is meant to ensure that the state Constitution is observed. See Markesinis *A Comparative Introduction* 1994, 1 et seq.

As regards the appeal system in German civil procedure, it should be noted that there are three types of appeals. The appeal of the first instance (*Berufung*), the appeal of the second instance (*Revision*), and the complaint (*Beschwende*). *Revision* can be claimed only against a judgement by one of the regional courts of appeal (*Oberlandesgericht*). (For certain judgements no appeal is allowed.). The Federal Court of Appeal (*Bundesgerichthof*; BGH) in Karsruhe is responsible for adjudicating these appeals (with the exception of Bavaria where the respective court is the *Bayerisches Oberstes Landesgericht*, responsible for the adjudication of the appeals on matters of law against second degree of jurisdiction decisions of the federal state of Bavaria). The BGH does not take evidence; it is bound by those presented to the court of first instance. A *Revision* is accepted if a statutory provision or other rule of law was ignored or falsely applied by the court of first appeal and if consequently a different judgement should have been rendered. The violated rule of law must be one the application of which extends beyond the province of a court of first appeal.

of the BGB[256]. The BGB did not change the law and the courts, continued the same policy; the indirect agent was considered entitled to recover not only the damages he suffered personally, but also the damages of his undisclosed client.

The federal courts received *Drittschadensliquidation* in these cases as self-evident[257] and developed it further. There are, for example, no requirements as to the form of the inner relationship between the agent and the person on whose behalf the former is acting. Any form of relationship would suffice[258]. Indirect agency could be regulated by legislation or based upon the will of the parties. Compensation for third parties is provided for other than forwarding or commission agency relationships, such as the case of assignment of accounts receivable for collection (*Inkasozession*)[259]. Compensation is owed for non performance, delayed performance and defective execution as well[260].

Drittschadensliquidation is well established in indirect agency cases, despite the critique it has attracted. This critique focuses on the provision of §281 BGB, that could lead to a compulsory transfer of the agent's claim[261]. *Drittschadensliquidation* has developed independently. The main purpose of §281 BGB is to avoid circuity of actions rather than to protect third parties[262].

The justification for *Drittschadensliquidation*, is based on the fact that the indirect agent has a claim for compensation but suffered no loss, while the injured person has no claim[263]. Loss extends to the third party by reason of the legislation or of the inner

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Only questions of law can be the subject of a *Revision*. (It is often difficult to draw the line between questions of fact and questions of law. A change of law while the *Revision* is pending is a valid ground however.)

256 Lorenz "Some Thoughts about Contract and Tort", 89.

257 Lange 282.

258 Grunsky on §249 BGB, 362

259 Lange 281.

260 Lange 281, Grunsky on §249 BGB, 362

261 §281 BGB compells the debtor who is released from the duty to perform due to impossibity of performance for which he cannot be held liable, to assign the claim for compensation he acquires for the object owed, or to tranfer the object he receives as substitute to the one it owed to his creditor.

262 Markesinis LQR, 1987, 354.

263 Grunsky on §249 BGB, 362-363. Hagen endorces *Drittschadensliquidation* for indirect agency cases only, justifying the mechanism on the idea that the agent has no

relationship between indirect agent and principal/third party[264]. This acceptance of the third party right does not lead to the multiplicity of potential claimants but to a change in the person entitled to claim compensation.

It is true, the agent might suffer damage which is not related to or derived from the contract. He might lose the claim for commission he would normally have in the course of orderly execution[265] and might have fewer possibilities to be satisfied, whether from the right of lien he has on the consigned goods[266], or from his right of pledge over movables and securities of the debtor (§369 HGB). However, these are side-effects only[267]. The loss which is typical for the contract involved is compensated through *Drittschadensliquidation*.

Drittschadensliquidation in indirect agency is a reasonable outcome of the latter's statutory treatment[268]. In commercial law there is special provision for the protection of the principal on whose account a commission agent contracts[269]. Without *Drittschadensliquidation* the injured party would have no contractual and, possibly, no delictual claim either.

2.1.2. Compulsory transfer of danger, (*obligatorische Gefahrenlastung*).

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interest of his own to sue but he serves the interest of another person. (Hagen's views are summarily referred to by Larenz I, 374, and Schmidt on §§249-253, 933-934, among others.)

264 The former only is entitled to claim compensation. See Larenz I, 373, noting that the law of contract affects this allocation of risks.

265 §396(I) HGB --Commercial Code -- .The commission agent is entitled to demand his commission when the transaction has been carried out. If the transaction has not been completed, he is, nevertheless, entitled to claim a delivery commission so far as this is locally customary (§ 396 (I) HGB, Handelsgesetzbuch; Commercial Code). The agent is in a disadvantaged position in any case.

266 On account of his expences, his commission, loans and advances etc (§ 397 HGB).

267 Lange 283.

268 Agency has been extensively dealt with by statute law in Germany. The extent of an agent's discretion, for example, (normally delimited by statute or by contract), is usually subjected to statutory standardarisation of contractual authority, with a view to protecting the interests of third parties. (§126(1) HGB, German Commercial Law). Cohn
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269 §392II HGB; claims arising from a transaction which a commission agent concluded, even when they have not been assigned to the principal, they are considered in the relationship between the principal and the commission agent or their creditors, as claims of the principal.

Damage in this case is suffered by a third person, instead of the party whose contractual rights are violated, because of a compulsory norm, often a statutory provision. There are three main examples; the case of dispatch of a sold thing, the case of a legacy and the case of damages or destruction of a thing delivered for works[270].

The object that is left to the legacy of a person is part of the property of the heir (§1922 BGB)[271]. The heir has a delictual claim (§823(I) BGB) for its destruction; however his loss is thought to have been compensated if he has been released from liability to transfer property on the legacy[272]. Because of this latter rule, damage is suffered by the third party, who is not entitled to claim compensation[273]. The courts have recognised the right of the injured person to have his injuries restored.

A similar case emerges in a contract of sale with dispatch, all too well known in Scots and Commonwealth laws[274]. The purchaser does not acquire ownership until delivery of the thing in accordance with the relative provisions[275]. The seller has contract-based compensation claims[276] against the carrier but has suffered no loss[277] and can claim

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270 See Sirp on § 249 BGB,534-535, Heinrich in *Palland Bürgerliches Gesetzbuch,* 233 et seq, Lange 286 et seq., Grunsky on §249 BGB 363, and Larenz I, 372

271 The legatees are not granted the right to an immediate share in the estate of the testator but are entitled to demand from the heir the delivery of a movable or the payment of a sum of money, (§2174 BGB). If the thing is destroyed before transfer to the legatee, the heirs' property suffers losses. See Cohn 259. See generally Heuse on §2174 BGB, 1713.

272 The heir is released from his obligation to transfer the property of the movable due to § 275 BGB which discharges the debtor from his obligation to perform in the case of impossibility of performance that occurred after the creation of an obligation. See Sirp on §249 BGB, 534, Heinrich in *Palland* , p.233, Lange 286 et seq.

273 See Grunsky on § 249 BGB 363, and Larenz I, 372

274 As said, the Law Commission and The Scottish Law Commission produced a common report on these carriage problems: Law Com No 196, Scottish Law Commission No 130) "Rights of suit in respect of carriage of goods by sea", 19/3/1991. The Carriage of Goods by Sea Act 1992, gives the right to the holder of the bill of lading to sue the carrier for culpably inflicted damages, something which was not possible under the 1855 Bills of Lading Act. As is discussed in relation to Scots law, the jus quaesitum tertio could have solved many of the problem of transport law if applied. See under "Development and Applications" in Chapter 5. See Clive E.M. "Jus Quaesitum Tertio and Carriage of goods by sea" in *Comparative and Historical Essays in Scots Law* Carrey D.L. & Meyers D.W. (eds) 1993, 47.

275 §447 BGB, See generally Weitenauer on §447 BGB, 1010, and Westerman on §447 BGB. See also Grunsky on § 249 BGB, 364.

276 If the thing is destroyed or damaged during transportation the seller has the right to ask compensation from the carrier on the basis of the contract of carriage, and, if he is the owner of the thing, he has delictual claims also.

277 The risk passes to the buyer upon delivery of the thing for transportation.

payment by the buyer[278]. He might suffer some damage if the buyer refuses to pay or delays payment, but this loss is not a typical consequence of the destruction or damage of the thing. The seller's economic position is, in principle, unchanged[279]. Court decisions and prevailing academic opinion[280] consider that in such cases the seller should be allowed to sue for the damages the buyer suffered, whether on the basis of the contract[281] or on the basis of delict[282].

Another example is the so-called mixture of contract of sale and contract of work (*Werklieferungsvertrag*)[283]. The materials to be used in the works are supplied by the works' contractor and the legislative allocation of risk is the same with the sale with dispatch[284]. The damage is caused by another contracting party of the employer. The works' contractor suffers loss as the materials' owner[285], but is released from his duty to perform. The loss for the non performance of the works is suffered by his employer. The works' contractor was allowed to claim compensation for the owner's damages in a number of instances[286].

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278 He has fulfilled his duties under the contract. Moreover he is not obliged to transfer property on the thing and he is not obliged to substitute something else in its place.

279 Lange 286.

280 Larenz I, 373, Grunsky on § 249 BGB, 364, Lange 286, Sirp on § 249 BGB, 534, Heinrich Helmut in *Palland* 233, Lange 286 et seq.

281 In Greek law carriage contracts are generally considered as contracts for the benefit of third parties as long as the consignee is a different person from the consignor. See under "Carriage contracts" in Chapter 3.

282 Lange . The situation is different if the seller has to restore the buyer's damage on the basis of their relationship or because of trade practices for instance.

283 Cohn 143.

284 §644(I) BGB refers to §447 BGB, (Soerge, in *Münchner Kommentar*). The works contractor is responsible for damage or destruction of the thing until delivery to his contracting party. Lange 286, Grunsky on §249 BGB, 364

285 As the heir in the case of a legacy.

286 In BGH, Urt. v. 30.9.1969-VI ZR 254/67 (Braunschweig); NJW 1970 38, claimant was the insurance company of a contractor with the federal government for works in a high technology physics laboratory. A fire that was caused negligently by an employee of the subcontractor destroyed already executed works which had to be redone. The insurance company obtained the first contractor's claim after it gave him compensation. The LG and the OLG accepted the liability of both the subcontractor and the employee. The BGH thought that the indemnification agreed between the Federal Government and the contractor did not extend to the subcontractor. The Federal Government had no duty to offer security to the latter. No contract with protective effect was taken to exist in favour of the subcontractor. The court accepted in principle that the plaintiff's contracting party was

Drittschadensliquidation can further be accepted when the allocation of risks that derives from an agreement is the same as that described in the previous cases[287].

Certain academic opinions oppose *Drittschadensliquidation*[288] for this group of cases, based on the idea that the person who is injured in law (the one who has a right to claim compensation) has in any case a claim for objective minimum damages[289] which consists of the replacement value. However, these replacement costs will possibly be lower than the loss the third party suffers[290]. Limiting third parties to objective damages contradicts the legislated allocation of risk and the restorative purpose of compensation.

2.1.3. Cases involving a duty of care, (*Obhutsfälle*).

In these cases, persons who hold in their possession a thing belonging to someone else (for instance, by reason of a lease or deposit), deliver this thing to a third person on the basis of a contract (for example, for repairs or deposit). If the thing is damaged or destroyed while in the sphere[291] of the latter's influence, the loss -- the substantial loss ("*Substanzschaden*"), is suffered by the owner. The initial possessor is injured as well, having lost the use of the thing.

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under a duty to seek compensation for the damages suffered by the plaintiff due to the subcontractor's negligence.

In another case (OLG Celle VersR 1975, 838, Lange 287) the defendant had contracted with a company for the use of space in a garage enterprise. The contract allowed the company to leave the enterpise to a third person. The company did that. The new manager of the enterprise sued the defendant for damages because due to the latter's behaviour, (causing floods of water), the former could not lease certain parking places. The claim was successful.

287 The example of the garage enterprise, or other situations where the management of business establishments is transferred could fall under this category. Lange 287, Grunsky on §249 BGB, 364.

288 Such is the opinion of Larenz I, 373, Hagen who is quoted by the former and by Lange 287.

289 "*Objective Mindestschaden*". Lange 288, referring to Hagen. The opinion gives priority to the possibility of actual restitution of the object destroyed.

290 The damage a seller, for example, might suffer with respect to the price he has to pay for the replacement of the lost goods is far lower than the damage of the buyer who pays at the purchase price and consequently suffers financial loss. Grunsky on §249 BGB 364, Lange 288.

291 "*in die Sphäre*"; Lange 288.

A delictual claim is unlikely in the light of §831 BGB, on vicarious liability[292]. Thus an attempt was made to protect the third party by inferring a duty to take account of the owner's interest from the possessor-wrongdoer relationship, something which is not easy. Such a duty has been accepted for contractual vicarious liability[293], the idea being that the initial possessor should replenish the loss of the owner by his contractual claims for compensation[294].

German courts applied such a duty to carriage cases[295]. The federal courts relied on HGB provisions protecting third parties[296], or on the construction of the contract's purposes[297]. This construction was crucial for other cases as these involving a hotelier's liability for things stolen from the client's car[298].

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292 The employer can evade liability if he proves he had exercised due care in supervising the employee. If the damages occur in the course of legitimate handling, as is likely to be the case, it is at least difficult to establish delictual claims. Similar arguments could be raised against the prospect of the application of the contract with protective effects *vis-a-vis* third parties mechanism. Grunsky on §249 BGB 361.

293 §278 BGB -- extending duties of protection. Lange 288.

294 Larenz I, 373.

295 The Reichsgericht accepted *Drittschadensliquidation* in a case where a Hamburg business had leased a boat which it delivered to the defendants to carry. The boat was damaged culpably by the defendants. RGZ 93 39, Lange 288-289. *Leigh and Sillivan v. Aliakmon Shipping Co.*, [1986] 2 All ER 145, could be an example of this group of cases.

296 The charterer of a ship received a water tank from a plaintiffs's boat. He omitted to open the air pipes of the tank on delivery, and the tank was destroyed. It was found that the plaintiffs could claim compensation for the loss of the owners of the tank. The decision called upon § 510 HGB, on the use of a ship by others than the owners, providing that the latter are considered, as far as relations to third parties are concerned, as the owners. BGH LM Nr. 3, Lange 288-289.

297 In one case the defendant, a forwarding agents firm, had appointed a carrier to transport scrap metal from West Berlin to West Germany. The heavy goods vehicle which belonged to the carrier was confiscated by the East German authorities at the borders because part of the metal scrap was of East German origin. The court of first instance applied a "supplementary" interpretation of the contract and held the view that the basic contractual duties of protection towards the other party, applied, accordingly to the contractual purpose, when the object of the obligation belonged to someone else. BGHZ 15, 224, 1955. Westermann on §447 BGB, 257.

298 A business representative spent the night in a hotel. He left his car in a garage below the hotel as suggested to him by the hotel's personnel. On the next day he found that from a watch collection that belonged to his company, and which he had left in the car, certain valuable pieces were missing. The court held that there was a contract for the deposit of the car in the garage. It also considered, following a reasoning similar to that in the previous case, that between the hotelier and his client a contract of deposit had been concluded regarding the car and its contents. It was decided that the duties of care arising from the contract of deposit extend to the thing that did not belong to the depositor. BGH, NJW, 1969, 789. Westermann on §447 BGB, Lange 290.

On the basis of this construction, the duties of care were extended to the owner of the thing delivered. It was not required that the defendant should have known or predicted the possibility that the thing might belong to a third party[299]. The hotelier's duty of care in particular was based on statute. §701 BGB duties apply when the thing deposited belongs to someone other than the depositor[300].

Hagen[301], focusing on the delivery of possession, suggested an alternative in the form a subtle 'teleological extension'[302] of §991 (II) BGB[303] which provides that the possessor, who was in good faith at the time of acquisition, is nevertheless answerable to the owner, from the time of the acquisition, to the extent he would be liable to the indirect possessor (§989 BGB)[304]. Following this view, third party claims would be based on real rights by virtue of a co-responsibility principle[305] covering all cases of damages the owner suffers[306].

Hagen's suggestion could find significant applications[307], but is not as well suited to third party loss instances as a contractual duty of care concept. The latter focuses on the wrongfulness of the debtor's behaviour, from which he should not benefit. The quest for a real right could lead to the satisfaction of the third party loss under different

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299 *Drittschadensliquidation* was thus said to be based on objective rights. Lange 290.

300 The claims in this case too, should, according to the prevailing opinion, be exercised by the depositor.

301 Larenz I, 374, Schmidt in *Soergel-Sibert, BGB Kommentar*, 933-934, Lange 290.

302 *"teleologischen Extension"*, Larenz I, 374.

303 To substitute the *'contractually flavoured'* claims of the third party. Markesinis 103 (1987) LQR, 354-397.

304 The direct possessor (the person in whose hands the thing was damaged), would thus be responsible against the owner to the same extent he would be liable against the person that delivered the thing, the indirect possessor that is, who is exempted from the claim for the damages described in §989 BGB, because he exercises possession through another person.

305 See Larenz I, 374, referring to Hagen.

306 The option of expanding the application of §991(II) BGB was thought to be preferable because it would offer easily detectable limits of the wrongdoer's responsibility opposite to third parties and would safely entitle the injured party to seek compensation. Larenz I, 374.

307 For instance, the claims of the former possessor (§1007 BGB), the claims arising out of the co-ownership (§1011 BGB), claims arising after interference with the right of usufruct (§1065 BGB), or the pledge claims (§1227 BGB). See Lange 290, who is referring to examples from other areas of law as well.

circumstances than those under a contractual solution, and possibly in fewer cases. Moreover, a real right is a far-fetched possibility in the light of the closed number of real rights in the BGB; an extension of the contractual duties is indeed more realistic.

2.1.4. Trust relationships (Treuhandverhältnisse).

Many authors include in this category third party loss situations arising in the context of trust law[308]. In German law[309] the trustor (*Treugeber*) transfers ownership on the trust and is the beneficiary. *Drittschadensliquidation* is considered possible for one of the two forms of trust, namely where the trustor transfers ownership and possession on the movable to a trustee (*Treuhänder*) who is *'administering the trust for the transferor (Verwaltungstreuhand)*[310]. It is reasonable to foresee the possibility of someone contracting

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308 In the opinion taken by Grunsky on §249 BGB, and by Lange, this is a distinguishable category of cases. Oher authors such as Fikentscher 266-269 and Larenz I, 371-374, include such situations in the category involving duties of care. There are similarities to the indirect agency cases as well. As will be seen in the discussion on Commonwealth systems, one of the techniques used by courts in common law to circumvent privity is to invoke the trust principle in favour of the third party beneficiary. See under "Third party beneficiary claims" in Chapter 6.

309 A few explanatory remarks on the German law of trusts would be useful. Valuable is the work of Serick, Rolf *Securities in Movables in Germany: An Outline,* 1988, tranlated by Tony Weir. German law (unlike English law) does not recognise two different legal systems; law and equity. Subsequently, German law does not recognise legal and beneficiary ownership; one form of ownership exists which corresponds to the legal ownership of English law. Trust beneficiaries have no real right claims against the trustees. The remedies available are contractual, delictual or unjust enrichment ones. Cohn 175.

310 The trustee might also be *"realising the property for the account of the transferor (Verwertungstreuhand)"*. Cohn 175, Serick 29-31. The transferee acquires ownership in both cases and he is bound to make use of the thing for the beneficiary's interest. Arguably, from an economic point of view, property to the thing does not become part of his property.

In the other possible form, the beneficiary transfers ownership but no possession to the trustee *'with the view to the transferee receiving security in respect of a claim against the transferor'* (*Sicherungseigentum*). Cohn 179. This transfer for security purposes (*Sicherungsübereignung*), resembles the chattel mortgage of Anglo-American law; security for a debt is offered by lien on personal property on which the debtor retains possession. The beneficiary continues to hold the possession of the thing, and he has a right to claim re-transfer if he has paid his debt. *Sicherungsübereignung* circumvents the Civil Code provisions that require the transfer of possession for the valid pledge of movables. The courts have sanctioned this circumvention. (See Serick 29, on a decision of the Bundesgerichtshof of 24 October 1979.) *Sicherungsübereignung* is of great practical importance, being widely used to secure loans and having *"in practice superseded the pledge of movables.* (Cohn 185).

The beneficiary of the trust; the third party which suffers the loss of because of the destruction of the trust property for instance, is likely in this second category of transactions to enjoy the protection available to the possessor against delictual injuries. (The

with the trustee and causing the destruction of the trust object or becoming the legal owner of the trust object (after, for instance, the trustee violates his duties by transferring the trust object), causing loss to the trustor (beneficiary) who has no delictual claim and might have no contractual or unjust enrichment claims against the trustee. The latter may be entitled to claim compensation but might have no interest to do so[311]. *Drittschadensliquidation* has been opposed on the basis that in most cases the beneficiary will have alternative protection[312]. However, the trustor might have special claims in a transfer for security

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beneficiary has a real right in this line of cases unlike indirect agency relationships). The beneficiary's right to demand the retransfer of the thing after having paid his debt is thought to be qualified as among the 'other rights *("sonstige Rechte")* of §823 (I), BGB, offering thus delictual protection to the beneficiary. (Grunsky on § 249 BGB 365.)

311 The difficulty with trust relationships is to discern the person suffering the loss which is typical of the beneficiary-trustee relationship. Usually the beneficiary will suffer the loss. This is so with *Verwaltungstreuhand* cases, if the trustor has no action against the third party to whom the object was sold, but merely a claim for compensation against the trustee who has committed a breach of the agreement, if this is the case. There is no *"following the trust property"* in German law (Cohn 179).

In *Sicherungsübereignung*, cases, the impairment of the security interests will cause damage to the trustee as well; his security will disappear or diminish in value. An impairment of security interests will possibly lead to the exclusion of the security property from the insolvency property of the trustee. The trustee is in a position similar to that of a creditor who has received a pledge; if the beneficiary becomes bankrupt the trustee has merely a right to demand that the property is used in the first instance for his own satisfaction. He cannot prevent it being used for the satisfaction of other creditors is so far as it is not required for his satisfaction. *"...[I]n the bankruptcy of the security-giver the lender is entitled to satisfy himself in respect of his loan , separately and priority to other creditors, by looking at the property which has been transferred to him as security."*. Serick29-31. The trust beneficiary can prevent the creditors of the trustee from using it for their own satisfaction based on the special provision of §771 of the Code of Civil Procedure (*Zivilprozeßordnung* - ZPO) which enables a third party who has an interest which will be injured by the enforcement of a decision to hinder the evolution of its process until his objection is examined. Cohn 176.

312 The main argument against this solution is based on the fact that the beneficiary might have special compensation claims provided that there are special provision in law to his benefit. In one view the beneficiary should be granted special rights. in the context of a fairer allocation of liability risks between the trustee and the wrongdoer. Lange 284-285.

Such views lay emphasis on the beneficiary's privileged position. It is as if he is been awarded real rights, which he no more has. The arguments lay emphasis on the rights of the beneficiary to oppose compulsory execution against the trust property; he can prevent the property in question being used for the satisfaction of other creditors than the beneficiary in a case of bankruptcy. (Cohn 176). Similar is the case with the trust beneficiary in Scots law. He has the right to obstruct the sale of the trust for the satisfaction of other creditors. This is a personal right (unlike the real right of English law) against the trustee in bankruptcy, to intervene and hold the trust assets which are separate and are not available for the satisfaction of other creditors. In Scots law, in case the trust assets are mixed with other assets, if the latter are still identifiable they still belong to the trust. Walker, *The Law of Civil Remedies in Scotland*, 1974, 1067 et seq.

purposes[313], but in *Verwaltungstreuhand*[314] the trustee does not appear to enter the particular relationship, and it is difficult to consider that the trustor has a special right[315]. The prevailing academic opinion is that the trustee should be granted the right to claim compensation for the damage the beneficiary has suffered, compensation being a surrogate of the impaired property and of the trust rights, that have been violated. As a matter of principle and prudent policy the mechanism should not be rejected outright for the convoluted trust relationships[316].

2.1.5. Agreed *Drittschadensliquidation* (*vereinbarte Drittschadensliquidation*).

The courts conclude in these cases that the parties have, explicitly or impliedly[317], agreed that compensation will be owed to third parties[318]. This group of cases illustrates more evidently the central role of judicial construction of contracts or legislation in the (contractual) protection of third parties. The achievements of German case law were, after all, a product of daring judicial activism[319].

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313 The beneficiary will often have his own special claims for compensation especially if a transfer for the purposes of security is involved, where he appears as a borrower in possession of a thing belonging to another person. The trustee, in this case might not be in a position to claim damages from the person liable to compensate, in so far as the borrowing transaction evolves without a breach. Similar is the situation with the assignment of security rights (*Sicherungszession*), where the cedent (in Scots law terms), -- assignor,*Zedent* -- is authorised for collection (*Einziehung*). Lange 285.

314 As with *Inkasozession* (assignment of receivable accounts Lange 285.)

315 He might not have any real interest in the entrusted property and, even if he does, he might not be affected in his capacity as a trustor by the injuring behaviour. A special interest for the beneficiary would have to be inferred from the relationship between the trustee and the injurer, which is unlikely.

316 Trust relationships can be considerably diversified in their details so as not to be able to be dealt with in a unified manner. The usefulness of *Drittschadensliquidation* particularly for cases where no claim is available can not be rejected especially if the advantages of contractual solutions with respect to the requirements of evidence and the possible amount of compensation are taken into account.

317 See Grunsky on §249 BGB,365.

318 Or rather, that the debtor undertakes the risk to compensate loss suffered by a third party. Fleming, discussing the judicial difficulty in awarding damages for pure economic loss, blames the persistent reluctance of the English courts to infer the existence of a contract. Fleming *Canterbury LR* 269-279. To the contrary French courts have always been eager to exploit the possibility of inferring a contract. Banakas 72 et seq.

319 See Markesinis *A Comparative Introduction*, 49 et seq.

The *Reichsgericht* first accepted agreed *Drittschadensliquidation* construing supplementary contractual clauses such as that in a contract for works that business will not be interrupted[320] or that a lessee will not undertake activities competitive to another lessee of the same space[321]. The clauses were thought to have been concluded in the interest of third parties, imposing upon the debtor the liability to compensate them. In contrast the *jus quasitum tertio* in Scots law does not seem to extend to restrictive convenants[322], while a recent Canadian decision, in an exceptional manner from a common law point of view, extended the application of such clauses to the creditor's employees[323].

Particular sets of circumstances facilitated the acceptance of agreed *Drittschadensliquidation* in a sequence of decisions of the federal courts. This is the case with contracts for works where the whole or part of the work undertaken is subcontracted[324]. The contractor was held liable to claim compensation for the loss his

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320 In a well known case, a town administration, contracted with a firm for repairs to some town owned cool-store depots. It was especially provided in the contract that the works would be operated without causing any interruption of business. Because of lack of proper attendance shown in the execution of the works, fire broke out. Damages were caused to the cool store depots' equipment and to meat supplies stored in the depots. The town administration had excluded the repairing firm's liability in the storage contract. The third party that suffered loss was a butcher whose supplies were kept in the damaged depots. The court accepted his claim. It considered that the clause referring to the absence of any interruption of business evidenced an implied agreement that the town administration was under a duty to restore the third party damage. On the basis of §281 BGB, the town administration was oblidged either to assign its claims to the butcher or to sue the injurer on his account. RGZ (Reichgericht Zeitung), 170, 246. See Lange 280, Sirp, on §249 BGB, 535, and Lorenz "Some thoughts about Contract and Tort", 89.

321 The owner of a store room had leased a part of the available space to a carpet trading business, and another part to a linoleum trading business. In both lease contracts the same clause existed which stated that the lessee would not perform activities competitive to the other lessees-possessors of the storeroom. The linoleum trading business violated that provision. The Court, on appeal by the other lessees, found that the agreement concerning the exclusion of competitive activities was obviously made to the interest of third parties; any other persons who at any time would be lessees. Only the latter could have been injured from a violation of the relevant clause. The owner had suffered no loss and he had no interest to sue on his own account; he was nevertheless under a duty to claim compensation for the damages the carpet traders had suffered. RG Recht 1923 Nr 1977. See Lange 281.

322 See under "Development and Applications", in Chapter 5.

323 *London Drugs v. Kuehne & Nagel International Ltd.* [1992] 3 SCR 299. See under "*London Drugs v. Kuehne & Nagel International Ltd.*", in Chapter 6. The decision is exceptional because it was based on contract and seems to be establishing a right in favour of third party beneficiaries of a contract.

324 See Lange 281,

client suffered due to the culpable behaviour of the subcontractor[325]. In American law, in certain cases at least, a direct claim by the client against the subcontractor is allowed[326].

The contractor might be held personally liable to compensate his client if held responsible for the person he employed (§278 BGB). It is questionable whether the client will obtain full compensation in this case, taking into account causation and/or culpability considerations. Moreover, as is usual, the contractor might have provided for the exclusion or limitation of his liability[327].

More complicated is a 1974 case[328] involving the plaintiff's permission to use a patent given to two companies (on license contracts), the second contract providing an exclusive right. The plaintiff had to sue this second company to compensate the first for the loss the first suffered when the second company violated a clause of its licence contract. The clause stipulated that it should not sell the product in question to companies supplied in the past by the first company without the latter's consent. The decision's rationale was based

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325 Two similar cases occurred in 1964 and 1972 respectively concerning undertakings to deliver fuel oil, which have been subcontracted. The contractors were entitled to ask for the recovery of the damages their clients, the vessels owners, had suffered, due to improper filling of the vessels' tanks by the subcontractors. BGH VersR 1964, 632, BGH VersR 1972, 67. See Lange 281.

326 See under "Claims of the owner against the subcontractor.", in Chapter 4. The situation in law is far from certain, and it is in few cases that the third party beneficiary rule, a contractual approach that is, is applied. it was noted that it is the contractor who in most cases has an interest in suing the subcontractor, and that a direct claim would upset the contractor's administration of the construction while it would not effectuate performance. A direct claim should be allowed, it as argued when there is no other means to protect the owner effectively.

327 Possibly in a clause referring to liability for possible damages caused by another person performing the works.

328 BGH 15.1.1974 - X ZR 36/71 (München), NJW 1974, 502. See Grunsky on § 249 BGB, 365. The plaintiff had patent rights for a special method of filling tablet tubes. It had granted a firm a simple (not exclusive) licence to use the method and provide with its products three particular business establishments. Subsequently the plaintiff gave a license for the exclusive use of the patent to a second firm, by a written contract. A clause in the license contract provided that the licence did not entitle the firm to make sales to the three particular firms mentioned before. Any offer for sales to these firms would be invalid unless the first firm (the holder of a simple license) had previously given its consent to these offers. The exclusive licensee sold its products that had been produced with the patented method to two of the three firms that had previously been provided by the first firm (the other licencee) and paid royalties to the plaintiff. The first firm rescinded the contract with the plaintiff and exercised its right of retention as to the royalties owed. The plaintiff was thus compelled to sue the defendant for the violation of the contract and pass the damages acquired to the first firm which suffered loss

on the fact that in these cases the interests of the person entitled to sue were combined, tied together with the interests of the third party, in such a manner that the former had to look after the interests of the third party. The party that contracted with the person entitled to sue should have taken this protection requirement into account[329].

In a typical pure economic loss case[330] the charitable organisation which contracted for the transportation of 39 students to Osaka claimed, on behalf of the students, the additional costs they endured when they reached their destination by other means than promised by the defendant travel agent.

Agreed *Drittschadensliquidation* can be established on the practice of relevant transactions, although this is not always the case. It is, for example, common practice for building contractors in Germany to assign in advance, using general terms of trade, all claims against their subcontractors from the breach of warranties[331].

This category illustrates the mechanism's potential to expand. It could for instance refer to a bank depositing by another bank securities or bonds that belong to the former's clients. If it can be inferred from the contract of deposit that the securities or bonds belong to the depositor's clients, it is reasonable to conclude that third party compensation has been agreed[332]. The same applies if, for example, the depositors were stock exchange brokers. It has been suggested finally that when there is lack of contrary evidence, debtors can be held

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329 The plaintiff was entitled to withhold from the compensation whatever was owed to him by the first firm. NJW 1974, 502.

330 BGH, 21.3. 1974 - VII ZR 87/73 (Hamburg), NJW 1974, 1046; the decision was based on §631 BGB. A travel agent contracted with a charitable establishment for the youth, for the organisation of transport from Berlin to Osaka and return, at the cost of 1,200 DM per participant. A chartered flight was booked for the 39 participants. The flight could not be made however because neither the agent nor the air carrier had obtained landing authorisation. The travellers had to reach Osaka by other means in order to be there at the scheduled time. The additional costs they had to bear, were claimed by the charitable organisation which had contracted with the agent in its own name. In both degrees of jurisdiction the claim was considered well founded. The defendants' appeal on reasons of law was rejected.

331 This is indeed a practical and cost-effective solution. A bulding owner accepting such an assignment does not lose his possible claim against the main contractor. Markesinis *A Comparative Introduction* 44. See the problems in American law in "Claims of the owner against the subcontractor.", in Chapter 4.

332 See Lange 280, quoting v. Caemmerer from "Das problem des Drittschadensersatzes", *Zeitschrft des Bernischen Juristenvereins*, 127 (1965), p. 241.

liable as willing to undertake the usual and predictable risks which include third party loss[333].

In sum, this category is likely to expand to considerable applications which might be similar to other instances of *Drittschadensliquidation*[334]. It could concern frequently arising and economically important cases. What is of significance is that in these cases the focus is on the contracts' content and not on some other value, such as reliance or a duty of care[335]. More profoundly than in other groups of cases, this group evidences the role of judicial involvement[336].

2.1.6. Special cases[337].

2.1.6.1. *Drittschadensliquidation* and corporate identity.

A striking, and possibly isolated, example is a notorious case of 1973[338], where the plaintiff, capital estate agent and sole shareholder of a limited liability company[339], sued his advocate for losses he suffered as a shareholder when, due to the advocate's negligence the plaintiff's name entered the list of debtors[340].

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333 Lange 287.

334 Yet this category is different. In agreed *Drittschadensliquidation* cases for instance unlike trust, the delivery of possession, although a frequent event, is not crucial.

335 It seems more readily justified and is certainly more easily enforceable.

336 The latter including not only the protection of third parties but generally a more rational and fair allocation of risks in the context of the these transactions.

337 Involving transactions' groups, areas of law or failures of the mechanism.

338 BGH, München 13/11/73, NJW 1974 , p.134. See also Sirp on § 249 BGB, 535, and Grunsky on § 249.

339 *Gesellschaft mit beschränkter Haftung,* GmbH.

340 Following non payment of personal execution costs, for a demand of 62.19 DM, the plaintiff was ordered to submit the company to a special judicial procedure aiming at imposing a statutory affidavit. The procedure was then limited to taking an oath of disposal (*Offenbarungseid;* oath of manifestation, affidavit as to the accuracy of an inventory). The advocate whom the plaintiff authorised to handle the issue, did not take notice of the relative hearing. As a consequence of the plaintiff's not participating to the procedure, a warrant of arrest was issued against him and his name entered the list of debtors drawn by the executions' court (*Vollstreckungsgericht*). The plaintiff sued the advocate, claiming compensation for the losses he suffered due to the violation of the advocate's duty of legal representation and asking 463,763.79 DM compensation. The plaintiff argued that he suffered the loss in his capacity as the sole shareholder of the limited liability company. Following his entering the debtors' list, the bank that had credited the company, regarded the latter as credit unworthy. In order to repay a purchase loan which was now demanded by the bank, the plaintiff had to sell a piece of land he had bought for the purpose of development.

The plaintiff's appeal[341] was successful and the case was remitted to the lower court. The legality of the claim was accepted in principle (presumably on the basis of the contract with protective effects *vis-á-vis* third parties) because it concerned the property of the one-shareholder company, that is, the plaintiff's own separate property (*"Sondervermögen"*), but the claim was rejected for other reasons[342].

The decision attracted considerable criticism[343]. German case law has traditionally respected the distinction between corporate and personal property[344] and only exceptionally has the piercing of the corporate veil been allowed[345], usually on grounds of good faith and equity[346].

In this situation though, the needs served by the property separation do not seem to be of particular importance because there is one partner in the company who, in economic terms, bears directly the effects of the company's losses[347]. Lifting the corporate veil was to the plaintiff's interest[348]. Good faith arguments favouring the acceptance of his claim were not reviewed[349] while evidence from the legislation would support the acceptance of the claim[350].

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341 The court of first instance rejected the plaintiff's claim because the damage had been suffered by a third person; the company. The exception of the *Drittschadensliquidation* was not found applicable. The company did not fall in the circle of people that could be protected by the contract between the plaintiff and the advocate. See Roll, Anmerkung, NJW 1974, 492-493.

342 It was thought, by the BGH, that it was not clear whether the company had suffered any loss at all and whether there was any causal link between the loss and the advocate's behaviour. See Sirp on §249 BGB, 535. Evidence was, in addition, required as regards the plaintiff's possible contributory negligence and on whether the defendant had ever been informed on the procedure regarding the still owed execution costs. See also Berg NJW 1974 933-935, at 934.

343 See Mann, Anmerkung , NJW 1974, 492, Roll, Anmerkung, NJW 1974, 492-493, Berg NJW 1974 933-935.

344 There is a distinct legal and economic rationale served by distinguishing between the legal identity and property of the person from that of a company that might belong to the latter. The company's debts, for example, are not the partner's debts and the company is not liable for the debts of the partner.

345 Sirp on §249 BGB, 535.

346 Roll NJW 1974 , 493.

347 His transactions' risks are practically risks of the company. Roll NJW 1974, 493

348 Mann NJW 1974, 492. It is questionable though whether this argument is decisive.

349 Berg, NJW 1974 , 934.

350 Critics of the decision have generally referred to legislative provisions that would justify the plaintiff's claim in this situation, such as §432 BGB, where an indivisible

The court persisted on the formality of property separation and did not contemplate *Drittschadensliquidation* -- the claim was by the shareholder in his own right anyway. The possibility for a contract with protective effects was, nevertheless, left open, but this option seems unlikely under the specific circumstances[351], although advocate liability, as indicated by case law, is more likely under this latter mechanism than under *Drittschadensliquidation*[352].

Drittschadensliquidation seems justified in such cases as the company has no contractual claim to recover its losses. The plaintiff should have sought compensation on behalf of the corporation focusing on his relationship with the advocate and its clear relationship to the company[353]. The legal person is first affected and, through the legal person, the shareholder suffers loss[354]. Arguments based on economic reality could highlight the community of the interests between the company and the plaintiff[355]. It was plausibly argued, for example, that since the plaintiff has contracted in his own name[356], but on the account of or, at least, in the interest of the company[357], *Drittschadensliquidation* should be effected on the basis of indirect agency. Agreed *Drittschadensliquidation* was also possible.

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performance is owed to all several creditors jointly while each can demand performance to all, or §2039 BGB where in a claim concerning a part of an estate, performance is effected or demanded in favour of all the heirs or §128 HGB, according to which partners are personally liable as joint debtors towards the creditors of the partnership. Berg, NJW 1974, 934.

351 Protective effects would have to be inferred from a relationship with a strong personal element. The company could hardly be held to be legally interested in providing for the shareholder's welfare. Berg, NJW 1974 , 934.

352 *Drittschadensliquidation* might of course be applied. As will be seen, the examples from advocates' liability are indeed useful for the comparison of the mechanisms. Lord Goff expressing his views in *White v. Jones* [1995] 2WLR 187, thought that this was a *Drittschadensliquidation* case, although in Germany it is undoubtedly a case where the contract with protective effects would apply.

353 The relationship with the plaintiff is a confidential one, involving considerable good faith and professional integrity requirements. It is easy nevertheless to identify the purpose of the particular contract with regard to the plaintiff's interests.

354 Recal that the court of first instance rejected the claim because the claimant was a third party.

355 Roll NJW 1974, 493.

356 Roll NJW 1974, p.493.

357 Roll NJW 1974, 493. See also Berg NJW 1974, 935

In sum, this case gives the opportunity to recall that contractual solutions in third party loss cases are precisely examples of overcoming doctrinal formality[358] and achieve fairer and more rational solutions in a responsive system of civil liability.

2.1.6.2. Third party compensation in public contracts[359].

Another decision attracted criticism for its legal reasoning. The federal government had to compensate the damage caused by contractors who had been hired by a landscape association acting as undisclosed agent of the federal government[360]. The appellate court[361] thought that the federal government was entitled to damages from the contractors for the loss it suffered compensating the owners of the damaged house, compensation resembling an expropriating intervention[362].

It was argued that the landscape association was an indirect agent for the federal government[363] and *Drittschadensliquidation* would seem reasonable, leading to the

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358 Compensation for third party loss is of course only a part of the problems the persistence on a strict separation between juridical entities and participants might create. See Berg NJW 1974, 935, on a more general view.

359 This category of cases should not be confused with that involving beneficiaries of gevernment contracts, whereby the contracts have been concluded for the promotion of government purposes -- usually welfare. See under "Government contracts", in Chapter 4.

360 In BGH, 2.12.1971 - VII ZR 73/70, (Hamm), NJW 1972, 288-289. The defendants, building contractors, had undertaken certain excavation and building works for the first part of a by-pass road in 1959. They contracted (in writing) with a landscape association which acted as a mandator for the federal government. Explosives had to be used in the works, and properties bordering the by-pass were damaged. A couple whose home suffered damage, sued the federal government asking for compensation. They obtained an order from the *Oberlandesgericht* of Hamburg, holding the federal state liable to pay adequate compensation for the loss suffered. The decision became "final and absolute", (*res judicata*), after the federal government withdrew its appeal. Finally an out of court settlement was agreed on the basis of which the government paid 75,000 DM, compensation. The government had given notice of the proceeding to the contractors. The latter intervened in the dispute in support of the federal government, the then appellant. The BGH thought that this intervention was legitimate if it was considered that the landscape association was not a representative but and undiscosed representative of the federal government. The federal government sued the building contractors seeking compensation for the loss if suffered restoring the damages the explosives caused. The appellate court thought that the claim was based in law.

361 The federal government sued the building contractors seeking compensation for the loss if suffered restoring the damages the explosives caused. The appellate court thought that the claim was based in law.

362 BGH NJW 1972, 288.

363 It had negotiated and contracted in its own name but for the account of the federal government. BGH, NJW 1974, p.288.

assignment of the claims of the landscape association to the government[364]. The appellate court did not examine the nature of the relationships[365] and concentrated on the type of loss for which the government had paid compensation.

Against these points it was observed that the third party was protected irrespectively of the justification used. The result is the same from the point of view of the building contractor. However, liability on the contract is not only the most natural option but predominantly is more predictable and equitable for the defendant; it is this that is important regarding third party loss.

2.1.6.3. Product liability and *Drittschadensliquidation.*

Third party loss will often involve liability for damages caused by a product, (instead of damages caused to the product itself[366]). *Drittschadensliquidation* has been consistently excluded from this area (and so has the contract with protective effects). Other contract-based ideas have been similarly rejected[367]. Compensation for third parties remains in the domain of delict; based possibly, on §823(II) BGB as certain protecting legislation will usually exist[368]. Academics have, however, acknowledged the advantages of a contractual solution[369].

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364 The landscape association suffered no loss while the loss the federal government suffered was causally linked to the implementation of the contract, that had been concluded on its behalf. NJW 1972, 289.

365 It is unclear whether it felt bound by the pre-trial view of the court in the first degree of jurisdiction as to who the parties to the building contract were.

366 See Markesinis *A Comparative Introduction,* 72 et seq, and 78-82, on the various instances of product liability. A useful comparative study is Fleming's "Drug Injury Compensation Plans", *AmJComL* 1982, 297.

367 Markesinis *A Comparative Introduction,* 72-75. See also BGHZ 51, 91, NJW 1969, 269, (with comments by Dieterischen) and JZ 1969, 287. As briefly remarked before this is the case with American law as well, and with any of the jurisdictions examined in this thesis. In American law product liability can be strictly tortious, or based on statutorily established implied warranty, (Uniform Commercial Code §2-314) which is not contractual in American law. See "Examples: Misrepresentation and product liability" in Chapter 4.

368 See Weitnauer "Die Haftung des Warenstellers", NJW 1968 1592. German product liability law has developed after 1960. Markesinis *A Comparative Introduction,* 71. German lawyers benefiting from the American experience proposed various solutions for third party protection in product liability situations.

369 It can be reminded at this point that in civil law systems although fault is an element of both the breach of contract and of delict (in contrast to common law systems), the requirement of proof in judicial proceedings might differ significantly. As will be discussed

In a leading 1963 decision[370] a court of final appeal[371] held that the defendant producer of defective leather which, after being turned into belts by the plaintiff, caused damage to the dresses it was fitted on by a third party (a clothing factory), was not liable for the latter's loss. *Drittschadensliquidation* was explicitly rejected. The possibility for contractual compensation to the last user was treated as excessive. Contractual liability could be based upon reliance on the manufacturer or on his guarantee on the goods[372], as is the case with the statutory implied warranty in American law[373]. In product liability these options are unlikely. The leather manufacturer was found liable in delict because he was in the best position to detect and correct defects. It seems that contract law does not suit product liability cases[374] since, *inter alia*, it is especially difficult to calculate the risk involved[375].

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later the allocation of the burden of proof is more disadvantageous for the defendant in the cases of product liability than in other delicts. In contrast to the normal practice it is the defendant that has to prove that he had not been negligent. On the other hand if vicarious liability is involved (§831BGB) it is easier for the defendant to evade responsibility if he proves that he showed due care in supervising his employees.

370 BGHZ 40, 91, NJW 1963, 2071. See also Lange 292.

371 A leather trader, bought wild suede leather from a factory, and delivered a quantity to a belt producing factory. The latter produced ladies' belts and supplied a clothing factory which fitted the belts on ladies' dresses. Due to defective work on the leather the colour on many dresses changed where they touched on the belts. The same thing happened to a small number of dresses of another firm that had also been supplied with belts from the plaintiffs. The belt producing factory which could not be held liable for the damage, sued the factory that processed the leather for the damages the former's customers suffered. The plaintiff thought it was entitled to ask for the recovery of its clients' loss.

The court of first instance held that the plaintiff was entitled to seek compensation for the loss his customers suffered. The appellate court rejected the defendant's appeal. The defendant used his last procedural means; with an appeal on questions of law (*Revision*) he attempted to have the plaintiff's claim wholly rejected. The court decided against the previous decisions that the plaintiff was entitled to recover his customers' losses. The claim was considered as unfounded. A contract of sale could not be interpreted on the basis of good faith so as to entitle compensation for a third party who is injured due to defects to a product bought. (Markesinis *A Comparative Introduction,* 354) *Drittschadensliquidation* was rejected after examining in turn agreed *Drittschadensliquidation,* indirect agency, transfer of danger and the duty of care as potential bases. BGHZ NJW 1963, 2074.

372 Markesinis *A Comparative Introduction,* 76.

373 However, as said, contrary to other common law systems this implied warranty established by the Uniform Commercial Code (§2-314) is not considered contractual. See "Examples: Misrepresentation and product liability" in Chapter 4.

374 Markesinis *A Comparative Introduction,* 75.

375 Basically the circle of persons towards whom a manufacturer might be liable. Lange 292.

The most important case concerned the liability of the manufacturer of chicken vaccination medicine. Their defective product led to the loss of the plaintiffs, chicken-farmers[376]. *Drittschadensliquidation*, examined by the appellate court in detail, was not excluded in principle[377], but was rejected as no "union of interests"[378] between the vet who used the vaccine and the plaintiff was found[379]. The vet had bought the vaccine for his own use and not for the benefit or at the order of the plaintiff[380]. There was delivery of possession of an object belonging to a third party. It was, accordingly, difficult to accept a particular duty of care of the wrongdoer (the manufacturer) towards the plaintiff[381] and agreed *Drittschadensliquidation* could not be inferred[382]. Unlike the case in *Drittschadensliquidation*, the plaintiff was both in law and in fact, the injured person[383]. No shifting of loss occurred and no division between the person entitled to sue, who had suffered no loss, and the injured person existed. The loss could not have been inflicted on the vet or the manufacturer but on the chicken farmer alone.

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376 BGHZ 51, 91, NJW 1969, 269, JZ 1969, 287. The case was decided in 1968. The plaintiff who ran a chicken farm had her chickens inoculated against fowl pest by a vet on 19/11/1963. Due to fowl pest that broke out only a few days later 4,000 chicken died and 100 had to be slaughtered. The plaintiff claimed compensation from the manufacturers of the vaccine the vet used. This vaccine, bottled in 500ml bottles, came from a batch that had been inspected on 18/10/1963. On 22/11/63 the same vet inoculated the chicken in another farm; fowl pest broke out there too. The disease appeared in three other farms in the Württemberg area where vaccine from the same batch had been used. Special inspection of the unused bottles found in some of them bacterial immunities and still active Newcastle disease viruses which had not been sufficiently immunised. The defendant argued that the use of the vaccine caused the fowl pest and not the vaccine in the defectively sterilised bottles. The court of the first instance and the appellate court held the claim to be well founded. The appellate court considered in detail the question of the applicability of *Drittschadensliquidation*. See a translation of the decision in *Sourcebook on German Law*, 1994, by Young, R. 364.

377 It was generally thought that compensation owed to third parties on the basis of a contract was exceptional since, in principle, entitled to ask compensation was only the person who suffered damage and who had to bear that damage according to the law. A contractual claim should be based on a special relationship between the creditor and the beneficiary of the protected interest and on the idea that the wrongdoer should not derive any benefit to the third party's disadvantage.

378 Markesinis *A Comparative Introduction*, 353.

379 As in indirect agency cases there is a union of interest between the undisclosed agent and the principal.

380 Markesinis *A Comparative Introduction*, 353.

381 The vet owes a duty of care to the latter.

382 Weitnauer, NJW 1968, 1592, et seq.

383 *Drittschadensliquidation*, requires the occurrence of damage suffered in law by the creditor and in reality by the third party who is injured in his protected interests.

The plaintiff's appeal was successful; he was entitled to claim compensation on §823(I) BGB. The decision is distinguished because it established a rebuttable presumption as to the negligence of the manufacturer[384]. This presumption resembles that of fault in contractual liability[385] and critics laid emphasis on the contract-like reliance involved in the relationships in the vaccine case[386]. However, overall policy reasons, involving certainty in product liability and the extent of manufacturer's exposure, made *Drittschadensliquidation* unreliable in the court's view[387].

It seems, finally, that the opposition to contractually based solutions in product liability is deeply entrenched[388], and, admittedly, supported by serious considerations. This is the case with all the jurisdictions involved in this study[389].

2.1.6.4. Retail chain and *Drittschadensliquidation.*

Drittschadensliquidation is not accepted in cases involving series of sales (retail chain, *Veräusserungskette*) where non delivery or late delivery or other defects in performance will injure the immediate buyer and the following purchasers to whom the first buyer might have already transferred (or promised to transfer) the goods.

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384 Normally the plaintiff has to establish, among others, that the defendant had been negligent in his conduct. In this case the court took the view that the plaintiff had to prove that the product was defective when it left the business of the manufacturer and not *"that the manufacturer fell bellow the ordinary standard of care"* (Horn, Kötz and Leser, 153). The latter had to prove that he had not been negligent. This allocation of the burden of proof brings the defendant to a position similar to strict liability.

385 See Horn, Kötz and Leser, 153.

386 Meaning the relationships between the manufacturer and the vet, on the one hand, and the vet and the farmer on the other. See Fleming *OxfJLSt,* 1984, 240.

387 See Markesinis *A Comparative Introduction,* 78-82, on the various instances of product liability.

388 Agreed *Drittschadensliquidation* was rejected as being a far feched option by both the product liability decisions referred to. The legislative treatment of product liability seemed incompatible with contract-based claims. The parties had, it was held, neither excluded nor wanted to avoid existing law in the regulation of the part of their relationships not covered from a contract. The legislation was considered as indicating the exceptional character of agreed *Drittschadensliquidation.* BGHZ NJW 1963 2074.

389 See under "Theory" in Chapter 2 on Greek law the footnoting to the views expressed by Stathopoulos on manufacturer's liability, under "Examples: Misrepresentation and product liability" in Chapter 4, on American law, and in various footnotes to the reference to pure economic loss in Chapters 5 and 6, especially in the former referring to pure economic loss.

Allowing third party contractual claims, it has been argued, would blur the distinction between contractual and delictual liability as regards the seller's position toward buyers with whom he had not contracted[390]. The immediate buyer would attempt to permit the liquidation of his purchaser's losses to the extent that he is not personally liable for these. The seller's risk might increase intolerably[391]. Liability in these cases, as in a case of product liability, is generally thought to belong to the domain of delict (§823(II) BGB)[392].

In addition to the product liability cases referred to (especially that against the leather manufacturer[393]), there is at least one case involving the retail sale of a second hand car, where *Drittschadensliquidation* was rejected (together with delict) as a possible basis for liability[394].

Arguably, however, delictual solutions might not cover third party loss in a satisfactory manner in these cases. A number of intermediaries cannot be held liable because they had not been careless. It is, moreover, difficult to demonstrate carelessness. In many cases §831(I) BGB on vicarious liability has to be applied[395], which is ever more

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390 Lange 289.

391 See Cohn 107 and Grunsky on §249 BGB.

392 See Sirp on §249 BGB, 535, and Lange 292.

393 The Supreme Federal Court took the view that, in principle, a seller could not be held liable for the damages caused to the purchaser's subpurchasers.

394 OLG Hammburg, NJW, 1974 , 2091. The defendant had sold a second hand car to a witness at the hearing. The latter after having used the car for a year resold it to the plaintiff. The plaintiff observed after delivery that the car had been damaged in a collision. He rescinded the contract of sale for the reason of cunning behaviour from his immediate seller. The latter was however in good faith. He assigned his compensation claims against the defendant to the plaintiff who then sued. The court of first instance rejected the claim holding that the assignment of the claims was not valid. The claim was examined in relation to the provisions of unjust enrichment, and it was thought that it could not succeed on this basis, since the witness had not rescinded his contract with the first seller (the plaintiff had no such right). A claim on the basis of §463 BGB (providing for the liability of the debtor in case of absence of a promised quality) could not be considered because the witness suffered no loss. *Drittschadensliquidation* was not found applicable, while it was thought that a plaintiff could not have a claim of his own against the defendant; the possible basis would have been §823(II) BGB, or §826 BGB. In sales of second hand objects the prevailing view is that the liability of the seller is limited. The appeal was partly successful since the validity of the assignment of claims was accepted.

395 When damage was caused by an employee for example. Markesinis *A Comparative Introduction*, 74.

restrictive on the extent of delictual liability[396]. In the light of this inefficiency, legislative action is suggested[397]. Contractual solutions seem to be more credible for certain of the cases involving a retail chain[398].

2.1.6.5. Dispatch of defective objects by the buyer.

These cases, similar to the previous ones, involve situations where a buyer sends the deficient thing he bought, to another person. The second buyer has not enforced his claims against his seller[399] and, in view of the provisions on sale with dispatch[400] and of the regulation of the gift contracts[401], the second buyer is the one who suffers loss.

The loss that should normally burden the seller[402] of the defective product falls upon the second buyer. *Drittschadensliquidation* seems justifiable in these cases but its application should be made with reservation as these situations might involve product liability questions.

2.2. Questions of enforcement – The problem of a direct claim.

It is generally accepted that *Drittschadensliquidation* provides no direct claim for the third party[403]. The fact that the creditor must claim compensation allegedly renders the mechanism inflexible and often depending upon the will of the creditor.

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396 The employer can be relieved if he proves that he exercised due care.

397 Lange 290. See also Berg NJW 1974, 934.

398 See Cohn 160.

399 §§440, 325 BGB, or §463 BGB. § 440 BGB refers to the rights of the purchaser in case the seller does not fulfil his duties, §325 BGB refer to the situation of impossibility of performance for which a debtor is responsible, and §463 refers to the case where the promised quality of the object sold is absent at the time of the purchase.

400 § 447 BGB; the risk passes to the buyer on the delivery to the forwarder.

401 §§523, 524 BGB; whereby a donor of a thing not yet acquired is liable for defects in the title or the quality if these defects were known at the time of acquiring or remained unknown out of gross negligence

402 His position will be the same in the cases where the first buyer has exonerated his liability. Lange 293.

403 See the reference to "Real contract in favour of third parties". The BGB, in comparison to other systems takes a conservative view and does not allow direct claims easily.

It is possible for the creditor to assign his claim to the injured person[404] and it is possible to sue on the latter's behalf and transfer the damages to him. If the injured party is contractually related to the contracting party who is entitled to sue, then the assignment of claims can be judicially compelled on §281 BGB[405]. The BGB requirements on the contractual assignment of claims[406] must be fulfilled in this case. Similarly, the contracting party can be compelled to transfer the damages he acquired.

An enforceable assignment of claims[407] together with the assignor's obligation to transfer necessary documents, provide information etc.[408], seems more likely in agreed *Drittschadensliquidation*[409], or in cases of compulsory transfer of danger and especially in sales' contracts. The first reporting of *Drittschadensliquidation*[410] could in the context of the BGB have led to an assignment of claims.

However, although a compulsory assignment of claims is, as said, possible[411], the third party cannot compel the creditor to sue. There is no equivalent in German Law to the French[412] and Greek[413] law mechanisms, enabling a creditor to ask for the judicial enforcement of one of his debtor's claims so that the latter would be in a position to satisfy the creditor.

It is difficult to infer a promise by the creditor to assign future claims -- the courts will be reluctant to do so. The third party can, nevertheless, turn against the creditor asking compensation or the assignment of the claim on the basis of unjust enrichment (§812

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404 §281BGB, and §398 BGB;*"Abtretung"*; contractual assignment of claims.

405 It provides that the debtor who is released from his liability to perform if it is impossible to perform for reasons he cannot be held liable for, is obliged to transfer to the other contracting party what he acquires because of this release from liability. See in Lorenz "Some Thoughts about Contract and Tort", footnote 14, 99, and Markesinis *A Comparative Introduction,* 47 et seq.

406 §§398-411 BGB.

407 On §281 BGB.

408 §402 BGB.

409 Even then no direct claim is allowed. Selb NJW, 1964, 1772. The interpretation on the basis of which this agreement is inferred might be dubious.

410 See the reference under "Indirect Agency" , previously in the text.

411 More likely when the creditor-third party relationship can be construed as involving the promise by the creditor to assign future claims.

412 article 1166 French Code Civil.

413 article 71 of the Greek Code for Civil Procedure.

BGB). However, it is doubtful whether the requirements of unjust enrichment will be satisfied.

There is considerable criticism regarding the absence of a direct claim [414], which should be related to the conservative approach to the 'real' contracts in favour of third parties in the BGB, in contrast to the Greek and the American systems[415]. The critique focuses on the ('real') contract for the benefit of third parties[416] and on the contract with protective effects *vis-á-vis* third parties, where a direct claim is accepted. Once the usefulness and rationale of *Drittschadensliquidation* is accepted, allowing a direct claim seems definitely reasonable[417].

The role of judicial interpretation is crucial as regards the enforceability of the assignment of claims. Although the German judiciary have acted daringly, indeed arbitrarily[418], in developing contractual protection for third parties, there are limits to what construction can achieve in the face of a firmly entrenched case law against the possibility of a direct third party suit[419]. The courts' conservative spirit is likely to allow the least possible departures from traditional approaches each time. It is of course questionable whether the direct claim is a matter of such cardinal importance in terms of legal doctrine. Its practical significance should not be overestimated since, eventually,

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414 See generally on the issue Reimer-Schmidt on §§249-253 BGB, 934. The discussion of the particular issue will be completed when the two mechanisms for the protection of third parties are compared and when the Greek counterpart of *Drittschadensliquidation* , will be discussed. At that point it can be noted that the absence of a direct claim accords to the relativity principle

415 See "Real contract in favour of third parties". In the Greek system there is a presumption that a direct claim was intented. In American law, a direct claim is provided is it will effectuate the parties intentions. This view introduces an alement of policy favouring the aceptance of direct claims for a simpler and more effective protection of third parties. See in Chapter 5, the debate on the requirements of *jus quaesitum tertio*, ("The *jus quaesitum tertio*") which together with judicial reluctance undermine the mechanism.

416 (§328 BGB); it provides for a direct claim by the third party beneficiary. It is usual in decisions accepting *Drittschadensliquidation* to refer to the contract for the benefit of third parties in order to reinforce their reasoning.

417 See Selb NJW, 1964, 1772.

418 In comparison to say Anglo-american courts trying to delimit liability in tort. Markesinis *A Comparative Introduction,* 48-49.

419 See Lange 293-294.

there is protection for third parties[420]. Procedural law affects the courts' attitude; its provisions would have facilitated the acceptance of a direct claim in Greek law[421].

The third party should accept the contract as it stands, with regard to the existing duties and the possible limitations of liability. The contributory negligence of the parties and of the third party will be taken into account. The third party bears thus the consequences of the fact that the claim is the creditor's, especially as regards defences[422].

2.3. General review.

The fact that *Drittschadensliquidation* is judicially established and developed over a long period, and the existence of its various applications makes it difficult to provide a simple outline or to identify the rationality of the mechanism[423]. It amounts more to a range of standardised applications than to a well-defined scheme of general application[424]. Its picture becomes more complete after comparison to the contract with protective effects *vis-á-vis* third parties[425].

What is important, in the prevailing view, is that *Drittschadensliquidation* involves contractual liability[426]. As discussed before, contract law offers the best opportunities for compensation[427] and balances efficiently the relative interests.

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420 See the analysis on §770 II ZPO (code on civil procedure), in Jauehrig, Othmar *"Zwangsvollstreckungs - und Konkusrecht"*, 1983.

421 However, it is unsettled whether the subject is one of substance or procedure, in either German or Greek law.

422 According to §404 BGB, for example, the debtor of an assigned claim has all the defences that were in existence against the assignor. See Lange 293-294.

423 It is difficult for instance to infer common prerequisities. See Lange 275 et seq., and Schmidt, "Hagen 'Die Drittschadensliquidation im Wandel der Rechtsdogmatic, 1971", in JZ, 1972, 607.

424 Authors disagree on the number of groups of cases where *Drittschadensliquidation* is applicable. See Larenz I, 371-374, Berg Jus 1977, 365. Undisputed are the cases of compulsory transfer of risk, the cases of indirect agercy and the cases involving a duty of care. See also Hohloch FamRZ, 1977, 530. who identifies three categories but not identical to the previous ones.

425 Certain authors give priority to this comparison. See Grunsky in his analysis on §249 BGB. The comparison and delimitation between the two mechanisms is an issue that atrracted particular concern. See Lange 294, Grunsky on §249 BGB,362, Berg Jus, 1977, 363, Berg, NJW, 1978, 2018.

426 Liability derives from the contract; it is described and regulated therein. Markesinis 103 (1987), LQR, 354-397.

The mechanism is exceptional as it transcends relativity and is not provided for in the legislation[428]. It does not necessarily lead to an increase in the volume of compensation[429] and is not mutually exclusive with delictual liability[430]. However, the advantages of contract were not the only decisive criterion in choosing a contractual claim[431]; there was a real need for protection.

This overall review of the mechanism will concentrate on three issues. The first is the problem of identifying a common element that characterises *Drittschadensliquidation*. This definition involves a summary description and an evaluation of its justification and rationale. This evaluation is assisted by a review of insurance and recourse in comparison to *Drittschadensliquidation*. Second, basic objections to the usefulness of *Drittschadensliquidation* are discussed. In the third part the issue of the theoretical doctrinal basis will be addressed with the relevant academic opinions which are parts of more general constructions on interests, loss, compensation etc.

2.3.1. The nature of *Drittschadensliquidation.*

Drittschadensliquidation is a form of civil compensation. Its basic purpose is thus restorative[432]. Interestingly, *Drittschadensliquidation* is said to be one of the exceptions

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Even if the term refers to both delict and contract, compensation is based on contract. *Drittschadensliquidation* is used by certain authors as a synonym for third party compensation, unrelated to any particular set of events. In this work the term is not used with this broad meaning.

427 In the light of the insufficiency of the law of delict.

428 §844 BGB for instance which is an exceptional delictual provision.

429 Although relativity is side-stepped, the debtor is not economically, financially liable in excess to what he would have been had the injured person been his contracting party. See Berg Jus 1977, 366, on the relationship between adjustment of benefits (*Vorteilausgleichung*) and *Drittschadensliquidation*.

430 *Drittschadensliquidation* applies when delictual liability is doubtful. However, it is not necessarily a last resort for the compensation of third parties. See Peters Frank "Zum Problem der Drittschadensliquidation" AcP, 1980, pp. 329-389, who argues that *Drittschadensliquidation* covers not only cases where no other source of information is available, but is also used for the improvement of the compensation amount.

431 See Markesinis *A Comparative Introduction*, 75-76.

432 Civil compensation has a merely restoratory perpose, in contrast to the punitive element of criminal law. (although aspects of a punitive character can not be excluded altogether). Larenz I, 344-346, Lange 5 et seq.

The amount of compensation will not in principle differ on the basis of the kind of fault or culpability, if, for instance, the damage has been caused intentionally or by gross

where compensation is calculated on the basis of the objective value of the loss (the market value of the worsening of the injured party's financial position), instead of the subjective value of loss meaning the loss as experienced by the injured party[433]. Compensation is, however, calculated *in concreto*, that is, for the particular damage the plaintiff suffered, as is the rule[434] and not for the damage the average person in his position would have suffered.

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negligence. (The form of intentional involvement is a set prerequisite of the law that establishes liability. Causality is not differentiated on the basis of the intentional element. §§ 249-253 BGB, the general provisions on the establishment of liability do not make differentiations as to the compensation on the basis of the degree of culpability once the latter is established. In certain circumstances the degree of culpability can exercise some influence towards mitigation of the compensation amount. See Larenz I, 411-416.)

Stathopoulos refers (Stathopoulos I, 230.) to two models of personal liability to compensate losses; the basic one focuses on the culpable conduct of the responsible actor and the other, that of objective liability, renders liable the person who derives benefits from the injuring event. (See Larenz I, 224; "Die Veranwortlichkeit des Schuldners": Verschuldengrundsatz und objektive Verantwortlichkeit"). In addition to these mechanisms another model of liability occupies an increasingly important role. The latter transfers the burden of compensation to social mechanisms and institutions such as insurance schemes or insurance companies. (See Lange 416; Regreßanspüche Dritter, 432, referring to areas of recourse such as private or social insurance -- *Privatversicherungsrecht, Sozialversicherungsrecht* -- law and civil servant law -- *Beamtenrecht*.) In all these models the fundamentally restoratory purpose of compensation does not change. (There are two diverging opinions on the rationale and purpose of the latter model that involves special institutionalised restituting mechanisms. One view stresses the economically rational distribution of damages in accordance to market economy perceptions and the other the best possible, socially justified treatment of the injured party. Staqopoulos I, 230.).

433 A usual distinction with regard to the calculation of compensation is that between the subjective value of loss (*"subjective Wert"* often described as *"Interesse"*; which is usually equated with the injury sufferred) and the objective value (*"objective Wert"* sometimes expressed as *"gemeines Wert"*). Larenz I, 385-389, "Subjektive und objectiver Wert der Vermogensgüter („Interesse" und „gemeiner Wert"). The first refers to the value of the loss as experienced by the injured person in accordance to his personal condition. The second refers to the actual value of the property reduction in objective market terms. The prevailing view is that the subjective value must determine the amount of compensation. In some cases though the *"gemeines Wert"* determines the losses payable . Thiele considers *Drittschadensliquidation* as one of the examples of the latter cases. (Thiele AcP, 1967, 193-240). The objective (market) value can be higher as in the case of destruction of one tea cup out of a set of six. The set losses its market value; sets consists of six cup. The subjective value is lower if the owner would never use the six cups for instance. The subjective value can be higher in the case of a portrait drawn by the owner's wife which is evaluated in emotional terms. Larenz I, 386.

434 This distinction focuses on whether the calculation of the damages should be made *in concreto*, for the particular damages, or in abstract for the damages that in the normal course of events the injuring behaviour would have caused. (See Lange 50 et seq., Larenz I, 403-405, „Konkrete" und „abstrakte" Schadensberechnung., Fikentscher 266 et seq.) In accordance with the references in the previous paragraph the prevailing view is that compensation is given for the particular, *in concreto* calculated damages. This view is based on the interpretation of §249 BGB that compells restitution in kind and only exceptionally

2.3.1.1. Conceptual links.

A first response to *Drittschadensliquidation* is to try and link conceptually the relative situations and decisions by focusing on common features, especially aspects of the case law rationale[435]. The views regarding the crucial aspects that characterise *Drittschadensliquidation* differ, and are not easily comparable. One opinion for example points at a common characteristic of the circumstances in question (the transfer of loss) as a descriptive element and legitimising reason for the mechanism. The other views look more into the legal justification of the mechanism (on a 'union of interests' or on the agreement).

2.3.1.1.1. *Schadensverlagerung;* transfer of loss.

According to a popular approach, *Drittschadensliquidation* involves cases where a transfer of loss (*Schadensverlagerung*) or, alternatively, of risk (*Gefahrtragung*)[436] has occurred. Damage is not suffered by the creditor but by the third party[437].

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monetary compensation. The *in concreto* method of calculation serves better the restoratory purposes of compensation. There could be, nevertheless, considerable differences as to the method of calculation in special provisions of commercial, or inheritance losses for instance, that do not depend upon the demonstration of damages and where the abstract calculation is used to the benefit of the creditor. Special provisions exist in areas such as private or social insurance law. (Lange 221) Abstract compensation is said to be based on §252(II)BGB, See Lange 223. According to §252 (II) BGB, which refers to loss of profits, lost is the profit which could probably have been expected in the normal course of events or in the light of special circumstances especially the preparations and arrangements made.

It is more of a rhetoric question in Germany, and of no concern to this work, whether damage has a literary, every day meaning or is a legal concept. (Lange 19) The fact is that the legislator departs from a natural perception, and in the process of evaluating various instances of damage along with the purposes of the law of compensation, the result might be that the damages compensated are not identical to the actual, natural damages. Larenz I, 403-405

435 See Selb NJW, 1964, 1765-1771, to whose critique this review is heavily indebt.

436 The latter expresion is more precise for the particular category of cases where the allocation of risks is the reason for this allocation of damages that are inflicted on the injured party. Larenz is more carefully distinguishing between the transfer of damages as a characteristic of all the *Drittschadensliquidation* cases and of the transfer of risk as a characteristic of the particular group of cases. (Larenz I, 371-374.), while Berg does not make this distinction, (Berg Jus 1977, 365).

437 Larenz argues that the party to the violated contract does not bear the damage; the debtor is relieved from liability to compensate the other party therefore. By reason of certain event or relationships the damage is suffered by the third person. Larenz I, 373.

The loss is related to the economic value incorporated in the contract. The contract's violation results in the expected amount of loss and compensation to be claimed; there is one, predictable unit of loss.

There is no multiplicity of creditors as in delict where each creditor can claim the whole amount of compensation[438]. If there is more than one third party, each is entitled to the losses that correspond to his interest in the contract's economic value. The idea is that the debtor cannot be burdened in excess of the financial risk he undertakes when entering the contractual relationship.

The transfer of loss allegedly occurs in some only of the instances where *Drittschadensliquidation* is applied. One basic argument points to the fact that the creditor as well might suffer loss[439] (the way to calculate this loss is disputed[440]), and doubts whether it is the creditor's loss that is transferred after all. On the other hand, it is argued that, even if there is always a transfer of loss, different standards should apply to the different groups of applications[441]. According to the criticism, the transfer of loss is not

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438 In the case of a multiplicity of creditors whether in delict or contract, each creditor can ask compensation for himself but the debtor is obliged to pay only once. The rest of the creditors have a claim against the one who was awarded compensation.

An important decision laid emphasis on the fact that there is no multiplicity of creditors. (BGHZ 40, 91, NJW, 1963, 2071. See also Selb NJW, 1964, 1767.) The purpose must have been to distinguish *Drittschadensliquidation* from the law of delict and the contractual undertaking of liability towards more creditors.

439 The indirect representative for example might loose his commission. In cases involving a series of sales (as on the leather belts case -- BGHZ 40, 91, NJW, 1963, 2071) it was pointed that loss is suffered by a number of intermediaries; the producer, processors, subsequent buyers who might seem to have an interest to compensation. It can be argued that there is one unit of loss which originates from the first contract of sale from the producer of a defective product and transcends the chain to the last buyer. Each of the intermediaries might have a claim against his seller but also has to face a claim by his buyer. Nevertheless, while none of the intermediaries seems unprotected, his immediate seller might be exculpated for lack of fault. Intermediaries might suffer other losses damaged professional reputation, time wasted, not causally deriving from the defective product's circulation. By linking the last user to the produser *Drittschadenliquidation* isolated the latter's risk and reduced possible litigation.

440 Reinhardt deduced the agent's commission, which the principal wouldn't pay, from the principal's loss, despite his doubts as to the existence of single unit of damages. On this latter view Selb argued that under this calculation there is no possibility to attain the highest possible compensation is cancelled. In Selb NJW, 1964, 1767, from Reinhardt *Der Ersatz des Dritschadens*, 1933

441 Different standards for the transfer of loss can be set accordingly in differrent circumstances, as for example in contracts for the custody of things comparatively to contracts that involve the surrender of the position of a moveable as a necessary element.

sufficient to describe the mechanism as it is not the connecting link between the different instances of *Drittschadensliquidation*.

These arguments fail to take into account the contractual nature of *Drittschadensliquidation*[442]. The loss that is transferred is not any possible loss which follows the violation of the contract. It is that loss which is typical in that particular context and should logically be predicted by the debtor[443]. The federal courts highlighted this characteristic of the loss in justifying the expansion of contract[444]. The loss suffered by others than the third parties is not derived from the contract in question as, for instance, the agent's loss of commission. In a retail chain there is one unit of loss transcending down the chain (even if not the same for all participants).

Damages, it is generally accepted, substitute performance[445], the economic value of the contract in question which is vested in the third party instead of the creditor[446]. The impairment or cancellation of performance affects the third party interests. The transfer of loss concept suitably connects the entitlement to the contract's economic value to the right to compensation, a link justified by fairness and economic rationality[447]. The transfer of loss forms the background to a transfer of a claim which the law sanctions (§281 BGB), as it

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See Dudschar, "Inhalt und Schutzbereich vor Bewachungsvertägen", NJW, 1989, 3241, referring to cases involving contracts of custody of things. See also Selb NJW, 1964, 1765.

442 See Larenz I, 371-372, Peters AcP, 1980, 329.

443 Lange 279-283.

444 It did so more decisively than the Reishsgericht. The latter had noticed however that the indirect agent might suffer his own losses, although they were not typical of the contract in question. Lange 279-283.

445 As in the division between primary and secondary obligations in English and Scots law.

446 See Berg Jus 1977, 365, on Reinhardt. The creditor is the possessor of the legally protected good.

447 Since a person other than the creditor is entitled to the economic value of the performance, it is reasonable that he should be entitled to the compensation that substitutes the value (Lange 279, Larenz I, 372). Fairness imposes that the normally liable debtor should not escape liability because the creditor does not suffer any damages. Economic reality justifies this approach. Holhoch discussing cases of indirect agency characterises the debtor and the third party as economic partners; *Wirtschaftchen Vertragsparteien*; (Hohloch FamRZ, 1977, 531).

sanctions the realisation of private transactions, in this case by protecting the third party legitimate interests in the transaction[448].

The fact that the third party might suffer lower or higher losses than the creditor[449] could be explained by its position towards performance and its different personal circumstances[450] and does not affect the plausibility of the transfer of loss concept. The latter was duly highlighted by, among others, Lord Goff in certain House of Lords decisions[451], and determines the conception of *Drittschadensliquidation* in common law countries[452].

The transfer of loss is, of course, somewhat abstract and imprecise in its generalisation. It is based on the parties' expectations defined objectively [453] and not on the third party view. Nevertheless, it conveys a significant part of *Drittschadensliquidation's* gist, especially its practical spirit in accommodating the third party needs in a manner equitable for the defendant.

2.3.1.1.2. *Interessenverknüpfung*; union of interests.

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448 The protection of confidence in the smooth and fair operation of transactions is also a basic priority which could justify the third party protection especially since the effects of contractual relationships might be far reaching. One could recall the tendency towards models transfering the burden of restoration to insuring mechanisms. (Lange 432 et seq.)

449 See previous references.

450 Reinhardt mentioned by Selb NJW, 1964, 1768. A usual example is that of a sale with dispatch. The seller's loss is less than the price of the sale in case of destruction, if a criterion based on the cost of replacement is used. The buyer will possibly be suffering higher losses; he has higher replacement costs. The seller, in the normal course of events, suffers no losses from the destruction since he will have been paid. It is further difficult to calculate the side effects of a transaction that was not completed on the seller's or the buyer's property or professional status etc. which is a general problem of compensation -- Thiele AcP, 1967, 193-240 --. The carrier on the other hand could have hardly predicted with some certainty the negative effects of his contractual breach.

451 *Leigh and Sillvan Ltd v Aliakmon Shipping Co.* [1986] 2 All ER 145, *Henderson v. Merret Syndicates Ltd*, 1994] 3AllER 506, {1994] 3 WLR 761, and *White v. Jones* [1995] 2 WLR 187. Lord Goff refers to the relevant English language literature on the German contractual mechanisms.

452 See the works of Markesinis, Kötz, and Flemming.

453 It would be difficult to justify full compensation for the subjective value of the third party loss which is usually higher than the loss that could have been expected to be suffered (by the creditor) at the conclusion of the contract. (Thiele AcP, 1967, 193-240) The debtor in such a case would have been placed to an unfairly disadvantaged position.

Some authors[454] lay emphasis on the union of interests' (*"Interessenverknüpfung"*[455]), between the creditor and the third party, as the basis of *Drittschadensliquidation*.[456] The legitimate interests of both the creditor and the third party are aimed at the benefit (and therefore the compensation) of the third party.

This view is definitely valid for situations that resemble trust relationships[457] (*"Treuverhältnisse"*) as the property interests of the creditor (trustee) are similar to those of the third party (trust beneficiary). In indirect agency a union of interests would exist if it is possible to infer that the agent is liable to compensate the principal. From there on, this linking of interests is weaker and should be interpreted generously. It is uncertain in the sale with dispatch (or any case of compulsory transfer of risk)[458] and doubtful when transfer of possession is involved. If this linking of interests were overstretched, it would become meaningless. Even if broadly understood, it cannot reflect the basic drive in *Drittschadensliquidation* to countermand the inefficiency of compensation law and offer a balanced solution to third party loss.

2.3.1.1.3. Agreement.

According to some views the essence of *Drittschadensliquidation* is that it has been agreed, consented to[459]. This is arguably an expression of the need to justify the mechanism

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454 Esser-Schmidt, 179 et seq., mentioned by Selb NJW, 1964, 1765, Lange 282, Markesinis *A Comparative Introduction*, 353, refering to the fowl pest case (BGHZ 51,91, NJW 1969, 269, JZ, 1969, 287).

455 According to the translation made by Markesinis *A Comparative Introduction*. A litteral translation of *'Interessenverknüpfung'* could be the combination, linking, associating, connecting interests.

456 The *'Interessenverknüpfung'* criterion has been used by the courts as evidence of the reasons justifying the acceptance of *Drittschadensliquidation*. See Lorenz JZ, 1960, 108. The criterion has been contemplated in the fowl-pest case. BGHZ 51,91, NJW 1969, 269, JZ, 1969, 287.

457 See Selb NJW, 1964, 1765.

458 Special contractual provisions would be required. In sales by dispatch the seller is released from liability by the delivery to the carrier. The latter in not contractually liable to the purchaser for the destruction of the things. It is not likely to infer a union of interests therefore.

459 See Lorenz JZ, 1960, 110, Selb NJW, 1964, 1770, Markesinis *A Comparative Introduction* 74-76, Lange referring to the case where refridgerated meat was destroyed, 279 et seq.

or particular decisions on a less controversial basis and evidence of the idea that *Drittschadensliquidation* is contractual. The reaction to the concept of a "voluntary assumption of responsibility", much in use in Commonwealth and Scots case law to justify the acceptance of pure economic loss claims[460], could be similar.

However, the view is improbable for the majority of the *Drittshadensliquidation* cases. It is unlikely that the debtor would have facilitated a compensation claim in such a manner[461], especially since the interests of the creditor and the third party are not similar. The debtor's consent reflects the fact that *Drittschadensliquidation* is usually related to the debtor's potential at least, knowledge of the third party involvement[462]. This might be easier to support when the debtor is employed in a professional capacity but not in indirect agency cases.

For the sake of certainty in law and in order to limit or, at least, clearly define judicial authority, such pretextual constructions are objectionable and so is any related judicial tendency[463]. The effect of such a view would be the blurring of the distinction between *Drittschadensliquidation* cases and contracts of insurance or guarantee and, potentially, the expansion of the debtor's liability beyond predictable limits[464], itself an

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460 See under "Third party pure economic loss: Contractual approaches" in Chapter 5 on Scots law.

461 A contract for the benefit of third parties (§328 BGB) has traditionally been accepted only when it was expressly made. An implied agreement would be accepted on concrete evidence. See later the relative discussion with regard to the contract with protective effects *vis-á-vis* third parties. Moreover, the relationships where *Drittschadensliquidation* occurs vary as regards proximity between the parties and the third party, reliance towards the debtor and the existence of common interests. Such differentiations cannot be blanketted over by a inventing an agreement.

462 See Thiele AcP, 1967, 193-240. See also Lorenz JZ, 1960, 108 et seq.

463 See the critique to the concept of "voluntary assumption of responsibility" under "Third party pure economic loss: Contractual approaches" in Chapter 5 on Scots law, which however centered on the allegation that the tort-contract relationship is distorted and not on the results from the use of the concept. The fact is that the concept was the single most important basis in awarding damages for third party pure economic loss. See in the same unit the critique on the concept of reliance as a legitimising reason to award damages. As said if the test of foreseeable reliance was taken seriously then the prudent expert should either keep silent altogether or speak after disclaiming liability (Feldthussen *Economic Negligence* 43). Reliance was a 'slippery concept' (Stapleton 107, 1991, LQR 283) used to justify decisions taken on other bases, easy to find in some only of pure economic loss cases.

464 See Selb NJW , 1964, 1771.

excessive intrusion in individual freedom[465]. Such a possibility is not compatible with the restorative purpose of compensation.

This focus on agreement, apart from confirming the reception of the mechanism as contractual, raises the point that, after all, civil liability is imposed in any case; in contract due to individual will sanctioned by law[466]. Consent in this case, it could be argued, is rather what the law imposes that the parties' arrangement should have included[467], in the manner that legislation, for instance, intervenes in individual freedom in numerous occasions. The judges could be seen as searching for a peg in law on which to impose what they consider as the socially and economically optimal decision. The idea of consent seems less fictitious if a general principle, such as good faith, is used for the interpretation of the parties' will and as a legitimising basis to impose a solution.

2.3.1.1.4. Conclusion.

It seems, therefore, that the 'transfer of loss' (or risks) concept[468] reflects better than the other concepts the basic characteristics of the cases and the purposes of *Drittschadensliquidation*.

The concept might seem imprecise[469], but this is inevitable as it is a generalisation, and it seems improbable that a single standard for third party loss could be

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465 This aspect is stressed by Lorenz JZ, 1960, 108 et seq.

466 As is mentioned under "Third party pure economic loss: Contractual approaches" in Chapter 5, "No one is liable because he wishes to be liable but rather because he ought to be liable." (Oughton 1, 1995, *Contemporary Issues in Law* 35). Liability is imposed in any case.

467 Lorenz seems to suggest that inferring an agreement is the result of a relative presumption in the interpretation of the contract. Lorenz JZ, 1960, 108 et seq. This view is evidence of the fact that Lorenz thought that the mechanism is compulsory or imposed a delict.

468 The concept was developed by lawyers in order to depict the different situations of *Drittschadensliquidation*. See Grunsky on §249 BGB, 362, Larenz I, 371.

469 Similarly imprecise are various concepts of compensation law; the subjective value of property damages or the very concept of damages for instance. See Larenz I, 346 et seq. There is similarly a discussion over concepts such as obligations in a wider sense or obligations arising out of social contract, that could refer to obligations without basic performance or with duties owed to a wider circle of people for example, that all lack a clearly or undisputedly defined content.

found. Its focus is basically right. It places the transfer in the context of the contract[470]. The debtor's contractual fault[471] bridges this transposition between the person injured in his contractual rights and the person suffering the loss[472]; this, along with the fact that the third party was not responsible for the loss[473], justifies compensation.

A transfer of loss is not a mere transfer of a compensation amount. This would be possible under §281 BGB (on the delivery of a substitute in case of impossibility of performance for which the debtor is not responsible), or §812 BGB (on unjust enrichment)[474]. *Drittschadensliquidation* does not depend upon these articles; it provides the legal reason for the application of §281 BGB and can further be taken to be a precondition for §812 BGB. Moreover, a discrepancy between the compensation and the value of loss is possible with any compensation claim. (The contract operates as a higher ceiling limiting the liability of the debtor.)

Whether a single concept can reflect the nature of *Drittschadensliquidation* or not, what is important is the mechanism's expansion of contractual limits[475]. *Drittschadensliquidation* is a contractual mechanism, the effectiveness and usefulness of

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470 The loss which is experienced as deriving from the contractual relationship. The effects of the violation of the latter are extended to the third person. The latter is in such a position in relation to the obligation and/or to its parties so as to suffer the loss in the context of the violation of the contract. It seems reasonable therefore to have this compensation claim regulated as provided for in the voluntary relationship.

471 Meaning personal liability as understood or functions in the context of a contract; whether, that is, the liability is fault-based or stricter (objective) etc. It can be argued that the exact character of liability towards third parties transcends the divisions between different expressions of personal liability, meaning the culpable and the objective.

472 As said before essential is the distinction between the person that is injured in his legal, contractual rights or interests and the person that actually suffers the damage (Lange 279). The reasons for this distinction could vary. Usually the third person will be the holder of the economic value involved in the performance of the contractual obligation. This notice is generally valid and consistent in the sense that it can highlight cases where a particular (legal) bond between the creditor and the third person can be identified.

The debtor is liable as if the creditor has been injured. (This point is repeatedly emphasised upon on *Drittschadensliquidation* cases.). The damages the debtor would have to pay to the creditor are transferred, from the point of view of the creditor at least, to another recipient.

473 Or, at least, the third party is not responsible for the full extent of the loss, meaning that his attitude might have led to the increase in the volume of the loss.

474 See the references to Hagen later in the text, and Selb, NJW, 1964, 1772.

475 The varying opinions on *Drittschadensliquidation* evidence its potential to this direction.

which cannot be doubted. This is duly reflected in the theoretical attempts to explain the mechanism.

2.3.1.2. Two questions - Similar institutions.

2.3.1.2.1. *Drittschadensliquidation* and insurance.

Drittschadensliquidation transfers the loss to the wrongdoer while insurance provisions transfer the loss to someone else. As *Drittschadensliquidation* redresses a specific allocation of risks and reallocates them, so does insurance law. However, unlike *Drittschadensliquidation*, insurance provisions cover the loss irrespectively of whether someone else is liable for compensation and do not necessarily imply the wrongdoer's release from liability. The purpose of *Drittschadensliquidation* is to render the debtor liable towards third parties while that of insurance is to protect the defender. The very allocation of risks redressed by *Drittschadensliquidation* 'insures' the defender from the duty to compensate the third party[476]. The calculation of damages is based on the contract in *Drittschadensliquidation*[477] while in insurance it depends on the insurance policy (it could, for instance, cover losses in part only). However, in *Drittschadensliquidation* there could be valid contractual limitation clauses. *Drittschadensliquidation* is based on superior principles of law and not on a contractual arrangement; it seems that its aims, function and context of operation differ from those of insurance law[478]. The similarities are rather

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476 This is especially evident in the case of a sale with dispatch. The transfer of risk 'insures' the seller against the dangers involved in transportation. The allocation functions so as to secure the seller against loss. Selb NJW, 1964, 1768, and Peters JZ, 1977, 119.

477 Damages are based on the value of the liability to perform. See Berg Jus, 1977, 365, on Reinhardt. The injured is characterised as *"Inhaber der Leistungsinteresse"*; 'owner'/'proprietor' -- holder -- of the performance interest.

478 Another case where insurance would seem incompatible with *Drittschadensliquidation* is the mitigation of compensation by the adjustment of benefits received *(Vorteilungsausgleichung)*. The *Vorteilungsausgleichung;* the *compensatio lucri cum damno*, is the basic means for the mitigation of the compensation for damages. The benefits the injured enjoyed due to the injuring fact should be calculated in the amount of compensation he asks. Cohn notes (Cohn 108.) that the*Vorteilausgleighung*, according to which the profit must be deducted from the damage in order to assess the compensation that is payable, is not stated in general terms in the code but it is universally recognised. The institution is by far not settled; there are diverging opinions as regards the benefits that should be taken into account. It is a rather complicated subject in insurance law, and it is doubtful whether it can concern cases of the institution in question. See Peters AcP, 1980,

superficial and noticing these similarities is an implied way to indicate that *Drittschadensliquidation* might not be necessary.

2.3.1.2.2. *Regreß.*

Another line of arguments highlight the resemblance between *Drittschadensliquidation* and recourse[479] (*"Regreß"*[480]) concerning the calculation of compensation; it is made on the basis of the claim of the person injured in law[481]. It is questionable whether there is enough ground for a comprehensive parallelism between the two[482]. *Regreß* claims are, most of the time, justified easily on the basis of the existence of a close relationship such as that between the employer and his employee, or of a contract of services as between a bank and its client[483]. Such relationships have been studied extensively and have often enjoyed legislative treatment. *Drittschadensliquidation* does not necessarily depend upon the existence of such a close relationship. *Regreß* does not concern, as *Drittschadensliquidation* does, the extension of the defendant's liability.

Drittschadensliquidation seems to have a more eloquent role to play involving balancing competing interests, while *Regreß* is applied in a rather mechanical manner. Through *Drittschadensliquidation* inequalities are corrected and allocated risks are redistributed[484]. The resemblance in the calculation of damages conceals their

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329-389. See Berg's Rechtswörterbuch p.1275, and Lange 298. See also the references to Tägert, (from Tägert *"Die Geltendmachung des Drittschadens"*, 1938) and Reinhardt in Selb NJW, 1964, 1768.

479 Peters AcP, 1980, 329-389.

480 Berg's Rechtwörterbuch, 900. See Lange 416, and Larenz I, 441, "Regreßansprüche".

481 In a resent case recourse of the carrier to the sub-carrier for damages the sender had sufferred was considered to be limited to the extent the carrier is liable to the sender. BGH 14.11.1991, NJW 1992, p.1698.

482 Larenz I, 441-443.

483 In Berg's Rechtswörterbuch for example such are the situations of*Haftung des Beamten,* (liability of civil servants) ,*Scheckregreß,* (recourse on a cheque), *Wechselregreß* (recourse on a bill of xchange or promissory note). 900.

484 The idea that the party violating a contract should not evade liability as this would be contrary to fairness and the need to provide adequate compensation for the injured party are central. The restoration of the damage is supported by economic reasoning. Fairness in transactions would be violated if the debtor was to enjoy the benefits of a third party suffering the damage. Economic rationality, predictability and stability of transactions are expressed through the requirements of fairness and good faith, and impose the distributive function of the *Drittschadensliquidation* mechanism. See on this

differences[485], the calculation of compensation itself being a delicate task[486], for which *Drittschadensliquidation* seems better qualified.

As with insurance, noticing the similarities between *Regreß* and *Drittschadensliquidation* bears an implication against the latter's utility. It is however a specialised mechanism not fully covered by existing provisions, and not replaceable by these even if, occasionally, their outcome is similar. This view is shared by the judiciary.

2.4. Theoretical considerations.

The doctrinal basis and definition of *Drittschadensliquidation* have been the object of considerable debate in Germany[487]. Theoreticians concentrated on related issues of compensation law[488], especially the causal link between contractual violation and the loss. A basic question concerns the legitimacy of the exception to relativity.

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distributive function *Readings in the Economics of Contract Law*, 1989, (Fuller and Perdue eds) "The reliance interest in contractual damages", Fuller and Perdue p.77, and "The choice of remedy for breach of contract", Bishop, p.122.

485 In any case compensation case law to the extent that it focuses on the debtor presents similarities to delictual or other legislation-based liabilities. The aim as regards compensation is to counterbalance, making even the loss (a somewhat abstruct tranlation of *Ausgleichsgedanke*) and is based in the prevailing view on interests of the injured party. See Larenz I, 344, outlining the doctrine of subjective value of compensation.

486 A number of factors must be taken into account. The actual amount of compensation might differ from the value of the particular damages in accordance to the evaluations and priorities of the legislature. (Larenz I, 342 et seq.) The degree of culpability or the causality links between the reason (event) causing loss and the loss are likely to exercise some impact on the recognition of compensationable losses. Other considerations involving major legal principles such as equity or fairness or requirements of legal predictability that could impose limits on the possible amount of damages the debtor has to pay as well as on the circle of persons to whom he is liable. (See Larenz I, 411 et seq. for factors limitting the amount of compensation.).

487 Berg Jus1977, 365. See Larenz I, 346 et seq., who makes a reference to the common use of *Drittschadensliquidation* and to the approach in the law.

488 In order to offer a brief update, the basic, prevailing view for the calculation of property losses is *Differenztheorie* the theory of difference, according to which the property of the party before the occurrence of the damage is compared to the property after the event of damage, in order to infer the damage a persons property suffered. (See Larenz I, 384, et seq and the relative clause in Berg's Wörterbuch). What is generally compensated is the subjective value of the loss; the value as calculated under the perspective of the injured party. (Larenz I, 385-389. Thiele AcP, 1967, 193-240.). The *"gemeiner Wert"* (the objective value), is only exceptionally the measure of compensation. (Thiele AcP, 1967, 193-240, Larenz I, 386.). As discussed, Thiele considers *Drittschadensliqidation* as one of the cases where the objective value is paid. (Thiele AcP, 1967, 193-240).

2.4.1. Until 1971: Focus on unlawfulness.

Reinhardt[489] laid emphasis on the violation of the contractual duty owed to the contracting party. The duty to compensate is a result of this violation. In order to overcome the doctrine that the creditor can transfer damages that he himself suffered[490], Reinhardt promoted the concept of the 'objective determination of interests'[491]. The latter are defined by the violated duties. Focusing on the theories of unlawfulness as regards the establishment of liability[492], he thought that the unlawfulness of the debtor's behaviour[493] was the basis of the mechanism, loss being the deprivation from enjoying the protected good. The existence of the latter is guaranteed by the violated provision.

Wilburg[494] after 1971 expressed similar views. Loss has to be restored, transcending the relativity limitations, if it has an objective correlation to unlawfulness[495]. In the case of a contract the question would be whether the particular third party interests were protected by the duties undertaken[496].

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489 Reinhardt *"Der Ersatz des Drittschadens"*, 1933. See the references in Selb NJW, 1964, 1766, Lorenz JZ, 1960, 108, Lange 275, and Reimer-Schmidt on §§249-253 BGB, 933.

490 The *'Dogma von Gläubigerinteresse'*,based on the creditor's loss and focusing on the subjective value of loss as regards the calculation of compensation. Berg Jus 1977, 365.

491 *'sachliche Fixierung des Interesses'* ('objective definition of interests'). The *"Prinzip der gegenständlichen Fixierung der Ersatzfähigen Interessen"* ('principle of the objective definition of compensationable interests'), was used to countermand the *"Dogma von Gläubigerinteresse"* . Berg Jus, 1977, 365.

492 As the *Rechtswidrikeitzusammenhang* (interrelation/link of unlawfulness) approach on causality for instance (Lange 275). Similar views are often expressed with respect to the liability to compensate. Reinhardt thought that it was decisive whether the protective purpose of the violated duty was directed towards the aquisition or preservation of a particular legally protected good, under particular conditions. See Lange, Berg Jus, 1977, 365, Selb NJW, 1964, 1766. See Larenz I, 357, on the protective purpose of the norm establishing liability.

493 Other, non contractual, interests of the contracting party that might have been affected do not influence the establishment of the mechanism. Reimer-Schmidt on §§249-253 BGB, 933.

494 Wilburg "Zur Lehre von der Vorteiausgleichung ", *Jherings Jahrbücher für die Dogmatic des Bürgerlichen Rechts*, 1982,126. See references in Lange 273, Larenz I, 386.

495 *'sachliche Rechtswidrikeitzusammenhang'* -- 'objective unlawfulness link'. Lange 273.

496 As in the case of a delict it would be decisive to examine whether the purpose of the violated behavioural norm included the protection of the third party interests.

These opinions, it was argued, could lead to a considerable extension of the liability boundaries. Lange[497] notes that neither Reinhardt nor Wilburg state that the violated norm should describe the loss as loss of the creditor. If the norm protects the third party specifically, the distinction between contractual and delictual liability is blurred at the expense of certainty. However, this will have little effect on the amount of compensation.

The views of these authors should be seen in their context in time. These ideas demonstrated a difficulty to comprehend the contractual expansion as a current phenomenon in civil liability and applied a delictual logic[498].

Tägert[499] thinks that the problem stems from the discrepancy between the person injured in law and the person who actually suffered the loss and focuses on the violation of a legal bond. As other writers, he thinks §281 BGB offers the justification for the duty to compensate third party losses[500]. However, a duty to compensate is a prerequisite of §281 BGB. The creditor can claim compensation for the third party even if the debtor has substituted the violated performance[501]. There is no explanation of the link between the third party loss and the creditor's right to compensation. The mere violation of the debtor's contractual duties is not enough to allow a third party loss claim under §281 BGB.

Other authors, following judicial views, focused on inferring a duty to compensate[502] from the violated contract. Heillwig[503], for example, laid emphasis on the

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497 Lange 274.

498 Reinhardt for instance expected that challenging the *'Dogma von Gläubigerinteresse'*, would lead to revolutionary changes in the system of liability. He based his approach on the interpretation of §249 BGB which however refers to the requirements of a compensation claim and not to the persons entitled to claim damages. Berg Jus, 1977, 365.

499 See the references in Reimer-Schmidt on §§249-253 BGB, 934, Lange 283, Selb NJW, 1964, 1766.

500 Tägert *Die Geldendmachung des Drittschadens*, 1938. See Selb NJW, 1964, 1766, Lorenz JZ, 1960, 108.

501 The creditor's right to ask for the payment of compensation for the third party loss does not derive from his right to ask for a substitute of performance which he can transfer to the third party.

502 This was deemed necessary as often no particular relationship between the creditor and the third party could be traced.

503 See the reference in Lorenz JZ, 1960, 108.

interpretation of the contract in question[504], i.e. whether the protection of third parties fell within its protective scope or not[505].

Lorenz[506] observed that there was no need for a special examination of the agreement in a number of cases such as sale with dispatch, as they have been treated in the legislation or there is a long established practice of third party protection.

In sum, the usefulness of *Drittschadensliquidation* in the system of civil liability is generally acknowledged, in this first phase[507]. By focusing on a fault basis of liability[508], the relative views could not reach a complete appraisal of the mechanism and were limited to underlining delict-like criteria or the shaky ground of hypothetical agreements. Theoretical approaches, similar to those described above, were developed at the earlier stages of the interpretation of the contract with protective effects *vis-á-vis* third parties[509] as well.

2.4.2. Second phase; after 1971.

During this phase, Hagen[510] takes the most critical stance[511] towards mechanisms expanding contractual liability. Noticing that the differentiation between the various

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504 He thought that *Drittschadensliquidation* was allowed when it is considered as having been specifically agreed by the parties or when such should be the interpretation of the contract by virtue of the specific transactions' morals and in the light of the particular circumstances. He noticed that a number of decisions concentrated on the agreement between the creditor and the debtor. In the leading case of the damage to refrigerated meat. *Drittschadensliquidation* was considered as agreed, on the basis of an interpretation of the contract for works in accordance to §157 BGB. RGZ 170, 246. See Lange 280.

505 See also Reimer-Schmidton §§249-253 BGB, 933.

506 Lorenz JZ, 1960, 111.

507 Reimer-Schmidt on §§249-253 BGB, 933.

508 See Lorenz JZ, 1960, 108.

509 Stoll already from 1936 discusses on duties of trust and/or confidence which he inferred from the duty to perform. Lorenz considers the construction of protection interests on the basis of compementary interpretation of the contract. Dölle bases the introduction of protection duties on the social contact involved. Wahl examines the parties will in comparison to tendencies to expand the application of contract law. See Lorenz JZ, 1960, 108.

510 Hagen *Die Drittschadensliquidation im Wandel des Rechtsdogmatic* 1971. See the references in Lange 288-289, Larenz I, 374, Schmidt JZ, 1972, 607. He is also attemping a broader comparison with other developments in civil liability

511 He attempts a critical analysis of the institution as it can be found in the particular judicially developed categories where it is applied. Hagen takes a different perspective in comparison to previous authors, who, by and large, tried to justify the development of

situations of damage has doctrinal and practical consequences[512], he alleges that the previous theoretical approaches are inconsistent and complex[513]. In an attempt to reduce this complexity[514], he acknowledges the usefulness of *Drittschadensliquidation* for indirect agency cases on the basis of a customary rule[515]. In these cases the mechanism is supported by well-established case law. From an economic point of view the third party (undisclosed principal) and the creditor (undisclosed representative) could be deemed as one party in economic and social terms. The exclusion of the undisclosed principal from the contract's ambit would be economically and morally unjustified.

Hagen takes a different view of cases involving compulsory transfer of risk[516] on the basis of the concept of objective minimum damage[517] that is present in any contractual violation. The creditor, injured in his legal rights, suffers minimum damage irrespective of whether he continues to have an interest in the performance[518]. However, by focusing on the injury to legal rights, he ignores the economic value vested in the particular transaction which resulted in loss that exceeds the loss the person injured in law has suffered. The creditor's objective minimum damages do not include the value of performance[519]. Hagen generally takes a doctrinally unrealistic view of the question of losses and compensation,

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Drittschadensliquidation and of the contract with protective effects *vis-á-vis* third parties, with the aim among others to expand their application.

512 Peters AcP, 1980, 332.

513 His work actually relies heavily on criticizing the weaknesses of other authors' works.

514 See Schmidt JZ, 1972, 607.

515 Berg Jus, 1977, 365. He notes that the indirect agent does not contract on his account but for his undisclosed principal serving the latter's interests. According to § 164 BGB, a declaration in the name of a principal within the scope of his agency can produce effects for the pricnipal if the declaration was made expressly in the principal's name or if circumstances indicate indicate that it has to be made in the principal's name.

516 As in §447 BGB, on sales with dispatch, §644 II, BGB on the contract for works, §275BGB on vicarious liability.

517 See Schmidt JZ, 1972, 607,and Larenz I, 374.

518 In the case of sale with dispatch, the creditor of the carriage contract, owner of the thing sold, is protected since property rights are always protected without consideration of the subsequent losses to third persons.

519 There should be no confusion with the fact that in *Drittschadensliquidation* it is the objective value of performance that is compensated. This is noticed by Wilburg. See Larenz I, 385, and 342 on the subjective value of damages.

focusing on the creditor's property in the thing dispatched, property which he might not still have or for which he might have been compensated.

Hagen doubts the mechanism's credibility. Noticing that the allocation of risks concerns the parties to the contract only, he argues that it lacks the capacity to deal with issues such as the mitigation of damages[520]. However, apart from the fact that the latter is treacherous ground[521], a *Drittschadensliquidation* claim is one which the creditor would have[522]. The third party is not involved in either the contractual allocation of risks or the mitigation of damages.

Cases involving duties of care were treated as obsolete[523] by Hagen, covered to a considerable extent by the contract with protective effects *vis-á-vis* third parties. Instead, Hagen suggested the teleological extension of §991II BGB, effecting the co-responsibility of those in possession[524], which would seem to establish a new real right in violation of the principle of the closed number of real rights in the BGB. Moreover, as said, this solution would possibly enable third party protection in different circumstances than those in the case law. Such protection would be more restricted and, more importantly, the solution

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520 *Vorteilausgleichung*'s(adjustment/compensation of damages by benefits received; mitigation of damages by benefits received (Berg's Rechtswörterbuch, 1275). It is the *compensatio lucri cum damno* of Roman law. He thinks that the mechanism cannot cope with the complexities of mitigation underlining that not all advantages correspond to a reduction of losses and lead to the diminution of damages.

521 There have been other opinions trying to relate conceptually the two mechanisms (*Vorteilausgleichung* and *Drittschadensliquidation* -- see Larenz I, 362) It was noted that only the advantages that correspond to the purpose of the liability for the losses should be taken into account (Larenz I, 17.). The calculation can be applied only as regards the creditor to the contract. Any opinion on *Vorteilausgleichung* is risky however as there are substantial differences in the opinions on the institution.

522 Hagen uses a pseudo-dilemma noting that from the point of view of an observer the debtor is liable to compensate the third party although normally he would be liable to compensate his contractual creditor.

523 See Schmidt JZ, 1972, 607 and Larenz I, 374.

524 This extention would cover duties of protection and preservation of the think in question (Lange 288-289.)

provides little for the debtor's protection[525]. The teleological extension of §991(II) BGB is finally harder to achieve than the extension of contractual duties[526].

The value of Hagen's critique cannot be denied. He led the way towards reconsidering third party loss and relativity. His observations and arguments enriched the academic debate[527]. He shares with other authors the view that a contractual arrangement for the transfer of risk, similar to the provisions in the BGB, should not be treated in the same manner as in the BGB[528].

Hagen's views were criticised[529] as unjustified and excessive, offering no real alternative to the third party loss. Using the objective value of performance as the standard for compensation was necessary, mainly for reasons of equity for the debtor, and in the light of the complexity of calculation. It is also indicated because limiting the creditor's claim to the 'objective minimum damages' might itself lead to an unfair restriction of compensation[530].

As regards the extension[531] of §991II BGB, despite its potential usefulness[532], it was noted[533] that the relative provisions (§§987 et seq BGB)[534] concern unlawful

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525 The debtor is burdened with duties of care even if he did not know who the owner was and even if the duties of care were not profound. In order to be protected if §991(II) BGB is applied, it was suggested that §851 BGB should be applied by analogy against all the claims of the owner -- not only delictual ones that is. Lange 291.

526 Hagen's solution was also deemed unnecessary as there were other means for protection. Schmidt JZ, 1972, 607.

527 The academic consideration of the issue developed, in part at least as a response to his work. See Berg Jus, 1977, 363.

528 Lange 287, Larenz I, 372.

529 It was at an early stage that his views had been criticised. See Schmidt JZ, 1972, 607. The most ardent critic was Berg, (Berg Jus, 1977, 363.).

530 The risk of the debtor is thus minimised and the injured party is in a disadvantaged position. Lange 288. The same applies with limiting the claim to the subjective value of performance since this will possibly be lower for the creditor -- the seller for instance. This is evident if the criterion of the cost of replacement is used as the measure for compensation

531 The rationale of expansion is that the possessor has violated duties of behaviour and that he should not acquire any benefits from the fact that the creditor is not the legally protected owner.

532 As §§1011, 1065, 1227, 1007, BGB, Lange 290.

533 In view of the origin of §991II BGB, from property law, it was generally observed that the circle of the protected persons will not be the same with the situations where a duty of care is inferred. Lange 291.

534 The purpose of the relative property law provisions (§987 BGB et seq.) is to protect the good faith possessor, who is not the owner, from subsequent claims by the owner. Such a

possession and damage to the thing[535] and not loss consequent to these events. The prerequisites render the extension suggested unlikely, while the possible outcome would constitute an inflexible approach, in contrast to *Drittschadensliquidation*. Rather the BGB encourages contractual solutions[536].

In Berg's[537] view, in *Drittschadensliquidation* there has been an identifiable, in economic terms, transfer of interests between the creditor and the third party which does not exist in contract law and is not accompanied by a transfer of the legitimate concerns of the creditor. The mechanism is justified because the legal issues raised after the transfer of interests cannot be tackled due to a failure of the law to take account of this transfer. Although the transposition of interests is permitted by law it is not completed with a transfer of the legal entitlements associated to these interests[538]. The debtor's behaviour is legally objectionable and the causal link between the behaviour and the loss is easy to establish. The defaulting debtor should not benefit from this transposition of interests. Berg recalls §843IV BGB (the claim is not barred by the fact that another person has to furnish maintenance to the injured party) to support this view[539].

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protection is meaningful when it is included in the rights to possess and obtain the benefits from the thing against a third person who is an unlawful possessor.

535 The claim of the creditor-owner concerns damages to the thing. According to §989 BGB, the possessor is liable to the owner from the day an action was filed, if as a consequence of his fault the thing deteriorates, or is destroyed, or cannot be surrendered for another reason. §991II BGB, determines that the possessor in good faith is liable to the owner from the day of acquisition to the extent he is liable to the indirect possessor.The claim does not include the following and related damages that the *Drittschadensliquidation*'s mechanism is concerned with (Berg Jus, 1977, 366). The prerequisites of protection are different. The possessor (trustee) is holding the thing legally against the owner. Berg Jus, 1977, 366. The protection is different in *rei vindicatio* (§ 987 BGB) from those where a duty of care is involved.

536 As argued by Peters, contrary to Hagen's views, the contractual solutions were encouraged by the BGB, on the basis of general (§157 BGB, § 242 BGB) or special (§ 701 BGB, § 703 BGB -- on hoteliers' liability, Berg Jus, 1977, 366) provisions. Peters AcP, 1980, 362.

537 Berg Jus, 1977, p. 366.

538 Especially those related to the violation of a performance duty, namely a duty to compensate.

539 The courts had actually underlined that the injurer should not be benefited from the inner transposition of interests as can be inferred from §843IV BGB. See BGHZ, 54, 269, in NJW, 70, 2071, Berg Jus, 1977, 366. The injurer cannot claim that another person has to compensate the injured party in order to consider that the latter suffered no damage. The third person can therefore ask compensation for injury which he did not suffer himself. Drees, B. on §843 IV BGB, 2275.

Berg notes that the transfer of interests and its consequences operates between the parties involved[540]. The creditor, claiming compensation for the third party loss, should include in his claim the restoration of his own losses (if any). They will be redistributed through his relation to the third party[541]. He also raises the issue of a responsive, flexible and economically rational system of civil liability -- an expression of which is the protection of third parties. Berg, finally, thinks that *Drittschadensliquidation* is one case where the adjustment of benefits is excluded[542]. The compensation should be calculated as if the injured party and the creditor had been one person[543].

2.4.3. Conclusion.

In sum, the usefulness of *Drittschadensliquidation* is not generally doubted. Academics also acknowledge the contractual character of *Drittschadensliquidation*, even if the justification they offer sometimes resembles delict. Liability is generally considered to be founded in law, as illustrated by the emphasis on the debtor's unlawfulness[544].

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540 Berg Jus, 1977, 366.

541 The commission of the indirect agent is deducted from the amount he would normally -- in the case the contract had been fulfilled -- have to give to his mandator (the principal). See Berg Jus, 1977, 363, and §399 HGB.

542 Berg Jus, 1977, 366.

543 Berg Jus, 1977, 366. The debtor should not be burdened more than if the if the claimant had been his creditor.

544 It is significant to notice the tendency to establish liability on the rule of law, on the law's definition of protected interests and description of unlawful behaviour. In terms or juridical views one could argue about the prevalence of the theory of the purpose of law (normzwecktheorie) inspired ideas focusing on a 'link of unlawfulness'(*Rechtswidrigkeitzusammenhang*). (See Larenz I, 357 et seq., Grunsky on §249 BGB 350. Larenz identifies *Rechtswidrigkeitzusammenhang*, as an expression of the approaches that focus on the protective scope of the rule of law.). The infelicities of the liability system are often not considered to be entrenched in the system but rather as results of the interpretation/utilisation of the existing provisions.

Academic opinion, emerging basically after the 1930's[545] along with considerations of the protective duties and the overall transformation of contract law[546], justify the mechanism as corrective of the infelicities of civil liability[547]. Academic opinion supports and reinforces the drive of the courts and would possibly endorse legislative intervention. The relative considerations are part of broader assessments on civil liability and compensation law, whereby contractual duties are expanding and the third party position is strengthened.

General equity principles, especially §242 BGB, are used as a basis of *Drittschadensliquidation*. They are the optimal means available to the courts to perform a delicate balancing of interests.

Drittschadensliquidation seems to be a suitable solution when the third party has an interest in the performance. Hagen leads the opposition to this idea, offering different alternatives for individual cases. However, the fact that third party loss of this kind can occur in an endless variety of situations and evidence from the development of *Drittschadensliquidation* point to the need for a mechanism of general application[548]. His views do not necessarily revoke the mechanism's rationale, which has been confirmed by its comparison to other mechanisms[549].

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545 Such views acquire special impetus in the third decade of this century almost simultaneously with the decline of the Weimar Republic, after twelve years of political freedom and legal developments that followed the prevalence of socially oriented ideas. Reinhardt writes *Der Ersatz des Drittschadens* (focusing on *Drittschadensliquidation*) in 1933, and Stoll writes *Die Lehre von den Leistungsstörungen*, a work promoting the *Vertrag mit Schutzwirkung für Dritte* in 1936.

546 This protection involves further connotations. It is not only correcting injustices, but also counterbalancing undesired economic consequences as redistributing unfairly acquired benefits. See the ideas of Reinhardt and Wilburg with respect to the problem of injured interests; see Lange 275.

547 Academic opinions seek to reinforce the daring attempts of the courts to expand contractual limits, in the same manner as academic views would support a legislative intervention. This is true especially for the first phase. Berg Jus, 1977, 365. The theoreticians' ideas are part of broader constructions which involve reforming liability and compensation law .

548 Hagen's arguments are expressions of a general tendency to promote the newer and more specialised means in the place of mechanisms of general application.

549 The courts might simply have to consider extending the application of *Regreß* or *Vorteilausgleichung* to different circumstances for instance. It is more certain to apply the open-ended *Dritschadensliquidation* mechanism.

In conclusion, the courts responded with this mechanism to the absence of protection for third parties and their daring spirit should be appreciated. *Drittschadensliquidation* can be applied in a wide-range of situations, and in such cases offers the most convincing answers .

3. The contract with protective effect *vis-à-vis* third parties.

3.1. Introduction.

The second major mechanism developed in German case law for the protection of third parties is the contract with protective effects *vis-à-vis* third parties[550].

The mechanism involves situations where third parties are injured due to a violation of secondary protective duties. As discussed, protective duties aim to preserve personal and property interests. Thus they defend an existing state of affairs and are not related to the fulfilment of the contract's purpose[551].

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550 This is the term used by Markesinis, and the most popular in English terminology. (Markesinis 103 (1987) LQR 354-397). In the text the mechanism will be often referred to as contract with protective effects. Literally it is the contract with protective effects for third parties*Vertrag mit Schutzwirkung für Dritte,* as referred to by Larenz who introduced the term. (Larenz K."Anmerkung an BGH 25.4.1956-VI ZR 34/55 (Düsseldorf)," NJW 1956 1193.). It also appears as contract with protective effects in favour of third parties -*Vertrag mit Schutzwirkung zugunsten Dritter,* in "Inhalt des Schuldverhaltnisses-Leistungsstörungen", by Emmerich in *Grundlagen des Vertrags- und Schuldrechts - Vahlens Rechtbücher Reile Zivilrecht Band 1.*, 279. See for general reference Westerman on §328 BGB, 814, Gottwald on §328 BGB, 1024, Reimer-Schmidt on § 328 BGB, 1112, Heinrichs on §328 BGB, 355, Ballhaus on § 328 BGB , Larenz I, 185 et seq., Canaris, Claus-Wilhelm "Ansprüche wegen "positiver Vertragsverletzung" und Schutzwirkung für Dritte" bei nichtigen Verträgen", JZ, 1965 pp. 475-482, Lorenz JZ, 1960, 108, Gernhuber JZ, 1962, 553-558, and "Drittwirkungen im Schuldverhältnis", 249-274. Henckel, Wolfram "Vorbeugender Rechtschutz im Zivilrecht, AcP 174 (1974), p.98. See also Bydlinski, Franz "Vertragliche Sorgfaltspflichten zugunsten Dritter", *Juristische Blätter* 1960 p.539, Böhmer, Emil D. "Gläubiger Schuldner und Dritte", *Monatschrift für Deutsches Recht* 1963 p.96, and "Die Hereinnahme Dritter in der "Schutzbereich" eines Vertrags-eine Fehlkontruktion", *Monatschrift für Deutsches Recht* 1962, p.345, Medicus, Dieter "Durchblick: Drittbeziehung im Schuldverhältnis", JZ, 1974 p.613, Strauch Dieter "Verträge mit Drittschutzwirkung", JZ, 982 p.823, Sonnenschein "Der Vertrag mit Schutzwirkung für Dritte-und immer neue Fragen", *Juristische Arbeitsblätter,* 1979 p.226.

551 They could emerge at a precontractual and post-contractual stage as well. Gerhardt "Die Haftungsfreizeichnung innerlalb des gesetzlichen Schutzverhältnisse", JZ 1960 535

The third parties' connection to the creditor places them under the potential effect of the debtor-creditor relationship, exposing them to risks of loss[552]. The third parties in these cases have no right and (possibly) no interest in the contractual performance but are injured from the violation of these protective duties[553] in a manner similar to the creditor (being in a comparable position). They are therefore allowed to ask compensation from the debtor directly.

The reasons for the development of this mechanism are not different from those that led to the creation of *Drittschadensliquidation*[554]. The third party interests that were affected seem worthy of protection for reasons of fairness and economic rationality[555]. A contractual solution, provided relativity was side-stepped, seemed necessary or at least preferable, since the debtor's behaviour is contractually wrong but might not fall within the scope of any particular delict[556].

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552 Gernhuber speaks more generally of the social effects of the obligational relationship (*Sozialwirkung des Schuldverhältnisses*); Gernhuber Joachim "Drittwirkungen im Schuldverhältnis kraft Leistungsnähe; Zur Lehre von den Verträgen mit Schutzwirkung für Dritte." in *Festschrift für Arthur Nikisch*, 1958, p.250.

553 Such are the duties to inform on the way the sold machine operates, or on risks that might be related to the leased house, or duties to take protective measures during the execution of works or safeguard the third party's legitimate interests to the preservation of his personal and financial situation.

554 See Gottwald on § 328 BGB 1024, Sonnenschein "Der Vertrag mit Schutzwirkung für Dritte-und immer neue Fragen", *Juristische Arbeitsblätter*, 1979 226.

555 The third party might have been injured in a manner similar to the creditor, or might have no other means to seek compensation. Gottwald on § 328 BGB, 1025. See Gerhuber who notes that our sense, feeling of justice reacts not only against absolute unfairness but also relative unfairness, which might be considerably harsh ("Drittwirkungen im Schuldverhältnis" 250)

556 Especially §§823 (I), and 831BGB. Moreover, the allocation of the burden of proof in delict is disadvantageous for the claimant. A presumption of fault exists in contractual liability and the claimant does not need to provide evidence for the existence of the intentional element required in order to establish liability. The defendant has to contradict the claimant's arguments. Contract law provisions on liability for *"legal representatives and persons employed in performing [an] obligation"*; agents and employees, (§278 BGB) and limitation periods (§§ 192-195 BGB) present considerable advantages for third party protection in relation to their law of delict counterparts (§§831, and 852 BGB respectively). See Gernhuber "Drittwirkungen im Schuldverhältnis" 252-253, on the comparison between contractual and delictual claims.). (As regards the phrase in inverted commas, it is taken from the *The German Civil Code*. It is hoped the phrase "agents and employees" which was suggested by my supervisor Professor Gretton will suffice for the expression of the relative concept.)

The contract with protective effects represents a departure from relativity. It has been recently established[557], in 1959 according to the prevailing view[558], although similar questions had been discussed by judges and academics after the introduction of the BGB in 1900. Academic opinion favouring the mechanism exerted significant influence in its handling by the courts[559], that went through different phases.

Considerable dispute has arisen over the proper doctrinal basis and justification of the contract with protective effects, such questions being central to German legal discourse[560]. The basic issues lawyers focused on were the mechanism's dependency upon the existence of a particular contract and its expansion from bodily injuries to property losses. Broader civil liability questions arose, involving judicial innovation and the use of general BGB clauses to establish liability[561].

In advance it can be said, that in many instances the third party is protected on the basis of this mechanism although there is alternative protection on the basis of a claim against the creditor of the violated contract[562]. The advantages contract-based claims present for the claimant and the advocate's tactics[563] play a role in this development[564].

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557 As will be seen, pure economic loss became a major issue in common law jurisdictions (and Scots law) basically in the present century, and is related historically related to the gradual formulation of the tort of negligence. See under "Third party pure economic loss", in Chapter 5 on Scots law.

558 With the Capuzol 22 case; BGH, 15.5.1959-VI ZR 109/58 (Braunschweig) in NJW 1959, 1676.

559 See the reasoning in the above decision and the references made therein.

560 The acceptance, development, vitality and usefulness of a legal concept relies greatly on its explanation. See Markesinis on the influence German academic theory has on the application of the law by the courts, in "A matter of style", 110 (1994) LQR, 607, comparing English, German, and American judicial styles. Theoreticians are referred to in German decisions far more often than in their British counterparts.

561 The mechanism is usually examined in parallel to the question of contractual exclusion or limitation of liability which is valid towards third parties. See Gernhuber JZ, 1962 553-558.

562 As in cases where an employee is injured from a defective tool which his employer bought and the employee is not suing the employer but the tool seller.

563 A claim against the person to whom the injured party is contractually related, might be rejected. The person against whom the claim is made might quite possibly be in a better financial position. Contractors, for example, often become bankrupt.

564 As a result of the doctrine *jura novit curia* (the court knows the law), the claimant is not, in principle, obliged to refer to the legal basis of his claim; the court is entitled to search for the proper basis of a claim for compensation. In practice law suits (or other legal documents) contain more than one different bases of a claim. Often auxiliary, or alternative

So do judicial preferences, as, among other things, on the contract with protective effects the workload of the courts is limited[565].

The contract with protective effects was first established on the basis of §328 BGB, as a form of a contract for the benefit of third parties. It has evolved acquiring doctrinal independence as a distinct mechanism based on BGB equity clauses (especially §242 BGB). The most popular theoretical approach highlights that it is justified beyond statutory provisions but within the law (*extra legem-intra jus.*)[566].

3.2. Initial stage.

The gradual formulation of the contract with protective effects commenced after the introduction of the BGB in 1900[567]. In a 1907 case[568] a company which had contracted with a travel agent for an excursion of its personnel, sued the agent in contract for the injuries certain employees suffered in a traffic accident[569].

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claims are made for the case the basic one is rejected. The courts can therefore choose among a variety of possible bases for providing compensation.

565 See generally on German civil procedure "Law of Civil Procedure" Cohn 162 et seq.

566 See the references to Kümmeth in Strauch JuS 1982 823. As will be seen, the same view is taken by Larenz speaking on "*Gesetzübersteigende Rechtsfortbildung*". See *Methodenlehre* 380.

567 At this initial stage the protection of the third party was more a question for the application of § 328 BGB in situations where secondary duties had been violated.

568 This reference (OLG Hambourg 18.10.1907; Recht 1907 3469) was found in Kefalas (see the chapter on Greek law) p.73. There are nevertheless cases of the same period as one on the liability of a carrier, liable towards the owner of the things carried who was not his contracting party (RG 16.5.1906; RGZ 63 308 and a similar case in 1918; RG 3.1.1918; RGZ 92 8); See Blaurock "Haftungsfreizeichnung zugunsten Dritter. Die Ausdehnung vetraglicher Haftunsregelungen aud Dritte" ZHR 146 (1982) p.238. Another early decision found the carrier liable for injuries sustained by the child of his contracting party when the steamship was mooring (RG recht 24 Nr 161; in Heinrichs on § 328 BGB 355.). See also Gottwald on § 328 BGB, 1020, footnote 140.

569 Two vehicles were used. Some of the employees who were on one of the vehicles were injured in an accident which was caused culpably by the driver. The passengers could not establish a compensation claim against the travel agency on the contract of carriage because they were not parties to that contract. It seemed, furthermore, difficult to infer a contract in the favour of third parties (§ 328 BGB). It had been the steady policy of the German courts to apply § 328 BGB only as regards performance duties and when the benefit favouring a third party was expressly provided for. (See Strauch JZ 1982 823, Gottwald on §328 BGB, 1020, Larenz "Anmerkung an BGH 25.4.1956-VI ZR 34/55 (Düsseldorf)," NJW 1956 1193.). In this case the performance duty had been fulfilled but duties of protection and care had been violated.*Drittschadensliquidation* was not applicable because the loss suffered had not been the result of the violation of the basic duty but of the violation of the duty of care of the debtor (travel agency), towards the creditor (company).

The appellate court, reversed the decision of the court of first instance, and contrary to the previous law, acknowledged that the contact of carriage had been concluded in favour of all personnel and ordered the compensation of the injured employees. Such contracts (§328 BGB) had until then been considered as referring to performance duties only[570].

In a number of other cases, the RG (Reichsgericht) recognised the right of a third party, not a performance beneficiary, to ask for compensation for losses suffered due to the violation of secondary, protective duties as in lease contracts, contracts for carriage, for medical treatment and contracts for works or for services[571].

Thus, a contract of employment produced protective effects based on a debtor's duty of care towards the child the employee was bringing with him in the work place[572]. A contract for the sale of equipment created protective duties owed by the seller to the employees of the buyer[573]. A child had a claim for compensation based on the assumption that he was entitled to a duty of care derived from the contract for his medical treatment that his legal representative (father) had concluded[574]. A contract between the hospital and an insurance scheme gave rise to a claim against the hospital by the insured patient who was injured following a doctor's mistake during an operation[575]. A hotelier was under a duty to prevent injury that extended to all the participants to a social function. (The function's organiser had leased the hotel's hall)[576]. The relatives of the person who contracted for the carriage were found to have a claim for compensation for injuries they

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570 The court based its decision on §§305 BGB (on the creation of an obligation by a contract), 241 BGB (on the content of the creditor's right "to claim performance"), 278 BGB (on the liability of the contracting party for the persons he employs), and 328 BGB.

571 Strauch JuS 1982 823.

572 RG JW 19 820; Westerman on §328 BGB 821.

573 RG 164 397; Westerman on §328 BGB 821.

574 RG 152 179; Heinrichs on §328 BGB 355, Westerman on §328 BGB 821. See later under "Contracts for medical treatment".

575 RG 165 91; Heinrichs on §328 BGB 356, Westerman on §328 BGB 821. See also Eberhardt "Zivilrecht and Socialrecht in der Beziehung von Kassenartzt und Kassen patient" in AcP 171 (1971) 289, referring especially to third parties problems.

576 RG 160 53; Heinrichs on §328 BGB 356, Westerman on §328 BGB 822, Gottwald on §328 BGB, 1037.

suffered during carriage[577]. However, the wife injured in a car accident caused negligently by the carrier who had contracted with her husband had a claim for the compensation of her personal injuries but not of her husband's death[578]. A promise for a donation to the son-in-law produced protective effect in favour of the daughter[579], and a contract between the parents and a private school gave the child a compensation claim[580]. Contracts for works protected the contracting parties' relatives and employees who, because of the kind and duration of their relationship to the creditor, found themselves at risk due to the mistakenly performed works. A cleaning lady had a claim for the injury she suffered because of the faulty installation of a gas meter, an installation for which her employer had contracted[581]. A contract by which a bank guaranteed a dividend could have protective effects towards the bank's customers who were shareholders[582]. Finally, a contract for the provision of services (*Dienstverschaffungvertrag*), produced protective effects for the employees of the services contractor[583].

The approach by the RG became gradually somewhat settled. A more consistent view was said to be hallmarked by a decision which held the landlord liable to compensate the daughter of the lessee who was infected by tuberculosis because the landlord had not decontaminated the house when the previous lessee who suffered from the disease left[584]. In sum, during that period significant progress was made towards the protection of third parties.

3.3. Doctrinal basis.

577 RG 87 65; Westermanon §328 BGB 821.
578 RG HRR 53 342; Reimer-Schmidt on §328 BGB, 1120.
579 RG 67 204; Westerman on §328 BGB 820.
580 RG 127 223; Heinrichs on §328 BGB 357, Westerman on §328 BGB 822.
581 RG 127 224; Heinrichs on §328 BGB 357.
582 RG 147 46;.Westermanon §328 BGB 822.
583 RG 164 399; Westerman on §328 BGB 820.
584 RZ 91 21; Heinrichs on §328 BGB 356, Gottwald on §328 BGB 1036.

At that initial stage, in their attempt *"to pin their views on some article of the code"*[585], the courts based the extension of the protective effect on the concept and function of the contract for the benefit of a third party (§328 BGB)[586]. They accepted the creation of special protective duties benefiting third parties, although §328 BGB clearly referred to performance[587].

The prevailing tendency in the RG was to construe the contract in a supplementary manner, filling the gaps (*lacunae*) by resorting to the *"so called hypothetical will of the parties"*[588]. The courts completed the contract as the parties would have, had they considered third party injuries.

In their approach the courts were guided by the interpretation provisions of the BGB; §§133 and especially 157 BGB[589]. Extensive references were made to the purpose (*Zweck)* of the contract -- in accordance to §328(2) BGB -- and to the principle of good faith (§242 BGB), in order to reinforce the validity[590] of the conclusions drawn. The direct claim was the logical consequence of accepting a 'real' contract[591] for the benefit of third parties[592].

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585 Markesinis 103 (1987) LQR, 367. This is a basic drive of German courts and German lawyers in general.

586 Gottwald on §328 BGB 1024. See also Sonnenschein *Juristische Arbeitsblätter,* 1979 226.

587 The performance of a contract will be made to a third party who can obtain the right to claim this performance by the promisor (§ 330 BGB). In the cases in question, to the contrary, the third party is not entitled to the performance and is not necessarily benefited by the performance. See on the contract for the benefit of a third party Heilman "Der Vertrag zugunsten Dritter-und ein schuldrechtiche Verfügungsgeschäft", NJW 1968 1853, and Lange "Die Auswirkung von Leistungsstuorungen beim echten Vertage zugunsten Dritter im rechtsbereich des Dritten", NJW 1965 657.

588 Linder "Law of Contract" in *Business Transactions in Germany* 1992, Rüster Bernard (general editor). This concerned situations for which no provision was made in the contract. The supplementary construction seems to involve an interpretating approach which goes beyond the discovery of the "implied terms" in a contract. In practice though there must not be considerable difference in view of the constraints on the supplementary construction from the expressed intentions of the parties.

589 §133 BGB imposes the search for the true intentions of a declaration of intentions according to their literal meaning, and under §157 contracts should be interpreted in accordance to the requirements of good faith giving consideration to the common usage of the expressions.

590 Sonnenschein *Juristische Arbeitsblätter,* 1979, 226.

591 As said, the contracts for the benefit of third parties are divided to 'real'/'pure' and 'not real'/'impure' ones, (*echte* and *unechte*). German lawyers have named "pure" the contracts for the benefit of third parties which give the third party the right to claim the

The reference to §328 BGB is an appeal to the autonomy of the will and freedom of contract principles[593]. The courts laid emphasis on the fact that, not contrary to these values, but because of and by virtue of these values the protection of the third party was possible. The courts thus achieved the protection of third parties, making clear their policy choices, without departing from basic doctrines.

However, as will be examined at length later, this basis attracted severe and well-grounded criticism. Supplementary construction is not meant to violate the autonomy of the parties' will; it cannot reach conclusions contrary to their intent[594], yet this seems to have happened in these cases. The courts were naturally reserved towards protecting third party interests at that stage. Under obligational relativity only the parties could extend the effects of a contract. §328 BGB was therefore the most reasonable basis[595] as the BGB primary example of a third party can deriving rights from a contract between others.

3.4. The BGH view.

Initially, the BGH followed the approach of the RG, extending the protection to the third party on the basis of §328 BGB[596]. The tendency was reconfirmed in 1954[597] and

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fulfilment of the obligation directly from the promisor. The terminology is used in order to give an indication of the German legal undertanding in the area.

592 As discussed before only these contracts give the right to the beneficiary to claim directly from the promisor. See Zunft "Wie ist das Vorliegen eines echten vertrages zugunsten dritter mit Schutzwirkung für Dritte festzustellen", *Monatschrift für Deutsches Recht*, 1960, 543.

593 Gottwald on §328 BGB 1025.

594 Ludwig "Law of Contract" in *Business Transactions in Germany*, 1992, Rüster (general editor), 1992.

595 It had been used for the basis of *Drittschadensliquidation* at its first stages. Gernhuber characterises the case law as crafty, because the courts managed to find a solution under pressure from their sense of justice on the one hand and from doctrinal principles (especially the relativity principle) on the other (251).

596 Sonnenschein *Juristische Arbeitsblätter*, 1979 226,

597 BGH 24.2.1954; NJW 1954, 874. A building firm contracted for works with the lessee of a building. The owner had agreed for the performance of these works. When a wall, the stability of which the firm had omitted to examine, collapsed, the owner was allowed to claim compensation from the firm. The decision inferred an agreement in favour of the owner as regards a duty of care although he was not a contracting party. It was considered that in the building contract the secondary duties of care were meant to benefit the owner. Interpreting the contract on the basis of §157 BGB, in the light of §242 BGB, and of the provision on the liability for agents and employees (§278 BGB), the court considered that each of the parties entrusted their contracting party not only for the execution of the basic

1956[598], in cases calling upon §§157 and 242 BGB for the construction of a contract in favour of a third party (§328 BGB). The latter decision gave the initiative for a powerful critique by Larenz[599] which contributed considerably to the change in the law.

The mechanism was presented as distinct from §328 BGB for the first time with the *Capuzol 22* case in 1959[600]. In this decision the court first accepted, in part at least, the mature academic critique and suggestions[601], and altered the basis of the mechanism, turning away from the intentions of the parties, to the general requirement of the legal order for good faith in transactions.

3.5. The *Capuzol* 22 decision[602].

The case concerned a suit by a worker[603] who was injured using anticorrosive material ordered by his company (employer), from the defendant producer. The latter

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duties but also for the realisation of the secondary duties of care. The latter duties were extended to the third parties who were in such a position in relation to the contract that their well-being was affected by the violation of the protection duties.

598 BGH 25.4.1956-VI ZR 34/55 (Düsseldorf); NJW 1956, 1193. The case involved the sale of an operationally safe transmission disc for a threshing machine. It was held that the seller was under a duty to protect, with information, guidance. etc., not only his contracting party but also the latter's employees. They were entitled to compensation for injuries caused by the operation of the machine. The seller was liable to compensate because in accordance with good faith and the purpose of the contract he should have recognised that, not only the buyer of the disc, but also other people were likely to be affected by the operation of the disc and should have given his consent to protect their interests also. Gernhuber notes that the object of the sale plays an important role in the case of sale of machinery, considering that they are somehow special not representative situations (Gernhuber "Drittwirkungen im Schuldverhältnis", 259). Although there was no express agreement the court inferred that the debtor should have expected to be exposed to the claims for compensation of a wider circle of persons. The decision relied on §328 BGB assuming that it can apply as far as secondary non performance duties are concerned. Gernhuber thinks that case law gave at that stage a new dimension to the contract for the benefit of third parties. It was not possible to foresee how far would the courts go in the development of the case law. A decision of the higher court would not be conclusive of the direction of the case law. (Gernhuber "Drittwirkungen im Schuldverhältnis", 260).

599 Larenz "Anmerkung an BGH 25.4.1956-VI ZR 34/55 (Düsseldorf)," NJW 1956 1193. See also Zirkel's reply in "Anmerkung an BGH 25.4.1956-VI ZR 34/55 (Düsseldorf),", NJW 1956 1675.

600 BGH 15.5.1959, VI-ZK 109/58 (Braunschweig); NJW 1959 1676.

601 The decision was outstandingly responsive to academic comments. It was greatly influence by Larenz's views and adopted partly his suggestions on the justification of the institution. Extensive references were made to other academic opinions as well.

602 BGH 15.5.1959, VI-ZK 109/58 (Braunschweig); NJW 1959 1676.

603 The worker was employed in a metallurgical industry.

delivered a new product (the Capuzol 22), instead of the usual one, failing to warn on its flammability and violating relative labelling provisions[604]. When the worker used the material, it caught fire followed by an explosion that resulted in her suffering serious burns on the face and hands. The claim against the producer was preferred to a claim against the employer[605] possibly for reasons of advocate tactics.

The Federal Court of Appeal, referring to concurring case law[606], accepted the compensation claim of the worker against the producing company. The producer was under a contractual duty to inform his contracting party on the flammability of the product. The contract of sale created protective effects in favour of the worker.

The innovation of the decision laid in the fact that it abandoned the contract in favour of third parties as the basis of the mechanism[607] and justified the extension of the protective effect on the provision of good faith (§242 BGB). The decision was thus consistent with the legal explanation of protective duties that are violated here, since good faith is their legal basis[608]. The debtor owed these protective duties towards certain third persons as well.

The reference to good faith was based on the observation that the third party came in contact with the contract via her relation to the creditor who himself suffered losses from the producer's violation of the protective duties. The creditor is responsible for the "better or worse"[609] of his employees and has an interest that duties of care from the sales contract are not violated[610].

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604 The new material was flammable under particular conditions in the workplace, but the producer failed to warn the purchaser of this special risk. The producer did not attach to the product special labels informing on the flammability, as he was obliged to do (from special legislation on labeling independently of any contract).

605 The employer is liable for the safety of his employees on the basis of §618 BGB.

606 For instance, BGH 25.4.1956-VI ZR 34/55 (Düsseldorf); NJW 1956, 1193 and to a case of a work's contract for the building of a garage which created duties to compensate the members of the owner's family who were injured.

607 The relative provisions were taken into account in order to reinforce the decision's argumentation but not as the basis of the mechanism.

608 Larenz I, 185. See also Canaris JZ, 1965 475-482,

609 *"Wohl und Wehe"*. The expression "better or worse" is borrowed from Markesinis (Markesinis 103 (1987) LQR, 367). An alternative way to translate the German term would be "loss or profit", but it is doubtful whether it would apply in situations where for instance family relations or bodily harm are involved. The purpose of the concept is to underline the

The debtor's liability was established on the (potential at least) knowledge of the employer's responsibility and interest for third party protection. Defining the circle of the protected persons so as not to extend this liability excessively, was a major concern of the decision. It was highlighted that the third parties form a limited circle, identifiable by the debtor[611]. The court tried to delimit this circle on the grounds of the objectively recognisable concern the creditor must demonstrate. This concern was based on the employer's duty of care towards his employees (§618 BGB[612]). The packaging department worker was involved in business activities that could create the risks defined in the statute.

Gernhuber's view[613] that third party participation in the contractual relationship should be permitted when the performance-related risks affect the third party equally seriously as the creditor, was referred to as evidence of the creditor's interests and in order to delimit the circle of protected third parties[614]. It is doubtful whether the worker was exposed to danger in a manner similar to the proprietor of the business. However, the employee should not derive fewer rights than the entrepreneur as regards the risks involved in the sale of the anticorrosive. Gernhuber's view[615] of third party protection based on customary law attracted some attention, an indication of the need to explain protection on another basis than contractual interpretation, but the question of a customary law basis was left open.

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seriousness of the link between the creditor and the third party and especially the liability of the creditor for the third party's position. The *"Wohl und Wehe"* should not be taken as corresponding necessarily to the integrity interests (*Erhaltugnsinteresse*) of the third party which are protected by the application of the secondary duties of care and protection.

610 BGH 15.5.1959, VI-ZK 109/58 (Braunschweig); NJW 1959 1677.

611 BGH 15.5.1959, VI-ZK 109/58 (Braunschweig); NJW 1959 1677.

612 §618 (I) BGB, referes to the duty of the employer, to equip the working place so as to protect the life and health of the employees, and §619(3) BGB imposes the application of the provisions of the law of delict to the employer's duty to make compensation.

613 Gernhuber JZ, 1962 553-558, and "Drittwirkung im Schuldverhältnis", 249-274. See also Strauch JuS 1982 825.

614 Gernhuber's suggestion that a wider circle of persons with a position similar to the creditor should participate in every obligational relationship was not discussed further, as the claim had already been accepted.

615 See Gernhuber JZ, 1962 553-558.

The decision paved the way for employing §242 BGB as the legal basis of the mechanism. The construction was a clear example of judicial law making[616] supplementing the parties' will[617]. However, supplementary interpretation of the contract was not required for a mechanism that derived its force from a provision which cannot be side-stepped by the will of the parties.

3.6. Special features.

3.6.1. Liability for physical injuries, property damage and economic loss[618].

As mentioned before, the contract with protective effect for third parties was established gradually. Even after *Capuzol* 22 the courts were often less daring in resorting to the mechanism. A basic question involved the range of cases the mechanism would cover. It was initially applied to cases where non-property interests were injured. Compensation was permitted for bodily injuries alone[619]. Such cases continue to be of considerable importance[620].

The courts felt that the extension of contractual liability to third parties would be undisputed if based on facts or relationships of considerable legal or moral gravity such as those involving bodily harm. Moreover, bodily injury cannot be the object of reasonable risk in transactions and cannot be the object of exclusion/limitation clauses. The emphasis of liability in tort on personal and material damages has plagued the reaction to pure

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616 See "Richterrecht"in *German Law and Legal System* 1992, by Foster, 54, and Gottwald on §328 BGB 1025.

617 Gottwald on §328 BGB 1025. See also Larenz I, 185.

618 The term is placed here for the purposes of facilitating comparative understanding. In principle there is no doctrinal difference between kinds of damage in German law.

619 See Gottwald on §328 BGB 1029.

620 Gernhuber, supporting the existence of customary law for the third party protection grounded his examples on cases of bodily injury. Gernhuber JZ, 1962, 553-558.

There is evidence from older and newer decisions on the continuing significance of bodily harm cases. Such are the cases of the worker using the threshing machine (BGH 25.4.56-VI ZR 34/55 (Düsseldorf); NJW 1956, 1193), the child who slipped on vegetables while visiting a store with her mother (OLG Koblenz 30.3.65; NJW 1965, 2347), the member of a society whose compensation claim was accepted for the violation of security measures by the lessor of a function hall (BGH 23.6.65; NJW 1965, 1757.), the three year old who was injured when a door collapsed in a stable where his father was employed (BGH 13.2.75 (Hamburg); NJW 1975 867).

economic loss in common law systems[621]. Cases of personal injury facilitated the justification of the contract with protective effects[622]. Legislation allows a direct claim in similar delict cases. Moreover, it is possible that limiting the mechanism to cases of bodily harm was considered as setting a sufficient barrier to the uncontrollable expansion of the circle of protected people. The courts, accordingly, require a *'personal law character'* relationship[623] between the creditor and the third party to establish the former's interest for the latter's protection.

Courts, and to some extent academic lawyers, concentrated on physical injury cases neglecting property loss, for no doctrinal reason. In a somewhat peculiar contention, third party property losses (including economic loss) were considered to fall in the exclusive domain of *Drittschadensliquidation*[624], a tendency followed by both the RG and the BGH (to a far lesser extent).

To illustrate[625], the court rejected the claim of the owner of a piece of land, injured from pipe laying operations on a neighbouring property. The owner was not closely related to the employer in the works' contract (for instance by a family or employment relationship). As argued, accepting the claim would have broadened the circle of protected persons excessively.

There was considerable criticism of this attitude. Zirkel[626] noted rightly that there is no justification for such a view in law since the BGB makes no conceptual

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621 See Markesinis 103 LQR (1987), 354, and Markesinis and Deakin 55 (1992) MLR 633. Pure financial loss. it is argued continues to be evaluated as of lesser importance compared to material harm something which comes at odds with modern social and economic circumstances.

622 See Berg Jus 1977, 363.

623 The phrase; "personal law character" is borrowed from the expression by Markesinis in 103 LQR (1987), 367, and it refers to the *"personliche"*; persona, element of the relationship in question which exists in the German jurisprudence.

624 §701 BGB, for instance, was thought as a classic example of *Drittschadensliquidation*.. § 701 BGB refers to the liability of the inkeeper *"...to make good the damage which a guest accommodated in the course of business suffers through the loss, destruction or damage of things brought into the premises",The German Civil Code,*. Berg Jus 1977, 365.

625 BGHZ 33 247, NJW 1961 211.

626 Zirkel "Anmerkung an BGH 25.4.1956-VI ZR 34/55 (Düsseldorf)", NJW 1956 p.1675.

differentiation between compensation for property/financial and for personal injuries[627]. The requirement of a personal link between creditor and third party could be satisfied when the third party's property interests were at stake, as when things which belong to a third person are destroyed in a leased building, or when a stolen vehicle is damaged during repairs. Third party loss is usually property loss.

The courts started to revise their previous attitude and allow claims for property losses, usually involving damage to specific items, starting with claims by owners of movables placed in leased premises against lessors, hoteliers or warehousemen[628].

Cases involving damage to the property as a whole or to the claimant's future financial position were less frequent. In 1965 the Appellate Court of Düsseldorf[629] accepted the claim of a landowner against the building contractor who had been hired by a neighbouring landowner to repair a middle wall. The claim was for the additional expenses the plaintiff would have to undergo for the erection of a building on his property, because the ground was unstable since the defendant had used debris and refuse to fill bomb craters. The court focused on good faith requirements in the building works; the foundations should suffice for both buildings. The contractor should have worked keeping in mind the needs of the neighbour for the future erection of a building. The court referred to the relevant building regulations that reinforced its arguments. The decision was (fairly)

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627 Bydlinski notes that the same apply to the Austrian law § 1295 (1): *"A person is entitled to demand identification for the damage from a person causing an injury by his fault; the damage may have been caused either by the violation of a contractual duty or without regard to a contract", "The General Civil Code of Austria"*. See Bydlinski *Juristische Blätter* 1960 539

628 The protection from a contract with a hotel extended to a third party the owner of the items which were stolen from the creditor's car in the hotel garage (BGH 29.1.69-I ZR 18/67 (Frankfurt); NJW 1969, 789). The owner of things the lessee has placed in his business had a claim against the landlord on the basis of the lease for the destruction of these items (BGHZ 49 350; NJW 1968 885. See also Berg "Anmerkung an BGH 22.1.68-VIII ZR 199/65 (Hamburg)"; NJW 1968, 1325.). Similarly the owner of merchandise placed in a leased warehouse had a claim on the basis of the lease for damage caused by water leaking from the water-pipes (BGH 17.12.1969-VIII ZR 52/68, OLG Frankfurt/M, JZ 1970 375).

629 OLG Düsseldorf, 9.12 64-9 U 172/63; NJW 1965 p.539.

criticised[630], but for present purposes it is worth noticing that the third party loss was compensated.

Other situations involving deterioration of the third party financial position occur in the context of contracts for services by advocates, property valuators (officially appointed sworn experts), and auditors[631].

Advocates were held liable to prospective heirs for carelessly failing to draft a testament[632], to the children of a divorced couple because the divorce agreement was not valid[633], to future lessees because, due to the delay in sending a notice of termination of lease, they had to bear additional costs for temporary accommodation[634].

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630 See the comment by Hobes, in NJW 1965 540, ("Anmerkung an OLG Düsseldorf 9.12.64"). It was considered that the existence of a middle, common wall did not suffice to justify the protection and care duties (as a family relationship for exmple). The building contractor should be held liable for the protection duties his undertaking involved. He could not have predicted for example the kind of building the neighbour intended to build. The building could be meant to have particularly deep basement or be exceptionally high. Some reservations could be expressed in favour of the liability of the building contractor on the bases of the building regulations and his professional status

631 See for instance Grunewald AcP 187 (1987) 285-308, Ebke JZ 1990 p.1688, (Literature review), Zimmerman FamRZ 1980, 99, Hopt AcP 183 (1983) 608-722.

632 BGH 6.7.1965-VI ZR 47/64 (OLG Hamburg); JZ 1966 141. See Lonerz "Anmerkung an BGH 6.7.1965-VI ZR 47/64 (OLG Hammburg)"; JZ 1966 142. The advocate was held liable when a testator died, without having realised his will to leave as sole heir his daughter (the claimant) and his granddaughter, from another child, as legatee of a property item. Due to the advocate's lack of care (postponement of consequent appointments) a testament was not drafted and the claimant was not named sole heir. The decision protected the future, expected financial situation of the plaintiff. The decision was criticised. Medicus (Medicus JuS, 1974 613) considers that the case did not involve the defective execution of the service contract (by not fulfiling protection duties), but the non execution of the basic contract. The advocate's liability to the intended beneficiary for drafting a void will, or for failing to draft a will as requested, is generally accepted in common law jurisdictions and Scots law. See under "Attorney liability to non clients -- A contractual view" in Chapter 4 n American law, and under "Development and Applications" and "Recent developments" in Chapter 5, on Scot law, referring to common law approaches as well.

633 BGH 11.1 1977-VI ZR 261/75 (Bamberg); NJW 1977, 2073. The defendant was the advocate of the plaintiff's father. In January 1972 the plaintiff's father and mother signed a divorce agreement drawn up by the defendant. After the divorce decree was granted in February 1972 the mother refused to transfer her interest in the property to the plaintiff and his siblings as provided in the divorce agreement. The plaintiff claimed damages for breach of the defendant's duty as an attorney. The LG rejected and the OLG accepted the claim. The defendant's appeal was dismissed. The BGH noted that it was not a problem to accept that there was a contract with protective effects in this case as the plaintiff was the son of the attorney's client and was entitled to care and protection from him. According to the divorce agreement the children were the sole beneficiaries, and the only people to suffer if the agreement proved invalid. A stingest test should be applied in order to allow a claim for damages to the third parties. In this case the direct claim was justified as the children were named in the contract and were represented by the attorney's client. The

The liability of a property valuator and an auditor towards prospective investors and financiers respectively for inaccurate reports[635] was rejected on the facts but liability for pure economic loss was not rejected in principle[636].

It is generally admitted that third party physical injury, material-property damage and pure economic loss alike can be compensated on a contractual basis[637]. The BGB makes no distinction between kinds of losses[638]. Damages for economic loss might be more limited and harder to prove in relation to other forms of loss[639]. However, there is no differentiation in law over its compensability.

BGH thought that in this case *Drittschadensliquidation* could be applied as well as it would have been proper for the client to idemnify his son for the loss he had suffered. The court did not pursue the matter further. See Markesinis *A Comparative Introduction*, 1990, 230, for a detailed translation.

634 LG München I 1.12.1982-25 O 4596/82; NJW 1983 1621. Due to his mistake in sending a notice of termination of a lease contract the termination delayed and the plaintiff and his family had to lease another flat temporarily and to pay increased removal costs.

635 In, BGH 2.11.1983-IV a ZR 20/82 (Nürnberg); NJW 1984, 355, an officially appointed sworn expert made a report on the value of some piece of immovable property, at the request of a trader. The expert failed to observe housing restrictions in the area, and gave an overestimated report. The plaintiff, an investor who participated in the first contact with the valuer, relied on the report, and, intending to build housing, he received a loan from a bank, which he had to rescind. The plaintiff claimed that the valuer owed him a duty of care as to the accuracy of the report, and he asked compensation. His claim was denied because the valuer could not be held responsible to an infinite number of prospective buyers who might have different investment purposes. However, the possibility of being liable for damages to the property as a whole was not excluded.

In BGH 19.3 1986-IV a ZR 127/84; JZ 1986, 1111, an auditor was asked by a business enterprise to prepare a report on its creditworthiness. The enterprise was intending to apply for a loan from a bank. The bank gave a maintenance loan on the basis of the report and received a land charge as security. When, subsequently, after the business's bankruptcy the bank tried to promote the existing building plans with the receiver (*Konkursverwalter*, trustee in bankruptcy), it discovered that the land was under charges which were not mentioned in the report. The claim of the credit institution was rejected. However the consideration of the contract with protective effect *vis-à-vis* third parties, did not exclude the possibility of liability for property losses. See also Ebke and Fechtup "Anmerkung an BGH 19.3 1984-IV a ZR 127/84", JZ 1986, 1112.

636 See under "Examples: Misrepresentation and product liability", in Chapter 4. Case law on liability for expert opinion in common law countries concerns usually audit or other financial reports.

637 See Gottwald on §328 BGB 1029 and Hohloch "Ersatz von Vermögensschäden Dritter aus Vertrag", FamRZ,1977, p.530.

638 The distinction in §253 BGB concerns the form of compensation; "For an injury which is not an injury to property, compensation in money may be demanded only as provided by law", *The German Civil Code*, Forrester, Goren, Ilgen.

639 Compensation claims for overall property losses might have to fulfil more demanding requirements in order to be accepted, because the connection between the injurer's behaviour and the loss is not always or easily evident. Pure economic loss claims might face stricter causality standards. See Hohloch FamRZ, 1977, 530.

3.6.2. Link to a contract.

The question here regards the dependence of the mechanism upon the contract for its justification[640]. For present purposes[641] it suffices to say that German jurisprudence considers the mechanism as contractual whether based on §328 BGB (whereby a valid contract should exist) or §242 BGB (whereby the mechanism applies to precontractual conduct and to void contracts).

3.7. Prerequisites[642].

3.7.1. Contract or precontractual relationship of confidence.[643]

3.7.1.1. Contract.

There is no limitation in principle on the type of contractual relationships which can create protective effects for third parties[644]. However, the mechanism is more easily applied with certain types of contracts or transactions due to typical characteristics[645], for example, subcontracting.

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640 See Gottwald on §328 BGB 1025, Bydlinski *Juristische Blätter* 1960, 539, and Sonnenschein *Juristische Arbeitsblätter*, 1979 226.

641 The question on the kind, quality and seriousness of the contact which would create protective effects for third parties is related to the legal basis of the mechanism, and will be dealt with later. See Canaris JZ, 1965 475-482, referring to the establishment of a relationship of reliance. See also Thiele JZ 1967 649-657.

642 The presentation of the requirements follows the view taken by Sonnenschein (Sonnenschein *Juristische Arbeitsblätter*, 1979 226.) Other authors distinguish three requirements omitting the first and the last of this structure (so does Larenz I, 185.); others ommit the first one only (Gottwald on §328 BGB 1029). See also Larenz I, 185, Gottwald on §328 BGB, 1029, Markesinis 103 (1987) LQR , 354-397, Dahm JZ 1992 1167. Gernhuber in 1958 refers to a limited number of contracts in relation to which the case law is settled. He is refering to transport contracts, contracts for medical treatment, contracts of lease for domestic purposes, contracts of services and contracts for works, and contracts of sale focusing on sale of mechanical equipment; Gernhuber "Drittwirkungen im Schuldverhältnis", 249-274.

643 The separate treatment of this category of requirements after the reference to the general problem of the link of the mechanism to a contract can be explained on the basis of the the significance of the requirements for the definition of the mechanism.

644 As is the case with the contract in favour of third parties (§328 BGB).

645 Sonnenschein *Juristische Arbeitsblätter*, 1979 226, Larenz I, 185.

The mechanism is often applied in lease contracts (the members of the lessee's domestic community -- family and domestic servants -- are protected against the lessor)[646], contracts of sale (the purchaser's lessees or employees are protected against the seller-producer)[647], contracts of services (with advocates, bankers, auditors or other experts, for medical treatment etc.)[648], and contracts for works (for building, carriage)[649].

3.7.1.2. Precontractual relationships[650].

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646 Landlords have been repeatedly held liable to show care and protection not only towards the lessee but also towards the latter's members of family and domestic servants; those that is who belong to the domestic community. (Gottwald on §328 BGB 1037) The lessor's liability might be taken to extent to guests of the lessee but not to beggars for instance. Similar is the liability of the hotelier, of the hirer of cars, and of the lessor of place where a business is established. As Gottwald on §328 BGB 1037, notes, the employees are protected but not clients, patients etc. See also Weimar NJW 1959 1860.

647 Protected persons in these cases are those who are affected by the sale being in the area of the receiving end of the sale transaction. These persons came in contact with the sale in accordance to the intented use and function of the sold item. Such cases are those referring to employees who are injured from the malfunction of bought spare parts of a machine (BGH 25.4.1956-VI ZR 34/55 (Düsseldorf); NJW 1956 1193) or materials they use in their work (BGH 15.5.1959-VI ZR 109/58 (Braunschweir); NJW 1959, 1676), to lessees who suffer losses from the lead contaminated water the landlord had bought, to family members injured from bought furniture (OLG Hammburg 1977, 137; see Sonnenschein *Juristische Arbeitsblätter,* 1979 227.). Mixed contracts of sale and lease would also produce protective effects (Sonnenschein *Juristische Arbeitsblätter,* 1979 227.)

648 Such are contracts for medical treatment (Recht RG 152 175; Westerman on §328 BGB 821), contracts with hospitals -- under certain circumstances -- (BGH 10.5.1951-III ZR 102/50 (Düsseldorf); NJW 51 596), contracts with advocates (BGH 6.7.1965-VI ZR 47/64 (OLG Hammburg); JZ 1966 141, BGH 11.1 1977-VI ZR 261/75 (Bamberg); NJW 1977 2073, LG München I 1.12.1982-25 O 4596/82; NJW 1983 1621), with bankers as for immediate payments from a client's account -- with certain limitations as to the amount -- (OLG Düsseldorf 6.5.1977-16 U 213/76; NJW 1977 1403, BGH 28.2.1977-II ZR 52/75 (Oldenburg): NJW 1977 1916, BGH 20.6.1977-II ZR 169/75 (Hamm); NJW 1977 2210), with people offering expertise advice as taxation consultants (BGH 2.11.1983-IV a ZR20/82 (Nürnberg); NJW 1984 885. See Grunewald AcP 187 (1987) 285-308), but not with auditors (BGH 19.3 1986-IV a ZR 127/84; JZ 1986 1111. See Ebke and Fechtup JZ 1986 1112.). See generally Heinrichs on §328 BGB 356 on *Dienstverschaffungsvertrag;* RG 164 399.

649 Gottwald on §328 BGB 1035.

650 A point needs to be made in advance. The cases referred to in this unit and the very subject of contractual solutions for injuries caused at a pre-contractual stage, might lead common law lawyers to think that precontractual liability exists only once a contract had been finally concluded. Otherwise, liability would profoundly be a matter for delict. However, in civil law doctrine, in theory at least, a violation of pre-contractual duties which are in most times duties owed during a negotiations' stage is considered a matter of contract law. It should be taken into account therefore that in the examples provided in this unit the conclusion of the contract is not a necessary requirement for the application of contractual mechanisms.

The mechanism applies on losses occurring at a precontractual stage[651]. In a leading case a 14-year old girl slipped on vegetables thrown on the floor, while escorting her mother in a self-service shop, and was injured. The court accepted the child's claim against the entrepreneur[652].

From the initiation of the negotiations or of any qualified contact[653], the prospective parties are bound by duties of care and protection. The protective effects of precontractual relationships were at first established on construing §328 BGB by analogy[654]. Newer opinions highlighted that behind *culpa in contrahendo* lies the evaluation of reliance[655] between the future parties[656] and that these precontractual protective duties are based on §242 BGB[657]. Since precontractual conduct can affect third parties, these protective duties should extend to them as well, independently of whether a valid contract was concluded.

A common objection is that precontractual liability falls in the domain of the law of delict[658] and the application of the contract with protective effects is an arbitrary

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651 See Dahm JZ 1992 p.1167.

652 BGHZ 66 51; JZ 1976 776 and NJW 1976 712. The court established the liability for protection on the reliance between the contracting parties. See also Kreuzer "Anmerkung an BGH 28.1.1976-VIII ZR 246/74 (OLG Koblenz)." JZ 1976, 778.

653 There could be significant dispute as to what a qualified contact is.

654 Sonnenschein *Juristische Arbeitsblätter*, 1979 227.

655 The relationship of reliance is of an 'objective nature'. Reliance is not a psychological phenomenon evidenced empirically, but a typical, objective situation. This reliance can be abstract in the sense that it can refer to a behaviour of the other party that will not injure the other's interests, but not to specific acts or omissions. (Dahm JZ 1992 1170). See the critique on the use of reliance as the legimising reason to award damages for pure economic loss. Ir was allegedly arbitrarily emphasised upon or degraded when that seemed convenient. It is easy to establish in some relationships only and generally it does not necessarily reflect the reality in transactions. See under "Third party pure economic loss: Contractual approaches" in Chapter 5, especially the reference in the footnotes.

656 See Canaris JZ, 1965, 475-482, Thiele 21 JZ 1967, 649-657, Larenz I, 185, Dahm, JZ 1992 1170.

657 More specifically the *"Gewährung und Inanspruchnahme von Vertrauen"* -- the granting and use of reliance --, that this article establishes. Dahm, JZ 1992 1170. Thus the protective effect of precontractual conduct towards third parties is well based in statute law.

658 Kreuzer JZ 1976 778. However as discussed before precontractual liability between negotiating parties is an issue of contract law.

violation of the BGB liability system. However, delictual protection is either not possible in these precontractual situations, or could coexist with contractual protection.

In one view[659], precontractual relations create duties which continue to exist and operate even after the conclusion of a valid contract. Two forms of liability coexist, one based on legislation and the other on the parties' consent. Precontractual duties cannot be changed by mutual consent, once based in statute.

The BGH took a different view[660]. Precontractual duties are replaced after the conclusion of the contract, by contractual duties of care, the contract being a complex organisation (with expanding effects) that absorbs precontractual duties[661].

Precontractual liability towards third parties might have caused difficulty to the lawyers who focus on the parties' will as well as evidence problems. The issue of the defendant's awareness of his possible contracting party's interests to protect the third party[662] is also complex. However, accepting such effects is fair and necessary for the comprehensive protection of third parties, since precontractual relationships might have repercussions for the latter in a manner similar to a contract, and there is legal treatment for *culpa in contrahendo* .

3.7.2. Third party proximity to the contractual relationship[663].

Defining the circle of those protected[664], the third party should typically be in proximity to the contractual performance through his relationship to the creditor[665]. He

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659 See for example Canaris JZ, 1965, 475-482.

660 Dahm JZ 1992 1171.

661 Precontractual duties cannot have a life of their own in view of the specific duties created by of after the conclusion of the contract. Dahm JZ 1992 1171.

662 Dahm, JZ 1992 1171.

663 A slight problem with the translation might arise in this context. "Proximity" is used in British case law in relation to the law of delict.

664 A basic concern in case law involves the delimitation and restriction of the circle of persons who might be entitled to a claim so as to keep the defendant's liability and financial exposure within reasonable limits from a legal and economic point of view, and so that the defendant will have a clear, sufficient overview of the risks he undertakes. (A narrow circle of persons is more easily and effectively surveyed. Damage is actually foreseeable and it is easier to understand the need for precautionary measures. Sonnenschein *Juristische Arbeitsblätter*, 1979 227.). This delimitation is required in order not to blur the

should be in the realm of the contractual effects in accordance to the contractual purpose and under a similar risk to the creditor's risk for defective execution[666]. The protective effect is based on this similarity of risks[667]. Arguably, this approach is similar to that taken when the concept of "voluntary assumption of responsibility" is relied upon in common law on pure economic loss cases[668].

Linked to contractual performance are members of the family of the creditor (lessee, passenger, employee etc.)[669], the domestic servants[670] the business employees[671] the members of a society for which the contract was concluded[672].

Some accidental link to the performance will not suffice[673]. The visitor in a hospital cannot be protected on the basis of the treatment contract[674]. A guest in a house

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dividing line between contract and delict, especially when the relative treatment might differ.

665 Gottwald on §328 BGB 1026.

666 The creditor and the third party share certain risks and interests,

667 Markesinis 103 (1987) LQR, 368.

668 See under "Third party ure economic loss: Contractual approaches" in Chapter 5, especially the reference in the footnotes. One of the factors prescribed in the test used in the leading American case *Biankanja v. Irving*, 49 Cal 2d 647, 320 P.2d 16 (1958), on the liability for negligent drafting of a will, was 'the closenes of the connection between the defendant's conduct and the injury suffered'. See under "Introduction" in Chapter 4, in the footnotes.

669 Thus for instance the daughter of a lessee had a claim against the landlord for not having decontaminated the house from tuberculosis (RGZ 91 21; Sonnenschein *Juristische Arbeitsblätter*, 1979, 227) the child who broke its arm while the steamship was mooring had a claim on the carriage contract his father concluded (RG Recht Nr 16; Heinrichs on §328 BGB 355) and the injured child of an employee in the defendant's pigstall had a claim on the complex relationship of employment and lease between his father and the defendant. (BGH 13.2.1975-VI ZR 92/73 (Hammburg); NJW 1975 867.)

670 As the cleaning lady injured from a wrongly installed gas meter (Gottwald on §328 BGB 1027, footnote 269)

671 For instance, the workers who were injured using a sawing machine hired by their employer that was not equipped according to the prescriptions (RGZ 98 210; Sonnenschein *Juristische Arbeitsblätter*, 1979 227), or the workers operating a threshing machine without warning on the risks the function of a spare part entailed (BGH 25.4.1956 - VI ZR 34/55 (Düsseldorf); NJW 1956 1193.).

672 A contract of lease of a hall for a function for example. (BGH 23.6.1965-VIII ZR 201/63 (Karlsruhe/Freiburg); NJW 1965 1757)

673 American courts took a similat approach in defining who were 'incidental' beneficiaries of contracts and thus not entitled to a claim against the promisor. See under 'Restatement secind (1979)" in Chapter 4. For instance the claimants were found incidental beneficiaries in the case of a plaintiff claiming the status of a third party beneficiary of oil and gas wells' leases between the defendant and the plaintiff's brother. What the plaintiff would receive would come though his brother's interest (*Martin v. Edwards*, 219 Kan 466 548 P2d 779, 1976). Similar is the result of a subcontractor claiming that he should

might be protected by the lease agreement but not beggars or pedlars. The workers using a threshing machine are protected but not the helping neighbour[675].

The third party is protected for personal injury, property damage and economic loss[676]. There is no need for the violated duty to be related to the object of performance for the criterion of proximity to be fulfilled[677].

3.7.3. Creditor's interest in the protection of the third party.

This requirement refers to a particular quality in the relationship between the creditor and the third party[678]. The creditor should have a legitimate interest in the proper execution of the contract so that the third party will not suffer loss[679]. The creditor might himself be liable towards the third party for care and protection[680], and possibly for compensation, as is the case with spouses[681], with parents towards children[682] and employers towards employees[683].

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be excempted from liability as a third party beneficiary of the building purchaser's insurance contract (*Weems v. Nanticole Homes Inc.*, 37 Md. App. 544, 378 A2d 190, 1977). An unpaid subcontractor was found to be an incidental beneficiary of the contract between the owner and the general contractor (*Port Chester Elec. Const. Co v. Atlas*, 40 NY 2d 652, 389 NY S2d 327, NE 2d 983, 1976)

674 OLG Düsseldorf 3.10.1974-8U161/73; NJW 1951 596.

675 Larenz NJW 1956 1193.

676 It is enough that his property is exposed to the risks the execution involves. Sonnenschein *Juristische Arbeitsblätter*, 1979 227.

677 JZ 1976 746.

678 See the gradual expansion of the third party beneficiary rule from creditor beneficiaries, where the promisor is discharging an obligation owed to the third party by the creditor, to cases for donee beneficiaries where the creditor's intention was merely donative. Creditor beneficiary claims have been accepted even when the creditor has a moral obligation to the third party. See under "*Lawrence v. Fox* -- Creditor beneficiaries", and "Expansion to donee beneficiaries" in Chapter 4.

679 Markesinis 103 LQR (1987), 367.

680 As said, there is no liability for persons who come in contact with the contract accidentally.

681 Involving for example the obligation to live in a conjugal community (§1353 BGB), the duty of spouses to help each other (§1356 BGB), the mutual obligation of support (§§1360-1361 BGB).

682 See BGHZ 66 51; JZ 1976 776. See §1626 BGB on parental authority §1631 BGB on the right of the parent to care, and §1638 BGB on the administration of the child's property.

683 §618III BGB.

The case law is not settled as to the seriousness of the creditor's interest. Decisions often require the existence of a relationship with a strong personal element[684] between the third party and the creditor. The parties to the contract can, of course, expressly provide for the extension of the contractual effects to third parties[685]. If the contract offers no information, the courts infer the protection and care duties of the creditor by examining whether he is responsible for the "better and the worse" of the third party[686]. This has been the least doubted criterion, although it is not enough to fit the multiplicity of the possible situations. Certain similarities can be found as with the case of the subcontractors claiming against the sureties of the main contractor, or of third party beneficiaries enforcing welfare programmes in American law[687].

The creditor's liability for third party welfare was easy to assess when the latter is socially dependent on the creditor as in family and employment relationships and in the context of family, labour, social, or lease law[688]. A requirement for a continuing relationship (*Dauernverhaltnis*) is excessive. Despite this fact, temporary workers might not be protected.

The creditor's interest is generally accepted when the third party experiencing the risks of the contract in the same or similar manner as the creditor, as for example, the family members of a lessee, or if he assists the creditor to obtain the performance or to use it

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684 A 'personal law character' relationship. Markesinis 103 LQR (1987), 367. Gottwald speaks of *"personliche Fürsorge und Obhutspflicht"* -- 'personal care and providence' (Gottwald on §328 BGB 1027), and Sonnenschein for *"ein Verhaltnis mit personenrechtliche Einschlag"* -- a relationship with a personal element -- (Sonnenschein *Juristische Arbeitsblätter,* 1979 228).

685 Gottwald on §328 BGB 1027.

686 This responsibility criterion serves as the basis of the presumption over the existence of care and protection duties. See Dahm JZ 1992 1168, and Gottwald on §328 BGB 1027.

687 See under "Claims against the sureties of the prime contractors" and "Government contracts: Third party beneficiary rule and private rights of action" in Chapter 4. In the former case a surety guarantees the owner that the subcontractor will perform (performance bond) or that the subcontractor will be paid (payment bond). The subcontractor's claims for the enforcement of payment bonds against the surety are generally accepted. Government contract concern welfare (usually) or other governement activities, related to the well being or those governed or the smooth functioning of the economy, function for which the government is liable according to the relative legislation. The element of special care and responsibility on behalf of the government is profound.

688 Gottwald on §328 BGB 1027.

properly. Such a criterion is difficult to apply in many cases as the third party is not in a position identical to that of the creditor; the similarity of risk should have to be interpreted broadly.

Apart from this social dependency criterion, which is potentially restrictive[689], a personal link of trust or reliance was acknowledged in a number of other relationships, a link imposed by economic reality. The creditor had the same special concern in cases where a mere financial relationship with the third party existed, such as in commercial leases[690], in international commercial agreements or in banking law relationships[691]. The duty of care was borne on the basis of the reliance on the debtor that was often justified by his professional capacity[692].

No interest of the creditor was acknowledged in producer's liability cases and generally in cases where a number of intermediaries intervene between the third party (last user or consumer) and the initial debtor due to the absence of a personal (i.e. close) link[693]. The existence of a legal relationship would not suffice for the acceptance of the creditor's interest. The lessee of a part of a building was not liable towards the lessee of another part for losses caused from water leaking from the water-pipes in the former's part. Their relationship could not justify an interest to protect the other[694]. It could not be

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689 As Strauch observed the request for a personal link restricts the range of transactions where the mechanism might be useful. The criterion does narrow down the circle of protected persons. Strauch JuS 1982 823.

690 BGHZ 49 350; NJW 1968 885.

691 Gottwald on §328 BGB 1027, Larenz I, 185. See also Rümker 147 ZHR (1983), 27-42, who refers to the protection of third parties.

692 See under "Third party pure economic loss: Contractual solutions", in Scots law, the critique on reliance as a means to justify awarding damages for pure economic loss. Foreseeable and reasonable reliance should, it is suggested, be taken as an indication of the debtor's voluntary assumption of responsibility. Reliance concerns confidence in the defendant's skills. Wilkinson and Forte, 30 (1985) JR 15-16. See also under "Examples: Misrepresantation and product liability", in Chapter 4.

693 BGH 14.4.1969-VIII ZR 131/67 (München); NJW 1969 p.1172; See also the comments by Berg; Berg "Anmerkung an BGH 14.4.1969-VIII ZR 131/67 (München)", NJW 1969 1172

694 See however under "Development and Applications", in Chapter 5, where it is envisaged that the *jus quaesitum tertio* (contract in favour of third parties), could be applied, by analogy to the claims between co-feuears (holding from the same superior) and co-disponees, where the mechanism traditionally applies, to cases of co-lessees, holding from the same landlord, seeking to enforce the obligations deriving from the lease contracts, which contain similar at least conditions.

implied from the quality of the lease contract that the landlord mediates for the liability of the lessee towards other lessees[695]. A lessee was included in the protective scope of a contract for repairs between the landlord and a building firm. However, accidental intruders in the leased space are not protected (pedlars for example) as the creditor would have no such interest[696].

In a claim against a landlord, protection was denied because the lessee of the second floor (creditor), was not liable for the protection of the lessee of the first floor (claimant) who was living with the former[697], and was injured when a balcony collapsed. Since the lessees were not married, the lessee of the first floor had no legitimate interest for the protection of the other lessee. The decision, was criticised as involving a moral judgment on the free union[698], emphasised provisions under which a lessee was not allowed to offer the leased thing to another person without the permission of the landlord[699].

A personal link is deemed unnecessary by newer BGH decisions[700]. In the absence of a concrete agreement, the courts undertake an objective evaluation of the parties' interests examining also the reasonableness of the third party protection[701]. However, some special link, some special contact between creditor and third party is again required to form the basis for the extension of the contract's protective ambit[702]. Moreover this criterion does not only qualify the mechanism but also distinguishes it from delict[703].

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695 NJW 1965 33, NJW 1969 41.

696 Gottwald on §328 BGB 1037-1038.

697 To the knowledge of the lessor.

698 Sonnenschein *Juristische Arbeitsblätter*, 1979 225.

699 §549 BGB, unless the contract provides otherwise. The Greek Civil Code allows the lessee to offer the leased thing to nother person, unless the opposite has been agreed, 593AK. Arguably as regards third party protection this right should be accepted when there is substantial justification from the facts of the case.

700 Gottwald on §328 BGB 1027. See The reference to American law of the third party beneficiary rule, where, following Restatement second, the requirements for accepting a third party beneficiary claim were relaxed -- Restatement second took a simpe and pragmatic approach to the issue, especially if compared to Restatement first -- and case law expanded the application of the rule. See under "Restatement second (1979)", in Chapter 4.

701 BGH NJW 1984 355

702 See BGHZ 69 82; NJW 1977 1916 . See also Canaris JZ, 1965, 475-482, Thiele 21 JZ 1967 649-657, and Gottwald on §328 BGB1027.

703 OLG Düsseldorf NJW 1977 1403.

It seems that the requirement of the creditor's interest and accordingly of some close link to the third party, as a means for the justification and explanation of the third party protection, guides the evaluation and selection of the third party losses which deserve contract-based compensation[704], restricting effectively the circle of protected persons[705]. Moreover, the criterion facilitated the distinction of the mechanism from a delictual approach.

The interest of the creditor for the protection of the third party will vary in accordance with the purpose of each relationship. Good faith can indicate a socially acceptable balance between the interest of the creditor and the possibility for the debtor to calculate his contractual risks.

3.7.4. Debtor's awareness of the proximity and of the creditor's legitimate interest.

According to this basic equity requirement, the debtor should be able to recognise that certain third parties are found in the realm of the contractual effect and that the creditor relies on the debtor's caring behaviour not only for his (the creditor's) own protection[706] but also for the protection of those third party interests[707]. The debtor must have this knowledge at the conclusion of the contract, or at the beginning or during the negotiation process. The requirement should be fulfilled cumulatively with the previous two[708] so that the court can consider that the debtor's contractual liability is justifiably extended since he was in a position to predict and calculate the extent of his contractual

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704 A wider circle of persons usually suffer loss, such as investors reading a report or financial advice of mass circulation. The inner creditor-third party link should be close in order to justify the interest of the creditor for the protection of the third party. Gottwald on §328 BGB 1027. See on the question of accepting the existence of a *jus quesitum tertio* in Scots law, where attention focused on the issue of the irrevocability of the relative beneficiary right. Alhough irrevocability could be justified on the basis of the contract alone, most decisions require some additional element. See under "The *jus quesitum tertio* Introduction", in Chapter 5.

705 The number of potential claimants.

706 With respect to the security of his (the creditor's) own goods.

707 See Strauch JuS 1982 p.827, Sonnenschein *Juristische Arbeitsblätter*, 1979 228, Dahm JZ 1992 1168.

708 Namely the third party proximity to the contractual relationship and the creditor's interest in the protection of the third party.

liability. Debtor's awareness is a requirement of the concept of 'voluntary assumption of responsibility', the most common means to justify compensation for pure economic loss in Commonwealth and Scots law[709].

Debtor's awareness has been a standard requirement for third party contractual protection independently of the relative legal basis[710]. Awareness in cases where the third party protection is thought to have been agreed (on §328 BGB), is one expression of the general principle that only circumstances which are known to both parties can be taken into account as far as interpretation is concerned[711].

This awareness requirement is justified under the good faith principle. Strauch argued that since the mechanism is based on a statutory clause (§242 BGB), the demand for potential awareness was superfluous and unnecessary[712]. The extension of liability should be deemed predictable when the third party loss cases fall within the typical risks particular contracts create. Certain recent decisions resorted to such an approach, especially in lease law[713].

This view reintroduces the potential awareness requirement. The typical risks, as any other, will be calculated on the basis of the facts of which the debtor is aware[714]. The legislative basis (good faith) was meant to rationalise the mechanism's application and prevent extensive judicial discretion without worsening the debtor's position. The requirement of awareness applies fully under today's accepted basis of the mechanism. It is instrumental in establishing the relationship of reliance justified under §242 BGB, which is

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709 See under "Third party pure economic loss: Contractual solutions", in Chapter 5. In the same spirit the concept of foreseeable and reasonable reliance was used, which in one view simply evidences the voluntary assumption. This awareness is a requirement protecting the defentant and at the same time justifying his liability.

710 Whether the mechanism was based on the supplementary interpretation of the contract (as a form of the contract for the benefit of a third party, §328 BGB) and when, later, it was based on §242 BGB, in statute law. (Dahm JZ 1992 1168).

711 Dahm JZ 1992 1168. Were thus the mechanism to be based on the supplementary interpretation of the contract, the recognisability of the position of the third party and of the creditor's interest is indispensable in order to establish liability in the first place. (Strauch JuS 1982 826.).

712 Strauch JuS 1982 p.826.

713 Gottwald on §328 BGB 1030.

714 Sonnenschein J*Juristische Arbeitsblätter*, 1979 229.

meant to create protective interests[715] when the personal link is less obvious, as with product liability, or when there are many intermediaries in the transaction[716]. Potential awareness is expressed in common law case law through the foreseeability of loss, which is a basic requirement in pure economic loss cases[717].

Abandoning the criterion of awareness could lead to an unjustified enlargement of the circle of protected persons, since the criterion of proximity, which would then occupy a central role, naturally involves more people[718]. Awareness is a flexible criterion, easily applicable in widely differing circumstances[719]. It has been exceptionally sidestepped in the case of a claim against the heir of the lessor/owner by a third party who brought equipment in the leased building[720], possibly because of the statutory guarantee liability in lease (§538(I)BGB)[721].

A distinction is made by Dahm[722] on the issue of precontractual liability; awareness should be based on objective legal provisions because the prospective parties' intentions are not yet articulated. Although the reliance shown at that stage might be less

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715 Gottwald on §328 BGB 1030.

716 The requirement was not met in a case involving a works contract for laying electrical cables, with regard to the protection of the final consumer of the current (BGH 12.7.1977 - VI ZR 136/76 (Stuttgard); NJW 1977 2208.), and in a case of a sales contract between the producer and a retailer with respect to the protection of the last purchaser (LG Köln 23.11.1977 - 13 S 187/77; NJW 1978 p.329.).

717 See under "Third party pure economic loss: Contractual solutions" in Chapter 5. Foreseeability should be 'reasonable' and, according to justified critique, is an inherently ambiguous concept which might not be matched by reliance that the defendant will be liable.See Feldthussen, *Economic Negligence*, 44-45.

718 In the case of a lease of a hall for large functions not only some creditor-third party relationship society and member/plaintiff) should exist but the debtor's (lessor's) knowledge of this relationship was required. Gottwald on §328 BGB 102.

719 As for instance in cases of protection towards the relatives of the creditor, or of liability for professional contact. Dahm JZ 1992 1168.

720 BGH 22.1.1968 -VIII ZR 195/65; NJW 1968 885. See also the comment by Berg in NJW 1968 1325. A third party was allowed to claim compensation for the destruction of equipment that belonged to her on the basis of the guarantee liability of the (new) owner (heir) of the leased building, who could have had no knowledge of the defect existing at the conclusion of the lease.

721 "If a defect of the kind specified in §537 exists at the time of entering into the contract, or if such a defect arises subsequently in consequence of a circumstance for which the lessor is responsible or if the lessor is in default in respect of the removal of a defect, the lessee may demand compensation for the nonfulfillment without prejudice to the rights specified in §537."; *The German Civil Code*, 1975

722 Dahm JZ 1992 1172.

certain than in the case of a concluded contract it is hard to see why a different arrangement is needed[723].

3.7.5. The need for protection.

The Federal Court of Appeal of Celle denied[724], the third party's (sublessee's) claim, in a sublease case, arguing that he was not in need of contractual protection[725]. He could ask compensation in delict, and he had a contractual claim for losses against the creditor of the initial lease (lessee) -- his lessor. The third party would be in the same position as if he had a claim against the debtor. The decision of the court of first instance was similar.

The idea behind these decisions was that the contract with protective effects (as *Drittschadensliquidation*) was developed to redress the unfairness encountered by the third party who suffered loss and had no legal protection. There was no need to allow contractual protection when the third party had a contractual compensation claim with the same content even against another defendant[726]. The rejection of the possibility in Scots law to treat the subcontract as a contract in favour of a third party (*jus quaesitum tertio*) -- the owner -- and the criticism of decisions accepting claims by owners/employers against subcontractors for pure economic loss in common law, rest on similar views[727].

This criticised[728] approach seems to equate the mechanism with *Drittschadensliquidation*, while the two schemes' areas of application, purpose and rationale are different. The position of the third party who might have two claims (one against the person causing the damage and one against his creditor) should not be worse than that of a third party with only one claim. Nonetheless, the rejection of one of his

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723 The debtor should be liable for the risks he can have knowledge of. The evaluation of his interests should not depend on the conclusion of a contract but it should be based on reliance on his behaviour.

724 BGH 70 737; NJW 1978 838.

725 Sonnenschein *Juristische Arbeitsblätter*, 1979 229.

726 Sonnenschein *Juristische Arbeitsblätter*, 1979 229.

727 See under "Subcontractors' liability" in Chapter 5, and "Third party pure economic loss" in Chapter 6.

728 See Sonnenschein *Juristische Arbeitsblätter*, 1979 229, and the references therein.

claims might have this effect yet. His legitimate interests are certainly safeguarded if his contractual claims against the debtor are accepted. The purpose of extending the protective contractual effect is not merely to substitute other claims or offer a solution where no claim exists, but to provide the most reasonable means for compensating damage[729].

The decision in question[730] is possibly an isolated exception. It is easy to note that, in any case, the third party claim is not denied when his other claim against the defendant has to meet different requirements[731]. Thus, in a number of decisions a contract with protective effects was accepted, although the third party had another claim for compensation. This was the case with a claim against the lessor by the third party-owner of a thing in the leased building, where the third party had a contractual claim against the depositiary lessee as well[732]. These other claims will not usually involve the same or similar instances of wrongfulness and will not have to meet the same requirements[733]. It seems that, the 'need for protection' requirement, of dubious general application anyway, does not pose a real threat towards restricting the mechanism.

Stretching the argument further, the third party claim in the sublease case could amount to an abuse of right, had the claimant a more certain means of protection. Nevertheless, even for the sublease case the claims might not be similar. One objection to the decision could focus on the guarantee liability of the new owner of the leased building[734]. It is unfair to consider that a subleasing lessee can have the same knowledge of the defects of the building as the owner[735]. The heirs of the leased area, who had no knowledge of its defects are liable as the owner. The lessee can, in this case, be considered

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729 Sonnenschein *Juristische Arbeitsblätter*, 1979 229.

730 BGH 70 737; NJW 1978 838.

731 Gottwald on §328 BGB1028. The employee has the claim from the works' contract as a third party together with the claim against his employer from the contractual relationship.

732 BGHZ 49 350; NJW 1968 885 . BGH 22.1.68-VIII ZR 199/65 (Hamburg); NJW 1968 1325. See also Berg NJW 1968 1325, and Gottwald on §328 BGB 1037; fn 397.

733 In Sonnenschein's view, modern jurisprudence lays emphasis on the requirement of the need for protection refusing claims in the limited number of cases where another similar claim of the third party exists. Sonnenschein *Juristische Arbeitsblätter*, 1979 229.

734 §538(I) BGB establishes the liability of the lessor for the defects of the leased thing which is irrespective of his knowledge of the defect's existence.

735 BGHZ 48 478; NJW 1968 694. See also Gottwald on §328 BGB 1037.

as an assistant (§278 BGB) of the -- initial -- lessor (landlord) in the latter's relationship to the sublessee, a relationship of mandate operating between the landlord and lessee-sublessor.

Possibly, the 'need for protection' requirement has a limited scope in the contract with protective effects[736]. However, the reference to the issue is useful in order to indicate the complexities of the contract with protective effects and to underline some of its differences from *Drittschadensliquidation*.

3.8. Theoretical considerations.

Judicial attitudes and academic opinions continuously interact in relation to the contract with protective effects.

At the beginning, following the courts' view, a number of authors (for instance, Kreß and Wahl[737]) accepted the possibility of contracts conferring benefits other than a right to the performance to the third parties[738], and established the mechanism under §328 BGB. There is very little support for this vigorously criticised view among academics today[739].

After the middle of the century, Wesenberg[740] and later Lehman[741], critical of the supplementary interpretation of the contract at the heart of the mechanism[742], suggested that the mechanism was based on a factual contract which had been created between the

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736 Sonnenschein *Juristische Arbeitsblätter*, 1979 229.

737 On Wahl see Bydlinski *Juristische Blätter* 1960 p.539. See also Strauch JuS 1982, 823.

738 Before that, academic lawyers followed the traditional approach of granting a protection claim on the basis of § 328 BGB only when a performance claim existed.

739 One exception is Fikentscher (153). He makes a distinction between contracts assigning rights and contracts imposing certain behaviour in favour of third parties. He considered the contract with protective effects *vis-à-vis* third parties, as a real contract for the benefit of a third party which created the obligation to compensate for the loss the violation of secondary duties caused. See also Sonnenschein *Juristische Arbeitsblätter*, 1979 229.

740 Strauch JuS 1982 p.823.

741 Enneccerus, Ludwig and Lehman, Heinrich *Recht der Schuldverhältnisse* 1959, 149.

742 The construction of the institution on the basis of supplementary interpretation according to §§133, 157 BGB, was questioned as to its validity and plausibility. §133 BGB imposes the search for the true intentions in a declaration of will according to their literal meaning, and §157 imposes the interpretation of contracts according to the requirements of good faith and giving consideration to the common usage of the expressions.

debtor and the third party -- the usual example being lease transactions. These views faded with the decline of the factual contract theories. The suggestion could not suffice for the different kinds of contractual relationships involved with the mechanism[743]. However, the approach heralded attempts to move beyond the content of the contract in question for the third party protection and offered convincing arguments for precontractual protection.

Another line of opinion sought third party protection in delict. Lorenz[744] considers that delict is the natural sphere for the treatment of inconsiderate, careless behaviour. One example was an advocate's failure to draft a will[745] where third party compensation could be based on §823 BGB according to newer case law. The special delictual provision for the violation of an official duty (§839 BGB) could also be applied for wrongful professional conduct where third party loss often occurs[746].

Other views against the rationale and usefulness of the contract with protective effects could be considered as endorsing a delictual view. Wolf[747] thinks that the mechanism does not derive from the BGB system and is not tenable. §831 BGB has been arbitrarily side-stepped and no sufficient explanation for the mechanism or its protective range has been offered. More far-fetched is von Jhering's[748] suggestion to recognise an *actio de dolo* and/or an *actio de legis Acquilae* in the cases of third party loss.

Larenz's powerful critique[749] and suggestions exerted major influence on the development of case law and academic opinion. He proposed the name of the mechanism and concentrated his critique on using §328 BGB as its legal basis.

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743 Gernhuber "Drittwirkungen im Schuldverhältnis" 269.

744 Lorenz JZ, 1960, 108.

745 Lorenz JZ 1966 143. The loss was economic in this case.

746 See for instance Grunewald AcP 187 (1987) 285-308, Ebke JZ 1990 1688, (Literature review), Zimmerman FamRZ 1980, p.99, Hopt "Nichtvertragliche Haftung außerhalb von Schadens- und Bereicherungsausgleich-Zur Theorie und Dogmatic des Berufsrechts und der Berufshaftung", AcP 183 (1983) 608-722.

747 Strauch JuS 1982 823.

748 In Lorenz JZ 1966 143.

749 Larenz NJW 1956 1193. See also Larenz replying to the comments by Heiseke on the BGH 15.5.1959; NJW 59 1676, (*Capuzol* 22 case) in NJW 1960 77.

When an issue concerns proper contractual behaviour and the extension of secondary duties, a discussion concerning direct application of the contract for the benefit of third parties can hardly arise. The parties do not intend to entitle the third party to claim the fulfilment of a particular behaviour; the third party is entitled to compensation only. Larenz discussed the possibility of applying §328 BGB by analogy[750], where this would seem justified. He does not reject the idea but his suggestions on the basis of the mechanism render the thought of little value.

The tendency to infer an implied agreement by supplementary construction amounts to imposing fiction as the real intention of the parties. No gaps in the contract call for a supplementary construction in the first place. In most cases the parties had not thought of the possibility of a third party suffering losses. The debtor could have hardly agreed to, and the parties did not consider, allowing a third party to ask compensation on the contract. Supplementary construction might in essence be an arbitrary replacement of the parties' will by the court's intentions.

The extension of protective effects should be based on contractual reliance[751], that is, the creditor's reliance concerning the debtor's behaviour towards himself and also towards the other parties who come in contact with the performance. The creditor should be legally, or at least morally, accountable to the third party to justify this reliance[752].

According to case law and academic opinion these violated secondary duties are based on the good faith clause (§242 BGB)[753]. Larenz suggested that good faith is the indicated basis for the contract with protective effects. Liability is not necessarily imposed on the debtor. The duty to compensate would still have to be evaluated on the basis of his

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750 Larenz NJW 1956 1193.

751 The protective effect should not, according to Larenz, be extended to all the third parties which might suffer losses.

752 See Larenz I, 188.

753 This is the prevailing view in case law since *Capuzol* 22 decision. Gottwald on §328 BGB 1025, Westerman on §328 BGB 824, Heinrichs on §328 BGB 355.

foreseeability[754]. Good faith as a legal basis represents no major reshuffle in the civil liability system[755].

Gernhuber[756] initiated another school of thought. He considered §328 BGB as a fragile and unreliable basis that did not allow effective supervision and that restricted the scope of protection[757]. Noting the difficulty in drawing a clear picture of the mechanism he examined the issue together with the possibility of excluding/limiting contractual liability that would be valid towards the third party.

Gernhuber considered that to treat §328 BGB as the legal basis was a legal error[758] whereby the jurisprudence relied unsuccessfully on §157 BGB to support its legal hypothesis[759]. He suggests that 50 years[760] of practice have led to the development of customary law rules protecting third parties at least for some cases. These rules could be applied, by analogy, to other situations[761]. for instance where the third party is linked to the creditor in such a manner so as to run a risk of losses, at least, as serious as the creditor's[762].

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754 On the basis of §157 BGB.

755 Larenz I, 188.

756 See Gernhuber, JZ, 1962 553-558, and "Drittwirkungen im Schuldverhältnis" 249-274. See also Böhmer *Monatschrift für Deutsches Recht* 1963 96, and *Monatschrift für Deutsches Recht* 1962.

757 Gernhuber "Drittwirkungen im Schuldverhältnis" 261.

758 Gernhuber accepts however that the attempts of the courts where made consiously in order to find a solution to the protection of third parties; Gernhuber "Drittwirkungen im Schuldverhältnis" 267.

759 There is no comprehensive explanation for the extension of behavioural duties, once their dependence upon the primary duties and the doctrine of the unity of a legal relationship's basic and secondary duties is taken into account. Contractual construction is necessary if the mechanism is meant to be based on the contract's content. However, supplementary interpretation is used, even if the will of the parties is fully explained. Non existing gaps are sought to be filled. Gernhuber noted that the absence of provisions for the third party protection does not automatically mean that there are gaps in the contracts. Relying on §157 BGB enabled the substitution of the subjective will of the courts for the hypothetical will of the parties and brought forward some only of the third party protection issues. Gernhuber "Drittwirkungen im Schuldverhältnis" 265-267.

760 In 1958; Gernhuber "Drittwirkungen im Schuldverhältnis" 269.

761 Gernhuber "Drittwirkungen im Schuldverhältnis" 269. The same author considers that under the idea of customary law there is easier linking between the third party and the contractual relationship, something that can facilitate the development of the mechanism.

762 Gernhuber "Drittwirkungen im Schuldverhältnis" 270.

There is no detailed discussion of the delimitation of those protected[763] and Gernhuber himself doubts whether custom would suffice for property losses or economic loss; the analogy to personal injury is unacceptable[764].

More recently Kümmeth[765], laid emphasis on the methodological character of the mechanism and, taking examples from legislation protecting third parties, he stressed that the contract with protective effects was the result of permitted judicial law-making since third party protection on a contractual basis is not forbidden in the BGB. The mechanism was the product of an *extra legem -- intra jus* interpretation, one moving beyond particular provisions and based on the legal system as a whole. Larenz takes the same view[766], without however the same emphasis: he establishes the mechanism on a general clause reflecting fundamental legal principles, having found no support from specific provisions on third parties. Gernhuber, on the other hand, supported a *contra legem* interpretation considering that the mechanism opposes §823BGB[767]. However, contractual protection is not forbidden as the mechanism does not amount to an extension of delictual protection[768] and thus a *contra legem* interpretation seems off the point.

It seems that Kümmeth reassesses the most plausible explanation of the way the judicial reasoning functioned and of what the decisions actually did, that is, establishing a new mechanism which could not be based in specific statutory provisions.

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763 He refers critically to the attempts in case law to restrict the circle of protected persons and seems to intend to take advantage of the existing experience. Gernhuber "Drittwirkungen im Schuldverhältnis" 273-274.

764 See also Strauch JuS 1982 823.

765 See Strauch JuS 1982 823 and Gottwald on §328 BGB1025.

766 He describes the process as *"Gesetzübersteigende Rechtsfortbildung"*, making the reference in his book on methodology while in the Law of Obligations textbook, or in various papers he lays no emphasis on the issue. Larenz *Methodenlehre* 1988, 380 et seq. The function of the courts was judicial law-making, beyond the existing statutory provisions but within the existing framework of legal liability, the focus being on basic ideas of the social economic and political organisation. In a sense the courts are pointing to the direction the legislature could or should follow.

767 See Gernhuber ("Drittwirkungen im Schuldverhältnis"). Gernhuber does not reject good faith as a legal basis, he thinks however that the mechanism is *contra legem* to the existing order.

768 In Germany the judiciary has expanded delictual liability in order to protect the right to an established business. The discretion exercised in this case is no less than the one required for the application a contractual mechanism for third party losses.

Other critics focus on specific aspects of the mechanism. Heiseke[769] attacks the provision of a direct claim. He thinks that under *Drittschadensliquidation,* where no direct claim is accepted, the interests of the debtor are better protected, than with the contract with protectective effects.

3.8.1. Critique of the theoretical views; the problem of a legal basis.

The central issue in the debate on the mechanism is that of its legal basis, sparked not only by doctrinal considerations but by the practical question of the mechanism's adjustability. Two lines of thought can be identified[770]. One line of thought identifies the autonomy of the parties' will as the basis of the mechanism while the other attempts to explain the mechanism independently of the parties' intentions.

3.8.1.1. Solutions based on the autonomy of the parties' will.

3.8.1.1.1. Direct application of §328 BGB.

The initial preference of the RG is reasonable, given the constraints of the relativity principle (only the parties can extend the effects of a contract) and the difficulty in applying delictual provisions. The broad interpretation of §328 BGB was a daring attempt, but it did not enable protection at the precontractual stage.

Naturally, the courts focused on the interpretation of the contractual intentions[771] in order to infer a contract for the benefit of third parties. The early critique that the

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769 Heiseke on BGH 15.5.1959; NJW 59 1676, (*Capuzol* 22 case) in NJW 1960 79.

770 This structuring of the discussion of the theoretical views, seemed logical as the first priority was before embarking upon a critical review to facilitate the understanding of the debate as the various views are not always clear or clearly separated among them. The risk this approach entails is that of repetition. It is likely that certain points of critique especially will have slipped in the presentation of the theoretical approaches.

771 Interpretation of a declaration of intent and subsequently of a juridical act is one of the focal points of civil law jurispudence. In Roman law, after the early years where only strict literary interpetation was accepted, with the creation of the *ius gentium* the principle of will prevails; the aim of the interpretator is to discover the true intent of the person declaring his will to the extent it can be inferred from the expression of this will. This focusing on the true, psychological, inner will, characterised the so-called subjective theory of interpretation which under the influence of the principle of the autonomy of will and in an era of legal individualism, prevailed in the 19th century and is still very influencial in France. (The basic provisions in the FCC are §1156, §§ 134 (3) and 1135

approach distorted the application of §328 BGB by inferring fictitious intentions and imposing the courts' will as objective interpretation, was basically correct[772].

Construction would most certainly look for implied agreement[773], but a construction explaining the parties' true will (§133 BGB)[774] was not helpful as there could be no

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contain objective criteria to assist interpretation "de bonne foi", "l'équite", "l'usage de la loi"). The judge serves the will of the persons declaring their intent; he cannot do anything else. In principle this theory considers that the inner will should even supersede the material means of its expression. Resort to the concepts of good faith, equity, transactions ethics for example was only auxiliary; it took place only if the true will could not be found. The BGB started from the same point of view; the legislator possibly meant that §133 would have priority and only in an auxiliary manner resort to §157 would be accepted. (Both provisions are compulsory guide-lines for the interpretator.). From the end of the 19th and especially from the beginning of the 20th century the academic considerations took a different view and together with the case law elevated §157 to at least an equal position. The object of interpretation was not the inner psychological will (this suffices for the existence of a will to act only) but the declaration of will as an act aiming at creating legal effects, and at being valid legally and binding, It is the juridical will that is interpreted. The aim was therefore to find the definition of the proper meaning of the will in law, and the objective criteria of what the law considers as proper meaning should prevail. The question of a legal meaning arises even if the declaration of intent is certain; §§133, 157 do not give a clear indication of the proper legal meaning. This view; the objective theory of interpretation, prevailed in Germany under in the quest for legal certainty. It was supported for instance that §157BGB prevailed over §133BGB.

The starting point in the German approach is searching for the true intentions of the person declaring his will, and, if this proves fruitless, then the interpretator resorts to objective criteria always under the perspective of what the law considers as important. In France too one can speak of a tendency to accept objective standards (good faith, equity, transactions ethics etc), more easily. See Ennecerus, Ludwig-Nipperdey, Hans Karl *Allgemeiner Teil des Bürgerliches Rechts*, 1960, Tübigen, p.1249, Siebert on § 157, 556, and 560, who seem to be nearer to the subjective theory of interpretation. Siebert thinks it is difficult to distinguish the psychological will from the juridical will and a rational evaluation of the possible overlapping and interaction is required each time. See also Larenz I, 262-269, Wieacker "Die Methode der Auslegung des Rechtgeschäfts", JZ 1967, p.385, and Mayer-Maly on §133 and §157 BGB especially with regard to the respective limitations of each of the institutions. Similar to the German view is the prevailing idea in Greek law (see the works of for instance Stathopoulos ND 1971, 1) as well as Austrian law. See Koziol-Welser describing the progressive steps of interpretation, 85 et seq. The Italian law focuses in principle on subjective (or "historic") interpretation applying *"the common intention rule", "on the basis of what they* (the parties) *have said and done"*; Griscuolli, G. and Rugsley, D. *The Italian Law of Contract*, 1991, Napoli, 145 et seq.

772 See the previous references to Larenz and Gernhuber. A somewhat different view was taken by Böhmer. He attacked the method followed and its results. He considered that the limits between contractual and delictual duties were blurred. The mechanism was the product of a mistaken construction in his view. Böhmer *Monatschrift für Deutsches Recht* 1962, 345.

773 *Stillschweigende Vereinbarung*, -- silent, tacit agreement literally. It is improbable that an express agreement in favour of the third party could be found.

774 This is a case of *Erläuterndte Vertragsauslegung* -- explanatory interpetation, one of the two major consepts of interpretation as they have been developed by the courts. The other is supplementary interpretation. In view of the difficulty of inferring the true will of the debtor the courts aimed at supplementing the agreement according to §157 BGB. §133

supportive evidence from the expressed will[775]. Supplementary interpretation[776] was the natural possibility, laying emphasis on objective elements such as good faith and transactions' ethics[777], which represent society's view of the contract's wider repercussions. However, in many if not most cases it is at least doubtful[778] whether there is

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BGB aims at interpreting declarations of will, while §157 BGB construes the contract as a whole. (See Hefermehl on §157 BGB 307). The interpretation aims at identifying the content of the contract as concluded by the parties by searching for their true intent. An intention to be bound is sought to be inferred -- however, not meaning some inner psychological predisposition. The inferred intentions should not be different from the expressed ones. The purpose of supplementary interpretation is to complete the existing agreement, and not to substitute the expressed declaration of intent. The expressed intent of the parties should neither be restricted or expanded or altered. See "Die ergäzende Vertragsauslegung" Henckel AcP 159 (1969) p.106. The parties would therefore be protected from an unexpected extension of duties. See also Linder "Law of Contract" 1992. See also Westermann on §133 BGB 186.

775 Any consideration of the true intent of the parties must find some objective elements to rely upon. (Westermann on §133 BGB 188). An implied will -- in this case the will of the debtor --, should be in harmony with the expressed will and it should be inferred with certainty from the parties' statements of intention. It is difficult to assume that the parties had ever actually intended to protect a third party; especially that the debtor would have agreed to that against his own interests.

776 *Ergänzende Vertragsauslegung*, See "Die ergäzende Vertragsauslegung" Henckel AcP 159 (1969) 106.

777 See Fikentscher (97-98), Henkel, Larenz, on the issue of the objective criteria in supplementary interpretation. The courts are trying to construe the hypothetical will of the parties, the intent that the parties would have shown had they considered making contractual provisions on the particular issue. (Mayer-Maly on §157 BGB, 1187. As Linder puts it *"..what would the parties have reasonably agreed upon had they considered the gap that is the open point."*; Linder "Law of Contract". Larenz focuses on what they would have accepted as a justified balancing of interests; Larenz I, 468.)

The supplementary construction is made on the basis of the objective criteria of good faith (*Treu und Glauben*) and transactions' ethics and practices (*Verkehrssitte*), which are not focused on the parties interests or intentions. *"Treu und Glauben "* reflect basic social and moral points of view; they introduce to the interpretation a posititive social morality regulatory content (Mayer-Maly on §157 BGB 1183). They are objective since they are used on the basis of prevailing social and economic ideas. The *Verkehrssitte* are objective in the sense that they can reflect the prevailing trends in particular modes of transactions or circles of people; Hefermehl on §157 BGB 308. Transactions morals do not present the overwhelming impact of *"Treu und Glauben"* however. Accepting these objective standards is significant as it underlines the social considerations involved in a contract which can have effects and repercussions extending beyond the parties.

778 The problem occurs when the arrangement of a relationship contained in a contract seems to be seriously incomplete. Larenz takes as a starting point the gap,the *lacuna* in statute law. A gap in the statute law exists when there is no provision on a particular issue in a specific regulation or in statute law as a whole. He moves on to consider that the contract is an attempt to organise compulsorily, the relationship between the parties and it presents therefore analogies for an extension of the idea of filling the gaps to the domain of the contract. See Larenz, NJW 1963 738. A gap exists when the agreement is ambiguous when an issue which logically asks for a provision has been left open. It is not enough for example that the provision produce an inequitable result; this does not by itself justify

a gap[779] to be filled. The agreements seem complete[780]. Inferring a gap violates the autonomy of will principle[781]. The same is true for the arbitrary application of

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supplementary intrpetation if the agreement is not ambiguous. See Linder "Law of Contract". The arrangement of a legal transaction proves to be incomplete when a situation appears which is not covered from the objective content of the arrangement. Mayer-Maly on §157 BGB 1187. The courts, when there is a doubt as to the meaning of the contract, are filling the *lacuna* because otherwise the purpose of the contract will be endangered (Siebert on §157 BGB, 575). The meaning of a contractual gap is narrowly interpreted in case law (See Mayer-Maly on §157 BGB 1188). As was put only actual failures to provide a ruling for particular circumstances, only real gaps that is should be supplemented (Hefermehl on §157 BGB 312). Supplementary interpretation is undoubtedly justified when for instance the parties should have foreseen an issue or anticipated its importance, when it seems therefore that the parties should have considered regulating a particular issue (accepting third party protection for example) but they did not. It is possible that the parties intented to leave a question unanswered. It is thus important to examine thoroughly the content of a contract in order to identify the existence of a gap. Siebert on §157 BGB, 573.

779 The first step is to identify the need for supplementary construction. There should be a gap (*lacuna*) in the contract (*Vertragslücke*). A gap may have already been there when the contract was consluded or may have arisen afterwards. It may be the result of the fact that the parties deliberately left a certain point open trusting that agreement on that point could be reached later. The gap may result from subsequent changes in legislation and economic circumstances or from the fact that the original provision in the agreement is no longer ascertainable. See Linder "Law of Contract". See also Siebert on §157 BGB, 573, Larenz NJW 1960 79, at 81. Larenz notes that when a judge is facing a gap in the conract he has two possible ways to choose in order to fill the gap. One is the supplementary construction on the basis of § 157 BGB and the other is to resort to relevant or similar statutory provisions in order to obtain guidelines for the filling of the gap. See Larenz "Ergäzende Vertragsaulegung und dispositives Recht", NJW 1963 737.

780 In the light of the parties' intentions that is, as the basic aim of a contract is the fulfilment of the basic performance which does not refer to the third party protection. Supplementary interpretation refers to the common contractual purpose; the ideas and goals of both the parties must be taken into account. Hefermehl on §157 BGB 312. See also Larenz I, 468. Protection and care duties towards third parties might be logically related to the performance but if they do not derive from the common will they do not fall in the scope of the contractual purpose. Supplementary interpretation must not reach *"...results which are contradictory to the parties' intent or to the content of the contract nor in any way change or extend the subject of the contract or the rights and obligations of the parties therefore."* The accommodation needs of the lessee and his family, for instance, are met by the lease contract but this is not a goal of both the parties to the contract. Third party protection should therefore be considered in exceptional cases. It is unlikely that they anticipated the third party injury in the course of realising the contractual purpose. Gernhuber "Drittwirkungen im Schuldverhältnis" 249-274.

781 As discussed, the extension of the secondary protection and care duties has to be based on the common intent of the parties. Supplementary interpretation cannot reach results contradicting the actual parties' intentions and cannot furthermore supersede their expressed declaration of will (Siebert on §157 BGB, 57 and Mayer-Maly on §157 BGB 1189). *"Supplementary interpretation may never violate the principle of private autonomy"*. Linder "Law of Contract". There is no gap if the parties had not intended to safeguard the legal position of the third party. (Gernhuber JZ, 1962 553-558). The debtor could have hardly considered an extension of his liability and the needs of the particular transaction are no convincing argument. The inclusion of a third party modifies the contract. The debtor's duties are increased in comparison to what the contract provides. The arguments for

supplementary construction leading to the 'discovery' of non existent intentions[782], under a cloak of 'objective' interpretation[783].

Third party protection cannot be the result of supplementary interpretation, since such a construction would contradict the parties' intentions[784] and would not cover the range of situations where the contract with protective effect applies, for example precontractual contact, void contracts, or standard contractual terms[785].

The extension of the contractual effects cannot be based on §328(2) BGB, which concerns the availability of a direct claim repeating the criteria of §157 BGB[786]. §328(2) BGB cannot be the threshold for the courts to resort to the §328 BGB mechanism.

In sum, the critique on using §328 BGB as the basis for the contract with protective effects was generally justified[787]. The rationale of the contract in favour of third parties and of the contract with protective effects is different. The latter has an equity, distributive-justice role, and not one of facilitating transactions or the realisation of the

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the existence of a gap are unconvincing. The courts defined no relevant criterion. Larenz NJW 1960 79, at 81.

782 Gernhuber "Drittwirkungen im Schuldverhältnis" 261. Gernhuber thinks that it is not the *"hypothetical will"* which is referred to but the opinion of the court dealing with a particular case.

783 As Gernhuber put it, the judiciary seemed to ignore the difference between "subjective" and "objective" theories of interpretation. His argument reflects the two basic views on the understanding of express intent; the subjective and the objective theory of intent. He lays emphasis on the tendency of the courts to adjust (if not manipulate) the conclusions of interpretation in order to suit the desired outcome. Gernhuber "Drittwirkungen im Schuldverhältnis" 261-262. See Wieacker "Die Methode der Auslegung des Rechtgeschäfts", JZ 1967, 385, and the previous reference to interpretation.

784 If the debtor, as is normally the case, has not accepted or even contemplated the protection of the third party then this protection transcends the limits of the meeting of wills and cannot be the result of supplementary interpretation. Larenz NJW 1956 1193.

785 See Strauch JuS 1982 826.

786 §328(2) BGB includes directions for the construction of contracts for the benefit of third parties, focusing on the meaning and purpose of the agreement.(Gottwald on §328 BGB 1012.) §328(2) BGB is activated only when there is a doubt as to the characterisation of a contract for the benefit of third parties as real (providing a direct claim against the promisor) or not. Reference to the particular rule of interpretation, which repeats the criteria of §157 BGB, would be justified only if the question of whether a particular contract is one for the benefit of a third party has already been answered in the affirmative (according to §328 BGB).

787 The contract for the benefit of third parties which concerns the basic contractual duties cannot extend on the basis of supplementary interpretation to the secondary protection duties, as no contractual gap or the respective common intention can be found. The same is true for the application of §328 BGB to precontractual relationships or void contracts.

parties' will. Third party protection cannot be answered by focusing on the parties' hypothetical intention as this would make the mechanism less flexible to cover a variety of applications and more open to arbitrary approaches. There is little support today for §328 BGB as the mechanism's basis[788].

3.8.1.2. Solutions which do not rely on the parties' intentions.

It was rightly noted that the contract with protective effects was a new mechanism[789]. In the light of the shortcomings of the initial legal justification, its legal basis should be sought beyond the parties' intent[790], abandoning the autonomy of the parties' will and the freedom of contract which constituted essential prerequisites of the initial approach[791].

3.8.1.2.1. Reconsidering § 328 BGB; application by analogy[792].

There are basic similarities between the mechanism for third party protection and the contract for the benefit of third parties, which justify the partial application of the latter's provisions[793].

The basic assumption, that there is a gap in statute law[794], seems difficult to justify. Third party loss situations could have been foreseen, for instance, when the BGB

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788 See the opinion of Fikenscher, and Helmann "Der Vertrag zugunsten Dritter ein Schuldrechtliches Verfügungsgeschäft.", NJW 1968 1853.

789 Not specifically provided for in law. Gernhuber thinks that the new mechanism does not transcend the limits of §328 BGB. Gernhuber "Drittwirkungen im Schuldverhältnis" 264.

790 Larenz I, 185 et seq. Eventually the courts reacted in a similar manner. Lorenz JZ, 1960, 108., at 112.

791 Gernhuber agrees with Larenz on the need to abandon the basis of contractual freedom. Gernhuber "Drittwirkungen im Schuldverhältnis", 264.

792 See on the analogy Larenz I, 59-60, and Dahm *Deutsches Recht*, 1963, 48 et seq.

793 Larenz seems to consider the idea in a comment. Larenz NJW 1956 1193.

794 *Lücke des Gesetz*, (See Larenz NJW 1963 737 and *Allgemeiner Teil des Bürgerlichen Rechts"*, 60). There is either no specific provision in statute law, or no inferable reference from the legislation on relevant situations. See also "Das Lückeproblem" in Dahm *Deutsches Recht*, 1963, 48. The gap is acknowledged through teleological interpretation.

was introduced[795] (although the problem is becoming more acute in recent times[796]). The provisions on delict clearly exclude most of these claims[797].

Moreover, the similarities between the mechanisms, thought not insignificant or accidental[798], conceal significant differences. They both involve third parties, claiming directly on a contract. Each mechanism refers to different categories of duties, and the contract with protective effects concerns precontractual relations as well, while the circle of the protected persons[799] is less definite than that of the §328 BGB beneficiaries.

It seems that §328 BGB is a generic mechanism on third party questions and no *a majore ad minus* [800] argument can be used to justify, by analogy, the contract with protective effects. This is the prevailing view in case law. In contrast, the application by analogy of the *jus quaesitum tertio* (JQT) in Scots law or of the third party beneficiary rule in American law, cannot be excluded. Not only do both seem more convincing options (especially the JQT), but they also seem more flexible encouraging expansion. This greater flexibility, which should be accepted even for the undeveloped JQT, is owed to the absence of a stricter definition of the mechanisms[801] combined with the potentially more innovative (in comparison to German law) judicial style -- especially in American law. The fact that they are not yet as exploited, and that they are the more credible solutions makes analogy with contractual third party protection possible. As will be later seen, these mechanisms will be

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795 The fact is that codifications usually reflect older law. Thus the BGB was heavily influenced by the Pandectists and Roman law.

796 A gap in the law can exist because the legislature has not foreseen the emerging problems or because there were changes in the social reality after particular provisions were made. See Linder "Law of Contract" and Dahm *"Deutsches Recht"* 1963, 49, referring to *"nachträgliche Lücken."*, literally 'belated', 'posthumous', gaps.

797 It could be argued that the BGB legislator intended to allocate the treatment of third party loss to delict, but the evidence against this position is overwhelming.

798 According to the argument the situations are similar in terms of the issues which are considered legally important. Larenz *"Allgemeiner Teil "*, 60.

799 The protected person can be anyone from a number of people to whom duties of care and protection are owed. Berg NJW 1978 2018.

800 See Larenz responding to Heiseke on BGH 15.5.1959; NJW 59 1676, (*Capuzol* 22 case) in NJW 1960 78, in 79.

801 In comparison to the German equivalent (§328BGB) more issues remain unsettled in American and Scots law mechanisms.

referred to as the likely models for contractual protection for third party loss; indeed in American law this is, in part, reality[802].

3.8.1.2.2. The question of customary law[803].

The idea of customary law as a foundation of the contract with protective effects, was based on the observation that the related cases and decisions are similar and customary law could have developed for some groups of cases involving certain 'typical' contractual forms[804]. By analogy, customary law could apply to all instances of third party loss[805]. However, customary protection has been limited to personal injuries.

In order to treat a rule as customary it should be *"accepted as legally binding"*; the result *"of a consistent and constant general application over many years and widespread conviction or recognition that is a valid and binding rule of law"*[806]. Even though the mechanism is well established[807] (and the continuity in the case law is rightly

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802 See "The way to achieve contractual solutions", in Chapter 4, on American law and "Law making by analogy" in Chapter 5 on Scots law.

803 Customary law is one of the sources of German law. See Foster *German Law and Legal System*, 1992, 52. Gernhuber is the main representative of this view on the contract with protective effects. Gernhuber JZ, 1962 553-558, and "Drittwirkungen im Schuldverhältnis" 249-274. Gernhuber's starting point is that of the social effects an obligational relationship (*Sozialwirkung des Schuldverhältnisses*) might be having and which can extend to non parties to the contract. He focuses on the sense of justice (*Rechtsempfinden*) favouring the protection of third parties reacting not only before absolute unfairness but against relative unfairness too. He considers that the judges pressed by the sense of justice and the relativity contraints proved crafty in resorting to §328 BGB at first for the protectionof the third parties. (Gernhuber "Drittwirkungen im Schuldverhältnis", 251.). Gernhuber focuses on 50 years of case law which can justify the emergence of customary rules.

In the same line of thought see also Böhmer *Monatschrift für Deutsches Recht* 1963 96, and *Monatschrift für Deutsches Recht* 1962, 345. See also Lorenz JZ, 1960, 108, and Berg JuS 1977, 365.

804 Gernhuber is examining the types of contracts where the protective effects have been accepted. He reviews the well established cases of transport contracts, contracts for medical treatment, and contracts of lease for domestic purposes, and the less widely accepted contracts for services and works, and of sale of machinery equipment. He noted, in 1958, the existence of a 50 year old tradition. Gernhuber "Drittwirkungen im Schuldverhältnis ", 249-274.

805 Where there was a need for the protection of third parties, according to Gernhuber. (Gernhuber "Drittwirkungen im Schuldverhältnis" 269).

806 Foster *German Law and Legal System*, 1992, 53.

807 Following a 70 years old tradition. See Gernhuber JZ, 1962 554, Strauch JuS 1982 826.

observed[808]), it is going too far to argue that it is actually treated as binding. The natural, first reaction to third party loss would be to examine delict[809] for third party protection. No specific statutory basis to establish the mechanism exists. The mechanisms took a more stable form only after the 1950's when courts started explaining the extension of the protective duties to third parties on §242BGB. A legislative amendment, for example, that would expand delict to apply to pure economic loss, would swiflty lead courts to apply delict instead of the contract with protective effects[810]. Apparently the conditions for the emergence of a customary rule are not fulfilled.

The mechanism is bound to be treated as exceptional in the absence of a statutory basis and since it departs from obligational relativity. As said, it was only recently shaped somewhat clearly (after the middle of the century), and the issue of the legal basis was settled even more recently in case law. There is still doubt as to compensation for pure economic loss, and no steady pattern for delimiting the range of the protective effect has yet emerged. Apart from academic doubt (the very usefulness of the mechanism is disputed), it seems that judicial policies have not been sufficiently consistent and continuous, at least not yet.

The idea of a customary law basis is not substantiated but is a significant indication of the view that the mechanism is fully accepted and legally sound. However, the view entails the risk of enabling considerable judicial discretion in deciding the existence and the extent of a customary rule which could, among other things, lead to the expansion of the protection. It could further lead to a detachment from the contract to the defendant's potential detriment[811].

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808 The usual, typical groups that could be mentioned in the 1960's were contracts of lease, contracts of carriage, and contracts for medical care.

809 It could further be argued that the mechanism contradicts legislation as the provisions of the BGB do not allow for the contractual treatment of third party loss. Customary rules cannot oppose legislation.

810 The same applies of course for any specific statutory provisions that might cover certain third party loss situations. However the example of the expansion of delict is more immediately comparable to the contract with protective effects as it would virtually deprive the mechanism of its object.

811 According to Gernhuber's approach the work of the courts in restricting the circle of the protected persons and in construing the relative criteria could be useful to the new case

3.8.1.2.3. The case for 'factual contracts'[812].

The factual contract view is said to be justified by the reliance shown to the debtor[813]. It is based on the idea that the social contact between the debtor and the third party is of such a quality as to create mutual rights and duties. Accordingly there is no need to focus on the parties' intentions[814]. However, fault as the basis of personal liability is thus ignored; the result is possibly unfair to the debtor, who will in most cases have no effective supervision of his potential liability. Reliance -- a doubtful criterion as critique on pure economic loss decisions in commom law has shown[815] -- cannot substitute wrongfulness. In any case, factual contract theories, fostered for mass, standardised transactions where no bargaining took place[816], are an unsuitable rule of thumb for individualised and complex third party loss situations. They seem to presume liability and

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law on the third party protection problem; Gernhuber "Drittwirkungen im Schuldverhältnis", 273-274.

812 See Hefermhl on §145 BGB 277, Heinrichss on §145 BGB 128, and Larenz I, 93.

813 The justification of the 'factual' contract view is centred on the reliance shown when one party enters the sphere of another party's (here the debtor's) influence, by entrusting his goods or his person to the other party.

814 The theory of a 'factual' (or *de facto*) contract has the advantage that it is not dependent upon the will of the parties. (See Gernhuber "Drittwirkungen im Schuldverhältnis" 268).A 'factual contract' *"...dispenses with the need for the declarations and does not come within a true consideration of contract law"* (Foster *German Law and Legal System,* 1992, 204.).

815 See under "Third party pure economic loss: Contractual approaches", in Chapter 5. Reliance, it was noted might not be matched by expectation, while the information inducing reliance might be available to a large number of peeople so as to difficult to identify those whom a duty is owed to. Moreover reliance is easy to identify in some only of the relative cases. Finally relying on reliance could either discourage potential defendants from engaging into the activity in question or lead them to protect themselves through exclusion of liability clauses for instance.

816 As said the 'factual' contract approach for third party protection faded away with the decline of the 'factual' contract theories, that never enjoyed extensive support anyway. Lehman critisised the idea from 1958 already (Lehman "Faktische Vertragsverhältnisse", NJW 1958 1) See also Esser-Schmidt, 112 and Gernhuber "Drittwirkungen im Schuldverhältnis" 269. These theories are basically related to typical situations where the contract is not the result of free bargaining, such as mass-scale transactions, often involving standard-form contracts. (See Metzger on §145 BGB 526 and Hohloch FamRZ 1977 532, and Foster *German Law and Legal System,* 1992, 204). It is difficult to infer a general rule on 'factual' contracts based on *"Persons acting in a manner which is typical in contemporary conditions..."* (Cohn 114).

entail the risk of allowing a far too extended liability and judicial discretion[817]. The idea is not suitable for precontractual conduct either[818].

3.8.1.2.4. Reliance between the parties.

Reliance between the parties[819] has often been called upon to justify third party protection, as it has been the legitimising reason for other rights, especially those at a precontractual stage. However, apart from the fact that reliance is not the rule even between parties to a contract[820], the question here is to establish the liability of the debtor towards the third party on criteria that are as objective as possible, guaranteeing a fair treatment of the debtor. Reliance entails an element of uncertainty[821]. It could actually play some role in exceptional circumstances when the creditor is profoundly liable for the welfare of the third parties.

3.8.1.2.5. Delict.

Suggestions in favour of delict are not accepted by the majority of academic lawyers. Delictual provisions, as treated by the courts, will possibly not offer substantial protection. Supporters of the application of the law of delict often imply (or link their suggestions to) a reform of delict which seems unlikely. Lorenz expresses[822] his preference

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817 Even persons coming in accidental social contact might be protected.

818 It has been argued that the 'factual' contract view provides an explanation for the extension of the mechanism to the precontractual stage. Arguments focusing on the provisions on *culpa in contrahendo* were used in order to support the acceptance of the theory of "factual" contracts, See Larenz "Die Begründung von Schuldverhältnissen durch Socialtypisches Verhalten" NJW 1958 1897. However the precontractual conduct and wrongfulness is considerably individualised, the 'factual' contract view would seem as if the debtor's liability is presumed.

819 See Canaris JZ, 1965 475-482, and Thiele JZ 1967 649-657.

820 Reliance is usually not the essential motive in concluding the contract. Moreover, when a party shows reliance in the possibility to conclude a contract, or to the behaviour of the debtor, he might not be taking into account the possibility of the violation of the duty of care. See the reference form common law in previous footnote.

821 A debtor might not know the increased risks involved in case the creditor's reliance is difficult to justify on the facts or transactions' practices and customs. Reliance is often difficult to prove comprehensively. Moreover, reliance is often taken as self evident while it should require special circumstances and proof .

822 Lorenz JZ 1966 143.

for a general provision such as an action for negligence as in Anglo-American law. He also suggests the assimilation of the requirements and consequences of §831 BGB to those of §278 BGB and the drafting of a code of professional duties.

The delimitation of the circle of protected persons would be significantly more difficult under the law of delict. German lawyers have given priority to the law of contract not only because of the difficulties in applying the law of delict but also because contractual solutions povide an equitable and economically rational manner of restricting the circle of protected persons.

To consider every violation of a behavioural duty as unlawful and to hold the debtor delictually accountable for it would enhance the applications of the law of delict against the rationale of liability in the BGB. The BGB legislator has made a clear choice against a general delictual clause. Moreover, in the case of precontractual conduct any impartial comment or any harmless conversation could endanger the third party's liability.

3.8.1.2.6. Good faith.

Attempts to focus the parties' intent as a possible foundation failed because they were arbitrary and unrealistic. The fact that the third party protection seemed fair and reasonable led the search for a basis in the legislation[823] to centre naturally on general fairness ideals[824], especially good faith in which protective duties are based[825]. The idea is now settled in case law although still debated among academics[826].

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823 The mechanism is not specifically provided for in statute law and contractual protection is in principle limited to the contracting parties, while the law of delict is supposedly covering the rest of the cases.

824 As said before it is a principle of immense value for the development of private law which incorporates basic aspects of western legal culture. (Sirp on § 242 BGB 451, Roth on §242 BGB 75)

825 Meaning of course good faith as a a compulsory legislative provision and an *"equitable principle of justice"* (Foster *German Law and Legal System,* 1992, 201) than a direction for the interpretation of the parties' will as found in §157 BGB.

826 See Gottwald on §328 BGB 1025, Sonnenschein *Juristische Arbeitsblätter,* 1979 226, Larenz I, 185, et seq., Sirp on §242 BGB 451 et seq.

The effect of good faith is determined by the nature and content of the legal relationships where it applies[827]. It presents particular advantages. First its pre-eminence among general principles offers indisputable legal credentials to the mechanism[828]. It focuses on the creditor's reliance upon the debtor to protect the third party, highlighting the former's interest as well. As a general clause it possesses conceptual flexibility in order to adjust to different facts, as well as to describe and regulate different situations and needs[829].

Good faith recalls broader social and ethical values[830] and brings forward requirements of justice[831], focusing on the honesty, sincerity and fairness that should be shown in transactions, according to prevailing social ideas[832]. The emphasis is thus removed from the inconclusive or inequitable parties' intent. Good faith imposing social norms on the contractual arrangement[833] is as objective as possible, as it is based on common perceptions about transactions which, ultimately, involve the promotion of community interests[834]. It imposes on the parties a duty to take account of the potentially affected

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827 § 242 BGB applies on any obligation whether it derives from the law or from contract, but it does not apply on simple social contact. It applies that is where a legally evaluated relationship exists. (Roth on §242 BGB 75, Larenz I, 107)

828 See Larenz I, 106-107.

829 General clauses are openly worded and are adjustable so as to apply to different sets of facts and to confront different requirements each time.

830 Roth on §242 BGB 75.

831 The protective effect for third parties is a requirement of justice, a socially justifiable request for the treatment of unfairness where the third party has no effective means to protect his wrongfully affected interests.

832 See Roth on §242 BGB 75.

833 Good faith prevails over the will of the parties and enables the imposition of socially required norms in the contractual arrangement. It upgrades the content of the relationship to the standards of the legal order and social justice.(Roth on §242 BGB 77 and 123, Siebert on §328 BGB 816).

834 Thus involving the balancing of competing interests and avoiding the excessive financial exposure of the debtor which could endanger the economic activity he is involved into.

See also Siebert on §328 BGB 807, Roth on §242 BGB 81. Good faith imposes the cooperation of the parties in the unfolding of their relationship, so that not only both the parties will be satisfied, but the social requirements the legal order evaluates as important will be met. Acting in accordance to good faith becomes a common purpose of the parties who thus have to undergo additional duties.

interests of their contracting parties. The sensitive role of the judiciary[835] is to acknowledge prevailing social concerns[836]. Good faith is a powerful equity clause and its potential explains the calls for its expansion in common law jurisdictions[837].

As said, good faith is a vehicle for modifying the contents of a relationship[838] and, especially, for imposing protective duties on the debtor[839]. Nevertheless, it does not alter the legal character of the relationship or of the expanded duties[840]. Moreover, it is better

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835 As the outcome of the application of general clauses can not be specifically predicted, their judicial handling must be particularly cautious not to allow subjective views intervene. (Sirp on §242 BGB 452.). The judge has to infer the requirements of the legal order and reach socially prudent, justified solutions, and not to apply his own views. However, the principle has, among others, *"increased considerably the freedom of the courts to interpretethe contracts"*, (Cohn 98).

836 The duty of the judge is to make the criterion of good faith specific and applicable in the particular case. He should determine which behaviour in each case corresponds to the honesty and sincereness owed in the transactions. See Larenz I, 106 et seq. referring to the influence the principle of good faith has exercised especially on the way an obligation should be executed. It would be useful to consider the effect of a number of general clauses in the BGB which introduced considerations of social justice, transactions' practices and ethics, good faith and morality. Among these influences prominent is that of the §242 BGB. See for a broader historical reference Wieacker *Privatrechtsgechigte der Neuzeit*, Göttingen 1967, 507 et seq. *Bona fides* in Black's Law dictionary (5th ed, 1979) characterised an action or behaviour which is done "in good faith, honestly, openly and sincerely; without deceit or fault".

837 See Farnsworth, in Beatson and Friedman 153-170, Lücke, H.K. "Good Faith and Contractual Performance", in Essays on Contract, 1987, on Australian law. As said "Fairness" is the basic equity principle in the English law. Allegedly, courts would have great difficulty to attribute a meaning to good faith (Goode quoted by Farnsworth). Recently the concept was indirectly introduced through the European Community directive on Unfair Terms in Consumer Contracts. (Beatson, J. and Friedman, D., 14.). See also Powel 9 (1956) CLP 16, Brownsword 7 (1994) JCL 917-244.

838 See Larenz I, 110 et seq. It can for instance lead to the increase of the debtor's duties but also to their diminution.

839 As discussed in a previous reference, the principle is the doctrinal basis for the justification and formulation of a number of additional duties. (Roth on §242 BGB 100 et seq.). Some might focus on the performance; guaranteeing its effects, safeguarding its results. More interesting for the purposes of this work are the duties which are relatively independent from the performance, aim at protecting the legitimate interests of one party who might be affected from the behaviour of the other party. The violation of the 'protection' duties gives rise to the third party claims. Protection duties are owed during the precontractual stage as well according to the good faith principle. See Gerhardt JZ 1960 535.

840 See Roth on §242 BGB 75 and Stathopoulos I,118.

suited for close relationships[841] such as continuous contractual relationships[842], or relationships with a strong personal element, as professional advice, where third party loss is more likely. Although contractual duties can be imposed on good faith, statute law does not enable the imposition of delictual duties unless specifically provided for; a violation of good faith will not necessarily give rise to delictual obligations.

Certainly, the application of good faith, as of any general clause, entails risks especially since the result of its application is not surely known in advance. There is always the danger of the judiciary imposing their subjective views as requirements of good faith. However, the 'objective' common views-based principle offers considerable safeguard. In conclusion the principle of good faith offers satisfactory solutions to the question of third party protection. However, establishing the contract with protective effects on a satisfactory legal basis does not explain the method by which the solution was produced, that is what the courts actually did by interpreting the general clause. The courts' function was best described as *extra legem-intra jus.*

3.8.1.2.7. *Extra legem-intra jus.*

As said, the suggestion that the mechanism was produced by an *extra legem-intra jus* intrerpretation reflects the process speculated by Larenz[843] who promoted the most convincing theory regarding the mechanism's legal basis. By characterising the courts' approach as *extra legem-intra jus,* emphasis is laid on the technique applied and not on the legal basis. It is a matter of acknowledging the fact that, once a solution could not be found in the particular BGB provisions on third parties, or some other piece of legislation, a legal basis beyond these specific provisions (*extra legem*) should be sought. §242BGB is the most credible basis in reflecting *jus*, as it represents more accurately than other clauses, social

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841 See Roth on §242 BGB 87, on the areas of §242 BGB application. It is in such contractual relationships that there is increased possibility for the impact of the debtor's behaviour to affect the interest not only of the creditor but of other parties related to the latter or to the relationship. This is especially the case in modern times.

842 *Dauernverhältnisse-;* the constitution of a company or association for instance

843 See before under "Theoretical considerations". See also the reference to Kümmeth in Strauch JuS 1982 , p.828.

perceptions on what is fair and equitable. Following the change of these perceptions, in recent times third party protection has become more eminent.

Identifying the construction involved in producing the mechanism as *extra legem-intra jus* underscores the daring judicial policies which enabled third party protection, and reimposes issues of judicial discretion, which are an important aspect of the contractual solutions to third party loss.

3.9. Special problems.

3.9.1. Release from liability.

It could be thought that, since liability towards the third party is based on a statutory provision, it cannot be altered by the parties' mutual consent[844]. However, §242BGB justifies a particular interpretation of the contract. This interpretation can vary according to the particular agreement and to the circumstances. The protective duties and third party rights are contractual and might vary in content[845]. Exclusions or limitations of liability are possible.

Any exclusion or limitation[846] must comply with the good faith requirements[847] and the provision of §138 BGB, which declares void transactions contradicting public policy[848]. Release from liability, which is meant to be valid against the third party only[849], would possibly contradict §§242 and 138 BGB and the relative clauses in the

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844 See Gottwald on §328 BGB 1031.

845 See Strauch JuS 1982, 828.

846 Were §328 BGB to be the basis of the mechanism then the defences arising from the contract would be available to the promisor (debtor). If a debtor is exempted from liability towards his creditor then this exemption or limitation is valid towards the third party on the basis of §334 BGB. A contractual release from liability functions thus to the detriment of the third party. A contract to the detriment of a third party is in principle void. (Gottwald on §328 BGB 1031, Larenz I, 185 et seq.). The debtor can successfully limit his risk of liability against the third party as against the creditor. Similar seems to be case in British law.

847 There is considerable academic literature on the issue. See See Sonnenschein *Juristische Arbeitsblätter*, 1979 230, Gottwald on §328 BGB 1031, Strauch JuS 1982, 828, Berg Jus 1977, 367.

848 '*gutten Sitten*', literally good mores, (*boni mores*), but in the context of §138 BGB it is translated as 'public policy'.

849 This is not the case with the recent, much debated decision from the Supreme Court of Canada, which will be discussed in Chapter 6, *London Drugs v. Kuehne & Nagel*

'Special Rule for Standard Terms and Conditions'[850]. The same would apply for an exemption at a later stage[851].

It is not enough that the exemption from liability is valid towards the creditor[852]. It is questionable whether an exemption clause must be known by the third party. This could imply some special value attributed to the latter's reliance[853], which might be the case between contracting parties[854] but does not apply to the contract with protective effects. Again the question arises of which exemptions/limitations would be considered acceptable on grounds of justice as expressed by §242 BGB.

Arguably, the very exemption from liability for protective duties contradicts their purpose and character as typical contractual risks. It is possible to argue that exemption

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International Ltd.,[1992] 3 SCR 299, where the application of the exclusion clauses was extended protectively in favour of the employees of the debtor. See "*London Drugs v. Kuehne & Nagel International Ltd.*" in Chapter 6.

850 *Gesetz zur Regelung des Rechts des Allgemeinen Geschäftsbedingungen von* 19.12 1976. § 9 declares void the provisions in standard contract conditions *"...if they place the other party at an undue disadvantage to such an extent as to be incompatible with the requirements of good faith"*. § 11 Nr. 7 renders void the provisions in standard contract conditions which in the event of one party rescinding or giving notice of termination thereof entitles the user to demand *"...(a) an unreasonably high remuneration...(b) an unreasonably large amount as compensation for expenses incurred by him"*. The quotations are taken from *Business Transactions in Germany*, 1992, Rüster (general editor), Appendix 8, reprinted from The German Standard Contracts Act, copyright 1979, by Fritz Knapp Verlag GmbH, Frankfurt am Main.

851 In Gottwald's opinion the debtor could have exempted his liability from the start creating a recognisable by the third party area of narrow liability. Gottwald on §328 BGB 1031. An already existing claim of the third party (from negotiations for instance) cannot be limited by a subsequent release from liability.

852 Release from provisions imposing liability towards the latest consumers can be valid if it was permitted in the relationship between the basic parties. See the "Special Rule for Standard Terms and Conditions" (*Gesetz zur Regelung des Rechts des Allgemeinen Ceschäftsbedingungen von* 19.12 1976). §24 considers that certain paragraphs and especially §11 which is to our concern, do not apply in standard contract conditions *"...1. which are used in a contract with a merchant in the course of his business; 2. which are used in contracts with public institutions and corporations"*. §9 is expressly excluded from this restriction. Commercial customs and usages shall however be taken into account in the application of this special statute on standard conracts conditions, *"...in the appropriate manner."*. The statute text was taken from *Business Transactions in Germany*, 1992, Rüster (general editor), Appendix 8, reprinted from The German Standard Contracts Act, copyright 1979, by Fritz, Knapp Verlag GmbH, Frankfurt am Main.

853 The idea being that the debtor cannot at the same time enter a relationship of reliance and limit his liability towards the third party without the latter's knowledge.

854 Or if the basis of the mechanism was §328 BGB.

from such risks should not be possible[855] as they constitute the predictable social repercussions of the contract (and not because they would not be known by the third party.

Exemption clauses are thus likely to be ineffective under particular circumstances. The debtor's claim to be released from liability will have to be evaluated on the basis of the good faith principle in order to establish whether it leads to an unacceptable impact on the sphere of the third party's legitimate interests, and contradicts basic principles and the rationale of the mechanism for the protection of third parties.

3.9.2. Contributory negligence.

It is generally accepted that the third party contributory fault should be taken into account in awarding damages[856], but whether the creditor's contributory fault should also be taken into account is questionable.

According to one view, on the basis of §§254(II) s.2[857] and 278 BGB[858], the creditor's contributory fault should be taken into account only when he functions as an assistant to the debtor's performance of the protective duties or as the third party's legal representative[859].

According to the prevailing view, by analogy to §§334 BGB and 846 BGB, the creditor's contributory fault should be used against the third party independently of

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855 This seems to be the opinion of Strauch who seems however to focus on the third party's lack of knowledge of the exemption from such typical risks. (Strauch JuS 1982 828.) In any case the invalidity of such exceptions is easy to base on the transactions practices, justice and good faith.

856 Gottwald on §328 BGB 1032

857 §254 BGB establishes contributory negligence ("If any fault of the injured party has contributed to causing the damage the oblgation to compensate and the extent of the compensation...depend upon the circumstances especially upon how far the injury has been caused by the one or the other party"). §254 BGB(II)s.2, expressly provides that § 278 BGB applies *mutatis mutandis*. in contributory fault cases. The quotations from the BGB were taken from *"The German Civil Code"*, Forrester, et al..

858 §278 BGB establishes the responsibility of a person for his legal representatives and for persons he employs in the performing his obligation.

859 Provided of course that the third party's claim is on a contractual basis. See Gottwald on §328 BGB 1032, Strauch JuS 982 828, Larenz I, 185, Thiele JZ 1967 649-657. See also BGHZ 9 316; NJW 1953 1977, BGH NJW 1975 867.

whether the creditor was an assistant to the debtor[860]. The idea is that the third party should not be in a better position than the creditor[861]. However, this assumption has been doubted. Fikentscher[862] considers that protective duties towards the third party can in special cases be stricter than those towards the creditor.

It is also argued that, on the basis of the legally independent character of the protective duties and of the separate debtor-third party relationship, contributory fault should neither be taken into account[863] nor limited on the basis of an analogical application of §846 BGB[864]. However, the third party is affected by developments in the contractual relationship, through his relationship to the creditor, and the violated protective duties are borne in the contract. Good faith would impose taking account of the creditor's contributory negligence in order to protect the defendant.

More complex is the situation where the third party has at the same time a delictual claim, (or where §278 BGB does not apply[865]). The prevailing view would apply §334 BGB by analogy and take account of the creditor's contributory negligence[866]. (The courts resort to §§254(II) s.2, and 278 BGB even when a delictual claim is made.). This

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860 In this case a proportional calculation of the damages is possible. One example which might raise questions would be that of a person hiring a car which has a faulty steering system. The person driving the car understands that the steering is faulty yet continues to drive, the car breaks down and causes pure economic loss to another person due to, for example, delay to attend a business meeting or make deliveries. If it were possible to establish liability in delict for the loss to which the driver and the hirer of the car contributed then according to the BGB provisions on joint and several liability each would be liable for the whole of the amount of the loss and if he pays the claimant he could turn against the other who contributed to the damage and ask the court for an apportionment of the damages. Under a contractual claim the defendants contribution to the loss can be specifically calculated. See under the following heading in the text.

861 Gottwald on §328 BGB 1032.

862 Fikentscher 153.

863 According to §254(II) s.2, and §278 BGB. §254 BGB(II) .2, expressly provides that §278 BGB applies *mutatis mutandis*. in contributory fault cases.,

864 § 846 BGB regulates contributory negligence in the law of delict: The provisions of §254 BGB apply. See Gottwald on §328 BGB 1032. See also Medicus "Zur Verantwortlichkeit des Geschädigten für seine Hilfspersonen", NJW 1962 2081.

865 See Medicus NJW 1962 2081.

866 Gottwald on § 328 BGB 1032, Strauch JuS 1982 , 828.

should be the case if the third party rejects the contractual claim[867]. By reason of §846 BGB[868], §254 BGB would be applied.

3.9.3. If both debtor and creditor are liable -- The case of joint and several liability.

The question of the creditor's contributory negligence, could be expressed itself as a problem of joint and several liability whereby both the debtor and the creditor are potential defendants. This is the case of pure economic loss caused by the careless behaviour of the creditor, for instance driving a hired vehicle while knowing that the steering wheel is defective[869]. Joint and several obligation of the hirer of the vehicle and the debtor is in principle possible in either contract or delict. The provisions on joint and several liability are similar regarding both contract and delict establishing each defendant's liability for the whole amount of the loss. It would be wrong to exclude beforehand the creditor's liability in contract. The creditor might have undertaken specific duties of care when hiring the car.

It is of course fairer and economically sensible for the debtor to avoid a claim for the entire loss, arguing that he was not meant to undertake under the contract. Although he has a right to turn against the other jointly liable debtors[870] if he has paid full compensation, the creditor's property -- the creditor is a jointly liable debtor -- might not suffice to compensate the debtor. In the case of a contractual claim, it is apparently easier to prove against the possibility of joint and several liability than it is in the case of a delictual claim. The general provisions on joint and several liability concern performance

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867 The third party might reject the contractual claim by analogy to §333 BGB. According to this article "if the third party rejects by declaration to the promisor, the right aquired under the contract, the right is deemed not to have been acquired". *The German Civil Code*, 1975. As the success of the delictual claim is not certain he would find himself in considerable disadvantage.

868 If "in the cases provided for by §§844, 845, some fault of the injured party has contributed in causing the damage which the third party has sustained, the provisions of §254 apply to the claim of the third party."; *The German Civil Code*, 1975.

869 This would be the case when the vehicle is immobilised due to mechanichal failure causing delay and loss of profit or other financial loss to the injured party.

870 §§426, and 840 BGB.

and are based on the agreement between the parties (§421BGB and §427BGB)[871]. Under contract it is easier to rebut the presumption of doubt according to which debtors of a divisible performance are joint debtors (§427BGB). In delict, the relative provision (§840BGB)[872] is more abstract regarding the criterion for the existence of joint and several obligation; as the law of delict as a whole, it is focused rather on guaranteeing the compensation of the injured party. Moreover, it is easier under contract to prove the contribution of each of the potential defendants to the loss, and this should influence the attitude of the court towards rejecting the possibility of joint liability for the entire loss. The debtor can raise the creditor's contribution to the damage in his defence, proving that, as can be evidenced in the contractual arrangement, the loss was not the result only of his (the debtor's) violation of a contractual duty. In sum, the application of contract law in the case where both creditor and debtor are possible defendants is preferable from the point of view of protecting the defendant and because it generally leads to fair and predictable results.

3.9.4. Limitation period.

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871 The BGB contains one sets of provisions on joint and several liability applicable to all obligations (§§420-432BGB) and one provision for obligations in delict §840BGB). §421BGB on 'Joint debtors' provides: "If several persons owe one performance in such a manner that each is bound to effect the whole performance, but the creditor is entitled to demand the performance only once (joint debtors) the creditor may demand the performance at his option by any one of the debtors, in whole or in part. Until the whole performance has been effected all of the debtors remain bound. " §427BGB reads: "If by contract several persons bind themselves to effect a divisible performance, they are liable in case of doubt, as joint debtors.". In §426BGB it is provided that 'As between themselves the joint debtors are liable in equal shares unless otherwise provided' and that the action of the creditor against the other debtors is transferred to the debtor who satisfies the creditor.

872 §840BGB [Liability of several persons] provides under "(1) If several persons are jointly responsible for the damage arising from a delict they are liable as joint debtors. " Thereon the provisions regulates the cases of delictual liability for employees and of liability of the persons exercising supervision. (Employees and supervised persons are jointly liable. As between the joint debtors only those supervised are liable to the person who has the duty of supervision.). Joint liability cases might arise in relation to the liability of animal keepers and supervisors when the latter are liable to compensate loss for which a third party is also liable. As between themselves only such third party is liable. Apparently the provision on the establishment of joint liability in delict is not sufficiently illuminating as regards the possibility to avoid and or prove against joint and several liability. If is easy to foresee that joint liability in delict might be difficult to avoid in the case a creditor has contributed to the damage.

The third party claim is naturally subject to contract law provisions[873] including those on limitation periods[874]. Contract law limitation periods, even if less advantageous for the plaintiff, are preferable from a policy perspective in all the systems examined[875]. They are fairer to the debtor because they are more predictable. It is, arguably, preferable to have disputes resolved sooner than later, especially if they concern professional liability as do many third party loss cases. Finally, contractual prescription periods are better targeted to the situations in question and reflect the evaluation by the legal order of the contractual relationships in question. In cases involving harm to an integrity interest it has been considered that by reason of similarity to delict the relevant provision (§852 BGB[876]) should apply[877]. This is not the prevailing view[878].

3.9.5. Contractual guarantee in lease cases.

Case law extends the guarantee for defects of the leased item present at the conclusion of the contract to the third party (§538(I) BGB[879]). Supporters of the view that

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873 Berg Jus 1977, 367, Gottwald on §328 BGB 1033, Sonnenschein *Juristische Arbeitsblätter*, 1979 230.

874 §195 BGB (a thirty years period) or some shorter special period from §§196-197 BGB (§196 BGB provides for a two years limitation period, and §197 BGB provides for a four years period). In the case of lease and loan contracts, the shorter limitation periods of §§ 538 and 606 respectively will apply. Gottwald on §328 BGB 1033.

875 See "Is the contractual approach advantageous?", in Chapter 3, on Greek law, "Limitation period" in Chapter 4 on American law, "Advantages", in Chapter 5 on Scots law, "Advantages of the contractual solutions", in Chapter 6 on Commonwealth systems.

876 The limitation period lasts for three years from the time the injured party has knowledge of the injury and of the identity of the person liable to compensate.

877 See Sonnenschein *Juristische Arbeitsblätter*, 1979 231, and Kreuzer "Anmerkung an BGH 28.1.1976-VIII ZR 246/74 (OLG Koblenz).", JZ 1976 778. The same view was supported for precontractual liability which resembles delict.

878 Even in cases of a multiplicity of claims it is doubtful whether delictual provisions should apply. It would seem inconsistent for instance, to deny the application of §831 BGB and resort to §852 BGB.

879 "If a defect of the kind specified in §537 exists at the time of entering into the contract, or if such a defect arises subsuently in consequence of a circumstance for which the lessor is responsible or if the lessor is in default in respect of the removal of a defect, the lessee may demand compensation for the nonfulfillment without prejudice to the rights specified in §537."; *The German Civil Code*, 1975. Gottwald on §328 BGB 1031, Söllner "Mietverrtagliche Sachmängelhaftung des Grundstückserwerbers gegenüber Dritten-BGHZ 49 350" JuS 1970 159.

third party protection has a statutory basis, laid emphasis on this extension. Protection will depend, however, on the extent and provisions of the basic obligational relationship.

In a well-known decision[880], a third party was allowed to claim compensation for the destruction of equipment that belonged to her on the basis of the guarantee liability of the (new) owner (heir) of the leased building, who could have had no knowledge of the defect existing at the conclusion of the lease. This is not an across-the-board exception to the requirement of the debtor's awareness of the creditor's legitimate interest[881] in the cases where there is a succession in the position of the debtor, but an isolated exception of the requirement based on a specific statutory provision. Similar situations might arise in sale, hire, contracts for works or in product liability[882].

3.10. Areas of application.

3.10.1. Advocates' contracts.

Contracts with advocates for legal advice (*Rechtsberatung*) or for the management of business transactions (*Geschäftsbesorgung*) can have protective effects in favour of third parties[883].

Thus the legality of the claim of the sole partner of a limited liability company who suffered loss due to his advocate's wrong advice not to take part in certain judicial procedure, and due to the advocate's failure to take part, was accepted in principle[884],

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880 BGH 22.1.1968 -VIII ZR 195/65; NJW 1968 885. See also the comment by Berg in NJW 1968 1325.

881 See under "Debtor's awareness of the proximity and of the creditor's legitimate interest".

882 Case law is settled in extending guarantee liability in cases of lease. However, the contract with protective effects for third parties does not apply in product liability cases.

883 The property of the latter is usually affected from the violation of the advocate's duties. See Gottwald on §328 BGB 1033, Ballhaus on §328 BGB, Heinrichs on §328 BGB 356, Zimmermann FamRZ1980, 99-103. For a brief reference to the common law position in some similar problems see McDonald "Solicitor's liability; Tort, Contract or Both?", in JCL 4 (1991) 121.

884 BGH Urt. v. 13.11.1973-VI ZR 53/72 (München); NJW 1974 134. The plaintiff a financial broker was the only shareholder and manager of a limited liability company. In his personal capacity he had a contract with an advocate. The plaintiff was asked to take an oath of disclosure for certain debts he owed for the expenses of judicial proceeding he had to face regarding a loan he finally paid. (The oath of disclosure, had been imposed on him by his opposing party in the dispute.) Following his advocate's advice the partner did

apparently on the basis of the contract with protective effects. Another example involved the mistaken delivery of a note to quit a leased building. The advocate was held liable to the future lessees for additional accommodation costs[885]. As with American and Commonwealth laws on attorney misrepresentation, the courts are reluctant to award liability, requiring usually some form of direct contact between attorney and plaintiff[886].

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not appear at a hearing in order to take the oath. Neither was his advocate present. A warrant of arrest against the partner was issued, and, according to the relative provisions, his name entered the list of insolvent debtors (*Schuldnerverzeichnis*). As a result a Hamburg bank which had offered the company a loan considered the company not creditworthy and the company had to sell a piece of land it had bought for investment in order to return the loan. The company suffered loss therefore. The plaintiff claimed compensation for personal damage he suffered as the only shareholder of the injured company. The BGH, overuling the OLG decision, noted that the plaintiff is not asking compensation for the damage a third person, the legal person of the company suffered, but for his own personal damages as only shareholder of the company which suffered losses. Although there was a need to take into account the different legal personality of the company, the BGH thought that in cases of one-man companies the property of the company is liable for the financial or other losses the shareholder is burdened with. In this case the plaintiff himself is practically suffering the losses. The BGH could not decide on whether the company had suffered losses or on the causal link between the behaviour of the advocate and the loss or on the argument of contributory negligence. The decision attracted the critisism of lawyers who would have prefered the application of *Drittschadensliquidation* .

As regards the list of insolvent debtors (*Schuldnerverzeichnis.*): *"When a debtor discloses his assets or when a committal order for his arrest is issued his name is entered in the list of insolvent debtors. This list is open to inspection by the general public. ....The list serves the purpose of making prospective business partners or customers aware of the financial position of the debtor"*; "Litigation in Civil Courts", by von Westerholt in *Business Transactions in Germay* 1992, Rüster (general editor). See §§901,908 ZPO.

885 LG (München) Urt.v. 1.12.1982-25 0 1596/82; NJW 1983 1621. The advocate made a mistake in delivering a note to quit (he delivered it to one of the lessees while he should have delivered it to both in order to be valid). The house belonged to a client and she had decided to leave it to her daughter to use. Due to the advocate's mistake the house was not available until one year after the prescribed time, and the daughter had to find accommodation elsewhere for herself and her family. The compensation claim included the additional expenses for (higher) rent and the double removal costs.

886 See under "Attorney's liability to non clients -- A contractual view", in Chapter 4, on American law, where liability is accepted for misrepresentations of the attorney to the plaintiff. See the relative cases in the footnotes. In most there is some form of direct contract between attorney and plaintiff as for instance*Vereins -- Und Weatbank, AG v. Carter*, 691 FSupp 704 (S.D.N.Y. 1988), where the attorney sent a letter to the plaintiff. The case law was influenced by decisions on cases concerning accountants' liability. Lawyers were found liable for misleading half truths and, in some states for innocent misrepresentation as well. However courts are reluctant to accept the liability of an attorney representing an entity to shareholders or partners. See under "Third party pure economic loss" in Chapter 5. In Scots law as in the Commonwealth systems for the case where the solicitor is offering legal advise to someone who is not a client the normal principles for misrepresentation the principles of famous *Hedley Byrne v. Heller* [1964] AC 465, [1963] 2 AllER 575, apply. According to the decision which rejected liability based on reasonable foresight, liability for negligent misrepresentation could be based on a special

The main difficulty in applying the contract with protective effects involves the identification of a special creditor's interest towards the third party. It is easier to accept when family links existed. Advocates have been found liable towards children who would have benefited from their services, had the advocates not shown lack of care, as with a divorce agreement found not to be valid against the couple's debtors[887]. However, as will be discussed in the context of American law, on the one hand, the creditor usually aims at benefiting himself alone, while on the other, the attorney owes a duty of undivided loyalty to his client, a duty not easily combined with duties to non parties[888]. This is the

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relationship between plaintiff and defendant which gives rise to reliance in the defendant and justified the argument that the latter assumed responsibility from his advice towards the plaintiff. *Hedley Byrne v. Heller* involved the inquiry by one bank to another (defendant) regarding the financial position of a company for whom the respondents were bankers. The respondents replied, in writing, that the company was trustworthy in the way of business.The answer was communicated to the inquiring bank's customers (plaintiffs) who, relying on this information, placed orders for adventising time and space with the company which soon after went into liquidation causing the inquiring bank's customers to lose £17,000 in advertising contracts. The House of Lords on appeal by the plaintiffs held that under the circumstances the bank which gave the information would be under a duty of care. However, due to a disclaimer of liability it could not be held that the respondent had assumed responsibility for the information provided. Important in this case was the fact that the respondent were under no contractual or fiduciary obligation to give the information or advice. In circumstances under which a reasonable man so asked would know that he was being trusted or that his skill and judgement were being relied on, if he does not qualify the answer so as to make clear he does not accept responsibility, then he under a duty to exercise such care as the circumstances require. See *Midland Bank v. Cameron, Thom Perkins and Duncans* 1988 SLT 611.

887 BGH Urt. v. 11.1.1971-VI ZR 261/75 (Bamberg);NJW 1977 2073. One party promised to the other that certain property assets would be given to the children. When the latter found that due to the advocate's fault they could not enforce the agreement, one sued the advocate. The LG rejected the claim, the OLG granted compensation and the *Revision* of the defendant was unsuccessful. The Federal Court of Appeal (the *"Revision"* court; the court adjudicating appeals against OLG decisions on issues of law only) noted that the child was asking compensation for his own losses on the basis of the contract with protective effects. The *Drittschadensliquidation* might have room of application had the father of the child raised the claim. The case created no problem as to the debtor's knowledge of the circle of protected people. The protective effect in favour of the children was not disputed at any trial level. The Senat of the *Revision* court questioned especially the extent this protection might reach. The applicability of the mechanism was not doubted in principle by the *Revision* court but, contrary to the appellate court, it was more sceptical on this application. It was further questioned whether the liability could be based on the violation of special performance duties.

888 See under "Beyond will beneficiaries" in Chapter 4 on American law.

case with Commonwealth systems and Scots law where no liability is accepted for the conduct of a case in court or for related preliminary work[889].

3.10.1.1. Drafting wills.

The cases involving the drafting of wills are more usual (and complicated), whereby the intentions of the testator or future testator are not realised[890]. The most well known case involves failure to draft a will[891]. Liability for negligent drafting or failure to draft wills is regularly accepted in Commonwealth systems and American law but it has not been accepted by Scottish courts yet[892].

Such decisions have given rise to criticism. It was argued that there was never a contract concluded between the deceased and the advocate[893]; their contact was

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889 See under "Third party pure economic loss", in Chapter 5, on Scots law. See Thomson *Delictual Liability*, 136, *Murray v, Reily* SLT (Notes) 49, and *Kyle v. P&J Stornmouth Darling WS*, 1993 SCLR 18.

890 See Zimmermann FamRZ 1980, 99.

891 BGH Urt. v. 6.7.1965-VI ZR 47/64 (OLG Hamm); JZ 1966 141. The case involved a testator who intended to leave as sole heir his daughter and as legatee of certain items his granddaughter, the child of his deceased son. The advocate undertook the obligation to arrange for the drafting of a will with a notary public. Four appointments were cancelled; two because the advocate had not been able to attend. The future testator died suddenly leaving as heirs his daughter and granddaughter on the basis of an older will. The daughter sued the advocate. The LG accepted the claim. Both the appeal and the *Revision* were unsuccessful. The court accepted the extension of particular behavioural duties to third persons and took into account the application of the mechanism to bodily injuries, material harm, and precontractual liability. See the comment on the decision by Lorenz in JZ 1966 143.

892 See under "Third party pure economic loss" in Chapter 5, under "Third party pure economic loss" in Chapter 6, and "Liability to disappointed will beneficiaries" in Chapter 4. Liability in Commonwealth systems is based on the leading *Ross v. Caunters*, [1980] Ch. 297, and recently it was expanded with the House of Lords decision in *White v. Jones*, [1995] 2 WLR 187. Scottish courts continue to follow the decision in *Robertson v. Flemming*, (1861) 4 Macq 167, of the House of Lords on a Scottish case, which is historically one of the leading privity establishing cases, despite expressed dissatisfaction, and although apparently the House of Lords attitude has changed. The Scottish courts rejected relative claims in *Weir v. J.M. Hodge* 1990 SLT 266, and *MacDougall v. MacDougall's Executors*, 1994 SLT 1178. Arguably *White v. Jones* is valid for English law only. The other Commonwealth systems follow English law -- in fact the Canadian *Whittingham v. Crease & Co*, (1978) 88 DLR (3d) 353, preceded *Ross v. Caunters* by a year --; at some stage Australian law was more progressive in favour of third parties [*Hawkins v. Clayton*, (1988) 78 ALR 69 (HC)]. Leadin in American law is *Biankanja v. Irving*, 49 Cal 2d 647, 320 P.2d 16 (1958). As is discussed in Chapter 4, unlike other attorney services, drafting will concerns the production of a specific result, and thus is more easily assessible, while there is no conflict of loyalties as far as the attorney is concerned.

893 Medicus NJW 1962 2081, and Lorenz JZ 1966 143.

precontractual. It is difficult to consider that the relationship between an advocate hired to prepare a will and his client can be anything else but contractual, although arguably a degree of uncertainty regarding the time the contract was concluded exists in professional relationships of confidence. However, the request to prepare a will is not a general preliminary contact but a specific mandate[894].

It was also noted that by not drafting the will the advocate violated his basic contractual duty rather than a special protection duty. This case was thus one of non fulfilment, not of wrong execution and the contract with protective effects should not apply[895]. In the recent *White v. Jones*[896], Lord Goff referred to the German mechanisms and noted the similarity of the failure to draft a draft a will to *Drittschadensliquidation* cases for which he expressed preference. Noting this similarity is a valid point, especially when taking into consideration that the performance is not realised. The court obviously focused on the defendant's carelessness and was reluctant to consider whether the plaintiff really had an interest in the performance, while possibly saw this specific conduct as part of the advocate's continuous relationship with the testator. Cammerer[897] thought that it was enough that the damage fell within the scope of the contractual relationship.

In such cases, it is also argued, the usual multiplicity of risks is not present as there should be. The prospective testator suffers no loss, as he is not at such risk[898], in contrast to the intended beneficiary. The legal position of the future testator is not worsened, noted a similar argument[899]. However neither a transfer of loss is a prerequisite, nor must the risks of the testator and the beneficiary be identical. The testator's right to bequeath his property is affected; his legal position is thus worsened.

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894 There is of couse the possibility of contractual protection for third parties for loss suffered due to the violation of precontractual duties, but this is clearly not the problem with the order for the preparation of a will. See "Precontractual relationships".

895 Zimmermann FamRZ 1980 99.

896 [1995] 2 WLR 187

897 In Zimmermann FamRZ 1980 100-101.

898 See Lorenz JZ 1966 143.

899 See in Zimmermann FamRZ 1980 101 et seq, the reference to Kegel in "Festsschrift für Flüme", 1978, Band I, 545 et seq..

It was also remarked, arguing against extending advocates' liability[900], that there is no legally relevant link between the wrongful behaviour and the loss[901]. The advocate's attitude was not related directly to the property loss; the client's death intervened. This view is mistaken. Once the causal link between the advocate's behaviour and the loss is not denied, it is hard to ignore that the advocate' behaviour was wrong and thus legally relevant.

Such decisions, it was also alleged, blur the boundaries between delict and contract and these cases should be decided in delict[902]. However, the wrongfulness of the injuring behaviour appears in its proper dimensions in the contract. Cammerer noted that the criteria for the contract with protective effects are stricter than delict's[903].

Another line of criticism focused on the fact that a person who is to benefit from a testament has no claim on the inheritance estate before the testator's death[904]. The testator can always change his will. The position of the intended beneficiary was therefore not affected. The law, however, protects future rights as well and, once the testator's will is sufficiently evidenced, the intended beneficiary has a valid interest; otherwise no testator's interest would be sanctioned.

Other views aimed at alternative ways to satisfy the intended beneficiary[905]. It was argued, that if the deceased had a claim against the advocate then the former's successor in his legal rights and duties would obtain this claim. However, the actual heir is

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900 It was thought that the courts were embarking on a "journey to the unknown". See Zimmermann FamRZ 1980 p.100.

901 See in Zimmermann FamRZ 1980 101 et seq, the reference to Kegel in "Festsschrift für Flüme", 1978, Band I, pp.545 et seq. See also Gottwald on §328 BGB 1033.

902 See Lorenz JZ 1966 143.

903 See in Zimmermann FamRZ 1980 100.

904 The close relatives for instance have, as long as a person is alive, neither a right to inherit, nor an expectation right.

In Scots law it could be said that such an expectation interest (hardly a right) is accepted. When for instance a will has been made, the person who is benefited from the will has an interest that the testator is not influenced unduly and change the testament. Were such an event to happen then a claim of the person benefited from the previous will for the annulment of the new will which is the result of undue influence might be accepted.

905 It was also suggested that advocate's liability should be upgraded to become similar to the notaries' one. Lorenz JZ 1966 143, referring to §19 of the BundesNotarOrdnung,(NotO).

not a reliable representative ("campaigner") of the intended heir's interests[906] and as no loss is transferred, there is no case or need to transfer a claim.

Kegel[907], opposes the idea of a contract protecting the third party, because it involves the unnecessary circulation of the value of the inherited estate, value asked by the advocate although the heir is known[908]. In his view, the legally protected interest in testament cases is the 'better will' of the testator[909], his real intentions. He suggests nullifying the heir's succession and allowing a claim by the intended beneficiary against the heir, referring to a number of instances in the BGB where a testament is annulled[910]. On these occasions, however, either the content of the last will stands against the legislature's evaluations, or the form is seriously defective. The will in the latter case was expressed in due course and is set aside by force of statute[911]. The succession is thus legal in these cases. Furthermore, Kegel seems to ignore the difficulty in proving the real intentions of the testator[912].

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906 See in Zimmermann FamRZ 1980 101 et seq, the reference to Kegel in "Festsschrift für Flüme", 1978, Band I, 545 et seq..

907 See in Zimmermann FamRZ 1980 101 et seq, the reference to Kegel in "Festsschrift für Flüme", 1978, Band I, 545 et seq. See also 1033.

908 His arguments are part of an overall attack against the form requirements of inheritance law (See in Zimmermann FamRZ 1980 102, the references to Fritz von Hippel (*"Formalismus und Rechtsdogmatik"*, 1935), and Lange in footnote 60.). These ideas are not generally accepted as the situation in the law is considered satisfactory in general. Gottwald on §328 BGB 1033.

909 *"Besseren Erblasserwillen"*. Zimmermann FamRZ 1980 101.

910 These where: (a) Challenging a testament's degree, disposition (*Anfechtung einer Verfügung;* especially in §§ 2078-2083 BGB, which refer to two possibilities of avoiding a testament's disposition; one when a particular declaration was made out of error, or was the result of erroneous assumption or expectation over circumstances or was made after threats and the second; when the testator has passed over a compulsory beneficiary unknown to him at the disposition or born after that time.), (b) Deprivation of a compulsorily granted portion (*Entziehung des Pflichtteils*, in §§ 2303 BGB et seq. which refers to those entitled to a compulsory portion of the inheritance estate.), (c) Obligations arising from an inheritance contract (*Erbvertrag;* §§2274 2302 BGB, especially § 2081 BGB referring to the avoidance of the contract by the testator) or from a joint will (*gemeinschaftliche Testament;* §§ 2265-2273 BGB, especially §§ 2270-2271 BGB referring to the revocation of the disposition). See Zimmermann FamRZ 1980 101.

911 Kegel attacks form requirements aiming at replacing existing last wills. These requirements guarantee the security of the relative transactions and restrict the possibility of precipitate decisions. These basic function of form in testament will thus be endangered. Zimmermann FamRZ 1980 102.

912 He seems to be taking the real intentions for granted. Proof of these intentions is considered difficult. Zimmermann FamRZ 1980 102

There are major policy reasons against upsetting inheritance laws[913], reflected in the increased formalities required for testament drafting, especially in the continental[914] and the Scottish systems. Morover, the invalidation of the testator's will most likely shall be impossible to achieve; even if achieved this would not lead to the satisfaction of the intended beneficiary[915].

The imposition of the testator's real intentions might seem practical and fair, but it would lead to the harm of the heir[916], who is not at fault, and would contradict a clear legislative mandate. The heir would suffer loss but would (possibly) have no redress against the advocate[917], as the link between his loss and the advocate's behaviour is causally weak.

In sum, the solution of the contract with protective effects seems to balance well the fairness arguments by turning against the behaviour which is disapproved by the law and without worsening unreasonably the position of the heir. It seems to be a convincing arrangement for allocating risks and economic advantages[918]. To return to a previous point, although it is fair to say that these cases, once performance is not accomplished, involve the violation of a basic duty and resemble *Drittschadensliquidation*, arguably, the contract with protective effects is the more appropriate venue for these cases. At first, as seen in the

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913 Stability in transactions, quick resolutions of disputes are such policy reasons, in addition to the clear preference of the legislature for specific lines of succession. It is thus almost impossible to prove that the testator simply intended a difference allocation of his property against a valid will, although it is easy to speculate on cases where most likely the deceased would have wanted a different succession in his property, as when the testator had fallen out with the beneficiary of his will, a lover, and had a new lover at the time of his death.

914 Moreover, the provisions for the annulment of will are restrictively enumerated in the BGB.

915 In Scots law for example there is a possibility to rectify a document if proven that it does not reflect the will of the parties, as it was at the time the document was drafted. The statutory provision could not expand to wills in the face of increased formalities imposed in relation to the drafting of the latter.

916 He would have the same opportunities to inherit, had the testator hesitated or changed his mind over changing his will or had the will been annulled for another reason. Moreover the law of compensation has no preventive purposes as a right against the heir could be taken to imply. Zimmermann FamRZ 1980 101.

917 An unjust erichement claim, which is not likely, would not offer the heir the inherited property

918 Zimmermann FamRZ 1980 103.

example, in certain cases, the largely theoretical distinction between basic and protective duties becomes meaningless, especially as far as the non-party is concerned. The choice of a mechanism for protection cannot, apparently, be based on the uncertain distinction of the kind of duties violated; this was developed for analytical convenience. This distinction cannot overshadow and/or invalidate the basic criterion, that of effective third party protection. A direct claim is certainly preferable. It is unreasonable to expect the legal successor of the testator to claim for the satisfaction of the intended beneficiary. The executor has no such interest and the heir could put the succession into risk. From the point of view of *Drittschadensliquidation*, it is arguable that the personal and confidential basic performance duty of the advocate to his client is extinguished with the latter's death, if not with the termination of drafting. Protective duties only can be owed to non parties, not performance ones, as the relationship with the client is intimate and confidential. Arguably, on the basis of the nature of the advocate-client relationship, performance has been accomplished. Evidence to that can be drawn from the law providing for the invalidation of wills; the presumption is that they are valid until declared void by a court. Moreover, through the contract with protective effects the element of the defendant's wrongfulness of behaviour becomes more evident and specifically linked to the intended beneficiary's loss. After all, the claimant asks compensation from the advocate, not a reversal of the otherwise legal succession. In conclusion, legal and policy arguments suggest that protective duties were violated here and that the contract with protective effects should apply in those cases that lie on the borderline between the two mechanisms[919].

3.10.2. Information, expert opinions and reports[920].

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919 The issue will be looked into again later in the chapter.

920 There is considerable literature on the relevant field. See for instance Littbarski NJW 1984 1667, Hopt "Nichtvertragliche Haftung außerhald von Schadens-und Bereicherungsausgleigh- Zur Theorie und Dogmatic des Berufsrechts und der Berufshaftung", AcP 183 (1983) pp.608-722, or Lammel "Zur Auskunfstvertrag", AcP 179 (1979) 337, Hellner "Rechtsprobleme der Zahlungsverkers under Berücksichtigung des höchsrichterlichen Rechtssprechung", ZHR (145) 1981 109-135, and the book reviews Ebke *"Zur Dritthaftung von Rechtsanwälten, Steurberaten, Wirtschaftsprüfen und Öffentlich bestellen und vereidigten Sachverständigen"*, JZ 1990 1688, Muselak, Hans-Joachim

If the information, investment counsel or other expert opinion (taxation advice, property evaluation, auditor's balance) is obviously destined to be used by third parties, then the latter can be included in the protective scope of the relative contract[921]. Third party protection is often justified by reliance on the business relations or legal transactions. Reliance is treated as worth protecting and a basis for professional liability[922]. Actually, reliance in these cases is the reason for the third parties' decision leading to their loss -- one characteristic of these situations being that loss is caused through an act or omission of the third party.

"Haftung für Rat, Auskunft, und Gutachten ", by Lorenz, ZHR 139 (1975) 567, and Gräfe, J., Lenzen, R., Thomas, Rainer "Steurberatenhaftung" by Ebke, Werner.

921 The courts in the relevant decisions are usualy examining three possibilities for the protection of the third party; the application of §826 BGB (which is considerably difficult), the existence of a direct contract for the provision of information between the third party and the expert (the expert being oblidged to inform), and the contract with protective effects *vis-à-vis* third parties. See Ballhaus on § 328 BGB, and Gottwald on §328 BGB 1034.

922 In Commonweath systems and Scots law laws the question of the extent the liability of the professional-expert might reach has attracted special concern. Provisionally it can be said that the liability of an auditor for his certificate of a company's acounts extends to all the shareholders who are entitled to receive a copy if they act mistakenly by selling or buing more shares for instance. The test courts applied in the past in order to hold an auditor liable was that of foreseeability. The test was withdrawn because it defined a very wide class of persons as potential claimants. The test preferred at present is that of fair valuation as regards the action of the injured party. It is examined whether there had or should have been anticipated reliance from the point of view of the debtor. Crucial is not if the person claiming compensation did rely on the auditor's report but if the courts consider it appropriate to rely. (If there is a statute which describes what the auditor should be doing a violation of this statute might raise his criminal liabillity but not civil liability as such.) On this issue see under "Third party pure economic loss" in Chapter 5. See under "Examples: Misrepresentation and product liability" in Chapter 4, the comment that the majority of American and Commonwealth decisions in their attempt to define and restrict the liability for misrepresentation relied on the criterion of the class of potential plaintiffs instead of the most plausible alternative of the permissible uses of the information in question. Classic in American law, is the decision in *Ultramares Corp. v. Touche*, 225 NY 170, 174 NE 441, (1931), where the liability of accountants towards shareholders, where the claim was rejected because of the risk to open the gates to the defendant's excessive liability. However in a number of cases where the use of the information was known the claims were accepted. In *Texas Tunnelling Co, v. City of Chattanooga*, 294 FSupp 821 District Court 1962, it was noted that thirty years had passed since Ultramares, society had become more business oriented reliance on specialists statements was essential in transactions.

§98 HGB[923] is a statutory example of third party protection. The liability for employment references towards future employers has been accepted[924], but the law is still uncertain[925]. Information given by one bank to another for the client of one of the banks might raise protective effects at least towards the person for whom information is provided, even if he is not named, but not against the client's commercial suppliers[926].

3.10.2.1. Expert opinion.

A multiplicity of cases could be included in this group, including property valuations, the balance of accounts, tax advice, even an arbitration[927]. The picture is rather complicated. The overall tendency in case law was, until recently, to deny the relative claims[928] and the basic obstacle was the lack of interest by the creditor to protect third parties. It was often held that they possibly had contradicting interests, as in a 1973 case of a claim by a bank against a creditor who prepared the year-end balance for a loan recipient, where the auditor knew that the report might be used by third persons[929]. The

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923 "The commercial broker is liable to each of the two parties for damages arising through his fault." in Peltzer-Doyle-Allen.

924 BGH, Urt. v. 15.5.1979-VI ZR 230/76 (Stuttgard); NJW 1979 1882. The plaintiff and the first defendant were traders. The second defendant had worked as a accountant keeping the books of the first defendant from 1970 until 1973. In 1973 he applied for a job in the plaintiff's business presenting an appraising employment reference by the first defendant. The latter, by the end of 1973 had serious suspicions and later he was given more information that the book keeper had shown seriously dishonest behaviour while he was in his employment. The first defendant did not inform the plaintiff however. The employee was repeatedly dishonest in his new post. He embezzled business money, drew checks on the plaintiff's account without authorisation etc. The plaintiff sued the previous employer. (The employee had no property at the time.) The LG accepted the claim on the basis of the protective effect of the reference but for a smaller amount because of the plaintiff's contributory negligence. The OLG lowered the amount further. The *Revision* by the defendant had no success. The basis for the decision was the reliance on the employment reference.

925 See Loewernheim "Schadenshaftung unter Arbeitgebern wegen unrichtiger Arbeitszeugnisse", JZ 1980 469.

926 See Ballhaus on §328 BGB and Gottwald on §328 BGB 1034 (BGH WM 1974 685).

927 A unique, it seems case referred to by Gottwald, on §328 BGB 1033.

928 See Ebke and Fechtrup "Anmerkung an BGH 19.3.1986 IV a ZR 127/84; JZ 1986, 1112. No special legal relationship between the mandator of the report and the third party which could justify a special protection duty of the former was accepted.

929 BGH, Urt.v. 5.12.1972-VI ZR 120/71 (Hamburg); NJW 1973 321. An auditors' firm had been preparing the year-end balances of a company since 1958. The auditor knew that his report might be used by third persons (The 1962 balance was presented to 17 credit institutions.). His 1964 balance was used for the approval of a loan by a bank. When the

decision was criticised for failing to lay emphasis on reliance and its central role in experts' liability[930].

The theory, responding to the problem, suggested that it is reasonable to accept protection for third parties who are affected by a report or expert opinion if, at the conclusion of the contract, the accuracy of the report or the opinion has been guaranteed or the expert has served the interests of certain parties only[931]. Protection should not be accepted when the person providing the information is impartial and independent, serving both parties to a relationship[932].

The obstacle of conflicting creditor-third party interests was easier to dismiss in a 1982 case[933] where a tax adviser employed by a company was found liable for not obtaining

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company ceased payments the bank sued the auditors' firm for compensation on the basis of the inaccuracy of the report. The LG accepted the claim but the OLG rejected it and the *Revision* of the plaintiff was unsuccessful. The decision considered that there was no special link between the auditors and the plaintiff which could justify a protection claim. The interests of the mandator and those linked to him and the interests of the bank where contradictory. The fact that the auditors' were professionally liable to grant honest reports did not alter the situation.

930 See Lammer, AcP 179 (1979) p.337. This reliance is justified on the professional capacity, the public appointment and the relative statute law. (See §§316-324 HGB and especially §316 HGB on the audit requirements; the annual statement for not small companies shall be examined by an auditor as well as the consolidated financial statements and the consolidated management reports (§267 HGB). See also § 319 HGB on the choice of qualified auditors or qualified auditing firms. See Peltzer-Doyle-Allen 1993.) The decision, was cautious not to allow liability expand beyond limits and allegedly failed to focus on the debtor's foreseeability as defining the circle of protected persons. The tendency was clear in all the possible bases on which liability could be established (§826 BGB, an information contract between the bank and the expert, and the contract with protective effects).

931 Gottwald on §328 BGB 1034.

932 Berg Jus 1977 363.

933 BGH Urt v. 29.9.1982-IV a ZR 309/80 (München); NJW 1983 1053. The auditor was hired by the company from 1947 until 1967. He prepared balances, the statements of corporate income tax of municipal trade tax and of capital tax, and represented the company in investigations with the tax authorities. Before 1964 the company had given loans to its shareholders. In November 1965 the adviser indicated that the amounts of the loans could be considered as hidden distribution of profits by the tax authorities. The adviser suggested that in order to repay loans given by the company to its shareholders and to avoid having these loans considered as distribution of hidden profits, the company should acquire a proportion of its shareholders' shares. The adviser after his ideas were applied added a relevant report in the 1965 year-end balance. The tax authorities were not convinced; following investigations they considered the loans as hidden distribution of profits and taxed the company's shareholders accordingly. The relation between the company and the auditor-expert, was said to create protective effects in favour of the shareholders too. In the first and the appellate degrees of jurisdiction the claim for

a reduction in the tax liability of the company's shareholders. At about the same time the case law, following examples from the field of banking law which abolished the criterion of a special interest for the protection of the third party[934], changed course to apply the mechanism in cases where the traditional requirements do not seem to be strictly fulfilled[935]. The Federal Appeal Court played an active role in this context. Attention should be drawn to the fact that accepting third party claims was associated with inferring third party's reliance to the creditor which, allegedly, the BGH was ready to acknowledge easily after the 1980's[936]. In a series of cases, the BGH protected third parties, overruling decisions of the lower courts, after a *Revision* (appeal on grounds of law) by the third party.

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compensation was rejected. The appeal on matters of law resulted to the overuling of the decision and the remand of the case to the lower courts.

934 See BGH, Uct. v. 2.11.1983-IV a ZR 20/82 (Nürnberg); NJW 1984 355. See also BGH, Urt v.28.4.1982-IV a ZR 312/80 (München); NJW 1982 2431.

935 Ballhaus on §328 BGB at §94.

936 In previous examples no reliance was acknowledged and the claims were rejected. In BGH, Urt.v. 5.12.1972-VI ZR 120/71 (Hamburg); NJW 1973 321, a company asked for a loan in 1964 using the previous year end balance as supportive document and received the loan. By November 1965 the company stopped payments. The plaintiff (bank) argued that the reports had been false since 1958, and the books had not been kept properly. The balance showed an unreal economic situation. The bank argued that it had based its decision on the accuracy of the report in order to approve the loan. The court doubted whether the decision of the bank could or had actually been influenced from the report in question in the light of the usual banks' policy to resort to other sources of information in order to grant a loan of a bank providing a loan

See also OLG Saarbrücken, Urt. v. 13.7.1971- 2 U 127/700; NJW 1972 55 where a carpenter business applied for a loan from a savings bank with the mediation of a mortage broker. The mortgage broken asked the defendant, an architect who was not a sworn and publicly appointed valuator to adjust an 1962 valuation of the property in question. The purpose of the report was for the broker to obtain information on the value of the building. Measurements or *in situ* examinations where expressly excluded. The defendant prepared a report on the basis of which a loan was provided. Later on, the property went into complulsory sales procedure from which the plaintiff received only a part of the amount of the loan. The plaintiff bought the property at a lower than the estimated price two years after. The argument of the claimant was that he suffered losses due to the inexactness of the report. The OLG refused protection whether or the basis of § 826 BGB, which the LG had accepted, or on the basis of a contract. No implied agreement for the protection of the third party could be inferred while it was argued that there should be some limitation in the duties of care of the reporter. The causal link between the wrong valuation and the loss was doubted. The purpose of the report was for the broker to obtain an evaluation, and in such cases the banks would not probably rely on such reports. The reporter had not committed any particular irregularity. There was not enough evidence that the decision for financing had relied heavily on the report.

Thus the *Revision*[937] in 1984 against a decision rejecting the liability of a property valuator towards the buyer of the evaluated property who was not the valuator's mandator but had come in contact with the valuator before the latter issued his report, was accepted by the BGH. The lower courts had rejected the claim[938] as they found no interest of the mandator for the third party protection[939]. According to the final decision, the defendant[940] should have calculated that behind the mandator was a group of potential buyers whose interests the expert had a duty to protect[941]. It was not necessary for the justification of this duty of care to consider that the mandator was entrusted with the protection of the third party.

Another case[942], involved the liability of a property valuator to a bank which received land assets as security for a loan to the mandating company. The defendant had given written assurance of his report's accuracy to an independent inquiry. The BGH accepted, following a *Revision* that the third party's right to compensation[943]. Although

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937 BGH, Urt. v. 2.11.1983-IV a ZR 20/82 (Nürnberg); NJW 1984 355. A mandate was given to an officially appointed sworn expert for the evaluation of a piece of immobile property. Mandator was a trader who in his first contact with the expert was escorted by the buyer of land and subsequent plaintiff and a qualified bank employee. The report failed to remark that the building in question was under social housing restrictions. The report was based on the presumption that the mandator would make use of the building for personal purposes (himself or his family). The buyer who had financed the purchase by a municipal funds' loan, and was planning to build housing for sale, had to cancel the purchase and return the loan when he was informed of the building restrictions. He sued the expert because he suffered losses by relying on the report which prescribed a lower than the real value for the property. The plaintiff claimed compensation for the commercial broker's commission, for the notarial costs, and for the loan's interest. The LG and the OLG rejected the claim but the *Revision* was successful. The court laid emphasis on the fact that the group of protected persons could be objectively supervised. The reporter should consider that his report would be used as the basis for the decision of a particular group of people and he should have taken their interests into account. A limitation of the protection to the contracting parties would not correspond to the significance and meaning of the particular transactions.

938 An extension of liability could have been agreed but this seemed quite unlikely.

939 The mandator was not liable for the welfare of the third party.

940 The defendant claimed that the purpose of the report was the overall information of the expert's contracting party and not the support of an application for financing.

941 It was possible to foresee that the report would be used as a basis for their decision.

942 BGH, Urt v.28.4.1982-IV a ZR 312/80 (München); NJW 1982 2431.

943 An officially appointed sworn expert prepared a report for the market value of the land holdings of a KG (*Kommanditgeselschaft*; a limited partnership where at least one of the partners has limited liability). Four months later he was approached by the Danish consulate and was asked (1) whether he was a qualified expert and (2) whether his report was still valid. He answered in the affirmative and, after request, in writing. Three

the mandator and the third party held opposite interests, the expert had a duty of care towards those who would predictably make use of the report.

These decisions took a realistic course and abandoned the creditor's (mandator's) interest requirement[944], paving a new way for expertise liability to third parties[945]. The absence, if not opposition, of the mandator's interest was substituted or countermanded[946] by the character of the expertise services (the professional qualifications, the public office, the company law requirement for expertise participation[947]). Similarly, in American law, in decisions awarding damages against surveyors and accountants, it was obvious that the defendant's exposure was not increased by holding him liable to non parties[948].

In a leading 1986 case[949], it was at the *Revision* stage again that an auditor was held liable. He had prepared a mistaken property evaluation for his mandator, used by the latter in an application for a loan. The bank which provided the loan was the

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months later the plaintiff bank granted a loan to the company and received some land assets as security. The loan was not repaid, and when the assets were auctioned it was found that their value was considerably lower than reported. The report examined the potential of the area for development, but did not appreciate the effects of a regional planning scheme which included the particular area. (The company had asked for mediation in order to obtain the loan. The mediating firm had addressed the Danish Ministry for Trade and Commerce which had referred it further to the Danish consulate.). The claim was rejected at the first two degrees of jurisdiction. The *Revision* was successful on grounds similar to the previous decision. The Federal Court of Appeal empasized on the jurisprudential acceptance of the contract with protective effects. (The *Kommanditgeselschaft;* is a partnership for the conduct of a commercial enterprise under a common firm name consisting of one or more general partners (*Komplementäre*) with full personal liability for the liabilities of the partnership and at least one limited partner (*Kommanditist*) whose liability in respect of the partnership's creditors is limited to the specific amount of his contribution. See §§161-177 HGB.)

944 The mandator would normally be interested in the protection of his interests alone. Littbarski NJW 1984, 1669

945 Littbarski NJW 1984, 1669.

946 The attempt to avoid the application of the law of delict in the cases of opposition between the interests of the mandator and of the third party (§826 BGB) is again noticeable.

947 See §§ 316 et seq. HGB refering to the duties of the auditors.

948 See under "Tort v. Contract: Third parties and pure economic loss" in Chapter 4, the reference in the footnotes to cases such as *Rusch Factor, Inc. v. Levin*, 284 F Supp 85, D. Rhode Island, 1968, accepting the claim by the lender bank against the accountant who prepared a statement on the financial position of the corporation that received a loan, and *Rozny v. Marnul*, 43 III 2d 54, 250 NE 2d 656, 1969, where the defendant surveyor of a vacant lot was held liable to a sub-subcontractor, who was the only person that could actually be injured.

949 BGH 19.3.1986 IV a ZR 127/84; JZ 1986, 1111. See also Ebke and Fechtrup "Anmerkung an BGH 19.3.1986 IV a ZR 127/84; JZ 1986, 1112.

claimant[950]. The decision is distinguishable because, instead of focusing on the parties' intentions, it concentrated on an objective evaluation of their interests, making more explicit than before that good faith was its basis[951]. The decision was praised for its daring approach although certain concerns were expressed for the broader consequences of the emphasis laid on the professional capacity of the defenders[952]. Nevertheless, the decision contained safeguards against excessive or unreasonable extension of liability, which represent basically a social evaluation of this liability. Thus the transposition of the loss to the general public through security schemes could be avoided on the basis of good faith[953].

A lender bank was the claimant in another publicised[954] decision[955] against an auditor-tax advisor company for the loss suffered by lending funds on the basis of an inaccurate interim balance[956]. The script, with the BGH reversing the lower courts'

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950 The mandator, in order to support his application to a bank for a maintenance loan ordered a report on his credit receiving capacity. A bank (the plaintiff) gave a loan and received as security charges on immobile property. The recipient of the loan went bankrupt. When the bank tried, in cooperation with the receiver, to promote existing building plans it found that the property was under obligations known to the debtor. The bank claimed compensation arguing that it would not have given a loan had the real situation been described in the report. The LG and the OLG rejected the claim. The OLG denied the possibility of a contract with protective effects considering that this could be accepted if the creditor's bank had been responsible for the better or worse of the plaintiff, if, for instance, the creditor had duties of care towards the third party which would justify his interest for the latter's protection. The OLG laid emphasis on the opposition of interests between the mandator and the third party and rejected the claim in line with the prevailing until then approach in case law at least. The appeal on issues of law was successful. The Federal Appeal Court considered the rejection of the contractual protection by the OLG an error in law. The decision did not require the existence of a special creditor's interest.

951 Ebke and Fechtrup JZ 1986, 1112 et seq.

952 It was alleged that the court focused on the auditor's professional capacity with the purpose of forging certainty in law. Ebke and Fechtrup JZ 1986, 1112 et seq. It was also alleged that the general conditions of businesses were not looked into. It was observed however that once §242 BGB is the decision's basis, the general conditions would not apply against a statutory provision.

953 A transfer the economic risk to the social whole, would be unacceptable as the outlook for profit remains with the credit offering bank. Ebke and Fechtrup JZ 1986, 1112 et seq.

954 It attracted the interest of the auditors' press.

955 BGH, Urt. v. 26.11 1986-IV a ZR 86/85 (München); NJW 1987 1758.

956 A film director was interested in buying all the shares of a film producing company. For that purpose he applied for a loan sudmitting an interim balance (from 31.5.81) prepared by the defendant whose auditors' company had been tax advisers to the film producing company for years. The report had been ordered by the only partner and

rejecting decisions, was repeated. The decision focused on an interpretation of the parties' will. No special interest of the creditor was required.

This avant-garde disposition of the German courts comes in sharp contrast to the approach to misrepresentation by American, Commonwealth and Scottish courts where liability is limited on the basis of the criterion of the number of potential claimants instead of the permissible uses of information, leading to inconsistency in case law[957]. It should be noted, however, that the examples from German law are from the more easily assessible situation of valuator's reports, involving predictable, often known non-parties[958]. In common law many of the cases concern the more complex area of financial assessments which potentially concern larger numbers of third parties such as investors or shareholders.

3.10.2. 2. Critique.

An attempt to pin down the extention of liability on the expert's professional conduct was criticised[959] as unconvincing in view of the opposition of interests between the expert's clients and the third party, an argument used in common law jurisdictions mainly in relation to advocates' liability[960]. However, it is easy to support that most experts,

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managing director of the company. One copy was sent to the manager and two more following specific request, to the film director. The loan was approved (on 13.8.81), and the company was bought (on 27.8.81). The loan was not repaid. The bank considered that bankruptcy proceedings could have only partial success. It claimed compensation from the tax advisers. The interim report was seriously mistaken (showing profit while there was loss), and there were serious book keeping errors (disorder and backlogs), which the defendants should have noticed and try to repeal. The balance did not have the quality a professional report should have. The claim was again rejected in the first and the appellate degrees. The *Revision* court overruled the appellate decision and remanded the case to a lower court.

957 See under "Examples: Misrepresentation and product liability" in Chapter 4 and the account by Feldthussen 13 (1984) *Anglo-american Law Review*, 59.

958 As referred to in previous fotnotes, when the uses of the information was known and/or the defendant's exposure was not expanded, liability was accepted in American law. See under "Tort v. Contract: Third parties and pure economic loss" in Chapter 4, *Rusch Factor, Inc. v. Levin*, 284 F Supp 85, D. Rhode Island, 1968, and *Rozny v. Marnul*, 43 III 2d 54, 250 NE 2d 656, 1969. The same apply for Commonwealth and Scots law. See under "Third party pure economic loss" in Chapter 5, and "Judicial considerations" in Chapter 6, especially the sources and cases referred to in the footnotes.

959 Grünenbald AcP 187 (1989) 289-290.

960 See under "Beyond will beneficiaries" in Chapter 4.

especially those qualified under a governmentally organised process, have to abide by duties of accurate professional performance and owe duties of honesty. This is especially the case with auditors, who are bound by strict codes of conduct in all the jurisdictions discussed.

It was also argued that contractual liability could provide no convincing answers to agreed modifications of liability. It would be unfair towards unaware third parties if these modifications were valid[961] and the expert could claim the application of the statutes on the general conditions of business in this case since he is involved in his professional capacity.

The prevailing view is that by analogy to §334 BGB the expert should be able to claim a limitation of liability which has to fulfil, among other things, good faith requirements to be valid towards third parties. The expert may claim limited liability as provided for by his contract or by professional rules of conduct. The expert's liability should be monitored in accordance to his knowledge and consideration of risks at the conclusion of the contract[962], including his speculation on the use of the report, as seen from the mandate's content[963].

It has been further noted that the emphasis on the expert's knowledge is unjustified[964]. The knowledge can be circumstantial[965], accidental[966], or insufficiently explained. Jurisprudence had not always presumed this knowledge so easily[967]. In the 1973

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961 Grünenbald AcP 187 (1989) 290. The position of the third party cannot be worsened by an agreement of the parties.

962 Littbarski "Die Berufhaftung -- eine unverschöpfliche quelle richterliche Rechtsfortbildung ?", NJW 1984 1667

963 And not from the third party's view of the latter.

964 In Museliak's view for instance the expert should know or be in a position to know of the use of his expert opinion so that protective effects will not expand indiscriminately. Grünenbald AcP 187 (1989), 293.

965 As in BGH, Urt. v. 2.11.1983-IV a ZR 20/82 (Nürnberg); NJW 1984 355, where the third party is one of a potential group of interested persons related to the mandator.

966 As in the Danish consulate case, BGH, Urt v.28.4.1982-IV a ZR 312/80 (München); NJW 1982 2431, where the knowledge of the expert is based on the consulate's questions.

967 In BGH, Urt.v. 5.12.1972-VI ZR 120/71 (Hamburg); NJW 1973 321, knowledge was not accepted although the auditor had been preparing the company's balances since 1958 and knew that the 1962 balance for instance was presented to 17 credit giving institutions.

case[968] referred to before, the knowledge of the auditor was not established although he had been preparing the company's balances since 1958 and knew that the balances were presented to credit institutions. Courts often denied protection when the potentially affected persons were unknown[969]. An agreement for the distribution of shares was considered not to be protecting potential investors[970]. It was argued that it could be different with a doctor giving medical advice from the pages of a ladies' magazine as the readers are expected to trust this advice and run the risk of suffering damages. The editor (mandator) can objectively calculate the circle of potentially affected people[971].

Against relying on the parties' will, it was noted that the protection expectations derived from the reliance upon the expert's professional credentials[972]. However, the least doubted decisions, whether focusing on the parties' will or on §242 BGB[973], were those where an interest of the mandator for the welfare of the third party was recognised, and this interest does not depend upon the third party's reliance. The delimitation of the range of the third party loss instances that can be covered by the professional conduct is, it must be recalled, a contentious issue[974], much debated in common law systems[975].

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968 BGH, Urt.v. 5.12.1972-VI ZR 120/71 (Hamburg); NJW 1973 321.

969 Littbarski NJW 1984, 1170.

970 Grünenbald AcP 187 (1989) 285-308.

971 Grünenbald AcP 187 (1989), 290.

972 As said, this reliance was meant to be evaluated in law as an event which can give rise to legal rights and duties and possibly sufficing for the extension of professional liability.

973 Hopt argued, on the latest auditor's case (BGH, Urt. v. 26.11 1986-IV a ZR 86/85 (München); NJW 1987 1758) that in terms of methodology there was no difference if the decision was based on the interpretation of the parties' will or on an objective interests evaluation. Both these options involve contractual interpretation and construction. See Hopt NJW 1947 1745 and "Nichtvertragliche Haftung außerhald von Schadens- und Bereicherungsausgleich-Zur Theorie und Dogmatic des Berufsrechts und der Berufshaftung", AcP 183 (1983) 608-722, especially 682.).

974 Hopt NJW 1947 1745, Grünenbald AcP 187 (1989), 285-308, Ebke JZ 1990 1688 (book review).

Hopt speaking on the latest auditor's case (BGH, Urt. v. 26.11 1986-IV a ZR 86/85 (München); NJW 1987 1758), where protection was limited to the first person who came in contact with the buyer, considers four possible situations whereby third parties might suffer losses because they relied on the experts' report in order to finance a transaction; (a)A report/statement of affairs as the one in the present case not passing directly from the auditor to the buyer, (b) financing by another source, (c) financing by a credit society or a pool of finances, (d) financing of financing (recapitalization) of the credit giving bank under assignment of security and presentation of balance sheets. The first three involved direct financing. and would lead to the protection of the creditor. This is not the case with the

In a general overview, Museliak[976] explained the expansion of liability for information, opinion etc., as judicial law-making permitted[977] under article 20 of the Basic Law[978], and §137 of the Courts Constitution Act[979], and as accepted by the Federal Constitutional Court. Different statutory regimes might apply to professional liability and the view of the legislature often changes[980]. Judicial law-making should be exercised with considerable restraint keeping a view of the relevant legislation[981], which is extensive and, as previously illustrated, more restrictive concerning the auditors' liability than English law[982]. Considering this latter point the employment of the contract with protective effects by the German courts as a means to hold experts' liable is indeed remarkable.

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fourth involving recapitalisation (financing of the financing) of the lending bank. Hopt makes the same distinction between three-party and four-party situations. Hopt, NJW 1947, 1746.

975 See under "Examples: Misrepresentation and Product liability" in Chapter 4.

976 Museliak *"Haftung für Rat, Auskunft, und Gutachten "*, book review by Lorenz W., ZHR 139 (1975) 567, (book review). See also Grünenbald AcP 187 (1989), 293.

977 Littbarski NJW 1984, 1669.

978 Grundgesetz (GG; the Constitution). This article is defining the Federal Republic of Germany as a democratic and social federal state where all authority emanates from people, and is exercised by the people, and the legislation,is subject to the constitutional order and the executive and the judiciary are bound by law and justice. Museliak is cautious about the preservation of the judicial task in its proper constitutional limits.

979 Gerichtsverfassungsgesetz (GVG)

980 Littbarski is giving an example of a draft law on the distribution of shares in proportional installments which included interesting provisions on prospect liability and which never became law,(Littbarski Sigurd "Die Berufhaftung - eine unverschöpfliche quelle richterliche Rechtsfortbildung ?", NJW 1984,p.1670).

981 The courts, considers Museliak, would be acting irresponsibly were they to leap from case to case creating different variants of liability without respect to the relative legislative attempts·

982 Markesinis and Deakin 55 (1992) MLR, 636. The relative norm §323HGB regulating the position of auditors for mandatory audits, restrict the liability of the auditor to the company only. The provision does not protect the interests of shareholders. As the loss is purely economic, there is no protection from §823 I BGB. An injured shareholder could seek compensation however, under §823 II BGB, allowing claims for breach of a statutory duty. The courts became more adventurous once moved out of the regime for public stock corporations. The courts have relied on §826 BGB, establishing liability for damage caused intentionally and *contra bonos mores*, to compensate for pure economic loss, extending in some cases the concept of intention to include *dolus eventualis*. The courts is cases of auditors violating §323BGB have also resorted to the device of the contract with protective effects to awards damages.

3.10.3. Banking law contracts.

Business relations (the "general banking contract") between a bank and its client can have protective effects for third parties[983], as accounts taken in the name of third parties entitle the latter to sue on the relative contracts in Scots law[984]. There are substantial difficulties in accepting additional behavioural duties or delictual liability[985] for banks or similar institutions. Security or guarantee in banking business often cover expressly only the basic liability (to perform). For a number of banks' actions no security is available[986] while it is often limited in time[987]. Along with various statutory regulations[988] banking is based on codes of practice or other industry-produced rules[989] or standardised contracts, aimed at limiting banks' liability[990]. The effect of these on third party protection is, in

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983 The case of the exchange of information between two banks which had protective effects towards the clients whom the information concerned, has already been mentioned. See Ballhaus on §328 BGB, and Gottwald on §328 BGB 1034 (BGH WM 1974 685).

984 See under "Development and Applications" in Chapter 5 on Scots law. The jus quaesitum tertio applies with regard to deposit receipts and savings and other accounts taken in the name of the third party, who is entitled to sue on such contracts, and, for an additional reference "Financing" in Chapter 4 on American law

985 See the interesting approach by Schwark "Individualanspruche Privaten aus wirtschaftrechtlichen Gesetzen", JZ 1979 670, where he examines in parallel the Gesetz über das Kreditwesen (Statute for the credit system); a public law statute on the organisation of banks and §§823II, 839 BGB. He notes the difficulty in establishing delictual liability on statutes referring to economic supervision. There can hardly be monitoring of the wider effect of the relative provisions. Protective norms, he argues, should be sought in the overall system of banks' orgsanisation. See the consideration on the application of §826 BGB in BGH, Urt.v. 20.6.1977-II ZR 169/75 (Hamburg); NJW 1977 2210. See also Mertens on § 823 I BGB.

986 As regards information on the value of particular assets or rights, and for the behaviour of assisting persons for example. Rümkehr ZHR 147 (1983) 36.

987 One year for example.

988 Public regulation, criminal law or the general commercial code for instance. See Rümkehr ZHR 147 (1983) 29, who is referring to the variety of regimes ranging from public law statutes -- *Gesetz über das Kreditwesen* (Statute for the credit system), commercial law legislation; *Gesetz über Kapitalanlagegeschäft* (Statute on investment companies).

989 As for instance the *Richtlinien und Gebräuche für Akkreditive* (Guide-lines for the use of letters of credit), the *Allgemeine Geschäftsbedingungen der Kreditinstitute* (General conditions of business of credit institutions), the *Allgemeine Geschäftsbedingungen der Privatbanken* (General conditions of business of private banks), the Allgemeine Versicherungsbedingungen (General policy conditions), the *Allgemeine Kreditvereinbarungen* (General arrangements to borrow). See Rümkehr ZHR 147 (1983) 29-36.

990 They often exclude liability for overall property damage for example Rümkehr ZHR 147 (1983) 36.

principle, questionable[991]. However, it seems that the existence of these regulatory schemes has influenced decisions[992].

Moreover, equity might hinder banks' liability. Concerning automated, mass-scale transactions, liability exists only when the behaviour or the loss can be attributed to premeditation or gross negligence[993]. Rules of evidence also favour banks. According to some private banks' standard rules the clients have to prove loss from delay or mistake (based on gross negligence only)[994].

Gross negligence was accepted in giro transfers (involving large scale non-cash payments)[995]. The middle bank had the obligation[996] to take into account the date the mandate was sent from the first mandated bank[997]. The middle bank was held liable for the delayed transfer; the court inferred gross negligence as to the violation of the duties of care.

In giro transactions protective effect has been accepted on the basis of the contractual relationship between the bank and the central giro institution (association)[998] or, more precisely, from a giro contract between the remitting bank and the receiving bank[999]. The giro contract of a client has no protective effects in favour of a depositor[1000].

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991 According to some views they concern only inter-bank relations. See Rümkehr ZHR 147 (1983) 37 and Hellner ZHR (145) 1981, 119-120.

992 See BGH, Urt.v. 20.6.1977-II ZR 169/75 (Hamburg); NJW 1977 2210, BGH,Urt. v. 28.2.1977-II ZR 52/75 (Oldenburg); NJW 1977 1916, OLG Düsseldorf Urt v. 6.5.1977-16 U 213/76; NJW 1977 1403, where extensive reference was made to the respective contracts for banking services. The content of such contracts is often standardised, it contains or expressly refers to, the relative private banks' code of practice, and is not negotiated with each client individually.

993 Examples from the bills of exchange and similar value incorporating documents offer evidence of the banks' privileged position. Thus banks' are liable for gross negligence only in cases of loss of interest. Rümkehr ZHR 147 (1983) 36.

994 Rümkehr ZHR 147 (1983) 36.

995 Gottwald on §328 BGB 1035.

996 From its relationship with the person ordering the transfer.

997 For the person and the account.

998 OLG Düsseldorf DB 82 749, WM 1982 575, Gottwald on §328 BGB 1035. See Rümkehr ZHR 147 (1983) 35.

999 OLG Frankfurt BB 1984 807, Gottwald on §328 BGB 1035

1000 LG Frankfurt ZIP 1982 1317, Gottwald on §328 BGB 1035

In transactions involving business documents used in international commerce the banks are liable towards the transport agent if they have wrongly confirmed the receipt of payment which led to the delivery of the products[1001]. Banks were found liable to protect the spouses of a client or the companies he owns by preserving the client's business secrets[1002], and for giving wrong ratings to their clients[1003].

In cases involving debit notes the creditor's bank has no duty in favour of the debtor to verify whether the creditor is actually authorised for collection[1004]. If the debtor objects to the transfer (in the case a notice of collection authorisation must be acknowledged), the debtor's bank is obliged to return the debit without delay and give timely notice to the creditor's bank of a failure to redeem. A delayed return would violate the protective duties in favour of the creditor[1005]. The debtor's bank is also obliged to return without delay to the first collecting agency -- the creditor's bank -- the debit which was not paid because it was not covered in the account[1006].

1001 OLG Hamburg VersR 1983, 350, Gottwald on §328 BGB 1035.

1002 DB 1968, 695, Gottwald on §328 BGB 1035.

1003 BGH 25.4.1974, WM 1974, in Linder "Law of Contract" in Rüster (general editor). Wrong information was provided as to the rates which were levied on particular property.

1004 BGHZ 69 82, BGH, Urt.v. 20.6.1977-II ZR 169/75 (Hamburg); NJW 1977 2210.

1005 OLG Düsseldorf Urt v. 6.5.1977-16 U 213/76; NJW 1977 1403, and, after *Revision;* BGH Urt v. 19.10 1978-II ZR96/77 Düss.; NJW 1979 542. In this case one plaintiff had been the supplier of a business with beverages (the other was the carrier). As it had been agreed the buyer was paying the price for the consignment directly from his bank account as he had authorised his bank, the defendant. For some time payments were being effected through the electronic transfers to the debtor's bank. Later and while the supplier and the carrier were filling some special bank formulas which contained an authorisation clause (which gave the debtor the right to deny payment) the buyer found himself in financial difficulties and ordered that some payments, for already delivered goods, which had already been debited in the plaintiffs' accounts in their bank should be reversed. The debtor's bank did so with delay. The relative amounts were returned from the creditor's bank. Meanwhile the buyer went into bankruptcy and the plaintiffs had only a claim for the goods delivered. The plaintiff sued the debtor's bank for the damage it caused with the delayed transfer of the information on the non payment of the buyer's debts. The OLG's final decision (the LG took an interim one) accepted the claim. An appeal on questions of law was not successful. The decision laid emphasis on the existence of a duty of care of the debtor's bank in giro transactions towards the plaintiffs on the basis of the contract with the creditor bank. The latter's interest is noted.

1006 BGH,Urt. v. 28.2.1977-II ZR 52/75 (Oldenburg); NJW 1977 1916. There was, it was decided a critical period of time after which the debit could not be reversed. The creditor had an interest in receiving the necessary information by the debtor's bank as soon as possible. It was considered that the creditor and the creditor's bank run not the same but similar risks and were both interested in being informed on the non payment as soon as possible (1917). The interest of the creditor's bank was based on its relationship of

These decisions, especially those referring to lack of debit entries, drew criticism[1007]. The view in one was that the duty for a timely return of a debit note is a protective duty established on the association of banks' rules of operation. The *Revision* was rejected because no such duty was owed between the respective banks[1008]. Critics thought[1009] that the relationship between the banks was one of special reliance and could give rise to protective duties.

Protection, it was argued, could be justified even in mass-scale transactions if the observance of the violated provision was in the interest of the third party too and this was known to the debtor, since case law had, already dismissed the need for a personal link between the bank and the third party[1010]. Protection in mass-scale transactions[1011] should be based on the possibility to create particular risks for third parties; risks which the participants want to keep low. There are objections to this view[1012] laying emphasis on the absence of performance-related risks, the lack of reliance on the credit institution, and the distance between the third party and the typically automated transaction. Stricter standards should apply, according to some views, when mere property damage occurs[1013].

On the other hand, it has been argued that complicated banking law relationships should not be burdened with special protective duties. An extension of a debit agreement might blur the lines between contract and delict and risk an unreasonable expansion of banks' liability[1014]. Thus, credit institutions should have some interest in protecting third

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confidence, and reliance with the creditor. Not only the creditor's bank had a duty for the immediate return of the not yet paid debit but also the debtor's bank had on the basis of good faith a protection duty towards the creditor. This protection duty was not agreed but was based on the legal relationship, the contractual purpose and the principle of good faith (1917).

1007 See Hellner ZHR (145) 1981, 109-135, especially in 115, and Rümkehr ZHR 147 (1983) 27-42.

1008 Rümkehr ZHR 147 (1983) 36.

1009 Hellner ZHR (145) 1981, 109-135.

1010 Hellner ZHR (145) 1981, 109-135.

1011 It is doubtful which transactions are included in this category. See Rümker ZHR 147 (1983) 27-42, who denies that for debit entry transactions.

1012 Hellner gives an account of these reactions. Halding and Badde are mentioned. (Hellner ZHR (145) 1981, p.115).

1013 Hellner ZHR (145) 1981, 109-135.

1014 The need to protect the banks is often emphasized. See Rümkehr ZHR 147 (1983) 36.

parties so that protective duties should not be easily accepted in today's extensively facilitated payment mechanisms. Third party protection should be exceptional, justified upon the contract and good faith. This is possible when the parties would have accepted the possibility of protecting others, believing that they do not increase their risks excessively[1015]. Scots case law takes a similarly conservative view. Although bank liability is accepted for deposit and savings accounts, negotiable instruments are regulated by law and documentary credits are considered independent promises in Scots law[1016]. Bank liability to non parties is less likely in other jurisdictions as well, as can be inferred from the scarcity of the financing cases in American law.

Commentators tried to infer a limitation of the protection to cases where special drawee interests are affected by the particular duties but not if the duties exist/have been agreed on a special procedural "technical" basis aiming at the organisation or facilitation of the banking business[1017]. Liability should exist when printed payment forms and magnetic cards are used on the basis of the clearing agreements with a central association of the respective institutions. A mere data exchange, however, whereby a violation of the technical organisation rules might occur, should not lead to the protection of third parties. Technical evolution aims at the facilitation of the banks operation not at the expansion of their liability without their consent[1018].

Banks' liability becomes more complicated in the light of the automated mode of transactions and the extensive self-regulation of the banking business[1019]. As noted before,

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1015 Hellner ZHR (145) 1981, 109-135.

1016 See under "Development and Applications", in Chapter 5 on Scots law, and "Financing" in Chapter 4 on American law. Most of the cases do not actually involve liability of banks. See however *Gilmore v. Century Bank and Trust Co.*, 20 Mass App Ct 49 477 NE 2d 1069, 1985, where a bank was held liable to the trustee of the subcontractor-creditor for breaching a construction loan contract to the owner. The plaintiff was considered a third party beneficiary of the loan agreement.

1017 Rümkehr ZHR 147 (1983) 27-42, Hellner ZHR (145) 1981, 109-135.

1018 Hellner ZHR (145) 1981, 109-135.

1019 The general tendency is to deny protection when loss occurs from failures of schemes providing services for transactions between credit businesses. This tendency is not undoubted. See Hellner ZHR (145) 1981, 109-135 and the examples he offers. See also the reasoning of previous decisions; BGH, Urt.v. 20.6.1977-II ZR 169/75 (Hamburg); NJW 1977 2210, OLG Düsseldorf Urt v. 6.5.1977-16 U 213/76; NJW 1977 1403, after *Revision*, BGH Urt v. 19.10 1978-II ZR96/77 Düss.; NJW 1979 542.

banks benefit and are in an advantageous position compared to their clients concerning access and use of the electronic communication systems. The third party might be seriously disadvantaged. It would thus seem fair to accept an extension of liability; the contract with protective effects could be employed towards counterbalancing this disadvantage.

3.10.4. Contracts for medical treatment.

Such contracts[1020] are often concluded with a hospital in favour of a third person (a child, a pregnant woman), who is the claimant.

In one case[1021], the insufficiency of measures against infection led to a newborn child being handicapped for life. The child was successful at the *Revision* stage.

More complicated is the case[1022] where no measures were taken to treat German measles a pregnant woman was suffering from, and a child with serious health problems was born (the problem of wrongful life)[1023]. It was thought that the doctors were not liable to the child if the wrongful life could have been avoided by interruption of pregnancy

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1020 See generally Eberhardt AcP 171 (1971) 289. See also Gernhuber "Drittwirkungen im Schuldverhältnis" 254. This category should not be confused with the cases referred to in "Other welfare cases" in Chapter 4 on American law. There the contracts involve the application of government welfare programmes, and the plaintiffs sue as beneficiaries of the relative contracts under which hospitals receive government funding for instance.

1021 BGH, Urt. v. 10.11.1970-VI ZR 83/69 (Koblenz); NJW 1971 241. The mother gave birth to a child in the defendant hospital in September 1952. On the first day some scratches were noticed on the baby's back and nose and were treated with a cream by the midwife. Later it was observed that the scratches were caused by an infection which was caused by a staphylococcus virus which did not retreat after penicillin was used and led to the child suffering osteomyelitis. Finally the child lived but with serious limps. The child turned against the hospital for the violation of its duty to take timely and proper measures in order to avoid the spreading of the infection. The LG and the OLG rejected the claim and the appeal respectively. The appeal on questions of law was successful.

1022 BGH Urt. v. 18.1.1983-VI ZR 114/81, JZ 1983 447.

1023 This issue has attracted the consideration of German lawyers. There is sustantial literature in the area often focusing on a comparison with English and especially American law. See Laufs "Haftung für Nachkommenschaftsschäden nach § 823 BGB", NJW 1965, 1055-1057, Selb "Schädigung des Menschen von Geburt-ein Problem der Rechtsfähigkeit", AcP 166 (1966), 76, especially on 104 et seq., Fuchs "Die zivilrechtliche Haftung des Artzes aus der Aufklärung über Genschäden.", NJW 1981 610-613, Fischer "Schadensersatz wegen unterbliebener Abteilung", NJW 1981 1991-1992.

only[1024]. The decision constituted a departure from the relativity principle since the husband's claim was accepted.

The court argued that the child had no legal capacity to claim protection[1025]. The right of the mother to decide abortion was in her interest only and not in the interest of the child[1026]. While normally a doctor should be liable for the child's health problems he was found not liable because the choice here was one over life or death and it was neither for the doctor to make the decision nor for the child to acquire a right from the doctor's behaviour[1027].

1024 Plaintiffs were the clild and the parents. They sought a declaration that the defendant was liable for compensation in respect of all the damage sufferred or were to be suffered as a result of the mothers infection during the pregnancy. The LG rejected the child's claim and accepted the parents' claim. The OLG rejected both claims. Only the parents' *Revision* was successful. The doctor was found liable for the additional expenses of the parents; no claim by the child was accepted. The BGH noted that the doctor had not caused the loss. In fact he was responsible that the child was alive and enjoying legal capacity. The duty to explain the risks in the pregnancy and the possible injury to the foetus was only incumbent upon the defendant in the interests of the second plaintiff, the mother. Regarding the latter's claim, it was noted that the defendant was not obliged to take into account the plaintiff's financial interests but merely to explain the medical and eugenic aspects of the risks related to the pregnancy. The court held that the defendant would not have been acting illegally had he interrupted the pregnancy. It is doubtful, therefore, that he had violated his contract. Regarding the claim of the child, the court noted that the doctor did not cause the child's condition nor could he have prevented it. However, it could be argued that in breach of his obligation to the mother he failed to prevent the deplorable condition through abortion. The court thought there can be no direct duty in tort to prevent the bird of a child with serious defects because it would imply a judgement on what was 'valueless' life, which in dogmatic opinion and from an ethical point of view the doctor could not make. Any breach of duty to render the defendant liable to the child would have to be derived from the contract with the mother. There is no possibility for tortious liability under §823BGB as, among other considerations, there was no uniform ethical evaluation of abortion. The only remaining possibility would be to establish contractual protective effects from the contract with the mother. The court was unable to find that such a protective effects was actually stipulated "since the law in force at present expressly authorizes the mother in her own interest alone to demand an abortion". The court deplored the fact that there was no protection for the child, but noted that the legal regulation of liability for far-reaching fateful and natural developments is "neither reasonable nor acceptable". (The quotations were taken from Markesinis A Comparable Introduction, 1994, 150-151, where a translation of the case is provided.) Fischer notes than in American law even if in some cases the courts of the first instance accept the claim of the child the appellate courts reject it. Fischer NJW 1981 1991-1992.

1025 In terms of British law two possibilities can be identified; (a) if the child is born dead then it had never existed and never acquired legal capacity to claim damages, (b) if the child is born damaged then the parents can claim on its behalf because it had not had, full at least, legal capacity at the time of the injury.

1026 BGH Urt. v. 18.1.1983-VI ZR 114/81, JZ 1983 447.

1027 Fischer "Schadensersatz wegen unterbliebener Abteilung", NJW 1981 1991.

The decision was criticised[1028] . Under both contractual and delictual liability a claim by the child would seem fair. Considering that the mother has no duty to decide on an abortion, then the wrongfulness of the doctor's behaviour and liability are relative; only if no life or death questions arose would the debtor be liable. The decision cannot aim at absolute fairness when dealing with such unanswerable dilemmas of life and death[1029] but rather at reducing the effects of the damages suffered. This should be adequate for the acceptance of a direct claim by the child[1030]. The burden of the disability does not fall on the parents alone and compensation should not be restricted to them[1031].

Fischer considers this a question of the proper realm of liability. Emphasis should be laid on the guarantee liability of the doctor and on his duties of conduct[1032]. The fear for the uncontrolled expansion of liability, for example, involving claims from all the future children of women with health problems which can affect pregnancy, leads Selb to reject contractual protection[1033].

Female sterilisation contracts might have protective effects for those who have maintenance duties towards the woman. Claims by the husbands for the maintenance costs of unexpectedly born children were accepted in 1977[1034] and 1980[1035].

1028 See Deutch "Anmerkung an BGH Urt.v.18.1.1983-VI ZR 114/81", JZ 1983 451 and Fischer "Schadensersatz wegen unterbliebener Abteilung", NJW 1981 1991-1992.

1029 Priority it was said, should not be given to the primeval existential fear for the birth of a disabled child or to the possible forms of liability

1030 Deutch "Anmerkung an BGH Urt.v.18.1.1983-VI ZR 114/81", JZ 1983 451.

1031 It was difficult in such a case to establish a direct delictual claim. The handicapped was naturally born and it was difficult to justify the violation of a personality right. Social security law would point to the professional liability to inform the mother on the situation.

1032 Fischer "Schadensersatz wegen unterbliebener Abteilung", NJW 1981 1991-1992.

1033 Selb AcP 166 (1966), 104.

1034 See OLG Celle Urt. v. 8.5.1978 1 U 37/77 (nicht rechtskräftig); NJW 1978 1688. The plaintiffs were parents of four. The wife after the birth of the third child had a sterilisation operation for reasons of health in the defendant's hospital. The operation failed; the woman gave birth to a fourth child. The claim, by the husband too, was for the maintainance costs of the fourth child. The LG rejected while the appeal court accepted the claim.

1035 BGH, Urt. v. 18.3 1980- VI ZR 247/78; NJW 1980 1452. A sterilisation operation for family planning purposes, failed because of a doctor's error and a child with serious health problems was born unexpectedly. It was decided that the doctor owed duties of care to the husband who was burdened with maintenance duties towards his family. Additional costs were claimed successfully as well as costs for a new sterilisation operation. Moral damages

If a patient dies then, on the basis of social security regulation[1036], the contract between the patient and the hospital does not have protective effects for the surviving relatives[1037]. Critics suggested that liability could be established by analogy to §618 III, and §844 BGB[1038].

Moreover, a hospital was found only delictually liable to the patient's guests (visitors). Neither the contract of acceptance for treatment nor the RVO provisions enabled the protection of the husband, injured while escorting his wife who was being accepted to the hospital[1039]. The case offers evidence of the cautiousness of the courts not to let third party liability expand excessively, interpreting narrowly the purpose of the contract and being obviously influenced by the fact that medical law is densely regulated.

3.10.5. Transport contracts[1040].

Third parties are usually meant to benefit by the careless transportation that results in their loss, although no contract in favour of third parties is inferred (as is the case

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were accepted by the Federal Court of Appeal) after *Revision* exercised by the first plaintiff, the woman.

1036 *Reichsversicherungsordnung;* RVO, Social insurance code (Regulations concerning the social security system in Germany).

1037 OLG Düss. Urt. v. 3.10.1974-8 U 161/73; NJW 1975 596. The son of the plaintiff had an accident and was operated in the stomach by a doctor in the defendant hospital. The patient died. The autopsy discovered injuries which had not been taken care of. The claimant argued that the surgeon, the hospital's employee, caused the death because of negligence and asked maintenance costs. The LG rejected the claim. The contract was for the medical treatment of the insured person alone; no protection duties were owed to the relatives.The appeal called in the delictual provisions speaking of a special duty of the doctor. The OLG rejected the claim.

1038 See Eberhardt AcP 171 (1971) 289.

1039 BGH, Urt. v. 10.5.1951-III ZR 102/50 (Düss): NJW 1951 596. The contract of treatment could in principle have protective effects towards third parties. The court rejected the claim based on the contractual purpose, the possible implied agreements, and the examination of similar situations in the law of lease. Liability, if accepted, would involve the lack of traffic security at the entrance of the hospital.

1040 Gernhuber notes the continuity in case law (for 50 years) as regards protecting third parties in cases involving transport contracts and the great number of relative examples especially referring to transportation of persons. It is interesting to consider the continuity in case law in view of the fact that there can be so different situations involved (the transportation of employees to their workplace under a contract between the carrier and the employer, or the arrangement for a flight for a group of travellers by a travel agent for instance) and because the means of transport as well as travelling or booking practices have changed greatly in the recent years. Gernhuber "Drittwirkungen im Schuldverhältnis", 253-254.

in Greek law[1041] and has tentatively been discussed for Scots law[1042]). Their claims are based on the transport contract[1043] and not on the third party-creditor inner relationship (sale for instance)[1044]. Relatives, members of a contracting society, participants in leisure journeys[1045] and friends may be protected[1046].

However, a person accompanying the buyer at delivery is not protected by the contract of transport if he is not objectively linked to the purchase. The situation would be different had he, for instance, encouraged or promoted the conclusion of the contract of sale[1047].

A time-charter contract between a ship owner and a charterer does not protect those who have an interest in the freight[1048]. The agreement in this case was regulated in part

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1041 See under "Carriage contracts" in Chapter 3 on Greek law. The carriage contracts are generally considered as contracts in favour of third parties provided the consignee is a different person than the consignor.The consignee is authorised to claim performance. See a possible exception in German case law in Gröhe, 1 (1993) ZEP 141.

1042 See under "Development and Applications" in Chapter 5 on Scots law. It has been argued that under the mechanism of the *jus quaesitum tertio*, the consignee would have a right to claim delivery which is provided in the Bill of Lading Acts of 1855 and 1992, and generally the JQT was a simpler and more effective mechanism to provide solutions for the problems of carriage.

1043 The third party has no performance claims.

1044 Gottwald on §328 BGB 1035.

1045 BGH Urt. v. 28.5.1957-VI ZR 136/56 (Stuttgard); NJW 1957 1187. An 8 year-old child took part in a journey organised by a federal youth agency, with the approval of his mother and his tutor. He fell from the open front left door of the vehicle and suffered brain injuries, during an accident caused negligently by the driver of the bus he was travelling with, while the agency's supervising employee was temporarily absent. The child sued the carrier and was partly successful. He argued that the defendant was liable provided no particular insurance scheme would cover the losses. The defendant argued that the liability of the youth agency should be taken into account; the latter's employee had neglected his duties. The LG accepted the evidence as to the 2/5 of the amount claimed, and rejected the claim as to the rest. The youth agency participated in the proccedings on the side of the injured party. The agency appealed asking for the full amount. The appeal and *Revision* were rejected.

1046 The Federal Court of Appeal rejected the claim in a case where the third party ordered a load of heating oil to the second defendant. Due to the negligence of the carrier employed by the supplier to deliver the load a leakage resulted in loss of a quantity and damages to a neighbouring pool. Plaintiff was the owner of the pool. (The carrier was the first defendant). BGH, Urt. v. VI ZR 156/76 (Karlsruhe); NJW 1978 1576. The LG rejected but the OLG accepted the claim. The appeal on questions of law led to the overuling of the latter decision. This, it can be argued was not a three party but a four party situation.

1047 See Ballhaus on §328 BGB, Gottwald on §328 BGB 1035; BGH VersR 1960, 163, LM § 328 Nr 18a.

1048 BGH, Urt. v. 17.11.1980-II ZR 51/79 (Hamburg); NJW 1981 869. The freight included hazardous substances. They were carried along with other goods. It was not

by compulsory U.S. Coast Guard regulation and could not be interpreted as involving consent for third party protection. The time-charterer was a consignor as far as the plaintiff (and all those with an interest in the load) were concerned and not a hirer and thus §564 b I HGB[1049] was not applicable.

More significantly, it seems that in order to establish protection on the contract, no other means of compensation should be available. The plaintiffs must prove that they sustained losses because of the allocation of risk in general average (*Havarie*) cases. Thus the transportation regulation operated against third party protection.

3.10.6. Contracts for services[1050].

In one case[1051], the contract for services between a limited liability company and its managers extended its protective effect to the limited partnership[1052], the management

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forbidden by international regulations for these non hazardous goods to be carried together with the hazardous ones. The charterer was not relieved from liability because he did something not forbidden. For the claim against the ship owner or/and the charterer to be accepted, those interested in the cargo should show the charterer's lack of care.

1049 § 564 b I HGB is refering to the liability for carrying dangerous substances; "*If flammable explosive or otherwise dangerous goods are brought aboard, the captain having obtained no knowledge of their dangerous nature or condition, the shipper or forwarder is liable under § 564 even when not guilty of a fault. ...*". § 564 I is referring to liability towards the carrier and the rest of the persons indicated in § 512 meaning "*...the shipowner but also the shipper, forwarder, consignee, passengers and the ship's company*". International maritime rules on the carriage of hazardous goods were also taken into account by the decision. (For the translation *The German Commercial Code* 1979, was used.)

1050 Such are contracts of managements, deposit, mandate contracts etc. See Gernhuber Joachim "Drittwirkungen im Schuldverhältnis" 257-258, at a stage when there where fewer examples. See also Gottwald on §328 BGB 1036. This is indeed very broad category and there is no equivalent group of cases with such a wide scope identifiable in any other of the jurisdictions discussed.

1051 BGH, Urt. v. 12.11.1979-II ZR 174/77 Düss.; NJW 1980 589. In this case in a *Publikumsgeselschaft* (a company in which less than 75% of the shares are held by individuals) a general partner in a limited liability company, was assigned with the direction and management of the transactions of a limited partnership (*Kommanditgeselschaft;* KG) which participated in the *Publikumsgeselschaft*. The protective effect of the contract of services between the limited liability company and its directors determined by the relative statutory provisions, extended to the KG. Plaintiff was the KG (a Ltd & Co partnership) which with the cooperation of the defendant was aiming at undertaking the construction of important projects abroad. In 27.11.1970 (million DM were transferred to an account held by a company dependent on the KG, in a Madrid bank for the purposes of capital subcription. The defendant transferred 8.2 million DM to a savings account in order to be used for the fulfilment of a building agreement and the rest 800,000 DM he transferred to an account of the same company in a Zurich bank. This amount was the object of the claim. The KG argued that the defendant had acted unlawfully. In

of which had been undertaken by another company. In the latter the limited liability company (employer) participated[1053], In another case[1054] the contract for services between a limited liability company and its managers created protective effect in favour of the limited partnership, the management of which had been undertaken by the limited liability company. The approach in certain American cases was similar to that in these examples[1055].

It was held that the person entitled to the services (orderer, mandator), was under protective duties towards the employees and the relatives of his contracting party, by analogy to §618 III BGB. A regional agency was thus liable towards the relatives of workers who died in an accident during work that the agency had undertaken and towards injured workers as well[1056].

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the first and the appellate degrees the claim was rejected but the plaintiffs' *Revision* was successful. The defendant was related to the general partner the Ltd and not to the KG. The view of the LG and the OLG that the defendant owed duties of care to this company only was denied by the Federal Court of Appeal. See Larenz I, 185 et seq., and NJW 1960 81.

1052 As said before, the *Kommanditgeselschaft* , KG, is a limited partnership where one at least of the partners has full liability. This is a partnership for the conduct of a commercial enterprise under a common firm name consisting of one or more general partners (*Komplementäre*) with full personal liability for the liabilities of the partnership and at least one limited partner (*Kommanditist*) whose liability in respect of the partnership's creditors is limited to the specific amount of his contribution.

1053 See Larenz I, 185 et seq., and NJW 1960 81.

1054 In BGH, Urt. v. 24.3.1980-II ZR 213/77 (Düss.); NJW 1980 1525. The management of the transactions of a KG had been assigned to a GmbH (Ltd company) which at the same time was a general partner of the KG. Again the protective effect of the contract of services between the latter and its director extended to the KG. The LG and the OLG rejected the claim. The appeal on questions of law was successful for part of the amount asked, the amount of the contribution paid to the KG which the defendant (director) withdrew when he left the company although he had no such right according to the relative statutory provisions. The decision on the *Revision* did not accept a claim for the amount of a loan the defendant had given to the company.

1055 See *Supplies for Industry Inc. v. Christensen*, 135 Ariz. 107, 659 P2d 660, 1983, in the footnotes in "Corporate transactions" in Chapter 4, whereby a subsidiary company turned against the defendant, founder and former president of the parent company who sold his business to a corporation and was employed by the latter. The plaintiff was third party beneficiary of the agreement of employment with the defendant when the latter was president of the parent company not to compete with the plaintiff or any other subsidiary which might in the future operate business conducted by the subsidiary.

1056 BGH, Urt. v. 20.2.1958-V III ZR 76/57 (KG); NJW 1958 710. The defendant agency was responsible for the construction of a bridge at a particular district. The agency contracted with a company for the construction of a road. During works an explosion of a land mine which had been forgotten from the previous war, caused the death of four workers and injured others. The surviving descendants of the deseased and the injured party asked compensation on the basis of the *Reichsversicherung* (RVO; the Federal State's

A strong link between the third party and creditor justifies protection. Contracts for the custody of children and contracts of deposit produce protective effects in favour of the persons taken into custody and of the owner of the deposited things. The father's landlord/employer was liable to compensate the child of his lessee-employee who was injured in the workplace[1057].

Children were also protected on the basis of contracts their parents conclude with kindergardens, day homes, private schools, halls of residence, or with supervisory personnel[1058], as well as on the basis of contracts with a federal state youth agency and an education hall[1059].

The link between third party and creditor could be one of a lease contract. A contract the owner concludes for the administration of his property produces protective effects in favour of the tenants[1060].

The link could be a contractual relationship. A contract between a penal institution and a business enterprise for the provision of services by convicts had protective effects in favour of those related contractually to the enterprise (employees)[1061].

However, an architect obliged to supervise the construction of a building is not liable to compensate workers who might be injured by his error in supervising a

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insurance code) provisions. The LG rejected the claim, while the OLG accepted it. The defendant's appeal on questions of law was unsuccessful.

1057 Weimar NJW 1959 1859. See BGH, Urt. v. 13.2.1975-VI ZR 92/73 (Hamm); NJW 1975 867. The three year old child of a defendant's worker was injured when a calf pushed an unlocked door and hit the childs hand between the door and the walls of the animal's box. (The hand had to be amputated.) The father of the child was living with his family in a house rented by the defendant. In order to set off part of the amount of the lease he worked in the stable which belonged to the defendant's father. The door in question could have been secured but it was not when the child entered the stable unnoticed. The plaintiff (child) asked damages on the basis of the owners delictual liability as the owner of the animals (§833 BGB), and compensation for immaterial damage. The LG accepted the claims in part (the amount was reduced) because of the plaintiff's contributory negligence. The OLG took the same view. The *Revision* of the defendant had only partial success. The mixed relationship of services and lease contracts was duly noted. The court was cautious as to the circle of protected people which it is hoped to be countermanded with the help of the principle of good faith whether as a guideline for the supplemntary interpretation of the contract (§ 157 BGB) or with the direct application of § 242 BGB .

1058 Gottwald on §328 BGB 1036; RGZ 127 218.

1059 Gottwald on §328 BGB 1036; OLG Schleswig VersR 1978 237.

1060 BGH, Urt.v.30.4.1968-VI ZR 29/67 (Zwabrücken); NJW 1968 1325.

1061 Gottwald on §328 BGB 1036, and Ballhaus on § 328 BGB.

scaffolding[1062]. The case rests on the interpretation of the architect's mandate, and might be limited to its facts.

3.10.7. Contracts for works.

The third party is often the owner of the property on which the works are performed. A contract for works concluded by the lessee or his spouse or the owner's employee[1063] protects the owner[1064], as is often the case in common law and Scots law, while in Greek law there is possibly liability in delict[1065]. Contracts concluded by the

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1062 BGH, Urt. v. 16.2.1971-VI ZR 125/69 (Köln); NJW 1971 752. The architect was ordered to do an inspection of the construction site of a building being erected. The accident was caused by the fall of a scaffolding the architect had actually inspected. The plaintiff was the insurer of the building firm. The LG accepted the claim. The defendants appeal led to the rejection of the claim. The *Revision* was not successful. The reference to RVO provisions as a basis of §823 BGB liability was not accepted. The architect has no protective duties on the basis of his mandate as the latter was interpreted according to §§133, 157 BGB.

1063 The owner of a vehicle was protected from the contract of the driver with a car wash enterprise. See Gottwald on §328 BGB 1038.

1064 BGH, Urt. v. 24.2.1954-VI ZR 315/52 Düsseldorf; NJW 1954 874. The contractor with whom the lessee, with the consent of the owner, contracted for repairs on a external wall owed duties of care towards the owner as well, as regards the measures taken for the stabiltity of the wall. The contractor had to to inform on the risk of collapse not only his contracting party but the owner too. The owner is thus protected contractually being in a position similar to the lessee, while this does not apply to people passing by.

1065 The results are mixed in American law where the examples involve claims by the owner against the subcontractor. The owner's claims are often rejected or are accepted on different basis that contract; the third party beneficiary rule that is. See under "Claims of the owner against the subcontractor" in Chapter 4. There are important decisions accepting the claim of a third party against the works contractor in English and Scots law. See the decisions in *Junior Books v. Veitchi*, [1983] 1 AC 520, [1982] 3 AllER 201, [1982] 3 WLR 477 (HL), which has, as will be argued greater validity in Scots law than in English law. See also *Scott Lithgow v. GEC Electrical Projects Ltd*, 1982 SLT 244, and *North of Scotland Helicopters Ltd. v. United Technologies Corpn (No 2)*, 1988 SLT 778 and the arguments in "Third party loss in the Scots law of delict: In favour of the third party", in Chapter 5, suggesting that the Scots law is more favourable towards third parties in delict as well, apart from contract that is. As regards Commonwealth laws, *Junior Books*, although much weakened in English law is still valid authority. Most interesting is the fact that this weakening has not made a serious impact as far as Canadian, Australian and New Zealand law are concerned. Most impressive were the recent decisions in *Winnipeg Condominium Corporation No. 36 v. Bird Construstion Company Limited*, [1995] 1 SCR 85, 11 (1995) ConLJ, 306, by the Supreme Court of Canada, accepting the claim of subsequent purchasers against cintractors for inadequately fixed cladding, and the Australian *Bryan v. Maloney*, accepting the claim by the third owners of a building against the original builders. See under "Third party pure economic loss" and "Is English law isolated?" in Chapter 6. See finally under "Building contracts" in Chapter 3 on Greek law. If the claim of the third party concerns performance it is possible that the contract in favour of the third party could

owner have protective effects for the lessee and the latter's relatives and employees[1066]. The third party-creditor link is, therefore, usually close. In Scots and American law as well, protection also concerns weaker parties related to the creditor, often with family links; otherwise difficulty arises in fulfiling the intention criterion of the contracts in favour of third parties.

Works contractors owe duties of care to the relatives and employees of their contracting parties, who are in the area where the works take place[1067], although this liability might be limited by social security provisions[1068].

If the area of work and the tools are provided by the mandator he then owes protective duties to the contractor and the latter's employees and relatives[1069] by analogy to §618III BGB[1070].

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be invoked for the protection of the third party, In any case the general delictual clause will enable the third party protection.

1066 See Gottwald on §328 BGB1038, and Reimer-Schmidt on §328 BGB, § 22.

1067 BGH, Urt.v. 7.11.1960-VII ZR 148/59 (Hamm.); NJW 1961 211, (See the Anmerkung of Lorenz on the same case JZ 1961 pp.170-171.). The case concerned the death of an engineer and the injury of a worker after the collapse of a steel roof caused by the buckling of cement plates that kept the construction together. The steel roof had been erected by a contractor in the place of an older roof. The construction was supervised by one of his employess. One month before the accident an explosion had damaged the connecting cement plates. The claimant argued that the defendant is the statutory insurer of his employees. He was liable to compensate according to §§618, and 328 BGB and the relative RVO provisions.The LG rejected the claim while the OLG accepted it. The *Revision* led to the overuling and the remanding of the case on the basis of the contributory negligence of the contractor's mandator which had not been taken into account by the lower courts. The acceptance of the claimants right to plead contributory negligence was based on §334 BGB which allows objections from the contract for the benefit of a third party to be raised against the third party too.

1068 BGH, Urt.v.10.11.1970-VI ZR 104/69 (Schleswig); NJW 1971 194. A professional association could not ask compensation by a second defendant who was the working together with the first defendant, beyond the RVO requirements and limits which apply to the first injurer. RVO provisions apply irrespectively of the basis of the particular claim.

1069 In BGH, Gr. Ziv. Sen, Beschl. v. 5.2.1952-GSZ 24/51; NJW 1952 458 a carpenter was working in the house of the defendant on wall panellings. He fell from a non secured cellar staircase while he was on the ground floor which was not lighted. His surviving dependants claimed compensation. The court laying emphasis on the fact that the defendant provided the area of work applied by analogy §618 III BGB. It was noted that the application of the law for works' contract alone would lead to unfair results. In BGH, Urt. v. 20.2.1958-VII ZR 76/57 (KG); NJW 1958 710. The insurance institution's claim for the injury of workers employed on a road construction project against the ordered, a federal authority was decided on the basis of §618 III BGB which was applied by analogy. Recall BGH, Urt. v. 7.11.1960-VII ZR 148/59 Hamm.; NJW 1961 211 (the case involving the collapse of a steel roof). See the Anmerkung of Lorenz on the same case JZ 1961 pp.170-171.

1070 Reference to §618 III BGB brought emphasis on the area the works are taking place.

Protection usually extends to subcontractors. The exclusion of liability is not valid towards the contractor's dependant employees and subcontractors[1071], following §619 BGB[1072]. However, subcontractors are not always protected[1073].

Protection could concern a larger circle of people. A person who had a contract with the police for towing away certain vehicles was found liable towards the owner of a car damaged when towed away[1074].

A construction contract for a public utilities' building, whereby the works caused temporary power cuts, did not have protective effects in favour of the consumers-owners of the servient tenements who suffered losses because of the power cut[1075]. Contacts for works

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1071 Ballhaus on §328 BGB, § 102. In BGH, Urt. v. 15.6. 1971-VI ZR 262/69 (Düss); NJW 1971 1931 it was held that the exclusion of liability was not valid towards the contractor's dependant employees and subcontractors, following §619 BGB. A contractor had undertaken to construct steel panels connecting more oil tanks. Only existing scaffoldings were to be used. For the last part of the work's the contractor contracted with a subcontractor with the approval of the owner. At the evening of the first day of the subcontractor in work, the scaffolding collapsed injuring the plaintiff (subcontractor) and three workers. The scaffolding fell because an oil pipeline gave in. The claimant argued that the defendant (owner of the business) should have been aware of the pipeline's situation and should have taken the proper measures. The LG rejected the claim but the OLG accepted it in part. The defendant's *Revision* was unsuccessful. However, the subcontractor's protection must be sufficiently evidenced in the relative contract and is less likely if no auxiliary statutory basis such as §619BGB can be found.

1072 "The obligations imposed upon the employer by §§617,618 may not be avoided or limited anticipatively by contract."*The German Civil Code"*.

1073 BGH, Urt. v. 30.9.1969-VI ZR 254/67 (Braunschweig); NJW 1970 38. Claimant was the insurance company of a contractor with the federal government for works in a high technology physics laboratory. A fire that was caused negligently by an employee of the subcontractor destroyed already executed works which had to be redone. The insurance company obtained the first contractor's claim after it gave him compensation. The LG and the OLG accepted the liability of both the subcontractor and the employee. The BGH thought that the indemnification agreed between the Federal Government and the contractor did not extend to the subcontractor. The Federal Government had no duty to offer security to the latter. No contract with protective effect was taken to exist in favour of the subcontractor. The court accepted in principle that the plaintiff's contracting party was under a duty to seek compensation for the damages suffered by the plaintiff due to the subcontractor's negligence.

1074 BGH, Urt. v 11.7.1978-VI ZR 138/76 (Hamburg); NJW 1978 1502. The driver employed by the contractor had to do considerable manoeuvring and while he was in the wrong traffic lane he collided with another vehicle and the car which was being towed away was damaged. The car's owner claimed compensation from the contractor and the driver (as second defendant). The LG and the OLG accepted the claim. The *Revision* by the contractor was rejected while the driver's *Revision* was successful.

1075 BGH. Urt. v. 12.7.1977-VI ZR 136/76 (Stuttgart); NJW 1977 2210. The contract was between the city authority and the defendant and it concerned the construction of a sewer and a sewage collector. In the process of the works a worker operating an excavator destroyed cables supplying electricity to a nearby factory. The factory suffered losses

on current cables do not protect the consumers of electrical power; these are the so-called 'cable' cases[1076]. Commonwealth and Scots law take the same view[1077].

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because of the 32 minutes power cut and sued the contractor. The LG and the OLG rejected the claim. The plaintiff's appeal on questions of law was unsuccessful. The reason for the rejection of the claim was that the requirement of the interest of the creditor for the better or worse of the third party was not fulfilled.

1076 'Cable' cases involve loss resulting from power cuts caused by negligence of contractors for public works. The claims in delict were often calling upon the damage to the "right to an established business". Usually in 'cable' cases the claims were not accepted under §823 I BGB as more strict directness requirements were applied. An attempt to establish protection on a protective rule of law was made (§823 II BGB). In BGH 12.3.1968 - VI ZR 178/66 (Hamm) NJW 1968 1279, where the contractor had damaged the cables leading to power cuts, a Statutory Order which rendered whoever damaged public installations liable to a fine was called upon on the idea that it involved the protection of the electricity consumers too. The argument was rejected by the LG under the view that the Order was aiming at the protection of the public in general and not at the protection of the financial interests of individual consumers. The BGH reversed the decision holding the opposite view on the aim of the Order. Protection was extended to individual consumers and to all typical consequences of power cuts caused when the supply system is damaged. Some decisions followed this approach, but in most cases and notably the BGH in a more recent decision changed this attitude (BGH 8.6.1976, - VI ZR 50/75 (Stuttgart), NJW 1976 1740). It considered that a decision accepting such a claim would undermine the legislator's choice.
In BGH 12.7.1977, - VI ZR 136/76 (Stuttgart) NJW 1977 2208 the contractor who damaged the cables was employed by the local administration which had issued a warning to the contractor to watch out for power cables. The contract, argued the plaintiff, had a protective effect in favour of business consumers. The contractor who was in breach of the contract owed compensation. The BGH rejected this view considering that the administrations warning aimed at safeguarding the general interest for the continuation of supply and not a special interest of the plaintiff's business. (There were 1385 consumers affected.). Banakas 268-275. See Gottwald on §328 BGB 1038.

1077 See as far as Scots law is concerned *Dynamco Ltd v. Holland and Hamnen and Cubitts (Scotland) Ltd*, 1971 SC257, 1972 SLT 38, according to which only the owners of the damaged property could claim damages. The plaintiff's excavator had damaged an underground cable causing a power cut and subsequently loss to the pursuer's factory. *Dynamco Ltd v. Holland and Hannen and Cubitts (Scotland) Ltd*, should be taken into account as one example of what Feldthussen describes "The Utility Cases", being one category where recovery is precluded for "negligent interference with contractual relations between the plaintiff and the victim of physical damage" (in this group of cases the plaintiff has a contract with the party who suffers physical damage. The principal example in English law is *Spartan Steel & Alloys Ltd v. Martin & Co. (Contractors) Ltd*, [1973] 1 QB 27, [1972] 3 All ER 557 (CA). Feldthussen, *Economic Negligence*, 235. See also the analysis by Smillie, 32 (1982), UTLJ, 243, on the justification of *Spartan Steel & Alloys Ltd v. Martin & Co. (Contractors) Ltd*, There was no problem of indeterminate liability and as the plaintiff already had a claim for physical damage, denial of the claim in respect of the pure economic loss represented no saving of administrative costs. In such type of damage (power cut) a large number of commercial users may suffer loss. Each claim might be for a small amount, but the total might be in excess of the contractor's liability insurance cover and beyond any reserved fund he might have predicted to accumulate. Potential defendants might include non commercial people (a motorist with no third party insurance for instance). In contrast a potential plaintiff can readily predict the loss a power cut might cause, and can prevent it by installing power generators of by arranging for insurance for example.

3.10.8. Contracts of lease.

In this area, where there is protection on §538 BGB[1078] -- establishing the guarantee liability of the lessor -- spouses, children, brothers and sisters and other persons belonging to the 'domestic community' (*Hausgemeinschaft*) may be protected on a contract of lease for domestic purposes[1079]. The same people may be protected by tenancy and lodging agreements with a hotelier[1080]. New-born family members and incoming relatives should also be protected[1081]. It is fair to suggest that unmarried individuals who live together should be protected[1082]. (The BGH has held a different view attracting criticism on the moral judgment it impliedly made[1083].) Moreover, domestic assistants, cleaning ladies, children's nannies, as participants of a changing domestic community, are protected by the lease contract[1084]. Short-time visitors and occasional workers or craftsmen are not protected[1085].

1078 Gottwald on §328 BGB 1037. A direct claim by the third party seems again the best possible solution.

1079 See Gottwald on §328 BGB 1037. See also Weimar NJW 1959 1860. Gernhuber considers in 1958 that the protection of third parties from contracts of lease for domestic purposes is established in case law. (Gernhuber "Drittwirkungen im Schuldverhältnis" 255).

1080 Gottwald on §328 BGB 1037.

1081 This is the case with the three year old child of a defendant's worker who was injured when a calf pushed an unlocked door and hit the childs hand between the door and the walls of the animal's box (BGH, Urt. v. 13.2.1975-VI ZR 92/73 (Hamm); NJW 1975 867). The father of the child was living with his family in a house rented by the defendant. See Weimar NJW 1959 1859. The plaintiff (child) asked damages on the basis of the owners delictual liability as the owner of the animals (§833 BGB), and compensation for immaterial damage. The LG accepted the claims in part (the amount was reduced) because of the plaintiff's contributory negligence. The OLG took the same view. The *Revision* of the defendant had only partial success. See Weimar NJW 1959 1859

1082 The foreseeability requirements will usually be fulfilled in cases of unmarried couples. It would be absurd to deny protection to unmarried couples at the time guests can be protected.

1083 OLG (Hamm) 9 Z S Urt.v.14.2.1976-9 U 216/76; FamRZ 1977 318. Sonnenschein *Juristische Arbeitsblätter*, 1979 225. The owner a 12 year old girl leased the first floor to a woman and the ground floor to a man who later developed a relationship and lived both on the first floor. The man was injured when the balcony collapsed. Delictual as well as contractual claims were dismissed. The man was not included in the protective scope of the woman's lease contract. The lessor had no protection duties towards the man from his contract with the woman. The man had not been married to the woman so as to justify the latter's interest in protecting him.

1084 See Lorenz JZ, 1960, 108, Heinrichs on §328 BGB 356.

1085 Recall an example from the contracts for medical treatment where the husband escorting his ill wife was not protectd contractually for the injuries he suffered when entering the hospital (BGH, Urt. v. 10.5.1951-III ZR 102/50 (Düss): NJW 1951 596).

Members of a travel group were protected by the contract between the trip organiser and a hotelier[1086], as all participants to a function in a hall leased by a society[1087], but such protection is objected to today[1088].

The landlord may be liable for injuries caused by initial defects of the leased thing[1089]. Subsequent owners can be held liable for defects of which they could have not been aware. In a well-known case[1090] the heir of the leased building was held liable for injuries caused from leakage of water which found its way into a forgotten, blocked chimney[1091]. The landlord was liable against the third party as he would have been against the lessee.

Critics[1092] thought that, this being a borderline case between the contract with protective effects and *Drittschadensliquidation*[1093], the latter should apply[1094], once the creditor had no interest for the third party protection[1095]. It is difficult to accept the

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1086 Gottwald on §328 BGB 1037.

1087 According to RG case law not only members of a society organising a function but all persons attending should be protected by the contract between the owner of the hall and the society. RGZ 166 153; Heinrichs on §328 BGB 356.

1088 At least as regards all participants for instance. Larenz among others doubts whether such extensive liability is desirable (Larenz I, 185 et seq.).

1089 §§535, 538, 571 BGB. The same provisions define the lessor's liability towards the third party. Gernhuber "Drittwirkungen im Schuldverhältnis" 256.

1090 BGHZ 49 350, BGH, Urt. v. 22.1.1968-VIII ZR 195/65; NJW 1968 885, which exemplified the readiness of the courts to protect the third parties.

1091 The plaintiff was the owner of equipment which her sister who was the lessee was keeping in the leased building for the purposes of her sister's business.

1092 This decision raised some criticism. See Söllner JuS 1970 159 and Berg NJW 1968 1325.

1093 Berg NJW 1968 1325.

1094 The plaintiff could claim on behalf of the lessee infering a sublease agreement between the two, with regard to the borrowed equipment. No special interest of the creditor (lessee) could be evidenced for the satisfaction of the requirements of the contract with protective effects. See Söllner JuS 1970 164 and Reimer-Schmidt on §328 BGB,1112, Heinrichs on §328 BGB.

1095 Söllner JuS 1970 164. This was the law until then. Berg (Berg NJW 1968 1325) and others refer to a well known case (the Klosterfall case RGZ 87 289) from 1914 . A monastery called a doctor and arranged for his transportation. The doctor was injured at an accident caused culpably by the wagon driver as he was returning from the monastery. His protection against the carrier was accepted on the basis of *Drittschadensliquidation* although it is obvious that he was not not benefited from the carriage in such a manner so as to accept the existence of a transfer of damage which characterises *Drittschadensliquidation* cases.

suggestion because, among others things[1096], no transfer of damage occurred and the injured party had no concern for the contractual performance[1097].

According to a compromising view the third party can be protected by both mechanisms but it would be better not to allow a direct claim by the injured party[1098] for reasons of equity towards the unaware defendant. Moreover, the choice for a direct claim is basic, evidence of the courts' readiness to protect the third party effectively, and reflects an accurate judgment in that the violation involves protective duties[1099].

Lessees are not protected by the lease contract of other lessees of the same building when the injury comes from these other lessees[1100]. In contrast, in Scots law there is

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1096 The suggestion to infer a sublease agreement between the lessee and the third party-plaintiff in this is not convincing; it would seem as an arbitrary invention of the courts.

1097 Typical with *Drittschadensliquidation* is that the third party alone suffers all the damage, due too his interest in the performance but has no contractual claim against the injurer while his contracting party has no interest to sue. See Berg NJW 1968 1325. This situation resembles that of a sale with retain of property by the seller whereby the things bought are transported to the buyer's establishment.

1098 Heinrichs on §328 BGB 356. This position is taken by Berg too (Berg NJW 1968 1325).

1099 See also the case of the owner of things deposited in a place leased by another person who is protected by the lease contract.

1100 BGH, Urt. v. 16.10.1963-VIII ZR 28/62 Hamm.; NJW 1964 33. In this case the landlord was living on the third floor of a building. The claimant who had a carpet selling business occupied the ground floor. The first floor was occupied by a private school for technical training. Various provisions had been made in the lease contracts for the use of the existing toilets and the construction of new ones. Due to the malfunction of the toilet the owner and the school's students were using on the first floor a flood of water caused damages to the carpets at the ground floor. The lessee of the ground floor sued both the owner and the other lessee. The LG rejected the claim, while the OLG accepted it. The appeal on questions of law was not successful. The OLG accepted the existence of a contract with protective effects. The Federal Appeal Court (BGH) thought that the mechanism had been drawn with narrow limits in the BGH jurisprudence and with srticter requirements as to the protection and care duties involved. It felt that no protective effect should be recognised in lease cases. The lease contract creates a link which is not so close as to say that the landlord is liable for the better or worse of the lessee. The court took account of Gernhuber's views especially.

BGH, Urt. v. 9.10.1968-VIII ZR 173/66 (Köln); NJW 1969 41. In this case one lessee claimed against the other on the basis of the latter's contract of lease with the (same) landlord because due to the negligence of the defendant the plaintiff's water-pipes were damaged (water left in them, froze during the vacation period). Compensation was awarded on a delictual basis. Contractual protection was denied before the need to draw narrow lines of the protective effect of the lease contract and not to blur the dividing lines with delict. The landlord did not owe protection duties to the lessee; he had no such interests.

arguably protection againt other co-lessees[1101], as possibly is the case in Canadian law[1102]. The decisions focus, not always clearly[1103], on the absence of any such creditor's interest[1104]. The fact is that the loss was not produced as a result of the lessor's behaviour[1105].

The courts systematically deny protection to the sub-lessee if he has a similar claim against the sublessor (his own debtor) on the idea that there was no need for protection[1106]. This is the prevailing academic view[1107] as well, although Vollkommer[1108] points out that no claim with similar content should exist against the same defendant[1109].

1101 See under "Development and Applications", in Chapter 5, where it is considered that the application of JQT could be expanded from the the cases of claims between co-feuars who derive their right from the same superior to co-lesses who hold leases from the same landlord under the same or similar terms. See *MacDonald v. Douglas*,1963 SLT 191, involving claims between co-feuars.

1102 See in the footnotes in "Development and Applications" in Chapter 5, the reference to *Re Spike et al and Rocca Group Ltd et al*, 1979 107 (3d) DLR 62. The case involved tenants of a shopping centre who had agreed with the landlord to restrict their activities in respect of particular business. It was held that one of the tenants has a right to seek an injunction to prevent a vioaltion of the agreement by another tenant.

1103 It is not clear which standards the courts apply as the definition of this interest is doubted. The liability of the lessor who contracts for repairs in the leased building is accepted if the contractor causes damage to the lessee but not if another lessee causes damage.

1104 There is a basic concern to avoid blurring of the limits between contractual and delictual liability and not to allow contractual liablity to expand excessively. See Krause JZ 1982, 16-19.

1105 Whether it concerns a violation of his basic obligation or it is (in most cases) related to other duties. Krause notes that the third parties are protected when the damage is caused by the object of performance itself (the leased thing), or is the result of the debtor's liable behaviour. Krause JZ 1982, 18.

1106 BGH, Urt. v. 15.2.1978-VIII ZR 47/77 (Hamm.); NJW 1978 883. The defendant who was the owner of a warehouse had it leased to a lessee who subleased the building to another person with the oral consent of the owner, although the initial lease contract contained the provision that written consent should be given. After heavy rains, water came in the building and caused damages to the sublessee's property. The sublessee claimed compensation by the owner. It was decided that he was not included in the protective scope of the initial lease contract. The LG and the OLG rejected the claim. The *Revision* was unsuccessful. See Krause JZ 1982, 16-19.

1107 Sonnenschein *Juristische Arbeitsblätter*, 1979 230. Krauze notes that the (initial) lessor is not liable when his lessee is liable towards the sublessee in the same manner as the lessor would have been. Krause JZ 1982, 19.

1108 See in Krause JZ 1982, 18.

1109 For a third party claim to be rejected.

Similar to that for domestic leases is the law on leases for professional establishment. The creditor's link to the protected persons (for instance, employees) is usually less close or obvious than in domestic leases and the criteria should be modified accordingly[1110]. Owners of things brought in the leased area (for example, a storage place or warehouse) are generally protected[1111].

When a business proprietor concludes a contract of lease, all those to whom he owes duties of care should be protected by analogy to §618 III BGB. Those protected should be closely related to the business[1112]; not, for instance, suppliers, clients or patients[1113].

Contracts of lease or loans for use concerning motor vehicles or machinery of any kind or other objects can have protective effects for third parties who use the leased objects according to the contractual purpose[1114].

The third parties are protected only if they do not have a special claim against the sublessor (initial lessee) from the sublease[1115], or from another relationship on the basis of which they are authorised to use the thing[1116].

1110 Weimar NJW 1959 1859.

1111 BGH, Urt. v. 22.1.1968-VIII ZR 195/65; NJW 1968 885. See Ballhaus on §328 BGB.

1112 Those who have *"engen Verbundenheit mit den Betrieb"*; Weimar NJW 1959 1861

1113 See Larenz I, 185 et seq. and Gottwald on §328 BGB 1037.

1114 BGH, Urt. v. 7.2.1968-VIII ZR 179/65 (Bamberg); NJW 1968 694. This case concerned the borrowing of a small bus by a transport business. A driver was employed to drive the vehicle to another destination. Following an accident the driver was injured and the bus was destroyed. The driver was included in the protective scope of the hire contract and the respective limitation period applied against him. In BGH, Urt. v. 7.7.1976-VIII ZR 44/75 (Düsseldorf); NJW 1976 1843, it was thought that a contract for the lease of a mechanical crane could be a contract with protective effects *vis-à-vis* third parties. The plaintiff contracted with the plaintiff for the demolition of a silo. The contractor subcontracted part of the works. The plaintiff contracted with another firm for a crane with personel to be dispatched to assist the works. Following an accident the crane's driver was injured and the crane was damaged. The company operating the crane sued for compensation. The defendant argued that the limitation period had passed. The LG rejected the claim, and the OLG the appeal. The *Revision* was unsuccessful. However, the contract with protective effects was accepted in principle. The limitation period of §558 BGB applied towards the third party too.

1115 BGH, Urt. 15.2.1978-VIII ZR 47/777 (Hamm); NJW 1978 883.

1116 BGH, Urt. v. 19.9 1973 VIII ZR 175/72 (Koblenz); NJW 1973 2059. This case involved damages to a leased building. Plaintiff was the insurance company which compensated the landlord for the losses, and who substituted the latter in his claim on the basis of § 67 *Verssicherungsvertragsgesetz* (VVG). The first defendant was the lessee of a building where he used one room as warehouse and, in an open space, he kept a trailer where he produced (using electricity from the building) food and drink for the purposes of his business and in the trailer, among other things, he kept two bottles containing

3.10.9. Contracts of sale - Producer's liability.

Although the quality of the product is often questioned in the case of contracts for sale, the group should be distinguished from product liability[1117] where the basic difficulty in awarding damages derives from the fact that a chain of intermediaries intervenes between the person suffering the loss and the manufacturer because, usually, of successive sales.

The protective effect is, as a rule, limited to immediate purchases. There is protection when the injured party is a relative of the buyer[1118] or when he is closely related to the latter (for example, an employee)[1119]. Usual examples involve the sale of tools and mechanical equipment[1120] to be used in the home[1121]. The lessee is protected from the sales contract the landlord is concluding for the purchase of water mains[1122].

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propanium. The lessee's employee forgot the propanium bottles open overnight and an explosion the following morning damaged the building. The LG accepted the claim but the OLG accepted the arguments of the lessee and his employee (second defendant) that the limitation period of §558 BGB had passed and accepted the appeal. The plaintiff's *Revision* was not successful. It is interesting that, as accepted,the limitation period of 6 months (§558 BGB) applied as far as the leased house and the other objects in it are concerned. The same limitation period applied with regard to the private vehicle (since the latter was included in the contract of lease) and not the one year limitation period of the *Straßenverkehrsordnung* (Road traffic regulation, StVG §14) on the basis of the content of the contract and the risks involved. The assistant the lessee is using with the lessor's consent can also claim the §538 BGB limitation period.

1117 See "Product Liability" by von Hülsen, Hans Viggo, in *Business Transactions in Germany,* Rüster (general editor).

1118 BGH, Urt. v. 28.1.1979 VII ZR 246/74 (Koblenz); NJW 1976 712. This is the well known case involving the injury of the 14 year old child who escorted her mother to the self-service shop of the defendant and slipped on vegetables thrown on the floor. The LG rejected the claim because it thought that the limitation period had expired. The OLG accepted the claim for the 1/4 of the amount asked. The *Revision* of the plaintiff was not successful. See also "Product Liability" by von Hülsen , in *Business Transactions in Germany,* Rüster (general editor).

1119 BGH, Urt. v. 25.4.1956-VI ZR 34/53 (Düsseldorf); NJW 1956 1193, BGH, Urt. v. 13.5.1959-VI ZR 109/58 (Braunschweig); NJW 1959 1676

1120 Gernhuber notes the role the object of sale plays in the cases of sale of mechanical equipment; Gernhuber "Drittwirkungen im Schuldverhältnis" 258.

1121 BGH, Urt. v. 25.4.1956-VI ZR 34/53 (Düsseldorf); NJW 1956 1193. This is the case involving the purchase of an operationally safe disk bought by a business proprietor in order to be used in his threshing manchine. The disk did not function properly and an employee was injured. The employee's claim on the basis of the contract of sale was accepted. The contract had protective effects in favour of the employees of the buyer. Recall BGH, Urt. v. 13.5.1959-VI ZR 109/58 (Braunschweig); NJW 1959 1676, the famous Capuzol 22 case. The contract of sale of a substance to be used in the workplace had

Producer's liability is also limited to the producer's immediate buyers (possibly merchants). Only exceptionally is the manufacturer liable toward a third party if, for instance, the contract has been concluded for his benefit -- something not usually accepted in supply contracts[1123].

The possibility for producer's duties of care[1124] to be based on an implied warranty[1125] has been rejected[1126]. Quality (trade certificate) marks do not create contractual protection in favour of the consumer[1127]. If, however, the producer has offered some guarantee for the product, then the immediate sale can operate as a contract with protective effects for a third party; the final consumer[1128]. In contrast, product liability in

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protective effects in favour of the injured worker who was not a party to the contract. BGH, Urt. v. 7.11.1960 VII ZR 148/59 (OLG Hamm); JZ 1961 169. See the Anmerkung of Lorenz on the same case JZ 1961 170-171.

1122 Gottwald on §328 BGB 1036; RG JW 1937 737. Depending on the quality, condition of the equipment and the use they are designed for, the possibility for physical injury or property loss might increase and accordingly the duties of the seller (duties to inform on the use of the equipment, to draw attention on the risks involved, to provide comprehensive manuals, etc.) will be increased.

1123 *"[T]he ultimate consumer does not benefit from the contractual duties the producer owes"* Kelly, Patricand Attree, Rebecca (eds) *European Product Liability*, 1992, 138.

1124 These (supplementary) duties of care were first developed by the RG. Such a duty of care *"..parallels the general duty of care vis-à-vis all third persons under tort law. The duty involves design, manufacturing, product monitoring and product handling duties"*; "Product Liability" by von Hülsen, Hans Viggo, in Rüster (general editor).

1125 Especially if they concern closely related people as family members, employees, so that a producer can be taken to be interested for the better or worse of the third party. BGH, Urt. v. 15.5.1959; JZ 1960 124. Müler (Müller AcP 165 304) mentions the analogy to §618 III BGB which could give rise to duties of protection and care. See Diedirichsen "Anmerkung an BGH, Urt. v. 26.11.1968-VI ZR 212/66 (Düsseldorf)"; NJW 1968, 271.

1126 *"[A]s well as a general contract like duty to take care stemming from social contract."*"Product Liability" by von Hülsen, in *Business Transactions in Germany*, Rüster (general editor).

1127 BGH, Urt. v. 14.5.1974-VI ZR 48/73 (Bamberg); NJW 1974 1503. The plaintiff bought in 1965 water pipes made of synthetic material, with a certificate mark of The German Association of Gas and Water Experts, which characterised a particular level of quality. In 1966 the pipes were damaged. The plaintiff sued the seller considering that the pipes did not correspond to the Association's standards. The seller argued that the pipes had all the qualities asked and that the best materials had been used in their construction. A minimum quality was guaranteed with the certificate marks. The LG and the OLG rejected the claim. The plaintiff's *Revision* was unsuccessful. There was no special relationship between the producer and the consumer which could justify an interest for the latter's protection on the basis of good faith.

1128 BGH, Urt. v. 28.6.1979-VII ZR 248/78 (Schleswig); NJW 1979 2036. The case concerned the use of glass of a particular quality in the works performed in the plaintiff's house. The glass was produced by the licensee defendant. The latter who was selling to wholesalers was offering guarantee in his prospectuses for 5 years after first delivery. The guarantee covered the glass works against condensation which was what happened to the

American law is to a considerable extent based on statutory implied warranty and does not involve contractual liability from a doctrinal point of view (in American doctrine)[1129].

As shown in product liability[1130] the courts are cautious not to let liability expand unpredictably against certainty and transactions practices, when a chain of sales is involved. In practice, it is difficult to acknowledge proximity to the performance[1131]. Typical examples concern mass-scale transactions[1132]. The fact that the claimant might not be the buyer makes things more complicated[1133]. There is also special product liability legislation as well as alternative security schemes for compensation. Product liability claims by consumers against producers are not easily accepted in any jurisdiction. The suggestion to expand this liability on the basis of contract should be faced with scepticism[1134].

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glass. The claim on the guarantee was the last stage of the dispute. The LG and the OLG rejected the claim because the limitation period had expired. The Federal Court of Appeal took a different view. The 5 years limitation period had not expired because the plaintiff had informed the producers of the problem.

This guarantee or advice for the use of the product is often a separate contract which creates a direct link between the manufacturer and the consumer and can justify contractual compensation claims. "Product Liability" by von Hülsen in *Business Transactions in Germany* Rüster (general editor).

1129 The implied warranty is based on §2-314 of the Uniform Commercial Code. The alternative is strict liability in tort. See under "Examples: Misrepresentation and product liability", in Chapter 4. See also Bungert, 66 (1992) TulLR, 1179-1266

1130 The final consumer has no claim against the producer or initial seller. BGH, Urt. v. 26.11.1968-VI ZR 212/66 (Düsseldorf); NJW 1969 269. See also the Anmerkung to the decision by Diederichsen NJW 1969 269-271. The producer is only delictually liable to the final buyer/consumer. An in-between purchaser cannot suit on a contract law basis for the compensation of the final consumer (third party). The decision concerns the vaccination of chicken against fowl pest with a product which proved to be defective and did not obstruct the outburst of the disease leading to the death of thousands of chicken. The decision rejected a third party claim on a contractual basis (the contract of sale). The producer could only be delictually liable. As it was noticed the social understanding of such situations was not contributing to the acceptance of liability.

See also Weitnauer NJW 1968 1593 and the review of *Grundhaften der Produzendhaftung*, 1965, by Simitis AcP 1967 290. See also Müller AcP 165 311. Moreover, in modern transactions it is often uncertain who the producer is and large industrial corporations have their own retail chain.

1131 Müller AcP 165 311.

1132 Diedirichsen NJW 1968, 271.

1133 As with the father who buys a product for his child. See Weitnauer NJW 1968 1593.

1134 See under "Theory" in Chapter 3 on Greek law, the reference to the suggestions of Stathopoulos, and the footnotes therein where references to German law are made.

4. Contract with protective effects and *Drittschadensliquidation;* delimitation.

4.1. Introduction.

Definition and delimitation are the subjects of considerable academic deductive interpretation of case law. Both mechanisms are judicially established devices aiming at protecting third parties suffering loss from the violation of contract duties. A basic idea in both is that the debtor should not benefit[1135] from the fact that the injured party is not a party to the contract when the debtor's contractual behaviour caused the loss[1136]. There are cases where the mechanisms seem to overlap, both being applicable[1137]. Today the definitions and the division are, with some exceptions, fairly clear[1138].

As is usually mentioned[1139], leaving aside doctrinal issues, in *Drittschadensliquidation* the injured party had an interest in the contractual performance and performance-related (basic) duties are violated. In the cases of the contract with protective effects the third party had no interest in the performance[1140], but his integrity

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1135 Berg NJW 1968 1325.

1136 It is fair therefore that the debtor should bear the consequences of a contractual violation. In some instances however the rationale of holding the debtor liable is based more on his respective position. He might for instance be benefited from the contract or be in such a dominant position to influence the conclusion and development of the contract that it seems proper to bear increased liability.

1137 See Hohloch FamR 1977 530, Heiseke on BGH 15.5.1959; NJW 59 p.1676, (Capuzol 22 case) in NJW 1960 77, Söllner JuS 1970 159, Berg NJW 1969 1172, and NJW 1968 1325, and JuS 1977, p.363, and Frank NJW 1974, p.2313. Recall BGH 11.1 1977-VI ZR 261/75 (Bamberg); NJW 1977, 2073. The defendant was the advocate of the plaintiff's father. In January 1972 the plaintiff's father and mother signed a divorce agreement drawn up by the defendant. After the divorce decree was granted in February 1972 the mother refused to transfer her interest in the property to the plaintiff and his siblings as provided in the divorce agreement. The plaintiff claimed damages for breach of the defendant's duty as an attorney. The LG rejected and the OLG accepted the claim. The defendant's appeal was dismissed. The BGH noted that it was not a problem to accept that there was a contract with protective effects in this case as the plaintiff was the son of the attorney's client and was entitled to care and protection from him. However, the BGH thought that in this case *Drittschadensliquidation* could be applied as well as it would have been proper for the cleint to idemnify his son for the loss he had suffered. The court did not pursue the matter further. See Markesinis *A Comparative Introduction*, 1990, 230, for a detailed translation.

1138 See Gottwald on §328 BGB 1030, Grunsky on §249 BGB 362, Berg JuS 1977, 363, Lange 294-297.

1139 As it can be inferred from the basic, major references especially in the attempts of the academics to find the proper dogmatic basis for the contract with protective effects. See Larenz NJW 1960 79, where he replies to previous Heiseke's observations and provides an outline of the differentiation between the two mechanisms focusing on the contract with protective effects. See also Gottwald on §328 BGB 1030

1140 He is only concerned with acquiring compensation.

interests[1141] are injured by the debtor's violation of a contractual protective duty that is owed to the third party[1142].

Moreover, in *Drittschadensliquidation* the creditor only is entitled to a compensation claim[1143]. The third party has a direct claim in his own right in the contract with protective effects. The difference might be minimal in economic terms but is significant in law[1144].

The utility of the simultaneous existence of the mechanisms has been questioned at an early stage of the establishment of the contract with protective effects[1145]. Both, in one view, covered the same area and *Drittschadensliquidation* sufficed for third party protection. The contract with protective effects created uncertainty[1146] and was thus unfair to the debtor[1147] who should be held liable within predictable, justifiable limits[1148]. The

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1141 As discussed before, the object of the the secondary protection and care duties are the so-called *Erhaltungsinteresse* (preservation integrity interests) of the protected person. The very definition of the integrity interests indicates their defensive character. The aim of the *Erhaltungsinteresse* is to delimit a sphere of a person's considerations where the outside influences are not permitted. Larenz considers that *Erhaltungsintrresse* set the standards as regards the definition of protection duties. Integrity interests go beyond the interest in the agreement and the execution of the contract. Larenz thinks that integrity interests might give rise to a complaint even if no particular right has been violated no legally protected good has been affected, no execution or reliance interest has failed to realise (Larenz I, 351.). See also Hohloch FamRZ 1977 532. In Koziol -Welser, the particular *Erhaltungspflichte* of the landlord as regards the condition of the leased place are discussed.

1142 See Gerhuber "Drittwirkungen im Schuldnerverhältnis" 249, and Larenz NJW 1960 79.

1143 Grunsky on §249 BGB 362. The legal position of the creditor is affected; his contractual rights are violated. He can either transfer the amount received to the third party, sue on behalf of the third party or transfer his claim. See Heiseke NJW 1960 78.

1144 See Strauch JuS 1982 823, who thinks that the difference in question concerns the exercise of the relative right only, it is thus external and not conceptual.

1145 See Heiseke NJW 1960 77, and Zirkel NJW 1956 1676.

1146 As to the circle of protected perople and as to the content of their claims.

1147 Heiseke NJW 1960 78. Larenz replies that the liability of the debtor is justified since he could consider that his contracting party was relying, when entering the relationship, on the security of certain third persons as much as on his own and that the circle of the protected persons is managable and can be supervised by the debtor (NJW 1960 79).

1148 Heiseke laid emphasis on the equitable protection of the debtor and especially on the possibility to raise the contractual objections against the third party (Heiseke NJW 1960 77).

direct claim could not be justified on civil liability law[1149]. The *Drittschadensliquidation* solution was not a mere formality but a prudent view that derived from the liability system, especially regarding the right to claim[1150], and could balance the interests involved successfully[1151].

Preference for *Drittschadensliquidation* was usually accompanied by allegations that the courts have made wrong use of their discretion when accepting the contract with protective effects merely in order to overcome the constraints of delict[1152]. However, overcoming these constraints was the motive for developing *Drittschadensliquidation* as well[1153].

According to another opinion[1154] the mechanisms could apply simultaneously since both were based on the same or similar considerations and reached similar results[1155]. The third party should be indifferent to which is used. Naturally if both apply, it is practical to prefer the one granting personal rights and direct claims[1156].

4.2. Borderline cases - Critique.

1149 Heiseke NJW 1960 78. Heiseke considers that a contract for the benefit of third parties (§328 BGB) only can give rise to a direct claim, whether the base of the protection had been the construction of an implied agreement of a pure contract for the benefit of third parties or the compulsory imposition of such a protection on the basis of good faith.

1150 See Schmitd on §328 BGB, 1112.

1151 Heiseke NJW 1960 78.

1152 See Berg JuS 1977, 363, and Hohloch FamRZ 1977 532.

1153 See Gerhuber "Drittwirkungen im Schuldnerverhältnis" 252-253, and Gottwald on §328 BGB 1030.

1154 See Zirkel NJW 1956 1676, who at that time compares the construction of the contract with protective effects with that of the contract for the benefit of third parties of which the contract with protective effects was then thought to be an application. Zirkel begins by observing the different treatment of cases involving bodily injury from those involving property or material damage, which is not based in law. See also Holhoch who spoke against applying either of the two. Hohloch FamRZ 1977 532

1155 Zirkel NJW 1956 1676.

1156 Accepting, with some certainty, a personal right as well. Zirkel NJW 1956 1676. See Gottwald on §328 BGB 1030, who justifies his preference on the stronger legal position of the third party in the cases of a contract with protective effects. This is not fully verified nevertheless.

The criteria used by the courts for the selection of one or the other mechanism are often unclear. It seems that the BGH, in contrast to lower courts, has a preference for the contract with protective effects[1157].

In a representative borderline case[1158] where the landlord-heir was found liable to the owner of equipment brought in the leased building on the contract with protective effects by the BGH, the appellate court had taken the view that the third party was a

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1157 In many cases, especially those involving contracts for expertise advice, and contracts for services, the BGH took such a view overruling OLG decisions which had decided on the application of *Drittschadensliquidation*. (See BGHZ 49 350; BGH Urt. v. 22.1.1968-VIII ZR 195/65; NJW 1968 885.)

The OLG, on the other hand, focussed exclusively on *Drittschadensliquidation* in a number of cases. There are cases for instance where the contract with protective effects had been applied in the past but the possibility was not considered by the OLG. In one case from 1970; OLG Hamm 4.5.1970-11 U 264/69; NJW 1970 1793, a notary public had violated his duties towards a dairy producers' association and the loss had been suffered by the plaintiff, a credit institution which had provided the association with a loan, and to whom the association had transferred its claim. The OLG had doubts as to the application of *Drittschadensliquidation* in cases involving notarial liability; it was doubted whether it would be reasonable from the point of view of the debtor's liability to extent the application of the mechanism to cases of improper behaviour. It was noted that the case did not fall in one of the usual categories of *Drittschadensliquidation*. Professional liability on the other hand was not accepted for mere negligent behaviour. In a case of 1967 (BGH Urt. v. 22.1.1966-VI ZR 49/65 (Schleswig); NJW 1967 930) a third party was protected from the violation of duty of a notary, it was held that a trust relationship existed the plaintiff being the beneficiary of the trust.

In another case (OLG Saarbrücken, Urt. v. 13.7.1971- 2 U 127/700; NJW 1972 55) a carpenter business applied for a loan from a savings' bank with the mediation of a mortage broker. The loan was secured for part of its value with a registration of an uncertificated mortage on immobile property belonging to a third person. The mortgage broker asked the defendant, an architect who was not a sworn and publicly appointed valuator, to adjust a 1962 valuation of the property in question. The purpose of the report was for the broker to obtain an estimation of the property's value. Measurements or *in situ* examinations where expressly excluded. The defendant prepared a report on the basis of which a loan was provided. Later on, the property went into a complulsory sales procedure from which the plaintiff obtained only a part of the amount of the loan. (The plaintiff bought the property at a lower than the estimated price, two years after.) The argument of the claimant was that he suffered losses due to the inexactness of the report. The OLG refused protection whether or the basis of §826 BGB, which the LG had accepted, or on the basis of a contract. No implied agreement for the protection of the third party could be inferred while the court felt that there should be some limitation in the duties of care of the reporter. The causal link between the wrong valuation and the loss was doubted. The purpose of the report was for the broker to have a valuation, and in such cases the banks would not probably rely on such reports. There was not enough evidence that the decision for financing was crucially influenced by the report while the reporter had not committed a particular irregularity.

1158 BGHZ 49 350; BGH Urt. v. 22.1.1968-VIII ZR 195/65; NJW 1968 885. The landlord would have been liable on the basis of §538 BGB (guarantee liability), even if he had no knowledge of the existence of or the ownership of the equipment.

trustee of the equipment and accepted the claim of the lessee-beneficiary of the trust on *Drittschadensliquidation*[1159].

The latter was preferable, it was argued, because it established a duty of care for the 'entrusted' thing[1160], even if the defendant was unaware of the third party interests[1161]. The contract with protective effects would seem a more equitable solution when the defendant had been in a position to know the third party interests.

It is true that the third party had no interest in the performance but the fact that the landlord is statutorily presumed liable[1162] would indicate that performance duties were violated, that is, performance duties deriving from a contract of deposit. The argument for *Drittschadensliquidation* is reinforced by §701 BGB, on the hotelier's liability to the creditor-guest[1163].

Against these latter points it was argued that not good performance was presented as non performance[1164]. This would certainly be the case if the separate character of

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1159 Some authors considered that either mechanism could apply. See Reimer-Schmitd on §328 BGB, 1112, and Söllner JuS 1970 159. They both prefer *Drittschadensliquidation* .

1160 A special duty of care (*Obhutspflicht*) of the landlord for the equipment brought in the leased building. Emphasis was laid on the contract of deposit between the lessee and the owner of the things.This duty did not however automatically exclude the contract with protective effects. (Berg NJW 1968 1326.).

Drittschadensliquidation applies in cases of destruction of "entrusted" things ("entrusted" meaning delivered, surrendered), in contrast to cases where an employer is buying materials to be used by his employees for example. (The things in this case were entrusted to the beneficiary of the trust (the lessee) for the needs of her business. Similar are the cases for the delivery of things to a freight forwarder or a commission agent for transportation for example. The beneficiary of the trust had a duty of care and not the injurer as in the cases were materials or tools to be used at a workplace are offered with retention of title.).

1161 In strict liability as well no knowledge by the debtor of the possibility to cause injury to a third party is required. *Drittschadensliquidation* is preferable, it was argued also because it takes a more equitable point of view as far as the landlord is concerned. The debtor does not escape liability while he is not burdened excessively. (In his point of view the equipment belongs to the lessee.). The landlord has all his contractual objections (limitation of liability, expiration of limitation period, etc). The injurer is in no disadvantage; the "beneficiary of the trust" can transfer the claim, or the amount received or sue on his behalf.

1162 See the description and analysis of the guarantee liability of §538 BGB in Söllner JuS 1970 159. This provision determines the liability of the debtor. The duty of care (*Obhutspflicht*) can be taken as a corollary of this increased liability of the debtor.

1163 An inkeeper *"..has to make good the damage which a guest accommodated in the course of business suffers through the loss, destruction or damage of things brought into the premises."; The German Civil Code* . See Berg NJW 1969 1172.

1164 See Berg NJW 1969 1172.

protective duties was difficult to discern, or if it seemed of little practical importance. However, the third party position was at stake; it was not performance but the latter's protection concerns that were involved, and a lease was at issue -- not a deposit.

Similar views were expressed for the decision that held an advocate liable for failure to draft a divorce agreement protecting the plaintiff child[1165] on a contract with protective effects. Allegedly there was no substantial legal justification[1166]. The requirements of the contract with protective effects seemed fulfilled[1167], but the decision did not refer to particular duties creating a closer link[1168] between the advocate and the child.

There was no doubt that the advocate should offer compensation. Once §839 BGB does not apply, contractual claims are the proper solution. The injuring behaviour was essentially similar to non-performance[1169] since the intended outcome (the transfer of property to the child) was not accomplished[1170]. Moreover, the child alone[1171] suffered loss, and the advocate did not run increased, unpredictable risks of financial exposure[1172]; these characteristics resemble a transfer of performance interest[1173].

1165 The divorce agreement he had drafted was not valid against the couple's debtors. BGH 11.1 1977-VI ZR 261/75 (Bamberg); NJW 1977 2073. See Hohloch FamRZ 1977 532.

1166 The solution given was satisfactory, but the decision was not adequately explained

1167 Thus the advocate owed duties of care in the exercise of his profession presumably to those potentially affected by improper conduct and the couple, being responsible for the financial situation of the child, had an interest for the latter's protection. Reliance towards the advocate was also emphasised upon.

1168 A well known decision on a testament case (BGH 6.7.1965-VI ZR 47/64 ; JZ 1966 141) was referring to particular duties apart from the basic obligation of the advocate.

1169 Hohloch FamRZ 1977 532, presented the violation as no good performance.

1170 There would be no objection accordingly if the advocate's contracting party (the father) had suffered loss and claimed compensation.

1171 The contracting party (father) suffers no loss. The child is interested in the performance. The child has expectation rights from the divorce agreement; failure to perform injures him alone.

1172 The possibility of a 'real'contract for the benefit of third parties (§ 328 BGB) had been rejected.

1173 Holhoch goes even further and considers that all cases involving property damages which result to third party loss because of no good performance, should be treated on the basis of *Drittschadensliquidation* (or as he prefers the term *"Schadensliquidation im Drittinteresse"*); Hohloch FamRZ 1977 533.

Drittschadensliquidation is, according to this line of thought, naturally applicable and preferable because it facilitates the advocate's overview of his liability[1174].

Among the groups of cases where *Drittschadensliquidation* usually applies[1175], the case seems similar to indirect agency, the father (the advocate's contracting party) being the indirect representative of the child. There is no §164 BGB relationship, of course, but there is a "representation of interests" where the representative cannot be affected financially, at least, by the contractual violation[1176]. This idea could be applied in other cases when information is asked by one bank from another on a client[1177], or in cases involving experts' reports[1178].

The fact that a 'forced' indirect agency is suggested indicates the weakness of the argument. The resemblance to non-performance is circumstantial and the father's interest in the child's protection cannot be dismissed. The father is suffering financial loss -- not only emotional distress -- as he might have to offer additional funds to the child. As was argued before, it is less meaningful to discern protective duties from basic duties in certain

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1174 In a previous case (BGH Urt. v. 22.1.1966-VI ZR 49/65 (Schleswig); NJW 1967 930), the liability of a notary was based on *Drittschadensliquidation* although in similar circumstances the contract with protective effects had been used. A notary public was found liable for a violation of his duties as to the authentification of certain transaction's documents. A loan for housing was provided by a compensation fund belonging to the public sector. (The Federal Government was the injured person.) The credit institution which contracted with the notary and granted the loan was acting, when concluding the contract, as an undisclosed representative of the Federal Government. The credit institution was handling the loan on a trust basis; it was the beneficiary of the trust in the court's point of view. Due to a mistake of the notary the loan was secured with a charge on immobile property for only a part of the amount of the loan. The compensation fund was left with an unsecured claim. The LG accepted *Drittschadensliquidation* but not the OLG. The BGH took the same view as the court of first instance.

1175 It is however a mechanism of general application. See Grunsky on §249 BGB 362. Courts and lawyers often think of the mechanism a number of particularly designated cases and apply the protection for the third parties when the application of one of the cases can be justified. It is a fact that this approach is facilitated from the pre-existing case law. (See Hohloch FamRZ 1977 530, who seems to be having a very limited idea of *Drittschadensliquidation*). The result is that in various cases there is an attempt to identify similarities with one of *Drittschadensliquidation*'s generally recognised groups of cases which are essentially three; indirect agency, compulsory transfer of danger, trust or trust-like relationships. Berg JuS 1977, 365.

1176 Hohloch FamRZ 1977 533.

1177 Gottwald on §328 BGB 1034, BGH WM 1974 985.

1178 Reference is made to BGH Urt v. 5.12.1972-VI ZR 120/71 (Hamburg), where the possibility of a contract with protective effects was not accepted with regard to a year-end balance submitted as supporting material for the approval of a loan.

relationships from the point of view of the effect of the violation. Legal and policy arguments suggest that advocate's liability should fall under the contract with protective effects. The performance has been completed; arguably in law a will is valid until judicially declared void, and the basic duty, as far as the testator is concerned, is surely extinguished with his death. Protective duties only can be owed to non parties from such a confidential relationship. From a policy point of view, the contract with protective effects is preferable because it is possibly the only effective means to protect the interests of the intended beneficiary by allowing a direct claim. The estate or the heir might have no interest for non party compensation, which could cast doubt on the testament's validity. In any case the third party protection involves a compensation claim and is concerned with the wrongdoer's (advocate's) behaviour. Its purpose is not to upset the course of transactions and affect innocent parties. Testament cases demonstrate the shortcomings of *Drittschadensliquidation* as regards effective third party protection.

Another criticised BGH decision was one in which the legality of the claim for losses caused to the company[1179], by the sole partner of a company against the advocate employed by that partner in his personal capacity, was accepted on the contract with protective effects[1180]. The appeal court had accepted the plaintiff's claim in his own name[1181].

1179 BGH Urt. v. 13.11.1973-VI ZR 53/72 (München); NJW 1974 134. The plaintiff who was the only shareholder and manager of a Ltd company, had a contract for services with an advocate in his personal capacity. Due to wrong advice of the advocate regarding the plaintiff's participation in a procedure of taking an oath of disclosure, a warrant of arrest was issued against the plaintiff and his name enterred the list of insolvent debtors. As an effect the treatment of the company by a fund providing bank was changed (the bank ceased to consider the company creditworthy), and the company had to sell a piece of land bought for investment in order to repay a loan. Moreover, certain business plans had to be cancelled. The plaintiff asked compensation in his personal capacity for the losses suffered by the company or by himself as the single shareholder. See Frank NJW 1974, p.2313.

1180 Berg thought that this mechanism should have been accepted had the claimant been asking compensation as a manager of the company for the loss the latter suffered; JuS 1977, 363.

1181 The possibility of a contract with protective effects *vis-à-vis* third parties was not excluded. *Drittschadensliquidation* was rejected because it was not the third party alone who suffered loss; the advocate's contracting party suffered loss too. The BGH argued that in cases of one-man companies although the company is a different legal person, a damage to the shareholder was a damage to the company as the latter's property is liable for those damages.

The decision allegedly ignored the separate legal personality of the company and the economic purpose in distinguishing its property. Contrary to good faith, it allowed a misuse of the company's legal form. The loss was inflicted first on the company. The shareholder was either asking personal damages or indirect ones -- suffered in his capacity as a shareholder[1182] -- for which no BGB liability is provided[1183].

It is wrong, from a legal point of view, to say that the shareholder's loss is identical to the company's loss. It is because the company suffers loss that the shareholder's property is reduced[1184]. As §249 BGB gives priority to *in natura* restoration of damages[1185], the best solution would be for the plaintiff to ask compensation for, on behalf of the company (and not for personal loss) so that the property loss, of the company primarily and of the shareholder subsequently, would be restored[1186]. According to legal doctrine and policy arguments, *Drittschadensliquidation* seems the proper vehicle for a claim in this case, although this would make little practical difference.

4.3. Distinction based on the kind of loss.

At its initial stages the contract with protective effects applied in cases of bodily injury alone while situations of property damage or economic loss were treated under

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1182 For loss resulting from the company's own loss.

1183 The company, it could be said, was directly injured from the change in the lending bank's attitude while the shareholder was injured indirectly. The BGB provides for the liability of those directly injured only. See Gernhuber who in criticising the so far case law commenting that it ignored the differentiation between directly and indirectly injured parties. (Gerhuber "Drittwirkungen im Schuldnerverhältnis" 273)

It would not be useful to take into account the debate referring to those directly or indirectly injured. However, it is doubtful whether there can be any single model to enable the distinction of the relative cases. It seems moreover pointless to attempt to elaborate on the way a damage inflicted to more that one persons is felt. Any criterion of differentiation should be based on law and should preferably or in case of doubt be teleological. It is enough at first to have a general understanding of who is nearer to the effects of the injuring behaviour.

1184 The plaintiff has suffered loss indirectly due to his participation in the company and as his personal property is linked to the property of the company. Frank NJW 1974, 2315.

1185 Frank NJW 1974, 2315.

1186 This solution is not unequitable for the shareholder. It would actually correspond better to the interests and the risks involved in the light of the legal and economic significance of the separate existence of the company.

Drittschadensliquidation[1187]. This differentiation was explained in terms of historical evolution and not on dogmatic bases. In the Klosterfall case[1188] from 1914 *Drittschadensliquidation*[1189] was accepted for bodily injuries, as the contract with protective effects had not yet been developed and the injured party would otherwise have remained unprotected[1190].

A distinction based on the kind of loss is not valid as there is no justification in the system of civil liability[1191]. Some authors still refer to a delimitation on this basis mainly in order to support their view that customary law has emerged as regards bodily injury[1192].

4.4. The quality of the creditor-third party relationship[1193].

In the contract with protective effects, it is argued, the creditor-third party relationship is closer, it has a personal character[1194], as the relationship between employer and employee or between family relatives. In *Drittschadesliquidation* this intimate link is absent. The creditor-injured party relationships, often contractual (for example, agency, trust, deposit), are more formal and limited to the particular

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1187 The contract with protective effects was as a rule rejected when the violation of the protection duty has led to material or property injuries.

1188 In this case a doctor was called to provide his services to a monastery. When the doctor was returning an accident occurred due to the negligence of the wagon driver who was hired by the monastery. See Berg JuS 1977, 363.

1189 The RG was not expressly concerned with the question of who was entitled to claim compensation; the doctor as the injured party or the Monastery which had contracted with the carrier for the transportation of the doctor. The claim however could be exercised by the claimant doctor only after transfer of the right to claim by the Monastery.

1190 §831 BGB could not be applied while the Appeal court rejected the possibility of a contract between the injured party and the carrier.

1191 Lange 295.

1192 Berg JuS 1977, 363, and Gerhuber "Drittwirkungen im Schuldnerverhältnis" 273-274.

1193 The expression "quality" corresponds to the term *"Intensität"* (intensity) in the relevant German jurisprudence. A literal transation would refer to the "intensity" of the relationship in question, meaning how close, serious, important it is; whether it is distinguished by special characteristics such as confidence or reliance for instance. The concept involved is focused on the qualitative elements of a relationship, and this is the reason for the choice of the expression "quality". Alternatively the "seriousness" of a relationship or a similar concept could be used. See Gottwald on §328 BGB 1030.

1194 This closer link justifies the priority of the direct claim when the two mechanisms overlap. Gottwald on §328 BGB 1030.

transaction's context -- unlike, for instance, an employment relationship which might have broader implications[1195].

This distinction expresses valid observations on the relationships each mechanism is related to, but it does not suffice for a convincing delimitation. *Drittschadensliquidation*, for instance, will apply on sale contracts with dispatch whether the buyer is personally related to the seller or not.

4.5. Transfer of damage – The criterion of risk.

The starting point of the view that focuses on the debtor's risk, is the transfer of loss in *Drittschadensliquidation*. Only one 'unit' of damage occurs and only one person is entitled to demand compensation for this damage each time[1196], and the compensation is determined by the performance value. While the creditor can claim compensation on the basis of his injured contractual rights, he has suffered no loss. Loss is suffered by the third party due to a transfer of the interest in the performance[1197]. *Drittschadensliquidation* is well-established in cases where this transfer occurs more often. The debtor's risk is not, or is not significantly, increased in financial terms[1198] as he has to pay damages for non performance to a person other than his contracting party[1199]; he is in no greater risk than he could have predicted at the conclusion of the contract. Finally, *Drittschadensliquidation* can be readily referred to a specific BGB provision, §281, on the debtor's obligation to deliver the possible substitute of the performance in case of impossiblity, that enables the creditor to sue for the injury the third party has suffered.

In the contract with protective effects, the interests in the protective duties do not shift to the third party. The duties 'extend' (are owed) to the injured parties who are

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1195 Berg JuS 1977, 365.

1196 According to Berg in *Drittschadensliquidation* the creditor could have suffered no damage from the violation of performance. Berg NJW 1978 2018.

1197 This transfer operates in the inner creditor-third party relationship. Berg JuS 1977, 365.

1198 Lange 295.

1199 The typical damage which could be caused by the violation of his duty to perform. Peters AcP (180) 1980, 329, and Lange 282 et seq.

drawn in the contractual relationship and each acquires a claim of his own[1200]. The debtor's liability and financial exposure are potentially increased as they concern more claimants[1201] and the risks are higher than could have been foreseen at the conclusion[1202].

This differentiation on the manner of including third parties in the contractual relationship is usually reflected in the possible contractual objections of the debtor[1203]. Undoubtedly, all contractual objections are accepted in *Drittschadensliquidation*. The prevailing view is that in the contract with protective effects, contractual objections are accepted by analogy to §334 BGB (including contributory negligence) or §333 BGB with regard to the limitation period (which is often shorter), and release from liability. However, there is uncertainty as regards accepting objections on contributory negligence and limitation periods under the latter mechanism[1204].

Nonetheless, the idea of limiting liability to the performance value in *Drittschadensliquidation* is not true for every instance. A hotelier might be liable towards a third party on the basis of §701 BGB[1205], but this does not exclude his liability towards the client for other damage. The risk is not necessarily limited therefore.

In fact the risk in *Drittschadensliquidation* evidently depends upon the contractual performance and is easier to calculate. The risk arising from the violation of a protective

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1200 See among others Berg, JuS 1977, 365.

1201 Gottwald on §328 BGB 1030. The third parties may be injured in various ways, serious or minor bodily harm, or property material damage or economic loss etc. In *Drittschadensliquidation* bodily injury seems less likely.

1202 The acceptance, on the other hand, of a third party claim in a case of a contract with protective effects is not related logically to the absence of injury of the contracting party.

1203 Berg refers extensively to this aspect. His views however are not generally accepted. (See Berg JuS 1977, 367.). It is beyond dispute that in the case of *Drittschadensliquidation* the debtor has all the objections from his relationship to the contracting party (and liquidator of the claim for compensation).

1204 Berg thinks that in the case of contributory negligence, objections can be turned against the claimant only to the extent that he has to bear the burden for the behaviour of the contracting party; if, for example the latter is assisting the third party in benefiting from the contract. In the case of release from liability or limitation period a different treatment of the delictual claims of the claimant is suggested by Berg contrary to the generally accepted idea that the debtor should not be treated in different terms for the same behaviour. Berg JuS 1977, 367

1205 A classic case of *Drittschadensliquidation* according to Larenz. Berg is making the same point. Berg NJW 1978 2018.

duty is more distant from performance and more difficult to predict. The range, however, of persons entitled to compensation is limited on the basis of the debtor's foreseeability[1206]. The courts are, as a rule, generally more willing to accept *Drittschadensliquidation* than a contract with protective effects and might still be hesitant to accept the latter for causally remote, potentially high economic losses.

The arguments focusing on risk are interesting even if, somewhat, simplified[1207]. They are convincing as a rule of thumb for distinguishing the relative situations. Although it is not claimed that they offer a view of the mechanisms' rationale, they offer evidence concerning specific issues related to the contract with protective effects; namely, greater doubts surrounding the decisions, the increased requirements, and the overall judicial reluctance to apply the mechanism.

4.6. Conclusion.

The courts felt naturally more comfortable with *Drittschadensliquidation*, possibly because, apart from its longer history, it could be referred to a statutory basis (§281 BGB), contrary to the contract with protective effects which is a completely new mechanism.

Moreover, *Drittschadensliquidation*, the contractual character of which is easy to acknowledge as it refers to performance interests[1208] and the loss is a necessary consequence of the contracts' operation[1209], represents a minor departure from the liability system and is easily compatible to the latter.

1206 The extension of liability is acceptable only when it can be predicated by the debtor when the latter undertakes his liability. The debtor's foreseeability concerns the possibility of injuring a third party and the creditor's interest in the latter's protection.

1207 Lange speaks of an extension of liability which applies in both the mechanisms, and of a corresponding increase of risks. (Lange 296.)

1208 *Drittschadensliquidation* is meaningful in the contractual realm. Berg JuS 1977, 365.

1209 The proper domain for protection should logically be the contract. It is said for *Drittschadensliquidation* that it is the result of the fact that the adjustment of damages to the benefits received is not permitted for the cases of third party loss. This is one more evidence of the contractual character of *Drittschadensliquidation*. See Gottwald on §328 BGB 1030, and Grunsky on §249 BGB 362.

The contract with protective effects is exceptional; the logical reaction to such situations would be delict[1210] and certain of the mechanism's overtones -- the protective duties[1211], the wrongfulness considerations -- give this impression. Unlike *Drittschadensliquidation,* where the delictual protection is excluded, this is not necessarily the case with the contract with protective effects.

Furthermore, protective duties emerged relatively recently[1212], identified by academic comment, and had to be extended beyond a general obligation for care in transactions to apply in favour of third parties.

The courts had to go to greater lengths to explain the side-stepping of relativity where no performance interests are involved, and without statutory support as in *Drittschadensliquidation* (§§281, 701 BGB)[1213]. Finally, the courts are more cautious with the contract with protective effects as it seems to bring the debtor to a less advantageous position[1214].

It could thus be argued that while *Drittschadensliquidation* is a well established, reasonable solution to third party loss, the contract with protective effects is always a mechanism of last resort, where increased requirements have to be fulfilled[1215].

1210 The cause of damage is some careless, inconsiderate behaviour similar to the negligent delictual behaviour. Hohloch FamRZ 1977 531. See also Söllner JuS 1970 164.

1211 However the unavailability of delictual protection is the most powerful motive for the application of the contract with protective effects.

1212 The first reference to protection duties was made by Stoll, Heinrich in *"Die Lehre von den Leistungsstörungen"* 1936. He paved the way for the analysis and elaboration of the various groupings. See Gerhardt, JZ 1960 535.

1213 There are many statutory examples where the relativity is set aside in relation to performance -- especially §328 BGB -- there are furthermore, cases of statutorily provided *Drittschadensliquidation* such as §701 BGB which was modified introducing *Drittschadensaliquidation* in 24/3/1966. Stronger evidence is required for the sidestepping of relativity in the contract with protective effects, although the mechanism is based on §242BGB and is backed by the theory of the protection duties.

1214 The unlimited expansion of the debtor's liability is a basic concern of the courts in handling the context of the contract with protective effects. Such extended liability could disturb particular economic activities and practices and undermine confidence in transactions. The debtor seems to be in a disadvantaged position as to the possibility to foresee the limits and extent of his liability. Once the mechanism is accepted there is additional jurisprudential effort to organise it within proper limits.

1215 Damage is the basic requirement in *Drittschadensliquidation* while there should be increased requirements in order to justify an independent claim in the case of the contract with protective effects. See Lange 296, and Söllner JuS 1970 164, referring to a relative comment made by Medicus in *Festsschrift für Kern*, 1968.

Drittschadensliquidation seems to offer justifiable contractual protection, which should be preferred over delictual protection, given the logic of the liability system[1216].

However, the usefulness of both mechanisms is not to be doubted as they obviously do not cover the same range of cases and, as far as the contract with protective effects is concerned, a direct claim is a practical and economy oriented approach[1217]. There could in principle be a single mechanism for all instances of third party loss. This, however, could make courts cautious in further allowing direct claims or extending protection for other instances of violated protective duties.

In any case the mechanisms are outstanding examples[1218] of judge-made law. The approach of the courts in developing the mechanisms should be the object of special consideration.

5. Judicial assertiveness.

As previously discussed, Larenz agrees with Kümmeth in that, from a methodological point of view, the courts, creating the contract with protective effects, applied a construction beyond the statute but within the law (*extra legem-intra jus*)[1219]. The idea was that the statute law gave no protection, and no indication of the treatment of

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1216 The idea of the priority of a contractual claim in relation to a delictual one is a common aspect of legal concepts and legal policies in most of the Western Europe (including German law). In this context the idea is merely reminded because it is uncertain whether the mechanisms in question can be taken to be typically contractual.

1217 See the suggestion on the case of the advocate failing to draft a will, that the intended beneficiary should be given a direct claim against the heir.

1218 Both mechanisms however are usually considered as auxiliary. There is arguably a tendency not to grant compensation to third parties on the basis of these mechanisms if some other source of compensation is available. See Grunsky on §249 BGB 362, who doubts the value of *Drittschadensliquidation*, which involves heterogeneous groups of cases and which might not apply if, for instance, other forms of compensation are available. See Sonnenschein *Juristische Arbeitsblätter*, 1979 226, on the requirement of need for protection of the contract with protective effects. These views can be explained however from the fact that often the alternative sources are specific statutory provisions (social security provisions, or §701 BGB).

1219 *"Gesetzübersteigende Rechtsfortbildung"*; in Larenz's terminology (Larenz*Methodenlehre* 1988, 380 et seq. Judicial law-making, that is, beyond the existing statutory provisions but within the existing framework of legal liability, the focus being on basic ideas of our social economic and political organisation. In a sense the courts are pointing to the direction the legislature could or should follow.

similar cases as technically there was no gap in statute law[1220]. *Drittschadensliquidation* was, in contrast, based on a *praeter legem* construction[1221], one within the spirit and purpose of the legislation, aimed at covering the gaps in the statute law. *Drittschadensliquidation* could be applied by analogy to existing third party provisions in the BGB. Gernhuber's suggestion regarding the contract with protective effects, on the other hand, amounts to a suggestion of *contra legem* law-making by the courts, the starting point of his view being that the contract with protecting effects contradicts §823 BGB[1222]. However, as said, contractual protection is not forbidden and the mechanism does not involve an extension of delictual protection[1223]; a *contra legem* approach, therefore, seems less plausible.

An *extra legem* interpretation is exceptional. It is the furthest limit of judicial discretion accepted in systems with no formal precedent and limited judicial law-making powers[1224]. Possible doubt on the contract with protective effects is likely to focus on whether the judiciary was acting within its limited range of authority. The law making powers of continental courts are restricted[1225] in comparison to those of courts in common

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1220 However, when the BGB has considered three-party, relationships a contract-like approach is applied.

1221 According to Larenz this interpretation is directed to the inherent purpose (teleology) of the law (*"immanenten Teleology des Gesetzes"*; Larenz *Methodenlehre* 402). It should be limited to cases *"wo Gesetz und Gewohnheitsrecht schweigen"*, -- where statute and custom are silent -- (Redeker Konrad "Legitimation und Grenzen richterlicher Rechtsfortbildung" NJW 1972 410).

1222 See Gernhuber ("Drittwirkungen im Schuldverhältnis"). Gernhuber does not reject good faith as a legal basis, but thinks that the mechanism is *contra legem* to the existing order.

1223 In Germany the judiciary has expanded delictual liability in order to protect the right to an established business. The discretion exercised in this case is no less than the one required for the application a contractual mechanism for third party losses.

1224 Deciding beyond the existing provisions is exceptionally accepted, *extra legem* constructions being one of the last possibilities of judicial operation. See in Larenz *Methodenlehre* 380 et seq the successive stages of the work of the courts. Foster describes briefly this function the major part of which is directed to the interpretation of existing provisions; Foster *German Law & Legal System,* 59. See also Banakas 71.

1225 Continental systems take a very restrictive view of the possibility of the judiciary to "make law". See Allexy and Dreir 73-121, Foster *The German Legal System,* 52 et seq., Larenz *Methodenlehre* As Banakas notes, while a Common law system is largely a product of a continuing process of judicial law making, systems like the German and to a lesser extent the French depend on legislative law-making. The primacy of the legislation is not doubted, and the judiciary cannot ignore statutory law, unless it collides with the constitution. Judicial law-making is excluded, in principle, judicial formulation of non

law countries[1226]. Law-making, often a product of compromise and part of *"the game of politics"*[1227] is a task allocated to the legislature alone. The courts are not meant to

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existing rules is forbidden. The courts are applying and not creating the law. *Stare decisis* is not a source of law.

1226 Any development of the law in Germany will have to keep strictly within the plan of the existing legislative principle. Only exceptionally is deciding beyond the law permitted. In France *"le pouvoir créateur"* of the courts should be limited to the interpretation of the law. (Banakas 69 et seq.)

These ideas are a product of the democratic principles of the separation of power and of the rule of law. The rule of law recognised the priority of the legislation and rendered the courts bound by law. (See Allexy and Dreir 118.). Such views were strictest in the 19th century and prevailed without challenge until the beginning of the present century. The doctrine of the complacency of the legislation suggested that every answer to a legal problem could be found in the legislation and therefore the role of the judge was simply to find each time the optimum applicable provision. (This idea was strongly held in Germany until the first two decades of the 20th century, especially because there was considerable confidence to the potential of the recently then introduced major codifications. The doctrine was profoundly unrealistic in the light of the plain truth that even when the courts specify the application of a statute in a particular case for instance they produce rules.).

The understanding of the role of the courts started changing in the 20th century. It was realised that the courts do have a more creative role when they specify the rules in the particular cases or when they interpret the law. In the light of the unpredictability of the circumstances and of the changing social and economic needs ideas, and values, it was furthermore thought that the courts could be instrumental parts of the development of the legal system. The judiciary in that sense assist the realisation of justice requirements, promote and serve the social needs.

The courts are primarily bound by the constitution; they must apply the statutory rules taking into account constitutional rules and principles, especially those incorporating fundamental social and moral ideas (Alexy notes that constitutional principles which are partly substantive or material and partly procedural *"entail the obligation to optimize control of all applications of law"*, and can lead to gap-filling, and *contra-legem* constructions. There is a continuous tension between the constitution and the statute law when it comes to the interpretation of the latter. (See Allexy and Dreir 73-121.). The courts according to article 20 of the German Constitution are bound "by law and justice". The Constitution is guide-line and limit of judicial law making. Redeker NJW 1972 412). The courts can, within the constitutional boundaries decide against a particular statute if for instance it contradicts the notions which are foundamental to the structure of the legal order; they are not bound by such provisions. The power of the courts to specify the content of a constitutional principle is confronted with the idea of the primacy for definition of the legislator, which is however an extreme view. See Larenz *Methodenlehre* 419, on the *"Konkretisierungsprimat" des Gesetzgebers.*

The work and function of the courts as well as the requirements and limits of this authority are the subject of voluminous legal literature (See Larenz*Methodenlehre* 380 et seq, Wenzel "Die Problematik der richerlichen Ausfüllung von Gesetzlücken" JZ 1960 713, Zippelius "Zur Problem der Rechtsfortbildung" NJW 1964 1981, Stein "Die verfassungsrechtlichen Grenzen der Rechtsfortbildung durch die Rechtsprechung" NJW 1964 1745, Redeker NJW 1972 409, Deutsch JZ 1984 pp.308-316, Bydlinki "Hauptpositionen zum Richterrecht". JZ 1985, pp.149-155.) The terminology with regard to the different classifications of the types of judicial function could be differing and might often be confusing. A greater freedom implies greater risks and the courts are controlled for in using this freedom in order not to upset the balance of public functions.

1227 Banakas 70.

formulate rules of general application even if a steady practice has developed[1228]. They are only exceptionally allowed to make legal policy decisions[1229] and only if such decisions remain within the relative constitutional or statutory principle.

Larenz notes that reference to *extra legem* construction should not be made when the question is one of appropriateness of legal treatment[1230]. Nor can the courts embark upon a "strategic law-reform"; they would infringe the balance of power in the democratic constitutional order[1231], the role of the courts being restricted to the preservation of the integrity of this order[1232].

Against this background, the ingenuity and decidedness of the German courts to tackle the problem deserves special mention. It might not be easily understood by common law standards but the task of the German courts in developing the contract with protective effects was of monumental proportions. Apart from the accuracy of judgment in realising the nature of the problem and the options for a solution, the very activist spirit of the German judiciary is the motivating power behind third party protection. The comparison will be striking when the Scottish and Commonwealth systems are examined[1233].

In fact, the courts have stretched their authority to the limits of "strategic law reform" if not beyond, when establishing the contract with protective effects. In all likelihood, they do not violate the limits of their constitutional mandate, given the seriousness of the need for legal protection.

1228 Allexy and Dreir 73-121.

1229 Decisions to questions which cannot be answered within the legal order, or when more than one choice is possible but not subject to evaluation on strictly legal grounds are not left for the courts to make. Larenz *Methodenlehre* 419.

1230 These are issues requiring a political decision, based on the evaluation of the goals. This is again not an issue for the courts to decide

1231 In a democtratic state these decisions are made by the legislature; Larenz*Methodenlehre* 418 et seq.

1232 As Larenz notes, concluding his reference to *"gesetzübersteigenden Rechtsfortbildung"*, the preservation or restoration of the inner character of the legal order is an indispensable criterion (*"unerläßliches Kriterium"*) of the judicial law formulation, whether the latter focuses on the inherent meaning of the statute law, or beyond the statute law (Larenz *Methodenlehre* 420).

1233 See Markesinis and Deakin 55 (1992) MLR 634. The issue will be discussed in the conclusion.

Judicial activism raises the issues of the continuity and endurance of a civil liability system, although third party loss is too small an example to permit more general conclusions. It would be repeating common truths to argue the significance of a system's flexibility and the role of the judiciary in this process. The case with the contractual mechanisms indicates not only the importance of the quality of legal analysis, but also that of self-confidence as a basis for the courts' determination. It would have been an easy solution for the courts to refuse protection and suggest legislative intervention. The courts, by developing protection, fulfilled their institutional role of supplementing the legislature. Moreover, the case of the development of the two mechanisms is an example of the process of shaping the institutional balance in the legal system, in effect not only a complementary but a somewhat antagonistic relationship, in the manner indicated by the system's needs. The importance of the role of the judiciary will be discussed again at the conclusion of the study.

Chapter 3. Third parties in Greek law.

1. Introduction.

Greek law belongs to the Germanic family of legal systems[1] and Greek civil law is based on the same Roman law foundations as most continental systems.

The question of the best model for civil legislation arose from the war of liberation[2] with the French system exercising strong influence at first[3]. Progressively, and especially after the creation of the Greek state in 1832 and the accession to the throne of King Otto from the House of the Bavarian Wittelsbachs in 1833, the German influence became

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1 According to the classification in Zweigert and Kötz. See also Fraggistas, Ch. "Greece", from the *International Encyclopedia of Comparative Law*, v. I (national reports), chapter 6.)

2 Started in 1821.

3 The recent (1804)French Code Civil, exercised powerful attraction. This was also due to the appeal the liberal ideas of the French revolution had on the Greeks who were under the Ottoman rule. This liberal spirit characterised the Greek revolution. (See in the *Introduction to Greek Law*, 1993 (Kerameus & Koziris eds.), Yiannopoulos, A. N. "Historical Development", especially 6 et seq.) The French doctrine and legislation had been influential already from the years preceding the revolution of 1821. Parts of the French Commercial Code of 1807 had been translated into Greek and were in use among Greek merchants. A Greek Criminal Code of 1823 was based on that of France. However, the Code Napoléon, though seriously considered, did not become the Greek Civil Code.

There had been a series of abortive attempts to introduce a civil code based on the French model, as for instance one before the second revolutionary national assembly of 1824, one when a committee was appointed to draft a civil code in 1836, another when a committee was appointed in 1856, (it managed to publish the first articles under the title "Civil Law", which became, along with a royal degree of 1835 (bringing in force *"the "political"* (civil) *laws of the Byzantine Emperors"*), a basic source of civil law until the introduction of the AK), another in 1866 which led to a complete draft presented to the parliament in 1874 but never accepted. (Βαβούσκος, Κ. Εγχειρίδιο Αστικού Δικαίου' 1984 -[Manual of Civil Law]-Γαζής, Ανδρέας 'Αστικόν Δίκαιον' 1970, -[CivilLaw],)

stronger[4]. This is illustrated in the appeal of the work of prominent German lawyers and in academic and educational conduct throughout 19th century[5].

The Greek civil code (Αστικός Κώδικας, AK) was adopted in 1946, after a series of failed attempts[6]. Until then Roman law applied, along with newer legislation[7], despite the intentions of the revolutionary assemblies and of the first governments of the independent state to focus on Byzantine law[8] especially as it was contained in

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4 Four major codes were drafted, based on French and Bavarian models under the direction of the Bavarian lawyer G. L. von Maurer a member of the regency council. One dealt with civil procedure (and remained in force until 1968) another dealt with the organisation of the courts (it was replaced in 1988), and the others were the Penal code and the Code of Criminal Procedure (replaced in 1951). Maurer was an adherent of the historical school of jurisprudence and believed that native institutions and ideas should prevail at least with regard to civil law, and so he did not draft a civil code, but started collecting local customs and current interpretations of Byzantine laws. He was suddenly called back to Bavaria in 1835 (he stayed in Greece for 17 months only) and his work was interrupted. (Yiannopoulos in *Introduction* Kerameus & Koziris eds, 9-10.).

5 Yiannopoulos in *Introduction* Kerameus & Koziris eds, 9-10. Greek lawyers resorted to the Pandectist law which was developed in Germany, for the purposes of applying Roman law. Progressively more and more lawyers were educated in Germany where the *Corpus Juris Civilis* was applied as common law. Greek textbooks used as models their German counterparts (some were translated). In 1838 for instance two professors of the of the Law School of Athens translated in Greek the roman law manual of the great German academic of the period Ferdinand Mackeldey in order to assist those applying the law. They did not limit themselves to the translation but next to the references to the Corpus Juris Civilis they also added the respective parts of the Basilica so as to define, as they thought, the law actually in force. (Γαζὴς, Ανδρèας *Ἀστικὸν Δìκαιον'* 1970, -[CivilLaw], Τρῶιανος, Σπὺρος 'Απο την Εξὰβιβλο στα Βασιλικὰ', -[from "Hexabiblos" to the Basilica], Ellhnikh; Dikaiosu;nh (periodical) (31) 1990 697.).

6 Between 1902 and 1909, nine committees for the drafting of a civil code were appointed. One, appointed at 1910, was dissolved in 1920. Another appointed in 1922 never finished its work in an atmosphere of political turbulence. Finally a five members committee was appointed in 1930. It produced a series of drafts up to 1937. Balis, a professor of the Law School of Athens undertook the task of combining the drafts. His work resulted to the drafting of the Civil Code of 1940 which was put into force retroactively in 1946 after the liberation of Greece from the Axes Forces. (Γαζὴς, Yiannopoulos in *Introduction* Kerameus & Koziris eds, 10-11).

7 Apart from the legislation referred to in the previous footnotes, such legislation included for instance laws on testaments (of 1830, before the enthronement of King Otto), on hypothecs of 1936, on transcription and inscription of 1856 (the French system of transcription is introduced), on curatorship of the under-aged of 1861, on prescription and limitation periods of 1909 and 1910, on testaments of 1911, on charging of interest of 1911, on societies of 1914, on divorce of 1920, on dowry property of 1918, and 1924, on the property on a floor of a building of 1929, on hoteliers' liability of 1931, etc. This legislation, often following foreign models as the German, the French the Swiss or the Italian civil codes, or other legislation, was a partial and piecemeal modernisation of the pre-existing law. the piecemeal character created considerable problems of interpretation and organisation of the provisions in force. (Γαζὴς, Civil Law, 14-16).

8 In the warding of local and national revolutionary assemblies *"..the law of our ever-memorable christian Emperors"*. This was the wish of the clergy and of the leading

"*Hexabiblos*" -- a brief collection from 1345[9]. For a variety of reasons[10], courts and jurists tended to disregard Byzantine period developments and refer to Roman law sources[11]. The German Pandectist school[12] of law exercised considerable influence in this context.

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classes considering that the Byzantine law would safeguard better their position. A large part of the population was also accustomed to the use of Byzantine law. At the same time there is an attack against the numerous local customs which had developed during the Ottoman rule and were endangering the uniformity of the legal system and the political unity of the nation. (Young intellectuals, many of whom had studied in France, were supporting the introduction of a French based civil code/law.) In a parliament decision on the courts organisation in 1828, the laws of Byzantine emperors contained in the "Hexabiblos" (a synoptic collection of laws based on the Basilica mainly, under the title Πρὸχειρον Νὸμων', compiled by Harmeropoulos a judge from Thessalonika in 1345) were defined as applied civil (but not commercial) law. In a degree of 1830 of the first governor Capodistrias the civil byzantine laws are defined as prevailing; according to an administrative order the Basilica and the newer Byzantine legislation should be compiled systematically. A degree of the regency council from February 1835 made clear that the *"political"* (civil) laws of the byzantine emperor, which were contained in the Hexabiblos would apply until the drafting of a civil code. It was strongly supported that the Basilica and newer byzantine laws could be used when the Hexabiblos had no provisions. This argument was based on the fact that Harmenopoulos took into account the Basilika or most of this codification (according to the prevailing view) and called upon the provision of the courts organisation of 1830. (Γαζὴς, Τρὼιανος ΕΔ (31) 1990 697.)

9 See previous footnote. Harmenopoulos synoptical collection of Byzantine law had been frequently used throughout the Ottoman period by tribunals (local or ecclesiastical) which were adjudicating private disputes between christians, and was often treated as customary law. Several copies of the collection could be found even in translation to new-Greek. It is generally considered that in this collection he expresses the law contained in the Basilica, the major compilation of the Macedons dynasty. However, there are disputes as to whether he does take into account all the different books (parts) of the Basilica. (Τρὼιανος ΕΔ (31) 1990 703-704.)

10 Such reasons were the scarcity of copies of the Basilica in the newly liberated state (in 1825 for instance only two copies could be found in Greece, although the situation had changed by the middle of the century) and the subsequent appeal of prominent lawyers who had been influenced by the Pandectists' school. The translation of Mackeldey's manual on roman law for instance, was also an indirect way to make the German scientific production more easily accessible and to obstruct the attempt for the introduction of a French inspired civil code. Kalligas reacted to the application by the Supreme Court of the latest Byzantine law (in order to fill the gaps and interprete the Hexabiblos), and for reasons of certainty of law (the civil law could not change whenever an unknown Byzantine legal text comes to light he argued) he supported that the Hexabiblos only had the force of law. This however was a clever trick for the introduction of the law of Pandectists. In order to fill the undoubted gaps of the Hexabiblos, the Basilica and other byzantine legislation which were a completed legal order were left aside and a huge leap was made to the *Corpus Juris Civilis*. Hexabiblos was, according to Kalligas, the starting point for the return to the initial law. The 6th century codification was not the initial law though, and its institutions and arrangements had been forgotten and repealed already from the middle and later Byzantine period -- let alone 19th century Greece. (The Basilica presented important differences from the justinian codification.). An increasing number of lawyers was becoming acquainted with the law of the Pandectists' school. (Τρὼιανος ΕΔ (31) 1990 703-704.).

11 Until the adoption of the Civil Code three local civil codes applied for a while on parts of the Greek territory. These were; the Ionian Civil Code of 1841 (made of 2111

The AK used BGB as a model, on the basis that it was closer to their common Roman law foundations[13]. Consequently, the BGB's basic structure was followed[14]. However, the AK is different: It incorporated changes introduced by the German courts construing the BGB, it took, in certain important issues, the view of other European codifications[15] and it improved the abstract conceptualisation of the BGB language[16].

The special provisions for the protection of personality (§57AK) and the prohibition of the abuse of rights (§281AK) the *"royal paragraph"*[17] of the Greek civil law that played a role similar to that of §242 BGB, in the AK 'General Part'[18], are not

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articles and following the model of the French Code Civil and the last of the two Sicilian Codes, the Civil Code of Samos of 1899 (made of 1927 articles and based on the 1874 draft Greek Code), and the Civil Code of Crete of 1904 (which, apart from the 1874 draft Greek Code took into account the BGB and the revision work on the Belgian Civil Code, was made of 1357 articles and did not include the law of inheritance and family law). They were established in areas which were subsequently included in the Greek territory and were allowed to remain in force. At the same time for the family relationships of Judes and Muslims their respective religious rules applied. (Γαζὴς [Civil Law, p.16, Yiannopoulos in *Introduction* Kerameus & Koziris eds, 11.).

12 As mentioned in Chapter 2, the Pandectist school is a product of the Historical Scool of law which appeared dominantly in Germany in the 19th century, with Savigny as it undisputable head, suggesting that law is a historically determined product of civilisation, instead of a product of planned legislation guided by reason as Enlightment views supported. The Pandectist school's only aim was the dogmatic and systematic study of Roman law, which they treated on an exagerattedly dogmatic manner. The legal system was considered "a closed order of institutions ideas and principles developed from Roman law: one only had to apply logical or 'scientific' methods in order to reach the solution of any legal problem." (Markesinis *A Comparative Introduction*, 1994, at 145 and 146).

13 The BGB had been hailed with enthusiasm from Greek Lawyers. Βαβοὐσκος *Ἐγχειρὶδιο Αστικοὐ Δικαὶου'* 1984 -[Manual of Civil Law]-Γαζὴς Civil Law. German law oriented lawyers suggested, in the 19th century, that Greek law presented similarities with ancient Germanic customs. (Τρὼιανος ΕΔ (31) 1990 699.). However, the model was not followed in a servile manner.

14 The structure of the AK follows that of the five books of the BGB. ("General Part', 'Law of Obligations', 'Property Law', Family Law', 'Inheritance Law').

15 Especially the Swiss codes and to a lesser extent the French Code Civil and the Italian Civil Code. See Zweigert and Kötz 159-161.

16 The abstract conceptualistic approach of the latter is abandoned for a moderate more convincing but not popular tone. In that sense the AK takes the middle way between the BGB and the Swiss Codes. See Zweigert and Kötz 159-161. Βαβοὐσκος 40-41.

17 See Zweigert and Kötz 161.

18 The "General Part" deals with the same issues as the BGB's relevant part, with the exception of the provisions on "things" which are included in the Law of Property. AK deviated from the BGB in protecting expressly the human personality (§57 AK), and by prohibiting the abuse of rights (§281 AK). The final part of this provision stems from the Civil Code of the Russian Soviet Republic of 1922 and it echoes ideas of French theoreticians of the end of the previous century. (See Zweigert and Kötz 160). In conclusion, the "General Part" shows a move away from the individualism of the BGB (inspired by Roman law and the School of Pandectists), to more social and moral oriented ideas. In

found in the BGB. More importantly, in the 'Law of Obligations'[19], the law of delict is based on the Swiss Code of Obligations[20] providing a general clause[21], that is, not distinguishing specific protected interests[22]. Special delicts are also provided. Moreover, the Greek judicial organisation and style are nearer to the French tradition[23]. In sum, the AK does not follow the BGB in a servile manner and has a stronger equity and social justice orientation.

2. Third party questions before the AK.

Regarding contract law, the main question asked involved the possibility of third parties acquiring contractual rights according to the parties' wishes. Roman (and Byzantine) law rejected, with exceptions[24], this possibility[25]. Courts allowed third party

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addition to these exceptions the AK restricts the conditions for rescission for an error; §§ 140, 146 AK.

19 The 'Law of Obligations' is largely (up to the 3/4 of to according to the estimation of Zweigert and Kötz 160) based on BGB. However rules developed by the courts in Germany and newer ideas such as those regarding the collapse of the basis of the contract were incorporated in the AK (§ 388 AK) while the verbal structure is often improved. Socially sensitive provisions on labour relations and protection for the weaker parties find their way in the codification. For a brief introduction Christodoulou "Law of Obligations", in the *Introduction* Kerameus & Koziris eds, 75 et seq. This work is used for the translation of most of the legal terms of Greek language.

To the contrary, the BGB influence on the Law of Property or the Law of Inheritance is considerably less significant. Family Law on the other hand bears the effect of the rules of the Orthodox church. See Fraggistas "Greece" in the *International Encyclopedia of Comparative Law*.

20 Article 41(1) of the Swiss Code of Obligations is the closer counterpart of the § 914 AK; the Greek Civil Code general delictual clause.

21 As in the BGB, the Swiss Code of Obligations and the Italian Civil Code, the separate requirement of unlawfulness is set in the general clause characterising undoubtedly the provision as one belonging to the German family of legal systems. (Banakas 50.).

22 As in the German law there is no distinction between pure economic loss and physical injury or material damage. In the Greek annd french systems however the concept of pure economic loss makes even less sence than in the German context as the delictually protected interests are not restrictively defined as in the BGB where pure economic loss is generally excluded from delictual protection.

23 This is evident for instance in the structure of the decisions; their reference to the rule and then to the facts of the case. As Kerameus notices *"the statement of reasons in Greek judgment compared to English, American, or German ones is rather short, tending more to French style, especially in the Supreme Court"*. (Kerameus "Judicial Organisation and Civil Procedure" in the *Introduction* `Kerameus & Koziris eds, 265 et seq at 286.). See Lawson "Comparative Judicial Style" *AJComL* (25) 1977 364, for a comparison between the attitudes of the courts in different jurisdictions.

24 Justinianian law accepts seven basic exceptions where a contract for the benefit of a third party is valid. These were repeated in the Basilika to which Greek judges turn for assistance. Windscheid (Windscheid, Bernhard *Lerhbuch des Pandektenrechts*, 1963, 2

contractual claims only when this was provided for in Roman law and in newer legislation[26] (covering banking, carriage etc.), with the Supreme Court acting as a guardian to the tradition[27]. Any bold teleological interpretation of the contracts was rare, the rule

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Auflage von T Kipps, v.II, § 316, p.295.) refers to these exceptions. These are: (1) A donation under condition where a duty is imposed upon the donee to deliver to a third person the object or part of the object of the donation. (2) By an arrangement for giving a dowry in favour of a woman by a parent of either the husband or the wife, under a special condition, the delivery of the dowry to the wife or her descendants is imposed. The latter acquired a direct claim. (3) A contract for deposit or of a loan for use of a thing belonging to a third party with the agreement that to deliver to the third party the latter acquiring an *actio depositii utilis*. There were doubts whether this constituted an exception to the relativity principle. The third had also the *rei vindicatio* or the *actio ad exhibendum*. (The *actio ad exhibendum* is an action for the production of property. Where the thing or property is hiden or detained by a third party or is joined to some other thing or property (in such a way that a separation can be legally demanded), a plaintiff may have recourse to the *actio ad exhibendum* for production of the property which is the subject of vindicatory or possessory suit. *Bell's South African Legal Dictionary,* 1951) The acceptance of contractual claims in this case was related to the recognition of the concept of legal representation after the classical period of Roman law. In the Basilica where this provision was transfered a direct contractual claim of the third party on the contract of deposit was not accepted. However a right of the third is recognised when the debtor does not accept payment. (4) The delivery of a thing with the agreement to transfer to a third party. The latter acquires the right on the basis of the relationship of management of others' affairs. (5) The case where the property administrator obtains a promise in favour of the owner. (6) The case where someone promises in favour of his heirs or one of his heirs, (7) the case where the pledgee in the course of selling the pledged object has agreed with the purchaser that the pledgor-debtor should be able to redeem his property (the pledged thing) from the purchaser. The pledgor has an *actio in factum*. (This was an *actio in factum civilis,* and more specifically an *actio* for the cases of innominate real contracts. (Some writers think that in the cases of a *bona fides negotiorum gestor* an *actio in factum ex aequitate* is offered to the person whose affair is managed. This view is not generally accepted.)This is no case of an *actio in factum lex aquilia.* See Zimmermann 533, 877.

Exceptions accepted from classical Roman law already continue to Byzantine law. In classical Roman law the third party had in this cases an *actio utilis* against the promisor as in a deposit or donation contract. The *actio utilis* is an action given by the Roman praetor in cases where no direct action was applicable by the *jus civile.* It was offered in cases where in relevant circumstances a *jus civile* action would apply. It was used in numerous instances such as agency, cession, mandate, negotiorum gestio etc. (Zimmermann 34-35).

25 The doctrine was described as *"alteri stipulari nemo potest"*. The obligation was a *vinculum juris* (a legal bond) which developed between two parties only; a third party had no place in a contractual relationship. See for a comprehensive reference Zimmermann 34. et seq.

26 As for example legislation giving the right to the holder of a bill of lading to sue the carrier and claim delivery, or legislation (from 1923 on limited liability companies) enabling the deposit by a bank in the name of another person.

27 Lower courts were more ready to accept a contract in favour of a third party. Their attempts were often curtailed by the Supreme Court Ἄρειος Πάγος -- AP -- is the Supreme Court in Civil and Criminal matters. See on the judicial organisation of Greece see Kerameus in the *Introduction* Kerameus & Koziris eds, 265. The Code of Civil Procedure provides for three types of district courts; justices of peace, one-member and three-member

being an allegedly formalistic attachment to doctrine[28]. Arguably the economic and social pressures for extending third party rights were minimal[29].

However, in certain cases, especially in the 20th century, the courts emphasized that the parties could side-step the principle against third party claims[30]. Based on the "Scholia" (notes, comments) on the Basilica[31], the courts were often willing to accept a third party beneficiary claim if the stipulator had an interest in it[32]. The interest

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district courts. The three-member district courts have general jurisdiction for appeals to decisions of the justices of peace. The appeals to decisions of the other district courts go to the Courts of Appeal. The Supreme Court, (Άρειος Πάγος) sitting in Athens, and hearing cases in panels (normally or in full bench), is not considered a regular appeal court, but a court of cassation which confines its extraordinarry review to questions of law. It has no authority to reverse finding sof facts.).

28 Λιτζερόπουλος, Αλεξ. 'Αι μεταστροφαὶ της νομολογίας και η ασφάλεια δικαίου' 1979, [the changes in case law and the certainty of law].

29 Overcoming doctrinal difficulties and extending the effects of the contract to third persons were not judicial priorities. The social and legal necessities and the historical setting of an emerging legal order and an underdeveloped economy were these of stability and certainty.

30 In the light of the exceptions to the rule, that the person for the benefit of whom an contract was made cannot exercise a claim on the basis of this contract, it was thought that it is not a public order principle any more, and it could therefore be changed by agreement of the parties. In one of the cases where this consideration was made, a committee of a small port had agreed with a coal trading company to provide coal to the industries of the area at a set price. The company refused to sell coal to one of the entrepreneurs and he had to buy at a higher price. He sued the company successfully. (Decision of the appellate court of Athens from 1924 -Εφ Αθ 218-1924, Θεμ ΑΕ 551-).

31 See *Basilica Textus*, Scheltema and van der Wal (eds), 1955, Groningen, and *Basilica Scholia* Scheltema and van der Wal (eds), 1953, Groningen. A claim by the third party is accepted if it would benefit the contracting party. If the buyer agreed to pay part of the price or all the amount, to a third party if the latter expresses his consent, the promisor is bound. The third party can then claim performance (decision of the Supreme Court from 1897, -ΑΠ 167\1897, θεμ ΙΕ 610- and of the Appellate Court of Athens from 1899 -Εφ Αθ 499-1899 Θεμ ΙΑ 13-). In other cases he could only exercise the right of the contracting party and ask performance to the latter. (Appellate Court of Athens from 1904 -Εφ Αθ 975-1904 Θεμ Is 24-).

32 Even before the Justinian codification or at the classical Roman law period, roman lawyers tried to overcome the obstacle which in doctrinal terms was the absence of a interest of the stipulator for the benefit of a third party. One strategy was to add a *stipulatio poenae* (penal clause) for the case of non-performance, in order to make forfeiture of the penalty dependent on non-performance by the promisor to the third party. The parties could use the mechanism of *solutionis causa adjectus*.: These are situations where performance can be made to a third party or by a third party. As Zimmermann, 752 et seq notices *"...a debtor was able to discharge his obligations by performing towards a solutionis causa adiectus* [he prefers this spelling]; *this was a third party (for instance a bank) specifically incorporated into the wording of a stipulation as an alternative recipient of the promisor's performance ("mihi aut Titio dari spondes")"*. The third party could not sure for performance; otherwise this case would be a *stipulatio alteri*. Once the choise of performing either to the debtor or to a *solutionis causa adiectus* had been offered to the debtor, the creditor could no longer withdraw that choise unilaterally. In the case of the

interpreted broadly to include moral concerns with no financial value[33] or claims by the public against the government[34].

Claims were accepted on a relationship of managing some other's affairs (*negotiorum gestio*)[35], by the receiver of goods against the carrier[36] or by the receiver of a bill of lading against the accepting bank[37], in an assumption of debts to which the

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contract for the benefit of third parties (§§410-415 AK, §§328-338 BGB), the promisor has no discretion but is obliged to perform to the third party.

The most usual cases of the contract for the benefit of third parties in Greek law were cases of donation contracts, cases involning dowry agreements, cases involving relationships of management of others' affairs (often in carriage contracts), and cases of *adjectio solutionis causa* (undertaking to pay a debt as for instance the purchaser of the inheritance property who promised to pay the debtors -decision of the Appellate Court of Athens from 1898, -Εφ Αθ 672-1898 Θεμ Θ 534-.) The courts were clearly considering such cases as exceptional.

33 Charity concerns for instance. A decision of the Appellate Court of Larissa from 1901, (Εφ Λαρ 236-1901 Θεμ ΙΓ, 479-) considered that the interest of the contracting party did not need to have a property character but it could be justified on social concerns or charity intentions. The partners of the deceased had agreed with the latter that in the case of his death a life-long monthly allowance would be paid to his wife or, if the latter remarried to his daugther. The widow sued the partners successfully.

34 The government had agreed for the supply of electricity at a low price for the residents of a designated area. This agreement created a right of the benefited individuals to claim directly against the electricity providing company. As the Appellate Court of Athens thought in 1914 (-Εφ Αθ 185-1914 Θεμ ΚΕ 536-) this was due to the (social) interest of the government that the consumers do pay the lower price

35 There are many examples were a third party claim was accepted on the basis of a management of others' affairs relationship. In one case a contracting party promised to pay the debt of another person to the third party. The latter derives a right even if at the time of the conclusion he had no legal capacity. (decision of the Appellate Court of Athens from 1896, - Εφ Αθ 2501-1896 Θεμ Η 187-). (*Negotiorum gestio* in Roman law is a quasi contract which arises when a person undertakes the management of the affairs of another without having received any mandate, express or implied; *Bell's South African Legal Dictionary* 1951).

36 In the case of a transport contract the carrier was the manager of the receiver's affairs. The person receiving money or things (movables) to transfer to another person is liable to the claims of the latter person on the basis of the management of others affairs. There is a series of decisions taking that point of view. However there are opposite decisions as well. The claims were not accepted when the relationship in question is a mandate. The buyer gave the price for things he bought to his mandatee to give to the seller (supplier of bread). The latter has no claim against the mandatee, because until performance the money was in the possession (meaning possession *animo domini*; the possession with the intention of ownership on the the think -- in the absence of such intention it is only detention) of the mandator (decision from the Appellate Court of Patras from 189 -Εφ Πατρών 322-1899 Θεμ ΙΑ 218-). See Yiannopoulos "Property" in the *Introduction* Kerameus & Koziris eds 126.

37 It has been held that the bank which accepted the bill of lading was managing the affairs of the receiver. There were a series of decisions of the appellate court. The Supreme Court sitting in full session retreated from its previous decision (also taken in full session), and overuled the appellate decision. There are three decisions of the Appellate Court of Thessalonika (Εφ Θεσσ 47-1922 Θ ΛΓ Εφ Θεσσ 56-80 1919 Θ ΛΑ, Εφ Θεσσ 101, 50-

beneficiary consented even by raising a claim[38], and when *negotiorum gestio* had been agreed[39].

The courts, contrary to academic suggestions[40], were reluctant to allow a direct claim, if it was not expressly provided for[41], and resorted to the procedural device of indirect (side) claim[42] that enables a creditor to exercise his debtor's claim.

1919 Θ ΛΑ 24-) which concerned the contract with the a bank for the sale of merchandise. The bank neglected to notify the transferee for the arrival of the bill of lading. The transferee had his own right to claim compensation from the bank.

38 The approval of the assumption of debt could be implied. There are many examples of assumption of debt. In one case the buyer accepted to pay to the state certain instalments the seller was owing (decision of the Appellate court of Patras from 1896-Εφ Πατρών 1228-1896 Θεμ Η 521-). In another case a company was dissolved and one of the partners undertook to pay the debts to the third parties. The latter could turn against the guarantor of the partner (decision of the Appellate Court of Athens from 1891 -Εφ Αθ 1587-1891 Θεμ Γ 25-). In these as well as in most similar cases the acceptance of the assumption of a debt was required for the creation of the third party right. The fact that the courts considered the raising of a claim as an indication of this acceptance is evidence of their willingness to accept a third party claim.

39 Since the duty of a person managing the affairs of others was accepted on the facts of receipt of the things which were to be delivered to a different person.

40 Such as academic work referring toconsiderations of good faith and transactions' morals, and the work of the Glossators and the Pandectists. See Zimmermann 34 et seq. Ζέπος, Πάναγιώτης Η κρίσις του δόγματος της ελευθερίας των συμβάσεων εν τω συγχρόνω αστικώ δικαίω, AID (1940 137 [the crisis of the doctrine of the freedom of contract in modern civil law], and *Ένοχικόν Δίκαιον, Α' Μέρος* 1977 169, 363 [law of obligations, first part].

41 It was disputed during that period whether the third party acquired his right by assignment from the stipulator, or whether the right could be created directly in the face of the third. (See Fourkiotis -Φουρκιώτης, Κωνσταντίνος 'Μαθηματα Αστικού Δικαίου, Ενοχικό Δίκαιο-Γενικό Μέρος', 1944 [Civil Law Lectures, Law of Obligations, General part] and Windscheid, 295). According to one view the third party right was produced from the promisee's right, was first created from the relationship between the promisor and the promisee and then transferred to the third by assignment of a claim or by authorisation. According to another view the third party acquired a direct claim either being represented by the promisee -- he latter being *negotiorum gestor* (manager of other's affairs) -- even after the conclusion of the contract, contracting in his own name), or as *adjectus solutionis causa;* the promisor (debtor) is the mandatee of the promisee and is released by performing to the third party. Modern codifications accept a right created for the first time in the face of the third party.

42 This claim (based on §1025(2) of the older (1834) Code of Civil Procedure and on §72 of the Code now in force) follows the model of the *action oblique* of the French law. (Action oblique is the indirect action of the creditor availing himself of the rights of his negligent debtor (also called action indirecte, and action subrogative; *Economic and Legal Dictionary; French-English, English-French,* Bayleyte, Kurgansky, Laroche, Spindeler, 1989.).(Λιόκα Μακρίδου 'Οι σχέσεις δανειστή και οφειλέτη στην πλαγιαστική αγωγή' [relationships between the creditor and the debtor in the indirect suit].

The absence of a modern codification, it was argued, could offer greater flexibility to the courts to depart from obsolete legal doctrines[43], but courts do not usually feel comfortable experimenting, and the priorities in the Greek legal order were more basic than extending third party rights. It is true, however, that courts took a very narrow view of the third party position. For example, in life insurance cases, claims by the stipulator's children were accepted[44] but not by the stipulator's widow or other relatives[45]. Nonetheless, in one view, the contract for the benefit of third parties had been accepted as a general principle by the beginning of the 20th century[46]. In any case, the mechanism was no novelty when introduced in the AK.

Most third party loss cases would possibly be covered by the law of delict. The latter was contained mainly in the *lex aquilia*[47], as it had expanded in the later Roman years and during the Byzantine period, to acquire the character of a general claim. On the basis of such a claim compensation could be sought for most cases of unauthorised loss[48].

2.1. Academic views.

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43 Κεφαλὰς 79 et seq.

44 A contract of a parent for a benefit to be given to his children after his death is valid even if the child did not approve, while his parent was alive, even if the child is not a heir. This was the case with an insurance agreement the Supreme Court speking of equity towards the child (decisions of the Supreme Court from 1911 and 1912 --; Αρειος Πὰγος 246-1911 Θεμ ΚΙ 339 Αρειος Πὰγος 85-1912 Θεμ ΚΓ 369-)

45 The contract between the deceased husband and the insurer does not create rights for the widow. When the husband dies the insurer is obstructed from paying the widow. The insurance money belong to the heirs (decision of the Supreme Court from 1909--; Αρειος Παγος 255-1909 Θεμ Κ 163-).

No contract for the benefit of a third party was accepted in the case of a father contracting with a school for his child's education. The beneficiary was however asking for an amount of money to be returned (decision of the Appellate Court of Athens from 1903 -Εφ Αθ 1171-1903 Θεμ ΙΕ 119-).

46 Παπαζὴση, Θεοφανὼ ' Η σὺμβαση υπὲρ τρὶτου για την περὶπτωση θανατου's [the contract for the benefit of a third party for the case of death], Ph.D Thessalonika, 1986.

47 The *lex aquilia* (286 BC) provides the *actio legis aquilia*, for loss wrongfully (wilfully or negligently) caused to another by injury to his property. Loss caused by injury to a person was claimed by *actio injuriam. Bell's Dictionary,* 1951.

48 As said one should be deeply concerned in order to find a loss causing act which would not create legal consequences. (Βαβοὺσκος Κ. 'Το αστικὸν αδικημα εις την ελληνικὴν νομολογὶαν υπο το κρὰτος του ΑΚ [the civil crime in the case law under the AK] ΕΕΝ (periodical) 21 1954 124). Two of the (three) local civil codes, that of Samos, and that of the Ionian islands followed the model of the French Code Civil as regards the delictual provisions providing that any loss caused by fault (culpably), should be compensated.

Academic opinion scarcely considered contractual protection for third party loss during this period[49], the priorities of the progressively developing legal education and theory were obviously different.

From the beginning of this century Triantafilopoulos[50], focusing on Roman law[51], thought that mandate and assignment of a claim were the proper venues for third party compensation. Third party loss [52] was an example of "indirect" -- consequential -- loss, for which, compensation is only exceptionally provided[53], but the possibility of an injurer escaping liability was unacceptable. Triantafilopoulos supports the extension of an *actio utilis* to the third parties in such cases.

Other authors reviewed third party protection through the examination of contemporary legal developments, and, in the light of the pending AK and the evidence of

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49 The contractual protection for third parties was referred to in the context of broader considerations on third party claims on a contract (as in Μιχαηλίδης-Νουάρος ' Η δυναμις της συμβάσεως έναντι τρίτων' [The effect of the contract towards third parties] ΑΙΔ [Ζ] 1940, 299.) or with the purpose of giving an example of the restriction of contractual freedom, or discussing legal policy issues, or furthermore when referring to foreign law. Greek jurists rejected almost unanimously the conservative approach of the courts on the question of the contract for the benefit of third parties.

50 Τριανταφυλλόπουλος, Κωνσταντίνος *'Ελληνικόν Ενοχικόν Δίκαιον, Γενικόν Μέρος*' [Greek Law of Obligations, General Part] 1922.

51 He starts from the idea that the creditor is or should be the one who has an interest in claiming compensation for the violation of a contract. He examines whether the damage suffered by another person might suffice for the establishment of the creditor's interest to claim damages.

52 He thought possible for a third party to suffer loss from a contractual violation, without having a contractul claim for compenation, as when a mandatee transfers the execution of the mandate to someone else and the latter does not perform. In this example the original mandatee having shown care in the selection of his substitute is not liable for negligent performance. The injurer escapes liability because his contractual party did not suffer loss, while he is not related contractually to the injured party. The injurer is not liable because the doctrinal view is that the creditor should have suffered the injury.

53 Banakas provides a brief review of German, French and Common law doctrine from a delictual point of view (50 et seq.). In France it is said that a "direct" causal link must exist between the defendant's conduct and the damage. The concept is unclear; foreseeability which is an important test for the acceptance of a causal link in Common (and German) law being *"une idée directrice"*. The test of adequacy of cause in Germany on the basis of the *ex post facto* judgement of a most prudent and perceptive observer presents strong similarities with the Common law *"reasonable foreseeability"* test. Third party loss is not in principle compensated in German law being *"damnum sine injuria"* (Banakas 215).

a changing contract law[54] they related third party protection to tendencies in foreign jurisdictions[55].

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54 Thus it was emphasised that the extention of the contractual effects was a piece of evidence of the progressive tendency in the 19th and 20th centuries, to restrict contractual freedom under the advance of social justice and equity oriented ideas and state intervention for the protection of the weaker. An overall view is usually taken, including the whole range of a "directed" economy, the state intervention by currency control, or the health and safety control in favour of the public, the labour laws and protection of workers, the collective labour contracts etc.

The older concept of contract is changing. The individualistic-liberal approach which had its roots in the Stoic philosophy and found his juridical expression in classical Roman law, reached a complete and final form by the 1500s and the 1700s, and is crystalised in the "Declaration of the Rights of Man", of the French revolution, and of the Napoleonic (Civil) Code of 1804. The corner-stone of this tendency is the "subjective right", a metaphysical concept of the (legal) power residing in a person. Gradually this system was supplanted by a realistic and social system of law. The new approach relied on a purely realistic idea; the idea of social function which each member of a society has to perform. This view rejects the concept of the individual's right as incompatible with the positivist realism of our era. Subjective rights set up the individual against the society. The individual has duties towards all. Social solidarity and interdependence determining the position of the individual. See *The Progress of the Continental Law in the 19th century*, 1918.

Emphasis is laid on the social function of the contract; on its operation in a social environment, and on the demand for co-operation between the parties, and consideration of the interests of others when participating in transactions. Mi≈ahli;dhß-Noua;roß AID ªZ° 1940 299, is making an interesting reference to the situation where someone participates in the violation of someone's contractual as when a businessman is hiring someone working for another, or when someone is selling the same piece of land to two buyers successively and the second, knowing the situation, transcripts the transfer to the land registry before the other, acquiring thus ownership). In Germany, *in pactum de non alienando* cases, the sale was valid but the third party participating in the violation liable under §826 BGB, while in France absolute priority is given to the condition not to sell. In the pre-AK Greek law the courts were reluctant to allow such a claim based on *lex Aquilia*. After the AK it seemed easier to establish a delict on the bases of §§ 281, 914 AK .

55 Reference concentrates on German law of course. These tendencies were described as part of the culmination of legal possitivism of our times and contributed to a so-called national-socialistic theory of law and, more specifically, theory of contract. Major theoreticians lay the background of a social function theory of contract (Larenz, K., Wieacker, Siebert.). Their views were promoted in Germany mainly in the first half of this century, especially during the second and third decades. Massimo La Torre in a recent publication (*Nostalgia for the Homogeneous Community: Karl Larenz and the National Socialist Theory of Contract*, La Torre, Massimo, European University Institute, Florence, EUI Working Paper Law, No 93/7, 1993) makes am interesting reference to this trend. He notices that the national-socialistic attack on the foundations of the liberal democratic society has particular features at the level of law, contract law especially. The attempt was to reconstruct legal knowledge. Emphasis was laid on the supremacy of the state, and on collectivist spirit. The subject-individual was meant to be but a product of the collectivity, solidarity determining the individual position against "selfishness". Subjective rights are attacked systematically and contractual freedom is rejected as masking the prevalence of the cleverer and the stronger. In this context Larenz who considers that only members of the folk community (*"Volkgenossen"*) have legal capacity, intends to replace a universal abstract concept of contract with a series of contract types (accepted and permitted by the community since contract is a function serving its ends), and

Michailidis-Nouaros[56] considered two possibilities; a direct third party claim (as the *action directe* of French law), and a claim by the creditor[57]. He infers from the case law[58] that both solutions were acceptable and satisfactory. It seems, from his indirect agency examples[59], that he preferred a direct claim[60].

2.2. Conclusion.

There was little, and circumstantial consideration of the third party contractual protection before the AK. The underdeveloped economy[61] and the developing legal order[62] did not pose serious third party loss questions and whichever arose were dealt through delict, third party beneficiary claims and special statutes [63].

Certain encouraging decisions appear in the 20th century[64], part of a process to reinforce social standards and morality in the legal order and especially in private law[65].

3. Third parties after the AK.

Wieacker notices the community of purpose of the parties to secure the goals of the collectivity. Μιχαηλίδης-Νουάρος ΑΙΔ [Ζ] **1940 299**, is referring to the philosophical work of Stammler, (who notices that the contract is a part of social life), and to the work of contemporary German academics.

56 Μιχαηλίδης-Νουάρος ΑΙΔ [Ζ] 1940 299.

57 This was the tendency which prevailed in Germany. It could lead to either the transfer of the claim to the third party, or to the exercise of the creditor's right by the third party on the basis of a special procedural device (the claim belongs to the creditor in any case).

58 Especially that referring to cases involving forwarding agents, where under the influence of Roman law and the Commercial Law (based on the model of the French Commercial Code), both a direct claim (on the basis of a contract for the management of other's affairs), or the compulsory transfer of the creditor's claim (on the basis of civil procedure law), were alternatively accepted.

59 He is giving the example of a trader of furniture for whom an agent (contracting in his own name) buys certain pieces of furniture but due to a delay in delivery the trader cannot use the new furniture in the front of his shop and suffers loss.

60 Judging from his references to statute law (especially on the continuation of labour contract with a business proprietor) and to the changes the AK would introduce.

61 Such as a small services sector and rudimentary credit system.

62 The Greek legal order, theory and education were in a process of gradual formulation and the need including the research into foreign systems were rather basic.

63 Such as transport or banking. Κεφαλάς 79 et seq., Γαζής.

64 Decisions favouring third parties that is.. Most of the references made before date from the 20th century and especially from the the midwar period.

65 Λιτζερόπουλος 1979.

The AK contract for the benefit of third parties (§§410-414 AK[66]) is closer to its Swiss equivalent[67] than to that in the BGB[68]. The AK also contains significant exceptions to contractual relativity[69], allowing direct claims of a contractual character by third parties. The law of delict, based on a general clause, seems to provide compensation for most third party loss cases.

3.1. Contract for the benefit of third parties.

The mechanism is applied in numerous occasions[70]. The acceptance of a direct claim is affected by considerations over the kind and function of the relationship in question and the practical and social utility of a direct claim[71]. Many of these applications concern third party loss.

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66 Γεωργιάδης §§410-415AK, in Γεωργιάδης-Σταθόπουλος, Σταθόπουλος 1, and comments on §§ 410-415 AK, by Λιτζερόπουλος, and Ζέπος.

67 §§ 112 et seq of the Swiss Code of Obligations.

68 §§ 328-338 BGB.

69 Exceptions to relativity were provided in a number of special statutes as well, in insurance law for instance

70 Some examples from the AK are, the donation subject to a burden, (§§503-504 AK), the assumption of a debt by a contract between debtor and the third person assuming the debt (§§478, 476 AK), the establishment of a life annuity in favour of a third party (§840(1) AK), and the public deposit of the thing owed or its value (§§427 AK et seq.) etc.

Other special statutes are those on the life insurance in favour of a third party, the deposit by a limited liability company, or by a bank, in favour of a third party.

Case law and theory are usually considering as cases of a contract for the benefit of a third party the lease contracts, the carriage contracts, the mandate, the labour contracts, the contracts for works, the donation, the assumption of a debt, a contract for annuity in favour of a third party, a bank deposit, etc. (Γεωργιάδης §§410-415AK, Γεωργιάδης-Σταθόπουλος.

71 In order to infer whether a direct claim has been provided for the third party, if no express reference is made, the intentions of the parties should be looked at first (subjective criterion) and if no conclusion is reached then the nature and purpose of the contract should be examined (objective criterion), §411 AK. Similarly § 478 AK provides that if a third party promises to the debtor that he (the third party), will pay the debt of the debtor, in case of doubt, the creditor obtains no right against the creditor. The Greek law, as the Swiss and the German laws, establishes a presumption in favour of the acceptance of a direct right of the third party (§411 AK).

For the purpose of interpretation therefore the kind and function of the relationship are reviewed, as well as the usefulness of a direct claim in social and economic terms. The practical importance of the allocation of a direct right is often taken into account. If a direct right is accepted this would mean that the benefit of the third party will not pass by the property of the stipulator and will not be subject to the claims of the latter's debtor's or heirs (it can not be the object of liquidation for instance, and it is not part of the inheritance property). Theoreticians distinguish clearly the contract for the benefit

3.1.1. Carriage contracts[72].

Contracts of carriage[73] are regularly considered as contracts for the benefit of third parties (when the consignee is a different person than the consignor), authorising the consignee to claim performance[74]. This approach by the courts certainly covers a considerable number of third party loss instances, for which special legislation was required in English law[75].

Among the differences between the contract for the benefit of third parties and carriage contracts[76], what is important is that it is not always the consignee who benefits

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of third parties from other contract-types where third parties are involved. as agency or the management of other's affairs.

If no direct claim is accepted the third will have to resort to the exercise of the creditor's right against the promisor, provided the former is the debtor of the third part. (It is the case of the indirect claim; πλαγιαστικὴ αγωγη;-*action oblique* in French law.)

All the provisions of the contract for the benefit of third party should be taken into account. Thus the contract, which is revocable under certain conditions only would be null if the legal cause for the indirect property transfer (from the stipulator's property) the relationship that is between promisor and stipulator is void. To the contrary, the nullity of the relationship between the stipulator and the third party has no effect on the validity of the contract for the benefit of a third party.

72 Γεωργακὸπουλος, Λ. Ἐγχειριδιο Εμπορικου Δικαὶου, Συμβὰσεις Ὑπηρεσιὼν' 1991,[Manual of Commercial law, Contracts of Services], Ρὸκας, Ι. Ἀστικὴ ευθὺνη και οδικὴ μεταφορὰ πραγματων' 1984, [Civil liability and road carriage (with reference to CMR -convention on the international carriage of goods by road-)]. See Gröhe, C. "Der Transportvertrag als Vertrag Zugunsten Dritter - Zum Passivlegitimatimation des Unterfrachtführers - Entscheidung der Corte di Cassazione vom 21 Okt. 1991, und des Bundesgerichtschhofes vom 24 Okt 1991 mit Anmerkung von Christian Gröhe, München", 1 (1993) ZEP 141.

73 Which are also contracts of deposit, contracts for works, a mandate a relationship of management of another person's affairs

74 See under "Development and Applications" in Chapter 5, on Scots law. The JQT would have offered simpler solutions to the problem of the holder of transport documents demanding delivery that the relative legislation. See also under "Transport contracts", in Chapter 2 on German law. There is protection for third party loss on the basis of the contract with protective effects when there is no other means of protection. Protection on the basis of the contract in favour of third parties in Greek law might be more effective even if it seems that intention requirements might constrain this protection.

75 The Bills of Lading Acts 1855 and 1992.

76 A rather uncertain distinction is that the economic benefit of the carriage contract is by definition directed to a third party while the direction of the benefir to a third party under §410AK et seq. is an exception in the AK. Unlike the principle in §414 AK, carriage contract provide for obligations for third parties as transport costs. This is also an uncertain distinction as the contract for the benefit of third parties can provide for conditions under which the beneficiary will qualify for the benefit.

economically from the carriage[77]. However, the fact that the benefit might be directed to another person has economic but not legal effects. The consignee acquires contractual rights in his own name[78].

The readiness of the courts to infer the existence of a contract for the benefit of a third party will depend on whether the consignee is identifiable. This is not always easy; even when the consignee is the beneficiary of the carriage, he might have no authority over the cargo[79] as when the transport documents are issued to the consignor or the bearer[80]. For the effective application of the contract in favour of third parties, the consignee should have the right to claim compensation even if he does not acquire a right to

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77 Taking for instance the simple example, where the consignor is the seller and the consignee the buyer, if the place of delivery is the premises of the consignor (f.o.b or f.o.t contract -- free on board, and free on truck for the road carriage) then the consignee is usually benefited by the carriage. He usually finds the carrier with whom the consignor contracts). If, however, the place of delivery is the premises of the consignee then the consignor is benefited from the economic value of the transaction. (The transport has been agreed for the benefit of the sender. Who the beneficiary is depends from the relationships between the sender and the consignee. If the sender is the seller, the consignee the buyer and the transport is a part of the execution of a c.i.f of f.o.b with consignment contract, or generally a sale with duty to deliver to the buyer then transport is made to the benefit of the sender/seller.). The same can be said when the consignor and the consignee are forwarding agents (contracting in their names) or the consignee alone is a forwarding agent, and the mandator is the final consignee who acquires the benefit of the carriage while he is not a party to the contract.

78 It is typical in transport,to be acting for another person.

79 There could be a distinction between the person entitled to the rights from the contract of carriage (to demand delivery) and the person who has authority over the cargo. The consignee will acquire authority on the cargo after delivery of the transport documents if he named therein. Before that point the consignor can ask the documents back and receive others. This is the case of CMR (Convention Relative au Contrat de Transport International de Merchaundises par Route -- The Convention on the Contract for the International Carriage of Goods by Road, drafted in 1956, adopted by the UK in 1967). CMR §12 which does not exclude different arrangements refers to the right to dispose the goods. This right belongs to the sender unless there is a different entry in the consignment note, or the second copy of the consignment note is handed to the consignee, or the latter asks this second copy after the arrival of the transported things (§CMR 13). According to CMR §12(2) the consignor has the right of disposal which he transfers to the consignee if is mentioned in the delivery note. In CMR §31(2) it is thought possible that two parrallel cases might be opened against the carrier for the same loss. The persons thus entitled to the rights from the contract of carriage might be others than those defined in the CMR, as when national law applies in a supplementary manner giving the rights to a third party beneficiary.

80 Transport documents (usually bills of lading or consignment notes.) could create confusion as they might be issued to the consignor or to the bearer who is not a third party beneficiary but a special successor of the consignor. This succession takes place under the rules of assignment (if the document names a person)or by transfer and surrender of the consignment note or bill of lading if it is to the bearer. (Γεωργακόπουλος 1991).

claim performance[81], or if he does not have authority over the cargo (the right of disposal). Damages concern not only defective performance but, possibly, breach of protective duties as well.

When both the consignor and the consignee, or the consignee alone are forwarding agents, the person ultimately benefited is the mandator of the receiving forwarding agent. He can turn against the carrier on the basis of the mandate (possibly as a third party beneficiary), or on delict[82].

3.1.2. Building contracts.

According to case law and theory 'real'[83] contracts in favour of third parties are also those contracts, common in practice, providing for the construction of one or more apartments with the contractor obtaining as payment[84] a part (percentage) of the undivided land ownership and exclusive ownership of certain apartments (in proportion with his percentage). The landowner becomes co-owner of the land (owner of the remaining percentage) and exclusive owner of the other apartments[85].

Third parties might be buyers of a percentage of land by the contractor[86]. They have a direct claim against the landowner for the transfer of property[87]. The solution is just and cost-effective, an example of *Drittschadensliquidation*, albeit where a direct claim

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81 Unless otherwise provided or implied, both the consignor and the consignee are entitled to claim performance of the transport contract (§411 AK). In the case the contract of carriage is a contract for the benefit of a third party it is possible then that both the consignor and the consignee will have the rights from the contract especially the right of disposal. The exercise of the rights by the one excludes the exercise by the other.

82 §716(3) AK provides for a right to claim against the person who substitutues the forwarding agent (mandatee) in the performance. The provision is not applied here because the carrier is not a substitute; he does have the authority of the forwarding agent.

83 *"Genuine"* according to the terminology used by Zimmerman (Zimmermann 34 et seq.). See the relative references in the chapter on German law.

84 Often according to the progress of the works.

85 The building contractor usually signs pre-sale agreements with future buyers for the transfer of land (and flat) ownership. He thus might obtain payment in advance from the future buyers so as to able to accumulate capital to proceed with construction.

86 Where by the contractor promises to transfer coownership on a percentage on the land and exclusive ownership in one or more apartments corresponding to this piece of land.

87 The third party could ask the landowner's sentencing to a declaration of will. The decision accepting the claim replaces the absence of a statement of intentions of the defendant.

is allowed. Although third parties cannot (possibly) turn against the contractor for defective performance the contractor will be liable in delict[88] or under special legislation. Nonetheless, the direct right of the buyer was doubted in a vigorously criticised 1982 Supreme Court decision[89].

If no direct claim is allowed, the contractor could assign the respective parts of his claims against the owner to the buyers, as would be the case in the rare occasions these construction contracts are used in Scotland or England[90].

The buyers can actually exercise their debtors' rights with an indirect claim but this would be to their disadvantage. The property would be transferred to the contractor[91]. The latter should register this transfer with the land registry, in order to acquire ownership, which will then be transferred to the buyer. It is doubtful whether the contractor can be obliged to register the transfer and a court order might be required to have the ownership transferred to the third party, the process being expensive and time consuming.

The regular application of §410 AK et seq. in this category of building contracts illustrates of the courts' willingness to protect third parties -- a willingness which would

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88 A delictual claim against the contractor might not facilitate transactions (the transfer of property), but it might seem more easily acceptable for compensation purposes. If the future buyer does not acquire a direct claim, in order to obtain ownership of the apartments he would (a) have to turn against the landowner exercising the contractor's claim and asking for the transfer of property to the contractor and (b) subsequently turn against the latter and ask from the court to oblige him to transfer the property on the land. The contractor however might have not accepted the transfer by the owner, and he might have not registered this transfer in the land registry. He might have not become the owner. It is doubtful, with regard to the last case, whether the contractor can be obliged by the court to make the actions required to acquire ownership. Even if he could be made to,the future buyer's position is at least complex.

89 Άρειος Πάγος 850-1982. The Supreme Court sitting in full session denied the creation of direct right of the future buyers to claim transfer of property. This decision, although no formal principle of precedent exists in Greek law, alarmed Greek lawyers who attacked the conclusion of the court as endangering existing contracts and creating instability. Διατσίδης, Μ. 'Η συμβαση ανέγερσης πολυκατοικίας με αντιπαροχή και η αποφαση 850-1982 της ολομέλειας του Άρειου Πάγου' [contract for the construction of a block of flats, with payment by transfer of land ownership and the 850-1982 Supreme Court decision] ΕΕΝ (51) 1984.

90 I owe this comment to my supervisor Professor Murray.

91 The claim is the contractor's.

possibly lead to the acceptance of claims by owners against subcontractors[92] -- yet, a willingness that has not actually been tested further. Of importance, however, is that the courts find practical and effective solutions at the time that there would be protection in delict, but this does not resemble the daringness shown in certain instances by common law courts; notably in *Junior Books v. Veitchi*[93].

3.2. Subleases and loans for use[94]: §599(2) AK[95], §819 AK.

§599(2)AK, a typical exception to contractual relativity, entitles the landlord or lessor to the delivery of the leased thing, from the sublessee or whomever the use of the thing has been transferred to[96] according to the lease contract.

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92 This category of building contracts cannot really be compared with the more expansive application of the third party beneficiary rule in American law. It seems closer to the case of claims by owners against subcontractors. See under "Construction projects", " Claims by the owmers against the subcontractors" in Chapter 4. However the contract in favour of the third parties could expand in more instances arising in the context of the construction industry. As far as the difference with the application of its equivalent in American law, the practice ofpayment or performance bonds is not followed in Greece. Moreover, as with the claims by owners against subcontractors in American law in many construction cases there will possibly be delictual protection. The particular contractual claims accepted in Greek law are the most effective answer to the problem in hand as are the the contractual claims of the subcontractors against the sureties of the prime contractor in American law. In a number of Scottish and Commonwealth cases such claims have been accepted in delict. See *Norwich Union Life Insurance Society v. Covell Mathews Parthership*, 1987 SLT 452, *Parkhead Housing Associations v. Phoenix Preservations Ltd.* 1990 SLT 812, *Junior Books v. Veitchi* [1983] 1 AC 520, *Kamploops (City) v. Nielsen*, [1984] 10 DLR (4th) 641, *Hamlin v. Bruce Stirling Ltd*, [1993] 1 NZLR 374 (HC), *Winnipeg Corporation No 36 v. Bird Construction Company Limited*, [1995] 1 SCR 85, 11 (1995) *ConsLJ*, 306, Bryan v. Maloney, HCA March 23, 1995, 11 (1995) *ConsLJ* 273.

93 [1983] 1 AC 520. The decision allowed the claim of a building owner against the subcontractor for defective flooring. See under "Third party loss in the Scots law of delict: In favour of the third party", in Chapter 5. Consider also *Anns v Merton London Borough Council*, [1978] AC 728. [1977] 1 AllER 492 HL. The decision accepted the liability of a local authority for negligent inspection of a building for which approval was found latter to have defective foundations. The owner was the claimant. The decision was overruled in *Murphy v. Brentwood District Council*, [1990] 2 AllER 908.

94 The corresponding provisions in the BGB are examined under "Tripartite relationships", (Chapter 2), and which should include the reference to subdepositing in the AK which is in a following unit. The differenct apploach was chosen because the normative character of subdepositing inthe Greek law is different: Togethr with the mandate provisions they substitute the third party to the position of the person subdepositing of transferring the performance in mandate. See later in the text.

95 Φουρκιώτης, Κ. Ἡ αγωγὴ του εκμισθωτοὺ κατὰ του τρὶτου' [The claim of the lessor against the third party] in ND(periodical) 1949, 217.

96 The provision, repeating §556(3) BGB and §264(III) of the Swiss Code of Obligations, is the outcome of the abolition of the Roman law rule that the sale terminates

The significance of the provision becomes more obvious when the lessor is not the owner of the leased property so as to have the protection of property claims[97]. The holder's liability, which might involve compensation as well, is, according to the prevailing view, statutorily based[98] and illustrates the tendency to protect the weaker parties.

Similarly, in the case of a loan for use (§819 AK)[99], the owner or lender can claim its return after the termination of the loan, from the person to whom their contracting party gave the movable, the provision aiming at the protection of the claimant's legitimate interests in the movable[100].

3.3. Employees' wages: §702 AK[101].

The provision, an exception to contractual relativity[102], based on §1798 of the FCC[103], entitles employees in building constructions to claim their wages from their

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the hire. This law had been modified from the middle ages already. The Germanic Codes of the 18th and 19th centuries contained provisions similar to the ones in question. In Greek law, as said under "Tripartite relationships" in Chapter 2, there is a presumption in favour of the possibility of a sublease, in contrast to German law. Similar to the Greek approach is the Austrian law on subtenbure, §1098 ABGBG.

97 The loss from non-delivery in accordance o the sulease for instance is suffered by the lessor.

98 There was in the past a dispute over the question of the basis of the sublessees duty to deliver to the lessor. According to one view both the sublessee and the lessee had undertaken (contractually) a debt towards the lessor; however it is to the disposal of the lessor to turn to the sublessee. Another view considered that the obligation of the sublessee is primary but *sui generis*. The duty though is not created from the delivery to the sublessee but only if and when the lessor turns against him.

99 This is §604(4)BGB. See under "Tripartite relationships", in Chapter 2.

100 Ρόκας, I, 819AK Γεωργιάδης-Σταθόπουλος. He considers that this is one example of absolutisation of an obligational right by a statutory provision.

101 Σακελλαρόπουλος, Αλέξ. Αγωγὴ εργατῶν κατα κυρίου οικοδομικοῦ ἐργου δι απαίτησιν μισθου' [claim of workers against the owner of a construction works for salaries] ΕπιθΕργΔ (periodical), 12 1953 337, Φρόνιμου, Ευ. ' Περὶ της εννοίας του αρθρου 702 ΑΚ' [on the meaning of §702 AK] NomB 18 1251 Καρδαράς 702AK· Γεωργιάδης-Σταθόπουλος.

102 It is not however an exception to the relativity of obligations; the law creates a new obligational bond between the employees and the employer's contracting party. Some authors speak of a tripartite-triange relationship, while others of a corner relationship (Καρδαράς 702AK, Γεωργιάδης-Σταθόπουλος). The mandator of the works owes to the contractor who owes to the workers. According to § 702 AK a property transfer is made to opposite direction since the "owner" of the works (as is often referred to) by paying the workers is released from his debt to the contractor.

103 Similar was the provision of the § 1003 of the Cretan Civil Code.

employer's contracting party up to the amount owed to the contractor/employer by the former.

§702AK responds to the social and economic reality of building or other construction projects[104] (of ships, railroads, aeroplanes[105] etc.) that involve considerable capital accumulation problems and high risks[106]. The defendant's exposure remains predictable, limited to what he would have been liable had he been sued by his contracting party[107].

Manual workers[108], particularly vulnerable in these operations, should not bear the effect of their employer's shortage of funds[109] or of other construction misfortunes. They can claim wages and any other loss attributable to the violation of the defendant's duties.

This is neither a case of a transfer of loss[110], nor one of a violation of protection duties. Despite questions of doctrinal classification[111], it is a practical solution for third

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104 Building or other constructions often last over a long period of time, are subject to price fluctuations of a number of materials, and are affected by the overall economic climate. They involve high expenses while payment is often made by instalments or at the completion of the construction. Often contractors are unable to complete the works for lack or capital or are forced to stop payments.

105 As it is generally accepted; Καρδαρὰς 702 ΑΚ Γεωργιὰδης-Σταθόπουλος.

106 From changes of economic circumstances, accidents, natural disasters, etc.

107 The person against whom the workers can turn is not burdened more than he would have been liable under the contract for works. The treatment of the owner of the building under §702 AK is thus equitable.

108 The provision (§ 702 AK) has been rightly criticised for its restriction to the manual workers. In modern conditions the application of a similar provisions to other categories of employees would seem justified.

109 In other words, the contractor's difficulty to pay should not be transfered to the employees.

110 The workers have a right to claim their own loss. The contractor might also suffer loss in the case of non-payment, but this loss is not transferred to the employee. The reason for the losses of both could be the same; the violation of the duties of the contracting party of the contractor.

111 It was argued for instance that an indirect labour relation exists between the works "owner" and the worker and that the provision's proper area is in labour law. The relation connecting these two parties however is a contract for works. The employer's contracting party can not exercise the employer's authority on the worker (and he is not related with a labour contract to the contractor so that a transfer of this authority could be accepted). The contractor's contracting party does not have the same, as the contractor, duties of care towards the employees.

According to one view an indirect labour relationship should be accepted because the "owner" of the works is benefited economically from the work of the employer. However, were an indirect relationship to be accepted, the claim would not be limited to the amount owed to the contractor.

party protection[112]. However, evidence from other systems could indicate that, such an extension of employees/third parties protection could not have been achieved by means other than legislation[113]. Nevertheless, the provision highlights the overall tendency for the protection of weaker third parties.

3.4. Innkeepers' liability: §834 AK.[114]

The innkeeper is liable for every damage, destruction or theft of things his customers bring with them into his premises[115]. The things might belong to third parties

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112 An example of protection for the weaker party, and an expression of corrective statutory intervention with a spirit of social justice

113 See for instance the reference to §163a BGB, under "Special succession in obligational rights", in Chapter 2, according to which the rights and duties from the employment relationship are transferred to the new purchaser of the business and the similar European Community Directive, [Directive 77/187 form 14.2.1977, (OJ L61/26, 5.3.77) that provides (article 3) that in the case of a transfer of a business the rights and obligations of the transferor from the employment relationships are also transferred to the new employer]. Consider the limitation of §328BGB and §410AK from intention requirements. See also the recent *London Drugs v. Kuehne & Nagel International Ltd.*, [1992] 3 SCR 299, where the Supreme Court of Canada, extended the protection of limitation clauses to the employees of a warehouse company, in relation to the damage to a warehoused transformer. See the discussion under "Is English law isolated?", "*London Drugs v. Kuehne & Nagel International Ltd.*", in Chapter 6.

114 Τραυλὸς-Τζαννετάτος 834 AK Γεωργιὰδης-Σταθὸπουλος. This is an expression of the praetorian edict of the Roman law, one type of informal agreement for the enfrcement of which as action could be granted. It is a receptum arbitri, one of the two forms of the co-called pacta praetoria, an informal undertaking of a certain quarantee by either an arbitrator, banker, or a carrier by sea an inkeeper or a stablekeeper. In particular the provision echoes the *receptum nautarum cauponum stabulariorum*, "dogmatically the most interesting and historically the most significant of the pacta praetoria" (Zimmerman 515), and particularly the receptum cauponum involving an undertaking by an inn-keeper. A customer had to depend on the good faith and honesty of the inn-keeper (or sea carrier or stablekeeper) because his property had been brought in a spere under the inn-keeper's control. The praetor's edict on the liability of nautae caupones and stabularii, became part of the European jus commune, is still in force in South Africa, and has been adopted by many modern civil codes. In the BGB it is accepted only for the case of inn-keepers (§701BGB). See Zimmerman 508 et seq.

115 The liability of the innkeeper has to be combined with the concepts of the customer (meaning everyone accepted to reside, even if no contract has been concluded), and of the things brought in the premises (the later being a material act). See the interesting article on Louisiana's law by Conkil Katherine "Innkeeper Negligence-Inapplicability of the limitation of liability of Article 2971" *TulLR*, v.57, 1982-1983, pp.412-430. The provision of the Louisiana Civil Code, which was based on § 1954 of the 1804 French Code Civil, is an illustration of the fact that the innkeeper's are *"necessary depositories for the effects of their guests"*. §2966 of the Louisiana Civil Code on 'Inkeeper's responsibility for traveller's effects' reads 'An inkeeper is responsible for the effects brought by travellers, even though they were not delivered into his personal care, provided however, that they were delivered to a servant or person in his employment.'. §2967 on 'Inkeeper's liability for

who are not entitled to turn against the innkeeper, the latter being contractually liable to his clients only. §834 AK is justified on the idea that the things in question are in the sphere of the innkeeper's control[116], and he should bear the risks associated to his business.

The situation would at firts seem to resemble that of a contract with protective effects, but the injured party has no claim of his own and the contractual protection is not actually extended. The customer claims in his own right. Arguably there seems to be a transfer of loss from the client to the third person based on their relationship. The provision covers cases which in Germany were treated under *Drittschadensliquidation*[117].

3.5. Mandators and depositors: §716(3) AK, §825(2) AK[118].

When a mandatee transfers his performance to another person (substitute in performance) the mandator has against the latter the mandatee's claims[119]. §716(3) AK[120] is explained as an attempt to protect the mandator, (which would be the case, if the

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effects damaged or stolen', reads 'He is responsible if any of the effects be stolen or damaged, either by his servants or agents, or by strangers going and coming on the inn'. The 1982 revision of §2971 on 'Limitation on liability of landlords and innkeepers', strenthened the position of the claimants against innkeepers.

116 It is considered for instance that the innkeeper should not be held liable when damage or distraction is due to *force majeure*.. According to the more plausible opinion a subjective understanding of *force majeure* (examining whether the loss was unpredictable even if every measure of care had been taken) should be rejected and the proper criterion should be whether the events causing the loss fell in the scope of the innkeeper's business risk. Τραυλὸς-Τζαννετατος αρθρο 834 ΑΚ Γεωργιὰδης-Σταθὸπουλος.

117 BGH, NJW, 1969, 789. A business representative spent the night in a hotel. He left his car in a garage bellow the hotel as suggested to him by the hotel's personnel. On the next day he found that from a watch collection that belonged to his company, and which he had left in the car, certain valuable pieces were missing. The court held that there was a contract for the deposit of the car in the garage. It also considered, following a reasoning similar to that in the previous case, that between the hotelier and his client a contract of deposit had been concluded regarding the car and its contents. It was decided that the duties of care arising from the contract of deposit extend to the thing that did not belong to the depositor. See under "Cases involving a duty of care" in Chapter 2.

118 Κρητικὸς 825 Γεωργιὰδης-Σταθὸπουλος. He thinks that since an express right is provided for the depositor there is no need to set into motion the AZT mechanism as would be the case in Germany where there is no corresponding provision in the BGB. He seems to imply that the AZT is applicable in the Greek law. Recall that unlike German law (§695BGB) in the AK there is a presumption in favour of the possibility of subdepositing the deposoted item. See under "Tripartite relationships" in Chapter 2.

119 Καρὰσης 716 Γεωργιὰδης-Σταθόπουλος.

120 §716(3) AK is based on §399III of the Swiss Code of Obligations. (There is a similar provision in the Italian Civil Code of 1942; §1717(4), but no corresponding provision in the BGB. However §399 III of the Swiss code speaks of claims, while §716(3) AK speaks of

mandatee is not contractually liable, and it is difficult to establish a delictual claim against the substitute[121]), and to avoid the procedural confusion involved in assigning the mandatee's claims. One of the most common applications of the provision is in undisclosed agency cases (for example, forwarding agency).

Similarly, a depositor acquires the right of the depositary against the sub-depositary with whom his contracting party has deposited the movables[122]. The depositor is running the risk of loosing ownership if the movable is sold[123].

Despite theoretical disputes on the precise character of the entitlements in §716(3), and §825(2)AK[124], what is of importance, is that third parties are protected effectively by both provisions.

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suits. It is generally accepted that the latter applies in all cases of rights of the mandator, whether they are exercised in court or out of court. The provision covers a significant 'gap' in the protection of the mandator and treats situations of gross unfairness.

121 If the mandatee had a right to substitute a person to he performance of the mandate, he would be liable only for showing due care when choosing the substitute and when giving him directions. If the mandatee had no authority to substitute another in the performance, he would be liable for the other's fault as for his own (§715 AK). In the latter case too the protection of the mandator's interests will vary in relation to the particular bases of liability each time. The substitute might not be delictually liable. He could then be acting irresponsibly without being held liable. (The original mandatee might have no interest to sue).

122 This is the case of a person who having received goods on deposit, deposits them with a third person. The first depositor acquires the rights of the second (his contracting party and sub-depositor) in order to protect his interests effectively, especially since the deposited thing can be sold. Although §825 (2) AK refers to suits only, it applies to all the rights of the depositor whether they are exercised in court or out of court.

123 Deposit relationships (often as parts of other contracts) are quite common in transactions.

124 The dispute focuses on the capacity under which the mandator in §716(3) AK, or the depositor in §825(2) exercise their rights against the third party. It has been considered that the relationship created is either (a) an assignment of a claim by law, or (b) a 'real' contract for the benefit of third parties, or (c) a relationship similar to the latter, or (d) a relationship similar to a joint and several obligation (ενοχὴ εις ολὸκληρον), or (e) a joint and several obligation. It should be remarked that an assignment of a claim (§469 AK) leads to a change in the person entitled to a claim, and is presented as an act by which a previously existing claim against the third party (in our case of the depositiary against the third party) is satisfied. In a joint and several obligation each debtor could ask performance once and to himself only. The mandatee, or the depositiary should however ask performance to the mandator or the depositor respectively. However, they do not exercise the right of the mandator or the depositor, as if an *"indirect"* claim was made (§72 of the Code of Civil Procedure; *action oblique* in the French law). In such a case there would be no need for the establishment of §§716(3), 825(2) AK.

The AK offers to the mandator or depositor a right of his own as he is not related contractually to the third party. A new creditor is added to the old as far as the third party is concerned. According to one view the situation created is nearer to the 'real'

As can be easily presumed both the provisions on mandate and deposit can have numerous application depending on the courts' willingness to discover elements of these contracts in the transactions resulting to third party loss. This is possible if the transactions involve, as is common, guidelines given to one of the parties or the surrender of movables. Judging from the experience in American, Scots and Commonwealth laws, the subdepositing provisions could, for instance, be applied in the cases of carriers' liability and in the cases of the liability of users of equipment in industry or construction[125]. The provision on mandate could apply in contracts for works or services[126], even in cases involving the liability of advocates and experts[127]. (Similarly, the AK provisions on a loan for use and subleasing could similarly have a more extended application.) It is apparent that since such provisions exist the need to extend contractual protection to third parties is diminished. The third party is practically given contractual claims, while delict is always an option[128]. There is no data as to the actual employment of the mandate and deposit provisions, as there is no distinct third party loss problem in Greek law. Nonetheless, these provisions more than those mentioned before[129] illustrate the overall approach on third party's position in the Greek system. The question in this work is for protection that need not be based on provisions specifically targeting third parties.

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contract in favour of third parties and the special problems should be dealt on the same bases. The third party should be able to raise claims based on his relationship to the mandatee or the depositiary, the mandatee and the depositiary will not in principle be entitled to exercise their contractual claims after the mandator or the depositor have raised a claim. (Κρητικὸς AK825 Γεωργιὰδης-Σταθὸπουλος).

125 See under "Transport contracts", in Chaprter 2, "Development and Applications" in Chapter 5,

126 See under "Contracts for works" and "Contracts for services" in Chapter 2, although the cases referred to therein do no involve a transfer of performance in a mandate relationship. See however the argument in American law on the liability of the subcontractor that the owner could sue as the creditor beneficiary of the contract between subcontractor and prime contractor. The argument is fairly rejected but it is possible to foresee that a mandate provision could find some application in a similar setting. See under "Claims of the owner against the subcontractor", in Chapter 4.

127 See under "Information, expert opinions and reports" in Chapter 2, and "Attorneys' liability to non-clients -- A contractual view", Chapter 4, "Development and Applications" in Chapter 5.

128 In extreme cases, if for instance there is collusion for the subdepositor and the possessor leading to the owner's injury

129 Meaning §§599(2)AK, 819AK, 702AK and 834AK.

3.6. Unjust enrichment and third party loss, §904 AK.

Third party protection in three-party ("triangular"[130]) relationships, where one of the parties is linked to each of the others (assumption of debts, novation, guarantee), could in principle be based on unjust enrichment as suggested by one majority judge in a famous Australian decision accepting a claim for third party pure economic loss[131].

It has accurately been pointed out that almost insurmountable evidential and procedural problems would emerge[132], especially as regards defining those entitled to

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130 It has been readily acknowledged that in American law there is usually liability in tort in cases of a so-called "triangular configuration" (Craig 92 LQR 197 239), also described as "tripartite exchange relationships" (Harris & Veljanovski in Furmston, 59), involving that is a voluntary transaction existing before the damage where the class of people likely to suffer injury is limited and predictable. "Triangular" in particular are the cases where one of the parties is linked contractually to each of the others, for instance, the owner to the contractor and the contractor to the subcontractor. See under "Tort v. contract: Third parties and pure economic loss." in Chapter 4.

131 *Trident General Insurance Co. Ltd. v. McNiece Bros. Pty. Ltd.* (1988) 62 *Australian Law Journal Reports* 508. A company, operating a limestone crushing plant, took out in respect of that operation a policy of insurance with the appellant. The policy was expressed meant to extend to that company, all subsidiary, associated and related companies, all contractors, subcontractors and suppliers. The respondent, principal contractor of the plant, was held liable for injuries sustained by one of its subcontractors at the plant. The appellant declined to indemnify the respondent under the policy, on the grounds that he was not a party to the contract and had provided no consideration. The Supreme Court of the New South Wales and (on appeal) the Court of Appeal held that the respondent could compel the appellants to indemnify it. (The respondent was not permitted to raise an alternative case based on trust.). The High Court, with a majority of four (out of seven) held that the appeal should be dismissed because it was established that the intention of the contracting parties was that the third party should benefit from performance of the contract. The court thought that the common law rule as to privity operated unsatisfactorily and unjustly in this case, especially in the light of the changes in the law by the Insurance Contracts Act (1984) of Australia and other pieces of legislation, and, in any event the common law rule had stood for a little more than a century and had attracted much criticism. Caudron suggested that a promisor who had accepted agreed consideration for the promise to benefit a third party is unjustly enriched at the expense of the third party to the extent that the promise is unfulfilled.

132 The basic problem in the tripartite relationships (order to pay or deliver, §876 AK-ἐκταξη-, performance to a third party, §317 AK, or by a third party, §417 AK, assumption of debt, §§471,477 AK, novation, §436AK, guarantee, §846 AK, authorisation to collect, relationships from bearer bonds, §888 AK or bank cheques), is to define which are the parties between which a relationship of unjust enrichment exists. The in-between person is related to the other two with special relationships; to the person offering the benefit with the so-called "cover" relationship (under which the person who offers the benefit undertakes the duty to make this property transfer) and to the receiver of the benefit with the so-called "value" relationship (which contains the reason why the receiver is obtaining this benefit.). If for instance A owes to B, and B owes to C, and A pays C directly, then the relationship between A and B is the "cover" relationship, and that between B and

claim and those liable to pay, apart from the fact that the process would be cumbersome and prolonged.

3.7. Delictual protection.

The AK did not follow the system of restrictively enumerated delicts[133]. The general delict clause[134] (§914 AK) provides that compensation is owed by anyone who culpably (intentionally or negligently) harms someone else. Unlawfulness[135], a much debated requirement[136], is not linked to the violation of statutorily defined legal interests.

C is the "value" relationship. It is important to notice who is the one suffering loss and who is enriched.

If the "cover" relationship is valid and the "value" relationship null (or non-existing) enriched and liable to pay is the receiver, and entitled to the return is the in-between. The debtor performed on the basis of a valid relationship, but the in-between was the debtor of a void relationship.

If the "value" relationship is valid and the "cover" relationship null (non-existing), the person who gave the benefit suffered loss which he can claim. The in-between, the debtor of a void relationship, is the unjustly enriched party. (The receiver took the benefit on the basis of a valid relationship.).

If both relationships are null (or are invalidated, or don't exist), then the person who gave the benefit (without valid legal cause), can turn directly against the receiver (who obtained the benefit without legal cause) and ask for the return of this benefit. (Σταθόπουλος §904 in Γεωργιάδης-Σταθόπουλος).

133 The BGB specifies restrictedly the delictually protected legal interests.

134 *"The Greek equivalent to the concept of tort or delict is the "unlawful act " (αδικοπραξία)", "The Civil Code dealt with the delictual liability in twi general clauses, supplemented by a number of special provisions. According to the general clauses, whoever 'unlawfully and culpably' (art. 914) or 'intentionally in a manner which violates the commands of morality' (art. 919) causes damage to another is bound to make reparation to the other for any damage thus caused".* The Civil Code *"is supplemented by several auxiliary statutes enacted to deal with particular allocations of risk and liability".* (Christodoulou in Kerameus and Kozyris eds, 114)

135 'Unlawfulness, is an *"original product of the German law"*. The requirement exists in all the civil codes belonging to the Germanic family. The French law has not developed a concept of "unlawfulness" comparable to that of common and German law. It is usually said that in French law , unlawfulness is included in the concept of *faute*. The courts tried to introduce a concept of legitimate interest (*intérêt légitime*) as a precondition of delictual recovery. The importance of this concept has been played down by the Cour de Cassation.

§41 (1) of the Swiss Code of Obligations has according to the most possible view served as the model for § 914 AK. Some authors think that both § 41(1) of the Swiss Code of Obligations, and § 1382 of the French Code Civil were the models for the Greek provision. The Swiss and the Greek systems seem in any case to combine elements from the German and the French systems. Γεωργιάδης 914 AK Γεωργιάδης, Σταθόπουλος. Unlawfulness resembles the breach of an existing duty of care which is a necessary condition of liability in the Common law of Negligence.

136 Unlawfulness is the more contentious of the delictual requirements. The Greek theoreticians were divided on the issue. According to the so-called subjective theories unlawful was any behaviour done without a legal entitlement (and which caused damage

Any statute violation will suffice; the requirement is fulfilled with the violation of a

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to the person or property of another); if the injurer cannot claim a right or other legal reason then his action is unlawful. These theories approaches thus the French view which imposes the duty to compensate every loss caused with fault (intentionally or negligenrly) without examining first whether the behaviour of the injurer was unlawful. (According to a slightly differing approach, there is no need to examine whether the act was done without a right because the cause of harm is always forbidden by the legal order if done culpably. This view is closer to the French Code Civil.)

§ 914 AK according to these opinions establishes a rule of sustance, forbidding the cause of damage to another intentionally or negligently, in the absence of a legal entitlement for the behaviour in question, and imposing a duty to compensate for the violation of this command.

Subjective theories seem to ignore the origin and history of § 914 AK. The suggestion that the "unlawfulness" requirement should be repealed from the AK draft was rejected by the drafting committee. Subjective theories could not be easily compromised with corresponding provisions in the German, the Swiss, the Austrian and the Italian civil codes. The choise of the Greek legislature and its model, the Swiss Code of Obligations were clear as regards introducing unlawfulness as a separate and independent requirement of liability. The purpose was to limit the duty of compensation within socially acceptable boundaries. The provision is intended to serve as a guide-line to the courts for disciplined and well justified compensation awards. Subjective theories do not serve this purpose of the AK to limit delictual liability within acceptable social boundaries and to create certainty of law, because they rely on the courts to identify the legally , socially proper behaviour. Certainty and predictabiltiy of law would require firmer assessment of what is permissible each time. There are important decisions, often from the Supreme court, especially from the sixties, were courts seem to accept the idea that any culpable cause of harm could give rise to a delictual claim. Even today, some decisions seem to take a similar view. (Σταθόπουλος 2, 100 et seq.)

According to the prevailing objective theories, unlawful is the behaviour which is contravening (a forbiting or injunctive) rule of law. § 914 AK is thus not a rule of substance as regards unlawfulness but a "*Blankettnorm*" a blank norm which defines only the "penalty" for the damage due to a violation of a rule of law and relies on other rules to give meaning to the violation. The unlawfulness of behaviour is examined from the point of view of the statute law as a whole (civil, penal, administrative provisions etc).

The differences between the theories tend to diminish, especially since many advocates of the objective theories support the extension of the concept of unlawfulness, so as to include more cases. It is not necessary for the injuring behaviour to contravene a specific statutory provision but it is enough that the cause of the loss opposes the overall rationale and purposes of the law, or the spirit of the legal order. According to more advanced views, for instance, negligence should be considered not only as a form of fault but as unlawful behaviour too, especially in cases where the injuring behaviour is an omission to act. This idea is based on the contention that even when the injurer violated a general duty of care required from any average social person (irrespective of whether a specific rule was violated), he should be held liable for compensation. (Γεωργιάδης 914 AK Γεωργιάδης, Σταθὸπουλος). However Stathopoulos underlined that the independence of the requirement of unlawfulness is not affected even if it seems that culpability and unlawfulness refer to the same concept (Στὰθοπουλος 2, 110-111.).

Banakas notices that German scholars have early acknowledged the difficulty to reach a satisfactory definition of *"Rechtswidrigkeit"* apart from the tautological *"contrary to the legal order"* (Banakas 212 et seq). In his words in German law *"A certain course of conduct may, firstly, be directly declared unlawful by the law. Secondly, its unlawfulness albeit not expressly declared may arise from its express prohibition by the law. Thirdly, an act may be unlawful when it transgresses a so-called primary rule (Norm) Evidence of this transgression is found there, where a particular conduct gives rise to a right of compensation."*. Banakas 59.

general clause such as §281 or §288AK. There is no distinction between material damage and economic loss. In fact, as in French law, the concept of pure economic loss makes little sense from a legal point of view[137]. It seems that under the Greek law of delict, pure economic and third party loss can be compensated as it happens under French law. However, doubts have been expressed. Unfortunately case law is scarce, due (as in the French system) to the absence of some systematic distinction of third party loss cases. The judiciary, with the Supreme Court offering the prime example, have shown considerable readiness to award damages in a variety of cases involving negligent omission[138] to take protective measures[139] and a profound easiness in accepting the unlawfulness requirement[140]. Protection in the Greek law of delict is definitely more extended than in the German law of delict[141].

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137 To the contrary in Germany the term makes more sence, though not formally as it denotes cases for which there is possibly no delictual protection.

138 Usually the omission to act corresponds to a negligent behaviour. When there is no intention to act, a delict should be established on the basis of negligence. In such cases there is often confusion between the unlawfulness which is defined by the negligent behaviour and the culpability; they seem to coinside, to have the same meaning. It has thus been said that in cases of not intentional harm, unlawfulness and fault are assimilated. However although both concepts refer to the same requirement, the differentiation between fault and unlawfulness corresponds to two different legal evaluations of the same human behaviour. The legal order disapproves of the behaviour, without reference to the actor (unlawfulness), and subsequently disapproves the actor personally (fault). In that sense unlawfulness as a requirement of delictual liability is logically clear and can be used in an educative manner informing the people of the limits of the permitted behaviour. Unlawfulness can by statute be related with consequences other than compensation on the right to resist to a person who is acting unlawfully irrespectivelly of fault. (Substantial in this area is the contribution of Σταθόπουλος 2, 110 et seq.).

139 In a number of instances omissions to act have been considered as establishing a delict on the basis of § 914 AK. Such are the omission of the owners of a block of flats to have a bannister on the staircase and to provide adequate lighting of the entrance so as to protect those coming in from accidents, the insecure transportation packaging of flammable materials, the omission to take safety measures for neighbouring building which are endangered from the explosions and vibrations, that the injurer's avtivity is causing (or the omission to abstain from the activity for as long taking such protective measures was not possible), the omission to warn adequately for oncoming danger which the injurer created himself, and the omission to examine the existence of a defect in a standardised product before the product is circulated to the consumers, the omission to construct the sewage connections in the indicated manner, so as to obstruct the reverse of the wasted waters to the sewage pipes. (Σταθόπουλος 2, 117)

140 Unlawfulness has been so easily accepted that there were discussion of a progressive assimilation of the Greek law to the French *"faute"* based system, This is not precise. In the Greek and Swiss systems the prevailing view is that unlawfulness is a distinct requirement for the establishment of delict; the injuring behaviour should violate a

Arguments doubting the 'directness'[142] of the loss in third party loss situations can easily be brushed aside as largely devoid of meaning[143]. The fulfilment of the unlawfulness test has been doubted, as the rights in question are not protected *erga omnes*, as is the case with pure economic loss[144]. This is a false alarm. As said, any statutory

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right or a protected interest of the agrieved party. *"Faute"* incorporates elements of the cuplpability and unlawfulness of the Germanic systems. Parallels should be drawn cautiously. Herbot, Jacques "Economic loss in the legal systems of the Continent" in Furmston 137 et seq.

141 Damages are for instance awarded to a person who had contracted for the purchase of a car but had not yet acquired ownership, for the loss he suffered from the destraction of the car while it was in a garage for repairs (Εφετείον Αθηνών 4110-1972 (Appelate Court of Athens), NomB, periodical) Expectation rights can be delictually protected while German law might need to resort to contractual schemes.

142 As it is usually expressed by German and Greek academics, the link between the legal reason for liability (the unlawful and culpably caused event) and the loss should be "direct". These ideas correspond to the remoteness of damage in the Scots and English law. Directness is required by the French case law as well. It is often said that delictual compensation is offered to "immediate" victims of the injuring event only. (The term is used by Banacas 212 et seq).).

The doctrine in German and Greek law is that no liability is available for indirect loss. It is unclear however which losses are characterised as indirect. In some occasions further consequences of a loss on someone's property are described as indirect losses. In other instances the losses which someone is sufferring as a result, consequence and reflection of somebody else's loss are described as indirect. This is usually the description offered in the area of delict law. In this sense Banakas is giving examples of transferred loss (*Drittschadensliquidation*) as cases where the "indirect" victim has no delictual protection in German law. However the issue does not appear in all the cases of third party loss; there dia not always a problem of remoteness. As directness is difficult to determine and apply (after all there can be various degrees of directness) it has minimal practical significance. The requirement is gradually abandoned. The same tendency appears in France.

In Germany as Stathopoulos mentions another distinction of causality is made. Causality is distinguished in causality necessary for the establishment of liability (*Haftungsbegründung*) and causality necessary for the completion of liability (*Haftugsausfüllung*). The latter is the causal relationship between the direct affect on a legally protected good (violation) and consequent loss. This view is based on the expression of §823 BGB which does not exist in § 914 AK. (Στάθοπουλος 1, 264 et seq.).).

143 In any case, in a third party loss setting the loss will not likely be remote.

144 If the violated right, is an *erga omnes* protected right -- right to personality, family right, health, physical integrity, property rights but also possession and the expectation right of the buyer when the title was reserved -- then there is no question of fulfilling the unlawfulness requirement and delictual protection will possibly be available. In one case a car the title on which had been retained by the seller was destroyed when given for repairs. The future buyer suffered loss which he could claim from the injurer. (Εφετείο Αθηνών [Appellate Court of Athens] 4110-1972- Αρμενόπουλος 1973 34). The buyer in these cases could be protected delictually on the basis of his possession. However the loss from the violation of his expectation right will usually be higher, including not only the deprivation of the use of the thing, but also its value or reduced value. (Γεωργιάδης 914AK Γεωργιάδης, Σταθόπουλος). If however this right is a relative one, one deriving out of a contract, as the timely execution of a contract, it is uncertain whether damages will be awarded to a third party. In principle only the contracting parties owe duties to each

violation will, in principle at least, suffice for the fulfilment of the requirement of unlawfulness and the courts accept the requirement easily. Obviously the predisposition of the courts is important, as would be the case with interpreting contracts to infer third party rights. However, for most third party loss cases the fulfilment of the unlawfulness criterion should not be an obstacle, provided, as is usually the case, some evidence for the defendant's involvement can be furnished.

Doubts on third party protection are more plausible regarding certain marginal cases that involve the violation of special legislation, for example banking regulation or rules of professional conduct. In such cases, it was speculated, the courts, might decide that the provisions do not aim at protecting third parties[145], as German courts did in the 'cable cases'[146]. In these cases as well, a lot will depend on the predisposition of the courts.

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other. Although there has been some expansion of delictual protection to relative rights, and a tendency to award damages for any deterioration of someone's financial position, the doudt however still remains. Georgiades notices that the examples given by some of the advocates of the expansion or delictual protection to any form of intrusion to obligational rights, are merely cases of protected possession (an *erga omnes* protected right). It is usually supported that protection for the effect on relative rights should be offered when the link of the person entitled to the right is affected, and the inclusion of the right in the peoperty of the latter is hindered. Such is the case where someone, acting as a creditor, assigns validly or collects another person's claim. (Γεωργιάδης 914AK Γεωργιάδης, Σταθόπουλος)

145 When the legal entitlement in question is an interest based in law om the professional conduct, on the regulation of banking activities for instance, although the courts seem willing to accept that most statutes could refer to the protection of the third party too, in marginal cases they could exercise substantial discretion rendering the application of delictual protection uncertain. In the case of a legal interest -- an advantage established by a so-called protective norm, in contrast to a legal right which is an entitlent to arrange one's relations at will --, it is important to examine whether the violated norm aimed at the protection of the injured party. It is argued that the violation of a statute which aims at the protection of the public interest only is not unlawful in the sense of § 914 AK; statutes on espionage or high treason are such examples. It was also thought that statutes dealing with government organisation and policy do not aim at the protection of individuals. Such tendencies have beeen alleviated.

According to the case law the violation of rules related to a licence for the operation of a cinema is not unlawful in the meaning of § 914 AK in the case of a claim for lost profits from the owner of a cinema already operating in the area. Similarly the violation of bulding regulations (as to the maximum height) was not could not establish claims for compensation from the owners of neiboughring buldings. (Γεωργιάδης 914AK Γεωργιάδης, Σταθόπουλος)

146 'Cable' cases involve loss resulting from power cauts caused by negligence of contractors for public works. The claims in delict were often calling upon the damage to the "right to an established business". Usually in 'cable' cases the claims were not accepted under §823 I BGB as more strict directness requirements were applied. An attempt to establish protection on a protective rule of law was made (§823 II BGB). In one case, BGH 12.3.1968 - VI ZR 178/66 (Hamm) NJW 1968 1279, where the contractor had damaged the cabled leading to power cuts, a Statutory Order which rendered whoever damaged public

Again, judging from the cases where third party loss occurs, compensation should not be a problem.

The courts, when no specific third party AK provision (including the expanded §410AK), could be invoked, relied on delict[147]. In the most important case [148], the public electricity company had a contract with the owner of a chicken farm. The latter leased the farm to a chicken farm business without informing the electricity company as he was obliged to do by the supply contract. The company's employees failed negligently to notify the owner of a programmed power cut, notification being the company's contractual duty. As a result of the power cut, several thousands of incubating eggs were destroyed. The court

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installations liable to a fine was called upon on the idea that it involved the protection of the electricity consumers too. The argument was rejected by the LG under the view that the Order was aiming at the protection of the public in general and not at the protection of the financial interests of individual consumers. The BGH reversed the decision holding the opposite view on the aim of the Order. Protection was extended to individual consumers and to all typical consequences of power cuts caused when the supply system is damaged. Some decisions followed this approach, but in most cases and notably the BGH in a more recent decision changed this attitude (BGH 8.6.1976, - VI ZR 50/75 (Stuttgart), NJW 1976 1740). It considered that a decision accepting such a claim would undermine the legislator's choise.

In a recent case (BGH 12.7.1977, - VI ZR 136/76 (Stuttgart) NJW 1977 2208) the contractor who damaged the cables was employed by the local administration which had issued a warning to the contractor to watch out for power cables. The contract, argued the plaintiff, had a protective effect in favour of business consumers. The contractor who was in breach of the contract owed compensation. The BGH rejected this view considering that the administrations warning aimed at safeguarding the general interest for the continuation of supply and not a special interest of the plaintiff's business. (There were 1385 consumers affected.). Banakas 268-275.

These are for common law and Scots law what Feldthussen describes as "The Utility Cases", being one category where recovery is precluded for "negligent interference with contractual relations between the plaintiff and the victim of physical damage" (in this group of cases the plaintiff has a contract with the party who suffers phusical damage. Feldthussen, *Economic Negligence*, 235. As far as Scots law is concerned see *Dynamco Ltd v. Holland and Hamnen and Cubitts (Scotland) Ltd*, 1971 SC257, 1972 SLT 38, according to which only the owners of the damaged property couls claim damages. The plaintiff's excavator has damaged an underground cable causing a power cut and subsequently loss to the pursuer's factory. The principle example in English law is *Spartan Steel & Alloys Ltd v. Martin & Co. (Contractors) Ltd*, [1973] 1 QB 27, [1972] 3 All ER 557 (CA).

147 See in a case involving international carriage by road where no delictual claim could de accepted as long as a contract regulated the particular relationship. (Πολυμελὲς Πρωτοδικεῖο Θεσσαλονίκκης -Three member district court of Thessalonika, 1159-1980, NomB, v.29, 1306). This attitude must have been reinforced by advocates' strategy, presumably avoiding to focus on novel contractual mechanisms.

148 Εφετεῖον Αθηνῶν 3148-1982 (Appelate Court of Athens), Αρμενόπουλος, (1973), 94. The lessee could not turn against the owner because the loss had been cause from a fact the owner had no responsibility for. Kefalas notices that such a case in Germany would have been dealt under a mechanism of contractual protection (the contract with protective effects possibly)-Κεφαλὰς 94 et seq.

noticed that the lessee was in a position similar to a third party beneficiary of the supply contract (as was the case with certain attorney liability cases in American law[149]), but resorted to delict in order to award damages.

In another important case[150], the responsible public authority recalled unlawfully the production and distribution licence of a pharmaceutical product. A third party, a person who had already contracted with the licensee for the transfer of those rights, suffered losses which he claimed successfully from the state. According to the decision, compensation could be available under either the special provisions on the civil liability of the state or under the general delictual clause (§914 AK). In the other jurisdictions third party claims often involve public authority liability[151]. However this Greek case, involving loss of profit is less usual. Several Commonwealth cases dealt with the liability of municipal authorities permitting -- mistakenly -- building constructions[152], whereby the irregularity of the injuring behaviour is more easily detectable and the loss, at least the repair costs easier to calculate. In another Greek decision[153] it was held that every third person injured by the unlawful cause has a claim for compensation. Such a person was the buyer of a car with retention of title (§531 AK). The claimant had an obligational -- relative -- right only. The destruction of the car which still belongs to the seller, is

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149 See under "Attorney liability to non clients - A contractual view", in Chapter 4, esprecially the reference to the leading *Biankanja v. Irving*, 49 Cal 2d 647, 320 P.2d 16 (1958) and the test developed by the decision.

150 Άρειος Πάγος 350-1982, (Supreme Court) NomB, v.30,1468.

151 This is not the case with the government contracts in American law. As far as the contracts are concerned the governmental entity is contracting as a private party, See under "Government contracts: Third party beneficiary rule and private rights of action" in Chapter 4. However the third party beneficiary rule was used in a huge variety of cases, including the protection of third parties from racial discrimination, [*Bossier Parish School Board v. Lemon*, 370 F.2d 847 (5th Cir 1967)aff'g 240 F Supp 709 (W.D.La) cert.denied 388 U.S.911, 87 SCt 2116, 18 L.Ed 2d 1350 (1967)] and the compensation of an Indian killed by police on the basis of an Indian treaty, *Hebah v. United States*, 192 Ct.Cl. 785. 428 F2d 1334, 1970.

152 See *Anns v. Merton London Borough Council*, [1978] AC 728, *Hamlin v. Bruce Stirling Ltd*, [1993] 1 NZLR 374 (HC), and *Invercargill City Council v. Hamlin*, [1994] 3 NZLR 513, 11 ConsLJ, 286, accepting the relative claims and *Murphy v. Brentwood District Council*, [1990] 2 AllER 908, *Sutherland Shire Council v. Heyman*, [1985] 60 ALR 1, 59 ALJR 564 (HC), rejecting them.

153 Εφετείον Αθηνών [Appellate Court of Athens] 4110-1972, Αρμενόπουλος, 1973 34.

indirectly affecting the property of the buyer. The latter suffered loss which he could claim from the injurer[154].

In conclusion, there seems to be delictual protection for third party loss in Greek law, and this is the general contention of the academics. More accurately, as will be pointed out later, there seems to be the potential to protect third party loss in delict, in an equitable manner. Doubts regarding protection for third parties, and actual infelicities of the law can possibly, and should logically, be corrected in delict on the basis of existing mechanisms and within the limits of permissible judicial discretion.

3.8. Theory.

Contractual solutions were discussed by academics. The majority of those who dealt with the issue supported the introduction of the mechanism of the 'restoration of third party loss' (αποκατάσταση ζημίας τρίτου-AZT --*Drittschadensliquidation*), but the support in favour of the contract with protective effects *vis-à-vis* third parties (σύμβαση με προστατευτική ενέργεια υπέρ τρίτου) was limited. Theoretical considerations were rarely thoroughly studied and contractual solutions were examined in the margin of other studies. It was not until the middle of the sixties that a systematic distinction between the two mechanisms was made.

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154 The allocation of risks in this case reselmbes the situation in the *Leigh & Sillivan Ltd v. Aliakmon Shipping Co.* [1986] AC 785, 819, whereby the consignee beared the risk of destruction but had no claim against the carrier nor against the consignor.

It was often thought that Greek law (like German law) did not provide compensation for "indirect" losses[155]. Apart from the fact that the term is unclear[156], the consequential or remote character of the losses was not the reason for not accepting responsibility for third party loss in the German law of delict[157], and did not hinder the development of contractual mechanisms.

Zepos[158], discussing the freedom of contract[159], thought that the restoration of third party loss could be easily based in the AK where the abolition of relativity is permitted in certain cases, obligations are defined in a broad manner, and the protection of the weaker party is a basic policy[160]. Zepos supports a direct third party claim, but in general he does not lay considerable emphasis on third party protection[161].

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155 See Banakas 50 et seq. for an account of the idea of "directness" of damages from the point of view of the law of delict. See before under "Delictual protection" the dismissal of the argument as non sencical.

As an attempt to limit liability towards a reasonable number of persons; the "directness" problem is related to the different theories of causation, and especially in the law of delict, with the question whether a delict should be established on the bases of an unlawful result or simply an unlawful behaviour (a view which prevails today). There could be various degrees of directness. The view that only direct damages should be compensated which is said to be a doctrine of Greek and German law, is useful according to Stathopoulos, for typological classification of causation cases only and not for determining liability. The development of causation theories provides a more flexible ground for a reasoned limitation of liability. (Σταθόπουλος 1).

156 It was thought that third party losses were certainly too remote to deserve compensation. This argument derived, in a contractual setting, from the idea that only the creditor could be injured from a contractual violation and that third parties' losses were thus remote. This logic, resembling the argument that in *Drittschadensliquidation* it is the creditor injured in his legal rights bu the third party suffering loss, cannot apply in delict

157 The reason was the restrictive enumeration of the delictually protected interests.

158 Ζέπος 'Η κρὶσις του δὸγματος της ελευθερὶας των συμβὰσεων εν τω συγχρὸνω Αστικώ Δικαὶω' [the crisis of the doctrine of the freedom of contract in modern civil law] AID 1940 137, 'Ενοχικὸν Δὶκαιον, Α' Μὲρος' [law of obligations, first part] 1977 169, 363.

159 The intervention of a third party in a contractual relationship is in this view an evidence of the moderation of the doctrine of contractual freedom and of the introduction of social oriented considerations in the law of obligations. Zepos makes this point reviewing the Roman law, the contribution of the Canonists, the School of Natural law, the French Code Civil and the BGB (Ζὲπος ΑΙΔ 1940 137.).

160 This policy should be preferred from that focusing on the (economic and social) security of transactions. Zepos thinks that the philosophical ideas over the autonomy of will were incompatible with the spirit of the 20th century.

161 He thinks that liability should be released from incumbent doctrinal approaches which narrow down the scope of fairness. Zepos does not go into detail as to the form contractual solutions could take. He generally does not enter into detail as regards the whole problem of third party loss. He does distinguish for instance between the cases where a new obligation connecting the third party and one of the contracting parties is

Balis[162] seems to reject the application of AZT[163]. He foresees the possibility of compensation for third party loss when the loss is reflected to the contracting party (that is, when the latter is liable to compensate the third party loss), and in cases of undisclosed agency. What he suggests is not the application of the AZT, but an exception to the exclusion of compensation for consequential losses[164]. Based on the German idea of coinciding interests ("*koinziedierendes Interesse*") the creditor would claim compensation for the satisfaction of the third party[165]. The third party should resort to the law of delict or to special statutes in order to seek compensation for his loss which is separate from the creditor's losses[166].

Fourkiotis[167], in a more systematic reference, thinks that the gap which exists in German law on third party protection exists in Greek law as well. This is clearly not the

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created by law and the cases where a direct claim but not an obligational link connects the third party to one of the contracting parties.

162 Μπαλὴς, Γεὼργιος Ἐνοχικὸν Δὶκαιον-Γενικὸν Μὲρος', [law of obligations, general part] 1952, 90-92.

163 However he notices the possibility of an injuring effect to have repercussions on third parties in cases of a transfer of the performance interest.

164 When the loss inflicted upon the third party has repercussions on the property of a contracting party, as when he has a duty to compensate the injured third person, the latter suffers loss and is entitled to claim compensation for the third party injury. although, in principle one can claim compensation for his own loss only. The reason for the exception in this indirect loss case (where, in principle, no compensation is allowed) that the contracting party is suffering loss. The third party compensation is in this case indirectly only contractual. The loss compensated is the loss of the creditor. The third party can ask compensation of this loss on the basis of an indirect claim; still however it is the creditor's loss for which compensation is asked.

165 Balis is refering to cases where third party loss usually occurs. Such are a contract for the construction of a building, undisclosed representation by a forwarding agent, a sublease where the sublessor asks from the sublessee the loss the lessor suffered if the sublessee retained the house after the expiry of the sublease which was the same with the expiry of the lease, a sale with dispatch of the goods where the seller includes in his claim against the carrier the buyer's loss if he is responsible for that, and the case of a contract for the favour of third parties where the promisee can ask compensation if he is liable for the third party loss from a contractual violation.

166 Balis's priority is to protect the contracting party. He did not consider that the third party might be in a similar position to that of the contracting party, entitled to the value of performance for instance.

167 Φουρκιὼτης 1944, Φουρκιὼτης 1964, 301.

From a contractual violation only the contracting party can suffer losses, be considered an injured party, and entitled to ask compensation. As regards the law of delict only those directly injured from the injuring fact can ask for compensation; the third parties are exceptionally only compensated (§§928, 929 AK). Fourkiotis recognises the possibility of a third party injury from a contractual violation, and refers to French and German solutions.

case as can be seen from the potential of the Greek law of delict and the range of statutory and judicial protection for third party beneficiaries[168]. The view can be explained as referring to a gap in contractual protection only.

Fourkiotis supports the acceptance of *Drittschadensliquidation* in cases where the execution of a contract depends upon the fulfilment of another contract[169], where the debtor is unable to perform because his debtor has not performed[170]. A typical example is the case of a forwarding agent not having received the things to be transferred[171]. His mandator is suffering the loss[172]. It would be unacceptable if the wrongdoer escaped liability. The debtor should claim his creditor's (the third party's) loss[173]. Fourkiotis, like other

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168 Fourkiotis's view, focusing on the similarities between the two systems ignores their differences as regards historical development, particular provisions, the use of equity provisions, the position of the judiciary etc. The provision on the good faith (§242 BGB) in Germany covers areas which in Greece are covered by the corresponding § 288AK, and its specific expression §388 AK (which gives the authority to the courts on request to abolish of modify the contract in the cases where the circumstances have changed dramatically), but also from the distinct principle forbidding the abuse of a right of a freedom to act; §281 AK. The latter has acquired in Greek law greater importance than § 288 AK: among other reasons it is more easily applicable and does not demand the creative involvement of the judiciary to the same extent as the good faith provision. (Στὰθοπουλος 1, 100). Greek courts do not share the daring spirit of their German counterpart and they are less sensitive to the suggestions of theory. As discussed before, the judicial style of the Greek courts, especially as regards the reasoning of the decisions is nearer to the French model; the reasoning of decisions is generally short. Kerameus in the *Introduction t*Kerameus & Koziris eds, 265 at 286. See Lawson "Comparative Judicial Style" *AmJComL* (25) 1977 364, for a comparison between the attitudes of the courts in different jurisdictions.

169 Cases of coinciding interests, according to Fourkiotis.

170 Even if the former is not liable for non performance. This is the case where in German law §281BGB, would have applied.

171 The agent might, as is usually the case, have bought the things acting in his own name.

172 The agent cannot, in principle, claim his mandator's loss as the agent himself sufferred no loss which he could claim on a contractual basis.

173 In the case of a building construction where the contractor was found in default (and liable to compensate the person who employed him) because of a delay in the delivery of the materials, the contractor can sue the supplier asking the damage of the third party which he (the contractor) has to pay.

In the case of a sublease, the sublessor can sue the sublesse for the loss his refusal to deliver the leased thing caused to the lessor.

In the case of a forwarding agent who is liable to the sender (seller) for the timely arrival of transported things, the seller can claim the buyer's loss which he is liable to cover.

These are not necessarily cases where AZT would apply, if instead of the contracting party a third party suffered the loss of non performance or delayed performance. However these cases are usually encountered as evidence of transactions where others apart from the contracting parties are affected.

theoreticians, thinks that the forwarding agent should be allowed to calculate the mandator's loss as his own, his model resembling *Drittschadensliquidation*[174] .

Litzeropoulos[175] discusses third party loss cases[176]. On the basis of the view that third parties are sufficiently protected in delict, he finds contractual protection unnecessary[177]. Most performance-related[178] third party loss cases, could be covered by a combination of §914 AK and §281 AK[179], since harm to property as a whole[180] constitutes unlawful behaviour[181]. The argument that harm to property as a whole is not unlawful and the argument that the injury is a remote consequence of the behaviour, should be rejected as abusive (§281 AK). However, Litzeropoulos notes that contractual third party compensation is advantageous[182] for the third party[183], especially when it is difficult to

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174 Judging by the emphasis he lays on the injustice in question and by his argument for the existence of the same gap in the Greek and German law, he seems to believe that AZT could be applied as in Germany

175 Λιτζερὸπουλος ΑΙΔ, 1940 158, Λιτζερὸπουλος 1960, Ἑρμηνεία Αστικοὺ Κώδικος αρθρα 297-298, και 410-414 AK, 1949 [interpretation of the civil code]. He considers reasonable if someone has a claim for his own loss only. In the cases where someone is rendered liable by statute for loss which he did not cause himself (as in the case of liability for employees §§334, 922 AK, §§278, 838 BGB) he can turn against the actual injurer transferring he loss. It is his own loss again. He notices that claims for third party loss existed in exceptional cases from Roman law already.

176 As he puts it, in some cases due to the particular structure of the contract or due to a pre-existing obligation, the debtor, by not fulfiling his duties is injuring not the creditor but a third party.

177 Contract is in his views, an indirect means for compensation, in contrast, presumably, to the straighforward law of delict. Litheropoulos is using the example of a forwarding agentwho contracts for the supply of goods in his own name but for his mandator's account. The agent cannot perform to his mandator because his contracting party does not supply him with the goods which were bought. The mandator is suffering the loss.

178 Meaning when the third party has an interest in the performance.

179 His view, which is legally sound, evidences the application potential the abuse of right provision.

180 Worsening a person's fimancial position.

181 Σταθόπουλος 2.

182 He focuses on the transfer of the contracting party's benefit (the right to claim compensation) to the actually injured party. He refers to the cases of abolition of the relativity principle in the AK (§§ 716 (3), 825 AK for instance), and he uses examples from situations of undisclosed agency. In the latter case this transfer is accomplished by the transfer of the agent's claim to the injured party or the transfer of the compensation which was awarded to the plaintiff.

183 The fault of the injurer is presumed (contrary to the law of delict), and provisions on limitation are usually more in favour of the injured party. A delict might not be accepted on the other hand. He does not examine whether the third party would acquire a direct claim or not.

establish delict or in the case of accidental losses[184]. On the basis of the AK provisions protecting third parties[185], he thinks that it is possible to allow direct third party claims[186]. He argues that the defendant should be held liable even if he was unaware of a third party interest, but his liability should be limited on the basis of foreseeability grounds[187].

Stathopoulos[188] is making a clear distinction between the German mechanisms. He endorses the acceptance of *Drittschadensliquidation* on the idea that the economic value of the contract has been transferred to the third party[189], supporting a direct third party claim[190] on good faith (§288 AK).

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184 Litzeropoulos thinks that more often there is liability without fault in contract law than in the law of delict.

185 The AK provisions which allow a third party claim, especially if compared to the BGB corresponding provisions, can be taken as indicative of an underlying general principle.

186 Both solutions; the assignment of the creditor's claim (compulsory in the light of particular procedural provisions) and the acceptance of a direct claim by the third party are legally sound according to Litzeropoulos. The acceptance of direct third party claim facilitates the purposes of the mechanism, leading to speedier solutions and avoiding the risk of the claim being part of the creditor's property and thus being subject to the debtors' claims (in case of liquidation) or part of the inheritance property. A direct claim can be based on the relativity exceptions of the AK. See §§716(3), 825(2), 599(2) 819, AK, which offer a direct right to the third person. Similar is the position in the Swiss law. §338 AK which could justify an assignment of claims is less qualified than its correspondent §281 BGB. According to §338 AK if a debtor was released from his obligations because it was impossible to perform due to an event for which he is not liable, he must give to the creditor everything he obtained as a consequence of the impossibility to perform.

187 The most popular idea on a fair limitation of the injurer's liability would be to rely on causation; on the (prevailing) adequate cause theory which limits liability to foreseeable damage. According to this theory a person is liable for the loss his behaviour had the tendency to cause judging by its nature and purpose. This tendency could have been foreseen as the *ex post facto* examination, from the point of view of a prudent observer could indicate. This theory prevails still in Greece and in Germany, although, especially in the latter jurisdiction, it seems to be retreating.

188 Σταθόπουλος 1, Σταθόπουλος 287-288ΑΚ, 297-298ΑΚ Γεωργιάδης-Σταθόπουλος.

189 In his views, when third parties are affected by a contractual violation the observancing of relativity might lead to unfairness. He does not endorce a general exception to relativity as he thinks it could lead to unlimited liability. Some third parties should, he notes, be allowed to claim compensation on a contractual basis as it might be difficult to establish delict while contractual liability is advantageous for the claimant. The AZT, he explains, involves loss suffered from the violation of the duty to perform. In AZT cases the creditor could have not been injured since the economic value incorporated in the contract has already been transferred to the third party. This value transfer is the reason for what in Germany is presented as transfer of risk or loss characterising *Drittschadensliquidation* cases. He makes a somewhat different interpretation of German law and he distinguishes one case of compulsory (statutory) transfer of risk, in a sale by dispatch where the allocation of the risk is the same as in Germany (§524 AK). The reason why the creditor has a compensation claim is his holding of the economic value of the performance. The

Regarding the contract with protective effects, which he characterises as an example of an obligation in a broader sense[191] -- where obligational duties are defined in general terms -- his view is that compensation should be provided when the violated duties affect the performance which was directed to the third party or to the latter as well[192]. Injured parties, not linked to the obligation, have to resort to delict[193] . Although

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unity between performance claim and interest in the performance value has been disrupted in AZT cases. A third party is entitled to the economic value while the creditor is still entitled to the performance in a material sense. The debtor should have a compensation duty towards the third party.

190 It would be against the good faith principle (§288 AK), were the debtor to be released from liability. §288 AK entitles the third party to contractual compensation. The good faith principle allows a direct claim so that the third party will not be dependent upon the creditor's intentions. The debtor is not burdened in excess to what he would have been had his creditor been the injured party. The creditor can for instance assign his contractual rights to another person without the need to inform the debtor (§477AK). If the debtor compensated voluntarily the creditor he should be released from liability (§417 AK). The third party can claim the compensation amount on the basis of § 338 AK. Stathopoulos rejects the argument that §288 AK applies only in situations where two parties are involved. The development of the principle and academic opinion seem to support this view.

191 These are relationships where performance is not adequately specified so as to be considered obligations in the sence described in §287 AK (§241 BGB). The other elements of an obligation are present, and the broader outline of the required behaviour can be defined with some clarity. One example of this looser bond can be found in the relationships created by the secondary duties, which can vary in terms of seriousness and/or the point in time they are created (the start of a relationship or during its operation. Stathopoulos in his approach of obligations in a broader sence, distinguishes between relationships which do not suffice for the creation of a fully fledged obligation. The obligations in a broader sense presuppose the existence of a link of certain seriousness between the parties. This condition is not satisfied if both the parties belong to a social whole and are bound to keep a socially acceptable behaviour for instance. Injury caused from the violation of the general social duty to be considerate of the interests of the others will be dealt with as a delict. Secondary duties can be imposed on the creditor too. The creditor should for instance take safety measures in order to protect the debtor's employee who comes in his premises for a repair. Σταθόπουλος 1, 80 et seq.

192 The possibility of third party loss due to violation of secondary, protection duties which derive from the good faith principle, is distinguished in two categories. The notional element characterising the first is that it concerns performance directed to third parties as well. These are not cases of a contract for the benefit of third parties. The third parties are not entitled to ask performance. The debtor is not bound to the third parties with an obligation in the sense of §287 AK (§241 BGB). (Obligation (ενοχή) according to §287 AK, is the legal bond by which a person (the debtor) is compelled to render performance to another (the creditor). The violation of the secondary duties (to inform, to take protective measures, etc) can cause loss to the third parties which will be different and separate from the loss the creditor might be suffering. This is possible because these duties affect the satisfaction from the performance to which third parties are meant to participate. The violation of these duties should according to good faith create repercussions for the debtor. Only those closely related to the obligation, who are going to

he makes extensive references to protection duties, his approach seems to suggest that there is little scope for an extension of the contract[194] in the light of delictual protection. Stathopoulos argues for contractual claims by consumers against manufacturers. His approach, far from being complete, contradicts stable case law[195].

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use the performance and are injured in this capacity should be protected contractually. The circle of the protected persons should be known or be objectively recognisable by the debtor.

193 At first this would seem the natural option, the proper domain to deal with the loss of a person who is not a party to the contract. The criteria for contractual protection are not derived from a looser (pre-existing) link alone, but also from the social and economic scope of the relationship in question, Σταθόπουλος 1, 80 et seq.

194 He takes a conservative view of this extension influenced by the contract in favout of third parties.

195 Product liability is treated separately, due to it special characteristics. The consumer will have no contractual claim against the producer (in the absence of a contractual bond) nor against the seller (he will usually not be in fault). The delictual claim against the producer, if accepted, might not lead to satisfactory results. In this case the object of performance is determined to be used exclusively by third persons. The producer-consumer relationship is closer in social and economic terms even than that of two members belonging to the same society. The producer can foresee that the circulation of the product is likely to create risks for consumers. On the basis of his entrepreneurial activity, he is burdened with secondary duties of safety which he undertakes when marketing the product. (It is not an obstacle that the consumer is not defined yet). Stathopoulos's ideas are interesting but incomplete in the light of the complex product liability law. Greek case law treats steadily cases of product liability on the basis of delict. As was emphasised in a case (Εφετείον Αθηνών Appellate court of Athens 1039-1979, NomB-27 985) where defective copper pipes were used for the construction of houses, the unlawfulness can be established on the basis of the violation of rules which concern the interests of the injured party too. A duty can be imposed not only from a special statute, but from the general clauses (§§200, 281, 288 AK). The producer failed to inform the consumers of the dangers the use of the pipes could entail. The existence of a series of sales between the producer and the user of the product, did not abolish the delictual liability of the producer if the injury was causally related to the defectiveness of the product. It was noted in the decision that, as in Germany, the defectiveness did not concern qualities which the product should have according to the contract, it did not concern real defects that is but it involves the existence or the absence of qualities which could render the product dangerous. A defective product is a dangerous product, actually more dangerous than (not defective) products of the same kind. There is therefore a judgement on the limits of danger each time, a judgement which is meant to be objective.

In another case concerning the sale of bier, a bottle of which contained due to insufficient washing, acid leading to consumers suffering burns, the producing company failed to apply during production the measures which were indicated for the safety of the bier. (Εφετείον Αθηνών Appellate court of a Athens 671-1979, NomB 28 791). (The question of product liability will be discussed further later in the chapter.).

In modern theory (Diedrischer NJW 1978 1281) it has been noticed that an indirect relationship is created nowadays between producer and consumer which is the product of advertisement and generally the attempts of the producer to influence the purchasing will of the consumer. The producer is exploiting the potential of mechanised mass production. He knows that that the production of defective products is inevitable. The chain of sales finally gives the in-between sellers the role of the simple distributor. Under this view the idea of a contractual or quasi-contractual liability of the producer were promoted.

Although his suggestion that the mechanism's basis should be §288AK[196] could be taken to imply a priority for contractual solutions, it is doubtful whether he considers contract as a viable option at all. Delict, as he understands it, would certainly cover third party loss[197]. He is right to mistrust the readiness of the judiciary to embark upon developing contractual solutions[198].

The contract with protective effects is examined briefly by Georgiades[199]. He thinks that Greek law could accommodate such a mechanism[200], provided it has a narrowly defined protective range, and that it is actually preferable to delict[201].

Under contract, the injured party is likely to lose the opportunity to claim moral damages. The prevailing view is that the law of delict provides the optimum vehicle for the liability of the producer. In this case the duties of care in the use of the product were not fulfilled. Entitled to compensation is the injured party irrespectively of whether he is the consumer or a mere user or a third party.

See under "Product liability", in Chapter 2, and under "Examples: Misrepresantation and product liability" in Chapter 4.

196 He lays emphasis on the provision's potential in formulating legal duties and liabilities. Stathopoulos devotes a considerable part of his work in the examination of §288AK. He considers that this provision which introduces social and moral considerations in the interpretation and development of the law of obligations gives the ideological stand-point of the AK as socially oriented in contrast to the ideologically neutral definition of the obligation in §287 AK.

197 Σταθόπουλος 2, 100 et seq.

198 As will be discussed later, the courts have found it easier to expand delictual liability since the general clause of §914 AK is capable to accommodate many cases of injury.

199 Georgiades (Γεωργιάδης 410-415AK Γεωργιάδης Σταθόπουλος) is refering to this mechanism in his examination of legal notions which present similarities to the contract for the benefit of third parties. In his views it is as a concept developed in Germany by case law and theory which extends the provisions of the contract in favour of the third party. He gives a brief but accurate account of the mechanism focusing on fact that the secondary, protection duties were owed to third parties.

200 He seems to consider that the Greek law, being similar to the German law has the background which would enable the operation of the mechanism in question. He does not enter into detail with regard to the possible bases of the mechanism. However, judging from his references to the system of obligational liability (secondary duties, liability from the violation of an omission duty etc), it seems that he is not thinking of the issue of the legal basis as involving the contract for the benefit of third parties.

201 This is the impression from his work as a whole. Georgiades when examining the law of delict (Γεωργιάδης 914 AK Γεωργιάδης Σταθόπουλος) thinks that the term "third party loss" should be avoided because it is associated to a problem of contract law. In the law of delict he says "indirect" losses, including those suffered by a third party are not compensated. He thinks in addition that only exceptionally should delictual liability be accepted for the violation of obligational rights. He seems to consider the contractual solutions as more reasonable than delict.

Sourlas[202] opposes the introduction of contractual mechanisms for third party loss in Greek law, although he does not deny the compatibility of the German mechanisms to the Greek system. Third party loss is compensated under delict; a crucial element of the development of the German mechanisms is absent[203]. *Drittschadensliquidation* alone could be applied in Greek law and only if there is no delictual protection. In the Greek system the question would not be to establish protection but to extend contractual liability against delictual liability[204]. The mechanisms, despite the advantages of contractual solutions[205], would represent unnecessary legal transplants undermining the integrity and logical consistency of the Greek order.

Finally, Kefalas is an ardent supporter of the introduction of both mechanisms in the Greek order. It is largely his arguments, to a degree consolidating previous approaches, that will be discussed in the reference to the critique on delict, delict's potential, and to the possible means to introduce contractual solutions. Regarding the contract with protective effects, he places greater emphasis on the extent and kind of judicial law-making, which will be marginally discussed in this work. However, his suggestions depend on the promotion of a judicial activism which seems quite unlikely, as can be seen from the moderate tone of the other academic suggestions so that his arguments seem less reliable.

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202 Σούρλας Παραβίαση συμβατικής υποχρέωσης ως λόγος αδικοπρακτικής ευθύνης προς τρίτους' [Violation of a contractual obligation as a reason of liability towards third parties] NomB 31, (1983) 449. Sourlas is referring to the case of electric supply to the chichen farm where the electricity company was found liable for compensation (Εφετείον Αθηνών 3148-1982, -Appellate Court of Athens-, NomB-1983-, 519). The decision he argued was based in deelict was accepted although the plaintiffs has suffered losses because his obligational right has been affected, namely the right to claim contractual damages from the owner. He noted that the possibility of the contract with the electricity company, to be a contract for the benefit of a third party was examined and rejected, on the basis of its content.

203 Σούρλας NomB 31, (1983) 449.

204 There is issue of protecion not being available (as in Germany) nor of providing a better solution.

205 Sourlas himself notices the disadvantages of the delictual claims. In the Greek law of delict apart from the existence of a general clause (§914 AK) the § 922 AK on the liability for employees, is better equiped that its German correspondent §837 BGB. Delictual claims are more difficult to support than contractual ones, as far as the injured party is concerned. Contractual solutions could make liability more predictable and allocating risks in a fairer manner.

In sum, the majority of the Greek theoreticians agree on the compatibility of the mechanisms with the Greek order. This means little once the similarity between the Greek and the German system is taken into account. The introduction of *Drittschadensliquidation* enjoys weak support usually under the implication that the available means are not satisfactory. Theoretical views are unlikely to have any serious impact on case law especially if there does not seem to be a particular need for reform[206]. This reaction of the theoreticians is reasonable once the potential of the law of delict is taken into account.

3.9. Conclusion.

It seems that under the AK the courts felt no need to develop contractual solutions, although the latter were not expressly rejected. The courts could resort to delict, to the AK provisions protecting third parties[207] , and to the expanded contract for the benefit of third parties (§410AK)[208] while third parties usually had an indirect claim[209].

4. Critique on the delictual option. Contract v. delict.

4.1. Delict's potential.

One point of critique, concerning the fulfilment of the unlawfulness criterion towards establishing delict, has already been discussed[210]. Delict is also targeted as

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206 In any case the impact of the Greek theoreticians in case law is minimal in comparison to that of German theory on German courts' decisions. See Allexy and Dreir 118, on the effect of academic lawyers on the case law in Germany.

207 As mandate or deposit (§§716(3), 825 (2)AK) occuring in the contex of various relationships involving services, employment, works, safeguarding, carriage etc, enable third party protection.

208 Courts (especially lower courts) have shown readiness in expanding the application of the contract for the benefit of third parties. Lease contracts, transport contracts, donation, mandate, employment contracts, contracts for works, a contract with a condition to prefer a particular third party for the conclusion of a future contract,life insurance and liability insurance in the favour of a third party, a contract for alimony in favour of third parties are some of the examples where the AK provisions have been applied. (Γεωργιάδης 410-415AK Γεωργιάδης-Σταθόπουλος). Academics support the use of the contract for the benefit of third parties in other cases too; one of them being the transfer of property rights. They argue that the provisions should apply not only with regard to a promise for transfer but also with regard to the transfer of real rights in land. This view has been sometimes accepted by the courts.

209 §72 of the Code of civil procedure.

210 See under "Delictual protection" in this Chapter.

unsuitable for third party loss cases. However, the requirement of delict will most likely be fulfilled[211].

It is argued that liability under delict, in contrast to contractual liability, is likely to be excessive and get out of control as regards the circle of protected persons. There are significant and effective controlling mechanisms. In France, for instance, control of exposure for pure economic loss is accomplished by not accepting *"faute"*, or by considering that the loss is not certain, or by finding that there is no sufficient *"lien de causalite"* [212]. It is not difficult to envisage similar trends in Greek case law, basically through its causality mechanism[213]. Not establishing unlawfulness (and maybe not finding *faute*) is, as not

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211 This is certainly the case considering the extensive protection under delict and the relative judicial decisiveness. As said, in the last extent the injuring behaviour is a violation of one of the general equity clauses of the AK.

212 Kötz *Tel Aviv University Studies In Law* 10 (1990), 194-213.

213 The existence of a causal link between the legal reason for which a person is held liable and the loss is a requirement for the establishment of the liability to compensate (§297 AK). The approach to causality is important for the extent of the defendant's liability.

In France there are specific provisions in the Code Civil, which define restrictively the losses for which compensation is owed. (§1150 provides that only the losses which were predicted or could have been predicted are compensated, if non performance was not willingful. §1151 provides that compensation is owed only for the direct consequences of a violation of a contract.). The Swiss Code of Obligations vests the judge with the authority to define the kind and extend of compensation according to the importance of the improper behaviour (§§43, 99). In English and Scottish law no liability for remote damages is accepted. Decisive is the criterion of reasonable contemplation or reasonable foresight with regard to the loss.

Various theories on the problem of the causal link have been developed, especially in Germany. They exercised a powerful influence on the Greek (and the Swiss, and Austrian) legal orders.

Three are the basic views. 1. The theory of the equality of the causes (of the *conditio sine qua non*) is an application of causality as it is understood by the natural sciences and logic. There is a causal link between an action and a result when the former is a necessary condition for the production of the latter. Any result which would have not been produced if the cause (condition) had not taken place is the outcome of this cause. This theory is abandoned because it expanded liability excessively. Logically, however it is necessary for the existence of liability.

2. The theory prevailing in Greece is the theory of adequate cause. The causal link requirement of liability is fulfilled when the cause is adequate. This is the cause which has the tendency and potential to lead to the loss according to the usual development of events. Liability is owed for the loss cased by the adequate loss. The concept of adequacy is somewhat elusive. The prevailing view accepts as decisive the ability of the third observer, the average prudent person as to the adequacy of a cause. The courts apply retrospective prediction. This theory is criticised because it focuses on the statistical possibility of occurrence of damage. It is questionable whether it corresponds to the spirit of the legislation.

allowing tort for fear of opening the floodgates to claims in common law, policy-based and normatively doubtful. If a policy argument should be followed this would be to leave the doors of unlawfulness, *faute*, duty of care open and stem the expansion of liability on causality grounds that in in third party loss is expressed in terms of predictability (Needless to say that the controlling mechanisms referred to before apply also systems where the law of delict is different from the Greek and the French.)

It is alleged that under delict it is at least doubtful whether the contractual context will be taken into account[214]. (One of the suggestions for improving third party pure economic loss in common law is to take the contract into account[215].) Inevitably, the contractual relationship will be considered in assessing the defendant's culpability and the circumstances of unlawfulness[216] -- any different approach would be seriously flawed -- as is illustrated in the case with the electricity supply to the sublessee[217]. The contractual context might be important for the acceptance of "reasonable reliance"[218] a vehicle to

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3. The theory which was developed in Germany and Austria, and which seems to gain ground against the theory of adequate cause, considers as crucial the purpose of the rule of law establishing liability. Important is to identify the interests the law protects and the extent they are protected. At times it is difficult to define the purpose the law serves.

There are ideas supporting that all the theories could be applicable but in different stages of examining the liability of a person to offer compensation to another. The progressive application of stricter criteria for the limitation of liability is thus supported. (Σταθόπουλος 2, 265 et seq, Banakas 50 et seq. See also Honoré, A. M. "Causation and Remoteness of Damage" in *International Encyclopedia of Comparative Law*, v.XI, chapter 7.)

214 Delictual liability in third party loss would depend heavily on the underlying contract. Causality determined by the foreseeability of the average person, (in order to fulfil the prevailing adequate cause standard) will be examined in the context of the contractual circumstances.

215 See Markesinis and Deakin, 55 (1992) MLR 619-646, and Markesinis, 103 (1987) LQR 355,

216 The contractual setting will provide the background to evaluate the capacity under which the injurer might have been acting (confidential, professional). *"Reasonable reliance"* (Banakas 163) as a factor to establish or enhance liability will be examined under the same perspective. The question of a violation will be considered with the underlying relationship in mind. Good faith violations will in many cases be meaningless without taking into account the "triangular" situation where the third party loss occurs. See Markesinis 25, (1991)*The International Lawyer*, , 953-965, and "The need to set acceptable boundaries between Contract and Tort" and 106, LQR (1990), 556-561. The unlawfulness in the case of professional conduct or a relationship of confidence will be appreciated on the special features of this relationship.

217 Εφετείον Αθηνών 3148-1982 (Appelate Court of Athens), Αρμενόπουλος, (1973), 94. It is the case involving the supply of electricity top the sublessee of a chicken farm.

218 Banakas 163.

establish, enhance and limit liability[219]. The electricity supply case referred to above[220] indicates the possibility of taking the contractual context into account[221]. In principle at least, neither the loss requirement nor causality differ between contract and delict. Even if this is to a degree a product of the unifying perception of the law of obligations, it is reasonable to say that the practical spirit of the courts handling a case operates in the same manner despite the fine print of doctrine. Neither the German courts labelled the mechanisms as contractual nor Commonwealth courts necessarily rejected pure economic loss claims in tort because pure economic loss was supposedly compensated in contract only[222].

It is thought, in particular, that defences based on the contract will not be valid against a claim in delict[223] -- something which might be unfair for the defendant. This, it is said, is the case in the French and German systems as well[224]. Unfortunately there is

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In one leading German case (BGHZ 41 123; NJW 1964 720, JZ 1964 457) the employees of a contractor damaged an electricity supply cable. The latter supplied the plaintiff's business. As a result of the six hours power cut more that 3,000 eggs were destroyed in the plaintiff's incubator machine. The defendant argued that the plaintiff was only indirect victim, not entitled to recover in delict. The court rejected this argument. The plaintiff was entitled to the recovery of his property loss, even if the causal connection was, so to speak, indirect. The court held the the plaintiff's loss was foreseeable; the fact that it could not have been predicted precisely did not refute the existence of an adequate causal link. The loss was a typical consequence of the damage to the cables and therefore it was not too remote. This case is an example of the fact that the courts accept more easily liability for physical loss.

219 See however under "Third party economic loss: Contractual approaches", in Chapter 5, the references to reliance as an untrustworthy foundation of liability.

220 This is the case where a chicken farming business, lessee of the owner who had contracted with the electricity company, suffered losses due to a power cut for which no notice was given to the owner and lessor of the business. The electrical company was obliged to give such notice to her contracting party. It should be reminded that the company had not been informed about the lease as provide in the contract with the owner. (Εφετεῖον Αθηνῶν [Appellate.Court of Athens], 3148-1982, NomB 1983 519).

221 In civil law systems different forms of obligations are treated in a unified manner, (or more unified than in common law jurisdictions) and fault (in the sense of *culpa*) is a requirement of contractual and delictual liability alike. In such systems -- examples being the Scottish, the French , the Gernman and the Greek, see Herbot in Furmston 137. -- basic consepts such as foreseeability, or negligence related to the recognition of liability do not in principle differ between contractul and delictual applications. These factors of liability will be determined on the terms of the contract in question.

222 They did no infer a duty of care.

223 See on the issue of exemption clauses; Eörsi, Gyula "The validity of clauses excluding or limiting liability", *AmJCompL* (23) 1974, p.215.

224 This according to Banakas is true for France but it could apply to Greece, the U.K. and Germany. (Banakas 159 et seq.), an example, allegedly, of the detachement of delictual protection from transactions' needs, and of the incapacity of the delict to allocate risks efficiently.

little case law on which to base inferences. It can be argued, however, that the contractual defences could be effective through the application of general equity clauses, especially §281AK. Excluding, for instance, liability for physical injury will most likely be illegal. A claim ignoring these defences or in excess of a limitation of liability which the plaintiff knew about, could be rejected as an abuse of right.

It could be supported, that under delict it is more difficult for the courts to balance the interests involved and reduce economic risks for the benefit of economic activity as a whole, and towards stability in law[225]. Such arguments make less sense once the same equity principles apply in either contract and delict. Especially §§281 and 288AK can be applied to formulate the application of delict as they would to shape contractual liability and the courts, whether under contract or delict, will be focusing on the same issues such as the defendant's foreseeability and the content of the plaintiff's claims. Certainty and stability will not be higher under contract. The basic elements of a contractual approach can be incorporated in delict. Moreover, case law depends, after all, on the consistency of judicial policies, and the courts are accustomed to apply delict rather than contract when no contractual relationship exists. (Regarding the application of equity principles in delict, it should be noted that such principles, particularly §281AK, are generally applied by the courts in delict, basically in order to reject unjustified claims. Such claims are, for instance, claims for damages to which the claimant has contributed, or claims for losses resulting from risks which the plaintiff had undertaken in the context of the particular transaction or of his , for example, professional activity. However, as is the case with third party loss and pure economic loss, related case law has not been accounted for specifically. The employment of such equity princples in delict is not exceptional doctrinally.)

It could be said that delict is meant to operate in two-party situations, and that it is less suitable for cases largely understood to occur in the context of voluntary relationships. Delict is focused on personal fault and has a strong punitive, preventive and

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225 See the concern of the authors in Markesinis 25, (1991),*The International Lawyer*, 953-965, and "The need to set acceptable boundaries between Contract and Tort" and 106, LQR (1990), 556-561, Kötz *Tel Aviv University Studies In Law* 10 (1990) 194-213, Rabin 37 *StanfLR*1985, 1513-1538, Fleming 4 (1984)*OxfJLSt*,, 235-243.

educational element, that make it attractive as an option (especially as far as deterrence is concerned[226]), but which should not be of any major concern in a basically contractual setting. These thoughts are unsubstantiated. Contractual liability is focused on personal fault as well. Compensation itself entails a *punitive* element, the only doctrinally acceptable punitive aspect of the law of obligations[227], and, in the third party loss setting, compensation could be targeted equally effectivelly whether in contract or delict. Provided the contractual context is taken into account, it is difficult to see the courts awarding, for instance, higher damages in delict or in contract in a third party loss situation. There is no particular blameworthiness in third party loss cases that would justify some deliberate policy of stricter treatment in delict than in contract[228].

Moreover, there is great interchangeability between delict and contract in the Greek system, greater than in Germany, due to the application of a general delictual clause[229]. Concurrent liability is possible[230] and it is usual in practice to call upon both

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226 See on deterrence under "Economic effeciency" and "Deterrence" in Chapter 4, and under "Economic arguments" in Chapter 6.

227 In contrast arguably with the situation in American law where, under tort it is a usual phenomenon to have high punitive damages awarded against defendants.

228 Reccall that American or Commonwealth courts have largely ignored economic efficiency arguments on pure economic loss. As the reference to the economic analysis and suggestions on pure economic loss (especially in relation to insurance considerations) could indicate, courts do not usually engage in self efacing accounts of their decisions character and repercussions, as, for example, punitive or educational. See The arguments from "Economic efficiency" in Chapter 4.

229 See under "Suggested reform: Increased contractual input" in Chapter 7, for a more comprehensive account of the difference between systems that employ a gebneral delictual clause and those that do not.

230 The prevailing view in Germany and Greece is that when the non fulfilment of a contract is, independently of the contract, an unlawful act, then the liability can be concurrent; can be based on either bases. The injured party can choose either for his claim. In France the idea is that the rules on contractual liability prevail as special, and cannot be concurrent with the rules on delictual liability. The injured cannot choose the basis of his claim. In Greece however it should be accepted that to the extent the violation of a contract would not have been unlawful without the existence of a previous obligational duty, then the French view should be followed.

It was disputed in the past whether the injured party has in this case one claim with two different bases or two different claims. Today, contrary to the previous opinion, the former view is accepted by the majority. A claim is a power the legal order is offering. It is a matter of legal techniqu; for the achievement of the same result two means are available. The claimant's legal power is not increased. The dispute has no great practical importance. A teleological interpretation of the particular provisions for each claim will indicate the issues that require uniform treatment as limitation period for istance. The

delict and contract to establish a claim. Considering that the law of delict is open ended, as regards the forms of behaviour it could involve, while the law of contract remains 'specialised' in voluntary arrangements, this interchangeability between the two depends, to a considerable extent, on delict[231]. Instances not classified as should plausibly be treated in delict. The unity of civil liability reflects a realistic focusing on compensation. Third party loss is not a distinct problem of the Greek legal order and a suggestion to distinguish it as a separate category[232], is out of place for a system with such a unified perception of civil liability.

The main point made here is that the law of delict seems to be adequate to cover third party loss, or, more accurately, to have this potential. Whichever infelicities the law of delict presents can be rectified in its judicial application, on the bases of existing rules, most likely the general clauses. The law of delict is flexible enough to accommodate a variety of cases, the role of the courts being to adjust the law accordingly. Thus, noticing the special needs of the third party loss situations, would lead to greater concern for the contract's context and encourage relying on the contract as the standard on which of equity

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application of the rest of the provisions will depend on the selection of a claim by the plaintiff. Often in suits an alternative, auxiliary basis for a compensation is provided.

See Swanton 10 (1996) JCL 21-52, for an account of concurrent liability in Commonwealth systems. She generally argues that in modern law concurrent liability is more likely. See also under "Advantages" "The balance between contract and delict" in Chapter 5, where it is argued that contract and delict are more closely interchangable in Scots law than in traditional common as the latter is still represented today by English law.

231 As argued in "Suggested reform: Increased contractual input" in Chapter 7, legal systems delict is 'naturally' employed for all relationships that do not specifically fall under some other heading of civil liability, in all systems. In systems with a general delictual clause, delict operates effectively as a safety net for civil liability, in a sinse, containing, surrounding civil liability.

232 Similar to the idea to split pure economic loss in American law. See Schwartz 23 *San Diego Law Review*, (1986), 37-79. Pure economic loss, the argument goes, should be treated on a contractual base, and cases of physical and material damage which should be treated on the basis of delict. It is true, the reaction of the legal order to the physical damage is far more intence and strict. Delictual protection for instance, would render inoperative contractual exemptions or limitations of liability while the award of damages will not be hindered by any considerations of the economic value involved in the conract. But the idea that pure economic loss is recoverable with certainty only when it occurs together with physical damage does not apply to an order with a general delictual clause as the French or the Greek. On the relationship between physical damage and economic loss see Markesinis 25, (1991),*The International Lawyer*, 953-965, and "The need to set acceptable boundaries between Contract and Tort", Atiyah 83 LQR (1967), 240, Fleming 105, LQR (1989), 508-511.

principles will apply. As will be discussed, this is not the case with American law due to the system's rationale (enumerated delicts) and despite an impressive judicial record on tort[233].

The delictual solution seems to be the natural option in a system which, as the German, does not provide immediate answers in contract law. A fundamental point as regards Greek law is, therefore, that the civil liability system gives priority to delict to deal with the problem and the law of delict is suitable for the purpose. Neither of the two arguments is valid regarding the other systems examined in this study[234].

Apart from delict being the natural option, there are positive signs of the courts' willingness to enhance delicts protective function and of their familiarity with its potential[235]. As will be discussed, the courts deciding in delict will, beyond doubt, be within the limits of their legitimate authority -- something which would be doubtful under contract.

4.2. Is the contractual approach advantageous?

In the light of the points on delict's protection it makes sense to consider whether contract is advantageous by comparison to delict for third party loss. As in German law, delict's prescription period[236] is advantageous for the claimant. However, as was established, the differences are of little practical significance and the provision on the abuse of right (§281AK) stands as a safeguard balancing, in fairness, the third party position in the context of what is considered reasonable in transactions. Thus, for example, a

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233 See "Improving tort" in Chapter 4.

234 See "Improving tort" in Chapter 4, "The balance between contract and delict" in Chapter 5, "The case for contract" in Chapter 6.

235 See under "Delictual protection" especially in the footnotes referring to the expansion od the relative protective effect.

236 The prescroption period is 20 years in contract law, (§249AK), but only 5 years for many contracts, (§250AK), and 5 years for delict, (§937AK). The prescription period for contractual rights of action starts from the point the claim was created and its judicial enforcemnent became possible (§251). The prescription period in delict starts form the point the injured person learnt of the damage and of the person responsible, and in any case it expires 20 years after the injuring behaviour (§937AK).

much delayed claim, which in theory could be accepted if the claimant was unaware of the loss and/or the injurer (§937AK) could be rejected as an abuse of right (§281AK).

Moreover, a number of benefits associated with contract law in precvious references -- a fairer balance of interests, a fairer account of contractual defences, effective limitation of liability -- can be accomplished under delict where equity principles play a central role. This is not the case with tort law the American and Commonwealth systems[237]. If an improvement in the treatment in delict is required, it would involve laying greater emphasis in equity principles. Such an improvement is manageable and justified in law. In fact, taking into account the context of third party loss and the problems raised, predominantly the issue of defences, it is hard to see the courts copping with the cases in any other manner than through the employment of equity principles. The latter would bring about in delict the advantages that treatment under contract law seems to entail. The application of equity principles in delict together with taking account of the contractual arrangement, will, for example, dispell with the possibility of finding the debtor and the creditor jointly liable, when the creditor has contributed to the loss, in which case the debtor might be unfairly exposed for the full amount of the damage[238]. On the other hand,

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237 See under "Improving tort?" in Chapter 4, and the calls for an enhanced role for good faith in American and other common law systems (see Farnsworth "Good Faith in Contract Performance" in Beatson and Friedman 153-170) See also "The case for contract" in Chapter 6.

238 See under "Contributory negligence" and "If both debtor and creditor are liable -- The case of joint and several liability" in Chapter 2. Recall the example of a creditor driving a car which is defective to his knowledge and causing pure economic loss to a third person who might turn against both the creditor and the hirer of the car. In principle he could turn against both in either contract or delict, and in principle they could be jointly liable. It is equitable for the debtor not to find himself liable jointly with the creditor as the latter's property might not suffice for the compensation of the debtor if the debtor has paid compensation for the whole amount of the damage. (If one of the joint debtord compensates the claimant he can turn agianst the other joint debtors.) The AK provisions on joint and several liability do not differ significantly from those in the BGB. A presumption is set according to which if more debtors or creditors owe or are entitled to respectively a divisible obligation. in doubt, each owes or is entitled to an equal part (§480AK which is similar to §420BGB). If there are more debtors of a performance each has to perform in full but the creditor can ask for the performance only once (§481AK). The provisions on joint and several liability in delict are more detailed. Defendants might be jointly and severally liable if the loss was caused by a common act, or more persons are responsible in parallel for the loss, or if more persons have acted simultaneously or successively and it cannot be established whose act brought about the loss (§926AK). Already from the phasing of this latter possibility regarding potential defendants having acted in succession it seems that

the introduction and application of contractual solutions in the absence of a precedent doctrine, involves, at the least, considerable judicial effort, and is likely to be fraught with uncertainty[239].

The plaintiff is supposedly benefited under contract law as there is a presumption for the defendant's fault. This benefit has little practical effect; it would not be difficult to prove culpability in delict, and, generally, there are few problems of evidence. Nor is the application of contract law easier for the courts[240]. Once delict is a viable option, courts would regard contract law as unjustifiedly restricting the flexibility of their decision-making and forcing them to look into uncompromising intention criteria. It is true that the contract for the benefit of third parties has a considerable potential for expansion. However, the treatment of third party loss, as experience from German law illustrates, could not be successful based on intention-related criteria[241]. Delict is more clearly focused on compensation which should be the priority in third party loss. It is arguably easier for the courts to apply delict as they do not have to go to considerable lengths to justify a contractual approach and because they are better accustomed to apply delict and have done so efficiently.

It is arguable, based on the fact that third party loss cases are often considered by those involved in the transactions as being of a voluntary-contractual character, and

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the Greek law of delict is more amenable to the fair arguments of the debtor who could find himself liable for the whole amount when not only the creditor might have contributed to the loss but he (the creditor) might have violated his duties of care under the contract. In Greek law, the defendants can resort to the contractual context and prove against the possibility of joint liability and based on equity principles raising the issue of the liability he undertook in contract, and establish that there is no doubt as to his participation to the loss. See also Christodoulou in Kerameus and Koziris, 90.

239 The same applies for all the jurisdictions discussed, but in the other systems delict/tort is not promissing as regards the potential for improved treatment and the courts have to go a longer way in increasing the role of contractual considerations. See under "Suggested reform: Increased contractual input" and "Judicial assertiveness" in Chapter 7.

240 See on this point Rabin 37 *StanfLR*1985 1513-1538, Schwartz 23 *San Diego Law Review*, (1986), pp37-79, Atiyah (1985)*OxfJLSt* 485-490.

241 See the deliberations on the theoretical basis of *Drittschadensliquidation*, and especially the contract with protective effects in Chapter 2 under "Theoretical considerations" and "Critique on the theoretical views; the problem of a legal basis".

judging from the considerable number of contract-based approaches in the AK[242], that these cases should, by analogy to existing provisions, be treated in contract[243]. The statutory examples could justify the counter argument, namely that these cases are specifically meant to be exceptions to the rule, they are restrictedly provided for and they were introduced by statute because they could not have been introduced otherwise. This of course should be combined with delict's applicability. The counter argument is not valid, therefore, in relation to the other systems discussed, as in these systems there is no such protection in delict[244]. Delict's priority can further be evidenced it its openness, it potential to expand and accommodate complicated considerations and in its successful application by the courts. Admittedly, these instances of contract-like approaches in the AK indicate a tendency in the law, the acknowledgement at least of the special issues posed by third party situations and the importance of the contractual context. The lessons from this tendency should be taken into account in the treatment in delict on the basis of general equity clauses. The reference to the contract in favour of third parties in the decisions developing the German contractual mechanisms, or in the decision on the electricity supply to the sublessee in Greek case law, or to the third party beneficiary rule in relation to advocate's liability for drafting wills in American law, illustrate the role the provisions in favour of third parties can play[245].

Contractual solutions benefit the class of defendants or potential defendants (and their insurers[246]), limiting their exposure and strengthens their defences. In effect,

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242 See the contract for the benefit of third parties (§410AK) and the specific exceptions refered before.

243 The point will be discussed again in the chapter on American law.

244 See under "Suggested reform: Increased contractual input" in Chapter 7. The question of the legal form which has priority in civil liability cannot be answered in the same manner for each of the jurisdictions discussed in this work.

245 See under "*Drittschadensliquidation*" and "Initial stage", in Chapter 2, Εφετειον Αθηνων 3148-1982 (Appelate Court of Athens), Αρμενοπουλος, (1973), 94, under "Delictual protection" in this Chapter, and to *Biankanja v. Irving*, 49 Cal 2d 647, 320 P.2d 16 (1958), under "Attorney's liability to non-clients -- A contractual view", in Chapter 4.

246 The limited contractual liability will benefit the defendant's insurer, while making it more difficult for the, usually disadvantaged, third party to buy insurance. Insurance considerations are an uncertain criterion to decide on the optimal protection basis. It is often argued that the tendency in modern transactions is to shift the loss to social

contractual liability benefits professionals and businesses that are usual defendants and, according to certain views at least, economic activity as a whole as there is a rational (pro-businesses) allocation of risk and increased stability in law[247]. In France, for instance, a contractual solution[248] could be used in order to avoid the ampler delictual protection[249] as

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institutions, as insurance companies rather than individuals. Banakas, Schwartz 23 *San Diego Law Review* (1986) 37-79. Eisenberg .92 (1992) *ColLR*, 1358-1435.

The shifting of losses acomplished by the law of delict might lead to excessive compensation. Under contract there is the advantage of limiting this amount to the value of the transaction in question and accordingly preserving the bargaining that took place. The economic efficiency argument will be valid especially for economic loss cases. However even in the case of physical damage the contractual solution might cause less disturbance in economic life. (Exeptions to liability will be considered void with regard to physical injuries.)

247 The arguments in favour of contract are, in the context of the Greek law, an attempt to curb third party protection, and safeguard the position of the defendant, usually a professional, a businessman, etc. Allegedly, the possibility of higher costs in the cases the defendant is found liable will have deterent effect on undertaking obligations and genarally engaging in economic activity. The negotiations' process and its outcome will be affected from the uncertainty over the possible level of liability, or over the effectiveness of the agreement. It would be a major drawback if people (especially professionals) would have to be liable beyond the contractual provisions or to an great number of claims. As said, the *contract ways"* (Banakas 70 et seq.) will help to rationalise civil liability especially when economic loss is at issue and/or when a great number of people might be affected.

248 The *"contract ways"* (Banakas 70 et seq.) function differently when no difficulty to apply the law of delict exists. In France in the absence of a contractual relationship only exceptionally a contractual treatment is applied, the judiciary having to show great diligence in tackling the less flexible contractual provisions of the Code Civil. See the reference under the following footnote.

In the BGB it is the law of delict which has been defined rigidly. It is noticeable that the extension of the law of delict does not amount to a new form of liability, but to the application of a form in different instances. In Germany too there has been a constant effort for the development of contract based liability, theory of de facto contracts, liability from conduct in transactions, etc. The expansion of the contract if understood as the establishment of a new form of liability, corresponding to social demands.

249 This is the case with French law. The judiciary had to show great diligence in tackling with the less flexible contractual provisions of the Code Civil. This inflexibility can be attribute to the effect the historical and social context had on the Code, when it was first introduced in 1804. The Code was "a legal masterpiece of the early generation of scholars after the Revolution inspired by the ideas of the triumphant "bourgeoisie" and the rising tide that went with it". The contract had thus a very important role to play in safeguarding the ideals of the new social forces. It was defined rigidly and with attention to detail (unlike delict). However provisions on contract seemed more and more outdated in the wake of the changing social values. The courts responded admirably to this challenge. They embarked upon remanding contractual principles; the basic provision of § 1121 of the Code Civil was adopted to the changing environment beyond recognition. The courts developed their skill and confidence in handling contractual cases. One example is the application of contractual liability in the case of the sale of a defective product if the seller is an expert with regard to the product (e.g. professionally qualified). French courts have managed to establish in such cases a presumption of fact about the seller's knowledge of the defect and therefore to render him contractually liable, on the basis of the contract of

happens in some product liability cases[250]. (Confidence in the French law of delict, that is similar to the Greek, can be seen from the reversal of three recent decisions in cases involving subcontracting where, on the basis of the concept of a 'group of contracts', contract law was applied[251].) Of course, as has been noted by the common law literature[252], by the nature of the situations in question, it is unlikely that third party losses will be excessive[253].

The need to limit the defendants' exposure within reasonable limits is generally acknowledged. There are sufficient mechanisms to accomplish this limitation in delict, through equity principles and by taking account of the contractual setting, and the claimant's responsibility for part of the loss. If the judicial effort involved, is far greater and of doubtful validity in the case of expanding contract, while it is brave but corrective as

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sale. The liability of the seller is reduced compared to a hypothetical delictual liability. The French courts do not leave the plaintiff unprotected but do not also impose the ampler delictual liability on the seller. (Banakas 70 et seq.).

In contrast German law was resorting to contract law in order to supplement the inadequate delictual protection; Banakas 82.

250 As said French courts have, for the cases where the seller of the defective product is professionally qualified; an expert in relation to those products, established a presumption of fact about his knowledge of the defect and therefore have held him contractually liable. (Banakas 78 et seq.)

251 See Whittaker, S. "Privity of Contract and the Law of Tort: the French Experience", 15 (1995) *Oxford Law Journal*, 328-369, at 354-357. In the course of the 1970s it was supported by some jurists that the traditional interpretations of privity should be abandoned in the cases were certain contracts are inextricably linked and the actions between the members of such groups of contracts should be based in contract with the double limit of the defendant's duties in his own contract and the plaintiff's rights in his own. Since 1988 the French courts have applied these ideas in three cases, one involving the subcontracting of the production of a film where one of the subcontractors lost the negatives, another involving the liability of the manufacturers of a tractor for the coupling used by the latter in pulling the plaintiff's aircraft, the third the surrender of the plaintiff's deposited items with another depositiary who by mistake put them in the rubbish bin. The Plenary Assembly of the Supreme Court put a, temporary at least, end to this development in a 1991 case involving the liability of a plumber subcontractor in respect of defects in the plumbing to the employer. Among other reasons, Whittaker notes the uncertainty of the concept of a 'group of contracts' and the idea that the scheme, coupled with the double limit of liability was too prejudicial for the plaintiffs.

252 See Markesinis and Deakin 55 (1992) 619-646, and Rabin 37 (1985) StanfLR 1513-1538, who suggests the separate treatment of certain pure economic loss cases, more or less those involving third party loss.

253 It seems, although it is an uncertain judgement, that Greek courts seem to be awarding higher damages on a delictual basis.

regards the application of delict, then it seems that the delictual option, the 'natural' option[254], is more viable as regards limiting liability as well.

The question of third party loss offers little insight in the value of preserving the integrity of a legal system by opting for what seems to be a 'natural' solution. It is difficult to consider this issue without an assessment of whether it is permissible to introduce contractual solutions. It seems at first that contractual approaches would upset the basic drive in the law even if they are not, strictly speaking, incompatible with the liability system. (As will be seen, from a constitutional point of view it is theoreticaly possible to introduce contract-based solutions in all the jurisdictions discussed[255].)

Moreover, it is obviously not realistic to try and draw parallels with the development of the contractual mechanisms in German law. Contractual solutions in the latter were, in effect, a last resort which the courts explored admirably. The greatest flexibility of the contractual approaches can be explained from the overall rigidity of the German law of delict which, had it been making protection available, would at best raise the same doubts spelled by the critics of the Greek solution in delict as regards, for example, taking contractual defences into account. To the contrary, in the Greek system, there is protection in the first place -- or, at least, two possible solutions, delict and contract. The Greek provisions are more like those of Scots law, but in the latter the 'open' law of delict is defunct[256].

However, contractual protection cannot, with the exception of product liability[257], be excluded and the examination of the means to achieve this protection might be

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254 See under "Suggested reform: Increased contractual input" in Chapter 7.

255 See under "Suggested reform: Increased contractual input" and "Legitimate authority" in Chapter 7.

256 As far as the cases discssed in this work are concerned at least. See under "Revitalising *culpa*?" in Chapter 5.

257 The Greek courts have dealt with product liability on the basis of the law of delict. The Appellate Court of Athens (Εφετειον Αθηνων 1039-1979, NomB, 27 984) held the the producer liable in delict in a case where, due to the defectiveness of the copper pipes which were used in the construction of a building, moisture spread in the plaintiff's apartment, and finally a flood of water caused considerable damage to the floor, so that extensive and costly repairs had to be made. In another esxample (Εφετειον Αθηνων 671-1979, NomB, 28 791) the plaintiff suffered burns from acidic substances which had remained in a bottle of beer due to improper washing. The produser was held liable.

important for a choice the courts have ultimately to make, since the concurrent application of contract and delict is possible under Greek law[258], and third party loss is often in the grey area where the two seem to overlap.

5. Reception.

The emphasis on delict's potential, underlined with certain vigour in order to show the contrast between the Greek law and the other systems, might be considered as somewhat exaggerated, as parts of the critique against delict make sense. Thus, there is no mechanism at present to guarantee that contractual defences will be taken into account, and there is no certainty that unlawfulness will be accepted in all cases. Unfortunately, there is little case law to offer evidence and no distinct perception of either third party loss or pure economic loss to distinguish the related decisions. Moreover, the comparison was between delict and the abstruct suggestion for contractual approaches, while the German contractual mechanisms are not uniform but correspond to essentially different situations. It is possible therefore to argue for selective application of contractual solutions.

It is thus not simply for the sake of argument or as a hypothetical exercise that the applicability of the specific German models will be examined. Delictual solutions might

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There are not however many cases in the area unlike, for instance German law. Emphasis is usually laid on the duty of the producer as well as on his position It is thought that he is dominant in the market chain especially as regards his knowledge of the product's qualities. (The traders are often mere distributors.)

The duties of the producer (manufacturer) extend to the whole process of production. The courts are ready to hold him liable for lack or improper supervision, quality control, absence of warning for the dangers the use of the product entails when the latter is marketed. The concept of defectiveness of a product is flexible to accommodate injuries from the use of the products.

Arguably the judiciary would welcome the liability of the producer that would actually resemble guarantee. The producer is benefited from mechanised massive manufacturing which statistically will lead to defective products, while he influences the will of the consumers with advertising. The producer creates (potential) risks when selling the product, and should bear the consequences. According to one view the AZT mechanism could apply by analogy in the the cases of product liability, when there is a transfer of danger situation, even though only secondary duties have been violated. (Maggivas (Μαγγὶβα 'Η ευθὺνη του κατασκευαστοὺ τυποποιημὲνων προιὸντων' [liability of the producer of standardised products], 1978) referred by Stathopoulos (Σταθόπουλος 1, 93).).

258 The claim will possibly rest on both bases; one of them being secondary. It is to the court's exclusive authoritty to select a basis. If no reference to statute law is made then the court has the authority and examine the claim under all possible basis.

not be fully satisfactory. It could be further argued that there is a gap in delict[259], as regards taking account of the contractual defences, that justify the consideration of alternatives. The latter point, it should be noted in advance, stresses the definition of a gap, ignoring the protection to the third party and the potential in delict. It is reasonable to suggest that it would take a very clear understanding of the third party as a contract beneficiary to allow compensation for pure economic loss on the basis of §410AK[260]. On the other hand, if anything close to such an understanding exists, then delictual protection would possibly be available[261].

The purpose of this reference is to acknowledge the possibility to introduce contractual mechanisms in the Greek system -- not merely their compatibility with the latter, which should reasonably be accepted. This application appears, as in the other systems, as a problem of legal basis and of judicial law-making[262].

5.1. *Drittschadensliquidation*[263] (restoration of third party loss -- AZT).

The argument could be that the mechanism is already applied in Greek law. It is part of the AK[264], the most typical examples being mandate and deposit (§§716(3), 825(2) AK) which could be extended further by analogy[265] on the idea that similar situations

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259 As Fourkiotis argued as regards the systems of civil liability as a whole, See under "Theory".

260 The posibility of applying the provisions on the transfer of performance in mandate, §716(3)AK, and subdepositing, §825(2)AK, are not examined here because they do not have the geenric character of the contract with protective effects.

261 It should be reminded that many instances of third party protection duties are coverred by the contract in favour of third parties.

262 See the debate in Germany on the issue. See Larenz *Methodenlehre* 419, and Gernhuber "Drittwirkungen im Schuldverhältnis" . The latter thinks that establishing of the contract with protective effective effects on §242BGB implies a contra legem interpretation, because the natural solution would be the law of delict. The contractual treatment is contra legem therefore.

Also Σούρλας NomB 31, (1983) 449. Κεφαλάς 94 et seq.

263 The German term is used here because the readers are more familiar with it.

264 The AK provisions protecting third parties are evidence of the conformity of the mechanism to the existing scheme of liability. The position of the debtor, it is argued, is not worsened (no additional duties are imposed) and his liability will not exceed that undertaken with the conclusion of the contract.

265 Reference to analogy entails the implication that there is a gap, an"incompleteness" of the law; the expression used by Larenz who speaks of an incompleteness which contradicts the plan, the framework of the legislation ,

should be dealt with in a similar manner[266]. The extension could be achieved with a *praeter legem* interpretation -- an interpretation within the statutory purpose[267] -- which seems possible.

It is unlikely that the courts will feel the need for such an interpretation. Not only do many specific provisions on third parties exist but, since elements of mandate and deposit are parts of numerous complicated transactions, the relative provisions could easily apply directly. The wide range of applications of the contract for the benefit of third parties (§410AK), the availability of an indirect claim[268], and the possibility to apply delict[269] should also be taken into account. Obviously, *Drittschadensliquidation* could not have in Greek law, the significance it has in the German system[270]. Even if the AK

(*"planwidrig Unvollständigkeit"*; Larenz *Methodenlehre* 402. Third parties' problems have been encountered only in specific cases in the AK and not as a general rule.

266 Good faith (§ 288 AK) would impose the same treatment of similar situations, which have been better described as involving a transfer of economic value. However, the idea of Litzeropoulos that the third party can claim damages and that the debtor's refusal of liability due to the absence of a contractual link, could be rejected as an abuse of right, is plausible but still there are doubts as to the courts' reaction.

267 A construction focusing on their scope and purpose. According to Larenz this interpretation, directed to the inherent purpose of the law (*"immanenten Teleology des Gesetzes"*; Larenz *Methodenlehre*), is limited to cases where legistation and custom are silent -- *"wo Gesetz und Gewohnheitsrecht schweigen"*, (See also Redeker NJW 1972 410).

268 Although it is doubtful whether a direct claim will be easily accepted, a third party will always be able to exercise the rights of the creditor, through an indirect claim.

269 AZT, it could be argued, seems a more reasonable means than delictiual liability as the risks involved are strongly attached to the contractual performance and the value of loss is largely equated to the value of performance. It is preferable to the law of delict because of the procedural presumption of the debtor's liability in contract law. The Greek case law has often treated AZT cases on a delictual basis. Recall the case before the Supreme Court involving the civil liability of the state, where public officials had unlawfully recalled the licence for the production and sale (distribution) of certain pharmaseutical products. Claimant was the person who had contracted with the licencee and had acquired those rights. It was held that alhought the unlawful act did not involve him, he was entitled to compensation on the basis of the provisions of the liability of the state as he would have been entitled under § 914 AK. (Άρειος Πάγος – Supreme Court -- 350-1982, NomB v.30 1468.) The decision overtutning a previous appelate ruling, descrides §914 AK as imposing a general principle to compensate losses caused without legal reason (without legal entitlement) to the "property" (financial situation) of another.

From the *obiter dicta* of this uncertain example it makes sense to foresee that the first reaction of the courts in AZT cases will often be the search for a delictual justification.

However courts are not allways so eager to award compensation. In a case involving international carriage, according to *obiter dicta* a delay in delivery would not constitute a delict. Πολυμελὲς Πρωτοδικεῖο Θεσσαλονίκης, 1159-1980, NomB 29 1306.

270 Two of the most usual cases of application; on mandate (§716(3) AK) and deposit (§825(2) AK), are especially provided for in the AK, while contracts of carriage are steadily considered as contracts for the benefit of third parties. Recall that the cases of

provisions are extended by analogy in some cases, this will hardly amount to the launching of a consistent judicial policy. As is the case with contractual solutions as a whole, there is limited need for reform[271]. By contrast, analogy as a means for establishing contractual solutions is, it will be argued, a viable way forward for Scots law where there is lack of protection for third parties[272].

5.2. Contract with protective effects.

The suggestion that a gap in the law exists that justifies an *extra legem* interpretation to establish the contract with protective effects, since no similar approach can be found in the legislation[273], rests on shaky ground as far as Greek law is concerned. There is, it seems, protection under delict, the infelicities of which can be mended. The clear predisposition of civil liability is towards delict. An *extra legem* interpretation should be attempted when there is no other satisfactory alternative for the courts[274]: their role is not to provide an array of alternatives, but to seek solutions, if possible within the existing provisions[275], limiting reasonably their law-making activity to what is dictated

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undisclosed agency, and the cases involving contracts of deposit, as in carriage contracts have played an important role towards the acceptance of *Drittschadensliquidation* in Germany.

271 As Kritikos notices commenting on §825(2) AK, there is no need to resort to AZT since the third party position is safeguarded expressly by law (Κρητικὸς 825ΑΚ Γεωργιάδης-Σταθόπουλος).

272 Because of the need for third party protection the Scottish courts aree legitimised to venture in analogy from JQT to try to introduce contract-based views. See "Law making by analogy", in Chapter 5. Recall that it was the earnest need for protection in the German law that drove the courts towards developing contractual protection.

273 This is the case with the German law contractual mechanisms as well. It is often said that the contract with protective effects is applied as a last resort when no delictual protection is available. According to one academic opinion, in Germany courts should aim at expanding the range of applications of the law of delict in order to confront situations such as third party loss due to a violation of a protection duty for instance. From the same line of thoughts, the establishment of a general delictual clause in German law, similar to Common law's negligence, is promoted to cover cases where the contract with protective effects is used. (Lorenz JZ 1960 108).

274 An *extra legem* construction can be made when a legal problem which cannot be answered by the interpretation, or the gap-filling of existing provisions occurs. The construction beyond the statute is permitted when no treatment or no reliable treament to a problem exists.

275 See the peculiar case of the Scots law of delict where the principle of *culpa* should theoretically cover cases of third party pure economic loss, yet it is defunct through its

by the framework of civil liability. It is obvious that there is little need for contractual solutions[276]. The theoretical suggestions made for the incorporation of the contract with protective effects in the Greek system indicate, through their weakness, the implausibility of the option.

One argument, applicable to German law as well, suggests relying directly on the constitutional provision on equality[277], which is understandood as meaning that 'equal' situations should be treated 'equally'. The third parties are in a position similar to that of the creditor so that contract law should reasonably apply on third party loss[278]. The direct applicability of constitutional provisions is a contentious issue[279]. Their normative quality

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assimilation to English tort law. See "Protection of third parties on the basis of delict" and "Revitalising *culpa*?", in Chapter 5.

276 Once there is adequate protection for third parties or adequate protection can be produced within the existing provisions there is no "*genuine legal necessity*" (Banakas 71.) to introduce contractual solutions.

277 §4 of the Greek Constitution, and §3 of the Grundgesetz-GG, is expressed in the civil law through §288 AK. On the basis of good faith it is thought that a judgement left to the discretion of a contracting party, (in the case of §371 AK) should be fair. (Σταθόπουλος 1, 100 et seq.)

Applied in the private law sphere, it has led the Greek courts to the imposition of equal treatment of the workers of as single employer. which is, somewhat bitterly, described as one of the few instances of remarkable judicial creativity in Greek law, (Κεφαλὰς 177 et seq). An employer, obliged to fulfil his obligations in accordance with § 288 AK, was found liable to pay to an employee the additional payment he was offering to other employees who had the same qualifications, and were performing essentially similar work (Άρειος Πὰγος -Supreme Court- 75-1974, NomB, v. 22, 112). Similar are decisions refferring to extra payment for dangerous occupation (A;reioß Pa;goß -Supreme Court- 78-1974, NomB 22, 112). Another decision specifies that the principle applies for workers working under the same conditions who have the same qualifications and are simmilarly efficient and productive (Άρειος Πὰγος -Supreme Court- 607-1974, NomB, 23).

278 The third party which seems worthy of contractual protection is not any injured party covered from some general social or professional duty of care for the interests of others (Sta;qopouloß 2, 100 et seq.). On the contrary he is a specific third person for whom the threat and the injury originate from a contract between others and who seems to be on a similar footing with the creditor, in the sense that the same protective behaviour could concern both the creditor and the third party. The risk of this third party, might be more serious than that of the creditor. If creditor and third party face a similar risk for the particular injury then it would seem unfair to treat them differently. Equality of treatment applies as a guide-line of the system of civil liability, and should lead according to this line of reasoning to the application of the same standards in the treatment of the creditor and the third party as a convincing and socially acceptable criterion for the choise of the proper form of liablity. The injured party would have a right to ask for the better treatment available.

279 The reference to the constitutional principle echoes the teaching of the theory of the direct applicability of constitutional rights to the whole of the legal order. However the gist of the reasoning here is that the legal system should treat similar situations on an equal bases. Κὸρσος, Δημ. 'Τα ατομικὰ δικαιὼματα εν τω ιδιωτικώ δικαὶω' [Civil rights

in the private law], Festschrift Zepos, 1973, 175. See Hesse *"Grundzüge des Verfassungsrechts des Bundesrepublick Deutschland"*, 19 Aufl, Heidelber, 1993, 149-151, Maunz und Dürig *"Grundgesetz: Kommentar"*, (2 vols) 4Aufl, München, 1976, Maunz *"Deutsches Staatrecht: Ein Studienbuch"*, 28Aufl. by Zippelius, 1991 (pp. 149, and 219 et seq.) who makes special reference to the principle of equality, Mangoldt *"Das Bonner Grundgesetz"*, Aufl. von Klein Friedrich, 1956, and Allexy and Dreir 117.

This idea is a product of the German legal thinking and is one of the most interesting theories of the post-war period. It did not have the same appeal among theoreticians in countries with similar legal orders such as Switzerland or Greece. It is not known, at least in the form usually presented, in the French law. It is difficult to have a profound meaning in English law in the absence of a clear delimitation between public and private law.

Civil rights are meant to protect the individual from the state; they delimit an area of activity or they set certain standards of conduct by the public authorities, guaranteeing the position of the individual in public law. According to the theory in question (*Drittwirkung des Grundrechts*), whose founder is Nipperdey, the (constitutional) civil rights apply in private law relations and not only in the area of public law. Civil rights have an absolute effect, extending to all areas of law, and are directly applicable in relations between private persons. Civil rights serve thus as binding rules which correct, supplement or formulate private law provisions and arrangements. Nipperdey noticed that the constitutional order is not neutral in terms of its values (*wertneutrale Ordnung*), but value oriented (*Wertordnung*) and each right or relationship is valid to the extent it abides with this order. Civil rights set inescapable rules of social conduct. The Federal Constitutional Labour Court accepted the direct application of the equality principle with regard to the treatment of employees by their employer and to the salary of men and women employees (See the references in Hesse149-151, and also BAG (Bundesarbeitsgericht) NJW 1978 1874, BAG NJW 1973 1977, EuGH NJW 1976 2068).

The theory was criticised. It ignored, it was said, the historical origin of the civil rights as means of protection against the state. The constitutional legislator had no mandate to regulate relationships between private persons. The direct application of constitutional rules would distort the principle of autonomy of will, which is an expression of individual freedom, and the whole concept of private arrangements. Direct applicability of delictual provisions was rejected therefore. Against this critique it could be said that it is not only the historical purpose of the civil rights or the mandate of the constitutional legislator that is important but the content, and value of the rights. The understanding of the effect of the constitutional principles can change over time, along with social and political ideas. Civil rights could have an effect as objective rules applying in the whole of the legal order.

Another idea falls in the middle of the two extremes. Private law, it is said is not alien to civil rights and the value system they introduce. Civil rights, as all constitutional provisions, are sources of private law albeit not directly, but via the so-called general clauses (*Generalklauseln*) or principles, as good faith, good morals, the so-called common sense of law (*Rechtsgefühl*) etc. Whatever contradicts civil rights would contradict a general clause. This view was supplemented by an idea supporting the extension of the conceptual content of the general clauses. The latter idea, of the indirect effect of civil rights, is preferable because it preserves the integrity and separate existence of private law. Critics of the idea argue that general clauses are not identical with the constitutional principles they are meant to express, that they are changeable and flexible in content while the values the civil rights refer to are more settled as elements of a legal, moral, political culture. However this adjustability of the general clauses might be a virtue. Civil rights are to some extent the outcome of a political decision of the constitutional legislature. The general clauses can express the values of the decisions leading to the constitutional provisions.

It is rather obvious that not all civil rights have the same potential for direct application in private law. The principle of (and right to) equality is often treated with

is disputed; the majority view is that they cannot be translated into specific rules[280]. It is doubtful not only if equality is directly applicable[281] -- apart form being a constitutional provision, there are AK clauses incorporating the ideals it expresses -- but also whether the introduction of contractual protection can be based on equality. The term 'equality' in a contractual setting is dubious[282]. Moreover, this equal treatment argument seems to be based on the hypothesis that contractual protection will be beneficial for the plaintiff. If this is the case for German law as there is no protection in delict, it is not necessarily so for the Greek system. The equality argument, a far-fetched venture for the courts to embark upon, is weak and obviously avoiding the question of whether there is legal protection for third party loss. Equality might make sense as a basis for the extension of contract by analogy if there is no delictual protection[283]. It seems, however, that an equality-based approach is too unsophisticated to deal with the complexities of third party loss.

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doubt. It is easier to accept where relationships involving the exercise of authority develop as in labour relationships.

280 General, broad principles especially those reflecting foundamental perceptions (as equality or justice) are not necessarily rules; their ability to regulate particular activities might vary greatly. Private autonomy on the other hand has a far more tangible and specific meaning. The more general and abstract a principle is the more difficult it is to have a practical effect against statutory provisions. See Larenz *Methodenlehre* 380 et seq, and Allexy and Dreir 117.

281 There is considerable criticism on the direct application of constitutional principles in private law, focusing on private autonomy as a cornerstone of civil law and turning against the abolition of the distinction between the private and the public sphere. The reasons for the preservation of the difference are historical, political and economic, and reflect the systemic rationale of a particular legal culture. Extending the application of the contract to third parties on the basis of equal treatment is a far fetched view and cannot be persuasive against legal certainty and the integrity of private autonomy.

282 Equality can not be easily compromised with the realities in the private sphere. The creditor and the third party are not on an equal footing, even if this concerns only the protective duties of the debtor. Otherwise the freedom to bargain and contract would be meaningless. The similarity of risks for instance is a quite complicated question for which there can be no *a priori* rule. The evaluation of the risks involved can be subjective. The risks should be appreciated in relation to the capacity of the parties and in relation to the benefits they are meant to obtain from the transaction. It is possible that in the context of some relationships certain third parties will be running a higher risk and contractual protection would seem reasonable. This might be the case where the lessor's members of family are injured.

283 In favour of analogy is the suggestion as regards Scots law. See under "Law making by analogy" in Chapter 5.

The next possibility would be an *extra legem* construction on the basis of §288AK as is the case in German law[284]. Leaving the issue of legal necessity aside, it should be pointed out that, although there are no qualitative differences between the good faith provisions of the AK and the BGB[285], §288AK never acquired the clout of §242BGB[286].

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284 Usually accombanied by references to other general clauses, understood as expressions of the social, philosophical and moral foundations of the legal order. It seems that the courts and academic lawyers find it easier (and safe) to rely on such concepts so as to incorporate in private law justice, social and moral arguments. Reference to such concepts is incompete or has no thrust without reference to good faith which engulfs the core of most of these moral and social principles.

285 There is no difference in quality between the relative clauses in the two jurisdictions. As in German law, in the Greek system good faith supplements or corrects existing relationship, and applies to any form of legal obligation, prevailing over contradictory provisions of statutes or private arrangements. The effect of the principle is greater on close, confidential, continuous, and professional relationships (an employment relationship, a company, a contract for medical treatment.); depending that is on how close or serious this relationship is. The impact of good faith is felt mainly as regards the proper way for the execution of an obligation. It imposes secondary duties to the parties to a relationship which according to one classification can be distinguished on the basis of their purpose in: (a) Duties aiming at guaranteeing the realisation of the performance and it goals; preparatory measures, safekeeping the performance object in the right packaging for example, insuring the object, provide manual with directions in the proper language, (b) Duties aiming at the protection of the other party's goods as to inform on the risks entailed in the use of the machine sold, (c) Duties of reliance towards the other party as in societies, companies, employment relationships. (Σταθόπουλος 1, 100 et seq.). It is useful to recall the application of § 288AK in the obligations in a broader sense according to the classification by Stathopoulos. He thinks that it should be enough for the law of delict that the injurer and the injured belong to the same social whole. The law of delict could apply in the cases of a violation of the general duty of care for safety and security in transactions,. This way he distinguishes the obligations in a broader sense from other forms of liability where no obligation existed before. (Σταθόπουλος 1, 83.).

In France, the corresponding provisions, §§ 1134 (3), 1135 of the French Code Civil, did not play such an important role as their German counterpart, although § 1135 F.C.C. is expressed efficiently dictating that contracts are binding not only in what has been expressed in them, but also in all the consequences which equity, morals and law give to the contract according to its nature.

The corresponding provision of the Swiss Civil Code is the second article. In the Italian Civil Code §1745 imposes on both the debtor and creditor the duty to keep a proper behaviour (*"correterra"*).

In common law the principle of equity has led to the development of the estoppel doctrine: A person is not allowed to call upon a right or a legal relationship when his behaviour contradicts a previous act or statement of his, from the point of view of "a reasonable man". (Σταθόπουλος 1, 100 et seq.).

286 §242BGB covers for instance areas which in the Greek law are treated as abuses of right (§281 AK). The German judiciary developed excessively the good faith principle. It is, for instance the basis of the theory of the foundations of the contract, the *culpa in contrahendo* and the nullity of simulated juridical acts. (Staqo;pouloß 1, 100 et seq.)

There are special provisions for these situations in the Greek law: The invalidity of the simulation of a juridical act is provided in §§ 138-139 AK. Simulation (εικονικότητα) corresponds to a situation where the will of the declarant is not defective but its

Many of the latter's expressions are specifically provided for in the AK, where the fundamental equity provision is §281AK[287]. The idea to rely on §288AK to introduce contractual solutions is associated with an aspiration to develop the provision, as it has not developed so far in case law. The suggestion to use §288AK is linked with the alleged failure of the Greek judiciary to exploit the provision adequately. It is a fact that §281AK

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declaration does not, knowingly and deliberately, correspond to the intent of the declaration, as when he makes a declaration jokingly or *"for appearances only"*, (§ 138 AK). A simulated juridical act is void but the nullity might not be accessed against the parties who are reasonably unaware of it (§ 139 AK). (Symeonidis "The General Principles of Private Law", in Kerameus & Koziris eds, 64.)

The *culpa in contrahendo* is specified in the provisions of liability for negotiations (§§ 197-198 AK). § 197 AK provides that the parties must deal with each other according to the dictated by good faith and business usage. Any damage caused because of the violation of these obligations should be compensated even if a contract is not eventually concluded (§ 198 AK). The reason for the provision was the fear that the §288 AK will not be applied at a precontractual stage.

The idea of the collapse of the foundation of the contract can be found in § 388 AK. which reads in part; *"If the circumstances on which the future parties, having regard to good faith and to business usage, mainly based a two sided contract, subsequently changed for extraordinary and unforeseeable reasons, and if, as a result of this change, fulfilment of the obligation, taking into account the counter-obligation, became inordinately onerous for the debtor, the latter may request the court to reduce his obligation at his discretion to a suitable extent, or to rescind the whole of the contract or the part not carried out"*- (Christodoulou in Kerameus & Koziris eds, 82.) The provision gives sweeping power to the courts.

There are generally more provisions which are specifications of the principle: §142 (an error as to the qualities of a person or a think is enough to vitiate if according to good faith the declarant would have not made the declaration), §371AK (if the performance of a party is to be determined by one of the contractual parties it is presumed that the determination must be made in an equitable manner; if the determination is inequitable or delayed it is made by the court), §519 AK (the duty of the seller to inform on the legal rights on the sold thing and to deliver all relevant documents), §662 AK (the duty of the employer to keep the place of work clear and satisfying hygiene standards), §889 AK (the debtor is relieved from liability if he pays the holder of a bill of exchange even if the latter has no right to ask payment), §1880 AK (the possessor of the inheritance property is obliged to inform the heirs on the situation of the property) .

The legislator wanted to make sure that the principle of good faith would be applied in these cases. Most of these provisions impose secondary obligations; to inform, to take protective measures etc. It is important that specific law making authority is given to the courts on the basis of these provisions, especiallyin §§388, 371 AK. It could be argued that the existence of the special provisions made it easier for the courts to treat particular cases without having to turn to §288 AK and develop its application. Resort to §288 AK has proven less necessary in Greek case law. According;y good faith has never acquired a significant momentum of application in the case law. The judiciary are less keen on exploiting and developing the provision.

287 § 281 AK seems to be easier to apply than § 288 AK. §281 AK refers not only to rights but to any freedom to act, and apart from good faith, it uses alternatively other criteria. (In § 288 AK for instance, the transactions' morals have logically to be in accordance with good faith.) It has in addition a more defencive content. § 281 AK has been the basic means for combating major injustices. However, the reference to the principle in legal petitions has in occasions been excessive. (Σταθὸπουλος 1, 100 et seq.)

could not by its defensive nature serve as the basis of the mechanism. However, once there is potentially wide-ranging protection in delict , the equity considerations have necessarily a defensive, restrictive character. The role of equity considerations is not creative regarding protection as happens in German law. The courts would have to undergo considerable strains to develop contractual protection on AK equity clauses, strains greater than those involved in developing third party loss protection in delict. In sum, although contractual 'protective duties' are recognised in Greek law, in the light of the open endedness of delict, it is obvious that there was profoundly lesser need for their expansion.

5.3. Summary.

Law-making, especially *extra legem,* is a sensitive task. The courts are, in a sense, indicating the optimal course for future legislation to cover gaps, on the basis of the rationale of the existing provisions which do not treat the problem in question. There is no such (hypothetical) need in Greek law, meaning that there are no gaps to be covered, as existing provisions can offer solutions to third party loss.

The courts would be usurping the authority of the legislature were they to introduce contractual solutions[288]. This point became more apparent with the discussion of means to introduce the contract with protective effects. The otherwise wished for judicial activism would contradict the rationale of the liability system and hamper the 'natural' development of delict.

It is not true that in improving delict the courts would exercise similar discretion as with introducing contract[289]. In the latter case they clearly move beyond the statutory framework and do not acknowledge and exploit existing potential as they are meant to do.

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288 The relative suggestions by Kefalas involve the overall expansion of the law making authority of the courts and in effect amount to a different institutional balance as regards developing institutional liability. Such wide ranging considerations cannot be answered in this context.

289 Or in some other area of civil liability as with developing the principle of the abuse of right (§281 AK). The courts might presumably need to strain the application of §914AK to cover certain third party pure economic loss cases, which however, seems to be within the provision's range. In contrast contractual solutions would require the expansion of contract beyond the AK framework, both in doctrine and practice.

As can be seen from the consideration of §288AK as a possible legal basis for the contract with protective effects, the rationale of the system weakens the contractual approaches. If the constructive power of §242BGB was crucial for German law (to justify the development of protective duties for example), for the Greek law with the flexible, 'open' and effectively protective delictual liability, the restrictive function of §281AK was more important.

Similarly, it is wrong to argue that the change from the introduction of contract will not be of such a voluminous character. Kefalas seems to be of this view although he urges for an extensive increase of judicial discretion. The results might not change greatly under contractual solutions, but the rationale of the civil liability will have been overturned and the foundations of the contractual solution will be unstable. As said, from a legal policy point of view, contract-based solutions are not advantageous.

The courts are of course entitled to distinguish third party loss cases and indeed this would be desirable for the development of more consistent case law. This exercise of the courts would of course be a matter of practice and it cannot be based on legislation or legal doctrine. Nonetheless, for a more consistent jurisprudence on third party loss, and for improving delictual liability in general, judicial alertness that would include keeping pace with theoretical accounts and foreign developments is necessary.

6. Conclusion.

The review of the Greek system may seem to be somewhat prejudiced in favour of delict and in favour of an increased role for equity clauses. It is easy to acknowledge that from the point of view of the function of the private law, a clear picture of the facts , the flexibility of the accountability mechanisms, and the potential for a more unified view of civil liability are significant advantages which can be attained in delict. Achieving such goals depends, to a considerable extent, on the quality of the judicial approach, which itself is based on the education and creative engagement of the courts. The basic doubt concerns the capacity of the courts to protect the position of the defendant since, judging

from the cases delict was applied protectively, there is less reason to doubt the availability of protection for third parties. The courts have shown little tolerance of injustice and, as safeguarding the defendant's interests appears fundamentally a question of fairness, once the equity mechanisms exist, it could be hoped that judiciary will protect the defendant sufficiently. The fact is that third party loss does not seem to be a major problem. The absence of substantial case law and of serious academic concern, might, after all, be positive signs.

Chapter 4.: Third parties in American law.

1. Introduction.

Third party loss in American law is an issue for both contract law, related to the possibility of conferring benefits to a third party, and tort law, centred on the difficulty in awarding damages for pure economic loss. Third parties are protected under American law better than in any other common law jurisdiction[1].

American contract law, led by case law and academic comment[2], has overcome doctrinal inflexibilities of traditional common law in order to provide socially prudent solutions. As far as this work is concerned, what is important is the decline of privity[3] and

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1 See Kötz "The Doctrine of Privity of Contract In The Context of Contracts Protecting The Interests of Third Parties" *Tel Aviv University Studies In Law* 10 (1990), 194-213, Lorenz "Contracts and Third Party Rights in German and English Law", in *The Gradual Convergence: Foreign Ideas, Foreign Influences and English Law on the Eve of the 21st century*, Markesinis (ed) 1994, and the older reference "Contracts for the Benefit of Third Parties", 12 *IntCLQ*, 1963, 318-329. See a recent review in support of the English doctrine "Third Parties: Rationalising a Right to Sue", 48 *CamLJ* 1989, 243-270.

There is limited interest in U.S. sources for the treatment of the third party issue in other jurisdictions. Reference is usually made to the classical English doctrine of privity which influenced the American law in the field in its first stages.

2 Case law, which is instrumental to this process, has been more open to academic opinion than its English counterpart. It is no coincidence that the prevailing bargain theory of contract law according to which only "bargains" are legally enforceable, meaning not simply an agreement but an exchange or a promise to exchange value has been vigorously disputed by American academics. One could refer to the "promise" theory according to which the promise is the central conception to the contract while consideration (the exchange for the promise) is immaterial, and to the relational contract law theories, rejecting the formalism of the bargain law theories, and promoting the acceptance of the reality of relationships in contract law, as most transactions arise out of relationships not fulfilling the contract requirements in the bargaining theories. See for a brief account, Flannigan 103 LQR (1987) 564-593, the more specifically on promise theories Fried *Contract as Promise: A Theory of Contractual Obligations* 1981, Eisenberg, M.A. "The Bargain Promise and its Limits", 95 *HarvLR* (1982) p.741, and on relational theories principally MacNeil, Ian R. *"The New Social Contract. An Inquiry into Modern Contractual Relations"*, 1980, and "Relational Contract: What We Do and What We Do Not Know", *Wisconsin Law Review* 1985, pp. 483-525.

3 The decline of privity in American law became more certain after the beginning of the present century. The leading cases in the area an the third party beneficiary rule (see later in the text) are closely linked in academic and judicial references.

MacPherson v. Buick Motor Co,(217 N.Y. 382, 111 N.E. 1050 (1916) where an injured bystander sued successfully the manufacturer of a vehicle the gasoline engine of which exploded due to negligent manufacturing is quoted as a pioneering case. The decision accepted a duty of care on a foreseeability test, and referred to the unreasonable risk created for the bystander.

With respect to third party situations, in *Glanzer v, Shepard*, 233 N.Y.236, 135 N.E. 275 (1922), the New York Court of Appeals held liable the public weighers

consideration[4], evidenced in the third party beneficiary rule[5]. According to the latter third party contract beneficiaries can claim on the contract. The rule applies in certain cases treated in German law by the contractual mechanisms for third party loss[6]. Third party

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(defendants) who furnished a vendor of beans with a mistaken certificate, and were sued by the vendee. Justice Cardozo emphasised that the use of the certificate by the vendor was known to the weighers; in fact it was the "end and aim" of the transaction.

In another landmark case, (*Ultramares Corporation v. Touche,* 255 N.Y. 179, 174 N.E. 441, 74 A.L.R. 1139, 1931) involving accountants liability, the New York Court of Appeals, refused a claim by an injured third party. The defendant accountant had negligently certified the accuracy of a corporations' balance sheet on which the plaintiff relied and loaned money to the corporation. The latter turned out to be insolvent. The fear of a far too extended liability, expressed in an often quoted apophthegm by Cardozo, was the reason for the rejection of the claim. The court relied on the assumption that the eventual use of the balance sheet was not known to the defendant. Cardozo was considering the possibility to "expose accountants to liability in an indeterminate amount for an indeterminate time to an indeterminate class". He added that "the hazards of a business conducted on these terms are so extreme as to enkindle doubt whether a flaw may not exist in the implication of a duty that exposes to these consequences."

The exemplary case for attorney liability to non clients (and much discussed in relation to the expansion of tort law in professional liability cases) is the *Biankanja v. Irving*, 49 Cal 2d 647, 320 P.2d 16 (1958), a case which in one view ended the "apparent immunity of attorneys to third parties" (Mallen & Smith *Legal Malpractice*, "Liability to the non-client - Negligence", 375.). The defendant was a non lawyer who had undertaken legal work in preparing a will. He carried out his task negligently and was sued by the disappointed beneficiary of the invalid will. The California Supreme Court thought that privity was not essential since liability could be established on a duty imposed by public policy. The court went on to give an outline of six factors which should be discussed on a case by case basis, in order to infer the existence of a duty of care; most of these factors were based on the underlying contract. The factors were; (1) the extent to which the transaction was intended to affect the plaintiff, (2) the foreseeability of harm to him, (3) the degree of certainty that the plaintiff suffered injury, (4) the closeness of the connection between the defendant's conduct and the injury suffered, (5) the moral blame attached to the defendants conduct, (6) the policy of preventing future harm. The last two factors which seem more distant from the contract are arguably addressed in any civil compensation case. The decision is considered classical although no subsequent case following its example applied the test as a whole.

4 Were they to be considered as distinct concepts. Markesinis 103 LQR (1987) 355-356, and 372, and Flannigan 103 LQR (1987) 564-593 seem to imply convincingly, that the privity doctrine is but one expression of consideration.

5 The third party beneficiary rule, which will be discussed later, a principle rather than a mechnism, developed gradually by case law mostly in the present century. The rule, which is usually called upon in compensation claims, extends beyond the idea of a contract in favour of third parties, and shows an impressive potential and flexibility to apply to different situations. Some of the rule's functions correspond to the *Drittschadensliquidation* or the *Vertrag mit Schutzwirkung für Dritte,* of German law.

The third party beneficiary rule will often be referred to as the beneficiary rule or the rule.

6 Moreover, consideration has been abandoned as a requirement of the revocability of offers. (Markesinis 103 LQR 1987, 372). Were one to take the view that privity is an expression of the concept of consideration, contractual liability has been relieved from the concept of reciprocal offer by the party entitled to enforce an action which lies at the heart of the bargain theory. See Flannigan 103 LQR (1987) 564-593.

loss is also compensated, often impressively in tort law[7] -- the problem there being usually one of pure economic loss[8]. The latter is compensated in American law in a considerably greater number of cases than in English or Scots law. As in the chapter on Greek law, the

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7 The tendency to protect third parties is evidenced mainly in the law of torts, as part of its dominant trend to expand. This expansion, largely instigated by case law, is probably the most distinctive feature in American private law and has reached results unprecedented in other Western legal systems, both in terms of the situations where tortious liability is recognised, and with regard to the amounts of compensation or punitive damages awarded. See on the expansion of tort, "Mass Torts" in *The American Tort Process*, Fleming 1988, 235. See in relation to third party situations, Atiyah 5 (1985) *OxfJLSt* 485-490, Markesinis "Doctrinal Clarity in Tort Litigation: A Comparative Lawyer's Viewpoint", 25 *The International Lawyer* (1991), 953-965, and "The Need to set acceptable boundaries between Contract and Tort".

This trend is still prevailing notwithstanding the criticism. The latter focuses on the effects on the credibility of the legal system, and the stability of the business environment. American courts seem to give priority to awarding compensation, or sentencing to punitive damages, without much consideration of the financial consequences of their decisions. There are impressive examples from cases involving products liability or catastrophic losses from damage to the environment for instance. It could be said however that many of the much publicised cases involve (first instance) civil jury decisions. The picture of vast compensation and punitive damages amounts is considerably different after the appeal stage where there are no civil juries that tend to award such vast amounts.

8 See "Liability between Contract and Tort", Castronovo Carlo, in *Perspectives of Critical Contract Law,* Wilhelmson T. (ed), 1992, 273-292.

Few comment on pure economic loss can be made at that stage. At first there is a noticeable discrepancy between cases involving liability for negligent misstatements -where liability is usually accepted - and cases involving liability for negligent acts where the courts seem to be far more hesitant.

In cases where a so-called "triangular configuration" exists compensation is usually awarded. Such are the cases involving third party beneficiaries, the liability of attorneys to their clients etc. Major exception to this category is the law on the liability of accountants towards investors or shareholders (starting with the decision in *Ultramares Corporation v. Touche*, 255 N.Y. 179, 174 N.E. 441, 74 A.L.R. 1139, 1931,). To the contrary it seems that in cases where loss is consequent upon property harm to a third party, or follows a catastrophic loss (to the environment for instance), claims are rejected. In the U.S., as in England and Scotland, claims for economic loss consequent upon physical harm are usually accepted. The basic reason for the rejection of pure economic loss claims, all other tort requirements being fulfilled, is the fear of introducing widespread tort liability. According to Restatement second of the Law of Torts claims for loss by the party for whom information was asked should be allowed, while compensation for other instances of economic loss with the exception of the latter being consequent upon physical injury should be rejected.

Notwithstanding the daring spirit of American judges and the development of some stable compensation patterns the general view of the law on economic loss in the U.S. can be confusing . The reasoning and justification of the decisions is not stable or sufficiently consistent and cannot offer a coherent picture of the criteria the courts are using. The argumentation often approaches the third party beneficiary contractual understanding, so as to make it difficult to see the special reason for deciding on tort.

See Rabin "Tort Recovery for negligently inflicted Economic Loss: A reassessment", 37 (1985) *StanfLR* 1513-1538, Markesinis 103 LQR 1987, 372.

discussion will have to tackle the questions of which, among the existing the solutions, is preferable[9] and whether improving tort is the best option for third party loss.

2. Third party beneficiary rule.

This is a rather recently established and still developing principle as is the contract in favour of third parties in European codifications[10]. The modern third party beneficiary law did not emerge until the beginnings of this century and matured after the 1930's[11]. Privity[12] was not entrenched until "as late as the late 19th century"[13]. Up to the early 18th century, the tendency in England was to allow third party claims[14]. Until the beginning of the 19th century, the majority of federal jurisdictions took a similar view. The

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9 The third party beneficiary rule and the various areas of its application will attract our attention at first. An attempt will be subsequently made to highlight the advantages of the contractual solution in relation to tort. The third party beneficiary rule will be examined as the basic alternative to tortious solutions. The cases which will be referred to have been taken from collections of cases and materials and from the Appendixes to the first and second Restatement of the Law of Contracts.

10 Third party rights on a contract were only exceptionally accepted in Roman law. See in the footnotes under "Introduction" in Chapter 3. The contract in favour of third parties was introduced in the 1804 French Code Civil (§1121FCC), and only in the 1900 BGB(§328BGB), as a general rule. The 1693 reference to JQT in Stair's *Institutions of the Law of Scotland* , (first edition), is profoundly progressive for the period.

11 For a comprehensive historical account of the law in the U.S. and England see "The Discovery of Law by English and American Jurists of the Seventeenth, Eighteenth and Nineteenth Centuries: Third-Party Beneficiary Contracts as a Test Case", Karsten in 9 (1991) *Law & History Review* , 327.

12 Classical in the U.K. law are the English decision in *Winterbottom v. Wright* from 1842 (10 Mees & W. 109,152 Eng. Rep 402 (Ex.1842), and the Scottish decision *Robertson v. Fleming* from 1861 (4 Macq. 167 (H.L.Sc. 1861). The former dealt with the liability of a coach manufacturer to an employee of the purchaser for injuries caused by a defect of the coach. The latter involved a solicitor who had been hired by a debtor to draft a security agreement for the benefit of his sureties. The solicitor erred and the sureties sued him for failing to provide security.

13 Atiyah *The Rise and Fall of the Freedom of Contract* 1979; privity is a rather recent development related to the prevalence of bargain theories and the history of assumpsit (Eisenberg, M.A. "The Bargain Promise and its Limits", 95 *HarvLR* (1982) p.741.).

14 Most notable is the case *Dutton v. Poole*, 83 Eng. Rep. 523 (K.B. 1677). A father was preparing to sell wood to raise marriage portions for his younger children, among which was his daughter. The eldest son who stood to inherit the wood, promised to the father that he would pay £1,000 to the daughter were his father not to sell the wood. The court held that the daughter could enforce the contract. Worth mentioning is also the case *Pigot v. Thompson* (127 Eng. Rep. 80 C.P. 1802) where the court affirmed in a footnote the "rights of a third person to sue upon a parole promise made to another for his benefit. ". The question of third party right attracted little attention in the eighteenth century. See Flannigan 103 LQR (1987) 566-567, for a short discussion.

influence of New York courts was predominant[15] in this trend, which reached its peak with *Lawrence v Fox* [16].

2.1. *Lawrence v Fox* -- Creditor beneficiaries

The landmark case in modern third party beneficiary law is the 1859[17] decision in *Lawrence v. Fox*[18]. It is not unique in that the third party's claim was accepted[19], but for the unprecedented doctrinal view it adopted[20]. This was one example of the so-called creditor beneficiary cases, where the promisee owes the third party an obligation prior to the contract and the performance objective is the discharge of this obligation by the promisor[21]. These cases resemble the *solutionis causa adjectus*, one of the bases to allow third party claims in contract in classical Roman law[22].

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15 In *Schermerhorn v. Vanderheyden*, 1 Johns 139, 149, N.Y. Sup.Ct. 1806, the court citing *Dutton v. Poole* asserted the action of a third party based on a promise the defendant made for the benefit of this third person. In a decision which is considered classical (*Farley v. Cleveland*, 4 Cow.432 N.Y. Sup. Ct. 1825. aff'd without opinion 9 Cow. 639, 640 N.Y. 1827) the promisor (buyer of hay in the transaction) promised the promisee (seller) he would pay his debt to a third party who was promisee's debtor. It seems thought that he promised to this third party also. See Eisenberg, M. A. 92 (1992)*ColL R*, 1362.

16 20 N.Y. 268 (1859).

17 The trial session was in 1853.

18 20 N.Y. 268 (1859).

19 There is no published report of a third party beneficiary case before 1801. It seems likely that the courts would not have treated them differently from the cases in the 17th century. From the beginnings of the 19th century the courts started getting influenced by the English doctrine of privity and consideration. This was a slow process, and by the time *Lawrence v. Fox* was decided "some seventeen jurisdictions allowed third party beneficiaries to suit while seven others either did not or severely limited such suits". *Lawrence v. Fox* "did not begin the career" of the third party beneficiary rule. At the time a gift beneficiary always fared better. (Karsten in 9 (1991)*Law & History Review* , 340.)

20 Third parties had been protected that far on the basis of fictions of trust or agency relationships

21 Holy and Fox were the contracting parties. Holy gave $300 to Fox, who agreed to pay the same amount to Lawrence, towards whom Holy had a pre-existing debt. (The name Holy appears in the records of the case. In the claim a Sammuel Hawley appears. Research in the Buffallo census of 1855, indicates that the claimant is possibly a merchant named Hawles but not Sammuel. Waters, Anthony Jon "The Property in the Promise: A Study of the Third Party Beneficiary Rule" 98 (1985)*Harv LR* , 1109 et seq).

22 See under "Introduction" in Chapter 3 the references to Roman law exceptions where third party claims were allowed. See Zimmermann 752. In the case of a claim by a *solutionis causa adjectus* no direct third party claim was allowed in Roman law. See also *Basilica Textus*, Scheltema and van der Wal (eds), 1955, Groningen, and *Basilica Scholia* Scheltema and van der Wal (eds), 1953, Groningen. A claim by the third party is accepted if it would benefit the contracting party. If the buyer agreed to pay part of the price or all the amount, to a third party if the latter expresses his consent, the promisor is bound.

The decision was fairly described as the "product of a freakish combination of events"[23]. The prior obligation was possibly not enforceable[24] and the claim made no commercial sense since the promisee's creditor could sue his wealthy debtor.

The action in the trial case was for money had and received, one of the older common counts[25] -- a form of *indebitatus assumpsit*[26] -- which had become the functional

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23 Waters 98 (1985)*Harv LR* , 1116.

24 As detailed research in facts such as the place and circumstances related to the delivery of the money, Waters 98 (1985)*Harv LR* , 1109-1210. The debt was possibly from gambling

25 An older form of pleading by which the pleader sets forth in account form the basis of his claim such as money had and received, goods sold and delivered. Black's Law Dictionary 5th edition, by Nolan & Conolly, 1979.

26 Meaning "being indebted, he promised or undertook". It is that form of the action of assumpsit "in which the declaration alleges a debt or obligation to be due from the defendant and then avers that in consideration thereof he promised to pay or discharge the same." Black's Law Dictionary. There were two species of assumpsit; the special assumpsit where the undertaking was express and the *indebitatus assumpsit* where the undertaking might have been implied from the mere existence of a previous debt (Fifoot, C.H.S. *History and Sources of the Common Law: Tort and Contract*, 1949, 360).

As Plurckett notices (Plurckett, T. *A Concise History of Common Law* 1956), in the case of *indebitatus assumpsit*, the earliest examples of which come from 1542, "the idea of deceit [which was the starting point of *assumpsit*] was carried a step further" (644). Assumpsit was originally an action to recover damages from a deceitful promise.

At the time of its inception in the middle of the 16th century *indebitatus assumpsit* required both proof of the debt and proof of a subsequent promise to discharge the obligation. It was thus more onerous for the plaintiff than the action for debt, which required proof of debt only. At the turn of the 17th century the Slade's case (*Slade v. Morley*. 4 Co. Rep. 9Ia, 76 Eng. Rep. 1072 -K.B.1595/6; 4 Co Rep 92b 76 Eng.Rep. 1074 K.B. 1601) dispensed with the promise as a necessary element of *indebitatus assumpsit*, rendering thus the *assumpsit* (promise) a legal fiction and giving to the King's Courts jurisdiction over what were in all but form actions of debt. (The question before that was whether an implied assumpsit would suffice to ground a claim on the promise. The crux of the issue lied with the nature of an "undertaking", a necessary requirement to allow assumpsit. The undertaking was considered either a fact proven upon evidence or a fiction introduced simply to give colour to assumpsit. This was a technical but formidable obstacle for assumpsit. The Queen's Bench were treating undertaking as fiction while the courts of the Common Pleas thought it was a fact. The latter had the monopoly on debt. Two categories of writs had been formulated: Case and Debt. They were eminently diverse. Lawyers, accustomed to the two forms of action opposed the merging of the categories. This contradiction between the courts with different jurisdictions in relation to assumpsit lasted for 30 years and was resolved with the Slade's case which started off with a scandal. As late as 1600 the Exchequer Chamber, "packed with the judges of the Common Pleas and of the Exchequer" upset, on the issue of the nature of the undertaking, the judgements of the Queen's Bench. The view held by the latter was vindicated in the Slade's case. Case was accepted as a general alternative to Debt, and when so used the assumpsit might be a pure fiction-See Fifoot, C.H.S. 330-368, describing the triumphant progress of assumpsit in all its branches.). In the words of Plucknett, after the Slade's case indebitatus assumpsit became "an alternative to debt at the plaintiff's choice". By assumpsit the plaintiff should recover not only damages but the original debt. The results from Slade became more and more important as years passed.

equivalent to action for debt. In form, it was an action for promise but in essence it was closer to a property claim. By the time of *Lawrence v. Fox*, however, the action for money had and received was, in New York at least, a residual claim applied when more tightly organised forms of action were not applicable. The defendant in those cases was treated as a trustee who had no proper business with the money and who had to deliver them to the rightful owner[27]. Changes in procedural requirements at the same period brought the focus on substance instead of form[28].

The plaintiff's attorney concentrated wisely[29] on the delivery of the money to Fox, while the defendant's attorney tried to prove that the money had been given as a loan to the defendant[30]. The courts in the trial and the trial appeal cases rejected the latter arguments and accepted the claim. The legal explanation of Fox's liability changed between the trial and the final appeals[31]. Alterations on the bill of exceptions led to the

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Later the quasi contractual *indebitatum* counts took special forms (e.g. for money had and received). Waters 98 (1985)*Harv LR* , 1118.

Recall the Justinian law exception whereby third parties had a right to claim on a contract: A contract for deposit or of a loan for use of a thing belonging to a third party with the agreement to deliver to the third party the latter acquiring an *actio depositii utilis*. There were doubts whether this constituted an exception to the relativity principle. The third had also the *rei vindicatio* or the *actio ad exhibendum*. (The *actio ad exhibendum* is an action for the production of property. Where the thing or property is hidden or detained by a third party or is joined to some other thing or property (in such a way that a separation can be legally demanded), a plaintiff may have recourse to the *actio ad exhibendum* for production of the property which is the subject of vindicatory or possessory suit. See further under "Introduction" in Chapter 3.

27 If the plaintiff managed to establish property on the money, a promise "implied by law" was employed in order to permit recovery of the plaintiff's property. If, however the claim was based on the defendant's promise, the plaintiff had to prove that the requirements of contractual liability (privity and consideration) were fulfilled. The case of a defendant receiving money to give to the plaintiff was falling in-between the two forms of action.

28 *Lawrence v. Fox* was litigated soon after the introduction of the New York Procedural Code for 1848 (the so-called Field Codification) which abolished the common counts and gave emphasis on the substance (instead of the form) of the claims. The plaintiffs had to prove their cause of action and they would not necessarily fail if they had chosen the wrong form. (Karsten in 9 (1991)*Law & History Review* , 344.).

29 The action for money had and received was part of a reasonable litigation strategy, as the plaintiff's attorney wanted to avoid focusing on the transactions involved (Holly-Lawrence, and Holly-Fox).

30 He would therefore be a borrower and not a trustee

31 Two inked-in alterations seem to have been inserted on the copy of the bill of exceptions that made its way to the Court of Appeals, The General Term of the Superior Court in Buffalo. (The bill of exception is a formal statement in writing of the objections and exceptions taken by a party during the trial of a cause of action to the decision's ruling or instructions of the trial judge, stating the objection, with the facts and the circumstances on

payment being considered as a loan. The (successful) action for money had and received was converted into an action on the promise by a creditor of the promisee[32].

The significance of this reasoning[33] lies in its potential consequences. As long as the object of the claim was money ("a bag of beans, or a bundle of coins"[34]), it made little difference if the plaintiff had a proprietary right or a right to enforce the defendant's promise. If, however, the object of the suit broadened to include all benefits, the action would be transformed -- as it did -- to an action on the promise[35].

Soon after *Lawrence v. Fox*[36] contract law came to be dominated by the classical contract law school, axiomatically entrenching the doctrine of privity[37] and rejecting (with

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which it is founded, and, in order to attest its accuracy, signed by the judge. The object is to put the controvercial ruling or decision upon the record for the information of the appellate court. See Black's Law Dictionary.

The changes were possibly made by Fox's attorney after consulting Lawrence's attorney and with the consent of the trial appeal judge. Both alterations involve the distinction between a "delivery" of money, and a loan of money which could sustain an action on debt or on contract but not by a third party, and not (as delivery) an action for money had and received. The nature of Hole's payment to Fox became the most critical fact.

32 The decision of the court of final appeal substituted in effect "the promise to pay money for the equitable property to money itself". Waters 98 (1985) *Harv LR* , 1125-1142. What the court effectively did was to meld a proprietary interest (resembling a beneficiary's interest in a trust) with a promissory interest (resembling the right of a party to the contract). Lawrence was neither a beneficiary of the trust of which Fox was a trustee, nor a party to the contract sued upon. The action thus became of a hybrid nature resembling a proprietary claim and a conventional contract action. The court' drew analogies from various field of law and referred to supportive scholar opinion

33 The decision of the Court of Appeals was "split three ways". Out of the eight judges, two thought that the plaintiff could not enforce the contract, due to the absence of privity, The other six took the opposite view but two considering that holly acted as plaintiff's agent, and four for rather obscure reasons stressing that compliance with the doctrine "should not be made in the face of manifest justice". Eisenberg, M. A. 92 (1992) *ColL R*, 1354.

It was difficult for the judges of the majority at that time to outweigh the doctrinal objections to the claims which called upon the privity of contract. Courts accepting third party beneficiary claims during this period often resorted to fictions such as the presumed assent or a unity of interest between the third party and the promisee.

34 Waters 98 (1985)*Harv LR* , 1146.

35 Had the courts continued to resolve such cases on a trust basis the third party beneficiary rule which applies today even for securing the benefits of welfare programmes, would have not attained a wider range of applications.

36 20 N.Y. 268 (1859).

37 Which is conceptually related to the bargain theory and the history of assumpsit, the latter being the basic form of claim on the promise (Eisenberg, M.A. "The Bargain Promise and its Limits", 95 *HarvLR* 1982, 741.)

minor exceptions) the possibility of third parties enforcing a contract[38]. Again, the impact of privity, stronger in some states[39], was not as grave as it was in England. Even among major classical contract law scholars there seems to be a more lenient predisposition towards third parties[40].

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38 This approach is evident in the writings of Langdell and Holmes while Williston takes a more lenient view. (Eisenberg, M. A. 92 (1992)*ColL R*, 1365-1366, Karsten in 9 (1991)*Law & History Review* , 327).

39 In the 1840's few states had adopted the new English rule to exclude a claim by a third party. In the 1850's other states apart from Massachusetts were moving towards adoption. For instance New Hampshire abandoned the third party beneficiary rule in 1851, Vermont in 1836, Missouri in 1858. Karsten in 9 (1991) *Law & History Review* , 344-345.

The consideration and privity doctrines characterise the school of classical contract law and were accepted in an axiomatic manner. Langell, for instance thought that the very essence of consideration imposed that it must move from the promisee and it was illogical and unacceptable that it could move from the a third party. The following argument that none but the promisee could sue for breach of promise was "so plain upon its face that it is difficult to make it plainer by argument"; Karsten in 9 (1991)*Law & History Review* , 330, quoting Christopher Langell's *Summary of the Law of Contracts* (1880). The fear of exposing the promisor to two suits on the basis of the contract was an important consideration leading the courts to reject third party claims. In a Louisiana case from 1818 however, the state's high court allowed in effect two suits on the same contract. Thomas Bailey bought a lot in New Orleans that was encumbered by a mortgage, agreeing to assume the debt. He continued the annuity payments for a while and then went into arrears. The mortgagee, the city of New Orleans bought two separate suits against both the original mortgagor and the grantee of the equity of redemption. The old Spanish Civil Law and the Louisiana Civil Code of 1808 permitted third party beneficiary claims and the suit against the grantee was accepted. This latter suit did not impair the right of the mortgagee to suit the mortgagor (since the former had not released the mortgagor from his obligation.

(In England the tendency is hallmarked (according to the majority of commentators and the case law) by *Tweddle v. Atkinson* (121 Eng.Rep. 762 (K.B. 1861). A and B were the fathers of a newlywed couple. They promised each other to pay certain sums to the husband and expressly agreed that the promise should be enforceable by him. The wife's father died without paying the promised amount and the husband sued the executor to enforce the contract. The court held for the executor on the ground of lack of privity. There are however differing opinions and strong criticism as to the meaning and effect of this case which is accepted as classical for the doctrinal views it advances. See Flannigan 103 LQR (1987), pp. 567-568.). This case rejects *Dutton v. Poole* "in all but form". See Eisenberg, M. A. 92 (1992) *ColL R*, 1365).

The impact of privity was stronger in Massachusetts, (continuing a tradition of strong attachment to English law) where the doctrine of privity was followed even after the third party beneficiary rule had been accepted elsewhere. The New York courts were more cautious; they upheld the *Lawrence v. Fox* approach but limited it to a minimum, to its bare facts in some instances, At first New York courts upheld claims from creditor beneficiaries only, considering often that the pre-existing legal obligation would create "a privity by substitution" with the promisor, which allowed the characterisation of the transaction as agency (the promisee being agent for the third party) or trust (the promisor being the trustee for the third party. Nearer to the end of the 19th century the New York courts restricted further the acceptance of third party rights. Eisenberg, M. A. 92 (1992)*ColL R*, 1368.

40 Williston was expressing his preference in 1920 for a right to sue of the beneficiaries for whom a donative intent has been expressed on the basis of equity.

2.2. Expansion to donee-beneficiaries.

Between 1860 and 1900 eight state Supreme Courts had accepted the third party beneficiary rule as an "American" rule[41]. Classical contract law accepted third party claims if there was an obligation of the promisee towards the third party. The courts expanded the concept of a prior obligation to include a moral duty, for example that between a husband and wife[42] (as was the case with Greek courts before the AK, expanding the creditor's interest in the performance to include moral concerns[43]). A more effective shift took place at the beginnings of the 20th century.

The decision in *Seaver v. Ransom*[44] in 1918, established the extension of the beneficiary rule to donee beneficiary cases, where the performance objective is to give effect to the promisee's donative intention. The claim was against the executors of a testament. The testator had promised his wife, while drafting her will, that he would leave property to the plaintiff (her niece) in his will, but did not do so[45]. The court allowed the plaintiff to enforce the promise. The ruling, not distinguished for its doctrinal clarity[46], focused[47] on

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41 The eight were: Iowa, Mississippi, Kansas, Colorado, Texas, Nebraska, Florida, and California. Sixteen state supreme courts had not addressed the issue, while three (Michigan Wyoming and Georgia) considered that the "English" rule was well settled. Karsten in 9 (1991)*Law & History Review* , 353.

42 A 1899 decision (*Buchanan v. Tilden*, 52 N.E. 724, N.Y. 1899) accepted the third party claim considering that there was a pre-existing obligation of the promisee towards the third party; more specifically a moral duty of the husband to his wife. The promisor made a contract with the promisee under which he agreed to pay $50,000 to the latter's wife. In exchange the promisee would obtain a loan for the promisor. The court held that the wife could enforce the promise. The "unity of interests" between the spouces was taken into account.

43 See under "Third party questions before the AK", in Chapter 3.

44 120 N.E.724 (N.Y. 1918).

45 The promisor was Judge Brenan who prepared his wife's will. After he read the will he had drafted under her directions, his wife expressed the wish that the property of a house which she was leaving to Judge Brenan for life, to be transferred after his death to a niece of hers and not to charity as the will provided for. As the wife's strength was waning and there would be no time to draft a new will, Judge Brenan promised that if she signed that will he would leave in his will enough property to her niece to make up the difference. Eventually he left nothing in his will to the niece who turned against the executors of his will.

46 In the end it was said that "the equities are with the plaintiff".

47 The decision could not call upon a unity of interest between promisee and third party

the moral duty of the wife (promisee) to her niece (plaintiff). In effect, the duty substituted consideration[48].

2.3. Academic contributions.

Arthur Corbin[49] was an enthusiastic campaigner for a general rule on third party beneficiary rights throughout his life[50]. Focusing on supportive case law and practical considerations, he tried to defeat the "empty formalism" which opposed the acceptance of the third party beneficiary rule[51]. The 1932 Restatement of the Law of Contracts (Restatement first)[52] did not go as far as Corbin would have liked. By his treatise in 1951 he influenced Restatement second of 1979[53].

Williston, the principal author of Restatement first held more conservative views[54]. In the second edition of his treatise, in 1936[55], contradicting his own 1920's view,

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48 In effect these decisions expanded the concept of a beneficiary with an enforceable title, it did not depend upon the existence of a previous obligation. The promise becomes the more critical fact. Aspects of a "promise" theory of contract law seem to find their way in the case law.

49 Corbin, Arthur Lindon *Contracts*, 1952, 723 et seq. Waters 98 (1985) *Harv LR* , 1169-1170.

50 Between 1918 and 1930 he published six influential articles which instigated discussion on the issue and advanced his goals; impressive is the effect he had on the jurisdiction of Pennsylvania. One of his articles in 1928 led to the acceptance of the third party rule in 1932). Waters 98 (1985) *Harv LR* , 1169.

51 He tried to promote the latter against the alternative devices of trust and agency. Waters 98 (1985) *Harv LR* , 1169.

52 The Restatement of Law, is a series of volumes authored by the American Law Institute, that tell what the law in an area is, how it is changing and what directions the authors think it should take. The Restatement refers to different areas of law; Restatement of the Law of Contracts or of Torts etc. Black's Law Dictionary.

The American Law Institute is a group of American Legal Scholars responsible for the Restatements and who, jointly with the National Conference of Commissioners on Uniform State Laws, prepare some of these Uniform Laws (the Uniform Commercial Code for instance).

53 He suggested that the one essential classification of beneficiaries should be "intended" and "unintended" beneficiaries. The former expression was finally adopted by the second Restatement. As a whole he influenced the drafters of both Restatements. Until his mid-eighties he was actively involved in the preparation of the materials for the first draft of the second Restatement which was completed in 1964 as seen from correspondence between drafters reveals (Corbin died in 1967.).

54 As can be seen by an article in 1902, and by the first edition of his treatise in 1920. In 1920 for instance he favoured the enforceability of the donee-beneficiary claims, and of some only of the creditor beneficiary claims. The latter, he thought, should be treated altogether differently; the creditor beneficiaries and the promisee had adequate remedies. The former could have interests worthy of protection on the basis of equity

55 Waters 98 (1985) *Harv LR* , 1167.

he accepts Corbin's idea that the third party's right is contractual[56], as opposed to being equitable (which is the view in Restatement first), and as such it is recognised in Restatement second.

From another point of view, the third party beneficiary rule is at the centre of a conflict between supporters of doctrinal and supporters of instrumental ideas on contract law. The former, reject the rule, focusing on principle, and ignoring the practical consequences[57] and the latter foster practically desirable developments endorsing the rule[58]. The establishment of a more instrumental approach was slow and gradual[59].

2.4. Restatement first.

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56 More precisely he rejects the distinction legal-equitable for the third party beneficiary rights; Corbin 740.

57 Dominant is Roscoe Pound. On the third party beneficiaries issue, Langell Chr. is a typical representative of doctrinal, formalistic ideas. (Karsten in 9 (1991)*Law & History Review*, 328-31).

58 As for instance Friedman Lawrence who thought that the law was "mirror of the society" (Karsten in 9 (1991) *Law & History Review* , 328), Corbin (discussed before), Kessler and Gilmore who treated the third party beneficiary rule as a victory over doctrine as evidence of "of the progressive liberalisation or erosion of the late nineteenth century theory of contractual obligation" in the process of "a socialisation of our theory of contract.*Contracts, Cases and Materials* 1970, 1118, and Eisenberg who stretches the need for the social congruence of common law, 92 (1992) *ColLR* , 1368.

59 It was after the beginnings of the 20th century that courts started to focus on the advantages in accepting a direct claim by the third party. The importance of the third party beneficiary rule in the 19th century for instance may lie in the fact that it was debated even when rejected with arguments that could be termed utilitarian. It was noticed that in the nineteenth century Pennsylvania, Virginia, Vermont and Connecticut, where rejecting the rule as "inconvenient", or an anomaly, because it could lead to two suits against the promisor, who needed the consent of a stranger to compromise with the promisee. In Nevada and Colorado it was held that the rule was "convenient"; a direct third party claim would lead to the avoidance of a multiplicity of actions. See Karsten in 9 (1991)*Law & History Review* , 351-352 and Eisenberg, M.A. who stretches the need for the social congruence of common law (92 1992, *ColLR*, 1368).

Nineteenth century American jurists would more often consider bending the rules for reasons of public policy or for the purpose of enforcing the position of an entrepreneur. The conflict between the two strands of understanding the use of law is but an expression of the different schools of understanding the rationale and function of he contractual relationships as a whole.

In the 19th century for instance the courts approached the assumpsit cases with great respect for doctrine, and gift beneficiaries fared somewhat better than creditor beneficiaries. By 1920 the third party beneficiary rule was of almost universal acceptance. In this process the role of specific legislative measures should not be omitted, concerning especially jurisdictions where the rule was not accepted. Karsten gives the example of the Field codification and its role in reversing the doctrinal views adopted in the state of Missouri. Karsten in 9 (1991) *Law & History Review*, 351-352.

The third party beneficiary rule is acknowledged in 1932 in the Restatement on the Law of Contracts (Restatement first), this basic source of American law. An increase in concern for third parties can be traced in the first three decades of the century in all the jurisdictions examined in this study[60]. Three categories of beneficiaries are identified in section 133 of Restatement first; the creditor and donee beneficiaries who are entitled to a claim on the contract, and "incidental" beneficiaries, falling under neither of the previous categories who do not have this right (§§135,136)[61].

Restatement first gave the impetus for the abolition of doctrinal objections to the rule and set the background for its development as a general norm[62]. It actually highlighted "an urgent need for such a formulation"[63].

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60 More impressive is the Sixth Interim Report of the Law Revision Committee, in Engand, published in 1937 under the title "Statute of Frauds and the Doctrine of Consideration" (Cmd. 5549), suggesting the recognition of a right of a third party to enforce a contract which by its express terms purports to confer a benefit directly on him (para. 41-80). See "Third party beneficiary claims", in Chapter 6. See under "Until 1971: Focus on unlawfulness", in Chapter 2, the reference to the pioneering work of Reinhard from 1933. See also under "Initial stage" in Chapter 2, referring to the first phase of development of the contract with protective effects from 1907. In Greek law third party claims were accepted at an increasing pace after the beginnings of the century, As regards Academic consideration, Triantafilopoulos is dealing with third party loss in 1922, and Michailidis-Nouaros in 1940. See under "Third party beneficiary questions before the AK" and "Academic views" in Chapter 2. In Scots law the leading case as regards JQT *Carmichael v. Carmichael's Executrix*, 1920 SC (HL) 195, was decided at the beginning of the second decade of the century, and has attracted the concern of Scottish lawyers ever since.

61 The characterisation of a beneficiary is based on the terms of the promise, in view of the accompanying circumstances. Donee beneficiaries are divided somewhat strangely into cases where the purpose of the contract was to confer a gift to the third party and cases where the purpose was to confer any other right. The pre-existing duty of the promisee towards the creditor beneficiary could be "actual, supposed or asserted" or even "a right of the beneficiary against the promisee which has been barred by the Statute of Limitations or by a discharge in bankruptcy, or which is unenforceable because of the Statute of Frauds"(§133, 1, b,).

62 Basically through the identification of certain categories of beneficiaries.

63 Eisenberg, M. A. 92 (1992)*ColL R*, 1374.

In Restatement first the rule was, allegedly[64], not provided for as a general principle[65]. The category of donee beneficiaries was ill drafted[66]. Moreover, emphasis was laid on the promisee's intentions, while both parties' intentions and the agreement should have been taken into account. However, in case law, it was the agreement that was examined. The Restatement's focus might have concerned the claims' legitimising reason[67].

The courts relied on the Restatement's intellectual authority to expand the application of the rule. Thus, apart from the rather obvious insurance contracts, the rule was applied in collective agreements, contracts for works, contracts with attorneys, franchising and government contracts and corporate liability cases[68].

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64 The outline of the third party beneficiaries rule in the first Restatement was criticised. See Eisenberg, M. A. 92 (1992)*ColL R,* 1358, "Third Party Beneficiaries and the Intention Standard: A Search for Rational Contract Decision Making", C.H.N. 54 (1968)*VaLR* , 1166-1193.

65 It was Willinston's idea that the provision of a general rule would create greater confusion which influenced the drafters of Restatement first. This view was related to the position that allowing third parties to enforce the contract was supported by equity and not by the law of contract principles.

66 The provision on a third party for whom a right was intended to be conferred seemed to presuppose the absence of a true donative intent which is difficult to assess in any case.

67 The examination of the agreement is inevitable as, in the last extent the content of the promise mattered. The promissee's intentions are related to his interests as a legilitimising reason for awarding a claim to the third party. See under "Real contracts for the benefit of third parties" in Chapter 2, and "Contract for the benefit of third parties" in Chapter 3: In both cases both parties' intentions and their meeting is examined. The situation seems to be more complicated in Scots law due to the debate on the question of the irrevocability of the third party's right in the JQT, but it is obvious that once the doctrinal explanation for the JQT has to refer to the acceptance of the enforceability of unilateral promises in Scots law (the doctrine of *pollicitatio*), whether it is an expression of this principle or not, then profoundly the agreement is looked at. See under "The *jus quaesitum tertio*" in Chapter 5.

68 The beneficiaries were characterised as creditor or donee beneficiaries. The application of the rule has affected tort-based reasoning, and has been discussed for other instances in accountants liability for example.

Again, case law was criticised as being restrictive of third party rights, ignoring commercial needs[69], and relying on ambiguous criteria such as the parties' intentions the promisee's motives or the directness of the harm[70].

These criticisms[71] cannot conceal the importance of the gradual shift in case law and the impetus Restatement first gave to this shift[72], leading to significant improvements to the rule in Restatement second[73].

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69 The allegation that case law ignores commercial needs and fairness or justice when focusing on intention was generally right. However, the intention aspect (fundamental in Western legal cultures) is indispensable in contract law can be seen in all the relative theories of the Anglo-american juridical culture, (See the reference in Flannigan 103 LQR (1987) 564-593.). To the extent that the rule is a contractual mechanism it cannot dispense with the intention criterion.

70 The courts focused on an intent-to-benefit test or a similar subjective motive of the promisee. An intent to benefit test could refer to objectively inferable or to subjective, not expressed intention; it could involve the final results of performance, or merely a course of action, or the means to be used. The definition of intent varied in the case law. Decisions often treated as intent the promisee's motive in entering the transaction or his more remote targets (see C.H.N. 54 (1968)*VaLR* , 1166, at 1170-1173.). The courts were not satisfied with the promisor's knowledge of conferring a benefit to the third party. A subjective motive by the promisee with this purpose was usually required. This criterion seems more satisfactory than the search for objective intent.

Other approaches involved elaborating the parties' intent as "clear" "express" or "definite" or the directness of harm. This latter concept is contradicted by many decisions on will drafting cases. One can anticipate cases where the benefit is conferred directly and yet the parties never intended to allow the third party sue on the contract. On the other hand, even if performance is directed to the contracting party (attorney's client), claims by third parties (disappointed beneficiaries of wills) have been accepted. The same apply to the alternative requirement of a "direct benefit".

These views were criticised as ambiguous and confusing. The case law was alleged to be short sighted and restrictive of third parties rights. There was substantial background on third party rights in the legislation and in academic work, and this background should have been exploited by the decisions. See C.H.N. 54 (1968) *VaLR* , 1175, referring to the Uniform Commercial Code's test in its balancing the intention to contract against a background of variables within a particular transaction as good faith, unconsionability, the commercial needs of the parties, and their reasonableness and desirability in the relevant market and trade custom and usage.

71 Critics of the case law are usually promoting their own idea on the future evolution of the third party beneficiary rule.

72 It would be excessive to anticipate a comprehensive outline of the rule's ramifications at that stage and difficult to think of a more advanced text which could gain the drafters' consent. there are at present many unsettled issues).

73 The case law expanded the application of the principle to a new array of different kinds of relationships, namely those concerning securing benefits from government contracts by enforcing public welfare programmes. As will be discussed later evidence of this newer view are traced back in 1964 coinciding with the first draft of Restatement (second) on the Law of Contracts.

2.5. Restatement second (1979).

Responding to the problems confronted by case law[74], a single term is used to describe the beneficiaries who should be entitled to sue; they are the "intended beneficiaries" (§302 I). A claim would be accepted if it would be an appropriate means to effectuate the parties' intentions[75], and involved either a promise to pay money or to give a gift[76], and if the beneficiary had shown reasonable reliance to the manifestation of intent.[77]

Critics argue that Restatement second inherited the weaknesses of the first[78], failing again to define a single general principle, and relying excessively and unqualifiedly on intention, while the presentation of reasonable reliance was confusing[79]. However, apart

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74 The formal reasons put forward for the substitution of the "intended beneficiaries" to the categories of Restatement first, were that the categories had been applied differently in different states (some of which accepted the rule for one of the categories only), while the courts had in numerous cases accepted the claims of third parties who could be described as neither donees or creditors, and had stretched those classifications to the point where the law required restating. Waters 98 (1985) *Harv LR* , 1171, and C.H.N. 54 (1968) *VaLR* , 1169. The two categories of Restatement first were abandoned as they carried "overtones of obsolete doctrinal difficulties".

75 This criterion is more practical than say the nature and purpose of the contract as is the case with §328BGB. See "Real contract in favour of third parties", in Chapter 2, although the point is again to interpret the content of the performance.

76 A third party is an intended beneficiary *"if recognition to a right to performance to the beneficiary is appropriate to effectuate the intention of the parties and either (a) the performance of the promise will satisfy an obligation of the promisee to pay money to the beneficiary; or (b) the circumstances indicate that the promisee intends to give the beneficiary the benefit of the promised performance"* (§ 302).

77 According to the comment on §302, the manifestation of intent by the promisee and the promisor must be such so as *"to make reliance by the beneficiary both reasonable and probable"*. Intended beneficiary is the one who has shown reasonable reliance to the intentions of the parties.

78 The section defining the intended beneficiaries (§302), combines elements from Restatement first, and from the intent-to-benefit test. According to one view therefore it is even more restrictive than Restatement first because it adds to the latter's requirements, (Eisenberg, M. A. 92 (1992)*ColL R*, 1381-1384.). This idea seems unfounded. The concept of an "appropriate means to effectuate performance", incorporates the most advance reasoning of the case law and constitutes a significant progress introducing more practical commercial or social criteria in case law.

79 The relative comment on §302 seems to fall short of the more complicated §302 text. The assessment of protected reliance, which is not actual but hypothethical, introduces an element of discretion without offering any significant guidelines, in addition to those contained in the commented section, for deciding on whether third parties should be allowed to enforce the contract. It has been noted that reliance forms uncertain ground for decisions on pure economic loss. See under "Third party pure economic loss: Contractual approaches", in Chapter 5.

from the fact that focusing on intention is inevitable[80], the rule is expressed better than in Restatement first[81], more uniform standards are set[82], and the guide-lines offered to the courts are flexible[83]. Nevertheless, there was still need for more workable criteria and firmer assessment of the law.

The application of the rule became more stable[84] after Restatement second, expanding to an impressive range of contracts[85]. The Restatement's appeal had been made

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80 Recall that neither *Drittschadensliquidation* nor the contract with protective effects were based on the contract in favour of third parties because the intention criterion could not be fulfilled. See under "Solutions based on the autonomy of the parties' will", Chapter 2.

81 Restatement second however does not appear to focus exclusively on the intention to benefit, especially with respect to its incorporation of the concept of an appropriate means to effectuate performance, a utility oriented concept.

The provisions seem broader than the New Zealand model of contracts in favour of third parties, or the equivalent of the continental Codes. (See Newman, Robert "The Doctrine of Privity of Contract: The Common Law and the Contracts (Privity) Act 1982, 4 *Auckland University Law Review* (1983) 339. With regard to Australian law see "Duty to avoid Economic Loss", 51 *The AustrLJ* 1977, pp.372-385. An account of the situation in Canadian law can be found in "Economic Loss and Negligence", 50 *CanBarRev* 1972, p.580.).

82 Restatement second abolishes the categories of beneficiaries and use of the single, broader term "intended" for the beneficiaries with an enforceable right.

83 A degree of discretion based on the looser terminology is not necessarily a defect and it does not hinder the development of the law. The third party beneficiary rule is a mechanism of general application. It is difficult to design in advance a convincing test, which will lead with certainty to the acceptance or rejection of the third party claims.

84 Thus, continuing previous policy, knowledge that the plaintiff would benefit from the contract was not sufficient to make the plaintiff an intended beneficiary. This is the case of a real estate broker who leased his land to a development company for building of a shopping mall. The developer entered into a sublease with a retail store chain. The developer, unable to build, declared bankruptcy and breached the lease. The broker sued the retailer for breach of lease, intentional interference with the contract under a third party beneficiary theory [*Hibbs v. K-Mart Corp*, 870 F2d 435, 1989]. In another case the plaintiff ordered a piece of paper manufacturing equipment from a dealer, who bought the equipment but sold it to someone else. The plaintiff turned against the seller whose premises he had visited for the inspection of the equipment. *Corrugated Paper Products v. Longview Fibre Co.* 868 F2d 908, 1989.

In order to consider therefore the claimant as intended beneficiary something more than knowledge of the benefit would be needed. Thus in one case it was the assertion that performance was intended to benefit the plaintiffs along with a description of the direct and immediate benefits the plaintiffs were expected to receive that led the courts to characterise the third parties as intended beneficiaries.*Vista Co. v. Columbia Pictures Industries, Inc.*, 725 F Supp 1286, 1989. Limited partnerships and general partners that had acquired ownership sued a movie corporation to recover certain tax losses and to enforce its ownership rights derived from contracts negotiated for the benefit of individual partners. The contracts were for the marketing and distribution of the films by the corporation which engaged in a number of improper acts that effectively reduced compensation in the market for the licensing of the films. The general partners were found to be intended beneficiaries of the contracts.).

evident since its drafting stage[86]. Case law and theory concentrated on the definition of "intended" and "incidental" beneficiaries[87].

The application of the beneficiary rule continued in the areas of life insurance, of attorney liability for the drafting of wills, of franchising etc.

85 This expansion evidences of the progressively greater willingness of the courts to adopt third party claims. In one case for example, the widow of an Indian shot and killed by an officer of the Indian Police force, brought a wrongful death action against the government under an Indian treaty by which the government pledged to "reimburse the injured party for the loss sustained". The court held that the plaintiff was entitled to sue as a beneficiary of the Indian treaty, and remanded the case to the trial commissioner (*Hebah v. United States*, 192 Ct.Cl. 785. 428 F2d 1334, 1970).

In a recent case an author sued a hardcover publisher for proceeds from the publication of his novel. The publisher's creditor intervened claiming that as a secured creditor he had a superior right to the funds the publisher had proffered as collateral. The district and the appellate courts held that the author, as an intended beneficiary, had a superior right to the proceeds. The appellate court further held that the author's interests in the two thirds of the proceeds from the paperback sublicence agreements between the paperback publisher and the hard cover publisher, was superior to the creditor's security interest when those proceeds had already been transferred to the creditor at the time the publisher assigned contract rights to its creditor. (*Septemertide Pub. B.V. v. Stein and Day Inc* 884, F2d 675, 1989). In another case an industrial car park tenant who had been cited for shortage of parking spaces on its property, sued the park's developers, inter alia, for a judgment declaring that it had the right to use an off-street parking area set aside pursuant to an agreement between the defendants and the village in which the park was located. The trial and appellate courts accepted the claimants argument on the idea that he was a third party beneficiary of the respective agreement (*6-8 Pelham Parkway v. Rusciano & Son*, 170 AD 2d 497,565 NY S2d 843, 1991).

86 The first draft was issued in 1964. The courts were focusing on the character of the plaintiff as intended or incidental beneficiary. In *Bush v. Upper Valley Telecable Co.*, 96 Idaho 83 524 P2d 1055 (1974), the plaintiff, a television cable subscriber, brought a class action against the defendant cable company for damages caused by the violation of a rate schedule filed with the city pursuant to the defendant's franchise with the city. The Supreme Court reversing a judgment for the defendant, held that he plaintiff was an intended beneficiary of the franchising agreement, and was excused for not seeking administrative relief because the latter was unlikely.

The courts were quick to reject claims which were genuinely unconvincing. The claimants were found incidental beneficiaries in the case of a plaintiff claiming the status of a third party beneficiary of oil and gas wells' leases between the defendant and the plaintiff's brother. What the plaintiff would receive would come though his brother's interest (*Martin v. Edwards*, 219 Kan 466 548 P2d 779, 1976). Similar is the result of a subcontractor claiming that he should be exempted from liability as a third party beneficiary of the building purchaser's insurance contract (*Weems v. Nanticole Homes Inc.*, 37 Md. App. 544, 378 A2d 190, 1977). An unpaid subcontractor was found to be an incidental beneficiary of the contract between the owner and the general contractor (*Port Chester Elec. Const. Co v. Atlas*, 40 NY 2d 652, 389 NY S2d 327, NE 2d 983, 1976)

Certain states kept the old rule even after the introduction of Restatement second. In *Quigley v. General Motors Corp* 660 FSupp 499 1987, the court considered that Kansas followed the old rule dividing the beneficiaries into three classes, therefore the cross-claim of the co-defendant, the county's government based on a donee beneficiary theory could not be accepted.

87 The examples one could refer to are numerous. The interpretation of the terms of the contract in question can be crucial. In a relatively recent case plaintiff was the employee of a bookstore, held at and assaulted in the store after closing, and defendant was the security company who provided the store with a security system. The trial court, the intermediate

2.6. Enforcement of public welfare programmes.

Despite the possibly opposite view in Restatement second[88] the rule was extended towards securing, by means of private suit, the benefits from government contracts, where one of the parties is a governmental entity and which, in most cases, aim at implementing welfare programmes.

Case law dates back from at least 1964[89]. Protection from the beneficiaries of welfare programmes had been accomplished until then by inferring private rights of action based on the relative legislation[90].

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appellate court and the appellate court held that the plaintiff was only incidental beneficiary of the contract between the bookstore and the security company. The contract was designed to protect property after the employer left and the company could not have anticipated protection of employees after the store closed for business (*Hill v. Sonitrol of Southwestern Ohio*, 36 Ohio St.3d 36, 521 NE 2d 780, 1988). .

88 Restatement second excludes the application of the rule for consequential damages to "contracts with a government or a government agency" (§313 repeating §145 of Restatement first). This statement seems to be suitable for (and aimed at) the commercial contracts concluded by governmental entities and not for welfare programmes. The provision is not easily compatible with the restitutionary side of the rule.

However Restatement second does not entirely disregard claims for benefit from public programmes provided they can be based on the "policy of the law authorising the contract" (§313, I).

89 An important feature in this process is the 1964 Civil Rights Act, since the passage of which the federal funding of public programmes have often been conditioned on the compliance of recipients with one or another federal statute. The statutes were defining the class of people intended to be benefited by the programme. It was after 1964 that the Supreme Court took a restrictive view of implied private rights to claim the enforcement of the relevant statute. Waters 98 (1985)*Harv LR* , 1172-1176.

90 Those whom the legislature intended to protect by statute, had a right to enforce the statute, even if there was no express statutory language to that purpose.

Gradually, after 1964[91], and with increasing pace after 1980[92], the third party beneficiary rule was applied as the, exclusive or auxiliary, alternative means for the beneficiaries' protection[93]. In fact, thanks to the rule, there was protection for the beneficiaries of government contracts at a time of increasing deployment of contracts as means of policy by governing bodies where "implied rights have all but disappeared for some groups of plaintiffs"[94]. The rule was applied in such diverse areas as the stock exchange, or public welfare programmes in education, housing or medical aid[95], and is still in the process of evolution[96]. There is no corresponding application of a contract liability mechanism in favour of third parties as citizens/governed/welfare beneficiaries in any

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91 The Supreme Court from 1964 onwards restricted the application of implied private rights of action. Especially after *J.I. Case Co. v. Borak*, 377 U.S. 426 (1964) where an implied private right was accepted. Borak was a stockholder in the J.I. Case Company who claimed that the management had participated in the issuance of false and misleading proxy statements in contravention of section 14(a) of the Securities Exchange Act of 1934 and that the misleading proxies lead to a merger with the American Tractor Company. The Supreme Court held that the legislature aimed at protecting investors such as Borak and effective enforcement of the act required recognition of a private right of action for damages. In 1975 following a period of stiffening of the Supreme Court's attitude, the Court established a four pronged test for inferring a private right of action. The test which was modified later is said to be marking the beginning of the end of the presumption in favour of such rights of action. Waters 98 (1985) *Harv LR* , 1175.

92 Between 1964 and 1984, more that two hundred federal cases have involved or discussed the application of the third party beneficiary rule, and a claim to an implied private right of action to enforce a contract. Most occurred after 1980. Waters 98 (1985) *Harv LR* , 1176.

93 The enforcement of the relative statutes was thus realised. The beneficiaries' claims have been accepted in instances, where implied private rights of action would have been rejected.

94 Waters 98 (1985)*Harv LR* , 1178. The attitude of the Supreme Court might seem self contradictory. The tendency to accept third party claims, undermining its own restriction of the private rights of action, can be explained as responding to a need not to leave the beneficiaries unprotected, and to rationalise the occasions where a private suit for the implementation of governmental policy would be accepted. In the case of the third party beneficiary rule emphasis is laid on the contracting activity of the governmental entities.

95 Waters 98 (1985)*Harv LR* , 1178 et seq., Eisenberg, M. A. 92 (1992)*ColL R,* 1406.

The contractual claims are often similar to claims based on the relevant statute; doctrinally they are different. However, courts are still hesitant to resort to contract law· Instead they often refer to the statute creating the benefit for the claimant, or use certain contract law provisions selectively. Such is the case *Baird v. Fraklin* (141 F.2d 238, 2d Cir), where although the relevant statute and not the contract formed the basis of the decision the longer contractual limitation period was applied as based on the same set of facts and involved the same complaint.

96 The restitutionary form of action proposed by Waters is based on the rules of unjust enrichment. However more discussion is required for the potential of the third party rule. Waters 98 (1985) *Harv LR* , 1192-1203.

other jurisdiction[97]. This fact could be explained on a hypothesis of greater frequency of such contracts in American governmental practice, but, in any case, the application of the beneficiary rule in such cases illustrates amply its potential expansiveness.

2.7. The dual nature of the third party beneficiary rule.

Public welfare benefits are an expression of the so-called "new property"[98] in American law. These are entitlements (intangibles usually) to the welfare governmental function, that have grown to form a distinct category of constitutionally protected rights[99].

The rule originates historically from a private law notion of equitable property which is similar to the rights to welfare benefits. Therefore, the rule includes not only the later developed promissory liability aspect but also, the equity oriented restitutionary liability[100].

In other words, in its contractual expression the rule is appropriate for compensating violated promises (expectation damages), while the quasi-contract, restitutionary side of the rule is appropriate for implementing government contracts[101], where the claimant's entitlement has a proprietary character[102].

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97 The nearest examples are those cases which concern public utility provisions, as the most important Greek case on the supply of electricity to the sublessee of a chicken farm, which do not involve the exercise of public authority in the same manner.

98 "The New Property" was of an influential article by Charles Reich in 1964, which initiated the relevant debate in the coming years.(73 *YaleLJ* (1964), 733). Reich noticed "a perspective of transformation of the society as it bears on the economic bases of individualism", and argued for "protection for the individual against the ruthless pressures of a collective society". He thought that government largess was "only one small part of a far greater problem", and that many "new other forms of wealth" were emerging. See also Reich, Charles "Individual Rights and Social Welfare: The Emerging Legal Issues", 74 *YaleLJ* (1965) 1245-1257.

99 Most, even if concerning intangibles, could not have been considered as property in terms of the common law (or civil law) meaning of the world.

100 See again the evolution of the rule as seen in *Lawrence v. Fox*, where a claim for money "had and received", essentially a claim on property (whereby claims were until then resolved on the basis of trust), was transformed to a claim on the promise.

In Waters' words the third party beneficiary rule was the result of a merger "of a restitutionary, trust-like concept with an action on the promise" (Waters 98 (1985)*Harv LR* , 1200.). It seems that the range of situations where the rule applies can be divided into cases where a quasi contractual (restitutionary) approach is suitable, and to those that are examples of a contractual setting.

101 As mentioned, Restatement second excludes the application of the rule for consequential damages to "contracts with a government or a government agency" (§313 repeating §145 of Restatement first), although it does not entirely disregard claims for

2.8. Promisor's defences[103].

The beneficiary's right is contractual[104] and he has the same remedies as "if he were a contractual promisee of the performance in question"[105]. It is seldom, if ever,

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benefit from public programmes provided they can be based on the "policy of the law authorising the contract" (§313 I). Restatement second does not seem to be compatible to claims for welfare benefits which are not for consequential damages or insurance risks claimed by an injunctive relief, as specific performance is asked. A bargain-based calculation of responsibility is not necessary since the object of the claim is specific. The policy considerations ("the likelihood of impairment, the possible excessive financial burden of the contractor, the availability of alternative relief insurance") in the same section of Restatement second do not seem to apply to welfare situations. The definition "members of the public" seems broad for the usually identifiable class of people involved in the programmes.

102 See the suggestion by Hagen on *Drittschadensliquidation*'s application to the category of duties of care. He argued that these cases could be treated on the basis of a teleological extention of §991(II)BGB. Hagen suggestion was less well placed to treat third party loss in comparison to a contractual approach, although they could have significant applications. See under "Cases involving a duty of care (Obhutsfälle)", in Chapter 2. Recall the provisions on subdepositing and subleasing (where there is an element of transfer of possession) in the AK and the BGB; §825(2)AK and §599(2)AK, and §6p5BGB and §556(III)BGB respectivelly. In those systems property/possession based claims have profoundly a narrowly conceived application, not comparable with that of the beneficiary rule in government contracts.

103 The question of defences has attracted much attention. See Corbin 770 et seq. As was observed "for the ensuing hundred years there was little or no discussion or either the freedom of promisor or promisee of either to rescind or modify the contract without the beneficiary's consent or the availability to the promisor when he is sued by the beneficiary on defences based on a) the transaction between promisee and beneficiary or, b) the transaction between promisor and promisee" (Kessler & Gilmore 1160).

It is however an area where the advantages of a contractual solution are more evident. Tort based decisions have found considerably difficulty when deciding on the effect of exemption clauses in third party situations. See Markesinis 106 LQR 1991. 555-561, and the English cases discussed therein. See also from the same author "Doctrinal Clarity in Tort Litigation: A Comparative Lawyer's Viewpoint", 25 (1991) *The International Lawyer*, 953-965.

104 The beneficiary's right is contractual as opposed to equitable. Corbin rejects the distinction legal-equitable as not applicable to third party rights. (Corbin 770 et seq). The distinction was born due to the division of jurisdiction between different courts (the Court of Chancery and the courts of King's Bench and Common Pleas,) which administered different sets of rules. Such a division of the relative rights is not applicable in the third party beneficiary case which were created out of this historical setting.

105 Corbin 770. The beneficiary, provided nothing different has been agreed, should have whatever form of action the promisee would have, for instance, action for debt for a specific amount of money, assumpsit -or civil action- for damages measured by the size of promised performance, injunction and decree for specific performance. The same approach is taken in all the jurisdictions where a contract in favour of third parties is accepted.

The availability of a direct claim is not questioned in American law as in continental systems. American law takes a practical and effective approach. See under "Real contracts for the benefit of third parties" in Chapter 2. The basic difference between 'conservative' and more 'progressive' continental systems is between those where there is a presumption in favour of the availability of a direct claim (as in teh Greek and Austrian

necessary for the promisee to accompany the beneficiary as a party in the latter's suit, but this seems to be in the interest of the promisor as he would avoid double liability[106].

The promisor can accordingly raise against the beneficiary, the defences he would have against the promisee under the contract[107], as is the case in the continental systems and, possibly, Scots law[108]. This idea is based on the assumption that the beneficiary should not have greater rights than the parties[109]. Exceptions to the general rule are the cases where the parties have expressly agreed that the beneficiary would have an enforceable right not subject to any defences[110], when policy reasons impose the rejection of the defences (for instance in collective bargaining)[111], or when estoppel applies[112].

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systems) and those where there is no such presumption (as in the German and French systems).

106 In practically all cases the promisee is the right party to join. The promisor,would not raise an objection. If sued jointly he would avoid a second litigation.

107 As it is the rule of the contracts in favour of third parties in the continental systems. The general rule is that "the promisor may assert against the beneficiary any defence he could assert against the promisee"; Calamari & Perillo *Contracts*, 3rd ed. 1987, 711. The promisor would have for instance the defence of defraud by the promisee or of the latter's absence of consideration or failure to perform his part. According to Corbin (Corbin 777) if the promisee's right is expressly, impliedly or constructively conditional the beneficiary's right is also conditional (provided nothing different has been agreed). See also Markesinis, 25 (1991) *The International Lawyer*, 953-965.

The most obvious defence is that of the invalidity of the contract. In *Moorings Development v. Porpoise Bay Co.*, 487 So. 2d 60 (1987), review denied 494 So 2d 1152 (1986), a development company and its subsidiary, a licensed real estate company, sued a landowner for breach of contract and for fraud and asked for the specific performance of an exclusive right of sale contract. The landowners and the development company were the parties to the sales contract. The trial and the appellate courts rejected the claim because the development company was not entitled to sell real estate property as required under Florida law. The appellate court stated that even if the subsidiary was a third party beneficiary of the sales contract, if the contract was voidable or unenforceable the beneficiary was subject to the infirmity.

108 See under "Defences" in Chapter 5.

109 In *Sears, Roebruck and Co. v. Jardel Co.* , 421 F2d 1048, (1970), an owner had turned against the subcontractor to recover the loss he suffered due to damages he had to pay to a tenant who claimed loss resulting from the collapse of a building allegedly because of the subcontractor's defective work. The trial and appellate courts held that the general release between the contractor and the subcontractor was binding on the owner and rejected his claim.

110 Such are usually the cases involving fire insurance containing the "standard mortgage clause"; a mortgagee (third party) may recover on the policy despite any neglect by the mortgagor (promisee). Calamari & Perillo 712.

111 In collective bargaining agreements, the employer may not use against the employees the defences he has against the unions. It seems that collective bargaining agreements are not typical third party beneficiary situations and policy considerations should prevail. (Calamari & Perillo 712)

112 In *Levy v. Empire Ins Co* (375, F.2d 860 -5th Cir 1967-), a beneficiary who purchased debentures in reliance of the term of a written contract was allowed to recover although the

Defences which would be contrary to good faith if raised against the beneficiary, will also not be accepted[113].

The issue becomes complicated when it comes to the question of the extent of the parties' authority to modify or rescind from the contract[114] . The answer would have to take into account and balance the self-evident right of the parties to modify or rescind from their contract and the need to protect the third party, especially if the latter has relied on the contract. Before 1932 the law was unsettled, one tendency being to dismiss alterations if they undermined reliance[115].

Restatement first restricted, unjustifiedly, the parties' authority to make alterations to the contract. The drafters suggested, among other possibilities[116], that the

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written contract was subject to conditions precedent not stated in writing. (Calamari & Perillo 712).

In the earlier case of *McCulloch v. Canadian Pa. Ry. Co. et al*, 53 FSupp 434, (1943), the rescission from a traffic agreement whereby the second railroad guaranteed interest on 4 per cent bonds the first rail road was to issue in exchange for its 5 per cent bonds, was not invalid as against the 5 per cent bonds. In the absence of reliance on the contract by the third party donee beneficiary, the contract may be extinguished without his consent. The decision however is rather an exception to the policy of that time.

113 In *Thompson v. Commercial Union Ins Co. of New York,* 250 So.2d 253,269 Fla (1961), following an accident the plaintiff won a judgment against a tortfeasor for $ 89,500. The insurance policy limit was for $25,000. The plaintiff alleged the insurance company of bad faith. The court thought that in automobile insurance contracts, the third party rule extended to the public at large and allowed the suit in excess of the policy limits based upon the alleged fraud or bad faith. (Jackson & Bollinger *Contract Law in Modern Society, Cases and Materials,* 1980).

114 "...at what point in time the rights of the beneficiary vest?"; Calamari & Perillo 713. The issue can be compicated in all the jurisdiction discussed (where the contract in favour of third parties is accepted). In Greek law, accordind to §412AK, if the beneficiary has a right to claim the benefit directly form the promisor and declares to the parties that he will exercise this right, the promisee cannot release the promisor from liability. Similar is the approach in the FCCI (§1121), in the Swiss Code of Obligations, §112(3), and in the Italian Civil Code, §1411(2), where it is put somewhat differently: the stipulation can be recovered or modified by the stipulator "until the third person declares to the promisor that he intents to avail himself of the stipulation" (*The Italian Civil Code,* Beltramo, Corge, Merryman, 1968 Stanford. In Scots law the very existence of a JQT has been related to the question of whether the *jus* is irreversible or not. See under "The *jus quaesitum tertio* -- Introduction", in Chapter 5.

115 In *Hartman v. Pictorious* (248 Ill 568 94 N.E.131 -1911-) for instance the defence on the rescission was allowed. The court considered that creditor beneficiary's rights do not vest while the performances running between the promisee and promisor are still executory unless the beneficiary changes his position in reliance upon the contract.

116 The drafters could have chosen one of more possible solutions. Thus the promisor could be allowed to raise the defence of modification or rescission against a recognised beneficiary, with the exception of life insurance cases, and family settlement cases -- in the former the beneficiary is typically a spouse and the premiums are paid out of family funds that the spouse helped to produce, and in the latter the beneficiary is typically a minors,

parties could validly vary or eliminate the rights of the creditor beneficiaries only[117], while the majority of beneficiaries were donee beneficiaries[118]. The idea in Restatement first was that the donee beneficiary's right should be "vested"[119] and thus irrevocable, in order to be effective[120], but the analogy to completed gifts could not explain the choice[121], although it seems to have influenced the choice made. A third party is possibly unaware of a benefit and the offer of the latter might be conditional[122]. There is rarely a true donative intent and what is offered is not gifts but promises to offer gifts. The approach in Restatement first makes little sense in legal or economic terms[123].

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usually treated with special solicitude by the courts -- or the promisor would be allowed to raise such defences unless the third party was a true donee beneficiary (that would distinguish again life insurance and family settlement cases). Eisenberg, M. A. 92 (1992)*ColL R,* 415.

117 Had the creditor beneficiary before knowing of the modification or rescission raised an action or materially altered his position, then the modification and rescission would be void towards him (Restatement first §§142,143).

118 Knowledge of the contract by the donee beneficiary was a prerequisite of the irrevocability of his right. The acceptance of these defences was therefore limited.

119 This is the so-called "doctrine of vesting": "The doctrine of vesting forms an exception to the general rule that the promisor may assert against the beneficiary any defence which he could assert against the promisee". The doctrine "arises only when the promisor and the promisee purport to vary or discharge the rights of the beneficiary" (Calamari & Perillo 713).

120 Corbin for instance (Corbin 777) considers that the rights of the promisee and the third party once the contract is formed live separate lives. This view however is related to possible unilateral acts of the promisee which might affect the beneficiary's right and not with the possibility of an agreed alteration to the contract.

121 Williston in the 1920 edition of his treatise tries to explain his position (adopted in Restatement first). by an analogy to the completed gifts (which are vested), on the basis of a presumed assent of the third party.

122 There is little justification for this view Since the third party will usually have not been informed, it is difficult to understand the different treatment of defences based on subsequent alterations to the agreement, from those based on the promisee's breach of the contract.

123 The view is not compatible with the idea that the promisor could raise the defences he would have against the promisee

Cooperland v. Beard, 217 Ala 216 115 So 389 (1928), involved a case where a debtor sold and conveyed real and personal property upon consideration in part that the purchaser shall assume and pay specified debts of the vendor. On the same day and before the creditors for whose benefit the promise was made assented to it, the purchaser sold and conveyed further the property upon consideration that the purchaser shall assume and pay the same indebtedness, and the original vendor released the original purchaser from his promise to pay. The Court of Appeals of Alabama, was faced with the question whether the creditor could maintain an action of assumpsit against the original purchaser. The court held that once the creditor had not assented to the assumption of the debt by the original purchaser his right against him had not become fixed. (This assumption was considered to be an open offer to the creditor.) Such a claim would be allowed in case of fraud. The court

However, in case law, donee beneficiaries' rights were not treated as vested[124]. This view was reflected in Restatement second[125]. The beneficiary's right is strengthened to become irrevocable after his expressed sign of consent[126], as in some continental codes[127],

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stated that: " The ownership of the property is of no concern to the creditor except as it may affect his power to collect the debt."

The court examined the different views on the status of the parties to an assumption of debt agreement after acceptance of the assumption by the debtor. Emphasis was laid on the view that: "The person assuming the debt becomes, as between the immediate parties, the principal and the debtor, a quasi surety, and the creditor, upon acceptance of the arrangement may sue either or both." The court adopts the view that the creditor's assent to the assumption of the debt should not release the original debtor from his liability because this might worsen the position of the creditor. The original debtor if sued can turn against the person who assumed the debt. The Court of Appeals reversed and remanded the decision.

124 In *Ford v. Mutual Life Insurance Company of New York* (283 Ill App. 325 (2d Dist 1936), the claimant was a person who had concluded a life insurance contract naming his wife as beneficiary, (subsequently assigned all the rights to his daughters. It was held that no surrender or modification of the insurance policy would be valid without the consent of the beneficiary. The latter had a vested right in the insurance policy when the contract of insurance took effect.

In *Salesky v. Hat Corp. of America,* 20 A.D. 2d 114, 224 N.Y. S.2d 965 (1963), plaintiff was the wife of a former president of the defendant corporation, who in November 1959 had entered into an agreement with the corporation for the purpose, among others, of providing for a pension for his wife for a limited period after his death. The agreement was conditional upon ratification by the majority of shareholders at the 1960 general meeting. The agreement was ratified but at a meeting of the Board of Directors in May 1962 a resolution was passed authorising the substitution of the president's sister as beneficiary. The agreement was amended without notice or decision by the shareholders. Following the president's death in 1963 both the wife and sister suited the corporation. The wife argued that because she was donee beneficiary the right vested at he time the contract was executed and she could not be deprived of her rights without her consent. The Supreme Court of New York (Appellate Division) held that no vested rights accrued to the plaintiff. Despite Restatement first the law in the area was unsettled, and there was a divergence of views between different jurisdictions. The court held that this was a case where the promisee continued to exercise certain control over the subject matter of the "gift", albeit not complete control. The right would have been vested on the plaintiff upon the execution of the agreement, and not before. The ratification requirement did not limit the power of the Board of Directors to amend the agreement. The court rejected the plaintiff's appeal.

125 Under §311 of the latter the parties can vary or eliminate the power of the third party to bring suit unless the beneficiary, before receiving notice of the modification or rescission, materially changes his position in justifiable reliance on the original contract, brings suit on the original contract, or manifests assent to the latter at the request of the promisor or promisee.

126 His awareness of the contract is therefore a logical assumption of the Restatement's approach.

127 These codes render the beneficiary's right irrevocable if he stated that he will exercise the right. §334 BGB reads "Differences arising from the contract are available to the promisee even as against the third party" (Forester, Goren, Ilgen 1975). According to §412AK the right of the beneficiary becomes irrevocable if he makes a statement to the promisor that he will exercise the right. Before that point the right is freely revocable. If revoked it is considered that it is cancelled retrospectively, that it was never acquired. §414AK allows the promisor to raise against the third party all the defences he has from

in order to safeguard the autonomy and discretion of the parties while taking the interests of the beneficiary into account.

Critics think that the third party is unnecessarily favoured[128], since he could seek expectation damages had he materially changed his position in justifiable reliance. It is doubtful if the beneficiary's reliance (which is an uncertain criterion[129]) deserves such protection[130] as expectation damages are based on the parties' bargaining[131]. Behind the criticism lies the worry that the third party could, for instance, claim performance or damages of a higher value than contemplated by the parties, had he justifiably held the impression that such was the volume of his benefit. This is a real concern in the light of the way the Restatement second's clause is expressed and it gives an indication of the uncertainty surrounding reliance. To give another example, the promisee is, in the case the promise is not fulfilled, entitled to ask performance (or possibly compensation) which apparently will be limited to what has been agreed. It would be profoundly unfair to have the beneficiary claiming in excess of what the promisee would have been able to claim, unless of course there is an express undertaking to that direction, in which case it is again a question of interpreting the agreement.

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the contract with the promisee. The provision does not refer to defences the promisor has personally against the third party. Defences which do not derive from the contract with the promisee are those related to the promisee's person, those derived from the promisee-third party relationship, the defence of set off with a right of the promisor against the promisee, defences from a contract with the promisee which is subsequent to the one in question etc. Both §§412 and 414AK can be modified by agreement of the parties. Similar is possibly the law on JQT. As will be referred, most decisions, apart from the contract require some additional element in order to accept the creation of a JQT. See under The *jus quaesitum tertio* -- Introduction" in Chapter 5. Similar were the provisional suggestions of the (English) Law Commission in its 1991 consultation paper (*Privity of Contract: Contracts for the Benefit of Third Parties*, Consultation Paper No 121), namely that the promisor should have against the third party the usual defences, set off and counterclaim that he would have against the promisee. See under "Third party beneficiary claims" in Chapter 6.

128 Eisenberg, M. A. 92 (1992)*ColL R*, 1389-1390.

129 See the critique to reliance as the legitimising criterion for pure economic loss decisions in the footnotes under "Third party pure economic loss: Contractual approaches", in Chapter 5.

130 Section 90 of Restatement second limits the claim of the donee to reliance damages. Should the third party-donee receive more?

131 It is an exceptional remedy meant to restore the position of an injured party on the basis of the bargaining made by the parties. It would in many cases be doubtful if the parties would have wanted the beneficiary to claim such damages.

Clearly therefore, the content of the parties' bargaining, the expectation of the parties that is, and not what the beneficiary might have relied upon, should serve as a limit to the claim. It is difficult to see what could the beneficiary claim otherwise, as reliance concerns performance as agreed by the parties. If he was in the promisee's position he should have expectation damages. The promisor's risk would be predictable. Claims in excess of reliance can be dismissed as being in bad faith. §311 can be interpreted accordingly to the profoundly different spirit of the Restatement second[132].

Defences based on modifications subsequent to beneficiary suits should be rejected otherwise the presumed reliance is left unprotected[133]. It was suggested finally that, for the protection of the defendant, the beneficiary's assent might be better combined with an actual reliance test[134]. Reliance, it seems, plays the role of the substitute for consideration as a reason legitimising claims. The truth is that, in many occasions, the beneficiary will not even be aware of the benefit. Moreover, requiring actual reliance as a prerequisite would undermine the rationale of the third party beneficiary rule, which is based on the freedom of contract, the autonomy of the parties will and, after all, the *pacta sunt servanda* doctrine. Equity principles can protect the defendant from unjustified claims.

2.9. Defences from the promisee-third party relationship[135].

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132 See the reference to §90 on donations in a previous footnote.

133 In the opposite case only suit costs could be claimed. Eisenberg, M. A. 92 (1992)*ColL R*, 1420-1421.

134 The examination of the beneficiary's assent can be complicated. There are for instance cases where the manifestation of assent amounts to the acceptance of an offer for an independent contract. The "presumed assent" in the case of gifts is a mere fiction on the other hand.

A safer view is to relate protection to assent with reliance and thus limit compensation or weed out unjustified claims. This approach can be supported on good faith. This idea seems compatible with Restatement second which offers a fair balance of private autonomy and protection of the beneficiary with regard to the modification of rescission defences.

135 The question here is whether the promisor can raise defences the promisee has against the beneficiaries, from the promisee-third party relationship that is. Calamari & Perillo 716, Fuller & Eisenberg, *Basic Contract Law* 765 et seq, Jackson & Bollinger, Kessler & Gilmore).

The issue emerges when the performance objective is to satisfy a pre-existing obligation of the promisee[136]. This obligation, however, might not exist or might not be of the same kind and/or value as the promisor thought. Were the promisor not to be allowed to raise the promisee's defences, he would be bearing greater responsibility than he was meant to. Rejection of such defences will often lead to the unjust enrichment of the promisee. A defence on unjust enrichment might not be accepted and an eventual separate claim will increase litigation and gear a circular movement of wealth[137]. The defences can be justified on fairness and certainty in transactions, which would suggest the rejection of adventitious claims and unfounded transfers of property.

In subsequent sales of property mortgaged by the owner in order to secure the debt to a creditor, some purchasers might not assume the debt[138], while others might promise to pay it[139]. Should the last purchaser, if sued by the ex-owner's mortgagee, be able to raise the defences of the previous purchasers who did not assume the debt? In such cases, under Restatement first, where a supposed duty would suffice for the recognition of a creditor beneficiary, the promisor would not be allowed to employ these defences. This is not the case under Restatement second (an actual obligation should exist)[140]. Restatement second reflects the law more convincingly[141].

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136 This is more likely to arise in a situation of interrelated contracts.

137 Fuller & Eisenberg 780-783.

138 The property is still be subject to the mortgage but the purshaser has asserted no financial obligation personally.

139 Such situations are treated in recent days with a "due on sales" clause inserted in the mortgage. Under this clause when the property is sold the entire amount due becomes due and payable. Calamari & Perillo 703.

140 Jackson & Bollinger 587-588.

141 In *Vrooman v. Turner*, 69 N.Y. 280 (1877), the Court of Appeals of New York, thought that considering the plaintiff a third party beneficiary of the assumption of debt was "just and practical". A mortgage was given as security of the loan. The action was actually for the foreclosure of a mortgage. The mortgaged property was subsequently conveyed many times. None of the grantees assumed to pay the mortgage. The defendant however, under a clause in the deed with which he obtained the property, assumed to pay the mortgage. The question the court had to deal with was whether the creditor (plaintiff) was a third party beneficiary of the last purchase. The court stated two requirements in order to accept that the plaintiff was a third party beneficiary; first that the parties intended to benefit the creditor and second that the promisee owed an obligation to the beneficiary. The second requirement was nor fulfilled because the promisee had not made a promise on the seller's indebtness. He had assumed no personal obligation. It was noted that in those cases of a broken chain of subsequent mortgage sales, in terms of Restatement first

The decision in *Rouse v. United States*[142] illustrates the prevailing view more clearly. If the assumption had been to pay whatever liability the promisee is under, then the promisor should be allowed to show that the promisee was under no enforceable liability. If, though, the assumption had been for the payment of an amount of money to someone to whom the promisee says it is indebted, "it is immaterial whether the promisee is actually indebted to that amount or at all."[143].

In the former case, if the promisee was under no enforceable liability, the promisor's liability would not have effectuated any performance objective. Moreover, as the promisee was not subject to a claim, litigation was not short-circuited. It was argued against this idea, that the promisor will have possibly paid a reduced price; he would be unjustly enriched if the suit was rejected[144]. The promisee had a reason to bargain for unlimited liability. Arguably, this reason should be plausible and real (not only an impression of the promisee for instance), in order to reject the defences. It is apparently

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where the obligation of the promisee to the creditor beneficiary can be a supposed one, the third party beneficiary rule would apply, but not according to Restatement second where the obligation in question must be actual. In *Vrooman v. Turner,* the court though that the plaintiff was an intended beneficiary or should be treated as one due to his reliance on the contract. Under Restatement second the plaintiff would qualify as a donee but not as a creditor beneficiary. Defences from the promisee-third party relationship could not thus be raised. (Calamari & Perillo 695, and Jackson & Bollinger 587-588.)

142 215 F.2d 872 (Ct. App. D.C. 1954). Winston, bought a heating plant from Associate Contractors Inc. He gave the company a promissory note, payable in monthly instalments. The Federal Housing Authority (FHA) assignor of the United States (plaintiff in the first degree), guaranteed the note and the payee endorsed it for value to the lending bank. Winston sold the house to Rouse who agreed to pay the amount due for the heating plant. Nothing was said about the warrantee note. Winston defaulted on the note. United States paid the bank, took an assignment of the note and sued Rouse. The latter's defence was that the plaintiff's assignor had breached his warrantee.

The Court of Appeals of the District of Columbia, reversed the trial court's decision for not allowing the purchaser set up as defence the vendor's misrepresentation. The purchaser would not be liable to the U.S. unless his contract with the vendor made him liable. It was held that Rouse's promise to assume liability made him liable to the seller of the plant, only if and so far it made him liable to the vendor. If Rouse had been sued by the corporation which sold the plant he would have been entitled to show fraud on the part of the vendor. He would have the same right if sued by the an assignee of the corporations claim. The trial court's refusal to accept the defences based on the condition of the heating plant was also rejected (the defendant had raised the argument that the selling corporation did not install the plant satisfactorily.). It was considered however that the trial court's striking of a defence based on the promisee-third party relationship, was right. The court quoted often the second edition of Williston's Treatise (1936).

143 Edgerton Circuit Judge in *Rouse v. United States.*

144 Eisenberg, M. A. 92 (1992)*ColL R,* 1420-1421.

difficult to decide on whether such a reason is 'plausible'. A judgment should look into the content of the agreement, the position of the promisee, and the practice in transactions.

In the cases where the purchaser promises to pay the debt, courts generally allow the mortgagee[145] (the creditor of the mortgagor), to turn against the assuming purchaser of the equity "either on the ground that it is surrogated to the mortgagor's rights against the

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145 *Schneider v. Feringo* (Supreme Court of Errors of Connecticut, 1929, 110 Conn. 86, 147 A. 303.), was again a case of a chain of sales of mortgaged property whereby only the defendant had assumed to pay the debt. The basic question presented to the court was "Can the holder of a mortgage make liable one who, upon acquiring title to the premises has assumed and agreed to pay that mortgage."(Maltbie J.). In deciding whether there was an intent to confer a right of action upon the third party, the court noted that if the grantor of the equity of redemption who had not assumed the mortgage had no objective to protect himself, an intent to confer a right to sue upon the holder of the mortgage, "would be the most natural motive to assign to him in requiring his grantee to agree to pay it.". The plaintiff's right was based on equity and statutory law. The result was not unfair for the owner of the equity of redemption; in fixing the amounts of the considerations for the purchase, the amounts of any mortgage he has agreed to pay were deducted. The appeal court of Connecticut reversed the decision of the trial court which did not hold the defendant liable because of the break in the chain of assumptions.

(In the cases involving a sale of a mortgage, the owner of the land mortgage it for an amount lower than the value of the land when it is "clear". After the mortgage is placed on the property the owner has an equity of redemption which is equal to the difference between the value of the land and the value for which the land has been placed under mortgage. The owner-mortgagor often wishes to sell his interest (the equity of redemption) before the mortgage matures. One procedure is to "refinance" the property at the time of the sale. The existing mortgage is paid off and the transferee of the equity of redemption gives a new mortgage to the bank or other agency that is financing the purchase for him. If the debt secured by the mortgage is not due at the time of the sale, or prepayment or anticipation are not permitted by the initial mortgage agreement, then the lien of the existing mortgage cannot be discharged without the consent of the creditor who holds the existing mortgage. This consent might be difficult to obtain if there are fewer opportunities for investing the funds in question. The purchaser might have to make an extra payment to the mortgagee, or he might have to accept his request that the mortgage should be running from the purchaser, who otherwise would have a more successful arrangement with a bank for instance. Interesting (and difficult) are the cases therefore where the mortgage is not paid off when the equity is sold. If the mortgage is recorded it is impossible for the owner mortgagor to convey the property in such a way as to free it from the lien of the mortgage. The owner cannot also be released from the mortgaged debt without the consent of the mortgagee. The debt sticks to the land and the mortgagor until the mortgagee releases one or the other or both.

As regards the assumption of the debt by the purchasers, three possibilities can be identified. In the first the mortgagor promises to discharge the mortgage and the purchaser pays the full value of the land. In the second the purchaser promises to pay the debt and pays the equity of redemption only. In the third, accepted in most jurisdictions, neither the mortgagor nor the purchaser promise to pay the mortgaged debt. The purchaser does not assume the debt and pays no more than the equity of redemption to the mortgagor. Fuller & Eisenberg 780-783.)

purchaser or on other grounds"[146]. The mortgagor (the owner of the property) is in the position of a surety in relation to the mortgagee: if he pays the debt he can proceed against the purchaser for reimbursement.

The situations of subsequent sales of mortgage property are economically and legally complex, and each case should be examined separately. The aims and terms[147] of mortgage sales, the probable future course of business activity and property values[148] should be considered to see, for instance, if the purpose is "refinancing" the property (involving the issue of a new mortgage)[149]. Such a view will illuminate the parties' motives and intentions, in assuming or not assuming the debt.

Restatement second expressly excluded the promisor's raising of the promisee's defences (§309 -3-)[150], explaining (in the comments) that the beneficiary's right is not derived from the promisee's right but is obtained directly by the former. The contract might contain different provisions. Often it would be a matter of interpreting implied terms; in

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146 The mortgagor (the owner of the property) is in a position of a surety in relation to the mortgagee; if he pays the debt he can proceed against the purchaser for reimbursement. Fuller & Eisenberg 782-783.

147 It is important to interpret carefully the terms of the purchase. However these terms are often ambiguous so as not to be clear whether there was a promise to pay off the mortgaged debt. Agreement is often oral while the Statute of Frauds is not generally applicable and the parole evidence rule will not normally prevent resort to oral evidence of the parties' understanding. Considerable litigation concentrated on such interpretation problems; New York now requires any assumption of the mortgage by the purchaser to be in writing and notarised (NY. General Obligations Law 5-705), and California requires a written agreement of assumption, except where stated in the deed (Civil Code §1624). (Fuller & Eisenberg 784).

148 If, for instance, the mortgage is relatively small and future prospects are positive, then the mortgagor would run little risk were the purchaser not to assume the debt; the latter will possibly pay off the equity in order to save the property. At the same time the purchaser would have little incentive to refuse to accept the debt. However if the value of property is declining or future prospects seem uncertain the differentiation between the two forms of action for the purchaser becomes more meaningful.

149 In *Schneider v. Feringo* (Supreme Court of Errors of Connecticut, 1929, 110 Conn. 86, 147 A. 303.) the mortgaged property was not "refinanced" at the sale -- that is the existing mortgage was not paid off and the mortgagor, transferee of the equity of redemption did not give a new mortgage to the agency financing the purchase --, but the existing mortgage continued.

150 Under Restatement first the defences from the promisee-third party relationship were unacceptable since the obligation of the promisee could not only be actual but also supposed or asserted. (Williston was accepting a defence that the debtor did not owe, for sales of mortgaged property, but not for a promise to pay a sum of money.) Restatement second limited the relevant provision of Restatement first to promises to pay a sum of money (§302), but did not take a differernt view as a whole.

particular the reason the promisee had to render the promisor unconditionally liable should be looked at[151]. The applicability of these defences could be justified on commercial or other economic policy reasons.

In some instances, therefore, it is prudent to allow the defences the promisee has against the beneficiary, to be raised by the promisor. Equity -- preferably the good faith principle -- could guide the relative decisions[152].

2.10. Conclusion.

In its different stages of evolution[153] and in the different aspects of liability it incorporates[154], the rule reflects the weakening of the traditional doctrine and the reinforcement of approaches to contract law which focus on the practical benefits in accepting beneficiary claims, and utilise the rule for the accomplishment of policy goals such as the realisation of welfare benefits[155]. The rule combines contract-oriented and restitutionary claims, and is exceptional[156] in the sense that it transcends doctrinal

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151 Eisenberg considers the case where the subsequent property owners can turn against the contractor for defects not apparent at the time of the sale, they should be able to raise the same defences as third party beneficiaries of the sale if sued by the contractor (Eisenberg, M. A. 92 (1992)*ColL R*, 1420-1421).

The promisor's unconditional liability should be adequately justified on reasons of policy or due to some special relationship (family, economic) between the promisee and the third party which would explain why the former would have agreed to the unconditional liability of the promisor.

152 It can for instance reinforce defences as that of unjust enrichment of the promisee which might seem less persuasive if promoted alone.

153 Waters is identified three stages of evolution of the third party rule; in the first a kind of equitable property involving actions for money and all restitutionary actions, in the second the property in the promise replaced the property in the money, and in the third, the rule as applying in contractual obligations, culminated with the provisions of Restatement second. Waters 98 (1985) *Harv LR* , 1201.

154 As discussed before, two variations of the action on the third party rule can be distinguished. In the one (original) form, straightforward contract law rules are applied (albeit itself is a hybrid of contract law and the law of restitution) and in the other form it would be better to think of the third party right as a restitutionary, quasi contractual right.

155 The process of the third party beneficiary rule has been seen as evidence of increasing "socialisation of our theory of contract" This argument takes into account, the clashing with traditional concepts, the acceptance of the rule as a "triumph of equity against doctrine", and the, more obvious, expansion to welfare programmes. (Kessler & Gilmore).

156 The rule has always unsettled "neighbouring doctrines". With its establishment in *Lawrence v. Fox*, it unsettled the principle that a stranger to the contract could not enforce it, and with its expansion to government programmes the rule unsettled the law of private

definitions of forms and bases of action (on property or on promise), and entails the potential for an equitable treatment of the promisor's defences.

As will be discussed, the beneficiary rule is developing towards two closely related directions. The intention requirement is often ignored and thus circumscribed, while the justification of decisions favouring third parties is based on wider concepts such as "equity" or "justice" or on policy considerations[157]. Moreover, the courts seem readier to accept the existence of a contractual relationship. This latter tendency is an expression of a progressive blurring of the boundary between contract and tort.

Prominent commentators have suggested ways to overcome the shortcomings of the rule[158], supporting a direct beneficiary claim on social, economic, or even moral arguments[159], without, however, contradicting the expressed intentions of the parties. A need commonly identified is to reach more stable decision patterns and reinforce the predictability of the law[160].

2.11. Applications.

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rights of action which the Supreme Court had struggled to achieve for twenty years. Waters 98 (1985)*Harv LR* , 1200.

157 The tendency is more evident in decisions dealing with claims from constructions. "Contracts for the benefit of third parties in the construction industry", 40 (1971) *Fordham LR* , (note) 315-334. See also Markesinis 103 LQR (1987) 355. The concept of a contract is faced more broadly, so as to include a greater number of voluntary relationships. However this latter tendency is more often expressed in the blurring of the boundaries between contract and tort and the expansion of the latter in the sense that the contract is relied upon in order to establish tortious liability (e.g. to assess a duty, to justify the blameworthiness of a behaviour and the proximity of cause.

158 C.H.N. 54 (1968)*VaLR* , 1166-1193.

159 Commentators refer to the inadequacies of the intent to benefit test and argue that the judicial handling of the cases in question should instead focus on the behaviour of the promisor (especially if he is acting in his capacity as a professional) and the need to protect the justifiable reliance of the third party. The context of the transaction is often referred to as justifying the acceptance of third party claims or, more often as the basis of third party reliance. Thus reliance should be established after taking into account a number of factors, such as good faith, the situation in the particular market, customs and practices. Policy factors such as the promotion of market based reliance and stability can advance third party claims even in the absence of actual intention to benefit.

160 Thus Eisenberg prepares a two-stage test, At the first stage the intentions of the parties are examined especially whether they intended to grant a right to sue, or whether the latter would be an effective means to attain performance objectives. In the case the establishment of the third party right is not accomplished at this first stage, the prevalent morality, and overall social and economic arguments are looked into as potentially giving the justification for a third party right to sue. (Eisenberg, M. A. 92 (1992) *ColL R,* 1385.).

The rule is a mechanism of general application[161]; there is no limit as to the forms of relationships it can apply to. Instrumental to its expansion was the development of the donee and creditor beneficiary categories[162] often at the expense of accuracy[163]. The range of its application illustrates its potential.

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161 As are the constract in favour of third parties in German (§328BGB), and Greek law (§410AK) and the JQT in Scots law.

162 In both creditor and donee beneficiaries' cases the promisor will not be liable in excess of the amount he would be liable towards his contracting party.

A number of arguments would support the award of damages to donee beneficiaries. A beneficiary's contractual claim is more effective than an available unjust enrichment claim; the enrichment might be less than the value of the promised performance. (In a situation like *Seaver v. Ransom,* 120 N.E.724, NAY. 1918, it is the estate of the promisor which would have the unjust enrichment claim.) A specific performance claim is generally problematic, resting largely on the discretion of the courts. A promisee might have no interest in suing for the compensation of the beneficiary. The promisee might have suffered no damage and have no interest to sue. Donee beneficiary cases involved situations such as life insurance or will beneficiaries. A 1938 case it was held for instance that labourers working for a construction company under a contract between the company and the United States which provided that labourers shall receive the prevailing wage were donee beneficiaries and could sue the construction company to recover the difference between the prevailing wage and their salaries (*US ex rel Johnson V. Morley Constr. Co.,* 98 F 2d 781, writ of certiorari denied in *Maryland Casualty Co. v. US* 305 US 651, 59 Ct 244, 83 L Ed 421.). It was cited in dictum in a 1937 case, that a person who has recovered a judgment against a doctor for malpractice, may sue the doctor's insurance company in equity for the recovery of the judgment (*Aetna L. Insurance. Co. v. Maxwell,* 89 F2d 988). It was held in 1942 that a valid contract in favour of an insured person's sisters had been created when the beneficiary of an insurance policy informed the insurer that she desired the insurance income to be given to the principal for life, and upon death, if she had not withdrawn the principal, the income should be paid to her sisters (*Mutual Ben. Life Insurance Co. v. Ellis* 125 F 2d 127, 13o, 138 ALR 1478, certiorari denied, 316 US 665 62 S Ct 945, 86 L Ed 1741).

As regards creditor beneficiaries, if a direct claim is allowed, a multiplicity of law suits is avoided and unjust enrichment is prevented. The fear for double liability of the promisor was a consideration for the courts in the beginnings of the rule only. In a 1928 case (*Heins v. Byers,* 174 Minn. 350, 219 N.W. 287), the plaintiff transferred property to the defendant, who promised to pay the plaintiff's creditors. The defendant broke this promise and the plaintiff sued him for the amount of the debts. The trial court held that since the creditors could sue as third parties beneficiaries the suit by the plaintiff should be excluded. On appeal the decision was reversed. The courts suggested that as a means of protection against double liability that it was possible for the defendant to ask for the decision to impose that the money should be paid to the creditors. In 1933 it was held that a contractor who installed a sprinkler system in a new building could recover the price from a surety company which contracted with the owner to "completely pay for said building" if the lesee failed to do so. (*Phillips Co. v. Constitution Indemnity Co.* 68 F2d 304). In *Drewen v. Bank of Manhattan Co.,*31 N.J. 110, 155 A 2d. 529 (1959), a separation agreement between Stanhope Nixon and his wife Doris contained the promise of the former that he would never reduce the quantity or quality of their children's interests under a will executed the same day. After Doris's death he changed his will and reduced the interests of his son Lewis, providing that any bequest would be void if the legatee called before any tribunal any of the provisions of the will. The plaintiff was appointed administrator of Doris's estate for the sole purpose of suing Stanhope's executor for specific performance of the separation agreement. The court reversed a judgment dismissing a complaint, considering

2.11.1. Attorney's liability to non clients - A contractual view.

As in other common law jurisdictions, the majority of the cases of attorney liability to non clients is decided in tort[164]. Initially, in the absence of fraud, collusion or privity, the attorney was not liable for injuries to non-clients[165]. The courts had generally found no difficulty in holding an attorney liable for negligence in situations involving misrepresentations[166]. However, the beneficiary rule is also applied affecting the treatment of other instances of professional liability[167].

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that a donee beneficiary could invoke the aid of a court of equity "for the general reason that his remedy in the law is inadequate, and he should not be denied an effective means of compelling fulfilment of a promise...".

Recall the earlierand exceptional in its times *McCulloch v. Canadian Pa. Ry. Co. et al*, 53 FSupp 434, (1943). The rescission from a traffic agreement whereby the second railroad guaranteed interest on 4 per cent bonds the first rail road was to issue in exchange for its 5 per cent bonds, was not invalid as against the 5 per cent bonds. In the absence of reliance on the contract by the third party donee beneficiary, the contract may be extinguished without his consent

163 Such is the cases of claims by owners of buildings against subcontractors. The owners were considered as creditor beneficiaries of the contract between contractor and subcontractor. As Corbin noticed however the subcontractor (promisor) is not promising to perform for the contractor; his performance will not release the subcontractor from his obligation to the owner. (Corbin 770 et seq.)

164 See "Third Parties: Rationalising a right to sue" Kincaid Peter, *CamLJ* 1989, 243-269, "Negligent Solicitors and doubtly disappointed beneficiaries",Cane Peter, 99 LQR 1983, 346-349, "The Solicitor and the Disappointed Beneficiary", Flemming 109 LQR 1993, 344-349, "Solicitor's Liability to Third Parties"Luntz Harold, 3 *OxfJLSt*, (1983) 284-289,"Solicitors' Liability: Tort Contract or Both", 4 *JCL*, 121-134, "Are we up to Expectations? Solicitors, Beneficiaries, and the Tort/Contract Divide." Barker, Kit, 14 *OxfJLSt*, 138-150.

165 Mallen & Smith 373. The case *National Savings Bank v.Ward*, 199 U.S. (10 Otto) 195, 25 L.Ed. 621 (1879), is classical in american privity law. An attorney was hired by the purchaser of property to furnish a lender with a certificate of title for a mortgage loan. The certificate was erroneous and the lender bank sued the attorney. The suit was rejected because of lack of privity.

166 Thus an attorney was held liable for negligent misrepresentation in *Roberts v. Ball, Hunt Hart Brown and Baerwitz*, 57 Cal App 3d 104, 128 Cal Rptr. 901 -1976. The plaintiff had loaned money to the client upon representation that the client was a general partnership. The partnership had been resolved before the attorney's representation to the plaintiff.).

In a unique decision lawyers were found liable towards investors for an erroneous tax opinion in an offering memorandum (*Eisenberg v. Gagnon*, 766 F.2s 770 (3rd Cir. 1985), cert. denied 474 U.S. 946, 106 S.Ct.342, 88 L.Ed. 2d 290 (1985). The court relied upon Restatement (second) of Torts.

The court in *Vereins - Und Weatbank, AG v. Carter*, 691 FSupp 704 (S.D.N.Y.1988), accepted the claim against an attorney, special counsel to various gas and oil companies, for an erroneous opinion letter issued at the request of his client to the plaintiff lender, calling upon the authority of two decisions concerning accountants; *White v. Guarente* 43 NY 2d 356 401 NY S 3d 474, 372 NE 2d 315 (1977), accepting the liability upon the representation of

2.11.1.1. Reasons for keeping an attorney liable[168].

At first, attorney's blameworthiness would easily justify his liability[169]. Moreover, by holding attorneys liable social costs are spread to a wider category of people and are thus minimised. Attorneys are better situated (due to skill and experience) to foresee the risks, arrange for insurance, and pass the costs to their clients.

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words, (it focused on the expected and actual plaintiff's reliance and the knowledge of this reliance by the professional) which created a duty to act with care, and *Credit Alliance Corp. v. Arthur Andersen & Co*, 65 NY 2d 362 489 NE 2d 249 (1985), refining the principle in the former case.

Lawyers have been found liable for misleading half-truths and in some jurisdictions even for "innocent" misrepresentations (limited to the parties by Restatement Second of the Law of Torts but extended by case law). The theory of negligent or innocent misrepresentation might not be available to an adversary whether in an actual or prospective litigation (the attorney would have the defamation privilege as defence), or in a non litigation context (business or commercial; transactions involving multiple sides for instance). Mallen & Smith 373-373.

The courts have been reluctant to establish attorney liability for an error while representing an entity (corporation or partnership usually) towards shareholders or partners, focusing on a potential conflict of interests. The claims were allowed on the idea that they were derived from the entity's right. A lawyer for a trust is usually considered a lawyer for the trustee. The rule is different under the statutory scheme of the Employee Retirement Security Act of 1974. Mallen & Smith 374.

In Commonwealth laws and in Scots law the principles of *Hedley Byrne v. Heller*, [1964] AC 465 [1963] 2 AllER 575, apply, according to which attorneys could be found liable if it was reasonably foresight that loss would be caused, reliance on the defencants being a legitimising reason for the plaintiff's claim. Reasonable foresight and reliance could be based on the relationship created between plaintiff and defendant. See under "Third party pure economic loss" in Chapter 5. From a German law point of view advocate's liability for advice would possibly fall under the group of cases involving expert opinion,or advice. See under "Information, expert opinions and reports", and "Expert opinion" in Chapter 2.

167 See "Liability for Information and Opinion Causing Pure Economic Loss to Third Parties: A Comparison of English and German Case Law", Bar, Christian von, from *The Gradual Convergence*, Markesinis, B.S. (ed) 1994, 98-127, referring to the liability of accountants mainly.

168 The reasons for keeping an attorney liable to third parties apply in other situations involving specialised services. See Eisenberg, M. A. 92 (1992)*ColL R*, 1393 et seq. and Eisenberg, Ellen "Attorney's Negligence and Third parties", 57 *NYULR*, 1982, 126. See also Barker 14 *OxfJLSt*, 138-150, and Mallen & Smith 360. In a number of cases involving tortious liability of accountants it was contemplated by the courts that their decision (or the reasoning) would apply to situations involving attorneys' liability to non clients. For an overall account of legal ethics see Cranston, (ed) *Legal Ethics and Professional Responsibility*, 1995, Clarendon Press, Oxford and Parker and Sampfond (eds) *Legal Practice - Contemporary Issues*, 1995 Clarendon Press, Oxford.

169 The traditional criterion of fault, the blameworthiness of the attorney would easily justify his liability in the light of his superior knowledge and expertise.

Attorneys are cheaper cost avoiders[170]. To deter the loss, they have to adopt a better method of action, allocate more time, ask advice or assistance (by another lawyer or a secretary). These costs, being costs for the completion of a task they are lower[171] than the third party's costs, which are performance costs and involve hiring another attorney[172]. This line of argument, usual in American jurisprudence, is rare in Continental systems or even other common law ones[173].

Deterrence purposes justify attorney liability and foster an improvement in the standards of conduct[174]. Even if the attorney's insurance reduces the economic effect of sanctioning, the effect will still be present be through increased insurance rates. The moral impact of a tarnished professional reputation has a deterrence function as well.

2.11.1.2. Liability to disappointed will beneficiaries.

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170 On the person or persons who can deter the injury with the least costs than other members of the society. If such a party is burdened with the injury there will be the least possible harm on the social whole. By putting the burden on the lower cost avoider the aggregate of accident costs and avoidance costs will be minimised.

171 Eisenberg, Ellen 57 (1982)*NYULR*, 127-128, Barker 14 *OxfJLSt* 138-150.

172 Negligent attorneys will have made some preparation, acquired some information, they may have performed in part; their avoidance costs will be lower. In cases where the attorney comes in direct contact with a third party his costs, namely not to undertake a particular comittment, will be even lower (although difficult to calculate; loss of goodwill or the extra time required for instance).

173 See however under "Economic efficiency" in this Chapter, where part of the economic oriented argument are based on British legal literature. However, these arguments focus on insurance considerations and do not extent as much as to set targets such as the dispersing of the social costs of eh loss as widely as possible. The strong academic current of economics oriented reasoning in law, with the so-called School of Chicago, in the University of Chicago, being pioneering have had relatively little effect in the academic views in other common law jurisdictions and even lesser in the continent.

174 The disciplinary procedures of the law societies are largely inadequate, while malpractice suits are unlikely to occur (the client might have no interest, or be bankrupt). As Eisenberg notices, few state bar associations finance adequately their disciplinary agencies, while seventeen state bar associations make no specific budgetary allowances for grievance committees. There is no systematic keeping of grievance committees' records, and it is difficult therefore to review their work . Many grievance committees lack the power to compel the production of documents, or do not have the authority to issue subpoenas. In addition "friendship and professional camaraderie among attorneys' make it difficult for attorneys' to discipline one another..". The author admits that other informal means to deter attorney misconduct may exist such as community grievance centres. Eisenberg, Ellen 57 (1982)*NYULR*, 130-131.

The beneficiary rule has been positively considered for the case of disappointed would be legatees[175], where an attorney is hired by a client for the purpose of drafting a will and due to the attorney's negligence the intended succession is not accomplished. However, there is usually tortious liability in such cases following the leading *Biankanja v. Irving*[176], as is the case in Commonwealth systems as well[177]. The rule was considered as a means for compensating the promisee's expectations, for confronting serious breaches of professional duty, and alleviating risks from the future conduct of the attorney. The majority of the relative decisions is based in tort. The negligent behaviour constitutes a breach of a duty based in statute or in contract[178].

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175 Attorneys' liability to would-be legatees is broader and different in kind from liability towards their contracting parties but not extraordinary compared to other instances of attorney liability. In addition the attorney might have charged a bigger fee due to increased risk.

176 49 Cal 2d 647, 320 P.2d 16 (1958). The decision is fundamental for attorney liability to non clients, and much discussed in relation to the expansion of tort law or professional liability) . As said, in one view it ended the "apparent immunity of attorneys to third parties" (Mallen & Smith, 375.). The defendant was a non lawyer who had undertaken legal work in preparing a will. He carried out his task negligently and was sued by the disappointed beneficiary of the invalid will. The California Supreme Court thought that privity was not essential since liability could be established on a duty imposed by public policy. The court went on to give an outline of six factors which should be discussed on a case by case basis, in order to infer the existence of a duty of care; most of these factor were based on the underlying contract. These factors were; (1) the extent to which the transaction was intended to affect the plaintiff, (2) the foreseeability of harm to him, (3) the degree of certainty that the plaintiff suffered injury, (4) the closeness of the connection between the defendant's conduct and the injury suffered, (5) the moral blame attached to the defendants conduct, (6) the policy of preventing future harm. No subsequent case which followed the decision's example applied the test as a whole.

177 See under "Third party pure economic loss" in Chapter 5. Leading cases are *Ross v. Caunters*, [1980] Ch 297, [1979] 3 All ER 580, (and the Canadian case *Whittingham v. Crease & Co* (1978) 88 DLR (3d) 353, decided one year before *Ross v. Caunters*,). See also *Gartside v. Sheffield, Young & Ellis* [1983] NZLR 37, and *Hawkins v. Clayton* (1988) 78 ALR 69 (HC). The most recent authority is *White and another v. Jones and others*, [1995] All ER, 691.

The situation is somewhat complicated. Despite House of Lords authority, the Scottish courts continue to apply the privity decisions *Robertson v. Flemming*, (1861) 4 Macq 167, pverrulling in a Scottish context *Webster v. Young* (1851)13 D. 752. See *Weir v. J.M. Hodge* 1990 SLT 266 and *MacDougall v. MacDougall's Executors*, 1994 SLT 1178.

178 Decisions on will beneficiaries' cases are based either in tort (mostly), or in contract. The attorneys' negligent behaviour could be treated as malpractice for non-performance of an obligation to exercise care imposed by law, or breach of a contract to exercise care agreed by the third parties. See Markesinis, 25 (1991) *The International Lawyer*, 953-965, and "The Need to set acceptable boundaries between Contract and Tort". See also Eisenberg, M. A. 92 (1992) *ColL R*, 1394.

In *Lucas v. Hamm*[179] the rule was considered as one basis of liability, but the case was decided on tort and tort language was used[180]. In *Heyer v. Flaig*[181] the court held that an attorney "realistically and in fact" assumed a relationship, not only with the client but also with the would be legatee whose rights were "clear and foreseeable"[182], but declared enigmatically that the beneficiary rule approach was "conceptually superfluous"[183] for that case.

The meaning of these decisions is doubted. In one view, the dicta in *Lucas v. Hamm*[184] became law in *Heyer v. Flaig*[185]. It is fairer to say that the latter gives evidence of the strong drive towards tortious solutions as well as of a tendency to diversify from the model of *Biankanja v. Irving*[186] to a more loosely established liability on an assumed duty. However, one fails to see the rationale for the rejection of a contractual solution. This is

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179 56 Cal 2d 583, 364 P 2d 685, 15 Cal Rptr. 821 (1961). The testator employed the defendant in order to prepare his will, whereby he was leaving property to the plaintiffs. The defendant drew the will provisions which were allegedly invalid under the rules relating to restrains on alienation and the rule against perpetuities. After the testator's death, the defendant advised the plaintiffs that the provision under which property was left to them was invalid and they would receive nothing unless they made a settlement with the testator's blood relatives. The plaintiffs settled for $75,000 less than the will provided and sued the defendant for the loss claiming both tort liability for negligence and breach of contract. The court, having effectively accepted the claim on the third party beneficiary rule, dismissed the claim on the idea that the restrains on alienation and perpetuities have long perplexed the courts and the bar, and that due to the nature of the error, it could not be demanded form the attorney to show skill in excess of the average in his profession.

180 A duty of care could be owed to the person the testator clearly intended to benefit. The attorney was aware that negligent professional conduct could injure a member of a clearly defined and limited class of people. Release from liability would amount to a gap in the law sanctioning the realisation of the client's intent. As said: "Obviously the main purpose of a contract for the drafting of a will is to accomplish the future transfer of the estate of the testator to the beneficiaries named in the will...", "..and this intent [of the testator] can be effectuated in the event of a breach by the attorney, only by giving the beneficiaries a right of action, we should recognise as a matter of policy that they are entitled to recover as third-party beneficiaries."

181 70 Cal 2d 223, 74 Cal Rprt. 225,449 P. 2d 161 (1969)

182 In this case the attorney failed to inform the prospective testatrix of the effect her planned marriage would have on her testamentary succession.

183 "This latter theory of recovery [the third party beneficiary rule], however, is conceptually superfluous since the crux of the action must lie in tort in any case; there can be no recovery without negligence."

184 56 Cal 2d 583, 364 P 2d 685, 15 Cal Rptr. 821 (1961).

185 Eisenberg, Ellen 57 (1982)*NYULR*, 139

186 49 Cal 2d 647, 320 P 2d 16 (1958). The decision borrowed from the Biankanja test the element of social policy to prevent future harm, as a basic justification factor.

especially the case if the *Biankanja v. Irving*[187] test is taken into account. The test, although meticulous, is not easily workable. Most of its criteria are based on the attorney contract while the special policy considerations could certainly have been accommodated under the beneficiary rule[188]. On the other hand, as in Greek law, once there was a solution in tort it might have been justifiable to rely on the latter[189].

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187 49 Cal 2d 647, 320 P.2d 16 (1958).

188 *Biankanja v. Irving* dominates attorney liability to non-clients in tort, although it has been followed in part only while its actual impact is disputed. The test it promoted, systematic and meticulous as it might be, is however difficult to apply. Ellen Eisenberg described the reluctance of the courts to apply the *Biankarja* test as evidence of the test's failure to persuade the judiciary and indication that the test is not workable (Eisenberg, Ellen 57 (1982)*NYULR*, 141-145).

Out of the factors the test embraces most are determined by the relationship in which the attorney is a party. The effect of the policy reasons developed, especially that for the protection of future harm is unclear. The third party beneficiary rule could accommodate policy considerations.

More specifically, the first factor (the extent to which the transaction was intended to affect the plaintiff) is a direct borrowing from contract law. The concept of "transactions" has been interpreted in a manner that simply connotes the activities between the contracting parties. (In this sense the factor is of limited use. Eisenberg, Ellen 57 (1982)*NYULR*, 141.). The transaction setting will determine the foreseeability outlined in the second factor. The "policy of preventing future harm" (sixth factor) is obscure as to the persons suffering harm or the type of harm it involves, and is not adjustable to accommodate most of third parties' situations. Notice that the extensive references to the policy questions made in the C.H.N. 54 (1968)*VaLR* , 1172, are not so abstract and general but are more focused on the institutional markets' requirements, the practices of the particular markets etc.

Another risk created by the test should be outlined. The factual assessment of proximate cause (referred to in the third and fourth factors, namely the degree of certainty that the plaintiff suffered injury, and the closeness of the connection between the defendant's conduct and the injury) has traditionally be left to the jury. The judge has a veto if there is insufficient evidence to support the causation or if the verdict violates public policy. The deployment of the factors here encourages the intervention of the judge and the usurpation of the jury authority. Before a sceptical judge a plaintiff might fail to establish a duty in a motion for summary judgment though a more in depth jury examination might be needed. (Eisenberg, Ellen 57 (1982)*NYULR*, 144.)

In conclusion, as far as will cases are concerned it is hard to see why a difficult to apply test should stand a better chance than a contractual solution. The intent to benefit is referred to in either approach, while the reliance of the third party is largely a fiction.

189 See the argument under "Delict's potential" and "Is the contractual approach advantageous?", in Chapter 3, that it is preferable for the courts to minimise their law making activity, and that the improvement of delict in Greek law is a corrective solution not as extended as the introduction of contract-based approaches.

The applicability of contractual solutions to cases of disappointed will beneficiaries[190], confirmed in later cases[191], can at first be explained by the fact that unlike most services (and most attorney undertakings) which do not involve the production of a specific result, but certain behaviour, the stated objective of drafting or promising to draft a will is specific and tangible: a specific inheritance succession. The clients' impression is that the attorney promises to achieve this objective[192]. Similar are the

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190 The application of the rule in other instances of attorney's activity is doubtful. See Markesinis on *Heyer v. Flaig,,* 70 Cal 2d 223, 74 Cal Rprt. 225,449 P. 2d 161 (1969); Markesinis, 25 (1991) *The International Lawyer,* 957, referring to the case law in Texas.

191 In one 1983 case a named beneficiary of a will who was also named executrix turned against the attorney who drafted the will and directed her to witness it, for the loss she suffered due to the invalidity of the entire legacy. The court of common pleads held that the plaintiff could proceed either under a negligence or a contract theory. On appeal the court dismissed the basis of negligence considering that the negligence standard was too broad, and allowed the claim on the basis of the third party beneficiary rule, thinking that the suit involved claims under a contract and referring to the second Restatement. (*Guy v. Lieberbach,* 501 Pa 47 459 A2d 744, 1983).

A 1987 decision characterised the beneficiary of a will who sued the attorney who constructed it, for failing to comply with the testator's instruction that the plaintiff receive a bequest, as a classical intended third party beneficiary of the lawyer's promise to his client who could enforce the duty so created. (*Hale v. Groce,* 304 Or 281, 744 P2d 1289, 1987)

In another case a husband and wife hired an attorney to draw up their wills, each leaving his or her estate to the other if he or she survived the decedent by 60 days; if not the estate was to be shared by the wife's two daughters and the husband's daughter. After the wife died the husband changed his will naming his daughter as sole beneficiary. The wife's daughters sued, inter alia, the attorney for negligence in drafting the original wills alleging that they were intended to be irrevocable. The trial court granted the attorney motion for a compulsory nonsuit. The appellate court affirmed, holding that the daughters could not sue the attorney for malpractice because they were not within the attorney-client relationship, but they could sue for breach of contract as third-party beneficiaries. However the court he;d that there were not sufficient evidence to warrant submission of this issue to the jury. (*Hatbob v. Brown,* 394 Pa Super. 234 575 A 2d 607, 1990).

192 If the latter are for instance problematic,(because of the Rule against Perpetuities for example) the attorney is obliged to inform the client, "and lay out the risks and the options". Markesinis on *Heyer v. Flaig,* 70 Cal 2d 223, 74 Cal Rprt. 225,449 P. 2d 161 (1969). Markesinis, 25 (1991) *The International Lawyer,* 953-965.and 103 LQR 1987.

In a 1981 case the plaintiff, the mother of a seaman killed in a ship collision, turned against the attorneys who represented the settling vessel owner for legal malpractice. The plaintiff argued that there had never been a settlement of her claim, due to the fraudulent acts of her son-in-law, who allegedly falsely presented himself as her representative and forged her name in certain documents including a power of attorney and a general release. The plaintiff sough compensatory and punitive damages from the lawyers, having negligently entered into a settlement agreement without certification of his asserted authority. The court found that the will cases were inapposite. In the representation of a testator there may be indirect privity in the sense that the fulfilment of the testator's wishes after demise depend entirely upon a valid instrument being drawn. In such situations the beneficiaries under the will are the intended and direct beneficiaries of the lawyer's services. The malpractice action in question did not involve the drafting of any instrument which could have been defective through the input of the law firm. The court

attorney services involving the preparation of adoption papers or the drafting of a divorce agreement, the contract's objective being the production of a specific result (rendering someone a legitimate child of the foster parents, and providing for the children's future[193]). This explanation applies in all the other jurisdictions discussed here and is generally useful when professional liability is concerned.

2.11.1.3. Beyond will beneficiaries.

Critics of the rule lay emphasis on its inherent limitations. It is applicable when an intention to benefit is clear and evident[194], as in the will cases, and where no adversity of interests between the third party and the client exists, which is unlikely with most attorney contracts, whether involving litigation or not[195]. The problem the German law faced with these cases involved the difficulty with finding an interest by the creditor towards the third party, which is an expression of the same consideration, having, that is, the attorney serving opposing interests[196].

Truly, in most attorney contracts the client aims at benefiting himself alone. The rule, however, in its evolution, set aside the strict application of an intention criterion. The latter could be side-stepped as regards professional liability[197] on the basis of the

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held that the lawyer could not be held liable on any negligence theory. (*Chatterjee v. Due* 511 F Supp 183, 1981)

193 See on the issue Eisenberg, Ellen 57 (1982)*NYULR*, 157.

194 It has been noted that in both contract and tort approaches to attorney's liability to non clients, "the predominant inquiry" made as to the principal purpose of retaining the attorney to provide legal services, is whether there was an intention to benefit the plaintiff. The crucial question was whether both the attorney and the client intend the plaintiff to be the beneficiary of the legal services. ("...whether the expressed intent of the client to benefit the plaintiff was the direct or and agreed purpose of the transaction or the relationship", Mallen & Smith 385.)

195 It is a constant attribute of attorney liability to non clients that the relative claims are rejected when a conflict between the interests of the client and of the plaintiff occurs, whether in a litigation or in a non litigation context (in contractual negotiations, misinterpreting the effect of legal documents, in a search for a legal title in an inter vivos transfer for instance). (Eisenberg, Ellen 57 (1982)*NYULR*, 151. Mallen & Smith 386-387.)

196 See under "Advocates' contracts" in Chapter 2.

197 In cases of professional liability the intention requirement is sufficiently repudiated by the increased standards of knowledge and experience of the injurer, who can assess at best the effects of his behaviour. The third party's reliance -- a basic justification for attorney liability -- is motivated by professional identity and conduct.

lawyer's superior knowledge and experience, and the close and confidential character of the attorney-third party relationship, that make plausible the fiction of third party reliance.

It is true, also, that attorneys owe a duty of undivided loyalty to their clients[198]. However, in certain relationships such as those involving the preparation of adoption papers[199], or the drafting of a divorce agreement[200], the interests of the beneficiaries are not opposite to those of the clients, at least when the attorney offers his services[201]. Even if the interests are opposite, the beneficiary might be relying on the attorney and be worthy of compensation[202], provided the clients' interests are not affected. The adversity of interests should, therefore, be documented sufficiently in order to establish the rejection of the claims[203] and to that purpose transaction practices could be looked into[204].

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198 The attorney is obliged to achieve the most advantageous position. (One can trace a difference in the treatment of accountants liability. Accountants have a predominant duty of honesty which cannot be neglected for the sake of their duties to their clients.). It is advisable however to examine carefully the cases where an adversity of interests supposedly exists, and to take account of the transaction as whole. The adversary situations highlight the importance of the policy reasons towards imposing liability, as well as the significance of third party reliance in rendering the attorney liable.

199 In a case of an adoption for instance the attorney failed to perfect the adoption papers, and the supposed adoptee found out that she was not after all a legitimate child of the couple and had no custody claim against the husband. The child sued the attorney and won compensation in tort. It could be argued that the interests of the parents (clients) were contradicting those of the children. This however is not the case if one takes into account the time that the settlement was made; the interests of the children and the husband coinsided then. (*Metzker v. Slocum*, 272 OR. 313, 537 P 2D. 74,-1974-)

200 In a case of a claim by the children of a divorced couple, the mother was obliged under the divorce settlement, to make them beneficiaries of her life insurance policy. The attorney, hired by the husband to represent him in the divorce proceeding failed to follow this part of the agreement and was held liable in tort. (*Pelham v. Griesheimer*, 93 Ill App 3d 751, 417 NE 2d 882 -1981-). See also BGH 11.1.1971 - VI ZR 261/75 (Bamberg); NJW 1977 2073, were the court enforced a divorce agreement to give certain property aseets to the children, one of whom was the claimant.

201 The adversity should appear at the time the contract between attorney and client is concluded, or when the attorney performs. Adversity situations have occurred during negotiations as well. A Texas court held that an attorney for a contractor would not be liable to the client's customer concerning the effect of legal documents. (*Bell v. Manning* 613 S.W.2d 335 Tex.Civ.App. 1981). Mallen & Smith 386.

202 A seller's, buyer's on mortgagor's attorney is usually not liable in tort towards third parties, when certifying the title on the sold item for instance. Unlike a will, it is thought, a sales transaction involves two sides. There are however opposing views. In an action by a buyer of property who claimed that the lender's attorney erred in searching the title the rule was applied even though the lender eventually charged the plaintiff for the lawyer's services; *Amey Inc. v. Henderson, Franklin, Starnes & Holt, P.A.* 367 So 2d 633 (Fla App 1979) cert denied 376 So 2d 68 (1979). See Mallen & Smith 386.

203 The Massachusetts Supreme refused to find a duty from a mortgagee's attorney to a mortgagor- purchaser for a error in the title examination, despite the benefit to the

2.11.1.4. Conclusion.

The beneficiary rule will possibly make decisions more predictable and case law more stable if applied in attorney liability cases. The rule is "less likely to disrupt the attorney-client relationship"[205], or undermine attorney services leading to excessive liability. In attorney contracts the circle of those protected is more or less predictable and the risk of extensive damages is low. Contract law can accommodate policy considerations[206] and the tort theory of an assumption of duty[207], while it might enable a

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mortgagor and the latter's obligation to pay the legal fees. The court took into account a number of other independent and conflicting duties the attorney owed to his client, as prepayments disclosures and late charge provisions. *Page v. Frazier*, 388 Mass 55 445 N.E.2d 148 (1983). If the interests of the client and the third party are profoundly opposite, so the third party should reasonably hire an attorney. One example is of an attorney preparing a tenancy agreement for the landowner and his possible liability towards the tenant. Eisenberg, Ellen 57 (1982)*NYULR*, 158.

204 Such as that the buyer should have his own attorney and not rely the seller's attorney, that no third party liability should be expected from contracts to represent in court.

205 Markesinis 103 LQR, 1987, 354.

206 The beneficiary rule could promote a more stable treatment for the cases it could encircle. It can be said that by rendering public policy reasons as the criterion for the acceptance of a duty, then the contractual interpretation is unnecessary; "superfluous" as in *Heyer v. Flaig*, (70 Cal 2d 223, 74 Cal Rprt. 225,449 P. 2d 161 -1969). This way however the voluntary character of the attorney activity is ignored and the advantages of a solution in a contractual setting are not examined. It is arguable that the (superior) policy considerations can be incorporated in a contractual reasoning, but without necessarily compelling a specific outcome.

207 One theory for the establishment of attorney liability is that of an assumption of duty by the attorney. (Better presented by Eisenberg, Ellen 57 (1982)*NYULR*, 144, as a "unifying theory"). The theoretical initiative is the same with tortious solutions; a duty should be found and neither intent to benefit nor the existence of a formal relationship and agreement are helpful for that purpose. The assumption of duty approach focuses on the action the attorney is engaged in and not on the relationship in question; when the action will foreseeably affect a third party a duty of care should be owed.

The assumption of a duty theory requires at first an undertaking by the attorney which might not be difficult to establish if evidence of professional conduct which are capable of inviting reliance and remove the third party's incentives to act on his own can be found. The knowledge and the superior training of the attorney make it easy to include negligent omissions as well as negligent acts and to refer to advice, statements or even silence. Some "indicia of professionality" are required in order to consider that the attorney acted as a representative of the profession. An undertaking could be found in direct dealings with the third party or while discharging the obligation to the client. The existence of an adversary situation (on the background of the whole of the transaction), should only create a precaution against holding the attorney liable. Evidence against the precaution should be allowed; namely that the attorney acted in his professional capacity so as to induce reasonable reliance. The duty of the attorney should be circumscribed by foreseeability so that his liability would be justified in economic terms and have a deterrent effect. The plaintiffs should be considered as members of an identifiable class, and the type of harm,

more accurate understanding of foreseeability. As will be discussed, contractual solutions are better focused than tort on third party loss cases and are neither less flexible[208] nor less effective from a deterrence point of view[209].

Unlike the beneficiary rule, which is a mechanism of general application, other contractual solutions, namely escrow agency or fiduciary relationship, do not seem to have a similar potential[210].

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meaning that the harm should belong to a foreseeable zone of risk. If the plaintiffs were unforeseeable the attorney is not blameworthy and is not economically efficient to hold him liable. No question of identification is created in cases of direct dealings between the attorney and the third party. The courts have been hesitant to award damages in cases where at the time of the attorney's act the plaintiffs were unidentifiable members of an identifiable class. It is argued that the misconduct of the attorney is the same in any case and he should be held liable. However, the fear of a far too extended liability makes the distinction of the identifiable claims uncertain. Foreseeability could be entrenched upon reasonable reliance. The latter concerns the likelihood of third parties to rely on the attorney action. Custom and practice in transactions might play an important role explaining reliance and thus in assessing or denying liability. Worth noticing is the measure of reliance employed; namely that due to reliance the third party would have no interest or incentive to hire a lawyer himself.

It is difficult to see why such a model for the establishment of liability should fall under the domain of tort, at the time that it is better explained and justified on the basis of the underlying contract.

208 Negligence seems a less plausible criterion to determine the optimal liability basis. When in *Heyer v. Flaig* (70 Cal 2d 223, 74 Cal Rprt. 225,449 P. 2d 161, 1969) the contractual view was rejected as "superfluous", puzzling commentators, the point made might have been that in any case negligence is the reason for liability. This argument should not lead to the exclusion of the mechanism explaining liability better, and by which if applied the awkward concept of liability in tort based on a duty derived from contract (in Judge Tobinger's words "the duty grows out of the contract but it is *ex delicto*"), would be avoided. The court in Heyer was anxious to void the application of the occurrence rule (in either contract or tort) which would lead to the award of nominal damages, and to apply the actual damages. The court was also anxious to evade preoccupation with the limitation period which might be shorter in contract law. Markesinis, 25 (1991) *The International Lawyer*, 953-965.

Unlike German law where there is debate on which of the contractual mechanisms should apply in advocates' liability cases, the beneficiary rule covers any contractual violation. See under "Drafting wills" and "Contracts with protective effects and *Drittschadensliquidation;* delimitation", in Chapter 2.

209 The deterrent effect of the beneficiary rule should not be underestimated. Contractual liability is more easily assessed, easier for the claimant to support, so that the economic aspects of deterrence might be more readily effective and attached to his professional, contractual conduct. Professional reputation (which can be affected by just raising a suit) can again be tarnished by a contractual claim quite effectively if the injury cause is related to a particular misconduct, and relayed to lawyers' circles or to circles of clients involved in similar transactions. This is especially true for today's attorney's services market which is highly competitive and implies a steady flow of information. Civil liability might of course not suffice for deterrence purposes. Disciplinary or criminal sanctions might be required.

210 Both theories are based on the idea that a special relationship between attorney and third party would suffice for the acceptance of a duty of care in the absence of privity.

2.11.2. Construction projects.

Construction operations require significant capital resources, spread over a considerable period of time and are subject to unpredictable circumstances[211]. Complex and lengthy, they involve a large number of participants (owners, prime contractors, subcontractors, suppliers of materials, labourers, lenders, sureties, insurers, investors etc.[212]), in a highly competitive market where timely and quality performance are essential. Due to the interdependence between the participants, the behaviour of each affects the performance of non contractual parties[213]. Some participants, especially small businesses, usually subcontractors or suppliers, are more vulnerable than others[214].

Escrow agency involves a tripartite agreement. One party undertakes to deliver an instrument to another upon the occurrence of some future condition. The third party holds the instrument until that condition is realised. In *McEvoy v. Helikson*, 277 Or. 781, 785-86, 562, P.2d 540, 542-43 (1977), the escrow agency was accepted on the basis of a divorce decree stipulating that the wife's attorney was to hold the passports of the wife and child until the wife returned the child to the husband's custody. However since an attorney is primarily an agent for his client and not for an independent third party, it would require an express agreement or overwhelming evidence to accept the theory.

A fiduciary on the other hand conducts business for the benefit of another, to whom he is related in confidence and trust. In *Stewart v. Sbarro* 142 NJ Super. 581, 362 A2d 581 (1976), an attorney who was in a position of trust in relation to the third party failed to execute a mortgage as part of a corporate transaction, and was found liable to the seller for breach of a fiduciary obligation. Again it is quite unlikely that the attorney will be in a fiduciary relationship with anyone else but his client.

It seems that the courts would have to stretch these theories to an impermissible extent in order to apply them. It is obvious that these two theories have little to offer as vehicles for the protection of third parties.

211 As changes in the prices of the materials, the insolvency of other participants, changes in the credit or insurance policies of related institutions, accidents, the overall economic atmosphere etc.

212 C.H.N. 54 (1968) *VaLR* , 1172.

213 This applies especially nowadays that the operations are more competitive and speed is important, highly advanced technology is applied and complex means of financing have been developed. See the reference in Chapter 1, on the instances that third party loss is more likely to occur.

214 In one case from 1987, a dock worker injured at a construction site collected compensation from his subcontractor employer and then sued the general contractor and another subcontractor to recover damages for his injuries. The defendants cross-claimed against the plaintiff's employer's seeking indemnification. The trial court granted the employers motion to dismiss. On appeal the Appellate Division of the New York Supreme Court, reversed the decision considering that a cause of action for indemnity could be based upon either as express agreement or an implied warranty of a reasonably safe place to work. The defendant subcontractor had a right to seek indemnification because it was clearly an intended third party beneficiary of the contract between the employer and the general contractor. (*Gjertsen V. Mawson & Mawson, Inc* AD 2d 779 522 NY S2d 891, 1987). See under "Construction projects" in Chapter 2. In German law ass a rule subcontractors are protected

Accepting direct third parties' claims in the construction industry would seem equitable, and preferable to other means of protection (liens for instance), as, among other things, it would avoid both a multiplicity of claims[215] and the consequent circular transfer of wealth. A stable practice of accepting third party claims has been established, after considerable time[216], only for claims against the prime constructor's sureties[217].

It was early acknowledged in case law that focusing on the parties' intention could hinder equitable solutions[218]: apart from the fact that the approach to the intent-to-

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by exclusion of liability clauses in the contracts between the contractors anf the owners/employers.

215 Procedural considerations dominated a decision on a claim by a prime contractor against a subcontractor where the latter cross complained against his supplier whose breach caused the subcontractors inability to perform (*Nomellini Construction Co. v. Harris*, 272 Cal App. 2d 353, 77 Cal Rptr 361, Dist Cir App 1969). The court considered that since the sole cause of the subcontractor's default was the supplier's breach, it was equitable to "telescope" the claims and permit entry of a direct judgment in favour of the prime contractor against the supplier. Thus a multiplicity of law suits, a circuitry of actions was avoided.

216 "..it was years before many jurisdictions permitted laborers and materialmen to recover the value of their services as beneficiaries", 40 (1971) *Fordham LR* , (note) 315-334, at 315.

217 Claims by subcontractors against contractor's sureties of payment bonds were for instance, accepted on the idea that a separate contract between subcontractor and surety had been established

218 In *Port Chester Elec. Construction Co. v. Atlas*, 40 NY 2d 652, 389 NY S 2d 327, NE 2d 983,-1976, the defendant Atlas had been actively engaged in the acquisition and development of real property. Atlas had organised the various ownership and construction ventures into a complex network of separate corporations. The general contractor had entered into a contract with the owner of an Atlas project for the construction of a shopping centre. Under the terms of the contract the owner was to reimburse the general contractor for the amounts of all subcontracts. The general contractor then entered into a subcontract with the plaintiff for the performance of electrical work. When the plaintiff did not receive payment, arbitration was demanded, in which the plaintiff prevailed but was unable to collect the judgment. As a result of certain financial manipulations, the general contractor was judgment proof. The plaintiff then sought to enforce its judgment against Atlas, as well as against other corporations allied with Atlas in the venture. The trial court lifted the corporate veil of the various corporate defendants, held that the subcontractor was a third party beneficiary of the contract between the general contractor and the project owner, and granted relief to the plaintiff. The appellate division affirmed. On review the New York Supreme Court rejected the third party beneficiary theory although it agreed with the result reached. The court thought that the ordinary construction contract does not give third parties who contracted with the promisee the right to enforce the latter's contract with another. As there is generally no express intention to benefit the third party, such parties being merely incidental beneficiaries. In the particular case the general contractor and the owner had no intention to benefit the subcontractor.

benefit test varies between different decisions, a strict understanding of intent would often remove the only effective means for protecting the third party[219].

In a number of important cases the intention requirement was largely ignored, and decisions accepting the claims were reached[220] on fairness or equity[221], acknowledging the need for just and practical solutions and for reducing litigation[222]. The courts' readiness to protect third parties is evidenced in the frequent 'discovery' of an intent to benefit in provisions for timely execution of different parts of a construction[223], or when the owner

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219 See the previous reference to the problems created by the intent-to-benefit test. Most of the academic work in the field was directed towards tackling the shortcomings generated by focusing on intent. See C.H.N. 54 (1968)*VaLR* , 1166.

220 The third party claims would have been rejected otherwise. 40 (1971) *Fordham LR* , (note) 326-328.

221 In *Flintkote Co. v. Brewer Co.*-221 So. 2d 784 (Fla. Ct. App.) (per curiam), cert.denied, 225 So. 2d 920 (Fla 1969)- plaintiff was a prime contractor who had contracted with the Air Force for the construction of an airstrip and then contracted with a subcontractor for the installation of some binding material on the strip. The subcontractor agreed with the defendant to supply the necessary material. The defendant failed to supply material fulfilling the required specifications and the plaintiff had to purchase it elsewhere. The Florida Court of Appeals held that, on the basis of the nature and purpose of the contract, between the subcontractor and supplier the plaintiff was entitled to sue as third party beneficiary. The intent of the parties was not looked at, arguably in order not to reject the third party beneficiary status of the plaintiff. The court seemed to have been cautious about the fact that no primary intention to benefit the third party could have been inferred. As said the failure of the supplier to provide the material did not relieve the subcontractor of his obligation under the subcontract. The plaintiff found the material elsewhere and did not pass the extra expense to the subcontractor but made the material available to him to fulfil his task.

222 In *County of Giles v. First U.S. Corp.*-445 S.W. 2d 157 (Tenn.1969)- plaintiff was a county in Tennessee which had decided to construct a building for the purpose of leasing it to the private industry and authorised the issuance and sale of bond in order to raise funding. A tenant (also plaintiff) agreed to have the lease determined by the amount necessary to retire the bonds and their interest. The defendant contracted with the county to act as its fiscal agent for the sale of the bonds. The county sued the defendant for breach of a fiduciary duty and wrongly withholding funds. The rental payments had risen as a result of the defendant's breach. The tenant's suit (he was also a plaintiff in the action) was accepted on the basis that he was a beneficiary of the contract between the county and the defendant. Although recovery by the county would accrue to the tenant's benefit accepting his action would release him from having to file another lawsuit after the recovery by the county in order to protect his interests. The decision did not discuss the question of the parties' intent to benefit the tenant. The latter's benefit was actually indirect. Rather, as the previous decision, the focus was on the practical and equitable manner of attaining the indicated result by allowing the plaintiff to sue directly. Avoiding a multiplicity of suits as well as extra expenses and providing an effective remedy for the third party were the basic objectives in the decision's rationale. See under "Contracts for works", in Chapter 2. In German law contracts concluded by the owner have protective effects for the lessee and the latter's relatives and employees.

223 In *Thomas G. Snavelly Co. v. Brown Constructions Co.*-16 Ohio Misc. 50, 239 N.E.2d 759 (C.P. 1968)- defendants were the owner and the prime contractor in a contract for the construction of a factory. The contract stated that time was of essence and provided time

was considered creditor beneficiary of the contractor-subcontractor contract on the basis of clauses that the construction is made for the owner, something which is rather common practice and does not connote special purposes[224]. The courts have thus expanded the application of the beneficiary rule provided this could be based on the relevant contracts[225]. This policy was positively accepted by the industry and the American Institute of Architects[226] has drafted payment bonds establishing a third party right to sue. The tendency resembles that of inferring a voluntary assumption of responsibility by the defendant, in pure economic loss cases, in Commonwealth laws and in Scots law[227].

2.11.2. 1. Claims against the sureties of the prime contractors.

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schedules for different phases which applied to all subtrades. The plaintiffs subcontracted for work which was to be completed in specific dates. Due to delays in the contract between owner and prime contractor the plaintiffs were not able to finish their schedule as planned and sued the defendants for the additional expenses they suffered. The court stated that the owner and the prime contractor knew of the importance of the schedule factor, and it was their duty to afford the plaintiff opportunity to perform as planned. Although the court "discovered" an intent-to-benefit, the focus was on the practical realities which imposed the acceptance of the third party beneficiary claim and not on the parties' intentions.

224 In *Sears, Roebruck & Co. v. Jardel Co.*-421 F2d 1048, 3d Cir 1970, a property owner contracted with a prime contractor for the construction of a shopping centre. The prime contractor contracted for some works with a subcontractor. The shopping centre collapsed and the owner sued the subcontractor for having breached his contract with the prime contractor as to the compliance with the specifications of the subcontract. The court accepted that the owner was a third party beneficiary of the subcontract, on the idea that the subcontract explicitly provided for the provisions of the services of the subcontractor to the owner. In the words of the court, the latter was the creditor beneficiary of the subcontract, since the prime contractor, in order to fulfil part of his duty to the owner had designated specific work to the subcontractor. The latter had agreed to "indemnify and save harmless" the owner for any claim of damage which could be asserted against the prime contractor as a result of the subcontractor's performance.

225 A designer engineer hired by a project owner, made miscalculations with respect to the tidal heights and project benchmark and a contractor and subcontractor who used the errant specifications to formulate their bid on the project sued the engineer, inter alia, for breach of contract. A Delaware court held, upon the defendant's motion for a summary judgment, that the plaintiffs were not third-party beneficiaries of the contract between the defendant and the project owner and could not therefore maintain an action for breach of contract. The court noted that the plaintiffs were not creditors or donees at the time the contract was made. (*Guardian Constr. v. Tetra Tech Richardson* 583 A 2d 1378, -1990)

226 American Institute of Architects Document A311, Labor and Material Payment Bond art. 2 (1970), and Document A312, Payment Bond, arts 4,11 (1984). See under a following footnote for details.

227 See under "Third party pure economic loss: Contractual approaches", in Chapter 5. Similar is the effect of the expansion of the contract in favour of third parties at the expence of the strict application of the intention criteria.

The most common construction scheme involves an owner (private or public entity) contracting with a prime contractor who subcontracts parts of the project to subcontractors, who contract with suppliers of materials, labourers etc.[228]. Subcontractors and suppliers are usually small businesses with limited funds, and the owners require from the prime contractor either a performance bond, (whereby a surety guarantees the owner that the prime contractor will perform) or a payment bond (whereby a surety guarantees the owner that the subcontractor's claims will be paid), or both[229]. As is generally accepted, subcontractors, suppliers and labourers can enforce the payment bonds as third party beneficiaries[230]. In German law there would possibly be protection under *Drittschadensliquidation* (§281 would apply)[231]. In Greek law an indirect claim would be available[232]. It is less likely that a JQT would be accepted in Scots law, unless considered a

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228 The contractor might contract with the materialmen or the labourers directly if the works are not subcontracted.

229 Surety bonds are mechanisms to alleviate basic risks of the construction industry; "default by the contractor on obligations to suppliers of labor or materials, and injuries to persons or property caused by the construction work". They are also meant to secure "the contractor's agreement to cooperate with others involved in the job". C.H.N. 54 (1968)*VaLR*, 1176-1177.

230 A materialmen's right of recovery on a surety bond was recognised as early as 1908 "on the theory that the resultant security would improve both quality and efficiency in the construction of public buildings". C.H.N. 54 (1968)*VaLR* , 1179.

In contrast, the surety is only an incidental beneficiary. A subcontractor sued a surety on a performance and payment bond for work done on a construction project. The surety moved to dismiss because the subcontractor's contract with the contractor provided for arbitration of all disputes. Affirming the trial court's denial of the motion, the Florida Appellate court, held that the surety was merely an incidental beneficiary of the construction contract, and had no right to enforce the contract provisions requiring arbitration. (*Aetna Cas. & Sue. Co. v. Jelac Corp.* 505 So 2d 37, -1987).

The right of the beneficiaries should be substantially evidenced. In a recent case a stone supplier brought suit on a payment bond against a contractor on a federal marine construction project. The defendant had refused to pay the plaintiff for the stone supplied, claiming a setoff due to its obligation to compensate a towing company for damage to its barge. The plaintiff had contracted with an excavating company to load stone. The barge was damaged as a result of the excavating company's alleged negligence. The towing company intervened in the suit seeking recovery from the plaintiff in admiralty. The district court entered summary judgment for the plaintiff against the towing company; the latter had no right to recover compensation from the plaintiff. The appellate court affirmed holding that the towing company had presented no evidence showing that the defendant, when it elicited a promise from the plaintiff to supply stone, had any desire or motivation to benefit the towing company. (*US for use of Valders Stone & Marble V. C-Way* 909 F2d 259, -1990).

231 At least for persons contracting with the prime contractor.

unilateral promise[233], while in the Commonwealth protection would be available if the bond was considered as a warranty or guarantee by the surety, or if it was considered that the prime contractor acted as an agent for the subcontractors[234].

Accepting such claims serves the operation of the construction[235], and is justified on the plaintiff's (subcontractor's) reliance on the surety. A direct contract between the surety and the subcontractor was acknowledged in some cases. The subcontractor knew of the bond, which operated as a standing offer[236].

Beneficiaries' claims against sureties were at first allowed when the owner was a public entity only[237], because against public entities there is no statutory right of lien in favour of subcontractors, materialmen and labourers[238]. This distinction is not applicable any more[239]. As regards private owners, even with a lien on the property, the

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232 And protection under §410AK is the payment bond was considered to be a guarantee. The same applies for German law (§328BGB), and possibly Scots law as well (JQT would apply).

233 See under "Development and Applications" in Chapter 5. Scottish courts have generally been considerably reluctant to develop the JQT. It is likely to expect a similar attitude in applying the doctrine of *pollicitatio*, under which unilateral promises are binding, which is ny case in the case of a bond would be difficult to apply. See under "Theoretical basis" in Chapter 5.

234 See in the footnotes under "Third party beneficiary claims" in Chapter 6, on the technoques used by English courts to avoid the constraints of privity.

235 C.H.N. 54 (1968)*VaLR* , 1177.

236 This far fetched idea, reached equitable results. 40 (1971) *Fordham LR* , (note) 324. See the previous reference in that text to the possibility to consider the bond a unilateral promise in Scots law.

237 The idea that the bond's purpose was to protect the owner, and also the tendency to protect the surety's reliance that he would not face third party claims lead to the rejection of such suits. C.H.N. 54 (1968)*VaLR* , 1180-1181.

238 Subcontractors, suppliers of materials and labourmen have by statute liens on the private owner's property for the value of work or materials; these liens often referred to as "mechanic's liens". Usually they are not available for an amount greater than the owner contracted to pay the original contractor, or than the amount due to the contractor at a time specified in the legislation. They are of considerable practical importance for construction operations and concern an impressive array of groups of interests, often organised and influential such as contractors, subcontractors, labourers, real estate owners, surety companies, financing agencies. "Mechanic's liens" are constantly an issue of discussion and the relative legislation is often revised. Fuller & Eisenberg 775.

Considering that the owner would either have to pay the subcontractor or bear the lien's foreclosure, when he is asking for the bond he cannot be intending to benefit the subcontractor but he intents to benefit himself, ensuring that he will not suffer loss from the lien. The subcontractor should not be allowed to sue therefore. Public owners are nor subject to liens. If they ask for a surety bond they must intent to benefit the subcontractor who would otherwise have no sufficient protection.

239 Both Restatements provide arguments in favour of this view, especially the second.

subcontractor's payment is not assured. They have to comply with lien law where foreclosure is complex and costly and the procedure is strict and slow, while in the end their claim might not be satisfied in full[240]. In the case of a direct third party claim the private owner will avoid the cost of filling the lien[241]. The objective of a payment bond will in any case be to ensure that the subcontractor receives payment; the latter should thus have a direct claim to realise this objective[242]. This was the view on which the 1970 and 1984 bonds issued by the American Institute of Architects were based[243].

Market policy reasons have been employed by the courts in order to allow a suit on the bond[244]. For similar reasons, namely the understanding by local traders of the provisions of the bond[245], a claim on a bond was rejected.

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240 If the private owner's equity is less than the total claims of the lien holders.

241 The private owners too would have a reason to believe that if a subcontractor is offered some assurance of payment he will lower his price and the cost of the project will be lower.

242 When public owners ask for a payment bond they are possibly expecting that if the subcontractors are given assurance of payment they will offer lower prices and the cost of the project will be reduced. In the latter case the cost of the bond, which is bound to be higher if the bond is enforceable, had to be calculated. The subcontractors, or materialmen, being small and vulnerable business will charge more in the absence of some payment guarantee (they are in a worse position than the surety to estimate the creditworthiness of the prime contractor). For a cross-reference, see under "Drafting wills" and Contracts with protective effects anf *Drittschadensliquidation*; delimitation", in Chapter 2, where it is suggested that from the point of view of legal doctrine and for efficiency reasons a direct claim by intended will beneficiaries is preferable.

243 American Institute of Architects Document A311, Labor and Material Payment Bond art. 2 (1970), and Document A312, Payment Bond, arts 4,11 (1984). The first writes "The ... Principal and Surety Hereby jointly and severally agree with the Owner that every [third party] claimant as herein defined, who has not been paid in full before the expiration of a period of ninety (90) days after the date on which the last of such claimants work was done or performed, or materials were furnished by such claimant, may sue on this bond..., prosecute to suit to final judgment for such sum or sums as may be justly due claimant and have execution thereon.". Fuller & Eisenberg 776. The 1984 payment bond is not as explicit as the 1970 one but it is substantially specific on the third party rights (Eisenberg, M. A. 92 (1992)*ColL R*, 1393). The 1946 bond was taking the opposite view ("No right of action shall accrue on this bond to or for the use of any person or corporation other than the Owner named herein or the heirs, executors, administrators or successors of Owner.", This phrase from the single form approved in 1946, was carried in 1970's edition "Performance Bond".). The shift in policy originated during World War II, started in 1958 and culminated in 1970. During the second world war the Surety Association of America became convinced that it was better to issue two separate bonds, one for performance and another for payment. The AIA issued two forms in 1958, after consultation with the Association of Casualty and Surety Companies, the Associated General Contractors, the National Association of Credit Men, and others.

244 In *Neeham Foundry Co. v. National Supr. Corp.*, 47 Ill, App 2d 427, 433, 197 Ne 2d 744,748 (1964), the court thought that the acceptance of the supplier's claim on the bond would encourage reputable suppliers to contract more readily and insuring a steady flow of

The wording of the bond is important for the acceptance of the claim[246]. In one case[247] the language of the bond was held to include all subcontractors of the general contractor but not the subcontractors of the subcontractors[248]. Yet, according to AIA, a claimant is "one having a direct contract with the Principal or the Subcontractor of the Principal for labour material or both used or reasonably required for use in the performance of the contract."[249].

The specific request of the owner could guide the interpretation of his intentions. If a private owner asks for a performance bond[250] only, it is reasonable to assume that he had only self-regarding purposes and he was not aiming at benefiting the subcontractor. A request for a payment bond should lead to opposite conclusions[251].

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labour and material to construction projects. Reliance by the defendant that he would not face third party claims lead to the rejection of such suits. C.H.N. 54 (1968)*VaLR* , 1180.

245 *Independent Bridge Co. ex rel. Ainsley v. Aetna Casualty and Surety Company,* 316 Pa 266 175 A 644 (1934), concerned a claim the supplier of coal to stoke boilers used in the construction of a county bridge. He sued on the bond between subcontractor and defendant. The Supreme Court of Pennsylvania rejected the claim because the local trade clearly understood the phrase "[materials] in or about the construction..", as including only materials actually incorporated in the complete structure.

246 In *Fidelity & Deposit Co. v. Rainer* (Supreme Court of Alabama, 1929, 220 Ala. 262, 125 So. 55, 77 A.L.R. 13), appellant was the surety on a bond executed by a building contractor as principal payable to appellee Rainer. The beneficiary plaintiff had furnished the contractor with materials for which he had not been paid. The circuit court rendered judgment for the plaintiff and the appellate court ratified that decision. Much of the effort in the reasoning was directed in justifying why should a claim be allowed against a private owner. The decision was based on the wording of the bond, to pay "all persons" who had contracted; the owner could not have been aiming at protecting (by indemnity) himself alone. The relevant clause of the bond would be meaningless "unless inserted for the benefit of the materialmen and labourers". The reasoning was the same to that related to bonds offered to public owners.

247 *Home Indem. Co. v, Daniels Construction Co.* 285 Ala 68 228 So. 2d 824 (1969). In *Craybar Elec Co. v John A Volpe Constr Co.* F 2d 55 (5th Cir 1967) 387, the court was faced with a payment bond prescribed by the Miller Act (40 USCA §§ 270a-270e). This bond covers only (1) those materialmen, laborers and contractors who deal directly with a prime contractor, (2) those materialmen, laborers and contractors who have a direct relationship with a subcontractor. Those in the second category must give written notice to the contractors within 90 days after the date on which such claimant performed the last of the material for which the claim is made.

248 Normally the latter as well as materialmen or labourers are included

249 Fuller & Eisenberg 776.

250 A performance bond protects the owner from losses by the prime contractor's non performance and thus covers possibly the losses due to the enforcement of the subcontractor's lien.

251 Eisenberg, M. A. 92 (1992)*ColL R,* 1399-1400

Finally, third party beneficiary law will have to be responsive to the frequent chances in the law of "mechanic's liens"[252] and acknowledge the influence of the industry's self-organisation on the particular body of law, as an indication of the institutional market's understanding of the bonds' terms and purposes.

2.11.2.2. Claims between contractors.

Such claims arise when the owner contracts with different (specialised) prime contractors for parts of the operation (multiprime construction contracts)[253].

As the different parts of the work are interrelated, delay or any other breach by one of the contractors affects the others. The general trend is to allow claims by the injured contractors against the wrongdoer[254]. The tendency is reinforced by the practice of contractors promising to pay all expenses caused to other primes due to their delay. The best means to give effect to this promise is to allow a direct claim by the injured party, who might actually have fulfilled his obligations in time with increased effort and expenses[255].

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252 As said, mechanic's liens" are constantly an issue of discussion and the relative legislation is often revised. (Fuller & Eisenberg 775).

253 The contractors could have been subcontractors of one prime contractor. This model is used when the project is broken down to smaller parts as in the construction of a highway or a pipeline. It is preferred for different reasons. It might be thought that it will lead to more effective coordination between the contractors, more efficient monitoring, or prudent financial administration. Sometimes this is the model of operation statutes require (Eisenberg, Ellen 57 (1982)*NYULR*, 140).

254 The tendency culminated with *Thomas G. Snavely Co. v. Brown Constructions Co.* (See previous footnote.) There are however opposite examples. In *Leavell & Co. v. Glantz Contracting Corp. of LA., Inc* 322 FSupp 779 (ED La 1971), the court held that architects hired by the Port of New Orleans to prepare plans were not liable to a contractor hired by the Port for delays due to improperly prepared plans, late delivery of plans, etc. The decision considered that there was no "stipulation pur autrui" under the Louisiana Civil Code, and no objective for establishing an advantage for a third person in the contract between the Port and the architects. Jackson & Bollinger 591

255 In *Broadway Maintenance Corp. v. Rutgers*, (90 NJ 253, 447 A 2d 906 -1982-), a university entered into nine separate prime contracts, and selected a general contractor to coordinate and supervise the prime contractorss. Each prime contractor promised in his contract that its work would nor interfere with or slow the progress of other contractors, and agreed that contractors injured by such delays could recover damages from the offending contractors. Two contractors brought a suit for damages against the university claiming that a failure to coordinate resulted in unreasonable construction delays. The trial court considered that the plaintiffs were the beneficiaries of the contract between the university and the general contractor and had a right to sue the latter. The plaintiffs appealed. The appellate court affirmed holding that the contracting parties intended that the plaintiffs

Even when each contractor promises to coordinate or cooperate with the others, although there is no explicit promise for the payment of losses, direct third party claims will be allowed[256].

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and other prime contractors should benefit from proper performance by their peers, by conferring a right of performance to the prime contractors. The university retained no supervising or coordinating duties which could give rise to a cause of action in the plaintiffs; the plaintiffs' remedies were limited to actions against fellow contractors.

In *Visintine & Co. v. New York, Chicago & St. Louis RR*, 160 N.E. 2d 311 Ohio (1959), the plaintiff, contractor for the State of Ohio, turned, in relation to the eventual elimination of a grade crossing, against other contractors of different parts of the works, because they allegedly had failed to perform as required by their contract. All contractors had promised to cooperate, by adhering to specific plans and completion dates for their operations. The defendant's objections to the plaintiff's tort and contract actions were sustained by the trial court. The Court of Appeals reversed the dismissal of the contract action. On appeal the Ohio Supreme Court held the decision affirmed. The court examined whether the third party's interests and benefit was among the primary intentions of the parties, by looking at what had been bargained for. It was thought that a third party beneficiary claim could be sustained even though the benefit of the third party was not a primary purpose, which is true for most cases, since parties aim at protecting themselves. The court ignored explicitly a strict application of the intention to benefit criterion and accepted the defendants' liability because performance fell short of an assumed obligation to a third party. The plaintiff qualified although the promisee had the benefit of sovereign immunity; otherwise the decision would be patently incorrect. "Contracts: Third Party Beneficiary - Contractor my recover on contract between railroads and State wherein railroads agreed to cooperate with contractor by meeting work schedule", 45 (1959) *VaLR* 1226.

Courts have not always taken such a view. In *Dickinson v. McCoppin*, 121 Ark 414 181 SW 151 (1915), The defendant contractor had promised the city-owner to indemnify the plaintiff engineer, for losses caused by the contractor's failure to complete his part of the works in time. The court denied recovery on a combination of intent and privity requirements and ignored the reliance of the plaintiff and the profound needs of the construction industry to secure the position of the participants to the extent possible. C.H.N. 54 (1968) *VaLR*, 1178.

In a more recent case the plaintiff, a mechanical contractor, brought an action against a landowner and a general contractor. The landowner's contracts with the plaintiff and the general contractor had a 200-day time term for the completion of construction. The plaintiff claimed damages because of inability to complete within the time period. He argued that the general contractor was responsible for the delay and that the landowner had violated his duty to create conditions for completion within time. The trial and the appellate court dismissed the arguments of the plaintiff. He was not a third party beneficiary of the landowner-general contractor agreement; there was no intention to benefit the plaintiff and the general contractor's performance would not discharge a duty the landowner owed to the plaintiff. The action against the landowner was dismissed as there was no express warranty that works should be completed within the time limit. (*Buchman Plumbing Co. v. Regents of the University of Minnesota*, 298 Minn. 328, 215 NW 2d 479, 1974)

256 In *Shea-S & Ball v. Massman-Kiewit-Early*, 606 F2d 1245 (D.C. Cir 1979), the relative contract provided that "The authority may undertake or award other contracts for additional works and the Contractor shall fully cooperate with such other contractors as shall other contractors and Authority employees and carefully fit his work to such additional work as may be directed by the Contracting Officer."

From an economic point of view it is questionable whether it would be to the interest of the owner to have one contractor liable to others since each would possibly include in his price the risk of this increased liability. However, the contractor would definitely increase the price to provide for losses by uncompensated breaches of the co-primes. The latter increase is likely to be higher than the former since the liability to other primes depends on a contractor's performance which, after all, he controls. Each contractor's target would be the other contractors and not the owner[257].

2.11.2.3. Claims of the owner against the subcontractor.

The results in the case law are mixed as are in German[258] and Scots law[259], while in the Commonwealth there are only some positive decisions[260]. The owner's claim is often rejected, or occasionally accepted on a basis other than the beneficiary rule, predominantly negligence[261].

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257 Eisenberg, Ellen 57 (1982)*NYULR*, 1400-1402.

258 This is possibly the case since the owner is protected from the contracts concluded by the lessees, of his (the lessees) spouces or the owner's employees. See under "Contracts for works" in Chapter 2. However subcontractors are usually protected by the exclusion or limitation clauses in the contract between the owner and the prime contractor.

259 See *Norwich Union Life Insurance Society v. Covell Matthews Partnership,* 1987 SLT 452, *Scott Lithgow v. GEC Electrical Projects Ltd,* 1982 SLT 244, were the claim was rejected, and *Parkhead Housing Association v. Phoenix Preservation Ltd,* 1990 SLT 812. See under "Third party loss in the Scots law of delict: In favour of the third party", and "Third party los privity oriented retreat from *Junior Books*", in Chapter 5. It is argued therein that the famous *Junior Books v. Veitchi*, [1983] 1 AC 520, [1982] 3 WLR 477 (HL), where a subcontractor was held liable to the owner for defective but not dangerous flooring, holds greater validity in Scotland than in England.

260 Basically *Junior Books v. Veitchi*, [1983] 1 AC 520, [1982] 3 WLR 477 (HL), which is still valid law, although the effect of the decision has been watered down significantly, in *Simaan Contracting Co v. Pilkington Glass Ltd*, [1988] 1 All ER 791, [1988] 2 WLR 761, *D&F Estates v. Church Commissioners for England*, [1988] 2 All ER 992, HL, [1989] AC 177, and *Greater Nottingham Co-operative Society Ltd. v. Cementation Piling and Foundation Ltd*, [1988] 3 WLR 396. See in the footnotes under "Third party loss privity oriented retreat from *Junior Books*", in Chapter 5. See the recent *Winnipeg Condominium Corporation No. 36 v. Bird Construction Company Limited,* [1995] 1 SCR 85, 11 (1995) *ConsLJ* (Burr, Franklin, Ramsey, eds) 306, in Canada on a claim of subsequent purchasers against contractors for inadequately fixed cladding, and *Bryan v. Maloney,* HCA March 23, 1995, 11 (1995) 11 *ConsLJ* 273, in Australia, on a claim by the third owners of a building against the original builders, held in favour of the third parties

261 Eisenberg, Ellen 57 (1982)*NYULR*, 1403.

It has been unsuccessfully argued that the owner should have a claim as a creditor beneficiary of the subcontract[262]. Corbin noticed that there was possibly not such case since subcontracts are made in order to enable the prime contractor to perform while the performance of a subcontractor does not release the prime from his obligation[263].

The intent-to-benefit test is of limited use. The injured contractor has an incentive to sue the subcontractor[264]. An action by the owner may upset the contractor's administration of the subcontracts and the construction process as a whole. Moreover, a direct claim by the owner will not effectuate performance.

The beneficiary rule can be applied when the owner has no other effective way to protect himself, as when the defect in the subcontractor's work is discovered after the prime has been paid and has become insolvent. The risk that normally falls on the subcontractor, might burden the owner in this case as his satisfaction from the bankruptcy estate is unlikely[265]. A direct action by the owner against the subcontractor is the fairest solution. The construction process is not disrupted and the performance objectives are not violated.

The owner will have to face the defences the subcontractor could bring against the prime under the subcontract. Limitation of the owner's right from his contract with the prime contractor must also be taken into account, as in German law where the limitations are regularly considered to be in favour of the subcontractors[266]. The claimant cannot be in a better position than he would have been had he turned against the prime, just because he was left with no other recourse than suing the subcontractor.

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262 The contract between the prime contractor and the subcontractor. The dispute is not settled yet. As late as 1971 it was noticed in a case (*Gilbert Fin. Corp. v. Steelform Contracting Co.*, 145 Cal Prtr 448. Ct App 1971), that the promissor (Steelform, the subcontractor) realised he was assuming the promisee's (the prime contractor's) duties for this phase of the construction and that Gilbert (the owner) would be the ultimate beneficiary as the owner of the building. Gilbert would obviously be a creditor beneficiary.

263 Corbin §802. Corbin accepts the characterisation of the subcontractors as creditors beneficiaries only as an expression of the fact that the benefit is not a gift.

264 The prime will have to remedy the breach himself or pay the damage to the owner.

265 The bankruptcy trustee would be authorised to bring the prime's claim against the subcontractor, but unless sued by the owner he might not do so, considering the claim as "inconsequential" or "burdensome" (11 U.S.C.A. §541 (a). Eisenberg, Ellen 57 (1982)*NYULR*, 1405.). The owner will possibly be not interested in urging the trustee to sue, since the general estate would be benefited and not himself.

266 See under "Contracts for works" in Chapter 2.

2.11.3. Corporate transactions.

It is difficult to infer generalisations on the corporate actions that might lead to third party loss from a variety of instances of corporate liability. Liability from corporate transactions is not met with such a frequency in any of the other jurisdictions examined[267]. What is of importance is that the loss is usually the result of the reliance shown to the corporate entity. It seems fair and commercially reasonable to see that this reliance is protected as this would reinforce the credibility of corporate activity and reallocate risks[268]. This was the court's policy from an early stage[269].

Third parties have been protected in cases involving corporate transfers, namely acquisitions or exchanges, leading to the assumption of liabilities (debts) by a corporation[270]. Such undertakings were often made by the chairmen of the companies

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267 The problem deal with the European community directive referred to in the introduction, has to do with the extent of the authority of a corporation's responsible bodies. According to directive 68/151 from 9/3/1968, a company is bound by the acts of its bodies that go beyond its purposes unless these acts violate legislative restrictions or the third parties are bad faithed. Third parties in these case are typically person contracting with a another company to which the defendant extended a guarantee. See under "Contracts for services" in Chapter 2. Most corporate transactions involce contacts for services. See BGH 12.11.1979 - II ZR 174/77 Düss.; NJW 1980 589.

268 C.H.N. 54 (1968) *VaLR* , 1166-1193.

269 In *Galdwell v. Ryan*, (173 KY 233 190 SW 1078, -1917), plaintiff and defendant, had a controversy over a fund which was later deposited with a bank. In 1909 the bank directors were ordered to pay an amount to Ryan, but paid only a part because the bank's resources had been exhausted. In agreement between the bank's directors, stockholders and creditors the latter consent to accept 75% of their claims and the stockholders to release the directors from liability. The directors (one of whom was Caldwell) agreed to assume personally claims against the bank. Ryan was a creditor who did not enter the agreement, but her executors were allowed to recover the full amount in an action against Caldwell on the idea that the directors' assumption of liability was for the benefit of all the creditors and was not limited by the 75% clause.

270 There have been a considerable number of such claims. A 1975 case dealt with a consolidation of three actions brought by minority shareholders against a Delaware corporation alleging breach of various contracts as well as violation of federal securities laws in connection with defendant's acquisition of a New Jersey corporation. In one case the plaintiff alleged breach of an employment contract originally entered into by the New Jersey corporation, arguing that he was a third party beneficiary of the acquisition agreement by which the defendant agreed to assume all duties and obligations of the New Jersey corporation. The defendant's motion to dismiss for failure to join the New Jersey Corporation as an indispensable party was denied. The defendant's right to raise certain defences was not contingent upon the third party beneficiary. (*Mayer v. Development Corporation of America*, 396 F Supp 917, 1975).

assuming the payment of debts[271] or promising not to compete[272]. In one case, a corporation's undertaking of tax liability was assumed to have been made for the benefit of

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271 The president and sole shareholder of a company contracted to sell his stock to a larger corporation. An involuntary bankruptcy petition was raised against the company and sustained. The appointed trustee of the company then sued the president under the stock sale contract in order to enforce his obligation to pay certain debts of the company. The bankruptcy court entered judgment for the trustee, agreeing that the company was a third party beneficiary of the president's promise in the stock sale contract to pay the debts. On appeal the district court reversed finding no indication that the company was an intended third party beneficiary. The circuit court reversed and remanded, holding that, although the company's benefit would have been indirect, the promise had been exacted by the intention of benefiting the company and freeing it from past obligations. (In *re Edward M. Johnson and Associates Inc.* 845, F2d 1395 C.A. 6, 1988)

272 In 1983 the Court of Appeals of Arizona dealt with a claim whereby a corporate subsidiary sought an injunction ordering its former president not to compete. The defendant who had founded the plaintiff parent company, sold his business to a corporation and entered into an employment agreement with the corporation. The trial court granted the injunction and the court of appeals affirmed. The subsidiary was the intended third party beneficiary of the employment contract between the parent company and the defendant when the latter was president of the company, which provided that the defendant would not compete with the plaintiff or with any other subsidiary which might in the future operate the business conducted by the plaintiff subsidiary. As an intended beneficiary the subsidiary was entitled to enforce the covenant not to compete. A release which the corporation gave to the defendant after the sale of a subsidiary to a second corporation did not discharge the defendant from his duty not to compete, because the employment contract was equably assigned to the second corporation at the time of the sale. (*Supplies for Industry Inc. v. Christensen*, 135 Ariz. 107, 659 P2d 660, 1983) & Eisenberg 768

See the Scottich case *Group 4 Total Security Ltd v. Ferrier*, 1985 SC 70, 1985 SLT 287. A company presented a petition to interdict one of their former employees from being directly or indirectly interested in any business activities which were in direct or indirect competition with those of the petitioners or any subsidiary or associated company for one year after the termination of the respondent's employment within a 50-mile radius of the petitioner's place of business at Aberdeen, and from being interested in two named companies insofar as their business was directly competing that of the petitioners. On appeal the Second Division held, that the arguments for the respondent had *prima facie* merit but the Lord Ordinary had rejected them. Having regard to the fact that the restriction had little more than two months to run it was equitable to recall the interim interdict, particularly as the petitioners had a remedy in damages if they established that they had sustained loss by the respondent's breach of contract.

the U.S. government[273]. Potential claimants are also benefited as, according to the prevailing view, by the assumption of liability a new limitation period begins[274].

However, focusing on intent to benefit alone led to unsatisfactory results. Thus the benefit of the third party might not be considered as the prior purpose of an agreement for the exchange of stock[275] as this would undermine commercial credibility, reliance by obligees and other third parties, and the reliability of changes in corporate control. Again such views contrast with the market need for accountability for corporate management.

It has been easier for the courts to protect third parties when the acquisition which led to their injury was done in bad faith and with the purpose of concealing added capital liabilities or avoiding obligations. The intent to benefit was ignored when the contract in question was collusive[276].

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273 *United States v. Industrial Crane & MFG Co.*, 492 F2d 772 (5th Cir 1974) Billmeier who owned all the stock of Industrial had, as an officer of Industrial's predecessor, a potential liability under Internal Revenue Code §6672, providing that persons responsible for non payment of employment taxes being liable for a penalty equal to the amount of the unpaid taxes. On April 1969 he sold Industrials stock to Quarles. The stock sale contract provided that Industrial was undertaking Billmeier's tax liability up to $7,500. In 1971 the U.S. government sued Industrial for the tax liability claiming that it was third party beneficiary of the stock-sale contract. The argument was accepted by the court. The Court of Appeals reversed the decision of the trial court and accepted the defence of Industrial to set off against the governments claim damages for Billmeier's breach of his promise not to compete.

274 In one Michigan case from 1984, the plaintiff loaned money to a businessman who executed a promissory note. The businessman sold his enterprise to the defendants, who executed an assumption in which they assumed the debts of the businessman. The plaintiff was listed as a creditor. The defendants failed to pay the plaintiff, and the latter brought suit, to recover the amount due on the note, alleging that he was a third party beneficiary of the contract between defendants and the businessman. The defendants denied the allegations and argued that the statute of limitations had run on the note. The trial court found for the defendants and the circuit court affirmed. The court of appeals reversed and remanded holding that the plaintiff was a third party beneficiary to the contract and that the defendant's promise to assume the debts created a new obligation which accrued from the date of the new obligation. (*Spiklevitz v. Markmil Corporation,* 136 Mich. App. 587, 357 NW 2d 721, 1984).

275 In *Hoge v. Farmers Mkt. & Supply Co,* (61 N.M. 138 A. 821, 1926) an exchange of stock took place between two corporations controlled jointly by the same entities. One corporation absorbed control of the other promising to pay specific accounts and general obligations of the acquired. The plaintiff who was an obligee of the acquired, sued the acquirer. The court applied the intent to benefit test, ignoring the fact that the parties to the exchange run both corporations together and denied relief because no intent to benefit was found.

276 *In Silver King Coalition Mines Co. v. Silver King Consol Mining Co,* (204 F. 166, -8th Cir 1913) the plaintiff company ran a mining claim together with another company as tenants in common. The latter company transferred its interests to the defendant (who

In contrast, no beneficiary claim could be based on a transaction in bad faith[277]. In such cases, honest participants relied on the undertaking in question, on the basis of its market context[278]. The courts assessed this reliance following market oriented policies. The same attitude can be found in decisions allowing bondholders to enforce the transferee's guarantee of the transferor's bonds[279].

More recently[280], a corporation was allowed to enforce an agreement between its shareholders, that the estate of any late shareholder was obliged to sell its stock to the

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undertook to pay all the outstanding debts of the transferor) sold stock to the latter and hired two of its officers as directors. Both the transferor and the transferee extracted and sold ore without the plaintiff's knowledge. The court accepted the claim for the ore extracted illegally, considering that the plaintiff was a third party beneficiary and that the beneficiary intent test did not apply when the court was faced with an honest creditor and a collusive transaction, for reasons of equity.

277 In one case (In *re A.C. Becken* Co, 75 F 2d 681 -7th Cir 1935), a company (purchaser) wanted to acquire another company and in order to avoid the adverse effect on its capital rating (to avoid that is including the purchase in its balance sheet), the company was purchased by the former's president. The buyer issued to the president, simultaneously with the purchase, preferred stock whose dividend rates and redemption and retirement schedules coincided with the purchase payment schedule. Both companies were small and the purchased knew of the purchaser's intentions. Many creditors extended credit to the purchaser ignoring its liability. The president later transferred his interests in the company, to the purchaser in return for its assumption of these liabilities. After the purchaser's economic failure the court rejected a claim by the purchased company's shareholders as third parties beneficiaries, against the purchaser because this way they would gain an advantage over the latter company's general creditor's because of their bad faith in a transaction.

278 This reliance was market induced in the sense that it is strongly attached to the nature of the businesses each time, if they require for instance extensive credit or imply a confidence relationship

In the second of the previously referred cases (In *re A.C. Becken Co*, 75 F 2d 681, 7th Cir 1935), the transaction concerned jewellery business where the availability of credit is of major importance. A tenancy in common on the other hand, as in the case on the mining enterprise, (*Hoge v. Farmers Mkt. & Supply Co*, (61 N.M. 138 A. 821,-1926), necessitates mutual trust.

279 In this exchange of corporate assets the reliance of the bond holder on such a specific guarantee would be justifiable. The court in *R.E.Duvall Co. v. Washington, B. & A. Elee. R.R.* (15 F. Supp. 536, 541, D. Md. 1916), accepted the enforcement of the guarantee by the bondholder. Such a policy would improve the security in bond sales, and stability in the bond market.

The same can be said for decisions accepting the enforcement of multiparty agreement to subscribe to stock or to contribute to corporate funds. (*Sterling v. Victor Cushwa & Sons* 170 Md 226, a 593, (1936). It has been noticed however that the policy was not made explicit in these cases. (54 (1968) *VaLR*, 1184.).

280 *Black & White Cabs, Inc V. Smith*, 370 S.W. 2d 669 (Mo. Ct. App.1963). The trial court entered a decree in favour of the corporation. The decree was affirmed. The court noted the purpose of the agreement that the same shareholders should retain the management of the company without having to adjust to a new relationship with a stranger. The plaintiff was considered to be a donee beneficiary of the agreement. (Fuller & Eisenberg 754).

corporation at a specifically calculated price. The court, apart from referring to the parties' intentions, contemplated on promoting harmony among shareholders and assuring the continuity of their close relationship. By excluding outsiders, the company could continue its ownership and management policies and avoid the risk of a sale to competitors. Industry and market policies can thus offer valuable guidance in deciding third party claims.

The courts, which often resorted to the study of corporate documents[281], required adequate evidence for the causality of the damage, as loss can be attributed to competition[282], or market forces. The trend to protect existing businesses is evidenced in the application of agreements excluding compensation[283].

2.11.4. Financing.

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281 In one case a Delaware court had to deal with a voting agreement entered by some shareholders of a corporation, agreement which resulted to the removal of the incumbent directors who were not parties. The directors sued the parties to the agreement alleging that the plaintiffs' removal was a violation of the agreement. The court granted the defendants' motion for summary judgment considering that the plaintiffs had no rights under the agreement. The plaintiffs were not creditors or donee beneficiaries of the agreement. The parties to the latter did not intend to create any rights for the incumbent board. (*Instituform of North America v. Chandler*, 534 A2d 257, -Del.Ch. 1987)

Such documents are often substantiallly clear and precise. The examination of these documents was done with the purpose to facilitate the establishment of the intention standard C.H.N. 54 (1968) *VaLR* , 1166-1193.

282 *Haran v. Hand*, 37 AppDiv 291 324 NY S 2d 556 (1971), dealt with a situation were nine stockholders sold their corporation for a merger into a buying corporation and entered into similar employment contracts with the merged corporation. The purchase price of their stocks was to be computed partly on the basis of success in a three year period following the merger. One stockholder who quit his job within one year was sued by the other eight on the idea that he was important to the business and his departure would reduce the amount payable for the stock. The claim was rejected. Admittedly there was hardly any evidence to support that the other stockholders were in that manner third parties beneficiaries of the employment contract of the person who left. Jackson & Bollinger 591.

In a 1985 Arkansa case, the president and major shareholder of a concrete company brought an action for tortious interference with a contract of sale against competitors who had filed suit to block one of the concrete company's sales, causing financial ruin to the company and forcing the president as guarantor to use his own assets to pay all obligations of the company. The district court affirmed the trial court's judgment granting the competitors' motion for summary judgment, holding that since the president was not a third party creditor beneficiary of the contract of sale he lacked standing to bring the action. (*Hufsmith v. Weaver*, 285 Ark 357, 687 SW 2d 130, -1985)

283 See the Arizona case referred to under a previous footnote, *Supplies for Industry Inc. v. Christensen*, 135 Ariz. 107, 659 P2d 660, 1983.

Claims have been accepted even if the benefit from financing has been only incidental, as that of the officers of a benefited company[284]. In other instances the courts, focusing on the parties' intention, failed to protect the reliance of the third parties and to strengthen the credibility of the relevant markets. For instance, in a case involving finance for farming, which involves grave risks and a small percentage of profit, the reliance of a third party providing land -- a basic commodity -- on the financier should have been protected[285]. A prudent evaluation of the particular market[286] might be necessary in order to allow a third party claim[287]. However, legislation and market reality, it should be

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284 In the early case *Carson Pirie Scott & Co. v. Parrett*, (346 III,252 178 N.E.498, 1931), a creditor agreed to finance the construction and furnishing of a hotel corporation but later refused to issue more funds because the corporation seemed to lack the capital to meet its obligations. Two corporation officers promised to the creditor to pay specific obligations. The court found that due to this specific listing the plaintiff, who was debtor of those obligations, could enforce this promise against the corporation offices. The decision is remarkable because the promise was not actually aiming at improving the position of the plaintiff, but to benefit the corporation in the light of funding difficulties. The benefit of the plaintiff was "incidental". The court by focusing on the listing of the specific debt circumvented in effect the examination of intention. Restatement first would have led to a different result. The decision responsds to market needs in protecting the reliance of the debtor upon the promise and holding the promisors accountable for their statements. The debtor would otherwise have to sue the heavily indebted corporation.

285 In *California Cotton Oil Corp. v. Radd*, 88 Ariz. 375,357 P.2d 126 (1960), the defendant's planed to give loans to a farmer, and to purchase his crop. The farmer was a tenant to the plaintiff, who in reliance upon this plan agreed to help finance farming by not placing any lien on the crop. The defendant in the presence of the plaintiff stated that the plan would be strictly followed. The level of lending exceeded the plan's limits and the farmer was unable (with the income from the sale of the crop), to pay the rent to the plaintiff after repaying the loans. The court held that the plaintiff was an incidental beneficiary. The plaintiff's reliance on the promises, and the defendant's irresponsible behaviour were not taken into account. The defendant was indeed to blame in the light of the vulnerability of the farming business. If the plan made sense as an attempt to finance farming, the plaintiff seems indeed worthy of protection since he is offering the commodity, land which is fundamental to farming and he is indeed exposed to the failure of the promise.

286 In *Reeves v. Better Taste Popcorn Co* (246 Iowa 508, 66 N.W.2d 853, 1954), A farmer rented land from the plaintiff and agreed to sell his crop to the defendant. The plaintiff had consented to the sale agreement on writing on the document. Although nothing was said about rental payment, the court, based on the fact that past dealings had always provided for payments to the plaintiff, construed the contract as made for the landlord's benefit in part and awarded him a share of the crop.

287 In another case where focusing on intention produced unsatisfactory results, (*Banker v. Breaux* 128 S.W.2d 23-Tex.Comm.App., 1939). the defendant was conveyed property by the plaintiff's grantee and made a number of payments directly to the plaintiff on the note which had financed the original transfer. Later the defendant conveyed the land to a buyer to whom he expressly promised to discharge the note. The appeal decision, reversing a previous judgment, found for the appellant (the defendant in the lower court), considering that the plaintiff was an incidental beneficiary. There was no intent in the promise to

recalled, drove the German[288] and Scottish courts[289] to be reluctant in expanding the duties of banks.

The conclusion on whether the claimant was a beneficiary could be based on various aspects of the relationship. This was the case with a claim by a seller's creditor against the purchaser[290]. The purpose of the transaction in question is similarly important to the

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benefit the plaintiff. The decision ignored the justifiable reliance of the plaintiff, reliance based on the previous behaviour of the defendant, and which was essential for the operation of the relevant transaction.

In a Massachusetts case from 1985 when a bank breached a construction loan contract delaying the completion and sale of condominium units, the trustee for the subcontractors-creditors sued and won a judgment in the trial court. Both the trial court and the Court of Appeals, rejected the bank's argument that the plaintiff could not recover for a breach of the agreement between the borrower owner and the lender bank because he was not a party to the contract. It was held that the trustee had a right to sue on behalf of the subcontractor as a third party beneficiary of the loan agreement. The owner was a surety for the bank, the loan agreement was an asset of the owner and a direct action by the beneficiary-trustee was appropriate to carry out the intention of the parties. The promisee-owner intended to pay the trustee with funds from the loan agreement breached by the bank. (*Gilmore v. Century Bank and Trust Co.*, 20 Mass App Ct 49 477 NE 2d 1069, 1985).

In another case where the examination of the parties' intentions did not hinder the courts from allowing the claim, a contractor contracted with a partnership to build a hotel, but stopped the work when the partnership failed to make progressive payments, and resumed when the partnership obtained a loan. The contractor receiver payment from the lender until the last one was due after the work was completed. The contractor sued and was awarded summary judgment. The Court of Appeals (in Minnesota) affirmed considering that the contractor was a third party beneficiary of the agreement between the partnership and the lender and that the latter's refusal to make payments constituted unjust enrichment. (*Twin City Construction Co. v. ITT Industries Credit Co.* 358, NW 2d 716, Minn. App. 1984).

288 See under "Banking law contracts", in Chapter 2. As is referred therein securoty and guarantee in banking business often covers expressly only the liability to perform but no additional duties. For many banks actions no security is available or is limited in time. Together with extensive statutory regulation, banking is often based in codes of practice prepared by the industry (rules, standardised contracts etc) designed to protect banks.

289 See under "Development and Applications" in Chapter 5. The JQT is basically applied in deposits or saving accounts taken in the name of third parties but on third party right from negotiable interests (they are protected by statute), while a banker's documentary credit is an independent promise in Scots law.

290 In a New York case from 1989, a bank that provided financing to a gasoline seller, which contracted to sell gasoline to a gasoline buyer and then repurchase it, sued the gasoline buyer after the seller filed for bankruptcy, and claimed that it was a third party beneficiary of the purchase agreement between the buyer and the seller and the assignee of the rights of one dealer under that purchase agreement, alleging breach of contract, fraud and fraudulent conveyance. The court denied the defendants motion for summary judgment stating that whether the plaintiff was a third party beneficiary depended on the terms of the contract between the buyer and the seller, and the purchase/payment confirmation sent by the defendant which was not obvious from their face. The court said that a jury could reasonably conclude from the evidence presented that the parties intended the plaintiff to be a third party beneficiary. (*Banque Arabe et International D'Investissement v. Bulk Oil* 726 FSupp 1411, SDNY 1989)

judicial reasoning; it was thought that a waiver of subrogation rights related to a real property lien, was not aiming at the benefit of the debtor's obligation guarantor[291].

2.11.5. Government Contracts - Third party beneficiary rule and private rights of action.

In these cases the creditor is a government entity and part or the whole of the performance is directed to the public. The beneficiary is seeking to enforce a promise made to a government entity. The cases often involve the undertaking of public utility services or operations by private entrepreneurs. Restatement first created a strong categorical presumption against the enforcement of government contracts by the beneficiaries[292]. Restatement second envisages the application of the rule in exceptional circumstances[293].

As mentioned, the expansion of the rule in this area paralleled the progressive restriction of the availability of the private rights of action imposed by the Supreme Court after 1964[294]. As contracts (or other formal agreements) are employed by the government with increased frequency there is a real need to protect certain groups of plaintiffs. From

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291 A corporation reimbursed a bank that honoured a standby letter of credit issued to the corporation's account, which had been drawn upon by a second bank to repay a debtor real estate development partnership's bankloan after the debtor defaulted on the loan. The debtor objected to a proof of claim filed by the corporation. Denying the objection the court held that the corporation was entitled to be surrogated to the rights of the second bank with respect to the bank's lien on certain real property owned by the debtor. The court rejected the debtor's argument that the guarantors of the debtor's obligations were third party beneficiaries of the agreement between the debtor and the corporation pursuant to which the standby letter of credit had been issued, stating that the waiver-of-subrogation promise in the agreement was not intended to benefit the guarantors as it related to real property. (*In re Valley vue Joint Venture* 123 B.R. 199, ED VA Bkrtcy. Ct. 1991)

292 §145 of Restatement first modified the beneficiary rule with respect to government contracts, requiring that an intention should be manifested in the contract "...that the promisor shall compensate members of the general public" for injuries caused by his breach.

293 §313(2) of Restatements second states that a person contracting with the government or a governmental agency for an act or the provision of services is not liable in contract to a member of a public for consequential damages caused by the performance of failure to perform. unless "(a) terms of the promise provide for such liability; or (b) the promisee is subject to liability ...and a direct action against the promisor is consistent with the terms of the contract and with the policy of the law authorising the contract and prescribing the remedies...".

294 Especially after the decision in *Case Co. v. Borak*, 377 U.S.426 (1964). In the same year the Congress enacted the Civil Rights Act, The American Law Institute introduced its first draft of Restatement second on Contracts, and Charles Reich published "New Property", in the *YaleLJ* ,Waters 98 (1985) *Harv LR* , 1173.

1964, and especially after 1974, the claimants have resorted to the rule as a legitimating basis of their suit[295].

Claims based on the rule, refer to the provisions of the relative statute; they are thus similar to private rights of action, differing mainly in form. Courts often found it difficult to alienate the contractual claim from that on the statute and consider the former independently. As it has already been pointed out, there is no comparative application of a contract in favour of third parties in other jurisdictions.

2.11.5.1. Stock exchange cases.

These decisions focused on the relationship between claims based directly on the statute and claims based on a contract which would not exist but for the statute. They examined section 6 of the Securities Exchange Act of 1934 (or contracts based on the latter), supposedly giving investors a private right of action[296].

In the case which dominated the relative field for a period of 26 years[297], investors, who had lost money as a result of embezzlement by a senior partner in a stock brokerage firm, which was a member of the New York Stock Exchange (NYSE), turned against a NYSE treasurer, on the statute[298] and as beneficiaries of the contract between

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295 Waters 98 (1985)*Harv LR* , 1173, is offering a small account of claims between 1964 and 1984.

296 In contrast to cases involving the application of public welfare programmes, the law related to section 6 of the Securities Exchange Act of 1934, is well developed as the cases focused on the specific statutory provision and arose before the same courts. The cases involving the application of welfare programmes arise "sporadically and in different courts" while they involve a greater variety of relationships lying somewhat in between statute and contract. Waters 98 (1985)*Harv LR* , 1177.

297 *Baird v. Franklin*, 141 f. 2d 238 (2d Cir), cert. denied, 323 U.S. 737 (1944).

298 For failing that is to comply with the provisions of the Securities Exchange Act of 1934. The plaintiff argued that the NYSE was liable because it failed to execute its duty under s.6(b). The act has now been amended in a manner that it invalidates the possibility to refer to the third party beneficiary on that basis, to insure fair dealing and protect investors. Section 6(b) conferred an implied private right of action on members of the investing public. The original s.6(b), referred to an "agreement ... to comply and to enforce, so far as is within its powers compliance by its members, with the provisions of this rule..."

The amendment removed the reference to the agreement and left s.6 with a mere specification of NYSE's duties with regard to the registration of an exchange (contained in s. 6,a, of the 1934 act).

See the Securities Exchange Act of 1934 in its amended (by Securities Amendment Act of 1975) form 15 U.S.C.A.§78f, "National Securities Exchanges".

NYSE and the Securities and Exchange Commission (SEC) -- governed by s.6 (a)(1) of the act -- under which NYSE promised to comply with the provisions of the act and to enforce compliance by its members.

The majority[299] accepted a private right of action[300]. The beneficiary rule basis was discussed in a partially dissenting opinion[301] and rejected as unnecessary[302]. The statute would be effective only if an individual right for investors to enforce it was acknowledged[303].

The beneficiary rule was questioned again in 1971[304]. The court had to decide whether the claim by a beneficiary had been filed within the prescribed limitation period[305]. Referring to Restatement first the court held that the plaintiff, a former partner of a defunct brokerage house, was neither a member of "the general public" nor "a member of the investing public"[306]. He had an independent cause of action on the contract and was

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299 Judge Hand wrote for the majority

300 It held that the plaintiffs did have a right of action to enforce s.6 of the Securities Exchange Act of 1934 . However it was held that the plaintiffs had failed to prove damage cause by the breach

301 By Judge Clark, whose opinion became an authoritative statement in finding a private right of action.

302 Possibly because it was felt that there was no reason for that since there was no damage.

303 Section 6 (b) could be effective only if it was construed as creating an individual right of the injured investors to ask for its enforcement. Common law would provide a remedy for the members of the class once a duty was acknowledged. The absence of an expressly provided mechanism of protection was not an obstacle therefore. The statutory rationale and the legislative background were looked at, assuming the parties intended to comply with the statute which ordered the contract, thus promoting an examination of the intentions involved.

304 Although claimants continued since *Baird v. Franklin*, 141 f. 2d 238 (2d Cir), cert. denied, 323 U.S. 737 (1944), to support their claims on the basis of the third party beneficiary rule it took the courts 26 years to rely on the rule.

305 *Weinberger v. New York Stock Exchange*, 335 F. Supp. 139 (S.D.N.Y.1971). Under New York law an action on the statute should be brought within three years while a contract claim had a six years period. The court had to decide whether the plaintiff had legitimately stated a claim as an intended beneficiary of the contract between the defendant and the SEC, under s.6. The defendant argued that the statute's three years limitation period should apply, because the agreement in s.6 was not a contract in the ordinary meaning of the word.

306 Restatement first forbid claims from "the general public", (§145).

entitled to the six years limitation period as a third party beneficiary; otherwise he would be left unprotected[307].

In a 1975 case[308] the defendants argued successfully that NYSE "insiders" were not (in contrast to "public investors") intended beneficiaries of the contract which served as the basis for the claim. Limited partners and subordinate lenders were protected by the Securities Exchange Act; the court held that contractual obligations could not extend the statutory duty in s.6. It was confirmed again in 1976 that investors could sue as beneficiaries[309].

The overall conclusion from case law is that the beneficiary rule has been used in such stock exchange cases in an auxiliary manner, to justify a right to sue on contract or even on the statute[310], and in order to avail the contractual advantages to the claimant.

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307 If, that is, the class of protected people did not expand beyond that referred to in *Baird v. Franklin*, 141 f. 2d 238 (2d Cir), cert. denied, 323 U.S. 737 (1944). He was, as said, "more than an incidental beneficiary" and should justifiably be protected.

308 *New York Stock Exchange v. Sloan*, 394 F.Supp 1303 (S.D.N.Y.1975), where the question was on the standing of the plaintiff.

309 The trustee of a bankrupt stock exchange member brought an action against the stock exchange and the members of a business conduct committee of the exchange, charging violation of the Securities Exchange Act, and The Securities Investor Protection Act. The defendants filed motion to dismiss for lack of standing. The first cause of action rested upon the allegation that at the time the defendants became aware that the liability limit on the fidelity bond of the debtor member of the Exchange, was $100,000 below the amount required by the rules of the Exchange, the defendants had known for a long time of the managerial and financial difficulties of the debtor and of the incompetence and inexperience of its employees, but, nevertheless failed to require compliance. The second cause of action rested upon the allegation that when the defendants concluded that the management of the debtor was inadequate to administer the existing affairs of the debtor, they forbade the opening of new offices, but they did nothing to prevent the opening of the debtor's New York branch. As a result, a loss was sustained which immediately caused insolvency. The court stated that although not necessary to the resolution of the issue in this case, individual liability also exists, because by accepting membership of the committee the individual members impliedly, if not expressly, promised the exchange to administer the relevant duties imposed on it by the both Securities Exchange Act and by its own rules. Since the policy behind the Securities Exchange Act is the protection of investors, such a promise must be interpreted not only for the benefit of the promisee Exchange, but also for the benefit of the members of the Exchange, creditor beneficiaries under the terminology of the Restatement first, §133, and intended beneficiaries under the terminology of the Restatement second §302. Such a promise therefore is an asset of the bankrupt brokerage house and therefore available to the trustee in bankruptcy. The defendants' motion to dismiss was rejected. (*Collin's v. PBW Stock Exchange Inc.* 408 F Supp 1344, E D Pa 1976)

310 Waters 98 (1985)*Harv LR* , 1173.

2.11.5.2. Public welfare programmes.

Claims against public utility providers were rejected at first (starting from a landmark 1928 decision[311]) on the basis of the interpretation of the policy behind the undertaking of the service. The undertaking was interpreted as implying the insulation of the parties from potential catastrophic loss[312]; the performance of governmental functions would otherwise be endangered. An economic analysis would support the argument that the contract was entered into on the assumption of non liability to the public. The service contractor, in view of extended liability to the public, would either refuse to supply the service or charge higher rates. The government entity would again prefer lower charges with no liability to the public, to higher rates with liability. Emphasis was laid on the lack of proportionality between the benefit of the utility providers and their potential liability[313]. The attempt to limit their exposure was expressed through a policy of

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311 In *H.R. Moch Co. v. Rensselaer Water Co,* 159 N.E. 896 (N.Y. 1928), a waterworks company (the defendant) had agreed with the City of Rensselaer to supply water for a number of public uses including fire hydrants. Due to inadequate (not in compliance with the contract) supply of water in the hydrants a warehouse owned by the plaintiff was destroyed by fire. The New York court (following Justice Cardozo's opinion) rejected the action brought on the third party beneficiary rule. Since the city did not owe its inhabitants a legal duty to provide them with water for the purpose of extinguishing fires, the contract between the city and the waterworks company could not be construed as an agreement to discharge a duty of the city to its inhabitants. In any case no intention was discernible that the promisor was to be held liable to individuals members of the public for breach of his duty to the city. In order to accept the application of the third party beneficiary rule the benefit to the members of the public should be "primary and immediate" and not "incidental and secondary" as in this case. Fuller & Eisenberg 768.

312 This was the case with the rejecion of liability for loss caused due to the defendant's damage to a public utility network, the so-called "cable" cases in German law for which no liability exists in any of the jurisdictions examined. The cases are not the same with those in the American context. The loss in the latter is caused by the provider of the utilities. The 'cable' cases involve loss resulting from power cauts caused by negligence of contractors for public works. The claims in delict were often calling upon the damage to the "right to an established business". Usually in 'cable' cases the claims were not accepted under §823 I BGB as more strict directness requirements were applied, neother a contract with protective effects applied. See BGH 12.3.1968 - VI ZR 178/66 (Hamm) NJW 1968 1279, BGH 8.6.1976, - VI ZR 50/75 (Stuttgart), NJW 1976 1740, and BGH 12.7.1977, - VI ZR 136/76 (Stuttgart) NJW 1977 2208. See Banakas 268-275. Feldthussen describes these as "The Utility Cases", a category where recovery is precluded for "negligent interference with contractual relations between the plaintiff and the victim of physical damage" (in this group of cases the plaintiff has a contract with the party who suffers phusical damage. Feldthussen, *Economic Negligence,* 235. On Scots law see *Dynamco Ltd v. Holland and Hamnen and Cubitts (Scotland) Ltd,* 1971 SC257, 1972 SLT 38, and on English law,*Spartan Steel & Alloys Ltd v. Martin & Co. (Contractors) Ltd,* [1973] 1 QB 27, [1972] 3 All ER 557 (CA).

avoiding a multiplicity of claims; "a multitude of suits for damages that could not have been intended or in the contemplation of the parties at the time the contract was made."[314]. Claims have been rejected for lack of an express undertaking of liability by the person or entity contracting with the governmental agency[315] or for lack of authorisation by the respective statute[316]. In other instances a proximal cause requirement[317], was not fulfilled[318], or there was alternative protection available[319].

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313 Cardozo in *H.R. Moch Co. v. Rensselaer Water Co*, 159 N.E. 896 (N.Y. 1928) referred to liability to the public as a "crashing burden" where "the consequences invited would bear no reasonable proportion to those attached by law to defaults not greatly different.".

314 Justice William T. Cowin, speaking for the majority in *Shubitz v. Consolidated Edison Co. of New York*, Supreme Court of New York, Special Term, Kings County, Part I, 1969, 59 Misc.2d 732, 301 N.Y.S2d 926. The defendant was a company supplying current to the owner of a building under an implied contract. The plaintiff was a tenant of the building. The claim concerned damage suffered after a blackout caused from the negligent upkeeping of a defendant's substation. The decision relied heavily on the previous cases law; especially on *H.R. Moch Co. v. Rensselaer Water Co*.

A multiplicity of claims would upset the relative transactions. In *Data Proc. Fin, & Gen. Corp. v. IBM*, 430 F2d 1277 (8th Cir 1970), the plaintiff claimed to be a third party beneficiary of a consent decree agreed between the United States government and the defendant (I.B.M.) for the purpose of assuring users or prospective users of electronic data processing machines the possibility of economically owing such machines as well as leasing them. Obviously there could be so many claims as to make the agreement unviable. Jackson & Bollinger 597.

315 In *Davis v. Nelson-Deppe Inc*, (Supreme Court of Idaho 1967, 91 Idaho 463. 424 P.2d 733), the plaintiff was the owner and operator of a tractor-trailer combination. He sued to recover damage to his equipment occasioned when it went of a portion of the U.S. highway No.93, then under reconstruction and repair by the defendant. The latter had entered into a contract with the State of Idaho department of Highways to recondition and resurface a portion of the highway. The court held that in the absence of manifest intent to the contrary the contracts between a contractor a state or other public body are not considered to be for the benefit of third persons, but are for the benefit of the State and the contractor.

In *Costa v. Callahan Road Improvement Co*, 15 Misc 2d. 198, 184 N.Y.S.2d 534 (Ulster County Court 1958) a direct action by a third party was rejected because of a specific clause dimissing any intent to give third parties that right.

In *Compangnie Nationale Air France v. Port of N.Y. Authority*, 427 F.2d 951 (2d Cir 1970), the Second Circuit denied the third party beneficiary status to an airline whose plane was damaged. The suit was based of a contract between the Airport Authority and a contractor to improve the airport.

In *Matternes v. Winston-Salem*, 286 NC 1, 209 SE 2d, 481, -1974), a city had a contract with a state board of transportation to do works and repairs within the city in a part of the highway system. The plaintiff bought actions against the city for wrongful death, personal injuries to a minor, property damage and medical expenses resulting from an accident in which the plaintiff's deceased wife's car went out of control on a bridge upon which there was an accumulation of ice and snow. On appeal the court affirmed the granting of a summary judgment to the defendant, holding that the plaintiff was merely an incidental beneficiary of the contract between the city and the state board, and therefore could not sue for the city's non performance.

316 *In Gallo v. Division of Water Pollution Control*, 374 Mass, 278, 372 N E2d 1258, (1978), landowners brought an action against the Division of Water Pollution Control's

Courts were willing to award damages for limited property or personal injuries to a limited number of people only[320]. Specific evidence was often required[321]. In the case of

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District Commission for towns and cities seeking injunctive relief and damages alleging that the defendants' acts and omissions resulted to the plaintiffs' inability to make sewer connections between their lots and the municipal sewage disposal system. The trial court granted the defendants' motion to dismiss and the plaintiffs appealed. On appeal the court affirmed the holding that the landowners who were prevented from making sewer connections by breach of contracts between the towns and the Commission were not authorised by the statutes permitting such contracts to bring actions to enforce contractual provisions or to seek declarations as to rights against the contracting parties, nor did the plaintiffs had a right of action as third party beneficiaries.

317 *Kornblut v. Chevron Oil Co* 62 A.D. 831, 407 N.Y.S. 2d 498 (1978). After waiting for two and a half hours on a hot day for road assistance to change a tyre, a driver in New York state thruway, changed the tyre himself and subsequently suffered a fatal heart attack. His children suit the defendant who under a contract with the thruway authority was to provide roadside service within 30 minutes. The Appellate Division Court reversed the lower courts judgment for the plaintiff. Even though the deceased could be a third party beneficiary of the contract in question, his children could not, as no proximate cause could be established in the absence of foreseeability.

318 The claims were far fetched. In one case a claim was made by the children of a man injured in an car collision against a company an employee of which was responsible for the accident. The claim focused on the promise the employee-driver had given to the state, when passing his driving exams, to comply with the rules and be a good driver, the children being third party beneficiaries. The claim was rejected. *Hayrynen v. White Pine Copper Co,* 9 Mich.App.452 157 NW 2d 502 (1968).

319 Juveniles who were arrested and detained under a state plan for dealing with juvenile offenders filed a class action against state, county and individual defendants alleging that their rights under the federal Juvenile Justice, Delinguency and Prevention act, had been violated. The court found for the plaintiffs considering that the Congress had created an enforceable right under the Act. The court noted that it must reject the urge to analogise civil rights legislation to the rights of third party beneficiaries in contract law, because in most states third party beneficiary rights exist only when both contracting parties intended to create a remedy enforceable in court by third parties. (*Henderson v. Griggs,* 672 FSupp 1126, ND Iowa, 1987)

320 *Turkel v. Fiore,* 62 Misc 2d 210, 308 N.Y.S.2d 432 (Cit.Ct.N.Y.C.1970), involved a claim by the owner of an automobile which was towed away by the defendant who had a contract with the city for towing away abandoned cars. The defendant stripped the car, in preparation of its being crushed, within two days from towing it away. The contract with the city required the defendant to hold the cars for five days before destroying them. The plaintiff's claim that he was third party beneficiary of the contract was accepted.

In another case an aeroplane crash was caused by the ingestion of birds swarming on a garbage dump adjacent to the airport. The County operated the airport and the dump. The suit by the victim's survivors was for negligence, nuisance and breach of the terms under which the airport was operated. The Court of Appeals of the Fifth Circuit rejected the claims for negligence and nuisance but accepted that the plaintiffs were third party beneficiaries of the contract between the county and the Federal Aviation administration for the safe operation of the airport. This decision was later reversed. [*Miree v. US* 526 F2d 679 5th Cir 1976 reversed en blanc, 538 F2d 643 (5th Cir 1976), vacated and remanded, Miree v. DeKalb County 433 US 2S, 97 SCt 2490 53 2Ed2d 557 (1977), Certificate of State Law Issue, Miree v, US 242 GA 126 249 S E2d. 573 (1978)].

In *New York Citizens Committee v. Manhattan Cable* TV 651 F Supp 802, SDNY 1986, an association of cable television subscribers sued a cable franchise for violation of antitrust laws. The court denied the defendant's motion for dismissal on the idea that the

express undertakings to benefit[322], and of insurance contracts[323] the beneficiary status was easily recognised. The same applied when the relative legislation illustrated an intention

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association of subscribers had standing to sue as third party beneficiaries of the contract between the cable franchise and the city. The court stated that even though all government contracts benefit the public, members of the public are usually not classified as third party beneficiaries, However in this case the court found that the cable franchise intended to confer the benefit of the contract to the subscribers making them third party beneficiaries.

321 In *Orchards v. United States*, 4 Cl. Ct. 601, judgment affirmed 748 F 2d 1571 (Fed Cir 1984), members of irrigation districts brought an action against the United States Bureau of Reclamation to inform the irrigation districts accurately as to the total quality of water it expected to be able to supply them for irrigation purposes. The parties filed cross-motions for summary judgment. The Claims Court held that the Bureau of Reclamation did not have any express of implied contractual obligation to make accurate water supply forecasts. The irrigation districts which entered into the contract with the Bureau of Reclamation were not mere agents of their members but could sue the United States for breach of contract, while their members could not bring n action as third party beneficiaries of the contracts between the irrigation districts and the United States merely because the members were the ultimate beneficiaries of the contract. Summary judgment was entered for the United States.

Residents and owners of small businesses in a small town in Massachusetts sued as third party beneficiaries of a contract between the town and the Corps of Engineers. The Claims Court was given jurisdiction under the Bonneville Project Act. On a motion for summary judgment the court dismissed the first two claims. Stating that every contract made by a government unit is made for the benefit of its inhabitants, the court held that only when the contract manifests a specific intent to give individual inhabitants enforceable rights to compensation for its breach may an individual sue the governmental unit. The court concluded that the plaintiffs were not intended third party beneficiaries. (*Berberich v. United States*, 5 Cl Ct 652, affirmed 770 F2d 179 (Fed Cir 1985)

322 *La Mourea v. Rhude*, 209 Minn. 53, 293 N.W. 304 (1940), concerned a contract between the defendants and the city of Duluth, for sewer construction. The construction would involve blasting, and the contract stipulated that the contractor would be liable for damages to public and private property and injuries to people caused by the operations. The plaintiff sued for the damage of his nearby real estate. The defendant's argument that the stipulation was aiming at indemnifying the city only were rejected. Fuller & Eisenberg 769.

In *Pacific Northwest Bell Tel Co. v. DeLong Corp*, 246 Or. 368 425 P2d 498 (1967), the plaintiff, a telephone company, was considered a third party beneficiary of the contract between the defendant (a contractor) and the state highway commission for the erection of a bridge. The contract stipulated that the contractor would avoid damage to private property and would be responsible for all such damage. The defendant sued for compensation for damage caused when, during the works, a telephone cable was cut.

323 An action was brought against the National Flood Insurers Association seeking compensation for the loss of the plaintiff's house due to flooding . The house had been insured under a lapsed policy issued by the Association. The plaintiff contended that she was a third party beneficiary of an agreement between the Association and the insurer and that the Association breached that agreement by failing to send renewal and expiration notices as required by the manuals expressly incorporated into the agreement. The district court granted summary judgment in favour of the Association. On appeal the decision was reversed and remanded holding that the plaintiff was an intended third party beneficiary of the agreement and thus had standing to challenge the Association's failure to notify her that her policy had expired. Because the obligation to send renewal and expiration notices arose from the express language of the service agreement and manuals incorporated therein, and because the obligation referred to a specific class of individuals clearly contemplated by the contract and identifiable at the time the obligation arose, policy holders were entitled, as third party beneficiaries, to receive renewal notices 45 days before the

to benefit a limited class[324]. For the sake of imposing policies such as the protection of employees, the protection of the beneficiary rule substituted that of -- inapplicable -- labour legislation[325]. Protection was thus related to the, need, dominant in American case law, to identify the class of claimants[326] and to superior policy requirements. In many government contracts the claimants are identified by the statute authorising the contract or is incorporated in the relative agreements, so that it cannot be argued that third party protection is contradicting the parties' objectives.

The basic rationale for rejecting beneficiary claims was presented conclusively in *Martinez v. Socoma Companies*[327], where the defendant companies had entered an agreement with the Secretary of Labor[328] under which the companies received federal funds and promised to train and employ a number of unemployed East Los Angeles residents characterised by the government as disadvantaged. The plaintiffs, who had been certified as disadvantaged, claimed lost wages and other benefits on the basis of the companies' failure to perform. The court held that they were not entitled to damages either as creditor

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expiration of their policies. Additionally the plaintiff relied on the Association's prior practice of notifying her that her policy was about to expire. She had reasonably expected that this practice would continue. (*Beverly v. Macy*, 702 F2d 931, CA 11, 1983)

324 *Shell v. Schmidt* 126 Cal.App.2d 279, 272 P.2d 82 (1954). The defendant was a building contractor who entered a contract with the national government under which he received priorities for building materials and undertook to build with these materials houses to be sold to war veterans at or bellow ceiling prices. It was held that the plaintiffs, 12 war veterans, claiming compensation because the houses did not comply with the agreed specifications, had a right to sue as third parties beneficiaries of the agreement with the government. Acceptance of the plaintiff's status was based on the clear manifestation of the parties' intention and the evidence from the legislation, that the purpose was the benefit of the beneficiaries, as, for instance it empowered the government to obtain compensation for the former.

325 *H.B.Deal & Co. v. Head*, 221 Ark. 47, 251 S.W.2d 1017 (1952), involved a contract between the government and Deal for the construction of an ordnance plan. Deal was obliged under the contract to pay his labourers time-and-a-half for overtime. The Fair Labor Standards Act, laid down a similar requirement with regard to certain classes of employment. Deal's employees turned against him under the act or, alternatively, the contract, The act was found inapplicable to the specific construction job but the claim was accepted under the contract's provision which aimed at benefiting the employees.

326 See under 'Examples: Misrepresentation and product liability" on the basic drive in American , Commonwealth and Scots laws for the identification of a limited class of persons entitled to compensation as a prerequisite for compensation in pure economic loss cases. See the references to Feldthussen *Economic Negligence.*

327 Supreme Court of California, 1974, 11 Cal.3d,113 Cal.Rptr.585,521 P.2d 841.

328 Pursuant to the federal Economic Opportunity Act, to benefit the residents of Special Impact Areas. Areas that is with "especially large concentrations of low income persons and suffering from dependency, chronic unemployment and rising tensions".

or donee beneficiaries because the parties had no intention to create such a cause of action[329]. The decision, calling upon §145 of Restatement first, focused on the authorising statute, which did not aim at benefiting individuals but the community[330].

It is no coincidence that claims were accepted in housing cases where the restitutionary aspect of the beneficiary rule -- the entitlement which was not realised -- evidently resembles an action for money had and received, and where the legislation clearly aimed at the recipients' benefit.

2.11.5.3. Housing cases.

In the landmark decision of *Zigas v. Superior Court*[331] the builders/owners of a San Francisco apartment house agreed with the Department of Housing and Urban Development (HUD) to abide to a maximum-rent schedule in return for construction financing by HUD. The agreement was pursuant to the National Housing Act[332]. The plaintiffs, tenants of the flats, argued that the defendants had agreed with HUD not to charge rents more than the amounts approved by the HUD and that they had been charged rents in excess of those amounts without HUD's approval as required by the agreement. Damages in excess of 2 million dollars were claimed. The Court of Appeal, applying Californian law and construing the contract on the basis of the statutory objectives, held that the plaintiffs were beneficiaries of the contract between the builders/owners and HUD and allowed the

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329 The absence of manifest intent of the parties to benefit the recipients of the programme distinguished this case from *Shell v. Schmidt* 126 Cal.App.2d 279, 272 P.2d 82 (1954)

330 "The congressional declaration of purpose of the Economic Opportunity Act as a whole points up the public nature of its benefits at a national scale. Congress declared that the purpose of the act was "to strengthen, supplement and coordinate efforts in furtherance of [the] policy" of "opening to everyone the opportunity to work and the opportunity to live in decency and dignity" so that the "United States can achieve its full economic and social potential as a nation".(42 U.S.C.A. §2702). Thus the contracts were designed not to benefit individuals as such but to utilise the training and employment of disadvantaged persons as a means of improving the East Los Angeles neighbourhood."; Chief Justice Wright, contemplating on the enabling legislation.

331 120 Cal. App. 3d 827, 174 Cal. Rptr. 806 (1981), cert. denied, 455 U.S. 943 (1982).

332 The act was promoting a policy of facilitating the production of rental accommodation at reasonable rents. HUD was authorised to direct the benefit of mortgage insurance primarily to those projects "in which every efforts had been made to achieve moderate rental charges". See 12 U.S.C.A.§1713.

claim[333]. The complaint did not allege a federal cause of action, one, that is, arising out of the National Housing Act. The claimants sought redress under Californian law as the parties agrieved from the violation of the agreement between the defendants, (builders/owners) and HUD. The contract on which the claim was based, as that in *Martinez v. Socoma Companies* "contained no indication of an intent to create a cause of action in the beneficiary class"[334].

The court felt the need to distinguish its decision from *Martinez v. Socoma Companies*[335]. In *Zigas* the claim was for moneys paid by the plaintiff to the defendant in excess of the agreed rent schedule. Restatement first did not apply[336]. In *Martinez* the claim was for benefits not obtained (which were difficult to calculate) and it was reasonable to protect the contractor.

The different approach in the two decisions was justified on the basis of the different rationale of the relative contracts. A direct claim in Zigas would possibly satisfy the recipients more effectively, as the government would possibly not show eagerness or allocate resources to litigate on behalf of the beneficiaries, as it was authorised to do[337].

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333 It should be noted that in *Zigas* the beneficiary's loss was easy to calculate on the basis of the maximum rent prescribed in the contract.

In *City & County of S.F. v. Western Air Lines, Inc* 22 Cal.Rptr 216 (Ct App. 1962) cert denied 371 U.S. 953 (1963), under a contract between the City and the federal government, the City received federal funds (pursuant to the Federal Airport Act) for the operation of an airport, as promised, in fair and reasonable terms and without unjust discrimination. Western Air Lines raised the argument that the City had discriminated against Western in its rate charging policy. The court interpreted the Federal Airport Act in order to infer the goal of the contract since "the contract made pursuant to the Act had the same objectives". The objective of the Act was to promote a nation-wide system of public airports and not to regulate airport operations. There was no evidence of intent in the contract between the City and the government to compensate third parties for non compliance. There was only a provision enabling the federal authorities to recover "where there has been any misrepresentation. The court rejected the defendant's objection.

334 Waters 98 (1985)*Harv LR* , 1190.

335 Judge Feinberg explained the differences.

336 § 145 is referring to consequential damages, and to contracts with the government for the benefit of the public. The defendants were not members of the public in the sense of §145 but specific persons who had paid the rent

337 In *Zigas* the authorising act empowered the federal government to claim damages on the tenants behalf. The government could of course seek injunctive relief or the repayment of the subsidies. None of these alternatives is more effective for the realisation of the purposes of the authorising act and of the housing scheme, than the claim the act itself provides for the government.

Damages is an effective substitute of the money paid in excess of the rent schedule while the entitlement to cheaper rents is not abolished. The builder's liability is likely to be the same irrespectively of who the plaintiff is[338]. The beneficiaries' claim does not profoundly conflict with the aims or the remedies envisaged in the authorising act. Were the plaintiffs' claim to have been accepted in *Martinez* the purposes of the act and of the relevant policy could have been endangered as the defendant's exposure might have increased considerably[339]. Such an outcome would discourage contracting with the government for similar projects and lead to an increase of their cost[340].

The differentiation between the two cases was better explained by reference to the resemblance of housing cases[341] to property-based claims and to the restitutionary aspect of the beneficiary rule. In *Zigas* the claim was for the return of money wrongfully held -- restitutionary that is[342]. In *Martinez* the beneficiaries' entitlement was for a place of training employment as promised[343]. This comparison illustrates how both forms of liability contained in the third party beneficiary rule continue to co-exist and function on

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338 In either case they will be obliged to return funds received while no performance was made.

339 In *Martinez* the contracts provided that the defendants were obliged to refund the government a particular amount for each employment opportunity they would fail to provide. The contract also provided for a non judicial procedure for settling disputes.

340 It seems clear that the contracting parties did not intent to allow a direct claim by the beneficiaries. Claims by the beneficiaries who are members of a defined class will not reinforce the relevant policy.

341 There is a steady flow of housing cases. In *Schillman v. Hobsetter*, 241 A2d 570, 249 Md 678 (1968), the purchasers of homes in a real estate development based their claim on an agreement between the Federal Housing Authority (FHA) and certain shareholders of the real estate development company under which the company guaranteed to refund deposits of purchasers if the company failed to complete the building. The claimants were considered donee beneficiaries of the agreement and the claim was accepted.

In *Town of Ogden v. Earl R. Howarth & Sons*, 58 Misc 2d 213 294 NYS2d 430 (1968), the defendants' counterclaim was accepted on the basis of the third party beneficiary rule. The defendants were purchasers of homes and sued the builder-vendor who constructed the houses under a contract with the City for the subdivision and improvement of land. The builder had violated the specifications and regulations of the contract.

342 The old common count for money had and received would accommodate the beneficiaries in *Zigas*. The concept of returning money had and received without entitlement is clearly resembling the origins of the rule.

Zigas could not therefore fall under §145 of Restatement first which was designed for claims base on promissory obligations.

343 The link between the contract and the beneficiaries is prescribed differently. The companies are meant to return the unused moneys to the government.

different sets of relationships (even if in *Martinez* the claim was rejected). Treating welfare benefits as a form of property and the subsequent expansion of the beneficiary rule indicated the latter's potential to adjust to newer demands.

A step further was taken by the Seventh Circuit in *Holbrook v. Pitt*[344]. The owner of a housing project was entitled to receive rent subsidy payments under contract with the HUD on behalf of eligible tenants. In contrast to *Zigas*, the money had not been received but would be provided upon request by each eligible family. The owner was responsible under the contract for determining the eligibility of applicants and computating the assistance payments[345]. The plaintiffs, tenants in the project, sued the owner claiming compensation for the amount lost due to his failure to assess and certify their eligibility for cheaper rent in a timely fashion. The successful claim was not of a restitutionary character (for money had and received) but was based on the promise. The court also allowed a third party beneficiaries' claim against the HUD for accepting deficient computations by the owner[346]. The claim resembled one based on the welfare entitlement than on the HUD's undertaking. Although the court rejected a claim based on the claimants' constitutional right, in effect it protected this right by relying on the third party beneficiary rule.

However, no consistent body of case law in favour of housing beneficiaries has been developed yet[347]. The claims are rejected if the undertaking of the private contractor is vague (for example, allocating percentages of the project[348]), or when a government action

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344 643 F. 2d 1261 (7th Cir. 1981)

345 He was obliged under the contract to apply to the HUD for the rent subsidies on behalf of the eligible tenants.

346 Although formally the plaintiffs could not recover more than they lost, they could recover all from either defendant.

347 In *Perry v. Housing Authority*, 664 F. 2d 1210 (4st Cir 1981) it was held that tenants have no enforceable rights under Annual Contributions contract between local housing authority and HUD. In *Falzarano v. United States*, 607 F.2d 506 (1st Cir 1979), it was considered that tenants in subsidised housing projects were not third party beneficiaries of the contract between landlords and HUD.

348 Applicants for low income Housing who were informed that no vacancies existed and that they would be put on waiting lists sued the Secretary of HUD, the head of Illinois Housing Development Authority, and developers for breaching their contract to set aside a percentage of apartments for low income families. The trial court awarded the defendants summary judgment on the ground that the contracts had been lawfully executed. On appeal the court affirmed, holding that the developers had not assumed contractual liability to the plaintiffs and that the plaintiffs as mere applicants for subsidised housing did not have third party beneficiary status to the contract between the developers and the state

which does not violate the statutory authorisation is involved[349]. Protection is awarded when more vital interests such as health and safety are at stake[350].

2.11.5.4.Other welfare cases.

In a number of other cases the question centred on the violation of contracts from the point of view of the Civil Rights Act of 1964, forbidding discrimination on a racial basis by those receiving government funding. The contracts involved federal funding to the defendants. The best known case involves school segregation[351]. In other instances, the

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housing authority, and therefore had no right to sue for the defendants' breach. (*Price v. Pierce*, 823 F 2d 1114 1121, cert. denied 485 US 960 108 S Ct 1222, 99 L Ed 2d 422, CA 7, 1987).

349 Certain tenants of an apartment project the mortgage of which was insured by HUD under the provisions of the National Housing Act, brought an action to enjoin the Secretary of HUD from consenting to the transfer of the projects physical assets to a new corporation. This transfer was sought by the project's owners as part of a plan to convert the apartments from rental units to a cooperative ownership. Dismissing the complaints the court ruled that the plaintiffs did not have standing to raise statutory and constitutional challenges to HUD's proposed action, that the action would not violate applicable statutes or the due process clause of the Fifth Amendment and that while plaintiffs might have been incidental beneficiaries of a regulatory agreement between HUD and the project owners, the agreement did not give enforceable contract rights to the tenants as third parties beneficiaries. [*Angleton v. Pierce*, 574 FSupp 719 736 judgment affirmed 734 F 2d 3 (3rd Cir 1984), certiorari denied-US-105 S Ct 245, 83 L Ed 2d 183 (1984), rehearing denied-US- 105 S Ct 551, 83 L Ed 2d 483 (1984)]

350 A mother and her two children who suffered lead poisoning sued a housing authority for failing to inspect and enforce elimination of lead paint hazard that resulted in the children being poisoned. The trial court granted the defendant summary judgment. On appeal, after granting direct appellate review, the court reversed and remanded, holding that the housing authority had a duty to inspect for lead hazards and to report the results of its inspections pursuant to the Housing Assistance Payments Contracts, and that they were entitled to recover damages from the defendant's breach of its obligation under those contracts to inspect for lead paint hazards. (*Ayala v. Boston Housing Authority*, 404 Mass 689, 536 NE 2d 1082, -1989).

351 In *Bossier Parish School Board v. Lemon*, 370 F.2d 847 (5th Cir 1967)aff'g 240 F Supp 709 (W.D.La) cert.denied 388 U.S.911, 87 SCt 2116, 18 L.Ed 2d 1350 (1967), the problem was intertwined with the statutory and constitutional position and rights of the plaintiffs. The Lemon were "federal children" (they lived on a federal air force base) and could only attend the Bossier Parish public schools as third parties beneficiaries of the contracts under which federal funds were provided for the construction of the schools. The contract provided that school facilities would be made available to federal children on the same terms they were available to other children in the State in question. The Lemon children were allowed to attend the school but not on the same terms. The school the Lemon children were attending was racially segregated contrary to the provisions of the Civil Rights Act 1964 which prohibits racial discrimination in all programmes receiving federal funds for their operation, and the equal protection clause of the fourteenth amendment. (See 42 U.S.C.A. §2000 d; "Prohibition against exclusion from participation in, denial of benefits of, and discrimination under federally assisted programmes on grounds of race, colour or national origin.").

Civil Rights Act 1964 was taken to establish a private right of action[352] but the beneficiary rule could be used instead of a civil rights suit[353]. Nevertheless, cases involving discrimination might be difficult to prove and could be rejected for lack of evidence[354], as is the case with refugees' claims against a government-funded organisation[355].

Both the district court and the Fifth Circuit accepted the statutory and constitutional claims. Furthermore the courts accepted that the Lemon children had a cause of action as third parties beneficiaries of the funding contract which entitled them to ask for injunctive relief. The third party beneficiary claim was treated not as an auxiliary means of protection (as in the stock exchange cases), when a private right of action was not available, but as a separate ground for injunctive relief, additional to the other theories proposed (statutory and constitutional claims). Even more, the contract not only provided the basis for the independent beneficiary claim, but defined the relationship and obligations referred to by the statutory and constitutional claims. (In the stock exchange cases there was no constitutional claim involved.)

352 In *Guardians Association V. Civil Service Com'n of City of N.Y.*, 463 U.S. 582, 103 S Ct. 3221, 3233 77 LEd 2d 866 (1983), certiorari denied 463 US 1228, 103 SCt 3568 77 LEd 2d 1410, 1983, plaintiffs were black and Hispanic members of a city police department. They brought a class action alleging that layoffs made pursuant to the police department's "last-hired, first-fired" policy, violated their rights under, inter alia, the Civil Rights Act 1964. The district court accepted a private rights of action, and granted relief. The granting of relief was reversed by the appellate court because of the absence of discriminatory intent. The Supreme court granted certiorari and affirmed the appellate court's decision; the plaintiff recovered injunctive relief only.

353 In a Florida case the plaintiff, minority business enterprise sued a cable television licensee on a third party beneficiary theory and under a civil rights statute, claiming that the defendant was in violation of its agreement with the city to make good faith efforts to use minority business enterprises in 20% of all contracted expenditures. The trial court granted the defendants motion to dismiss. Affirming in part, reversing in part and remanding, the appellate court stated that the plaintiff had stated a valid cause of action on the third party beneficiary theory. Both under the contract and by application of the Restatement, the circumstances indicated that the promisee city intended to give the beneficiary the benefit of the promised performance. The plaintiff had not however sufficiently stated a cause of action under the civil rights statute. (*Technicable Video Systems Inc v. Americable of Greater Miami Ltd*, 479 So 2d 810, Fla App 1985)

354 *Gilliam v. City of Omaha*, 388 F.Supp. 842 (D.Neb. 1975); affidavid524 F2d 1013 (8th Cir 1975). In this case a black woman brought a claim against the City of Omaha for discriminatory employment practices. She failed to prove she was among the persons intended to be benefited under the Economic Opportunity Act of 1964 or that she was a third party beneficiary of a contract between the city an a community action organisation.

355 In *Nguyen v. United States Catholic Conference*, 548 F Supp 1333, 1348, affirmed 719 F 2d 52 (3rd Cir 1983), the plaintiffs were Indochinese refugees bringing a class action against a private social service agency, alleging a breach of the agency's contract with the federal government (the Department of State), for the provision of grants. They claimed to be third party beneficiaries of the contract. The district court rejected the claim and the plaintiff's appealed. The appellate court affirmed the decision on the ground that the defendant could not be held liable for language absent from the agreements. The Supreme Court granted a certiorari and stated that individual members of the public who were benefited by a public contract should be treated as incidental beneficiaries unless a different intention was manifested at the time the contract was made. In this case there was no

In another case[356] the claim of a resident in a nursing home owned and operated by the defendant, was for the enforcement of certain regulations of the Medicaid programme[357]. The latter conditioned federal and state subsidies on the provision of a number of services by private health care providers such as the defendant. The plaintiff sued both on a private right of action and as a beneficiary of the defendant's promise to abide by Ohio's federally approved state plan. A private right of action was rejected[358], and the court accepted the status of the plaintiff as a beneficiary of the defendant's contract with the state which incorporated the relevant federal regulations. The public benefits were secured on the beneficiary rule. The private right was not accepted due to, among other reasons, the availability of a beneficiary claim; a contractual claim was treated as the basic alternative for protection. The decision, important in advancing the less wealthy as regards medical treatment[359], did not concentrate on the congressional intent to benefit individuals but focused on the contract's content. Thus, depending on the

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contractual provision evidencing an intent that the defendants should be liable to the plaintiffs if they failed to perform their duties. The plaintiffs were only incidental beneficiaries of the grant agreements.

356 *Fuzie v. Manor Care Inc.*, 461 F.Supp. 689 (ND Ohio 1977).

357 Manor Care, by contract with the Ohio Department of Public Welfare, agreed to abide by Ohio's federally approved "state plan". The plan had been designed by Ohio as a condition for receiving federal funds and was intended to ensure that Ohio would observe federal Medicaid regulations.

358 It was thought that the Medicaid programme provided for administrative rather than judicial resolution of disputes, that the legislative history of the programme indicated that there was no intent to create a private right of action, and that the plaintiff had substantial remedies under state law as a beneficiary of his agreement with the state for the provision of services.

359 *Cook v. Ochner Foundation Hospital*, 319 F.Supp. 603 (E.D.La.1970), dealt with class action by persons unable to pay for hospital services, seeking to compel a hospital to abide with the terms under which it received federal funds on the basis of the "Hill-Burton" Act (42 U.S.C.A. §291), for the provision of such services. The court accepted that the plaintiffs were third party beneficiaries of the hospital's undertaking. The decision focused on the purposes of the act "to benefit persons unable to pay for medical services" who might not be "the sole beneficiaries of the act but they certainly are the object of much of the Act's concern". Jackson & Bollinger 597.

The act provided in the relevant section: The purpose of this subchapter is (a). to assist several States in the carrying out or their programmes for the construction and modernisation of such public or other non profit community hospitals and other medical facilities...(b), to stimulate the development of new or improved type of ...facilities..(c), to promote research experiments and demonstrations relating to the effective development and utilisation of hospital, clinic or similar services.

facts of the case[360], the beneficiary rule could prevail over legislative intent to create a private right of action. As with the German law mechanisms, the expansion of contractual protection is motivated by the need to protect those weaker in transactions. However, the case law is not settled yet.

3. Tort v. contract: Third parties and pure economic loss.

Despite the beneficiary rule, protection for third party loss is basically a tort problem[361]. Concerning third party loss, the question is often of a choice[362] between legal bases for protection entailing a consideration of the relative position of tort and contract.

As said, in common law jurisdictions third party loss is a pure economic loss problem. In American law, more evidently than elsewhere in the common law world, pure economic loss is linked to the position of third parties[363].

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360 As for instance the priority in applying state law.

361 An attempt will be made in this unit to provide information for the situation in England and other Commonwealth jurisdictions, mainly in the footnotes. I hope this is will make things clearer especially for the reader who is more familiar with the English law. It is my contention that the arguments discussed here can be useful in the latter context. Arguably however, the American literature on the preferability of contract is more limited.

362 Veljanovki and Harris for instance identify the contractual solution as "first best", (Harris & Veljanovski "Liability for Economic Loss in Tort" in Furmston 59).

363 References to either include inevitably *Glanzer v. Shepard* 233 N.Y.236, 135 N.E. 275 (1922), *Ultramares Corp. v. Touche*, 225 NY 170, 174 NE 441 (1931), *Biankanja v. Irving*, 49 Cal 2d 647, 320 P.2d 16 (1958), and the more recent *J'Aire Corp. v. Gregory*, 24 Cal 3d 799 598 P. 2d 60, 157 Cal Rptr 407, 1979. It should be recalled that the pioneering cases awarding liability for pure economic loss are the ones which are considered classical in the abolition of the privity requirement.

As with contract, American law is distinct from other common law systems on pure economic loss[364]. The overall picture, to the extent definite conclusions can be drawn[365], is mixed, but decisions are by far more likely to award damages than, for instance, in English law. Liability, not excluded in principle[366], is often acknowledged, predominantly in

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364 The most valid assumption on pure economic loss is that it is not a uniform problem, but a multifarious one. See among others Schwartz "Economic Loss in American Tort Law: The Examples of *J'Aire* and of Products Liability" 23 (1986) *San Diego LR,,* . 37-79. Pure economic loss can for instance involve relatively simple third party situations (attorney's liability), product liability questions, and entrepreneurial loss from damage of an environmental character (there are many cases involving loss caused to a great number of people due to oil spills. It is hard to infer steady decisional criteria (Craig 92 LQR 1976 213-241) and that makes the grouping of the cases more difficult. By referring to pure economic loss therefore one puts together cases with essentially different characters. Third party situations are cases involving a transaction, a (bilateral or multilateral) relationship of a voluntary character which exists before the occurrence of damage. Compensation for economic loss is primarily awarded in such cases, and it is wrong to group them indiscriminately with the rest.

365 It is clear for instance that lack of foreseeability, not a problem in most instances, is not a safe criterion of the rejection of a claim. See Craig 92 LQR 1976 231-235.

In a number of cases of clearly foreseeable damage liability was not accepted. Rabin mentions some characteristic examples of pure economic loss where compensation was not awarded. These examples concern situations of physical harm or personal injury to a third person which results to the financial loss of the plaintiff. Thus in one case the claim of an employee for lost wages against the defendant who transported negligently a load of bombs, caused a massive explosion which lead to the temporary closure of the plant where the employee was working, was rejected despite the foreseeability of the harm. (*Adams v Southern Pacific Transportation* 50 Cal App 3d 37 123 Cal Rptr 216, 1975).

As Rabin points out that "It is pure muddle to attempt an explanation ... in 'foreseeability' terms. General tort principles should be used to interpret judicial trends.(Rabin 37 (1985) *StanfLR* 1523).

Similar comments could be made for the recent trend in the U.K. case law towards rejecting economic loss claims, reversing previous case law. Following the decision in *Junior Books Ltd. v. Veitchi Co.*, [1983] 1 A.C. 520, which allowed a building owner's claim against a sub-contractor for defective flooring, the House of Lords has step by step limited the significance of this decision and reversed the trend towards rejecting economic loss claims. Three important examples whereby liability for negligence was rejected, are *D & F Estates Ltd and Others v. Church Commissioners for England*, [1989] 1 AC 177, involving the liability of subcontractors to the owner and to the occupiers of a flat for not supervising adequately plaster work carried out by other subcontractors whom the defendants had employed, *Caparo Industries plc v. Dickman and Others* [1990] 1 AllER 568, examining the liability of a company auditor to the shareholders of the company, and *Murphy v. Brentwood DC [1991] 1 AC 398*, involving the liability of a local authority to an occupier of a house for authorising the plan for construction in reliance on the negligent advice of an independent inspector. The occupier had to sell the defective house at a diminished value. See the analysis in "The Random Element of their Lordships' Infallible Judgment; An Economic and Comparative Analysis of the Tort of Negligence from Anns to Murphy", by Markesinis, B. and Deakin, S. 55 *MLR* 1992, 619-646.

366 In the modern case law on economic loss it is clear that in most cases at least it is not the character of the loss as economic that will obstruct the courts from awarding liability. In *J'Aire Corp. v. Gregory*, 24 Cal 3d 799 598 P. 2d 60, 157 Cal Rptr 407, 1979, for instance the

negligent misrepresentation cases[367]. The landmark decision of *Ultramares Corp. v. Touche*[368] that established as a basic reason for rejecting a claim the risk of opening the

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argument that the claim was for pure economic loss since the claim was for loss of profit in tort was ignored.

367 It has been rightly observed that liability is usually awarded in cases involving negligent misstatements, or (better) negligent misrepresentations, in contrast to cases involving negligent acts. Veljanovski and Harris refer to the provision of information as one of the unusual situations where pure economic loss arises (Harris & Veljanovski in Furmston 47). See also Stanton "The recovery of pure economic loss in tort: the current issues of debate" in Furmston 9-24.

The reference here draws heavily on the English experience as well. (Craig 92 LQR 1976 213-241). It could be argued that the reason for the different treatment of negligent misrepresentation, is that the provision of information is related to a contractual or contract-like relationship inducing a particular behaviour, contrary to a negligent act which usually involved interference with a contract (Usually there is no pre-existing relationship, and the purpose of the behaviour is less easy to identify. On the issue of the negligent interference with a contracts see J.C.S. "Negligent interference with a contract: Knowledge as a standard for recovery" 63 (1977) *VaLR.* 813-839.).

Accordingly, acceptance of intent and foreseeability of damage to a limited class of people is relatively easy to establish, (especially in the context of a professional relationship): It seems easier to attribute misstatements to intent instead of negligence, as it is reasonable to presume intent in a contractual or other voluntary relationship. The foreseeability of damage is more readily accessible as misstatement involve relationships with a more easily traceable purpose. Similar is the situation with the related question of proximity, which is often posed as a separate requirement. Finally it is due to the scope of the relationship in question that the number of affected people is usually limited, and predictable.

Similar is the view in the second Restatement of the Law of Torts. It refers to damages from mistaken information in language resembling that of the third party beneficiary rule. §552 (b) (i) of the first Restatement(1938) accepted liability if the plaintiff was the person or one of the class of persons for whose guidance liability was provided. §552 of the second Restatement reads. "(1) One who in the course of his business, profession or in any other transaction in which he has pecuniary interest, supplies false information for the guidance of others in their business transactions, is subject to liability for pecuniary loss caused to them by their justifiable reliance upon the information, if he fails to exercise reasonable care or competence in obtaining or communicating the information.

(2) Except as stated in subsection (3) the liability stated in subsection (1) is limited to loss suffered (a) by the person or one of a limited group of persons for whose benefit and guidance he intends to supply the information or knows that the recipient intends to supply it; and (b) through reliance upon it in a transaction that the intends the information to influence or knows that the recipient so intends or in a substantially similar transaction.

(3) The liability of one who is under a public duty to give the information extends to loss suffered by any of the class of person for whose benefit the duty is created in any of the transactions in which it is intended to protect them".

Liability for negligent interference with a contract is rejected in the second Restatement. §766B reads "One who intentionally interferes with another's prospective contractual relation (except a contract to marry) is subject to the other for the pecuniary harm resulting from the loss of the benefits of the relation whether the interference consists of (a) including or otherwise causing a third person not to enter into or continue the prospective relation or (b) preventing the other from acquiring or continuing the prospective relation".

368 225 NY 170, 174 NE 441 (1931),

way for indeterminate liability[369], has been repeatedly doubted by subsequent decisions[370]. In the more recent, *J'Aire Corp. v. Gregory*[371], damages were awarded against

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369 The basic reason for denying liability for pure economic loss (all other requirements being fulfilled) is the fear of introducing a far too expanded liability. The apophthegm of Justice Cardozo in*Ultramares Corp. v. Touche*, 225 NY 170, 174 NE 441 (1931), rejecting the claim as otherwise liability "in an indeterminate amount for an indeterminate time to an indeterminate class" would be introduced is definitely the most popular of the descriptions of expanded liability. It is unclear which liability would be considered indeterminate, with the exception of catastrophic losses. The fear of a potentially expanding liability, is justified in some views in the light of the expansion of tort in American law. This point is repeated by in support of the "brightline rule" which required that a claimant of economic loss should have suffered personal injury or property damage for his claim to be accepted, has been expressed in different forms. The courts usually laid emphasis on the possibility of a large number of claims; the well known "floodgates argument". (Most of the sources made this reference. See Atiyah 5 (1985) *OxfJLSt* 485-490, Stanton in Furmston, 16.)

Claims were allowed when the plaintiff was a member of a limited, identifiable class of people; when the claim was sufficiently predictable. As Markesinis notices, most of the effort of American courts has been directed to assessing whether the claimant is a member of an identifiable class of people; Markesinis (103 LQR (1987) 372-377. The thrust of the question however was not the number of potential claims but the possibility of a large extention in the defendant's financial liability. Feldthussen "Negligent misrepresentation: Indeterminate language about indeterminate loss", 13 , 1984, *Anglo-American Law Review*, 55. This is a less valid reason for third party situations since the possibility of increased financial exposure is low.

370 See Feldthussen 13 (1984) *Anglo-american Law Review*, 62-65.

In *Texas Tunnelling Co. v. City of Chattanooga*, (294 F Supp 821 District Court 1962), The plaintiff was a building company which had entered a construction contract with the City of Chattanooga for the construction of a sewer. The plaintiffs claimed that the defendants had given a negligent evaluation of the geological barriers involved in the project and the plaintiffs had thus offered a low price and had suffered loss. The court criticised the *Ultramares* decision (*Ultramares Corp. v. Touche*, 225 NY 170, 174 NE 441, 1931) stating that in the thirty years which had passed since that decision society had become more business oriented and reliance on specialists' statements was essential in transactions. It has been noticed however that the criticism was not necessary as only the tenderer to the contract could suffer loss and that was clearly predictable (Feldthussen 13 (1984)*Anglo-american Law Review*, 63).

In *M. Miller Co v. Central Contra Costa Sanitary District*, 18, Cal Rptr 13, Distr. C.A. (1962), the defendant, an engineering company hired a specialist to prepare a soil report which, as the defendant knew, was going to be available to all bidders for works on the sewer system. The plaintiff was a successful bidder who used the inaccurate report.

In *Granberg v. Turnham*, 333 P.2d 423 (Cal. C. A.), 1962, the defendant negligently supplied information to a real estate board, which, as the defendant intended, circulated the information in its multiple listing to prospective buyers. The defendant was held liable for misrepresentation to the ultimate buyer. Although the class of potentially affected people seem large, it is actually one, the ultimate buyer who could suffer loss. The crucial issue therefore was the knowledge of the intended use of the statement and not the foreseability of the large class of prospective buyers.

In *Rusch Factor, Inc. v. Levin* (284 F Supp 85, D. Rhode Island, 1968), the defendant prepared a statement on the financial position of a corporation which had applied for a loan to the plaintiff (a bank). The corporation soon became bankrupt although in the statement he was shown to be solvent by a substantial amount. The plaintiff sued for the part of the loan it had not been able to recover. The court noted that no accountant has been found liable to a party not in privity, but thought that an accountant should be liable in

a building contractor for losses caused to an owner's tenant (plaintiff) due to the delay of improvement works in the plaintiff's business.

It has been readily acknowledged that in American law there is usually liability in cases of a so-called "triangular configuration"[372], also described as "tripartite exchange relationships"[373], involving that is a voluntary transaction existing before the damage where the class of people likely to suffer injury is limited and predictable[374]. Third party loss is thus compensated in delict in a considerable number of cases.

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negligence "for careless financial misstatements relied on by actually foreseen and limited classes of persons". However the court did not elaborate further on the extent of this liability. It is true that this case does not involve the expansion of liability as the *Ultramares Corp. v. Touche,* 225 NY 170, 174 NE 441 (1931). It was noted that the facts were nearer *Glanzer.* (Craig 92 LQR 1976, p.231, Feldthussen 13 (1984)*Anglo-american Law Review,* 71).

Rozny v. Marnul (43 III 2d 54, 250 N.E. 2d 656, 1969), dealt with the liability of a surveyor for a mistaken survey of a vacant lot. The defendant was, surprisingly held liable to a sub-subcontractor. Recognising the opposing previous trend, the court thought that there was only a limited class of potential benefits and no overwhelming potential liability as "injury would occur only once. (Craig 92 LQR 1976 232)

371 24 Cal 3d 799 598 P. 2d 60, 157 Cal Rptr 407, 1979

372 Craig, referring to *Glanzer v. Shepard* 233 N.Y.236, 135 N.E. 275 (1922), and *International Products Co. v. Erie R. Co,* (1927), 155 N.E. 662, where the principle of the former was endorsed; a warehouse proprietor had negligently missinterpreted the place of storage so that the plaintiff could not recover on his insurance when the warehouse burned down (Craig 92 LQR 197 239).

373 Harris & Veljanovski in Furmston, 59.

374 The injured party is often a third party beneficiary, These instances include attorney liability, insurance, franchising or construction.

In contrast, the claims are rejected in cases involving "personal injury or property damage to a third party which has the collateral consequence of causing economic loss to the plaintiff as with damage to the factory causing the loss of worker's wages. In Veljanovski's words "Reasonably foreseeable financial loss is suffered by the plaintiff as the result of the defendant causing physical harm (or the risk of it) to a third person or his property.", (Harris & Veljanovski in Furmston, 65). The rejection is an expression of the brightline rule to dismiss recovery for economic loss when the plaintiff has not suffered material damage to his property. The rule was stated by Higginbotham J. in the Testbank case (*State of Louisiana v. M/V Testbank,* 752 F.2d 1019, 5th Cir., 1985). He considered the rule to an extent arbitrary, but it could reduce litigation and encourage settlement out of courts. Atiyah expressed similar views appraising the administrative simplicity and the plausible, stable answers provided by the beneficiary rule. Atiyah 5 (1985) *OxfJLSt* 485-490.

In a number of these cases, the damage was the result of a development in a voluntary undertaking but not a typical one. The classical example is *Robins Dry Dock v. Flint,* 275 US 303 (1927). The time charterers of a ship sued for lost profits when the defendant dry dock company negligently damaged the ship's propeller and extended dry docking time by two weeks. The time charterers were under no obligation to pay rent for the time the ship was dry docked. The claim was rejected by the Supreme Court which considered that a tortfeasor who had caused property damage or personal injury to someone was not liable to another "merely because the injured person was under a contract with that other, unknown to the doer of the wrong" (Holmes J.). See Markesinis 103 LQR (1987) 381

American courts remained attached to tort in third party loss cases as it is relatively easy to establish liability[375], and, as is usually the case, the compensation is

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who notices a trend in American case law to return to the Robins Dry Dock ruling, and Atiyah 5 (1985) *OxfJLSt* , 486.

Different are also a number of important pure economic loss decision which are grouped together with *Robins Dry Dock* because they concern damage to the relationship of the plaintiff to physical property falling short of legal ownership or a possessory title, and because they steadily raise the "floodgates argument". These cases unlike those this work is focusing on, do not involve a voluntary relationship, a development in which caused the damage. Such is the case of *Amoco Transport Co. v. S/S Mason Lykes and Others* (768 F2d. 659, 1985) involving a claim of the cargo owners against the owners of a ship which collided with the one transporting their cargo, that was subsequently unloaded and transported by another vessel, the calim being for additional freight. (The claim was accepted on the basis of the existence of a "community of venture"). In *Domar Ocean Transportations Ltd. V. M/V Andrew Martin* (754 F. 2d. 616, 1985), the plaintiff owner of a barge and charterer of a tug disputed the magistrate courts method of calculation of the damage caused to the barge due to negligent navigation of the tug. The courts considering it was not restricted by the "bright line rule", accepted the argument that barge and tug should be regarded as a unit and that compensation for not using the tug should be given as well. In *Venore Transportation Company v. M/V Struma* (583 F2d 708 4th Cir, 1978) the plaintiff, charterer of a ship was allowed compensation by the defendants owners of a vessel which collided with the chartered one, for the loss suffered while the latter was out of service. Under the charter the plaintiff was paying rent for that period. (The references are taken from Markesinis 103 LQR (1987) 381-384.)

The situation in *State of Louisiana v. M/V Testbank*, 752 F.2d 1019, 5th Cir.,1985), which was mentioned before, is also different than the one in*Robins Dry Dock v. Flint*, 275 US 303, 1927. In the former following a collision between two ships in the Mississippi River Golf outlet, and the fear of widespread contamination by a container loaded with highly toxic waste, the River Golf outlet was closed to navigation, residents within a ten miles radius were evacuated, fishing shrimping and associated activities were suspended, while seafood and shellfish caught in the area were embargoed. The measures lasted for four weeks. Forty-one legal actions were submitted, by a variety of injured parties, including fishermen, seafood enterprises, marinas operators, boat owners, cargo terminal operators, seafood restaurants, bait and tackle shops, vessel owners seeking expenses, lost profit and demurrage. The Federal District Judge, and the Court of Appeals for the Fifth Circuit, rejected the claims. The appeal decision was affirmed by the full Fifth Circuit sitting *en banc*.

375 This attachment characterises not only courts but jurists in general. In a major recent case (*J'Aire Corp. v. Gregory*, 24 Cal 3d 799 598 P. 2d 60, 157 Cal Rptr 407, 1979) where the appellate court accepted the liability of a building contractor for losses caused to the tenant of the owner (contracting party), due to the delay of improvement works in the plaintiff's business, the claimant's advocate abandoned in the appeal the contractual basis of his claim (third party beneficiary rule) because contract was never his strong point in the law school. Schwartz 23 (1986)*San Diego LR*, 43.

J'Aire comes as the culmination of a process involving a number of other important decisions which expanded the concept of the duty of care, including new situations, as involving emotional distress, or abolishing the limited categories to entrants on land. One example is *Tarasoff v. Regents of the University of California* 17 Cal 3d 425, 551 P.2d 334, 131 Cal Rptr 14 (1976), where a therapist who failed to warn a victim of death threats communicated by his client was found liable; the duty of care was thus extended. See Rabin 37 (1985) *StanfLR* 1518-1519. The case of Tarasoff has attracted considerable academic interest. Seventeen years after the case, a relatively recent publication is "Warning Third

not likely to be excessive. The question discussed here is whether contractual solutions are more suitable for these three-party situations.

3.1. Improving tort?

As mentioned, in several relevant decisions damages for many third party loss cases are awarded[376] under tort law. Moreover, tort law has the potential for further development and courts seem willing to protect third parties. The question is why, then, would the suggestion made for Greek law, namely to improve the law of delict, not apply in the case of American law. The reasons are based on the character of the common law of torts and American law in particular.

Pure economic loss law has been chronically problematic under tort, even if not as much as in other common law countries. Due to the nature of American precedent, differentiating on the facts of each individual case, and as experience has shown, any tort-based development is likely to be unsteady and unpredictable and thus unlikely to involve consistent treatment of the 'third party loss' group of cases. Obviously the approach to civil liability is not unified, in sharp contrast to Greek law, or any other Continental system[377].

The need to distinguish the treatment of cases where the loss is the result of a contractual violation has been acknowledged in theory[378] but case law remains bogged down to cases involving excessive damage, usually consequent upon physical harm, which, not being third party loss cases, blur the picture and possibly obstruct compensation for third party loss. Courts and attorneys lay emphasis on tort, stifling the possibility for alternatives, and making the law more difficult to change

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Parties: The Ripple Effects of Tarasoff', by Roselham, D.I. Teitelbaum, T.W., Teitelbaum, K.W., Davidson, M., 24, (1993) *Pacific Law Journal*, 1165-1224.

376 American law as a whole provides considerable protection to third parties.

377 See as an example, the reference to the concurrent application of contract and delict in the Greek system.

378 As said "the key to overcoming any surviving doubts lies in insisting that any tort right must be regarded as subsidiary to any contractual relationship.". Stanton in Furmston, 21-22.

Unlike Greek law there is little chance for American law incorporating considerations from the contractual setting of the cases in question[379]. It is also unlikely to limit liability in tort on the basis of the underlying contract. Thus from the point of view of fairness and legal policy the tort option and liability in general seem less appealing. To the contrary, from the point of view of the potential plaintiffs a claim in tort seems to offer higher returns than a claim in contract. The question for the plaintiff is of course whether a claim in tort will be accepted at all. It might be indeed doubtful. One factor that adds to the uncertainty is the attitude of the courts if they feel unable to balance the relative concerns and reach a fair solution in tort. They might be more reluctant to acknowledge a duty of care in this case.

Moreover, equity principles such as good faith, have not acquired in American law the status they hold in Continental systems, and they could not possibly function so as to create tort duties or exercise a leverage on tort liability or enable the introduction of contract-based considerations[380].

Thus, establishing the tort of negligence, especially as regards the acceptance of a duty of care could be significantly more arduous than assessing unlawfulness in the Greek system of delict, as this can be based on a general clause. More importantly, there is lack of convincing means to focus on the contractual context and limit liability accordingly.

Tort in American law seems less promising for third party loss than the Greek law of delict. Despite a tradition of American judicial daringness, American law faces a serious challenge confronting (third party) pure economic loss, basically because it cannot rely on the underlying contract or because it has not been and, possibly, cannot be made clear in terms of judicial attitude that pure economic loss is not a uniform group of cases. As will be discussed, the potential in American law for third party loss cases lies with contract.

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379 See the relative allegations in Markesinis, 25 (1991) *The International Lawyer*, 957 et seq., Stanton in Furmston, 16 et. seq., Feldthussen 13 (1984)*Anglo-american Law Review*, 63.

380 See Farnsworth, E. A. "Good Faith in Contract Performance" in Beatson and Friedman *Good Faith and Fault in Contract Law*, 153-170 for a comprehensive account.

3.2. Splitting pure economic loss.

A first step would be to note that third party pure economic loss cases form a distinct group and pose specific problems to which the legal order should respond. Emphasis should be laid on the voluntary relationship[381] in the broader context of which the loss occurs, meaning that loss is the result of an anti-contractual behaviour, and is suffered by the third party due to his links to either one of the contracting parties or to their relationship or to both. As a matter of experience from transactions, and according to the participants' understanding, the voluntary relationship has effect beyond the parties[382]. Third party loss is an event logically and/or legally attributable to the voluntary relationship. To stretch the argument further, the defendant's behaviour should be appreciated in this contractual context as is the case with the beneficiary rule, another example of expanded contractual effects.

Contract law, it can be argued, should be given priority in the American civil liability system, irrespective of its advantages[383] by comparison to tort. Contract law is 'specialised' on the broad range of voluntary relationships. Tort law, defined by distinction to contract law, is, despite the almost generic tort of negligence, still a law of individual torts, as can be seen by the need to establish a duty of care which is equivalent to the identification of the legally protected interests in the German law of delict[384]. American contract law, based on a broader concept of contract than traditional common law, and

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381 There is no intention to examine contract theories such as those laying emphasis on the voluntary undertaking ("promise" theories), on on the relation ("relation theories). This will be done at a later stage. See Fried *Contract as Promise: A Theory of Contractual Obligations,* 1981, Eisenberg, M.A. "The Bargain Promise and its Limits", 95 (1982) *HarLR* p.741, and on relational theories principally MacNeil, Ian R. *The New Social Contract. An Inquiry into Modern Contractual Relations,* 1980.

382 The third party claims and the courts' evaluation of the injuring behaviour or the decisions to award compensation revolve around the exchange relationship, and are adjusted to the risks and benefits it entails. This is more evident with regard to the professional or confidential character of the services in question as well as for the interrelations in a "network" of contracts (construction for instance).

383 See later on the discussion of the advantages. Certaintly each mechanism will be preferable for different participants; however the contractual solution balances advantages and is preferable from the point of view of the legal order.

384 See under "The case for delict" in Chapter 2.

employing the beneficiary rule, has a considerable potential for expansion[385], and, accordingly, it is doctrinally and functionally predetermined to apply by priority to all cases with an element of a voluntary arrangement (whether contracts or not) whereby the arrangement is important for the definition of liability.

On the basis of the special character of third party loss cases and of the priority of contract law in the civil liability system it is reasonable to suggest that the cases of pure economic loss should be divided[386], and those involving (or seeming to involve) third party loss should be treated under contract law. This is, in effect, what the German courts did. The problem, as mentioned was the absence of protection for pure economic loss. The latter can be the product of wrongful behaviour other than the violation of a contract[387], for which the contractual mechanisms do not suffice.

The division is logical and doctrinally sound as can be seen by the special character of the cases in question and by the similar needs covered by the beneficiary rule. This

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385 The potential for expansion of the law of torts is running short in the light of the problems it faces with pure economic loss cases, although both contract and tort have expanded in the last two centuries.

386 This would imply the extension of contractual treatment to relationships which are not strictly speaking contractual, according, that is, to the prevailing bargain theory of contract.

The treatment of a part of economic loss cases can be related to the interesting discussion of the transitivity of certain contractual relationships discussed in "Privity, Transitivity and Rationality", by Beyleveld and Brownsword, 54 *MLR* 1991, pp. 48-71. The question is whether in situations of logically and functionally interrelated contractual relationships as those in construction projects, where a contractual nexus exists at the time the loss occurs -- excluding however product liability cases --, direct claims by third parties should be accepted, on the idea that these contracts are transferring their effects and implications to the third parties. (Constant references are made to *Junior Books Ltd. v. Veitchi Co.*,1982 SC (HL) 244, 1982 SLT 492, [1983] 1 A.C. 520), The point of view taken here is broader as it does not concentrate on such multi-contract situations alone, nor it has to tackle the doctrinal obstacles of privity and consideration. (In American law which forms the backbone of this review neither poses a problem.)

In support of the suggestion to divide the treatment of pure economic loss between contract and tort law a reference to Castronovo is justified ("Liability between Contract and Tort", Castronovo, Carlo, in *"Perspectives of Critical Contract Law"*, Wilhelmson T. (ed), 1992, p.281). Castronovo after observing the treatment of pure economic loss in different systems , considers that both tort and contract could offer "natural" solutions, and thinks that pure economic loss could be treated on the basis of an extended tort or that a kind of contractual relationship could be taken to exist independently of a contract.

387 As with American cases of widespread damage such as *Robins Dry Dock v. Flint*, 275 US 303 (1927), there is usually an element of physical damage there. Limiting the range of those protected will, most likely, in German system be a problem of causation (causality and foreseeability).

division of pure economic loss resembles the fundamental distinction in civil liability between liability based on a pre-existing relationship and liability founded irrespectively of such a relationship[388].

Treating pure economic loss in a uniform manner under tort is based on the uncertain similarity of the loss, that has little doctrinal justification which is, after all, eroded with the emergence of categories of cases where the loss is compensated. The fact is that the expanding contractual effects and the character of third party loss are ignored at the time the third party beneficiary rule offers third party protection, which can be further extended. Considering that contract law in the American system should have priority in all the cases with a voluntary element and that the judiciary have already, unintentionally, distinguished "tripartite relationships", it seems legally sound to examine these cases under a contractual perspective. In practical terms the strongest incentive against tort is the potential unfairness against the defendant as regards containing his liability[389].

From a legal policy point of view the division of pure economic loss cases is justified in the light of the difficulties in dealing with such cases in tort, and of the absence of a unified view of civil liability, that call, when the question is for improved third party protection, for a redrawing of the dividing line between tort and contract, reallocating the tasks of each of these liability vehicles. An overhaul of civil liability is required which is in effect what the German courts did, since third party loss seems at first sight to fall in the domain of delict. It could be further argued that in an economy with an expanded services' sector and extended corporate organisation, tort is rather a blunt instrument to serve the need of complicated cases of third party loss. As suggested, the third party loss could involve a vast number of relationships[390], including professional or business engagements.

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388 Or even the one between obligations based on a private arrangement and those based on law.

389 It would for instance be against good faith were the plaintiff to bring a claim in tort if it can be conclusively shown that he understood the defendants obligation to him as contractual.

390 "Exchange relationships' as described by Harris & Veljanovski in Furmston, 59, who also use the term "voluntary undertaking".

It would be difficult to express such a range of relationships with a sufficient legal term. Economists refer to these relationships as part of the continuum of exchange relationships. They could, for instance, be formally negotiated contracts, or the producer-

In fact, any business activity including those related to entrepreneurial administration[391] could be covered.

As said, examining third party loss cases under a contractual perspective is a first step. Damages might again not be awarded. The liability in tort should not be excluded but seems less likely, unless some distinct ground for the defendant's blameworthiness can be established. The overhaul of civil liability discussed here entails targeting a more flexible and unified view of liability, implying that tort and contract could complement each other more effectively than is currently the case.

3.3. The benefits of contractual solutions: An improved perspective.

A contractual point of view enables a more accurate perspective[392] of the, often complicated[393], third party loss cases, a perspective unlikely to have under tort. This perspective is important for the evaluation of the defendant's wrongfulness, the financial

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consumer relationship. The provision of information is an example. It might not involve a formal contractual relationship as when information is supplied from the pages of a journal. (Harris & Veljanovski in Furmston, 47).

The purpose here is to single out the crucial elements of these groups of cases and attribute legal consequences to them. The term "exchange relationships" makes more sense in economic parlance. It can be accepted in the legal discourse however as it does not place any special (additional) evaluative requirements. (Criteria related to the quality of the relationships in question would be coloured by a particular economic theory on liability.) The relational contract law theories define contract in the same broad terms.

This is not the case with another economists' categorisation, namely that described as "direct harm", involving the direct affect on the injured party (by affecting his decisions, or by obstructing hereditary succession for instance), and "indirect harm", whereby the harm is caused by affecting others than the injured(the clientele, the competitors; if, for instance consumer preferences are affected or a rival business is benefited). This idea, influenced from economists' perceptions that harm caused as a result of market forces is natural and desirable, cannot easily find its way into the legal treatment of wrongful behaviour. When the third party is immediately affected it will obviously be easier to hold the injurer liable. The examination of foreseeability is enough to distinguish the cases where liability should be accepted, irrespective of economic arguments. An artificial distinction between "direct" and "indirect" harm will place more constraints on an area where both contract and tort seem to apply. (Harris & Veljanovski in Furmston, 47).

391 Communications, conduct, guidelines etc.

392 This of course is an overall improvement, somewhat abstract and difficult to measure. For the identification of some of the following areas of comparison I am particularly indebted to Markesinis, 25 (1991) *The International Lawyer*, 957 et seq., and Fridman "The Interaction of Tort and Contract", 93 LQR 1977 422, at 431.

393 As indicated before, third party and pure economic loss cases, often demand a detailed, complicated calculation of the position of the parties, and of the damage in question which the tort lacks the flexibility to achieve.

value involved, the risks taken, and the relative economic and commercial circumstances. This better perspective, an advantage in itself, has potentially beneficial effects on the quality of the courts' rationale[394]. That, together with the fact that the contract is an effective tool in allocating risks, makes it preferable for third party pure economic loss.

The contract is the proper venue for the evaluation of the damages in third party pure economic loss since, to a considerable extent at least, they are expressed as expectation damages, that is, damages related to the third party anticipation[395]. The restoration of the *status quo ante*[396], formally the task of tort, would not present the loss in its proper dimension, even if the latter stems from interfering with an existing interest as with the protective duties in German law. In third party loss, contractual behaviour appears to be the cause of harm and the defendant is liable for not making things better[397].

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394 As will be argued in the Conclusion, Chapter 7, taking contract into account is necessary for the effective treatment of third party loss whether in delict of contract. Improving the law implies a stronger contractual input.

395 The scope of calculating the damages resembles that of compensation in the light of a predictable future. Thus courts often focus on the reliance (actual or hypothetical) of the injured party, on the transaction and its outcome. This predicament should not however be related to the "contemplated benefit", characteristic of the so-called "productive" character of contract in Weir's division between contract and tor. See Weir Tony quoted in Kötz *Tel Aviv University Studies In Law* 10 (1990).

More importantly from the point of view of containing liability, compensation can be adjusted accordingly to what the plaintiff could have reasonably expected in the context of the transaction. It is possible therefore that the latter will not be allowed to claim compensation for the whole of the value involved in the transaction. On the basis of tort it would be more difficult to reduce liability in the same manner. Courts would have to undergo greater effort to construe their reasoning accordingly on the basis of foreseeability and proximity possibly, and potentially at the expense of truth.

396 The stereotype distinction between (full) expectation losses awarded in contract and the restoration of the status quo accomplished in tort is not the focal point of the comparison. None of the two concepts is found in a pure form. In a tort claim for economic loss for instance, compensation is awarded for losses suffered when the expectations for a "stable financial future" did not materialise. The same applies for third party beneficiary cases treated in tort. It is clear that a contractual claim brings the focus on an anticipated, financial or other, situation the prospects of which have deteriorated. The contractual model can be useful even for cases where no previous commitment exists. See Stanton in Furmston, 16.17 et. seq.

397 See Weir Tony in Kötz Hein "The Doctrine of Privity of Contract In The Context of Contracts Protecting The Interests of Third Parties"*Tel Aviv University Studies In Law* 10 (1990), p.212. In his words "Contract is productive, tort law is protective. In other words, tortfeasors are typically liable for making things worse, contractors for not making them better. ...the typical contractual claim is in respect of the non-provision of the contemplated benefit" The distinction Weir is making is a useful conceptual tool but does not necessarily explain real situations.

Similarly, as evidenced in several negligence cases[398], the standard of care, on the basis of which the defendant's behaviour is assessed[399], is better defined under a contractual viewpoint. Under contract it is easier to establish liability for inactivity or omissions, contractual liability involving misfeasance and nonfeasance[400]. The latter is often the cause of third party loss; construction delays where the beneficiary rule has been applied is one example. It seems less certain to establish a duty not to act in tort, especially if it concerns contractual violation.

Contract, therefore, forms the proper context for the examination of evidence[401]. The plaintiff's procedural task is possibly facilitated once he can rely on the contract. The role of the courts is possibly becoming easier as the focus is on a relatively narrow field,

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398 In most tort based third party loss decisions, negligence was founded upon the contractual breach although this was rarely admitted. In *Heyer v. Flaig*, 70 Cal. 2d. 223, 449 P.2d 161, 74 Cal Rptr 225 (1969), Lobinger J. made the somewhat absurd statement that " if the cause of action arises from a breach of promise set forth in the contract, the action is *ex contractu*, but if it arises from a breach of duty growing out of the contract it is *ex delicto*". In that case then the cause must have been *ex contractu*. Markesinis, 25 (1991) *The International Lawyer*, 95.

See Lord Goff's speech in *Leigh and Sillivan Ltd. v. Aliakmon Shipping Co. Ltd.*,[1986] A.C. 785, referring to the German mechanism of *Drittschadensliquidation* and suggesting the acceptance of the tort of negligence on the basis of the contractual breach. He argues that liability will be the same whether based on contract or on tort. Lord Goff examined again the German mechanisms of *Drittschadensliquidation*, and of the contract with protecting effects *vis-á-vis* third parties in the recent case of *White and another v. Jones and others*, [1995] All ER, 691, where the House of Lords accepted the liability of a solicitor to the disappointed beneficiaries. The solicitor delayed negligently to implement the wishes of the testator (his client) regarding certain chances in his will, the testatoer died before the plaintiffs were named as beneficiaries. Although Lord Goff appraises the results achieved by these mechanisms he rejects the possibility of their actual transposition in English law. What is interesting is that he seems to find *Drittschadensliquidation* (the theory of transferred loss) more useful for the situation in question, than, as would seem more likely, the contract with protective effects. Lord Goff devotes a small part of his speech to American law.

399 To define the kind and extent of (contractual or other) misbehaviour, to establish culpability etc. Standards of care could refer to the definition of the quality of performance an important issue in areas such as product liability or the construction industry. Under the terms of the voluntary transaction, concepts such as danger, defects in design, the fitness of the product, can be given a precise and adjustable meaning. The definition of such standards in tort is often problematic, and can lead to uncertainty. The contractual model could be applied directly, in this field where quite often contractual exclusions of liability are provided.

400 See Markesinis, 25 (1991) *The International Lawyer*, 958, Schwartz 23 (1986) *San Diego LR*, 46. There is some uncertainty as regards delictual liability for omissions in both the Greek and the German law of delict. See under "Delictual protection" in Chapter 3.

401 Evidence in third party claims is inevitably derived from the voluntary relationship. It is legally sound and it would facilitate the role of the plaintiff and ease that of the courts (even if the claim is to be rejected) to take a contractual viewpoint

seeking readily accessible evidence of anti-contractual behaviour, than on the somewhat abstract duty of care. Judicial efforts are thus better targeted.

3.3.1. Limitation period.

As regards the limitation period[402], were tort to be applied in a third party claim the defendant would be under two different limitation regimes for the same behaviour. This is unacceptable from the point of view of fairness[403] and stability in transactions, even if advantageous[404] for the plaintiff[405]. If the defendant acts in bad faith to make the plaintiff miss the contractual limitation period, his limitation defence would not be accepted.

3.3.2. Forum of adjudication.

If under tort the forum of adjudication is that of the accident's locus, as is usually the case[406], the defendant might face a claim where he had not expected to and/or be

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402 The limitation period might differ between the two legal bases, both as to the duration and as to the starting point. In tort claims for instance "the statute of limitations is generally held not to run against a negligence action until some damage has occured" (*Prosser and Keeton on the Law of Torts* 1984 5th ed., Keeton W.P. editor, p.165). This rule did pose considerable difficulties especially with regard to medical malpractice and product liability. Courts tried to circumvent the general rule by establishing among other means the "discovery rule": liability would not run until the plaintiff discovered that he had suffered injuries. However the courts had to follow statutes taking a different point of view. Several statutes on limitation period have been enacted. A usual model is that of the so-called statutes of repose which set an outer limit for negligence and related claims to be accepted, and suplement or override the accrual rule. There is a controversy as to the limitation period in cases involving continuous tresspass, while the limitation period runs against a death action from the date of death. (*Prosser and Keeton on the Law of Torts,* 1984 5th ed., Keeton editor, 167, 83, 957). In the case of contracts the limitation period starts running from the time of the breach which gives a right to claim. See the reference in Markesinis, 25 (1991) *The International Lawyer*, 959.

403 The defendant should be liable according to a predictable set of rules.

404 Advantageous for the paintiff is also the tort based starting point of the limitation period.

405 As in the German and the Greek systems, the advantage for the plaintiff is not the sole criterion for choosing a solution to third party loss. In either jurisdiction the limitation period for claims in delict is less advantageous for the claimant that the limitation period under contract. See under "Contract and delict -- Advantages of contract", in Chapter 2, and "Is the contractual approach advantageous?", in Chapter 3.

406 Another possibility would be the forum of the tortfeasor's domicile, but this would not possibly pose problems for the defendant.

subject to different state jurisdictions for the same behaviour[407]. It would generally be ackward to have the relationship between the injured party and the defendant governed by one rule and that between the parties (one of whom is the defendant) governed by a different rule and/or the law of a different state. Contract law, even if it enables a choice of forum by the plaintiff, is preferable from the point of view of the defendant, and for reasons of fairness and certainty in the transactions[408], because it is predictable regarding the possible fora of adjudication.

3.3.3. Defences.

Contract law entails a fairer allocation of risks as regards possible contract-based defences[409]. These are unlikely to be accepted under tort law[410]. In a hypothetical

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407 The differences in the case law or the attitude of the courts in different state jurisdictions could be significant. Recall the more progressive attitude of California courts on economic loss. Also important is the fact that the defendant would have to incur increased costs and time spent if confronted with a claim in a jurisdiction away from his place of establishment and exercise of profession.

408 Markesinis, 25 (1991) *The International Lawyer*, 959, Kötz *Tel Aviv University Studies In Law* 10 (1990), pp. 211-213.

409 Accepting such defences might seem fair especially in the case of chains of related contracts such as in the construction industry, whereby each of the contracts includes terms related to contracts from up or down the scale of relationships in question.

As regards English law where the focus is on privity, it has been argued that either the remedy is denied, or privity is lifted and the defendant subcontractor can raise claims from his relationship with the contractor. Beyleveld and Brownsword, 54 *MLR* 1991, 62.

In *Junior Books Ltd. v. Veitchi Co. Ltd.* 1982 SC (HL) 244, 1982 SLT 492, [1983] 1 AC 520, Lord Roskill considered in his speech that an exclusion clause from the contract between subcontractor and contractor could in certain instances limit the duty of care owed by the subcontractor to the owner of the building. See also Allen "Hedley Byrne Revalued", 105 LQR 1989, 511.

410 The relative arguments are the weaker in the discussion of improving delict in the Greek law. The question of defences is basic in the debate on the acceptance of third party claims in cases involving interrelated contracts. As Beyleveld and Brownsword comment, under English tort law defences from contracts where the defendant is not party cannot be accepted. There are however a number of "contractual counterprinciples"; namely the principle of vicarious immunity (in the hypothetical example of a claim of the owner against the subcontractor, accepting a defence from the owner-contractor relationship), the principle of special acceptance in bailment (accepting, under conditions, defences from the contractor-subcontractor relationship, the emerging idea of a contractual setting, allowing the construction of underlying contracts as a whole (accepting, as recent cases would indicate defences from either relationships). On the latter possibility recall the cases involving claims of the site owner against the subcontractor. In *Southern Water Authority v. Carey*, [1985] 2 All ER 1077, the subcontractor was released from liability on the basis of an exemption clause in the contract between contractor and subcontractor, while in *Norwich City Council v. Harvey*, [1989] 1 All ER 180, where the defendant was released after he called upon a limitation clause in the contract between owner and contractor. (The second

example, had certain claims in tort been accepted, it would amount to circumscribing certain contractual defences[411]. The same result, however, would have easily been reached under contract law[412]. (In these actions the claimants avoided to invoke the beneficiary rule. It

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decision is doubiously calling upon the authority of the first. The fact is that they do not involve similar situations). Beyleveld and Brownsword, 54 *MLR* 1991, 54, Markesinis 106 LQR 1991. 556-560.

411 Markesinis "The Need to set acceptable boundaries between Contract and Tort", 323 refers to *Blake Construction Co. v. Allen*, 353 S.E. 2d 726 (1987), which involved a triangular setting in the construction industry, where the tort claim of the plaintiff contractor against the architect for breach of the latter's duties from his contract with the owner, was dismissed. Had the action succeeded the architect's contract with the owner, containing the usual limiting provision, would not have availed themselves against the plaintiff. Similarly, in *Bryant Electric v. City of Fredericksburg*, 762 F.2d 1192 (1985), plaintiff was a contractor with the City, who turned against the latter and an architect who had breached his contract with the city, leading to the plaintiff's financial loss. The claim was dismissed but had it been accepted the plaintiff would have evaded the strict forum selection clause contained in his contract with the City.

In the recent English case of *Caparo Industries plc v. Dickman and Others* [1990] 1 AllER 568, (examining the liability of a company auditor to the shareholders of the company), the plaintiffs were a corporation, and as shareholders in a company "they were shielded from economic risk to a significant degree due to the institution of limited liability". The decision to reject the claim is explained on this basis. The defendant on the other hand argued that it was extremely difficult to obtain professional indemnity cover. Markesinis and Deakin 55 *MLR* 1992, pp.628-629.

412 Tort based decisions would have to face serious constraints and rest on doctrinally unsteady ground, in order to achieve similar results, something which is not guaranteed. See Stanton discussing the quality standards of care (Stanton in Furmston, 20-22.).

Also recall the comment of Lord Goff in the Aliakmon (*Leigh and Sillivan Ltd. v. Aliakmon Shipping Co. Ltd.*,[1986] A.C. 785) who suggests to accept the tort of negligence on the basis of the contractual breach.

See also (under a previous footnote) the unclear statement in *Heyer v. Flaig*, 70 Cal. 2d. 223, 449 P.2d 161, 74 Cal Rptr 225 (1969), which should let us believe that liability is *ex contractu*.

The issue of defences is stressed by Beyleveld and Brownsword , 54 *MLR* 1991, 48, as it obvious from the hypotheses-examples used. See also the reference to the "contractual counterprinciples" whereby, contrary to the general principle of privity, and the trend in case law, defences from relationships where the defendant is not a party to are accepted (54-55). Certain of these defences could be accepted as parts of the voluntary relationship's content, on the basis of which the injurer's liability is established. Markesinis 106 LQR 1991. 560. He argues that certain defences from the third party-promisee relationship, can be taken to be *de facto* parts of the breached promise.

Although there is no comprehensive case law, the contract seems to have the potential to guide to fairer solutions as can be seen from the discussion of the third party beneficiary rule. The potential of the contractual provisions on the question of defences can be considered in relation to the previously referred hypothetical case where an owner sues the subcontractor, because the contractor has gone bankrupt. If the defendants had paid the contractor he can bring this argument to his defence; he is liable to the owner in the same manner he was liable to the contractor. It is suggested however that in case the owner's loss is greater than the contractor's the subcontractor should pay the difference. (Markesinis, 25 (1991) *The International Lawyer*, 963-964).

A very interesting idea is developed in Beyleveld and Brownsword , 54 *MLR* 1991, p.64. As one of the legitimising concepts for the acceptance of direct claims by third parties

would be bizarre to think of the courts rejecting a claim in tort so as to avoid dealing with a contract-based defence against the third party claimant, if it would seem fair to accept the defence and reject the claim.).

As said, there is little evidence from case law, but the discussion of the beneficiary rule offers indications that contractual defences are likely to be accepted. The basic idea behind the application of contract law being that the defendant will not be subject to a different or more extended liability "than he would have been had be been sued by his co-contractor"[413]. Supportive evidence can be drawn from the contract in favour of third parties in Continental systems and from the *jus quaesitum tertio*[414]. However, it is reasonable to expect that when the defences are profoundly unfair for the plaintiff, as when he could have had no knowledge of them, or when they are exceptional in commercial practice, they could be rejected as violations of good faith[415].

3.3.4. Extent of liability

The extent of liability[416] under contract is not only clearer but also potentially limited. The probability of widespread damage in third party loss situations is low[417] and

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in a multi-contract setting is that of the "breakdown principle", according to which a direct claim should be allowed if no alternative remedy is available. It seems that the absence of an alternative remedy is interpreted in a broad manner. Therefore if the contractual claim against the contracting party of the plaintiff is barred, even if this is due to an agreed compromise, then a direct claim should be permitted.

413 Markesinis "The Need to set acceptable boundaries between Contract and Tort" 324.

414 See under "Defences" in Chapter 5. According to §414AK the promisor has the right to raise against the third party as well the defences from the contract. Similar is the approach in §334BGB. Similarly the Austrian Civil Code provides (§882II) that "The promisor retains any defences in regard to the contract even as against the third party. while §1413 of the Italian Civil Code reads "The promisor cab raise against the third person defences based on the contract from which the third person derives his right but not those based on other relationships between the promisor and stipulator. (*The Austrian Civil Code*, Beck, ed., *The Italian Civil Code*, Beltramo, Conge, Merrymam, eds.)

415 One of the most common uses of good faith in the U.S. contract law is against arguments in a trial. See Farnsworth, E. A. "Good Faith in Contract Performance" in Beatson and Friedman 153-170,

416 As illustrated from pure economic loss cases, courts are reluctant "to venture too readily into the unknown" (Stanton in Furmston 16.), and the "floodgates argument", a risk which is often overstated, exercises considerable influence. Harris& Veljanovski in Furmston 51-55. In England for instance Lord Fraser speaking in *Junior Books Ltd V. Veitch Co., 1982 SC* (HL) 244, 1982 SLT 492, [1983] 1 AC 520, found the argument not persuasive, were the thrust of its rationale to be that liability should stop at some point. Lord Roskill said that as a matter of principle, if a plaintiff had a remedy this could not be denied to

the financial risk involved in the transaction sets a barrier to excessive compensation. Foreseeability, on which the extent of compensation in pure economic loss depends and which has troubled the courts so much[418], is easier to assess in contract. Contract-based

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him because the same remedy is available to many people. However even if there is open doubt as to the credibility of the floodgates argument it does still play an important role.

417 The argument that the defendants or their insurers cannot meet the expenses then there is no point in allowing a such claims, is not related with the extent of the damage or the possibilities of a great number of claims. See Beyleveld and Brownsword, 54 *MLR* 1991, 64.

418 The extension of liability in economic loss depended usually on the approach to foreseeability, whether it was liability for negligent acts or liability for negligent misstatements -- most examples originate from this latter area.

American courts take the middle ground between following privity -- rejecting the claims -- and foreseeability -- compensating all foreseeable damage -- (Feldthussen 13 (1984) *Anglo-american Law Review*, 63) or, in the words of another commentator, between direct nexus and foreseeability as is the case with leading English decisions. Obviously liability based on a direct nexus requirement would be too restrictive, while based on pure foreseeability grounds it could potentially become too expansive. It is a common trend to demand something more than mere foreseeability for the acceptance of economic loss claims.

In English and Scots law, the principle of reasonable foresight (the test developed by Lord Atkin in *Donoghue v. Stevenson*, 1932 SC (HL) 31, 1932 SLT 317, [1932] AC 562) was rejected in *Hedley Byrne & Co Ltd. v Heller and Partners Ltd*, [1964] AC 465, because it could lead to indeterminate liability. The decision was based on the existence of a special relationship between plaintiff and defendant, which created an assumption of liability and reliance. The special feature of the case was that it concerned economic loss. The principle of the decision was applied in many English and Commonwealth cases.

Another test is that of the "two phased" approach usually related to Lord Wilberforce's opinion in *Anns v. Merton London Borough* , [1978] A.C. 728. The decision found that a local authority, empowered to make and enforce bylaws on building construction, was under a duty of care in relation to the inspection of foundations. The lessees were allowed to recover the cost of repairing a defect. (Markesinis 103 LQR, 1987, 388 argues that this is nor precise, and that this two stage approach was formed in *Dorset Yacht Co. Ltd. v Home Office*, [1970] AC 1004). The test required a "prima facie sufficient proximity for a duty of care" if the defendant should have reasonably foreseen that his carelessness is likely to cause damage to the plaintiff, and there is no policy consideration which would lead to the rejection or reduction of the scope of the duty.

The same apply for *Junior Books Ltd. v. Veitchi Co.*, [1983] 1 A.C. 520, where due to the fact that the owners or their architects had nominated their flooring contractors as subcontractors, a close proximity has been created "falling only short of a direct contractual relationship". Reliance on the subcontractor's skills is evidence of the proximity. The nomination of the contractors as subcontractors is one aspect of the English practice in building contracts, where the contractor might not select his subcontractors. Based on this point Lorenz considered that the decision was limited to such situations. The reversal of the law showed that the House of Lords, had a similar idea about the limited effect of the case. (Lorenz "Some thoughts about contract and tort" 95). See also Fleming "Requiem for Anns", 106 LQR 1990 525-530, Huxley "Economic Loss in Negligence-The 1989 Cases", 53 *MLR* 1990, 369-376, Cane "Economic Loss in Tort: Is the Pendulum out of Control?"52 *MLR* 1989, 200-214.

It is arguable that in the context of an exchange relationship understanding foreseeability on the terms of the particular voluntary relationship, would very much resemble this middle ground demanding more than foreseeability, without having to struck a sensitive and, to a degree arbitrary, balance. Foreseeability, though not difficult to

foreseeability will plausibly enable the limitation of the defendant's exposure, if needed through good faith, to what seems reasonable under the contract[419], most likely to a specific, predictable class of people[420].

Proximity[421] between the plaintiff's property or person and the defendant's acts, whether party[422] or risk[423] proximity, is a foreseeability criterion that will again be judged more accurately in the contractual context and plausibly be limited to what is financially reasonable in the transaction's terms[424].

Moreover, punitive damages are not awarded in contractual claims[425]. Punitive damages are undesirable from an economic point of view as they could discourage entering into certain transactions, make law less predictable and add to the courts' discretion, while

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establish, is however arduous to construe so as to limit liability. The contractual model relies on the understanding of the transaction to limit liability, in the same manner as foreseeability is established; the criteria are uniform and the result is safeguarded by good faith.

419 The argument of overwhelming liability based on the fact that the transaction was deliberately underinsured (Harris & Veljanovski in Furmston, 55) can be rejected on the basis of good faith.

420 In the case of interrelated contracts as in the contraction industry it was argued that if it were accepted that the plaintiff (owner) would have a claim against his contracting party (the contractor) or had reached a compromise with the latter, the floodgates argument would not be raised. (Ultimately the subcontractor would bear the loss.) How then it could be accepted in a direct claim against the subcontractor? Beyleveld and Brownsword, 54 *MLR* 1991, 64.

As discussed in the context of the private arrangement before, the amount of compensation can be adjusted to the third party's reasonable expecations.

421 Stanton in Furmston, 11. The concept of proximity is rather vague. In case law proximity is often qualified as "close" or "high party proximity". The concept is often referred to in English case law.

422 Involving the relationship between the person acting and the person suffering the damage as with a duty of care owed to one's neighbour. Such where the views in *Hedley Byrne & Co Ltd. v Heller and Partners Ltd*, [1964] AC 465 or *Anns v. Merton London Borough*, [1978] A.C. 728. In the latter it is used as a common equivalent to foreseeability.

423 The likelihood of a particular consequence following from a high risk activity. This seems to be the view in *Junior Books Ltd. v. Veitchi Co.*, [1983] 1 A.C. 520. This form of proximity is more difficult to distinguish notionally from foreseeability.

424 The contract provides the right context to comprehend the link between the injuring behaniour and the damage and therefore the proper yardstick to calculate whether in each case this link is sufficient to justify liability. Similar should be the arguments in support of contractual solutions as regards the directness of harm, which some decisions require in order to award damages (Stanton in Furmston, 15-16).

425 Punitive damages are available in tort only. However, there have been opinions favouring the expansion of the authority to award punitive damages in cases of contractual liability as well. Punitive damages are undesirable from an economic point of view as they could discourage entering into certain transactions make law less predictable and add to the courts' discretion, while their deterrent effect is doubtful.

their deterrent effect is doubtful. It is implausible to suggest that in third party loss cases punitive damages would not have been awarded anyway[426], as in many of these cases the fact is that confidential relationships and professional duties are being breached which are more likely to be treated severely by the courts[427].

Finally, risk of rendering someone liable for an excessively long period of time (seeming possible in construction, expert opinion, or product liability cases) can be confronted better under contract than under tort[428]. An interpretation of the relationship would exclude this possibility, as there will be no understanding or expectation that the injurer would be held liable over long time. The claims could be rejected as violations of good faith.

3.3.5. Examples: Misrepresentation and product liability.

Misrepresentation decisions[429], have focused on the permissible uses of the information or the class of potential plaintiffs in order to limit liability[430]. The majority of American (and Commonwealth) decisions rely on the second criterion[431].

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426 Considering that is that the judges would be hesitant to place on the defendant a burden beyond the financial dimension of the transaction which provides the outline of the injurer's involvement. Such a possibility would amount to unfair treatment of the defendant. Taking into account the huge punitive damages awarded in some instances then the plaintiff-third party would find himself in a better position than if the contract had not been violated. In any case under a contractual view the law is more predictable and the discretion of the courts is contained. It could be argued for instance that the courts might require a higher degree of intentional interference, or grave risk arising from the activity in question in order to award punitive damages, which is again unlikely in most third party situations.

427 Moreover in American law, in the first degree of jurisdiction it is quite likely to have a civil jury. The juries tend to award considerably high damages actual and punitive.

428 Feldthussen 13 (1984)*Anglo-american Law Review*, 68-70.

429 Determining liability depended largely on the foreseeability of the loss. The courts acknowledged that "the defendant should have some determinate notion of risk". Feldthussen 13 (1984)*Anglo-american Law Review*, 59

430 This view is somewhat simplified. Within both opinions there is a range of attitudes. Decisions use obscure language bearing aspects of both these factors.

431 The majority of American decisions and Restatement second of the Law of Torts, §552(2)(a) focused on the class of plaintiff although the classical case of *Glanzer v, Shepard*and other pioneering decisions examined the use of the information. The decision in *Glanzer v, Shepard* 233 N.Y.236, 135 N.E. 275 (1922) focused on the "end and aim" of the transaction.The Ultramares rule has been rejected in cases where the use of the information was known. Certain cases were referred to before. In *Texas Tunnelling Co. v. City of Chattanooga*, (294 F Supp 821 District Court 1962), the criticism of *Ultramares Corp. v. Touche*, 225 NY 170, 174 NE 441 (1931) was not necessary; only one person the successful

This emphasis is misleading. Liability cannot in principle depend on the number of claims[432]. The two criteria might seem indistinguishable but, logically[433], the use of the

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bidder on the sewer contract could suffer loss in the first place. Similar is *M. Miller Co v. Central Contra Costa Sanitary District*, 18, Cal Rptr 13, Distr. C.A. (1962).

In *Granberg v. Turnham*, 333 P.2d 423 (Cal. C. A.), 1962,. the crucial issue was the knowledge of the intended use of the statement and not the foreseability of the large class of prospective buyers.

Similar is the situation in *Rusch Factor, Inc. v. Levin* (284 F Supp 85, D. Rhode Island, 1968); the possibility of extensive damage is minimal, the court however does not make clear why contrary to precedents the claim is accepted.

In *Rozny v. Marnul* (43 III 2d 54, 250 N.E. 2d 656, 1969), although the liability of the surveyor was extended to the sub-subcontractor in fact the amount of loss as limited; only one person could be injured.

(§552 (2) (a) of the second Restatement reads. "Except as stated in subsection (3) the liability stated in subsection (1) is limited to loss suffered (a) by the person or one of a limited group of persons for whose benefit and guidance he intends to supply the information or knows that the recipient intends to supply it; and (b) through reliance upon it in a transaction that the intends the information to influence or knows that the recipient so intends or in a substantially similar transaction.")

Similar is the attitude in leading Commonwealth cases. In *Chandler v. Crane Christmas and Co.*, [1951] 2 KB 164, CA, the defendants accountants were hired to prepare accounts with the express purpose of encouraging the plaintiff to invest money in the company. The defendant knew the plaintiff's name and the accounts were shown to the plaintiff in the presence of the defendants. In Lord Denning's words the duty of care extended to the transaction for which the accountants knew their accounts required..". Lord Denning referred to the American cases of *Ultramares Corp. v. Touche*, 225 NY 170, 174 NE 441 (1931) and to *Glanzer v, Shepard* 233 N.Y.236, 135 N.E. 275 (1922).

In *Hedley Byrne and Co. Ltd. v. Heller and Partners Ltd.*, [1964] A.C. 465, where liability was rejected, although the reference to the establishment of liability was made for the basis of the class of plaintiffs. However crucial was that the defendants knew that the information was requested for the purpose of negotiating a contract, and they knew the amount at risk.

In *Anns v. Merton London Borough* , [1978] A.C. 728, the decision found that a local authority, empowered to make and enforce bylaws on building construction, was under a duty of care in relation tot he inspection of foundations. The lessees were allowed to recover the cost of repairing a defect.

In the New Zealand case *Diamond Mfg. Co. v. Hamilton*, [1969] N.Z.L.R. 609 (C.A.) where an accountant was held liable to a party who purchased shares in their employers company relying on a negligent balance sheet, it was accepted that the defendant knew that the accounts were wanted by the plaintiff for the purpose of making an offer and that he would rely on the accounts.

In the Canadian case *Haig v. Bamford*, (1977) 72 D.L.R. (3rd) 68, the plaintiff gave a loan relying on the negligent financial statement the defendants accountants had drawn on behalf of the recipient of the loan. (The recipient was in need of the loan in order to raise an amount of equity capital which was the precondition for receiving a loan from a government agency.) The decision was, it seems based on the fact the plaintiff was foreseeable but it is fair to say that crucial was the fact that the loss was suffered in precisely the transaction for which the accounts were required. (See on Canadian law, Harvey Chr "Economic Loss and Negligence", 50 *CanBarRev* 1972, p.580.)

432 This is Lord Roskill's comment in *Junior Books Ltd. v. Veitchi Co.*, [1983] 1 A.C. 520. Beyleveld and Brownsword, 54 *MLR* 1991, 62-64.

433 The fact that the plaintiffs formed a limited, foreseeable class is indistinguishable from (if not a consequence of) the knowledge of the use of the information.

information should be the prior in time[434] and the criterion concerning substantive law, therefore, the crucial one.

Under a contractual model of liability, the focus would be on the plaintiff's undertaking[435] and voluntary degree of exposure, enabling a thorough understanding of misrepresentation and potentially limiting liability to what the defendant would likely (and should) accept[436].

Contractual liability for third party loss will not enhance the defendant's exposure. As with the case of the accountants' liability[437] for reports addressing (being available to) the public, where negligence is not established[438], contractual liability is not

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434 Considerations as to the number of claimants which seem subsequent to the occurrence of the loss. The defendant could have considered limiting his liability by restricting the permissible uses of his exposure to claims.

435 The provider of information is liable because the information is mistaken, and the information is damaging if and when used. When he enters a relationship he can foresee mostly the use of the information and subsequently the users.

436 No one would accept a far too extended liability, and certainly not a liability which could not be weighed against the benefit he acquires in the transaction. A reference to the use of the information, namely the transaction intended to be influenced or even a similar one is made by the second Restatement. In §552 (2) (b); ..the liability stated in subsection one is limited to loss suffered b)through reliance upon it in a transaction that he intends the information to influence or knows that the recipient so intends or in a substantially similar transaction.

The concept of "similar transactions" is a sign that the drafters of the Restatement favoured an expansion of the liability caused by negligent information. Again in third party situations it is on the basis of the voluntary undertaking and the transactions' environment that the similar transactions will be defined.

437 Accountants are employed for a variety of services such as offering financial opinions, drafting balance sheets, performing statutory audit, etc. Their reports might be relied upon for financial decisions of investors, shareholders or creditors. Thus the need to preserve the objectivity, impartiality and high quality standards of the accountant's performance is clear. Distinct features of this widespread attitude is the establishment of qualified bodies of accountants, and the promotion of quality standards in their performance. When the potential plaintiffs form a limited and predictable class of people for whose benefit the accountant servises are offered, the claims are accepted, and this should preferably be made on a contractual basis (as report with report on the financial situation of an enterprice relied upon by a creditor.). In one view this should be the case with the additional requirement that the accountants have been adequately rewarded for that purpose; Bar, Christian von in Markesinis (ed), 98-127, at 116.

438 The question here involves liability for misrepresentation from audit reports for instance, which address the public at large. The possible plaintiffs might be unpredictably many and the amounts lost vast. In these cases, following the *Ultramares* decision there is no liability for negligence toward third parties. In *Ultramares* in contrast to *Glanzer* the identity of the persons likely to rely on the defendant's certified balance was unknown. The defendants, a firm of certified public accountants was employed by a company to prepare and certify a balance sheet excibiting the condition of the complany as of December 31, 1923. This balance sheet was used by the client in order to obtain credit and borrow large sums of

money. from banks and other lenders. This was known to the defendants, who were aware of the relative business practice, and had for that purpose provided their clients with 32 copies of the balance sheet as counterpart originals. The defendants did not know the persons to whom these would be shown or the extent or number of the transactions in which they would be used. Plaintiff was a lender who had relied on the balance sheet. (See §552 of the second Restatement of the Law of Torts from a previous reference.)

Liability to third parties is invariably accepted for deceit. See the earlier but comprehensive reference in Bohlen "Misrepresentation as Deceit Negligence or Warranty", 42 *HarvLR* 1929, 733-747. There is a degree of uncertainty as to the exact meaning of deceit. In the leading English case *Derry v. Peek,* [1889] 14 AC 337, which was followed by American courts, the defendants who were directors of a tramway corporation and had issued a prospectus to induce the public to subscribe for stock, which erroneously stated that the company had the right to use steam or mechanical motive power instead of horses, the defendants were acquited because they honestly believed the truth of their statement. The court stated that for deceit there must be proof that a false representation was made knowningly or without belief in its truth, or recklessly, carelessly whether it is true or false. A minority of American jurisdictions have modified this rule and have extended the action for deseit to negligent misrepresentations and/or innocent misrepresentations.

In California negligenct misrepresentation is considered by statute to be a form of deceit.(California Civil Code §§1710-2, 1752-2). Similar provisions have been adopted in Montana, South Dakota, North Dakota and Oklahoma. See Letivin, Alan Lloyd "Accountants' Scope of Liability For Defective Financial Reports", 15 *The Hastings Law Journal* (1964), pp.436-463.

In *Ultramares* the court held that if the defendants' statement was false "they are not to be exonerated because they believed it to be true". Good faith was no good defence. An opinion by an expert could be fraudulent even if the grounds supporting it "are so flimsy as to lead to the conclusion that there was no geenuine belief back of it.". *Ultramares* extended the scope of liability for deceit. Untill then liability was limited to people whom the defendant intendend to induce into reliance and who relied in the intented manner. In *Ultramares* it is enough that the defendant should reasonably have foreseen the possibility of inducing reliance. The principles of Ultramares were followed in *State Street Trust Co. v. Ernst*, 278 NY 104, 15 NE 2d 416 (1938), where the defendant accountant had provided a factory business with certified balance sheets showing a totally false picture (the business was insolvent), and sent a letter to their client alone to which they underlined their observations as to the real situation. The court holding that accountants "may be held liable to third parties even when there is lacking deliberate or active fraud", and that "heedlessness and reckless disregard of consequences may take the place of deliderate intention", allowed the claim upon deceit. In the more recent *Duro Sportswear Inc. v. Cogen*, 131 NY S 2d 20 (Sup Ct 1954) Affdavit mem., 285 App Div 867, 137 NY S 2d 829 (1st Dep't 1955), the court held that an accountant who prepared a report which he knew would form the basis of the decision of a stockholder to purchase the interests of another in a corporation, was liable for gross negligence. Fraud was rejected. A 1967 deceit case (*Fischer v. Kletz*, 266 F Supp 180 -SDNY 1967-), did not involve affirmative misrepresentation but nondisclosure. In the course of special studies on the finances of a corporation, a firm of accountants undertook in 1964, they discovered that figures they had used in their previous certified statement for the same corporation were false and misleading. The defendants did not disclose these facts to the exchanges on which the corporation was traded, or to the public at large, until may 1965 when the special studies were released. The court accepted the claim for deceit, acknowledging the potential policy issues involved as to the extent liability might reach.

In conclusion the scope of the general duty to third persons not to misrepresent wilfully is broader than responsibility for negligent misrepresentation. Katsoris 36 (1967) *Fordham LR* , 191-234. Deceit cases seem more suitably treated under tort due to the specific evaluation of the injurer's behaviour and in the light of the potentially limited

likely to be accepted[439]. A number of arguments turn against holding accountants' liable in these situations. Such are fairness arguments, -- focusing on the disproportionality between the accountants' benefits and the losses[440] -- the fact that accountancy is not an exact science[441] and liability standards are difficult to assess[442], the fact that the loss is

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compensation under a contract. Search for good faith violations would be of little help. Bad faithed accountants will have committed deceit, and violated special statutes.

§531 of the second Restatement of the Law of Torts, reads: "One who makes fraudulent misrpresentation is subject to liability t the person or class of persons whom he intends or has a reason to expect to act or to refrain from action on reliance upon the misrepresentation, for penuciary loss sufferred by them through their justifiable reliance in the type of transaction in which he intends or has reason to expect thir conduct to be influenced.".

439 Similar is the situation in English law. In *Chandler v. Crane, Christmas and Co.*, [1951] KB 164, the defendants were accountants who prepared a balance sheet for a client and were told by the latter to exhibit the balance sheet to a prospective investor. In reliance on the balance sheet the investor (plaintiff) purchased an interest in the company. The latter became insolved, and it was found that the accountants had been extremely careless in preparing the balance sheet. The court held for the defendants, considering that the accountants were not liable for negligent misrespesentation to third persons. *Ultramares* was often cited; it has been observed however that the case showed more similarities to Glanzer (Katsoris 36 (1967) *Fordham LR*, 197). Lord Denning held the only dissenting opinion considering that an accountant should be held liable in the cases where he makes a report for the guidance of "the very person of the very transaction in question".

A more recent decision which "suprised many, including auditors", (Chua "The auditor's liability in negligence in respect of the audit report: part 1" 14 *The Company Lawyer* 1993, 203) is that of the House of Lords in the *Caparo Industries plc v. Dickman and others*, [1990] 1 All ER 568, concerning a claim by a public limited company which had purchaged another company and turned against the latter's directors for negligent misrepresentation, and against its auditors for negligent auditing and reporting which they were required to do under the Companies Act 1985 (sections 236 and 237). The court held that liability for economic loss due to negligent misstatement was confined to cases were the statement or advice had been given to a known recipient for a specific purpose of which the maker was aware and upon which the recipient had relied and acted to his detriment. The purpose of the staturory requirements for the audit was to enable the shareholders to exercise their class rights in general meeting, and did not extent to the provision of information to assist shareholders in the making of decisions and to the future investment in the company. Since, additionally, the auditors had no special relationship with non-shareholders contemplating investment, they did not owe any duty of care to their plaintiffs in respect of their purchase of public limited company on which they reported.

440 The disproportionality between the loss and the benefit of the injurer is considered by Rabin to be the reason for the rejection of liability for economic loss in cases where the physical damage leads to third party property damage. (Rabin 37 (1985) *StanfLR* 1534 et seq.). It is furthermore difficult ro calculate these losses and to relate them casually to the reports.

441 Lasok & Grace "Auditors and Lawyers" 14 *The Company Lawyer* 1993, 130-132, at 131. Accountants cannot therefore be conclusive in every evaluation they make.

442 The methodology the accountants have to follow in the exercise of their duties is defined not by strict rules but by more flexible, volatile standands on the basis of which it is difficult to be conclusive as to the character of wrongfulness and the assessment of liability. The law usually defines specifically and strictly the requirements of accountantants' performance; their basic obligations being objectivity and impartiality.

experienced in commercial practice as either the result of the injured's decision[443] or of the operation of market forces[444] and mostly, the public policy to protect accountants profession for the importance of the profession in the economy. One should further add the special legislative treatment of many of these instances[445], illustrate the legislature's intent to discourage claims against the accountants on bases other than statute[446]. Finally, although the damage is foreseeable, the 'contractual' element is very weak[447] in these cases. Social

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443 The loss seems to be caused by the decision and action of the injured party whose prudency is difficult to assess. Unlike will beneficiary cases for instance, where the (certain) benefit was cancelled due to the attorney's mistake, here the injured party decided and acted for the improvement of his position.

444 Thus the causal connection between the negligent report and the damage seems weaker and the contribution of the report to the damage is less significant.

445 Various parts of commercial legislation provide for the liability of accountants. Section 11 (a) of the Securities Act 1933, entitles any person acquiring a security on a registration statement containing a statement of a material fact which is untrue, or omits to state a material fact required or necesary so as not to be misguiding, to sue every accountant, engineer, appraiser, or any person whose professional capacity gives authority to the statement. Proof of reliance (which is usually required in third party liability), is eliminated under the same section. The standard of reporting is that of a reasonable man in the management of his own property. In *Shonts v. Hirliman*, 28 F Supp 478 (SD Cal 1939), on a claim by purchasers of registered securities to recover damages against the accountants who certified the financial statements in the regaistration statement, the court found for the defendants, considering that on the basis of the evidence available there was no omission of anything existing when the certification was made. Section 18 of the Securities Exchange Act 1934 renders those prepariing the statements defined in the act liable to any person, not knowing that the the statement was false or misleading, who in reliance upon the statement purchased or sold a security at a price affected by such statement. The defendant could be exonarated if he acted in good faith and without knowledge that the statement was false or misleading.

Section 10 (b) of the same act referring to the Securities and Exchange Commission (SEC), renders unlawful the employment in connection to a securities' purchase of any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Comission may prescribe necessary or appropriate. SEC rule 10b-5 specifies the unlawful acts outlined in the previously referred section. Although neither of the ywo refers to civil liability, it is established that an unlawful conduct under section 10(b), gives rise to a civil remedy. (Katsoris 36 (1967)*Fordham LR* , 217).

446 The special legislative treatment of the acountants' reporting, aims, among others, at clearing the picture with regard to the accountants' liability and set a more stable framework of the accountants' exposure. This legislative treatment matched by performance standards set by the accountants' organisations seems to operate to the exclusion of other liability models.

447 It could be argued, that this point simply restates the proximity question in the award of tort liability, as expressed in English law, proximity reflecting a social and legal evaluation of the relationship as not giving rise to a compensation claim.

perceptions would oppose considering the plaintiff-defendant relationship as approximate to a voluntary one[448].

Similarly, contractual approaches should be excluded from the complex area of product liability[449]. In this field the contrast in American law is between implied

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448 The policy arguments against awarding liability, are an expression of the prevailing (among entrepreneurs, lawyers, and the society at large), idea that that the relationships in question lack the adequate quality to give rise to a compensation suit. It could be argued that the intentional link of the accountant's performance to the third party injury is weaker than in typical third party beneficiary rule cases, or that the significance of the contractual element in accountants' performance is reduced in the light of the important public interest they serve. The broader consequences of the accountant's behaviour are not thought to be part of his performance. An expansion of the contractual application cannot take place in the absence of a more widely acknoledged view on the adequacy of the particular relations to generate a voluntary undertaking of liability. Chua notices the expectation gap "in what the public perceives of and expects from an audit report and what auditors are professionally responsible for". (Chua 14 *The Company Lawyer* 1993, 203-207).

It could be recalled that German courts imposed in certain cases audiotr's liability ajthough the relative legislation was more protective of the auditors than English law, [Markesinis and Deakin 55 (1992) MLR 634] but the analogy is not precise, since in German law there are no examples from potentially as widespread liability as in American or English cases.

449 Product liability is the field where allegedly the fall of the citadel of privity began with the introduction of strict liability in tort. See Prosser "The Attack upon the Citadel: Strict Liability to the Consumer", 69 *Yale LJ* 1960, 1099. The pioneering case was *Hennigsen v. Bloomfield Mottors Inc.* 32 NJ 358, 161 A 2d 69 (1960), where the plaintiff sued in implied warranty for personal injuries she suffered when a car, manufactured by the defendant and given to her by her husband who bought it from a retailer, made an unscheduled turn into a wall. The court upheld the plaintiff's action without proof of negligence and invalidated the defendant's disclaimer because of its unfair and unbargained-for quality. In California the decision in *Greenman v. Yuba Power Prods., Inc.*, 59 Cal 2d 57, 27 Cal Rptr 697, 377 P.2d 897 (1963), where a husband was allowed to recover for personal injury caused by a defective home carpentry outfit made by the defendant and given to the plaintiff by his wife who had bought it from a local retailer, without requiring negligence. Justice Traynor first granted recovery on implied warranty grounds and then announced that the obligations could more accurately be viewed as a form of strict liability. In *Le Blanc v. Louisiana Coca Cola Bottling Co.*, 221 La 919, 60 So. 2d 873 (1952), on a claim by a plaintiff who became ill after drinking a gift bottle of cola which contained the remains of a house fly, the court held that the consumer of defective goods whether purchaser or not, has a tort action based on implied warranty and independent of any requirement of proving negligence. (Until then Louisiana decisions wavered between contract and tort principles.).

Referring to the context of strict liabilty Schwatz, discussing Californian law argues:"By the time Greenman introduced strict liability, negligence law already afforded the injured product victim generous compensation rights against a negligent manufacturer, and implied warranty law conferred on the product consumer a strict liability right running against the product retailer if not again the product manufacturer." (Scwartz "Understanding Products Liability" 67 *CalLR* 1979, 448.).

One might say that there are more than one "varieties" of stict liability. It is not my purpose in this context to enter into the ramifications of the relative definitions. See Scwartz 67 *CalLR* 1979, pp.435-496, Franklin, Marc A. "When Worlds Collide: Liability Theories and Disclaimers in Defective Product Cases", 18 *StanfLR* 1966, 974-1020, and on

Louisiana law, Robertson, David M. "Manufacturer's Liability for Defective Products in Louisiana Law", 50 *TulLR* 1976, 50-113.

In the majority of decisions liability for economic loss, which mostly concerns third parties, is rejected. Two are the most important cases. In *Santor v. A&M Karagheusian, Inc.*, 44 NJ 52, 207 A 2d 305 (1965), the plaintiff who had purchased a carpet for his home from a retailer, was allowed to recover directly from the manufacturer for the redused value of the carpet caused by the appearance of unusual lines. The decision in *Santor v. A&M Karagheusian, Inc.*, followed that in *Hennigsen v. Bloomfield Mottors Inc.* 32 NJ 358, 161 A 2d 69 (1960). The court in *Santor v. A&M Karagheusian, Inc.*, admitted that the decision in *Hennigsen v. Bloomfield Mottors Inc* had emphasised on personal injury (as the defendants had argued), but on the basis of justice to the ultimate consumer it invoked again implied warranty. Once in existence, the field of operation of the implied warrany remedy should not be limited to personal injury cases. However the court, considering that the implied warranty disposed the case in the plaintiffs favour, it also stated that the liability could be based on tort directly. The court invoking the public interest demands for consumer protection, held that if the goods were not suitable and safe for the intended use, the burden should be borne by the manufacturer than by the injured or damaged persons. (The appearance of goods on the market was treated to be a representation that they were suitable and safe for the intended use.)

The second important case is *Seely v. White Motor Co.*, 63 Adv. Cal. I, 45 Cal Rptr. 17, 403 P. 2d 145 (1965), where the plaintiff sought recovery from a truck manufacturer for money he had paid to a retailer (the purchase price) and for profits lost in his business when he was unable to make normal use of the truck. Recovery was allowed (Justice Traynor speaking for the majority), under an express warranty given by the manufacturer. Although that express warranty was limited to making good any defective parts at the factory, the courts disregarded the limitation because the manufacturer had repeatedly failed for over eleven months to correct the defects. Since the warranty was express, privity of contract was not required. Justice Traynot emphasised that while it was for tort law to treat physical injuries, it was the sales law which was suitable to govern the relations between suppliers and consumers. In his views physical property damage came within the protection of the product liability doctrine, as personal injury did; it was part of the tort tradition. He thought that the decision in *Santor v. A&M Karagheusian, Inc.* 44 NJ 52, 207 A 2d 305 (1965), was correct because of an express waranty a reason not used by the court in that decision. Economic loss did not fall under the product liability doctrine. The decision in *Seely v. White Motor Co.* was related to *Greenman v. Yuba Power Prods., Inc.*, 59 Cal 2d 57, 27 Cal Rptr 697, 377 P.2d 897 (1963). In *Seely v. White Motor Co.* Justice Traynor rejected the idea that the tort philoshophy of *Greenman v. Yuba Power Prods., Inc.*, had superseded the legislative warranty scheme. Judge Traynor was concerned with holding a manufacturer liable for hot having met the plaintiff's business needs or the palintiffs economic expectations.

Following these two decisions the vast majority of the courts confronted with the choice between the two opted for the solution in *Seely v. White Motor Co.* A limited number of jurisdictions (Michigan, and Wisconsin for example) followed *Santor v. A&M Karagheusian, Inc.*, applying this view to considerable range of product purchasers. (Schwartz 23 (1986)*San Diego LR*, 52).

Support of *Seely v. White Motor Co.*, is found in *Louisiana in Media Produucts Consultants Inc.v. Mercedes-Benz of North America Inc.* 262 La 80 262 So 2d 377 (1972), where the purchaser of a mercedes car discovered that his purchase was a disaster and turned against the North America mercedes distributor as the manufacturer. In a situation which resembled more *Santor v. A&M Karagheusian, Inc.*, the court held that on expectation losses the express warranty approach was prevailing, nevertheless implied warranty could suffice as well. (It was after this case that the requirement of privity was abalished in Louisiana. (Robertson 50 *TulLR* 1976, 78).

In an Oregon case from 1965, *Price v. Gatlin*, 81 Ore Adv 169 405 P 2d 502 (1965), in an action against the wholesaler for damages suffered because a purchased Ford tractor did not

warranty as expressed in the Uniform Commercial Code (UCC)[450] -- that is not considered as involving contractual liability[451] -- and strict (tortious) liability[452] which are considerably different[453].

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perform adequately, liability was denied. It was thought that the extention of liability for economic losses could not be supported in the same manner as for the victims of physical injury. (Franklin 18 *StanfLR* 1966. 978).

450 UCC § 2-314 on "Implied Warranty: Merchantabality; Usage of Trade" reads:
(1) Unless excluded or modified (Section 2-316), a warranty that the goods shall be merchantable is implied in a contract for their sale if the seller is a merchant with respect to goods of that kind. Under this section the serving for value of food or drink to be consumed either on the premises or elsewhere is a sale
(2) Goods to be merchantable must be at least such as (a) pass without objection in the trade under the contract description; and (b) in the case of fungible goods, are of fair average quality within the description; and (c) are fit for the ordinary purposes for which such goods are used; and (d) run, within the variations permitted by the agreement, of even kind, quality and quantity within each unit and among all units involved; and (e) are adequately contained, packaged, and labeled as the agreement may require; and (f) conform with the promises and affirmations of fact made on the container or label if any.
(3) Unless excluded or modified (Section 2-316) other omplied warranties may arise from course of dealing or usage of trade.
(Uniform Laws Annotated-Uniform Commercial Code, Master Edition, 1989). See White and Summers *Uniform Commercial Code*, 3rd ed. 1988, 434 et seq.)

451 The view in English law is different.

"It is precisely when for one reason or another, the UCC declines to affirm the plaintiff's claim that the status of that claim under products liability law becomes a meaningful question.", Schwartz 23 (1986)*San Diego LR*, 55.

More comprehensive is the reference of the same author in another article: "Negligence law, in its product application seems at first to take into no account of the point that the product manufacturer stands in a kind of contractual relationship with the product purchaser; it imposes on the manufacturer the same obligation of reasonable care as it places on defendants in 'stranger' cases... Warranty law, by contrast is drawn directly from the essentially contractual relationship between the consumer and the manufacturer. Its purpose is to give effect to the reasonable expectations ... particularly [of] the consumer." (Schwartz 67 *CalLR* 1979, p.448).

452 Stict product liability is expressed in §402A of the second Restatement of the law of Torts which reads:
(1) One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby used to the ultimate user or consumer, or to his property, if, (a) the seller is engaged in the business of selling such a product, and (b) it is expected to and does reach the user or consumer without substantial change in the condition in which it is sold.
(2) The rule stated in Subsection (1) applies although (a) the seller has exercised all possible care in the preparation and sale of his product, and (b) the user or consumer has not bought the product from or entered into any contractual relation with the seller.

453 The two mechanisms seem to have impressive similarities. As regards the basic standard of liability, in strict product liability what is required is a "defect" of the product, while according to the UCC the consumer must show that the product was "unmerchantable". As regards products design the UCC requires that the product is "fit for ordinary purposes". One criterion in the strict product liability is that the product should comply with ordinary consumer expectations. It has been decided in common law that price is a factor in assessing the adequacy of design and the official comment of the UCC entails a similar guideline. Product liability case law might be more demanding with respect to the

The application of the UCC is supported on the basis of its superior intellect, quality of formulation and, mostly, on the basis of its statutory authority. There seems to be no ground for a contractual approach, as is the case with jurisdictions discussed in this work[454]. The doctrine of implied warranty takes a view similar to contractual approaches

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quality of the product since it requires not only average quality as the UCC, but it could involve claims related to foreseeable misuses of the product. The UCC requirement that the consumer must give notice to the defendant of an impending claim within a reasonable time after the violation of the warranty is detected, does not differentiate the implied warranty significantly; the requirement is "porous and flexible" (Schwartz 23 *San Diego Law Review*, 1986, 56-58.), and (according to the Official Comment to the UCC the purpose of the requirement is not to deprive a good faith consumer of his remedy. (The courts have practically refused to give effect to the provision; the more possible explanation is that the requirement applies provided that in good faith there is time to offer notice. Franklin 18 *StanfLR* 1966, 1000.) As Schwartz notes, even if some discrepancies are noticeable between the implied warranty doctrine and the strict product liability law these have not found their way in the case law.

The mechanism differ with regard to the treatment of privity constraints, where the UCC approach seem more restrained. There are problems of the so-called "vertical" privity when the defendant is either a remote seller or the manufacturer, and "horizontal" privity when the plaintiff is not the buyer or the owner of the product. With regard to vertical privity, it is true that the UCC identifies the retailer as the principal defendant. However claims against the manufacturer are not excluded. Indeed a minority of decisions has accepted implied warranty against the manufacturers. With regard to horizontal privity it is generally assumed in the UCC (§2-301), that the plaintiff must be the owner of the product (the protection of stict product liability extends to all possible victims). This requirement is not very limiting for cases of pure economic loss at least; the persons suffering loss will usually be the owner. (In Franklins view the references in the UCC amount to a neutrality comment which "leaves courts free to fashion law to meet the vertical and uncovered horizontal nonprivity personal injury cases". Franklin 18 *StanfLR* 1966, 998 et seq). See also Schwartz 23 (1986) *San Diego LR*, 59.

They also differ on the limitation period (the UCC limitation period is longer). Strict liability is regulated by the tort statute of the particular jurisdiction. Generally the limitation period begins to run from the date of the harm and frequently expires after two years. The UCC's limitation period is four years from the time of the sale (§ 2-275). The parties can however by agreement reduce th period of limitation. (The UCC provisions are admittedly less fortunately drafted.), Schwartz 23 (1986)*San Diego LR*, 65-67.

The discrepancy in the treatment of disclaimers, which are possible under the UCC scheme, might in one view, be "more apparent than actual". Schwartz 23 (1986) *San Diego LR*, 62. According to the official comment on the second Restatement f the Law of Torts, §402A, m, product liability is not subject to a disclaimer. Implied warranty can be disclaimed contractually -§2-316 (2). (Many claims are based on tort in order to avoid contractual waivers of liability.). The UCC at first discourages disclaimers referring to personal injury §2-719 3, (allbeit not in a similarly strong manner as products liability). It is a fact that courts have given effect to disclaimers not only in the case of commercial buyers' claims but also in claims by ordinary consumers. The picture of the law is far from clear; it is questionable which the effect of disclaimers will be in situations of economic loss (Schwartz 23 (1986)*San Diego LR*, 61). In one view the more important discrepancy in these cases is that related to the limitation period. (Schwartz 23 (1986)*San Diego LR*, 61 et seq). See "Enforcing Waivers in Products Liability", (note), 69 (1983) VaLR, 1111-1152, and Franklin 18 *StanfLR* 1966, 1014-1016.

454 See under "Product liability" and "Contracts of Sale -- Production liability" in Chapter 2. See Bungert, Hartwin 66 (1992) TulLR, 1179-1266.

and is naturally opposing contractual alternatives[455]. Moreover, significant policy reasons such as stability would oppose a scheme beyond those legislated[456].

3.3.6. Further benefits: conflict of interests.

In certain cases the defendant's liability might be rejected because of a conflict of interests between his contracting party and the plaintiff; especially if the contractual relationship is professional and confidential. As under contract the defendant's duties are defined more accurately[457] than under tort, it is more likely to find compensation compatible with the defendant's contractual loyalty. Thus a professional should not be held liable to a third party provided that, in accordance to the practice followed in the particular transactions, the latter would have been expected to have their own professional advisors. On the contrary, a professional should be held liable if the facts he certifies are within his exclusive knowledge. The potential conflict of interests between creditor and third party, can be a reason to exclude liability. In German law, however, the conflict was referred to as a reason to support a direct third party claim[458]. Apparently the legitimacy of a claim is based on an overall fairness consideration that precedes discussion of the proper means.

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455 The character of the implied warranty as well as the qualities attributed to the solution are evidence of a negative predisposition towards a contractual third party solution. The concept of implied warranty, although suggesting the application of a voluntary model, is conceptually exclusive of a third party claim. The rationale behind the implied warranty doctrine is, in part at least, motivated by doubts over the acceptance of third party claims and is an attempt to offer the advantages of a contractual solution to the claimant.

456 Product liability inolves an immense variety of products and relationships of a varying content in the different stages of the retail chain. In product liability law the contradiction between contract and tort is but a minor part of the whole picture. The area involves high economic stakes, strong political connotations, powerful interest-groups, and the sensitivity of public opinion. A third party rule is plainly too simplistic to deal with the complexities of the field. Stability and predictability in law, which cannot be assured on the basis of third party beneficiary rule, justify the legislature's intervention. The contractual third party model cannot cope with the special features of product liability. It seems therefore fair to acknowledge the limited use of a third party beneficiary rule in this area.

457 Especially as regards the participants' position and taking account of the relative commercial practices and transactions' ethics.

458 See under "Borderline cases; critique" in Chapter 2.

3.4. Economic efficiency.

Economic efficiency arguments on pure economic loss[459], more frequently in American law than in other common law jurisdictions[460], could involve third party cases. The basic idea behind economic efficiency is minimising social costs. Compensation, it is said, should burden the cheaper cost avoider. Economic arguments are by far not undoubted and in third party pure economic pure loss they could lead to confusion. Although they usually favour businesses and professionals[461], it has been suggested that the defendant professionals should bear pure economic loss because they can pass the loss to their clients, have it spread, and minimise social costs[462].

Fortunately, courts do not rely on economic efficiency arguments[463]. This is evident with insurance considerations[464]. Decisions on third party loss situations might affect the

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459 They are part of the tendency of economic analysis which is considerably developed in the United States, basically by academic lawyers. The "floodgates" question, insurance issues, commercial stability, the preservation of competition are major concerns. They advocate rules of limited recovery once there are no social costs as a result of the plaintiff's loss. Priority is given in calculating the costs of a particular activity to the society. In the area of free exchange, resource allocation should be based on the operation of the competitive market, where the most efficient allocation of resources is possible. In this context, considering that both parties to an exchange act in a rational manner, a contractual relationship is less likely to create net social costs than tort, which does not normally create a surplus of wealth, in the manner the contract is meant to be creating. This is another way to say that the contract has priority in the law of obligations, and this applies unless the transaction costs are so great that outweigh the parties' mutual gains. There the law has to intervene and attribute those costs to those responsible for them. See Rizzo "A theory of economic loss in the law of torts", 11 (1982) *JLSt*, 281, Markesinis and Deakin 55 *MLR* 1992, 623-625, Harris & Veljanovski in Furmston, 45.

460 As said, economic efficiency considerations have had negligible impact in other common law countries and even lesser in continental systems. This impact can be basically examined through academic analysis because, the truth is, courts do not usually make explicit such reasoning.

461 Arguing for the loss to bear the plaintiff the latter considered the cheaper cost avoider or becuse his costs are smaller.

462 Bishop "Economic Loss in Tort", 2 (1982) *OxfJLSt*, 1. The efficiency here lies in transferring the loss to another part of the society. See the reference in the discussion of attorney liability under the third party beneficiary rule.

463 Moreover, courts are not qualified to examine complex insurance implications and the relative (economists' or others') arguments. Insurance implications are difficult to measure and predict. It has been repeatedly noted that it is important therfore for lawyers to inform themselves on insurance. Atiyah 5 (1985) *OxfJLSt* 489-490.

464 In modern transactions the impact of loss is largely a matter of insurance coverage. To some extent the allocation of risks (and losses) between parties amounts to the allocation

litigants' insurers as for example with interrelated contracts in construction: if the claim of the plaintiff (the owner) is barred, then his insurer's subrogation right is barred as well, while the defendant's (the subcontractor's) insurer is released from his liability to indemnify his client. In such a case the courts would show a clear preference for first party insurance against third party insurance[465]. Relative, but often doubtful[466] arguments might contradict the will of the parties and are largely ignored by the courts[467] .

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of risks (and losses) between insurers. A decision will often have consequences as to whose insurer will bear the cost of the loss is often the implication of a decision.

These situations should be distinguished from cases of potentially incalculable loss where the argument is that liability in more easily insured by the plaintiff (considering the courts can evaluate the insurance implications, and that first party insurance is available), Atiyah 5 (1985) *OxfJLSt* 489. Markesinis, 25 (1991) *The International Lawyer*, 953-965, and 106 LQR 1991.

465 Markesinis, 25 (1991) *The International Lawyer*, 361.

This attitude is often supported as a policy choice together with the diversion of losses through channelling contracts, and the exclusion of liability to avoid needless litigation costs for instance. The denial of the subrogation right, it is said, will lead to avoid the wastefulness of fire insurance, usually undertaken by the owner and liability insurance, usually undertaken by the subcontractor. The purpose of these policies is to lead to more efficient, and cheaper insurance policies. The courts according to these ideas should create the conditions which will drive the parties to make the most cost-effective decisions, even if they are against one's security.

The tendencies of the case law in the area of economic loss have been treated differently by different commentators. Rizzo (Rizzo 11 (1982) *JLSt* 281) argued that the main judicial concern had been the amount of litigation, and that liability is denied when a channelling contract enables the victim of physical harm to claim economic loss as well, reducing thus the amount of litigation. The view had been criticised as t does not correspond to what the courts actually do. Bishop (Bishop 2 (1982) *OxfJLSt* 1., 96 LQR 1980, 360, "Economic loss: economic theory and emerging doctrine", in Furmston 73.) argued that many economic loss cases do not involve net social costs but a mere redistribution of wealth in which the law should not interfere. However even in third party beneficiary cases liability is accepted although they do not usually involve social costs since the harm suffered by some is a benefit for others. (See the comments by Rabin 37 (1985) *StanfLR* 1535-1538.). It should be recalled nevertheless that economists arguments do not examine at any point the third party problem as such.

466 The argument for instance that the duplication of insurance coverage is avoided if subrogation rights are denied, rests on unsteady ground; subrogation itself makes duplication unnecessary (Markesinis, 25 (1991) *The International Lawyer*, 362).

There can be no credible a priory assessment of the costs of insurance and the incentives therefore for the parties to the dispute on the choice of an optimal insurance policy. Comments focusing on the financial aspects of insurance might be doubtful and speculative. It is hard to see such considerations guide the award of compensation and allowing such a discetion to the courts, discretion which the latter do not seems to wish to undertake and are not qualified to do so.

467 It is argued that there is a distinguishable tendency in the UK, to curb insurer's rights. In the resent case of *Murphy v. Brentwood DC [1991] 1 AC 398*, which involved the liability of a local authority to an occupier of a house for passing the plans for construction in reliance of negligent advice of an independent contractor, the availability of first party insurance to the house owner must have weighed considerably in the rejection of the claim;

Contract can offer a clearer perspective of the interests involved. Insurance policies might, for instance, be taken into account if this can be based on contract[468]. It is not only the complexity and elusiveness of economic arguments that becomes clearer under contract, but also their incompatibility to basic approaches to liability; especially in third party loss cases where the parties' predisposition is important. Thus, a clearer view would enable the rejection of liability when the social benefit from the activity causing the loss is greater than the loss. Thus, it is suggested that the possibility of (inevitably) mistaken services by an accountant should be outweighed[469] from the overall social benefit of the regular reports[470], and liability for misstaments in these reports should be rejected.

Finally, the contractual model can impose greater rationality from an efficiency point of view promoting stability and predictability in law. A contractual view could, for instance, discourage unnecessary litigation were it to make predictable which claims are likely to succeed.

3.5. Deterrence.

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the insurer would benefit from the subrogation of the tort claim. See Markesinis and Deakin 55 *MLR* 1992, 629.

It is reasonable to assume that both parties to the dispute wish to continue their insurance policies. Favouring thus one insurance policy turns against the intentions of the parties to the relationship. The aim of the law is to secure the priority of the realisation of the relationship's content; the imposition of an allocation of risks cannot prevail over the latter.

468 If insurance considerations have a role to play this should be justified in terms of the relationship. The parties might have intended to include certain insurance considerations in their relationship in a manner which affects liability. In third party situations insurance policies are negotiated and drafted on the basis of the exchange relationship they are meant to offer security for as well as on the basis of the character of the voluntary undertaking in question (e.g. professional, confidential), and the transactions' practices. The size and the terms of the insurance are related to the interests involved in the transaction and the conditions under which it is taking place.. Those related to the transaction should bear the effects of their insurance policy choices.

469 Harris & Veljanovski in Furmston, 51

470 Thus the possibility of a mistaken report is a risk investors are expected to undertake when relying on the statement. It could be argued that the financial exposure of the accountant cannot exceed a level guaranteed from his professional capacity if not the amount involved in the particular contract.

As mentioned elsewhere, the deterrent effect[471] of contractual liability should not be underestimated. The defendant will be under a smaller risk of extensive liability but his liability will be more likely than it would have been under tort[472]. The deterrent effect of damaging a professional reputation would not be significantly weakened under contract. The economic efficiency argument, that if awarding damages would have an insignificant deterrent effect, then there should be no liability[473], could again be illuminated under contract. The liability of a specialist who with little extra care could have avoided the loss should not be rejected, but it could be denied if the transactions are deemed to contain a degree of risk which third parties have to undergo. Finally, the potentially limited third party loss liability will not create a disincentive for economic activity.

3.6. Good faith considerations.

Certain economic loss decisions have stepped into treacherous ground indicating that damages could be awarded on the basis of the tort of bad faith[474]. It is unlikely that bad faith could be established in most third party loss cases where usually the injurer's negligence, but not intention, led to the damage[475]. Although good faith, on the other

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471 A comprehensive reference to is made in Markesinis and Deakin 55 *MLR*1992, 624-629

472 This increased likelihood of holding someone liable might be more effective for the improvement of the performance of various professionals or businesses.

473 Harris & Veljanovski in Furmston, 51

That would be the cases if imposing liability for all losses will not increase safety, will not improve the standard of care, will not decrease the risk for losses and will not have a significant deterrent effect.

474 The tort of bad faith, better the tort involving the violation of an implied convenant of good faith, applies in circumstances where the violation of a contract is a tort at the same time. Developed in California in the sixties, in relation to third party liability insurance contracts, it is now accepted in most jurisdictions in the U.S., and has expanded to first party insurance contracts, employment and services contracts, and even loan and deposit contracts. It was said to be justified on the bases of the special "quasi public" character of insurance contract, the opposing interests of the insurer and the insured, and the expectations of the insured from an insurance relationship. The imbalance of bargaining power between the parties is often posed as the legitimising reason to allow recovery in by customers turning against the banks. The expansion of the tort can raise worries as to the extent that it can encroach on the setting of a private arrangement, and the level of judicial discretion it instigates. See Burton "Breach of Contract and the Common Law Duty to perform in Good Faith" 94 *HarvLR* 1980, 369.

475 The tort of bad faith corresponds to exceptional circumstances. In some cases it employed in order to offer protection the plaintiff did not have under contract (e.g. if the

hand, is a part of American law[476], the principle is characterised by general indefinability[477] and its effects are doubtful[478]. It could supplement the allocation of risks regarding the treatment of defences (dismissing unfair ones)[479]. Calls for an increasing role for good faith are indicative of the acknowledgement of its potential[480].

3.7. Choice of liability.

The suggestion to leave the choice of the liability vehicle to the claimant[481] seems to undermine the benefits for the legal order as a whole from the contractual solutions, meaning stability, predictability, fair allocation of legal entitlements. Considering that

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limitation period of a contractual claim had expired.). Bad faith has been elaborated in a contractual setting and arguments based on bad faith would function more effectively for e.g. the rejection of certain defences. It does seems unnecessary to resort to the tort of bad faith if a contractual solution is possible. See Markesinis "The Need to set acceptable boundaries between Contract and Tort", 315

476 The concept was established in case law initially. It is included in different pieces of legislation the most important being the Uniform Commercial Code (§1-203 in the UCC of the 1950's). In an improved version it is found in the second Restatement of the Law of Contracts, §205. See Summers "Good Faith in General Contract Law and the sales provisions of the Uniform Commercial Code", 54 (1968) VaLR , 195-267.

477 Its conceptualisation is problematic; it is expressed usually through the description of the instances of bad faith. The principle which is more a maxim than a detailed rule.. On these issues see Summers "The General Duty of Good Faith: Its Recognition and Conceptualisation", *67 Cornell LR* 1982, 810-838, and Burton 94 *HarvLR* 1980, 369-403.

478 It does not in effect have the same content as the German law principle of good faith for instance.It has never been used in a comparable manner, (moulding legal concepts, establishing independent rights), but defensively as a means to avert gross injustices. Good faith does not hold in U.S. law the central position it holds in continental systems, and it has not acquired the status of a public order principle of compelling force enabling the exclusion of opposite legislation or private arrangements.

479 A possible role in establishing asdditional duties and liability in tort, as envisaged by Farnsworth, E. A. "Good Faith in Contract Performance" in Beatson and Friedman 153-170 is doubtfull. In any case, it would make sense to say that in a third party loss situations these duties would more likely be contactual.

480 See Farnsworth, E. A. "Good Faith in Contract Performance" in Beatson and Friedman 153-170. Farnsworth makes wishful thinking that the development will expand over borders to affect the law in Canada and may be other common law countries, but this seems unlikely.

481 Fridman G.H.L. "The Interaction of Tort and Contract", 93 LQR 1977 : *"My contention is that nothing precludes a policy that permits a party to sue in either tort or contract if the facts substantiate such a claim. ..The adoption of such an approach, which, I suggest involves no startling innovations in the law, only carrying what is presently being done a stage further, would obviate much if not all of the kind of hair-splitting and similar questionable judicial argument... The defendant could still plead whatever defences he can legitimately raise to a claim in tort or contract: but he could no longer dictate to the plaintiff the kind of claim which the latter may bring, and them prevent the plaintiff from achieving the success which should be his, on the merits of the case"*, (436).

the contractual model is preferable, the privilege of the courts to intervene correctively in the adjudication of these claims should be recognised[482] as their discretion is not effectively increased[483]. However, this is not likely in the light of the overall corservative attitude of the courts[484].

3.8. Judicial considerations.

Judicial discretion is not necessarily reduced under contract but is rather channelled more properly. The contractual view enables a clearer understanding of foreseeability and allows considerable flexibility in calculation of the damages awarded, through weighing of the relative interests. The role of the courts is facilitated as they become better focused than under tort, as regards evidence, risks etc. The administration of the third party loss cases can be simplified under contract as the pattern of the decisions' rationale can arguably be more specific and predictable[485]. Finally the review of contract-based decisions at other degrees of jurisdiction is easier than that of tort-based decisions[486]. In any case the constitutional role of American courts, the less strict, by comparison to English law,

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482 This should be the case even if the contractual model is less favourable for the plaintiff.

483 It is doubtfull whether the legal basis of a claim could be rejected as being against good faith, and replaced with one the court would consider as the proper vehicle.

484 Such activism by the courts would seem to undermine the right of private persons to arrange their affairs at will. One aspect of individual freedom in private law concerns the choice of the vehicle to support claims judicially. In Greek law, the claimant is not in principle obliged to suggest the legal bases of his claim. The court is entitled to establish a compensation claim for instance on a basis not contained in the claim, on the basis of the doctrine *jura novit curia* (the court knows the law) if the facts described in the claim (provided they were proven) fall under a different heading of liability. In practice advocates include in the claims all possible bases of a claim.

485 Moreover, as discussed before it is unconvincing to treat all economic loss situations in the same manner. Many recent decisions do not consider the fact that loss might be economic. (See Rabin 37 (1985) *StanfLR* 1518 et seq., Markesinis 103 LQR, 1987, 371. On the recent trend in English law see Markesinis and Deakin 55 *MLR* 1992, 626 et seq. discussing the advantages of a contractual solution). Once the need to compensate economic loss is acknowledged it does make sense for the judicial treatment of the relative situations to separate third party loss cases on the basis of the exchange relationship they are related to, and employ the best available means for their resolution.

486 The review will have to examine the decisions in question on the narrow background of the transaction. Miscarriages of justice can be spotted with greater certainty. The review can certainly be easier and thus more effective and possibly stricter than when it would involve decisions under tort law.

precedent doctrine[487], the daringness of the American judiciary, and the experience from the application of the third party beneficiary rule, illustrate that their venture into contractual solutions will not be comparable with the strains the German courts had to undergo in developing the contractual mechanisms.

3.9. The way to achieve contractual solutions.

The expansion of contractual solutions to third party loss in American law is most likely to originate in case law. The 'technical' question of the method to achieve this expansion has not been the object of special concern among those suggesting reform. The reason is possibly the flexible approach of American courts in a number of related issues. Doctrine has not hindered the American judiciary when employing a broader understanding of contract (by comparatison to other common law jurisdictions), or when examining in parallel the third party beneficiary rule and the tort option or other possible bases of the claim[488].

Once the potential of the beneficiary rule to expand and its possible interchangeability to tort law have been acknowledged, it makes sense to think that the beneficiary rule or a similar model, drawing analogies from the rule, could be used as the basis of contractual solutions. The issue in American case law would be to extend existing contractual protection to new loss situations, against tort law. There is little worry for lack of judicial authority.

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487 See for a brief account of the development of American law and the position of English law inheritance, *An Introduction to the Legal System of the United States*, Farnsworth, A. Parker School of Foreign and Comparative Law, 1963, New York, and Horwitz. The basic difference concerns the force of precedent, evidently less important in American law than in English law. Thus American case law is more easily changable and more adjustable to changes and fluctuations of the circumstances. The reasons for the differenct development cannot of course be discussed here, but the overall picture of American law is far more complicated and unstable than that of English law. See also *American Legal History -- Cases and Materials*, Hall, Wiecek, Finkelman, 1991, Oxford University Press.

488 See the examples of *Biankanja v. Irving*, 49 Cal 2d 647, 320 P.2d 16 (1958),*Lucas v. Hamm* 56 Cal 2d 583, 364 P 2d 685, 15 Cal Rptr. 821 (1961) and of the welfare cases where the third party beneficiary rule was applied or discussed.

The problem, it seems, would be to persuade the courts on the preferability of the contractual approach, which concerns the judicial handling of the cases as well, and not just the compatibility of the suggestion to American law which eventually is the case for reform in all the jurisdictions[489]. Persuasion does not seem highly possible. The courts might feel that there is substantial protection, or that, on the contractual model, it is business interests that would be protected. In the latter case the usually pro-plaintiff American courts might be driven away from adopting contractual solutions.

3.10. Conclusion.

A considerable part of the arguments in favour of contractual solutions could be doubted. More significantly, the judgment that a contractual approach is preferable could be questioned as concealing the fact that the approach is advantageous mainly for the defendant. However, it was indicated that the approach combines advantages for the plaintiff, (facilitating evidence) for the defendant, (containing liability), for the courts (it makes certain decisions easier) and for the legal order as a whole (it enhances stability, contains economic exposure, balances the competing interests and enables a consistent incorporation of social perceptions in the law[490]).

The critique on the suggestions for a contractual approach is inevitable. The fact is that there is a need for an input of ideas on pure economic loss, as can be seen from the relative academic comment. Certain of the suggestions, such as those focusing on fairness and equality principles -- involving, for instance, the acceptance of the promisor's defences -- and those focusing on policies of stability and the preservation of economic activity, are clearly met by the contractual solutions.

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489 Even in Greek law courts should be persuaded to focus on the contractual context when deciding the case in delict.

490 Contract law can be responsive to changes in the ideas and practices of the transactions.

It is not the purpose of this work to suggest new liability mechanisms, between tort and contract for example -- a division which is up to a degree artificial[491]. The approach is limited within the existing schemes of liability. If the 'natural' application of contract for third party loss is doubted, it is again less arbitrary than the exclusion of contractual solutions or the undisputed treatment of these cases under tort, as can be seen from the application of the beneficiary rule in similar situations.

Viewed from a different perspective, the division of civil liability apart from reflecting particular legal (and social) perceptions, is also a way of allocating tasks to specific liability schemes with the efficiency of operation being implied in the rationale of this allocation. The doctrinal justification of the suggestion to divide the treatment of pure economic loss[492] is an expression of this more efficient allocation of tasks. The suggestions made in this work on the contractual solutions and the argument for a more flexible employment of equity principles such as that of good faith, are also suggestions for the more efficient operation of the American civil liability system. The development of contractual protection for the third party pure economic loss in American law is not only legally possible but also desirable from the point of view of the efficiency of the civil liability system that is a major concern among American lawyers.

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491 After all every form of liability is imposed by law, which as it cannot provide for all possible future situations, it cannot divide the situations tightly with regard to the applicable form of liability.

492 This division is meant to enable a competent understanding of the situations and promote a effective response to complicated situations. Thus discussion aimed at underlying the disadvantages of tortious treatment in cases involving a tripartite situation.