

SCRITTI DI DIRITTO PRIVATO EUROPEO
ED INTERNAZIONALE

Collana diretta da Ilaria Queirolo e Alberto Maria Benedetti

SCRITTI DI DIRITTO PRIVATO EUROPEO
ED INTERNAZIONALE

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**Private International Law and the
European Union: Developments in
Contemporary Private Law**

CONTRIBUTORS

AMBER BOES; SIMONE CARREA; SOFIA CARUSO;
MONIKA CHMIELOWIEC; JONATHAN L. T. CHU;
STEFANO DOMINELLI; MICHAŁ KUĆKA; PAULA GRANELL;
MARÍA GONZÁLEZ MARIMÓN; KAI HÜNING; FRANCESCA MAOLI;
LUANA MATOSO; MONIKA NAUMOVSKI; ROSA PLA ALMENDROS;
FELIX D. POLLMANN; RUTH SANDER; EDEN SMITH;
LISE VAN DEN EYNDE.

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info@editorialescientifica.com

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SCRITTI DI DIRITTO PRIVATO EUROPEO ED INTERNAZIONALE
Essays in european and International Private Law

Diritto privato, diritto europeo e diritto internazionale rivelano intrecci via via più significativi, chiamando docenti e studiosi dei diversi settori a confrontarsi e a collaborare sempre più intensamente. Da tale proficua osmosi scientifica origina la collana “*Scritti di diritto privato europeo ed internazionale*”, con la quale si persegue l’obiettivo di raccogliere opere scientifiche – a carattere monografico e collettaneo – su temi di attualità in un’ottica interdisciplinare ed in una prospettiva di valorizzazione della stretta connessione tra le discipline coinvolte. Tale obiettivo trova un riscontro nelle specifiche competenze dei Direttori e dei membri del Comitato scientifico.

In “*Scritti di diritto privato europeo ed internazionale*” sono pubblicate opere di alto livello scientifico, anche in lingua straniera, per facilitarne la diffusione internazionale. I Direttori approvano le opere e le sottopongono a referaggio con il sistema del “doppio cieco” (“*double blind peer review process*”), nel rispetto dell’anonimato sia dell’autore, sia dei due revisori.

I revisori rivestono o devono aver rivestito la qualifica di professore ordinario nelle università italiane o una qualifica equivalente in istituzioni straniere. Ciascun revisore formula una delle seguenti valutazioni: a) pubblicabile senza modifiche; b) pubblicabile previo apporto di modifiche; c) da rivedere in maniera sostanziale; d) da rigettare. La valutazione tiene conto dei seguenti criteri: i) significatività del tema nell’ambito disciplinare prescelto e originalità dell’opera; ii) rilevanza scientifica nel panorama nazionale ed internazionale; iii) attenzione alla dottrina e all’apparato critico; iv) adeguato aggiornamento normativo e giurisprudenziale; v) rigore metodologico; vi) proprietà di linguaggio e fluidità del testo; vii) uniformità dei criteri redazionali. Nel caso di giudizio discordante fra i due revisori, la decisione finale è assunta di comune accordo dai Direttori, salvo casi particolari ove venga nominato tempestivamente un terzo revisore. Le schede di referaggio sono conservate in appositi archivi.

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CONTRIBUTORS

Amber Boes, PhD Candidate, Institute for Contract Law, KU Leuven

Simone Carrea, Associate Professor in International Law, University of Genoa

Sofia Caruso, PhD Candidate, KU Leuven and Leiden University, FWO fellowship no 11PQW24N

Monika Chmielowiec, PhD Candidate, Jagiellonian University in Kraków, Doctoral School in the Social Sciences

Jonathan L. T. Chu, PhD Candidate, Faculty of Law and Downing College, University of Cambridge

Stefano Dominelli, Associate Professor in International Law, University of Genoa

Michał Kućka, Assistant Professor of Private Law, Jagiellonian University in Cracow

Paula Granell, PhD Candidate, University of Valencia

María González Marimón, Assistant Professor of Private International Law, University of Valencia

Kai Hüning, PhD Candidate and Research Assistant, University of Münster

Francesca Maoli, Associate Professor of European Union Law, San Raffaele University of Rome

Luana Matoso, PhD Candidate, Max Planck Institute for Comparative and International Private Law

Monika Naumovski, PhD Candidate, Faculty of Law, University of Maribor

Rosa Pla Almendros, PhD Candidate, University of Valencia

Felix D. Pollmann, PhD Candidate and Research Assistant, Institute for Corporate and Capital Markets Law, University of Münster

Ruth Sander, PhD Candidate, Bucerius Law School, Hamburg

Eden Smith, PhD Candidate, Faculty of Law and Trinity College, University of Cambridge

Lise Van den Eynde, PhD Candidate and FWO Fellow, KU Leuven

PREFACE

The goal of the Series of Essays '*Scritti di diritto privato europeo ed internazionale*' is to disseminate the results of academic research at European and international level, and to contribute to the national and international scientific debate, with methodological rigor and openness to multi and intra-disciplinary approaches.

The PEPP Programme, which brings together PhD Candidates from different EU Member States to attend four seminars of advanced learning in a Programme in European Private Law for Postgraduates (PEPP), and the 'Series', due to their common aims, have long established a cooperation in the dissemination of research studies.

This Volume comprises contributions from Lecturers and PhD Candidates who participated in the 2024-2025 PEPP Session, coordinated by the University of Münster along with the Katholieke Universiteit Leuven; the University of Zagreb; the University of Cambridge; the Bucerius Law School; the Max-Planck-Institute for Comparative and International Private Law; the University of Genova; the University of Silesia in Katowice; the Jagiellonian University in Kraków; the University of Maribor, and the University of Valencia.

Authors focus on their own research topics, connected to various aspects of family law, tort law, and contract law, mainly from a comparative and a private international law perspective.

The works poignantly address dogmatically relevant questions that have wider practical implications, focusing on the emergence of new legal personality for environmental features; the protection of children; promotion of alternative dispute resolutions; protection of the internal market and access to justice, also dwelling on the how proceedings may be used to impede the exercise of the right to inform the public; online activities and conflict of

laws; jurisdiction from the perspective of both common law systems and choice of court agreements in EU law, including tax arbitration, and comparative and historical analysis of fundamental and classical features of contract law.

All contributions were subject to a double-blind referee procedure.

Bettina Heiderhoff
Ilaria Queirolo
April 2026

***Rivers and Other Elements of Nature as Legal Persons: On the
Use of Private Law Instruments in Environmental Protection
(Polish Perspective)****

Michał Kućka

CONTENTS: 1. Introduction. – 2. Nature and Its Elements as the
'Common Good'. – 3. The Right to Live in an Environment Free
from Pollution (or the right to clean environment). – 4. Legal Per-
sonality of the Oder River. – 5. Conclusions.

1. *Introduction*

More than half a century ago, in a property law lecture, Christopher D. Stone – reflecting on the evolving views of who could hold property rights and what could constitute their object – suggested that it might be high time for nature and its components to shift from being objects to becoming subjects of rights (including property)¹. At the time this may have sounded like a mere provocation aimed at bored students (lecturers' ingenuity knows no bounds!)². Soon thereafter, however – due to Stone's own work³ – granting legal subjectivity, to varying degrees, to nature or its components (other than humans) ceased to be merely an academic or thought experiment and became a genuine proposal for a paradigm shift⁴.

* I have written in Polish an in-depth analysis on the use of legal personality structures for river protection, with a detailed critique of the draft bill on recognising the Oder as a legal entity – KUĆKA M., *Czy rzekom należy przyznać osobowość prawną? (Should legal personality be granted to rivers?)*, in *Kwartalnik Prawa Prywatnego* 2, 2025, p. 309-334. This text is neither a translation nor an abridged version of that analysis. I refer to the earlier publication only where I take the same or a similar view.

¹ STONE C. D., *Should Trees Have Standing? Law, Morality and the Environment*, Oxford 2010, p. XI (Introduction. *Trees* at Thirty-Five).

² STONE C. D., *Should Trees Have Standing? Law, Morality and the Environment*, cit., p. XI.

³ STONE C. D., *Should Trees Have Standing? – Towards Legal Rights for Natural Objects*, in *Southern California Law Review* 45, 1972, p. 450-501.

⁴ STONE C. D., *Should Trees Have Standing? Law, Morality and the Environment*, cit., p. 159-176.

The reasons differ across legal systems – and following the Spanish precedent of Mar Menor⁵ the matter has ceased to appear exotic to Europeans. In this brief analysis I focus on private law and its deployment for the protection of nature and its elements under Polish law, considering the draft bill submitted to the Polish Parliament that would grant the Oder River legal personality⁶.

It is also worth remembering that in his groundbreaking work, Stone identified three elements of legal personhood that should be guaranteed to nature (its elements): ‘(1) that suit be permitted in the object’s own name and interest; (2) that the calculation of damages (or balance of equities where damages were inappropriate) include an accounting for the interests of, or non-intrinsic value of, the object (not limited to commercial economic value); and (3) that judgement be applied for the benefit of the object’⁷. At the end of this article, I will refer to the extent to which these elements are being realised in Poland, according to the current legal situation.

2. *Nature and Its Elements as the ‘Common Good’*

The Polish Civil Code of 1964⁸ does not define ‘nature,’ although it refers to the ‘forces of nature’ in the context of torts and strict liability⁹. The Polish Constitution of 1997¹⁰ does not use the term ‘nature’ but repeatedly refers to the environment and its pro-

⁵ *Ley 19/2022, de 30 de septiembre, para el reconocimiento de personalidad jurídica a la laguna del Mar Menor y su cuenca* – <https://www.boe.es/boe/dias/2022/10/03/pdfs/BOE-A-2022-16019.pdf> (date of entry: 14.04.2026).

⁶ See <https://www.sejm.gov.pl/Sejm10.nsf/druk.xsp?nr=2082> (date of entry: 14.04.2026). English version of the draft bill is also available here: <https://osobaodra.pl/en/draft-bill/> (date of entry: 14.04.2026) and significantly amended version here: <https://osobaodra.pl/wp-content/uploads/2026/01/Draft-bill-on-recognizing-the-legal-personality-of-the-Oder-River-including-self-amendment-13-01-2026.pdf> (date of entry: 14.04.2026).

⁷ STONE C. D., *Should Trees Have Standing? Law, Morality and the Environment*, cit., p. 159.

⁸ Ustawa z dnia 23 kwietnia 1964 r. – Kodeks cywilny, Dziennik Ustaw z 2025 r. pozycja 1071, ze zmianami (hereinafter: the Polish Civil Code).

⁹ Article 435 (1) of the Polish Civil Code.

¹⁰ *Konstytucja Rzeczypospolitej Polskiej z dnia 2 kwietnia 1997 r., Dziennik Ustaw z 1997 r., Nr 78, pozycja 483, ze zmianami* (hereinafter: the Polish Constitution).

tection¹¹. For example, under Article 86 of the Constitution, everyone is obliged to care for the environment and bears responsibility for any deterioration they cause. The rules of such liability are set by statute. Statutes governing environmental (i.e., nature) protection are primarily public-law (administrative) instruments. Protection therefore occurs outside private law because – abstracting from the often blurred boundary between private and public law¹² – its objective is not to safeguard an individual (private) interest, but rather a collective (public) one.

For the avoidance of doubt, when I refer to the environment as a “common good”¹³, I use the term as it appears in Article 323(2) of the Environmental Protection Law of 2001¹⁴: an interest shared by the community at large, whose protection may be pursued independently of any specific individual’s private right. Under Article 323(2) of the Environmental Protection Law¹⁵, where unlawful impact on the environment poses a risk of damage or causes damage to the environment as a common good, an action seeking the restoration of legality¹⁶, the adoption of preventive measures, or – if restoration is impossible or excessively difficult – the cessation of the harmful conduct may be brought by the State Treasury, a local government unit, or an environmental organisation.

¹¹ Article 5, Article 31, Article 68(4), Article 74 and Article 86.

¹² ZOLL F., POŁUDNIAK-GIERZ K., BAŃCZYK W., *Towards an Environment-friendly Law of Obligations*, in *The Future of European Private Law*, ed. JANSSEN A., LEHMANN M., SCHULZE R., Baden-Baden 2023, p. 195-199.

¹³ IWAŃSKA B., *Koncepcja „skargi zbiorowej” w prawie ochrony środowiska (The concept of ‘collective complaint’ in environmental law)*, Warszawa 2013, p. 87-141.

¹⁴ *Ustawa z dnia 27 kwietnia 2001 r. – Prawo ochrony środowiska, Dziennik Ustaw z 2025 r. pozycja 647, ze zmianami* (hereinafter: the Environmental Protection Law).

¹⁵ Similar regulation enabling environmental organisation to sue when the damage is caused to the environment as a common good may be found in Article 57(2) of the GMO Act of 2001 (*ustawa z dnia 22 czerwca 2001 r. o mikroorganizmach i organizmach genetycznie modyfikowanych, Dziennik Ustaw z 2022 r. pozycja 546*). In Article 105(3) of the Atomic Law (*ustawa z dnia 29 listopada 2000 roku – Prawo atomowe, Dziennik Ustaw z 2024 r. pozycja 1277, ze zmianami*) it is the minister responsible for climate issues who may pursue the claim for compensation for environmental damage.

¹⁶ This is not the same as restoration of the previous state (see Article 363(1) of the Polish Civil Code) and may lead to the amount of damage being exceeded but is considered as constitutionally justified (under already mentioned Article 86 of the Constitution) – IWAŃSKA B., *Koncepcja „skargi zbiorowej” w prawie ochrony środowiska*, p. 609-610.

Given the often-noted institutional links between the State Treasury or a local government unit and the entity unlawfully affecting the environment, the most significant feature is the standing of environmental organisations to litigate on behalf of the environment. Under Article 3(16) of the Environmental Protection Law, an environmental organisation is a social organisation whose statutory purpose is environmental protection. Such an organisation – provided it has the capacity to sue and be sued – may bring claims before the ordinary civil courts in the interest of the environment as a common good. Importantly, an action under Article 323(2) of the Environmental Protection Law is brought by an environmental organisation not before an administrative court but before a civil court, which may give rise to several procedural difficulties (related to the specific nature of civil procedure). For example, the burden of proof lies with the claimant rather than the court (a poorly represented organisation may therefore lose despite the objective merits of its claim). Furthermore, fundamental doubts arise as to whether more than one organisation may pursue protection of the environment before the courts (before different courts?), and what effect one set of proceedings has on another seeking the same relief – raising issues of identity of claims and, potentially, *res iudicata*.

It bears repeating that although Polish law does not grant *actio popularis* (general standing) to everyone to litigate “on behalf of nature,” it does vest such standing in environmental organisations (as representatives of society). Moreover, it does so independently of whose property rights are affected by the harmful conduct. It is therefore irrelevant, for instance, that a river under Polish law belongs to the State Treasury¹⁷ (whose *statio fisci* may be uninterested in seeking protection). Crucially, an environmental organisation (like the State Treasury or a local government unit) cannot pursue monetary relief (contrary to the general rule of civil law in Article 363 (1) of the Polish Civil Code, under which the injured party may choose between restitution in kind and damages)¹⁸. This design

¹⁷ Article 211(2) of Water Law of 2017 (*ustawa z dnia 20 lipca 2017 r. – Prawo wodne, Dziennik Ustaw z 2025 r. pozycja 960, ze zmianami*; hereinafter: Water Law).

¹⁸ IWAŃSKA B., *Koncepcja „skargi zbiorowej” w prawie ochrony środowiska*, p. 610 f.

limits – as Stone diagnosed¹⁹ – the risk of corrupting environmental organisations through damages paid directly into their assets (circumventing the ‘injured’ environment). Notably, an organisation may seek interim measures, such as orders to adopt preventive steps to avert aggravation of harm or to suspend the harmful activity pending adjudication²⁰. The environmental organisation acts as a representative of society concerned with the environment – the protected interest is not the organisation’s own, but the environment (nature or its elements) as a common good. Procedural shortcomings – including the absence of a bespoke procedure²¹ – call for legislative attention, but they do not discredit the underlying solution. In response, then, to a layperson’s question whether a river can currently be represented in court in Poland in the event of its contamination – the answer is yes. ‘On behalf of’ the river, beyond the State Treasury or a local government unit, an environmental organisation may bring the claim, because – again – the environment is a common good (transcending individual and temporal boundaries, as it concerns future generations).

¹⁹ STONE C. D., *Should Trees Have Standing? – Towards Legal Rights for Natural Objects*, p. 462-463.

²⁰ A famous example of interim relief granted is the ruling (appealed and still not final) suspending logging in the Białowieża Forest in connection with a ruling by the Court of Justice of the European Union (Judgment of the Court – Grand Chamber of 17 April 2018 – European Commission v Republic of Poland, Case C-441/17) and an action brought by an environmental organisation under Article 323 of the Environmental Protection Law – decision of Regional Court in Warsaw of 8 November 2021 (*postanowienie Sądu Okręgowego w Warszawie — Wydziału IV Cywilnego z 8 XI 2021 r., IV C 264/18*, <https://orzeczenia.warszawa.so.gov.pl/> - date of entry 14.04.2026).

²¹ An additional difficulty for environmental organisations may be the fact that cases against entrepreneurs for ceasing environmental violations and restoring the environment to its previous state, or for repairing the damage caused, and for prohibiting or restricting activities that threaten the environment, are commercial cases to which the special provisions on commercial proceedings of the Polish Code of Civil Procedure of 1964 apply (*tytuł VII dział IIA ustawy z dnia 17 listopada 1954 roku - Kodeks postępowania cywilnego, Dziennik Ustaw z 2024 roku pozycja 1568 ze zmianami*).

3. *The Right to Live in an Environment Free from Pollution (or the right to clean environment)*

Polish law affords special protection to personal rights. Under Article 23 of the Polish Civil Code, personal rights – such as health, freedom, dignity, freedom of conscience, name or pseudonym, image, privacy of correspondence, inviolability of home, and scientific, artistic, inventive or improvement achievements – are protected independently of other legal provisions. Under Article 24 of the Polish Civil Code, a person whose personal right is threatened by another’s act may demand cessation of that act unless it is lawful; if the infringement has occurred, the person may request measures necessary to remove its effects, including an appropriate public statement. The person may also seek compensation of non-pecuniary loss (pain and suffering) or payment of a sum for a specified social purpose, and if pecuniary loss has been suffered, compensation under general rules. The catalogue of personal rights is open-ended²², but new rights should be recognized cautiously (civil courts play a key role in this matter but the case law is unfortunately inconsistent)²³. There is no doubt, for example, that the “cult of the memory of a deceased person” (i.e. respect for the memory of the deceased)²⁴ constitutes a personal right; by contrast, it remains debatable whether there exists a distinct personal right to ‘ties with a close person’ (or ‘family bonds’)²⁵. Faced with state inaction

²² It does not mean though that every immaterial interest can be protected as a personal right - ZOLL F., POŁUDNIAK-GIERZ K., BAŃCZYK W., *Towards an Environment-friendly Law of Obligations*, cit., p. 200-201.

²³ See among many – *uchwała Sądu Najwyższego z dnia 19 listopada 2010 r.*, III CZP 79/10, *Orzecznictwo Sądu Najwyższego Izby Cywilnej* 2011, numer 4, pozycja 41, strona 39.

²⁴ See among many – *wyroki Sądu Najwyższego* (judgements of the Polish Supreme Court of) *z dnia: 20 września 2007 r.*, II CSK 237/07, *Orzecznictwo Sądów Powszechnych* 2008, numer 9, pozycja 94, strona 632 and 9 lutego 2011, V CSK 256/10, *Orzecznictwo Sądu Najwyższego Izby Cywilnej – Zbiór dodatkowy* 2011 numer C, pozycja 57, strona 31. ZOLL F., BUJAŁSKI M., *A human being, dignity, consciousness and private law (a thought-provoking essay on legal subjectivity)*, in *Človek v práve. A human in law, Medzinárodná vedecká konferencia International Scientific Conference Smolenice 21. – 22. 9. 2023*, JURČOVÁ M. (ed.), HLUŠÁK M. (ed.), Bratislava 2024, p. 204.

²⁵ See three judgements of Polish Supreme Court recognizing this personal right (*uchwały składu siedmiu sędziów Sądu Najwyższego z dnia 27.03.2018 r.*, III CZP 36/17,

against smog (or at least lack of a consistent state policy in this area), citizens began seeking judicial protection – not so much for life and health as for a ‘right to live in an environment free from pollution’ (or right to live in a clean environment)²⁶. In its resolution of 28 May 2021 (III CZP 27/20)²⁷, the Polish Supreme Court held that a right to live in a clean environment is not a personal right²⁸. What is protected as personal rights are health, liberty, and privacy, which may indeed be threatened by breaches of statutory air-quality standards.

Leaving air pollution aside, it should be noted that recognising such a personal right would enable any individual who considered their right infringed to bring claims like, or even broader than, those available under Article 323 of the Environmental Protection Law (broader because including monetary claims). Yet the core interest at stake is not that of an individual, but the common good –

Orzecznictwo Sądu Najwyższego Izby Cywilnej 2018, numer 11, pozycja 103; III CZP 60/17, *Orzecznictwo Sądu Najwyższego Izby Cywilnej* 2018, numer 9, poz. 83; III CZP 69/17, *Orzecznictwo Sądu Najwyższego Izby Cywilnej* 2018, numer 11, poz. 104). See also arguments against recognizing such personal right: GRZESZAK T., *Dobro osobiste jako dobro zindywidualizowane*, p. 896-929 and PAŁKA K., *Kreowanie dóbr osobistych*, p. 1024-1033, (both articles) in *Experientia Docet. Księga jubileuszowa ofiarowana Pani Profesor Elżbiecie Traple*, ed. KOSTAŃSKI P., PODRECKI P., TARGOSZ T., Warszawa 2017.

²⁶ WIŚNIEWSKA K., Poland: *The Right To a Clean Environment as a Personal Interest – Seeking Distinction Between the Personal Interests and the Common Good*, in *Osteuropa Recht*, 2, 2022, p. 272-273.

²⁷ *Orzecznictwo Sądu Najwyższego Izby Cywilnej* 2021, numer 11, pozycja 72, strona 17.

²⁸ However, the Supreme Court's ruling is interpreted in a convoluted (or overly far-reaching) manner in judicial practice. For example, in a decision of the Regional Court in Warsaw of 30 July 2021 (appealed and still not final), it was held that "even if it were to be considered that the right to enjoy the natural environment does not constitute a personal right, a violation or threat of violation of this right results or may result in a violation of the plaintiffs' personal rights in the form of their health or right to leisure. As indicated in the case law, the right to leisure and peace constitutes a personal right, as human health depends on it." Firstly, distinguishing the right to leisure (or even wider: peace) as a personal right is questionable. Secondly, linking logging with the violation of the health or life of individuals should be done with great caution and not automatically (*postanowienie Sądu Okręgowego w Warszawie z dnia 30 lipca 2021 r.*, III C 1697/19, <https://orzeczenia.warszawa.so.gov.pl/> - date of entry 14.04.2026). The right to leisure and peace was recognized by the Appellate Court in Katowice in its ruling of 18 April 2014 (*wyrok Sądu Apelacyjnego w Katowicach z dnia 18 czerwca 2014 r.*, I ACa 213/14, <https://orzeczenia.katowice.sa.gov.pl/> - date of entry - 14.04.2026).

the environment. Using personal-rights protection to safeguard the environment amounts to repurposing a tool designed for different situations²⁹. It is attractive in practice but systemically undesirable, as it could i.a. yield a multitude of conflicting judgments³⁰. If the prospect of numerous environmental organisations pursuing parallel actions under Article 323(2) of the Environmental Protection Law already raises concerns, the spectre of unlimited individual suits premised on alleged infringements of a personal right – when in substance the aim is to protect the common good – should raise even greater ones³¹.

4. *Legal Personality of the Oder River*

A bill is currently before the Polish Parliament that would grant legal personality to the Oder River³². It was drafted in response to the 2022 environmental disaster on the Oder³³ and one of the principal reasons for this bill invoked by the drafters is that ‘existing

²⁹ WIŚNIEWSKA K., Poland: *The Right To a Clean Environment as a Personal Interest – Seeking Distinction Between the Personal Interests and the Common Good*, cit., p. 283.

³⁰ ZOLL F., POŁUDNIAK-GIERZ K., BAŃCZYK W., *Towards an Environment-friendly Law of Obligations*, cit., p. 200-205.

³¹ This is not a new problem in the context of personal rights protection. In the case of behaviour directed against a group, there have already been rulings on when an attack against a group may lead to a violation of individual personal rights. WIŚNIEWSKA K., Poland: *The Right To a Clean Environment as a Personal Interest – Seeking Distinction Between the Personal Interests and the Common Good*, cit., p. 275-276 and PAŁKA K., KUĆKA M., *Ochrona przed mową nienawiści – powództwo cywilne czy akt oskarżenia? (Protection against hate speech – civil action or criminal prosecution?)*, in WIERUSZEWSKI R., WYRZYKOWSKI M., BODNAR A., GLISZCZYŃSKA-GRABIAS A., *Mowa nienawiści a wolność słowa. Aspekty prawne i społeczne (Hate speech and freedom of speech. Legal and social aspects)*, Warszawa 2010, p. 42-54.

³² Pursuant to Article 3 (1) of the draft bill (version amended on 13.01.2026) the Oder River has a legal personality of an environmental nature (<https://osobaodra.pl/wp-content/uploads/2026/01/Draft-bill-on-recognizing-the-legal-personality-of-the-Oder-River-including-self-amendment-13-01-2026.pdf> - date of entry 14.04.2026). On the one hand the Oder has legal capacity and the capacity to perform legal acts within the scope specified in the bill but on the other hand in matters not regulated by this bill the provisions of the Civil Code concerning legal persons shall apply accordingly.

³³ *An EU analysis of the ecological disaster in the Oder River of 2022*, <https://publications.jrc.ec.europa.eu/repository/handle/JRC132271> (date of entry: 14.04.2026).

protection mechanisms have proved ineffective'^{34, 35}. Under the bill, the Oder is a legal person (for both public and private law purposes). It is not a state legal person, despite being financed from the state budget³⁶.

The Oder – whose sources lie in the Czech Republic, and which flows through Poland and Germany (its basin spans these three countries, with the longest section in Poland and along the Polish-German border) – is the third largest river flowing through Poland, after the Vistula and the Warta. Nonetheless, granting it legal personality must consider the international implications of such regulation (for the riparian states)³⁷. The definition of the Oder in the draft bill is very broad, which makes it difficult to determine (in terms of clear boundaries) which elements of nature constitute the bearer of legal personality. According to the draft bill the Oder River is '*an integral ecosystem comprising: (a) the Oder River within the borders of the Republic of Poland as a single geographical, biological, and hydrological unit, including: flowing surface waters, their quantity and quality, bottom sediments, aquifers, and tributary supply, – the riverbed, banks, and floodplains, organisms living in the river, including fauna and flora species, (b) the Oder River valley as a geographical natural unit supporting the func-*

³⁴ The draft bill includes an amendment of the Polish Civil Code by adding these provisions: 'an entity of an environmental nature established on the basis of a separate act may also be a legal person' and 'environmental legal entities shall operate solely for the purpose of protecting the natural environment on the terms specified in separate acts'.

³⁵ One of the co-authors of the bill and a supporter of granting legal personality to alleged entities is Professor Jerzy Bieluk, who was the first in Poland to publish a text on this subject even before the ecological disaster on the Oder River – BIELUK J., *River as a Legal Person*, in *Studia Iuridica Lublinensia* vol. XXIX, 2, 2020, p. 11-23 (<http://dx.doi.org/10.17951/sil.2020.29.2.11-23> - date of entry 14.04.2026).

³⁶ According to Article 21 of the bill 'The Oder River Fund shall be established as a state special-purpose fund. The Fund shall be financed from: (1) environmental fees; (2) penalties for violations of water law relating to the Oder River; (3) subsidies from the National Fund for Environmental Protection and Water Management; (4) funds from the European Union.' The authors also include – controversial – 'a compensatory contribution' to the River Fund paid by 'companies using the waters of the Oder River'.

³⁷ Pursuant to Article 3 (4) of the (amended version of) the bill 'The Oder River has its registered office in Wrocław'. Contrary to the drafters' expectations, the formal designation of the registered office of a legal person "of an environmental nature" does not resolve the doubts regarding its legal form or settle the qualifying issues from the perspective of private international law.

tioning of the river, including areas related to its natural hydrological, natural and biological processes, including floodplains, wetlands, and coastal ecosystems'³⁸. Polish law presently protects the Oder primarily through public-law provisions (notably the Water Law of 2017 and the Environmental Protection Law). Several aspects of the draft bill deserve closer attention.

First, the draft bill distinguishes between three bodies of the Oder River: the Committee of Representatives (a decision-making body), the Management Board (an executive body) and the Scientific Committee (an advisory body). The bill provides that the Committee of Representatives is composed of 15 members, including such vague categories as 'the most important user groups of the Oder River' or 'representatives of the legislative initiative to recognize the legal personality of the Oder River'. The Management Board consists of three persons appointed by the Committee of Representatives for a period of four years. The river is represented by two members of the Management Board acting jointly. The tasks of the Management Board include, in particular: (1) representing the Oder River in relations with third parties, (2) implementing the resolutions of the Committee of Representatives, (3) managing the resources of the Oder River, (4) managing the Oder River Fund, (5) submitting annual reports on its activities. Moreover, the bill provides that the Management Board: represents the Oder River in legal transactions and before state authorities and courts, but most importantly represents the river in administrative and court proceedings, in particular: (1) acting on behalf of the river in administrative proceedings concerning water law permits, (2) it lodges appeals and complaints in cases violating the rights of the river, (3) initiates proceedings in matters concerning the protection of the river's rights, (4) cooperates with law enforcement authorities in cases of crimes against the aquatic environment. Still the Committee's tasks include making decisions on property matters exceeding the scope of 'ordinary management' and giving consent to actions that may significantly affect the rights of the river. The division of responsibilities between the bodies is not entirely clear,

³⁸ As for systemic inconsistencies in the definition of the Oder River - KUĆKA M., *Czy rzekom należy przyznać osobowość prawną?*, cit., p. 313.

and given the collegial nature of the decision-making body, this may lead to deadlock. This naturally raises the question of why establishing a complex structure of bodies is supposed to protect the river's interests better than an environmental organisation acting on its behalf (cf. Article 323(2) of the Environmental Protection Law)³⁹.

Second, the Oder would be able to acquire property (ownership and other proprietary rights) from various sources – not only through inheritance, compensation, legacy, or donation. Although the Oder would be barred from conducting business activity, it would not be prevented from entering legal transactions that could lead to acquisitions – for instance, of real estate located by other rivers⁴⁰. This has little to do with the Oder's legal or procedural capacity to vindicate its listed rights (e.g., the right to exist or to flow freely). At the same time, the bill provides that the Oder's resources would remain the state's property. The river would exercise (exclusively?) fiduciary management over these resources. Given that, financially speaking, Oder is to rely largely on the state, this once again raises questions about the point of its legal separation.

Third, under the bill in the event of a violation of the rights of the Oder River or damage to its ecosystem (a distinction that is difficult to justify conceptually), the following entities shall be entitled to bring an action on behalf of the river: (1) the Management Board; (2) environmental organizations entered in the register kept by the minister responsible for the environment, operating for at least 3 years⁴¹; (3) local government units in whose area part of the Oder River is located, (4) the public prosecutor; (5) the minister re-

³⁹ KUĆKA M., *Czy rzekom należy przyznać osobowość prawną?*, cit., p. 330. For these very reasons, the State Council for Nature Conservation, in its opinion on the draft bill (which incorporates the self-amendment), proposes that, rather than granting legal personality to the river, the institution of the Nature Ombudsman be utilised as a more “appropriate” and “constitutionally compatible” alternative. See – <https://orka.sejm.gov.pl/Druki10ka.nsf/0/383EA4B86FA7FE3FC1258DB0004C3242/%24File/2082-008.pdf> (date of entry: 14.04.2026).

⁴⁰ KUĆKA M., *Czy rzekom należy przyznać osobowość prawną?*, cit., p. 317.

⁴¹ This restriction is difficult to reconcile with the coherence of the system and the aforementioned Article 323 (2) of the Environmental Protection Law, which does not impose similar restrictions on environmental organisations.

sponsible for the environment; (6) the authorities of the State Water Management Authority⁴²; (7) a group of at least 100 natural persons residing in the Oder River basin. In the latter case – that of residents’ groups – the question arises once again as to the point of granting a group active legal standing in a situation where an environmental organisation (already has such standing under current legislation, and to a greater extent than proposed) and Oder already possess it⁴³.

Fourth, the drafters of the bill have abandoned their original proposal to grant the river legislative powers regarding the rights and obligations of those using its resources (which were, at that time, still its own). The current proposal provides for the river to play a significant role in administrative proceedings. Pursuant to the draft bill the Oder River is a party to administrative proceedings in matters that may affect its condition, flow, water quality, or the integrity of the river ecosystem. This includes, in particular: (1) water law permits concerning the Oder River; (2) building permits for structures in the river's area of influence; (3) decisions on environmental conditions; (4) spatial development plans for areas adjacent to the river; (5) concessions for the exploration and extraction of minerals from the river bed; (6) permits for discharging sewage into the river. The draft statute grants extensive powers to the governing body, allowing it to challenge administrative decisions even after the expiry of the statutory time limits, where such decisions infringe the rights of the river as defined in the proposed legislation. Any conflicts between the “rights of the river” and “other public interests” are to be adjudicated by a specialised chamber of the Voivodeship Administrative Court in Warsaw – a newly established Water Court – in which, in addition to professional judges,

⁴² Polish Waters (Państwowe Gospodarstwo Wodne Wody Polskie) has been the principal authority responsible for national water management since 1 January 2018 (according to the Water Law of 2017). Polish Waters is a state legal entity that exercises ownership rights with respect to waters owned by the State Treasury, assesses and collects fees for water services, and issues administrative decisions, including water law permits. It also performs the function of a regulatory authority, with the aim of protecting residents against unjustified increases in the prices of water supply and wastewater services.

⁴³ KUĆKA M., *Czy rzekom należy przyznać osobowość prawną?*, cit., p. 321.

lay assessors with expertise in the protection of aquatic environments are to serve.

Fifth, the Oder would bear no obligations: the regulation seeks to strengthen protection while excluding liability – for instance, for flooding or drought⁴⁴. The draft bill does not impose any obligations on the river. Consequently, the costs of protecting against drought or flooding are borne by other entities, which – firstly – is not reflected in the way the river’s activities are funded, and – secondly – once again calls into question the granting of legal personality to the river. The concern here is not only whether partial legal subjectivity is justified, but also how, for example, contractual liability would be addressed: if the Oder were to inherit real estate located along another river (e.g. the Vistula) and lease it, would it incur liability under that lease (naturally through its governing body)?⁴⁵.

Sixth, according to the draft bill – *‘the Oder River has the right to: (1) exist as an integral ecosystem, (2) free flow in accordance with natural hydrological processes, (3) natural evolution as an ecosystem and to perform functions necessary within that ecosystem, (4) preserving its native biodiversity, (5) regenerate its resources, (6) feeding and being fed by aquifers and tributaries, (7) protection from unauthorized interference, in particular from pollution, (8) participation in administrative proceedings concerning its condition, flow, water quality, or the integrity of the river ecosystem.’* The draft law is silent on the content and scope of these rights, which may hinder, if not prevent, their protection⁴⁶. Such regulation may be considered inconsistent with constitutional standards – the principle of legal certainty or the principle of proportionality.

⁴⁴ The submitted version of the draft bill stated that *‘the Oder shall not be liable to any person, group, government, local government unit, or other entity for damage resulting from the exercise of its natural functions, including inter alia natural flow, flooding, or drought. While preserving the Oder’s fundamental rights, the government, local government units, citizens, and other entities may take measures to protect against risks arising from the river’s natural functions’*.

⁴⁵ KUĆKA M., *Czy rzekom należy przyznać osobowość prawną?*, cit., p. 322.

⁴⁶ KUĆKA M., *Czy rzekom należy przyznać osobowość prawną?*, cit., p. 315-316.

The bill – after a significant amendment – is currently being examined once again by two parliamentary committees – Maritime Economy and Inland Navigation; and Environmental Protection, Natural Resources and Forestry (the lower house of parliament voted on 28 of March 2026 against rejecting the bill at its first reading). On 8 January 2026, the Parliament’s Bureau of Expertise and Regulatory Impact Assessment issued an opinion expressing a negative assessment of the bill’s legal, social, economic, and financial ramifications (it was a version before the amendment of 13 of January 2026)⁴⁷. So far the draft bill has been criticised by the Supreme Court, the Prosecutor General, the State Council for Nature Conservation, the Association of Polish Counties and the Association of Polish Provinces.

Finally, I would like to point out that when considering legal personhood for Oder or any other element of nature I am disregarding the use of this construct in any sense other than the pragmatic (functional) one⁴⁸. The point is to answer the question of whether granting legal personality – even partial – will bring practical benefits and solve specific problems (e.g. will it increase the protection of the environment and its elements, including facilitating the prevention of its pollution). If a river or any other element of nature does not perform legal acts and does not bear responsibility, granting them legal capacity is pointless. If, on the other hand, they do perform these legal acts – obviously through their human representatives – at least up to the point when it will be represented by artificial agents – the question is whether this will be pragmatically justified. It is worth repeating: what arguments are there in favour

⁴⁷Biuro Ekspertyz i Oceny Skutków Regulacji Kancelarii Sejmu, *Opinia w sprawie oceny skutków regulacji poselskiego projektu ustawy o uznaniu osobowości prawnej Odry* (druk sejmowy nr 2082), BEOS-951/25 <https://orka.sejm.gov.pl/Druki10ka.nsf/0/A5C56CEAABAD12D0C1258D7900599DFF/%24File/2082-002.pdf> (date of entry: 14.04.2026). The opinion was prepared by OLEJNICZAK D. (I-III), KUPIS D., TAZUSZEL A. (IV, XI.5), TERESZKIEWICZ P. (V.1, X, XI.1.1), WOJTYCZEK K. (V.2, XI.1.2), GWIAZDOWICZ M. (VI, VII, X, XI.2, XI.3) and MARCHEWKA-BARTKOWIAK K. (VIII, X, XI.4).

⁴⁸ KUĆKA M., *Czy rzekom należy przyznać osobowość prawną?*, cit., p. 325-331 and but in context of attributing legal personhood to AI – PAŁKA K., *Dyskusje na temat przyznania sztucznej inteligencji podmiotowości prawnej* (*Discussions on granting legal personality to artificial intelligence*), in *Kwartalnik Prawa Prywatnego 2*, 2025, p. 272.

of the Oder (or any other Polish river) being able to inherit property from anyone?

5. Conclusions

NGOs that prepared reports following the 2022 Oder disaster identified numerous failings that contributed to the event⁴⁹. It was not so much a lack of regulation as a lack of effective enforcement and monitoring procedures that allowed excessive pollution and, consequently, algal bloom (and ecological catastrophe in the end). Notably, none of these NGOs advocated for altering private law or deploying it to improve protection against future (sadly, predicted) river disasters. It was within public law and its instruments that these organisations (potentially) saw effective environmental protection.

Finally, under Poland's Nature Conservation Act of 2004⁵⁰, one of the fundamental forms of protection is the national park⁵¹. A national park covers an area of at least 1,000 hectares distinguished by special natural, scientific, social, cultural, and educational values, where the entirety of nature and landscape values is protected⁵². A national park is established to preserve biodiversity, resources, formations and components of inanimate nature, and landscape values; to restore proper conditions of resources and components of nature; and to recreate degraded habitats of plants, animals, and fungi⁵³. A national park is a state legal person⁵⁴. Thus, nature and its elements can already – through the construct of legal

⁴⁹ Among others – CLIENTEARTH, *Biała Księga Polskich Rzek (White Paper on Polish Rivers)* <https://www.clientearth.pl/media/z1djojf4/2023-03-21-biala-ksiega-polskich-rzek-1.pdf> (date of entry: 14.04.2026) and WWF, *Rivers flowing with salt*, <https://www.wwf.pl/rzeki-sola-plynace> (date of entry: 14.04.2026).

⁵⁰ *Ustawa z dnia 16 kwietnia 2004 r. o ochronie przyrody, Dziennik Ustaw z 2026 r. pozycja 13* (hereinafter – Nature Conservation Act).

⁵¹ Article 6(1) of the Nature Conservation Act.

⁵² Article 8(1) of the Nature Conservation Act.

⁵³ Article 8(2) of the Nature Conservation Act.

⁵⁴ Article 8a (1) of the Nature Conservation Act.

personality – be protected via national parks⁵⁵. Unfortunately, but predictably, the creation of new protected areas does not occur without controversy. In November 2025, the President of the Republic of Poland vetoed the Act of 17 October 2025 establishing the Lower Oder Valley National Park⁵⁶, citing fears that it would ‘block the region’s economic development, where the Oder is a key source of investment potential,’ and that it would ‘impose significant restrictions on residents without broad consultation and expert debate’⁵⁷. That the state possesses ready-made or familiar instruments for environmental (e.g., river) protection does not guarantee their use. It is of utter importance that the state remembers that “*The Republic of Poland shall (...) ensure the protection of the environment, guided by the principle of sustainable development*”⁵⁸. It certainly should not argue in favour of turning to civil-law solutions conceived for entirely different interests – individual rather than universal. The Oder, the Vistula, the Warta and their ecosystems or any other elements of nature remain common goods and should be protected as such, without conferring legal personality upon them or stretching the protection of personal rights. Legisla-

⁵⁵ Polish government has recently introduced *Białowieża Forest World Heritage Site Management Plan (Polish part)* - <https://www.gov.pl/web/klimat/unesco-puszcza-bialowieska-dokumenty> (date of entry: 14.04.2026). The plan fulfils the obligations of the state arising from the inscription of the Białowieża Forest on the World Heritage List, which is based on the Convention concerning the Protection of the World Cultural and Natural Heritage, adopted in Paris on November 16, 1972 and ratified by Poland on June 29, 1976. The document sets out a framework for all activities in the area of the Białowieża Forest until 2050. A bill on the UNESCO World Heritage Site of Białowieża Forest, recognising Białowieża Forest as a state legal entity, was also submitted to the Polish Parliament (upper house) in 2024. However, due to the Polish government's presentation of the aforementioned plan, the bill has stalled.

⁵⁶ See <https://www.sejm.gov.pl/sejm10.nsf/PrzebiegProc.xsp?id=961ACC9D109818E8C1258D0E0042DBE9> (last entry: 14.04.2026) and <https://www.gov.pl/web/climate/the-act-on-the-establishment-of-the-lower-oder-valley-national-park-was-passed-by-the-sejm> (date of entry: 14.04.2026).

⁵⁷ See <https://www.prezydent.pl/prawo/ustawy-zawetowane/prezydent-karol-nawrocki-zawetowal-cztery-ustawy,109827> (date of entry: 14.04.2026). Detailed justification of President’s veto – <https://orka.sejm.gov.pl/Druki10ka.nsf/0/DBD5E1A247CD25F1C1258D45006B1A27/%24File/1957.pdf> (date of entry: 14.04.2026).

⁵⁸ Article 5 of the Polish Constitution.

tors should focus more attention on regulating the procedure for pursuing claims referred to in Article 323(2) of the Environmental Protection Law so that it is clear what happens when more than one environmental organisation files a claim or what impact the conclusion of proceedings against one of several environmental organisations has on the possibility of pursuing environmental protection as a common good. Furthermore, consideration should be given to whether referring environmental protection cases to commercial courts (within the civil courts) with a restrictive procedure is justified from the perspective of the objective to be achieved. Certainly, the tendency to use private law vehicles in cases where public law does not function properly or effectively will continue or intensify (which is facilitated by the unstable case law of civil courts in cases concerning the protection of personal rights). The implementation of the Białowieża Forest World Heritage Site Management Plan (Polish part) will most probably provide knowledge on how to achieve the best results using various nature conservation measures.

In conclusion, I would like to return to Stone's concept (elements) of legal personality (for the Environment) and compare it with Polish regulations, particularly those contained in Article 323 (2) of the Environmental Protection Law. First, Stone's requirement that a natural object be able to 'sue in its own name and interest' is not fulfilled. Polish law allows (environmental) NGOs to bring actions in defence of the environment, but the claim is still formally brought in the organisation's name, not in the name of the natural object itself. The environment therefore does not have independent procedural standing. However, if the environment had a right to sue, still it would have to be exercised by its representative (such as the environmental NGO). Second, the requirement that damages be calculated regarding the object's own interests – beyond commercial or economic value – is partially fulfilled. Article 323 (2) of the Environmental Protection Law allows actions aimed at preventing or remedying environmental harm, and the concept of 'environmental damage' under Polish law includes ecological value and non-economic harms. However, this remains an assessment made by authorities or courts, not an expression of the object's own legal interest. Third, Stone's condition that judgments be applied

‘for the benefit of the object’ is partially realised. Measures ordered under Article 323 (2) of the Environmental Protection Law are oriented toward restoration, prevention, or mitigation of harm, meaning that the ultimate beneficiary is the natural environment (deemed as a common good). Yet this is still pursued through the legal interests of society or NGOs, not the rights of the natural object as such. In sum, Polish law does not grant nature legal personhood, but it incorporates functional elements of Stone’s framework through mechanisms allowing representation by NGOs and through remedies aimed at ecological restoration rather than compensation in economic terms.

Mediation in International Child Abduction Cases in the Brussels II ter Regulation

María González Marimón

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1. Introduction

International child abduction is a paradigmatic example of the complexity of cross-border cases involving children, in which the principle of the best interests of the child must prevail,¹ and which

¹ BORRÁS A., *EL «interés del menor» como factor de progreso y unificación del Derecho internacional privado (discurs d'ingrés)*, in *Acadèmia de jurisprudència i legislació de Catalunya*, 1993, p. 14; HAMMJE P., *L'intérêt de l'enfant face aux sources internationales du droit international privé*, in NOËLLE M., MAYER P. (eds), *Le droit international privé: esprit et méthodes. Mélanges en l'honneur de Paul Lagarde*, Paris, 2005, pp. 371–373; HERRANZ BALLESTEROS M., *El interés del menor en los Convenios de La Haya de Derecho Internacional Privado*, Madrid, 2004, p. 118; BIAGIONI G., CARPANETO L., *Children under*

also involve multifaceted realities. This is especially true at a time when there are calls for a redefinition of the regulatory framework for international child abduction and a search for clarification of its sources and their interaction.²

The legal response to international child abduction in the European Union (hereinafter EU) presents a complex landscape of multiple legal sources that seek to discourage this phenomenon. It is mainly a tripartite legal framework consisting of the interplay between Council Regulation (EU) 2019/1111 of 25 June 2019 on jurisdiction, the recognition and enforcement of decisions in matrimonial matters and the matters of parental responsibility, and on international child abduction (recast)³ (hereinafter Brussels II ter Regulation or 2019/1111 Regulation) and the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction (hereinafter the 1980 Hague Convention),⁴ which is supplemented by the timely interaction of the Hague Convention of 19 October

Brussels II ter Regulation, in *Yearbook of Private International Law*, v. XXII 2020-2021, 2021, pp. 139-154; CARPANETO L., *Impact of the Best Interests of the Child on the Brussels II ter Regulation*, in BERGAMINI E., RAGNI, C. (eds.), *Fundamental Rights and Best Interests of the Child in Transnational Families*, Cambridge – Antwerp – Chicago, 2019, pp. 265-286; GONZÁLEZ MARIMÓN M., *The Child's Best Interests in International Jurisdiction Under the Brussels IIter Regulation*, in HEIDERHOFF B., ARNOLD S. (eds.), in *Children in Migration and International Family Law. The Child's Best Interests Principle at the Interface of Migration Law and Family Law*, Cham, 2025, pp. 31-58.

² On the evolution of the system of sources in the field of international child abduction, see, among others, BORRÁS A., *La sustracción internacional de menores: del Convenio de La Haya de 1980 al Reglamento Bruselas II ter*, in PÉREZ VERA E. (ed.), *El Derecho Internacional privado entre la tradición y la innovación. Libro homenaje al Profesor Doctor José María Espinar Vicente*, Madrid, 2020, pp. 159-174.

³ OJ L 178, 2.7.2019. For an overall analysis of the main new features of the Brussels II ter Regulation, inter alia, BORRÁS A., *Bruselas II, Bruselas II bis, Bruselas II ter...*, in *Revista Electrónica de Estudios Internacionales*, n. 38, 2019, pp. 1-5; HERRANZ BALLESTEROS M., *El Reglamento (UE) 2019/1111 relativo a la competencia, el reconocimiento y la ejecución de resoluciones en materia matrimonial y de responsabilidad parental y sobre la sustracción internacional de menores (versión refundida): principales novedades*, in *Revista Española de Derecho Internacional*, v. 73, n. 2, pp. 229-260; CORNELOUP S., KRUGER T., *Le Règlement 2019/1111, Bruxelles II: la protection des enfants gagne du terrain*, in *Revue Critique de Droit International Privé*, n. 2, 2020, pp. 215-245.

⁴ For a recent general and critical study on the 1980 Hague Convention see CELIS AGUILAR M., *Sustracción internacional de menores: estudio jurisprudencial, doctrinal y crítico del Convenio de La Haya de 1980: aspectos clave y soluciones a los problemas de aplicación*, Madrid, 2023.

1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Cooperation in Respect of Parental Responsibility and Measures for the Protection of Children (hereinafter the 1996 Hague Convention).

This regulatory framework was reformed with the adoption of the Brussels II ter Regulation, which entered into force on 1 August 2022,⁵ replacing Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000⁶ (hereinafter Brussels II bis Regulation or 2201/2003 Regulation).

The EU legislator opted for a unique approach to regulating international child abduction and combining these legal texts: the Brussels II regime refers to the 1980 Hague Convention, but with certain modifications.⁷ These changes mainly concern the procedural aspects of the 1980 Hague Convention return system.

In fact, this mechanism for the return of the child is the most problematic element of both the 1980 Hague Convention and the Brussels Regime.⁸ While the 1980 Hague Convention prioritises the return of the child, it contains a system of exceptions to the child's return in specific cases in order to strike a balance between the return and the child's best interests.⁹ Conversely, the Brussels II bis Regulation reinforced the immediate return of the child and introduced certain modifications to limit the exceptions to the return.

⁵ Art. 100.1 del Reglamento Bruselas II ter.

⁶ OJL 338 of 23.12.2003.

⁷ For a study of this relationship see MCELEAVY P., *The new Child Abduction Regime in the European Union: Symbolic Relationship or Forced Partnership?*, in *JPIL*, n.1, 2005, p. 5.

⁸ There are many academic works regarding the return of the child. In Spain, see ie HERRANZ BALLESTEROS M., *El retorno seguro del menor: ¿puente entre la excepción de grave riesgo y la obligación de devolución?*, in *Bitácora Millennium DIPr.*, n. 19 20241, 1–43; RODRÍGUEZ PINEAU E., *La oposición al retorno del menor secuestrado: movimientos en Bruselas y La Haya*, in *REEI*, n. 35, 2018, pp. 1–31; ESPINOSA CALABUIG R., *Ciberviolencia contra las mujeres y cooperación judicial digitalizada en procesos de sustracción internacional de menores*, in DI STASI A., ESPINOSA CALABUIG, R. (dirs), *Ciberviolencia de género y nuevas “fronteras” normativas y jurisprudenciales: la Directiva UE 2024/1385*, Napoli, 2025.

⁹ See arts 12, 13 and 20 of the 1980 Hague Convention.

The object of this paper is to explore new approaches to solve international child abduction cases from a children's rights-based approach, in ways that try to deescalate the tension of the conflict behind the parents' disputes.

In order to illustrate this idea, this paper will analyse the introduction of mediation in the Brussels II ter Regulation. It will first contextualise both the proliferation of mediation in the EU and its advantages to solve international child abduction cases. Secondly, the Brussels II ter Regulation regime will be analysed. And thirdly, two of the main limitations regarding the circulation of mediation agreements will be discussed, to finally close with some final remarks.

2. Contextualising the use of mediation for international child abduction in the EU

The use of alternative methods of conflict resolution is increasing in general in family law both in Europe and beyond. This is in line with the numerous doctrine that has expressed the need to develop channels to facilitate the use of cross-border mediation in family disputes, particularly in cases of international child abduction.¹⁰ The new regulation introduced in the Brussels II ter Regulation reflects this trend, as will be discussed below.

2.1. The promotion of mediation as a means of resolving disputes in the EU

Within the framework of a global trend favouring the exploration of alternatives to state courts,¹¹ the EU has maintained for years a position strongly in favour of promoting alternative dispute resolution methods (ADRs) as a means of resolving disputes that may

¹⁰ In this regard, see FULCHIRON H., *Les enlèvements internationaux d'enfants*, Paris, 2005; AZCÁRRAGA MONZÓN C., *Sustracción internacional de menores: vías de actuación en el marco jurídico vigente*, in *Revista Boliviana de Derecho*, n. 20, 2015, pp. 192-213.

¹¹ BARONA S., ESPLUGUES C., *ADR Mechanisms and Their Incorporation into Global Justice in the Twenty-First Century: Some Concepts and Trends*, in ESPLUGUES C., BARONA S., *Global Perspectives on ADR*, Cambridge, 2014, pp. 7-16.

arise within the legally integrated space of the Union.¹² Article 81 of the Treaty on the Functioning of the European Union (hereinafter TFEU)¹³ perfectly illustrates this idea by recognising the important role that these mechanisms play in the European civil justice system.

The Union, according to paragraph 1 of this article, shall develop judicial cooperation in civil matters having cross-border implications, based on the principle of mutual recognition of judicial judgments “*and extrajudicial*” decisions. This cooperation may include the adoption of measures to approximate the laws and regulations of the Member States. And, as stated in paragraph 2 of Article 81, this shall result, “*in particular*” where necessary for the proper functioning of the internal market, in the adoption of measures ensuring, among other things, “(a) *the mutual recognition and enforcement between Member States of judgments and of decisions in extrajudicial cases; b) the cross-border service of judicial and extrajudicial documents;...*” or “g) *the development of alternative methods of dispute settlement*”.

Significantly, this approach in favour of promoting alternative means of dispute resolution has been one-sided.¹⁴ The EU's very limited action in the field of arbitration, motivated by a variety of reasons of different kinds and nature,¹⁵ firmly contrasts with the increasingly decisive action in the field of mediation.¹⁶ The adoption of Directive 2008/52/EC of the European Parliament and of the Council of 21

¹² PALAO MORENO G., *Cross-border mediation in Spain*, in FORNER I DELAYGUA J.J., GONZÁLEZ BEILFUSS C., VIÑAS FARRÉ R. (coords.), *Entre Bruselas y La Haya: Estudios sobre la unificación internacional y regional del Derecho internacional privado. Liber amicorum Alegria Borrás*, Madrid, 2013, p. 641.

¹³ Consolidated version of the Treaty on the Functioning of the European Union, *OJ C* 326/47, 26.10.2012.

¹⁴ PALAO MORENO G., *La mediación familiar internacional*, in LLOPIS GINER J. M. (coord.), *Estudios sobre la Ley Valenciana de Mediación Familiar*, Valencia, 2003, pp. 61-88.

¹⁵ In this regard, and for all, see ESPLUGUES C., *International Commercial Arbitration in the EU and the PRC: A tale of Two Continents or 28 + 3 Legal Systems*, in BASEDOW J., PISSLER K.B. (eds.), *Private International Law in Mainland China, Taiwan and Europe*, Tübingen, 2014, pp. 409-413.

¹⁶ Not only in the civil sphere, but also in many other areas of its regulatory activity. In this regard, see, FRA – EUROPEAN UNION AGENCY FOR FUNDAMENTAL RIGHTS, *Access to Justice in Europe: An Overview of Challenges and Opportunities*, Viena, 2010, p. 44.

May 2008 on certain aspects of mediation in civil and commercial matters,¹⁷ has been accompanied by an acceleration of activity in favour of mediation by the EU, which has placed the institution on the European legislative agenda and, consequently, on that of many Member States, which have not hesitated to promote its use.¹⁸

However, it must be acknowledged that the results achieved have been very uneven.¹⁹ The transposition of the Directive by the various EU Member States has been inconsistent, resulting in significant differences across the Union.²⁰ Furthermore, it does not appear to have led to an expansion of the areas of law to which disputes can be referred for mediation. This is particularly true with regard to cross-border disputes.

In fact, as it will be further discussed below, the circulation of any agreements reached in the context of mediation in civil and commercial matters within one EU Member State is by no means guaranteed in other Member States under the current legal framework.²¹ To ensure such circulation within the scope they cover, it is necessary to rely on the set of European instruments in the field of private

¹⁷ OJL 136, de 24.8.2008.

¹⁸ EUROPEAN COMMISSION, *The 2020 EU Justice Scoreboard*, Luxembourg, 2020, p. 20. On the codification process in the EU, see PALAO MORENO G., *La mediación y su codificación en Europa. Aspectos de derecho internacional privado*, in GÓMEZ COLOMER J.L., BARONA VILAR S., CALDERÓN CUADRADO P. (coords.), *El derecho procesal español del siglo XX a golpe de tango: Juan Monero Aroca. Liber Amicorum, en homenaje y para celebrar su LXX cumpleaños*, Valencia, 2012, pp. 1337-1352. On the situation in Spain, see AZCÁRRAGA MONZONÍS C., *Impulso de la mediación en Europa y España y ejecución de acuerdos de mediación en la unión europea como documentos públicos con fuerza ejecutiva*, in *Revista Electrónica de Estudios Internacionales*, n. 25, 2013, pp. 1-35.

¹⁹ By way of example, it is stated that the promotion of mediation has not in all cases led to a significant increase in the use of this dispute resolution mechanism. CHÉLIZ INGLÉS M.C., *La UE y la armonización de la regulación en materia de mediación: ¿hacia una mediación obligatoria en todos los Estados miembros?*, in *Revista de Estudios Europeos*, n. 71, 2018, p. 204.

²⁰ ESPLUGUES C., *Civil and Commercial Mediation in the EU After the Transposition of Directive 2008/52/EC*, in ESPLUGUES C. (ed.), *Civil and Commercial Mediation in Europe. Cross-Border Mediation*, Cambridge, 2014, pp. 519-527.

²¹ On the impact of the Directive, see, among others, AZCÁRRAGA MONZONÍS C., *El (limitado) impacto de la directiva sobre mediación en asuntos civiles y mercantiles y la mediación obligatoria como medida de promoción*, in BARONA VILAR S. (coord.), *Mediación, arbitraje y jurisdicción en el actual paradigma de justicia*, Madrid, 2016, pp. 103-118.

international law,²² provided they are incorporated into a court decision or recorded in a public deed, given their generally purely contractual nature in Europe.²³ This response is highly unsatisfactory and has led the Union to consider amending Article 6 of the Directive, at least, with a view to promoting the circulation of this type of agreement.²⁴

2.2. *Mediation as a tool for de-escalating the conflict in international child abduction cases*

There is nowadays a common trend of international bodies to agree on promoting mediation for international child abduction cases. This includes not only the EU legislator, as we will discuss below, but also the Hague Conference on Private International Law. Art. 7 of the 1980 Hague Convention makes reference to the need to seek for amicable solutions in the context of international child abduction cases. However, the Hague Convention does not make any express reference to the inclusion of mediation of other forms of alternative dispute resolution. Nevertheless, the Hague Conference fostered mediation with different initiatives, for instance, the Guide to Good Practice on the Use of Mediation in these cases.²⁵

The importance of the need to promote amicable solutions for international child abduction cases has even been outlined by the ECtHR in *Mk v Greece*.²⁶ According to the Court: “*The understanding and cooperation of all those concerned is always an important factor*

²² ESPLUGUES C., *Civil and Commercial Mediation in the EU After the Transposition of Directive 2008/52/EC*, cit., pp. 729-730.

²³ See, in this regard, HOPT K.J., STEFFEK F., *Mediation: Comparison of Laws, Regulatory Models, Fundamental Issues*, in HOPT K.J., STEFFEK F. (eds.), *Mediation Principles and Regulation in Comparative Perspective*, Oxford, 2013, p. 46.

²⁴ ESPLUGUES C., IGLESIAS J.L., *Mediation and Private International Law: Improving Free Circulation of Mediation Agreements Across the EU*, in EUROPEAN PARLIAMENT – DIRECTORATE-GENERAL FOR INTERNAL POLICIES, *The Implementation of the Mediation Directive 29 November 2015. Compilation of In-depth Analysis*, Brussels, 2016, p. 79 and ff.

²⁵ HCCH: Guide to Good Practice under the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction. Mediation, 2012. *Online version available at: <https://assets.hcch.net/docs/d09b5e94-64b4-4afe-8ee1-ab97c98daa33.pdf>*, last accessed on 12 December 2025.

²⁶ ECtHR No 51312/16, *MK v Greece* (Grand Chamber) 1 February 2018, para. 78.

(*Maumousseau and Washington v. France*, no. 39388/05, § 83, 6 December 2007), often the only peaceful and appropriate solution that takes into account the child's psychological state. The existence of a civil mediation channel in the national judicial system, as recommended by Recommendation Rec (98)1 of the Committee of Ministers of the Council of Europe on family mediation, is desirable as an aid to such cooperation between all parties to the dispute (*Cengiz Kılıç v. Turkey*, no. 16192/06, §§ 132-133, 6 December 2011, and *Kacper Nowakowski v. Poland*, cited above, § 87)²⁷.

In this case, the child had even expressed his wish to find a solution and for her mother to avoid going to Court again.²⁸ However, due to the circumstances of the case, it was concluded that mediation could not be reasonably expected by Greek authorities.²⁹

To the same degree, doctrine has constantly referred to the use of mediation as an effective means of resolving cases of international child abduction.³⁰ In fact, mediation can play at least three roles in

²⁷ *MK v Greece*, para. 78. Free translation.

²⁸ *MK v Greece*, para. 85.

²⁹ *MK v Greece*, para. 85. In the words of T. Kruger et. al: "However, the Court considered that (i) the high degree of conflict between the parents and (ii) the fact that M.K. resides in France provided an excuse why negotiation or mediation between the parents could not reasonably be expected from the Greek authorities. On the other hand, Judge Woityczek, in his dissenting opinion, stressed that mediation and cooperation are intended to operate precisely in these situations". KRUGER T. ET. AL., *Current-day international child abduction: does Brussels IIb live up to the challenges?*, in *JPIL*, 2022, v. 18, n. 2, p. 173.

³⁰ GONZALEZ MARTIN N., *International Parental Child Abduction and Mediation: An Overview*, in *Family Law Quarterly*, 2014, p. 319; KIESEWETTER S., PAUL CC. (eds), *Cross-Border Family Mediation. International Parental Child Abduction, Custody and Access Cases*, Frankfurt, 2011; VIGERS S., *Mediating International Child Abduction Cases - The Hague Convention*, London, 2011; PAWLOWSKI R., *Alternative dispute resolution for Hague convention child custody disputes*, in *Family Court Review*, 2007, p. 302; BARUFFI M.C., *A child-friendly area of freedom, security and justice: work in progress in international child abduction cases*, in *JPIL*, 2018, n. 3, p. 415; OREJUDO PRIETO DE LOS MOZOS P., *El empleo de la mediación en situaciones de secuestro internacional de menores*, in ALDECOA LUZÁRRAGA F., FORNER I DELAYGUA J.J. (dirs.), *La protección de los niños en el derecho internacional y en las relaciones internacionales: Jornadas en conmemoración del 50 aniversario de la Declaración Universal de los Derechos del Niño y del 20 aniversario del Convenio de Nueva York sobre los Derechos del Niño*, Madrid, 2010, pp. 367-384; SOTO RODRÍGUEZ M.L., *La mediación en la sustracción internacional de menores en la Unión Europea*, in *Revista de Estudios Europeos*, n. 71, 2018, pp. 149-170; HERNÁNDEZ

cases of international child abduction: firstly, as a preventive measure; secondly, as a means of resolving the conflict created after a wrongful removal or retention; and thirdly, as a mechanism to facilitate the enforcement of a return order.³¹

One relevant reason in favour of mediation is the clear shift in the logic of conflict resolution. First of all, it is a tool to de-escalate the conflict.³² Pawlowski even refers to the need to “*de-aversarialize the conflict*”.³³ Rather than confrontation in court, it encourages cooperation and agreement,³⁴ ultimately fostering a culture of compromise.³⁵ This promotes a satisfactory outcome for all parties involved, especially the children. As González Beilfuss understands, the return procedure “*exacerbates the climate of confrontation between the parents, making future cooperation difficult*”.³⁶ She emphasises the potentially harmful nature of the coercive power of the law in such

RODRÍGUEZ A., *Mediación y secuestro internacional de menores: ventajas e inconvenientes*, in *Cuadernos de Derecho Transnacional*, 2014, pp. 130-146; CAAMIÑA DOMÍNGUEZ C., *La mediación ante el secuestro internacional de menores*, in *Revista Internacional de Estudios de Derecho Procesal y Arbitraje*, n. 1, 2011, pp.1-35; VELARDE D’AMIL Y., *La mediación en los supuestos de sustracción internacional de menores y el Convenio de la Haya de 25 de octubre de 1980, sobre los aspectos civiles de la sustracción internacional de menores*, in *Revista de Derecho UNED*, n. 17, 2015, pp. 1279-1301.

³¹ OREJUDO PRIETO DE LOS MOZOS P., *Competencia judicial internacional y contenido de los acuerdos de mediación en la sustracción internacional de menores*, in AZCÁRRAGA MONZÓNIS C., QUINZÁ REDONDO P. (eds.), *Tratado de mediación. Tomo III. Mediación en conflictos de familia*, Valencia, 2017, p. 190. For a study of the application of the three functions by Spanish case law see HERRANZ BALLESTEROS M., *Acuerdos de mediación en un contexto transfronterizo: reflexiones desde la jurisprudencia española*, in CALVO CARAVACA A. L., CARRASCOSA GONZÁLEZ J., *El Derecho de familia internacional del siglo XXI en la práctica judicial*, Madrid, 2022, pp. 57-77.

³² KRUGER T. ET. AL., *Current-day international child abduction: does Brussels IIb live up to the challenges?*, cit., p. 172.

³³ PAWLOWSKI R., *Alternative dispute resolution for Hague convention child custody disputes*, cit., p. 304.

³⁴ GONZÁLEZ BEILFUSS C., *La sustracción de menores en el nuevo Reglamento 2019/1111*, in VV.AA., *Relaciones transfronterizas, globalización y Derecho. Homenaje al Prof. Dr. José Carlos Fernández Rozas*, Cizur Menor (Navarra), 2020, p. 397.

³⁵ DURÁN AYAGO A., *Mediación en procesos de responsabilidad parental*, in CAMPUZANO DÍAZ B. (Dir.): *Derecho de familia internacional en un contexto de creciente migración: cuestiones vinculadas con el reglamento 2019/1111*, Madrid, 2024, p. 221.

³⁶ Free translation from: “*exacerba el clima de confrontación entre los progenitores contribuyendo a hacer inevitable la cooperación futura*”. GONZÁLEZ BEILFUSS C., *La sustracción de menores en el nuevo Reglamento 2019/1111*, cit., p. 397.

cases, which can lead to ineffective or highly traumatic results for those involved, particularly the children.³⁷ In short, as Diago Diago points out, these agreements promote the achievement of “a *high-quality solution*”.³⁸ Additionally, they are faster and cheaper than judicial proceedings.³⁹

However, several authors remain cautious about the potential use of mediation in cases of child abduction. Firstly, they recognise that these situations are extremely complex and tense for both parties, making it difficult to reach an agreement, particularly for the parent who has custody rights. Secondly, mediation is seen as an opportunity for the abducting parent to delay the proceedings, thereby delaying the return of the child. This is also difficult to detect in practice.⁴⁰

Apart from these latent risks, what it is clear is that mediation can certainly proportionate a child-centered response in an international family conflict. In order to achieve this goal, mediation in interna-

³⁷ GONZÁLEZ BEILFUSS C., *La sustracción de menores en el nuevo Reglamento 2019/1111*, cit., p. 397.

³⁸ Indeed, as Prof. Diago Diago rightly argues: “*The reason is simple: this solution, which affects children, will be agreed upon by consensus. These agreements are intended to be complied with voluntarily, and this implies maintaining a friendly relationship between the parties, which is crucial for achieving an optimal environment in which children can grow up.*” (Free translation from: “*La razón es sencilla, esta solución que afecta a los menores será consensuada. Estos acuerdos están llamados a cumplirse voluntariamente y ello implica mantener una relación amistosa entre las partes, lo que es crucial, para la lograr un ambiente óptimo en el que crezcan los niños*”). DIAGO DIAGO P., *Formas alternativas de resolución de conflictos*, in PALAO MORENO G. (Dir.), GONZÁLEZ MARIMÓN M. (Ed. Lit.), *El nuevo marco europeo en materia matrimonial, responsabilidad parental y sustracción de menores: Comentarios al Reglamento (UE) no 2019/1111*, cit., p. 284.

³⁹ In this regard see CASO SEÑAL M., *La mediación en los conflictos transfronterizos de sustracción de menores*, in *Revista de Mediación*, n. 8, 2011, p. 26.

⁴⁰ BEAUMONT P., WALKER L., HOLLIDAY J., *Parental Responsibility and International Child Abduction in the proposed recast of Brussels IIa Regulation and the effect of Brexit on future child abduction proceedings*, in *University of Aberdeen*, 2016, p. 4. Online available at https://www.abdn.ac.uk/law/documents/CPLI_Working_Paper_No_2016_6_revised.pdf, last access 7.10.2025.

tional child abduction cases, as any other topic where a child is concerned, should take into account the best interest of the child.⁴¹ Particularly important is the child participation in mediation proceedings.⁴² Including the right of the child to information, and the right of the child to be heard.⁴³ In this regard, iCare I and iCare II⁴⁴ projects are working on a methodology to implement children's rights in mediation proceedings.⁴⁵

3. *The reinforcement of mediation - and other methods of alternative dispute resolution- in the new Brussels II ter Regulation*

In this context of the promotion of ADR by the EU institutions, the Brussels II bis Regulation only made a minimum reference to its use. In fact, it only promoted the role of the central authorities in the search for an alternative resolution to family disputes in the field of parental responsibility.⁴⁶

Given this limited legal framework, the Brussels II ter Regulation represents a further step in promoting mediation and any other

⁴¹ One example is the VOICE Project. JUST Action Grant (2016) 764206. The project was coordinated by Missing Children Europe. The full Research Report (2019) is available at <https://repository.uantwerpen.be/docstore/d:irua:5744>.

⁴² See COUNCIL OF EUROPE, Guidelines of the Committee of Ministers of the Council of Europe on child friendly justice, 17 November 2010, available at <https://rm.coe.int-/16804b2cf3>, last access 16.12.2025.

⁴³ See Article 12 of the CRC (UN Convention on the Rights of the Child, 20.11.1989) and Article 24 of the CFREU (Charter of Fundamental Rights of the European Union, in OJ C 326, 26.10.2012, p. 391). On the best interest of the child and the child's right to be heard in custody proceedings see HEIDERHOFF B., *The Hearing of the Child in Custody Disputes and the Principle of Mutual Trust in the EU*, in HEIDERHOFF B., QUEIROLO I. (eds.), *EU and Private International Law: Open Questions in Family Law, Contracts, and Torts*, Napoli, 2025, pp. 7-36. See also ECtHR No 2068/2024, *M.P. and others v. Greece* (Grand Chamber) 9 September 2025, in which the hearing of the child in the context of return proceedings is considered within the scope of Art. 8 ECHR.

⁴⁴ ICARE II project is implemented with the support of Justice Programme of the European Commission under Grant Agreement №101007436. See the website <https://project-icare.eu/project/>, last access 16.12.2025.

⁴⁵ For instance, in IcareI Project it was developed a methodology "International Family Mediation in the Best Interests of the Child Methodology and Orientations for Mediation in International Child Abduction". See iCareI Project, *D2.4 iCare Methodology*, 2021. Online available at <https://project-icare.eu/deliverables/>, last access 7.10.2025.

⁴⁶ See Recital 25 and Article 55 of the Brussels II bis Regulation.

means of alternative dispute resolution in matters of parental responsibility and international child abduction, offering a somewhat more developed and structured legal framework.⁴⁷

3.1. *The proactive role of Central Authorities*

Firstly, Article 79 of the Brussels II ter Regulation maintains the reference to the adoption by the requested central authorities, either directly or through the courts, of appropriate measures to “(g) *facilitate agreement between holders of parental responsibility through mediation or other means of alternative dispute resolution, and facilitate cross-border cooperation to this end*”.

In fact, as it has already been pointed out, this action by the authorities dates back to the Brussels II bis Regulation, and was precisely one of the few tangential references to the use of mediation.⁴⁸

In relation to this point, the Practice Guide for the application of the Brussels IIb Regulation specifies that “*The Regulation does not require the Central Authorities to engage directly in the mediation. Thus, they are not obliged to provide mediators. However, doing so is not precluded. The Central Authorities usually explain the benefits of the amicable resolution of the issues, give information about providers of mediation services and collaborate with the Central Authorities of another Member State when the mediation takes place there*”.⁴⁹

⁴⁷ See also DURÁN AYAGO A., *Mediación en procesos de responsabilidad parental*, cit., p. 228.

⁴⁸ Specifically, recital 25 of the aforementioned instrument promoted the work of central authorities in seeking an agreed solution to family disputes in the field of parental responsibility. Indeed, Article 55 mentioned that, at the request of a central authority of another Member State or of a holder of parental responsibility, central authorities shall cooperate in specific cases in order to achieve the objectives of the Regulation. To this end, they shall take all appropriate measures, either directly or through public authorities or other bodies, in accordance with the legislation of that Member State on the protection of personal data, with a view, inter alia, to “(e) *facilitate agreement between holders of parental responsibility through mediation or other means, and facilitate cross-border cooperation to this end*”.

⁴⁹ EU, *Practice Guide for the application of the Brussels IIb Regulation*, Publications Office of the European Union, Luxembourg, 2023, p. 178. Available at: <https://op.europa.eu/en/publication-detail/-/publication/ff34bda5-ea90-11ed-a05c-01aa75ed71a1>, last accessed on 14.12.2025.

3.2. *The proactive role of courts: the incorporation of court-based mediation*

Secondly, progress has been made in the initial acceptance of the use of ADR mechanisms as a means of resolving disputes concerning parental responsibility by incorporating a provision, Article 25 of the Brussels II ter Regulation, which specifically addresses the case of court-based mediation.⁵⁰ This provision is included in Chapter III, which specifically regulates international child abduction cases, and is therefore one of the major developments in this area. This option

⁵⁰ This new vision of the EU legislator is in line with the approach taken by the Spanish legislator in this area. Specifically, in similar terms, Article 778 quinquies 12 of the Spanish Civil Procedure Act provides: "*At any stage of the proceedings, both parties may request the suspension of the proceedings in accordance with the provisions of Article 19.4, in order to undergo mediation. The judge may also, at any time, either ex officio or at the request of either party, propose a mediation solution if, in view of the circumstances, he or she considers it possible for the parties to reach an agreement, without this entailing an unjustified delay in the proceedings. In such cases, the court clerk shall agree to the suspension for the time necessary to process the mediation. The public body responsible for the protection of children may act as mediator if requested to do so ex officio, by the parties or by the Public Prosecutor's Office.*

The duration of the mediation procedure shall be as short as possible and its proceedings shall be concentrated in the minimum number of sessions, without the suspension of the proceedings for mediation exceeding the legal time limit provided for in this Chapter. The legal proceedings shall be resumed if requested by either party or, if an agreement is reached in mediation, which must be approved by the judge, taking into account the regulations in force and the best interests of the child. On the topic see JIMÉNEZ FORTEA F.J., *MASC y sustracción internacional de menores por sus propios padres*, in BARONA VILAR S. (ed.), *Masc, to be or not to be: medios adecuados de solución de conflictos en la justicia*, Valencia, 2024, pp. 793-826. It is also worth noting the recent Organic Law 1/2025 of 2 January on measures to improve the efficiency of the Public Justice Service, BOE of 3.1.2025. This law "*introduces into our legal system, alongside the jurisdiction itself, other appropriate means of non-judicial dispute resolution, as an essential measure for the consolidation of a sustainable public justice service*" (Preamble, section IV). Specifically, Article 5.2 of LO 1/2025 states the following: "*Prior to judicial proceedings, negotiation shall be required as a prerequisite for admissibility in all declaratory proceedings under Book II and in special proceedings under Book IV of Law 1/2000 of 7 January on Civil Procedure, with the exception of those concerning the following matters (...)*". Therefore, this requirement will be necessary for proceedings relating to parental responsibility within the meaning of the Brussels II ter Regulation, with the exception of the adoption of the measures provided for in Article 158 of the CC, i.e. measures for the protection of children. However, international child abduction cases have been excluded from this new requirement (Art. 5.2.g). On the topic see AZCÁRRAGA MONZÓNIS C., *MASC y nuevo requisito de procedibilidad, también en conflictos transfronterizos (Parte I)*, in *Bitácora Millennium DIPr*, n. 22, 2025, pp. 24 and ff.

runs parallel to the possibility that the parties always have to resort to extrajudicial mediation or any other ADR mechanism.

However, despite its location within this chapter, the literal wording of the provision clearly extends the use of ADR to all matters relating to parental responsibility, and not exclusively to international child abduction. Indeed, recital 43 of the Brussels II ter Regulation begins with the sentence “*In all cases concerning children, and in particular in cases of international child abduction*”. Therefore, the EU legislator assumes that in all matters of parental responsibility, with the special focus to international child abduction cases, “*courts should consider the possibility of achieving solutions through mediation and other appropriate means, assisted, where appropriate, by existing networks and support structures for mediation in cross-border parental responsibility disputes*”.⁵¹

It that was the case, mediation, or the method chosen by the parties, may take place in either the Member State of origin or the Member State of refuge.⁵² In addition, the parties may agree on both the return or non-return of the child and issues relating to parental responsibility, such as custody and access rights or the place of habitual residence of the child.⁵³

3.2.1. *The invitation to the parties to resort to mediation or any other alternative dispute resolution method*

The aforementioned Article 25 of the new Regulation 2019/1111 explicitly states that “*as early as possible*” and “*at any stage of the proceedings*”,⁵⁴ the court hearing the dispute concerning parental re-

⁵¹ Recital 43 of the Brussels II ter Regulation.

⁵² EU, *Practice Guide for the application of the Brussels IIb Regulation*, cit., p. 178.

⁵³ EU, *Practice Guide for the application of the Brussels IIb Regulation*, cit., p. 178.

⁵⁴ It should be borne in mind Recital 35 of the Brussels II ter Regulation, regarding the commencement of proceedings: “*This Regulation defines at what time a court is deemed to be seised for the purposes of this Regulation. In light of the two different systems existing in the Member States, which either require the document instituting the proceedings to be served upon the respondent first, or to be lodged with the court first, it should be sufficient for the first step under national law to have been taken, provided that the applicant has not*

sponsibility “either directly or, where appropriate, with the assistance of the Central Authorities, shall invite the parties to consider whether they are willing to engage in mediation or other means of alternative dispute resolution”. This gives the courts an active role in seeking an agreement between the parties, clearly reflecting the change in philosophy and approach of the new Regulation in this area.⁵⁵

In this regard, it has been rightly suggested that the invitation to the parties should be accompanied by sufficient information on mediation and other appropriate methods of dispute resolution,⁵⁶ as well as a minimum of information on the channels available in the EU to facilitate cross-border mediation, in order to ensure that the parties can make an informed decision, as a first step towards promoting the use of ADR in practice.⁵⁷

*subsequently failed to take any steps that he or she was required to take under national law in order to have the second step effected. Taking into account the growing importance of mediation and other methods of alternative dispute resolution, also during court proceedings, in accordance with the case-law of the Court of Justice, a court should also be deemed to be seised at the time when the document instituting the proceedings or an equivalent document is lodged with the court in cases where the proceedings have in the meantime been suspended, with a view to finding an amicable solution, upon application of the party who instituted them, without the document instituting the proceedings having yet been served upon the respondent and without the respondent having had knowledge about the proceedings or having participated in them in any way, provided that the party who instituted the proceedings has not subsequently failed to take any steps that he or she was required to take to have service effected on the respondent. According to the case-law of the Court of Justice, in the case of lis pendens, the date on which a mandatory conciliation procedure was lodged before a national conciliation authority should be considered as the date on which a 'court' is deemed to be seised.” See in this regard CASTELLÓ PASTOR J.J., *Iniciación del procedimiento*, in PALAO MORENO G. (Dir.) and GONZÁLEZ MARIMÓN, M. (Ed. Lit.), *El nuevo marco europeo en materia matrimonial, responsabilidad parental y sustracción de menores: Comentarios al Reglamento (UE) no 2019/1111*, cit., pp. 213-218.*

⁵⁵ ESPLUGUES MOTA C., *El Reglamento Bruselas II ter y el recurso a los MASC en materia de responsabilidad parental y sustracción internacional de menores*, in *Cuadernos de Derecho Transnacional*, v. 13, n. 2, 2021, p. 159.

⁵⁶ DIAGO DIAGO P., *Formas alternativas de resolución de conflictos*, cit., p. 287.

⁵⁷ See Recital 43. The *Practice Guide for the application of the Brussels IIb Regulation* refers to the European e-Justice Portal: https://e-justice.europa.eu/topics/taking-legal-action/mediation/family-mediation/family-mediation_es?clang=es (EU, *Practice Guide for the application of the Brussels IIb Regulation*, cit., p. 178.

3.2.2. *The three exceptions to the use of ADR*

However, the general rule of inviting the parties to use mediation or any other alternative dispute resolution method is accompanied by three exceptions provided for in Article 25 of the Brussels II ter Regulation:

- i. Firstly, if mediation is contrary to the best interests of the child.
- ii. Secondly, if it is not appropriate in the particular case. By way of example, Recital 43 of the Brussels II ter Regulation expressly states that mediation may not be appropriate in all cases, mentioning in particular cases of domestic violence.⁵⁸
- iii. Finally, the third exception refers to an undue delay in the proceedings.⁵⁹ In relation to this last requirement, Recital 43 of the Regulation states that: “*Such efforts should not, however, unduly prolong the return proceedings under the 1980 Hague Convention*”. Indeed, in the words of Diago Diago, “on this issue, there is tension between the impetus of the ADR (which leads courts to always consider this possibility) and the fact that recourse to these means does not prolong the return proceedings”.⁶⁰

It is important to remember that the invitation must be made “*as soon as possible*” This requirement for speed, accompanied by the aforementioned exception, is in line with any procedure involving children, in which the time factor is essential.⁶¹ This statement takes on even greater importance in cases of international child abduction,

⁵⁸ In relation to this point, see HCCH, Guide to Good Practice under the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction. Mediation. *Online version available at: <https://assets.hcch.net/docs/d09b5e94-64b4-4afe-8ee1-ab97c98-daa33.pdf>*, last accessed on 12 December 2025.

⁵⁹ This is in line with art. 23.1 and 24 Brussels II ter Regulation, which seek for the need for authorities to act expeditiously.

⁶⁰ Free translation from “*en este tema se produce una tensión entre el impulso de los MARC (que conduce a que los órganos jurisdiccionales contemplen siempre esta posibilidad), y el hecho de que el recurso a estos medios no prolongue el procedimiento de restitución*”. DIAGO DIAGO P., *Formas alternativas de resolución de conflictos*, cit., p. 294.

⁶¹ GRAMMATICAKI-ALEXIOU A., *Best Interests of the Child in Private International Law*, in *Collected Courses of The Hague Academy of International Law – Recueil de cours*, v. 412, Leiden, 2021, p. 334.

in which, it should be remembered, the main objective of the 1980 Hague Convention is the immediate return of the child and, to this end, it requires urgent action, an objective that is fully supported by the Brussels II ter Regulation⁶². It is therefore up to the court to assess whether this objective has been met and to prevent it from being undermined.

Anyway, the three exceptions have an open and general formulation, so it is clear that they will require an individual assessment by the specific court. Furthermore, as exceptions, they must be interpreted restrictively.

Despite the novelty of this provision, however, concerns have been raised about the vagueness of its wording, as it does not specify the procedure to be followed or the guarantees necessary for its proper implementation, perhaps due to differences between Member States on this issue.⁶³

In this regard, the text finally adopted is far from the proposals put forward by the European Parliament during the drafting process.⁶⁴ In fact, the European Parliament significantly amended Recital 28

⁶² See Articles 1 and 11 of the 1980 Hague Convention. In fact, both Article 11 of the 1980 Hague Convention, in a guiding manner, and the Brussels II ter Regulation, in a restrictive manner, establish a period of six weeks for the resolution of proceedings concerning the return of the child. However, Article 24(2) of the Brussels II ter Regulation specifies that the courts of each instance shall have a period of six weeks to decide on the return. On this issue, see, among others, GONZÁLEZ MARIMÓN M., *La regulación de la sustracción internacional de menores en el Reglamento Bruselas II ter y sus principales novedades: hacia una mejor protección del interés superior del menor*, in *Cuadernos de Derecho Transnacional*, 2022, v. 14, n. 1, p. 294.

⁶³ In this regard RODRÍGUEZ PINEAU E., *La refundición del Reglamento Bruselas II bis: de nuevo sobre la función del Derecho Internacional privado europeo*, in *Revista Española de Derecho Internacional*, v. 69, n. 1, 2017, p. 144; BEAUMONT P., WALKER L., HOLLIDAY J., *Parental Responsibility and International Child Abduction in the proposed recast of Brussels IIa Regulation and the effect of Brexit on future child abduction proceedings*, cit., pp. 12-13; GEDIP, *Comments on the Commission Proposal for a Council Regulation on jurisdiction, the recognition and enforcement of decisions in matrimonial matters and the matters of parental responsibility, and on international child abduction (recast) (COM (2016) 411 final)*, par. 26. Online available at: <https://www.gedip-egpil.eu/reunionstravail/Reunion%2026/Annexe%20I.pdf>, last access 7.10.2025.

⁶⁴ EUROPEAN PARLIAMENT, *European Parliament legislative resolution of 18 January 2018 on the proposal for a Council regulation on jurisdiction, the recognition and enforcement of decisions in matrimonial matters and matters of parental responsibility, and on international child abduction (recast)*, [COM(2016)0411 – C8-0322/2016 – 2016/0190-(CNS)], Brussels, 18.1.2018.

of the Commission's 2016 Proposal⁶⁵ – concerning mediation – emphasising the importance of mediation as a means of resolving disputes in matters of parental responsibility and international child abduction.

Specifically, it stated that “*The use of mediation can play a very important role in ending conflicts, in all cases concerning children and especially in the case of cross-border parental conflicts about the custody of and right of access to a child and in cases of international child abduction. In addition, given the increase in cross-border custody disputes across the European Union, where no international framework is available, as a result of the recent migration inflows, mediation has often proven to be the only legal means to help families reach an amicable and prompt solution on family disputes*”.⁶⁶ In addition, in order to promote mediation in such cases, the European Parliament pointed out that judicial and administrative authorities, with the help of existing networks and support structures, “*should assist the parties, before or during the judicial proceedings, in the selection of appropriate mediators and in the organisation of the mediation*”. It added that “*The parties should be provided with financial assistance to carry out the mediation at least to the extent to which they have been granted or would have been granted legal aid*”.⁶⁷ Finally, the European Parliament's interest in promoting mediation goes so far as to include a new recital on the training of mediators and judges.⁶⁸

⁶⁵ EUROPEAN COMMISSION, *Proposal for a Council Regulation on jurisdiction, the recognition and enforcement of decisions in matrimonial matters and the matters of parental responsibility, and on international child abduction (recast) {SWD(2016) 207 final} {SWD(2016) 208 final}*, Brussels, 30.6.2016, COM(2016) 411 final 2016/0190 (CNS).

⁶⁶ See EUROPEAN PARLIAMENT, *European Parliament legislative resolution of 18 January 2018 on the proposal for a Council regulation on jurisdiction, the recognition and enforcement of decisions in matrimonial matters and matters of parental responsibility, and on international child abduction (recast)*, cit., amendment 15.

⁶⁷ See EUROPEAN PARLIAMENT, *European Parliament legislative resolution of 18 January 2018 on the proposal for a Council regulation on jurisdiction, the recognition and enforcement of decisions in matrimonial matters and matters of parental responsibility, and on international child abduction (recast)*, cit., amendment 15.

⁶⁸ See EUROPEAN PARLIAMENT, *European Parliament legislative resolution of 18 January 2018 on the proposal for a Council regulation on jurisdiction, the recognition and enforcement of decisions in matrimonial matters and matters of parental responsibility, and*

This reflects the importance given by the European Parliament to mediation in cross-border family proceedings, in an attempt to promote this figure. However, these proposals were not ultimately incorporated into the final text of the new Regulation. At the opposite end of the doctrinal spectrum, the flexible and open nature of the regime introduced in the Brussels II ter Regulation is praised⁶⁹.

Anyway, what is clear is that the Regulation remains silent in relation to mediation in practice. There is a lack of a common framework regarding the functioning of international family mediation in the different Member States.⁷⁰ It does not make any reference to the

on international child abduction (recast), cit., amendment 16: “In order to offer an effective alternative to court proceedings in national or international matters of family disputes, it is crucial that the mediators involved have undergone appropriate specialised training. The training should cover, in particular, the legal framework of cross-border family disputes, intercultural competence and tools to manage high conflict situations, while at all times having regard to the best interests of the child. Training for judges, as a potential key source of referrals to mediation, should also address how to encourage parties to engage in mediation as early as possible and how to incorporate mediation into court proceedings and the set timeframe of Hague Convention Child Abduction proceedings without causing unnecessary delay”.

⁶⁹ FORCADA MIRANDA J., *Comentarios prácticos al Reglamento (UE) 2019/1111. Competencia, Reconocimiento y Ejecución de Resoluciones en materia Matrimonial, Responsabilidad Parental y Sustracción Internacional de Menores*, Madrid, 2020, p. 231.

⁷⁰ See, for example, IcareI Project, *D2.3 Recommendation List Analysis report*, 2021, p. 15. Online available at <https://project-icare.eu/deliverables/>, last access 7.10.2025.

“The provision of international family mediation services is organised differently in EU Member States and, as a result, the approaches and practices differ from country to country. This results in unequal access and highly fragmented standards of mediation, in relation to several matters, such as:

- *the consideration mediation gives to the rights and the best interests of the child;*
- *questions relating to the (mandatory or optional) information on international family mediation to be given to parents before proceedings start;*
- *questions of access to international family mediation, including associated costs and mediation aid;*
- *the moments at which international family mediation can be initiated before, during or after court proceedings;*
- *the manner by which the international family mediation process is connected and coordinated with judicial proceedings;*
- *provisions concerning the cross-border circulation of mediated agreements among Member States (i.e. recognition and enforcement in a Member State different from the one in which the agreement was reached);*

difficulties of logistic of mediation from different countries and in different languages⁷¹; the need of specialised bi-lingual cross-border mediators,⁷² or of the convenience to promote pre-mediation desks.⁷³

Beyond the perhaps not particularly sophisticated or developed wording of the recourse to mediation introduced in the Brussels II ter Regulation, it is clear that this provision is, in short, an expression of the European legislator's desire to promote the use of ADR within the Union. It is thus emphasised that in any restitution process, mediation must be considered as an alternative to judicial proceedings, with this institution being given a particularly important complementary role in the regulatory text as a means of resolving this type of dispute and, in any case, avoiding any delaying effect.⁷⁴

4. The circulation of mediation agreements as a remaining challenge in the EU, also for international child abduction cases

Despite the clear progress represented by the explicit inclusion of mediation or any alternative dispute resolution method in Article 25 of the Brussels II ter Regulation, there is still a fundamental problem with regard to the circulation of mediation agreements within the EU, which is of enormous practical significance and it is not exclusive to international child abduction cases.⁷⁵ We refer to the nature

- questions concerning the training and licensing of international family mediators, including specialised qualifications required for interacting with children;
- the provision and admission of digital mediation services within or outside court proceedings”.

⁷¹ KRUGER T. ET. AL., *Current-day international child abduction: does Brussels IIb live up to the challenges?*, cit., p. 174.

⁷² See IcareI Project, *D2.2 Comparative Analysis Report*, 2021, p. 32. Online available at <https://project-icare.eu/deliverables/>, last access 7.10.2025.

⁷³ See IcareII Project, *D4.1 Methodology on pre-mediation*, 2025, p. 32. Online available at <https://project-icare.eu/deliverables/>, last access 7.1.2026.

⁷⁴ GONZÁLEZ BEILFUSS C., *La sustracción de menores en el nuevo Reglamento 2019/1111*, cit., p. 396.

⁷⁵ The need to have enforceable agreements in the context of international child abduction cases has been outlined from the HCCH and the EU. In this regard see HCCH, *Guide to Good Practice under the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction. Mediation*, Chapter 12. Online version available at:

of the agreement reached and the requirements for it to be enforceable. In Europe agreements are generally of a purely contractual nature.⁷⁶ Therefore, they must be judicially approved or recorded in a public deed as a prerequisite for their subsequent circulation within the Union as an enforceable title.⁷⁷

To address this problem, the issues of the fragmentation of international jurisdiction for the recognition of mediation agreements (1) and the extraterritorial effectiveness of such agreements through the rules on recognition and enforcement provided for in the Brussels II ter Regulation (2) are particularly relevant.

4.1. *The fragmentation of international jurisdiction for the recognition of mediation agreements*

A first problem that may arise in mediation in international child abduction cases is the fragmentation of international jurisdiction for the recognition of a mediation agreement when that agreement is reached not only on the return or non-return of the child, but also on matters of parental responsibility for the child.⁷⁸

<https://assets.hcch.net/docs/d09b5e94-64b4-4afe-8ee1-ab97c98daa33.pdf>, last accessed on 12.12.2025; EUROPEAN PARLIAMENT, *40 Years of The Hague Convention on Child Abduction: Legal and Societal Changes in the Rights of a Child*, Policy Department for Citizens' Rights and Constitutional Affairs Directorate-General for Internal Policies, 2020, p. 16. Online available at [https://www.europarl.europa.eu/RegData/etudes/IDAN/2020/660559-IPOL_IDA\(2020\)660559_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/IDAN/2020/660559-IPOL_IDA(2020)660559_EN.pdf), last access 18.12.2025.

⁷⁶ Problems that were already pointed out at the beginning of Directive 208/52 by DIAGO DIAGO P., *Aproximación a la mediación familiar desde el Derecho Internacional Privado*, in VVAA, *La Unión Europea ante el Derecho de la globalización*, Madrid, 2008, pp. 265-298.

⁷⁷ As indicated in Article 6.2 of Directive 208/52: "The content of the agreement may be made enforceable by a court or other competent authority in a judgment or decision or in an authentic instrument in accordance with the law of the Member State where the request is made". And, in the case of Spain, Article 25 of Law 5/2012 of 6 July on mediation in civil and commercial matters.

⁷⁸ Similarly, if the agreement also included other issues, in the case of so-called "package agreements", for example, concerning maintenance or even other property issues between the parents, the problem of fragmentation of international jurisdiction and enforcement of the agreement would also arise in relation to these issues. For an in-depth analysis of this problem, see CHÉLIZ INGLÉS M.C., *La ejecución de los acuerdos resultantes de me-*

In such a case, the courts of the Member State where the child is wrongfully present will have jurisdiction only to decide on the return or non-return of the child, but not on the merits, i.e. on parental responsibility. This is in accordance with Article 9 of the Brussels II ter Regulation, which provides that, in the event of the wrongful removal or retention of a child from one Member State to another, the courts of Member State where the child was habitually resident immediately before the wrongful removal or retention shall retain their jurisdiction as a general rule, provided that the requirements laid down in that provision are met.

Legal doctrine had already sought partial solutions through the extension of jurisdiction under Article 12 of the Brussels II bis Regulation and the transfer of jurisdiction to a court better placed to hear the case under Article 15 of that instrument.⁷⁹ However, a clearer solution was needed in this regard and the new Brussels II ter Regulation expressly addresses this issued and provides for a solution.

In fact, compared to the 2003 system, one of the new features introduced in relation to international child abduction is the reference in Article 9 of the Brussels II ter Regulation to “*without prejudice to Article 10*”, i.e. the new choice of court provision. This reference, not present in the text of Brussels II bis, allows parents to agree on the jurisdiction in matters of parental responsibility, under the terms of the aforementioned Article 10 of the Brussels II ter Regulation. The extension of jurisdiction in the context of child abduction can indeed be extremely useful, particularly in those cases where parties have reached an amicable agreement requiring the approval of

diación familiar: el conflicto de los "package agreements" en materia de sustracción internacional de menores, in AZCÁRRAGA MONZONÍS C., QUINZÁ REDONDO, P. (eds.), *Tratado de mediación. Tomo III. Mediación en conflictos de familia*, cit., pp. 43-66.

⁷⁹ This possibility had been called for by legal scholars in order to facilitate mediation agreements. In this regard, see CHÉLIZ INGLÉS M.C., *La sustracción internacional de menores y la mediación. Retos y vías prácticas de solución*, Valencia, 2019, pp. 301 y and ff.; CHÉLIZ INGLÉS M.C., *Novedades introducidas por la refundición del reglamento Bruselas II Bis en relación con la sustracción internacional de menores*, in GARCÍA ÁLVAREZ L., MARTÍN RODRÍGUEZ J.M. (Coords), *El mercado único en la Unión Europea. Balance y perspectivas jurídico-políticas*, Madrid, 2019, p. 47.

the court with jurisdiction over the substance of the matter.⁸⁰ Specifically, in cases where the agreement has been reached in the State where the child is wrongfully located.

In this regard, Recital 43 of the Brussels II ter Regulation clearly indicates the EU legislator's intention to encourage mediation. This provision allows for the possibility of extending the court's jurisdiction to include the return case, enabling it to give legal effect to the agreement relating not only to the child's return, but also to parental responsibility. Literally, Recital 43 states that "*Where in the course of return proceedings under the 1980 Hague Convention, parents reach agreement on the return or non-return of the child, and also on matters of parental responsibility, this Regulation should, under certain circumstances, make it possible for them to agree that the court seised under the 1980 Hague Convention should have jurisdiction to give binding legal effect to their agreement, either by incorporating it into a decision, approving it or by using any other form provided by national law and procedure. Member States which have concentrated jurisdiction should therefore consider enabling the court seised with the return proceedings under the 1980 Hague Convention to exercise also the jurisdiction agreed upon or accepted by the parties pursuant to this Regulation in matters of parental responsibility where agreement of the parties was reached in the course of those return proceedings*".⁸¹

⁸⁰ In this sense GONZÁLEZ BEILFUSS C., *La sustracción de menores en el nuevo Reglamento 2019/1111*, cit., p. 389.

⁸¹ This situation is also addressed in the EU Practice Guide for the application of the Brussels IIb Regulation: "*The mediation or the other means of alternative dispute resolution may take place in the Member State of origin or in the Member State of refuge, remotely or in presence. The parties may agree on the return or non-return, and also on matters of parental responsibility (for example custody, access, place of residence). The court of the Member State of origin has jurisdiction to give binding legal effect to the agreement based on Article 7. The court of the Member State of refuge can do this if chosen by the parties pursuant to Article 10. Both courts may either incorporate the agreement of the parties into a decision, approve it or use any other form provided by their national law and procedure. It is most likely that the parties will avail themselves of the court of the Member State of refuge as the child is located there, and the agreement will directly end the pending return proceedings. In order to achieve this result, the Member States which have concentrated jurisdiction should consider enabling the court seised with the return proceedings under the 1980 Hague Convention to also exercise the jurisdiction agreed upon or accepted by*

4.2. *The extraterritorial effectiveness of mediation agreements or other ADR: the recognition and enforcement regime in matters of parental responsibility under the Brussels II ter Regulation*

As has been stated, the first problem for the circulation of mediation agreements within the EU is their purely contractual nature. Once it has been overcome, basically, by the necessary enforceability through judicial or extrajudicial approval, the new model of extraterritorial effectiveness in matters of parental responsibility under the Brussels II ter Regulation may be applied. Indeed, one of the fundamental innovations of the Brussels II ter Regulation is the abolition of the declaration of enforceability for all decisions, public documents and agreements on parental responsibility.⁸²

However, the new text is overly complex due to the existence of three types of titles linked to the agreement reached by the parties in relation to the parental responsibility of the child, which are eligible for free circulation within the EU⁸³: on the one hand, court decisions, with their own regime of recognition and enforcement (A); and on the other, public documents and agreements, the latter being a new third category that shares the recognition and enforcement regime of public documents (B). Therefore, one of the main problems for legal practitioners will be characterization of the three categories.⁸⁴

the parties pursuant to the Regulation in matters of parental responsibility where agreement of the parties was reached in the course of mediation and other means of alternative dispute resolution (see Recital 43)". See EU, Practice Guide for the application of the Brussels IIb Regulation, cit., p. 106.

⁸² See Chapter IV of the Brussels II ter Regulation. For an in-depth analysis of the new regime of extraterritorial effectiveness of decisions and public documents in matters of parental responsibility, see, among others, GONZÁLEZ MARIMÓN M., *Menor y responsabilidad parental en la Unión Europea*, Valencia, 2021, pp. 331 y and ff.

⁸³ ESPLUGUES MOTA C., *El Reglamento Bruselas II ter y el recurso a los MASC en materia de responsabilidad parental y sustracción internacional de menores*, cit., p. 165 ff.

⁸⁴ In this regard GONZÁLEZ BEILFUSS C., *What's New in Regulation (EU) no 2019/1111?*, in *Yearbook of Private International Law*, v. XXII 2020-2021, 2021, p. 99.

4.2.1. *The recognition and enforcement of court decisions that approve a mediation agreement – or other ADR*

The first option available to the parties after reaching an agreement in mediation, or any other ADR, is a judicial decision that approves the agreement concluded by the parties in mediation – or outside of it.

In this regard, Recital 14 of the Brussels II ter Regulation clarifies that “*According to the case-law of the Court of Justice, the term 'court' should be given a broad meaning so as to also cover administrative authorities, or other authorities, such as notaries, who or which exercise jurisdiction in certain matrimonial matters or matters of parental responsibility*”. Thus “*Any agreement approved by the court following an examination of the substance in accordance with national law and procedure should be recognised or enforced as a 'decision'*”.

Decisions will be recognised and enforced according to Chapter IV of Brussels II ter Regulation. As has been anticipated, one of the main novelties of the Brussels II ter Regulation is the elimination of the declaration of enforceability for all decisions on matters of parental responsibility.⁸⁵

4.2.2. *The recognition and enforcement of authentic instruments and agreements on parental responsibility*

As already mentioned, an additional route for the circulation in the EU of mediation agreements – or other ADR – in matters of parental responsibility is through a public document – authentic instrument- incorporating the agreement reached by the parties.

To this end, Article 2.2(2) of the Brussels II ter Regulation provides a definition of authentic instrument as a document which has been “*formally drawn up or registered as an authentic instrument in any Member State in the matters falling within the scope of this Regulation and the authenticity of which: a) relates to the signature and the content of the instrument; and; y b) has been established by a*

⁸⁵ In this regard, see Article 34.1 of the Brussels II ter Regulation.

public authority or other authority empowered for that purpose. The Member States shall communicate those authorities to the Commission in accordance with Article 103". This category would therefore include mediation agreements approved by a public authority.

Therefore, as specified in Recital 14 of the Brussels II ter Regulation: "*Other agreements which acquire binding legal effect in the Member State of origin following the formal intervention of a public authority or other authority as communicated to the Commission by a Member State for that purpose should be given effect in other Member States in accordance with the specific provisions on authentic instruments and agreements in this Regulation*".

As a third and last option, the Brussels II ter Regulation introduces a new -and uncertain- category of "agreements" on parental responsibility.⁸⁶ Thus, Article 2.2.3 of the Brussels II ter Regulation, which considers an "agreement", for the purposes of Chapter IV of the Regulation, "*a document which is not an authentic instrument, has been concluded by the parties in the matters falling within the scope of this Regulation and has been registered by a public authority as communicated to the Commission by a Member State in accordance with Article 103 for that purpose*".

In fact, Recital 14 of the Brussels II ter Regulation, after referring to the authentic instruments set out in the previous paragraph, goes on to state the Regulation does not enable the circulation of "*mere private agreements*". On the contrary, "*agreements which are neither a decision nor an authentic instrument, but have been registered by a public authority competent to do so, should circulate. Such public authorities might include notaries registering agreements, even where they are exercising a liberal profession*".

From the point of view of the evolution of contemporary Private International Law, the introduction of these agreements is considered to be a manifestation of the current trend of transferring certain situations and acts traditionally covered by conflict of laws to the

⁸⁶ Prof. Esplugues Mota points out that this concept is not entirely new, as it already appeared in the Brussels II bis Regulation (ESPLUGUES MOTA C., *El Reglamento Bruselas II ter y el recurso a los MASC en materia de responsabilidad parental y sustracción internacional de menores*, cit., p. 44) In the same sense CORNELOUP S., KRUGER T., *Le Règlement 2019/1111, Bruxelles II: la protection des enfants gagné du ter(rain)*, cit., p. 238.

area of extraterritorial effectiveness.⁸⁷ The introduction of this type of “private” agreement is a novelty in the Brussels II ter Regulation, as the question of the practical application of this type of agreement in matters of parental responsibility remains to be clarified.⁸⁸

It can be said that the EU legislator, as in other European instruments of Private International Law, treats the effectiveness of authentic instruments and agreements on parental responsibility⁸⁹ in the same way as the regime for judicial decisions. The new Brussels II ter Regulation does not require a declaration of enforceability prior to enforcement for authentic instruments and agreements on parental responsibility that are legally binding and enforceable in the Member State of origin.⁹⁰ To this end, it provides for a request to be made by a party to the court or competent authority of the Member State of origin for a certificate of an authentic instrument or agreement on parental responsibility.⁹¹ In this way, the Regulation empowers the court of the Member State of origin to control international jurisdiction under Chapter II of the aforementioned instrument, as well as to assess the best interests of the child.⁹² In any case, the certificate is subject to rectification or revocation.⁹³ In addition, the grounds

⁸⁷ This is stated by CORNELOUP S., KRUGER T., *Le Règlement 2019/1111, Bruxelles II: la protection des enfants gagnes du ter(rain)*, cit., p. 237.

⁸⁸ In this regard see ESPLUGUES MOTA C., *El Reglamento Bruselas II ter y el recurso a los MASC en materia de responsabilidad parental y sustracción internacional de menores*, cit., pp. 44 and ff.

⁸⁹ Article 64 of the Brussels II ter Regulation does, however, require that these be “*authentic instruments which have been formally drawn up or registered, and to agreements which have been registered, in a Member State assuming jurisdiction under Chapter II.*”, which lays down the rules of jurisdiction in matters of matrimonial and parental responsibility.

⁹⁰ Art. 65.2 Brussels II ter Regulation.

⁹¹ See Art. 66.1.b and Annex IX Brussels II ter Regulation. The provision adds that this certificate shall contain a summary of the enforceable obligation included in the public document or agreement. The link between recognition and enforcement and the certificate is direct and exhaustive, such that “*If the certificate is not produced, the authentic instrument or agreement shall not be recognised or enforced in another Member State*” (Art. 66.5 Brussels II ter Regulation).

⁹² Art. 66.2 Brussels II ter Regulation.

⁹³ Art. 77 Brussels II ter Regulation.

for refusing recognition or enforcement of authentic instruments or agreements on parental responsibility are provided for.⁹⁴

5. *Final remarks*

In the context of the growing global trend towards exploring alternative routes to State courts, also promoted from the EU, the new Brussels II ter Regulation introduces a clear commitment to its promotion in the context of conflict resolution in matters of parental responsibility. Leaving behind the almost absolute silence in the area of its predecessor, the new Regulation represents a step forward in the regulation of this issue, and even facilitates it in all its covered areas, both in parental responsibility procedures and in those relating to the international child abduction. It also incorporates relevant improvements to facilitate the circulation of mediation agreements.

This can be understood as a positive step forward from a children's right based approach. Mediation in international child abduction cases can definitely be a tool to deescalate the conflict and help parents to come to an amicable solution in the best interests of the child. In this regard, it should not be forgotten that, as in other matter which involve the child, children's right should be implemented in the mediation proceeding. And, in particular, the right of the child to participate, to information, and to be heard.

However, there is still an absence of a common framework of the development of mediation in international family law cases. That is why, further research is needed to look for methodologies and best practices that are being conducted in different Member States.

⁹⁴ Art. 68 Brussels II ter Regulation.

The EU Legislation on SLAPPs and its First “Stress-Tests” in Lawsuits Between Environmental NGOs and Corporations

Francesca Maoli

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1. Introduction

The so-called “SLAPPs” (*Strategic Lawsuits Against Public Participation*) are civil actions aimed at instituting manifestly unfounded or abusive court proceedings against journalists or other “public watchdogs” such as activists or human rights defenders¹. They are designed to obstruct the action of the aforementioned private subjects, undermine their credibility or their communications to the public. SLAPPs are part of the broader phenomenon of strategic litigation², albeit understood in its “negative” sense. The objective of a SLAPP is to bend judicial protection to other, different aims, which consist in producing intimidating and dissuasive effects, as well as causing practical obstacles that can interfere with the activities of the defendants, by reason of their objectives and/or the position they hold in civil society.

Many legal systems have dealt with the issue of SLAPPs, encountering difficulties in defining, rationalizing and sketching its

¹ SCHENNACH S., *Countering SLAPPS: an imperative for a democratic society*, report on request of the Parliamentary Assembly of the Council of Europe, Doc. 15869 of 23 November 2023.

² See HESS B., *Strategic Litigation: A New Phenomenon in Dispute Resolution*, in *MPILux Research Paper Series*, No. 2022(3), p. 25. The Author, highlighting the difference between “litigation strategy” and “strategic litigation”, stresses that in the latter case “*lawsuits are filed with a larger political ambition, most often to promote societal and legal change*”.

outlines³. Worldwide, there are many examples of SLAPPs: reference can be made to few, key leading cases which have fuelled the debate on the topic in their respective jurisdictions.

In the 1990s, McDonald's Corporations sued two environmental activists of "London Greenpeace" before English courts, after they produced and distributed on the streets of London a leaflet critical to the company: McDonalds claimed damages of up to GBP 100 thousand and spent around GBP 10 million for the proceedings which lasted nearly ten years. The company was awarded GBP 76 thousand by the Court of Appeal, but the decision was never enforced⁴.

Between 2008 and 2017, the investigative journalist Daphne Caruana Galizia faced over 40 defamation lawsuits from politicians and businesspeople she exposed for corruption, in her home country in Malta and in other jurisdictions. She was assassinated in 2017, with several lawsuits still pending against her estate after her death⁵.

In 2013 and in 2016 respectively, the company Resolute Forest Products filed two lawsuits against Greenpeace Canada and two of its employers before the U.S. District Court in Georgia (for a \$300 million anti-racketeering action) and the Ontario Superior Court of Justice (for a \$7 million damage action for defamation, malicious falsehood and intentional interference with economic relations)⁶. In

³ Moving away from the European area, see among others SHAPIRO P., *SLAPPs: Intent or Content: Anti-SLAPP Legislation Goes International*, in *Review of European, Comparative & International Environmental Law*, 2010, p. 14; ETCHART L., *Global Governance of the Environment, Indigenous Peoples and the Rights of Nature Extractive Industries in the Ecuadorian Amazon*, Cham, 2022, p. 121; DUTTA N., *SLAPPs in the Global South: Features and Policy Responses*, International Center for Not-for-Profit Law, 2020, available at <https://www.icnl.org>; as concerns South Africa, see also MUROMBO T., VALENTINE H., *Slapp suits: an emerging obstacle to public interest environmental litigation*, in *South Africa, in South African Journal on Human Rights*, 2011, p. 82; for the Asia-Pacific region, see United Nations Environment Programme, *Environmental Rule of Law and Human Rights in Asia Pacific: Strategic litigation against public participation (SLAPPs). Summary for Decision Makers*, Nairobi, July 2023, available at <https://wedocs.unep.org/>.

⁴ The case was brought before the European Court of Human Rights. See LILLARD M.C., *McGoliath v. David: The European Court of Human Rights Recent "Equality of Arms" Decision*, in *German Law Journal*, 2005, p. 895.

⁵ The website of the Daphne Caruana Galizia Foundation is available at <https://www.daphne.foundation/en/>.

⁶ More information are available in the database *Global Freedom of Expression* of the Columbia University, available at <https://globalfreedomofexpression.columbia.edu/cases/-resolute-forest-products-v-greenpeace-international/> (last accessed 7th February 2026).

April 2024, the parties’ joint statement announced the final conclusion of all related long-running litigations⁷.

At the same time, it should be borne in mind that the phenomenon of SLAPPs is far to be restricted to few, sensational cases. Much research has highlighted the widespread nature of the phenomenon and the difficulty in identifying cases of this type, given the magnitude of situations that occur on a daily basis. Those examples show that defamation is the most popular accusation which is used as a basis for a SLAPP. On the other hand, strategic lawsuits can also be based on other grounds, such as data protection, privacy or even criminal charges connected to strikes or protests, which may be based on the specific features of the case or may depend on possibilities offered by the national applicable law.

In Europe, attention to SLAPPs has particularly surged following the aforementioned case of Daphne Caruana Galizia. According to the most recent statistics of CASE (a coalition of NGOs with a focus on this topic)⁸, there have been 1303 documented SLAPPs from 2010 to 2024. Among the 43 countries covered by the report, Italy results to experience the highest number of SLAPPs in the last annuality covered by the research, namely 21 in the course of 2024.

It has been observed that the negative impact of SLAPPs could be further amplified in cases where they present elements of transnationality: although statistics in this sense are not currently much significant⁹, the impact of a cross-border SLAPP could be much greater compared to a purely “domestic” one, as the complications and costs borne by defendants would increase, and they may also find themselves involved in multiple proceedings initiated in different States¹⁰.

⁷ Available at <https://www.greenpeace.org/international/press-release/66635/>.

⁸ CASE, *2025 Report. SLAPPs in Europe: Democracy in the Dock*, January 2026, available at <https://www.the-case.eu/wp-content/uploads/2026/01/CASE-2025-Report-layout-ted-vf.pdf> (last accessed 3rd February 2026).

⁹ CASE, *2025 Report. SLAPPs in Europe*, cit., highlighted that, out of the SLAPPs recorded between 2010 and 2024, 8.5% were cross-border cases.

¹⁰ FRANZINA P., *Sinergie tra cooperazione giudiziaria e armonizzazione materiale e processuale in Europa: il caso delle azioni bavaglio*, in ANNONI A., FORLATI S., FRANZINA P. (eds.), *Il diritto internazionale come sistema di valori - Scritti in onore di Francesco Salerno*, Napoli, 2021, p. 809.

Cross-border SLAPPs have become subject to regulation at the European level with the adoption of Directive (EU) 2024/1069 on the protection of persons engaged in public participation from manifestly unfounded or abusive court proceedings (hereinafter, also Anti-SLAPP Directive)¹¹. The Directive entered into force on May 6, 2024 and must still be implemented by the Member States: the deadline for the adoption of national implementing measures is 7 May 2026 (so far, only Ireland, Malta, Lithuania, Romania (partially), Slovenia and Sweden have adopted or at least communicated an implementing legislation¹² and some other countries are in the drafting phase¹³). To a large extent, the instrument aims to introduce into national legal systems some measures aimed at guaranteeing certain procedural safeguards against SLAPPs¹⁴.

As it will be examined, the Directive only applies to “cross-border” SLAPPs. This is one of the main limits of the instrument. Despite this – and also considering that SLAPPs present many problems

¹¹ Directive (EU) 2024/1069 of the European Parliament and of the Council of 11 April 2024 on protecting persons who engage in public participation from manifestly unfounded claims or abusive court proceedings (‘Strategic lawsuits against public participation’), OJ L, 2024/1069, 16.4.2024. See MEMMEL A., *The EU anti-SLAPP Directive: (un)founded optimism?*, in *Nordic Journal of European Law*, 2026, p. 51; ROSSI E.A., *Directive (EU) 2024/1069 («anti-SLAPPs»)*. *Analysis of private international law*, in *Eurojus*, 2025, p. 148. On the proposal which preceded the adoption of the Directive, see KOHLER C., *Private International Law Aspects of the European Commission’s Proposal for a Directive on SLAPPs (‘Strategic Lawsuits Against Public Participation’)*, in *Rivista di diritto internazionale privato e processuale*, 2022, p. 813; PASQUA M., *The Proposed EU Directive on SLAPPs: A (First) Tool for Preserving, Strengthening and Advancing Democracy*, in *Athena*, 2023, p. 209.

¹² As concerns Malta, see the Maltese L.N. 77/2024, Strategic Lawsuits Against Public Participation Order, amending the European Union Act (Cap. 460), Government Gazette of Malta No. 21,292– 31.07.2024. Lithuania, Romania, Slovenia and Sweden have communicated to the European Commission various acts linked to the transposition of the Directive (and the conformity of national law with the objectives and scope of the latter): all are available on EUR-Lex at <https://eur-lex.europa.eu/legal-content/EN/NIM/?uri=CELEX-:32024L1069>.

¹³ The transposition of the Directive is monitored by a working group established under the aegis of the European Association of Private International Law (EAPIL). More information is available on the official webpage at <https://eapil.org/what-we-do/working-groups/group-on-anti-slapp-directive-transpositions/>.

¹⁴ MELCHER C.M., *Shielding Speech: Evaluating the European Anti-SLAPP Directive’s Efficacy in Curtailing Strategic Lawsuits Aimed at Public Participation*, in *European Union Law Working Papers*, 99/2024.

from the private international law perspective¹⁵ – the Directive contains only two provisions of private international law (Articles 16 and 17), which are the main focus of this contribution. Nevertheless, not all the private international law issues will be analysed in the paper, which will address a recent judicial initiative initiated in a dispute between an environmental NGO and a US-based corporation: the case may constitute a first “stress-test” for the Directive.

2. The EU initiative: the Directive on cross-border SLAPPs

When the EU decided to launch a legislative proposal on SLAPPs, the intention of the institutions was clearly to address the phenomenon as a whole, in the light of the threat that those actions may constitute for democracy, freedom of expression and the administration of justice. At the same time, the future instrument needed to take into account the limits of the EU competences. In the end, the chosen legal basis was Article 81(2)(f) TFEU, which allows the European Union to adopt measures aimed at ensuring “*the elimination of obstacles to the proper functioning of civil proceedings, if necessary by promoting the compatibility of the rules on civil procedure applicable in the Member States*”. In line with the boundaries set by Article 81 TFEU for the exercise of competences in the field of civil judicial cooperation, the Directive intends to apply to matters that have cross-border implications.

Indeed, as mentioned, the presence of one or more elements of transnationality can assume great importance in the context of SLAPPs, especially from the point of view of the consequences that such actions can have on the persons who are their target. Indeed, civil litigation systems in some EU countries create particularly

¹⁵ See among others BENVENUTI E., *Azioni strategiche tese a dissuadere la partecipazione pubblica e tutela delle libertà di espressione e informazione nel diritto internazionale privato dell’Unione europea*, in *Freedom, Security and Justice: European Legal Studies*, 2024, p. 138; BORG-BARTHET J., LOBINA B., ZABROCKA M., *The Use of SLAPPs to Silence Journalists, NGOs and Civil Society*, Study requested by the European Parliament, Committee on Legal Affairs, 2021, available at [https://www.europarl.europa.eu/RegData/etudes/STUD/2021/694782/IPOL_STU\(2021\)694782_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/STUD/2021/694782/IPOL_STU(2021)694782_EN.pdf); KOHLER C., *Private International Law Aspects of the European Commission’s Proposal for a Directive on SLAPPs*, cit.; E.A. ROSSI, *Directive (EU) 2024/1069 («anti-SLAPPs»)*. *Analysis of private international law*, cit.

beneficial conditions for SLAPPs, while others have developed anti-SLAPPs provisions or are perceived as a less attractive forum¹⁶. At the same time, the great majority of SLAPPs occur in the domestic context and this circumstance contributes to weaken the efficacy of the new instrument¹⁷.

Perhaps for this reason, the definition of “cross-border SLAPPs” provided by the Directive is rather wide: according to Article 5, a dispute is considered cross-border unless both parties are domiciled in the same Member State as the court seized and all other elements relevant to the situation in question are located exclusively in that Member State. It is also specified that domicile is determined in accordance with regulation (EU) No. 1215/2012 (Brussels I-*bis*)¹⁸. Moreover, the instrument has been accompanied by a Recommendation to Member States in order to persuade the extension of the guarantees of the Directive to purely internal situations¹⁹. Some countries, including Italy, seem already reluctant to follow this advice²⁰.

On the other hand, the Directive largely consists of provisions aimed at harmonizing national civil procedural law rules, when a court of a Member State is faced with a claim that is “*manifestly unfounded*” or presents the characteristics of an “*abusive court proceeding aimed at blocking public participation*”. The wording of the

¹⁶ See BAYER J., BÁRD P., VOSYLIUTE L., CHUN LUK N., *Strategic Lawsuits Against Public Participation (SLAPP) in the European Union: A comparative study*, 30 June 2021, available at https://commission.europa.eu/document/d8024bf5-5c15-48fb-bbfc-5cc54bc-a518e_en?prefLang=it.

¹⁷ CASE, *2025 Report. SLAPPs in Europe*, cit.

¹⁸ Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast), OJ L 351, 20.12.2012, p. 1. Despite the absence of any further indications in the text or in the recitals of the Directive, reference shall be made to Article 4 of the Brussels I *bis* Regulation, laying down the general rule for jurisdiction in civil and commercial matters, as well as to Articles 62 and 63 of the aforementioned Regulation.

¹⁹ Commission Recommendation (EU) 2022/758 of 27 April 2022 on protecting journalists and human rights defenders who engage in public participation from manifestly unfounded or abusive court proceedings (‘Strategic lawsuits against public participation’), OJ L 138, 17.5.2022, p. 30-44.

²⁰ Even if no official written statement has been released yet, see the declarations of President Giorgia Meloni, reported here: <https://www.ossigeno.info/meloni-la-direttiva-anti-slapp-si-applica-solo-a-cause-trans-frontaliere/>. The full press conference of 9 January 2026 is available at <https://webtv.camera.it/evento/30032#>.

Directive also highlights how difficult it is to define and to identify strategic lawsuits of this kind: according to its Article 4(3), “*abusive court proceedings against public participation*” are “*court proceedings which are not brought to genuinely assert or exercise a right, but have as their main purpose the prevention, restriction or penalisation of public participation, frequently exploiting an imbalance of power between the parties, and which pursue unfounded claims*”. No definition is provided of “*manifestly unfounded claims*”.

Firstly, it is provided that associations, organizations or other entities holding a legitimate interest may intervene in proceedings that present the characteristics of a SLAPP, to support the defendant (who must give consent to the intervention) or to provide information they consider relevant to the resolution of the dispute²¹.

Secondly, the possibility is provided for defendants to obtain security for legal costs and, if provided by the *lex fori*, compensation for damages²².

Thirdly, the court seized has the possibility to adopt (at the request of a party or *ex officio*) a decision of early dismissal of the claim for manifest lack of foundation, without prejudice to the possibility for the plaintiff to demonstrate the merit of the claim and/or to appeal such decision²³.

Fourthly, the Directive requires Member States to introduce the possibility for the court seized: i) to order the plaintiff to pay all legal costs, including those for legal representation (unless they are “*excessive*”)²⁴; ii) to impose effective, proportionate and dissuasive sanctions or other equally effective appropriate measures, including payment of a sum of money as compensation or publication of the decision, if provided for by national legislation²⁵. There may also be the possibility of availing oneself of such forms of protection even in the event that the plaintiff decides, during the proceedings, to amend or withdraw the claim.

²¹ Article 9 of the Directive (EU) 2024/1069.

²² Article 10 of the Directive (EU) 2024/1069.

²³ Articles 11, 12 and 13 of the Directive (EU) 2024/1069.

²⁴ Article 14 of the Directive (EU) 2024/1069.

²⁵ Article 15 of the Directive (EU) 2024/1069.

Finally, a fast-track procedure is established for all requests submitted by the defendant in accordance with the provisions of the Directive, taking into account the circumstances of the case, national legislation, “*the right to an effective remedy and the right to an impartial court*”²⁶.

3. *The private international law provisions of the Anti-SLAPP Directive*

The Anti-SLAPP Directive also contains two provisions relating to aspects of private international law, systematically placed in Chapter V and expressly qualified, in the Commission’s proposal, as “*ancillary to the main objective of the initiative*”. These are Articles 16 and 17, which both concern situations in which a SLAPP has been brought in a third State, outside the European Union.

In particular, Article 16 establishes that Member States must decline the recognition and enforcement of decisions rendered in a third country, following legal proceedings that can be qualified as manifestly unfounded or abusive according to the law of the Member State in question. This ground for refusal should apply only in the case where the defendant in the main proceedings (which must present the characteristics of a SLAPP in terms of Article 4(3) of the Directive) is domiciled in a Member State, which does not necessarily have to be the same country in which recognition or enforcement of the judicial measure is requested. In this regard, recital 43 specifies that “[I]t is for the Member States to choose whether to refuse recognition and enforcement of a judgment issued in a third country as manifestly contrary to public policy or on the basis of a separate ground for refusal”.

Some concerns can be raised about the decision of the EU lawmaker not to address the issue of the intra-EU circulation of SLAPP judgments. Even if the Anti-SLAPP Directive will reach the desired result of at least reducing the number of SLAPPs brought before Member States’ courts, the risk remains. Maybe, the decision not to include provisions on intra-EU recognition and enforcement was

²⁶ Article 7 of the Directive (EU) 2024/1069.

inspired by the willingness not to interfere with the Brussels I bis Regulation and/or the mutual trust already existing among Member States. On the other hand, the creation of a dual track could increase uncertainty.

Article 17, for its part, aims to introduce a special ground of jurisdiction in favour of Member States’ courts, to which victims of a SLAPP brought in a third country may turn to request compensation for damages suffered and reimbursement of expenses incurred in relation to the SLAPP in the Member State of domicile. In this case, the defendant in the compensation action is domiciled in a third country: Member States are therefore required to introduce into their international civil procedural law rules a *forum actoris*²⁷.

Pursuant to Article 17, paragraph 2, Member States “*may limit the exercise of jurisdiction under paragraph 1 while the proceedings are still pending in the third country*”. In addition to adopting a rather vague formulation, which does not provide any binding obligation for national courts, this provision makes it clear that Article 17 is conceived as an *ex post* remedy: it may not be able to function when the SLAPP is still ongoing. Therefore, if a Member State decides to make use of this clause²⁸, the slow pace of national proceedings may significantly limit the practical effectiveness of the remedy. Another element that could weaken the deterrent and protective effects of the provision is that Article 17 (contrary to the original legislative proposal) will not apply to SLAPPs initiated, in a third country, by applicants domiciled in a Member State.

As highlighted by recent research, the overall transposition of the Anti-SLAPP Directive is registering rather uneven progress across the EU²⁹. The same is therefore true for Articles 16 and 17, to which some Member States have extended the general position that their

²⁷ KOHLER C., *Private International Law Aspects of the European Commission’s Proposal for a Directive on SLAPPs*, in *Gedip-egpil.eu*, undated.

²⁸ For instance, this is the solution adopted by Malta: according to Article 9 of the L.N. 177 of 2024 cit., Maltese courts shall stay proceedings until the final judgment in the third country has been delivered.

²⁹ See van HOUTERT B., PASQUA M., *Status of the Anti-SLAPP Directive Transpositions at the 7 May 2026 Deadline*, in *EAPIL Blog*, 7 May 2026, available at <https://eapil.org/2026/05/07/status-of-the-anti-slapp-directive-transpositions-at-the-7-may-2026-deadline/>.

legal system is already in line with the objectives stated by the Directive: for instance, the Dutch government stated that domestic law already provides for the special jurisdiction ground of Article 17(1) of the Anti-SLAPP Directive in Article 6(e) of the Dutch Code of Civil Procedure, in respect of obligations arising out of a tortious act, when the harmful event has occurred or may occur in the Netherlands³⁰.

On the other hand, national judicial authorities have already been called upon to address the private international law rules that the Directive aims to introduce, even before the expiration of the deadline for its transposition.

4. *A first “stress-test” for the Anti-SLAPP Directive? The case Greenpeace v Energy Transfer*

A very first opportunity to discuss on the practical application of the Directive (namely its Article 17) is already in place and finds its origins in the US-based dispute between the holding Energy Transfer and the non-governmental organization Greenpeace Int. In 2017, the first had filed a lawsuit against the latter (and other connected entities) before the US District Court in North Dakota on the basis of US federal law – in particular, the *Racketeer Influenced and Corrupt Organizations Act* (RICO)³¹, because of the protest organized against the Dakota Access Pipeline. Greenpeace was accused of racketeering, defamation and instigation to eco-terrorism.

While the Federal Court had granted the defendant’s motion to dismiss³², Energy Transfer had brought a complaint before the North Dakota State Court (County of Morton): in July 2025, the jury found Greenpeace Int., Greenpeace Inc. and Greenpeace Fund Inc. liable for defamation and other accusation, granting the Energy Transfer

³⁰ On the topic VAN HOUTERT B., *Progress and Challenges for SLAPP Targets from the Perspective of EU and Dutch PIL*, in *EAPIL Blog*, 18 February 2025.

³¹ Racketeer Influenced and Corrupt Organizations Act (or RICO Act), 18 U.S.C. §§1961-1968, enacted on 15 October 1970.

³² All the decision adopted by US Courts are available on the *Climate Litigation Database* of the Sabin Center for Climate Change Law (Columbia Law School), at https://www.climatecasechart.com/collections/energy-transfer-lp-v-greenpeace-international-_056d68.

group more than \$660 Million of damages³³. A subsequent decision of the Court has reduced the amount to approximately \$345 Million³⁴.

The proceedings before US State Courts are still pending. Once they are definitive, it may be possible that Energy Transfer will try to ask for recognition and enforcement, eventually in The Netherlands where Greenpeace has its main statutory seat. Article 16 of the Anti-SLAPP Directive is precisely designed for those kinds of situations: once applicable, it will at least impose over EU Member States an assessment on whether the legal proceedings in third countries can be qualified as SLAPPs.

It is in this context that Greenpeace Int. decided to invoke – for the very first time and even before the final decision of the State Court – the special ground of jurisdiction of Article 17 of the SLAPPs Directive, eradicating a proceeding against Energy Transfer before the Amsterdam District Court in The Netherlands³⁵. Greenpeace therefore seeks to obtain the recovery of damages consequent to the SLAPP allegedly suffered in the US³⁶.

More specifically, the international jurisdiction of Dutch courts for the dispute in question has been invoked on the basis of different grounds. Firstly, Article 6(e) of the Dutch Code of Civil Procedure, which refers to the place in which the event which caused the damage has occurred or may occur in The Netherlands. Here, Greenpeace has invoked an interpretation of domestic procedural law in the light of the case law of the EU Court of Justice on the special

³³ Ibid.

³⁴ Ibid.

³⁵ The summons sent to Energy Transfer are available on the Greenpeace official website at <https://www.greenpeace.org/international/about/legal/dutch-anti-slapp-lawsuit/> (the English version was used as a reference for the present contribution). On the lawsuit see ECKES C., PAIEMENT P., *Silencing Greenpeace: Can the EU Prevent the Chilling Effect on Democracy From Crossing the Atlantic?*, in *VerfassungsBlog*, 21 March 2025.

³⁶ According to the materials available on the *Climate Litigation Database*, cit., requests of Energy Transfer for anti-suit injunction have been rejected by the North Dakota State Court. However, on May 7, 2026 the North Dakota Supreme Court has directed the district court to issue an antisuit injunction, albeit “narrowly tailored”, barring Greenpeace from pursuing claims in Dutch court asserting that the North Dakota case lacked foundation. The decision is available at <https://cases.justia.com/north-dakota/supreme-court/2026202503-41.pdf?ts=1778163095>.

ground of jurisdiction of Article 7(2) of the Brussels I bis regulation, whose rules of jurisdiction are not applicable in the case at hand due to the fact that Energy Transfer (the defendant) is domiciled in the US³⁷. In the context of the Brussels I bis Regulation, the Court of Justice has specified that the “*place where the harmful event occurred*” is to be interpreted as both the place of the event giving rise to the tort, or the place where the (primary) damage occurred, which may be geographically distinct³⁸. Applying the same approach in the interpretation of Dutch Law could result in attributing jurisdiction to the Amsterdam District Court, even though it should be remembered that the Court of Justice’s case law on the aforementioned special ground of jurisdiction is far from clear and straightforward: for instance, in cases of damages consisting in purely financial losses, the Court has specified that neither the mere location of a bank or investment account, the place of the applicant’s domicile, nor the place where his assets are concentrated cannot be considered as sufficient to determine the place in which the damage directly materialized³⁹.

In addition, Greenpeace has decided to invoke the jurisdiction of Dutch courts on the basis of Article 17 of the Anti-SLAPP Directive, albeit from a peculiar perspective. In the summons, it is recognized that the Dutch government considers that domestic law already provides for the possibility for the EU-based SLAPP target to seek compensation before the court of its domicile⁴⁰. Therefore, Greenpeace fosters an interpretation of Article 6, lit. e) of the Dutch Code of Civil Procedure also in the light of Article 17 of the Anti-SLAPP Directive, in line with the goal of achieving far-reaching protection against SLAPPs. At the same time, Greenpeace also states that the decision of the Dutch government not to transpose some provisions

³⁷ Article 6 of the Brussels I bis Regulation.

³⁸ Judgment of the Court of 30 November 1976, *Handelskwekerij G. J. Bier BV contro Mines de potasse d’Alsace SA*, case 21/76. On the principle of ubiquity and the subsequent CJEU case law confirming this position, see P. MANKOWSKI, *Article 7*, in MAGNUS U., MANKOWSKI P. (eds.), *Brussels I bis Regulation*, Köln, 2022, p. 108.

³⁹ See the Judgment of the Court (Second Chamber) of 10 June 2004, *Rudolf Kronhofer v Marianne Maier and Others*, case C168/02; Judgment of the Court (Fourth Chamber) of 28 January 2015, *Harald Kolassa v Barclays Bank plc*, case C-375/13; Judgment of the Court (Second Chamber) of 16 June 2016, *Universal Music International Holding*, case C-12/15.

⁴⁰ At p. 32 of the summons cit. *supra*, note 34.

of the Directive makes the contents of the latter “*directly enforceable*”⁴¹.

In the light of the above, the legal reasoning of Greenpeace is very much based on the domestic rules of jurisdiction, interpreted in the light of the EU legislation. At the same time, Greenpeace seems to invoke the attribution of direct effects to Article 17 of the Anti-SLAPP Directive.

5. (continue) *The direct effects of Article 17 of the Anti-SLAPP Directive?*

If some Member States decide not to adopt specific legislative instruments to transpose the Anti-SLAPP Directive, the decision of Dutch courts on the *Greenpeace v Energy Transfer* case may be relevant also from the perspective of the possible attribution of direct effects to some provisions of the abovementioned instrument. At the same time, the limits and conditions imposed by EU law should be carefully considered. As it is known, the possible attribution of direct effects to the provisions of a Directive that was not transposed at the national level is the subject of extensive discussion and traditionally depends on compliance to certain conditions⁴². It is equally true that those parameters have been subject to adjustments over time⁴³.

In particular, this assessment may concern specific provisions and not the legal instrument as a whole. The possible attribution of direct effects can be discussed when the Member State has not transposed the Directive by the deadline: in *Greenpeace v Energy Transfer*, the Dutch courts may decide to consider that condition if, after 7 May 2026, a domestic implementing legislation was not adopted.

⁴¹ At p. 33 of the summons cit. *supra*, note 34.

⁴² Elaborated by the Court of Justice starting from its landmark case law in the 1970s: see Judgment of the Court of 17 December 1970, *SACE*, case 33/70; Judgment of the Court of 4 December 1974, *Yvonne van Duyn v Home Office*, case 41/74, on which recently FESTA A., *L'effetto diretto verticale delle direttive negli ordinamenti nazionali. Una rilettura dei fatti, del contesto e dei protagonisti della storica sentenza van Duyn*, in *Eurojus*, 2025, p. 164.

⁴³ CECCHETTI L., *Verso i cinquant'anni dell'effetto diretto delle direttive: questioni ancora aperte*, in *Quaderni AISDUE*, 2023, n. 4, p. 7.

Moreover, the traditional position is that a Directive can have only vertical direct effects: individuals may invoke it only against a State and not against other individuals⁴⁴. This requisite has interested some evolutions as a result of the Court of Justice's case law and is the object of an intense doctrinal debate⁴⁵.

Most importantly, the provision shall be sufficiently clear, precise and unconditional, in order for national authorities to be able to apply it without the intermediation of domestic law. It is doubtful whether the wording of Article 17 of the Anti-SLAPP Directive could, in fact, be considered self-sufficient and suitable for direct application by national authorities: if a claimant domiciled outside the European Union has brought a SLAPP before a court in a third country against a natural or legal person domiciled in a Member State, the latter's jurisdiction must provide adequate remedies so that the victim "*may claim, before the courts of the place where that person is domiciled, compensation for the damages and costs incurred in connection with the proceedings before the court of the third country*". The provision already establishes the domicile of the victim of SLAPP as the ground of jurisdiction for such actions, but nevertheless requires Member States to determine the forms, modalities and content of the remedy. Furthermore, pending the deadline for implementation of the Directive (and despite the aforementioned position expressed by the Dutch legal system) the appropriateness of attributing direct effects to it is debatable. In any case, as mentioned above, such effects could only be relevant in vertical relationships and would therefore not affect the case in question.

⁴⁴ Judgment of the Court of 26 February 1986, *M.H. Marshall v Southampton and South West Hampshire Area Health Authority*, case 152/04; Judgment of the Court of 14 July 1994, *Paola Faccini Dori v Recreb Srl*, case C-91/92.

⁴⁵ BOBECK M., *Why It Is Better to Treat Every Provision of EU Directives as Having Horizontal Direct Effect*, in *International Journal of Comparative Labour Law and Industrial Relations*, 2023, p. 211; CAFARI PANICO R., *L'efficacia orizzontale delle direttive nella recente giurisprudenza della Corte di giustizia*, in *Papers di diritto europeo*, 2024, p. 33; CECCHETTI L., *Something new under the Sun: The direct effect of directives plus Article 47 Charter in horizontal situations in the K.L. judgment*, in *Quaderni AISDUE*, 1/2024, p. 1; GALLO D., *La vexata quaestio dell'efficacia interna delle direttive: l'insostenibile leggerezza del divieto di effetti orizzontali*, in MOAVERO MILANESI E., PICCIRILLI G. (a cura di), *Attuare il diritto dell'Unione europea in Italia. Un bilancio a 5 anni dall'entrata in vigore della legge n. 234 del 2012*, Bari, 2018, p. 19.

On the other hand, even excluding any direct effect to Article 17, all provisions of domestic law would still need to be interpreted and applied in conformity with EU law, in order to achieve the results sought by the latter⁴⁶. Even if the applicants in the case under examination have invoked the Anti-SLAPP Directive *ex abundantia cautela*, the EU provisions may well serve as a parameter for interpretation of the other grounds of jurisdiction already at disposal in Dutch procedural law.

While waiting for the decision of the Amsterdam District Court, another possibility can be considered. Should the Dutch judges decide to attribute horizontal direct effects to Article 17 of the Anti-SLAPP Directive, this approach would be in line with the recent position expressed by the Court of Justice. In the same context of the attribution of direct effects to the provisions of a Directive which was not (or incorrectly) transposed, the Court has admitted the possibility for Member State’s courts “*or for any competent national administrative authority, to disapply, on the basis of domestic law, any provision of national law which is contrary to a provision of EU law that does not have such effect*”⁴⁷. This means that the attribution of horizontal direct effects is not radically excluded, provided that this decision can only emanate from the domestic legal system.

6. Concluding remarks

The dispute between Greenpeace and Energy Transfer illustrates some of the hurdles that may characterize the future application of

⁴⁶ Judgment of the Court (Grand Chamber) 5 October 2004, *Bernhard Pfeiffer and Others v Deutsches Rotes Kreuz, Kreisverband Waldshut eV*, Joined Cases C-397/01 to C-403/01; Judgment of the Court (Grand Chamber) of 24 January 2012, *Maribel Dominguez v Centre informatique du Centre Ouest Atlantique, Préfet de la région Centre*, Case C-282/10.

⁴⁷ Judgment of the Court (Grand Chamber) of 18 January 2022, *Thelen Technopark Berlin GmbH v MN*, case C-261/20, para. 33. Similarly the Judgment of the Court (Fifth Chamber) of 11 April 2024, *Gabel Industria Tessile SpA, Canavesi SpA v A2A Energia SpA, Energit SpA, Agenzia delle Dogane e dei Monopoli*, case C-316/22, para. 24: «*a Member State may, on the other hand, confer on the national courts the power to disapply, on the basis of its domestic law, any provision of national law which is contrary to a provision of EU law that does not have direct effect*».

the Anti-SLAPPs Directive, with particular reference to the private international law provisions.

As mentioned, the Directive avoids introducing new rules on intra-EU disputes or integrating/amending the already existing ones, possibly not to put into discussion the mutual trust existing between Member States. Hence, if a SLAPP is initiated in the EU, the novelties required by the Directive will be enough to address the phenomenon: if not, the circulation of the decision will be subject to the common rules (probably, of the Brussels I bis Regulation).

On the contrary, if a SLAPP is initiated in a third country, Article 16 of the Anti-SLAPP Directive requires Member States to prevent the recognition and enforcement in Europe, either through the introduction of a new ground for refusal or by opposing public policy considerations. If no specific ground is provided, the problem might be to understand whether the concrete application of the public policy exception would be enough to realize the objectives of the Directive: the general notion of public policy may not be adequately tailored to address the specific features of SLAPPs, which require an evaluation whether the overall legal proceeding in the third country was manifestly unfounded or abusive in the terms stated by EU law. Overall, it seems that the policy considerations on the adoption or non-adoption of a specific ground of jurisdiction will need to be combined with the general sensitivity that a legal system may have towards the issue of SLAPPs, as well as with the case law existing on the topic. On the other hand, if a new refusal ground is introduced, doubts are raised whether there might be overlaps with the existing public policy provisions⁴⁸.

As mentioned, it is also possible that a victim of a SLAPP initiated in a third country may seek for reparation before the EU courts of domicile, through the ground of jurisdiction that Member States must provide *ex* Article 17 Anti-SLAPP Directive. In the proceedings initiated before the Amsterdam District Court, Greenpeace has based jurisdiction both on domestic civil procedural law and on the aforementioned provision, possibly invoking the attribution of

⁴⁸ VAN HOUTERT B., PASQUA M., *Second Meeting of the EAPIL Working Group on Anti-SLAPP Directive Transpositions – Report (Part 1)*, cit.

horizontal direct effects. The hurdles of sustaining this solution have already been analysed.

It should also be highlighted that, in assessing the allegations brought by Greenpeace, the Dutch judicial authority will have to conduct a thorough assessment of the proceedings brought in the US to determine whether they meet the criteria set out in the definition of SLAPP provided by the Directive. Indeed, even before constituting an assessment on the merits, this would be necessary to determine the applicability itself of the ground of jurisdiction of Article 17 Anti-SLAPP Directive. This seems to be one of the most challenging task that EU law asks to Member States’ judicial authorities: the latter are called to evaluate the proceedings conducted in the third country, even on the merits, to assess whether they (i) “*have as their main purpose the prevention, restriction, or penalisation of public participation*” and (ii) “*pursue unfounded claims*” (Article 4(3) of the Directive). All in all, the wide and potentially blurred definition of the legal actions or proceedings that may be qualified as SLAPPs makes it difficult to address the issue in a systematic way.

As a final reflection, the future practice will also show whether Article 16 and 17 (and in particular their national implementing provisions) will operate in synergy. Both provisions require EU courts to assess whether the lawsuit in the third country was a SLAPP. If the recognition and enforcement of a decision is declined for this reason, this refusal should probably impact the assessment undertaken under civil liability proceedings initiated by the SLAPP victim in the EU country, and vice-versa.

Arbitrability of Tax Matters in the Context of Inter-private Disputes

Simone Carrea

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1. Introduction and outline

The purpose of the present contribution is to address the issue of arbitrability of tax matters in the context of international arbitration, by focussing, more specifically, on inter-private disputes involving a tax issue.

With a view to introducing the subject of this paper as well as providing an outline of the analysis carried out in the following paragraphs, it seems important to remind that the very possibility to decide tax matters in the context of arbitral proceedings has for long been a “taboo”¹, basically motivated by the innate rejection of the idea that a private form of justice administration (arbitration) could adjudicate on the most public of the obligations (taxation)².

¹ D. ZANNONI, *The Slow Erosion of the Tax Arbitrability Taboo*, in *Riv. dir. int.*, 2021, pp. 469 ff.

² On the topic of arbitrability of tax matters a vast literature exists. See *ex plurimis* T. CARBONNEAU, A.W. SHELDRIK, *Tax Liability and Intarbitrability in International Commercial Arbitration*, in *J. Transnat'l Pol'y*, 1992, pp. 23 ff.; L. MELCHIONNA, *Tax Disputes*

This is the reason why the first part of the present contribution will be devoted to verify whether such a “taboo” corresponds to an actual rule and – if so – the exact content of such rule.

To this end, regard will initially be had (in a more widened perspective) to all the different areas where, we might say, arbitration “meets” taxation.

These areas – as will be seen – are not confined to i) inter-private disputes (which is the specific object of the present analysis), but include also ii) disputes between States and private actors (mostly foreign investors) and iii) inter-State disputes (§ 2). As a matter of fact, the overall analysis of the three situations mentioned above might provide some general insights with regard to the fundamental and preliminary question as to whether tax matters are arbitrable.

After having concluded that – at least to a certain extent – tax matters might indeed be arbitrable (§ 3), the second part of the analysis will then try to address (in a more narrowed perspective, focused, as already mentioned, on inter-private disputes) the specific legal questions arising when a tax issue is brought before an arbitration panel (§§ 4 and ff.).

2. *When does arbitration “meet” taxation?*

As mentioned in the introduction, in order to establish whether (and if so, to what extent) the non-arbitrability of tax matters corresponds to an actual rule pre-empting tax matters from being adjudicated in the context of arbitral proceedings, it seems useful to adopt a more general perspective and consider the different contexts where, we might say, arbitration “meets” taxation³.

and International Commercial Arbitration, in *Diritto e pratica tributaria internazionale*, 2003, pp. 769 ff.; W.W. PARK, *Arbitrability and Tax*, in L. MISTELIS, S. BREKOULAKIS (eds.), *Arbitrability: International & Comparative Perspectives*, Kluwer Law International, 2009, pp. 179 ff.; H. FAZILAFAR, *Overriding Mandatory Rules in International Commercial Arbitration*, Cheltenham, 2019, esp. p. 44.

³ This effective metaphor is borrowed from G. ZEYEN, *When Taxation Meets Arbitration: Recent Initiatives to Introduce and Promote Arbitration in International and European Taxation*, in *Intertax*, 2017, pp. 722 ff.

2.1. *Inter-private contractual disputes*

The first situation – which also represents the focus of the present contribution – is represented by disputes involving a conflict of laws between private parties, a case falling in the classical domain of private international law⁴.

For example: two private actors enter into a contract for the performance of services or for the sale of a certain asset. Such contract gives rise to reciprocal obligations between the parties, but as it often (almost invariably) happens, it creates also fiscal obligations towards the State (or – since we are dealing with an international situation – the States) connected with the contract.

As a matter of fact, in this situation, private international law will lead to the identification of the applicable law, while the rules of international taxation will determine the States holding the power to tax the transaction and, in case of competing taxing powers, the methods to coordinate such powers.

The private (reciprocal) obligations of the parties and their tax liability, however, do not always run on separate tracks, but sometimes overlap, thus giving rise to the possibility that – whenever the parties have opted for arbitration – an arbitral panel might be faced with the need of addressing tax issues as well.

As a practical examples, we might consider the following situations.

I) Business A (Client) enters into a contract with business B (Contractor) for the performance of a certain service. The parties agree that A will have to pay B € 1.000.000 for the performance of the service, but nothing is expressly agreed with regard to the application of Value Added Tax (V.A.T.). Supposing that a) it is uncertain whether a 22% V.A.T. is applicable with regard to this service and b) a dispute arises between the parties concerning the payment of the

⁴ In this regard, it has to be reminded that fiscal matters are excluded from the scope of application of most legal instruments of private international law. For instance, with specific regard to the contractual matter, art. 1, par. 1, of Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I), in OJ L 177, 4.7.2008, pp. 6–16 provides that «[t]his Regulation shall apply, in situations involving a conflict of laws, to contractual obligations in civil and commercial matters. It shall not apply, in particular, to revenue, customs or administrative matters».

price (where B claims to owe only 1.000.000 and A claims to be owed 1.220.000), a doubt might arise as to whether such a dispute (and its underlying tax issue) can be referred to arbitration.

II) Football club C hires D, a very talented player, and they agree for a 1.000.000 yearly remuneration, net of any tax. Supposing that neither party, in the heat of negotiation, is inclined to define the precise meaning of the expression “net of all taxes”, it then remains unclear by reference to which taxation such expression has to be interpreted. Further assuming that the player moves to the State of the club (where taxation is 10%) but is still considered fiscally resident in his State of origin where taxation is 40%, a 30% gap would emerge depending on the identification of the State to which the taxes are due according to the applicable rules of international taxation. In the light of the above, the player might ask for the payment of (approximately) 1.400.000 € (€ 1.000.000 + the 40% taxation), while, at the same time, the Club might claim to owe him (roughly) € 1.100.000 (€ 1.000.000 + the 10% taxation). Since this kind of disputes is quite often referred to arbitration, one might wonder whether the arbitrators could decide on the tax issue underlying the solution of this contractual dispute.

2.2. *International disputes between States and foreign investors*

The second situation (disputes between States and private actors) where a tax issue might be raised within an arbitral proceeding is represented by contractual disputes between States and foreign investors.

As it is well known, foreign investments are usually covered by international investment agreements (between the national State of the investor and the host State where the investment is supposed to take place) which usually devote specific provisions to the issues concerning the protection that the investor is entitled to⁵. The

⁵ Among the vast literature on this topic see G. KOJANEC, *Investimenti all'estero: regime giuridico e garanzie internazionali*, Padova, 1970; G. SACERDOTI, *I contratti tra Stati e stranieri nel diritto internazionale*, Milano, 1972; I. ALVIK, *Contracting with Sovereignty: State Contracts and International Arbitration*, Oxford, 2011.

remedies envisaged for these purposes usually correspond to arbitration between the investor and the host State⁶.

Supposing that the host State adopts against the foreign investor a tax decision which is deemed to be inconsistent with the investment treaty (as practical examples, reference might be made to a denial of a tax refund due by the host State to the foreign investor or enactment of a discriminatory tax measure, heavily affecting – and possibly amounting to indirect expropriation of – the investment itself), the investor might initiate arbitral proceedings against the host State and challenge the legitimacy of such tax measures *vis-à-vis* the international legal framework governing the investment relations. The question will then be raised as to whether such matter – undoubtedly concerning taxes – can (or cannot) be decided by the panel of arbitrators.

On the one hand, leaving tax measures outside the scope of arbitration might create a vacuum in the protection of the investor. On the other hand, allowing arbitrators to assess the legitimacy of tax measures would make room for the adjudication, by a body external to the system of domestic courts, of a very sensitive matter, as taxation undoubtedly is for every State.

2.3. *International disputes among States*

Finally, the last situation that deserves to be taken into account is represented by international disputes between States concerning the exercise of their respective taxation powers.

As it is well known, international conventions are the instrument used by many States with a view i) to preventing double taxation (*i.e.* the outcome where a same person is taxed twice in two different States with regard to the same income) or, at least, ii) to neutralizing

⁶ As far as Member States of the European Union are concerned regard must be had to the Judgment of the European Court of Justice (Grand Chamber), 6th March 2018, *Slowakische Republik v Achmea BV*, case C-284/16, ECLI:EU:C:2018:158, according to which «[a]rticles 267 and 344 TFEU must be interpreted as precluding a provision in an international agreement concluded between Member States (...) under which an investor from one of those Member States may, in the event of a dispute concerning investments in the other Member State, bring proceedings against the latter Member State before an arbitral tribunal whose jurisdiction that Member State has undertaken to accept».

(or minimizing) the economic impact of such a double taxation (so called double taxation conventions).

These conventions basically distribute and coordinate the taxing powers of the States involved on the basis of connecting criteria between the taxpayer and the taxing States, such as, for instance, the residence of the taxpayer and, in case of multiple residences, they solve the conflict through a set of criteria (so-called tie-breaker rules) aimed at identifying the prevailing residence⁷.

Supposing that the fiscal authorities of the two States involved do not share the same view on the application of the treaty on a specific matter (since, for instance, they both maintain that the taxpayer is a resident of their State and do not agree on the application of the tie-breaker rules), a case of double taxation might arise.

In such a situation, the taxpayer will usually have the possibility to challenge the decisions of the national tax authorities before the competent domestic courts by invoking the tax treaty (and its national implementation measures) as a parameter of legitimacy of the domestic decisions.

An inter-State dispute might arise as well, however, as regards the correct application of the tax convention. It is interesting to observe that – while the older conventions foresaw, as a remedy for the solution of such disputes, a mutual agreement procedure between the competent authorities of the States involved – the more recent treaties expressly make room for arbitration as well⁸. Therefore, even with regard to this third type of situation a tax matter (namely the

⁷ For a general overview of the double tax conventions see M. LANG, *Introduction to the Law of Double Taxation*, 3rd ed., Vienna, 2021; C. GARBARINO, *International Tax Treaties Law*, Torino, 2025.

⁸ Art. 25 of the OECD (2019), Model Tax Convention on Income and on Capital 2017 (Full Version), OECD Publishing, Paris, <https://doi.org/10.1787/g2g972ee-en> expressly makes room for the possibility that an interstate dispute concerning the application of the treaty is deferred to arbitration. G. ZEYEN, *When Taxation Meets Arbitration: Recent Initiatives to Introduce and Promote Arbitration in International and European Taxation* quoted at footnote 3, observes «[a]t present, both at international (OECD) and European levels, initiatives have been taken to introduce and promote arbitration as an additional tool of settling disputes in the field of international taxation». See on this topic also G. GROEN, *Sovereignty and Tax Treaty Dispute Settlement*, Amsterdam, 2024; U. GONZÁLEZ DE FRUTOS, *International tax arbitration: what it means and how it has evolved*, in H. MOOIJ (ed.), *International Tax Disputes Arbitration, Mediation, and Dispute Management*, Cheltenham, 2024, pp. 2 ff.

consistency of a domestic tax decision with the double taxation treaty) could end up being adjudicated by an arbitral panel.

3. *Understanding and defining the non-arbitrability of tax matters*

The overall analysis of the three situations considered above seems to be extremely significant for the purposes of understanding the above mentioned “tax arbitrability taboo” as well as for determining to what extent it corresponds to an actual rule.

As a matter of fact, and from a general perspective, all of the three hypotheses listed in the previous paragraph have in common that a tax issue is brought before an arbitral panel. However, as it will be pointed out subsequently, a closer analysis of the solutions reached by the arbitration case law reveals that, in each situation, the possibility – for the arbitrators – to adjudicate on tax matters mainly depends on two different variables, namely: i) whether the State whose taxation is concerned is a party to the dispute and accepted arbitration as an admissible remedy to decide a tax issue; and/or ii) in what exact terms the tax issue is raised before the arbitral panel.

These two elements are fundamental not only for the purposes of proving that tax matters are indeed arbitrable (at least to a certain extent), but also as a guide to identify a solution for the several complexities raised by the arbitral adjudication of tax issues⁹.

In the light of the above, after a brief description of the exclusion of arbitrability of tax matters and its historical rationale (§ 3.1), such variables will be specifically addressed in §§ 3.2 and 3.3, with the final aim of achieving a more precise and accurate definition of the actual limits within which tax matters can be considered to be arbitrable (§ 3.4).

3.1. *The exclusion of arbitrability of tax matters*

The exclusion of arbitrability of tax matters stems from the almost innate belief that only States can decide, through their domestic administrations and courts, about the extent and the validity of their tax

⁹ See *infra* § 4 and ff.

measures. This traditional view further entails an absolute monopoly of States about their taxes, which means that only the organs of the State whose taxation is concerned can be involved in the assessment and collection of their taxes¹⁰.

The corollary of these assumptions therefore appears to be that no other authority than the domestic courts of the State concerned – even less so an arbitration body – could be entitled to decide about taxation.

3.2. *Breaking the taboo: the cases where States agree for a tax matter to be decided by arbitrators*

The above mentioned exclusion of arbitrability of tax matters seems, however, to be disproven – at least according to the current international law framework – in the situations addressed *supra sub* §§ 2.2 and 2.3, whose analysis clearly shows that arbitrability of tax matters is not only practically pursued by States but also legally admissible, at least to the extent (and within the limits) that such a solution has been accepted by the State(s) whose taxation is concerned.

This conclusion is fairly obvious, first of all, taking into account the inter-State disputes considered under § 2.3, where the interested States expressly make room for arbitral adjudication of a dispute concerning the interpretation of a double tax treaty. Reference might be made, in this regard, *e.g.* to art. 25 of the 2017 Model Tax Convention¹¹ according to which – upon failure to reach an agreement through the mutual agreement procedure – «any unresolved issues arising from the case shall be submitted to arbitration if the person so requests in writing».

¹⁰ The perfect coincidence that – at least at the origins of the modern State – had to exist between the State levying taxes, the authorities collecting such taxes and the courts adjudicating over their legitimacy is further demonstrated by the fact that it was not even accepted that a State collected, on behalf of another State (and with its consent), taxes owed to the latter. As a matter of fact, according to the so-called revenue rule, States did not and could not enforce tax laws of other States. See on this issue A. BRIGGS, *The Revenue Rule in the Conflict of Laws: Time for a Makeover*, in *Singapore Journal of Legal Studies*, 2001, pp. 280 ff.

¹¹ See *supra* footnote 8.

A similar conclusion might be reached as regards the situations addressed *supra sub* § 2.2 (disputes between States and foreign investors) as well. As a matter of fact, the possibility for an arbitral panel, in the context of an international investment dispute, to adjudicate over the legitimacy of a tax measure enacted by the host State is not outrightly (nor necessarily) excluded, but, rather, specifically regulated in each investment treaty.

It is interesting to observe that i) each investment treaty adopts a solution of its own on this specific topic and ii) in most cases these solutions consist of very complex (procedural or substantial) provisions defining the limits within which a tax measure might be assessed by a panel of arbitrators.

This also entails that different agreements might provide for different solutions on this very same topic, as clearly shown by the comparison between two cases (*Encana v. Ecuador*¹² and *Occidental v. Ecuador*¹³), which – albeit dealing both with the same issue (the legitimacy of Ecuadorian authorities’ decision not to refund V.A.T. to the foreign investor) – were decided in an opposite way as concerns the arbitrability of tax matters.

As a matter of fact, in the *Occidental* case the arbitrators considered that – although tax matters, as a general rule, fell outside the scope of application of the Treaty¹⁴ – the challenged decision of the Ecuadorian authorities «even if it was characterized as a “matter of taxation”, would be captured by the “exception to the exception” of Article X.2(c) of the Treaty»¹⁵, which extended the application of the

¹² *EnCana Corporation v. Republic of Ecuador*, LCIA Case No. UN3481, UNCITRAL (formerly *EnCana Corporation v. Government of the Republic of Ecuador*).

¹³ *Occidental Petroleum Corporation and Occidental Exploration and Production Company v. The Republic of Ecuador*, ICSID Case No. ARB/06/11.

¹⁴ See § 498 of the award, making reference to Art. X of the Agreement according to which «[w]ith respect to its tax policies, each Party should strive to accord fairness and equity in the treatment of investment of nationals and companies of the other Party» (par. 1), although the Treaty applies to matters of taxation only within the limitations specifically established by par. 2 (see *infra* footnote 15).

¹⁵ Article X of the Treaty between the United States of America and the Republic of Ecuador concerning the Encouragement and Reciprocal Protection of Investment: «2. Nevertheless, the provisions of this Treaty, and in particular Article VI and VII, shall apply to matters of taxation only with respect to the following: (a) expropriation, pursuant to Article III; (b) transfers, pursuant to Article IV; or (c) the observance and enforcement of terms of an investment agreement or authorization as referred to in Article VI (1) (a) or (b), to the

Treaty to the matter of taxation whenever relating directly to the observance and enforcement of the terms of the investment agreement between the investor and the host State¹⁶.

On the contrary, in the *Encana* case the London Court of International Arbitration relied on the wording of art. XII of the Canada – Ecuador Investment agreement, according to which «nothing in this Agreement shall apply to taxation measures», to conclude that «EnCana’s claim so far as it relates to the entitlement of the subsidiaries to VAT refunds is excluded from the scope of the BIT by Article XII as a “taxation measure”, subject to the exception for expropriation»¹⁷.

For the specific purposes of the present analysis, what can be gathered from these cases – regardless of their specific complexities – is that arbitrability of tax matters is not straightforwardly forbidden but can be considered admissible depending on the willingness of the States which are party to the dispute to accept it and strictly within the limits of such acceptance.

3.3. *Breaking the taboo: reframing a tax issue as a contractual claim: horizontal vs. vertical relations*

The analysis carried out in the previous paragraph highlights a significant difference between the situations considered *sub* §§ 2.2 (disputes between States and investors) and § 2.3 (inter-State disputes), on the one hand, and the case outlined in § 2.1 (inter-private disputes), on the other hand.

More specifically, in both § 2.2 and § 2.3 the legitimacy of a tax decision or of a tax measure is directly called into question (in one case with regard to an investment treaty and in the other case with reference to a tax convention) in the context of arbitral proceedings to which the State whose taxation is concerned is a party (thus also

extent they are not subject to the dispute settlement provisions of a Convention for the avoidance of double taxation between the two Parties, or have been raised under such settlement provisions and are not resolved within a reasonable period of time».

¹⁶ § 499 of the award.

¹⁷ § 149 of the award.

being in a position to express – or to have expressed beforehand – its consent to having such tax matter adjudicated by an arbitral panel).

On the contrary, in the situation addressed in § 2.1 (inter-private disputes), the State whose taxation is concerned is not directly involved, but remains, so to speak, as a looming presence in the background of the contractual relation existing between the private parties.

Following this line of reasoning, mapping the interests and the legal relations involved in this type of disputes might represent the key to determine if – and to what extent – tax matters might be arbitrable also in the latter kind of situations.

As a matter of fact, going back to the example suggested *supra* sub § 2.1.I and II, it seems possible to identify two different sets of legal relations. On the one hand, there is a “horizontal” relation between the private parties of the contract, which see the applicable taxation as an important “budget item”, heavily impacting upon their contractual balance, since determining the measure of taxation and its allocation severely affects the contractual obligations of the parties.

On the other hand, a “vertical” relation (or, more precisely, several “vertical” relations) between the private parties and the State(s) connected to the transaction can be detected. The latter are completely indifferent to the allocation of the economic burdens (including taxation) between the former, being only interested in collecting the taxes that are due according to their legislation and on the basis of the decisions of their own administrative and/or judicial authorities.

The first (horizontal) relation is governed by private (international) law and the parties are free to refer their potential disputes to arbitration. The second (vertical) relations are governed by the public laws of the States involved and any dispute that might arise will necessarily have to be referred to States’ courts belonging to the States whose taxation is concerned.

All the above said, it is possible to observe that i) the decision of a tax matter is clearly relevant to both of the above-mentioned coexisting relations and ii) arbitrability has without any doubt to be excluded in the second one. It is unclear, instead, whether arbitration is admissible as regards the first of the considered relations.

The answer to this question appears to mainly depend on i) how the tax issue is framed in the context of the arbitration proceedings and ii) the provisions of the law applicable to the issue of arbitrability.

As far as the first element is concerned, it seems reasonable to assume that a tax matter can be considered arbitrable only in so far as its decision is meant to bind merely the private parties of the “horizontal” relation and, at the same time, is not intended to affect in any way the “vertical” relation involving the State(s) whose taxation is concerned.

From a more practical point of view, this means that the arbitrators will never be in a position to decide on the fiscal obligation owed by the private parties to the State(s) involved, but only to adjudicate on the (private) contractual obligation (indirectly affected by the measure and the allocation of the fiscal obligation) existing between the private parties. This distinction – as elusive as it might appear – is of the essence in order to avoid falling in the trap of the non-arbitrability of tax matters.

Secondly, as said, the law applicable to the issue of arbitrability¹⁸ is also to be taken into account with a view to identifying potential limitations to the arbitrability of tax issues. It is interesting to observe, in this regard, that several national provisions seem to make room for arbitrability of tax issues whenever they are framed – as suggested above – as a purely private matter not affecting the vertical relation with the States whose taxation is concerned.

By way of example, art. 806 of the Italian code of civil procedure states that « [t]he parties may have disputes arising between them decided by arbitrators that do not concern non-disposable rights,

¹⁸ The identification of the law applicable to the issue of arbitrability (over which there is no unanimous agreement) falls outside the topic of the present contribution, for the purposes of which it suffices to observe that «the choice regarding which law governs arbitrability is challenging and ‘may depend upon the stage at which [arbitrability] is raised’. Putting aside enforcement, where it is clear that the law governing arbitrability is the law of the forum where enforcement is sought, there is no consensus about how the choice as to which law governs should be made. However, there are two prime contenders for the law governing arbitrability, at least when it is being decided by an arbitral tribunal. These are the law governing the arbitration agreement and the *lex arbitri*» (L. BRAZIER, *The Arbitrability of Investor-State Taxation Disputes in International Commercial Arbitration*, in *Journal of International Arbitration*, 2015, pp. 1 ff.).

unless expressly prohibited by law». In the same way, art. 177 of the Swiss Private International Law Act provides that «(1) Any claim involving a financial interest may be the subject-matter of an arbitration. (2) Where a party to the arbitration agreement is a State, or an enterprise held by, or an organisation controlled by, a State, it may not invoke its own law in order to contest the arbitrability of a dispute or its capacity to be a party to an arbitration».

In light of the above, it seems possible to conclude that – as long as a tax issue can be presented as a private claim only affecting the rights and the positions of the parties to the dispute – arbitrability cannot be denied. Practically speaking, following the example of § 2.1.I (dispute over the application of the V.A.T.), the arbitrators will not be entitled to determine whether V.A.T. applies (and, if so, to what extent) to the transaction, but only whether the Client owes to the Contractor a certain amount of money whose measure is indirectly to be determined on the basis of an incidental assessment as to the applicable V.A.T.

This solution seems to be supported by arbitral case law. For instance, the International Chamber of Commerce (I.C.C.), with regard to a case¹⁹ where the Contractor claimed to be owed a certain (disputed) amount of money corresponding to V.A.T. and interests – observed that «VAT is part of the contract price, an element of a civil contract. The determination of the amount of VAT owed by one party to a contract to the other party is incidental to deciding on the contract price. For determining the total (gross) price or the VAT-part thereof the Tribunal needs to apply, as an incidental matter, taxation law. The Tribunal is authorized and obliged to do so, and such disputes are clearly arbitrable. Inherently, disputes on the contract price owed under a civil contract will incidentally raise issues of VAT»²⁰. Such a conclusion has then been reinforced by the remark that «[t]aking the opposite position would shift the vast majority of commercial disputes directed at the payment of a (gross) contract price (including VAT) to the exclusive jurisdiction of the fiscal authorities».

¹⁹ ICC Case No. 23652/MHM accessible at <https://jsumundi.com/en/document/decision/en-claimant-v-respondent-final-award-monday-16th-september-2019>.

²⁰ § 223 of the decision.

A similar conclusion might as well be reached in the case considered *supra* § 2.1.II (dispute over the correct application of a “netto clause” established within an employment contract), where the arbitrators – albeit lacking jurisdiction to determine the fiscal residence of the player – will have (as long as they are empowered by the parties to do so) the possibility to award the player a certain amount of money determined by having regard, incidentally, to issues concerning the applicable taxation.

3.4. *Reframing the rule*

In light of the above, it is possible to conclusively observe that the exclusion of arbitrability of tax matters i) has been – and to a certain extent still is – an historical tendency motivated by the sensitive nature of fiscal obligations; ii) it does not correspond however (at least not any more) to a straightforward prohibition against having a tax issue decided by a panel of arbitrators.

States still detain a monopoly over the enactment and the application of their tax measures. Nonetheless, they are entitled to exercise such a monopoly by allowing external authorities (different from their courts) to enforce or apply their tax legislation. As a matter of fact, nowadays, States agree – although to a limited extent (as shown *supra* with regard to the §§ 2.2 and 2.3 types of situations) – to submit to arbitration State-investors disputes involving taxation as well as interstate disputes concerning the application of double taxation agreements.

At the same time, arbitration of tax issues can also be considered admissible (even in the absence of States’ consent) whenever States’ prerogatives are not affected. With regard to the § 2.1 type of situations, this means that if the dispute involving a tax issue is i) characterised as an inter-private dispute, ii) only incidentally concerning taxation and iii) to be decided with an award not meant to be binding for the States concerned, such a dispute will be qualified as arbitrable, provided that iv) the law deemed to be applicable to the issue of arbitrability²¹ does not lay down any limitations in this regard.

²¹ See *supra* footnote 18.

This preliminary conclusion as to the potential arbitrability of tax issues gives rise to several further questions that will be addressed in the next paragraphs. Indeed, after having established “if” such disputes are arbitrable, it is necessary to focus on the many “hows” of such arbitrability.

4. *The drafting of the arbitration clause*

The first topic that has to be addressed is represented by the drafting of the arbitration clause.

As a matter of fact, if the parties foresee that their potential disputes might involve a tax issue (and their intention is to defer such issue to arbitrators), it might be useful to clearly provide for such possibility within the arbitration clause, by expressly stating that it is not intended to directly defer to arbitrators any tax matter, but rather only those inter-private obligations which indirectly depend on the incidental adjudication of a tax issue.

In this way, consistently with the principles highlighted *supra*, it will be manifest that the award is not by any means intended to affect the interests of the States concerned, whose authorities are therefore left with the final and binding decision concerning the tax matter at stake.

Moreover, the drafting of the clause might also give the parties the opportunity to regulate further issues. For instance, with a view to avoiding – or at least discouraging – potential disputes concerning arbitrability, the parties might stipulate that the arbitrators will be vested with the sole power to decide tax matters relevant for determining the private obligations of the parties and to interpret only incidentally, for this limited purpose, the tax rules of the relevant State(s), with the *caveat* that – should the competent authorities later reach a different decision concerning the tax issue at stake – the parties will then be obliged to act accordingly.

Such a wording of the arbitration clause might also prevent the risk of a misalignment between the decision of the arbitrators and the one of the competent authorities over the same tax issue, which

might give rise to an unjust enrichment of one party to the detriment of the other²².

5. *Applicable law*

As far as tax issues are concerned, the arbitrators will obviously need to have regard to the tax rules of the States involved (namely, the States whose taxation is concerned). It is necessary, however, to inquire on what legal basis it would be possible to give relevance to such rules in the context of arbitration.

Indeed, it might happen that the tax rules that come to relevance for the purposes of incidentally deciding the relevant tax issue do not belong to the *lex causae*.

This could be the case, for instance, of the example suggested *supra sub* § 2.1.II, where the player D (resident of State α) is hired by the Club C (resident of State β). Supposing that the contract is governed by the law of State β (*lex causae*), in so far as the application of the “netto clause” laid down in the contract involves an assessment of the fiscal obligations of D towards his State of residence (State α), the law of State α will necessarily (from a logic point of view) have to be taken into account.

In such a case, the possibility to give relevance to tax rules not belonging to the *lex causae* would mainly depend on the choice made by the parties or – in lack thereof – on the rules applicable to the arbitration. Some of them are drafted in a broad way and would easily allow the arbitrators to take into account also the relevant tax rules of States whose law is not applicable, as *lex causae*, to the merits of the dispute. Other arbitration rules are more narrowly drafted.

For instance, art. 21 of the ICC Rules of Arbitration²³ establishes that «[t]he parties shall be free to agree upon the rules of law to be applied by the arbitral tribunal to the merits of the dispute. In the absence of any such agreement, the arbitral tribunal shall apply the rules of law which it determines to be appropriate». In this context,

²² See *infra sub* § 8.

²³ The rules can be accessed at the following link <https://iccwbo.org/dispute-resolution/dispute-resolution-services/arbitration/rules-procedure/2021-arbitration-rules/#block-accordion-21>.

the rules which the arbitral tribunal «determines to be appropriate» might include – if necessary to solve a tax matter – the tax rules of the relevant legal system.

Art. 45 of the rules of arbitration of the Court of Arbitration for Sport, instead, is drafted more narrowly since it provides that «[t]he Panel shall decide the dispute according to the rules of law chosen by the parties or, in the absence of such a choice, according to Swiss law», thus apparently not opening to the application of different laws than the *lex causae*.

Nonetheless, even in the latter situation, several alternative arguments might be suggested with a view to allowing arbitrators to take the relevant tax provisions into account.

A first possibility would consist of emphasising the mandatory character of tax law, which is inextricably connected to the determination of the taxes owed to a certain State. In this regard it could be argued that it would not be possible, in the example considered *supra*, to apply the law of State β for the purposes of incidentally determining the tax obligations owed towards State α . This would entail that – admitting that the arbitrators are entitled to incidentally assess tax liability *vis-à-vis* State α (for the limited purposes of determining the obligation of the Club C towards the player D) – this assessment would have to be conducted in light of and according to the law of State α (regardless of the fact that the law of State β applies to the merits of the dispute). In this perspective, in other words, application of the relevant tax rules would indissolubly attach to the arbitrability of the issue.

According to a second line of reasoning, it might be argued i) that – by allowing the arbitrators to adjudicate over a certain tax matter involving a certain State – the parties impliedly agreed upon the application of the law of that State for that specific purpose²⁴, even if they chose a different law as applicable, in general, to the merits of the dispute or, alternatively, ii) that such law is the legal system most connected to the dispute for the specific purpose of the assessment of the tax issue. This *depeçage* of the applicable law might (even

²⁴ On the implied choice of law in the context of arbitration see *ex plurimis* D. MUKHERJEE, *Proper Law in International Arbitrations Involving Contractual Claims: When Parties Fail to Choose*, in *National Law School of India Review*, 2008, pp. 62 ff.

better) be expressly agreed by the parties in the arbitration clause, as suggested above.

A third possibility (consistent with the argument brought in favour of arbitrability of tax matters in the context of inter-private disputes) would be to stress the merely incidental character of the assessment of the arbitrators concerning the relevant tax issue and argue that arbitrators, in this situation, do not really apply tax law, but rather ascertain a fact (the extension of the tax liability of the parties towards the States connected to the transaction) which, in its turn, impacts upon the content of their inter-private obligations.

6. Introducing knowledge: the importance of expert opinions

Once we admit that arbitrators can incidentally decide matters of taxation, another complication that arises concerns their (potential) lack of knowledge in the field of tax law.

As a matter of fact, the arbitrators might not be experts in tax law (mainly because tax law might be only one of the several issues involved in the proceedings, rather than the one in light of which the arbitrators have been specifically selected) and – even if they are tax law experts – they might nonetheless not have a specific knowledge of the tax rules of all the legal systems concerned²⁵.

In light of this, introducing an expert opinion within the arbitral proceedings might be very important.

In this regard, it can be observed that the possibility – for the parties and for the arbitrators themselves – to appoint an expert and/or to produce expert reports is generally foreseen by the rules of arbitration.

Art. 816-ter, par. 5, of the Italian code of civil procedure, for instance, expressly states that «arbitrators may be assisted by one or more technical advisors». In the same vein, art. 25 of the Rules of the International Chamber of Commerce provides that «[t]he arbitral tribunal may decide to hear witnesses, experts appointed by the parties or any other person, in the presence of the parties, or in their

²⁵ About the powers and the obligations of the arbitrators with regard to the ascertainment of the applicable law, see S.M. CARBONE, *Iura novit curia e arbitrato commerciale internazionale*, in *Riv. dir. int. priv. proc.*, 2010, p. 353 ss.

absence provided they have been duly summoned» (par. 2) and «[t]he arbitral tribunal, after consulting the parties, may appoint one or more experts, define their terms of reference and receive their reports. At the request of a party, the parties shall be given the opportunity to question at a hearing any such expert» (par. 3)

Since – it can be supposed – the very arbitrability of the tax issue might be controversial and its incidental adjudication might prove complex and discourage the arbitrators from entering into this field, it seems very important, also from a strategic point of view, that the interested party promptly provides the panel with the necessary expert opinions to facilitate the decision of this issue.

7. Promoting consistency: stay of proceedings

The incidental decision, by the arbitrators, of a tax issue makes room for the possibility that the same tax matter is decided in a different way in the context of the two relations addressed *supra sub* § 3.3.

It is useful to recall that – in the context of an inter-private dispute incidentally involving the assessment of a tax issue – it is possible to distinguish i) a horizontal relation, between the private parties (where the tax matter is and can only be incidentally decided by arbitrators for the sole purposes of determining the inter-private obligations of the parties) and ii) a vertical relation (or, in most cases, several vertical relations) between the private parties and the State(s) to which taxes are owed, depending on the solution of the tax issue at stake.

As already established, the arbitrators will have the power to assess the tax matter in the context of the horizontal relation, while only the competent State courts (namely, the courts of the States whose taxation is respectively concerned) will be empowered to decide the same tax issue for the purposes of the vertical relation (by determining the amount of taxes owed by the parties to the States involved).

There is no guarantee, however, that the two decisions will coincide. As it is well known, the application of law (and tax law makes no exception in this regard) is not that certain in most legal systems,

so much so that different courts of the same State often reach different decisions over the same topic. This may occur even more so when a certain tax matter is decided by a panel of arbitrators with (potentially) no familiarity with the tax system(s) concerned and only supported by expert opinions.

The timing of the two decisions is usually not very convenient either. Indeed, supposing that the horizontal dispute arises at an earlier stage than the vertical one, the arbitrators will probably not be able to rely – for the purposes of their incidental assessment – upon any determination from the competent authorities. With regard, for instance, to the case considered *supra sub* § 2.1.II, we can assume that the player D will knock quite soon on the door of Club C to claim the gross remuneration he believes to be entitled to on the basis of the “netto clause” agreed in the contract. On the contrary, the competent fiscal administrations will usually have several years to assess the tax returns of the parties and will consequently take a formal position only at a later stage.

Here lies, therefore, the significant risk of inconsistency mentioned above, *i.e.* a different assessment of the same tax obligation: i) by arbitrators, for the purposes of the horizontal relation; and ii) by the competent tax courts, for the purposes of the vertical relation; which would, in its turn, give rise to an unjust enrichment to the benefit of one of the parties and to the detriment of the other one.

Let us suppose, for instance, that – with regard to the example suggested *sub* § 2.1.II – on the one hand, the arbitrators incidentally decide that the player is fiscally resident in State α so that the net remuneration agreed upon by the parties will have to be determined by taking into account a 40% taxation, while, on the other hand, the competent tax authorities of State α and State β subsequently decide that the player only has to pay his taxes to State β (10%). In such a case the player would obtain an unjust enrichment corresponding to the 30% difference he unjustly received (as taxes supposedly to be paid to State α , but actually not paid).

The opposite might also happen (giving rise, in this case, to an unjust advantage for the Club) if the arbitrators decided that the player D is only entitled to receive from the Club the 10% taxation imposed by State β and, afterwards, the competent courts found that

the very same player is indeed subject to the 40% taxation of State α .

One possible solution to deal with this risk of inconsistency would be to stay the arbitral proceedings with a view to having the issue decided by the competent tax authorities or courts.

In this regard, it is relevant to mention that the power to stay arbitral proceedings is generally considered among the powers that arbitrators are vested with.

There are, however, at least three obstacles to consider, which would probably discourage such a solution (that, from an abstract point of view, would seem to offer the best coordination possible between the two relations considered above): 1) firstly, as already mentioned, tax audits are in most cases subject to extended deadlines, inconsistent with the expedite character of arbitration; 2) secondly, the parties of the private (arbitrable) dispute rarely have any influence (let alone exercise any control) over the behavior of the competent authorities: more specifically, the parties have no power to provoke a tax audit with a view to obtaining at an earlier stage the authoritative assessment they need; 3) thirdly, in most cases, preliminary ruling procedures²⁶ might not be available to the parties for the purposes of provoking a decision of the competent authorities on the specific relevant tax issue.

However, if and when the applicable tax legislation offers some procedural mechanisms apt to determine *ex ante* and in a binding way the amount of taxation applicable, staying the proceedings (pending the response to the parties' request) would represent a very convenient solution.

8. *Dealing with inconsistencies*

When there is no way to coordinate the decision of the tax issue by the arbitrators, on the one hand, and by the competent authorities, on the other hand (for instance because staying the arbitral

²⁶ For instance, according to Italian law, the assessment of the conditions for establishing the effectiveness of tax residence is a matter of fact that cannot be the subject of a request for a ruling, pursuant to Article 11 of Law No. 212 of 2000 (see Circular No. 9/E of April 1, 2016).

proceedings is not an option), it then becomes necessary to devise a different solution in order to deal with the potential misalignment that might arise in the assessment of such tax issue in the context, respectively, of the horizontal and vertical relations.

This result might be achieved through substantial or procedural methods (which in most cases might not be mutually exclusive).

8.1. *Procedural methods*

From a procedural point of view, it is firstly necessary to consider whether i) an award might be challenged on the ground that the arbitrators mistakenly decided a tax issue or ii) recognition or enforcement of the award might be opposed on the same ground.

Since an extensive analysis of such remedies falls outside of the scope of the present contribution, this paragraph will only be devoted to pointing out some of the limitations that these procedural methods present for the purposes of removing or neutralizing the inconsistency that we are dealing with.

In this regard, it is relevant to mention that the control that can be exercised over the arbitral decision (both in case of challenge of the award and in case of opposition against its recognition and enforcement) does not make room for a full review of the merits of the award, being limited to specific grounds, among which the violation of the law applied for the decision of the case is not usually included²⁷.

Assuming that the dispute (and its underlying tax issue) is arbitrable²⁸, the award (or its recognition and enforcement) might be challenged on the ground of its inconsistency with the public policy of the *forum* where the appeal is brought²⁹ or recognition is sought.

²⁷ There also appears to be no reason to suppose that the courts before which the proceedings for the appeal or the opposition against the award are brought are more competent, in the adjudication of a tax dispute, than the panel of arbitrators.

²⁸ Since otherwise arbitrability might be an admissible ground of challenge itself whenever the law of the State where recognition is sought does not consider the issue arbitrable. See art. V par. 2 of the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 10 June 1958).

²⁹ Depending on the applicable *lex fori*, which, however, in most States, lists inconsistency with public policy among the possible grounds of appeal against the award. See A.

This remedy however faces at least two significant limitations when used to challenge an erroneous arbitral decision of the tax issue with regard to the applicable tax law.

First of all, the *forum* where the appeal or the opposition is lodged might very well not coincide with the State whose tax law was mistakenly applied. In light of this, for instance, an award that incorrectly applies Italian tax law could not be considered inconsistent with Swiss public policy.

Secondly, a more insidious objection might also be raised, even when such a challenge is brought before the courts of the State whose taxation is concerned. Let us suppose, for the sake of this argument, that the party challenging the award claims that tax law is an expression of fundamental interests of the State, so that an incorrect application of tax law by the arbitral award under scrutiny would endanger States' interests, thus giving rise to an inconsistency with public policy of the *forum* (assuming, for the purpose of this argument, a coincidence between the *forum* and the State to which the misapplied tax rules belong).

To such an argument the counterparty might reply that i) since fiscal authorities are not (and cannot be) affected by the award (because the tax issue would otherwise be not arbitrable³⁰), the award cannot in any way affect the public interests of the State concerned, which will collect the taxes it decides (through its competent authorities) that are due to it, regardless of any decision reached by the arbitrators; ii) in the same vein, it might further be observed that the parties validly disposed of their economic interests when they made room for the possibility that arbitrators could adjudicate the tax issue impacting upon their relation, thus accepting the risk of a potential inconsistency (between the arbitral decision and the competent authorities' assessment); a misalignment, however, which does not pose any threat to States' interests, nor any conflict with the public policy of the *forum*.

In other words – as can be gathered from the above – the very same arguments that have been suggested in favour of the possibility

ATTERITANO, *Impugnazione del lodo arbitrale*, in M. COCCIA, M.B. DELI (eds.), *Introduzione al diritto dell'arbitrato internazionale*, Torino, 2024, pp. 295 ff.

³⁰ See *supra* sub § 3.

that the arbitrators incidentally decide a tax issue could also be used to limit the scrutiny that the award might be subjected to on public policy grounds.

In light of this, an attempt to challenge an arbitral award on this ground (due to the allegedly erroneous interpretation of tax law), would require reference to be made to a different principle, not directly connected to the interests of the State(s) involved (which – as shown – have to be necessarily unaffected by the award to make the issue arbitrable), but rather to the interests of the private party which would suffer an unjust detriment from the misalignment in the decision of the same tax issue, respectively for the purposes of the horizontal and vertical relation.

As a matter of fact, to this end, a plausible argument might perhaps be based on the principle of fair and proportionate taxation, which is embedded in most legal systems, also at constitutional level³¹, according to which taxation should be proportionate to the actual wealth it is supposed to apply to. In this regard, it might be contended that an award that entitles the player considered *sub* § 2.1.II to receive only the 10% taxation, on the (erroneous) assumption that this is the applicable taxation (while the competent authorities later established that the same player is subject to the 40% taxation), would be inconsistent with the fundamental principle of fair taxation (provided that this principle is recognized by the law of the *forum* and amounts to a public policy principle).

In other words, only by making the private interests of the affected party rise, so to say, on the wings of the principle of fairness of taxation, to the level of public policy of the *forum*, a potential challenge of the award might be attempted on this ground.

³¹ See, for instance, art. 53 of the Italian Constitution, according to which «[e]veryone is required to contribute to public expenditure in proportion to their ability to pay». For a comparative analysis of similar principles in different legal systems see R. ALFANO, F. AMATUCCI, *Ordinamenti tributari a confronto. Problematiche comuni e aspetti procedurali*, Torino, 2017.

8.2. Substantial methods

A different technique to deal with the potential inconsistency that we are considering would be, for the parties, to regulate such a possibility in the contract, through a substantial clause not only making room for the possibility that i) arbitrators can incidentally decide a tax issue, but also establishing beforehand that ii) if the competent authorities, at a later stage, were to reach a different decision concerning the same issue, the parties would then be obliged to fully comply with such a decision, if necessary by refunding what has been paid on the basis of the arbitral decision.

In this way, the parties would *ex ante* enter into an agreement that would offer an *ex post* (substantial and contractual) remedy to the divergence that has been analysed.

This solution might perhaps even be argued – on the basis of a general principle, such as good faith – also in the lack of a specific contractual clause. Nonetheless it would seem preferable, for the sake of certainty, that the parties expressly and preventively address this issue in their contract.

9. Conclusion

In conclusion, it might be observed that arbitrability of tax issues raised in the context of inter-private disputes represents a crucial topic (more than the arbitral case-law, which is mostly undisclosed, seems to show).

Indeed, on the one hand, excluding arbitrability *tout court* in the situations considered above would indirectly limit the very possibility, for the parties, to defer to arbitration the decision of their inter-private dispute, due to the pervasive nature of fiscal obligations that attach to most private relations and are all the more complex to assess in case of international situations.

On the other hand, admitting arbitrability gives rise to several intricacies that the parties should better be aware of (and preventively address) in their agreement.

Lex fori prorogati and Brussels I bis

Stefano Dominelli*

CONTENTS: 1. *Lastre Spa*: The case. – 2. Admissibility / validity of choice of court agreements and applicable law. – 3. The residual scope of application of the *lex fori prorogati*. – 4. Choice of court agreements and connected and related actions. – 5. Conclusions: Recasting Brussels I bis.

1. *Lastre Spa*: The case

Choice of court agreements under current Brussels I bis¹ have consistently been addressed both in the case law² and in the scholarship³. Despite this attention, *at times* the regulation – even after more

* The Author is member of the Expert Sub-Group on Brussels Ia. Any opinion is of the Author only.

¹ Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast), in OJ L 351, 20.12.2012, p. 1.

² From a quantitative perspective, art. 25 Brussels I bis Regulation on choice of court agreements calls for more than 200 decisions in the online *Beck* database and more than 60 decisions in *Wolters Kluwer Leggi d'Italia*.

³ *Amplius* M. WELLER, *The Latest from the CJEU on Choice of Court Agreements (Inkreal, Lastre, Maersk)*, in 26 *YPIL*, 2025, p. 95; T. DOMEJ, *A Swiss Federal Court Decision on Jurisdiction Clauses and Multiple Defendants*, in *idem*, p. 129; L.M. BRITO, *The Law Governing Forum-Selection Clauses in International Commercial Contracts Interpretation and Enforcement in Light of Choice-of-Law Provisions*, in *idem*, p. 145; J.D. LÜTTRINGHAUS, *Vertragsfreiheit und ihre Materialisierung im Europäischen Binnenmarkt. Die Verbürgung und Materialisierung unionaler Vertragsfreiheit im Zusammenspiel von EU-Privatrecht, BGB und ZPO*, Tübingen, 2018; F. SALERNO, *Giurisdizione ed efficacia delle decisioni straniere nel regolamento (UE) n.1215/2012 (rifusione)*, Milano, 2015, p. 199; K. KROLL-LUDWIGS, *Die Rolle der Parteiautonomie im europäischen Kollisionsrecht*, Tübingen, 2013; J. BASEDOW, *The Law of Open Societies: Private Ordering and Public Regulation of International Relations (General Course on Private International Law)*, in *Recueil des cours*, Volume 360, p. 165 ff; S.M. CARBONE, *L'autonomia privata nei rapporti economici internazionali ed i suoi limiti*, in *RDIPP*, 2007, p. 891 ff; P. FRANZINA, *L'autonomia della volontà nel regolamento « Roma I » sulla legge applicabile ai contratti*, in I. QUEIROLO, A.M. BENEDETTI, L. CARPANETO (eds), *La tutela dei soggetti deboli tra diritto internazionale, dell'Unione europea e diritto interno*, Roma, 2012, p. 29; S.M. CARBONE, *Opportunità e limiti dell'autonomia privata. Tra diritto comparato e D.I.P.*, in *Dialoghi con Guido Alpa*, Roma, 2018, p. 41; J. BASEDOW, *Exclusive Choice-of-Court Agreements*

than fifty years from the development of the first uniform rules – still seems to miss out its point in ensuring certainty and predictability of

as a Derogation from Imperative Norms, in P. LINDSKOUG, U. MAUNSBACH, G. MILLQVIST (eds), *Essays in Honour of Michael Bogdan*, Lund, p. 15; M.M. WINKLER, *Overriding Mandatory Provisions and Choice of Court Agreements*, in P. MANKOWSKI (ed), *Research Handbook on the Brussels Ibis Regulation*, Cheltenham, 2020, p. 346; T. SZABADOS, *Overriding Mandatory Provisions in the Autonomous Private International Law of the EU Member States – General Report*, in *ELTE Law Journal*, 2020, p. 9, at p. 32 ff; H. KRONKE, *The Fading of the Rule of Law and its Impact on Choice of Court Agreements and Arbitration Agreements – Law and Policy*, in *IPRax*, 2024, p. 106; S.M. CARBONE, C.E. TUO, *Il valore della electio fori e i suoi limiti nel regolamento Bruxelles I-bis: alcune recenti tendenze*, in A. ANNONI, S. FORLATI, P. FRANZINA (eds), *Il diritto internazionale come sistema di valori. Scritti in onore di Francesco Salerno*, Napoli, 2021, p. 631 ff; J. BASEDOW, *Theorie der Rechtswahl oder Parteiautonomie als Grundlage des Internationalen Privatrechts*, in *RabelsZ*, 2011, p. 32; S.M. CARBONE, *Giurisdizione ed efficacia delle decisioni in materia civile e commerciale nello spazio giudiziario europeo: dalla convenzione di Bruxelles al regolamento (CE) n. 44/2001*, in S.M. CARBONE, M. FRIGO, L. FUMAGALLI, *Diritto processuale civile e commerciale comunitario*, Milano, 2004, p. 3; ID, *Gli accordi di proroga della giurisdizione e le convenzioni arbitrali nella nuova disciplina del Regolamento (UE) 1215/2012*, in *Dir. comm. int.*, 2013, p. 651; ID, *Autonomia privata e commercio internazionale. Principi e casi*, Milano, 2014; A. MALATESTA, G. VITELLINO, *Le novità in materia di proroga della giurisdizione*, in A. MALATESTA (eds), *La riforma del Regolamento Bruxelles I*, Milano, 2016, p. 63; I. QUEIROLO, *Gli accordi sulla competenza giurisdizionale. Tra diritto comunitario e diritto interno*, Padova, 2000; ID, *Choice of Court Agreements in the New Brussels I-bis Regulation: A Critical Appraisal*, in 15 *YPIL*, 2013/2014, p. 113; F.C. VILLATA, *L'attuazione degli accordi di scelta del foro nel Regolamento Bruxelles I*, Milano, 2013; ID, *Choice-of-Court Agreements in Favour of Third States' Jurisdiction in Light of the Suggestions by Members of the European Parliament*, in F. POCAR, I. VIARENGO, F.C. VILLATA (eds), *Recasting Brussels I*, Milano, 2012, p. 219; L. VÁLKOVÁ, *Choice-of-Court Agreements Under the EU Regulations in Family and Succession Matters*, Milano, 2022; U. MAGNUS, *Choice of Court Agreements in the Review Proposal for the Brussels I Regulation*, in E. LEIN (ed), *The Brussels I Review Proposal Uncovered*, London, 2012, p. 83; P. BEAUMONT, *Hague Choice of Court Agreements Convention 2005: Background, Negotiations, Analysis and Current Status*, in *JPIL*, 2009, p. 509; J.J. KUIPERS, *Choice-of-court Agreement under the European and International Instruments. The Revised Brussels I Regulation, the Lugano Convention, and the Hague Convention*, in *Comm. Mark. L. Rev.*, 2014, p. 1549; M. WINKLER, *Understanding Claim Proximity in the EU Regime of Jurisdiction Agreements*, in *ICLQ*, 2020, p. 431; M. AHMED, *The Nature and Enforcement of Choice of Court Agreements. A Comparative Study*, Oxford, 2017; S. BARIATTI, *Volontà delle parti e internazionalità del rapporto giuridico: alcuni sviluppi recenti nella giurisprudenza della Corte di giustizia sui regolamenti europei in materia di diritto internazionale privato*, in *RDIPP*, 2019, p. 513; P. OSTENDORF, *Anforderungen an einen genuinen Auslandsbezug bei der Rechtswahl im Europäischen Kollisionsrecht*, in *IPRax*, 2018, p. 630; ID, *The Choice of Foreign Law in (Predominantly) Domestic Contracts and the Controversial Quest for a Genuine International Element: Potential for Future Judicial Conflicts between the UK and the EU?*, in *JPIL*, 2021, p. 421, and, for further references, S. DOMINELLI, *Ancora sull'accordo di proroga della giurisdizione contenuto nel contratto di trasporto ceduto dal passeggero alla società di riscossione*, in *Dir. mar.*, 2024, p. 110.

the competent court. Litigation on where to litigate⁴ is still common and the persistence of choice of court agreements in the dockets of the Court of Justice of the European Union (CJEU) grounds the idea there is still a margin of development in the field to ensure certainty of the competent court⁵ in connection to party autonomy.

The case dealt with by the CJEU in *Società italiana Lastre s.p.a. c. Agora s.a.r.l.*⁶, C-537/23, seems to be just one of the latest contributions of the court that reduces the residual scope of application of domestic law by offering further uniform conditions of validity for choice of court agreements. *Agora*, a French company, concluded a supply contract with the Italian Company *Società italiana Lastre*. The contract contained an asymmetric choice of court agreement⁷ whereby *Agora* was only to start proceedings before the tribunal in Brescia, whereas the Italian Company was allowed to start proceedings before any competent court. The final client started proceedings against *Agora* before French courts and there, most likely under art. 8, n. 2 Brussels I bis, *Agora* brought an action for guarantee against the Italian Company that, on its own side, invoked the choice of court agreement to contest the jurisdiction of the court. French courts were thus called to determine the validity of the asymmetric choice

⁴ On the expression, see G.G.J. MORSE, *International Shoe v. Brussels and Lugano: Principles and Pitfalls in the Law of Personal Jurisdiction*, in *Univ. Cal. Davis Law Review*, 1995, p. 999, at p. 1012.

⁵ On predictability of the competent court, cf Brussels I bis, recital 16. For a critical reading, see S. DOMINELLI, *Regolamento Bruxelles I bis e US jurisdiction in personam: riflessioni e proposte su condivisioni valoriali, influenze e osmosi di metodi*, Napoli, 2025.

⁶ Judgment of the Court (First Chamber) of 27 February 2025, *Società Italiana Lastre SpA (SIL) v Agora SARL*, Case C-537/23, ECLI:EU:C:2025:120, on which see already D. BUREAU, *Une réponse européenne aux clauses attributives de juridiction asymétriques*, in *RCDIP*, 2025, p. 405; T. KINDT, *Asymmetrische Gerichtsstandsvereinbarungen im Unionsrecht*, in *IPRax*, 2026, p. 19; M. BECKER, *Beurteilung der Gültigkeit asymmetrischer Gerichtsstandsvereinbarung*, in *NJW*, 2025, p. 1938; K. BÄLZ, *EuGH, Urteil vom 27.2.2025 - Rs. C-537/23; Società Italiana Lastre SpA (SIL) gegen Agora SARL*, in *RIW*, 2025, p. 357; M. WELLER, *The Latest from the CJEU on Choice of Court Agreements (Inkreal, Lastre, Maersk)*, cit., p. 95.

⁷ C. THOLE, *Artikel 25*, in R. BORK, H. ROTH (eds), *Stein/Jonas Kommentar zur Zivilprozessordnung, Band 12, EuGVVO*, 23rd ed., München, 2022, p. 489, rn. 118; P. ASHFORD, *Is an Asymmetric Disputes Clause Valid and Enforceable?*, in *Int. J. Arb., Med. & Disp. Manag.*, 2020, p. 347; M. WELLER, *The Latest from the CJEU on Choice of Court Agreements (Inkreal, Lastre, Maersk)*, cit., p. 116; T. KINDT, *Asymmetrische Gerichtsstandsvereinbarungen im Unionsrecht*, cit., p. 20.

of court agreement and requested a preliminary ruling to the CJEU on the admissibility and validity of such agreements, as well as on the degree of precision that is required for such agreements to be valid⁸.

2. *Admissibility / validity of choice of court agreements and applicable law*

Before turning to the analysis made by the CJEU, it seems necessary to recall the state of the arts on the law applicable to choice of court agreements. Art. 25 Brussels I bis only regulates some⁹ elements of their validity. Whereas a non-admissible clause would make any further investigation unnecessary, the provision does not expressly speak of *admissibility*. Based on the case law of the CJEU, some scholars distinguish between admissibility and validity, suggesting that in the first category elements such as the prorogation of courts of Member States¹⁰; the precision of the clause¹¹, and the clear connection of the clause with a specific legal relationship¹², should

⁸ D. BUREAU, *Une réponse européenne aux clauses attributives de juridiction asymétriques*, cit., p. 406, noting how the CJEU has in part changed the preliminary question that was referred.

⁹ I. QUEIROLO, *Prorogation of Jurisdiction in the Proposal for a Recast of the Brussels I Regulation*, in F. POCAR, I. VIARENGO, F.C. VILLATA (eds), *Recasting Brussels I*, Milano, 2012, 183, at p. 189.

¹⁰ Report by Professor Dr Peter Schlosser on the Convention of 9 October 1978 on the Association of the Kingdom of Denmark, Ireland and the United Kingdom of Great Britain and Northern Ireland to the Convention on jurisdiction and the enforcement of judgments in civil and commercial matters and to the Protocol on its interpretation by the Court of Justice, in OJ C 59, 5.3.1979, p. 71, at par. 179; V. LAZIĆ, P. MANKOWSKI, *The Brussels I-bis Regulation. Interpretation and Application*, Cheltenham, 2023, p. 315. In the case law, see Judgment of the Court (Fifth Chamber) of 9 November 2000, *Coreck Maritime GmbH v Handelsveem BV and Others*, Case C-387/98, ECLI:EU:C:2000:606. See also F. SALERNO, *L'armonia delle decisioni come principio generale dello spazio giudiziario europeo in materia civile e commerciale*, in G. BIAGIONI (eds), *Il principio dell'armonia delle decisioni civili e commerciali nello spazio giudiziario europeo*, Torino, 2015, p. 1, at p. 19, and there fn. 46, and L. MARI, I. PRETELLI, *Possibility and Terms for Applying the Brussels I Regulation (Recast) to Extra-EU Disputes*, in 15 *YPIL*, 2013/2014, p. 211.

¹¹ U. MAGNUS, *Article 25*, in U. MAGNUS, P. MANKOWSKI (eds), *ECPII, Volume I, Brussels Ibis Regulation*, Köln, 2016, p. 590 ff.

¹² M. GEBAUER, F. BERNER, *Art. 25 Brüssel Ia-VO*, in T. GEBAUER, T. WIEDMAN (eds), *Europäisches Zivilrecht*, München, 2021, p. 1387, rn. 4.

be included. Of course, others argue differently and suggest that the same questions should be treated as a matter of validity rather than of admissibility¹³. *Società italiana Lastre s.p.a. v. Agora s.a.r.l.*¹⁴ indirectly seems to confirm the last approach since the vagueness of the clause is dealt from the standpoint of the validity of the agreement. In other words, the CJEU seems to reject the idea that there is a double requirement, one of admissibility, and one of validity.

Furthermore, art. 25 Brussels I bis separately deals with formal and substantive validity of choice of court agreements. Formal validity requirements are autonomously and exclusively¹⁵ determined by the provision at hand, and require the agreement to be in writing, evidenced in writing, or to comply with formal requirements determined either by established practices between the parties or by international commercial customs. Such requirements are necessary and functional to ensure consensus between the parties to the agreement, and their respect introduces a legal presumption that consensus between the parties has existed at the time of the conclusion of the agreement¹⁶.

As for substantive validity, it was generally acknowledged that domestic law had a residual role to play. Recital 20 of Brussels I bis, a recital *on* conflict of laws, required the agreement not to be null

¹³ A. HERMANN, *Zuständigkeitsvereinbarungen im internationalen Rechtsverkehr: Wirksamkeitsanforderungen und Wirkungen von Gerichtsstandsvereinbarungen unter dem Geltungsregime von HGÜ und Brüssel Ia-VO*, Berlin, 2024, p. 241.

¹⁴ Case C-537/23, cit., para. 54 ff.

¹⁵ F.C. VILLATA, *Choice-of-Court Agreements in Favour of Third States' Jurisdiction*, cit., p. 219; P. MANKOWSKI, *Art. 25 Brüssel Ia-VO*, in T. RAUSCHER (ed), *Europäisches Zivilprozess- und Kollisionsrecht, Brüssel Ia-VO*, 5 Aufl., Köln, 2021, p. 714; C. KOHLER, *Agreements Conferring Jurisdiction on Courts of Third States*, in F. POCAR, I. VIARENGO, F.C. VILLATA (eds), *Recasting Brussels I*, Padova, 2012, p. 199 ff; U. MAGNUS, *Choice of Court Agreements in the Review Proposal for the Brussels I Regulation*, cit., p. 99 ff; L. KIERDORF, *Das auf international Gerichtsstands- und Schiedsvereinbarung anwendbaren Recht*, Baden-Baden, 2024, p. 90 ff, and S. DOMINELLI, *Emoji and Choice of Court Agreements: A Legal Appraisal of Evolutions in Language Methods through the Prism of Art 25 Brussels Ia Regulation*, in *RDIPP*, 2022, p. 900. In the case law, see CJEU 17 March 2016, Case C-175/15, *Taser Inter-national Inc. v. SC Gate 4 Business SRL and Cristian Mircea Anastasiu*, ECLI:EU:C:2016:176; High Court of Justice, 12 May 2005, *Konkola Copper Mines Plc v. Coromin*, [2005] EWHC 898 (Comm); BGH, 24 November 1988 No III ZR 150/87, in *NJW*, 1989, p. 1431, and BGH 20 January 1986 No II ZR 56/85, in *ibidem*, 1986, p. 1438.

¹⁶ Cf OLG Hamm, 20 September 2005 No 19 U 40/05, in *IPRax*, 2007, p. 125.

and void under the law of the prorogated Member State, local private international law rules included. This does not however correspond to the text of art. 25¹⁷, which, with a conflict of laws provisions, requires the agreement not to be null and void under the law of the prorogated State (thus, with no reference to its domestic rules of private international law). The debate on which law governs the validity of choice of court agreements revolves around their nature and function¹⁸. If such agreements are deemed to be contracts, the traditional *lex causae* rule should apply. If they are considered to be procedural acts, they should be governed by the *lex processus*¹⁹. If they are deemed to be contracts with procedural effects²⁰, their validity should be governed by the *lex fori prorogati*, as in the 2005 Hague Choice of Court Convention²¹ and as art. 25 Brussels I bis would seem to suggest.

On this matter, *Società italiana Lastre s.p.a. v. Agora s.a.r.l.* surely seems peculiar: at para. 33, the CJEU recalls the connecting factor in art. 25 Brussels I bis e puts it in relation to – making them completely overlap – recital 20²². Still, when quoting recital 20, the quotation is incomplete as it loses any reference to the renvoi to domestic conflicts provisions. Such an omission could potentially be seen a tentative by the Court to harmonise the recital and art. 25, and to harmonise the regulation with the Hague Convention.

¹⁷ In detail see U. MAGNUS, *Article 25*, cit., p. 626 ff, and H. SCHACK, *Internationales Zivilverfahrensrecht*, München, 2025, p. 223 f.

¹⁸ T. HARTLEY, *Civil Jurisdiction and Judgments in Europe*, Oxford, 2017, p. 227; I. QUEIROLO, *Prorogation of Jurisdiction in the Proposal for a Recast of the Brussels I Regulation*, cit., p. 189, and L.M. BRITO, *The Law Governing Forum-Selection Clauses in International Commercial Contracts Interpretation and Enforcement in Light of Choice-of-Law Provisions*, cit., p. 147 ff.

¹⁹ On procedural acts, see G. CHIOVENDA, *Istituzioni di diritto processuale civile*, Vol. II, Sez. I, Napoli, 1934, p. 383.

²⁰ I. QUEIROLO, *Choice of Court Agreements in the New Brussels I-bis Regulation: A Critical Appraisal*, cit., p. 124, and L.M. BRITO, *The Law Governing Forum-Selection Clauses in International Commercial Contracts Interpretation and Enforcement in Light of Choice-of-Law Provisions*, cit., p. 154.

²¹ Convention of 30 June 2005 on Choice of Court Agreements, Entry into force: 1-X-2015, *online*, art. 5.

²² Critical on the point, D. BUREAU, *Une réponse européenne aux clauses attributives de juridiction asymétriques*, cit., p. 408.

3. The residual scope of application of the lex fori prorogati

Taking stock of the state of the art, the solution in *Società italiana Lastre s.p.a. v. Agora s.a.r.l.* should have been rather straightforward: the validity of the choice of court agreement was to be determined under Italian law (the *lex fori prorogati*) and not under French law (the *lex processus*, which would have called for an invalidity of the clause²³).

Nevertheless, the CJEU reaches a completely different solution. At para. 30, whilst acknowledging that art. 25 Brussels I bis does make a renvoi to domestic law, the Court argues that the very own definition of substantive validity still has to be determined by EU law itself. Only after EU law has determined such a definition can domestic law identify specific conditions for (in)validity²⁴. What seems to be particularly interesting is that, at para. 31, the CJEU argues that such a European definition, rather than being grounded on the regulation or its aims and goals, can be inferred from the common current language as identified in judgments (of which court is not clear) and in procedural acts. Also of interests it the fact that the Courts invokes previous case law when it argues the necessity to develop a uniform definition of substantive validity. Yet, none of the two decisions quoted²⁵ refer to the field of judicial cooperation. Whereas general principles of EU law surely have a horizontal ap-

²³ On French approaches related to the invalidity of asymmetrical choice of court agreements, see A. BRIGGS, *Civil Jurisdiction and Judgments*, Oxon, 2015, p. 186; L. MERRETT, *The Future Enforcement of Asymmetric Jurisdictional Agreements*, in *ICLQ*, 2018, p. 37; T. HARTLEY, *Civil Jurisdiction and Judgments in Europe*, cit., p. 265; R. FENTIMAN, *Unilateral Jurisdiction Agreements in Europe*, in *Camb. L.J.*, 2013, p. 24; D. BUREAU, *Une réponse européenne aux clauses attributives de juridiction asymétriques*, cit., p. 405; T. KINDT, *Asymmetrische Gerichtsstandsvereinbarungen im Unionsrecht*, cit., p. 21, and K. BÄLZ, *EuGH, Urteil vom 27.2.2025 - Rs. C-537/23; Società Italiana Lastre SpA (SIL) gegen Agora SARL*, cit., p. 357.

²⁴ M. BECKER, *Beurteilung der Gültigkeit asymmetrischer Gerichtsstandsvereinbarung*, cit., p. 1938; K. BÄLZ, *EuGH, Urteil vom 27.2.2025 - Rs. C-537/23; Società Italiana Lastre SpA (SIL) gegen Agora SARL*, cit., p. 358.

²⁵ Judgment ECLI:EU:C:2025:120, para. 30, quoting Judgment 10 June 2021, Commissioners for Her Majesty's Revenue and Customs (Agente incolpevole), C-279/19, EU:C:2021:473, para. 23, and 4 October 2024, AFAÏA, C-228/23, EU:C:2024:829, para. 39.

plication, the way of underplaying such an approach of taking principles developed in different areas without saying it clearly seems to indicate a certain will to show the current judgment is less innovative than what it really is.

In addition to arguing that requirements for substantive validity of choice of court agreements are autonomously determined by EU law, thus *a priori* limiting the residual relevance of the *lex fori prorogati*, the CJEU further concludes that domestic law may only operate within the limits of ‘*general causes of nullity of a contract, namely, in particular, those which vitiate consent, such as error, deceit, violence or fraud, and incapacity to contract*’²⁶. Such words may be understood, and are to be agreed with, if it is highlighted how limiting the relevance only to domestic laws in the field of contract law that may condition the validity of a choice of court agreement pursue uniform application of EU law and enhances uniform protection of party autonomy in the EU judicial space. In other words, grounds of *procedural invalidity* for choice of court agreements governed by domestic law are excluded, and only general contractual grounds of invalidity are accepted²⁷.

On the merits, the CJEU argues that the substantive validity of choice of court agreements is to be determined against the background of art. 25 Brussels I bis²⁸, whilst the *lex fori prorogati* may only determine the invalidity of the agreement if there is a vitiated consent. Of course, to the extent consensus is vitiated, there may be a certain overlap with the uniform requirements already imposed by EU law. It seems that the scope of application of the *lex fori prorogati* is indeed residual: non-existing consensus is already sanctioned by EU law as art. 25 Brussels I bis requires consensus, and only vitiated consensus may still be sanctioned by domestic law.

Still, art. 25 Brussels I bis does not expressly list autonomous substantive requirements and the CJEU in *Società italiana Lastre s.p.a. v. Agora s.a.r.l.* proceeds its analysis with a case by case approach.

Concerning unilateral asymmetric choice of court agreements, the CJEU notes that when the EU lawmaker had the intention to prohibit

²⁶ Judgment ECLI:EU:C:2025:120, para. 36.

²⁷ See already, T. HARTLEY, *Civil Jurisdiction and Judgments in Europe*, cit., p. 265.

²⁸ Judgment ECLI:EU:C:2025:120, para. 47 ff.

them, it did so clearly, as in the case for the protection of weaker parties²⁹. In addition, the CJEU recalls that such clauses were indeed prohibited under the 1968 Brussels Convention, but the same limit has not been transposed in the subsequent Brussels Regulations³⁰. In this sense, and convincingly, there appears to be no reason to exclude *a priori* the validity of asymmetric choice of court agreements under the general rules.

Always according to the Court, and always agreeably, the Brussels I bis Regulation does not necessarily require choice of court agreements to clearly list the courts where proceedings can be started by the parties or by only one of them³¹ so long the agreement at least makes a general reference to applicable rules of international civil procedure and the regulation itself³². In this sense, a clause where only one of the parties retains the possibility of starting proceedings ‘*in Italy or abroad*’³³ is not invalid due to its vagueness according to EU law, and cannot be declared invalid under the *lex fori prorogati* as it does not relate to vitiated consent.

If the two conclusions above on the merits by the CJEU seem convincing, there is an element that seems to be less convincing: substantive validity requirements are to be interpreted in such a way to render null and void choice of court agreements in favour of third-States not bound by either the Brussels I bis Regulation or the parallel 2007 Lugano Convention³⁴. Conferring jurisdiction to such States, not bound by uniform rules who might have different approaches to jurisdiction and to choice of court agreements, are ontologically ‘uncertain’, thus against the principles of certainty and predictability of Brussels I bis.

²⁹ Judgment ECLI:EU:C:2025:120, para. 54 ff. Cf D. BUREAU, *Une réponse européenne aux clauses attributives de juridiction asymétriques*, cit., p. 413.

³⁰ *Ex multis*, T. KINDT, *Asymmetrische Gerichtsstandsvereinbarungen im Unionsrecht*, cit., p. 21.

³¹ *Amplius* D. BUREAU, *Une réponse européenne aux clauses attributives de juridiction asymétriques*, cit., p. 414 ff.

³² Judgment ECLI:EU:C:2025:120, para. 59.

³³ Judgment ECLI:EU:C:2025:120, para. 17.

³⁴ Judgment ECLI:EU:C:2025:120, para. 59 ff.

This solution does not come with any surprise: in *Owusu*³⁵, the CJEU has already shown that the relationship with third countries is governed by the preference for EU rules. Yet, the latest contribution in *Società italiana Lastre s.p.a. v. Agora s.a.r.l.* seems of particular importance to conceptualise the relationship between prorogation of, and derogation to jurisdiction. Some scholars³⁶ assumed that Brussels I bis was simply not applicable to choice of court agreements in favour of third countries, leaving the admissibility of such agreements and of derogation to domestic law. Some argued that derogation to purely domestic jurisdiction was to be determined by domestic law, possibly following approaches similar to Brussels I bis; others assumed that derogation to ‘European’ jurisdiction, meaning a choice of court agreement in favour of a third State where at least two EU Member States would have had jurisdiction under the Brussels I bis Regulation, was still to be governed by EU law even though art. 25 Brussels I bis did not specify anything on derogation³⁷. *Società italiana Lastre s.p.a. v. Agora s.a.r.l.* seems to privilege such a second approach in that it clearly argues that choice of court agreements in favour of third countries do fall within the scope of application of substantive requirements that can be derived from art. 25 Brussels I bis, and are to be considered invalid due to their uncertainty³⁸.

From a critical standpoint, as already stressed by scholars³⁹, it seems however that the very starting point of the CJEU is incorrect: it seems rather difficult to argue that a choice of court agreement in

³⁵ Judgment, 01/03/2005, ECLI:EU:C:2005:120.

³⁶ Critical, see U. MAGNUS, *Article 25*, cit., rn. 36, and C. THOLE, *Artikel 25*, cit., rn. 16.

³⁷ See for different positions in the scholarship, P. GOTTWALD, *Art. 25 Brüssel Ia-VO*, in *MünchKomm ZPO, Band 3*, 6th ed, München, 2022, p. 2470, rn. 9 ff; H. SCHACK, *Internationales Zivilverfahrensrecht*, cit., p. 224; C. HEINZE, A. DUTTA, *Ungeschriebene Grenzen für europäische Zuständigkeiten bei Streitigkeiten mit Drittstaatenbezug*, in *IPRax*, 2005, p. 224, at p. 228; C. KOHLER, *Agreements Conferring Jurisdiction on Courts of Third States*, cit., p. 203; T. HARTLEY, *Civil Jurisdiction and Judgments in Europe*, cit., p. 231 ff. In the case law, see KG Berlin, *Hinweisbeschluss vom 1.7.2025 – 2 U 37/22*, in *ZVertriebsR*, 2025, p. 391, rn. 20.

³⁸ Judgment ECLI:EU:C:2025:120, para. 60.

³⁹ M. WELLER, *The Latest from the CJEU on Choice of Court Agreements (Inkreal, Lastre, Maersk)*, cit., p. 119.

favour of the courts of New York is uncertain, and – as such – invalid. Even the European Commission⁴⁰, when recasting the Brussels I Regulation, at first tried to introduce rules concerning prorogation of third countries, evidently assuming that such a practice is not generally inconsistent with the aims of the European Judicial Space. In this sense, it is this Author's opinion that the – too quickly dismissed – double category of *admissibility* and of *validity* of choice of court agreement would be much useful. Assuming a choice of court agreement in favour of third countries is not admissible under the regulation would protect party autonomy, as it would save the agreement for which parties have expressed their consensus and that have taken into account in their legal relationship. At the same time, this would still 'save' the jurisdiction of courts of the Member States that, not bound by the choice of court agreement, would still be able to ground jurisdiction either under the general heads of jurisdiction of Brussels I bis if this instrument is applicable, or eventually under domestic law.

4. Choice of court agreements and connected and related actions

In *Società italiana Lastre s.p.a. v. Agora s.a.r.l.*, the CJEU seems to miss out on the possibility to clarify the relationship between art. 25 and art. 8 Brussels I bis. This could probably have been an important occasion to clarify that being a defendant in one proceedings should not allow the party to use art. 8 Brussels I bis Regulation to circumvent an exclusive choice of court agreement concluded under art. 25⁴¹. Of course, this would only hold true for the parties to the choice of court agreement itself: if the final client in *Lastre* had started proceedings in France against *Agora* based on contractual liability and against *Lastre* based non-contractual liability, joining

⁴⁰ On which see S.M. CARBONE, C.E. TUO, *Non-EU States and Brussels I: New Rules and Some Solutions for Old Problems*, in *RDIPP*, 2015, p. 5, at p. 6 ff, and F.C. VILLATA, *Choice-of-Court Agreements in Favour of Third States in Light of the Suggestions by Members of the European Parliament*, cit., p. 219.

⁴¹ Cf U. MAGNUS, *Article 25*, cit., m. 158. In the domestic case law, see Corte di Cassazione, Sez. III, 16 ottobre 2025, n. 25392, *Gruber Logistics c. Le navi*.

proceedings would not have amounted to circumventing an exclusive choice of court agreement.

5. *Conclusions: Recasting Brussels I bis*

Società italiana Lastre s.p.a. c. Agora s.a.r.l. constitutes a moment to further reflect on choice of court agreements and, regardless of whether the final outcome of the judgment is agreed with⁴², the decision surely demonstrates how much the validity of such agreements is still at the heart of both the academic debate and legal practice.

Even though some have welcomed the decision in as much as it protects the interests of the parties by ‘saving’ unilateral asymmetric choice of court agreements⁴³, the complexity of the topic hardly fits the vision preliminary expressed by the European Commission in its 2025 Recast Report, where it is argued that ‘*Given the general satisfaction with the operation of the Regulation, any modifications should respond to real practical difficulties and should not lead to an overhaul of the well functioning system of the Regulation. In particular, such modifications should aim to further simplify the Regulation and reduce administrative burdens, specifically for weaker parties, such as consumers, or for SMEs. At the same time, difficulties that can be adequately resolved by future case law should be left out from the scope of any legislative intervention*’⁴⁴.

For now, it would seem that art. 25 Brussels I bis Regulation is not amongst those provisions that are destined to be amended. Still, *Società italiana Lastre s.p.a. v. Agora s.a.r.l.* appears to be a call for clarity: the new recast process should not leave choice of court

⁴² Critically, see D. BUREAU, *Une réponse européenne aux clauses attributives de juridiction asymétriques*, cit., p. 408.

⁴³ M. BECKER, *Beurteilung der Gültigkeit asymmetrischer Gerichtsstandsvereinbarung*, cit., p. 1938. *Contra*, T. KINDT, *Asymmetrische Gerichtsstandsvereinbarungen im Unionsrecht*, cit., p. 26 ff.

⁴⁴ Report from the Commission to the European Parliament, the Council and the European Economic and Social Committee on the application of Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast), Bruxelles, 2.6.2025, COM(2025) 268 final, p. 2.

agreements behind, and – at the very least – consider the possibility of introducing much needed recitals that crystallise the case law of the CJEU.

***Choice of Court Agreements and Service Out of the Jurisdiction:
The Influence of the Brussels I bis Regulation on English Law
After Brexit***

Luana Matoso

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1. *Introduction*

English law¹ has changed the way it gives effect to choice of court agreements. On 6 April 2021, rule 6.33 of the Civil Procedure Rules (CPR)² was amended³ to include choice of court agreements among those circumstances under which a claimant is not required to seek permission to serve process out of the jurisdiction of the United Kingdom⁴. In other words, when based on a choice of court, service out of the jurisdiction is now a legal entitlement of the claimant under English law.

¹ For better readability, all references to “England”, “English court” or “English law” are shorthand for England and Wales, a court of England and Wales, and the laws of England and Wales.

² Civil Procedure Rules 1998, SI 1998/3132, with amendments. Available at: <https://www.legislation.gov.uk/uksi/1998/3132/contents>, last accessed on: 20.04.2026.

³ Amendment 2021 (SI 2021/117) of the CPR, which came into force on 6 April 2021.

⁴ CPR r 6.33 (2B)(b) and (c).

This development deviates from a basic rule under the English law on jurisdiction, according to which a claimant has to obtain court permission to serve process upon a defendant who is not present in the territory⁵. An exception had previously been recognised in English law only when jurisdiction was governed by uniform instruments, such as the Brussels I bis Regulation⁶, the Lugano Convention⁷, and the 2005 Hague Convention on Choice of Court Agreements (2005 Hague Convention)⁸. Now, at least where there exists an agreement selecting the jurisdiction of England, this exception is also part of English national law.

The amendment came into effect shortly after the withdrawal of the United Kingdom from the European Union. Before Brexit, the English rules on jurisdiction in claims *in personam*⁹, were in great part overshadowed by the Brussels regime¹⁰. Since Brexit, however, those instruments have ceased to govern the field, bringing the English national law rules on jurisdiction and choice of court—including those requiring permission to serve out of the jurisdiction—back into focus¹¹.

⁵ CPR, r 6.37.

⁶ Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, in OJ L 351, 20.12.2012, p. 1.

⁷ Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, in OJ L 339, 21.12.2007, p. 3.

⁸ Convention of 30 June 2005 on Choice of Court Agreements.

⁹ That is, jurisdiction over a claim brought against a person to compel them to do or not do something. Common law systems usually make a distinction between jurisdiction for claims *in personam*, which are directed at persons, as opposed to claims *in rem*, which are directed against an item of property. The court's assertion of adjudicatory jurisdiction follows different rules in each respective case.

¹⁰ Namely the set of EU legal instruments that govern jurisdiction in civil and commercial matters, including the Brussels I bis Regulation along with its predecessors, such as the Brussels I Regulation (Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, in OJ L 12, 16.1.2001, p. 1) and the 1968 Brussels Convention (1968 Brussels Convention on jurisdiction and the enforcement of judgments in civil and commercial matters, in OJ L 299, 31.12.1972, p. 32).

¹¹ See, for instance, FENTIMAN R., *Commercial Litigation in the UK: A Future Outside the EU*, in TRUNK A., HATZIMIHAİL N., DOLL J. (eds), *EU Civil Procedure Law and Third Countries: Which Way Forward?*, London, 2021, p. 157.

It has been suggested on many occasions that Brexit—and, more specifically, the Brussels I bis Regulation—has played a role in the 2021 amendment¹²; however, existing references remain cursory. In this paper, I examine the role and influence of the Brussels I bis Regulation on the amendment from the perspective of a civil lawyer. The argument advanced here is that the amendment was triggered by Brexit, with the objective to at least in part reproduce within English law the effect given to choice of court under the Brussels regime. This development can be attributed to two converging factors. First, there is a strong policy interest in facilitating the enforcement of choice of court under English law as a means of protecting London’s dominance in the litigation market. Second, the many years in which the Brussels regime was applied in England led to a partial assimilation of the effect given to choice of court by the Brussels regime into English law. This assimilation is however limited, as the English framework of choice of court remains distinctively English.

¹² See BRIGGS A., *What remains of the Brussels I Regulation in the English conflict of laws?*, in *Journal of Private International Law*, 2024, Vol. 20(3), p. 539, 547, 549, suggesting that CPR r 6.33(2B)(b) “must owe something” to Art. 25 of the Brussels Regulation; MILLS A., *Assessing the Hague Convention on Choice of Court Agreements 2005*, in *Journal of Private International Law*, 2024, Vol. 20, p. 573, 580, affirming, in the context of the amendment of CPR r 6.33(2B)(b), that the 2005 Hague Convention, alongside with the Brussels regime, arguably “normalised or at least reinforced the idea that exclusive jurisdiction agreements ought to be given effect absent very exceptional circumstances”; and also MILLS A., *Exorbitant Jurisdiction and the Common Law*, in HARRIS J., MCLACHLAN C. (eds), *Essays in International Litigation for Lord Collins*, Oxford, 2022, p. 243, 251, affirming that the amendment “offer[ed] continuity with the position under the Brussels I Regulation”. See also, FENTIMAN R., *Commercial Litigation in the UK: A Future Outside the EU*, cit., p. 157, 166 suggesting before the amendment was adopted: “It is possible that this requirement of seeking permission might be dispensed with in future so as to approximate the position in national law with that of the Brussels Ibis regulation.” Affirming that the amendment was introduced “as part of the EU exit arrangements consequent upon Brexit”, see *Pantheon International Advisors Limited v Co-Diagnostics, Inc* [2023] EWHC 1984 (KB) at para. 17.

2. Jurisdiction under English law: Foundations

2.1. Service as the Foundation of Jurisdiction

Adjudicatory jurisdiction is the authority to say what the law is; it refers to the power of a court to make a binding adjudication over a particular dispute, which will have the status of *res judicata*¹³. In civil law systems¹⁴, including under the Brussels regime, the adjudicatory jurisdiction of a court is given by the application of a particular set of rules to the case. These rules provide the basis for jurisdiction by listing a number of circumstances that establish a connection between the forum and the dispute. The court will have jurisdiction whenever the facts of the case fall under one of these provisions. For instance, one widely accepted rule is that a court has jurisdiction where the defendant is domiciled within its territorial boundaries¹⁵. This is also the general rule of jurisdiction under the Brussels regime, as reflected in Art. 4(1) Brussels I bis Regulation.

In common law systems, the court does not acquire jurisdiction through the mere application of rules. Under English law, the foundation of jurisdiction is service of process¹⁶, meaning, in practical terms, notification given to the defendant of the court's initiating process. Whenever defendants are served with process, the court has jurisdiction over them. This, however, does not mean that the court will exercise the jurisdiction it has: the court enjoys a discretionary power to order a stay of proceedings commenced on the basis that England is an inappropriate forum (*forum non conveniens*)¹⁷.

¹³ For an overview of adjudicatory jurisdiction in private international law, see VON MEHREN A., *Adjudicatory Authority in Private International Law: A Comparative Study*, Leiden, 2007; MICHAELS R., *Jurisdiction, foundations*, in BASEDOW J., RÜHL G., FERRARI F., ASENSIO P. M. (eds), *Encyclopedia of Private International Law*, Cheltenham, 2017, p. 1043.

¹⁴ For a comparative analysis between civil and common law, see MICHAELS R., *Two Paradigms of Jurisdiction*, in *Michigan Journal of International Law*, (27) 2007, p. 1003.

¹⁵ Also referred to as the principle of *actor sequitur forum rei*.

¹⁶ LORD COLLINS OF MAPESBURY, HARRIS J. (eds), *Dicey, Morris & Collins on the Conflict of Laws*, Vol. 1, London, 16. Ed. 2022, para. 11-004.

¹⁷ See *Spiliada Maritime Corp v Cansulex Ltd* [1987] A.C. 460.

The significance of these different approaches to service should not be overlooked by a civil lawyer, to whom the function of service is limited to that of ensuring procedural guarantees—namely, to guarantee that defendants have sufficient notice of the claims raised against them. Under English law, however, service fulfils not only this procedural function¹⁸, it also serves to establish jurisdiction itself—and thereby delineates the limits of that jurisdiction. Thus, while in civil law systems jurisdiction and service are not correlated, in the English legal system service and jurisdiction are closely intertwined—the broader the rules allowing service, the more extensive the court’s jurisdiction.

2.2. Service as of Right and Service Where Permission is Required

The rules as to service under English law are laid down in Part 6 of the Civil Procedure Rules (CPR) and supplemented by the Practice Directions (PD) 6A and 6B¹⁹. The law distinguishes between two categories: those cases in which service of process is a legal entitlement of the claimant (often referred to as service “as of right”²⁰) and those cases in which the claimant must seek permission of the court to have the defendant served with process.

When service was first established under English law as a foundation for jurisdiction²¹, the distinction between service as a legal entitlement and service conditioned upon court permission was essentially based on whether the defendant was located in- or outside

¹⁸ See *Abela v Baadarani* [2013] UKSC 44, [2013] 1 W.L.R. 2043, para. 53. Moreover, unlike civil law systems, not only the court but also the parties to the proceedings may serve documents under English law (see CPR r 6.21(1)).

¹⁹ Practice Directions are official statements of interpretative guidance that supplement the CPR by giving them final detail. PD 6A and PD 6B are available at: <https://www.justice.gov.uk/courts/procedure-rules/civil/rules>, last accessed on 20.04.2026.

²⁰ See, for instance, *Spiliada Maritime Corp v Cansulex Ltd*, cit., 467; BRIGGS A., *Private International Law in English Courts*, Oxford, 2014, para. 4.390; VON MEHREN A., *Adjudicatory Authority in Private International Law: A Comparative Study*, cit., p. 274.

²¹ Originally, the jurisdiction of English courts was founded on the physical presence of the defendant before the court. See DICKINSON A., *Keeping Up Appearances: The Development of Adjudicatory Jurisdiction in the English Courts*, in *British Yearbook of International Law*, 2015, Vol. 86(1), p. 6, esp. 16 ff; MILLS A., *Exorbitant Jurisdiction and the Common Law*, cit., p. 243, 244 ff.

the territorial jurisdiction of the court²²: service is a right of the claimant if the defendant is within the court's jurisdiction²³; if the defendant is out of the jurisdiction, the claimant has to seek permission from the court to effect service. Traditionally, the requirement of permission to serve out of the jurisdiction was perceived as exceptional and justified with reference to sovereign power²⁴. Specifically, service of process abroad was an assertion of sovereign power over a defendant who was not within the court's own territory and thus represented a corresponding interference in the domain of another sovereign state²⁵.

The distinction between service in and out of the jurisdiction still exists in the law today, and the requirement of permission for service out continues to operate as a general rule under English law²⁶. Where permission is required, the claimant must satisfy the court by establishing one of the grounds for performing service out of jurisdiction²⁷. These grounds are often referred to by the term "gateway"²⁸ because they are literally the pathway through which a claimant can bring a defendant who is outside of England into the jurisdictional confines of an English courtroom. Just as the provisions which establish the basis of jurisdiction in civil law regimes, the grounds under English law for service out of the jurisdiction are based on a connection between the forum and the dispute²⁹. General grounds are,

²² Ibid.

²³ Temporary presence is sufficient as a basis for (service within the) jurisdiction.

²⁴ It is arguable whether this explanation is still true for the law today, see *Abela v Baadarani*, cit., paras. 45, 53. See also below under Section 4.2.

²⁵ *Societe Generale de Paris v Dreyfus Bros* (1885) 29 Ch. D. 239, 242 f. For this reason, service out of the jurisdiction has been traditionally characterised as "exorbitant jurisdiction". Arguing that the use of this term is no longer a "realistic view of the situation", see *Abela v Baadarani* cit., paras. 45, 53. For the employment of this term throughout time and today, see MILLS A., *Exorbitant Jurisdiction and the Common Law*, cit., p. 243, 247 ff.

²⁶ CPR rr 6.36 ff.

²⁷ CPR r 6.37(1)(a), PD 6B para 3.1.

²⁸ See e.g. *Abela v Baadarani*, cit., para. 53; BRIGGS A., *Private International Law in English Courts*, cit., para. 4.437.

²⁹ It is, however, arguable whether all gateways establish a substantial connection between the English forum and the dispute. See MILLS A., *Exorbitant Jurisdiction and the Common Law*, cit., p. 243, 256 ff.

for instance, claims relating to a contract governed by English law³⁰, claims relating to contracts made within the jurisdiction of England³¹, or claims relating to torts where damage was sustained or results from an act committed within the jurisdiction of England³². Today, these grounds are listed under paragraph 3.1 of the PD 6B³³.

Where one of the grounds exists, the claimant can apply for permission to serve out of the jurisdiction pursuant to CPR r 6.37. The application must set out which ground is relied upon, aver that the claimant believes the claim has a reasonable prospect of success and include the defendant's address, or the place the defendant is likely to be found³⁴. In addition, the claimant must satisfy the court that England is the *forum conveniens*, which is to say, that England is the proper place in which to bring the claim³⁵. In this latter assessment, the court enjoys a right of discretion³⁶.

The accession of the United Kingdom to the European Union gave rise to an exception to this rule: permission to serve out of the jurisdiction was no longer required in cases in which the court's jurisdiction was given by the Brussels regime³⁷. I will come back to this point later³⁸. Here, it is important to note that the English common law rule is structured around the requirement of permission to serve out of the jurisdiction, and the absence of this requirement constitutes an exception to the rule.

³⁰ In relation to contractual claims, see *e.g.* CPR, PD 6B para. 3.1(6)(c); torts PD 6B para. 3.1(9)(c); trusts PD 6B para. 3.1(12), (15)(c), (15B)(c)(16)(c).

³¹ CPR, PD 6B para. 3.1(6)(a)(i).

³² CPR, PD 6B para. 3.1(9)(a)(b).

³³ Available at: https://www.justice.gov.uk/courts/procedure-rules/civil/rules/part06-pd_part06b, last accessed on 20.04.2026.

³⁴ CPR, r 6.37(1).

³⁵ CPR, r 6.37(3).

³⁶ *Spliada Maritime Corp v Cansulex Ltd*, cit., 480 f.

³⁷ See below under Section 5.3.

³⁸ See below under Section 5.1.

3. *Service and Choice of Court: Before 2021*

3.1. *The Effect of Choice of Court on English Jurisdiction*

When parties designate by agreement a forum to adjudicate their dispute, they seek to make that forum's jurisdiction available to them. A choice of court agreement is thus always³⁹ an agreement on prorogation, which is to say, an agreement which aims to confer jurisdiction to the designated forum. A different question is whether the parties also aimed to exclude the jurisdiction of other courts (derogation). The existence of an agreement on derogation, and its scope, will inform whether the choice of court agreement is exclusive, non-exclusive, or asymmetrical⁴⁰. Each of these types of clauses entails a prorogation agreement. However, just what effect courts give to such agreements varies significantly across different legal systems.

In civil law systems, including under the Brussels regime, the existence of a valid choice of court agreement suffices to establish the jurisdiction of the court over the dispute. The agreement thus functions as a legally recognised element of connection that directly confers jurisdiction to the court. This is clear, for example, from the wording of Art. 25(1) Brussels I bis Regulation, which provides that a court "shall have jurisdiction" if the parties have agreed on the jurisdiction of this court. Under common law, on the other hand, the existence of a choice of court agreement designating the jurisdiction of an English court does not, by itself, give this court jurisdiction to adjudicate the claim. Here as well, it is service which confers jurisdiction. For this reason, there is a close correlation between the effect of choice of court agreements and the rules governing service.

Service is unproblematic when occurring within the jurisdiction: the claimant is entitled to complete service on a defendant who is

³⁹ From a theoretical point of view, it is argued that it is possible for clauses to include only derogation and not any prorogation. GEIMER R., *Internationales Zivilverfahrensrecht*, Cologne, 9 Ed. 2024, pp. 656 f. For this type of clause to be valid, however, at least one forum must remain available to the parties.

⁴⁰ For the distinctions between these types of agreements in comparative perspective, see KEYES M., MARSHALL B., *Jurisdiction agreements: exclusive, optional and asymmetrical*, in *Journal of Private International Law*, 2015, Vol. 11(3), p. 345.

present in England, irrespective of the existence of a choice of court agreement⁴¹. Service out of the jurisdiction, by contrast, has historically been more problematic, as it requires express statutory authorisation⁴². Until the beginning of the twentieth century, choice of court agreements did not fall within the categories of cases in which service out of the jurisdiction was expressly permitted⁴³. This has hampered the enforceability of choice of court agreements, as case law made clear that parties could not, by contract, extend the court's power to serve a defendant abroad where such service is not authorised by statute⁴⁴.

3.2. *The Requirement of Permission for Service Out*

This position was reversed in 1920, with the introduction of Ord. 11, rule 2A⁴⁵. According to this rule, service may be effected out of the jurisdiction whenever the parties have agreed on the English jurisdiction of the High Court—in some cases, even without permission of the court⁴⁶. In the 1960s, the latter aspect of the rule was viewed as *ultra vires*⁴⁷ and replaced by the general rule applicable to all jurisdictional gateways under which service out of the jurisdiction is subjected to the prior permission of the court⁴⁸.

⁴¹ Parties may also agree on the mode of service, see e.g. *Tharsis Sulphur and Copper Company v Société Industrielle et Commerciale des Métaux* (1889) 60 L.T. 924, where the parties designated by agreement an agent within the jurisdiction on whom service could be effected.

⁴² See above under Section 2.2.

⁴³ See permitted cases under Ord. XI of the Rules of the Supreme Court 1883.

⁴⁴ See *British Wagon Co v Gray* [1896] 1 Q.B. 35, in which the court refused to permit service on a defendant in Scotland notwithstanding an agreement by which the defendant “submits to the jurisdiction of the High Court of Justice in England.”

⁴⁵ Ord. 11, r 2A of Rules of the Supreme Court 1920, SI 1920/1296.

⁴⁶ See also DICKINSON A., *Keeping Up Appearances: The Development of Adjudicatory Jurisdiction in the English Courts*, cit., p. 6, at 62 f.

⁴⁷ *Annual Practice 1966* (Sweet & Maxwell) Vol I, 11.

⁴⁸ Ord. 10, r 3 and Ord. 11, r 2 of Rules of the Supreme Court (Revision) 1965, SI 1965/1776. Later, these provisions were replaced by Ord. 11, r 1(1)(d)(iv) of the Rules of the Supreme Court (Amendment) 1983, SI 1983/1181.

Until 6 April 2021, for cases governed by English national law, a claimant who wished to initiate proceedings in England against a foreign defendant had to apply for permission to complete service⁴⁹, complying with the requirements set out in CPR r 6.37⁵⁰ and relying on the choice of court agreement as a jurisdictional gateway, as provided by PD 6B para. 3.1(6)(d): “*Service out of the jurisdiction where permission is required. 3.1 The claimant may serve a claim form out of the jurisdiction with the permission of the court under rule 6.36 where – (...). (6) A claim is made in respect of a contract where the contract – (a) was made within the jurisdiction; (b) was made by or through an agent trading or residing within the jurisdiction; (c) is governed by English law; or (d) contains a term to the effect that the court shall have jurisdiction to determine any claim in respect of the contract*”⁵¹.

To rely on PD 6B para. 3.1(6)(d), the claimant had to satisfy the court that he had “a good arguable case”⁵² in support of the jurisdictional gateway, which was understood to mean that the claimant must have a “much better argument on the material available”⁵³. In the context of PD 6B para. 3.1(6)(d), this meant that there must have been a good arguable case that there was a contract between the

⁴⁹ See summary in *VTB Capital Plc v Nutritek International Corp* [2012] EWCA Civ 808 [2012] 2 C.L.C. 431 at para. 99-101, also applied in the context of service out based on choice of court agreements, see *Dawnus Sierra Leone Ltd v Timis Mining Corp Ltd* [2016] EWHC 236 (TCC), para. 42.

⁵⁰ See above under Section 2.2.

⁵¹ My emphasis. Available at: https://webarchive.nationalarchives.gov.uk/ukgwa/2021-0203170413/https://www.justice.gov.uk/courts/procedure-rules/civil/rules/part06/pd_part-06b, last accessed on 20.04.2026.

⁵² “A good arguable case” was the standard applied to all jurisdictional gateways, see *Vitkovic Horni a Hutni Tezirstvo v Korner* [1951] A.C. 869, 880; *Seaconsar (Far East) Ltd v Bank Markazi Jomhouri Islami Iran* [1994] 1 A.C. 438. See also *Brownlie v Four Seasons Holdings Inc* [2017] UKSC 80, [2018] 1 W.L.R. 192, para. 4 ff. For the application of this standard under PD 6B para. 3.1(6)(d), see *Rimpacific Navigation Inc v Daehan Shipbuilding Co Ltd* [2009] EWHC 2941 (Comm) [2010] Bus. L.R. D61; JOSEPH D., *Jurisdiction and Arbitration Agreements and Their Enforcement*, London, 3. Ed. 2015; BRIGGS A., *Civil Jurisdiction and Judgements*, Abingdon, 7 Ed. 2021, p. 506. See criticism at ROGERSON P., *Problems of the Applicable Law of the Contract in the English Common Law Jurisdiction Rules: The Good Arguable Case*, in *Journal of Private International Law*, 2015, Vol. 9, No. 3, p. 387.

⁵³ JOSEPH D., *Jurisdiction and Arbitration Agreements and Their Enforcement*, cit., para. 9.09; *Canada Trust Co v Stolzenberg* [1998] 1 W.L.R. 547, 555.

parties, a good arguable case that a claim was made in respect of such contract, a good arguable case that it contained a choice of court agreement designating the jurisdiction of England, and a good arguable case that the claim fell within the scope of such agreement⁵⁴. Here, the mere existence of the agreement on the jurisdiction of the court, as a severable contract, did not suffice as a ground for permission; there must have been a main contract which was binding between the parties⁵⁵, and the claim must have been related to it. It was arguable whether, and under which circumstances, PD 6B para. 3.1(6)(d) would cover matters which arose not in respect of a contract but from a non-contractual obligation⁵⁶. It was contended in academic literature that claims for the restitution of money paid pursuant to a void supposed contract would fall within the scope of this provision⁵⁷. A claim seeking a declaration that no contract existed—in a situation where the contract, if it were found to exist, would fall within the scope of PD 6B para. 3.1(6)(d)—was governed not by the latter but rather by PD 6B para. 3.1(8)⁵⁸.

In addition, the claimant was required to satisfy the court that the claim had a reasonable prospect of success, and that the designated English court was the proper forum to try the case (*forum conveniens*). In most cases, compliance with these requirements did not pose large practical difficulties, for the courts adopted an approach favourable to the enforcement of the agreement. First, the courts required a low threshold from claimants to establish that there was a serious issue to be tried on the merits of the claim⁵⁹. Second, and

⁵⁴ JOSEPH D., *Jurisdiction and Arbitration Agreements and Their Enforcement*, cit., para. 9.17; BRIGGS A., *Civil Jurisdiction and Judgements*, cit., p. 506. See also *Rimpacific Navigation Inc v Daehan Shipbuilding Co Ltd*, cit., D64.

⁵⁵ *Rimpacific Navigation Inc v Daehan Shipbuilding Co Ltd*, cit. D64 f.

⁵⁶ See at BRIGGS A., *Civil Jurisdiction and Judgements*, cit., p. 506.

⁵⁷ *Ibid.*

⁵⁸ CPR, PD 6B para. 3.1(8): “A claim is made for a declaration that no contract exists where, if the contract was found to exist, it would comply with the conditions set out in paragraph (6).” See also JOSEPH D., *Jurisdiction and Arbitration Agreements and Their Enforcement*, cit., para. 9.04 ff; BRIGGS A., *Civil Jurisdiction and Judgements*, cit., p. 506.

⁵⁹ JOSEPH D., *Jurisdiction and Arbitration Agreements and Their Enforcement*, cit., para. 9.20; BRIGGS A., *Civil Jurisdiction and Judgements*, cit., p. 538. There have been, however, recent cases based on choice of court in which application for permission was set

more remarkably, the courts replaced the proper forum test, as required by statute, with a presumption in favour of the party enforcing the choice of court agreement.

Unlike other jurisdictional gateways, applications for service out of the jurisdiction based on choice of court agreements were not determined by reference to the principle of *forum (non) conveniens*, under which the claimant had to satisfy the court that England is clearly and distinctly the appropriate forum for trial⁶⁰. Instead, the court would *prima facie* permit service, holding the parties to their bargain absent strong reasons to the contrary⁶¹. This “strong reasons test” imposes a higher threshold than the usual *forum (non) conveniens* assessment and requires the party resisting the agreement to establish reasons against its enforcement that engage the interests of justice and go beyond mere considerations of convenience of the forum⁶². Such reasons are deemed to be rare⁶³ and have to be unforeseeable at the time the agreement is concluded⁶⁴. This test has consistently been applied to cases involving exclusive choice of court

aside based on the non-fulfilment of this requirement, *Dawnus Sierra Leone Ltd v Timis Mining Corp Ltd*, cit, para. 47.

⁶⁰ *Spiliada Maritime Corp v Cansulex Ltd*, cit.

⁶¹ *Donohue v Armco Inc* [2001] UKHL 64, [2002] C.L.C. 440, 449. See also *Standard Steamship Owners Protection and Indemnity Association (Bermuda) Ltd v Gann* [1992] 2 Lloyd's Rep. 528, 537; *Citi-March v Ltd v Neptune Orient Lines Ltd* [1997] 1 Lloyd's Rep 72, 76; *BAS Capital Funding Corp v Medfinco Ltd* [2003] EWHC 1798, para. 192. The same consideration applied in cases involving a stay of proceedings in England where the agreement designates the jurisdiction of a foreign court: *Insurance Co “Ingosstrakh” v Latvian Shipping Co* [2000] I.L.Pr. 164, 169. *Prima facie* enforcement of choice of court agreements had already been recognised in earlier cases, before *Spiliada: Unterweser Reederei GmbH v Zapata Offshore Co (The Chaparral)* [1968] 2 Lloyd's Rep. 158, 162; *Owners of Cargo Lately Laden on Board the Ship or Vessel Eleftheria v The Eleftheria* [1970] P 94, 99 f; *Aratra Potato Company Limited Morello International Limited v The Owners of the Ship “El Amria” (El Amria)* [1981] 2 Lloyd's Rep. 119, 123, 128 f.

⁶² *Antec International Ltd v Biosafety USA Inc* [2006] EWHC 47 (Comm), para. 7.

⁶³ *Mercury Communications Ltd v Communication Telesystems International* [1999] 2 All E.R. (Comm) 33, 41. An example is where the interests of parties other than those bound by the agreement were involved, and there was a risk of parallel proceedings and inconsistent decisions: *Donohue v Armco Inc*, cit.

⁶⁴ The relevant test is whether such circumstances were unforeseeable, and not whether they were actually unforeseen: *Cuccolini SRL v Elcan Industries Inc* [2013] EWHC 2994 (QB), paras. 29-32. See also *Konkola Copper Mines Plc v Coromin Ltd* [2006] EWHC 1093 (Comm), para. 42; *British Aerospace plc v Dee Howard Co* [1993] 1 Lloyd's Rep. 368, 376

agreements⁶⁵ and to many cases concerning non-exclusive agreements⁶⁶. There are also cases in which courts have regarded non-exclusive agreements differently from exclusive ones, and applied the *forum (non) conveniens* test⁶⁷. In such cases, however, courts nonetheless gave significant weight to the agreement, observing that, albeit non-exclusive, it still “creates a strong *prima facie* case that [the agreed forum] is an appropriate one”⁶⁸, for, by agreeing on the forum, the parties implicitly accepted that such forum was appropriate to try their case.

Against this background, applications for service out of the jurisdiction based on an English choice of court agreement were very likely to succeed⁶⁹. This should not, however, obscure the practical significance of the permission requirement. For the parties, as well as the courts, the existence of the permission requirement entailed additional procedural steps, and thereby increased the delay and cost of proceedings when compared with cases in which service could be effected without permission⁷⁰. Such burdens fell particularly heavily on the claimant, who carried the burden of applying for permission. An application had to be made in writing, setting out the requirements listed under CPR r 6.37, and was made without notice to the defendant⁷¹. In practical terms, this framework imposed an additional hurdle on the claimant in bringing the defendant before the

⁶⁵ *The Chaparral*, cit.; *Evans Marshall & Co v Bertola SA (No.1)* [1973] 1 W.L.R. 349; *El Amria*, cit.; *British Aerospace plc v Dee Howard Co*, cit.; *Insurance Co “Ingosstrakh” v Latvian Shipping Co*, cit.; *Donohue v Armco Inc*, cit.; *Konkola Copper Mines Plc v Coromin Ltd*, cit.

⁶⁶ *Standard Steamship Owners Protection and Indemnity Association (Bermuda) Ltd v Gann*, cit.; *Gulf Bank KSC v Mitsubishi Heavy Industries Ltd* [1994] 1 Lloyd's Rep. 323; *Mercury Communications Ltd v Communication Telesystems International* [1999] 2 All E.R. (Comm) 33; *Marubeni Hong Kong and South China Ltd v Mongolia*, cit.; *Antec International Ltd v Biosafety USA Inc*, cit. See also FAWCETT, J., *Non-exclusive jurisdiction agreements in private international law*, in *Lloyd's Maritime and Commercial Law Quarterly*, 2001, p. 234, 244 ff.

⁶⁷ *S&W Berisford Plc v New Hampshire Insurance Co Ltd* [1990] 2 Q.B. 631.

⁶⁸ *Ibid*, 646.

⁶⁹ “[I]t is most unusual for an English court to stay proceedings brought in England pursuant to an English jurisdiction agreement”: Lord Collins of Mapesbury at *UBS AG v HSH Nordbank AG* [2009] EWCA Civ 585, [2009] 1 C.L.C. 934, para. 100.

⁷⁰ See below under Section 5.2.

⁷¹ See CPR r 6.37 and PD 6B.

English courts, notwithstanding the defendant's prior contractual agreement to English jurisdiction.

4. *Service and Choice of Court: After 2021*

4.1. *The Removal of the Permission Requirement*

On 6 April 2021, an amendment⁷² moved choice of court agreements out of the list of jurisdictional gateways found in PD 6B para. 3.1(6)(d). Now, these agreements can be found under CPR r 6.33(2B)(b), which governs the circumstances in which permission is not required for service out of the jurisdiction. On 1 October 2022, a further amendment⁷³ added r 6.33(2B)(c) in order to expand the scope of r 6.33(2B)(b). Today, CPR r 6.33(2B) reads as follows: “6.33. *Service of the claim form where the permission of the court is not required — out of the United Kingdom (...). (2B) The claimant may serve the claim form on a defendant outside the United Kingdom where, for each claim made against the defendant to be served and included in the claim form— (a) the court has power to determine that claim under the 2005 Hague Convention and the defendant is a party to an exclusive choice of court agreement conferring jurisdiction on that court within the meaning of Article 3 of the 2005 Hague Convention; (b) a contract contains a term to the effect that the court shall have jurisdiction to determine that claim; or (c) the claim is in respect of a contract falling within sub-paragraph (b).*”⁷⁴

Altogether, CPR r 6.33 covers two types of choice of court agreements. The first are those agreements which fall within the scope of the 2005 Hague Convention, expressed in CPR r 6.33(2B)(a). This provision brings English national law into alignment with Art. 5(1) of the Convention, which imposes an obligation on the courts of the contracting states to establish their jurisdiction in all cases when such

⁷² See above under Section 1.

⁷³ The Civil Procedure (Amendment No. 2) Rules 2022 (S.I. 2022/783). Available at: <https://www.legislation.gov.uk/uksi/2022/783/rule/7/made>, last access on 20.12.2025.

⁷⁴ Emphasis added.

jurisdiction has been designated in a choice of court agreement. Thus, the scope of application of CPR r 6.33(2B)(a) is given by the scope of application of the 2005 Hague Convention, set out in its Art. 1 to Art. 3. Importantly, the Convention is applicable only to exclusive choice of court agreements⁷⁵, which is significantly more restrictive if compared with Art. 25 of the Brussels I bis Regulation.

The second part of this provision is expressed in CPR r 6.33(2B)(b) and (c), which applies in principle to all other choice of court agreements designating the jurisdiction of English courts which do not fall within the scope of the Convention. It applies thus not only to exclusive but also other types of clauses, such as non-exclusive and asymmetric choice of court agreements⁷⁶.

4.2. *Implications for the Parties*

Behind this development, there is essentially a policy decision concerning the distribution of procedural burdens between the parties. Specifically, where a choice of court agreement exists, the claimant should no longer bear the burden of satisfying the requirements of CPR r 6.37; rather, the defendant should alone bear the burden of establishing why the agreement should not be given effect.

Today, it is accepted that the rationale behind the common law rule requiring permission for service out of the jurisdiction is no longer grounded in considerations of sovereignty⁷⁷, but in considerations of justice as between the parties⁷⁸. In that sense, the requirements of CPR r 6.37 have the function of protecting the interests of the defendant: it is considered that defendants who are not present or who do not reside in England face a heavier burden in having to appear and defend themselves before an English court than defendants

⁷⁵ Art. 1(1) of the Convention. The definition of an exclusive agreement is given by Art. 3(1).

⁷⁶ LORD COLLINS OF MAPESBURY, HARRIS J. (eds), *Dicey, Morris & Collins on the Conflict of Laws*, cit., para. 11-241.

⁷⁷ See above under Section 2.2.

⁷⁸ *Abela v Baadarani*, cit., para. 53.

who reside locally⁷⁹. Hidden behind each of the jurisdictional gateways is thus—at least traditionally—the perception that a higher hurdle should be imposed on claimants as a matter of fairness between the parties when ascertaining jurisdiction⁸⁰.

The central question is whether, in cases where a choice of court agreement exists, the imposition of such a hurdle on the party enforcing that agreement is justified. Where a claimant seeks to initiate proceedings in a court whose jurisdiction the defendant has already contractually accepted, the continued requirement to obtain permission to serve out of the jurisdiction appears more difficult to justify, at least by comparison with cases in which there is no agreement on jurisdiction. Interestingly, this line of criticism has attracted little attention in England in recent decades, presumably because cases falling within the permission requirement have become increasingly rare, and so has sustained engagement in both case law and academic literature.

Finally, the 2021 amendment reflects a deliberate recalibration of the distribution of procedural burdens between the parties. Even if a presumption in favour of enforcing choice of court agreements already operated under English law, the removal of the permission requirement has further facilitated the procedural position of a claimant seeking to enforce an agreement designating the jurisdiction of an English court. Claimants are now entitled to effect service out of the jurisdiction whenever they show a “good arguable case” that a choice of court agreement exists⁸¹, without having to apply for permission. Once service is effected, the defendant alone carries the burden to dispute the court’s jurisdiction to try the claim⁸² or otherwise persuade the court not to give effect to their bargain.

⁷⁹ DICKINSON A., *Keeping Up Appearances: The Development of Adjudicatory Jurisdiction in the English Courts*, cit., p. 6, 45 f, 66.

⁸⁰ See above under section 3.2.

⁸¹ See *Pantheon International Advisors Limited v Co-Diagnostics, Inc*, cit., para. 18 ff.

⁸² See CPR r 11.

4.3. Implications for the System

The removal of the permission requirement raises, beyond implications for the parties, further systemic implications for English law. The implications are twofold. First, the amendment impacts the English framework for choice of court agreements, for it substantially alters how choice of court agreements affect jurisdiction. Where the parties have chosen the jurisdiction of an English court, the law now treats that choice as a sufficient basis for service outside of the jurisdiction without further judicial scrutiny. In normative terms, this reflects the assumption that the choice of court agreement itself justifies service, and, thus, the jurisdiction of the court.

Second, and more broadly, by exempting cases involving choice of court agreements from the requirement of permission to effect service out of the jurisdiction, the amendment breaks down the traditional distinction between service in and out of the jurisdiction under English law⁸³. While permission remains a requirement for service out under all other jurisdictional gateways, choice of court agreements become an exception to the rule⁸⁴. In that sense, the amendment of 6 April 2021 not only transforms the framework for choice of court under English law, but also creates an important exception under the English law on jurisdiction. The importance of this development invites further investigation.

5. The Role of Brussels in the New Framework

5.1. Brexit as a Trigger: The Continuation of the Brussels Regime under English law

During Brexit's transition period⁸⁵, considerable efforts were made to prevent the enforcement of choice of court agreements by

⁸³ MILLS A., *Exorbitant Jurisdiction and the Common Law*, cit., p. 243, 251, see fn. 38.

⁸⁴ See *Pantheon International Advisors Limited v Co-Diagnostics, Inc*, cit., para. 16 f.

⁸⁵ From 1 February 2020 until 31 December 2020, the EU treated the United Kingdom as if it were a Member State, with the exception of participation in EU institutions and governance structures. During this period, the Brussels I bis Regulation was applicable as it was before Brexit. See Agreement on the Withdrawal of the United Kingdom of Great

English courts from reverting exclusively to the jurisdictional gateway in PD 6B para. 3.1(6)(d), and thus from again, on a larger scale, requiring permission to serve out of the jurisdiction. The first of such measures were the United Kingdom's applications to accede, as an independent state, to the Lugano Convention⁸⁶ and the 2005 Hague Convention⁸⁷—both instruments containing a framework for choice of court agreements inspired by the Brussels regime⁸⁸. As the application to join the Lugano Convention was rejected⁸⁹, the United Kingdom's accession to the 2005 Hague Convention served to only partially relax the requirement of court permission, given that the latter Convention's scope of application is limited to exclusive choice of court agreements. On 28 January 2021, less than a month after the expiry of the Brexit transition period, the amendment introducing CPR r 6.33(2B)(b) was made, thereby exempting the requirement of permission to serve out of the jurisdiction also under English national law.

What is striking about this sequence is not only the measures themselves, but the timeline in which they happened. The short interval between the end of the Brussels regime's applicability in the United Kingdom and the adoption of the CPR amendment suggests that the objective of the amendment was to reproduce under English law, at least partially, a similar level of facilitation for establishing jurisdiction based on choice of court agreements as that established under the Brussels regime.

Britain and Northern Ireland from the European Union and the European Atomic Energy Community 2019/C 384 I/01, OJ C 384I, 12.11.2019, p. 1.

⁸⁶ On 8 April 2020, the United Kingdom applied to accede to the Lugano Convention.

⁸⁷ On 28 September 2020, the United Kingdom deposited its instrument of accession to the Convention. The Convention was implemented into English law through the adoption of the Private International Law (Implementation of Agreements) Act 2020 (c. 24). For the role of the 2005 Hague Convention to the enforcement of choice of court agreements in England after Brexit, see MILLS A., *Assessing the Hague Convention on Choice of Court Agreements 2005*, cit., p. 573, 582 ff.

⁸⁸ HARTLEY T. C., *Choice-of-court agreements under the European and international instruments: the revised Brussels I Regulation, the Lugano Convention and the Hague Convention*, Oxford, 2013, paras. 1.36, 1.55.

⁸⁹ Communication on the Assessment on the application of the United Kingdom of Great Britain and Northern Ireland to accede to the 2007 Lugano Convention (COM(2021) 222 final), 4 May 2021, Document 52021DC0222.

The question that follows is why it was sought to replicate such a level of facilitation in domestic law. I submit the answer to this question is twofold. First, the amendment responds to policy considerations linked to England's position in the market for international commercial litigation, particularly in relation to competing European fora. Second, it reflects an at least partial assimilation of the effect on jurisdiction accorded to choice of court agreements in the Brussels regime.

5.2. Policy Considerations: London's Litigation Market

Following the 2016 Brexit referendum, concerns were widely expressed about the future competitiveness of London as a magnet forum for international commercial litigation⁹⁰. These concerns can be best understood in light of the recent proliferation of Commercial Courts around the globe⁹¹ and particularly in Europe⁹², which has heated competition in the litigation market. From the English perspective, it was feared that reverting to a purely common law framework for the enforcement of choice of court agreements would lead to commercial parties being deterred from agreeing on the jurisdiction of English courts in their contracts⁹³.

⁹⁰ See, among many, FENTIMAN R., *Commercial Litigation in the UK: A Future Outside the EU*, cit., p. 157; ROGERSON P., *Litigation Post-Brexit*, in *New Law Journal*, 2016, available at: <https://www.newlawjournal.co.uk/content/litigation-post-brexit-0>, last accessed on 20.04.2026. See also the report of the UK House of Lords EU Justice sub-committee, *Brexit: justice for families, individuals and businesses?*, 20 March 2017, available at <https://publications.parliament.uk/pa/ld201617/ldselect/ldecom/134/134.pdf>, last accessed on 20.04.2026.

⁹¹ For a comparative overview, see RÜHL G., YIP M. (eds), *New International Commercial Courts: A Comparative Perspective*, Cambridge, 2024, especially General Report, p. 1-53.

⁹² New commercial courts have been established in the last decade for instance in the Netherlands (2019) and Germany (2024). See, respectively, KRAMER X., ANTONOPOULOU G., *Commercialising Litigation: The Case of the Netherlands Commercial Court*, in HENKE A., TORSELLO M, FONSECA E. Z. G.(eds), *International Commercial Courts. A paradigm for the future of adjudication?*, Napoli, 2023, p. 105; RÜHL G., LANGENFELD N. D., *International Commercial Courts 'Made In Germany': Attractive Alternative For Big Business?*, in: *Journal of Law & Commerce*, 2025, Vol. 43, No. 2, p. 311.

⁹³ FENTIMAN R., *Commercial Litigation in the UK: A Future Outside the EU*, cit., p. 157, 165 f.

As discussed above, the requirement to seek permission to serve out of the jurisdiction for cases where a choice of court existed presented an additional burden for the claimant⁹⁴. Comparatively, this English framework was perceived as less efficient than the enforcement under the Brussels regime: “(...) jurisdiction agreements in favour of the English courts have always been respected, but the procedural context in which such agreements are enforced is more cumbersome than under the Brussels 1bis regulation”⁹⁵. Following Brexit, concerns were raised that the permission for service as required under English law would put the English courts at a competitive disadvantage compared to those of other Member States.

This may appear counterintuitive, given that English law and English courts are often perceived as efficient, particularly friendly to commercial disputes, and as giving great effect to party autonomy in comparison to other courts around the world⁹⁶. This is not to say that this perception is unfounded; but in those cases where a choice of court agreement existed, the English rules on service out of jurisdiction certainly did not contribute to this positive reputation. It can thus be affirmed that this reputation heavily relied on Art. 25 of the Brussels I bis Regulation, and later on the 2005 Hague Convention, owing to the strong enforcement accorded to choice of court agreements.

From this perspective, the inclusion of CPR r 6.33(2B)(b) and (c) can be understood as a policy response aimed at preserving London’s standing as a leading centre for international commercial dispute resolution. By excluding the requirement for permission to serve out of the jurisdiction, it was possible to guarantee a certain level of continuity of the Brussels regime under English law and thus to ensure a more effective enforceability of choice of court agreements designating the jurisdiction of English courts.

⁹⁴ See above under Section 3.2.

⁹⁵ FENTIMAN R., *Commercial Litigation in the UK: A Future Outside the EU*, cit., p. 157, 166.

⁹⁶ See e.g. LEIN E., MCCORQUODALE R., MCNAMARA L., KUPELYANTS H., DEL RIO J. *Factors Influencing International Litigants’ Decisions to Bring Commercial Claims to the London Based Courts* (Ministry of Justice, 2015). Available at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/396343/factors-influencing-international-litigants-with-commercial-claims.pdf, last accessed on 20.04.2026.

5.3. The Partial Assimilation of the Brussels Regime

Service out of the jurisdiction without permission was first established in England for cases in which the jurisdiction of the court was given by the Brussels regime⁹⁷. It dates to 2008⁹⁸, when the title of CPR r 6.33 was changed from “Request for service” to “Service of the claim form where the permission of the court is not required—out of the United Kingdom”⁹⁹. This rule exempted the requirement for permission for service out of the jurisdiction when the jurisdiction of the English court was given by the Brussels I Regulation, including in cases where such jurisdiction was based on a choice of court agreement¹⁰⁰. Later, CPR r 6.33 was amended to also include cases where jurisdiction was given by the Lugano Convention¹⁰¹ and the 2005 Hague Convention¹⁰².

Thus, the notion that service out of the jurisdiction can be made without prior permission is an exception within English law¹⁰³. Rather, it was first established to align English law to the mandatory nature of jurisdiction as conferred by European and international law instruments. Such regimes operated in parallel to and separately from English law. For instance, a potential assimilation of the

⁹⁷ Under English national law, service without permission has been briefly permitted in cases involving a choice of court agreement, but this position was subsequently reversed, see above under Section 3.2.

⁹⁸ CPR r 6.33 as of 1 October 2008, available at: <https://www.legislation.gov.uk/ukxi/1998/3132/rule/6.33/2008-10-01>, last accessed on 20.04.2026.

⁹⁹ The Civil Procedure (Amendment) Rules 2008 (S.I. 2008/2178), effective on 01/10/2008. Available at: <https://www.legislation.gov.uk/ukxi/1998/3132/rule/6.33/2008-10-01>, last accessed on 20.04.2026.

¹⁰⁰ See CPR r 6.33(1)(b)(iii) and (2)(b)(iii) of the 2008 amendment.

¹⁰¹ The Civil Jurisdiction and Judgments Regulations 2009 (S.I. 2008/2178), effective on 01.01.2010. Available at: <https://www.legislation.gov.uk/ukxi/2009/3131/contents>, last accessed on 20.04.2026.

¹⁰² The Civil Jurisdiction and Judgments (Hague Convention on Choice of Court Agreements 2005) Regulations 2015, (S.I. 2015/1644). Available at: <https://www.legislation.gov.uk/ukxi/2015/1644/contents>, last accessed on 20.04.2026.

¹⁰³ Still today, there are only a few statutes which allow service out to be made without permission. See, for instance, Section 6 of the Protection of Trading Interests Act 1980. For an overview of cases where service out of the jurisdiction could be effected without permission before the amendment of 6 April 2021, see BRIGGS A., *Civil Jurisdiction and Judgements*, cit., p. 480 f.

Brussels regime rules into the English national rules on jurisdiction, even for the interpretation of the jurisdictional gateways of PD 6B para. 3.1., has been rejected in academic literature¹⁰⁴ and case law¹⁰⁵.

Nonetheless, English law has been changed, and since 6 April 2021 permission for service out of the jurisdiction is no longer required for choice of court agreements as a matter of English law. This change was not self-evident for two main reasons. First, as discussed above¹⁰⁶, because CPR r 6.33(2B)(b) and (c) creates a significant exception to the general principle of English law under which permission is required for service out of the jurisdiction. Second, because it deviates precisely from the idea that English law should not assimilate rules deriving from the Brussels regime. Nonetheless, it happened: the rule was created by the English legislature on its own motion, thus allowing, to a certain extent, for the continued application of the Brussels framework in England.

Just as with Art. 25 Brussels I bis Regulation, CPR r 6.33(2B)(b) and (c) applies whenever the parties, regardless of their domicile, have selected the jurisdiction of England and to agreements of all types, including not only exclusive choice of court agreements but also non-exclusive and asymmetric choice of court agreements. Most importantly, just as under the European regime, permission is not required for service.

Over the almost 34 years during which the Brussels regime applied in the United Kingdom¹⁰⁷, the expectations of the English legal system about the level of effectiveness that choice of court agreements should enjoy were shaped by that regime. Such effectiveness no longer involved applying for court permission to serve out of the

¹⁰⁴ BRIGGS A., *What remains of the Brussels I Regulation in the English conflict of laws?*, cit., p. 539, 547 ff.

¹⁰⁵ See, for instance, *FS Cairo (Nile Plaza) LLC v Brownlie*, [2021] UKSC 45, [2022] A.C. 995, para. 52 ff in which the Supreme Court reaffirmed the application of English law rules on service out of the jurisdiction for cases falling outside the scope of the Regulation and rejected an interpretation more in line with the Regulation for cases governed by English law.

¹⁰⁶ See above under Section 4.3.

¹⁰⁷ The Brussels regime was applicable in the United Kingdom from when the 1968 Brussels Convention came into force domestically on 1 January 1987 until the end of the transition period after Brexit, by which time the Brussels I bis Regulation was in force.

jurisdiction. This position is supported by the fact that, despite deviating from the traditional principle under which permission is required for service out of the jurisdiction, the amendment met with little resistance among English common lawyers¹⁰⁸. The significance of this point came to my attention during a conversation with an English legal scholar in London, who suggested that CPR r 6.33(2B)(b) and (c) had been introduced primarily as a matter of “administrative tidying” of the CPR. On this view, the amendment was driven by considerations of convenience: provisions relating to choice of court agreements were consolidated within a single rule, rather than divided between cases governed by the 2005 Hague Convention and the jurisdictional gateways in PD 6B para. 3.1. While such an anecdotal observation offers little evidential support, it is nonetheless indicative of the extent to which this development has been perceived by many English lawyers as a natural step. That impression finds some confirmation in the legal literature, where the amendment has attracted remarkably little sustained attention¹⁰⁹. Only a few contributions in English scholarship address, albeit briefly, the context and motivations underlying the amendment to CPR r 6.33¹¹⁰.

This relative lack of critical engagement is itself revealing. It suggests that a choice of court agreement should operate directly as a sufficient basis for service (and thus jurisdiction), without procedural hurdles, has become sufficiently familiar within English procedural thinking to be perceived as self-evident. In this sense, the amendment to CPR r 6.33(2B)(b) and (c) may be understood not merely as an “administrative tidying”, but as the manifestation of a broader process through which an approach to choice of court inspired by the Brussels regime has been internalised, and ultimately naturalised, within English law.

¹⁰⁸ Some criticism has, however, been registered: BRIGGS A., *What remains of the Brussels I Regulation in the English conflict of laws?*, in *Journal of Private International Law*, 2024, Vol. 20(3), p. 539, 548 f.

¹⁰⁹ See above under Section I.

¹¹⁰ BRIGGS A., *What remains of the Brussels I Regulation in the English conflict of laws?*, cit., p. 539, 547 ff; MILLS A., *Assessing the Hague Convention on Choice of Court Agreements 2005*, cit., p. 573, 580 ff and MILLS A., *Exorbitant Jurisdiction and the Common Law*, cit., p. 243, 251.

Lastly, it should be mentioned that some influence can also be attributed to the 2005 Hague Convention¹¹¹. It is clear that CPR r 6.33(2B), as it stands today, was included as part of the post-Brexit arrangements, which also encompassed the United Kingdom's independent accession to the Hague Convention. The wording of this provision, and in particular the placement of Hague cases under sub-paragraph (a), with other cases falling outside the scope of the Convention in sub-paragraphs (b) and (c), suggests that the enforcement of agreements governed by the Hague Convention was central to the amendment. At first sight, this may imply that the Hague Convention, rather than the Brussels regime, constituted the more immediate influence. However, such a reading would be incomplete. What is striking about the amendment is that it deliberately goes beyond the obligations assumed under the Convention, thereby reflecting a broader policy shift. The new policy closely resembles the position prior to Brexit, when the Convention applied in the United Kingdom by virtue of its membership of the European Union and operated alongside the Brussels regime. Following Brexit, not only does the Convention apply by virtue of independent accession, but the exclusion of the permission requirement has also been extended to all types of agreements (including non-exclusive and asymmetric) which, before withdrawal, fell within the scope of the Brussels regime. As noted above, the first exception to the permission requirement was itself grounded in the Brussels regime, and pre-dated the Convention while also extending to a broader category of cases. The common features between the new CPR r 6.33(2B)(b) and (c) and Art. 25 Brussels I bis Regulation, and their similarly expansive scope of application, therefore confirm that the Brussels model continued to serve as the primary and most proximate reference for the amendment.

¹¹¹ See MILLS A., *Assessing the Hague Convention on Choice of Court Agreements 2005*, cit., p. 573, 579.

5.4. *A Limited Influence: The Common Law that Remains*

From the perspective of a civil lawyer, while the amendment may be regarded as a development that aligns English law more closely with the Brussels regime, it would be premature to conclude that a new paradigm emerged in English law. Two features, in particular, indicate that the English approach to choice of court remains firmly rooted in its tradition.

First, although the amendment confers a more immediate effect on jurisdiction than under the previous framework, for permission for service is no longer required, jurisdiction based on the choice of court agreement is still not direct. Unlike in civil law systems, service, rather than the agreement itself, remains the formal basis upon which the court's jurisdiction is established.

Second, even after the amendment, English courts retain discretion to stay proceedings in the face of an English choice of court agreement. While English courts are, in practice, very unlikely to exercise such discretion against the enforcement of a choice of court agreement¹¹², the continued availability of this instrument marks an important point of divergence from the model of civil law systems, as well as the Brussels regime¹¹³ and the 2005 Hague Convention¹¹⁴, in which jurisdiction given by agreement is mandatory to the court.

In this context, a further point is noteworthy. Although service out of the jurisdiction based on choice of court agreements now constitutes a striking exception to the permission requirement for service out of the jurisdiction, such agreements have long occupied a particularly favourable position among the jurisdictional gateways. This can be illustrated by the assessment of *forum conveniens* under

¹¹² See above under Section 3.2.

¹¹³ See Judgment of the Court (Grand Chamber) of 1 March 2005. *Andrew Owusu v N. B. Jackson*, Case 281/02. *Forum non conveniens* is also inapplicable when assessing jurisdiction under the 2005 Hague Convention.

¹¹⁴ See Art. 5(2) of the 2005 Hague Convention: "A court that has jurisdiction under paragraph 1 shall not decline to exercise jurisdiction on the ground that the dispute should be decided in a court of another State." About the interpretation of this provision, see BRAND R. A., JABLONSKI S. R., *Forum Non Conveniens: History, Global Practice, and Future under the Hague Convention on Choice of Court Agreements*, Oxford, 2007, p. 208 f.

CPR r 6.37. As we have seen¹¹⁵, already before the amendment, applications for permission for service out relying on choice of court agreements were not subjected to the usual *forum conveniens* test, but enjoyed a presumption that the agreement was enforceable unless “strong reasons” were shown to the contrary. This presumption remains unchanged. Now, however, the “strong reasons test” is no longer intermingled with the assessment of both the existence of the court’s jurisdiction, in applications for permission for service out, and the question of whether the court should exercise its jurisdiction, as a matter of discretion. Rather, it is now relevant only at the later stage. Once service relying on an English choice of court agreement has been effected, defendants still carry the burden of showing strong reasons why the proceedings should be stayed in spite of an English jurisdiction clause.

Taken together, these considerations confirm that the role of the Brussels regime has been both significant and limited. It acted as a catalyst and as a model for the amendment, but it did not displace fundamental common law aspects of the enforcement of choice of court under English law. Certainly, the most meaningful impact of the amendment to the English framework has been the weakening of the traditional approach oriented by service in and out of the jurisdiction. However, recent developments reveal a broader shift in English law towards revisiting this approach.

6. *Conclusion: The First Step Towards a New English Framework on Jurisdiction?*

Beyond the reform of English law on choice of court, it appears that English law on jurisdiction is on the path to a broader reconfiguration¹¹⁶. The United Kingdom’s withdrawal from the European

¹¹⁵ See above under Section 3.2.

¹¹⁶ Among many, see the critical discussion on permission to serve out of the jurisdiction at BRIGGS A., DICKINSON A., *Reframing jurisdiction: a new scheme?*, in *Civil Justice Quarterly*, 2022, Vol. 41(4), p. 317, 319; ARZANDEH A., “Gateways” within the Civil Procedure Rules and the future of service-out jurisdiction in England, in *Journal of Private International Law*, 2019, Vol. 15, No. 3, p. 516; DICKINSON A., *Service Abroad—An Inconvenient Obstacle?*, in *Law Quarterly Review*, 2014, Vol. 130, p. 197. Courts have also been

Union seems to have prompted renewed attention to the domestic rules on jurisdiction altogether, rules with which English lawyers seem increasingly dissatisfied. The current framework is described as fragmented, overly complex and costly¹¹⁷—thereby raising the fear that disputes about where to litigate become, as it has been put, “an embarrassment to the English legal system¹¹⁸.”

It has been suggested that English law on jurisdiction should be reframed under a new scheme¹¹⁹. Under this new scheme, the rules on jurisdiction would no longer be based on the distinction between service in and out of the jurisdiction, but instead on a statutory framework grounded in identifiable factors connecting the forum and the dispute. Some of these grounds should be self-sufficient, that is to say, the court should have jurisdiction without any further condition to be met¹²⁰—as is now the case for choice of court under CPR r 6.33(2B)(b) and (c). As a consequence, it is suggested, there should be a complete abandonment of the current system founded on permission to serve out of the jurisdiction¹²¹.

It remains to be seen whether, and in what form, further change will occur. One point, however, appears clear: change has already begun. Brexit has triggered English lawyers to reassess their domestic law on jurisdiction from a reshaped perspective. And as regards choice of court, this new perspective is closer to the Brussels framework than it was before.

changing their approach to questions of jurisdiction over foreign defendants: *Abela v Baadarani*, cit.; *FS Cairo (Nile Plaza) LLC v Brownlie* cit.

¹¹⁷ BRIGGS A., DICKINSON A., *Reframing jurisdiction: a new scheme?*, in *Civil Justice Quarterly*, 2022, Vol. 41(4), p. 317, 319.

¹¹⁸ *Ibid.*, p. 317.

¹¹⁹ *Ibid.*

¹²⁰ *Ibid.*, p. 320 f. Self-sufficient grounds of jurisdiction are those which establish a connection between the claim and England which is both “real and substantial”, for example, when the defendant is present in the territory in the moment of service or when there is a choice of court agreement in favour of English courts which fall within the scope of the 2005 Hague Convention. The authors suggest two further grounds of jurisdiction, one which is not self-sufficient, but still based on a real and substantial connection with England, and one intended to guarantee access to justice in cases where there is some (less substantial) connection to England.

¹²¹ *Ibid.*, p. 319.

The Relevant and Complex Role of Private International Law in the Private Enforcement of the DSA

Rosa Pla Almendros

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1. Introduction: the DSA and the importance of its hybrid enforcement

In recent years, the EU, in contrast to other world powers such as the United States or China¹, has made a firm commitment to regulate the digital environment in order to protect fundamental rights and European values without hindering innovation or economic growth. To this end, it has enacted a set of “*European digital laws*”² which include regulations such as the General Data Protection Regulation³,

¹ For a detailed comparative analysis of how different world powers have approached the legal treatment of the digital economy, see BRADFORD A., *Digital empires: the global battle to regulate technology*, Old Saybrook, 2024, p. 131.

² LÓPEZ-TARRUELLA MARTÍNEZ A., *El futuro Reglamento de inteligencia artificial y las relaciones con terceros Estados*, in *Revista Electrónica de Estudios Internacionales*, 2023, p. 2.

³ Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation), in OJ L 119, 4.5.2016, p. 1.

the Digital Markets Act⁴, the Digital Services Act⁵, the Data Act⁶, the Data Governance Act⁷ or the IA Act⁸.

In this context, one of the most notable regulations has been the Digital Services Act (“DSA”), which became applicable on 17 February 2024 (Art. 93.2 DSA). In fact, the importance of this regulation is such that, even before that date, it was termed the “*Europe’s new Digital Constitution*”⁹. Furthermore, of all European digital laws, the DSA seems to be the one that is set to most significantly change the way the online environment works¹⁰.

More specifically, the DSA aims to achieve a safe and trusted online environment in which fundamental rights are effectively protected (Art. 1.1 DSA). With this aim, which belongs to the so-called “*digital constitutionalism*”¹¹, the DSA seeks to protect digital users, whether consumers or businesses, from providers of intermediary services, especially from powerful online platforms such as

⁴ Regulation (EU) 2022/1925 of the European Parliament and of the Council of 14 September 2022 on contestable and fair markets in the digital sector and amending Directives (EU) 2019/1937 and (EU) 2020/1828 (Digital Markets Act), in OJ L 265, 12.10.2022, p. 1.

⁵ Regulation (EU) 2022/2065 of the European Parliament and of the Council of 19 October 2022 on a Single Market for Digital Services and amending Directive 2000/31/EC (Digital Services Act), in OJ L 277, 27.10.2022, p. 1.

⁶ Regulation (EU) 2023/2854 of the European Parliament and of the Council of 13 December 2023 on harmonised rules on fair access to and use of data and amending Regulation (EU) 2017/2394 and Directive (EU) 2020/1828 (Data Act), in OJ L, 2023/2854, 22.12.2023, p. 1.

⁷ Regulation (EU) 2022/868 of the European Parliament and of the Council of 30 May 2022 on European data governance and amending Regulation (EU) 2018/1724 (Data Governance Act), in OJ L 152, 3.6.2022, p. 1.

⁸ Regulation (EU) 2024/1689 of the European Parliament and of the Council of 13 June 2024 laying down harmonised rules on artificial intelligence and amending Regulations (EC) No 300/2008, (EU) No 167/2013, (EU) No 168/2013, (EU) 2018/858, (EU) 2018/1139 and (EU) 2019/2144 and Directives 2014/90/EU, (EU) 2016/797 and (EU) 2020/1828 (Artificial Intelligence Act), in OJ L, 2024/1689, 12.7.2024, p. 1.

⁹ VAN HOBOKEN J., QUINTAIS J.P., APPELMAN N., FAHY R., BURI I., STRAUB M., *Foreword*, in VAN HOBOKEN J., QUINTAIS J.P., APPELMAN N., FAHY R., BURI I., STRAUB M., *Putting the DSA into practice: Enforcement, Access to Justice and Global Implications*, 2023, online version available at: https://www.ivir.nl/publicaties/download/vHoboken-et-al_Putting-the-DSA-into-Practice.pdf, p. 5, last access 14 January 2026.

¹⁰ CIOFFI J. W., KENNEY M. F., ZYSMAN J., *Platform power and regulatory politics: Polanyi for the twenty-first century*, in *New Political Economy*, 2022, p. 829.

¹¹ DE GREGORIO G., *Digital Constitutionalism in Europe. Reframing Rights and Powers in the Algorithmic Society*, Cambridge, 2022, p. 24.

Instagram, TikTok and X (formerly Twitter), or online marketplaces such as Amazon and Booking. It should be pointed out in this regard that providers of intermediary services subject to the DSA are all those operating in the Union, regardless of whether they are established within or outside it (Art. 2.1 DSA)¹².

In order to achieve the goal to protect digital users, Chapter III of the DSA has created a set of “due diligence obligations” for providers of intermediary services, which are intended to regulate their behaviour in the digital market¹³. These obligations, which are essentially related to the transparency of content moderation, recommendation systems, or online advertising, aim to improve the control that users have over what they see when they access the interface of those platforms. For example, digital users can now decide to avoid personalized recommendations (Arts. 27.3 and 38 DSA) or can report content for being illegal or contrary to the terms and conditions of a platform (arts. 16, 20 and 21 DSA).

Accordingly, Chapter IV of the DSA (Arts. 49 to 88 DSA), which accounts for half of the articles in the DSA, is devoted exclusively to creating a robust supervision and enforcement regime to ensure

¹² The doctrine has considered that this point, which is common to the European digital laws, leads to their extraterritorial application: e.g. see SVANTESSON D.J.B., A Jurisprudential Justification for Extraterritoriality in (Private) International Law, *Santa Clara Journal of International Law*, 2015, p. 519. Therefore, the doctrine refers to the extraterritorial scope of the DSA because it applies to every provider of intermediary services operating in the Union, even if they are established outside it. It is true that “extraterritoriality” is a vague and ambiguous concept (KAMMINGA M.T., *Extraterritoriality*, in PETER, A., WOLFRUM R. (eds.), *The Max Planck Encyclopedia of Public International Law*, Oxford 2012, p. 1071). However, in this context and in our view, this term should under no circumstances be identified with an illegitimate legal basis, as the DSA only applies extraterritorially in cases connected to the internal market. It should also be noted that this extraterritorial scope is the only way for the EU to achieve a “level playing field” among all economic operators in the Union and to protect all digital users in the Union (KUNER C., *The Internet and the Global Reach of EU Law*, in *LSE Law, Society and Economy Working Papers*, 2017, p. 20, and HÖRNLE J., *Internet jurisdiction: law and practice*, cit., pp. 22 and 31).

¹³ In addition, it should be noted that Chapter II of the DSA (esp. arts. 4 to 6 DSA) reproduces and repeals the exemptions from liability for providers of intermediary services contained in Arts. 12 to 15 of the E-Commerce Directive (Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market ('Directive on electronic commerce'), in OJ L 178, 17.7.2000, pp. 1–16). However, failure to comply with any of these rules would not be subject to the private enforcement regime of the DSA, and therefore we will leave them aside on this occasion.

that all the aforementioned intentions are translated into the practical reality. Essentially, the Chapter creates a reinforced enforcement system that stands out for its hybrid nature: it combines a public enforcement regime, which is traditional in European regulations, with private enforcement.

Briefly, the public enforcement system in the DSA grants powers of supervision and enforcement to national administrative authorities—the so-called “Digital Services Coordinators”—and also to the European Commission in the case of very large online platforms. They can carry out investigations and, where appropriate, impose fines on those providers who fail to comply with the due diligence obligations of Arts. 11 to 48 DSA.

For its part, the private enforcement system of the DSA would allow digital users, either individually or collectively (arts. 86 and 90 DSA), to take action against providers of intermediary services to seek compensation for damages when they have failed to comply with the due diligence obligations required under Chapter III DSA, and this behaviour has been the cause of the damage suffered by them (Art. 54 DSA).

However, the fact that the public and the private enforcement are combined in the DSA does not mean that the importance that the DSA attaches to each form of enforcement is identical. On the contrary, except for three provisions, which regulate the private enforcement (Arts. 54, 86 and 90 DSA), the rest of Chapter IV is devoted to establishing the system of public enforcement.

Even so, the DSA focuses on both ways of enforcement to prevent the DSA from remaining a dead letter and to demonstrate that this question represents a main concern of the European legislator. In fact, the DSA enforcement system constitutes one of the priorities of the European Commission’s Political Guidelines for the period 2024-2029¹⁴.

Therefore, it follows from the above that the enforcement system of the DSA is set to play a crucial role in the European digital landscape in the coming years, both because of the importance of the

¹⁴ VON DER LEYEN U., *Europe’s choice political guidelines for the next European Commission 2024–2029*, online version available at: <https://commission.europa.eu/priorities-2024-2029>, p. 10, last access 14 January 2026.

Regulation in question, and because of the peculiarity of its enforcement system. Next, we will focus on one of the two aspects of the enforcement regime: the private enforcement. In addition to being by far the least known and least traditional in the EU, this choice is justified because it is the one that raises Private International law (“PIL”) issues.

2. *The private enforcement of the DSA*

The fact that the provisions of the DSA pay virtually no attention to the private enforcement of the Regulation is probably due to the lack of tradition in the EU regarding the private enforcement of its rules¹⁵. Traditionally, the European legislator has only used public enforcement mechanisms (administrative law measures) to ensure the correct implementation and enforcement of their instruments.

Consequently, the private enforcement side of the European rules is an unknown legal institution in the European Union, except in areas such as competition law. The fact that private enforcement is now proliferating in instruments such as the DSA or other digital laws¹⁶ means that we must study how this system works in general

¹⁵ WILMAN F., *Private Enforcement of EU Law before National Courts. The EU Legislative Framework*, Cheltenham, 2015, pp. 416-418.

¹⁶ Undoubtedly, the first European digital law that sparked interest due to its potential private enforcement was the General Data Protection Regulation (GDPR). In fact, several studies have been conducted on this subject, notably those carried out by RODRÍGUEZ PI-NEAU E., TORRALBA MENDIOLA E.C., *Delimitación del derecho aplicable en el Reglamento 2016/679*, Valencia, 2023, and by DE MIGUEL ASENSIO P.A., *Derecho a indemnización en materia de datos personales: aspectos internacionales*, in *Cuadernos de Derecho Transnacional*, 2024, pp. 487-500. In addition to that, a case in point would be the Digital Markets Act, whose private enforcement system has been studied by PODSZUN R., *Private Enforcement and the Digital Markets Act*, in *Verfassungsblog*, 2021, online version available at: <https://verfassungsblog.de/power-dsa-dma-05/>, last access 14 January 2026, and HORN-KOHL L., RIBERA MARTÍNEZ A., *Collective Actions and the Digital Markets Act: A Bird Without Wings*, in *The Antitrust Bulletin*, 2025, p. 4. In the same vein, a similar situation could be found regarding the Platform-to-Business Regulation (Regulation (EU) 2019/1150 of the European Parliament and of the Council of 20 June 2019 on promoting fairness and transparency for business users of online intermediation services, in OJ L 186, 11.7.2019, pp. 57–79), whose private enforcement regime has also been analysed by FRANZINA P., *Promoting Fairness and Transparency for Business Users of Online Platforms: The Role of Private International Law*, in PRETELLI I. (ed.), *Conflict of laws in the maze of digital platforms*, Zürich, 2019, pp. 151-152.

regarding European rules, so that we can later transfer this knowledge to the sphere of the DSA and understand the role of private enforcement in that context.

2.1. *The private enforcement of European Union law*

Private enforcement, also known as civil enforcement¹⁷, includes legal actions brought by any individual to remedy a breach of a right, regardless of whether the opposing party is another individual¹⁸. In other words, (judicial) private enforcement means that individuals can bring claims before the courts for breach of the rights granted to them by the EU law. Thus, for a rule to be privately enforced, it must not only impose obligations but also recognise subjective rights in favour of individuals.

In Europe, the private enforcement of European legislative instruments is characterised by its decentralised functioning and dual regulation.

On the one hand, private enforcement is decentralised in the sense that legal actions brought by individuals for breach of a Union rule can only be brought before national courts, but not European courts¹⁹. The underlying logic is that national courts must hear all cases in which a breach of Union law cannot be brought before the European courts by a private individual. And since the latter cases are very exceptional (Arts. 263, 265, 268 or 340 TFEU), national courts will end up hearing most of the private enforcement proceedings.

¹⁷ BASEDOW J., *The multiple facets of Law Enforcement*, in ETCHEVERRY ESTRÁZULAS N., FERNÁNDEZ ARROYO D.P., *Enforcement and Effectiveness of the Law – La mise en oeuvre et l'effectivité du droit*, Cham, 2018, p. 5.

¹⁸ Case law has recognised that private enforcement would allow individuals to assert their rights both against authorities (Judgment of the Court of 19 November 1991, *Andrea Francovich and Danila Bonifaci and others v Italian Republic*, Joined cases C-6/90 and 9/90) (vertical relations) and against other individuals (Judgment of the Court of 20 September 2001, *Courage Ltd v Bernard Crehan and Bernard Crehan v Courage Ltd and Others*, Case C-453/99) (horizontal relations). More recently and clearly, we can cite, among others, the Judgment of the Court (Grand Chamber) of 22 December 2022, *JP v Ministre de la Transition écologique and Premier ministre*, Case C-61/21, par. 46.

¹⁹ VERA ARONSTEIN I., *Remedies for Infringements of EU Law in Legal Relationships between Private Parties*, Deventer, 2019, p. 27.

On the other hand, the private enforcement system of a European rule is subject to a double regulation, according to the doctrine established by the CJEU in *Rewe Saarland* (1976) and *Comet* (1976)²⁰. There, the CJEU established the following “*implicit pact*”²¹ whereby the private enforcement regime of European rules would be subject to a two-tier regulation, both European and national.

From one perspective, European legislation, either explicitly or implicitly, would be responsible for granting individuals rights whose violation they could subsequently invoke. In this regard, European law can create these rights in two different ways: either they may be expressly provided for in the law (explicitly), or they may derive from the “*direct effect*” of its provisions (implicitly). The latter doctrine, which was created by the CJEU in *Van Gend en Loos*, allows obligations imposed by the rule that meet the triple requirement of “*clarity, precision and unconditionality*” to be translated into rights that individuals can enforce privately²².

Thus, the rights that benefit individuals are the minimum that the European legislator must regulate. However, in addition to that, it may also govern the remedies and procedural issues relating to the private enforcement of an instrument when it deems appropriate.

From the other perspective, national law shall regulate all other aspects not covered by Union law. In this regard, it will determine the procedural issues (e.g. burden of proof, standard and means of proof, compensable damages or limitation and expiry periods), as well as the remedies available to the parties that are not regulated by European legislation²³. And this freedom of the national legislator,

²⁰ Judgment of the Court of 16 December 1976, *Rewe-Zentralfinanz eG and Rewe-Zentral AG v Landwirtschaftskammer für das Saarland*, Case C-33/76, para. 5. In the same sense, Judgment of the Court of 16 December 1976, *Comet BV v Produktschap voor Siergewassen*, Case 45-76, paras. 11 and 13.

²¹ KILPATRICK C., *The Future of Remedies in Europe*, in KILPATRICK C., NOVITZ T., SKIDMORE P., *The Future of Remedies in Europe*, Oxford, 2000, p. 3.

²² Judgment of the Court of 5 February 1963, *NV Algemene Transport- en Expeditie Onderneming van Gend & Loos v Netherlands Inland Revenue Administration*, Case 26/62, par. II.B), pp. 340-341.

²³ Both the CJEU and the European legislator have progressively adopted a more intrusive approach to regulating procedural issues and remedies in European private enforcement. Even so, these European rulings and Regulations do not fully harmonise the remedies or procedural perspective of private enforcement. Indeed, there are many sectors in the

which has been termed “*national procedural autonomy*”, would only be limited by the principles of equivalence and effectiveness.

With regard to the combination and the scope of both levels of regulation, European and national, the situation varies depending on the area of law analysed²⁴. However, the most common scenario is silence on the part of the European legislator on everything that is not related to rights. That would mean that procedural issues and remedies will end up being regulated almost exclusively by national rules, which must comply with the principles of effectiveness and equivalence.

2.2. *Concept and functioning of the private enforcement of the DSA*

Once we understand how the private enforcement of a European instrument works, we must now analyse how it would operate in practice for the DSA. Concerning this European digital law, despite its considerable and criticised length, at no point does it expressly refer to its possible private enforcement. Even so, there are three provisions which, due to their wording, indicate the possible private enforcement of the instrument. These are arts. 54, 86 and 90 DSA, and, according to the doctrine, they form the “visible face” of the private enforcement of the DSA²⁵.

To begin with, Art. 54 DSA is indicative in that it allows digital users to bring an action for damages against providers of intermediary services when they have caused them harm by failing to comply with the obligations imposed on them by the DSA. For their part,

Union where private enforcement is used, in which European legislation and case law do not refer to or affect procedural aspects or remedies. Nevertheless, having handed down case-by-case solutions, the CJEU's rulings have been so fragmented that it is sometimes unclear which remedies and procedural aspects are subject to EU law and which are subject to national law. In this sense, see TRIDIMAS T., *The General Principles of EU Law*, Oxford, 2^a ed., 2006.

²⁴ TOMASZ NOWAK J., *Considerations on the Impact of EU law on National Civil Procedure: Recent Examples from Belgium*, in SSRN, 2017, pp. 26-31.

²⁵ The adjective “visible” is correctly used in the doctrine by FRANCK J., *Individual Private Rights of Action under the Platform-to-Business Regulation*, in *European Business Law Review*, 2023, p. 528, and LEERSSEN P., VAN DUIN A., TOEPOEL I., VAN HOBOKEN J., *Pathways to Private Enforcement of the Digital Services Act (DSA)*, in *Institute for Information Law*, 2025, p. 9.

Arts. 86 and 90 DSA address recourse to representative actions, and the former undoubtedly allows for the private enforcement of the DSA by referring to the possibility of digital users exercising ‘*the rights conferred by this Regulation*’ through the representative actions it regulates.

In view of the above, it is undeniable that the Regulation allows for private enforcement, even though it does not expressly stipulate this. In particular, this means that digital users may bring legal proceedings before national courts, either individually or collectively, if they consider that providers of intermediary services have infringed the rights granted to them by the European Regulation. However, the DSA adds little else regarding its private enforcement system. It is then that, in light of the two-tier regulation theory set out in the previous section, we must elucidate how the DSA’s private enforcement works.

i) On the one hand, the first question that arises is what rights digital users can claim against providers of intermediary services. The DSA, as a European regulation, is responsible for establishing these rights, but it does not explicitly determine them, since it only establishes due diligence obligations. Given this silence, the rights must be derived from the so-called direct effect of the DSA provisions. That means that, if the due diligence obligations imposed on providers of intermediary services in Arts. 11 to 48 DSA meet the aforementioned three requirements, they will enjoy direct effect and can be translated into subjective rights.

If recalled, the three conditions require that the obligations are clear, precise and unconditional. In this regard, the CJEU has recently interpreted the criteria of clarity and precision in an extremely lax manner, to the point that they are taken for granted²⁶. In line with

²⁶ GALLO D., *Direct effect in EU law*, Oxford, 2025, pp. 87-90, who argues that the CJEU has affirmed direct effect without referring to those criteria (Judgment of the Court of 1 February 1977, *Verbond van Nederlandse Ondernemingen v Inspecteur der Invoerrechten en Accijnzen*, Reference for a preliminary ruling: Hoge Raad - Netherlands - Capital goods - Case 51-76) or even it has made no mention of the direct effect and the criteria (Judgment of the Court (Grand Chamber) of 22 June 2010, *Aziz Melki* (C-188/10) and *Sélim Abdeli* (C-189/10), Joined Cases C-188/10 and C-189/10). In the same vein, see Opinion of Advocate General Bobek delivered on 23 September 2021, *NE v Bezirkshauptmannschaft Hartberg-Fürstenfeld*, Case C-205/20, para. 36. Also, in favour of the direct effect of the provisions of EU Regulations as a general rule, see DE WITTE B., *Direct Effect*,

this, all due diligence obligations covered by the DSA would meet both requirements, even if in certain cases they use vague or ambiguous expressions²⁷.

Conversely, it would still be necessary to check which of the due diligence obligations are unconditional. In this regard, unconditionality is normally equated with direct applicability²⁸, and given that EU regulations intrinsically enjoy this characteristic (Art. 288 TFEU), it should be confirmed that the due diligence obligations of the DSA that are clear and precise are also unconditional.

Ultimately, the due diligence obligations of the DSA will have direct effect and will translate into rights for individuals in virtually all cases, provided that they are intended to directly benefit digital users²⁹. Therefore, obligations such as those related to the designation of points of contact for the authorities (Art. 11 DSA) or trusted flaggers (Art. 22 DSA), or the obligations to assess and mitigate risks (Arts. 34 and 35 DSA) cannot be translated into rights in favour of digital users, as they cannot expect to benefit from them³⁰. On the contrary, digital users will have the right to sue the platform if it does not offer notice and action mechanisms (Art. 16 DSA), does not provide for a statement of reasons (Art. 17 DSA), or does not fulfil their transparency obligations regarding their recommender systems (Art. 27 DSA), among many others.

ii) On the other hand, the aspects relating to remedies and procedural issues addressed in Arts. 54, 86 and 90 DSA are minimal and refer exclusively to issues such as standing to sue (digital user), standing to be sued (provider of intermediary service) and the triple requirement of liability (infringement, damage and causality).

Primacy, and the Nature of the Legal Order, in CRAIG P., DE BÚRCA G. (eds.), *The Evolution of EU Law*, Oxford, 2021, p. 197, and VERA ARONSTEIN I., *Remedies for Infringements of EU Law in Legal Relationships between Private Parties*, cit., p. 19.

²⁷ GALLO D., *Direct effect in EU Law*, cit., p. 87.

²⁸ Judgment of the Court of 10 October 1973, *Fratelli Variola S.p.A. v Amministrazione italiana delle Finanze*, Case 34/73, para. 8.

²⁹ DEL MORAL SÁNCHEZ M., *The Devil is in the Procedure: Private Enforcement in the DMA and the DSA*, in *University of Bologna Law Review*, 2024, p. 28.

³⁰ This issue is discussed regarding Arts. 34 and 35 DSA, but it seems that they cannot be directly enforced by individuals since their language is vague and unprecise and are not clear or concrete enough to benefit individuals. In this sense, see HUSOVEC M., *Principles of the Digital Services Act*, Oxford, 2024, p. 437.

However, apart from this, the provisions on the private enforcement of the DSA establish nothing else.

Given this insufficiency or “imperfect liability” of Art. 54 DSA, this provision will always need to be supplemented by a national legal basis, whether contractual or non-contractual³¹, which must comply with the principles of equivalence and effectiveness. In short, national law will be responsible for specifying most of the remedies and elements of the private enforcement regime of the DSA, including aspects such as quantification of damages, evidence, fault, and issues of Private International law (hereinafter, “PIL”)³².

3. *What role does Private International law play in the private enforcement of the DSA?*

Once we understand how the private enforcement system of the DSA works, we must ask ourselves what role PIL plays in it. In this regard, the starting point is to acknowledge that all disputes concerning the private enforcement of the DSA are verified via the internet and therefore are inherently cross-border in nature. This means that it is indispensable to address the most classic questions in the area of PIL, including international jurisdiction and applicable law, to resolve any of the aforementioned disputes.

In the context of the DSA, whose private enforcement system would allow digital users to bring claims against the providers of intermediary services in case of unfulfillment of the due diligence obligations with direct effect, the answer to both questions will be of significant importance. In particular, they will enable digital users to know the courts before which proceedings should be brought, as well

³¹ BARTELS M., *Enforcement*, in KRAUL T., *New Digital Services Act. A Practitioner's Guide*, Baden-Baden, 2024, pp. 154-155; RAUE B., *Art. 54. Entschädigung*, in HOFMANN F., RAUE B., *Digital Services Act*, Baden-Baden, 2023, pp. 804 and 810; HUSOVEC M., *Principles of the Digital Services Act*, cit. pp. 428-429; and LEERSSEN P., VAN DUIN, A., TOEPOEL I., VAN HOBOKEN J., *Pathways to Private Enforcement of the Digital Services Act (DSA)*, cit., pp. 4, 10 and 12.

³² It should be clarified that most of these aspects will depend on the law designated as applicable by the Rome I or Rome II Regulations, according to arts. 12 Rome I and 15 Rome II Regulations. That means that those elements will be ruled by the *lex causae* determined by the Rome system, and not (exclusively) by the *lex fori*. Hence the need to apply the Regulations in question.

as which law should be applied to supplement the regulation of the private enforcement of the DSA, since this instrument does not cover it in its entirety.

However, the necessary study of these PIL issues is opposed by the response of the European legislator, who does not regulate how to concrete them. In contrast to Art. 79 of the General Data Protection Regulation, which provides for a specific rule on international jurisdiction, the DSA does not incorporate any PIL rules beyond those confirming that the Regulation applies “*without prejudice*” to the general rules of this discipline, such as Brussels I bis Regulation³³ and Rome I and Rome II Regulations³⁴ (rec. 10 and 126 and Art. 2.4.h) DSA)³⁵.

Given this silence, it is the PIL generic rules that must be applied to resolve issues of international jurisdiction and applicable law in the private enforcement of the DSA. Specifically, we refer to the Brussels I bis Regulation on jurisdiction and the Rome I and Rome II Regulations on applicable law, which do not distinguish between

³³ Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast), in OJ L 351, 20.12.2012, p. 1.

³⁴ Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I), in OJ L 177, 4.7.2008, p. 6, and Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II), in OJ L 199, 31.7.2007, p. 40.

³⁵ According to JAULT-SESEKE F., *Les non-dits du droit européen du numérique en matière de droit international privé: l'exemple du règlement sur les services numériques (DSA)*, in *Revue critique du droit international privé*, 2025, pp. 596 and 613, this could be explained due to the difficulty of trying to coordinate specific PIL rules with the generic rules of this discipline, or to the markedly public nature of the DSA. For their part, other voices suggest that the absence of a conflict rule is due to the broad scope of application of the DSA, which, when applied horizontally to any sector in which providers of intermediary services operate, means that the liability regime must be determined according to very different conflict rules in each case, suggesting that it would not be possible to establish a single conflict rule for all of them. This is the opinion of DE MIGUEL ASENSIO P.A., *Derecho Privado de Internet*, Cizur Menor (Navarra), 2022, p. 378, and PAREDES PÉREZ J.I., *Aspectos internacionales de la responsabilidad civil de las plataformas en línea b2c frente a los contenidos ilícitos en materia de protección de los consumidores*, in CASTELLÓ PASTOR J.J., *Análisis del Reglamento (UE) de servicios digitales y su interrelación con otras normas de la Unión Europea*, Madrid, 2025, pp. 257-258.

disputes that arise in the digital sphere and those that do not³⁶. In this regard, it is worth clarifying that their applicability in this specific case is confirmed because the private enforcement of any European instrument, even one that is eminently administrative such as the DSA, forms part of the “civil and commercial matters”³⁷ that define the material scope of application of the three PIL Regulations mentioned above³⁸.

Next, an analysis of the Regulations will reveal which courts would have jurisdiction and which law would apply to disputes concerning the private enforcement of the DSA. This will show that the generic PIL Regulations do not always apply smoothly to the private enforcement of the DSA, as they were designed to deal with offline disputes and have not been fully adapted to the digital environment³⁹.

³⁶ DE MIGUEL ASENSIO P.A., *Conflicts of laws and the internet*, Cheltenham, 2024, p. 396, and PALAO MORENO G., *Competencia judicial internacional en supuestos de responsabilidad civil en Internet*, in PLAZA PENADES J., *Cuestiones Actuales de Derecho y Tecnologías de la Información y la Comunicación (TICs)*, Cizur Menor (Navarra), 2006, pp. 278-279. For this reason, the Brussels I bis Regulation regime has been described as “technology-neutral” in LUTZI T., *Casting the Net: Has the Court of Justice’s Approach to Online Torts Made the Brussels Framework Fit for the Internet Age?*, in HESS B., LANAERTS K., *The 50th Anniversary of the European Law of Civil Procedure*, Baden-Baden, 2020, p. 453, and in DRAETTA U., *Internet et commerce électronique en Droit International des Affaires*, in *Recueil des cours de l’Académie de La Haye*, 2005, p. 197.

³⁷ Judgment of the Court (Third Chamber), 23 October 2014, flyLAL-Lithuanian Airlines AS v Starptautiskā lidosta Rīga VAS and Air Baltic Corporation AS, Case C-302/13, paras. 37 and 38; Judgment of the Court (First Chamber) of 16 July 2020, Belgische Staat and Directeur-Generaal van de Algemene Directie Controle en Bemiddeling van de FOD, Case C-73/19, paras. 46 a 64, and HESS B., ORO MARTÍNEZ C., *Civil and commercial matters*, in BASEDOW J., RÜHL G., FERRARI F., DE MIGUEL ASENSIO M., *Encyclopedia of private international law*, Cheltenham, 2017, pp. 356-357.

³⁸ Nevertheless, it must be considered that the Brussels I bis Regulation cannot be applied when the defendant is domiciled outside the Union (Arts. 4 and 6). Usually, the service providers affected by the DSA are domiciled in the Union, even when it comes to very large online platforms, which have normally established their subsidiaries in the EU for tax and regulatory reasons (JAULT-SESEKE F., *Les non-dits du droit européen du numérique en matière de droit international privé: l’exemple du règlement sur les services numériques (DSA)*, cit. p. 599). Even so, it is possible to find some cases in which the provider is not domiciled in the EU but is still subject to the DSA because it operates in its territory. However, we will return to this last point in the final section.

³⁹ TANG S.Z., *Electronic consumer contracts in the conflicts of laws*, Oxford, 2015, p. 12; PALAO MORENO G., *Competencia judicial internacional en supuestos de responsabilidad civil en Internet*, cit., p. 279; CORDERO ÁLVAREZ C.I., *Plataformas digitales: nuevos*

3.1. *International jurisdiction in the private enforcement of the DSA*

In order to determine which Member State's courts will have jurisdiction to hear disputes concerning the private enforcement of the DSA, the Brussels I bis Regulation establishes different regimes depending on whether the digital user is a consumer or a professional, given that the defendant —i.e. the provider of intermediary services— will always be a professional. It should be emphasised that the competent courts designated by the Brussels I bis Regulation can only be those of the Member States.

3.1.1. *If the digital user is a professional*

On the one hand, the digital user will be a professional when, for example, they use an online marketplace such as Amazon or a comparison site such as Booking to offer their services. In these cases, as is well known, the fora contained in the Brussels I bis Regulation operate hierarchically.

In the context of the DSA, and in the absence of exclusive jurisdiction under Art. 24 Brussels I bis, the competent courts will be, first, those agreed upon by the parties, either expressly (Art. 25 Brussels I bis) or tacitly (Art. 26 Brussels I bis). Although examples of tacit submission can be found in practice⁴⁰, it will be more common for the platform's general terms and conditions to unilaterally impose a choice of forum agreement in favour of the courts of the place of

retos conceptuales para el Derecho Internacional privado de consumo, in CASTELLÓ PASTOR J.J., *Desafíos jurídicos ante la integración digital: aspectos europeos e internacionales*, Cizur Menor (Navarra), 2021, p. 83, and DRAETTA U., *Internet et commerce électronique en Droit International des Affaires*, cit., p. 197.

⁴⁰ E.g. Rechtbank Amsterdam, judgment 28 May 2025, C/13/767436 / KG ZA 25-254, online version available at: <https://uitspraken.rechtspraak.nl/details?id=ECLI:NL:RBAMS:2025:4460&showbutton=true&keyword=2022%252f2065&idx=24>, last access 14 January 2026.

its establishment⁴¹. This is the case in Facebook (Ireland)⁴², Amazon (Luxembourg)⁴³, and Booking (the Netherlands)⁴⁴.

Although this is the most common situation, in the absence of an agreement, the competent courts would be those of the Member State of domicile of the defendant (Art. 4 Brussels I bis), i.e., again, those of the Member State where the provider of intermediary services has its establishment. However, as an alternative to this general forum of Art. 4, the claimant could also bring their claim before the courts referred to in Art. 7.1 or Art. 7.2 Brussels I bis, depending on whether the claim is contractual or non-contractual in nature:

In the first case, the competent courts would be those designated by Article 7.1.b) Brussels I bis, given that the contract between the service provider and the digital user is usually a contract for the provision of services⁴⁵. According to this provision, the competent courts would be those of the place where the services are provided, which, again, usually coincides with the place of establishment of the provider.

⁴¹ HÖRNLE J., *Internet jurisdiction: law and practice*, Oxford, 2021, p. 277; HERRANZ BALLESTEROS M., *Cuestiones a debate en torno a las cláusulas de jurisdicción. Retos y desafíos para una propuesta de reforma limitada del Artículo 25 del Reglamento Bruselas I (refundido)*, in *Cuadernos de Derecho Transnacional*, 2023, p. 620; FELIU ÁLVAREZ DE SOTOMAYOR S., *Modelos colaborativos en plataformas digitales: nuevos retos para los negocios internacionales y para el Derecho Internacional privado*, in *AEDIPr*, 2018, p. 403; DE MIGUEL ASENSIO P.A., *Demandas frente a redes sociales por daños en materia de datos personales: precisiones sobre competencia judicial*, in *La Ley Unión Europea*, 2018, p. 2, and MANKOWSKI P., *Jurisdiction and enforcement in the Information Society*, in NIELSEN R., JACOBSEN S.S., TRZASKOWSKI J., *EU Electronic Commerce Law*, Copenhagen, 2004, pp. 131-132.

⁴² <https://www.facebook.com/legal/terms/update>, last access 14 January 2026.

⁴³ https://www.amazon.es/gp/help/customer/display.html?nodeId=GLSBYFE9MG-KKQXXM#GUID-6F014DE6-CB56-4A28-BCAA-38F5D24E6324__SECTION_9539827D244E4D73B01A21984486D0F0, last access 14 January 2026.

⁴⁴ https://www.booking.com/content/terms.es.html?aid=304142&label=gen173nr-10CBQoggJCBXRlcmIzSDFYBGhGiAEBmAEzuAEXyAEM2AED6AEB-AEBiAI-BqAIBuALFs6bJBsACA-dICJDk2N2NiNGI3LTk4YTQtNDU3MS04ODk5LTkxMmI2MGU5NGQ4ZtgCAeA-CAQ&sid=c19828349795a567180667c62230815b&keep_landing=1&#may_25_a20_title, last access 14 January 2026.

⁴⁵ DE MIGUEL ASENSIO P.A., *Conflicts of laws and the internet*, cit., p. 431 considers that contracts with providers of intermediary service are typical examples of contracts for the provision of services within the meaning of Article 7.1.b) Brussels I bis Regulation.

In the second case, if the dispute is non-contractual in nature, Article 7.2 Brussels I bis grants jurisdiction to “*the courts for the place where the harmful event occurred or may occur*”. On this occasion, Art. 7.2 Brussels I bis needs to be interpreted following the “*ubiquity theory*”⁴⁶, according to which the competent courts would be those of the place where the event giving rise to the damage occurred (normally, the place of establishment of the defendant⁴⁷), or those of the place where the direct damage materialised (normally, the place of establishment of the professional digital user⁴⁸).

Moreover, when the damages are located in more than one Member State, the so-called “*mosaic theory*” is applicable. In accordance with it, the courts of every place where the direct damage materialised have jurisdiction, but only to hear cases concerning the damage that occurred in that territory⁴⁹.

3.1.2. *If the digital user is a consumer*

On the other hand, digital users will be considered consumers when they use platforms for personal purposes. This is the case when we use social networks such as Instagram or LinkedIn to communicate with our friends and family, or online marketplaces such as Amazon to purchase goods for our own use.

In these cases, where we assume there would be a consumer relationship within the meaning of Art. 17.1 Brussels I bis⁵⁰, the method for determining the competent courts is completely different from that outlined above. Here, the fora in Section IV of Chapter II

⁴⁶ Judgment of the Court of 30 November 1976, *Handelskwekerij G. J. Bier BV v Mines de potasse d'Alsace SA*, case 21-76.

⁴⁷ LEHMANN M., LEIN E., ROGERSON P., ANCEL M., *Special Jurisdiction*, in DICKINSON A., LEIN E., *The Brussels I Regulation Recast*, Oxford, 2015, p. 164.

⁴⁸ Judgment LG Berlin II, 13 May 2025, 41 O 140/25 eV, para. 21, online version available at: <https://openjur.de/u/2526186.html>, last access 14 January 2026.

⁴⁹ Judgment of the Court of 7 March 1995, *Fiona Shevill, Ixora Trading Inc., Chequepoint SARL and Chequepoint International Ltd v Presse Alliance SA*, case 68/93.

⁵⁰ The three requirements of Art. 17 Brussels I bis must be met: the weaker party must be a consumer within the meaning of Art. 17 Brussels I bis, who must have entered into a contract with a professional, and this contract must be one of those listed in Arts. 17.1.a) to c), which include those derived from the criterion of “*direction of activities*”.

Brussels I bis (Arts. 17 to 19 Brussels I bis) must be considered, because they would supersede the general rules mentioned above⁵¹.

According to these, the courts with international jurisdiction to hear the dispute would be, first and foremost, those agreed upon by the parties. However, this choice of forum clause would only be valid if it meets certain conditions stipulated in Art. 19 Brussels I bis Regulation, which, in practice, are not usually verified⁵². Among other reasons, that can be explained because the agreements are not normally entered into after the dispute has arisen⁵³.

Failing that, Arts. 17.2 and 18 Brussels I bis would allow the consumer to bring their claim before any of the following courts: (i) those of the place of domicile of the defendant —provider of intermediary services— if it is located in a Member State; (ii) those of the place of residence of the consumer digital user; or (iii) those of the place of establishment in the Union of the provider of intermediary services, provided that the dispute arises from the operations of that establishment. Clearly, the most common and most favourable for the consumer is the first one, the *forum actoris*, which would allow them to litigate in the courts of their place of habitual residence.

3.2. *The applicable law in the private enforcement of the DSA*

Once the courts of the Member State that would have jurisdiction to hear disputes relating to the private enforcement of the DSA have been determined, the next step concerns the identification of the relevant applicable law.

Again, the determination of the law applicable to disputes concerning the private enforcement of the DSA depends on whether they

⁵¹ LAZIC V., MANKOWSKI P., *The Brussels I-bis Regulation*, Cheltenham, 2023, p. 222; BONOMI A., *Jurisdiction over Consumer Contracts*, in DICKINSON A., LEIN E., *The Brussels I Regulation Recast*, Oxford, 2015, p. 214; and TANG S.Z., *Electronic consumer contracts in the conflicts of laws*, cit., p. 78.

⁵² ESPINIELLA MENÉNDEZ A., *Contratos de consumo en el tráfico comercial UE-Terceros Estados*, in *AEDIPr*, 2014-2015, p. 296.

⁵³ EUROPEAN COMMISSION, *Study to support the preparation of a report on the application of Regulation (EU) No 1215/2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Brussels Ia Regulation)*, in *Publications Office of the European Union*, Luxembourg, 2023, p. 175.

are contractual or non-contractual in nature. In the first case, the instrument that will determine the applicable legal system will be Rome I Regulation, while in the case of non-contractual disputes, the Rome II Regulation will be applicable.

The application of both Regulations is particularly relevant in the context of the private enforcement of the DSA, as it gives rise to two types of conflicts relating to the applicable law, which we will refer to here as “*ad extra* conflicts” and “*ad intra* conflicts”⁵⁴.

3.2.1. *Ad extra* conflicts

Ad extra conflicts, which take place when the DSA does not apply to all the cases that fall within its scope of application, can be explained by the following reasoning. Both Rome I and Rome II Regulations are characterised by their universal nature (Art. 2 Rome I and Art. 3 Rome II), which allows the legal system designated as applicable to be that of a Member State, but also that of a third country. In any case, the conflict rules of Rome I and Rome II, although different, always seek to apply the law closest or most closely linked to the dispute. Therefore, the law of a third country will apply when the factual situation is related to that country.

In the context of the relationships affected by the DSA, it is possible that Rome I or Rome II Regulations may lead to the application of the law of a third country. This will be the case when the DSA applies to providers of intermediary services who, although established outside the Union, are subject to the DSA because they operate in its market, as is the case with SnapChat⁵⁵. In such cases, the

⁵⁴ This nomenclature has been inspired by that used by RODRÍGUEZ PINEAU E., TORRALBA MENDIOLA E.C., *Delimitación del derecho aplicable en el Reglamento 2016/679*, cit., pp. 58-74 and, before, by VIRGÓS SORIANO M., GARCIMARTÍN ALFÉREZ F.J., *Estado de origen vs. estado de destino. Las diferentes lógicas del Derecho Internacional privado*, in *Indret*, 2004, pp. 3 and 19.

⁵⁵ Its Terms of Service clarify the company responsible for services outside the United States and the Asia-Pacific region is called Snap Group Limited and is located in the United Kingdom. (<https://www.snap.com/terms#sgl-terms>, last access 14 January 2026). By the same token, this is further confirmed in Rec. 8 of the Commission Decision of 25.4.2023 designating Snapchat as a very large online platform in accordance with Article 33(4) of Regulation (EU) 2022/2065 of the European Parliament and of the Council, C(2023) 2730 final.

relationship in question would be linked to a third State, whose law could be designated as applicable by Rome I or Rome II. In fact, in this context, it is not unusual for contracts entered into by platforms with digital users who are not consumers to include choice of law clauses in favour of a non-EU Member State⁵⁶.

The scenario thus presented is problematic: if the law applicable to a factual situation is that of a third State, the application of Union rules would not be guaranteed, as they are not part of that legal system. This would deny the application of the DSA to a case falling within its scope, which would undoubtedly contradict the imperative spirit of the instrument. This is when *ad extra* conflicts arise, since the application of the DSA is not guaranteed in all cases that fall within its scope.

Under these circumstances, the way to resolve these *ad extra* conflicts would be to ensure the mandatory application of the DSA. It is widely believed that this solution could be implemented in two different ways.

The first would be to consider that the DSA is an overriding mandatory rule within the meaning of Arts. 9 Rome I and 16 Rome II, since the rule is mandatory, has the aspiration to protect crucial interests of society such as freedom of expression and information of the consumer protection and the proper functioning of the European market, and is applicable regardless of any other instrument (Art. 1.1 DSA). In this way, the DSA should be applied above any other law⁵⁷.

In contrast, the second option would be to defend that the DSA contains in its Art. 2.1 DSA a special unilateral conflict rule within the meaning of Arts. 23 Rome I and 27 Rome II, so that it should prevail over the multilateral conflict rules provided for in Rome I and Rome II Regulations (*lex specialis derogat generalis*). The justification for maintaining this alternative stems from the fact that Art. 2.1 DSA defines its spatial scope of application through a rule of

⁵⁶ Continuing with the example of Snapchat, section 22 of its Terms of Service makes it clear that the laws of England and Wales will govern its Terms and any claim or dispute arising out of or in connection with them (<https://www.snap.com/terms#sgl-terms>, last access 14 January 2026).

⁵⁷ BONOMI A., *Article 9: Overriding mandatory provisions*, in MAGNUS U., MANKOWSKI P. (eds.), *European Commentaries on Private International Law. Commentary. Volume II: Rome I Regulation*, Köln, 2017, pp. 619-628.

applicability that allows to know the factual cases to which it applies, without taking into consideration the applicable law according to the multilateral conflict rules of Rome I or Rome II Regulations.

In doctrine, there are positions attached to both sides⁵⁸. In our view, the DSA meets the requirements to be considered an overriding mandatory rule, although, in the same vein, we believe that Art. 2.1 DSA constitutes a special conflict rule within the meaning of Arts. 23 Rome I and 27 Rome II.

In other words, the DSA is an overriding mandatory rule that also contains a special unilateral conflict rule, i.e., a rule that determines

⁵⁸ In favour of considering the digital European instrument as an overriding mandatory rule, see: ZARRA G., *Imperativeness in Private International Law. A View from Europe*, The Hague, 2022, pp. 190-192; LEHMANN M., *Regulation, global governance and private international law: squaring the triangle*, in *Journal of Private International Law*, 2020, p. 7; CORDERO ÁLVAREZ C.I., *Comercio de consumo a través de intermediarios digitales: nuevo marco jurídico para plataformas de contratación B2C en el Reglamento de Servicios Digitales*, in OTERO GARCÍA-CASTRILLÓN C., *Economía digital y guerras comerciales. ¿Poniendo nuevas puertas al campo?*, Madrid, 2024, p. 230, DE MIGUEL ASENSIO P.A., *Conflicts of laws and the internet*, cit., p. 82; REQUEJO ISIDRO M., *La aplicación privada del derecho para la protección de las personas físicas en materia de tratamiento de datos personales en el Reglamento (UE) 2016/679*, in *La Ley mercantil*, 2017, p. 11, and ESTEBAN DE LA ROSA F., *La economía colaborativa y las nuevas iniciativas europeas en el ámbito de la contratación a través de plataformas digitales de intermediación: la transformación del modelo de protección internacional de la parte débil*, in JIMÉNEZ BLANCO P., ESPINIELLA MENÉNDEZ A., *Nuevos escenarios del Derecho Internacional privado de la contratación*, Valencia, 2021, p. 442. However, there are also doctrinal voices against it, such as STEINRÖTTER B., *Kollisionsrechtliche Bewertung der Daten-schutzrichtlinien von IT-Dienstleistern*, in *MultiMedia und Recht*, 2013, p. 693, who argues that the fact that an economic regulation is public in nature—even if it contains private provisions—and includes a unilateral conflict rule establishing its territorial scope of application does not make it an overriding mandatory provision.

On the other hand, the opposite position would be in favour of considering that a special unilateral conflict rule exists: BONOMI A., *Article 9: Overriding mandatory provisions*, in MAGNUS U., MANKOWSKI P. (eds.): *European Commentaries on Private International Law. Commentary. Volume II: Rome I Regulation*, Köln, 2017, p. 620; MANKOWSKI P., *Article 23: Relationship with Other Provisions of Community Law*, in MAGNUS U., MANKOWSKI P. (eds.), *European Commentaries on Private International Law. Commentary. Volume II: Rome I Regulation*, Köln, 2017, p. 851; MELCHER M., *Substantive EU Regulations as Overriding Mandatory Rules?*, in *ELTE Law Journal*, 2020, pp. 46-47; RODRÍGUEZ PINEAU E., TORRALBA MENDIOLA E.C., *Delimitación del derecho aplicable en el Reglamento 2016/679: Tutela jurídica privada de la protección de datos*, cit., pp. 125-126; SCHMIDT-KESSELM., *Article 9. Overriding Mandatory Provisions*, in FERRARI, F. (ed.), *Concise Commentary on the Rome I Regulation*, Cambridge, 2020, pp. 244 and 253-256; BUXBAUM H.L., *The New Unilateralism in EU Cross-Border Regulation: Objectives, Methods, Institutions*, in *RabelsZ*, 2025, p. 8, and RAUE B., *Art. 54. Entschädigung*, cit., p. 810.

its own scope of application, which makes it perfectly possible for it to fit into either of the two options proposed. Ultimately, since both positions are defensible, the dilemma between the overriding mandatory rule and the conflict rule must be overcome in order to consider the DSA as falling into both categories at the same time. Ultimately, this result, which is a consequence of the so-called “extraterritorial application” of the DSA, diminishes to some extent the relevance of the categories specific to PIL, since the result is the same irrespective of which option is selected.

3.2.2. *Ad intra conflicts*

After ensuring the applicability of the DSA to all cases falling within its scope, the second question of applicable law in the private enforcement of the DSA arises: *ad intra* conflicts. As noted above, Article 54 DSA is the only provision governing the private enforcement of the DSA, but it is a rule of “imperfect liability” that is so brief that leaves many aspects of it unaddressed⁵⁹. Therefore, the private enforcement of the DSA requires national law to supplement its own regulation⁶⁰. And this national legal system should complement the regulation as it considers appropriate by virtue of its national procedural autonomy, with the only limits being the principles of equivalence and effectiveness.

Given that the DSA does not comment on the conflict rule that will designate the applicable national law, it will be Rome I and Rome II Regulations that determine the applicable law in these cases. If the claim is of a contractual nature, the conflict rules of the Rome I Regulation will apply for this purpose, and if the claim is of a non-contractual character, this same function will be performed by the conflict rules of the Rome II Regulation.

In short, the application of Rome I would require differentiating between whether the digital user bringing the claim is a consumer or a professional. In the first case, Article 6 Rome I would allow the

⁵⁹ RAUE B., *Art. 54. Entschädigung*, cit., p. 804.

⁶⁰ JAULT-SESEKE F., *Les non-dits du droit européen du numérique en matière de droit international privé: l'exemple du règlement sur les services numériques (DSA)*, cit., p. 604, and RAUE B., *Art. 54. Entschädigung*, cit., p. 804.

parties to agree on the law applicable to the dispute, with the limit of rules that cannot be derogated from by virtue of the law otherwise applicable. In the absence of an agreement, the applicable law would be precisely that of the consumer's habitual residence.

However, if the digital user is not a consumer, the applicable conflict regime would be the general one, consisting of Arts. 3 and 4 Rome I. According to this, the parties can freely agree on the applicable law (Art. 3 Rome I)⁶¹, which usually means that platforms incorporate choice of law clauses in favour of their place of establishment in the general terms and conditions they offer to users. At a minimum, this practice is common today on platforms such as Booking⁶², Twitter⁶³, or Meta⁶⁴.

In the absence of an agreement, the applicable law would be that of Art. 4.1.b), as the contract between the digital non-consumer user and the service provider is a contract for the provision of services⁶⁵. According to this provision, the applicable law would be again that of the place where the provider of intermediary services has its habitual residence.

⁶¹ LUTZI T., *Private ordering, the platform economy, and the regulatory potential of private international law*, cit., p. 136, and SCHU R., *The applicable law to consumer contracts made over the internet: consumer protection through private international law*, cit., p. 200.

⁶² Booking, based in the Netherlands, states in clause A20 that: “*These Terms are governed by Dutch law (for accommodations, flights or attractions) ...*” (<https://www.booking.com/content/terms.es-ar.html?aid>, last access 14 January 2026).

⁶³ X (formerly Twitter), based in Ireland, sets out in the clause 6 of its Terms of Service that all disputes relating to its Terms shall be governed by Irish law, notwithstanding any other agreement to the contrary between the platform and the user (<https://x.com/es/tos>, last access 14 January 2026).

⁶⁴ Meta, based in Ireland, also imposes the following in its section 4.4: “*With respect to any claims or disputes between you and us relating to any other aspect [other than for a consumer’s related], you agree that they will be settled in a competent court in Ireland and governed by the laws of that country, without regard to its conflict of laws provisions.*” (https://www.facebook.com/terms?section_id=4, last access 14 January 2026).

⁶⁵ The concept of the contract for the provision of services must be the same as that used in Art. 7.1.b) Brussels I bis Regulation: CALLIESS G., *Article 4: Applicable law in the absence of choice*, in CALLIESS G., *Rome regulations. Commentary*, Alpe aan den Rijn, 2020, p. 91; FERRARI F., BISCHOFF J.A., *Article 4: Applicable law in the absence of choice*, in FERRARI F., *Rome I Regulation: Pocket commentary*, Munich, 2015, p. 139, and MAGNUS U., *Article 4*, in MAGNUS U., MANKOWSKI P., *Rome I Regulation. European commentaries on private international law*, vol 2, Köln, 2017, p. 284.

With regard to non-contractual claims, the way to determine the national law that will complement the private enforcement regime of the DSA requires recourse to the special conflict rules contained in Arts. 5 to 9 of Rome II Regulation⁶⁶. In this regard, given that the DSA establishes requirements for market conduct⁶⁷, the most common situation will be one in which breaches of non-contractual obligations under the DSA constitute acts of unfair competition falling under Art. 6.1 Rome II⁶⁸.

According to this provision, the law applicable to the non-contractual obligation would be that of the country in whose territory the competitive relations or collective interests of consumers are or may be affected. In other words, the applicable law will be that of the affected market, which in any case must be among those to which the platform directs its activities⁶⁹.

Thus, when the digital user bringing the claim is a natural person, this place usually coincides with their habitual residence. In contrast, if they are a legal person, it is more likely that their interests will be affected in multiple States at the same time, since the affected market usually coincides with the set of States where the professional digital user markets their goods and services⁷⁰.

⁶⁶ MANKOWSKI P., *Article 1: Scope*, in MAGNUS U., MANKOWSKI P., *Rome II Regulation. European commentaries on private international law*, vol 3, Köln, 2019, p. 151; PLENDER R., WILDERSPIN M., *The European private international law of obligations*, London, 2023, p. 523, and BACH I., *Article 4: General rule*, in HUBER P. (ed.), *Rome II Regulation: Pocket commentary*, Munich, 2011, p. 69.

⁶⁷ RAMÍREZ BENAVENTE M.D., *Protección de consumidores y usuarios frente a prácticas comerciales desleales en el mercado digital*, in *Revista de Derecho de la Competencia y la Distribución*, 2025, p. 21, and CASADO NAVARRO A., *Prácticas desleales en entornos digitales*, Valencia, 2025, pp. 71-73.

⁶⁸ DICKINSON A., *The Rome II Regulation: the law applicable to non-contractual obligations*, Oxford, 2015, pp. 270-272, and DE MIGUEL ASENSIO P.A., *Plataformas digitales y actividades transfronterizas*, in JIMÉNEZ BLANCO P., ESPINIELLA MENÉNDEZ A. (dirs.), *Nuevos escenarios del Derecho Internacional privado de la contratación*, Valencia, 2021, p. 389.

⁶⁹ PAREDES PÉREZ J.I., *Aspectos internacionales de la responsabilidad civil de las plataformas en línea b2c frente a los contenidos ilícitos en materia de protección de los consumidores*, cit., p. 260.

⁷⁰ FERNÁNDEZ ROZAS J.C., ARENAS GARCÍA R., DE MIGUEL ASENSIO P.A., *Derecho de los negocios internacionales*, Madrid, 2024, p. 173.

By contrast, when the unfulfillment of the obligation cannot be considered an act of unfair competition nor any other special damage of arts. 5 to 9 Rome II, the applicable conflict rule would be that of Arts. 14 and 4 Rome II. The former would allow for agreement on the applicable law, albeit in a restricted manner for non-professional users. And if the digital user were a professional, providers would usually take advantage of this to unilaterally impose the law of their place of establishment, as indicated above in relation to contractual matters. In the absence of an agreement, Art. 4 Rome II would lead to the law of the place where the damage occurred, which in the private enforcement of the DSA usually coincides with the place of residence of the digital user.

4. *Final critical notes*

This chapter has highlighted that the Digital Services Act aims to achieve the ambitious goal of a safe, predictable, and trusted online environment in which platforms act transparently and diligently. In line with this, the DSA has established a particularly strong enforcement system which, among other aspects, is characterised by its hybrid nature, combining public and private enforcement.

Of the two aspects, private enforcement is the least known in the regulatory sphere of the Union. However, this contribution has sought to address its importance and functioning both in general and for the DSA in particular.

As per the DSA, its private enforcement inevitably raises the typical PIL questions, such as international jurisdiction and applicable law. As we have seen, the way to determine the competent court and the applicable law requires recourse to the generic rules of PIL—i.e. Brussels I bis Regulation and Rome I and Rome II Regulations—, but their results would differ depending on whether the relationship is contractual or non-contractual in nature and whether the digital user interacting with the provider is a consumer or not.

Although we have tried to apply the aforementioned regimes in the simplest way possible, the truth is that their application to the private enforcement disputes of the DSA raises at least the following three problems:

Firstly, it can be extremely difficult to determine whether a digital user is a consumer or not. In this regard, the concepts of “professional” and “consumer” are considered opposites and cover the entire range of possible classifications provided for in Brussels I bis Regulation and Rome I.

However, these instruments do not define either concept, and the case law of the CJEU is also unclear in this regard. Specifically, although it was initially sufficient to say that a consumer was someone who acted for exclusively personal purposes in which the professional component was insignificant and marginal⁷¹, in the platform economy it has stated that consumer status would only be lost if the user acted for an “essentially professional” purpose⁷².

This shows that neither the European legislator nor, for the time being, the CJEU have been able to adapt the regulation of the current reality to dual-purpose contracts or to new figures raising in the platform economy such as the *prosumer*, who acts as both a consumer and a professional⁷³.

Secondly, it may prove very challenging to differentiate between contractual and non-contractual obligations under the DSA. This is not a trivial matter, as it determines which courts have jurisdiction and which will be the applicable conflict rule.

Concerning this matter, it should be clarified that claims for damages made under Article 54 DSA for breach of any of the obligations created by the Regulation should not be classified as contractual simply because the parties are bound by a contract. Indeed, one may doubt as to whether the obligation is of this nature, since it may not

⁷¹ Judgment of the Court (Second Chamber) of 20 January 2005, *Johann Gruber v Bay Wa AG*, Case C-464/01, para. 39; and Judgment of the Court (Second Chamber) of 14 February 2019, *Anica Milivojević v Raiffeisenbank St. Stefan-Jagerberg-Wolfsberg eGen*, Case C-630/17, para. 94.

⁷² CAAMIÑA DOMÍNGUEZ C.M., *El consumidor frente al profesional en entornos digitales. Tribunales competentes y ley aplicable*, in *Cuadernos de Derecho Transnacional*, 2020, p. 164; CALVO CARAVACA A.L., CARRASCOSA GONZÁLEZ J., *Contratos internacionales de consumo*, in CALVO CARAVACA A.L., CARRASCOSA GONZÁLEZ J. (dirs.), *Tratado de Derecho Internacional privado*, Valencia, 2022, p. 3451; and Judgment of the Court (Third Chamber) of 25 January 2018, *Maximilian Schrems v Facebook Ireland Limited*, Case C-498/16, paras. 37 and 38.

⁷³ CORDERO ÁLVAREZ C.I., *Plataformas digitales: nuevos retos conceptuales para el Derecho Internacional privado de consumo*, cit. p. 96.

have been freely assumed by the service provider vis-à-vis the digital user, but rather imposed by law⁷⁴.

Following in the footsteps of German case law⁷⁵, in order to determine whether the claim related to the private enforcement of the DSA is contractual or non-contractual in nature, the *Wikingerhof* criterion created by the CJEU should be applied⁷⁶. According to this, the obligation would be non-contractual when it is not essential to interpret the contract to assess the lawfulness of the conduct under review, and vice versa. Pursuant to this criterion, it seems that in practice we could find both, either contractual or non-contractual obligations created by the DSA.

For example, the due diligence obligation contained in Art. 14 DSA, which refers to the transparency of the terms and conditions of the service provider, should be clearly considered a contractual obligation, since it is imposed due to the existence of the terms and conditions —i.e. the contract—. On the other hand, obligations such as the one included in Art. 40.12 DSA, which would oblige platforms to allow researchers access to a certain amount of data, needs to be considered non-contractual, since it is imposed regardless of any contract⁷⁷.

However, it may not be so easy to classify other obligations of the DSA, and this complex issue is perfectly reflected in the different doctrinal positions that have been put forward to this effect, which do not specify which obligations would be contractual and which would be non-contractual⁷⁸. Ultimately, it would be necessary to conduct a case-by-case analysis.

Thirdly, except for the specific consumer regime of Arts. 17 to 19 of the Brussels I bis Regulation and the express and tacit submission

⁷⁴ PLENDER R., WILDERSPIN M., *The European private international law of obligations*, cit., p. 60.

⁷⁵ Judgment LG Berlin II, 13 May 2025, case n. 41 O 140/25 eV, para. 21, online version available at: <https://openjur.de/u/2526186.html>, last access 14 January 2026.

⁷⁶ Judgment of the Court (Grand Chamber) of 24 November 2020, *Wikingerhof GmbH & Co. KG v Booking.com BV*, Case C-59/19.

⁷⁷ Judgment LG Berlin II, 13 May 2025, case 41 O 140/25 eV, para. 21, online version available at: <https://openjur.de/u/2526186.html>, last access 14 January 2026, para. 21.

⁷⁸ See, e.g., RAUE B., *Art. 54. Entschädigung*, cit., p. 810, and HUSOVEC M., *Principles of the Digital Services Act*, cit., pp. 429, 438 and 439.

agreements of Arts. 25 and 26 Brussels I bis, as said before, the Brussels I bis Regulation cannot be applied if the providers of intermediary services are domiciled in third countries, even if they are subject to the DSA because they operate in the Union (Art. 2.1 DSA).

In these circumstances, determining the competent courts in each Member State would require applying the rules laid down in international conventions and, failing that, in national rules (Art. 6 Brussels I bis Regulation). And the problem would be that they do not normally allow defendants domiciled in third countries to be subject to the jurisdiction of a Member State⁷⁹. Therefore, it would not be possible to subject the service provider to the jurisdiction of any Member State, and the DSA would be rendered meaningless because a third country would not be obliged to apply it and would be unlikely to do so.

Even though these situations will not be the most common, they could be conceivable. A case in point would be the social network SnapChat, which, although operates in the Union and is therefore subject to the DSA—to the extent that it was designated as a very large online platform within the meaning of Art. 33 DSA by the European Commission⁸⁰—, it is domiciled in a third country (United Kingdom), and therefore it will be very difficult to subject it to the jurisdiction of any Member State.

Ultimately, the three reasons outlined above are just some of the factors that explain that the application of the PIL generic rules is not particularly well suited to the private enforcement of the DSA. Specifically, classification issues arise and it is difficult to subject some big tech companies to the jurisdiction of Member States.

Beyond doubt, these issues would need to be resolved in order to ensure the correct enforcement of the DSA, which would otherwise be meaningless, at least from a private perspective. However, this question would go beyond the scope of our research, which has sought to highlight the important role of PIL in the private

⁷⁹ ESPLUGUES MOTA C., PALAO MORENO G., *Derecho Internacional privado*, Valencia, 2025, p. 134.

⁸⁰ Commission Decision of 25.4.2023 designating Snapchat as a very large online platform in accordance with Article 33(4) of Regulation (EU) 2022/2065 of the European Parliament and of the Council, C(2023) 2730 final.

enforcement of the DSA, as well as the complexity that arises from applying the PIL solutions to it according to the current state of legislation.

Standard Terms in Business-to-Business Contracts under English and German Law: Comparative Assessment and Strategies for Avoiding the Application of §§ 305-310 BGB

Felix D. Pollmann, Jonathan L. T. Chu*

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1. Introduction

The German law governing standard terms, particularly as applied to business-to-business contracts, is frequently regarded in legal scholarship and practice as a significant weakness of German substantive law and a disadvantage of the German legal system in international comparison¹. English law, in contrast, enjoys an excellent reputation, including with regard to its rules on standard terms², while the German regime is perceived to be overly restrictive,

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¹ See RÜHL G., *Das Justizstandort-Stärkungsgesetz: (International) Commercial Courts für Deutschland*, in *Zeitschrift für die gesamte Privatrechtswissenschaft*, 2024, p. 424; WAGNER G., *Rechtsstandort Deutschland im Wettbewerb*, Munich, 2017, pp. 181–182.

² *Ex multis* LANDBRECHT J., *Ein Sonderprivatrecht für internationale Verträge – Section 27(1) des englischen Unfair Contract Terms Act als Vorbild?*, in *Recht der Internationalen Wirtschaft*, 2011, p. 291.

barring the parties from incorporating such clauses that are commonly used in business transactions all over the world. Especially limiting or excluding liability in business-to-business contracts, thereby achieving a predictable and calculable business risk, is considered to be very difficult and often times legally uncertain³. For this reason, different strategies are being discussed in legal scholarship and pursued in practice in order to avoid its scope of application⁴.

The aim of this contribution is threefold.

First, we intend to give an overview of the standard terms regimes under English and German law for business-to-business contracts.

Second, with regard to German standard terms law, we will focus on identifying and highlighting elements that are commonly criticised while drawing comparisons to the English law approach.

Third, after having demonstrated certain perceived shortcomings of German standard terms law, we turn to strategies for the avoidance of its application.

We deliberately confine our analysis to domestic business-to-business contracts. Limiting the discussion to *domestic*⁵ contracts allows us to comprehensively depict the relevant English standard terms law and highlight certain pitfalls that hinder strategies to avoid the application of German standard terms law. By focusing on *business-to-business* contracts, we exclude consumer protection regimes, which are driven by different policy considerations, while capturing the context in which the restrictive effects of German standard terms law are most contested and frequently criticised in practice.

³ See only SOMMERFELD A., *AGB-Reform und Rechtsflucht*, Tübingen, 2021, p. 3. Opposite view held by WESTPHALEN F. Graf v., *Wider einen Reformbedarf beim AGB-Recht im Unternehmerverkehr*, in *Neue Juristische Wochenschrift*, 2009, p. 2977.

⁴ See only AXER C., *Rechtfertigung und Reichweite der AGB-Kontrolle im unternehmerischen Geschäftsverkehr*, Frankfurt am Main/Berlin/Bern/Wien, 2012, p. 158.

⁵ Meaning that all of the relevant elements of the contract and the transaction as a whole are confined to one country – i.e. Germany or England, depending on the respective assessment, within the meaning of Art. 3(3) Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I), in OJ L 177, 4.7.2008, p. 6.

2. English law

English law does not have a unified regime for the comprehensive control of all forms of standard terms in business-to-business contracts. Individual controls are found in a mishmash of common law rules⁶, supplemented by the Unfair Contract Terms Act 1977⁷ (hereafter *the 1977 Act* or *the Act*)⁸.

There are two important points to bear in mind at the outset. First, English law in fact neither controls standard terms *per se*, nor does it proceed on the basis that standard terms are necessarily objectionable. That one party deals on another's standard terms is *prima facie* evidence of unequal bargaining power, which may attract a particular form of scrutiny, or influence the way a particular form of scrutiny is conducted⁹. But the common law and statutory controls here discussed do not automatically render all standard terms ineffective. Conversely, they are well capable of striking down contractual provisions failing their scrutiny, even if they are not standard terms.

Secondly, English law draws a distinction between contractual terms that exclude or restrict a party's liability for breach of duty (hereafter *exemption clause*) and those stipulating a sum of money which a contract breaker has to pay to the innocent party (hereafter

⁶ In this contribution, the expression "common law" is used to indicate that part of English law that is created and developed by judges in the adjudication of disputes, in contrast to that other part of English law that is the result of legislation.

⁷ "The title of the Act was always somewhat misleading ... the Act does not seek to control unfair contract terms generally, but applies, for the most part, only to terms that purport to exclude or restrict liability, that is to say, to exemption clauses": BEALE H. (ed.), *Chitty on Contracts*, London, 2026, para. 18-079.

⁸ Speaking generally, the common law controls discussed in this contribution apply to business-to-business and business-to-consumer contracts without distinction. Initially, this was also the position under the 1977 Act. But heightened controls for the benefit of consumers were necessitated by Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts, in OJ L 95, 21.4.1993, p. 29. This first led to the enactment of the Unfair Terms in Consumer Contracts Regulations 1994, later replaced by the Unfair Terms in Consumer Contracts Regulations 1999. In 2015, as part of a major reform of consumer protection law, the 1999 Regulations were revoked, and the 1993 Directive was re-implemented by the Consumer Rights Act 2015. From then on, the 1977 Act ceased to apply to business-to-consumer contracts. For a detailed account of this history, see BEALE H. (ed.), *Chitty on Contracts*, ch. 41. For a discussion of other relevant consumer protection legislations, see *ibid.*, paras. 18-162 *et seq.*

⁹ *Last Bus Ltd. v Dawsongroup Bus and Coach Ltd.* [2023] 4 W.L.R. 80, [46].

agreed damages clause)¹⁰. Different controls apply accordingly. For example, a term purporting to exclude any liability for negligence, or impose a more restrictive time bar than that provided by the general law (six years¹¹), is an exemption clause subject to the 1977 Act. By contrast, the Act does not apply to agreed damages clauses; they are regulated instead by the “penalty rule”, a longstanding common law doctrine stretching back to the fifteenth century¹². We shall focus on these two types of clauses to demonstrate the different regimes of control under English law.

2.1. Exemption clauses

2.1.1. Background: limited common law controls

At common law, courts have limited means to control exemption clauses, whether they are standard terms or not. The position was brought out by Lord Diplock in these words: “*Parties are free to agree to whatever exclusion or modification of all types of obligations as they please within the limits that the agreement must retain the legal characteristics of a contract ... exclusion clauses are to be construed strictly ... But this does not entitle the court to reject the exclusion clause, however unreasonable the court itself may think it is, if the words are clear and fairly susceptible of one meaning only*”¹³.

That is not to say that there is no common law limit to what contracting parties might agree, or what standard terms might provide,

¹⁰ *Suisse Atlantique Société d'Armement Maritime S.A. v N.V. Rotterdamsche Kolen Centrale* [1967] 1 A.C. 361.

¹¹ Limitation Act 1980, s. 5.

¹² *Cavendish Square Holding B.V. v Makdessi* [2016] A.C. 1172, [3]. For a brief account of the penalty rule's early history, see BAKER J., *An Introduction to English Legal History*, Oxford, 2019, pp. 346–47.

¹³ *Photo Production Ltd. v Securicor Transport Ltd.* [1980] A.C. 827, 850–51.

by way of exclusion or restriction of liability. Exemption clauses are subject to three main common law controls¹⁴.

First, as a matter of public policy, parties cannot contract out of liability for their own fraud. Any contractual term purporting to do so is unenforceable, standard term or not¹⁵. It is worth noting that English law does not recognise the civil law doctrine *culpa lata dolo aequiparatur*. In other words, exemption of liability for gross negligence is not caught by this control and is permissible at common law¹⁶.

Secondly, an exemption clause relating to non-fraud liabilities is also ineffective, unless incorporated according to the common law rules governing the incorporation of contractual terms¹⁷. This is of particular comparative interest, so a little more will be said. English law does not proceed on the basis that standard exemption clauses are necessarily onerous or unusual; nor does it automatically bar the incorporation of onerous or unusual terms¹⁸. It is therefore quite possible for an onerous or unusual standard exemption clause to become part of a contract in accordance with these common law rules. This web of rules is intricate but may for present purposes be digested as follows:

(a) If an exemption clause is communicated to the innocent party only after the contract has been concluded, it will not form part of the contract, whether or not it is standard, onerous, or unusual¹⁹.

(b) In contrast, if it is available to the other party at or before contract formation (*e.g.*, stated in a document which has

¹⁴ For more details, see ANDREWS N., *Exclusion Clauses and Unfair Contract Terms*, London, 2025, paras. 1-015 *et seq.*; BEALE H. (ed.), *Chitty on Contracts*, cit., paras. 16-005–16-015, 18-066 *et seq.*

¹⁵ *HIH Casualty and General Insurance Ltd. v Chase Manhattan Bank* [2003] UKHL 6.

¹⁶ *Armitage v Nurse* [1998] Ch. 241, 254; *Spread Trustee Co. Ltd. v Hutcheson* [2012] 2 A.C. 194. To a common lawyer, gross negligence is not fraud, though it may be evidence of fraud: *Goodman v Harvey* (1836) 4 Ad. & El. 870, 876.

¹⁷ These rules apply generally to all contractual terms, but in this paragraph, we will focus on their application to exemption clauses.

¹⁸ *Goodlife Foods Ltd. v Hall Fire Protection Ltd.* [2018] EWCA Civ 1371, [35]; *MS Amlin Marine N.V. v King Trader Ltd.* [2025] EWCA Civ 1387.

¹⁹ *Olley v Marlborough Court Ltd.* [1949] 1 K.B. 532.

been handed over to the other party, or published on a publicly accessible website), but that party complains that they have not in fact read the clause or understood its effect, then the status of the clause will turn on whether the contract is embodied in signed writing.

i. If not²⁰, the exemption clause will be unincorporated, unless the party relying on that clause has done what is “reasonably sufficient” to bring it to the other party’s attention²¹. If the exemption clause is “particularly onerous or unusual”²², a higher standard applies: the party relying on that clause must have done what was both “fair” and “reasonable” to draw attention to it²³.

ii. A different set of rules operates where the contract is in signed writing. Here, English law—in what has been dubbed the “signature rule”—starts from the position that parties are ordinarily bound by all terms contained in a signed contractual document, whether the terms are standard or negotiated, whether they have in fact been read and understood, and whether the exemption clause contained in it is onerous or unusual²⁴. A well-accepted exception to the signature rule is where the signature was procured by fraud, duress, undue influence, or misrepresentation²⁵. But there may be a further exception where, although none of these vitiating factors exists,

²⁰ Consider such commonplace examples as buying a train ticket, paying for groceries, and leaving your car at a carpark. Although these examples are more typical in the consumer context, they illustrate the point here discussed.

²¹ BEALE H. (ed.), *Chitty on Contracts*, cit., paras. 16-010–16-011. For instance, if an exemption clause is printed on the back of a document, the face of that document will have to contain words like “for conditions, see back”.

²² The Court of Appeal has recently emphasised the high threshold needed to establish that a clause is onerous or unusual, particularly in a commercial context: *MS Amlin*, cit., [84], [88].

²³ *Goodlife*, cit., [29]; *MS Amlin*, cit., [86]; BEALE H. (ed.), *Chitty on Contracts*, cit., para. 16-012. In what has become a celebrated adage, Lord Denning said, “Some clauses which I have seen would need to be printed in red ink on the face of the document with a red hand pointing to it before the notice could be held to be sufficient”: *J. Spurling Ltd. v Bradshaw* [1956] 1 W.L.R. 461, 466.

²⁴ *L’Estrange v F. Graucob Ltd.* [1934] 2 K.B. 394; BEALE H. (ed.), *Chitty on Contracts*, cit., para. 16-005.

²⁵ Beale H. (ed.), *Chitty on Contracts*, cit., paras. 16-006, 18-067.

it is clear on the facts that, due to pressure of time for instance, a party had no real opportunity, before signing the document, to read and understand the exemption clause, which proves to be onerous or unusual. Then, it may fall outside of the contract, despite the signature²⁶.

Finally, even if an exemption clause passes the above controls, its proper effect remains a matter of judicial interpretation. If the wording of an exemption clause is unambiguous, it must, at common law, be given effect accordingly. But there is a judicial assumption that, in the absence of clear words, parties do not intend the contract to derogate from their normal rights and remedies as provided by law. A vaguely worded exemption clause will therefore be construed strictly, and thus risks being incapable of achieving the exemptive effect craved²⁷.

These common law controls have their limit, however. For one thing, in what may be thought a significant gap, the common law does not prohibit exemption of liability for death or personal injury resulting from negligence²⁸. For another, English courts have no common law power to disapply a validly incorporated, clearly worded exemption clause, even if it may be unreasonable, unfair, or oppressive—for instance, where it appears in a set of standard terms offered on a “take it or leave it” basis²⁹.

2.1.2. *Statutory intervention: the need for a balance*

Such was the state of affairs that prompted legislative intervention. But it was recognised early on that any heightened control must not apply indiscriminately, especially in arm’s-length business-to-business transactions. As Lord Reid observed a decade before the 1977 Act: “*Exemption clauses differ greatly in many respects.*

²⁶ *Ocean Chemical Transport Inc. v Exnor Craggs Ltd.* [2000] 1 Lloyd’s Rep. 446, [48]–[49]; BEALE H. (ed.), *Chitty on Contracts*, cit., para. 16-006.

²⁷ *Gilbert-Ash (Northern) Ltd. v Modern Engineering (Bristol) Ltd.* [1974] A.C. 689; *Triple Point Technology Inc. v PTT Public Co. Ltd.* [2021] A.C. 1148, [108]–[111]; BEALE H. (ed.), *Chitty on Contracts*, cit., para. 18-008.

²⁸ *White v Blackmore* [1972] 2 Q.B. 651.

²⁹ BEALE H. (ed.), *Chitty on Contracts*, cit., paras. 18-008, 18-066, 18-070.

Probably the most objectionable are found in the complex standard conditions which are now so common. In the ordinary way the customer has no time to read them, and if he did read them he would probably not understand them. And if he did understand and object to any of them, he would generally be told he could take it or leave it. And if he then went to another supplier the result would be the same. ... At the other extreme is the case where parties are bargaining on terms of equality and a stringent exemption clause is accepted for a quid pro quo or other good reason. ... it does not seem to me to be satisfactory that the decision must always go one way ... This is a complex problem which intimately affects millions of people and it appears to me that its solution should be left to Parliament”³⁰.

This was amplified by Lord Wilberforce, speaking shortly after the Act was enacted: “*After this Act, in commercial matters generally, when the parties are not of unequal bargaining power, and when risks are normally borne by insurance, not only is the case for judicial intervention undemonstrated, but there is everything to be said, and this seems to have been Parliament’s intention, for leaving [such] parties free to apportion the risks as they think fit and for respecting their decisions”³¹.*

This was echoed still more recently by Lord Justice Lewison: “*The traditional approach of the courts towards exclusion clauses has been one of hostility. A strict and narrow approach to their interpretation held sway. This began to change with the passing of the Unfair Contract Terms Act 1977. Since then the courts have become more accepting of such clauses, recognising (at least in commercial contracts made between parties of equal bargaining power) that exclusion and limitation clauses are an integral part of pricing and risk allocation”³².*

³⁰ *Suisse Atlantique*, cit., 406.

³¹ *Photo Production*, cit., 843.

³² *Interactive E-Solutions J.L.T. v O3B Africa Ltd.* [2018] EWCA Civ 62, [14]. For the history of English judges employing strained interpretation to curb unreasonable exemption clauses, see BEALE H. (ed.), *Chitty on Contracts*, cit., paras. 18-007 *et seq.* Another instance of an artificial development of the common law in response to such clauses is the so-called “fundamental breach” doctrine, discussed *ibid.*, paras. 18-023 *et seq.*, which had lived for roughly two decades before it was firmly rejected by the House of Lords in *Photo Production*, cit. An animated account of all this can be found in Lord Denning’s judgment in *George Mitchell (Chesterhall) Ltd. v Finney Lock Seeds Ltd.* [1983] 1 Q.B. 284, 296–99.

Under the Act, balance is principally struck in two ways. First, exemption clauses are not in general automatically disapplied, but are made subject to a “reasonableness” inquiry; only “unreasonable” exemption clauses are rendered unenforceable. Secondly, in relation to liability for breach of contract specifically, the Act, as a threshold matter, requires the exemption clause to come from the contract breaker’s “written standard terms of business”.

2.1.3. Reasonableness inquiry

The 1977 Act applies to exemption clauses in business-to-business contracts³³ that are directed at one of three types of liabilities. First is liability for negligence³⁴. As we have said, negligence under English law includes ordinary and gross negligence. It also includes, under this Act, breach of a contractual duty of care (*i.e.*, contractual negligence) and breach of a duty of care under the general law of torts³⁵. Second is liability for goods sold or supplied in the context of sale, hire purchase, or other contracts under which goods pass. Specifically, this category captures a seller or supplier’s liability for want of title to the goods in question, or for their lack of conformity, quality, or fitness³⁶. Third is what we may call liability for “mere” breach of contract, *i.e.*, a breach of contract which is neither based on contractual negligence nor related to defective title or condition of goods³⁷.

Among these three categories of liabilities, the Act prohibits outright the exclusion or restriction of two sub-categories. First is

Interestingly, Denning’s early involvement with exemption clauses was exposed by Lord Justice Longmore in *African Export-Import Bank v Shebah Exploration and Production Co. Ltd.* [2018] 1 W.L.R. 487, [1].

³³ As explained above (n. 8), the 1977 Act does not apply to business-to-consumer contracts. Within the field of business-to-business contracts, the Act excludes certain types of contracts from all or some of its control. Of interest for the last part of this contribution is s. 27, which excludes contracts the applicable law of which is the law of any part of the UK only by choice of the parties. For other exclusions, see ss. 13(2), 26 and Schedule 1.

³⁴ s. 2.

³⁵ s. 1(1).

³⁶ ss. 6 and 7.

³⁷ s. 3(2)(a).

liability for death or personal injury resulting from negligence³⁸. Second is liability for failure to give good title to goods sold or supplied³⁹.

Subject to these outright prohibitions, the Act does not automatically disapply an exemption clause, but puts it through a reasonableness inquiry. This asks whether the exemption clause is “*a fair and reasonable one to be included having regard to the circumstances which were, or ought reasonably to have been, known to or in the contemplation of the parties when the contract was made*”⁴⁰.

How does the reasonableness inquiry operate? Six points bear mentioning.

First, as statutorily dictated, the reasonableness of an exemption clause is to be judged based on the circumstances existing at the time of contract. Subsequent events will not be taken into account⁴¹.

Secondly, the burden of satisfying the reasonableness requirement rests with the party relying on the exemption clause⁴².

Thirdly, reasonableness is not a hard-and-fast line, but a balancing exercise that involves the weighing of a range of factors⁴³. An exhaustive list of factors does not exist, and a court may take into account any factor relevant to the case at hand⁴⁴. There are salient and recurrent factors, though, such as⁴⁵:

- (a) The strength of the bargaining positions of the parties relative to each other. (That a party deals on another’s standard terms of business is *prima facie* evidence of unequal bargaining power⁴⁶.)

³⁸ s. 2(1).

³⁹ ss. 6(1) and 7(3A).

⁴⁰ s. 11(1).

⁴¹ *Goodlife*, cit., [109].

⁴² s. 11(5).

⁴³ *George Mitchell (Chesterhall) Ltd. v Finney Lock Seeds Ltd.* [1983] 2 A.C. 803, 816.

⁴⁴ *Smith v Eric S. Bush* [1990] 1 A.C. 831, 858.

⁴⁵ These factors are set out in Schedule 2 to the 1977 Act, which are understood to be of general application for the purposes of the reasonableness inquiry: BEALE H. (ed.), *Chitty on Contracts*, cit., para. 18-110. For detailed discussions of other potential factors, see *ibid.*, paras. 18-112 *et seq.*; ANDREWS N., *Exclusion Clauses and Unfair Contract Terms*, cit., ch. 10.

⁴⁶ *Last Bus*, cit., [46].

(b) Whether the customer received an inducement to agree to the term, or in accepting it had an opportunity of entering into a similar contract with other persons, but without having a similar term.

(c) Whether the customer knew or ought reasonably to have known of the existence and extent of the term (having regard, among other things, to any custom of the trade and any previous course of dealing between the parties).

(d) Where the term excludes or restricts liability if some condition was not complied with, whether it was reasonable at the time of the contract to expect that compliance with that condition would be practicable.

Fourthly, it follows from the evaluative character of the reasonableness inquiry that each case falls to be judged on its own facts. A decision on the reasonableness of a particular exemption clause in a particular case has, generally speaking, no precedential value for the reasonableness of a similarly worded clause featured in a different case⁴⁷.

Fifthly, a clause failing the reasonableness inquiry is of no effect. The court has no power under the Act to rewrite the clause in a way that the court considers reasonable⁴⁸.

Finally, if an exemption clause, by its express wording, purports to exclude liability which cannot be exempted (*e.g.*, liability for death) as well as liability which can be exempted subject to reasonableness (*e.g.*, liability for other loss caused by negligence), it has been decided that the proper approach is to disregard the non-exemptible part of the clause and subject the remaining part to the reasonableness inquiry⁴⁹. *A fortiori*, if an exemption clause does not expressly refer to a non-exemptible liability, it is unlikely that it would be automatically struck down, merely because it may be wide enough to capture such liability and fails to preserve it expressly.

⁴⁷ ANDREWS N., *Exclusion Clauses and Unfair Contract Terms*, cit., para. 10-148; BEALE H. (ed.), *Chitty on Contracts*, cit., para. 18-104.

⁴⁸ BEALE H. (ed.), *Chitty on Contracts*, cit., para. 18-143.

⁴⁹ *Troxel Products Ltd. v Merral Fire Protection Engineers Ltd.*, 20 November 1991, C.A.; *Goodlife Foods Ltd. v Hall Fire Protection Ltd.* [2017] EWHC 767 (TCC), [63]–[71]; BEALE H. (ed.), *Chitty on Contracts*, cit., para. 18-144.

2.1.4. *Written standard terms of business*

In relation to exemption of liability for mere breach of contract, the 1977 Act, as a threshold matter, requires the innocent party to be “deal[ing] on” the contract breaker’s “written standard terms of business”⁵⁰. In other words, provided that the parties do not use standard terms, they can contract out of liability for mere breach of contract without having to satisfy the reasonableness inquiry. By contrast, for the other two types of liabilities covered by the Act (*i.e.*, liability for negligence and liability for goods sold or supplied), the fact that the parties have not used standard terms is a factor going to the reasonableness inquiry, but does not preclude the inquiry in the first place.

The expression “deals on the other’s written standard terms of business” is not defined in the Act, although it has been judicially interpreted as follows⁵¹.

First, a set of written terms is not a party’s written standard terms of business, unless that party habitually uses them in its business. “*It is not enough that he sometimes does and sometimes does not [use them]. Nor is it enough to show that a model form has, on the particular occasion, been used*”⁵².

Secondly, if negotiations have led to more than insubstantial variations to the terms otherwise habitually used by a party, then the parties will not have been “dealing on” that party’s written standard terms of business⁵³.

Thirdly, there is no requirement that the negotiations leading to such variations must relate specifically to the exemption clause in question⁵⁴. In other words, the focus is on the quality of the whole set of terms rather than the quality of the particular clause in question.

⁵⁰ s. 3(1).

⁵¹ *African Export-Import Bank*, cit. This “extensive judicial glossing” has attracted criticism: ANDREWS N., *Exclusion Clauses and Unfair Contract Terms*, cit., para. 9-057.

⁵² *African Export-Import Bank*, cit., [20].

⁵³ *Ibid.*, [21]–[25].

⁵⁴ *Ibid.*, [36].

Finally, the burden of proof respecting this threshold question lies on the innocent party⁵⁵. It is only after this threshold is crossed that the contract breaker bears the burden of satisfying the reasonableness inquiry.

2.2. *Agreed damages clauses – penalty rule*

An agreed damages clause is not an exemption clause, because it does not seek to exclude or restrict the contract breaker's liability, to the detriment of the other. Rather, it is for the benefit of both parties: "*the party establishing breach by the other need prove no damage in fact; the other must pay that, no less but no more*"⁵⁶. It is not therefore subject to the control of the 1977 Act.

Of course, an agreed damages clause may be onerous or unusual so as to attract the heightened requirements for incorporation under the common law rules discussed. But first, agreed damages clauses are not regarded as invariably onerous or unusual⁵⁷; moreover, there is no *a priori* rule in English law that an onerous or unusual term can never form part of a contract. Therefore, even an onerous or unusual agreed damages clause can be validly incorporated into a contract, provided that it is in signed writing, or if the attention of the other party has fairly and reasonably been drawn to it before or at the time of contract.

The principal means of control is the "penalty rule"⁵⁸. The gist of this rule, as reflected in its name, is to strike down penalties. English law does not recognise a contracting party having a legitimate interest in punishing the other for not keeping their contractual bargain by imposing a penal sum payable upon breach of contract⁵⁹. An agreed damages clause is penal if it imposes a financial detriment on a contract breaker that is "*out of all proportion to any legitimate interest of the innocent party*" in the enforcement of the contractual

⁵⁵ *Ibid.*, [18].

⁵⁶ *Suisse Atlantique*, cit., 420.

⁵⁷ *Interfoto Picture Library Ltd. v Stiletto Visual Programmes Ltd.* [1989] 1 Q.B. 433; BEALE H. (ed.), *Chitty on Contracts*, cit., para. 16-012. Also, recall n. 22.

⁵⁸ *Cavendish Square Holding B.V. v Makdessi* [2016] A.C. 1172.

⁵⁹ *Ibid.*, [31]–[32].

bargain⁶⁰. In other words, the penalty rule requires the party claiming the agreed damages to show what legitimate interest is at stake, and that the sum is commensurate with the legitimate interest so identified⁶¹. All this is to be judged based on the circumstances existing at the time of contract⁶².

In a straightforward case, a party's legitimate interest in enforcing the contractual bargain "*will rarely extend beyond compensation for the breach*"⁶³. Therefore, an agreed sum will be a penalty if it extravagantly exceeds a genuine pre-estimate of the loss that the breach will likely cause. In *Cavendish*, however, the Supreme Court was concerned to stress that "*compensation is not necessarily the only legitimate interest that the innocent party may have*"⁶⁴. So, a sum is not necessarily penal merely because it is not a genuine pre-estimate of loss. Deterrence against breach—or, put another way, inducement to adhere to the bargain—can constitute legitimate interest in an appropriate case⁶⁵, say, where, because of the nature of the bargain, loss would be hard to prove, or compensation would be an insufficient remedy⁶⁶.

Therefore, like the reasonableness inquiry under the 1977 Act, the penalty rule also calls for an evaluative exercise; agreed damages clauses are not automatically disapplied but are put to the court's value judgement. After *Cavendish*, there is now, in the commercial context, a high bar for the court to decline to give effect to an agreed damages clause⁶⁷. If the clause is found to be penal, it will be unenforceable, and the innocent party will be left to recover its actual proven loss. If it is not penal, however, then the contract breaker must pay the agreed sum, regardless of whether the innocent party

⁶⁰ *Ibid.*, [32].

⁶¹ *Houssein v London Credit Ltd.* [2024] EWCA Civ 721, [40].

⁶² *Cavendish*, cit., [9].

⁶³ *Ibid.*, [32].

⁶⁴ *Ibid.*, [152], [248]–[249].

⁶⁵ *Ibid.*, [31], [82], [99].

⁶⁶ BEALE H. (ed.), *Chitty on Contracts*, cit., paras. 30-226 *et seq.*

⁶⁷ *Ibid.*, para. 30-250.

has actually suffered any loss, or whether the actual loss is different from the sum agreed⁶⁸.

Consistent with what we said at the outset, the penalty rule does not impinge on standard terms *per se*⁶⁹. Therefore, a clause may be struck down as penal, even if it is freely negotiated between parties of equal bargaining power⁷⁰. But if the clause is part of an arm's-length, negotiated contract between sophisticated commercial parties, there is a strong initial presumption of validity⁷¹. As Lord Justice Diplock said, “*The court should not be astute to descry a ‘penalty clause’*” in every agreed damages clause⁷².

3. German law

The path of today's German standard terms law, especially in business-to-business contracts, was largely paved (and is still dominated) by the courts⁷³. Early decisions were based on general provisions of the German Civil Code (*Bürgerliches Gesetzbuch* – hereafter *BGB*), namely § 242 (good faith principle) and § 138 BGB (prevention against transactions offending common decency). Later, the jurisprudence developed under the general provisions was incorporated into a dedicated Standard Terms of Business Act (*AGB-Gesetz* – hereafter *AGBG*), before being moved to the BGB where it now neatly sits in §§ 305–310.

The decisive reason why standard terms are faced with a higher form of scrutiny is the following: Standard terms are the unilateral exercise of the right to shape the content of a contract. The user of standard terms insofar replaces dispositive law with provisions they have created themselves thereby limiting the other party's ability to protect their own interests and influence the content of the contract

⁶⁸ *Ibid.*, para. 30-206.

⁶⁹ *Cavendish*, cit., [257].

⁷⁰ BEALE H. (ed.), *Chitty on Contracts*, cit., para. 30-210.

⁷¹ *Cavendish*, cit., [35], [152].

⁷² *Robophone Facilities Ltd. v Blank* [1966] 1 W.L.R. 1428, 1447.

⁷³ For an elaborate overview, see PAMP R., *Das Leitbild des angemessenen Vertrags in der Konkretisierung der Rechtsprechung*, in *Zeitschrift für Wirtschaftsrecht*, 2025, pp. 3114–3117.

themselves. While the other party has the freedom whether to conclude the contract or not, they no longer have the freedom to shape its content. In the dispositive law there is a fair balance of interest between the contracting parties, and standard terms must therefore be scrutinised as to whether they uphold a similar weighing of interest, or if they constitute an abusive pursuit of unilateral interest (of the user) at the expense of the other party⁷⁴.

The standard terms control for business-to-business contracts is based on the same general framework under §§ 305–310 BGB only with some modifications⁷⁵. The reason given by the legislator, when adopting the AGBG, why the overall framework is the same even though business parties generally require less protection when facing each other compared to a consumer is that standard terms law is an expression of the good faith principle governing the entire German legal system⁷⁶.

As mentioned above, initially the standard terms law had been developed by the courts and was later introduced into the relevant statutory law. Still today the interpretation of the relevant provisions is strongly guided by jurisprudence, especially of the German Federal Supreme Court (*Bundesgerichtshof* – hereafter *BGH*). For the most part, it is not necessarily the *written provisions* of the German standard terms law *per se* that is to be blamed for its restrictive nature, but rather its authoritative interpretation by the *BGH*⁷⁷. This distinction will become apparent below.

3.1. *Standard terms of business*

The standard terms control only applies to contractual terms which are pre-formulated for a large number of contracts that the user imposes on the other party when concluding a contract,

⁷⁴ See BT-Drs. 7/3919, 13; *BGH*, *NJW* 1976, 2345, 2346.

⁷⁵ Note the lack of EU-wide harmonisation of standard terms control for business-to-business contracts, THÜSING G., BROHL J., FANDER L., *AGB-Kontrolle: Wo kommen wir her; wo gehen wir hin?*, in *Zeitschrift für Wirtschaftsrecht*, 2025, pp. 3112–3113.

⁷⁶ BT-Drs. 7/3919, 43.

⁷⁷ HERRESTHAL C., *Reform der AGB-Kontrolle im B2B-Bereich*, Baden-Baden, 2020, p. 17; MÜLLER W., *Standortnachteil*, cit., pp. 1355–1356.

§ 305(1) 1 BGB. It is irrelevant whether the provisions take the form of a physically separate part of a contract or are made part of the contractual document itself, what their volume is, what typeface is used, § 305(1) 2. It is of particular interest that, according to the BGH's interpretation, a term has already been "pre-formulated for a large number of contracts" where not necessarily the *user* intends to utilise it several (at least three) times, but who *drafted* it was of such intention, e.g. where a model form is used⁷⁸. A first-time use is also covered⁷⁹.

In the negative, such terms are *not* standard terms if they were individually negotiated, § 305(1) 3 BGB. Any individually agreed terms take priority over standard terms, § 305b BGB. According to established case law, "individual negotiations" are more than mere bargaining and require the user to seriously put up for discussion the core of the relevant term for the other party to influence the content to uphold their own interests⁸⁰. This can normally only be assumed where the relevant terms have actually been changed⁸¹. Common attempts to circumvent the application of §§ 305–310 BGB by individually negotiating certain clauses are regularly rejected by the BGH. A confirmation issued by the parties or a corresponding clause in the contract that the relevant terms were individually negotiated, was deemed insufficient⁸². The same was concluded where the user sent over their draft contract including standard terms requesting to communicate any comments or desired changes, or where alternatives for certain clauses were provided as an option⁸³. Even where lengthy in-depth negotiations took place and the other party only approved the draft after elaborate legal review, the BGH did not consider the relevant clauses to be the product of individual negotiations, since that would require the party opposing the standard terms to have accepted them as justified and incorporated them into their

⁷⁸ BGH, *NJW* 2000, 2988, 2989.

⁷⁹ BGH, *NJW* 2004, 1454, 1455; 2002, 138, 139.

⁸⁰ BGH, *NJW* 2013, 856, 857; 2005, 2543, 2544.

⁸¹ BGH, *NJW* 2013, 856.

⁸² BGH *NJW* 2014, 1725; *ZIP* 2014, 924.

⁸³ BGH *NJW-RR* 2018, 814; *NJW* 2017, 2346; *ZIP* 2016, 474.

own legal intent⁸⁴. This strict interpretation is a central cause for criticism⁸⁵.

In comparison, we can make out an interesting point of difference: Under English law there seem to be (some) stricter requirements when it comes to determining contract clauses as standard terms compared to German law. Different from English law it is not necessary for the user of the relevant terms to be habitually using them, and it is enough if there is only occasional (or even single) use under German law. Furthermore, under German law there are stricter requirements applied with regard to individual negotiations excluding standard terms. Taken together, there is a reversed approach on how readily contract clauses are assumed to be *standard* terms. Notably, the duality of standard terms vs. individually negotiated terms is much more crucial under German law, since only standard terms are strictly scrutinised under § 307 BGB (below), while the relevant English law controls apply not only to standard terms for the most part⁸⁶.

3.2. *Incorporation*

Once the requirements under § 306(1) BGB are satisfied, it must be evaluated whether the standard terms have been effectively incorporated into the contract. Such terms are not incorporated if they are so unusual and surprising that the party contracting with the user need not expect to encounter them, § 305c(1) BGB. This protection applies to both business-to-business as well as the business-to-consumer relationships⁸⁷. General and individual circumstances accompanying a certain clause are regarded. A general cause of suspicion is the degree a clause deviates from the dispositive law (further on that below); individual circumstances could be the way the negotiations were conducted or how the contract was ultimately drafted (e.g.

⁸⁴ BGH, *NJW* 2013, 856, 857; 1998, 410, 411.

⁸⁵ HERRESTHAL C., *Reform*, cit., pp. 17–19.

⁸⁶ See also OSTENDORF P., *Auslegung und Wirksamkeit von Freizeichnungsklauseln im unternehmerischen Geschäftsverkehr im deutschen, Schweizer und englischen Recht*, in *Rabels Zeitschrift für ausländisches und internationales Privatrecht*, 2025, p. 305.

⁸⁷ BGH *NJW* 1990, 576, 577.

burying certain clauses under the wrong heading)⁸⁸. However, whether a specific clause is unusual or surprising must be determined from the perspective of the relevant community being confronted with it, and so special features of certain business fields must be considered.⁸⁹ Therefore, a clause could be surprising to a consumer or even to a business party that belongs to a certain business community, while being perfectly acceptable and expected by members of a different business community. This does not mean, however, that generally a reduced standard of scrutiny applies in business-to-business contracts and that business parties must expect unusual terms because of their greater experience. If there is a common practice in a certain business community, deviations from that practice are not to be suspected and would therefore have high prospects to be excluded under § 305c(1) BGB.⁹⁰

Here, too, we can make out a relevant difference compared to the treatment of onerous or unusual terms: An equivalent to the English law signature rule, which serves as some kind of a “switch-off” for incorporation concerns, is not available in German law.⁹¹ So these remain a risk for contracting parties under German law.

3.3. Contents

Finally, standard terms which have been incorporated effectively are scrutinised regarding their specific content. Pursuant to the relevant § 307(1) BGB such standard terms are ineffective that, contrary to the requirement of good faith, unreasonably disadvantage the party contracting with the user. In this assessment the courts do not differentiate between companies with greater or lesser bargaining power, and so different opportunities to conclude more or less favourable agreements regarding the contents of the relevant standard

⁸⁸ BGH *NJW* 2010, 3152; 1982, 2369.

⁸⁹ BGH *NJW* 2007, 1703; *NJW-RR* 2007, 1702, 1703; 2004, 780, 781.

⁹⁰ BONIN B., § 305c, in GSELL B., KRÜGER W., LORENZ S., et al. (eds.), *BeckOGK-BGB*, Munich, 2026, para. 12.

⁹¹ See also OSTENDORF P., *Auslegung*, cit., pp. 304–305.

terms, but instead the clauses are reviewed in a generalised supra-individual way⁹².

Under §§ 308, 309 BGB there is a list of clauses that are prohibited from the outset or subject to a balancing exercise. And while the latter two provisions do not directly apply in the business-to-business context, a clause may still be found to be ineffective under § 307(1) BGB that corresponds with one of the terms prohibited in business-to-consumer contracts, § 310(1) 2 BGB. The BGH has taken this interaction and flipped it on its head: According to BGH jurisprudence the prohibition of certain clauses in business-to-consumer contracts is considered to be indicative of the ineffectiveness of a corresponding clause if used against a business⁹³. As a result, the review of clauses is ultimately largely based on consumer protection standards, which calls into question the appropriateness of the assessment for business transactions⁹⁴.

Additionally, even if a term is not thrown out based on the indicative effect of §§ 308, 309 BGB, the BGH generally assumes a guiding role of the dispositive law (*Leitbild des dispositiven Rechts*) also in business-to-business contracts⁹⁵, meaning that where a standard term is not compatible with essential principles of the statutory provision from which it deviates, this regularly constitutes an unreasonable disadvantage. And while the guiding role of the dispositive law has not been invented entirely by the BGH, but has its basis in § 307(2) no. 1 BGB, pursuant to the provision an unreasonable disadvantage in this instance is only to be assumed “in case of doubt”. This doubt, however, is rarely considered by the courts to be refuted, meaning that deviations from these essential principles *per se* are hardly possible⁹⁶.

Notably, the law itself makes further concessions regarding the control of standard terms in business-to-business contracts as it

⁹² BGH *NJW* 2017, 2986, 2991; 2014, 206, 208.

⁹³ BGH *NJW* 2016, 2173, 2176; 1984, 1750, 1751.

⁹⁴ HERRESTHAL C., *Reform*, cit., pp. 20–21; MÜLLER W., *Standortnachteil*, cit., p. 1356; STOMPS A., *Methodik der Klauselkontrolle im unternehmerischen Geschäftsverkehr*, Baden-Baden, 2011, pp. 36–37.

⁹⁵ BGH *NJW* 2017, 2986, 2989; 2014, 2420, 2427.

⁹⁶ HERRESTHAL C., *Reform*, cit., pp. 22–23; MÜLLER W., *Standortnachteil*, cit., p. 1356.

prescribes that due consideration shall be given to the customs and practices applicable in business transactions, § 310(1) 2 BGB. However, this cannot be seen as a genuine corrective measure⁹⁷; ultimately there is no practical significance, since the courts interpret “customs and practices” very narrowly⁹⁸.

What adds to the strictness of scrutiny is that clauses with an ambiguous or overall unclear meaning must be interpreted to the detriment of the user, § 305c(2) BGB. So, for example, if a standard term purports to “exclude liability for damages arising from negligence”, since the clause neither clarifies the degree of negligence (ordinary or gross) nor that liability for death were excluded from the exemption, it would be interpreted strictly to the detriment of the user as covering both gross negligence as well as liability for death, too. Consequently, since § 309 no. 7(a), (b) BGB prohibit the exclusion or limitation of liability for damage from injury to life arising from ordinary negligence and the exclusion for other damages arising from gross negligence, and since those prohibitions have the above-mentioned indicative effect in business-to-business contracts, too⁹⁹, the exemption clause would be ineffective in its entirety (each ground being sufficient for that result).

This highlights further relevant differences between German and English law. Under English law the same orientation towards consumer protection legislation does not exist and terms that have an ambiguous scope of application can be partly disregarded and do not have to be strictly interpreted to the detriment of the user. Finally, as a specific example, exemption of liability for gross negligence is generally permissible under English law while being strictly prohibited under German standard terms law.

⁹⁷ HERRESTHAL C., *Reform*, cit., pp. 20–21.

⁹⁸ BERGER K. P., REISS R., *Vertragsfreiheit im B2B-Bereich – neue Impulse für eine Reform des AGB-Rechts im Unternehmerverkehr*, in *Neue Juristische Wochenschrift*, 2025, 1316; KRANER J., *AGB-Recht – ein Blick in die rechtspolitische Glaskugel aus aktuellem Anlass*, in *Rechtspraxis der Industrie- und Infrastrukturprojekte*, 2025, p. 151.

⁹⁹ BGH NJW 2007, 3774.

3.4. *Legal consequences of non-incorporation and ineffectiveness*

Provided certain standard terms do not pass the incorporation or contents control, they do not determine the contents of the contract, neither in their drafted nor an amended form, § 306(1) BGB. These standard terms are generally not reduced in their content to maintain validity (*geltungserhaltende Reduktion*)¹⁰⁰, but instead the (default) statutory provisions are applied, § 306(2) BGB. However, where a clause can be divided into a part that is permissible in terms of content and a part that is not, only the latter part of the clause is struck down while the former remains valid (“blue-pencil-test”)¹⁰¹. But such a division requires from the outset that the relevant clause covers several points of regulation which can be separated from each other in terms of content and are individually comprehensible, so that deleting the invalid part of the clause would not affect the meaning of the other part¹⁰². This must be clearly distinguished from cases where a clause has been formulated in an unclear or ambiguous manner – in such cases, a (strict) interpretation to the detriment of the user continues to apply; there are no parts to be separated, but one (invalid) clause as a whole.

Compared to English law one might be inclined to assume a similarity here – under both systems the courts do not have the power to rewrite a clause so that it remains valid/reasonable. But that is not the full picture. Because, as mentioned earlier, where English courts are confronted with an exemption clause which is ambiguous in its scope of application, they may disregard the non-exemptible parts and proceed with the usual reasonableness inquiry for the remaining parts; overall invalidity is *not* the automatic consequence. Under German law, such a differentiated approach is generally not available, leaving invalidation of the term as the only outcome.

¹⁰⁰ See only FORNASIER M., § 306, in SÄCKER F. J., RIXECKER R., OETKER H., et al. (eds.), *MiKoBGB*, Munich, 2025, para. 24; BGH, *NJW-RR* 2004, 1498.

¹⁰¹ See BGH, *NJW* 2022, 1944, 1949; Opinion of AG Szpunar, 13 Sept 2018, Cases C-70/17 and C-179/17, para. 92–93. It is based on the “blue pencil doctrine” from English common law, cf. *Nordenfelt v Maxim Nordenfelt Guns and Ammunition Co Ltd* [1894] A.C. 535.

¹⁰² FORNASIER M., § 306, cit., para. 27.

4. Avoiding the application of German standard terms law

We have now demonstrated that under German standard terms law a more (perhaps overly) restrictive control regime is applied, which in some aspects differs considerably from the English law regime and often bars business parties from effectively incorporating desired terms in their contract. We now move to considering strategies on how to avoid the application of German standard terms law altogether.

Because of their domestic mandatory nature, contracting parties cannot opt-out of §§ 305–310 BGB as long as their contractual relationship is governed by German law¹⁰³. Dodging §§ 305–310 by agreeing on the relevant terms individually is an impractical and unreliable strategy because of the courts' strict interpretation of what constitutes the necessary "negotiations". But the rescue could lie in private international law. Since §§ 305–310 (with regard to business-to-business contracts) are not overriding mandatory (within the meaning of Art. 9(1) Rome I Regulation)¹⁰⁴, a choice of a more favourable law could help avoiding the application of §§ 305–310, thereby safeguarding the validity of certain desired terms¹⁰⁵.

One option to avoid German standard terms law could be a "partial" choice in favour of German substantive law without §§ 305–310 BGB, to mitigate the control of standard terms while still remaining in a familiar legal system. Choosing English law as *lex causae* seems to be a sensible option, too¹⁰⁶. The extent to which a *lex causae* may be chosen is in part determined by the dispute

¹⁰³ WESTPHALEN F. Graf v., *Schiedsvereinbarungen und Ausschluss der §§ 305-310 BGB, aber Aufrechterhalten der Geltung des § 242 BGB - was gilt?*, in *Zeitschrift für Wirtschaftsrecht*, 2022, p. 245; KYSEL N., *Rechtswahl bei Entgeltvereinbarungen im Zusammenhang mit einem Darlehen - Möglichkeiten und Grenzen*, in *Zeitschrift für Wirtschafts- und Bankrecht*, 2018, p. 2267; BGH, *NJW* 2014, 1725.

¹⁰⁴ See KONDRING J., *Flucht vor dem deutschen AGB-Recht: Rechtswirklichkeit versus Reformdiskussion*, in *Betriebsberater*, 2024, p. 971; BGH, *NJW* 2009, 3371, 3373.

¹⁰⁵ OSTENDORF P., *Abwahl des AGB-Rechts per Rechtswahl und Schiedsvereinbarung: Problem oder Problemlöser?*, in *Zeitschrift für Wirtschaftsrecht*, 2022, p. 731; SOMMERFELD A., *Rechtsflucht*, cit., p. 87.

¹⁰⁶ Especially since the 1977 Act expressly excludes its application from these contracts (n. 34), LANDBRECHT J., *Sonderprivatrecht*, cit., pp. 293–294.

resolution forum. We will therefore assess the feasibility of both options under German and English court litigation and arbitration.

4.1. *Court litigation*

4.1.1. *German courts*

The relevant conflict-of-laws rule applied by German courts is Art. 3 Rome I Regulation. Pursuant to Art. 3(1) a contract shall be governed by the law chosen by the parties. Under this provision the parties may, in principle, choose every legal system irrespective of whether it has any connections to the contract or the parties¹⁰⁷.

Art. 3(1) requires, however, the parties to choose the laws of a country. A choice in favour of non-national body of law, e.g. Unidroit Principles or the *lex mercatoria*, has effect only within the regulatory power of the otherwise applicable law of a country¹⁰⁸. The same is true for a choice of only *certain parts* of a country's law¹⁰⁹. Consequently, a "partial" choice of German substantive law without §§ 305–310 BGB is not feasible under Art. 3(1).

What is feasible under Art. 3(1) Rome I Regulation, however, is a choice also in favour of any non-EU Member law¹¹⁰. Therefore, a choice-of-law agreement designating English law is generally possible¹¹¹. Apart from being limited to choosing the law of a country, there are further limits to the freedom of choice under the Rome I Regulation. Pursuant to Art. 3(3), if all relevant elements, apart from the choice of law, are located in one country, provisions which

¹⁰⁷ MARTINY D., *Art. 3 Rome I Regulation*, in SÄCKER F. J., RIXECKER R., OETKER H., et al. (eds.), *MiKoBGB*, Munich, 2025, para. 8; FERRARI F., *Art. 3 Rome I Regulation*, in FERRARI F., KIENINGER E.-M., MANKOWSKI P., et al. (eds.), *Internationales Vertragsrecht*, Munich, 2018, para. 14.

¹⁰⁸ MARTINY D., *Art. 3*, cit., para. 33; SOMMERFELD A., *Rechtsflucht*, cit., p. 93; FERRARI F., *Art. 3*, cit., para. 18; MCPARLAND M., *Rome I-Regulation*, cit., p. 290.

¹⁰⁹ This must be distinguished from the (genuine) partial choice provided for in Art. 3(1) 3 pursuant to which different laws (in their entirety) can be chosen for different parts of a contract (*dépeçage*).

¹¹⁰ The Rome I Regulation as *loi uniforme*, cf. Art. 2.

¹¹¹ See MANKOWSKI P., *Brexit und Internationales Privat- und Zivilverfahrensrecht*, in *Europäische Zeitschrift für Wirtschaftsrecht Sonderausgabe 1*, 2020, p. 6.

cannot be derogated from by agreement of that country continue to apply. Since we observe *domestic* contractual relationships and §§ 305–310 BGB are domestically mandatory¹¹², any standard terms would still be scrutinised accordingly, albeit the English-law choice.

4.1.2. *English courts*

The same outcome must be reached if the case is brought before the English courts. Although the UK has left the EU, certain EU law was retained and thereby remains effective as national legislation. Accordingly, the Rome I Regulation was incorporated into national law¹¹³.

So, a choice of German law without §§ 305–310 BGB is not permitted under Art. 3(1) Rome I Regulation (as retained EU law effective in the UK). Also, according to recital (15) a choice-of-court-agreement accompanying the choice-of-law clause does not sufficiently “internationalise” the situation, so Art. 3(3) limits a choice of *English law* again, too. In conclusion, the English courts would be bound to apply §§ 305–310 BGB.

4.2. *Arbitration*

The application of §§ 305–310 BGB might be avoided, if not German or English courts, but an arbitral tribunal constituted under the German or English arbitration laws was the competent forum.

4.2.1. *German arbitral tribunal*

Under the relevant German arbitration laws, which apply where the seat of arbitration lies in Germany¹¹⁴, according to the majority

¹¹² See above n. 104.

¹¹³ Cf. Statutory Instrument 2019 No. 834, “The Law Applicable to Contractual Obligations and Non-Contractual Obligations (Amendment etc.) (EU Exit) Regulations 2019”; European Union (Withdrawal) Act 2018.

¹¹⁴ Cf. §§ 1025(1), 1043(1) ZPO.

scholarship view¹¹⁵, arbitral tribunals do not rely on Art. 3 Rome I Regulation as the relevant conflict-of-laws rule to determine the *lex causae*, but on § 1051 ZPO. § 1051(1) mandates the arbitral tribunal to resolve a dispute according to “legal provisions” (*Rechtsvorschriften*) determined by the parties. Different from Art. 3 (1) pursuant to which the “law” (*Recht*) (of a country) must be chosen, in arbitration proceedings the choice can therefore generally be made in favour of a non-national body of law or only *parts of* a certain country’s law, e.g. German law without §§ 305–310 BGB¹¹⁶. Naturally, parties resolving their dispute through arbitration can still choose a country’s law, so English law could also be agreed on. Still, there are several issues to consider:

First, the applicability of § 1051 over Art. 3 in arbitration proceedings is not undisputed, and their relationship has not yet been clarified by the Court of Justice of the European Union¹¹⁷. Thus, the view held by a minority of scholars¹¹⁸ could turn out to be correct and Art. 3 could claim primacy over § 1051, meaning that the limits under Art. 3(1), (3) would equally apply.

Second, even if we assumed that § 1051 applied, the available choice could once more be limited because of the dispute’s domestic nature. While there is no provision in German arbitration law that prescribes the application of mandatory domestic provisions¹¹⁹, some argue for the *ratio* of Art. 3(3) to be a general principle of

¹¹⁵ SCHLOSSER P., § 1051, in BORK R., ROTH H. (eds.), *Stein/Jonas: ZPO*, Tuebingen, 2014, para. 6; GRIMM A., *Applicability of the Rome I and II Regulations to International Arbitration*, in *Zeitschrift für Schiedsverfahren*, 2012, p. 189; PFEIFFER T., *Neues Internationales Vertragsrecht*, in *Europäische Zeitschrift für Wirtschaftsrecht*, 2008, p. 623

¹¹⁶ KONDRING J., *Flucht*, cit., p. 971; MÜNCH J., § 1051, in RAUSCHER T., KRÜGER W. (eds.), *MiKoZPO*, Munich, 2022, para. 15; VALDINI D., *Gesetzesreform durch die Hintertür? Die Abwahl zwingenden Rechts durch Schiedsabreden bei Inlandsachverhalten*, in *Zeitschrift für Wirtschaftsrecht*, 2017, p. 8.

¹¹⁷ See PÖRNBACHER K., ZAHN B., *Die Wahl deutschen Rechts unter Ausschluss der AGB-Kontrolle: Lösungsansätze für die Praxis aus der schiedsrechtlichen Perspektive*, in GEBAUER M., KLÖTZEL T., SCHÜTZE R. A. (eds.), *Usus atque Scientia: Festschrift für Roderich C. Thümmel zum 65. Geburtstag am 23.10.2020*, Berlin/Boston, 2020, pp. 620–621.

¹¹⁸ See MANKOWSKI P., *Schiedsgerichte und die Rom I-VO*, in *Recht der Internationalen Wirtschaft*, 2018, p. 1; MCGUIRE M.-R., *Grenzen der Rechtswahlfreiheit im Schiedsverfahrensrecht? - Über das Verhältnis zwischen der Rom-I-VO und § 1051 ZPO*, in *Zeitschrift für Schiedsverfahren*, 2011, pp. 262–264.

¹¹⁹ HANDORN B., *Sonderkollisionsrecht*, cit., pp. 160–164.

private international law¹²⁰. Accordingly, §§ 305–310 BGB could have to be considered by the arbitral tribunal irrespective of any choice.

Third, even if we shared the other scholars' view and did *not* accept this as a general *ratio*¹²¹, the specific choice-of-law agreement under § 1051(1) could be invalid. The relevant control standard must be derived from the intended *lex causae*, i.e. German law without §§ 305–310 BGB or English law¹²². Validity concerns could arise where a party is blindsided by an unexpected choice-of-law clause in the (domestic) contract, which can be countered by a corresponding notice or individual agreement¹²³.

Fourth, even if we assumed that there were no apparent concerns with the validity of the *choice-of-law-agreement*, we must not disregard a potential invalidity of the overall *arbitration agreement* which is forming the basis for any arbitration proceedings.¹²⁴ Provided the parties have not agreed on the law applicable to the arbitration agreement (to be distinguished from the choice designating the *lex causae*), German law applies¹²⁵. Notably, a choice of German law without §§ 305–310 BGB is not feasible here, because the relevant § 1059(2) no. 1(a), unlike § 1051, and similar to Art. 3(1), mentions “law” instead of “legal provisions”¹²⁶. Accordingly, §§ 305–310

¹²⁰ MÜNCH J., § 1051, cit., para. 23; VALDINI D., *Abwahl*, cit., p. 9; HANDORN B., *Sonderkollisionsrecht*, cit., pp. 164–165

¹²¹ VOIT W., § 1051, in MUSIELAK H.-J., VOIT W. (eds.), *Zivilprozessordnung: Kommentar*, Munich, 2025, para. 3; KONDRING J., § 1051 Abs. 1 ZPO und die Abwahl einfach zwingenden Rechts bei Binnensachverhalten: Über die Normenhierarchie von Kollisionsrecht und materiellrechtlichem Umgehungsverbot, in *Zeitschrift für Wirtschaftsrecht*, 2017, pp. 708–710; OSTENDORF P., *Wirksame Wahl ausländischen Rechts auch bei fehlendem Auslandsbezug im Fall einer Schiedsgerichtsvereinbarung und ausländischem Schiedsort?*, in *Zeitschrift für Schiedsverfahren*, 2010, p. 238.

¹²² By analogy Art. 3(5), 10(1) Rome I Regulation, see MÜNCH J., § 1051, cit., para. 18.

¹²³ Insofar, § 242 serves the same purpose as § 305c(1) BGB, see PFEIFFER T., *Die Abwahl des deutschen AGB-Rechts in Inlandsfällen bei Vereinbarung eines Schiedsverfahrens*, in *Neue Juristische Wochenschrift*, 2012, p. 1173; OSTENDORF P., *Schiedsgerichtsvereinbarung*, cit., p. 236.

¹²⁴ Cf. §§ 1029(1), 1059(2) no. 1(a) ZPO. See OSTENDORF P., *Der richtige Einsatz von Streitbeilegungsklauseln in internationalen Wirtschaftsverträgen: Auswahl, Ausgestaltung und wirksame Einbeziehung*, in *Internationales Handelsrecht*, 2024, p. 223.

¹²⁵ Cf. § 1059(2) no. 1(a) ZPO. See also BGH, *NJW* 2025, 896, 897.

¹²⁶ OSTENDORF P., *Abwahl*, cit., p. 733.

BGB would regularly become decisive in testing the effectiveness of the arbitration agreement. Regarding arbitration proceedings with German law without §§ 305–310 BGB as *lex causae*, *Graf v. Westphalen* readily derives ineffectiveness under § 307, since a party could only (perhaps not even) waive the protection of the standard terms law by individual agreement¹²⁷. *Ostendorf* favours the same conclusion, but argues that the arbitration agreement with an underlying *domestic* contract was only chosen in order to avoid (German) mandatory provisions. Thereby, the user of the terms intends to create a system of lowered control which is only to the disadvantage of the other party. In addition, the “partial” application of German law creates further risk of an *imbalance* of control which is higher compared to a choice of other legal systems in their entirety, that perhaps have an overall lowered (but balanced) standard¹²⁸. The latter line of argument does not apply to a choice of English law, so the risk of invalidity is lower. Others consider the arbitration agreement to be generally valid either way¹²⁹.

Even if we assumed that none of these concerns were conclusive, we must still ask if the strategy of opting for arbitration and choosing German law without §§ 305–310 BGB or English law, to safeguard the validity of certain terms would ultimately succeed. This requires us to turn to the review standard that applied *instead* of §§ 305–310.

The question is not difficult to answer if we look at the choice in favour of English law as the relevant common law rules would apply. We must focus on the choice of German law without §§ 305–310 BGB.

By excluding German standard terms law the parties intend to lower the overall level of control. It seems to be undisputed that

¹²⁷ WESTPHALEN F. Graf v., *Holpriger Ausweg aus der AGB-Kontrolle durch Abschluss einer Schiedsvereinbarung*, in *Europäische Zeitschrift für Wirtschaftsrecht*, 2025, pp. 805–808; WESTPHALEN F. Graf v., *Ausschluss*, cit., p. 252.

¹²⁸ OSTENDORF P., *Abwahl*, cit., pp. 733–734. Recently, the BGH ruled on the validity of an arbitration agreement in connection with a choice-of-law clause excluding §§ 305–310 BGB, cf. BGH, *NJW* 2025, 896. The Court upheld its validity, but since the proceedings did not concern a *domestic* dispute, it does not refute *Ostendorf’s* line of argument.

¹²⁹ KORTE O., *Abwahl des AGB-Rechts bei Zuständigkeit eines Schiedsgerichts*, in *Zeitschrift für Vertriebsrecht*, 2025, p. 194; ZONS J., *Ausschluss des AGB-Rechts in Bau-/Anlagenbauverträgen*, in *Rechtspraxis der Industrie- und Infrastrukturprojekte*, 2025, p. 173; PÖRNBACHER K., ZAHN B., *Ausschluss*, cit., pp. 622–624.

where the specific §§ 305–310 BGB are effectively excluded, the control is carried out under the general provisions of §§ 242, 138 BGB¹³⁰. Some then argue that the control under §§ 242, 138 is more restrained (compared to § 307)¹³¹. This view, however, must be considered as flawed if we recall the origins of German standard terms law and how the case law developed under the general provisions ended up in §§ 305–310 BGB. The control of standard terms under German law is evidently not tied to §§ 305–310, but equally flows from §§ 242, 138. Therefore, both regimes result in the same (strict) level of control¹³².

In conclusion, there are several pitfalls, each of which could hinder the avoidance of the application of German standard terms law. Not only could limits to the relevant choice of law stand in the way, but the arbitration agreement could be invalid altogether. Finally, even if none of those concerns were conclusive, we submit that only by applying English law altogether (not German law without §§ 305–310) any avoidance could be successful.

4.2.2. English arbitral tribunal

The situation only slightly differs for arbitration proceedings in England where the relevant English arbitration laws apply¹³³. The regulatory framework is similar, however, some issues under German law do not equally apply.

Arbitration Act 1996, s. 46(1)(b) corresponds with § 1051(1) ZPO pursuant to which the parties can agree on “other considerations” (than the laws of a country) as *lex causae*¹³⁴. The parties may, too, agree on non-national bodies of law, legal principles, or a mix

¹³⁰ See only PFEIFFER T., *Anm. zu BGH: Der Ausschluss des AGB-Rechts im Rahmen einer Schiedsvereinbarung*, in *Neue Juristische Wochenschrift*, 2025, p. 868; ZONS J., *Ausschluss*, cit., p. 173; PÖRNBACHER K., ZAHN B., *Ausschluss*, cit., p. 621.

¹³¹ BARTH M., *Anm. zu BGH: Ausweg aus der AGB-Kontrolle durch Schiedsvereinbarung*, in *Fachdienst Zivilrecht*, 2025, p. 807219; KORTE O., *Abwahl*, cit., p. 194; PFEIFFER T., *Ausschluss*, cit., p. 868; PFEIFFER T., *Abwahl*, cit., p. 1173.

¹³² This view is shared by PAMP R., *Leitbild*, cit., pp. 3118–3119; WESTPHALEN F. Graf v., *Schiedsvereinbarung*, cit., p. 806.

¹³³ Cf. Arbitration Act 1996, s. 2(1).

¹³⁴ SOMMERFELD A., *Rechtsflucht*, cit., p. 169.

of different systems¹³⁵. Accordingly, a choice-of-law agreement designating German law without §§ 305-310 BGB would be feasible, a choice of English law, of course, as well.

After Brexit there is no doubt that s. 46(1)(b) applies instead of Art. 3 Rome I Regulation in arbitration proceedings. Because while the issue for Germany revolves around EU law taking primacy over national law, in the UK this principle no longer applies. The Rome I Regulation was retained as *national* law and therefore no longer assumes a hierarchically superior position¹³⁶.

If one assumed the *ratio* of Art. 3(3) to be a general principle, a choice under s. 46(1)(b) would also be limited and §§ 305-310 BGB applied. Notably, agreeing on English arbitration proceedings does not sufficiently “internationalise” the otherwise domestic dispute¹³⁷.

Validity concerns regarding the choice-of-law agreement arise irrespective of whether German or English arbitration laws apply; this holds equally for the validity of the arbitration agreement. Arbitration Act 1996, s. 6A(1) corresponds with § 1059(2) no. 1(a) ZPO only that the former applies English law in the absence of a choice made by the parties instead of German law. Here, too, the relevant (national) “law” provides the legal framework for testing the agreement’s validity.

The ultimate application of either English law or German law without §§ 305–310 BGB is carried out by an English arbitral tribunal in the same way as a German one, meaning that only under English (substantive) law less strict scrutiny applies.

In conclusion, not all of the pitfalls that apply under German law equally concern an English arbitral tribunal. However, several points of concern do remain. We submit again that a choice of English law has the best (if any) prospects of success in avoiding German standard terms law.

¹³⁵ COLLINS L., HARRIS J. (eds.), *Dicey, Morris & Collins on the Conflict of Laws*, London, 2025, para. 16-051; HARRIS B., PLANTEROSE R., TECKS J., *The Arbitration Act 1996*, Oxford, 2014, [46D].

¹³⁶ See PFEIFFER T., *Brexit und internationale Schiedsgerichtsbarkeit*, in *Deutsche Richterzeitung*, 2020, p. 140.

¹³⁷ SPICKHOFF A., *Art. 3 Rome I Regulation*, in HAU W., POSECK R. (eds.), *BeckOK-BGB*, Munich, 2025, para. 37; HANDORN B., *Sonderkollisionsrecht*, cit., p. 159.

5. Conclusion

We have given an overview of the different regimes that apply to standard terms under English and German law in domestic business-to-business contracts. Several differences have been highlighted which explain why the German regime has a rather negative reputation, especially in comparison with English law.

None of the strategies to avoid the application of German standard terms law that we have considered¹³⁸ are definitely successful. Therefore, German domestic parties are bound to wait for legislative reform¹³⁹ or significant jurisprudential changes.

¹³⁸ For avoidance strategies under Swiss law, see only OSTENDORF P., *Abwahl*, cit., p. 731; PÖRNACHER K., ZAHN B., *Ausschluss*, cit., p. 621.

¹³⁹ Some suggestions LEUSCHNER L., *Die Bifunktionalität der AGB-Kontrolle als Schlüssel zur Neuausrichtung der §§ 305 ff. BGB im unternehmerischen Rechtsverkehr*, in *ZIP*, 2025, p. 2476; HERRESTHAL C., *Reform*, cit., p. 89. See also POLLMANN F. D., *European Commercial Court*, forthcoming.

The Hearing of the Child in Child Abduction Cases under the 1980 Hague Convention

Kai Hüning

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1. *Introduction*

The hearing of the child is an important right of the child¹ and can be significant in a variety of family law proceedings. Its importance for the child should not be underestimated. A child can derive various benefits from participation. It is assumed that it increases their ability to make independent decisions, their self-confidence and their communication skills, and generally promotes a child's development.² In addition, the information obtained from a hearing of a child

¹ Described as perhaps the most significant right in the UN Convention on the Rights of the Child by LUNDY L., TOBIN J., PARKES A., *Article 12. The Right to Respect for the Views of the Child*, in TOBIN J. (ed), *The UN Convention on the Rights of the Child – A Commentary*, Oxford, 2019, Art. 12 I. A; “opportunity to better fit the decision with the child's wishes or to explain why this is not possible”, see SMEETS D., RAP S., *Child Participation in Family Law Proceedings. Pedagogical Insights on Why and How to Involve Children*, in SCHRAMA W., FREEMAN M., TAYLOR N., BRUNING M. (eds), *International Handbook on Child Participation in Family Law*, Cambridge, 2021, p. 54.

² LUNDY L., TOBIN J., PARKES A., *Article 12. The Right to Respect for the Views of the Child*, cit., Art. 12 I. B. with the addition that this also supports Art. 6 and 29 of the CRC; adding to this, the manner of the participation is important in order to achieve these positive

enables the judge to better ascertain the facts of the case and thus make better decisions.³

Until now, the hearing of the child has been addressed too rarely in the context of return proceedings under the 1980 Hague Convention⁴. However, this intersection raises some interesting legal questions. The European Court of Human Rights (ECtHR) has now addressed one of these questions in its recent decision of September 9, 2025⁵: Does a court also have to examine *ex officio* whether the hearing of the child is appropriate in proceedings under the 1980 Hague Convention? On this occasion, this essay would like to analyse the content of the decision and examine whether it is convincing.

For this purpose, this article provides a short general introduction to the 1980 Hague Convention (2.) and to the hearing of a child (3.). It then outlines when the hearing of a child may be relevant under the 1980 Hague Convention (4.). This will be followed by a summary and analysis of the new judgment by the European Court of Human Rights (5.-7.). Concluding the article, a broader perspective will be taken to examine the significance of the ruling for states that are parties to the 1980 Hague Convention but not to the European Convention on Human Rights (ECHR)⁶ (8.).

2. Overview of the 1980 Hague Convention

The 1980 Hague Convention is a convention dealing with the civil aspects of international child abduction.⁷ It is one of the oldest

effects, see SMEETS D., RAP S., *Child Participation in Family Law Proceedings. Pedagogical Insights on Why and How to Involve Children*, cit., p. 47.

³ LUNDY L., TOBIN J., PARKES A., *Article 12. The Right to Respect for the Views of the Child*, cit. Art. 12 I. B.

⁴ Convention on the Civil Aspects of International Child Abduction, 25 October 1980.

⁵ Judgment of the European Court of Human Rights of 9 September, 2025, M.P. and Others v. Greece, 2068/24.

⁶ Convention for the Protection of Human Rights and Fundamental Freedoms, 4 November 1950, CETS No.005.

⁷ The term child abduction in the 1980 Hague Convention is not to be confused with “classic kidnapping”, it means the “unilateral removal or retention of children by parents,

international instruments in the field of child protection.⁸ Currently, it has 103 Contracting States, making it one of the most signed international agreements.⁹ Its main purpose is set out in its Art. 1 lit. a, which is to return the abducted children to their state of habitual residence as soon as possible. It wants to ensure that the rights of custody and access are respected in the other Contracting States.¹⁰ This is based on the child's best interest principle¹¹ and the assumption that it is generally best for the child to be in their usual environment at their place of habitual residence.¹² Art. 19 of the 1980 Hague Convention shows that the 1980 Hague Convention does not seek to make a decision *on* custody. It is about getting back to the *status quo ante*, so that the courts of the state of habitual residence can then decide on custody issues.

In order to return the child to its state of habitual residence the central provision Art. 12 para. 1 of the 1980 Hague Convention provides an according right. In general, the return shall be ordered where a child has been wrongfully removed or retained which is further detailed in Art. 3 of the 1980 Hague Convention. There are only a few defences to a mandatory return: Art. 12 para. 2, 13 and 20 of the 1980 Hague Convention. The two defences relevant for this article are the defence of grave risk of harm in Art. 13 para. 1 lit. b of the 1980 Hague Convention and the child's objection defence in Art. 13 para. 2 of the 1980 Hague Convention.

guardians or close family members" see BEAUMONT P., MCELEAVY P., *The Hague Convention on International Child Abduction*, Oxford, 1999, p. 1.

⁸ KRUGER T., MAOLI F., *The Hague Conventions and EU Instruments in Private International Law*, in SCHRAMA W., FREEMAN M., TAYLOR N., BRUNING M. (eds), *International Handbook on Child Participation in Family Law*, Cambridge, 2021, p. 70 f.

⁹ A table showing the current status is available at <https://www.hcch.net/en/instruments/conventions/status-table/?cid=24>, last accessed on 20 April 2026.

¹⁰ For detailed information on the aims of the Convention see BEAUMONT P., MCELEAVY P., *The Hague Convention on International Child Abduction*, cit., p. 28 ff.

¹¹ This can be derived from the preamble, see also BEAUMONT P., MCELEAVY P., *The Hague Convention on International Child Abduction*, cit., p. 29.

¹² KRUGER T., MAOLI F., *The Hague Conventions and EU Instruments in Private International Law*, cit., p. 72.

3. *The Hearing of the Child*

3.1. *Sources of International Law*

Over the past few decades, the hearing of the child has gained increasing attention and has been incorporated into various international agreements.

First and foremost, Art. 12 of the UN Convention on the Rights of the Child (CRC)¹³ is an important source on the hearing of the child.¹⁴ Art. 12 para. 1 of the CRC states that every “*child who is capable of forming his or her own views [has] the right to express those views freely in all matters affecting the child*”. Art. 12 para. 2 of the CRC specifies that “*the child shall in particular be provided the opportunity to be heard in any judicial [...] proceedings affecting the child*”. Art. 12 of the CRC is considered one of its most influential rights¹⁵ and should be taken into account – as one of the four guiding principles – in the interpretation and application of the other rights of the CRC.¹⁶ The UN has also published a General Comment on Art. 12 of the CRC.¹⁷

In addition, Art. 3 of the European Convention on the Exercise of Children's Rights¹⁸ is another source of international law on the hearing of the child. An obligation to hear the child can also be derived from Art. 8 of the ECHR, the right to respect for private and family

¹³ UN Convention on the Rights of the Child, 20 November 1989.

¹⁴ HEIDERHOFF B., *The Hearing of the Child in Custody Disputes and the Principle of Mutual Trust in the EU*, in HEIDERHOFF B., QUEIROLO I. (eds), *EU and Private International Law: Open Questions in Family Law, Contracts, and Torts*, Naples, 2025, p. 14.

¹⁵ LUNDY L., TOBIN J., PARKES A., *Article 12. The Right to Respect for the Views of the Child*, cit., Art. 12 I. A.

¹⁶ UN COMMITTEE ON THE RIGHTS OF THE CHILD, *General Comment No. 12 – The right of the child to be heard*, 2009, para. 2.

¹⁷ UN COMMITTEE ON THE RIGHTS OF THE CHILD, *General Comment No. 12 – The right of the child to be heard*, cit.

¹⁸ European Convention on the Exercise of Children's Rights, 25 January 1996.

life,¹⁹ as will be shown in the ECtHR judgment discussed here. Furthermore, in the EU, the hearing of the child is also subject to the provisions of Art. 24 para. 1 sentence 3 of the EU Charter²⁰ and (with the exception of Denmark) Art. 21, 26 of the Brussels IIter Regulation²¹.

3.2. Procedure of the Hearing of the Child

The international regulations do not provide any further details on the hearing of the child. Therefore, for example, it is unclear at what age a hearing should be held and at what age a child has the maturity for their views to be taken into account. Furthermore, there are also different approaches to the question of who should hear the child. The consequence of this lack of supranational regulation is that the hearing of the child is organized very differently in the different countries.²²

This article does not focus on determining the right approach to hear the children from the various possibilities. However, two things should be emphasised at this point. Firstly, the age at which a child is heard in matters concerning them should not be set too high.²³ It

¹⁹ PÄTZOLD J., *Art. 8 Recht auf Achtung des Privat- und Familienlebens*, in KARPENSTEIN U., MAYER F. (eds), *EMRK. Konvention zum Schutz der Menschenrechte und Grundfreiheiten*, München, 3rd ed. 2022, para. 52.

²⁰ Charter of Fundamental Rights of the European Union, in OJ C 202, 7.6.2016, p. 389.

²¹ Council Regulation (EU) 2019/1111 of 25 June 2019 on jurisdiction, the recognition and enforcement of decisions in matrimonial matters and the matters of parental responsibility, and on international child abduction (recast), in OJ L 178, 2.7.2019, p. 1.

²² For 17 detailed country reports, see SCHRAMA W., FREEMAN M., TAYLOR N., BRUNING M. (eds), *International Handbook on Child Participation in Family Law*, cit.; detailed information for some EU Member States at CARPANETO L., MAOLI F. (eds), *Children's right to information in EU civil actions. Improving children's right to information in cross-border civil cases*, Pisa, 2021; some differences between European countries are pointed out by HEIDERHOFF B., *The Hearing of the Child in Custody Disputes and the Principle of Mutual Trust in the EU*, cit., p. 16 ff.; The UN Committee on the Rights of the Child also has concerns about some practices of the hearing of the child, see UN COMMITTEE ON THE RIGHTS OF THE CHILD, *General Comment No. 12 – The right of the child to be heard*, cit., para. 4.

²³ An age set too high also violates Art. 12 of the CRC, see HEIDERHOFF B., *The Hearing of the Child in Custody Disputes and the Principle of Mutual Trust in the EU*, cit., p. 16;

is not necessary for the child to understand everything completely for it to be meaningful for them to be heard.²⁴ And secondly, it is essential that the hearing always takes place in an age-appropriate and child-friendly manner.²⁵

4. *Relevance of the Hearing of the Child in the 1980 Hague Convention*

The 1980 Hague Convention itself does not contain any explicit provisions on the hearing of the child.²⁶ The question of whether to hear the child is therefore generally subject to national regulation on hearing children.²⁷ The hearing of the child may be relevant at various stages of the return procedures.

Firstly, from the child's perspective the hearing of the child is fundamentally relevant, as return proceedings affect the child. Furthermore, the hearing of the child is relevant for establishing the facts of the case. The first thing that comes to mind is the child's objection

see also UN COMMITTEE ON THE RIGHTS OF THE CHILD, *General Comment No. 12 – The right of the child to be heard*, cit., para. 20 f.

²⁴ LUNDY L., TOBIN J., PARKES A., *Article 12. The Right to Respect for the Views of the Child*, cit., Art. 12 I. C.; HEIDERHOFF B., *The Hearing of the Child in Custody Disputes and the Principle of Mutual Trust in the EU*, cit., p. 15.

²⁵ “Under the right circumstances, the benefits of participation can overrule the possible disadvantages.”, see SMEETS D., RAP S., *Child Participation in Family Law Proceedings. Pedagogical Insights on Why and How to Involve Children*, cit., p. 58; for young children, playing, drawing, painting and other activities can therefore also be used as a method of hearing the child, see UN COMMITTEE ON THE RIGHTS OF THE CHILD, *General Comment No. 12 – The right of the child to be heard*, cit., para. 21; SCHMAHL S., *NomosKommentar Kinderrechtskonvention mit Zusatzprotokollen*, Baden-Baden, 2nd ed. 2017, Art. 12 of the CRC, para. 14.

²⁶ SCHWEPPE K., *Kindesanhörung im europäischen Vergleich*, in HEILMANN S., LACK K. (eds), *Die Rechte des Kindes. Festschrift für Ludwig Salgo zum 70. Geburtstag*, Cologne, 2016, p. 235; This is also very common for private international law instruments, see KRUGER T., MAOLI F., *The Hague Conventions and EU Instruments in Private International Law*, cit., p. 70.

²⁷ KRUGER T., MAOLI F., *The Hague Conventions and EU Instruments in Private International Law*, cit., p. 70.

defence under Article 13 para. 2 of the 1980 Hague Convention,²⁸ as it concerns the child's resistance to the return. Additionally, the hearing of the child may also be helpful when establishing the child's habitual residence,²⁹ when determining a grave risk under Art. 13 para. 1 lit. b of the 1980 Hague Convention³⁰ and when establishing whether the child has settled in its new environment under Art. 12 para. 2 of the 1980 Hague Convention.³¹

5. Strasbourg calling: Judgement of the European Court of Human Rights of 9 September 2025

In a recent development the ECtHR had to deal with the hearing of the child in the context of Art. 13 para. 1 lit. b of the 1980 Hague Convention in his case *M.P. and Others vs. Greece* of 9 September 2025.³²

In this case the mother and her two children, whose complaint was also lodged by the mother, complained about two judgments by the Greek courts that their two children (born in 2016 and 2018) should be returned to their father in the United States under the provisions of the 1980 Hague Convention. They considered that these judgments and the failure to hear the children constituted violations of Art. 8 of the ECHR.

The ECtHR then held, by 5 to 2 votes, that there had been a violation of Art. 8 of the ECHR.

²⁸ SCHUZ R., *The Hague Child Abduction Convention. A Critical Analysis*, Oxford, Portland, 2013, p. 373; HEIDERHOFF B., *Art. 13 [Ablehnung der Rückgabe]*, in *Münchener Kommentar zum Bürgerlichen Gesetzbuch*, Volume 12, Munich, 9th ed. 2024, para. 19.

²⁹ SCHUZ R., *The Hague Child Abduction Convention. A Critical Analysis*, cit., p. 373, (see also p. 213).

³⁰ BEAUMONT P., MCELEAVY P., *The Hague Convention on International Child Abduction*, cit., p. 193; SCHUZ R., *The Hague Child Abduction Convention. A Critical Analysis*, cit., p. 373.

³¹ SCHUZ R., *The Hague Child Abduction Convention. A Critical Analysis*, cit., p. 373, 242.

³² Judgment of the European Court of Human Rights of 9 September, 2025, *M.P. and Others v. Greece*, 2068/24.

5.1. *Case History*

The mother, the father and the children lived in the United States.³³ The mother then travelled to Greece with their children in October 2020 with consent of the father. However, she did not return with the children in February 2021 as it was agreed with the father. Instead she announced in January 2021, that she and their children would remain in Greece until May.³⁴ As no return to the United States took place the father applied on 5 August 2021 for the return of the children to the United States.³⁵

In May 2022, the Rhodes Court of First Instance ruled that in general the retention of the children was wrongful and the conditions for a return were met. However, following the mother's submission, the Court found that there was a grave risk that their return would expose the children to psychological harm. This means that the defence to the mandatory return under Art. 13 para. 1 lit. b of the 1980 Hague Convention applied, and the Court rejected the return of the two children.³⁶

The father successfully appealed against this judgment to the Do-decanese Court of Appeal. On 29 December 2022 ruled that there was not a grave risk that their return would expose the children to psychological harm and therefore ordered the return of the children to the United States.³⁷

After another appeal by the mother, the Court of Cassation upheld the judgment.³⁸

³³ Judgment of the European Court of Human Rights of 9 September, 2025, M.P. and Others v. Greece, 2068/24, paras. 6 ff.

³⁴ Judgment of the European Court of Human Rights of 9 September, 2025, M.P. and Others v. Greece, 2068/24, para. 10.

³⁵ Judgment of the European Court of Human Rights of 9 September, 2025, M.P. and Others v. Greece, 2068/24, para. 12.

³⁶ Judgment of the European Court of Human Rights of 9 September, 2025, M.P. and Others v. Greece, 2068/24, paras. 19 ff.

³⁷ Judgment of the European Court of Human Rights of 9 September, 2025, M.P. and Others v. Greece, 2068/24, paras. 22 ff.

³⁸ Judgment of the European Court of Human Rights of 9 September, 2025, M.P. and Others v. Greece, 2068/24, paras. 25 ff.

As a result of this, the mother and her two children filed their complaint with the ECtHR.

5.2. The Court's Assessment

The Chamber considered the complaint to be admissible³⁹ and justified.⁴⁰

In terms of the justification, the ECtHR stated that in general a court-ordered return constitutes an infringement of Art. 8 of the ECHR.⁴¹ However, since the interference was provided for by law and pursued a legitimate aim, it does not constitute a violation of Art. 8 of the ECHR if it can be considered as necessary in a democratic society.⁴² The decisive factor in this regard is whether the decision making process served the child's best interests and whether a grave risk under Art. 13 para. 1 lit. b of the 1980 Hague Convention had been ruled out.⁴³

Introducing this question, the ECtHR first states in general terms that the will of a child with sufficient capacity to exercise judgement must be taken into account in proceedings affecting him or her. Art. 13 para. 2 of the 1980 Hague Convention also states that the will of

³⁹ Judgment of the European Court of Human Rights of 9 September, 2025, M.P. and Others v. Greece, 2068/24, para. 72; in their joint Dissenting Opinion to the judgment, judges Roosma and Hüseyinov explained that in their opinion the domestic remedies were not exhausted, and that therefore the complaint about the missing hearing should have been declared as inadmissible, Joint Dissenting Opinion of Judges Roosma and Hüseyinov annexed to Judgment of the European Court of Human Rights of 9 September, 2025, M.P. and Others v. Greece, 2068/24 paras. 2, 16.

⁴⁰ Judgment of the European Court of Human Rights of 9 September, 2025, M.P. and Others v. Greece, 2068/24, para. 104; for the dissenting opinion of judges Roosma and Hüseyinov in this regard see 5.3.

⁴¹ Judgment of the European Court of Human Rights of 9 September, 2025, M.P. and Others v. Greece, 2068/24, para. 88.

⁴² Judgment of the European Court of Human Rights of 9 September, 2025, M.P. and Others v. Greece, 2068/24, para. 89.

⁴³ Judgment of the European Court of Human Rights of 9 September, 2025, M.P. and Others v. Greece, 2068/24, para. 90.

the child can be of relevance if they are of an appropriate age and maturity.⁴⁴

The ECtHR then states that the mother presented and submitted various arguments that indicate a grave risk under Art. 13 para. 1 lit. b of the 1980 Hague Convention. The Greek courts took all of the arguments raised into consideration.⁴⁵ The files do not indicate that a request to hear the two children was made.⁴⁶

The ECtHR then noted that, in its previous case law, it had not yet established any obligation for courts to examine *ex officio* in return proceedings whether a hearing of the child was appropriate. The ECtHR then explains that, considering the relevant international agreements (including Art. 12 of the CRC), there is agreement among the Contracting States of the ECHR that children must have a genuine and effective opportunity to express their opinions.⁴⁷ In order to give the child this opportunity, the ECtHR points out that it is necessary for a court to examine whether it is appropriate to hear the child. Any negative decision in this regard must be justified.⁴⁸

The ECtHR then looks at the specific case again and points out that there were also specific indications that would have required an examination of the appropriateness of hearing the children in this case. Firstly, the return could lead to significant changes in the lives of the two children. Furthermore, the Greek courts have reached different outcomes regarding a grave risk under Art. 13 para. 1 lit. b of the 1980 Hague Convention in the different instances. In connection with the obligation of the courts to act in the best interests of the children, the higher Greek courts should therefore have examined whether it was appropriate to hear the children. This applies

⁴⁴ Judgment of the European Court of Human Rights of 9 September, 2025, M.P. and Others v. Greece, 2068/24, para. 93.

⁴⁵ Judgment of the European Court of Human Rights of 9 September, 2025, M.P. and Others v. Greece, 2068/24, paras. 94 ff.

⁴⁶ Judgment of the European Court of Human Rights of 9 September, 2025, M.P. and Others v. Greece, 2068/24, para. 98.

⁴⁷ Judgment of the European Court of Human Rights of 9 September, 2025, M.P. and Others v. Greece, 2068/24, para. 100.

⁴⁸ Judgment of the European Court of Human Rights of 9 September, 2025, M.P. and Others v. Greece, 2068/24, para. 101.

regardless of whether an explicit request for a hearing was made. Finally, the Court concludes that the Greek courts did not hear the children at any point.⁴⁹

Therefore, the ECtHR ruled that the infringement of Art. 8 of the ECHR was not necessary in a democratic society.⁵⁰

5.3. The Joint Dissenting Opinion of Judges Roosma and Hüseyinov

The violation of Art. 8 of the ECHR was not unanimously established. Judges Roosma and Hüseyinov voted against it and decided to publish their dissenting opinion,⁵¹ which is briefly outlined below insofar as it relates to the subject matter of this article.

In their dissenting opinion, Roosma and Hüseyinov argue that, although an obligation to review the appropriateness of an order may in principle arise from Art. 8 of the ECHR, they have reservations about such an obligation in connection with return proceedings under the 1980 Hague Convention, as the 1980 Hague Convention pursues a specific objective and purpose.⁵² In particular, they question whether it is still possible to apply the ECHR and the 1980 Hague Convention harmoniously with this obligation.⁵³ While the child's wishes are relevant in Art. 13 para. 2 of the 1980 Hague Convention, the failure to hear the children in the present case explicitly relates to Art. 13 para. 1 lit. b of the 1980 Hague Convention.⁵⁴ Since the exception under Art. 13 para. 1 lit. b of the 1980 Hague Convention must be raised by the abducting parent, it would seem more reasonable that courts should not examine *ex officio* whether a hearing of the child is appropriate. This is reinforced by the fact that the drafters of the 1980 Hague Convention intentionally drafted it this way to

⁴⁹ Judgment of the European Court of Human Rights of 9 September, 2025, M.P. and Others v. Greece, 2068/24, para. 102.

⁵⁰ Judgment of the European Court of Human Rights of 9 September, 2025, M.P. and Others v. Greece, 2068/24, para. 104.

⁵¹ Joint Dissenting Opinion of Judges Roosma and Hüseyinov, cit.

⁵² Joint Dissenting Opinion of Judges Roosma and Hüseyinov, cit., para. 1.

⁵³ Joint Dissenting Opinion of Judges Roosma and Hüseyinov, cit., para. 2.

⁵⁴ Joint Dissenting Opinion of Judges Roosma and Hüseyinov, cit., para. 3.

weaken the position of the abducting parent. The case law of the ECtHR is also consistent with this approach.⁵⁵ The Greek courts examined all the evidence presented and, on that basis, concluded that there was no grave risk within the meaning of Art. 13 para. 1 lit. b of the 1980 Hague Convention. The courts reached their decisions on well-founded grounds.⁵⁶ Roosma and Hüseyinov then refer to the decision in *X v. Latvia*, which clearly demonstrated the need for a harmonious interpretation between the ECHR and the 1980 Hague Convention. This means that the core purpose of the Hague Convention (the prompt return of children) is upheld while at the same time the guarantees of the ECHR are applied in a practical and effective manner. The restrictive interpretation of “grave risk” is a key element of the harmonious interpretation of both conventions.⁵⁷

Roosma and Hüseyinov then agree that children should be heard in matters affecting them and should be able to express their views, and that this also applies in principle to return proceedings under the 1980 Hague Convention, regardless of whether Art. 13 para. 2 of the 1980 Hague Convention is relevant or not. However, according to Art. 12 of the CRC, the age and maturity of the child as well as national procedural rules must be taken into account. In any case, the specific circumstances of each individual case should be considered.⁵⁸ Greek national regulations contain clear rules on when a court must hear the child. Notably, no reasons need to be given for not hearing the child.⁵⁹ At no point prior to the ECtHR proceedings did the complainants argue in writing that a hearing of the children was necessary. There is neither a written application nor a complaint in the higher courts regarding the failure to hear the children.⁶⁰ Ultimately, they find it difficult to see how hearing the children could have influenced the outcome.⁶¹

⁵⁵ Joint Dissenting Opinion of Judges Roosma and Hüseyinov, cit., para. 4.

⁵⁶ Joint Dissenting Opinion of Judges Roosma and Hüseyinov, cit., para. 8.

⁵⁷ Joint Dissenting Opinion of Judges Roosma and Hüseyinov, cit., para. 10.

⁵⁸ Joint Dissenting Opinion of Judges Roosma and Hüseyinov, cit., para. 12.

⁵⁹ Joint Dissenting Opinion of Judges Roosma and Hüseyinov, cit., para. 13.

⁶⁰ Joint Dissenting Opinion of Judges Roosma and Hüseyinov, cit., para. 14.

⁶¹ Joint Dissenting Opinion of Judges Roosma and Hüseyinov, cit., para. 15.

6. Opinion on the Judgment and Dissenting Opinion

The ECtHR judgment strengthens children's rights and therefore deserves applause. From a legal perspective, the ruling regarding the hearing of the child is not objectionable. The dissenting opinion published by Judges Roosma and Hüseyinov cannot be fully agreed with.

Admittedly, Judges Roosma and Hüseyinov are correct in arguing that, in general, courts are not required to conduct *ex officio* investigations under Art. 13 para. 1 lit. b of the 1980 Hague Convention.⁶² It is also true that this was intentionally drafted this way, to put the abductor and the other parent on an equal footing.⁶³ Therefore, in general, a court should only take evidence once the abducting parent has sufficiently substantiated that there is a grave risk.⁶⁴ Furthermore, Roosma and Hüseyinov are correct in stating that Art. 13 para. 1 lit. b of the 1980 Hague Convention should be interpreted restrictively.⁶⁵

However, Roosma and Hüseyinov overlook the fact that, it is a matter of the child's own right, regardless of the footing of the two parents. The child does not derive this right from either parent. The child stands here independently. The child's right to be heard is based on the fact that the child has his or her own personality and his or her

⁶² Joint Dissenting Opinion of Judges Roosma and Hüseyinov, cit., para. 4; see also PÉREZ-VERA E., *Explanatory Report on the 1980 Hague Convention*, 1982, para. 114; BEAUMONT P., MCELEAVY P., *The Hague Convention on International Child Abduction*, cit., p. 140; HEIDERHOFF B., *Art. 13 [Ablehnung der Rückgabe]*, cit., para. 18; ERB-KLÜNEMANN M., *Art. 13 [Ablehnung der Rückgabe]*, in HEIDEL T., HÜBTEGE R., MANSEL H.-P., NOACK U. (eds), *NomosKommentar BGB*, Volume 1, Baden-Baden, 4th ed. 2021, para. 4.

⁶³ Joint Dissenting Opinion of Judges Roosma and Hüseyinov, cit., para. 4; PÉREZ-VERA E., *Explanatory Report on the 1980 Hague Convention*, cit., para. 114.

⁶⁴ HEIDERHOFF B., *Art. 13 [Ablehnung der Rückgabe]*, cit., para. 18; ERB-KLÜNEMANN M., *Art. 13 [Ablehnung der Rückgabe]*, cit., para. 4.

⁶⁵ Joint Dissenting Opinion of Judges Roosma and Hüseyinov, cit., para. 10; PÉREZ-VERA E., *Explanatory Report on the 1980 Hague Convention*, cit., para. 34; HEIDERHOFF B., *Art. 13 [Ablehnung der Rückgabe]*, cit., para. 14; ERB-KLÜNEMANN M., *Art. 13 [Ablehnung der Rückgabe]*, cit., para. 3; the need for a restrictive approach is even described as self-explanatory, see BEAUMONT P., MCELEAVY P., *The Hague Convention on International Child Abduction*, cit., p. 138; Judgment of the European Court of Human Rights of 6 December, 2007, *Maumousseau and Washington v. France*, 39388/05, para. 73.

own view of matters affecting him or her;⁶⁶ the child is a subject of rights.⁶⁷ It would be incompatible with the child's own rights if the right to be heard only applied when a parent raised a defence to a mandatory return in the proceedings.⁶⁸

Therefore, hearing the child is not only a means of establishing the facts or gathering evidence; it is also important for the child itself.⁶⁹ The aim is to enable the child to express their opinions, views and feelings, rather than simply to provide the court with useful information for establishing the facts of the case.⁷⁰ It therefore seems wrong to deprive the child of their right to be heard in order to put both parents on an equal footing. Consequently, it cannot be of relevance whether an application to hear the children is made before the domestic courts. Furthermore, Art. 12 para. 2 of the CRC may not be interpreted as meaning that national regulations may restrict or prevent the child's right to be heard.⁷¹ On the contrary, this provision is intended to have an enabling effect.⁷² Therefore, the child must be heard in return proceedings.

Furthermore, it is already questionable whether such an *ex officio* hearing would actually put the abductor and the parent, from whom the child was taken away, on an equal footing. Would hearing the child *ex officio* or examining the appropriateness of such a hearing really change the rules on the burden of proof under Art. 13 para. 1 lit. b of the 1980 Hague Convention?

⁶⁶ SCHUZ R., *The Hague Child Abduction Convention. A Critical Analysis*, cit., p. 114.

⁶⁷ UN COMMITTEE ON THE RIGHTS OF THE CHILD, *General Comment No. 12 – The right of the child to be heard*, cit., para. 18.

⁶⁸ SCHUZ R., *The Hague Child Abduction Convention. A Critical Analysis*, cit., p. 373.

⁶⁹ HEIDERHOFF B., *The Hearing of the Child in Custody Disputes and the Principle of Mutual Trust in the EU*, cit., p. 14; SCHUZ R., *The Hague Child Abduction Convention. A Critical Analysis*, cit., p. 115, 374.

⁷⁰ SCHUZ R., *The Hague Child Abduction Convention. A Critical Analysis*, cit., p. 115.

⁷¹ UN COMMITTEE ON THE RIGHTS OF THE CHILD, *General Comment No. 12 – The right of the child to be heard*, cit., para. 38; SCHMAHL S., *NomosKommentar Kinderrechtskonvention mit Zusatzprotokollen*, cit., Art. 12 of the CRC, para. 17.

⁷² LUNDY L., TOBIN J., PARKES A., *Article 12. The Right to Respect for the Views of the Child*, cit., Art. 12 III. D.

As just outlined, the purpose of the hearing of the child is primarily to uphold the child's right to be heard in matters affecting them. It is not primarily about establishing the facts or gathering complete evidence of a grave risk. Admittedly, a court cannot ignore it if the hearing of the child already reveals a grave risk to their physical or psychological well-being. Failing to take the hearing into account in such a case would constitute a clear violation of Art. 12 para. 1 of the CRC, which states that the views of the child must be given due weight. It would also violate the principle of the best interests of the child set out in Art. 3 of the CRC. However, the mere possibility that the outcome may be influenced by the hearing is not a valid reason to prevent the child from being heard.⁷³ In most cases, however, the hearing alone will not be sufficient to establish a grave risk.⁷⁴ This is primarily because the grave risk needs to be interpreted restrictively and correspondingly high requirements for proof must be met.⁷⁵ Beyond the hearing, the burden of proof remains with the abducting parent. There is therefore no danger that a hearing will ignore the chosen distribution of the burden of proof, suddenly turning the exception into the rule and rendering the agreement a mere “*dead letter*”⁷⁶. A harmonious interpretation of the ECHR and the 1980 Hague Convention is therefore still not threatened by hearing the child or reviewing the appropriateness of the hearing.⁷⁷

Considering the above, one might conclude that the ECtHR ruling is perhaps even too restrictive, as it only requires courts to examine whether the hearing is appropriate and does not require the hearing as a matter of principle. However, in the present case, it does not appear to be decisive whether a) courts are obliged to examine

⁷³ SCHUZ R., *The Hague Child Abduction Convention. A Critical Analysis*, cit., p. 375.

⁷⁴ SCHUZ R., *The Hague Child Abduction Convention. A Critical Analysis*, cit., p. 374 f.

⁷⁵ PÉREZ-VERA E., *Explanatory Report on the 1980 Hague Convention*, cit., paras. 27 ff., 113 ff.; HEIDERHOFF B., *Art. 13 [Ablehnung der Rückgabe]*, cit., paras. 15, 17; ERB-KLÜNEMANN M., *Art. 13 [Ablehnung der Rückgabe]*, cit., para. 3.

⁷⁶ PÉREZ-VERA E., *Explanatory Report on the 1980 Hague Convention*, cit., para. 34.

⁷⁷ See also KRUGER T., MAOLI F., *The Hague Conventions and EU Instruments in Private International Law*, cit., p. 76; on the need for harmonious interpretation, see Judgment of the European Court of Human Rights of 26 November, 2013, X v. Latvia, 27853/09, paras. 106, 94.

whether it would be appropriate to hear the child (and, as a rule, to answer this question in the affirmative)⁷⁸ or b) whether the child must always be heard, unless there are exceptions that justify not hearing the child.⁷⁹

It seems appropriate that a court should justify a decision that a hearing is not appropriate. This ensures that an effective appeal can be lodged against this decision.

7. When should a hearing not be held or the assessment of the appropriateness of a hearing be negative?

At this point, a few concluding thoughts should be made as to when an assessment of the appropriateness of a hearing of the child should be negative, or when a hearing of the child should not be held. Firstly, it should be noted that, due to the particular importance of the right to be heard for the child, the assessment of the appropriateness of the hearing should generally be positive or the appropriateness should be assumed.⁸⁰ It can then be stated that a hearing should not be held if the hearing itself would pose a risk to the child's best interests. One thing to keep in mind is that hearing the child can also have negative effects on them.⁸¹ This applies in particular to return proceedings under the 1980 Hague Convention, as children in such cases are affected by one or more changes of location, may have already witnessed numerous disputes between their parents, and may feel that they have to choose between their parents.⁸² However, one should not be too quick to assume that there is a risk that would prevent a hearing from being held. Rather, this should be understood as a call to take the appropriate measures. Furthermore, it is a right of

⁷⁸ See under 7.

⁷⁹ Such an exception could arise, for example, if the hearing itself posed a risk to the best interests of the child.

⁸⁰ On the special significance of the hearing of the child, see already 1. and 3.1.

⁸¹ Even entering a courtroom can be stressful for a child, see HEIDERHOFF B., *The Hearing of the Child in Custody Disputes and the Principle of Mutual Trust in the EU*, cit., p. 13.

⁸² PÉREZ-VERA E., *Explanatory Report on the 1980 Hague Convention*, cit., para. 30; SCHUZ R., *The Hague Child Abduction Convention. A Critical Analysis*, cit., p. 115.

the child to be heard, not an obligation.⁸³ “*Children need to be protected ‘in participation’ and not ‘from participation’.*”⁸⁴

8. *A judgment whose content is also valid for the 1980 Hague Convention Contracting States that are not ECHR Contracting States*

At first glance, the ruling is only relevant for courts in ECHR member states, as only these courts can violate Art. 8 of the ECHR by failing to review the appropriateness of a hearing. However, not all states that are parties to the 1980 Hague Convention are also parties to the ECHR.⁸⁵ This leads to the conclusion that courts in countries that have ratified the 1980 Hague Convention but are not Contracting States to the ECHR are not bound by the judgment of the ECtHR.

However, this reasoning falls short. Although courts in states that are not party to the ECHR are not directly bound by judgments of the ECtHR, the content of this judgment is still relevant to their courts. Looking at the reasoning of the ECtHR, it can be seen that the obligation to examine the appropriateness of a hearing of the child applies to all Contracting States to the 1980 Hague Convention. This is derived from Art. 12 of the CRC. In the presented ECtHR judgment, the ECtHR points out that the obligation to examine the appropriateness of the hearing also originates from Art. 12 of the CRC,⁸⁶ which states that children must always be heard in matters affecting them. The UN Convention on the Rights of the Child has

⁸³ UN COMMITTEE ON THE RIGHTS OF THE CHILD, *General Comment No. 12 – The right of the child to be heard*, cit., para. 16; SCHMAHL S., *NomosKommentar Kinderrechtskonvention mit Zusatzprotokollen*, cit., Art. 12 of the CRC, para. 11.

⁸⁴ SCHUZ R., *The Hague Child Abduction Convention. A Critical Analysis*, cit., p. 115.

⁸⁵ A Chart of signatures and ratifications of the ECHR can be found under <https://www.coe.int/en/web/conventions/full-list?module=signatures-by-treaty&treaty-num=005>, last accessed on 20 April 2026; for the 1980 Hague Convention see <https://www.hcch.net/en/instruments/conventions/status-table/?cid=24>, last accessed on 20 April 2026.

⁸⁶ Judgment of the European Court of Human Rights of 9 September, 2025, M.P. and Others v. Greece, 2068/24, paras. 100, 49.

been signed and ratified by all 1980 Hague Convention Contracting States (with the exception of the United States)⁸⁷ and thus has the same effect in all Contracting States to the 1980 Hague Convention (again with the exception of the United States). It has already been demonstrated that an *ex officio* hearing does not conflict with the burden of proof on the abductor under Art. 13 para. 1 lit. b of the 1980 Hague Convention. It can therefore be assumed that the intention of the legislator in all Contracting States of the 1980 Hague Convention is that a hearing (or review of the appropriateness of a hearing) should also be conducted *ex officio* in return proceedings under the 1980 Hague Convention. This is because it can be assumed that, by signing, the Contracting States actually wanted to be bound by both treaties and to behave in accordance with them thereafter.⁸⁸ Otherwise, there would be a contradiction with the signing and ratification of both international treaties.⁸⁹ Therefore, a harmonious interpretation of the 1980 Hague Convention and the UN Convention on the Rights of the Child requires a hearing to be held (or an examination whether a hearing is appropriate).⁹⁰

It should be noted at this point that the obligation to hear the child is unfortunately a toothless tiger. To this end, it is important to be aware of the difference between the European Convention on Human Rights and the UN Convention on the Rights of the Child: Obligations under the European Convention on Human Rights can be enforced through the ECtHR, but there is no such supranational court for the enforcement of the UN Convention on the Rights of the Child.

⁸⁷ The status table of the UN Convention on the Rights of the Child is available at https://treaties.un.org/pages/ViewDetails.aspx?src=IND&mtmsg_no=IV-11&chapter=4, last accessed on 20 April 2026.

⁸⁸ GRUBER U., *Methoden des internationalen Einheitsrechts*, Tübingen, 2004, p. 23.

⁸⁹ Thought from GRAMSCH K., *International-einheitsrechtliche Abgrenzungsnormen. Auslegung und Anwendung. Zugleich eine Untersuchung der Anwendbarkeit des UN-Kaufrechts auf Verträge über digitale Güter*, Tübingen, 2021, p. 8; MELIN P., *Gesetzesauslegung in den USA und in Deutschland. Historische Entwicklung, moderne Methodendiskussion und die Auswirkungen von Divergenzen für das internationale Einheitskaufrecht (CISG)*, Tübingen, 2005, p. 330.

⁹⁰ KRUGER T., MAOLI F., *The Hague Conventions and EU Instruments in Private International Law*, cit., p. 76 f.

An appeal must therefore be made to the national supreme courts to recognise and enforce this obligation to hear children in return proceedings. National legislators should clarify this obligation to hear children in their national law.⁹¹ The more countries that enforce this obligation within their borders, the sooner it will be applied uniformly. This could be promoted through exchanges between judges at conferences, for example, or by taking foreign court rulings into account when reaching a judgment.⁹²

9. Conclusions

The right to be heard is one of the most important rights of the child and is becoming increasingly significant. In its recent judgment in September, the ECtHR rightly strengthened this right by ruling that, in return proceedings under the 1980 Hague Convention, domestic courts must always examine *ex officio* whether it is appropriate to hear the child and that any negative decision must be justified. The criticism raised against this is not convincing. The right to be heard not only serves to establish the facts of the case, but is also the child's inherent right. This is so important for the child that it prevails over the burden of proof rule in Art. 13 para. 1 lit. b of the 1980 Hague Convention. However, this result is not problematic and does not undermine any fundamental principles of the 1980 Hague Convention. This is because only in exceptional cases a hearing alone is enough to conclude that a return cannot take place on the basis of Art. 13 para. 1 lit. b of the 1980 Hague Convention. Beyond the hearing, the burden of proof remains with the abducting parent. A harmonious interpretation of the ECHR and the 1980 Hague Convention is maintained. The assessment of whether a hearing is appropriate should generally be positive. Only in exceptional circumstances

⁹¹ For example, the EU legislator has already done so in Art. 26 of the Brussels IIter Regulation for child abductions between EU Member States.

⁹² Foreign judgments may be taken into account in the interpretation of the 1980 Hague Convention, see BEAUMONT P., MCELEAVY P., *The Hague Convention on International Child Abduction*, cit., p. 227; uniform application is only possible by taking foreign case law into account, see BEAUMONT P., MCELEAVY P., *The Hague Convention on International Child Abduction*, cit., p. 235.

should the assessment be negative. The negative decision must then be justified.

With this decision, the ECtHR has provided clarification for the ECHR Contracting States. Nevertheless, the content of the judgment is of great importance to all Contracting States to the 1980 Hague Convention. The obligation to examine the appropriateness of the hearing of the child arises not only from Art. 8 of the ECHR, but also from Art. 12 of the CRC, which has been ratified by all Contracting States to the 1980 Hague Convention (with the exception of the United States) and must therefore also be taken into account when interpreting the 1980 Hague Convention. Unfortunately, there is no supranational court for the UN Convention on the Rights of the Child that could enforce this obligation. It is therefore necessary to appeal to legislators and the supreme courts of the Contracting States to ensure clarity in their laws and to recognise and enforce the right of the child to be heard.

Judicial Powers in Promoting Mediation: A Paper Tiger or a Wolf in Sheep's Clothing?

Amber Boes

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1. Introduction

Since the implementation of the Mediation Directive,¹ European legal systems have further paved the way for mediation. While some legal systems like Belgium and France have adopted a rather comprehensive legal framework for mediation, others, like the Netherlands and England and Wales have not.² Nonetheless, within any legal system, judges are one of the most important actors in promoting the use of mediation. This reflects a paradigm shift in which the institutional coordination between courts and mediation is given greater emphasis and is more firmly anchored in civil procedural law.³ Andrews denominates this phenomenon of complex

¹ Directive 2008/52/EC of the European Parliament and of the Council of 21 May 2008 on certain aspects of mediation in civil and commercial matters, in *OJ* 136/3, 24.05.2008 (hereafter: Mediation Directive): this directive applies to cross border disputes in civil and commercial matters (art. 1.2 Mediation Directive). See also: Directive 2025/2647 of the European Parliament and of the Council of 16 December 2025 amending Directive 2013/11/EU on alternative dispute resolution for consumer disputes and amending Directives (EU) 2015/2302, (EU) 2019/2161 and (EU)2020/1828 following the discontinuation of the Europea Online Dispute Resolution Platform, *OJ* 30 December 2025.

² HOPT K.J., STEFFEK F., *Mediation. Principles and regulation in comparative perspective*, Oxford, 2013, p. 17-18.

³ Belgium: LANCKSWEERDT E., *Alternatieve geschillenoplossing. Bevorderd door de rechter*, in *Nieuw Juridisch Weekblad*, 2019, p. 273. France: JOLY-HURARD J., *Conciliation et médiation judiciaires*, Aix-En-Provence, 2003, p. 185.

interaction as “Civil Justice’s Double Helix”: “*The metaphor expresses the idea that the two strands – one consisting of ADR, including arbitration and mediation, and the other consisting of the court process – are complementary and entwined.*”⁴

The research question for this contribution is “*what different types of power do judges in domestic civil law cases hold to promote the use of mediation for resolving conflicts and to what extent is coercion accepted?*” To answer this research question, this contribution adopts a functional comparative law perspective.⁵ Functional equivalents of judicial powers to promote mediation are compared in the Belgian, French, Dutch and English (and Welsh) legal system. Where this is relevant, insights from other European legal systems are mentioned on an *ad hoc* basis.

After briefly considering what mediation entails, this contribution examines two kinds of powers judges have to promote it. Firstly, it discusses the power of courts to inform parties about the possibility of mediation and to inquire about previous attempts to settle their dispute. Secondly, it discusses the power of courts to order mediation, resulting in a so-called court annexed mediation. Within this type of power, a distinction is made depending on whether all parties freely consent to mediation or not. Particularly regarding this latter type – called “mandatory mediation” – the contribution adopts a critical perspective on the extent to which coercion may be justified.⁶ Therefor this contribution considers whether elements of coercion turn mediation into a wolf in sheep’s clothing or whether the lack thereof turns it into a paper tiger.

⁴ ANDREWS N., *Andrews on civil processes. Court proceedings, Arbitration & Mediation*, Cambridge, 2019, p. 6.

⁵ ZWEIGERT K., KOTZ H., *Introduction to comparative law*, Oxford, 1998, xxvi + 714 p.

⁶ A third type of judicial power to promote mediation consists of adverse cost sanctions. Especially in the English legal system this type of power is established. In principle the losing parties pays the costs of the winning party unless they unreasonably refused to attempt mediation. For this contribution, this power is discussed as a form of coercion in the frame of the power of judges to order mediation (*infra*, 3.2.2.2.). Nonetheless, this type of coercion may apply beyond the hypothesis of a court annexed mediation if one of the parties unreasonably refuses an offer to mediate before initiating legal proceedings. According to s. 44.4 (3) (a) (ii) CPR the court takes into account “*the efforts made, if any, before and during the proceedings in order to try to resolve the dispute*” when assessing the reasonable character of costs incurred.

2. Mediation

The Mediation Directive defines mediation as “a structured process, however named or referred to, whereby two or more parties to a dispute attempt by themselves, on a voluntary basis, to reach an agreement on the settlement of their dispute with the assistance of a mediator.”⁷ Both Belgium and France have introduced a definition of mediation in their Code of Civil Proceedings, as opposed to the Netherlands and England.⁸ In any case, there is a common understanding of the fundamental characteristics of mediation, like its voluntary nature, confidentiality, and the principle of self-determination. The mediator is a neutral, independent and impartial third party that is not in a position to impose a particular solution on the parties but rather facilitates the communication and negotiation process between them.⁹

Mediation is a form of Alternative Dispute Resolution (ADR), as it offers an alternative to legal proceedings. This is in line with the policy objective that litigation should be considered as an *ultimum remedium*. Accordingly, parties are increasingly expected to make reasonable efforts to avoid legal proceedings. This policy objective is not only pursued because of its potential to reduce the workload on the judiciary, but also because of the added value that mediation offers to disputing parties. It enables them to reach a solution for their conflict that aligns more with their interests, often more quickly and at lower cost, as compared to legal proceedings which are not always capable of filling in these needs.¹⁰ In this

⁷ Art. 3 Mediation Directive.

⁸ Belgium: art. 1723/1 Code of Civil Proceedings (hereafter: *Gerechtelijk Wetboek*). France: art. 1530 Code of Civil Proceedings (hereafter: *Code de Procédure Civile*). See also: Luxembourg: art. 1251-2 NCPC.

⁹ ESPLUGUES C., *General report* in ESPLUGUES C. and MARQUIS L., *New Developments in Civil and Commercial Mediation*, Cham, 2015, p. 12-13; HOPT K. and STEFFEK F., *Mediation. Principles and regulation in comparative perspective*, cit., p. 11-12.

¹⁰ Belgium: MvT bij wet van 18 juni 2018 houdende diverse bepalingen inzake burgerlijk recht en houdende wijziging van het *Gerechtelijk Wetboek* met het oog op de bevordering van alternatieve vormen van geschillenoplossing, KAMER, 2017-2018, 18 juni 2018, nr. 54-2919/001, 55; BOUDART A.-M., VANDER STOCK C., *L'arrêt de la Cour Constitutionnelle du 24 septembre 2020: la procédure contentieuse restera le 'plan B' (noot onder GwH 24 september 2020)*, in *JLMB*, 2021, (156) p. 156. England: art. 4.8 Practice Direction – Pre-action conduct and protocols; AHMED M., *Implied compulsory mediation*,

sense, it is more accurate, to understand the “A” in ADR as “Appropriate” Dispute Resolution.¹¹ This interpretation reflects a holistic approach towards conflict resolution, also known as process pluralism, by selecting the method that best fits the nature of the conflict, specific circumstances of the case and the needs of the parties involved.¹²

Despite the advantages of mediation both on a microlevel for the disputing parties as on a macrolevel for the judiciary and society as a whole,¹³ the number of mediations remains rather marginal as compared to the number of legal proceedings. This is called the “mediation paradox”. Some scholars therefore suggest “*that introducing a ‘mitigated’ form of mandatory mediation may be the only way to make mediation eventually happen in the EU.*” Examples of these mitigated forms of mandatory mediation are compulsory attendance at mediation information sessions or mandatory mediation with an opt-out possibility.¹⁴

in *Civil Justice Quarterly*, 2012, p. 156; RONEY J.H.B., *Alternative dispute resolution: a change in perception*, in *International Company and Commercial Law Review*, 1999, p. 329. France: Direction des affaires civiles et du scea, Circulaire du 19 juillet 2025, N° NOR JUSC2520914C, CIV/08/2025. EU : DE PALO, G., FEASLEY, A. and ORECCHINI, F., *Quantifying the cost of not using mediation – data analysis*, Brussels 2011; ZUCKERMAN, A., *Civil Justice in Crisis. Comparative perspectives of civil procedure*, Oxford, 1999, viii, p. 6-10.

¹¹ MENKEL-MEADOW, C., *Alternative and Appropriate Dispute Resolution in Context* in COLEMAN P., DEUTSCH M. and MARCUS E. (eds.), *The handbook of conflict resolution: theory and practice*, Hoboken – New Jersey, 2014, Chapter 50.

¹² MENKEL-MEADOW, C., *Peace and Justice: Notes on the Evolution and Purposes of Legal Processes*, in *Georgetown Law Journal*, 2006. Belgium: BOES, A., *The integration of mediation as part of a holistic framework for shareholder conflicts*, in *TMD*, 2023, 50-58; VOET, S., *Recht in balans. Pleidooi voor een meer holistisch (process)recht*, in *Tijdschrift voor Privaatrecht*, 2017, p. 623; VERBEKE, A.-L. and VERVAEKE, G., *Constructief omgaan met conflicten en geschillen*, Antwerp, 2023, p. 17. England: ANDREWS, N., *Andrews on civil processes. Court proceedings, Arbitration & Mediation*, cit., p. 4. See rational criteria put forward by SANDER, F. and GOLDBERG, S., *Fitting the forum to the fuss: a user-friendly guide to selecting an ADR procedure*, in *Negotiation Journal*, 1994.

¹³ STORME, M., *Algemene beginselen van behoorlijke procesvoering*, in *Algemene rechtsbeginselen*, Antwerp, 1991, p. 167.

¹⁴ DE PALO G., D’URSO L., TREVOR M., BRANON B., CANESA R., CAWYER B. and FLORENCE R., “*Rebooting” the mediation directive: assessing the limited impact of its implementation and proposing measures to increase the numbers of mediations in the EU*, Brussels, 2014, p. 163. See also: VILCHES SUCH V., VERBEKE A.L. and MENKEL-MEADOW C., *Mandatory Workplace Mediation* in BOLLEN K., EUWEMA M. and MUNDUATE L. (eds.),

3. Judicial powers to promote mediation

The role of judges is not limited to rendering judgments by applying the law to facts but also consists of reconciling parties and promoting the amicable resolution of disputes. The Belgian, French, and English Codes of Civil Proceedings have codified this pacifying mission.¹⁵ The Dutch Code of Civil Proceedings lacks an explicit provision asserting this pacifying mission. Yet it is considered part of what is called, “regievoering” or active case management as it is called in England. The goal of this concept is to improve the efficiency of legal proceedings while guaranteeing fair outcomes.¹⁶ Judges have wide discretionary powers to fill in this task. This allows them to consider all relevant circumstances of the case when promoting mediation. Yet it is challenging to fulfill this task in an appropriate manner as it raises tension between the two missions of the judge.¹⁷

These judicial powers can be categorized into two types. Firstly, judges may gather information about previous attempts at ADR and inform parties about the possibility thereto. Secondly, judges have the power to stay proceedings and refer parties to a mediator, eventually resulting in a court annexed mediation. Within this type of power, different sub-types emerge depending on the degree of coercion involved. These are presented on a gliding scale of coercion.

Advancing workplace mediation through integration of theory and practice, Cham, 2016, p. 145.

¹⁵ Belgium: art. 730/1, §1 Ger. W.. France: art. 21 CPC. England: art. 1.4 (e) CPR. See also: Germany: s. 278 ZPO.

¹⁶ The Netherlands: art. 19, tweede lid W. Rv.; AHSMANN M.J.A.M., *De regierol van de rechter*, Deventer, 2024, p. 391, 404, 454. England: articles 1.1 and 1.4 CPR.

¹⁷ SHAZ SHWEDER S., *Judicial limitations in ADR: The role of Ethics of Judges encouraging Settlements*, in *The Georgetown Journal of Legal Ethics*, 2007, 52. Also see: GENN, H., *Why the privatization of civil justice is a rule of law issue*, in F.A. Mann. *Lecture*, 2012, 15-16.

3.1. *Information*

3.1.1. *Providing information to litigants*

For the effective promotion of mediation, it is crucial that parties are adequately informed about the possibilities thereto. That is why legal actors, like lawyers, bailiffs and court experts¹⁸ play an important role in informing parties about the possibilities to resolve their conflicts through ADR. In the context of a Belgian study evaluating the Mediation Act of 2018, the lawyers surveyed indicated that they all comply with their legal obligation to provide information about ADR. Yet, the quality of this information strongly depends on their knowledge about possible forms of ADR and their attitude towards them.¹⁹ That is why it is important that also judges play an important role in providing adequate information about the possibilities and potential limitations to resolve disputes through ADR.²⁰

Judges may also outsource this task of providing information, for instance through mediation information sessions.²¹ Belgian law grants judges the power to adjourn the case to a fixed date, at the request of one of the parties or *ex officio* if they deem it useful. The adjournment of the case allows parties then to examine whether they can resolve their dispute, in whole or in part, amicably and to obtain further necessary information in this regard.²² The Chancery

¹⁸ Explicitly codified in the Belgian code of civil proceedings in articles: 444, 519 §4 and 977 Ger. W. See also: Italy: art. 4, 3. decreto legislativo 4 marzo 2010 attuazione dell'articolo 60 della legge 18 giugno 2009, n. 69, in materia di mediazione finalizzata alla conciliazione delle controversie civili e commerciali, nr. 28, *GU* 5 marzo 2010, nr. 53

¹⁹ ALOFS E. and VAN DONINCK J., *Bruggen bouwen*, Brussels, 2023, p. 40-41.

²⁰ Belgium: art. 730/1 Ger. W. The Netherlands: PEL M., *Professioneel verwijzen naar mediation* in BRENNINKMEIJER A., BONENKAMP, D., VAN OYEN K. and PREIN H. (eds.), *Handboek Mediation*, The Hague, 2017, p. 476.

²¹ EU: art. 5.1 Mediation Directive; JASPERS C., *Mandatory mediation from a European and comparative law perspective*, in BOELE-WOELKI K. and MARTINY D. (eds.), *Plurality and diversity of family relations in Europe*, Antwerp, 2019, p. 346-350. France: art. 225, 2° Civil Code. England: rules 3.5-3.10. Family Procedure Rules.: MIAM. See also: Poland: art. 183⁸, §4 Code of Civil Proceedings of 17 November 1964.

²² Art. 730/1, §2, 2. Ger. W.

Guide provides for a similar possibility of adjournment “[...] *to encourage and enable participation in an appropriate form of ADR* [...]”.²³

Belgian law regulates this possibility to adjourn the case further to avoid compromising the right to obtain a judicial solution within a reasonable period of time. The Belgian Council of State was concerned that this would jeopardize the right of access to a court within the meaning of Article 6 of the ECHR and that the administration of justice would be wrongly regarded as a subordinate alternative to amicable solutions.²⁴ Firstly, in principle, this adjournment may not exceed one month, unless the parties agree otherwise. This is to prevent the parties from requesting adjournment solely for the purpose of delaying proceedings. Secondly, judges retain a margin of discretion to assess the appropriateness of the adjournment. They may only order this measure if they consider that a settlement between parties is possible. Thirdly, the measure can only be ordered at the start of the proceedings, namely at the preliminary hearing or a hearing scheduled for a nearby date, in order to prevent a denial of justice. Finally, judges may only impose an adjournment once in the same dispute (first instance or appeal). The risk associated with adjournment is that it may prove to be an ineffective measure for promoting ADR, as it is perceived as a waste of time and therefore encounters resistance. For this reason, the legislator has excluded adjournment in summary proceedings.²⁵

3.1.2. *Collecting information from litigants*

Moreover, the Belgian Code of Civil Proceedings explicitly grants the power to judges to inquire parties about the previous at-

²³ The Business and Property Courts of England & Wales, Chancery Guide, 2022, p. 75.

²⁴ Advies bij wetsontwerp houdende diverse bepalingen inzake burgerlijk recht en houdende wijziging van het Gerechtelijk Wetboek met het oog op de bevordering van alternatieve vormen van geschillenoplossing, RAAD VAN STATE, 2017-2018, 4 oktober 2017, nr. 61.997-4, 548-549.

²⁵ Art. 730/1, §2, 3. Ger. W.; MvT bij wetsontwerp houdende diverse bepalingen in burgerlijke en gerechtelijke zaken, KAMER, 2022-23, 13 september 2022, 55-3552/001, 243.

tempts they made to resolve their dispute amicably in article 730/1 of the Code of Civil Proceedings.²⁶ Usually this takes place at the preliminary hearing. Parties should only inform about the conflict resolution method they attempted to. As mediation is a confidential process, parties should not reveal the content of their discussions or the reasons for ending it.²⁷ This inquiry provides the judge with information about whether parties are sufficiently aware of possibilities and potential of ADR and allows them to assess whether they have made reasonable efforts to resolve their dispute amicably.²⁸ Accordingly, the English Practice Direction – Pre-action Conduct expects parties to consider whether negotiation or some other form of ADR might enable them to settle their disputes without commencing proceedings.²⁹ Therefore, judges are entitled to ask the parties what they have undertaken in this way to avoid legal proceedings.³⁰ This possibility to inquire parties may not only shift responsibility to litigants to consider ADR before initiating legal proceedings, but also enables judges to provide the necessary information themselves where other judicial actors, such as lawyers, have failed to do so.

In the initial draft of article 730/1, the Belgian legislator provided for the possibility of imposing sanctions when parties fail to respond to these questions. Following the advice of the Legislative Section of the Council of State, the legislator revised this provision. The possibility of sanctions could give the impression that parties are always *compelled* to attempt alternatives prior to legal proceedings. The legislator then clarified that ADR has no preference over

²⁶ Belgium: art. 730/1, §2 Ger. W. France: art. 1533-1 *a contrario* CPC.

²⁷ Belgium: art. 1728 Ger. W.; England: AHMED M., *Implied compulsory mediation*, cit., p. 174.

²⁸ MvT bij wet houdende diverse bepalingen inzake burgerlijk recht en houdende wijziging van het Gerechtelijk Wetboek met het oog op de bevordering van alternatieve vormen van geschillenoplossing, KAMER, 2017-2018, 5 februari 2018, nr. 54-2919/001, 243; VAN LEYNSEELE, P., *La loi du 18 juin 2018: l'appel à la médiation ou le Waterloo de la médiation volontaire?*, in *Journal des Tribunaux*, 2018, p. 882.

²⁹ Art. 8-10 Practice direction – Pre-action conduct and protocols.

³⁰ AHMED M., *Implied compulsory mediation*, cit., 2012, p. 166.

legal proceedings.³¹ Whereas Belgian law currently does not explicitly impose any sanctions for failure to answer these questions, English case law adheres to the possibility to impose cost sanctions on parties that unreasonably refused to undertake an attempt to settle their dispute prior to commencing legal proceedings (*infra*, 3.2.2.2.).³²

3.2. Court annexed mediation

A second power judges hold in promoting mediation is referring the case to a mediator. In doing this, the judge considers and chooses jointly with one or more litigants to attempt mediation, discusses this option with them and may help them organize it, depending on the legal system.³³ This is how a “court annexed mediation” is set-up.³⁴ In the Belgian and French legal system, this type of mediation corresponds to two cumulative criteria. First, it presupposes that mediation takes place while legal proceedings are pending. Second, the judge appoints the mediator.³⁵ However concerning the latter, the appointment is sometimes outsourced to for instance the responsible of a public or private organization as it is the case in Italy³⁶ or left to the discretion of the parties as it is the case in England.³⁷

³¹ MvT bij wet van 18 juni 2018 houdende diverse bepalingen inzake burgerlijk recht en houdende wijziging van het Gerechtelijk Wetboek met het oog op de bevordering van alternatieve vormen van geschillenoplossing, KAMER, 2017-18, 5 februari 2018, 54-2919/001, 242.

³² S. 44.4 (3) (ii) CPR; ANDREWS N., *Andrews on civil processes. Court proceedings, arbitration & mediation*, cit., p. 796.

³³ PEL M., *Professioneel verwijzen naar mediation*, cit., p. 462.

³⁴ ESPLUGUES C., *General report*, cit., p. 37.

³⁵ Belgium : art. 1734, §1/1 Ger. W.; ALLEMEERSCH B., *Bemiddeling en verzoening in het burgerlijk proces*, in *Tijdschrift voor Privaatrecht*, 2003, 414. France: art. 1534-1, 1° CPC ; JOLY-HURARD, J., *Conciliation et médiation judiciaires*, cit., p. 76. See also the Netherlands : OK 7 November 2022, ECLI:NL:GHAMS:2022:3179.

³⁶ Artt. 1, d) and 8 decreto legislativo 4 marzo 2010 attuazione dell’articolo 60 della legge 18 giugno 2009, n. 69, in materia di mediazione finalizzata alla conciliazione delle controversie civili e commerciali, nr. 28, *GU* 5 marzo 2010, nr. 53.

³⁷ Parties may call upon mediation organizations, such as CEDR (Centre for Effective Dispute Resolution) for assistance in this regard.

Where mediation takes place in the frame of legal proceedings, judges continue to play a supervisory role. This entails first that the jurisdiction of the court is not affected. The judge remains at the disposal of the parties without actually being involved in the mediation.³⁸ This way the judge remains an active case manager and avoids mediation dragging on ineffectively.³⁹ Therefore judges may take all necessary provisional, protective or investigative measures like the appointment of an expert.⁴⁰ Furthermore, judges may adjudicate on all aspects of the case that remain unresolved by agreement between the parties. Finally, judges may either extend or end the mediation if they deem it appropriate.⁴¹

In all jurisdictions that this contribution covers, court annexed mediation originates from a praetorian practice.⁴² Judges have been a driving force in the promotion of ADR because they detected a real need for alternative forms of dispute resolution, especially in family law cases. Belgium and France eventually adopted a legal framework for mediation in general, in which their link with legal proceedings is also regulated.⁴³ In the Netherlands and England and Wales, court annexed mediation remains largely regulated by courts.⁴⁴

Court annexed mediation supposes typically a form of discretionary referral as opposed to categorical referral. The latter type obliges mediation for certain categories of disputes prior to initiating legal proceedings. Both Italy and France introduced this type of

³⁸ ALLEMEERSCH B., *Bemiddeling en verzoening in het burgerlijk proces*, cit., p. 446.

³⁹ AHSMANN M.J.A.M., *De regierol van de rechter*, cit., p. 409.

⁴⁰ Belgium: art. 19, 3. Ger. W. France: art. 1535-3, 2. CPC. the Netherlands: OK 2 November 2017, ECLI:NL:GHAMS:2017:4493.

⁴¹ Belgium: art. 1735, §3 Ger. W. France: art. 1534-4 and 1535-5 CPC. England: The Business and Property Courts of England & Wales, Chancery Guide, 2022, 75, 10.8.

⁴² Belgium: LIGOT, F., *Le pouvoir de conciliation du juge, la médiation et l'autorité des accords*, in *Annales du droit Louvain*, 1996, p. 102-103. France: JOLY-HURARD, J., *Conciliation et médiations judiciaires*, cit., p. 14-15.

⁴³ Belgium: Part VII of the Code of Civil Proceedings (Gerechtelijk Wetboek). In particular for court annexed mediation articles 1734-1737 Ger. W.. France: livre V Code de Procedure Civile. In particular for court annexed mediation articles 1531-1537-7 CPC.

⁴⁴ See for instance chapter 10 on Alternative Dispute Resolution in the Business and Property Courts of England & Wales Chancery Guide 2022.

categorical referral.⁴⁵ However, for court annexed mediation there is no so-called presumption in favor of mediation.⁴⁶ Judges *may* refer parties to mediation, if they are convinced that this is appropriate given the specific circumstances of the case.⁴⁷ This also entails that judges may refuse to refer parties to mediation, even if one or both parties request it.⁴⁸ This discretionary referral makes judges pivotal actors in promoting mediation. Judges become gatekeepers for ADR. This discretion demands efforts of judges to balance the right interests but should result in customized and therefore fairer referral.⁴⁹

3.2.1. Court annexed mediation by agreement of all parties

A court annexed mediation by agreement of all parties may take place at the request of the parties or at the suggestion of the judge. The first type of mediation is entirely in line with the principle of self-determination.⁵⁰ Despite initiating legal proceedings, parties

⁴⁵ SANDER F., *Another view of mandatory mediation*, in *Dispute Resolution Magazine*, 2007, p. 16. France: art. 750-1 CPC. Italy: art. 5.1 decreto legislativo 4 marzo 2010 attuazione dell'articolo 60 della legge 18 giugno 2009, n. 69, in materia di mediazione finalizzata alla conciliazione delle controversie civili e commerciali, nr. 28, *GU* 5 marzo 2010, nr. 53. See also England: Practice Direction 51ZE – Small claims track automatic referral to mediation pilot scheme.

⁴⁶ England: Court of Appeal (Civil Division) 11 May 2004, Halsey, Milton Keynes General NHS Trust, *Steel v Joy, Halliday*, [2004] EWCA Civ 576, 2004 WL 960979, consideration nr. 16.

⁴⁷ Belgium: art. 1734, §1 Ger. W. England: art. 1.4 (2), e) CPR; *Churchil v Merthyr Tydfil*, [2023] EWCA Civ 1416. France: art. 1533 en 1534 CPC. Italy: art. 5quater, 1. decreto legislativo 4 marzo 2010 attuazione dell'articolo 60 della legge 18 giugno 2009, n. 69, in materia di mediazione finalizzata alla conciliazione delle controversie civili e commerciali, nr. 28, *GU* 5 marzo 2010, nr. 53. EU: art. 5.1 Mediation Directive.

⁴⁸ Belgium: MEUWISSEN W., *De gerechtelijke bemiddeling (commentaar bij artikel 1735 Ger. W.)*, in *Artikelsgewijze commentaar. Gerechtelijk recht*, Mechelen, 2024, nr. 11. Contra: SENAËVE P., *Bemiddeling en collaboratieve onderhandelingen na de wetten van 15 juni, 18 juni en 11 juli 2018*, Mortsels, 2018, p. 128-129. France: DECKERT, *France in K.*, in STEFFEK F. and HOPT K. (eds.), *Mediation. Principles and regulation in comparative perspective*, Oxford, 2013, p. 466.

⁴⁹ SANDER, F., *Another view of mandatory mediation*, cit., p. 16.

⁵⁰ ALLEMEERSCH B., *Taakverdeling in het burgerlijk proces*, Antwerp, 2007, p. 605.

may still request the court to appoint a mediator.⁵¹ Also without a request, judges may suggest the possibility of mediation.⁵² Consequently, parties may agree or disagree to this suggestion.⁵³ The possibility for judges to suggest mediation to parties is mostly undisputed.⁵⁴ This is part of their above-mentioned pacifying mission or active case management powers.

The Dutch legal system strongly adheres to the requirement that all parties agree to mediation. The consent of all parties is considered a *conditio sine qua non* for court annexed mediation, as it is also the case in Poland, Germany, and Luxembourg.⁵⁵ They have always been very reluctant to any kind of coercion when it comes to mediation.⁵⁶ Nonetheless the Dutch Supreme Court (Hoge Raad) recently did recognize the legally binding force of a mediation clause. The High Council ruled that if a mediation clause stipulates an obligation to attempt mediation before initiating legal proceedings (or arbitration), the court may at the request of one of the parties stay the proceedings to give the parties the opportunity to fulfill their obligation. Nonetheless, the court may decide not to stay the proceedings, for example for reasons of urgency or because mediation would be pointless.⁵⁷ In the absence of a mediation clause,

⁵¹ Belgium: art. 1734, §1 Ger. W. France: art. 1528, 1528-1 CPC. England: Court of Appeal (Civil Division) 25 January 2017, Thakkar & ANR v Patel & ANR, [2017] EWCA Civ 117, 2017 WL 11884.

⁵² Belgium: art. 1734, §1, 1. Ger. W.. The Netherlands: Hoge Raad 20 januari 2006, ECLI:NL:HR:2006:AU3724; VAN BEUKERING-ROSMULLER, E.J.M., *Mediation in juridisch perspectief*, Deventer, 2024, p. 167. France: art. 1534 CPC; DECKERT K., *France*, cit., p.467; JAUDEL M. en FERAL-SCHUHL C., *La médiation*, Paris, 2025, p. 24. England: ANDREWS N., *Andrews on civil processes. Court proceedings, Arbitration & Mediation*, cit., 796. Germany: s. 278a, (1) ZPO.

⁵³ However, English law imposes a threat of adverse costs sanctions: Court of Appeal (Civil Division) 25 January 2017, Thakkar & ANR v Patel & ANR, [2017] EWCA Civ 117, 2017 WL 11884.

⁵⁴ Contra: the Netherlands: INGELSE, P., *Waar zit de weerstand?*, in *Tijdschrift Conflictantering*, 2012, p. 48.

⁵⁵ Poland: art. 183¹, §4 and 183⁸ Code of Civil Proceedings of 17 November 1964 (English translation). Germany: s. 278a ZPO. Luxembourg: art. 1251-12, (1) NCPC.

⁵⁶ Hoge Raad 20 January 2006, ECLI:NL:HR:2006:AU3724.

⁵⁷ Hoge Raad 12 July 2024, ECLI:NL:HR:2024:1078. Also in Belgium and in England judges may enforce a mediation clause by staying the proceedings: Belgium: art. 1725 Ger. W. England: s. 26.5 CPR; s. 49 3) Senior Courts Act 1981; Queen's Bench Di-

however, judges may still strongly recommend mediation to parties, thereby creating a perception of coercion. Despite the premise that they are free to mediate or not, parties may feel compelled to mediate against their will out of fear for negative consequences for their course of legal action.⁵⁸

The lack of a legal framework for mediation in the Netherlands may be a possible explanation for this reluctance to accept mandatory mediation. They only adopted a legal framework for cross-border mediation as is required by the Mediation Directive but not for domestic civil and commercial disputes.⁵⁹ In her conclusions to the High Council's judgment on the enforcement of a mediation clause, advocate general De Bock stated that compliance with a mediation clause cannot be sanctioned by the inadmissibility of the action, as is the case in France and in Italy. She argued that considering Article 6 ECHR a mediation clause cannot preclude access to the court. The advocate general indeed emphasized that "*it must be borne in mind that, unlike arbitration, mediation has no legal basis. A mediation process does not have to meet certain legal requirements and, unlike arbitration proceedings, is not accompanied by certain minimum safeguards [...] Furthermore, the profession of mediator has not yet been regulated by law, which means that there are no safeguards with regard to the person of the mediator either.*"⁶⁰ However, as will be demonstrated later (infra,

vision (Technology & Construction Court) 16 August 2019, Ohpen Operations UK Limited v. Invesco Fund Managers Limited, [2019] EWHC 2246 (TCC); Court of Appeal (Civil Division) 17 March 2023, Kajima Construction Europe (UK) Ltd & Anor v Children's Ark Partnership Ltd, [2023] EWCA Civ 292.

In France and in Italy judges may do so by declaring the claim inadmissible: France: Cass. 14 February 2003, Poiré v. Tripier, nr. 00-19.423, *Rev.Arb.* 2003/32, p. 403. Italy : art. 5sexies Decreto legislativo 4 marzo 2010 attuazione dell'articolo 60 della legge 18 giugno 2009, n. 69, in materia di mediazione finalizzata alla conciliazione delle controversie civili e commerciali, nr. 28, *GU* 5 marzo 2010, nr. 53.

⁵⁸ AHSMANN M.J.A.M., *De regierol van de rechter*, cit., p. 406.

⁵⁹ Wet implementatie richtlijn nr. 2008/52/EG betreffende bepaalde aspecten van bemiddeling/mediation in burgerlijke en handelszaken, *Staatsblad* 20 november 2012.

⁶⁰ Conclusions advocate general at the High Council, 26 January 2024, ECLI:NL:PHR:2024:103. France: Cass. 14 February 2003, Poiré v. Tripier, nr. 00-19.423, *Rev.Arb.* 2003/32, p. 403. Italy: art. 5sexies Decreto legislativo 4 marzo 2010 attuazione dell'articolo 60 della legge 18 giugno 2009, n. 69, in materia di mediazione finalizzata alla conciliazione delle controversie civili e commerciali, nr. 28, *GU* 5 marzo 2010, nr. 53

3.2.2.2), in England the courts were a driving force in the development of mandatory mediation, despite the lack of an extensive legal framework for mediation.

3.2.2. *Mandatory mediation*

Mandatory mediation implies that the power of judges reaches further than merely suggesting parties to first attempt mediation or asking them to at least considerate it. On the contrary, this implies that some form of coercion is involved. There are different types of coercion, going from direct to indirect forms. The former type of coercion consists of an explicit order to *attempt* mediation, while the latter penalizes parties for not attempting mediation, for instance through cost sanctions.⁶¹ It is true that coercion within court annexed mediation comes in many ways and forms. This contribution addresses three types of mandatory court annexed mediation in three different jurisdictions.⁶²

3.2.2.1. *Belgium: court ordered mediation unless all parties disagree*

The mediation Act of June 18, 2018, has strengthened the power of judges to promote mediation in the Belgian legal system.⁶³ It introduced the possibility for judges to order mediation without the agreement of all parties involved (supra, 3.2.1.). Only if all parties oppose to mediation, judges have no authority to impose it.⁶⁴ Originally the Belgian legislator intended to go even further as the proposal did not require the approval of *any* party. However, this proposal met strong opposition from parliament, judges, lawyers, and

⁶¹ HENSEN, W., *Gerechtelijke bemiddeling*, Brugge, 2018, 375.

⁶² See also: Italy: art. 5.1 decreto legislativo 4 marzo 2010 attuazione dell'articolo 60 della legge 18 giugno 2009, n. 69, in materia di mediazione finalizzata alla conciliazione delle controversie civili e commerciali, nr. 28, *GU* 5 marzo 2010, nr. 53.

⁶³ Wet van 18 juni 2018 houdende diverse bepalingen inzake burgerlijk recht en bepalingen met het oog op de bevordering van alternatieve vormen van geschillenoplossing, *BS* 2 juli 2018.

⁶⁴ Art. 1734, §1, 2. Ger. W.

mediators because it was considered an excessive restraint on the voluntary nature of mediation.⁶⁵ That is why the current provision requires the approval of *at least one of the parties* to order mediation.

The law adds two more rules for this court ordered mediation. First, judges have to hear the parties on this issue. Secondly, the judge must ensure that the reasonable time limit for obtaining a court decision is not compromised.⁶⁶ This second condition was recently amended by the Act of May 15, 2024.⁶⁷ Before that, the possibility for court ordered mediation was limited in time to reduce delays in the administration of justice. A court order to mediate was only possible at the preliminary hearing, a hearing at which the preliminary hearing was adjourned, or at a hearing scheduled no later than the last day of the month following that in which the defendant's first conclusions were filed. Now by framing the possibility of referral with an open standard in the procedure, the legislator has given judges more power to assess the appropriateness of mediation.

The Legislative Section of the Council of State issued a negative advice on this form of court ordered mediation because it would be at odds with not only the right to a fair trial in the sense of article 6 ECHR but also the voluntary basis that is fundamental to mediation. The Council of State believes that court ordered mediation “*undermines the entire philosophy underlying the legitimacy and efficiency of using mediation in an attempt to find a solution to a dispute that has arisen between the parties with regard to their civil rights and obligations.*”⁶⁸ According to the Council of State the

⁶⁵ ALOFS E. and VAN DONINCK J., *Bruggen bouwen*, Brussels, 2023, p. 53; RENSON P.-P., *L'avocat, le juge, le notaire et la médiation : quand la réalité dépasse la fiction* in DAMBLY P., JACUBOWITZ E., RENSON P.-P., UYTENDAELE N. and VEROUGSTRAETE I. (eds.), *Etats généraux de la médiation*, 2025, p. 80 ; WIJNANT, T., *Bemiddeling in balans*, Antwerp, 2021, p. 664-666.

⁶⁶ Art. 1734, §1, 2. Ger. W.

⁶⁷ Art. 86 wet van 15 mei 2024 houdende bepalingen inzake digitalisering van justitie en diverse bepalingen II, *BS* 28 mei 2024.

⁶⁸ Raad van State, advies bij wetsontwerp houdende diverse bepalingen inzake burgerlijk recht en houdende wijziging van het Gerechtelijk Wetboek met het oog op de bevordering van alternatieve vormen van geschillenoplossing, 4 oktober 2017, nr. 61.997-4, p. 551.

legal principle that one is entitled to assert civil rights through effective legal proceedings must in any case prevail. This implies primacy of legal proceedings over alternatives like mediation. For this reason, the Council of State reproaches the legislator for unduly making legal proceedings an alternative to mediation.⁶⁹ In other words, the Council of State considers ADR strictly as an alternative to legal proceedings but not as *Appropriate* Dispute Resolution, (*supra*, 2). Also some legal scholars are critical about this court ordered mediation because of interference with its voluntary basis. Moreover this measure, that aimed at shifting mentalities towards mediation, could have a negative effect if the practice of referral acquires a bad reputation, amounting to the paradox of mandatory mediation.⁷⁰ By contrast, other legal scholars believe some form of coercion is necessary in order to reverse the so-called mediation paradox (*supra*, 2).⁷¹

Despite this negative advice, the Belgian legislator firmly opted for court ordered mediation, albeit accompanied by the earlier described guarantees. For the Belgian legislator both the right to access to justice and mediation's voluntary nature are guaranteed as long as parties are free to end it whenever they think it is fit and it does not affect the core of the right to a fair trial. Accordingly article 1729 of the Belgian Code of Civil Proceedings stresses that parties are free to end mediation at all times, without any negative consequences. In other words, freedom to exit is crucial as opposed to freedom to enter mediation.⁷²

⁶⁹ Raad van State, advies bij wetsontwerp houdende diverse bepalingen inzake burgerlijk recht en houdende wijziging van het Gerechtelijk Wetboek met het oog op de bevordering van alternatieve vormen van geschillenoplossing, 4 oktober 2017, nr. 61.997-4, p. 551-552.

⁷⁰ WIJNANT, T., *Verplichte doorverwijzing naar bemiddeling: we can lead a horse to water, but can we make it drink?*, in *TMD*, 2018, p. 79.

⁷¹ DE PALO, G., D'URSO L., TREVOR M., BRANON B., CANESSA R., CAWYER B. and FLORENCE R., "*Rebooting*" the mediation directive: assessing the limited impact of its implementation and proposing measures to increase the number of mediations in the EU, cit., p. 1, 7-8 and 144. VAN LEYNSEELE, P., *La loi du 18 juin 2018: l'appel à la médiation ou le Waterloo de la médiation volontaire ?*, cit., p. 878.

⁷² MvT bij wetsontwerp houdende diverse bepalingen inzake burgerlijk recht en houdende wijziging van het Gerechtelijk Wetboek met het oog op de bevordering van alternatieve vormen van geschillenoplossing, KAMER, 2017-2018, 5 February 2018, nr. 54-2919/001, 255.

Yet, the law mitigates this possibility for mandatory court ordered mediation in situations of (suspected) violence between litigants. The reason is that the Council of Europe Convention on preventing and combating violence against women and domestic violence (the Istanbul Convention) obliges ratifying states to take measures to prevent mandatory participation in alternative dispute resolution, like mediation, in case of violence.⁷³ Belgium implemented this Convention by Act of November 6, 2022.⁷⁴ Whenever there are serious indications of violence, threats or any other form of pressure between parties, judges must ensure that the victim freely consents to mediation. For that matter, judges must hear the victim in chambers in absence of the other party and obtain their explicit consent. The law is very broadly formulated. The obligation applies to a broad concept of violence, including indications thereof, and is not gender related. Yet this legislation is considered symbolic with limited practical added value. After all, careful and reasonable judges will not use their discretionary power to promote or order mediation in situations of violence.⁷⁵

3.2.2.2. *England and Wales: evolvment from indirect coercion in the form of costs sanctions to direct coercion in the form of order for mediation*

According to the previous version of art. 1.4 of the Civil Procedure Rules, active case management included merely “*encouraging the parties to use an alternative dispute resolution procedure if the court considers that appropriate and facilitating the use of such procedure.*” At first sight, there seemed to be no form of coercion implied. However, it follows from *Dunnet v Railtrack* that an un-

⁷³ Council of Europe Convention on preventing and combating violence against women and domestic violence, 11 May 2011, *Council of Europe Treaty Series*, nr. 210.

⁷⁴ Wet van 6 November 2022 teneinde te waarborgen dat de slachtoffers van geweld vooraf hebben ingestemd met een bemiddeling, een verzoening of een verwijzing naar een kamer voor minnelijke schikking, *BS* 21 November 2022.

⁷⁵ Art. 5.72 Civil Code; SENAËVE P., *Bemiddeling, verzoeningspoging en minnelijke schikking tussen dader en slachtoffer van geweld. Commentaar bij de wet van 6 november 2022*, in *Tijdschrift voor Familierecht*, 2023, p. 9.

reasonable refusal of the court's suggestion to participate in ADR may result in an adverse costs decision. The judge could take into account the parties' behavior to reverse the principle that the unsuccessful party bears the legal costs of the successful party if the latter unreasonably refused to attempt ADR.⁷⁶ Although Railtrack was successful at first instance, the court of appeal refused to award them legal costs. The court did not accept Railtrack's argument that they wanted to avoid additional costs caused by mediation which was suggested by the court. This argument was considered a misunderstanding of the purpose of mediation: "*Skilled mediators are now able to achieve results satisfactory to both parties in many cases which are quite beyond the power of lawyers and courts to achieve. This court has knowledge of cases where intense feelings have arisen, for instance in relation to clinical negligence claims. But when the parties are brought together on neutral soil with a skilled mediator to help them resolve their differences, it may very well be that the mediator is able to achieve a result by which the parties shake hands at the end and feel that they have gone away having settled the dispute on terms with which they are happy to live. A mediator may be able to provide solutions which are beyond the powers of the court to provide. [...]*" Because of the threat of cost sanctions, some form of indirect or implied compulsory mediation emerged.⁷⁷ This mandatory mediation even reached beyond court annexed mediation. Cost sanctions may also be awarded for unreasonable refusals to mediate prior to initiating legal proceedings.⁷⁸

The court of appeal in *Halsey v Milton Keynes General NHS Trust* further elaborated the principle laid down in *Dunnet v Railtrack*.⁷⁹ In this decision the court answered the question "*when should the court impose a costs sanction against a successful liti-*

⁷⁶ Art. 44.2 (2) (a), (b) en (4) (a) CPR; Court of Appeal (Civil Division) 22 February 2002, *Susan Dunnett v Railtrack Plc*, [2002] EWCA Civ 303, 2002 WL 45445.

⁷⁷ AHMED M., *Implied compulsory mediation*, cit., p. 151-175.

⁷⁸ S. 44.4 (3) (a) (ii) CPR; ANDREWS N., *Andrews on civil processes. Court proceedings, arbitration & mediation*, cit., p. 796

⁷⁹ Court of Appeal (Civil Division) 11 May 2004, *Halsey, Milton Keynes General NHS Trust, Steel v Joy, Halliday*, [2004] EWCA Civ 576, 2004 WL 960979.

*gant on the grounds that he has refused to take part in an alternative dispute resolution (“ADR”)?”⁸⁰ The court developed a list of six factors, which are neither exhaustive nor decisive, that may be relevant in assessing whether a party (un)reasonably refused to attempt ADR. A first element to consider is the nature of the dispute. The court acknowledges that most disputes are suitable for ADR, unless there is a need for precedent or some kind of remedy, like injunctive relief to safeguard the legal position of the party.⁸¹ Secondly, the court cites the merits of the case as an element to be taken into consideration: “[...] *the fact that a party reasonably believes that he has a watertight case may well be sufficient justification for a refusal to mediate.*”⁸² A third factor is whether previous attempts for amicable settlement have been made. However, it is more correct to consider whether there is added value in the assistance of a neutral, third party facilitating communication and between conflicting parties, as the court also pointed out in *Dunnet v Railtrack*.⁸³ Further, the costs of mediation are a factor to be taken into account. After all, these may be disproportionately high in relation to the stakes of the dispute. The court emphasized that “*A mediation can sometimes be at least as expensive as a day in court.*”⁸⁴ The court also considered the impact of mediation on the delay of legal proceedings.⁸⁵ Finally, the court considered whether ADR had a reasonable prospect of success.⁸⁶*

In *Halsey* the court also addressed the question whether judges can force parties to attempt mediation (*obiter dictum*). Although it was accepted that judges could (strongly) encourage parties to do so, they could not impose mediation as this would violate their right to a fair trial in the sense of article 6 ECHR. This case law immediately had a chilling effect on the active encouragement of

⁸⁰ *Cit.*, nr. 2.

⁸¹ *Cit.*, nr. 17.

⁸² *Cit.*, nr. 18-19.

⁸³ *Cit.*, nr. 20.

⁸⁴ *Cit.*, nr. 21.

⁸⁵ *Cit.*, nr. 22.

⁸⁶ *Cit.*, nr. 23.

mediation by courts, as was envisaged by the Woolf Reforms.⁸⁷ The fact that on the one hand judges could not impose mediation as part of their active case management powers, but on the other hand could impose severe cost sanctions *a posteriori*, caused not only legal uncertainty but also shifts the responsibility to promote ADR as part of the overriding objective entirely from judges to the parties.

In 2021 the Civil Justice Council departed from this reluctance towards the power to force parties to attempt ADR. They published a report arguing that parties can lawfully be compelled to participate in ADR, provided certain factors are borne in mind.⁸⁸ Accordingly, in the landmark case of *Churchill v Merthyr Tydfil* English case law departed from the controversial line of reasoning that had emerged from *Halsey*, *Milton Keynes General NHS Trust*, *Steel v Joy*, *Halliday*.⁸⁹ Sir Geoffrey Vos explained why judges are *ex officio* empowered to stay proceedings and order parties to attempt ADR: “[...] *the court can lawfully stay proceedings for, or order, the parties to engage in a non-court-based dispute resolution process provided that the order made: (a) does not impair the very essence of the claimant’s right to a fair trial, (b) is made in pursuit of a legitimate aim, and (c) is proportionate to achieve that legitimate aim.*”⁹⁰ The exercise of this power is at the discretion of the judge and is part of their active case management powers. In this regard it should be taken into consideration that the order to attempt ADR does not detract from the essence of the right to obtain a judicial hearing of the case and is proportionate to the achievement of the

⁸⁷ AHMED M., *Revisiting compulsory alternative dispute resolution in the English system*, in *Civil Justice Quarterly*, 2024, p. 266.

⁸⁸ For instance: “*the cost and time burden on the parties; whether the process is particularly suitable in certain specialist areas of civil justice; the importance of confidence in the ADR provider (and the role of regulation where the provider is private); whether the parties engaged in the ADR need access to legal advice and whether they have it; the stage(s) of proceedings at which ADR may be required; and whether the terms of the obligation to participate are sufficiently clear to the parties to encourage compliance and permit enforcement.*” (CIVIL JUSTICE COUNCIL, *Compulsory ADR*, 2021, p. 4-5).

⁸⁹ Court of appeal (civil division) 29 november 2023, *Churchil v Merthyr Tydfil*, [2023] EWCA Civ 1416.

⁹⁰ *Cit.*, nr. 54.

overriding objective of resolving disputes fairly, quickly, and at reasonable cost.⁹¹

Following, mediation was stronger embedded in civil procedures. For instance, the Chancery guide now stipulates that parties may be compelled to participate in ADR.⁹² Further, article 1.4 (e) CPR was amended by amendment nr. 3 of July 29, 2024. Besides the power to encourage it, it granted judges the power to *order* the parties to use alternative dispute resolution.⁹³

3.2.2.3. France: order to follow an information session and civil fine

French law distinguishes between on the one hand a mandatory mediation and on the other hand a mandatory information session on mediation.⁹⁴ The law does not allow for the first type of referral. To refer the case to mediation, litigants must give their consent.⁹⁵ However, article 1533 CPC codifies the latter type of referral. It stipulates that the judge may order parties to meet with a mediator who will inform them about the purpose and the procedure of mediation. The idea behind the information session is to enable parties to decide for themselves whether they wish to engage in mediation and therefor aims to safeguard the fundamental voluntary basis of mediation.⁹⁶ Following the information session, they can decide whether to initiate out-of-court mediation, request for court an-

⁹¹ *Cit.*, nr. 65-66.

⁹² The Business and Property Courts of England & Wales, Chancery Guide, 2022, p. 75, nr. 10.9.

⁹³ Art. 3, (2) amendment Nr. 3 Civil Procedure Rules, CIVIL PROCEDURE RULE COMMITTEE, 2023-2024, 29 July 2024, nr. 839; Chancery Division 21 November 2024, DKH Retail Limited, C-Retail Limited, Supergroup Internet Limited, Superdry Plc v City Football Group Limited, [2024] EWHC 3231 (Ch), 2024 WL 05323482; Chancery division (High Court of Justice Business and Property Courts in Bristol Property, Trusts and Probate List (ChD) 12 September 2025, Paul Ivey, Treve Ivey, Christopher Ivey, Geraldine Bolton v Susan Mari Lythgoe, Janice Mary Piper Trust Inheritance Limited, [2025] EWHC 2325, 5ch), 2025 WL 02633058.

⁹⁴ See also art. 5.1 Mediation Directive.

⁹⁵ Art. 1534 CPC.

⁹⁶ JAUDEL M. en FERAL-SCHUHL C., *La médiation*, cit., p. 385.

nexed mediation or continue the proceedings on the merits. Interestingly, the law stipulates a fourth option, by which the judge takes a 2-in-1 decision. The judge then orders a court annexed mediation provided that the mediator receives the consent of the parties after the mandatory information session. By anticipating the consent of the parties to mediate, the legislator wants to avoid a useless multitude of court decisions.⁹⁷

The mandatory nature of the information session is stressed by the possibility to sanction a party that did not attend it without legitimate reason. French law stipulates that parties may then incur a civil fine up to €10.000. The mediator is compelled to inform the judge of the absence of a party from the session. Therefor the law expressly stipulates that this information is not covered by the confidentiality that applies in principle to everything what is said, written or done in mediation.⁹⁸ This form of coercion is said to have contributed to the development and the success of mediation in France.⁹⁹

However, this distinction between a mandatory information session and mandatory mediation is somewhat artificial and paradoxical. The French legislator implemented quite a far-reaching form of coercion into mediation, particularly when compared with the approach adopted by the Belgian legislator. In any case the fundamental voluntary basis entails that the freedom to exit mediation is at all times guaranteed.¹⁰⁰ Article 1729 of the Belgian Code of Civil Proceedings codifies this principle and stipulates that parties can end the mediation at all times without this being to their detriment. In other words, even if Belgian law does allow for mandatory mediation as opposed to French law, it cannot go beyond an initial session in which the mediator explains the purpose and process of

⁹⁷ Circulaire du 19 juillet 2025, DIRECTION DES AFFAIRES CIVILES ET DU SCEAU, N° NOR JUSC2520914C, N°/CIRC CIV/08/2015, 11 ; JAUDEL, M. en FERALSCHUHL, C., *La médiation*, Paris, 2025, p. 386.

⁹⁸ Art. 1528-3 and 1533-1 CPC.

⁹⁹ VERT, F., *Médiation, conciliation, audience de règlement amiable : vers un office conciliatoire effectif du juge Français ?*, in *La Semaine Juridique*, 2023, p. 26.

¹⁰⁰ Consideration 13 Mediation Directive; ECJ 14 juni 2017, Livio Menini, Maria Antonia Rampanelli t Banco Popolare Società Cooperativa, C-75/16, consideration nr. 51.

mediation.¹⁰¹ This is functionally equivalent to the French mandatory information session. Furthermore, Belgian law does not impose any specific sanctions for parties failing to attend a mediation session, unlike French or English law. Indeed, it happens that mediation is not even initiated after a referral, just like is the case in the Netherlands.¹⁰²

3.2.2.4. *Gliding scale of coercion*

Conclusively, there is a tendency for the promotion of mediation to be accompanied by greater coercion across legal systems. The question then is how this coercion relates to the fundamental voluntary basis of mediation.¹⁰³ The exact meaning and scope of this fundamental principle is debated. The debate boils down to the question whether the voluntary basis of mediation entails freedom to enter and/or exit mediation. This question gave rise to two schools of thought.¹⁰⁴ According to one school of thought, this entails that parties are at all times free to end mediation and to (dis)agree to a mediated settlement. According to another school, however, this is only one aspect of what this fundamental basis entails. Moreover, the choice to resort to mediation should be free and sustained.

The Court of Justice of the European Union adheres to the first school of thought. According to the Court article 6 ECHR does not

¹⁰¹ Art. 1731, 1. Ger. W..

¹⁰² Court of Appeal Antwerp 8 February 2024, *TRV-RPS* 2024, p. 273.

¹⁰³ QUEK D., *Mandatory mediation: an oxymoron? Examining the feasibility of implementing a court-mandated mediation program*, in *Cardozo J. of Conflict Resolution*, 2010.

¹⁰⁴ Art. 1729 Ger. W.. HEDEEN T., *Coercion and self-determination in courtconnected mediation: all mediations are voluntary but some are more voluntary than others*, in *The Justice System Journal*, 2005, p. 276-285; QUEK, D., *Mandatory mediation: an oxymoron? Examining the feasibility of implementing a court-mandated mediation program*, cit., p. 485: coercion “into” vs. coercion “within” mediation; SIDOLI DEL CENO J., *Compulsory Mediation: Civil Justice, Human Rights and Proportionality*, in *International Journal of Law in the Built Environment* 2014, p. 289; VILCHES SUCH V., VERBEKE A.L. and MENKEL-MEADOW C., *Mandatory Workplace Mediation* in BOLLEN K., EUWEMA M. and MUNDUATE L. (eds.), *Advancing workplace mediation through integration of theory and practice*, Cham, 2016, p. 157 and 166.

necessarily oppose to an attempt to achieve an out-of-court settlement as a mandatory condition for the admissibility of an action before the courts. However, this supposes that “*that procedure does not result in a decision which is binding on the parties, that it does not cause a substantial delay for the purposes of bringing legal proceedings, that it suspends the period for the time-barring for claims and that it does not give rise to costs – or gives rise to very low costs – for the parties, and only if electronic means is not the only means by which the settlement procedure may be accessed and interim measures are possible in exceptional cases where the urgency of the situation so requires.*”¹⁰⁵

Based on these insights, the order to mediate can only be understood as imposing an obligation to attempt mediation, but never an obligation to continue mediation and reach an agreement. Similarly, a mediation clause, entails two types of obligations according to Belgian law. The first one is an obligation to attain a certain result (“*resultaatsverbintenis/obligation de résultat*”), namely undertake an attempt to mediate. A second one is an obligation of means (“*inspanningsverbintenis/obligation de moyens*”), namely, to mediate in good faith and attempt to reach an agreement. Not attaining the first obligation to undertake an attempt to mediate constitutes a fault giving rise to liability.¹⁰⁶ Conclusively, the voluntary basis does not preclude a form of coercion that obliges litigants to attempt mediation and therefore at least once meet with a mediator, preferably in person but possibly by representation.

According to Quek, only the reunion of three factors could pose an impediment to the voluntary basis of mediation. First, the referral to mediation should be discretionary as opposed to categorical. As explained above, this is true for all jurisdictions covered in this

¹⁰⁵ Judgment of the Court (Fourth Chamber) of 18 March 2010, Rosalba Alassini v Telecom Italia SpA and others, case C-317/08 and others. Also: Judgment of the Court (First Chamber) of 14 June 2017, Livio Menini, Maria Antonia Rampanelli v Banco Popolare Società Cooperativa, C-75/16.

¹⁰⁶ Belgium: art. 5.72, 2. Civil Code; ANDRIES K., *Het bemiddelingsbeding nader bekeken* in WEYTS L. and CASTELEIN C. (eds.), *Notariële blikvangers*, Antwerp, 2007, p. 101. The Netherlands: VAN BEUKERING-ROSMULLER E., *Mediation in juridisch perspectief*, cit., p. 174-175. France: JARROSON C., *La sanction du non-respect d'une clause instituant un préliminaire obligatoire de conciliation ou de médiation : note Cour de Cassation 6 juillet 2000*, in *Revue de l'Arbitrage*, 2001.

contribution. It is true that this should ensure a fairer and more considered referral policy. However, there is a risk that judges are not sufficiently trained to exercise their discretion properly and therefore resort to automatic referrals. Therefore, the training of judges is crucial to turn them into professional referrers¹⁰⁷ and gatekeepers for *Appropriate* Dispute Resolution.

Secondly, the imposition of excessive penalties for refusing to mediate puts the voluntary nature of mediation under pressure. In this regard, only the English and French legal system provide for the possibility of imposing financial sanctions, in the form of either adverse costs decisions or civil fines.¹⁰⁸ The question then is to what extent these sanctions could be considered 'excessive'. In any case, the amount is measurable in advance as it refers either to the costs of legal proceedings or a maximum of €10.000. However English courts are tied to the (sometimes substantial) costs of legal proceedings, even though they have discretion to adverse the costs partially.¹⁰⁹ Moreover both the English and the French sanction mechanism do not apply if parties justify a reasonable or legitimate reason to refuse mediation.

Finally, a third risk factor for the voluntary basis is the excessive monitoring of the parties' behavior during mediation. The principle of confidentiality is therefore fundamental to mediation. This entails *inter alia* that all documents or communications in the context of mediation purposes are covered by confidentiality and cannot be used as evidence in legal or arbitration proceedings.¹¹⁰ However,

¹⁰⁷ PEL M., *Professioneel verwijzen naar mediation*, cit., p. 462.

¹⁰⁸ See also: Italy: art. 12bis - 13 decreto legislativo 4 marzo 2010 attuazione dell'articolo 60 della legge 18 giugno 2009, n. 69, in materia di mediazione finalizzata alla conciliazione delle controversie civili e commerciali, nr. 28, *GU* 5 marzo 2010, nr. 53.

¹⁰⁹ Court of Appeal (Civil Division) 25 January 2017, *Thakkar & ANR v Patel & ANR*, [2017] EWCA Civ 117, 2017 WL 11884: 75%.

¹¹⁰ EU: art.7 and consideration nr. 23 Mediation Directive. Belgium: art. 1728 Ger. W.. France: art. 1528-3 CPC. The Netherlands: art. 7 code of ethics MfN. England: Without prejudice privilege: House of Lords 3 November 1988, *Rush & Tompkins Ltd v Greater London Council* 1989, [1989] AC 1280; Supreme Court 27 October 2010, *Oceanbulk Shipping & Trading SA v TMT Asia Limited and others*, [2010] UKSC 44, 2010 WL 4180765; King's Bench Division (Commercial Court) 9 August 2024, *The Pentagon Food Group Limited; Khan Estates Limited, Ashfaq Khan v B Cadman Limited*, [2024] EWHC 2513 (Comm), 2024WL 04394603, nr. 60. Italy: art. 9 -10 decreto legislativo 4 marzo 2010 attuazione dell'articolo 60 della legge 18 giugno 2009, n. 69, in materia di

the French Code of Civil Proceedings stipulates an exception to this principle by exempting the presence or absence of parties during the mediation information session from the duty of confidentiality. The mediator has to inform the judge about this.¹¹¹ Moreover, article 1535-4 CPC obliges the mediator to keep the judge informed of any difficulties encountered in the performance of his task. While the first exemption to confidentiality enhances the enforceability of the injunction to follow an information session, the latter seems to be at odds with the principle of confidentiality.¹¹²

4. Conclusion

Conclusively, some form of coercion in a court annexed mediation scheme does not necessarily oppose to the fundamentally voluntary basis of mediation.¹¹³ In other words, coercion should not be equated to a wolf in sheep's clothes. However, mandatory (court annexed) mediation is merely a paper tiger without the possibility to sanction the obligation to undertake at least one mediation attempt. Even though the Belgian amendment that introduced the possibility of mandatory court annexed mediation, met a lot of criticism and was deemed going to far in "*shaking the sacred house of voluntarism to its foundations*"¹¹⁴, legal comparison demonstrates that this type of coercion risks being not sufficiently effective. Judges must be given means to enforce an order to attempt mediation, as is the case in France and in England. At first glance, Belgian civil procedure law offers various possibilities for enforcing an order for court annexed mediation. Following the English adverse costs decision, article 1017, 1. of the Belgian Code of Civil Proceedings allows to impose the unnecessary costs to the party that caused them by mistake. Following the French civil fine, arti-

mediazione finalizzata alla conciliazione delle controversie civili e commerciali, nr. 28, *GU* 5 marzo 2010, nr. 53

¹¹¹ Art. 1533-1, 1533-3 CPC.

¹¹² JAUDEL M. and FÉRAL-SCHUHL C., *La médiation*, cit., p. 370-371.

¹¹³ QUEK D., *Mandatory mediation : an oxymoron? Examining the feasibility of implementing a court-mandated mediation program*, cit., p. 491.

¹¹⁴ WIJNANT T., *Bemiddeling in balans*, Antwerp, 2021, p. 664

cle 780bis, 1. of the Belgian Code of Civil Proceedings allows to impose a civil fine on the party that uses legal proceedings for manifestly delaying or for unlawful purposes.¹¹⁵ However, further and thorough research is required to determine if these sanctions are appropriate for enforcing an order to mediate and to what extent they are capable of protecting both private interests of litigating parties, as public interests of the judiciary and therefor society as a whole.¹¹⁶

¹¹⁵ Art. 1017, 1. Ger. W. (adverse cost decision); art. 780bis, 2. Ger. W. (damages for vexatious and reckless litigation); art. 1022, 3. Ger. W. (increase in legal costs due to the manifestly unreasonable character of the situation – verhoging van de rechtsplegingsvergoeding wegens het kennelijk onredelijk karakter van de situatie); art. 780bis, 1. Ger. W. (civil fine); art. 1385bis Ger. W. (penalty payment).

¹¹⁶ DE JAEGER T., *Verstorend procesgedrag : doeltreffend sanctioneren voor een efficiënte procesvoering*, in *Tijdschrift voor Privaatrecht*, 2017, p. 1246.

Conflict of Interest in Representation: Belgian ‘Novelty’ versus German Tradition

Lise Van den Eynde, Ruth Sander

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1. Introduction

“*Two souls, alas, dwell in my breast...*” – what *Goethe* famously captured in *Faust* as a metaphor for inner conflict¹ has arguably no legitimate place in the law of representation. When an individual acts on behalf of another, they are expected to do so with undivided loyalty to safeguard the interests of the principal. Yet, conflicts of interest can easily arise, particularly in situations where the representative is “servant of two masters”²: either by simultaneously representing both parties of a transaction or by acting as the representative of one party while being the other party themselves. In such constellations, the representative is apparently pulled in two directions at once—and the risk that one party will be unfairly disadvantaged becomes apparent.

For this reason, most legal systems limit the representative’s power in situations where their loyalty might be compromised. In

¹ Quote used by KRAFKA A., *Section 181 BGB*, in GSELL B. et al. (eds), *beck-online.Großkommentar*, München, 2026, para. 63.

² Expression used by FAUST F., *Bürgerliches Gesetzbuch – Allgemeiner Teil*, Baden-Baden, 2025, p. 266 § 26 para. 29.

fact, the general prohibition of so-called *self-dealing* has come to be recognized as a core principle of European private law.³ It appears in major harmonization projects, such as the *Principles of European Contract Law* (PECL)⁴ and the *Draft Common Frame of Reference* (DCFR)⁵, and is likewise embedded in national legal systems.⁶ Still: while there is broad consensus on the underlying concern, the legal responses to it vary in detail. The ongoing reform of Belgian private law has brought renewed attention to this issue, as a new provision on conflicts of interest in representation entered into force in 2023. It presents an opportunity to take a closer look at the new Belgian approach—and set it in contrast to its German counterpart, which has remained unchanged since the German Civil Code (BGB) came into force in 1900.

1.1. *New kid on the block: Article 1.8 of the Belgian Civil Code*

Before Book 1 on “*General Provisions*,” adopted in 2022 and entering into force in 2023, the earlier version of the Belgian Civil Code (CC) did not have general rules on representation. What the Code regulated instead was only the mandate, a special form of representation.⁷ Articles 1984-2010 old CC governed the nature and form of the mandate, the obligations of the mandatary and the mandator, and the various ways in which the mandate could be terminated. Article 1.8 CC has now introduced general rules on representation, confirming the existing views in case law and legal scholarship, although it does regulate all aspects of representation.⁸

³ See LOBINGER T., *Insichgeschäft und Erfüllung einer Verbindlichkeit: Ein Beitrag zur historisch-systematischen Restriktion von § 181 letzter HS BGB*, in *AcP* 213, 2013, p. 367: „gemeinschaftseuropäisches Rechtsprinzip“.

⁴ See Art. 3:205 *PECL*.

⁵ See Art. II.-6:109 *DCFR*.

⁶ See e.g., Art. 1395 Subs. I of the *Codice Civile* in Italy; Art. 7:416 I, II of the Dutch Civil Code; Art. 1161 of the French *Code civil*.

⁷ Wetsvoorstel houdende Boek 1 “Algemene bepalingen” van het Burgerlijk Wetboek, *Parl.St.* Kamer 2020-21, nr. 55-1805/001, p. 19; DIRIX E., *Het algemeen deel van het nieuw BW*, in *Rechtskundig Weekblad*, 2021-22, p. 1178-1179.

⁸ Wetsvoorstel houdende Boek 1 “Algemene bepalingen” van het Burgerlijk Wetboek, *Parl.St.* Kamer 2020-21, nr. 55-1805/001, p. 19 (for example, the rules on the representation

A final aspect added through an amendment⁹ was a rule on conflicts of interest: Article 1.8, § 6 CC now stipulates that a person who must carry out legal acts on behalf of another may not act as that person's counterparty, nor in the event of a conflict of interest. Such a legal act is void,¹⁰ unless the represented party has expressly or tacitly consented thereto. This provision has its roots in Roman law¹¹ and its subsequent adaptation in article 1596 of the French *Code Napoléon* (which used to be the relevant provision in the Belgian Civil Code for more than 200 years, albeit reinterpreted by the Belgian Court of Cassation).

Nevertheless, the mentioning of a conflict of interest in Article 1.8, § 6 CC adds a new layer to Belgium's existing rules on self-dealing, arguably extending to a broader category of conflict of interest situations. Besides the general provisions of Book 1, Book 5 on obligations contains another interesting feature with regard to this topic. Where Article 1596 old CC did not allow for any balancing of interests in applying the nullity sanction, Article 5.57 CC now sets aside nullity where the circumstances show that the sanction of nullity would clearly be inappropriate, considering the purpose of the violated rule.

1.2. *Old but gold: Section 181 of the German Civil Code*

The German counterpart to the Belgian provision is Section 181 BGB, which reads: “*An agent may not, unless otherwise permitted, enter into a legal transaction in the name of the principal with themselves in their own name or as the agent of a third party, unless the*

of protected persons); DIRIX E., *Het algemeen deel van het nieuw BW*, in *Rechtskundig Weekblad*, 2021-22, p. 1178-1179.

⁹ Amendement nr. 3 (K. GEENS) op het wetsvoorstel houdende Boek 1 “Algemene bepalingen” van het Burgerlijk Wetboek, *Parl.St.* Kamer 2021-22, nr. 55-1805/003.

¹⁰ The term “void” is used as the English equivalent of the Dutch term “*nietig*” and the French “*nul*” in Article 1.8, § 6 CC. It denotes a legal act that is, in principle, devoid of legal effects, subject to statutory exceptions, such as the consent of the represented party.

¹¹ The Digest 18.1.46; see also VAN DAMME N., VAN LOOCK S., *Interdiction du représentant de se porter contrepartie et d'agir en cas de conflit d'intérêts* in VAN MEERBEECK J., NINANE Y. (eds.), *Les principes généraux du droit privé*, Limal, 2023, p. 352.

legal transaction consists solely in the performance of an obligation.” The provision thus distinguishes between two forms of self-dealing: First, self-contracting (*Selbstkontrahieren*), where the agent concludes a legal transaction with himself in the name of the person represented. Second, multiple representation (*Mehrfachvertretung*), where the same individual acts as a representative for two parties and concludes a transaction between them by exercising their authority on behalf of both sides at the same time.¹² Thus, although *Selbstkontrahieren* is at times mistakenly used as a catch-all term for any kind of self-dealing,¹³ it actually covers only one of the two specific scenarios addressed in Section 181 BGB, alongside with multiple representation.¹⁴

2. Origins and reception

2.1. Belgium

In Belgium, before the reform of the Civil Code, conflicts of interest in representation were mainly governed by Article 1596 old CC, containing a prohibition for certain categories of people to become the buyer of a good entrusted to their care. As the representative of the seller, one ought to pursue the highest possible price. But when the same person also acts as the buyer, it is obviously in their interest to exclude other interested buyers in order to obtain the good for themselves at the lowest possible price.¹⁵ As such, it was aimed

¹² See e.g., SCHUBERT C., *Section 181 BGB*, in SÄCKER F. et al. (eds), *Münchener Kommentar zum Bürgerlichen Gesetzbuch*, München, 2025, para. 1; SCHILKEN E., *Section 181 BGB*, in SCHILKEN E. et al. (eds), *J. von Staudingers Kommentar zum Bürgerlichen Gesetzbuch*, Berlin, 2024, para. 1.

¹³ See KRAFKA A., *Section 181 BGB*, cit., para. 29; LEIPOLD D., *BGB I: Einführung und Allgemeiner Teil*, Tübingen, 2022, § 27 para. 1.

¹⁴ For a clear overview of this distinction, see MEDICUS D., PETERSEN J., *Allgemeiner Teil des BGB*, Heidelberg, 2024, paras. 954-956; FAUST F., *Bürgerliches Gesetzbuch – Allgemeiner Teil*, cit., p. 266 § 26 para. 34.

¹⁵ ERNST P., *Belangenconflicten in naamloze vennootschappen*, Antwerpen, 1997, p. 100; VAN DEN BERGH B., *Het aankoopverbod voor lasthebbers krachtens art. 1596 BW: pleidooi voor een rechterlijke belangenafweging i.p.v. een absolute wettelijke onbekwaamheid* in *Rechtskundig Weekblad*, 2013-14, p. 1101.

at preventing conflicts of interest,¹⁶ but it had a limited scope in several ways. First, the text applied solely to purchases made at a public auction, but this was later extended by the Court of Cassation as encompassing private sales.¹⁷ Second, it only applied to four categories, acting either directly or through intermediaries: (1) guardians, with respect to the property of those under their guardianship, (2) mandataries, with respect to the property whose sale they are entrusted with, (3) administrators, with respect to the property of municipalities or public institutions entrusted to their care, and (4) public officials, with respect to the property of the State whose sale takes place through their intervention.¹⁸ Still, it applied to both voluntary sales and public forced sales,¹⁹ and to both movables and immovables.²⁰ Circumvention of the prohibition by the interposition of other persons was not permitted.²¹

¹⁶ FAURE M., *Communication officielle au Tribunal* in FENET P.A., *Recueil complet des travaux préparatoires du Code civil*, XIV, Paris, 1829, pp. 155-156; GRENIER J., *Discussion devant le Corps Législatif* in FENET P.A., *Recueil complet des travaux préparatoires du Code civil*, XIV, Paris, 1829, p. 190; PORTALIS M., *Présentation au corps législatif et exposé des motifs* in FENET P.A., *Recueil complet des travaux préparatoires du Code civil*, XIV, Paris, 1829, p. 116; see also MARYSSE S., *Commentaar bij art. 1596 oud BW* in DAMBRE M., DIRIX E., TILLEMANN B. (eds.), *Bijzondere overeenkomsten. Artikelsgewijze commentaar met overzicht van rechtspraak en rechtsleer*, Mechelen, 2021, p. 79; VAN DAMME N., VAN LOOCK S., *Interdiction du représentant de se porter contrepartie et d'agir en cas de conflit d'intérêts* in VAN MEERBEECK J., NINANE Y. (eds.), *Les principes généraux du droit privé*, Limal, 2023, pp. 353-354.

¹⁷ Cass. 24 September 1981, *Arr. Cass.* 1981-82, 132 and *Pas.* 1982, I, 125.

¹⁸ See also MARYSSE S., *Commentaar bij art. 1596 oud BW* in DAMBRE M., DIRIX E., TILLEMANN B. (eds.), *Bijzondere overeenkomsten. Artikelsgewijze commentaar met overzicht van rechtspraak en rechtsleer*, Mechelen, 2021, pp. 77-86.

¹⁹ Gent 4 July 1857, *Pas.* 1857, II, 385; ERNST P., *Belangenconflicten in naamloze vennootschappen*, Antwerpen, 1997, p. 99. *Contra* LIMPENS J., *La vente en droit belge*, Brussel, 1960, p. 84.

²⁰ ERNST P., *Belangenconflicten in naamloze vennootschappen*, Antwerpen, 1997, p. 97.

²¹ VAN DEN BERGH B., *Het aankoopverbod voor lasthebbers krachtens art. 1596 BW: pleidooi voor een rechterlijke belangenafweging i.p.v. een absolute wettelijke onbekwaamheid* in *Rechtskundig Weekblad*, 2013-14, p. 1103; DAMBRE M., *Handboek bijzondere overeenkomsten*, Brugge, 2020, pp. 37-38. See, in general, on circumvention of the law and the interposition of persons VAN DAMME N., *Wetsontduiking. Fraus legis*, Antwerpen, 2020, p. 716

The fragmented approach of Article 1596 old CC was readily discussed in case law and legal doctrine. While some authors²² preferred staying close to the (literal) text, others²³ suggested a broader interpretation.²⁴ They considered it to be a legal principle that a representative could not act as the counterparty of the party they represented (*i.e.* self-dealing or *Selbstkontrahieren*).²⁵ An even more general (but debated)²⁶ expression of this rule is the principle that no person may act, in the same legal act, in two capacities that involve conflicting interests (*nemo potest auctor esse in rem suam*).²⁷ In a series of decisions, the Belgian Court of Cassation interpreted Article 1596 old CC, widened its scope and recognized the legal principle that is now codified in Article 1.8, § 6 CC.²⁸ However, where the Court of Cassation only referred to self-dealing, Article 1.8, § 6 CC now also applies in case of *a conflict of interest*. The legislator seemingly mentions it as separate from self-dealing but failed to define the notion. Inspiration was drawn from foreign codes and model laws, such as Article II.-6:109 DCFR.²⁹

²² See mainly LAURENT F., *Principes de droit civil français*, XXIV, Brussel, 1877, p. 58.

²³ See mainly ARNTZ E., *Cours de droit civil français*, III, Brussel, 1879, p. 471.

²⁴ See also ERNST P., *Belangenconflicten in naamloze vennootschappen*, Antwerpen, 1997, pp. 91-92; VAN DAMME N., VAN LOOCK S., *Interdiction du représentant de se porter contrepartie et d'agir en cas de conflit d'intérêts* in VAN MEERBEECK J., NINANE Y. (eds.), *Les principes généraux du droit privé*, Limal, 2023, pp. 354-355.

²⁵ See mainly DE PAGE H., DEKKERS R., *Traité élémentaire de droit civil belge*, V, Brussel, 1975, p. 410; see also ERNST P., *Belangenconflicten in naamloze vennootschappen*, Antwerpen, 1997, pp. 90-92.

²⁶ See COOLS S., *De verdeling van beslissingsbevoegdheden tussen algemene vergadering en raad van bestuur in de NV*, Leuven, 2015, p. 151.

²⁷ VAN DEN BERGH B., *Het aankoopverbod voor lasthebbers krachtens art. 1596 BW: pleidooi voor een rechterlijke belangenafweging i.p.v. een absolute wettelijke onbekwaamheid* in *Rechtskundig Weekblad*, 2013-14, pp. 1101-1102; see also PAULUS C., BOES R., *De lastgeving in Algemene Praktische Rechtsverzameling*, Gent, 1978, p. 95; ERNST P., *Belangenconflicten in naamloze vennootschappen*, Antwerpen, 1997, p. 92.

²⁸ See Cass. 7 December 1978, *Arr.Cass.* 1978-79, 407 and *Pas.* 1979, I, 408; Cass. 24 September 1981, *Arr.Cass.* 1981-82, 132 and *Pas.* 1982, I, 125; Cass. 18 March 2004, C.02.0249.N., *Arr.Cass.* 2004, 482, *Pas.* 2004, 458 and *RW* 2004-05, 303, note A. SMETS; Cass. 13 September 2012, C.11.0730.F, *Arr.Cass.* 2012, 1940, *Pas.* 2012, 1667 en *RW* 2013-14, 1100, note VAN DEN BERGH B.

²⁹ Art. II.-6:109 DCFR: “Conflict of interest (1) If an act done by a representative involves the representative in a conflict of interest of which the third party knew or could reasonably be expected to have known, the principal may avoid the act according to the

2.2. Germany

The origins of Section 181 BGB date back to the late 19th century, when a commission was tasked with drafting a German civil code.³⁰ In its initial version, the Code did not include a general prohibition on self-dealing. Quite the contrary: it assumed such transactions were generally permissible, and only included specific prohibitions in certain areas – most notably, in the context of corporate representation and in cases of legal representation by parents or guardians.³¹ This approach drew sharp criticism: particularly it was argued that allowing representatives to act on both sides of a legal transaction – even where no specific conflict had yet materialized – opened the door to self-interest and disloyal conduct.³² In response, the preliminary commission of the Imperial Ministry of Justice (*Reichsjustizamt*) proposed a new approach: both self-dealing and multiple representation would be generally prohibited, with narrow exceptions where the transaction either fulfilled an existing obligation or had been expressly (or impliedly) authorized by the principal.³³ This

provisions ofc II.-7:209 (Notice of avoidance) to II.- 7:213 (Partial avoidance). (2) There is presumed to be a conflict of interest where: (a) the representative also acted as representative for the third party; or (b) the transaction was with the representative in a personal capacity. (3) However, the principal may not avoid the act: (a) if the representative acted with the principal's prior consent; or (b) if the representative had disclosed the conflict of interest to the principal and the principal did not object within a reasonable time; (c) if the principal otherwise knew, or could reasonably be expected to have known, of the representative's involvement in the conflict of interest and did not object within a reasonable time; or (d) if, for any other reason, the representative was entitled as against the principal to do the act by virtue of IV.D.-5:101 (Self-contracting) or IV. D.-5:102 (Double mandate)."

³⁰ On the history of the provision, see in more detail LOBINGER T., *Insichgeschäft und Erfüllung einer Verbindlichkeit: Ein Beitrag zur historisch-systematischen Restriktion von § 181 letzter HS BGB*, cit., p. 367 seq.; KIEHNLE A., *Das Selbsteintrittsrecht des Kommissionärs (§ 400 HGB) und das Verbot des Selbstkontrahierens (§ 181 BGB)*, in *AcP* 212, 2012, pp. 893 seq.; KRAFKA A., *Section 181 BGB*, cit., paras. 40-42.

³¹ See LOBINGER T., *Insichgeschäft und Erfüllung einer Verbindlichkeit: Ein Beitrag zur historisch-systematischen Restriktion von § 181 letzter HS BGB*, cit., p. 368.

³² See LOBINGER T., *Insichgeschäft und Erfüllung einer Verbindlichkeit: Ein Beitrag zur historisch-systematischen Restriktion von § 181 letzter HS BGB*, cit., p. 368, who notes that it was above all Rümelin's criticism that proved decisive, see RÜMELIN M., *Das Selbstkontrahieren des Stellvertreters nach gemeinem Recht*, Freiburg i.B., 1888, pp. 287-293.

³³ See LOBINGER T., *Insichgeschäft und Erfüllung einer Verbindlichkeit: Ein Beitrag zur historisch-systematischen Restriktion von § 181 letzter HS BGB*, cit., p. 368.

model was adopted by the Second Commission and forms the basis of the wording still found in Section 181 BGB today. In justifying this shift, the Second Commission explicitly stated that, as a rule, self-dealing always carries with it the risk of a conflict of interest and of harm to one of the parties involved, and must therefore be prohibited unless the law or a power of attorney (expressly or tacitly) permits the representative to act otherwise.³⁴

Despite its long-standing history, the legal character of Section 181 BGB remains subject of ongoing debates.³⁵ Traditionally, the provision was seen as a “regulatory provision” (*Ordnungsvorschrift*) that imposes a strict prohibition on any self-dealing transaction—regardless of whether a conflict actually arises.³⁶ This interpretation, upheld by the Imperial Court of Justice (*Reichsgericht*),³⁷ was justified on the grounds of legal certainty and creditor protection: the legislator, it was argued, did not intend to introduce a rebuttable presumption of abuse, but rather to impose a general rule, and to exclude any case-by-case assessment of potential conflicts.³⁸ The Federal Court of Justice (*Bundesgerichtshof*, BGH) initially adopted the same formalistic view, grounding its position in the clear statutory language and the dangers of unpredictability.³⁹

³⁴ *Ibid.*

³⁵ See e.g., STOFFELS M., *Section 181 BGB*, in HEIDEL T., et al. (eds), *Nomos-Kommentar zum Bürgerlichen Gesetzbuch*, Baden-Baden, 2021, para. 3.

³⁶ See, e.g., SCHUBERT C., *Section 181 BGB*, cit., para. 4; LEIPOLD D., *BGB I: Einführung und Allgemeiner Teil*, cit., § 27 para. 9; PAWLOWSKI H.-M., *Allgemeiner Teil des BGB*, cit., § 5 para. 792: „formale Ordnungsvorschrift mit rechtspolizeilichem Charakter”.

³⁷ See RGZ 68, 172, 176; 103, 417, 418; 157, 24, 31.

³⁸ See RGZ 68, 172, 176.

³⁹ See e.g., BGH, Beschl. v. 9.7.1956 – V BLw 11/56, NJW 1956, 1433, 1433; BGH, Urt. v. 6.10.1960 – II ZR 215/58, NJW 1960, 2285, 2285.

However, over time, this rigid interpretation has come under increasing criticism. Modern scholarship⁴⁰ and more recent jurisprudence⁴¹ have moved toward an interpretation of Section 181 BGB that is guided by its underlying rationale: to prevent situations that typically involve a general and abstract risk of conflicting interests. From this perspective, it became widely accepted that the provision's scope may require adjustments in two directions: first, where the wording of the statute applies, yet no conflict of interest arises, the provision should not be applied, thus be teleologically reduced. Second, where the provision does not formally apply, but the situation nonetheless involves a significant risk of conflicting interests, the provision should be applied analogously.⁴²

3. Scope of application

3.1. Shared scope: self-contracting

Turning to the scope of the respective provisions, Belgian and German law show fundamental similarities. Both Article 1.8, § 6 CC and Section 181 BGB apply exclusively to situations of representation—namely, cases in which a person has the authority to perform a legal act with a third party on behalf of another.⁴³ Article 1.8, § 6 CC

⁴⁰ See among many others e.g., STOFFELS M., *Section 181 BGB*, cit., paras. 6-8 with detailed reasoning; KRAFKA A., *Section 181 BGB*, cit., paras. 270 seq. with diverse examples; SCHILKEN E., *Section 181 BGB*, cit., paras. 34 seq.; SCHUBERT C., *Section 181 BGB*, cit., para. 6; MANSEL H.-P., *Section 181 BGB*, in STÜRNER R. (eds), *Jauernig, Bürgerliches Gesetzbuch*, München, 2023, para. 11; MEDICUS D., PETERSEN J., *Allgemeiner Teil des BGB*, cit., para. 961; a dissenting view is taken, e.g., by PAWLOWSKI H.-M., *Allgemeiner Teil des BGB*, Heidelberg, 2023, § 5 para. 794: „Die Abkehr von der rechtspolizeilichen (formalen) Auslegung des § 181 ist abzulehnen.“

⁴¹ See in particular BGH, Urt. v. 19.4.1971 – II ZR 98/68, NJW 1971, 1355, 1356; BGH, Urt. v. 27.9.1972 – IV ZR 225/69, NJW 1972, 2262, 2263.

⁴² See SCHILKEN E., *Section 181 BGB*, cit., paras. 30-34; for the concept of teleological reduction and analogy in German law in general see in detail LARENZ K., CANARIS C.-W., *Methodenlehre der Rechtswissenschaft*, Berlin, 1995, pp. 202-216.

⁴³ For Belgian law, see definition in article 1.8, § 1 CC; for German law, see SCHILKEN E., *Section 181 BGB*, cit., para. 9.

is formulated broadly and covers both direct and indirect representation,⁴⁴ regardless of whether the authority derives from an agreement, a judicial decision, or the law.⁴⁵ Likewise, Section 181 BGB extends to voluntary, statutory, and corporate representation.⁴⁶ Both provisions therefore govern all private law transactions concluded by a representative.⁴⁷

Within this shared framework, both Article 1.8, § 6 CC and Section 181 BGB, prohibit self-contracting—situations in which the representative simultaneously represents the principal and acts as its counterpart in the same transaction. A common example would be a car dealer authorised to sell a vehicle on behalf of a principal but purchases the vehicle for themselves, thereby acting both as agent and as contracting party.

3.2. *Multiple representation vs. conflict of interests*

Beyond this consensus, each provision addresses an additional, distinct scenario: Section 181 BGB prohibits multiple representation, meaning that the same person may not act as representative for two different principals at once. A typical example is a real estate agent authorized to represent both the buyer and the seller in the same property sale, thereby negotiating the transaction on behalf of both parties simultaneously. Therefore, Section 181 BGB covers all situations in which one and the same person stands on both sides of a legal transactions and, by doing so, risks compromising their duty of loyalty.⁴⁸

Belgian law, in contrast, does not confine itself to that narrowly defined category, but approaches the issue more broadly: Article 1.8, § 6 CC applies whenever the representative has a *conflict of interest*.

⁴⁴ Article 1.8, § 1 CC defines both.

⁴⁵ Compare article 1.8, § 2 CC.

⁴⁶ See STOFFELS M., *Section 181 BGB*, cit., para. 10.

⁴⁷ For Belgian law, see CLAEYS I., THANGE T., *Nieuw algemeen contractenrecht*, Brussel, 2025, p. 451 (to the exclusion of purely material acts, and with the clarification that procedural acts are governed by their own rules, laid down in Articles 860-867 Ger.W.); for German law, see SCHUBERT C., *Section 181 BGB*, cit., para. 21.

⁴⁸ See STOFFELS M., *Section 181 BGB*, cit., para. 19.

Notably, the legislator left this notion entirely undefined. Several authors have pointed out that its meaning should not be construed too broadly, as not all conflicting interests (in day-to-day language) are legally relevant.⁴⁹ According to *Kruithof*, a conflict of interest arises when the holder of a duty of loyalty must choose how to act in the interest to which he owes loyalty, while that choice simultaneously affects his own interests (*conflict of interest*) or the interests of another person to whom he also owes loyalty (*conflict of duties*).⁵⁰ Indeed, representatives are subject to a duty of loyalty, which prohibits them from using their purpose-bound powers for their own benefit.⁵¹ These conflicting interests in and of themselves make it unlikely that the representative will fully comply with his duty of loyalty.⁵²

Belgian authors agree that the new provision applies to multiple representation (often referred to in a contractual context as a double

⁴⁹ See extensively KRUIHOF M., *Wanneer vormen tegenstrijdige belangen een belangenconflict?* in *Van alle markten. Liber amicorum Eddy Wymeersch*, Antwerpen, 2008, pp. 575-598; see also VAN DAMME N., VAN LOOCK S., *Interdiction du représentant de se porter contrepartie et d'agir en cas de conflit d'intérêts* in VAN MEERBEECK J., NINANE Y. (eds.), *Les principes généraux du droit privé*, Limal, 2023, pp. 356-357; VAN DEN EYNDE L., *Belangenconflicten bij vertegenwoordiging: het nieuwe artikel 1.8, § 6 BW* in TILLEMANN B. (ed.), *Themis 2023-2024 nr. 128 Bijzondere overeenkomsten*, Antwerpen, 2024, p. 326.

⁵⁰ KRUIHOF M., *Wanneer vormen tegenstrijdige belangen een belangenconflict?* in *Van alle markten. Liber amicorum Eddy Wymeersch*, Antwerpen, 2008, p. 595.

⁵¹ See, for example, Bergen 24 March 2016, *TBBR-RGDC* 2016/9, 528; Brussel 16 February 2023, *RPP* 2023/3, 307; GLANSDORFF F., VAN DEN HAUTE E., *Tome III: Les contrats. Volume 4: Mandat, prêt, dépôt, transaction, contrats aléatoires* in *De Page. Traité de droit civil belge*, Brussel, 2017, pp. 89-90; JACQUEMIN C., *Le mandat dans la vente immobilière: rappel des principes* in *Jurim Pratique*, 2018, p. 113; VAN DEN BERGH B., *Het aankoopverbod voor lasthebbers krachtens art. 1596 BW: pleidooi voor een rechterlijke belangenafweging i.p.v. een absolute wettelijke onbekwaamheid* in *Rechtskundig Weekblad*, 2013-14, pp. 1102-1103; compare the duty of loyalty of company directors in JANSSEN A., *Le devoir de loyauté de l'administrateur, en particulier sous le prisme de la réglementation des conflits d'intérêts au sein de l'organe d'administration dans la SA et la SRL* in DE CUYPER J.Q., INGHELS B., JAFFERALI R., LAMBERT T., PAQUOT B., SCARNA S., SIMONART V. (eds.), *Gouvernance et responsabilité. Mélanges à la mémoire de Didier Willermain*, Brussel, 2023, pp. 661-697.

⁵² KRUIHOF M., *Wanneer vormen tegenstrijdige belangen een belangenconflict?* in *Van alle markten. Liber amicorum Eddy Wymeersch*, Antwerpen, 2008, p. 595.

mandate⁵³). Before, it was argued that a double mandate was in principle permissible.⁵⁴ Nevertheless, a conflict of interest could arise when the principals' distinct interests were in conflict.⁵⁵ This creates the risk that one represented party may be favored at the expense of the other.⁵⁶ This risk is all the greater when the representative himself stands to gain (e.g., when he can collect a double commission (incentivizing him to conclude a contract in any case, regardless of whether it serves the interests of his principal(s)) or where his remuneration depends on the price he can negotiate (for example, a percentage)).⁵⁷ To avoid nullity, the representative was advised to obtain the consent of the represented parties by informing them in advance of his double mandate.⁵⁸ Article 1.8, § 6 CC now explicitly recognizes this possibility of consent. Since Article 1.8, § 6 CC is relatively new and has not yet been widely applied in case law, a further examination of the application of Section 181 BGB under German law may provide insights into the interpretation of this undefined concept under Belgian law.

3.3. *Limiting the scope of application?*

In both Germany and Belgium, it remains debated whether, and to what extent, the prohibition of self-dealing may be restricted in individual cases.

⁵³ CLAEYS I., THANGE T., *Nieuw algemeen contractenrecht*, Brussel, 2025, p. 453.

⁵⁴ CLAEYS I., THANGE T., *Nieuw algemeen contractenrecht*, Brussel, 2025, p. 453; HEEB C., *De makelaar*, Brugge, 2012, p. 108; WÉRY P., *Le mandat*, Brussel, 2000, pp. 158-159.

⁵⁵ VAN DAMME N., VAN LOOCK S., *Interdiction du représentant de se porter contrepartie et d'agir en cas de conflit d'intérêts* in VAN MEERBEECK J., NINANE Y. (eds.), *Les principes généraux du droit privé*, Limal, 2023, pp. 357 and 365-366.

⁵⁶ SAGAERT V., TILLEMANN B., VERBEKE A.L., *Vermogensrecht in kort bestek*, Antwerpen, 2022, p. 504; VAN DAMME N., VAN LOOCK S., *Interdiction du représentant de se porter contrepartie et d'agir en cas de conflit d'intérêts* in VAN MEERBEECK J., NINANE Y. (eds.), *Les principes généraux du droit privé*, Limal, 2023, pp. 364-365.

⁵⁷ ERNST P., *Belangenconflicten in naamloze vennootschappen*, Antwerpen, 1997, p. 150.

⁵⁸ SAGAERT V., TILLEMANN B., VERBEKE A.L., *Vermogensrecht in kort bestek*, Antwerpen, 2022, p. 504.

3.3.1. Teleological reduction in clearly defined cases

In Germany, it is now widely accepted that Section 181 BGB may not be applied in certain circumstances, although the precise limits remain disputed. Some scholars have argued that the mere absence of an actual conflict should be sufficient to exclude the provision's application altogether.⁵⁹ However, this approach is problematic as it would require the court to engage in a detailed case-by-case assessment.⁶⁰ This, in turn, risks undermining legal certainty and predictability. Therefore, others advocate for a principled, risk-based approach: Section 181 BGB should only be set aside where a conflict of interest can be clearly and typically excluded.⁶¹ Any limitation of the provision's scope must therefore rest on abstract and generally applicable criteria, rather than on a balancing of interests in the individual case.⁶²

One well-established limitation concerns self-dealing transactions that are legally solely beneficial (*rechtlich lediglich vorteilhaft*) to the represented party. A classic example concerns parents, acting as legal representatives⁶³ of their eight-year-old child in order to make a gift – for instance, a bicycle. Because the child is minor and thus incapable of contracting himself,⁶⁴ the parents act both as donor and as the child's legal representative, thereby formally engaging in self-dealing. However, both the underlying gift agreement and the subsequent transfer of ownership⁶⁵ are legally solely beneficial to

⁵⁹ See FINKENAUER T., *Section 181 BGB*, in WESTERMANN H.-P. et al. (eds), *Erman BGB*, Köln, 2023, para. 23; BROX H., WALKER W.-D., *Allgemeiner Teil des BGB*, München, 2025, § 26 para. 15.

⁶⁰ See, e.g., STOFFELS M., *Section 181 BGB*, cit., para. 7.

⁶¹ See already fn. 39, 40. Compare Articles 3:68 and 7:416-7:418 of the Dutch Civil Code (the law stipulates that the prohibition on self-dealing or multiple representation does not apply when the content of the legal act to be performed is so precisely determined that a conflict between their respective interests is excluded).

⁶² STOFFELS M., *Section 181 BGB*, cit., para. 32.

⁶³ See Sections 1626(1), 1629(1) BGB.

⁶⁴ See Sections 106, 107 BGB.

⁶⁵ German law distinguishes between two distinct legal acts: the obligational agreement (*Verpflichtungsgeschäft*), which creates a duty (e.g., to transfer ownership), and the dispositive act (*Verfügungsgeschäft*), which effects the actual transfer of rights. For example, a

the child. As a result, the transaction is not subject to Section 181 BGB due to teleological reduction.⁶⁶

This category of legally beneficial self-dealing takes its cue from Section 107 BGB, which provides that a minor requires the consent of their legal representative to make a declaration of intent, except where the minor receives *merely a legal benefit*.⁶⁷ Section 107 BGB thus explicitly distinguishes between legally disadvantageous and legally beneficial transactions.⁶⁸ It is intuitive to extend this rationale to Section 181 BGB: there is no need to protect the principal in transactions that are entirely free of risk.⁶⁹ Such transactions are accordingly treated as falling outside the scope of the provision. They constitute a systematically identifiable category of self-dealing that is legally unobjectionable.⁷⁰

While the BGH has emphasized that determining whether a transaction confers only a legal benefit is usually straightforward⁷¹, in practice, the boundaries appear less clear. This becomes apparent

contract of sale under Section 433 BGB obliges the seller to transfer ownership, but ownership only passes through a separate conveyance pursuant to Section 929 sent. 1 BGB. Each of the two acts is legally autonomous; the invalidity of one does (usually) not affect the other, see for this so-called *Trennungs- und Abstraktionsprinzip* OECHSLER J., *Section 929 BGB*, in SÄCKER F. et al. (eds), *Münchener Kommentar zum Bürgerlichen Gesetzbuch*, München, 2025, paras. 5, 8-11.

⁶⁶ Specifically with regard to legal representation of minors see, e.g., RADTKE T., *Das Insichgeschäft (§ 181 BGB)*, in *JuS*, 2023, p. 1008; HASLACH J., *Rechtlich nachteilhafte Grundstücksübertragung an einen Minderjährigen ohne die Mitwirkung eines Ergänzungspflegers?*, in *JA*, 2017, pp. 491 seq.

⁶⁷ See SCHUBERT C., *Section 181 BGB*, cit., para. 34; STÜRNER R., *Der lediglich rechtliche Vorteil*, in *AcP* 173, 1973, pp. 442 seq.

⁶⁸ So, the assessment of benefit is thus made solely in legal, rather than economical or practical, terms, see KUNZ L., BALDUS C., *Section 107 BGB*, in HEIDEL T., et al. (eds), *Nomos-Kommentar zum Bürgerlichen Gesetzbuch*, Baden-Baden, 2021, para. 17; contrary to this by arguing in favour of an economic assessment, see STÜRNER R., *Der lediglich rechtliche Vorteil*, cit., p. 420.

⁶⁹ See BROX H., WALKER W.-D., *Allgemeiner Teil des BGB*, cit., § 26 para. 15. It should be noted, however, that the purposes of Section 107 and 181 BGB do not fully coincide, so that the reasoning developed in Section 107 BGB cannot be uncritically transferred to Section 181 BGB, see extensively STÜRNER R., *Der lediglich rechtliche Vorteil*, cit., pp. 442-447.

⁷⁰ See STOFFELS M., *Section 181 BGB*, cit., paras. 21 seq., with reference to the case law of the BGH.

⁷¹ See BGH, Urt. v. 27.9.1972 – IV ZR 225/69, NJW 1972, 2262, 2263.

once the above mentioned example is modified: suppose the parents gift their child not a bicycle but a piece of real estate. In this case, ownership entails public charges such as taxes, fees and levies and increased civil liability,⁷² suggesting that such a transaction should not be regarded as legally solely beneficial. Yet, several arguments have been advanced to the contrary: one view holds that these burdens arise only indirectly, under public law, and therefore fall outside the immediate effects of the legal transaction itself.⁷³ The BGH likewise assumes that minor obligations—such as property taxes—should not be regarded as relevant where their potential to endanger the represented party's interests remain purely theoretical.⁷⁴ In particular, such obligations can usually be covered by the property's ongoing revenues.⁷⁵ Though these arguments may appear persuasive, they apply only to this particular constellation—which highlights a fundamental difficulty: while the concept of a legally solely beneficial transaction aims to delineate a predictable exception to Section 181 BGB, it lacks a universally applicable definition.⁷⁶ Over time, various subcategories of such transactions have therefore emerged, often highly specific, to determine precisely when a legal benefit exists.⁷⁷ At least to some extent, this reintroduces the case-by-case assessment that had been explicitly rejected.

⁷² For a detailed analysis of this example, see HASLACH J., *Rechtlich nachteilhafte Grundstücksübertragung an einen Minderjährigen ohne die Mitwirkung eines Ergänzungspflegers?*, cit., pp. 490-495.

⁷³ With further references to this view, see DUDEN K., *Section 107 BGB*, in GSELL B. et al. (eds), *beck-online.Großkommentar*, München, 2025, paras. 47 seq.; critically, among others, SPICKHOFF A., *Section 107 BGB*, in SÄCKER F. et al. (eds), *Münchener Kommentar zum Bürgerlichen Gesetzbuch*, München, 2025, para. 39 arguing that it is difficult to draw a clear distinction between direct and indirect consequences; see also STÜRNER R., *Der lediglich rechtliche Vorteil*, cit., pp. 420 seq., for an extensive discussion on this issue.

⁷⁴ See BGH, Beschl. v. 25.11.2004 – V ZB 13/04, NJW 2005, 415, 418.

⁷⁵ *Ibid.*

⁷⁶ The lack of clarity regarding the cases in which Section 181 BGB should be teleologically reduced is also emphasized, e.g., by STÜRNER R., *Der lediglich rechtliche Vorteil*, cit., pp. 409 seq.; SCHILKEN E., *Section 181 BGB*, cit., para. 32; MANSEL H.-P., *Section 181 BGB*, cit., para. 6.

⁷⁷ See, e.g., the long list of categories by KRAFKA A., *Section 181 BGB*, cit., paras. 271-288, discussing a teleological reduction, inter alia, in the context of real burden, the imposition of charge or condition (*Auflage*), the reservation of right of withdrawal, or transactions involving leased real property.

3.3.2. *Balancing of interests*

A similar debate has meanwhile emerged under Belgian law: does a violation of the prohibition allow for a balancing of interests, or must nullity invariably ensue? Traditionally, the law *de facto* presumed that self-dealing, given the representative's knowledge of the principal's situation and intentions, necessarily harmed the latter.⁷⁸ Hence, a breach of Article 1596 old CC triggered nullity, without the need for substantive review, balancing of interests, or proof of actual harm.⁷⁹ If the persons listed in Article 1596 old CC failed to abstain from a purchase, it was *as such* voidable, as the provision imposed an absolute prohibition.⁸⁰ Consequently, the prohibition fulfilled a strong preventive function.

At the time, the strict approach under Article 1596 old CC already received some criticism.⁸¹ With regard to Article 1.8, § 6 CC, *Van Damme* and *Van Loock* argue in favor of a case-specific assessment to determine whether a genuine conflict of interest existed.⁸² In some

⁷⁸ DAMBRE M., *Handboek bijzondere overeenkomsten*, Brugge, 2020, p. 35; VAN DEN BERGH B., *Het aankoopverbod voor lasthebbers krachtens art. 1596 BW: pleidooi voor een rechterlijke belangenafweging i.p.v. een absolute wettelijke onbekwaamheid* in *Rechtskundig Weekblad*, 2013-14, p. 1102.

⁷⁹ VAN DAMME N., VAN LOOCK S., *Interdiction du représentant de se porter contrepartie et d'agir en cas de conflit d'intérêts* in VAN MEERBEECK J., NINANE Y. (eds.), *Les principes généraux du droit privé*, Limal, 2023, pp. 357-358; VAN DEN BERGH B., *Het aankoopverbod voor lasthebbers krachtens art. 1596 BW: pleidooi voor een rechterlijke belangenafweging i.p.v. een absolute wettelijke onbekwaamheid* in *Rechtskundig Weekblad*, 2013-14, p. 1102.

⁸⁰ ROMAIN J.F., *Du contrat avec soi-même et des conflits d'intérêts: théorie générale dans le droit commun de la représentation, fondée sur le principe de bonne foi et applications en droit financier* in *Les conflits d'intérêts*, Brussel, 1997, p. 147; VAN DAMME N., VAN LOOCK S., *Interdiction du représentant de se porter contrepartie et d'agir en cas de conflit d'intérêts* in VAN MEERBEECK J., NINANE Y. (eds.), *Les principes généraux du droit privé*, Limal, 2023, pp. 357-358; VAN DEN BERGH B., *Het aankoopverbod voor lasthebbers krachtens art. 1596 BW: pleidooi voor een rechterlijke belangenafweging i.p.v. een absolute wettelijke onbekwaamheid* in *Rechtskundig Weekblad*, 2013-14, p. 1102.

⁸¹ VAN DEN BERGH B., *Het aankoopverbod voor lasthebbers krachtens art. 1596 BW: pleidooi voor een rechterlijke belangenafweging i.p.v. een absolute wettelijke onbekwaamheid* in *Rechtskundig Weekblad*, 2013-14, pp. 1101-1106; compare ERNST P., *Belangenconflicten in naamloze vennootschappen*, Antwerpen, 1997, pp. 153-155.

⁸² VAN DAMME N., VAN LOOCK S., *Interdiction du représentant de se porter contrepartie et d'agir en cas de conflit d'intérêts* in VAN MEERBEECK J., NINANE Y. (eds.), *Les principes généraux du droit privé*, Limal, 2023, pp. 364-365; compare VAN DEN BERGH B., *Het*

cases, according to these authors, it is virtually impossible for the principal to suffer harm from a conflict of interest. The primary example is when the representative acted strictly in accordance with the terms explicitly set out in advance by the principal.⁸³ Consider, for example, the sale of shares at a predetermined price. Here, there is no (harm caused by) conflict of interest. The authors therefore advocate abandoning the Court of Cassation's case law⁸⁴ that takes the opposite view. Where only a minimum price is established, the sanction of nullity must still apply, as the representative may secure the asset for themselves without attempting to obtain a higher price. In doubtful cases between a minimum and maximum price, the authors suggest resolving it based on the principle of good faith contract performance.⁸⁵

On the one hand, there is no indication that the drafters of Book 1 intended to depart from the traditional strand. On the other, the authors find support for their argument in Book 5 on obligations. Here, Article 5.57 CC reads that a contract shall remain valid when the circumstances show that the nullity sanction would clearly be inappropriate, considering violated rule's purpose.⁸⁶ In this (exceptional) case, a judge can replace the nullity with another, more appropriate

aankoopverbod voor lasthebbers krachtens art. 1596 BW: pleidooi voor een rechterlijke belangenafweging i.p.v. een absolute wettelijke onbekwaamheid in Rechtskundig Weekblad, 2013-14, pp. 1105-1106.

⁸³ VAN DAMME N., VAN LOOCK S., *Interdiction du représentant de se porter contrepartie et d'agir en cas de conflit d'intérêts* in VAN MEERBEECK J., NINANE Y. (eds.), *Les principes généraux du droit privé*, Limal, 2023, pp. 365-366 and 373. Compare Articles 3:68 and 7:416-7:418 of the Dutch Civil Code, under which the prohibitions on self-dealing and multiple representation do not apply where the content of the legal act is defined with such precision that any conflict between the parties' interests is excluded.

⁸⁴ Cass. 24 September 1981, *Arr. Cass.* 1981-82, 132 and Pas. 1982, I, 125.

⁸⁵ Article 5.73 CC; VAN DAMME N., VAN LOOCK S., *Interdiction du représentant de se porter contrepartie et d'agir en cas de conflit d'intérêts* in VAN MEERBEECK J., NINANE Y. (eds.), *Les principes généraux du droit privé*, Limal, 2023, p. 366.

⁸⁶ See also, for the anticipatory application of this provision by the Court of Cassation, Cass. 7 November 2019, C.19.0061.N, *Amén.* 2020, 251, *JT* 2020, note DE DUVE E., *NjW* 2019, 895, note MEIRLAEN M., *Rev.not.b.* 2020, 713, note ONCLIN F. and *RW* 2020-21, 900, note MEYS S.; Cass. 22 January 2021, C.19.0303.N, *OOO-MCP* 2021/1, 118, *NjW* 2021, 348, note MEIRLAEN M., *RW* 2021-22, 998, note WILLEMS D. and *TBBR* 2023, 138, note HERBOSCH M.

remedy, or even omit the sanction entirely.⁸⁷ Accordingly, *Van Damme* and *Van Loock* suggest that a judge could opt for damages, non-opposability, or even refrain from sanctioning a violation of Article 1.8, § 6 CC when nullity would not serve the purpose of the prohibition against conflicts of interest.⁸⁸ Damages could be particularly appropriate when a representative bought an asset at a set minimum price, but the price could reasonably have been higher had they not acted as the counterparty. Conversely, it could be argued that this case-by-case approach undermines the preventive function of the prohibition, since the representative has little real incentive not to act to their own advantage at the principal's expense.⁸⁹

This approach, while different from Germany's exception for solely beneficial transactions, similarly aims to set aside the sanction of nullity where there is no real risk of harm to the principal. Both approaches entail a degree of balancing of interests, although German law seeks to base the limitation of Section 181 BGB's scope on more abstract and generally applicable criteria. By contrast, the Belgian legal system appears to be less reluctant in engaging in case-by-case assessments. Given the challenges in creating abstract (sub)categories of solely beneficial transactions – difficulties that ultimately lead to similar *in concreto* assessments in practice – the German and Belgian approaches are, in fact, less divergent than they might appear at first glance.

3.4. *Extending the scope of application?*

In Belgian law, it remains contested whether Article 1.8, § 6 CC covers situations beyond self-dealing and multiple representation. For example, a *conflict of interest* could also involve benefits to the

⁸⁷ Wetsvoorstel houdende Boek 5 “Verbintenissen” van het Burgerlijk Wetboek, *Parl.St.* Kamer 2020-21, nr. 55-1806/001, p. 64.

⁸⁸ VAN DAMME N., VAN LOOCK S., *Interdiction du représentant de se porter contrepartie et d'agir en cas de conflit d'intérêts* in VAN MEERBEECK J., NINANE Y. (eds.), *Les principes généraux du droit privé*, Limal, 2023, pp. 365-366 and 373.

⁸⁹ It is worth noting, however, that at the time of writing, a legislative amendment to Art. 1.8, § 6 CC is under discussion by the drafters of Book 7 on special contracts, which would remove the automatic sanction of nullity in cases of conflicts of interest.

representative's close relatives (e.g., spouse or children) or to a company in which he is a director or significant shareholder, even in the absence of a clear case of self-dealing or multiple representation.⁹⁰ In the language of the DCFR, which inspired the Belgian reform, a conflict of interest is *presumed* where “(a) the representative also acted as representative for the third party; or (b) the transaction was with the representative in a personal capacity”.⁹¹ This raises the question of which conflicts of interest beyond these presumptions – which essentially amount to multiple representation and self-dealing – are legally relevant.

German law takes a restrictive stance on extending the rule to such additional constellations. The mere existence of a conflict of interest is generally considered too indeterminate a criterion to justify analogous application, as it cannot clearly define the boundaries of judicial law-making.⁹² Moreover, the interests of the counterparty must be taken into account: the represented party may not be deprived of their contractual partner without compelling justification.⁹³ Where the German legislature has perceived a regulatory need, it has typically addressed it through specific statutory provisions that take precedence over Section 181 BGB. This can be seen, for example, with regard to the aforementioned constellations in which the legal transaction involves not the representative himself, but his spouse, registered partner, or a close relative. An analogous application of Section 181 BGB must be rejected⁹⁴ in such cases because the legislature has, at least partially, regulated that area through a special provision: Section 1824(1) No. 1 BGB prohibits a legal guardian (*Betreuer*) from acting for the person under guardianship in certain transactions. The provision thus expands the rationale of Section 181

⁹⁰ ERNST P., *Belangenconflicten in naamloze vennootschappen*, Antwerpen, 1997, p. 150; VAN GYSEL A.C., *Un mandat (extra)judiciaire in Revue du Notariat Belge*, 2023, pp. 862-863.

⁹¹ Article II.-6:109, (2) DCFR.

⁹² See MEDICUS D., PETERSEN J., *Allgemeiner Teil des BGB*, cit., para. 963; similarly STOFFELS M., *Section 181 BGB*, cit., para. 32.

⁹³ MEDICUS D., PETERSEN J., *Allgemeiner Teil des BGB*, cit., para. 963.

⁹⁴ See, e.g., FAUST F., *Bürgerliches Gesetzbuch – Allgemeiner Teil*, cit., p. 266 § 26 para. 39; SCHUBERT C., *Section 181 BGB*, cit., para. 2.

BGB to situations in which the interests of guardian and ward typically collide, including specific family-law constellations.⁹⁵ Reading this *e contrario*, transactions outside those specific statutory cases must be permissible; otherwise, Section 1824(1) No. 1 BGB would be redundant. In these situations, the represented party is therefore not protected by Section 181 BGB, but instead by the general doctrines of abuse of authority in representation⁹⁶ and potential claims for damages.⁹⁷ To summarize, the presence of a conflict of interest as such does not trigger an analogous application of Section 181 BGB.

There are, however, at least two constellations in which the application of Section 181 BGB by analogy is widely accepted. The first arises where the representative appoints a so-called sub-agent (*Untervertreter*) for the principal and then concludes a legal transaction with that sub-agent acting on their own behalf. For instance, an agent authorised to manage the rental of a property may engage a sub-agent to find tenants and later enter into a lease contract with the sub-agent personally. The second constellation concerns the reverse situation: the representative appoints another person to act on their own behalf (*i.e.* to represent the representative personally), and then concludes a transaction – acting for the principal – with that person. Consider, for instance, an agent authorized to sell a car on behalf of the principal. The agent appoints a third person as their own representative to purchase vehicles, and subsequently concludes the sales contract with that third party acting in this representative capacity.⁹⁸

Formally, both scenarios falls outside the wording of Section 181 BGB, since there is no personal identity between the agent and the

⁹⁵ SCHMIDT-RECLA A., *Section 1824 BGB*, in GSELL B. et al. (eds), *beck-online.Großkommentar*, München, 2025, para. 2; for a comprehensive discussion of the provision and the practical challenges it raises, see SCHEULEN A., *Das Insichgeschäft und die Familieninsichgeschäfte: Praktische Probleme für Betreuer*, in *BtR*, 2024, pp. 116-119.

⁹⁶ See MEDICUS D., PETERSEN J., *Allgemeiner Teil des BGB*, cit., paras. 965-968; on the relationship between abuse of authority in representation and Section 181 BGB, see SCHOLZ P., *Missbrauch der Vertretungsmacht, Insichgeschäft und Erfüllung einer Verbindlichkeit – Zum Verhältnis von Missbrauch der Vertretungsmacht und § 181 BGB*, in *ZfPW*, 2019, pp. 297-316.

⁹⁷ FAUST F., *Bürgerliches Gesetzbuch – Allgemeiner Teil*, cit., p. 266 § 26 para. 39.

⁹⁸ See, on these two constellations, LEIPOLD D., *BGB I: Einführung und Allgemeiner Teil*, cit., § 27 para. 11.

other party to the transaction.⁹⁹ For this reason, the *Reichsgericht*, in a 1922 decision, still denied the applicability of Section 181 BGB in such cases.¹⁰⁰ This formalistic view has since been abandoned. Today, both the judicial practice¹⁰¹ and the overwhelming majority of legal scholarship¹⁰² accept an analogous application.¹⁰³ The decisive argument is that the interposition of a sub-agent or other intermediary does not eliminate the risk of self-interested or biased decision-making by the representative – it merely obscures it. Since the representative typically appoints, instructs, and controls the intermediary, they effectively influence both sides of the transaction.¹⁰⁴ Allowing this would invite circumvention of the statute.

In this regard, Belgium adopts essentially the same approach. Under the old Civil Code, this was more explicit: the prohibition in Article 1596 applied to both *direct* and *indirect* purchases made by the persons within its scope. Although this is no longer stated in Article 1.8, § 6 CC, this does not mean that a representative may now interpose another (natural or legal) person to evade the prohibition.¹⁰⁵ Concealing a conflict of interest through intermediaries in order to avoid the application of this legal rule, in fact, amounts to a

⁹⁹ See, e.g., DÖRNER H., *Section 181 BGB*, in SCHULZE R. (ed), *Handkommentar zum Bürgerlichen Gesetzbuch*, Baden-Baden, 2024, para. 15; SCHUBERT C., *Section 181 BGB*, cit., para. 54.

¹⁰⁰ See RGZ 103, 417-419; see also RGZ 108, 406 et seq.

¹⁰¹ See, e.g., BGH, Urt. v. 6.3.1975 – II ZR 80/73, NJW 1975, 1117, 1118 seq.; OLG Brandenburg, Urt. v. 17.3.2022 – 10 U 16/21, NZG 2022, 929 para. 29; OLG Frankfurt, Urt. v. 22.1.1974 – 20 W 810/73, OLGZ 1974, 347, 349 seq.

¹⁰² See, e.g., SCHUBERT C., *Section 181 BGB*, cit., para. 54 with further references; extensively HARDER M., *Das Selbstkontrahieren mit Hilfe eines Untervertreeters*, in *AcP*, 1970, pp. 295-305; for a contrary view, see PAWLOWSKI H.-M., *Allgemeiner Teil des BGB*, cit., § 5 paras. 794-97.

¹⁰³ Some authors even consider an analogy unnecessary, arguing that where the representative is barred by Section 181 BGB from concluding the transaction himself, he equally lacks the authority to appoint a subagent for that purpose, see, e.g., FINKENAUER T., *Section 181 BGB*, cit., para. 11.

¹⁰⁴ See LEIPOLD D., *BGB I: Einführung und Allgemeiner Teil*, cit., § 27 para. 11; STOFFELS M., *Section 181 BGB*, cit., para. 33.

¹⁰⁵ VAN DAMME N., VAN LOOCK S., *Interdiction du représentant de se porter contrepartie et d'agir en cas de conflit d'intérêts* in VAN MEERBEECK J., NINANE Y. (eds.), *Les principes généraux du droit privé*, Limal, 2023, pp. 359-360.

circumvention of the law.¹⁰⁶ If the undefined notion of a conflict of interest under Article 1.8, § 6 of the Civil Code were to be interpreted in line with the application of Section 181 BGB – on the assumption that no natural persons (such as spouses, partners, or children) or legal persons (such as companies) are interposed so as to conceal the conflict of interest – such an interpretation would not extend to situations in which the interposed person cannot be assimilated to the representative. Hence, other conflicts of interest would be legally irrelevant. However, Section 181 BGB refers explicitly to self-dealing and multiple representation, which does not naturally suggest the same interpretation for the more broadly formulated Article 1.8, § 6 of the Civil Code. Yet, the German reluctance to treat the mere existence of a conflict of interest as a criterion, due to its indeterminate character, serves as a clear warning for legal certainty, and suggests that in Belgium this formulation should be approached with caution.

4. *Exceptions*

The prohibitions under Section 181 BGB and Article 1.8 § 6 CC are both subject to an important exception: the consent of the principal. By consenting, he authorizes the representative to enter into the transaction despite the potential conflict of interest.¹⁰⁷ The underlying rationale behind the prohibitions is to protect the principal from a conflict of interest—a safeguard that he may choose to waive.¹⁰⁸

¹⁰⁶ VAN DAMME N., VAN LOOCK S., *Interdiction du représentant de se porter contrepartie et d'agir en cas de conflit d'intérêts* in VAN MEERBEECK J., NINANE Y. (eds.), *Les principes généraux du droit privé*, Limal, 2023, p. 360; see also VAN DAMME N., *Wetsontduiking. Fraus legis*, Antwerpen, 2020, pp. 453-454.

¹⁰⁷ For Belgian law see SAGAERT V., TILLEMANN B., VERBEKE A.L., *Vermogensrecht in kort bestek*, Antwerpen, 2022, p. 504; VAN DAMME N., VAN LOOCK S., *Interdiction du représentant de se porter contrepartie et d'agir en cas de conflit d'intérêts* in VAN MEERBEECK J., NINANE Y. (eds.), *Les principes généraux du droit privé*, Limal, 2023, p. 369; for German law, see e.g., SCHUBERT C., *Section 181 BGB*, cit., para. 79.

¹⁰⁸ For Belgian law see CLAEYS I., THANGE T., *Nieuw algemeen contractenrecht*, Brussel, 2025, p. 454; for German law, see SCHÄFER C., *Section 181 BGB*, in HAU W., POSECK R. (eds.), *Beck'scher Online-Kommentar zum BGB*, München, 2026, para. 29.

Consent may relate to a specific transaction only (e.g., a certain purchase agreement), to a particular category of transactions, or may be granted in general terms.¹⁰⁹ Where the representative acts on behalf of multiple parties, consent must be obtained from each of them.¹¹⁰ It has to be expressed through a unilateral declaration of intent, which the principal must receive, and can be made explicitly or implied by conduct.¹¹¹ Under German law, implied consent requires conduct that clearly signals approval; mere tolerance of the transaction does not suffice.¹¹² Belgian law, in contrast, takes a more lenient approach: the legal act is not void if the represented party knew of the conflict of interest (for example, because the representative had informed them) and did not object, or could be deemed not to have objected (for instance, by failing to respond within a reasonable time).¹¹³ Thus, Belgian law more readily accepts the principal's consent than German law.

In Belgian law, certain limits remain: Consent is not possible where a specific rule of mandatory law or public policy applies. This includes, for instance, corporate law rules¹¹⁴ on conflicts of interest,

¹⁰⁹ For Belgian law, see ERNST P., *Belangenconflicten in naamloze vennootschappen*, Antwerpen, 1997, p. 174; for German law, see FINKENAUER T., *Section 181 BGB*, cit., para. 27; BGH, Urt. v. 12.5.2000 – V ZR 470/98, WM 2009, 1757, 1758.

¹¹⁰ For Belgian law, see VAN DAMME N., VAN LOOCK S., *Interdiction du représentant de se porter contrepartie et d'agir en cas de conflit d'intérêts* in VAN MEERBEECK J., NINANE Y. (eds.), *Les principes généraux du droit privé*, Limal, 2023, p. 370 ; for German law see FINKENAUER T., *Section 181 BGB*, cit., para. 33.

¹¹¹ For Belgian law, compare Amendement nr. 3 (K. GEENS) op het wetsvoorstel houdende Boek 1 “Algemene bepalingen” van het Burgerlijk Wetboek, *Parl.St.* Kamer 2021-22, nr. 55-1805/003; for German law, see SCHILKEN E., *Section 181 BGB*, cit., para. 46.

¹¹² See STOFFELS M., *Section 181 BGB*, cit., para. 39; SCHUBERT C., *Section 181 BGB*, cit., para. 81: „Das Schweigen des Vertretenen ist grundsätzlich ohne Bedeutung.”

¹¹³ Amendement nr. 3 (K. GEENS) op het wetsvoorstel houdende Boek 1 “Algemene bepalingen” van het Burgerlijk Wetboek, *Parl.St.* Kamer 2021-22, nr. 55-1805/003.

¹¹⁴ See Article 5:76, 6:64, 7:96, 7:102 and 7:115 WVV; see also VOS T., *Belangenconflicten in het Belgisch vennootschapsrecht: een kritische analyse van het WVV na de omzetting van de Tweede Aandeelhoudersrichtlijn* in *Tijdschrift voor Privaatrecht*, 2020, pp. 231-233; HERMANT P., *Les conflits d'intérêts en droit des sociétés: état des lieux et interaction avec l'article 1.8 du nouveau Code civil* in DE CUYPER J.Q., INGHELS B., JAFFERALI R., LAMBERT T., PAQUOT B., SCARNÀ S., SIMONART V. (eds.), *Gouvernance et responsabilité. Mélanges à la mémoire de Didier Willermain*, Brussel, 2023, pp. 623-627.

rules regarding conflicts in guardianship (*voogdij; tutelle*)¹¹⁵, powers of attorney for care (*buitengerechtelijke bescherming; protection extrajudiciaire*)¹¹⁶, or the administration of protected persons (*bewind; administration*)^{117, 118}

Apart from that, German law provides a further exception: A self-dealing transaction is permissible if it consists solely in the performance of an existing obligation (*Erfüllung einer Verbindlichkeit*). Consider the following example: the agent (A), acting on behalf of the principal (P), fulfills P's obligation to pay the purchase price under a previously concluded contract of sale (Section 433 BGB). To do so, A takes the amount owed from P's cash register and transfers it to himself. This transfer of ownership of the money formally constitutes self-dealing since A acts on both sides of the transaction. Substantively, however, it merely executes a pre-existing obligation arising from the contract of sale. The rationale is intuitive: if the legal outcome of the transaction is already owed, there is no room for a conflict of interest – the representative simply effects what the law already requires.¹¹⁹ In other words, the principal is not exposed to any legal or economic risk as they either receive what they are already entitled to, or they perform what they are already legally required to do.

Although this exception does not exist under Belgian law, such a situation might, under certain circumstances, give rise to the principal's (implicit) consent, since the principal would already have agreed to pay the purchase price to the agent. If the principal, however, objects to the agent making the payment on their behalf, the judge could modulate the nullity sanction under Article 5.57 CC,

¹¹⁵ See Article 411 old CC.

¹¹⁶ See Article 490/2, § 1, fourth paragraph old CC; Vred. Antwerpen 29 January 2019, *T.Vred.* 2019, 266; see also Vred. Sint-Pieters-Woluwe 2 September 2022, *T.Vred.* 2023/5-6, 160; VANDERHULST V., GORET H., *10 jaar zorgvolmacht in Notarieel en Fiscaal Maandblad*, 2023, p. 288.

¹¹⁷ See Article 499/10 old CC; see also Vred. Zomergem 30 September 2009, *RW* 2010-11, 379.

¹¹⁸ *Lex specialis derogat legi generali*; CLAEYS I., THANGE T., *Nieuw algemeen contractenrecht*, Brussel, 2025, p. 453.

¹¹⁹ See STOFFELS M., *Section 181 BGB*, cit., para. 46; for a detailed discussion of this exception, see KRAFKA A., *Section 181 BGB*, cit., paras. 255-267.

since nullifying the act would be inappropriate in light of the purpose of Article 1.8, § 6 CC.

5. Legal consequences

A legal act concluded despite a conflict of interest will not be automatically void under either German or Belgian law, though the wording of Section 181 BGB (“*may not enter into a legal transaction*”) and Article 1.8, § 6 CC (“*may not act as the counterparty, nor in the event of a conflict of interest*”) might suggest otherwise. Instead, both systems provide for a more moderate legal consequence, while the specific design of the respective provisions differs.

5.1. *Suspensively ineffective under German Law*

A transaction concluded in violation of Section 181 BGB is merely suspensively ineffective (*schwebend unwirksam*): it remains without effect unless the principal ratifies it (pursuant to Section 177 BGB).¹²⁰ Once ratified, the transaction becomes retroactively valid; if the principal refuses consent, the transaction is finally void.¹²¹ In this way, Section 181 BGB merely imposes a legal limitation on the representative’s authority.¹²² This approach reflects that, despite their structural risks, self-dealing transactions may still serve the principal’s best interests.¹²³ There is thus no reason to prohibit them categorically. Rather, Section 181 BGB entrusts the principal with the decision of whether to waive the protective effect of the provision. Ratification must be declared to the agent, either expressly or implicitly through conduct.¹²⁴ In cases in which the agent represents

¹²⁰ See, e.g., LEIPOLD D., *BGB I: Einführung und Allgemeiner Teil*, cit., § 27 para. 4; critically on this approach HAUSCHILD A., § 181 BGB im Gesellschaftsrecht – eine heilige Kuh auf (international) verlorenem Posten?, in *ZIP*, 2024, p. 959.

¹²¹ See SCHUBERT C., *Section 181 BGB*, cit., para. 68; and paras. 68-78 extensively to the ratification of the transaction.

¹²² See SCHUBERT C., *Section 181 BGB*, cit., para. 68; FLUME W., *Allgemeiner Teil des BGB*, cit., § 48 1.

¹²³ See LEIPOLD D., *BGB I: Einführung und Allgemeiner Teil*, cit., § 27 para. 4.

¹²⁴ See KRAFKA A., *Section 181 BGB*, cit., para. 381.

multiple parties at once, ratification requires the consent of all principals involved.¹²⁵

5.2. *Relative nullity under Belgian Law*

The Belgian legislator, by contrast, has taken precisely the opposite approach. Article 1596 old CC and Article 1.8, § 6 CC entail a *relative* nullity.¹²⁶ Thus, the transaction remains valid unless the represented party invokes its annulment, but they are equally entitled to consent to the voidable legal act.¹²⁷ Even under Article 1596 old CC, consent (whether given before or afterward) could permit self-dealing.¹²⁸ Of course, the represented party could also choose to carry out the legal act themselves, bringing the representation to an end and preventing any further self-dealing.¹²⁹ However, merely setting the terms of the legal act does not terminate the representation.¹³⁰ In such a case, the prohibition remained in effect. If the represented party confirms the relative nullity (*bevestiging; confirmation*),¹³¹ they unilaterally relinquish their right to invoke the (relative) nullity.

¹²⁵ See SCHILKEN E., *Section 181 BGB*, cit., para. 46.

¹²⁶ Cass. 7 December 1978, *Arr.Cass.* 1978-79, 407 and *Pas.* 1979, I, 408; VAN DEN BERGH B., *Het aankoopverbod voor lasthebbers krachtens art. 1596 BW: pleidooi voor een rechterlijke belangenafweging i.p.v. een absolute wettelijke onbekwaamheid in Rechtskundig Weekblad*, 2013-14, p. 1102.

¹²⁷ Cass. 7 December 1978, *Arr.Cass.* 1978-79, 407 and *Pas.* 1979, I, 408; Cass. 24 September 1981, *Arr.Cass.* 1981-82, 132 and *Pas.* 1982, I, 125.

¹²⁸ Gent 18 May 1876, *Pas.* 1877, II, 15; MARYSSE S., *Commentaar bij art. 1596 oud BW* in DAMBRE M., DIRIX E., TILLEMANN B. (eds.), *Bijzondere overeenkomsten. Artikelsgewijze commentaar met overzicht van rechtspraak en rechtsleer*, Mechelen, 2021, p. 83.

¹²⁹ Cass. 13 September 2012, C.11.0730.F, *RW* 2013-14, 1100, note VAN DEN BERGH B.

¹³⁰ Cass. 24 September 1981, *Arr.Cass.* 1981-82, 132 and *Pas.* 1982, I, 125.

¹³¹ See Article 5.61 CC; SAGAERT V., TILLEMANN B., VERBEKE A.L., *Vermogensrecht in kort bestek*, Antwerpen, 2022, p. 504.

Alternatively, they may also ratify the legal act (*bekrachtiging; ratification*),¹³² meaning that the represented party retroactively remedies the lack of authority through a unilateral act.¹³³

6. Comparison to DCFR and PECL

The preparatory works for the new Belgian provision explicitly refer to foreign codes and model laws as sources of inspiration, in particular Article II-6:109 of the DCFR.¹³⁴ It is therefore worth examining the DCFR more closely.

In contrast to German and Belgian law, Article II-6:109(1) DCFR provides that the principal may void an act performed by a representative involving a conflict of interest where the third party knew or could reasonably be expected to have known of that conflict. Article 3:205(1) PECL similarly allows the principal to avoid the contract if the third party knew or could not reasonably have been unaware of the agent's conflict of interest. In other words, both the DCFR and the PECL protect the third party acting in good faith.

Under both models, this protection is tempered by two presumptions of a conflict of interest: (a) the representative also acted as a representative for the third party; or (b) the transaction was concluded with the representative acting in a personal capacity.¹³⁵ These are precisely the two situations covered by Section 181 BGB, which may explain why German law does not afford similar protection to the third party acting in good faith. As indicated by *Eidenmüller et al.*, these presumptions are not exhaustive, and a conflict of interest may also arise in other situations – an indefinite legal concept they caution is “*not conducive to legal certainty, particularly with regard*

¹³² Article 1.8, § 4 BW; compare ERNST P., *Belangenconflicten in naamloze vennootschappen*, Antwerpen, 1997, p. 174.

¹³³ VAN DEN BERGH B., *Het aankoopverbod voor lasthebbers krachtens art. 1596 BW: pleidooi voor een rechterlijke belangenafweging i.p.v. een absolute wettelijke onbekwaamheid* in *Rechtskundig Weekblad*, 2013-14, p. 1104.

¹³⁴ Amendment nr. 3 (K. GEENS) op het wetsvoorstel houdende Boek 1 “Algemene bepalingen” van het Burgerlijk Wetboek, *Parl.St.* Kamer 2021-22, nr. 55-1805/003, p. 14.

¹³⁵ Article II-6:109(2) DCFR; *mutatis mutandis* Article 3:205(2) PECL.

to a sensitive question such as this.”¹³⁶ This is exactly the problem that Belgium is currently grappling with. Yet, Article 1.8, § 6 CC does not require the third party to have known or reasonably been expected to know of the conflict of interest for the principal to void the act. In other words, while the Belgian provision – like the DCFR – appears broader than mere self-dealing or multiple representation, it does not extend protection to the third party who is unaware of potentially more unusual types of conflict of interest.¹³⁷ This, is another reason why the Belgian provision should not be applied too extensively. Finally, Article II-6:109(3) of the DCFR lists several exceptions under which the principal may not avoid the act: “(a) if the representative acted with the principal’s prior consent; or (b) if the representative had disclosed the conflict of interest to the principal and the principal did not object within a reasonable time; (c) if the principal otherwise knew, or could reasonably be expected to have known, of the representative’s involvement in the conflict of interest and did not object within a reasonable time; or (d) if, for any other reason, the representative was entitled as against the principal to do the act by virtue of IV.D.–5:101 (Self-contracting) or IV.D.–5:102 (Double mandate).” Article 3:205(3) of the PECL similarly provides exceptions in cases where (a) the principal had consented to, or could not have been unaware of, the agent’s actions; or (b) the agent disclosed the conflict of interest to the principal and the principal did not object within a reasonable time. Belgium’s approach to (implicit) consent closely mirrors the DCFR and PECL, reflecting a similarly broad framework of exceptions. As noted, under German law, however, implicit consent requires conduct that clearly signals approval, not just tolerance of the transaction. As a result, while Belgian law – following the DCFR and PECL – adopts a broader notion of conflict of interest, it simultaneously – again like the DCFR and PECL – provides broader exceptions to nullity. One could view this

¹³⁶ EIDENMÜLLER H., FAUST F., GRIGOLEIT H.C., JANSEN N., WAGNER G., ZIMMERMANN R., *The Common Frame of Reference for European Private Law—Policy Choices and Codification Problems*, Oxford, 2008, p. 676.

¹³⁷ STORME M.E., *Derden in het nieuwe verbintenissenrecht* in *Tijdschrift voor Privaatrecht*, 2024, p. 1770; VAN LOOCK S., *Vertegenwoordiging en lastgeving in het nieuwe Belgische Burgerlijk Wetboek* in *Nederlands Tijdschrift voor Burgerlijk Recht*, 2025, pp. 400-401.

as a deliberate effort to balance broad conflict definitions with legal certainty by curbing nullity.

While the DCFR and PECL provide important inspiration for Belgian Article 1.8, § 6 CC, the central issue – what precisely constitutes a conflict of interest – remains unresolved. The statutory presumptions are not exhaustive, and no guidance is given as to which other conflicts might give rise to nullity. From this perspective, the German approach has the advantage of being more clearly delineated, even though “other” conflicts of interest may fall outside the scope of Section 181 BGB.

7. Conclusion

Comparing Article 1.8, § 6 CC and Section 181 BGB, the German provision is in many respects more systematic than its Belgian counterpart. First, the wording of Section 181 BGB is clearly limited to cases of self-dealing and multiple representation. Only in exceptional circumstances is its scope extended by analogy, namely where the representative interposes a sub-agent or intermediary in order to circumvent the prohibition. In addition, the German exception for transactions that are legally solely beneficial to the principal – an exception unknown in Belgian law – further restricts its scope.

Belgium, by contrast, opted for a broad formulation similar to that found in the DCFR and the PECL. Beyond self-dealing and multiple representation, other conflicts of interest may therefore fall within its ambit. This indeterminate wording – already criticised in relation to the DCFR and PECL, and by Belgian scholars with regard to Article 1.8, § 6 CC – undermines legal certainty, as it remains unclear how far the provision’s scope should extend. These criticisms, together with German law’s general restraint, provide an additional argument against an overly broad interpretation of Article 1.8, § 6 CC.

Apart from self-dealing, the provision should primarily address situations of multiple representation (a category widely recognised in foreign civil codes and model laws), as well as cases involving the interposition of other persons (consistent with German law and with the wording of Article 1596 of the former Civil Code). The added value of the broad formulation in Article 1.8, § 6 CC may lie in its

capacity to capture complex constructions in which other natural or legal persons are used to conceal a conflict of interest. In such circumstances, however, subjecting a good-faith third party who benefits from the transaction or legal act to nullity may be inappropriate.

Both German and Belgian law contain mechanisms that soften the sanction of nullity. First, there are consent-related exceptions: Belgium, in line with the DCFR and PECL, appears more willing to accept implicit consent, for instance where no objection is raised within a reasonable time after the principal becomes (or is made) aware of the conflict of interest. Second, in both jurisdictions there is a discernible move away from automatic nullity. Although the techniques differ – suspensive ineffectiveness in Germany, and relative nullity combined with the corrective mechanism of Article 5.57 CC in Belgium – both approaches moderate the sanction on the basis that the principal's interests may not have been harmed.

While this evolution may weaken the preventive effect traditionally intended by conflict-of-interest prohibitions, it does alleviate some of the concerns associated with an excessively broad application of such rules. At present, Belgian case law on this issue remains scarce, but future developments will reveal how narrowly or broadly the provision will ultimately be applied.

Debt, Judgment, and Security: English and German Approaches to Preclusion

Jonathan L. T. Chu, Felix D. Pollmann*

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1. Introduction

Preclusion law is the assemblage of legal rules underpinned by, and which pursue, the principle of finality in litigation. As Jacob van de Velden observed, “*most if not all legal systems based on the rule of law ... recognise the value*” of this principle, which may be defined to mean that “*in the private and public interest [alike] ... there should be an end to litigation*”, so that “*matters conclusively [adjudicated upon] by a court of competent jurisdiction should not, save for exceptional circumstances, be reopened*”¹.

In his comprehensive study of English and Dutch preclusion laws, van de Velden identified two essential considerations for any

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¹ VAN DE VELDEN J. B., *Finality in Litigation: The Law and Practice of Preclusion – Res Judicata (Merger and Estoppel), Abuse of Process and Recognition of Foreign Judgments*, Alphen aan den Rijn, 2017, p. 1.

meaningful attempt at comparison. First is the recognition that different legal systems implement the principle of finality differently. Similar concerns may be addressed, and comparable functions may be served, by legal rules that “do not always look and sound the same”². Second is the awareness that, within a given system, preclusion law often extends beyond the law of *res judicata* strictly so-called. This reflects the reality that finality in litigation is a wide field, aspects of which are implemented by “rules of law that preclude (re)litigation of matters which are not strictly *res judicata*”³. Going past labels and system-specific categorisations is what van de Velden called a “functional” and “principle-oriented” approach to comparing preclusion laws⁴. In this, our own Anglo-German comparative study, we adopt this approach.

Our focus is on a specific aspect of preclusion law, in the specific context of a creditor’s claim for the non-payment of a contractual debt⁵. We are concerned with whether, and how, English and German legal systems preclude a creditor from reasserting a contractual debt, in an attempt to recover greater monetary relief, in circumstances where the creditor has already recovered money judgment from an earlier action on the strength of the same debt.

The following case scenario illustrates and defines the nature of our inquiry: Debtor owes Creditor €100 under a contract, and

² Ibid., p. 9.

³ Ibid., pp. 14–15.

⁴ Ibid., pp. 8–9.

⁵ Our use of the word “claim” in this contribution requires a word of clarification. Under German substantive law, a person’s legal entitlement is denoted by the word *Anspruch*, which is usually translated into English as “claim”. To an English lawyer, however, the English word “claim” is more naturally associated with either (1) the court proceedings in which a person’s legal entitlement is asserted; or (2) the subject matter of such proceedings, i.e., the facts relied on and/or the particular relief demanded by the claimant. The second of those meanings roughly corresponds to *Streitgegenstand* or *prozessuale Anspruch* under German procedural law, which may also be rendered in English as “claim”. On the other hand, what is meant by *Anspruch* is, to an English lawyer, a “right” or an “entitlement”, not a “claim”. Given this disjunction, and in order to facilitate comparative analysis as well as to avoid confusion, we will, in this contribution, render *Anspruch* as “legal entitlement”, while the word “claim” will be used throughout only to mean a court action or its subject matter.

Creditor has taken security for this debt, either *in personam* or *in rem*⁶. The debt has fallen in arrears, and Creditor has sued Debtor for the non-payment of it, recovering a final money judgment for €80⁷. In this action, Creditor made no mention of the fact that the true amount of the debt was €100. On the face of the claim and the evidenced adduced, €80 was all that Creditor was claiming. In turn, the court in its judgment made no mention of the fact that the true amount of the debt might be €100. The court was oblivious to that possibility. It gave judgment for €80 simply because that was what Creditor had claimed⁸. Despite the judgment, Debtor has not paid a single cent to Creditor.

Two questions arise from this case scenario.

First, can Creditor sue Debtor a second time to recover a further money judgment for the €20 balance under the contract?

Secondly, can Creditor, instead of suing Debtor a second time, enforce the pre-existing security to recoup (1) the €80 judgment sum; or even, (2) the €100 contract sum in full?

The motivation for this exercise is not exactly the same from both English and German perspectives. An English lawyer will have no hesitation in answering “No” to the first question. As we will see, however, they struggle with articulating the true reasons for this answer, and with discerning the proper effect of the legal rules at play. It is a widely held assumption among English lawyers that, upon recovering money judgment for the non-payment of a contractual debt, the creditor’s contractual right is extinguished and replaced by a new payment right born of the judgment, which is said to become her sole right.

On the other hand, German lawyers on the whole have no difficulty in correctly appreciating the proper effect of a judgment. The

⁶ Under German law, a creditor must normally sue the debtor before enforcing certain third-party personal security, unless the contract expressly abrogates this requirement. English law has no such rule. For our analysis of German law, we proceed on the basis that this requirement has been contractually abrogated.

⁷ In other words, we assume that this judgment has acquired *res judicata* status in the respective legal systems.

⁸ In other words, this is a different scenario from one where Creditor *did* claim €100, but the court positively decided that the true value of the debt was €80 instead. Different considerations apply in that event: see n. 86 (English law) and text following n. 154 (German law).

first question is a difficult one for them, however. It is often assumed that, like other civilian systems, German law has no mechanism to curb the second claim, and that “splitting” the claim in the way Creditor did in our case scenario is inherently and invariably unobjectionable.

Our aim is to show both assumptions to be unfounded. The English assumption will be disproved by a thorough consideration of the second question, which is often overlooked in judicial and academic writings on the topic. The German assumption, on the other hand, will be revealed to be overly simplistic; there are at least three mechanisms—two coming from outside the law of *res judicata* strictly so-called—by which Creditor *may* be precluded from suing Debtor a second time for the balance.

2. *English law*

2.1. *Foundations*

2.1.1. *English preclusion law*

We shall begin with an overview of English preclusion law. This is a vast field spreading beyond the law of *res judicata*. Van de Velden has shown us that English preclusion law can be understood as comprising the following four aspects⁹.

First is the rule that, once a judgment is perfected, the judgment-rendering court is *functus officio* so that the parties are, save in exceptional situations, precluded from going back to that court to reopen matters that have been conclusively decided.

Second is merger *in rem judicatam*¹⁰ (hereafter “merger”). This doctrine precludes a claimant¹¹ who has recovered money judgment on a cause of action from reasserting the same cause of action, in a

⁹ VAN DE VELDEN J. B., *Finality in Litigation*, cit., pp. 30–31; and see the rest of chapter 1 for details.

¹⁰ Also known as the doctrine of former recovery, or by the full Latin tag *transit in rem judicatam*.

¹¹ Including a counterclaimant.

bid to recover a further money judgment. This is based on the notion that the cause of action is extinguished by being merged in the judgment recovered—hence the name of the doctrine. The proper effect of this doctrine is the central question for our study.

Third is estoppel *per rem judicatam* (hereafter “estoppel”). To “estop” simply means to stop¹². Here, it means being stopped by res judicata from putting forward an assertion. More specifically, this doctrine precludes any party to litigation from contradicting a conclusive judicial finding about the existence or non-existence of a cause of action (known as “cause of action estoppel”), or the merits of an issue of law or fact that was essential to be determined in the earlier judgment (known as “issue estoppel”).

Fourth and final is the doctrine of abuse of process. This has a few specific strands, though speaking generally, they all aim at precluding a party to litigation from raising matters through “*procedural conduct that, though technically consistent with procedural law*”—that is, including the law of res judicata—“*is in effect manifestly unfair to [the other party], or otherwise brings the administration of justice into disrepute*”¹³.

As the names reveal, only merger and estoppel comprise the English law of res judicata. That said, all the rules and doctrines mentioned are what van de Velden would call “agents of finality”—legal rules that promote and implement the principle of finality in litigation.

A final point in this quick sketch of English preclusion law is that res judicata under English law has a somewhat different meaning from what civil lawyers may be accustomed to. There are several distinctions, but the most important one for our purpose is this. Under English law, a judgment has res judicata status for any matter conclusively determined by the judgment-rendering court, even if that judgment remains subject to appeal. The determination of the judgment-rendering court does not of course bind the appeal court. Save as to that, however, the matter decided is res judicata for as long as the first-instance judgment stands undisturbed¹⁴.

¹² *Oxford English Dictionary*, under this word.

¹³ VAN DE VELDEN J. B., *Finality in Litigation*, cit., p. 100.

¹⁴ *Ibid.*, pp. 58, 71–72, 219.

2.1.2. *Merger in rem judicatam*

From the perspective of a claimant trying to reassert a cause of action, the difference between merger and estoppel may be explained in terms that the former applies to a claimant who was “successful” in the first action, the latter to one who lost. Merger is concerned with the situation where a court has, not only decided that a cause of action existed, but given money judgment on the strength of that cause of action. Importantly, even if the judgment did not tally with the full extent of the claimant’s monetary entitlement arising from that cause of action, the claimant is still precluded from bringing a second action to recover the balance. On the other hand, if a court has decided that a claim was unfounded because the cause of action relied on did not in fact exist, the claimant cannot bring a second action based on the same alleged cause of action, because to do so would be to contradict the earlier judicial finding. This is estoppel.

Indeed, apart from the fact that merger renders unrecoverable any unrecovered balance, the combined effects of merger and estoppel correspond to the claim preclusive effect of *res judicata* under German law¹⁵. The question is, why does the English law of *res judicata* extend its reach to the unrecovered balance? The usual explanation is that English law does not allow a claimant to “split” her monetary claim¹⁶; “for one cause of action you must recover all damages incident to it by law once and for ever”, as Lord Halsbury said¹⁷. If we pause to ponder for a moment, however, it would seem that this explanation cannot get us very far, unless we are told what an

¹⁵ See text between n. 111 and n. 113.

¹⁶ We use the expression “monetary claim” advisedly: in *Zavarco plc v Nasir* [2025] A.C. 738 (S.C.), the Supreme Court has held that a claimant may first seek a declaration before bringing a consequential claim for monetary relief; the Court further left open the question whether the grant of a final injunction would preclude a later monetary claim based on the same facts.

¹⁷ *Darley Main Colliery Co. v Mitchell* (1886) 11 App. Cas. 127, 132 (H.L.). See also *King v Hoare* (1844) 13 M. & W. 495, 504; *Nelson v Couch* (1863) 15 C.B. N.S. 100, 108; *Brunsdon v Humphrey* (1884) 14 Q.B.D. 141, 147 (C.A.); *Conquer v Boot* [1928] 2 K.B. 336, 343 (D.C.); *Clark v Urquhart* [1930] A.C. 28, 54 (H.L., N. Ire.); *Rothwell v Chemical & Insulating Co. Ltd.* [2008] 1 A.C. 281, [13]–[14] (H.L.); *Virgin Atlantic Airways Ltd. v Zodiac Seats U.K. Ltd.* [2014] A.C. 160, [17] (S.C.); *Zavarco*, cit., [29]. There is a similar rule in Scotland: *Aitchison v Glasgow City Council* 2010 S.C. 411 (I.H.).

indivisible unit of monetary claim comprises; in other words, what “all damages incident to [a cause of action]” means.

Lord Halsbury, if pressed, would probably say that he had in mind the entirety of a claimant’s monetary entitlement as prescribed by law to arise on a given set of facts; which was different, he would hasten to add, from what the claimant herself had precisely sought by way of relief. If this is the correct view, it brings to light an important difference in legal tradition.

As we will see later¹⁸, German law has a procedural principle known as “party disposition”, within which the Roman principle *ne eat iudex ultra petita partium*¹⁹ (hereafter “*non ultra petita*”) is observed. *Non ultra petita* enjoins a court from giving relief beyond what the claimant has craved in her statement of claim. This results in a more restrictive meaning of a cause of action, and, by extension, a more restrictive res judicata effect of a judgment upon it. Under German law, the object of a cause of action is partly defined by law but partly defined by the claimant herself. Therefore, causes of action are the same only if there is identity in both the underlying facts as well as the particular relief sought. In our case scenario, for instance, Creditor has pursued her cause of action for €80, but this leaves intact a distinct cause of action—or potentially multiple causes of action even—for the €20 balance.

By contrast, English law does not have the tradition of strictly enforcing *non ultra petita*. In giving relief, an English judge is not constrained by what precisely the claimant has demanded in her claim form; this is now expressly reflected in the Civil Procedure Rules²⁰. In practice, moreover, the “prayer for relief” section of the claim form is almost always couched in the most general terms, complete with a catch-all request for “further and other relief”. All this may be a legacy of the pre-20th century formulary system: as far as monetary relief was concerned, the precise shape and form of the relief was a matter for proof before jury, not something to be fixed

¹⁸ Text at n. 107.

¹⁹ “Let the judge not go beyond what has been requested by the parties”.

²⁰ Rule 16.2(5): “The court may grant any remedy to which the claimant is entitled, even if that remedy is not specified in the claim form”.

in stone before trial²¹. This is still the case, the only difference being that jury trial has now been gotten rid of. The result is that English law does not regard the object of a cause of action as being defined by reference to the precise extent of what the claimant has demanded as her monetary relief. It is instead—as Lord Halsbury would have said—the whole of the claimant’s monetary entitlement, determined solely according to law to have arisen from the facts. This is why, when someone has a cause of action for monetary relief, she has one chance to recover all that she is by law entitled to on a given set of facts.

For these reasons, a “successful” claimant cannot claim any unrecovered balance, even if a second claim for greater monetary relief would involve neither claiming the “same” relief (in the sense that the claimant would not be claiming the same portion of her monetary entitlement a second time) nor contradicting an earlier judicial finding (because the claimant would be relying on, not disputing, the determination that she had a cause of action). In one of many judicial statements attempting to justify this policy of English law, Mr. Justice Willes said: “*the recovery in the former action was held to be a bar to the latter, on the ground that the plaintiff had had an opportunity of recovering in the first action the whole of his demand, and that, regard being had to the shortness of life, it was unreasonable to allow a defendant to be vexed a second time for the same cause*”²².

Thus, the second claim is barred. The doctrine of merger—with its notion that the entire cause of action is merged in the judgment recovered and therefore gone—is the doctrinal vehicle through which this preclusive effect is both manifested and attained.

There are two aspects to the operation of merger which we can usefully distinguish. The first is a logically anterior enquiry as to what cause of action the claimant had. This is in truth a question of

²¹ See BULLEN E., LEAKE S. M., *Precedents of Pleadings in Actions in the Superior Courts of Common Law, With Notes, First Edition*, London, 1860, pp. 4–5, n. (f); IBBETSON D., *The Assessment of Contractual Damages at Common Law in the Late Sixteenth Century*, in DYSON M., IBBETSON D. (eds.), *Law and Legal Process: Substantive Law and Procedure in English Legal History*, Cambridge, 2013, pp. 126–27. On the formulary system, see further text at n. 62.

²² *Nelson*, cit., 109. See also *Hoare*, cit., 504; *Kendall v Hamilton* (1879) 4 App. Cas. 504, 542 (H.L.). Discussed VAN DE VELDEN J. B., *Finality in Litigation*, cit., p. 44.

substantive law which turns on the nature of the obligation in question²³. In a contract case, for instance, that would depend on a proper construction of the terms of the contract²⁴. Identifying the cause of action can be a complex matter. Difficult questions abound, for instance, where different rights are allegedly violated, or multiple defendants are allegedly involved, or the wrongful conduct has allegedly continued for a period of time or has caused continuous or multiple harms²⁵. With these questions we are not concerned. Focusing on money being owed under a contract by one debtor to one creditor, we may say that, speaking generally, one debt gives the creditor one cause of action upon the debtor's failure to pay by the time required²⁶.

Once the cause of action has been identified, the doctrine of merger can then properly operate. The traditional explanation of merger's operation is in terms that the cause of action is merged in and extinguished by the judgment. Lady Justice Arden put it this way: "*Merger explains what happens to a cause of action when a court or tribunal gives judgment. If a court or tribunal gives judgment on a cause of action, it is extinguished. The claimant, if successful, is then able to enforce the judgment, but only the judgment*"²⁷.

And she added: "*The effect of merger is that a claimant cannot bring a second set of proceedings to enforce his cause of action even if the first tribunal awarded him less than he was entitled to*"²⁸.

Two things stand out from this entirely orthodox explanation. First is that merger operates automatically. It does not leave room for

²³ *National Coal Board v Galley* [1958] 1 W.L.R. 16, 26 (C.A.).

²⁴ As illustrated by *Overstone Ltd. v Shipway* [1962] 1 W.L.R. 117 (C.A.), for instance.

²⁵ See, e.g., VAN DE VELDEN J. B., *Finality in Litigation*, cit., pp. 46–54; CHU J. L. T., "*Continuing Cause of Action*" Revisited, in *Law Quarterly Review*, 2024, pp. 192–97.

²⁶ Unless the contract otherwise provides. For instance, if a debt is payable by instalments, a distinct cause of action arises upon each instalment date for the corresponding portion of the debt: *Workman, Clark & Co. Ltd. v Lloyd Brazileño* [1908] 1 K.B. 968 (C.A.); *Galley*, cit., 26–27. Where a loan is given on terms that the debtor shall repay the principal together with interests thereon, the creditor may have a single cause of action to recover both principal and interests, or distinct causes of action to recover them separately, depending on the terms of the contract: *Union Investment Co. v Wells* [1908] 39 S.C.R. 625, 645 (S.C., Can.).

²⁷ *Clark v In Focus Asset Management & Tax Solutions Ltd.* [2014] 1 W.L.R. 2502, [5] (C.A.).

²⁸ *Ibid.*

judicial disapplication²⁹. Second is that merger operates immediately upon judgment. It does not matter that the judgment has not since been carried out. The claimant cannot sue the defendant again, even if the defendant has not discharged the judgment debt, or execution of the judgment has left the claimant unsatisfied. Furthermore, as we have said, it does not matter whether the judgment remains subject to the possibility of reversal. There are circumstances where a cause of action may revive upon judgment being reversed on appeal or otherwise set aside. For as long as that has not happened, however, the cause of action is gone³⁰.

2.2. *Our case scenario*

2.2.1. *Can Creditor sue Debtor a second time for the €20 contract balance?*

The short answer is “No”³¹. Our case scenario is a vanilla case where a single debt gives rise to a single cause of action upon non-payment. Having recovered money judgment on that cause of action, Creditor cannot sue Debtor again, even though the judgment sum does not tally with the full extent of Creditor’s contractual entitlement³². Upon judgment, Creditor’s cause of action is gone. It is merged in and extinguished by the judgment for €80.

²⁹ Save perhaps in the most exceptional circumstances: *Buckland v Palmer* [1984] 1 W.L.R. 1109 (C.A.). On the other hand, it has been said that merger must be pleaded by the defendant and that a court cannot apply it of its own motion: VAN DE VELDEN J. B., *Finality in Litigation*, cit., p. 45.

³⁰ *Higgins’s Case* (1607) 6 Co. Rep. 44b, sub nom. *Randall v Higgins* (1607) 142 Selden Soc. 1560.

³¹ *Chamberlain v Deputy Commissioner of Taxation* (1988) 164 C.L.R. 502 (H.C., Aus.); followed *Lloyds Bank plc v Hawkins* [1998] 3 E.G.L.R. 109 (C.A.). See also *Robinson v Bland* (1760) 2 Burr. 1077, 1087; *Nelson*, cit., 109; *Hollis v Palmer* (1836) 2 Bing. N.C. 713, 717–18; *Clark v Alexander* (1845) 8 Scott N.R. 147, 165.

³² In principle, Creditor cannot even sue Debtor a second time to recover unclaimed damages over and above the value of the debt as compensation for loss caused by late payment. This flows from the earlier discussion (in text at and following n. 20) that the object of a cause of action for monetary relief is the whole of a claimant’s monetary entitlement arising by law, which includes damages.

Importantly, it does not matter what Creditor's intentions were when she limited the claim to €80. It does not even matter whether she made a conscious decision or a slip. In a remarkable case from Australia³³, the Deputy Commissioner of Taxation sued a taxpayer for AU\$25,557.92 in unpaid tax. The real amount was in fact AU\$255,579.20. Judgment was however entered for AU\$25,557.92 as claimed. It was obvious that the claim suffered from an ingenuous clerical error. Nevertheless, the Deputy Commissioner was barred from subsequently suing for the balance. He had one cause of action that was completely exhausted in the earlier proceedings. So long as the judgment for AU\$25,557.92 stood, he could not sue the taxpayer again for the same demand.

2.2.2. Does this mean that the contractual debt is gone?

So far we have been using the expression "cause of action" to denote the subject matter that the doctrine of merger extinguishes. But what does that mean? What precisely is being extinguished? This is a difficult question. Difficult, because English lawyers have not traditionally been entirely transparent with their expressions, and "cause of action"—with its rich history and multifarious usages—is no exception³⁴.

In some contexts outside of merger, "cause of action" means the facts on which a court action is founded. It "*has been held from the earliest time to mean every fact which is material to be proved to entitle the plaintiff to succeed*", said Mr. Justice Brett³⁵. Or, as the same judge (now Lord Esher, Master of the Rolls) later put it, it signifies "*every fact which it would be necessary for the plaintiff to prove ... in order to support his right to the judgment of the Court*"³⁶.

³³ *Chamberlain*, cit.

³⁴ For an important endeavour to dissect the different meanings and usages attached to that expression, see SMITH L., *Defences and the Disunity of Unjust Enrichment*, in DYSON A., GOUDKAMP J., WILMOT-SMITH F. (eds.), *Defences in Unjust Enrichment*, Oxford, 2016, ch. 2, pp. 36–37; SMITH L., *Sources of Private Rights*, in DEGELING S., CRAWFORD M., TIVERIOS N. (eds.), *Justifying Private Rights*, Oxford, 2020, ch. 7, pp. 142–45.

³⁵ *Cooke v Gill* (1873) L.R. 8 C.P. 107, 116 (C.P.).

³⁶ *Read v Brown* (1888) 22 Q.B.D. 128, 131 (C.A.).

In this sense, the cause of action in a contractual debt claim is the fact of the debtor failing to pay the creditor in strict accordance with the stipulations of the contract—for the stipulated amount, at the time and place stipulated, in the stipulated currency, so on and so forth.

But as Lord Hodge recently observed in a case concerning merger, “[t]he facts are the facts and cannot be extinguished by a judgment”³⁷. This must be right. Judges are not magicians; judgments cannot magically extinguish what has happened in the real world. Moreover, a favourable judgment for the claimant always implies that the court is in agreement—to some extent if not fully—with the claimant’s account of the facts. In recording those facts, judgments seek to confirm rather than to “destroy” those facts.

Thus, in the context of merger, “cause of action” cannot mean the facts. If the operation of this doctrine does lead to something being extinguished, that must be something that exists in the mind—a juridical construct, in other words. Put another way, it must be some legal entitlement of the successful claimant that is extinguished upon judgment.

Yet even here there is room for ambiguity. Precisely what legal entitlement of the claimant is extinguished? Consider our case scenario. Creditor has first and foremost a legal entitlement under the contract to be paid €100. That is her contractual right to be paid a debt. Some lawyers do, controversially, call this right a “cause of action”³⁸. Is this the kind of legal entitlement that merger extinguishes? Or is it something else?

That the doctrine of merger extinguishes the contractual debt is a widely held assumption, supported by judicial statements from even the highest authorities. The origin of this assumption appears to be some fantastical words employed by Sir Edward Coke in his report of the *Higgins’s Case* (1607)³⁹, that upon judgment, “the debt due

³⁷ *Zavarco*, cit., [37]. For the same point: VAN DE VELDEN J. B., *Finality in Litigation*, cit., p. 41.

³⁸ BIRKS P., *Rights, Wrongs, and Remedies*, in *Oxford Journal of Legal Studies*, 2000, pp. 25, 27–28; *Hardy Exploration & Production (India) Inc. v Government of India* [2019] Q.B. 544, [120] (Com. Ct.).

³⁹ *Higgins’s Case*, cit. In *Zavarco*, cit., [19], the Supreme Court attributed those words to the Court of Common Pleas, where the *Higgins’s Case* was indeed heard. There is danger

by the bond is transformed and metamorphosed into a matter of record”⁴⁰. This was echoed nearly three centuries later by Mr. Justice Bramwell, who said, “the original debt is gone, transit in rem judicatum, a fresh debt is created with different consequences”⁴¹. Similar expressions abound in the decided cases⁴² and literature⁴³. On this view, merger is not merely a legal rule concerned to uphold and implement the principle of finality in litigation. It is a substantive rule that effects changes—drastic changes in some cases—to the legal relations between the parties⁴⁴.

in this attribution, however, because, as has been well observed, Coke had the habit of “not always distinguishing ... his own views from those he was reporting”: BAKER J., *An Introduction to English Legal History, Fifth Edition*, Oxford, 2019, p. 194.

⁴⁰ *Higgins’s Case*, cit., 45b. Compare *Preston v Perton* (1601) Cro. Eliz. 817; *Attorney General v Bagg* (1658) Hard. 125, 128; *Anon.* (1406) Jenk. 69, 70 (being Judge David Jenkins’s notes to Y.B. Pas. 7 Hen. IV, fo. 39, pl. 3, first published in 1661 in French and Latin).

⁴¹ *Re European Central Railway Co.* (1876) 4 Ch. D. 33, 38 (C.A.).

⁴² *Ex parte Higgins, Re Tyler* (1858) 3 De G. & J. 33, 38; *Kendall*, cit., 519, 539–40; *Ex parte Fewings, Re Sneyd* (1883) 25 Ch. D. 338, 349–50, 353–54 (C.A.); *Beckett v Ramsdale* (1885) 31 Ch. D. 177, 188–89 (C.A.); *Ex parte Lewis, Re Clagett* (1888) 36 W.R. 653, 654 (C.A.); *Re King & Beesley* [1895] 1 Q.B. 189, 193 (D.C.); *Economic Life Assurance Society v Osborne* [1902] A.C. 147, 149, 151 (H.L., Ire.); *Riches v Westminster Bank Ltd.* [1947] A.C. 390, 411 (H.L.); *President of India v La Pintada Compania Navigacion S.A.* [1985] 1 A.C. 104, 122 (H.L.); *Director General of Fair Trading v First National Bank plc* [2002] 1 A.C. 481, [3], [50] (H.L.); *Virgin Atlantic*, cit., [17]. Sometimes, instead of the “debt”, it is said that it is the “contract” or the “covenant” that is gone, which may or may not amount to the same thing: *Higgins’s Case*, cit., 45a; *Biddleson v Whitel* (1764) 1 Wm. Bl. 506, 507; *Drake v Mitchell* (1803) 3 East. 251, 259; *Fewings*, cit., 355–56; *Director General*, cit., [55].

⁴³ *Halsbury’s Laws of England, Fifth Edition*, London, 2025, vol. 22, ch. 8, para. 417; BEALE H. (ed.), *Chitty on Contracts, Thirty-Sixth Edition*, London, 2026, paras. 29-008, 29-010; BIRKS P., *Rights, Wrongs, and Remedies*, cit., pp. 15–16, 30–31; DICKINSON A., *The Effect in the European Community of Judgments in Civil and Commercial Matters: Recognition, Res Judicata and Abuse of Process: Report for England and Wales*, British Institute of International and Comparative Law, 2008, pp. 6, 18–19; KEANE P., *Spencer Bower and Handley: Res Judicata, Sixth Edition*, London, 2024, para. 19.02; MALEK H. M. (ed.), *Phipson on Evidence, Twenty-First Edition*, London, 2026, para. 43-17; STEEL S., STEVENS R., *The Secondary Legal Duty to Pay Damages*, in *Law Quarterly Review*, 2020, pp. 287–90; ZAKRZEWSKI R., *Remedies Reclassified*, Oxford, 2005, pp. 108–09; ZUCKERMAN A., *Zuckerman on Civil Procedure: Principles of Practice, Fifth Edition*, London, 2026, paras. 23.101, 26.91.

⁴⁴ *Virgin Atlantic*, cit., [17]; *Clayton v Bant* (2020) 272 C.L.R. 1, [66] (H.C., Aus.).

One of us has argued elsewhere that this assumption is mistaken⁴⁵. Drawing on a recent decision of the U.K. Supreme Court⁴⁶, it is argued that what is extinguished by the doctrine of merger is the claimant’s “right to claim a further remedy arising from [the same] factual circumstances” as that which grounded an earlier money claim⁴⁷. A creditor’s right to be paid a debt is different from her right to sue for the debt upon non-payment⁴⁸. The second of those rights—often called a “right of action”⁴⁹ or even a “cause of action”⁵⁰—is the true target of the doctrine of merger. The former is not, and it is not affected in the slightest by the pronouncement of a favourable money judgment for the creditor. The judgment merely takes away the actionability of the contractual debt, thereby changing its nature⁵¹. It does not extinguish it⁵². On this view, merger is a procedural rule concerned solely with the regulation of court actions, in furtherance of the principle of finality in litigation⁵³. It has no substantive effect on the parties’ legal relation.

This argument is not new. Van de Velden made the same point nearly a decade ago in his comparative study of preclusion laws⁵⁴. More recently, Stephen Smith’s study of private law remedies in the

⁴⁵ CHU J. L. T., *Degrees of Right*, in *Cambridge Law Journal*, 2025, pp. 514–17.

⁴⁶ *Zavarco*, cit.

⁴⁷ *Ibid.*, [37].

⁴⁸ SALMOND J., *Jurisprudence, Seventh Edition*, London, 1924, p. 248. For a similar point in the civil law tradition, see WHITTY N. R., *From Rules to Discretion: Changes in the Fabric of Scots Private Law*, in *Edinburgh Law Review*, 2003, pp. 288, 305–07; SMITH L., *Defences and the Disunity of Unjust Enrichment*, cit., pp. 33–36.

⁴⁹ *Buckland v Johnson* (1854) 15 C.B. 145, 165; *Kendall*, cit., 515, 526; *Wegg Prosser v Evans* [1895] 1 Q.B. 108, 111–13 (C.A.); *Economic Life*, cit., 149, 153, 154.

⁵⁰ *Patterson v Patterson*, 59 N.Y. 574, 578 (N.Y. 1875); *Board of Trade v Cayzer, Irvine & Co. Ltd.* [1927] A.C. 610, 617 and *passim* (H.L.).

⁵¹ (1470) Y.B. Hil. 9 Edw. IV, fos. 50–51, pl. 10, per Mr. Justice Littleton; *Higgins’s Case*, cit., 45b; *Smith v Nicholls* (1839) 5 Bing. N.C. 208, 220; *Economic Life*, cit., 149. Sometimes, instead of the debt, it is said that it is the nature of the “remedy” that has changed, discussed text at n. 62.

⁵² Scotland takes the same view: *Bank of Scotland v Davis* 1982 S.L.T. 20, 21 (I.H.).

⁵³ *Brinsmead v Harrison* (1871) L.R. 6 C.P. 584, 586 (C.P.); *Zavarco*, cit., [17], [31].

⁵⁴ VAN DE VELDEN J. B., *Finality in Litigation*, cit., pp. 40–43.

common law tradition led him to the same conclusion⁵⁵. Going back in time, Charles Dunlop, in his treatise on creditor-debtor law in Canada, put forth the same argument and contended that the language of merger was a work of supererogation⁵⁶. It is a notable feature of this scholarship that all three jurists, coming as they did from different intellectual backgrounds, ended up reaching the same conclusion independently.

Moreover, this view is not entirely alien to judicial analyses, although it is true that judges seldom express the proposition as frankly as we now do. A rare exception is found in the judgment of Mr. Justice FitzGerald⁵⁷ in the Irish case *Wakefield v Smythe*⁵⁸. A landlord applied for a court order to evict the tenant for non-payment of rent. The tenant argued that the application should fail, because judgment for the unpaid rent having been recovered, the debt was gone and so was the foundation of the eviction action.

In rejecting this argument, Mr. Justice FitzGerald expressed his disapprobation of the debt-merging theory: “*The effect of the application of the rule transit in rem judicatam, as Mr. Baron Parke showed [in King v Hoare⁵⁹], was not to extinguish the debt, but simply to merge the remedy ... The right which the recovery of a judgment gives to have an execution, merges the inferior remedy; and obviously so, because it would be absurd that a party, having got a right to an execution for a single debt, should institute another action, and proceed to judgment and execution for the same cause of action over again. That decision therefore is, not that the judgment operates as a satisfaction or extinguishment of the debt, but simply that it operates as a merger of the remedy; because the plaintiff has already got the highest remedy, and should not be permitted to look*

⁵⁵ SMITH S. A., *Rights, Wrongs, and Injustices: The Structure of Remedial Law*, Oxford, 2019, pp. 59–65.

⁵⁶ DUNLOP C. R. B., *Creditor-Debtor Law in Canada, Second Edition*, Scarborough, 1995, pp. 200–04.

⁵⁷ Later Lord FitzGerald, the first Irish Lord of Appeal in Ordinary (1882–89).

⁵⁸ *Wakefield v Smythe* (1864) 16 Ir. C.L.R. 173 (Q.B., Ire.). Followed *Irish Land Commission v Junkin* [1888] 24 L.R. Ir. 40, 43 (Q.B.D., Ire.).

⁵⁹ *Hoare*, cit., 504.

*for an inferior remedy, or one merely co-extensive ... that does not import that the debt is extinguished or satisfied*⁶⁰.

Therefore: “*the mere recovery of judgment in an action for rent does not merge or extinguish the rent, or so affect its character as to prevent the landlord from maintaining ... an action of ejectment, to recover possession of the lands in respect of the same rent*”⁶¹.

It will be noticed that Mr. Justice FitzGerald invoked the word “remedy” several times without defining it. This recurred in some other old cases addressing merger⁶². To an English lawyer of today, the word “remedy” is more readily understood as a reference to the court order that a claimant is seeking or has obtained from a court⁶³. We must however notice that, in Mr. Justice FitzGerald’s time, the word “remedy” also signified the particular action that a person could bring in court for recovering a particular form of relief, according to the laws and practices of the day⁶⁴. The “inferior remedy” in this context was the form of action for recovering a contractual debt; the “highest remedy” that to execute a judgment recovered. What Mr. Justice FitzGerald and the judges in those other cases were saying, then, is that when judgment has been recovered, the action to sue for the debt—or, as lawyers would now say, the entitlement to bring such action—is gone. The debt is not⁶⁵.

The picture across the Atlantic is worth noting as well. Founded in 1923, the American Law Institute publishes *Restatements of the Law* which share the aim of civilian codes of stating the law in a series of short propositions. These are not binding legal statements, but they do have foundational importance in American lawyers’

⁶⁰ *Wakefield*, cit., 178–79.

⁶¹ *Ibid.*, 179.

⁶² *Drake*, cit., 258; *Smith*, cit., 220–21; *Hoare*, cit., 504, 506; *Johnson*, cit., 166; *Tyler*, cit., 38; *Kendall*, cit., 544; *Economic Life*, cit., 152.

⁶³ ZAKRZEWSKI R., *Remedies Reclassified*, cit., ch. 4; SMITH S. A., *Rights, Wrongs, and Injustices*, cit., pp. 6–7.

⁶⁴ ZAKRZEWSKI R., *Remedies Reclassified*, cit., pp. 11–12; VAN DE VELDEN J. B., *Finality in Litigation*, cit., pp. 36–37.

⁶⁵ To the same effect see *Energy Investments Global Ltd. v Albion Energy Ltd.* 2020 (2) J.L.R. 421, [30] (C.A., Jersey).

understanding of their laws⁶⁶. For our purpose, it appears that the American Law Institute has made a subtle but decisive shift in their understanding of the effect of a favourable judgment for a claimant. Early in the last century, *Restatement First: Contracts*⁶⁷ confidently stated: “A contractual duty ... is discharged by merger when a judgment to enforce that duty is rendered against the party subject to the duty ... ”⁶⁸. Merger was discussed in *Restatement First: Restitution*⁶⁹ and *Restatement First: Torts*⁷⁰ as well, on the basis of the view later expounded in *Restatement First: Judgments*⁷¹ that it was a question of substantive law, because “[a] valid judgment always affects the legal relations of persons”⁷². The change in attitude came in the 1970’s, when *Restatement Second: Torts*⁷³ and *Restatement Second: Contract*⁷⁴ ceased to treat merger, because it was now thought to be a “matter[] of procedure”⁷⁵. *Restatement Third: Restitution and Unjust Enrichment*⁷⁶ contains no reference to merger at all. Crucially, *Restatement Second: Judgments*⁷⁷ no longer states that judgments affect legal relations. Rather, merger is now said to result in “the claim [being] extinguished”⁷⁸, and is understood to be a part of the

⁶⁶ SMITH S., *The Restatement of Liabilities in Restitution*, in MITCHELL C., SWADLING W. (eds.), *The Restatement Third: Restitution and Unjust Enrichment—Critical and Comparative Essays*, London, 2013, ch. 10, p. 227.

⁶⁷ AMERICAN LAW INSTITUTE, *Restatement of the Law of Contracts*, St. Paul, 1932.

⁶⁸ *Ibid.*, § 444.

⁶⁹ AMERICAN LAW INSTITUTE, *Restatement of the Law of Restitution, Quasi Contracts, and Constructive Trusts*, St. Paul, 1937, § 145.

⁷⁰ AMERICAN LAW INSTITUTE, *Restatement of the Law of Torts*, St. Paul, 1934–39, § 897.

⁷¹ AMERICAN LAW INSTITUTE, *Restatement of the Law of Judgments*, St. Paul, 1942.

⁷² *Ibid.*, p 5. Merger was discussed at § 47.

⁷³ AMERICAN LAW INSTITUTE, *Restatement of the Law Second: Torts 2d*, St. Paul, 1965–79.

⁷⁴ AMERICAN LAW INSTITUTE, *Restatement of the Law Second: Contracts 2d*, St. Paul, 1981.

⁷⁵ AMERICAN LAW INSTITUTE, *Restatement Second: Contracts*, cit., § 378. Compare AMERICAN LAW INSTITUTE, *Restatement Second: Torts*, cit., § 897.

⁷⁶ AMERICAN LAW INSTITUTE, *Restatement of the Law Third: Restitution and Unjust Enrichment*, St. Paul, 2011.

⁷⁷ AMERICAN LAW INSTITUTE, *Restatement of the Law Second: Judgments 2d*, St. Paul, 1982.

⁷⁸ *Ibid.*, §§ 17–18.

“*law of res judicata*”, described as “*a subcategory of the law governing procedure in civil actions*”⁷⁹.

The *Restatements* are not binding in America, still less in England. It is not suggested that this shift in thinking of the American Law Institute—if a shift indeed there has been—is probative or conclusive of the position under English law. But the considered views of this learned body of common lawyers should at least prompt their counterparts on this side of the Atlantic to revisit the ingrained assumption—however time-honoured it may appear to be—that judgment extinguishes contractual debt. The question is, how do we test it?

2.2.3. *Can Creditor enforce security?*

We suggest that the answers to our second question provide solid proof that Mr. Justice FitzGerald and others were right to say that a debt subsists beyond judgment and that the doctrine of merger has no substantive effect whatsoever.

2.2.3.1. *To recoup the €80 judgment sum?*

The answer to this part of the question is “Yes”⁸⁰. To understand why, we need to recall the basic principle that “*the holder of a security*”, in Lord Reed’s words, “*holds a right, accessory in nature, which he can exercise to secure the payment of the debt that is distinct from, and additional to, the right of action and execution which any creditor can exercise to enforce the performance of the debtor’s personal obligation*”⁸¹. In other words, the enforceability of a security for a debt is distinct from the actionability of the debt. Therefore,

⁷⁹ *Ibid.*, p. 5.

⁸⁰ *Economic Life*, cit. (real security); *Vestry of Bermondsey v Ramsey* (1871) L.R. 6 C.P. 247, 252 (C.P.) (personal security).

⁸¹ *National Crime Agency v Szepietowski* [2014] A.C. 338, [83] (S.C.).

security is in no way affected or compromised by the creditor's recovery of a money judgment⁸².

If merger did extinguish the contractual debt, it would not be possible for Creditor to enforce the security to recoup any amount. This is because the security would cease to exist from the very instant money judgment was pronounced⁸³. It is a basic principle that security is accessory in nature and goes whenever the underlying debt is discharged or extinguished⁸⁴.

One may try to explain away Creditor's ability to enforce the security by saying that, post judgment, the object of the security is transposed from an erstwhile €100 contractual debt to the new €80 judgment debt⁸⁵. There are two answers to this. First, it is an unusual explanation, and one would expect a proposition of such importance, if it existed, to rank among the foundational principles of the law of security—but it is not. Secondly, as we shall presently explain, Creditor's ability to enforce the security is not limited to the judgment sum; it extends to her full contractual entitlement.

2.2.3.2. Or even, to recoup the €100 contract sum in full?

The answer to this part of the question is “Yes” as well⁸⁶. This answer was given by the House of Lords more than a century ago in

⁸² The converse is also true; if enforcement of security leaves the creditor unsatisfied, she can sue for the balance: *Seddon v Tutop* (1796) 6 T.R. 608; *Nelson*, cit., 112; *Drake*, cit.; *Bell v Banks* (1841) 3 Man. & G. 258; *Wegg*, cit.

⁸³ This was the precise argument mounted by the debtor—in a bid to avoid post-judgment enforcement of security—and rejected by the Court of Appeal of Jersey in *Energy Investments*, cit., [33]–[34] (the debtor ultimately succeeded on different grounds: [60]–[73]).

⁸⁴ GOODE R., GULLIFER L., *Goode and Gullifer on Legal Problems of Credit and Security, Seventh Edition*, London, 2023, para. 1-35; *Aman v Southern Railway Co.* [1926] 1 K.B. 59, 73–74 (C.A.).

⁸⁵ As was attempted, not perhaps entirely consciously, in *Popple v Sylvster* (1882) 22 Ch. D. 98 (Ch.D.); *Usborne v Limerick Market Trustees (No. 2)* [1900] 1 I.R. 85, 111 (C.A., Ire.); FREEMAN A. C., *A Treatise of the Law of Judgments, Fifth Edition*, San Francisco, 1925, vol. 2, § 550; AMERICAN LAW INSTITUTE, *Restatement First: Judgments*, cit., § 47 (see especially comment *d*).

⁸⁶ *Economic Life*, cit.; *Parr v Tiuta International Ltd.* [2016] EWHC 2 (QB). While these cases concerned real security, the same principle should likewise apply to the realisation of personal security, through an action for money judgment against the relevant third

Economic Life Assurance Society v Usborne (1902)⁸⁷. The lower courts⁸⁸, swayed by the debt-merging theory, had held that the creditors could not enforce their security to recoup more than what was due under the money judgment previously recovered. That decision was overturned by the House of Lords. The Earl of Halsbury said that it involved “*a confusion of thought*”⁸⁹: “*Where you are endeavouring to sue by any form which the law recognises for the realization of the security, or to free it from all claims, whether it be in the form of the redemption of a mortgage, or whatever the form be, all the rights arising from the instrument in question are to be observed; and it is idle to say, because the right as to one specific sum of money has been changed in its nature—changed from a right to sue upon the covenant into a judgment ... —that therefore you have got rid of the other obligations which are involved in either the realizing of the security or the freeing of the security, in whichever form it arises, from the claims attaching to it*”⁹⁰.

This profound but somewhat packed explanation was amplified by the speech of Lord Davey. He explained that the doctrine of merger only meant that, “*when a judgment is recovered in respect of a debt any other personal remedy for the same debt is extinguished or merged in the judgment*”⁹¹. In other words, the right of action is gone⁹²; even a secured creditor is precluded from suing the debtor a second time for a second money judgment⁹³. But the enforcement of security—including the realisation of it through foreclosure or

party. It is true that Creditor might be precluded by the doctrine of abuse of process from recovering the full €100 from a third-party provider of personal security, if the earlier judgment against Debtor had positively decided that the value of primary debt was €80 instead of €100: VAN DE VELDEN J. B., *Finality in Litigation*, cit., pp. 93–94, citing *Reichel v Magrath* (1889) L.R. 14 App. Cas. 665 (H.L.) (compare German law, discussed n. 154). In our case scenario, however, this concern is not engaged.

⁸⁷ *Economic Life*, cit.

⁸⁸ The Master of the Rolls and the Court of Appeal in Ireland: *Limerick*, cit.

⁸⁹ *Economic Life*, cit., 149.

⁹⁰ *Ibid.*

⁹¹ *Ibid.*, 152.

⁹² *Ibid.*, 153, 154.

⁹³ Sometimes it is said—inaccurately, as the above discussion reveals—that the doctrine of merger does not apply to secured debts: *Ealing London Borough Council v El Isaac* [1980] 1 W.L.R. 932, 937 (C.A.); *Parr*, cit., [20].

redemption proceedings—is entirely distinct from an action to sue for a money judgment. Even if judgment has been recovered for a smaller sum, a secured creditor is entitled “*to sit upon their deeds*”, meaning, “*to hold their security until they have been paid every penny of the [debt] measured by what is expressed in the covenant*”⁹⁴.

The creditor’s post-judgment ability to extract from the security her full contractual entitlement is solid proof that the doctrine of merger does not extinguish the contractual debt. In our case scenario, for instance, it is impossible to understand how on the one hand Creditor can enforce the security to recoup the €100 contract sum in full, while on the other hand it is said that the €100 contractual debt is gone and replaced by the €80 judgment debt.

One may be struck by the notion that, post judgment, Creditor has both a subsisting contractual right to be paid €100 and a new judgment right to be paid €80. How is that possible? Would that not lead to double recovery? The answer lies in Lord Justice Bankes’s explanation that a money judgment “*merely operates as an additional security for the due payment of the debt*”⁹⁵. Judgment is not of course security in the strictest sense. What Lord Justice Bankes meant was that a money judgment operates *like* a security, so that Creditor’s right to be paid €80 under the judgment—along with the ensuing entitlement to execution—is limited to a security function and accessory to the €100 contractual debt. Once the judgment has been fully satisfied, either voluntarily or by execution, the contractual debt will be reduced to €20⁹⁶. Conversely, if Creditor fully recoups €100 from the security, the judgment will cease to have force even without an annulment from the court; any subsequent attempt to execute the judgment will be wrongful⁹⁷. However, if ever the creditor is unable to recoup €100 fully from the security, she can always fall back on the judgment and execute it to recover the balance of the *contract*

⁹⁴ *Economic Life*, cit., 155.

⁹⁵ *Aman*, cit., 71. See also *Drake*, cit., 258; *Kendall*, cit., 526; *Potteries, Shrewsbury, and North Wales Railway Co. v Minor* (1871) L.R. 6 Ch. App. 621, 625 (Ch. App.).

⁹⁶ *Bell*, cit., 266.

⁹⁷ *Clissold v Cratchley* [1910] 2 K.B. 244 (C.A.); *Moore v Lambeth County Court Registrar (No. 2)* [1970] 1 Q.B. 560 (C.A.).

sum, as long as that is within the limit of the judgment sum⁹⁸. If Creditor recoups €80 from the security, the judgment will remain executable for €20. If she recoups €50, then €50. If €20, then the €80 in full. The debt-merging theory struggles to explain why, in all these situations, the money judgment stands enforceable for the balance of the contractual debt (up to the judgment sum) rather than the balance of the judgment debt.

2.3. *Summary*

In summary, the proper effect of the doctrine of merger is to bar a successful claimant from reasserting her contractual entitlement to be paid a debt, in a bid to recover a further money judgment. Properly explained, the mode by which the doctrine of merger brings about this preclusive effect is to extinguish the successful claimant's entitlement to assert her monetary entitlement by action. These two entitlements are distinct. The doctrine of merger does not extinguish the monetary entitlement itself—only the entitlement to sue upon it. Where the creditor has no security, the practical outcome of merger is that she cannot recover any deficiency between her actual monetary entitlement and the judgment sum. All she can now do is to execute the judgment; and if the judgment sum falls short of the contract sum, it cannot be helped. This may generate the impression that, post judgment, all that is left for the creditor is her entitlement under the judgment. An examination of the position of a secured creditor reveals this to be an illusion. The contractual debt is not gone; it merely becomes unactionable. The widely held assumption that the debt is merged in and extinguished by judgment is wrong.

It may seem a wonder that, despite in possession of these answers, English lawyers have so nurtured the debt-merging theory that it may persist for so long. This is probably due to the fact that the theory, fallacious though it is, largely does no harm. As we have seen, for an unsecured creditor, the impression that the contractual debt is gone certainly looks very real in the practical nature of things. Moreover, the position of a secured creditor may not always enter the picture so

⁹⁸ As illustrated by *Parr*, cit. Compare n. 82.

as to be ever present in the minds of judges and jurists writing on the topic⁹⁹. Even when secured creditors are indeed involved, the right result can somehow be reached by (mis)reading the principle upheld in the *Usborne* case as creating an exception to the doctrine of merger rather than clarifying its true analytical import¹⁰⁰. These may be some of the reasons why the fallacy has lingered on. On the other hand, how this theory originated in the first place is an entirely different question. As the quotation from Coke's report of the *Higgins's Case* indicates¹⁰¹, the genesis of the fallacy lies deep within the historical evolution of English law. But the unravelling of this history must await another day.

3. German law

3.1. Foundations

3.1.1. Main German preclusion doctrines

Under German law, (re-)litigation may be precluded mainly on two grounds: (1) on the claim preclusive effect of a judgment according to the German Code of Civil Procedure (*Zivilprozessordnung*, hereafter "ZPO"); or (2) on the basis that it would constitute an abuse of rights or abuse of process, violating the principle of good faith enshrined in § 242 of the German Civil Code (*Bürgerliches Gesetzbuch*, hereafter "BGB").

Ground (1) falls under the doctrine of *res judicata* (*materielle Rechtskraft*)¹⁰². Provided that a judgment is final (*formelle*

⁹⁹ As observed in *Limerick*, cit., 127.

¹⁰⁰ N. 93.

¹⁰¹ Text at n. 40.

¹⁰² Cf. § 322 ZPO. Since the *res judicata* effect only extends to the operative part (*Tenor*) of the judgement and to those findings necessary to support it (*tragende Gründe*), cf. VOLLKOMMER G., *Vorbemerkungen zu § 322*, in ALTHAMMER C., FESKORN C., GREGER R., et al. (eds.), *Zöller Zivilprozessordnung: Kommentar*, Cologne, 2026, para. 31; WOLFF R., § 322, in MUSIELAK H.-J., VOIT W. (eds.), *Zivilprozessordnung: Kommentar*, Munich, 2025, para. 16, there is no dedicated *issue* preclusion associated with it under German law, but rather, certain situations may be solved via the *res judicata* effect, more specifically, the

Rechtskraft)¹⁰³—meaning that it is no longer subject to appeal—res judicata applies (only) to such part of the claimant’s legal entitlement (*Anspruch*)¹⁰⁴ that was pursued in the relevant action¹⁰⁵ and adjudicated on by the court¹⁰⁶. In other words, the res judicata effect of a judgment is determined by the plaintiff in the statement of claim (*Klageantrag*). This is because, pursuant to the principle *non ultra petita*, which forms part of the more general procedural principle of party disposition (*Dispositionsmaxime*), the court may only rule on the claim declared in the statement of claim and may not award more than what was claimed, or an unclaimed relief¹⁰⁷. Claims are identical if they concern the same cause of action (*Streitgegenstand* or *prozessuale Anspruch*), and this is determined based on two requirements that must be fulfilled in conjunction¹⁰⁸: the identity of the underlying factual basis on which the claim is based, and the identity of the relief sought—both defined by the statement of claim. Claims are considered identical if they at their core ultimately seek to achieve the same¹⁰⁹. A subsequent claim is also treated as identical with a previous claim if it reasserts parts of that previous claim¹¹⁰.

prejudicial effect of a judgment, or as an abuse of rights or abuse of process, cf. GOTTWALD P., § 322, in RAUSCHER T., KRÜGER W. (eds.), *MüKoZPO*, Munich, 2025, para. 56; ALTHAMMER C., § 322, in BORK R., ROTH H. (eds.), *Stein/Jonas: ZPO*, Tuebingen, 2018, paras. 194, 206. More in favour of an issue preclusion even under German civil procedure, ZEUNER A., *Die objektiven Grenzen der Rechtskraft im Rahmen rechtlicher Sinnzusammenhänge: Zur Lehre über das Verhältnis von Rechtskraft und Entscheidungsgründen im Zivilprozeß*, Tuebingen, 1959.

¹⁰³ Cf. § 705 ZPO. See GOTTWALD P., § 322, cit., para. 17; WOLFF R., § 322, cit., para. 5.

¹⁰⁴ For an explanation as to why we render *Anspruch* as “legal entitlement” instead of “claim”, see n. 5.

¹⁰⁵ Including a counterclaim.

¹⁰⁶ Cf. § 322(1) ZPO.

¹⁰⁷ Cf. § 308 ZPO, based on the principle *non ultra petita* in Roman law, ELZER O., § 308, in VORWERK V., WOLF C. (eds.), *BeckOK-ZPO*, Munich, 2025, para. 2; MUSIELAK H.-J., HÜNTEMANN A., § 308, in RAUSCHER T., KRÜGER W. (eds.), *MüKoZPO*, Munich, 2025, para. 1.

¹⁰⁸ See only BECKER-EBERHARD E., *Vorbemerkung zu § 253*, in RAUSCHER T., KRÜGER W. (eds.), *MüKoZPO*, Munich, 2025, para. 32; BGH, *NJW* 2009, 2210, 2211.

¹⁰⁹ GOTTWALD P., § 322, cit., para. 41; GRUBER, § 322, in VORWERK V., WOLF C. (eds.), *BeckOK-ZPO*, Munich, 2025, para. 20.

¹¹⁰ GOTTWALD P., § 322, cit., para. 41; ALTHAMMER C., § 322, cit., para. 185.

Res judicata thus bars the re-litigation of the same claim as declared by the plaintiff in the previous trial¹¹¹. This means that, on the one hand, the courts are prohibited from issuing a second decision on the merits, where an action is brought for the same claim (*ne bis in idem*) or its contradictory opposite¹¹². Such action would be inadmissible and declared by the court as such *ex officio*¹¹³. On the other hand, if the claim that was ruled on in the first trial constitutes a prerequisite under substantive law for the claim brought in the second trial, the judgment on the first claim has prejudicial effect¹¹⁴. This means that the second decision must be based on and be congruent with the first one¹¹⁵.

Ground (2) is not based on any preclusive effect of a previous judgment, but is associated with the parties' conduct¹¹⁶. It may be derived from the general principle of good faith under German law and the court's and parties' duty to conduct fair proceedings¹¹⁷. Accordingly, a party may be barred from bringing an action in the first place or putting forward certain arguments, if the relevant party's conduct is in violation of the good faith principle and the duty of fair processing, and is abusive of the civil procedural system.

¹¹¹ GRUBER, § 322, cit., para. 12; WOLFF R., § 322, cit., para. 9.

¹¹² GOTTWALD P., § 322, cit., paras. 40, 43; ALTHAMMER C., § 322, cit., para. 185 *et seq.*

¹¹³ Cf. BGH, *NJW* 1993, 3204, 3205; 1962, 1109. See also GOTTWALD P., § 322, cit., para. 59.

¹¹⁴ Cf. BGH, *NJW* 2019, 1745, 1746; 2012, 1964, 1965. See also VOLLKOMMER G., *Vorbemerkungen zu § 322*, cit., para. 24.

¹¹⁵ For example, the decision on a claim for performance seeking payment has prejudicial effect on a subsequent action based on unjust enrichment to reclaim what was paid, see VOLLKOMMER G., *Vorbemerkungen zu § 322*, cit., para. 25; GOTTWALD P., § 322, cit., para. 53.

¹¹⁶ See VAN DE VELDEN J., STEFANELLI J., *Comparative Report: The Effect in the European Community of Judgments in Civil and Commercial Matters: Recognition, Res Judicata and Abuse of Process*, British Institute of International and Comparative Law, 2008, p. 34.

¹¹⁷ Cf. § 242 BGB. See KÄHLER L., § 242, in GSELL B., KRÜGER W., LORENZ S., et al. (eds.), *BeckOGK-BGB*, Munich, 2025, para. 1184.

3.1.2. *Claim splitting*

Bringing a partial action (*Teilklage*), i.e., an action for only a portion of the claimant's legal entitlement and thereby splitting the claim for it, is a common occurrence in German civil procedure. While partial action is not explicitly prescribed in German statutory law¹¹⁸, it is derived from the general procedural principle of party disposition¹¹⁹. So, if an action is brought for a portion of a legal entitlement, the court may only rule on that portion.

Pursuing only parts of an entitlement can be in the parties' interest for several reasons¹²⁰. The parties may test the outcome of their dispute in a cost-effective way, especially in a case that involves difficult legal and evidentiary issues. Since the court fees are calculated based on the amount in dispute, it is cheaper for the parties to only litigate parts of an entitlement to clarify their legal positions first. If the judgment is rendered in favour of the plaintiff, the defendant may be inclined to fulfil the remaining entitlement out of court, so as to avoid further court proceedings and associated costs. Conversely, even if the plaintiff failed, costs have been saved and he could then refrain from bringing another action. It may also be in the parties' interest to keep the claim value below a certain monetary threshold. In this way, the case may be heard, not in the regional courts or even the higher regional courts in the form of the newly established "Commercial Courts"¹²¹, but in the local courts, where the legal fees may be lower, among other things, because representation by a qualified lawyer is not mandatory¹²². In general, there is also no appeal

¹¹⁸ Unlike Switzerland, for example, where the partial action is listed as a type of action, cf. Art. 86 Swiss Code of Civil Procedure.

¹¹⁹ FRIES H., *Dogmatische Einordnung und prozessuale Konsequenzen einer quantitativen Klageermäßigung*, Wiesbaden, 2022, p. 117; SCHACK H., *Rechtskraft und Bindungswirkungen bei offenen und verdeckten Teilklagen*, in BERGER C., BOEMKE B., GAUL H. F., et al. (eds.), *Prozessrecht, Zwangsvollstreckungsrecht, Insolvenzrecht: Festschrift für Ekkehard Becker-Eberhard*, Munich, 2022, p. 492; FRIEDRICH D., *Probleme der Teilklage*, Cologne, 1995, pp. 1–2.

¹²⁰ GRUBER, § 322, cit., para. 24; FRIEDRICH D., *Teilklage*, cit., p. 3 *et seq.*

¹²¹ On the jurisdiction and procedural rules of the newly introduced German Commercial Courts, see POLLMANN F. D., *European Commercial Court*, forthcoming.

¹²² Cf. § 78(1) ZPO.

available against decisions below a certain value of the matter under appeal¹²³.

The prerequisite to bringing a partial action is that the legal entitlement must be divisible in nature. Essentially what this means is that the legal relationship asserted in the action is divisible. Monetary entitlements, e.g., debts or damages, are naturally divisible in this sense and they constitute the vast majority of partial actions. On the other hand, certain declaratory actions and claims for injunctive relief are indivisible¹²⁴.

Partial actions, for the purposes of this contribution, may appear in two forms: (1) open partial actions (*offene Teilklage*), where the plaintiff expressly declares that he is pursuing a portion of his entitlement only, reserving the right to claim the rest in another action¹²⁵; (2) disguised partial actions (*verdeckte Teilklage*), where the plaintiff does not disclose (and perhaps does not even know at the time) that he is only claiming a portion of his entitlement¹²⁶.

3.2. *Our case scenario*

3.2.1. *Can Creditor sue Debtor a second time for the €20 contract balance?*

Given German law's openness to claim splitting, it is true that Creditor can generally sue Debtor again for the balance, unless Ground (1) or Ground (2) bars him from doing so. Let us explore the various ways in which this preclusive outcome may be achieved.

¹²³ A judgment with a value of the matter under appeal not exceeding €1000 may not be appealed (unless the case is of fundamental importance or imperative for developing or safeguarding the uniformity of jurisprudence), cf. § 511(2) no. 2, (4) ZPO.

¹²⁴ Cf. BGH, *NJW* 1994, 3165. See also ROTH H., § 253, in BORK R., ROTH H. (eds.), *Stein: ZPO*, Munich, 2024, para. 29; TROMMLER S., *Die Teilklage im Zivilprozess*, Tuebingen, 2018, pp. 26–31; FRIEDRICH D., *Teilklage*, cit., p. 2.

¹²⁵ Cf. BGH, *NJW* 1997, 3019, 3020. See also TROMMLER S., *Teilklage*, cit., p. 24; KUSCHMANN H., *Die materielle Rechtskraft bei verdeckten Teilklagen in der Rechtsprechung des Bundesgerichtshofs*, in LÜKE G., JAUERNIG O. (eds.), *Festschrift für Gerhard Schiedermaier zum 70. Geburtstag*, Munich, 1976, p. 354.

¹²⁶ GOTTWALD P., § 322, cit., para. 130; KUSCHMANN H., *Teilklagen*, cit., p. 356.

3.2.1.1. *Not if res judicata effect of the judgment extends to €20*

Let us start with Ground (1): Creditor would be barred from claiming €20 if the previous judgment for €80 creates *res judicata* effect to that result. Since the judgment is final, it fulfils the *conditio sine qua non* for *res judicata* effect. Accordingly, Creditor would be barred from claiming €20, if either (1) this second claim was considered identical to the first claim for €80; or (2) the judgment for €80 was considered to have resolved all of Creditor's entitlements.

The first option can be disregarded straight away, because it is obvious that even though both claims have the same underlying factual bases—the contractual relationship between Creditor and Debtor—an order for payment of €80 is a different relief claimed than an order for payment of the remaining €20¹²⁷.

The second option, i.e., that the judgment for €80 has resolved all of Creditor's entitlements, must be examined more closely. As explained before, the court in the first trial is restricted to ruling on what was claimed, based on the statement of claim, and a judgement only has *res judicata* effect within the confines of that claim. Therefore, the judgment for €80 may only have resolved all of Creditor's entitlements, if (1) the first action for €80 was *actually* an action for the entire entitlement under the contractual debt; or (2) Creditor's conduct in bringing the first action for €80 was *interpreted* by the court in the second trial as an action for the entire entitlement.

It would have actually been an action for the entire entitlement if what was claimed was *indivisible* in nature. But since Creditor has an entitlement to a debt, and therefore seeks monetary relief, that entitlement may be split with regard to the amount and generally pursued in parts via partial actions.

So, only the interpretation of Creditor's conduct in the first trial remains as a possible basis for extending the *res judicata* effect of the judgment to the remaining €20, thereby barring a subsequent action for that amount. This can happen if it is possible to interpret the action for €80 as an action for the entire entitlement. If Creditor

¹²⁷ TROMMLER S., *Teilklage*, cit., p. 35; FRIEDRICH D., *Teilklage*, cit., p. 12; HABSCHIED W. J., *Der Streitgegenstand im Zivilprozess und im Streitverfahren der Freiwilligen Gerichtsbarkeit*, Bielefeld, 1956, p. 274.

brought an open partial action, there would not be any room for such interpretation of conduct, and this is undisputed¹²⁸. By pursuing only €80 and explicitly reserving the right to pursue €20 in a subsequent trial, the court in the first trial is restricted to ruling on €80 as a portion of the wider entitlement. Since the €20 portion of the entitlement was not part of the first trial, the court in the second trial has no basis to interpret the judgment for €80 as fully resolving Creditor's entitlement. Therefore, the res judicata effect only extends to €80.

However, if Creditor did *not* disclose that €80 was only a portion of the €100 debt, and so did not expressly reserve the right to bring another partial action for €20, we are in the territory of *disguised* partial action.

The majority view held by scholars¹²⁹ and reaffirmed in jurisprudence¹³⁰ is that open and disguised partial actions are generally to be treated the same, meaning that the court in the first trial is understood to have only ruled on €80 and so any res judicata effect only extends to that. While it is accepted that the plaintiff's statement of claim and conduct in the first trial must be interpreted and the court in the second trial could conclude that the plaintiff had brought his entire entitlement in the first trial and so the court had ruled on that entire entitlement, they argue that there is rarely any room for this interpretative result, where the legal entitlement is divisible, quantified and limited to a certain amount. This is because from such an entitlement, the scope of what the court may rule on is clearly restricted to that partial amount declared in the statement of claim. Consequently, the judgment only has res judicata effect with regard to that partial amount and not the rest of the entitlement^{131, 132}.

¹²⁸ Cf. BGH, *NJW* 1985, 1340, 1342. See also SCHACK H., *Teilklagen*, cit., p. 494; BRAUN J., *Lehrbuch des Zivilprozeßrechts: Erkenntnisverfahren*, Tuebingen, 2014, p. 476; KUSCHMANN H., *Teilklagen*, cit., p. 354.

¹²⁹ VOLLKOMMER G., *Vorbemerkungen zu § 322*, cit., para. 48; GOTTWALD P., § 322, cit., para. 131; TROMMLER S., *Teilklage*, cit., p. 151 *et seq.*

¹³⁰ BGH, *NJW* 2015, 2566, 2567; BGH, *NJW* 1997, 1990.

¹³¹ BGH, *NJW* 1997, 1990.

¹³² There are some exceptions to this rule, SCHWAB M., *Zivilprozessrecht*, Heidelberg, 2016, para. 432 *et seq.*; KUSCHMANN H., *Teilklagen*, cit., p. 359 *et seq.*, but these do not apply to the case scenario at hand: For instance, in a disguised partial action for compensation for financial loss arising from expropriation, the court in the second trial would interpret the claimant's conduct in the first trial as having resolved his entire entitlement. This

Some scholars argue for a different interpretative approach. According to them, Creditor's partial claim for €80 that was not declared as such must *always* be understood as an action for all of Creditor's entitlements, so that the *res judicata* effect of the judgment for €80 would extend to the full €100, thereby preventing Creditor from litigating the rest of his entitlement in a second trial¹³³. Their proposition effectively stems from considerations of procedural fairness which might be endangered by a disguised partial action. These considerations also underpin the doctrine of good faith, which we will discuss below. For now, we observe that relying on considerations of procedural fairness to extend the effect of *res judicata* is neither a mainstream opinion nor a favourable understanding of German law. This would essentially abolish disguised partial action and contradict established *res judicata* doctrine.

In summary, it is unlikely that Creditor's claim for €20 will be barred under the doctrine of *res judicata*. Creditor can definitely sue Debtor a second time for €20, if he disclosed in the first action that he was only bringing a partial action. In this case, *res judicata* clearly covers €80 only and not the remaining €20 pursued in the second action. On the other hand, if Creditor did *not* disclose in the first action that he was only bringing a partial action, he *may* be barred from suing Debtor a second time for €20. This outcome can be achieved if Creditor's initial claim for €80 is interpreted as intended to be a final resolution of all of Creditor's entitlements. In this case, the first judgment for €80 would have *res judicata* effect over the entire entitlement and the second action for €20 would be

is because such compensation is generally pieced together based on the various detrimental effects and costs associated with the expropriation, and partial action is generally not expected, KUSCHMANN H., *Teilklagen*, cit., p. 361; BGH, *NJW* 1961, 917. Another example is a disguised partial action for damages for pain and suffering, where the claimant is not required to quantify his entitlement in the statement of claim, since the nominal value of compensation is for the court to determine. In this situation, the court is not confined by the claimant's statement of claim. Any amount indicated by the claimant would not be binding on the court. Unless the claimant expressly reserves the right to bring further partial actions, the conduct in the first trial would be interpreted as covering the entire entitlement, BGH, *NJW* 2004, 1243.

¹³³ SCHACK H., *Waffengleichheit im Zivilprozess Schack*, in *Zeitschrift für Zivilprozess*, n. 129, 2016, p. 412; BRAUN J., *Zivilprozeßrecht*, cit., p. 485; PAGENSTECHER M., *Die Einrede der Rechtskraft im Aufwertungsprozess im Lichte der Judikatur des Reichsgerichts*, Mannheim, 1925, pp. 72–77.

inadmissible. Under the prevailing view, however, such interpretation of conduct would be highly unlikely.

3.2.1.2. *Not if subsequent claim for €20 is considered abusive*

Moving over to Ground (2): Creditor could be barred from suing Debtor a second time, if such suit would violate the general principle of good faith under German law and the court's and party's duty to conduct proceedings fairly, thereby constituting an abuse of rights or process. There are several situations in which a subsequent claim may be considered abusive.

First, it *could* be considered abusive if Creditor deliberately split the claim for her legal entitlement only to remain under a court's monetary thresholds. However, splitting a claim for this purpose is generally permitted if Creditor brought the claims for €80 and €20 one after the other, and not at the same time¹³⁴. If the claims were brought at the same time, then it is apparent that the Creditor was not making use of most of the advantages associated with partial actions. A cheaper and more convenient way of resolving the entire entitlement would have been available to Creditor in the form of extending the action, in order to combine both sums in one action¹³⁵. Therefore, Creditor would lack the need for legal protection and either the action for €80 or the one for €20 would be dismissed¹³⁶. In our case scenario, where the Creditor only brought the action for €20 after having obtained favourable judgment for €80, there is not such instrument available to Creditor and so the action for €20 will *not* be dismissed on this ground.

¹³⁴ FRIEDRICH D., *Teilklage*, cit., p. 113 *et seq.*

¹³⁵ Cf. § 264 no. 2 ZPO. Extending the claim would be more convenient, compared to parallel litigation, since then, among other things, only one court would resolve the entire dispute, gather evidence, and hear the parties. It would also be cheaper, because court fees, while they depend on the amount in dispute, do not increase in a linear way but degressively. So, one trial for €100 generates lower fees than several trials for the same total amount.

¹³⁶ TROMMLER S., *Teilklage*, cit., pp. 57–58; FRIEDRICH D., *Teilklage*, cit., pp. 118–120; HABSCHIED W. J., *Streitgegenstand*, cit., pp. 274–275. Braun, however, argues that these inconveniences were to be accepted by the defendant, BRAUN J., *Zivilprozessrecht*, cit., pp. 475–476.

Second, it may be considered abusive in extreme cases if Creditor brought the claim for €100 literally “drop by drop” only to visit the Debtor with disproportionate court fees¹³⁷. This would be considered harassment and the corresponding action would be dismissed. This is not the case in our scenario, however. Note, also, that the statute of limitations is only suspended for the part of the legal entitlement that is claimed¹³⁸. So, indefinitely stretching out partial actions drop by drop is not always possible and therefore only a subordinate concern in practice.

Third, some argue that bringing a *disguised* partial action is *per se* abusive¹³⁹. This proposition is another manifestation of the minority view under Ground (1) but leads to different legal consequences (i.e., the subsequent action being admissible but unfounded, instead of inadmissible outright). To approach this proposition, we must appreciate the differences between open and disguised partial actions from the perspective of Debtor.

If Debtor was confronted with an open partial action, he may put the entire €100 to resolution by counterclaiming a declaration that beyond €80 nothing more was owed¹⁴⁰. In this way, Debtor may evade the split resolution of Creditor’s legal entitlement via partial action brought by Creditor. Provided that Creditor was ultimately successful in pursuing the entire €100, it would be less costly if the claim was not split into the partial claim for €80 and another for €20 but resolved in one trial, because of the degressive increase of court fees. If Creditor brought a disguised partial action, however, Debtor might not be alerted to the availability of this option, since he might have no knowledge of the fact that Creditor was merely bringing a partial action for €80, intending to claim the rest in a subsequent trial. The partial action is generally a cost-saving instrument for both parties, in the sense that the court fees for a partial claim are lower, and

¹³⁷ BRAUN J., *Zivilprozeßrecht*, cit., p. 475.

¹³⁸ Cf. § 204(1) no. 1 BGB; BGH, *NJW* 2002, 2167. See also VOLLKOMMER G., *Vorbermerkungen zu § 322*, cit., para. 48; TROMMLER S., *Teilklage*, cit., pp. 133–134.

¹³⁹ SCHACK H., *Waffengleichheit*, cit., p. 412; BRAUN J., *Zivilprozeßrecht*, cit., p. 485; MARBURGER P., *Rechtskraft und Präklusion bei der Teilklage im Zivilprozeß*, in SCHÖN W. (ed.), *Gedächtnisschrift für Brigitte Knobbe-Keuk*, Cologne, 1997, p. 194 *et seq.*

¹⁴⁰ Cf. §§ 33, 256(1) ZPO. See also SCHACK H., *Teilklagen*, cit., p. 498; FRIEDRICH D., *Teilklage*, cit., p. 47.

Debtor, if unsuccessful, could choose to pay the remaining €20 outside of court proceedings. But if Debtor was surprised by Creditor bringing the remaining claim for €20, because Debtor did not recognize the first action for €80 as a partial action, Debtor might not be prepared to pay voluntarily¹⁴¹. Further, it is possible that, confronted with a low-value claim for €80 that is not expressed to be a partial action, Debtor might have defended himself with less intensity and care, compared to the situation where Creditor and Debtor understood that the claim for €80 was only a stand-in for a total entitlement of higher value €100¹⁴². We must not underestimate the effect a judgment rendered in a partial action has on a subsequent trial for the remaining entitlement. Even though it is not strictly speaking *res judicata* for the remaining entitlement, a later court will be inclined to decide in line with the previous decision, particularly if the same court and the same judges are concerned¹⁴³.

So, we can see that the disguised partial action can potentially lead to an imparity between Creditor and Debtor that does not exist under the open partial action. Imparity alone, however, does not suffice to raise the accusation of abuse of process against Creditor. Assuming Creditor did not know his bringing of an action for €80 was only a partial action (because, e.g., he did not know his entitlement amounted to €100), he could neither have extended the claim in the first trial to €100 nor disclosed the partial nature of the action for €80 so that Debtor could have responded properly. An abuse of process may therefore only come into question where Creditor knew or was negligently unaware that the claim for €80 in the first action was actually only part of the bigger entitlement to €100¹⁴⁴.

The next question, however, is how we might deal with such an abuse. As stated under Ground (1), even if there was an abuse of process by Creditor, we must not disregard the rules of *res judicata*. But even then, there are several potential consequences for the second action for €20 to consider.

¹⁴¹ MARBURGER P., *Teilklagen*, cit., p. 196.

¹⁴² *Ibid.*; FRIEDRICH D., *Teilklage*, cit., p. 59.

¹⁴³ MARBURGER P., *Teilklagen*, cit., p. 196.

¹⁴⁴ SCHACK H., *Teilklagen*, cit., p. 498; BRAUN J., *Zivilprozeßrecht*, cit., p. 485; MARBURGER P., *Teilklagen*, cit., pp. 198–199.

Some scholars argue for mandatory consequences: *Marburger* advocates that Creditor in the second trial for €20 had to be precluded from arguing such claim, if, during the first trial for €80, he was aware that he was bringing a disguised partial action, or was negligently unaware of this¹⁴⁵. On this view, the second action for €20 would be admissible but unfounded. This proposition is based on an analogy with several preclusion provisions. Ultimately, however, this approach is not convincing¹⁴⁶. It is foreign to German procedural law to preclude a claimant from raising a certain legal entitlement for the first time (which is the case with respect to the remaining part of the entitlement, i.e., €20), or to lose a legal entitlement based on negligently not raising it. In addition, the provisions used by analogy are special provisions that cannot be generalized in this form.

Other scholars qualify the abuse as a breach of duty under the legal relationship that exists between Creditor and Debtor as plaintiff and defendant to a civil trial (which is different from the contractual relationship that is the basis of the dispute in the first place)¹⁴⁷. So, if Creditor knew or was negligently unaware that the claim for €80 was actually only part of a bigger entitlement to €100, bringing the second action for the remaining €20 would make Debtor eligible for damages under the legal relationship between them as plaintiff and defendant. The damages would be in the amount of the difference in legal fees between what would have to be borne if the entitlement to €100 was resolved in one trial and what is now borne for the resolution via partial actions for €80 and €20. On this view, however, Creditor would not be precluded from bringing the second action for €20 and the action would be successful on the merits. The Debtor could only offset the damages claim against the second partial claim for €20¹⁴⁸.

In summary, there is more—albeit still little—likelihood that Creditor’s claim for €20 might be barred for being abusive under the doctrine of good faith. Arguably, Creditor would cause procedural

¹⁴⁵ MARBURGER P., *Teilklagen*, cit., p. 199.

¹⁴⁶ See only GOTTWALD P., § 322, cit., para. 135; SCHWAB M., *Zivilprozessrecht*, cit., para. 428.

¹⁴⁷ SCHACK H., *Teilklagen*, cit., p. 498; SCHWAB M., *Zivilprozessrecht*, cit., para. 429.

¹⁴⁸ SCHWAB M., *Zivilprozessrecht*, cit., para. 430.

prejudice to Debtor, if he knowingly brought a disguised partial claim for €80. According to some scholars, this conduct would constitute an abuse of process in itself and in consequence, Creditor's second action for €20 would be admissible but unfounded, either wholly (according to *Marburger*) or partially (due to set-off with damages). The same is argued to be the result where Creditor was negligently unaware of the total entitlement to €100. These are not mainstream opinions, however. Finally—and only this we argue to be a commonly held view—it is abusive for Creditor to bring several partial claims at the same time, or to split his claims excessively in order to cause disproportionate court fees. Such claims would probably from the outset (i.e., before any trial, not just in a subsequent trial) be thrown out as inadmissible, and Creditor would then have the opportunity to restructure his approach. But our case scenario is not such a case.

3.2.1.3. *Outside the main preclusion doctrines: interpreting the claim for €80 as forgiving the rest*

Under the prevailing opinion, Grounds (1) and (2) are unlikely to lead to the preclusive effect under discussion, but there might be a Ground (3) that prevents Creditor from suing Debtor a second time for €20. This is not part of the main preclusion doctrines under German law, although it may—on van de Velden's framework—be understood as an “agent for finality” as well. It is drawn from substantive instead of procedural law¹⁴⁹. Here once more the interpretation of conduct comes into play (conduct that happens to have occurred in the course of a trial, but which could have also taken place out of court): Creditor's conduct in bringing the first claim for €80 is correctly understood as only bringing a partial claim (contrast the minority view under Ground (1)), but further than that, the conduct during trial is interpreted as forgiving any potentially remaining parts of the debt. It is interpreted, for example, as an offer to conclude a contract of forgiveness under § 397 BGB. Such conclusion, however, must not be drawn too easily. First, there is really only room for such

¹⁴⁹ GOTTWALD P., § 322, cit., para. 133; ALTHAMMER C., § 322, cit., para. 153.

interpretation where Creditor brought a disguised partial action¹⁵⁰. Second, Creditor must have knowledge of his entire entitlement to €100 in order to have the required intent for forgiving the debt¹⁵¹. Under the assumption that Creditor's conduct could be interpreted as forgiving Debtor the remaining €20, the second action for €20 would be admissible but unfounded, not based on any of the main preclusion doctrines, but because the debt to the extent of €20 was gone, since the parties had concluded a contract of forgiveness.

3.2.2. *Can Creditor enforce security?*

We now turn to consider the analytical question of whether a judgment has “substantive” effect of extinguishing the debt on which the claim is brought, against the backdrop of the second question of our case scenario.

3.2.2.1. *To recoup the €80 judgment sum?*

Under German law, no matter whether Creditor is precluded from suing Debtor a second time, it is undisputed that Creditor can enforce the security to recoup €80. Post judgment, Creditor can still choose to fall back on the original security¹⁵². Once Creditor has got satisfaction from realising the security, he will be precluded from executing the judgment against Debtor.

3.2.2.2. *Or even, to recoup the €100 contract sum in full?*

The answer to this question is more complex, as it depends on whether Creditor is precluded from suing Debtor a second time and, if so, the basis on which he is so precluded.

¹⁵⁰ Cf. BGH, *NJW* 1997, 3019, 3021. See also VOLLKOMMER G., *Vorbemerkungen zu § 322*, cit., para. 48.

¹⁵¹ FRIES H., *Klageermäßigung*, cit., p. 114; SCHACK H., *Teilklagen*, cit., p. 497.

¹⁵² MADAUS S., § 773, in GSELL B., KRÜGER W., LORENZ S., et al. (eds.), *BeckOGK-BGB*, Munich, 2025, para. 18. Note the initial stipulation under n. 6.

To start with, if Creditor is not precluded from suing Debtor a second time, then he must be able to enforce the security to recoup €100 in full, for the reasons explained.

Even if Creditor is precluded from suing a second time under Ground (2), because his second claim against Debtor is barred by the doctrine of good faith for abuse of process, he should still be able to enforce security.

From the above, we may now determine that the first judgment for €80 only has procedural effect; it does not extinguish the underlying debt¹⁵³.

On the other hand, Creditor cannot enforce security to recoup €100 in full, if he is precluded from suing a second time under Ground (1) on the basis that his conduct in bringing a disguised partial action for €80 is interpreted as resolving his entire entitlement to €100. This is not because the contractual debt is gone. Rather, it is because the judgment for €80 will have *res judicata* effect as to the remaining €20, and under German law, this *res judicata* effect will apply in favour of Debtor as well as a third-party security provider, even if the latter was not a party to the proceedings in which judgment was given¹⁵⁴. In terms of the *res judicata* effect, German law sees no difference between (a) Creditor initially claiming €100 but the court determines that Debtor only owes €80, not €100 as claimed; and (b) Creditor initially claiming €80, omitting to claim the balance, and the court interprets this conduct as intending to bring the entire

¹⁵³ This conclusion confirms the prevailing understanding in German law, that a civil judgment has procedural instead of material effect. See on the distinction ROTH H., *Materielle und prozessuale Rechtskrafttheorien*, in *Ritsumeikan Law Review*, n. 33, 2016, p. 83.

¹⁵⁴ *Res judicata* effect normally only applies to the original parties to the proceedings and certain third parties as prescribed by law: §§ 325–327 ZPO. These are, for example, persons that have assumed legal succession after the dispute has become pending. It is further accepted by the courts and the majority of legal scholars, that beyond the parties to the proceedings, a third-party security provider may rely on a judgment beneficial to the debtor with regard to the secured debt when subsequently litigating with the creditor, cf. KIEHNLE A., § 1137, in GSELL B., KRÜGER W., LORENZ S., et al. (eds.), *BeckOGK-BGB*, Munich, 2025, para. 13; ALTHAMMER C., § 325, in BORK R., ROTH H. (eds.), *Stein/Jonas: ZPO*, Tuebingen, 2018, para. 99; BRAUN J., *Zivilprozeßrecht*, cit., p. 950. See also FERVERS M., *Die Bindung Dritter an Prozessergebnisse*, Tuebingen, 2022, pp. 288, 301 *et seq.* with further references. The creditor, however, may not rely on a previous favourable judgment, achieved (only) against the debtor, in subsequent litigation with the third-party security provider, see *id.*, *Dritte*, cit., p. 290.

entitlement to €100 into resolution. In both situations, Creditor cannot contradict the judicial resolution that his entitlement is limited to €80. Therefore, Creditor cannot sue or enforce security against Debtor for the remaining €20, and this extends to suing or enforcing security against a third-party security provider.

Finally, Creditor also cannot enforce security to recoup €100 in full, if he is precluded from suing a second time under Ground (3) on the basis that his conduct in bringing a disguised partial action for €80 is interpreted as forgiving €20. The debt, to the extent of €20, is gone, but only because of Creditor's conduct and not because the judgment for €80 itself extinguishes any part of the debt. Because the debt to the extent of €20 is gone, Creditor cannot enforce security to recoup €20.

3.3. *Summary*

In summary, under German law, in theory, a creditor may be precluded from reasserting the contractual debt for a greater money relief based on one of the main preclusion doctrines (Grounds (1) and (2)) or another agent of finality (Ground (3)). In reality, the application of Grounds (1) and (2) to achieve this preclusive effect is not looked favourably upon by the prevailing opinion, although Ground (3) is treated in a different light. Regardless, this preclusive effect is always—under all Grounds—subject to the possibility of the creditor expressly reserving in his statement of claim the right to bring another partial action in the future. This flows from the general procedural principle of party disposition as well as German law's openness to claim splitting. Moreover, as regards disguised partial action, the prevailing view supported by jurisprudence is that this preclusive effect is not automatic, but is always—again under all Grounds—subject to the court's evaluation of the creditor's conduct, knowledge and intention in bringing the first action. In all cases, post judgment, a secured creditor can fall back on the security and recoup at least the judgment sum. Where the creditor is not precluded from suing again, or is precluded under Ground (2), he can even enforce the security to recoup the full contract sum. All this is testament to the fact that judgment does not extinguish the underlying debt. Under

Grounds (1) and (3), a creditor cannot recoup the debt in full from the security, but this is not because the judgment extinguishes the debt; it is because the court interprets the conduct of Creditor as either intending to bring all of his entitlements to a full resolution, or as forgiving the unclaimed part of the debt.

4. Conclusion

Drawing the threads together, we hope that this contribution has brought out two important matters of comparative interest.

First is that under both English and German law, a money judgment ordering a debtor to pay his debt does not have the substantive effect of extinguishing the debt. This is confirmed by the fact that, under both systems, a secured creditor is able, post judgment, to enforce the pre-existing security for the debt to recoup the judgment sum, at the least; under English law and in some situations under German law, she may even recoup the contract sum in full, where that is greater than the judgment sum. It is a common mistake to assume that English law approaches the effect of a money judgment differently from civil law systems. Properly analysed, the English doctrine of merger *in rem judicatam* is a procedural rule that regulates actions for monetary relief in the courts. While its rigid operation may lead to harsh consequences, these consequences flow from procedural law and are procedural in nature only.

Second is that we have been able to identify several mechanisms in German law by which a creditor may be precluded from suing for the balance, potentially achieving an outcome that is somewhat similar to that obtained under English law. This confirms van de Velden's argument that, just because a legal system does not bar "claim splitting" by default, it does not necessarily follow that there is nothing in that system that can be invoked to curb reassertion¹⁵⁵.

The "functional", "principle-oriented" approach to comparing preclusion laws does not entail overlooking systemic differences and overreaching conclusions. In comparing different laws, the

¹⁵⁵ VAN DE VELDEN J. B., *Finality in Litigation*, cit., pp. 105, 124–33, 210, 213–14, 219–20.

differences are just as important as the similarities. It is useful to recap the three major differences we have identified.

First, because of the distinct meaning of *res judicata* under English law, the preclusive effect arising from the doctrine of merger fastens immediately, even if the judgment remains subject to appeal. In contrast, a matter is not *res judicata* under German law until appeal is exhausted or no longer available. At least if we take the *res judicata* approach, i.e., Ground (1) in our German law analysis, there is this difference in timing to consider.

Secondly, all three mechanisms under German law operate upon the court's evaluative adjudication. In contrast, there is no room for such inquiry under English law and, in this sense, the doctrine of merger operates automatically.

Thirdly, although it is our conclusion that under both systems a money judgment does not have any substantive impact on extra-curial legal relations, under German law, there are situations—i.e., under Grounds (1) and (3)—where, post judgment, a secured creditor may nonetheless lose the benefit of the security for the balance between a higher contract sum and a lower judgment sum. This is—we stress—not because the judgment itself extinguishes the contractual debt to that extent. Rather, it is because either the *res judicata* effect of judgment extends to the enforcement of security (whether as against the debtor or a third-party security provider), or the creditor's bringing of the first action is interpreted as generating a contract of forgiveness for the unclaimed portion of the debt. On this front, therefore, i.e., on the question of post-judgment enforcement of security, there is this significant divergence between English and German law, even if all three mechanisms have the potential of achieving, under German law, a similar preclusive outcome to that which would follow from the English doctrine of merger, with respect to a second money claim.

These are analytical differences, but there is, we suggest, a difference of a different kind. In comparing different legal systems, we must not forget the reality and fixate solely upon theoretical possibilities. To a German lawyer, this whole exercise of trying to look for ways to preclude a second money claim may look baffling, and English lawyers must not too readily dismiss this gut reaction as no more than a civilian peculiarity. The reaction of a German lawyer

bred in the traditions and usages of their own legal system must be carefully unpacked and understood. This is not the place to put forward any comprehensive argument, but we will venture a thought, which is this. In the context of a legal system that gives central importance to the principle *non ultra petita*¹⁵⁶, the whole question about “claim splitting” is really, generally speaking, a non-starter. At a fundamental level, most German lawyers do not see any problem with “splitting” a monetary claim. This is because under the German system, a money claim is defined, not solely by reference to abstract rules of law like how English lawyers do it, but by the claimants themselves, acting against those rules. For an English lawyer, reflection will reveal that a “cause of action” in this context is really the right to sue for a particular *kind* of relief to which a person is by law entitled on a legally significant set of facts; so we speak of whether there is a cause of action for monetary relief, a cause of action for declaratory relief, a cause of action for injunctive relief, so on and so forth¹⁵⁷. To German lawyers, however, “cause of action” is defined additionally by reference to the particular *extent* of the kind of relief that the claimant has specified in her statement of claim. At an analytical level, as long as the claimant wills it, she can have as many causes of action for monetary relief arising from the same set of facts as possible. It is for this reason that all three mechanisms we have identified cannot apply where there is an open partial action¹⁵⁸. Even in the context of a disguised partial action, a candid German lawyer will tell you that the application of one of those mechanisms to achieve a similar preclusive outcome as that reached under English law, while theoretically possible, does not sit easily with their lawyerly instincts. Provided that their system works well in practice, though, who are we to say that they have got it wrong (and vice versa)?

The ultimate lesson is that there is no single right way of doing things. This comparative exercise has helped us see more clearly that the English doctrine of merger *in rem judicatam* does not exist for

¹⁵⁶ Recall the discussion in text at n. 18 and n. 107.

¹⁵⁷ This explains the Supreme Court’s view set out in n. 16, addressed in CHU J. L. T., *Degrees of Right*, cit.

¹⁵⁸ For the meaning of open and disguised partial action, recall text at n. 125.

its own end. It is there to buttress, and is therefore explicable intelligibly only by reference to, the long-standing judicial policy that claiming a further money judgment where you have had the opportunity to recover your whole monetary entitlement is a bad thing—is vexatious, as it were. This is not the stance of German law—not at least as the position from which legal analysis begins.

To van de Velden’s trailblazing guidance on comparing preclusion laws, perhaps one more point should be added in consequence: that the principle of finality in litigation, while no doubt recognised by all functioning legal systems in the world, may itself be understood differently. To each their own¹⁵⁹.

¹⁵⁹ Consider SMITH L., *Peter Birks and Comparative Law*, in *Revue de droit de l’Université de Sherbrooke*, 2013, pp. 193–208; STORME M. E., *Common Core Projects*, in SMITS J. M., HUSA J., VALCKE C., NARCISO M. (eds.), *Elgar Encyclopedia of Comparative Law*, Cheltenham, 2023, pp. 306–17.

Access to Justice for Consumers and SMEs: A Competition Law Problem?

Sofia Caruso

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1. *Introduction*

Private enforcement of EU competition law has undergone a remarkable transformation over the past twenty years, from the recognition of the right of “any individual” to claim compensation for the harm suffered as a consequence of an infringement EU competition law in *Courage v Crehan*¹, to its codification in the Damages Directive².

The Directive aimed to remove most practical obstacles to redress, however, not all market participants took part in this evolution. In fact, it appears that, across the European countries, actions

¹ Judgment of the Court of September 20, 2001, *Courage Ltd v Bernard Crehan and Bernard Crehan v Courage Ltd and Others*, Case C-453/99.

² Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union, in OJ L 349, p. 1.

filed by consumers and SMEs are still at the tail end of the recent surge in damages actions (Section 2).

Pursuant to an access-to-justice perspective, this article investigates the reasons behind such an enforcement gap and examines whether consumers and SMEs can be understood as “weaker victims” in the context of private enforcement of EU competition law. This hypothesis is tested against two potential criticisms: first, whether their weakness is specific to competition law litigation or reflects their general status as consumers and SMEs; and second, whether consumers and SMEs are suitable to be meaningfully subsumed under one and the same label, or their different positions in the supply chain require different sets of solutions.

Firstly, the article briefly describes the structural features of competition law litigation that more intensely disadvantage consumers and SMEs (Section 3). Secondly, it analyses whether consumers’ weakness is specific to competition law enforcement by means of comparison with their position in consumer protection enforcement (Section 4). Similarly, competition litigation by SMEs is studied to identify differences and similarities with consumer-led litigation in competition law (Section 5). In conclusion, the hypothesis is confirmed, based on the consideration that the procedural weakness of consumers and SMEs in competition law litigation outweighs their differences.

2. Damages actions before the Damages Directive ...³

Before the Damages Directive came into force⁴, the EU’s landscape of private enforcement presented wide disparities between Member States. They could be grouped into three categories⁵: those

³ This paragraph is largely based on the findings of the AHRC funded research project ‘*Application of competition law in the national courts*’, which was the first and most complete quantitative study on the case law of EU private enforcement of competition law from 1 May 1999 to 1 May 2012. The findings have been collected in RODGER B.J., *Competition law, comparative private enforcement and collective redress across the EU*, Alphen aan den Rijn, 2014.

⁴ Damages Directive, cit.

⁵ RODGER B.J., *Competition law, comparative private enforcement and collective redress across the EU*, cit.

having limited or no private enforcement experience, where no damages actions have been filed; those where private enforcement was developing and showed an upward trend in the number of damages actions⁶; and a third group of countries showing “considerable” experience with private enforcement⁷, where the United Kingdom was an obvious outlier⁸.

Quantitative studies conducted at the time challenged two assumptions on private enforcement of competition law across the EU⁹. The first assumption was that private enforcement equates with actions for damages. In fact, non-damages remedies, such as injunctive and restitutory remedies, accounted for the majority of private enforcement actions in most Member States¹⁰. The second hypothesis to be refuted was that most damages actions were follow-on actions. In fact, follow-on actions were considerably less frequent than stand-alone actions¹¹, but they were much more suc-

⁶ Austria, Denmark, Greece, Ireland, Portugal, and Sweden.

⁷ Belgium, France, Germany, Italy, the Netherlands, Spain, and the UK.

⁸ Since 1998, the UK has undertaken a process to encourage and facilitate private enforcement, for example by providing that follow-on actions for monetary redress could be brought before the specialised Competition Appeal Tribunal (Section 47A Competition Act 1998) and extensive disclosure of all documents relevant to the litigation – albeit, after *Pfleiderer*, UK courts adopted the ECJ approach to leniency documents, see RODGER B.J., UK Report, p.7 in AHRC project, *Comparative Private Enforcement & Consumer Redress in the EU*, <<https://www.clcpecreu.co.uk/>>.

⁹ RODGER B.J., *Competition law, comparative private enforcement and collective redress across the EU*, cit.; RENDA A., PARDOLESI R., VAN DEN BERGH R., RODGER B.J., *Making antitrust damages actions in the EU more effective*, Brussels, 2007.

¹⁰ Between 1999 and 2012, over two thirds of the competition case law of the EU consisted of non-damages cases, albeit with significant differences among the Member States, RODGER B.J., *Competition law, comparative private enforcement and collective redress across the EU*, cit., p. 125.

¹¹ In the period 2006-2012, only one fourth of the Commission’s final cartel and antitrust prohibition decisions was followed by damages actions in any Member State, Impact assessment report, Damages actions for breach of the EU antitrust rules accompanying the proposal for a directive of the European Parliament and of the Council on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union, 2013, p. 52 (Impact assessment).

cessful than the latter – although only a minority of them collected compensation in the order of a few thousand euros¹².

Based on this limited number of damages actions, it is possible to observe that claimants were typically (big) businesses¹³, whereas consumers played only a very marginal role in private enforcement¹⁴. Most Member States counted no consumer-led action, while in others, litigation initiated by consumers and SMEs was “related to isolated streams of cases”¹⁵. One such example is the seminal *Manfredi* case¹⁶, which, together with over 100,000 damages actions, was filed in the aftermath of the Italian *Car Insurance* cartel. Interestingly, even in countries where consumer associations had standing to bring representative damages actions, these were almost insignificant in numbers and participation rates¹⁷.

The seeds of change had been planted, but they were sprouting with changing fortunes. So much that AG MAZÁK declared that – while no *de jure* hierarchy had been established between public enforcement of EU competition law and private actions for damages – so reduced was the role of private actions for damages “*that I would hesitate in overly using the term ‘private enforcement’*”¹⁸.

¹² For instance, Spain registered many disputes between oil companies and distributors. Follow-on actions were raised from the *Vitamins* infringement decision in Germany, France, and the UK, all of which involved business intermediaries that used such supplements in their own final products. RODGER B.J., *Let’s Talk About Consumers: Competition Law Compensation for Indirect Purchasers’ Losses - A United Kingdom Perspective*, in *Antitrust Law Journal*, 2022, p. 407.

¹³ *infra* footnote 21; Impact assessment, *cit.*, p. 53.

¹⁴ Out of a total of 1263 cases analysed under the AHRC study, only 3,2% were consumer cases, and a minuscule 0,4% were collective or aggregated consumer cases. Even in a mature jurisdiction such as the Netherlands, only 3 out of 308 cases had been initiated by consumer organisations.

¹⁵ RENDA A., PARDOLESI R., VAN DEN BERGH R., RODGER B.J., *Making antitrust damages actions in the EU more effective*, *cit.*, p. 9, 40.

¹⁶ Judgment of the Court of 13 July 2006, Vincenzo Manfredi v Lloyd Adriatico Assicurazioni SpA, Joined cases C-295/04 to C-298/04.

¹⁷ VAN DEN BERGH R., LOUIS VISSCHER, *The Preventive Function of Collective Actions for Damages in Consumer Law*, in *Erasmus Law Review*, 2008, p. 23.

¹⁸ Opinion of AG Mazák of 16 December 2010, *Pfleiderer*, Case C-360/09, para 40.

2.1. ... and after – The private enforcement gap

Due to its late implementation, it is still too early to draw conclusions on the effects of the Damages Directive on private enforcement of competition law. However, it appears to have had the merit of making the discussion on private enforcement more relevant across the entire EU. Over the past decade, the number of actions for damages has increased across the Member States¹⁹, whose national courts interacted with the ECJ through a growing number of requests for preliminary rulings²⁰.

Nonetheless, the surge in damages actions following the implementation of the Damages Directive is led by the more sophisticated players. These are (big) business claimants²¹ and public bodies, such as ministries or municipalities²².

¹⁹ ICC Compendium of Antitrust Damages Actions, Paris, 2021, p. 541; LABORDE J.-F., *Cartel damages actions in Europe: How courts have assessed cartel overcharges*, in *Concurrences*, 2021, p. 232–242.

²⁰ Report from the Commission to the European Parliament and the Council on the implementation of Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union, 2020, p. 3–4.

²¹ Such as supermarkets (Danish Maritime and Commercial Court judgment of 24 January 2017, Breeders of Denmark vs. Danish Agriculture & Food Council/Pig Research Centre; Paris Commercial Court judgment of 20 February 2020, Lactalis; Bordeaux Commercial Court judgment of 20 December 2023, Carrefour Hypermarchés c/ Valade), insurance companies (Paris Commercial Court judgment of 1 October 2019, CNAMTS v Sanofi), and telecoms companies (Paris Commercial Court judgment of 16 March 2015, SAS Outremer Telecom c/ SA Orange Caraïbe et SA Orange; Paris Commercial Court judgment of 18 June 2015, SFR Numericable v Orange).

²² This is especially the case in Germany, France and the UK, see RENGIER L., *Cartel Damages Actions in German Courts: What the Statistics Tell Us*, in *Journal of European Competition Law & Practice*, 2020; AMARO R., *Chapter 18 - France*, in AMARO R. (ed.) *Private Enforcement of Competition Law in Europe*, Brussels, 2021, p. 383–404; WHISH R., *Article 102 TFEU in the UK: victims of abuse go directly to court*, in *Abuse of Dominance in EU Competition Law*, 2017, p. 67.

For instance, in the aftermath of the *Elevator and escalator* cartel, damages actions were filed by the European Commission, the Belgian State, the Austrian railways, the Land Oberösterreich. Similarly, grid-operators companies acting for damages against the members of the *Gas Insulated Switchgear* cartel were publicly owned, see ICC Compendium of Antitrust Damages Actions, cit., p. 449 et seq. The follow-on actions to the *Steel* cartel provide another example of damages actions filed by the German national railways (Limbourg Court judgment of 16 November 2016 and s-Hertogenbosch Court of Appeal

Conversely, private enforcement aimed at compensating consumers is very limited²³, and individual consumer actions are rare²⁴. By means of exception, Portugal is growing as a consumer-friendly jurisdiction in the field of competition law enforcement, particularly due to the availability of opt-out collective actions initiated by proactive consumer associations and supported by third-party funding²⁵.

Similarly, SMEs are underrepresented in the private enforcement case law, although the thousands of actions filed across the Member States in the aftermath of the *Trucks* cartel by SMEs – individually or collectively – and, to a lesser extent, by consumers have shown that it is possible for them to pursue damages in the EU jurisdictions when the potential harm exceeds litigation costs²⁶.

The small numbers in consumer- and SME-led private enforcement actions cannot be attributed to the little number of infringing conducts affecting them. In fact, Article 101 and 102 infringements affecting essential goods and services are the object of 20% of the Commission's successful investigations in price-fixing cartels and

judgment of 28 January 2020, *Deutsche Bahn v Spanstraal*). Public institutions count for most of the plaintiffs in the *German Rails* and *Fire Engines* cases, and figure as claimants also in the *Trucks* litigation.

²³ RODGER B.J., FERRO M.S., MARCOS F., *A panacea for competition law damages actions in the EU? A comparative view of the implementation of the EU Antitrust Damages Directive in sixteen Member States*, in *Maastricht Journal of European and Comparative Law*, 2019, p. 480–504.

²⁴ In a comprehensive study conducted on cartel damages actions across twenty European countries from 1998 until 2024, LABORDE revealed that local authorities and publicly owned companies initiated the vast majority of the cases, 54% and 34% respectively, while end consumers contributed for 3%, see LABORDE J.-F., *Cartel damages actions in Europe: How courts have assessed cartel overcharges*, in *Concurrences*, 2025, p. 6. SOUSA FERRO argues that there is no enforcement for consumers outside collective remedies in *Consumer Antitrust Private Enforcement in Europe: As Complete a Survey as Possible (Extended Version)*, in *SSRN Electronic Journal*, 2022, p. 6.

²⁵ SOUSA FERRO M., *Consumer Antitrust Private Enforcement in Europe: As Complete a Survey as Possible (Extended Version)*, cit., p. 17.

²⁶ DUDOK VAN HEEL M., *Bundling of follow-on damages claims – an efficient way to litigate in the Netherlands?*, in *Mass Claims*, 2024; MARCOS F., *Trucks Cartel Damages Claims: Thousand and Odd Judgments issued by Spanish Appeal Courts*, in *Zeitschrift für Europäisches Privatrecht*, 2023; RODGER B.J., *Private Enforcement in the UK: Effective Redress for Consumers?*, cit., p. 336.

27% of NCAs' investigations in international price-fixing cartels²⁷. Anticompetitive conducts taking place in these industries have clear implications for end consumers.

The chiasm between damages actions filed by businesses and other victims of competition law infringements depicted in this empirical picture suggests the persistence of obstacles in accessing justice specific to consumers and SMEs. Therefore, this article tests whether both may be defined as “weaker victims” of competition law infringements, i.e. victims with no or limited access to compensation for the harm suffered.

In keeping with the access-to-justice approach, this definition intentionally recalls that of “weaker parties” under EU Private International Law²⁸, which photographs the imbalance between contracting parties. The same imbalance can also be addressed from the procedural point of view. Accordingly, VÁRADI draws on the ECJ case law on Regulation Brussels I bis and Article 47 CFR to qualify “a person whose persecution of rights is hindered by the lack of resources and legal knowledge in comparison to the other party of the procedure”²⁹ as a weaker party. These asymmetries also come into play in competition damages claims. Additionally, similarly to the notion of weaker parties, weaker victims entail a category broader than consumers alone.

²⁷ These are the results of a personal elaboration of CONNOR's dataset, covering international price-fixing cartels, i.e. having one or more participants with headquarters outside of the jurisdiction of the investigating CA, that have been discovered and fined between 1990 and 2019, CONNOR J.M., *Private International Cartels Full Data 2019 edition*, <<https://purr.purdue.edu/publications/2732/2>>. The percentage of fines imposed for infringements targeting essential products out of the total number of successful investigations varies among NCAs, from 68% in Portugal to zero in Finland, Cyprus, Ireland and Slovenia. However, it is difficult to provide representative figures for the practice of CAs in small Member States due to the limited number of *international* cartels identified. See also STEPPE R., DEVROE W., DEBLANDER G., *Support study for the evaluation of Regulations 1/2003 and 773/2004: final report*, Luxembourg, 2024, p. 2.

²⁸ Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast), OJ L 351, 20.12.2012, p. 1; LAZIĆ V., *Procedural Position of a 'Weaker Party' in the Regulation Brussels Ibis*, in LAZIĆ V., STUIJ S. (ed.) *Brussels Ibis Regulation*, The Hague, 2017, p. 51–70.

²⁹ VÁRADI Á., *Social and Economic Challenges, Legal Answers: Protection of the Weaker Party in Contractual relationships*, 2017, p. 4 and case law cited.

This hypothesis is tested in the following sections. Section 3 describes the features of private enforcement of competition law and how those could constitute obstacles to legitimate claims. Focusing on consumers, Section 4 investigates whether consumer undercompensation is due to obstacles to access to justice specific to competition law litigation, or rather to the relative weakness inherent to consumers as such in enforcing their rights. The conclusions are drawn by comparing the conditions of consumers faced with infringements of competition law and consumer protection law. Finally, Section 5 compares the position of consumers and SMEs to determine whether they can be subsumed under the same category of weaker victims.

3. Features of private enforcement of competition law

Private enforcement of competition law faces several structural and procedural challenges that hinder its effectiveness within the EU. Notably, the reasons for this are the inherent complexity of antitrust litigation, the high costs associated with accessing judicial remedies, and the striking asymmetries between claimants and defendants in terms of financial resources, legal expertise, and access to crucial information.

Competition law cases are known to be particularly fact-intensive³⁰. The process of finding the infringement, demonstrating the existence of harm and its causal link to the unlawful conduct, and ultimately quantifying the resulting damages requires a thorough examination of complex and often technical facts, which must ultimately be corroborated by appropriate evidence.

Consequently, follow-on actions are on average more successful³¹, whereas claimants in stand-alone actions face a significant challenge in proving the anticompetitive practice³². Suppliers and

³⁰ Commission Staff Working Paper accompanying the White Paper on damages actions for breach of the EC antitrust rules, SEC(2008) 404, point 65.

³¹ Although it is the complexity of the specific case at issue that determines the hurdle of an action for damages, AMARO R., *Chapter 18 - France*, cit., p. 389.

³² CSERES K., MENDES J., *Consumers' access to EU competition law procedures: Outer and inner limits*, in *Common Market Law Review*, 2014, p. 497.

buyers – even consumers – may have an informational advantage when it comes to uncovering vertical agreements and abuse of dominance cases that emerge from their contractual agreements with the infringer³³. However, consumer actions are mostly follow-on³⁴.

Secondly, the type of infringement also affects the complexity of litigation. Uncovering collusion is the most fact-intensive aspect of cartel cases; therefore, CAs who may rely on their investigatory powers and leniency programmes are the best placed to find them³⁵. However, once detected, cartels often involve relatively straightforward legal assessments³⁶. By contrast, abuse of dominance cases entail a more sophisticated analysis of multi-layered markets, assessment of dominance, and evaluation of the effects of the conduct³⁷.

The Damages Directive provides for measures aimed at mitigating the adverse effects of the information asymmetries between the parties. Chiefly, under Article 9, final infringement decisions by NCAs or review courts irrefutably establish the infringement, to the benefit of follow-on damages actions. Similarly, Article 17(2) establishes a rebuttable presumption that cartels cause harm, and un-

³³ Ibid.; RENDA A., PARDOLESI R., VAN DEN BERGH R., RODGER B.J., *Making antitrust damages actions in the EU more effective*, cit., p. 220.

³⁴ M. IOANNIDOU, *Consumer Involvement in Private EU Competition Law Enforcement: Evaluating and Reshaping the Enforcement Toolbox—Towards Acceptable Mechanisms* (Degree Doctor of Philosophy in Law), Corpus Christi College, University of Oxford, 2012, p. 85.

³⁵ RENDA A., PARDOLESI R., VAN DEN BERGH R., RODGER B.J., *Making antitrust damages actions in the EU more effective*, cit., p. 346.

³⁶ RENGIER L., *Cartel Damages Actions in German Courts*, cit., p. 74. On the factual presumption that information cartels cause harm see German Federal Court judgment of 29 November 2022, Schlecker; TILMAN MAKATSCH, BABBETTE KACHOLDT, *Factual presumption that price-related anti-competitive information exchange leads to price increases facilitates cartel damages claims in Germany*, in *Global Competition Litigation Review*, 2023, p. 82–88.

³⁷ PARCU P.L., ROSSI M.A., *The role of economics in EU private antitrust enforcement: theoretical framework, empirical methods and practical issues*, in PARCU P.L., MONTI G., BOTTA M. (ed.) *Private Enforcement of EU Competition Law*, Cheltenham, 2018, p. 74; MANDRESCU D., *Applying Article 102 TFEU to Multisided Online Platforms: Discrimination, Leveraging and Undefined Abuses of Dominance*, in CALZOLARI L., MIGLIO A., CELLERINO C., CROCI F., ALBERTI J. (ed.) *Public and private enforcement of EU competition law in the age of big data*, 2024, p. 94.

der Article 14(2) it is rebuttably presumed that, if a violation has resulted in an overcharge for the direct purchaser, the overcharge has been passed on entirely to the indirect purchaser. Finally, rules for disclosure of evidence allow national courts to order defendants and third parties to disclose relevant information to the claimants, with the notable exception of sensitive documents from CAs' files, such as leniency statements and settlements (Art. 6(6)). Indeed, notwithstanding judicial estimation of the harm (Arts. 12(5) and 17), claimants must submit thorough economic evidence³⁸, the collection and processing of which comes with considerable costs³⁹.

As a matter of fact, factual complexity comes with lengthy proceedings and higher litigation costs, which result in substantial risk⁴⁰. Especially, cartel cases are characterised by an uneven distribution of the financial risk between a single plaintiff and multiple defendants⁴¹. However, the Damages Directive does not provide specific indications on direct or adversarial costs, thus the impact of cost bearing on the right to full compensation is to be assessed under the general principles of equivalence and effectiveness. Court fees are regulated under national law, and most Member States adopt a claimant-friendly approach⁴². Also, several jurisdictions concentrate competition law cases in a few specialised courts

³⁸ Judgment of the Court of February 16, 2023, *Tráficos Manuel Ferrer SL and Ignacio v Daimler AG*, Case C-312/21; SERAFIMOVA M., *Quantification of Harm in EU Consumer Antitrust Actions for Damages*, in *World Competition*, 2024, p. 15.

³⁹ BARENNE M., SEEGER M., *Chapter 3 - Litigation costs, funding and access to justice in competition damage actions in Europe*, in AMARO R. (ed.) *Private Enforcement of Competition Law in Europe*, Brussels, 2021, p. 51–52. See also *Royal Mail Group Limited v DAF Trucks Limited and Others* [2023] CAT 6; Spanish Tribunal Supremo judgment of 12 June 2023, Trucks; Valencia Court judgment of 10 March 2023, *Tráficos Manuel Ferrer/Daimler*.

⁴⁰ BARENNE M., SEEGER M., *Chapter 3 - Litigation costs, funding and access to justice in competition damage actions in Europe*, cit., p. 49.

⁴¹ *Ibid.*, 55–56.

⁴² For example, in Germany court fees are capped at a maximum claim value of €30 million and subject to adjustment operated by the judges, whereas the Netherlands Commercial Court fees are fixed at €15,000 for the judgment of first instance and €20,000 for the appeal; under the French system no court fees are charged, pursuant to the principle that justice is free.

or sections in order to ensure more efficient proceedings⁴³. Nonetheless, when the upfront costs and financial risk associated with litigation exceed the potential value of the claim, they effectively deter victims of competition law infringements from pursuing legitimate claims⁴⁴.

4. Access to justice for consumers: a competition law problem?

This section focuses on the challenges systematically affecting consumers as claimants under competition law⁴⁵. It is investigated whether the obstacles they encounter in accessing damages actions are the same as in consumer-led litigation at large⁴⁶, or whether competition law litigation presents specific challenges.

4.1. Information and resources asymmetry

Consumer claims in competition and consumer protection law share underlying structural and behavioural dynamics. Chief among them is the asymmetry in resources and access to information between claimants and defendants. In both domains, consumers often lack a clear understanding of their rights or fail to fully grasp the legal avenues available to them⁴⁷. They might be unaware of the

⁴³ KOZAK M., *Private enforcement of competition law*, in VAN DEN BRINK T., PASSALACQUA V. (ed.) *Balancing Unity and Diversity in EU Legislation*, Cheltenham, 2024, p. 155–174; HITCHINGS P., *RH v AB Volvo: A Call for Centralized and Specialized Courts in the Midst of Jurisdictional Dispersion. Case Note: C-30/20, ECLI:EU:C:2021:604*, in *Mass Claims*, 2021, p. 136–139; SILVESTRI E., *The Pros and Cons of Judicial Specialization*, in *New Pathways to Civil Justice in Europe: Challenges of Access to Justice*, Cham, 2021.

⁴⁴ BARENNE M., SEEGER M., *Chapter 3 - Litigation costs, funding and access to justice in competition damage actions in Europe*, cit., p. 41.

⁴⁵ For the purpose of this contribution, consumers are identified as natural persons acting for purposes outside their trade, business, or profession pursuant to EU consumer protection law, Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on consumer rights, OJ L 304, 22.11.2011, p. 64.

⁴⁶ SOUSA FERRO M., *Consumer Antitrust Private Enforcement in Europe*, in *Journal of European Competition Law & Practice*, 2022, p. 578–593.

⁴⁷ Across the EU countries, more than a third of consumers has a low knowledge of their (consumer law) rights, compared with 29% with high knowledge, calculated based

very existence of a violation, especially when the harm is invisible to them, as is the case with competition law infringements.

Section 3 has outlined some of the factors that determine the complexity of competition law damages actions. Although many consumer complaints are resolved directly with traders, consumer law cases can also be factually challenging. For instance, product liability cases may require sophisticated technical or scientific assistance⁴⁸, and misleading health or “greenwashing” claims are unlikely to be detected by individual consumers. Similar to antitrust follow-on actions, when technical expertise is required, the intervention intermediary bodies proves crucial in bringing infringements to the surface⁴⁹.

4.2. *Rational apathy and access to remedies*

The competition law infringements that consumers most often report suffering from occur in the sectors of energy, food, telecommunications, and transport, which are relevant to them. However, even when they believe they have a legitimate cause for complaint, most consumers do not act upon it⁵⁰. Such rational apathy results from the assessment that the effort, cost, and time associated with a legal claim are disproportionate to any potential gain⁵¹. In competition law damages cases, further down the supply chain, the

on their awareness of different aspects of consumer protection (i.e. cooling off period for distance purchases, one-sided change to contracts, faulty product guarantee, unsolicited products), see EUROPEAN COMMISSION, *Consumer Conditions Scoreboard: 2025 edition*, Luxembourg, 2025, p. 22.

⁴⁸ For example cases on defective medical devices. Court of Milan, Case CC-23551/2024, *Adusbef et al. v Philips*. See also ROTT P., *Improving consumers’ enforcement of their rights under EU consumer sales law: Froukje Faber*, in *Common Market Law Review*, 2016, p. 509–526.

⁴⁹ For instance, at the origin of the *Dieseltgate* scandal was the investigation of the International Council on Clean Transportation and the subsequent intervention of the US Environment Protection Agency, which was later followed by countless individual and collective actions in the US.

⁵⁰ IPSOS EUROPEAN PUBLIC AFFAIRS, *Citizens’ perceptions about competition policy*, Brussels, 2022, p. 25.

⁵¹ EUROPEAN COMMISSION, *Dataset Consumer Conditions Scoreboard: 2025 edition*, 2025, Q18.

number of potential claimants typically increases and the fraction of harm each bears grows smaller. Additionally, there is a higher risk for small claims that the means of proof – e.g., the receipt proving the purchase of a consumption good – are lost over time⁵². Indeed, despite the presumption under Article 14(2) Damages Directive, indirect purchasers have to prove that they have bought the affected good or service.

Consumer claims under consumer law are also typically small claims⁵³. However, consumers are way more likely to take action and tackle them⁵⁴.

Therefore, it appears that remedies are less accessible for competition than in consumer claims. Indeed, consumers' preferred solution when facing a violation of their consumer rights is to resort directly to the retailer or service provider, or alternatively, the product manufacturer⁵⁵. This is possible because many consumer claims are rather straightforward, making them suitable for being resolved directly by complaining to and obtaining redress from the trader⁵⁶. Conversely, competition law cases are more complex, and victims can only obtain remedies through litigation.

4.3. Evidence

There are further differences between consumer protection and competition law cases.

⁵² DREXL J., *Consumer Actions after the Adoption of the EU Directive on Damage Claims for Competition Law Infringements*, in *Max Planck Institute for Innovation & Competition Research Paper*, 2015, p. 14; CONNOR J.M., *Private International Cartels Full Data 2019 edition*, cit. This is even more the case when final product purchased by consumers only derives or contains the cartelised product, as illustrated by the *Vitamins* litigation, where virtually all claimants were other operators in the food industry, ICC Compendium of Antitrust Damages Actions, cit.

⁵³ CSERES K., MENDES J., *Consumers' access to EU competition law procedures*, cit., p. 498; RENDA A., PARDOLESI R., VAN DEN BERGH R., RODGER B.J., *Making antitrust damages actions in the EU more effective*, cit., p. 29.

⁵⁴ TNS POLITICAL & SOCIAL, *Consumer Attitudes towards Cross-border Trade and Consumer Protection*, Brussels, 2015, p. 61.

⁵⁵ *Ibid.*, 49.

⁵⁶ *Ibid.*, 49.

Firstly, the harm caused to consumers by competition law infringements is often mediated, for it has been passed on through several rings of the supply chain⁵⁷. This makes proof of causation and quantification of the harm more difficult to provide. While the presumption under Article 14(2) of the Damages Directive lifts the claimant from proving causation, the quantification of the harm has to be supported by sound economic analysis establishing what portion of such harm has been passed on. In order to overcome these hurdles, Article 17(1) of the Damages Directive empowers judges to quantify damages when exact calculations based on such analysis would be practically impossible or excessively difficult. However, the ECJ specified that, in assessing whether these conditions are satisfied, the judge should consider whether the claimant has made use of the tools made available to them under the Directive and “*intended to correct in [their] favour the balance of power between that claimant and the defendant*”⁵⁸. Said otherwise, if the practical impossibility of assessing the harm results from the inaction of the claimant, it is not for the court to make up for it⁵⁹. Although the judicial estimation of damages has been introduced in order to mitigate the power and information asymmetry between claimants and defendants, such asymmetry should be measured not with regard to the initial conditions of the parties, but rather to the *evolution* of their relative positions in the course of the proceeding⁶⁰. Once such tools have been used – e.g. a request for disclosure of evidence has been filed – a judicial estimation of damages might still be necessary to overcome the hurdles of exact quantifi-

⁵⁷ RODGER B.J., *Let’s Talk About Consumers*, cit., p. 390.

⁵⁸ Tráficos Manuel Ferrer SL and Ignacio v Daimler AG, cit., para. 46. The referring judge eventually considered that it would have been not impossible nor excessively difficult to quantify the harm, thus it was up to the parties to propose their quantification of the damages. Although flawed by some weaknesses, the judges deemed the claimants’ attempt at quantification “*sufficiently plausible and reasonable*”, Valencia Court judgment of 10 March 2023, Tráficos Manuel Ferrer/Daimler, cit., p. 5§2(iv).

⁵⁹ Tráficos Manuel Ferrer SL and Ignacio v Daimler AG, cit., para. 57.

⁶⁰ *Ibid.*, para. 45–46.

cation, of which information asymmetry is only one of the determining factors⁶¹.

4.4. Cost and risk allocation

Secondly, consumer protection law and competition law claims follow different rules with respect to cost allocation⁶². If a claim for competition damages is partially upheld, consumers may be obliged to pay part of the costs, provided that these are attributable to them, for example, due to the formulation of excessive claims⁶³. Conversely, under the UCTD, such a provision was considered to breach the principle of effectiveness, given that it would discourage consumers from exercising their right to an effective judicial review of an alleged unfair contract term⁶⁴.

These reasons underscore a fundamentally different approach to the protection of consumers as weaker parties to B2C contracts and as weaker victims of a competition law infringement. While the former are considered inherently at a disadvantage in contractual relationships with professional parties, the CJEU does not acknowledge the same structural disparity with regard to the latter – or at least deems that the instruments made available under the Damages Directive are adequate to counter such initial disad-

⁶¹ Ibid., para. 58–59. Said otherwise, while the Court specifies that the information asymmetry is not a prerequisite to resort judicial estimation of damages, it expects the claimants to take all necessary steps to reduce such asymmetry, HORNKOHL L., *Of Adequate Cost Rules, Judicial Damages Estimation, and Fundamental Principles of Antitrust Damages Actions – Tráficos Manuel Ferrer, C-312/21*, in *Kluwer Competition Law Blog*, 2023.

⁶² SERAFIMOVA M., *The balancing of powers in private antitrust enforcement – when David met Goliath?*, 2023. AG KOKOTT's suggested approach mimicked that of the Court's case law on the UCTD.

⁶³ Tráficos Manuel Ferrer SL and Ignacio v Daimler AG, cit., para. 47. See also KERSTING C., *Reimbursement of Costs under Procedural Law and Requirement for Estimation of Damages according to Tráficos Manuel Ferrer*, in *Global Competition Litigation Review*, 2023, p. 141–145.

⁶⁴ Tráficos Manuel Ferrer SL and Ignacio v Daimler AG, cit., para. 45 and case law cited.

vantage⁶⁵. Ultimately, claimants of antitrust damages actions are held to a higher degree of responsibility: not only do they have the right to utilise the means provided for by the Damages Directive, but also a *duty* to do so⁶⁶.

However, it would be paradoxical to treat consumers differently based on the type of claim they are enforcing. One solution could be interpreting the relevant provisions in the light of the principle of proportionality⁶⁷. Another, more radical approach would be to place the burden of uncertainty on the defendants, as under the UCTD, because they should not benefit from the inherent complexity of private enforcement cases arising from their own infringing behaviour at the detriment of the effectiveness of weaker victims' right to compensation⁶⁸.

4.5. *Multiparty litigation*

Another distinctive feature of private enforcement in competition law is its multiparty nature, often involving multiple actors on both sides of the dispute. Multiparty litigation significantly increases both the complexity of proceedings and the associated costs, posing further obstacles to effective redress⁶⁹. Illicit conducts that

⁶⁵ SERAFIMOVA M., *Quantification of Harm in EU Consumer Antitrust Actions for Damages*, cit., p. 8; Tráficos Manuel Ferrer SL and Ignacio v Daimler AG, cit., para. 45.

⁶⁶ SERAFIMOVA M., *Quantification of Harm in EU Consumer Antitrust Actions for Damages*, cit.; HORNKOHL L., *Of Adequate Cost Rules, Judicial Damages Estimation, and Fundamental Principles of Antitrust Damages*, cit.

⁶⁷ For example, by allowing the judicial estimation of damages when disclosure would be excessively costly in relation to the value of the claim, as is already the case before the Spanish Supreme Court. Cfr. SERAFIMOVA M., *Quantification of Harm in EU Consumer Antitrust Actions for Damages*, cit., p. 8, 14; KERSTING C., *Reimbursement of Costs under Procedural Law and Requirement for Estimation of Damages according to Tráficos Manuel Ferrer*, cit., p. 143; HORNKOHL L., *Of Adequate Cost Rules, Judicial Damages Estimation, and Fundamental Principles of Antitrust Damages Actions*, cit.

⁶⁸ AG KOKOTT stressed that the risk inherent to the complexity of competition law litigation should be shifted on the defendant who committed the infringement, Judgment of the Court of 2021, Opinion of Advocate General Kokott delivered on 22 September 2022, Tráficos Manuel Ferrer S.L. and Ignacio v Daimler AG., Case C-312/21.

⁶⁹ For this reason, individual SMEs and consumers often file actions against single cartel members rather than all persons who could be held jointly and severally liable. This was the case in the Spanish Car cartel and Euribor follow-on actions, see SOUSA FERRO

violate consumer law provisions also affect a plurality of consumers, and collective actions against retailers and manufacturers – albeit still few – are one example of multiparty consumer litigation.

Collective actions in consumer protection law have been harmonised at the EU level⁷⁰, but not in competition law. Such a difference is partially compensated by the fact that sixteen Member States provide for collective compensatory actions in favour of consumers when they are victims of competition law infringements. Yet, even countries where several collective actions have been filed under consumer protection law lack comparable experience in competition law⁷¹. This reinforces the idea that there are special challenges to antitrust private enforcement that provide “*an additional and decisive barrier to consumer collective redress*”⁷².

4.6. *The role of public authorities*

Finally, the conduct and role of public bodies differ between the two legal regimes. The new Regulation on cooperation between national consumer protection authorities empowers NCPAs to receive from traders remedial commitments to the benefit of consumers affected by an infringement of consumer protection law, such as reparation, replacement, price reductions, termination of contract or reimbursement of the price paid for the goods or services (Art. 9(4)(c))⁷³. NCPAs must inform consumers of their possibilities for seeking redress (Art. 9(4)(d)), and consumer protection authorities

M., *Consumer Antitrust Private Enforcement in Europe: As Complete a Survey as Possible (Extended Version)*, cit., p. 24.

⁷⁰ Directive (EU) 2020/1828 of the European Parliament and of the Council of 25 November 2020 on representative actions for the protection of the collective interests of consumers and repealing Directive 2009/22/EC OJ L 409, 4.12.2020, p. 1 (RAD).

⁷¹ For an analytical study of such actions, see SOUSA FERRO M., *Consumer Antitrust Private Enforcement in Europe: As Complete a Survey as Possible (Extended Version)*, cit., p. 11.

⁷² *Ibid.*; RODGER B.J., *Competition law, comparative private enforcement and collective redress across the EU*, cit., p. 94.

⁷³ Regulation (EU) 2017/2394 of the European Parliament and of the Council of 12 December 2017 on cooperation between national authorities responsible for the enforcement of consumer protection laws and repealing Regulation (EC) No 2006/2004.

often provide accessible mechanisms for information, dispute resolution, injunctive relief and, in some cases, regulatory redress⁷⁴ – an all-encompassing term indicating compensation paid as the result of the intervention of a public regulatory authority⁷⁵. Additionally, many such bodies have standing to bring representative actions in the interest of consumers, although most never have. Moreover, the CPC Network ensures widespread coverage through hundreds of Single Liaison Officers and competent authorities⁷⁶. In contrast, no similar provisions are included in the ECN+ Directive⁷⁷.

Article 17(3) of the Damages Directive allows NCAs to assist national courts in quantifying damages. However, CAs have rarely ever directly engaged in facilitating the resolution of disputes between consumers and infringing undertakings, even by simply joining as *amici curiae* in proceedings. In very few cases, the EC delivered redress by awarding lower fines or no fines to the infringers committing to compensatory schemes, or by considering compensation payments as sufficient reasons to close investigations⁷⁸. The evidence is merely anecdotal also among national competition authorities⁷⁹. More recently, there have been examples of proactive

⁷⁴ For example, the Latvian and Danish Ombuds negotiate collective settlements with businesses infringing consumer rights. Sectoral authorities may also provide for regulatory redress as do the Hungarian Regulatory Enforcement of Competition Authority, the Croatian Regulatory Authority for network industries, the Lithuanian Telecommunication Authority, and the UK regulatory agencies for finance, energy and the environment. Under the UK Digital Markets Act, the CMA can directly enforce consumer law and award compensation to consumers. Regulatory redress may also take the shape of compensatory commitments made binding under settlement procedures or made a condition for waiving fines, ACM, *Going forward, Decathlon and H&M will provide better information about sustainability to consumers*, in *ACM.nl*, 2022.

⁷⁵ HODGES C.J.S., VOET S., *Delivering collective redress: new technologies*, Oxford, 2018, p. 153.

⁷⁶ EUROPEAN COMMISSION, *Consumer Protection Cooperation Network. Sharper teeth for EU consumer protection*.

⁷⁷ Directive (EU) 2019/1 of the European Parliament and of the Council of 11 December 2018 to empower the competition authorities of the Member States to be more effective enforcers and to ensure the proper functioning of the internal market, 2018.

⁷⁸ For instance, Commission decision of 10 February 2021 and final commitments of 28 January 2021, Case AT.40394, Aspen; BEUC, *Evaluation of the framework for anti-trust enforcement of Articles 101 and 102 TFEU*, 2022, p. 8–9.

⁷⁹ *Ibid.*, 9.

NCA's behaviour in the interest of public entities. For instance, the Belgian Competition Authority reduced of 5% the fine to the companies participating in a cartel of fire protection systems in consideration of their commitment to fully compensate their clients⁸⁰. The first of its kind, the Catalan Competition Authority has been granted the power to conduct due diligence for bodies of the Catalan government and assess the viability of damage actions following infringements decisions⁸¹. However, no comparable initiative has taken place to further the claims of affected consumers. This happened for the first time in Italy following investigations on a cartel among passenger shipping companies⁸², where the AGCM accepted compensatory measures in favour of consumers as commitments. The Authority recognised that measures such as refunds or vouchers represented “*a quid pluris*” and mitigated the potential negative effects of the agreement on the users of the transport services.

4.7. Considerations on consumers as weaker victims

In conclusion, it appears that consumers have better access to justice when enforcing their rights under the consumer law regime rather than the competition law one. Despite substantial overlap in the obstacles they face when confronted with a problem, consumers are less active in competition law rather than in consumer law enforcement. The cause could be attributed to the additional “degrees of separation” between consumers and redress in competition law. In-court litigation is the only viable route and requires the assistance of specialised legal and economic experts, especially in stand-alone claims. The harm itself has its origin far removed from consumers, thus making it more difficult to detect and prove. While under consumer law, an entire ecosystem of intermediaries devel-

⁸⁰ Belgian Competition Authority decision of 8 July 2024 no ABC-2024-I/O-27-AUD, Protection incendie.

⁸¹ CATALAN COMPETITION AUTHORITY, *Strategies to promote damages claims for anti-trust infringements in public administrations*, 2024.

⁸² Italian Competition Authority, Commitment decision of 15 July 2026, case I872, MSC/MOBY.

oped to bridge the “consumer gap” – including regulatory agencies, ombudsmen, and consumer associations – the same did not happen for the private enforcement of competition law.

5. Consumers and SMEs: friends or foes?

Similarly to consumers, SMEs⁸³ appear to have limited access to compensation for harm caused by competition law infringements. However, they are generally subject to separate EU legislation. Indeed, EU consumer protection law generally refers to natural persons acting outside the scope of economic activity – a negative definition that excludes businesses – whereas there are only a limited number of directives aimed at protecting all customers alike⁸⁴. Nevertheless, “*some businesses, such as individual entrepreneurs or small businesses, may sometimes be in a similar situation as consumers when they buy certain goods or services*”⁸⁵. Therefore, both rules governing B2C and B2B relationships aim to guarantee a fair negotiation *process*⁸⁶. However, only consumer protection law is also concerned with the fair *outcome* of such negotiations.

⁸³ The notion of SMEs encompasses a heterogeneous category of businesses, which constitutes nearly the totality of EU businesses in numbers. SMEs range from Medium-sized companies (under 250 employees and a turnover under €50 million), to Small companies (under 50 employees and €10 million turnover), to Micro companies where less than 10 people work and for a turnover of maximum €2million. They represent 99% of all businesses in the EU, EUROPEAN COMMISSION, *SME definition*.

⁸⁴ Advertising Directive, Product Liability Directive, Insurance Directive, Package Travel Directive, Credit Transfer Directive, e-Commerce Directive. Conversely, the Proposal for a Regulation on Common European Sales Law covering both consumers and SMEs when entering an agreement with a more powerful contractual party was withdrawn, cfr. BRULEZ P., *Creating a Consumer Law for Professionals: Radical Innovation or Consolidation of National Practices?*, in LOOS M.B.M., SAMOY I. (ed.) *The Position of Small and Medium-Sized Enterprises in European Contract Law*, 2014, p. 41–72.

⁸⁵ Green Paper on the Review of the Consumer Acquis, 2006, p. 4.1.

⁸⁶ For example, the Principles of European Contract Law entitle the disadvantaged party to a contract to set aside and modify the unfair term non individually negotiated, irrespective of whether such party is a consumer or a professional.

5.1. Asymmetry as “relational weakness”

The “relational weakness”⁸⁷ between SMEs as victims of competition law infringements and infringing undertakings is relevant and not new to competition law. Indeed, several Member States enforce specific provisions against the abuse of relative dominance⁸⁸, which can manifest in any asymmetrical business relationship. Although absent from EU competition provisions, the contrast to abuse of relative dominance matches a trend in European legislation aimed at granting more protection to certain structurally weak positions in specific B2B situations⁸⁹. SMEs may easily find themselves in such a position.

Therefore, the question is whether consumers and SMEs face sufficiently similar obstacles in enforcing their right to compensation for harm caused by a competition law infringement to qualify as weaker victims.

The competition law issues affecting SMEs typically consist of high prices and powerful suppliers or buyers being able to impose unfair selling or buying conditions, difficulties in comparing prices and changing suppliers, and lack of choice in selecting business partners⁹⁰. Also, newer businesses are more exposed to the effects of anticompetitive behaviours than more established ones⁹¹.

Despite acting on the market in a professional capacity, SMEs appear to be no better informed than their consumer customers when it comes to competition law infringements and how to ad-

⁸⁷ HESSELINK M.W., *Democratic contract law*, in *European Review of Contract Law*, 2015, p. 96.

⁸⁸ Austria, Belgium Cyprus, France, Germany, Greece, Hungary Italy, Lithuania, Portugal, Romania, Spain, Sweden.

⁸⁹ RINALDO C., *Beyond Consumer Law – Small Enterprises, Independent Contractors and other Professional Weak Parties*, in *European Review of Contract Law*, 2019, p. 248. The phenomenon of extending protection against unfair contract terms to business-to-business standard and even negotiated contracts takes place also at national level, TERRY E., *Consumers, by Definition, Include Us All . . . But Not for Every Transaction*, in *European Review of Private Law*, 2016, p. 275.

⁹⁰ IPSOS EUROPEAN PUBLIC AFFAIRS, *SMEs’ expectations for an effective competition policy*, 2022, p. 30.

⁹¹ *Ibid.*, 23.

dress them⁹². In fact, SMEs who believe they have a legitimate cause to complain report they do not know where or to whom to turn two to three times as much as consumers⁹³. To this end, a major role is played by consumer associations, which consumers perceive as a bridge between them and the enforcement of their rights in general⁹⁴. SMEs lack a corresponding figure, for, in most Member States, business associations cannot bring claims on behalf of their members⁹⁵, or at least not damages claims⁹⁶. Therefore, SMEs suffering from anticompetitive behaviours are more likely to file a complaint with their national competition authority or national courts than consumers⁹⁷.

5.2. Fear factor

When it comes to taking action, while consumers are held back by “rational apathy”, SMEs suffered from a “fear factor”, for they are reluctant to go to court and hinder their contractual relationship with an important partner⁹⁸.

⁹² CARPAGNANO M., *International Report*, in KËLLEZI P., KILPATRICK B., KOBEL P. (ed.) *Antitrust for Small and Middle Size Undertakings and Image Protection from Non-Competitors*, Berlin, Heidelberg, 2014, p. 24; IPSOS EUROPEAN PUBLIC AFFAIRS, *SMEs' expectations for an effective competition policy*, cit., p. 24.

⁹³ IPSOS EUROPEAN PUBLIC AFFAIRS, *SMEs' expectations for an effective competition policy*, cit., p. 18; IPSOS EUROPEAN PUBLIC AFFAIRS, *Citizens' perceptions about competition policy*, cit., p. 14.

⁹⁴ 46% of consumer respondents say they would turn to a consumer organisation when confronted with a major competition problem, IPSOS EUROPEAN PUBLIC AFFAIRS, *Citizens' perceptions about competition policy*, cit., p. 18.

⁹⁵ CARPAGNANO M., *International Report*, cit., p. 26.

⁹⁶ As it is the case in Italy, ZAMMIT C., *Italy*, in KËLLEZI P., KILPATRICK B., KOBEL P. (ed.) *Antitrust for Small and Middle Size Undertakings and Image Protection from Non-Competitors*, Berlin, Heidelberg, 2014, p. 182.

⁹⁷ Although in countries where the competition and the consumer protection authorities coincide, consumers are more likely to resort to them, IPSOS EUROPEAN PUBLIC AFFAIRS, *SMEs' expectations for an effective competition policy*, cit., p. 19.

⁹⁸ RINALDO C., *Beyond Consumer Law*, cit., p. 249; BOUDOU M., CHARVOZ L., DE LA LAURENCIE J.-P., SAUTEL O., SËLINSKY V., *France*, in KËLLEZI P., KILPATRICK B., KOBEL P. (ed.) *Antitrust for Small and Middle Size Undertakings and Image Protection from Non-Competitors*, Berlin, Heidelberg, 2014, p. 124; CARPAGNANO M., *International Report*, cit., p. 24.

Moreover, small claims are not worth litigating via traditional means, neither by SMEs nor by consumers – although the very idea of what constitutes “small damages” varies considerably based on the jurisdiction and the anticipated costs of the litigation⁹⁹.

5.3. Evidence

When instructing a case, as professional parties, SMEs are more likely than consumers to possess evidence substantiating their claims, resulting from their bookkeeping practices or contractual arrangements with the infringing undertaking¹⁰⁰. Indeed, most SME antitrust litigation relates to supplier-buyer relationships, such as cases of refusal to supply or limiting distribution agreements¹⁰¹. However, SMEs would struggle as much as consumers in articulating a convincing economic analysis: in any stand-alone abuse of dominance case, providing a relevant price analysis making use of the SNIPP test and elaborating on price elasticity, or bringing market studies in support, is likely to be out of reach for most SMEs¹⁰². Conversely, bigger businesses are more likely to have accumulated experience and expertise to draw on, and to be able to afford competent advice when they lack the necessary skills in-house¹⁰³.

Critically, at the time of quantifying the harm, consumers and SMEs find themselves in different and potentially antagonistic positions. Since SMEs are, in principle, able to pass the harm on to their customers, the amount claimed by end-consumers for compensation of the *damnum emergens* should be subtracted from the

⁹⁹ In *ASG 2*, the German judge did not hesitate to qualify damages for €300,000 per claimant as “small”, Judgment of the Court of January 28, 2025, ECJ judgment of 28 January 2025, *ASG 2 Ausgleichsgesellschaft für die Sägeindustrie Nordrhein-Westfalen GmbH v Land Nordrhein-Westfalen*, C-253/23, ECLI:EU:C:2025:40, Case C-253/23.

¹⁰⁰ CSERES K., MENDES J., *Consumers’ access to EU competition law procedures*, cit., p. 497; RENDA A., PARDOLESI R., VAN DEN BERGH R., RODGER B.J., *Making antitrust damages actions in the EU more effective*, cit., p. 220.

¹⁰¹ NEYRINCK N., *Belgium*, in KËLLEZI P., KILPATRICK B., KOBEL P. (ed.) *Antitrust for Small and Middle Size Undertakings and Image Protection from Non-Competitors*, Berlin, Heidelberg, 2014, p. 62.

¹⁰² For an example, see the Belgian *Vlan* case in NEYRINCK N., *Belgium*, cit.

¹⁰³ RINALDO C., *Beyond Consumer Law*, cit., p. 233.

damages to which the SMEs are entitled. By exploiting such a contrast and adopting the passing-on defence “as a shield”, infringing undertakings can rebut the claims from both sides.

5.4. *Abusive clauses in jurisdiction, arbitration and applicable law*

Another difference lies in the fact that consumers find themselves in a better protected position than SMEs with regard to certain aspects of the proceeding when these are regulated under a contract with the infringing undertaking. Indeed, although consumers are often indirect victims of infringements, they may have a direct contractual relationship with the infringing undertakings¹⁰⁴. When a contract contains unfair contractual clauses relevant to antitrust litigation, such as clauses on jurisdiction, mandatory arbitration, law applicable to the contract and class action prohibitions, consumers are better protected than SMEs. This discrepancy is motivated by the different weight attributed to the principle of party autonomy in business-to-business and business-to-consumer situations.

Under the Brussels I bis Regulation, consumers have the right to choose where to file their claim, whether at their domicile or in the Member State where the counterpart is domiciled, and the situations where they are bound by a jurisdiction clause are limited (Art. 18). General jurisdiction clauses do not cover antitrust damages actions in commercial cases either, unless the anticompetitive conduct materialised by means of contractual terms and thus is predictable, as it often happens in abuse of dominance cases¹⁰⁵. Additionally, if the clause is agreed upon after the discovery of the infringement or explicitly covers disputes arising in connection with

¹⁰⁴ *Vincenzo Manfredi v Lloyd Adriatico Assicurazioni SpA*, cit.

¹⁰⁵ Judgment of the Court of 24 October 2018, *Apple Sales International and Others v MJA*, Case C-595/17. SOUSA FERRO warns against cases where the imposition of a jurisdiction clause is by itself abusive or makes it excessively difficult or impossible for the victims to enforce their right to damages in *Apple (C-595/17): ECJ on jurisdiction clauses and private enforcement: “Multinationals, go ahead and abuse your distributors”?*, in *Competition Policy International*, 2018, p. 4.

liability incurred as a result of the competition law infringement, it should be upheld¹⁰⁶.

Arbitration clauses may have similar effects to jurisdiction clauses, for national courts could refuse to hear a damages case in favour of a different forum. In consumer contracts, such clauses are presumed to be invalid under the UCTD. Even if the defendant were able to prove that the clause was individually negotiated and the consumer understood its implications, i.e. the clause complied with fairness requirements, the national court would still have to examine it against the principle of effectiveness of EU competition law¹⁰⁷. In commercial disputes, EU legislation and case law do not provide precise answers as to whether arbitration clauses should be limited when at odds with the principle of effectiveness¹⁰⁸, thus the matter falls within the competence of the Member States¹⁰⁹.

¹⁰⁶ Judgment of the Court of 21 May 2015, CDC Hydrogen Peroxide SA v Evonik Degussa GmbH and Others, Case C-352/13; NOWAG J., TARKKILA L., *How much effectiveness for the EU Damages Directive? Contractual clauses and antitrust damages actions*, in *Common Market Law Review*, 2020, p. 443.

¹⁰⁷ NOWAG J., TARKKILA L., *How much effectiveness for the EU Damages Directive?*, cit., p. 469.

¹⁰⁸ Opinion of Advocate General Jääskinen delivered on 11 December 2014, CDC Hydrogen Peroxide, Case C-352/13; Opinion of Advocate General Wathelet delivered on 17 March 2016, Genentech Inc. v Hoechst GmbH and Sanofi-Aventis Deutschland GmbH, Case C-567/14.

¹⁰⁹ Member States addressed the matter differently. In Finland, when delivering an interlocutory judgment on the *Hydrogen peroxide* cartel, the Helsinki District Court deemed the damages to be not directly based on the supply agreements covered by the arbitration clauses, which thus did not apply. The Amsterdam Court of Appeal adopted a similar approach by extending the ECJ *Hydrogen Peroxide* reasoning to arbitration clauses in general. Conversely, the English and German courts refused a general prohibition of arbitration clauses based on the principle of effectiveness. Particularly, in *Microsoft v. Sony*, the High Court of England stated that arbitration clauses cover damages claims that are closely connected to an arguable contractual claim, and only on a case-by-case basis it would be possible for the claimant to argue that arbitrating the claim would make the exercise of their EU rights impossible or excessively difficult. Helsinki District Court judgment of 4 July 2013, CDC Hydrogen Peroxide Cartel Damage Claims SA v. Kemira Oyj; Microsoft (Nokia) v. Sony (2017) EWHC 374 (Ch); Amsterdam Court of Appeal judgment of 21 July 2015, Kemira Chemicals Oy v. CDC Project; Dortmund Regional Court judgment of 13 September 2017, Rail cartel. See also NOWAG J., TARKKILA L., *How much effectiveness for the EU Damages Directive?*, cit., p. 454–456; NAZZINI R., *Arbitrability of cartel damages claims in the European Union: CDC, Kemira, and Microsoft Mobile*, in *University of Queensland Law Journal*, 2018, p. 127–138.

With regard to the law applicable to disputes arising from contractual relationships, consumer contracts are subject to more favourable conflict-of-law rules. Article 6(1) of the Rome I Regulation provides that B2C contracts are governed by the law of the country where the consumer has their habitual residence, provided that the professional pursues their activity or directs them to said country. Alternatively, the parties may choose the applicable law, but such a choice should not deprive the consumer of the protection granted under the binding rules of their country of habitual residence (Art. 6(2)). Despite the Recital 22 stating that parties regarded as being weaker “*should be protected by conflict-of-law rules that are more favourable to their interests than the general rules*”, there are no specific rules addressing the position of SMEs, to which general provisions apply, prioritising freedom of choice.

5.5. Multiparty litigation

SME cases are not necessarily multiparty – for instance, claims for damages from abuse of relative dominance are less likely to affect a plurality of parties, as opposed to consumer cases. However, when a common supplier or gatekeeper engages in abusive behaviour or enters an anticompetitive agreement, SME claims would be suitable for being brought together, particularly when they would not be able to file an individual action.

Nonetheless, genuinely collective actions in competition law appeal primarily to consumers, even though case law remains limited, whereas in most jurisdictions they serve businesses less well¹¹⁰. In fact, collective actions are available to SMEs in only some Member States¹¹¹.

¹¹⁰ DRIJBER B.J., *Massaclaims en mededingingsrecht*, in *Markt en Mededinging*, 2023, p. 2.

¹¹¹ Bulgaria, Denmark, Italy, Lithuania, Malta, the Netherlands, Portugal, Romania, Slovenia, Sweden and the UK. Belgium and Germany equate SMEs to consumers in recognition of their procedural weaknesses, thus granting them standing in collective actions, VLAHEK A., *The Great Saga of Collective Redress in EU Competition Law: All Cry and No Wool?*, in *World Competition*, 2024, p. 12.

Moreover, contract clauses are increasingly prohibiting victims of competition law from reassigning their claims to SPVs or joining class actions¹¹². The negative impact of such clauses would primarily concern SMEs, for these mechanisms allow to avoid direct confrontation with stronger business partners with whom they might have an ongoing relationship and overcome their hesitation in enforcing their rights. The trend of contractually closing this avenue to redress, originating from the US, is now affecting the European litigation landscape¹¹³. When combined with jurisdiction or arbitration clauses, it forces victims of competition law infringements to bring individual damages actions before tribunals with less favourable rules or where they would face a linguistic barrier¹¹⁴.

However, in a recent air passengers case¹¹⁵, AG KOKOTT and the Court agreed that a similar contractual provision, prohibiting passengers from bringing their case against the carrier via assignment of claims, runs counter to the effectiveness of their right to compensation; indeed, passengers should have the option to transfer claims to third parties to avoid difficulties and costs that might deter them from pursuing their rights due to the limited financial gain¹¹⁶. The underlying *ratio* is that the principle of effectiveness invests not only limitations directly affecting EU rights as such, but also in the means for exercising those rights. Therefore, rights holders should have the freedom to choose the most effective way to defend their rights, which may even be via collective proceedings¹¹⁷. By following a similar line of reasoning, it could be argued that prohibiting assignments of claims or collective proceedings in private enforcement of competition law constitutes a breach of the

¹¹² NOWAG J., TARKKILA L., *How much effectiveness for the EU Damages Directive?*, cit., p. 436.

¹¹³ Köln District Court judgment of 11 October 2016, Ryanair.

¹¹⁴ NOWAG J., TARKKILA L., *How much effectiveness for the EU Damages Directive?*, cit., p. 436.

¹¹⁵ ECJ judgment of 29 February 2024, *Eventmedia Soluciones SL v Air Europa Líneas Aéreas SAU*, C-11/23.

¹¹⁶ *Ibid*, para. 44.

¹¹⁷ *Ibid*, para. 43-44.

effectiveness of the right to damages provided for under Articles 101 and 102 TFEU, in light of the condition of underenforcement characterising this type of claim. Whether this applies to competition damages cases is yet to be defined¹¹⁸. In the absence of specific provisions, consumer protection law might still come to the rescue of individual consumers¹¹⁹.

5.6. *The role of public authorities*

Finally, it appears that SME protection is not a priority on competition authorities' agendas. For instance, not all Member States have extended their powers to investigate abuse of relative dominance,¹²⁰ which would make private enforcement of competition law more relevant to SMEs by tackling situations where weaker parties rely on a stronger business partner to exercise their freedom to compete in the market¹²¹.

However, there are exceptions. For instance, German competition law specifically includes provisions targeting undertakings

¹¹⁸ Although the wording of AG KOKOTT in *Eventmedia* encompasses all EU right-holders, independently of whether they are consumers or not.

In the *ASG 2* case, the Court addressed the issue of whether a national law preventing the assignment of claim in antitrust damages cases was incompatible with the principle of effectiveness of EU law. The Court set two conditions for national courts to consider before disapplying of the provision of national law at issue: the first is that national law does not provide any other possibility of grouping together the individual claims; the second is that bringing individual actions for damages is impossible or excessively difficult for the claimants, *ASG 2*, cit., para. 2.

¹¹⁹ Claimants faced with a clause limiting their procedural avenues to court may be able to rely on the combined provisions of Article 3(3) UCTD and Section (q) of the UCTD Annexe, which establish that any clause that excludes or hinders a consumer's right to take legal action shall be regarded as unfair, NOWAG J., TARKKILA L., *How much effectiveness for the EU Damages Directive?*, cit., p. 470.

¹²⁰ STEPPE R., DEVROE W., DEBLANDER G., *Support study for the evaluation of Regulations 1/2003 and 773/2004*, cit., p. 7.

¹²¹ According to BAKHOUM, provisions on abuse of relative dominance are less concerned with protecting the weaker party as such than its economic freedom, thus ultimately its freedom to compete, in *Abuse Without Dominance in Competition Law: Abuse of Economic Dependence and its Interface with Abuse of Dominance*, in *Max Planck Institute for Innovation & Competition Research Paper*, 2015, p. 2.

abusing their superior market power against SMEs¹²². Other Member States implemented programs targeting SMEs and their representative bodies, such as Chambers of Commerce, to enhance their understanding of competition law¹²³.

5.7. Considerations on consumers and SMEs as weaker victims

In sum, the position of consumers and SMEs in EU competition law does not perfectly overlap.

In the context of private enforcement, they are both “one-shot litigants” facing infringing undertakings that are “repeat-players”¹²⁴. When instructing the proceedings, they face similar obstacles due to their lack of knowledge in the field of competition law, difficulties in accessing information, and limited resources to litigate their claims successfully, especially when sophisticated economic analysis is required. In consideration of the procedural weakness affecting both consumers and SMEs, some Member States have extended access to collective actions to the latter.

However, despite the fact that they both hold the short end of the stick when engaging in the market with more powerful businesses, consumers receive specific protection by virtue of their presumed contractual and procedural weakness relative to infringing undertakings, from which SMEs are excluded. For instance, consumer protection law shields consumers from abusive contractual clauses on the choice of applicable law and jurisdiction, which are left to the contractual freedom of commercial parties, notwithstanding the fact that SMEs might have no more bargaining power than consumers. SMEs might find themselves in a position of subordination and dependence with respect to business partners violating competition law, and, when suffering damage under such circumstances, they avoid bringing claims in fear of straining ongoing commercial relationships. Hence, given their position in the supply chain, the

¹²² STEPPE R., DEVROE W., DEBLANDER G., *Support study for the evaluation of Regulations 1/2003 and 773/2004.*, cit., p. 85.

¹²³ Such as the advocacy programs offered by the Croatian Competition Authority.

¹²⁴ GALANTER in CAPPELLETTI M., GARTH B., *Access to Justice: the newest wave in the worldwide movement to make rights effective*, in *Buffalo Law Review*, 1978, p. 193.

way to redress looks particularly steep for SMEs. On top of their contractual and procedural weaknesses, SMEs receive little attention by public enforcement authorities, especially in those jurisdictions where competition law does not cover abuse of relative dominance. Additionally, consumers appear to have a more consolidated support network than SMEs, of which consumer associations constitute the backbone. Therefore, although a consumer and an SME taken individually appear to be in a similar position when facing competition law infringers, consumers as a group are better protected than SMEs by means of target provisions and support from intermediary bodies.

6. Conclusions: weaker victims that matter

This contribution has examined the position consumers and SMEs as weaker victims of competition law infringements, namely categories of claimants that are largely absent from the private enforcement case law.

Consumers and SMEs share a number of structural vulnerabilities that are associated not only with their inherent qualities, but also with the specificities of competition law litigation. When confronted with the infringing undertakings, both groups suffer from information asymmetry and limited economic resources and expertise. Affected by such constraints, consumers and SMEs might not even be aware that they are victims of a competition law infringement. When they are, the complexity and cost of substantiating and bringing a competition law case to court, coupled with the prospect of recovering only small damages, further discourage them from pursuing claims individually. Nevertheless, collective proceedings are not yet the established highway to redress the Commission once envisaged in its Green Paper. Adding to that, delivering compensation to consumers and SMEs does not sit high in the priorities of competition authorities. These factors result in limited access to justice, confirming that both consumers and SMEs occupy a weaker position in the enforcement of competition damages.

However, “weaker victims” are not a homogeneous category.

The differences between consumers and SMEs stem from their positions as direct or indirect victims of competition law damages respectively, or, said otherwise, their distance from the source of the harm: while rational apathy keeps consumers who are far removed from the harm from bringing their claims, the close business relationship with the infringing undertaking constitutes a disincentive for SMEs to take their partners to court.

Additionally, consumers and SMEs receive different levels of protection under EU and national law. Yet, it seems that SMEs are in a procedurally weaker position than consumers when suffering from competition law infringements. As non-business parties, consumers are shielded from abusive contractual clauses to which SMEs are exposed, even though, in competition law cases, they are more likely to be the direct victims of infringements. Moreover, consumers can count on a better-developed support network, which, albeit more effective under consumer protection than competition law, could provide the stepping stone for better enforcement of their rights. In light of these considerations, it appears that SMEs have earned their status of weaker victims of competition law as much, if not more than, consumers.

The judicial protection gap left by the lack of access to justice for weaker victims of competition law infringements exposes a breach in the effectiveness of EU law. Addressing such a gap would be possible by acting on the procedural obstacles preventing consumers and SMEs from enforcing their rights, although the differences between the two require nuanced consideration when addressing specific aspects of private enforcement proceedings.

Origins and Aspects of Mitigation in the Law of Damages in England and Germany

Eden Smith

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1. *Introduction*

This paper is the result of conversations with colleagues from various European universities, many of them in and around the University of Genoa in 2025¹. It seeks to outline a principle of the law of damages in England and Wales² by which a party seeking to recover damages for breach of a contract may not claim damages in respect of loss which they could reasonably have mitigated. That principle appears relatively simple, but much has been written in England attempting to explain and to justify it. This paper is the result of several discussions all of which asked three simple questions—what are the origins of the mitigation rule in English law? What are the rationales for its existence? And in light of the highly theorised nature of the rule in England, what rationales underpin such European versions of the rule as may exist?

The majority of this paper is in answer to the first two questions, drawing on a range of accounts to consider the development of damages law in England and the early judicial *dicta* which preceded the

¹ I am particularly grateful to Dr Christian Rüsing and Felix Pollmann for their advice on various aspects of German law, and to Matthew Frey and Jonathan Chu for a range of discussions on this topic.

² This paper subsequently uses “England” and “English” as a shorthand for the author’s jurisdiction.

first clear articulation of the rule. It discusses in some detail a series of cases, some of which are routinely cited but rarely discussed as part of a historical narrative. It then outlines the scope and application of the rule in modern English law and offers some new comments on the earliest and most recent cases, before making some European comparisons, with a particular discussion of the operation of the rule in Germany and its normative justifications.

2. *The development of damages law leading up to British Westinghouse*

The origins of the mitigation rule in England are generally attributed to the decision of the House of Lords in *British Westinghouse Electric Co. Ltd v Underground Electric Railways Co of London Ltd (No. 2)* (1912)³ discussed below at 2.2. The relatively late date of that decision, by comparison to the sophistication of other areas of English contract law by an earlier period, is a consequence of the fact that a general law of damages was inhibited in England by the primacy of jury assessment of damages and the limited judicial control thereof⁴. References to “mitigation” in the earliest English law reports do not generally concern mitigation of the *claimant’s* loss⁵. By the seventeenth century, we have what is one of the earliest, if not the earliest, case in which a recognition appears in the reports that the plaintiff’s conduct might affect the damages. The case is *Burford v Dadwel* (1669), a trespass claim, in which the plaintiff’s wife was badly injured by a horse. The court declined to increase the damages payable because they lacked evidence as to “*how [the horse] came, or whether the woman could have avoided it*”⁶. This case does not appear to have been discussed as an early recognition

³ [1912] AC 673; see some doubt on the way in which *British Westinghouse* has been interpreted in e.g. DYSON A., *British Westinghouse Revisited*, in *Lloyd’s Maritime and Commercial Law Quarterly*, 2012, p. 412.

⁴ SIMPSON A.W.B., *A History of the Common Law of Contract: The Rise of the Action of Assumpsit*, Oxford, 1987, p. 583–585.

⁵ For example *Ashton v Marsel* (1496) YB 16 Edw. IV, pl. 6 concerning a reduction in a price payable; *Hare v Savil* (1609) 1 Brownl. & Golds. 20, 123 ER 638 concerning variation of the damages award.

⁶ 1 Sid. 433, pl. 26; BAKER SIR J. H., and MILSOM S. F. C., *Sources of English Legal History: Private Law to 1750*, Oxford, 2010, p. 377.

of the possibility of the importance of the plaintiff avoiding loss, but such a conclusion is implicit in the language of the report.

In the nineteenth century, however, judges began to exercise greater control over such assessments. Some of these cases are often cited as laying down the foundations of English damages law. However, they exist amongst a plethora of other caselaw which is rarely discussed in a holistic sense in any kind of detail; this paper provides a brief opportunity to do so. The cases show the nascent doctrines of damages law being developed in detail, and the seeds of what would become the mitigation rule in England being planted—unsurprisingly so, at a time when the old common law system of pleading was being radically reformed, with a resulting focus on substance over form⁷.

2.1. *Judicial control of damages assessment in England pre-1900*

With the “*eclipse of the jury [came] a need to formulate clearer rules about the assessment of damages*”⁸. The fundamental damages principle established by the courts is classically attributed to Parke B. in *Robinson v Harman* (1848), holding that “*The rule of the common law is, that where a party sustains a loss by reason of a breach of contract, he is, so far as money can do it, to be placed in the same situation, with respect to damages, as if the contract had been performed*”⁹.

By 1848, in fact, that idea already had some currency; in the little-discussed 1846 case of *Alder and anor v Keighley*¹⁰, the plaintiff had been indebted for £500 on the basis of goods purchased from the defendant. The defendant demanded payment of £100 as part discharge of the debt. The plaintiff gave the defendant a bill of exchange for £600; the defendant then agreed to retain £100 of that for himself plus a discounted sum, and return the difference to the plaintiff. The defendant did not do this, and then became bankrupt. The question for the court was whether the trial judge was right to direct

⁷ BAKER SIR J. H., *An Introduction to English Legal History*, Oxford, 2019, p. 99.

⁸ IBBETSON D., *A Historical Introduction to the Law of Obligations*, Oxford, 1999, p. 229.

⁹ (1848) 1 Ex Rep 850, p. 855.

¹⁰ (1846) 15 M & W 117; 153 ER 785.

the jury to award the plaintiff £500 less a discount, or whether the judge should have left the assessment to the jury entirely. Pollock CB held that “*No doubt, all questions of damages are, strictly speaking, for the jury; and, however clear and plain may be the rule of law on which the damages are to be found, the act of finding is for them*”¹¹. He added, however, that “*there are certain established rules according to which they ought to find; and here there is a clear rule—that the amount which would have been received if the contract had been kept, is the measure of damages if the contract is broken*”¹².

Whilst Pollock CB’s words reiterate the orthodox primacy of the jury’s role in determining damages, they also prefigure the language of Parke B in *Robinson*, namely that the damages should reflect which the plaintiff would have received had the contract not been breached. *Alder* was not in fact cited in *Robinson*, but it was cited in the seminal later case of *Hadley v Baxendale* (1854)¹³, which stands as authority for the proposition that recoverable damages are those “*arising naturally...or such as may reasonably be supposed to have been in the contemplation of both parties at the time they made the contract, as the probable result of the breach of it*”¹⁴.

Earlier cases show an awareness of the “*established rules*” to which Pollock CB referred in *Alder*, and some nineteenth century examples indicate not only an early acknowledgment of the broad principle of assessing damages “*as if*” the contract had been performed, but ideas even more closely related to those which would later emerge in *British Westinghouse*. Simpson notes that the compensatory principle was understood to underpin the action of assumpsit in English law precisely because the action of debt—which lay to recover a fixed sum—was “*recuperatory*”¹⁵. The compensatory principle clearly led courts to the idea that the “*loss*” suffered by the plaintiff might include any variations to an original sum payable which occurred after breach. Several cases discussed by Sedgwick in his text on contracts show early glimpses of this as a general

¹¹ *Alder* (1846), cit., p. 120.

¹² *Alder*, cit., p. 120.

¹³ (1854) 9 Exch 341, p. 355.

¹⁴ *Hadley* (1854), cit., p. 354 per Alderson B.

¹⁵ SIMPSON A.W.B., *A History of the Common Law of Contract*, cit., p. 584.

approach to damages¹⁶. For example, when discussing sales of chattels, Sedgwick cites *Shepherd (Executor) v Johnson* (1802)¹⁷. In that case, the defendant had provided a bond to replace stock which had been loaned to him by the plaintiff's testator. The question for the court was the relevant date for the assessment of the damages, namely 1 August 1799—the date on which the stock was to be replaced—or the date of the trial. Gosse J held it was the latter, as “*the true measure of damages, in all these cases, is that which will completely indemnify the plaintiff for the breach of the engagement*”. It is possible, however, that the outcome was influenced by Equity, as in the same case Lawrence J observed that “*suppose a bill were filed in equity, for a specific performance of an agreement to replace stock on a given day, which had not been done at the time, would not a court of equity compel the party to replace it at the then price of stock if the market had risen in the mean time*”. From these early cases, Sedgwick could assert that “[a]s a general principle it is the actual loss alone for which the common law seeks to give compensation”¹⁸. Parts of Sedgwick were later cited to the court in *Hadley*, alongside the work of the seventeenth century French jurist Domat¹⁹; the English courts were not alone in articulating the idea that compensation reflected the actual loss sustained as a result of the defendant's breach. Domat had written, in the context of sale contracts, that “*anyone who was required to deliver wheat, wine or other goods on a certain date [where] the price has increased on the date and at the place where delivery was to be made, shall owe the purchaser the current value on that date and at that place, for the profit he would have made by reselling them there, or for the loss he suffers if, for his own use, he is obliged to buy others at a price that exceeds that of the sale*”²⁰.

The above cases show the emergence of the compensatory principle in the early nineteenth century English courts. The principle with which we are concerned, that of mitigation, may have first been properly discussed in a case which Ibbetson cites for the proposition

¹⁶ SEDGWICK T., *A Treatise on the Measure of Damages*, New York, 1847.

¹⁷ (1802) 102 ER 349, 2 East 211.

¹⁸ SEDGWICK T., *A Treatise on the Measure of Damages*, cit., p. 217.

¹⁹ IBBETSON D., *A Historical Introduction to the Law of Obligations*, cit., p. 231.

²⁰ REMY J., *Oeuvres Complètes de J. Domat, Vol. I*, Paris, 1828, p. 161.

that “[w]here there was an obligation to deliver goods, damages would be assessed as the value of the goods at the date on which they should have been delivered”²¹. However, the case may stand for more than that. In *Gainsford v Carroll* (1824)²², the defendant vendor had contracted to sell and deliver 50 bales of bacon. The jury were initially instructed to calculate the damages by reference to the date of the execution of the writ of inquiry, i.e. the date at which the jury were making their assessment. The defendant challenged this, however, and claimed that the plaintiffs should only be permitted to recover on the basis of the difference in value between the agreed price and the price as it was on the day set for delivery. Allowing this, the court noted that “*the plaintiff had his money in his possession, and he might have purchased other bacon of the like quality the very day after the contract was broken, and if he sustained any loss by neglecting to do so, it is his own fault*”. Therefore, “*the damages should be calculated according to the price of the bacon at or about the day when the goods ought to have been delivered*”. Although on a simple compensatory basis the damages might be thought to be those that would have enabled the plaintiff to replace the goods *after* the breach, in fact the court’s reasoning seemed to be that where the plaintiff knew the contract had been breached but then failed to take any steps in respect of that breach, “*it [was] his own fault*”, and the quantum of damages should be restricted accordingly. In other words, this appears to be one of the first clear judicial directions that a failure to mitigate loss has consequences for the amount of loss which a plaintiff will be able to recover²³. It is this principle which emerged in *Sedgwick* several decades later, in the conclusion that “*it seems to be well settled that as a general rule [when a vendor breaches a sale contract] the measure of damages is the difference between the contract price and the value of the article at the time*

²¹ IBBETSON D., *A Historical Introduction to the Law of Obligations*, cit., p. 229.

²² (1824) 107 ER 516, 2 B & Cres. 624.

²³ The case was critically discussed in connection with the nature of the market in KESSLER F., GILMORE G., KRONMAN A. T., *Contracts: Cases and Materials*, Third Edition, Boston, 1986, 11.3.9. SUMMERS A., *Mitigation in the Law of Damages*, Oxford, 2024, p. 13 cites two pre-1824 cases, but neither contain *dicta* on this point as clear as in *Gainsford* and are both more broadly concerned with causation: *Vertue v Bird* (1676) 3 Keb 766, 84 ER 1000; *Boyce v Bayliffe* (1807) 1 Camp 58, 170 ER 875. On the connection between mitigation and causation, see below in 3.3.

when it should be delivered, upon the ground that this is the plaintiff's real loss, and that with this sum he can go into the market and supply himself with the same article from another vendor"²⁴.

2.2. *British Westinghouse Electric v Underground Electric (1912)*

Notwithstanding the historical background discussed above, modern writers traditionally attribute the mitigation rule to the case of *British Westinghouse v Underground Electric* (1912). The case arose from a contract made in 1902 to supply turbines to a railway company. This the appellants then did, but the machines supplied were defective in various ways contrary to the requirements of the contract. The respondents took delivery of the turbines and used them, "reserving always their right to damages in respect of the said breaches on the part of the appellants of the terms of the contract"²⁵. Eventually, despite attempts to improve the machines by the appellants, the respondents replaced the machines. The appellants sued for the unpaid balance of the purchase price, and the respondents counterclaimed for their losses caused by the defective machines. They first claimed for the cost of the excess coal consumption and labour costs until the installation of the replacement machines²⁶. They also claimed in the alternative for (i) the cost of the excess coal which would have been required, had they not replaced the machines, or (ii) the cost of the installation of the replacement machines, although as Dyson notes they did not press (i) at any stage in the litigation²⁷.

The case first went to arbitration, and the arbitrator found that "the purchase of [replacement] machines by the respondent was a reasonable and prudent course, and that it mitigated or prevented the loss and damage which would have been recoverable from the appellants if the respondents had continued to use the defective machines in the future"²⁸. The High Court held that the cost of the installation was recoverable given the significantly higher damages to which the appellants would have been exposed had the respondents

²⁴ SEDGWICK T., *A Treatise on the Measure of Damages*, cit., p. 260.

²⁵ *British Westinghouse*, cit., p. 674.

²⁶ *British Westinghouse*, cit., p. 675.

²⁷ DYSON A., *British Westinghouse Revisited*, cit., p. 415.

²⁸ *British Westinghouse*, cit., p. 676.

not purchased replacement machines, and sent the case back to the arbitrator for damages assessment.; the arbitrator awarded damages to the respondent, and the case went to the Court of Appeal, which upheld the arbitral award. British Westinghouse then appealed to the House of Lords; the relevant question was whether the Court of Appeal had been correct in holding—by a majority—that the choice by the respondents to purchase alternative machines had been “*merely for the purpose of mitigating the damages, and that the appellants were [therefore] not entitled to have the pecuniary advantages arising from the subsequent use of [the new] superior machines*”²⁹. Lord Haldane LC, giving the judgment for a unanimous court, held that in fact the correct damages assessment was one which had “*the jury or arbitrator ... look at what actually happened, and to balance loss and gain*”³⁰. The court then held that the Court of Appeal was wrong to permit recovery in respect of the time after the installation of the replacement machines³¹, given that the respondents could not be said to have suffered actual pecuniary loss after that point. In reaching this conclusion, Lord Haldane relied in part on the judgment in *Dunkirk Colliery v Lever* (1878)³², in which James LJ held that “*a person who has broken [a] contract is not to be exposed to additional cost by reason of the plaintiffs not doing what they ought to have done as reasonable men*”³³. Lord Haldane cited those words with approval, although noted that the “*principle does not impose on the plaintiff an obligation to take any step which a reasonable and prudent man would not ordinarily take in the course of his business*”³⁴. *British Westinghouse* was not a case in which the plaintiffs were prevented from claiming damages in respect of losses which they had suffered but failed to mitigate. Rather, the non-breaching party was prohibited from claiming damages for loss which they *had* successfully mitigated. These are two sides to the same coin however, and Lord Haldane arguably expressed the principle fully when he said that the principle of “*compensation for pecuniary loss naturally flowing*

²⁹ *British Westinghouse*, cit., p. 687.

³⁰ *British Westinghouse*, cit., p. 691.

³¹ *British Westinghouse*, cit., p. 692.

³² (1878) 9 Ch. D. 20.

³³ *Dunkirk Colliery*, cit., p. 25.

³⁴ *British Westinghouse*, cit., p. 689.

*from the breach...is qualified by a second, which imposes on a plaintiff the duty of taking all reasonable steps to mitigate the loss consequent on the breach, and debars him from claiming any part of the damage which is due to his neglect to take such steps*³⁵. That last part in which Lord Haldane discusses the damages which a plaintiff might be debarred from claiming, provides the classic statement of the principle compared to the facts of the case.

However, as a matter of modern law, the principle imposes no *obligation* on the plaintiff at all. Dyson observes a tension between Lord Haldane's observation that a plaintiff is under no duty to act otherwise than as a prudent and reasonable man of business would, and that the rule only applies where the steps taken were those that a reasonable and prudent man of business would take³⁶. Dyson suggests this is especially strange given that we are told that if the plaintiff takes steps *outside* of the normal course of business, "*the effect in actual diminution of the loss he has suffered may be taken into account even though there was no duty on him to act*"³⁷. Dyson suggests the explanation for those words "*may lie in the dichotomy perceived between regulation of the claimant's conduct and the assessment of damages*"³⁸. However, a better explanation of them is by reference to the unhelpfully ambiguous meaning of the phrases "*acting reasonably and prudently within the course of business*". A plaintiff might act unreasonably to the advantage *or* to the detriment of the defendant. Where Lord Haldane says that a plaintiff may not recover for loss sustained by his "*neglect to take [reasonable] steps*"³⁹, he clearly means where he acts to the defendant's detriment. Where he says that the plaintiff is under no obligation no duty to act otherwise than as a prudent and reasonable man of business would but where he has done so and so diminished his loss such that that diminution "*may be taken into account even though there was no duty on him to act*"⁴⁰, he means where the plaintiff has done more

³⁵ *British Westinghouse*, cit., p. 689.

³⁶ DYSON A., *British Westinghouse Revisited*, cit., p. 421.

³⁷ *British Westinghouse*, cit., p. 689.

³⁸ DYSON A., *British Westinghouse Revisited*, cit., p. 421.

³⁹ *British Westinghouse*, cit., p. 689.

⁴⁰ *British Westinghouse*, cit., p. 689.

than he had to, i.e. where he has “bent over backwards” to avoid loss⁴¹.

This does not explain the additional suggestion that the rule only applies where the plaintiff has acted reasonably. These words came after Lord Haldane discussed the case of *Staniforth v Lyall* (1830)⁴², in which a captain, arriving in New Zealand to discover the defendant’s contract-breaching absence, returned home by way of Batavia. This circuitous voyage was in fact more profitable than the original contract, and such increased profitability was permitted to be taken into account in the assessment of damages. It was to this that Lord Haldane observed that “*provided the course taken to protect himself...was one which a reasonable and prudent person might in the ordinary conduct of business properly have taken*”⁴³ then the full circumstances may be considered by the jury. The words do not admit of obvious explanation, and I suggest they are erroneous. On their own, they suggest that had the captain acted unreasonably, then the “full circumstances” could *not* be taken into account by a jury, i.e. the losses *would* have been recoverable, and the unreasonable circuitous route would have been ignored. Lord Haldane cannot have meant that; he cannot have meant the alternative meaning of unreasonable, i.e. overly generous to the defendant, as the actions in *Staniforth*, on which he was drawing, do not reflect that interpretation of

⁴¹ DYSON A., *British Westinghouse Revisited*, cit., footnote 75 suggests that this would render Lord Haldane’s meaning inconsistent with the judgment in a case in which he sat three years later, *AKAS Jamal v Moolla Dawood Sons & Co* [1916] 1 AC 175 (PC). *AKAS Jamal* does appear inconsistent with the outcome of *British Westinghouse*, insofar as it involved subsequent conduct by the respondent/plaintiff which proved profitable to them, but the benefit of which was denied to the appellant/defendant; the distinguishing feature appears to have been the focus of the court on the importance of the date of breach, however, and the Privy Council did not explicitly suggest that the defendant could not obtain the benefit of the plaintiff’s mitigating action *even where* the mitigation was beyond what the plaintiff might reasonably have been expected to do. The case does not necessarily involve conflict with an interpretation of the words “*action...even when there was no duty to act*” as sometimes meaning action which avoids loss which it might be reasonable to suffer. The case may conflict more broadly with *British Westinghouse*, which does not appear to have been cited to the Privy Council, insofar as in *AKAS Jamal* the court observed that “[i]t is undoubted law that a plaintiff who sues for damages owes the duty of taking all reasonable steps to mitigate the loss consequent upon the breach and cannot claim as damages any sum which is due to his own neglect. But the loss to be ascertained is the loss at the date of breach”, p. 179.

⁴² (1830) 7 Bing. 169; 131 ER 65.

⁴³ *British Westinghouse*, cit., p. 690.

the word. It is possible Lord Haldane was simply repeating the qualification he had earlier drawn, namely that the plaintiff need not bend over backwards to mitigate loss, but may inadvertently have done so in a sentence in tension with other parts of his judgment.

3. *The modern mitigation rule in English law*

3.1. *Scope and detail of the mitigation rule*

As suggested by the above discussion, the modern English law articulation of the rule is in two parts. First, a claimant may not claim damages in respect of loss which should have been avoided. Second, if as a consequence of the breach the claimant has obtained a benefit, this must be factored into the subsequent damages claim. These twin ideas give rise to what many writers call the claimant's "*duty to mitigate*", even though strictly the principle imposes no duty on the claimant but merely restricts the scope of their claim⁴⁴. Notwithstanding the repeated references to the "duty" in the caselaw, this must be the case, at least in Hohfeldian terms: a defendant has no "claim-right" which they can exercise against the innocent party, and thus whatever the nature of the rule, it cannot comprise a duty.⁴⁵

In many cases, the operation of this rule will lead to the claimant re-entering the market, either in order to sell goods which a purchaser in breach has failed to pay for or to buy goods which the defaulting seller has not provided. If the claimant fails to do this and the market changes to their detriment—for example where the claimant is left with shares depreciating in value—that loss is *attributed* to their failure to mitigate and they cannot claim in respect of it. As Treitel observes, the replacement market contract must be a "*true substitute*" for the original contract⁴⁶. By this requirement, the injured party need not mitigate by doing something which—had the contract not been broken—they would have been able to do in addition to performing the original contract.

⁴⁴ PEEL E., *Treitel: The Law of Contract*, Sixteenth Edition, London, 2025, p. 1124.

⁴⁵ See HOHFELD W.N., *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning* in *Yale Law Journal*, 1913 p. 16, 28–59.

⁴⁶ PEEL E., *Treitel: The Law of Contract*, cit., p. 1125.

The mitigating action of the injured party must be reasonable; where they act unreasonably and sustain further loss, this will not be recoverable. For example, in *The Borag* (1981)⁴⁷ ship owners sought compensation for the wrongful arrest of their ship by its managers. In securing the release of the ship the owners incurred expenses paid for by way of a five year bank loan. The owners, for various commercial reasons, incurred heavy compound interest; the Court of Appeal held that whether through viewed through the lens of mitigation of damage, causation or remoteness, the interest charges were unreasonable for the owners to have incurred, and thus not recoverable. The case illustrates that the critical question—indeed the “*acid test*” as Templeman LJ noted⁴⁸—is the reasonableness of the claimant’s conduct. In the same way that the manner in which the shipowners financed the loan to secure the release of their vessel in *The Borag* was unreasonable, it may in other cases be unreasonable for an over-cautious claimant to sell goods at a ludicrously low price when there is an accessible market, or to spend more than the total value of goods in repairing them. Another example of this unreasonableness might be where the claimant, by the defendant’s breach, then breaches a contract themselves. Where such subsequent breach is unequivocal, if the claimant expends huge sums of money litigating their own breach then those sums will not be recoverable even though the legal costs of settling with an affected third party precipitated by the defendant’s breach would normally be recoverable⁴⁹. *British Westinghouse* discussed above is an example of the converse of the rule; where mitigation results in benefit to the claimant, as by the purchase of the new turbines, such benefit will be taken into account by the court.

3.2. *Sharp v Viterra* (2024)

Many cases since *British Westinghouse* have refined and developed the scope of the mitigation rule, but the most recent major cases

⁴⁷ *Compania Financiera “Soleada” S.A. and ors v Hamoon Tanker Corporation Inc.* (“*The Borag*”) [1981] 1 All ER 856.

⁴⁸ *The Borag*, cit., p. 864.

⁴⁹ PEEL E., *Treitel: The Law of Contract*, cit., p. 1127, citing *Biggin & Co. Ltd v Permanite Ltd* [1951] 2 KB 314.

involving its application warrant some discussion, those of *Sharp v Viterra* (2024)⁵⁰ and, in a more limited way, *URS Corp Ltd v BDW Trading Ltd* (2025). *Sharp* will be discussed here, and *URS* after the discussion of rationalisations.

In *Sharp v Viterra* the dispute concerned the value of agricultural produce left in port unpaid for, the value of which increased post-breach. The Supreme Court was asked whether the appropriate measure of damages one which valued the performance of a substitute contract, or which took account of the increased value of the goods in port.

The facts were straightforward: peas and lentils were sold and shipped from Canada to India. The buyers (Sharp Corp Ltd) were obliged to pay for the goods within 5 days prior to arrival at Mundra, which they did not do⁵¹. Despite being given further time to pay, they nonetheless defaulted, and the sellers (Viterra BV) claimed damages⁵². After the goods' arrival, the Government of India imposed heavy import tariffs on peas and lentils, substantially increasing the value of the goods in the domestic market⁵³. The sellers reclaimed the goods and sold them to an associate company of theirs.

At a Grain and Feed Trade Association (“GAFTA”) Appeal Board, damages were awarded on the basis of difference between the contract price and the “actual or estimated value of the goods on the date of default”, per the standard GAFTA default clause. That value, without an independent market to sell goods per the contract description Cost & Freight free out (“C&FFO”) Mundra, was to be “estimated” according to the cost of a hypothetical substitutionary contract, i.e. the sale and freight of new goods. On appeal, the High Court dismissed the buyers' argument that the value should be referable to the domestic Indian market. The Court of Appeal subsequently held that, whilst a notional substitute contract was the basis for assessment of damages, such a notional contract should not be a C&FFO Mundra contract but an ex-warehouse contract, because the contract had been varied prior to default. Permission to appeal was

⁵⁰ [2024] UKSC 14.

⁵¹ *Sharp*, cit., [11].

⁵² *Sharp*, cit., [22].

⁵³ *Sharp*, cit., [15]–[30].

granted to the sellers on the basis of the Court of Appeal's determination of questions of law and fact not determined by, or asked of, the arbitrators, in light of s. 69 of the Arbitration Act 1996, and to the buyers to cross-appeal on the assessment of damages⁵⁴.

The sellers succeeded in their appeal concerning the Arbitration Act, resulting in the *prima facie* vindication of the substitute contract damages assessment. The relevant question as to mitigation was thus whether this approach to assessment was in fact correct. In upholding the cross-appeal, Lord Hamblen noted that “[t]wo fundamental principles of the law of damages are the compensatory principle and the principle of mitigation of damage”⁵⁵. This was the first time that mitigation of loss was labelled a fundamental principle of damages alongside the compensatory principle, the development of which is laid out above.

After discussing cases which articulate some of the contours of loss mitigation and laying out sections 50(3) and 51(3) of the Sale of Goods Act 1979, which mirror the GAFTA default clause, Lord Hamblen observed that the compensatory principle and the mitigation principle work together. Lord Hamblen quoted from *Benjamin's Sale of Goods* that the rationale of sections 50(3) and 51(3) was “to provide a straightforward and readily applicable measure of damages which will enable the innocent party to be put into the same financial position as it would have been in had the contract been performed and which does not depend upon the action actually taken by the innocent party”⁵⁶. The core question for Lord Hamblen was thus “by reference to which market is the estimated value of the goods to be established”⁵⁷, the ex-warehouse Mundra market or the Vancouver market.

Lord Hamblen answered this question using the language of what was “reasonable” for the sellers to do, concluding that in light of the location and increased value of the goods, “the obvious market

⁵⁴ *Sharp*, cit., [48]–[49].

⁵⁵ *Sharp*, cit., [83].

⁵⁶ *Sharp*, cit., [96].

⁵⁷ *Sharp*, cit., [99].

in which to sell the goods, and in which it would clearly be reasonable to do so, [was] the ex-warehouse Mundra market”⁵⁸. Furthermore, it was “difficult to see how it could be reasonable to sell those goods in the international market [given] the costs of re-exporting the goods and losing the increase in value resulting from the goods being customs cleared before the significant increase in tariffs”⁵⁹. He found support for this, first in Benjamin’s approach to damages for non-accepted goods, which recognises that “the governing principle is [in] which market it is ‘reasonable for the seller to dispose of the goods’”⁶⁰. Furthermore, where sellers retain goods, the location must be a relevant factor in determining reasonable subsequent steps, because the goods under contract were not goods at sea but “customs cleared goods lying in a warehouse in Mundra”⁶¹. Calculating damages by reference to a substitute sale does not necessitate, reasoned Lord Hamblen, “the notional purchase of a further consignment of goods in a different market in a different continent...resulting in the arrival of the goods at Mundra weeks after the date of default”⁶². Doing so would reflect neither “the principle of mitigation nor the commercial realities of a seller left with contract goods following...default”⁶³.

This analysis results in the same deemed valuation as if “an arms-length mitigation sale into the domestic market had been made [establishing a] default price”⁶⁴. Whilst recognising that previous case law had referred to a true substitute contract⁶⁵, “[a] more flexible approach is permissible [at common law and under GAFTA through] making reasonable adjustments...to arrive at a like for like value”⁶⁶. In many ways, this most recent articulation of the law of mitigation brought some welcome clarity.

⁵⁸ Sharp, cit., [100].

⁵⁹ Sharp, cit., [100].

⁶⁰ Sharp, cit., [103].

⁶¹ Sharp, cit., [107].

⁶² Sharp, cit., [109].

⁶³ Sharp, cit., [109].

⁶⁴ Sharp, cit., [112].

⁶⁵ Sharp, cit., [117], see *Bunge SA v Nidera BV* [2015] UKSC 43 at [14] per Lord Sumption and [82] per Lord Toulson.

⁶⁶ Sharp, cit., [118].

One important thing to note, however, was that whilst the case elevated the principle of mitigation—and whether that elevation has substantive consequences is an important but separate question—it did not explicitly determine the conceptual basis of the action. It did, however, emphasise that the reasonableness of the mitigatory action would be the benchmark for the purposes of damages assessment. The fact that *Sharp* did not explore the conceptual basis of mitigation, although we might find some implicit support in Lord Hamblen’s judgment for certain views, requires us to explore what in fact those various bases might be.

3.3. *Justifying the rule*

The outstanding question is simple: *why* does the “duty” to mitigate exist? What explains the fact that only such loss as was mitigated can be claimed by the innocent party? The existence of the rule, and its long history traced above, does not appear to be controversial. What is more contested, however, is the precise basis for the rule. Indeed, the Singapore Court of Appeal noted in *The Asia Star* (2010) that these “*rules have evolved over the last two centuries without any coherent overarching legal framework*”⁶⁷.

A view common in the caselaw, and defended by some academic writers, is that the rules of mitigation are in fact an aspect of the law of causation. This view has recently been defended by Summers⁶⁸, who first argues that the range of judicial *dicta* which view the mitigation principle through the lens of causation suggest that critics of the causation analysis bear the burden of proof in explaining the rule in other ways⁶⁹. Many judges have expressed the principle in causal terms: Robert Goff J in *The Elena Amico* (1980) noted that “*aspects of mitigation are all really aspects of a wider principle which is that, subject to the rules of remoteness, the plaintiff can recover, but can*

⁶⁷ [2010] 2 SLR 1154, [25].

⁶⁸ SUMMERS A., *Mitigation in the Law of Damages*, cit., especially p. 79–120.

⁶⁹ See also in the context of equitable compensation for breach of trust: “[T]he loss must be caused by the breach of trust, in the sense that it must flow directly from it. Losses resulting from unreasonable behaviour on the part of the claimant will be adjudged to flow from that behaviour, and not from the breach”, *AIB Group (UK) plc v Mark Redler & Co Solicitors* [2014] UKSC 58, per Lord Reed at [135].

only recover, in respect of damage suffered by him which has been caused by the defendant's legal wrong. In other words, they are aspects of the principle of causation"⁷⁰. Robert Goff J's view was explicitly endorsed in *Lagden v O'Connor* (2004) by Lord Walker⁷¹. Equally explicit was Lord Toulson in *Bunge*, suggesting the rule "is an aspect of the principle of causation that the contract breaker will not be held to have caused loss which the claimant could reasonably have avoided"⁷². However, to explain any rule in terms of an underlying concept is insufficient if that concept is itself not defined and explained. Summers thus adopts Hart and Honoré's analysis of causation, which tied it to the ordinary person's process of attribution in non-legal scenarios, often called "common-sense causation"⁷³. For Summers, the two key aspects of this view of causation are choice and abnormality: "if the claimant makes a choice to depart from the normal response to breach, it will be held responsible for the consequences of that choice, for better or worse"⁷⁴. This departure from what is normal is viewed in the legal context, i.e. there exists a legal norm that a claimant will attempt to do themselves what a damages remedy would achieve, namely put themselves in as close a position as possible to that in which a breach had not occurred. Summers contends that empirically, such claimants will attempt to do this in a "usual or unexceptional way"⁷⁵. From these two principles, he argues that a causation analysis is not only apt, but best explains some puzzles which otherwise result from the rule.

Some writers have rejected the language of causation as applying to the mitigation rule. It is worth noting that in *Sharp* itself Lord Hamblen did not explicitly endorse the causation analysis. By elevating mitigation to a "fundamental principle", it might be argued that his Lordship did not wish to suggest it was merely an aspect of

⁷⁰ *Koch Maritime Inc. v d'Amica Societa di Navigazione arl (The Elena d'Amico)* [1980] 2 Lloyd's Rep. 75, 88.

⁷¹ [2004] 1 AC 1067 at [99]–[100].

⁷² *Bunge*, cit., [81]. Lord Toulson said this whilst explaining that mitigation is not a duty but merely a rule of limitation; to that extent, his reference to causation is perhaps less significant as his principal point was as to the non-existence of a "duty".

⁷³ SUMMERS A., *Mitigation in the Law of Damages*, cit., see chapter 5 generally; see HART H.L.A., HONORÉ T., *Causation in the Law*, Second Edition, Oxford, 1985.

⁷⁴ SUMMERS A., *Mitigation in the Law of Damages*, cit., p. 104.

⁷⁵ SUMMERS A., *Mitigation in the Law of Damages*, cit., p. 105.

causation, although that is speculative. More explicitly, McGregor has disputed that viewing mitigation as part of causation is in fact the orthodox view, noting that whilst “*the matter can be put in terms of causation, doing so does not tell us much*”⁷⁶. More recently, Moore-Bick LJ was ambivalent in *Uzinterimpex J.S.C. v Standard Bank Plc* (2008), noting that the court had heard much debate over “*whether mitigation should be understood in terms of causation*”⁷⁷, which previous cases had not necessarily heard⁷⁸. He continued by observing that “[f]or my part I accept that it can be viewed that way, but I am not sure that to do so adds greatly to our understanding of the principles”⁷⁹, and noted that if a causation analysis was applied, it would have to be adapted to take account of the fact that the duty to mitigate is relatively undemanding.

A view with little judicial support concerns the just allocation of resources. This view generally argues that mitigation exists because the law should seek “*to prevent the waste of resources in society*”⁸⁰. This is achieved by the incentivisation of the acceptance of substitutionary performance of approximate value. This view has received very limited support, and as both academic⁸¹ and judicial⁸² comments have noted, the concept of economic efficiency cannot explain all the outcomes. Not only does mitigation not always result in savings—as where an aggrieved party inadvertently causes greater loss through their attempts at mitigation—but the current rules do not minimise externalities on a strict economic analysis. By focusing exclusively on the behaviour of the innocent party, the principle does

⁷⁶ MCGREGOR H., *The Role of Mitigation in the Assessment of Damages* in SAIDOV D. and CUNNINGTON R. (eds) *Contract Damages: Domestic and International Perspectives*, London, 2008, p. 329, p. 331.

⁷⁷ [2008] EWCA Civ 819, [56].

⁷⁸ Although Shaw LJ in *The Borag* noted that “*The arguments developed before the umpire as to the respective concepts of causation, foreseeability and mitigation of damage assumed almost the character of a debate on some philosophical abstraction*”, and the Court of Appeal reached a similarly ambivalent position to that of Moore-Bick LJ: *The Borag*, cit., p. 862.

⁷⁹ *Uzinterimpex J.S.C.*, cit., [56].

⁸⁰ BEALE H. (ed.) *Chitty on Contracts*, London, 2025, 30-099.

⁸¹ BARNETT K., *Substitutive Damages and Mitigation in Contract Law*, in *Singapore Academy of Law Journal*, 2016, p. 807.

⁸² *The Asia Star*, cit., [27].

not “encourage behavioural adjustments that minimise [the breaching party’s] loss”⁸³, even though in theory either party could adapt to the new factual scenario at potentially different costs to the net gain of both. In response to a changing market likely to cause a seller to breach a contract, a buyer might adjust their product requirements, permit the seller to supply a quasi-product, or perhaps obtain the product before the price rises in the event they have advance notice whilst the seller does not. Any of these might incur a cost to the seller, who remains the primary risk-bearer, but a lower cost than the overall cost of breach. The current system of loss mitigation does not encourage an innocent buyer to adapt, whereas “in a perfect adjudication environment, the parties could assign the adjustment responsibilities after the performance obligations were allocated... [to w]hichever party could better adapt”⁸⁴. The mitigation rule as it exists in English law cannot be said to facilitate the minimisation of economic waste, and certainly in commercial relationships the waste of resources is likely to be confined to the parties themselves.

However, viewing the principle in terms of “reasonableness” has attracted some support; Templeman LJ in *The Borag* chose only to view the principle in terms of reasonableness and suggested it did not matter which principle was at issue, “whether it be the principle of causation or mitigation”⁸⁵. Similarly, Shaw LJ in the same case noted that “[a]lthough the umpire made no express reference to mitigation of damage, he must have recognised the question of reasonableness as intruding itself into the determination of what was the damage arising from the breach”⁸⁶. The language of reasonableness was recently applied by the Court of Appeal in the context of cryptocurrency in *BSV Claims Ltd v Bittylicious and ors* (2025), in which Sir Geoffrey Vos MR said—unusually using the language of duty—that the innocent parties “had a duty to mitigate their losses, and they cannot recover losses that they could reasonably have mitigated”⁸⁷. When conduct will or will not be reasonable is not necessarily clear, but

⁸³ GOETZ C., SCOTT R., *The Mitigation Principle: Toward a General Theory of Contractual Obligation*, in *Virginia Law Review*, 1983, p. 977.

⁸⁴ GOETZ C., SCOTT R., *The Mitigation Principle: Toward a General Theory of Contractual Obligation*, cit., p. 977.

⁸⁵ *The Borag*, cit., p. 864.

⁸⁶ *The Borag*, cit., p. 862.

⁸⁷ [2025] EWCA Civ 661, [35].

the attraction of the reasonableness analysis is that it enables the mitigation rule to be stated in one straightforward sentence, as Dyson and Kramer do: in mitigation, “*damages are assessed as if the claimant acted reasonably, if in fact it did not act reasonably*”⁸⁸. The “as if” approach provides a helpful understanding of the operation of the rule. Indeed, Lord Leggatt in *Stanford International Bank Ltd v HSBC Bank* (2022) used that very language, summarising the rule in the context of discussing the rules on the date of breach as “*where there is an available market in which an adequate substitute can be obtained for goods or services of which the defendant’s breach of duty deprived the claimant, damages are to be assessed as if the claimant entered the market and obtained such a substitute at the earliest reasonable opportunity whether or not the claimant in fact did so*”⁸⁹.

Although Summers argues that this reasonableness test is insufficient if we take the meaning of the word “reasonable” literally—there are many things a claimant may do that are reasonable that nonetheless would not result in them being able to recover for the cost of their actions—it may be that, as Lord Walker noted in *Lagden*, “as so [often] it comes down to a choice of terminology”⁹⁰; certainly Dyson and Kramer seem to agree that their understanding of mitigation is “closely related to legal causation”⁹¹. The Singapore Court of Appeal has affirmed Bridge’s suggestion that “[n]o single [factor] sufficiently explains the requirement of mitigation as a general rule”⁹². The absence of a clear rationalisation in English law can perhaps be explained best by the observation made at the start; for most of English legal history damages assessments were carried out by juries, the effect of which has been to mask the factors which were used to determine “loss” in many cases before the nineteenth century. Unlike many other English private law concepts, which have been developing for nearly a thousand years, damages law is

⁸⁸ DYSON A., KRAMER A., *There is No “Breach Date Rule”: Mitigation, Difference in Value and Date of Assessment*, in *Law Quarterly Review*, 2014, p. 259, at p. 263.

⁸⁹ [2022] UKSC 34, [43].

⁹⁰ *Lagden*, cit., [97].

⁹¹ DYSON A., KRAMER A., *There is No “Breach Date Rule”: Mitigation, Difference in Value and Date of Assessment*, cit., p. 263.

⁹² *The Asia Star*, cit., [29] citing BRIDGE M., *Mitigation of Damages in Contract and The Meaning of Avoidable Loss*, in *Law Quarterly Review*, 1989, p. 410.

comparatively new. If reasonableness is the touchstone, independently or as a corollary of Summers' "departure from a normal response" analysis, the content of that reasonableness requirement may in fact have most aptly been summarised by reference to causation in the language of Lord Haldane in the key early case, *British Westinghouse* discussed above, albeit in connection with a slightly different question: has the claimant "*take[n] any step which a reasonable and prudent man would not ordinarily take*"⁹³?

A brief comment on *URS Corp Ltd v BDW Trading Ltd* (2025)⁹⁴ is required. This is the most recent Supreme Court case which discusses mitigation in any detail, although it did so in the context of tort litigation. Unusually, it discussed the rationalisation of the rule, although not with any clear conclusions. Importantly for present purposes, the judgment of Lord Hamblen and Lord Burrows, writing on behalf of six of the seven judges, frequently used or cited the phrase "*legal causation or mitigation*"⁹⁵. Lord Leggatt in a short concurring judgment explored the issue in slightly more detail, noting that "[a]lthough the test is often said to be whether the claimant has acted reasonably, 'reasonable' is such a protean term that this statement lacks any explanatory power"⁹⁶. His Lordship then cited Summers' recent monograph and described it as "*illuminating*", which explains why in the preceding paragraph he had described mitigation as operating where "*the claimant chooses to respond to the defendant's breach of duty in a way that would not reasonably be expected, damages will be assessed as if the claimant had responded in the expected way, even though in fact it did not*"⁹⁷. This language reflects much of Summers' analysis. Lord Leggatt's judgment was not endorsed by the rest of the court, and he did not explicitly go so far as to say that he viewed mitigation as an aspect of causation; the other judgment's repeated use of the phrase "*legal causation or mitigation*" may suggest that those two concepts belong together, but equally may suggest that the latter is categorically not an aspect of the former. Overall, no clear conclusions are available, but at least

⁹³ *British Westinghouse*, cit., p. 689.

⁹⁴ [2025] UKSC 21.

⁹⁵ *URS Corp Ltd*, [55], [56], [61], [121], [125], [163].

⁹⁶ *URS Corp Ltd*, [176].

⁹⁷ *URS Corp Ltd*, [175].

impressionistically, the judgments appear more comfortable siding with the “causation” camp—at least Summers’ particular view of causation—than any other.

4. *Analogous mitigation rules in European jurisdictions*

4.1. *Domestic and international provisions*

Concepts similar to the English mitigation rule appear in a variety of domestic and international legal texts. Representative examples include Italy, where a creditor is obliged to prevent the worsening of the damage⁹⁸, and Switzerland, where if the harm-sufferer “*consented to the harmful act or circumstances attributable to him helped give rise to or compound the damage*”⁹⁹, the court may reduce the damages award. The UNIDROIT principles provide that a “*non-performing party is not liable for harm suffered by the aggrieved party to the extent that the harm could have been reduced by the latter party’s taking reasonable steps*”¹⁰⁰. Interestingly, the commentary to the principles provides that this is the case because “*it would be unreasonable from the economic standpoint to permit an increase in harm*”¹⁰¹ which could reasonably have been avoided. Similarly, in the Vienna Convention on the International Sale of Goods, article 77 provides that a “*party who relies on a breach of contract must take such measures as are reasonable in the circumstances to mitigate the loss, including loss of profit, resulting from the breach. If he fails to take such measures, the party in breach may claim a reduction in the damages in the amount by which the loss should have been mitigated*”¹⁰².

Comparatively and notably among European countries, France lacks a general mitigation of damages rule; whilst several judgments

⁹⁸ Art. 1227, Italian Codice Civile, see also VALCAVI G., *Scritti Giuridici Scelti*, Varese, 2005, p. 59, citing Cassation, sez. III, no. 2437/67.

⁹⁹ Art. 44(1), Swiss Code of Obligations, effective in Contract Law by virtue of art. 99(3).

¹⁰⁰ UNIDROIT Principles on International Commercial Contracts, 2016, Article 7.4.8.

¹⁰¹ UNIDROIT Principles, Art. 7.4.8 Comment (1).

¹⁰² United Nations Convention on Contracts for the International Sale of Goods, 11 April 1980, Article 77.

of the Court de Cassation in recent years seemed to open the door to such a rule¹⁰³, a general rule was firmly rejected in 2014¹⁰⁴ on the basis of the compensation principle enshrined in art. 1382, now art. 1240, of the Code Civil. Whilst affirming the absence of a general duty to mitigate, in 2025 the Cour de Cassation suggested that where the sufferer of injury by their own fault aggravates that injury, that might result in a reduction in the damages claimed,¹⁰⁵ which does not track precisely onto the mitigation duty in English law but does at least recognise the fault of the innocent party as relevant to the question of damages. Otherwise, whilst contracting parties remain free to stipulate that an innocent party must mitigate their damages, French law—despite some academic criticism¹⁰⁶—nonetheless remains wedded to the principle of full compensation for loss caused by a wrongful act, otherwise expressed as the principle of equivalence between damage and compensation. The court’s insistence on this is not surprising, given French law bases liability for damages on the recognition that an act is wrongful where the party causing harm has no right to so act; from this flows an absolute requirement to compensate¹⁰⁷. Nonetheless, other principles could soften French law’s approach, particularly the requirement that “[c]ontracts must be negotiated, formed and performed in good faith”¹⁰⁸. An expansive view of good faith has led some writers to point to a “duty to cooperate” in French contract law; although the scope of this principle is contested¹⁰⁹, it could provide an avenue for future recognition of the mitigation principle in France¹¹⁰.

¹⁰³ See for example 2nd Civil Chamber of the Cour de Cassation, June 19, 2003 n°00-22.302; 2nd Civil Chamber of the Cour de Cassation, June 19, 2003, n°01-13.289; 3rd Civil Chamber of the Cour de Cassation, May 19, 2009, n°08-16.002.

¹⁰⁴ 2nd Civil Chamber of the Cour de Cassation, July 2, 2014, n°13-17.599.

¹⁰⁵ 3rd Civil Chamber of the Cour de Cassation, June 5, 2025, n°23-23.775.

¹⁰⁶ LE PAUTREMAT S., *Mitigation of Damage: A French Perspective*, in *International and Comparative Law Quarterly*, 2006, p. 205.

¹⁰⁷ QUÉZEL-AMBRUNAZ C., *Fault, Damage and the Equivalence Principle in French Law*, in *Journal of European Tort Law*, 2012, p. 21, p. 24.

¹⁰⁸ Art. 1104, Code Civil.

¹⁰⁹ PEDAMON C., VASSILEVA R., *The “Duty to Cooperate” in English and French Contract Law: One Channel, Two Distinct Views*, in *Journal of Comparative Law*, 2019, p. 1, p. 20.

¹¹⁰ Indeed, the equivalent provision in Italian law has sometimes been understood this way, see VALCAVI G., *Scritti Giuridici Scelti*, cit., p. 64–5.

4.2. *Existence of the principle in German law*

A more interesting comparison emerges from German law, however. The default damages rule in German law does not resemble English contract law, and to an English lawyer would seem closer to the position in English tort law; per §249 BGB, “*A person who is liable in damages is to restore the position that would exist if the circumstance obliging them to pay damages had not occurred*”. However, §252 expressly provide that this damage also includes lost profits, and that such profits include those which “*in the normal course of events...could be expected to be attained as a matter of likelihood*”. Whilst German law contains no explicit mitigation rule where loss *has* been suffered, §254 contains analogous provisions. First, §254(1) BGB provides that “*(1) Where fault on the part of the injured person contributes to the occurrence of the damage, liability in damages as well as the extent of compensation to be paid depend on the circumstances, in particular to what extent the damage is caused mainly by one or the other party*”. §254(2) BGB then provides that “*This also applies if the fault of the injured person is limited to failing to draw the attention of the obligor to the danger of unusually extensive damage, where the obligor neither was aware of the danger nor ought to have been aware of it, or to failing to avert or mitigate the damage*”. §254(1) might be said to refer to what in English law would constitute contributory negligence, whilst §254(2) contains explicit reference to a failure to “*avert or mitigate the damage*”. Much of the literature on the article focusses on the former; as discussed below, this may hinder a proper understanding of the rationale for the latter.

The distinction between these two provisions has been considered by the Federal Court of Justice (BGH). For example, in 2019 in a case concerning a purported copyright infringement in which the plaintiff ceased the production of greetings cards and then claimed damages, the BGH summarised the Court of Appeal’s assessment as being “*that the plaintiff was not accused of complicity in establishing the damage [i.e. § 254(1)] but of a violation of the obligation to mit-*

igate or avoid damage (*sondern ein Verstoß gegen die Schadensminderungs bzw. abwendungspflicht*) [i.e. §254(2)]”¹¹¹. To refer to the language of §254(2) as connoting an “*abwendungspflicht*” frames the provision in obligatory terms. In the same case, however, the BGH suggested that the consequences of the Court of Appeal’s failure to categorise the plaintiff’s actions, and indeed the difference between the legal consequences of the two provisions, were none¹¹².

The first thing to note is that this provision appears to be highly flexible; the cost of the damages can be shouldered entirely by either party. This appears to be the effect of the words “*liability in damages as well as the extent of compensation to be paid*”, which might better be translated—recognising the duplication of the word *Ersatz* in the original—as “the obligation to pay compensation and the extent of the compensation”. In other words, the BGB thus recognises that there may be situations in which no compensation will be payable at all, a conclusion which might implicitly have been precluded had the provision only mentioned the extent (*Umfang*) of the compensation. This open-textured provision appears to have been intended; as Höpfner notes in *Staudinger*, the aim of the historical legislator, in the context of the predecessor provision to §254, “was to achieve a flexible, generally applicable model of liability, which would allow for a more nuanced differentiation between degrees of fault and types of damage”¹¹³.

The wideness of the provision highlights the immediate distinction with English law; whilst English law treats contributory negligence and mitigation of damages as two separate concepts, §254 comprises both. In fact, §254 contains another rule, namely that damages might be assessed where the injured party failed to warn the injuring party of “*the danger of unusually extensive damage*”. This rule does not appear in the same way in England; it might fall under the rules on remoteness of damages, as in England contract damages are limited to those the type of which were in the reasonable contemplation of the parties at the time of contracting¹¹⁴. Some doubt

¹¹¹ BGH judgment of 19.09.19, I ZR 116/18, para. 19.

¹¹² I ZR 116/18, cit., paras 11, 13.

¹¹³ Staudinger/HÖPFNER (2021) BGB § 254, Rn. 1.

¹¹⁴ *Hadley*, cit., p. 354.

was case on this in *The Achilles* (2008)¹¹⁵, but since *Attorney-General (Virgin Islands) v Global Water* (2020)¹¹⁶ it seems the *Hadley* formulation is still good law. Nonetheless, the key point as a matter of classification is that the scope of §254 embraces no fewer than three areas of English law.

However, whilst founded on an open-ended provision about fault liability, German law is likely to reach the same result as English law in many cases. For example, whether viewed through the lens of “reasonableness” or of the “normal” response, English law does not require, in Lord Haldane’s words, the innocent party to “*take any step which a reasonable and prudent man would not ordinarily take in the course of his business*”. The BGH reached the same conclusion in a 2012 case, in which, following incorrect advice on the sale of securities, the plaintiff sold its securities and sought damages¹¹⁷. The BGH rejected the application of §254(2) because whilst “*according to §254 para. 2 sentence 1 case 2 BGB, the injured party is obliged in the interest of the injured party to mitigate the damage incurred*”, he “*cannot be expected to continue to take speculative risks*”¹¹⁸. The only difference in approach seems to be the BGH’s use of mandatory language—“*the injured party is obliged*”—which does not appear in §254(2), and which has been repeatedly resisted by the English courts.

Whilst §254 is solely about damage caused by the injured party in some way, German law provides for the *British Westinghouse* scenario, i.e. where the injured party has acted so as to reduce their loss. It does so by only looking to the damage caused in the first place; where there is no damage, the case would not fall within §280 and so the “injured” party would be precluded from suing. It is worth asking whether there is any requirement that the injured party take mitigatory steps *before* a breach occurs, where they know that a breach is likely. It is doubtful whether such a requirement exists in English law, as although it might be reasonable for a party to do so, only once they *know* that they have a right to sue the injuring party

¹¹⁵ *Transfield Shipping Inc v Mercator Shipping Inc* (“*The Achilles*”) [2008] UKHL 48.

¹¹⁶ [2020] UKPC 18 per Lord Hodge at [26].

¹¹⁷ BGH judgment of 13.11.2012, XI ZR 334/11.

¹¹⁸ XI ZR 334/11, cit., para. 33.

can they be expected to take steps to reduce the compensation accruing under that right¹¹⁹. By contrast, §254(2) is so widely phrased that a probable imminent breach, known to the injured party, followed by a failure to act, could be construed as a fault and a “*failure to mitigate*”, which is all the article requires. Whilst there seems to be no case on a duty to mitigate pre-breach, in 1972 the BGH made clear that where a contract had not perfected, co-fault could not be attributed to the innocent buyer¹²⁰, because §254 must follow the conclusion of the contract temporally¹²¹. §254 may operate to protect an injured party if they mitigate pre-breach, however, as the section requires fault on the part of the injured party. Where they take mitigatory steps before a breach has even occurred it is hard to see how a court could find that their action constituted fault.

4.3. Rationalisations in German law

The same question emerges as in English law; what is the basis for the provision that damages should be reduced in light of the plaintiff’s action? An immediate similarity emerges, not merely in the fact that the provision’s basis is contested, but in the various ideas espoused in the literature and caselaw.

Höpfner suggests that, at least originally, the section reflected causation, noting that “*the historical legislator had already recognised the problem that the injured party’s own contribution could exclude the liability-establishing facts altogether... this was viewed from the perspective of the interruption of the causal link*”¹²². Although this may predominantly be in relation to §254(1), this view appears to persist in relation to the modern provision; Looschelders suggests that “*case law and the majority of legal literature rightly assume that §254—like the liability of the injuring party—is based*

¹¹⁹ An injured party must mitigate “*as soon as he knows of his rights. He cannot do so before he does know his rights*”, see Devlin J in *Kwei Tek Chao v British Traders & Shippers Ltd* [1954] 2 QB 459, 494.

¹²⁰ BGH judgment of 12.07.1972, Az.: VIII ZR 200/71.

¹²¹ VIII ZR 200/71, cit., para. 14.

¹²² Staudinger/HÖPFNER, cit., Rn. 1.

on the principle of responsibility (*Verantwortlichkeit*)”¹²³. Looschelders goes on to note that “*The reduction of the claim for damages is therefore only justified if the injured party is just as responsible for the damage as the injuring party*”¹²⁴; in a sense, this appears to reflect the idea of causality. Where the plaintiff has *caused* (is responsible for) the damage to the same extent that the defendant has/is, then a reduction in damages is appropriate.

Looschelders has also noted that some writers view good faith—*Treu und Glauben*—as underpinning the rule,¹²⁵ and indeed the BGH has used this language when explaining the rule¹²⁶. For Looschelders, however, such a principle would undermine the primacy of other principles, namely responsibility and equal treatment (*Gleichbehandlungsgebot*)¹²⁷. Whilst those principles must be justified on their own terms, the arguments espoused by Höpfner in defence of good faith are not convincing. He suggests that it would be bad faith for a party to act against their own interests, i.e. *venire contra factum proprium*¹²⁸; his reason, however, is that this is because it is contrary to good faith for a party to demand full compensation whilst the defendant is only partially responsible¹²⁹. This seems to collapse back into a causation analysis, however; the reason it is contrary to bad faith is because plaintiff did not in fact *cause* the full loss. That said, German courts may use the general good faith provisions under §242 to achieve a “just” result as well; in the 1972 case discussed above, the court considered whether the knowledge of the buyer that the seller was unable to fulfil the order meant that it would be contrary to good faith for the buyer to claim full compensation¹³⁰. Whilst the BGH did not find bad faith on those facts, the case does indicate the alternative tools the German courts may use to reach a just result even where §254 is not applicable.

¹²³ BeckOGK/LOOSCHELDERS, (2025) BGB §254 Rn. 5.

¹²⁴ BeckOGK/LOOSCHELDER, cit., Rn. 5.

¹²⁵ BeckOGK/LOOSCHELDER, cit., Rn. 9.

¹²⁶ XI ZR 334/11, cit., para 33.

¹²⁷ BeckOGK/LOOSCHELDER, cit., Rn. 10.

¹²⁸ Staudinger/HÖPFNER, cit., Rn. 2.

¹²⁹ “*Treuwidrig (oder gar arglistig) sei es dann aber, trotzdem von dem nur mitursächlichen Schädiger vollen Ersatz zu verlangen*”: Staudinger/HÖPFNER, cit., Rn. 2.

¹³⁰ VIII ZR 200/71, cit., para. 15–17.

The rule might also be explained best by the idea of *Spiegelblichkeit*, which might be translated as “mirroring”. The injured party should be treated in a similar way to that of the injuring party, an idea which Looschelders captures with the language of “*equal treatment or symmetry*”¹³¹. The attraction of this idea is also that it reflects the language of §254 itself, which requires fault on the part of the injured party in order to be engaged. Again, however, this results in causal language: where the injured party has also *caused* a part of the loss through their own fault, they may not disregard this when claiming full compensation. We treat the parties in the same way because we are concerned with their respective fault in causing the loss; viewed this way, the principle of *Spiegelblichkeit* is attractive but not conclusive without reference to causation.

Another rationalisation criticised by Looschelders perhaps exposes a problem with recent commentary. The first explanation he discusses is *causum sentit dominus*, the idea that all must bear responsibility for their own losses. He criticises this, however, as it only applies where the damage is not caused by a third party, and so cannot explain §254. The problem is that in §254(2), the loss has *not* been “caused” by a third party, but arguably in part by the plaintiff’s own failure to take appropriate measures to reduce their loss. This exposes one of the problems with the above analyses; they all attempt to explain §254 as a unitary provision. As noted above, in English law the concepts of contributory negligence and mitigation of damages are very separate, and thus may respond to separate norms. In German law the discussion of causation, responsibility, good faith and *causum sentit dominus* all attempt to engage with the principles as aspects of one broader principle, which poses problems in hard cases. When combined with the primacy of causation as the determining principle of liability limitation, the width of the German provision in contrast to the more atomised set of distinct English principles becomes difficult to escape. A final observation is that crucial to understanding the provision is that German law regards causation¹³² as the fundamental limiting factor in damages; this contention in fact explains why several rationalisations appear to be reflections

¹³¹ “*Gleichbehandlungs oder Symmetriegebot*”, BeckOGK/LOOSCHELDER, cit., Rn. 6.

¹³² *Haftungsausfüllende Kausalität*, in this case.

of a causation analysis. On one view, §254 exists as a *consequence* of the primacy of causation, rather than in English law where—because mitigation arose as a principle *distinct* from causation—it has not always been viewed as part of the same enquiry.

5. Conclusion

As traced by this paper, the development of the mitigation of damages rule in England has been a long and winding path; by comparison, the equivalent German provision appears succinct and, being a provision of a civil code, straightforwardly founded. This paper has contrasted the different mechanics of the rule in Germany and England but suggested that the operation of the provisions is generally similar. It has also shown that both rest on contested normative foundations, and that the simplicity of §254 in fact encompasses various concepts which in English law would be treated very differently. Good faith aside, it is interesting to note not merely the fact of the contested rationalisations of the rules, but also the similarity of what appears to be a causation analysis which can be deployed to explain the rule in both jurisdictions. It is likely that attempts to explain the rule will also continue, notwithstanding the fact that both German commentators and the English courts appear content to proceed on the understanding that mitigation is important—indeed a “*fundamental principle*”¹³³ in England—without needing to pin down a single explanation for its existence.

¹³³ *Sharp v Viterro*, cit., [83].

Transfer Pricing and the Role of Contractual Terms in the Post-BEPS Era

Paula Granell

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1. Introduction

The globalisation of economic activities and the growing prominence of multinational enterprise groups have intensified the legal challenges associated with cross-border profit allocation. Among these challenges, transfer pricing occupies a central position, as it determines how income generated within multinationals is attributed to the jurisdictions in which these entities operate. While transfer pricing is traditionally classified as a domain of international tax law, its effective application necessarily engages concepts that originate in private law, particularly in contract law. Intra-group transactions are, after all, defined and articulated through contractual arrangements, and the legal characterisation of these arrangements plays a decisive role in establishing the taxable base of related entities.

This contribution examines transfer pricing from a dual perspective, combining international tax law with selected issues of private law. The analysis departs from the premise that the application of the

arm's length principle cannot be fully understood without engaging with the contractual structures that underpin intra-group transactions and with the methods through which those contracts are interpreted, supplemented, or even disregarded for tax purposes.

Section 2 revisits the foundations of transfer pricing from this perspective. It begins by addressing the problem of profit shifting through intra-group pricing practices and then examines the arm's length principle as the internationally accepted response to these challenges. In this context, the Organisation for Economic Co-operation and Development ("OECD") has played a central role in shaping internationally accepted standards¹, which are reflected in its OECD Model Tax Convention on Income and on Capital (from now on, "OECD MC"). Particular attention is paid to Article 9 of the OECD MC, not only as a corrective mechanism for profit adjustments, but also as a provision whose application is inseparable from the legal characterisation of the controlled transaction.

In this regard, the developments introduced by the Base Erosion and Profit Shifting (from now on, "BEPS") Project mark a turning point in the international transfer pricing framework. The BEPS Project², promoted by the OECD and the G20, is a global initiative to

¹ The central role played by the OECD in the development of international tax standards has long been acknowledged in both academic literature and policy practice. Although the OECD lacks formal legislative authority, its influence stems from its capacity to act as a forum for coordination among economically significant states and to articulate shared normative expectations. The outputs, while formally classified as *soft law*, have exerted a profound harmonising effect on domestic tax systems and bilateral tax treaties, shaping the content and interpretation of tax norms well beyond the OECD membership. The OECD's legitimacy in this field derives not from binding force, but from technical expertise, consensus-building processes, and the practical need for coordination in an increasingly integrated global economy. For a critical reflection on the OECD's norm-setting role in international taxation, see AULT H. J., *Reflections on the Role of the OECD in Developing International Tax Norms*, in *Brooklyn Journal of International Law*, 2009.

² The BEPS Project emerged in the aftermath of the global financial crisis as a coordinated political and technical response to growing concerns about the perceived misalignment between multinational profit allocation and the location of real economic activity. Triggered by heightened public scrutiny of corporate tax avoidance and by the increasing visibility of base erosion strategies facilitated by mismatches between domestic tax systems, the initiative was formally endorsed by the G20 and entrusted to the OECD as the technical body responsible for its development. Rather than proposing a complete overhaul of the international tax architecture, the BEPS Project sought to recalibrate existing standards. Its origins therefore lie not only in technical deficiencies of the pre-existing framework, but also in a broader legitimacy crisis of the international tax regime and the political

combat aggressive tax planning strategies used by multinationals to artificially shift profits to low or no-tax jurisdictions. Therefore, Section 3 focuses on the evolution of transfer pricing analysis in the post-BEPS context, with particular emphasis on the emergence of a conduct-based approach. This section analyses how the increasing reliance on the actual behaviour of the parties has altered the process of delineating the controlled transaction. The discussion highlights the legal and methodological implications of this shift, especially in terms of legal certainty, administrative discretion, and the evidentiary role of contractual documentation.

Building on this, Section 4 examines the post-BEPS reassessment of transfer pricing, with a specific focus on the accurate delineation of the transaction and the growing relevance of economically significant conduct. This section analyses how the BEPS Project has reshaped the understanding of contractual terms, risk allocation, and functional profiles, and how these elements are now assessed through a combination of legal form and observable economic reality.

Section 5 provides a conceptual and critical discussion of contractual terms and contract interpretation in transfer pricing, within the context of the post-BEPS shift towards a conduct-oriented approach. It examines contracts as the formal framework for delineating intra-group transactions and allocating functions, assets, and risks, as well as their role in transfer pricing documentation and evidentiary practice. The section further explores the constraints on contractual autonomy in the tax context and considers the relationship between general principles of contract law and the methodological assumptions embedded in the OECD Transfer Pricing Guidelines, highlighting the challenges of interpreting intra-group agreements in line with both legal and fiscal requirements.

Section 6 complements the preceding conceptual analysis through a detailed case study of *Meda AB v. Swedish Tax Agency*, decided by the Stockholm Administrative Court of Appeal in 2024. By examining the reallocation of profits arising from the acquisition and exploitation of intellectual property within a multinational group, this

demand for coordinated action at the multilateral level. On the origins and policy drivers of the BEPS Project, see BRAUNER Y., *What the BEPS?*, in *Florida Tax Review*, 2014.

section illustrates how the post-BEPS conduct-based approach operates in judicial practice. The case provides a concrete example of the interaction between contractual risk allocation and the requirement of effective risk control, as well as of the circumstances under which tax authorities and courts may depart from the formal terms of intra-group agreements. In doing so, it highlights the structural limits of contractual autonomy in transfer pricing and offers an empirical benchmark for assessing the practical implications of accurate delineation and substance-over-form reasoning within a domestic legal order.

The work concludes by arguing for a more integrated conceptual framework capable of reconciling the economic objectives of international tax law with the legal principles governing private contractual relationships. By placing contractual terms at the core of transfer pricing analysis, the work aims to clarify the legal status of intra-group transactions in the post-BEPS environment and to clarify the normative limits within which tax administrations may intervene in intra-group contractual agreements.

2. The problem of profit shifting through transfer pricing techniques

There is a widespread perception that large multinational groups do not contribute fairly to tax systems, which is supported by empirical evidence. A very small fraction of global firms captures a disproportionate share of worldwide profits, while effective corporate tax rates have steadily declined since the 1980s³, reducing public revenue and undermining tax equity. Public outrage following major scandals in the 2010s⁴ further highlighted the scale of multinational

³ CHANCEL L., PIKETTY T., SAEZ E., ZUCMAN G. (ed), *World Inequality Report 2022*, Cambridge, 2022, p. 150.

⁴ The year 2012 marked a turning point in public and political perceptions of multinational tax avoidance, particularly in Europe and the United Kingdom. A series of journalistic investigations and parliamentary inquiries revealed how large multinational corporations, especially in the technology and consumer sectors, were able to achieve extremely low effective tax rates despite generating substantial sales in market jurisdictions. These outcomes were largely achieved through the use of complex corporate structures and the strategic allocation of intangible assets to low-tax jurisdictions. The cases, which received extensive media coverage, were widely perceived not as isolated instances of lawful tax planning, but as evidence of structural deficiencies in the international corporate tax

tax avoidance and its corrosive effect on trust in the corporate tax system, prompting calls for structural reform.

The influence of multinationals as economically powerful actors in the global trade has developed within an international tax framework built on principles -such as physical presence, permanent establishment or source and residence taxation- that, according to many academics, due to globalisation and digitalisation, are not working anymore⁵.

Profit shifting by multinational enterprises represents a central mechanism of corporate tax avoidance. Recent estimates indicate that, in 2022, about USD 1 trillion in profits were shifted to tax havens, resulting in significant revenue losses for different jurisdictions⁶.

This outcome is made legally possible by the structural features of the international corporate tax system, which is built upon the principles of separate entity accounting, territorial allocation of taxing rights, and the recognition of legal personality within multinational groups. Under this framework, each group entity is treated as an independent taxpayer, even where economic decision-making and value creation are highly integrated across borders. This allows multinational enterprises to organise their internal transactions, such as the transfer of goods, services or intellectual property, through group entities located in jurisdictions offering preferential tax regimes, low rates or specific tax incentives.

Profit shifting typically exploits differences and mismatches between domestic tax systems, including divergent definitions of taxable presence, asymmetric qualification of income, and varying rules on the allocation of risks and returns. These practices are not

framework. See HM REVENUE AND CUSTOMS, *Tax avoidance by multinational companies*, Annual Report and Accounts - Public Accounts Committee, London, 2012, <https://publications.parliament.uk/pa/cm201213/cmselect/cmpubacc/716/71605.htm>.

⁵ Scholars have argued that these principles were designed for a world in which economic activity was largely tied to tangible assets and geographically identifiable business operations, and therefore struggle to capture value creation in business models characterised by digital services, data exploitation, and remote participation in markets. See GELEPITHIS M., HEARSON M., *The politics of taxing multinational firms in a digital age*, in *Journal of European Public Policy*, 2022, p. 709; MASON R., *The Transformation of International Tax*, in *American Journal of International Law*, 2020, p. 393.

⁶ ALSTADSAETER A., GODAR S., NICOLAIDES P., ZUCMAN G. (eds), *Global Tax Evasion Report 2024*, Paris, 2023, p. 36.

confined to a single legal system but arise precisely in cross-border contexts, where national tax laws interact through bilateral tax treaties and coordination instruments. As a result, profits may be allocated, for tax purposes, to jurisdictions where little or no substantive economic activity takes place.

The main mechanism used by companies to transfer profits is transfer pricing, which is of crucial importance in the field of international taxation. Although there is no single definition of transfer pricing used by doctrine, case law or the various laws that cover it, the most widespread and important definition, as set out in the OECD Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations (from now on, “OECD Guidelines”), is as follows: “*Transfer prices are the prices at which a company transfers tangible and intangible assets or provides services to associated companies*”⁷.

More technically, we could also define transfer pricing as the area of tax law dedicated to the tax consequences of pricing in cross-border transactions between related companies⁸.

The importance of regulating transfer pricing is understood by one revealing fact: in the 21st century, according to UNCTAD data, cross-border transactions carried out by multinational companies were estimated to account for one-third of global exports⁹. This phenomenon reflects the growing interdependence of multinational companies’ operations and the complexity of their organisational structures. In fact, we can say that transfer pricing is the most complex issue in international taxation for multinational companies and tax administrations at the beginning of the 21st century, and it is also a fundamental problem for those responsible for fiscal policy¹⁰.

The shifting of profits through price manipulation by globally operating companies is quite evident. In the international context, two opposing interests clash: on the one hand, multinational groups aim

⁷ OECD, *OECD Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations 2022*, Paris, 2022, para. 11.

⁸ MONSENEGO J., *Introduction to transfer pricing*, Alphen aan den Rijn, 2023, p. 6.

⁹ UNCTAD, *World Investment Report 2010: Investing in a Low-Carbon Economy*, Geneva, 2010.

¹⁰ ROXAN I., *Introduction*, in BAISTROCCHI E., ROXAN I. (eds), *Resolving Transfer Pricing Disputes: A Global Analysis*, Cambridge, 2012, p. 4.

to pay the least amount of taxes possible overall; on the other hand, tax authorities try to attract investment to their territories by establishing tax regimes and benefits that facilitate the transfer of profits and losses from one jurisdiction to another.

This characterization highlights the regulatory and fiscal concerns regarding price manipulation in transactions between so-called related entities, that is, those that, due to relationships of control or dependence, do not operate with full economic autonomy. The economic and legal link justifies a differentiated tax treatment, since it is presumed that the conditions agreed between them may not conform to free market conditions.

When applying transfer pricing rules between two or more constituent parts of a multinational, at least one of which is headquartered in a host country, the tax authorities of that country must be vigilant to identify the characteristics of a foreign company operating within their jurisdiction and understand its *modus operandi*. This includes the need to carefully define the structure and ownership of multinational companies to determine the relationships between their constituent parts that could give rise to opportunities for transfer pricing abuse. Furthermore, they must consider the full range of assets that may be traded between two enterprises of the same corporate group¹¹.

Multinational enterprise groups can engage in a wide variety of intra-group transactions to shift profits, which are normally structured through contracts. These typically include intercompany services agreements, covering the provision of management, administrative or technical support services within the group; royalty or licensing agreements, which govern the use of intellectual property rights developed or held by a group entity; cost-sharing arrangements, especially those relating to joint research and development efforts, where participating entities agree to share the risks and costs of developing intangible assets; intra-group financing agreements, including intercompany loans, guarantees or cash pooling mechanisms aimed at optimising the group's liquidity; and sales and distribution agreements, which regulate the transfer of tangible goods or

¹¹ LI J., PAISEY A., *Transfer Pricing Audits in China*, Oxford, 2007, p. 56.

the provision of digital services between production and marketing entities within the group.

Intra-group contracts therefore play a central role not only in defining the legal form of the transaction but also in shaping the economic incentives that underpin profit allocation within the group. The contractual architecture chosen by multinational enterprises is often designed to reflect a particular distribution of functions, assets, and risks among affiliated entities, which in turn influences where profits are ultimately reported for tax purposes.

Thus, the starting point for the transfer pricing issue is that multinational corporations operate based on a common economic interest: maximizing the profit of the multinational company as a whole. As a result of the shared ownership, management, and control relationships that exist among the members of a multinational group, their transactions are not fully subject to many of the market forces that would have come into play if the transactions had been carried out between entirely independent parties¹². In other words, the price set between related companies is more likely the result of a deliberate agreement than a price that independent parties would agree upon given the tensions between supply and demand¹³. For this reason, we conclude that transactions between related parties may not occur under normal market conditions.

3. The internationally accepted solution to the transfer pricing problem: the arm's length principle

The arm's length principle constitutes the internationally accepted solution for assessing the pricing of transactions between associated enterprises. Its application is premised on the idea that related parties must behave as if they were independent, particularly in the contractual structuring and economic valuation of their intercompany agreements.

¹² COOPER J., FOX R., LOEPRICK J., MOHINDRA K., *Transfer Pricing and Developing economies: A Handbook for Policymakers and Practitioners*, Washington DC, 2016, p. 27.

¹³ GÓMEZ REQUENA J. A., *El análisis de comparabilidad post-BEPS en precios de transferencia: Una visión sobre las operaciones vinculadas con activos intangibles*, Pamplona, 2019, p. 30.

The arm's length principle has been the cornerstone of transfer pricing rules for decades. According to the arm's length principle, multinational companies should carry out controlled transactions at arm's length prices. We can define the arm's length price as the price which associated enterprises would have agreed if they had made a comparable transaction on the open market rather than the controlled transaction that they actually made¹⁴.

This principle finds its formal expression in Article 9(1) of the OECD MC¹⁵, which provides that where conditions are made or imposed between two associated enterprises that differ from those that would be made between independent enterprises, then any profits that would have accrued to one of the enterprises, but did not because of those conditions, may be included in that enterprise's taxable income. As inferred from its nature, Article 9(1) establishes a rule for allocating income among the contracting states according to a specific criterion: at arm's length¹⁶.

Article 9(1) of the OECD MC, which has been incorporated into most bilateral tax treaties, reads as follows: "*1. Where a) an enterprise of a Contracting State participates directly or indirectly in the management, control or capital of an enterprise of the other Contracting State, or b) the same persons participate directly or indirectly in the management, control or capital of an enterprise of a Contracting State and an enterprise of the other Contracting State, and in either case conditions are made or imposed between the two enterprises in their commercial or financial relations which differ from those which would be made between independent enterprises, then any profits which would, but for those conditions, have accrued to one of the enterprises, but, by reason of those conditions, have not so accrued, may be included in the profits of that enterprise and taxed accordingly*".

This formulation establishes a comparative normative standard: the conditions agreed upon between related parties must mirror those

¹⁴ WITTENDORFF J., *Transfer Pricing and the Arm's Length Principle in International Tax Law*, Alphen aan den Rijn, 2010, p. 6.

¹⁵ OECD, *OECD Model Tax Convention on Income and on Capital: Condensed Version 2017*, Paris, 2017.

¹⁶ GARCÍA PRATS F. A., *Los precios de transferencia: su tratamiento tributario desde una perspectiva europea*, in *Crónica Tributaria*, 2005, p. 33

that would have been agreed by independent parties acting at arm's length in comparable circumstances.

Article 9(1), as it is currently configured, was first incorporated by the 1963 version of the OECD MC. The impact of Article 9 within the conventional framework, both bilateral and multilateral, is clearly dominant.

Unlike the standard wording typically found in the rest of provisions of the OECD MC, this provision does not operate as a distributive rule nor as a norm for allocating taxing rights between the contracting states. Instead, its function is to reassign business profits and, consequently, to subject them to taxation in the state of residence of the associated enterprise to which the tax adjustment is made when the arm's length principle has been breached.

Indeed, Article 9 did not even share the objective of eliminating international double taxation with the rest of the OECD MC until 1977, when the second paragraph¹⁷ of the provision was included¹⁸.

Two requirements must be met in order to apply Article 9 OECD MC. On the one hand, two enterprises must be "associated". On the other hand, if they are "associated", their profits may be adjusted but only to the extent required to meet the arm's length principle¹⁹.

Given the first requirement, defining the term 'associated enterprises' is of enormous relevance in determining the role of Article 9²⁰. Article 3(1) deals with the task of defining what are "associated enterprises": it includes two enterprises where either one participates

¹⁷ Article 9(2) of the OECD MC: "*Where a Contracting State includes in the profits of an enterprise of that State — and taxes accordingly — profits on which an enterprise of the other Contracting State has been charged to tax in that other State and the profits so included are profits which would have accrued to the enterprise of the first mentioned State if the conditions made between the two enterprises had been those which would have been made between independent enterprises, then that other State shall make an appropriate adjustment to the amount of the tax charged therein on those profits. In determining such adjustment, due regard shall be had to the other provisions of this Convention and the competent authorities of the Contracting States shall if necessary consult each other*".

¹⁸ GÓMEZ REQUENA J.A., *El análisis de comparabilidad post-BEPS en precios de transferencia: Una visión sobre las operaciones vinculadas con activos intangibles*, cit.

¹⁹ Profits may also be adjusted based on the arm's length principle in the case of inter-entity transactions. Article 7 OECD MC deals with this type of transactions, as this provision operates under the fiction that the permanent establishment must be treated as a "separate and independent enterprise".

²⁰ TEIXEIRA DE ABREU M., *The Role of Article 9 OECD MC*, in HAASE, F., KOFLER, G. (eds), *The Oxford Handbook of International Tax Law*, Oxford, 2023, p. 521.

in the management, control or capital of another; or they are both under the management, control or capital of other persons.

The Commentary to Article 9 of the OECD MC is, given the practical importance of this provision, very short. Thus, further interpretation of Article 9 is considered essential. To fulfil that need, the provision refers to the OECD Guidelines, a much more detailed document which since 1995 represents the “internationally agreed principles” for the application of the arm’s length principle²¹.

According to the Commentary itself, the OECD Guidelines reflect the result of the time and effort devoted by the OECD’s Committee on Fiscal Affairs of “*examining the conditions for the application of this Article, its consequences and the various methodologies which may be applied to adjust profits where transactions have been entered into on other than arm’s length terms*”²².

For this reason, the OECD Guidelines have constituted the general framework for transfer pricing regulations in the international sphere. This work has evolved and adapted to economic and social changes and, in addition, has outlined with greater technical complexity the regulation of transfer pricing.

As the OECD Guidelines do not have coercive measures to enforce their application or penalize non-compliance for all OECD countries, they are formally constituted as *soft law*²³.

Although the OECD Guidelines do not have real normative value, insofar as they reflect an international consensus, states feel bound and pressured to respect that consensus at the international level²⁴.

So far in the 21st century, one of the main steps taken by different countries has been to strengthen their existing transfer pricing rules,

²¹ COLLIER R. S., ANDRUS J. L., *Transfer pricing and the arm’s length principle after BEPS*, Oxford, 2017, p. 146.

²² Paragraph 1 of the Commentary on Article 9 of the OECD MC, p. 226.

²³ MARTÍN JIMÉNEZ defines *soft law* as acts that are not legally binding but to which practice attributes significant moral force because they represent the political will of Member States and there is an expectation that Member States will do their utmost to follow the recommendations. See MARTÍN JIMÉNEZ A. J., *Los comentarios al MC OCDE: su incidencia en el sistema de fuentes del derecho tributario y sobre los derechos de los contribuyentes*, in *Carta Tributaria*, 2003, p. 2.

²⁴ GARCÍA BAÑUELOS J. A., MUT AGUILAR I., *Descripción precisa de las transacciones entre partes vinculadas, desconocimiento o sustitución de las mismas y su relación con las cláusulas antiabuso generales*, in *Crónica Tributaria. Nueva Época*, 2017, p. 110.

aligning them with the OECD Guidelines²⁵. In 2025, 102 jurisdictions in the BEPS Inclusive Framework²⁶, representing 95% of global GDP²⁷, comply with the Guidelines.

4. *The BEPS Project and the emergence of a conduct-based approach in transfer pricing*

4.1. *Transfer pricing within the BEPS Action Plan: scope and key developments*

In relation to the issue of profit shifting through transfer pricing, it is necessary to mention the leading role that the OECD has played in international taxation in the 21st century, particularly through the BEPS Project²⁸.

The main organizations representing the international community, reflected in the Ministers of Finance of the G-20 countries and the OECD itself, focused on the harmful practices carried out by multinationals taking advantage of different tax regulations between jurisdictions. Based on the various problems encountered, in 2013 the Committee on Fiscal Affairs of the OECD drew up an Action Plan consisting of 15 Actions²⁹, developed on the basis of three basic

²⁵ LOHSE T., RIEDEL N., *Do Transfer Pricing Laws Limit International Income Shifting? Evidence from European Multinationals*, in *Oxford University Center for Business Taxation Working Paper 13/07*, 2013.

²⁶ The BEPS Inclusive Framework (formally, the OECD/G20 Inclusive Framework on Base Erosion and Profit Shifting) is an international cooperation framework created to implement, monitor and develop the measures agreed upon in the OECD and G20 BEPS Project. The Inclusive Framework was created in 2016, following the approval of the 15 Final Reports of the BEPS Project. Its main objective was to overcome the limited nature of the original BEPS, which had been designed primarily by OECD and G20 countries, by incorporating developing economies and non-OECD jurisdictions into the regulatory process. For an in-depth discussion of the institutional design of the BEPS Inclusive Framework and the participation of member and non-member states, see CHRISTIANS A., VAN APELDOORN L., *The OECD Inclusive Framework*, in *Bulletin for International Taxation*, 2018.

²⁷ OECD, *A Decade of the BEPS Initiative: An Inclusive Framework Stocktake Report to G20 Finance Ministers and Central Bank Governors*, Paris, 2025, p. 97.

²⁸ OECD, *BEPS Project Explanatory Statement: 2015 Final Reports*, OECD/G20 Base Erosion and Profit Shifting Project, Paris, 2016.

²⁹ Action 1: Address the Tax Challenges of the Digital Economy; Action 2: Neutralise the Effects of Hybrid Mismatch Agreements; Action 3: Strengthen CFC Rules; Action 4: Limit Base Erosion via Interest Deductions and Other Financial Payments; Action 5:

concepts that were to underpin the new paradigm of the international tax system: substance, consistency, and transparency.

In the field of transfer pricing, Actions 8–10 provide substantive guidance aimed at aligning the allocation of profits with value creation. In particular, they clarify how returns associated with intangible assets, intra-group services and cost contribution arrangements should be allocated by emphasising the functional analysis and the performance of economically significant activities, including the control of risks and the capacity to assume them. These Actions 8–10 were formally incorporated into the OECD Guidelines in 2016, thereby significantly reinforcing the practical relevance of this OECD guidance in international tax practice³⁰.

Regarding substance, the OECD's work on BEPS-related transfer pricing issues has been guided by the objective of aligning transfer pricing outcomes with value creation. In this context, the OECD has articulated a conceptual sequence according to which contractual arrangements give shape to economic substance, substance underpins value creation, and value creation ultimately determines the allocation of profits³¹. This approach reflects an effort to prevent a disconnect between legal form and economic outcomes by bringing the notions of substance and value creation into closer alignment.

Therefore, the important concept introduced by the BEPS Action Plan related to transfer pricing is “value creation,” a concept with no *ex ante* meaning that aims to ensure that transfer pricing outcomes align with economic reality³². Due to its subjective rather than objective approach, the practical consequence is that the application of transfer pricing legislation now relies more heavily on assessments

Counter Harmful Tax Practices More Effectively, Taking into Account Transparency and Substance; Action 6: Prevent Treaty Abuse; Action 7: Prevent the Artificial Avoidance of PE Status; Action 8-10: Assure that Transfer Pricing Outcomes are in Line with Value Creation; Action 11: Measuring and Monitoring BEPS; Action 12: Require Taxpayers to Disclose their Aggressive Tax Planning Arrangements; Action 13: Re-examine Transfer Pricing Documentation; Action 14: Make Dispute Resolution Mechanisms More Effective; Action 15: Develop a Multilateral Instrument.

³⁰ KOBETSKY M., *The Status of the OECD Transfer Pricing Guidelines in the Post-BEPS Dynamic*, in *International Tax Studies*, 2020, p. 20.

³¹ PETRUZZI R., MYZITHRA A., *Substance in Transfer Pricing in a Post-BEPS World and Beyond...*, in *International Transfer Pricing Journal*, 2020, p. 437.

³² BAISTROCCHI E., *The International Tax Regime and Global Power Shifts*, in *Virginia Tax Review*, 2021, p. 252.

such as functional analysis or risk allocation, with no single legally correct outcome. This creates an environment of marked legal uncertainty, where determining compliance becomes particularly complex and, consequently, litigation may increase significantly.

According to the OECD Guidelines, a transfer pricing comparability analysis comprises two phases or aspects: the accurate delineation of the controlled transaction between the associated enterprises and the comparison between the accurately delineated transaction with comparable transactions between independent enterprises. Based on the post-BEPS approach, the core of the current debate focuses primarily on the first phase.

This means applying the arm's length principle requires not only access to the so-called comparables, which can be very difficult to find sometimes, but also a precise understanding of the actual terms and conditions governing the intra-group transaction, that is, the contractual relationship as agreed or performed by the parties.

In the second phase, determining whether a price complies with the arm's length standard requires a comparability assessment between a controlled transaction and a transaction between independent parties.

The Glossary of the OECD Guidelines states that, under the comparability analysis, "*controlled and uncontrolled transactions are comparable if none of the differences between the transactions could materially affect the factor being examined in the methodology (e.g. price or margin), or if reasonably accurate adjustments can be made to eliminate the material effects of any such differences*"³³.

The comparability analysis traditionally includes evaluating the functions performed, assets used and the risks assumed by the entities within the multinational group. The relevance of each of these elements is highly contingent upon the specific factual context and economic circumstances surrounding the transaction under examination.

³³ OECD, *OECD Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations 2022*, Paris, 2022.

4.2. The pre-BEPS transfer pricing framework

The 2010 version of the OECD Guidelines explained the importance of recognizing the controlled transaction as it was structured by the parties, and to only recharacterize it under specified exceptional circumstances.

The recharacterization, or non-recognition of the transaction, as used in the OECD Guidelines, means that the correct application of the arm's length principle allows adjusting the conditions of controlled intercompany transactions or even disregarding the very existence of such transactions. It is important to clarify that the term "conditions" denotes those aspects of a transaction that fall within the sphere of control of the contracting parties, such as the allocation of specific risks, in contrast to the broader contextual factors in which the transaction takes place, which remain outside their control³⁴. In other words, the faculty of recharacterization implies that some elements of a valid private law transaction, or the transaction itself, can be ignored for tax purposes. The domestic legal basis for these transactional adjustments may be general income tax provisions, statute-based anti-avoidance rules or court-based doctrines on substance over form, economic substance, business purpose, ...

The reasons given by the OECD to recharacterize only exceptionally could be read in the wording of paragraph 1.64 (p. 51): "*Restructuring of legitimate business transactions would be a wholly arbitrary exercise the inequity of which could be compounded by double taxation created where the other tax administration does not share the same views as to how the transaction should be structured*".

The OECD Guidelines also stated that it was important to examine whether the conduct of the parties conformed to the terms of the contract, and that if the actual conduct was inconsistent with the contractual terms, further analysis was required to determine the true terms of the transaction (paragraph 1.29).

The term "commercial or financial relations" in Article 9(1) should be interpreted on the basis of domestic law. Hence, Article

³⁴ NAVARRO A., *Transactional Adjustments in Transfer Pricing*, Amsterdam, 2018, p. 50.

9(1) did not authorise contractual terms to be disregarded for transfer pricing purposes.

4.3. *Transfer pricing after BEPS: a conduct-oriented reassessment*

One of the most consequential developments in the post-BEPS application of the arm's length principle has been the growing emphasis on the actual conduct of associated enterprises when identifying and analysing controlled transactions. This evolution is frequently described as the most significant shift in transfer pricing practice in decades, insofar as it alters the basis on which the transaction subject to pricing is identified. Whereas earlier approaches tended to rely predominantly on written contractual arrangements as the primary reference point, the post-BEPS framework accords increasing importance to the factual behaviour of the parties as a means of revealing the effective allocation of functions, assets and risks within a multinational group.

The rationale underpinning this development lies in the recognition that intra-group transactions are often concluded in environments characterised by centralised decision-making, economic dependence and informational asymmetries. In such contexts, formal contractual documentation may fail to fully capture the economic reality of the transaction. Consequently, the identification of the "actual transaction" can no longer be based exclusively on legal form but must be informed by an objective assessment of how the parties operate in practice.

Within this revised framework, the accurate delineation of the transaction has assumed a central role in the transfer pricing field. In the post-BEPS era, delineation is no longer a purely formal exercise, but a substantive analytical step that seeks to establish the economically relevant characteristics of the controlled transaction as a precondition for applying the arm's length principle. But how should the actual controlled transaction be delineated? To answer this question, the BEPS Actions 8-10 Final Reports explained that "*where a transaction has been formalised by the associated enterprises through written contractual agreements, those agreements provide the starting point for delineating the transaction between them and*

how the responsibilities, risks, and anticipated outcomes arising from their interaction were intended to be divided at the time of entering into the contract”.

Accurate delineation involves specifying the true contractual relationship between the associated enterprises, including the rights and obligations assumed by each party, and encompasses all elements that are relevant for comparing the controlled transaction with comparable uncontrolled transactions. In this sense, delineation is intrinsically linked to the comparability analysis and cannot be detached from the assessment of contractual terms, functions performed, assets used and risks assumed.

A major challenge in applying the transfer pricing rules arises from the inconsistent interpretations of the delineation and risk framework rules by tax authorities across multiple jurisdictions. These interpretations often diverge from, or fail to fully reflect, the requirements of the OECD Guidelines³⁵. The significance of this issue is considerable, given the central role of the risk framework in delineating controlled transactions, the scale of the disagreements between authorities, and the potential consequences of inconsistent application for the reliability and predictability of transfer pricing outcomes.

Echoing earlier guidance, the current 2022 OECD Guidelines provide the following broad rules: *“If the characteristics of the transaction that are economically relevant are inconsistent with the written contract between the associated enterprises, the actual transaction should generally be delineated for purposes of the transfer pricing analysis in accordance with the characteristics of the transaction reflected in the conduct of the parties”* (1.45) ... *“Where no written terms exist, the actual transaction would need to be deduced from the evidence of actual conduct provided by identifying the economically relevant characteristics of the transaction”*. (1.49)

In this sense, the conduct-based approach redefines the process of delineation: the focus moves from the contract as a dispositive expression of will to the concrete economic reality evidenced by the

³⁵ COLLIER R. S., DYKES I. F., *On the Apparent Widespread Misapplication of the OECD Transfer Pricing Guidelines: Risk and Post-BEPS Problems for the Arm's Length Principle*, in *Bulletin for International Taxation*, 2022, p. 20.

parties' performance, the control they exercise, and the risks they demonstrably assume. This means the terms and conditions of such formal arrangements are subject to verification based on the actual conduct of the parties. Where such terms are absent, incomplete, or insufficiently precise, the transaction is reconstructed on the basis of observable behaviour and other factual elements that reveal its economic substance.

4.3.1. *Administrative practice and the limits of conduct-based delineation*

In theory, the conduct-oriented approach introduced in the post-BEPS framework requires tax authorities to assess whether the contractual allocation of rights, obligations and risks is consistent with the economically relevant characteristics of the transaction as reflected in the parties' actual behaviour. The focus of the delineation exercise should therefore lie in examining the coherence between the contractual framework and the conduct of the associated enterprises involved in the transaction.

In practice, however, administrative practice often departs from this evidentiary logic. Rather than limiting the analysis to the conduct effectively observed in the controlled transaction, tax authorities increasingly rely on hypothetical benchmarks based on how independent parties would have behaved in comparable circumstances. This method shifts the focus from the concrete conduct of the tested parties to an abstract model of rational behaviour derived from the options realistically available to similarly situated independent enterprises³⁶.

By introducing this hypothetical standard at the stage of delineation, the analysis risks moving beyond the identification of the actual transaction and into a form of normative reconstruction. In such cases, delineation ceases to function as an evidentiary assessment grounded in observable facts and instead becomes an exercise in re-defining the transaction according to an assumed arm's length behaviour. This practice raises significant conceptual concerns, as it

³⁶ COLLIER R. S., DYKES I. F., *The Functional Fallacy: The ALP and the Limits of the Conduct-Based Approach*, in *World Tax Journal*, 2025, p. 675.

blurs the distinction between accurately delineating a controlled transaction and recharacterizing it on the basis of counterfactual assumptions, thereby expanding the scope of administrative discretion beyond what the delineation process was originally intended to achieve.

4.3.2. *Critical assessment of the post-BEPS shift*

Despite its stated objectives, the OECD's attempt to prioritise the performance of functions over other elements, such as assets or contractual allocations of risk, has shown limited effectiveness in addressing profit shifting and base erosion. In practice, multinational enterprises have been able to adapt to this functional emphasis by reorganising their internal structures without substantially altering the underlying allocation of profits, either by fragmenting functions across entities or by aligning high-value functions with jurisdictions offering favourable tax conditions. Moreover, the functional analysis itself often remains closely intertwined with contractual arrangements and group-wide decision-making, which limits its capacity to constrain aggressive tax planning strategies in a meaningful way. While functions may be less mobile than intangible assets or contractual risk allocations, they are nonetheless capable of relocation through the transfer of key personnel who perform those functions³⁷.

Following the changes to the transfer pricing guidance made by the BEPS Project, the nature and existence of controlled transactions are now in practice much more commonly to be constructed or inferred from the relevant human functional activity or conduct³⁸. The increased emphasis on conduct has also led to higher compliance and organisational costs, which are often outweighed by the substantial income generated by intangible assets.

³⁷ NAVARRO IBARROLA A., *La modificación de las pautas sobre precios de transferencia en BEPS (Acciones 8-10): ¿cambio o evolución?*, in ALMUDÍ CID J. M., FERRERAS GUTIÉRREZ J. A., HERNÁNDEZ GONZÁLEZ-BARREDA P. A. (eds), *El plan de acción sobre erosión de bases imponibles y traslado de beneficios (BEPS): G-20, OCDE y Unión Europea*, Cizur Menor, 2017, p. 140.

³⁸ COLLIER R. S., DYKES I. F., *The Functional Fallacy: The ALP and the Limits of the Conduct-Based Approach*, in *World Tax Journal*, cit., p. 633.

As a consequence, profit shifting strategies may continue to persist, now operating within the formal framework of the post-BEPS recommendations themselves. This outcome calls into question the extent to which the conduct-based reassessment of transfer pricing genuinely enhances the effectiveness of the arm's length principle, or whether it instead exposes its structural limitations in addressing modern multinational business models.

5. Contractual terms and contract interpretation

5.1. Contractual documentation, legal form and their role in transfer pricing

Contracts occupy a central position in the architecture of transfer pricing, as they provide the legal framework through which intra-group transactions are structured, performed, and evidenced. In defining the rights and obligations of the associated enterprises, contractual arrangements are intended to reflect the allocation of functions, assets, and risks within the multinational group and thus constitute a key reference point for the application of the arm's length principle. At the same time, contracts operate within a broader compliance environment in which documentation and evidentiary standards play an increasingly prominent role. This section examines how contractual terms are assessed and interpreted in transfer pricing, and how their interaction with documentation requirements shapes both the delineation of the controlled transaction and the evaluation of its consistency with economic substance.

On the one hand, in transfer pricing, the analysis of the transaction goes beyond the mere identification of the prices charged. In its most recent developments, the OECD has explicitly recognised that transfer pricing rules are no longer limited to assessing the price of intra-group transactions but rather extend to a broader examination of the contractual conditions that govern such dealings. As stated in one of its official reports, "*transfer pricing rules, for tax purposes, aim to establish the conditions, including the price, applicable to transactions carried out within a multinational enterprise, which determine*

the allocation of profits among group entities located in different countries”³⁹.

This formulation makes it clear that the conditions of the transaction -not merely the price- are essential for determining whether the arrangement complies with the arm’s length principle. Consequently, modern transfer pricing analysis increasingly requires a detailed review of contractual terms, such as risk allocation, performance obligations, rights over intangibles, exclusivity clauses, and the consistency between the written agreement and the actual conduct of the parties. This shift in focus elevates the relevance of private contract law in the assessment of intra-group arrangements. Legal notions such as cause, simulation, defective performance, and good faith become critical in evaluating whether the transaction reflects genuine economic substance and can be relied upon for tax purposes.

Contracts, in this context, fulfil more than one function within the transfer pricing analysis. They first operate as the legal framework through which functions, risks and rights are allocated among associated enterprises, and thus constitute the “starting point”⁴⁰ for the allocation of profits. In addition, contractual arrangements also serve as a means to justify and document the transaction, especially when audited by tax authorities.

However, tax authorities are not bound by the form of the contract alone. The OECD Guidelines explicitly state that the analysis must take into account whether the contractual terms are consistent with the conduct of the parties and with the economic substance of the transaction. This evaluative process brings transfer pricing into direct contact with private law notions, such as the binding force of contracts, the role of performance in contractual interpretation, and the legal limits to simulation or sham agreements.

On the other hand, transfer pricing compliance relies heavily on documentation, which plays a central role in substantiating the economic characteristics of intra-group transactions. The OECD’s three-tiered approach, consisting of the master file, local file, and

³⁹ OECD, *Aligning Transfer Pricing Outcomes with Value Creation, Actions 8-10 - 2015 Final Reports, OECD/G20 Base Erosion and Profit Shifting Project*, OECD Publishing, Paris, 2015.

⁴⁰ Paragraph 1.42 of the OECD Guidelines.

country-by-country reporting, emphasises the need for accurate, contemporaneous, and consistent documentation, particularly with regard to the contractual basis of intra-group transactions.

From a legal perspective, such documentation fulfils several distinct functions. First, it operates as evidence of the terms governing the transaction, enabling tax administrations to assess whether those terms are consistent with the arm's length standard. Second, it constitutes a legal instrument that must be interpreted in accordance with private law principles, especially in situations characterised by ambiguity, internal inconsistency, or incomplete performance. Third, it plays a decisive role in allocating the burden of proof in transfer pricing disputes, as the existence or absence of adequate documentation may affect both presumptions of validity and the scope of administrative discretion.

In this sense, transfer pricing documentation cannot be regarded as a merely formal compliance requirement: it represents a crucial interface between fiscal rules and contractual norms. These reporting obligations enhance transparency regarding the contractual and economic terms of related-party transactions and help identify practices that artificially shift profits to low-tax jurisdictions⁴¹. Participating BEPS countries agree that such transparency is essential for understanding, monitoring, and addressing BEPS-related behaviours.

5.2. Contractual autonomy and the will of the parties in international tax law

Against this background, it is necessary to consider how contractual autonomy operates differently in tax law as compared to private law, particularly in an international setting. Principles such as freedom of contract and freedom of choice, which are fundamental to private law systems grounded in market autonomy, cannot be straightforwardly applied to the realm of taxation. Within tax law, the principle of distributive justice must take precedence, ensuring

⁴¹ OECD, *Transfer Pricing Documentation and Country-by-Country Reporting, Action 13 - 2015 Final Report, OECD/G20 Base Erosion and Profit Shifting Project*, OECD Publishing, Paris, 2015, p. 9.

that the determination of the taxable base within controlled entities reflects an equitable allocation of the tax burden⁴².

Moreover, while private international law frequently determines the applicable law by reference to the legal consequences of a given behaviour, such as the effects of an antitrust infringement on a particular market⁴³, international tax law refers only exceptionally to situations in which the taxpayer's presence in the territory of a State is accidental or unintended. On the contrary, international tax rules traditionally attach decisive importance to the taxpayer's will to establish an economic presence, normally through residence or a permanent establishment. In this sense, international tax law attributes greater normative relevance to individual autonomy and intentional economic engagement than private law⁴⁴.

However, allowing taxpayers to unilaterally determine the allocation of profits among related entities would be inconsistent with the rationale of the arm's length principle⁴⁵, as they could manipulate transfer prices at their discretion to minimize tax liabilities. In this context, contractual autonomy over intragroup agreements loses its normative significance, since the very objective of the arm's length standard is to ensure that the allocation of income reflects economic reality rather than the arbitrary preferences of the parties.

Despite the reforms attempting to clarify the analysis in the post-BEPS environment, the role of taxpayer autonomy within the international tax regime remains ambiguous⁴⁶. Contractual freedom continues to exist, yet it is increasingly constrained by the need to ensure a fair allocation of taxing rights and to safeguard distributive justice in the determination of the taxable base. Therefore, while the will of the parties remains a central concept in private law, it must yield to

⁴² KANE M. A., *Transfer Pricing, Integration and Synergy Intangibles: A Consensus Approach to the Arm's Length Standard*, in *World Tax Journal*, 2014, p. 302.

⁴³ See, for instance, Judgment of the Court (Grand Chamber) of 6 September 2017, *Intel Corp. v European Commission*, Case C-413/14 P.

⁴⁴ KOURALEVA-CAZALS P., *International Tax Law and Private International Law*, in HAASE, F., KOFLER, G. (eds), *The Oxford Handbook of International Tax Law*, Oxford, 2023, p. 164.

⁴⁵ NAVARRO A., *The Arm's Length Standard and Tax Justice: Reflections on the Present and the Future of Transfer Pricing*, in *World Tax Journal*, 2018, p. 369.

⁴⁶ KOURALEVA-CAZALS P., *International Tax Law and Private International Law*, cit., p. 161.

the need for coherence and fairness in assessing the fiscal responsibilities of multinational groups.

5.3. Contract interpretation, conduct and the limits of the conduct-based approach

Contracts constitute the primary legal instrument through which intra-group transactions are structured and documented and therefore represent the starting point for any transfer pricing analysis. By defining the rights and obligations of associated enterprises, contractual terms are intended to reflect the agreed allocation of functions, assets, and risks and to provide the framework for assessing compliance with the arm's length principle.

Nevertheless, the informational value of contractual terms depends on their completeness and clarity, as well as on their capacity to capture economically relevant aspects of the transaction. Where contractual provisions are ambiguous, incomplete, or silent, their interpretation becomes particularly significant. In this respect, the OECD Guidelines recognise the need to complement contractual information by reference to broader interpretative criteria, as reflected below: *“If the contract neither explicitly nor implicitly (taking into account applicable principles of contract interpretation) addresses characteristics of the transaction that are economically relevant, then any information provided by the contract should be supplemented for purposes of the transfer pricing analysis by the evidence provided by identifying those characteristics”*⁴⁷.

In light of the above excerpt, since the 2017 revision, the OECD Guidelines have explicitly recognized the importance of contractual interpretation principles in identifying the economically relevant characteristics of controlled transactions.

Once contract terms have been identified in a controlled transaction, it is necessary to interpret those terms to determine the parties' contractual intentions. The OECD now also emphasizes the importance of identifying the parties' contractual intentions and

⁴⁷ Paragraph 1.43 of the OECD Guidelines, p. 43.

recommends identifying the intentions of the parties as they may have been conveyed in the formalized written contract⁴⁸.

This interpretative exercise is well established in private law and has been recognized at the international level. As an example, Article 8 of the United Nations Convention on Contracts for the International Sale of Goods states the following: “(1) For the purposes of this Convention statements made by and other conduct of a party are to be interpreted according to his intent where the other party knew or could not have been unaware what that intent was. (2) If the preceding paragraph is not applicable, statements made by and other conduct of a party are to be interpreted according to the understanding that a reasonable person of the same kind as the other party would have had in the same circumstances”.

As noted in the literature, the OECD’s guidance does not provide sufficient clarity on the interplay between contract law and transfer pricing⁴⁹, particularly when conduct is used to supplement or override written agreements.

Beyond these interpretative difficulties, a further unresolved issue concerns the extent to which the contractual adjustments implicitly authorised by the OECD Guidelines as part of the “accurate delineation” process are already permissible under general principles of contract law. The post-BEPS revisions to Chapter I appear to rest on an underlying assumption that the conduct-driven reconstruction of contractual terms does not require specific enabling legislation at the domestic level but can instead be accommodated within existing private law frameworks.

This assumption may be explained by the fact that both common law and civil law systems recognise, albeit in limited circumstances, the possibility of implying terms into contracts between independent parties. Such implication is typically grounded in an objective assessment of the intention of the parties⁵⁰. At a superficial level, this

⁴⁸ PICHHADZE A., *The Role of Contract Interpretation in Transfer-Pricing Law: Lessons from Canada*, in *Canadian Tax Journal*, 2017, p. 884.

⁴⁹ PICHHADZE A., *Exposing Unaddressed Issues in the OECD’s BEPS Project: What About the Roles and Implications of Contract Interpretation Law and Private International Law in the Transfer Pricing Arm’s Length Comparability Analysis?*, in *World Tax Journal*, 2015, p. 167.

⁵⁰ COHEN G. M., *Interpretation and implied terms in contract law*, in DE GEEST G. (ed), *Contract Law and Economics*, Cheltenham, 2011, p. 130.

methodology may resemble the approach advocated by the OECD, insofar as both rely on contextual elements beyond the express wording of the agreement.

However, the analogy is fragile. Under contract law, the implication of terms is subject to strict constraints and is generally confined to situations where the contract contains genuine gaps that the parties did not contemplate, or where the implied term is necessary in the business or commercial sense to ensure the efficacy of the agreement⁵¹. Crucially, a term cannot be implied where it would contradict an express contractual provision. Where a written contract is internally coherent and capable of interpretation on its own terms, courts will ordinarily give effect to its objective meaning, regardless of the parties' subjective intentions or subsequent conduct.

This distinction is particularly relevant given the legal status of the OECD Guidelines. As a form of *soft law*, the Guidelines are not self-executing and require domestic legislative implementation in order to produce legal effects within national legal systems. While the transfer pricing framework draws upon a mixture of legal and non-legal concepts, certain elements of the analysis -most notably the identification and interpretation of contractual terms- must be carried out in accordance with the law governing the contract in question.

Although the basic principles of contract interpretation may be displaced in specific contexts -such as consumer protection, labour law, or through explicit domestic transfer pricing provisions- the conduct-based approach of the OECD Guidelines cannot, as a general matter, be achieved through contract law alone. Absent clear enabling legislation, private law does not provide a sufficient legal basis for overriding or reconstructing a contract that is otherwise complete and interpretable solely on the basis of its written content.

Taken together, these considerations suggest that the conduct-based approach to contract interpretation endorsed in the post-BEPS OECD Guidelines operates in a legally constrained environment. While conduct may legitimately assist in clarifying ambiguous or

⁵¹ LORD NEUBERGER, *Express and Implied Terms in Contracts*, speech delivered at the Singapore Management University, 2016, para. 26, https://supremecourt.uk/uploads/speech_160819_02_002340855a.pdf.

incomplete contractual arrangements, its use as a basis for reconstructing, supplementing, or overriding express contractual terms raises serious concerns from a private law perspective. In the absence of explicit domestic rules authorising such an outcome, general principles of contract law continue to require that clear and internally consistent agreements be respected as written. This tension exposes a structural mismatch between the methodological ambitions of the transfer pricing framework and the normative limits imposed by the law governing contractual relations.

6. Case study: *Meda AB v. Swedish Tax Agency*

The practical implications of the OECD transfer pricing framework, and in particular of the post-BEPS emphasis on accurate delineation of controlled transactions, can be effectively illustrated through the 2024 decision of the Stockholm Administrative Court of Appeal in *Meda AB v. Swedish Tax Agency*⁵².

In this case, a Luxembourg-based subsidiary within a multinational group headed by a Swedish parent company purchased intellectual property from independent third parties. Throughout the relevant period, the Luxembourg entity had a limited workforce and operated with modest capitalisation. The transaction was financed through intragroup lending arrangements, in which the profits derived from the acquired IP were attributed to the Luxembourg company as its formal legal owner on the basis of a cost-plus mechanism⁵³.

However, the Swedish Tax Agency (*Skatteverket*) maintained that the key functions related to the control of risks associated with

⁵² Judgement of the Stockholm Administrative Court of Appeal, Sweden vs Meda AB, 10 April 2024, Case No 6754-6759-22.

⁵³ In transfer pricing, the cost-plus method refers to a remuneration framework under which an associated enterprise is compensated for the costs it incurs in performing certain functions for the group, plus an arm's length mark-up intended to reflect the profit that an independent enterprise would earn for comparable activities under similar circumstances. For a broader and systematic overview of the different transfer pricing methods applied under the arm's length principle, and of the circumstances in which each may be considered the most appropriate method, see BROWN M., ORLANDI M., *Transfer Pricing Methods: Traditional Transaction Methods*, in PETRUZZI R., COTTANI G., LANG M. (eds), *Fundamentals of Transfer Pricing - Volume 1: Principles and Practice*, Alphen aan den Rijn, 2025.

the IP acquisition were carried out by the Swedish parent company and other group entities, rather than by the subsidiary established in Luxembourg.

The Swedish Tax Agency challenged this allocation, arguing that the subsidiary lacked the practical capacity to control and manage those risks and that the resulting profit attribution therefore failed to reflect economic reality. In the view of the tax authorities, strategic decision-making powers and the ability to influence key risk drivers were effectively concentrated at the level of the parent company, calling into question the arm's length nature of the transaction and applying a profit-split method⁵⁴ to allocate income between the different parties.

From a broader perspective, the dispute exemplifies a recurrent tension nowadays in transfer pricing analysis: the extent to which contractual allocations of functions and risks should be respected when they are not supported by the operational and decision-making reality of the group. This tension requires tax administrations and courts to look beyond the formal wording of intra-group agreements and to assess whether the contractual allocation of risks is consistent with the actual conduct of the parties and their capacity to control those risks⁵⁵.

Against this background, the Meda decision illustrates a judicial approach in which the court did not undertake a detailed identification of the specific contractual rights and obligations underlying the controlled transaction. Particularly, it was not necessary for tax authorities to specify in detail the alternative contractual terms and conditions that would have governed the transaction between independent parties. Instead, it endorsed an allocation of profits primarily based on the geographical distribution of significant decision-making functions⁵⁶.

⁵⁴ For a comprehensive analysis of the current framework of the profit split method and the circumstances in which this method is applicable, see CHAND V., WAGH S., *The Profit Split Method: Status Quo and Outlook in Light of the BEPS Action Plan*, in *International Transfer Pricing Journal*, 2014, p. 402.

⁵⁵ MATSUBARA Y., GARCIA C., *OECD Transfer Pricing Guidelines and International Tax Law*, in HAASE F., KOFLER G. (eds), *The Oxford Handbook of International Tax Law*, Oxford, 2023, p. 539.

⁵⁶ COLLIER R. S., DYKES I. F., *The Functional Fallacy: The ALP and the Limits of the Conduct-Based Approach*, cit., p. 683.

Although the administrative court appeared to accept that certain strategic decisions could produce long-term effects capable of justifying an ongoing entitlement to profits, the reasoning did not address how such entitlement should be linked to past, as opposed to current decision-making. Nor did it engage with the broader methodological question of whether this reasoning effectively amounts to an implicit shift towards a formulaic logic in the allocation of profits under the OECD Guidelines. It is therefore understandable that Swedish scholars have expressed concern that the complex legal and methodological issues raised by Meda and other similar cases have not yet been reviewed by the Swedish Supreme Court of Appeal⁵⁷.

The Administrative Court of Appeal emphasised that, under Swedish law, a contractual assignment of risks cannot be upheld for transfer pricing purposes unless the entity to which the risks are attributed demonstrates the capacity to control and manage them in practice. This reasoning closely mirrors the OECD Guidelines' position that the delineation of controlled transactions requires a combined assessment of contractual terms and economically relevant conduct, including decision-making authority, access to information, and the ability to assume and mitigate risks.

The Court concluded that Meda AB could not be regarded as bearing full responsibility for certain operational and financial risks, notwithstanding the contractual allocation, because it did not exercise meaningful control over the relevant risk drivers. As a result, the transaction was re-characterised for transfer pricing purposes, and the allocation of profits was adjusted to reflect the subsidiary's actual functional profile and limited risk-bearing capacity. The ruling thus reinforces the idea that the arm's length outcome cannot be determined solely on the basis of contractual form, but must rest on a holistic evaluation of legal, economic and operational evidence.

More broadly, the Meda decision illustrates the structural limits of contractual autonomy in the field of international taxation. While the OECD Guidelines recognise the right of multinationals to structure their international operations as they see fit and warn tax

⁵⁷ COLLIER R. S., DYKES I. F., *The Functional Fallacy: The ALP and the Limits of the Conduct-Based Approach*, cit., p. 678.

authorities not to interfere in those business decisions⁵⁸, such autonomy loses its normative force where it conflicts with the objective of ensuring a fair and economically grounded allocation of taxable profits. Tax authorities and courts therefore retain the power to disregard or override contractual arrangements where these do not accurately reflect the functional and risk profile observed in reality.

From a doctrinal standpoint, the case provides a concrete benchmark for assessing the practical reach of the OECD's conduct-based approach to transfer pricing. It confirms that transfer pricing analysis is inherently fact-sensitive and context-dependent, and that even formally valid and consistently applied contracts may be insufficient to sustain a particular profit allocation if they are not supported by demonstrable control over risks. For both practitioners and scholars, the Meda AB case thus offers a valuable illustration of how the principles of accurate delineation and substance-over-form are operationalised at the domestic level, particularly within legal systems that formally recognise contractual primacy while simultaneously subjecting it to substantive economic scrutiny.

7. Concluding remarks

The analysis developed throughout this work has shown that the post-BEPS evolution of transfer pricing cannot be properly understood without close attention to the legal nature and interpretation of intra-group contracts. While the OECD's efforts have sought to realign profit allocation with value creation, the growing reliance on conduct as a delineating criterion has fundamentally altered the balance between contractual form and tax evaluation.

As the analysis moves away from the parties' stated intentions towards an increasingly objective reconstruction of conduct, questions arise concerning the limits of administrative discretion, the evidentiary burden placed on taxpayers, and the extent to which private agreements may legitimately be disregarded. These issues demonstrate that the conduct-based approach, while conceptually

⁵⁸ GONEN E., KARASIK L., McDONALD M., *Control Over Risk, DEMPE Functions, And the Remuneration of R&D Service Providers*, in *Tax Notes International*, 2021, p. 1620.

appealing, introduces a series of practical and theoretical challenges that remain insufficiently addressed by the OECD Guidelines.

Against this background, one of the central insights emerging from the post-BEPS framework is that the process of accurate delineation necessarily requires the prior identification of the legal and economic relationship existing between the associated enterprises. Where tax authorities consider that the relationship as described in the intra-group contract does not adequately reflect the underlying reality of the transaction, the delineation exercise effectively entails reconstructing the terms, conditions, and rights that would characterise the “actual” relationship between the parties. This task goes well beyond a mere clarification of contractual ambiguities and often involves a substantive reassessment of the structure of the transaction itself.

However, under the interpretation advanced, the extent to which contractual terms may be supplemented or displaced by reference to conduct must be assessed through a combined reading of the OECD Guidelines and the general principles governing contract law. From this perspective, such a power cannot be regarded as unlimited. General contract law principles continue to require that clear, internally consistent agreements be respected as written, allowing the implication or adjustment of contractual terms only in narrowly circumscribed situations. Accordingly, in our view, and in the absence of explicit domestic enabling provisions, the conduct-based approach endorsed by the OECD Guidelines cannot, on its own, justify a systematic departure from the legal framework that governs the formation, interpretation and binding force of contracts.

Moreover, while the OECD Guidelines increasingly rely on the notion of actual conduct as a corrective to formal contractual arrangements, they provide limited guidance on how conduct is to be translated into legally meaningful rights and obligations. The absence of a clear methodological framework for moving from observed behaviour to the identification of specific contractual features creates significant uncertainty. In practice, it remains unclear whether conduct should be understood as evidentiary support for interpreting existing contractual terms, or whether it may serve as an autonomous basis for redefining the content of the transaction altogether.

This ambiguity is particularly evident in cases where the conduct-based approach fails to conclusively establish the economically relevant conditions of the delineated transaction. Rather than clarifying the nature of the controlled transaction, the emphasis on conduct may, in certain circumstances, obscure the analysis by introducing indeterminate standards. As a result, the delineation process risks becoming an open-ended exercise in reconstruction, rather than a principled assessment grounded in identifiable elements.

Further complexity arises from the interaction between two distinct strands of the OECD guidance. On the one hand, the Guidelines acknowledge that contractual terms may need to be adjusted where they are not aligned with the parties' actual conduct. On the other hand, they also suggest that contractual features may be disregarded or modified where they diverge from those that independent parties would have agreed upon, having regard to the options realistically available to them. The relationship between these two approaches - one focused on what the parties did, and the other on what they hypothetically would have done- remains insufficiently clarified.

Taken together, these factors contribute to an increasingly uncertain transfer pricing landscape, in which the core principles governing the allocation of profits have become contested and difficult to apply with consistency. Both taxpayers and tax administrations face significant challenges in determining the standards to which they are to be held, particularly in cross-border disputes involving divergent interpretations of the OECD Guidelines.

From a broader perspective, it appears unlikely that the conduct-based approach will undergo substantial revision in the near future. As a result, the current framework is likely to remain a persistent source of controversy, litigation, and interpretative divergence. This reinforces the need for a more rigorous engagement with private law concepts in order to define the normative limits of administrative intervention and to restore a degree of legal certainty to the application of the arm's length principle in the post-BEPS era.

Towards a Framework of Tort Liability for AI: Insights from Legal Scholarship

Monika Chmielowiec

CONTENTS: 1. Introduction. – 2. The gap(s). – 3. The models. – 3.1. AI personhood. – 3.2. Fault-based liability. – 3.3. Strict liability. – 3.4. Product liability. – 3.5. Vicarious liability and agency law. – 3.6. No-fault compensation schemes. – 3.7. Mixed models. – 4. Summary.

1. Introduction

The primary goal of this contribution is to provide a structured analytical overview of ideas expressed across legal scholarship as far as harm caused by or arising from the use of artificial intelligence is concerned. Rather than advocating for a single normative solution, the work seeks to map existing theoretical and doctrinal approaches in the literature and to assess their underlying assumptions, their strengths and limitations.

Methodologically, this analysis is based exclusively on a review and synthesis of existing literature. The selection of contributions was guided by their development of conceptual, doctrinal, or regulatory arguments on the allocation of responsibility and liability for the use of AI. I excluded works where focus did not concern responsibility and liability in the legal sense. The analysis does not aim to be exhaustive, but to capture representative and influential strands of the debate to identify recurring themes and arguments.

This article contributes to the discussion regarding adequate model of tort liability for the use of AI by reviewing and systematizing the main models discussed by legal scholarship, with the aim of identifying key points of convergence, disagreement, and unresolved issues.

While being a potentially dangerous technology, using AI brings unclear risks that may be difficult to secure against, disrupting

known and understood dynamics of the world¹. AIs are designed to operate increasingly autonomously, which means that they can and will act in ways that are neither intended nor foreseeable to designers or users. Their actions can also be the result of input from multiple independent developers, rendering the identification of an entity on which to impose liability and any causal relationship necessary for such liability to attach particularly difficult. These characteristics seriously challenge traditional legal frameworks for attribution and liability, resulting in potential accountability gaps. As rightfully pointed out by van Dijk, “*the more autonomous robots will become, the less they can be considered as mere tools in the hand of humans, and the more they obtain active digital agency. In this context, issues of responsibility and liability for behavior and possible damages resulting from the behavior would become pertinent*”².

Given unique characteristics of AI, unlike any other technological regulatory subject so far, scholars ponder the feasibility of existing liability frameworks when applied in relation to AI. In *inter partes* relations, the parties enjoy the freedom to shape their relationship virtually at will within the limits prescribed by law.

Outside of the contract, however, legal entities must rely on the reasonableness and adequacy of generally applicable law – which are quite puzzling in the context of AI. “*As AIs move towards greater autonomy, existing liability rules are likely to become insufficient [...]; as technology becomes more complex and convoluted, whether it be more lines of code or more entities involved in the production process, traditional avenues of assigning responsibility will become less apparent*”³.

¹ LIU H.-Y., *The power structure of artificial intelligence*, in *Law, Innovation and Technology*, 2018, pp. 197–229.

² DIJK N., *In the hall of masks: Contrasting modes of personification*, in *Life and the Law in the Era of Data-Driven Agency*, Edward Elgar Publishing, 2020, pp. 230–251.

³ JACKSON B., *Artificial Intelligence and the fog of innovation: a deep-dive on governance and the liability of autonomous systems in Santa Clara High Technology Law Journal*, 2019, p. 35.

It should be noted that this contribution focuses exclusively on non-contractual (tort) liability arising from AI use, as indicated by the title.

2. *The gap(s)*

Ascribing responsibility serves various purposes both from a moral and a legal perspective: attributing conduct, blaming wrongdoers, imposing a duty to account or answer for what happened, punishing the guilty, preventing future harm, compensating victims, and so forth⁴. “Responsibility” is however different than “liability”. To be “liable” means to be expected to compensate for the consequences of one’s behavior⁵. While liability is closely connected to responsibility, responsibility itself does not always constitute a basis for legal liability, and liability is not always associated with any moral responsibility.

In the debate regarding how anyone could be responsible for the behavior of AI, naturally there is a regular discussion about who is liable for the events in which artificially intelligent systems are involved. Glavaničová & Pascucci (2022) argue that legal systems often lack not only the fitting bearer of legal consequences, but also a human wrongdoer: it just appears as if the AI is the “wrongdoer”. Consequently, this leads to “responsibility gaps”; situations, where no party is in fact responsible and thus – no party can be held liable for the harm suffered⁶.

Matthias (2004) points out to a dilemma: we should either renounce the use of the new technology that gives rise to the gap or renounce traditional concepts of responsibility⁷. Other authors claim that there are four different responsibility gaps associated with the use of ‘learning automata’, such as AI: a culpability gap, a

⁴ GLAVANIČOVÁ D., PASCUCCI M., *Vicarious liability: a solution to a problem of AI responsibility?*, in *Ethics and Information Technology*, 2022, vol. 24 no. 3, article 28.

⁵ CAPES J. A., *Strict morality*, in *Social Philosophy and Policy*, 2019, pp. 52–71.

⁶ GLAVANIČOVÁ D., PASCUCCI M., *Vicarious liability: a solution to a problem of AI responsibility?*, cit. p.3

⁷ MATTHIAS A., *The responsibility gap: Ascribing responsibility for the actions of learning automata*, in *Ethics and Information Technology*, 2004, pp. 175–183.

moral accountability gap, a public accountability gap, and an active responsibility gap. These gaps may potentially lead to the users of AIs ending up as ‘moral crumple zones’, compensating for the difficulty of attributing responsibility for AI outputs to upstream actors⁸.

Not all scholars agree on the existence of such gap(s)⁹. Some claim that there is no gap in “techno-responsibility”; Tigard (2021) in particular distinguishes the concept of responsibility into accountability, attributability, and answerability, rejecting a gap in the respective practices of responsibility; “*Like our accountability practices toward fellow humans, we can hold AI to account by imposing sanctions, correcting undesirable behavioral patterns acquired, and generally seeing that the target of our responses works to improve for the future - a bottom-up process of reinforcement learning*”¹⁰.

Danaher (2016) proposes the “retribution gap”, noting that the gaps in the existing regulatory infrastructure focus on liability issues that arise from robot misdeeds, but miss the potential, underlying “retribution gap”. He argues that it’s not the responsibility itself that is problematic – it’s the lack of adequate retribution for harm suffered. He notices that increasing levels of robotization make it likely that robots will be responsible for more injuries, but the robots themselves are unlikely to meet the conditions for retributive blame. There will be no appropriate and deserving subject of retributive punishment, and a “retribution gap” will arise. In turn, people will look to attach retributive blame to robots (or other associated agents who are thought to have responsibility for those robots, e.g. manufacturers/programmers) for causing harmful outcomes, but neither the robots nor the associated agents (manufac-

⁸ SANTONI DE SIO F., MECACCI G., *Four Responsibility Gaps with Artificial Intelligence: Why they Matter and How to Address them*, in *Philosophy & Technology*, 2021, pp. 1057–1084.

⁹ SAUER H., KÖHLER S., ROUGHLEY N., *Technologically blurred accountability?: Technology, responsibility gaps and the robustness of our everyday conceptual scheme*, in ULBERT C. ET AL. (EDS), *Moral Agency and the Politics of Responsibility*, Routledge, 2017, pp. 51-69.

¹⁰ TIGARD D. W., *There Is No Techno-Responsibility Gap*, in *Philosophy & Technology*, 2021, pp. 589–607.

turers/programmers) will be appropriate subjects of retributive blame for those outcomes. No appropriate and deserving subject of retributive punishment will be found. The moral and legal tests for determining who should bear the burden of harm fail to align with the reality of who is causing the actual harm¹¹.

3. *The models*

The current legal doctrine is full of opinions pointing to problems, as well as opinions proposing solutions, in relation to the abovementioned gap(s). Below I present summary of scholarly regarding possible models of liability for the use of AI.

3.1. *AI personhood*

Some scholars urge to reconceptualize intelligent and autonomous machines as entities with the status of a “person” under the law, such that AI can be held directly liable for harm – just as legal entities are¹².

Mocanu (2022) proposes a bundle theory framework – “gradient theory” – of legal personhood, which encompasses analysis of partial legal capacity and how it lends itself to being applied to AIs. She describes legal personhood as a gradient, similar to David Hume’s bundle theory of personal identity and the self, according to which “*the peculiarly complex unity or identity of the self should be interpreted in terms of constantly changing causal relations, more like the identity of a complex play than a simple material object*”¹³. She argues that such an approach might be better suited to explain at least some use cases of AIs and proposes some ideas on how a gradient theory of legal personhood could develop.

¹¹ DANAHER J., *Robots, law and the retribution gap*, in *Ethics and Information Technology*, 2016, pp. 299–309.

¹² HAGE J., *Theoretical foundations for the responsibility of autonomous agents*, in *Artificial Intelligence and Law*, 2017, pp. 255–271.

¹³ MOCANU D. M., *Gradient Legal Personhood for AI Systems—Painting Continental Legal Shapes Made to Fit Analytical Molds*, in *Frontiers in Robotics and AI*, 2022, vol.8.

Other scholars call for AI itself to be held liable for its negligence¹⁴. Some are disregarding the philosophical, technical, anthropological (“AI-thropological”?) and ethical aspects of legal personhood. Western legal traditions have developed the concept of legal personhood to taxonomize the entities that can act in law, however, being human is not a necessary condition of having legal personhood¹⁵. Legal personhood is merely a construct used to distinguish certain entities from others. Legal personhood does not have to be synonymous with anthropomorphizing of the AI. As a construct, legal personhood is certainly fictional and allowing for various adjustments in the concept, not always granting “personhood” to actual people – just like in case of corporations¹⁶. For some theorists, the value and utility of legal personhood lays mostly in its “plasticity” as a legal technique. The more “moldable” legal personhood becomes, the more it can extend its protections to prevent harms caused by naturalized identities, as in case of animal and environmental rights. Why do social systems personify non-humans, such as organizations? Such a non-human’s personification is a performative event in social interaction that constitutes the “person” as a semantic construct, compensating for the asymmetry in the human relationship with said entity¹⁷. Just like in case of corporations, we grant them legal personhood to emphasize their rights and obligations towards human actors.

However, there must be good reasons to accord them this status, and these reasons must be tailored to the specific function that the new candidate for legal personhood is meant to serve¹⁸. I could imagine a scenario where possibility to sue AIs for their own actions makes it necessary for either AI developers, AI owners or AI de-

¹⁴ SOLAIMAN S. M., *Legal Personality of Robots, Corporations, Idols and Chimpanzees: A Quest for Legitimacy*, in *Artificial Intelligence and Law*, 2017, pp. 155–179.

¹⁵ BANTEKA N., *Artificially Intelligent Persons*, SSRN Scholarly Paper, Rochester, NY, 2020, pp. 537-596.

¹⁶ VATTER M. E., DE LEEUW M., *Human Rights, Legal Personhood and the Impersonality of Embodied Life*, SSRN Scholarly Paper, Rochester, NY, 2019.

¹⁷ BECKERS A., TEUBNER G., *Three liability regimes for artificial intelligence: Algorithmic actants, hybrids, crowds*, Oxford, London, New York, New Delhi, Sydney, 2022.

¹⁸ WAGNER G., *Robot, Inc.: Personhood for Autonomous Systems?*, SSRN Scholarly Paper, Rochester, NY, 2020.

ployers to insure their AIs against potential liability, since AIs do not have any means of paying out compensation¹⁹. Nonetheless, I doubt whether there is necessity or even usefulness of such a measure. Nothing prevents the legal system from taking many objects – such as divinities, saints, temples – as attribution points and giving them legal personhood, but what’s the point? Especially if they can be protected otherwise, without socio-legal implications of granting personhood?

On the other hand, some scholars argue that an entity must be granted legal personhood by any legal system that sees legal personhood as necessary for the enforcement of legal rights²⁰. In this framework, whether a particular entity can be considered a legal person carries with it the normative question of whether this entity should be subject to certain legal rights and duties, as well as the pragmatic question of which of these rights and duties ought to be conferred on this entity to advance the purposes of the legal system²¹.

Naturally, whether AIs could be accorded some form of legal personhood, thus entering law’s ontology as legal persons, is simply a matter of decision. It is similar to qualifying AIs as “products” – there is no discovery that tipped the scale, but rather the decision of the lawmaker that solidified an approach. However, the approach of granting legal personhood to AIs is widely criticized²². In legal environment of Western civilization as of 2025, where change in the legal status of animals. It must be noted, however, that the foundation for granting legal personality to animals’ rests on their sentience and capacity for suffering, characteristics fundamentally absent in AI systems, which limits the force of this analogy. As far

¹⁹ The reality where AIs have their own assets, especially of monetary nature, is in my opinion highly unlikely. Human greed at times makes it unimaginable to share money even with other human beings, and I see very thin chances of humans wilfully sharing their treasures with AIs.

²⁰ JOWITT J., *Assessing contemporary legislative proposals for their compatibility with a natural law case for AI legal personhood*, in *AI & SOCIETY*, 2021, pp. 499–508.

²¹ BANTEKA N., *Artificially Intelligent Persons*, cit., p. 570.

²² E.g. in the Expert Group Report on Liability for Artificial Intelligence and other Emerging Digital Technologies (n 24), the Expert Group denied the necessity to adopt the notion of electronic personhood.

as AI is concerned, this analogy is “*not simply unacceptable, but rather unthinkable for many jurists*”²³. Instead of pondering potential AI personhood legislation, societies will much rather profit from deeper and robust actions focusing on rights for humans impacted by AI²⁴. I understand and see that the growing responsibility gaps confront private law as far as use of AI is concerned, however I do not agree that the legal system must either assign AI-systems an independent legal status as responsible actors or accept an increasing number of accidents without anyone being responsible for them. The specific legal treatment of AIs and the rules applicable to them do not depend on legal personhood. Developing any appropriate legal status for AIs is a matter of carefully specifying rules for their role in a socio-digital reality, and what freedom can the legal personification of AIs assume vis-à-vis their personification in different socio-digital institutions²⁵? And even if we acknowledge differential social attribution of AIs, there remains a difference in principle between its social actor status and its legal personification. Finally, given the divide between persons and nonpersons is a part of the “*deep structure of law*”²⁶, I do not think it will change anytime soon, as evidenced by EU Parliament's shift in stance from the establishment of “*electronic persons*” in 2017 to its 2020 Resolution²⁷.

Beck (2016) argues that legal personhood for AIs would in practice mean that “*each such machine would be entered in a public register (like the commercial register) and would obtain their legal status at the moment of registration. [...] A certain financial basis would be affixed to autonomous machines, depending on the area*

²³ KURKI V., *A Theory of Legal Personhood*, SSRN Scholarly Paper, Rochester, NY, 2019, pp. 1-28.

²⁴ MARSHALL B., *No legal personhood for AI*, in *Patterns*, 2023, p.3.

²⁵ BECKERS A., TEUBNER G., *Three liability regimes for artificial intelligence: Algorithmic actants, hybrids, crowds*, cit.

²⁶ TUORI K., *Critical Legal Positivism*, London, 2017, pp.163-212.

²⁷ European Parliament resolution of 20 October 2020 with recommendations to the Commission on a civil liability regime for artificial intelligence (2020/2014(INL)), OJ C 404, 6.10.2021, pp. 107–128.

of application, hazard, abilities, degree of autonomy, etc.”²⁸. However, AI personhood is unnecessary – all this may be achieved with more appropriate legal instruments – without social, philosophical and legal consequences of using (quasi)personhood. Similarly, in situations of interconnectivity of AIs, it does not make sense to grant each AI involved legal personhood.

However, if legal personhood were to be the answer to problems related to duty of care or negligence, we would first have to establish such obligations for AIs. In law, we usually determine breach of duty of care or negligent behavior by comparing the behavior in question to an appropriate normative standard. In the case of AIs – what would be the relevant comparator for an AI²⁹? Should it be another similar AI or a trained professional doctor? Trained professional seems off limits since by introducing AIs we should be aware that they use a completely different logic than humans; logic that is in no way comparable to the logic of human decision-making process. This would indeed seem like apples to oranges comparison.

Overall, recognizing AI as legal persons seems to address mainly a specific structural problem: the attribution of responsibility in cases where harm results from autonomous, self-learning, or opaque systems whose behavior cannot easily be reduced to identifiable human fault or product defect. Equipping AI with legal personhood is supposed to bypass the difficulties related to causation and distributed agency by introducing another entity that can fully „take on the blame” for the wrongdoing. However, these models leave core issues unaddressed. As far as fault attribution is concerned, these models propose detaching fault from human agency and shifting liability to another legal entity. With that attribution becomes fictional, since AI lacks moral agency and adequate standards of operation (standard of care) to be able to be considered

²⁸ BECK S., *The problem of ascribing legal responsibility in the case of robotics*, in *AI & SOCIETY*, 2016, pp. 473–481.

²⁹ HOLM S., STANTON C., BARTLETT B., *A New Argument for No-Fault Compensation in Health Care: The Introduction of Artificial Intelligence Systems*, in *Health Care Analysis*, 2021, pp. 171–188.

“at fault”. Similarly, as far as establishment of defectiveness or causation is concerned, these models do not provide new inputs.

At the same time, the introduction of AI personhood generates new conceptual and systemic difficulties. It destabilizes foundational distinctions between subjects and objects of law, raises questions concerning representation, asset segregation, insolvency, and regulatory arbitrage, and risks fragmenting existing liability structures. Structurally, these models are rather weak functionally in modern Western legal frameworks and are met with a great deal of resistance.

3.2. *Fault-based liability*

Widmer (2005) emphasizes that fault is “*the most traditional, most widespread and – apparently – most important criterion of imputation or foundation of responsibility*”³⁰. Liability for fault is applicable across the board to any human activity, be it a movement of human body, the production and operation of conventional machinery or manufacture and deployment of AI³¹.

A duty of care can be deemed central in most Member States’ fault-based liability regimes and requires adherence to a standard of reasonable care, while performing any acts that could foreseeably harm others³². While statutory law may define such duties, more often they are reconstructed by the court based on social beliefs about the prudent and reasonable course of action in the circumstances at stake.

Some legal scholars find that fault-based liability is a valid foundation for liability in case of AI. There have been proposals to implement a “reasonable” conduct standard for self-learning systems due to their resemblance to human decision-making and the potential for resultant harm. However, this solution raises a ques-

³⁰ BUSNELLI F., COMANDE G., GAGLIARDI M. in WIDMER P, KOZIOL H., *Unification of tort law: fault*, Lusanne/Berne, 2005, p. 151.

³¹ WAGNER G., *Liability Rules for the Digital Age - Aiming for the Brussels Effect*, SSRN Scholarly Paper, Rochester, NY, 2023, p. 6.

³² WERRO F., BÜYÜKSAGIS E., *The bounds between negligence and strict liability*, in *Comparative Tort Law*, Edward Elgar Publishing, 2021, pp. 186–213.

tion: what constitutes reasonable behavior for algorithms³³? Abbott (2016) ponders on an answer. He proposes to use a “reasonable computer” as a comparator, determining a standard of operation for computers. He argues that the acts of “autonomous computer tortfeasors” should be evaluated under fault-based liability regime in cases where an autonomous computer is occupying the position of a reasonable person in the traditional negligence paradigm and where automation is likely to improve safety³⁴. For practical reasons, the manufacturers and retailers should still be responsible for satisfying judgments under standard principles of product liability law. Interestingly, he states that just as computer tortfeasors should be compared to human tortfeasors, humans should be compared to computers as well, “*once computers become safer than people and practical to substitute, computers should set the baseline for the new standard of care*”³⁵. For Abbott, with such change in standard of care, people would engage in certain activities at their own peril, since this rule would mean that someone’s best efforts would no longer be sufficient to avoid liability. This in turn, according to Abbott, would benefit the general welfare.

Fraser & Suzor (2025) advocate for fault-based liability for the use of AI, emphasizing the need of conceptualizing it in ways that make sense within the legal understanding of fault and responsibility. They propose a socio-technical mental model of how AI accidents happen, and how they may be prevented, that does not focus too narrowly on what caused a specific, aberrant, harmful AI output (‘error’). Instead, they propose that fault inquiries should proceed from the understanding that AI accidents arise from a whole set of socio-technical factors, including the experience of human-computer interaction, system affordances, poorly managed relationships and culture, organizational and procedural arrangements around the development and deployment of the system in its con-

³³ CHAGAL-FEFERKORN K., *How Can I Tell if My Algorithm Was Reasonable?*, in *Michigan Technology Law Review*, 2021, pp. 213–262.

³⁴ ABBOTT R., *The Reasonable Computer: Disrupting the Paradigm of Tort Liability*, SSRN Scholarly Paper, Rochester, NY, 2016, p.4.

³⁵ ABBOTT R., *The Reasonable Computer: Disrupting the Paradigm of Tort Liability*, cit., p.5.

text of use³⁶. They explain that scholars who focus narrowly on errors – “*who and what caused the specific error, whether it was foreseeable, whether it was preventable*” – struggle to implement concepts of fault-based liability effectively. Building upon common law framework of negligence, they note that difficulties in establishing duty of care arise from a lack of control and foresight of how AI outputs and users will interact³⁷, but that does not mean that fault-based liability is impossible to establish. Seeking to locate negligence in the failure to detect or prevent harmful AI outputs simply ignores that artificial intelligence is probabilistic, meaning *some* degree of error is inevitable³⁸.

However, it is impossible to find two distinctive AIs that work the same – distinct AIs will instantiate different mathematical models, different testing, validation or calibration data, different weights and biases³⁹. Just because they work differently, does not mean one works worse than the other. Establishing a singular industry standard for duly diligent cancer diagnostic software raises the question of where that would lead to innovation. The essence of a black box is that it enables software to detect cancer accurately – even without proper understanding of the underlying mechanisms. This is also why different AIs may be excellent in diagnosing cancer while working completely differently. Thus, I believe it may be impossible to formulate genuine criteria that would facilitate the development of an AI comparator.

Rather than resorting to conceptually new theories, some authors propose introducing a predetermined, detailed and acceptable level of care (or quasi-safe harbor) for designers, manufacturers, owners and users of AI. If the standard of care is not satisfied, a presumption of negligence and, consequently, liability will arise; if satis-

³⁶ FRASER H. L., SUZOR N. P., *Locating fault for AI harms: a systems theory of foreseeability, reasonable care and causal responsibility in the AI value chain*, in *Law, Innovation and Technology*, 2025, pp. 103–138.

³⁷ BAMBAUER J., *Negligent AI Speech: Some Thoughts About Duty*, in *Journal of Free Speech Law*, 2023, p. 346.

³⁸ DESAI D. R., KROLL J. A., *Trust But Verify: A Guide to Algorithms and the Law*, in *Harvard Journal of Law & Technology*, 2017, p.21.

³⁹ HOLM S., STANTON C., BARTLETT B., *A New Argument for No-Fault Compensation in Health Care: The Introduction of Artificial Intelligence Systems*, cit., p. 180.

fied, the defendant will benefit from a quasi-safe harbor, while the claimant will have the burden of demonstrating actual carelessness. However, in the absence of obvious errors in the programming or data used to create the AI, it can be extremely difficult to identify where any fault lies, let alone point the finger at any person responsible. And this is not only legal problem – it’s a factual one. With this technology, when a harmful outcome occurs, there seriously may be no one to blame⁴⁰.

As Karnow (2016) rightfully notes, in situations where defendants have taken reasonable steps to prevent “errors”, the inevitable emergence of some unexpected error simply will not raise liability within the frames of fault-based legal regime. He explains that “*all the knowledge in the universe about all the agents and subsystems is not enough to fix the future behavior of these systems*”⁴¹. What it really means is that while it is possible to program AI to some extent, its very nature contradicts the possibility to foresee every possible outcome of its actions, and thus – prevent possible errors. Therefore, the fault-based liability may not arise even if the harm and causal link occur - simply because there may be no one to put the blame on⁴². There may be no one who could be accused of negligence, and it is simply because of the character of AIs⁴³.

Applying fault-based liability rules to AIs is difficult, because they lack well-established models of proper functioning and develop by learning without direct human control. The processes running them cannot all be measured according to duties of care designed for human conduct, an accepted standard of care for the creation and operation of autonomous systems has not emerged yet. It may

⁴⁰ RACHUM-TWAIG O., *Whose Robot Is It Anyway?: Liability for Artificial-Intelligence-Based Robots*, in University of Illinois Law Review, 2020, p.1149.

⁴¹ KARNOW C. E. A., *The application of traditional tort theory to embodied machine intelligence*, in *Robot Law*, Edward Elgar Publishing, 2016, pp. 51–77.

⁴² SELBST A. D., *Negligence and AI's Human Users*, SSRN Scholarly Paper, Rochester, NY, 2019.; YOSHIKAWA J., *Sharing the Costs of Artificial Intelligence: Universal No-Fault Social Insurance for Personal Injuries*, in *Vanderbilt Journal of Entertainment & Technology Law*, 2019, p. 1155.

⁴³ ERDÉLYI O. J., ERDÉLYI G., *The AI Liability Puzzle and a Fund-Based Work-Around*, in *Proceedings of the AAAI/ACM Conference on AI, Ethics, and Society*, New York, NY, USA, 2020, pp. 50–56.; RACHUM-TWAIG O., *Whose Robot Is It Anyway?: Liability for Artificial-Intelligence-Based Robots*, cit., p. 1167-1173.

sometimes be hard even to identify the person obliged to meet such duty of care. In fact, it could be arbitrary to assign liability for any damage caused by an AI product to the designer of the algorithm. Depending on circumstances, liability should be allocated also to other subjects or entities, such as operators, yet this is not self-evident in the case of AIs. However, according to any liability regime, tracing a damage back to a specific person is still a fundamental prerequisite for any fault-based claim⁴⁴.

Soyer & Tettenborn (2022) observed that as far as the general rule in negligence is concerned, “*there is no liability unless a human being ought to have spotted that something was wrong, gives seriously skewed results if applied unaltered [...] [W]e now have the serious possibility that even if an error would give rise to damages when committed by a human, the self-same error having the self-same effect will create no liability if committed by a smart computer or an algorithm*”⁴⁵. What I think they mean is simply that only if a person involved in the process of creating an AI is negligent, then yes, fault-based liability applies. Without negligence, however, no liability arises.

The fault paradigm presupposes a certain level of predictability and control that may not fully correspond to the dynamic and evolving operation of certain AI – especially the generative AI. Moreover, as far as fault attribution is concerned, two levels need to be separated. First, fault of the operator of an AI. On this level, autonomy and opacity of operation of AI make it difficult to trace harm back to any kind of intent or negligence on the part of a human actor. Establishing clear boundaries of duty and identifiable breach thereof is crucial and yet difficult both from the standpoint of how AI should be used and how it should operate. Thus, standard of care becomes unstable.

The second level is fault in creation of AI – for instance of a producer or an individual developer. For very similar reasons, fault

⁴⁴ MONTAGNANI M. L., NAJJAR M.-C., DAVOLA A., *The EU Regulatory approach(es) to AI liability, and its Application to the financial services market*, in *Computer Law & Security Review*, 2024, p. 105984.

⁴⁵ SOYER B., TETTENBORN A., *Artificial intelligence and civil liability—do we need a new regime?*, in *International Journal of Law and Information Technology*, 2022, pp. 385–397.

liability is hardly an appropriate response to the phenomena of complexity, openness and vulnerability of digital ecosystems, and the same holds true for their function. As far as establishment of defectiveness is concerned, some of these models may replace “defect” with breach of duty, but that nonetheless require extensive knowledge, expertise and, consequently, evidence. Problems with fault attribution still apply.

3.3. *Strict liability*

Strict liability is a widely discussed regime regarding the model of liability for the use of innovation across legal doctrine⁴⁶. Researchers argue that AI’s “black-box” nature with its unpredictability, especially in high-risk uses make fault-based liability systems unjustly unfavorable to victims. Difficulties in proving negligence or causation, elements necessary for establishing a successful cause in a fault-based legal environment, are likely to make it impossible for victims to get due compensation⁴⁷.

According to Wenderhost (2020), strict liability is an appropriate response to situations where 1) significant and/or frequent harm may occur despite the absence of any fault, or 2) fault would be so difficult for the victim to prove that requiring such proof would lead to under-compensation or inefficiency. She also proposes interesting notion of risk-based approach, where she distinguishes if strict liability is an appropriate response based on the type of risk associated with the use of technology⁴⁸. She notes that strict liabil-

⁴⁶ Among others: DE GRAAF, T., & VELDT, G., *The AI Act and its impact on product safety, contracts and liability* in *European Review of Private Law/Revue Européenne De Droit Privé/Europäische Zeitschrift Für Privatrecht*, 30(Issue 5), 2022, pp. 803–834.; BOSEK, L. *Perspektywy rozwoju odpowiedzialności cywilnej – zagadnienia wybrane odpowiedzialności za inteligentne roboty* in *Forum Prawnicze*, 2019, 2(52), pp. 3–17.

⁴⁷ DE BRUYNE J., OOMS W., *Tort Liability and Artificial Intelligence: Some Challenges and (Regulatory) Responses*, in SMUHA N. A. (ED), *The Cambridge Handbook of the Law, Ethics and Policy of Artificial Intelligence*, Cambridge, 2025, pp. 158–173.

⁴⁸ “Safety risks’ inherent in a product comprise all risks of harm that may be caused to people or to assets and values different from the relevant product itself. For example, where an autonomous vehicle hits a pedestrian, this is clearly a safety risk. By contrast, functionality risks comprise risks of the software or other product not performing properly, ie the user not getting ‘good value for money’. Thus, if the autonomous vehicle stops

ity should cover physical risks in the broader sense, as well as psychological harm that amounts to a recognized state of illness, however pure economic risks or social risks should not be easily granted. It is because if immaterial harm (or its economic consequences) is compensated through a strict liability regime where only threshold is causation, the situations where compensation is due are potentially endless; strict liability is thus only appropriate if further conditions, such as non-compliance with mandatory legal standards or some defect or malperformance, are added. That inclusion would however mean that the regime is no longer strict liability in the proper sense⁴⁹.

Wagner (2023) presents a somehow similar view. He also rejects compensation of pure economic loss (because of its present misuse in fault-based liability) and infringement of personality rights (because it requires balancing of interests). He states that use of strict liability for AI-related harm is right, however ideally this liability should be irrespective of determination of defect. He notes that by constructing product liability as duty-based, in a sense that manufacturer must compensate harm caused by product defect, and not by product itself, effectively this system is not really a system of strict liability⁵⁰. Therefore, Wagner accepts product liability regime (such as current EU law), with preference for strict-liability regime irrespective of defect in the future.

running, this is a functionality risk. Functionality risks are typically a matter of contract law and will not be dealt with in this context.", p. 161.

⁴⁹ Wendehorst provides a further example based on the EP Resolution on AI liability Recommendation for the Commission: "*For example where AI used for human resources management (assuming such AI were qualified as a 'high-risk' application) leads to a recommendation not to employ a particular candidate, and that candidate therefore suffers economic loss by not receiving the job offer, full compensation under the Proposal for a Regulation would be due even if the recommendation was absolutely well-founded and if there was no discrimination or other objectionable element involved. While some passages of the report seem to choose somewhat more cautious formulations, basically calling upon the Commission to conduct further research, Recital 16 explains very firmly that 'significant immaterial harm' should be understood as meaning harm as a result of which the affected person suffers considerable detriment, an objective and demonstrable impairment of his or her personal interests and an economic loss calculated having regard, for example, to annual average figures of past revenues and other relevant circumstances.*", p. 167.

⁵⁰ WAGNER G., *Liability Rules for the Digital Age - Aiming for the Brussels Effect*, in *Forschungsinstitut für Recht und digitale Transformation*, 2023, pp. 53-58. SSRN:

Just like Wendehorst and Wagner, Hacker (2022) proposes inclusion of rebuttable, general presumptions of defectiveness, but also fault and causality in cases involving SMEs or non-high-risk AIs⁵¹. He recommends truly strict liability as a default for high-risk AIs that should not cause harm from a social perspective. He emphasizes strict liability's role in ensuring victim compensation and incentivizing safety investments. Hacker strongly critiques the EU's reliance on fault-based mechanisms as inadequate for addressing AI's unique risks.

Botero Arcila (2024) partially agrees, stating that '*Truly strict liability should be reserved for high-risk AIs that, from a social perspective, should not cause harm (illegitimate-harm models, e.g., autonomous vehicles or medical AI). Models meant to cause some unavoidable harm by ranking and rejecting individuals (legitimate-harm models, e.g., credit scoring or insurance scoring) may merely face rebuttable presumptions of defectiveness and causality*'⁵².

There are also common lawyers who propose strict liability – for instance Henson (2024) argues for adoption of strict liability, because the dangers associated with the use of AI make it an “abnormally dangerous activity”. She proposes using the six-factor abnormally dangerous activities test after revision to fit the special challenges associated with AI; e.g. considering the inability to foresee harm, even when exercising reasonable care⁵³.

However, strict liability is not unanimously seen as ideal solution for AI. It is criticized for its potential stifle innovation, especially for SMEs⁵⁴. It is plausible to presume that the implementation of strict liability will compel several financially constrained enterprises to exit the market - some even see potential to allow

⁵¹ HACKER P., *The European AI Liability Directives – Critique of a Half-Hearted Approach and Lessons for the Future*, SSRN Scholarly Paper, Rochester, pp. 47-54.

⁵² BOTERO ARCILA B., *AI liability in Europe: How does it complement risk regulation and deal with the problem of human oversight?*, in *Computer Law & Security Review*, 2024, p. 106012.

⁵³ HENSON R., *"I Am Become Death, the Destroyer of Worlds": Applying Strict Liability to Artificial Intelligence as an Abnormally Dangerous Activity*, in *Temple Law Review*, 2024, pp. 349–390.

⁵⁴ HACKER P., *The European AI Liability Directives – Critique of a Half-Hearted Approach and Lessons for the Future*, cit., p. 51.

well-financed big-tech companies to monopolize the AI-inflicted industries⁵⁵, given their disregard for potential costs even in strict-liability legal landscape.

In sum, strict liability is portrayed as a solution to the structural weaknesses of fault-based regimes. Its primary objective is to detach liability from proof of negligence. In the AI context, strict liability seeks to address two central problems: (i) the difficulty of proving fault in complex and opaque systems, (ii) the distributed nature of AI development and deployment chains. By shifting the focus from negligence to risk creation, strict liability aims to ensure compensation, and, to a significant extent, strict liability does resolve the compensation gap.

However, strict liability may require complementary mechanisms, such as mandatory insurance, to function effectively. Without such infrastructure, strict liability merely reallocates risk without ensuring solvency or fair distribution of costs.

3.4. *Product liability*

There is a considerable amount of research about applying product liability to damages created by AI, in both state and common law alike. In the context of assigning liability for harm arising from AI technologies, product liability shifts the focus from those using or controlling the device to its producer – often requiring that the product is distributed with some inherent vice, or as European lawmaker puts it – “defect”. Simplifying, to successfully apply product liability regime, the plaintiff must prove that a product has at least one “defect”, which in fact means determining whether a defendant was negligent in manufacturing the product⁵⁶ or, as it is with European product liability regime, whether a product is non-compliant with standards set for this specific type of product, irrespective of producer’s negligence. This, in fact, resembles determi-

⁵⁵ LIOR A., *AI Strict Liability Vis-À-Vis AI Monopolization*, in *Science and Technology Law Review*, 2020, pp. 90–126.

⁵⁶ MEIER L., *Achieving True Strict Product Liability (But Not For Plaintiffs With Fault)*, in *University of Michigan Journal of Law Reform*, 2024, pp. 301–350.

nation of fault on side of the producer; some authors suggest that “defect” may in fact be considered as “fault in production”⁵⁷.

Borgetti (2019) goes even further, offering an intriguing thought experiment regarding actual fault of a robotic agent – such as AI. “Assuming, be it only for the sake of discussion, that there could be such a thing as a robot’s fault, how should this fault be characterized? [...]. A negligent robot is just a defective one”⁵⁸.

Borgetti emphasizes that, although fault-based liability could potentially be considered as an alternative to liability based on defectiveness, given the closeness of fault and defect when algorithms are at stake, it just is only some form of strict liability, not based on defect, that can offer an effective remedy to those harmed using algorithms. This is why Borgetti proposes a sector-by-sector approach as more appropriate than general liability regime, since the basis and nature of liability would then depend upon the type and the intensity of the risk that is associated with the use of specific AI.

Other scientists argue that the concept of “defect” encourages the distribution of responsibility downstream to application developers, integrators, and users, rather than upstream to the developers of foundation models or the providers of infrastructure⁵⁹. However, because of the problems with defectiveness assessment regarding AI products, some scholars have simply suggested that the defectiveness concept be abandoned altogether and replaced by a truly strict liability system⁶⁰.

Lior (2019) rejects product liability regime in case of AI – “adopting the product analogy essentially acknowledges that AI en-

⁵⁷ BUITEN M. C., *Product liability for defective AI*, in *European Journal of Law and Economics*, 2024, pp. 239–273.; DHAFFR N., ET AL., *Improvement of quality performance in manufacturing organizations by minimization of production defects*, in *Robotics and Computer-Integrated Manufacturing*, 2006, pp. 536–542.

⁵⁸ BORGETTI S. in LOHSSE S., SCHULZE R., STAUDENMAYER D., *Liability for artificial intelligence and the internet of things: Mèunster Colloquia on EU Law and the Digital Economy IV*, cit., p. 65.

⁵⁹ FRASER H. L., SUZOR N. P., *Locating fault for AI harms: a systems theory of foreseeability, reasonable care and causal responsibility in the AI value chain*, cit., p. 120.

⁶⁰ LUZAK J., *A Broken Notion: Impact of Modern Technologies on Product Liability*, in *European Journal of Risk Regulation*, 2020, pp. 630–649.

*tities, or at least the majority of them, are nothing more than toasters or fridges*⁶¹. She argues that “*products are still pieces of hardware, e.g. metal or plastic, which are rather predictable and mostly safe given their predictability, unlike AI entities which are mostly software and may behave in an erratic and unpredictable manner. Given those features, the product analogy should give way to an agent analogy, one which takes into account the basic differences between a fridge and an algorithm and their social connections to humans*”; in other words, she rejects product liability because of reasons that some authors argue are resolved by the Directive 2024/2853⁶².

Ulfbeck (2024) points out that product liability law was built around physical objects and linear supply chains and is thus unsuitable for software that is constantly evolving and opaque. He notes that “*whereas one might intuitively think that the product liability regime will come to play a vital role in an era where machines take over from humans, it may in fact be the other way around: AI may end up dissolving the very concept of product liability*”⁶³.

Moreover, as far as the very notion of “defect” is concerned, the well-known concepts of Consumer Expectations Test (CET) and Risk-Utility Test (RUT) assessments seem to fail⁶⁴. Some authors ponder on the idea that AI agents partly “design themselves”, and consequently, if there is a mistake in that designing – how can producers be held liable for planned features of their software?⁶⁵

All these issues are centered around commentators describing the EU’s reliance on product-style liability as ill-fitted to AI’s dynamic and evolving nature, arguing this choice creates “legal un-

⁶¹ LIOR A., *AI Entities as AI Agents: Artificial Intelligence Liability and the AI Respondeat Superior Analogy*, in Mitchell Hamline Law Review, 2020, p. 1056.

⁶² LIOR A., *AI Entities as AI Agents: Artificial Intelligence Liability and the AI Respondeat Superior Analogy*, cit., p. 1057.

⁶³ ULFBECK V., *Product Liability Law and AI: Revival or Death of Product Liability Law*, in LIM E., MORGAN P. (EDS), *The Cambridge Handbook of Private Law and Artificial Intelligence*, Cambridge, 2024, pp. 206–226.

⁶⁴ HACKER, P., *The European AI Liability Directives – Critique of a Half-Hearted Approach and Lessons for the Future*, cit. p.21.

⁶⁵ STAALDUINEN, J. H. VAN., *European product liability for AI-based clinical decision support systems* in: K. PRIFTI, E. DEMIR, J. KRÄMER, K. HEINE, & E. STAMHUIS (EDS.), *Information technology & law series*, 2024, pp. 15-40.

certainty” and fails to capture AI’s operational realities. As a result, concepts like defect, causation, and fault attribution break down, leaving victims under-protected.

Product liability provides a structured and relatively victim-friendly framework, offering a harmonized regime at EU level, thereby promoting legal certainty. However, the regime encounters significant limitations when applied to AI systems. First and foremost, the notion of defectiveness is rather ill-suited to the reality of AI. Complexity, openness and vulnerability of digital ecosystems may, in addition, make it difficult to identify the source of the defect, i.e. who is responsible for the defect. Second, complex causations and evidentiary barriers remain, especially where harm results from interactions between software, data inputs, and user behavior. Furthermore, product liability primarily targets producers, potentially overlooking the role of other parties in the market chain.

3.5. Vicarious liability and agency law

Supporters of vicarious liability point out that this regime reacts to the risk of a division of labor between AI user and the system itself⁶⁶. Lior (2019) advocates for the agency analogy and subsequently, the *respondeat superior* doctrine. She argues that legal analogies, fictions and metaphors (used synonymously) are helpful when unknown phenomena intersect with the law, but these analogies must have an underlying “*well-thought-out theory and correlative principle*”. Lior does not guarantee that analogies to AI agent will remain free of problems - she argues that if deficiency does not undermine the applicability of the analogy, this deficiency is manageable.

Some scholars suggest that legal subjectivity for AI could resemble the derivative, limited status given to animals⁶⁷. Others note that AI entity is like many non-human animals, as it is first deemed non-threatening but may subsequently become dangerous. Others

⁶⁶ BECKERS A., TEUBNER G., *Three liability regimes for artificial intelligence: Algorithmic actants, hybrids, crowds*, cit.

⁶⁷ WOJTCZAK S., *Endowing Artificial Intelligence with legal subjectivity*, in *AI & SOCIETY*, 2022, pp. 205–213.

explicitly note that liability rules for damage caused by animals could be applied *per analogiam* to AIs due to their unpredictability and control by humans⁶⁸.

Lior (2019) advocates for agency law solutions, but also argues that, should an analogy to animals be applied, the owner of the animal would be held accountable for any damages incurred upon its escape, irrespective of culpability. She also recognizes that analogy to either domesticated or non-domesticated animals would most likely lead to a strict liability regime when AI entities cause damages⁶⁹.

On the other hand, da Fonseca et al. (2024) argue that liability regime for damages caused by animals does not cover all issues arising with the use of AI. They argue that liability for animals does mostly not distinguish between dangers of the animal itself and dangers of the animal in context. Meanwhile, with certain AIs, the possible liability should correspond to the materialization of different dangers⁷⁰. In other words, situation 1. where the damage is the result of the materialization of dangers of the system itself and of the decision to use it in that context and for that specific purpose, is different from situation 2. where the damage is solely the result of the materialization of dangers of the system itself, which is different from situation 3. where the damage is solely the result of the materialization of decision to use the system in particular context and for specific purpose. If damage comes from both, i.e. situation 1., there should be joint and several liability of all participants in the causal process, meaning joint and several liability of both creators and users of incriminated system. If damage comes from only one of them, i.e. situations 2. or 3., only one entity should be held liable. In situation 1. – AI producer, in situation 2. – AI user. Naturally, within each group - producers or users - there may (and probably will) be several persons. In the impossibil-

⁶⁸ PAGALLO U., *The Laws of Robots: Crimes, Contracts, and Torts*, Dordrecht, 2013, pp. 115-145.

⁶⁹ LIOR A., *AI Entities as AI Agents: Artificial Intelligence Liability and the AI Respondeat Superior Analogy*, cit., pp. 1071-1076.

⁷⁰ DA FONSECA A. T., VAZ DE SEQUEIRA E., BARRETO XAVIER L., *Liability for AI Driven Systems*, in SOUSA ANTUNES H. ET AL. (EDS), *Multidisciplinary Perspectives on Artificial Intelligence and the Law*, Cham, 2024, pp. 299-317.

ity of determining the dangerousness of each individual participation and the contribution of each to the production of the damage, each potentially harmful person should answer jointly and severally for the damage. Meanwhile, the liability regime for damage caused by animals does not provide adequate coverage to all those situations.

Moreover, I also think that theoretical structure behind the analogy to animals is rather frail - and “*analogy without theory is blind*”⁷¹. The social and cultural significance of animals alongside their status is completely different from that which we attribute to AI, and I don’t think the Western legal traditions will, or should, move towards their unification.

Just like the notion of treating AI like animals *per analogiam*, vicarious liability is not unanimously accepted. Lawton et al. (2024) note that entities vicariously liable for the AI conduct may be unfairly targeted as defendants even though they might have minimal control over the AI’s design or operation, which causes the risk associated with the use of AI to be very uneven bottom - top vs top – bottom⁷². Gredka-Ligarska (2025) emphasizes that with implementation of vicarious liability, the challenge of specifying the standard of care which an autonomous AI is supposed to follow, persists. So do obligations to prove the specific wrongdoing and causal link between tortious behavior and harm, which are not only highly complicated, but also existent in fault-based regimes. ‘*Therefore, applying vicarious liability to the legal regime of employers’ liability for damage caused directly by autonomous AIs does not solve the problems existing under the currently applicable model of fault-based liability incurred by AI operators*’⁷³.

Gredka-Ligarska also rightfully notes that the idea behind vicarious liability assumes the ability to exercise real control over the actions of the worker. Meanwhile, an employer has no real possi-

⁷¹ DWORKIN R., 2 *In Praise of Theory*, in *Justice in Robes*, Harvard University Press, 2008, pp. 49–74.

⁷² LAWTON T., *Clinicians risk becoming 'liability sinks' for artificial intelligence*, in *Future Healthcare Journal*, 2024, p. 100007.

⁷³ GREDKA-LIGARSKA I., *Employer’s Vicarious Liability for Damage Caused by an AI Worker: Comparative Law Perspective* | *Utrecht Law Review*, 2025., pp. 36-48.

bility to exercise real control over autonomous AI. This means that vicarious liability can apply, but only for a tort committed by an employee (human), being the direct “operator” of the AI, and not for a tort committed directly by the AI without human involvement.

In sum, vicarious liability allocates responsibility to an entity that exercises control and oftentimes benefits from the activity. In the AI context, the model seeks to respond to the accountability gap, aiming to resolve puzzle of attribution within structured organizational settings. To a certain extent, vicarious liability provides an interesting, pragmatic solution, by alleviating fragmentation and avoidance of liability.

However, it does not fully eliminate fragmentation where multiple actors (e.g. developers, data providers, software deployers, and operators) each contribute to system design and functioning. Moreover, establishing vicarious liability would be complicated as, currently, there is no means of determining whether the AI “acted negligently” (if vicarious liability regarded AI itself) or what degree of control an AI operator should exert over an AI (if vicarious liability regarded the person operating an AI).

3.6. *No-fault compensation schemes*

In response to the challenges outlined above, part of the doctrine seeks solutions in the adoption of no-fault schemes.

Authors proposing to adapt insurance schemes to AI often point out to its resemblance of other inherently risky, but also highly beneficial new technologies, as it takes time for any innovation, “to become fully assimilated within everyday tort law”⁷⁴. Citron (2009) refers to this time as the “hyper-vigilant” stage of law’s reaction to new technologies - “after the technology’s benefits become apparent, the law abruptly reverses course, seeing its earlier awards of liability as threats to technological progress and granting sweep-

⁷⁴ WITT J. F., *Toward a New History of American Accident Law: Classical Tort Law and the Cooperative First-Party Insurance Movement*, in *Harvard Law Review*, 2001, pp. 690–841.

ing protection to the firms in the new industry”⁷⁵. During these grace periods, tort law often does not assign liability for damages to any party, be it from complete lack of law or legal uncertainty, which in turn leads to regulatory void. Insurance could help fill this void.

Some suggest perspectives based purely on private law solutions, e.g. Thomas (2017) recognizes that vaccines share many of the characteristics with AI, and just like vaccines – AI is unfit for traditional buckets of liability. He proposes applying the system of mandatory insurance (such as one of vaccine producers) to compensating patients injured by artificial intelligence. He emphasizes that one of the reasons the vaccine insurance programs work so well is that the negative outcomes from vaccines have been well documented and catalogued in a table that stipulates the various complications that can give rise to a claim.

Others seek to combine private and public law solutions. In these models, tort law and liability insurance are not alternatives - each has distinct features and characteristics but are nonetheless deeply intertwined. They emerged and evolved together. The report of Institute for law & AI emphasizes that insurance serves as a powerful catalyst for societal stability and progress, because it not only facilitates just risk-spreading, but can also send price signals that encourage responsible innovation practices that balance the benefits of automation against the risks⁷⁶.

Lior (2022), proposes to emphasize the regulatory effect of liability insurance. She notes that insurance has the power to better handle AI-inflicted damages, serving both a preventive and compensatory function, making compensation rules more predictable, while working complementarily to traditional in-court proceedings. She claims that insurance industry, with its flexibility, can change its policies in real time – as opposed to courts, which additionally may be underequipped to react to AI-posed risks. This makes insurance systems better equipped to situations in which the initial

⁷⁵ CITRON D. K., *Cyber Civil Rights*, in *Boston University Law Review*, 2009, pp.61-125.

⁷⁶ WEIL G., VAN ARSDALE S., *Insuring emerging risks from AI*, in *Institute for Law & AI*, 2024, p.25.

kinds of accidents caused by a new technology may be very different than later cases after the technology has matured and stabilized itself in the market, as well as less likely to make hasty choices that endure – unlike judiciary⁷⁷. However, Lior does not suggest substituting litigation with insurance; “*it is a complementary system to the tort system, not a replacement*”. Insurance in her account plays a role only in anticipation or after the determination of liability by the court of law. Lior is also hesitant towards compulsory insurance for all AIs. She proposes distinguishing the need for compulsory insurance based on the risk of the activity of the AI⁷⁸.

Stetler (2025) proposes a framework for “federally backed reinsurance”, taking from historical precedents in nuclear energy, terrorism risk, agricultural crop insurance, flood reinsurance, and medical malpractice. Similarly to Lior, he emphasizes the regulatory function of insurance and notices that “*the insurance industry exists to do what regulation often struggles with: price risk under uncertainty. Every policy represents an implicit judgment—what can go wrong, how often, and at what cost. This makes insurance more than just a financial hedge; it is a disciplinary mechanism. If AI developers are required to carry liability insurance for their systems, they would become accountable not only to public regulators but to private underwriters. Insurers could shape behavior by denying coverage, adjusting premiums, or excluding risky practices—tools that are often more nimble than legal mandates.*”. His three-tiered framework is designed to match a specific layer of the AI risk landscape at each tier - from frequent, distributed failures to

⁷⁷ LIOR, A., *Insuring AI: The Role of Insurance in Artificial Intelligence Regulation*, in *Harvard Journal of Law & Technology*, 2022, pp.468-530.

⁷⁸ “[...] despite legislatures’ general enthusiasm to impose compulsory insurance,³¹¹ they are unlikely to mandate the acquisition of an insurance policy for every AI entity purchased, rejecting such a policy as overbroad, invasive, and inefficient.³¹² Instead, whether insurance is voluntary or mandatory should turn on the type of AI and the activity it performs. For particularly dangerous but essential AI activities, or those that may lead to a serious market failure, insurance should be mandatory. Existing mandatory insurance policies should continue to be mandatory even when the activity they cover is handed over to AI entities. On the other hand, mandating a coercive insurance policy for Roomba vacuum cleaners is less advisable, given the low-risk nature of the activity this AI entity carries out.³¹³ Roombas can still lead to physical and property damages, but the likelihood of this occurring is far lower than with other AIs, like AVs.³¹⁴”, p. 525.

catastrophic, existential-scale events. In doing so, he combines purely private insurance schemes with public funds, subsidizing the compensation for AI-generated harm.

Stetler's solutions are designed to place responsibility on companies profiting from AI, since he recognizes that at the time being, new legal precedents are needed to shape the evolving intersection of AI and tort law – by holding holds developers liable for flawed AI decision making, as well as the use of enterprise liability, the responsibility is effectively shifted to companies profiting from AI⁷⁹.

The notions of purely publicly governed funds as no-fault compensation schemes for harms arising from AI use are relatively underexplored. Tran (2025) proposes a publicly funded, non-adversarial compensation scheme, that eliminates the need to prove fault, negligence, or product defect completely, and operates parallel to existing liability frameworks⁸⁰. The model requires that the state, by actively designing and supervising sand-box environments, becomes a “*co-producer of legal risk, and therefore bears a principled duty to provide compensation mechanisms*”. Tran claims that by utilization of a no-fault regime, evidentiary and legal challenges posed by the opacity and distributed agency of AI are alleviated, therefore reducing compliance burdens on SMEs, and calls further examination of the practical pathways for implementing a state-backed, no-fault compensation scheme.

The weakness of insurance and other alternative compensation systems has long been identified – it's the inability to deter the tortfeasor. Others note that while insurers are expected to play a socially beneficial quasi-regulatory role, they can never fully substitute for regulation⁸¹. It aligns with a lot of voices in the legal doctrine, since it has been long believed in the legal doctrine that insurance alone lacks the ability to deter conduct that causes harm, and in-

⁷⁹ STETLER N., *Reinsuring AI: Energy, Agriculture, Finance & Medicine as Precedents for Scalable Governance of Frontier Artificial Intelligence*, arXiv, 2025, p.4.

⁸⁰ TRAN H.-C., *Bridging Liability Gaps in the Age of AI: The Case for No-Fault Compensation Schemes*, in *Proceedings of the AAAI/ACM Conference on AI, Ethics, and Society*, 2025, pp. 2930–2932.

⁸¹ TROUT C., *Liability and Insurance for Catastrophic Losses: the Nuclear Power Precedent and Lessons for AI*, arXiv, 2025, p.3.

deed it sometimes creates a moral hazard that increases incentives to engage in risky conduct⁸².

Some authors even form opinions that insurance from civil liability, although fulfilling the compensatory justice goal of tort law, may lack the aspect of retributive justice and most probably will lack the aspects of corrective justice that tort law intends to apply - although I must note that these voices are irrespective of the AI factor. These scholars further argue that insurance does not force tortfeasors to internalize the costs that their tortious activities create, but rather, it insulates them from those costs, and potentially incentivize a tortfeasor to engage in risky behavior if he or she carried insurance - if tortfeasors' payments to tort victims are covered by insurance premiums, the thinking goes, tort judgments no longer serve to deter tortious conduct⁸³.

Overall, no-fault compensation schemes are designed to remedy the difficulties of proving negligence or causation by providing victims with prompt and accessible compensation irrespective of fault. They do, and thereby they enhance efficiency and victim protection.

However, they do not address functions of tort law properly, including particularly corrective and retributive justice functions. Tort law serves as a legitimate outlet for victims to satisfy their need for retributive and social justice. As such, eliminating the tort regime for personal injuries sacrifices a rather important public interest. Solution may be to incorporate mixed approaches.

3.7. *Mixed models*

Apart from the abovementioned models, there are also mixed approaches, combining various valuable perspectives as to how liability for the use of AI can be perceived. Among these, in my view, three are particularly attention-worthy due to their innovative character and useful insights they provide.

⁸² LEMANN A., *Coercive Insurance and the Soul of Tort Law*, in *Georgetown Law Journal*, 2016, p. 65.

⁸³ LEMANN A., *Coercive Insurance and the Soul of Tort Law*, cit., p. 78.

For instance, Soyer & Tettenborn (2022) propose a regime based on differentiation by harm. They categorize their scheme by reference to the claimant's interest at stake and try to match it with existing rules of tort liability. They distinguish four classes of potential claims and regimes (i) personal injury and death – strict liability; (ii) dignitary interests of natural persons – fault-based liability; (iii) damage to property - insurance; and (iv) others – fault-based liability⁸⁴.

Beckers & Teubner (2022) propose a model based on interrelations between machine behavior, socio-digital institutions and liability regimes. They distinguish three liability regimes, aiming to avoid the overgeneralizing approach, as well as the fallacy of misplaced concreteness of a sectoral approach. They distinguish liability model between categories of: (1) individual machine behavior – AIs acting autonomously; digital assistance, (2) hybrid machine behavior – AIs acting alongside with humans; human-machine association, and (3) collective machine behavior (multi-agent) – many AIs acting at once; digital interconnectivity. Each of three categories reflects different liability regime, ranging from vicarious liability, through enterprise liability up to fund liability⁸⁵.

4. Summary

This contribution has examined the principal approaches to tort liability for the use of artificial intelligence developed in contemporary legal scholarship. By systematically reviewing and categorizing existing liability models, the analysis has highlighted the key doctrinal challenges posed by AIs. The discussion demonstrates that while traditional tort law concepts retain analytical value, their application to AI-related harm often requires reinterpretation or supplementation considering the technological characteristics of AIs.

⁸⁴ SOYER B., TETTENBORN A., *Artificial intelligence and civil liability—do we need a new regime?*, cit., pp. 385–397.

⁸⁵ BECKERS A., TEUBNER G., *Three liability regimes for artificial intelligence: Algorithmic actants, hybrids, crowds*, cit., pp. 99–110.

Overall, the insights developed in this overview provide a foundation for further normative analysis and may inform future legislative, judicial, and scholarly efforts to refine tort liability regimes applicable to the use of artificial intelligence.

Consumer Safety in the Internal Market: The Harmonisation of EU Product Liability

Monika Naumovski

CONTENTS: 1. Introduction. – 2. The Development of European Consumer Policy. – 3. Product Liability Directive. – 4. Conclusion.

1. Introduction

For a long time, consumer policy did not hold formal status as an autonomous field of law within the European Union (EU). Although the founding Treaties contained the idea that a unified European market would contribute to improving citizens' living conditions, consumer protection developed gradually and primarily under the influence of external impulses – technological progress, political pressure, and high-profile scandals. The latter vividly demonstrated how quickly technological and industrial development can outpace existing regulatory frameworks and how vulnerable consumers are in conditions of mass production.

The construction of the internal market has always been accompanied, in the field of consumer law, by a tension between an economic logic promising benefit through increased competition, innovation, and lower prices, and a precautionary logic emphasising the protection of health, safety, and the environment. Since the 1970s, this tension has been reflected both in the political dynamics of EU institutions and in substantive law. The 1985 Product Liability Directive¹ revealed how challenging the reconciliation of competing interests can be. As it interferes with the delicate balance between industrial interests and consumer protection and, as an instrument of maximum harmonisation, significantly intervenes in national legal systems, it inevitably brought into focus the limitations of the EU's legal basis for such intervention.

¹ Council Directive 85/374/EEC of 25 July 1985 on the approximation of the laws, regulations and administrative provisions of the Member States concerning liability for defective products, in OJ L 210, 7.8.1985, p. 29.

Over recent decades, the regulatory context of the EU has changed fundamentally. The market for which the original rules were designed was defined in physical and material terms, but today, EU law operates in an environment of software, digital services, connected devices, and artificial intelligence systems. These developments deepen the information asymmetry between producers and users and expose the limitations of traditional concepts such as the expected safety of products; limitations that are also reflected in the case law of the Court of Justice of the European Union (CJEU).

The evolution of EU consumer policy reveals a fundamental dilemma of European integration: balancing the free movement of goods and economic growth against legitimate societal values and the expectations of citizens. Should the EU pursue citizens' welfare solely through the prism of economic growth? And to what extent is the EU allowed to regulate consumer or tort law outside the functional framework of the internal market, particularly when relying on a model of maximum harmonisation that excludes the possibility of stricter national measures?

This article examines the development of the EU's competence in the field of consumer law through a twofold analytical approach. It first traces the historical and political foundations of European consumer policy, analysing the gradual construction of the EU's legal basis for intervention in national consumer protection regimes and the role of the CJEU in shaping the notion of the European consumer. Building on this contextual analysis, the article proceeds to critically assess the effectiveness of the 1985 Product Liability Directive, focusing both on its substantive design and on the political compromises that characterised its adoption, with particular attention to its function as an instrument of maximum harmonisation. In light of the recent revision of the Directive, which extends its scope to digital products and related services and introduces new mechanisms addressing evidentiary problems, the analysis explores the implications of the expanded role of the product liability regime. The article concludes by identifying the shortcomings and structural realities of the existing approach.

2. The Development of European Consumer Policy

2.1. The Historical Origins of Consumer Protection in EU Law

Consumer protection in the EU did not emerge as an autonomous policy area but rather as a by-product of the construction of the internal market and the need for consumer confidence in its functioning.² In the early development of European Community law, the consumer was conceived as an indirect beneficiary of market integration, rather than as a subject of independent rights. Although the 1957 Treaty of Rome³ scarcely mentioned consumers, it was based on the assumption that an integrated market would indirectly benefit consumers through increased competition, greater choice, and lower prices.⁴ In the absence of an explicit legal basis for consumer policy,⁵ the Community's early initiatives were developed primarily within the technical framework of standardisation and remained largely outside the sphere of political attention.⁶ As a result, European consumer protection evolved for a long time in a sectoral and fragmented manner,⁷ situated between technical standards on the one hand, and broader objectives relating to safety and public health on the other.

The rise of mass consumption in the 1960s and 1970s, together with the development of increasingly complex technologies, exposed the limits of existing national regulatory frameworks. Food

² SCHWARTZ D. J., *Loose Teeth in European Union Consumer Protection Policy: The Injunction Directive and the Mass Default Scenario*, in *Georgia Journal of International and Comparative Law*, 2000, p. 528.

³ Treaty establishing the European Economic Community and the Treaty establishing the European Atomic Energy Community.

⁴ WEATHERILL, S., *Consumer Policy*, in: CRAIG, P., DE BÚRCA, G. (eds.), *The Evolution of EU Law*, Oxford University Press, 2021, p. 874; MICKLITZ, H.-W., WEATHERILL, S., *Consumer Policy in the European Community: Before and After Maastricht*, in *Journal of Consumer Policy*, 1993, p. 285, 287.

⁵ MICKLITZ, H.-W., WEATHERILL, S., *Consumer Policy in the European Community: Before and After Maastricht*, cit., p. 291; MAIER L., *Institutional Consumer Representation in the European Community*, in *Journal of Consumer Policy*, 1993, p. 356.

⁶ EUROPEAN PARLIAMENTARY RESEARCH SERVICE (EPRS), *Study: The European Parliament and the Origins of Consumer Policy*, 2024, p. 1, 2.

⁷ OUYANG J. J., *“Embedded Consumer”*: Towards Constitutional Reframing of the Legal Image of Consumers in EU Law, in *Journal of Consumer Policy*, 2024, p. 407.

and industrial scandals, such as the Baumol baby powder (1952),⁸ the Thalidomide tragedy (1960–1962),⁹ and later the Talc de Morhange incident (1972),¹⁰ demonstrated that consumers were often unable to assess the safety of products they used on a daily basis due to structural information asymmetries. These events served as a catalyst for the development of the first comprehensive EU consumer protection policies, intended to apply across the internal market rather than being limited to specific categories of products.¹¹

A turning point was marked by the Cassis de Dijon judgement (1979),¹² in which the CJEU for the first time acknowledged that insufficient consumer protection could itself jeopardise the functioning of the internal market.¹³ The Commission had already articulated this understanding in its 1975 Preliminary Programme for a Consumer Protection and Information Policy,¹⁴ which recognised consumers as an autonomous legal category and identified five fundamental consumer rights.¹⁵ The Programme was based on the

⁸ Baumol baby powder disaster caused the deaths of approximately 80 children in France in 1952 after arsenic contamination during manufacturing. COULOMB B., *Television at the Crossroads of the History of Consumption and Health: The Morhange Talc Affair (1972–1981)*, in *VIEW Journal of European Television History and Culture*, 2020, p. 1-2.

⁹ The Thalidomide disaster (late 1950s–1960s) involved a pharmaceutical product prescribed to pregnant women which caused severe congenital disabilities in thousands of children across Europe and beyond. VARGESSON N., *Thalidomide-induced Teratogenesis: History and Mechanisms*, in *Birth Defects Research Part C: Embryo Today*, 2015, p. 140-141.

¹⁰ The Morhange talc affair (1972) concerned the accidental contamination of baby powder with excessive quantities of hexachlorophene during manufacturing, leading to the deaths of 36 children in northern France and exposing the serious health risks associated with mass-produced consumer goods. COULOMB B., *Television at the Crossroads of the History of Consumption and Health: The Morhange Talc Affair (1972–1981)*, cit., p. 1-2.

¹¹ EPRS, *Study: The European Parliament and the Origins of Consumer Policy*, cit., p. 1, 16-17; WEATHERILL, S., *Consumer Policy*, cit., p. 874.

¹² Judgment of the Court of 20 February 1979, *Rewe-Zentral AG v Bundesmonopolverwaltung für Branntwein*, Case C-120/78.

¹³ The importance of CJEU and its history in giving force to the mandate for the Member States to implement directives indicates a possible predisposition toward interpreting the duties of the Member States in this area in a very pro-consumer way. SCHWARTZ D. J., *Loose Teeth in European Union Consumer Protection Policy: The Injunction Directive and the Mass Default Scenario*, cit., p. 548.

¹⁴ Council Resolution of 14 April 1975 on a preliminary programme of the European Economic Community for a consumer protection and information policy, in OJ C 92, 25.4.1975, p. 1.

¹⁵ These are: protection and assistance, redress against damage, information, education, representation and consultation. SCHWARTZ D. J., *Loose Teeth in European*

recognition that technological progress, increasingly complex production chains, and the cross-border relocation of industry had altered the balance of power between consumers and producers in local markets and deepened informational asymmetry between suppliers and users.¹⁶ In this context, the Commission also identified the need for a specific regime of product liability. The proposal for the Product Liability Directive, adopted in 1985, constituted a landmark regulatory development, as it introduced strict liability of manufacturers for damage caused by defective products. Although its legal basis remained formally linked to the internal market, it was evident from the outset that the substantive content of the Directive was strongly consumer oriented.¹⁷

From the mid-1980s onwards, the Commission's policy documents increasingly linked consumer policy to the strengthening of confidence in the internal market.¹⁸ The primary objective was to ensure the effective enforcement of existing rules. After 1992, consumer policy gradually began to expand as a more autonomous policy field, increasingly connected to environmental protection, sustainable development and consumer information. Nevertheless, its legislative scope remained limited and was largely focused on the enforcement and consolidation of measures already adopted.¹⁹

Union Consumer Protection Policy: The Injunction Directive and the Mass Default Scenario, cit., p. 531; AUSTGULEN M. H., *Understanding National Preferences in EU Consumer Policy: A Regime Approach*, in *Journal of Consumer Policy*, 2020, p. 767.

¹⁶ WEATHERILL, S., *Consumer Policy*, cit., p. 880-881; EPRS, *Study: The European Parliament and the Origins of Consumer Policy*, cit., p. 6, 38.

¹⁷ MICKLITZ, H.-W., WEATHERILL, S., *Consumer Policy in the European Community: Before and After Maastricht*, cit., p. 291-292. This consumer policy document was strongly based on a rationale of weaker party protection. OUYANG J. J., "Embedded Consumer": *Towards Constitutional Reframing of the Legal Image of Consumers in EU Law*, cit., p. 397.

¹⁸ For instance, the new Consumer Action Programme for 1999-2001 defines the protection of the consumer's economic interest as a top priority. SCHWARTZ D. J., *Loose Teeth in European Union Consumer Protection Policy: The Injunction Directive and the Mass Default Scenario*, cit., p. 527, 554.

¹⁹ The Action Programme (1996-1998) emphasised the importance of consumer education and information, as well as the links between consumer policy and environmental and development policies. The subsequent Action Programme (1999-2001) put forward that EU consumers policy should ensure that consumer interests are equitably reconciled with those of other stakeholders, including those of businesses. Strategic documents up to 2006 maintained a similar orientation, focusing on fewer new directives, greater emphasis on the effective enforcement of existing rules, and the integration of consumer policy into

With the adoption of the Maastricht Treaty,²⁰ the EU formally acquired a legal basis for the adoption of consumer-oriented measures. However, the development of consumer policy continued to rely predominantly on regulatory mechanisms designed to facilitate the functioning of the internal market. At the same time, the tension between innovation-driven market integration and a precautionary regulatory approach, accompanied by increasing awareness of the importance of consumer protection, did not disappear, but instead became a structural feature of European regulation.²¹

In the early 2000s, the EU adopted a more comprehensive strategic approach in this field. The 2002–2006 Consumer Policy Strategy²² clearly identified three core objectives: a high common level of consumer protection, effective enforcement of existing rules, and the involvement of consumer organisations in the EU policy-making process. Although EU interventions in national consumer protection laws were generally based on minimum harmonisation, this period marked the beginning of a shift towards maximum harmonisation, intended to ensure uniform standards of protection and to reduce barriers to cross-border trade. As this approach simultaneously excludes the possibility of stricter national rules, it became crucial that the European standard itself be sufficiently ambitious.²³

The Consumer Policy Strategy 2007-2013²⁴ introduced an integrated approach based on three pillars: empowering consumers,

a broader social and technological context. WEATHERILL, S., *EU consumer law and policy*, Cheltenham, 2005, p. 26-28; OUYANG J. J., “*Embedded Consumer*”: *Towards Constitutional Reframing of the Legal Image of Consumers in EU Law*, cit., p. 398.

²⁰ Treaty on European Union, in OJ C 191, 29.7.1992, p. 1.

²¹ WEATHERILL, S., *Consumer Policy*, cit., p. 882; SCHWARTZ D. J., *Loose Teeth in European Union Consumer Protection Policy: The Injunction Directive and the Mass Default Scenario*, cit., p. 527-528; AUSTGULEN M. H., *Understanding National Preferences in EU Consumer Policy: A Regime Approach*, cit., p. 768. Consumer protection became secondary to market building. OUYANG J. J., “*Embedded Consumer*”: *Towards Constitutional Reframing of the Legal Image of Consumers in EU Law*, cit., p. 399. This is also emphasised in: Communication from the Commission: A European Consumer Agenda – Boosting Confidence and Growth, COM(2012) 225 final, Section 2.

²² Communication from the Commission to the European Parliament, the Council, the Economic and Social Committee and the Committee of the Regions - Consumer Policy Strategy 2002-2006, in OJ C 137, 8.6.2002, p. 2.

²³ WEATHERILL, S., *EU consumer law and policy*, cit., p. 26-28.

²⁴ Communication from the Commission to the Council, the European Parliament and the European Economic and Social Committee - EU Consumer Policy Strategy

enhancing consumer welfare, and effectively protecting consumers from risks which they cannot adequately address independently. This approach was subsequently institutionalised by Regulation (EU) No 254/2014²⁵, which, through the multiannual programme for the period 2014–2020, explicitly placed the empowered consumer at the centre of the internal market.²⁶ This trajectory has been further reinforced by the 2018 New Deal for Consumers package²⁷; 2020 New Consumer Agenda Strengthening consumer resilience for sustainable recovery²⁸ laying out the strategy for EU consumer policy from 2020 to 2025, and most recently the 2030 Consumer Agenda and Action Plan for consumers in the single market entitled “*A new impulse for consumer protection, competitiveness and sustainable growth*”.²⁹

The historical development of European consumer law confirms a shift from narrowly economically driven harmonisation towards a broader understanding that a stable internal market also requires a high level of product safety and effective consumer protection.³⁰ In

2007-2013 - Empowering consumers, enhancing their welfare, effectively protecting them, COM/2007/0099 final.

²⁵ Regulation (EU) No 254/2014 of the European Parliament and of the Council of 26 February 2014 on a multiannual consumer programme for the years 2014-20 and repealing Decision No 1926/2006/EC, in OJ L 84, 20.3.2014, p. 42.

²⁶ It also identified five priority objectives: improved market monitoring, more effective protection, enforcement and redress, consumer education, and the integration of consumer interests into all other EU policies.

²⁷ It seeks to modernise legislative instruments, strengthen the enforcement of existing rules, enhance cross-border cooperation, and address emerging challenges such as the problem of “dual quality” products.

²⁸ COM/2020/696 final.

²⁹ It was adopted on 19 November 2025 and laid down a new strategic framework for EU consumer policy that sets out concrete priorities and actions for the next five years. COM(2025) 848 final.

³⁰ In preparation for the Single Market, the Commission recognized that its acceptance by consumers depended on ensuring a level of consumer protection comparable to that in the most advanced Member States. MAIER L., *Institutional Consumer Representation in the European Community*, cit., p. 357. Consumer confidence was thus framed as a precondition for the proper functioning of the internal market, and the Commission expressly stated that “[t]he interests of consumers must be taken into account in the same way as those of other economic actors.” Draft Proposal for a Decision of the European Parliament and of the Council Establishing a General Framework for Community Activities in Favour of Consumers, COM(97) 684 final, p. 2. This approach has been described by some authors as the instrumentalization of consumers in the service of market integration. OUYANG J. J.,

the early stages of European integration, the prevailing paradigm was one of innovation-driven regulation, based on the belief that technological progress and market competition would, in themselves, improve product quality and safety, thereby justifying minimal regulatory intervention. By the 1970s, however, it had become evident that this approach was creating new risks, prompting the rise of a precautionary logic that emphasises the protection of health, safety, the environment, and fundamental consumer interests.³¹

2.2. Normative Development: From Article 100 of the Treaty of Rome to Article 114 TFEU

The legal foundations of EU consumer policy and the product liability regime developed within the broader process of building the internal market. Although the EU did not possess an explicit competence to adopt measures in the field of consumer protection prior to 1993, legislative harmonisation rapidly became its de facto regulatory instrument on the basis of Article 100 of the Treaty of Rome, which allowed for the approximation of laws where divergences between national rules impeded the functioning of the common market.³²

EU consumer policy did not emerge as a coherent and systematic body of rules; rather, it developed gradually and indirectly through mechanisms of functional spillover.³³ Sector-specific interventions were driven by divergent objectives and institutional logics, resulting in a fragmented regulatory landscape. As a result, some directives intervene primarily in public law, while others operate within private law; some pursue objectives related to health and safety,

“Embedded Consumer”: *Towards Constitutional Reframing of the Legal Image of Consumers in EU Law*, cit., p. 397.

³¹ EPRS, *Study: The European Parliament and the Origins of Consumer Policy*, cit., p. 38; WEATHERILL, S., *Consumer Policy*, cit., p. 881; PELIKÁNOVÁ, R. M., *Harmonization of the protection Against Misleading Commercial Practices: Ongoing Divergences in Central European Countries*, in *Oeconomia Copernicana*, 2019, p. 241.

³² EPRS, *Study: The European Parliament and the Origins of Consumer Policy*, cit., p. 20; MICKLITZ, H.-W., WEATHERILL, S., *Consumer Policy in the European Community: Before and After Maastricht*, cit., p. 295; MAIER L., *Institutional Consumer Representation in the European Community*, cit., p. 357.

³³ WEATHERILL, S., *Consumer Policy*, cit., p. 881.

whereas others focus on economic interests; some prohibit specific practices, while others rely on regulatory techniques such as mandatory information disclosure.³⁴ Within this evolving framework, harmonisation served a dual function: it aimed, on the one hand, to remove regulatory differences obstructing the free movement of goods and services and, on the other, to introduce progressively common standards of consumer protection across the internal market.³⁵

The evolution of EU consumer protection law gained significant momentum with the introduction of Article 100a by the 1986 Single European Act, which enabled the adoption of harmonisation measures — including in the field of consumer law — by qualified majority voting rather than unanimity.³⁶ This institutional shift, later reinforced by the Maastricht Treaty, represented an important

³⁴ EU consumer protection operates through a combination of private law and public law instruments. Among private law directives, prominent examples include Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts, in OJ L 95, 21.4.1993, p. 29; Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market and amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No 2006/2004 of the European Parliament and of the Council, in OJ L 149, 11.6.2005, p. 22; Directive 98/6/EC of the European Parliament and of the Council of 16 February 1998 on consumer protection in the indication of the prices of products offered to consumers, in OJ L 80, 18.3.1998, p. 27 and in 1985 Product Liability Directive. Alongside these, public law instruments - such as product safety legislation and sector-specific measures concerning food, package travel, timeshare arrangements and related consumer markets - play a significant role. More recently, digital platform regulation has introduced strong public enforcement components, notably: Regulation (EU) 2022/1925 of the European Parliament and of the Council of 14 September 2022 on contestable and fair markets in the digital sector and amending Directives (EU) 2019/1937 and (EU) 2020/1828 (Digital Markets Act), in OJ L 265, 12.10.2022, p. 1 and Regulation (EU) 2022/2065 of the European Parliament and of the Council of 19 October 2022 on a Single Market For Digital Services and amending Directive 2000/31/EC (Digital Services Act), in OJ L 277, 27.10.2022, p. 1. WEATHERILL, S., *EU consumer law and policy*, cit., p. 247-248; DE ELIZALDE F., *Fragmenting Consumer Law Through Data Protection and Digital Market Regulations: The DMA, the DSA, the GDPR, and EU Consumer Law*, in *Journal of Consumer Policy*, 2025, p. 358, 376.

³⁵ WEATHERILL, S., *EU consumer law and policy*, cit., p. 11-12.

³⁶ MICKLITZ, H.-W., WEATHERILL, S., *Consumer Policy in the European Community: Before and After Maastricht*, cit., p. 295. Until the Maastricht Treaty was signed, the Council declaration of 1975 was considered the Consumer Charter of the Community. MAIER L., *Institutional Consumer Representation in the European Community*, cit., p. 358. After 1987, Article 100a became the central legal basis for the adoption of such measures. WEATHERILL, S., *EU consumer law and policy*, cit., p. 11.

development for consumers, as it facilitated more effective legislative action at Union level.

In 1993, the Maastricht Treaty, through the introduction of Article 129a, recognised consumer protection as a shared EU policy and established an explicit legal basis for action in this field. At the same time, it also formally incorporated the principle of subsidiarity into EU law,³⁷ thereby reshaping the debate on the scope of Union competence in consumer protection. Despite these developments, legislative measures continued to rely predominantly on the market legal basis now contained in Article 114 of the Treaty on the Functioning of the European Union (TFEU).³⁸ As a consequence, consumer legislation remained structurally embedded within the logic of internal market integration rather than developing as a fully autonomous policy field.

Although EU law significantly intervenes in national legal systems, its influence is by no means unlimited. EU primary law retains distinct intergovernmental features and lays down the constitutional foundations of the Union. Secondary law — such as regulations and directives — and the case law of the CJEU, although supranational in character, must remain fully consistent with primary law. The principle of subsidiarity requires that the EU acts only within the limits of the competences conferred upon it and only where the objectives pursued cannot be sufficiently achieved by the Member States acting individually.³⁹

³⁷ SCHWARTZ D. J., *Loose Teeth in European Union Consumer Protection Policy: The Injunction Directive and the Mass Default Scenario*, cit., p. 527; GIBSON L., *Subsidiarity: The Implications for Consumer Policy*, in *Journal of Consumer Policy*, 1993, p. 323.

³⁸ Consolidated versions of the Treaty on European Union and the Treaty on the Functioning of the European Union Protocols Annexes to the Treaty on the Functioning of the European Union Declarations annexed to the Final Act of the Intergovernmental Conference which adopted the Treaty of Lisbon, signed on 13 December 2007, in OJ C 202, 7.6.2016, p. 1.

³⁹ This limitation became apparent in the context of the proposal for the 1985 Product Liability Directive; Council Directive 85/577/EEC of 20 December 1985 to protect the consumer in respect of contracts negotiated away from business premises, in OJ L 372, 31.12.1985, p. 31 (now incorporated into Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on consumer rights, amending Council Directive 93/13/EEC and Directive 1999/44/EC of the European Parliament and of the Council and repealing Council Directive 85/577/EEC and Directive 97/7/EC of the European Parliament and of the Council, in OJ L 304, 22.11.2011, p. 64), and other pre-Maastricht legislative initiatives. See WEATHERILL, S., *EU consumer law and policy*, cit., p. 12–13, 17–20; RISSO,

In some instances, given the broad wording of Article 114 TFEU, the connection between regulatory measures and the objective of improving the functioning of the internal market has appeared tenuous, particularly where EU action has intervened in national consumer protection regimes. Where the market justification appeared weak, this gave rise to concerns about EU competence, Member States' autonomy⁴⁰ and compliance with the principles of conferral and subsidiarity. As early as 1990, in its three-year Action Plan for Consumer Policy in the EEC,⁴¹ the Commission emphasised that: "*Practical consumer policy must be effectively managed in the Member States on an ongoing basis with the management and control of safety, information and redress being adapted in each instance to local needs. It would be unrealistic to undertake such tasks continuously at a Community level*".⁴² This reflects the division of competences between the EU and the Member States, as well as the operation of the principle of subsidiarity.⁴³

Also, in connection to the Article 114 TFEU, the CJEU made it clear in the landmark judgement in Tobacco Advertising that it does not give a general competence, as any measure adopted on that basis must genuinely improve the conditions for the establishment or functioning of the internal market.⁴⁴

In practice, however, subsidiarity has more frequently been invoked as a political argument rather than operating as a genuine legal constraint on integration. During the 1990s, several Member States relied on subsidiarity to oppose EU consumer legislation, prompting

G., *Product Liability and Protection of EU Consumers: Is it Time for Serious Reassessment*, in *Journal of Private International Law*, 2019, p. 214–215.

⁴⁰ Although the Maastricht Treaty introduced an explicit consumer policy competence, the internal market legal basis remained the main one for adopting consumer protection measures. WEATHERILL, S., *EU consumer law and policy*, cit., p. 4, 249-250.

⁴¹ COM/90/98FINAL.

⁴² PELIKÁNOVÁ, R. M., *Harmonization of the protection Against Misleading Commercial Practices: Ongoing Divergences in Central European Countries*, cit., p. 242; MICKLITZ, H.-W., WEATHERILL, S., *Consumer Policy in the European Community: Before and After Maastricht*, cit., p. 305.

⁴³ The scope and intensity of EU-level legislation are constrained by the principle of subsidiarity. SCHWARTZ D. J., *Loose Teeth in European Union Consumer Protection Policy: The Injunction Directive and the Mass Default Scenario*, cit., p. 545.

⁴⁴ Judgment of the Court (Grand Chamber) of 12 December 2006, *Federal Republic of Germany v European Parliament and Council of the European Union*, Case C-380/03, para. 24.

the Commission to withdraw or amend several proposals in areas such as food labelling, the liability of service providers and comparative advertising.⁴⁵ Despite concerns that reliance on subsidiarity might reduce the EU's contribution to consumer policy and create regulatory gaps, most key consumer protection measures were nonetheless adopted, indicating that subsidiarity has not, in practice, significantly curtailed EU legislative activity.⁴⁶ The Commission also pointed to the inconsistency between Member States' rhetoric on the need to respect subsidiarity and their actual conduct in the Council, where they frequently supported more centralised regulatory solutions.⁴⁷

The CJEU has responded to this development by gradually elaborating stricter criteria for the use of Article 114 TFEU. In its judgments *Tobacco Advertising I and II*⁴⁸ and *British American Tobacco*,⁴⁹ the Court emphasised that a measure may be based on Article 114 TFEU only where it genuinely contributes to the

⁴⁵ However, subsidiarity is not a politically neutral principle. As practice has shown, certain Member States - notably Germany and the United Kingdom - have invoked subsidiarity as a means of resisting or limiting EU consumer protection initiatives, using it as a shield against deeper harmonisation. SCHWARTZ D. J., *Loose Teeth in European Union Consumer Protection Policy: The Injunction Directive and the Mass Default Scenario*, cit., p. 546.

⁴⁶ Besides argument for Member States' inaction, Community institutions have also been criticized for hiding behind the shield of subsidiarity, historically especially there was lack involvement in action to improve consumer access to justice and redress for disputes concerning cross-border purchases of defective goods and services. GIBSON L., *Subsidiarity: The Implications for Consumer Policy*, cit., p. 337. The changes introduced by the Lisbon Treaty in this field do have consequences, but these are predominantly political and procedural in nature (ex ante control, ex post subsidiarity review) rather than resulting in far-reaching judicial developments. HUYSMANS M., VAN DEN BRINK T., VAN GRUISEN P., *Subsidiarity Ex Ante and Ex Post: From the Early Warning System to the Court of Justice of the European Union*, in *Journal of Common Market Studies*, 2023, p. 744, 757.

⁴⁷ WEATHERILL, S., *EU consumer law and policy*, cit., p. 15-16, 21-23. On formation of national preferences and negotiating positions see also: AUSTGULEN M. H., *Understanding National Preferences in EU Consumer Policy: A Regime Approach*, cit., p. 768.

⁴⁸ Judgment of the Court of 5 October 2000, Federal Republic of Germany v European Parliament and Council of the European Union, Case C-376/98, para. 84; Judgment of the Court (Grand Chamber) of 12 December 2006, Federal Republic of Germany v European Parliament and Council of the European Union, Case C-380/03.

⁴⁹ Judgment of the Court of 10 December 2002, *The Queen v Secretary of State for Health, ex parte British American Tobacco (Investments) Ltd and Imperial Tobacco Ltd.*, Case C-491/01.

establishment or functioning of the internal market. The mere existence of differences between national laws is not sufficient; such differences must give rise to actual or potential obstacles to trade. At the same time, the CJEU has recognised the legitimacy of preventive harmonisation where there is a likelihood that obstacles to trade or distortions of competition may emerge in the future, provided that the legislation is specifically designed to prevent such foreseeable barriers.⁵⁰

Over the past decade, however, the Commission has increasingly promoted maximum harmonisation as the central approach to EU consumer policy. This marks a departure from the historical compromise of the 1980s, under which the EU sets minimum standards of consumer protection while allowing Member States to maintain or introduce more stringent rules. A shift towards maximum harmonisation entails a comprehensive transfer of regulatory competence to the EU level and excludes the possibility for individual Member States to adopt higher standards of consumer protection.⁵¹ While this approach offers legal predictability for industry and lower compliance costs, it simultaneously raises the broader question of whether harmonised EU-level protection can provide a sufficiently effective response to consumer protection concerns in all areas, even when compared with more context-sensitive national approaches.

2.3. *The concept of (reasonable) consumer*

EU consumer policy was originally developed on the assumption that an integrated and competitive market would, in itself, optimise consumer welfare. The CJEU, when reviewing national measures restricting the free movement of goods and services, played a

⁵⁰ WEATHERILL, S., *Consumer Policy*, cit., p. 882-884. Judgment of the Court of 5 October 2000, Federal Republic of Germany v European Parliament and Council of the European Union, Case C-376/98, para. 49, 84; Judgment of the Court (Grand Chamber) of 12 December 2006, Federal Republic of Germany v European Parliament and Council of the European Union, Case C-380/03, para. 24; Judgment of the Court of 10 December 2002, The Queen v Secretary of State for Health, ex parte British American Tobacco (Investments) Ltd and Imperial Tobacco Ltd., Case C-491/01, para. 60.

⁵¹ WEATHERILL, S., *EU consumer law and policy*, cit., p. 25-26.

significant role in shaping the image of the consumer as a rational market participant who benefits from economic liberalisation.⁵²

Over time, however, it became apparent that the European consumer does not constitute a single, coherent legal concept, but rather a multifaceted and context-dependent figure. While EU consumer policy frequently invokes the concept of “average” or “reasonable consumer,”⁵³ the reality of consumer markets remains inherently heterogeneous.⁵⁴ Consumers range from highly informed and prudent actors to vulnerable or less informed individuals who may be misled by the accessibility and complexity of modern products.⁵⁵ When confronted with the question of which consumer the CJEU is actually protecting, it has increasingly become clear that the model of a single average consumer is not entirely realistic.⁵⁶

⁵² OUYANG J. J., “*Embedded Consumer*”: *Towards Constitutional Reframing of the Legal Image of Consumers in EU Law*, cit., p. 396; WEATHERILL, S., *EU consumer law and policy*, cit., p. 245-246.

⁵³ The notion of the average consumer has been defined as a person who is reasonably well informed and reasonably observant and circumspect. Judgment of the Court of 16 July 1998, Gut Springenheide GmbH and Rudolf Tusky v Oberkreisdirektor des Kreises Steinfurt – Amt für Lebensmittelüberwachung, Case C-210/96, para. 31; Directive concerning unfair business-to-consumer commercial practices, Recital 18; Judgment of the Court (Fifth Chamber) of 14 November 2024, Compass Banca SpA v Autorità Garante della Concorrenza e del Mercato (AGCM), Case C-646/22, para. 52–56.

⁵⁴ Ouyang emphasises that although the direct application of the average consumer standard is most visible in the context of combating unfair commercial practices, it has permeated the broader design of European consumer law, fostering the presumption that consumers are highly homogeneous. This constructed image of the consumer has contributed to the development of legal instruments primarily aimed at safeguarding economic interests, as they only want to search for lower prices and better bargains in the marketplace. OUYANG J. J., “*Embedded Consumer*”: *Towards Constitutional Reframing of the Legal Image of Consumers in EU Law*, cit., p. 398.

⁵⁵ WEATHERILL, S., *Consumer Policy*, cit., p. 887-888.

⁵⁶ In cases such as: Judgment of the Court of 7 March 1990, GB-INNO-BM v Confédération du Commerce Luxembourgeois, Case C-362/88; Judgment of the Court of 26 November 1981, Gerhard Züchner v Bayerische Vereinsbank AG, Case C-172/80, and Judgment of the Court of 11 July 1996, Commission v France, Case C-265/95, the CJEU treated national measures invoking consumer protection as obstacles to trade incapable of justifying derogations from the principle of the free movement of goods. Similarly, in Judgment of the Court of 2 February 1994, Verband Sozialer Wettbewerb eV v Clinique Laboratoires SNC and Estée Lauder Cosmetics GmbH, Case C-315/92, and Judgment of the Court of 6 July 1995, Verein gegen Unwesen in Handel und Gewerbe Köln e.V. v Mars GmbH, Case C-470/93, the Court limited the application of national rules premised on a more protective conception of the consumer than that recognised under EU law. By contrast, in Judgment of the Court of 7 August 2018, Karel de

In the early phase, EU law operated primarily in a deregulatory manner, and the case law of the CJEU reflected this orientation, portraying the consumer, in the context of free movement, as a rational and well-informed actor capable of navigating market choices. On the other hand, with the judgement *Cassis de Dijon*,⁵⁷ the CJEU recognised that the functioning of the internal market may also be undermined by an insufficient level of consumer protection and thereby opened regulatory space for legitimate reliance on safety, health, and consumer protection as grounds capable of justifying departures from full liberalisation.⁵⁸ This diversity is further compounded by differences in national cultural and regulatory traditions, which the CJEU has acknowledged as influencing consumer behaviour.⁵⁹

Grote – Hogeschool Katholieke Hogeschool Antwerpen VZW v Thomas, Case C-147/16, para. 59; and Judgment of the Court of 3 September 2015, *Costea v SC Volksbank România SA*, Case C-110/14, para. 27, the CJEU emphasised that the consumer's weaker position derives from asymmetries in information, expertise, or bargaining power. This understanding is also reflected in Article 5(3) of the Directive concerning unfair business-to-consumer commercial practices and in Recital 34 of the Directive on consumer rights. WEATHERILL, S., *Consumer Policy*, cit., p. 880-881, 887-888, 890; WEATHERILL, S., *EU consumer law and policy*, cit., p. 1-20; OUYANG J. J., "*Embedded Consumer*": *Towards Constitutional Reframing of the Legal Image of Consumers in EU Law*, cit. p. 398, 407; AUSTGULEN M. H., *Understanding National Preferences in EU Consumer Policy: A Regime Approach*, cit., p. 793-794. Case law of CJEU also shows that consumers may also exercise rights relating to national procedural law, enforcing EU norms through litigation. Judgment of the Court of 27 June 2000, *Océano Grupo Editorial SA v Roció Murciano Quintero and Others*, Joined Cases C-240/98 to C-244/98; Judgment of the Court of 26 October 2006, *Elisa María Mostaza Claro v Centro Móvil Milenium SL*, Case C-168/05; Judgment of the Court of 14 March 2013, *Mohamed Aziz v Caixa d'Estalvis de Catalunya, Tarragona i Manresa (Catalunyacaixa)*, Case C-415/11. In some cases, even triggering the invalidation of EU acts. Judgment of the Court of 6 October 2015, *Maximillian Schrems v Data Protection Commissioner*, Case C-362/14; Judgment of the Court of 16 July 2020, *Data Protection Commissioner v Facebook Ireland Ltd and Maximillian Schrems*, Case C-311/18.

⁵⁷ Judgment of the Court of 20 February 1979, *Rewe-Zentral AG v Bundesmonopolverwaltung für Branntwein*, Case C-120/78.

⁵⁸ WEATHERILL, S., *EU consumer law and policy*, cit., p. 58, 60. Judgment of the Court of 20 February 1979, *Rewe-Zentral AG v Bundesmonopolverwaltung für Branntwein*, Case C-120/78, para. 14.

⁵⁹ Judgment of the Court of 4 February 1980, *Commission v United Kingdom*, Case 170/78, para. 21, 22; Judgment of the Court of 12 March 1987, *Commission v Germany*, Case 178/84, para. 47, 48, 49; Judgment of the Court of 8 March 2001, *Gourmet International Products AB v Konsumentombudsmannen*, Case C-405/98, para. 39, 41.; Judgment of the Court of 10 February 2009, *Commission v Italy*, Case C-110/05, para. 63-69; Judgment of the Court of 4 June 2009, *Åklagaren v Mickelsson and Roos*, Case C-142/05, para.36, 40, 44.

This complexity complicates the application of a uniform standard. By applying EU law across diverse national regulatory and cultural contexts on the implicit assumption that consumers possess a certain level of competence and market awareness, there is a risk that, in constructing its own model of the consumer, the EU renders regulatory protection merely formal or even illusory where that model does not adequately reflect market realities.⁶⁰ The tension between competing conceptions of the consumer is particularly visible in the field of product liability. The EU product liability regime introduces strict liability based on the existence of a defect and the level of safety that may legitimately be expected, rather than on the conduct of the producer. The underlying rationale is clear: the consumer is conceived as a structurally weaker party, unable to understand or control complex production processes or technological risks. Strict liability is therefore intended to shift the burden of risk from the individual consumer to the producer, who is better positioned to prevent harm and distribute costs.⁶¹ In this sense, product liability law appears to embody the protective paradigm of EU consumer law — one that recognises structural vulnerability rather than rational market autonomy.

Yet this protective logic is mediated through the so-called consumer expectations test. A product is defective if it does not provide the safety that a person is entitled to expect, taking all circumstances into account. This raises uncertainties as to whose expectations should be decisive - those of the average consumer, a technologically informed user, or a person without specific knowledge — and whether the test is based on actual or normative (legitimate) expectations. As a result, the content of the standard is largely shaped by national courts on a case-by-case basis, taking into account specific social and technological contexts.⁶² Courts thus effectively

⁶⁰ OUYANG J. J., “*Embedded Consumer*”: *Towards Constitutional Reframing of the Legal Image of Consumers in EU Law*, cit., p. 404.

⁶¹ LUNDMARK, T., *The Restatement of Torts (Third) and the European Product Liability Directive*, in *Journal of International Law and Practice*, 1996, p. 263-265.

⁶² For detailed report on thirteen European legal systems see: SILVA, M., FAIRGRIEVE, D., RAJNERI, E., KEIRSE, A., MACHNIKOWSKI, P., BORGHETTI, J., GARCÍA, P., SCHMON, C., ULBECK, V., VALLONE, V., ZECH, H., *Relevance of Risk-benefit for Assessing Defectiveness of a Product: A Comparative Study of Thirteen European Legal Systems*, in *European Review of Private Law*, 2021.

determine what consumers are entitled to expect, whether in terms of cost-efficient safety features, non-negligent manufacturing, or mere compliance with the producer's specifications.⁶³

These difficulties are amplified in cases involving complex or novel technologies where consumers often lack sufficient knowledge to form meaningful safety expectations. Despite the Commission's position that practical problems related to this have not been identified,⁶⁴ the CJEU held in the Boston Scientific case⁶⁵ that proof of a potential defect may suffice when an increased risk is inherent in an entire batch of medical devices, without requiring the individual claimant to demonstrate a specific malfunction of their own device.⁶⁶ The relativisation of strict evidentiary requirements in this case is particularly noteworthy given the very low incidence of defects within the product series at issue,⁶⁷ while the Court refrained from defining precise conditions for establishing the existence of such a potential defect.⁶⁸ Moreover, in contrast to earlier cases in which the CJEU relied on the safety expectations of the public at large, the Court in this instance expressly limited the relevant safety

⁶³ HENDERSON, J. A., TWERSKI, A. D., *What Europe, Japan, and Other Countries Can Learn from The New American Restatement of Products Liability*, in *Texas International Law Journal*, 1999, p. 16–17; POWERS, W. JR., *A Modest Proposal to Abandon Strict Products Liability*, in *University of Illinois Law Review*, 1991, p. 653–654.

⁶⁴ RISSO, G., *Product Liability and Protection of EU Consumers: Is it Time for Serious Reassessment*, cit., p. 222–223.

⁶⁵ Judgment of the Court (Fourth Chamber) of 5 March 2015, *Boston Scientific Medizintechnik GmbH v AOK Sachsen-Anhalt – Die Gesundheitskasse and Betriebskrankenkasse RWE*, Joined Cases C-503/13 in C-504/13.

⁶⁶ CJEU held that, regarding pacemakers and defibrillators, safety requirements are particularly high. See BERGKAMP, L., *Is There a Defect in the European Court's Defect Test? Musings about Acceptable Risk*, in *European Journal of Risk Regulation*, 2015, p. 310–312. Judgment of the Court (Fourth Chamber) of 5 March 2015, *Boston Scientific Medizintechnik GmbH v AOK Sachsen-Anhalt – Die Gesundheitskasse and Betriebskrankenkasse RWE*, Joined Cases C-503/13 in C-504/13, para. 42.

⁶⁷ In the case of pacemakers, no malfunctions had been detected for up to 44 months of use, and as of January 2006 the defect rate amounted to only 0.88% out of approximately 28,000 devices. Regarding defibrillators, only four cases of malfunction were confirmed among 46,000 devices, without any resulting injury to patients. BERGKAMP, L., *Is There a Defect in the European Court's Defect Test? Musings about Acceptable Risk*, cit., p. 321–322.

⁶⁸ One possible answer would be that all products within the series posed an unacceptably high risk of failure, particularly given that they were medical devices.

expectations to the users of the devices themselves, thereby raising the applicable safety standard.⁶⁹

It may thus be concluded that EU law does not operate, in practice, on the basis of a single, uniform notion of the consumer, but rather through multiple consumer figures shaped by specific regulatory objectives, institutional dynamics, and historical contingencies. The result is a system that must repeatedly determine which “reasonable” consumer it seeks to protect, and by what means. This question becomes increasingly significant in the context of digital risks, particularly in the field of product liability.

3. *Product Liability Directive*

The 1985 Product Liability Directive represented the first comprehensive European framework establishing a regime of strict liability for producers for damage caused by defective products. It was adopted on the basis of former Article 100 of the Treaty of Rome (now Article 114 TFEU) with the aim of eliminating disparities between national civil liability regimes that distorted competition and impeded the free movement of goods, whilst simultaneously ensuring a high level of consumer protection.

The lengthy legislative process leading to its adoption between 1976 and 1985 revealed profound divergences between national tort law systems and the reluctance of Member States to transfer regulatory competences in this field to the Community level. As a result, the Product Liability Directive embodies a series of political compromises and establishes a structurally hybrid European liability regime.

⁶⁹ Moreover, the CJEU’s ruling in *Boston Scientific* is of particular significance, as the Court held that a producer may be liable for the costs of replacing devices belonging to a product series affected by a potential defect” even in the absence of an explicit statutory obligation to recall the products. Under this interpretation, a mere field safety notice, even if it does not formally require replacement, may amount to an implicit acknowledgment of a potential defect and thus trigger an obligation to reimburse replacement costs. BERGKAMP, L., *Is There a Defect in the European Court’s Defect Test? Musings about Acceptable Risk*, cit., p. 321–322. Judgment of the Court (Fourth Chamber) of 5 March 2015, *Boston Scientific Medizintechnik GmbH v AOK Sachsen-Anhalt – Die Gesundheitskasse and Betriebskrankenkasse RWE*, Joined Cases C-503/13 in C-504/13, para. 38, 52, 54.

3.1. Competence to Adopt the Directive

The accompanying documents to the original proposal for the 1985 Product Liability Directive indicate that the question of EU competence in the field of product liability was primarily a political one. In 1985, that is, prior to the entry into force of the Maastricht Treaty, consumers were mentioned in the legal order of the European Communities only indirectly, namely in a limited number of provisions of the Treaty of Rome relating to the common agricultural policy, competition, and State aid. None of these provisions, however, contained a comprehensive strategy for consumer protection, as consumers were predominantly conceived as passive beneficiaries of market integration rather than as autonomous subjects of regulatory concern.⁷⁰

Article 100 of the Treaty of Rome also served as the legal basis for the adoption of the 1985 Product Liability Directive. While the Directive was formally framed as an internal market harmonisation measure, its substantive content was unmistakably consumer-oriented. It introduced a regime of strict liability for producers and thereby a consumer-friendly redistribution of risk, intended to bridge the informational and evidentiary asymmetries inherent in damage caused by mass-produced goods and to facilitate the effective enforcement of claims in technically complex cases.⁷¹ In this sense, the Directive represented not merely an approximation of national laws, but a structural intervention into national tort systems, recalibrating private law relationships in favour of injured consumers. The political sensitivity of such intervention contributed to the fact that the legislative procedure lasted almost a decade.

The initial proposal of the Product Liability Directive in 1976 envisaged a uniform regime of strict liability intended to establish a new European standard. During the nine-year legislative process, however, this ambition was progressively diluted by political compromises, as opponents criticised the Commission's proposal for

⁷⁰ WEATHERILL, S., *Consumer Policy*, cit., p. 881.

⁷¹ WEATHERILL, S., *EU consumer law and policy*, cit., p. 138.

introducing an entirely new system of liability that allegedly exceeded the powers conferred by Article 100 of the Treaty of Rome.⁷²

Within the European Parliament, the Committee on the Environment supported the original proposal, whereas the Committee on Legal Affairs and the Committee on Economic Affairs raised concerns regarding the questionable EU competence. They argued that insufficient evidence had been provided to demonstrate that divergences between national liability regimes distorted competition, and that the proposal went beyond harmonisation by introducing a new liability system rather than approximating existing national rules. Both committees requested additional empirical evidence, which the Commission was unable to supply; they therefore voted against the initial proposal.⁷³

A political compromise was eventually reached, allowing the Commission to proceed with the Directive while granting the European Parliament decisive influence over several key substantive elements. Consumer organisations repeatedly warned that an initially ambitious proposal, conceived as a cornerstone of consumer protection, was gradually transformed into an instrument aligned with industrial interests.⁷⁴ Producers of agricultural products, craftsmen, and creators of artistic works were excluded from the scope of the draft proposal, while the development risks defence was

⁷² STAPLETON J., *Bugs in Anglo-American Products Liability*, in *South Carolina Law Review*, 2002, p. 1231-1232.

⁷³ The Committee on Economic and Monetary Affairs concluded that the Commission had failed to provide sufficient empirical data, making it impossible to assess either the impact of regulatory divergences or the expected increase in costs, in particular insurance costs. The Committee further warned that the proposed regime could impose a disproportionate burden on craftsmen and small and medium-sized enterprises. The Committee on Legal Affairs, for its part, found that the Commission was not merely harmonising common elements of national regimes but was instead introducing a new and more stringent European liability regime. In its view, this went beyond the purpose of the legal basis relied upon and this led to doubts as to the legitimacy of such an intervention in national systems of tort law. In its concluding resolution, the Committee on Legal Affairs merely stated that the proposed directive does not meet the requirements of Article 100 and cautioned that the establishment of a new European regime alongside existing national systems would only increase legal uncertainty and reduce transparency for consumers. EPRS, *Study: The European Parliament and the Origins of Consumer Policy*, cit., p. 20–21.

⁷⁴ EPRS, *Study: The European Parliament and the Origins of Consumer Policy*, cit., p. 21, 24-25.

simultaneously introduced. On this basis, the Committee on Legal Affairs substantially revised its position and concluded that Article 100 of the Treaty of Rome constituted an appropriate legal basis.⁷⁵

From the foregoing, it may be concluded, that for the EU to exercise regulatory competence in a specific field, such intervention must not only be legally justified but also politically acceptable, particularly in areas characterised by highly diverse national tort law traditions.⁷⁶ The revised Product Liability Directive,⁷⁷ applicable to products placed on the market after 9 December 2026, once again brings into focus questions concerning the scope of EU competence, especially in light of the available data regarding the practical effectiveness of the 1985 Product Liability Directive.

3.2. Effectiveness of the 1985 Product Liability Directive

As previously noted, the 1985 Product Liability Directive, although formally grounded in market integration, was driven by a distinctly consumer-oriented rationale. The European Commission envisaged that product liability claims would serve as a principal mechanism for compensating harm caused by defective products. However, political compromises in the wording of the Directive,

⁷⁵ The necessity of reaching a political compromise in some cases is further illustrated by the failed proposal for a Directive on the liability of service providers in 1990, which encountered strong political resistance. In that context, the principle of subsidiarity - invoked particularly by regulated professions - was successfully relied upon. The Commission withdrew the proposal in 1994 because the necessary amendments would have deprived it of its purpose and announced a shift towards sector-specific initiatives. To date, however, the EU has not adopted a comprehensive regime governing liability for services, which illustrates both the political sensitivity of the field and the significant divergence between the regulation of goods and the regulation of services. WEATHERILL, S., *EU consumer law and policy*, cit., p. 147; EPRS, *Study: The European Parliament and the Origins of Consumer Policy*, cit., p. 20–21; 22–25.

⁷⁶ WEATHERILL, S., *Consumer Policy*, cit., p. 893. On the fact that subsidiarity is essentially a political rather than a legal concept see also: GIBSON L., *Subsidiarity: The Implications for Consumer Policy*, cit., p. 329, 332, 340.

⁷⁷ Directive (EU) 2024/2853 of the European Parliament and of the Council of 23 October 2024 on liability for defective products and repealing Council Directive 85/374/EEC, in OJ L 2024/2853, 18.11.2024.

combined with implementation difficulties, significantly diluted the originally envisaged liability regime.⁷⁸

Four decades later, product liability litigation in Europe remains relatively rare, notwithstanding the difficulty of precisely quantifying the number of cases across Member States.⁷⁹ The impact assessments underpinning the revision of the Directive indicate that consumers are not significantly better positioned as a result of harmonisation and do not experience an equivalent level of protection, owing to geographical disparities in enforcement practices and expectations regarding compliance by manufacturers and sellers with product safety rules.⁸⁰ The 1985 Product Liability Directive has therefore succeeded in establishing a stable framework for the allocation of costs and benefits for businesses; however, from the consumer

⁷⁸ Concerns about a potential increase in insurance premiums were, however, already dispelled in 1979, when the European Committee of Insurances informed the Commission that its members would be able to offer adequate insurance coverage without a significant increase in production costs. EPRS, *Study: The European Parliament and the Origins of Consumer Policy*, cit., p. 22; WEATHERILL, S., *EU consumer law and policy*, cit., p. 141–142; WEATHERILL, S., *Consumer Policy*, cit., p. 893; HOWELLS, G. G., *The Relationship Between Product Liability and Product Safety: Understanding a Necessary Element in the European Product Liability through a Comparison with the U.S. Position*, in *Washburn Law Journal*, 2000, p. 306–307; SCHMIT, J. T., *Factors Likely to Influence Tort Litigation in the European Union*, in *The Geneva Papers on Risk and Insurance – Issues and Practice*, 2006, p. 226–242.

⁷⁹ Although the exact number of claims is difficult to determine, as highlighted by several studies, the available evidence indicates that the volume of product liability claims remains low. Report from the Commission to the European Parliament, the Council and the European Economic and Social Committee on the application of the Council Directive on the approximation of the laws, regulations, and administrative provisions of the Member States concerning liability for defective products (85/374/EEC), 2018, p. 4. Between 2000 and 2016, studies across the EU identified a total of 798 cases, corresponding to an average of approximately 30 to 50 cases per year across the then 28 Member States. Directorate-General for Internal Market, Industry, Entrepreneurship and SMEs, *Evaluation of Council Directive 85/374/EEC on the approximation of laws, regulations and administrative provisions of the Member States concerning liability for defective products – Final report*, 2018, p. 21–22. The Lovells Report of 2003 presents survey findings suggesting a perceived increase in litigation following 1985; however, it does not provide concrete data on actual litigation trends. SCHMIT, J. T., *Factors Likely to Influence Tort Litigation in the European Union*, cit., p. 305. See also number of cases in selected Member States: European Commission, *Impact assessment study on the possible revision of the Product Liability Directive (PLD) 85/374/EEC: Final report*, 2022, p. 205–206.

⁸⁰ Eurobarometer 2006, <<https://europa.eu/eurobarometer/surveys/detail/441>>, p. 85–86.

perspective, those costs and benefits are not distributed evenly across Member States, sectors, or categories of products.⁸¹

The limited effectiveness of the Directive may be attributed to several factors. The evidentiary burdens placed on claimants, together with other structural shortcomings, have rendered this harmonised instrument largely unattractive for injured parties in practice.⁸² The limitations on legally recoverable damage under the regime (e.g., the EUR 500 threshold for property damage⁸³ and the exclusion of damage to the defective product itself) may further explain this outcome.

A further key compromise in the adoption of the 1985 Product Liability Directive was the inclusion of the development risk defence. By allowing producers to be exempt from liability for non-discoverable defects — namely defects that could not have been detected at the time the product was placed on the market given the state of scientific and technical knowledge — the defence reflects a fundamental regulatory choice: who should ultimately bear the risks of technological development, producers or consumers? Although Member States were formally permitted to exclude this defence, few were willing to do so, as no State wished to place its producers at a competitive disadvantage.⁸⁴ The political economy of the Directive

⁸¹ Report from the Commission to the European Parliament, the Council and the European Economic and Social Committee on the application of the Council Directive on the approximation of the laws, regulations, and administrative provisions of the Member States concerning liability for defective products (85/374/EEC), 2018, p. 6.

⁸² WAGNER, G., *Next Generation EU Product Liability – For Digital and Other Products*, in *Journal of European Tort Law*, 2024, p. 172; SPACONE, A. C. *Strict Liability in the European Union - Not a United States Analog*, in *Roger Williams University Law Review*, 2000, p. 355.

⁸³ Certain shortcomings, such as the EUR 500 threshold, have been addressed by the revised Product Liability Directive.

⁸⁴ For example, the development risk defence places the burden of undiscoverable defects on the consumer. The controversy surrounding the development risk defence is addressed in the European Commission's Final Report. Impact assessment study on the possible revision of the Product Liability Directive (PLD) 85/374/EEC: Final report, 2022, p. 79–81. Its problematic nature has also been highlighted by some authors. MACHNIKOWSKI, P., *The Principles of European Tort Law and Product Liability*, in *Journal of European Tort Law*, 2024, p. 42; WAGNER, G., *Next Generation EU Product Liability – For Digital and Other Products*, cit., p. 194; LI, S., FAURE, M., *The Revised Product Liability Directive: A Law and Economics Analysis*, in *Journal of European Tort Law*, 2024, p. 165–166; WEATHERILL, S., *Consumer Policy*, cit., p. 893; WEATHERILL, S., *EU consumer law and policy*, cit., p. 141-142, 145-146.

thus tilted the balance in favour of industry, and the resulting compromise proved so politically sensitive that it remained largely untouched in subsequent reform cycles.⁸⁵

In addition to substantive legal ambiguities, high evidentiary hurdles further deter injured parties from resorting to product liability litigation. Claimants must establish the existence of a defect, damage and the causal link between the defect and the damage — issues that typically require technical expertise, complex assessments, considerable time, and substantial financial resources.⁸⁶ Although the regime is formally based on liability without fault, the concept of defect — defined by reference to the level of safety that may legitimately be expected — introduces uncertainty regarding the application of a uniform standard across different types of defects, particularly in cases involving complex products or situations where user expectations are not clearly established.⁸⁷

Had the 1985 Product Liability Directive fulfilled the Commission's original objective of becoming the primary remedial

⁸⁵ Following the adoption of the Directive, the five periodic reports of the Commission on its implementation consistently reiterated that the Directive strikes an appropriate balance of interests. WEATHERILL, S., *Consumer Policy*, cit., p. 893–894. In its assessments, the Commission emphasised that the removal of the development risk defence could potentially discourage innovation, as manufacturers might face difficulties in obtaining insurance and be exposed to unmanageable liability costs. At the same time, the Commission acknowledged that empirical evidence on the actual impact of this defence remains extremely limited. WEATHERILL, S., *EU consumer law and policy*, cit., p. 141–142.

⁸⁶ SPACONE, A. C. *Strict Liability in the European Union - Not a United States Analog*, cit., p. 346; STAPLETON, J., *Bugs in Anglo-American Products Liability*, cit., p. 1226, 1246, 1254; LIU, J., *Two Roads Diverged in Yellow Wood: the European Community Stays on the Path to Strict Liability*, in *Fordham International Law Journal*, 2004, p. 1952–1953; GEISTFELD, M., *Products Liability*, 2009, p. 288.

⁸⁷ Nor does the legislative background to the adoption of the Product Liability Directive provide clear guidance as to the content of the safety expectations test, beyond the European Commission's view that the standard is to be understood as objective. SPACONE, A. C. *Strict Liability in the European Union - Not a United States Analog*, cit., p. 355; HOWELLS, G. G., MILDRED, M., *Is European products liability more protective than the Restatement (Third) of Torts: Products liability?*, in *Tennessee Law Review*, 1998, p. 985, 994; DE BRUYNE, J., WANNES, O., *Tort Liability and Artificial Intelligence Some Challenges and (Regulatory) Responses*, in *The Cambridge Handbook of the Law, Ethics and Policy of Artificial Intelligence*, 2025, p. 170; HACKER, P., *The European AI Liability Directives – Critique of a Half-Hearted Approach and Lessons for the Future*, 2022, p. 47; LUNDMARK, T., *The Restatement of Torts (Third) and the European Product Liability Directive*, cit, p. 255.

instrument for consumers, its economic impact could have been substantial, given that already in 2019, the market size of the industries covered by the Directive amounted to EUR 2.25 trillion in gross value added, according to the Commission's impact assessment.⁸⁸

The revised Product Liability Directive addresses several of the aforementioned structural obstacles by introducing mechanisms intended to make product liability claims more accessible and attractive to consumers. Notably, it removes the EUR 500 threshold for property damage, which had constituted a significant barrier to individual claims, and introduces rules designed to alleviate evidentiary burdens. In light of its expanded scope to include digital products and related technologies, the future impact of the revised framework may exceed initial expectations, provided that the newly introduced mechanisms effectively enhance practical access to justice.⁸⁹ Moreover, the availability of collective redress mechanisms under Directive on representative actions⁹⁰ may further strengthen the enforceability of product liability claims, particularly in cases involving low-value or mass harm, where individual litigation would otherwise be economically irrational.

⁸⁸ Impact assessment study on the possible revision of the Product Liability Directive (PLD) 85/374/EEC: Final report, 2022, p. 17–19, 82, 224. Private consumption accounted for 52.8 % of the EU GDP in September 2025. CEIC DATA, *EU Private Consumption: % of GDP*, 2024 <[⁸⁹ In 2016, the European Commission estimated that the number of devices connected to the Internet of Things in the EU would increase from approximately 1.8 billion in 2013 to nearly 6 billion by 2020. Advancing the Internet of Things in Europe: Accompanying the communication “Digitising European Industry – Reaping the full benefits of a Digital Single Market”, 25.5.2016, COM\(2016\) 288 final, p. 7. Even these projections have since been exceeded. Mordor Intelligence Research & Advisory, 2024, *Europe Digital Transformation Size & Share Analysis – Growth Trends & Forecasts \(2025–2030\)* <\[. On the problem of inefficient enforcement of consumer law and the perception of Member States see: AUSTGULEN M. H., *Understanding National Preferences in EU Consumer Policy: A Regime Approach*, cit., p. 780.\]\(https://www.mordorintelligence.com/industry-reports/europe-digital-transformation-market\)](https://www.ceicdata.com/en/indicator/european-union/private-consumption--of-nominal-gdp#:~:text=European%20Union%20Private%20Consumption%20accounted%20for%2052.8%20%25,2025%2C%20with%20an%20average%20share%20of%2055.4%20%25.>></p></div><div data-bbox=)

⁹⁰ Directive (EU) 2020/1828 of the European Parliament and of the Council of 25 November 2020 on representative actions for the protection of the collective interests of consumers and repealing Directive 2009/22/EC, OJ L 409, 4.12.2020, p. 1.

3.2.1. *Maximum Harmonisation – An Obstacle to Stronger National Consumer Protection?*

One of the key strategic dilemmas of contemporary EU consumer policy concerns the relationship between minimum and maximum harmonisation. For many years, the paradigm of minimum harmonisation prevailed, permitting Member States to maintain or introduce stricter national rules where they deemed the European standard insufficiently protective. However, in response to increasing regulatory fragmentation and growing obstacles to cross-border economic activity, the EU has gradually shifted towards maximum harmonisation as a means of establishing uniform rules and enhancing legal certainty within the internal market.⁹¹

The sensitivity of this development should not be underestimated. Where maximum harmonisation is employed, the regulatory autonomy of Member States is significantly curtailed, and EU legislation effectively recalibrates the balance between internal market integration and national approaches to public interest protection.

Member States' positions on maximum harmonisation are far from uniform, as they are shaped by differences in legal traditions, regulatory structures, levels of existing consumer protection, political systems, and underlying economic interests.⁹² In areas traditionally situated at the core of national civil law regimes, harmonisation may interfere with long-established regulatory traditions and deeply embedded conceptions of public interest protection. States with more protective domestic frameworks often resist full harmonisation

⁹¹ This shift was not merely doctrinal but structurally conditioned: the more developed and diverse national consumer legislation became, the more difficult it was to establish supranational standards. Extensive national regulation, while beneficial domestically, complicated the harmonisation process at European level by increasing the political and legal costs of convergence. WEATHERILL, S., *EU consumer law and policy*, cit., p. 245-246; MAIER L., *Institutional Consumer Representation in the European Community*, cit., p. 358.

⁹² Eastern European countries traditionally had mostly been in favour of full harmonization, but the position for some countries, such as the Czech Republic, is no longer as solid as it used to be, "because sometimes it goes too far, even for us"; the Netherlands stated that they in principle are in favour of full harmonization as it is important for achieving a true single market, but that it is difficult to achieve a high enough standard. For more detailed report see: AUSTGULEN M. H., *Understanding National Preferences in EU Consumer Policy: A Regime Approach*, cit., p. 781 ff.

for fear of downward adjustment of national standards, whereas others may support uniform rules as a means of strengthening market integration or compensating for weaker domestic regimes.⁹³ Even where governments endorse maximum harmonisation in principle for the sake of the Single Market, they may face political constraints in justifying any perceived reduction in protection to domestic constituencies.⁹⁴ At the same time, maximum harmonisation restricts their ability to maintain or introduce higher standards, leaving recourse to legislative change at EU level as the only — often politically demanding — avenue.⁹⁵

The 1985 Product Liability Directive was among the earliest examples of maximum harmonisation in the field of consumer protection. The CJEU has consistently confirmed in its case law that, in areas governed by the Directive, Member States may neither introduce nor maintain a stricter regime of liability, save for pre-existing special liability schemes.⁹⁶ In practice, however, the 1985 Product Liability Directive has functioned less as a coherent regime of full harmonisation than as a mosaic of divergent national interpretations and transposition approaches, reinforced by a relatively limited body of case law.⁹⁷ Besides that, in its recent decision in the *Sanofi Pasteur* case, the CJEU explained that Article 13 of the 1985 Product Liability Directive also permits Member States to maintain fault-based liability regimes, provided that such regimes are grounded not solely in the existence of a defect, but in the producer's conduct such as

⁹³ WEATHERILL, S., *Consumer Policy*, cit., p. 887; AUSTGULEN M. H., *Understanding National Preferences in EU Consumer Policy: A Regime Approach*, cit., p. 784

⁹⁴ AUSTGULEN M. H., *Understanding National Preferences in EU Consumer Policy: A Regime Approach*, cit., p. 781-782.

⁹⁵ WEATHERILL, S., *Consumer Policy*, cit., p. 888.

⁹⁶ Judgment of the Court (Fifth Chamber) of 25 April 2002, *María Victoria González Sánchez v Medicina Asturiana SA*, Case C-183/00, para. 24; Judgment of the Court (Fifth Chamber) of 25 April 2002, *Commission of the European Communities v French Republic*, Case C-52/00; Judgment of the Court (Fifth Chamber) of 25 April 2002, *Commission of the European Communities v Hellenic Republic*, Case C-154/00; WEATHERILL, S., *EU consumer law and policy*, cit., p.143.

⁹⁷ The regime contains gaps regarding recourse claims, non-pecuniary damage, causation, and the assessment of damages, and allows for optional provisions, as a result of which differences between the Member States remain significant. RISSO, G., *Product Liability and Protection of EU Consumers: Is it Time for Serious Reassessment*, cit., p. 210-212, 215.

retaining a product on the market despite knowledge of risks or failing to exercise due care.⁹⁸

This indicates that, if consumers are to be afforded comprehensive protection and effective compensation, liability for damage caused by defective products can no longer be regarded as confined to a self-contained and fully harmonised strict liability regime. Instead, it operates within a complementary framework in which strict product liability interacts with contractual remedies and fault-based duties of care imposed on producers.

3.2.2. *The Revised Product Liability Directive*

Contemporary products, such as digital goods, software, and artificial intelligence systems, illustrate how information asymmetry, operational complexity, and a lack of transparency undermine traditional market-corrective mechanisms. This reopens the fundamental question of whether market forces alone can ensure the safe use of emerging technologies, or whether a precautionary legislative approach is required, a question that lies at the core of the interpretation and future application of the revised product liability framework.

The 2022–2024 revision of the Product Liability Directive constitutes the most comprehensive reform of the European product liability system since its adoption in 1985. At the heart of the reform is an attempt to align manufacturers' liability with the technical realities of a globalised and digitalised market through an expanded scope of application and the introduction of new substantive and procedural mechanisms. The extension of the circle of liable persons within global supply chains and digital ecosystems,⁹⁹ the recognition of new categories of damage, the introduction of procedural presumptions, and strengthened disclosure obligations collectively

⁹⁸ Judgment of the Court (Second Chamber) of 26 March 2026, LF v Sanofi Pasteur SA, Case C-338/24.

⁹⁹ Article 8 of the Product Liability Directive. At the same time, despite the multi-layered approach introduced by the revised Product Liability Directive, a significant structural problem remains. Manufacturers may establish subsidiaries within the EU with limited assets, or even fictitious (empty) companies, against which the enforcement of liability would be ineffective, thereby enabling the manufacturer to escape responsibility. RISSO, G., *Product Liability and Protection of EU Consumers: Is it Time for Serious Reassessment*, cit., p. 232-233.

reshape traditional concepts of tort law that have traditionally fallen within the competences of the Member States.

The notion of product now encompasses digital products, software (including artificial intelligence systems), updates, and related digital services.¹⁰⁰ In response to persistent evidentiary challenges, the Directive also introduces several mechanisms. Courts may require manufacturers to disclose technical data, internal documentation, or development-related information where such material is necessary to establish a defect or a causal link — a measure designed to address entrenched information asymmetries that have often prevented effective enforcement. Subject to specified conditions, such as excessive difficulty in proving a claim due to technical or scientific complexity or a sufficient likelihood of the existence of a defect or causal link, presumptions of defect and causation may also apply.¹⁰¹ This illustrates how deeply intertwined substantive and procedural dimensions of EU private law have become. Harmonised material law increasingly requires corresponding procedural adaptation in order to ensure effective enforcement.

On the other hand, the revised framework retains the development risk defence, which continues to shift the burden of harm resulting from undiscoverable defects onto consumers. This has implications not only for compensation but also for the preventive design of product safety, particularly in the context of emerging technologies. In a digital environment in which products are globally designed, remotely updated, embedded in data ecosystems, and often operate as opaque “black boxes,” it appears increasingly inappropriate for users to bear the risks of technological development.¹⁰² Whereas traditional liability concepts were built around tangible physical products, defects in digital systems frequently arise in software

¹⁰⁰ Article 4(1) of the Product Liability Directive.

¹⁰¹ Article 9 and Article 10 of the Product Liability Directive.

¹⁰² The Expert Group on New Technologies (NTF) found that the existing liability regimes in the Member States provide a basic level of protection for victims who suffer damage caused by the operation of new technologies. However, the specific characteristics of such technologies and their modes of use, such as complexity, continuous modification through updates, self-learning during operation, limited predictability, and vulnerability to cybersecurity threats, may significantly hinder injured parties in effectively pursuing compensation claims. Commission Report on safety and liability implications of AI, the Internet of Things and Robotics, 19.2.2020, p. 3.

architecture, algorithmic logic, missing updates, inadequate cybersecurity protocols, or flawed data processing — elements that users neither understand nor are realistically able to assess. Consequently, they are unable to form meaningful or realistic safety expectations.¹⁰³ Against this background, the continued inclusion of the development risk defence within the product liability regime remains normatively contentious.

Despite the expansion of the scope of the EU product liability regime and the introduction of new substantive and procedural mechanisms, the relative absence of an explicit subsidiarity debate in the context of the adoption of this reform is noteworthy, particularly in light of the fact that the principle was formally incorporated into EU law eight years after the adoption of the original Directive.¹⁰⁴ The core concern remains structurally similar to that raised during the initial legislative process, when critics argued that insufficient evidence had been provided to demonstrate that divergences between national liability regimes distorted competition and that the proposal went beyond harmonisation by introducing an entirely new system of liability. This is especially significant given that the revised framework also entails intervention in the architecture of national civil procedure systems — a field traditionally regarded as falling within national procedural autonomy yet long influenced by EU law through the principles of equivalence and effectiveness.¹⁰⁵

¹⁰³ KEČEK, J., *Napaka proizvoda kot predpostavka odgovornosti za proizvod v pravu ZDA*, in *Podjetje in delo*, 2017, p. 326.

¹⁰⁴ GIBSON L., *Subsidiarity: The Implications for Consumer Policy*, cit., p. 326.

¹⁰⁵ Although civil procedure is often described as falling within the sphere of national autonomy, the concept of national procedural autonomy has never been absolute. Since the Judgment of the Court of 16 December 1976, *Rewe-Zentralfinanz eG and Rewe-Zentral AG v Landwirtschaftskammer für das Saarland*, Case 33/76, the CJEU has consistently held that, in the absence of EU procedural rules, it is for the domestic legal order of each Member State to determine the applicable procedural rules, subject to the principles of equivalence and effectiveness. This position has been reaffirmed and further developed in subsequent case law, including the Judgment of the Court (First Chamber) of 15 March 2017, *Lucio Cesare Aquino v Belgische Staat*, Case C-3/16, para. 52, where the Court emphasised that national procedural rules limiting the exercise of rights conferred by EU law are permissible only insofar as they respect the principle of effectiveness and do not render the exercise of such rights practically impossible or excessively difficult.

Empirical evidence also indicates that strict liability actions in Member States remain limited in practice.¹⁰⁶ It may therefore be concluded that product liability has never functioned as the primary instrument of consumer redress in cases of product failure. Procedural constraints, evidentiary burdens, litigation costs and the availability of contractual or sector-specific remedies often render it a secondary avenue of enforcement.¹⁰⁷ In this light, the Directive appears less as a response to demonstrated market distortion and more as a structural integration measure — symbolically reinforcing consumer protection while only marginally reshaping everyday litigation realities.

The actual effectiveness and future trajectory of the Product Liability Directive will therefore depend largely on implementation practices and judicial interpretation within Member States, now operating in an increasingly digitalised and multi-layered legal environment.

4. Conclusion

The development of European consumer and product liability law demonstrates that the EU has not operated with a single, preconceived vision of consumer protection. Rather, the existing framework reflects an accumulation of normative responses to the evolving demands of the internal market, technological transformation, political contingencies, and industrial scandals, which have exposed the widening gap between industrial progress and consumers' capacity to protect themselves against emerging risks. The *acquis* in this field has therefore evolved incrementally, with legislation often adopted on the basis of political consensus rather than pursuant to a

¹⁰⁶ The European Commission's final study conducted a review of case law in selected Member States and found that, between 2018 and 2021, the number of cases ranged from 0 to 2 per year in Austria, 3 to 6 in France, 5 to 13 in Germany, 7 to 14 in the Netherlands, and 11 to 18 in Spain. Impact assessment study on the possible revision of the Product Liability Directive (PLD) 85/374/EEC: Final report, 2022, p. 205–206.

¹⁰⁷ This is consistent with broader observations that consumers are often unwilling to initiate complex cross-border litigation and may instead withdraw from transnational transactions altogether, while nevertheless expecting protection at European level. SCHWARTZ D. J., *Loose Teeth in European Union Consumer Protection Policy: The Injunction Directive and the Mass Default Scenario*, cit., p. 528, 530, 532.

fully articulated and systematic theory of EU competence.¹⁰⁸ This piecemeal development has made it difficult to integrate individual measures into a coherent architecture, which explains why EU consumer law is frequently described as a mosaic of fragmented interventions: “*a stone from Brussels here and there inserted into the edifices of national private law*”.¹⁰⁹

Yet, despite this fragmented evolution, a recognisable and increasingly influential body of European consumer law has emerged. The 2024 revision of the Product Liability Directive exemplifies this trajectory: it expands the notion of product to encompass software and digital services and introduces procedural mechanisms such as disclosure obligations and presumptions of defect and causation, thereby further intertwining substantive and procedural dimensions of EU private law.

At the same time, the question of competence remains a central concern. Although most measures in this field, including the Product Liability Directive, have been adopted on the basis of Article 114 TFEU, the legitimacy of using that provision for systemic interventions in national consumer law regimes — particularly in contexts of maximum harmonisation that significantly constrain Member State autonomy — continues to provoke debate. While EU competence is formally recognised, it is not without limits: harmonisation measures must genuinely contribute to the functioning of the internal market. The historical development of EU consumer policy reveals, however, that legal bases have often evolved alongside political ambition.¹¹⁰ Where sufficient political will existed, integration advanced and a legal pathway was found. In this sense, consumer protection at EU level has always been as much a political project as a legal one.

¹⁰⁸ WEATHERILL, S., *Consumer Policy*, cit., p. 894-896.

¹⁰⁹ REMIEN O., *Über den Stil des europäischen Privatrechts – Versuch einer Analyse und Prognose*, in *Rabels Zeitschrift für ausländisches und internationales Privatrecht*, 1996, p. 8.

¹¹⁰ With the introduction of a principle of subsidiarity, which is not conceived merely as a technical rule of allocation, but rather as a politically sensitive principle governing the exercise of conferred powers, the question of EU’s legislative competence in consumer law was not eliminated but rather transformed into more political one. GIBSON L., *Subsidiarity: The Implications for Consumer Policy*, cit., p. 324, 329, 332.

The history of the Product Liability Directive further illustrates how competence concerns tend to recede once political consensus is secured. At the same time, it demonstrates that measures redistributing risk from producers to consumers — or vice versa — inevitably trigger resistance from powerful economic actors.¹¹¹ Consequently, the extent of political compromise directly shapes the practical effectiveness of the adopted instrument.

The broader debate on the Europeanisation of private law mirrors this tension. Some commentators warn that partial harmonisation fragments national legal structures and neglects Europe's cultural and legal diversity.¹¹² Others view the EU's expanding role, particularly in procedural civil law, as an opportunity to develop a more coherent and uniform framework capable of strengthening legal certainty and access to justice across the Union.¹¹³

¹¹¹ SCHWARTZ D. J., *Loose Teeth in European Union Consumer Protection Policy: The Injunction Directive and the Mass Default Scenario*, cit., p. 545.

¹¹² The increasing Europeanisation of private law has prompted debate as to whether further harmonisation - including in the field of civil procedure - is necessary to ensure the effective functioning of EU consumer law. WEATHERILL, S., *EU consumer law and policy*, cit., p. 150-151; MULDER J., *New Challenges for European Comparative Law: The Judicial Reception of EU Non-Discrimination Law and a Turn to a Multi-layered Culturally-Informed Comparative Law Method for a Better Understanding of the EU Harmonization*, in *German Law Journal*, 2017, p. 724. Rather than enforcing uniform interpretations, European legal integration should respect structural diversity and reinterpret subsidiarity as a principle safeguarding the autonomy of social and economic systems. TEUBNER G., *Legal Irritants: Good Faith in British Law or How Unifying Law Ends up in New Divergences*, in *The Modern Law Review*, 1998, p. 13.

¹¹³ Van Gerven believes that some degree of procedural convergence may be required to support the uniform application of substantive Union Law. VAN GERVEN W., *The ECJ's Recent Case-Law in the Field of Tort Liability: Towards European Ius Commune?*, in: JANSEN ROSA, H.M; DAGMAR KOSTER, A.C; VAN ZUTPHEN REINIER F.B (eds.), *European Ambitions of the National Judiciary*, 1997, p. 95–96. This view is shared also by: OUYANG J. J., “Embedded Consumer”: *Towards Constitutional Reframing of the Legal Image of Consumers in EU Law*, cit., p. 407. Private parties, whether natural or legal persons, must be afforded the opportunity to ensure that rights derived from Community law can be effectively upheld through judicial means, which in turn requires sufficiently harmonised rules enabling individuals to enforce those rights by sanctions and legal remedies that are, if not identical, at least equivalent across all Member States in order to secure the uniform application of EU law. SCHWARTZ D. J., *Loose Teeth in European Union Consumer Protection Policy: The Injunction Directive and the Mass Default Scenario*, cit., p. 550. Maier believes that the completion of the Single Market requires comprehensive and far-reaching harmonisation of consumer law, including the harmonisation of contract law and the regulation of business practices, to ensure transparency and legal certainty for cross-border

Ultimately, any attempt at normative improvement at EU level must confront the structural diversity of national legal systems. In the field of consumer protection, a clear majority of EU citizens support uniform levels of protection across Member States,¹¹⁴ a demand that gains importance in an era of globalised production, digital markets, and decentralised harm. The future of European product liability law therefore lies in defining the appropriate balance between integration and pluralism, between market efficiency and social protection, and between political compromise and effective access to justice. In that sense, the evolution of EU consumer law is a continuing negotiation about the shape and limits of European integration itself.

transactions. MAIER L., *Institutional Consumer Representation in the European Community*, cit., p. 370, 385.

¹¹⁴ Public opinion surveys conducted show strong support among EU citizens for common rules and cooperation at the European level. MAIER L., *Institutional Consumer Representation in the European Community*, cit., p. 385; AUSTGULEN M. H., *Understanding National Preferences in EU Consumer Policy: A Regime Approach*, cit., p. 780.

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