Comparative private law - Second partial

Written by Lavinia Morgante
Updated for A.A. 2025/2026 by Gloria Bellanova and Zoe Ferretti
Edited by Lavinia Morgante

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Legal facts and legal acts

Scholars have tried to find which methods can be used to recognize events or activities that have legal consequences.
How can we determine if such events or actions no longer hold any legal significance/are relevant?
(i) It's impossible to establish a criterion for distinguishing what is inherently legal from what is not.
(ii) When a specific situation is prescribed by a regulation, we encounter an occurrence or an act that has legal consequences.
Scholars have said that one way to understand if a given behaviour can produce legal consequences and effects is looking at the typical **structure of norms**.

Structure of norms

IF a "state of affairs" comes into being **THEN** someone will be burdened with a "sanction": **if-then-clause**

- A norm is shaped as a '**hypothetical independent period'**, whose protasis (= the IF-clause) consists of a state of affairs and whose apodosis (= the THEN-clause) of a sanction: **categorization of legal acts** (which acts are relevant).

-->The legal acts come together with a declaration of will that is capable of producing a legal effect: the legal effect produces a change of duties and rights of individuals. In the Western civilization, the legal acts are related to the concept of private autonomy- these acts can be written or oral and can produce a modification in duties and rights (e.g. contract is a declaration of will aiming at producing some consequences).

- The norm attaches a (negative) reaction of the State to a possible event or behavior (e.g. IF a contract is breached by one of the parties which have entered into it, THEN that party will be deprived of her/his rights towards the other.

THE SCOPE OF NORMS

A norm is marked by two characteristics, **generality** and **abstractness: "treat like cases alike"**

- **Generality**: a norm is applicable to anybody who finds herself/himself in the state of affairs envisaged by the IF clause + a norm is addressed not to individuals identified as such but to a class of individuals who happen to find themselves in the state of affairs envisaged by the IF-clause.
- **Abstractness:** a norm is applicable to whatever event or behaviour matches the state of affairs envisaged by the IF-clause.

MANDATORY AND DEFAULT RULES

- **Mandatory rules** (zwingendes Recht, règles impératives, norme inderogabili) may not be set aside by an agreement between their addressees: most public law consists of mandatory rules + paramount for public law is the supremacy of public interest over individuals' interests.
- **Default rules** (dispositives Recht, règles supplétives, norme dispositive) may be set aside through an agreement between their addressees: nearly the entirety of private law consists of default rules + a major role is played by default rules which supplement agreements entered into by the parties.

SUBJECTIVE RIGHTS

RELATIVE RIGHTS (in personam)

ABSOLUTE RIGHTS (in rem)

PROPERTY RIGHTS (patrimonial rights in rem)

PERSONALITY RIGHTS (non-patrimonial in rem)

Autonomous legal acts

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

Legal acts--> Private autonomy: freedom of parties is the basis for private autonomy and for legal acts

Any legal subject is given the power to produce a legal effect on her/his own patrimony or personality, to the extent to which the law does not pose any mandatory prohibition on doing so (ex. the contract).

One example of private autonomy is given in the Draft Common frame of Reference

II. – 1:102: Party autonomy

(1) Parties are free to make a contract or other juridical act and to determine its contents, subject to any applicable mandatory rules.

(2) Parties may exclude the application of any of the following rules relating to contracts or other juridical acts, or the rights and obligations arising from them, or derogate from or vary their effects, except as otherwise provided (they are free to decide the content of the contract).

(3) A provision to the effect that parties may not exclude the application of a rule or derogate from or vary its effects does not prevent a party from waiving a right which has already arisen and of which that party is aware.

Distinction between legal facts and legal acts

THE GERMAN TRIPARTITE TAXONOMY (they do not use the subdivision between legal acts and legal facts, atti giuridici and fatti giuridici)

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

1. **Autonomous legal act** --> parties are free to decide the specific act they want to conclude (two capacities of parties: to choose which act they want to conclude + they decide the legal effects arising from the act they want to conclude)--> The legal consequences associated with an AUTONOMOUS LEGAL ACT are the ones that the party/parties executing such transaction intend (as long as their intent is sincere and not influenced by any irrational factors, such as lack of judgment or discernment, mistakes, etc.)
   The legal consequences of an **AUTONOMOUS LEGAL ACT** are not primarily dictated by the law itself but are instead chosen by the party/parties involved in such a transaction (e.g. **Contract** and **testament**/last wills and marriage= archetype of legal transactions)
2. **Heteronomous legal act** --> parties can enter a legal act, but they are not free to decide the effects arising from the behaviour. In contrast, regulations can assign legal consequences to certain actions regardless of whether the author intends for any legal effects to occur or not (**HETERONOMOUS LEGAL (OR JURIDICAL, OR JURISTIC) ACTS**). (e.g. **Tort:** I'm not entitled to choose the consequences, because I have to pay for compensation after I adopted a given behaviour: the legal systems decide the consequences attached to my given behaviour) «a legal subject can freely decide whether or not to undertake certain action, but she cannot elect the legal effects attached thereto, which are stipulated by the relevant norms»
   Example: the legal consequences of a tort are not conditional upon its author's would-be intention to produce or not produce some legal effects- "these acts must be done by their author with sufficient judgement and discernment of her own action"-
3. **Material facts** --> Ultimately, certain legal circumstances are governed by a regulation without regard for the individual judgment or discernment of those responsible for them, or they may purely involve natural occurrences. These can be referred to as MATERIAL FACTS. Some legal facts are addressed by a norm irrespective of the particular judgment or discernment of their authors or they simply consist in natural events. (death for example has legal effects): natural events are capable of producing effects without the intervention of individuals.
   Example: "when a person dies, title to her property vests in the heirs, subject to administration. That is, the right to possession of an intestate's property and the right to take through intestate succession accrue on the death of the ancestor, whatever event or action may have caused it – be it a murder, a heart attack, etc. In this respect, death is regarded by the law as a material fact": death as a material fact that is provided by the law with effects.

The **archetypes of legal transactions are**:
1. Contracts
2. Last wills (testaments)
3. Marriage (marriage is not regarded as a contract)

The French bipartite taxonomy

- The French Civil Code **lacks any regulation** explicitly referring to autonomous legal acts in contrast to heteronomous legal acts.
- Hence, any fact that holds legal significance is categorized as either an:
    1. **Acte juridique (juridical act)**
    2. **A fait juridique (juridical fact)**

  Art. 1100(1) Code civil "Obligations arise from legal acts, legally significant facts or the sole authority of the law".
- In the Civil Code, the term "**actes juridiques**" has effectively been employed to refer to autonomous legal acts.

  Art. 1100–1 Code Civil: "Juridical acts are manifestations of will be intended to produce legal effects. They may be based on agreement or unilateral. As far as is appropriate, they are subject, both as to their validity and as to their effects, to the rules governing contracts".

  Juridically significant facts (faits juridiques) encompass 1) physical occurrences (événements); 2) also material facts (des événements); 3) heteronomous legal acts (des agissements): in these instances, the legal outcome is determined by the relevant rules, regardless of the author's intention for such a result.

Conversely, pursuant to the new Art 1100-2 Code civil: "Legal facts are actions or events to which the law attaches legal effects. Obligations arising from a legal fact are governed, as the case may be, by the subheading relating to non-contractual liability or the subheading relating to othe sources of obligations."

The eclectic Italian taxonomy

- In the Italian Civil Code, the differentiation between "**fatti giuridici**" and "**atti giuridici**" is similar to the distinction between "faits juridiques" and "actes juridiques" found in the French Civil Code.
- **However**, Italian legal scholarship follows a primarily German influenced approach, where it predominantly recognizes the concept of "**negozi giuridici**" (meaning **autonomous legal acts**, where they are allowed to pick the effects), as opposed to the narrower category of "**atti giuridici in senso stretto"** (meaning **heteronomous legal acts**). This category is also recognised by the Italian Corte di Cassazione who usually mentions it.

THE EUROPEAN TAXONOMY

1. **Structure of the contract** (PARTIES WHO CONCLUDE THE ACT):

UNILATERAL	BILATERAL	MULTILATERAL
e.g., WILLS.	e.g., SALE CONTRACTS	e.g., COMPANIES
These actions are carried out through the unilateral declaration of intent by a single	It necessitates the expression of mutual agreement between two	

party (e.g. the withdrawal from a contract)	parties (as is the case with the majority of contracts)	

2. **Content of the contract:**
   a. **PATRIMONIAL**: The intent of the party or parties is driven by an interest that can be evaluated in economic terms. E.g. Contract (art. 1321 Italian Codice Civile).
   A contract is the exemplary form of a legal transaction where the content inherently involves economic aspects.
   b. **NON-PATRIMONIAL**: The intent of the party or parties is directed towards an interest that cannot be financially valued.
   E.g. Marriage. It also contains an agreement because the consent of the parties is necessary and an economic aspect, but this aspect is quite restricted and doesn't fully define its nature.

3. **Atti inter vivos and atti mortis causa**

a. **INTER VIVOS ACTS**: Typically designed to govern the concerns of the involved parties during their lifetimes (E.g. contract that governs the circulation of wealth).
b. **MORTIS CAUSA ACTS**: Conducted to arrange for the distribution of the author's assets that will come into effect after the death (typically succession law).

COMPARATIVE CONTRACT LAW

Typically, contract is based on an agreement between two or more parties (bilateral or multilateral). In some countries there can be also a contract of one party (contratto unilaterale: contratto con obbligazioni del solo proponente: the obligations arising from the contract bind only one party. Scholars have tried to analyse this structure).

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

WHAT IS A CONTRACT?

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

DEFINITION OF CONTRACT

ROMAN LAW: *Contractus = cum-trahere* meant "to bind" the parties.

1. **CIVIL LAW JURISDICTIONS**

Contract is an agreement.

- Donations are contracts and included in the agreement.

2. **COMMON LAW JURISDICTIONS**

Contract is a bargain, reflects an **exchange**.

a. **Gratuitous promises** are <u>not</u> contracts (**if not made by deed**).
Gratuitous promises may be regarded as contracts if we have a formal requirement (similar to a notarization): if there's the deed put on a gratuitous promise then we can an enforceable act. However, the standard approach is that the gratuitous promise are not contracts.
™**Exception** (**formal requirement**): Common law recognizes a promise to be enforceable if it is contained in a deed under seal. A seal maybe affixed to a contract by placing a red sticker on the paper or simply drawing a circle with «LS» (loco sigilli) stamped on it. The deed then takes effect upon delivery.

b. **Gratuitous bailments** are <u>not</u> contracts:
A bailment occurs when a person (the bailor) transfers possession of a chattel (a movable) to another (the bailee): it is not a contract. Remember that possession does not refer to the property and gratuitous bailment indicate the transfer of possession, and this operation does amount to a contract.
Common law recognises a promise to be enforceable if it is contained in a deed under seal. A seal may be affixed to a contract by placing a red sticker on the paper or simply drawing a circle with «LS» (loco sigilli) stamped on it. The deed then takes effect upon delivery.

CONSIDERATION in COMMON LAW JURISDICTIONS

Consideration is a crucial element in common law: the mechanism that the common law jurists use to **distinguish promises** that are to be **enforced** from promises which are **not to be enforced**.
«An act of forbearance of the one party, or the promise thereof, is the price for which the promise of the other is bought, and the promise thus given for value is enforceable» (Pollock on Contracts).

The doctrine of consideration is based on the idea of **reciprocity.**
«**Something of value in the eye of the law**» must be given for a promise to make it **enforceable** as a contract and it must be a value for both parties in a bilateral contract. E.g. in sale there's a party who gains the property but has to give a sum of money.
Consequence: an informal gratuitous promise does not amount to a contract because there is no deed (no formality)
Consideration is similar to the notion of cause, but it is not precisely the same: consideration entails the concept of exchange between two parties.
Ex.

- Thomas v. Thomas (1842): Even a small or symbolic value is sufficient to constitute valid consideration cases
- Haines v. Hill (2007): Courts will not question the adequacy of consideration as long as something of legal value has been given

PURPOSE of CONSIDERATION in COMMON LAW JURISDICTIONS

«*The purpose of this doctrine is to put some legal **limits on the enforceability of agreements** even where they are intended to be legally binding and are not vitiated by some factor such as mistake, misrepresentation, duress or illegality*» (vitiated factors).
Courts do <u>not</u> judge adequacy: they do not concern themselves with the question or address whether «adequate» value has been given, or whether the agreement is harsh or one-sided. Courts are not interested to address the content of the bargain: parties are free to decide the content of the exchange even if it seems unfair, the court still are not interested in the adequacy of the content:

they just ascertain **if consideration is present** in the exchange (not the content or fairness of the consideration).

RECAP:

In common law jurisdictions, consideration must have a value, but the courts are not entitled to assess the adequacy from an economic point of view for a performance and counter-performance- traditionally consideration is related to the concept of bargain (where Ungerer argued that mixed gifts in German law must be included in the category of bargain and not gifts) and adequacy is unnecessary. Therefore, there is a strong bond between consideration and notion of bargain. This also justifies why gratuitous promises do not amount to contract because typically consideration is based on a value: the traditional theory is that gratuitous promises are deprived of value and therefore are not contracts or bargains: they may be regarded as contracts if we have a formal requirement- the deed- coming into play (similar to a notarization). The same holds true for the bailment.

The value must be present for both parties when the contract is bilateral: there must be **benefits** for both the contracting parties because the notion of benefit is contacted to the one of value ("something of value in the eye of the law"). The aim is to put limits to the enforceability of the agreements. Of course, vitiating factors can still challenge the agreements and the contracts, but consideration also plays a role when there are no vitiating factors.

DEFINITIONS OF CONTRACTS

They have some variations depending on the approach that each legal system adopts.

- **Draft common frame of reference: II-1:101 Meaning of "contract" and "juridical act"** (1) Contract is an agreement which is intended to give rise to a binding legal relationship or to some other legal effect (e.g. extinction of other legal relationship= mutuo dissenso)+ (structure of the contract) It is a bilateral or multilateral **juridical act**: using the Germany and French taxonomy, we can say that a contract is an autonomous legal act because parties may decide to enter a given contract and are also entitled to choose the legal effects arising from the act they want (1. Parties want to stipulate a given act 2. Parties can choose, determine the legal effects arising from the contract= the ratio behind is the freedom of parties).
  -->This definition reflects the general principles of contract law accepted in the European area (after a comparative law enquiry to identify the similarities and differences: contract law core is in the DCFR)
- **Art. 1321 codice civile** A contract is an agreement between two or more parties to **establish**, **regulate** or **extinguish** patrimonial legal relationships (3 main functions pursued by the contract) (different from marriage which does not rest on a patrimonial element) (mainly inspired by the Code Napoleon).
- **Code Napoleon Art. 1101** (as amended in 2016) A contract is a concordance of wills of two or more persons intended to create, modify, transfer or extinguish obligations (source of inspiration for the c.c.).
  Art. 1103 (as amended in 2016) Contracts which are lawfully formed have the force of legislation for those who have made them: contract only applies to contracting parties who are also allowed to cease the effects of the contract they have entered.

Once the contract is formed, the contract becomes and amounts to the law for the parties. The only chance to dissolve contract effects is to stipulate another agreement (in Italy is mutuo dissenso) to set aside the law governing the relationship.

Contract is essentially a source of obligations (+ torts and other facts and acts that are capable of producing obligations).

E.g. Obligations in the contract of sale

Obligations of the seller	**Obligation of the buyer**
- To deliver the thing to the buyer - To guarantee the buyer quiet possession of the goods sold, and that the goods are free from defects	- To pay the price within the time and in the place fixed by the contract. Payment of the price does not play any role in the formation of the contract but is part of the performance (ECJ: deposit analysed before).

E.g. contract of sale (the contract having as its object the transfer of the ownership of a thing or the transfer of other rights in exchange for a price) = payment is part of the performance but not of the formation of the contract. There is a legal consequence and difference between the conclusion and the performance: if the performance is not rendered, there's the breach of contract and thus the compensation of damages: we have compensation because there's a breach, but the contract was validly formed. Therefore, if there's a lack of payment, the issue at stake is the performance- that comes after the conclusion of the contract that is validly formed (the conclusion revolves around the agreement of the parties (offer and acceptance provided with the same content)).
Obligations are in the stage of performance: if obligations are not respected, the parties will be in breach and this paves the way to remedies in contract law, but it does not affect the conclusion and formation of the contract which only depends on the offer and acceptance + the object and the price have to be clearly identified because without the object we do not have an offer= there has to be a clear intention to sell: the price has to be fixed and finally set (difference: declaration of will vs. offer).

THE FORMATION OF CONTRACT

«Offer and acceptance» are perceived as statements of intent, generated by both parties and dispatched to each other (declaration of will that are generated by both parties).

Ex. Art. 1113 (1) Code Civil: "A contract is formed by the meeting of an offer and an acceptance by which the parties demonstrate their **will to be bound**": according to the Italian legislature offer and acceptance should be provided with same content in order to have a contract concluded= THE INTENTION OF CONTRACTING PARTIES IS LESS RELEVANT because what typically matters is the content of offer and acceptance that has to be the same, so it is a more cautious approach (different from PECL and DCFR).

Art. 2:201 (1) PECL (soft law tool): A proposal amounts to an offer if: (a) It is intended to result in a contract if the other party accepts it, and (b) It contains sufficiently definite terms to form a contract.

Ex. Art. II-4:201 DCFR (soft law tool): "Any form of statement or conduct by the offeree is an acceptance if it indicates assent to the offer".
Silence or inactivity does not it itself amount to acceptance.

There's no reference to the content of offer and acceptance: we need the intention of parties, offeror and offeree: there's no mention of the content of the contract (ratio: drafters were interested in fostering/stimulating the conclusion of contract) so there are less limits on the elaboration of drafters because the contract may be deemed to be concluded even though the content of two statements is different, if the parties show their will to be bound: stimulation of the conclusion of contracts and underline the freedom of the parties (intention to be bound is the primary element: less limits on contracting parties).

Silence or inactivity does not it itself amount to acceptance.
In the Italian civil code, there's "facta concludentia": the party who receives the offer and should send the acceptance, decides to start the execution of the contract= this behaviour is the facta concludentia which amounts to acceptance.

OFFER VS. INVITATION TO TREAT
Invitation to treat does not include all the elements of the contracts because they can be further specified and determined because they are going to be negotiated. The contract is not validly formed only with the invitation.
Instead, the offer will contain all the elements of the contract that is going to be stipulated.
There are particular kinds of offer:
1. **Display of goods in shop windows or an supermarket shelves**= this can be qualified as an offer to the public but with a particular aspect because the contract is concluded with taking the shampoo on the shelf (behaviour that amounts to facta concludentia + the payment is part of the performance), we can put the shampoo back on the shelf but the payment comes after the conclusion, because the contract is concluded with taking it from the shelf.
2. Invitations to submit tenders?
3. Announcements of items for sale at an auction?
4. Newspaper advertisement?

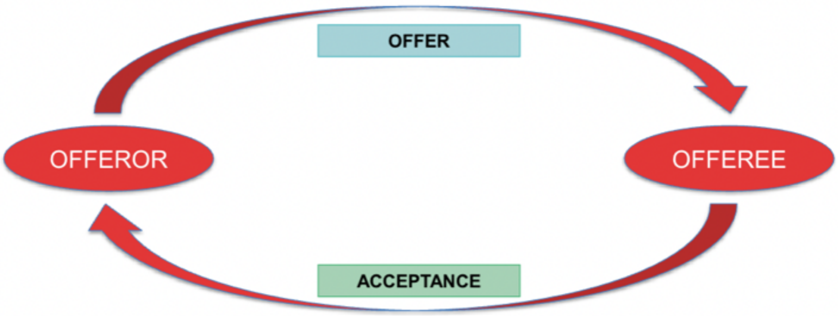
Art. 2:201 (3) PECL: A proposal to supply goods or services at stated prices made by a professional supplier in a public advertisement or a catalogue, or by a display of goods, **is presumed to be an offer** to sell or supply at that price until the stock of goods, or the supplier's capacity to supply the service, is exhausted (more <u>cautious approach because there's a presumption</u>)

II-4:201 (3) DCFR OFFER: A proposal to supply goods from stock, or a service, at a stated price made by a business in a public advertisement or at a catalogue, or by a **display of goods, is treated, unless the circumstances indicate otherwise, as an offer** to supply at that price until the stock of goods, or the business's capacity to supply the service, is exhausted.
-->Civil law jurisdictions tend more easily to acknowledge **offers made to the public at large,** common-law jurisdictions do not.

Code napoleon: **Art. 1113 (as amended in 2016)** (1) A contract is formed by the meeting of an offer and an acceptance by which the parties demonstrate their will to be bound.

Offer and acceptance
«Offer and acceptance» are conceived as declarations of willingness, issued by each party and dispatched to the other. If the acceptance has new elements and different conditions (different content from the offer), it is regarded as a new offer sent to the offeror.

--> OFFEROR does an OFFER and there is ACCEPTANCE by the OFFEREE.



Ex. Offer:
Francesco texts Pietro to say that he would be glad to give away his wrecked car if someone were ready to pay him 500€ for it. Does Francesco's statement constitute an offer to enter into a contract?
a. Does Francesco actually intend to sell his car? Or is he just joking? If it is the latter, it is not an offer, but possibly an invitation to treat.
b. Is the car to be sold identified either in Francesco's statement or due to Pietro's prior knowledge of it? If it is unclear which car Francesco is referring to (e.g. among the many he owes), it is not an offer.
c. Is the sale price specified in Francesco's statement? Or is the price intended to be negotiated later? If it is the latter, it is not an offer, but possibly an invitation to treat.

IRREVOCABLE OFFER

Jurisdictions which generally allow the withdrawal of an offer, stipulate, however, that the offeror can voluntarily bind herself/himself to her/his own offer (which thus turns **irrevocable** for a given period of time**,** in contrast with the typical rule that the offer can be revocable= offerta irrevocabile).

- In the civil law: it suffices that the offeror unilaterally promises to keep open the offer (for a given time): unilateral act which can also be gratuitous.
- In common law: a **proper contract** shall be concluded between the negotiating parties, which is called **option** (if gratuitous, it must be made by a deed, a stamp attached to the agreement= formal act): in order to have the irrevocable offer, a contract must be concluded, and it is called option.

There are differences but many similarities in the legal effects produced by the contract of option and the irrevocable offer.
In case of option, in common law, the option can be gratuitous, but the deed (formal act) is required, because the bargain must be of value to be enforceable.

CONTRACT OF OPTION

An option is a preliminary contract through which one party **(option issuer or writer)** binds herself/himself to her/his own offer and the other party (**option holder**) is given the right to close the deal unilaterally (relationship between preliminary contract and final contract which resembles this particular contract).

- ➔ **Call options**: give the holder the **right to purchase** an underlying asset at a specified price (**strike price**) and conditions that are specified before.
- ➔ **Put options**: give the holder the **right to sell** an underlying asset at a specified price (**strike price**). The holder is free to assess and take time to evaluate the terms of the offer.

ACCEPTANCE

DCFR: II-4:201 Acceptance

(1) Any form of statement or conduct/silent behaviour by the offeree is an acceptance if it indicates assent to the offer (juridical act like the offer). E.g. a conduct that amounts as acceptance is for example executing one of the obligations arising from the contract.

! **Silence** or inactivity does not it itself amount to acceptance.

WHEN IS A CONTRACT CONCLUDED?

In **commercial practice**, matter arises a significant: individuals must determine precisely when they become bound to a contract and, as a result, assume their contractual rights and obligations.
Ex. **II-4:205 DCFR**: If an acceptance has been dispatched by the offeree the contract is concluded when the acceptance reaches the offeror.

Civil law	Common law
KNOWLEDGE RULE: the acceptance must be sent and reach the address of the **offeror** (knowledge rule). There's a **presumption of knowledge** when the acceptance is dispatched and reached the addresses: the offeror knows that the offer was accepted. Indeed, across numerous civil law jurisdictions, the contract is concluded when the acceptance is notified to the offeror.	**POSTAL RULE**: The contract is deemed to be concluded when the **acceptance is sent/dispatched by post.** Indeed, under English common law, when the acceptance is dispatched by post, the contract is formalized at the moment the acceptance is posted, as per the **postal rule.** Even though the acceptance does not reach the knowledge of the offeror, the contract is still concluded when the acceptance is sent /no need of notification).

THE POSTAL RULE

Adams v. Lindsell (1818)

A contract for the sale of wool fleece was at issue. Here is the timeline:

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

Lindsell argued that there was never a valid contract because acceptance was not received by the specific date of September 7th. If we use the postal rule, the contract was concluded and was valid.

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

EXCEPTION TO THE POSTAL RULE

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

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

RATIO: the postal rule does not apply when a notification of acceptance has been agreed upon by the parties.

The offeror asks that the acceptance has to be notified.

INEQUALITY OF BARGAINING POWER

FREEDOM OF CONTRACT

Civil codes were written based on the notion that parties are all put on the same level and have the same contracting power: men of full age and competent understanding shall enjoy the highest degree of freedom in contracting and **their contracts, when entered into willingly and without coercion, shall be considered sacred and upheld by the legal system.**

Permitting economic forces to operate without restraint can result in **unfairness** when there is an **imbalance in bargaining power** between the parties involved (Ex. Consumer contracts: b2c). Contracts can also be b2b, b2c or c2c (consumer to consumer).

Competition law: guarantee the rule of the game and that’s why the European union decided to regulate this area of contracts because consumers needed to be protected especially with the aim to ensure the well-functioning of the market, because if the consumer is not protected there could be negative consequences on the larger scale (e.g. consumer buys something at an unfair price and this results in negative effects for the market).

How to guarantee **CONTRACTUAL FAIRNESS**? Legal tools:

- ✓ Ex. By requiring the stronger party a mandatory duty to offer precise and punctual information, and more details: e.g. business is in the position to do so because the consumer sometimes buys online and cannot even see the object he’s buying.
- ✓ Ex. By granting the weaker party to terminate the contract or within a cooling-off period in a gratuitous way (e.g. recesso dal contratto can be gratuitous or for a given price, but this does not hold true for consumer law, with the recesso is always free).

Through the implementation of **mandatory rules** that offer robust safeguards for the weaker party. Employment contracts, residential leases, insurance contracts, consumer credit arrangements and consumer purchases (the so called "regulated contracts")- mandatory rules are in contrast with the contract law rules of civil law that are **default rules**: parties can set aside default rule and opt for other rules (e.g. choose another place of delivery). This is not possible in consumer law where we have mandatory rules with specific characteristics and cannot be set aside: need to ensure the well-functioning of the market- Mandatory rules are related to the need of consumers: strong parties are not able to choose the terms of contracts. The ratio behind **mandatory rules**/the interest behind mandatory rule is the **public interest** because mandatory rules consider the public interest, the **interest to govern the well-functioning of the economy** and the market: b2c contracts affect the economy and therefore the public interest.
Instead default rule represent a private interest and therefore can be set aside because parties are free to do what they want: the interest of the parties does not affect negatively the economy or the public interest- they represent the private interest (contract law is mostly made of default rules).

Ex. Francesco decides to buy a vacuum cleaner manufactured and sold by the company "Alfa." The contract is concluded through Amazon. The price is not negotiated and is therefore determined in advance by Alfa.
Information (example): information about the right to withdrawal of the consumer (**Dir. 83/2011/EU**). This right can be freely exercised by the consumer.

European discussion among scholars on the possibility to extend the scope of application of consumer rules to other legal subjects. However, according to the widespread idea this is not possible because the definition of **Consumer**: "any natural person who (…) is acting for purposes which are outside his trade, business or profession" **(Directive 1993/13/EEC)**

RULE OF GOOD FAITH IN CIVIL AND COMMON LAW

Historically, there is a clear distinction between the civil law and common law jurisdictions in regard to the good faith principle.

CIVIL LAW	**COMMON LAW**
Within a civil law system, the fundamental principles of contract law are typically set out in the civil codes: it is frequently mentioned in several continental civil codes.	In common law jurisdictions, the fundamental principles of contract law are usually established by a body of case law, which is made up of previous judicial decisions.
Well-known PRINCIPLE OF GOOD FAITH (in making and carrying out contracts): all embracing principle because it governs all the realm of contract law.	**The principles of contract law are established based on numerous legal precedents, with a significant number dating back to the nineteenth century**. This is why, in common law, a contract is seen as an arm's length transaction, and it falls to the Parliament to implement measures to safeguard a broader spectrum of consumers and other vulnerable contractual parties.

GOOD FAITH IN THE CIVIL LAW

- **BGB §242 Performance according to good faith:** The debtor shall render the performance in the way it is necessary to comply with the requirement of good faith settled in usage: relation between usage and good faith. The good faith principle and its specific content is determined case by case, typically by courts, based on the usage spread in each sector: a given court identifies the principle of good faith based on the common usage connected to the issue at stake.
  NB. Usage is different from customs (usi e costumi).
- **Code Napoleon Art. 1104 (as amended in 2016):**
  1. Contracts must be **negotiated** (object, price is decided etc.), **formed** (coincidence of offer and acceptance) and **performed** (ex. payment) in **good faith** (relevance of the good faith principle in 3 stages of the contract).
  2. This provision is a **matter of public policy.**

  It is a **mandatory provision** (it cannot be set aside by parties because the requirement of good faith also reflects a public interest/matter of public policy).

In the Italian codice civile we have three different rules that discipline the role of good faith in the negotiation, in the formation and in the execution of the contract (strong influence of the French code napoleon).

GOOD FAITH IN THE COMMON LAW

1. **ENGLISH COMMON LAW**
   - **No general principle of good faith** in general law of contract: historically good faith principle was not known and recognised. This lack traces back to the origin of common law: good faith was not rooted in the customary law at the basis of common law (no connection between old customs and good faith).
   - Adversarial position of the parties when involved in negotiations and performing their contractual obligations, **except for cooperative (commercial) contracts and fiduciaries**.

«The concept of a duty to carry on negotiations in good faith is inherently repugnant to the adversarial position of the parties when involved in negotiations…[and] unworkable in practice. Each party to the negotiations is entitled to pursue his own interest, so long as he avoids making misrepresentations.» (*Lord Ackner (Walford v Miles: 1992, 2 A.C.128,138) –House of Lords.*

<u>HOWEVER</u>, ENGLISH COMMON LAW and the ROLE OF GOOD FAITH*:* «some elements of the common law (including aspect of our contract law) already probably correspond– if only approximately– to the general duty of good faith which is acknowledged as a foundation principle of the continental civil codes. It may be that over time some further developments of the common law will ensure that this correspondence is even closer *(Hogan J Flynn v. Breccia [2017])*

Historically, there has been no room for a broad overarching **principle of good faith** within the general realm of contract law. Old customary English law did not make any reference to the principle of good faith and that's why good faith is not mentioned in the English common law (which followed a divergent path, different from the civil tradition which was based on roman law.) This is due to the **strict adversarial stance** taken by parties during negotiations and in fulfilling their contractual duties. **However**, recent legal decisions demonstrate a more **flexible and evolving perspective** that is receptive to the **concept of good faith**, particularly in **cooperative or commercial contracts and fiduciary relationships**. (Wood v Capita Insurance Services Ltd [2017] UKSC; Walford v Miles [1992]. (Good faith has also started to influence many other contracts as we have said).

The **significance of good faith** has increased considerably over the 30 years because the UK was in the European Union that enacted directives that led to the increasing relevance of the good faith principle in the English common law and since Lord Ackner expressed that hostile view (**legislative shift: act of transposition in the UK law was necessarily based on the principle of good faith**).
This can be seen in three main ways:

- **Good faith in EU Law**: Several EU directives have incorporated the concept of good faith into legislation to be implemented by Member States. Good faith is a key element in both the general assessment of unfair contract terms and unfair commercial practices by traders towards consumers.
- **Express Terms requiring good faith**: In practice, courts have been increasingly willing to give effect to express contract terms requiring the parties to negotiate (or renegotiate because if something was unfair, the parties can still renegotiate a clause in that same contract) a contract in good faith.
- **Implied Terms requiring good faith**: Courts have proved increasingly willing to imply terms requiring good faith (see Laggatt J, infra). Courts have progressively used the good faith principle to solve cases: even though the term was not expressively mentioned by the parties, the courts resorted to the good faith principle to solve a potential ambiguity/conflict.

2. **AMERICAN COMMON LAW**
    - Significant role played by the requirement of good faith, especially with regard to the **performance of a contract** (e.g. payment**)**: more relevant, especially in the stage of performance/execution of the contract, after the negotiations (so it is stronger than in the UK common law), so the compensation for damages is relevant and taken into consideration.
    - The same applies to other common law jurisdictions (as Australia, etc.)

- ✓ **UCC (Uniform commercial code) Section 1-203:** Every contract or duty within this Act imposes an obligation of good faith in its performance or enforcement.
- ✓ **RESTATEMENT OF CONTRACTS SECOND § 205 Duty of Good Faith and Fair Dealing:** every contract imposes upon each party a duty of good faith and fair dealing in its performance and its enforcement (relevance of good faith principle in the performance. We do not encounter good faith in other stages of the contract).

The requirement of acting in good faith, particularly in relation to carrying out a contract, holds a substantial importance. (Section 1-203 UCC; § 205 Restatement of Contracts Second).
To understand the **violation of the good faith principles**, we must look at the distinction between the **rules of validity** and **behavioural rules** must be followed. The violation of **rules of validity** pertains the **validity** of the contract (**nullity, voidance, annullability**), instead if there is a violation of **behavioural rules/regole di comportamento** then there's **compensation for damages** (it does not pertain the structure, the essential elements of the contract that are still present and relevant: the contract is still valid but the party acted in a certain way and therefore there can be compensation for damages).

Case

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

Al Nehayan v Kent [2018] EWCH 333
Kent claimed that his consent to the agreement and the promissory note has been obtained in breach of fiduciary duties and / or a contractual duty of good faith owed to him by Sheikh Tahnoon.

L.J. LEGATT (since 21 April 2020 Justice of the UK Supreme Court): "it is sufficient to identify two forms of furtive or opportunistic conduct which seem to me incompatible with good faith in the circumstances of this case. First, […] for one party to agree or enter into negotiations to sell his interest or part of his interest in the companies which they jointly owned to a third party covertly and without informing the other beneficial owner. Second, while the parties to the joint venture were generally free to pursue their own interests and did not owe an obligation of loyalty to the other, it would be contrary to the obligation to act in good faith for either party to use his position as a shareholder of the companies to obtain a financial benefit for himself at the expense of the other" (para 176).

Interpretation of the contract

Once the contract is formed and we have all the essential elements, we have to understand the meaning of the contract from a comparative law perspective: how common and civil lawyers interpret contracts.

1. **INTERPRETATION**/assign a given meaning to the contract: how common lawyers and civil law lawyers interpret contracts in common and civil law jurisdictions. Parties might have varying interpretations of the precise significance of the language they employed (as to the wording used in the contract). Simply interpreting what the parties expressly agreed on is rarely enough to determine their contractual obligations. The vast majority of parties are unable to envisage every possible circumstance that could arise during the term of the contract.
2. **SUPPLEMENTATION** of the contract: if there is a gap in the contract, how is the gap filled by parties or courts in civil and common law jurisdictions. Legal systems provide solutions for addressing incomplete contracts. In many cases, it is impractical to negotiate and draft contracts that attempt to anticipate every possible eventuality.

CONSTRUING A CONTRACT

How is a contract conceived and built?

OPPOSING PREMISES

1. **OBJECTIVE APPROACH**: **EXPRESSION/**objective theory, "**Any promise binds the promissor, whether or not intended by her/him**" (OTTO BÄHR). Principle of **RELIANCE** on someone else's **promise**: **LEGAL CERTAINTY**. The latter is linked to the text: a promise is enforceable because there is a text that clearly shows that enforceability. The external expression of the parties' intention should take precedence. The interpretation of the words used would be based on how a reasonable person would understand them.
   Ex. §157 BGB: "contracts are to be interpreted «as required by good faith, taking customary practice into account»".
   Ex. Art. 1188 (2) code civil: "Where this intention cannot be discerned, a contract must be interpreted in the sense which a reasonable person placed in the same situation would give to it."
2. **SUBJECTIVE APPROACH**, principle of **self-determination**/subjective theory: **INTENTION** is the only essential element to be considered when constructing a contract= to understand a contract we must look at the intention of the parties. "**Intention per se is the only important and effective thing**" (FRIEDRICH VON SAVIGNY). The notion of legal certainty is less strong in case jurists are called to interpret the intention behind the text, which is a complex process carried out by courts.
   The process of interpretation involves determining the meaning that the parties intended to convey through their statements. Priority should be given to recognizing the presence of a shared intention.
   Ex. Art. 1188 (1) code civil: "A contract is to be interpreted according to the common intention of the parties rather than stopping at the literal meaning of its terms".
   Ex. §133 BGB: "When a declaration of intent is interpreted, it is necessary to ascertain «the true intention rather than adhering to the literal meaning of the declaration. »

--> If there is a contrast between the text of the contract and the intention of the parties, according to the subjective approach, the intention is more relevant: the intention comes into place for determining the enforceability of some promises.

1. **SUBJECTIVE TEST**: It aims at seeking out the parties' subjective understandings and is thus based solely on the inner intention of their communications or conduct (soft law projects especially emphasize this test). The judge has to determine whether the parties wanted to be bound by their acts.
2. **OBJECTIVE TEST**: It aims at seeking out the objective assessment of an external, detached observer and is thus based solely on the outspoken meaning of the parties' communications or conduct. In the English common law, the objective test has more relevance because they tend not to look at the intention of the parties, but at the wording of the contract. The judge limits his decision to the text.

--> CIVIL LAW JURISDICTIONS are generally keen to strike a **balance between the objective and the subjective** test: combination between the objective and subjective test (hybridization).

--> COMMON LAW JURISDICTIONS are generally keen to acknowledge solely an **objective test**, albeit one in various forms. The intention is not significantly looked upon. Tendency to recognize only an objective test, even though it may be adapted in various ways.
(These tests are also taken into consideration when considering the acceptance and the offer).

CONSTRUING A CONTRACT in COMMON LAW?
Ashington Piggeries Ltd v Christopher Hill Ltd. (1972; AC 441)
Hill (feeding stuff compounder) vs. Ashington (mink breeder).
Contract for the supply of an animal foodstuff. The contract described the basic expected "nutrition facts" of that foodstuff. --> "Ingredients of the foodstuff are to be of fair average quality of the season, expected to analyse not less than 70% protein, not more than 12% fat and not more than 4% salt".
An ingredient of the supplied foodstuff contained a toxic agent which, though not unfit to animals in general, caused thousands of Udall's minks to die.
Ashington sued Hill for breach of contract BUT Ashington's claim for damages **was dismissed**
"What the seller promised is determined by ascertaining what his words and conduct would have led the buyer reasonably to believe that he was promising. That is what is meant in the English law of contract by the common intention of the parties. **The test is impersonal** (no relevance to intention). It does not depend upon what the seller himself thought he was promising, if the words and conduct by which he communicated his intention to the buyer would have led a reasonable man in the position of the buyer to a different belief as to the promise; nor does it depend upon the actual belief of the buyer himself as to what the seller's promise was, unless that belief would have been shared by a reasonable man in the position of the buyer".
A subjective test could have determined the opposite result --> the claim is dismissed or accepted depending on the test used.

«Interpretation is the ascertainment of the meaning which the document **would convey (**based on the wording in the text- deprived of an intention assessment**) to a reasonable** person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract. The law excludes from admissible background the previous negotiations of the parties and their declarations of subjective intent."» **Lord Hoffmann** in Investors Compensation Scheme Ltd v West Bromwich Building Society [1998]
«The court's task is to ascertain the **objective meaning of the language which the parties have chosen to express their agreement.** It has long been accepted that this is not a literalist exercise focused solely on a parsing of the wording of the particular clause but that the court must consider the contract as a whole and, depending on its nature, formality and quality of drafting, give more or less weight to elements of the wider context » **Lord Hodge JSC in Wood v Capita Insurance Services Ltd [2017] UKSC.**

N.B. In case of ambiguity «If detailed semantic and syntactical analysis of words in a **commercial contract** (b2b) is going to lead to a conclusion that flouts business commonsense, it **must be made to yield to business commonsense**» Lord Diplock in Antaiosv Salen Rederierna A.B. [1985] AC 191 at 201: express reference to the need to adequate the meaning of the word to the common sense of that word in the business context.

INTERPRETATION IN COMMON LAW JURISDICTIONS

Lord Hoffmann in Investors Compensation Scheme Ltd v West Bromwich Building Societ:

- *"The law excludes from <u>admissible background the previous negotiations of the parties and their declarations of subjective intent</u>."*
- *"Interpretation is the ascertainment of the meaning which the document would convey to a reasonable person <u>having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract</u>."*
- *"The ascertainment of the meaning which the document would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties."*

The task of a court when resolving an interpretation dispute is to ascertain the meaning which the document would convey to a reasonable person having knowledge of the background circumstances.
The relevant background knowledge does not cover previous negotiations and parties' declarations of subjective intent.

Lord Hodge JSC in Wood v Capita Insurance Services Ltd:
«The court's task is to **ascertain the objective meaning of the language** which the parties have chosen to
express their agreement. […] **this is not a literalist exercise focused solely on a parsing of the wording of the particular clause but that the court must consider the contract as a whole** […]. »
⇩
The Court's task is to determine the objective meaning of contractual language. This involves considering
the entire contract and giving varying weight to contextual elements based on the drafting's nature, formality, and quality.

Lord Diplock in Antaios v Salen Rederierna A.B
«If detailed semantic and syntactical analysis of words in a commercial contract is going to lead to a conclusion that flouts business commonsense, it must be made to yield to **business commonsense**. »
⇩
If a literal interpretation of a commercial contract's words leads to a result that is completely unreasonable from a business perspective, the courts should prioritize the «business common sense» of the situationto find a more rational meaning.

CIVIL LAW: interpretation of promises

- **BGB: § 133 Interpretation of a Declaration of Intent.** When a declaration of intent is interpreted, it is necessary to ascertain «the true intention rather than adhering to the literal meaning of the declaration»
- **BGB: § 157 Interpretation of a contract**. Contracts are to be interpreted «as required by good faith, taking customary practice into account»
- **BGB: § 133 Interpretation of a promise**. In interpreting a promise, the effective intent shall be investigated, whilst the literary meaning of its expression is not binding. The primary element to interpret a given promise is the intention and the literary meaning is secondary.

-->This position is **opposed to the English Common Law**, where the literary meaning is the primary tool taken into consideration in order to interpret a promise.

- **Code Napoleon Art. 1188 (as amended in 2016)** 1. A contract is to be interpreted according to the common intention of the parties rather than stopping at the literal meaning of its terms (High relevance to the intention of the parties + the text is nevertheless important). 2. Where this intention cannot be discerned, a contract is to be interpreted in the sense which a **reasonable person** placed in the same situation would give to it. Literal meaning is relevant but must be combined with a further analysis, which is the investigation on the intention: what the parties wanted to do with the juridical acts.

  The **PRINCIPLE OF REASONABLENESS** comes into place: it was believed to be external to the law, and just related to the common sense of the everyday life (the standard parameter of action of a given person was used in the interpretation of the contract by the judge). Today it reflects the interpretation of the contract and is not outside the law anymore.

  Soft law tools:
- **PICC (global law project)**
  - **Art. 4.1 (intention of parties)** --> A contract shall be interpreted according to the **common intention of the parties**. If such an intention cannot be established, the contract shall be interpreted according to the meaning that **reasonable persons** of the same kind as the parties would give to it in the same circumstances. Strong **influence of the civilian tradition** although the project is global + the literary interpretation becomes even less relevant than in civil law countries (art. 12 of preleggi in Italy, disposizioni preliminary del codice civile, mentions it): no mention of the document and the need to base the interpretation on the wording of the text.
  - **Art. 4.2 (interpretations of statements and other conduct)** --> The statements and other conduct of a party shall be interpreted according to the party's intention if the other party knew or could not have been unaware of that intention (**relational provision/interpretation**: it relates the interpretation phenomenon to the two parties). If the preceding paragraph is not applicable (it is ascertained that the other party is not in the position to be aware of the intention: **de facto circumstance**, because the non-awareness must be ascertained by the court based on facts), such statements and other conduct shall be interpreted according to the meaning that a reasonable person of the same kind as the other party would give to it in the same circumstance.

EXPRESS/IMPLIED TERMS

EXPRESS TERMS --> these expressly contained in the parties' agreement and document.

⇩

GAPS

⇩

IMPLIED TERMS --> These are provisions that haven't been explicitly stated but are nevertheless incorporated into the contract --> terms not expressly put in the contract by the parties. However, if there is a gap in the contract, it is possible for the court to use the implied terms to fill the gap. It happens when parties do not regulate some aspects of the contract: when these aspects come to be relevant, the judge must fill the gap (gap filler).

IMPLIED TERMS IN THE CIVIL LAW – SUPPLEMENTATION IN CIVIL LAW

- The parties' will cannot generally set out all contractual rights and obligations in the contract: it is possible but very difficult to establish in advance all the problems/complexities that parties may encounter when executing the contract.
- Parties only discuss those elements of the contract which they deem essential (e.g. price and time of delivery). This is especially true in standard contracts between individuals, and less true in international contracts (where there are great experts).
- Often, certain rules are missing in the contract, such as what will happen if one party fails to fulfil the terms of the contract.: in standard and daily contracts it is not determined what happens if something goes wrong. However, this is a frequent event and that's why judges need to resort to implied terms.

Most contract law consists of "default rules" (or rules of thumb), which apply unless the parties have agreed otherwise: they relate to private interest + they can be used by courts to fill gaps. (e.g. if the place of delivery is not set in advance by parties, the judge can decide to resort to the default rule= the place must be identified, and the task of the court is where the place of delivery will be).

VS. Arbitration clause and arbitral tribunal in case of a dispute (both procedural aspects, so which law will determine the dispute, and substantial material aspects): parties decide the arbitration clause and refer the potential dispute to a specific arbitral tribunal in advance (especially in international contracts).

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

GENERAL PART	SPECIAL PART
One body of norms which are applicable to any contract, notwithstanding its type (e.g. negotiation, formation, performance of the contracts): notions that apply to all the contracts (norms of method because they characterize contract law in each aspect).	Additional sets of norms particularly applicable to single and most relevant types of contracts. They consist quite often in default rules which serve as gap-fillers of contractual agreements: **TERMS IMPLIED BY LAW.** (Specific norms that relate to specific contracts).

SOME **TRADITIONAL SPECIAL CONTRACTS** (they are provided with specific rules and norms for each contract):

- SALE (emptio-venditio)
- LEASE (locatio-conductio)
- LOAN (mutuum)
- DEPOSIT (depositum)

E.G. DEFAULT ROLE IN THE CONTRACT OF SALE (SPECIFIC RULE): Art. 1510 Place of delivery: "Lacking an agreement or usage to the contrary, a chattel/movable shall be delivered at the place where it was located at the time of its sale, if the party knew of that place, or otherwise at the place where the seller had his domicile or where her/his enterprise was headquartered".

E.g. General rules apply to all contracts (e.g. standard formation). However, some contracts require the written form and the notarization, like the sale of immovable while other contracts do not.

E.g. General rule: to be concluded a contract needs the offer and the acceptance. However, some contracts in order to be concluded require the delivery as well. For instance, **pegno**: in Italy we have a real guarantee based on the delivery of the good (real contract because it is based on the good, and without the delivery the contract of pignus is not concluded).

THE CONTRA PROFERENTEM RULE

- This principle means that if there are doubts as to the meaning of the contract terms, they **must be interpreted against the person who drafted it** --> **contra proferentem rule.** Today it is considered a component of member state's law. It became relevant with the European private law (asymmetry power between the parties).
- The rule cannot be found in national codes only, but it is also laid down in **European Directive 93/13 on Unfair Terms in Consumer Contracts** (not provided by the civil codes but became relevant with the European private law).
  Art. 5 (2): In the case of contracts where all or certain terms offered to the consumer are in writing, these terms must always be drafted in plain, intelligible language. **Where there is doubt about the meaning of a term, the interpretation most favourable to the consumer shall prevail.**

SUPPLEMENTATION

Merely addressing the ambiguities in the explicit terms agreed upon by the parties is inadequate. In certain situations, it might be essential to supplement the contract when an issue arises that the parties did not account for in their agreement (= anticipate). Or because the parties did not foresee the issue. Either because the parties anticipated it but neglected to address it.
! Furthermore, in numerous cases, the process of negotiating specific contract terms can incur significant costs in many cases.

SUPPLEMENTATION BY DEFAULT RULES

Default rules offer standard solutions for issues commonly encountered in specific categories of contracts.

- In **CIVIL LAW JURISDICTIONS** --> in most instances, gaps in the contractual agreement will be filled by referring to legal rules and the precedents established by the courts.
- In COMMON LAW JURISDICTIONS: gaps in contractual agreements are filled by recourse to "terms implied by law". But the number of such rules is not many.

AD HOC GAP FILLING

There might still be circumstances which are open and require tailor-made solutions for the parties agreement.
The gap filled with terms that are essential for the functioning of the contract and would have been mutually accepted by the parties had they considered them.

- In common law jurisdictions, the gap-filling is done through the use of "**terms implied in fact".**
- In civil law jurisdictions, courts refer to what is called "**constructive interpretation**".

Courts may also resort to the "hypothetical will" of the parties --> Under the civil law jurisdictions, court will make reference to what is called "constructive interpretation" --> This is generally done through the determination of the **hypothetical intention** of the parties. --> The judge will take the purpose of the contract, the interests of the parties, business practices in the industry and the principle of good faith and will find "how the parties would have regulated this point (hypothetical intention)".

COMMON LAW JURISDICTIONS

CLASSIFICATION OF SPECIAL CONTRACTS PLAYS A MINOR ROLE (if any): implied terms are only rarely provided for by statutes and mostly derived through the correct interpretation of the agreement between the parties BUT GENERALLY SPEAKING they are not present and listed because they do not have a code.

IMPLIED TERMS IN COMMON LAW – SUPPLEMENTATION IN COMMON LAW

1. **TERMS IMPLIED BY STATUTE -->** classification of special contracts plays a minor role (if any). Ex. The Sale of Goods Acts 1979 (in England) implies terms that goods must be of satisfactory quality and fit for purpose.
2. **TERMS IMPLIED IN FACT**
3. TERMS NECESSARY TO GIVE THE CONTRACT «BUSINESS EFFICACY»
4. **TERMS IMPLIED AT COMMON LAW,** judicial decisions are reiterated and followed by future courts.
5. **OBVIOUS, REGULAR, AND CUSTOMARY TERMS**: judicial precedent reflects old customary law

Parties try to mention and cover every single aspect of the contracts, which are somehow all embracing because they try to prevent and compress of scope of the judicial interpretation and the use of implied terms. This is connected to the approach of common law which adopts the objective test: if we concentrate on the literal text of the contract, we can find all the solutions.

CONTRACT DRAFTING IN THE COMMON LAW

- **Absence of a principle of «special contracts»** and **limited role of implied terms at statutes**: no distinction between the special part and general part like civil jurisdiction.
- **Absence of general principles of good faith** (however consider recent trends, e.g. commercial and relational contracts) and co-operation between the contracting parties + the good faith principle is related to the interpretation and not considered in the construction of the contract because it is not traditionally recognised in common law.
- **Limited role for the court in case of serious supervening circumstances**: courts are not entitled to intervene when there are circumstances that change the initial situation where the contract was concluded. For example, in the renegotiation, the role of the court is very limited (unlike the civil law courts): common law courts are not interested in addressing the adequacy, the content and economic part of the contract because they do not assess the economic convenience of the contract, they only ascertain the presence of consideration. The contracting parties here bear the risks that may arise (e.g. covid situation). In the civilian tradition there's a strong relationship between the possibility to negotiate and the supervening circumstances, that significantly modify the relationship of the parties while this is not a characteristic of the common law courts.

⇩

- Parties tend to draft their agreement in as much detail as possible, **to limit the scope of judicial interpretation:** parties are entitled to do what they want in a stronger sense.
- The content of the bargain shall be set out explicitly as far as possible**, in the interests of certainty**.
- Parties shall conduct due diligence exercises and allocate risks as far as possible in the contract itself: they may face the negative consequences of the supervening circumstances, and this is why common law courts are not allowed to modify the private law relationships.

DRAFTING INTERNATIONAL (COMMERCIAL) CONTRACTS

- The **boilerplate clauses** characterize international contracts.

They are standardized clauses, which generally put an end to lengthy contract drafting and govern many points (e.g. notice procedures, amendment procedures, interpretation issues, dispute resolution mechanisms, etc.).

If there is an ambiguity in the interpretation, the judge will opt for the literary criterion; if it is not possible, then they will opt another parameter --> these clauses provide the instruments and criteria to solve the ambiguity, to prevent the intervention of the judge, who will remain bound to follow the boilerplate clauses.

- That way, parties no longer need to rely as much on contract law principles of a single jurisdiction.
- Therefore, it is claimed that the contract is autonomous and not subject to the jurisdiction of any single country, making it truly international. Because those boilerplate clauses do not follow any particular State law, but are chosen by the parties, they are defined as autonomous and are not linked to any jurisdiction.

Like the common law contracts, also parties located in different countries who stipulate a contract (the object/good could also be located in a third country) so international contracts follow the common law approach: to guarantee the certainty they opt for the objective test.

➔ What if a boilerplate clause is contrary to a mandatory rule? The mandatory rule prevails.

Contractual invalidity

AVOIDANCE AND VOIDNESS

Contractual invalidity: different degrees!

A contract is **invalid** if it is affected by a **significant flaw** that impairs its legal enforceability.

AVOIDANCE / RESCISSION - annullabilità	VOIDNESS/NULLITY- nullità
Invalidity is meant to protect private interests. E.g., contract concluded by a minor, legal incapacity, incapacity de facto, defects of consent.	Invalidity is meant to protect general/public interests. E.g., contract contrary to mandatory rules + genetic vitiating factor: during the formation of the contract, one of the structural elements lacks. E.g. the agreement+ the object+ the causa (unambiguous objective which is not anymore present in France after 2016)

	+ the form when it is needed by mandatory rules (interest for the public interest that comes into play in the contract= parties are not allowed to set aside those rules)

These categories are less clearly defined in common law jurisdictions because the difference between voidness and avoidance is less clear.

- The case of invalidity is different from the case of termination: the issue is not invalidity, because they are two different cases.
- Invalidity is aimed at guarantying and protecting general interest: there's a general interest of the authority that such contracts of sale of immovable must be concluded in a given form (mandatory rules).
- Avoidance is aimed at protecting private interests

EFFECTS OF AN INVALID CONTRACT

1. **Nullity**: the contract is null and void and is never capable of producing any legal effect. If some performance was given, everything that was given must be given back: e.g. the payment must be returned (restitutionary effects of the contract)
2. **Avoidance**: A voidable contract means that a contract is valid unless rejected by a party, with the legally protected option of doing so. Therefore, it produces legal effects unless the party entitled to invalidate the contract invokes the invalidity: this rule reflects the private interest of the parties. The interested party who is potentially injured must raise the claim. It therefore may produce legal effects unless the party entitled to invalidate the contract invokes the invalidity. After the court declares the avoidance, the effects of the contracts these effects are treated as if they have never been produced, so there must be the restitution. Ex. A contract concluded under duress / the coerced party.

VALIDATION OF AN INVALID CONTRACT

1. **Nullity**: No party will be legally bound by it, and it cannot be relied on to obtain compensation for past performance. Because **public interests** are at stake. --> No one can validate null contracts. Ex. Illegal contracts, absence of an essential element of the contract (unlawfulness of subject matter, contract contrary to mandatory rules, public order or morality)

In Italy it is possible to have the conversion del *contratto nullo*, so the null contract is transformed into another contract and this operation is done on the effects of the contracts.

2. **Avoidance**: The party empowered to bring a. claim to avoid a voidable contract may validate it. (invalidity is meant to protect private interests). The purpose of avoidance is to protect individual interests. Ex. Legal incapacity, defects of consent.

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

1. DEFECTS AS TO THE AGREEMENT BETWEEN THE PARTIES
    a. It is merely apparent, lack of mutual agreement of the parties, e.g. offer and acceptance do not coincide and the court ascertain that the agreement was not reached by the parties.
    b. Failure to meet mandatory form requirements (if any) (want of form);

   c. Non-existence or impossibility of the subject matter of the contract
2. ILLEGALITY AND IMMORALITY (illicit contracts)
   a. infringement of a mandatory rule, which prohibits both parties from entering into a contract (a specific public interest is violated);
   b. Contracts against public policy (*ordre public*), including morality (*contra bonos mores*).

ILLEGAL OR IMMORAL CONTRACTS

ILLEGALITY AND IMMORALITY (illicit contracts) is strictly intertwined with a breach of a mandatory rule.

The judge's ruling regarding the consequences of violating the statutory rule 'depends on considerations of public policy in the light of the mischief which the statute is designed to prevent, its language, scope and purpose, the consequences to the innocent party and any other relevant consideration'. (*Phoenix General Insurance Co. of Greece S.A. v Administratia Asigurarilor de Stat [1987] 2 All ER 152)*

UNFAIRNESS

Does the validity of a contract depend on the existence of a fair balance between performance and counterperformance?

For a time, it was believed that it was sinful for one party to pay less than a just price (iustum pretium).

Natural law scholars developed the idea that a party should have the right to withdraw from a contract based on the principle of 'laesio enormis'.

The issue of unfairness seemed irrelevant during the 19th century because of the prevailing dominance of liberalism.

However, § 138 (2) BGB states that a contract is void if:

- performance and counterperformance are *'clearly disproportionate'*, and
- one of the parties exacted the contract *'through exploiting the predicament, inexperience, lack of judgment or significant indecisiveness'* of the other party.

Does the validity of a contract depend on the existence of a fair balance between performance and counterperformance?

There is no general principle in English law that permits a party to escape from a clearly unfavorable contract.

Lord Denning in Lloyd's Bank v 55 Bundy [1975] QB 326, 329.

«who, without independent advice, enters into a contract on terms which are very unfair … when his bargaining power is grievously impaired by reason of his own needs or desires, or by his own ignorance or infirmity, coupled with undue influence or pressures brought to bear on him by or for the benefit of the other»

It is frequently transmitted through contracts via the use of standard terms.

Standard terms save the parties the expense of negotiating the terms of each contract individually.

Companies often structure their terms in such a way as to transfer as much risk as possible to the other party.

Consequently, standard terms can be unfair and benefit the drafting party more.

Consumers frequently agree to unfavorable standard terms because of their 'unequal bargaining power'.
Courts consistently intervene to protect individuals from unfair standard terms
They are considered unwritten (invalid) if the party who drafted them did not allow the consumer to carefully read and understand their consequences.

CONTRA PROFERENTEM RULE

Germany (1976): Act on General Conditions of Business
UK (1977): Unfair Contract Terms Act
France (1978): Act on the Protection and Information of the Consumer (*'Loi Scrivener'*)
In 1993, a Directive on Unfair Terms in Consumer Contracts was enacted.

LACK OR IMPOSSIBILITY OF THE SUBJECT-MATTER

Civil law jurisdictions	Common law jurisdictions
Contracts whose specific performance is impossible are generally not enforceable in civil law jurisdictions.	Common law jurisdictions tend to enforce such contracts: if a party has undertaken to do something which is physically impossible, it is bound to **pay damages** for breach of contract--> compensation for damages which is grounded in the contract that was not observed.

Code Napoleon (similar to the Italian civil code): Art. 1163 (as amended in 2016)
(1) An obligation has as its subject matter a present or future act of performance.
(2) The latter must be possible and determined or capable of being determined (the subject matter has to be predetermined in advance or determinable in the future in order that that the obligation stemming from the contract will be valid.)

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

- ➔ Civil law court would declare that the contract is just null and void (no compensation).
- ➔ Common law court would say that the legal issue is not the nullity of the contract, but to condemn and oblige the party to compensate.

This is the traditional distinction between common law and civil law.

Sometimes we have **hybridization**: the view of the common law has taken root in civil law jurisdictions as well, like in Germany where in 2001 there was a reform of the civil code in the part of law and obligations, which related specifically to the law of obligations and so the legal relations.
The **modern version of §311** a Hurdle to performat the time the contract is concluded

(1)A contract is not devoid of its effects for the fact that one of the parties' performance is impossible already at the time when the contract has been concluded.
(2) The other party can claim (expectation) damages or reimbursement of expenses […]
--> the german case is isolated and exceptional confronted with other civil law jurisdictions.

AVOIDANCE

General grounds of avoidance are (depending on the legal system):

1. **LACK OF LEGAL OR DE FACTO CAPACITY**: A contract concluded by a minor or a mentally incapacitated person. A potential claim of avoidance may be raised before the court. Incapacity of one of the contracting parties. The contract is concluded by a minor (legal incapacity) or the contract is concluded by a person who is in a situation of incapacity de facto.
2. **DEFECTS IN CONSENT**, vizi del consenso:
    a. Duress: It occurs when one party forces the other into a contract against their will.
    b. Deceit or Fraud: Deceit/Fraud is a deliberate act of deception intended to induce another party into a contract. It involves knowingly making a false statement, concealing material facts or making promises with no intention of fulfilling them.
    c. Mistake: A mistake is an erroneous belief, at contracting, that certain facts are true.
    d. Undue Influence: Undue influence exists when one party uses a position of power to pressure another into a contract, undermining their free will and consent.

Mistake

Civil law jurisdictions	Common law jurisdictions
Adopt an 'intention-based approach' to contract, which leaves more room for its avoidance based on a vitiating factor, particularly a mistake. Broader approach. The mistaken party can claim avoidance of contract in case –conditions: 1. the mistake is material (or essential): It must pertain to a fundamental element of the contract. Mistakes in subsidiary elements do not affect validity. the mistake is related to a structural clause and without it the contract does not make any sense: OBJECTIVE ELEMENT. 2. the other party knew of the mistake, or could have known of it, had she/he acted in good faith: SUBJECTIVE ELEMENT. **LIMITS TO CONTRACTUAL AVOIDANCE DUE TO MISTAKE:** A legally significant mistake can only be discussed where it has been "caused by information provided by the other party". The counterparty was aware, or should have been	Adopt an 'expression-based approach' to contract (objective test- we assign relevance to the text), which immunizes it from 'unilateral' mistake incurred by each party, unless they have been caused by a misrepresentation. Narrower approach: mistake has a narrower space, apart from the case of misrepresentation. Less possibility to resort to avoidance on the ground of a mistake. A unilateral mistake does not affect the validity of the contract, however fundamental to the mistaken party's decision to enter into the contract (even if it is material, related to essential or ancillary clauses). An equitable remedy of avoidance (rescission™) of the contract is granted in case the mistake was created by a misrepresentation made by the other

aware, of the mistake, yet failed to fulfil their obligation to provide information that could have rectified it. However, avoidance might be permissible in extraordinary circumstances where both parties have made the same mistake ("common mistake"). A mistake may be considered "fundamental" if it "radically and essentially alters the subject matter of the contract from what the parties believed it to be". Ex. Art. 6:228 (c) BW enables a party to avoid a contract if, at the time of its conclusion, the counterparty "has based itself on the same incorrect assumption as the mistaken party" and should have been aware that, if provided with accurate information, the other party would not have agreed to the contract.	party, or her/his agent, or a third party whose misrepresentation the other party had knowledge of. **Innocent Misrepresentation.** Misrepresentation Act 1967, s 2 (2): «if of opinion that it would be equitable to do so». The party that made the mistake may receive compensation instead of the contract being avoided. Compensation can only be sought not only when the other party knew their statement was false (i.e. fraudulent misrepresentation), but also in other cases, but also when he was merely negligent.

Rescission: in common law jurisdictions avoidance and rescission are treated similarly--> they do not recognise the three categories.
Civil law --> the contract cannot be avoided solely because one of the parties made a mistake regarding the value of the subject matter. Similarly, a party cannot use a mistake as a justification to evade a risk that was specifically or implicitly assigned to them by the contract.

SPICE GIRLS LTD V APRILIA WOLRD SERVICE BV

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

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

".. If A with a view to inducing B to enter into a contract makes a representation as to a material fact, then if at a later date and before the contract is actually entered into, owing to a change of circumstances, the representation then made would to the knowledge of A be untrue and B subsequently enters into the contract in ignorance of that change of circumstances and relying upon that representation, A cannot hold B to the bargain" Romer LJ in With v O'Flanagan (1936)

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

Judgment delivered by the Court of Appeal
The Court of Appeal concluded that the representations, express or implied, in both the fax of 30th March 1998 and participation in the commercial shoot on 4th May 1998 were **material inducements** to AWS to enter into the Agreement on 6th May 1998. **It is inconceivable that AWS would have entered into those commitments had it been told of Ms Halliwell's declared intention to leave in September 1998. It might have entered into some other agreement with a view to cutting its losses.**
SGL is liable to AWS under s.2(1) Misrepresentation Act 1967.

Misrepresentation refers to a false statement or false impression made with the intent to deceive, or which has the effect of misleading others. It typically occurs in the context of contracts, business dealings, or legal situations. Misrepresentation can be either intentional (fraudulent) or unintentional (negligent or innocent).
In legal contexts, misrepresentation can affect the validity of a contract, and the affected party may be entitled to remedies such as rescinding the contract or claiming damages.

Deceit (fraud)

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

- ❖ **FRAUDOLENT MISREPRESENTATIONS** both in civil and common law jurisdictions: the mistake proves to be intentional (we must distinguish if behind the mistake there was or not the intention of the party).
- ❖ **SILENCE (NON-DISCLOSURE OF AN INFORMATION)** solely in (most) civil law jurisdictions (and as a recent development). One of the contracting parties decides not to reveal information to induce the other party to conclude the contract.

CLAIM FOR AVOIDANCE

- ✓ If correctly informed, the mistaken party would not have concluded the contract (dolus causam dans). The mistaken party can ask the court to declare that the contract is avoidable.
- ✓ Contract is not avoidable in case of laudatory puffery (esagerazione pubblicitaria) that no reasonable man would have taken literally (dolus bonus) (no taken seriously by a legal perspective)

CLAIM FOR DAMAGES

- ✓ If correctly informed, the mistaken party would have concluded the contract, although on better terms (dolus incidens): better terms were not included, and this justifies the claim for damages.
- ✓ Damages are to be assessed along the better terms which the mistaken party would have bargained, if correctly informed (expectation damages)= the damage is rooted and grounded on the better terms that would have been negotiated if the mistaken party knew everything before the contract.

AVOIDANCE FOR DECEIT (FRAUD)

Avoidance is granted when the fraud is committed by the other contracting party (or her/his agent).

If it is committed **by a third party**, avoidance is granted when the other **contracting party knew** or must have known it (the court has to ascertain that the other contracting party knew and this would justify the claim for avoidance).

DURESS

Duress consists in threats of a harm:

- to a would-be party's or her/his family's life and limb, honour or property
- to a would-be party's economic interests (economic duress)

which do induce that would-be party to enter into a contract (in order to avert the danger thus faced).

A claim for avoidance of such obligations can be presented.

Does the legitimate threat of something that one is entitled to do amount to duress? Is the legitimate threat of doing something one is entitled to do considered duress?

CIVILIAN TRADITION: Code napoleon Art.1141(as amended in 2016) A threat of legal action does not constitute duress, except where the legal process is deflected from its own purpose or where it is invoked or exercised in order to obtain manifestly excessive advantage: the court and judge will ascertain if the duress is so relevant and important to constitute grounds for avoidance.

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

Genetic causes of invalidity vs. functional invalidity

FUNCTIONAL INVALIDITY is not related to the moment in which the contract is stipulated, to his genesis, but it pertains to the life of the contract, problems occurring after the formation of the contract.

Breach of contract (inadempimento)

When a breach of contract takes place, we must identify the **consequences** for this fact and clarify the **conditions for granting remedies.** If they are met, the court will grant some remedies to restore the position of the aggrieved party. To be compensated there are some conditions to be met.

The contract was already formed, but during the life and execution of the contract there was a breach: correct/incorrect performance during the third stage of the life of the contract (1. Negotiation, 2. Formation, 3. Performance).

1. ANTICIPATORY BREACH OF CONTRACT: One party announces its intention not to fulfil the contract before the agreed time for performance. E.g. I buy the car, we stipulate that the car must be delivered before September 20th, but the seller tells me that he won't deliver the car on September 15th (he won't deliver the car by the due date). Prestazione non era ancora esigibile.
2. ACTUAL BREACH OF CONTRACT: It occurs when there is a failure to perform on the agreed date or during the performance was in progress: the performance becomes due but on that date the performance is not rendered by the seller.

What are the conditions for remedies and remedies themselves? Provided that the buyer of the car has suffered a given contract damage: evidence of the damage e.g. I needed the car for September 20th.

Remedies

Contractual expectations are satisfied when both parties fulfil their respective commitments. When there is a breach of contract by one party, the other party will have remedies. A remedy is a legal method of enforcing a right or appropriately repairing an error.

1. **Specific performance**: If a party fails to fulfil their obligation, a court of law may compel them for performance.
2. **Termination of contract**: The non-breaching party can request termination, fulfil contract decline to its obligations, or seek a refund of any payments made (restitutionary effects stemming from the contract).
3. **Compensation for damages**: A monetary compensation that can restore the injured party to the same level of benefit or utility as if the contract had been executed correctly. The damaged must be proved by the aggrieved party: only if the damage is proved, compensation will be granted by the court.

Common and civil law jurisdictions have different approaches regarding those remedies: compensation is seen as the typical remedy in common law, while specific performance is the typical remedy in civil law.

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

Civil law jurisdictions	Common law jurisdictions
MORAL APPROACH TO CONTRACT LAW Promises must be kept (*pacta sunt servanda*). In the event of non-fulfillment, the legal system initially enforces the	**ECONOMIC APPROACH TO CONTRACT LAW** Rather than carrying out the performance, the debtor may choose to compensate the other party to restore their financial

debtor's obligation as a corrective measure: need to continue and respect the contract that has been stipulated--> **specific performance** is the typical remedy considered because it proves fully in line with the need to preserve the contract. Enforcing specific performance is a typical remedy. Only in rare cases is it prohibited	position as if the contract had been correctly executed. The moral approach of *pacta sunt servanda* is significantly weaker but common law aims at guaranteeing the aggrieved party the right to be see the financial position restored= need to preserve the contract is not strong--> the typical remedy is **compensation for damage**s so that the injured party is restored.

CIVIL LAW APPROACH --> Specific performance is the typical remedy. It is only prohibited in exceptional cases
sometimes the specific performance is not feasible and this evaluation is carried out by the court depending on the circumstances, because some performances may become e.g. impossible and the only chance for the court is opting for other remedies.

Exceptions for specific performance:
- **IMPOSSIBILITY TO PERFORM** (Regardless of whether it is caused by the debtor's fault or not)
- **CONTRACTS INVOLVING PERSONAL SERVICES**: Not only could specific performance infringe upon the debtor's personal freedom, but if compelled, the debtor might not perform to the best of their capabilities. The object of the contract stipulated by two parties is based on a personal service that must be carried out personally by the debtor, so specific performance is not an option for the court (also considering the interest of the aggrieved party).
- **UNDUE HARDSHIP / DISPROPORTIONATE COSTS**: Although performance is still possible, it would cause the debtor to incur excessive effort or costs. Ex. Art. 1221 Code Civil: A creditor of an obligation may, having given notice to perform, seek performance in kind unless performance is impossible or if there is a manifest disproportion between its cost to the debtor and its interest for the creditor.

COMMON LAW APPROACH (US, UK + CANADA (ex. Quebec) + AUSTRALIA) --> The typical remedy is to provide monetary compensation for damages; specific performance is rare.
Efficient breach of contract --> a party should have the option to terminate the contract and provide compensation for damages if it proves to be a more economically efficient choice than fulfilling the contract --> emphasis is put on the economic interests of the parties. If the economic sums do not meet these interests, then other options can be taken into consideration. Paradoxically it is fully allowed not to respect the contract: the parties can decide not to fulfil the contract if they decide that it is not economically convenient to perform the contract itself --> sometimes the breach of contract is more efficient than performing the contract (we do not recognise this theory in civil law countries).

"The only universal consequence of a legally binding promise is that the law makes the promisor pay damages if the promised act does not come to pass. In every case it leaves him free to break his contract if he chooses" Justice Oliver Wendell Holmes jr. – 1881.

The monetary sum established by the court should be capable of fully restore the position of the aggrieved party: there's the need to fully the restore the position of the aggrieved party. <u>If compensation cannot do so, another remedy can be granted: **hierarchy among remedies**.</u>
! In common law jurisdictions, courts may issue a specific performance order when the innocent party's claim for damages fails to adequately address its interests.
! Damages are considered "inadequate" when the debtor pledged to provide a distinctive asset, one that is exceptionally rare or possesses sentimental value that is <u>challenging to quantify in monetary terms</u>.

Art. 13, DIR. 2019/771/UE «In the event of a lack of conformity, the consumer shall be entitled to have the goods brought into conformity (**specific performance**) or to receive a proportionate reduction in the price (**specific performance**: the price is reduced), or to terminate the contract (**termination of the contract**), under the conditions set out in this Article»: **ALTERNATIVES OF REMEDIES**
Art. 45 CISG (1) If the seller fails to perform any of his obligations under the contract or this Convention, the buyer may: (a) exercise the rights provided in articles 46 to 52 (i.e. specific performance and other rights); (b) claim damages as provided in articles 74 to 77. (2) The buyer is not deprived of any right he may have to claim damages by exercising his right to other remedies = **POTENTIAL COMBINATION OF REMEDIES.**

TERMINATION

The innocent party might opt for contract termination. If this remedy is permissible under the law, neither party is obligated to perform, and <u>if performance has already occurred, it must be returned by the recipient</u>. Termination must be related to a **fundamental** or **material breach of contract**. The court has the task to ascertain if the breach is highly relevant for contracting parties based on de facto circumstances. The German civil code for example does not mention this requirement.
Sometimes courts do not have this task, because it will be done by parties in advance. For example, when there's an explicit termination clause (parties do not want to bear the risk of the interpretation of the court).
Art . 25 CISG: A breach of contract committed by one of the parties is fundamental if it results in such detriment to the other party as substantially to deprive him of what he is entitled to expect under the contract [...]

- To make a distinction between 'substantial' and other breaches which are not so significant, **English law** frequently depends on the distinction between '**warranties'** and '**conditions' (major term of contracts**= when violated, the contractual victim has the right to ask for termination, because a major term is infringed, and this is not an option for warranties because they are **minor terms** in the contract, and so are less relevant)
- Under French law, the injured party has the right to unilaterally terminate the contract if the other party's non-performance is "<u>suffisamment grave" (sufficiently serious</u>).

To sum up, the innocent party might opt for contract **termination**. If this remedy is permissible under the law, neither party is obligated to perform, and if performance has already occurred, it must be returned by the recipient **FUNDAMENTAL OR MATERIAL BREACH OF CONTRACT**
--> Art. 6:265 BW affirms that a party cannot ask for contract termination if 'the non-performance, considered its peculiar nature or trivial significance, does not justify' the remedy.
--> **German law** doesn't necessitate a 'fundamental' or 'material' breach --> the standard principle is that if the debtor didn't carry out the performance as per the contract, the injured party can terminate the contract only when it meets certain conditions. The innocent party 'has fixed, to no avail, a reasonable period for performance or cure' (**Nachfrist model**).

COMMON LAW APPROACH (ENGLAND): as we said before, to make a distinction between 'substantial' and breaches which are not so significant, English law frequently depends on the distinction between 'warranties' and 'conditions':

- **Conditions -->** Terms of the contract that are so essential to the contract that their breach goes to 'the root of the agreement': ESSENTIAL TERMS. When the debtor fails to comply with a condition, the other party will be entitled to terminate the contract (can also claim compensation).
- **Warranties --> Less** critical, collateral promises or assurances about the quality or performance of goods or services: MINOR TERMS. When the debtor fails to comply with a warranty, the other party will be entitled to claim compensation but will not be entitled to terminate the contract.
- **Innominate (intermediate) terms -->** They are neither minor terms (warranties) nor essential terms (conditions) from the outset. If a breach of an innominate term significantly deprives the innocent party of the whole benefit of the contract, it is treated as a breach of a condition. If the breach of an innominate term is less severe, it is treated as a breach of warranty, and the innocent party can only claim damages.

AGREED RIGHTS OF TERMINATION

The contract can be terminated without the condition of a significant breach if the parties agree to it. The evaluation of the fundamental breach is made in advance and not by the court or judge, who usually has the task to decide if the breach is fundamental/material or not and so the risk of the termination.

1. EXPLICIT DISSOLUTION CLAUSE

The parties entering into a contract can expressly stipulate that the contract will be terminated if a particular obligation is not fulfilled. This provision enables the contractual parties to assign significant importance (regarding the termination of the contract) to an obligation, which otherwise might be considered of minor significance.

2. TIME ESSENTIAL FOR ONE OF THE PARTIES

The contract will be terminated if the agreed time for performance is not met, as this has been expressly defined as essential for the benefit of the other party: it is expressly related to the time of the performance.

TERMINATION AND BREACH OF CONTRACT

When is there a breach of the contract?
In case of:
(i) **non-performance** (e.g. the seller decides not to deliver the car at all)

(ii) **defective performance** (e.g. the seller gives me a car with defects, even though I paid for a new car without defects)
(iii) **delay in performance** (e.g. I bought the car, the price was accepted, but the seller delivers the car later than the due date).

In all cases we should analyse if the breach is fundamental/material or not in the light of the contract: ascertain if this breach is essential (e.g. I needed the car for a specific activity, but the delay did not allow me to do so).
Therefore, the event must impact seriously the contract and has to be material: legal prerequisite + the breach is attributable to the active/passive behaviour of the contracting party + the court has to ascertain and establish whether or not the breach existed.
A potential breach could also not cause any compensation when the judge establishes that the victim did not suffer any damage or harm: there's no loss to be compensated.

The creditor (the injured party) **might** be able to seek compensation for damages. The possibility must be ascertained by the court (de-facto circumstance) --> the so-called **POSITIVE INTEREST**: the need to restore the economic position of the party --> The injured party should be put in a financial position that is as close as possible to what it would have been had the contract been executed correctly.

CLAIM FOR DAMAGES

French distinction between obligations de moyens (di mezzi) and obligations de resultat (di risultato)--> this distinction has been embraced by several Italian scholars and also the Italian supreme court.

(i) **OBLIGATIONS DE MOYENS**: it revolves around the idea that the result is not the final parameter looked at by the court to establish damages, because the debtor simply committed to taking all the required actions that a rational individual facing similar circumstances would take in order to accomplish their objective. The debtor has to adopt all the behaviours required to fulfil the obligation: the debtor only promises to take all the actions that a reasonable person in the same circumstances would take to achieve their goal. E.g. Lawyer = the client is not entitled to reach compensation if the lawyer loses.

The injured party needs to demonstrate that the other party didn't exercise the level of care that a reasonable person in a similar situation would have taken.

COMMON LAW APPROACH	≠	CIVIL LAW APPROACH

(i) The mere occurrence of non-performance or breach is **sufficient** on its own to initiate a claim for compensation. The fact that there's a breach. is a ground for compensation and is the only element that we need. The breach is highly relevant to award damages. (ii) The debtor will be held responsible without exception if the promised outcome is not achieved (because a debtor making a contractual promise guarantees to perform the promise). --> Doctrine of FRUSTRATION A contract comes to an end under the following circumstances: • If performance becomes impossible for the debtor beyond its control. • If performance becomes difficult for the debtor because of an unforeseen change of circumstances for which neither party bears the risk.	≠	(i) If the debtor is capable and willing to remedy the breach, the **contract cannot be terminated, and damages cannot be requested** instead of performance. (ii) The general rule is that the injured party must first give a reasonable time period for the debtor **to fulfil the contract or remedy a defective performance**. It is only when performance is not effected before the expiry of that period that the injured party can claim damages. A debtor will only be liable in damages for breach of contract if the breach is '**attributable'** or '**imputable'** to them (**FAULT PRINCIPLE**). Nevertheless, numerous **exceptions** to the **'fault principle**' are acknowledged. Contrary to the common law approach, in 2023 the Italian supreme court argued that the traditional view in the civil liability sector is that the material loss/damage should be suffered in order to be compensated (majority view).

OBLIGATIONS DE RÉSULTAT: it binds the party to reach a given result. So, if the result is not reached, then there's a breach of contract and the debtor will be responsible for paying damages without exception, unless that they can prove execution was prevented by **force majeure event**.

'Force majeure' --> circumstances outside the debtor's control, which were not reasonably foreseeable when the contract was concluded, and unavoidable by reasonable measures.

How to assess damages? Damages compensate:

1. Losses incurred by the injured party (direct losses / pecuniary and non-pecuniary)
2. Any loss of earnings (consequential losses)**:** based on the breach, the victim did not receive a gain which he would have obtained if the contract would have been respected.

--> **General principle**/aim: **full reimbursement** for the damages resulting from a contract breach (financial reimbursement). (Ex. **Unidroit PICC - 7.4.2** --> (1) The aggrieved party is entitled to full compensation for harm sustained as a result of the non-performance. Such harm includes both any loss which it suffered and any gain of which it was deprived, taking into account any gain to the aggrieved party resulting from its avoidance of cost or harm. (2) Such harm may be non-pecuniary and includes, for instance, physical suffering or emotional distress). The monetary sum will be a tool for compensation.

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

FORESEEABILITY

= A condition that must be met in order to compensate damages.

When awarding damages, the courts provide compensation to the injured party solely for the losses that were (i) foreseeable/predictable in advance or (ii) within the **contemplation of the parties** when **contract was concluded** (Ex. III. – 3:703 DCFR).

--> Foreseeability does not require actual foresight but rather a reasonable expectation of the event or outcome.

Two types of injuries are deemed to be foreseeable:

1. Injuries that will naturally arise from a breach in the ordinary course of events. There's a breach, and the consequence follows it.
2. Injuries that arise from the special needs or circumstances of the aggrieved party, of which the other contracting party has knowledge or reason to be aware. (**potential foreseeability**).

In some cases, foreseeability should be present, but there could also be a potential foreseeability: the damage could have been excepted and prevented.

DUTY TO MITIGATE DAMAGES

A cardinal rule of contract damages is that the aggrieved party cannot recover those losses which the party could have avoided **by reasonable effort** and without undue expense by virtue of opportunities that the party would not have had but for the breach--> the victim takes measures to avoid the damages, consistent with the life of the contract (not disproportionate)= duty must be observed by the injured party. Otherwise, the victim will not be entitled to be compensated, because he did not take the measures to avoid the damages.

Consequences of failure to comply with the duty --> The profits that the injured party could have earned through reasonable efforts are subtracted from the amount they could otherwise claim as compensation.

What is meant by reasonable effort? Proportionality, so consistent with the life of the contract.

--> The amount of compensation that the injured party could otherwise claim is reduced by the profits they could have earned through reasonable effort. Only **a reasonable effort to mitigate damages is required**. The doctrine does not require that his efforts be successful.

DCFR

III. – 3:703: Foreseeability

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

III. – 3:705: Reduction of loss

1) The debtor is not liable for loss suffered by the creditor to the extent that the creditor could have reduced the loss by taking reasonable steps.

2) The creditor is entitled to recover any expenses reasonably incurred in attempting to reduce the loss.

LIQUIDATED DAMAGES CLAUSES

How to calculate the amount of compensation? To avoid the risk of these calculations, and the long time needed for the court to establish it, the contracting parties could include a **liquidated damages clause**: the parties to a contract may agree to include a clause stating that, in the event of a breach, the responsible party should pay a specified amount to the affected party. In this way the parties already know/pre-estimate the amount of money they are going to pay in case of a given event, so it's an **EX-ANTE APPROACH.**

Risks:

- The breach results in an amount of money that is greater than the sum of money lost
- The breach results in an amount of money that is less than the sum of money lost

To sum up, parties to a contract agree, as one of the terms of their agreement, that, in the event of breach, the culpable party should pay a specified amount to the injured party without having to go before the court.

- Unlike the approach to assessing damages after a breach, a liquidated damages clause anticipates the breach by setting the amount to be recovered before any party defaults on their contractual obligations.
- As the actual amount of damages resulting from a potential breach is often unknown at the time of contracting, liquidated damages represent the parties' pre-estimate of the probable amount of damages.
- Often this pre-estimate will turn out to be an inaccurate forecast of the actual damages caused by the breach.

--> Are contracting parties <u>free to determine the amount</u> of liquidated damages? It <u>depends</u> whether we're discussing civil law or common law.

Functions in general

1. It is a convenient method of determining the amount to be paid in the event of a breach (i.e. a good faith estimate of probable damages).
2. It may force a party to fulfil its obligations if the liquidated sum provides for damages that exceed the actual amount of damages (preventive function).
3. It may reduce the amount of loss incurred by a party in breach if the liquidated sum is less than the actual amount of damages.

--> The monetary sum in the clause should not be excessive compared to the actual damage: there must not be a disproportion.

Common law approach

Enforceable	Unenforceable
Liquidated damages clause Purpose --> to pre-estimate the probable amount of damages	Penalty clause Purpose --> coerce the defaulting party to perform his/her obligation (in a disproportionate way).

--> The pre-estimation should be proportionated to the damage which takes place, considering the contract.

In case there's no proportion, a common law court will say that the clause is not enforceable (penalty clause= these clauses are manifestly disproportionate). There are some criteria used by

common law courts to detect clauses that are enforceable and clauses that are not enforceable. The court will conduct a concrete assessment on the clauses and will decide if they are enforceable or unenforceable (they do not consider the labels which the party decided).
--> The type/nature of the clause is determined by the court after an analysis of whether the stipulated sum is a reasonable pre-estimate of potential damages.

LIQUIDATED DAMAGES CLAUSES

CIVIL LAW APPROACH		COMMON LAW APPROACH
• Clauses that require the breaching party to pay a certain sum are generally enforceable. • In civil law legal systems, there is often no clear distinction between **‘penalty’** and ‘**liquidated damages’ clauses**. • Civil law jurisdictions provide only for one type of clause which is called in different ways: *clause pénale, clausola penale, Vertragsstrafe.* In civil law jurisdictions, it’s common for the judge to have the authority to **reduce the amount** determined by the parties if it is clearly excessive, or in cases of partial fulfilment of the contractual obligation.	≠	1. Liquidated damages clauses are enforceable because their purpose is to estimate in advance the likely extent of damages. 2. Penalty clauses are **not enforceable**, and their primary purpose is to pressure the defaulting party into fulfilling their obligation. **N.B.** Dunlonp v New Garage (1915) (see below)

THE DUNLOP TEST

Common law approach
--> Criterion for distinguishing liquidated damages clause and penalty clause:

Dunlonp v New Garage (1914) UKHL 1:

Lord Dunedin held that the terminology used by the parties is not conclusive. The court must find out whether the payment is in truth a penalty or a liquidated damages clause: there’s the concrete assessment on the monetary sum by the court, and only if the latter is proportionate and not manifestly excessive, then the clause is enforceable.
--> The essence of a penalty is a payment of money stipulated in terrorem of the offending party while the essence of liquidated damages is a genuine covenanted pre-estimate of damage: the first-mentioned clauses cannot be enforced because their function is not consistent with the legal systems (the amount of money is not fair).

The following principles may assist the court in its task:
1. The sum agreed by the parties will be considered a penalty clause if it is **excessive** and **unreasonable** compared to **the greatest loss** that could be proven to have resulted from the breach.
2. The agreed sum will be considered a penalty clause if **the breach consists of failing to pay a sum** of money, and the stipulated sum is greater than the amount that should have been paid.

3. A clause is presumed to be a penalty clause if a single lump sum is payable as compensation for one or more events causing varying degrees of loss (i.e. **if a single lump sum is payable for different events, regardless of whether they cause serious or minor damage**).
4. **If the financial consequences of a breach are difficult to estimate**, but the parties have agreed on a **genuine pre-estimate**, this will not invalidate the clause. On the contrary, it will support its enforcement, as the courts should follow the parties' agreement.

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

The government contracted a manufacturer to supply gun carriages. Delivery. time was important to the government, which is why it had rejected lower bids in favour of the manufacturer who promised the fastest delivery. The government and the manufacturer agreed that the manufacturer would pay the government $35 penalty for each day that a delivery of gun carriages was delayed. This sum was calculated based on the average price difference between the manufacturer and cheaper, slower suppliers. However, the manufacturer delayed the delivery of some of the gun carriages.
Is the clause enforceable? In other words, Is it a liquidated damages clause? Yes, the purpose of the clause was to provide the government with reasonable compensation for losses incurred due to the increased costs of speedy delivery.

FUNCTIONS OF TORT LAW, GROUNDS FOR LIABILITY

WHAT IS TORT LAW?

Tort is a source of obligations like contracts (agreement made by two parties to have reciprocal obligations + contratto con obbligazioni del solo proponent like suretyship), and unjustified enrichment.
Tort law is a body of civil law that deals with situations where one person's wrongful actions or omissions cause harm to another, and it aims to provide a legal remedy to the victim, usually through monetary compensation.

- In essence, tort law consists of remedies granted to the injured persons by those who have caused the harm. However, there are several differences among the remedies granted by jurisdictions depending on the philosophy adopted.
- In private law, "torts" are considered one of the sources of legal obligations (see, for example, Art. 1173 of the Italian Codice Civile, where they are listed alongside contracts and other sources of legal obligations).
- The essence of the relationship between the "tortfeasor" (wrongdoer) and the "injured party" (victim) is the tortfeasor's duty to provide relief for the victim's suffering (by paying a sum of money or by restoring the status quo).

Common pattern:

- Before any damage occurs, the parties are not linked by a formal legal relationship of any kind, such as a contract.

- Tort liability is commonly referred to as **non-contractual liability**, which distinguishes it from liability arising from non-performance (breach) of previously defined contractual duties/obligations.
- An act by one person that results in harm to another person.

4 main questions:

- Why shift the costs of harm from one individual to another? --> *The function(s) of tort law*
- Under what conditions? --> The elements of liability in tort (rule of fault, strict liability)
- What kind of 'harm' can be compensated? (economic loss, non-economic loss...) --> *The scope of tort law*
- How to get compensation? --> ***Remedies***

THE FUNCTIONS OF TORT LAW

The philosophical inspiration of the legislature faces the problem of the function of tort law: why do we want to grant remedies for the victim?
The starting point of any legal system is that victims bear the cost of loss themselves, unless there is a good reason to allocate these costs to another person, whether natural or legal.
What is the rationale for departing from this default rule?
Traditionally, 3 main functions:

- **Compensation** (distributive justice): my primary aim is not to sanction the injurer but to compensate the victim.
- **Sanction / reaction of public authorities** (retributive justice): my primary aim is to sanction the injurer.
- Deterrence / prevention of future damages (efficiency).

1. '**DISTRIBUTIVE JUSTICE'** requires the fair and equitable distribution of resources among individuals based on their respective merits. (Aristotele)

--> It would be unjust not to restore an original allocation of wealth to a party that has been deprived of resources following damage (EX POST APPROACH) = these rules are destined to be applied after the tort takes place.
The civil law approach focuses on compensation rather than sanction= the emphasis is put on the aim of compensation because the focus is on the position of the victim, so to restore the legal position of the victim (who has unjustly suffered a loss), and not to sanction the injurer--> they do not have a deterrent function traditionally.

2. '**RETRIBUTIVE JUSTICE'** requires that those who commit wrongful acts be punished in proportion to their wrongdoing, even if no other benefit would accrue from their punishment. Although the concept was initially developed in relation to serious crimes, it can also be applied to civil wrongs (R. Nozick Philosophical Explanations, 1981).

-->The obligation to remedy the damage caused is the proportionate reaction of the legal system to the tort committed by the tortfeasor (EX POST APPROACH like distributive justice, so only after the event takes place)
However, the sanction could prove to be greater/higher than the actual loss suffered from the victim: the emphasis is not on the actual damage suffered from the victim.
This is not allowed at all in compensation: the compensation will be the same amount as the loss suffered.

The legal parameter taken into account for the sanction is not the loss suffered by the victim, but the behaviour adopted by the tortfeasor (it could be active or passive)

3. '**DETERRENCE'**: legal rules can be considered instruments that guide individuals' behaviour = preventing individuals from adopting a given behaviour before the damaging event takes place. By imposing liability, tort law seeks to influence the conduct of rational agents (both potential tortfeasors and victims) (It was elaborated by G. Calabresi, The Costs of Accidents 1970)

-->It is efficient for the overall system to prevent the occurrence of accidents (and associated damages) by imposing the expected cost of damage on potential tortfeasors (EX-ANTE APPROACH) = deter individuals from adopting given behaviours (civil law approach).

N.B. Sometimes this approaches can be mixed or combined: mixed approach in different jurisdictions, but in the civilian tradition the approach is mainly focus on compensation. There are rules which gave sanctions, but tort law is anchored to an approach that aims at compensating the victim.

The debate on the functions of tort law is not merely theoretical, but it is intimately linked to the fundamental regulatory choices that each legal system implements in order to concretely define the scope and conditions for the assessment of liability and related duties.

E.g. Subjective elements of tort liability

- **Retributive justice**: if the purpose of tort law is to punish the tortfeasor, a fundamental principle of the system should be that fault (intentional or negligent) is required to be liable (*nullum crimen, nulla poena sine culpa*).
- **Distributive justice/ deterrence**: if the purpose of tort law is to compensate victims or create incentives to prevent accidents, liability may be established even if the injurer´s conduct is not underpinned by any subjective element of intent or negligence. The compensation may take place without a negligent or intentional behaviour of the victim = strict liability.

SCOPE OF PROTECTION

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

Protected interests VS. general clause

1. GENERAL CLAUSE --> The French Code Civil mandates the presence of dommage (harm) but does not necessitate the violation of a protected interest. Consequently, it appears to lack a foundation for distinguishing between economic losses resulting from the violation of bodily integrity or tangible property, and purely economic losses.
2. According to the **English common law** perspective, individuals are not required to **prevent all forms of loss experienced** by third parties. Instead, they are obliged to refrain from **causing specific types of harm**, thus incorporating the question of the extent of protection within the concept of the duty of care.
3. SPECIFIC INTERESTS --> According to German law, which adopts a very special criteria, the liability for negligence is confined to the violation of protected interests explicitly listed in § 823 (1) BGB: there is a list encompassing all the cases which may justify a claim for compensation (i.e. the life, limb, health, freedom, property or any other rights).

In Italy there is no such list of events, but instead we have a general clause in the 2043 c.c.

Purely financial interests and intangible personality interests such as honour, dignity, and privacy may only be safeguarded under the **provisions of § 823 (2)** (breach of statutory duty of intended to protect the victim against financial loss) **and § 826** (actions contrary to public policy) of the German BGB.

Grounds for liability

1. **FAULT**: traditional default rule for tort law--> cases in which a tortfeasor has acted wrongfully and must compensate for the damage that resulted from the wrongful behavior (liability for one's own fault). This rule is the default rule both in common law and civil law jurisdictions (similarity). "**Fault based rule"** in all jurisdictions. The action of the tortfeasor can be <u>active</u> (**action**) or <u>passive</u> (an **omission**) causing tort law.
2. **VICARIOUS LIABILITY**: cases in which someone is liable for the damage that was wrongfully caused by another tortfeasor (i.e. liability for a tortfeasor's fault) --> **exception to the fault-based rule**
3. **STRICT LIABILITY**: cases in which a party is held liable for damages or injuries regardless of fault or negligence, such as a manufacturer of a defective product (strict liability). The tortfeasor was not at fault, but the damage was caused by another source. Traditionally, strict liability was deemed to be an **exception to the fault-based rule** and was described as a "liability without fault". Now the tendency is different with the emerging of new technologies (e.g. AI takes autonomous decisions, like Tesla cars).

Conditions – fault

<u>General rule --> Fault based system of torts.</u>

Fault

- A wrongful (intentional / negligent) act/behaviour of the injurer, which can be attributed to a given individual.
- For which the agent can be blamed.

For many centuries, the concept of fault has been considered an essential condition for liability in tort. The famous jurist von Jhering's opinion is often quoted: "Not the damage, but the fault obliges compensation".

SUBJECTIVE ELEMENTS – FAULT

<u>Intentional behavior (dolo-intention)</u>

- The harmful event which results from the act or omission is foreseen and **desired** by the agent as a consequence of his own act or omission (wants to cause a given damage to another individual)

<u>Negligence</u>

- Although the event is foreseeable, it is **not desired** by the agent. It occurs as a result of carelessness, imprudence, a lack of skill, or a failure to comply with laws, regulations or orders. The damage is not a consequence of the intention. Tort without intention.

What are the criteria relevant for assessing fault/negligence?

❖ **Breach of a duty of care** (**common law tradition**: case made law)
❖ **Statutory interpretation** (**civil law tradition**) which means an interpretation based on the texts of the codes.

COMMON LAW: BREACH OF A DUTY OF CARE

Breach of a duty of care is a criteria/parameter mentioned in common law decisions.

United States v Carroll Towing [1947] --> The case arose from the sinking of the barge Anna C in New York Harbour on 4 January 1944. Before the accident, the Anna C and several other barges were moored at Pier 52 on the North River. On the day of the incident, the tugboat Carroll **was dispatched to remove a barge from the public pier adjacent to Pier 52. During this process, the line connecting the barges at Pier 52 to those at the Public Pier was removed**. Once this had been done, the barges at Pier 52 broke free. This resulted in the Anna C sinking. The United States, Anna C's lessee, sued Carroll Towing Co., the owner of the Carroll, for damages.

Judge Learned Hand's formula --> "Since there are occasions when every vessel will break from her moorings, and since, if she does, she becomes a menace to those about her; the owner's duty, as in other similar situations, to provide against resulting injuries is a function of 3 variables: (1) The probability (the event) that she will break away (the court has to make this assessment); (2) the gravity of the resulting injury (evaluate the specific degree of consequences arising from the event), if she does; (3) the burden of adequate precautions".
Is compensation a feasible remedy after this test? The standard of care is the paradigm with which common law courts base their decisions, so the duty of care is concrete in common law.
This case shows how the awarding of the remedy (compensation for damages) is granted.
This calculation is not typically present in the civilian tradition.

- If (Burden < Cost of Injury × Probability of occurrence), then the defendant has not met the required **standard of care,** so there's need for compensation --> If it is possible to avoid harm at a cost **lower** than that of the harm itself, the individual should take precautions rather than allow the harm to occur. Failing to take precautions would constitute a breach of the legal duty of care.
- If (Burden ≥ Cost of injury × Probability of occurrence), then the defendant may have met the **standard of care,** so no need for compensation --> If the cost of taking precautions **exceeds** the potential harm, then the tortfeasor cannot be expected to take them, and therefore, they cannot be found to have breached their duty of care.

CIVIL LAW – STATUTORY INTERPRETATION

The civil law approach to torts differs from the common law approach in that the fundamental principles of tort liability are set out in legislation / statute (civil codes), which tend to be relatively consistent.

Liability for one's own fault: civil law approach.

- There must be an **act** or an **omission** which **unlawfully violates a legally protected interest** (may coincide with an absolute right but also relative right).

There was a discussion in the 1960s in the Italian legal system and civilian tradition because they said that tort came into place with an unlawful act or an omission which violates a legally protected interest, but the rights were only absolute rights like property. Should tort law only pertain absolute rights? The traditional doctrine in the 1960s said that the relative rights were not included in tort law --> This view changed in the 60s because some scholars argued that the scope of application of tort law was significantly wider than absolute rights, so there was an extension of the aim of tort law after some decision of the Corte di Cassazione.

- This unlawful act or omission must have caused damage that qualifies for compensation = casual nexus, a link between the behaviour (act or omission) and the damage suffered by the victim.

CIVIL LAW – STATUTORY INTERPRETATION
There are a number of provisions in the Italian Civil Code regarding tort liability. The role of case law interpretation is relevant.
Art. 2043 c.c. --> Any willful or negligent* conduct that causes* unjustified damage to another person obliges the person who has caused the damage to compensate it.
* Intention and non-intention approach,
* Causal nexus between the conduct, the behaviour (action or omission) to the event (damaging consequences).

This article is also combined with article 1223 c.c.: in the civilian tradition we need to give evidence to the damage in concrete suffered by the victim. It is not sufficient that a mere violation of a right takes place. We additionally need a concrete loss suffered by the victim e.g. you enter a land and it's a specific damage and I need the loss in order to ask for compensation (always with a monetary sum).
Sentenza 33645/2022: in case there's no concrete loss for the victim, there's no ground for compensation. Even in a sine titulo occupation, the owner can be compensated only if he/she gives the proof that he suffered a damage: the legal position can be restored only a concrete damage was suffered. However, there were different opinions: one said that compensation could be justified, but the opposite opinion prevailed.

Vicarious liability

Cases in which someone is liable for damage caused by another tortfeasor. (exception to the fault-based rule). There are specific rules in the civil codes for this particular type of vicarious liability.
Main elements:
a) There must be a relationship between the tortfeasor and the person who is vicariously liable.
b) For the vicariously liable person to be held liable, the wrongful act must be sufficiently connected to the relationship.

E.g.
- Liability of employers (employers and employees);
- Liability of parents and their children;
- Liability of schoolteachers;
- Liability of subjects who control the activities of mentally handicapped persons.

-->Specific relationships between the tortfeasor (work relationship= employee who causes a given damage during his working activity/the performance of the contract: the employer may be liable for lack of supervision of the employer over the behaviour of the employee)

VICARIOUS LIABILITY – CIVIL LAW

Section 832 BGB
Liability of a person with a duty of supervision
(1) A person who is obliged by operation of law to **supervise a person who requires supervision because he is a minor or because of his mental or physical condition** is liable to make

compensation for the damage that this person unlawfully causes to a third party**. Liability in damages does not apply if he fulfils the requirements of his duty to supervise or if the damage would likewise have been caused in the case of proper conduct of supervision** (Possibility of the employer to be exempted/exonerated from the liability, so that they are not obliged to compensate)**.** (2) The same responsibility applies to any person who assumes the task of supervision by contract.

VICARIOUS LIABILITY - DCFR

VI. – 3:201: Accountability for damage caused by employees and representatives

(1) A person who employs or similarly engages another is accountable for the causation of legally relevant damage suffered by a third person when the person employed or engaged:
    a. caused the damage in the course of the employment or engagement; and
    b. caused the damage **intentionally** or **negligently** or is otherwise **accountable** for the causation of the damage (fault-based rule: the conduct of the tortfeasor)

These two conditions must be met to have vicarious liability.

VICARIOUS LIABILITY – COMMON LAW

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

Justification is rooted in an interest/relevance of public policy matter: there's a wider interest in case of vicarious liability (civil law and common law).

- In English common law, the liability of employers for their employees is the main type of vicarious liability.

DRIVER OF PETROL TANKER

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

Davison was a petrol tanker driver for a transport company. While pumping fuel from his truck into an underground tank at a petrol station, he lit a cigarette and dropped the match on the ground.

The match ignited material that had been left on the ground. The fire spread to the tanker, resulting in an explosion that caused significant property damage.

Did Davison act within the course of his employment when he lit his cigarette?

The act was committed in the course of the employment. It must be **considered in the light of the surrounding circumstances** (not only on the single damaging activity) and must not be taken in isolation.

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

Strict liability

For a long time, it was considered a secondary ground of liability, and this is why there are very detailed rules for strict liability because the cases were rare, and the main paradigm was the fault-base rule.

Predetermination ex-ante of the legislator: he decides in advance that a given individual can be held liable for his/her behaviour.

Sometimes, a victim suffers harm for which no one deserves blame. Usually, the victim has to bear the consequences personally, but sometimes there are reasons to transfer the liability to someone else, even if someone else was not personally involved in the damaging event -->This is for a matter of fairness: it is unjust that someone suffers a damage and is not compensated + question of public policy.

Movement towards Strict liability--> why do we have strict liability?

- Rise of accidents in the course of industrialization. Industrialization has increased the probability of accidents (matter of public policy) so there's a need to compensate the damage even though it was not caused directly by someone.
- Fairness
- Possibility to recover damages (*Best insurer*)
- Prevention of damages
- Economic efficiency (Internalization of Externalities)

The damage is suffered by someone who did not adopt the behaviour who caused it: he has to compensate even though he did not cause the damage (**liability without fault**)

STRICT LIABILITY – CIVIL LAW

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

• Article 2050 c.c. Liability for the **exercise of dangerous activities**

• Article 2052 c.c. Liability for damage caused by **animals**

• Article 2054 c.c. Liability arising from **circulation of vehicles** (ex. a friend drives my car and does an accident, causing damage to a third person. The victim is entitled to seek compensation from the person who drove the car and from the owner of the car: there's liability without fault, so there's **joint and several liability** between the person who was driving the car and the owner of the car). The victim becomes the creditor and bases on the institution of the libera electio, so he will be entitled to seek the compensation from both.

Strict liability- common law

COMMON LAW (CASE LAW)	STATUTORY LAW
• In English common law, strict liability cases are rare	• There are statutory rules on strict liability. E.g. • Nuclear Installations Act 1965 • Animals Act 1971 • Product Liability (in Consumer Protection Act 1987)

In decisions issued by common law courts, cases which concern strict liability are rare, especially considering that the vast majority of strict liability cases is provided within statues: in this case, the main source of law for strict liability is statues (and not case law like it usually is).

OBJECTIVE ELEMENTS, SCOPE OF PROTECTION

OBJECTIVE ELEMENTS

1. **INJURER**: Activity / behavior (intentional or negligent)

• In tort law, legal effects are associated with conducts which are conscionably and voluntarily carried out by a person- fault-based liability

Art. 2046 c.c. He who caused a damage is not liable, when he acted unconscionably and involuntarily, unless his unconscionableness and involuntarily were due to his own negligence (the lack of intention is generated by his negligence: despite it is non-voluntary, there's involvement of the tortfeasor, so he will be held liable and will be bound to compensate)

2. **CAUSATION**: linking the event triggering the liability of the defendant with the damage suffered by the victim (the behaviour adopted by the person and the final damaging result, the loss). Without the causal link there's no chance, a court can condemn someone: the causal link is necessary to have compensation by the injurer.

There are several theories elaborated by scholars. Two main approaches to the problem:

• **2.A- "but for" causation** (***conditio sine qua non***): it requires that the damage would not have occurred in the absence of a certain activity or event= this behaviour connected to the activity is essential for the damage, because without it the loss would not have happened (the court has to adopt this approach for this line of reasoning to be applied).

BUT: By applying this parameter, the scope of the causal chain could be extended almost *ad infinitum*

• **2.B- "adequate cause theory":** the conduct of the injurer is adequate cause of the damage if it is generally likely to:

- produce a result such as that which occurred
- or significantly increased the likelihood of that result occurring

Was the behaviour adopted by the tortfeasor capable of increasing the likelihood of the damaging event/negative result suffered by the victim?

These are two different lines of reasoning: the first theory is stricter than the second theory and proves to be more difficult

CAUSATION: CASE LAW in Common Law

Two ships (Edelweiss and HH9) moored side by side in a lock.

The ships' operators were asked to report the width of their vessels before the water level in the lock was lowered, so that the harbor staff could safely organize the mooring operations.

The operator of HH9 mistakenly understated the width of the ship, resulting in the two ships becoming stuck in the lock during the subsequent operation. The rescue operation was improperly executed by the lock personnel and as a result the Edelweiss was submerged and sank.

The insurer of the Edelweiss sued the insurers of the HH9 for damages in tort. (The incorrect width information was the «but for» cause of the accident). Is the mistake by the operator of HH9 the conditio sine qua non (but for theory)?

<u>BGH 23.10.1951</u> Plaintiff's claim was dismissed on the ground of the «**adequate cause» theory**. (The mistake by the lock personnel was the adequate cause for the damage).
The assumption that the fault of the HH9 operator directly caused the injury is not correct.
«But for causation» goes too far in placing the full burden of the consequences of each such cause on the person who initiated it.
«**Adequate causation»** is meant to allow individual events that are conditions for a result – in the logical sense that the result would not have occurred but for them – to be excluded from causation in the legal sense.

The court said that the *but for causation* was not fit for the purpose, while the adequate causation theory was more fit for the case: it is true that the operator made the mistake but is it sufficient to justify the final negative event? Could've this damage been avoided in some other way?

3. **DAMAGE**: compensable losses relevant in tort liability do not cover any kind of harm.

COMPENSABLE DAMAGE	NON-COMPENSABLE DAMAGE
Firm A deliberately avoids installing the technical measures prescribed by lawin order to control pollution. This creates an emission of toxic pollutants which spoils the field of a neighbouring farm.	Mr Johns is very idle and postpones the renovation that his property would need. This creates protests by his neighbours who complain that his spoiled building ruins the decorum (depends on the assessment made by individuals), and the public view, of their street.

(DISCUSSION ON THE TWO CASES ABOVEMENTIONED*). ACCORDING TO SOME OPINION, THE SECOND ONE IS NOT A DAMAGE CASE BECAUSE THE OWNER OF THE PROPERTY DOES NOT HAVE A LEGAL OBLIGATION TO CHANGE IT, SO HE CAN DECIDE WHAT HE WANTS.

Only some specific harms can be protected in the everyday life. Here we have a concrete damage, but which damage can be compensated according to the legal point of view?
NON-PATRIMONIAL DAMAGES CAN STILL BE COMPENSATED (E.G. OFFENSE + IN ITALY, THE ITALIAN COURTS ELABORATED SOME "TABELLE" FOR NON-PATRIMONIAL DAMAGES).

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

SCOPE OF TORT LIABILITY

Different Tort law systems
• **RULES-BASED (typical) approach** to tort law: Legal systems characterized by a set of causes of action defined by law (e.g. Germany).
E.g. Common law tradition / German system: predetermined list of causes which may justify a claim in tort

• **PRINCIPLE-BASED (atypical)** approach to tort law: formulation of an abstract rule providing a comprehensive discipline of tort liability
E.g. French / Italian systems: general clause (in Italy art. 2043) that governs tort law (no predetermined list of causes).

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

Loss suffered by individuals / Legal concept of compensable damage
- In a **rule-based system**, the limitation of the legal interests that can be protected by tort law is set ex ante by the law.
- In a **principle-based system**, this limitation results from the interpretation of the general clause introducing tort liability by the courts (i.e., case-law).

Notwithstanding the differences in the approach to tort law, all Western legal systems allow for compensation for (e.g.):
• physical injuries
• personality and privacy rights
• damage to property
(i.e. Absolute rights in the civil law tradition)

SCOPE OF PROTECTION – EVOLUTIONS

Compensable damages: ITALY (Art. 2043)
Tort liability in Italy has been progressively extended over the last half century in a number of ways, including the award of damages for economic loss arising from relative rights and not only absolute rights (a classic tenant for tort law for a long time): the scope of application of tort law expanded significantly and other legal interests are protected.
E.g.
• Court of Cassation, Third Civil Division, **4 July 1953,** n. 2085
• Associazione calcio Torino v. Soc. A.L.I.
• Court of Cassation, Joint Civil Divisions**, 26 January 1971**, n. 174
• S.p.a. Torino calcio v. Romero

Court of Cassation, 4 July 1953, n. 2085

Associazione calcio Torino v. Soc. A.L.I.

On 4 May 1949, a plane (Italian Airlines) carrying the entire Torino football team, crashed into the walls behind of the Basilica of Superga, on the hill above Turin, killing 31 people.

The Torino football team sued the airline for **compensation for the extinction of its credit rights to the footballers** as a result of their death in the crash.
The legal relationship between Torino and its players was based on contractual/relative rights (position of creditor and debtor which are interchangeable based on the performance excepted).
As the plaintiff did not claim injury to an asset falling within the protected category of "absolute subjective rights", liability was denied (the legal issue at stake was the violation of a relative right).

Cassazione, 26 January 1971, n. 174

S.p.a. Torino calcio vs. Romero

Luigi Meroni was a famous Italian professional footballer who played as a winger for Torino.
On 15 October 1967, at the age of 24, Meroni was killed by a car driven by Mr Romero.
The Torino football team sued Romero for compensation for the extinction of their credit rights with the footballer.
After 18 years separating the two cases, which present strikingly similar issues and facts, the Court of Cassation reverses itself: tort law covered a relative right for the first time. Mr. Romero, the third party, who caused the incident, had to compensate the football team.

! Relative rights can be protected by tort law

UNJUST (OR UNJUSTIFIED ENRICHMENT)

Another source of obligation is unjustified enrichment. The emphasis is put on the individual who gains and receives the benefit without justification.
There is an important distinction in common law and civil law tradition, since they followed different historical paths.

(i) Unjustified enrichment is used in Civil law

vs.

(ii) Unjust enrichment is used in Common Law (particularly in the English common law)

WHAT IS THE LAW OF RESTITUTION ABOUT?

The law of restitution is strictly intertwined with unjust enrichment. Restitution is an effect coming from a performance/payment made without justification/legal basis (civil law) or by mistake (common law).
The main justification in the civilian tradition is absence of a legal basis, while mistake (payment made by mistake) in common law.
FUNCTION: The Law of Restitution is concerned with the award of a generic group of **remedies** (**concept of remedies**) which arise by operation of law, and which have one common function, namely, to deprive the defendant of a gain rather than to compensate the claimant for loss suffered.
-->**Restitutionary Remedies**: the aim of these remedies is to reverse the defendant's gain; this has been called the 'restitution interest'. The core on unjustified enrichment revolves around the role of the defendant and reverse its gain which was unjustified.

PERSONAL RESTITUTIONARY REMEDIES	PROPIETARY RESTITUTIONARY REMEDIES
AIM: to restore to the claimant the value of a benefit which the defendant has received. They are said to operate ***in personam***. **Why "in personam"?** The defendant is liable to pay the value of the benefit to the claimant, rather than transfer the benefit itself. The value is a monetary sum: the actual benefit that the defendant actually received without justification. There's the obligation to always return a sum of money which reflects the benefit that the defendant has received: **the claimant will claim the value of the gain** and not the gain itself. **EXAMPLE**: the claimant pays 10,000 euro to the defendant <u>by mistake</u> (important element in common law and not in civil law); the defendant will be liable to repay the amount of 10,000 euro to the claimant, even if the defendant no longer has the money which they had received from the claimant (restitutionary obligation which creates a relationship between the two parties: the defendant becomes debtor and has to give the sum of money back). The <u>specific benefit is not returned, but the value is.</u> **Consequence**: the award of a personal **restitutionary remedy and legal interest** creates a **relationship of creditor** and **debtor** between the parties. Since the defendant owes money to the claimant, he becomes a debtor. This is true for both civil law and common law (with some adjustments). Therefore, unjust enrichment also is a source of obligations.	**AIM**: to enable the claimant to assert their proprietary rights in an asset which is held by the defendant. These remedies are said to operate **in rem since the remedy itself follows the good,** The claimant will claim the good itself he was unjustly deprived of. Why "in rem"? These remedies relate to the res (i.e., the good) TWO TYPES OF PROPR. RESTITUTIONARY REMEDIES ❖ Remedies by virtue of which the claimant can recover the asset which is held by the defendant - Benefit: the claimant can gain the benefit of any increase in the value of the asset and can claim it from third-party recipients--> during the possession, if there's an increase of the value of the good, the claimant will be entitled to receive also the increased value of the good by the defendant. In addition, the claimant can also assent from any third-parties recipients. If the defendant has transferred the possession of the good to a third party, the claimant (entitled to asset his right) will be entitled to asset the same right against a third party. 2. Remedies which recognize that the claimant has a security interest in an asset which is held by the defendant (security right) -Benefit: the claimant has a proprietary interest in an asset which is held by the defendant, the claimant's claim to the asset ranks above other creditors of the defendant, with the result that the claimant is more likely to recover the asset or its value if the defendant becomes insolvent. The defendant has more creditors, but the creditor has a security interest, so his claim is preferred to the others: the creditor who has the security interest remedy prevails over other creditors (ranks of claim)

N.B. THERE'S A DIFFERENCE BETWEEN THE VALUE OF THE BENEFIT AND THE BENEFIT ITSELF.

E.G. WHEN THERE'S A LOAN, YOU GIVE BACK ANOTHER SUM OF MONEY THAT WILL BE EQUAL TO THE BENEFIT RECEIVED.

UNJUSTIFIED ENRICHMENT AS A SOURCE OF OBLIGATIONS

-->Civil Law Tradition: unjustified enrichment is but a source of obligations and therefore it gives always and **only rise to a personal right** (or action in personam) to restitution. Remedies in rem exists, but they are not specifically connected to the law of unjustified enrichment.

-->Common Law Tradition: Unjustified enrichment (unjust enrichment is more common) is a source of obligations [see **Fibrosa Spolka Alkcyina v. Fairbairn LawsonCombe Barbour Ltd.** (1943), where their Lordships for the first time clearly stated that unjustified enrichment is the third branch of the law of obligations, besides contract and tort]
Moreover, Unjustified Enrichment is related also to real rights (actions in rem)
These remedies are connected to the **notion of justice and fairness:** unjustified enrichment was a tool to guarantee justice, because if there's a deprivation, the interest must be protected. These remedies were given taken from and were in line with the **equity principles**, which are often resorted to by courts.
Examples: constructive trust and equitable lies that belong to equity. These remedies are in rem and can be exercised against third parties (i.e., creditors and purchasers from the defendant)

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

Commonality: unjustified enrichment is a source of obligation
Difference: civilian tradition only action in personam vs. common law both in personam and in rem

RESTORING WHAT THE CLAIMANT LOST

The award of restitutionary remedies to the claimant is justified on the ground that, where the defendant has inappropriately received a benefit from the claimant, justice demands that this should be restored to the claimant.
The result ex-post must be reversed: the situation must be corrected because the subject is deprived of something, so his interest needs to be protected.
'Corrective justice'
Lord Reed in Investment Trust Companies v HMRC [2012] EWHC 458 (Ch): it 'reflects an Aristotelian conception of justice as the restoration of a balance or equilibrium which has been disrupted. That is why restitution is usually the appropriate remedy

In roman law there was no unjustified enrichment. Instead, these principles were shaped and are **rooted in the ius commune**, even though we have some references from the past, so these principles are relatively new/younger than other legal institutions, e.g. notion of contracts etc.
(Some references in Roman law and precisely Pomponius' famous sentence according to which «*aequum est neminem cum alterius detrimento fieri locupletiorem»)*

It is necessary to have further elements apart from the gain of the defendant to establish unjustified enrichment.

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

1. the defendant was enriched; (gain of the defendant) *[1]
2. at the claimant's expense;
3. a recognized ground of restitution is engaged;
4. there was no valid legal basis for the defendant's receipt; (e.g. mistake)
5. there is no defence to the claim

*[1] Legal relationship between the two parties: the gain of the defendant depends on the expense of the claimant. The positive situation of the defendant is based on the detriment of the other
The claim of **unjustified enrichment is a subsidiary mechanism (France, Italy)**: other remedies are not available e.g. no claim in tort or based on a contract. The enrichment is not rooted in tort or contract; thus, the plaintiff is allowed to resort to unjustified enrichment and base his request on it. In the german civil code there's no express reference to the subsidiarity of unjustified enrichment, although some german scholars have justified it.

COMMON LAW, CIVIL LAW AND UNJUSTIFIED ENRICHMENT

CIVIL LAW (e.g. France and Spain) Condictio sine causa	COMMON LAW (e.g. English common law) Mistake
If a payment is made without the cause (notion of causa), it must be returned. This interpretation seems to be compliant with a system of transferring property which is causal, notwithstanding if the transfer is an effect of the simple contract (like in France) or it requires also the delivery of the transferred good or the conveyance of the transferred land (like in Spain): if a cause is required to transfer the property, it is clear that without that cause the payment is undue. If I give a sum of money to someone else, or I transfer the good to somebody else, we need causal justification for the transfer of something= notion of causa. When the causa lacks, we enter into the realm of unjustified enrichment. Even though the notion of causa was abolished in the French contract, still unjustified enrichments remain intertwined with that notion: if the causa lacks, it becomes relevant.	Claims against the recipient have been granted only in presence of an unjust factor which affected the payment, the most typical of such unjust factors being a mistake of the payer on his liability to pay. If a payment is made by mistake this can be classified as unjustified enrichment, because the latter was built upon the notion of mistake. The reference in common law is more subjective: there's no notion of causa, which is more objective.

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

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

The House of Lords held that the defendant casino should make restitution because the money stolen from the client's account belonged to the plaintiff law firm.
Lord Templeman: 'in a claim for money had and received by a thief, the plaintiff victim must show that money belonging to him was paid by the thief to the defendant and that the defendant was unjustly enriched and remained unjustly enriched.

However, according to recent years scholars this was not a case of unjustified enrichment but a case about vindication and property right
However, the claim is more precisely based on the vindication of the firm's property rights. "Lord Goff emphasized that the claim for money had and received did not depend on the club's retention of any money; it was a personal claim which turned on whether the club had received money in which the firm had a continuing proprietary interest at the time of the defendant's receipt. Lord Goff acknowledged that the firm needed to establish a basis on which it was entitled to the money, and it could do so by showing that the money was its legal property". The claim was 'founded simply on the fact that (…) the third party cannot in conscience retain the money—or, as we say nowadays, for the third party to retain the money would result in his unjust enrichment at the expense of the owner of the money'

This was the point of view of the common law scholars; however, the civilian tradition would consider this case differently.

EXECUTION OF VALID CONTRACTS: The difference between mistake approach (i.e., common law jurisd.) and the lack of legal basis approach (i.e., civil law jurisd.) has had little practical relevance when a valid contract has been executed, because under both points of view the payment was obviously not to be given back: there was a valid ground justifying the payment, there was no mistake so there's no unjustified enrichment.

WHAT IF A VOID CONTRACT IS EXECUTED? If the contract turns out to be void and was executed by both parties, common law and civil law approaches traditionally diverge:

- **Civil law tradition**: there is generally no good reason to deny each giver's claim. The payment must be rendered back, even though the contract turned out to be null and void (lack of a legal basis).
- **Common law tradition**: the doctrine of consideration has led the traditional common law of England to the opposite rule (no restitution when a void contract has been performed by

both parties), unless some specific unjust factors of the enrichment were existing, like duress or fraud.

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

Performance in case of CONTRACT TERMINATION

1. **Civil law jurisdictions** usually include restitutionary obligations in the category of restitutions based on the contract (subsequent rules of the nullity in the realm of contract law).
2. **Common law jurisdictions** (in part. English common law): law of restitution: it treats all restitution following on winding up as part of the law of restitution, which is not part of contract law. Restitutionary effects are treated separately because law of restitution in common law jurisdiction is an autonomous area of law, which does not pertain to contract law, therefore the law of restitution follows a different path.

Performance in case of a CONTRACT TURNS OUT TO BE NULL AND VOID:

(i) Civil law tradition: Unjustified enrichment
(ii) Common law tradition: Law of Restitution

SUBROGATION IN CIVIL LAW AND COMMON LAW JURISDICTIONS

Is the institution of subrogation related to unjustified enrichment?

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

Subrogation: the law states that a claim will pass directly and automatically to another person

There's responsibility for the debt owed by another (e.g. suretyship). The surrogation in suretyship and other cases is a mechanism in many cases that is provided by the law in advance and not agreed upon by parties.

One example is when the debtor in order to buy an apartment, seeks the money from a creditor (e.g. a bank). However, the person who lends the money wants to have a surety to be sure that the money will be given back ("negozio di intervento" = intervention of the surety).

If subrogation is not allowed/if there was no subrogation there would be an unjustified enrichment of one party: the surety enters to guarantee a debt owed by another party: the surety ensures that the performance of the main debtor is rendered. Without the right of recourse (regresso) and subrogation, the main debtor would enrich unjustly because he becomes the owner of the apartment, but the payment of it was made by the surety: with the subrogation the surety is entitled to receive the money from the main debtor.

English common law: the basis of **subrogation** (by law) is commonly **identified as unjust enrichment**, as it nips in the bud any ambition to obtain double enrichment on the part of the insured who, but for subrogation, would otherwise be able to sue the wrongdoer despite having been paid by the insurer. Without subrogation, the injured party would be entitled to act in tort and to act in contract (in this case subrogation prevents this case of unjustified enrichment).

Instead, the insurer pays to the injured party/victim (who suffers a loss and thus the damage is paid by the insurer) so the insurer becomes the new creditor and can exercise subrogation towards the tortfeasor (relationship between the insurer and the tortfeasor).

Subrogation in common law is considered part of unjust enrichment, while according to other civilian countries subrogation does not directly comes into place when there's unjustified

enrichment. E.g. When the insurer pays, subrogation operates by law, so there's no possibility for the insured/victim to bring a claim both for tort and contract: **subrogation is considered a tool to prevent unjust enrichment by the victim**.
The same reasoning holds true for suretyship.

German Law: German *Legalzession* is "the functional equivalent of the English doctrine of subrogation";
however, in case B wrongfully and negligently damages A's car. The damage costs €10,000 to repair. A now has a claim in tort. A claims this amount from the insurer C and C pays. The moment that C pays, A's claim in delict is transferred to C (example in the book). Relationship of tort between A and B and a contractual relationship between C and A. Once the insurer pays towards A because the insurer wants to repair the damage, then the insurer becomes the new creditor and is entitled to sue the wrongdoer.
To recap: A is the victim who suffers a loss, and thus should be paid for this loss, the tortfeasor is B who caused the damage and should pay. To immediately satisfy the interest of the victim, the insurer pays. Therefore, the relationship relevant is between B and C (SUBROGATION to prevent unjust enrichment by the victim). The same mechanism holds true for suretyship.

According to German scholars, there is no period under which A can bring a claim in tort and claim in contract overlap. Because the insurer pays, this does not happen and the interest of a is fully satisfied, then the insurer exercises subrogation.
Therefore, subrogation in civil law countries is aimed at PREVENTING what would otherwise have amounted to unjustified enrichment (it is not unjustified enrichment in itself).

DISGORGEMENT OF PROFITS

In some cases, the remedy awarded, although it is still assessed by reference to the defendant's gain, results in the claimant obtaining something of value which they never had before: there's involvement of a third party and a profit gained by the defendant.
TRILATERAL OPERATION: Claimant, defendant and third party + because there was a breach of duty of the defendant against the claimant, the defendant received a sum of money (UNJUST PROFIT) from a third party, but the sum of money was the consequence of a previous wrong by the claimant.
Common law scholars include this case in **restitution by restoration/disgorgement of profits** (corrective justice like unjustified enrichment).
<u>EXAMPLE</u>: the defendant may have obtained some money from a third party in breach of duty to the claimant.
In such circumstances, the claimant may be able to make a claim in respect of the money, but, since it has not been taken from the claimant, it is inappropriate to describe the remedy which enables the claimant to obtain this money as literally restitutionary, because it is not possible to restore to the claimant what they never had in the first place. It is more appropriate, therefore, to describe the function of such remedies as requiring the defendant to disgorge benefits to the claimant

In cases where a defendant's gain was received from a third party as a consequence of a wrongdoing to the claimant by the defendant, the claimant's ability to reach that gain is determined as a response to the wrong, an while it may be called "restitution", it cannot mean "restitution by restoration" (i.e., restitution by unjust enrichment). It is better called "restitution by disgorgement". It is different from the case of unjustified enrichment, so the two must be distinguished.

The unjust enrichment is typically focused on the corrective justice, while disgorgement in some specific case may be provided with this function, but it also based on the deterrent/distributive function.

The DISGORGEMENT may encompass

- **profit positively acquired** (in effect from a third party) by the defendant as a consequence of wrongdoing (met historically to pay over the accounted amount of the profit to the claimant: the positive amount of money must be returned because their patrimony increased by the wrongdoing of the third party), and/or
- to **expenditure saved by a defendant as a consequence of wrongdoing**
- disgorgement based on **profits as a consequence of the tort** (i) + **expenditures** saved by the same defendant… (ii)

This case of disgorgement of profits is not precisely considered a restitution by unjust enrichment: here we're considering a very specific of restitution, which is called restitution by disgorgement.
The case of unjustified enrichment thus must be distinguished from the case of disgorgement of profits.

SUBSIDIARITY OF UNJUSTIFIED ENRICHMENT

SUBSIDIARITY OF UNJUSTIFIED ENRICHMENT: this feature is controversial because it is mentioned by some civil law codes, but it is not mentioned in other civil codes, and it is not expressively recognised in the English common law. Subsidiarity means that **the claim is allowed to the claimant only when no other claims are available** (no other claims based on the contract, etc.).

1. **Art. 1303-3 Code Civil: "The impoverished person has no action on this basis if another action is available to the plaintiff or if he is faced with a legal obstacle, such as prescription"**

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

- ➔ The main remedies that come into place are the main paradigm, so the primary remedies that must be used by the claimant. If these remedies are not available, the claimant will be entitled to bring a claim in unjustified enrichment.

This perspective is dominant in France.

2. **Art. 2042 Italian Codice civile: "A claim in enrichment cannot be brought when the injured party can bring another action to obtain compensation for the harm suffered"**

The Italian Corte di cassazione in 2023 gave a traditional interpretation of the article (Extended Bench (Sezioni Unite) because there was an ambiguity in the interpretation of this subsidiary feature): a **claim in unjustified enrichment is allowed when other remedies are flawed/not available from the outset** (ab origine: e.g. contract turns out to be null and void), **as it happens when no contract is found to exist between the parties or when the contract exists, but it is null and void** (unless it violates mandatory rules or contravenes public policy) (TWO SEPARATE CASES:

<u>difference between inexistence and invalidity, precisely nullity, where the contract exists but it turns out to be null and void</u>).
Conversely, the subsidiary remedy is denied in cases where e.g. a valid contract is found, but the claimant fails to prove damages resulting from the defendant's breach.

➔ Italian civil codes expressively recognise the subsidiarity of the unjustified enrichment: **the claim of unjustified enrichment is possible only when no other remedies are available.**

3. No mention of "subsidiarity" in the German civil code

"In German law, in particular, the doctrine of subsidiarity is often applied in cases of unjustified enrichment especially in three-party cases based on the nullity or annulment/rescission of a contract of sale (or of another contract aimed at transferring the property), and is used to limit the proliferation of restitution claims by the transferor against the transferee (or a remote recipient): to the extent that the payer of an undue performance has the right to claim restitution from the recipient (*Leistungskondiktion*), it does not have the right to alternatively claim restitution of any other unjustified enrichment that the recipient or a remote recipient might otherwise have obtained from that same performance (*Nichtleistungskondiktion*)".

➔ The feature of subsidiarity is scholarly applied thanks to the interpretation given by jurists but is not expressively recognised and mentioned in the BGB. It is often applied, and it is deemed to be existing in three-party cases, based on the nullity and annulment of a contract of sale. It is resorted to by jurists to limit the restitution claims by the transferor against the transferee.

4. Common law jurisdictions: courts have historically made no use of the doctrine of subsidiarity of unjust enrichment, even though scholars have widely elaborated on it

➔ The doctrine of subsidiarity related to unjust enrichment was less known, so the reference to the latter lacks. The courts historically do not resort to this doctrine, because they <u>do not</u> intend unjust enrichment as a subsidiary mechanism.
However, in common law books and articles by scholars this feature of subsidiarity has been analysed, but **not embraced by common law courts** in the end.

PROPERTY

<u>WHAT IS PROPERTY LAW?</u>

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

This last right is different from the first two. It is not a right against a specific person such as the other party to the contract or the tortfeasor; it is a right on a **tangible object** (**right in rem**= traditionally property law refers to this connection between the owner of the absolute right and the given good), valid against the rest of the world (**erga omnes**)= it is an **absolute right** so the **owner of a given good can defend his right against everyone** (there's no relationship between two people).

VS. Relative right, the creditor is entitled to claim the performance from a specific person (e.g. relationship between debtor and creditor). E.g. technically speaking, the creditor of a sum of money is not the owner of the sum of money, but he is entitled to ask for it.

AN ECONOMIC VIEW

Hardin, The Tragedy of the Commons, Science (1968) (criticism towards the doctrine of Commons)
This book is based on two main assumptions:
Common goods:
1. **Rivalrous** in consumption: their use by one consumer prevents simultaneous consumption by other consumers (they cannot use the same item at the same time)
2. **Non-Excludable**: it is not possible to prevent people who have not paid for them from having access to them

Experiment to demonstrate the need of adopting specific rules governing property law: grazing cows in a free-access parcel of land (common good)
• Every herder can take his cattle to the field
• However, the constant and repeated use of land spoils it and prevents its future use
• **Free access gives no incentive to any user to protect this future value**, although its protection is socially desirable
The free access to a common good does not inspire any individual to take of such good.
-->Tragedy of the commons was the philosophical inspiration of the rules governing property law. It shows the inefficient outcome determined by the overuse of (partially) rival resources when freely accessible to every individual in each given moment.

WHY PROPERTY LAW?

Legal rules for the allocation among individuals of **exclusive rights of use** and **disposal of resources** (the owner can exercise his right to use, to destroy, to sell etc.)

1. Incentive to work
2. Incentive to maintain and improve things
3. Avoidance of disputes and of efforts to protect things
4. Property rights and the market economy
   •Property and contracts as the basis for voluntary exchange of goods between individuals.

PROPERTY INTERESTS

Property law as the field of absolute rights
Property rights are valid **erga omnes** (as opposed to mere relative rights)
Basic features of property rights:

1. The right-holder is assigned an **exclusive right** to her objects
2. The right-holder can **exclude anyone from interfering with her peaceful enjoyment**
3. The right-holder is given a **specific recovery action** for her goods (cases of disputes over the good)
4. Anyone wishing to deprive the holder of the right must buy it from her in a voluntary transaction

Objects of Property

Property Law as the Law of Things

Property rights as rights **in rem**: regulate how individuals can use and dispose of things/goods

Objects of Property Rights--> Things / Goods

Traditionally goods are divided into:

1. **Movable / Immovable Goods**
2. **Tangible / Intangible Goods**

Based on this distinction on the nature of the objects, common law and civil law followed different paths:

1. **Civil law** has a **unified field of property law** (the ground for this unification is the right of ownership, so property law revolves around the ownership whether the good is movable or immovable): **unitary system**
2. **Common law tradition** (particularly **English common law**) recognised two separate branches of law:
   -->**LAND LAW**, which is related specifically to immovable
   -->**PERSONAL PROPERTY**, connected to movables.

MOVABLE / IMMOVABLE GOODS

1. **Movable** property is any property that can be moved from one place to another without being altered.
2. **Immovable** is any property that cannot be moved from one place to another without being destroyed or altered.

--> **Civil Law tradition**: Unified field of property law (unitary system). Even though movables and immovables do not share the same identical rules, these different rules are all put in the same field. For example, movables have specific rules, e.g. regarding the circulation of movables and immovables*[1].

*[1] **Different rules on circulation, publicity, security rights**, e.g. the period needed for becoming the owner varies depending on the nature of the object (movables and immovable), how the contract is concluded (e.g. in some civil law countries, the pledge is regarded as a real contract that is concluded thanks to the delivery of the good), e.g. some contracts for the sale of immovables require a given written form, whereas the sale of movables does not typically require this written form, etc.

However, **all these different rules should be framed into this unified system of property**.

- Based on the absolute **right of ownership**

CIVIL LAW: Unitary system of property, covering all types of assets. Both movable and immovable things represent the potential objects of the absolute right of ownership

Ownership= property rights (Absolute rights) both for **immovables** (e.g. Ownership of land) and **movables** (e.g. Ownership of a Smartphone)

--> **Common Law tradition**: Two separate branches of law

- **Land Law** (Real Property): immovables
- **Personal Property**: movables

Ownership as the primary property right over goods

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

! **Exception**: the owner cannot interfere with other person's property or right + the owner is not entitled to change the good if there's the **interference of a public interest in the proprietary right**: the general interest prevails over the good owned by an individual (e.g. the apartment has an historical importance, so the owner is not entitled to change the apartment as he wishes, because the changes must be consistent with the directives of the city related to the goods of historical importance)--> **impact of a relevant public interest in the rights of the owner.**

OWNERSHIP – ART. 544 CODE CIVIL

Propriété

Art. 544 of the French Code civil: Ownership is the right to enjoy and dispose of things **in the most absolute manner**, provided they are not used in a way prohibited by statutes or regulations.
(This article was the main source of inspiration for the Italian civil code.)
-->Relation between the extension of the powers of the owner and the limitations put by the public authority. There's a specific relation between the powers of the owner, which are broad and the incidence of public interest: specific interest between the private interest of the owner and the public interest (and this conflict might be strong).

OWNERSHIP – § 903 BGB

Eigentum

Section 903 BGB (German Civil Code): the owner of a thing may, to the extent that a statute or third-party rights do not conflict with this, deal with the thing **at his discretion** and **exclude** others from every influence.
(Specific relation between private interest and public interest).

ITALIAN CIVIL CODE – ART. 832 C.C

Propriet-->

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

➔ From a comparative law perspective, civilian traditions highlight how the public and private interests interact, even though it is typically recognised that property law is based on the possibility to dispose of the things fully. However, this assumption must be related to the potential existence of limits rooted in the public interest.

CIVIL LAW TRADITION: OWNERSHIP

DCFR -VIII. – 1:202

"Ownership" is the most comprehensive right that a person, the "owner", can have over property, including the exclusive right, to the extent consistent with applicable law or rights granted by the owner, to **use, enjoy, modify, destroy, dispose of, and recover the property** (**rei**

vindicatio/recovery action: aimed at protecting the private interest and the absolute right of the real owner. E.g. the good is stolen and there is another person who claims to be the owner, so the two private interests interact).

COMMON LAW

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

Land Law (Real Property)	**Personal Property**
Absolute rights of individuals over immovables. Based on the **fictitious presumption that the Crown is the residual owner of all the land**: the real owner of the land is the crown, so he is entitled to dispone of the land. Historically this is explained by the feudal tradition, based on this relation between landlords and vassals: this particular relationship impeded a unitary system of property law.	**Absolute rights over movables (chattels).** The specific rules over movables are mainly developed and elaborated in different areas of law (tort law, commercial law, intellectual property law). Therefore, they follow different paths depending on the area of law we consider.

LAND LAW: DOCTRINE OF ESTATES

NO FORMAL RIGHT OF OWNERSHIP

It is impossible to recognize the formal right of ownership because of the fictitious presumption that immovables do not belong to individuals. Under the rules of common law, the **Crown is still regarded as the owner of all land**; all others hold land in tenure--> legal basis for using **immovables** in the English common law.
Property law is split between ownership, which formally belongs to the crown, while individuals hold the land in tenures. In the feudal system of land tenure, the king could originally determine the content of the right granted to others in return for services.
These property rights in land, held for different periods of time (or without a limit of time), were called **ESTATES in land**.
This expression reflects this split between formal ownership, belonging to the crown and the possibility for individuals to use such property as tenants (they hold the land in tenure).

Property Act (1925) (considered a modernization of English land law)

-->To limit and standardize the property rights available in land.
Under common law, there are only **two types of (feudal) rights in land**:
1. **Fee Simple**: entitles the holder to exclusive **possession for an unlimited period of time** (functionally similar to civil law ownership) but the property belongs to the crown, so it is still different from the property in the civilian tradition. The possession shapes the position of the individual, while the property is the legal position of the crown.
2. **Term of Years**: gives exclusive someone else exclusive **possession for a limited period of time** (similar to usufruct, locazione, possession without animus possidendi in the civilian tradition, etc.)

These two serve two different functions.

PERSONALY PROPERTY LAW

Personal property law applies to:
1. **Movable goods (chattels**)
2. **Choses in action** (among others: claims, credits, shares, etc.).
In personal property law, the primary right is called "**title**" and only if there's a valid existence of a title the individual becomes fully entitled to possess it. It expressively refers to movables.
Our res is the **movable** and the **right on it is called "title".** If you're the holder of this title, then you are entitled to possess the good, so without the interference of third person. It is in fact deemed to be the **most significant right** in the English common law.
Title is the right of exclusive possession to a chattel. It is the most extensive entitlement to a chattel a person can have.

E.g. according to a minority view, the case of Lipkin Gorman regarded a vindication of a proprietary right, so the rules of personal property law had to be applied.

In the civil law tradition credits do not belong to the category of property because traditionally they are part of the law of obligation. Traditionally we do not refer the essence of credits and shares in the area of property law in the civilian tradition.

INTANGIBLE GOODS

Property law (in particular in civil law tradition) formally refers to tangible goods. This is because good were deemed to be so because they were tangible: the qualification of something as good was connected to the possibility of having the material appearance of the good itself. Historically this was reflected into the civil codes.
E.g. – German Civil Code
Section 90 BGB –Concept of thing
Only corporeal objects are things as defined by law. ->This is not true anymore, because the legal scope of things and goods now includes other kinds of objects: we also have intangible goods.

INTELLECTUAL PROPERTY LAW

Property law at the beginning was only related to tangible goods. However, its scope expanded, so recently another area of law which was intertwined with property law, became relevant: intellectual property law. Both in common law and civil law, intellectual property law is generally regarded as an **autonomous area of law** (despite being connected to property law) that regulates the **exclusive rights** to use and dispose of **intangible resources**. This area came into place because it addressed the use of intangible goods. From a functional point of view, we have traditional property law and intellectual property law they have significant commonalities.
-->We have **three subareas of intellectual property law**:

- **Copyright Law**: Exclusive rights of use and distribution of an original work of art, granted to its creator.
- **Patent Law**: Exclusive rights to use and distribute a novel invention, granted to its inventor (this invention may also have an impact on the society and could serve different functions for the community).
- **Trademark Law**: Exclusive rights to recognizable signs, designs, or expressions that identify products, granted to entrepreneurs and companies ...

-->Evolutionary approach

PROPERTY OVER INTANGIBLES

How property law connects to intangible resources

Myriad Genetics was founded in 1994 as a start-up company by scientists involved in the search for the BRCA genes (DNA sequences associated with certain types of cancer).

In August1994, Myriad isolated the BRCA1 sequence and patented it in the US. The following year, in collaboration with the University of Utah, Myriad isolated and sequenced the BRCA2 gene, and the first BRCA2 patent was filed in the US.

In 1996 Myriad launched its BRACA analysis product, which detects certain mutations in the BRCA1and BRCA2 genes that put women at high risk of breast cancer and ovarian cancer.

Since 1996, Myriad's business model has been exclusively to provide diagnostic testing services for the BRCA genes.

In 2012, Myriad - which was founded in 1994 - employed around 1,200 people, had revenues of around $500 million and was a publicly traded company.

In 2010 the Association for Molecular Pathology challenged the validity of gene patents in the United States: **is it possible to have private property on human DNA? Is it possible to conceive a private property of human DNA?**

DO WE «OWN» OUR BODY?

Association for Molecular Pathology v. Myriad Genetics

Patentability requirements: **novelty, usefulness, and non-obviousness**

Genes are "products of nature" that may not be patented, since they are not artificial invention

The isolation of BRCA sequence is a "human-made invention" eligible for patent protection

On 13 June 2013, in a unanimous decision, the Supreme Court invalidated Myriad's claims to isolated genes. The Court held that the mere isolation of genes found in nature does not make them patentable because it is not a novel invention. It is not possible to patent something already existing in nature.

What is a real novel invention? Somethings that already exists is not a novel invention, but it is a product that was produced from zero.

Property Protection and property Interests

OWNERSHIP – PROTECTION

Exclusivity of ownership is recognized by the legal remedies by which the owner can be protected. These actions can be raised against everyone who influences property (a contractual/legal relationship is not necessary for the recovery action and injunctive relief).

Ownership is an absolute right--> protection *erga omnes*:

1. **Recovery action (Rei vindicatio):**

The right of the owner to **assert his right of property** and **claim the return of the object** from any third party.

2. **Injunctive relief (Actio negatoria)**:

The right of the owner to **prevent** or **remove any interference** with his property interests.

In this second case, the concept of interference comes into place because the latter may limit the exclusivity of ownership. The dispute does not revolve around the right of property (like in rei vindicatio), but the legal issue at stake is the interference impacting on the exclusive right of the owner.
Therefore, these two actions serve different purposes.
N.B. This structure is very well-known and embraced in the civilian tradition because it was strongly influenced by Roman law.

1. RECOVERY ACTION

Cour de cassation, 22 April 1823 – Hellot v. Leclerc

Hellot and **Leclerc** owned two neighbouring buildings separated by a wall.
In 1819, Leclerc demolished the wall and built a new building.
Hellot sued Leclerc, claiming that the new building encroached on his property by 14 inches, and destabilised it (legal issue at stake).
Leclerc did not deny the allegations but replied that: (i) Hellot's building had collapsed and could not be repaired due to legal restrictions; (ii) Hellot had suffered only minor losses, whereas the obligation to remove his building would cause him substantial damage.
-->**Hellot has the right to demand the removal of the encroaching building (the demolishment of the new building) and the return of his property (the owner is restored), regardless of the state of the property and of the actual harm suffered.** The ratio behind this decision is that property is understood as an exclusive right which cannot be limited in any way (not even by an encroachment).
N.B. The exclusive right does not authorize the other party to encroach: we are only interested in ascertaining if property law has been violated or not, but we're not interested in verifying whether the encroachment is significant or not.

Cour de cassation, 20 March 2002 Houssin v. Legrasse

Lagrasse built a fence that extended **0.50 cm** into his neighbour's property. The neighbour, **Houssin**, sued him.
The **Paris Court of Appeal** dismissed the case on the grounds that the **encroachment was negligible** (evolutionary interpretation/new understanding of property law= the exclusivity right can coexist with a small encroachment).
-->However, **no one may be deprived of their property** and Houssin has the right to demand the removal of the encroaching fence and the return of his property.
The degree of encroachment is of irrelevant according to the traditional view of property law**.**
The **French supreme court** opted for this old view of property law, remarking that the degree of encroachment is irrelevant and if there's the violation of a proprietary right, the violation must be sanctioned and the claim of the owner must be accepted: Houssin has the right to demand the removal of the fence.

2.INJUNCTIVE RELIEF

German Supreme Court, 1.12. 1995: interference of the enjoyment of the good by the owner.

The claimants bought a plot of land situated next to the defendant's factory premises in order to build an underground car park.
The construction company discovered significant chemical contamination. The disposal of the excavation waste resulted in high costs.

The claimant demanded payment of additional disposal costs. In the meantime, the defendant company had gone bankrupt and was being managed by a liquidator.
-->**The operator of a facility that has caused soil contamination on neighbouring land remains responsible after closure and it can be ordered to remove the contaminants that interfere with the owner's peaceful enjoyment of his property.** The legal issue here at stake is not the right of property, but an interference which must be removed. Therefore, injunctive relief is granted.

German Supreme Court, 12.7.1985
The claimant owned a plot of land with a house.
The defendant, his neighbour, let his property to a married couple and allowed them to run it as a brothel.
The claimant believed that his underage daughter was being morally endangered and that the value of his property was being devalued.
The claimant demanded that the defendant stop the commercial sex work in his house.
--> The claim was dismissed.
Injunctive relief does not cover property interferences of a genuine moral nature.

PROPERTY INTERESTS

- **Primary Property Rights:**

These rights include the **full bundle of powers that the holder can have over goods:**
• Ownership
• Intellectual Property

- **Secondary (Lesser) Property Rights**

These rights include **only some of the powers that the owner may have over goods:**
• Secondary Right of Use
• Secondary Security Rights (e.g. pledge, hypothec, which appear to be restrictive compared to property. Nevertheless, they are rem because they refer to the good).

Limited property rights

Limited property rights are property rights with erga omnes effect derived from a right of ownership (primary property right) over a movable or immovable thing
Limited property rights and the distinction between primary and secondary rights are rooted in the **fragmentation of ownership/property fragmentation**: French theory of **démembrement de la Propriété**—> the creation of limited rights by the owner can be understood as a process of subtracting certain rights from his original bundle and granting them to third parties= the powers of ownership can be singled out and fragmented in separated powers.
Two categories of limited property rights:

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

1. Servitudes (EASEMENTS in common law)
2. Usufruct, which has a limitation period of time that may extend to the life of the usufruct owner (comparable to the TERM OF YEARS in common law= possession for a limited period of time)
3. Use-Habitation

1. **Limited property rights of security** are created to secure the payment of a claim/debt and are referred to a good, so it is a **guarantee of rem** (vs. suretyship which is a personal guarantee, so it is related to the patrimony of the surety). They are usually created by the debtor/owner over an object in favour of his creditors:Hypothec / Mortgage: it is connected to an immovable object.
2. Pledge (pignus): it refers to a movable object. In the civilian tradition it is deemed to be a real contract, so the latter is concluded when the good is delivered.

Common features

i. **Protection erga omnes**

• Absolute rights: they can be forced against anyone else in the world (no relationship with the creditor)

ii. **Run with the asset**

•They are referred to the good and not to the person. If ownership is fragmented, limited property rights bind subsequent owners of the (remaining rights in) the asset.

iii. **Numerus clausus (numbered by law)**

• Limited property rights are only provided and predetermined by the law: individuals cannot create new types of property rights outside the list provided by the civil code or the legislation.
(It is a traditional theory in the private law- civilian tradition- even though nowadays it is discussed: according to some minority views and schools, parties can be entitled to create further rights).

SERVITUDES (Limited property rights of enjoyment)

A **predial servitude** consists of **a burden imposed on one piece of land (servient)** for the **benefit of another piece of land (dominant) belonging to a different owner.**
E.g. right of way allows the owner of the one piece of land to walk across the other piece of land, usually the neighbour's (e.g. property of B is limited by the right of way of A)

DOMINANT LAND	**SERVIENT LAND**
The piece of land that benefits from the establishment of a servitude (it benefits from the right of way)	The land subject to the servitude, i.e. on which the "burden" is imposed

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

- **AFFIRMATIVE SERVITUDES**: The owner of the dominant land can do something on the servient land

• E.g. **Servitude of way**: the owner of the dominant land may pass through the servient land to access a public road

- **NEGATIVE SERVITUDES**: The owner of the dominant land can prevent something being done on the servient land

• E.g. **Servitude not to build on land**: the owner of the servient land may be prevented from erecting new buildings that would obstruct the dominant land's view

N.B.! The duty imposed on the servient land **cannot be an obligation on the owner to do something**, only not to do something.