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Why the Proposed Optional Common European Sales Law Has Not, But Should Have, Abandoned the Principle of All or Nothing: A Guide to How to Sanction the Duty to Mitigate the Loss

ANNE KEIRSE*

Abstract: It is widespread accepted that a creditor, who after a breach of contract wishes to safeguard his entitlement to full compensation for loss incurred, has a responsibility to take reasonable steps to mitigate this loss. There are, however, different views with regard to the scope of this duty to mitigate. Here it is advocated that the legal consequences of a failure to avert or minimize a loss must be similar to those of any joint occurrence of a fault of the wrongdoer with neglect of the aggrieved party. This implies that the liability of the wrongdoer should be reduced by apportioning the loss, which both parties could and should have avoided, between them both. Most modern legal systems do in fact acknowledge the assimilation of the doctrines of contributory negligence and failure to mitigate the loss and thus recognize the prospect of an apportionment of the damage. Not so, however, the European Commission's Expert Group. They exempt the debtor from liability insofar as the creditor contributed to his own loss. This contribution presents some critical reflections on how the duty to mitigate the loss is sanctioned in the newly proposed instrument on European contract law. The author illustrates that the provision in question – Article 163 of the proposal – does not provide for an adequate representation of the latest developments in the various European legal systems on this matter.

Résumé: Il est largement admis qu'un créancier qui, à la suite d'une rupture de contrat, souhaite sauvegarder son droit à entière réparation du dommage subi, doit effectuer des démarches raisonnables pour atténuer son dommage. Il existe toutefois différentes opinions quant à la portée du devoir d'atténuer le dommage. La thèse ici défendue est la suivante : les conséquences juridiques du défaut d'empêcher ou de diminuer un dommage doivent être similaires à celles de tout événement conjugant une faute de l'auteur du dommage et une négligence de la partie lésée. Ceci implique que la responsabilité de l'auteur du dommage devrait être réduite en répartissant la perte que les deux parties auraient pu ou auraient dû éviter, entre elles deux. La plupart des systèmes juridiques modernes reconnaissent en réalité l'assimilation des doctrines de la faute de la victim ('négligence contributive') et du défaut de modération du dommage, et admettent donc l'idée de la répartition du dommage. Ce n'est cependant pas le cas du Groupe d'Experts de la Commission Européenne. Ils exonèrent le débiteur de sa responsabilité pour autant que le créancier a contribué à son propre dommage. La présente analyse présente quelques réflexions critiques sur la question de savoir comment l'obligation de modérer le dommage est sanctionnée dans l'instrument nouvellement proposé en droit européen des contrats. L'auteur explique que la disposition en question – Article 163 de la proposition – ne réflète

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pas de manière adéquate les récents développements des divers systèmes juridiques européens en cette matière.

Zusammenfassung: Es ist weithin anerkannt, dass ein Gläubiger, der nach einem Vertragsbruch seinen Anspruch auf Ersatz des vollen hierdurch erlittenen Schadens geltend machen will, die Verantwortung trägt, angemessene und zumutbare Schritte zu unternehmen, um seinen Schaden möglichst gering zu halten. Nichtsdestotrotz gibt es verschiedene Ansichten über die Reichweite dieser Schadensminderungspflicht. Hier ist es zu befürworten, dass die Rechtsfolgen einer Verletzung der Schadensabwendungs- oder Schadensminderungspflicht gleich denen eines jedweden Zusammenfalls eines anspruchsbegründenden Fehlverhaltens des Schädigers mit einem Mitverschulden der geschädigten Partei behandelt werden. Dies impliziert, dass die Haftung des Schädigers nach Maßgabe einer Aufteilung des Schadens zwischen beiden Parteien, insoweit sie den Verlust hätten verhindern können und müssen, reduziert werden sollte. Wenn beide Parteien für einen Schaden verantwortlich sind, so lässt es sich im Allgemeinen nicht rechtfertigen, diesen gleichwohl nur einer Partei aufzuerlegen. Tatsächlich findet sich in den meisten modernen Rechtsordnungen die Angleichung der Grundsätze zum Mitverschulden des Gläubigers mit denen bezüglich einer Verletzung der Schadensminderungspflicht wieder. Damit zeigt sich gleichzeitig auch die Anerkennung des soeben beschriebenen Quotenteilungsprinzips. Nicht so hingegen bei der Expertengruppe der Europäischen Union. Sie geht davon aus, dass der Ersatzanspruch des Geschädigten hinsichtlich der vermeidbaren Folgeschäden grundsätzlich vollständig ausgeschlossen sei. Diese Ansicht, dass der Geschädigte den vermeidbaren Anteil am entstandenen Schadenl stets in vollem Umfang selbst zu tragen habe, stellt einen teilweisen Rückfall in das mittlerweile überwundene Alles-oder-nichts-Prinzip dar. Der vorliegende Beitrag präsentiert einige kritische Überlegungen hinsichtlich der Art und Weise, wie die Schadensminderungspflicht im neu vorgeschlagenen optionalen Instrument des Europäischen Vertragsrechts sanktioniert ist. Der Autor führt aus, dass die fragliche Vorschrift – Artikel 163 des Vorschlages – keine angemessene Berücksichtigung der jüngsten Entwicklungen in den verschiedenen europäischen Rechtssystemen zu diesem Thema vorsieht.

1. Two Different Tendencies

Following a breach of contract or a tortious act, the aggrieved party will commonly try to mitigate the loss it has suffered; it is a matter of well-understood self-interest. A merchant of perishable goods, for example, confronted with a buyer who refuses the delivery of purchased goods will make efforts to sell the rejected goods in the market. To offer two other illustrations: if one gets hurt, one seeks medical care; and when one's phone is temporarily out of use, the owner will find other modes of communication. Failure to take such steps will lead to more severe consequences of the detrimental incident. Thereby the question arises as to who must bear the costs in such cases: the wrongdoer who caused the damaging incident or the aggrieved party who by neglecting one's own interests contributed to the extent of the loss suffered.

The recently proposed optional instrument on European contract law, to which this issue of the *European Review of Private Law* is devoted, firmly answers affirmatively to the latter part of the suggestion and denies the legitimacy of the first part of it. It determines that a 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.

However, there developed an opposite tendency, a tendency adhering to the principle of proportionality. In this view, the aggrieved party is not debarred from claiming any part of the losses it could have avoided through reasonable efforts; instead, it holds that the debtor should bear a proportional share of these losses.

The object of this article is to confront the first tendency, which is presented by the proposed optional instrument, with the second one. On that account, the following illuminates the background against which both tendencies could evolve. It provides a historical and comparative overview. The historical outline gives us a better understanding of the *raison d'être* of the controversy over debarring and reducing liability for the additional loss that the creditor could have prevented. Comparative research shows that the two different currents of opinion are common in several European countries. Comparative data should be used to find arguments to resolve the ongoing dispute. This is compounded by the current objective of unification. In the end, I question whether the choice made in the proposed Optional Common European Sales Law in this regard can be said to be appropriate.

2. Is It All or Nothing, or Somewhere in Between?

2.1 Reconciling Tensions between Fundamental Principles

There has been much reflection on how to address a loss that is caused by both the neglect of the wrongdoer and the aggrieved party. Should someone who wrongfully endangers the interests of another person always be held liable, even if the latter could have avoided or minimized the damage incurred as a result thereof? If so, does this liability absolve the aggrieved party of the responsibility to take reasonable care for one's own interests? Here not only the fundamental issue arises as to what extent the freedom of the wrongdoer must be limited in order to protect the legal interests of the aggrieved party, but these roles are also reversed; the question also comes down to finding the limits of to what extent the interests of the wrongdoer should be protected against the freedom of the aggrieved party. This necessitates a complex assessment. The restrictions of freedom and responsibility need to be delineated both for the debtor and the creditor.

Throughout history, three solutions have been applied. One could adhere to the principle *alterum non laedere*[1] (not to harm another) and, thence, ignore the aggrieved party's own contribution to the sustained loss. Liability of the debtor is then maintained in full, and the contributory fault of the creditor is left without effect. The line of reasoning would be as follows. The aggrieved party may have been foolish for not protecting his own interests, but he has not acted unlawfully, whereas the wrongdoer has. With regard to one's own person and one's own property, one is free to do (and not to do) as one pleases; in other words, in one's personal jurisdiction, one rules. Neglecting one's own interests is legally allowed, so long as the legally protected interests of others are not harmed. On the other hand,

[1] *Digesta (corpus iuris civilis)* 1, 10, 1 (*Ulpianus*).

the wrongdoer has clearly committed a civil wrong; he intentionally or accidentally failed to meet a contractual obligation or an applicable duty of care towards another person and in consequence thereof this other person suffers damage. This in itself might be reason enough to entitle the aggrieved party to full compensation for harm sustained as a (direct or indirect) result of the non-performance or tortious act.

The second solution is quite the opposite and gives the principle *casum sentit dominus*[2] (loss lies where it falls) a free hand. It implies that the neglect of the aggrieved party exempts all liability of the wrongdoer. The rationale behind this position is that he who suffers damage by his own fault has no right to complain, whereas a loss that is one's own responsibility cannot legally be considered as damage. Whether another cause is also involved is then considered irrelevant.

The third solution seeks to find a middle way in between these two extremes and is therefore a more balanced approach, as a form of a compromise between the two conflicting principles. It leads to a distribution of the loss between the debtor and the creditor in accordance with the contributions that each made to the extent of the loss. While a person is entitled to neglect his own interests, he is not entitled to recover damages sustained as a result of his neglect from another person. It would be unfair to reassert one's right to self-determination and at the same time transfer the consequent costs to the other person. This does not imply that the debtor's liability is thereby extinguished, merely that it is reduced. After all, it is the wrongdoer's action that led to both the harm and the resulting necessity to mitigate it. In this view, shared responsibility calls for shared apportionment. As it now stands, this balanced approach is becoming rather commonplace, but for a long time, this was not the case, as will be exemplified in the following.

2.2 A Historical and Comparative Overview

The doctrine of contributory negligence has its origins in classical Roman law. Based on the well-known maxim by Pomponius, as laid down in *de Digesta* (*Corpus Iuris Civilis*) 50, 17, 203: *quod quis ex culpa sua damnum sentit, non intellegitur damnum sentire* (that a person who by his own fault suffered a damage had not been damaged in the eye of the law), it is asserted that according to Roman law a wrongdoer is fully exempted from liability in case the aggrieved party contributed to the loss.[3] If in the old days, someone suffered harm due to his own fault, he was denied compensation. An exception was made if the wrongdoer had acted intentionally, in which case full compensation was warranted. This strict application of the principle of *all or nothing* was predetermined by the Roman procedural formula:

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[2] Derived from *Codex* (*corpus iuris civilis*) 4, 24, 9 and *Digesta* (*corpus iuris civilis*) 50, 17, 23 in fine.

[3] See amongst others P. AUMANN, *Das mitwirkende Verschulden in der neueren juristischen Dogmengeschichte* (diss. Hamburg), Hamburg 1964, pp. 4 *et seq.*; C.J.H. JANSEN, 'Eigen schuld van de benadeelde', 4. *RMThemis* 2002, p. 205; A.L.M. KEIRSE, *Schadebeperkingsplicht; Over eigen schuld aan de omvang van de schade* (diss. Groningen), Kluwer, Deventer 2003, pp. 16, 19-20; R. ZIMMERMAN, *The Law of Obligations,* Oxford, 1996, p. 1010.

the judge only had the alternative to condemn in the full amount and give the claimant *all* or to absolve the defendant and leave the claimant with *nothing*. *Tertium non datur*: a third option was not at hand.

This principle of all or nothing, anchored in classical Roman law, has not been abandoned in the subsequent legal tradition of the *ius commune* in Europe, into which the reception of Roman law evolved. Some disagreement did, however, exist on the question as to whether an aggrieved party should also lose compensation for his damage in case of a marginal fault on his side, notwithstanding the degree of fault on the part of the wrongdoer. The commonly taught approach in such instances was often that the wrongdoer could only escape liability if the fault of the aggrieved party was equalled or was greater than that of the wrongdoer. That the outcome would remain all or nothing remained beyond dispute.

Even in the eighteenth century, after criticism from the natural law movement was voiced against the principle of all or nothing, it still took quite some time before this un-nuanced approach made way for a broadly held alternative. The German philosopher and supporter of the natural law movement, Christan Wolff, can be said to hold the honour of being the first to set aside the Roman law principle of all or nothing.[4] Where both the wrongdoer and the aggrieved party have contributed to the damage, he did not bring into question the conditions for liability, as it was traditionally the practice, but rather he brought forward that the extent of compensation should be lowered. As such, Wolff did not place the burden of full liability on the shoulders of the person who contributed the most to the damage, but rather, he divided the amount of compensation between the wrongdoer and the aggrieved party in proportion to the degree of the amount of fault each had.

Although this groundbreaking vision initially remained in the arena of legal theory, the nuanced teaching of damage apportionment according to the wrongdoer's and victim's fault eventually managed to spread across Europe. Wolff's ideas first found their way through a natural law codification in the Austrian *Allgemeines Bürgerliches Gesetzbuch* (ABGB) of 1811. Paragraph 1304 of the ABGB provides that, in case of joint fault on the part of the wrongdoer and aggrieved party, the damage is to be distributed in proportion to each one's fault. In case this relation cannot be determined, an alternative equal division of the damage is given:

> §1304 ABGB (1811): Wenn bei einer Beschädigung zugleich ein Verschulden von Seite des Beschädigten eintritt; so trägt er mit dem Beschädiger den Schaden verhältnismäβig; und, wenn sich das Verhältnis nicht bestimmen läβt, zu gleichen Teilen.

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[4] C. WOLFF, *Jus Naturae methodo scientifica pertractatum,* Halae Magdeburgicae 1742, *Pars secunda*, secs. 628-632, *Pars quarta* sec. 591; *Grundsätze des Natur- und Völckerrechts,* Halle 1754, Hildesheim 1980, sec. 283. See also AUMANN, 42 *et seq.*; K. LUIG, 'Überwiegendes Mitverschulden', in: *Ius Commune II,* Frankfurt am Main 1969, p. 231.

Also in the Swiss Code of 1883, under the title *Schweizerisches Obligationenrecht* (OR), the principle of contributory negligence came into effect. For such instances, Article 51 II OR (1883) provides the judge with the freedom to reduce the amount of the wrongdoer's obligation to compensate damages:

> 51. II OR (1883): I) Art und Größe des Schadensersatzes wird durch richterliches Ermessen bestimmt im Würdigung sowohl der Umstände als der Größe der Verschuldung.
> (II) Ist auch dem Beschädigten ein Verschulden beizumessen, so kann der Richter die Ersatzpflicht nach Verhältnis mäßigen oder gänzlich von derselben entbinden.[5]

The new doctrine gained a firm foothold in Germany on 1 January 1900, at which time the German Civil Code (BGB) came into force. Based on the new Code, the legal consequences of contributory negligence should, according to section 254 BGB, be determined based on an assessment in light of all the circumstances of a given case. This assessment will usually result in an apportionment of the damage between the wrongdoer and the aggrieved party, while by way of exception, all damages may also be borne by one party:

> §254 BGB (1900): 1) Hat bei der Entstehung des Schadens ein Verschulden des Beschädigten mitgewirkt, so hängt die Verpflichtung zum Ersatze sowie der Umfang des zu leistenden Ersatzes von den Umständen, insbesondere davon ab, inwieweit der Schaden vorwiegend von dem einen oder dem anderen Teile verursacht worden ist.[6]

Greece followed in 1946 with the implementation of Article 300 *Astikos Kodikas* (Civil Code). Again, the judge was given freedom to come to a nuanced damage apportionment in instances of contributory negligence, varying from full compensation for the damage to an overall dismissal of the claim:

> Art. 300 Astikos Kodikas (1946): Hat der Beschädigte bei der Entstehung des Schadens oder bei dessen Umfang aus eigenem Verschulden mitgewirkt, so kann das Gericht eine Entschädigung ablehnen oder ihren Betrag mindern.[7]

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[5] The successor to Art. 51 II OR (1883), Art. 44 I OR (1912), reads: 'Hat der Geschädigte in die schädigende Handlung eingewilligt, oder haben Umstände, für die er einstehen muss, auf die Entstehung oder Verschlim-merung des Schadens eingewirkt oder die Stellung des Ersatzpflichtigen sonst erschwert, so kann der Richter die Ersatzpflicht ermässigen oder gänzlich von ihr entbinden'. Other than Article 51 II OR (1883), Art. 44 I OR (1912) sees to both contractual and non-contractual liability.

[6] This article has remained unaffected in the version of the BGB promulgated on 2 Jan. 2002.

[7] D. GOGOS, *Das zivilgesetzbuch von Griechenland (1940),* Berlin 1951, p. 34.

The lack of a codification of a provision dealing with the issue of contributory negligence in the French *Code Civile* of 1804, which was also implemented in annexed Belgium, the Dutch *Burgerlijk Wetboek* of 1838 and the Italian *Codice Civile (del Regno d'Italia)* of 1865, meant that, in all these countries, the all-or-nothing principle remained firmly in place. At the present, French law still does not contain a provision regarding contributory negligence. However, there is a traditional rule regarding the *faute de la victime*, and already in the second half of the nineteenth century, case law has become distanced from a rigid application of the all-or-nothing principle.[8]

The turning point in the Netherlands came only in 1916, prior to which time, and fully in line with the traditional all-or-nothing approach, both Dutch doctrine and case law sought to deal with the issue of contributory negligence in terms of questioning the existence of liability itself rather than the extent of liability. The *Hoge Raad* (the Dutch Supreme Court) first broke with this tradition on 4 February 1916. The case in question concerns a tragic incident: a pedestrian was crossing a public road in Amsterdam, which also served as a marshalling yard for railway trains, when he was scraped by an oncoming train, owned by the Hollandsche IJzeren Railway Company. The horrific accident left the pedestrian's arm heavily maimed, and as a result, it later had to be amputated. In the liability proceedings that followed, both the pedestrian and the Hollandsche IJzeren Railway Company were considered to be at fault. The latter had breached its duty of care by failing to erect a road sign warning of the dangerous situation or closing off the road all together. In turn, the victim had carelessly crossed the road without first looking for oncoming objects. In accordance with the then prevailing doctrine, the court of first instance dismissed the claim for compensation to the victim. The Court of Appeal, however, sought a different approach to the matter and handed down a judgment through which the damage was divided equally between both parties. In cassation, the *Hoge Raad* sanctioned this ruling by stating that:

> Article 1401 BW [of the old Code Civil (1838), the predecessor of Article 6:162 BW (1992), ALMK], which places an obligation to compensate for the damage on one through whose fault a damage occurs, does not limit nor stand in the way for the judge to assess the obligation to compensate to the extent to which each person's fault contributed to the damage, in case that the damage occurs as a result of civil wrongs (or omissions) of more persons.

Although a legal basis was yet lacking, since then it became established in case law that the own fault of an aggrieved party (contributory negligence), as a

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[8] Cass. Req. 8 Feb. 1875, *DPO* 1875.1.320. See amongst others B. WEYTS, *De fout van het slachtoffer in het buitencontractueel aansprakelijkheidsrecht* (diss. Antwerpen), Antwerpen 2003, no. 377.

rule, leads to a reduction of the extent of liability of the wrongdoer. Later, with the introduction of the New Civil Code of 1992, the legislator came to move and codified the previously established approach of somewhere in between, all or nothing in Article 6:101 of the Civil Code:

> Art. 6:101 BW (1992): 1) When the damage is also caused by circumstances which are attributable to the aggrieved person himself, the obligation to compensate the damage is reduced by apportioning the damage between the aggrieved person and the liable person in proportion to the degree to which the circumstances which have caused the damage can be attributed to them individually, with the proviso that another apportionment shall be made, or the obligation to compensate the damage shall be extinguished totally or maintained in full, if this is required by fairness in view of the significance of the various faults or other circumstances in the underlying situation.

In Belgium, which – other than the Netherlands – did not implement its own Civil Code after its independence, a provision on the subject of contributory negligence is also lacking all the same. However, in 1936, the *Hof van Cassatie* (the Belgian Supreme Court) provided a judgment for the adoption of co-responsibility.[9] Since then, the wrongdoer is deemed to be released from the requirement of full compensation, as soon as a fault of the aggrieved party has been found to have contributed to the loss.

Likewise, the Italian legal doctrine and case law has, for a long time, held the view that the fault of the wrongdoer is lifted in case of a fault on the victim's part, but over time, the reasoning for apportioning the damage between both parties gained ground. It was at last adopted in the *Codice civile* of 1942:

> Art. 1227 CcIt (1942): 1) Se il fatto colposo del creditore ha concorso a cagionare il danno, il risarcimento è diminuito secondo la gravità della colpa e l'entità delle conseguenze che ne sono derivate.

A similar development can be traced in English law, as in the common law traditional, the general rule was all the same that contributory negligence qualified as a *complete defence*.[10] In this sense, the damage remained with the aggrieved party, in case some fault could be attributed to him, regardless of the degree of the fault and no matter how slight. In light of the unjust judgments that this rule could bring about,

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[9] Hof van Cassatie 2 Apr. 1936, *Pasicrise Belge* 1936, I, 209; *La Belgique judiciare* 1936, 392. See also WEYTS, no. 377.

[10] R.F.V. HEUSTON & R.A. BUCKLEY, *Salmond and Heuston on the Law of Torts,* London 1987, pp. 573 *et seq.*; B.S. MARKESINIS & S.F. DEAKIN, *Tort Law*, Oxford 1999, pp. 680 *et seq.*; M. LUNNEY & K. OLIPHANT, *Tort Law; Text and Materials*, Oxford 2010, pp. 300 *et seq.*

later case law sought to remedy the situation by adopting the *last opportunity rule*. According to this rule, the person that fails to prevent damage, who had the last clear chance to do so, is considered responsible for the occurrence of the damage. Not surprisingly, this rule led to some peculiar outcomes as well. Had the victim himself had the last opportunity to avoid the damage, then no compensation was awarded to him. However, were the behaviour of the wrongdoer the *causa proxima*, then the aggrieved party had the right to full composition, despite his own fault.

The famous case of *Davies* v. *Mann* serves to bring the oddity of the said rule in view.[11] The case concerned an accident where a donkey was run over by a speeding wagon. The donkey died as a result of the accident and the owner of the donkey claimed compensation, even though the owner himself was to be blamed for the accident since he had bounded and neglectfully left the donkey on the road. Despite this, he was still allowed full compensation, as the person in control of the wagon was reasoned to have been the last person to have had the opportunity to avoid the collision.

It was 1945 before contributory negligence was considered a *partial defence*. With the *Law Reform (Contributory Negligence) Act of 1945,* the path towards apportionment of the damage between parties was finally opened:

> Law Reform (Contributory Negligence) Act 1945, section 1(1): Where any person suffers damage as the result partly of his own fault and partly of the fault of any other person or persons, a claim in respect of that damage shall not be defeated by reason of the fault of the person suffering the damage, but the damages recoverable in respect thereof shall be reduced to such extent as the court thinks just and equitable having regard to the claimant's share in the responsibility for the damage.

This *Act* was also applicable in Scotland and later had impact in certain other common law systems, including Ireland, Australia and New Zealand. With regards to the United States, the principle of all or nothing remained in place even a bit longer. But in time, this traditional, un-nuanced approach made way for the new doctrine of co-responsibility, which was introduced through legislation there as well.[12]

In summary, it can be concluded that, in each examined legal system, the all-or-nothing principle has been found to be unfair. Given that it is fair and just that he who causes damage to himself should bear the costs and that it is fair and just that he who wrongfully causes damage to another should compensate this, then it is also fair and just that, if the damage can be traced back to the wrongdoer and the aggrieved party, the damage should be divided between them both.

It goes without saying that throughout the many academic endeavours to find and further develop common principles and rules in the private law systems within the European Union both the doctrine of contributory negligence and the apportionment

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[11] *Davies* v. *Mann* [1842] 10 M. & W. 546. See HEUSTON & BUCKLEY, 573.

[12] W.P. KEETON *et al.*, *Prosser and Keeton on the Law of Torts*, St. Paul, Minnesota 1984, 470 *et seq.*

as the legal consequence thereof are acknowledged. The recently proposed optional Common European Sales Law reads in this respect:

> The debtor is not liable for loss suffered by the creditor to the extent that the creditor contributed to the non-performance or its effects.[13]

The principle that the creditor's contributory negligence reduces or in extreme circumstances even excludes an otherwise well-founded claim is also expressed in the present *acquis*, for example, in the Package Travel Directive (Article 5), the Air Carrier Liability Regulation (Article 3) and the Product Liability Directive (Article 8).[14] The European Court of Justice also acknowledges that forms of contributory negligence are relevant in determining the awards of damages. For example, in *Brasserie du Pêcheur,* the European Court said:

> In particular, in order to determine the loss or damage for which reparation may be granted, the national court may inquire whether the injured person showed reasonable diligence in order to avoid the loss or damage or limit its extent and whether, in particular, he availed himself in time of all the legal remedies available to him.[15]

2.3 Legal Consequences of a Failure to Mitigate the Loss

One would expect that the question regarding the sanction for non-compliance with the duty to mitigate the loss is deemed to have been fully answered with the foregoing. After all, an unreasonable failure to mitigate the loss is a kind of contributory negligence, the sole unique feature being that it does not relate to the whole of the aggrieved party's loss but, rather, to a portion thereof. There is no fundamental difference between the doctrines of contributory negligence and of the failure to mitigate the loss. The difference is only in their relative importance. So it

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[13] Article 166 in the in June 2011 published Feasibility Study, Art. 163 in the renewed version of the draft optional instrument published in August 2011 (see <http://ec.europa.eu/justice/contract/files/feasibility-study_en.pdf>), Art. 162 in the Proposal for a Regulation of the European Parliament and of the Council on a Common European Sales Law, COM(2011) 635 final.

[14] Article 8:403 of the Principles of the Existing EC Contract Law (Acquis Principles) reads: 'Damages are reduced or excluded to the extent that the creditor wilfully or negligently contributed to the effects of the non-performance or could have reduced the loss by taking reasonable steps'. Here we see that contributory negligence referring to the creation of the damage is treated the same way as contributory negligence referring to the later mitigation of its effects. See further in para. 2.3 below. See also U. MAGNUS, 'The Damage Rules in the Acquis Communautaire, in the Acquis Principles and in the DCFR', in R. Schulze (ed.), *Common Frame of Reference and Existing EC Contract Law (2nd and rev. edition),* Munich 2009, p. 224.

[15] ECJ 5 March 1996, C-46/93 and C-48/93 *Brasserie du Pêcheur & Factortame* III [1996] 1 *CMLR* 889, para. 84.

should not matter whether the creditor's contributory negligence relates to the materialization of the damage or to the later mitigation of its effect. Both doctrines are founded on an appropriate care for one's own interests. This is not a legal duty or an obligation that can be enforced by law, rather it indicates that the liability of someone else does not absolve the aggrieved party of the responsibility to take reasonable care for its own interests.

Nevertheless, while the doctrine of contributory negligence has distanced itself from the traditional all-or-nothing principle, the doctrine on failure to mitigate the loss has yet to undergo the same progress. And although the affiliation between the two doctrines is commonly acknowledged, the doctrine on the duty to mitigate the loss has for decades long been isolated. By the twentieth century, it was indeed common practice that contributory negligence that resulted in the *occurrence* of the damage would lead to the apportionment of damages between the aggrieved party and wrongdoer. But in instances in which contributory negligence (read: failure to mitigate the loss) solely affected the *extent* of the damage, the general consensus was still that the aggrieved party was not entitled to compensation for any additional loss that he could have avoided through reasonable efforts. In other words, where the failure to mitigate the loss was concerned, the all-or-nothing approach thus remained firmly in place.

In European countries, it was generally thought that the aggrieved party who could have reasonably been able to mitigate his loss but instead omitted to do so forfeits his right to claim compensation for the additionally suffered loss from the wrongdoer. Nevertheless, some opposing views were voiced.

As was previously noted, both the French and the Belgian Civil Code lack an explicit provision on the doctrine of contributory negligence or the duty to mitigate the loss. Both doctrines are however more-or-less acknowledged in the case law of each legal system.[16] In both countries, it is now taught that the failure of the aggrieved party in taking appropriate measures for reducing his own loss should be seen as a particular species of the genus of contributory negligence, for which

[16] However, here it should be noted that the Cour de Cassation has stated that the victim of a wrong has no duty to mitigate his damage in French tort law. See Cass. 2nd Civ. 19 June 2003, No. 931 FS-PRBI, Dibaoui/Flamand, D. 2003, Jur 2326; Cass. 2nd Civ. 19 June 2003, No. 930 FS-PBRI, Xhauflaire/Decrept, D. 2003 Jur 2396; O. MORÉTEAU, 'France', in H. Koziol & B.C. Steiniger, *European Tort Law 2007*, Wien/New York 2008, p. 283; S. LE PAUTREMAT, 'Mitigation of Damage: A French Perspective', 55. *International & Comparative Law Quarterly* 2006, pp. 205 *et seq.* If the Catala Avant project is adopted, things may change, since Art. 1373 reads as follows: 'When the victim by sure, reasonable, and proportionate means might have reduced the extent or the aggravation of the injury suffered, his failure to do so will result in a reduction of his award, unless the nature of the measures would be such as to violate his physical integrity'. Furthermore Art. 1149 of the French Civil Code should be mentioned here. This provision expressly states that the damages due to the victim of a breach of contract for loss suffered are subject to the exceptions and modifications of the Arts 1150–1155 of the Civil Code.

the aggrieved party, under certain circumstances, may be held responsible.[17] The legal consequences of a failure to mitigate the loss are therefore dealt with in the same manner as any other situation in which the unlawful act of the wrongdoer and the own fault of the aggrieved party jointly cause some loss.[18] That is to say, to distribute the damages amongst both parties. Nevertheless, it is commonly taught that this entails that the propagation of that part of the damage, which is caused by the negligence on the part of the aggrieved party, falls entirely on the shoulders of the aggrieved party itself and can thus not be partly shifted to the wrongdoer.[19] A few, however, leave open the possibility of an apportionment of this additional loss between the wrongdoer and the aggrieved party. Dirix, just to name one, believes that the additional loss, depending on the degree of fault of the parties, should either just partly, or sometimes in whole, remain uncompensated.[20]

Austrian law does not contain a separate statutory provision on the duty to mitigate the loss either. Even so, an *Obliegenheit* on the part of the aggrieved party to mitigate the loss is, similar to other European countries, derived from the general provisions on contributory negligence (section 1304 ABGB).[21] In Austrian case law

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[17] *France*: L. RIPERT, *La réparation du préjudice dans la responsabilité délictuelle* (diss. Paris), Paris 1933, pp. 112 *et seq.*; H. MAZEAUD *et al.*, *Traité théorique et pratique de la responsabilité civile délictuelle et contractuelle, Tome II*, Montchrestien, Paris 1970, no. 1455 *et seq.*, at 545 *et seq.*; A.M. HONORÉ, 'Causation and Remoteness of Damage', in A. Tunc (ed.), *International Encyclopedia of Comparative Law*; *Volume XI, Torts; Part I*, Tübingen 1983, no. 7-153, at 101. However, see also LE PAUTREMAT, 205 *et seq.* Here it should be mentioned that it is also taught that the question of mitigation relates to the question of causality. Those who consider the mitigation of loss as a question of causality would deal with it by referring to the requirement of the causal link by stating that the victim's loss was not generated by the defendant's conduct but rather by the victim's conduct. *Belgium:* E. DIRIX, *Het begrip schade*, Antwerpen, 1984, no. 78, at 56; J.M.R.K. RONSE, *Schade en schadeloosstelling, Deel I*, Gent, 1984, no. 464, at 325; A. VAN OEVELEN, 'De zgn. schadebeperkingsverplichting van de benadeelde in het buitencontractuele aansprakelijkheidsrecht', 39. *Rechtskundig Weekblad* 1993-1994, p. 1396; WEYTS, no. 56; H. COUSY & D. DROSHOUT, 'Contributory Negligence under Belgian Law', in U. Magnus & M. Martín-Casals (eds), *Unification of Tort Law: Contributory Negligence*, The Hague/London/New York 2004, p. 29.

[18] HONORÉ, no. 7-153, at 101; DIRIX, 1984, no. 78, at 56; VAN OEVELEN, 1396; D. SIMOENS, *Beginselen van Belgisch privaatrecht; XI, Buitencontractuele aansprakelijkheid; Deel II, Schade en schadeloosstelling*, Antwerpen 1999, p. 89.

[19] L. RIPERT, *La réparation du préjudice dans la responsabilité délictuelle* (diss. Paris), Paris 1933, p. 116; RONSE, no. 464, at 325; R. KRUITHOF, 'L'obligation de la partie lésée de restreindre le dommage', *Revue Critique de Jurisprudence Belge* 1989, p. 53; SIMOENS, 89; WEYTS, nos 74-75.

[20] E. DIRIX, 'Schadebeperkingsplicht van de benadeelde (annotatie bij Rb. Hasselt 26 februari 1979)', 43. *Rechtskundig Weekblad* 1979-1980, pp. 2921-2929; DIRIX, 1984, no. 78, at 56.

[21] See A. EHRENZWEIG & A. EHRENZWEIG, *System des österreichischen allgemeinen Privatrechts; Zweiter Buch, Das Recht der Schuldverhältnisse; Erster Abteilung, Allgemeine Lehren*, bearbeitet von H. Mayrhofer, Wien 1986, p. 308; P. RUMMEL, *Kommentar zum Allgemeinen Bürgerlichen Gesetzbuch, 2. Band, §1304*, bearbeitet von R. Reischauer, Wien 1992, Rn. 37-45, at 420 *et seq.*; H. KOZIOL, *Österreichisches Haftpflichtrecht; Band I, Allgemeiner Teil,* Wien 1997, Rn. 12/85 *et seq.*, at 414 *et seq.*; R. DITTRICH & H. TADES, *Manz Groβe Ausgabe der Österreichischen Gesetze;*

and doctrine, it was generally assumed that damage that results from a breach of the duty to mitigate the loss is wholly shifted towards the aggrieved party.[22] However, Koziol and Kletecka oppose this prevailing policy and advocate for the apportionment of the additional loss between both parties in accordance with each one's degree of mutual fault.[23] They believe that the rule and measure of damage apportionment, as embodied in the general contributory negligence provision of section 1304 ABGB, should be applied in the majority of cases involving a breach of the duty to mitigate the loss. Kozial perceives the customary view debarring liability for the additional loss as a considerable setback to the out of date principle of all or nothing.

Both schools of thought can also be found in Dutch law.[24] Under the old Dutch Civil Code (prior to the coming into force of the new Civil Code of 1992), in both the case law and the literature, the general consensus was that the liability of the wrongdoer is excluded for the additional loss, as soon as the aggrieved party is found to have failed in his duty to mitigate his loss.[25] The legal basis for barring liability for any additional loss was found in the assumption that the causal connection between the liability-creating event and the additional loss due to the failure to mitigate the loss is lacking. This approach was nevertheless not devoid of criticism. As early as 1906, Ribbius maintained that the general principle of fairness does not necessarily require such a far-reaching limitation of liability.[26] He called for an apportionment of the additional

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Zweiter Band: Das Allgemeine bürgerliche Gesetzbuch, Wien Manz 1999, sec. 1304, E 84–148; M . HINTEREGGER, 'Contributory Negligence under Austrian Law', in U. Magnus & M. Martín-Casals (eds), *Unification of Tort Law: Contributory Negligence*, The Hague/London/New York 2004, p. 12.

[22] See HINTEREGGER, 12.

[23] KOZIOL, 1997, Rn. 12/90, at 418; H. KOZIOL, 'Rechtsfolgen der Verletzung einer Schadensminderungspflicht – Rückkehr der archaischen Kulpakompensation?', *Zeitschrift für Europäisches Privatrecht (ZEuP)* 1998, pp. 593 *et seq.*; A. KLETECKA, *Mitverschulden durch Gehilfenverhalten*, Wien 1991, pp. 58–60.

[24] See amongst others KEIRSE, 43 *et seq.*; J. SPIER a.o., *Verbintenissen uit de wet en schadevergoeding*, Deventer 2006, p. 263; ASSER/HIJMA 5-I, 2007, no. 474; ASSER/HARTKAMP/SIEBURGH 6-II*, 2009, no. 127.

[25] P. SCHOLTEN, 'Eigen schuld', 2665. *Weekblad voor Privaatrecht, Notariaat en Registratie (WPNR)* 1921, p. 34; A. WOLFSBERGEN, 'De causaliteit van art. 1401 BW (slot)', 3004. *WPNR* 1927, pp. 513–514; J.PH. SUIJLING, *Inleiding tot het Burgerlijk Recht, 2e stuk – 1e gedeelte,* Haarlem 1934, no. 358; A. WOLFSBERGEN, *Onrechtmatige daad*, Leiden 1946, p. 219; R.J. POLAK, *Aanspraak en aansprakelijkheid uit onrechtmatige daad* (diss. Amsterdam), Zwolle 1949, p. 25; W.J. SLAGTER, *De rechtsgrond van de schadevergoeding bij onrechtmatige daad* (diss. Leiden), Leiden 1952, p. 261; HR 18 Nov. 1927, *Nederlandse Jurisprudentie (NJ)* 1928, p. 123 (Huidenhandel/Kalker en Norden); HR 24 Apr. 1931, *NJ* 1931, 1321 (Quick Dispatch); HR 29 januari 1932, *NJ* 1932, 330 (Brenninkmeijer/Van Hasselt II); HR 4 oktober 1957, *NJ* 1958, 12 (RTM II); HR 31 oktober 1958, *NJ* 1959, p. 29 (Maarse en Kroon); HR 31 oktober 1958, *Verkeersrecht (VR)* 1959, p. 121 (NS I); HR 31 oktober 1958, *VR* 1959, p. 122 (NS II); Hof's-Gravenhage 6 maart 1957, *NJ* 1957, p. 429 (Apenbeet); Hof Leeuwarden, 9 oktober 1968, *Schip & Schade (S&S)* 1970, p. 23 (Ameland I); Hof's-Hertogenbosch 4 juni 1974, *NJ* 1975, p. 18 (Glasz/Benjamins); Hof Amsterdam 23 December 1976, *NJ* 1978, p. 89 (Coveco).

[26] H.R. RIBBIUS, *De omvang van de te vergoeden schade bij niet-nakoming van verbintenissen en bij onrechtmatige daad*, Leiden 1906, pp. 194 *et seq.*

loss, which the aggrieved party could reasonably have mitigated, in accordance with the degree to which the aggrieved party could understandably be pardoned for his lack of care in avoiding his own loss. Bloembergen as well did not consider it fair that the wrongdoer should, as a rule, always be freed from liability in such instances of additional loss.[27] Even if the aggrieved party could have avoided the additional loss, the fact remains that the initial act of the wrongdoer lays at the root of the situation, whereby consequently, the aggrieved party is placed in a position to have to mitigate a loss. Bloembergen suggested that it was theoretically incorrect to have to assess the failure to mitigate the loss differently from instances of 'ordinary' contributory negligence. This view was endorsed by Van Wassenaer of Catwijck.[28] He argued that failure to mitigate the loss is simply one facet of the general subject of contributory negligence and should therefore result in a similar outcome. From this, it follows that the wrongdoer should not only be held to compensate the loss that results from his unlawful conduct but also that the wrongdoer should, as a rule, also have to bear some of the additional loss. It was thus a matter of a difference of opinion on whether the causal connection between the liability-creating event and the additional loss was lacking or not.

The dispute on the existence of a causal connection in such instances was finally settled through the introduction of Article 6:101 of the New Dutch Civil Code (BW) in 1992. Similar to other European systems, the current law treats the duty to mitigate the loss as a particular species of the genus of contributory negligence. The Parliamentary report of Meijers supports this point of view as he suggests that the attributability of neglecting to take appropriate measures in reducing the loss on the part of the aggrieved party should simultaneously be assessed in line with the contributory negligence regarding the *occurrence* of the loss in the first place.[29] This brings about that now it is no longer an issue of causal connection, but rather Article 6:101 BW that forms the basis for the doctrine on failure to mitigate the loss.

This creates a significant difference. Stating that a breach of the duty to mitigate the loss implies the lack of a causal connection between the initial liability-creating event of the wrongdoer and the additional loss that the aggrieved party could have avoided brings that the aggrieved party is debarred from a liability claim against the wrongdoer for the additional loss. The requirement of causal connection forms after all a rigid condition for liability. Hence, it is all or nothing; the additional loss cannot be divided between the wrongdoer and the aggrieved party. Whilst according to the new school, which treats the principle of contributory negligence as the basis for the duty to

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[27] A.R. BLOEMBERGEN, *Schadevergoeding bij onrechtmatige daad* (diss. Utrecht), Deventer 1965, no. 276. See also the conclusion of Advocate-General Bloembergen in the case of HR 24 Jan. 1997, *NJ* 1999, p. 56 (De Ridder/Staat), in which he states that 'although it is generally accepted that the additional loss that results from neglecting to take adequate measures to mitigate the loss should in most cases remain with the aggrieved party, exceptions on the rule should be possible'.

[28] A.J.O. BARON VAN WASSENAER VAN CATWIJCK, *Eigen schuld* (diss. Leiden), Groningen 1971, pp. 82 and 206–210.

[29] T.M., *Parl. Gesch. Boek 6,* at 350.

mitigate the loss, it is assumed that both circumstances that can be attributed to the wrongdoer as well as to the aggrieved party himself can lead to additional loss. This in turn provides the means for nuanced and case-specific damage apportionment. For the application of the doctrine of contributory negligence, with all its nuanced outcomes in between all or nothing, a double causality test is required: first, a causal connection needs to exist between the liability-creating event on the part of the wrongdoer and the additional loss and, second, there also needs to be causal connection between the attributable conduct of the aggrieved party and the additional loss.

The school that excludes liability for additional loss, due to a lack of causal connection, seems to be outdated. Nevertheless, the line of reasoning that provides that the loss that the aggrieved party could have reasonably avoided should, as a rule, completely be deducted from the wrongdoer's duty to provide compensation is, to this date, still defended by some scholars.[30] A comparison between the old and new theory quickly raises questions on the consistency of this school. As of now, the new school that provides that the additional loss should be apportioned between both the wrongdoer and the aggrieved party who both reasonably could have avoided this damage, to which I consider myself a supporter, is steadfastly gaining ground.[31] Unfortunately, the *Hoge Raad* has not made use of the opportunity to shed its stance on this controversy.[32]

The German jurisdiction embraces the duty to mitigate the loss; the mitigation of damage principle has explicitly been included in the German Civil Code. Based on Article 254 BGB, the obligation of the wrongdoer to compensate the loss is reduced in case negligence on the side of the aggrieved party is found to have contributed to the cause of the loss (paragraph 1) and in case the aggrieved party has neglected to stress the danger of unusually high damages that the wrongdoer neither knew nor should have known or if the aggrieved party has failed to take appropriate measures in avoiding or reducing the loss himself (paragraph 2):

> §254 BGB: 1) Hat bei der Entstehung des Schadens ein Verschulden des Beschädigten mitgewirkt, so hängt die Verpflichtung zum Ersatz sowie der Umfang des zu leistenden Ersatzes von den Umständen, insbesondere davon ab, inwieweit der Schaden vorwiegend von dem einen oder dem anderen Teil verursacht worden ist. (2) Dies gilt auch dann, wenn sich das Verschulden des Beschädigten darauf beschränkt, dass er unterlassen hat, den Schuldner auf die Gefahr eines ungewöhnlich hohen Schadens aufmerksam zu machen, die der Schuldner weder

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[30] Mon. Nieuw BW B-36 (Spier), no. 4; H.B. KRANS, *Schadevergoeding bij wanprestatie* (diss. Leiden), Deventer 1999, p. 203; ASSER/HIJMA 5-I 2007, no. 474; E.E. SLOB, 'Terugblik van een reiziger', in F.T. Oldenhuis (ed.), *Schadebeperkingsplicht; wie verwacht wat van wie?*, Den Haag 2010, pp. 115 *et seq.*

[31] A.J.O. BARON VAN WASSENAER VAN CATWIJCK & R.H.C. JONGENEEL, *Eigen schuld en medeaansprakelijkheid*, Zwolle 1995, p. 55; KEIRSE, 261-273; N. FRENK, 'Naar echte eigen schuld?', 2. *Aansprakelijkheid Verzekering & Schade (AV&S)* 2006, p. 44; ASSER/HARTKAMP 6-II 2009, no. 127.

[32] See HR 9 Aug. 2002, LJN-no AE2176, JOL 2002, at 437.

kannte noch kennen musste, oder dass er unterlassen hat, den Schaden abzuwenden oder zu mindern. Die Vorschrift des §278 findet entsprechende Anwendung.

The concrete effects of such forms of contributory negligence (*Mitverschulden*) are as a matter of practice determined through an assessment of all the circumstances of a given case. This assessment will usually lead to an apportionment of the loss between the wrongdoer and the aggrieved party. In German case law and legal literature, this *Quotenteilungsprinzip* is generally applied in so far as the contributory negligence plays a role in the materialization of the loss (*Mitverschulden im Rahmen der haftungsbegründenden Kausalität).*[33] Where the contributory negligence referring to the extent of the loss is concerned (in German termed *Mitverschulden im Rahmen der haftungsausfüllenden Kausalität*), there are varying points of view. Some suggest that in case of the breach of the duty to mitigate the loss (*Warn-*, *Schadensabwendungs-*, or *Schadensminderungspflicht),* the outcome should, as a rule, lead to an exclusion of the liability for the additional loss.[34] Others advocate that exempting liability can only, in certain circumstances, be the right outcome; in other instances, the apportionment of the loss is deemed to be favourable.[35] Venzmer even suggest that an apportionment of the additional loss between both parties should be considered as the general rule.[36] In the meantime, the *Bundesgerichtshof* has joined in with this discussion:

Eine umfassende Abwägung der wechselseitigen Verursachungs- und Verschuldensbeiträge ist im gesamten Anwendungsbereich des §254 BGB geboten. Auf sie kann im Rahmen des §254 II 1 weder bei der Alternative der Schadensabwendung noch

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[33] H.J. MERTENS (ed.), *Bürgerliches Gesetzbuch mit Einführungsgesetz und Nebengesetzen; Kohlhammer-Kommentar, begründet von Hs.Th. Soergel, neu herausgegeben von W. Siebert; Band 2, Schuldrecht I (§§241-432),* bearbeitet von H.J. Mertens, A. Teichmann e.a., Stuttgart 1990, sec. 254, Rn. 109–110; M. MARTINEK (ed.), *J. von Staudingers Kommentar zum Bürgerlichen Gesetzbuch mit Einführungsgesetz und Nebengesetzen; Zweites Buch, Recht der Schuldverhälnisse (§§249-254)*, bearbeitet von G. Schiemann, Berlin 1998, sec. 254, Rn. 111; D. LOOSCHELDERS, *Die Mitverantwortlichkeit des Geschädigten im Privatrecht*, Tübingen 1999, p. 559; W. KRÜGER (ed.), *Münchener Kommentar zum Bürgerlichen Gesetzbuch; Band 2a, Schuldrecht Allgemeiner Teil (§§241-432),* bearbeitet von H. Oetker e.a., München 2007, sec. 254, Rn. 107.

[34] H. STOLL, *Haftungsfolgen im bürgerlichen Recht; eine Darstellung auf rechtsvergleichender Grundlage*, Heidelberg 1993, pp. 252 *et seq.*; H.C. HELMUT HEINRICHS (ed.), *Münchener Kommentar zum Bürgerlichen Gesetzbuch; Band 2, Schuldrecht Allgemeiner Teil (§§241-432),* bearbeitet von W. Grunsky e.a., München Beck 1994, sec. 254, Rn. 44, 59 en 62; W. KRÜGER (ed.), *Münchener Kommentar zum Bürgerlichen Gesetzbuch; Band 2a, Schuldrecht Allgemeiner Teil (§§241-432),* bearbeitet von H. Oetker e.a., München 2003, sec. 254, Rn. 76 en 107; OLG Bremen 20 Nov. 1975, *VersR* 1976, at 558.

[35] K. LARENZ, *Lehrbuch des Schuldrechts; Erster Band, Allgemeiner Teil*, München 1987, pp. 550–551; H. LANGE, *Handbuch des Schuldrechts; Band I, Schadensersatz*, Tübingen 1990, pp. 623–624; LOOSCHELDERS, 561–564 and 596–597.

[36] K.J. VENZMER, *Mitverursachung und Mitverschulden im Schadensersatzrecht*, München-Berlin 1960, pp. 193–194.

bei der der Schadensminderung verzichtet werden. Die in der Literatur vereinzelt vertretene Ansicht, dass der Geschädigte den vermeidbaren Schadensteil stets in vollem Umfang zu tragen habe, ist mit dem Wortlaut der Vorschrift nicht vereinbar, enthält einen Wertungswiderspruch sowohl zu §254 I als auch zu §254 II in der Alternative der unterlassenen Schadensabwendung und stellt überdies einen teilweisen Rückfall in das durch §254 BGB überwundene Alles-oder-nichts-Prinzip dar.[37]

Similarly, the Greek law considers a breach of the duty to mitigate the loss to be on par with the general principle of contributory negligence. For the Greek law provides that:

Art. 300 Astikos Kodikas (1946): Hat der Beschädigte bei der Entstehung des Schadens oder bei dessen Umfang aus eigenem Verschulden mitgewirkt, so kann das Gericht eine Entschädigung ablehnen oder ihren Betrag mindern. Das gleiche gilt auch dann, wenn der Beschädigte unterlassen hat, den Schaden abzuwenden oder zu mindern, oder wenn er den Schuldner auf die Gefahr eines ungewöhnlich groβen Schadens, die der Schuldner weder kannte noch kennen muβte, nicht aufmerksam gemacht hat.

Italian law can be said to take a special position in this matter. Namely, the viewpoint that the aggrieved party who breaches his duty to mitigate the loss loses any claim for compensation against the wrongdoer for an additional loss is explicitly established in the law. Article 1227 paragraph 1 of the Italian Civil Code provides for a apportionment of the loss for contributory negligence where the creation of the damage is concerned, but where the contributory negligence refers to the later mitigation of its effect, the second paragraph provides that the additional loss, which the aggrieved party could have avoided by taking reasonable steps will as a whole stay where it falls and is not be shifted towards the wrongdoer:

Art. 1227 CcIt (1942): 1) Se il fatto colposo del creditore ha concorso a cagionare il danno, il risarcimento è diminuito secondo la gravità della colpa e l'entità delle conseguenze che ne sono derivate.
(2) Il risarcimento non è dovuto per i danni che il creditore avrebbe potuto evitare usando l'ordinaria diligenza.

This rule that provides that the loss that the aggrieved party could have reasonably been able to avoid, is not applicable for compensation, is linked to the general provisions of Articles 1223 jo. 2056 of the Italian Civil Code. These

[37] BGH 24 Jul. 2001, *NJW* 2001, pp. 3257-3258.

provisions limit the obligation of the wrongdoer to compensate the loss that has occurred as an immediate and direct consequence of the liability-creating event.[38]

Similar to the Italian system, in English law, a general categorical difference is made between *contributory negligence* on the one side and the *breach of the duty to mitigate the loss* on the other side. Case law provides that an aggrieved party must do everything in his power to take the appropriate measures in order to reduce the loss, which he may suffer after a liability-creating event by the wrongdoer. Should the aggrieved party fail to do so, then he can no longer have a claim for the additional loss that could have been avoided.[39] The speech of *Lord Chancellor* Viscount Haldane in the leading case *British Westinghouse* v. *Underground*, provides one of the most authoritative expressions of this established rule:

> The fundamental basis is thus compensation for pecuniary loss naturally flowing from the breach; but this first principle is qualified by a second, which imposes on a plaintiff the duty of taking all reasonable steps to mitigate the loss consequent on the breach, and debars him from claiming in respect of any part of the damage which is due to his neglect to take such steps.[40]

The breach of the duty to mitigate the loss, which comes into play after the wrong is committed, is thus distinguished from the doctrine of contributory negligence referring to the occurrence of the loss. Hence, according to the mainstream, the legal consequence of a breach of the duty to mitigate the loss is not an apportionment of the loss between the parties but rather an exclusion of the liability of the wrongdoer for the additional loss. Some consider the breach of the duty to mitigate the loss, as a *novus actus interveniens*, whereby the causal connection between the conduct of the wrongdoer and the additional loss is lacking.[41] This two-pronged approach, however, is subject to some resistance. In a rather convincing plea, Williams shows that 'the duty to mitigate the loss is merely a species, a particular application, of the broad doctrine of contributory negligence'.[42] He

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[38] F.D. BUSNELLI, 'Landesberichte Italien', in C. Von Bar (ed.), *Deliktsrecht in Europa; Systematische Einführungen, Gesetzestexte, Übersetzungen; Band V*, Köln 1993, pp. 15–16; LOOSCHELDERS, 90–91.

[39] H. MCGREGOR, *McGregor on Damages*, London 1988, no. 275, at 168; R.A. PERCY, *Charlesworth & Percy on Negligence*, London 1990, pp. 210–311 and 408–411; J.P.H. LORD MACKAY OF CLASFERN (ed.), *Halsbury's Laws of England; Crown and Royal Family to Damages*, vol. (12) I, London 1998, no. 1041, at 456.

[40] *British Westinghouse* v. *Underground* (1912) All. E.R. Rep. 69.

[41] J. MUNKMAN, *Damages for Personal Injuries and Death*, London 1985, p. 37.

[42] G.L. WILLIAMS, *Joint Torts and Contributory Negligence; A Study of Concurrent Fault in Great Britain, Ireland and the Common-Law Dominions,* London 1951, pp. 281–294. Compare also W.V.H. ROGERS, 'Contributory negligence under English Law', in U. Magnus & M. Martín-Casals (eds), *Unification of Tort Law: Contributory Negligence*, The Hague/London/New York, 2004,

believes that the rules that cover the doctrine of contributory negligence in general, under which the *Contributory Negligence Act* falls, should also be applied in instances of a failure to mitigate the loss. Negligence on the part of the aggrieved party could, depending on the degree of negligence, lead to a reduction of the claim for compensation of the additional loss. Here too, the end result would be that the hardly fair all-or-nothing outcomes would make place for more nuanced intermediate solutions. Honoré also notes that 'there is no real justification for having two separate doctrines of contributory negligence and failure to mitigate damage in common law systems, and the most recent tendency is towards their assimilation'.[43]

2.4 Forgotten Heritage

In summary, it can be said that where the duty to mitigate the loss of the aggrieved party is concerned, European legal systems seek solutions within the general doctrine of contributory negligence. The possibility of a complete limitation of liability for the additional loss for the aggrieved party, as a form of sanction for the fact that the aggrieved part failed to fulfil its duty to mitigate the loss, is thereby left open, but this outcome is certainly not self-evident in all instances.[44] On the contrary, the mainstay is an apportionment of the loss. At the eighth Annual Conference on European Tort Law in Vienna, this was presented as a snapshot of development of particular note:

> A notable trend here is towards apportionment of responsibility between claimant and defendant, where the defendant's responsibility may previously have been denied altogether.[45]

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p. 59; LUNNEY & OLIPHANT, 311. The more elaborate Irish legislation provides that a 'negligent or careless failure to mitigate damage shall be deemed to be contributory negligence in respect of the amount by which such damage exceeds the damage that would otherwise have occurred' (Civil Liability Act 1961, sec. 34(2)(b)).

[43] HONORÉ, no. 7-154, at 103.

[44] Compare Riigikohus 20 Jun. 2006, No. 3-2-1-64-06 (2006) RT III 26, 241. Here the Supreme Court of Estonia stated that only the intentional self-damaging of the aggrieved party, not his negligence or gross negligence, can exclude liability based on LOA sec. 1059. However, the negligence of the aggrieved party may be the reason to reduce the amount of damages according to LOA sec. 139 subsec. 1. This provision reads that if a damage is caused in part by circumstances dependent on the aggrieved party or due to a risk born by the aggrieved party, the amount of compensation for the damage shall be reduced to the extent that such circumstances or risk contributed to the damage. See J. LAHE & I. KULL, 'Estonia', in H. Koziol & B.C. Steiniger (eds), *European Tort Law 2006*, Wien/New York 2007, p. 186.

[45] K. OLIPHANT, 'Comparative Remarks', in H. Koziol & B.C. Steiniger (eds), *European Tort Law 2008*, Wien/New York 2009, p. 666.

Against this background, Article 163 of the recently proposed regulation on an optional Common European Sales Law leaves much to be desired, which is altogether regrettable. The article provides:

> The non-performing party is not liable for loss suffered by the aggrieved party to the extent that the aggrieved party could have reduced the loss by taking reasonable steps.[46]

This article is identical to Article 3:704 of the *Draft Common Frame of Reference* (DCFR), which in turn is identical to Article 9:505(1) by the *Lando Commission's Principles of European Contract Law* (PECL), which, again, resembles Article 77 of the *United Nations Convention on Contracts for the International Sale of Goods* (CISG) (1980). Considering the above-mentioned developments in the various European countries, it becomes clear that this undifferentiated rule, which altogether excludes the wrongdoer's liability for any additional loss that the aggrieved party may suffer due to negligence in mitigating his loss is not a justifiable representation of the latest developments on the matter of the duty to mitigate the loss. Instead, the proposed rule in the cited Article 163 constitutes a step backward towards the already tread path of the all-or-nothing approach. Koziol also dubs this as an unfortunate setback in his criticism of the identical Article 9:505 PECL:

> Die Rechtsvereinheitlichung erscheint nicht sehr zukunftsweisend und erstrebenswert, wenn sie sich als Weg zurück in archaische Zustände erweist.[47]

The old theory is apparently so deeply rooted that it still crops up with a certain obstinacy. Yet, I hope that the time is now ripe for progress and that by the help of an additional plea for a proportional approach, as will be presented in the following, we can succeed in finally breaking with this tired tradition.

3. A Call for a Proportional Approach

3.1 Spirit of the Age

Our law is subject to a development by which responsibility is shifted from one person and, instead, is shared by multiple parties. The doctrine of contributory negligence has taken a leading role in this matter, but by now, the reasoning of co-responsibility in liability law is widespread. In this context, keywords are judicial

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[46] Article 167 in the June 2011 published Feasibility Study, Art. 164 in the renewed version of the Draft Optional Instrument published in August 2011 (see <http://ec.europa.eu/justice/contract/files/feasibility-study_en.pdf>), Art. 163 in the Proposal for a Regulation of the European Parliament and of the Council on a Common European Sales Law, COM(2011) 635 final.

[47] KOZIOL, 1998, at 594.

mitigation, the standards of reasonableness and fairness and profit remittance. Following this line, reference should also be made to the ongoing progress of proportional liability in case of causal uncertainty. Through the use of sophisticated and nuanced legal means, such notions as proportionality and balance are truly beginning to gel. With this, the all-or-nothing thinking belongs to the past.

Given the increasing focus on compromises, it is no less than remarkable that the solution to the subject of the failure to mitigate the loss is still sought in terms of all or nothing. It is now time that the development on the failure to mitigate the loss comes to take its place as a species of the general genus of contributory negligence. Therefore, the solution proposed by the European Commission's Expert Group cannot and should not form the final peace in the development of the doctrine. Instead, the proposed rule brings us back to square one, namely, to the old and tired principle of all or nothing.

3.2 Groundwork

In dealing with the subject of the duty to mitigate the loss over the years, we can see a turning point from a causality-based way of thinking to a contributory negligence-based approach. In various western European countries, we can trace a development whereby the breach of the duty to mitigate the loss is seen as a form of contributory negligence. In both the domestic and international case law and literature, this assumption is generally accepted.[48]

On this basis, it is not logical to apply an apportionment of the loss in instances where the aggrieved party has contributed to the liability-creating event, but to all together part with the possibility for a similar apportionment, in instances where an own fault on the part of the aggrieved party has added to the extent of the loss. It seems more consequent to deal with the problem of failure to mitigate the loss through the same system as contributory negligence referring to the materialization of the loss and to thereby part ways with the argument relating to the lack of causal causation. There are no practical objections to this approach, now that the doctrine of contributory negligence is fully capable and indeed directed at dealing with this task. An argument for is also quite obvious from the perspective of legal simplicity. The foregoing does not in any way imply that *causa interveniens* cannot manifest themselves in such a way that the causal connection is never breached. Rather, it merely means that instances where causal connection plays a role should, in principle, be distinguished from instances where the doctrine on the failure to mitigate the loss and, in turn, the doctrine of contributory negligence are at stake.

Dealing with the doctrine on the failure to mitigate the loss as part of the doctrine of contributory negligence brings with it that the total loss that the aggrieved party suffers as a result of an unlawful conduct of a wrongdoer should

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[48] See also U. MAGNUS & M. MARTÍN, 'Comparative conclusions', in U. Magnus & M. Martín-Casals (eds), *Unification of Tort Law: Contributory Negligence*, The Hague/London/New York 2004, p. 263.

be divided into the portion that is exclusively due to the debtor's wrongful act and unrelated to the negligence of the aggrieved party, on the one hand, and another portion that can be attributed to the conduct of both parties, on the other hand. Only with regards to the latter loss (i.e., the additional loss) the responsibility is shared between the aggrieved party and wrongdoer. Where the initial loss is concerned, however, the wrongdoer is still fully responsible for that portion of the loss, which would have been suffered even if the aggrieved party had mitigated the loss. It is evident that there is no reason for a shared distribution of this portion of the loss between the wrongdoer and the aggrieved party. For the additional loss that results from the failure to mitigate the loss by taking adequate measures, there, on the other hand, is reason for a shared apportionment of the loss.

Failing to take measures in order to reduce the loss does not take away the causal connection between the liability-creating event and the additional loss. It merely provides that the aggrieved party itself has also contributed to this portion of the loss. Hence, the portion of the loss that is the result of attributable conduct by both the wrongdoer and the aggrieved party should be apportioned between both parties to the degree that each contributed to the loss. A mere dichotomy between the initial loss and the loss that would not have occurred had mitigating action been taken cannot suffice for the reason that the additional loss should also be attributed to the wrongful act of the debtor. Hence, the logical consequence is that additional loss should be apportioned according to the same measure that is used in instances of contributory negligence. Those who simply wish to split the two portions of the loss and plea for the exclusion of liability for the additional portion overlook the fact that the attributability of the loss is shared by both parties. They place the responsibility of the initial loss with the wrongdoer and the responsibility of the additional loss with the aggrieved party. And although it is true that the aggrieved party could have mitigated the additional loss, one must bear in mind that the same also applies to the wrongdoer himself, since he was able to mitigate the loss in its entirety to begin with.

Now that contributory negligence is seen as a genus of the duty to mitigate the loss species, it follows that the point of departure should be that both parties have contributed to the additional loss in a way they both should have avoided. Hence, where the additional loss is concerned, an apportionment of this loss between the parties according to their share in the responsibility for this loss is the logical course.

3.3 Appraisal

From the above, it follows that the theory of eliminating liability for the additional loss is difficult to defend dogmatically. So then is a special rule with the purpose of debarring liability for the additional loss of a justifiable solution in view of the reasonableness of the outcome? This is not the case. In instances of joint responsibility where the aggrieved party has some blame, it is generally insufficient to shift this portion of the loss onto either the wrongdoer or the aggrieved party. It is not satisfactory that the aggrieved party should recover the whole of his damage or

nothing accordingly, as his conduct is put at the reasonable or unreasonable end of what is in fact a continuous gradation.[49] The conduct of the aggrieved party should instead be weighed in a fine balance. This can also be exemplified as follows. If the negligence of the aggrieved party is so small that it does not yet qualify as a breach of the duty to mitigate, the entirety of the loss is shifted to the wrongdoer. Is it then reasonable that when the negligence is only slightly larger, but does constitute a breach, that the additional loss is to be entirely born by the aggrieved party? Bearing in mind that, although the aggrieved party could have avoided the additional loss, by taking due measures, the fact remains that he was placed in a predicament by the wrongdoer in which the aggrieved party is faced with the task to act more carefully than otherwise would have been expected. No such duty to mitigate loss would have even existed had the initial wrongful act not been committed. To cite Lord MacMillan, it is often easy after an emergency has passed to criticize the steps that have been taken to meet it, but such criticism does not come well from those who have themselves created the emergency.[50] Where there is joint responsibility, the legal ground for shifting the damage may be diminished in strength, but it still remains present. The wrongdoer should not escape liability completely.

An example may be in order. Suppose a remote office building catches fire as a result of a short circuit, caused by improper wiring by an electrician. If the property catches fire on a Sunday and the building burns down completely, the electrician is held liable for the entirety of the loss. Were the fire to occur on a weekday and the aggrieved party is on sight but fails to take measures in containing the fire, then this could be a cause to reduce the wrongdoer's obligation to compensate for the loss. Should the aggrieved party knowingly refrain from intervening and instead wait and watch idly as the fire spreads, then it is reasonable that the additional loss that he could have prevented remains entirely at his own expense. But such an act of wilful intent will rarely be the case. It is possible that the aggrieved party may be accused of negligence because he has set the wrong priorities or perhaps he had financial motives for not taking the fire safety guidelines strictly or not having purchased enough fire extinguishers, leading to a more serious loss than would otherwise have been. It is also possible the extra damage was merely due to a panic reaction. It is not very reasonable to treat such cases, which differ greatly among themselves, equally. Furthermore, should it not make any difference if the wrongdoer was grossly negligent or reckless or actuated by malice?

The above illustrates that justice is better served by a consideration of the circumstances that arise on both sides. As the behaviour of the aggrieved party is to a lesser extent endangering, also in comparison with the degree of the endangerment by the wrongdoer, a more restricted reduction of liability is in place. This proportional approach avoids the inequities of the all-or-nothing approach. In short, the aggrieved party may or may not breach his duty to mitigate the loss,

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[49] See WILLIAMS, 292.

[50] *Lord MacMillan in Banco de Portugal* v. *Waterlow* [1932] All E.R. Rep. 204.

but the degree to which he contributes to the extent of the actual loss varies from case to case. The proportional approach addresses this complex reality. A case-by-case adjudication then prevails. It prevents largely similar situations from being treated very differently, whereas widely different situations would be treated equally. Abandoning the all-or-nothing principle also has economic advantages in that it induces both parties to limit damages as much as possible.

I offer another example. A hired gardener acts carelessly and, as a result of his sawing activities, causes a tree to collapse and fall on the car of his client, who is a salesman. This car is so damaged that it must be towed away for repair. The tow fee is EUR 100, and the repair costs EUR 1,900. But what is more, the salesman is dependant on his transport in order to perform his work duties. During the period in which his car is being repaired as the result of the accident, the salesman stays at home and consequently loses EUR 1,000 income. A more reasonable approach would have been possible. The salesman could have used a rental car to resume his work in the meantime, whereby he would not have had the loss of income. Now that he failed to take this measure, he is deemed to have violated his duty to mitigate the loss. What are the emerging legal consequences in this case? It is self-evident that the loss relating to the towing and repairing lay fully with the gardener. However, where the loss of income is concerned, the matter is more complicated. This additional loss occurred due to the negligence of the salesman in taking adequate measures for the purpose of resuming his work, to which the wrongdoer had no influence. A division of the damage in accordance with the old theory based on causality would therefore lead to an exclusion of the gardener's liability for this additional portion of the loss. The total loss of the salesman, resulting from the gardener's breach of contract, is EUR 3,000, but the gardener will only have to compensate EUR 2,000.

This, however, is a patently unreasonable result. If the obligation of the gardener is limited to EUR 2,000, he in practice has to pay less than he would have had if the salesman had taken measures in mitigating his loss. Namely, assuming that the salesman did rent a car and thereby suffered no loss of income, then it follows that the gardener, in this case, would have to pay for the costs of the rental car.[51] Further assuming that the cost of a rental car for the relevant period would have been EUR 500, it is easily imaginable that the gardener would, on the balance, have had to pay EUR 2,500 in damage compensation. It is generally not reasonable that the aggrieved party is left with more loss than he would have had had he not taken the adequate measures to mitigate his loss. As a consequence of

[51] See also sec. II of Art. 163 in the Proposal for a Regulation of the European Parliament and of the Council on a Common European Sales Law, COM(2011) 635 final (Art. 164 of the proposed instrument (renewed version of August 2011) (Art. 167 of the version published in June 2011), which reads as follows: 'The creditor is entitled to recover any expenses reasonably incurred in attempting to reduce the loss'.

this, it is important to take into account the cut of costs associated with the breach of the duty to mitigate the loss.

3.4 A Balanced Approach

By some advocated rule whereby the liability for the additional loss is eliminated has the advantage of simplicity, let this be admitted. Application of a measure of apportionment of responsibility, as supported by me, indeed necessitates the use of percentages that cannot be established with mathematical precision. However, should one be hesitant due to the fear of complications that may arise from such a relativistic way of legal reasoning, then it is important to bear in mind that it is not the practice of *l'art pour l'art* that is promoted; rather, the law itself inherently necessitates such a relativization. With contributory negligence referring to the materialization of the damage, a similar measure of apportionment of the damage is applied, whereby an exact accuracy is not achievable all the same. Yet this is not used as an argument to shift the entirety of the loss to the aggrieved party. Furthermore, accuracy in the attributing and assessing of damage is, in practice, often problematic and rarely archived in exact precision. This is a fact that the legislators have been able to accept. For example, courts in Europe are granted with the authority to estimate the extent of a loss, if it is not possible to determine it exactly. In addition, concerns about the exact nature of dealing with percentages are also a matter that haunts the all-or-nothing approach. The all-or-nothing approach inevitably brings along the need for a tipping point between 'all' and 'nothing'. Pinpointing the exact line of division between either two of the possible outcomes has proven exceedingly difficult and is in no way an exact science. A complicating factor is that the actions of the aggrieved party and the wrongdoer are intertwined. How likely must the responsibility of the aggrieved party be for debarring the wrongdoer's liability for the additional damage? Or how unlikely must his responsibility be for the damage to be fully shifted towards the wrongdoer, including the entirety of the additional loss? Furthermore, the outcome in the all-or-nothing approach is that in rather similar cases (i.e., to say cases that rest on the narrow edge of either side of the tipping point), often are treated entirely dissimilarly. While drastically separate situations, namely all cases on one side or the other side of the tipping point, are treated equally.

4. Conclusion

With the question of who should bear the consequences of a loss that can both be attributed to the unlawful conduct by a wrongdoer as well as to the negligence of the aggrieved party, we touch upon the core of liability law. That is, the search for a balanced level between protection of the interests of the aggrieved party on the one side and the importance of parties in being able to act freely on the other. This balance differs from time and place. The boundaries of the mutual responsibility of the wrongdoer and the aggrieved party are in a continuous motion; that much has at

least been demonstrated in the foregoing. The starting point of the illustrated historical evolution in the law in Europe has been the strict separation of responsibilities according to the classical Roman law. It was too early for the judgment of Solomon.

In more modern civilization, as the relationships and interactions of individuals have become increasingly interwoven, the inadequacies of a strict separation of responsibilities have become more and more obvious. In Western European legal systems, this has led to the recognition of the legal concept of co-responsibility. The judicial trend to extend the scope of responsibility for the consequences of a breach of contract and tortuous conduct has been accompanied by increasing recourse to apportionment. Should one irresponsibly endanger the interests or the property of another, one can be held liable even if the aggrieved party could have avoided the manifestation of the damage or minimized the loss resulting thereof. But in the light of the claimant's contributory fault, a flexible apportionment of the damage is called for, as the liability of the defendant does not entail that the aggrieved party is freed from any responsibility to take reasonable care for his own interest.

With the recognition that the legal responsibilities of the wrongdoer and the aggrieved party can overlap, one is hard-pressed to find logic in maintaining the all-or-nothing approach, as it can no longer be regarded as the most logical nor the desired solution. After all, shifting the risk of the loss on either party lacks credibility, when both parties are found to be responsible for the loss. It is therefore more reasonable to spread the damages onto both parties in proportion to the degree of co-responsibility. The applicable principles within the doctrine of contributory negligence are flexible and open-textured, leaving much to be decided through interpretation of the facts of a specific case. This trade-off of certainty for flexibility meets the need for individual justice.

Article 163 of the draft instrument on European contract law thus deserves serious reconsideration. The proposed European standard regarding the duty to mitigate the loss does not correspond with the developments in the national legal systems of the Member States. This is a great loss. What matters is that the research on European private law is concerned with European law that actually exists and therefore considers the dynamic that has developed in European legislation and jurisprudence. The task before us is analysing the tendencies of law developments and making sure this is reflected by the European principles, definitions and model rules that see the light of day. After all, only when the law seeks to find correlation with actual developments is the legislator able to pave the way for regulation that can truly come to full fruition.

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