

## The Borderland of Tort and Contract—Opening a New Frontier?

Tort and contract, their respective remedies, their relation and concurrence, create problems in most legal systems which the author of this article has examined. Jurisdiction and applicable law in international cases, different statutes of limitation, standards of care, measures and kinds of damages recoverable, immunities, and survival of actions are but a few of the issues which in domestic law have to be resolved if a cause of action can be founded in tort as well as in contract. The arrival of Uniform Sales Law adds an additional item to this list.

In the borderland of tort and contract,<sup>1</sup> the new frontier between domestic law and internationally unified law has to be observed. Liability based on breach of an international sales contract falling under CISG may “collide” or “concur” with liability based on domestic tort law rules. If, for instance, an American dry cleaner has purchased from a French manufacturer a machine which is destroyed by a fire caused by a defect in its wiring, products liability under domestic tort law rules or the responsibility of the seller under Section 45(1)(b) of CISG could be invoked by the purchaser. The reader might ask, why not? But if the buyer had failed to examine the machine, therefore overlooked the defect which an examination would (perhaps) have revealed, and consequently did not give notice of the “non-conformity,” he loses his remedies under the Convention, Section 39(1) of CISG. Can he circumvent this cut-off provision by basing his claim on domestic tort law? This effect of circumvention of one set of liability rules (and its restrictions on liability) by opting for the concurring liability system constitutes the core of the so-called problem of concurrence of actions, “*Anspruch-*

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\* Dr. iur. 1964 (U. of Freiburg); M.C.L. 1965 (U. of Chicago); Professor 1971 (U. of Heidelberg); Professor and Director Institute of Foreign and Comparative Law, U. of Freiburg, 1977. The author was a member of the FRG delegation at the Vienna U.N. conference in 1980.

1. Phrase borrowed from Prosser's famous essay, *The Borderland of Tort and Contract* in W. PROSSER, *SELECTED TOPICS ON THE LAW OF TORTS* (1953).

*skonkurrenz*," of "*cumul ou non-cumul*" or "election of remedies."<sup>2</sup>

In analyzing this problem, one has to ask first, what specific dimension CISG has added to it (Sec. I.A.) and whether "traditional" techniques to solve it could be applied (Sec. I.B.). Secondly, the areas of possible overlap or concurrence of domestic tort law and CISG have to be considered (II), before a solution could be attempted (III).

## I.

### A.

The circumvention of one liability system by relying on concurring actions, which thereby gain factual priority over the other system, might be welcome and therefore not be regarded as a problem at all. This is true especially if the superseded rules of liability are outdated, inadequate and need correction. In Germany, the growth of contractual law liability and the generous postulation of contractual or pre-contractual bonds between two parties or on behalf of third party beneficiaries were partly stimulated by the need to overcome shortcomings of the traditional tort law. "Concurrence" and the possibility of an "election" of remedies was not a problem but a blessing. Where, however, the rules of one liability system are regarded as adequate, well-balanced and just, there is a need to protect them from being pushed aside by concurring actions. This is especially the case if tort law uses broad general clauses, protecting even purely economic interests (in contrast to such tangible goods as life, health and property) and thereby (theoretically) allowing tort actions for every interest violated by a breach of contract. Special liability rules for breach of contract, their prerequisites and restrictions, become useless when the party to a contract could always revert to tort law. This is the main reason for the rule of "*non-cumul*" under French law, excluding the application of tort law rules (almost) altogether if there is a contractual relation between the parties. The conflict, therefore, is decided by a court-made rule of law giving the contractual liability system legal priority over a concurring tort liability system.

It depends, in other words, on an evaluation of the concurring liability systems and their details whether courts will accept "concurrence" and grant an option between the respective causes of action or "protect" one set of rules from the other by a rule of "*non-cumul*" or the like. In regard to CISG, however, municipal courts are, in my opinion, not as free as in cases involving only domestic law to grant remedies founded in tort if regulations of CISG and prerequisites for or restrictions on its remedies are in effect pushed aside. For CISG is created by a Convention binding the states which have acceded to it by the proper acts, and leaves no room for national legislators or courts to deviate from the

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2. As to French law, see DURRY, *LA DISTINCTION DE LA RESPONSABILITÉ CONTRACTUELLE ET DE LA RESPONSABILITÉ DÉLICTUELLE* 146 (1986). As to American Law, see W. PROSSER & P. KEETON, *THE LAW OF TORTS* § 92 (5th ed. 1984).

Convention, unless use was made of one of the few reservations.<sup>3</sup> The Convention has, so to speak, "preempted" the field for all matters regulated by the Convention, if and as far as it is applicable. A legislator or a court would breach the obligation incurred by a state in acceding to the Convention by creating or allowing remedies for a sales contract falling under the Convention, which are inconsistent with the rules on liability under CISG—regardless of the validity of an act of Congress, Parliament, or "*Bundestag*."<sup>4</sup> The same, however, must apply if the rules of the Convention are not attacked openly by a new statute granting contractual remedies inconsistent with the constitution but by tort or similar actions which are aimed at interests of buyers or sellers that are protected under CISG. If, under domestic tort law, a rule as stated in *Santor*<sup>5</sup> gave a buyer a tort remedy for the inferior value of nonconforming goods, it would be an infringement of the Convention and its rules if such a remedy were granted to a buyer who, under a CISG contract, had omitted to give notice of the nonconformity in time.

## B.

Courts and legal writers dealing with the problem of overlapping or concurring tort and contract liability have developed a number of theories and techniques as basis of a solution. Instead of giving one liability system legal or factual priority over the other it was proposed to "merge" the causes of action and their prerequisites into a new remedy called "contort,"<sup>6</sup> an "*Einheitsanspruch*."<sup>7</sup> But merging means that some elements of the respective liability systems are selected and put together to create a new remedy while others necessarily are discarded. In regard to contractual liability under CISG, this would lead to at least a partial neglect of its prerequisites for liability, that is, to an infringement of CISG's regulation of buyer's or seller's remedies and the corresponding liabilities. Apart from the violation of obligations created by an international convention, such a "solution" would negate the essence of CISG and its objective to create a uniform law. If such "mergers" were practiced by the courts of all the member states of the Convention with their different tort law systems, the resulting "contort" actions would be

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3. See arts. 92-96 CISG.

4. I cannot argue here with the Chinese Exclusion Case, 130 U.S. 581 (1889) and its ruling that lawful treaties are subordinate to subsequent acts of Congress. *But see* Henkin, *The Constitution and United States Sovereignty: A Century of Chinese Exclusion and Its Progeny*, 100 HARV. L. REV. 853 (1987); Westen, *The Place of Foreign Treaties in the Courts of the United States*, 101 HARV. L. REV. 511 et passim (1987) and Prof. Henkin's reply in 101 HARV. L. REV. 524 (1987). Nor can I argue that the U.S. has the "prerogative" to "violate" its international commitments. I am only stating that there would be a violation, and that this should be weighted even more so in dealing with the problem analyzed here, since tort actions are based normally on rules of law enacted prior to the Convention.

5. *Santor v. A. & M. Karagheuzian, Inc.*, 44 N.J. 52, 207 A.2d 305 (1965).

6. See G. GILMORE, *THE DEATH OF CONTRACT* 87 (1974).

7. GEORGIADES, *DIE ANSPRUCHSKONKURRENZ IM ZIVILRECHT UND ZIVILPROZESSRECHT* 204 et seq. (1968) (as to German law).

widely diverging and the core of the Uniform Sales Law thereby destroyed.

The French solution of "*non-cumul*," absolute legal priority of contractual relations and suppressing of tort actions between contract partners, would overshoot the mark. It is, of course, up to municipal courts and domestic law to decide this question; French courts probably will apply the doctrine of *non-cumul* also to international sales contracts. However, as a general solution, this theory seems to reach too far, for it would suppress tort rules even as to such issues where the Convention is silent, such as jurisdiction and venue.

German courts and legal writers favor a theory of "*Anspruchskonkurrenz*," that is, allowing concurring and "competing" remedies.<sup>8</sup> The merchant who has purchased for resale juice unfit for human consumption, therefore, could base his (tort) claim for lost profits and the violation of an applicable food law,<sup>9</sup> despite the fact that his contractual remedies were lost by his omission to give notice of the defects. This case must be regarded as overruled by many exceptions to the general rule, which cannot be reported here, and recently the courts have increasingly accepted the view that an explicitly regulated, well and fairly balanced system of contractual remedies should not be disturbed by competing tort remedies.<sup>10</sup> It is, therefore, doubtful, whether the case cited above could still be regarded as a precedent, as the main problem in recent cases emphasized the need to draw the line that separates the "immune" core of contract liability from the domain of tort law or areas where tort and contract actions can concur and "compete." This could remind the reader of the early approach of American courts, which attempted to separate the areas of contract and tort law neatly (using, among other criteria, the distinction of misfeasance and nonfeasance) and determine the "essence" or the "gist" of the action raised<sup>11</sup>—an attempt that Prosser has reported, analyzed in detail, and partly criticized as a "forest of flat, stale and unprofitable cases."<sup>12</sup>

It seems to me, however, that the idea of circumscribing the field, where one set of liability rules is exclusive, is a sound one and might be

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8. See P. SCHLECHTRIEM, *VERTRAGSORDNUNG UND AUSSERVERTRAGLICHE HAFTUNG* (1972).

9. See Imperial Ct., Dec. of Nov. 2, 1942, RGZ 170, 155.

10. See "*Spundwandurteil*," Supreme Ct. FRG, Dec. of Nov. 7, 1985, BGHZ 96, 228. But see Supreme Ct. FRG, Dec. of Sept. 16, 1987, *Wertpapiermitteilungen* 1987, 1299 passim.

11. See *Dawson Cotton Oil Co. v. Kenon, McKay & Speir*, 21 Ga.App. 688, 94 S.E. 1037 (1918) (action in contract despite allegation of tort for "wrongful" failure to purchase goods); *Finch v. Burgheim*, 122 Minn. 152, 142 N.E. 143 (1913) (negligent medical treatment held to state cause of action in contract); *Whittaker v. Collings*, 34 Minn. 299, 25 N.W. 632 (1885) ("gist" of negligence action against physician was malfeasance or nonfeasance *on the contract*); *Kansas City Stockyards Co. of Maine v. Federal Grain Co.*, 279 S.W. 771 (Mo.App.1926) (contract obligating defendant warehouses to handle plaintiff's corn determines cause of action in contract, not tort, despite defendant's negligence in failing to store corn before spoilage).

12. PROSSER, *supra* note 1, at 433.

helpful in dealing with the concurrence of CISG rules and domestic tort law. Before exploring its potential, however, it is necessary first to see where an overlap of tort law and CISG could occur. This, however, would need an exhaustive analysis not only of the whole system of CISG rules and remedies but also of all domestic tort law that might "concur" with CISG. Such a task cannot, for lack of competence, time and space, be undertaken here. A few examples, therefore, must suffice, although solutions based on such limited material can only be tentative.

## II.

### A.

An overlap can only occur where a matter is regulated by the Convention. If a matter is clearly excluded from CISG's ambit, no problem can arise. This is the case in regard to death and personal injury caused by goods sold under a CISG contract, Article 5. However, property damages are not mentioned. Leading scholars are of the opinion that property damages caused by non-conformity of goods are recoverable under Article 74.<sup>13</sup> But they disagree whether tort (product) liability is displaced in these cases by CISG.<sup>14</sup> And if we assume that the Convention displaces domestic tort law in these cases, then to what extent? If the property damages were not foreseen or foreseeable at the time of the conclusion of the contract and therefore not recoverable under the Convention, Article 74(2), can the injured buyer *now* revert to domestic tort law, which perhaps allows recovery of consequential, remote damages more generously?

The problem is even more difficult, if a domestic tort law protects (some) purely economic interest of one or the other party (especially consumers), such as the interest that goods bought on the market have an "adequate" value or are "properly presented" and "described." One is inclined to see purely economic interests as a domain of contract law and therefore of CISG. However, all domestic laws I know protect potential contract partners and their economic interests against misrepresentation and fraud, granting the betrayed buyer not only contractual but also extra-contractual remedies for damages to be qualified as tort or "*culpa in contrahendo*," and allow the defrauded person to avoid, rescind, or nullify the contract.<sup>15</sup> What about innocent or negligent

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13. See J. HONNOLD, *UNIFORM LAW FOR INTERNATIONAL SALES*, art. 5, No. 73 (1982); O. BIANCA & W. KHOO, *COMMENTARY ON THE INTERNATIONAL SALES LAW*, art. 5, sub 3.2 (1987); Stoll, *Inhalt und Grenzen der Schadensersatzpflicht sowie Befreiung von der Haftung im UN-Kaufrecht im Vergleich zu EKG und BGB in EINHEITLICHES KAUFRECHT UND NATIONALES OBLIGATIONENRECHT*, 257-259 (P. SCHLECHTRIEM ed. 1987); VON CAEMMERER, *PROBLEME DES HAAGER EINHEITLICHEN KAUFRECHTS* 121, 147 (1978).

14. See HONNOLD, *supra* note 13 (CISG displaces domestic products liability rules); Stoll, *supra* note 13 (Domestic tort law remains applicable).

15. Remedies invalidating a contract are, however, excluded from the ambit of the Convention, art. 4(a). See HONNOLD, *supra* note 13, at art. 4 No. 65, art. 35 No. 238, and art. 48 No. 299 (examples); BIANCA & KHOO, *supra* note 13, at art. 4, sub 3.3.4.

misstatements about the conformity of goods, though giving ground for an action in tort, which may collide with CISG remedies for nonconformity of the goods? Can these damages be recovered beyond the contemplation rule in Article 74(2) CISG despite a lack of notice by the buyer?

#### B.

Not only specific features of remedies for damages under CISG can be pushed aside by competing tort remedies but also rights of the parties. According to Art. 16 of CISG, an offer can be revoked until the acceptance is dispatched unless the exceptions of paragraph two are applicable. However, domestic tort rules—or other non-contractual concepts like “*culpa in contrahendo*”—may hold a prospective contract partner liable if he breaks off negotiations which have reached a point where the other party could have trusted that a contract would be concluded. Thus, revocation of an offer might be “punished” by liability for reliance loss, which could deter a party from using his right under CISG to revoke an offer. Is domestic law applicable, because not excluded, when the offeror harms the offeree by such wrongful conduct?<sup>16</sup> Or is revocation, because (and as far as) allowed under Article 16 of CISG, no longer “wrongful,” regardless of how domestic law sees it?

#### C.

A final example may show that “disturbances” of CISG rules by domestic tort law can occur in rather hidden places. Article 29(2) restricts modification or termination of contracts which contain a form requirement (writing) to written modifications (or terminations). The second section of this provision, however, protects a party to the extent that it relied on conduct of the other party which indicates that the form requirement was waived. The modification of a contract is, therefore, valid despite the neglect of a form requirement. Could there be room for an extra-contractual remedy for damages besides or instead of the consequences of the second sentence of Article 29(2)?<sup>17</sup>

### III.

In trying to find a theory which could help in clarifying, perhaps even solving, the issues described above in Section II, the quality of the Convention as a binding treaty and its aim to promote worldwide uniformity in dealing with sales disputes arising from international sales have to be remembered. Domestic policies, therefore, cannot be regarded as a sufficient basis to maintain tort law solutions that may supersede legal rules created by the Convention and thereby violate obligations of an interna-

16. See HONNOLD, *supra* note 13, at art. 16, No. 147.

17. See WEY, DER VERTRAGSSCHLUß BEIM INTERNATIONALEN WARENKAUF NACH UNCITRAL UND SCHWEIZERISCHEM RECHT, No. 445 (1984) (reluctantly answering in the positive).

tional treaty. CISG can, on the other hand, claim priority only as to “matters governed by this Convention” under Article 7(2). What are the criteria to characterize a matter as being governed by CISG in this context and when is the gravamen of an issue a contractual one falling under CISG?

A.

It seems that one has to start with protected interests, the respective duties and the interrelations of interests and obligations. The obligation of the seller to deliver goods conforming to the contract in time corresponds to interests of the buyer to use, to consume, or to resell the goods purchased, and therefore to receive them in time and conforming to the contract. These economic interests are basically contractual, for they are created by a contract. Their shape and extent depends on the parties’ agreement; time of delivery, conformity of the goods and the corresponding interests of the parties are “offspring” of the contract. There were in general<sup>18</sup> no extra-contractual obligations of private parties to provide other private parties with goods and their use. Extra-contractual duties—duties of care or duties to manufacture and market goods free of defects—are designated to protect interests such as health and property existing independently of contractual obligations, but also to protect certain economic interests. There is a well known correlation between interests and duties, for the recognition of interests, worth protection, shapes the corresponding duties, and the formulation of the duties circumscribes the protected interests.

It is the essence of contractual interests, as outlined above, which is regulated by CISG and its rules and remedies for international sales, and which should not be altered or changed by a tort protection granted by domestic legislatures or courts for economic interests. If a domestic law sets certain standards for goods in regard to quality, safety, and prices to be charged, a violation would not necessarily render goods sold under a CISG contract “non-conforming.” They might be destined for re-export to countries with less stringent laws, and if they are non-conforming, as will normally be the case, damages for purely economic loss of the buyer can be claimed only in accordance with the articles of CISG.

The picture changes if other interests and respective duties are concerned. If the goods are defective—non-conforming to the contract or not—and cause bodily injury, we are outside the scope of CISG, Article 5. But, even if only property damages were caused, which as consequential damages were within the contemplation of the parties and, therefore, recoverable under CISG, Article 74, we are outside the principal domain of interests created by contracts and protected by contractual remedies, and would have entered the field of genuinely extra-

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18. I.e., besides times of crises such as war or other disasters where special laws might be enacted.

contractual remedies.<sup>19</sup> Therefore, a tort action for property damages caused by defective and non-conforming goods should not be barred by an omission to give notice within reasonable time under Article 39 of CISG, so as to prevent the loss of remedies granted by Article 45, *et seq.* of CISG. Even if the goods themselves were destroyed by a defect giving rise to a tort action based on strict liability, the interest protected is basically an extra-contractual one, for it should not be decisive whether the "dangerous" defect destroyed the goods sold or another piece of property of the buyer or someone else.

The same result should be reached in regard to misrepresentation, fraud, betrayal and intentional harm to economic interests. The duty not to defraud or intentionally harm other people exists independently of an agreement of the parties, and the respective interests are not only created by contract. Article 89 of ULIS,<sup>20</sup> the predecessor of CISG, therefore contained a provision stating that "in case of fraud, damages shall be determined by the rules applicable in respect to contracts of sale not governed by the present law," and it was the unanimous opinion of legal writers that not only the amount of damages might be determined by domestic law in cases of fraud but that tort actions for damages fraudulently caused were altogether not regulated or restricted by the Uniform Sales Law.<sup>21</sup>

The same is true in regard to CISG, although an explicit provision is missing; the omission of Article 89 of ULIS was not meant as a decision of the problem dealt with herein.<sup>22</sup> Not only fraudulent causation of injury to economic interests, but also the intentional violation of interests under aggravated circumstances could be qualified as a tort outside the genuine scope of contract law, so that punitive damages are not excluded.

More difficult is the case of negligent misstatements and the like, if they could be the basis of tort actions under domestic law. In my opinion, one has to distinguish various circumstances that could arise under these claims: If the negligent misstatement is made in regard to the quality of the goods or the capacity of a party to perform, it concerns interests genuinely created by the sales contract which, therefore, are protected exclusively by rules and remedies of CISG. Not even domestic remedies to avoid or rescind the contract should be allowed despite Article 4(a).<sup>23</sup>

19. *Contra* HONNOLD, *supra* note 13, at art. 5, No. 73. *See also* Stoll, *supra* note 13, at 257 *passim*.

20. Uniform Law on the International Sale of Goods, Convention of July 1, 1964.

21. *See* DÖLLE & WEITNAUER, *Kommentar zum Einheitlichen Kaufrecht*, art. 89 Rn. 4, Vor art. 82-89 Rn. 72 (1976).

22. *See* UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW, VII YEAR-BOOK, 89 *passim* (135, sub. 8) (1976).

23. As to conformity of goods, see art. 35 *passim*; as to assumptions and expectations about the ability of the other party, see arts. 71, 72. *See also* HONNOLD, *supra* note 13, at art. 35, No. 240 ("The unifying role of the Convention would be crippled by domestic rules that govern the same situations and issues . . . , for statements as to



If, however, the negligent statements concern topics and interests outside the CISG, obligations to deliver conforming goods in time, for instance, wrong information about the chances to resell the goods in question at a profit, domestic rules, including tort law rules, remain fully applicable.

In regard to Article 16 of CISG, the analysis should yield similar results. Article 16 contains an elaborate balance between the freedom to break off contract negotiations by revoking an offer in the last minute and the reliance interests of the other party. The "right" to revoke under certain conditions is therefore granted by CISG and the opposite interest of the offeree restricted, circumscribed and protected exclusively by the Convention. There should be no room for concurring tort actions. The same reasoning applies to the situation of Article 29(2): The scope of the form requirement agreed upon is a matter of the agreement; the circumstances and consequences of a waiver are a contractual matter regulated by the Convention. It should not be superseded or supplemented by domestic (non-contractual) remedies.

## B.

There remains the rather technical question of how the necessary adjustments of domestic tort law to the contractual interests and respective CISG remedies could be achieved. Should the priority of CISG remedies as under the French rule of *non-cumul* lead to inapplicability of tort rules altogether, where CISG governs matters exclusively? It has already been mentioned that an overall exclusion of tort remedies among contractual partners would overshoot the mark. But even a limited exclusion seems to be unnecessary. If a domestic tort law protects the expectations of a buyer with regard to the quality of goods and thereby concurs with matters genuinely governed by CISG, it is sufficient to adjust the "concurring" tort action to the rules of CISG. It could not be maintained, if the notice requirement was neglected, and it could not extend to damages beyond the contemplation of the parties or include punitive damages (unless there is an intentional violation under aggravated "tortious" circumstances). However, the injured parties could still sue in tort in a forum having jurisdiction only for tort actions, for jurisdiction and venue are not matters governed exclusively by CISG. The same would apply to other features of tort actions outside the scope of CISG such as (non)discharge in an bankruptcy proceeding or restrictions on attachments and garnishments.

The problems and frictions caused by the implantation of a Uniform Sales Law, created by a binding international Convention, into domestic legal systems are manifold, and the jurists have just begun to sort them out. The concurrence of contractual rights and remedies with tort

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quality were a description of the goods and part of the contract"). But Honnold sees domestic law untouched in cases of negligent or innocent misstatements about one's solvency—this, however, is exclusively governed by Article 71.

actions is but one detail, and it is not altogether new. This article could only direct attention to it, hoping that it might encourage other scholars to discuss this topic and thereby help to develop theories capable of international consensus before the courts go off in all directions.