From National Product Liability to Transnational Production Liability: Conceptualizing the Relationship of Law and Global Supply Chains

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Usko Soikkelin ja Sten Hellnerin muistolle.

Olen taas ihan pieni poika, joka jouluviikolla, suurten lumihiutaleitten keinuessa ilmassa, seisoo City-pasaasin leikkikalukaupan ikkunan vieressä ja tahtoisi niin kovin mielellään rakastaa ja puristaa suurta, pörröistä leikkikoiraa. Mutta ne ovat liian kalliita, ne ovat loistokoiria, niitä saa rakastaa vain kylmän, paksun lasin lävitse. Täytyy kääntyä pois, lumi takertuu raskaihin kenkiin, askelista jää mustia, kiiltäviä jälkiä sähkölamppujen valaisemaan asfalttipihaan.

Mika Waltari, 1929

Acknowledgments

Without due notice to the author, this dissertation became a global endeavour far removed from its local origins as a two-year, Nordic review of the scope of contractual actions in relation to arbitration. With these words I wish to express my sincere gratitude to all the actors who contributed to the utter demolition of my original plan, the vast majority of whom I unfortunately cannot fit into these few pages.

First, Professors Vibe Ulfbeck and Peer Zumbansen generously donated their time to act as the pre-examiners of this manuscript and, despite their well-founded critique, deemed it fit for the last act of my journey, the public defence. Professor Ulfbeck has also kindly promised to be my opponent during the denouement. This seems particularly fitting as I first encountered her during the Nordic phase of this work in the form of her Danish dissertation on direct causes of action and, much later, in the global phase of this work in person in Copenhagen a year ago where she hosted a conference that greatly helped me piece together the diverse strands of my thoughts into this manuscript.

Second, this journey and its transformations would never have left the drawing board without the dedication of my supervisors, Professors Ari Saarnilehto and Mika Viljanen. Ari has picked my brain countless times on matters both dogmatic and pragmatic and infused in me traces of a style of writing about law that seems to translate well from the Finnish to the English. Mika has endowed my project with tons of goodwill coupled with the occasional grumpiness and, through both, encouraged me to go on. I owe an inestimable debt of appreciation towards both Ari and Mika in believing in my project despite its radical contortions and transformations and for providing me with an extensive foundational network of supportive colleagues and institutions.

Third, five or so years ago I started on my path as a doctoral student in the company of Patrik Nyström and Mikko Rajavuori. Patrik was the first of us to finish and Mikko is hot on my heels. Over the course of our journey we have shared countless highs and lows which perhaps are best left out of this narrative—except for the creeping doubt in my head of where I'd be now were it not for my conspiracy with Mikko to use our faculty's travel budget to the full in our quest to seek like-minded colleagues in far-flung places such as Beijing, Cambridge (MA), and Doha. And for that matter, I have to thank Mikko for a pinch of JUFO envy, making me send papers to top tier journals even before polishing up this little project and resulting *i.a.* in numerous eminently helpful peer reviews.

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only grants and wonderful libraries but also a long list of friends and colleagues. To cut it short I'll just name two. In Lausanne I met Agnes Hellner from Stockholm, while in Hamburg I debated with Samuel Fulli-Lemaire from Paris II everything from Louise Bourgeois to the correct pronunciation of 'Max Planck'. Both have kindly read and commented papers leading to this dissertation.

Fifth, after meeting Agnes I suddenly found myself more and more frequently seeing Stockholm in ways that only someone who has spent a life there can see it and cherished every moment to my heart's delight. Then in 2014 Malka was born in Turku and in 2015 Kai in Uppsala. Uppsala? Agnes started as a doctoral candidate there and soon I too felt as if I had. Professor Joel Samuelsson was kind enough to host my research stay at Uppsala University and provide plenty of strategic advice on writing in addition to memorable moments talking about law over a drink or two. With Love Rönnelid and David Johansson we first explored the quirky but endearing nature of Uppsalites in the lone late autumn atmosphere of an island cottage, full of law, surrounded by the Baltic sea. Oskar Mossberg is my partner in crime on the scope of contracts and has provided exceptionally thorough comments on my manuscript and Savigny. And friends such as Ilmari Käihkö and Olof Nordenström (with family!) have made Uppsala feel not just as a place for work but as a place to live. In sum, this dissertation project has made Uppsala a home to me.

Sixth, Professor Outi Korhonen joined the faculty in Turku soon after I had started there, bringing us tidings of Harvard Law School's *Institute for Global Law and Policy*. The 2013 Conference in Harvard and the 2014 workshop in Doha made me feel utterly lost, but happily first appearances were deceiving. In addition to meeting countless wonderful researchers and activists, from Gary Gereffi to the Finnish and Swedish speaking anthropologist/lawyer and GVC theory aficionado Kevin Sobel-Read to name just two, IGLP finally made me understand the role of my previously local dissertation in the global scheme of things. Gradually I learned that the *Law and Global Production Working Group*, organized by Dan Danielsen and Grietje Baars over 2014 and 2015, was where I belonged in the IGLP and again made new friends, in particular Klaas Eller, with whom I've shared not only wild nights from Harvard to Själö to Köln but also countless thoughts on the organization of global production.

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Eighth, and finally, two actor-networks in particular loom above the rest. The first of these is the University of Turku Faculty of Law, a focal point for me during the last five years. The faculty has been supportive of this project in

so many ways, ranging from providing me with funding and a stable institutional framework to a wealth of like-minded colleagues and friends. Faculty leadership, in particular deans Jukka Mähönen and Jussi Tapani, have believed in me, the many professors, such as Anne Alvesalo-Kuusi, Anne Kumpula, Jukka Snell, and Tuomas Mylly have contributed to my academic and personal growth, faculty administration, in particular Mia, Mirkka, Tarja, Marja, and Matti S., have gone to great lengths to help me overcome practical challenges, and my dear fellow doctoral candidates (many of whom have since made the leap), such as, off the top of my head, Ahmad, Ali, Anna, Anu, Felix, Daniel, Elina, Jakob, Johanna F., Johanna S., Johannes H., Johannes L., Jussi, Jutta, Maija, Matti U., Minna, Mira, Olli, Päivi, Sandra, Tero, and Toni to name just a few, have truly made me feel at home both at and out of work. And to everyone I did not name—know that I miss you all as dearly.

And then there is the other, even greater actor-network. I remember when, during the interview preceding my first real legal job, I was asked wouldn't I rather follow in the footsteps of my parents, Professors Seppo and Eeva Salminen, than take on a 'normal' job. I remember replying then that I'd had it with academia at home, from the weird books and documents strewn about since my earliest childhood to the constant travels and nightly typing sprees of my parents. But, as we see now, of course I hadn't. Or perhaps it was something else, something more personal, like my dear Mother who so often has made me question my own ideas of right and wrong. Or perhaps it started with my grandparents, Pirkko and Jaakko, who through their gentle care infatuated me with an unending thirst for learning more. Or perhaps it was the many friends and other relatives with whom I've lived both right and wrong over and over again, always ending up wondering why things are the way they are and how they could've been if only… In the end, who knows. But for what I and this dissertation have become, I can but thank my family and friends for both their constant loving support and occasional scathing critique. I love you all.

Done in Uppsala, on Monday, 2 October 2017, under the last warm rays of an all-forgiving autumn sun as the waxing night's darkness slowly falls in place.

Contents

1. Transformations of Global Production Reflected in Law: From a Hypothesis towards a Methodology

1.1 The Hypotheses at the Heart of this Dissertation—Law's Necessary Responses to the Unbundlings of Globalization

Production has always been fragmented and globalized to various degrees. To what extent we are dealing with something 'new and unprecedented' or merely variations on earlier themes depends on one's standing point.[1] The standing point that I adopt here is that of Baldwin and Martin's narrative of two unbundlings of globalization.[2] This narrative focuses on certain fundamental differences between two currents of global change that have shifted production patterns over the last two or so centuries. It was originally presented as a critique of narratives describing turn-of-the-millennium globalization as either nothing new or something completely new.[3]

In short, Baldwin and Martin argue that despite many superficial similarities two fundamentally different waves of globalization have spread around the globe.[4] Globalization's first unbundling took place in the 19th century and was caused by the rapidly falling transportation costs of physical goods. Technological developments such as railways and steamships made it feasible to separate production and consumption on a mass scale. Once feasible, scale economies and comparative advantage made the separation inevitable and led to centralized mass production and the fragmentation of distribution.

Globalization's second unbundling has been taking place since the mid-20th century.[5] It is caused by the advancement of communication technology and the rapidly falling costs of transporting information. Under the second

[1] For example, when comparing *world-systems theory* and *global commodity chain theory*, Bair notes the contrast between the former's understanding of globalization as a gradual historical tendency with roots in the development of Eurocentric trade and production patterns since the 16th/17th centuries, and the latter using globalization specifically to reflect on late 20th century changes in production patterns. See Jennifer Bair, "Global Capitalism and Commodity Chains: Looking Back, Going Forward" (2005) 9 Competition & Change 153. Baldwin and Martin make the same argument perhaps more pointedly in Richard Baldwin and Philippe Martin, "Two Waves of Globalization: Superficial Similarities, Fundamental Differences" (1999) 1.
[2] Richard Baldwin, "Globalisation: the great unbundling(s)" (2006); Baldwin and Martin.
[3] Baldwin and Martin.
[4] Baldwin; Baldwin and Martin.
[5] Baldwin; Baldwin and Martin.

unbundling, improved communication and coordination capabilities allow for the fragmentation of production processes that, because of the first unbundling, had been massively centralized for efficiency. Similarly to the first unbundling, once the fragmenting of production became technically feasible, it became inevitable from an economic standing point as it could decrease production costs and in so doing increase return on capital.

The narrative of globalization's two unbundlings is a necessary simplification of currents of change and development for the sake of argument. My purpose here is not to comment directly on the discussions of economics, production, trade, and globalization that form the core of the argument over two unbundlings of globalization. Instead, I will use them as a broad methodological lens for looking at and hypothesizing about law. I argue that these two drivers of change, globalization's two unbundlings, have affected societal structures so that law has been and is forced to reconsider its most basic understandings of civil liability under contract and tort/delict.

Firstly, globalization's first unbundling led to centralized production and fragmented distribution chains where producers increasingly sold their goods to middle-actors, such as distributors, retailers, and franchisees, instead of selling them directly to users. This changed the business of buying and selling for example by upending earlier reputation based transaction mechanisms.[6] I hypothesize that this has been a primary reason for the rise of product liability law in the form of various private law mechanisms embedded in national legal systems and based on a combination of contract and tort/delict, that allow actors to overcome the bounds of privity to hold producers liable for defectively manufactured goods.

Secondly, globalization's second unbundling has led and is leading to the global fragmentation of production. I hypothesize that the communication mechanisms enabling fragmented production should be reflected in arrangements for coordinating production. Here, at least two structurally radically distinct forms of production can be discerned. One is based on equity ownership and corporate governance to extend control over subsidiaries, while

[6] For example, Dietz argues that globalization brought the breaking down of reputational networks due to changes in trade patterns which led to the rise of national contract laws: "the massive upheavals of the 19th and 20th centuries destroyed the very social and economic structures that had previously enabled the control of opportunistic behaviour in local exchange relations". Thomas Dietz, *Global Order Beyond Law: How Information and Communication Technologies Facilitate Relational Contracting in International Trade* (Hart 2014) 29. For another example, see Whittaker's quote from Professor Street describing the inadequacy of early 20th century English law in face of mass production, complex systems of marketing, and lack of privity with producers due to numerous intermediaries, all these contributing to difficulties in being able to fault anyone in particular. Simon Whittaker, "The Development of Product Liability in England," *The Development of Product Liability* (Cambridge University Press 2010) 73.

the other is based on contractual arrangements with governance through contract used to extend control over suppliers. While the first of these has been the focus of considerable research over the last decades, the latter has seen but few concentrated research efforts.[7] Thus, in relation to the latter one can ask: What form or forms do the contractual arrangements used for organizing production take? How does a buyer control a global supply chain consisting of multiple actors through its contractual arrangements, if it only has a direct contractual relationship with its first tier supplier?

Thirdly, I hypothesize that the two unbundlings of globalization imply two different functional counterparts in relation to law. The first of these is product liability law, or liability for defective products, in relation to the first unbundling. The second of these is production liability law, or liability for defective production practices, in relation to the second unbundling. Currently, while there is considerable scholarship on parent companies' liability for their foreign subsidiaries' acts, for example in the form of foreign direct liability, there is no similarly established effort to research liability in contractually organized supply chains. As a consequence, neither is there a more general field of law that could be termed 'transnational production liability law' covering liability for globally fragmented production structured through either equity ownership or contractual arrangements.

As hypothesized, though, following the functional equivalence of globalization's first unbundling and the rise of national product liability regimes, the fragmentation of production under globalization's second unbundling necessarily leads to the rise of transnational production liability. This is because both unbundlings are enabled by similar legal-structural foundations: The compartmentalization of liability through contract and company law. Therefore, both require specific forms of liability to counter otherwise prevalent equity deficits.

This leads to the question of what legal effects should be attributed to different arrangements for contractually extending control over production beyond privity. In this respect I hypothesize that, similarly to what happened under product liability, contract and tort/delict causes of action are increasingly used for attempting to breach the bounds of privity on the grounds that a buyer located at the other end of a supply chain is coordinating and controlling production. Even if law currently has problems in understanding, categorizing, and discussing the Derridean monster of production liability, it is, after all, the existing structures of law which enable the contractual fragmentation of production. In relation to product liability law the compartmentalization of

[7] Discussion of the two and the relative inequality in their application to date is provided in Section 4.2.

liability created by these very same structures was breached through a combination of contract and tort/delict.

In short, in this dissertation I argue that product liability law arose as law's answer to the contradicting expectations arising out of societal change related to the fragmentation of distribution bumping its head into the rigid wall of legal structure. Now, product liability law is being matched by production liability law, which similarly is law's necessary answer to more recent societal changes related to the fragmentation of production.

1.2 Research Objectives: Gathering Cognitive Resources for Understanding and Debating Production Liability

Having thus far briefly hypothesized production liability law, my objective with this dissertation is to provide a framework for exploring this argument. This work is not meant as a traditional dogmatic endeavour.[8] My aim is not to analyse how production liability would work, if at all, from a dogmatic perspective *de lege lata* or *de lege ferenda* under a given legal system. While this work should be able to assist more dogmatic endeavours and I am indebted to dogmatic insight, I feel that a focus on the functioning of a specific legal system would limit this work too much. The world is full of legal systems, each already on its own bustling with innumerable contingencies. Any concentrated approach to transnational production liability, such as that I undertake here, needs to have a measure of trans-substantive global potential.

What I am looking for is a more general narrative of the interrelated development of product liability and production liability, in particular in relation to contractually organized production. This narrative should bring with it cognitive resources that can be used to argue over liability in contractually organized production structures irrespective of the dogmatic parameters of contract and tort/delict in individual legal systems.[9] Following the three

[8] For some recent examples of more dogmatically focused endeavours, see e.g. Anna Beckers, *Enforcing Corporate Social Responsibility Codes: On Global Self-Regulation and National Private Law* (Hart 2015); Louise Vytopil, *Contractual Control in the Supply Chain: On Corporate Social Responsibility, Codes of Conduct, Contracts and (Avoiding) Liability* (Eleven International Publishing 2015); Joe Phillips and Suk-Jun Lim, "Their Brothers' Keeper: Global Buyers and the Legal Duty to Protect Suppliers' Employees" 61 Rutgers Law Review 333.

[9] For one characterization of cognitive resources in the context of global law, see Marc Amstutz and Vaios Karavas, "Weltrecht: Ein Derridasches Monster" in Gralf-Peter Callies, Andreas Fischer-Lescano and Dan Wielsch (eds), *Soziologische Jurisprudenz: Festschrift für Gunther Teubner* (De Gruyter Recht 2009). Amstutz and Karavas see cognitive resources as arguments coming from multiple sources, but not necessarily from any specific legal system, in order to engage global social mechanisms such as media, reputation, scandalization etc. that in turn force regulators and adjudicators to reflect upon these arguments in their decision-making. Following this, the cognitive resources I am looking for could be characterized as a-national or

hypotheses discussed above, the general objectives of this work in the form of cognitive resources are: 1) providing an understanding of how law has reacted to the fragmentation of distribution in the past; 2) how mechanisms of governance through contract that are used for controlling globally fragmented production can be understood and typologized in a legally meaningful way; and 3) using the dogmatic and sociological cognitive resources derived from objectives 1 and 2 to frame and develop current understandings of production liability law and in particular liability for contractually controlled production. These three objectives are reflected in the three main chapters of this work.

In Chapter 2, my focus is on the role of contract and tort/delict in regulating contractual arrangements such as fragmented distribution and production chains. My key research question here is the interrelationship of contract and tort/delict in governing the legal structural boundaries afforded to private ordering. To answer this question, I undertake a historical-comparative dogmatic study, limited through its primary focus on the development of product liability law under English, French, German, and United States' laws. My comparative approach aims to provide cognitive resources on how contract and tort/delict have been interwoven under different legal systems to provide legal means for overcoming the bounds of privity and private ordering in order to establish liability for defective products.

In Chapter 3, my focus is on theories of and empirical research on governance through contract. Here, my key research question is how contractual arrangements are used to control production beyond privity in global supply chains. To study this question, I examine and collate the available eclectic resources on governance through contract, ranging from governance literature to transaction cost theory, global value chain theory, and empirical case studies. In the process, I establish a framework of governance through contract with a focus on controlling production beyond privity. This framework provides crucial cognitive resources for understanding the mechanisms of control that can be embedded in contract. While the framework is not *per se* limited to transnational contexts, the *global* fragmentation of production requires that it be capable of transcending national boundaries.

In Chapter 4, my focus turns to transnational production liability. Again, while the fragmentation of production is not per se limited to transnational contexts, any truly useful conceptualization of production liability must address concerns of extraterritoriality due to the global fragmentation of production. After defining transnational production liability, I discuss general justifications and possible forms for such liability and important procedural parameters affected by the transnational nature of litigation. Then, based on existing

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global legal policy that is sufficiently intertwined in transnational conceptualizations of legal dogma so that adjudicators and regulators need to account for them.

meagre caselaw I provide a detailed typology of production liability. This typology is a key cognitive resource enabling us to understanding the crucial differences related to whether production takes place in structures founded in equity ownership or contractual arrangements. I argue that the contractual governance nexus underlying the latter type of production liability, what I call transnational supply chain liability, provides challenges specifically different from foreign direct liability. These challenges are related to the nature of liability, the content of the governance relationship, and the role of private ordering in countering legal safeguards embedded in national legal systems.

Taken together, these chapters provide a broad range of cognitive resources for understanding and conceptualizing transnational production liability and in particular transnational supply chain liability, a neglected subtype of production liability founded in contractual structures. These cognitive resources should allow regulators, adjudicators, scholars, businesses, NGOs, and activists to reflect on the challenges and problems of globally fragmented production. My hope is that this will make it easier to match control with appropriate liability in line with the possibilities inherent in contract and tort/delict in individual legal systems.

1.3 The Margins of Methodology

Each of the main chapters of this dissertation confronts its own methodological challenges. Chapter 2 is focused on drawing insight from historical-comparative legal dogmatics. Chapter 3 combines eclectic strands of theory and empirical studies into a framework of governance through contract. Chapter 4 focuses on applying the cognitive resources gained in Chapters 2 and 3, first by presenting tentative parameters for and a typology of a unified field of law called transnational production liability and then by charting the parameters of a specific subtype of production liability, transnational supply chain liability. In each Chapter, I try to account for methodological and practical challenges in context and will not discuss these here.

However, underlying this main body of work is my own understanding of private law. This understanding, with its strengths and shortcomings, is imbibed throughout this work. To try and shine a light on this understanding of private law, I will next discuss this understanding that comes in the form of a critique of the separation of contract and tort/delict from one another in major strands of dogmatic, transnational, empirical, and functional types of research and their embeddedness in society.

1.3.1 Contract or Tort/Delict: The Difference Between Perfect Cartography and Imperfect Pedagogy

What is contract? What is tort/delict? How are the two interrelated in the scheme of private law in different legal systems? Despite the immense relevance of the question to existing theorizations of using contracts to govern supply chains (and more generally relationships beyond privity), there are no clear-cut answers. Instead, researchers in contract governance seem to resort to almost naïve abstractions that may have little relevance from practical legal perspectives.[10] More generally, any definition of contract or tort/delict seems to be lacking in some aspects, both within specific legal systems and even more so when comparing multiple legal systems to one another. To try and sort out this mess and provide a better understanding of contract (and tort/delict) from the perspective of privity-spanning contract governance, I will in this section discuss theoretical and dogmatic characterizations of contract and tort/delict and their inherent interrelationship.

First, if one were to adopt an extreme legalistic perspective then the existence of contract and tort/delict causes of action would probably come down to the hollow maxim that an action in contract exists when the law says that an action in contract exists, while an action in tort/delict exists when the law says that an action in tort/delict exists.[11] Unsurprisingly, this starting point does not tell much about contract or tort/delict, being instead more akin to the fabled perfect map of the empire.[12] While it gives an insight into the extreme plurality of the world that private law is asked to account for and offers an avenue of critique towards any effort of categorization, it is useless from most other perspectives.

Second, a seemingly natural way of understanding categories of private law such as contract and tort/delict is by presenting them as pedagogic categorizations designed to help in understanding and using the respective causes of action. Gaius' division between contract and delict and Justinian's further development of this scheme into contract, quasi-contract, delict, and quasi-delict can both be seen to constitute pedagogic classificatory schemes

[10] E.g. the writings of Williamson, Möslein and Riesenhuber, and Gereffi, Humphrey and Sturgeon, all important works in relation to understanding governance through contract, have at their heart an extremely abstract understanding of contract as will be discussed in Chapter 3. While for example Williamson accepts that abstractions are necessary for research, he does little to explicitly discuss the abstraction he uses or its effects. Similar problems seem evident in most empirical research on contract, as discussed in Subsection 1.3.3.

[11] For the problems of defining contract and tort/delict generally, see e.g. John Murphy, *Street on Torts* (12th edn, Oxford University Press 2007) 3–4; Simon Deakin, Angus Johnston and Basil Markesinis, *Markesinis and Deakin's Tort Law* (Oxford University Press 2008) 17–29.

[12] For traditional sources, see e.g. Jorge Luis Borges, "On Exactitude in Science," *Collected Fictions (trans. Andrew Hurley)* (1999); Umberto Eco, "On the Impossibility of Drawing a Map of the Empire on a Scale of 1 to 1," *How to Travel with Salmon and Other Essays (translated by William Weaver)* (1995).

intended to mold into a more digestible form the thick historical layers of causes of actions that had developed in Roman law in different times and contexts.[13] Variations of these classificatory schemes are still in use in many jurisdictions today.[14] For another example, in England contract and tort were more recently similarly used as pedagogic categories for grouping thick historical layers of causes of action that had developed over the course of centuries.[15] In an attempt to simplify the law, the old causes of action were abolished in the mid-19th century, but the pedagogic categories of contract and tort survived and thrived by replacing earlier more casuistic causes of action.

Contract and tort/delict could thus be seen as ultimately arbitrary classifications reflecting attempts at grouping different kinds of actions for pedagogic and practical purposes. The problem with such divisions is that despite their apparent usefulness, their focus on specific features of law as the grounds of classification makes them lose sight of other features. On the other hand, the search for the paradigmatic foundations of contract and tort/delict may in itself be a useful endeavor in discussing law more generally. As the legal effects of actions under contract and tort/delict can be vastly different, knowing under what kinds of general circumstances the one or the other typically arises is of imperative importance for the effective functioning of society. Thus any underlying arbitrariness in differentiations between contract and tort/delict has not hindered scholars from grounding these two forms of action in various more or less specific paradigms despite the problems inherent in such projects.

Before moving onto more specific categorizations, it may be useful to note that one often used approach is to define one and then define the other by excluding the former. Thus for example Black's Law Dictionary describes contract as:[16]

> *An agreement between two or more parties creating obligations that are enforceable or otherwise recognizable at law.*

While in the same dictionary tort is defined simply by excluding contract and criminal (i.e. non-civil) culpability:[17]

> *A civil wrong, other than breach of contract, for which a remedy may be obtained, usu. in the form of damages.*

Of course, things are not quite that simple. Black's Law Dictionary includes a number of additional definitions to contract, including the use of

[13] Reinhardt Zimmerman, *The Law of Obligations: Roman Foundations of the Civilian Tradition* (1996) 10–19.
[14] Zimmerman 19–24.
[15] Whittaker, "The Development of Product Liability in England" 55–60.
[16] Bryan A Garner (ed), *Black's Law Dictionary* (9th edn, 2009).
[17] Garner.

contract to refer to a specific physical document, contract as a 'promise or set of promises by a party to a transaction, enforceable or otherwise recognizable at law', or, most broadly, contract as 'any legal duty or set of duties not imposed by the law of tort'.[18] The latter definition in particular brings the reader back to the beginning in a showing of the classic problem of many dictionaries, i.e. circular definitions. On the other hand, focus on contract as a physical document, while misleading from a legal perspective, may make contract more easily definable in public imagination than the arguably more abstract category of wrongs constituting tort, thus perhaps more often relegating definitions of tort to the role of catch-all clauses.[19]

Nonetheless, a number of attempts have been made at more or less independent definitions of both contract and tort/delict. Starting with contract, a number of different paradigmatic justifications of contract have been identified in different historical periods.[20] For example, during the Age of Enlightenment earlier ideas of a distinctly moral foundation of contract gradually gave way to ideals of rationality and using one's free will as paradigmatic foundations for contract.[21] One outcome of this development is so-called classical contract law, an attempt to create a pure law of contract based on the parties' mutual exercise of their free will.[22] Since then, a number of critiques have eroded the foundations of classical contract law. These typically related to practical problems, such as the realization that identifying the intent of parties in case of a dispute typically must be based on an external evaluation of circumstances.[23] More salient critiques include the inadequacy of a consent-based paradigm in justifying numerous existing limitations to freedom of contract,[24] the apparent lack of consent in many contractual relationships,[25] and the theoretical challenges of using the same paradigm for discrete one-off transactions between

[18] Garner.
[19] Murphy 3; Christian von Bar, *The Common European Law of Torts I* (Oxford University Press 1998) 2–3.
[20] James Gordley, *The Philosophical Origins of Modern Contract doctrine* (Clarendon Press 2011); Sacharias Votinius, *Varandra som vänner och fiender: En idékritisk undersökning om kontraktet och dess grund* (Symposion 2004).
[21] Gordley 71.
[22] Melvin A Eisenberg, "Third-Party Beneficiaries" (1992) 92 Columbia Law Review 1358; Ian R Macneil, "Contracts: Adjustment of Long-Term Economic Relations under Classical, Neoclassical, and Relational Contract Law" (1978) 72 Northwestern University Law Review 854. More generally, Duncan Kennedy, *The Rise & Fall of Classical Legal Thought* (BeardBooks).
[23] On subjective and objective intent in contract law, see e.g. E Allan Farnsworth, *Contracts* (4th edn, Aspen 2004) 114–115; Macneil, "Contracts: Adjustment of Long-Term Economic Relations under Classical, Neoclassical, and Relational Contract Law" 883–884. For a continental/Nordic perspective, see e.g. Juha Pöyhönen, *Sopimusoikeuden järjestelmä ja sopimusten sovittelu* (Suomalainen lakimiesyhdistys 1988).
[24] Patrick S Atiyah, *The Rise and Fall of Freedom of Contract* (Oxford University Press 1979).
[25] Zev J Eigen, "Empirical Studies of Contract" (2012) 8 Annual Review of Law and Social Science 291, 299.

relative strangers and realizing future long-term relationships between partners who already know each other well.[26]

Following these critiques more nuanced perspectives might now see contracts as foundational 'frameworks' or 'constitutions' to a relationship.[27] More generally, it has been proposed that factors such as consent and party autonomy be subjugated to a secondary role, where they would be indicative of but not in themselves decisive for justifying the existence of a contractual relationship.[28] Instead, they would act as possible indicators of contract under a paradigm ultimately governed by more general notions of societal equity.[29] At the same time, any tendencies to expand contractual foundations to something broader than agreement have also received backlashes, in particular in the form of the 'back to contract' school.[30]

Turning to tort/delict, a number of different approaches to understanding liability in tort/delict may also be traced throughout history.[31] Currently, an often central idea is that of corrective justice, that damage caused in an abstract bilateral private relationship must be repaired.[32] This idea is variedly expressed in different legal systems by way of preconditions for tort/delict to apply, such

[26] Macneil, "Contracts: Adjustment of Long-Term Economic Relations under Classical, Neoclassical, and Relational Contract Law."

[27] Karl N Llewellyn, "What Price Contract? — An Essay In Perspective" (1931) 40 Yale Law Journal 704, 736–737; Macneil, "Contracts: Adjustment of Long-Term Economic Relations under Classical, Neoclassical, and Relational Contract Law" 894. Taking this approach even further, Catá Backer sees a corporations governance of their supply chain as a constitution. Larry Catá Backer, "Transnational Corporations' Outward Expression of Inward Self-Constitution: The Enforcement of Human Rights by Apple, Inc." (2013) 20 Indiana Journal of Global Legal Studies 805.

[28] Macneil, "Contracts: Adjustment of Long-Term Economic Relations under Classical, Neoclassical, and Relational Contract Law."

[29] E.g. Macneil concludes his article on relational contracting by noting that '[a]t this point, the relation has become a minisociety with a vast array of norms beyond the norms centered on exchange and its immediate processes.' Macneil, "Contracts: Adjustment of Long-Term Economic Relations under Classical, Neoclassical, and Relational Contract Law" 901. Zumbansen has argued for 'an understanding of contracts as complex societal arrangements that visibilize and negotiate conflicting rationalities and interests'. Peer Zumbansen, "The Law of Society: Governance Through Contract" (2007) 14 Indiana Journal of Global Legal Studies 191. Pöyhönen/Karhu specifically sees a more general paradigm of societal equity subsume earlier paradigms of e.g. free will and reasonable expectations as possible indicators of contract. Pöyhönen, *Sopimusoikeuden järjestelmä ja sopimusten sovittelu*; Juha Pöyhönen, *Uusi varallisuusoikeus* (2nd edn, Talentum 2003). More generally, for example Krebs identifies multiple possible justifications for the plurality of contractual or contract-like 'special relationships' under German law. Peter Krebs, *Sonderverbindung und außerdeliktische Schutzpflichten* (C H Beck'sche Verlagsbuchhandlung 2000).

[30] FH Buckley (ed), *The Fall and Rise of Freedom of Contract* (Duke University Press 1999); Jane Stapleton, *Product Liability* (Butterworths 1994) 208–209.

[31] Nils Jansen, "Law of Extracontractual Liability Duties and Rights in Negligence: A Comparative and Historical Perspective on the European Law of Extracontractual Liability" (2004) 24 Oxford Journal of Legal Studies 443.

[32] Ernest J Weinrib, "Corrective Justice" (1992) 77 Iowa Law Review 403; Ernest J Weinrib, "Correlativity, Personality, and the Emerging Consensus on Corrective Justice" (2001) 2 Theoretical Inquiries in Law 107.

as fault,[33] unlawful intentional or negligent violation of codified norms,[34] or breach of a duty of care.[35] In many cases, however, it is argued that any general notion of corrective justice is inadequate to describe the historical or current plurality of tort/delict and, instead, more functional descriptions of different objectives of tort/delict, such as distributive, punitive, deterrent, or empowering functions, are necessary.[36] Here, as under contract, the discussion turns towards whether tort law should be seen as something paradigmatically private or instead as 'public law in disguise'.[37]

From a purely corrective justice perspective, contract and tort/delict arguably come close to one another. Tort/delict can been seen as the foundational mode of private law from the perspective of controlling abstract bipolar private relationships,[38] the key difference between the two being, again, the formal agreement that serves to divert the legal framing of a situation from the rules of tort/delict to the parties' private ordering as governed by the rules of contract law. Following this, one approach posits that tort/delict covers relationships between *strangers*.[39] Similarly to the definitions in Black's Law Dictionary cited above, even this approach is dependent on a contractual yardstick because 'strangerhood' is to an extent defined by the lack of another legally relevant relationship, such as contract, which would create a level of intimacy or privity between actors. On the other hand, there clearly are degrees to the relative proximity of actors even in the absence of a contract.[40]

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[33] As under French law, for which see Cees van Dam, *European Tort Law* (2nd edn, Oxford University Press 2013) 56 ff. Under Article 1240 of the Code civil (Art. 1382 of the pre-Octorber 2016 Code civil), '*Tout fait quelconque de l'homme, qui cause à autrui un dommage, oblige celui par la faute duquel il est arrivé à le réparer.*'

[34] As under German law, for which see van Dam, *European Tort Law* 78 ff. Under Article 823 of the Bürgerliches Gesetzbuch, '*Wer vorsätzlich oder fahrlässig das Leben, den Körper, die Gesundheit, die Freiheit, das Eigentum oder ein sonstiges Recht eines anderen widerrechtlich verletzt, ist dem anderen zum Ersatz des daraus entstehenden Schadens verpflichtet.*'

[35] As under English law, for which see van Dam, *European Tort Law* 102 ff.

[36] Generally e.g. the collection of essays in Ernest J Weinrib (ed), *Tort Law (The International Library of Essays in Law and Legal Theory, Second Series)* (Ashgate 2002). In particular, Jansen argues that tort/delict in practice focuses more on economically quantifiable rights than duties to prevent harm. Jansen. For some comparative notes on the different functions of tort/delict, see e.g. Deakin, Johnston and Markesinis 49–55; Helmut Koziol, *Basic Questions of Tort Law from a Germanic Perspective* (Jan Sramek Verlag 2012) 75–92; Helmut Koziol, *Basic Questions of Tort Law from a Comparative Perspective* (Jan Sramek Verlag 2015) Part 3 of each chapter.

[37] Martin Stone, "On the Idea of Private Law" (1996) 9 Canadian Journal of Law and Jurisprudence 235.

[38] E.g. Weinrib, "Correlativity, Personality, and the Emerging Consensus on Corrective Justice."

[39] E.g. Stapleton sees that negligence emerged in its clearest form in the 19th century as a cause of action for a stranger physically injured by another stranger, such as a pedestrian overrun by a train on a level crossing. Jane Stapleton, "Duty of care and economic loss: a wider agenda" (1991) 107 Law Quarterly Review 249. Similarly, civil law notions of delict can be characterized as focusing on relationships between strangers. Bar 1–3; Pauli Ståhlberg and Juha Karhu, *Suomen vahingonkorvausoikeus* (Talentum 2013) 41–42.

[40] Thus for example under English law it might be said that one set of preconditions is used to evaluate whether there is enough proximity for a general duty of care to arise while another set of preconditions is used to evaluate whether a 'special relationship' arises that allows recovery of pure economic loss. See the

Notwithstanding any general theories of contract or tort/delict, the parameters of the two in specific legal systems play a major role in deciding which one is applicable or preferable in a given situation. First, despite textbooks and scholars often focusing on either contract or tort/delict, in many legal systems the two are not mutually exclusive, while in some they may be so.[41] Second, in some legal systems recovery under tort/delict is generally seen to rule out the recovery of pure economic loss, thus leaving a proprium to contracts, while in others this is not so.[42] Third, the strictness of the obligation is often seen to differ fundamentally between contract and tort/delict due to the inherent nature of the two obligations, but also here legal systems generally acknowledge that the starting point of either may be reversed to match that of the other.[43] Fourth, tort/delict are often seen to cover relationships between

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discussion in Section 2.2 in relation to *Caparo* v *Dickman*. Much simplified, this could be seen as three categories of strangerhood: One where no duty of care is applicable, another where a duty of care is applicable, and a third where a duty of care allowing even recovery of pure economic loss is applicable.

[41] As will be discussed in detail in Chapter 2, under American, English, and German law contract and tort/delict can be concurrently applicable while under French law they are mutually exclusive. Under the French principle of *non-cumul des responsabilités contractuelle et délictuelle* an action must be classified as falling under contract or delict. Marianne Faure-Abbad, "Ce que l'on appelle en France le principe du non-cumul des responsabilités contractuelle et délictuelle (notes de conférence)," *In Memoria di Paolo Maria Vecchi / Giornata di studio Le frontiere mobile della responsabilità contrattuale Università degli Studi Roma Tre Rome, 16 avril 2015* (2015). Similar tendencies have earlier existed in other legal systems, such as the common law. E.g. Vernon Palmer, "Why Privity Entered Tort—An Historical Reexamination of Winterbottom v. Wright" (1983) 27 Am. J. Legal Hist. 85.

[42] Some legal systems that do not so differentiate include French, Belgian, and Dutch law. Under English and American law, however, pure economic loss, typically recoverable under contract but not recoverable under tort, has become a key battleground in demarcating the border between contract and tort. For England, see e.g. Simon Whittaker, "Privity of Contract and the Tort of Negligence: Future Directions" (1996) 16 Oxford J. Legal Stud. 191, 207–212; Stapleton, "Duty of care and economic loss: a wider agenda." In the United States one primary argument here is that contract and tort have their own proper fields of use and need to be distinguishable from one another. Feinman explains the rationale behind the economic loss rule thus: *Economic losses are losses due to disappointed expectations and should therefore be governed by contract law; only losses due to personal injury or property damage, which generally are not the subject of prior bargaining and which invoke public safety concerns, are within the realm of tort law.* Jay M Feinman, *Professional Liability to Third Parties* (3rd edn, American Bar Association 2013) 262. The question of demarcation and overlap also finds multiple expressions. For example the German law of delict generally shuns the recoverability of pure economic loss, but contract may be used instead to allow recovery in many cases where tort would be necessary under English law. Basil S Markesinis and Hannes Unberath, *The German Law of Torts: A Comparative Treatise* (4th edn, Hart Publishing 2002) 52–67; van Dam, *European Tort Law*. And turning back towards legal systems where there is no distinction in recovery of pure economic loss, at least in some cases in some American states it does not seem to matter whether contract or tort is called upon as *both* may be able to provide relief for pure economic loss. E.g. Jay M Feinman, "The Economic Loss Rule and Private Ordering" (2006) 48 Ariz. L. Rev. 813, 816.

[43] Contractual obligations are typically seen as stricter in nature than obligations founded in tort/delict. One way of framing this argument is by arguing that tort/delict focuses on governing *conduct* while contract is focused on achieving a specific *result*, thus making the latter obligation stricter in the sense that, however diligent an actor is, as long as the end result is not adequate then liability exists. E.g. Jean Bellissent, *Contribution à l'analyse de la distinction des obligations de moyens et des obligations de résultat: à propos de l'évolution des ordres de responsabilité civile* (LGDJ 2001); Gerhard Wagner, "The development of product liability in Germany" in Simon Whittaker (ed), *The Development of Product Liability* (Cambridge University Press 2010) 126–127. However, it is generally accepted that contracts

strangers while contractual actions are limited to those who have entered into the privity of an agreement, but even this distinction does not hold or does so only when one greatly stretches the notions of 'stranger' and 'agreement'.[44] Fifth, there may be numerous other parameters that can affect the choice between tort/delict and contract, such as differences in limitation periods,[45] different means for governing available remedies,[46] and differences between applicable to conflicts of law rules.[47] Sixth and finally, even private ordering, i.e. the parties' agreement, may be subject to either contract or tort/delict.[48]

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may also contain obligations to perform, such as a surgeon contractually undertaking best efforts to operate on a patient, while (strict) tort/delict liability may be focused on guaranteeing specific results, such as an explosive expert who under strict tort/delict liability cannot exonerate herself from damage. For some examples of how these rules can be tweaked to affect liability, see Section 2.4 on French law. On another note, there may also be theoretical but practically relatively negligible differences in how legal systems generally understand the nature of obligations under contract and tort/delict. Under the common law contractual obligations are typically seen as strict in the sense that only *force majeure* can excuse a default, while under civil law jurisdictions the relative strictness of contractual obligations may arise instead from a shift in burdens of proof, as under German law where the party in default bears the burden of showing that it has acted diligently (Art. 276(1) BGB). Some legal systems may employ a mixture of these two, such as under Finnish and Swedish law where 'more direct' damages arising due to contractual default fall under a strict obligation that only force majeure can excuse, while 'less direct' damages arising under contractual default fall under a reversed burden of proof, so that these theoretically may be excused even where no *force majeure* exists as long as the party in default acted diligently. Thomas Wilhelmsson, Leif Sevon and Pauliine Koskelo, *Huvudpunkter i köplagen* (3rd edn, Talentum 2006).

[44] As noted above in footnote 40, under tort/delict law there may be different classes of 'strangerhood'. Similarly under contract many non-parties may nonetheless have a contractual cause of action. For example, while English law has been notoriously stingy in relation to expanding the scope of claimants under contractual actions, under American, French, and German law various methods have been utilized to allow contractual actions against actors who, *prima facie*, have not entered into a contract with a specific claimant. See Chapter 2 for details.

[45] For example, in cases such as the English *Henderson* v *Merrett* (for which see Subsection 2.2.1) and the French *Besse* (for which see Subsection 2.4.1) the choice of one action allowed the plaintiff to overcome the already expired limitation period of the other. This could also have been possible in the recent production liability related cases *Rahaman* v *JCPenney* and *Das* v *Geoge Weston* discussed in Section 4.3. For a recent comparison of limitation periods under tort/delict and contract, see the sections on prescription of compensation claims in Koziol, *Basic Questions of Tort Law from a Comparative Perspective*.

[46] In particular, contract law, despite the starting point that the parties should know each other best, poses numerous restrictions on what kinds of contracts or terms (or implied terms) can be enforced, while tort law, despite the starting point that claimants are taken as they come, typically also provides means for adjusting recoverable damages for example on the basis of fairness or deterrence, for example in the case of punitive damages. Generally on diverse contractual controls, see Chapter 2. For examples of governing remedies under tort, compare for example Mark Lunney and Ken Oliphant, *Tort Law: Text and Materials* (4th edn, Oxford University Press 2010) ch 16; Ståhlberg and Karhu.

[47] E.g. James Fawcett and Janeen M Carruthers, *Cheshire, North, & Fawcett's Private International Law* (14th edn, 2008). These differences will be in focus in Chapter 4.

[48] The enforceability of contractual arrangements allows parties to subjugate their relationship to rules and liabilities of their own drafting. This means that the standard, dispositive rules of both tort/delict law *and* contract law can be moved aside by private ordering as long as private ordering does not step on mandatory rules of public policy. Thus the default rules of both tort/delict and contract can be seen as 'public' in relation to the parties own private rules. The rules governing the use of 'public' contract law and private ordering, i.e. the requirements of entering into an agreement, can, however, differ greatly between legal systems, leading to different kinds of pressures. Thus for example the formal requirements

Thus, this very brief dogmatic survey of general differences between contract and tort/delict comes down to the point that identifying any broadly accepted paradigmatically descriptive differences between the two is an elusive if not impossible task.

It seems that the main thing which these different theoretical and dogmatic approaches to contract and tort/delict flesh out is a major grey area between different attempts at defining the two. It is difficult, if not impossible, to offer useful classifications of contract and tort/delict that do not either overlap one another or exclude specific situations.[49] From a practical vantage point there may be little reason to differentiate exactly between contract and tort/delict, and thus already in the *Glanzer* ruling from 1922 Justice Cardozo argued that:[50]

> *…assumption of the task of weighing was the assumption of a duty to weigh carefully for the benefit of all whose conduct was to be governed. We do not need to state the duty in terms of contract or of privity. Growing out of a contract, it has none the less an origin not exclusively contractual. Given the contract and the relation, the duty is imposed by law…*

To go further, some have argued that contract and tort/delict should be conflated into a single unified action of civil liability.[51] Others have seen such indeterminacy problematic. Because very different legal rules and traditions govern contract and tort/delict, the choice between either may open up radically different continuities of law. Thus calls have also been made to abandon a general paradigm of contract as too abstract and focus on the special rules used in more narrow contexts.[52] Perhaps something of a middle-road between these

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of contract are stricter under English law than under German law, pressuring English courts to expand the use of torts under 'special relationships' where German courts were inclined to use contractual avenues. Basil Markesinis, "An Expanding Tort Law–The Price of a Rigid Contract Law" (1987) 103 Law Quarterly Review 354. Following this, in some cases English tort law exclusively governs even what seem to be clear agreements relating to liability for provided information, such as the scenario in *Hedley Byrne & Co v Heller & Partners Ltd*, ('*Hedley Byrne*') discussed in Subsection 2.2.2), where a liability disclaimer was 'enforceable' under tort despite a lack of formal contract.

[49] 'It is now common knowledge that the traditional distinctions between tort law and contract law have been eroded and have lost their descriptive power.' Israel Gilead, "Non-Consensual Liability of a Contracting Party: Contract, Negligence, Both, or In-Between?" (2002) 3 Theoretical Inquiries in Law 511.

[50] *Glanzer* v *Shepard* 233 N.Y. 236 (N.Y. 1922).

[51] E.g. Gilmore Grant, *The Death of Contract* (Ohio State University Press 1974); Atiyah; Pöyhönen, *Uusi varallisuusoikeus*. Similar discussions have existed before, with e.g. Whittaker noting discussions in France during the late 19th century. Simon Whittaker, "Privity of Contract and the Law of Tort: The French Experience" (1995) 15 Oxford J. Legal Stud. 327, 333.

[52] E.g. Whittaker argues that special regulation of different nominate contracts, such as the system in place in France, is superior to the 'general' contract law of England in its ability to effectively regulate very different situations. Whittaker, "Privity of Contract and the Tort of Negligence: Future Directions" 192–193. Similarly, Macneil sees the peeling away of layers of special contexts from general contract law through 'spin-offs' such as corporate law as decreasing interest in general contract law as a single coherent

two opposites are calls that, in order to increase legal certainty, law should recognize a general third classification of liability that combines some aspects of contract and tort/delict and could explain the borderline cases that lie in the grey zone between them.[53] Practical examples of the partial filling in of the grey zone might be seen in the proliferation of promissory estoppel in the United States[54] or the concept of special relationships under English or German law.[55]

What am I to make of the efforts put into system-building in relation to contract and tort/delict? For one, it is a necessary task to create abstract roadmaps of law's complexity in order to be able to discuss the use and blind spots of legal concepts such as contract and tort/delict in different contexts and different legal systems. At the same time, it seems that all such roadmaps have their own blind spots and are not able to cover the plurality of law to its full.[56] The parameters of contract and tort/delict in different legal systems seem to provide each other's yin and yang that cannot fully be understood except when fused together to a whole.

This understanding of the changing and potentially extreme relativity of contract and tort/delict within specific legal systems and in particular across different legal systems forms a basic legal foundation of this work. In particular in Chapter 3 I will be dealing with abstractions of contract used for research in governance. In Chapter 4, I will need to resort to relative abstractions myself. To avoid the problems of too narrowly interpreted abstractions of contract or tort/delict, I focus in Chapter 2 on fleshing out a practically oriented, historical-dogmatic comparative narrative of the intertwinement of contract and tort/delict in relation to the development of product liability law. My hypothesis is that such a narrative based on product liability law should also allow a focused understanding of the role and potential of *both* contract and tort/delict in relation to how they can be used to overcome privity and private ordering in relation to production liability law. This approach should enable me to avoid the pitfalls of resorting to too ungainly abstractions of contract or tort/delict and

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system. Macneil, "Contracts: Adjustment of Long-Term Economic Relations under Classical, Neoclassical, and Relational Contract Law" 885–886. For an argument on the benefits of general contract law, e.g. Nathan B Oman, "A Pragmatic Defense of Contract Law" (2009) 98 Georgetown Law Journal 77.

[53] See in particular Krebs. For a brief comparative analysis Koziol, *Basic Questions of Tort Law from a Germanic Perspective* 93–109; Koziol, *Basic Questions of Tort Law from a Comparative Perspective* 761–765. In Finland, e.g. Ståhlberg and Karhu 47–49.

[54] Described so e.g. by Michael D Green and W Jonathan Cardi, "Basic Questions of Tort Law from the Perspective of the USA" in Helmut Koziol (ed), *Basic Questions of Tort Law* (2015). More generally, see e.g. Jay M Feinman, "Promissory Estoppel and Judicial Method" (1983) 97 Harvard Law Review 678; Marco J Jimenez, "The Many Faces of Promissory Estoppel: An Empirical Analysis Under the Restatement (Second) of Contracts" (2010) 57 UCLA Law Review 669.

[55] E.g. Murphy 82 ff.; Krebs.

[56] Gunther Teubner, "In the Blind Spot: The Hybridization of Contracting" (2007) 8 Theoretical Inquiries in Law 51.

at the same time allow me to critique existing models of contract governance for their lack of a detailed understanding of the interrelationship of contract and tort/delict or private law more broadly.

1.3.2 A Transnational Move

Modern conceptions of law are to a major extent dependent on nation states. In order for law to be legitimate, it must typically originate in a recognized nation state or, in relation to international law, a group of such states. But what happens when actors operate in a space that is difficult to ascribe to any particular state or international law? Jessup famously noted that there seems to exist something that is difficult to capture by concepts of either domestic or international law as it seems to involve both while belonging fully in neither.[57] One way of characterizing this space is by referring to it as transnational.

Dietz sees that there are three general approaches to how economic actors operate in the transnational sphere.[58] One is by resort to domestic laws through the choice of forum, choice of law, and enforcement mechanisms of private international law. Here the argument goes that every conflict can be subjugated under some specific national legal system. A second solution would be to resort to institutions of transnational law, typically created by private actors for commercial purposes and dependent on nationally embedded enforcement mechanisms such as that of international commercial arbitration. Here, the legitimacy of 'private actor created global contract law' is not directly dependent on enactment by nation states, only on their enforcement mechanisms. A third solution would be to avoid formal regulatory or enforcement frameworks altogether and resort instead to actors' own institutional or informal frameworks, such as reputation mechanisms. From all of these three perspectives, the transnational potential of contract and tort/delict is radically different.

Contract, firstly, is transnationally comprehensible to law through the principle of *pacta sunt servanda*. Under private international law, an agreement can be used to specify choice of law, forum, and, by choosing to submit disputes to international arbitration, even near-global enforceability.[59] While there are exceptions in the form of mandatory fora and laws, the general rule is that if the parties have chosen a specific jurisdiction, procedure, and procedural

[57] See e.g. Harold Hongju Koh, "Why Transnational Law Matters" (2005) 24 Penn State International Law Review 745.

[58] Thomas Dietz, "Contract Law, Relational Contracts, and Reputational Networks in International Trade: An Empirical Investigation into Cross-Border Contracts in the Software Industry" (2012) 37 Law and Social Inquiry 25.

[59] Generally on choice of law and forum, see e.g. Fawcett and Carruthers. With regard to arbitration, the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, done in New York on 10 June 1958 ('New York Convention'), practically guarantees the enforceability of awards in the 157 state parties to the convention. General on the New York Convention, see e.g. Albert Jan van den Berg (ed), *50 Years of the New York Convention* (Wolters Kluwer 2009) 649–711.

and substantive laws for resolving their contractual disputes, then these apply. Only if the parties have not made an explicit choice are various rules for identifying an implicit choice or otherwise identifying an applicable forum and law put in motion. In such cases while the rules for applicable forum are similar to tort/delict cases, in stark contrast to tort/delict the general approach for identifying the applicable law typically focuses on identifying the law with the closest connection to the contract.[60]

A key aspect here is that through adept choice of law, forum, and procedure, contracts can be used to carve out increasingly protected areas of private ordering. One alternative is to simply choose a law and forum that is presumed to be more appreciative of specific kinds of claims. Another alternative is avoiding national laws by referring to institutions of transnational law, for example in the expectation that these are more focused on commercial interests instead of e.g. public policy considerations.[61] A third alternative for increasing deference to private ordering might be to resort to multiple layers of transnational distancing in order to move the agreement further away from national legal safeguards towards a transnational vacuum.[62] While some scholars argue that notions of rights developed in national legal systems could and should be transplanted into transnational law, there is little global consensus on what these rights should be and how breaching them should be remedied.[63]

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[60] Fawcett and Carruthers.

[61] Typically, such instruments attempt to identify global principles of commercial law. The roots of this approach are often seen in medieval Law Merchant or *lex mercatoria*, for which see e.g. Amstutz and Karavas. A number of actors have sought a common denominator of international commercial contracts, resulting in private regulation, such as the Unidroit Principles of International Commercial Contracts (for the latest version (2010) of which see http://www.unidroit.org/instruments/commercial-contracts/unidroit-principles-2010) and international model legislation that has been broadly incorporated into domestic legal systems, such as the United Nations Convention on Contracts for the International Sale of Goods (United Nations Convention on Contracts for the International Sale of Goods, done at Vienna 11 April 1980). On a similar note, the concept of contract in the sense in which it is used in transnational areas of EU law, such as under the Brussels regime of international private law, is squarely based in a notion of 'voluntarily assumed obligations' instead of the potentially different notions of contract under the legal systems of EU member states. See e.g. *Jakob Handte & Co. GmbH* v *Traitements mécano-chimiques des surfaces SA* (C-26/91, 17 June 1992, discussed in Section 2.4).

[62] Jaakko Salminen, "The Accord on Fire and Building Safety in Bangladesh—A New Paradigm for Limiting Buyers' Liability in Global Supply Chains?" [2018] American Journal of Comparative Law (Forthcoming). The argument is summarized in Section 4.4, but, in principle, takes place through contracts that span actors in multiple jurisdictions, not explicitly choosing a specific substantive law from multiple equally applicable jurisdictions, procedural rules that do not explicitly identify a specific applicable forum from multiple equally applicable fori, dispute resolution through ad hoc tribunals not bound by precedent, potentially uncertain procedural mechanisms, and enforcement via the New York Convention, all of which factors together serve to highlight focus on the four corners of the agreement instead of locally embedded legal safeguards.

[63] E.g. Peer Zumbansen, "Piercing the Legal Veil: Commercial Arbitration and Transnational Law" (2002) 8 European Law Journal 400. For discussion of various critiques, see Stephan W Schill, "W(h)ither fragmentation? On the literature and sociology of international investment law" (2011) 22 European Journal of International Law 875. For the inherent challenges of any approach left to e.g. 'transnational

Under tort/delict the situation in relation to private international law is different for two primary reasons. First, there is no *ex ante* agreement to point to a governing forum or law. Second, the law of tort/delict is typically seen as a national endeavor founded in public policy.[64] In relation to private international law, this typically means that the principles of *lex loci damni* (law of the place of damage) or *lex loci delicti commissi* (law of the place where the damage was caused) are used to identify the applicable substantive law, while principles such as litigating in the forum of the defendant's domicile govern choice of forum.[65] Lacking global enforcement regimes, enforcement of tort judgments is typically problematic in jurisdictions other than that where the judgment was made. From the eyes of private international law, tort/delict is a domestic affair.

Similar considerations affect attempts at identifying a transnational law of torts. While one might distil some kind of global principle of tort law corrective justice, the lack of a focal point, such as an agreement between the relevant actors, and the differences between systems of tort/delict make it difficult to define the relevant parameters of that principle in specific transnational circumstances beyond principles such as focusing on the law of the place where the damage occurred. This is reflected in the dearth of attempts at describing a transnational law of tort in a vein similar to the codifications discussed above in relation to contract law.[66] On the other hand, there seems to be considerable overlap between tort/delict law and human rights norms or *jus cogens*.[67] However, instead of a truly transnational law of tort/delict, the concept of 'transnational torts' has come to refer to the extraterritorial application of national tort/delict law.[68] Here, the applicable law is typically (but not always)

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public policy' and the deliberation of arbitrators, see e.g. *World Duty Free Company Limited* v *The Republic of Kenya*, ICSID Case No ARB/00/7 (2006).

[64] E.g. under French law delict is considered public policy and therefore the rules of delictual liability cannot be directly modified by agreement. Similarly, in the United States tort is seen to be the realm of public policy, as seen in discussions related to product liability law. On the other hand, under English law the effect of public policy considerations under tort have been less expansive. For these discussions, see Chapter 2.

[65] Fawcett and Carruthers.

[66] Attempts at identifying generally applicable principles of tort law have focused on more geographically limited areas such as the context of European integration, where the Lando Commission's earlier contract-focused *Principles of European Contract Law* have since been expanded into the *Draft Common Frame of Reference*. The DCFR attempts to draw together general principles of European private law including both contract and tort/delict. Ole Lando and Hugh Beale (eds), *Principles of European Contract Law Parts I and II* (Kluwer Law International 2000); Christian von Bar, Eric Clive and Hans Schulte-Nölke (eds), *Principles, Definitions and Model Rules of European Private Law: Draft Common Frame of Reference (DCFR)* (Sellier 2008).

[67] Generally e.g. Cees van Dam, "Tort Law and Human Rights: Brothers in Arms On the Role of Tort Law in the Area of Business and Human Rights" (2011) 2 Journal of European Tort Law 221. For example the Alien Tort Statute gives US federal courts jurisdiction over 'civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States', and is discussed in detail in Chapter 4.

[68] For 'transnational torts', see e.g. Roger P Alford, "Human Rights After Kiobel: Choice of Law and the Rise of Transnational Tort Litigation" (2014) 63 Emory Law Journal 1089. For 'transitory torts', perhaps

that of the state where the damage occurred, while the forum is typically (but not always) that of the defendant's home state or other non-host state that claims jurisdiction.[69]

From a transnational perspective, contract and tort/delict are thus very different creatures. Contracts are transnationally robust and can be used to carve out private regulative areas that are dislocated from national legal systems and nonetheless almost universally enforceable. Tort/delict, on the other hand, while containing inherent transnational potential is typically bound to specific national legal systems by way of private international law, lacking the deference towards and the advanced enforcement mechanisms of private ordering.

But what does this entail for construing liability? First, in some cases, contractual mechanisms may be able to draw the mat from under tort/delict.[70] While national legal systems may be able to counter such moves by implementing specific legal safeguards such as protective legislation, setting limits to private ordering in the transnational sphere may be much more difficult.[71] Second, the radically different conceptualizations of contract and tort/delict under national legal systems may also prove problematic from a transnational perspective. If some legal systems use contractual means for protecting certain interests while other legal systems focus on tort/delict for the same, this might mean that the transnational scope of such actions is also different due to the different rules of private international law governing contract and tort/delict. Both of these conclusions will be reflected on in more detail in Chapter 4.

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more properly referring to cases where service of process is made on actors only in transit through a jurisdiction, see e.g. Chimène Keitner, "State Courts and Transitory Torts in Transnational Human Rights Cases" (2013) 3 UC Irvine Law Review 81.

[69] Crucial questions related to jurisdiction and choice of law depend on the target forum's laws and are discussed in more detail in Chapter 4. For one example, in the EU forum is typically ascribed on the basis of the defendant's domicile, while in tort cases applicable law is that of the place where the damage occurred, the *lex loci damni*. See generally the Regulation (EC) 864/2007 of 11 July 2007 on the law applicable to non-contractual obligations (Rome II). Recent strands of litigation against Royal Dutch Shell for its alleged actions in Nigeria provide one example. One action was raised in the United States under special legislation, the Alien Tort Statute, that gives United States federal courts jurisdiction over human rights committed in other jurisdictions, while another strand was raised in the domicile of Shell, the Netherlands, against both Shell and its Nigerian subsidiary against actions in Nigeria. These are both discussed in more detail in Chapter 4.

[70] A recurrent example discussed in Chapter 2 is the use of contract to rule out tort/delict, either generally, such as in *Winterbottom* v *Wright* (see Subsection 2.2.2) and under French law (see Subsection 2.4.1), or by specifically using disclaimers to rule out claims under tort. For an example that is not in the spotlight in Chapter 2, choosing specific procedures such as arbitration has a long history of overriding procedural safeguards such as the possibility of class actions in the United States. E.g. Myriam Gilles, "The Day Doctrine Died: Private Arbitration and the End of Law" (2016) 2016 University of Illinois Law Review 372.

[71] This is discussed in more detail in Section 4.4.

1.3.3 An Empirical Half Step

As seen in Subsection 1.3.1, juridical theories rely on abstractions of legal concepts. Even more so, however, do non-juridical theories and studies focusing on contractual arrangements. To understand and develop the use of contractual arrangements for controlling production, I focus in Chapter 3 on a number of non-juridical studies, in particular empirical and analytical research on the use of contracts to govern production. In lieu of this, a discussion of how contracts are perceived of in empirical research is merited here.

In the early 1960's Stewart Macaulay asked 'What good is contract law'.[72] Based on interviews with Wisconsin businessmen and lawyers and reviews of standard terms, Macaulay argued the role of contract is in many cases limited. Meticulously crafted contracts were seen to hinder relationships instead of fostering them. Other factors, such as reputation and trust, often played a more crucial role in exchange. In one example Macaulay describes that a Wisconsin corporation estimated that 50–70 % of its contracts were probably unenforceable without this hindering business.[73] On the other hand, Macaulay also argued that in some cases, in particular complex transactions such as the sale of the Empire State Building, contracts were meticulously used.

Ever since Macaulay's piece there has been a gradually increasing focus on whether and how contracts are used to govern relationships.[74] At the same time, contract law has increasingly invaded both public and private spaces as a governance method almost without par.[75] It has also moved towards the transnational, with Dietz' work on whether and to what extent international commercial actors rely on contracts providing a recent transnational version of Macaulay's work.[76] These factors have led to a ballooning of research on

[72] Stewart Macaulay, "Non-Contractual Relations in Business: A Preliminary Study" (1963) 28 American Sociological Review 55.

[73] This may have to do with the state of the law in 1950's Wisconsin. More generally, Macaulay does not inquire into non-contractual forms of legal enforcement, such as restitution or tort, that are less burdened by formal requirements than common law contracts.

[74] For two recent reviews of empirical research on contract, see e.g. Eigen; DJ Schepker and others, "The Many Futures of Contracts: Moving Beyond Structure and Safeguarding to Coordination and Adaptation" (2014) 40 Journal of Management 193. Both are described in more detail in this section. For the relationship of theory and empirical research, e.g. Gordon Smith and Brayden King, "Contracts as Organizations" (2009) 51 Arizona Law Review 1.

[75] For one, societal functions that used to be controlled by the state or local entities have been externalized to public actors for example through public procurement contracts. E.g. Duncan Kennedy, "The Stages of the Decline of the Public/Private Distinction" (1982) 130 University of Pennsylvania Law Review 1349. For another, the role of private governance has burgeoned to areas that have general importance, such as the internet, and governance more generally. E.g. Steven L Schwarcz, "Private Ordering" (2002) 97 Northwest University Law Review 319; Peter Vincent-Jones, "Contractual Governance: Institutional and Organizational Analysis" (2000) 20 Oxford Journal of Legal Studies 317. Moving to the traditionally private sphere, the question of whether to organize production through contract or corporate form has long been seen as crucial. E.g. Ronald Harry Coase, "The Nature of the Firm" (1937) 4 Economica 386.

[76] Dietz, *Global Order Beyond Law: How Information and Communication Technologies Facilitate Relational Contracting in International Trade*.

contracts that is classified as 'empirical'. But what is 'empirical' and how does it differ from 'dogmatic'?

Eigen, in describing his method for identifying research for his review article on empirical studies on contract law, describes empirical rather loosely as 'applying a systematic disciplinary-based method of observation'.[77] I argue that a better way of understanding the broad swaths of recent empirically branded research on contract may be by their focus rather than their methodology per se. In original empirical research, such as Macaulay's, and in broader review articles, such as those of Eigen and Schepker *et al.*, the focus seems to be on if and how contracts are in practice used in specific scenarios, with what motives, and whether the non-use or use of contracts is effective in fulfilling these motives. This focus covers a large number of approaches with different theoretical foundations and empirical methodologies.[78] However, a specific difference to dogmatic research entailed by this focus is that contract is necessarily made more abstract by removing it from its legal contexts. To clarify, I will next turn to two review articles attempting to broadly generalize recent empirical research on contracts.

In his review article *Empirical Studies of Contract*, Eigen reviews what he sees as blossoming empirical research on contract law 'written' between 2005 and January 2012.[79] To start with, Eigen argues that there are two principal 'driving forces' for empirical research on contracts. The first of these is interest in the general discord between how contracts are experienced and how law assumes that contracts are experienced.[80] The other is interest in the effectiveness of different contractual arrangements as vessels of incentivization, recently highlighted for example in the 2016 Nobel Prize for Economic Sciences awarded to Oliver Hart and Bengt Holmström 'for their contributions to contract theory'.[81] Eigen sees that this latter type of interest is more connected to other disciplines than law, such as economics, where 'contracts are often mere vessels for incentivization structures in dyadic exchanges'.[82] Despite generally acknowledging the role of other disciplines, in particular economics,

[77] Eigen.
[78] For some theoretical focuses, see e.g. Eigen 293; Schepker and others. For methodological focuses, see e.g. Eigen 302–303; Schepker and others.
[79] Eigen.
[80] While focusing on the time-frame 2005–2012, Eigen notes that in the wake of Macaulay at least Gilmore, Fried, and Macneill have provided theorizations 'on contract's doctrinal shortcomings born out of the discord between how contract is experienced and how the law assumes contract is experienced' in the 70s and 80s. Eigen 293.
[81] Generally, see Smith and King. For the Nobel Prize, see The Committee for the Prize in Economic Sciences in Memory of Alfred Nobel, "Scientific Background on the Sveriges Riksbank Prize in Economic Sciences in Memory of Alfred Nobel 2016 for Oliver Hart and Bengt Holmström on Their Contributions to Contract Theory" (2016) <https://www.nobelprize.org/nobel_prizes/economic-sciences/laureates/2016/advanced.html>.
[82] Eigen 293.

as drivers for empirical research on contracts, Eigen's methodology seems to value *legal*-disciplinary research on contracts over other disciplines.[83] Furthermore, Eigen's statement on the role of contracts as incentivization structures can be seen as problematic. This is because understandings of contracts as vessels for incentivization arguably also have an effect on what actors expect from contracts and what law may assume they expect.

In the end, Eigen identifies 113 papers containing empirical research on contracts between 2005 and January 2012. To aggregate this research, Eigen categorizes it according to eight general empirical questions. These are:[84]

1. *How do courts interpret contracts?*
2. *What is the relationship between public policy (laws) and contract terms?*
3. *Which terms are included in contracts?*
4. *Do signers read their contracts?*
5. *How do individuals perceive, interpret, or experience contracts?*
6. *What is the relationship between contract terms and performance, breach, or renegotiation?*
7. *Are contract terms associated with contractor characteristics or contracting settings?*
8. *Is there a relationship between trust and contracts?*

Eigen sees that these questions can be spread over a continuum between two propositions. Questions 1–3 are primarily motivated by the proposition that '[c]ontracts are a product of how drafters and signers interpret the law' while Question 8 is most motivated by the proposition that '[c]ontracts are a product of factors exogenous to law'.[85] Questions 4–7 are roughly located in between the two poles because they are motivated by both propositions. Following his classification of empirical research on contract, Eigen moves on to look at the

[83] For example, while Eigen does not explicitly limit his research to *legal*-empirical scholarship, his methodology seems biased towards traditional legal sources (e.g. he lists Lexis-Nexis, Westlaw, JSTOR, SSRN, HeinOnline, Northwestern's law library's digital search tool, Wiley, and Google Scholar as means for identifying papers). Eigen states that his methodology for searching for empirical research on contract led to papers 'mostly from law, economics, management, psychology, and sociology as well as from hybrid "law-and-" disciplines, such as law and economics'. For methodology, see Eigen 294–295. For a breakdown of the different disciplines he identifies, see Eigen 297–298. Unfortunately, Eigen does not provide a list of the 113 articles that he has identified. In any case, of those specifically identified in his paper, only two match the resources identified by Schepker et al. during the same time phase in their work on how contracts are used in business contexts. Schepker and others. This would seem to support the notion that Eigen's focus has been more on the legal discipline than in other disciplines also dealing with contract.

[84] Eigen 293–294.

[85] Eigen 295–297.

findings of the reviewed papers.[86] Finally, Eigen's paper provides some substantive and methodological suggestions for future research.

In their paper *The Many Futures of Contracts: Moving Beyond Structure and Safeguarding to Coordination and Adaptation*, Schepker, Oh, Martynov, and Poppo focus on the 'functional' aspects of contract. They do this by 'review[ing] literature on interfirm contracting in an effort to synthesize existing research and direct future scholarship'. The literature in Schepker *et al.* is squarely rooted in the discipline of economics, with only two of the numerous works reviewed cited also by Eigen. Otherwise the primary research reviewed by Schepker *et al.* is empirical, consisting of various theoretically and methodologically diverse case studies with generally broad samples, ranging from analyzing disputes or contracts to surveying and interviewing key personnel.[87] They first review empirical literature related to different theoretical understandings of contract structure, including transaction cost economics, relational and firm capabilities, and real options and interfirm contracting and find that the different basic underlying economic theories of contracting are well-supported empirically. However, the primary focus of Schepker *et al.* is to critique these studies in that they focus on contract structure primarily only as a safeguard to economic risk.[88] To remedy this narrow focus, Schepker *et al.* see that economic research has recently expanded towards other possible functions for contracts.

To provide an overview of the functional approach, Schepker *et al.* again review empirical literature, this time in relation to what they see as party-focused functions of contract. The primary alternative functions of contract, in addition to safeguarding risk, for which they find empirical support in literature are coordination and adaptation. Under safeguarding, contract design is used 'to mitigate ex ante and ex post risks of opportunism and thereby safeguard partner investments'.[89] Under adaptation, contract structure is seen as a means of adapting to uncertainties, such as environmental contingencies.[90] Under

[86] These include: that actors do not consistently behave rationally or in manners that optimize efficiency; that moral constraints are important in understanding how individuals interpret contracts; and the many problems related to 'form-adhesive contracts', such as whether they should be seen as exploitative or as efficient risk allocation and to what extent reading such a contract matters in relation to performance. Eigen 298–301.

[87] For lists of reviewed literature, see Tables 2 and 3, Schepker and others 198–200, 207–210.

[88] Schepker and others 194.

[89] Schepker and others 205–211. The use of contracts to appease third parties, such as insurers, banks, and management/shareholders, in situations where they may have relatively little such relevance in the dyadic interfirm relationship, as described e.g. by Dietz, can perhaps also be seen as a form of safeguarding. Dietz, "Contract Law, Relational Contracts, and Reputational Networks in International Trade: An Empirical Investigation into Cross-Border Contracts in the Software Industry" 38.

[90] Schepker and others 212–213. This focus on the need to adapt individual contractual relationships in light of unexpected contingencies has for long been a central critique against earlier, rigid contractual paradigms that understood contracts as perfectly self-contained relationships and therefore had major problems in responding to the need to adapt for example long-term contractual relationships. E.g. Macneil,

coordination, contracts are used to counteract uncertainty and complexity through 'high levels of coordination [required] due to the interface of activities and concerns relating to the division of labor'.[91] The primary difference between adaptation and coordination seems to be that adaptive mechanisms are used to directly modify specific contractual relationships, while coordinative mechanisms are in effect used to instill organizational abilities among otherwise independent actors. Based on these three functions of contract and the functional analysis of contract more generally, Schepker *et al.* propose six 'opportunities' for research on understanding existing theories of contract from the perspective of different contract functions. In effect, Schepker *et al.* argue that their functional approach to contract provides a novel perspective on contracting that can help improve economic understandings of the consequences of contracting.[92]

So what do these kinds of empirical insight tell us about contract and tort/delict? To state the obvious, it seems that contract crucially overshadows tort/delict. At the same time, contract itself is made extremely abstract from a legal perspective in order to focus on other issues such as revealing how actors think about them. For Macaulay, contract seems to be something limited to 1950s Wisconsin contract law.[93] For Eigen, contract is apparently something generally in line with the common law tradition of contract but removed from various potentially relevant exogenous factors.[94] For Schepker *et al.*, contract is simply a structured dyadic agreement with little if any legal relevance.[95] While these abstractions may be important from the perspective of increasing focus on certain aspects of contracting, such as the intent of parties, they miss the question of actual legal effect.

On the other hand, by examining factors on the border of the legal/non-legal divide, such as the expectations of contractual actors, these abstractions nonetheless provide information usable to law. Firstly, while contracts can serve functions that contract law does not recognize, contract law may also be

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"Contracts: Adjustment of Long-Term Economic Relations under Classical, Neoclassical, and Relational Contract Law." See also the discussion in Subsection 1.3.1 above.

[91] Schepker and others 211–212. A similar proposal is made by Dietz in transnational circumstances. Dietz argues that the primary role of contracts in international commerce is a communicative one, ensuring common socio-cultural norms. Dietz, "Contract Law, Relational Contracts, and Reputational Networks in International Trade: An Empirical Investigation into Cross-Border Contracts in the Software Industry" 38–39.

[92] Similar ideas have been presented also in legal literature. E.g. Llewellyn. Nonetheless, Schepker *et al.* present the argument in a particularly compelling and analytical way that may help legal scholars appreciate the manifold objectives of contract based private ordering beyond mere safeguarding.

[93] From a modern (or foreign) perspective it seems unimaginable that the 'contracts' discussed in Macaulay's work would be unenforceable or, at least, not give rise to other forms of restitution.

[94] See Eigen 292–293.

[95] Schepker and others 194.

receptive of such functions if it is taught to understand them.[96] Secondly, contract not only means different things in different legal systems and these meanings evolve over time, but it is also intertwined with other means of law such as actions under tort/delict. From a legal perspective, empirical research focusing on contract can thus at the same time be merited for uncovering important information useful to law while simultaneously being critiqued for a lack of focus on law more generally due to necessarily simplified understandings of contract. Bearing these merits and deficiencies of contractual abstractions in mind is focal for the evaluation of governance through contract in Chapter 3 and its proposed applications in Chapter 4.

1.3.4 Law &…: The Embeddedness, Indeterminacy, and Interplay of Form and Function

> *One turns from contemplation of the work of contract as from the experience of Greek tragedy. Life struggling against form, or through form to its will—"pity and terror—." Law means so pitifully little to life. Life is so terrifyingly dependent on the law.*
>
> –Karl Llewellyn, 1931[97]

In different legal systems contract and tort/delict exist in an interrelationship with one another that is difficult to generalize without delving deeper into the specific parameters of the respective legal systems. Going further, the initial parameters of contract and tort/delict in different legal systems seem to be ingrained in broader institutional contexts. Consider the following two quotes from the English House of Lords. First, in *Dunlop Pneumatic Tyre Co* v *Selfridge & Co* (1915), Viscount Haldane LC stated:[98]

> *My Lords, in the law of England certain principles are fundamental. One is that only a person who is a party to a contract can sue on it. Our law knows nothing of a jus quaesitum tertio arising by way of contract. Such a right may be conferred by way of property, as, for example, under a trust, but it cannot be conferred on a stranger to a contract as a right to enforce the contract in personam. A second principle is that if a person with whom a contract not under seal has been made is to be able to enforce it consideration must have been given by him to the promisor or to some*

[96] One example is the doctrine of certainty, traditionally used to guard the clarity of the parties' agreement under common law, under which only unambiguous provisions can be enforceable. For example, clauses requiring negotiation in good faith or mediation were for long seen to not fulfil requirements of certainty due to their uncertain results. Since then, courts have in many cases learned to negotiate this uncertainty. Jaakko Salminen, "The Different Meanings of International Commercial Conciliation" [2011] Nordic Journal of Commercial Law.
[97] Llewellyn.
[98] [1915] AC 847.

> *other person at the promisor's request. These two principles are not recognized in the same fashion by the jurisprudence of certain Continental countries or of Scotland, but here they are well established. A third proposition is that a principal not named in the contract may sue upon it if the promisee really contracted as his agent. But again, in order to entitle him so to sue, he must have given consideration either personally or through the promisee, acting as his agent in giving it.*

Second, in *Donoghue* v *Stevenson*, Lord Macmillan stated:[99]

> *What then are the circumstances which give rise to this duty to take care? In the daily contacts of social and business life human beings are thrown into or place themselves in an infinite variety of relationships with their fellows and the law can refer only to the standards of the reasonable man in order to determine whether any particular relationship gives rise to a duty to take care as between those who stand in that relationship to each other. The grounds of action may be as various and manifold as human errancy and the conception of legal responsibility may develop in adaptation to altering social conditions and standards. The criterion of judgment must adjust and adapt itself to the changing circumstances of life. The categories of negligence are never closed.*

In England, these cases have contributed to the closure of a contractual path for product liability law and the opening of a tortious path towards liability beyond privity for defective products.[100] But looking at the two speeches from a more general perspective on legal change, how can the two be reconciled, if at all? Both focus on whether or not a previously unavailable cause of action should be allowed. In the one, reference is made to principles so fundamental to law that they cannot be changed by judges. In the other, reference is made to the necessity of law adapting to the 'changing circumstances of life'. Law is at the same time rigid in its form and flexible. What is at work?

This conflict could be resolved by referring to dogma: The highest court has the power to decide that some principles of law are so fundamental that judges cannot change them. In relation to Viscount Haldane's speech, the change that he found impossible to undertake was effected by legislation implemented almost a century later. Conversely, some principles are not as

[99] [1932] AC 562.

[100] While the first case concerns primarily contractual third-party beneficiary doctrines which neither in England nor in the United States were integral for the development of product liability *per se*, the English case of *Dunlop* v *Selfridge* also more broadly restates the position of English law that no contractual action can be allowed unless there is privity and consideration. This position effectively limits the use of contractual causes of action compared to the much more liberal way in which they were used in the United States in the early 20th century. See Chapter 2.

fundamental and are apt to change over time through judge-made law. In relation to Lord Macmillan's speech, a major change took place in that very judgment. But how can we know which principles are apt to change at a given moment and which are not?

The question becomes more charged when perspective is shifted from England to the broad swath of jurisdictions comprising the United States. In principle both follow the same common law traditions. In the United States, however, the first of these questions received a different answer late in the 19th century.[101] Courts did not see law as so formalistic in relation to privity or consideration that it would prevent judges from tinkering with contractual causes of action to third parties. At the same time, courts were ready to create new tortious duties of care. This approach led to a very different path for product liability law in the United States, one focused much more on contract than tort.[102] Why did American judges find differently from their English counterparts despite shared tradition?

Eisenberg argues that the common law has two ideals.[103] One ideal is that all common law rules should be based on applicable social propositions, those of morality, policy, and experience that it is proper for the courts to take into account. This ideal is one of social congruence. The other ideal of the common law is that every rule should be consistently followed, reflecting social values such as predictability and even-handedness. This ideal is one of doctrinal stability. In other terms, these ideals resemble form and function. Law is rigid in form in order to guarantee stability. The maintaining of functionality of law, however, requires flexibility. Following Eisenberg, development of the common law in the late 19th and early 20th century United States was less formal than English law and more functional in addressing social considerations.

Again, this does not help much in understanding what is going on. It does, however, point towards an overwhelming methodological problem, that of embeddedness.[104] First, specific legal figures, such as contract and tort/delict, are embedded within a broader legal order. This results in differences between systems of law in how the function of for example contract is perceived in relation to other parts of the system, such as tort/delict.[105] Secondly, legal

[101] Generally, Eisenberg, "Third-Party Beneficiaries."
[102] See Section 2.3.
[103] Eisenberg, "Third-Party Beneficiaries." (Expounding on his earlier and more general positions on the nature of common law with regard to the development of contractual third-party beneficiary doctrines in particular.)
[104] Generally, Mark S Granovetter, "Economic Action and Social Structure: The Problem of Embeddedness" (1985) 91 American Journal of Sociology 481; Walter W Powell, "Neither Market Nor Hierarchy: Network Forms of Organization" (1990) 12 Research in Organizational Behavior 295, 299.
[105] One kind of functional analysis could thus focus on extrapolating the function of law from within the broader legal order. An example of this kind of functional analysis is Krebs' work on special relationships under German law. He starts by gathering instances of German legal figures that have been attributed to

systems are embedded into the functioning of society more broadly, composing a functional element that is in interplay with other functional elements. For example, the development of the role of tort/delict in society may depend on the extent to which other forms of compensation, such as universal healthcare coverage, are available, or on how the justice system is organized.[106] Thirdly, legal systems are embedded in more general conceptualizations of justice and the function of society at large. Here, for example economic and moral theories might come into play, focusing on a society's and its institutions' *raison d'être* and asking questions such as what is a good life and how this should be reflected in law.[107]

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fall under so-called 'special relationships', something more than a tortious relationship but less than a full-blown contract, either by statute, courts, or legal scholarship. He ends up with an extensive list of almost 140 legal figures which he then systematizes and analyzes according to their function. As a result, Krebs' systematizing effort identifies what he sees as the underlying justifications of different kinds of special relationships, providing insight for extrapolating from existing law to lawmakers, courts, and scholars. Krebs. One key challenge with such methods of systematizing law and distilling the function of legal figures is the precondition that legislators, courts, and scholars have provided material that allows a meaningful systematization from a specific perspective. Another focal question is how material is framed and limited, as there may be infinite ways of connecting the dots.

[106] This kind of functional analysis might focus on the relationship of law to other societal institutions. Once different systems have been identified, the question turns to inter-systemic references or how these different systems affect one another. However, while law is intuitively embedded in a broader reciprocal relationship with other institutional contexts, the relative relationships of these are difficult to discern. Stapleton, for example, notes institutional differences between England and the United States that *could* be important in understanding differences between US and English approaches to the development of private law in relation to liability for defective products. One of these is the paralysis of the US legislative process and the parallel activism of US courts. Other factors may be related to the justice systems, such as the more general use of juries, the contingency fee system, and the general availability of punitive damages in the United States, or the organization of health care in society, such as the existence of a general coverage healthcare system in England, all of which in combination appear to produce relatively huge awards in the United States. A further notion is accidents of history that have propelled institutions in different contexts on different routes, such as the relatively minuscule effects of the Thalidomide scandal in the United States, which led to different focuses in relation to unforeseeable losses to bystanders. Stapleton, *Product Liability* 5. For the interplay between different institutions and understanding the boundaries of institutions themselves, compare e.g. Luhmann and Latour. Niklas Luhmann and Klaus A Ziegert, *Law as a Social System* (Fatima Kastner and others eds, Oxford University Press 2009); Bruno Latour, *Reassembling the Social : An Introduction to Actor-Network-Theory* (Oxford University Press 2005).

[107] This kind of functional analysis might focus on extrapolating the function of law from without the law more generally. Arguably law should be inherently cognizant of the general function of society. The problem here is what exactly is the function of society. For example, various moral and economic theories have been proposed as crucial for the general functioning of society. These can be used to critique law in relation to how it fulfills its perceived objectives. The trouble with general societal theories seems to be that they are based on premises that render them flawed or insufficient, unable to cover the plurality of social activity. For example, theories on wealth maximization cannot easily take into account the question of existing wealth, leading to questions concerning the redistributive effects of law. Should law equal out differences in existing wealth patterns, or try to remain neutral with regard to distributive effects, in which case what would be the starting point selected and on what basis could wealth be accrued at all? Moral theories similarly face problems. For example, what is the relationship of personal liberty and duties towards others? More generally, how can we in the first place reduce the multiplicity of human life into an all-covering ideal? While problematic and ultimately insufficient in themselves, these theories provide new perspectives from which to construct the meaning of law. Shining light on issues such as wealth

Different functional analyses of law are not limited to the three described here. In particular, the law and… literature of the critical legal studies movement focuses on evaluating law from different perspectives ranging from economics to gender and wealth distribution.[108] All these approaches provide different lenses through which to debate and critique law. In themselves, however, they do not provide further answers to the choices ultimately made by law. For example, Stapleton ultimately sees the historical dogmatic progression of product liability as a random progression despite extensive ex-post efforts at theorizing its general theoretical undercurrents.[109]

Here, the legal boat that I am piloting runs perilously close to a shoal. If we cannot effectively theorize the progress of law and are forced to allow for randomness even in relation to *ex-post* narratives, as proposed in relation to the development of product liability, then what am I doing? Specific strands of scholarship have focused on this indeterminacy by noting that law does not seem to be going anywhere in particular just by itself but through the constant irritations of its users. Even if there are systemic safeguards in place, such as constitutional or human rights law, these can ultimately be turned upside down by societal developments. Law could be categorized as a never-ending tug of war over which direction society should be drawn towards. In order to pull law in a specific direction, one must act on multiple fronts, from courts to legislation to businesses to TV-shows and everyday discussions. This is the founding notion of legal process scholarship.[110] Here, any specific perspective on law can be used as argument to expose law for what it is. This exposure, however, does not guarantee change. Change comes from us acting as irritants, lobbying our cause. Law becomes a battleground where individual cases are but small battles over the contours of the frontline.[111]

But if we accept that law is ultimately an indeterminate political struggle, then what do we talk about when talking about law? One tentative answer is

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distribution and human nature, they allow important critiques of law. Generally, these can then be used for various purposes, for example to reimagine institutionalized distribution patterns (such as with the critical legal studies movement) or to focus on maintaining current distributory patterns relatively intact (such as with the economic analysis of law). Generally on broader economic and moral theories of law, see Stapleton, *Product Liability* 89–230.

[108] Generally, Roberto Mangabeira Unger, *The Critical Legal Studies Movement: Another Time, A Greater Task* (Verso 2015).

[109] Stapleton, *Product Liability*.

[110] William N Eskridge Jr and Philip P Frickey, "The Making of the Legal Process" (1994) 107 Harvard Law Review 2031; Harold Hongju Koh, "Transnational Legal Process" (1996) 75 Nebraska Law Review 181.

[111] For some examples, see e.g. Feinman's argument that there is a political conservative campaign to gradually 'roll back the law' without legislative action. Jay M Feinman, "Un-Making Law: The Classical Revival in the Common Law" (2004) 28 Seattle University Law Review 1. For a similar account focusing on how increased deference towards arbitration has pushed through objectives that Reagan could not force into statute, see Gilles.

provided by Latour in *La fabrique du droit*.[112] Through his ethnographic analysis of law as it is made by the French Conseil d'État, law for Latour comes down as a set way of argument embedded in systemic peculiarities. Most importantly, it seems, law is just this: A method of reflection on societal developments with hesitation and detachment so as not to rush into too sudden conclusions, nonetheless offering the blessing of decisions in the 'now' without fully locking the paths of the future.[113] For Latour, it seems that a major function of law is a kind of 'Hammertime', where something makes us stop amidst the hectic music of life and for a second become conscious and reflect upon what is going on before blazing on.[114]

From this perspective, the uncomfortable truth that I am facing is that law is never ready but relies on all of us, the infinite complexity of society, for direction. Understanding this, I will try to follow the many traditions of law in this dissertation without forgetting that it is I who construct and deconstruct the world around me.[115] And here I must realize that there is so much I cannot see because I see only for myself.[116] Every countless perspective of different functional analyses of law allows us to see and discuss, revealing otherworldly vistas filled by Derridean monsters that we (and by extension, law) barely have the words to begin to describe—*wovon man nicht sprechen kann, darüber muss man schweigen*. But going further, what we cannot see we cannot even be silent about.

In this dissertation, I think I am seeing something that law also needs to see, learn to talk about, and do something about, or at least tell me why it will not so do so I can change my own argument. Because of the novelty of the undertaken topic, this work is not full of dogma & theory on production liability like Stapleton's *Product Liability*. Instead, it merely gathers three things I see, as if fragments in a dream: I want to show how law has tamed monsters in the past by extending liability beyond privity to show that it can be done; I want to show how a new monster is born out of existing structures of law, using them to

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[112] For the English, see Bruno Latour, *The Making of Law: An Ethnography of the Conseil d'Etat* (Polity 2010).

[113] In particular, Latour, *The Making of Law: An Ethnography of the Conseil d'Etat* 141–152.

[114] MC Hammer, "U Can't Touch This" <https://www.youtube.com/watch?v=otCpCn0l4Wo>.

[115] Werner, writing from the perspective of textual criticism, notes that:
…the editor…is charged with the task of re-making [Emily] Dickinson['s poems] in the image of the present critical and cultural age. Of particular interest here will be the ways in which [the edition] responds to recent readings of Dickinson – many feminist and poststructuralist in orientation – that challenge, among other things, the "hierarchies of traditional textual components (e.g., truth and error, reading and variant, center and margin)," and that are clearly antithetical to masterpiece theories of art.
Martha Werner, "Nor Difference It Knows" (1998) 12 Text: Transactions of the Society for Textual Scholarship 255, 256.

[116] For a reader's perspective, see Georges Poulet, "Criticism and the Experience of Interiority." in Richard Macksey and Eugenio Donato (eds), *Languages of Criticism and the Sciences of Man* (Johns Hopkins University Press 1970). For an author's perspective, see Mika Waltari, *Lähdin Istanbuliin* (1954 edn, WSOY 1947) 184.

extend control without liability and, on top of it, make a tidy profit; I want to show how this monster can be tamed by giving it a name and by learning its habits and tendencies. All this I want to show, to show that it can be done and that the world could be a better place as a result.

Following narratives of product liability, sometimes change comes relatively fast, as in the United States of late 19th and early 20th centuries. At other times change comes late, as in England almost a century later. Whatever the case in relation to the topic of this dissertation, I hope that in ten years' time there will be enough material on this topic to write a book similar to Stapleton's *Product Liability* but full of the dogma, theory, and critique of *production liability*.

Chapter 2. Reflections of Societal Change in Dogmatic Struggles: Comparative-Historical Product Liability and Beyond

2.1 The Making of a Comparative Methodology

In the introductory chapter, I provided a preliminary critique of existing conceptualizations of contract and tort/delict. In particular, I noted that abstractions of contract, often necessary for different kinds of research, may provide a problematic foundation for understanding the relationship of law and the practical use of contracts. To overcome this challenge, I will in this chapter try to distill an understanding of the intertwined role of contract and tort/delict in different national settings in providing a remedy to overcome the bounds of privity in contractually organized structures of distribution/production. This understanding, or cognitive resources, will allow me to avoid the pitfalls of broad generalizations of contract and tort/delict and to better focus on the practical problems and dogmatic means relevant for liability beyond privity. Then, in Chapter 4, I can use this insight in arguments related to production liability.

Thus my aim here is to establish an understanding of the intertwined role of nationally embedded conceptualizations of contract and tort/delict in overcoming privity in contractual arrangements. To accomplish this, I use historical-dogmatic product liability law as a lens through which to see how different national legal systems have used contract, tort/delict, and different mixtures of the two to overcome the bounds of privity in establishing effective liability for defective products in contractually organized structures of manufacturing and distribution. The outcome, as explained in the final section of this chapter, is to provide a functionally relevant foundation for conceptualizing governance through contract in fragmented production structures.

I have chosen four primary jurisdictional focuses for this study. These are English, German, French, and United States law.[117] There are a number of reasons for the choice of these jurisdictions. One is practical. I feel confident in

[117] 'United States law' on contract and tort can be seen as an oxymoron and thus requires immediate explanation. I use the term here as a cover term, gathering underneath it what I see as converging tendencies in the laws of the various United States in relation to contract and tort which have culminated in a more or less unified ideas of contract, tort, and product liability law as codified in the American Law Institute's restatements of law, in particular the *Restatement of the Law (Second), Contracts* (1981), *Restatement of the Law (Second), Torts* (1965–1979), and *Restatement of the Law (Third), Torts: Products Liability* (1998). At the same time, I try to remain cognizant of the potentially vast differences between the individual States. To judge how this works out, see Section 2.3.

reading legal material in English, German, and French, and even if I were not so there is relatively ample material available from all four jurisdictions in today's *lingua franca*, English.[118] For the sake of the reader I will also try to refer to works written in English where available.

A more important reason is that these four jurisdictions, while converging later on, have taken very different routes to implementing liability for defective products. These different routes depend on the one hand on different initial parameters of contract and tort/delict in the respective systems, and on the other, on different interpretations of these parameters. For example, modern product liability law can be seen as having originated in the United States through a court-led creation and merger of novel contract and tort causes of action. In England, however, which shares the same common law background as the United States and thus the same initial parameters of contract and tort, a very different approach was adopted in interpreting existing rules which led to crucial product liability related measures being implemented only late in the 20th century through legislative means. On the other hand, the more formalistic tendencies of English law may have led to a more rigorous development of a tort of negligence with its own implications for *production* liability, in particular in the form of the recent *Chandler* v *Cape* ruling.[119] Similarly, German and French law have developed product liability from their own very different initial parameters of contract and delict, providing more fodder for comparison and in particular interesting focuses on the potential of contractual actions, founded in very different notions of agreement and the role of contract, in overcoming privity.

Thus I believe that this choice of jurisdictions is not only practically feasible for myself but also particularly useful from the perspective of understanding the intertwined relationship of contract and tort/delict as developed in the United States and Europe in relation to overcoming the problem of privity in contractually organized structures of production. Of course, this also means that this work will be severely biased towards these jurisdictions at the expense of the rest of the world. From a practical perspective, this bias is to some degree mitigated through the discussion in Chapter 4 of the capabilities of private international law to localize disputes into specific jurisdictions, including those discussed here which are home to

[118] E.g. in relation to tort law one could mention recent general treatises such as Helmut Koziol's *Basic Questions of Tort Law* (2015), discussing all four jurisdictions and available online as open access, and Cees van Dam's *European Tort Law* (2nd ed. 2013), comparing in particular English, German, French, and EU tort law. In relation to contract, in particular comparatists from England, such as Basil Markesinis, Jane Stapleton, and Simon Whittaker, have focused on the differences of English contract/tort law and its German, French, and American counterparts. Similarly, there is relatively ample material available on comparative product liability law, such as Simon Whittaker's (ed.) The Development of Product Liability (Cambridge University Press 2010) and Jane Stapleton's Product Liability (Butterworths 1994).

[119] Discussed in more detail in Chapter 4.

numerous globally operating corporations. Nonetheless, this bias must be born in mind throughout this work. Thus I do not argue that specific national conceptualizations of contract or tort/delict would be closer to universal ideals of fairness than others and could work as models or 'implants' in other legal systems. Instead, I am exploring the limits of contract and tort/delict in specific legal systems by using comparison to highlight different histories, approaches, limits, and possibilities.

As noted, while I aim at a general perspective on the relationship of contract and tort/delict in the respective legal systems, my comparative lens is particularly focused on the historical-dogmatic development of product liability law. This is not a laser-cut focus. For one, looking more broadly at the general parameters of contract and tort/delict in different legal systems seems crucial for understanding these developments. Thus, excursions are occasionally made that reach farther into the realm of contract or tort/delict than what may be justifiable from a purely product liability related perspective. For another, my aim is to chart the potential of contract and tort/delict in the different legal systems to establish a distinct kind of production liability, as discussed in detail in Chapter 4. This objective also makes me adopt a perhaps broader perspective on both contract and tort/delict than a focus squarely on the development of product liability would necessitate.

As a specific caveat, in this work my comparative lens is probably contorted by seeing English law as a kind of 'default' mode of law. The comparative part of this chapter starts with English law, with English developments thus forming a starting point and probably also affecting the ensuing structure of comparative discussion. If I had written this with the German or French law as a starting point, the order and structure of discussion might well be different. The reasons for choice of structure and starting point are again practical. For one, I am more fluent in English than German or French, and, indeed, writing primarily to an English speaking audience that may see the conceptualizations of English law as linguistically closer to their mindset. For another, many of the impulses behind my comparative effort owe greatly to scholars writing from the perspective of English law, such as Basil Markesinis (an English legal scholar focusing in particular on German law), Jane Stapleton (an English legal scholar focusing in particular on American law), and James Whittaker (an English legal scholar focusing in particular on French law). During the 1980s and 1990s, these scholars were motivated to questioning and developing English law and, in doing this, sought a deeper understanding of English law by comparing it to other legal systems. Because I am following their work, my comparative approach is necessarily grounded in an English perspective on legal comparison.

There are, however, also substantive reasons. The primary one is the apparent relevance of English legal discourse from both historical-domestic and

modern-transnational contexts. First, due to historical reasons English common law developments form the starting point for understanding also United States law. Thus discussing the common origins of the two first (i.e. the historical traditions of English common law) seems natural. Second, ideas of a 'classical' contract law, similar to that imagined by American scholars in the late 19th and early 20th centuries on the basis of a selective reading of English common law, seem to persevere in transnational contexts.[120] This is also the starting point of English common law, which has more strongly than the other legal systems discussed here defended itself against tendencies to overcome privity as a foundational force for contractual causes of action while other legal systems have acquiesced to calls of modernizing contract law. Similar rigorous tendencies seem to relate to English tort law, perhaps giving it similar transnational appeal. Third, English law continues to be seen as an important focal point in the development of common law and thus has potential applicability in a wide range of other related legal systems throughout North America, Africa, and Asia-Pacific. Here, recent English developments such as *Cape* v *Chandler* stand a chance of serving as examples for establishing production liability under tort in jurisdictions related to the Commonwealth of Nations.[121]

A final caveat to be noted is that the fact that law changes over time cannot be overlooked. In principle this is a positive notion—the paradigms and parameters of law need to change over time to reflect changing societal needs. Sometimes this change is driven by the courts, while at other times legislators intervene. However, change can also be the cause of confusion, especially when collating comparative material from different periods of time. In all the legal systems discussed here notable legislative changes have taken place since the turn of the millennium, ranging from more general remolding of the German BGB in 2002[122] and the French Code civil in 2016[123] to the launch of the Restatement of the Law (Third) of Torts: Product Liability in the United States

[120] See Subsections 1.3.1, 1.3.2, and 4.4.4.

[121] This and other precedent for production liability is discussed in more detail in Chapter 4.

[122] van Dam, *European Tort Law* 75. While the legal changes should be limited, consisting of clarifying and reordering many of the articles and adding new ones mainly to reflect changes made by existing caselaw, this is nonetheless a potential source of confusion in relation to earlier legal materials and earlier postulations on the relationship of judge-made and statutory law.

[123] See e.g. John Cartwright and Simon Whittaker, "The Transformation of French Contract Law by Government Decree – and Translated into English" (2015) <https://www.law.ox.ac.uk/news/2015-11-02-transformation-french-contract-law-government-decree-—-and-translated-english>. The remodeling was enacted on 1 October 2016 and also focused on systemic simplification and statutorification of earlier judge-made law, reordering broad swaths of the *Code civil* and causing similar challenges as in relation to the BGB modernization. For a now historical perspective, see also van Dam, *European Tort Law* 53. For French material, see e.g. the French Ministry of Justice websites http://www.textes.justice.gouv.fr/dossiers-thematiques-10083/loi-du-170215-sur-la-simplification-du-droit-12766/ and http://www.textes.justice.gouv.fr/lois-et-ordonnances-10180/loi-de-simplification-du-droit-et-des-procedures-27874.html.

(and the ongoing debate over the rest of the Restatement of the Law (Third) of Torts),[124] to the English Contracts (Third parties) Act of 1999 which, for the first time in almost two centuries explicitly allowed third party beneficiary actions under contract.[125] In particular, the recent updating of French private law causes challenges in referring to articles of the Code civil, some of which have been fully removed while others have merely changed their enumeration. Where relevant, these and other changes will be noted and discussed in more detail.

I have structured this comparative study as follows. Each section begins with a subsection focusing on the general personal and material scope of claims under contract followed by a subsection on mechanisms for overcoming the limits of tort/delict. Each section is concluded with a brief summary focusing on the role of contract and tort/delict in regulating private ordering, in particular from the perspective of product liability law and tentative ideas over the relevance of different mechanisms for transnational production liability. Finally, the ultimate section of this Chapter gathers together from the comparative sections a narrative of governance through contract as seen from the vantage point of product liability law.

2.2 England: 'The price of a strict contract law…'

2.2.1 The Personal and Material Scope of Contracts: The Lasting Resilience of Privity

In comparison to most European and United States jurisdictions, English law has adhered to the doctrine of privity of contracts exceptionally rigorously.[126] This has had a major effect on where the boundaries of contractual causes of action are drawn. Even the most basic and most universally agreed upon exception to the principle that contracts can bind and provide benefits only to their parties, namely that parties can *explicitly* agree that their contract is enforceable by third-parties, was unacceptable to English common law. In some early English cases, such as *Dutton* v *Poole*[127] and *Martyn* v *Hind*,[128] third-

[124] While not legislation per se, the American Law Institute's Restatements have in part a similar task as the modernizations of legal codes in Germany and France, namely, to better reflect recent developments in American caselaw. In particular, the widely influential Section 402a of the *Restatement of the Law (Second) of Torts* (1965–1979), establishing a model of product liability, has given rise to such a body of caselaw that it was superseded by the *Restatement of the Law (Third) of Torts: Product Liability* (1998).
[125] This act brought English law in line with most other legal systems in relation allowing contractual third-party beneficiary actions, if only in a relatively limited form and with deference to earlier tort-based actions. See comparative note on England for detailed discussion.
[126] E.g. Markesinis; Whittaker, "Privity of Contract and the Law of Tort: The French Experience"; Edwin Peel, *Treitel's The Law of Contract* (12th edn, Sweet & Maxwell 2007) Chapter 14. For detailed historical background, see Vernon Valentine Palmer, *The Paths to Privity: A History of Third Party Beneficiary Contracts at English Law* (The Lawbook Exchange 2006).
[127] 83 ER 523 (KB 1677).

party beneficiaries to contracts appear to have been allowed to sue on contractual grounds.[129] However, for reasons of doctrinal purity, in particular the idea that the enforcement of contractual obligations should be confined to those in privity and under consideration, English judges in the 19th and 20th centuries categorically denied common law exceptions to the doctrine of privity of contracts.[130] Caselaw such as *Tweddle* v *Atkinson* (1861),[131] *Dunlop Pneumatic Tyre Co* v *Selfridge & Co* (1915),[132] and *Beswick* v *Beswick* (1961)[133] have stated and restated that only parties to a contract have a right to enforce any rights or obligations arising out of it.[134]

The absolute approach to privity adopted by English courts was ultimately perceived as unfair or, at the very least, illogical.[135] At the same time, continental legal systems such as French and German law generally allowed third-parties to enforce contracts made to their benefit.[136] Even in the United States, ostensibly following the same common law traditions as England, most jurisdictions generally declined to follow the English absolutist approach.[137] Calls for change were made also in England but these were, until recently, without result.[138] Instead, a number of techniques resembling third-party

[128] 98 ER 1174 (KB 1776).

[129] Peel sees early authorities as conflicting in this regard. Peel 623. Others present the early caselaw as generally accepting in relation to the enforcement of contracts by third-party beneficiaries. E.g. Eisenberg, "Third-Party Beneficiaries" 1360–61.

[130] Generally Peel 622; Eisenberg, "Third-Party Beneficiaries" 1365–1371; Neil Andrews, "Strangers to Justice No Longer: The Reversal of the Privity Rule under the Contracts (Rights of Third Parties) Act 1999" (2001) 60 Cambridge Law Journal 353.

[131] 121 ER 762 (QB 1861). The fathers of a newlywed couple promised each other to pay certain sums to the groom and drafted a contract to that extent, expressly agreeing that the groom could enforce the contract. The wife's father died before paying the agreed sum. The court found that the groom could not enforce the promise against the deceased father's executors, primarily because the groom had not participated in consideration.

[132] AC 847 (1915). A manufacturer asked her dealers not to sell tires below a certain price and to include a similar provision in the dealers' contracts with retailers, with the added proviso that if retailers nonetheless sold the tires at a lower price they would have to pay damages directly to the manufacturer. When a retailer sold tires at a lower price, the court found that the retailer was not liable to pay damages to the manufacturer because of a lack of privity between the two.

[133] AC 58 (1968). A merchant passed on his business to his nephew. In return, the nephew promised, among other things, to pay a monthly allowance to his uncle's wife in case of the uncle's death. After his uncle's death, the nephew ceased payments to the wife. The court found that were it not for the wife's position as administratrix of the deceased uncle's estate, she would not have a cause of action.

[134] Generally Peel 623–625.

[135] For example, in *Beswick* v *Beswick* Lord Reid noted that if the beneficiary could not recover, the result would be 'grossly unjust'. Generally Peel 622–623.

[136] For France, see Articles 1120–1121 Code Civil, dating from 1804, while for Germany, see Articles 328–335 BGB, dating from 1904. Both codifications reflect earlier legal traditions allowing third-party beneficiary actions. See e.g. Palmer, *The Paths to Privity: A History of Third Party Beneficiary Contracts at English Law*.

[137] For developments in the US, see generally Eisenberg, "Third-Party Beneficiaries" 1360–1374.

[138] See e.g. Farnsworth 654. For example, in 1937 the Law Revision Committee called for a change in this regard in its sixth interim report, for which see Law Revision Committee, "Sixth Interim Report: Statute of Frauds and the Doctrine of Consideration Cmd. 5449" (1937) paras 41–48.

beneficiary theories were utilized by English judges in the name of preserving equity, such as trusts of promises, collateral contracts, and the use of agency.[139] Courts also attempted to find other equitable solutions to cases where the application of the principle that only parties may enforce benefits granted to third parties under a contract had results that were perceived as especially egregious, such as in *Beswick* v *Beswick*. Nonetheless, on the level of principle English courts stayed firm in maintaining that only statutory exceptions to the privity principle were generally allowed.[140]

The refusal by courts to adopt a general contractual third-party beneficiary theory and the lack of legislative action to the same extent resulted in an increased reliance on actions under tort.[141] A still relevant case demonstrating the English tendency to rely on tort instead of contract is the House of Lords' 1995 ruling in *White* v *Jones*.[142] In that case a man had asked a solicitor to redraft his will so that his previously disinherited daughters would after all be covered by the will. The solicitor failed to do this prior to the man's death. The court held with a 3 to 2 majority that the daughters could recover from the solicitor, who, due to the special relationship between the solicitor and the daughters was under a duty of care not only towards the client but also towards the daughters despite a lack of contractual or fiduciary relationship towards the latter. Notably, the court expressly denied a contractual solution for the case even when academic and legislative discussion at the time seemed supportive of such, opting instead for allowing recovery of pure economic loss under the tort of negligence.[143]

English lawmakers finally implemented legislation allowing third-party beneficiary actions through the 1999 Contracts (Rights of Third Parties) Act.[144] The Act allows third-party beneficiaries to enforce contracts made to their benefit, firstly, in cases where the contract expressly provides that the third

[139] For collateral contracts, in effect warranties that extend beyond privity, Peel 616–618. For the use of theories of agency, in particular in relation to cases where exception clauses are seen to cover non-privy actors, Peel 619, 685, Chapter 16. For trusts of promises, see Peel 685–690. For the use of theories of assignment, Peel 685, Chapter 15. For covenants related to land or marriage settlements, Peel 685, 690–691. The damages of e.g. non-privy family members could also be included in a claim made by a consumer who had bought a good or service, e.g. in relation to a family holiday, as in *Jackson* v *Horizon Holidays Ltd* (1 WLR 1468, 1975), though these were specifically limited to consumer claims in *Woodar Investment Development Ltd* v *Wimpey Construction UK Ltd* (1 WRL 277, 1980).

[140] For example Peel refers to statutory exceptions relating to insurance and the Law of Property act of 1925 as remaining in force despite the Contracts (Rights of Third Parties) Act of 1999, Peel 708–713. A number of other current and historical statutory exceptions to privity include e.g. the Married Women's Property Act of 1882, the Bill of Lading act 1855, the Carriage of Goods by Sea Act 1992, the Bills of Exchange Act 1882, the Consumer Protection Act, and the Defective Premises Act (1972), for which see generally see generally Robert Merkin (ed), *Privity of Contract: The Impact of the Contracts (Rights of Third Parties) Act 1999* (Routledge 2000).

[141] Markesinis.

[142] *White* v *Jones* [1995] UKHL 5.

[143] E.g. Whittaker, "Privity of Contract and the Law of Tort: The French Experience" 328–329.

[144] 1999 c. 31.

party may in its own right enforce a contract and, secondly, in cases where a term in the contract purports to confer a benefit on the third party, unless it appears that the parties did not intend to have the third party enforce the contract. If either case applies, then a third party receives an independent right to enforce the contract or a term in it. This includes not only positive benefits but also defensive benefits, such as exclusion clauses or arbitration clauses that work to the benefit of a third party.[145]

The act is a comparatively narrow version of the third-party beneficiary theory, in particular in relation to the question of intended beneficiaries. 'Clear' cases of contracts granting benefits to third parties, such as the much critiqued case of *Beswick* v *Beswick* where one actor promises another to pay money to a third party, are covered by the Act. However, many constellations where it is less clear that the parties have agreed to grant a benefit to a third party are not covered even when other legal systems have adopted a contractual approach also in such situations.[146] For example, the act does not apply to contracts between solicitors and clients, because only clients are seen as the intended beneficiaries of a solicitor's agreement. Thus the negligently forsaken legatees in *White* v *Jones* are seen as unintended beneficiaries and, together with other similar cases focusing on the tort of negligence to provide actionable claims to contractual third parties, retains its relevance by falling beyond the scope of the Act. In sum, even following the Act English law leaves to a major extent intact the earlier caselaw's reliance on the tort of negligence in cases where contractual approaches are used in other legal systems, such as Germany, France, and the United States.[147]

The Act thus reflects the general attitude of English law that allows only marginal room for expansive interpretations of the scope of contracts. This approach has resulted in increasingly expansive interpretations of the torts, in particular the tort of negligence that in part grew to answer another problem related to privity, the so-called privity or contract fallacy. Before discussing the tort approach to conceptualizing relationships between actors, I will first look at the regulation of contractual relationships more generally. This is because in cases where privity has been established, English law has been keen to regulate.

During the 19th century the rule of caveat emptor was, despite its many exceptions, seen to be a general principle of English contract law.[148] In contracts for the sale of goods this principle was increasingly hollowed out first by the courts and then by the parliament through the 1893 Sale of Goods Act,

[145] For more details on the extent of these rights in various scenarios, see e.g. Andrews.
[146] For some examples, see Andrews 358–9; Peel 694–695.
[147] Thus for example in relation to the scenario in *White* v *Jones*, in the United States similar cases have been classified as potentially falling under both contract and tort causes of action. Markesinis and Unberath 332. In Germany, however, similar situations clearly fall under contractual liability. Markesinis and Unberath 328–338. For discussion, see Sections 2.3 and 2.4.
[148] Whittaker, "The Development of Product Liability in England" 61–69.

which standardized existing implied warranties that placed on manufacturers a strict obligation with respect to quality.[149] The act placed all goods, whether in relation to consumers or businesses, under an implied warranty of merchantability.[150] While the act changed the default form of liability under contracts from *caveat emptor* towards a strict liability in relation to the typical use of goods, it did not affect the possibility that parties explicitly exclude liability, whether under contract in relation to those in privity with them or under 'notice' in relation to third parties. As a result, manufacturers started providing 'guarantees' which, while ostensibly providing users with a level of protection, in practice reduced liability under *both* implied warranties and the tort of negligence and even in relation to personal injury.[151]

This earlier common law position allowing the wide use of exclusion clauses and non-contractual disclaimers of liability[152] changed with the 1977 Unfair Contract Terms Act.[153] Under the Act, if liability arises 'in the course of business', under Section 2(1) liability for damages in negligence could not be excluded in respect of death or personal injury and under Section 2(2) liability for other types of damages could only be excluded if a test of reasonableness is satisfied. Similarly, under contract the statutory implied warranty of merchantability could not be excluded in relation to consumers and could only be excluded in relation to other parties if the exclusion clause satisfied the test of reasonableness. In particular, the act denied manufacturers of consumer goods the use of 'guarantees' that, in fact, limited liability beyond statutory requirements. The scope of the 1977 Unfair Contract Terms Act has been subsequently clarified and expanded in particular in relation to consumer contracts.[154]

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[149] Sale of Goods Act, 1893, 56 & 57 Vict., c. 71. Whittaker, "The Development of Product Liability in England" 61–69.

[150] Whittaker, "The Development of Product Liability in England" 61–69.

[151] E.g. Whittaker notes that 'it was a particular problem at the time [of the drafting of the 1977 Act]' that manufacturers of consumer goods excluded liability with clauses disguised as guarantees. Whittaker, "The Development of Product Liability in England" 68–69, 83. For more detail see also Stapleton, *Product Liability* 39–42. For the current treatment of guarantees in relation to consumer goods, see Peel 270.

[152] Such as that which excluded non-contractual liability in *Hedley Byrne & Co* v *Heller & Partners Ltd*, discussed in the next subsection.

[153] Unfair Contract Terms Act, 1977, c. 50. For discussion, see Whittaker, "The Development of Product Liability in England" 68–69, 83–84; Stapleton, *Product Liability* 39–44.

[154] Whittaker, "The Development of Product Liability in England" 83–84. For example, the requirement of 'merchantable quality' in relation to goods sold has since become 'satisfactory quality'. More generally, later legislative efforts include the 1987 Consumer Protection Act, implementing in particular the Council Directive 85/374/EEC of 25 July 1985 on the approximation of laws, regulations and administrative provisions of Member States concerning liability for defective products ('1985 EEC Product Liability Directive'), and the Unfair Terms in Consumer Contracts Regulations (1999 No. 2083) implementing the Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts ('1993 EEC Unfair Consumer Contracts Directive') and which perhaps confusingly applies in addition to the 1977 Unfair Contract Terms Act. For the relationship of the 1977 and 1999 acts, see Peel 266 ff. The consumer related provisions of these have since been compiled into the 2015 Consumer Rights Act (2015 c. 15).

Another, very different strand of development is also relevant in relation to the regulation of contract terms. Earlier on, it seemed that the mere existence of contract could cap the limit of damages available under tort.[155] An example of this is the ruling in *Tai Hing Cotton Mill* v *Liu Chong Hing Bank*, in which the court found that the existence of a contractual relationship in practice capped any liability in tort to the maximum allowed under contract.[156] In response, scholarship argued for a less absolute and more contextual approach.[157] A more balanced approach to tort claims in relation to contractual structures was later accepted in the 1994 ruling in *Henderson* v *Merrett Syndicates Ltd*, which also definitively established the possibility of concurrent and independent actions under contract and tort in relation to the same facts.[158]

The case, related to managing investments at the Lloyd's of London insurance market, concerned both so-called direct Names, who had a direct contractual relationship to the agents managing their investments, and indirect Names, who had a contractual relationship to underwriting agents who, in turn, had a sub-agency agreement with the agents managing investments. When investments failed, both direct and indirect Names claimed compensation from the managing agents. Furthermore, some direct Names also chose to claim under tort because the limitation period of their contractual claims had run out. The managing agents denied liability under negligence on grounds that such liability would override the contractual structure in place. The first instance and court of appeals found that the duty of care under tort was not excluded by the contractual structure in relation to either direct or indirect Names, and the House of Lords followed suite by dismissing the appeal.

Following *Henderson*, an action could thus be available in tort even if contractual actions were disallowed due to a shorter limitation period. As both actions can exist independently of each other they must also be judged independently at least to the extent that contractual arrangements are not intended to govern matters related to tort. Similarly, in the 1998 ruling *Williams* v *Natural Life Health Foods Ltd* the House of Lords argued that 'tort may play an interstitial role where contract fails to deliver justice' and thus that privity is not a 'bar to liability; it is simply a consideration which should not be overlooked'.[159] Thus generally the tort of negligence could now be used to override contract where actors are not seen to have contracted upon the specific

[155] Stapleton, "Duty of care and economic loss: a wider agenda" 286–288.
[156] Stapleton, "Duty of care and economic loss: a wider agenda" 289.
[157] Stapleton, "Duty of care and economic loss: a wider agenda" 288–292.
[158] [1994] UKHL 5.
[159] [1998] UKHL 17. Claimants wished to open a franchise from first defendant on the basis of a brochure containing testimony from second defendant, without having directly contacted the second defendant. The franchise failed and claimants sued, following which first defendant went into liquidation. The House of Lords found no liability inter alia due to no personal dealings, lack of assumption of responsibility, and no reliance on second defendant personally. E.g. Murphy 61.

issue at heart of the tort claim. At the same time, actors may generally exclude duties under tort from the scope of contracts as long as these exclusions are in line with legislative safeguards such as the 1977 Unfair Contract Terms Act.[160]

2.2.2 Overcoming the Limits of Tort—From the Privity Fallacy to Identifying New Duties of Care

The notions of *privity fallacy* or *contract fallacy* are used to refer to the idea that the mere existence of a contract precludes any action in tort by third parties against the parties to a contract.[161] The case of *Winterbottom* v *Wright* from 1842 is often established as a key starting point for this line of argument under English law.[162] In that case, a stagecoach broke and the driver, Winterbottom, was injured. Winterbottom sued Wright, who had been contracted by the Postmaster to maintain the stagecoach in safe operating condition. The court ruled that the contract between the Postmaster and Wright precluded any duties under tort that would arise solely based on a breach of contract. At the same time, the court found no other duty that could have been used to sustain an action against the manufacturer, so Winterbottom was without remedy against Wright.

Palmer sees three historical factors for the court's line of argument in *Winterbottom*. These are, firstly, that a general tort of negligence had not yet developed in English law,[163] secondly, that there was an 'analytical inability to distinguish between tort and contract except in procedural terms',[164] and that, thirdly, there was 'a strong bias, if not rule, against concurrent actions in contract and tort'.[165] While the case cannot be explained only through a bias against concurrent actions, the non-concurrence of contract and tort are an important aspect in the ruling in the sense that a breach of contract could not give rise to a duty under tort. This privity fallacy was incorporated into the law of tort in order to control and reinforce existing notions of concurrence. Palmer argues that only subsequently to the development of the tort of negligence was

[160] E.g. Murphy 60.

[161] The former term is used for example by Stapleton, "Duty of care and economic loss: a wider agenda" 250.. The latter term is used for example by Palmer, "Why Privity Entered Tort—An Historical Reexamination of Winterbottom v. Wright" 92.

[162] *Winterbottom* v *Wright* [1842] 10 M.&W. 109, 152 ER 402. For discussion, see Palmer, "Why Privity Entered Tort—An Historical Reexamination of Winterbottom v. Wright"; Stapleton, "Duty of care and economic loss: a wider agenda" 250–252; Whittaker, "The Development of Product Liability in England" 55–60, 69–71. For a more critical perspective, see Stapleton, *Product Liability* 16–20.

[163] Palmer, "Why Privity Entered Tort—An Historical Reexamination of Winterbottom v. Wright" 85.

[164] Palmer, "Why Privity Entered Tort—An Historical Reexamination of Winterbottom v. Wright" 85. This was grounded in the differentiation of the old causes of action into contractual and tortious causes for primarily pedagogical reasons. Once the old causes of action were abolished in the mid 19th century, the earlier pedagogical divide persevered and gained a life of its own. Whittaker, "The Development of Product Liability in England" 55–60.

[165] Palmer, "Why Privity Entered Tort—An Historical Reexamination of Winterbottom v. Wright" 85; Whittaker, "The Development of Product Liability in England" 55–60.

the privity rule used to control the expansion of the tort of negligence.[166] Later on, the case became generally representative of the idea that the existence of a contract precludes actions in tort. In this context the privity fallacy has been seen *inter alia* to protect employers and other contracting actors from non-contractual claims, thus limiting the number of those who can sue under negligence.[167]

Two other strands of development are relevant for the development of a general tort of negligence.[168] These are manufacturers' and sellers' tortious liability for dangerous goods and the development of contractual implied warranties.

With regard to sellers' liability under tort for dangerous goods, there were three or four main strands of authority that could be relied upon to place liability on a manufacturer or seller beyond privity.[169] The first of these was liability for fraud, exemplified by a case where a seller wittingly sold an unsafe gun that then injured the buyer's son.[170] The second was liability for inherently dangerous things or things known to be dangerous by the seller, exemplified by a case where the seller sold without warning a medicament that was dangerous if not applied properly.[171] The third strand of authority was a duty for sellers to exercise ordinary care in relation to buyers or users of the product that they knew of, as exemplified by a case where the buyer's fiancée was harmed by a product despite the seller warranting the buyer that it was fit for her use.[172] A possible fourth strand might be seen as extending a seller's liability to cover not only those users she had knowledge of but also those who were reasonably foreseeable as being injured by the good, as exemplified by a case where a dry dock owner supplied burnt rope to support a stage used by the employees of an independent contractor for work at the dry dock.[173] Thus there was relatively ample precedent establishing a variety of duties on manufacturers or sellers to ensure that goods sold did not damage those who would use them regardless of privity. A general manufacturer's or seller's duty under tort, however, was not available.

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[166] Stapleton, *Product Liability* 17. Attempts at such control can be seen for example in Lord Buckmaster's argument in *Donoghue* v *Stevenson*, for which see e.g. Whittaker, "The Development of Product Liability in England" 69–70.

[167] See for example Jonathan Morgan, "Technological Change and the Development of Liability for Fault in England and Wales" in Miquel Martín-Casals (ed), *The Development of Liability in Relation to Technological Change* (Cambridge University Press) 52.

[168] Whittaker, "The Development of Product Liability in England" 54–69; Stapleton, *Product Liability* 8–20.

[169] Whittaker, "The Development of Product Liability in England" 60–61; Stapleton, *Product Liability* 19–20.

[170] *Langridge* v *Levy* [1837] 2 M & W 519, in Ex. Ch. [1838] 4 M & W 337.

[171] *Clarke* v *Army and Navy Co-operative Society* [1903] 1 KB 155.

[172] *George* v *Skivington* [1869–1870] LR V Ex. 1.

[173] *Heaven* v *Pender* [1882–1883] LR XI QBD 503.

With regard to implied terms, as discussed above the earlier rule of caveat emptor had been replaced with general implied warranties of quality by the end of the 19th century.[174] These obligations were not restricted to business to business relationships but were generally effective also in relation to goods sold to consumers and thus soon became an important exemplar of the implied duties in general.[175] Nonetheless, under the strict conceptualization of privity in place under English law, these implied warranties were only effective between parties in privity, unlike *explicit* disclaimers, such as so-called classical warranties, which could follow products.[176] While American law used so-called 'a-classical' warranties that in effect were transmissible implied warranties, under English law this was not possible.[177] Furthermore, those not in privity at all, such as family members, friends, or innocent bystanders coming into contact with defective goods, were typically not protected directly. Nonetheless, this general change in contractual risk allocation in part also helped clear the way for the recognition of a general duty under tort towards all users.[178]

Despite these developments, Stapleton argues that:[179]

> *…at the turn of the century the residue of the defendant oriented privity fallacy had taken on an authority of its own and still survived to bar tort claims in respect of injuries caused by defective products to non-privy victims, and in other cases where the conduct constituting the alleged want of care was recognised as a breach of a contract between the defendant and a third party.*

Thus while it was not without precedent,[180] the House of Lords' 1932 ruling in *Donoghue* v *Stevenson,* where a 3 to 2 majority allowed a claim under negligence despite a lack of privity, has become the watermark symbol for this change under English law.[181] In that case a person enjoying a soft drink bought to her by a friend in a restaurant fell ill due to a snail in the bottle. The soft drink manufacturer, whose actions were found to constitute a breach of contract between the manufacturer and the retailer, was found to be liable under

[174] Whittaker, "The Development of Product Liability in England" 61–69.
[175] Whittaker, "The Development of Product Liability in England" 67–68.
[176] Whittaker, "The Development of Product Liability in England" 68. Classical warranties can be separated from the much more radical 'a-classical' warranties under American law, which extended implied warranties to non-privy actors. For these, see Section 2.3 on American law.
[177] For the American, see Section 2.3 on American law.
[178] E.g. Whittaker, "The Development of Product Liability in England" 61–69; Stapleton, *Product Liability* 14–16.
[179] Stapleton, "Duty of care and economic loss: a wider agenda" 251.
[180] In addition to the cases mentioned above in relation to dangerous goods and implied warranties, the *Donoghue* court referred in particular to an American precedent establishing a general tort of negligence the 1916 New York ruling of *MacPherson* v *Buick.*
[181] Donoghue v Stevenson [1932] AC 562. E.g. Murphy 61; Whittaker, "The Development of Product Liability in England" 69–73.

negligence towards the user. The case is seen as a seminal development of English law, establishing a manufacturer's duty towards users of manufactured products irrespective of whether the manufacturer and user where party to the same contract and irrespective of any contracts the manufacturer had entered into with other actors, such as a retailer. While the action in *Donoghue* v *Stevenson* was limited to injury to a person, it nonetheless helped establish the possibility that, if an applicable duty of care was available, the tort of negligence could be used to override a contractual structure. Following Stapleton:[182]

> *…the tort of negligence, emerging to protect the unprotected, made a breakthrough in Donoghue v Stevenson because it was then recognised that such protection may be justified even where contractual arrangements and one-sided expectations might thereby be upset.*

After *Donoghue*, the possibility of using tort actions despite the existence of contractual structures became an established principle of English law.[183] A further question is under what circumstances a duty of care exists giving rise to a claim under negligence and whether there exist different kinds of duties giving rise to different kinds of remedies. In particular, two strands of development have followed, one in relation to general duties of care, allowing recovery for personal injury and physical damage, and another in relation to so-called special relationships that allow recovery for pure economic loss under tort.

The general rule for evaluating whether or not a duty of care exists in particular circumstances has developed over time since the ruling in *Donoghue*. While *Donoghue* is still remembered for Lord Atkin's formulation of the 'neighbour principle' for identifying in relation to which actors a duty of care exists, this principle is not seen as crucial for actually deciding the case.[184] Following intermediary approaches,[185] the ruling in the *Caparo Industries Ltd* v *Dickman* case is seen as the current formulation of the requirements for a

[182] Stapleton, "Duty of care and economic loss: a wider agenda" 277.
[183] Peel 643–656.
[184] For example Murphy sees that Donoghue is typically cited for two reasons, these being firstly the establishment of a duty of care from manufacturers to users and secondly Lord MacMillan's statement that 'the categories of negligence are never closed', leaving open the development of duties of care. Murphy 24.
[185] In particular *Anns* v *Merton London Borough Council* [1978] A.C. 728, which concerned a claim by lessees of apartments against a city council that had negligently approved a builder's faulty plans. In that case the House of Lords established that in order for a duty of care to exist there should be a 'sufficient relationship of proximity based upon foreseeability' and consideration of reasons why a duty of care should not exist. While this so-called '*Anns'* test was buried by the ruling in *Murphy* v *Brentwood DC* [1991] 1 AC 398, it has still been referred to in later caselaw, e.g. in *Spring* v *Guardian Assurance Plc* [1995] 2 AC 296.

general duty of care to arise.[186] In that case, the claimants bought shares in a company based on annual accounts prepared by the defendants. This was followed by a successful takeover bid from the claimants. However, the claimants then alleged that the accounts were so inaccurate that, had they known it, they would never have bid for the company. The claim failed when the House of Lords saw that accountants had no general duty of care towards the public or shareholders interested in increasing their share of a company. The House of Lords formulated the existence of a duty of care as dependent on 1) that the claimant is foreseeable; 2) that there is a relationship of proximity between the claimant and defendant; and 3) that imposing a duty of care on the defendant is fair, just, and reasonable under the circumstances.[187]

In particular, the *Caparo* test has been recently restated in the 2011 appeals court ruling in *Chandler* v *Cape Plc*.[188] *Chandler* v *Cape* is a potentially highly influential ruling in relation to *production liability* finding that a tortious duty of care can exist between a parent company and its subsidiary's employees despite the fact that no relevant *company law* relationship exists for such a duty of care.[189]

Turning to so-called special relationships, one often used distinction between claims under contract and tort under English law is that they allow compensation for different types of damages. Contractual causes of action allow the recovery of expectation damages, including pure economic loss, while recovery under tort is limited to reliance damages typically including damage to property or person but excluding pure economic loss.[190]

With regard to English law, the notion that pure economic loss could not be recovered under tort changed with the 1963 House of Lords ruling in *Hedley Byrne & Co Ltd* v *Heller & Partners Ltd*.[191] In that case an advertising agent wished to verify a customer's financial situation and asked their bank to get a financial report from the customer's bank. Despite the positive report the customer went into liquidation. The advertising agent sued the customer's bank for losses arising out of the negligently prepared report. The court found that the customer's bank owed a duty of care to the advertising agent due to

[186] [1990] UKHL 2.
[187] Generally Murphy 33–45.
[188] Lord Bridge at page 618: *The three-stage test in Caparo, to which the judge refers, is the test established in Caparo Industries plc v Dickman [1990] 2 AC 605 for determining whether a situation gives rise to a duty of care. The three ingredients are that the damage should be foreseeable, "that there should exist between the party owing the duty and the party to whom it is owed a relationship characterised by the law as one of "proximity" or "neighbourhood" and that the situation should be one in which the court considers it fair, just and reasonable that the law should impose a duty of a given scope upon the one party for the benefit of the other."*
[189] The *Chandler* case is discussed in more detail in Chapter 4. The ruling has also been developed in e.g. *Thompson v The Renwick Group Plc* [2014] EWCA Civ 635.
[190] E.g. Whittaker, "Privity of Contract and the Tort of Negligence: Future Directions" 207–212.
[191] [1964] AC 465.

sufficient proximity giving rise to a special relationship. However, the *disclaimer* included in the report excluded any liability.[192]

The recoverability of pure economic loss in *Hedley Byrne* was made dependent on the existence of a special relationship akin to a contract that gives rise to a special duty of care.[193] Following *Hedley Byrne*, a special relationship may exist when one actor reasonably relies on the skill and care of the other.[194] The exact nature of a special relationship was, however, unclear. Thus while the ruling in *Hedley Byrne* was generally recognized as having opened up the possibility of recovering pure economic loss under tort in the specific case of negligent misstatements, at the same time it opened up the door for attempting recovery of pure economic loss in diverse different contexts.[195] A trend of liberal interpretation of the term ensued.[196] According to Stapleton:[197]

> *With hindsight, the explosive potential of Hedley Byrne is evident. It can be taken to rest on the dual propositions that there is nothing about pure economic loss per se to warrant its being irrecoverable in negligence actions, and that in as much as caution is generated by concern about opening floodgates to indeterminate liability, it is focused on negligent words not negligent acts. Later, when it became clear that negligent acts could equally well cause economic loss it was not, therefore, surprising that Hedley Byrne was applied to cases where negligent professional acts generated economic loss…*

Among the cases expanding liability under special relationships, the 1983 House of Lords ruling in *Junior Books Ltd* v *Veitchi Co Ltd* is seen as the 'high-water mark'.[198] In *Junior Books*, an employer was found to have an action under tort against a specially selected subcontractor, thus allowing tort to be used to override privity in relation to pure economic loss (i.e. the decrease in value of a building due to faulty floor-work) and not just in relation to personal injury or physical damage. However, the courts soon backed away from this approach to the extent that by the early 1990s *Junior Books* seemed to have little practical relevance other than as a cautionary tale of judicial adventurism

[192] Since then the question might be raised whether such an exclusion of liability could be deemed as unreasonable under the 1977 Unfair Contract Terms Act. See *Eric* v *Bush* [1990] UKHL 1 and, more generally, Stapleton, "Duty of care and economic loss: a wider agenda."
[193] E.g. Stapleton, "Duty of care and economic loss: a wider agenda" 286.
[194] Thus also referred to as 'assumption of responsibility', e.g. van Dam, *European Tort Law* 214.
[195] *Hedley Byrne*, for discussion see e.g. Stapleton, "Duty of care and economic loss: a wider agenda" 259–263; Peel 376 ff.
[196] Murphy, for example, notes that while the House of Lords suggested that the term apply only to certain professional relationships where giving advice was the primary purpose of the relationship, the Court of Appeals ignored this in practice. Murphy 83.
[197] Stapleton, "Duty of care and economic loss: a wider agenda" 267.
[198] [1983] 1 AC 520. For discussion, Whittaker, "Privity of Contract and the Law of Tort: The French Experience" 328; Whittaker, "The Development of Product Liability in England" 75.

not to be repeated.[199] Whittaker, for one, sees that 'prominent in the judgments [displacing *Junior Books*] is the idea that privity of contract or "the contractual structure which the parties have chosen to enter" should be protected from disruption by the intrusion of the tort of negligence'.[200] Writing in 1991, Stapleton went further by arguing that the then current House of Lords would never have allowed a ruling akin to *Hedley Byrne* and was intent on maneuvering around it by limiting it to identical fact situations, i.e. negligent misstatements.[201]

Nonetheless, Whittaker, writing just four years later in 1995, argued that 'recovery in respect of pure economic loss in the tort of negligence appears to

[199] In *Simaan General Contracting Co* v *Pilkington Glass Lid (No 2)* [1988] QB 758, one justice noted that *Junior Books* cannot 'now be regarded as a useful pointer to any development of the law,' and that citation from the case could not serve any useful purpose in the future. Nonetheless Junior Books continued to pick academic interest. For an attempt at fitting in *Junior Books* among the broader contours of special relationships, see Stapleton, "Duty of care and economic loss: a wider agenda." For even broader theorization based on the case, see Deryck Beyleveld and Roger Brownsword, "Privity, Transitivity and Rationality" (1991) 54 The Modern Law Review 48.

[200] Whittaker, "Privity of Contract and the Law of Tort: The French Experience"; Whittaker, "Privity of Contract and the Tort of Negligence: Future Directions" 191; Whittaker, "The Development of Product Liability in England" 75; Beyleveld and Brownsword passim, g. 51, 53, 70. Cases typically cited as evidence of this retrenchment include rulings such as *Balsamo* v *Medici* [1984] 1 WLR 951 (no duty of care for pure economic loss owed by sub-agent to principal); *Muirhead* v *Industrial Tank Specialities Ltd and Other* [1986] QB 507 (Claimant employed defendant to supply fish tanks for storing live lobsters. Defendant Industrial Tank Specialities contracted another company, Leroy Somer Electric Motors Ltd, to make electric motors for pumps oxygenating the tanks. The pump motors were defective and the lobsters died. Furthermore, the defendant became insolvent. The Court of Appeal overturned the lower court's application of Junior Books and argued that it could not be used to support the present facts. Thus the claimant could only recover foreseeable physical loss and consequential economic loss, but not pure economic loss.); *Simaan General Contracting Co* v *Pilkington Glass Ltd* [1988] QB 758 (Main contractor ordered sub-contractor to purchase glass from Pilkington Glass. Glass was partly defective and main contractor did not receive the full price from the employer. Main contractor sued supplier for price difference. Claim was not allowed due to lack of special relationship. Whittaker sees that the disallowance of an action under tort was here due to the contractual structure which would otherwise have been circumvented, Simon Whittaker, "The Development of Product Liability in England," *The Development of Product Liability* (Cambridge University Press 2010) 75.); and *Leigh and Sillavan Ltd* v *Aliakmon Shipping Ltd (The Aliakmon)* [1985] UKHL 10 (no duty of care for pure economic loss owed by carrier of goods to someone at whose risk the goods were at the time of their damage but who did not at that time hold a proprietary or possessory title.). Like Junior Books, and unlike Hedley Byrne, however, these cases involve at least tripartite scenarios. For example, as in *Junior Books*, both *Muirhead* and *Simaan* dealt with hopping over an actor in a chain of contracts, either due to insolvency or other reasons such as settlement or convenience.

[201] Stapleton, "Duty of care and economic loss: a wider agenda" 259–263. Stapleton identifies three 'pockets' of caselaw related to economic loss. The first of these includes *Hedley Byrne* type cases. The second pocket consists of cases relating to a dependence on the property of a third party, such as *Spartan Steel & Alloys Ltd* v *Martin & Co (Contractors) Ltd* [1973] QB 27, *Candlewood Navigation Corp Ltd v Mitsui OSK Lines Ltd (Mineral Transporter)* [1986] AC 1, and *The Aliakmon*. The third pocket focusses on the acquisition of defective property, as under *Junior Books*, *D. & F. Estates Ltd* v *Church Commissioners for England and Wales* [1988] UKHL 4, and *Murphy*.

be undergoing something of a revival'.[202] In 2002, Markesinis was more adamant, writing that:[203]

> *Thus, once again, a series of decisions revealed a tendency to advance the frontiers of liability in negligence by applying Hedley Byrne beyond its factual limitations to performance services. (Only this time the expansion followed the directions given in Murphy and Caparo and was attempted incrementally).*

Thus while it is generally accepted that liability in tort for pure economic loss is available in a broader scope than what was the case in the original *Hedley Byrne* ruling, this revival seems to be limited to specific cases similar to *Hedley Byrne*. For example, in his textbook on torts Murphy notes the 'extended *Hedley Byrne* principle'[204] while acknowledging that beyond it 'it seems that the courts take the view that no duty to protect others from pure economic loss will arise however predictable that loss may be, and however just and reasonable it might appear that the defendant should bear the loss'.[205] Murphy continues by noting that 'there is no obvious reason for this stance'.[206] Some examples of the current, extended reach of the *Hedley Byrne* principle include cases such as *Smith* v *Eric S Bush*,[207] *Henderson* v *Merrett Syndicates*,[208] *White* v *Jones*,[209] *Williams* v *Natural Life*,[210] and *Spring* v *Guardian Assurance Plc*.[211]

Similarly to general duties of care, the current standard test for the existence of a special relationship is elaborated in the ruling in *Caparo*

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[202] Whittaker, "Privity of Contract and the Tort of Negligence: Future Directions" 203. The cases that Whittaker here refers to are *Henderson* v *Merrett Syndicates, White* v *Jones, Spring* v *Guardian Assurance Plc* [1995] 2 AC 296 (finding that sending a bad and inaccurate letter of reference could be a breach of duty under negligence for the employee), and *Bryan* v *Maloney* (1995) 128 ALR 163 (High Court of Australia).

[203] Markesinis and Unberath 336–337.

[204] Murphy 81–97.

[205] Murphy 94.

[206] Murphy 94.

[207] [1990] UKHL 1. *Smith* v *Eric Bush* is often seen as the 'outer extent' of Hedley Byrne liability. A surveyor had inspected and valued a property and disclaimed liability. Despite stating that no essential repairs were necessary, the chimney collapsed. The House of Lords found that it was reasonable for purchasers of 'modest houses' to be able to rely on surveyors and not to be required to resort to contract. For the challenges inherent in the judgment see Stapleton, "Duty of care and economic loss: a wider agenda" 267–283.

[208] Discussed above in Subsection 2.2.1. For example Murphy sees the difference between Caparo and Henderson possibly being that in Henderson the claimants had specifically trusted the defendants with their investments, while in Caparo the claimants merely relied on information provided by defendants to make their own investment decisions. Murphy 85–86.

[209] Discussed above in Subsection 2.2.1.

[210] Discussed above in Subsection 2.2.1

[211] [1995] 2 AC 296, concerning a former employer's liability towards the employee for a negligently prepared reference, though the case is also related to contractual duties inherent in an employment agreement and a regulatory requirement to give references to employees.

Industries Plc v *Dickman.*[212] As noted above, the case concerned auditor's liability towards existing shareholders interested in acquiring the whole company. According to the court, in order for a special relationship to exist it must be that 1) the defendant is fully aware of the nature of the transaction which the claimant had in contemplation as a result of the information; 2) the defendant communicated the information directly to the claimant or knew that it would be so communicated to the claimant or a restricted class of persons including the claimant; 3) that the defendant would anticipate the claimant to rely on the information; and 4) that the purpose for which the claimant relies on the information is connected with interests that it is reasonable to require the defendants to protect.

2.2.3 Contract and Tort Intertwined: The English Experience

The interplay of tort and contract in regulating private ordering under English law is made tangible by the historical developments related to establishing liability for defective products. Following developments in English contract law during the 19th century, contractual actions were limited to their parties on the one hand but, on the other, *inter partes* they were freed from earlier *caveat emptor* doctrines through implied warranties of merchantability. At the same time, increasing numbers of users of goods, who were not buyers and thus not in privity with any seller or manufacturer, were affected by the consequences of defective goods, causing what was seen to be a legal anomaly as buyers' harms were generally actionable while mere users' harms were not. This lead to the gradual liberation of actions in tort so that, in cases where a general duty of care could be identified, tort actions could be used to establish liability despite the existence of specific contractual arrangements along the chain of sales.

Product liability under the tort of negligence, however, is limited by the general duty of claimants to show a defendant's tortious negligence. In a few cases the *res ipsa loquitur* or similar doctrines have helped plaintiffs in this regard, but the burden of showing negligence remained a major challenge for recovery in tort.[213] Unlike the other legal systems discussed here, no English homegrown solution to this problem was adopted despite extensive discussion over statutory reform. The situation was remedied only with the 1985 EC Product Liability directive, based in part on American developments of product liability law and implemented in England through the 1987 Consumer Protection Act, thus bringing English product liability law to a level comparable to the other legal systems discussed here, i.e. the United States, Germany, and France.[214]

[212] [1990] UKHL 17.
[213] Whittaker, "The Development of Product Liability in England" 74–75.
[214] Consumer Protection Act 1987 c. 43. Generally, Whittaker, "The Development of Product Liability in England"; Stapleton, *Product Liability*.

On the other hand, the relatively restricted form of both English contract and tort law may be particularly robust in spreading to transnational contexts. First, the use of contract is much more restricted by privity than under the other legal systems studied here, thus most closely resembling the model of classical contract law. Only very basic exceptions to this rule, such as a narrow version of the third party beneficiary doctrine relying on the parties' agreement, are allowed. In the other legal systems discussed here the confines of implied agreement are enlarged considerably as will be seen in the next three subsections.

At the same time, the earlier policy orientation of English common law in relation to constricting the use negligence to cover relationships of actors in contractual (or, as seen in the *Chandler* v *Cape* case, equity-ownership based) structures appears largely declined. An action in negligence can exist alongside contractual structures, guaranteeing the possibility of using negligence to override such structures. The scope of claims under the tort of negligence is tied to the extent to which these claims are or are not regulated by any relevant contract. And if they are, legislative intervention under the 1977 Unfair Contract Terms Act subjugated any attempt at limiting liability under negligence to a test of reasonability. While this may not guarantee an equitable approach for example due to challenges related to burdens of proof, it may be close to common ground in the form of a smallest common denominator from a comparative perspective, with or without the additional statutory factor of the 1977 Unfair Contract Terms Act. Thus the English approach provides a starting point for tort-based approaches to liability in structures of production.

2.3 United States—Legal Creativity by Taking Doctrine 'Less Seriously'

2.3.1 The Personal and Material Scope of Contracts: Policy's Upper Hand over Form

The common laws of England and the many jurisdictions of the United States[215] originate from the same legal tradition. This tradition is visible in cases like *Winterbottom* v *Wright* and *Tweddle* v *Atkinson*, which presented crucial hurdles in relation to contractual and tort actions under the laws of England and which were reflected also the United States. However, despite the common origins of English and American common law, the legal narratives begun to separate from one another.[216] These differences are probably due to the cultural,

[215] There are at least 53 United States jurisdictions that have the power to create common law (including the 50 states and the Federal Admiralty Jurisdiction). E.g. David W Robertson, "An American Perspective on Negligence Law" in Simon Deakin, Angus Johnston and Basil Markesinis (eds), *Markesinis and Deakin's Tort Law* (Clarendon Press 2008) 283–284.

[216] Generally on the history of American law, see Lawrence Friedman, *A History of American Law* (3rd edn, Touchstone 2005).

institutional, and legal differences underlying the different common law systems.[217] From a more dogmatic perspective, the differences in the use of contract and tort between English and American law may result from different attitudes towards formal law, with American courts taking doctrines such as consideration and privity less seriously than English courts.[218] As a result, while English law has focused on developing remedies under the tort of negligence, American courts have seen concurrent growth of remedies under both contract and tort.[219]

Even considering the variance between individual US jurisdictions, the differences between English and American common law during the late 19th and early 20th centuries are clearly visible in relation to the personal scope of contracts, in particular in relation to the doctrine of contractual third-party beneficiaries and transmissible implied warranties.[220] Early American courts followed English courts by being open to contractual third-party beneficiary actions to the extent that by the early 19th century the majority of US states allowed such actions.[221] This changed with the arrival of so-called classical contract law.[222] Classical contract law valued the extreme consistency of legal rules, such as privity and consideration, over substantive justice considerations. This shift can be seen for example in the English 1862 ruling in *Tweddle* v *Atkinson*, which overruled earlier precedent that had allowed third-party beneficiary actions, such as *Dutton* v *Poole* (1677) and *Martyn* v *Hind* (1776).[223] Through *Tweddle* v *Atkinson* and later caselaw, contractual third-party beneficiary actions were explicitly denied under English common law.

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[217] Stapleton, *Product Liability* 5; Robertson 283–285; Green and Cardi 431–435.

[218] E.g. Markesinis has argued that differences in relation to the use of contractual actions between English and American law result from US jurisdictions taking doctrines such as consideration and privity less seriously than English courts. Markesinis and Unberath 94. Similarly, Stapleton sees English courts as more formalistic than their counterparts in the United States. Stapleton, *Product Liability* 5.

[219] One example is the approach of the American Uniform Commercial Code to contractual warranties more closely reflecting French ideas of transmissible warranties as opposed to the more restricted ideas of warranty under English law. Markesinis and Unberath 94.

[220] Again, there can be considerable differences between US jurisdictions. For example, in relation to the contractual third-party beneficiary doctrine some US jurisdictions, such as New York, have accepted their use and development early on. Others, in particular Massachusetts, have more closely followed English developments of the common law until relatively recently. The general gist, however, is that third-party beneficiary theories were accepted at least to the extent that they were included in the American Law Institute's Restatement (First) of Contracts in 1932. The divergence of Massachusetts is said to have been due to the influence of formalist classical contract law developed in Harvard. Eisenberg, "Third-Party Beneficiaries."

[221] Eisenberg, "Third-Party Beneficiaries" 1360–62; Peter Karsten, "The 'Discovery' of Law by English and American Jurists of the Seventeenth, Eighteenth, and Nineteenth Centuries: Third-Party Beneficiary Contracts as a Test Case" (1991) 9 Law & Hist. Rev. 327.

[222] For more formalist 'classical contract law' and its relationship to a more functionalist 'modern contract law', see e.g. Eisenberg, "Third-Party Beneficiaries" 1358–1359, 1365–1371.

[223] See Section 2.2 on English law and Eisenberg, "Third-Party Beneficiaries" 1358–1362.

In the United States, however, the backlash of classical contract law was not quite as harsh. In many states third-party beneficiary actions survived and provided a foundation for an expanding source of actions during the 20th century. The tenacity of American support for the contractual third-party beneficiary doctrine during the reign of classical contract law is perceived in particular through two New York rulings, *Lawrence* v *Fox* (1859)[224] and *Seaver* v *Ransom* (1918).[225]

In the 1859 ruling *Lawrence* v *Fox*, the New York Court of Appeals allowed with a 6–2 majority a beneficiary to sue upon another's contract. In that case Holly, who owed money to Lawrence, lent money to Fox in return for which Fox promised to pay Holly's debt to Lawrence. When Fox did not do so, Lawrence sued him and the court allowed an action for recovery between Lawrence and Fox based on principle adopted from the law of trusts. Similar cases have since been referred to as 'creditor beneficiary cases', in reference to the promise to pay a debt of the promisee.[226] As long as the facts resembled creditor beneficiary cases, third-party beneficiary actions were subsequently also allowed in other circumstances, such as cases revolving around an assumption of mortgage.[227]

In the 1918 ruling *Seaver* v *Ransom*, the New York Court of Appeals allowed third-party beneficiary actions in a different kind of case. Mrs Beman wanted to bequeth her house to her niece. As she was in failing health, her husband promised to compensate the niece in his will instead. The husband did not keep his promise, following which the court allowed the niece to recover from the executors. Similar cases were subsequently referred to as 'donee beneficiary cases', because they dealt with gratuitous promises to third parties.[228]

The ruling in *Seaver* v *Ransom* is seen as particularly important.[229] During the period between *Lawrence* v *Fox* and *Seaver* v *Ransom*, New York courts had generally adopted a restrictive interpretation of the third-party beneficiary doctrine, limiting it to factual situations similar to *Lawrence* v *Fox*. In *Seaver* v *Ransom*, however, the court argued that the doctrine of *Lawrence* v *Fox* is progressive, making it possible for courts to enlarge the scope of the third-party beneficiary doctrine.[230] According to Eisenberg, *Seaver* v *Ransom* is positioned smack in the middle of the transition from the rigid rules of classical contract law, which tend to disallow third-party beneficiary claims on formal grounds or

[224] 20 N.Y. 268 (1859).
[225] 120 N.E. 639 (N.Y. 1918).
[226] E.g. Brian H Bix, *Contract Law: Rules, Theory, and Context* (Cambridge University Press 2012) 111; Farnsworth 655.
[227] *Burr* v *Beers*, 24 N.Y. 178 (1861). See Farnsworth 655.
[228] E.g. Bix 111; Farnsworth 656.
[229] Eisenberg, "Third-Party Beneficiaries" 1368–1369.
[230] *Seaver* v *Ransom*, 120 N.E. 639, 640–41 (N.Y. 1918). See also Farnsworth 656.

to limit them to specific standardized categories in the form of pre-existing legal obligations, and modern contract law, which recognizes also prior moral obligations as a basis for enforcement.[231]

These two types of third-party beneficiary actions, creditor and donee actions, were subsequently 'codified' in the 1932 Restatement (First) of Contracts.[232] Under the Restatement (First) of Contracts, if a beneficiary's action did not fall under the category of either creditor or donee beneficiaries she was seen as an incidental beneficiary without a cause of action. While the Restatement (First) of Contracts is seen as 'generally representative of the law at the time', all jurisdictions did not follow suite.[233] For example, in Massachusetts, perhaps a hotbed of classical contract law due to the influence of Harvard Law School in developing it, recovery by contract beneficiaries was allowed only in 1979.[234] On the other hand, in New York the requirement of a family relationship of some kind as a foundation for donee beneficiary cases was explicitly abandoned only in 1985.[235] In any case, cases allowing third-party beneficiary actions proliferated.[236] Some of the many contexts in which the third-party beneficiary theory gained usage include construction contracts, payment bonds, and government contracts.[237]

To reflect evolving caselaw, the 1981 Restatement (Second) of Contracts departed from the approach of the earlier restatement by replacing the categories of creditor and donee beneficiaries with a broader category of intended beneficiaries.[238] To qualify as an intended beneficiary, as opposed to an incidental beneficiary who has no cause of action, an actor must meet the two requirements of § 302(1). Firstly, the 'recognition of a right to performance in the beneficiary' must be 'appropriate to effectuate the intention of the parties'. Secondly, 'the performance of the promise' must 'satisfy an obligation of the promisee to pay money to the beneficiary' or 'the circumstances indicate that the promisee intends to give the beneficiary the benefit of the promised performance'.

Despite the two legs of the second requirement resembling, respectively, creditor and donee beneficiaries, there are differences to the earlier restatement.[239] For one, there are differences in how cases that would have

[231] Eisenberg, "Third-Party Beneficiaries" 1371–1373.
[232] American Law Institute, *Restatement of the Law (First) of Contracts* (1932) §§ 133(1)(a) & (b). Eisenberg, "Third-Party Beneficiaries" 1373–1374, 1376–1377; Farnsworth 656–657.
[233] Farnsworth 656–7.
[234] Eisenberg, "Third-Party Beneficiaries" 1367.
[235] Eisenberg, "Third-Party Beneficiaries" 1368.
[236] See, generally, Eisenberg, "Third-Party Beneficiaries" 1389–1412; Farnsworth 651–652, 664–670. NB the examples include cases both prior to and following the 1981 Restatement (Second) of Contracts.
[237] Eisenberg, "Third-Party Beneficiaries" 1389–1412; Farnsworth 651–652, 664–670.
[238] American Law Institute, *Restatement of the Law (Second) of Contracts* (1981) § 302(1). See Farnsworth 657.
[239] Farnsworth 658.

fallen in either of the two categories of the earlier restatement are classified under the two legs of the second requirement of the later restatement.[240] For another, the question arises of whose intention counts when courts are evaluating third-party beneficiary situations.[241] The Restatement (Second) of Contracts refers on the one hand to 'the intention of the parties' and on the other hand to the promisee's intention. US jurisdictions vary in that some focus on both the promisor and promisee, others focus on the promisee's intentions, and a remainder ask whether the promisor knew or ought to have known of the promisee's intention.[242]

Despite the general acceptance of the third-party beneficiary doctrine in the United States, in exactly which contexts in different US jurisdictions it is applied instead of or in addition to other causes of action, such as the tort of negligence, is a somewhat confusing matter. For example, under English law cases of solicitor liability towards intended legatees have, following the ruling in *White* v *Jones* and despite the Contracts (Rights of Third Parties) Act of 1999, been the exclusive domain of the tort of negligence. In the United States courts have used both contractual third-party beneficiary theories and a negligence based approach to establish liability in similar cases.[243] For example, the 1961 Californian ruling in *Lucas* v *Hamm* is seen by some authors as revolving around a contractual third-party beneficiary theory, while others view it as an action under the tort of negligence.[244] In some situations courts may be reluctant to find liability towards others than clients and thus negligence is deemed more appropriate due to its restrictions in relation to contract.[245] On the other hand, some courts have adopted clearly contractual approaches. For example in the ruling in *Guy* v *Liederbach* the Pennsylvania Supreme Court rejected negligence in favor of a contractual third-party beneficiary approach.[246]

Thus unlike under English law, where the separation of tort and contract into their proper spheres of application is strict on the grounds of privity, under American laws contract and tort can be concurrently available in overcoming

[240] Farnsworth 663.
[241] Farnsworth 658–660, 662–664.
[242] Bix 111; Phillips and Lim 368–375.
[243] Eisenberg, "Third-Party Beneficiaries" 1395.
[244] 364 P.2d 685 (Cal. 1961), for other cases see e.g. Farnsworth 659–660. Regarding the latter view for example Feinman sees that the case is one in a line of cases establishing that while a third party beneficiary action is available, liability lies in negligence on the basis of the so-called 'balance of factors' test. Feinman, "The Economic Loss Rule and Private Ordering" 815–816. In its ruling in *Heyer* v *Flaig* (70 Cal. 2d 223) the Californian Supreme Court noted that while both actions were sustained in Lucas, the action under contract was 'conceptually superfluous' because the 'crux of the action must lie in negligence…'. In the end, the *Heyer* court found that the duty rested on finding that 'public policy requires that the attorney exercise his position of trust and superior knowledge responsibly so as not to affect adversely persons whose rights and interests are certain and foreseeable'.
[245] As an example Farnsworth mentions trust beneficiaries as in *Spinner* v *Nutt*, 631 N.E.2d 542 (Mass. 1994). Farnsworth 659–660.
[246] 501 Pa. 47 (1983). Generally Feinman, *Professional Liability to Third Parties* 45.

the bounds of privity. Claimants have in many cases a choice between alternative concurrent remedies that may or may not differ in their practical results, and thus in some cases an explicit choice between founding an action in contract or tort may even seem unnecessary to courts.[247] One example is that of misrepresentation related to a contract. Misrepresentation may sound either in tort or contract, entailing possible differences such as with regard to limitation periods or burdens of proof.[248] Another example is product liability law, where claimants may be able to raise a claim under theories of contractual warranty, general negligence, and product liability, each with their own parameters for example in relation to discovery.[249] These differences have on occasion seen by courts as an 'election of remedies', meaning that once a claimant has chosen to sue under tort she may not sue under contract anymore.[250] Generally, however, Farnsworth sees that 'one is not disadvantaged by asking for both kinds of relief in the alternative'.[251]

In relation to regulating contract terms US legislation has, similarly to English law, accepted implied warranties.[252] A major difference to English law is that these warranties can be 'a-classical' in that they are transmissible beyond contract boundaries within the chain of sales and even beyond the sales chain.[253] In a product liability context, in its 1913 ruling in *Mazetti* v *Armour & Co.* a Washington appeals court established that a buyer, in that case a restaurant, could sue not only their direct contractual partner, a retailer, but could also leapfrog over the retailer and sue the manufacturer of impure food under an implied warranty and recover pure economic loss.[254] As vividly described by Prosser, *Mazetti* followed nationwide agitation over food standards expressed in the press and literature by investigative journalists and spreading into the political agenda.[255] The substantive reasoning of *Mazetti* in relation to food products was followed in other states and by 1960 had become accepted in the majority of the United States.[256] Initially there was confusion over which theory of liability explained the cause of action in *Mazetti*.[257] After

[247] E.g. *Glanzer* v *Shepard* 233 N.Y. 236 (N.Y. 1922).
[248] E.g. Farnsworth 234, 243, 253.
[249] E.g. discovery in relation to a negligence claim might focus on how the product was made while discovery in relation to a warranty claim might focus on how a product is marketed.
[250] Farnsworth 253.
[251] Farnsworth 253.
[252] Farnsworth.
[253] Stapleton, *Product Liability* 20–24.
[254] 135 P 633.
[255] William L Prosser, "The Assault Upon the Citadel (Strict Liability to the Consumer)" (1960) 69 Yale Law Journal 1099, 1104–1106.
[256] Prosser, "The Assault Upon the Citadel (Strict Liability to the Consumer)" 1106–1110.
[257] Prosser, "The Assault Upon the Citadel (Strict Liability to the Consumer)" 1106. In footnotes 152–153 and their accompanying text Prosser cites Cornelius W. Gillam's Products Liability in a Nutshell, 37 Oregon Law Review 119 (1957) and lists the 29 alternative techniques Gillam had identified in caselaw for overcoming privity in *Mazetti* type cases.

meddling with theories such as agency and third-party beneficiary contracts, courts settled with the idea of warranties running with the goods and thus seeing liability as founded in warranty or, as it can also be called, 'a-classical' warranty to differentiate it from the classical common law notion of implied warranties being confined by privity.[258]

The challenges of suing under tort, for example in relation to burdens of proof, helped push the a-classical warranty approach to other contexts than foodstuffs. After some back and forth,[259] the New Jersey Supreme Court's ruling in *Henningsen* v *Bloomfield Motors* is generally seen to have tipped the tide.[260] In that case the court allowed an injured user, who was not the buyer of the car, to sue the retailer and manufacturer for defects on the basis of an implied warranty and despite the manufacturer's disclaimer.[261] Thus the court allowed that a-classical warranties, firstly, could apply generally to manufactured goods and not just food or other more narrowly construed categories of products and, secondly, that such warranties could override disclaimers made by manufacturers. While the scope of such 'a-classical' warranties currently differs between different states and has to an extent been excluded by the use of tort, they remain available.[262] Thus also in this regard American law differs considerably from English common law.

A further alternative, perhaps similar to implied guarantees but related to payments, might exist in the form of unjust enrichment.[263] In some exceptional cases unjust enrichment may be able to cross contractual boundaries so that e.g. subcontractors not paid by the general contractor can sue an employer who has

[258] Prosser, "The Assault Upon the Citadel (Strict Liability to the Consumer)" 1106; Stapleton, *Product Liability* 21–22.
[259] Prosser, "The Assault Upon the Citadel (Strict Liability to the Consumer)."
[260] 161 A 2d 69 (1960). William L Prosser, "The Fall of the Citadel (Strict Liability to the Consumer)" (1966) 50 Minnesota Law Review 791. For discussion of *Henningsen* in relation to policing agreements, see also Farnsworth 294.
[261] Regarding the disclaimer, the court noted: '*The disclaimer of the implied warranty and exclusion of all obligations except those specifically assumed by the express warranty signify a studied effort to frustrate that protection. True, the Sales Act authorizes agreements between buyer and seller qualifying the warranty obligations. But quite obviously the Legislature contemplated lawful stipulations (which are determined by the circumstances of a particular case) arrived at freely by parties of relatively equal bargaining strength. The lawmakers did not authorize the automobile manufacturer to use its grossly disproportionate bargaining power to relieve itself from liability and to impose on the ordinary buyer, who in effect has no real freedom of choice, the grave danger of injury to himself and others that attends the sale of such a dangerous instrumentality as a defectively made automobile. In the framework of this case, illuminated as it is by the facts and the many decisions noted, we are of the opinion that Chrysler's attempted disclaimer of an implied warranty of merchantability and of the obligations arising therefrom is so inimical to the public good as to compel an adjudication of its invalidity*.'
[262] E.g. Marshall S Shapo, *Shapo on the Law of Products Liability Vol. I* (2013) § 6.01[B].
[263] Bix 42–43.

not paid the general contractor,[264] or a contractor not paid by the tenant suing an owner instead.[265]

A number of other alternatives are generally available for policing contracts. While a comprehensive discussion of such is not possible here, some similarities and in particular differences compared to English common law may be pointed out.

For example, similarly to English law the general starting point under American law is that actors can disclaim liability for torts. However, a number of public policy exceptions have grown to limit this possibility.[266] For general examples, actors generally cannot exempt themselves from tortious liability for intentionally or recklessly caused harm, [267] while for example employers cannot exempt their liability towards employees, common carriers or public utilities cannot exempt their liability in negligence towards customers, and exculpatory clauses cannot be used in residential leases.[268] In particular, however, public policy requires that a seller of a product typically cannot exempt itself from liability imposed for physical harm due to a product's unreasonably dangerous condition.[269] Uncertainties remain for example in cases revolving around freely-negotiated contracts between equal parties and in relation to whether a seller can exempt itself for non-fraudulent misrepresentation.[270]

The *Tunkl* test, derived from the Californian Supreme Court's 1963 ruling in *Tunkl* v *Regents of University of California*, offers one possibility for evaluating whether a limitation clause is unenforceable under public policy.[271] In that case, the court emphasized six factors in ruling a clause limiting the liability of a hospital for negligence as unenforceable. These were the nature of the undertaken business as suitable for public regulation, the great importance and practical necessity of the service for the public, a general willingness to perform the service in question to any member of the public, the decisive advantage in bargaining strength, the use of a standardized adhesion contract not allowing additional risk coverage for additional fees, and placing the other

[264] *Commerce Partnership 8090 Limited Partnership* v *Equity Contracting Co.*, 695 So. 2d 383 (Fla. App. 1997).
[265] *Idaho Lumber, Inc* v *Buck*, 710 P.2d 647 (Idaho App. 1985).
[266] Generally, Farnsworth 318–322.
[267] Eg *Martin Marietta Corp* v *International Telecommunications Satellite Org*, 991 F.2d 94 (4th Cir. 1993), 'under Maryland law, a party… cannot waive liability for gross negligence' (cited by Farnsworth).
[268] Farnsworth 320–321.
[269] Farnsworth 321–322. See also the quote from *Henningsen* in fn. 47 above.
[270] While limitations on product liability are generally unenforceable, Farnsworth sees no good reason for this being so 'under a fairly negotiated contract between two merchants for the sale of an experimental product'. This does not mean that third parties would be affected. *Keystone Aeronautics Corp* v *R.J. Enstrom Corp*, 499 F.2d 146 (3d Cir. 1974): 'Pennsylvania law does permit a freely negotiated and clearly expressed waiver of [Restatement (Second) of Torts] § 402A between business entities of relatively equal bargaining strength' (cited by Farnsworth). Farnsworth 322.
[271] 383 P.2d 441, 445–46 (Cal. 1963).

party's person or property under its control.[272] Some states have followed the Tunkl example, though with emphasis on public interest deriving from state legislation and exceptions with regard to recreational activities of hazardous nature.[273] While substantively perhaps similar, this approach is considerably different from that of English law which relies on statutory interpretation of the 1977 Unfair Contract Terms Act instead of court-developed public policy.

The notion of unconscionability is also used to police contract terms perceived as unfair.[274] Thus for example exemption clauses that disclaim liability under tort are accepted as long as they are not seen as unconscionable.[275] The doctrine, grounded in the proliferation of standard contract terms and unevenness of bargaining power, can be used to police contracts that are perceived as unfair from the onset.[276] For example, UCC 2-302 subsection 1 provides that:

If the court as a matter of law finds the contract or any clause of the contract to have been unconscionable at the time it was made the court may refuse to enforce the contract, or it may enforce the remainder of the contract without the unconscionable clause, or it may so limit the application of any unconscionable clause as to avoid any unconscionable result.

In particular, it is argued that unconscionability helps clarify substantive arguments underlying courts' reasoning that have earlier been clouded by 'interpretation'.[277]

Finally, and again in differentiation from English law,[278] general duties of good faith in contractual relationships are enshrined in both US legislation, such as the Uniform Commercial Code first published in 1952,[279] and restatements of law, such as the 1981 Restatement (Second) of Contracts.[280] The notion of

[272] Generally, Farnsworth 321.
[273] Farnsworth 321.
[274] Generally Farnsworth 285–311. Farnsworth covers also standard contract terms and what he describes as 'precursors to unconscionability'.
[275] E.g. *O'Callaghan* v *Waller & Beckwith Realty Co*, 155 N.E.2d 545 (Ill. 1958) and UCC 1-302(b), which states that 'obligations of good faith, diligence, reasonableness, and care…may not be disclaimed by agreement'.
[276] For what this policing entails in practice, see Omri Ben-Shahar, "Fixing Unfair Contracts" (2011) 63 Stanford Law Review 869.
[277] Farnsworth 294.
[278] E.g. Gunther Teubner, "Legal Irritants: Good Faith in British Law or How Unifying Law Ends Up in New Divergences" (1998) 61 Modern Law Review 11.
[279] For example, Sections 1-201(20) and 1-304 of the current UCC refer to good faith. The former defines good faith as '*honesty in fact and the observance of reasonable commercial standards of fair dealing*', while the latter states that '[e]*very contract or duty within the Uniform Commercial Code imposes an obligation of good faith in its performance and enforcement.*' See generally Robert S Summers, "The Conceptualisation of Good Faith in American Contract Law: A General Account" in Reinhardt Zimmerman and Simon Whittaker (eds), *Good Faith in European Contract Law* (Cambridge University Press 2000) 122–123. (Summers refers to an earlier version of the UCC with different enumeration but with substantially the same provisions regarding good faith).
[280] Relevant sections reprinted for example in Summers 136–141.

good faith has been used in a number of cases and scholars have offered various methods for classifying the concept.[281] In general, Summers sees that good faith is broadly imbibed in American law, covering the negotiation and formation of contracts, the performance of contracts, and the enforcement of contractual rights.[282] On one hand, implied terms of good faith can be read into existing agreements by courts as has been done for example in the numerous examples referred to by Farnsworth.[283] On the other hand, specific doctrines such as misrepresentation are also used to remedy situations that would fall under broad conceptions of good faith, in particular in relation to contract formation.[284]

2.3.2 Overcoming the Limits of Tort by Covering Contractual Policymaking Under a Veil of Torts

Following English common law, the ruling in *Winterbottom* v *Wright* and the ensuing notion of a privity fallacy are one focal starting point in US narratives of the relationship of tort and contract.[285] Also similarly to English common law, the development of implied warranties of merchantability that vested a no-fault liability on sellers towards buyers of defective goods helped pave the way for a general tort of negligence.[286] And again similarly to English common law, pockets of caselaw related to what were seen as inherently dangerous goods, such as poison, worked to gnaw at the sides of the privity fallacy, slowly expanding the possible scope of tortious remedies available to users of defective goods not in privity with a seller.[287]

These tendencies led to the 1916 ruling in *MacPherson* v *Buick Motor Co*.[288] In that case, the buyer of an automobile had been injured when a wheel of his automobile broke. The buyer wanted to sue the manufacturer instead of

[281] For a brief overview, see Summers 118–141.
[282] Summers 120–121, 125–129.
[283] Farnsworth 488–500.
[284] For misrepresentation, see generally Farnsworth 234–255.
[285] Prosser, for example, begins the brief historical review of product liability in his influential piece *The Assault Upon the Citadel* with reference to that case. Prosser, "The Assault Upon the Citadel (Strict Liability to the Consumer)." *Winterbottom* v *Wright* was also cited by US courts, such as by the US Supreme Court in its 1879 ruling in *Savings Bank* v *Ward* (100 U.S. 195) which established a privity bar in relation to economic loss caused by third parties and discussed in more detail in relation to pure economic loss below.
[286] E.g. Stapleton, *Product Liability* 9–16.
[287] Earlier cases attempted to distinguish between inherently dangerous objects, for defects in which a seller might be liable for its negligence despite a lack of privity, such as in relation to belladonna in *Thomas* v *Winchester* (6. N.Y. 397; 1852), and objects not deemed by courts to be inherently dangerous, for which a seller could only be liable for its negligence within the bounds of privity, such as a balance wheel for a circular saw (that eventually caused death) in *Loop* v *Litchfield* (42 N.Y. 351; 1870) or a steam boiler (exploding after installed adjacent to dwellings and stores) in *Losee* v *Clute* (51 N.Y. 494; 1873). For one discussion of how these cases can be construed as a procession, see Melvin A. Eisenberg, "Principles of Legal Reasoning in the Common Law" in Douglas E Edlin (ed), *Common Law Theory* (Cambridge University Press 2007) 90 ff.
[288] 111 N.E. 1050 (N.Y. 1916).

the retailer. The court allowed this despite the lack of privity, with Justice Cardozo arguing that where 'the nature of a thing is such that it is reasonably certain to place life and limb in peril when negligently made, it is then a thing of danger'. This ruling, in practice establishing that claims under the tort of negligence were possible despite contractual structures, preceded its English counterpart *Donoghue* v *Stevenson* by some fifteen years.

Friedman describes the *MacPherson* v *Buick* ruling as 'a decision clearly written for posterity'.[289] The ruling was soon accepted in practically every US jurisdiction.[290] Liability under the tort of negligence expanded to cover not only personal injury but also property damage, even in cases that involved no risk of personal injury.[291] Similarly the sphere of persons affected was extended beyond purchasers to the purchaser's employees, family members, subsequent purchasers, other users of the chattel, and casual bystanders.[292] Finally, on the defendant's side the doctrine had been extended to component manufacturers and parts assemblers, brand holding companies, 'pure' sellers, repairmen, and building contractors.[293] Prosser sums it up as having become 'a general rule imposing negligence liability upon any supplier, for remuneration, of any chattel'.[294] Thus *MacPherson* v *Buick* was successful in tearing down the last vestiges of the bar to actions under negligence created by the privity fallacy. Furthermore, its legacy was felt even outside the United States, as visible in two law lords citing it in the English ruling *Donoghue* v *Stevenson*.

Despite this, *MacPherson* v *Buick* is not seen as the crucial development at heart of modern product liability law.[295] As already noted with regard to English law, basing liability in tort is problematic even once the privity bar is eradicated. One key problem is formed by the difficulties of proving negligence in modern manufacturing processes.[296] More generally, Prosser argued in 1960 that the limited scope of the classical contractual warranty coupled with problems in suing under negligence was an unbearable burden for many.[297] Neither were these problems alleviated by the help of other developments related to warranties, for example the notion that buyers could sue upon a manufacturer's express warranties whether or not they were in privity with the manufacturer.[298] These deficiencies led to what is seen as the real impulse behind modern product liability law, i.e. a liberation of contractual implied

[289] Friedman 520.
[290] Prosser, "The Assault Upon the Citadel (Strict Liability to the Consumer)" 1100.
[291] Prosser, "The Assault Upon the Citadel (Strict Liability to the Consumer)" 1100–1101.
[292] Prosser, "The Assault Upon the Citadel (Strict Liability to the Consumer)" 1101.
[293] Prosser, "The Assault Upon the Citadel (Strict Liability to the Consumer)" 1101–1102.
[294] Prosser, "The Assault Upon the Citadel (Strict Liability to the Consumer)" 1102.
[295] E.g. Stapleton, *Product Liability* 20–21.
[296] Stapleton, *Product Liability* 22.
[297] Prosser, "The Assault Upon the Citadel (Strict Liability to the Consumer)" 1114–1124.
[298] *Baxter* v. *Ford Motor Co*, 12 P 2d 409; 15 P 2d 1118 (1932), 35 P 2d 1090 (1934). Generally Prosser, "The Assault Upon the Citadel (Strict Liability to the Consumer)" 1134–1138.

warranties from the privity bar. The classical implied warranty was effective only between actors in privity, i.e. the buyer and seller, and did not extend to other actors in the chain of sales or beyond them. However, as discussed above in relation to the *Henningsen* case, courts started experimenting with so-called a-classical implied warranties that are tied to the goods themselves instead of a specific contract.[299] The ensuing transmissible implied warranties could override both privity and exemption clauses.

The use of a-classical warranties attracted its own criticism. In particular, it was argued that courts used a legal means, contract, to reach specific policy purposes even when contract was supposed to focus on party autonomy instead of policy.[300] On the other hand, a-classical warranties could carry with them contractual burdens, such as requirements to give defendants timely notice of their breach.[301] In the California Supreme Court's 1963 ruling in *Greenman* v *Yuba Power Tools* the court thus argued that as a matter of policy manufacturers were strictly liable for defects under tort.[302] Similarly, the then contemporary Section 402a of the Restatement (Second) of Torts introduced strictish liability under tort with regard to all products for not only manufacturers but also sellers.[303] By the end of the 1970s, most states had adopted either a *Greenman* or Section 402a type strict tortious liability for defective products that then became the standard model for product liability.[304] In addition to the shift from contract to tort, another change in relation to a-classical warranties was that under the Greenman/Section 402a type rules not only manufacturers but also sellers were clearly included in the scope of liability. Earlier, buyers of a product might have fallen under the classical warranty, but non-privy actors not, which allowed those in privity a choice between suing sellers under classical warranties or manufacturers under a-classical warranties. Under the new tort rules sellers and even lessors could be as liable as manufacturers.[305]

Following the advent of the Greenman/402a rule the broad lines of US product liability doctrine were set in place. Differences between the different US jurisdictions continue to be notable, in particular in regard to the nature of classical and a-classical warranties and recovery of pure economic loss.[306] As under English law, American torts of negligence typically limit recovery to physical loss, while pure economic loss is seen as the domain of contracts. This starting point was used also in the context of the American product liability

[299] Stapleton, *Product Liability* 21.
[300] Stapleton, *Product Liability* 23–25.
[301] Stapleton, *Product Liability* 23–25. E.g. in *Greenman* v *Yuba Power Tools* (377 P 2nd 897).
[302] 377 P 2d 897.
[303] Stapleton, *Product Liability* 24–25.
[304] Stapleton, *Product Liability* 25.
[305] Stapleton, *Product Liability* 25–26.
[306] Stapleton, *Product Liability* 28–30.

debate to differentiate the Greenman/402a rule from warranties so that the latter would not be swallowed up by the former.[307] After the rise of the Greenman/402a rule many US jurisdictions also limited the recovery of pure economic loss under theories of warranty to actors in privity.[308]

A general line of critique has been raised against the perceived economic ineffectiveness of the system of product liability.[309] Calls have been made to limit product liability, primarily from the perspectives that the different rules in place in different US jurisdictions create confusion, that product liability is too costly for industry due to a litigation boom, that related insurance coverage costs are excessive, and that product liability rules are generally vague.[310] Stapleton, for one, argues that this critique is ungrounded as it would be similarly applicable to other techniques, such as grounding product liability in negligence. Instead, she sees as problematic the individual treatment of product liability instead of a 'more rational organization of liability or its replacement in the personal injuries field by a comprehensive system of compensation, if that ever finds political favour'.[311]

Moving beyond product liability, under English law duties of care can differ with regard to whether or not pure economic loss is recoverable under tort. Under the multitude of American jurisdictions, the situation is more complicated due to the general availability of multiple possible foundations for recovery, such as contract, tort, and promissory estoppel, that can all allow contract-like recovery of damages even where the formal requirements of contract have not been met.[312] Nonetheless, at least *prima facie* American law is strict in locking out the tortious recovery of pure economic under the so-called 'economic loss rule'.[313] Feinman sums up the rule as stating that:[314]

> *…a person who suffers only pecuniary loss through the failure of another person to exercise reasonable care has no tort cause of action against that person…*

[307] Stapleton, *Product Liability* 28.
[308] Stapleton, *Product Liability* 28–29.
[309] Stapleton, *Product Liability* 29–36.
[310] Stapleton, *Product Liability* 29–36.
[311] Stapleton, *Product Liability* 36.
[312] Generally, Feinman, *Professional Liability to Third Parties*. For promissory estoppel, which in the United States can allow contract-like recovery in cases where the formal requirements of contract have not been fulfilled, see Feinman, "Promissory Estoppel and Judicial Method"; Jimenez; Phillips and Lim 375–377.
[313] As seen above in relation to the 'torting' of product liability, this approach has also affected contractul theories of recovery.
[314] Feinman, "The Economic Loss Rule and Private Ordering" 813; Feinman, *Professional Liability to Third Parties* 61. Similarly for example Robertson, in his discussion over economic loss, cites Dobbs' 2000 treatise the Law of Torts as stating as a general rule that '[w]hen commercial or economic harm stands alone, divorced from injury to person or property, courts have not imposed a general duty of reasonable care'. Nevertheless he continues that not all courts in the US have agreed and exceptions abound particularly in relation to negligent misstatements. Robertson.

He then distinguishes four types of cases in which the economic loss rule is used to bar negligence actions.[315] First, if one of the parties to a contract performs it negligently, then the other party typically cannot rely on the tort of negligence to recover ensuing economic loss. Second, if an actor suffers economic loss due to the physical injury of another person or damage to another person's property, then these third-party effects of torts are typically not recoverable under negligence.[316] Third, if an actor suffers economic loss in the absence of physical injury to property, then this loss is typically not recoverable under negligence.[317] Fourth, in three-or-more-party cases where an actor is injured by the negligent performance of a contract to which she is not a party or beneficiary, economic loss is typically not recoverable.[318] My primary focus here is on the last type of case which is most relevant for understanding liability in contractually organized structures of production.

Feinman argues that prior to the 1950s the economic loss rule was not formally stated simply because it was not needed: 'the absence of general principles of liability for negligence precluded recovery'.[319] Here again, the history of the economic loss rule is tied to the English ruling of *Winterbottom* v *Wright* as restated for example in the US Supreme Court's 1879 ruling in *Savings Bank* v *Ward*.[320] As already noted, the privity barrier *per se* was eventually overridden in relation to recovery for physical loss through *MacPherson* v *Buick Motor Co*.[321]

Recovery for pure economic loss, however, was more problematic. For example, in the 1922 ruling in *Glanzer* v *Shepard* a professional bean weigher was found liable for economic loss to non-privy actors due to certifying an

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[315] Feinman, *Professional Liability to Third Parties* 61–63. A list with three types of cases is presented in Feinman 2006 with type number three omitted.

[316] I.e. third-party loss. See e.g. Robertson 296–297. E.g. in some early product liability claims physical harm resulting from defective food is suffered by a family member of the buyer and the buyer has standing to sue the seller *under contract* for recovery of economic loss following from staying at home to treat the sick family member, or even for the loss of a family member's services, as in *Kennedy* v *F. W. Woolworth Co.*, 205 App. Div. 648, 200 N.Y. Supp. 121 (1923). Generally Prosser, "The Assault Upon the Citadel (Strict Liability to the Consumer)" 1117–1119.

[317] Robertson 295–296, 298–300.

[318] Examples include the negligent drafting of a will vis-à-vis intended legatees, a home buyer who suffers due to a negligent home inspector, or a contractor injured due to the negligence of an architect. E.g. Robertson 297–298. Generally, Feinman, *Professional Liability to Third Parties*.

[319] Feinman, "The Economic Loss Rule and Private Ordering" 815.

[320] 100 U.S. 195. A lawyer had been employed by his client to examine and certify to the recorded title of real property as basis for a loan between the client and plaintiff using the property as security. In examining records the lawyer overlooked a file and thus erroneously certified the title as good even when the whole property had been transferred away from the client. The court found that there being no fraud, collusion, or falsehood by the lawyer, nor privity between the lawyer and plaintiff, the lawyer was not liable for any loss incurred by the plaintiff. Feinman sees that, similarly to Winterbottom v Wright in England, the Savings Bank case 'established the bar of privity economic loss cases' in the US. Feinman, "The Economic Loss Rule and Private Ordering" 815.

[321] 111 N.E. 1050 (N.Y. 1916).

erroneous weight.[322] On the other hand, in the 1931 ruling *Ultramares Corp.* v *Touche* an accounting company was not liable to third parties relying on balance sheets it had prepared, with Cardozo J famously arguing against allowing 'liability in an indeterminate amount for an indeterminate time to an indeterminate class'.[323] According to Feinman, *Glanzer* was seen by the *Ultramares* court as revolving around privity or a privity-like relationship between plaintiff and defendant.[324] With this narrowing down of *Glanzer*, the ruling in *Ultramares* provided a foundation for the economic loss rule and effectively denied the recovery of pure economic loss under tort in typical third-party situations such as with regard to negligent misrepresentation.[325]

Starting in the 1950's, the *Ultramares* trend changed and courts increasingly turned towards allowing recovery for economic loss.[326] The attitude of courts towards different possible doctrines, however, depends on jurisdiction and, as seen above, there may even be overlapping avenues for recovering pure economic loss. In particular, however, there seem to be four general dogmatic justifications for recovery, each receiving different levels of support in different US jurisdictions and under different circumstances.

Firstly, a 'near privity' type relationship, as referred to in the *Ultramares* decision, can allow recovery.[327] Secondly, contractual third-party beneficiary doctrines may allow recovery in cases where a specific contractual relationship is seen to have caused damage to a third party.[328] Thirdly, negligence may allow recovery despite the economic loss rule.[329] Here, a balance of factors test for determining whether there exists a duty to exercise reasonable care in relation to economic loss has been influential since its first formulation in the 1958 Californian Supreme Court ruling in *Biakanja* v *Irving*.[330] Fourthly, the doctrine of negligent misrepresentation may allow recovery.[331]

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[322] 135 NE 275 (NY 1922).

[323] 174 NE 441,445 (NY 1931). The case revolved around whether an accounting company was liable to third-parties that relied on balance sheets that it had certified. The balance sheets were based on falsified account books provided to the accounting company.

[324] Feinman, *Professional Liability to Third Parties* 12–15.

[325] Feinman, *Professional Liability to Third Parties* 12–15.

[326] Feinman, *Professional Liability to Third Parties* 16–22.

[327] Feinman, *Professional Liability to Third Parties* 29–37. Here, the *Credit Alliance* test (*Credit Alliance Corp.* v *Arthur Andersen & Co.*, 483 NE 2d 110 (NY 1985)) has been used to discern whether recovery of economic loss is possible, requiring firstly the existence of a special or privity-like relationship imposing a duty on the defendant to impart correct information to the plaintiff; secondly, that the information was correct; and thirdly, reasonable reliance on the information.

[328] Feinman, *Professional Liability to Third Parties* 39–54. Cases such as *Guy* v *Liederbach*, 459 A.2d 744 (Pa. 1983) have specifically opted for contractual theories because of the perceived contractual foundations of a claim and the conceptual challenges of recovering under negligence in relation to a contract.

[329] Feinman, *Professional Liability to Third Parties* 55–75.

[330] 320 P.2d 16 (Cal. 1958). The case concerned a notary who had been negligent in drafting a will and was sued by an heir named in the failed will. The court found that liability for economic loss in such cases was a matter of policy to be founded upon the balancing of various factors. Possible examples of such

Despite the abundance of possible theories, Feinman sees that a backlash starting in the 1980s has again limited the recoverability of economic loss.[332] This backlash is tied to a general critique of tort law in the United States, such as claims of the excessive costs of litigation and insurance.[333] In particular in the product liability related rulings in *Seely* v *White Motor Co*[334] and *East River SS Co* v *Transamerica Delaval Inc*[335] courts specifically limited the application of liability under negligence to physical loss. Both are now generally seen as leading cases of the economic loss rule, as a consequence of which Feinman sees that the 'great majority of jurisdictions held that the rule bars an action against the manufacturer in the case of a remote commercial purchaser who suffers only economic loss because of the inadequacy of the product'.[336]

There are two general justifications for the economic loss rule. The first is the private ordering or contractual argument, maintaining that the divide between contracts and torts must be kept clear so as to not let tort interfere with the domain of contracts.[337] Thus where a contract is involved a plaintiff, whether a party or third party to the contract, typically does not have an action in negligence for pure economic loss against a defendant who has already

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factors are the intended third party effects of a transaction, the foreseeability and degree of certainty of third party harm, closeness of connection between the defendant's conduct and the third party's harm, moral blame, and the policy of preventing future harm. See generally "Negligence–Duty of Care–Absence of Privity Does Not Bar Recovery by Legatee for Negligent Preparation of Will. – Biakanja v . Irving (Cal. 1958)" (1958) 72 Harvard Law Review 380; Feinman, *Professional Liability to Third Parties* 67–70. In later cases Californian courts noted that recovery might be possible under both contractual third-party beneficiary theories and negligence. In the *Heyer* v *Flaig* (449 P.2d 161 Cal. 1969) ruling the Californian Supreme Court noted that while both actions were sustained in *Lucas* v *Hamm* (364 P.2d 685 Cal. 1961), the action under contract was 'conceptually superfluous' because the 'crux of the action must lie in negligence…'. In the end, the *Heyer* court found that the duty rested on finding that 'public policy requires that the attorney exercise his position of trust and superior knowledge responsibly so as not to affect adversely persons whose rights and interests are certain and foreseeable' (70 Cal. 2d 223).

[331] Feinman, *Professional Liability to Third Parties* 77–93. Here, Feinman sees that scholarly debate coupled with the drafting of § 552 of the Restatement (Second) of Torts and several court decisions, such as *Rusch Factors Inc* v *Levin*, 284 F. Supp. 85 (D.R.I. 1968), imposing liability on accountants, and *Rozny* v *Marnul*, 250 N.E.2d 656 (Ill. 1969), imposing liability on a surveyor of property, helped extend liability for negligent misrepresentation to economic loss despite the earlier ruling in *Ultramares*. Again, a practical problem may concern differentiating between negligence and negligent misrepresentation.

[332] Feinman, *Professional Liability to Third Parties* 22–25; Feinman, "The Economic Loss Rule and Private Ordering."

[333] See for example Stapleton's summary of various critiques on the expansive role of tort based product liability, Stapleton, *Product Liability* 29–36.

[334] 403 P.2d 145 (Cal. 1965). '*A consumer should not be charged at the will of the manufacturer with bearing the risk of physical injury when he buys a product on the market. He can, however, be fairly charged with the risk that the product will not match his economic expectations unless the manufacturer agrees that it will. Even in actions for negligence, a manufacturer's liability is limited to damages for physical injuries and there is no recovery for economic loss alone.*'

[335] 476 U.S. 858 (1986). '*…we adopt an approach similar to Seely, and hold that a manufacturer in a commercial relationship has no duty under either a negligence or strict products liability theory to prevent a product from injuring itself.*'

[336] Feinman, *Professional Liability to Third Parties* 25.

[337] Feinman, *Professional Liability to Third Parties* 61–63; Robertson 293–294.

allocated her liabilities with a contract between herself and another party.[338] The second justification for the economic loss rule is the floodgates argument, related to the potentially indeterminate amount of liability or litigation that might ensue if liability for economic loss would be generally allowed in non-contractual situations.[339] Some scholars stress the private ordering argument to the extent that they relegate the floodgates argument into a general category of minor arguments and mention it primarily in relation to historical discussions.[340] While there are for now numerous exceptions to the economic loss rule, it has also been generally argued that the rule is in danger of spreading from negligence to other torts that have typically been used in business circumstances, such as negligent misrepresentation, and thus prohibiting the recovery of economic loss not only in cases that can be seen to be covered by contracts but under tort more generally.[341]

2.3.3 Contract and Tort Intertwined: The American Experience

Unlike English law, the multiplicity of jurisdictions that constitutes the United States has not been averse to experimenting with the bounds of privity in addition to greatly expanding the scope of tort.[342] Thus in relation to for example liability for defective products both contractual and tort avenues of recourse have developed and then merged into a specific form of 'products liability', a marriage of implied contractual warranties and tort-related policy combining a relative strictness of obligation derived from contract with the general applicability of tort and, by way of public policy, protecting the outcome from infringement by liability disclaimers.

This marriage of contract and tort effectively avoids the problems of the traditional English approach which focuses on the tort of negligence as aided by legislation that prevents the opting out of negligence liability in many situations. Furthermore, the creation of a specific form of product liability does not necessarily rule out the simultaneous use of contractual warranties, the tort of negligence, or strict product liability in relation to a product liability claim. Thus depending on the relevant US jurisdiction and context a multiplicity of claims under both contract and tort are generally available. Similarly, while the

[338] For discussion and critique of this aspect of the rule and its treatment in early drafts of the Restatement (Third) of Torts on economic loss (still a work in progress at the time of this writing), see generally Feinman, "The Economic Loss Rule and Private Ordering." Others stress the clarity of the contract/tort distinction instead of the more general private ordering, e.g. Robertson 293 ff. As already discussed, numerous exceptions exist.

[339] E.g. Robertson 294.

[340] Feinman, "The Economic Loss Rule and Private Ordering" 814, 816.

[341] See, for example, Mark S Davidson and Todd R Sorensen, "Tort Damages for Breach of Contract? The Ebb and Flow of the Economic Loss Rule" [2008] The SIRMon — News From the Self-Insurers and Risk Managers Committee 1.

[342] Stapleton sees this general inventiveness of courts as the result of a 'legislative quagmire'. Stapleton, *Product Liability*.

role of negligence in relation to economic loss is generally limited by the economic loss rule, alternatives exist that may allow also this the rule to be overcome.

From a collective perspective, the general openness of law in the individual states towards alternate and concurrent actions seems to allow for major leeway in inventive litigation. On the other hand, the abundance of alternative avenues of recourse causes confusion between and within the broad array of separate jurisdictions. Furthermore, the institutionalization of litigation coupled with problems in legislative processes seems to have caused a backlash in the form of the back to contract school, perhaps also reflected in the legal process approach. However, in the end it is clear that in addition to the tortious approach of English law American law keeps the door open to diverse contractual approaches to establishing liability beyond privity in structures of production.

2.4 France: A Solution in the Strict Separation of Contract and Tort?

2.4.1 The Personal and Material Scope of Contracts: A Playground of *Actions Directes* and *Ensembles Contractuelles*

Compared to English law, the approach to contractual privity embodied by French law seems outright exotic. First, the rights of third-party beneficiaries to enforce contracts under a *stipulation pour autrui* ('stipulation for the benefit of another') has been codified in the Code civil since 1804.[343] Second, the so-called *actions directes* ('direct action') allow a range of contractual actions beyond privity in chains of contracts. Third, the principle of *non-cumul des responsabilités contractuelle et délictuelle* ('non-cumulability of contractual and delictual liability') requires that each case be strictly classified as either contractual or delictual, in most cases denying the possibility of claims under delict in actions related to contract.[344]

[343] According to the original formulation of the Code civil, the principle of privity of contracts was enshrined in Art. 1165 old-CC ('*Les conventions n'ont d'effet qu'entre les parties contractantes ; elles ne nuisent point au tiers, et elles ne lui profitent que dans le cas prévu par l'article 1121*') while Art. 1121 old-CC in turn allowed third parties to enforce contracts made to their benefit ('*On peut pareillement stipuler au profit d'un tiers lorsque telle est la condition d'une stipulation que l'on fait pour soi-même ou d'une donation que l'on fait à un autre. Celui qui a fait cette stipulation ne peut plus la révoquer si le tiers a déclaré vouloir en profiter.*'). These provisions remained unchanged since their promulgation in 1804 until October 2016, when they were replaced by Arts. 1199–1209 new-CC which, while textually different, are in practice meant to resemble two hundred years of caselaw developing the old-CC. Thus for example while Art. 1199 new-CC begins by noting that '*Le contrat ne crée d'obligations qu'entre les parties*', Art. 1205 new-CC similarly starts by noting that '*On peut stipuler pour autrui*'. Generally on the theory of third-party beneficiaries under French law, see e.g. Philippe Delebecque and Frédéric-Jérôme Pansier, *Droit des obligations: contrat et quasi-contrat* (2001) 222–225.

[344] The reasons for this approach appear historical. During the late 19th century French scholars debated whether liability under delict and contract were essentially the same. While the two were eventually kept apart, the question remained whether claims under delict related to contractual situations should be

While there is little question in principle that third-party beneficiaries may enforce contracts, the scope of application of the doctrine has been debated under French law. Initially the enforceability of contracts by third-party beneficiaries was limited to cases where both the promisor and promisee stood to benefit from the granting of third-party rights.[345] Further developments diminished this requirement by requiring only a moral interest of the promisee for the existence of such right.[346] Currently, there seem to be no clear rules on when a third party accrues rights under a contract, with the right of a third-party beneficiary resting on a court finding that the parties explicitly or impliedly intended to benefit the third party.[347] Judicial attitudes have differed over time in relation to courts finding implied third-party beneficiary rights and with regard to scholarship using the third-party beneficiary doctrine to explain caselaw.[348]

Whittaker, from an English perspective, has critiqued the French doctrine of contractual third-party beneficiaries for its potential to hide the substantive arguments underlying the reasoning of courts.[349] One example that he sees problematic is using the third-party beneficiary doctrine to allow the dependents of deceased passengers to sue a carrier under a strict *obligation de sécurité de résultat* (in the context of transport, an 'obligation to guarantee safe passage').[350] Another example that he sees problematic concerns a case in which a blood transfusion center was held liable under contract towards a person infected with HIV.[351] In such cases, Whittaker sees that a key aspect of the use of the *stipulation pour autrui* is to overcome the requirement of showing fault under delict or doctrinal challenges related to using available no-

subjected to the terms of the relevant contract. In the end, French courts decided instead to make the two forms of action strictly separate from one another. Thus if the facts of a case supported both a claim under contract and delict, the delictual claim would be ruled out. Generally, see e.g. Whittaker, "Privity of Contract and the Law of Tort: The French Experience" 333–334; Faure-Abbad. Borghetti notes that some see the term as improper and refer instead to a *no-choice* rule, see Jean-Sébastien Borghetti, "The development of product liability in France" in Simon Whittaker (ed), *The Development of Product Liability* (Cambridge University Press 2010) 93.

[345] Whittaker, "Privity of Contract and the Law of Tort: The French Experience" 337.

[346] Whittaker, "Privity of Contract and the Law of Tort: The French Experience" 337.

[347] Delebecque and Pansier 223.

[348] Delebecque and Pansier 223. Whittaker notes that for example *consignation* was earlier seen to fall under the third-party beneficiary doctrine, but this approach has subsequently been abandoned. Whittaker, "Privity of Contract and the Law of Tort: The French Experience" 339–349.

[349] Whittaker, "Privity of Contract and the Law of Tort: The French Experience" 338–339, 342–343. This is echoed by Delebecque and Pansier, who note for example that in early cases the possibility for implicitly finding *stipulations pour autrui* could result in situations where its use was '*…intéressante mais artificielle…*' and in particular '*…l'action des victims contre le transporteur est avant tout légale'*. Delebecque and Pansier 222–225.

[350] Whittaker, "Privity of Contract and the Law of Tort: The French Experience" 340.

[351] TGI Paris, 1st July 1991, J.C.P. 1991.II.21762, confirmed by the Paris CA 28.11.1991. In ruling over the appeal, the Cour de cassation (Cass civ (1) 12.4.1995) accepted that the undiscoverable nature of the virus did not constitute a valid defense.

fault delictual liability under the *gardien de chose/responsabilité du fait des choses* theories ('liability for the acts of things').[352]

The rights of any third party are generally limited by disclaimers included in the contract.[353] At the same time, however, third-party beneficiaries may also give up their contractual rights in order to sue under delict instead, for example if their contractual rights are limited by disclaimer. In the *affaire Lamoricière* the ship *Lamoricière* had sunk at sea while attempting to aid another sinking ship.[354] The dependents of the passengers first raised a claim as implied third-party beneficiaries. However, the contract of carriage excluded the carrier's liability. The Cour de cassation allowed the dependents to give up their contractual rights as third-party beneficiaries and sue under delict instead, effectively overriding the exclusion of liability. Thus in relation to the third-party beneficiary doctrine, the rule of *non-cumul* can be relative to whether or not the beneficiaries wish to sue as such or as sufferers of harm under delict.

In addition to the third-party beneficiary doctrine, the so-called *actions directes*, which allow a creditor directly to sue her debtor's debtor, constitute a central aspect of French private law.[355] The *actions directes* exist in two primary forms, the *action directe en responsabilité* and the *action directe en paiement*. The former is used to establish liability beyond privity for defects, for example in a chain of sales or a construction project, and can be founded in either caselaw or statute.[356] The latter is used to establish liability beyond privity for the payment of the contract price, for example to the benefit of subcontractors or subagents, and is primarily founded in statute.[357]

One major subgroup of the *action directe en responsabilité* is the *action directe en garantie*, in principle a transmissible warranty. This is probably the internationally most well-known example of *action directe* due to its relevance in the sphere of transnational commercial transactions related to French law.[358]

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[352] These approaches are discussed in Subsection 2.4.2.

[353] Delebecque and Pansier 224; Whittaker, "Privity of Contract and the Law of Tort: The French Experience" 338.

[354] Cass. com. 19.6.1951. In particular, the Cour de cassation noted that '*…il est, en effet, loisible aux intéressés de renoncer à la stipulation faite en leur faveur par le défunt au moment de la conclusion du contrat de passage, et de se placer sur le terrain de la responsabilité délictuelle…*'. The case is available at http://droit.wester.ouisse.free.fr/pages/support_responsabilite/causalite_doc7.htm. See also Whittaker, "Privity of Contract and the Law of Tort: The French Experience" 342.

[355] Generally, Delebecque and Pansier 227–233.

[356] Delebecque and Pansier 228–229.

[357] Delebecque and Pansier 227–228.

[358] It has been discussed for example in ECJ cases, such as *Jakob Handte & Co. GmbH* v *Traitements mécano-chimiques des surfaces SA* (C-26/91, 17 June 1992), in which the ECJ adopted a narrow reading of Art. 5(1) of the 1968 Brussels Convention so that only voluntarily assumed obligations, which an *action directe* thus apparently was not, were covered by the jurisdictional rules of the convention. A similar narrow reading was taken in *Réunion Européenne SA and Others* v *Spliethoff's Bevrachtingskantoor BV and the Master of the vessel Alblasgracht V002* (C-51/97. 27 Octobre 1998). More generally *actions directes* are often discussed in relation to comparisons of warranties or in relation to the transferability of arbitration provisions in related situations. See e.g. Ingeborg Schwenzer and Mareike Schmidt, "Extending

Under this action, a buyer may sue not only her seller but also any other actor before her in the chain of sales, such as manufacturers, distributors, and earlier tiers of retailers, for a defect in the good. The action concerns not only so-called homogenous chains, such as chains of sales where the goods are transferred without modifying them, but also heterogeneous chains, where the product sold by a first actor constitutes a part of another product sold by a second actor.[359] Thus for example the buyer of an electric pump may sue the manufacturer of the electric motor instead of the pump manufacturer from whom the pump was bought in case of a defect in the motor.

The *action directe en garantie* allows buyers to avoid chain litigation and insolvency of middle-actors. Whittaker sees that the historical foundation for this action was grounded in a need to instill in sub-buyers a right against the seller when the applicability of delict was uncertain in such situations.[360] Importantly, the action relies to a major extent to developments in French caselaw in relation to hidden defects. In particular, discussions over adequate responses to the question of product liability in the 1950s boosted a*ctions directes* by the courts' expansive interpretation of the statutory guarantee against hidden defects, *garantie des vices cachés*.[361] Art. 1645 CC maintains that when a product causes injury or damage not related to the diminution of the value of the product sold, a seller is liable only if she knew of the defect. In the 1969 the Cour de cassation ruled that professional and business sellers are under an irrebuttable presumption that they know of any defects even if it is physically impossible for them to know of such.[362] Professional sellers can exclude such liability only if the buyer and seller operate in the same field of business, construed narrowly.[363] Exclusion clauses or other disclaimers of liability thus have relatively little bearing on the *action directe en responsabilité*.

The *action directe en garantie* has been accepted in French caselaw at least since the late 19th century. One early example is a Cour de cassation ruling of 12 November 1884, in which a railway company bought locomotives from the bankruptcy administration of another company.[364] The company was able to sue

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the CISG to Non-Privity Parties" [2009] Vindobona Journal of International Commercial Law & Arbitration 109; Ingeborg Schwenzer and Florian Mohs, "Arbitration Clauses in Chains of Contracts" (2009) 27 ASA Bulletin 213; Stavros L Brekoulakis, *Third Parties in International Commercial Arbitration* (Oxford University Press 2010).

[359] Delebecque and Pansier 228–229.

[360] Whittaker, "Privity of Contract and the Law of Tort: The French Experience" 343–345.

[361] Embodied in Articles 1641 ff. CC (not changed in 2016 recodification). For an example of *vices cachés*, see the ECJ case *Alsthom Atlantique* v *Sulzer* (C-339/89), noting that a similar rule exists in no other EC Member State but that nonetheless the rule was not seen by the ECJ as problematic from the perspective of the common market.

[362] Cass. com. 1 July 1969. Borghetti, "The development of product liability in France" 95.

[363] For an overview, see e.g. the ECJ case *Alsthom Atlantique* v *Sulzer* (C-339/89).

[364] Cass. civ. (12 Novembre 1884), Dalloz 1885 I 357.

the manufacturer directly for defects, with the court seeing that all the bankrupt company's rights in the locomotives had been transferred in the sale. However, it was only in the Cour de cassation's 1980 ruling *Lamborghini* that the *action directe en garantie* was specifically seen as necessarily contractual.[365] In that case a buyer had bought a used Lamborghini which had a manufacturing defect. The court found that any *action directe* against the manufacturer or any intermediate actor was necessarily contractual, and thus, due to the rule of *non-cumul*, explicitly ruled out any claims in delict.

The *action directe en responsabilité* is not limited to claims for damages nor to the sales of goods. For example, the *action directe en résolution* allows a sub-buyer to terminate the sales contract due to a defective product and claim restitution from actors beyond one's own seller.[366] For another example, Art. 1792 CC imposes a range of liabilities in various actors (such as constructors, architects, advisors, the employer, and generally any actor owing duties under contract directly with the employer) engaged in the construction of a building towards owners and subsequent owners.[367] The liabilities vary in nature and are related to various defects in the building and may carry specific limitation periods. In particular, under the so-called *responsabilité décennale* such actors owe the employer or her successors a strict ten year liability for all damages caused by hidden defects that threaten the soundness of building or make it unfit for its purpose.[368] Despite being based in statute and not subject to contrary agreement, the liability is seen as contractual. Similarly, *actions directes* for liability may also exist between principals and their sub-agents.[369]

In the case of *action directe en paiement*, a direct cause of action may exist in relation to paying the contract price.[370] Under this action for example a landlord may be able to sue a subtenant for rent,[371] a sub-agent a principal for expenses,[372] and a sub-contractor an employer for the price of work undertaken.[373] In relation to construction projects, the Code civil included from its onset provisions for masons, carpenters, and others engaged in construction to claim payment directly from their employer.[374] A claimant's right to sue the

[365] Cass. Civ. (1) (9 Octobre 1979). The court found that '*…l'action directe dont dispose le sous-acquéreur contre le fabricant ou un vendeur intermédiaire, pour la garantie du vice caché affectant la chose vendue des sa fabrication, est nécessairement de nature contractuelle…*'.
[366] Whittaker, "Privity of Contract and the Law of Tort: The French Experience" 344.
[367] Thus the liability does not cover subcontractors. If these are seen to be sellers of products incorporated in the building, they may be liable under the *action directe en garantie*. If not, they are in most cases liable under delict as per the ruling *Besse* discussed below. See generally Whittaker, "Privity of Contract and the Law of Tort: The French Experience" 347–348.
[368] Whittaker, "Privity of Contract and the Law of Tort: The French Experience" 346–347.
[369] Whittaker, "Privity of Contract and the Law of Tort: The French Experience" 362–365.
[370] Delebecque and Pansier 227–228.
[371] Whittaker, "Privity of Contract and the Law of Tort: The French Experience" 358.
[372] Whittaker, "Privity of Contract and the Law of Tort: The French Experience" 365–366.
[373] Whittaker, "Privity of Contract and the Law of Tort: The French Experience" 357–361.
[374] Whittaker, "Privity of Contract and the Law of Tort: The French Experience" 358.

employer despite lack of privity concerns only subcontractors approved by the employer.[375] The right cannot be excluded by agreement.[376] Furthermore, it is allowed only if there is over a month's delay from the last notice of payment and the amount recoverable is restricted by a double limit: No more can be claimed than, firstly, what is owed from the sub-contract and from which the employer in fact benefits, and secondly, what the employer in total owes to the principal builder at the time of receipt of the notice to pay.[377]

As with third-party beneficiary theories, a key question with regard to the *action directe* has been its scope. The breadth of the *action directe en garantie* is typically explained to cover so-called 'translative' (*chaîne translative*) chains of contracts where products are moved from one actor to another without changing them, such as in chains of sales (including the addition of a product into another). A strand of French caselaw in the 1980's momentarily expanded the scope of the *action directe en responsabilité* to include so-called non-translative chains (*chaîne non-translative*) of contracts.[378] This meant expanding the sphere of application to chains of contracts more generally than in relation to the transfer of goods, for example in the context of subcontracting services.

Here, the French notion of groups of contracts (*groupes de contrats*) is crucial. During the 1970s, legal scholars such as Teyssié argued that some contracts should be understood as legally intertwined with one another due to their economic intertwinement.[379] In particular, this would mean that the relationship between members in a group of contracts would be specifically contractual, instead of delictual, even if there would be no direct contractual relationship between them. Furthermore, claims between group members would be subject to a so-called 'double limit', meaning that in case of an *action directe* the defendant could rely on defenses and limitations inherent in both the claimant's and the defendant's contracts. In a number of cases during the 1980s this approach was applied by the Cour de cassation. Two Cour de cassation rulings from 1988 in particular were seen as foundational for the notion of groups of contracts until they were explicitly overruled by the court in a 1991 ruling.

First, in the so-called *Clic Clac Photo* case the Cour de cassation found that a claim between an employer and subcontractor was necessarily contractual and restricted by limitations of liability inherent in both involved contracts.[380] The

[375] Loi n° 75-1334 du 31 décembre 1975 relative à la sous-traitance, § 3.
[376] Loi n° 75-1334 du 31 décembre 1975 relative à la sous-traitance, § 12.
[377] Loi n° 75-1334 du 31 décembre 1975 relative à la sous-traitance, § 12–13.
[378] See for example Sébastien Pellé, *La notion d'interdépendance contractuelle* (Dalloz 2007) 278–286.
[379] Bernard Teyssié, *Les groupes de contrats* (1975). For more recent summaries of Teyssié's argument, see Pellé 47; Whittaker, "Privity of Contract and the Law of Tort: The French Experience" 354–357.
[380] Cass Civ (1) 8 March 1988. The court found that '*…dans le cas où le débiteur d'une obligation contractuelle a chargé une autre personne de l'exécution de cette obligation, le créancier ne dispose*

claimant had contracted a company to make enlargements of photographic negatives. That company subcontracted the work to the defendant, who lost the negatives. The court found that the action was necessarily contractual, and that limitations of liability in either of the contracts in question would apply. So the defendant could rely on limitations of liability in its own contract in relation to the claimant.

A similar result was arrived at in the *Aéroports de Paris* case.[381] An air carrier suffered damage because the tractor pushing its airplane in preparation for departure broke due to a defective valve and damaged the airplane. The carrier sued the airport as operator of the tractor, the manufacturer of the defective tractor, and the manufacturer of the defective valve used in the tractor. The air carrier's contract with the airport included a clause excluding all liability. Again, the court found that any action between the claimant and defendants would be contractual and dependent on exclusions of liability relevant to contracts between the claimant and respective defendants.

These rulings were rebutted in 1991 in the ruling in *Besse*.[382] The case concerned an employer who raised a claim against a subcontractor for defective plumbing after the 10 year guaranty of *responsabilité décennale*. Here, the Cour de cassation overruled earlier decisions by finding that the relationship between an employer and subcontractor is necessarily delictual. Thus the subcontractor could not avail itself of the claim that because the contractual guaranty under *responsabilité décennale* had run out, no claim could be raised by the employer in contract.

While there has been confusion over the exact scope of *actions directes en responsabilité* under different circumstances, the *Besse* ruling has in practice limited such actions to translative chains of contracts under the *action directe en garantie* and statutory exceptions, such as the *responsabilité décennale*.[383] Whittaker sees a number of reasons for the eventual refusal to expand the doctrine to non-translative chains under the group of contracts theory.[384] One of these is dogmatic: No provision in the Code civil provides explicit justification for the theory of groups of contracts. The other three reasons are more practical.

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contre cette personne que d'une action de nature nécessairement contractuelle, qu'il peut exercer directement dans la double limite de ses droits et de l'étendue de l'engagement du débiteur substitué…'.

[381] Cass Civ (1) 21 June 1988. The court found that '*…dans un groupe de contrats, la responsabilité contractuelle régit nécessairement la demande en réparation de tous ceux qui n'ont souffert du dommage que parce qu'ils avaient un lien avec le contrat initial ; qu'en effet, dans ce cas, le débiteur ayant dû prévoir les conséquences de sa défaillance selon les règles contractuelles applicables en la matière, la victime ne peut disposer contre lui que d'une action de nature contractuelle, même en l'absence de contrat entre eux…*'.

[382] Ass. plén 12 July 1991. '*…le maître de l'ouvrage ne dispose contre le sous-traitant, avec lequel il n'a aucun lien contractuel, que d'une action de nature quasi délictuelle soumise, avant l'entrée en vigueur de la loi du 5 juillet 1985, à la prescription trentenaire du droit commun…*'.

[383] Pellé 278–286.

[384] Whittaker, "Privity of Contract and the Law of Tort: The French Experience" 356–357.

Firstly, there need not be any necessary connection between economic and contractual relationships.[385] Secondly, there is uncertainty as to how groups of contracts should be defined.[386] Thirdly, the extension of contract coupled with the 'double limit' may be overly prejudicial towards plaintiffs and generally lacks grounding in any of the involved contracts.[387] The question of the general scope of *actions directes* in groups of contracts is not fully resolved in scholarship or legal practice.[388] Nonetheless, in current doctrine the *actions directes* are generally limited to sales of goods on the one hand and situations specifically allowed by statute on the other.

As already seen, the mutually exclusive relationship between contract and delict under the principle of non-cumul provides a starting point for regulating liability in a number of different ways. Delictual liability is seen as *ordre public* and thus under Art. 6 CC cannot be limited by agreement.[389] As a consequence, finding liability under delict automatically excludes any limitation. On the other hand, a number of techniques have emerged to regulate situations where the principle of non-cumul does point towards contractual liability. For example, if liability is based on *dol* (willful misrepresentation) or *faute lourde* (gross negligence), contractual limitations do not apply. Courts also have the specific power to adjust penalty clauses and, in relation to consumer contracts, to ban unfair terms (*clauses abusives*).[390]

A particular judge-made change to liability under contract is the strict liability for hidden defects in professional contracts for the sale of goods that are not made between actors in the same trade. While originally limited to cases where the seller was aware of the defect under Art 1645 CC, the scope of the provision was expanded by the Cour de cassation so that business actors are now faced with an irrebuttable presumption that they are aware of hidden

[385] Actors can specifically wish to create contracts that do not match their exact economic relationships or they wish to leave some aspects of their relationship for later agreement.

[386] For example, the notion of groups of contracts is used in a number of situations unrelated to *actions directes* and the ensuing question of whether a relationship between extreme participants in a chain of contracts is contractual in nature. E.g. Pellé 47–52. Furthermore, even with regard to chains of contracts there seems to be no firm consensus on in what situations an *action directe* could arise on the basis of a group of contracts. Whittaker, "Privity of Contract and the Law of Tort: The French Experience" 356–357.

[387] Under the 'double limits' approach defendants can rely on limitations inherent in both their own contract and that of the claimant. Exemption clauses may thus work to the benefit or detriment of actors that have no knowledge of them while at the same time the recognition of a contractual action rules out actions in delict, which may place some actors with considerable legal burdens. A further possible problem is the incoherence of the different contracts, for example in relation to jurisdictional disputes. Whittaker sees that the 'double limits' test might ultimately result in a contractual action based on rules and terms that neither litigant has agreed on.

[388] Pellé 282–286.

[389] Art. 6 CC: '*On ne peut déroger, par des conventions particulières, aux lois qui intéressent l'ordre public et les bonnes moeurs*.' That delictual liability falls under *ordre public* was established in Cass civ (2) 17.2.1955.

[390] Reinhard Zimmermann and Simon Whittaker (eds), *Good Faith in European Contract Law* (Cambridge University Press 2000) 36–37.

defects.[391] Excluding this liability is possible only between actors engaged in the same trade.[392]

Another example is the development of various obligations based in the requirements of observing good faith and equity imposed by Art. 1104 new-CC (previously Art. 1134 old-CC) and Art. 1194 new-CC (previously Art. 1135 old-CC).[393] These include, firstly, the already mentioned *obligations de sécurité* in carrier contracts to the benefit of passengers and their (non-travelling) dependents.[394] The *obligation de sécurité* establishes contractual no-fault liability on professional carriers that promise to carry someone from one place to another. The liability is founded in an implied guarantee of safe travel that can only be set aside due to *force majeure*. Secondly, another established feature of French law based on good faith are the *obligations d'information* (or *obligation de conseil et de renseignement*), which require parties to inform their counterparts of relevant information, for example in relation to contract negotiations or, in relation to the sale of goods to both professionals and consumers, information necessary for the use of the goods.[395] Thirdly, o*bligations de loyauté* and *obligations de co-opération* are also seen as integral parts of French law, more generally requiring parties to observe good faith in the execution of their contracts.[396]

The good faith based provisions of French law are conceptually not far removed from good faith under e.g. United States law. A perhaps more radical notion, however, is that of *interdépendance contractuelle* ('contractual interdependence') which transcends the boundaries of individual contracts without reference to guarantees of some kind but instead by reference to the shared motives of formally separate contracts.[397] Teyssié, who is seen as the founder of the theory of groups of contracts, distinguished 'groups of contracts' as including both chains of contracts and *ensembles contractuelles*, 'contractual ensembles'.[398] The first of these could be defined by each contract in the chain having the same '*objet*', or performance. For example, in a chain of sales each

[391] Cass com 17.12.1973, '*…le vendeur professionnel est tenu de connaitre les vices affectant la chose par lui vendue et ne peut donc se prévaloir d'une stipulation excluant a l'avance sa garantie pour vices cachés…*'. E.g. Whittaker, "Privity of Contract and the Law of Tort: The French Experience" 343.
[392] E.g. Whittaker, "Privity of Contract and the Law of Tort: The French Experience" 350.
[393] The original formulations from 1804 were for Art. 1134 al. 3 old-CC, '[*Les conventions*] *doivent être exécutées de bonne foi*,' and for Art. 1135 old-CC, '*Les conventions obligent non seulement à ce qui y est exprimé, mais encore à toutes les suites que l'équité, l'usage ou la loi donnent à l'obligation d'après sa nature*'. See generally Delebecque and Pansier 181–197; Zimmermann and Whittaker 32–39. These have been replaced by Art. 1104 new-CC, '*Les contrats doivent être négociés, formés et exécutés de bonne foi. Cette disposition est d'ordre public*.' and Art. 1194 new-CC, '*Les contrats obligent non seulement à ce qui y est exprimé, mais encore à toutes les suites que leur donnent l'équité, l'usage ou la loi.*'
[394] Delebecque and Pansier 193–194; Zimmermann and Whittaker 35–36.
[395] Delebecque and Pansier 191–197; Zimmermann and Whittaker 36, 178–180.
[396] Delebecque and Pansier 186–191; Zimmermann and Whittaker 37.
[397] These are very much different than the more conventional notion of 'indivisible' contracts. Pellé 76 ff.
[398] Teyssié; Pellé.

contract is used to sell the same good further down the chain in a chronological chain of contracts. The legal result of such chains of contracts is that certain rights accompany the transferred good allowing the later actors of the chain to use an *action directe* against the earlier actors.

Contractual ensembles, on the other hand, were defined by Teyssié as having the same '*cause*', or more general objective, behind the actual contractual performance. Differentiation between *objet* and *cause* is conceptually challenging. In a simple chain of sales contracts ranging from a manufacturer to a consumer buyer, all contracts would revolve around the same contractual performance, the sale of a good, which could be seen as the *objet*. At the same time the manufacturer, distributor, retailer, and consumer all also have their own objectives, typically separate from one another, and this underlying motive for the contract could be seen as the *cause*. The manufacturer's general objective behind her contract is to manufacture goods for profit. The distributor's general objective behind her contract is to organize the gathering of goods from manufacturers and distribute them to professional retailers. The retailer's general objective behind her contract is to buy goods from distributors and retail them to consumers. Consumers may have any number of objectives behind their contract, ranging from utility to leisure to giving a gift to someone.

The requirement that each contract have a licit *cause* is founded in Article 1131 of the old-CC and has its own historical background.[399] As a feature regulating the validity of contract it could be compared to the common law concept of consideration. Under the concept of consideration each contract must be linked to some kind of a bargain, a *quid pro quo* between the parties that by its existence justifies the enforceability of the agreement. Similarly, under the notion of *cause* each contract must be linked to a licit underlying objective that justifies the enforceability of the agreement. While more general than consideration, the concept of *cause* is nonetheless used similarly as a basic logical requirement underlying every contract.

Typical cases where the notion of *cause* has been used to regulate contracts is where a sale of goods has been linked to illegal or immoral activities. Thus for example a contract for the lease of an apartment could be void if the general objective of the lessor underlying the lease contract is prostitution. Similarly, because earlier French criminal codes criminalized astrology a contract for the sale of equipment related to astrology was void because of the lack of a proper cause underlying the contract for sale of equipment.[400] Like consideration under common law, the notion of cause has been severely critiqued in France. Some have called for its deletion, while others have defended it as an important

[399] '*L'obligation sans cause, ou sur une fausse cause, ou sur une cause illicite, ne peut avoir aucun effet.*' For a brief overview, see e.g. Delebecque and Pansier 129–131.
[400] E.g. Cass civ (1) 12 July 1989.

feature in the regulation of contracts.[401] With the recasting of the French law of contract that entered into force in October 2016, cause has been deleted from the Code civil, but the notion continues to exist in practice.

Coming back to contractual ensembles, Teyssié argued that if two contracts shared the same *cause* they were inherently tied together so that if one of the contracts ceased to exist then, necessarily, the other contract would also lose its purpose and ceased to exist. The result would be a so-called *anéantissement en cascade*, by which the voidness (or termination) of one contract would also make the other contract void (or allow it to be terminated).

Under current French caselaw, an *ensemble contractuelle* may be formed when two or more contracts participate in the same overall undertaking.[402] Two criteria are required, firstly *interdependence* between the contracts and, secondly, the parties' awareness of this interdependence.[403] The awareness criterion is relatively straightforward. Interdependence is more complex.[404] Pellé argues that the key elements of interdependence are a factual intertwinement (*imbrication*) of the contracts and a shared intent or motivation (e.g. *cause*) behind the contracts.[405] In an *ensemble contractuelle*, the separate contracts engaged in the same undertaking share the same *cause*, thus forging a strong bond between the existence of the general undertaking and its constituent contracts. The contracts participating in the undertaking become to such an extent dependent on one another that should one of these cease to exist, then the whole undertaking, and any related contracts with it, would cease to be viable. Pellé argues that only horizontal contracts can be interdependent with one another. For example, a subcontract or a contract made under a framework agreement could not be interdependent with its main contract or the framework agreement due to the already existing relationship of dependency between such agreements.

One example of interdependence is provided by the Cour de cassation's ruling of 4 April 2006.[406] A company had entered into a contract for the heating of a military hospital. The company then entered into a contract with a utilities company for the procurement of gas to be used for heating. The two contracts had different provisions regarding termination. When the military hospital terminated the heating contract, the fixed term of the gas supply contract had not yet expired. The company claimed that it had right to terminate the gas supply contract. The courts agreed that the sole purpose of the gas supply contract was to provide the gas needed for the heating contract. The two

[401] For a brief overview of arguments, see Delebecque and Pansier 131–132.
[402] Carole Aubert de Vincelles, "Réflexions sur les ensembles contractuelles : un droit en devenir" [2007] Revue des contrats 983, 983–992.
[403] Though some argue that *consent* is required instead of mere awareness. Aubert de Vincelles.
[404] Pellé 178, 254–258.
[405] See generally Pellé 255 ff.
[406] Cass civ (1) 4.4.2006, 02-18.277.

contracts formed an *ensemble contractuelle* in which both were so intertwined that they could not exist without the other. Further, the utilities company was aware that the gas supply contract was used solely to fulfill obligations under the heating contract. Thus it could not object to the termination of the gas supply contract upon the termination of the heating contract.

As *ensembles contractuelles* have been defined through a shared *cause* between contracts and *cause* is a condition precedent to a valid contract, the effects of interdependence in French jurisprudence have focused on the question of termination. If one of the contracts of the *ensemble contractuelle* is terminated, then this extends also to the other contracts of the general undertaking as they have simultaneously lost their *cause*. Once the *cause* of one contract of an *ensemble contractuelle* ceases to exist, the cause for the whole *ensemble contractuelle* is nullified. Whether interdependence could result in other effects than termination is thus tied to the more general relationship between equity and changes in a contract's *cause*. A cascading 'adjustment' of contracts is thus probably not foreseeable at least under French law, even if the idea of such does not seem too far-fetched in comparison.

In sum, the notion of *interdépendance* rests on the idea that contracts may be factually linked so that they form a single undertaking. This link may be characterized as equitable: If the contracts comprising the *ensemble* were made under the awareness that their existence was contingent on the existence of the other contracts and should one of the contracts be terminated for good cause, then the termination would affect also the other contracts of the whole.

2.4.2 Overcoming the Limits of Tort by Regulating Tort Through Contract

In comparison to English and American law, the French law of delict seems even more liberal than its law of contract.[407] Under Art. 1240 new-CC (Art. 1382 old-CC), every person whose act causes damage is obligated to repair that damage.[408] The general rule has no requirements of a duty of care or even negligence.[409] Art. 1241 new-CC (Art. 1383 old-CC) does add that any person causing damage through their negligence must repair that damage.[410] This article is generally seen to have covered omissions, but there is overlap and the exact relationship of the two is unclear.[411] Neither are there limitations to what kinds of damage must be repaired and thus for example pure economic loss is

[407] E.g. Whittaker, "Privity of Contract and the Law of Tort: The French Experience" 331. (Discussing various aspects of the French law of delict in the text and footnotes).
[408] The wordings of the two are identical: '*Tout fait quelconque de l'homme, qui cause à autrui un dommage, oblige celui par la faute duquel il est arrivé à le réparer*.'
[409] Generally van Dam, *European Tort Law* 56–58.
[410] Again, the wording is identical in both: '*Chacun est responsable du dommage qu'il a causé non seulement par son fait, mais encore par sa négligence ou par son imprudence*.'
[411] van Dam, *European Tort Law* 56–57.

automatically recoverable.[412] Though unique in relation to the other three legal systems discussed here, this approach to the scope of recoverable damages is by no means unique from a more global perspective, as for example Belgian and Dutch law have a similar approach.[413] An alternative to fault-based liability is provided by the stricter *gardien de la chose* or *responsabilité du fait des choses* liability ('liability for acts of things') of Art. 1242 new-CC (Art. 1384 old-CC), under which the guardian, typically the owner, of a thing can be held responsible for damages regardless of any fault or lack of it on her part.[414]

As discussed above the existence of a contractual relationship typically rules out delictual liability under the principle of *non-cumul*. Interestingly, the finding of a contractual relationship may also serve to replace the stricter form of delictual liability with a less strict form of contractual liability.[415] As noted, delictual liability comes under two different standards, the fault-based liability of Art. 1240–41 new-CC and the no-fault liability for 'acts of things', *responsabilité du fait des choses*, under Art. 1242 new-CC. At the same time, contractual liability can be based on either the strict *obligation de résultat* (obligation to achieve a specific result) where only force majeure or the fault of the victim are applicable defenses, or the less strict *obligation de moyen* (obligation to undertake reasonable care) where the defendant is only required to show reasonable care.[416] In some cases the courts' finding of contractual liability are used to establish no-fault liability between actors, as seen above in the case of establishing a strict *obligation de sécurité* in relation to a carrier's liability towards passengers.[417] However, in other cases the delictual *responsabilité du fait des choses* is deemed more proper, as in relation to employers' liability towards employees.[418]

Thus if the facts of a specific case would allow the use of the strict variant of delictual liability despite the existence of a contract that allows only fault-based liability, the role of the contract might be reduced to nothing (assuming that other factors would not be affected by the choice of obligation, such as limitation periods). The rule of *non-cumul*, however, can be used to control the extent of liability by ruling out the claim under delict. Whittaker uses the Cour de cassation's 1936 ruling finding a medical doctor's liability towards patients

[412] van Dam, *European Tort Law* 210–211.
[413] E.g. Markesinis and Unberath 53.
[414] Art. 1242 new-CC shares the same wording as the most recent version of Art. 1384 old-CC, '*On est responsable non seulement du dommage que l'on cause par son propre fait, mais encore de celui qui est causé par le fait des personnes dont on doit répondre, ou des choses que l'on a sous sa garde...*' followed by a list of examples and exceptions. Generally, see van Dam, *European Tort Law* 60 ff. Whittaker refers to *gardien* liability, Whittaker, "Privity of Contract and the Law of Tort: The French Experience" 332–333.
[415] Generally, Bellissent.
[416] Delebecque and Pansier 273–274.
[417] Whittaker, "Privity of Contract and the Law of Tort: The French Experience" 335.
[418] Whittaker, "Privity of Contract and the Law of Tort: The French Experience" 334–335.

as being grounded in contract as an example.[419] The finding of contractual liability, which was based on an obligation to undertake reasonable care and thus not strict, also prevented the possibility of imposing on doctors a delictual strict liability under Art. 1242 new-CC.

This approach to shifting the measure of liability depending on whether contract or tort is used can be coupled with actions under contract being subject to any limitations of damages agreed to by the parties or applicable under statute. Thus for example in the *Besse* case discussed above the defendant subcontractor tried to rely on the contractual nature of its indirect relationship to the employer as a means of limiting liability by adhering to contractual limitations applicable in the relationship between the employer and the main contractor. The Cour de cassation refused to allow this approach, ruling for delict instead. Similarly, in the *Lamoricière* case discussed above, the fact that the claimants could reject their contractual third-party beneficiary rights allowed them to sue under delict and thus forego disclaimers that would have limited their contractual actions. More generally, in addition to explicit limitations of liability and the strictness of the obligation, whether a relationship is seen as contractual or delictual may have implications related to other legal parameters.[420]

Together, these factors lead to the crucial role of the principle of *non-cumul* in manipulating the boundaries of contract and delict under French law.[421] The situation seems in some ways opposite to for example the common law perspective described earlier. While under common law courts seem to fight against the expansion of the recoverability of certain types of damages under tort, under French law focus has been more on to what extent parties are allowed by their agreement to limit the scope of damages recoverable under contract *or* delict.

The separate nature of contract and tort are also reflected in the development of product liability under French law.[422] On the one hand, the *action directe* offered those who participated in the chain of sales, such as consumer buyers, a contractual action against any previous actor in the chain of sales for defects.[423] Under the principle of *non-cumul* they would have no recourse to delict in the first place. The problem of exclusions of liability remained, however. Here, as discussed above the courts developed an expansive

[419] Cass civ 20 May 1936.
[420] This used to be the case in particular in relation to statutory limitation periods, but these have since been unified in relation to contract and delict. Olivier Moréteau, "Basic Questions of Tort Law from a Comparative Perspective" in Helmut Koziol (ed), *Basic Questions of Tort Law* (2015) 93.
[421] Whittaker, "Privity of Contract and the Law of Tort: The French Experience" 335–336.
[422] Generally for the French approach on product liability from a comparative perspective, see Jean-Sébastien Borghetti, *La responsabilité du fait des produits* (LGDJ 2004). However, for the convenience of English audiences I will here primarily refer to Borghetti.
[423] See e.g. Borghetti 93–94.

interpretation of the statutory guarantee against hidden defects, *garantie des vices cachés*.[424] In the 1960's the Cour de cassation ruled that in relation to professional or business sellers there is an irrebuttable presumption that the seller knows of the defect even if it is physically impossible for the seller to know of such.[425] The combined effect of the *action directe en garantie* and the enlarged *garantie des vices cachés* was that any consumer who had bought a product had a contractual claim for damages arising out of the product's defects, even ones that it would have been impossible for the manufacturer to know of, against any previous actor in the chain of sales. Under this form of liability manufacturers are clearly liable for e.g. development risks while the types of damages recoverable include also pure economic loss, such as damages caused by the product's own defectiveness.[426] Claimants had to prove merely the existence of a defect and causation, however with some added caveats, for example that claims might be limited temporarily under contractual statutes of limitations.[427]

On the other hand, recourse to delict was necessary for those who were not party to the chain of sales.[428] In the late 19th and early 20th century liability for defective products was typically vested not in the manufacturer but in the owner of the products. Here, the strict liability of 1242 new-CC, *responsabilité du fait des choses*, was liberally interpreted by courts.[429] Thus for example liability to employees harmed by industrial tools was vested in the employer who owned the machinery.[430] Similarly, liability for accidents caused by defective automobiles was vested in the owner of the automobile in the period between the two world wars.[431] Furthermore, the already noted *obligation de sécurité* was used to establish the no-fault liability of carriers towards passengers. These were, however, not practical avenues for establishing effective product liability when consumer goods started proliferating in the 1950s and increasingly challenged existing caselaw.[432]

Despite some interest by scholars in the liability of manufacturers and sellers, no general theorization of product liability followed. Besides the contractual avenue for those related to the chain of sales, courts developed the standard delict rule of French law to overcome its biggest challenge, i.e. that in

[424] Embodied in Articles 1641 ff. CC (not changed in 2016 recodification). For an example of *vices cachés*, see the ECJ case *Alsthom Atlantique* v *Sulzer* (C-339/89), noting that a similar rule exists in no other EC Member State but that nonetheless the rule was not seen by the ECJ as problematic from the perspective of the common market.
[425] Cass. com. 1 July 1969, *Bull. civ. IV* n. 243. Borghetti 95.
[426] Whittaker, "Privity of Contract and the Law of Tort: The French Experience" 344.
[427] Borghetti 96.
[428] Borghetti 96–97.
[429] Borghetti 90, 99–100.
[430] Borghetti 89–90. Cass civ (v) 16.6.1896.
[431] Borghetti 91. Cass ch réunies 13.2.1930.
[432] Borghetti 94.

line with other fault-based rules of tort and delict it requires the claimant to show fault in the manufacturer. The Cour de cassation removed this burden by ruling that negligence could be imputed from the mere fact that a professional seller puts into circulation a defective product.[433] During the 1960s this became a general rule of liability on part of sellers and manufacturers alike.[434] Add to this that the French law of delict, like contract, allows the recovery of pure economic damages, both the contractual and delictual avenues of recovery became similar in effectiveness. While those suffering injuries were in theory treated differently based on whether their claim was founded in contract or in delict, this scarcely affected the situation of victims in practice.[435] Whether or not they were buyers, they only had to show the defectiveness of the product in order to recover from the seller or manufacturer damages caused by the defective product.

The practical similarity of the contract and delict approaches lead Borghetti to see the system put in place in France as very close to a general no-fault system that applies equally to manufacturers and sellers alike.[436] While the relative strictness of different product liability systems is open to debate, Borghetti sees the French system as not unlike the American rules embodied in *Greenman* v *Yuba Power Tools* and the Restatement (Second) of Torts.[437] This is reflected also in discussions surrounding the later advent of the 1985 EC Product Liability Directive. In particular the question of whether the form of liability under the Directive is as strict as earlier French law, due to the development exception included in the Directive, caused a long delay in the implementation of the Directive, similarly to the directive's focus on manufacturers instead of all tiers of the chain of sales.[438]

2.4.3 Contract and Tort Intertwined: The French Experience

Because under French law both contract and delict are supposed to have their proper domains that do not overlap, the relationship of the two would *prima facie* seem to be a less important concern than, for example, under English or American law. The development of product liability exemplifies this, as the two avenues of action have complemented one another in providing different classes of actors similar possibilities for legal action. Thus, in their proper fields of application both contract and delict offer possibilities for raising claims beyond privity that are not hampered by for example limitations with regard to recovery of pure economic loss.

[433] Cass. civ. 22 July 1931. Borghetti 96–97.
[434] Borghetti 96–97.
[435] Borghetti 97.
[436] Borghetti 98–99. Borghetti argues, however, that some areas of product liability, such as liability for failure to warn and for design defects, was based on fault.
[437] Borghetti 98–99.
[438] Borghetti 103–111.

On the other hand, in practice contract and delict are more thoroughly intertwined. As noted by Whittaker, by redrawing the bounds of contract judges can simultaneously alter the applicability of delict and the strictness of liability and applicability of limitations. This is in particular visible in the notion of so called groups of contracts that were for a while used to redraw the limits of liability in contractually organized supply chains. And similarly to US law, French law seems to be focused on policy concerns, with in particular delict being seen to constitute public policy that cannot be limited via contract, *unless* the whole action is founded in contract whereby the rule of *non-cumul* is triggered.

Thus French law provides ample means for using both contractual and delictual causes of action to overcome the bounds of privity in relation to contractually organized structures of production. However, the contractual focus on expanding the bounds of agreement and delictual focus on public policy may make the transnational potential of French law limited because of its idiosyncracy. This idiosyncracy is reflected for example in the ECJ judgment *Jakob Handte & Co. GmbH* v *Traitements mécano-chimiques des surfaces SA* (C-26/91, 17 June 1992) revolving around the applicability of French contract law in a European cross-border situation. The court found that an *action directe* was not a 'voluntarily assumed obligation' and thus was not governed by the rules of the Brussels convention, leading to the conclusion that at least some developments of French contract law are not compatible with broader transnational conceptualizations of what it means to contract.

2.5 Germany: A Rigid Law of Delict Overtaken by Contract but Later Redeemed

2.5.1 The Personal and Material Scope of Contracts: Third-Party Beneficiaries, Protectees, and Beyond

In comparison to the other legal systems studied here, the most striking feature of German contract law is perhaps its relative ease of contract formation. Technically, the only requirements for a contract are offer and acceptance, that the contracting parties have legal capacity, and that the contract is generally in line with public policy.[439] Furthermore, through *culpa in contrahendo* (generally 'pre-contractual duties'), the use of contract can be extended to cover situations where arguably no contract has yet been concluded.[440] This entails that contractual relationships may be relatively freely implied under German

[439] Generally, see Basil Markesinis, Hannes Unberath and Angus Johnston, *The German Law of Contract: A Comparative Treatise* (Hart Publishing 2006).
[440] Markesinis and Unberath 704. See also BGH 28.1.1976, NJW 1976, 712, the 'leaf-of-salad' case discussed below.

law. Thus cases that have been resolved under English law by recourse to tort, as in *Hedley Byrne*, or by recourse to promissory estoppel in the United States can receive a direct contractual answer under German law, leading Markesinis to argue that it is the rigid English paradigm of contract which has forced English law to resort broadly to tort instead of contractual causes of actions.[441]

One example is provided by a *Bundesgerichtshof* ('Federal Court of Justice') ruling in a case concerning the so-called contract to supply information.[442] In that case a bank had provided a letter with information on a possible investment to customers. The claimant received the letter from her broker, relied on the information, and lost her investment. On the facts of the case the courts found that a contract to supply information had been concluded between the claimant and the bank. Under the contract the bank was liable to remedy the claimant's loss because it had been negligent by not providing objectively correct information in the letter.

Similarly to the French Code civil, the German *Bürgerliches Gesetzbuch* (German Civil Code, 'BGB') contained from its onset in 1904 provisions on contracts to the benefit of third parties ('*Vertrag zugunsten Dritter*') allowing third parties to enforce contracts made to their benefit. The first leg of Art. 328 BGB states the rule that parties can agree in their contract to grant an enforceable right to a third-party.[443] The second leg of Art. 328 BGB further clarifies situations where there are no explicit provisions on third-party rights in a contract. In such cases the existence, initiation, and conditions precedent of a third-party's right, and the right of the parties to terminate or change the third-party's right, become a matter of contractual interpretation, in particular in relation to the objective of the contract.[444]

German law does not stop here, however. In the United States and France the notion of contracts to the benefit of third parties has been used to enlarge the protective scope of contracts, for example in some legatee beneficiary cases in the United States and via the use of the *obligation de sécurité* under French law. In Germany, however, another legal figure was created that at first sight closely resembles the third party beneficiary doctrine. This is the notion of *Vertrag mit Schutzwirkung zugunsten Dritter* ('contracts with protective effects to third parties').[445] Markesinis describes contracts with protective effects to third

[441] Markesinis. For an interesting recent comparison in relation to bindingness of codes of conduct, see Haley Revak, "Corporate Codes of Conduct: Binding Contract or Ideal Publicity?" (2012) 63 Hastings Law Journal 1645, 654–657.

[442] BGH 12.2.1979, NJW 1979,1595. Translated in Markesinis and Unberath 265–269.

[443] '*Durch Vertrag kann eine Leistung an einen Dritten mit der Wirkung bedungen werden, dass der Dritte unmittelbar das Recht erwirbt, die Leistung zu fordern.*'

[444] '*In Ermangelung einer besonderen Bestimmung ist aus den Umständen, insbesondere aus dem Zwecke des Vertrags, zu entnehmen, ob der Dritte das Recht erwerben, ob das Recht des Dritten sofort oder nur unter gewissen Voraussetzungen entstehen und ob den Vertragschließenden die Befugnis vorbehalten sein soll, das Recht des Dritten ohne dessen Zustimmung aufzuheben oder zu ändern.*'

[445] Markesinis and Unberath 59–64.

parties as a judicial creation that 'brings strangers to a contract under its protective umbrella and allows them to entertain an action for damages for breach of one of the contract's *secondary* obligations'.[446]

One example of a secondary obligation is a shopkeeper's duty to keep his premises safe, something which under common law is typically seen as a duty sounding in tort. Here, a traditional example of the contract with protective effects to third parties is the so-called leaf-of-salad case.[447] In that case, the daughter of a patron visiting a store slipped on a leaf of salad and was injured. Almost seven years later the daughter sued the store for recovery of present and future costs related to the injury. The courts found that the daughter was protected by the contract that her mother was negotiating with the store. In particular, they saw that the claim of the daughter should be similar to that which the mother could hypothetically have and thus contractual in nature.

Another example of a secondary obligation is an expert's liability for economic loss caused by her advice. In this type of cases the contractual foundations of the doctrine allow the recovery of pure economic loss without further ado, as opposed to approaches founded in tort or delict. Thus the doctrine has been applied to many of the purposes for which English law has been forced to develop the recovery of pure economic loss under tort, such as the *White* v *Jones* scenario referred to in the previous sections on English and American law.[448]

Going beyond *White* v *Jones*, the role of contracts with protective effects to third parties in relation to expert liability has been extended by the use of implication. For one example, the Federal Court of Justice has found that a request for financial information could be interpreted as a contract with protective effects to third parties.[449] For another example, in a case concerning financial advise the Court noted that an act can give rise to a duty of care towards a number of actors even if it is specifically not seen as a contract to the benefit of third parties.[450] Generally, the tendency to rely on implication has

[446] Markesinis and Unberath 59. Emphasis in original.

[447] BGH 28.1.1976, NJW 1976, 712. English translation in Markesinis and Unberath 789–793. The leaf-of-salad case can be compared to the English ruling in *Ward* v *Tesco Stores Ltd* (1976) 1 WLR 810.

[448] *White* v *Jones* can be compared to for example BGH 19.1.1977, NJW 1977, 2073, translated in Markesinis and Unberath 328–330. For comparative comments, see generally Markesinis and Unberath 330 ff.

[449] BGH 28.8.1982, NJW 1982, 2431, translated in Markesinis and Unberath 273–275. The court found that on the facts of the case it was clear that the actor requesting information had little personal interest in it. Even if she did not act in the name of another (i.e. was not an agent), it could be that those acting upon the information would be included in the protective sphere of the contract. Similarly, BGH 28.2.1977, NJW 1977, 1916, translated in Markesinis and Unberath 269–273.

[450] BGH 2.11.1983, NJW 1984, 355, translated in Markesinis and Unberath 275–280. The claimant had accompanied another person who had instructed the defendant to provide financial information regarding the value and income related to a premises. The claimant, instead of the requesting person, acted upon the information. The court found that on the facts of the case the defendant should have understood that the claimant was part of a group of buyers and thus a contractual duty could extend to cover her.

since increased and has been critiqued as removing the doctrine too far from contract.[451]

There are three main prerequisites for contracts with protective effects to third parties.[452] Firstly, there is a requirement of proximity of performance (*Leistungsnähe*), meaning that the third party must come into contact with the contractual performance and be endangered by it in roughly the same way as the creditor.[453] Secondly, the creditor must have some interest in protecting the third-party (*Gläubigerinteresse*).[454] Thirdly, these two elements must be known to the debtor (*Erkennbarkeit für Schuldner*).[455] The third party must also be in need of protection (*Schutzbedürftigkeit des Dritten*). This generally means that she has no comparable alternative avenue of recourse. Thus for example a delictual claim under Art. 823 BGB, which in most cases rules out recovery of pure economic loss, would typically not provide sufficient protection to overrule the contractual claim afforded by contracts with protective effects on third parties.[456]

Except for its contractual foundation, the doctrinal justification of contracts with protective effects to third parties is unclear.[457] Courts have earlier been inclined to see contracts with protective effects as falling under the realm of contracts to the benefit of third parties under § 328 BGB, for example via implied terms under § 157 BGB, while later decisions seem to have avoided focusing on precise theoretical underpinnings.[458] German academics, on the other hand, have distinguished contracts with protective effects to third parties from the traditional contracts to the benefit of third parties, often seeing the former as falling under the scope of the general clause of § 242 BGB.[459]

Contracts with protective effects to third parties are clearly a potentially expansive figure of law. For example, in the 1980s it was argued that its use might lead to similar legal results as in the English *Junior Books* case.[460] Both the English tort approach and the German contractual approach, however, have their own problems in providing clear demarcations and justifications for liability. Earlier, the German contracts with protective effects towards third-

[451] Markesinis and Unberath 293–294.
[452] Markesinis and Unberath 63–64.
[453] Markesinis and Unberath 63.
[454] Markesinis and Unberath 63.
[455] Markesinis and Unberath 63.
[456] On the limits of delictual claims, see Subsection 2.5.2 below.
[457] For discussion over possible justifications, see Krebs.
[458] Markesinis and Unberath 62.
[459] Markesinis and Unberath 62. (Citing Larenz, Schuldrecht I (1st ed. 1953), 16. III; Larenz, NJW 1956, 1193; Larenz NJW 1960, 79).
[460] Markesinis and Unberath 61–62; Peter Schlechtriem, "Deliktshaftung des Subunternehmers gegenüber den Bauherrn wegen Minderwerts seines Werkes—Eine neue Entscheidung des House of Lords" [1983] Versicherungsrecht 64. On the other hand, in German construction contexts liability is typically apportioned by contractors assigning in advance to employers all claims they may have against their subcontractors.

parties may have been better able to avoid indeterminate liability and the blurring of contract and tort.[461] This was due to its focus on the relationship of the creditor and a third-party claimant and the knowledge that the debtor/defendant has of this relationship, as opposed to the English common law's more general focus on the general foreseeability of third-party claimants to the defendant.[462] Now, however, both approaches seem to be converging to a considerable extent.[463] In particular, the contractual foundations of contracts with protective effects to third parties have come under the critique of being too far removed from any reasonable notion of consent.[464] As a result, some scholars have proposed the use of delict instead, even if the contractual foundations of the figure of law have been restated by the Federal Court of Justice.[465]

Another German legal figure that extends the personal scope of contracts is that of *Drittschadensliquidation*, which could be translated to for example transferred loss.[466] Markesinis describes transferred loss as:[467]

> *…a judge-made doctrine which allows a creditor (the promisee) to a contract to claim (in contract) for loss resulting from the non-execution or bad execution of the contract, which falls not upon him (the creditor) but upon a third party provided that the third party has suffered a loss instead of the promisee.*

A typical example of the doctrine are cases where the risk of loss of property (but not the property) has passed from seller to buyer. This may be the case for example when a seller has transferred the property to the carrier it has contracted and, at the same time, the risk of loss is transferred to the buyer. The buyer who now bears the risk of loss does not have a claim against the carrier for loss of property as only the seller has a contractual relationship with the carrier.[468] The primary rationale behind transferred loss is to prevent a defaulting actor from escaping liability.[469] This is the crux of transferred loss: Without it, a defaulting actor could not be sued under German legal doctrine in the situation described because the actor that has suffered a loss has no remedy

[461] Generally, Markesinis and Unberath 59–63.
[462] Markesinis and Unberath 62–63.
[463] Markesinis and Unberath 62–63.
[464] Markesinis and Unberath 62–63.
[465] BGH 14.11.2000, NJW 2001 514.
[466] Though with the caveat that 'transferred loss' was used by Goff LJ in the appeals court decision in *The Aliakmon* [1985], QB 350, apparently without awareness of German construction despite a similar context, and with crucial differences to the German construction, such as reliance on tort. Markesinis and Unberath 66.
[467] Markesinis and Unberath 64.
[468] Such a situation is discussed for example in Art. 447 BGB, '*Gefahrübergang beim Versendungskauf*', regarding the transfer of risk.
[469] Markesinis and Unberath 64–65.

while the actor with a remedy has no loss, thus leaving the defaulting actor and her insurer with potential windfall.[470]

Transferred loss under German law has typically been used in situations of agency, trust and bailment, and carriage of goods.[471] Markesinis sees two common elements in these cases.[472] Firstly, there is no floodgates related problem as only one actor suffers a loss. Secondly, the contractor that would normally have the right to sue has little incentive to do so or even may not even exist anymore. Arguably in such situations the enlargement of privity only minimally affects the legal relationships of the actors. On the other hand, who should bear the risk of loss for example with regard to insolvency can be debated.

Apart from techniques of extending the scope of contracts, German law offers a number of ways for regulating the substance of contractual relationships.[473] Here, the general requirement of *Treu und Glauben*, loosely defined as good faith, is central. A general clause of good faith in the execution of contracts is contained in Art. 242 BGB and has been used for regulating contracts and other qualified relationships under German law.[474] Another article, Art. 157 BGB, requires the interpretation of contracts under good faith and has similarly been used by courts as a foundation for regulating contracts and other qualified legal relationships.[475] The relationship of the two is uncertain and occasionally contested. Thus for example courts have in some cases referred to Art. 157 BGB, such as in relation to contracts with protective effects toward third parties while scholarship has argued that Art. 242 BGB is a more proper foundation for what it sees as judicial development of the law.[476]

In practice Art. 242 BGB has seen much wider application.[477] Since its inauguration it has notoriously been used in connection with extreme circumstances such as hyperinflation following World War I and the National Socialist regime.[478] Since then the applicable scope of Art. 242 BGB was narrowed down by the fundamental rights provisions of the *Grundgesetz*, but the practical relevance of Art. 242 BGB continued to be great, with one post-war commentary containing as many as 1500 pages on this one article.[479]

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[470] Similarly to the outcome in the English case of *The Aliakmon* where the buyer was left without a cause of action in negligence. *Leigh and Sillavan Ltd.* V *Aliakmon Shipping Co Ltd (The Aliakmon)* [1985] UKHL 10.

[471] Markesinis and Unberath 64–65.

[472] Markesinis and Unberath 66–67.

[473] Generally, Markesinis, Unberath and Johnston.

[474] '*Der Schuldner ist verpflichtet, die Leistung so zu bewirken, wie Treu und Glauben mit Rücksicht auf die Verkehrssitte es erfordern.*' For the extent of related relationships, see e.g. Krebs.

[475] '*Verträge sind so auszulegen, wie Treu und Glauben mit Rücksicht auf die Verkehrssitte es erfordern.*'

[476] E.g. Zimmermann and Whittaker 29.

[477] Generally on the two good faith clauses, see Zimmermann and Whittaker 18–32.

[478] See generally, Bernd Rüthers, *Die unbegrenzte Auslegung* (7th edn, 2012).

[479] Zimmermann and Whittaker 23, compare to 31.

Art. 242 BGB operates in three key ways. Firstly, it supplements the law in practice, giving rise to duties related to not only contractual performance but also to pre- and post-contractual situations.[480] These include for example duties of information, co-operation, and protection towards contractual partners. Secondly, Art. 242 BGB limits the exercise of contractual rights by prohibiting abuse of rights, for example under the estoppel-like principle of *venire contra factum proprium*.[481] Thirdly, Art. 242 BGB has been used by courts to interfere in contractual relationships to avoid unreasonability.[482] This includes in particular the rise of the doctrine of *Wegfall der Geschäftsgrundlage* ('loss of the foundations of a transaction'), a general *clausula rebus sic stantibus* type clause.[483]

Over time, many of the doctrines originally based in Art. 242 BGB have been codified either in the BGB itself or in other legislation. *Wegfall der Geschäftsgrundlage* provides one example, having been codified as Art. 313 BGB in the modernization of the BGB in 2002.[484] Another example of such a progression is provided by the judicial regulation of boilerplate or standard contract terms. Here, caselaw based on Art. 242 BGB was first codified into the so-called *AGB-Gesetz*, or standard contract terms act, in 1977.[485] The *AGB-Gesetz* was subsequently incorporated into Art. 305–310 BGB via the modernization of the BGB in 2002.[486] A key provision here is Art. 307 BGB, according to which any standard contract term that unreasonably disadvantages the other party in light of the principle of good faith is invalid.[487] While the

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[480] Zimmermann and Whittaker 24.
[481] Zimmermann and Whittaker 24–25.
[482] Zimmermann and Whittaker 25–26.
[483] Codified since 2002 as Art. 313 BGB, 'Störung der Geschäftsgrundlage', according to which: *(1) Haben sich Umstände, die zur Grundlage des Vertrags geworden sind, nach Vertragsschluss schwerwiegend verändert und hätten die Parteien den Vertrag nicht oder mit anderem Inhalt geschlossen, wenn sie diese Veränderung vorausgesehen hätten, so kann Anpassung des Vertrags verlangt werden, soweit einem Teil unter Berücksichtigung aller Umstände des Einzelfalls, insbesondere der vertraglichen oder gesetzlichen Risikoverteilung, das Festhalten am unveränderten Vertrag nicht zugemutet werden kann. (2) Einer Veränderung der Umstände steht es gleich, wenn wesentliche Vorstellungen, die zur Grundlage des Vertrags geworden sind, sich als falsch herausstellen. (3) Ist eine Anpassung des Vertrags nicht möglich oder einem Teil nicht zumutbar, so kann der benachteiligte Teil vom Vertrag zurücktreten. An die Stelle des Rücktrittsrechts tritt für Dauerschuldverhältnisse das Recht zur Kündigung.*
[484] See the *Gesetz zur Modernisierung des Schuldrechts*, 21.11.2001, BGBl. 61, 29.11.2001, and the *Entwurf eines Gesetzes zur Modernisierung des Schuldrechts* is available at http://dipbt.bundestag.de/dip21/btd/14/060/1406040.pdf.
[485] *Gesetz zur Regelung des Rechts der Allgemeinen Geschäftsbedingungen*, 09.12.1976, BGBl. I S. 3317.
[486] See the *Gesetz zur Modernisierung des Schuldrechts*, 21.11.2001, BGBl. 61, 29.11.2001, and the *Entwurf eines Gesetzes zur Modernisierung des Schuldrechts* is available at http://dipbt.bundestag.de/dip21/btd/14/060/1406040.pdf.
[487] '*(1) Bestimmungen in Allgemeinen Geschäftsbedingungen sind unwirksam, wenn sie den Vertragspartner des Verwenders entgegen den Geboten von Treu und Glauben unangemessen benachteiligen. Eine unangemessene Benachteiligung kann sich auch daraus ergeben, dass die Bestimmung nicht klar und verständlich ist. (2) Eine unangemessene Benachteiligung ist im Zweifel anzunehmen, wenn eine Bestimmung 1. mit wesentlichen Grundgedanken der gesetzlichen Regelung, von*

AGB-Gesetz could be seen as comparable to the 1977 Unfair Contract Terms Act in England, the former is related to only standard contract terms in comparison to the latter's much broader reach. For a third example, in relation to consumer contracts the *Einwendungsdurchgriff* allows consumers to raise defenses based on a purchase contract against a related credit or financing agreement.[488] This concept of 'connected contracts' was similarly first founded in caselaw on the basis of Art. 242 BGB, then codified in the Consumer Credit Act of 1990, and finally moved into the BGB as Art. 359 BGB in the 2002 modernization.[489]

In addition to the general clauses of good faith, the prohibition of obligations contrary to *bonos mores* in Art. 138 BGB has also seen use in relation to excessive interest rates in installment payment plans or contracts of suretyship entered into by relatives of debtors.[490] A similar provision related to delict focusing on intentional acts *contra bonos mores* is encased in Art. 836 BGB and will be briefly discussed below in relation to delict.

Finally, beyond these established approaches there is plentiful theory. In particular, scholars such as Krebs and Teubner have pushed towards an acceptance of relationships apparently beyond both contract and delict (while somewhat closer to contract)—arguing that neither doctrines such as contracts with protective effects to third parties nor 'normal' contract or delict can adequately reflect the idiosyncrasies of certain forms of organization.[491] Here, Teubner would see that extra-contractual duties of loyalty ('*vertragslose Verbundpflichten*'), based in readings of Art. 242 BGB, would exist between actors indirectly connected via contracts.[492] Unfortunately, I do not have room here to discuss these expansive theories in detail. I will, however, briefly return to them in Chapter 4 as they highlight certain practically relevant aspects of complex contractual arrangements.

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der abgewichen wird, nicht zu vereinbaren ist oder 2. wesentliche Rechte oder Pflichten, die sich aus der Natur des Vertrags ergeben, so einschränkt, dass die Erreichung des Vertragszwecks gefährdet ist.'

[488] Zimmermann and Whittaker 28.

[489] '*Der Verbraucher kann die Rückzahlung des Darlehens verweigern, soweit Einwendungen aus dem verbundenen Vertrag ihn gegenüber dem Unternehmer, mit dem er den verbundenen Vertrag geschlossen hat, zur Verweigerung seiner Leistung berechtigen würden. Dies gilt nicht bei Einwendungen, die auf einer Vertragsänderung beruhen, welche zwischen diesem Unternehmer und dem Verbraucher nach Abschluss des Darlehensvertrags vereinbart wurde. Kann der Verbraucher Nacherfüllung verlangen, so kann er die Rückzahlung des Darlehens erst verweigern, wenn die Nacherfüllung fehlgeschlagen ist.*'

[490] '*Ein Rechtsgeschäft, das gegen die guten Sitten verstößt, ist nichtig.*' Zimmermann and Whittaker 29–30.

[491] Krebs; Gunther Teubner, *Netzwerk als Vertragsverbund: Virtuelle Unternehmen, Franchising, Just-in-time in sozialwissenschaftlicher und juristischer Sicht* (Nomos 2004). In English translation as Gunther Teubner and Hugh Collins, *Networks as Connected Contracts* (Hart 2011).

[492] Teubner, *Netzwerk als Vertragsverbund: Virtuelle Unternehmen, Franchising, Just-in-time in sozialwissenschaftlicher und juristischer Sicht* 193–197, 203.

2.5.2 Overcoming the Limits of Tort—From the Privity Fallacy to Regulating New Duties of Care

In addition to the malleability of contractual form, another principal reason for the flexibility of protection offered by German contract law is the related rigidity of the German law of delict. Two problems in particular have been attributed to the German law of delict. One is the difficulty of recovering pure economic loss, while the other is a lack of true vicarious liability. Both these reasons are generally seen as contributing to the broad use of contractual actions under German law.

Similarly to English and American tort law, the German law of delict does not generally allow the recovery of pure economic loss. The general grounds of recovery in delict, Art. 823 I BGB, in practice rules out pure economic loss, the approach typically being justified through arguments relating to the indeterminacy of damages and insurance considerations.[493] Art. 823 II BGB allows recovery of pure economic loss, but only in relation to breaches of specific statutory duties.[494] Another grounds of recovery in delict, Art. 826 BGB, allows recovery of pure economic loss where the defendant has intentionally acted *contra bonos mores*.[495] While such an approach has limited applicability, this approach has seen some use for example in relation to early approaches to product liability.[496]

As already seen above, however, by far the most used avenue for recovery in this regard seems to be recourse to contract. Scholars generally see that German law has used contractual means to achieve similar outcomes in relation to the recovery of pure economic loss as tort law in England.[497] Despite some German scholars calling for a broader use of delict, in many cases there continues to be a clear preference for contractual solutions. This approach is aided by the general concurrence of contract and tort.[498]

Art. 831 BGB makes vicarious liability under delict onerous when compared to for example the laws of England, France, or the United States.[499] On the face of it, employers are liable for the acts of their employees only if they have not exercised ordinary care in choosing or controlling the employees.

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[493] Generally, Markesinis and Unberath 52–59; van Dam, *European Tort Law* 211–213. One exception is the limited 'right to business', for which van Dam, *European Tort Law* 88.

[494] E.g. van Dam, *European Tort Law* 285–286; Markesinis and Unberath 885–888.

[495] *'Wer in einer gegen die guten Sitten verstoßenden Weise einem anderen vorsätzlich Schaden zufügt, ist dem anderen zum Ersatz des Schadens verpflichtet.'* See van Dam, *European Tort Law* 83–84; Markesinis and Unberath 888–892.

[496] Wagner 120. (Referring to RGZ 163, 21, 25, RG Deutches Recht 1940, 1293). More generally for a list of relevant cases in relation to Art. 826 BGB, see Markesinis and Unberath 890–892.

[497] Koziol, *Basic Questions of Tort Law from a Germanic Perspective* 94; van Dam, *European Tort Law* 212; Markesinis and Unberath 55–56, 59–64.

[498] Wagner 117.

[499] Wagner 119, 124; Markesinis and Unberath 59–60, 693–705.

Thus the German law of delict requires plaintiffs to show that the defendant was negligent in choosing its assistants. One way of overcoming this problem is using contractual means, such contracts with protective effects to third parties, because under Art. 278 BGB vicarious liability exists under contractual and similarly qualified relationships.[500]

The lack of true vicarious liability coupled with the standard problem of the delictual approach, i.e. the need to show a defendant's fault, focused early German discussions of product liability towards contractual means.[501] Thus, when faced with the question of product liability in the 1950s and 1960s, scholars proposed a number of different contractual theories to resolve questions of liability beyond privity. These would have clear benefits such as easier burdens of proof on claimants and true vicarious liability, to say nothing of the recoverability of pure economic loss.

Proposed contractual theories included express or implied warranties directed to ultimate consumers (similarly to the United States), *culpa in contrahendo*, contracts with protective effects on third parties, and transferred loss.[502] Other proposals can be labelled as semi- or quasicontractual or as a *third track* of liability situated between contract and tort.[503] These included the promissory estoppel-like figure of *Vertrauenshaftung*, liability for breach of trust, based on the idea that intense marketing and advertising activities of manufacturers justifiably caused consumers to rely on them;[504] liability for a breach of Art. 122 BGB, referring to the voidness of unserious or erroneous declarations which in this case would be a manufacturers' marketing or advertising efforts, resulting in compensation for reliance losses;[505] and a strict liability of manufacturers, based on the *sui generis* reliance of consumers on manufacturers irrespective of any marketing or advertising efforts.[506]

Despite strong calls from scholars advocating for the use of contract, the Federal Court of Justice decided in its 1968 ruling in the *Hühnerpestfalle* ('Newcastle disease case') to opt for delict instead.[507] In that case a chicken farmer's livestock had died due to a veterinarian using contaminated vaccines, and the court explicitly ruled out contractual avenues of recourse such as contracts with protective effects to third parties and transferred loss. The gist of

[500] Markesinis and Unberath 703–705.
[501] Markesinis and Unberath 94–97.
[502] Markesinis and Unberath 94–96; Wagner 122–123.
[503] Markesinis and Unberath 96–97; Wagner 122–123. Generally on the notion of the third track of liability between contract and tort, see Krebs.
[504] Wagner 123. (Referring to Canaris, Die Produzentenhaftung in dogmatischer und rechtspolitischer Sicht, *Juristenzeitung* (1968) 494.)
[505] Markesinis and Unberath 96. (Referring to Lorenz, Warenabsatz und Vertrauensschutz, *Karlsruher Forum* (1963).)
[506] Markesinis and Unberath 96. (Referring to Diederichsen, *Die Haftung des Warenherstellers* (1967).)
[507] BGH (6) 26.11.1968, NJW 1969, 269, with English translation in Markesinis and Unberath 555–564. Generally, Markesinis and Unberath 97–99; Wagner 123–4.

the case with regard to distancing product liability from contractual theories seems to be the avoidance of a 'gap' in the system of product liability in relation to different categories of damage sufferors.[508]

Thus while for example French courts were ready to pursue two alternative avenues of recourse so that those contractually related to the chain of sales had a practically similar but foundationally different action than those not related to the chain of sales, the Federal Court of Justice opted for a single unified solution. Contractual theories were focused on protecting persons who were in some way involved in the sales chain more than just as users of a good and could therefore justify a relationship with the manufacturer, for example through reliance or a guarantee. Such theories might not be able to encompass all those potentially injured by the product, such as users not subject to the manufacturer's marketing efforts. At the same time, the policy reasons for imposing liability on the manufacturer, i.e. her greater ability to detect and correct defects, insure against risk, and to shift the costs of accidents, were the same for those connected to the chain and those not so connected.[509]

While the case was based on special legislation, the court argued that normal delict would also suffice to raise a claim with a shifted burden of proof. A key problem with this approach was the lack of true vicarious liability under German law.[510] As already noted, unlike English or American law which follow the rule of *respondeat superior*, Art. 831 BGB requires that in order for an employer to be at fault she must have been negligent in choosing or supervising her employees. On the one hand, Art. 831 BGB offers a reversed burden of proof to the benefit of the victim. On the other hand, as organizations had grown larger the Federal Court of Justice's requirements for how an actor could exculpate itself from its employees' actions had also been mitigated. Defendant enterprises could relatively easily offer proof that their whole workforce was diligently selected and well supervised. Furthermore, with the concept of *dezentralisierter Entlastungsbeweis* ('decentralized proof of exoneration') caselaw pointed towards employers being able to fulfill the duties of Art. 831 BGB by showing that directors or administrators, not each and every one of their subordinate workers, were diligently selected.[511]

To overcome the limitations of § 831 BGB, the Federal Court of Justice drew on the concept of *Organisationspflicht* ('duty to organize one's business'), founded in the general rule of delictual liability under § 823(1) BGB. According to Wagner, this duty, when placed on employers:[512]

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[508] In particular, end of Section II of the case in translation: 'The plaintiff was not a "consumer" of the vaccine, nor even a "user" of it, but, from a legal point of view, "only" a sufferer of damage. As such she is limited to her claim in delict'. See also Markesinis and Unberath 97–98.
[509] Markesinis and Unberath 97–98.
[510] Wagner 124–126.
[511] Wagner 124–125.
[512] Wagner 125.

> *requires that the operator of an enterprise takes the necessary precautions to ensure that the rights of third parties are protected in the course of business, i.e. that third parties are neither wrongfully injured nor their property wrongfully damaged or diminished.*

This non-delegable duty obligates employers to ensure that nobody is injured in the course of operation of business, thus eating away at Art. 831 BGB. While the general relationship of the duty to organize one's business and the rule of vicarious liability under Art. 831 BGB is unclear, the former has become the norm in product liability issues.[513] This has gone so far that today there is little reference to either Art. 831 BGB or the duty to organize one's business in product liability decisions, and that instead it seems that manufacturers are generally treated as single beings falling under the ambit of Art. 823(1) BGB.[514]

Another problem is related to the nature of 'defects' falling under the scope of product liability. Wagner sees that defects are a natural part of contractual obligations, but not so with regard to delict because the latter is focused on the means by which things are done instead of the result.[515] Thus, through the concept of defect the result-oriented nature of contract law became part of the law of product liability despite the latter being founded in delict. The Federal Court of Justice overcame this contradiction in the Newcastle disease case by assigning defects an evidentiary role.[516] Claimants must prove the presence of a product defect, the external or objective part of negligence, while the defendant manufacturer bears the burden of showing that any defect was not cause by her negligent behavior, related to the subjective or internal criterion of negligence. The result seems in some ways similar to the *res ipsa loquitur* doctrine in common law, but in other ways also similar to the marriage of convenience between contract and tort in relation to American product liability law.

This leads further to the question of whether the notion of a reversed burden of proof is in fact used to disguise the strict liability nature of German products liability law. Wagner argues that this is not so. For him, the general lack of cases where manufacturers have escaped liability due to lack of negligence is outweighed on the one hand by the conceivable possibility of such a case and, on the other, the notion that product defects can be used as clear evidentiary indicators of negligence under German law.[517] Thus liability would even here be only 'strictish'.

[513] Wagner 125–126.
[514] Wagner 126.
[515] Wagner 126–7.
[516] Wagner 126–7.
[517] Wagner 127–8.

Product liability claims have since been expanded to cover e.g. after sale duties to monitor the goods in light of advances in science, damage to the product itself, and establishing liability on *directors* in addition to the liability of companies.[518] In particular, courts have allowed the use of negligence to allocate losses within chains of professionals, so that a manufacturer of components can recover against its own suppliers who delivered defective parts.[519] Wagner argues that because there is no distinction between the liability of small or big businesses or consumers, German product liability has become far removed from its original policies, such as 'consumer protection, affluent society, mass production, standardisation'. Instead:[520]

> *delictual product liability is an area of the law of delict that defines duties of care incumbent on manufacturers of all sizes and their directors and staff with respect to the goods placed on the market.*

With the advent of the 1985 EC Product Liability directive, the 'homegrown' German law of product liability, based in delict, was complemented with a Product Liability Act based on the EC system of strict liability.[521] The two systems coexist under German law and courts have resorted to the one or the other, depending on which is more beneficial in a given situation to the plaintiff.[522]

2.5.3 Contract and Tort Intertwined: The German Experience

Under German law, the limits of delict in relation to the recovery of pure economic loss and the lack of true vicarious liability have led to a strong focus on contractual causes of action that extend the scope of contracts not only personally to third parties, but also materially to not only third party beneficiaries but also third parties in need of protection, and *temporally* to *prospective* parties and third parties. While such causes of action are an established form of German law, in relation to product liability they were nonetheless pushed to the sidelines and the Federal Court of Justice instead developed a contractually fortified form of delict. The ensuing form of delictual strictish liability is, perhaps similarly to the United States, a marriage of contract and tort/delict that allows law to overcome the confines of privity and burdens of proof.

Beyond delictual causes of action for liability for defective products, however, the German law of delict seems even more limited than the common law tort of negligence. In response, the multiple contractual approaches adopted

[518] Generally Wagner; Markesinis and Unberath 99–102.
[519] Wagner 130–131.
[520] Wagner 133.
[521] *Gesetz über die Haftung für fehlerhafte Produkte*, 15.12.1989, BGBl. I S. 2198 ('Produkthaftungsgesetz').
[522] Wagner 133–138.

under German law can be seen to stretch definitions of agreement and may thus be similarly limited to national contexts as French law. This is probably even more so in relation to the more imaginative but practically illuminating innovations of German legal theory such as those discussed by Teubner and Krebs. Similarly to French law, it is unclear whether these advanced developments could stand scrutiny in transnational contexts lacking a clear reference to German law.

2.6 Private Ordering, Contract Governance, and Liability Beyond Privity

2.6.1 A Marriage of Contract and Tort/Delict, Hidden from Public View

To sum this Chapter up so far, while both contract and tort/delict are clearly intertwined to one another in how the discussed legal systems control private ordering, from a comparative perspective it does not seem to matter too much which one is given preference. Both approaches have their challenges, in particular the burden that claimant show fault under tort/delict and increasingly stretched fictions of 'agreement' under contract, whether due to formal restrictions or over-expansive interpretations. Nonetheless, both can provide workable options, and both are ultimately subject to policy choices made by judges in light of available alternatives.

The different legal systems studied here seem to focus more on contract (German law), tort (English law), or both (US and French law) in relation to providing alternative avenues for recourse. All of them have means for overcoming the limits of their primary approach by expanding the scope of tort/delict, contract, or both, with techniques ranging from overcoming the bounds of 'agreement' under contract to enabling the recovery of pure economic loss under tort, to the concurrent use of contract and tort/delict as either exclusive or non-exclusive avenues of recourse.

Ultimately, though, it seems that both contract and tort/delict are needed for efficient regulation of private ordering. Here, the example of product liability is telling. First, it is crucial to note that existing historically developed notions of privity (and, though not the focus here, limited liability) enabled, and therefore promoted, the use of private ordering to avoid liability for defective products. The guise of privity prevented claims against manufacturers who no longer were in a direct relationship with the buyers or users of goods. This preventive effect could be total, as under the privity fallacy in England and the United States. It could also direct focus to other actors such as owners of machinery and goods in France or employees engaged in production instead of companies in Germany.

Second, new causes of action under tort/delict were created, as in the United States and England, or developed, as in Germany and France, to allow buyers and in particular users of products to overcome the lack of a meaningful

legal relationship to manufacturers of defective products. The role of contract in this process is crucial. Over the last century contract has served as a general avenue of recourse for defective products, as in the United States, one of two alternative avenues of recourse, as in France, a crucial argument driving the development of liability in delict towards a more contractual direction, as in Germany, or a driver for developing legislation controlling the quality of goods and the validity of disclaimers of liability under negligence, as in England.

Third, these different approaches combining contract and tort/delict have melted into one relatively unified approach to product liability law. Thus the contractual approach of the United States was subsumed as a particular type of claim now falling under tort, while the European approaches (the German delict on contractual steroids, the French alternation between contract and delict depending on the plaintiff's class, and the English 'normal' negligence with added statutory protection towards limitations of liability) were complemented (and to an extent modified) by the 1985 EC Product Liability Directive.

Going beyond the use of either contract or tort/delict as the primary means of regulating private ordering in a national legal system with a preference for one or the other cause of action, the development of product liability shows the seemingly necessary intertwinement of contract and tort/delict for effective regulation of fragmented production: Neither contract nor tort/delict *by itself* seems to have held potential for establishing liability in fragmented production structures in the legal systems analyzed here. At the same time, however, this intertwinement of contract and tort/delict has also resulted in the relegation of specialized product liability regimes away from more general theories of contract and tort/delict. While the underlying causes of action, both in contract and tort/delict, to a major extent continue to exist and to be developed in the respective legal systems, the culmination of the two that is product liability law is restricted in application to specific situations. Thus the intertwinement of contract and tort/delict could from this perspective be seen as a pyrrhic victory from the perspective of developing societal standards of liability, in the sense that the ensuing broader notion of liability entailed by the individual developments was not fully accepted into general theories of contract and tort/delict but has instead been restricted into its own narrow confines.

2.6.2 …Except for One Thing: Who Gets to Govern Transnational Private Ordering?

A key limitation in this Chapter is the focus on systems of contract and tort/delict embedded in national (or state) legal systems. Due to this starting point, there is one key factor that the previous discussion has not taken into account. This is the transnational nature of production enabled by the second unbundling of globalization.

The extra-jurisdictional effects of product liability law, for example from the perspective of the global economic competitiveness of local companies, have been an important aspect of more recent debate over product liability.[523] Nonetheless, current product liability regimes are inherently local in that they primarily mitigate the effects of defective products arriving within a jurisdiction. Any regime of production liability, as conceived of here as a necessarily global or at least jurisdiction-spanning concept, ends up being similarly detached from purely local policing and rule-making by effectively regulating production as it happens in other jurisdictions. As preliminarily discussed in Chapter 1, this brings to fore basic questions of private international law, in particular the choice and content of law governing the relationship of actors engaged in production through a global supply chain.

If the relationship between a buyer company and a supplier or supplier employee is conceptualized as contractual, it may be easier for a regulator in the buyer company's domicile to police the effects that that relationship has abroad under requirements of equity built-in in local contract law. This is because the rules of private international law generally allow a flexible analysis of the jurisdictional grounding of contractual relationships. A potential caveat here is the use of private ordering to distance a relationship from specific jurisdictions, as discussed in Chapter 4.

If instead a relationship is seen to exist in tort/delict, then this may be more problematic from the perspective of choice of law. While it is not always clear which legal system would be applicable to govern substantive matters, a strong principle points towards the law of the place where the damage occurred. A potential antidote here is the apparently more transnationally functional nature of some approaches to tort/delict, such as the role of the tort of negligence under legal systems related to English law, which may enable English courts to exert influence over how tort is conceptualized in related legal systems.

Both considerations increase the challenges of drawing from the development of national product liability regimes in relation to a more transnational context. Nonetheless, possibilities for developing both contract and tort/delict abound and will be discussed in more detail in Chapter 4. Prior to moving to Chapter 4, however, I will in Chapter 3 next focus on the means of control of global production and how these are enabled by the basic building

[523] E.g. Stapleton, *Product Liability*. The economic hegemony of the United States or the general post-war growth of France and Germany may have at first alleviated any such fears during the development of product liability law. Later on, in the 70s and 80s critical arguments were made in relation to product liability from the perspective of maintaining the competitiveness of industry in particular in the United States and the United Kingdom. In the context of England, for example, such considerations may have helped hinder the development of national product liability rules until the 1985 EC Product Liability Directive could create a supranational legal order that ensured the relative stability of EU markets from an English perspective. Then again, English developments might also have to do with other aspects, such as a more formalist approach to law, or the general randomness of undertaken path dependencies.

blocks of private law. Understanding the practical means and mechanisms of control, or governance through contract, will have a crucial impact on constructing causes of action under both contract and tort/delict, as has been the case in relation to product liability. Equity is, after all, based to a great extent on an actor's practical control over matters.

Chapter 3. Flouting Privity: A Framework of Governance Through Contract in Global Supply Chains

3.1 Regulation, Fragmentation, Globalization: Laying Down the Basic Contours of an Analytical Orienteering Map of Contract Governance

3.1.1 Introduction to the Cartographic Effort: Liability Through Comprehension?

My task in this chapter is to sketch an orienteering map of global contract governance. This map tries to subsume and process various scales that typically constitute maps of their own.[524] Examples range from the general contours of national jurisdictions,[525] to maps showing the extent of institutions such as international arbitration conventions,[526] and in particular the to-date uncharted paths created by contract and tort/delict between centrally governed actors dispersed around the globe.[527] Once sorted out, such a map will help us orienteer between different actors in global supply chains and better understand how contracts are used to control not only first-tier suppliers but also actors beyond privity, such as further tiers of suppliers, supplier employees, and other stakeholders, such as environmental interests. Such a mapping of control constitutes an important cognitive resource for apportioning liability in supply chains by highlighting how the building blocks afforded by law, in particular contracts, are used by actors to overcome the national limits to private ordering provided by contract and tort/delict.

As noted in Section 1.3, I cannot describe this orienteering map in perfect detail. Arguably, I do not have to, as long as the wanderer following the route of this map is up to her sport.[528] Furthermore, the contours of both law and governance are ever-changing. Some possible pathways end up covered by undergrowth as the result of a judicial decision or institutional failure, while new paths are simultaneously cut through the wilderness. I nonetheless hope the

[524] For the challenges of mapping beyond those mentioned by Borghes and Eco and briefly discussed in Section 1.3.1, see in particular Peter Dicken and others, "Chains and networks, territories and scales: towards a relational framework for analysing the global economy" (2001) 1 Global Networks: A Journal of Transnational Affairs 89.

[525] These typically constitute jurisdictions in themselves, even though political maps may not convey jurisdictional subdivisions such as state law in federal systems.

[526] For example, take map regarding the scope of the ICSID convention, such as this: https://international-arbitration-attorney.com/wp-content/uploads/ICSID-Contracting-States-Map.jpg. Then imagine that different shadings would be used on the same map for identifying parties to the New York Convention, the Inter-American Arbitration Convention, etc. etc.

[527] In relation to equity ownership, such mappings have been undertaken, but they fail to adequately reflect practiced control which is the focus here. See e.g. Stefania Vitali, James B Glattfelder and Stefano Battiston, "The network of global corporate control" [2011] PloS one.

[528] For which see e.g. the discussion of embeddedness between Granovetter and Powell in Powell note 9 and accompanying text.

map will be enough to be of relevance. To make this possible, the map starts from the general contours of political economy and then, as one zooms in the scale, becomes dotted in increasing detail with the relative locations of individual actors and the governance paths connecting them. The final outcome is presented in Section 6 of this Chapter, where I present a preliminary framework of governance that helps us to connect the dots of individual actors on the map with regard to the control extended by actors towards their supply chains.

Three primary features are integral for understanding the background to this orienteering map of contractual governance. These are regulation, fragmentation, and globalization.

The notion of *regulation* forms the basic contours of the map, similarly to the use of different colors on orienteering maps to symbolize different kinds of terrain. Here, these colors represent not terrains in the literal sense but rather the jurisdictional terrain upon which actors tread. Regulation here is a multifaceted feature. It is not one-to-one with a state's jurisdiction. Instead, the colors may change even within the jurisdictional borders of a state and, occasionally, extend beyond them. Actors located in a jurisdiction may be regulated in different ways, in which case the different types of entities must be marked with different symbols on the map.

In particular, private actors are to a great extent allowed to regulate one another, especially via the private ordering of their contracts. Here, the notion of *fragmentation* is used to describe the mushrooming of relationships of private governance between connected entities. This is particularly important following the two unbundlings of globalization that have dispersed distribution and production from primarily single entities into interconnected collectives. The regulatory and other governance effects that weigh down on different entities of a collective may be disparate, requiring some actors to exert control over the whole to guarantee unified operation. Thus the paths of governance must be drawn with different kinds of road or route symbols leading from one actor to another in order to reflect governance relationships.

Finally, the notion of *globalization* extends the map to cover not only the different regulatory and institutional contexts within a jurisdiction but also globally. For example, aspects of global law perhaps necessitate the similar shading of several different jurisdictions to show that they comply to some of the same regulatory standards or even share some of the same laws, while at the same time they differ completely in relation to other laws and regulations or the enforcement of certain obligations. In particular, however, globalization serves, firstly, to provide private actors with radically different regulatory contexts in which to place parts of their fragmented production networks, and secondly, to increase the need for private actors to use transnationally accepted means of private ordering to control their globally dispersed supply chains.

3.1.2 Regulation

Our world is immersed in regulation. Product safety, labor, and environmental regulations set general standards for production and liability within jurisdictions. More specialized regulation adheres to fields such as nuclear construction or aviation. While regulation may be based in international frameworks, such as in relation to nuclear construction, or supranational legislation, such as product liability in the European Union, it is generally perceived to be the eminent domain of independent nation states. Take the example of product liability which is supposed to ensure that manufacturers are liable for defective products. Typically product liability is nonetheless confined within nation states so that the chain of liability, which in principle should extend to manufacturers, is cut short by liability in practice ultimately being imposed on the actor that imported the defective good into a specific jurisdiction or otherwise is in its practical reach.[529]

Based on its relationship to the jurisdiction that enforces it and an actor that is bound by it, regulation may be divided into a number of subgroups. First, regulation may cover actors in relation to their operations located within a specific jurisdiction, such as local labor and environmental regulations. Second, foreign regulation may be relevant to actors in relation to the extent that their operations are aimed at abroad, such as foreign product safety or emission specifications in relation to exporters of vehicles.[530] Third, local regulation may specifically extend to cover a local actor's operations beyond the jurisdiction it is located in.[531] Fourth, in some cases regulation may be able to extend to actors and acts that have no bearing on the regulation's jurisdiction.[532] Assuming they are effectively enforced, all these types of regulation may overlap to create a regulatory network requiring actors to comply with multiple regulations from multiple jurisdictions.

In the shadow of these kinds of public regulation, however, there exists also a fundamentally different kind of regulatory force. This can be referred to by various names, such as private regulation, private ordering, or private power. Here, the onus is not on the state or state-related actors but instead on how states either explicitly or by lack of effective enforcement of public regulation

[529] For example, the Council Directive (85/374/EEC) of 25 July 1985 on the approximation of the laws, regulations and administrative provisions of the Member States concerning liability for defective products provides alternative recourse in particular to importers if producers do not fall under the relevant jurisdiction.

[530] E.g. standards for manufactured goods. More generally, Dan Danielsen, "Local Rules and a Global Economy: An Economic Policy Perspective" (2010) 1 Transnational Legal Theory 49.

[531] The US Foreign Corrupt Practices Act and the British Bribery Act 2010 provide typical examples of regulation that extends to cover overseas corruption. On the FCPA, see e.g. David Kennedy and Dan Danielsen, *Busting Bribery: Sustaining the Global Momentum of the Foreign Corrupt Practices Act* (Open Society Foundations 2011).

[532] Two examples discussed in Chapter 4 are the US Alien Tort Statute, the extraterritorial scope of which has since been radically limited, and the Belgian universal jurisdiction law, since repealed.

leave *de facto* regulatory power to private actors. This privatization of governance, in particular through contractual means, lies at the heart of this chapter and will be discussed in more detail in Section 3.2.

3.1.3 Fragmentation ('Outsourcing')

As discussed in Chapter 1, production has always been fragmented to some extent. For example, the availability of raw materials or expertise, such as knowledge of sericulture or the availability of large quantities of pine for boiling pine tar, may be only (or more readily, or more cheaply) available in specific locations. Here, however, I use fragmentation to refer to what is seen as an increasing tendency of outsourcing specific aspects of production.[533] This 'increase' is seen in relation to a period characterized by 'vertical integration', or sourcing as much production related activities as possible in-house within a single corporation e.g. for benefits of scale or avoiding hold-up.[534] Recently it has been argued that companies should instead focus on their more lucrative core competencies to increase profits.[535] This has resulted in 'vertical disintegration' as companies, focusing on their core competencies, turn to outsourcing non-core processes and activities to other companies, leading to the fragmentation of production. Companies like Apple may concentrate on design, marketing, and R&D while leaving for example manufacturing and component design to outside suppliers.[536] In extreme cases a company may only be an innovative marketing front for standard products produced by others.[537] This

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[533] For the perceived relative dynamics of fragmentation and globalization compare Locke's statement: '*As nicely described by Meyer and Gereffi (2010), these changes in the locus and organization of global production had profound implications for labor regulation. In a world where manufacturing occurred primarily within domestic firms and/or vertically integrated MNCs headquartered in the advanced industrial states, national governments could still regulate labor conditions in most factories…*' with Weil's lucid description of a fissuring national workplace that argues that fragmentation can have a major effect even within 'advanced' national jurisdictions. Richard M Locke, *The Promise and Limits of Private Power: Promoting Labor Standards in a Global Economy* (Cambridge University Press 2013) 10; David Weil, *The Fissured Workplace: Why Work Became So Bad for So Many and What Can Be Done to Improve It* (Harvard University Press 2014).

[534] E.g. Peter G Klein, "Blog Post: Coase and the Myth of Fisher Body" <https://organizationsandmarkets.com/2006/09/12/coase-and-the-myth-of-fisher-body/>.

[535] Coimbatore Krishnarao Prahalad and Gary Hamel, "The Core Competence of the Corporation" (1990) 68 Harvard Business Review 79 <http://www.springerlink.com/index/v1774282g031q747.pdf>.

[536] For illustrative descriptions, see, e.g., Gary Gereffi, "Global value chains in a post-Washington Consensus world" (2014) 21 Review of International Political Economy 9; John Humphrey, "Upgrading in global value chains" (2004) 28; Timothy J Sturgeon, "Global Value Chains and Economic Globalization - Towards a New Measurement Framework" 71.

[537] E.g. the Dollar Shave Club recently acquired by Unilever, for which see Steven Davidoff Solomon, *$1 Billion for Dollar Shave Club: Why Every Company Should Worry*, New York Times, July 26, 2016, http://www.nytimes.com/2016/07/27/business/dealbook/1-billion-for-dollar-shave-club-why-every-company-should-worry.html and Farhad Manjoo, How Companies Like Dollar Shave Club Are Reshaping the Retail Landscape, New York Times July 27, 2016, http://www.nytimes.com/2016/07/28/technology/these-stores-didnt-develop-websites-they-started-there.html.

relatively recently highlighted shift towards increased fragmentation of production has its roots in multiple strands of economic theory. My focus, however, is on the effects of fragmented production on regulatory frameworks.

On the one hand, fragmentation within a jurisdiction can have regulatory effects as regulations may be differently focused on different kinds of companies for example in relation to their size or function.[538] Furthermore, fragmentation is currently causing clear disruptions in particular in relation to new labor practices that existing regulatory frameworks have trouble understanding.[539] Nonetheless, as long as production takes place within the same jurisdiction it is, whether fragmented or not, generally subject to roughly similar regulations.[540]

On the other hand, while fragmentation allows companies to concentrate on their core competencies it also fragments control and liability. Corporate and contract law typically do not impose liability on a company for the conduct of its contractors or suppliers due to the boundaries imposed by corporate entities and contracts.[541] Suppose that a buyer outsources particularly labor intensive or environmentally hazardous manufacturing processes to a supplier generally known to provide such services. Suppose then that the supplier abuses labor regulations or negligently causes environmental damage in order to cut costs. In such cases, the buyer is typically not liable for the actions of its supplier. This starting point can arguably lead to buyers having more interest in whether an outsourced product or service meets requested cost and quality requirements than in how outsourced production is managed and organized for example in terms of labor or the environment.

A variety of factors, however, may make companies try to exert compliance on their suppliers. Important reasons for retaining a level of control can be related to maintaining efficiency, for example through supply chain wide cost-management or research and development, brand image, for example by choosing suppliers that comply with their environmental or social codes of conduct, maintaining the moral wellbeing of company personnel, or avoiding

[538] For example, a perceived need to support small businesses may result in less stringent regulatory requirements, such as in relation to handicapped access, while tax benefits may be available for businesses seen as particularly beneficial.

[539] Though for example the effects of fragmentation on labor, in particular in relation to the recent rise of services relying on labor hire or massive amounts of 'independent contractors', has been problematic from a traditional regulatory perspective. Generally Weil. Also e.g. Noam Scheiber, 'Growth in the 'Gig Economy' Fuels Work Force Anxieties', *New York Times*, July 12, 2015, https://www.nytimes.com/2015/07/13/business/rising-economic-insecurity-tied-to-decades-long-trend-in-employment-practices.html.

[540] E.g. Locke 10.

[541] E.g. Peter Muchlinski, "The Changing Face of Transnational Business Governance: Private Corporate Law Liability and Accountability of Transnational Groups in a Post-Financial Crisis World" (2011) 18 Indiana Journal of Global Legal Studies 665, 685.

public backlashes that may result in increased regulation.[542] In some cases the uncertainty caused by fragmentation is countered through relational practices used by buyers to secure the sustained availability of commodities and services.[543] In other cases it seems that cooperation within fragmented structures is necessary in order to secure a competitive advantage.[544] From these perspectives compliance plays a major role in organizing production even where regulatory differences are negligible.

Thus there are clear motives for companies to extend their control over outsourced production. One primary way of doing this is through contractual means.[545] However, as seen in the following sections, current notions of governance through contract do not seem able to account for or to explain the use of contracts to extend control beyond bilateral relationships, such as between a buyer and second tier suppliers or a buyer and its suppliers' employees. This is one of the main motivations for my developing existing accounts of governance through contract in this Chapter.

3.1.4 Globalization ('Offshoring')

With globalization I refer here to the possibility of outsourcing production to different jurisdictions and thus to radically different regulative environments.[546] With increasingly effective means of transporting goods and information, the fragmentation of production can take place on a global scale so that the

[542] For the impact of ethical values of business (and moral wellbeing of employees), see Ingeborg Schwenzer and Benjamin Leisinger, "Ethical Values and International Sales Contracts" in Ross Cranston, Jan Ramberg and Jacob Ziegel (eds), *Commercial Law Challenges in the 21st Century: Jan Hellner in memoriam* (Stockholm universitet 2007). For an example of cost management, see Peter Kajüter and Harri I Kulmala, "Open-book accounting in networks: Potential achievements and reasons for failures" (2005) 16 Management Accounting Research 179. For an example of innovative R&D, see Ronald J Gilson, Charles F Sabel and Robert E Scott, "Contracting for Innovation: Vertical Disintegration and Interfirm Collaboration" (2009) 109 Columbia Law Review 431.

[543] Gereffi 16.

[544] One example might be provided by the comparison of German auto-OEMs to American auto-OEMs in the early 2000s, for which compare the examples in Omri Ben-Shahar and James J White, "Boilerplate and Economic Power in Auto Manufacturing Contracts" (2006) 104 Michigan Law Review 953; Kajüter and Kulmala.

[545] Another could be purely relational practices. Generally e.g. Laura Poppo and Todd Zenger, "Do Formal Contracts and Relational Governance Function as Substitutes or Complements?" (2002) 23 Strategic Management Journal 707; Dietz, *Global Order Beyond Law: How Information and Communication Technologies Facilitate Relational Contracting in International Trade*. However, I argue that contractual or other legal paradigms are increasingly able to frame such 'non-legal' relationships in legal terms, especially as the two are often used to complement one another.

[546] An extensive recent account of offshoring (despite the title of the book referring to outsourcing the topic is in fact offshoring) is provided by William Milberg and Deborah Winkler, *Outsourcing Economics: Global Value Chains in Capitalist Development* (Cambridge University Press 2013). Here, a terminological difference might also be made between globalization and internationalization, with the term globalization here used specifically to refer to the functional integration and coordination of internationally dispersed activities. E.g. Gary Gereffi, John Humphrey and Timothy Sturgeon, "The governance of global value chains" (2005) 12 Review of International Political Economy 78, 78–79, 100. See also footnote 533 above.

supplier's country of production need not have any relation to a buyer's country of origin or the intended market of a good. Again for example Apple, domiciled in California, outsources the manufacturing of its devices to suppliers based primarily in China while the components used in the devices come from a number of suppliers located in further different countries.[547] At the same time, the devices are marketed globally to wealthy consumers.

As already noted, fragmentation can in itself distort the local frameworks of regulation and liability within a jurisdiction for example in relation to labor practices. Globalization, on the other hand, can amplify this distortion to a wholly different magnitude. This is because of the vast differences in regulatory and enforcement frameworks around the globe and their typically limited extraterritorial application. Suppose that a supplier is located in a country where labor, environmental, or product safety standards are non-existent. If a buyer wishes to buy products from this supplier to sell at the buyer's jurisdiction where labor, environmental, and product safety standards are rigorous, the supplier must typically only strive to comply with product safety regulations in the buyer's jurisdiction.[548] The labor or environmental regulations in place at the buyer's jurisdiction typically do not have power to affect activities in the supplier's jurisdiction.[549]

When outsourcing production to another jurisdiction, the key focus of a buyer is probably to ensure that the end product is competitively priced and fulfills quality, product safety, and other standards in jurisdictions where the buyer runs a risk in relation to liability or brand image. On the other hand, the procedural aspects of production, such as environmental and labor impact, are less directly important. At the same time, the effect of procedural aspects of production in relation to for example brand image may not be as easily visible in countries where the end product is marketed and may rely on grassroots action to come to light. Thus disparities in production-related regulations and their enforcement may be less of a concern for an outsourcer.

The disparities in regulation may, however, become more than a moot point for a buyer. A number of reasons, such as cost-effectiveness, maintaining brand image, the moral wellbeing of company personnel, and avoiding a regulatory backlash were already noted in relation to fragmentation. To these can be added the danger of a truly global media backlash and threat of extraterritorially

[547] Gereffi; Milberg and Winkler.

[548] Even though globalization in principle, at least, not only gives rise to jurisdictions that can be utilized as potential regulatory loopholes but also to jurisdictions that exert their regulatory standards beyond their own boundaries. Danielsen.

[549] The ensuing search for suppliers less bound by costly regulations was, in the late 19th and early 20th century United States context, labelled the 'race to the bottom'. For example Justice Brandeis in *Louis K. Liggett Co.* v *Lee*, 288 U.S. 517 (1933) notes that the 'race was one not of diligence, but of laxity'.

focused regulatory efforts in core jurisdictions.[550] Thus, similarly as in relation to fragmentation, in many cases and for diverse reasons buyers may be keen on controlling their global supply chains.

Here, the problems of conceptualizing governance through contract remain in principle the same as under fragmentation, however with added layers of public and private municipal and international law brought by the transnational context of production. While there have been attempts at conceptualizing governance specifically in globally fragmented 'global value chains' (one such example is discussed in detail in Section 3.4), these seem to share the same conceptual problems with frameworks developed in 'merely' fragmented contexts. Thus while this Chapter focuses primarily on the effects of fragmentation for governance through contract, the onus of discussion on the legal relevance of *globalized* fragmentation will be in Chapter 4.

3.2 Private Power, Private Ordering, Private… Governance? Narrowing It Down to Governance Through Contract

3.2.1 Private Power, Private Ordering, Private Governance

If a buyer wishes to control its supply chain, how can this be done in practice? This question has crucial relevance for the orienteering map. If the relationships connecting actors in supply chains are all similar, there is no need to differentiate between types of connections. However, if there is a range of different mechanisms that are used for controlling supply chains, then these need to be made clear in the map in order to understand the varied relationships within and between supply chains.

In particular, my focus is on the question of how buyers control their supply chains in the space allowed them by regulators. As seen in Chapter 2, this implies a mix of 'public' and 'private'. Public in the sense that laws and regulations carve out 'exclusion zones' of liability in different types and sizes depending on jurisdiction, whether coined as privity (or lack thereof), duty of care (or lack thereof), special arrangements not impeded by public policy, or something else. Private in the sense that within this exclusion zone, some actors are through their relationship (or lack thereof) able to control their liabilities to the extent that they abide by the boundaries of the exclusion zone. These

[550] A typical example is the rise of the FCPA as a backlash following the unveiling of massive corruption. Kennedy and Danielsen. A somewhat similar scenario seems to have ensued from the Rana Plaza disaster, which led to global corporations pooling together to organize what are claimed to be fundamentally improved governance mechanisms. Generally, Beryl ter Haar and Maarten Keune, "One Step Forward or More Window-Dressing? A Legal Analysis of Recent CSR Initiatives in the Garment Industry in Bangladesh" (2014) 30 International Journal of Comparative Labour Law & Industrial Relations 5; Mark Anner, Jennifer Bair and Jeremy Blasi, "Toward Joint Liability in Global Supply Chains: Addressing the Root Causes of Labor Violations in International Subcontracting Networks" (2013) 35 Comp. Lab. L. & Pol'y J. 1.

boundaries of public and private are in motion, constantly drafted and redrafted by legislators and courts.

Law itself does not offer a practical framework for conceptualizing private mechanisms of control operating under the authorization of public regulation. As seen in Chapters 1 and 2, legal systems have widely divergent conceptualizations of contract, tort/delict, and other private law relationships (in particular public policy exceptions) that are potentially relevant for classifying potential mechanisms of control. In practice, it seems that law generally provides a dichotomy of contract/no contract, to which can be added further dichotomies applicable in specific legal systems, such as tort/no tort, special relationship/no special relationship, promissory estoppel/no promissory estoppel etc. These highly idiosyncratic classifications available through law are not practically feasible for understanding the multiplicity of control mechanisms enabled by and used under the auspices of law.

My aim is to provide a better understanding of the different mechanisms of control in supply chains and link these in a meaningful way to their potential legal effects in different jurisdictions. To accomplish this, I will for the rest of this chapter focus on providing an increasingly detailed differentiation of the relationships of control that can be used by buyers. To start with, three concepts potentially relevant for such discussion are private power, private ordering, and private governance. All these terms are used to focus to a varying extent on the relationship between public, as in coming from the state, and private, as in coming from non-state actors.

Locke contrasts 'private power' to public regulation in order to highlight the capabilities of private actors to maintain their own regulatory sphere of control, a kind of safe-space from intrusive public regulation.[551] More specifically, Locke uses private power as a collective term to refer to various means of control undertaken by private actors (companies, occasionally in coordination with state actors, NGOs, and e.g. the ILO) in relation to other private actors (other companies, employees, other stakeholders), as opposed to control of private actors by a state or states in the form of public regulation. These means of control include diverse mechanisms ranging from contractual requirements to co-operation frameworks (or lack thereof) that are spread around supply chains but which are, ultimately, voluntary and the use of which is dependent on the will and relative power of negotiating actors. Private power is an inclusive and evocative term able to capture not only varied mechanisms of control but also to account for asymmetries in power relationships. But because of its breadth, private power remains conceptually elusive and seemingly too broad for differentiating between different mechanisms of

[551] E.g. Locke.

control. For now, I will leave 'private power' in the sidelines even when I will return to Locke's grouping of mechanisms of control in Section 3.6.

'Private ordering' is another term often used to draw a contrast between the private and the public, with public ordering generally synonymous with public norm-making or public regulation. Private ordering, on the other hand, has multiple potential meanings. For example, Schwarz sees that private ordering 'can be viewed as part of a broad spectrum within which rulemaking is classified by the amount of governmental participation involved'.[552] To give some examples, private ordering can firstly be used to refer to the private regulation of relationships in the absence of law, through an apparently autochthonous evolution of behavioral norms.[553] Secondly, private ordering can be used to refer to a 'hybrid' form of ordering where public actors draw upon private actors for assistance in drafting regulations or even delegating specific regulatory powers to private actors.[554] Thirdly, private ordering can be used to refer to the use of contractual arrangements to offset default (or 'dispositive') law within the general bounds allowed by private and public law in a way that is enforceable under law and the different extents to which this has been allowed in different historical periods.[555] Fourthly, and building on the third case, the use of contractual arrangements can specifically rely on more private but nonetheless ultimately public-law endorsed mechanisms such as legally enforceable forms of arbitration or mediation agreements, as opposed to the first type of private ordering which operates without resort to public law, for example through trade-association arbitration backed solely by reputational enforcement mechanisms.[556]

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[552] Schwarcz 324.

[553] E.g. Robert C Ellickson, *Order without Law: How Neighbors Settle Disputes* (Harvard University Press 1991); Jonathan R Macey, "Public and private ordering and the production of legitimate and illegitimate legal rules" (1997) 82 Cornell Law Review 1123; Schwarcz; Barak D Richman, "Firms, Courts, and Reputation Mechanisms: Towards a Positive Theory of Private Ordering" (2004) 104 Columbia Law Review 2328; Tehila Sagy, "What's So Private about Private Ordering?" (2011) 45 Law & Society Review 923.

[554] E.g. Schwarcz; Dan Wielsch, "Global Law's Toolbox: Private Regulation by Standards" (2012) 60 American Journal of Comparative Law 1075. The boundaries of this and the first type of private ordering mentioned here are fuzzy. For example Sagy argues that, with regard to the first type of private ordering, a 'state often intentionally assumes a proactive role in the creation of [private] orders'. Sagy.

[555] E.g. Michael Krauss, "Tort Law and Private Ordering" (1990) 35 Saint Louis University Law Journal 623; Feinman, "Un-Making Law: The Classical Revival in the Common Law"; Feinman, "The Economic Loss Rule and Private Ordering"; Peer Zumbansen, "Private Ordering in a Globalizing World: Still Searching for the Basis of Contract" (2007) 14 Indiana Journal of Global Legal Studies 181; Mark P Gergen, "Privity's Shadow: Exculpatory Terms in Extended Forms of Private Ordering" (2015) 43 Florida State University Law Review 1.

[556] In relation to the use of arbitration or other procedures as 'enablers' of private ordering or more broadly the 'privatization' of private law, see e.g. Melvin A Eisenberg, "Private Ordering Through Negotiation: Dispute-Settlement and Rulemaking" (1976) 89 Harvard Law Review 637; Charles L Knapp, "Taking Contracts Private: The Quiet Revolution in Contract Law" (2002) 71 Fordham Law Review 761; Christopher R Drahozal, "Private Ordering and International Commercial Arbitration" (2009) 113 Penn State Law Review 1031; Gilles.

While I have no room for a detailed genealogy here, it is clear that the different meanings of private ordering, while evocative, overlap with fuzzy boundaries. Both extralegal and legal, public and private, contractual arrangements and default law, private and 'even more private' are all contrasted and reflected upon in discussions of private ordering in different senses of private norm-making. As all these connotations are reflected in the term 'private ordering', it does not seem precise enough to be used for further, even narrower inquiry. Thus it does not offer an adequate starting point for further analysis into mechanisms for the control of supply chains, instead being more akin to a slogan for varying degrees of privatization.[557]

A third alternative is provided by private governance. Generally, governance research goes both deeper than the overly general notion of asymmetric power relationships underlying 'private power' and beyond the focus on private or hybrid norm-making of 'private ordering'. For example, Möslein and Riesenhuber, in explaining governance to legal scholars, explain the concept as:[558]

> *a field of research that is concerned with mechanisms of regulation and steering, as well as with their institutional framework. The focus is on coordination of action and behavior, be it hierarchical or not, but also on potential effects of such coordination.*

Even this broad definition is, however, but a pail in the sea of governance research.[559] Levi-Faur, discussing governance literature more generally, notes that governance can be seen as a structure, a process, a mechanism, and a strategy:[560]

> *As a structure, governance signifies the architecture of formal and informal institutions; as a process it signifies the dynamics and steering functions involved in lengthy never-ending processes of policy-making; as a mechanism it signifies institutional procedures of decision-making, of compliance and of control (or instruments); finally, as a strategy it signifies the actors' efforts to govern and manipulate the design of institutions and mechanisms in order to shape choice and preferences.*

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[557] E.g. Macey sees that increased societal legitimacy would require more of the first type of private ordering and less public regulation, while for example Feinman critiques the third and fourth types of private ordering as wielding too much power to corporations. Macey; Feinman, "The Economic Loss Rule and Private Ordering."

[558] Florian Möslein and Karl Riesenhuber, "Contract Governance – A Draft Research Agenda" (2009) 5 European Review of Contract Law 248, 249.

[559] E.g. David Levi-Faur (ed), *Oxford Handbook of Governance* (Oxford University Press 2012); Francis Fukuyama, "Governance: What Do We Know, and How Do We Know It?" (2016) 19 Annual Review of Political Science 89.

[560] David Levi-Faur, "From 'Big Government' to 'Big Governance'?" in David Levi-Faur (ed), *Oxford Handbook of Governance* (Oxford University Press 2012) 8.

Governance itself can be used to mean many things, directly bringing to question the usefulness of the concept similarly to private ordering.[561] On the other hand, here also lies its strength because it specifically *is* broadly used in radically different contexts as opposed to the other two terms discussed here. A focus on mechanisms of regulation and steering in different institutional frameworks,[562] going beyond regulation by states and examining also mechanisms of social and other types of influence,[563] through an inherently embedded and multi-disciplinary research,[564] is precisely what I am after in order to be able to focus on the use of private mechanisms (and power) in a globally fragmented regulatory framework, as when buyers seek to control their global supply chains.[565] This approach, however, needs to be massively focused. Here, earlier governance research provides a plethora of existing alternatives for classifying different kinds of control, and this is what ultimately turns the scales in favor of private governance.

3.2.2 Governing Production: The Classic Choice Between Contract and Equity Ownership

Interest in how production is governed has been a key driving factor in governance research.[566] This interest is grounded in the now classic question of whether production should be governed through market-mechanisms in the form of actors connected by supply contracts or through a hierarchy of ownership by vertically integrating actors into a corporation. These two

[561] See e.g. RAW Rhodes, "Waves of Governance" in David Levi-Faur (ed), *Oxford Handbook of Governance* (Oxford University Press 2012); Fukuyama. On a further note, some scholars switch almost interchangeably between for example 'private ordering' and 'private governance' when talking about contractual arrangements. E.g. Oliver Williamson, "Credible Commitments: Using Hostages to Support Exchange" (1983) 73 American Economic Review 519; Zumbansen, "Private Ordering in a Globalizing World: Still Searching for the Basis of Contract."

[562] E.g. Frans van Waarden, "The Governance of Markets: On Generating Trust in Transactions" in David Levi-Faur (ed), *Oxford Handbook of Governance* (Oxford University Press 2012).

[563] The traditional starting point of law, rules and regulations made by state actors in accordance with legal procedures to govern subjects, often referred to as *public law*, is encompassed by *public governance*, typically understood as the regulatory efforts of public actors. Similarly, private law provides boundaries within which private actors can regulate their dealings with one another and is thus encompassed by private governance, typically understood as regulatory efforts between private actors. The traditional starting points of law, however, cannot fully reflect the broad range of institutions potentially involved in governance. Research has convincingly show that the relationships between public and private actors and among private actors are in many cases not shaped by law alone, if at all. E.g. Karl-Heinz Ladeur (ed), *Public Governance in the Age of Globalization* (Routledge 2004); Anne-Marie Slaughter and David Zaring, "Networking Goes International: An Update" (2006) 2 Annual Review of Law and Social Science 211. In relation to business, see e.g. Macaulay; Dietz, *Global Order Beyond Law: How Information and Communication Technologies Facilitate Relational Contracting in International Trade.*

[564] Peer Zumbansen, "Governance: An Interdisciplinary Perspective," *Oxford Handbook of Governance* (2012) 83.

[565] E.g. Levi-Faur, "From 'Big Government' to 'Big Governance'?" More generally, e.g. Levi-Faur, *Oxford Handbook of Governance*; Fukuyama.

[566] Levi-Faur, "From 'Big Government' to 'Big Governance'?" 5–6.

structures of governance, markets and hierarchies, coincide with the legal forms of contract and corporation and thus respectively contract and company law. Ronald Coase is often seen as the first to highlight this choice in his 1937 paper *The Nature of the Firm*:[567]

In view of the fact that while economists treat the price mechanism as a co-ordinating instrument, they also admit the co-ordinating function of the "entrepreneur," it is surely important to enquire why co-ordination is the work of the price mechanism in one case and of the entrepreneur in the other'.

Oliver Williamson, however, is more generally credited with bringing to broad scholarly focus the choice, based on transaction cost economics, between these two structures of governing production.[568] In 1979, Williamson summarized transaction-cost economics and modes of governance thus:[569]

> *The overall object of the exercise essentially comes down to this: for each abstract description of a transaction, identify the most economical governance structure—where by governance structure I refer to the institutional framework within which the integrity of a transaction is decided. Markets and hierarchies are two of the main alternatives.*

Williamson proposed that the choice of governance structure is based on factors such as transactional uncertainty, transactional frequency, and asset-specificity (or idiosyncratic exchange), the degree to which durable transaction-specific investments are required.[570] Asset-specificity refers not only to specialized physical capital but also to transaction-specific human capital in the form of accumulated personal knowhow and relationships,[571] or as Powell summarizes it, investments of 'money, time or energy that cannot be easily transferred'.[572] In short, asset-specificity is used to refer to assets that are not in general supply on markets, resulting in idiosyncratic relationships in commerce but also more broadly, such as in relation to labor or family relationships.[573]

Following Williamson, business transactions that are straightforward, non-repetitive, and can be undertaken with 'standard' assets take place most effectively through contracting under market mechanisms.[574] Transactions that

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[567] Coase 389.
[568] For an overview, see e.g. Powell 296; Levi-Faur, "From 'Big Government' to 'Big Governance'?" 5–6.
[569] Oliver Williamson, "Transaction-Cost Economics: The Governance of Contractual Relations" (1979) 22 Journal of Law & Economics 233, 234–235.
[570] Williamson, "Transaction-Cost Economics: The Governance of Contractual Relations" 239.
[571] Williamson, "Transaction-Cost Economics: The Governance of Contractual Relations" 239–245. Here, Williamson refers to examples such as the accumulated skills of Stradivarius in making violins and Polanyi's discussion of '[d]ifferent vocabularies for the interpretation of things [that] divide men into groups which cannot understand each other's way of seeing things and acting upon them'. Williamson, "Transaction-Cost Economics: The Governance of Contractual Relations" 242–243.
[572] Powell 296–297.
[573] Williamson, "Transaction-Cost Economics: The Governance of Contractual Relations" 244–249.
[574] Powell.

involve uncertainties, recur frequently, and require specialist knowledge and control in the form of asset-specificity, on the other hand, take place most effectively under vertically integrated hierarchies.[575] Perceptions of bounded rationality and opportunism also affect the choice.[576]

As already seen in the above quote from Williamson, these two governance structures are not the full story or the end of the story. For one, scholars have sought to understand whether there is a third mode of governance between markets and hierarchies or whether these two should be seen as for example two ends of a continuum. In particular, research has focused on locating a hybrid form of governance that would combine some aspects of both markets and hierarchies, for example in relation to long-term relationships that are not subsumed by vertical integration.

Walter Powell's 1990 paper is particularly well-known for discussing the potential parameters of hybrid or, as they are also known, 'network' structures of organization that fall between markets and hierarchies.[577] Powell argues that some transactions, such as those that involve learning or the transfer of technological know-how, are poorly governed by market-price mechanisms, while others, such as those involving sharp fluctuations in demand or unanticipated changes, are poorly governed by hierarchical relationships. Instead, these kinds of transactions are 'more dependent on relationships, mutual interests, and reputation—as well as less guided by a formal structure of authority'.[578] Into this picture Powell introduces the concept of network as a form of organization.

In networks, transactions rely on the interdependence of actors in pooling together resources and agreeing to an extent to forego their right to pursue their own interests at the expense of others.[579] Despite the lack of formal coordinating structures, such as contract or corporation, in certain scenarios it becomes more lucrative for network actors to co-operate rather than outright compete, thus forming a networked organization. The flow of efficient, reliable information, which decreases uncertainty, is guaranteed by mutual feelings of reciprocity. Powell identifies three factors as critical components for networked organization of production. These are know-how, the demand for speed, and trust.[580] Network structures are 'particularly apt for circumstances in which there is a need for efficient, reliable information'. Powell discusses illustrative cases ranging from the relationship of general contractors to subcontractors resulting in 'quasi-firms', publishing, the film and recording industries, regional

[575] Powell.
[576] Powell 297.
[577] Powell 296. For later developments in governance building on Powell, in particular that of Cohen and Sabel, see e.g. Slaughter and Zaring 218–220.
[578] Powell 300.
[579] Powell 303–304.
[580] Powell 323–327.

economies and extended trading groups, strategic alliances, and vertical disaggregation.[581]

While markets and hierarchies as forms of organization loosely correspond to two specific legal forms, contract and corporation, 'hybrid' or 'network' structures of organization have no such direct correspondence. This led Richard Buxbaum to famously conclude that 'network is not a legal concept' but, instead, something that necessarily lies beyond the legal.[582] From this perspective, and building on Powell's focus on reciprocal trust, network would be a form of private ordering beyond the law.[583] Thus solely reputational mechanisms, such as those discussed by Dietz, would be used for enforcing the breaking of any (non-legal) obligations between network members.[584]

Nonetheless, Powell's work has also inspired legal scholars. In particular, Teubner has used Powell's conceptualization of networked organization as a part of his elaborate work showing that law is apt to find legally relevant relationships even where there is no explicitly apparent contractual or other grounding for such as relationship.[585] Teubner's argument serves in particular to highlight one of the key problems of private ordering beyond law: That law, in these days of increasing focus on expectations instead of form, should be able to recognize private ordering as such and to grant it a measure of legal enforceability, even if steeped in uncertainty.

From this perspective the descriptive power of Powell's focus on the role of interpersonal trust, 'reciprocal patterns of communication and exchange', can be seen as something inherently accessible to law. Take the example of *Hedley Byrne* liability discussed in Section 2.2, which does not fulfill the formal requirements of contract but nonetheless imposes contract-like liability for trust in something akin to 'reciprocal patterns of communication and exchange'. While shrouded by uncertainty, at least in some cases these kinds of relationships arguably find expression in law, whether a special form of liability in tort as under English law or special duties under contract as under German law.

From the perspective of a buyer's control over supply chains, however, whether organization is more market-based, hierarchical, or 'networked' does not alleviate one key problem. As Williamson puts it:[586]

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[581] Powell 305–322.
[582] Richard M Buxbaum, "Is 'Network' a Legal Concept?" (1993) 149 Journal of Institutional and Theoretical Economics 698.
[583] The first type of private ordering described above in Section 3.2.1.
[584] Dietz, *Global Order Beyond Law: How Information and Communication Technologies Facilitate Relational Contracting in International Trade* Chapter 2.
[585] Teubner, *Netzwerk als Vertragsverbund: Virtuelle Unternehmen, Franchising, Just-in-time in sozialwissenschaftlicher und juristischer Sicht*.
[586] Oliver Williamson, "The Economics of Governance" (2005) 95 American Economic Review 1.

> *…the economics of governance, as herein described, is principally an exercise in bilateral private ordering…*

Powell's notion of network is similarly essentially bilateral in nature, focusing on bilateral relationships that are not based on the structural components of contract or corporation. From this perspective, using the term *network* to describe governance between market and hierarchy is somewhat misleading but can perhaps be understood as referring to the networks of interpersonal relationships that form for example between directors and managers of companies.[587] At the same time, for example Teubner has used 'network' to refer to the creation of new kinds of direct bilateral relationships in situations where the relationship would otherwise, under the traditional legal structural component of contract, be classified as *indirect* or non-existent. This is clearly relevant from a supply chain perspective, allowing focus on conditions beyond formal contract to give rise to legally relevant relationships overcoming the bounds of privity. It does not, however, in itself help focus on the role of contractual arrangements in governance.

3.2.3 From the Governance of Contractual Relations to Governance Through Contract

Williamson's work, focusing on contract and corporation as the structural features within which the governance of production takes place, would naturally seem to stimulate further research in governance through contract and governance through corporation. The latter of these, under the moniker corporate governance, has for decades been a focal point of governance research.[588] Corporate governance studies how corporations are directed and controlled, from a more narrow perspective focusing on the relationship of owners and management or, from a wider perspective, also taking into account various stakeholders such as labor, suppliers, customers, or the environment.[589] While there have been references to corporate governance in legal scholarship even before, following Williamson's work a veritable explosion has taken place

[587] See e.g. Kajüter and Kulmala's example of networks where groups of personnel are used to build interorganizational trust. Kajüter and Kulmala.

[588] For a brief non-legal history of corporate governance, see Dieter Plehwe, "Modes of Economic Governance: The Dynamics of Governance at the National and Firm Level" in David Levi-Faur (ed), *Oxford Handbook of Governance* (Oxford University Press 2012).

[589] The narrower description of *corporate governance* is derived from the so-called 'Cadbury Committee' in the UK. Committee on the Financial Aspects of Corporate Governance, "The Financial Aspects of Corporate Governance" (1992). Generally on the committee, see http://cadbury.cjbs.archios.info/report. Since then, the scope of corporate governance has expanded to cover relations to other stakeholders, in particular employees. Klaus Hopt, "Comparative Corporate Governance: The State of the Art and International Regulation" (2011) 59 American Journal of Comparative Law 1.

since the late 1970s.[590] Since then, corporate governance, constituting the multiplicity of relationships between the stakeholders in and of corporations, has become a massive and established field of research.[591] This literature, and with it the term corporate governance, have been influential in shaping legal scholarship over corporations, with the use of the term corporate governance now extending even to historical contexts.[592] Some have seen the development of legal scholarship on corporate governance also as an important model for research into modes of governance structured around contracts.[593]

Contract governance, however, seems only recently to have surfaced as a more focused field of research.[594] Currently, contractual or contract governance seems nowhere near as impactful as corporate governance. As noted above, the latter gives almost 30.000 search hits on HeinOnline. The former, on the other hand, gives less than four hundred, and of these only a few discuss contractual or contract governance in more than passing and not as a subgroup of corporate governance for example in relation to corporate compensation.[595] One reason for this dearth of focus on contract governance may simply be that other 'brands' of research are used. For example, some works that could be classified under contract governance may be branded as private ordering.

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[590] For example, using the search term 'corporate governance' on the HeinOnline database of primarily American legal scholarship provides only a handful of references prior to the explosion in the use of the term from the late 1970s onward, culminating in, as of late 2016, almost 30000 hits altogether. On the other hand, at the time of Williamson's 1984 paper Corporate Governance he referred to a 'revival' after a 'long hiatus' on the study of corporate governance, though he was here probably referring to social studies scholarship in a broad sense. Oliver Williamson, "Corporate governance" (1984) 93 Corporate Governance 1197.

[591] Generally, see Hopt; Andreas Fleckner and Klaus Hopt (eds), *Comparative Corporate Governance: A Functional and International Analysis* (Cambridge University Press 2013). For a recent Finnish comparative perspective, see Patrik Nyström, *Osakeyhtiön hallituksen fidusiaariset velvollisuudet: osakeyhtiö- ja vahingonkorvausoikeudellinen tutkimus* (Suomalainen lakimiesyhdistys 2016).

[592] E.g. Lyman Johnson, "Law and the History of Corporate Responsibility: Corporate Governance" (2013) 10 University of St. Thomas Law Journal 974.

[593] E.g. Möslein and Riesenhuber. Also Teubner has focused on corporations as one possible model for governing contractual structures. E.g. Teubner, *Netzwerk als Vertragsverbund: Virtuelle Unternehmen, Franchising, Just-in-time in sozialwissenschaftlicher und juristischer Sicht* 86–94 and passim.

[594] Though arguably there is overlap for example to private ordering and other types of research that could be classified as contract governance. For 'early' research on contract governance, see e.g. the references in Vincent-Jones; Möslein and Riesenhuber; Zumbansen, "Private Ordering in a Globalizing World: Still Searching for the Basis of Contract"; Zumbansen, "The Law of Society: Governance Through Contract"; Stefan Grundman, Florian Möslein and Karl Riesenhuber (eds), *Contract Governance: Dimensions in Law and Interdisciplinary Research* (2015). More generally, Gibbons, Holden, and Powell lament that, over the 35 years since Williamson's 1975 *Markets and Hierarchies*, 'the market disappeared from the literature on firms' boundaries', literature instead focusing on 'non-integration versus integration at the transaction level, rather than the functioning of the price mechanism at the market level'. (Integration and Information: Markets and Hierarchies Revisited, NBER Working Paper 15779, 2 (2010).

[595] In late September 2016, using the search term 'contract governance' on HeinOnline gave 85 hits, spread mostly from the late 70s with a slight increase in recent years. Using the search term 'contractual governance' provides 282 hits with pretty much the same temporal dispersion.

However, more compelling reasons also seem present. One of these may be the generality of contract law. The basic structure of corporations, such as shareholders, directors, and executives, is relatively similar globally.[596] Contract law, on the other hand, provides a much more general framework used in far more contexts and for many other purposes than merely structuring production. Furthermore, as outlined in Chapters 1 and 2, whatever is the 'proprium' of contract law depends greatly on the legal system and is in practice intertwined with private law more generally, such as tort/delict. Following this, another reason for the relative absence of contract governance, at least in law, may be a dearth until recently of empirical research outlining the contours of contracts as vehicles of governance.[597]

Building on these arguments, it seems that scholars of contract law have had difficulties in making explicit the relationship of law and other societal institutions in ways that extend beyond traditional dogmatics.[598] The primary challenge here is the relationship of more general understandings of contract, that could be used for theorizing, to the expert knowledge of legal specialists, who have difficulties in seeing contract in practice reduced from the mass of private law into a generalization akin to that of classical contract law which, while offering a tidy conceptualization of contract, may have little relevance in relation to legal outcomes. Williamson alludes to this when talking about the necessity of theorizations of contract:[599]

To be sure, some legal specialists insist that all of this *[i.e. that there are different types of contracting]* was known all along. There is a difference, however, between awareness of a condition and an understanding. Macneil's treatment *[in providing an abstract typology of different phases of contract law]* heightens awareness and deepens the understanding.

Despite the lack of a focused research, governing through contracts has a long history. As seen in Chapter 2, companies have created new kinds of private governance structures via contracts and states have regulated the use of such structures. One practical example is provided by the 1915 ruling in *Dunlop Pneumatic Tyre Co* v *Selfridge & Co*, referred to in Chapter 2 in relation to the bounds of privity under English law.[600] Similar cases can probably be identified

[596] See e.g. John Armour, Henry Hansmann and Reinier Kraakman, "Agency Problems and Legal Strategies" in Reinier Kraakman (ed), *The Anatomy of Corporate Law: A Comparative and Functional Approach* (Second, 2009) 52.

[597] E.g. Vincent-Jones sees this as important. Vincent-Jones 318. On the development of empirical research, see the discussion in Section 1.3.3, revolving around e.g. Smith and King; Eigen; Schepker and others. For a broader social sciences perspective on empirical research on the effects of contract, see in particular Locke; Weil.

[598] E.g. Smith and King.

[599] Williamson, "Transaction-Cost Economics: The Governance of Contractual Relations" 26.

[600] AC 847 (1915). In that case, a manufacturer included in its dealer contracts a provision not to sell tires below a certain price. The manufacturer also required dealers to include a similar provision in the dealers' contracts with retailers, with the added proviso that if retailers nonetheless sold the tires at a lower price

in different periods of history.[601] Similarly, theorizations of the use of contract to avoid or alter public ordering abound.[602] Here, however, focus seems to be less on developing approaches to governance through contract per se than more generally arguing for 'an understanding of contracts as complex societal arrangements that visibilize and negotiate conflicting rationalities and interests' and highlighting the relationship of public governance of contract and private governance by contract.[603]

To go beyond this initial public/private divide and delve deeper into the possible distinctions and meanings of contract governance, Möslein and Riesenhuber propose in their 2009 paper four main topics of contract governance research.[604]

The first of these is 'governance of contract law'.[605] Here, focus is on the institutional framework of contract law rule-making. Particular questions include the relationship of different levels of regulation (local, national, supranational, and global levels) and the different legitimacies of state, private, and hybrid regulation. Relevant instruments of governance include statutes and codes, subordinated public regulation by supervisory authorities such as in relation to banking and regulated markets, and private bodies of rules and regulations, such as model laws and American Restatements, institutionalized standard form contracts, international commercial clauses such as incoterms and collective agreements.

The second topic of contract governance research is 'governance of contracts'.[606] Here, focus is on institutions that constitute the framework of private transactions, i.e. the facilitative or enabling function of contract law. This constitutes of two factors. On the one hand, there is the requisite of contractual stability under *pacta sunt servanda.* On the other hand, there are various elements used for guaranteeing fairness in contracting. Examples of elements used for governing the fair use of contract range from public policy, such as competition law, consumer protection, and more general policies of fairness such as pre-contractual duties, default rules, form requirements, and

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they would have to pay damages directly to the manufacturer. Today, the matter would probably fall under competition law in the form of an anticompetitive agreement. At the time of the judgment, however, the courts 'governed' the agreement by noting that the damages provision was void for the lack of privity between the retailer and manufacturer.

[601] In addition to the examples in Chapter 2, see for example the stated use of contracts to regulate retail of tulips in 17th century Holland. Hans-W Micklitz, "Herd Behaviour and Third Party Impact as a Legal Concept: On Tulips, Pyramid Games, and Asset-backed Securities" in Stefan Grundmann, Florian Möslein and Karl Riesenhuber (eds), *Contract Governance: Dimensions in Law and Interdisciplinary Research* (Oxford University Press 2015).

[602] E.g. Zumbansen, "The Law of Society: Governance Through Contract."

[603] Zumbansen, "The Law of Society: Governance Through Contract."

[604] Möslein and Riesenhuber.

[605] Möslein and Riesenhuber 260–268.

[606] Möslein and Riesenhuber 268–274.

substantive controls, to private standards such as best practices and codes of conduct on for example customer data, health and safety, and example product safety.

The third topic of contract governance research is 'governance by means of contract law'.[607] Here, focus is on using contract law as an instrument to achieve specific regulatory goals other than the general fairness of private ordering. Here, contract law can be compared for example to tax law as but one of many instruments used to govern society. Möslein and Riesenhuber use discrimination as a practical example. Prohibitions of discrimination embedded in contract law can be complemented with other mechanisms such as social dialogue, gender mainstreaming, and certifications. Possible instruments for such governance include the use of default rules and especially so-called penalty default rules penalizing certain kinds of contracting, which exert regulatory impact despite leaving private autonomy relatively unfettered. Examples mentioned by Möslein and Riesenhuber include legislation encouraging negotiation between parties while providing a default rule that may be non-optimal for both, for example in relation to regulation on European Works Councils and German copyright law and in particular in relation to the control of collecting societies.

The fourth topic of contract governance research is 'governance through contract'.[608] Here, focus is on using contracts to create a framework of governance. Möslein and Riesenhuber argue that this is particularly important when contractual structures come factually close to organizational structures, such as in long term, multi-party, and network contracts. Echoing Williamson, Möslein and Riesenhuber argue that uncertainty and complexity require custom-tailored mechanisms and that contract governance comes particularly close to corporate governance. Here, legal instruments based on guaranteeing the general fairness of contract law (i.e. governance of contract law) play a role in establishing default rules. Governance through contract is then used to supplement or complement the starting point, for example through clauses related to termination, adaptation (indexes, dispute resolution, re-negotiation), allocation of risk, and incentives.

Möslein and Riesenhuber's framework effectively sorts out four different meanings of contract governance.[609] The notion of *governance through contract*, the use of contracts specifically to create frameworks of governance, is to an extent present already in earlier research on private ordering. Möslein

[607] Möslein and Riesenhuber 274–281.
[608] Möslein and Riesenhuber 281–287.
[609] They acknowledge possible overlap. E.g. Möslein and Riesenhuber 2009, 260 (generally), 266 (in relation to when standard terms fall under governance of contract law or governance through contract, respectively), 268–269 (the fuzzy boundaries of governance of contract and governance by means of contract law), 283–284 (in relation to governance of contract and governance through contract).

and Riesenhuber's framework, however, brings clarity to the concept by separating it more clearly from other avenues of research related to contract governance.

A number of critiques may nonetheless be noted. In particular, Möslein and Riesenhuber focus on bilateral contracts and do not talk about for example standards or codes of conduct in the context of governance through contract. The focus on 'contract' and 'parties' may be one of the key problems with Möslein and Riesenhuber's framework. Specifically, Möslein and Riesenhuber point out that one of the differences between governance by means of contract law and governance through contract is that:[610]

> the range of governance is different, given that governance through contract can, due to the privity of contract, only affect the relationship of the parties as such, and, as a matter of principle, it will not cover the initial negotiation of a contract.

However, as seen in Chapters 1 and 2, concepts such as 'contract' and 'party' are extremely vague and fluid. Governance through contract can use various means, ranging from cascading standards to denying recourse via privity (or lack of it), to affect actors beyond privity. This effect may take the form of not only 'contract' but also of tort/delict or other legal actions, depending on the legal system in question. Governance through contract and its effects are thus not confined to traditional notions of parties to a bilateral contract.

On a similar note, Möslein and Riesenhuber's framework is grounded to some extent in European Union law but focuses mostly on a restrained interpretation German contract law, thus offering a potentially one-sided perspective of the diversity of contract governance. They also seem particularly focused on economic theories and analysis, in particular with regard to the research methods they propose for contract governance.[611] Only occasionally do they explicitly refer to other alternatives, such as more general public policy in the form of consumer protection.[612] A broader empirical or analytic analysis of the functions of contracting, for example, is not present. To overcome these deficits, I will in the next sections focus on different ways of conceptualizing *governance through contract*.

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[610] Möslein and Riesenhuber 284.

[611] Möslein and Riesenhuber 2009, 259–260 (in relation to corporate governance), 267–268 (in relation to governance of contract law), 273–274 (in relation to governance of contract), 279–280 (in relation to governance by means of contract law), 286–287 (in relation to governance through contract). Occasionally, for example in relation to governance of contract law, they refer for example to policy arguments

[612] Möslein and Riesenhuber 2009 p. 269–270, used specifically as a contrast to economic theory but then explained as a requirement to account for externalities and market failures.

3.3 Governance Through Contract—Classifying Different Kinds of Bilateral Contractual Relationships

3.3.1 Updating the Orienteering Map: Next Steps

Similarly to contract governance, governance through contract has received little focus in legal scholarship until recently. One possible exception is the broad literature on private ordering. There, however, focus is more generally on the relationship between rulemaking under the public and the private and not so much on the specific contractual mechanisms used by actors to control or govern others. Another exception comes in the form of interdisciplinary and empirical research on contract, but even this has focused little on law itself,[613] in addition to the major challenge that such research is generally limited in its conceptualization of contract.[614]

Starting with this section and continuing for the rest of this Chapter 3, I will try to highlight in increasing detail the different kinds of routes that connect actors on the orienteering map of contract governance. In this section I focus on Williamson's inaugural work and in particular its foundations in Ian Macneil's idea of different systems of contract law. The next sections build on these foundations by focusing on global value chain theory and empirical accounts of governance through contract before unveiling the ensuing framework of governance through contract in the final section.

3.3.2 A Crucial Foundation for Governance Through Contract: Ian Macneil's Systems of Contract Law

As discussed in Subsection 3.2.3, more focus has been on researching hierarchies, i.e. corporations as vehicles of governance, than on the diverse ways of using contracts as vehicles of governance. This is somewhat strange taking into account in the first place the divide between two forms of governance, market and hierarchy, and in the second that Williamson himself focused on going deeper into the role of contract as a governance structure in his 1979 paper 'Transaction-Cost Economics: The Governance of Contractual Relations'.[615] I argued earlier that a key challenge in relation to legal approaches to governance through contract is the conceptualization of what it means to contract. As seen in Chapters 1 and 2, contract can mean almost

[613] Thus while Holmström has received a Nobel Prize for his long work on 'contract' starting since the late 70s, within legal scholarship empirical work on contract is a much more recent phenomena. E.g. Eigen; Smith and King.

[614] See Subsection 1.3.3. For example, Macaulay's classic work seems to be steeped in an understanding of an extremely formal contract that is isolated from the greater sphere of private law (no recourse to tort, promissory estoppel, restitution, etc.) Macaulay.

[615] Williamson, "Transaction-Cost Economics: The Governance of Contractual Relations." For an overview of Williamson's theories in general, see Oliver Williamson, *The Mechanisms of Governance* (Oxford University Press 1996).

anything and almost nothing depending on the parameters of contract in a specific legal system at a specific time. In line with this, it is difficult to create a conceptualization of contract that could both overcome jurisdictional lines *and* be practically useful. This is because such a conceptualization would probably end up as a reductive minimum of contract instead of the extensive and widely varying conceptualizations of private law in different jurisdictions that are used to govern relationships.

However, for research on governance through contract abstractions are a necessary evil. Indeed, Williamson argues that generic modes of governance are supported by and significantly defined by distinctive forms of contracting.[616] Probably the most well-known theorizer of contract since the 1970s, in particular in the United States but also more generally, is Ian Macneil.[617] To understand different models of governance, including those of Williamson discussed in this Section,[618] global value chain theory discussed in the next,[619] and economic and empirical research on contracts generally as briefly discussed in Chapter 1,[620] it is imperative to take a look at Macneil's work.

In his classic account of contract law, Macneil identifies three 'systems' of contract law.[621] These systems differ from one another to the extent to which contract law can account for various externalities, in particular to what extent contractual paradigms are flexible enough to take into account changes in the relationship of the parties. All these systems are based on what Macneil sees as the justifications of contract law, namely that:[622]

All aspects of contractual relations are subject to the norms characterizing contracts generally, whether they are discrete or relational. As noted earlier these are: (1) permitting and encouraging participation in exchange, (2) promoting reciprocity, (3) reinforcing role patterns appropriate to the various particular kinds of contracts, (4) providing limited freedom for exercise of choice, (5) effectuating planning, and (6) harmonizing the internal and external

[616] Williamson, *The Mechanisms of Governance* 10.
[617] In particular Ian R Macneil, "The Many Futures of Contracts" (1974) 47 Southern California Law Review 691; Macneil, "Contracts: Adjustment of Long-Term Economic Relations under Classical, Neoclassical, and Relational Contract Law."
[618] Williamson acknowledges the role of Macneil's work on contracts throughout his œuvre. E.g. Williamson, "Transaction-Cost Economics: The Governance of Contractual Relations" 238–239.
[619] While Macneil's work is not mentioned in the foundational work of global value chain theory, Williamson's work is and, at the same time, the 'center-piece' of the GVC framework is formed by 'relational value chains', apparently building on Macneil's relational contracting. Gereffi, Humphrey and Sturgeon.
[620] For example, Schepker, Oh, Martynov, and Poppo even name their paper after Macneil's 1974 work. Schepker and others 193; Macneil, "The Many Futures of Contracts."
[621] Macneil, "Contracts: Adjustment of Long-Term Economic Relations under Classical, Neoclassical, and Relational Contract Law."
[622] Macneil, "Contracts: Adjustment of Long-Term Economic Relations under Classical, Neoclassical, and Relational Contract Law" 895.

matrixes of particular contracts. These norms affect change in contractual relations just as they affect all their other aspects.

The first of Macneil's systems is classical contract law.[623] Classical contract law is formalistic and focused on locking the parties' agreement into a single unchangeable state, as if it perpetually existed in a specific time and space from whence it is understood. The result is a discrete[624] and presentiated[625] contract, perfect in that it is as far removed from any externalities to the agreement as possible. To reflect the goals of discreteness and presentiation, classical contract law does not allow for uncertainties to be built into contracts, such as clauses by which the parties 'agree to agree' to modify their contract in face of changed circumstances. The problem with the system of classical contract law, however, is that no contract can be fully removed from societal externalities.[626] Furthermore, some contractual relationships, for example long-term business relationships, are very much removed from discrete relationships. In order to function, such relationships require flexibility to evolve over time.[627]

The second of Macneil's systems is 'neoclassical' contract law.[628] In order to overcome the rigors of classical contract law for example in relation to long-term contracts, actors utilize numerous contract provisions that decrease the presentiation and discreteness of contracts. Some examples include the incorporation of external standards into contracts,[629] specific terms on how the

[623] Macneil, "Contracts: Adjustment of Long-Term Economic Relations under Classical, Neoclassical, and Relational Contract Law" 856–865.

[624] 'Discreteness' is achieved, for example, by seeing the parties' identities as irrelevant, by commodifying the subject matter of contracts, such as labor, by limiting the sources of interpreting transactional content for example to specific formal communication, by limiting available remedies to increase foreseeability, by rigorous lines between 'in' and 'out' of transaction, and by discouraging the involvement of third-parties. E.g. Macneil, "Contracts: Adjustment of Long-Term Economic Relations under Classical, Neoclassical, and Relational Contract Law" 863–864.

[625] 'Presentiation' is achieved, in particular, through 'equation of the legal effect of a transaction with the promises creating it', by supplying 'a precise, predictable body of law to deal with all aspects of the transaction not encompassed by the promises', and 'stress on expectation remedies, whether specific performance or damages measured by the value of performance, tends to bring the future into the present, since all risks, including market risks, are thereby transferred at the time the "deal is made'. Macneil, "Contracts: Adjustment of Long-Term Economic Relations under Classical, Neoclassical, and Relational Contract Law" 864.

[626] Macneil, "Contracts: Adjustment of Long-Term Economic Relations under Classical, Neoclassical, and Relational Contract Law" 856–857.

[627] Macneil, "Contracts: Adjustment of Long-Term Economic Relations under Classical, Neoclassical, and Relational Contract Law" 857–858.

[628] Macneil, "Contracts: Adjustment of Long-Term Economic Relations under Classical, Neoclassical, and Relational Contract Law" 865–886.

[629] E.g. price indexes or leaving additional costs of performance to be calculated by market standards. Macneil, "Contracts: Adjustment of Long-Term Economic Relations under Classical, Neoclassical, and Relational Contract Law" 866, 869.

contract can be adapted by the parties later on,[630] and the subjugation of contractual disputes to third-party assisted dispute resolution processes that may be better at recognizing techniques that overcome discreteness and presentiation than generalist courts.[631] Macneil argues that such features are inherently in conflict with the goals of presentiation and discreteness embedded in classical contract law.[632] To counter this conflict of form and function, neoclassical contract law has developed a number of doctrines to mollify the rigidity of classical contract law. On the one hand, law increasingly allows the use of contractual mechanisms enabling one or some of the parties to a contract to escape the consequences of changed circumstances.[633] On the other hand, new techniques surface to enable the use of law itself to modify contractual relationships in relation to changing circumstances.[634] These two intertwine to allow a more constructive approach to contractual disputes.[635] At its heart, however, Macneil sees that neoclassical contract law maintains the same core focus on consent as the foundation of contract as classical contract law.[636] This has inter alia led to the narrowing scope of application of contract law as other areas of law, such as corporate and collective bargaining law, have been 'spun-off' from the core of contract.[637]

The third system identified by Macneil is what he refers to as 'relational contract law'.[638] Here, focus is on the multiple forms of contracting that come close to organizational form, such as the numerous long-term contractual relationships typical in contemporary society and the need to continue such relationships despite disputes.[639] Macneil argues that these relationships are

[630] E.g. one-party controlled terms, such as options, and 'agreements to agree'. Macneil, "Contracts: Adjustment of Long-Term Economic Relations under Classical, Neoclassical, and Relational Contract Law" 868, 870–872.

[631] E.g. forms of dispute resolution that are more focused than courts on 'interests' than 'rights', e.g. third party determination and arbitration for Macneil, but implicitly also mediation. Macneil, "Contracts: Adjustment of Long-Term Economic Relations under Classical, Neoclassical, and Relational Contract Law" 866–868.

[632] Macneil, "Contracts: Adjustment of Long-Term Economic Relations under Classical, Neoclassical, and Relational Contract Law" 873.

[633] Macneil, "Contracts: Adjustment of Long-Term Economic Relations under Classical, Neoclassical, and Relational Contract Law" 870–873.

[634] In addition to traditional theories such as frustration, for Macneil newer forms included more general doctrines focusing on equity, such as good faith and unconscionability. E.g. Macneil, "Contracts: Adjustment of Long-Term Economic Relations under Classical, Neoclassical, and Relational Contract Law" 875–876, 884–885.

[635] Macneil, "Contracts: Adjustment of Long-Term Economic Relations under Classical, Neoclassical, and Relational Contract Law" 876–883.

[636] Macneil, "Contracts: Adjustment of Long-Term Economic Relations under Classical, Neoclassical, and Relational Contract Law" 885–886.

[637] Macneil, "Contracts: Adjustment of Long-Term Economic Relations under Classical, Neoclassical, and Relational Contract Law" 885–886.

[638] Macneil 1978, 886–900.

[639] Macneil sees that: '*Interfirm contractual relations follow the kinds of patterns discussed here–e.g., in a long-term consortium–but more typical relations of this nature would include such structures as the*

underscored by an emphasis not only on fixed and reliable planning but also on flexibility for change. Here, in addition to the six justifications underlying all contracts Macneil notes two additional justifications for contractual *relations* in particular:[640]

> *In addition, I have identified two norms particularly applicable to contractual **relations**: (1) harmonizing conflict within the internal matrix of the relation, including especially, discrete and presentiated behavior with nondiscrete and nonpresentiated behavior; and (2) preservation of the relation. These norms affect change in contractual relations just as they affect all their other aspects. [emphasis added]*.

While acknowledging the merits of neoclassical contract law in accounting for flexibility, Macneil argues that the paradigmatic focus on discreteness and presentiation of classical contract law underlying neoclassical contract law needs to be replaced to make law more coherent. Here the role of 'original consent' at the heart of classical and neoclassical contract law becomes crucial. A focus on consent fixed in a specific point of time and space, Macneil argues, cannot reflect changes in societal circumstances no matter how much the different techniques of neoclassical contract law try to mitigate the problems arising out of such change. With the disappearance of reliance on consent:[641]

> *What will disappear is the abrasion resulting from application of contract law founded on the assumption that all of a contractual relation is encompassed in some original assent to it, where that assumption is manifestly false. The elimination of that assumption not only would eliminate the unnecessary abrasion but also would remove the penultimate classical characteristic justifying calling a contract law system neoclassical.*

What this relational system would be like is unclear. Macneil himself only proposes to note some possible answers to this question.[642] First and foremost,

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internal workings of corporations, including relations among management, employees, and stockholders. Corporate relations with long- and short-term creditors, law firms, accounting firms, and managerial and financial consultants may also acquire many of the characteristics discussed and increasingly seem to do so. Collective bargaining, franchising, condominiums, universities, trade unions themselves, large shopping centers, and retirement villages with common facilities of many kinds are other examples now existent. If present trends continue, undoubtedly we shall see new examples, now perhaps entirely unforeseen.' Macneil, "Contracts: Adjustment of Long-Term Economic Relations under Classical, Neoclassical, and Relational Contract Law" 887.

[640] Macneil, "Contracts: Adjustment of Long-Term Economic Relations under Classical, Neoclassical, and Relational Contract Law" 895.

[641] Macneil, "Contracts: Adjustment of Long-Term Economic Relations under Classical, Neoclassical, and Relational Contract Law" 888–889.

[642] Macneil, "Contracts: Adjustment of Long-Term Economic Relations under Classical, Neoclassical, and Relational Contract Law" 889.

the traditional consent based paradigm of law would continue to be part of the system, just not the paradigm itself but *a part* of a broader paradigm that does not rest solely on consent.[643] Thus the role of consent might continue to be important even when it would be subordinate to other goals of a broader paradigm.[644] For example, Macneil sees that contracts could be relegated into the role of 'relational constitutions', even if any such notion, if improperly understood as re-establishing the general hierarchical eminence of contract, risks giving too much deference to contract generally.[645]

It seems that under relational contract law the starting point provided by contract would then be governed by general mechanisms for responding to changes. Some examples are the recovery of expectation damages without formal contract through promissory estoppel,[646] the incorporation of current social and political norms within contractual relationships,[647] and a broader recognition of the ties between contracts and external circumstances.[648] All these allow contracts to account for external circumstances more generally than the discrete and presentiated paradigms of classical or neoclassical contract law. More generally, Macneil seems to propose a form of mediation as the optimal form of dispute resolution instead of neoclassical contract law's arbitration or classical contract law's litigation, as mediation most focuses on the parties' interests and maintaining their relationship.[649]

3.3.3 Building on Macneil: Williamson's Typology of Contract Governance

Coming back to Williamson, in a 1979 paper he combined Macneil's depiction of three systems of contract law into the market/hierarchy differentiation of governance.[650] In particular, he uses Macneil's three systems of contract law to argue that there could be multiple different modes of governance that are all based on contract:[651]

[643] Macneil, "Contracts: Adjustment of Long-Term Economic Relations under Classical, Neoclassical, and Relational Contract Law" 888–889.
[644] Macneil, "Contracts: Adjustment of Long-Term Economic Relations under Classical, Neoclassical, and Relational Contract Law" 889.
[645] Macneil, "Contracts: Adjustment of Long-Term Economic Relations under Classical, Neoclassical, and Relational Contract Law" 894.
[646] Macneil, "Contracts: Adjustment of Long-Term Economic Relations under Classical, Neoclassical, and Relational Contract Law" 897–898.
[647] Macneil notes in particular distributive justice, liberty, human dignity, social equality and inequality, and procedural justice. Macneil, "Contracts: Adjustment of Long-Term Economic Relations under Classical, Neoclassical, and Relational Contract Law" 898.
[648] Macneil, "Contracts: Adjustment of Long-Term Economic Relations under Classical, Neoclassical, and Relational Contract Law" 899–900.
[649] Macneil, "Contracts: Adjustment of Long-Term Economic Relations under Classical, Neoclassical, and Relational Contract Law" 891–893, 896–897.
[650] Williamson, "Transaction-Cost Economics: The Governance of Contractual Relations."
[651] Williamson, "Transaction-Cost Economics: The Governance of Contractual Relations" 244–245.

> *The general argument of this paper is that special governance structures supplant standard market-cum-classical contract exchange when transaction-specific values are great. Idiosyncratic commercial, labor, and family relationships are specific examples.*

Following Macneil, Williamson argues that market governance is based on classical contract law and best suits occasional and recurring non-specific transactions.[652] Examples of such transactions might be the purchasing of standardised equipment or material, which require little asset-specificity.[653] Here, Williamson understands classical contract law from an economic perspective as contingent claims contracting, which:[654]

> *entails comprehensive contracting whereby all relevant future contingencies pertaining to the supply of a good or service are described and discounted with respect to both likelihood and futurity.*

If, instead, occasional transactions are of mixed or highly idiosyncratic kinds, 'trilateral governance', based on neoclassical contract law, is better suited as a governance structure than marker governance.[655] An example of a mixed transaction could be the purchase of customized equipment, while an example of a highly idiosyncratic transaction could be the construction of a plant.[656] Uncertainty may also play a role, either by requiring recourse to more standard equipment by way of design changes or by requiring the development of governance mechanisms to offset uncertainties.[657] With trilateral governance Williamson specifically refers to neoclassical contract law and in particular its focus on aiming to maintain continuity in relationships despite disputes, for example through third-party assistance, such as arbitration, instead of outright litigation, and focus on specific performance remedies.[658] With regard to neoclassical contract law, Williams sees that:[659]

> *[a] recognition that the world is complex, that agreements are incomplete, and that some contracts will never be reached unless both parties have confidence in the settlement machinery thus characterizes neoclassical contract law.*

Finally, in cases of recurring mixed or highly idiosyncratic transactions, 'transaction-specific governance', based on relational contracting, is most

[652] Williamson, "Transaction-Cost Economics: The Governance of Contractual Relations" 248–249.
[653] Williamson, "Transaction-Cost Economics: The Governance of Contractual Relations" Figure 1, 247.
[654] Williamson, "Transaction-Cost Economics: The Governance of Contractual Relations" 236.
[655] Williamson, "Transaction-Cost Economics: The Governance of Contractual Relations" 249–250.
[656] Williamson, "Transaction-Cost Economics: The Governance of Contractual Relations" Figure 1, 247.
[657] Williamson, "Transaction-Cost Economics: The Governance of Contractual Relations" 253–254.
[658] Williamson, "Transaction-Cost Economics: The Governance of Contractual Relations" 249–250.
[659] Williamson, "Transaction-Cost Economics: The Governance of Contractual Relations" 238.

appropriate.[660] An example of a recurring mixed transaction might involve customized goods, while Williamson's example of a recurring highly idiosyncratic transaction is the 'site-specific transfer of an intermediate product across successive stages'.[661] As in trilateral governance, uncertainty can also play a role.[662] The non-standardized nature of transactions makes reliance on market governance problematic, while the recurrent nature of the transactions makes the use of specialized governance mechanisms lucrative.

Williamson sees that transaction-specific governance can take place in two specific forms. The first of these is 'bilateral governance' focusing on bilateral transactions via obligational contracting.[663] The second of these is 'unified governance' focusing on vertical integration into one internal organization.[664] Ultimately, the choice between bilateral and unified governance seems to hinge on the level of asset-specificity of the transactions, with bilateral governance focusing broadly on recurrent mixed transactions while unified governance would take place under highly idiosyncratic recurrent transactions.[665] This neatly brings into the model not only relational contracting but also hierarchies, which Williamson, following Macneil, here sees as form of relational contracting.

How exactly Williamson understands relational contract law is somewhat difficult to sort out. By subjugating hierarchies under relational governance, Williamson clearly advocates Macneil's idea that relational contracting is more akin to an ongoing relation, such as the internal workings of a corporation, than a contract fixed in time and space. In relation to bilateral governance, Williamson sees that the adaptation of a contract to match externalities is crucial but, in achieving this, he seems to primarily refer to general adjustment mechanisms or renegotiations.[666] Thus, it seems that Williamson is not moving towards Macneil's relational contracting from a public ordering perspective but calling for more focus on transaction-specific mechanisms of governance through contract than those allowed by neoclassical contract law. Both these perspectives are reflected in Williamson's summary of relational contracting:[667]

> *The pressures to sustain ongoing relations "have led to the spin-off of many subject areas from the classical, and later the neoclassical, contract law system, e.g., much of corporate law and collective bargaining." Thus, progressively increasing the "duration and complexity" of contract has*

[660] Williamson, "Transaction-Cost Economics: The Governance of Contractual Relations" 250.
[661] Williamson, "Transaction-Cost Economics: The Governance of Contractual Relations" Figure 1, 247.
[662] Williamson, "Transaction-Cost Economics: The Governance of Contractual Relations" 253–254.
[663] Williamson, "Transaction-Cost Economics: The Governance of Contractual Relations" 250–252.
[664] Williamson, "Transaction-Cost Economics: The Governance of Contractual Relations" 252–253.
[665] Williamson, "Transaction-Cost Economics: The Governance of Contractual Relations" 252–253.
[666] Williamson, "Transaction-Cost Economics: The Governance of Contractual Relations" 251–252.
[667] Williamson, "Transaction-Cost Economics: The Governance of Contractual Relations" 238. Footnotes, consisting solely of references to Macneil's 1978 text, have been omitted.

> *resulted in the displacement of even neoclassical adjustment processes by adjustment processes of a more thoroughly transaction-specific, ongoing-administrative kind. The fiction of discreteness is fully displaced as the relation takes on the properties of "a minisociety with a vast array of norms beyond those centered on the exchange and its immediate processes." By contrast with the neoclassical system, where the reference point for effecting adaptations remains the original agreement, the reference point under a truly relational approach is the "entire relation as it has developed … [through] time. This may or may not include an 'original agreement'; and if it does, may or may not result in great deference being given it.*

3.3.4 The Curses and Blessings of Looking at Contract from Beyond Law

Thus into the earlier space between governance through market and governance through hierarchy Williamson, building on Macneil's differentiation of systems of contract law, crams two new kinds of governance. This brings the number of modes of governance from two to four. Three of these are based in contract, just different *kinds* of contracting (or four, if one follows Macneil's position equating corporations with contractual relationships)[668]. Arguably, with this move Williamson opened the field for research into structures of governance through contract by proposing that different *types* of contracts may be the most transaction-cost efficient ways of governing different types of transactions.

Macneil's and Williamson's combined focus on different kinds of contracting is liberating on a theoretical level. With increased empirical research and better theoretical models of what it means to contract, different contractual techniques and mechanisms can be used to create a more detailed typology of governance through contract. This liberation of governance through contract is reflected in the major impact of Macneil's and Williamson's work outside the field of law.[669] For example, King and Smith note that:[670]

> *Not surprisingly, Macaulay's and Macneil's sociological approaches found an audience beyond the legal academy among economic sociologists and management scholars. Scholars utilized relational contract theory to understand how relational attributes, such as trust and reciprocity, enhanced inter-firm cooperation and improved the performance of partnering firms.*

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[668] E.g. Macneil, "Contracts: Adjustment of Long-Term Economic Relations under Classical, Neoclassical, and Relational Contract Law" 887.

[669] One indicator is the 2009 'Nobel Prize' in Economic Sciences, half of which was awarded to Oliver Williamson for his analysis of economic governance, especially the boundaries of the firm. More generally e.g. Levi-Faur, "From 'Big Government' to 'Big Governance'?" 5–6; Smith and King.

[670] Smith and King 11–12.

In comparison, the legal impact of Williamson's and Macneil's work has been limited.[671]

While ground breaking, Williamson's approach is also problematic. First, it is clearly indebted to the understanding of systems of contract law presented by Macneil.[672] This is merited in highlighting the need of general theories of different kinds of contracting for a better theory on contractual governance. However, the vagueness of Macneil's work, in particular in relation to the notion of 'relational contracting', is similarly reflected in Williamson's work. Williamson does not provide clear examples of contractual or other legal technique that could sufficiently concretize relational contracting. Perhaps as a consequence of this difficulty of conceptualizing the notion of 'relational' contract law as presented by Macneil, 'relational' is often understood as extra-legal or at least extra-contractual in the sense that traditional formal requirements of contract are flouted.[673] Similarly, Williamson does not really delve into the contractual specificities of other forms of governance through contract either, providing, for example, only scant examples of trilateral governance based on Macneil's neoclassical contract law.

A particular critique applicable to both Macneil and Williamson is their focus on traditional notions of 'parties', similarly to Möslein and Riesenhuber's description of governance through contract. Williamson's differentiation of contract governance is purely bilateral. Macneil's notion of relational contracting seems to be less so, as claiming to overcome consent as the foundation of contractual relationship at least implicitly would simultaneously override any traditional notion of party to contract. On the other hand, Macneil's practical examples focus on bilateral relationships, with the only considerable references to 'third parties' being made to third-party assisted dispute resolution. Thus while Macneil's system of relational contracting contains clear potential for overcoming traditional notions of parties to a contract, there is little in either Williamson's or Macneil's work that clearly focuses on the role of contracts in governing relationships beyond privity.

[671] See e.g. references in Smith and King fn. 52.

[672] Williamson 1979 note 26: 'To be sure, some legal specialists insist that all of this was known all along. There is a difference, however, between awareness of a condition and an understanding. Macneil's treatment heightens awareness and deepens the understanding.'

[673] Smith and King 12. Similarly when describing relational global value chain governance (the focus of the next Section), Gereffi, Humphrey, and Sturgeon note that the 'mutual dependence that then arises may be regulated through reputation, social and spatial proximity, family and ethnic ties, and the like.' Gereffi, Humphrey and Sturgeon 86. And this is again similar to notions of 'networks' as non-legal concepts discussed in the previous section.

3.4 Global Value Chain Theory—What's in a Name, Except a Promise to Go Beyond Bilaterality?

3.4.1 From Bilateral Governance to Chain Governance

A key problem in existing frameworks of governance seems to be their focus on clearly defined bilateral relationships instead of the effects that bilateral relationships can have on broader structures of production and the multiple stakeholders associated with different stages of production. By itself, however, the proposition to look at production more broadly than in relation to specific bilateral relationships is not new. For example, Hopkins and Wallerstein, writing in 1977 in the context of world-systems theory, proposed that:[674]

> *Let us conceive of something we shall call, for want of a better conventional term, "commodity chains". What we mean by such chains is the following: take an ultimate consumable item and trace back the set of inputs that culminated in this item – the prior transformations, the raw materials, the transportation mechanisms, the labor input into each of the material processes, the food inputs into the labor. This linked set of processes we call a commodity chain. If the ultimate consumable were, say, clothing, the chain would include the manufacture of the cloth, the yarn, etc., the cultivation of the cotton, as well as the reproduction of the labor forces involved in these productive activities.*

Following Hopkins' and Wallerstein's notion of commodity chains, a series of 'theories' have proposed to look at the organization of chains of actors in production. The latest development in this line of research is *global value chain* ('GVC') theory, 'launched' by Gereffi, Humphrey and Sturgeon in their 2005 paper *The governance of global value chains.*[675] GVC theory has since received global prominence in a number of contexts, in particular through its adoption by development-related organizations such as UNCTAD,[676] the World Bank, the International Monetary Fund, the World Trade Organization, the U.S. Agency for International Development, and the Organisation for Economic Co-operation and Development.[677]

GVC theory draws on numerous previous lines of research in order to:[678]

> *…generate a theoretical framework for better understanding the shifting governance structures in sectors producing for global markets, structures*

[674] Terence K Hopkins and Immanuel Wallerstein, "Patterns of Development of the Modern World-System" (1977) 1 Review 111, 128.
[675] Gereffi, Humphrey and Sturgeon.
[676] In relation to UNCTAD, see in particular UNCTAD, *World Investment Report 2013* (2013). See also UNCTAD, *World Investment Report 2011* (2011).
[677] Generally, Gereffi 23–28.
[678] Gereffi, Humphrey and Sturgeon 79.

> *we refer to as 'global value chains'. Our intent is to bring some order to the variety of network forms that have been observed in the field.*

In addition, GVC theory has a major developmental focus: [679]

> *One of our hopes is that the theory of global value chain governance that we develop here will be useful for the crafting of effective policy tools related to industrial upgrading, economic development, employment creation, and poverty alleviation.*

In particular, GVC theory offers a typology of global supply chain governance.[680] The typology includes five governance types: Three network forms of governance fill the space between the traditional divide into markets and hierarchies. Before focusing on this typology of governance, I will discuss some background, aims, and critique related to GVC theory.

3.4.2 Global Value Chain Theory—Origins, Aims, Critique

Global value chain theory is only the latest step in a succession of economic and political theories used to understand the effect of fragmentation and globalization on production. In particular, global value chain theory has been preceded by *world-systems theory* and *global commodity chain theory*.[681] The quote from Hopkins and Wallerstein in the previous section can be seen as descriptive of all the three theories discussed here. According to Bair, all of these theories 'agree that the commodity chain concept is a useful construct for thinking about the international division of labor characteristic of capitalist production'.[682] All three are focused on trying to understand the different inputs and outputs that go into the 'chain' of actions that constitute economic production. Thus, for example Kaplinsky notes that the concept of global value chains:[683]

> *…describes the full range of activities that are required to bring a product or service from conception, through the intermediary phases of production (involving a combination of physical transformation and the*

[679] Gereffi, Humphrey and Sturgeon 79. More generally, Gereffi.
[680] Other contributions generally attributed to GVC theory include a focus on 'value', in particular value-added. E.g. Gereffi 20–22; UNCTAD, *World Investment Report 2013* 122–140. The focus on value added, however, seems in some ways secondary to governance. For example, the UNCTAD WIR 2013, while acknowledging value-added, focuses primarily on governance. UNCTAD, *World Investment Report 2013* 140–199. In particular, Gereffi, Humphrey, and Sturgeon's 2005 inaugural paper on GVC theory focuses on governance and made little if any new use of value-added literature, which seems to have joined the picture later on. Gereffi, Humphrey and Sturgeon.
[681] Bair, "Global Capitalism and Commodity Chains: Looking Back, Going Forward" 159–61; Jennifer Bair, "Global Commodity Chains: Genealogy and Review" in Jennifer Bair (ed), *Frontiers of Commodity Chain Research* (Stanford University Press 2009).
[682] Bair, "Global Capitalism and Commodity Chains: Looking Back, Going Forward" 155.
[683] Raphael Kaplinsky, "Spreading the Gains from Globalization: What Can be Learned from Value-Chain Analysis?" (2004) 47 Problems of Economic Transition 74, 80.

input of various producer services), delivery to final consumers, and final disposal after use…

Werner and Bair see world-systems theory as using the notion of commodity chains to differentiate from 'earlier methodologically nationalist approaches to economic change', allowing researchers to overcome earlier state-centered orientations and methodologies of research.[684] For world-systems theory, it is not so much the transformation of raw materials into goods as such that is important, but how production connects with the social reproduction of human labor. World-systems theory thus focusses on studying commodity chains in order to understand how they 'structure and reproduce a stratified and hierarchical world-system'.[685]

Global commodity chain ('GCC') theory, whilst grounded in world-systems theory, focusses instead on inter-firm networks in global industries with particular concern on the question of 'how participation in commodity chains can facilitate industrial upgrading for developing country exporters'.[686] While world-systems theory sees commodity chains as reproducing existing strata and hierarchies of capitalism, GCC theory adopts a development-oriented position by looking for possibilities for 'upgrading' less well-off actors in supply chains. This focus on upgrading has spread more generally to CSR related arguments and studies on the responsibility of so-called lead-firms over their supply chains.[687] More generally, GCC theory sees global commodity chains as an emergent organizational form.[688] Here, depending on the characteristics of their governance, GCC theory makes a distinction between buyer-driven and producer-driven global commodity chains.[689] Looking at commodity chains as a contemporary phenomenon differentiates GCC theory from world-systems theory, which traces the notion of commodity chains to the emergence of European capitalism.[690]

Global value chain theory, then, is an outgrowth of both these earlier approaches, sharing in particular the preceding theories' focus on understanding the input-output structures of global production and the latter theory's strong

[684] Jennifer Bair and Marion Werner, "Commodity chains and the uneven geographies of global capitalism: a disarticulations perspective" (2011) 43 Environment and Planning A 988; Bair, "Global Capitalism and Commodity Chains: Looking Back, Going Forward" 156.
[685] Bair, "Global Capitalism and Commodity Chains: Looking Back, Going Forward" 154–158.
[686] Bair, "Global Capitalism and Commodity Chains: Looking Back, Going Forward" 154–158.
[687] Bair, "Global Capitalism and Commodity Chains: Looking Back, Going Forward" 161.
[688] Bair, "Global Capitalism and Commodity Chains: Looking Back, Going Forward" 157.
[689] Bair, "Global Capitalism and Commodity Chains: Looking Back, Going Forward" 157.
[690] Bair, "Global Capitalism and Commodity Chains: Looking Back, Going Forward" 157; Bair, "Global Commodity Chains: Genealogy and Review" 7.

policy focus.[691] Echoing the quote from Hopkins and Wallerstein, Gereffi notes that:[692]

> *The GVC framework focuses on globally expanding supply chains and how value is created and captured therein. By analyzing the full range of activities that firms and workers perform to bring a specific product from its conception to its end use and beyond, the GVC approach provides a holistic view of global industries from two contrasting vantage points: top down and bottom up. The key concept for the top-down view is the 'governance' of GVCs, which focuses mainly on lead firms and the organization of global industries; the main concept for the bottom-up perspective is 'upgrading,' which focuses on the strategies used by countries, regions and other economic stakeholders to maintain or improve their positions in the global economy.*

Differentiating GVC theory from GCC theory is somewhat problematic because the use of 'value' instead of 'commodity' seems to have arisen in part from a need to create a common, consensus-based vocabulary among researchers from different countries and backgrounds who study global networks.[693] Because global *value* chain was seen as an inclusive term able to cover the broadest range of possible activities and end products, it was chosen despite global *commodity* chain already being seen by its proponents as an inclusive term.[694] Thus some scholars have used the two interchangeably.[695]

On the other hand, a number of reasons point towards the change from commodity to value chains being material and not just a rebranding for convenience. First, it is arguably necessary in practice to use a more expansive denominator than 'commodity', in particular to highlight the inclusion of intangible inputs and outputs such as design and marketing.[696] Second, the switch to a common vocabulary allows the inclusion of multiple strands of research, enabling an outgrowth and broadening of earlier research.[697] Thirdly, the more recent metric of 'value added' might be considered as a differentiator.[698]

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[691] Bair, "Global Capitalism and Commodity Chains: Looking Back, Going Forward" 164, 160.
[692] Gereffi 12–13.
[693] Bair, "Global Capitalism and Commodity Chains: Looking Back, Going Forward" 162; Bair, "Global Commodity Chains: Genealogy and Review" 11–12.
[694] Bair, "Global Capitalism and Commodity Chains: Looking Back, Going Forward" 162.
[695] Bair, "Global Commodity Chains: Genealogy and Review" 12.
[696] Bair, "Global Capitalism and Commodity Chains: Looking Back, Going Forward" 162.
[697] Bair, "Global Capitalism and Commodity Chains: Looking Back, Going Forward" 162.
[698] The value-added metric is 'introduced' for example in Gereffi 19–21. The metric is based on the realization that most of the global trade focuses on intermediate instead of finished products, reflecting a shift from trade in goods to trade in value-added, tasks, and capabilities. From this perspective, global value chain theory allows for a more exact analysis of global trade by exposing so-called double-counting, the inclusion of value-added in earlier stages of production into estimates of value-added in later stages of

The key differentiator between global commodity chain theory and global value chain theory, however, seems to lie in their conceptualizations of governance. Global commodity chain theory already differentiated between buyer and producer driven commodity chains. Global value chain theory, however, adopts and expands on literature on organizational economics and in particular transaction cost economics by separating five different modes of governance.[699] Furthermore, Bair sees that the different approaches of governance of GCC theory and GVC theory may be used for different purposes. The GVC governance framework can provide a more detailed perspective of sectoral logics while the GCC governance framework may allow a more focused macro-level analysis.[700]

Finally, before discussing in detail the governance approach of GVC theory, some salient general critiques may be noted. The relatively narrow focus of GVC theory on lead firm governance has led to the sidelining of a number of issues.[701] One such issue is *regulatory mechanisms* and in particular the role of trade policy in the shaping and reshaping of value chains.[702] Another sidelined issue is the influence of *market institutions* and social and institutional contexts more broadly, because these can strongly affect the extent to which capital and labor benefit from value chain participation.[703] A third issue is formed by the *structural properties* of contemporary capitalism. World-systems theorists see that the changes in production that are the focus of global value chain theory have not subverted but instead reproduced the hierarchy of world-economy, which is to a large extent based on existing wealth.[704] This perspective questions the underpinnings of GVC theory to the extent that GVC theory seeks to evaluate practical possibilities for joining value chains and upgrading one's position in them from a developmental perspective, potentially reducing GVC theory's stated goals to mere supporting narratives. Bair proposes for example asking the 'apposite' question to that of how to upgrade, i.e., 'asking how commodity chains contribute to the reproduction of inequality in the global economy'.[705] Following Bair's critique, a general problem with GVC theory is

production, providing for a more precise focus on value generation along the value chain. See generally the GVC section in the UNCTAD, *World Investment Report 2013*.

[699] Bair, "Global Commodity Chains: Genealogy and Review" 12–13.

[700] Bair, "Global Commodity Chains: Genealogy and Review" 13–14.

[701] Bair, "Global Capitalism and Commodity Chains: Looking Back, Going Forward" 167.

[702] Examples include meeting the technical requirements of EC trade policy, the role of NAFTA, and the existence and demise of international coffee agreements in governing trade in coffee and influencing profit distribution. Bair, "Global Capitalism and Commodity Chains: Looking Back, Going Forward" 168–169.

[703] Examples from different geographic and industrial settings highlight these factors, ranging from the Mexican apparel industry to Chilean salmon farming and Indonesia's participation in timber trade. Bair, "Global Capitalism and Commodity Chains: Looking Back, Going Forward" 169–170.

[704] Bair, "Global Capitalism and Commodity Chains: Looking Back, Going Forward" 170.

[705] Bair, "Global Capitalism and Commodity Chains: Looking Back, Going Forward" 171–172.

that it does not adequately take into account the role of law in providing the structural properties that enable global capitalism.[706]

3.4.3 Contractual Governance under Global Value-Chain Theory

The typology of supply chain governance proposed under GVC theory by Gereffi, Humphrey, and Sturgeon is based on three factors: the complexity of information required for a transaction; the extent to which information can be codified in a contract; and the capabilities of the supplier base.[707] Each of the three factors can have a value of either "high" or "low."[708] While eight combinations of these factors are possible, according to Gereffi, Humphrey, and Sturgeon, only five generate global value chain types.[709]

At one end of this spectrum of five different governance types are "market-based relationships"; at the other is "vertical integration".[710] These reflect markets and hierarchies as proposed by Williamson.[711] However, to translate markets and hierarchies into Gereffi, Humphrey, and Sturgeon's terms, governance through arm's length contracts based on market price mechanisms occurs when production does not require complex information, transactions are relatively easy to codify, and supplier capability is high. In such situations little input is needed from buyers, and capable suppliers are abundantly available. Governance through vertical integration, on the other hand, occurs when product complexity is high, the ability to codify transactions is low, and capable suppliers are not readily available. In such situations, production often relies on tacitly communicated information and the coordination of different actors and resources, such as intellectual property rights.[712]

Between markets and hierarchies, Gereffi, Humphrey, and Sturgeon identify three additional governance types: "modular," "relational," and "captive" value-chain governance.[713] Gereffi, Humphrey, and Sturgeon see these three as broadly representing 'network' governance that has followed from the globalization and fragmentation of production.[714] Thus these three forms of governance try to squeeze in with other strands of literature focusing on the in-between of markets and hierarchies.

The first form of network governance is modular governance, which lies closest to market governance. In modular value chains, the relationship between a buyer and supplier is close to a price-based market-type structure, the

[706] IGLP Law and Global Production Working Group, "The role of law in global value chains: a research manifesto" (2016) 4 London Review of International Law 57.
[707] Gereffi, Humphrey and Sturgeon 85–87.
[708] Gereffi, Humphrey and Sturgeon 85–87.
[709] Gereffi, Humphrey and Sturgeon 85, 87, endnote 10.
[710] Gereffi, Humphrey and Sturgeon 83.
[711] For which see the Sections 3.2 and 3.3.
[712] Gereffi, Humphrey and Sturgeon 87.
[713] Gereffi, Humphrey and Sturgeon 86–87.
[714] Gereffi, Humphrey and Sturgeon 78–79.

difference being that actors share knowledge of common standards. The complexity of information required for a transaction is high, the capabilities of the supply base are high, and due to shared standards, the ability to codify the transaction is also high.[715] Thus the buyer can rest assured that a capable supply base can correctly understand its requirements. An example of a modular value chain is a turnkey business model, where a buyer can, due to shared standards, relatively easily order complex products without needing to oversee production.[716]

Modular value chain governance is clearly based on a specific contractual technique. Standards are a well-researched area of governance.[717] Gereffi, Humphrey, and Sturgeon do not explicitly differentiate between different types of governance through standards, even though it seems that institutional standards are prevalent.[718] The important aspect is that the standards are 'shared' between the different actors. Thus it seems that standards can comprise anything from industrywide technical standards to *ad hoc* standards such as private codes of conduct drafted by a buyer. With regard to substance, standards can be either technical in nature or related to a process, such as in relation to quality, labor, or environmental outcomes.[719] Because of the relative clarity of 'standards', modular governance is probably the easiest to understand of Gereffi, Humphrey, and Sturgeon's network modes of governance.

The second form of network governance is relational governance, apparently located a relatively even distance away from both market governance and governance through hierarchy. Here, the complexity of information required for a transaction is high and the capabilities of the supply base are also high, but a lack of shared standards makes the ability to codify the transaction low.[720] Relational value chains can form where shared standards do not exist and highly complex transactions thus cannot be easily codified, but a highly capable supply base nevertheless allows special forms of cooperation to ensure conformity. A relational value chain may exist for example in prototype-related production, such as the development of new products.

Relational governance is much more difficult to conceptualize than the standards behind modular governance. Gereffi, Humphrey, and Sturgeon refer to asset-specificity, in the form of a need to transfer high-levels of tacit knowledge, and ensuing mutual dependence.[721] These may in practice translate to non-contractual means of relational governance, such as reputation or family

[715] Gereffi, Humphrey and Sturgeon 86–87.
[716] Gereffi, Humphrey and Sturgeon 97–98.
[717] E.g. citations at Gereffi, Humphrey and Sturgeon 85.
[718] Gereffi, Humphrey and Sturgeon 85, 90–91, 95, 97.
[719] For the former, e.g. Gereffi, Humphrey and Sturgeon 85, 90–91, 95, 97. For the latter, e.g. Gereffi, Humphrey and Sturgeon 85, 93.
[720] Gereffi, Humphrey and Sturgeon 86–87.
[721] Gereffi, Humphrey and Sturgeon 84.

or ethnic ties.[722] On the other hand, they may also take the form of contractual arrangements providing for safeguards and explicit coordination mechanisms:[723]

> *When product specifications cannot be codified, transactions are complex, and supplier capabilities are high, relational value chain governance can be expected. This is because tacit knowledge must be exchanged between buyers and sellers, and because highly competent suppliers provide a strong motivation for lead firms to outsource to gain access to complementary competencies. The mutual dependence that then arises may be regulated through reputation, social and spatial proximity, family and ethnic ties, and the like. It can also be handled through mechanisms that impose costs on the party that breaks a contract, as discussed in Williamson's analysis of credible commitments and hostages (Williamson, 1983). The exchange of complex tacit information is most often accomplished by frequent face-to-face interaction and governed by high levels of explicit coordination, which makes the costs of switching to new partners high.*

Gereffi, Humphrey, and Sturgeon do not provide specific examples of contractual techniques that could be used in this regard. They do, however, provide descriptions of three case studies that relate to the development of what they see as relational governance in specific contexts. These descriptions are intensive and difficult to paraphrase without losing detail. I will therefore directly quote substantive parts of them.

A first example concerns the East Asian apparel industry's move towards full package production, which Gereffi, Humphrey, and Sturgeon see as a form of relational value chain governance:[724]

> *The key to East Asia's success was to move from captive value chains – i.e., the mere assembly of imported inputs, typically in export-processing zones – to a more domestically integrated and higher-value-added form of exporting broadly known in the industry as full-package supply. Whereas the assembly-oriented captive model required explicit coordination in the form of cut fabric and detailed instructions, full package production involved the more complex forms of coordination, knowledge exchange, and supplier autonomy typical of relational value chains.*
>
> *Unlike captive networks, in which foreign firms take responsibility for supplying all the component parts used by local contractors, full package*

[722] Gereffi, Humphrey and Sturgeon 84.
[723] Gereffi, Humphrey and Sturgeon 86.
[724] Gereffi, Humphrey and Sturgeon 91–92.

production requires offshore contractors to develop the capability to interpret designs, make samples, source the needed inputs, monitor product quality, meet the buyer's price, and guarantee on-time delivery. …

A second example is related to the fresh vegetables trade between UK and Kenya. Here, the value chain in question is characterized as moving from market coordination to 'explicit' coordination, apparently implying both relational and modular governance:[725]

…Supermarket [sic] saw fresh produce (fruit and vegetables) as strategic because it was one of the few product lines that could persuade consumers to shift from one supermarket chain to another. In order to attract customers, the supermarkets introduced new items, emphasized quality, provided consistent year-round supply, and increased the processing of products to provide fresh produce that required little or no preparation prior to cooking or eating. At the same time, the supermarkets were forced to respond to an increasingly complex regulatory environment related to food safety, particularly pesticide residues and conditions for post-harvest processing, as well as environmental and labor standards.

Supermarkets pursued these strategic goals by increasing explicit coordination in the value chain. Instead of purchasing through wholesale markets, they developed closer relationships with UK importers and African exporters, and moved to renewable annual contracts with suppliers whose capabilities and systems were subject to regular monitoring and audit. Supermarkets began to inspect suppliers prior to incorporation in the chain, and made regular spot checks at all points in the chain, right down to the field. The interaction of the firms in the chain also became more complex and relational. Suppliers and buyers worked together on product development, logistics, quality, and the like. This created new value chain relationships and competencies. Over time, relationships between supermarkets and UK importers took new forms, with the recent trend moving value chain governance in the direction of modularity.

Further back along the chain, organizational fragmentation has decreased and inter-organizational relationships have become relational. The risks of this have been contained by the development of exclusive bilateral relationships…

[725] Gereffi, Humphrey and Sturgeon 92–94.

A third and final example of relational governance is from the US electronics industry, which at the time of the example was at a crossroads.[726] During the 90s most US electronics firms outsourced manufacturing with the help of standardization, but due to changes in the business would now either need to invest in developing new standards or move towards relational governance:[727]

> *Today, as contractors seek new sources of revenue by providing additional inputs to lead firm design and business processes, and new circuit-board assembly technologies appear on the scene, such as those for boards with optical components, the hand-off of design specifications is becoming more complex and less standardized, making it harder for lead firms to switch and share suppliers. Closer collaboration in the realm of product design requires contractors to receive fully blown computer-aided-design files for their customer's new products; files that can contain core intellectual property. As contractors take over more distribution functions, lead firms must reveal critical knowledge about end-customer requirements and pricing. All of these interactions are being embedded in elaborate information technology systems that span the organizations of lead firms and their key contractors, creating new areas of risk for lead firms in the areas of intellectual property leakage and buyer-supplier lock-in. Shared information technology systems are evolving in two directions simultaneously: toward proprietary systems that increase asset specificity and lock-in, but better protect key intellectual property; and toward open standards (e.g., RosettaNet) and/or third-party systems that better support value chain modularity but that leave the door open for intellectual property leakage. The question of which direction the industry will take – toward proprietary systems and relational value chains, or toward commonly used standards and modular value chains – is still open, and its answer will help to determine the future shape of the electronics industry.*

These extensive examples are fuzzy both generally and in the details. As a consequence, it is generally difficult to say where exactly the boundaries of modular and relational governance should be drawn. Clearly, relational governance requires more than just standards, but how much more, and what? With regard to the details, it is difficult to see where the line goes between e.g. reputational and contractual mechanisms as both seem very much intertwined, and there is even less detail on the specifics of either kind of mechanism.

[726] Gereffi, Humphrey and Sturgeon 94–96.
[727] Gereffi, Humphrey and Sturgeon 95.

Nonetheless, it seems clear that contractual arrangements lie at the heart of relational governance. For example, bilateral relationships based on renewable annual contracts (presumably to guarantee more continuity than a reliance on individual purchase orders), monitoring and auditing of supplier capabilities and systems, and working together on product development, logistics, and quality seem to be characteristics of relational governance. On the other hand, for example some level of monitoring would presumably be an important aspect also in modular governance, so the lines are probably not clearly drawn in the sand.

Finally, the third form of network governance is 'captive governance'. Captive value chains may form when product complexity is high and the ability to codify transactions is high but supplier capabilities low.[728] The low capabilities of the supply base make it dependent on cooperation with the buyer. Gereffi, Humphrey, and Sturgeon describe captive governance as:[729]

> *…low supplier competence in the face of complex products and specifications requires a great deal of intervention and control on the part of the lead firm, encouraging the build-up of transactional dependence as lead firms seek to lock-in suppliers in order to exclude others from reaping the benefits of their efforts. Therefore, the suppliers face significant switching costs and are 'captive'. Captive suppliers are frequently confined to a narrow range of tasks – for example, mainly engaged in simple assembly – and are dependent on the lead firm for complementary activities such as design, logistics, component purchasing, and process technology upgrading. Captive inter-firm linkages control opportunism through the dominance of lead firms, while at the same time providing enough resources and market access to the subordinate firms to make exit an unattractive option.*

As an example, Gereffi, Humphrey, and Sturgeon describe a stage of development in the East-Asian apparel industry, where captive value chains are characterized as 'the mere assembly of imported inputs, typically in export-processing zones',[730] by requiring 'explicit coordination in the form of cut fabric and detailed instructions',[731] and by foreign firms taking 'responsibility for supplying all the component parts used by local contractors'.[732] These features are contrasted with full-package production, which is seen as a relational practice.

[728] Gereffi, Humphrey and Sturgeon 86–87.
[729] Gereffi, Humphrey and Sturgeon 86–87.
[730] Gereffi, Humphrey and Sturgeon 91.
[731] Gereffi, Humphrey and Sturgeon 91.
[732] Gereffi, Humphrey and Sturgeon 92.

Captive governance differs in fundamental ways from the two other types of network value chain governance. While in both modular and relational governance supplier capabilities are high, in captive governance supplier capabilities are low, resulting in 'dominance of lead firms'. Asymmetric power relations thus play a major role in captive governance. While probably not inherently unconscionable, this may serve to push the boundaries of accepted notions of equal and fair contracting. Ben-Shahar and White's description of the dependence of outsourced divisions of U.S. automotive manufacturers on their former parent companies and the way in which the latter use one-sided and even unconscionable contract terms to control the former could be an extreme example of a captive value chain where first-tier suppliers are locked-in with the choice of either consenting to their buyer's extreme contracting practices or facing insolvency.[733] This collates also with one of the key drivers of global value chain theory, which is understanding how suppliers locked into in particular a captive value chain can upgrade their position or, more broadly, what regulators can do to help upgrade the position of in particular captive supply chain actors in their territory.[734]

3.4.4 GVC-theory: Increased Analytical Focus on the Role of Contractual Arrangements

So, what can be made of supply chain governance under global value chain theory? Firstly, it is clearly indebted to not only Williamson's model of governance but also the focus on relational governance through contract seems to a great extent based in Macneil's work. While Gereffi, Humphrey, and Sturgeon do not directly refer to either, they seem to do so indirectly by referring to for example network theorists like Powell.[735] Standards, the central foundation of modular governance, are a key aspect in Macneil's neoclassical contract law and therefore also in Williamson's 'trilateral' governance. Macneil's relational contract law, and by extension also Williamson's 'bilateral' governance, are clear precursors for Gereffi, Humphrey, and Sturgeon's relational governance. If it were not for GVC theory's 'captive' value chain governance, focusing on power asymmetries, the three models would overlap very neatly.

To try and sort out this apparent similarity one might focus on the underlying parameters used for arriving at these types of governance. While Williamson focused primarily on the recursive nature of transactions and asset-specificity, Gereffi, Humphrey, and Sturgeon refer to the complexity of information, ability to codify information, and the capabilities of the supply

[733] Ben-Shahar and White 970–78.
[734] Gereffi, Humphrey and Sturgeon 79; Gereffi 12–13.
[735] For discussion of some influences of global value chain theory in their inaugural paper, see Gereffi, Humphrey and Sturgeon 78–83.

base. Williamson's 'asset-specificity' roughly corresponds to Gereffi, Humphrey, and Sturgeon's focus on the complexity of information and ability to codify it, resulting in a similar outcome. The key difference here seems to be Williamson's focus on the 'need' to codify information, as represented by his notion that *often recurring* asset-specific transactions require more advanced strategies for dealing with relationships, while for Gereffi, Humphrey, and Sturgeon the key driving factor of a combination of complex information and the 'ability' to codify it is not per se dependent on the recurrence of transactions. The two approaches thus offer slightly different perspectives on the same scenario. Again, focus on the capabilities of the supply base differentiates governance under GVC theory by providing additional focus on power asymmetries.[736]

In a possible differentiation from e.g. Williamson's and Macneil's models, Gereffi, Humphrey, and Sturgeon see a focus on *globally* fragmented production as lying at the heart of global value chain theory. This focus is ingrained in its direct predecessors, world-systems theory and global commodity chain theory. Here, a key question is to what extent the governance model itself makes use of globalization. The use of captive value chains to highlight power asymmetries and the more general focus on upgrading, both particularly from the perspective of actors located in developing nations, might be examples of this. Explicit discussion over the effects of power asymmetries is clearly lacking in Williamson's and Macneil's work, as is the migration from one governance type to another due to changing circumstances, as Williamson's and Macneil's models focus primarily on relatively stable relationships between symmetrically powerful parties.

In a clear change of tone from Williamson and Macneil, Gereffi, Humphrey, and Sturgeon's model clearly implies that multiple actors, not necessarily just two, are responsible for production. Under GVC theory production takes place in global chains or networks of actors, many of which presumably do not have a direct contractual relationship between one another. While GVC theory claims to account for the fact that production takes place in chains or networks of actors, its governance analytic, however, seems limited to primarily bilateral relationships. For example, in Gereffi, Humphrey, and Sturgeon's Figure 1, describing global value chain governance types, market and captive governance are clearly bilateral affairs while hierarchy is clearly unilateral.[737] Modular and relational governance, on the other hand, seem to extend at least on some level beyond first tier suppliers. This figure, however, does not in practice translate to evaluating the privity spanning effects of the governance typology nor to discussion of specific mechanisms through which

[736] Even if these might be covered by Williamson's additional focus on uncertainty and opportunism. E.g. Williamson, "Transaction-Cost Economics: The Governance of Contractual Relations" 234, 253.
[737] See Gereffi, Humphrey and Sturgeon Figure 1, also 98.

such governance could be achieved. As if aware of this deficit in the governance model, Gereffi, Humphrey, and Sturgeon note that:[738]

> *The global value chains framework focuses on the nature and content of the inter-firm linkages, and the power that regulates value chain coordination, mainly between buyers and the first few tiers of suppliers. However, it is important not to ignore the actors at both ends of the value chain…[followed by a brief discussion of some examples of upstream and downstream actors and their potential to affect value chains].*

On the other hand, Gereffi, Humphrey, and Sturgeon do provide extensive, if general, practical examples of the different modes of governance and in particular how these may change from one form to another. Williamson based his typology of governance on the two classic modes of governance of transaction cost economics, markets and hierarchies, complemented by a *theory of contract*.[739] The governance typology of global value chain theory, on the other hand, is founded on analytical research on supply chains. The examples above quoted from Gereffi, Humphrey, and Sturgeon highlight this approach, which works to make their governance typology much more concrete than the extremely abstract works of Williamson or Macneil.

What is more, the GVC approach also works to highlight indicators of contractual arrangements that are typical for the respective governance types in more detail than the approaches of Williamson and Macneil. For example, focus on 'standards' instead of the more abstract and less telling 'trilateral governance' seems revolutionary in its apparent simplicity and neatness as a descriptor. Similarly, relational governance and captive governance are evocative as classifications, focusing more concretely on specific kinds of practical contractual arrangements instead of theories of contract. From the perspective of *governance through contract* this whets the appetite for even more detailed studies of contracting in supply chains and, in particular, the effects of governance mechanisms beyond privity.

Taking into account Bair's critique of GVC theory, contract law (and private law more generally) clearly provides the building blocks enabling the governance of global supply chains.[740] As provided by the governance analytic of GVC theory, different kinds of contractual mechanisms have an important role in shaping the relationship of the different tiers of actors in a supply chain. How these governance choices might be reflected in further tiers of suppliers or, for example, supplier employees, is the focus of the next section.

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[738] Gereffi, Humphrey and Sturgeon 98.
[739] Smith and King 10–11.
[740] IGLP Law and Global Production Working Group.

3.5 Elaborating and Developing GVC Theory—Towards an Empirical Understanding of the Techniques of Governance Through Contract in Supply Chains

3.5.1 Going Beyond the State-of-Art

The governance analytic of global value chain theory could be seen as a new state-of-art of bilateral governance through contract. For the purposes of my roadmap of governance, however, it has two crucial shortcomings.

One problem is its general fuzziness. The typology of governance provided by GVC theory is evocative (standards! relational mechanisms! captives of power asymmetries!). It is also based on an analysis of broad case studies ranging from the global South to the North and in particular to interactions between the two. Furthermore, it provides compelling and liberating narratives of development from a second-rate, captive form of governance, where unskilled suppliers are hand-led by powerful buyers, towards modular or relational governance, where skilled suppliers take the power in their hands and are more akin to equal peers of buyers.

Nonetheless, for the first it remains unclear what exactly constitutes, from a contractual perspective, a relational mode of governance and where to draw the line between modular and relational governance. A second problem is that the governance analytic of GVC theory is so squarely centered on bilateral relationships. Despite focusing in name on supply chain governance, its focus in practice is on bilateral relationships within a supply chain. There is little if any focus on the effects, whether intended or not, of these bilateral relationships to actors beyond privity. Thus the question arises of if and how exactly the different modes of governance differ in how they can account for actors beyond privity.

In an attempt to overcome these two shortcomings, I will in this section focus on complementing the governance analytic of global value chain theory with more empirical work related to governance through contract. My goals are twofold and reflect the problems discussed here. First, I will try to further concretize the *contractual* mechanisms in which governance through contract is embedded. Second, I will try to better describe how these mechanisms have the power to affect actors beyond privity.

In undertaking this effort, I will draw first on Locke's extensive work on supply chain governance in Subsection 3.5.2. Then, I will complement this by discussing in Subsection 3.5.3 a case study related to the auto industry and the mechanisms for governing the safety of garment supply chains in Bangladesh that sprouted up as a result of the Rana Plaza catastrophe. The choice of these materials is primarily motivated by their availability and descriptive power.

3.5.2 Locke's Account of the Effects of Governance Through Contract on the Employees of Foreign Suppliers

In his extensive work, a major part of which is gathered in *The Promise and Limits of Private Power*, Locke undertakes an empirical analysis of how buyers use private power to control globally fragmented supply chains.[741] While he does not use the term governance and even less so governance through contract, a primary aspect of Locke's work is in essence exactly that: He focuses on how buyers use specific contractual arrangements to try to persuade suppliers to comply with their requirements and whether and how these requirements in practice translate to benefits to specific stakeholders further down the supply chain, in Locke's case supplier employees. On the other hand, Locke also analyses the effect of public regulation as a complement to private power in relation to labor issues in supply chains. Locke's account is thus not only a lucid telling of the interplay of public and private but at the same time provides a more focused account of governance through contract than the typologies of Williamson and Gereffi, Humphrey, and Sturgeon.

In short, Locke's work implies a number of different phases of private governance. The first is an initial 'null-stage', where no specific governance methods are utilized in relation to production processes. Here, the ghost of globalization past sets the stage for Locke's account of the development of labor compliance in supply chains. Buyers outsourced production to third-world countries concentrating only on the end product and its price while shutting their eyes to working conditions. Products were ordered from the lowest bidder, often located in a vastly different regulatory setting than that of the buyer. Little, if any, attention was paid to working conditions. However, once increasing coverage on poor working conditions began circulating in Western media buyers felt a need to polish their tarnished images.[742]

As a result of increasingly bad press, buyers started implementing private labor standards that suppliers were required to comply with. The ensuing 'private compliance', as Locke calls it, can be seen as the second phase of governance development.[743] The standards typically consist of for example codes of conduct drafted by first-world buyers. These require suppliers to guarantee workers basic rights such as minimum wages and freedom of association, while prohibiting for example slavery and child labor. Suppliers may then be required to pass these codes of conduct on to their own suppliers, thus making the standards cascade down the supply chain until all relevant actors are subject to them. From the perspective of working conditions, this can

[741] Locke. For notable scholarly reviews of Locke's monograph, see e.g. Gary Gereffi, Marino Regini and Charles F Sabel, "On Richard M. Locke, The Promise and Limits of Private Power: Promoting Labor Standards in a Global Economy" (2014) 12 Socio-Economic Review 219.
[742] Locke 24.
[743] Locke 24–45.

be seen as a move from market-based to modular governance by setting supply chain wide standards.

According to Locke, private compliance programs are generally seen as falling short of their objectives.[744] He sees three main reasons for this shortcoming.[745] First, a wide range of factors affect the relative power of actors, so that a single buyer may not be able to exert its standards on a powerful supplier or beyond a powerful supplier.[746] Second, the causes of compliance problems may be invisible to factory audits, and audits may even serve to undermine trust between actors, driving problems underground.[747] Third, the traditional approach to enforcing standards with a fear of sanctions may not be an effective deterrent and may even discourage suppliers from compliance.[748] In many cases companies follow regulations and standards not due to fear of sanctions but instead because they have been educated or assisted to do so in their everyday affairs.

From the ensuing premise that suppliers in the developing world lack resources, expertise, and management systems necessary for combating the root causes of compliance failures, buyers started actively developing supplier capabilities as a complement to traditional compliance programs. The ensuing 'capability building', as Locke calls it, can be seen as the third phase of governance development.[749] The idea is to create shared standards in practice by empowering suppliers and their employees to promote continuous improvement. Capability building builds on private compliance programs but emphasizes transparency through trust and multilateral communication instead of the traditional compliance model of top-down communication enforced through audits and sanctions.

Despite their advantages, capability-building programs have their own challenges due to what Locke sees as three problematic assumptions.[750] The first is that assistance in some areas, for example industrial or technical upgrading, would lead to improvement in other areas, such as social upgrading.[751] However, improved working conditions may have little to do with increased profitability or technical sophistication. The second assumption is that actor interests would be convergent, so that for example suppliers would also share an interest in developing working conditions instead of focusing solely on

[744] Locke 35–45, 66–68.
[745] Locke 28–35.
[746] Locke 32. On developments in changing asymmetries of power, see e.g. Gereffi 15.
[747] Locke 33.
[748] Locke 34.
[749] Locke 78–85.
[750] Locke 101–104.
[751] Locke 102–103. Locke sees that GVC theory in part has focused attention on upgrading a supplier's position in a supply chain as a goal in itself.

profit maximization.[752] In practice, however, actors' interests may be widely divergent and it may be difficult to guarantee that gains from capability-building are spread evenly instead of accruing to the benefit of the more powerful. The third assumption is the universality of technical, managerial, and organizational changes so that features implemented, for example, in the organizations of buyers located in the United States could be directly transplanted to the organizations of suppliers in other countries and contexts.[753] In practice, capability building programs may not be transplantable into other contexts without more but must first be adapted to local economic, social, and cultural realities.

Following capability building, Locke focuses on two additional factors that have not been included in the previous phases. These are, firstly, accounting for the upstream practices of buyers, and, secondly, public regulation and its enforcement.[754] First, lead firm practices have a crucial effect on production that can be overlooked in compliance mechanisms due e.g. to divergent interests between buyers and suppliers. In effect, lead firms cannot simply impose obligations on other actors without considering the effect of their own production practices on the supply chain. For example, unpredictable product life-cycles may translate to cyclical changes in production that may in turn require the use of short-term labor, which increases risks of poor labor practices. As a solution, Locke proposes a more equal sharing of risks and gains through more collaborative relationships between buyers and suppliers.[755] Second, public regulation has a central role in supporting private compliance. While public actors can be efficient in creating regulation, effective enforcement may be difficult in particular in the developing world. Locke sees that private governance mechanisms seem to work best when complementing and complemented by public mechanisms, so that each gains from the institutional support of the other.[756]

While Locke treats them primarily as critique aimed at the earlier phases of private governance, these two additional factors together could be seen as a fourth phase of development. In this fourth phase of development private compliance and capability building mechanisms would be complemented with a focus on buyer activities, e.g. via partnering, and furthermore implement cooperation with existing public regulatory frameworks. I have previously argued that for example the Accord on Fire and Building Safety in Bangladesh, which establishes a direct contractual relationship between buyers and the representatives of supplier employees while taking into account the

[752] Locke 103.
[753] Locke 103.
[754] Locke 126–155, 156–173.
[755] Locke 153–155.
[756] Locke 64–68, 169–173.

Bangladeshi National Action Plan on Fire Safety, could be seen as a practical example of such a further phase of development.[757]

Locke's account thus provides four phases of private governance, each focusing on certain types of contractual arrangements. How, then, do these measure up with the typology of governance presented by global value chain theory?

The first phase can clearly be related to market type governance. There is no special focus on governing labor (or other) processes. Instead, market price mechanisms reign supreme.

The second phase, private compliance, is clearly related to modular governance based on standards. Locke's account shows clearly that monitoring, auditing, and sanctions (or perks) can be important features in governance mechanisms focusing on shared standards. A particular problem is that standards, Locke argues, are often unilaterally imposed by buyers on suppliers even when the standards are not truly shared by other supply chain actors, i.e. when other supply chain actors cannot in practice enforce them for a variety of reasons.

The third phase, capability building, seems close to relational governance. The focus of capability building on building transparency through trust and multilateral communication echoes the basic tenets of relational governance. Furthermore, working together to improve capabilities echoes the example cases provided by Gereffi, Humphrey, and Sturgeon. Again, however, Locke's account provides a sharper picture of the contractual mechanisms of relational governance, in part through a better focus on modular governance, which helps remove e.g. audits and monitoring from the core of relational governance, and in part through a focus on buyers explicitly cooperating with other supply chain actors to resolve problems in coordinating production. And again, Locke provides a coherent critique of this kind of governance, in particular in the form of diverging actor interests and differences in social and cultural contexts.

The fourth phase, a deeper integration among supply chain actors on the one hand and private and public actors on the other, is not as easy to relate to GVC theory. This phase is clearly neither akin to captive governance nor a hierarchy. In a sense, this phase best echoes Macneil's system of relational contract law in that the differences between contractually organized supply chains begins to dissolve and increasingly become a relationship. While contract forms a crucial part of the relationship, the intertwinement of private and public actors is seen as a totality that cannot be reduced to contracts per se. While this phase could be classified as its own method of governance, I will for now subjugate it alongside GVC theory's relational governance as a second

[757] E.g. Jaakko Salminen, "Contract-Boundary-Spanning Governance Mechanisms: Conceptualizing Fragmented and Globalized Production as Collectively Governed Entities" (2016) 23 Indiana Journal of Global Legal Studies 709.

subcategory of such. After all, a key change to the third phase is the extension of relational governance to additional actors, in particular buyers. Seeing capability building and the fourth phase both subsumed under relational governance is in line with Locke's critique towards the third phase of private governance, as he argued that the third phase in many cases cannot succeed without inclusivity towards all relevant actors.

Finally, a mapping such as presented here would leave without a direct equivalent the 'captive' mode of governance proposed by GVC theory. On the other hand, power asymmetries seem to be present in all the different phases of governance that Locke discusses: All the described mechanisms of governance are prone to abuse. Thus captive governance, at least if it is defined primarily as a power asymmetry in relation to a less skilled supply base, might be separable from the other modes of governance proposed by GVC theory and instead be seen as an aspect that can affect any system of governance. Generally, every contract is only as good as the *quid pro quo* that its parties reach and is thus suspect to abuse. Every phase of Locke's model of governance can suffer abuse by power asymmetries. As I have argued elsewhere, even the fourth phase, partnering between buyers and suppliers and having reverence towards public regulation, is subject to potential abuse, just in new ways in comparison to earlier modes of governance.[758]

3.5.3 Scraping Up Further Evidence of the Contractual Arrangements underlying Governance Through Contracts

Locke's account offers possibilities for both critiquing and enhancing the governance typology presented by GVC theory. To provide some additional enhancements in order to better overcome the problems of vagueness and privity discussed above, I will in this section discuss two case studies. I do this in particular to provide a more concrete idea of relational governance and the extent to which contractual governance mechanisms can be used to overcome the bounds of privity.

The first example is provided by Kajüter and Kulmala's management-based research on open-book accounting.[759] Open-book accounting refers to practices where supply chain actors share production-related cost information in order to develop the supply chain as a whole.[760] While Kajüter and Kulmala's study is not juridical in nature, it provides an interesting account of contractual practices in a German automotive supply chain. In one of the examples reported by Kajüter and Kulmala, the first tier suppliers of a German original equipment manufacturer (OEM) of automobiles agreed to implement open-book

[758] Salminen, "The Accord on Fire and Building Safety in Bangladesh—A New Paradigm for Limiting Buyers' Liability in Global Supply Chains?"
[759] Kajüter and Kulmala 186–190.
[760] Kajüter and Kulmala 182–184.

accounting practices to identify cost reduction opportunities.[761] The first tier suppliers were then expected to pass on the practice to their own suppliers and so on. The gathered information provided the OEM with a 'value chain flow chart' and 'worksheets' containing detailed information on cost-breakdowns.[762] The value chain flow chart is in effect a map showing relationships between different tiers of suppliers and highlighting the flow of materials between them and the value added at each stage. It provides the OEM with a detailed map of value-generation throughout the supply chain, enabling the OEM to focus development measures where they are most needed.

Cost information is extremely sensitive and companies are typically not motivated to share it with potential buyers due to competitive reasons. At the same time, in a fragmented economy a buyer's cost-effectiveness and innovativeness are crucially affected by how these two aspects are reflected in its supply chain. Thus the auto-OEM uses a number of relational techniques to make it more lucrative for suppliers to participate in open book accounting. First, interpersonal trust is promoted through working groups with members from both the OEM and a supplier.[763] Second, based on the information collected the OEM can provide technical support, such as process analysis and optimization, to improve a supplier's capabilities.[764] Third, dedicated tools are used for the disclosure and analysis of sensitive information.[765] Finally, any benefits resulting from the open books practices are shared between the OEM and supplier, depending for example on whether the supplier can use the improved processes also with customers other than the OEM.[766]

The second example actually consists of two recent and related examples of CSR related relational governance. On 24 April 2013 the Rana Plaza garment factory building in Savar, Bangladesh, collapsed catastrophically resulting in over a thousand deaths.[767] The ensuing global media uproar forced first-world garment buyers to undertake relatively radical measures to ensure that similar catastrophes could be avoided in Bangladesh in the future. This has resulted in two competing CSR initiatives, the Accord on Fire and Building Safety in Bangladesh ('Accord') and the Alliance for Bangladesh Worker Safety

[761] Kajüter and Kulmala 187–190.
[762] Kajüter and Kulmala 187–189.
[763] Kajüter and Kulmala 187.
[764] Kajüter and Kulmala 187.
[765] Kajüter and Kulmala 187.
[766] Kajüter and Kulmala 189.
[767] For example, the New York Times has extensively covered the disaster and the different global initiatives that have followed in its aftermath. Using the search term 'Rana Plaza' at http://www.nytimes.com provides a source of general reporting on the topic. For an overview, see the New York Times Editorial Board, *One Year After Rana Plaza*, NEW YORK TIMES, 27 April 2014, http://www.nytimes.com/2014/04/28/opinion/one-year-after-rana-plaza.html. For a more victim-oriented perspective, see Jason Motlagh, *The Ghosts of Rana Plaza*, 90 VQR (2014), http://www.vqronline.org/reporting-articles/2014/04/ghosts-rana-plaza.

('Alliance').[768] Both mechanisms aim to provide better fire and building safety for employees working in the factories of Bangladeshi garment suppliers. While the relative success of these two approaches is under debate, they provide two structurally highly contrasting examples of supply chain governance.[769]

Both the Alliance and the Accord should be seen as additional governance measures intended to complement already existing measures. Presumably most if not all buyers participating in either already use at least basic private compliance mechanisms to govern their supply chains.[770] On top of existing private compliance measures, the Alliance and the Accord aim at consorted efforts at inspecting supplier factories and providing assistance in remedying any structural problems.

The Alliance is based on a group of North American buyer companies pooling together by way of a Delaware corporation to coordinate gratuitous aid to suppliers. The Accord, on the other hand, takes the form of a governance contract between buyer companies and the global and local union representatives of their suppliers' employees. In addition to coordinating factory inspections and repairs together with those most affected by them, i.e. supplier employees, the Accord provides direct benefits to protect supplier employees in case of unsound factory buildings and to ease any burdens placed on them due to repairs. Finally, the relative enforceability of the Accord is guaranteed to an extent by an arbitration provision.

There is nothing exceptionally relational in the Alliance, even if it implies buyers' direct control over certain aspects of their suppliers' employees which can have a constituting effect on liability.[771] Instead, it has been critiqued by labor rights groups as superficially resembling the Accord while omitting the

[768] For general information, see the websites of the Accord, http://bangladeshaccord.org, and the Alliance, http://www.bangladeshworkersafety.org. For scholarly discussion, see e.g. Anner, Bair and Blasi; Haar and Keune. For a comparison of the two initiatives by workers' rights activists, see Clean Clothes Campaign, *Comparison: The Accord on Fire and Building Safety in Bangladesh and the Gap/Walmart scheme*, http://www.cleanclothes.org/resources/background/comparison-safety-accord-and-the-gap-walmart-scheme/view.

[769] For a critical view claiming that only a marginal proportion of Bangladeshi workers is covered by the two initiatives, see Sarah Labowitz and Dorothée Baumann-Pauly, "Beyond the Tip of the Iceberg: Bangladesh's Forgotten Apparel Workers. NYU Stern Center for Business and Human Rights Research Paper 17 December 2015" (2015) <http://www.stern.nyu.edu/experience-stern/faculty-research/cbhr-bangladesh-mapping-project>. For research claiming that the previously mentioned report is methodologically flawed and that over 70 % of Bangladesh garment workers are covered, see Mark Anner and Jennifer Bair, "The Bulk of the Iceberg: A Critique of the Stern Center's Report on Worker Safety in Bangladesh, Penn State Centre for Global Workers' Rights Research Brief 10 February 2016" (2016). For an example of a critique towards an individual company's, H&M's, efforts under the Accord, see Clean Clothes Campaign, International Labor Rights Forum, Maquila Solidarity Network, and Worker Rights Consortium, *Evaluation of H&M Compliance with Safety Action Plans for Strategic Suppliers in Bangladesh*, September 2015, http://www.cleanclothes.org/resources/publications/hm-bangladesh-september-2015.pdf.

[770] See, for example, the discussion over Wal-mart's code of conduct in *Doe* v *Walmart*.

[771] For example under so-called good samaritan doctrines. Phillips and Lim.

key substantive elements of the latter.[772] Anner, Bair, and Blasi summarize this critique as focusing on three main issues.[773] Firstly, the Alliance does not mandate monetary contributions from participants apart from administrative fees and a nonobligatory loan program; secondly, the Alliance lacks enforcement provisions; and thirdly, the Alliance was developed and is governed without worker participation. Ter Haar and Keune similarly critique the legitimacy of the Alliance due to the exclusion of worker representatives from any binding mechanism, seeing that the Alliance:[774]

> *…relies on traditional command-and-control mechanisms and monitoring by means of financial-style auditing, with little attention for the capabilities of the Bangladeshi factories and workers to identify and address problems, or the dangers of unreliable or false information supplied to audits. As such, it bears a strong resemblance to the early period of unilateral CSR codes that were often not effective in practice.*

The Accord, on the other hand, follows the tenets of relational governance. In particular, the Accord contains enforcement provisions and espouses worker participation, creating an enforceable mechanism of coordination, development, and remediation uniting numerous buyers with their Bangladeshi suppliers' employees. However, perhaps the most interesting feature from a legal perspective is that the Accord is precisely what it is, a dedicated governance *contract*.

The mechanisms of control described in relation to the German automotive OEM and the Alliance leave, from a legal perspective, one major issue out in the open: The nature of the legal relationship between the governor and the governed where there is no formal contract between the two. Thus, in the auto OEM example if a tier 2 supplier of the OEM would suffer a production stoppage due to erroneous information provided by the OEM and this production stoppage would affect the supplier's deliveries to other buyers, how would the relationship between the OEM and the tier 2 supplier be constructed from a legal perspective? Similarly, in relation to the Alliance example, if the assistance coordinated under the Alliance would cause an unplanned production stoppage resulting in massive layoffs or fail to prevent another catastrophic fire or collapse in a factory, how would the relationship of the supplier employees and Alliance members be construed?

The Accord appears to overcome such questions regarding the basic nature and contents of the relationship. In effect, it creates dual layers of contracts.

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[772] E.g. Clean Clothes Campaign, *Safety scheme GAP and Walmart only 'empty promises'*, press release form 10 July 2013, http://www.cleanclothes.org/news/press-releases/2013/07/10/safety-scheme-gap-and-walmart.
[773] Anner, Bair and Blasi 30.
[774] Haar and Keune 24.

One layer consists of the bilateral contracts that form the supply chain. The other layer consists of one or more governance contracts that complement certain governance aspects of the supply chain and at the same time contractually connect actors relevant for governance purposes. While this dual structure has its own problems,[775] it nonetheless serves to clarify the relationship of supply chain actors who would otherwise not be connected by contract. In particular, it effectively avoids any claims that there is no legally meaningful relationship between the relevant actors. Otherwise, even when governance mechanisms such as that in the auto OEM example would directly affect actors beyond privity, the question might arise how the nature and contents of the relationship should be understood by law.[776]

In any case, it seems that for now we have enough information on different perspectives on governance through contract, from theoretical to analytical to empirical, to draw together these different strands of research and see what kinds of conclusions they give rise to.

3.6 Finalizing the Orienteering Map? A Framework of Contract-Boundary-Spanning Governance Through Contract

In this chapter, I have focused on the question of mapping how actors in practice can and do control their contractually organized supply chains. Before moving on to the results of this endeavor, a number of challenges must be acknowledged. Due to a dearth of earlier research my approach has been necessarily eclectic. I have sorted through research based in different intellectual and methodological backgrounds and with different objectives, providing different kinds of typologies of governance. Based on these earlier typologies, I have attempted to provide a more precise framework of governance through contract—how contractual arrangements are used by buyers to govern their supply chains in particular in relation to actors beyond privity.

Furthermore, there is only meagre practical information available on how companies actually govern their supply chains. This is probably because the mechanisms employed in governing production typically constitute business secrets and are not publicly available. One major exception is provided by Locke's research, which provides a wealth of empirical information. Anonymous research, such as that of the German auto-OEM example, also provides some exceptions. Two further exceptions are provided by the Accord and the Alliance, on which relatively ample information is publicly available for the precise reason of gaining positive publicity. However, in these cases too

[775] For these, see Chapter 4.4.
[776] For discussion, see Salminen, "Contract-Boundary-Spanning Governance Mechanisms: Conceptualizing Fragmented and Globalized Production as Collectively Governed Entities."

there is little if any public information on how for example the parties to the Accord perceive the legal effects of its provisions in case of litigation.[777] More generally, as discussed in the next Chapter there is often little legal precedent available on contractual governance mechanisms.

In addition to the general eclecticism of the theoretical and empirical foundations of this task, two key practical challenges are evident. The first challenge has been the general abstractness, from a contractual viewpoint, of the theories discussed. They often lack any clear notion of precisely what kinds of mechanisms constitute specific forms of governance through contract. The second challenge has been a lack of focus on how contractual arrangements can extend the control of actors beyond the bounds of privity. While for example global value chain theory in name focuses on the governance of global supply chains, its governance typology is in practice limited to bilateral relationships. I have tried to overcome both these challenges by focusing on a few particularly illuminating empirical accounts of governance through contract.

To sum up, the current framework consists of four alternative modes of governance. This is despite even more modes of governance being proposed either explicitly or implicitly in literature. Adopting terminology from GVC theory, these modes of governance are market-based governance, modular governance, relational governance, and governance based on hierarchies. I will not discuss hierarchies further here as I see them belong beyond the scope of governance through contract in the realm of corporate governance.

Market based governance is governance through a simple price mechanism, focusing, as Williamson put it, on standard transactions where there is little need to coordinate information between a buyer and a supplier. Modular governance, following in particular the GVC framework, is an extension of market governance that focuses on cases where a buyer and supplier have a need to coordinate specific aspects of production. Following GVC theory and in particular Locke's account of private compliance, standards, monitoring, and auditing are used as specific techniques embedded in contracts for coordinating information under modular governance. On another note, market based governance could be defined by a lack of such coordination in relation to a specific aspect of production.[778] Where the line should be drawn between 'pure' market based governance or governance based on standards is a good question. As I will shortly argue, however, following Locke a meaningful difference between the two forms of governance can be made specifically in relation to their use to govern supply chain actors beyond privity.

[777] For discussion of some tentative possibilities, see Salminen, "The Accord on Fire and Building Safety in Bangladesh—A New Paradigm for Limiting Buyers' Liability in Global Supply Chains?"

[778] Here it could perhaps be left without saying that some aspects of a supply relationship could be left to one governance mode, such as market governance, while other aspects might be governed through standards.

Relational governance, following GVC theory, focuses on scenarios where production is dependent on information that is not easily transferrable. Examples range from Williamson's highly idiosyncratic production, such as creating prototypes, to long-term relationships, which following Macneil require multilateral control in face of evolving contexts, to Locke's capability building, where buyers try to 'upgrade' the capabilities of their supply chains. As I see it, Locke's third and fourth phases of private governance and the German OEM example discussed in Subsection 3.5.2 provide examples of all these tendencies and of many of the governance mechanisms that can be embedded in contractual arrangements as examples of relational governance. While it seems that it is more difficult to abstract the breadth of relational mechanisms in a manner comparable to standards, it seems that in relational governance the function of contractual mechanisms is most clearly tilted towards coordinating and adapting relationships instead of mere safeguarding.[779]

Following the focus of GVC theory on captive governance and Locke's focus on the potential inadequacy of different modes of private governance in general, I argue that *all* of the four governance mechanisms that I have here included in my framework can be subject to the abusive use of power asymmetries from either a buyer's or a supplier's side. This can be reflected in not only squeezing unfair prices from suppliers or requiring them to consent to unreasonable standards or impossible to fulfil codes of conduct,[780] but also in more nuanced ways of using for example relational governance mechanisms to one-sidedly control liability.[781] Specific problems of this kind are precisely the knowing use of a 'wrong' or 'inadequate' governance mechanism to govern a relationship or the abuse of a generally adequate governance mechanism. In such cases buyers would under the principles of contract law typically have the upper hand as it is often the suppliers who have 'consented' to e.g. implementing codes of conduct that they in practice do not have the resources or capabilities to implement.[782]

All these governance modes can have an effect beyond privity. As seen in Chapter 2, even market based governance served earlier on to completely disallow claims from non-privy actors via the privity or contract fallacy. While

[779] See discussion in Subsection 1.3.3 on Schepker and others.
[780] For this argument, see in particular Salminen, "Contract-Boundary-Spanning Governance Mechanisms: Conceptualizing Fragmented and Globalized Production as Collectively Governed Entities." The argument is also summarized in Section 4.3.
[781] For this argument, see in particular Salminen, "The Accord on Fire and Building Safety in Bangladesh—A New Paradigm for Limiting Buyers' Liability in Global Supply Chains?" (Discussing the Bangladesh Accord as a new paradigm for controlling supply chain liability). The argument is also summarized in Section 4.4.
[782] On this, see Schwenzer and Leisinger who note that for example under the CISG it is the buyer requiring codes of conduct to be followed who suffers if a supplier for any reason defaults on following the requirements. Schwenzer and Leisinger.

this may not be the case anymore, in practice the existence of a contract typically does constitute a boundary for liability save for exceptional cases such as product liability.[783]

Modular governance clearly has the power to directly affect actors beyond privity. Codes of conduct drafted by buyers can be cascaded down supply chains and the extent to which actors abide by them can be judged by monitoring and audits, giving buyers the chance to undertake additional governance measures if needed. The legal effects of modular governance beyond privity, however, are currently highly unclear as seen in the *Doe* v *Wal-mart* case discussed in Chapter 4.

Importantly, focus on effects beyond privity helps differentiate market and modular governance from one another. Here, market governance can be reduced to an attempt to avoid direct control of actors beyond privity in order to safeguard the principle of privity. Modular governance, on the other hand, is precisely used to extend the effect of specific governance mechanisms beyond privity. This clears a number of definitional difficulties in relation to differentiating between market and modular governance, at least in relation to their contract boundary spanning effects.

Finally, relational governance can similarly be clearly associated with effects beyond privity. As the examples from Locke, the auto-OEM example, and the Alliance show, the breadth of relational governance mechanisms allow actors beyond privity to coordinate and adapt their relationships in many meaningful ways despite the lack of a formal contract. A key challenge here is the nature and content of the ensuing legal relationship. One way of attempting to overcome this problem is following the example of the Bangladesh Accord and using a dedicated governance contract in addition to the underlying contracts of the supply chain. If this is not done, the legal nature and content of the relationship remain unclear and depend on the parameters of the relevant legal system.[784]

There it is. A framework of governance through contract with a special focus on the effect of governance mechanisms beyond privity. This framework enables us to fill out the orienteering map with the different kinds of relationships connecting supply chain actors. As seen here, these relationships, with regard to governance through contract, exist in the three primary forms of market, modular, and relational governance. Variables related to power asymmetries should also be noted when drawing out these relationships. Similarly, the effect of specific relationships on one another should be noted, for example by drafting dotted lines of different thickness from specific governance contracts to the actors and relationships that they affect and modify.

[783] Generally, for discussion in the US see e.g. Gergen; Feinman, *Professional Liability to Third Parties*.
[784] Salminen, "Contract-Boundary-Spanning Governance Mechanisms: Conceptualizing Fragmented and Globalized Production as Collectively Governed Entities."

For example, in the auto-OEM example a dotted line would be drawn from the auto-OEM to all suppliers affected by the governance mechanism even if there were no explicit contract between the auto-OEM and a specific supplier.

Of course, in practice things are never quite so simple. The mechanisms are typically concealed, except for when companies wish to reveal them to the public for strategic reasons such as increasing goodwill. This general concealment means that even when we know what companies are capable of, we are left facing the question of what does this potential imply if we cannot know for sure what kinds of mechanisms are in place in a given situation and how, if at all, these mechanisms are in practice used. Thus the framework and orienteering map that I provide is perhaps more akin to a template of the general possibilities of governance through contract. If we truly would want to know what kind governance relationships were in place in a given situation, we would have to dig deep into that particular situation to construct the reality of governance. Then again, I argue that the template provided here nonetheless serves as a useful abstraction and typology of the possibilities available for governance through contract.

Now, the final question is what can be done from a legal perspective with this template of an orienteering map. How does it help us conceptualize production liability? Do these governance relationships materialize into legally meaningful relationships? If so, would such relationships be under contract or tort/delict, and what would be the legal implications of either? How can any conflicts between the potentially numerous crisscrossing and conflicting relationships of supply chain governance be resolved? These questions in focus in Chapter 4.

Chapter 4. Transnational Production Liability, Foreign Direct Liability, and Supply Chain Liability: Taming the Contractual Nexus

4.1 Cutting a Long Story Short—A Narrative of Transnational Production Liability

The general focus of this chapter is transnational production liability. Mirroring product liability, with production liability I generally understand *liability for defectively organizing one's production practices*. Production liability is clearly a relevant topic in today's world. As hypothesized by Baldwin, new information technology has for some decades now enabled a radical increase in the global fragmentation of production.[785] This view is supported by the examples that the governance model of global value chain theory rests on.[786] According to UNCTAD's figures from its 2013 World Investment Report, 80 % of global trade takes place under 'global value chains' organized through contract or equity ownership based relationships.[787]

Before moving forward, it is important to make a vital comment on business and human rights. A major part of what I am describing in this chapter is referred to in literature as 'business and human rights'.[788] The perspective that I adopt here is that we are not dealing with human rights *per se* even if many of the violations can clearly also be classified as human rights violations.[789] Instead, under production liability we are dealing generally with liability towards stakeholders injured physically or economically due to inadequately organize production. Production liability thus deals with issues

[785] See Section 1.1.
[786] See Section 3.4.
[787] UNCTAD, *World Investment Report 2013*.
[788] E.g. Juan José Álvarez Álvarez Rubio and Katerina Yiannibas (eds), *Human Rights in Business: Removal of Barriers to Access to Justice in the European Union* (Routledge 2017); van Dam, "Tort Law and Human Rights: Brothers in Arms On the Role of Tort Law in the Area of Business and Human Rights"; Richard Meeran, "Tort Litigation against Multinational Corporations for Violation of Human Rights: An Overview of the Position Outside the United States" (2011) 3 City University of Hong Kong Law Review 1; Philipp Wesche and Miriam Saage-Maaß, "Holding Companies Liable for Human Rights Abuses Related to Foreign Subsidiaries and Suppliers Before German Civil Courts: Lessons from Jabir and Others v KiK" (2016) 16 Human Rights Law Review 370.
[789] For example many, if not all human rights offences can be translated into torts. For comments on the overlap of human rights law and tort law, see e.g. van Dam, "Tort Law and Human Rights: Brothers in Arms On the Role of Tort Law in the Area of Business and Human Rights" 243; Christopher A Whytock, Donald Earl Childress III and Michael D Ramsey, "Foreword: After Kiobel—International Human Rights Litigation in State Courts and Under State Law" (2013) 3 UC Irvine Law Review 1, 5–6. On the relationship of English tort law and human rights as embodied in the European Convention on Human Rights, e.g. Jane Wright, *Tort Law and Human Rights: The Impact of the ECHR on English Law* (Hart 2001).

ranging from a supplier company suffering economic loss because of a buyer's negligent governance of its supply chain, for example in a scenario such as the German automotive OEM discussed above in Section 3.5, to outright humanitarian or environmental catastrophes, such as in the notorious cases of *Union Carbide*, *Trafigura*, or *Rana Plaza*.[790]

There may be some differences with the more business related and the more human rights related scenarios. For one, business scenarios may tend to relate more often to economic loss, such as loss of profits, but on the other hand even human rights related scenarios can focus on for example unpaid overtime, less-than-legal-minimum wages, or the loss of other purely economic benefits. For another, while it is difficult to get information on corporate practices underlying catastrophes such as *Union Carbide*, *Trafigura*, and *Rana Plaza*, it is probably even more difficult to gain insight into business related litigation. Business focused litigation over production liability probably takes place between companies that have voluntarily sworn themselves to secrecy in order to guard business secrets, maintain customer relationships, or just to avoid any extra publicity, while in human rights litigation typically at least one party has an interest in whistle-blowing publicity. There may be further differences to be found.[791] Here, however, I will fundamentally treat production liability as one topic that may affect both businesses and other stakeholders and thus draw on both 'business and human rights' literature and more business focused scholarship.

Organizing production through global value chains, whether focusing on contractual or equity ownership structures, entail a fundamental role for lead firm coordination. Through their business decisions, lead firms have control over how they organize production through subsidiaries, subcontractors, and suppliers. This control can be mirrored in the use of fragmented distribution structures in relation to product liability law. While multiple justifications may exist and have been discussed in particular in relation to product liability law, the *control exerted by lead firms* is arguably the fundamental justification for production liability. The role of control and the general contours of production liability based on such control are discussed in Section 4.2.

[790] Litigations related to Trafigura and Rana Plaza are discussed in more detail in Section 4.4. For Rana Plaza, see also Section 3.5. For Union Carbide, e.g. van Dam, "Tort Law and Human Rights: Brothers in Arms On the Role of Tort Law in the Area of Business and Human Rights" 229–230.

[791] For example, it might be that the structures of control utilized by businesses in relation to their supply chains may be different in more business related and more human rights related contexts. Thus for example of the auto-OEM supply chain discussed in Chapter 3 seems relatively egalitarian and uses advanced mechanisms of structuring information and communication, while many of the examples related to garment and electronics supply chains seem to bely one-sided, asymmetrical power relationships open to abuse. However, such abuse can prevail also in more business oriented relationships, so I will not regard this as a difference but more as factor that can potentially affect every kind of production liability. See Ben-Shahar and White.

Control in itself can be used as a general justification in both domestic and transnational contexts.[792] Production liability, however, can be crucially affected by the global, or transnational, contexts of production. There may be major differences in regulatory frameworks between domestic and transnational supply chains, thus again serving to highlight a lead firm's control through its choice to outsource to a specific jurisdiction. However, a number of procedural factors also add to the complexity of transnational production liability. As also discussed in Section 4.2, the foundational questions of private international law, i.e. choice of forum, choice of law, and enforcement, have a crucial effect on transnational production liability.

Production liability is of course a broad term. It encompasses multiple types of structures of production, in particular those structured around equity ownership and those structured around contractual relationships. Production organized through equity ownership structures has been increasingly the focus of scholarship and litigation since the 1990s in the form of 'foreign direct liability'.[793] This term has proliferated to the extent that scholars have subsumed other kinds of production liability under foreign direct liability. In Section 4.3, however, I argue that there is a fundamental difference between production liability in structures organized through equity ownership, i.e. foreign direct liability, and production liability in structures organized through contractual relationships, where I differentiate between liability for choosing one's subcontractor and the broader concept of supply chain liability, implying control that is extended throughout one's supply chain. From a practical perspective, contractually organized production is probably at least as important as production organized through equity.[794]

There are major differences between production organized through equity ownership or contract beyond the basic organizational form. Chapter 3 focused on how contractual arrangements can be used to exert control beyond privity, which can be compared to corporate governance. In this Chapter, however, my focus is on differences in structuring liability in different forms of production. By focusing on the current state of art of production liability in Section 4.3, and in particular by creating a novel typology of production liability, I am able to

[792] For example, as discussed in Section 4.3, the common law tort of negligence, the basic mechanism for judging liability for subsidiaries under English law, seems to be similarly relevant in both domestic and transnational cases.

[793] See Subsection 4.3.2 for detailed discussion.

[794] While the UNCTAD 2013 World Investment Report does not differentiate its figures between equity and contractual forms of organizing value chains, earlier UNCTAD reports have stressed the importance of non-equity forms of governance. UNCTAD, *World Investment Report 2011*. To this can be added broad empirical evidence of such practices, such as the examples discussed in Section 3.4 and 3.5. The list of actors participating in the Alliance and Accord, limited to the garment industry outsourcing in Bangladesh, contains many global giants such as Wal-mart, Costco, Target, H&M, Inditex, and Adidas. For Alliance members, see http://www.bangladeshworkersafety.org/who-we-are/membership. For Accord signatories, see http://bangladeshaccord.org/signatories/.

effectively highlight these differences. In particular, while foreign direct liability is now primarily based on using tort/delict to override company boundaries in corporate groups, in what I call supply chain liability the contractual governance mechanisms used for exerting control beyond privity allow an extensive role for private ordering, thus bringing contract into play as an alternative to and possible suppressor of tort/delict.

Finally, in Section 4.4 I focus on the particularities of supply chain liability based on its focus on a contractual governance nexus. Some of these particularities were already tentatively identified at the end of Chapter 3 and are further supported by the typology in Section 4.3. The first of these challenges is the nature of liability. A number of possibilities based in different legal systems have been proposed, but arguably contract and tort/delict are the most universal and thus probable forms of liability. While some of these, such as the tort of negligence, may be shared with foreign direct liability, supply chain liability clearly offers broader possibilities for the use of contract. Here, it may be possible to use the framework of control I proposed at the end of Chapter 3 to overcome some problems of translation. Another problem is related to conflicts of contracts (i.e. contractual arrangements in conflict with both contractual or other relationships), as multiple legally relevant relationships crisscross contractual boundaries in supply chains. A final problem related to the last one is that private ordering may be used to distance production from national legal systems. Together, all these factors make supply chain liability a subfield of production liability, clearly distinct from foreign direct liability.

4.2 The Back Story: Why Production Liability under Private Law?

4.2.1 From Lacking Regulation to Justifying Liability under Private Law

Primarily, one would hope that a regulator would step up and do something about the liability deficit inherent in governing transnational production. Statutory frameworks of production liability are certainly changing. This is witnessed *inter alia* by the French obligations of corporate vigilance in relation to supply chains,[795] the UK Companies Act amendment requiring directors to consider the impact of their activities on communities and the environment and the UK Modern Slavery Act's partial focus on transparency in supply chains,[796] and the Californian Transparency in Supply Chains Act requiring companies to

[795] *Loi n° 2017-399 du 27 mars 2017 relative au devoir de vigilance des sociétés mères et des entreprises donneuses d'ordre*, JORF n°0074, 28.3.2017. For brief discussion, see Thomas Baudesson and Charles-Henri Boeringer, "Loi relative au devoir de vigilance des sociétés mères et des entreprises donneuses d ' ordre" [2017] *Clifford Chance Briefing Note 21.4.2017*.

[796] The Companies Act 2006 (Strategic Report and Directors' Report) Regulations 2013, 2013 No. 1970 and the Modern Slavery Act 2015, c. 30, Part 6.

disclose efforts related to excluding human trafficking in their supply chains.[797] Here, the general focus is on increased reporting on diverse supply chain management activities. Such instruments may play a crucial role in bringing to light specific problems and aiding in litigation and in establishing duties of care. They do not, however, directly translate to hard law imposing liability for actors outsourcing their production.[798]

At the same time, there are successful examples of regulating the acts of local companies abroad through a threat of sanctions. So-called universal jurisdiction statutes, such as the US Alien Tort Statute or its Belgian counterpart, have held promise but have since been watered down or repealed.[799] More narrowly focused instruments include the US Foreign Corrupt Practices Act of 1977[800] and Comprehensive Anti-Apartheid Act of 1986[801] and the UK Bribery Act.[802] These are, however, limited in scope and have little relevance from a general production perspective. Any more general attempts at regulating production through hard law have generally failed, such as the proposed US Corporate Conduct Act, the Australian Corporate Conduct Bill, or the UK Corporate Responsibility Bill, similarly to the removal of direct sanctions from the recent French legislation.[803]

Currently, it seems that there is little hope for regulatory changes establishing production liability. This is probably due to both historical reasons, in particular the tradition of compartmentalizing liability through limited liability equity ownership and contract, and policy, in particular economic competition and a fear of harming domestic industry. Again, such arguments seem similar to those made earlier against product liability. Following the example of product liability, where focus on judge-made private law provided an answer to a liability deficit in face of a breakdown of legislative processes, private law seems to be the only option currently reasonably available for establishing production liability.

In this section, I will briefly discuss the primary justification of liability beyond privity in relation to production. Arguably, the primary justification is control over production, as discussed in Subsection 4.2.2. Control, in particular

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[797] See California Transparency in Supply Chains Act, Senate Bill 657 (2010), Cal. Civ. Code § 1714.43(a)(1) (West 2012). For general discussion, see Kamala D Harris, *The California Transparency in Supply Chains Act: A Resource Guide* (California Department of Justice 2015); KnowTheChain, "Five Years of the California Transparency in Supply Chains Act" (2015).

[798] Generally on such instruments, e.g. Galit A Sarfaty, "Shining Light on Global Supply Chains" (2015) 56 Harvard International Law Journal 419; van Dam, "Tort Law and Human Rights: Brothers in Arms On the Role of Tort Law in the Area of Business and Human Rights" 226–227.

[799] These are discussed in Section 4.3.

[800] 15 U.S.C. § 78dd-l(a) (2012).

[801] 22 U.S.C. § 5034 (repealed 1994).

[802] Bribery Act 2010 (c.23).

[803] For the first three, see van Dam, "Tort Law and Human Rights: Brothers in Arms On the Role of Tort Law in the Area of Business and Human Rights" 226–227. For the French, see footnote 795.

in the form of enterprises taking risks in pursuit of profit, is also reflected in justifications related to product liability and thus generally provides a number of existing models for both the theoretical and legal-dogmatic structuring of production liability. While drawing from the experience of product liability and the understanding of governance presented in Chapter 3, the discussion here is, however, highly hypothetical. It is meant to jot down the general underpinnings of production liability instead of arguing how production liability could or should look like under a specific legal system. A more practically oriented approach to the current state of art of production liability is undertaken in Section 4.3.

On the other hand, the transnational contexts of litigation over production liability bring with them other justifications for suing lead firms, discussed in Subsection 4.2.3. These justifications, while here seen as secondary to control, highlight the challenges of holding lead firms liable for globally fragmented production. In particular, a transnational context shapes litigation through its effect on numerous procedural factors, ranging from applicable rules on choice of forum, choice of law, enforcement, costs and funding, and evidence and consolidation of claims, to note some. In a global context, the potentially trans-substantive notion of control is thus intertwined with local procedural rules that must be accounted for.

4.2.2 Control as the Central Underpinning of Product and Production Liability

The idea that corporate or contractual boundaries limit liability is deeply vested in law. Regarding corporate boundaries, Muchlinski writes that:[804]

> *The logic of company law externalizes the risk of liability away from the controlling interest by insulating it from liability except in the few cases where it can be shown that it has a direct involvement in the events leading to the violation. This position is reinforced by the highly restrictive conditions under which an Anglo-American judge will "pierce the corporate veil" and find the parent directly responsible for the acts of the subsidiary. Current law only permits this in cases of abuse of the corporate form. This excludes most tort cases where the parent is not directly involved in the course of events leading to the harm but is aware of the general situation, or ought to be so aware, but fails to prevent the harm from materializing. In these instances, "it may only be possible to hold the parent liable by showing that it was in actual control of the events that led to the injury and the resulting claims for compensation."*

[804] Muchlinski 685. At the end of the citation, Muchlinski quotes himself in Peter Muchlinski, 'Limited Liability and Multinational Enterprises: A Case for Reform?', 34 Cambridge Journal of Economics 915, 918 (2010).

As seen in Chapter 2, a similar compartmentalized structure, a 'contractual veil', exists in relation to contractual boundaries. While allowing nowhere near a full insulation of claims (as was seemingly possible earlier under the privity fallacy), the contractual veil does create a presumption that the private ordering of the parties in the form of their contractual arrangements governs and limits claims that fall under its scope.[805] Thus, for example under the common law a duty of care that is either not covered by these arrangements or specifically exempted from them by law is needed in order to breach the bounds of privity. This focus on maintaining form is typically seen as important from the perspectives of foreseeability and stability.[806]

As seen in Chapter 2, all the legal systems compared in this dissertation contain numerous exceptions to privity. These can be statutory or judge made.[807] More generally, various exceptions to privity have been made due to perceptions of general equity.[808] However, compiling and systematizing the breadth of such exceptions to any degree of completeness is an onerous task.[809] Thus research has adopted narrower focuses, such as discussing the legal nature of relationships in 'network' structures.[810] The conceptualization of a network and the socio-legal objectives of network research in such discussions have proven problematic from a legal perspective.[811] I will try to avoid challenges of both types of research by focusing instead on the lessons of product liability.

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[805] Generally, Chapter 2. Also e.g. Stapleton, "Duty of care and economic loss: a wider agenda"; Feinman, "The Economic Loss Rule and Private Ordering."

[806] This is reflected in the generally onerous requirements for changing existing default divisions of risk. Examples discussed in Chapter 2 include the challenges of extending the bounds of product liability or extending or limiting the bounds of recoverability of pure economic loss under tort.

[807] A statutory example is the implementation of the 1985 EC Product Liability Directive in England in the form of the 1987 Consumer Protection Act. Judge-made examples abound in Chapter 2, such as allowing new duties of care to be found under *Donoghue* v *Stevenson*.

[808] For some examples, see e.g. Whittaker's comparison of English and French law. Whittaker, "Privity of Contract and the Law of Tort: The French Experience"; Whittaker, "Privity of Contract and the Tort of Negligence: Future Directions."

[809] For one extensive example under German law, see Krebs.

[810] For example, English research in the wake of the 1983 ruling in *Junior Books* focused on the use of 'network' structures to examine non-privity relationships in e.g. construction networks. Central focuses in this line of literature were justifying legal relationships beyond privity for example in *Junior* Books -like scenarios where middle-actors could not be sued. See e.g. Beyleveld and Brownsword. This naturally raised interest in the French *action directes*, on the basis of which French scholarship discussed *groupes de contrats*, which were for a brief while also realized in caselaw as discussed in Section 2.4. In a German context, recent focus has been instead on the potential for abuse of legal form in networks. E.g. Krebs; Teubner, *Netzwerk als Vertragsverbund: Virtuelle Unternehmen, Franchising, Just-in-time in sozialwissenschaftlicher und juristischer Sicht*.

[811] In particular, Teubner's argument summarizes many outcomes of broad German discussion. Teubner, *Netzwerk als Vertragsverbund: Virtuelle Unternehmen, Franchising, Just-in-time in sozialwissenschaftlicher und juristischer Sicht*. Its practical legal relevance, however, is unclear. See e.g. Gunther Teubner, "'And if I by Beelzebub Cast Out Devils, ...': An Essay on the Diabolics of Network Failure" (2009) 10 German Law Journal 395; Marc Amstutz, "The Constitution of Contractual Networks" in Marc Amstutz and Gunther Teubner (eds), *Networks: Legal Issues of Multilateral Co-operation* (Hart 2009).

There is no clear consensus on the theoretical foundations of liability in relation to product liability law. Writing from an English perspective, Stapleton suspects that the growth of modern product liability law, consisting of a 'strictish' liability spotted with exceptions,[812] is more due to historical accident than the emergence of a 'coherent new principle of civil liability'.[813] This has not stopped scholars from proposing a number of economic and non-economic justificatory theories for product liability, each with its own limitations and challenges.[814] Neither has it stopped scholars from using these to argue for the extension or restriction of product liability. Ultimately, Stapleton sees that 'moral enterprise liability' can best provide a theoretical justification that can account for the current 'strictish' regimes of product liability, in particular by showing how liability for outcomes that 'cannot be helped' can be justified on the basis of enterprise risk taking in the pursuit of profit.[815]

Prima facie, at least, this reasoning resonates strongly from a globally fragmented production perspective. Global outsourcing drives down production costs and increases the value captured by a limited number of well-placed corporations and shareholders at the cost of other stakeholders.[816] Production liability could thus be generally justified on the basis of buyers taking a knowing risk in the pursuit of profit and therefore being liable for that risk materializing. The risk that they take is outsourcing production. The profit that they stand to gain is increased return on capital. Should they nonetheless implement specific governance mechanisms, such as codes of conduct or more advanced governance mechanisms, they are in control of how the mechanisms end up in practice and thus also bear the primary risk for the functioning of these mechanisms.[817]

Following the example of product liability, any project of production liability could, hypothetically, take two very different turns, each with its own problems and challenges. One turn would be to argue for a strict form of production liability, perhaps under a justificatory theory similar to moral enterprise liability. Under strict production liability, a focal problem would be how to separate justified strict liability from unjustified strict liability, i.e. carving out exceptions to the general rule of strict liability as is done in relation to product liability to ease the functioning of society. Imposing a general rule of strict liability could arguably serve to undermine the very point of equity ownership or contractual structures as private ordering related to the division of risk in many situations. To counter this, an approach similar to the development

[812] For a categorization of the comparative strictness of various obligations, see Stapleton, *Product Liability* 97–98.
[813] Stapleton, *Product Liability* 90. Similarly, e.g. Wagner.
[814] Stapleton, *Product Liability* 90–217.
[815] In particular Stapleton, *Product Liability* 179–184, 185 ff.
[816] E.g. Locke; Milberg and Winkler.
[817] E.g. Phillips and Lim 340–350.

risk defense of product liability law might be used for shielding buyers. Potential cases excepting liability could include dealing with powerful monopolistic suppliers that buyers simply cannot exert control over and are forced to deal with, though such cases are probably few if not wholly inexistent in practice. Locke in particular has argued that partnering and commitment are necessary on behalf of buyers to truly forge a working supply relationship, so perhaps such exceptions would ultimately prove unnecessary except for political reasons.[818]

The other turn would be to focus on 'normal' fault based liability as the foundation for production liability. Here, a key problem would be the attribution of fault. This may be difficult in particular in cases where a lead firm argues it had no control over a subsidiary, supplier, or other actor more directly attributed with wrongdoing.[819] This might be countered by an awareness of the problems of fragmented production necessitating action, at the very least by requiring supply chain actors to follow codes of conduct or other regulations and in many cases by more active means such as through auditing, monitoring, and even by concretely helping supply chain actors to build compliance. On the other hand, if such mechanisms are present, they could help show that a buyer has assumed relevant control and is liable for this assumption. Where based on contract, such mechanisms might also allow for somewhat easier burdens of proof. In any case, a general fault based approach would probably filter from liability omissions in the form of cases of 'market governance' unless other factors, such as a requirement to vet suppliers in a given region based on e.g. negligence would be used to patch this hole.[820]

However liability is formulated, as 'strict' or fault based, control will most probably play a key role in argument. In the form of moral enterprise liability, i.e. liability over the risks incurred by undertaking a profit making activity, control could be seen as a general justification for strict liability or, in relation to control asserted over supply chain actors in assisting them with compliance or control over the choice of supply chain actors, as a general justification for different kinds of fault based liability. Perceived lack of control might also justify exceptions to strict liability or defenses against fault based liability.

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[818] See e.g. Stapleton for English discussions focusing on the trade effects of product liability or American discussions over the insurance effects of product liability would surely be similarly reflected in any concerted discussion of production liability. Stapleton, *Product Liability*.

[819] For the general problems of liability for omissions, see e.g. Markesinis and Unberath 90; Phillips and Lim.

[820] For example in the *Das* v *George Weston* case, related to Rana Plaza and discussed in Subsection 4.3.4, no liability was found under the common law despite plaintiff's counsel arguing that the buyers knew that conditions in Bangladeshi factories were dangerous. It has been proposed that more right's focused civil law approaches might lead to a different result, for which see van Dam, "Tort Law and Human Rights: Brothers in Arms On the Role of Tort Law in the Area of Business and Human Rights" 243–244.

A further problem might be the apportionment of liability in relation to multiple buyers sourcing from a specific supplier. In some current cases liability appears to have been argued on the grounds that a specific buyer has been the primary or sole buyer of a supplier.[821] Were this not so, one would have to consider the possibility of apportioning liability between actors in relation to their control which might lead to difficult demarcations between those involved. Such apportionment is, however, not exceptional, as witnessed by cases on e.g. market share liability in a product liability context.[822]

In a similar vein, questions such as the primacy of a buyer's or supplier's liability towards harmed actors such as employees and the relative liability of a buyer and supplier in such circumstances need to be vetted out. Even here, product liability provides tentative answers. For example under the 1985 EC Product Liability Directive a 'producer', liable for a defective product, can mean either the producer of a raw material, the manufacturer of a finished product or component, the importer of a product, any person putting their name, trademark or other distinguishing feature on a product, or any person supplying a product whose producer or importer cannot be identified.[823] If two or more 'producers' are liable at the same time, they are liable jointly and severally.[824] This does not stop them from apportioning liability as they wish *inter partes*.

Finally, a word might be said about arguments made *against* product liability, such as fears of increased legal uncertainty, 'floodgates' of liability opening up, or more recently fears of an 'insurance meltdown' or of the decreasing the competitiveness of domestic industry. While there may not be any perfect answers to such questions, I believe that the experience of product liability and the justificatory power of moral enterprise liability has shown these concerns to be secondary in relation to the harm caused by lack of such liability. From this perspective, such concerns are either moot or manageable, as seems

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[821] E.g. the *Jabir* v *KiK* case discussed in Subsection 4.3.5.

[822] *Sindell* v *Abbott Laboratories*, 26 Cal. 3d 588 (1980).

[823] Article 3 of the Product Liability Directive (85/374/EEC):

1. 'Producer' means the manufacturer of a finished product, the producer of any raw material or the manufacturer of a component part and any person who, by putting his name, trade mark or other distinguishing feature on the product presents himself as its producer.

2. Without prejudice to the liability of the producer, any person who imports into the Community a product for sale, hire, leasing or any form of distribution in the course of his business shall be deemed to be a producer within the meaning of this Directive and shall be responsible as a producer.

3. Where the producer of the product cannot be identified, each supplier of the product shall be treated as its producer unless he informs the injured person, within a reasonable time, of the identity of the producer or of the person who supplied him with the product. The same shall apply, in the case of an imported product, if this product does not indicate the identity of the importer referred to in paragraph 2, even if the name of the producer is indicated.

[824] Article 5 of the Product Liability Directive (85/374/EEC):

Where, as a result of the provisions of this Directive, two or more persons are liable for the same damage, they shall be liable jointly and severally, without prejudice to the provisions of national law concerning the rights of contribution or recourse.

to have been the outcome of relegating product liability law into its own restricted field of law instead of building on general principles of tort and delict (even though for example the German and in particular French examples show also the feasibility of relying on general principles).

Of course, some practical limits on the sphere of liable actors might nonetheless be imposed at least temporarily, such as in relation to current legislative reporting efforts typically directed towards larger enterprises in order to support small and medium sized enterprises.[825] Similarly, actors verging on consumers, for example in the form of hybrid consumer-producers, would likely be exempt at least until practically effective frameworks for access to supplier information are available, highlighting the importance of diverse regulatory reporting initiatives. Ultimately, though, a general approach to liability for all economic actors, similar to product liability, is both feasible and justifiable.

As already noted, this preliminary discussion over the justification of production liability remains highly hypothetical. The experience of product liability merely shows that liability beyond privity, either fault based or stricter, is possible in complex structures of production and could be generally justified through the notion of control over one's enterprise. Any more practically oriented discussion of such liability would have to be based on the parameters of liability of a specific legal system. Chapter 2 shows that such liability could take the general form of contract or tort/delict, while other causes of action have also been proposed.[826] This question will be discussed in some more detail in Section 4.4. Prior to that, Section 4.3 will discuss what meagre practical cases there are on transnational production liability to move the discussion to a less hypothetical plane.

4.2.3 The Effects of Global Fragmentation on Litigation

In literature on transnational liability for production, a number of perspectives have been discussed in relation to the question of whom and where to sue in relation to transnational production liability. Some arguments focus on why parent companies and buyers that are more indirectly related to damage should be sued instead of subsidiaries or suppliers that are more directly connected to damage causing activities. I call these legal-functional arguments. Other arguments focus on why not to sue in the host jurisdictions where production takes place but instead aim at litigating in other jurisdictions, such as the home states of the parent or buyer companies. I refer to these as legal-infrastructure

[825] Such limitations are in place for example under the French *loi de vigilance* (see footnote 795), the UK Companies Act amendments (see footnote 796), and the Californian Transparency in Supply Chains Act (see footnote 797).

[826] For some approaches, see e.g. Teubner, *Netzwerk als Vertragsverbund: Virtuelle Unternehmen, Franchising, Just-in-time in sozialwissenschaftlicher und juristischer Sicht*; Phillips and Lim.

arguments. Both aspects are interrelated in the sense that the forum of litigation typically needs to have a connection to the damage causing activity.[827] For transnational torts this generally means that suing a parent or buyer is a precondition for commencing litigation in the home jurisdiction of a parent or a buyer.[828] Nonetheless, for the sake of clarity of argument I will discuss these two aspects separately here.

The main legal-functional argument (and ultimately the most important reason) for suing buyer or parent companies for damage caused elsewhere by their subsidiaries or suppliers is undoubtedly that of control, which has already been discussed above. In relation to transnational litigation some additional practical arguments have been pointed out, such as greater media visibility and better guarantees of solvency. For example, van Dam notes that 'targeting the parent company exposes the heart of the company to its involvement in the human rights violations', helping achieve optimal media coverage and reputational effect, while parent companies are likely more solvent debtors than their foreign subsidiaries.[829]

These arguments, while subsidiary to control, seem particularly strong in relation to suppliers in contractually organized production. The media effect of targeting a globally known brand company, such as Walmart or H&M, is no doubt greater than litigating against a comparatively or totally unknown local third-world supplier. Furthermore, focusing on a global buyer or buyers may, through that buyer's sourcing practices, have an effect on a great number of suppliers.[830] Finally, while a parent company may have multiple subsidiaries, its commitment to these as part of its corporate group may be bigger than a buyer's investment in its suppliers, increasing the weight of solvency related considerations. Thus in relation to production structured through contractual arrangements, focusing on a lead firm/buyer is generally even more important than focus on a lead firm/parent in corporate structures. Nonetheless, while practically relevant, these arguments may not in themselves provide additional *legal* leverage for pursuing claims against a specific actor in relation to the control argument.

What I see as legal-infrastructure related arguments relate to the practical possibilities of plaintiffs suing in a specific jurisdiction.[831] Thus for example

[827] One exception is universal jurisdiction, but with the demise or restriction of crucial statutes these are increasingly irrelevant for this discussion. Restrictions on the United States Alien Tort Statute and the demise of the Belgian universal jurisdiction law are noted in the next section.
[828] Some exceptions are discussed in Section 4.3.
[829] van Dam, "Tort Law and Human Rights: Brothers in Arms On the Role of Tort Law in the Area of Business and Human Rights" 228.
[830] E.g. Walmart has over 3000 independent suppliers (http://corporate.walmart.com/suppliers/supplier-diversity), while Apple publishes a list of its top 200 suppliers (http://images.apple.com/supplier-responsibility/pdf/Suppliers.pdf).
[831] Generally on this topic, see e.g. Robert Wai, "Transnational Private Law and Private Ordering in a Contested Global Society" (2005) 46 Harvard International Law Journal 471; Robert Wai, "Private v

when choosing whether to sue in the plaintiff's own jurisdiction or, for example, in a parent company's jurisdiction, a number of factors can play a crucial role. These include the prevalence of persecution or corruption and the parameters of procedural rules ranging from choice of forum and substantive law to the availability of funding, the ease of gathering evidence, the availability of procedural aids such as class-action claims, and where judgments or awards would be enforced.

Here, a key role is played by the target forum's rules for adopting jurisdiction.[832] In some jurisdictions, courts may under the doctrine of *forum non conveniens* have powers to assess whether they should defer jurisdiction to a forum that is deemed more appropriate.[833] In other jurisdictions, courts are required to examine every case against defendants domiciled in their jurisdiction.[834] Whether or not *forum non conveniens* arguments are available has a major effect on litigation. In many cases the doctrine has been used by parent company defendants to avoid being litigated on their home turf under the argument that litigation should take place in the jurisdiction with which it is most closely connected, typically that where harm took place, even if practical possibilities for plaintiffs to litigate or enforce a judgment there are close to zero.[835] Notoriously, cases may even be bumped back and forth in or between jurisdictions while courts argue over which forum should be seen as appropriate.[836] Generally, persecution and corruption in one jurisdiction are

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Private: Transnational Private Law and Contestation in Global Economic Governance" in Horatia Muir Watt and Diego P Fernández Arroyo (eds), *Private International Law and Global Governance* (Oxford University Press 2014).

[832] Meeran 11–14; van Dam, "Tort Law and Human Rights: Brothers in Arms On the Role of Tort Law in the Area of Business and Human Rights" 229–230.

[833] E.g. Meeran 11–14.

[834] This is generally the approach under the European Brussels regime. See e.g. Wesche and Saage-Maaß 373–374; van Dam, "Tort Law and Human Rights: Brothers in Arms On the Role of Tort Law in the Area of Business and Human Rights" 230.

[835] E.g. *Connelly* v *RTZ Corporation*, for which Meeran 28–30. More recently, see e.g. *Doe* v *Chiquita Brands International*, No. 08-MD-80421, (US District Court, Southern District of Florida), for information on which e.g. Earthrights International, 'Human Rights Claim against Chiquita for Funding Colombian Paramilitaries Will Proceed in US Court', November 30, 2016, available at https://www.earthrights.org/media/human-rights-claims-against-chiquita-funding-colombian-paramilitaries-will-proceed-us-court.

[836] In the *Connelly* v *RTZ Corporation* case a claim in England went twice to the appeals court before the House of Lords finally resolved the outstanding procedural issue regarding *forum non conveniens*. Only then could trial on the merits begin. At the end of his majority opinion regarding the issue of *forum non conveniens*, Lord Goff notes (para 34) that: '*…this interlocutory battle has continued for nearly three years, and it is highly undesirable that it should be prolonged by yet another hearing. For these reasons, and bearing in mind that it is in the public interest that the point should be addressed and decided, I would not invite further submissions on the point.*' An international example is the *Anvil* case, where, following earlier strands of litigation in Congo and Australia plaintiffs raised a claim in Canada, but there the courts from the trial to appellate and supreme court levels differed on whether to allow the claim or not. See Meeran 12. Another example is the traversal of the different strands of the Union Carbide case between India and the United States, for which see van Dam, "Tort Law and Human Rights: Brothers in Arms On the Role of Tort Law in the Area of Business and Human Rights" 229–230.

potential reasons for litigating in other jurisdictions and may be taken into account in *forum non conveniens* considerations.[837] Other rules, such as the availability of funding or procedural safeguards, may also play a role in *forum non conveniens* evaluations.[838]

Once a specific forum has accepted jurisdiction, the procedural rules applicable to a case are typically those of the jurisdiction in which it is litigated. This can have a profound impact on issues such as funding, evidence, possibilities for class action claims, and the choice of substantive law.

Funding and cost related rules and practicalities play a critical practical role in the availability of lawyers for pursuing claims. These factors range from the availability of legal aid and other public funding[839] to factors such as the availability of contingency fees and success fees,[840] whether the amount of damages is limited to reparation or can be extended through e.g. punitive damages,[841] requirements of proportionality of legal costs,[842] whether a loser pays rule is used in relation to legal costs,[843] and which substantive law is used to measure damages.[844] Generally, it may be impossible to secure funding for challenging litigation in host state courts thus making claimants reliant on legal aid, *pro bono* or contingency fee based funding in home state jurisdictions.[845] In particular, procedural rules related to funding can have a huge impact on the possibilities of funding complex and long-running transnational litigation, with common law systems with more liberal possibilities for funding and claiming damages seemingly offering an edge to civil law jurisdictions focused on reparation and reasonability in costs.[846] However, these rules are themselves often the subject of controversy from different interest groups, as witnessed by

[837] Generally van Dam, "Tort Law and Human Rights: Brothers in Arms On the Role of Tort Law in the Area of Business and Human Rights" 228; Meeran 10. In relation to forum non conveniens considerations related to corruption, see e.g. Meeran 12. For a recent US case, *Doe* v *Chiquita*, see note 835 above.

[838] For example, the *Connelly* v *RTZ Corporation* case went twice to the appeals court level before the English House of Lords finally decided that the plaintiff's problems in procuring funding for litigation in Namibia, in contrast to legal aid or contingency fee arrangements in England, meant that English courts should not defer to Namibian ones even when the latter were materially more closely connected to the case. Generally, Meeran 28–30.

[839] Meeran 18. See in particular the decision allowing legal aid in *Jabir* v *KiK* where a German court decided to grant legal aid to the employees of a Pakistani supplier suing a German buyer. *Jabir et al.* v *KiK Textilien und Non-Food GmbH*, LG Dortmund (7 O 95/15), decision from 29.08.2016, and the court's related press release from August 30, 2016, available at http://www.lg-dortmund.nrw.de/behoerde/presse/Pressemitteilungen/PM-KiK_docx.pdf.

[840] Meeran 18; van Dam, "Tort Law and Human Rights: Brothers in Arms On the Role of Tort Law in the Area of Business and Human Rights" 230; Wesche and Saage-Maaß 383–384.

[841] van Dam, "Tort Law and Human Rights: Brothers in Arms On the Role of Tort Law in the Area of Business and Human Rights" 230; Wesche and Saage-Maaß 383.

[842] Meeran 19; Wesche and Saage-Maaß 383.

[843] van Dam, "Tort Law and Human Rights: Brothers in Arms On the Role of Tort Law in the Area of Business and Human Rights" 230.

[844] Meeran 18–19; Wesche and Saage-Maaß 383.

[845] Meeran 10; Wesche and Saage-Maaß 382.

[846] Generally, compare Meeran 17–19; Wesche and Saage-Maaß 383–384.

the recent changes to English civil procedure rules that have reduced the possibilities for funding claims or the recent trend in Europe that may restrict the amounts recoverable by claimants from other jurisdictions by requiring recoverable damages to be judged by the law of the host state instead of the law of the jurisdiction.[847]

Legal infrastructures can also affect evidence procedures, such as the availability of discovery or document presentation rules for uncovering evidence,[848] possibilities to shift burdens of proof,[849] or more generally the organization of cases, such as the scope of collective or class actions.[850] For example, rules related to the production of evidence are relatively lax in the United States and relatively strict in Europe. American discovery rules are generally seen as allowing plaintiffs broad powers to sift through defendants' documents and other material and are even described as supportive of so-called fishing expeditions. This may be especially helpful in cases revolving around the control of corporate or supply chain structures. European rules on production of evidence are typically much stricter, requiring plaintiffs to have knowledge of documents they wish defendants to produce before production is required.[851]

A particular challenge is related to applicable substantive law.[852] Again, the choice depends on the rules applicable in the target jurisdiction. The situation in the United States is complicated and may allow leeway to courts in choosing the applicable substantive law.[853] In other common law jurisdictions and in the EU, focus in relation to torts is primarily on the *lex loci damni*, i.e. the law of

[847] Michael D Goldhaber, "Corporate Human Rights Litigation in Non-U. S. Courts: A Comparative Scorecard" (2013) 3 UC Irvine Law Review 127, 132–134. Meeran 17–19.
[848] van Dam, "Tort Law and Human Rights: Brothers in Arms On the Role of Tort Law in the Area of Business and Human Rights" 230; Meeran 22. See also the challenges of producing evidence in the *Milieudefensie* case.
[849] Wesche and Saage-Maaß 381.
[850] Regarding class-actions, common law jurisdictions generally provide various procedural aids for conducting class-actions while for example in Germany few if any such procedural aids are available for collective litigation. Meeran 19–20; van Dam, "Tort Law and Human Rights: Brothers in Arms On the Role of Tort Law in the Area of Business and Human Rights" 231; Wesche and Saage-Maaß 381–382.
[851] For Germany, see e.g. Wesche and Saage-Maaß 380–381. For a practical example, in the *Milieudefensie* v *Shell* case (discussed in Section 4.2) plaintiffs lost their trial court motions for production of evidence and claimed that this had a major impact on their case against Shell. Liesbeth Enneking, "The Future of Foreign Direct Liability? Exploring the International Relevance of the Dutch Shell Nigeria Case" (2014) 10 Utrecht Law Review 44, 46. On the other hand, parts of the decision were reversed on appeal, allowing the plaintiffs access to evidence. See *Oguru, Efanga & Milieudefensie* v *Royal Dutch Shell Plc and Shell Petroleum Development Co Nigeria Ltd*, Gerechtshof den Haag, 18.12.2015 / 200.126.804-01 200.126.834-01, available at https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:GHDHA:2015:3586, with information available at e.g. http://www.foei.org/news/outcome-appeal-shell-victory-environment-nigerian-people-friends-earth-netherlands and https://milieudefensie.nl/english/shell/courtcase/documents.
[852] Meeran 14–17; van Dam, "Tort Law and Human Rights: Brothers in Arms On the Role of Tort Law in the Area of Business and Human Rights" 231–232.
[853] Alford.

the place where the damage occurred.[854] In the EU, for example, this rule is particularly strictly enforced under the Rome Regulation with only few exceptions allowed.[855] For one, if a tort is manifestly more closely connected with another state, the law of that state may be applied, but it is highly dubious if parent company control fulfils this criterion.[856] For another, in relation to environmental damage the plaintiff may choose to sue under the law of the place where the 'event giving rise to the damage' occurred, but also the application of this alternative to FDL claims is highly speculative.[857] Furthermore, *ordre public* and mandatory law exceptions might allow some aspects of *lex loci damni* to be replaced with home state law.[858] Similarly, other local variations may exist.[859] The application of foreign law comes with additional burdens in relation to evidence and argument.

Once the applicable substantive law has been identified, it may have crucial bearing on how the case is pleaded. On the one hand, different legal systems can have widely different parameters for causes of action. For example differences in statutes of limitations can be problematic.[860] Substantive limitations may also apply.[861] For example, Nigerian rules on liability for sabotage and the general common law approach to liability for omissions have affected in particular the trial phase of the *Milieudefensie* v *Shell* case.[862] More generally, some legal systems can be seen as more accommodating of certain claim types than others.[863]

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[854] E.g. Meeran 14–15; Wesche and Saage-Maaß 374–375; van Dam, "Tort Law and Human Rights: Brothers in Arms On the Role of Tort Law in the Area of Business and Human Rights" 231–232.

[855] Regulation (EC) 864/2007 of 11 July 2007 on the law applicable to non-contractual obligations ('Rome II'), for *lex loci damni* see Article 4(1).

[856] Rome II Article 4(3) and van Dam, "Tort Law and Human Rights: Brothers in Arms On the Role of Tort Law in the Area of Business and Human Rights" 231.

[857] Rome II Article 7 and van Dam, "Tort Law and Human Rights: Brothers in Arms On the Role of Tort Law in the Area of Business and Human Rights" 231–232.

[858] Rome II Articles 16 and 26 and van Dam, "Tort Law and Human Rights: Brothers in Arms On the Role of Tort Law in the Area of Business and Human Rights" 232.

[859] E.g. Liesbeth Enneking, "Dutch case note" (2008) 16 European Review of Private Law 499, 502.

[860] Meeran 17. For example in both *Rahaman* v *J.C. Penney* and *Das* v *George Weston Ltd.* (for which see Subsection 4.3.5) complaints related to the Rana Plaza disaster were dismissed by courts in Delaware and Ontario as time-barred under a Bangladeshi statute of limitations.

[861] Meeran 16–17.

[862] Enneking, "The Future of Foreign Direct Liability? Exploring the International Relevance of the Dutch Shell Nigeria Case" 46–47.

[863] For example Enneking argues that the Dutch law of delict might be less restrictive than common law torts in the circumstances of the *Milieudefensie* v *Shell* case. Enneking, "The Future of Foreign Direct Liability? Exploring the International Relevance of the Dutch Shell Nigeria Case" 52. Similarly, Wesche and Saage-Maaß argue that the German law of delict could readily offer possibilities for holding parent companies or buyers liabile. Wesche and Saage-Maaß 375–379. Similarly, the rules of contract formation in Germany are less strict than in England and contractual causes of action can more readily overcome the bounds of privity and thus for example Teubner, who however focuses on various business structures, sees that courts might in many cases refer to contracts with protective effects on third parties to create liability beyond privity. Teubner, *Netzwerk als Vertragsverbund: Virtuelle Unternehmen, Franchising, Just-in-time*

On the other hand, there may also be broad similarities between legal systems, such as in relation to tortious duties of care.[864] Many former French colonies are to a great extent still following the *Code civil's* approach to contract and delict, while many current and former members of the Commonwealth of Nations follow developments in English common law.[865] On the other hand, supranational tendencies of unifying law may also be identified.[866] Furthermore, focus on factual circumstances may result in similar results despite differences in applicable legal systems. Thus for example Meeran argues that despite the differences of the Peruvian Civil Code and English common law, in the *Monterrico* case differences between the two legal systems seemed irrelevant as far as liability under both seems to revolve around the same factual constellations, thus turning into a matter of proof over the same facts.[867]

Finally, even in cases of successful substantive argument and litigation, the enforcement and execution of outcomes may face practical challenges. Here, suing a parent company/buyer in their own jurisdiction most increases the chances of enforcing any subsequent decision or award in that jurisdiction as there is no need to recognize a foreign judgment. Such a jurisdiction may also have more effective legal enforcement options available (including injunctions). More importantly, the jurisdiction of the parent or buyer is most likely to have a solvent actor related to the corporate group or supply chain. On the other hand, in some cases defendants may try to take extreme measure to avoid enforcement by for example relocating themselves (resulting in the use of freezing injunctions) or intimidated victims or counsel in host states or forum

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in sozialwissenschaftlicher und juristischer Sicht. On how differences in contract doctrine may affect the bindingness of codes of conduct in relation to Walmart's codes of conduct, see e.g. Revak 1656–1657.

[864] Meeran argues that for example South African and Namibian law are similar enough to English law to produce similar results. Meeran 15–17. Similarly, the English case of *Chandler* v *Cape* (discussed in Subsection 4.3.2) was referred to by Dutch courts discussing claims under Nigerian law, and developments in English and Indian common law seem to be relevant in the KiK case, litigated under Pakistani common law. Enneking, "The Future of Foreign Direct Liability? Exploring the International Relevance of the Dutch Shell Nigeria Case" 52. For the latter, see European Center for Constitutional and Human Rights, 'Q&A on the Compensation Claim against KiK', under the heading 'On what basis are victims suing in Germany?', available at https://www.ecchr.eu/en/our_work/business-and-human-rights/working-conditions-in-south-asia/pakistan-kik/q-a-compensation-claim-against-kik.html. Broadly, in particular two approaches to tort are generally well-known. These are the common law notion of duties of care, where emphasis is on whether a defendant is under a duty to protect the plaintiff, and civil law notions of protected rights, where emphasis is on whether the defendant prejudiced the plaintiff's right. van Dam, "Tort Law and Human Rights: Brothers in Arms On the Role of Tort Law in the Area of Business and Human Rights" 243–244.

[865] van Dam, "Tort Law and Human Rights: Brothers in Arms On the Role of Tort Law in the Area of Business and Human Rights" 237; Meeran. These include not only jurisdictions such as Canada, Australia, and New Zealand, but also e.g. Nigeria, South Africa, Namibia, India, and Pakistan.

[866] EU law provides one focal example, in particular in relation to private international law in the EU member states. Fawcett and Carruthers.

[867] Meeran 15–16.

states.[868] Problems may arise also post-enforcement. For example in the *Trafigura* case the bank account containing the settlement sum paid was embezzled by corrupt officials in Côte d'Ivoire before the moneys received from Trafigura could be forwarded to victims, with the end result that the plaintiff's counsel were found guilty of negligently handling money.[869] Thus, despite a focus on a specific jurisdiction, efficient litigation may require global collaboration.[870]

On the other hand, litigating in home state jurisdictions also faces major challenges. In particular fact-finding, which can be costly and often needs to be done in the jurisdiction where the damage occurred, can be challenging.[871] Van Dam sums up the general difficulties of home state litigation by noting that:[872]

> *They are complex, risky, hard-fought by the TNCs, resource-intensive, of uncertain duration and outcome, and have significant cash flow implications for the lawyers, who also tend to be at the less wealthy end of the legal profession. Corporate lawyers, by contrast, are funded on an ongoing basis irrespective of outcome.*

Finally, a central methodological problem should be noted. This is that there is often very little information available on key cases. Firstly, the structures and governance mechanisms employed in governing production are typically not public information.[873] This has repercussions for not only research but also for actual litigation.[874] Similarly, there is little legal precedent available due in particular to many cases ending up being settled before trial, providing little in the way of judicially evaluated evidence or precedent except in relation to subsidiary considerations such as the allocation of costs for i.a. massive evidentiary undertakings.[875] Much relevant material in litigation relies on activist organizations such as Global Witness and Sherpa, while for research purposes public reporting by established news sources, such as the New York

[868] Meeran 21–22.
[869] John Hyde, 'Court finds Leigh Day breached duty of care to Trafigura claimant', The Law Society Gazette, June 17, 2016, http://www.lawgazette.co.uk/law/court-finds-leigh-day-breached-duty-of-care-to-trafigura-claimant/5055953.fullarticle.
[870] Meeran 20–21.
[871] van Dam, "Tort Law and Human Rights: Brothers in Arms On the Role of Tort Law in the Area of Business and Human Rights" 228–229; Meeran 18; Wesche and Saage-Maaß 383.
[872] van Dam, "Tort Law and Human Rights: Brothers in Arms On the Role of Tort Law in the Area of Business and Human Rights" 228.
[873] With the Bangladesh Accord and Bangladesh Alliance as two exceptions. See Subsection 3.5.2.
[874] For example in its complaint against DLH, Global Witness apparently could not figure out the corporate structure of DLH. See Global Witness, 'Formal complaint regarding DLH's violation of FSC-POL-01-004 Policy for the Association of Organizations with FSC', 20 February 2014, available at https://www.globalwitness.org/sites/default/files/formal%20complaint%20to%20fsc%20regarding%20dlh_final.pdf.
[875] See, in particular, the English strand of *Trafigura*, discussed in Subsection 4.3.4.

Times and Guardian, and anonymized research, such as that of Kajüter and Kulmala, are crucial.

4.3 The Many Faces of Transnational Production Liability

4.3.1 Differentiating the Structural Foundations Underlying Production

In this section, I aim towards a preliminary typology and genealogy of 'transnational production liability'. Currently, no such typology of production liability seems to exist. I argue that such a typology is necessary to enable discussion over production liability by highlighting the central structural features of different types of production liability claims, each opening up specific legal contexts bringing with them not only similarities but also crucial differences.

Previously, research has primarily focused on 'foreign direct liability', originally referring to a parent company's liability for its foreign subsidiaries. The success of the term foreign direct liability has been so pervasive that some scholars see it as subsuming what are other, clearly distinct, forms of liability, in particular liability for subcontractors.[876] To clarify the crucial differences between different types of production liability, I will here specifically limit foreign direct liability to cases concerning relationships of equity ownership, i.e. the relationship between parent companies and subsidiaries. While tort/delict causes of action may be similarly applicable in both foreign direct liability and contractually organized supply chain contexts, I maintain a strict separation of these different contexts in particular to highlight the potential of contractual arrangements to change many of the central legal parameters applicable to foreign direct liability claims. The resulting kind of 'foreign direct liability', limited to structures of equity ownership, is discussed in Subsection 4.3.2.

Liability for production that is not structured through equity ownership may exist in several different forms. First, an actor may generally be held liable for actions it has undertaken in foreign jurisdictions, such as negligent advice or consulting. These kinds of cases seem limited, which is probably due to the

[876] While Meeran for example notes this discrepancy when discussing the *Trafigura* case ('Note that the *Trafigura* case for victims of toxic waste dumping in Côte d'Ivoire was atypical in this respect as it involved the UK head office company itself and no subsidiary'), he does not explicitly distinguish other forms of liability from foreign direct liability. Larsen in Sweden and Enneking in the Netherlands seem to equate subcontractor liability directly with foreign direct liability. Thus for example Enneking sees foreign direct liability as a general term for discussing an entity's liability over its foreign subsidiaries or suppliers. Meeran 5, fn 24; Rasmus Kløcker Larsen, "Foreign Direct Liability Claims in Sweden: Learning from Arica Victims KB v. Boliden Mineral AB?" (2014) 83 Nordic Journal of International Law 404, 405; Liesbeth Enneking, *Foreign Direct Liability and Beyond* (Eleven International Publishing 2012) Chapter 3.

prevalence of global value chains.[877] Some possible examples are nonetheless discussed in Subsection 4.3.3.

More interesting are cases where production is structured through the use of contractual relationships. As seen in the subsection on foreign direct liability, relationships between parent companies and subsidiaries can come with different levels of 'control'. In particular, courts have argued that, due to the separate legal personalities of parent and subsidiary companies, specific control that goes beyond normal company law relationships is necessary for a parent to be held liable for its subsidiary's actions.[878] As argued in Chapter 3, contractually governed production can similarly be undertaken through different mechanisms and intensities of control. Here, I will focus on two specific types of cases of contractually controlled production.

The first type of case, which I call transnational liability for subcontractors for lack of a better term, is based on founding contractual outsourcing of production on solely market-price mechanisms. Under this approach, there is little focus on establishing a contract based governance mechanism *per se*. Contracting is used to outsource production without retaining control over it. As argued in Chapter 3, this kind of governance arrangements generally focus on generic sales where an efficient market is available with capable suppliers and low information costs. Such cases would seem to be optimal from the perspective of using contractual arrangements for limiting liability. Nonetheless, a number of cases exist where companies have been sued apparently on grounds of negligent choice of subcontractors. Here, liability, if found, would probably be founded in tort/delict instead of a focus on the underlying contractual arrangement. These kinds of cases are discussed in Subsection 4.3.4.

The second type of case, which I call transnational supply chain liability, is based on the idea elaborated in Chapter 3 that control can specifically be extended beyond privity in a supply chain through governance mechanisms embedded in contract. Whether modular governance based on standards would suffice for liability in a specific situation, or whether contractual arrangements more akin to relational mechanisms are needed for establishing liability, is open to question. Nonetheless, liability, if found, would be based on a contractual nexus of governance. While this does not rule out liability in tort/delict, the underlying contractual arrangements can have a major effect on for example how duties of care are formulated. Under supply chain liability, liability is founded in how contractual arrangements are used to control production. Thus

[877] UNCTAD estimated in 2013 that 80 % of global trade takes place in value chains governed either through contract or equity, thus diminishing the role of liability for one's actions abroad. UNCTAD, *World Investment Report 2013*.

[878] The insulating tendencies of company law in relation to foreign direct liability are noted for example by Muchlinski 685.

the potential for contractual arrangements to alter the parameters of liability under private ordering, for example through the rules of private international law, is at its clearest. These kinds of cases are discussed in Subsection 4.3.5.

Arguably, other legal situations could be discussed under production liability. From a hard law perspective these could include for example liability for deceptive advertising and socially responsible investing. The stakeholders here, however, are not directly related to production but instead are consumers, competitors, or beneficiaries of investment schemes. While they may have considerable power in affecting production practices, these kinds of liability are not at focus here.[879] From a soft law perspective, mechanisms such as the Specific Instance Procedure of the OECD Guidelines for Multinational Enterprises, despite being strictly non-binding, may also have relevance. The OECD Guidelines specifically try to account for supply chain management and thus allows discussion over the relationship of different actors engaged in production.[880] However, while the guidelines have been referred to as possible examples of international standards in cases such as *Das* v *George Weston*, discussed below in relation to supply chain liability, they are due to their soft law nature clearly secondary to specific contractual arrangements and will not be focused on here.

4.3.2 Foreign Direct Liability

4.3.2.1 Foreign Direct Liability?

A major strand of literature has recently focused on foreign direct liability, or whether a parent company can be held liable for the acts of its foreign subsidiaries.[881] Under narrow circumstances, a parent company's liability for its

[879] Well-known cases regarding deceptive advertising include for example *Kasky* v *Nike* (2002, No. S087859, California Supreme Court), *Tony's Chocolonely*, and *Verbraucherzentrale Hamburg* v *Lidl* (settled, generally see https://business-humanrights.org/en/lidl-lawsuit-re-working-conditions-in-bangladesh). For *Kasky* v *Nike* and *Tony's Chocolonely*, see Vytopil. Regarding socially responsible investing a recent focus has been on requiring the divestment of investments harmful to the climate, such as in *Harvard Climate Coalition* v *President and Fellows of Harvard College*, Appeals Court of Massachusetts, No. 15-P-905 (decided October 6, 2016), 2016 Mass. App. LEXIS 141. Generally on cases related to deceptive advertising, see e.g. Vytopil. On socially responsible investing, see e.g. Benjamin J Richardson, "Fiduciary Relationships for Socially Responsible Investing: A Multinational Perspective" (2011) 48 American Business Law Journal 597.

[880] Though most of these cases seem to focus on corporate relationships. See e.g. the UK national contact point's final statement in *Afrimex*, where the NCP found that Afrimex was sufficiently intertwined with two Congolese companies to be able to significantly influence them and thus all three should be treated as 'linked'. Following this, the NCP found that Afrimex did not adequately use its influence over its Congolese suppliers to avoid violations of the OECD Guidelines (2000 version) in relation to stakeholders.

[881] See e.g. Peter Rott and Vibe Ulfbeck, "Supply Chain Liability of Multinational Corporations?" (2015) 23 European Review of Private Law 415; Enneking, "The Future of Foreign Direct Liability? Exploring the International Relevance of the Dutch Shell Nigeria Case"; Goldhaber; Meeran; van Dam, "Tort Law and Human Rights: Brothers in Arms On the Role of Tort Law in the Area of Business and Human Rights"; Muchlinski.

subsidiary's acts can probably be established in most systems of *company* law.[882] The focus of FDL claims, on the other hand, is typically on liability for human rights, labor, social, or environmental violations through other means than company law, such as general tort law or more specific statutes. According to one account, foreign direct liability claims aim:[883]

> *to hold parent companies legally accountable in developed country courts for negative environmental, health and safety, labour or human rights impacts associated with the operations of members of their corporate family in developing countries.*

Foreign direct liability is grounded in traditions of legal activism and concern for the impunity of corporate actions abroad.[884] Since the 1990s, this activism has been reflected in particular in two strands of litigation. One of these is based on litigating human rights claims under specific statutes, in particular the Alien Tort Statute in the United States.[885] Subsection 4.3.2.2 focuses on this strand. The other strand is based on tort claims under general negligence in particular in England and related common law jurisdictions, such as Canada and Australia.[886] Subsection 4.3.2.3 focuses on this strand.

Muchlinski argues that in the focal jurisdictions of both these strands, i.e. the United States, England, Canada, and Australia, the general parameters for legal activism, ranging from a broader freedom for lawyers to govern how cases are litigated, a critical mass of NGOs, and the ready availability of multinational corporations, have been open for FDL claims.[887] The similarity of tort law in current and former members of Commonwealth of Nations is most

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[882] E.g. Muchlinski 685.

[883] E.g. Halina Ward, "Governing Multinationals: The Role of Foreign Direct Liability" (2001) <http://www.blackwell-synergy.com/doi/abs/10.1111/j.1468-0319.1985.tb00102.x>.

[884] Muchlinski 686.

[885] Another possibility was afforded by the 1993 Belgian law allowing universal jurisdiction over human rights matters, which however was struck down a decade later. See e.g. Human Rights Watch, Belgium: Universal Jurisdiction Law Repealed, August 1 2003, https://www.hrw.org/news/2003/08/01/belgium-universal-jurisdiction-law-repealed. The law was used in a corporate context for example in the (unsuccessful) Total litigation, for which see *A.M.Z et al.* v. *Total et al*, Cour de cassation de Belgique, N° P.07.0031.F, 28 Mars 2007. General information on the case is available at https://business-humanrights.org/en/total-lawsuit-in-belgium-re-myanmar. Other legislation with extraterritorial applicability but more limited in scope might include the 1991 Torture Victim Protection Act (106 Stat. 73, note following 28 U. S. C. §1350), US Terrorist Accountability Act, the US Foreign Corrupt Practices Act, and the UK Bribery Act. Generally, however, the ATS is seen as unique. On the prospects of translating the ATS to other legal systems, see Beth Stephens, "Translating Filartiga: A Comparative and International Law Analysis of Domestic Remedies for International Human Rights Violations" (2002) 27 Yale Journal of International Law.

[886] This is simply because many if not all human rights offences can be translated into torts. For comments on the overlap of human rights law and tort law, see e.g. van Dam, "Tort Law and Human Rights: Brothers in Arms On the Role of Tort Law in the Area of Business and Human Rights" 243; Whytock, Childress III and Ramsey 5–6. On the relationship of tort and human rights violations, e.g. Wright.

[887] Muchlinski 686–687.

probably an additional factor, in particular as many of these claims concern subsidiaries operating in such countries.[888] Since then, foreign direct liability claims have spread to further jurisdictions.[889] In particular, while ATS litigation in the United States has recently been severely restricted, it seems that transnational tort litigation in Europe has seen increased use.[890] But neither is the latter without its setbacks.[891]

4.3.2.2 The American Flirt with ATS

According to 28 U.S. Code § 1350, 'Alien's action for tort':[892]

> *The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.*

This so-called Alien Tort Statute ('ATS')[893] allows federal courts original jurisdiction over aliens for torts committed in violation of the law of nations or US treaties.[894] Ever since the 'resurfacing' of the ATS through the 1980 ruling in *Filártiga* v *Peña-Irala*,[895] the ATS has seen a snowballing of litigation related to torts against the law of nations committed outside the United States.[896] This took place despite challenges to ATS litigation in the form of state immunities or the *forum non conveniens* doctrine.[897]

While cases were originally aimed against foreign governments and their officials, the ruling in *Kadic* v *Karadzic*[898] opened the way for suing private non-state actors, including corporations.[899] Since then, over 180 disputes have been filed against business entities.[900] Out of these, a handful have proceeded to

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[888] Discussed below in Subsection 4.3.2.3.
[889] Goldhaber; van Dam, "Tort Law and Human Rights: Brothers in Arms On the Role of Tort Law in the Area of Business and Human Rights"; Meeran; Muchlinski 687–689. For arguments relating to the situation outside the US, see e.g. Whytock, Childress III and Ramsey.
[890] E.g. Jodie A Kirshner, "Why is the U.S. Abdicating the Policing of Multinational Corporations to Europe?: Extraterritoriality, Sovereignty, and the Alien Tort Statute" (2012) 30 Berkeley Journal of International Law 259.
[891] See e.g. Goldhaber 132–134.
[892] 28 U.S. Code § 1350.
[893] Also referred to as the Alien Tort Claims Act ('ATCA').
[894] For background, see e.g. Jonathan C Drimmer and Sarah R Lamoree, "Think Globally, Sue Locally: Trends and Out-of-Court Tactics in Transnational Tort Actions" (2011) 29 Berkeley Journal of International Law 456, 459.
[895] 630 F.2d 876 (2d Cir 1980).
[896] E.g. Stephens.
[897] Peer Zumbansen, "Transnational Law" (2008) 4 CLPE Research Paper 09/2008 746.
[898] 70 F 3d 232, 236–37 (2d Cir 1995).
[899] David P Kunstle, "Kadic v. Karadzic: Do private individuals have enforceable rights and obligations under the Alien Tort Claims Act?" (1996) 6 Duke Journal of Comparative & International Law 319.
[900] For a relatively recent count of corporate ATS cases, see Goldhaber 128–129; van Dam, "Tort Law and Human Rights: Brothers in Arms On the Role of Tort Law in the Area of Business and Human Rights" 233.

trial, with at least one resulting in a positive judgment for the plaintiff.[901] Another handful has been settled, such as the well-known cases against UNOCAL and Shell regarding human rights abuses related to oil production in Myanmar and Nigeria.[902] Thus the balance sheet of ATS litigation in relation to foreign direct liability does not seem particularly promising from the perspective of actual judgments or successful settlements.[903] This may in part be offset by the broad media and scholarly coverage of such cases.

Adding to the challenges of ATS litigation has been uncertainty about its scope of application. Two particular lines of uncertainty concern the nature of violations covered by 'the law of nations' and whether corporations can be held liable under it. The former question was addressed by the US Supreme Court in *Sosa v. Alvarez-Machain*,[904] where it was found that only serious violations of the law of nations, such that were conceivable during the drafting of the ATS, could be tried under it.[905] The latter question divided federal appeals courts and ultimately led to the Supreme Court granting certiorari in the case *Kiobel* v *Royal Dutch Petroleum*.[906] There, however, focus turned instead to the question of the extraterritorial scope of application of ATS.[907]

In its 2013 ruling in *Kiobel* v *Royal Dutch Petroleum*, the United States Supreme Court found that the presumption against the extraterritorial scope of federal statutes applies to the ATS. The court was unanimous in this finding but divided in the reasoning behind it, thus resulting in uncertainty over the extent of the presumption in relation to the ATS. This has led to confusion over what kinds of claims could fall within the scope of ATS. The majority, consisting of chief justice Roberts joined by justices Scalia, Kennedy, Thomas, and Alito, noted that the presumption may be displaced:[908]

> *…where the claims touch and concern the territory of the United States … with sufficient force to displace the presumption against extraterritorial application. Corporations are often present in many countries, and it would reach too far to say that mere corporate presence suffices.*

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[901] Drimmer and Lamoree 465.

[902] E.g. *Roe* v *UNOCAL*, 395 F.3d 932 (9th circ. 2002, subsequently vacated to be argued en banc following *Sosa* v *Alvarez-Machain*), settled before proceedings. For the settlement, see Earthrights International, 'Doe v UNOCAL Case History', available at https://www.earthrights.org/legal/doe-v-unocal-case-history. *Wiwa* v *Royal Dutch Petroleum Co*, 226 F 3d 88 (2d Cir 2000). For the settlement, see Jad Mouawad, 'Shell to Pay $15.5 Million to Settle Nigerian Case', New York Times June 8, 2009, http://www.nytimes.com/2009/06/09/business/global/09shell.html?ref=global.

[903] Goldhaber 137.

[904] 123 S.Ct. 2739.

[905] Brad R Roth, "Sosa v. Alvarez-Machain: United States v. Alvarez-Machain. 123 S.Ct. 2739" (2004) 98 American Journal of International Law 798.

[906] For the final ruling, see *Kiobel v. Royal Dutch Petroleum Co.*, 133 S.Ct. 1659 (2013).

[907] For background, see Ingrid Wuerth, "Kiobel v. Royal Dutch Petroleum Co.: The Supreme Court and the Alien Tort Statute" (2013) 107 American Journal of International Law 601.

[908] For discussion, see Wuerth 606–609.

Justice Kennedy noted in addition that this rather vague rule could be complemented in future cases. For their part, a concurring minority consisting of justice Breyer, joined by justices Ginsburg, Sotomayor, and Kagan, argued that the statute should provide jurisdiction:[909]

> *…where (1) the alleged tort occurs on American soil, (2) the defendant is an American national, or (3) the defendant's conduct substantially and adversely affects an important American national interest, and that includes a distinct interest in preventing the United States from becoming a safe harbor (free of civil as well as criminal liability) for a torturer or other common enemy of mankind.*

The Supreme Court's general approach in restricting ATS litigation has been critiqued but is for now accepted as the state of law.[910] The scope of ATS litigation is severely limited from both substantive and territorial perspectives.[911] The ruling has resulted in backlashes in a number of other ongoing cases that have been either dismissed or vacated for reconsideration.[912] Thus it seems that the bar for overcoming the presumption against extraterritoriality and applying the ATS is set high.

In part due to *Kiobel* and in part due to other unanswered questions related to ATS, the eyes of United States human rights advocates have turned towards transnational torts.[913] With regard to state tort law, there is no presumption against extraterritoriality.[914] Key problems, however, include the variety of US jurisdictions with their own rules on matters ranging from the parameters of tort to choice of law.[915] Thus no single federal approach remains except in limited cases, such as e.g. torture and corruption.[916]

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[909] For discussion, see (including discussion of Kennedy's concurring opinion) Wuerth 609–612.
[910] For critique, see e.g. Louise Weinberg, "What We Don't Talk About When We Talk About Extraterritoriality: Kiobel and the Conflict of Laws" (2014) 99 Cornell Law Review 1471. For reflexion more generally, see *Agora: Reflections on Kiobel. Excerpts from the American Journal of International Law and AJIL Unbound*, available at https://www.asil.org/sites/default/files/AGORA/201401/AJIL%20Agora-%20Reflections%20on%20Kiobel.pdf.
[911] Alford 1160.
[912] Enneking, "The Future of Foreign Direct Liability? Exploring the International Relevance of the Dutch Shell Nigeria Case" 50–51.
[913] Whytock, Childress III and Ramsey; van Dam, "Tort Law and Human Rights: Brothers in Arms On the Role of Tort Law in the Area of Business and Human Rights."
[914] Alford 1161.
[915] Alford.
[916] And with regard to terrorism, there is merely a federal waiver of immunity pointing towards the application of state law. Alford 1111.

4.3.2.3 The Rest of the World: No Detour to Statute on the Route to Transnational Torts

Due to the lack of legislation similar to the ATS, in most other jurisdictions foreign direct liability has focused on general tort/delict law. The benefits of tort law include its generality and malleability: Most events raising questions of civil wrongs can be connected to remedies under tort or delict.[917] A particular feature of the rise of general tort law based foreign direct liability is its focus on jurisdictions within the Commonwealth of Nations. Most claims have concerned suing parent companies domiciled in England, Canada, or Australia.[918] The focus of these claims has been, for example, the liability of English parent companies for their subsidiaries operating in South Africa/Namibia,[919] Australian parent companies for their subsidiaries in Papua New Guinea[920] and the Congo,[921] and Canadian parent companies for their subsidiaries in Guyana[922] and the Congo.[923]

Similarly to ATS litigation, a key point in practically all these cases is that it is difficult to find a single fully successful judgment regarding a case of foreign direct liability. For example in England a number of procedural victories have paved the way for eventual foreign direct liability.[924] Despite partial successes, however, most of these cases have ultimately either been dismissed or settled before a judgment on the merits, similarly to most other instances of foreign direct liability.[925] In both cases of dismissal and some of the settled cases, courts have tentatively taken up the general possibility of foreign direct liability claims.[926]

What currently seems to be the most important ruling under English law is that of *Chandler* v *Cape plc*.[927] *Chandler* v *Cape* is not *per se* a foreign direct

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[917] van Dam, "Tort Law and Human Rights: Brothers in Arms On the Role of Tort Law in the Area of Business and Human Rights" 233–234.
[918] Muchlinski 686.
[919] *Connelly* v *RTZ Corporation* [1998] AC 854, *Ngcobo* v *Thor Chemicals Holdings Ltd* (unreported 1996) (Maurice Kay J); Sithole v Thor Chemicals Holdings & Desmond Cowley (2000 WL 1421183); *Lubbe* v *Cape Plc* [1998] CLC 1559 (CA); [2000] 1 WLR 1545 (HL); *Vava* v *Anglo American South Africa Ltd* (Claim No HQ11X03245).
[920] *Dagi* v *BHP* [1997] 1 VR 428.
[921] *Association Canadienne Contre L'impunité* v *Anvil Mining* [2011] JQ No 4382, 500-06-000530-101.
[922] *Recherches Internationales Quebec* v *Cambior Inc* [1998] QJ No 2554 (Superior Court of Quebec, Canada).
[923] *Association Canadienne Contre L'impunité* v *Anvil Mining* [2011] JQ No 4382, 500-06-000530-101.
[924] E.g. regarding forum non conveniens, the House of Lords has found England to be a viable forum in relation to South Africa in *Lubbe* v *Cape*, [2000] 1 WLR 1545 (HL) and in relation to Namibia in *Connelly* v *RTZ Corporation* [1998] AC 854.
[925] E.g. *Connelly* v *RTZ* was dismissed (*Connelly* v *RTZ Corporation Plc* (unreported December 1998); (1999) CLC 533)), while *Lubbe* v *Cape* was settled. Generally on these cases, see Meeran 28–37.
[926] See Meeran 7–8.
[927] [2012] EWCA Civ 525. For comments on the case, see e.g. Martin Petrin, "Assumption of Responsibility in Corporate Groups: Chandler v Cape plc" (2013) 76 Modern Law Review 603; Andrew Sanger, "Crossing the Corporate Veil: The Duty of Care Owed by a Parent Company to the Employees of

liability claim but instead a domestic claim between a parent company and an employee of its now defunct domestic subsidiary. Despite this, *Chandler* v *Cape* builds upon earlier foreign direct liability cases and finds that in principle a parent company may be under a tortious duty of care towards its subsidiaries' employees. This principle is not limited to the foreign or domestic parameters of a case.

In *Chandler* v *Cape*, the English Appeals Court accepted that under specific circumstances a parent company may owe a duty of care towards its subsidiaries' employees. This duty sounds in tort, thus specifically not taking the form of 'vicarious liability or agency or enterprise liability', i.e. specifically not piercing the corporate veil. The existence of such a duty depends on the so-called *Caparo* test.[928] As per Arden LJ:[929]

> *In summary, this case demonstrates that in appropriate circumstances the law may impose on a parent company responsibility for the health and safety of its subsidiary's employees. Those circumstances include a situation where, as in the present case, (1) the businesses of the parent and subsidiary are in a relevant respect the same; (2) the parent has, or ought to have, superior knowledge on some relevant aspect of health and safety in the particular industry; (3) the subsidiary's system of work is unsafe as the parent company knew, or ought to have known; and (4) the parent knew or ought to have foreseen that the subsidiary or its employees would rely on its using that superior knowledge for the employees' protection. For the purposes of (4) it is not necessary to show that the parent is in the practice of intervening in the health and safety policies of the subsidiary. The court will look at the relationship between the companies more widely. The court may find that element (4) is established where the evidence shows that the parent has a practice of intervening in the trading operations of the subsidiary, for example production and funding issues.*

Chandler v *Cape* establishes relatively non-rigid guidelines for establishing a parent company's duty of care towards its subsidiaries' employees. Similar tendencies can be traced in some of the state jurisdictions of the United States under either 'Good Samaritan' or general contractor duties.[930] Thus arguments

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its Subsidiary" (2012) 71 Cambridge Law Journal 478. For the potential applicability of the case in foreign direct liability contexts, see e.g. Vibe Ulfbeck and Andreas Ehlers, "Tort Law, Corporate Groups and Supply Chain Liability for Workers' Injuries: The Concept of Vicarious Liability" (2016) 13 European Company Law 167; Rott and Ulfbeck; Meeran.

[928] Discussed in Subsection 2.2.2.

[929] [2012] EWCA Civ 525, § 80.

[930] Phillips and Lim 351–368.

along the lines of *Chandler* v *Cape*, as developed by further caselaw,[931] could be seen to form the current state of art of foreign direct liability, and potentially also other forms of liability under tort under both English and related common law.

Some foreign direct liability claims have also been taken up in non-Commonwealth jurisdictions. In particular, the first foreign direct liability claim in the Netherlands, the case of *Oguru, Efanga & Milieudefensie* v *Royal Dutch Shell and Shell Petroleum Development Co Nigeria Ltd*, has raised discussion.[932] This case is similar to the *Kiobel* action in the United States in that it concerned the actions of Shell and its subsidiaries in Nigeria. Unlike *Kiobel* which was based on ATS and tried in a jurisdiction foreign to the parties, *Milieudefensie* sounded in tort and was pursued in the domicile of the parent company. Ultimately, while Kiobel was thwarted on procedural grounds, in *Milieudefensie* the Dutch courts ruled also on substance.

The Dutch trial court, applying Nigerian law, found no liability in the parent company. Shell's Nigerian subsidiary, however, was found liable on one count focusing on the negligent securing of a well-head that was sabotaged, leading to environmental damage. Under Nigerian law sabotage of well-heads typically removes liability from its operator, but for this one count the Dutch court found that Shell's Nigerian subsidiary had not secured the well-head appropriately. In the subsequent appeal the plaintiffs had procedural successes in relation to the production of evidence that was unprocurable in the first instance and in the appeals court maintaining jurisdiction over not just Shell but also Shell's Nigerian subsidiary. The case opens up a number of interesting possibilities and verifies the potential threat posed by foreign direct liability to corporations beyond the United States and the Commonwealth.

In particular, because of the general principle of *lex loci damni* the focus of the *Milieudefensie* case has been on using Nigerian common law as the substantive law governing tort litigation even when the forum and, subsequently, procedural law have reflected the civilian traditions of Dutch law. This has led to the approach of *Chandler* v *Cape* being directly referred to in *Milieudefensie*.[933] This highlights on the one hand the challenges of the current

[931] For example *Thompson v The Renwick Group Plc* [2014] EWCA Civ 635.

[932] For the trial court phase, *Oguru, Efanga & Milieudefensie* v *Royal Dutch Shell Plc and Shell Petroleum Development Co Nigeria Ltd* (No. 330891/ HA ZA 09-579 2009). For discussion, see Enneking, "The Future of Foreign Direct Liability? Exploring the International Relevance of the Dutch Shell Nigeria Case." For the appeals court phase, *Oguru, Efanga & Milieudefensie* v *Royal Dutch Shell Plc and Shell Petroleum Development Co Nigeria Ltd*, Gerechtshof den Haag, 18.12.2015 / 200.126.804-01 200.126.834-01 (including English translation), and see e.g. Friends of the Earth International, 'Outcome appeal against Shell: victory for the environment and the Nigerian people – Friends of the Earth Netherlands', December 18, 2015, available at http://www.foei.org/news/outcome-appeal-shell-victory-environment-nigerian-people-friends-earth-netherlands.

[933] Enneking, "The Future of Foreign Direct Liability? Exploring the International Relevance of the Dutch Shell Nigeria Case" 52.

regime of choice of law (at least in Europe) and on the other the *potential* of the English ruling in *Chandler* v *Cape* to affect the common law tort of negligence in jurisdictions beyond England, such as Nigeria.

Moving beyond the common law line of tort cases and *Milieudefensie*, cases on foreign direct liability seem meagre. For example, there seem to be no such cases in Germany[934] and similarly few elsewhere.[935] Scholars have, however, discussed the possibility of such claims in many European jurisdictions, in particular concluding that civil law concepts of delict, if they would be applicable, could offer more fruitful chances of success for such claims.[936]

4.3.2.4 Extraterritorial Liability of Subsidiaries in their Parent Company's Jurisdiction: A Further Permutation of FDL?

Following the *Milieudefensie* case, a potential subgroup of FDL-claims might focus on *subsidiaries* being held liable in their parent companies' jurisdictions for acts committed in their own jurisdiction. Here, the existence of a parent-subsidiary relationship would become the only reason for trying a case outside its normal forum.

For example, the first instance in the *Milieudefensie* case found the Nigerian subsidiary of Shell liable even when the parent company was not. The reason the Dutch trial court had accepted jurisdiction over the Nigerian subsidiary in the first place was because under European forum rules it had jurisdiction over the *parent company* domiciled in the Netherlands. According to Enneking:[937]

> *The court, however, based its assumption of jurisdiction over [claims against a foreign subsidiary] on a rule of international jurisdiction that allows Dutch courts to exercise jurisdiction over claims against co-defendants in proceedings in which they have jurisdiction with respect to one of the defendants, if the causes of action against the different*

[934] Beyond supply chain liability cases, which are here discussed below as distinct from foreign direct liability. See Wesche and Saage-Maaß 371–372.

[935] E.g. Larsen sees that no foreign direct liability cases have been filed in Denmark, Norway, or Sweden with the exception being *Arica* v *Boliden*, which I do not classify as a foreign direct liability case but instead subcontractor liability. See Larsen.

[936] For the Netherlands, see e.g. Enneking, "The Future of Foreign Direct Liability? Exploring the International Relevance of the Dutch Shell Nigeria Case"; Enneking, "Dutch case note"; Nicola Jägers and Marie-José van der Heijden, "Corporate Human Rights Violations: The Feasibility of Civil Recourse in the Netherlands" (2008) 33 Brooklyn Journal of International Law 833. For Germany, see Wesche and Saage-Maaß. For France and Belgium, see Siel Demeyere, "Liability of a Mother Company for Its Subsidiary in French, Belgian, and English Law" (2015) 23 European Review of Private Law 385. For Sweden and to some extent the rest of Scandinavia, see Larsen.

[937] Enneking, "The Future of Foreign Direct Liability? Exploring the International Relevance of the Dutch Shell Nigeria Case" 46.

defendants are connected in such a way that a joint consideration is justified for reasons of efficiency.

The parent company, however, was acquitted from liability during the proceedings. Thus through this jurisdictional loophole the subsidiary was found liable in a foreign jurisdiction for its acts in its home jurisdiction. The appeals court has upheld the trial court's finding of jurisdiction.

Taking this line of argument further, in *Vava* v *Anglo American South Africa Ltd*,[938] a complaint was raised in England against a defendant who was a wholly owned subsidiary of the London based Anglo American Plc. The claimants argued that the 'central administration' or 'principal place of business' of the defendant, i.e. the subsidiary, was comparable to the domicile of the parent company.[939] Following this, EU choice of forum rules would allow the claim against the subsidiary to be filed in England.

Cases like *Milieudefensie* and *Vava* v *Anglo American* do not exactly fit the traditional categorization of foreign direct liability claims in that focus is on directly litigating subsidiaries abroad instead of litigating parent companies for their foreign subsidiaries' actions. A primary reason for trying such cases in a parent company's jurisdiction is, however, the basic company law based connection between parent companies and their subsidiaries, and thus these types of claims may be classified as a further offshoot to foreign direct liability. These claims entail additional jurisdictional complications, e.g. a requirement that parent companies are on some level included in the claim in order for jurisdiction to be found, and thus they are probably limited in nature.

4.3.3 Transnational Liability for One's Own Acts

The principle idea behind foreign direct liability is that parent companies retain control over their subsidiaries and therefore should also be responsible for their actions, thus equating foreign subsidiaries' actions with those of parent companies. On the other hand, actors can also be directly responsible for damage they cause in foreign jurisdictions. However, due to the proliferation of complex corporate and contractual structures, it may be difficult to find a case where the acts of a corporation are not attributable at least in part to one or some of its subsidiaries or suppliers, thus fulfilling the criteria of foreign direct liability or supply chain liability. Indeed, one potential subcategory of such cases, suing subsidiaries in their parent's jurisdiction, was already mentioned as a possible subcategory of foreign direct liability above due to the inherent connection between the parent and subsidiary.

Another strand of claims includes suing actors in a jurisdiction to which they or the case have little or no ties. This is the case in many claims related to

[938] Claim No. HQ11X0324.
[939] For discussion, see Meeran 39.

the jurisdictional capture previously allowed by the ATS. In some of these cases the defendant may merely have ended up in the United States, such as in the case of private persons directly liable for crimes committed by corrupt governments, companies, or themselves. For example, ATS litigation is broadly seen to have started with the case *Filártiga* v *Peña-Irala*,[940] in which a Paraguayan police official who had ended up in the United States was there held liable for torture committed in Paraguay. Some cases may have even more meagre ties to the United States. In *Kiobel*, discussed above, the defendant's global corporate group extends into the United States, but the defendant companies (a Dutch and a Nigerian company), the plaintiffs (Nigerian private persons), and the acts on which the case was founded (alleged misdoings in Nigeria) bear little if any connection to the United States. Even post-Kiobel, theoretically an actor that was directly responsible for wrong-doings in another jurisdiction could be tried in the United States under the ATS *if* the *Kiobel* test of sufficient ties to the United States would be satisfied. Conceivably, also a corporation could be tried for its own actions abroad under the ATS, even though most common situations would probably focus on the actions subsidiaries or suppliers.

One strand of claims might involve liability for expertise in relation to a consulting actor operating abroad without recourse to a subsidiary or supplier. An example of a possible such case that has received broad publicity is that of *Sutradhar* v *NERC*.[941] That case concerned the construction of massive amounts of tubewells in Bangladesh in the 1980s and 1990s to guarantee clean water to local inhabitants.[942] The British Geological Survey, an arm of the British National Environment Research Council (NERC), had been commissioned to survey the efficiency of some of the tubewells. As the tubewells were found to be intact and funding was left over, they undertook a study of the hydrochemistry of the of the local aquifers, among others testing for substances toxic to fish and humans.[943] This study did not look for traces of arsenic. Later on, it came to light that about a third of the tubewells in Bangladesh produce arsenic-contaminated water, potentially harming millions of Bangladeshis.

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[940] 630 F.2d 876 (2d Cir 1980).

[941] *Sutradhar* v *Natural Environment Research Council* [2006] UKHL 33. See e.g. Peter J Atkins, M Manzurul Hassan and Christine E Dunn, "Toxic torts: arsenic poisoning in Bangladesh and the legal geographies of responsibility" (2006) 31 Transactions of the Institute of British Geographers 272; Enneking, "Dutch case note"; Marine Friant-Perrot, "Empoisonnement à l'arsenic par l'eau au Bangladesh: vers la mise en cause de la responsabilité des acteurs de l'aide au développement?" (2008) 16 European Review of Private Law 489.

[942] For background, see e.g. *Sutradhar* v *Natural Environment Research Council* [2006] UKHL 33, §§ 7–22,

[943] *Sutradhar* v *Natural Environment Research Council* [2006] UKHL 33, § 12.

A complaint was raised against NERC for alleged negligence, which Lord Hoffman in his House of Lords majority opinion found to revolve around either the existence of a duty to test for arsenic or misrepresentation in issuing a report that gave the impression that there was no arsenic in the water or that it was safe to drink.[944] In short, the House of Lords found that the context in which the report was created was not connected directly enough to a request for assessing the potability of the water in the tubewells. Thus the requirement of proximity was not fulfilled and no liability found. Apparently, if NERC had been *specifically* commissioned to evaluate the potability of the water *then* liability could have ensued. This approach has been severely critiqued.[945] In any case, it presents the possibility and challenges of actors being held liable for their acts abroad.

Even in cases related to the provision of expertise, such as auditing and inspections, most actors probably operate in complex contractual structures.[946] As already noted, 'direct liability' for one's own actors is generally difficult to separate from foreign direct liability due to the proliferation of corporate structures. Furthermore, the notion of direct liability does not seem as centrally related to questions of production liability in the sense of holding responsible actors who *organize their corporate or supply chain structures* in a specific way. In particular, even if procedural difficulties and challenges are set aside, suing for example Pakistani or Bangladeshi subcontractors in Western courts would probably have little practical result due to questions of solvency and *de facto* lack of control over operations. Thus, liability for one's extraterritorial actions or one's extraterritorial liability for its actions at home will not be further discussed here. Focus will instead turn to liability of buyers and contractors for their foreign subcontractors and supply chains.

4.3.4 Transnational Liability for Subcontractors

What I call 'liability for subcontractors' entails cases involving subcontracting to independent entities operating in foreign jurisdictions. Here, actors do not intend to extend their control over production undertaken by others. The mode of governing production is based on market-price mechanisms and using contractual arrangements as structural features that safeguard the buyer's end of a bilateral agreement and limit any liabilities arising from the actions of subcontractors. Liability for subcontractors is thus comparable to the use of corporate structures in limiting liability when special modes of control are not present.

[944] *Sutradhar* v *Natural Environment Research Council* [2006] UKHL 33, § 25.
[945] E.g. Atkins, Hassan and Dunn. (Though published before the House of Lords' judgment, based on the rulings of lower instances).
[946] Examples are provided by the currently ongoing cases of *Das* v *George Weston*, where Bureau Veritas' French parent is sued together with its US and Bangladesh subsidiaries, and a case related to the Tazreen factory fire in Pakistan, one strand of which focuses on suing an Italian auditing company.

Suppose, then, that injuries arise as a result of a company subcontracting work to a second company. The harm is caused because the subcontractor inadequately executes the subcontracted work, for example by disregarding law, human rights, or other relevant standards, or by failing to complete the task at all. *Prima facie* liability would be on the subcontractor who, in addition to its liability for harm caused, might be liable to the first company for any breach of contract that this entails.[947] In some cases, however, the first company might also be held liable. This includes in particular negligence in choosing one's subcontractor. Other forms of liability, in particular negligence in not controlling one's subcontractor, entail a measure of control and will be discussed in the following subsection on supply chain liability.

Some relatively high profile cases of transnational liability for subcontractors have been taken up by courts. These include in particular the different strands of the *Trafigura* case in England, the Netherlands, and France, the *DLH* case in France, and the ongoing *Arica Victims KB* v *Boliden Minerals AB* case in Sweden. Of these, *Trafigura* and *Arica* v *Boliden* revolve around the dumping of toxic waste, while *DLH* deals with purchases of timber from Liberian companies supporting Charles Taylor's government.

The *Trafigura* case, with multiple strands of litigation started in different jurisdictions, is a complicated matter. In short, balking at the price of treating a shipload of industrial waste in Amsterdam, the company Trafigura ordered its ship *Probo Koala* to sail to Côte d'Ivoire, where the handling of the toxic waste was outsourced to a Côte d'Ivoirian company that simply dumped the waste in sites in and around the city of Abidjan, causing a number of deaths and tens of thousands of injuries.[948] Trafigura avoided liability in Côte d'Ivoire apparently through a settlement including a 200 million trust for clean-up.[949] Nonetheless, a number of claims ensued in England, in the Netherlands, and in France.

The English strand of Trafigura focused on the liability of Trafigura for its handling of the toxic waste.[950] Allegedly it was well-known that no actors in Cote d'Ivoire at the time could handle such waste.[951] Furthermore, the company to which the waste was outsourced, Société Tommy, was apparently founded only after Trafigura had decided not to handle the waste in Amsterdam because of the costs that would be incurred in the Netherlands. Victims injured by the

[947] For discussion under the CISG, see e.g. Schwenzer and Leisinger.
[948] Lydia Polgreen and Marlise Simons, 'Global Sludge Ends in Tragedy for Ivory Coast', New York Times 2 October 2006, http://www.nytimes.com/2006/10/02/world/africa/02ivory.html.
[949] Lydia Polgreen, 'Ivory Coast: 2 Sentenced in '06 Scandal', New York Times October 23, 2008, http://www.nytimes.com/2008/10/24/world/africa/24briefs-2SENTENCEDIN_BRF.html.
[950] *Yao Essaie Motto v Trafigura*, High Court of Justice, Queen's Bench Division, No. HQ06X03370.
[951] Polgreen and Simons, 'Global Sludge Ends in Tragedy for Ivory Coast', New York Times 2 October 2006.

toxic waste sued Trafigura in England, following which Trafigura settled.[952] However, a part of this settlement was apparently embezzled by officials in Côte d'Ivoire, leading to further complications.[953] Similarly, another well-known subplot in the proceedings included Trafigura's attempted use of a so-called super injunction to hinder media from following the case.[954] An even further subplot of the English strand concerns claimant's costs.[955]

In the Netherlands, Trafigura was first fined for breaking environmental regulations by concealing the toxic nature of the cargo carried by the vessel *Probo Koala*.[956] Since then, a further claim has recently been raised in order to get compensation for a number of actors not covered by the English settlement. This case, however, is currently at an early stage with little information available. Similarly, in France a number of victims sued Trafigura for personal injury, but there seems to be little information easily available on this strand of the case.[957] In sum, however, it seems that Trafigura could have been held legally liable for outsourcing waste processing to a clearly incompetent foreign actor.

The Swedish case of *Arica Victims KB* v *Boliden Minerals AB* is relatively similar to Trafigura, however the allegations of wrongdoing continue to be contested in on-going court proceedings.[958] In 1985 the Swedish company Boliden contracted the treatment of toxic sludge residue from its refining processes to a Chilean company, Promel. Subsequently, however, the waste was dumped near the town of Arica. Desert winds allegedly blew the waste into the town, injuring its inhabitants. In 2007, a Chilean court found Promel liable but unable to compensate for damages because it had ceased to exit, and liability was placed on the State for not having implemented protective measures. The Swedish case focuses on recovering from Boliden the amount that the Chilean court found Promel liable for. The case currently revolves around whether Boliden acted negligently in trusting Promel's capabilities for taking care of the waste, in particular in light of its expert information on how and where the waste could be treated.

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[952] David Jolly, 'Ivory Coast Toxic-Dump Case Settled, Company Says', New York Times September 21, 2009, http://www.nytimes.com/2009/09/21/business/global/21iht-toxic.html.
[953] Adam Nossiter, 'Payments in Ivory Coast Dumping Case at Risk, Lawyer Says', New York Times November 4, 2009, http://www.nytimes.com/2009/11/05/world/africa/05trafigura.html.
[954] Noam Cohen, 'Twitter and a Newspaper Untie a Gag Order', New York Times October 18, 2009, http://www.nytimes.com/2009/10/19/technology/internet/19link.html.
[955] See *Yao Essaie Motto* v *Trafigura Limited*, [2011] EWCA Civ 1150. For an overview, see http://www.hendersonchambers.co.uk/resources/articles/court-of-appeal-judgment-in-trafigura2.
[956] Netherlands: Toxic Waste Case Is Settled, New York Times November 17, 2012, http://www.nytimes.com/2012/11/17/world/europe/trafigura-to-pay-fine-for-exporting-toxic-waste.html
[957] E.g. van Dam, "Tort Law and Human Rights: Brothers in Arms On the Role of Tort Law in the Area of Business and Human Rights."
[958] Generally, see Larsen. More up-to-date information on the case, including the claimants' complaint and the defendants' answer, are available at https://business-humanrights.org/en/boliden-lawsuit-re-chile.

Finally, complaints have been filed against the Danish firm DLH in France.[959] The case concerns allegations that DLH or its subsidiaries were involved in buying timber from companies sourcing illegal timber in Liberia during the Liberian civil war and as late as 2012.[960] The first claim has since been dismissed while the latter, concerning acquisitions made in 2012, is still on-going.[961] The latter claim has also resulted in the withdrawal of DLH's Forest Stewardship Council certificate.[962]

As suggested by the general focus of these kinds of cases on market-based governance, the role of contracts and contract law in these claims seems diminutive, similarly to the role of company law in relation to foreign direct liability claims. All the cases discussed here are ostensibly focused on the results of specific contracts. Trafigura and Boliden subcontracted the handling of toxic waste to Tommy and Promel respectively, while DLH bought timber from Liberian companies. Nonetheless, little focus is on the contractual relationship itself, primarily because it is not used to structure ongoing relationships but only to serve as a legal safeguard for maintaining agreed changes to existing rights positions. The role of contract law is limited to its role in *prima facie* serving to limit liability, similarly to the use of corporate entities in relation to foreign direct liability claims. Following this, focus has been on whether the defendant was negligent in trusting its subcontractor or supplier to undertake a task, whether the task is selling goods to the defendant or undertaking other actions on its behalf.

The lack of focus on dedicated contractual governance speaks against the use of contract law and for the application of tort/delict instead. There is for example no question that contractors would try to control or influence subcontractors in the diverse ways discussed in Chapter 3. The lack of control asserted by the underlying contractual relationships diminishes the potential of

[959] E.g. van Dam, "Tort Law and Human Rights: Brothers in Arms On the Role of Tort Law in the Area of Business and Human Rights" 236. For a timeline, see https://www.asso-sherpa.org/procedures-and-milestones-dlh-liberia.

[960] For a complaint concerning activities during 2000–2003, see Global Witness, 'International Timber Company DLH Accused of Funding Liberian Civil War', Press Release 18 November 2009, https://www.globalwitness.org/fr/archive/international-timber-company-dlh-accused-funding-liberian-war/ and for the later complaint Global Witness, 'Complaint Accuses International Timber Company DLH of Trading Illegal Timber and Funding Liberian War, Press Release 12 March 2014, https://www.globalwitness.org/fr/archive/complaint-accuses-international-timber-company-dlh-trading-illegal-timber-and-funding-0/.

[961] See Global Witness, 'Complaint Accuses International Timber Company DLH of Trading Illegal Timber and Funding Liberian War, Press Release 12 March 2014, note 2.

[962] Global Witness, Wartime Timber Company DLH Penalized for Trading Illegal Liberian Private Use Permit Logs, Press Release of February 13, 2015, https://www.globalwitness.org/fr/archive/wartime-timber-company-dlh-penalized-trading-illegal-liberian-private-use-permit-logs-0/ and Global Witness, Danish Timber Giant Kicked Out of Forest Stewardship Council Certification Scheme for Trading Illegal Timber, Press Release of February 12, 2015, https://www.globalwitness.org/fr/archive/danish-timber-giant-kicked-out-forest-stewardship-council-certification-scheme-trading/.

contract law to intervene. This in itself is of course not enough to fully rule out contractual claims under the parameters of legal systems that have a broader recourse to contract. Depending on applicable law, specific contractual remedies might be available, such as contracts with protective effects on third parties in Germany. Thus while foreign direct liability is restricted to tort, contract might in some cases be a viable option in relation to liability for subcontractors. Furthermore, liability for subcontractors could raise questions in relation to the effect of contractual arrangements on third parties similar to early notions of product liability.

Finally, I have not discussed in detail here the practical possibilities of establishing liability for subcontractors. It is clear that in particular under the common law this is not an easy task, as seen for example in the cases *Rahaman* v *J. C. Penney Companies* and *Das* v *George Weston Limited*. These are discussed in more detail in Subsection 4.3.5 because, while they were ultimately treated by courts as 'liability for subcontractor' type cases, I see them more reminiscent of supply chain liability cases and thus use them to highlight the potential of developing supply chain liability. Nonetheless these two cases portray very well the difficulties (if not often the impossibility) of pleading under the common law that a duty of care exists requiring an actor (say a lead firm) to protect others (say supplier employees) from harm caused by third parties (say suppliers).

4.3.5 Transnational Supply Chain Liability

What I call supply chain liability entails, similarly to liability for subcontractors, outsourcing production to foreign suppliers. The difference, then, is in the form of governance. Here, buyers specifically intend to extend control over outsourced production by the various means discussed in Chapter 3 under modular and relational governance. The explicit governance of outsourced production through contractual arrangements places the key focus of these kinds of cases firmly in the contractual arrangements used to govern supply chain wide production, as opposed to liability for subcontractors. This liability is arguably similar to foreign direct liability in that it is based on a buyer's control of its supply chain. Where the exact cut-off point between liability for subcontractors and supply chain liability is placed is ultimately arbitrary and depends on the parameters of individual legal systems.

A few cases have to date focused on the contractual responsibilities of buyers in governing their global supply chains.[963] The most well-known of

[963] Other than those discussed here, possibly related cases, such as *Rodriguez-Olvera* v. *Salant Corp*. No. 97.07-14605-CV (365th Dist. Ct. of Maverick County, Tex. 1999) (concerning an American buyer negligently providing a bus transfer service to its Mexican subsidiary supplier's employees, case settled during trial; see http://www.prnewswire.com/news-releases/mexican-workers-employed-in-american-owned-maquiladora-factory-win-unprecedented-30-million-settlement-74009787.html), are discussed for example by Phillips and Lim.

these is probably *Doe* v *Wal-Mart* in the United States. Otherwise, cases are meagre and hard to find. To provide some examples, I discuss an additional trial level court case from the United States that, despite the apparent existence of specific governance mechanisms, focuses on negligence, and two cases currently at the trial court level in Canada and Germany that employ a more control oriented approach. Generally, when compared to foreign direct liability, these claims are a much more recent trend, probably due to the comparative novelty of large scale supply chain governance when compared to the now relatively well-documented rise of complex equity driven corporate structures a hundred years earlier.

Currently the most well-known case on supply chain liability is that of *Doe* v *Wal-Mart Stores Inc*.[964] As the first widely recognized case to discuss a buyer's liability over the way it governs its supply chain, it has generated considerable discussion in scholarly literature.[965] To summarize, employees of Walmart suppliers located in Bangladesh, China, Indonesia, Nicaragua, and Swaziland sued Walmart in California.[966] While the claim covered actions under a number of legal theories, including contractual and tortious third-party beneficiary theories,[967] the crux of the complaint was that Walmart had failed to enforce its code of conduct which required suppliers to adhere with local laws and specific standards. Walmart's alleged failure resulted in problems to supplier employees, ranging from excessive work hours and denial of pay or other benefits to a lack of safety related equipment, discrimination, and physical abuse.

The courts rejected the claims.[968] For them, the result hinged to a great extent on the interpretation of the language used in Walmart's then applicable code of conduct. For example, in relation to the contractual third-party

[964] *Doe* v *Wal-Mart Stores, Inc*, 572 F.3d 677 (9th Cir. 2009). For a brief overview, see Revak 1647–8.

[965] For discussion on *Doe* v *Wal-Mart*, see, *following* the appeals court decision, Madeleine Conway, "A New Duty of Care? Tort Liability from Voluntary Human Rights Due Diligence in Global Supply Chains" (2015) 40 Queen's Law Journal 741, 774–777; Revak 647–648; Debra Cohen Maryanov, "Sweatshop Liability: Corporate Codes of Conduct and the Governance of Labor Standards in the International Supply Chain" (2010) 14 Lewis and Clark Law Review 397, 429–436; Julia S van de Walle, "Doe v. Wal-Mart. Revisiting the Scope of Joint Employment" (2009) 30 Berkeley Journal of Employement & Labor Law 589. For discussion *prior* to the appeals court decision, see Phillips and Lim; Katherine E Kenny, "Code or Conduct: Whether Wal-Mart's Code of Conduct Creates a Contractual Obligation between Wal-Mart and the Employees of Its Foreign Suppliers Code or Contract: Whether Wal-Mart's Foreign Suppliers" (2007) 27 Nw. J. Int'l L. & Bus. 453.

[966] Earlier stages of the case also included claims filed by employees of Walmart's competitors in Southern California.

[967] By the time the complaint reached the appeals court, the four legal theories in focus were the contractual third-party beneficiary theory, joint employment, negligence (including third-party beneficiary negligence, negligent retention of control, negligent undertaking, and common law negligence), and unjust enrichment through the suffering of supplier employees.

[968] The district court judgment is available at http://www.plainsite.org/dockets/ui5wusi0/california-central-district-court/jane-doe-i-et-al-v-walmart-stores-inc/ while the appeals court judgment is available at for example at http://digitalcommons.ilr.cornell.edu/cgi/viewcontent.cgi?article=1214&context=globaldocs.

beneficiary theory, both the federal district and appeals courts found that the language used by Walmart did not impinge on Walmart a duty to monitor suppliers but merely reserved the right for Walmart to do so.[969] On the other hand, what the appeals court saw as a lack of significant control (in relation to negligent retention of control and supervision) and the lack of any undertaking to protect the employees (in relation to negligent undertaking) were key reasons for it finding that there was no tort duty on Walmart to protect supplier employees. The result was dismissal for failure to state a claim.

Generally, the treatment of the case is illustrative of two challenges faced by an approach focusing on the buyer's role in governing its supply chain in the United States. First, US courts may be apt to interpret contractual language, such as a code of conduct included in a contract between a buyer and its supplier, restrictively unless there is clear indication that supplier employees were intended beneficiaries of the contract. Second, if the buyer is not directly controlling its supplier's employees, US courts may have a hard time finding a duty under tort that would place liability on the buyer. This is due in part to the general tendency of the common law to emphasize that mere passersby are under no duty to help others.[970]

A recent trial court case from Delaware, that of *Rahaman* v *J.C. Penney Company*,[971] is something of a mixed bag. The case focused on whether the defendant buyers were liable towards their supplier employees in relation to the Rana Plaza catastrophe. Crucially, the case seems to have revolved around what I coined as liability for subcontractors and thus could be placed in that category. On the other hand, while there is no explicit discussion over specific contractual arrangements in *Rahaman*, one of the defendants is Wal-mart, so probably *at least* a similar governance structure as discussed in *Doe* v *Wal-mart* was in place in relation to the defendants in *Rahaman*. The other defendants probably had similar governance structures in place at the relevant time.[972] Thus while

[969] The code contained wording such as 'Wal-Mart will undertake affirmative measures, such as on-site inspection of production facilities, to implement and monitor said standards'. But because this wording was found in a paragraph entitled 'Right of Inspection' and no adverse effects were stipulated on Wal-Mart if it did not monitor suppliers, the courts found that there was no promise on behalf of Wal-Mart to do so.

[970] E.g. Phillips and Lim 351. On the other hand, it seems that the situation in other common law jurisdictions has changed in particular following the ruling in *Chandler* v *Cape* discussed above in relation to foreign direct liability.

[971] *Rahaman et al.* v. *J.C. Penney Corporation, Inc. et al.*, C.A. No. N15C-07-174 MMJ (Del. Super. Ct. May 4, 2016). Defendants included J.C. Penney Corporation, The Children's Place, and Wal-mart Stores Inc. The judgment is available at http://courts.delaware.gov/Opinions/Download.aspx?id=240380. See also Leon Kaye, *U.S. Court Dismisses Rana Plaza* Lawsuit, TRIPLE PUNDIT 9 May 2015, http://www.triplepundit.com/2016/05/u-s-court-dismisses-rana-plaza-lawsuit/#.

[972] J.C. Penney's corporate social responsibility website does not seem to provide information on what kind of practices were in place at the time of Rana Plaza. Presumably, however, these were at least similar to *Doe* v *Wal-mart.* Post-Rana Plaza practices are described at

there seems to have been potential for a contractual focus similar to *Doe* v *Wal-mart*, the reason for focusing on tort without regard for contractual arrangements may have been due the outcome in precisely that case.

In sum, despite conflicting interpretations of both choice of law under Delaware law (in particular a so-called 'borrowing statute') and a Bangladeshi statute of limitations, the court found that the complaint fell under Bangladeshi law resulting in it being time-barred and thus dismissed. Nonetheless, the court discussed in some detail whether the defendants were under a duty of care towards the plaintiffs. Delaware law applied to the determination of whether the plaintiffs' complaint adequately alleged a claim for negligence or wrongful death. The plaintiffs focused on the 'peculiar risk' doctrine instead of arguing for a more general 'special relationship' between plaintiff and defendant. The court argued that the peculiar risk doctrine does not cover contractors' employees but only 'third party bystanders'. It furthermore noted that defendants 'could not be reasonably expected to take precautions against a building collapse when deciding to source garments from factories in Bangladesh' because the 'inadequacies in the construction of Rana Plaza are not peculiar to the business in which Defendants engaged'.[973] Finally, the court noted that no exceptions were applicable to the rule that general contractors owe no duties to protect independent contractors' employees, in particular because defendants 'neither voluntarily undertook any safety responsibilities, nor controlled the work being done in Rana Plaza in any fashion'. Other arguments for a duty of care, such as defendants' knowledge of unsafe working conditions in Bangladesh or that the employer caused or knew of and sanctioned illegal conduct, were summarily dismissed.

Following this, one could speculate on whether a contractual focus would have changed the result in *Rahaman*. Now, the plaintiffs' reliance on negligence brought into play Bangladeshi law. A contractual cause of action might have avoided the Bangladeshi statute of limitations by applying US law instead. However, it is unclear from the case whether the defendants could show requisite amounts of control in light of the ruling in *Doe* v *Wal-mart.*

In Canada, the Ontario Superior Court of Justice has recently ruled on another case related to the Rana Plaza disaster in *Das* v *George Weston Ltd*.[974]

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http://ir.jcpenney.com/phoenix.zhtml?c=70528&p=irol-govCSR&pageId=pg40036000011&ref=fatFooterCS?pageId=pg40036000011&ref=fatFooterCS.

[973] *Rahaman et al.* v *J.C. Penney Corporation.*

[974] *Das* v *George Weston Limited*, 2017 ONSC 4129 (Ontario Superior Court of Justice, No. CV-15-52662800CP, judgment on 5 July 2017). The defendants included George Weston Ltd, Loblaws Companies Ltd, Loblaws Inc, Joe Fresh Apparel Canada Inc, Bureau Veritas—Registre international de classification de navires et d'aeronefs SA, and Bureau Veritas Consumer Products Services (BD) Ltd. For early briefs, see Tyler Planeta, And Who is my Neighbour? Superior Court Rejects Proposed Class Action by Survivors of the Rana Plaza Disaster, 21 August 2017, at http://www.siskinds.com/rejected-class-action-rana-plaza/, and Jessica Lam and Nicole Henderson, Who Is My Neighbour? Ontario Court Rejects

Both *Das* and *Rahaman* are grounded in the same event, the Rana Plaza catastrophe. Nonetheless, it is unclear to what extent the contractual governance arrangements between the defendants in *Rahaman* are similar or dissimilar to those in place in *Das*. In any case, it seems that again little focus in the claim was on specific governance mechanisms. In *Das* the plaintiffs claimed negligence, breach of fiduciary duties, and vicarious liability of the defendants. In part the plaintiffs argued that the defendants could not have been unaware of the 'notoriously unsafe conditions of garment factories and buildings in Bangladesh', based on earlier deadly factory collapses in 2005 and 2006, over two hundred factory fires between 2006–2009, and efforts to build awareness of severe building safety issues.

At the same time, the plaintiffs stressed the role of contractual structures for limiting liability and a failure to ensure that CSR standards were enforced throughout this structure, in particular by not conducting effective audits and inspections that might have prevented the Rana Plaza collapse. The relevant standards of care referred to are based in particular on the defendant's contractual arrangements, but to an extent also on for example the MNE declaration, ISO 2600, and the OECD Guidelines.[975] The plaintiffs also extended the claim to Bureau Veritas and its relevant subsidiaries, which were tasked with auditing and inspecting Rana Plaza on behalf of other defendants. In particular, the plaintiffs claimed that at least Bureau Veritas' local subsidiary should have been aware of the conditions in Bangladesh and thus breached its duty to ensure the safety of workers by failing to appropriately audit factories.

In the end, the result was similar to *Rahaman* v *JCPenney*, which case was also cited by the Canadian judge. Again, following a lengthy argument over Bangladeshi statutes of limitations, the comparably short one year Bangladeshi limitation period for tort claims was seen to apply, time-barring the claims of the plaintiffs except for those who were minors at the time of the accident. And again, the court found that no duty of care required the defendants to act for the plaintiffs. First, the court found no assumption of risk on part of the defendants.[976] Lacking such, the question came down to whether a general duty of care existed that required an actor (the defendants) to intervene to protect another person (the plaintiffs) from a foreseeable risk of harm from third parties. Analysing both Bangladesh and Ontario common law, the court answered this in the negative.[977] Interestingly, the court did find that there were policy factors supporting a novel duty of care:[978]

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a Duty of Care to Employees of Foreign Suppliers, 24 July 2017, at https://www.lexology.com/library/detail.aspx?g=70f560a1-45fc-4459-85cd-25e19459d985.

[975] Statement of claim §§ 175–250, available at http://www.rochongenova.com/Fresh-as-Amended-Statement-of-Claim-filed-November-5-2015.pdf.

[976] E.g. §§ 417–418 and 425–439.

[977] §§ 395–559.

[978] § 451.

> *including: (a) accountability by Canadian corporations who enjoy substantial profits from holding themselves out as responsible corporate citizens; (b) preventing Canadian corporations from exploiting the regulatory vacuum in developing countries, particularly when doing so places vulnerable workers at risk of death or grave bodily harm, and (c) advancing the common law duty of care in a manner that reflects the globalized economy in which Canadian entities participate…*

Despite these policy factors, the court ultimately concluded that they were outweighed by other policy factors, such as the danger of indeterminate liability (floodgates!), fairness, and 'the law's hesitancies to impose liability for nonfeasance and to impose a duty of care to protect the plaintiff from harm caused by a third party'.[979] Similarly the court found that, lacking any direct control over the plaintiffs, the defendants did not owe them a fiduciary duty.[980]

Thus the starting point and outcome in both *Rahaman* and *Das* is excruciatingly similar. In both cases courts applied a comparatively short Bangladeshi statute of limitations to time bar the cases either wholly or for the most part, and then argued that in any case there is no duty of care under common law requiring actors to intervene on behalf of others even when the actor is aware of dangerous circumstances. Thus both *Rahaman* and *Das* were ultimately focused on 'liability for subcontractors' type pleadings in almost exactly the same factual scenario. If anything both cases serve to highlight the challenges of negligence claims where buyers exercise little control over suppliers except for requiring basic compliance and attempting to verify this through outsourced monitoring.

In Germany, the case of *Jabir* v *KiK*, currently at trial, concerns Pakistani claimants suing the retailer KiK for liability over a deadly fire at its supplier's factory in Pakistan.[981] Relatively little can be said about the case as of now as it has to date only resulted in one procedural order. Nonetheless, that procedural order, on costs, is promising in itself and the case may also generally highlight a more governance-oriented approach to litigation than *Rahaman* or *Das*.

In sum, a deadly fire at the supplier Ali Industries' Tazreen factory in Pakistan resulted in casualties and injuries. The German company KiK was apparently the principal buyer of products manufactured at the Tazreen factory.

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[979] § 452.
[980] §§ 560–589.
[981] *Jabir et al.* v *KiK Textilien und Non-Food GmbH*, LG Dortmunt, 7 O 95/15 (pending). Generally on the case, see Wesche and Saage-Maaß. For updates, see the European Center for Constitutional and Human Rights website 'Paying the price for clothing factory disasters in south Asia', available at https://www.ecchr.eu/en/our_work/business-and-human-rights/working-conditions-in-south-asia/pakistan-kik.html.

In addition to criminal investigations regarding the Ali Industries in Pakistan[982] and proceedings in Italy against RINA, the Italian audit company that apparently had certified the factory as safe a few weeks before the fire,[983] the plaintiffs sued KiK for its role, as a buyer, in failing to ensure necessary safety requirements at its suppliers' factories.

Due to a tort based approach, the applicable law for the civil action against the buyer is Pakistani law. Here, however, the plaintiffs seem to emphasize the buyer's control via various contractual arrangements. In particular, they utilize English and Indian common law developments, probably *Chandler* v *Cape*, in a supply chain perspective under Pakistani common law:[984]

> *We are basing the lawsuit on current developments in the common law that have been consolidated by Pakistani, Indian and British courts. These court judgments increasingly take account of modern economic structures: The courts see it as appropriate to impose liability for buyer companies where there was a sufficiently close relationship between the buyer and the producer company. Since the Pakistani factory produced for KiK almost exclusively and because KiK has repeatedly made assurances that they regularly visit all their suppliers and control them personally, the business ties between KiK and the Pakistani factory are to be seen as strong and sufficiently close.*

That case cleared one procedural hurdle when the Dortmund Regional Court in German court granted legal aid to the Pakistani claimants, thus allowing the case to proceed.[985] While the granting of legal aid often means that courts judge a claim to be not without merit, in this case the practice may be more related to the challenges of arguing over Pakistani law in front of a German court. Since the procedural ruling KiK has agreed to paying USD 5,15 million in damages to those impacted by the fire. Despite the settlement the lawsuit seems to be continuing, as KiK has not acknowledged its responsibility or accepted to paying damages for pain and suffering as requested by the

[982] See European Center for Constitutional and Human Rights, Criminal Proceedings against Ali Enterprises in Pakistan, https://www.ecchr.eu/en/business-and-human-rights/working-conditions-in-south-asia/pakistan-kik/proceedings-in-pakistan.html.
[983] See European Center for Constitutional and Human Rights, Factory Fire in Pakistan: Criminal investigations into RINA in Italy, https://www.ecchr.eu/en/business-and-human-rights/working-conditions-in-south-asia/pakistan-kik/proceedings-in-italy.html.
[984] European Center for Constitutional and Human Rights, 'Q&A on the Compensation Claim against KiK', under the heading 'On what basis are victims suing in Germany?', available at https://www.ecchr.eu/en/our_work/business-and-human-rights/working-conditions-in-south-asia/pakistan-kik/q-a-compensation-claim-against-kik.html. More generally, see the plaintiffs' *Legal Opinion on English Common Law Principles on Tort* from 7 December 2015.
[985] Landgericht Dortmund, PRESSEMITTEILUNG 30 August 2016, available at http://www.lg-dortmund.nrw.de/behoerde/presse/Pressemitteilungen/PM-KiK_docx.pdf.

claimants.[986] It remains to be seen whether the end result with regard to the finding of a duty of care will be similar to *Rahaman* and *Das*, but in any case it seems that the plaintiffs are attempting a *Chandler* v *Cape* type approach focusing on the negligent governance of KiK.

For now, the number of transnational supply chain liability claims is meagre. As a case in point, of the four cases discussed here at least two have failed to even point towards a governance mechanism strongly enough that the court in question would consider it, focusing instead on more traditional common law analyses of whether a duty of care existed to require actors to help others. But while there seems to be no successful litigation to refer to in relation to supply chain liability, the deeper imbrication of claims with contractual governance arrangements could nonetheless have a major effect on litigation for two particular reasons.

The first, and primary, driver behind this is the continuous development of governance mechanisms, as seen in Chapter 3. In *Doe* v *Wal-mart*, courts interpreted the governance mechanisms as non-binding, in particular by arguing that Wal-mart *reserved the right* to inspect supplier factories but was not obligated to do so. In current circumstances, following recent developments in relation to governance mechanisms, such an interpretation becomes strenuous. The Alliance for Worker Safety in Bangladesh, in which Wal-Mart is engaged post-Rana Plaza, much more clearly places on Wal-Mart a specific duty to inspect and remedy supplier factories. If *Doe* v *Wal-mart* had revolved around such as mechanism, the outcome could well have been different under contractual, tortious, or any of the other theories of liability that plaintiffs tried in that case.

Another driver is that under supply chain liability contractual causes of action most clearly offer an alternative to tort/delict. As seen in Chapters 1 and 2, both are typically intertwined in relation to governing private ordering: Depending on the legal system, either can have generally similar potential within a legal system. However, *in a transnational context* the choice of action, whether contact or tort, entails crucial differences in relation to the three fundamental topics of private international law; choice of forum, choice of law, and enforceability. Under the principle of *lex loci damni* under tort law, tort claims are often resolved under the law of the place where the damage occurred, such as in the *Das*, *Rahaman*, and *KiK* cases discussed above. If a contract cause of action were chosen instead, this picture could change dramatically and focus instead on the law applicable to the contract. For example in the *Doe* v *Wal-Mart* case the applicable law, at least relating to

[986] European Center for Constitutional and Human Rights, 'Paying the price for clothing factory disasters in south Asia', available at https://www.ecchr.eu/en/our_work/business-and-human-rights/working-conditions-in-south-asia/pakistan-kik.html.

grounds of the action founded in contract, was American.[987] Thus a tangible contractual nexus might lead to crucial differences in relation to private international law, with possible benefits not only in relation to substantive issues, such as burdens of proof and limitation periods, but also in relation to procedural factors such as measuring damages and, consequently, recoverable costs.[988]

4.3.6 What Difference a Contract Makes

All these four different types of production liability, 'foreign direct liability', transnational liability for one's own acts, transnational liability for subcontractors, and transnational supply chain liability, seem to provide if not outright possibilities for successful litigation then, at the least, a tangible threat of litigation towards parent companies, entrepreneurs, contractors, and buyers.[989] This increasing threat is reflected in a meagre but growing collection of cases resulting in a number of successful or partially successful judgments and settlements and in scholars arguing for an expansive interpretation of existing caselaw,[990] but in particular also in the development of governance mechanisms discussed in Chapter 3.

As I have shown, the primary difference between different types of production liability is the nature of the legally relevant relationship and its potential effects in a transnational context. While all these types could be transferred into domestic contexts, for the purposes of this dissertation I focus in particular on the potential of governance through contract to modify the parameters of transnational litigation such as forum, applicable law, and enforcement. Thus, unlike some earlier scholars, it is crucial to highlight the possible differences between different forms of production liability and not to equate them with foreign direct liability.

In particular, this approach highlights the contractual foundations of supply chain liability and, to an extent, liability for subcontractors. Company law, which creates the foundational structure necessitating foreign direct liability, seems now to have little relevance for transnational torts which can be used to override its structures as established under foreign direct liability. Contrary to the relatively weak role of company law, the law of tort/delict has much more deference towards the private ordering of contract which provides the

[987] The plaintiff and defendant could not agree whether this was California or Arkansas law, but for the purposes of the case the court found that both accepted the use of the Restatement Second of Contract and thus the choice of law question was not pursued further.
[988] See Subsection 4.2.3.
[989] As already noted in Subsection 4.3.1, my focus here is not on other types of liability or responsibility that could fall under the scope of production liability such as deceptive advertising or investment practices or soft law such as the Specific Instance Procedure of the OECD Guidelines for Multinational Enterprises.
[990] E.g. Rott and Ulfbeck 435–436; Conway 784–785; Meeran 23–24; van Dam, "Tort Law and Human Rights: Brothers in Arms On the Role of Tort Law in the Area of Business and Human Rights" 253–254; Maryanov; Phillips and Lim 377–378.

foundational structure necessitating supply chain liability. Thus while under foreign direct liability tort seems to be superior to company law, under supply chain liability tort may be superseded by a deference towards contract that can replace the status quo of private law liability or relocate a legal relationship to a specific jurisdiction through the power of private agreement.

Key problems arising out of contractually focused modes of production liability are the nature of relationships beyond privity, cases of conflict of contracts and the legal construction of the contents of the relevant relationship, and the use of private ordering to limit liability materially and procedurally. These, alongside failures in effectively regulating supply chains, are the focus of the next and final section of this chapter.

4.4 Supply Chain Liability and the Implications of a Contractual Governance Nexus

4.4.1 The Contractual Core of Supply Chain Liability

The contractual focus of supply chain liability, as opposed to the use of tort/delict to overcome corporate structures under foreign direct liability, can have major and different impacts on liability in both domestic and transnational contexts. Within the confines of this project I cannot delve deep into the parameters of specific legal systems. Arguably such an approach would not be particularly useful either at this point. This is, firstly, because preliminary forays made by others into the dogmatics of supply chain liability are already available, and, secondly, because relevant caselaw, in particular in transnational contexts, is unavailable. For me, the question that remains is what exactly is the role of the contractual nexus in supply chain liability. The aim of this final section is to offer some tentative answers to the role and potential effects of the contractual foundations of supply chain liability.

As seen in Chapter 2, contractual foundations were crucial for the formation of product liability law as we know it. Without cross-pollination between contract and tort/delict, it would be difficult to imagine strictish liability extending beyond privity in distribution chains the way it now does. Following this line of thought, it might be conceivable to think about a similar cross-pollination again resulting in a strictish form of production liability, such as the type discussed in Section 4.2. In relation to *supply chain liability* this might even be doctrinally simpler than in relation to product liability. In particular, under product liability the question revolved around ’inventing’ new types of warranties tied to products sold beyond privity or otherwise tweaking existing forms of liability. In relation to supply chain liability, we are already clearly dealing with contracts that are specifically intended to extend their governance effects beyond privity.

In relation to production liability generally, however, the notion of establishing strict liability by reference to contract is problematic even when leaving aside arguments related to policy and global coordination. Production liability as understood here extends not only to contractually structured supply chains but also to production structured through equity ownership. A unitary approach to production liability would require imposing strict liability not only in contractually structured supply chains but also on parent companies on behalf of their subsidiaries' actions. Such a discussion is beyond this dissertation except for noting that if no unitary approach to production liability is found, then any differences between foreign direct liability, in equity ownership contexts, and supply chain liability, in contractual governance contexts, could end up causing an imbalance in how the two forms of structuring production are utilized.

A stricter form of liability in relation to supply chain liability might nonetheless be possible if contractual theories of liability are applicable, as they might well be due to the existence of a contractual governance nexus. Founding liability in a contractual nexus could also make a broader recovery of damages possible, either via the use of contract under legal systems that do not generally allow for the recovery of pure economic loss under tort/delict or, if tort is opted for, by reference to special duties of care sounding in tort but arising out of contract.[991] In relation to transnational litigation, however, a most crucial outcome of litigation falling under contractual theories relates to private international law. Finally, despite the plurality of possible causes of action, the general applicability of a contractual nexus might be evaluated by a trans-substantive tool such as the framework proposed by Teubner. These themes are discussed in Subsection 4.4.2.

Whatever the nature of liability, there are bound to be conflicts related to the many underlying contracts of a supply chain and the possible non-contractual but contractually founded relationships between non-privy actors. These conflicts reflect in particular on how the relationship founded in the governance mechanism is construed in relation to the involved contracts and other legally relevant relationships. A particular problem, related to not only the nature of liability but to the construction of its scope and content, relates to whether the governance mechanism can be separated from any individual contract. To resolve the issue, a certain cross-pollination of contract and tort/delict in a manner similar to the development of product liability seems unavoidable. This issue is discussed in Subsection 4.4.3.

A particular method for avoiding uncertainty about the nature and scope of liability could be to resort to special contractual arrangements that capture the

[991] In relation to recovery of pure economic loss contract is per se not necessary, as this is inherently possible under e.g. French delict and possible via modified duties of care under English tort law.

governance mechanism within the scope of a specially drafted governance contract that is binding on the parties. To an extent, this avoids ambiguities as to the legal effects of the governance mechanism. On the other hand, such mechanisms can specifically be used to control liability over governance. These issues are discussed in Subsection 4.4.4.

Finally, Subsection 4.4.5 concludes with some possible problems raised in business and human rights literature related to duties of care founded in private governance mechanisms. From this perspective, a general duty of care that would govern production liability or at least supply chain liability would be preferable. However, I argue that private governance, and basing liability on private governance mechanisms, will retain its importance in relation to supply chain liability.

4.4.2 A Plurality of Form: Tort, Contract, or Something Else as the Foundation for Liability?

Numerous different legal means have been attempted or proposed for establishing a buyer's liability over its supply chain. Theories that have been or are being pleaded in transnational supply chain liability cases include the theory of third party beneficiaries to a contract,[992] negligent breach of duty,[993] unjust enrichment,[994] joint employment,[995] breach of fiduciary duty,[996] and vicarious liability.[997] Apart from specific cases, scholarship has proposed further mechanisms. These include promissory estoppel in the United States,[998] the German doctrine of contracts with protective effects on third parties,[999] and negligence for both control and omissions under different civil law jurisdictions.[1000]

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[992] E.g. *Doe* v *Wal-mart*, §§ 2–4. For scholarly discussion in the United States, see e.g. Phillips and Lim 368–375.

[993] E.g. *Doe* v *Wal-mart*, §§ 8–11; where third-party beneficiary negligence, negligent retention of control, negligent undertaking, and common law negligence were attempted. For scholarly discussion in the United States, e.g. Phillips and Lim focus on so-called Good Samaritan duties and general contractor duties. See Phillips and Lim 351–368. Apparently also *Jabir* v *KiK*, based on Pakistani common law, uses a negligence approach. More generally, the tort of negligence as developed under foreign and domestic direct liability, in particular in *Chandler* v *Cape*, seems promising in relation to torts in jurisdictions following the common law. On the other hand, Beckers sees the negligent performance of a service as relevant here under English law. Beckers.

[994] E.g. *Doe* v *Wal-mart*, §§ 5–7. Generally Bix 42–43.

[995] E.g. *Doe* v *Wal-mart*, §§ 12–13. Rogers critiques the 'joint employer' approach in domestic supply chains, advocating for negligence instead. Brishen Rogers, "Toward Third-Party Liability for Wage Theft" (2010) 31 Berkeley Journal of Employement & Labor Law 1. On the application of joint employment theories in Doe v Wal-mart, see Walle.

[996] E.g. *Das* v *George Weston.*

[997] E.g. *Das* v *George Weston.*

[998] Phillips and Lim 375–377.

[999] Beckers.

[1000] For Germany, see Wesche and Saage-Maaß 375–379. For the Netherlands, see Enneking, "The Future of Foreign Direct Liability? Exploring the International Relevance of the Dutch Shell Nigeria Case."

The discussions cited in the previous paragraph have focused primarily on a business and human rights context, even when the discussions on underlying liability are not thus limited.[1001] Moving beyond a CSR context, it is more difficult to find focused discussions or examples of supply chain liability.[1002] One clear exception is Teubner's extensive discussion of various alternatives for holding actors in networked structures liable beyond privity under German law, ranging from negligence to various contractual means such as contracts with protective effects for third parties and corporate law.[1003] Teubner focuses on production structures such as virtual enterprises, franchising, and just-in-time, which he sees as formed through 'connected contracts'. While unable to come to any conclusive conclusion about the nature of liability in such situations, Teubner sees that three factors are crucial for finding liability *within* a networked structure between actors not party to the same contract. These are 'the mutual referencing of contracts to one another', i.e. both actors' are party to some contract that through a chain of contractual references is connected to the other; 'association with system purpose', e.g. in relation to the theme of this dissertation these might include maintaining network wide cost-management, worker safety, or ethical standards; and 'factual co-operation', that is actually working towards the system purpose.[1004] While Teubner draws these factors from a legal-sociological evaluation of German law, I have elsewhere argued that they could be used as a basis for a trans-substantive framework for discussing liability without reference to the parameters of any specific legal system.[1005]

Here at least, I will not go further in relation to different possible causes for supply chain liability. Until there is any consorted effort to produce supranational legislation akin to the example of product liability, the form of liability will depend on the parameters of the underlying legal system. But however the nature of liability is ultimately construed, its locus in supply chain liability lies in the contractual nexus underlying governance in supply chain liability. This can have a crucial effect on the different parameters of liability.

First, if a contractual cause of action is found to apply, this could ease plaintiffs' burdens of proof in relation to a mere action under tort/delict.

Regarding French and Belgian law, Demeyere has discussed general approaches to delict in corporate groups which might be translatable to supply chain contexts. Demeyere 392–394.

[1001] E.g. Phillips and Lim discuss a wide range of cases related more to 'normal' business contexts rather than business and human rights *per se*. Phillips and Lim.

[1002] Probably for the reasons discussed in Section 4.1, in particular the wish to retain confidentiality and secrecy over the details of business relationships.

[1003] Teubner, *Netzwerk als Vertragsverbund: Virtuelle Unternehmen, Franchising, Just-in-time in sozialwissenschaftlicher und juristischer Sicht*; Teubner and Collins.

[1004] Teubner, *Netzwerk als Vertragsverbund: Virtuelle Unternehmen, Franchising, Just-in-time in sozialwissenschaftlicher und juristischer Sicht* 203–204; Teubner and Collins 233–234.

[1005] Salminen, "Contract-Boundary-Spanning Governance Mechanisms: Conceptualizing Fragmented and Globalized Production as Collectively Governed Entities."

Second, in legal systems where a difference is made in relation to the scope of damages recoverable under different theories, the recovery of pure economic loss could be allowed either through contractual actions or actions under tort qualified by the underlying contractual nexus. Third, and particularly interestingly, if liability is found to be contractual, this would have a profound effect on litigation under the rules of private international law. In particular, contract underlying an action might shift focus from the *lex loci damni* to the law applicable in the buyer's home state.[1006] In some cases at least the latter are argued to be potentially more receptive of actions.[1007] Fourth… Stop. Hammertime.

Thinking about such potentially positive tendencies of a contractual nexus makes one realize that there may be a huge white elephant hidden in this room of dogmatic porcelain, about to sneeze. That is the elephant of contractual capture. Suppose that the relationship is based on a contract. The traditional viewpoint is that in such a case the contract in which the relationship is embedded governs the relationship even if this means that the ensuing relationship has little to do with any agreement of the parties.[1008] This elephant will be discussed next.

4.4.3 Conflict of Contracts, or How to Construe a Relationship

Litigation beyond privity in a supply chain necessarily entails conflict between different avenues of liability. Terminology resembling 'conflict of contracts' has been used to refer to situations where a functional choice has to be made over multiple contracts which could justifiably govern a specific dispute.[1009] For the purposes of this discussion I extend the notion to cover conflicts between any kinds of liability as long as at least one contract is involved in the conflict. This extends discussion to not only the interrelationships of connected contracts but also to the interrelationship of a contract and tort/delict in situations where both may be relevant.

Now, suppose that liability is extended beyond privity in a supply chain context, whether under contract or tort/delict. What are the parameters of the new form of liability in relation to the contracts forming the supply chain? How should the relationship be construed? This is a classic question that has picked scholars and courts at least ever since *Winterbottom* v *Wright*. In more recent scholarship, in particular two basic types of cases have been discussed and occasionally confused with one another.

[1006] Generally, Fawcett and Carruthers.
[1007] See Subsections 4.2.3 and 4.3.5.
[1008] E.g. in relation to adherence to arbitration clauses in transnational contexts, see Brekoulakis.
[1009] Generally, Amstutz 341–346. While that piece does not in English contain the term conflict of contracts, it proposes to use something akin to the 'conflict of laws method' to identify which of multiple contracts governs a given dispute. Amstutz also refers to his earlier work titled *Vertragskollisionen*, 'collisions of contracts'.

The first type consists of single contract cases where third parties to a contractual relationship are not party to any contract that would also be connected to the first contract. *Winterbottom* is an example. In relation to supply chains, these kinds of claims could be seen to focus on stakeholders outside the supply chain's governance mechanism. Bystanders suffering from physical or environmental harm caused by production, such as in the *Trafigura* incident, are an example. In a business context, Teubner refers to similar situations as the external liability of networks.[1010]

The second type consists of structures where the third party in relation to one contract is simultaneously party to a second contract that is connected to the first contract via a chain or network of contracts. An example could be where a second tier supplier sues the buyer, with which it does not have a direct contractual relationship, instead of the first tier supplier, with which it does. This could happen if litigation would arise in a scenario such as the auto-OEM example described in Chapter 3. Teubner, also providing a practical case example from a German automotive distribution chain, refers to these kinds of situations as piercing liability within a network.[1011]

In relation to supply chain liability the situation is far from clear-cut. For the sake of simplicity, I argue here that governance mechanisms are embedded in contract: The extent of governance, at least, is based on a chain or network of contracts that unites the actors. This governance, and the chain of contracts, can be extended even beyond supplier companies to actors such as supplier employees and, in theory at least, to other stakeholders, even the environment if some actor can be identified who has the power to represent an environmental interest *ex ante*.[1012] The boundaries of governance are thus construed on the basis of the governance mechanism itself instead of any individual contracts. Stakeholders, such as supplier companies, supplier employees, or environmental interests could be seen to be located within or without the sphere of supply chain liability depending on the extent of the relevant governance mechanism.

Either type need have no bearing on whether the relationship is seen as contract, tort/delict, or something else. Both, however, have had historically and continue to have bearing on how the relationship between the actors not in privity is construed. The 'privity fallacy' approach enshrined in *Winterbottom*

[1010] 'Außendurchgriff im Netz.' Teubner, *Netzwerk als Vertragsverbund: Virtuelle Unternehmen, Franchising, Just-in-time in sozialwissenschaftlicher und juristischer Sicht*.
[1011] 'Binnendurchgriff im Netz.' Teubner, *Netzwerk als Vertragsverbund: Virtuelle Unternehmen, Franchising, Just-in-time in sozialwissenschaftlicher und juristischer Sicht*. For the example, see Teubner and Collins 77–78, 233–234.
[1012] E.g. Salminen, "The Accord on Fire and Building Safety in Bangladesh—A New Paradigm for Limiting Buyers' Liability in Global Supply Chains?"; Jaakko Salminen, "Governance Through Contract and the Environmental Impact of Supply Chains—Still Waiting for a 'Rana Plaza' Moment of Global Recognition" [2017] University of Oslo Faculty of Law Working Paper No. 2017-28.

denied any recourse to tort/delict by third parties to a contract. It is no longer valid law. Nonetheless, it is echoed in more recent discussions where the existence of a contractual relationship transposes some or all of the limitations in that contractual relationship to other related relationships under contract or tort/delict if a duty of care is drawn from the first contract.[1013]

In a single contract situation, in the absence of a general duty of care imposed by law any specific duty relied upon would have to be derived from a governance mechanism. Under contractual theories, such as the third party beneficiary or protective effects to third parties doctrines, this would imply reliance on a specific contract. This typically brings to play the limitations of that contract, as is seen for example in relation to arbitration clauses: A third party wishing to rely on a benefit conferred by a contract is typically bound by any limitations in that contract, including a clause submitting all disputes to arbitration.[1014] Under tort/delict theories, the situation is not too different. A governance mechanism establishing a specific duty of care under tort/delict may be limited by the underlying contract if that contract specifically proclaims to limit claims under tort/delict and there is no public policy exception denying such limitations.

In situations involving chains of contracts there seems to have been particular pressure to see contractual arrangements as limiting liability.[1015] The effect of liability beyond privity in chains of contracts was the focus of intense scrutiny in France and England during the 1980s, and these narratives provide two specific example of courts and scholars debating whether contracts in chains or networks of contracts should automatically limit claims beyond privity.

In France, contractual actions beyond privity relating to implied warranties were governed by relatively uniform rules. Contractual actions beyond privity relating to subcontracting, however, were problematic due to the potentially conflicting content of different contracts in a supply chain. One solution was the theory of 'groups of contracts'.[1016] Following this, in a number of cases the Cour de cassation in practice found that in such cases a defendant could rely on limitations in both its own contract and that of the plaintiff. This approach has been critiqued as both theoretically ('creating' a contract out of scratch) and practically (often beneficial towards defendants) biased, and was scrapped in the early 90s in favor of using the French law of delict to govern such relationships instead. Under the French law of delict, contractual limitations are irrelevant and pure economic loss is recoverable.

[1013] Stapleton, "Duty of care and economic loss: a wider agenda"; Beyleveld and Brownsword 69–71; Feinman, "The Economic Loss Rule and Private Ordering" 820–823.
[1014] Generally, Brekoulakis.
[1015] E.g. Beyleveld and Brownsword 69–71.
[1016] See Section 2.4.

In England, following the *Junior Books* ruling similar questions as in France arose in relation to the role of contracts in limiting what appeared to be a tortious claim that could override chains of contracts for example in cases where a middle actor was insolvent or beyond liability for other reasons, such as due to a settlement agreement. While the scope of *Junior Books* was soon restricted and ultimately lost its value as precedent,[1017] it did give rise to scholarly discussions on the relationship of torts and contractual arrangements in similar situations. In particular Beyleveld and Brownsword focused on the question of transitivity by asking to what extent the relationship between A and C can be derived from the relationships between A and B on the one hand and B and C on the other. In an approach similar to the French 'groups of contracts', Beyleveld and Brownsword argue that if contracts are 'organically related' under what they call the subsumption principle, defendants could raise defenses inherent in either their or the claimant's contracts.[1018]

These kinds of approaches could be described as a cumulative limitation of liability based on the totality of contracts in a chain. Not surprisingly, the critique raised against this kind of application of the 'groups of contracts' theory in France is particularly applicable in supply chain contexts.[1019] A contrary approach, such as that adopted in France, would give tort/delict power to overcome any contractual limitations in chains. Such an all-or-nothing approach is merited by the mutual exclusivity of contract and tort under French law. Another approach might focus on to what extent contracts are specifically seen to govern relationships that might arise in relation to other supply chain members. This kind of an approach has received support in legal systems where contract and tort/delict are not mutually exclusive.[1020] While offering a possible partial answer, it does not, however, fully resolve the problem of the elephant.

The problem in relation to construing governance mechanisms in a supply chain is clearly related to the problems encountered by the group of contracts theory. In situations like those described in Section 4.3, no individual contract resembles a mutual agreement over governance. More specifically, governance relationships are founded not in any specific contract *per se* but in the relevant governance mechanism that is merely *embodied* in contract while overcoming the boundaries of any individual contract. Thus also the content of the governance relationship should specifically be formed by the mechanism itself and not the whole contract in which the mechanism is embedded.[1021] Doing otherwise would resurface the same legitimacy problems as those related to the

[1017] See Section 2.2.
[1018] Beyleveld and Brownsword 70–71.
[1019] See Subsection 2.4.1.
[1020] E.g. Stapleton, "Duty of care and economic loss: a wider agenda."
[1021] Teubner has extensively discussed a similar problem in relation to the 'system purpose' of networks in giving rise to specific duties of loyalty. Teubner, *Netzwerk als Vertragsverbund: Virtuelle Unternehmen, Franchising, Just-in-time in sozialwissenschaftlicher und juristischer Sicht*.

group of contracts theory, namely one-sided agreements that are not based on mutual consent.[1022]

Founding the contract-boundary-spanning effects of the relationship in the governance mechanism and not in a specific contract would be in line with an approach where tortious duties of care are based on the governance mechanism while at the same time not being covered by any contractual relationship.[1023] If the action is, however, of a contractual nature, such as under a contractual third-party beneficiary theory, then typically all the limitations of the contract from which benefits are derived can be called upon by the defendant.[1024] While perhaps not always seen as problematic in relations between business actors,[1025] this could lead to extremely problematic situations where the liability of less powerful stakeholders, such as supplier employees, could be contractually limited without their consent.[1026] And if the action lies in tort/delict but is nonetheless seen to be covered by the postulations of a specific contract, then the same problems may again arise.

Lacking a general duty of care, arguably the most logical solution would be to separate the governance mechanism from any specific contract it could be seen related to and, if needed in addition to the stipulations of the governance mechanism itself, supplementing it with the default rules of law, whether those of contract or tort/delict. This would enable any duties of care to arise freely from the stipulations of the parties without any additional contractual baggage. This kind of cross-pollination between contract and tort/delict is not without precedent. In the product liability context in the United States for example the *Henningsen* ruling was based in contract while overriding limitations included in any of the specific underlying contracts included in a distribution chain.[1027]

[1022] Generally, see Subsection 2.4.1. For this critique in relation to contracts with protective effects towards third parties, see Teubner and Collins 223–225.

[1023] Such an approach would *prima facie* seem problematic in relation to legal systems where contract and tort are mutually exclusive, such as French law. On the other hand, Whittaker notes that even such legal systems offer ample possibilities for tweaking the parameters of liability. Whittaker, "Privity of Contract and the Law of Tort: The French Experience."

[1024] E.g. Brekoulakis. Similarly, see Teubner's critique of contracts with protective effects to third parties. Teubner and Collins 223–224.

[1025] Though again note Teubner's critique.

[1026] Towards this, e.g. Thomas argues that '*Another example is that a sweatshop worker's poor working conditions are directly intertwined with the supply contract between the manufacturer and purchaser. Still, one could not imagine courts compelling sweatshop workers to arbitrate such claims based on the underlying supply contract.*' Aubrey L Thomas, "Nonsignatories in Arbitration: A Good-Faith Analysis" (2010) 14 Lewis and Clark Law Review 953, fn 70.

[1027] In *Henningsen*, the court argued that: '*The disclaimer of the implied warranty and exclusion of all obligations except those specifically assumed by the express warranty signify a studied effort to frustrate that protection. True, the Sales Act authorizes agreements between buyer and seller qualifying the warranty obligations. But quite obviously the Legislature contemplated lawful stipulations (which are determined by the circumstances of a particular case) arrived at freely by parties of relatively equal bargaining strength. The lawmakers did not authorize the automobile manufacturer to use its grossly disproportionate bargaining power to relieve itself from liability and to impose on the ordinary buyer,*

The approach was transferred to tort once general duties of liability under tort for defective products were established. Similarly, under French law the parameters of contract and delict and under German law the parameters of delict were tweaked to form a functional combination of contract and tort/delict.

A crucial question is how to identify the governance mechanism for extraction from the contracts it is embedded in. The discussion in Chapter 3 provides guidelines for this. For one, the same mechanism can be embedded in multiple contracts; in such cases it should be easy enough to separate the mechanism based on the identical versions of the governance mechanism as they appear in the different contracts. In other cases, such as in relation to the auto-OEM example, some parts of the mechanism might be based less in contract and more on action-in-fact. Here, identifying the extent of the mechanism would probably be based on interpretation and, where any specific rules that could clearly be seen as part of the mechanism cannot be identified, on default rules of contract interpretation. This kind of an approach seems to match the intentions of those covered by governance mechanisms. In the auto-OEM example broad areas of possible interaction, such as the question of profit sharing, are not regulated by the governance mechanism beforehand. In a dispute, these would thus presumably be interpreted in line with the default rules of law unless evidence to the contrary existed.

Thus there seems to be both dogmatic and practical precedent for a cross-pollination of contract and tort/delict if one follows the example of product liability. In practice, however, the situation may not be easily resolvable due to the highly specialized nature of product liability regimes and the existing legal traditions of contractual capture. For example, in his extensive discussion over liability in production networks, Teubner ends up focusing on the vague concept of so-called 'extra-contractual duties of loyalty' instead of contract or tort/delict per se.[1028] As shown by Teubner's example, any discussion in relation to a specific legal system might have to delve deep into that legal system's dogma.

One final question remains. What would be the extent of deference toward a contract that claims specifically to cover a governance mechanism?

4.4.4 Transnational Regulatory Capture Through Private Ordering

The final point to discuss here is the possibility of explicitly subjugating the effects of governance mechanisms to private ordering. This would in practice mean that the governance mechanism takes the form of a contract where all

who in effect has no real freedom of choice, the grave danger of injury to himself and others that attends the sale of such a dangerous instrumentality as a defectively made automobile. In the framework of this case, illuminated as it is by the facts and the many decisions noted, we are of the opinion that Chrysler's attempted disclaimer of an implied warranty of merchantability and of the obligations arising therefrom is so inimical to the public good as to compel an adjudication of its invalidity.'

[1028] Teubner and Collins 225–229.

relevant stakeholders are parties or in some other way bound by the private ordering of the governance agreement. I have argued elsewhere that, witnessed from this perspective, the Bangladesh Accord could be seen as providing a new paradigm for limiting liability beyond privity in supply chains.[1029] I will summarize that argument here.

Suppose that a governance mechanism, instead of being embedded within the existing supply chain contracts, itself comes in the form of a contract. This dedicated governance contract then exists alongside the individual supply chain contracts and complements them from a governance perspective. What is more, as the dedicated governance contract brings together all actors relevant from a governance perspective, there is no question over the nature of the governance relationship—it is clearly contractual and all relevant actors are in privity with one another.

The Bangladesh Accord serves as a practical example. Following the Rana Plaza disaster, it became clear that governance mechanisms embedded in the supply chain contracts were not adequate to govern worker safety. To improve the situation, a governance contract was created that directly connected buyers and the representatives of their suppliers' employees. Beyond the underlying contracts forming the supply chain, the Bangladesh Accord thus explicitly creates a level of privity between two ends of a supply chain that otherwise would not be so connected.

In principle, the objective of the Bangladesh Accord is to create a coordination mechanism for safety inspections and remediation. In particular, this mechanism brings together both workers and buyers thus enhancing its legitimacy and provides a legally enforceable platform through its contractual form and arbitration clause. The Accord can also be seen to grant direct benefits to supplier employees, for example the right to refuse unsafe work, guarantees of wages during factory downtime caused by necessary repairs, and a related prohibition of discrimination. The inclusivity and enforceability of the Accord has been seen as a positive development by scholarship and workers' rights groups, in particular in comparison to earlier non-binding and exclusive CSR mechanisms.[1030]

All this positive hype may, however, come with a downside. If the governance mechanism is fully enclosed in a contract, then this governance contract would conceivably also regulate the mechanism. There are a number of challenges here that, in case of dispute, ultimately depend on the parameters of relevant underlying legal systems.

[1029] Salminen, "The Accord on Fire and Building Safety in Bangladesh—A New Paradigm for Limiting Buyers' Liability in Global Supply Chains?"; Salminen, "Governance Through Contract and the Environmental Impact of Supply Chains—Still Waiting for a 'Rana Plaza' Moment of Global Recognition."

[1030] E.g. Haar and Keune; Anner, Bair and Blasi.

The material scope of contract, i.e. the extent to which a specific legal system allows private ordering to replace e.g. tort law, is one such challenge. Public policy typically places limits on the extent to which private ordering can limit claims under tort or subjugate disputes to special procedural mechanisms such as arbitration. Between supply chain *companies* this is probably not a major issue. Between other stakeholders, however, it may be, as public policy considerations typically exert more pressure in relation to non-company stakeholders such as e.g. supplier employees or the environment. Then again, this may not be the case. A particular example is the general use of 'consumer guarantees' to limit liability for even personal injury under English tort law until the 1977 Unfair Contract Practices Act remedied the situation.[1031]

The personal scope of contract, i.e. the extent to which different actors can be bound by contract, is another challenge. Again, supplier companies typically pose no challenge in this sense. Extending the governance mechanism *ex ante* to other stakeholders, such as supplier employees or even on behalf of the environment, is more problematic. While its practical legal effects are unclear, the Bangladesh Accord could be seen as an example of using unions to bind the workers they represent. On the other hand, even if a mechanism is not *per se* binding on a specific stakeholder, it may become so either by stakeholders consenting to its benefits and limitations as third-party beneficiaries (the alternative could after all be difficult transnational litigation) or by establishing a de facto standard of compensation, the legitimacy of which could be increased by inclusivity towards stakeholders.

These challenges may be alleviated by the mechanism itself. Ways for limiting liability may generally be classified into substantive and procedural limitations. Substantive limitations specifically limit liability, for instance by explicitly capping liability (e.g. the Bangladesh Accord's provision requiring suppliers to pay a maximum of six months' wages for factory downtime) or by making the onset of liability fuzzy and uncertain (e.g. the Bangladesh Accord requires buyers to undertake 'reasonable' efforts to find workers employment at safe suppliers).

Procedural limitations, on the other hand, limit the applicability of various procedural safeguards in interpreting substantive safeguards or in relation to applying public policy related safeguards.[1032] These may take a number of forms that can be combined for maximum effect. Take the example of the Bangladesh Accord. First, the Accord contains an arbitration clause. Arbitral procedure is founded in the parties' agreement, generally rules out substantive review, and is eminently enforceable. Furthermore, international commercial arbitration is focused on business interests instead of for example public policy,

[1031] See Section 2.2.

[1032] For this argument in detail, see Salminen, "The Accord on Fire and Building Safety in Bangladesh—A New Paradigm for Limiting Buyers' Liability in Global Supply Chains?"

often providing possibilities for overriding national legal safeguards. Second, the Accord is an inherently transnational contract. It has no single explicitly chosen forum or applicable law. At the same time, disputes governed by the Accord may arise between actors from dozens of different jurisdictions. This inherently transnational background of the Accord arguably increases any arbitrator's focus on the four corners of the agreement instead of any specific national legal system, thus working to distance the Accord further from any nationally embedded legal safeguards. Thirdly, the Accord's choice of forum and applicable law provisions are anything but clear. The potential disputes arising out of these and the key requirement on arbitrators, producing an enforceable award, may serve to focus litigation even more on the four corners of the agreement and to avoid basing interpretation in a specific legal system. Taken together, all this serves to focus attention on the parties' agreement instead of a specific national legal system with its embedded safeguards, thus propelling the construction of the Accord towards a transnational void.

In short, the Accord has come a long way from the 'consumer guarantees' used to limit liability under tort in English law prior to 1977. In principle, however, it could be seen as a similar mechanism. If the governance mechanism is inherently embedded in a contract that all relevant actors are bound to, then this private ordering may be given deference against other forms of redress. Here, transnationalization may serve to increase this deference in an age where many national legal systems contain safeguards against unfair contracting practices. A key conclusion from this is that such safeguards should be developed so that they can effectively counter governance embedded in transnational private ordering. In particular, in addition to any individual contracts being given deference only if they explicitly claim to govern a specific relationship, such deference should perhaps not be given even then if there is a chance that the agreement overrides public policy. A general theory of production liability or at least supply chain liability would be necessary to provide a foundation for such policy.

4.4.5 Some Concluding Remarks Over the Need of a General Duty of Care

In sum, the nature and scope of any liability based on supply chain governance is primarily dependent on the nature and scope of the governance mechanism and how it is interpreted from the parameters of a specific legal system at least unless the mechanism is integrated into a dedicated governance contract. A key challenge is that following this, any liability is based on the applicable private governance mechanism and not in a general duty of care bestowed on buyers or parent companies. This has raised discussion over whether this approach would

lead to a backlash in the form of buyers and parents cutting back on value chain governance. Phillips and Lim, discussing supply chain liability, note that:[1033]

> *Buyers may prefer to end code programs than [sic] be legally vulnerable. If the Good Samaritan knows that she could be sued for helping an injured brethren, she may just let him bleed. Though that seems improbable for buyers with public brands, the lawsuit threat might provide a publicly acceptable excuse to at least scale back. More likely, the better buyers will stay the course because their well-run programs could usually avoid negligence or breach of promise findings. Retreating buyers probably do not have effective code regimes and perhaps it is better that they are exposed. Better buyers might welcome this flushing out of free riders who advertise a code without incurring enforcement costs.*

Similarly, Rogers has argued in a US-domestic context that the development of notions of joint employment could lead to a similar backlash, and that, instead, a general duty of reasonable care should be placed on buyers.[1034] A general duty of care would in many cases be preferable and even more so if it were to take the form of strictish liability. However, this does not seem probable at the moment in particular to the economic and political fears, particular so in relation to any disjuncture that would ensue in relation to different forms of production liability.

At the same time, it seems that there are a number of reasons that would prevent a forceful backlash of private governance. Firstly, the value of such mechanisms in coordinating cost-management, R&D, and ethical image are probably greater than ever, making them an integral part of a buyer's business. Second, even if governance mechanisms are scaled back there may be liability, for example in the form of liability for omissions, even though this is highly uncertain. Third, scaling back on private governance mechanisms could leave the door open for further global media backlashes à la Rana Plaza which not only damage bottom lines but can also serve to increase interest in regulatory approaches. Fourth, as seen in this section there may be ways of controlling the uncertain liabilities effective governance opens up by embracing the enforceability and binding nature of dedicated governance contracts. Adopting such a strategy could, from a corporate perspective, provide the best of both worlds in relation to combining effective governance and controlling liability.

While it certainly would be reasonable, from a moral enterprise liability perspective, that there would be a general duty imposing strictish liability for outsourced production, it seems that one cannot feel hopeful in relation to the

[1033] Phillips and Lim 377–378.
[1034] Rogers.

statutory establishment of such liability. Nonetheless, perhaps increasing focus on private governance and liability related on specific duties of care could provide models and reassurance for judicial activism in the formation of a general duty founded in some combination of contract and tort a la product liability. Meanwhile, increasing pressure on actors to take care of their supply chains should ensure the continued development of private governance and trying to hold these actors liable when mechanisms do not work as claimed.

5. Conclusion—Product and Production Liability, Two Necessary Hybrids of Tort/Delict and Contract

So, there we have it. The contours of the law of production liability mapped with new precision. To briefly recap, in the introductory Chapter 1, I laid out the theme, underlying hypotheses, and objectives of this dissertation. These are based on theory proclaiming that two specific waves of globalization have affected society in ways that, I argue, necessarily lead to a liability deficit arising out of existing structures of contract and tort/delict. The first of these liability deficits, relating to fragmented distribution, has been resolved through the development of product liability law. The second, later, of these liability deficits, relating to fragmented production, has only recently seen any attempts at a concentrated legal focus, much of which I have tried to gather here. Furthermore, in Chapter 1 I also examined a number of methodological issues focusing in particular on the inherent interrelationship of contract and tort/delict in relation to specific legal systems, transnational law, empirical research, and law more generally, and ways in which removing this interrelationship limit our ability to understand private law.

In Chapter 2, to overcome the divide of contract and tort/delict I focused on historical-comparative dogma of product liability law in four different legal systems. This is necessary to gather a toolbox of the ways in which private law has responded and thus could respond to the fragmentation of production and any ensuing liability deficits. This toolbox contains different perspectives on how contract and tort/delict can be utilized to establish liability beyond privity for defective production practices, and in particular how the two causes of action have intertwined in legal history to create a marriage of contract and tort/delict, or product liability law as we know it. Thus this toolbox is crucial for providing cognitive resources on both possible dogma and the practical problems of different forms of liability and private ordering for the ensuing discussion on production liability in Chapter 4. I dare say that also on its own this toolbox can be used for further and more profound analysis in the practical, dogmatic, and political possibilities for extending liability for outsourced production than I have had the chance to do here.

In Chapter 3, in order to understand how the fragmentation of production is enabled by contractual control beyond privity, I focused on governance through contract. Here, my methodology is eclectic to say the least, in major part because unlike in relation to corporate governance there is little if any concentrated approach to developing our understanding of governance through contract. To chart approaches to governance through contract, I start by narrowing down private governance, private ordering, and private power to governance through contract. I then compare Williamson's theory of contract

governance, founded in Ian Macneil's abstractions of contract law, to Gereffi, Humphrey, and Sturgeon's model of governance in global value chains, motivated by broad analytical case studies. To elaborate and critique the outcome of this comparison and in particular the almost complete lack of focus on the effects of governance through contract beyond privity, I draw on Locke's account of private power alongside other practical examples of governance through contract. This results in a framework of governance through contract with special focus on control beyond privity. This framework translates into an orienteering map highlighting the role of different kinds of governance mechanisms and attitudes and allows us to discern and typologize how buyers use specific contractual arrangements to extend control beyond privity when governing their supply chains. This orienteering map should be of particular help in understanding contractual mechanisms of control. For example, it could provide a model for how governance mechanisms can be typologized for better use in regulatory and other reporting initiatives. Even further, the orienteering map could be used as a basis for adding specific levels of normativity to different types of governance structures.

In Chapter 4, my focus turned to production liability. I draw on lessons learned from product liability and existing cases on liability for production externalities to chart the field of production liability. The ensuing discussion starts with general justifications for and the procedural underpinnings of transnational production liability, with the latter focused on using private international law to localize transnational disputes into specific jurisdictions each with their own substantive and procedural effects on litigation. I explore in a trans-substantive way the possibilities and challenges of using private law to establish production liability, ranging from establishing liability under contract and tort/delict to the problems of construing the relevant mechanism in which a duty of care is founded and the use of dedicated governance contracts to control liability. This should allow considerable progress towards conceptual clarity in relation to further developing the field of transnational production liability, perhaps in a fashion similar to earlier developments related to product liability.

In particular, I provide in Chapter 4 a functional typology of different kinds of production liability. Earlier, focus has been almost exclusively on foreign direct liability, based on liability in structures of equity ownership. I argue that liability for one's own acts, liability for subcontractors, and supply chain liability can all be added to the list. This classification of different types of production liability helps us better understand practical possibilities for putting into place liability for defective production practices.

For example, what I call supply chain liability entails an organizational form of production that is fundamentally different from foreign direct liability due to its foundation in contractual governance arrangements. Focus on the contractual nexus underlying supply chain liability could turn focus from tort to

contract and, in doing so, remove many of the problems of the tort based approaches originally developed under foreign direct liability. These problems include the claimant's burden of proof under tort and the use of the *lex loci damni* for measuring damages and identifying relevant limitation periods. Focus on contract instead of tort and the ensuing re-localization of the dispute to the substantive law of the contractual governance mechanism could overcome these problems. Furthermore, I argue that any limitations of liability inherent in individual supply chain contracts could be avoided, at least as long as the governance mechanism itself is not embedded in a single, dedicated governance contract.

There are still numerous dragons and other monsters dwelling on the orienteering map of production liability. The biggest, certainly, is the question of 'how to get there': How to find the road that would achieve the goal of general liability over defective production practices not only in relation to products themselves but also in relation to the externalities of making products. This question I have not been able to answer with sufficient precision—there are so many ways towards this outcome and each depends on how one (or a particular legal system) looks at the orienteering map that I have drafted, in particular to what extent the seer's eyes are focused on duties of care arising out of either contract or tort/delict or can, as if through bifocal glasses, easily catch glimpses of both.

Precisely a bifocal approach seems necessary to establish a functional form of supply chain liability. Governance through contract in supply chains is embodied in supply chain contracts but, typically, not founded in any specific contract per se, thus requiring one to separate governance from contracts and, once a specific duty of care is located in the governance mechanism, to fall back to either tort/delict or the default rules of contract in a specific legal system to establish liability that, eventually, hopefully, will also be stricter than normal fault-based liability. This approach seems to have precedent in product liability law and existing business practice. Furthermore, the advanced forms of control over production that it entails may be enough to avoid buyers from 'scaling back' on private governance despite increasingly advanced governance mechanisms opening up liabilities.

Thus while I see little hope for a general duty of care being established in relation to production liability anytime soon, there is some hope in the form of more particular duties of care arising out of private governance mechanisms in relation to supply chain liability. Generally, these can be helped with increasing and increasingly precise focus on regulatory approaches, such as obligatory reporting practices. The road will be long, but the orienteering map provided by this dissertation map should help, in particular in helping frame a move from corporate governance to governance through contract that could then be reflected in regulatory approaches.

Now, for a moment, I call it quits. In the words of Latour, it is time to detach and hesitate with colleagues over what I have written here. In particular, I cannot fight all the dragons on the map without knowing which are windmills and which are true monsters. Therefore, I plead for the help of readers and critics to point out to me the dragons on this map that are the mightiest and strangest and the most in need of taming before I continue with the task—it remains to be seen whether one lifetime will be enough.

Sources

Scholarship

Alford RP, "Human Rights After Kiobel: Choice of Law and the Rise of Transnational Tort Litigation" (2014) 63 Emory Law Journal 1089

American Law Institute, *Restatement of the Law (First) of Contracts* (1932)

——, *Restatement of the Law (Second) of Contracts* (1981)

Amstutz M, "The Constitution of Contractual Networks" in Marc Amstutz and Gunther Teubner (eds), *Networks: Legal Issues of Multilateral Co-operation* (Hart 2009)

Amstutz M and Karavas V, "Weltrecht: Ein Derridasches Monster" in Gralf-Peter Callies, Andreas Fischer-Lescano and Dan Wielsch (eds), *Soziologische Jurisprudenz: Festschrift für Gunther Teubner* (De Gruyter Recht 2009)

Andrews N, "Strangers to Justice No Longer: The Reversal of the Privity Rule under the Contracts (Rights of Third Parties) Act 1999" (2001) 60 Cambridge Law Journal 353

Anner M and Bair J, "The Bulk of the Iceberg: A Critique of the Stern Center's Report on Worker Safety in Bangladesh, Penn State Centre for Global Workers' Rights Research Brief 10 February 2016" (2016)

Anner M, Bair J and Blasi J, "Toward Joint Liability in Global Supply Chains: Addressing the Root Causes of Labor Violations in International Subcontracting Networks" (2013) 35 Comp. Lab. L. & Pol'y J. 1

Armour J, Hansmann H and Kraakman R, "Agency Problems and Legal Strategies" in Reinier Kraakman (ed), *The Anatomy of Corporate Law: A Comparative and Functional Approach* (Second, 2009)

Atiyah PS, *The Rise and Fall of Freedom of Contract* (Oxford University Press 1979)

Atkins PJ, Hassan MM and Dunn CE, "Toxic torts: arsenic poisoning in Bangladesh and the legal geographies of responsibility" (2006) 31 Transactions of the Institute of British Geographers 272

Aubert de Vincelles C, "Réflexions sur les ensembles contractuelles : un droit en devenir" [2007] Revue des contrats 983

Backer LC, "Transnational Corporations' Outward Expression of Inward Self-Constitution: The Enforcement of Human Rights by Apple, Inc." (2013) 20 Indiana Journal of Global Legal Studies 805

Bair J, "Global Capitalism and Commodity Chains: Looking Back, Going Forward" (2005) 9 Competition & Change 153

——, “Global Commodity Chains: Genealogy and Review” in Jennifer Bair (ed), *Frontiers of Commodity Chain Research* (Stanford University Press 2009)

Bair J and Werner M, “Commodity chains and the uneven geographies of global capitalism: a disarticulations perspective” (2011) 43 Environment and Planning A 988

Baldwin R, “Globalisation: the great unbundling(s)” (2006)

Baldwin R and Martin P, “Two Waves of Globalization: Superficial Similarities, Fundamental Differences” (1999)

Bar C von, *The Common European Law of Torts I* (Oxford University Press 1998)

Bar C von, Clive E and Schulte-Nölke H (eds), *Principles, Definitions and Model Rules of European Private Law: Draft Common Frame of Reference (DCFR)* (Sellier 2008)

Baudesson T and Boeringer C-H, “Loi relative au devoir de vigilance des sociétés mères et des entreprises donneuses d ’ ordre” [2017] *Clifford Chance Briefing Note 21.4.2017*

Beckers A, *Enforcing Corporate Social Responsibility Codes: On Global Self-Regulation and National Private Law* (Hart 2015)

Bellissent J, *Contribution à l’analyse de la distinction des obligations de moyens et des obligations de résultat: à propos de l’évolution des ordres de responsabilité civile* (LGDJ 2001)

Ben-Shahar O, “Fixing Unfair Contracts” (2011) 63 Stanford Law Review 869

Ben-Shahar O and White JJ, “Boilerplate and Economic Power in Auto Manufacturing Contracts” (2006) 104 Michigan Law Review 953

Berg AJ van den (ed), *50 Years of the New York Convention* (Wolters Kluwer 2009)

Beyleveld D and Brownsword R, “Privity, Transitivity and Rationality” (1991) 54 The Modern Law Review 48

Bix BH, *Contract Law: Rules, Theory, and Context* (Cambridge University Press 2012)

Borges JL, “On Exactitude in Science,” *Collected Fictions (trans. Andrew Hurley)* (1999)

Borghetti J-S, *La responsabilité du fait des produits* (LGDJ 2004)

——, “The development of product liability in France” in Simon Whittaker (ed), *The Development of Product Liability* (Cambridge University Press 2010)

Brekoulakis SL, *Third Parties in International Commercial Arbitration*

(Oxford University Press 2010)

Buckley FH (ed), *The Fall and Rise of Freedom of Contract* (Duke University Press 1999)

Buxbaum RM, "Is 'Network' a Legal Concept?" (1993) 149 Journal of Institutional and Theoretical Economics 698

Cartwright J and Whittaker S, "The Transformation of French Contract Law by Government Decree – and Translated into English" (2015) <https://www.law.ox.ac.uk/news/2015-11-02-transformation-french-contract-law-government-decree-–-and-translated-english>

Coase RH, "The Nature of the Firm" (1937) 4 Economica 386

Committee on the Financial Aspects of Corporate Governance, "The Financial Aspects of Corporate Governance" (1992)

Conway M, "A New Duty of Care? Tort Liability from Voluntary Human Rights Due Diligence in Global Supply Chains" (2015) 40 Queen's Law Journal 741

Danielsen D, "Local Rules and a Global Economy: An Economic Policy Perspective" (2010) 1 Transnational Legal Theory 49

Davidson MS and Sorensen TR, "Tort Damages for Breach of Contract? The Ebb and Flow of the Economic Loss Rule" [2008] The SIRMon — News From the Self-Insurers and Risk Managers Committee 1

Deakin S, Johnston A and Markesinis B, *Markesinis and Deakin's Tort Law* (Oxford University Press 2008)

Delebecque P and Pansier F-J, *Droit des obligations: contrat et quasi-contrat* (2001)

Demeyere S, "Liability of a Mother Company for Its Subsidiary in French, Belgian, and English Law" (2015) 23 European Review of Private Law 385

Dicken P, Kelly PF, Olds K and Wai-Chung Yeung H, "Chains and networks, territories and scales: towards a relational framework for analysing the global economy" (2001) 1 Global Networks: A Journal of Transnational Affairs 89

Dietz T, "Contract Law, Relational Contracts, and Reputational Networks in International Trade: An Empirical Investigation into Cross-Border Contracts in the Software Industry" (2012) 37 Law and Social Inquiry 25

——, *Global Order Beyond Law: How Information and Communication Technologies Facilitate Relational Contracting in International Trade* (Hart 2014)

Drahozal CR, "Private Ordering and International Commercial Arbitration" (2009) 113 Penn State Law Review 1031

Drimmer JC and Lamoree SR, “Think Globally, Sue Locally: Trends and Out-of-Court Tactics in Transnational Tort Actions” (2011) 29 Berkeley Journal of International Law 456

Eco U, “On the Impossibility of Drawing a Map of the Empire on a Scale of 1 to 1,” *How to Travel with Salmon and Other Essays (translated by William Weaver)* (1995)

Eigen ZJ, “Empirical Studies of Contract” (2012) 8 Annual Review of Law and Social Science 291

Eisenberg MA, “Private Ordering Through Negotiation: Dispute-Settlement and Rulemaking” (1976) 89 Harvard Law Review 637

——, “Third-Party Beneficiaries” (1992) 92 Columbia Law Review 1358

Ellickson RC, *Order without Law: How Neighbors Settle Disputes* (Harvard University Press 1991)

Enneking L, “Dutch case note” (2008) 16 European Review of Private Law 499

——, *Foreign Direct Liability and Beyond* (Eleven International Publishing 2012)

——, “The Future of Foreign Direct Liability? Exploring the International Relevance of the Dutch Shell Nigeria Case” (2014) 10 Utrecht Law Review 44

Eskridge Jr WN and Frickey PP, “The Making of the Legal Process” (1994) 107 Harvard Law Review 2031

Farnsworth EA, *Contracts* (4th edn, Aspen 2004)

Faure-Abbad M, “Ce que l’on appelle en France le principe du non-cumul des responsabilités contractuelle et délictuelle (notes de conférence),” *In Memoria di Paolo Maria Vecchi / Giornata di studio Le frontiere mobile della responsabilità contrattuale Università degli Studi Roma Tre Rome, 16 avril 2015* (2015)

Fawcett J and Carruthers JM, *Cheshire, North, & Fawcett’s Private International Law* (14th edn, 2008)

Feinman JM, “Promissory Estoppel and Judicial Method” (1983) 97 Harvard Law Review 678

Feinman JM, “Un-Making Law: The Classical Revival in the Common Law” (2004) 28 Seattle University Law Review 1

Feinman JM, “The Economic Loss Rule and Private Ordering” (2006) 48 Ariz. L. Rev. 813

——, *Professional Liability to Third Parties* (3rd edn, American Bar Association 2013)

Fleckner A and Hopt K (eds), *Comparative Corporate Governance: A*

Functional and International Analysis (Cambridge University Press 2013)

Friant-Perrot M, "Empoisonnement à l'arsenic par l'eau au Bangladesh: vers la mise en cause de la responsabilité des acteurs de l'aide au développement?" (2008) 16 European Review of Private Law 489

Friedman L, *A History of American Law* (3rd edn, Touchstone 2005)

Fukuyama F, "Governance: What Do We Know, and How Do We Know It?" (2016) 19 Annual Review of Political Science 89

Garner BA (ed), *Black's Law Dictionary* (9th edn, 2009)

Gereffi G, "Global value chains in a post-Washington Consensus world" (2014) 21 Review of International Political Economy 9

Gereffi G, Humphrey J and Sturgeon T, "The governance of global value chains" (2005) 12 Review of International Political Economy 78

Gereffi G, Regini M and Sabel CF, "On Richard M. Locke, The Promise and Limits of Private Power: Promoting Labor Standards in a Global Economy" (2014) 12 Socio-Economic Review 219

Gergen MP, "Privity's Shadow: Exculpatory Terms in Extended Forms of Private Ordering" (2015) 43 Florida State University Law Review 1

Gilead I, "Non-Consensual Liability of a Contracting Party: Contract, Negligence, Both, or In-Between?" (2002) 3 Theoretical Inquiries in Law 511

Gilles M, "The Day Doctrine Died: Private Arbitration and the End of Law" (2016) 2016 University of Illinois Law Review 372

Gilson RJ, Sabel CF and Scott RE, "Contracting for Innovation: Vertical Disintegration and Interfirm Collaboration" (2009) 109 Columbia Law Review 431

Goldhaber MD, "Corporate Human Rights Litigation in Non-U. S. Courts: A Comparative Scorecard" (2013) 3 UC Irvine Law Review 127

Gordley J, *The Philosophical Origins of Modern Contract doctrine* (Clarendon Press 2011)

Granovetter MS, "Economic Action and Social Structure: The Problem of Embeddedness" (1985) 91 American Journal of Sociology 481

Grant G, *The Death of Contract* (Ohio State University Press 1974)

Green MD and Cardi WJ, "Basic Questions of Tort Law from the Perspective of the USA" in Helmut Koziol (ed), *Basic Questions of Tort Law* (2015)

Grundman S, Möslein F and Riesenhuber K (eds), *Contract Governance: Dimensions in Law and Interdisciplinary Research* (2015)

Haar B ter and Keune M, "One Step Forward or More Window-Dressing? A Legal Analysis of Recent CSR Initiatives in the Garment Industry in

Bangladesh" (2014) 30 International Journal of Comparative Labour Law & Industrial Relations 5

Harris KD, *The California Transparency in Supply Chains Act: A Resource Guide* (California Department of Justice 2015)

Hopkins TK and Wallerstein I, "Patterns of Development of the Modern World-System" (1977) 1 Review 111

Hopt K, "Comparative Corporate Governance: The State of the Art and International Regulation" (2011) 59 American Journal of Comparative Law 1

Humphrey J, "Upgrading in global value chains" (2004) 28

IGLP Law and Global Production Working Group, "The role of law in global value chains: a research manifesto" (2016) 4 London Review of International Law 57

Jägers N and Heijden M-J van der, "Corporate Human Rights Violations: The Feasibility of Civil Recourse in the Netherlands" (2008) 33 Brooklyn Journal of International Law 833

Jansen N, "Law of Extracontractual Liability Duties and Rights in Negligence: A Comparative and Historical Perspective on the European Law of Extracontractual Liability" (2004) 24 Oxford Journal of Legal Studies 443

Jimenez MJ, "The Many Faces of Promissory Estoppel: An Empirical Analysis Under the Restatement (Second) of Contracts" (2010) 57 UCLA Law Review 669

Johnson L, "Law and the History of Corporate Responsibility: Corporate Governance" (2013) 10 University of St. Thomas Law Journal 974

Kajüter P and Kulmala HI, "Open-book accounting in networks: Potential achievements and reasons for failures" (2005) 16 Management Accounting Research 179

Kaplinsky R, "Spreading the Gains from Globalization: What Can be Learned from Value-Chain Analysis?" (2004) 47 Problems of Economic Transition 74

Karsten P, "The 'Discovery' of Law by English and American Jurists of the Seventeenth, Eighteenth, and Nineteenth Centuries: Third-Party Beneficiary Contracts as a Test Case" (1991) 9 Law & Hist. Rev. 327

Keitner C, "State Courts and Transitory Torts in Transnational Human Rights Cases" (2013) 3 UC Irvine Law Review 81

Kennedy D, *The Rise & Fall of Classical Legal Thought* (BeardBooks)

——, "The Stages of the Decline of the Public/Private Distinction" (1982) 130 University of Pennsylvania Law Review 1349

Kennedy D and Danielsen D, *Busting Bribery: Sustaining the Global*

Momentum of the Foreign Corrupt Practices Act (Open Society Foundations 2011)

Kenny KE, "Code or Conduct: Whether Wal-Mart's Code of Conduct Creates a Contractual Obligation between Wal-Mart and the Employees of Its Foreign Suppliers Code or Contract: Whether Wal-Mart's Foreign Suppliers" (2007) 27 Nw. J. Int'l L. & Bus. 453

Kirshner JA, "Why is the U.S. Abdicating the Policing of Multinational Corporations to Europe?: Extraterritoriality, Sovereignty, and the Alien Tort Statute" (2012) 30 Berkeley Journal of International Law 259

Klein PG, "Blog Post: Coase and the Myth of Fisher Body" <https://organizationsandmarkets.com/2006/09/12/coase-and-the-myth-of-fisher-body/>

Knapp CL, "Taking Contracts Private: The Quiet Revolution in Contract Law" (2002) 71 Fordham Law Review 761

KnowTheChain, "Five Years of the California Transparency in Supply Chains Act" (2015)

Koh HH, "Transnational Legal Process" (1996) 75 Nebraska Law Review 181

——, "Why Transnational Law Matters" (2005) 24 Penn State International Law Review 745

Koziol H, *Basic Questions of Tort Law from a Germanic Perspective* (Jan Sramek Verlag 2012)

——, *Basic Questions of Tort Law from a Comparative Perspective* (Jan Sramek Verlag 2015)

Krauss M, "Tort Law and Private Ordering" (1990) 35 Saint Louis University Law Journal 623

Krebs P, *Sonderverbindung und außerdeliktische Schutzpflichten* (C H Beck'sche Verlagsbuchhandlung 2000)

Kunstle DP, "Kadic v. Karadzic: Do private individuals have enforceable rights and obligations under the Alien Tort Claims Act?" (1996) 6 Duke Journal of Comparative & International Law 319

Labowitz S and Baumann-Pauly D, "Beyond the Tip of the Iceberg: Bangladesh's Forgotten Apparel Workers. NYU Stern Center for Business and Human Rights Research Paper 17 December 2015" (2015) <http://www.stern.nyu.edu/experience-stern/faculty-research/cbhr-bangladesh-mapping-project>

Ladeur K-H (ed), *Public Governance in the Age of Globalization* (Routledge 2004)

Lando O and Beale H (eds), *Principles of European Contract Law Parts I*

and II (Kluwer Law International 2000)

Larsen RK, "Foreign Direct Liability Claims in Sweden: Learning from Arica Victims KB v. Boliden Mineral AB?" (2014) 83 Nordic Journal of International Law 404

Latour B, *Reassembling the Social : An Introduction to Actor-Network-Theory* (Oxford University Press 2005)

——, *The Making of Law: An Ethnography of the Conseil d'Etat* (Polity 2010)

Law Revision Committee, "Sixth Interim Report: Statute of Frauds and the Doctrine of Consideration Cmd. 5449" (1937)

Levi-Faur D, "From 'Big Government' to 'Big Governance'?" in David Levi-Faur (ed), *Oxford Handbook of Governance* (Oxford University Press 2012)

—— (ed), *Oxford Handbook of Governance* (Oxford University Press 2012)

Llewellyn KN, "What Price Contract? — An Essay In Perspective" (1931) 40 Yale Law Journal 704

Locke RM, *The Promise and Limits of Private Power: Promoting Labor Standards in a Global Economy* (Cambridge University Press 2013)

Luhmann N and Ziegert KA, *Law as a Social System* (Fatima Kastner and others eds, Oxford University Press 2009)

Lunney M and Oliphant K, *Tort Law: Text and Materials* (4th edn, Oxford University Press 2010)

Macaulay S, "Non-Contractual Relations in Business: A Preliminary Study" (1963) 28 American Sociological Review 55

Macey JR, "Public and private ordering and the production of legitimate and illegitimate legal rules" (1997) 82 Cornell Law Review 1123

Macneil IR, "The Many Futures of Contracts" (1974) 47 Southern California Law Review 691

——, "Contracts: Adjustment of Long-Term Economic Relations under Classical, Neoclassical, and Relational Contract Law" (1978) 72 Northwestern University Law Review 854

Markesinis B, "An Expanding Tort Law–The Price of a Rigid Contract Law" (1987) 103 Law Quarterly Review 354

Markesinis B, Unberath H and Johnston A, *The German Law of Contract: A Comparative Treatise* (Hart Publishing 2006)

Markesinis BS and Unberath H, *The German Law of Torts: A Comparative Treatise* (4th edn, Hart Publishing 2002)

Maryanov DC, “Sweatshop Liability: Corporate Codes of Conduct and the Governance of Labor Standards in the International Supply Chain” (2010) 14 Lewis and Clark Law Review 397

MC Hammer, “U Can’t Touch This” <https://www.youtube.com/watch?v=otCpCn0l4Wo>

Meeran R, “Tort Litigation against Multinational Corporations for Violation of Human Rights: An Overview of the Position Outside the United States” (2011) 3 City University of Hong Kong Law Review 1

Melvin A. Eisenberg, “Principles of Legal Reasoning in the Common Law” in Douglas E Edlin (ed), *Common Law Theory* (Cambridge University Press 2007)

Merkin R (ed), *Privity of Contract: The Impact of the Contracts (Rights of Third Parties) Act 1999* (Routledge 2000)

Micklitz H-W, “Herd Behaviour and Third Party Impact as a Legal Concept: On Tulips, Pyramid Games, and Asset-backed Securities” in Stefan Grundmann, Florian Möslein and Karl Riesenhuber (eds), *Contract Governance: Dimensions in Law and Interdisciplinary Research* (Oxford University Press 2015)

Milberg W and Winkler D, *Outsourcing Economics: Global Value Chains in Capitalist Development* (Cambridge University Press 2013)

Moréteau O, “Basic Questions of Tort Law from a Comparative Perspective” in Helmut Koziol (ed), *Basic Questions of Tort Law* (2015)

Morgan J, “Technological Change and the Development of Liability for Fault in England and Wales” in Miquel Martín-Casals (ed), *The Development of Liability in Relation to Technological Change* (Cambridge University Press)

Möslein F and Riesenhuber K, “Contract Governance – A Draft Research Agenda” (2009) 5 European Review of Contract Law 248

Muchlinski P, “The Changing Face of Transnational Business Governance: Private Corporate Law Liability and Accountability of Transnational Groups in a Post-Financial Crisis World” (2011) 18 Indiana Journal of Global Legal Studies 665

Murphy J, *Street on Torts* (12th edn, Oxford University Press 2007)

“Negligence–Duty of Care–Absence of Privity Does Not Bar Recovery by Legatee for Negligent Preparation of Will. – Biakanja v . Irving (Cal. 1958)” (1958) 72 Harvard Law Review 380

Nyström P, *Osakeyhtiön hallituksen fidusiaariset velvollisuudet: osakeyhtiö- ja vahingonkorvausoikeudellinen tutkimus* (Suomalainen lakimiesyhdistys 2016)

Oman NB, “A Pragmatic Defense of Contract Law” (2009) 98 Georgetown

Law Journal 77

Palmer V, “Why Privity Entered Tort—An Historical Reexamination of Winterbottom v. Wright” (1983) 27 Am. J. Legal Hist. 85

Palmer VV, *The Paths to Privity: A History of Third Party Beneficiary Contracts at English Law* (The Lawbook Exchange 2006)

Peel E, *Treitel’s The Law of Contract* (12th edn, Sweet & Maxwell 2007)

Pellé S, *La notion d’interdépendance contractuelle* (Dalloz 2007)

Petrin M, “Assumption of Responsibility in Corporate Groups: Chandler v Cape plc” (2013) 76 Modern Law Review 603

Phillips J and Lim S-J, “Their Brothers’ Keeper: Global Buyers and the Legal Duty to Protect Suppliers’ Employees” 61 Rutgers Law Review 333

Plehwe D, “Modes of Economic Governance: The Dynamics of Governance at the National and Firm Level” in David Levi-Faur (ed), *Oxford Handbook of Governance* (Oxford University Press 2012)

Poppo L and Zenger T, “Do Formal Contracts and Relational Governance Function as Substitutes or Complements?” (2002) 23 Strategic Management Journal 707

Poulet G, “Criticism and the Experience of Interiority.” in Richard Macksey and Eugenio Donato (eds), *Languages of Criticism and the Sciences of Man* (Johns Hopkins University Press 1970)

Powell WW, “Neither Market Nor Hierarchy: Network Forms of Organization” (1990) 12 Research in Organizational Behavior 295

Pöyhönen J, *Sopimusoikeuden järjestelmä ja sopimusten sovittelu* (Suomalainen lakimiesyhdistys 1988)

——, *Uusi varallisuusoikeus* (2nd edn, Talentum 2003)

Prahalad CK and Hamel G, “The Core Competence of the Corporation” (1990) 68 Harvard Business Review 79 <http://www.springerlink.com/index/v1774282g031q747.pdf>

Prosser WL, “The Assault Upon the Citadel (Strict Liability to the Consumer)” (1960) 69 Yale Law Journal 1099

——, “The Fall of the Citadel (Strict Liability to the Consumer)” (1966) 50 Minnesota Law Review 791

Revak H, “Corporate Codes of Conduct: Binding Contract or Ideal Publicity?” (2012) 63 Hastings Law Journal 1645

Rhodes RAW, “Waves of Governance” in David Levi-Faur (ed), *Oxford Handbook of Governance* (Oxford University Press 2012)

Richardson BJ, “Fiduciary Relationships for Socially Responsible Investing: A Multinational Perspective” (2011) 48 American Business Law

Journal 597

Richman BD, “Firms, Courts, and Reputation Mechanisms: Towards a Positive Theory of Private Ordering” (2004) 104 Columbia Law Review 2328

Robertson DW, “An American Perspective on Negligence Law” in Simon Deakin, Angus Johnston and Basil Markesinis (eds), *Markesinis and Deakin’s Tort Law* (Clarendon Press 2008)

Rogers B, “Toward Third-Party Liability for Wage Theft” (2010) 31 Berkeley Journal of Employement & Labor Law 1

Roth BR, “Sosa v. Alvarez-Machain: United States v. Alvarez-Machain. 123 S.Ct. 2739” (2004) 98 American Journal of International Law 798

Rott P and Ulfbeck V, “Supply Chain Liability of Multinational Corporations?” (2015) 23 European Review of Private Law 415

Rubio JJÁÁ and Yiannibas K (eds), *Human Rights in Business: Removal of Barriers to Access to Justice in the European Union* (Routledge 2017)

Rüthers B, *Die unbegrenzte Auslegung* (7th edn, 2012)

Sagy T, “What’s So Private about Private Ordering?” (2011) 45 Law & Society Review 923

Salminen J, “The Different Meanings of International Commercial Conciliation” [2011] Nordic Journal of Commercial Law

——, “Contract-Boundary-Spanning Governance Mechanisms: Conceptualizing Fragmented and Globalized Production as Collectively Governed Entities” (2016) 23 Indiana Journal of Global Legal Studies 709

——, “Governance Through Contract and the Environmental Impact of Supply Chains—Still Waiting for a ‘Rana Plaza’ Moment of Global Recognition” [2017] University of Oslo Faculty of Law Working Paper No. 2017-28

——, “The Accord on Fire and Building Safety in Bangladesh—A New Paradigm for Limiting Buyers’ Liability in Global Supply Chains?” [2018] American Journal of Comparative Law (Forthcoming)

Sanger A, “Crossing the Corporate Veil: The Duty of Care Owed by a Parent Company to the Employees of its Subsidiary” (2012) 71 Cambridge Law Journal 478

Sarfaty GA, “Shining Light on Global Supply Chains” (2015) 56 Harvard International Law Journal 419

Schepker DJ, Oh W-Y, Martynov A and Poppo L, “The Many Futures of Contracts: Moving Beyond Structure and Safeguarding to Coordination and Adaptation” (2014) 40 Journal of Management 193

Schill SW, “W(h)ither fragmentation? On the literature and sociology of

international investment law" (2011) 22 European Journal of International Law 875

Schlechtriem P, "Deliktshaftung des Subunternehmers gegenüber den Bauherrn wegen Minderwerts seines Werkes—Eine neue Entscheidung des House of Lords" [1983] Versicherungsrecht 64

Schwarcz SL, "Private Ordering" (2002) 97 Northwest University Law Review 319

Schwenzer I and Leisinger B, "Ethical Values and International Sales Contracts" in Ross Cranston, Jan Ramberg and Jacob Ziegel (eds), *Commercial Law Challenges in the 21st Century: Jan Hellner in memoriam* (Stockholm universitet 2007)

Schwenzer I and Mohs F, "Arbitration Clauses in Chains of Contracts" (2009) 27 ASA Bulletin 213

Schwenzer I and Schmidt M, "Extending the CISG to Non-Privity Parties" [2009] Vindobona Journal of International Commercial Law & Arbitration 109

Shapo MS, *Shapo on the Law of Products Liability Vol. I* (2013)

Slaughter A-M and Zaring D, "Networking Goes International: An Update" (2006) 2 Annual Review of Law and Social Science 211

Smith G and King B, "Contracts as Organizations" (2009) 51 Arizona Law Review 1

Ståhlberg P and Karhu J, *Suomen vahingonkorvausoikeus* (Talentum 2013)

Stapleton J, "Duty of care and economic loss: a wider agenda" (1991) 107 Law Quarterly Review 249

——, *Product Liability* (Butterworths 1994)

Stephens B, "Translating Filartiga: A Comparative and International Law Analysis of Domestic Remedies for International Human Rights Violations" (2002) 27 Yale Journal of International Law

Stone M, "On the Idea of Private Law" (1996) 9 Canadian Journal of Law and Jurisprudence 235

Sturgeon TJ, "Global Value Chains and Economic Globalization - Towards a New Measurement Framework" 71

Summers RS, "The Conceptualisation of Good Faith in American Contract Law: A General Account" in Reinhardt Zimmerman and Simon Whittaker (eds), *Good Faith in European Contract Law* (Cambridge University Press 2000)

Teubner G, "Legal Irritants: Good Faith in British Law or How Unifying Law Ends Up in New Divergences" (1998) 61 Modern Law Review 11

——, *Netzwerk als Vertragsverbund: Virtuelle Unternehmen, Franchising,*

Just-in-time in sozialwissenschaftlicher und juristischer Sicht (Nomos 2004)

——, "In the Blind Spot: The Hybridization of Contracting" (2007) 8 Theoretical Inquiries in Law 51

——, "'And if I by Beelzebub Cast Out Devils, ...': An Essay on the Diabolics of Network Failure" (2009) 10 German Law Journal 395

Teubner G and Collins H, *Networks as Connected Contracts* (Hart 2011)

Teyssié B, *Les groupes de contrats* (1975)

The Committee for the Prize in Economic Sciences in Memory of Alfred Nobel, "Scientific Background on the Sveriges Riksbank Prize in Economic Sciences in Memory of Alfred Nobel 2016 for Oliver Hart and Bengt Holmström on Their Contributions to Contract Theory" (2016) <https://www.nobelprize.org/nobel_prizes/economic-sciences/laureates/2016/advanced.html>

Thomas AL, "Nonsignatories in Arbitration: A Good-Faith Analysis" (2010) 14 Lewis and Clark Law Review 953

Ulfbeck V and Ehlers A, "Tort Law, Corporate Groups and Supply Chain Liability for Workers' Injuries: The Concept of Vicarious Liability" (2016) 13 European Company Law 167

UNCTAD, *World Investment Report 2011* (2011)

——, *World Investment Report 2013* (2013)

Unger RM, *The Critical Legal Studies Movement: Another Time, A Greater Task* (Verso 2015)

van Dam C, "Tort Law and Human Rights: Brothers in Arms On the Role of Tort Law in the Area of Business and Human Rights" (2011) 2 Journal of European Tort Law 221

——, *European Tort Law* (2nd edn, Oxford University Press 2013)

Vincent-Jones P, "Contractual Governance: Institutional and Organizational Analysis" (2000) 20 Oxford Journal of Legal Studies 317

Vitali S, Glattfelder JB and Battiston S, "The network of global corporate control" [2011] PloS one

Votinius S, *Varandra som vänner och fiender: En idékritisk undersökning om kontraktet och dess grund* (Symposion 2004)

Vytopil L, *Contractual Control in the Supply Chain: On Corporate Social Responsibility, Codes of Conduct, Contracts and (Avoiding) Liability* (Eleven International Publishing 2015)

Waarden F van, "The Governance of Markets: On Generating Trust in Transactions" in David Levi-Faur (ed), *Oxford Handbook of Governance* (Oxford University Press 2012)

Wagner G, “The development of product liability in Germany” in Simon Whittaker (ed), *The Development of Product Liability* (Cambridge University Press 2010)

Wai R, “Transnational Private Law and Private Ordering in a Contested Global Society” (2005) 46 Harvard International Law Journal 471

——, “Private v Private: Transnational Private Law and Contestation in Global Economic Governance” in Horatia Muir Watt and Diego P Fernández Arroyo (eds), *Private International Law and Global Governance* (Oxford University Press 2014)

Walle JS van de, “Doe v. Wal-Mart. Revisiting the Scope of Joint Employment” (2009) 30 Berkeley Journal of Employement & Labor Law 589

Waltari M, *Lähdin Istanbuliin* (1954 edn, WSOY 1947)

Ward H, “Governing Multinationals: The Role of Foreign Direct Liability” (2001) <http://www.blackwell-synergy.com/doi/abs/10.1111/j.1468-0319.1985.tb00102.x>

Weil D, *The Fissured Workplace: Why Work Became So Bad for So Many and What Can Be Done to Improve It* (Harvard University Press 2014)

Weinberg L, “What We Don’t Talk About When We Talk About Extraterritoriality: Kiobel and the Conflict of Laws” (2014) 99 Cornell Law Review 1471

Weinrib EJ, “Corrective Justice” (1992) 77 Iowa Law Review 403

——, “Correlativity, Personality, and the Emerging Consensus on Corrective Justice” (2001) 2 Theoretical Inquiries in Law 107

—— (ed), *Tort Law (The International Library of Essays in Law and Legal Theory, Second Series)* (Ashgate 2002)

Werner M, “Nor Difference It Knows” (1998) 12 Text: Transactions of the Society for Textual Scholarship 255

Wesche P and Saage-Maaß M, “Holding Companies Liable for Human Rights Abuses Related to Foreign Subsidiaries and Suppliers Before German Civil Courts: Lessons from Jabir and Others v KiK” (2016) 16 Human Rights Law Review 370

Whittaker S, “Privity of Contract and the Law of Tort: The French Experience” (1995) 15 Oxford J. Legal Stud. 327

——, “Privity of Contract and the Tort of Negligence: Future Directions” (1996) 16 Oxford J. Legal Stud. 191

——, “The Development of Product Liability in England,” *The Development of Product Liability* (Cambridge University Press 2010)

Whytock CA, Childress III DE and Ramsey MD, “Foreword: After

Kiobel—International Human Rights Litigation in State Courts and Under State Law" (2013) 3 UC Irvine Law Review 1

Wielsch D, "Global Law's Toolbox: Private Regulation by Standards" (2012) 60 American Journal of Comparative Law 1075

Wilhelmsson T, Sevon L and Koskelo P, *Huvudpunkter i köplagen* (3rd edn, Talentum 2006)

Williamson O, "Transaction-Cost Economics: The Governance of Contractual Relations" (1979) 22 Journal of Law & Economics 233

——, "Credible Commitments: Using Hostages to Support Exchange" (1983) 73 American Economic Review 519

——, "Corporate governance" (1984) 93 Corporate Governance 1197

——, *The Mechanisms of Governance* (Oxford University Press 1996)

——, "The Economics of Governance" (2005) 95 American Economic Review 1

Wright J, *Tort Law and Human Rights: The Impact of the ECHR on English Law* (Hart 2001)

Wuerth I, "Kiobel v. Royal Dutch Petroleum Co.: The Supreme Court and the Alien Tort Statute" (2013) 107 American Journal of International Law 601

Zimmerman R, *The Law of Obligations: Roman Foundations of the Civilian Tradition* (1996)

Zimmermann R and Whittaker S (eds), *Good Faith in European Contract Law* (Cambridge University Press 2000)

Zumbansen P, "Piercing the Legal Veil: Commercial Arbitration and Transnational Law" (2002) 8 European Law Journal 400

——, "Private Ordering in a Globalizing World: Still Searching for the Basis of Contract" (2007) 14 Indiana Journal of Global Legal Studies 181

——, "The Law of Society: Governance Through Contract" (2007) 14 Indiana Journal of Global Legal Studies 191

——, "Transnational Law" (2008) 4 CLPE Research Paper 09/2008

——, "Governance: An Interdisciplinary Perspective," *Oxford Handbook of Governance* (2012)

General Reporting

Clean Clothes Campaign, 'Safety scheme GAP and Walmart only 'empty promises'', Press Release From 10 July 2013, https://cleanclothes.org/news/2013/07/10/safety-scheme-gap-and-walmart.

Clean Clothes Campaign, International Labor Rights Forum, Maquila Solidarity Network, and Worker Rights Consortium, 'Evaluation of H&M Compliance with Safety Action Plans for Strategic Suppliers in Bangladesh,' September 2015, http://www.cleanclothes.org/resources/publications/hm-bangladesh-september-2015.pdf.

Global Witness, 'International Timber Company DLH Accused of Funding Liberian Civil War', Press Release 18 November 2009, https://www.globalwitness.org/fr/archive/international-timber-company-dlh-accused-funding-liberian-war/.

Earthrights International, 'Doe v UNOCAL Case History', available at https://www.earthrights.org/legal/doe-v-unocal-case-history.

Earthrights International, 'Human Rights Claim against Chiquita for Funding Colombian Paramilitaries Will Proceed in US Court', November 30, 2016, available at https://www.earthrights.org/media/human-rights-claims-against-chiquita-funding-colombian-paramilitaries-will-proceed-us-court.

European Center for Constitutional and Human Rights, 'Paying the price for clothing factory disasters in south Asia', available at https://www.ecchr.eu/en/our_work/business-and-human-rights/working-conditions-in-south-asia/pakistan-kik.html.

European Center for Constitutional and Human Rights, 'Q&A on the Compensation Claim against KiK', under the heading 'On what basis are victims suing in Germany?', available at https://www.ecchr.eu/en/our_work/business-and-human-rights/working-conditions-in-south-asia/pakistan-kik/q-a-compensation-claim-against-kik.html.

European Center for Constitutional and Human Rights, 'Plaintiffs' Legal Opinion on English Common Law Principles on Tort in *Jabir et al.* v *KiK Textilien*', 7 December 2015.

European Center for Constitutional and Human Rights, 'Criminal Proceedings against Ali Enterprises in Pakistan', available at https://www.ecchr.eu/en/business-and-human-rights/working-conditions-in-south-asia/pakistan-kik/proceedings-in-pakistan.html.

European Center for Constitutional and Human Rights, 'Factory Fire in Pakistan: Criminal investigations into RINA in Italy', available at https://www.ecchr.eu/en/business-and-human-rights/working-conditions-in-south-asia/pakistan-kik/proceedings-in-italy.html.

Friends of the Earth International, 'Outcome appeal against Shell: victory for the environment and the Nigerian people – Friends of the Earth Netherlands', December 18, 2015, available at http://www.foei.org/news/outcome-appeal-shell-victory-environment-nigerian-people-friends-earth-netherlands.

Global Witness, ’Complaint Accuses International Timber Company DLH of Trading Illegal Timber and Funding Liberian War, Press Release 12 March 2014, https://www.globalwitness.org/fr/archive/complaint-accuses-international-timber-company-dlh-trading-illegal-timber-and-funding-0/.

Global Witness, ‘Wartime Timber Company DLH Penalized for Trading Illegal Liberian Private Use Permit Logs’, Press Release of February 13, 2015, https://www.globalwitness.org/fr/archive/wartime-timber-company-dlh-penalized-trading-illegal-liberian-private-use-permit-logs-0/

Global Witness, ‘Danish Timber Giant Kicked Out of Forest Stewardship Council Certification Scheme for Trading Illegal Timber’, Press Release of February 12, 2015, https://www.globalwitness.org/fr/archive/danish-timber-giant-kicked-out-forest-stewardship-council-certification-scheme-trading/

Noam Cohen, ‘Twitter and a Newspaper Untie a Gag Order’, New York Times October 18, 2009, available at: http://www.nytimes.com/2009/10/19/technology/internet/19link.html.

Human Rights Watch, ‘Belgium: Universal Jurisdiction Law Repealed’, August 1 2003, https://www.hrw.org/news/2003/08/01/belgium-universal-jurisdiction-law-repealed.

John Hyde, ‘Court finds Leigh Day breached duty of care to Trafigura claimant’, The Law Society Gazette June 17, 2016, http://www.lawgazette.co.uk/law/court-finds-leigh-day-breached-duty-of-care-to-trafigura-claimant/5055953.fullarticle

David Jolly, ‘Ivory Coast Toxic-Dump Case Settled, Company Says’, New York Times September 21, 2009, http://www.nytimes.com/2009/09/21/business/global/21iht-toxic.html

Landgericht Dortmund, PRESSEMITTEILUNG 30 August 2016, available at http://www.lg-dortmund.nrw.de/behoerde/presse/Pressemitteilungen/PM-KiK_docx.pdf.

Leon Kaye, *U.S. Court Dismisses Rana Plaza* Lawsuit, TRIPLE PUNDIT 9 May 2015, http://www.triplepundit.com/2016/05/u-s-court-dismisses-rana-plaza-lawsuit/#.

Farhad Manjoo, ‘How Companies Like Dollar Shave Club Are Reshaping the Retail Landscape’, New York Times July 27, 2016, http://www.nytimes.com/2016/07/28/technology/these-stores-didnt-develop-websites-they-started-there.html.

Jad Mouawad, ‘Shell to Pay $15.5 Million to Settle Nigerian Case’, New York Times June 8, 2009, http://www.nytimes.com/2009/06/09/business/global/09shell.html?ref=global.

‘Netherlands: Toxic Waste Case Is Settled’, New York Times November 17, 2012, http://www.nytimes.com/2012/11/17/world/europe/trafigura-to-pay-fine-for-exporting-toxic-waste.html.

Adam Nossiter, ‘Payments in Ivory Coast Dumping Case at Risk, Lawyer Says’, New York Times November 4, 2009, http://www.nytimes.com/2009/11/05/world/africa/05trafigura.html.

Lydia Polgreen, ‘Ivory Coast: 2 Sentenced in ’06 Scandal’, New York Times October 23, 2008, http://www.nytimes.com/2008/10/24/world/africa/24briefs-2SENTENCEDIN_BRF.html.

Lydia Polgreen and Marlise Simons, ‘Global Sludge Ends in Tragedy for Ivory Coast’, New York Times 2 October 2006, http://www.nytimes.com/2006/10/02/world/africa/02ivory.html.

PR Newswire, ‘Mexican Workers Employed in American-Owned 'Maquiladora' Factory Win Unprecedented $30 Million Settlement’, August 16, 1999, http://www.prnewswire.com/news-releases/mexican-workers-employed-in-american-owned-maquiladora-factory-win-unprecedented-30-million-settlement-74009787.html.

Noam Scheiber, ‘Growth in the ‘Gig Economy’ Fuels Work Force Anxieties’, New York Times, July 12, 2015, https://www.nytimes.com/2015/07/13/business/rising-economic-insecurity-tied-to-decades-long-trend-in-employment-practices.html.

Steven Davidoff Solomon, ‘$1 Billion for Dollar Shave Club: Why Every Company Should Worry’, New York Times, July 26, 2016, http://www.nytimes.com/2016/07/27/business/dealbook/1-billion-for-dollar-shave-club-why-every-company-should-worry.html.

Legal Cases

Australia

Dagi v *BHP* [1997] 1 VR 428.

Belgium

A.M.Z v *Total*, Cour de cassation, N° P.07.0031.F, 28 Mars 2007.

Canada

Association Canadienne Contre L’impunité v *Anvil Mining* [2011] JQ No 4382, 500-06-000530-101.

Das v *George Weston Limited*, 2017 ONSC 4129, 5 July 2017 (Ontario Superior Court of Justice No. CV-15-52662800CP).

Recherches Internationales Quebec v *Cambior Inc* [1998] QJ No 2554 (Superior Court of Quebec, Canada).

England

Agouman v Leigh Day [2016] EWHC 1324 (QB).

Anns v *Merton London Borough Council* [1978] A.C. 728.

Balsamo v *Medici* [1984] 1 WLR 951.

Beswick v *Beswick* (1961) AC 58 (1968).

Candlewood Navigation Corp Ltd v Mitsui OSK Lines Ltd (The Mineral Transporter) [1986] AC 1.

Caparo Industries Ltd v *Dickman* [1990] UKHL 2.

Chandler v *Cape* [2012] EWCA Civ 525.

Clarke v *Army and Navy Co-operative Society* [1903] 1 KB 155.

Connelly v *RTZ Corporation* [1998] AC 854.

Connelly v *RTZ Corporation* (unreported December 1998).

Connelly v *RTZ Corporation* (1999) CLC 533.

D. & F. Estates Ltd v *Church Commissioners for England and Wales* [1988] UKHL 4.

Donoghue v *Stevenson* [1932] AC 562.

Dunlop Pneumatic Tyre Co v *Selfridge & Co* (1915) AC 847 (1915).

Dutton v *Poole* 83 ER 523 (KB 1677).

Eric v *Bush* [1990] UKHL 1.

George v *Skivington* [1869–1870] LR V Ex. 1.

Heaven v *Pender* [1882–1883] LR XI QBD 503.

Hedley Byrne & Co Ltd v Heller & Partners Ltd. [1964] AC 465.

Henderson v *Merrett Syndicates Ltd*[1994] UKHL 5.

Leigh and Sillavan Ltd. V *Aliakmon Shipping Co Ltd (The Aliakmon)* [1985] UKHL 10.

Lubbe v *Cape Plc* [1998] CLC 1559 (CA).

Lubbe v *Cape Plc* [2000] 1 WLR 1545 (HL).

Martyn v *Hind*, 98 ER 1174 (KB 1776).

Motto v *Trafigura*, High Court of Justice, Queen's Bench Division, No. HQ06X03370.

Motto v *Trafigura Limited* [2011] EWCA Civ 1150.

Muirhead v *Industrial Tank Specialities Ltd and Other* [1986] QB 507.
Murphy v *Brentwood DC* [1991] 1 AC 398.
Ngcobo v *Thor Chemicals Holdings Ltd* (unreported 1996) (Maurice Kay J).
Jackson v *Horizon Holidays Ltd* (1 WLR 1468, 1975).
Langridge v *Levy* [1837] 2 M & W 519, in Ex. Ch. [1838] 4 M & W 337.
Simaan General Contracting Co v *Pilkington Glass Ltd* [1988] QB 758.
Sithole v *Thor Chemicals Holdings & Desmond Cowley* (2000 WL 1421183).
Spartan Steel & Alloys Ltd v *Martin & Co (Contractors) Ltd* [1973] QB 27.
Spring v *Guardian Assurance Plc* [1995] 2 AC 296.
Sutradhar v *Natural Environment Research Council* [2006] UKHL 33.
Thompson v The Renwick Group Plc [2014] EWCA Civ 635.
Tweddle v *Atkinson* (1861) 121 ER 762 (QB 1861).
Vava v *Anglo American South Africa Ltd* (Claim No HQ11X03245).
White v *Jones* [1995] UKHL 5.
Williams v *Natural Life Health Foods Ltd* [1998] UKHL 17.
Winterbottom v *Wright* [1842] 10 M.&W. 109, 152 ER 402.
Woodar Investment Development Ltd v *Wimpey Consturction UK Ltd* (1 WRL 277, 1980).

European Union

Alsthom Atlantique v *Sulzer* (C-339/89).
Jakob Handte & Co. GmbH v *Traitements mécano-chimiques des surfaces SA* (C-26/91, 17 June 1992).
Réunion Européenne SA and Others v *Spliethoff's Bevrachtingskantoor BV and the Master of the vessel Alblasgracht V002* (C-51/97, 27 October 1998).

France

Cass. civ. November 12, 1884, Dalloz 1885 I 357.
Cass civ. (v) June 16, 1896.
Cass ch. réunies February 13, 1930 (*Jand'heur*).
Cass. civ. July 22, 1931.
Cass. civ. May 20, 1936.
Cass. com. June 19, 1951 (*Lamoricière*).
Cass. civ. (2) February 17, 1955; 55-02810.
Cass. com. July 1, 1969, *Bull. civ. IV* n. 243.

Cass. com. December 17, 1973; 72-11017.

Cass. civ. (1) October 9, 1979; 78-12502 (*Lamborghini*).

Cass. civ. (1) March 8, 1988; 86-18182 (*Clic Clac Photo*).

Cass. civ. (1) June 21, 1988; 85-12609 (*Aéroports de Paris*).

Cass. civ. (1) July 12, 1989; 86-11443.

Ass. plén July 12, 1991; 90-13602 (*Besse*).

Cass. civ. (1) April 12, 1995; 92-11950, 9211975.

Cass. civ. (1) April 4, 2006; 02-18.277.

T.G.I. Paris, 1st July 1991, J.C.P. 1991.II.21762

Germany

BGH 26.11.1968, NJW 1969, 269

BGH 28.1.1976, NJW 1976, 712

BGH 19.1.1977, NJW 1977, 2073

BGH 28.2.1977, NJW 1977, 1916,

BGH 12.2.1979, NJW 1979,1595.

BGH 28.8.1982, NJW 1982, 2431

BGH 2.11.1983, NJW 1984, 355

BGH 14.11.2000, NJW 2001 514

Jabir et al. v *KiK Textilien und Non-Food GmbH*, LG Dortmund (7 O 95/15).

Verbraucherzentrale Hamburg v *Lidl* (settled, generally see https://business-humanrights.org/en/lidl-lawsuit-re-working-conditions-in-bangladesh)

ICSID

World Duty Free Company Limited v *The Republic of Kenya*, ICSID Case No. ARB/00/7, 2006.

Netherlands

Oguru, Efanga & Milieudefensie v *Royal Dutch Shell Plc and Shell Petroleum Development Co Nigeria Ltd* (No. 330891/ HA ZA 09-579 2009).

Bellissimo Foods v *Tony's Factory*, Rechtbank Amsterdam February 6, 2007, 361761 / KG ZA 07-139 AB/MV (*Tony's Chocolonely*).

OECD

Final statement by the UK National Contact Point for the OECD Guidelines for Multinational Enterprises: Afrimex (UK) Ltd, August 28, 2008.

Sweden

Arica Victims KB v. *Boliden Minerals AB*, Skellefteå Tingsrätt, T. 1021-13.

United States

Baxter v *Ford Motor Co*, 12 P 2d 409; 15 P 2d 1118 (1932), 35 P 2d 1090 (1934).

Biakanja v *Irving*, 320 P.2d 16 (Cal. 1958).

Burr v *Beers*, 24 N.Y. 178 (1861).

Commerce Partnership 8090 Limited Partnership v *Equity Contracting Co.*, 695 So. 2d 383 (Fla. App. 1997).

Credit Alliance Corp. v *Arthur Andersen & Co.*, 483 NE 2d 110 (NY 1985).

Doe v Chiquita Brands International, No. 08-MD-80421, (US District Court, Southern District of Florida).

Doe v *Wal-Mart Stores, Inc*, 572 F.3d 677 (9th Cir. 2009).

Doe v Wal-Mart Stores, Inc, California Central District Court, Case No. 2:05-cv-07307.

East River SS Co v *Transamerica Delaval Inc.*, 476 U.S. 858 (1986).

Filártiga v *Peña-Irala*, 630 F.2d 876 (2d Cir 1980).

Glanzer v *Shepard* 233 N.Y. 236 (N.Y. 1922).

Greenman v *Yuba Power Tools* (377 P 2nd 897).

Guy v *Liederbach* 501 Pa. 47 (1983).

Harvard Climate Coalition v *President and Fellows of Harvard College*, Appeals Court of Massachusetts, No. 15-P-905 (decided October 6, 2016), 2016 Mass. App. LEXIS 141.

Heyer v *Flaig* (70 Cal. 2d 223, Cal. Supreme Court).

Idaho Lumber, Inc v *Buck*, 710 P.2d 647 (Idaho App. 1985).

MacPherson v *Buick Motor Co*. 111 N.E. 1050 (N.Y. 1916).

Kadic v *Karadzic* 70 F 3d 232, 236–37 (2d Cir 1995).

Kasky v *Nike* (2002, No. S087859, California Supreme Court).

Kennedy v *F. W. Woolworth Co*., 205 App. Div. 648, 200 N.Y. Supp. 121 (1923).

Kiobel v. Royal Dutch Petroleum Co., 133 S.Ct. 1659 (2013).

Lawrence v *Fox*, 20 N.Y. 268 (1859).

Loop v *Litchfield* (42 N.Y. 351; 1870).

Losee v *Clute* (51 N.Y. 494; 1873).

Louis K. Liggett Co. v *Lee*, 288 U.S. 517 (1933).

Lucas v *Hamm* (364 P.2d 685 Cal. 1961).

Mazetti v *Armour & Co* 135 P 633 (Washington).

Rahaman et al. v. *J.C. Penney Corporation, Inc. et al.*, C.A. No. N15C-07-174 MMJ (Del. Super. Ct. May 4, 2016).

Rodriguez-Olvera v. *Salant Corp*. No. 97.07-14605-CV (365th Dist. Ct. of Maverick County, Tex. 1999).

Roe v *UNOCAL*, 395 F.3d 932 (9th circ. 2002).

Rozny v *Marnul*, 250 N.E.2d 656 (Ill. 1969).

Rusch Factors Inc v *Levin*, 284 F. Supp. 85 (D.R.I. 1968).

Savings Bank v *Ward* 100 U.S. 195.

Seaver v *Ransom* 120 N.E. 639 (N.Y. 1918).

Seely v *White Motor Co* 403 P.2d 145 (Cal. 1965).

Sosa v. Alvarez-Machain 123 S.Ct. 2739 (2004).

Thomas v *Winchester* (6. N.Y. 397; 1852).

Ultramares Corp. v *Touche* 174 NE 441,445 (NY 1931).

Wiwa v *Royal Dutch Petroleum Co*, 226 F 3d 88 (2d Cir 2000).