A Civilian Perspective on Network Contracts and Privity

*Matthias E. Storme**

Abstract

In order to contribute to the debate on the "edges of contract law," especially on the value of the privity rule in an age of network contracts and sharing economy, this Essay analyzes some approaches and solutions chosen by continental or civil law systems of private law. It mainly deals with the effects of chains of (in principle bilateral) contracts and more specifically the effect in one relationship of the fact that a contracting partner also has a contract with a third party. First, this Essay studies the effects in a first contractual relationship, of other contracts concluded by one of the parties in the first one (internal liability). Second, it discusses some ways in which persons may acquire rights or be burdened by duties from a contract to which they were not a party, and privity is thus "extended" (paying attention inter alia to assignment, contracts for the benefit of a third party, and so-called "direct actions"). Finally, it touches upon some aspects of tort law specifically relevant to chains or networks of contracts.

Table of Contents

* Full professor (ord.), Chair of Commercial and Insolvency Law, KU Leuven (Belgium). All Figures are lightly modified versions of those designed by myself and used in earlier publications, first in *The Structure of the Law on Multiparty Situations in the Draft Common Frame of Reference*, 14 Juridica Int'l 78 (2008), http://www.juridicainternational.eu/public/pdf/ji_2008_1_78.pdf.

November 2017 Vol. 85 No. 6

INTRODUCTION

In a panel of the Symposium on "Divergence and Reform in the Common Law of Contracts," I was asked to contribute to the debate on the "edges of contract law," especially on the value of the privity rule in an age of network contracts and the share economy, in which users may sign up for a service with one party but have a third party ultimately perform that service. I offer some approaches, ways of thinking, and solutions chosen by continental or civil law systems of private law.

There are many limits to such an essay, and I would like to acknowledge at least some of them (other than the limits of my own knowledge) as a trigger warning. This contribution mainly deals with the effects of chains of (usually bilateral) contracts and more specifically the effect on one relationship of the fact that a contracting partner also has a contract with a third party. I am not dealing with the

organization of networks by means other than contracts, such as corporations, partnerships, associations, and different forms of co-ownership. I am also not dealing with trusts and trust-like arrangements, although I am well aware that some of the functions of the institutions mentioned below are served by trust law in common law countries (e.g., some functions of contracts stipulating a benefit for a third party). I will touch upon effects in insolvency only marginally (as a professor in insolvency law I cannot wholly avoid it), and the same is true for the important topic of restitution or enrichment law. I am dealing neither with questions of labor law nor with the role of network effects in competition law, and only marginally with contracts of carriage (transport law).[1]

Second, as to the sources and materials, there is no uniform civil law on many of these topics. I will refer to European Union ("EU") law where it does say something on a topic, but most of the law in this area is state law (national law). Next to the common law systems (England and Wales, Ireland), there are at least twenty-eight systems of contract law in the EU (counting Scotland and Catalonia),[2] and I am not going to give a full comparative overview, but rather do a lot of cherry-picking, selecting mainly those rules and institutions that deviate from a strict rule of privity of contract, but also indicating some of the more important divergences among civil law jurisdictions in this field.[3] I will also refer to the Principles, Definitions and Model Rules of European Private Law: Draft Common Frame of Reference ("DCFR"), drafted as a kind of restatement of the law of contract, tort, restitution, and property.[4]

Third, English is neither my native language nor a native language in any of the continental legal systems featuring in this contribution. I may use gender indications in ways that differ from American usage or politeness. The terminology I use attempts to

---

1 *See infra* Section I.A.1.

2 *See* HECTOR L. MACQUEEN, ANTONI VAQUER & SANTIAGO ESPIAU ESPIAU, REGIONAL PRIVATE LAW AND CODIFICATION IN EUROPE (2003).

3 *See infra* Part II.

4 STUDY GRP. ON A EUROPEAN CIVIL CODE & RESEARCH GRP. ON EC PRIVATE LAW (ACQUIS GRP.), PRINCIPLES, DEFINITIONS AND MODEL RULES OF EUROPEAN PRIVATE LAW: DRAFT COMMON FRAME OF REFERENCE (DCFR) (Christian von Bar, Eric Clive & Hans Schulte-Nölke, and Hugh Beale, Johnny Herre, Jérôme Huet, Peter Schlechtriem†, Matthias Storme, Stephen Swann, Paul Varul, Anna Veneziano & Fryderyk Zoll eds., 2009), http://ec.europa.eu/justice/contract/files/european-private-law_en.pdf [hereinafter DCFR]. I was a member of some of the working groups and of the final redaction team. The drafters followed the model of the Restatements of the American Law Institute ("ALI"), but this does not mean the DCFR has the same role or authority as an ALI Restatement.

render into the English language concepts and rules from non–common law systems that often do not have a substantial equivalent in common law terminology; I try to stay close to the terminology in the DCFR by using, for example, "right to performance" instead of "claim," "termination" of contractual relationship, "debtor" rather than "obligor," "creditor" rather than "obligee," "movables," etc.

Within these limits, I will first address, in Part I, the effect, in the internal relationship between contracting parties, of other contracts concluded by one of those parties. In Part II, I will discuss how persons may acquire rights or be burdened by duties from a contract to which they were not a party. Finally, in Part III, I will deal very briefly with some aspects of tort law specifically relevant to chains or networks of contracts, including the effects in tort law of the fact that the damage is related to the nonperformance of a contractual obligation.

I. Internal Liability Between Contracting Parties

This Part discusses in A the traditional rules on liability for performance entrusted to another and its variations in contemporary civil law, including the rules on linked contracts. It continues with two more specific cases of liability, namely indirect representation (corresponding—to some extent—to undisclosed agency) (B) and liability from information by earlier links in the business chain (C). Due to the limits of this contribution, discussed above, this Part will not discuss the related question of whether (apart from the case of undisclosed agency) a party is entitled to claim compensation for damage caused by the defendant to a linked third party.

A. Performance Entrusted to Another

1. The Basic Rule: Liability in Chains of Contracts

The starting point is the same in essentially all systems of contract law, namely that a debtor of a contractual obligation is liable for nonperformance by a third person to whom performance was entrusted or delegated. We find it in DCFR Article III.-2:106,[5] in the Restatement (Second) of Contracts at section 18,[6] and indirectly in the United Na-

5 *Id.* art. III.–2:106 ("A debtor who entrusts performance of an obligation to another person remains responsible for performance.").

6 Restatement (Second) of Contracts § 318 (Am. Law Inst. 1981) ("Unless the obligee agrees otherwise, neither delegation of performance nor a contract to assume the duty made with the obligor by the person delegated discharges any duty or liability of the delegating obligor.").

tions Convention on Contracts for the International Sale of Goods ("CISG") at Article 79(2).[7] The rule is wider than delegation of performance in a strict sense: a debtor remains liable for nonperformance if he cannot deliver goods or services because they are not delivered by his own supplier or service provider. In that sense, it is a rule on "chains" of contracts.

Insofar as mandatory provisions of law do not prevent the debtor from stipulating an exemption of liability for his own nonperformance, he can, a fortiori, stipulate an exemption of liability for nonperformance by such third person. There is one question that may, however, arise as to a debtor who is in principle prevented by mandatory provisions of law from stipulating an exemption of liability for his own nonperformance. Can he nevertheless do so for the nonperformance of a third party in exchange for an assignment to the creditor of one's rights against that third party? The question has arisen, for example, in relation to financial leasing in jurisdictions where there are limitations to exemption clauses in lease contracts. The lessor will normally stipulate that he is not liable for any nonconformity in relation to the equipment and, in exchange, either assign to the lessee its rights against the supplier or stipulate from the supplier that he owes obligations in relation to the equipment directly to the lessee;[8] but in most continental jurisdictions, the liability of a lessor of movables is not mandatory anyway,[9] except in consumer contracts.[10]

This first case must be distinguished from cases where the rule does not apply because the contracting party did not promise the performance itself to the buyer or client, but merely promised to contract with a third party as an agent of the buyer or client or merely intervened to assist the buyer or client to find a supplier or service provider and contract with that supplier or service provider. This frequently happens in cases where a seller does not promise to deliver the goods to the buyer, but merely to contract with an independent carrier who will be liable to the buyer according to the terms of the contract of carriage (in many consumer contracts, however, a seller may be mandatorily obliged to deliver the goods to the consumer and cannot

---

7 United Nations Convention on Contracts for the International Sale of Goods art. 79(2), Apr. 11, 1980, 1489 U.N.T.S. 3 [hereinafter CISG].

8 In some jurisdictions or instruments, such an arrangement is the default rule. *See, e.g.*, Unidroit Convention on International Financial Leasing arts. 8 (1°), 10, 12, May 28, 1988, 2321 U.N.T.S. 195.

9 *See, e.g.*, Hof van Cassatie [Cass.] [Court of Cassation], June 17, 1993, No. 9405 (Belg.), http://jure.juridat.just.fgov.be/view_decision.html?justel=N-19930617-8.

10 *E.g.*, DCFR, *supra* note 4, art. IV.B.–1:104.

contract out of this obligation by delegating it to an independent carrier). According to classical contract law, there is no chain of contracts, but a "star"[11]: the client or buyer has separate but related contracts with different parties. Contemporary contract law in many continental jurisdictions often deviates from this classical rule, especially in consumer contracts, as I will summarize in Section I.A.2.

Also, as discussed in Section B, continental civil law differs from the common law tradition in that this classical rule does not normally apply in cases of "indirect representation," i.e., where the intermediary concludes a contract with a service provider or seller in its own name, even if for the account of a principal and even if the name of the principal is disclosed, or vice versa. The triangle is treated as a chain. The intermediary will then be liable for nonperformance (nondelivery of goods or services) only when he acts—within the scope of his authority—in the name of his principal, thus establishing from the beginning a direct contractual relationship between the principal and the third party.[12] Insofar as the third party agrees, this may nevertheless also be a contract in the name of a principal to be named later.[13] It is thereby also perfectly possible that a service provider is undertaking, on the one hand, to provide certain services himself and, on the other hand, merely to act as an intermediary for other services. As to the latter, he will only be liable if he breaches his obligations as an agent (inter alia, negligence as to the advice given, the choice of the third party, etc.).[14] On the other hand, in some cases, to be discussed in Section I.B, a contracting party cannot escape liability in contract by stipulating that he will merely act as an agent for the buyer or client in order to delegate the provision of goods or services to a third party. Inversely, the main rule may also not apply in certain cases because the subcontractor or supplier was imposed by the client or buyer. I will come back to these exceptions under Section I.A.3.

2. *Stars Treated as Chains: Linking of Separate but Related Contracts*

Contemporary EU law and, more generally, continental contract law have developed a number of devices whereby formally separate

---

11 I borrow the images of stars, triangles, and chains from Stefan Grundmann, *Contractual Networks in German Private Law*, *in* CONTRACTUAL NETWORKS, INTER-FIRM COOPERATION AND ECONOMIC GROWTH 111, 114 (Fabrizio Cafaggi ed., 2011).

12 *See* DCFR, *supra* note 4, art. II.–6:105.

13 *But cf. id.* art. II.–6:108 (noting that failure to reveal identity of principal can result in personal liability for intermediary).

14 See, for example, the obligation of skill and care of an agent. *Id.* art. IV.D.–3:103.

contracts are nevertheless linked in such a way that the fate of one contract is linked to the fate of another, and in some cases also to the extent that one of the contracting parties is liable for a nonperformance under another contract to which it is not a party, if it has organized or facilitated the conclusion of that other contract.

a. Passive Linking of Contracts

When I say that "the fate of one contract is linked to the fate of another," this refers to the following effects: a) one contract will only come into effect if a linked contract also comes into effect or b) where a party validly withdraws from or avoids or terminates one contract, this implies a withdrawal from, avoidance of, or termination of the linked contract as well, or at least entitles that party to also withdraw from, avoid, or terminate the linked contract. Such a link may have been explicitly or impliedly agreed by the parties, or may apply by virtue of law (often mandatory law, at least in consumer contracts).

Parties may link the fate of one contract to the fate of another by stipulating conditions precedent (suspensive conditions) or subsequent (resolutive conditions).[15] Contracts for the sale of land are frequently concluded under the suspensive condition that the buyer obtains a credit contract as well as under other suspensive conditions (not necessarily requiring the conclusion of another contract).[16] It is, in such a case, relevant to find out whether the condition is stipulated for the benefit of one of the parties only or for the benefit of both; in the first case, that party can waive the condition in order to give effect to the contract.[17] It is also a default rule in civil law systems that the fulfillment or nonfulfillment of a condition is set aside if it was caused by a party interfering with events contrary to the requirements of

15 *See, e.g.*, Carole Aubert de Vincelles, *Linked Contracts Under French Law*, *in* CONTRACTUAL NETWORKS, INTER-FIRM COOPERATION AND ECONOMIC GROWTH, *supra* note 11, at 163, 163–64. The definition of "condition" in section 224 of the Restatement (Second) of Contracts corresponds basically to what is a suspensive condition in continental civil law. *Compare* DCFR, *supra* note 4, art. III.–1:106(1), *with* RESTATEMENT (SECOND) OF CONTRACTS § 224 (AM. LAW INST. 1981). There are, however, clearly some differences as to the way in which conditions function in continental civil law of obligations on the one hand and classical common law of contract on the other (I refer to the traditional common law distinction between conditions, terms, and warranties which does not exist in civil law).

16 *See* Aubert de Vincelles, *supra* note 15, at 164.

17 *See, e.g.*, Cour de Cassation [Cass.] [Court of Cassation], June 30, 2016, RECHTSKUNDIG WEEKBLAD [RW] 2016–17, 1535 (Belg.) (annotated by Sanne Jansen), http://jure.juridat.just.fgov.be/view_decision.html?justel=N-20160630-17. A comparable approach in American law is presented in 13 SAMUEL WILLISTON & RICHARD A. LORD, A TREATISE ON THE LAW OF CONTRACTS § 39:17 (4th ed. 2013).

good faith (e.g., by not making the required efforts to obtain a credit);[18] further, it is wise for the parties to determine within which period of time a condition must be fulfilled or efforts have to be made. I will not enter into details on these questions.

The fate of one contract can also be linked to the fate of another by virtue of law. Such legal rules are, to a large extent, a reaction to developments in business practice that have increasingly blurred the difference between chains and stars of contracts. On the one hand, market participants are trying to minimize or shift risks by splitting up or reorganizing contracts in order to avoid the traditional rule of liability for upstream nonperformance. On the other hand, they try to obtain the benefits of networking between formally independent contracts without also taking responsibility for partners in such networks.[19]

European consumer law directives have responded by, among other things, extending the effect of a withdrawal or termination by the consumer to the linked contract. This is true of the Consumer Credit Directive,[20] the Consumer Rights Directive,[21] and the Package Travel Directive.[22] First, in the Consumer Credit Directive, the rule applies to "linked credit agreement[s]," defined in Article 3(n) as credit agreements where:

> (i) the credit in question serves exclusively to finance an agreement for the supply of specific goods or the provision of a specific service, and
> (ii) those two agreements form, from an objective point of view, a commercial unit; a commercial unit shall be deemed to exist where the supplier or service provider himself finances the credit for the consumer or, if it is financed by a third party, where the creditor uses the services of the sup-

---

18 *See* DCFR, *supra* note 4, art. III.–1:106(4).

19 *See supra* Section I.A.1.

20 Directive 2008/48/EC of the European Parliament and of the Council of 23 April 2008 on Credit Agreements for Consumers and Repealing Counsel Directive 87/102/EEC, 2008 O.J. (L 133) 66, http://data.europa.eu/eli/dir/2008/48/oj [hereinafter Council Directive 2008/48].

21 Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on Consumer Rights, Amending Council Directive 93/13/EEC and Directive 1999/44/EC of the European Parliament and of the Council and Repealing Council Directive 85/577/EEC and Directive 97/7/EC of the European Parliament and of the Council, 2011 O.J. (L 304) 64, http://data.europa.eu/eli/dir/2011/83/oj [hereinafter Council Directive 2011/83].

22 Directive (EU) 2015/2302 of the European Parliament and of the Council of 25 November 2015 on Package Travel and Linked Travel Arrangements, Amending Regulation (EC) No 2006/2004 and Directive 2011/83/EU of the European Parliament and of the Council and Repealing Council Directive 90/314/EEC, 2015 O.J. (L 326) 1, http://data.europa.eu/eli/dir/2015/2302/oj [hereinafter Council Directive 2015/2302].

> plier or service provider in connection with the conclusion or preparation of the credit agreement, or where the specific goods or the provision of a specific service are explicitly specified in the credit agreement.[23]

Second, in the Consumer Rights Directive, the rule applies to "ancillary contracts," defined as contracts "by which the consumer acquires goods or services related to a distance contract or an off-premises contract and where those goods are supplied or those services are provided by the trader or by a third party on the basis of an arrangement between that third party and the trader."[24] Third, in cases of separate contracts with individual travel service providers, the Package Travel Directive distinguishes between "packages" where these contracts are fully linked and forming a whole and merely "linked travel arrangements" where online or High Street traders facilitate the procurement of travel services by leading the traveler to form contracts with different travel services providers, including through linked booking processes that do not contain the features of a package.[25] Linked travel arrangements are distinguished from

> websites which do not have the objective of concluding a contract with the traveller and from links through which travellers are simply informed about further travel services in a general way, for instance where a hotel or an organiser of an event includes on its website a list of all operators offering transport services to its location independently of any booking or if "cookies" or meta data are used to place advertisements on websites.[26]

In cases where separate contracts are merely "linked" but not a package, the effect of the resulting linking is, by virtue of law, very limited. The service provider merely has to protect the traveler in the case of

---

23 Council Directive 2008/48, *supra* note 20, art. 3(n).

24 Council Directive 2011/83, *supra* note 21, art. 15 (rule); *id.* art. 2(15) (definition of ancillary contract); *see* Aubert de Vincelles, *supra* note 15, at 163, 166–68 (interpreting the meaning of "ancillary contracts").

25 Council Directive 2015/2302, *supra* note 22, Recital 9. The definition of "linked travel arrangement" is found in Council Directive 2015/2032, art. 3(5). A linked travel arrangement occurs where

> a trader facilitates: (a) on the occasion of a single visit or contact with his point of sale, the separate selection and separate payment of each travel service by travellers; or (b) in a targeted manner, the procurement of at least one additional travel service from another trader where a contract with such other trader is concluded at the latest 24 hours after the confirmation of the booking of the first travel service.

Id.

26 *Id.* Recital 12.

insolvency of the other service provider.[27] In the case of a package, the trader organizing the package is in principle liable for nonperformance under any of the contracts forming the package.[28]

These rules have been restated in the DCFR Article II.-5:106, where the effects of a withdrawal are extended to linked contracts as defined in paragraph two:

> Where a contract is partially or exclusively financed by a credit contract, they form linked contracts, in particular: (a) if the business supplying goods, other assets or services finances the consumer's performance; (b) if a third party which finances the consumer's performance uses the services of the business for preparing or concluding the credit contract; (c) if the credit contract refers to specific goods, assets or services to be financed with this credit, and if this link between both contracts was suggested by the supplier of the goods, other assets or services, or by the supplier of credit; or (d) if there is a similar economic link.[29]

Other examples can be found in Member State law relating to business contracts with small businesses as in France, for example, where termination of one contract entails termination of linked contracts, with the exception of contracts for the leasing of the premises.[30] Where contracts are linked in such a way that the effect of a withdrawal or termination by the consumer is extended to the linked contract, this normally also implies that the consumer may raise defenses based on the first contract against the creditor of the linked contract (especially the right to suspend performance of payment under the credit contract in case of nonconformity of the goods or services under the linked contract).[31]

b. Active Linking of Contracts

In some cases, separate contracts are linked by making at least one of the business parties to the different contracts liable for a non-

---

27 *See id.* art. 19.

28 *See id.* art. 13.

29 DCFR, *supra* note 4, art. II.–5:106.

30 See CODE DE COMMERCE [C. COM.] [COMMERCIAL CODE] art. L341-1 (Fr.), as inserted by the so-called Loi-Macron, Loi 2015-990 du 6 août 2015 pour la croissance, l'activité et l'égalité des chances économiques [Law 2015-990 of August 6, 2015 for Growth, Activity, and Equal Economic Opportunities], JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], Aug. 7, 2015, p. 13537, https://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000030978561&categorieLien=id.

31 *See* DCFR, *supra* note 4, art. II.–5:106 cmt. D.

performance under the linked contract to which it is not a party.[32] This is the case where travel services under separate contracts are considered to form a single package.[33] It is, to some extent, found in the Consumer Credit Directive, but the Directive leaves the specific rules to Member State law. It states:

> (2) Where the goods or services covered by a linked credit agreement are not supplied, or are supplied only in part, or are not in conformity with the contract for the supply thereof, the consumer shall have the right to pursue remedies against the creditor if the consumer has pursued his remedies against the supplier but has failed to obtain the satisfaction to which he is entitled according to the law or the contract for the supply of goods or services. Member States shall determine to what extent and under what conditions those remedies shall be exercisable.
>
> (3) This Article shall be without prejudice to any national rules rendering the creditor jointly and severally liable in respect of any claim which the consumer may have against the supplier where the purchase of goods or services from the supplier has been financed by a credit agreement.[34]

This more radical solution can also be found in national rules that prohibit certain sellers or service providers from shifting the liability for part of a package to a third party by stipulating that they will conclude the contract with that third party (subcontractor) as an agent for the client or buyer. An example is the Belgian statute on contracts for residential construction: whenever a contractor promises to procure residential dwellings and the contract stipulates any payment before the dwelling is finished, a mandatory set of rules applies and the contractor will be liable for the result without any possibility of discharging this liability by delegating the performance or part of it to third parties.[35] This is somewhat similar to the rules on travel packages.[36] Such a solution is also found in the recent expert group proposal, Dis-

---

32 *See* DCFR, *supra* note 4, art. II.–5:106.

33 *See* Council Directive 2015/2302, *supra* note 22, art. 3(2).

34 Council Directive 2008/48, *supra* note 20, art. 15(2)–(3).

35 *See* Loi réglementant la construction d'habitations et la vente d'habitations à construire ou en voie de construction (mise à jour au 19-06-1993) [An Act to Regulate the Construction of Dwellings and the Sale of Dwellings to Be Erected or Under Construction] of July, 9 1971, MONITEUR BELGE [M.B.] [Official Gazette of Belgium], Sept. 9, 1971, 10442, as amended by Act of May 3, 1993, MONITEUR BELGE [M.B.] [Official Gazette of Belgium], June 19, 1993, 14999, www.ejustice.just.fgov.be/eli/loi/1971/07/09/1971070904/justel.

36 *See* Council Directive 2015/2302, *supra* note 22, Recitals 22–23.

cussion Draft of a Directive on Online Intermediary Platforms.[37] According to Article 16, "A platform operator who presents itself to customers and suppliers as intermediary in a prominent way is not liable for non-performance under supplier-customer contracts."[38] However, he may be liable "to customers who can reasonably rely on the predominant influence of the platform operator over suppliers under Art. 18."[39] Article 18(2) then states:

> When assessing whether the customer can reasonably rely on the platform operator's predominant influence over the supplier, the following criteria are to be considered in particular:
> (a) The supplier-customer contract is concluded exclusively through facilities provided on the platform;
> (b) The platform operator can withhold payments made by customers under supplier-customer contracts;
> (c) The terms of the supplier-customer contract are essentially determined by the platform operator;
> (d) The price to be paid by the customer is determined by the platform operator;
> (e) The platform operator provides a uniform image of suppliers or a trademark;
> (f) The marketing is focused on the platform operator and not on the suppliers;
> (g) [OPT:] The platform operator promises to monitor the conduct of suppliers.[40]

c. Chains Treated as Stars

On the other hand, we also find rules precisely discharging a main contractor for nonperformance by a subcontractor where the subcontractor or supplier was imposed by the client, even where the main contractor did not contract with the subcontractor as an agent for the client.[41] The client will then in principle have a claim only against the subcontractor itself. The precise rules in the various civil law jurisdictions are not always clear and not fully uniform, therefore I will limit myself to the restatement of rules for service contracts and financial leasing in the DCFR.

---

37 Research Grp. on the Law of Digital Servs., *Discussion Draft of a Directive on Online Intermediary Platforms*, 5 J. EUR. CONSUMER & MKT. L. 164 (2016), https://ssrn.com/abstract=2821590.

38 *Id.* at 167.

39 *Id.*

40 *Id.* at 168 (brackets in original).

41 *See, e.g.*, Hof van Cassatie [Cass.] [Court of Cassation], June 17, 1993, No. 9405 (Belg.).

As to financial leasing, the DCFR states: "The lessee has no right to enforce performance by the lessor, to reduce the rent or to damages or interest from the lessor, for late delivery or for lack of conformity, unless non-performance results from an act or omission of the lessor."[42] This requires that the lease contract meets certain requirements, including the requirement that "the lessor, on the specifications of the lessee, acquires the goods from a supplier selected by the lessee" and that "the lessee, in providing the specifications for the goods and selecting the supplier, does not rely primarily on the skill and judgement of the lessor."[43] The rule is thus restricted to financial leasing. Such a rule is found as a default rule for financial leasing in some civil law jurisdictions; in others, it corresponds to the standard contractual practice, at least in business-to-business contracts.[44]

A rule with a more general scope is found in DCFR Article IV.C.–2:104(4), as its scope covers all service contracts. It states that "[i]n so far as subcontractors are nominated by the client or tools and materials are provided by the client, the responsibility of the service provider is governed by IV.C.–2:107 (Directions of the client) and IV.C.–2:108 (Contractual obligation of the service provider to warn)," whereas Article IV.C.–2:107(2) states that

> [i]f non-performance of one or more of the obligations of the service provider . . . is the consequence of following a direction which the service provider is obliged to follow under paragraph (1), the service provider is not liable under those Articles, provided that the client was duly warned under IV.C.–2:108 (Contractual obligation of the service provider to warn)."[45]

The same question arises in a contract of sale when the goods must be procured by a third-party supplier agreed upon by the parties (nominated in the contract) and the supplier does not supply the goods to the seller without any negligence of the seller itself. There is a tendency to judge that the seller in such a case is not liable for non-performance by the supplier, but only for his own negligence if he has not taken sufficient care in trying to obtain the goods from that supplier.[46]

---

42 DCFR, *supra* note 4, art. IV.B.–4:104 (Remedies to be directed towards supplier of the goods).

43 *Id.*

44 The rule is similar to Article 8.1(a) of the Unidroit Convention on International Financial Leasing, *supra* note 8.

45 DCFR, *supra* note 4, arts. IV.C.–2:104, 2:107.

46 For English law, see *Societe Co-operative Suisse des Cereales et Matieres Fourrageres v.*

d. Recourse

In general, there is a right of recourse of the liable intermediary contractor towards the supplier or subcontractor. But this is typically not harmonized among the laws of the EU Member States, as we see in the Directive on Certain Aspects of the Sale of Consumer Goods and Associated Guarantees[47] or in the Directive on Payment Services in the Internal Market.[48] Recourse may be barred by an exemption clause stipulated upstream (by a supplier or subcontractor, including a carrier) in cases where the main contractor is mandatorily liable (especially towards consumers), a so-called "pinched intermediary," unless statutory rules protect the small business intermediary by setting aside such clauses in these cases.[49]

La Plata Cereal Co. S.A. [1947] 80 Lloyd's List LR 530 (Eng.), discussed by NEIL ANDREWS, CONTRACT LAW § 16.11 (2d ed. 2015). Under CISG Article 79, the rule is not very clear; the doctrine mainly deals with the cases where there is only a single possible supplier. *See* PETER SCHLECHTRIEM & INGEBORG SCHWENZER, COMMENTARY ON THE UN CONVENTION ON THE INTERNATIONAL SALE OF GOODS (CISG) art. 79, § 27, at 1074 (Ingeborg Schwenzer ed., 3d ed. 2010) ("In case of a sale . . . from a particular batch or stock, the seller . . . only bears the risk of being able to procure goods from that batch or stock."); CISG ADVISORY COUNCIL, OPINION NO. 7, cmt. 18, http://www.cisgac.com/cisgac-opinion-no7/ [https://perma.cc/GE9D-2DL6] (dealing with suppliers or subcontractors: "An exception should be allowed, however, for those very exceptional cases in which the seller has no control over the choice of the supplier or its performance, in which case the supplier's default may be established as a genuine impediment beyond the control of the seller."); *id.* cmt. 20 (dealing genuinely independent third person: "[T]he seller's liability is not unconditional, for in exceptional cases he may be able to establish that he had no control over the choice of such third person, either because the third person enjoys a monopoly in the supply of goods or services, or if the third person was chosen by the buyer . . . .").

47 Directive 1999/44/EC of the European Parliament and of the Council of 25 May 1999 on Certain Aspects of the Sale of Consumer Goods and Associated Guarantees, art. 4, 1999 O.J. (L 171) 12, 15 ("Where the final seller is liable to the consumer because of a lack of conformity resulting from an act or omission by the producer, a previous seller in the same chain of contracts or any other intermediary, the final seller shall be entitled to pursue remedies against the person or persons liable in the contractual chain. [T]he person or persons liable against whom the final seller may pursue remedies, together with the relevant actions and conditions of exercise, shall be determined by national law.") For an implementation in Member State law, see, for example, CODE CIVIL [C.CIV.] art. 1649sexies (Belg.); and BÜRGERLICHES GESETZBUCH [BGB] [CIVIL CODE], § 478, para. 1, *translation at* https://www.gesetze-im-internet.de/englisch_bgb/englisch_bgb.html#p1694 (Ger.).

48 Directive (EU) 2015/2366 of the European Parliament and of the Council of 25 November 2015 on Payment Services in the Internal Market, Amending Directives 2002/65/EC, 2009/110/EC and 2013/36/EU and Regulation (EU) No 1093/2010, and Repealing Directive 2007/64/EC, art. 87, 2015 O.J. (L 337) 15, http://data.europa.eu/eli/dir/2015/2366/oj.

49 *E.g.*, CODE CIVIL [C.CIV.] art. 1649sexies (Belg.); BÜRGERLICHES GESETZBUCH [BGB] [CIVIL CODE], § 478, para. 4, *translation at* https://www.gesetze-im-internet.de/englisch_bgb/englisch_bgb.html#p1694 (Ger.).

B. *The Effects of Undisclosed Agency*

The effects of undisclosed agency in most continental civil law systems differ to some extent from the effects under common law. An intermediary will only not be liable towards the party with whom he contracts for nonperformance by his principal (nondelivery of goods or services) when he acts—within the scope of his authority—in the name of his principal, thus establishing from the beginning a direct contractual relationship between the principal and the third party:

> When the representative, despite having authority, does an act in the representative's own name or otherwise in such a way as not to indicate to the third party an intention to affect the legal position of a principal, the act affects the legal position of the representative in relation to the third party as if done by the representative in a personal capacity. It *does not as such affect the legal position of the principal in relation to the third party* unless this is specifically provided for by any rule of law.[50]

Thus, it neither creates obligations of the principal towards the third party nor obligations of the third party against the principal.

The privity of the contract is in this case stricter under civil law than under common law. The intermediary is personally liable to its principal (for nonperformance by the third party) and the co-contracting third party (for nonperformance by the principal); on the other hand, the intermediary can also personally claim performance and compensation of damage caused by nonperformance. The rule was applied recently in the judgment of the European Court of Justice ("ECJ") in *Wathelet/Garage Bietheres*,[51] in which a car dealer was selling a car from a private seller without informing the buyer-consumer that he was not personally the seller. The court nevertheless considered him to be the seller with the same obligations to the buyer as a seller and not merely of an agent for the seller.

C. *Information from or Advertising by Earlier Links of the Business Chain*

A more recent development concerns the impact of statements—including information and advertisement—by earlier links in the busi-

---

50 DCFR, *supra* note 4, art. II.–6:106 (emphasis added).

51 Judgment of Nov. 9, 2016, in Case C-149/15, Wathelet v. Garage Bietheres & Fils SPRL, curia.europa.eu/juris/documents.jsf?num=C-149/15 (noting that "a trader acting as intermediary on behalf of a private individual who has not duly informed the consumer of the fact that the owner of the goods sold is a private individual" is the seller).

ness chain in relation to goods or services sold by a later link in the chain. This should be understood in the context of modern sales law, where incorrect information by a business seller in relation to the goods sold does not, or at least not only, give rise to a remedy for misrepresentation (or similar pre-contractual remedy) but is qualified as an undertaking of the business to deliver goods in conformity with those statements (thus giving rise to remedies for nonperformance if the goods do not conform to the information given). Otherwise said, the buyer is not merely entitled to the reliance interest, but to the expectation interest. This rule closely corresponds to Uniform Commercial Code Article 2-313, especially (1)(a),[52] and is found in the DCFR:

> If one of the parties to a contract is a business and before the contract is concluded makes a statement, either to the other party or publicly, about the specific characteristics of what is to be supplied by that business under the contract, the statement is regarded as a term of the contract unless: (a) the other party was aware when the contract was concluded, or could reasonably be expected to have been so aware, that the statement was incorrect or could not otherwise be relied on as such a term; or (b) the other party's decision to conclude the contract was not influenced by the statement.[53]

The DCFR, following the example of some civil law jurisdictions, has extended this warranty not only to "a statement made by a person engaged in advertising or marketing on behalf of the business,"[54] but in consumer contracts also to "a public statement made by or on behalf of a producer or other person in earlier links of the business chain between the producer and the consumer," which "is treated as being made by the business unless the business, at the time of conclusion of the contract, did not know and could not reasonably be expected to have known of it."[55]

---

52 U.C.C. § 2-313(1)(a) (AM. LAW INST. & UNIF. LAW COMM'N 2014) ("Any affirmation of fact or promise made by the seller to the buyer which relates to the goods and becomes part of the basis of the bargain creates an express warranty that the goods shall conform to the affirmation or promise.").

53 DCFR, *supra* note 4, art. II.–9:102(2).

54 *Id.* art. II.–9:102(3).

55 *Id.* art. II.–9:102(4).

II. Extending Privity: Third Persons as Parties to a Contractual Obligation

In a previous article on multiparty relationships in the 2009 Draft Common Frame of Reference and Belgian Law, I analyzed the legal structure of relationships such as direct representation (disclosed agency), contracts in favor of a third party, assignment, appropriation of a right to performance by the undisclosed principal, personal subrogation, real subrogation, and security interests in the form of so-called "direct actions."[56] In all these cases a third party acquires a contractual right (or an interest in it) without having been party to the contract. I also analyzed the structure of situations where a third party became a new or additional debtor. In this contribution, I would like to restrict myself to a general approach and the following subtopics: a summary of the general approach detected as to privity of contract; some additional information on so-called "direct actions," where there is more divergence among national laws in Europe; specific cases where obligations run with ownership or where rights can only be acquired by taking over related obligations; and forum and arbitration clauses.

A. What Privity Means and What It Does Not in Continental Civil Law

Continental civil law does not have a technical term that corresponds to the notion of "privity." Continental lawyers generally use the expressions "relativity of contract" and "relativity of the contractual/obligational relationship." However, these two expressions should be distinguished rather clearly. This gives rise to three rules: there is no relativity of contract on the active side, there is relativity of contract on the passive side, and there is a privity of the resulting contractual relationship.

First, there is no relativity of contract on the active side. Contractual rights can be stipulated at the outset in favor of a third party, and they can also be acquired after the fact by a third party (by assignment, subrogation, or some other institution) without the consent of the debtor, except where the contract creates "strictly personal" rights (rights "*intuitu personae creditors*," that is, concluded in consideration of the person of the creditor). In both cases, this acquisition of rights

56 Matthias E. Storme, *The Structure of the Law on Multi-Party Situations in the 2009 Draft Common Frame of Reference and Belgian Law*, *in* The Draft Common Frame of Reference: National and Comparative Perspectives 147, 149–51, 161–62, 164–67, 176–81, 186 (Vincent Sagaert, Matthias E. Storme & Evelyne Terryn eds., 2012), https://ssrn.com/abstract=2871103.

by a third party does not deprive the debtor of any defense, even if the third party or acquirer does not as such become liable for the obligations of the promisee (contract in favor of third party), respectively the original creditor (assignment etc.). The first case (contract in favor of a third party) is the result of a long evolution in civil law, but has essentially been accepted in civil law jurisdictions since the nineteenth century; it is well known that classical common law still does not accept this extension of privity in general and that the change in English law has been introduced by the Contracts (Rights of Third Parties) Act 1999.[57] As to the second case, the acceptance of assignability of rights to performance—without consent of the debtor and without taking over the corresponding obligations—is equally the result of a long evolution in private law, whereby rights to performance came to be treated as incorporeal things or assets (in contrast with the old maxim *nomina ossibus inhaerent* that opposed a transfer of rights to performance).[58] Civil law jurisdictions differ to a larger extent as to the third-party effects of no-assignment clauses.[59] Further, at least in some jurisdictions, some benefits of a contract cannot be acquired by a third party without also taking over the burdens. Civil law jurisdictions also differ to a larger extent as to the acceptance of so-called "direct actions," which is a good reason to focus precisely on them to illustrate the possible extensions of privity on the active side.[60]

Second, there *is* relativity of contract on the passive side, in the sense that a contract cannot, in principle, impose obligations on a third party without the consent of that party (either given in advance, at the same time, or later; either given personally or through a person with authority to bind that party). This is the "no third-party burden" principle. However, contractual obligations are sometimes, by virtue of law, attached to or run with property rights in things (called qualitative obligations, or sometimes—but this expression is less clear and thus confusing—obligations *propter rem*).[61]

---

57 *See, e.g.*, HEIN KÖTZ, EUROPÄISCHES VERTRAGSRECHT 468 (2d ed. 2015); REINHARD ZIMMERMANN, THE LAW OF OBLIGATIONS: ROMAN FOUNDATIONS OF THE CIVILIAN TRADITION 34 (1996).

58 *See, e.g.*, FILIPPO RANIERI, EUROPÄISCHES OBLIGATIONENRECHT 434 (2d ed. 2003); ZIMMERMANN, *supra* note 57, at 58–67; Dave De Ruysscher, *Innovating Financial Law in Early Modern Europe: Transfers of Commercial Paper and Recourse Liability in Legislation and* Ius Commune *(Sixteenth to Eighteenth Centuries)*, 19 EUR. REV. PRIV. L. 505 (2011).

59 I will not tackle this hot topic here. *See, e.g.*, Storme, *supra* note 56.

60 *See infra* Sections II.C, II.D.

61 *See infra* Section II.E.

Third, there is a privity of the resulting contractual relationship in the sense that a person who is not a party to the relationship (as creditor or debtor) may, on the one hand, not deprive the creditor (who is seen as owner of the right to performance) of the benefit of the right to performance, but is, on the other hand, not bound to perform. The latter is true even if performance by a third party is generally allowed[62] and will, under certain conditions, also subrogate the performing third party in the rights of the original creditor, who is thus not discharged.[63] The first aspect is traditionally expressed in the vague formulation that the "existence" of the contractual right or relationship is a "fact" for third parties that they have to "respect" and may also enjoy.[64] The concrete meaning of this formula becomes clearer in some doctrines of tort law (such as the tort of inducement into breach of contract).[65] Before analyzing some cases where a third party acquires contractual rights otherwise than by assignment, I would like to elaborate a bit more on the rules on defenses in the relationship between the debtor and the "new" creditor (including a beneficiary of a contract for the benefit of third parties).

B. Defenses in General

Where a third party acquires a contractual right, the right acquired is in principle dependent upon the original contractual relationship and not abstracted from it. On the contrary, in cases where a negotiable instrument is issued, the contractual right *is* abstracted.[66] As illustrated in Figures 1 to 4, it has become customary to name the original relationship the "provision relationship" in all triangular relationships, even though this term was originally used only for bills of exchange and similar payment instruments. In the same vein, the rela-

---

62 In some cases, personal performance by the debtor is required by the terms of the contract. *See, e.g.*, DCFR, *supra* note 4, art. III.–2:106.

63 *See id.* art. III.–2:107. The requirements for such a subrogation vary in different civil law jurisdictions; which explains why the DCFR does not restate these rules.

64 *See, e.g.*, 2 JAN H. DALHUISEN, DALHUISEN ON TRANSNATIONAL COMPARATIVE, COMMERCIAL, FINANCIAL AND TRADE LAW 112 (2013).

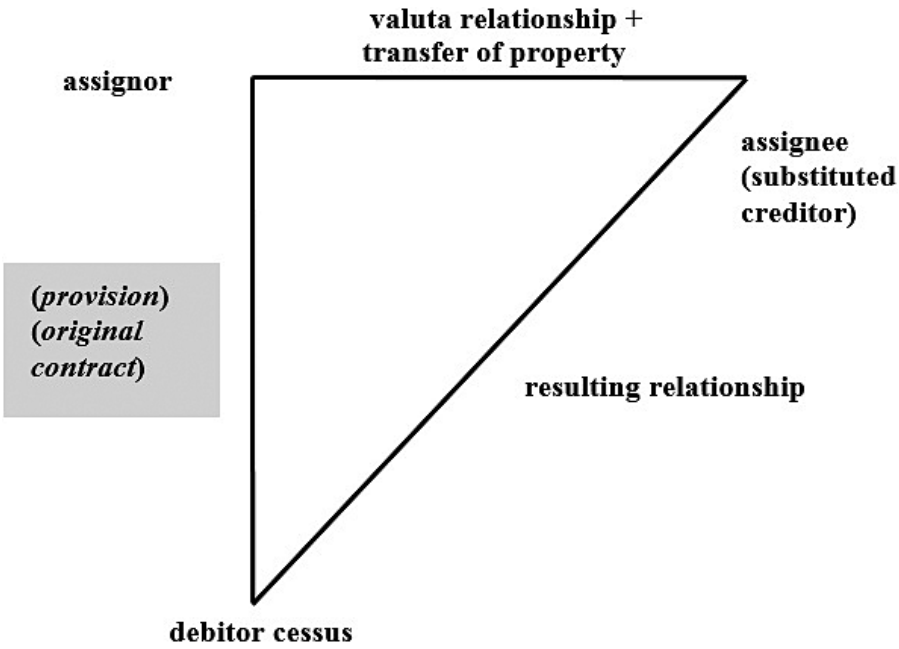
65 Irrespective of whether such interference is contrary to public policy (as it is according to section 194 of the Restatement (Second) of Contracts), it will constitute a tort where the third party did not act in legitimate protection of one's own interest. *See, e.g.*, DCFR, *supra* note 4, art. VI.–2:211. For English law, see the judgment of the House of Lords in *OBG Ltd. v. Allan* [2007] UKHL 21, [2008] 1 AC (HL) 17.

66 *See, e.g.*, Convention Providing a Uniform Law for Bills of Exchange and Promissory Notes art. 17, June 7, 1930, 143 L.N.T.S. 257. *See generally* Peter Ellinger, *Negotiable Instruments*, *in* 9 INTERNATIONAL ENCYCLOPEDIA OF COMPARATIVE LAW ¶¶ 5, 14 (1981).

tionship between the old and the new creditor is now generally named the "valuta relationship."

The rule, illustrated in Figure 1, is well known in the law on assignment and common to civil and common law jurisdictions.[67] The right is acquired "as is" and the debtor may assert against the new creditor "all substantive and procedural defences to a claim based on the assigned right which the debtor could have invoked against the assignor."[68]

FIGURE 1. ASSIGNMENT



The rule is, however, not limited to assignment, but applies in principle to any acquisition by a third party of an already existing contractual right, such as in the case of acquisition by subrogation (also named assignment *ex lege* or *cessio legis*), or as an accessory right passing together with property of a main right, as illustrated in Figure 4 in Section C.2, or in the case of appropriation by a principal of rights acquired by an intermediary (in jurisdictions allowing such appropriation).[69]

---

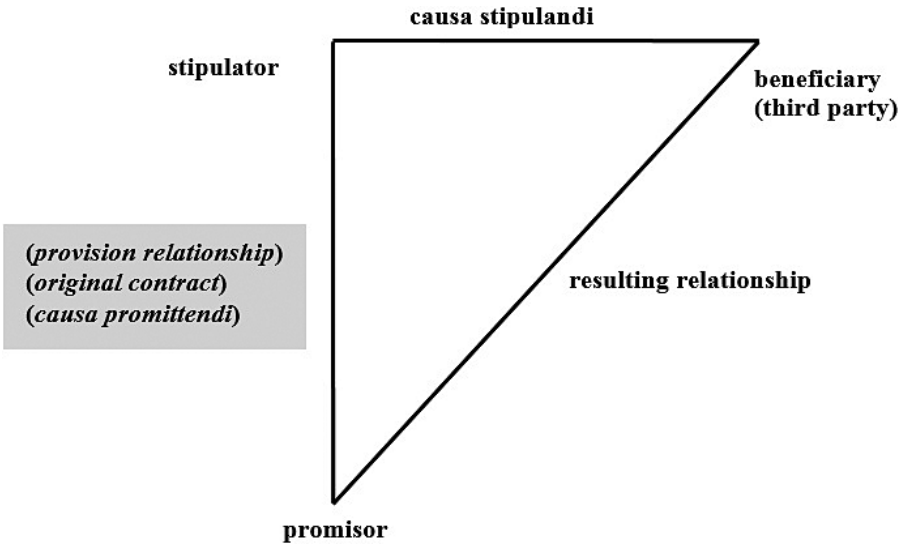
67 *See, e.g.*, RESTATEMENT (SECOND) OF CONTRACTS § 336; DCFR, *supra* note 4, art. III.–5:116(1).

68 DCFR, *supra* note 4, art. III.–5:116.

69 *See infra* Section II.C.3.

In civil law jurisdictions, the same rule applies to rights acquired by a third-party beneficiary from a contract in favor of third parties, whereas the rule does not apply to the same extent according to the Restatement (Second) of Contracts.[70] We thus find it in the DCFR as "the contracting party may assert against the third party all defences which the contracting party could assert against the other party to the contract."[71] This rule is an application of the more general principle that "[t]he nature and content of the third party's right or benefit are determined by the contract and are subject to any conditions or other limitations under the contract,"[72] as illustrated in Figure 2.

FIGURE 2. STIPULATION IN FAVOR OF A THIRD PARTY



The right is acquired "as is" by the third party, and it must be determined from which moment in time "new" modifications or facts affecting the provision relationship between the debtor and the old

70 RESTATEMENT (SECOND) OF CONTRACTS § 309(3) ("Except as stated in Subsections (1) and (2) and in § 311 or as provided by the contract, the right of any beneficiary against the promisor is not subject to the promisor's claims or defenses against the promisee or to the promisee's claims or defenses against the beneficiary.")

71 DCFR, *supra* note 4, art. II.–9:302(b).

72 *Id.* art. II.–9:301(2). There is more variation among civil law jurisdictions as to the question at which exact moment in time and under which conditions the third-party beneficiary acquires a right or at least an irrevocable right. The DCFR has opted for the most coherent solution, namely that this depends on the terms of the contract. *See id.* Thus the DCFR contains no default rule corresponding to Restatement that the promisor and promisee retain power to discharge or modify the duty by subsequent agreement, unless a term of the promise provides that this is ineffective or the beneficiary manifests its assent. *See* RESTATEMENT (SECOND) OF CONTRACTS § 311(2)–(3).

creditor can no longer be set up against the new creditor. Facts such as payment, fulfillment of requirements for set-off, incidents relating to limitation of the action (in civil law terms "prescription"), etc. In most civil law jurisdictions, this moment in time is, in the case of assignment, the notification of the assignment to the debtor.[73] In that case, the debtor can assert against the assignee: (1) all defenses that the debtor could have invoked against the assignor and that existed (in American law "accrued") already at the time of notification; and (2) all defenses against the assignee itself.[74]

Caselaw has specified that in contractual relationships the right to suspend (often named with the Latin expression *exceptio non adimpleti contractus*[75]) and the right to terminate the contractual relationship for nonperformance are defenses that are inherently part of the relationship from its origin and do not come into existence merely at the time of nonperformance. They can thus be invoked against the assignee even when the nonperformance of the assignor took place only after the assignment or its notification.[76]

C. Types of So-Called "Direct (Contractual) Actions"

The purpose of this contribution and the Symposium to which it contributed is to provide insight for legal reform through a greater understanding of differences between civil and common law jurisdictions. Thus, I would like to illustrate the possible extensions of privity of contract by choosing, from among the different techniques by which third parties acquire rights to performance or interests in such rights, the category of so-called "direct actions." I choose it because this concept is indeed typical of civil law jurisdictions and despite the fact that—or precisely because—it is not a unitary category at all. Indeed, we are making it particularly difficult for foreign lawyers to understand the so-called "direct actions" by using the same word for quite different rights and using different words for basically identical institutions, such as (some forms of) "direct action," "own right,"

---

73 *Cf.* RESTATEMENT (SECOND) OF CONTRACTS § 336(2).

74 *Id.*

75 *See, e.g.*, DCFR, *supra* note 4, art. III.–3:401, cmt A.

76 See, for examples under Belgian law, [Cass.] Sept. 13, 1973, RECHTSKUNDIG WEEKBLAD [RW] 1973–74, 997, 352, http://jure.juridat.just.fgov.be/view_decision.html?justel=N-19730913-2; [Cass.] Sept. 27, 1984, RECHTSKUNDIG WEEKBLAD [RW] 1984–85, 2699, jure.juridat.just.fgov.be/view_decision.html?justel=N-19840927-4; [Cass.] Jan. 28, 2005, Case No. C.04.0035.N, *VTB-VAB v. ABB*, RECHTSKUNDIG WEEKBLAD [RW] 2006–07, 476, jure.juridat.just.fgov.be/view_decision.html?justel=N-20050128-11.

"lien," or "statutory pledge." The direct action is thus the chameleon of contract law.

There are three basic types of situations where the term "direct action" is used. First, it is used where a third party acquires—by virtue of law or presumed will of the parties—the full right to performance. This is so in cases of acquisition of rights as accessory to a thing acquired[77] and cases of takeover by an undisclosed principal of a right acquired by the agent in its own name.[78] Second, it is used where a third party acquires—by virtue of law—a security interest (one could call it a lien) in a right to performance, thus granting that party a priority in case of insolvency of the owner of the right (who is also the primary creditor of the right).[79] Third, it is used in situations where a third party has an "abstract" right to performance against a debtor of its debtor, and more specifically against the liability insurer of its debtor, as explained hereunder in Section 1.

1. Direct Actions as Suretyship

The most far-reaching case is the third scenario. In that case, illustrated in Figure 3, the insurance contract grants, within the limits of the insurance coverage contracted, the "victim" of the insured party a right to performance against the insurer that is not dependent on the fate of the insurance contract. In most civil law jurisdictions, this is only rarely the case, and a direct action against the insurer looks more like the second scenario.[80] In Belgian law, however, this is the case for all obligatory liability insurance contracts (i.e., where an activity may only be exercised if there is a valid liability insurance contract granting the insurance coverage required by statute). The best-known case is certainly obligatory motor car liability insurance, but there is a very long list of other situations where liability insurance is obligatory.[81] Where liability insurance is not obligatory, we are in the second scenario, discussed *infra* Section II.D, and the victim has merely a lien on the right that the insured party has against the liability insurer.

---

77 *See infra* Section II.C.2.

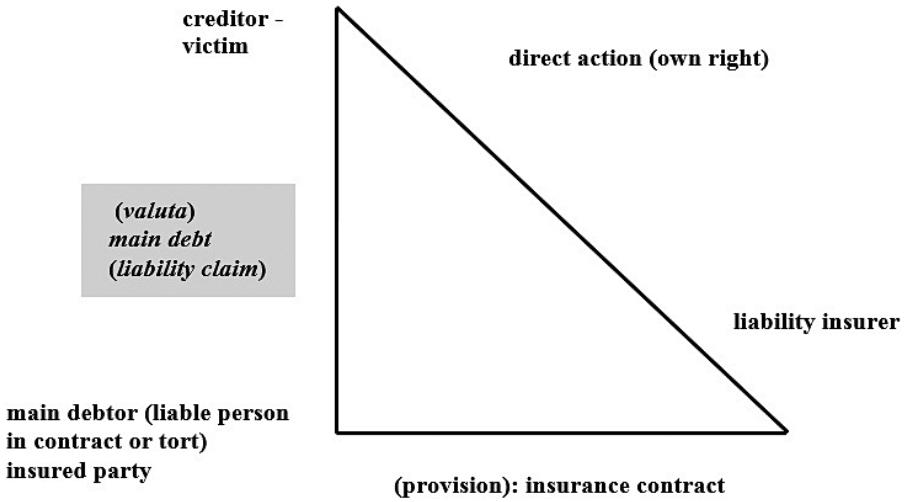
78 *See infra* Section II.C.3.

79 *See infra* Section II.D.

80 *See infra* Section II.D.

81 *Liste des Assurances Obligatoires*, FIN. SERVS. & MKTS. AUTHORITY (Dec. 31, 2016), https://www.fsma.be/fr/liste-des-assurances-obligatoires-0 (on file with *The George Washington Law Review*) (containing an unofficial list of obligatory insurance scenarios).

FIGURE 3. DIRECT ACTIONS IN OBLIGATORY INSURANCE CONTRACTS



This "direct action" against the insurer in case of compulsory insurance is functionally equivalent to a suretyship. There are some differences: the coverage is granted by a contract that is not concluded with the creditor as in the case of suretyship, but with the person who might be liable, and deemed to be concluded also in favor of third parties (future victims); a surety who has paid the creditor has a recourse against the main debtor, whereas the insurer who has paid has a recourse only in cases where the liability is not covered according to the internal contractual relationship. Nevertheless, there are still many similarities: the victim has a direct action within the limits of its right to compensation towards the insured person and the coverage that was granted by the insurer; the insurer may still invoke that no coverage was granted or that the contract granting coverage is void or avoided, but may not invoke any defenses out of the insurance contract arisen after its conclusion. For all the activities where liability insurance is compulsory, the legislator thus obliges the actor to find a guarantee for possible victims, not in the form of a classical suretyship, but in the form of liability insurance.

2. *Acquisition of Rights as Accessory to a Thing Acquired*

Let us now turn to the first type of direct action. It is the name sometimes given—even if misleadingly—to the effect of treating rights to damages in relation to things and similar rights in relation to things as "accessory" or "qualitative" rights that pass along with the property right in the thing. This effect is rather widespread in some

civilian jurisdictions. It has been developed by caselaw on the basis of vague provisions in, for example, the French Civil Code.[82] The doctrine thus established by caselaw is interesting for our theme especially in the cases where contractual rights are in this way transferred by operation of law to subsequent acquirers of goods or rights in land. This is the case for rights and remedies of a landlord against a tenant, when the premises are sold; rights of the insured against a first-party insurer insuring damage to the thing, when the thing is sold; rights and remedies against building contractors or architects for defective performance, when the defective building is sold; and rights and remedies against sellers for nonconformity of goods, when these goods are sold. The rule does not exclusively apply in case of sale. It also applies in other cases of transfer of ownership or the granting of proprietary rights. We say that the accessory right goes with ownership, but in case the goods or rights in land are charged or mortgaged, the secured creditor of the acquirer will acquire a proprietary security interest in that accessory right as well.

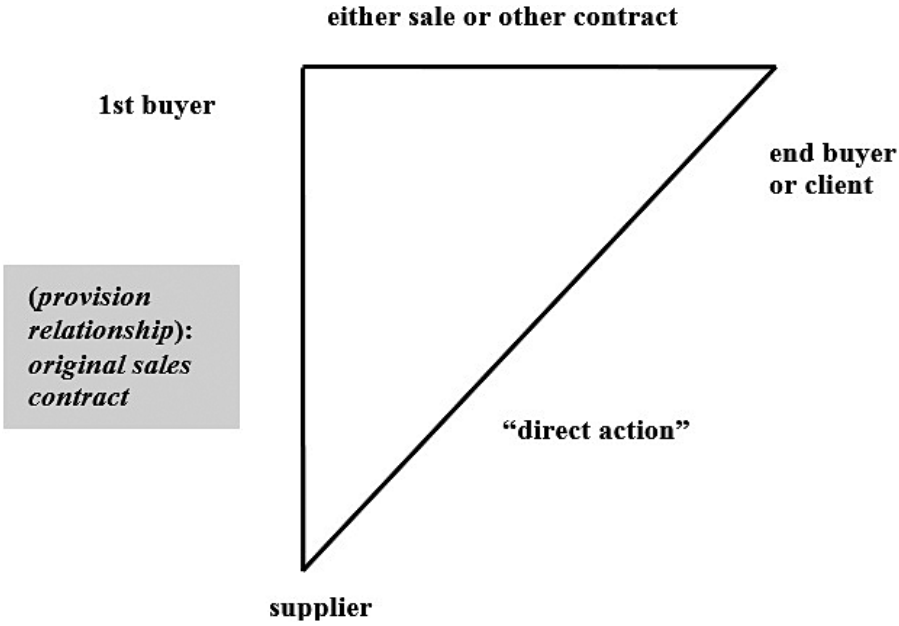
As the right acquired in this way is not a new or independent right, but the right of the preceding owner that was passed along, the debtor can assert against the acquirer of the right all defenses he could have set up against his contracting partner, as illustrated in Figure 4. Thus, the supplier may assert against the sub-buyer all defenses he could assert against the first buyer. The effect is the same as in the case of assignment, which explains why these cases are sometimes also named assignment "*ex lege*," or assignment as a matter of law.[83]

---

82 Code civil [C. civ.] [Civil Code] art. 1615 (Fr.).

83 DCFR, *supra* note 4, art. IV.D.–1:105 note 13; Matthias E. Storme, *The Structure of the Law on Multiparty-Situations in the 2009 Draft Common Frame of Reference*, 17 Eur. Rev. Priv. L. 531, 546 (2009).

FIGURE 4. DIRECT ACTIONS IN SALES



The transfer *ex lege* of accessory rights is, however, usually not mandatory but based on the presumed intention of the parties (to be more precise, the parties to the second contract); therefore, in the case of defects or nonperformance already apparent at the time of conclusion of that contract, this presumption falls and there is rather a presumption that the goods or property were sold for a lower price and that it was the intention of the parties that the right to damages of the seller against its supplier or service provider remains with that seller.

The practical effect of this rule can be illustrated with a case[84] that bears some resemblance to the English case of *Simaan General Contracting Co. v. Pilkington Glass Ltd. (No. 2)*[85] and concerned an office building in Brussels with defective glass panels. The client of the main contractor was the Belgian government, the main contractors were Sogiaf and Gillion Construct, the subcontractor was Bombardier, and the supplier of glass panels engaged by the subcontractor was AGC Glass Europe.[86] The court decided that the client could exercise

84 Cour de Cassation [Cass.] [Court of Cassation], Sept. 15, 2011, No. C.10.0456.N, http://jure.juridat.just.fgov.be/pdfapp/download_blob?idpdf=F-20110915-6 (Belg.).

85 [1988] 1 QB 758 (Eng.). For further analysis of this English case, see Simon Whittaker, *Contract Networks, Freedom of Contract and the Restructuring of Privity of Contract*, *in* CONTRACTUAL NETWORKS, INTER-FIRM COOPERATION AND ECONOMIC GROWTH, *supra* note 11, at 179, 192.

86 Cour de Cassation, No. C.10.0456.N.

against its contractor (the main contractor) the rights out of that contract and exercise, as owner of the defective glass panels, against the supplier AGC Glass Europe the rights out of the contract between the subcontractor Bombardier and that supplier (in that sense the supplier was "directly" liable towards the client).[87] However, the client could not exercise a direct right against the subcontractor Bombardier; the right of the contractor against its subcontractor did not pass *ex lege* to the client, as the ownership of the glass panels was not transferred by the main contractor to the client (the client became owner directly when the subcontractor installed the glass).[88]

Such a direct action has two main advantages for its acquirer: the direct claim is not subject to the limitations of one's own contract, and it stands in case of insolvency of one's own contractor (the intermediary contractor). The latter will not be very helpful, however, if its debtor has not been paid by the intermediary chain, as that debtor can raise against the direct action all defenses he could assert against its direct creditor. But the recognition of a direct action is especially important in those jurisdictions where, as in France and Belgium, a subcontractor enjoys immunity in tort against claims for any damage suffered by the client that amounts to a nonperformance of the main contract.[89]

It may also be interesting in this context to point to a judgment of the Belgian Constitutional Court of 2006. In Belgium, as in some other countries of continental Europe (such as Germany and Italy[90]), constitutional courts have been quite active in reshaping private law on the basis of the constitutional equality principle, reviewing whether a legal rule is not discriminating by making a distinction that is not reasonably justified. In the 2006 Belgian decision,[91] the client com-

87 *Id.*

88 *Id.*

89 *See infra* Part III.

90 See the different national chapters in CONSTITUTIONALISATION OF PRIVATE LAW (Tom Barkhuysen & Siewert D. Lindenbergh eds., 2006), especially for Germany, Gert Brüggemeier, *Constitutionalisation of Private Law: The German Perspective*, *in* CONSTITUTIONALISATION OF PRIVATE LAW, *supra*, at 59, and the different chapters in THE INFLUENCE OF HUMAN RIGHTS AND BASIC RIGHTS IN PRIVATE LAW (Verica Trstenjak & Petra Weingerl eds., 2016), especially for Italy, Emanuela Navarretta & Elena Bargelli, *The Influence of Human Rights and Basic Rights in Italian Private Law: Strategies of 'Constitutionalisation' in the Courts Practice*, *in* THE INFLUENCE OF HUMAN RIGHTS AND BASIC RIGHTS IN PRIVATE LAW, *supra*, at 421. For Germany, see Elke Luise Barnstedt, *Judicial Activism in the Practice of the German Federal Constitutional Court: Is the GFCC an Activist Court?*, 13 JURIDICA INT'L 38 (2007), http://www.juridicainternational.eu/public/pdf/ji_2007_2_38.pdf.

91 Cour Constitutionnelle [CC] [Constitutional Court (Cour d'arbitrage prior to 2007)] decision no 111/2006, June 28, 2006, http://www.const-court.be/public/f/2006/2006-111f.pdf (Belg.).

plained to the Constitutional Court that in cases of insolvency of the intermediary contractor, subcontractors are protected with a direct action against the client for payment of the price for their work,[92] but clients are neither protected by a direct action against subcontractors (except in rare cases) nor allowed to sue the subcontractor in tort for the damage that also amounts to a nonperformance by the main contractor, even if caused by the subcontractor. The court decided, however, that the two situations are entirely different.[93] One could also say that in cases of insolvency of the intermediary, the insolvent estate would be enriched at the expense of the subcontractor if the estate could claim payment from the client for the work of the subcontractor without paying the subcontractor. According to the judgment of the Belgian Constitutional Court, the estate is not enriched in the same way at the expense of the client if it can claim damages from the subcontractor, whom it has already paid, without paying back the main contractor. The difference is in my view not so apparent, but it is understandable that the court was not willing to create an additional priority in bankruptcy merely on the basis of the constitutional equality principle (although Americans may immediately remind us that the Supreme Court of the United States has created quite a number of constitutional rights with much less backing in the text of their Constitution).

3. Unilateral Takeover by an Undisclosed Principal

Previously, I explained that in the case of indirect representation (more or less corresponding to undisclosed agency), the principal does not, in principle, have a direct right to performance against the contractor of the intermediary, and neither does that contractor have a direct right to performance against the principal. This does not exclude that, in at least some civil law jurisdictions, property will pass directly from the principal to the contracting third party or vice versa, but this question of property law is beyond the scope of this contribution. This main rule is quite common among continental civil law systems; the exceptions to the rule are less common. The national laws differ as to the cases in which the principal has the right to take over *unilaterally* (with proprietary effect) the right acquired by the agent in its own name.[94] Evidently, in all jurisdictions, the intermediary can

92 *See infra* Section II.D.2.

93 *Id.*

94 The reverse question whether the third party may take over the rights of the agent against the principal is discussed in Sections II.D and II.E.

assign the right to its principal. A right of unilateral takeover is granted in the DCFR only in the case of insolvency of the agent.[95] Under the Principles of European Contract Law ("PECL"), the right already accrues to the creditor in the case of fundamental nonperformance of the agent.[96] Laws also differ as to the effect of such a takeover: Is the right only limited in the sense that the debtor may assert all defenses as in the case of assignment (the PECL rule and the Belgian rule), or is the principal also bound to perform the corresponding obligations of the agent towards the third party (DCFR rule)?

The expression "direct action" is also used for the right of a principal in the case of disclosed agency to act directly against the third party to whom the agent has delegated his task,[97] but this is to be explained differently: in delegating the task, the agent has exercised its authority to act in the name of the principal, and the subagent is therefore deemed to have concluded the contract directly with the principal.

D. Direct Actions as Security Rights

Finally, continental civil law has also developed various close encounters of a third kind, where the so-called "direct action" amounts to a security interest, acquired by virtue of law, in a right to performance that one's debtor has against a third party. This grants the creditor a priority in case of insolvency of that debtor (being the primary creditor of the right). The direct action basically has the same effects as a lien, as the creditor has a right to performance against the third party only within the limits of his claim against his contractor (the secured claim) and those of the claim of his debtor against the third party (the collateral). I would like to give a bit more detail about two typical cases of such direct actions: liability insurance and unpaid subcontractors. Other cases where such direct actions can be found in

---

95 *See* DCFR, *supra* note 4, art. III.–5:401; *cf.* Loi sur les faillites [Insolvency Act] of Aug. 8, 1997, art. 103, para. 2 (Belg.), http://www.ejustice.just.fgov.be/cgi_loi/change_lg.pl?language=fr&la=F&cn=1997080880&table_name=loi. From May 1, 2018, on, this paragraph of the Insolvency Act is replaced by Article XX.196 of the Code of Economic law, http://www.ejustice.just.fgov.be/cgi_loi/change_lg.pl?language=fr&la=F&cn=2017081114&table_name=loi.

96 *See* PRINCIPLES OF EUROPEAN CONTRACT LAW: PARTS I AND II art. 3:302 (Ole Lando & Hugh Beale eds., 2000) [hereinafter PECL].

97 *See, e.g.*, CODE CIVIL [C.CIV.] art. 1994, para. 2 (Belg.); CODE CIVIL [C. CIV.] [CIVIL CODE] art. 1994, para. 2 (Fr.); ASTIKOS KODIKAS [A.K.] [CIVIL CODE] Art. 716, para. 3 (Greece); CODICE CIVILE [C.C.] [CIVIL CODE] art. 1705, para. 2 (It.); CÓDIGO CIVIL [C.C.] [CIVIL CODE] art. 1722 (Spain); OBLIGATIONENRECHT [OR] [CODE OF OBLIGATIONS] art. 399, para. 3 (Switz.).

some civilian jurisdictions are subtenancy,[98] direct actions and liens in the case a check or bill of exchange is drawn (relevant where the drawee has not made an independent promise to pay), liens in favor of tax authorities or social security institutions, and counterclaims of the third party against the undisclosed principal (traditionally named *actio contraria*).[99]

1. Liability Insurance

As to the question whether there is such an "own right" (direct action) against the insurer or an equivalent lien in the case of liability insurance, national systems differ considerably. Most systems prohibit the insured party from disposing of its cover entitlement (right to payment from the insurer) to the disadvantage of the victim, while some will more explicitly grant the victim an own right or a lien over the cover entitlement, at least for certain types of liability insurance.[100] My own legal system (Belgium) grants the widest range of rights: not only does it grant a direct action in *all* cases of liability insurance, it also makes that right "abstract" in all cases where the liability insurance is compulsory, as discussed in Section II.C.1. As a general rule, unless the direct action is abstract, an insurer may assert against the victim all defenses based on an act or fact *prior* to the insured event (including termination of the insurance contract for nonperformance by the in-

---

98 *See, e.g.*, CODE CIVIL [C.CIV.] art. 1753 (Belg.), *translated in* THE CONSTITUTION OF BELGIUM AND THE BELGIAN CIVIL CODE 284 (John H. Crabb trans., 1982); CODE CIVIL [C. CIV.] [CIVIL CODE] art. 1753 (Fr.); CODICE CIVILE [C.C] [CIVIL CODE] art. 1595 (It.); CÓDIGO CIVIL [C.C.] [CIVIL CODE] art. 1552 (Spain); CÓDIGO CIVIL [CIVIL CODE] art. 1063 (Port.).

99 This action is found in the PECL, *supra* note 96, art. 3:303, according to which the third party may, in case of insolvency or fundamental nonperformance of the intermediary towards the third party, "exercise against the principal the rights which the third party has against the intermediary, subject to any defenses which the intermediary may set up against the third party and those which the principal may set up against the intermediary." *Id.* The rule is inexistent in the DCFR, which does give the third party a more far-reaching right, but only in case the principal has already decided to act directly against the third party.

100 For a recent overview, see COMPULSORY LIABILITY INSURANCE FROM A EUROPEAN PERSPECTIVE (Attila Fenyves et al. eds., 2016), especially questions 17 to 19 in the country reports in the comparative overview on pages 407 to 411. The matter is not harmonized in the EU, although there is a vague formula for obligatory motor vehicle insurance in article 3 of EU Directive 2009/103 relating to insurance against civil liability in respect of the use of motor vehicles. Directive 2009/103/EC of the European Parliament and of the Council of 16 September 2009 Relating to Insurance Against Civil Liability in Respect of the Use of Motor Vehicles, and the Enforcement of the Obligation to Insure Against Such Liability, art. 3, 2009 O.J. (L 263) 11, http://data.europa.eu/eli/dir/2009/103/oj ("Each Member State shall, subject to Article 5, take all appropriate measures to ensure that civil liability in respect of the use of vehicles normally based in its territory is covered by insurance.").

sured, if effected before the event). But the insurer is cut off from asserting defenses based on acts *subsequent* to the insured event.

2. Subcontractors

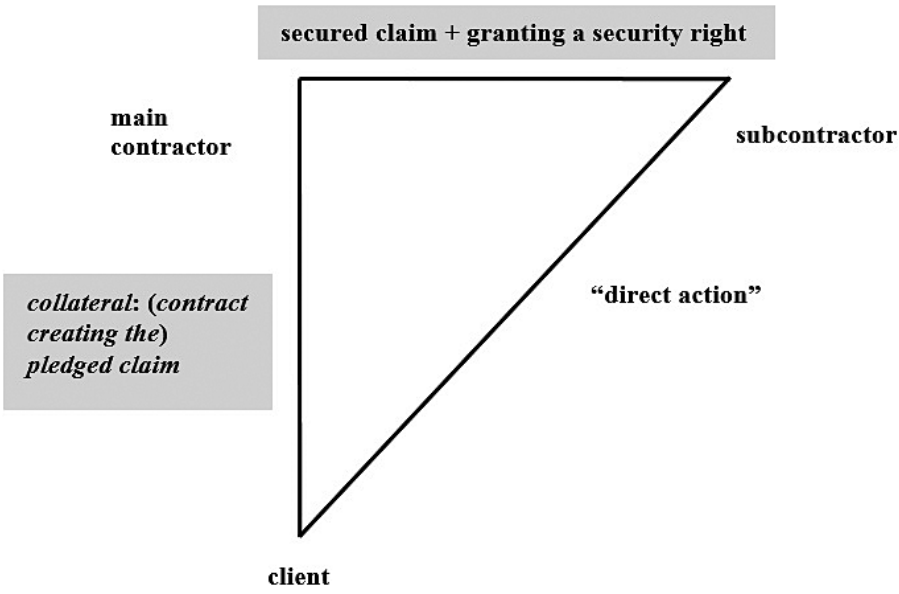
Some national systems do also protect subcontractors or employees of contractors against the insolvency of their contractor by granting them—by operation of law—a lien or a direct action on the right to payment that their contractor still has against its client,[101] as illustrated in Figure 5. This also applies to a sub-subcontractor acting directly against the main contractor.[102] A legal system recognizing this possibility will determine the answers to the three following questions: 1) which link is sufficient between the secured right to payment and the charged right to payment (i.e., must they relate to the same work or service, or not); 2) from which moment in time (e.g., upon notification to the client by the subcontractor of a statement that the subcontractor is not paid and therefore exercises its direct right) can new defenses no longer be asserted by the client against the subcontractor;[103] and 3) what is the ranking of this security right in cases of conflict with other pledges or charges on the collateral (e.g., Is there a filing system? Does it only rank at the time of notification? Does it automatically rank first, given the link between the secured right to payment and the charged right to payment?).

101 *E.g.*, Code civil [C.civ.] art. 1798 (Belg.); Code civil [C. civ.] [Civil Code] art. 1798 (Fr.); Loi 75-1334 du 31 décembre 1975 relative à la sous-traitance [Law 75-1334 of December 31, 1975 Relating to Subcontracting Consolidated], www.legifrance.gouv.fr/affichTexte.do?cid Texte=JORFTEXT000000889241; Astikos Kodikas [A.K.] [Civil Code] Art. 702 (Greece); Codice Civile [C.c.] [Civil Code] art. 1676 (It.); Código Civil [C.C.] [Civil Code] art. 1579 (Spain).

102 For an extensive interpretation of the right as imposed under Belgian law, see Grondwettelijk Hof [GwH] [Constitutional Court] decision no 12/2012, Feb. 2, 2012, http://www.const-court.be/public/n/2012/2012-012n.pdf (Belg.).

103 Such notification has the same function as a notification of an assignment, albeit that the effect of this type of direct action, merely constituting a security right, is more limited than that of an outright assignment.

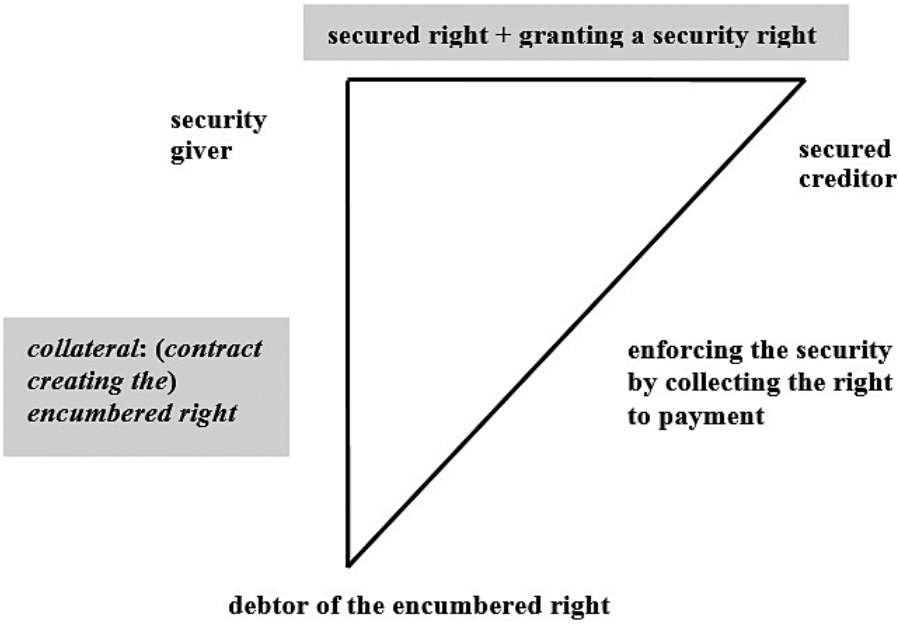
FIGURE 5. DIRECT ACTION AGAINST SUBCONTRACTOR



3. Analogy with a Pledge of Receivables

There is a clear analogy with the situation where a right to performance is pledged or charged on the basis of a contract, as illustrated in Figure 6. The main difference is that, in cases of a contract of pledge, the parties (and not the law) determine which rights are secured by the charge, pledge, or lien. This is even more the case in those jurisdictions where pledges or charges over rights to performance do not have to be registered or filed to be effective in insolvency of the pledgor.

FIGURE 6. SECURITY RIGHT IN A RIGHT TO PERFORMANCE



E. Rights Only Acquired in Cases Where Obligations Are Taken Over as Well; Obligations Running With Ownership

In some civil law systems, some benefits of a contract cannot be assigned separately but only in the context of a transfer of the full contractual relationship. Insofar as the transferor would be discharged from its obligations, this requires the consent of the other party to the original contract (except in special cases provided by law), but often the transfer of contract is "imperfect" and the old contracting party remains liable, at least as a subsidiary debtor. This doctrine, requiring a party to take over the obligations along with the rights, is rare, but the ECJ has employed the doctrine with respect to forum clauses.[104] Another case is found in DCFR Article III.–5:402, which states that in cases of a unilateral takeover by an undisclosed principal of rights acquired by an intermediary by contracting with a third party, the third party has the counter-option to claim performance by the principal of the corresponding rights he has against the intermediary.

Apart from the special cases, the main example that applies to all contracts and is found in caselaw is the right to terminate a contract. In many cases of assignment of rights without corresponding obligations, the assignee cannot terminate the original contract (to which he

104 *See infra* Section II.F.

was not a party) for nonperformance. This is not the solution in Belgian caselaw, according to which the assignee is entitled to terminate the contract for nonperformance under the same conditions as the assignor, unless the assignee has acquired only part of the contractual rights and that part is indivisibly linked to the remaining part of the contract.[105]

There is, however, another doctrine that has important applications and similar effects; namely the doctrine of qualitative obligations.[106] In most continental systems, an acquirer of a thing (e.g., goods, rights in land, etc.) who is acquiring by way of particular acquisition and not by way of universal acquisition, is not bound by the obligations of its predecessor in relation to those goods, except in cases explicitly provided by law. In other countries, parties may make obligations in relation to land qualitative (running with the land) by contract under the condition that they are registered in the land register (e.g., Netherlands, Spain). Most civil law jurisdictions are in this respect clearly more restrictive than the common law on real covenants in land. Typical examples of qualitative obligations by operation of law may include: obligations of landlords towards tenants (in cases of sale of leased property; "*emptio non tollit locatum*");[107] obligations linked to certain limited proprietary interests in land; obligations linked to co-ownership (e.g., condominiums or apartment buildings); and obligations of a licensee of intellectual property rights.

F. The Case of Forum and Arbitration Clauses

Within the EU, the formation, validity, and effect of forum clauses is to a large extent uniformly governed by EU law (especially the Brussels Ibis regulation[108]). The caselaw of the ECJ in relation to such forum clauses departs from the rule in many EU countries that the debtor of a right to performance may assert a forum clause against the assignee of the right or any other acquirer of the right (including direct actions). According to that caselaw, in cases within the scope of

105 Cour de Cassation [Cass.] [Court of Cassation], Sept. 20, 2012, No. C.11.0662.F (Belg.), http://jure.juridat.just.fgov.be/view_decision.html?justel=F-20120920-5. In the latter case, termination requires the consent of all creditors of rights out of that contract.

106 *See supra* text accompanying note 61.

107 *E.g.*, CODE CIVIL [C.CIV.] art. 1743 (Belg.); CODE CIVIL [C. CIV.] [CIVIL CODE] art. 1743 (Fr.); BÜRGERLICHES GESETZBUCH [BGB] [CIVIL CODE], § 566 (Ger.); CODICE CIVILE [C.C.] [CIVIL CODE] § 1599 (It.); DCFR, *supra* note 4, art. IV.B.–7:101 (some of these provisions deal specifically with either the lease of movables or immovables).

108 Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on Jurisdiction and the Recognition of Enforcement of Judgments in Civil and Commercial Matters, O.J. (L 351) 1, data.europa.eu/eli/reg/2012/1215/oj (especially art. 23).

the Brussels Ibis regulation, a forum clause can be asserted against a third party only where there is actual consent, in writing by that party or in a form which accords with a usage in international commerce; or where the third party has (according to the applicable national law) taken over the full relationship (i.e., not only the rights but also the obligations).[109] One application of the latter rule is that a forum clause in articles of association can be asserted against new shareholders (having bought shares on the secondary market),[110] and a forum clause in issuing conditions of bonds can be asserted against a buyer on the secondary market.[111] Nevertheless, the ECJ was more lenient in the case of a forum clause in a bill of lading that could be asserted against the acquirer of the goods,[112] although the acquirer of the goods does not take over the obligations towards the carrier.

As there is no uniform EU rule on the formation, validity, and effect of arbitration clauses, this is a matter for national law. Most national systems tend to let the debtor assert the arbitration clause against assignees and all other acquirers of the right against the debtor, including in direct actions. Caselaw diverges as to the question of whether a trustee in bankruptcy is bound by an arbitration clause (e.g., he is bound according to Belgian[113] and English[114] caselaw, and not bound according to Polish law[115]).

---

109 Judgment of Feb. 7, 2013, in Case C-543/10, Refcomp SpA v.Axa Corp. Sols. Assurance SA, curia.europa.eu/juris/documents.jsf?num=C-543/10. For a recent overview, see Martina Melcher, *Zur Drittwirkung von Gerichtsstandsvereinbarungen nach der EuGVVO nF*, 14 GPR (EUR. UNION PRIV. L. REV.) 246 (2017).

110 Judgment of Mar. 10, 1992, in Case C-214/89, Powell Duffryn plc v. Petereit, 1992 E.C.R. I-1769, I-1775, curia.europa.eu/juris/documents.jsf?num=C-214/89.

111 Judgment of Apr. 20, 2016, in Case C-366/13, Profit Investment Sim SpA v.Ossi, curia .europa.eu/juris/documents.jsf?num=C-366/13.

112 Judgment of June 19, 1984, in Case C-71/83, Russ v. NV Haven, 1984 E.C.R.2417, 2421, curia.europa.eu/juris/documents.jsf?num=C-71/83; Judgment of Nov. 7, 2000, in Case C-387/98, Coreck Maritime GmbH v. Handelsveem BV, 2000 E.C.R., I-9362, I-9375, curia.europa.eu/juris/documents.jsf?num=C-387/98.

113 Cour de Cassation [Cass.] [Court of Cassation], May 8, 1998, No. C.96.0400.F, ARR.CASS. 1998, No. 229 (Belg.), jure.juridat.just.fgov.be/view_decision.html?justel=N-199805 08-12; Hof van Beroep [HvB] [Court of Appeal] Feb. 21, 2006, RECHTSKUNDIG WEEKBLAD [RW] 2009–10, 279.

114 Philpott v. Lycee Français Charles de Gaulle School, [2015] EWHC 1065 (Ch), http:// www.bailii.org/ew/cases/EWHC/Ch/2015/1065.html.

115 As applied in Switzerland by Bundesgericht [BGer] [Federal Supreme Court] Mar. 31, 2009, Vivendi S.A. v. Deutsche Telekom AG, Case No. 4A_428/2008 (Switz.), http://www.servat .unibe.ch/dfr/bger/090331_4A_428-2008.html, *translation at* http://www.swissarbitrationdecisions .com/sites/default/files/31%20mars%202009%204A%20428%202008.pdf.

III. Effects in Tort Law

In this last part, I would finally like to point out very briefly some doctrines and developments in tort law that are specifically relevant to chains or networks of contracts.

A. Expanding Tort Law

First of all, contracting may lead to an expansion of liability in tort (i.e., for other damage than damage for which one is already contractually liable). In one direction there is the traditional doctrine of vicarious liability. A more recent development, however, is the debate on chain liability; either liability for torts committed upstream (by suppliers or subcontractors) or downstream in other cases than the traditional cases of vicarious liability (more specifically by distributors).[116] There is not much appetite yet in civil law countries for expanding tort law in this way. On the other hand, big buyers or service providers are increasingly imposing performance standards on their suppliers or subcontractors, including sustainability standards. The study of such clauses and their effects is, however, beyond the scope of this Essay.[117]

B. Restricting Tort Law by the Doctrine of Non-Cumul

Continental civil law systems do also vary considerably as to the question whether a contracting party may obtain, on the basis of the law of torts, compensation for "contractual damage" (i.e., damage consisting of, or caused by, the nonperformance of a contract with the claimant). Several jurisdictions do exclude an action in tort for such damage against the debtor of a contractual obligation towards the claimant. French and Belgian caselaw went a step further by also excluding an action in tort against any third party to whom the contractual debtor has entrusted performance of the contractual obligation whose nonperformance caused the damage.[118] The third party is thus protected by the content of the contract under which it undertook to perform. This protection is not frustrated by direct contractual actions, where they apply, as the third party may then set up all the defenses

116 *See, e.g.*, Liesbeth Enneking, Foreign Direct Liability and Beyond: Exploring the Role of Tort Law in Promoting International Corporate Social Responsibility and Accountability 535–38 (2012).

117 See Fabrizio Cafaggi, *Regulation Through Contracts: Supply-Chain Contracting and Sustainability Standards*, 12 Eur. Rev. Cont. L. 218 (2016), for more on this topic.

118 For a recent case, see Hof van Cassatie [Cass.] [Court of Cassation], Mar. 24, 2016, No. C.14.0329.N (Belg.), http://jure.juridat.just.fgov.be/view_decision.html?justel=N-20160324-17, where the bank of the claimant had entrusted a payment service to another bank.

out of its own contract.[119] Jurisdictions accepting a "cumul" and tort claim against the third party in such cases are confronted with complicated questions as to the third-party effect of exemption clauses stipulated by subcontractors.

C. Other Immunities in Tort

Civil law jurisdictions typically recognize a number of specific immunities under tort law that are based on public policy considerations. By way of example, I would like to mention three examples of such immunities that are precisely relevant in chains or networks of contracts. First of all, most jurisdictions restrict the liability in tort of employees, granting them immunity for, for example, simple negligence.[120] Secondly, rules regulating the internet grant some immunity to internet service providers. They are found mainly in Articles 12 through 15 of the e-commerce Directive 2000/31.[121] It limits their liability according to the following functions: access providers (as the "mere conduit") are solely liable for the proper transmission of the data, and hosting providers are excluded from the liability for the content available on their websites as long as they have not been advised to take down illegal content. According to the assessment of the European Commission, online platforms should enjoy the same preferential treatment because otherwise the continued growth of the digital economy could be seriously jeopardized.[122] Thirdly, several constitutions contain immunities in order to protect freedom of speech, namely by protecting intermediaries such as publishers and printers who are not the author of the speech, in order to avoid private censorship by such persons to limit their own risk of liability.[123]

---

119 *See supra* Sections II.C, II.D.

120 *See, e.g.*, ARBEIDSOVEREENKOMSTENWET [Labour Contracts Act] art. 8 (Belg.); VAHINGONKORVAUSLAKI [Tort Liability Act] ch. 4, § 1 (Fin.); SKADESTANDSLAG ch. 4, § 1 (Svensk författningssamling [SFS] 2010:1458) (Swed.).

121 Directive 2001/31/EC of the European Parliament and of the Council of 8 June 2000 on Certain Legal Aspects of Information Society Services, in Particular Electronic Commerce, in the Internal Market (Directive on Electronic Commerce), arts. 12–15, 2000 O.J. (L 178) 1, 12, 13, data.europa.eu/eli/dir/2000/31/oj.

122 *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: Online Platforms and the Digital Single Market Opportunities and Challenges for Europe*, COM (2016) 288 final (May 25, 2016), http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52016DC0288.

123 See, for example, TRYCKFRIHETSFÖRORDNING [TF] art. 5 [Freedom of the Press Act 1810] (Swed.), now TRYCKFRIHETSFÖRORDNING ch. 1, §§ 1–3 (Svensk författningssamling [SFS] 2015:151) (Swed.), and 1994 CONST. art. 25 (Belg.).

Conclusion

From this overview, it appears that continental civil law jurisdictions have developed different instruments deviating from a strict doctrine of privity of contract in order to cope with at least some of the questions that arise specifically because of the rise of contract chains and networks. The two main concerns seem to be protecting contractual distribution of risks in relation to third parties and protection against insolvency of the intermediate link.