



Prof. Dr. José Luis Alonso
Dr. Nataša Hadžimanović
Dr. Anna Plisecka

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Comparative Private Law

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Duration: 120 minutes

- Please check both at receipt as well as at submission of the exam the number of question sheets. The examination contains 4 pages with 3 cases.

Notes on marking

- When marking the exam each question is weighted separately. Points are distributed to the individual questions as follows:

Case 1

Question 1	15 points	ca. 16%
Question 2	6 points	ca. 7 %
Question 3	15 points	ca. 16%

Case 2

Question 4	2 points	ca. 2%
Question 5	4 points	ca. 5%
Question 6	8 points	ca. 9%
Question 7	16 points	ca. 17%

Case 3

Question 8	4 points	ca. 5%
Question 9	3 points	ca. 3%
Question 10	6 points	ca. 7%
Question 11	4 points	ca. 5%
Question 12	4 points	ca. 5%
Question 13	3 points	ca. 3%

Total	90 points	100 %
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We wish you a lot of success!



Case I: 36 Points

Mr. Linus Lorange sells 2 metric tons of oranges to Sweetpies & Co. They (validly) agree on the applicability of English law to their sales contract. Sweetpies wish to use these organic oranges to produce their fine marmalade. The oranges are stored in a bulk consisting of 10 metric tons of oranges on the vessel "Moonlight". Mr. Lorange represents that the goods for Sweetpies have been set aside on the vessel. The buyer Sweetpies relies on that representation. However, no separation of the goods has taken place.

After the sales contract has been concluded, the price for organic oranges rises significantly. Mr. Lorange states all of a sudden that it is no longer possible to deliver the oranges. He does not disclose the reason, but this is simply because he wishes to sell them to another buyer at a higher price.

Sweetpies are in need of oranges and have no extra cash to buy them elsewhere at a significantly higher price. Sweetpies insist therefore that they have become the owners of the oranges. To show that ownership has passed, Sweetpies' lawyer relies especially on the fact that Mr. Lorange has deceived Sweetpies by telling them that separation of the goods has taken place.

Questions:

1. What is the core issue, i.e. the problem of this case? Would your answer differ if the applicable law would not be English law? (15 pts)
2. Do you think the attorney's idea to base the case on Mr. Lorange's behavior is a successful strategy with regard to the ownership issue? On which arguments do you base your answer? (6 pts)
3. Could section 20A of the English Sale of Goods Act 1979 help Sweetpies to become owners of the oranges? If so, what kind of proprietary right would this be (if it could come into existence), and how would this affect Sweetpies, for instance, in case part of the oranges would go bad? (15 pts)

Sale of Goods Act 1979

20A Undivided shares in goods forming part of a bulk.

(1) This section applies to a contract for the sale of a specified quantity of unascertained goods if the following conditions are met—

(a) the goods or some of them form part of a bulk which is identified either in the contract or by subsequent agreement between the parties; and

(b) the buyer has paid the price for some or all of the goods which are the subject of the contract and which form part of the bulk.

(2) Where this section applies, then (unless the parties agree otherwise), as soon as the conditions specified in paragraphs (a) and (b) of subsection (1) above are met or at such later time as the parties may agree—



- (a) *property in an undivided share in the bulk is transferred to the buyer, and*
- (b) *the buyer becomes an owner in common of the bulk.*
- (3) *Subject to subsection (4) below, for the purposes of this section, the undivided share of a buyer in a bulk at any time shall be such share as the quantity of goods paid for and due to the buyer out of the bulk bears to the quantity of goods in the bulk at that time.*
- (4) *Where the aggregate of the undivided shares of buyers in a bulk determined under subsection (3) above would at any time exceed the whole of the bulk at that time, the undivided share in the bulk of each buyer shall be reduced proportionately so that the aggregate of the undivided shares is equal to the whole bulk.*
- (5) *Where a buyer has paid the price for only some of the goods due to him out of a bulk, any delivery to the buyer out of the bulk shall, for the purposes of this section, be ascribed in the first place to the goods in respect of which payment has been made.*
- (6) *For the purposes of this section payment of part of the price for any goods shall be treated as payment for a corresponding part of the goods.*

Case II: 30 Points

Company A and company B have signed a contract for transportation of goods. According to the contract company B is obliged to transport the goods produced by the company A between the factory and the retailer warehouse using its own transportation vehicles and providing fuel. The company B will be payed a fixed price per quantity of goods transported. The contract is signed for 6 years. After 2 years the price of fuel has doubled making the performance of B much more onerous. The company B is seeking adjustment of the price of its services to the increased costs of fuel.

Questions:

4. Define the main problem of the case. (2 pts)
5. Which are the legal principles underlying the decisions in similar cases? (4 pts)
6. How would have been such case solved under French law before and after the reform of 2016? (8 pts)
7. How would the case be solved under German and English law? (16 pts)

Please compare with known examples of similar cases from those two legal systems.

Case III: 24 Points

In September 1969, the transport company of Erich W. purchased an antifreeze product to protect its lorries. Despite the assurances of the selling firm, the product turned out to be ineffective. As a result, in August 1970 it turned out that four of the lorries had suffered damages in value of 12.990 DM. Since under §477 I BGB contractual claims for latent defects in sold products prescribed six months after delivery, and tortious claims instead (§852 I BGB) only three years from the time the victim had knowledge of the harm and the identity of the person liable, the purchaser decided to claim in tort under §823 I BGB. The court of first instance and the court of appeal dismissed the claim. The Bundesgerichtshof (BGH) reversed the decision of the court of appeal.

Judgement: "(a) As the BGH repeatedly stated, in accordance with prevailing opinion, the overlap of claims for reparation arising out of breach of contract and of tort constitutes a case of genuine concurrence of claims (*echte Anspruchskonkurrenz*). If a course of conduct satisfies the conditions for liability under both contract and tort law, a claim arises under each of them. Each claim is to be assessed on an autonomous basis, according to its respective conditions, its content and its enforcement mechanisms. Accordingly, each claim follows in principle its respective prescription period (...) (b) A different approach applies only if, and insofar as, the purpose of a particularly short prescription period under contract law would be frustrated – and in effect contract law would be undermined – as a result of the power given to the victim to switch over to a claim in tort after the expiry of the prescription period for contractual claims (...) Along those lines, the Courts apply the short prescription period of §558 I BGB to claims of the landlord against the tenant arising from a change or deterioration of the rented property, even though they were brought up under tort law (...) If the landlord were able to claim in tort for a culpable infringement of his ownership even after the expiry of the six-month prescription period, the aim of §558 BGB, namely the rapid settlement of the landlord-tenant relationship after the end of the lease, would be gravely undermined. (...) (c) The peculiarities discussed above justify that claims in tort are exceptionally made subject to a shorter contractual prescription period. They do not come to bear, however, as regards the prescription period in commercial sale contracts."

Questions:

8. What does 'genuine concurrence of claims' mean? What is the position of the BGH regarding the compatibility of contractual with tortious liability? Does this position have a normative basis? How could an argument in its favour be built on the basis of the applicable norms? (4 pts)
9. This same position has found defenders in France: how has it been argued, and how plausible is such argumentation? (3 pts)
10. What is the common doctrine of the French courts? How is it commonly argued? Are there structural reasons in the French system to prefer this solution? (6 pts)



11. What is the dominant doctrine in English law? Was there a landmark case for it? Does this doctrine lead to a uniform solution for every case where the conditions for liability are fulfilled both in contract and in tort? (4 pts)
12. Is the compatibility of claims in contract and in tort also the question discussed in the decision of the German BGH? What is the question on which the Court here rules? What is the position of the Court on this question? (4 pts)
13. Are there according to the BGH cases where a different solution would be justified? What are the conditions for this different solution? What is the reason for this departure from principle in such cases? (3 pts)