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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%

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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)**

The core issue of this case is the question whether the goods were ascertained, whether there was **specificity** (3 points).

Concerning a **proprietary right** it must be absolutely **clear which object is concerned** (1 point).

**Only if this prerequisite is met, ownership can pass** (1 point).

If there is **no ascertainment**, there can only be a **contractual claim** to get goods delivered (1 bonus point), but no proprietary right like ownership (1 point).

Ascertained goods are existing, identifiable and not mixed with goods belonging to anyone else (1 point for a correct definition).

By contrast, unascertained goods are generic goods which cannot yet be specifically identified, perhaps because the delivery date is in the future and the goods could be obtained from a number of sources, or because they are mixed with parcels belonging to other parties in a warehouse/on board of a vessel etc. (1 point for a correct definition).

The answer would **not be different** under a legal system other than English law (1 point): The requirement of specificity is a **universal principle of property law** (3 points). Proprietary rights to come into existence **necessarily** require **specificity** (3 points).



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)

The attorney's idea **does not help** to establish ownership (3 points).

This is because the goods form part of a bulk and have **not been ascertained** (3 points).

The argument may, however, be used to show that **Mr. Lorange's behavior was unfair** and that he may therefore be denied the right to deny the truth of his representation (3 bonus points).

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)

Section 20A of the English Sale of Goods Act 1979 requires a) that the goods form part of a **bulk which is identified in the contract** (1 point) and b) that the buyer has **paid the price** for at least one part of the goods (1 point).

In such a case the buyer becomes **owner in common of the bulk** because property in an undivided share in the bulk is transferred to the buyer (3 points). The buyer does, therefore, **not become the sole owner** of the quantity of goods it has bought (3 points). That means for instance that if oranges within the bulk of oranges go bad, the buyer cannot state that "his part" has not gone bad because there is no such separated part (3 points).

The question is whether Sweetpies have **become owners in common** of the bulk (1 point).

It seems that the bulk has been **identified** in the contract, Section 20A para. 1 a Sale of Goods Act 1979 (1 point). But Sweetpies have not **paid the price**, therefore they cannot become owners in common, Section 20A para. 1 b Sale of Goods Act 1979 (1 point). (*Equally, it can be argued that the purchased item has not been paid for or that no information on payment can be derived from the facts of the case.*)

Therefore, Section 20A of the English Sale of Goods does not confer a proprietary right to Sweetpies (1 point). (*The opposite view is valued equally*)

#### 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 paid 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)

**Change of circumstances** which was **not foreseen** by the parties at the moment of concluding the contract. (1)

The subsequent change of circumstances makes the performance of one of the parties much **more onerous, but not impossible**. (1 point)

#### 5. Which are the legal principles underlying the decisions in similar cases? (4 pts)

The relevant legal principles are:

**Pacta sunt servanda** (1 point for mentioning, 1 for definition)

**Rebus sic stantibus** (1 point for mentioning, 1 for definition).

#### 6. How would have been such case solved under French law before and after the reform of 2016? (8 pts)

Before the reform, courts **could not modify** contracts even if their adjustment would seem fair (3 points) (see the decision in **Canale de Carpone** case: 1 point)

After the reform, there is a range of possibilities:

B can ask A to **renegotiate** the contract (2 point)

In case the negotiations do not succeed the parties may **terminate** the contract or ask the court to **adapt it or terminate it**. (2 points)

#### 7. How would the case be solved under German and English law? Please compare with known examples of similar cases from those two legal systems. (16 pts)

Under German Law:

The doctrine of the **disappearance of the basis of the transaction** as requisite for the revision of the contract (2 pt)

**Judicial revision** of contract: preference for revision versus rescission of the contract (2 pt)

The contract as it stands is considered **contrary to good faith** (2 pt)

Reference to the **German reunification** case or the **1919 inflation** case (2 pt)



Under English law:

Principle **pacta sunt servanda** (2 pt)

The courts have **no possibility to adapt** existing contracts (2 pt)

Parties **should include in the contract their own provisions** for the possible changes of circumstances (2 pt)

In "Staffordshire Area Health Authority v South Staffordshire Water Works Co" the court used the argument that the contract was concluded for an unlimited period of time and therefore could be brought to an end after a period of notice. However, the contract in the present case is concluded for a determined period of 6 years: therefore, a termination after a period of notice will not be possible. The parties will be bound by the contract. (2 pt)



### 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)**

Under "genuine concurrence of claims" ("echte Anspruchskonkurrenz") one must understand not a cumulative but an **alternative concurrence**: the claim in tort remains possible even when a contractual claim is available, yet the plaintiff must of course **choose** between both. (1 pt)



The BGH deems tortious liability **compatible** with contractual liability: even in the context of a contractual relationship, tortious claims are not excluded, they remain possible as alternative to contractual ones. (1 pt)

This 'freedom of choice' rule is not stated in the BGB or any other legislative text: it has simply asserted itself in the German courts as uncontroverted **case law**. (1 pt)

Yet, a normative basis can be argued from the very fact that, in the absence of an explicit rule excluding concurrence, a claim in tort as well as one in contract must arise when a given situation **fulfills the normative conditions for both**. (1 pt)

**9. This same position has found defenders in France: how has it been argued, and how plausible is such argumentation? (3 pts)**

In France, in fact, some have argued that the law of delicts belongs to the **ordre public**, so that private persons **cannot derogate or modify it by contract**: contractual liability should then coexist with delictual liability. (1 pt)

This consideration of delictual liability as part of the ordre public is arguable in that (a) such liability **derives from the law itself**, not from the will of the parties and (b) in that it is, in the very general terms in which it is introduced by art. 1240 and 1241 C.c., expression of **general duty not to cause damage to others unlawfully**. (1 pt)

The argument is ingenious, but not strong enough to counterbalance the consequences of accepting it: i.e. the **practical dissolution of the law of contracts** given how all-encompassing tortious liability is introduced in the French Code Civil (infra question 9). (1 pt)

**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)**

The French courts uphold the so-called **non-concurrence (non-cumul)** doctrine (1 pt): delictual liability does not arise when contractual liability exists: it is, thus, subsidiary, i.e. operative only **in absence of contract**. (1 pt) This is so embedded in the French notion of delict that the term '**extra-contractual**' liability is commonly used as synonymous of delictual liability. (1 extra pt)

Non-cumul is commonly argued along the following lines: contractual liability is introduced by the law to secure the fulfillment of contracts: allowing a party to choose a claim in tort instead of the claim arising from the contract she has herself concluded is thus **incompatible with the respect due to the law as much as with the respect due to the contract**. (2 pt)

The main reason that commends this doctrine, though, is structural: the French Code civil defines the delictual liability in **very general terms** in Art. 1240 and 1241, according to which every damage caused by fault must be compensated; taken literally, this would cover **all damages arising from breach of contract, thus depriving the entire law of contracts of its binding force**, a claim in tort being always a possible way out of it. The doctrine of non-cumul prevents this displacement of the law of contracts by the law of delicts. (2 pt)





**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)**

The English courts accept concurrent liability in contract and in tort, and in such case **freedom of choice** for the plaintiff. (1 pt)

The landmark case was **Henderson v. Merrett Syndicates Ltd.** in 1994, where the decision in favour of concurrence was advanced under the leading judgement of Lord Goff. (1 pt)

The doctrine advanced by Lord Goff included a correction based on the respect due to the contract: not in the sense that this excludes per se concurrence in every case, as held by the French courts, but in the sense that **tortious liability must be excluded when it is "so inconsistent with the applicable contract that ... the parties must be taken to have agreed that the tortious remedy is to be limited or excluded"**. This means that the rule to be applied varies depending on the presumable will of the parties in each case. (1 pt)

**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)**

In this case, the compatibility per se is out of discussion, **taken for granted as established case law**. (1 pt)

The question is rather whether some aspects of the regulation of the contractual liability, namely the prescription terms, should not be **extended also to the tortious liability**. (1 pt)

The court answers in the negative: "each claim is to be assessed on an autonomous basis, according to its respective conditions, its content and its enforcement mechanisms". Hence, **each claim falls under its own prescription period**. (1 pt)

**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)**

Yes: according to the BGH, an exception must be admitted and the contractual norm extended to the tortious claim, when otherwise **the purpose of the contractual norm would be frustrated**, and contractual law itself therefore undermined. (1 pt)

This happens when the **field of application of the tortious claim coincides** to such an extent with that of the contractual claim that there is **practically no case in which both do not concur**. (2 pt)

As an example, the court mentions the claims of the landlord against the tenant arising from a change or deterioration of the rented property, when brought up under tort law; despite the contract, a claim in tort is practically always possible, since the landlord is, as a rule, also the owner of the rented property. Freedom of choice would in this case deprive the prescription period set for the contractual claim of all relevance, were it not extended to the tortious claim. (1 extra pt in case the example is properly explained)