Comparative Private Law (Regular Examination, January 2018)

I.

Facts:
A is the owner of a small tattoo shop in a town of 100‘000 inhabitants. When he learns that his competitor C from the next larger town wants to rent a shop in the same street, A starts negotiating with B, the owner of the premises, in order to avoid C’s expansion. Contrary to the truth, A tells B that he is interested to enlarge his business and that B’s premises seem to be ideal for this purpose. When C gets in touch with B about the premises, B is about to sign the contract with A and therefore tells C that he is already negotiating with a competitor. After having heard that C has abandoned his project and moved to another city, A suddenly stops the negotiation with B and does not sign the contract. One year later, B has still not found a tenant for the shop. After two years, B can finally rent the shop for half of the price that A would have paid and that would have been the usual market price.

Questions:
Please answer the following questions with regard to (a) Germany, (b) France, (c) United Kingdom and explain your answers:

1) Can B claim a compensation for the late renting and/or the cheaper price obtained for renting his store from A? Please explain the conditions for liability in all three jurisdictions!
2) Is the liability incurred by A (in the three jurisdictions) of tortious or of contractual nature?
3) Would A be held liable, if he really had the plan to enlarge his business, but did not get the credit he hoped for from the bank? Please explain the legal situation with regard to all the three jurisdictions!
4) Can you explain why some scholars think that the so-called *culpa in contrahendo* should be qualified as a “third way” of liability? What is your opinion on this question?

II.

Facts:
The plaintiff, Domingues, was injured, riding his motorcycle, in a collision with 12-year old S. Bertrand, due to a sudden turn the latter took with his bicycle. Domingues sued the boy's father, pursuant to Art. 1384(4) C. Civ. [now 1242(4)], according to which 'the father and the mother, in so far as they exercise parental authority, are solidarily liable for the damage caused by their minor children who reside with them'. The French Cour the cassation upheld the decision of the court of appeal, holding the defendant liable.

Cass. civ. 2e, 19 February 1997, Bull. civ. 1997.II.56:
“Against the judgement which held J.-C. Bertrand liable, he argues that the presumption that the parents are liable for their minor child, under Article 1384(4) C. Civ., can be set aside not only in case of force majeure or contributory negligence by the victim, but also when the parents prove that they did not commit a fault in the supervision or upbringing of the child. The court of appeal did not apply Article 1384(4) C.Civ. correctly

when it refused to examine whether J.-C. Bertrand could prove that he committed no fault in his supervision, on the ground that only force majeure or contributory negligence could exclude his objective liability.
However, having correctly held that only force majeure or contributory negligenge could relieve J.-C. Bertrand from the objective liability resulting from the damage caused by his minor son which lived with him, the court of appeal did not need to examine whether there was a lack of supervision on the part of the father"

Questions:

1) Explain the arguments of the defendant as summarised above. How do they relate to the qualification of Article 1384(4) C. civ. as a presumption? How do they relate with the French general rules on tortious liability?

2) According to the decision of the Cour de cassation, what defences are admitted in a case judged under Article 1384(4) C. Civ.? Explain the nature of these defences. Might they be understood as referred to some condition of liability other than fault?

3) What did the rejection of the arguments of the defendant by the Cour the cassation imply regarding the nature of the liability under Article 1384(4) C. civ. ? Explain the historical importance of this decision.

4) Consider Art. 1384(7) and (8) C.Civ.: "(7) The liability outlined above occurs, unless the father and mother ... prove that they could not have prevented the act that gives rise to that liability." "(8) As to teachers, the fault, imprudence, or negligence invoked against them as having caused the damaging act will have to be proven by the plaintiff at the trial in accordance with the general law."
Was there an interpretation of Art. 1384(7) C.civ., consistent with the position of the defendant? How should this article be understood after the decision of the Cour de cassation?

5) §832 I BGB reads: "Anyone who is bound by law to supervise a person who requires supervision on account of minority or of physical or mental condition, is liable to compensate for the damage that this person unlawfully causes to a third party. No liability arises if the duty to supervise has been fulfilled or if the damage would also have occurred under adequate supervision". Comment the main differences between the conditions of liability established by this article and those required under French law.

6) Does the same liability exist under English law? Does English law acknowledge any instance of liability for others?

<u>Nota bene:</u>

I: ca. 45 %
II: ca. 55 %

Both parts have to be treated and all questions have to be answered.

Lösungsskizze Comparative Private Law
(Regular Examination January 2018)

Part I:

		Points
Ad 1) A ➔ B: compensation		
(a) Germany	(1) B can claim compensation on the basis of so-called ***culpa in contrahendo***. This liability is based on the pre-contractual mutual good faith of the parties and obliges both parties to respect the other party's interest. [Since 2001, a special statutory basis exists.[1]] Especially with view to breaking of negotiations, **good faith does not hinder the parties to break off negotiations for a contract that they do not want**, but they have to inform the other party of any important change in their intention to conclude a contract. In this case, **A never had the intention to conclude a contract**, which means that he acted with bad faith from the very beginning of the negotiations. Therefore A has to compensate B for the losses B encountered because B believed in A's intention to negotiate in good faith and fair dealing. This means that B has to be compensated for the **negative interest**, i.e. he has to be put in the situation as if he had never heard of the contract (with A). The negative interest comprises also **gains** that B could have obtained if he had not stuck to the contract with A, meaning that B has to prove that one of A's competitors would have taken the premises and paid the price A was also willing to pay. In this case, B would get the expected profit from A. [*If A was aware of the fact that, as an outcome of their negotiations, B would have to accept a lower price for the premises, he is liable in tort for wilfully causing damage to B in a manner contrary to public policy (§826 BGB)*].	*Culpa in contrahendo*: term and nature (**1**) Origin, Evolution, Basis (**2**); Application to the case (**5**): • Freedom of contract (**1**) • Missing intention to conclude a contract (**2**) • Compensation of negative interest (**2**) **Total: 8 Points** *Supplementary points for § 826 BGB: 2 Points*
(b) France	Under French law, B can also claim compensation with regard to A's breaking	Tortious liability (**1**)

[1] § 280 BGB in combination with §§241(2), 311(2), (3) BGB.

	off of the negotiations, **but not on a contractual, but on a tortious basis**. In fact, the French general clause for tortious liability (**art. 1382 old Civil Code and NEW art. 1240 Civil Code**) covers all human acts that cause harm to another. Liability under these articles requires the fulfilment of **three cumulative conditions: fault, harm and a chain of causation between the two**. The **fault** consists in the breach of a legal duty. It must be regarded as a violation of a 'general norm of behaviour', since it is wrongful to enter or maintain negotiations without a real intention to conclude the contract, as in the present case. Secondly, the other party must have suffered **harm**. There will no distinction as to the head of damages, but the entire damage must be compensated. This includes (**third condition**), that B proves that A's competitors lost interest in his store because of A's breaking off. Therefore A's negotiating without the intention to conclude a contract that led to B's loosing other contracts and his reputation must be compensated under French law. *[It must be noted that under French law tortious and contractual liability cannot be cumulated. Since the liability is one of tort, no contractual claim will be available.]*	3 conditions = abstract knowledge: (**1**) Application to the case: Fault (**2**) Harm (**2**) Causation (**2**) <u>Total: 8 Points</u> *[1 supplementary point for Principle of No-Cumulation]*
c) United Kingdom	(1) Until now **a special liability for breaking-off negotiations in bad faith has not been established in the UK**. The reason is that the parties' freedom to break off negotiations must be maintained and that the Common law does not recognise a duty to negotiate in good faith and according to fair dealing. Such a duty is said to be too general and subjective to be enforced (**Walford v. Miles**). Therefore no special claim will be opened to B. (2) General claims that might be opened can be derived from **tortious liability**. The most important tort would be the **tort of deceit**. Since A got only in negotiations with B in order to prevent C from contracting, A deceived B about his intentions and will therefore be held liable for all damages that	In principle no special liability under English law: (**2**) Walford v. Miles (**1**) if arguments Tortious liability (**1**) *[Supplementary Points: Tort of deceit: 2 (has not been treated in detail)* *Conditions and application: 2 (has not been treated in detail)]*

	B has occured in consequence of A's fraud. This compensation includes all losses that are causal to A's behaviour, i.e. the loss of two years of rent and the loss of reputation leading to a minor rent in later contracts. [(3) **Tort of negligence**: B cannot succeed here in the tort of negligence because, although it is established that one party during negotiations for a contract may owe a duty of care to the other party in relation to the accuracy of statements made during the negotiations, the duty does not require one party to look to the other's interests in the conduct of the negotiations themselves: there is no duty of (effectively) good faith in pre-contractual negotiations through the tort of negligence. No such duty has ever been established in the English cases, and would be contrary to the general position that each party to contractual negotiations is entitled to pursue his own interest, so long as he avoids making misrepresentations (➔ tort of deceit).]	Tort of negligence: (**1**) Conditions: (**2**) Application (= does not apply): (**1**) <u>Total: 8</u>
Total Question 1:		**24 Points**
Ad 2)	The liability incurred is of different nature in the three jurisdictions; whereas under German law A is liable according to contractual rules, France and the UK apply tortious liability to the pre-contractual phase. It must be noted that tortious liability is not excluded by German law, but that it can be cumulated with the special liability for *culpa in contrahendo* that is of contractual nature.	3 points *Attention: these arguments might have been mentioned to question 1; the student is free to refer to the answer to question 1.*
Total Question 2:		**3 Points**
Ad 3) A's liability if he really had the intention to enlarge his business but could not sign the contract due to the bank's refusal to give credit.	In all the three jurisdictions, A would not be held liable if he had the real intention to conclude a contract with B; since all the three jurisdictions **accept the idea of parties' autonomy and freedom of contract**, they also accept that the parties are in **principle free to break of negotiations**. Under French and German law, only very special circumstances, can found a claim against a party who made use of this fundamental right. These circumstances can derive from the party's behaviour before the breaking-off (e.g. telling the other party that there will be no problem) or by breaking-off (e.g. waiting	Freedom of contract implies freedom to break off negotiations (**3**) French/German distinction of the behaviour during breaking-off (**2**) English general acceptance of breaking-off (**1**)

	too long to inform the other party about the intention to break off). If there are no special circumstances, A will not be held liable nor under French and German law neither under English law.	
Total Question 3:		**6 Points**
Ad 4) "third way of liability"	The proposition of a „**third way of liability**"means that the liability incurred is **neither delictual nor contractual**, but situated between the two liabilities mentioned. This idea is not new since Roman law knew also liability close to contract (quasi-contractual liability) and liability close to tort (quasi-delictual liability). **The statement stems from the observation that the founding of pre-contractual liability differs considerably between different jurisdictions and that the different nature does hinder efforts of harmonisation among European countries**. Moreover, the discrepancies between different jurisdictions also show **that the classification to one or the other legal nature are not logically mandatory**, but that it is a normative question whether one classify the different shades of liability in the pre-contractual phase under one common denominator or in two or three different categories. It might be regarded as progress if the ambiguous nature of pre-contractual liability is openly named.	Explanation (**2**) Origin of the „third way"(**1**) Other explanation (**1**) Pro's and Con's (if appropriate) (**3**)
Total Question 4:		**7 Points**
Total Part I		**40 Points**

Part II:

		Points
Ad 1) Bertrand's arguments	The defendant's argumentation has at its core the consideration of Art. 1384(4) as a **presumption of fault, that can therefore be challenged** by evidence of lack of fault. Proving that the parents did not commit fault in the child's upbringing and supervision should be sufficient to exclude their liability. This is, in fact, how the article had been **applied until then**: in line with the **general rule set by Art. 1382 and 1383 C.Civ.** (today's 1240 and 1241) that impose liability only on those 'by whose fault the damage ocurred', and require at least 'negligence or imprudence' for such liability	Art. 1384(4) as a mere (challengeable) presumption of fault **(3)** Liability, excluded by evidence of sufficiently diligent upbringing and supervision **(3)**

	to exist. By rejecting this defence, and accepting only those of force majeure and contributory negligence, the court of appeal had applied Art. 1384(4) incorrectly.	Consistency with the general rules of tortious liability **(2)**
Total Question 1:		**8 Points**
Ad 2) Admissible defences	The cour de cassation, as before it also the court of appeal, accepts in cases judged under Art. 1384(4) only the defence of force majeure and that of contributory negligence. **Force majeure**, irresistible force, excludes liability because of the irruption of an external event that cannot be reasonably fought against or (if, as it is often done, we include cas fortuit in the notion) foreseen. **Contributory negligence** excludes or diminishes liability because of the concurrence of the plaintiff's own fault with that of the defendant. Both defences can be understood as referred to **fault**: the latter, in that is **depends on the plaintiff's own fault,** which, when leading to situations that the plaintiff could not have foreseen, diminishes or excludes his fault; the former, in that irresistible and unforeseeable events are per definition **beyond the reasonable standard of diligence** that could be demanded from the defendant. Both can, though, be also understood, and tend in fact to be understood in French law, as related to **causation** rather than to fault. They both compromise, as an **external concurrent cause** (*cause étrangère*), the direct connection between the damage and the defendant's behaviour: because the damage would not have been caused, or not to the same extent, had the irresistible or unforeseeable event not intervened, or had the plaintiff behaved with the necessary caution.	Definitions of force majeure **(1)** and contributory negligence: **(1)** Connection of both to fault **(3)** Connection of both to causation **(3)** *1 extra point for the mention of cause étrangère*
Total Question 2:		**8 Points**
Ad 3) The Betrand decision	By restricting the opposable exceptions under Art. 1384(4) to force majeure and contributory negligence, the Cour de cassation effectively transformed the presumption of fault laid down in that article into a regime of **vicarious liability**. This means: parents are responsible for the damages caused by the children under their custody **regardless of their own fault**: no negligence or imprudence on their part is required for them to be held liable. As far as the parents are concerned, this was thus	Vicarious liabilty **(2)** and its meaning **(2)**

	made into a case of **strict liability** (responsabilité de plein droit). **They are not, though, cases of unrestricted or absolute liability**: as the court underlines, force majeure and contributory negligence still exclude (or diminish) the liability of he defendant under the new interpretation of Article 1384(4). In delineating this intepretation of Art. 1384(4), the court: (a) made parental liability into an **exception** to the general principle of **liability for fault** delineated in Art. 1382 and 1383 (b) assimilated this instance of liability to that of the **employer** for harm caused by employees [under the same Art. 1384(5)]: also the employer cannot, under French law, be exonerated by lack of fault.	Strict liability **(1)**, not unrestricted liability **(1)** Relation to the general system of tortious liability **(1)** and to the liability of the employers **(1)**
Total Question 3:		**8 Points**
Ad 4) Art. 1384(7)	From the point of view of the defendant, Art. 1384(7) merely establishes the **burden of proof**. It is not the plaintiff who must prove fault, imprudence or negligence, **contrary to the general rule** of Art. 1382 and 1383 C.Civ., **reiterated for teachers in 1384(8)**, but he is allowed to prove the absence of fault. The article, therefore, merely establishes a (challengeable) **presumption of fault**. Under this interpretation, 'that they could not have prevented the act' is understood in the sense that the defendant observed a sufficient standard of diligence, and such sufficient standard of diligence was not enough to prevent the damage. The Cour de cassation, instead, understood Art. 1384(7) **literally**: only proving that they could not have prevented the damage can the parents avoid liability. This implies proving an external cause (**'cause étràngere'**) **unforeseeable and invincible**, like force majeure (or concurrent negligence - in its most qualified form)	The 'traditional interpretation': presumption of fault, shifting to the defendant the burden of proof. **(3)** Contrast with the general rule and to 1384(8) **(1)** Any plausible interpretation of 'could not have prevented' **(1)** 1384(7), force majeure and cause étràngere **(3)**
Total Question 4:		**8 Points**
Ad 5) §832 I BGB	Unlike in France since the Bertrand case, under §832 I BGB the parents are under **no strict liability** regarding the damage caused by their children. For them to be liable, the fault of the children regarding the damage is not sufficient: **their own fault is necessary, although not regarding the damage but their duty of supervision.** The system is in this respect **analogous to the one established regarding employees** in	no strict liability **(1)** nor vicarious liability proper **(1)** necessity a of the parent's fault **(3)** nature of such fault: not referred to the damage, but to

	§831(1) BGB. Also there the fault of the employer (in selecting or supervising the employee) was a necessary condition to make him liable. Precisely because it requires concurrent fault in the defendant, this is **not a system of vicarious liability proper.**	the supervision **(3)** extra point: analogy to the employer's liability
Total Question 5:		**8 Points**
Ad 6) English law	Vicarious liability exists in English law for the **employers** regarding damage caused by their employees, frequently argued on the principle **cuius commodum eius incommodum**, to the point that it extends even to actions that the employers had explicitly **forbidden**. Such system, though, **has never been extended to parents** regarding the damage caused by their children. In such case, a sufficiently diligent parent is not held liable. Contrary to the German system (and to the French prior to Bertrand) there is in English law **not even a presumption of fault** shifting to the parents the burden of proof.	instance **(2)**, fundament **(2)**, forbidden acts **(1)** not on parents **(3)** *Extra point: no presumption of fault*
Total Question 6:		**8 Points**
<u>Total Part II:</u>		**<u>48 Points</u>**
<u>TOTAL PART I & II</u>		**<u>88 POINTS</u>**