

EXTENDING THE CISG TO NON-PRIVITY PARTIES

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1 INTRODUCTION

The borderland of tort and contract was one of Peter Schlechtriem's main areas of research. It was the topic of his *opus magnum*,¹ his postdoctoral thesis on *Vertragsordnung und ausservertragliche Haftung* of 1972, which has influenced further discussions in Germany to this day. Peter Schlechtriem was already addressing the relationship between contracts and torts in regard to uniform sales law and national tort law remedies shortly after the adoption of the UN Convention on Contracts for the International Sale of Goods (CISG).² This problem is of particular relevance for chains of contracts, as is evidenced by this year's 'Vis Moot' problem.³ The developments of recent years – especially due to globalisation of trade – have made chains of contracts

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¹ Schlechtriem, P., *Vertragsordnung und ausservertragliche Haftung: eine rechtsvergleichende Untersuchung zur Konkurrenz von Ansprüchen aus Vertrag und Delikt im französischen, amerikanischen und deutschen Recht*, 1972, Frankfurt a.M., Berlin: Metzner.

² Schlechtriem, P., "The Borderland of Tort and Contract – Opening a New Frontier?" (1988) 21 *Cornell International Law Journal* 467.

³ The problem of the 16th Willem C. Vis International Commercial Arbitration Moot involved a car retailer's claim against the manufacturer of cars, which the car retailer had bought from an importing company that became insolvent before arbitration proceedings were commenced. The Moot problem is available at: <<http://cisgw3.law.pace.edu/cisg/moot/moot16.pdf>>.

an important focus for consideration.⁴ Thus, it seems more than appropriate to dedicate a few thoughts on this topic to the cherished memory of Peter.

In an international sales context, whether a question is dealt with by contract or tort law at the same time implies a choice between uniform law – the CISG – and domestic tort law. This has considerable consequences upon the question of predictability since the application and interpretation of the CISG becomes increasingly predictable, even by state courts, whereas domestic tort law is not easily accessible to foreign parties and is often unpredictable. Furthermore, in the realm of contract law, freedom of contract prevails, while in many parts of the world tort law is neither open to choice of law nor to any other agreement.

This paper will not discuss questions of product liability, since Art. 5 CISG explicitly excludes the Convention's application to the liability of the seller for death or personal injury caused by the goods; nor will it address questions of consumer protection, because Art. 2(a) CISG excludes consumer contracts from the Convention's scope of application. Rather this paper will focus on primary financial losses sustained by the ultimate commercial buyer and that buyer's possibilities of recourse against a party upstream in the chain of sales contracts, in particular against the manufacturer of the goods, with whom the buyer has no privity of contract.

2 NATIONAL CONCEPTS ALLOWING CONTRACTUAL CLAIMS OF NON-PRIVITY PARTIES

In all legal systems, the sanctity of privity of contract has nowadays been attenuated and possibilities exist to extend contractual claims to persons who are not a party to the original contract.

2.1 ASSIGNMENT OF CLAIMS AND ASSUMPTION OF DEBT

One possibility to extend contractual rights to a third person is the assignment of a contractual claim. The concept of assigning rights to a third party has been known for a long time. Although ancient Roman law as well as medieval Common law initially considered contractual rights as exclusively confined to the original contracting parties, at least by the turn of the eighteenth century Common as well as Civil law countries recognised the possibility of the free assignment of claims.⁵

Whereas by assignment the creditor transfers its rights to a third person, on the proverbial flipside of the coin, the transfer of a debt to a new debtor via the concept of assumption of debt is nowadays similarly acknowledged. In chains of contracts, these two concepts are mostly used in group of companies scenarios. Thus, take the example

⁴ On procedural aspects concerning chains of contracts see Schwenger, I. and Mohs, F., "Arbitration Clauses in Chains of Contracts" (2009) 27 *ASA Bulletin* to be published.

⁵ Kötz, H., *Europäisches Vertragsrecht*, vol. 1, 1996, Mohr Siebeck, Tübingen, at p. 402.

of a daughter company that contracts in its own name with the manufacturer for goods exclusively destined for the use of its mother company. If anything goes wrong with the original contract, the mother company has an interest in asserting contractual rights in its own name; this can easily be achieved through an assignment of the daughter company's rights under the original contract with the manufacturer. Likewise, an assumption of debt by the mother company will in practice often occur where the daughter company is a mere distributor and unable to meet remedial claims asserted by its contract partners.

2.2 MANUFACTURER'S GUARANTEE OR EXPRESS WARRANTY

Another possibility of extending contractual claims to non-privity parties is by way of issuing manufacturers' guarantees or express warranties. It is common practice in today's business world that manufacturers not only advertise their products to have certain qualities, but also issue written guarantees or warranties intended to induce the public to buy their products and thus to reach the ultimate purchaser.⁶ Such guarantees usually warrant the product to be free of any defects in material and workmanship for a certain period of time, while simultaneously limiting the remedies for non-conforming goods to repair and replacement or a refund of the purchase price.

In all legal systems, manufacturers' guarantees and warranties are governed by their respective contractual regimes. However, the dogmatic justification for categorising such guarantees and warranties as contractual arrangements varies. For the purposes of this article, it is sufficient to refer to the approaches of the Germanic and U.S. legal systems. According to Germanic legal doctrine, the manufacturer's warranty creates a true contract between the manufacturer and the remote purchaser.⁷ This is conceptually explained in three different ways. Either the offer emanates from the manufacturer and is delivered by the seller to the ultimate buyer;⁸ or the seller acts as an agent for the manufacturer.⁹

⁶ Kelley, C. A., "Warranty and Consumer Behavior: Product Choice" in Blischkie, W. R. and Murthy, D. N. P. (eds.), *Product Warranty Handbook*, 1996, Marcel Dekker, at p. 409 ff; such guarantees are often issued to consumers, but they may also include commercial purchasers, such as e.g. the *BMW Limited Warranties* of BMW Canada, available at: <http://brianjessel.bmw.ca/content/service/service_warranty.aspx?lang=en&retailerID=10102>: 'BMW Canada Inc. (BMW Canada) warrants to the first retail purchaser and each subsequent purchaser, of Canadian specification vehicles imported by BMW Canada, or sold through the BMW Canada European Delivery Program to be free of defects in material or workmanship.'

⁷ Swiss Federal Supreme Court, 8 February 2008, BGE 134 III 218, considered a manufacturer's guarantee to a sub-purchaser as a unilateral contract *sui generis*.

⁸ Androulakis, Konstantinos, *Die Herstellergarantie*, 1998, München, Verlag V. Florentz (PhD thesis, University of Tübingen, 1998), at p. 31; Jungemeyer, S., *Kaufvertragliche Durchgriffsrechte in grenzüberschreitenden Lieferketten und ihr Verhältnis zum Einheitlichen UN-Kaufrecht*, 2009, Jenaer Wissenschaftliche Verlagsgesellschaft, Jena, at p. 33.

⁹ German Federal Supreme Court, 12 November 1980, 78 BGHZ 369, 372; German Federal Supreme Court, 23 March 1988, 104 BGHZ 82, 85, (1988) NJW 1726.

Finally, the contract between the manufacturer and its initial buyer may be construed as a third party beneficiary contract with the remote purchaser as a beneficiary.¹⁰

For nearly half a century, US-American courts have almost unanimously held that the manufacturer can be held liable by the remote purchaser based on the theory of breach of an express warranty notwithstanding the lack of privity of contract.¹¹ Today, in most states, this result is achieved by relying on the express warranty provision of the Uniform Commercial Code (UCC) (s. 2-313 UCC).¹² The UCC's wording, however, appears to be restricted to the immediate relationship between the seller and the direct buyer.¹³ Thus it does not come as a great surprise that the revision of the UCC creates a new provision for such 'pass-through' warranties in the normal chain of distribution (s. 2-313A UCC Draft 2003).

Both Germanic and U.S.-American case law shows that from the beginnings of this development not only consumers but often also commercial buyers were able to claim damages for their commercial losses based on the concepts of manufacturers' guarantees or express warranties.¹⁴

2.3 EXTENDING IMPLIED WARRANTIES TO THE REMOTE PURCHASER

In addition to allowing express warranties to non-privity parties, many legal systems contemplate the extension of implied warranties to a remote purchaser in a chain of contracts. As with manufacturers' guarantees and express warranties, the scope of application of these theories is not confined to consumers even though the emphasis is, in general, on consumer protection.

¹⁰ German Federal Supreme Court, 28 June 1979, 75 BGHZ 75, 77ff.; see H. P. Westermann, *Münchener Kommentar zum BGB*, 2008, Beck, Munich, § 443 BGB at para. 7.

¹¹ See the seminal (pre-UCC) case of *Randy Knitwear v. American Cyanamid Company* (1962) 11 N.Y.2d 5, 181 N.E.2d 399, 226 N.Y.S.2d 363; and even earlier already: *Rogers v. Toni Home Permanent Co.* (1958) 167 Ohio St. 244, 147 N.E.2d 612.

¹² *Seely v. White Motor Co.* (1965) 63 Cal.2d 9, 403 P.2d 145, 45 Cal.Rptr. 17, 2 UCC Rep.Serv. 915; *Hauter v Zogarts* (1975) 14 Cal.3d 104, 534 P.2d 377, 120 Cal.Rptr. 681, 74 A.L.R.3d 1282, 16 UCC Rep.Serv. 938; *Dravo Equipment Co. v. German* (1985) 73 Or.App. 165, 698 P.2d 63, 40 UCC Rep.Serv. 1240; *Alberti v. Manufactured Homes, Inc.* (1991) 329 N.C. 727, 407 S.E.2d 819, 15 UCC Rep.Serv.2d 1184; *DaimlerChrysler Corp. v. Inman* (2003) 121 S.W.3d 862, Prod.Liab.Rep. (CCH) P 16,831; *Harris Moran Seed Co. Inc. v. Phillips* (2006) 949 So.2d 916, 60 UCC Rep.Serv.2d 25. Even though s. 2-313 UCC addresses the issue of third party beneficiaries of warranties, it is silent on the issue of vertical privity; see Official Comment to s. 2-313 UCC, comment 3; *Kassab v. Central Soya* (1968) 432 Pa. 217, 246 A.2d 848.

¹³ See *Flory v. Silvercrest Industries, Inc.* (1981) 129 Ariz. 574, 633 P.2d 383, 31 UCC Rep.Serv. 1256, which held that UCC warranties cannot be relied upon to recover purely economic losses for lack of vertical privity.

¹⁴ In Germany, see Federal Supreme Court, 24 June 1981, (1981) NJW 2248 (residential construction company); in the U.S., see, e.g., *Randy Knitwear v. American Cyanamid Company*, *supra* fn 11; *Klein v. Asgrow Seed Co.* (1966) 246 Cal App 2d 87, 54 Cal Rptr 609 (joint venturers engaged in tomato growing); *B.B.P. Asso. v. Cessna Aircraft Co.* (1966, Idaho) 420 P2d 134.

2.3.1 ACTION DIRECTE IN FRENCH LEGAL SYSTEMS

As long ago as 1820, French courts recognised the possibility of a contractual claim for damages for breach of warranty (*garantie de vices cachés*) by the remote purchaser not only against its immediate seller but also directly (i.e., *action directe*) against the manufacturer of the goods, the original seller, and every intermediary in the chain of contracts.¹⁵ Warranty claims under a sales contract are treated as being automatically transferred to any downstream buyer as an accessory to the goods sold.¹⁶ Similar concepts to the French *action directe* exist in other European countries, such as in Belgium and Luxemburg.¹⁷

2.3.2 IMPLIED WARRANTIES UNDER THE UNIFORM COMMERCIAL CODE

Although still highly debated, courts in some U.S. states have justified product liability with the theory of breach of an implied warranty.¹⁸ Such liability not only covers personal injury and property damage but may also include economic losses of the ultimate buyer.¹⁹ Concurrently, a growing number of US courts allow non-privity plaintiffs to recover direct and even consequential economic losses.²⁰

¹⁵ Cass. civ., 25 January 1820, *Recueil Général des Lois et des Arrêts*, 1re partie, at pp. 171 ff; see further Civ. 3, 7 March 1990, Bull. Civ. III, No. 72: 'Le sous-acquéreur est recevable à exercer l'action en garantie des vices cachés contre le vendeur originaire de la chose atteinte de vices'.

¹⁶ Cass. civ., 12 November 1884, (1886) *Sirey* I 149; Ghestin/Jamin/Billiau, *Traité de droit civil – Les effets du contrat*, 2001, Paris, No.1116, at p. 1198; Bauerreis, J., *Das französische Rechtsinstitut der action directe und seine Bedeutung in internationalen Vertragsketten*, 2001, Duncker & Humblot, Berlin, at pp. 61 ff.

¹⁷ Carette, N., "Direct Contractual Claims of the Sub-buyer and International Sale of Goods: Applicable Law and Applicability of the CISG" (2008) 4 *European Review of Private Law* 583, at p. 586 ff; Köhler, M., *Die Haftung nach UN Kaufrecht im Spannungsverhältnis zwischen Vertrag und Delikt*, 2003, Mohr Siebeck, Tübingen, at p. 167 fn 151.

¹⁸ See the leading case of *Henningsen v. Bloomfield Motors, Inc.* (1960) 32 N.J. 358, 161 A.2d 69, 75 A.L.R.; *Kassab v. Central Soya* (1968), *supra* fn 12; *Nobility Homes of Texas, Inc. v. Shivers* (1977) 557 S.W.2d 77, 22 UCC Rep.Serv. 621; and more recently see, e.g., *Derienzo v. Trek Bicycle Corp.* (2005) 376 F.Supp.2d 537.

¹⁹ *Continental Copper and Steel Industries, Inc., v. E. C. 'Red' Cornelius, Inc.* (1958) 104 So.2d 40; *Santor v A. & M. Karagheusian, Inc.* (1965) 44 N.J. 52, 207 A.2d 305, 16 A.L.R.3d 670; *Power Ski of Florida, Inc. v. Allied Chemical* (1966) 188 So.2d 13, 1970 A.M.C. 505; *Manheim v. Ford Motor Co.* (1967) 201 So.2d 440; *Morrow v. New Moon Homes, Inc.* (1976) 548 P.2d 279, 19 UCC Rep.Serv. 1; *Nobility Homes of Texas, Inc. v. Shivers* (1977), *supra* fn 18; *Spring Motors Distributors v Ford Motor Co.* (1985) 98 N.J. 555, 489 A.2d 660; Cf. White, J. J. and Summers, R. S., *Uniform Commercial Code*, 2000, West Group, St. Paul, at § 11-2, § 11-5.

²⁰ *Nobility Homes of Texas, Inc. v. Shivers* (1977), *supra* fn 18 (privity not required for UCC implied warranty action for economic loss); *Spagnol Enterprises, Inc. v. Digital Equipment Corp.* (1989) 390 Pa.Super. 372, 568 A.2d 948 (damages for breach of warranty where injury has been incurred as a result of defectively manufactured product which in turn results in needless expenditure of money in attempting to make defective product operational and functional so as to be productive in a 'business-sense'); *Israel Phoenix Assur. Co. v. SMS Sutton, Inc.* (1992) 787 F.Supp. 102, 18 UCC Rep.Serv.2d 120 (privity of contract was not required to recover damages for breach of an implied warranty of merchantability or warranty of fitness for a particular purpose under Pennsylvania law, even though the

2.3.3 CONTRACTS WITH PROTECTIVE EFFECTS

Contractual solutions were also considered for product liability cases in Germanic legal systems during the 1960s and 1970s. Although most countries ultimately favoured tort solutions,²¹ Austria decided to adopt a solution based on a contract with protective effects for third parties.²² According to this Austrian solution, the first sales contract between the manufacturer and the initial buyer confers contractual rights upon the ultimate purchaser. Recovery of purely economic loss seems not to be permitted under this cause of action,²³ but a commercial buyer may rely on this doctrine to recover losses from property damage.

3 WHICH LAW DETERMINES THE ADMISSIBILITY OF CONTRACTUAL CLAIMS OF NON-PRIVITY PARTIES?

The law governing the admissibility of the claim can be and often is different from the law governing the substance of the claim. Thus, when applying the abovementioned concepts in an international sales context, two questions must be distinguished. The first question is whether a contractual claim can be advanced at all where there is no privity of contract between the parties. As explained in detail below, some argue that the mere fact that the first contract between the manufacturer and its buyer is governed by the CISG would preclude any direct contractual claims by a sub-purchaser. In order to determine whether contractual claims may be asserted directly by non-privity parties, it is first necessary to consider whether the CISG deals with the question of the admissibility of contractual claims without privity of contract, and if not, which domestic regime applies. Only where according to the latter the ultimate buyer can raise a direct contractual claim against the manufacturer, a second question arises – what is the law governing the substance, i.e. the scope and extent of the claim?

loss was a purely economic loss); White, J. J. and Summers, R. S., *Uniform Commercial Code*, § 11-5, at p. 406.

²¹ German Federal Supreme Court, 26 November 1968, BGHZ 51, 91, 97ff. (so-called ‘fowl pest’ decision); Swiss Federal Supreme Court, 9 November 1984, BGE 110 II 456. The doctrine of ‘reliance liability’ (*Vertrauenshaftung*), which was invented as a hybrid form of the law of obligations between contracts and torts by the Swiss Federal Supreme Court in its decisions of 15 November 1994, BGE 120 II 331, and 10 October 1995, BGE 121 III 350, has not yet been applied to chains of contracts; see the decision of the Federal Supreme Court, 12 June 2007, BGE 133 III 449, where a direct claim for payment of a subcontract against the principal in a chain of construction contracts was denied.

²² Austrian Supreme Court, 4 February 1976, (1977) *Juristische Blätter* 146; Welser, R. and Rabl, C., *Produkthaftungsgesetz, Kommentar*, Introduction (Vorbemerkungen), 2004, Lexis Nexis ARD Orac, Vienna, at para. 7.

²³ Austrian Supreme Court, 28 November 1978, SZ 51/169; Austrian Supreme Court, 29 October 1987, 7 Ob 623/87, (1988) *IPRax* 363, 365; Welser, R. and Rabl, C., *supra* fn 22, at para. 7.

3.1 INFLUENCE OF THE CISG UPON ADMISSIBILITY OF CONTRACTUAL CLAIMS OF NON-PRIVITY PARTIES?

The CISG itself is silent on the admissibility of direct contractual claims by non-privity parties. However, it has been discussed, particularly in France, whether the fact that the first contract between the manufacturer and the first buyer is governed by the CISG precludes any contractual claim by the ultimate purchaser against the manufacturer in an international setting. The starting point was a case decided by the French Supreme Court in 1999²⁴ where a French buyer purchased a thermostatic truck trailer from a French seller. The truck was equipped with a freezer that was manufactured by a U.S. company and sold to the French seller via a French distributor. When the freezer broke down during the transport of nuts and fish causing damage to the ultimate French buyer, it sued the U.S. manufacturer based on the manufacturer's express warranty. The French Supreme Court denied the ultimate buyer's direct action under the CISG. The Court held that the rules of the CISG were designed exclusively to deal with the relationship between the seller and the buyer. Thus, the CISG could only apply between the ultimate buyer and the manufacturer if they had concluded a sales contract directly between themselves. Because no sales contract had been concluded between the ultimate buyer and the manufacturer, the buyer could not rely on the manufacturer's express warranty. The ambit of this decision is controversial among French legal scholars. Some authors confine this decision to cases where the ultimate buyer relies on a contractual guarantee by the manufacturer, because the CISG only applies to sales contracts and not to independent guarantees.²⁵ Others argue that whenever the initial sales contract is governed by the CISG no *action directe* is admissible.²⁶

Certainly, no positive answer concerning the general question of admissibility of a contractual claim without privity can be derived from the CISG. This is because according to Art. 4 of the CISG the Convention is indeed only concerned with the contractual relationship between a seller and a buyer. On the other hand, however, a negative answer excluding any possibility of contractual third party claims cannot be deduced from this provision either. Rather, this question is entirely outside the scope of the Convention. This is most obvious in the case of an assignment of contractual claims by the first buyer to any third party. In this situation, it is undisputed that the assignment as such is to be judged according to the respective governing law and is

²⁴ Cass. civ. 1, 5 January 1999, CISG-online 431, available at: <<http://www.globalsaleslaw.org>>, with a note by Witz, C., (1999) *D.* 383 ff; with note by Heuzé, V., (1999) *Rev. crit. DIP* 519.

²⁵ Heuzé, V., *supra* fn 24, at pp. 523 ff; Bauerreis, J., "Le rôle de l'action directe contractuelle dans les chaînes internationales de contrats" (2000) *Rev. crit. DIP* 331, at pp. 352 ff.; de la Touanne, B., (1999) *D. Affaires* 334.

²⁶ Witz, Cl., (1999) *D.* 383, *supra* fn 24; Raynard, J., (1999) *RTD civ.* 503.

not precluded by the simple fact that it is a CISG claim that is being assigned.²⁷ This reasoning, however, also applies to all other cases of direct contract claims.

The argument that the Convention in some parts refers to third parties without giving them any rights²⁸ appears to be purely formalistic and cannot be relied upon to exclude any third party claims. Neither can the fact that the Convention did not intend to deal with products liability issues²⁹ be asserted here. At the time the Convention was drafted, it was clear that product liability was particularly understood as addressing personal injury to consumers, as is evidenced by Art. 5 CISG.³⁰ Any economic loss and also property damage, however, is at the core of the Convention.

Some authors further oppose the possibility of direct contractual claims by remote purchasers against the manufacturer when they burden the manufacturer by adding a creditor even if the manufacturer's scope of liability remains unchanged.³¹ The manufacturer's expectation of dealing exclusively with its immediate contracting partner, however, does not deserve protection as is also evidenced by the mere possibility of (partial) assignment. The determining factor is that the manufacturer's financial outcome remains the same; be it by way of recourse within the respective contract relationships ultimately attributing the loss to the manufacturer or by way of a direct claim. Indeed, the direct claim may be overall more beneficial to the manufacturer because in this way less transaction costs accrue.

In summary, although the CISG is silent on the issue, it does not prohibit any direct contractual action by the ultimate purchaser against the manufacturer.³²

3.2 CONFLICT OF LAWS RULES

With the CISG being silent, the question which law applies to contractual claims between non-privity parties remains to be answered. Is it the law of the country where the potential debtor, the manufacturer, has its seat? Is it the law applicable to the first

²⁷ Polish Supreme Court, 19 December 2003, CISG-online 1222 (wrongly resorting to the gap-filling mechanism of Art. 7(2) CISG); Austrian Supreme Court, 7 September 2000, CISG-online 642; German Federal Supreme Court, 12 February 1998, CISG-online 343; CA Grenoble, 13 September 1995, CISG-online 157; Appellate Court Thurgau, 19 December 1995, CISG-online 496; Ferrari, F. in Schlechtriem, P. and Schwenger, I. (eds), *Kommentar zum Einheitlichen UN-Kaufrecht*, 2008, C. H. Beck, Helbing Lichtenhahn, Art. 4, at para. 38; Piltz, B., *Internationales Kaufrecht*, 2008, C. H. Beck, Nördlingen, at para. 2-163; Schlechtriem, P. in Schlechtriem, P. and Schwenger, I. (eds), *Commentary on the UN Convention on the International Sale of Goods*, 2005, OUP, Art. 4, at para. 23.

²⁸ Jungemeyer, S., *supra* fn 8, at pp. 67 ff.

²⁹ *Ibid.* at pp. 64 ff.

³⁰ Official Records, United Nations Conference on Contracts for the International Sale of Goods, Vienna, 10 March–11 April 1980 (A/CONF.97/19), at pp. 245ff., Nos. 12, 14, 16, 20, 21; Schlechtriem, P. in Schlechtriem, P. and Schwenger, I. (eds), *supra* fn 27, Art. 5, at para. 7 with further references.

³¹ Schroeter, U. G., *UN-Kaufrecht und Europäisches Gemeinschaftsrecht*, 2005, Sellier, Munich, at paras. 282-3.

³² For cases of *action directes*, the same conclusion is reached by Carette, N., "Direct Contractual Claims" (2008) 4 *European Review of Private Law* 583, 596, 597 and by Köhler, M., *supra* fn 17, at p.176.

sales contract between the manufacturer and its initial buyer? Is it the law governing the final sales contract between the final seller and the ultimate purchaser? Or is it the law of the seat of the ultimate purchaser or simply the *lex fori*? Matters become even more complicated in cases where the ultimate purchaser in a chain of contracts tries to sue one of the intermediate members of the chain, for example, an exporting company.

In cases of a simple *action directe* (i.e., where no manufacturer's guarantee is at stake), French courts often do not discuss any conflict of laws rules, thus implicitly determining the admissibility of a direct claim against the manufacturer based on the *lex fori*.³³ Therefore, French courts always admit an *action directe* without taking into account the country of the manufacturer's seat or the law governing the contracts involved. This approach, however, is not convincing. The forum may not have any significant relationship to the parties involved. The *lex fori* is not necessarily the *lex causae* of the contract between the ultimate purchaser and its seller, and is probably hardly ever the *lex causae* of the contract between the manufacturer and its first buyer. Such reliance on the *lex fori* might invite undesirable forum shopping.

Thus, the applicable law should be determined by the relevant conflict of laws rules.³⁴ This means for cases of assignment of claims and assumption of debt that the transfer of rights and duties is governed by the law which the relevant conflict of law rules determine to be applicable. In all other cases, the particular conflicts rules to be used will depend on whether the direct claim by the ultimate purchaser is classified as being contractual or tortious in nature. Contrary to the French Supreme Court's approach,³⁵ this assessment should follow the method of functional classification.

As regards manufacturers' guarantees and express warranties, the relationship between the manufacturer and the ultimate buyer has to be qualified as contractual.³⁶ Such guarantees ultimately rest on the free will of the manufacturer and are not imposed by law. Nevertheless, different considerations apply to the French *action directe*, the extension of implied warranties to the remote purchaser,³⁷ as well as

³³ Cass. civ. 1, 10 October 1995, (1996) *Rev. crit. DIP* 332ff. with note by Heuzé, V.; Cass. civ. 1, 18 December 1990, (1992) *JCP II*, 21824; CA Paris, 14 June 1989, (1990) *Rev. crit. DIP* 785; Bauerreis, J., *supra* fn 16, at pp. 292-293; Beaumart, M., *Haftung in Absatzketten im französischen Recht und im europäischen Zuständigkeitsrecht*, 1999, Duncker & Humblot, Berlin, at p. 158; Jungemeyer S., *supra* fn 8, at pp. 171 ff.

³⁴ In arbitration proceedings, arbitral tribunals are more flexible in determining the applicable law, see Redfern, A. and Hunter, M., *Law and Practice of International Commercial Arbitration*, 2004, Sweet & Maxwell, London, at paras. 2-31 ff.

³⁵ The French Supreme Court always follows the approach of classifying *lege fori*, i.e. based on French legal concepts, see e.g. Cass. civ. 1, 10 October 1995, *supra* fn 33; Bauerreis, J., *supra* fn 16, at pp. 292-293; Beaumart, M., *supra* fn 33, at p. 158; Jungemeyer, S., *supra* fn 8, at pp. 171 ff.

³⁶ So also US case law, e.g., *Hauter v. Zogarts* (1975) 14 Cal.3d 104; 534 P.2d 377; 120 Cal.Rptr. 681; 74 A.L.R.3d 1282; 16 UCC Rep.Serv. 938: 'express warranties [...] are basically contractual in nature'.

³⁷ Unclear with regard to the classification of implied warranty claims: *Caterpillar, Inc. v. Usinor Industrieel* (2005) 393 F.Supp.2d 659, 56 UCC Rep.Serv.2d 931, where claims based on breach of contract, breach of express and implied warranties and other claims were summarily classified as contractual.

contracts with protective effects for third parties. In relation to the French *action directe*, this question has been decided by the European Court of Justice (ECJ) under Art. 5(1) of the European Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters.³⁸ The ECJ concluded that the French *action directe* cannot be classified as a contractual claim. This is because a contract in the sense of Art. 5(1) of the European Convention is to be understood as covering situations only where one party freely assumes an obligation towards another party. In case of a French *action directe*, however, the manufacturer's obligation is not freely assumed but rather imposed by law.

The reasoning of the ECJ as expressed in relation to international jurisdiction applies by analogy to the issue of the applicable law.³⁹ Even prior to the ECJ's decision, the Austrian Supreme Court had ruled that despite the seemingly contractual nature of product liability based upon the concept of a contract with protective effects, the applicable law in an international context had to be determined by the conflict rules regarding tort law.⁴⁰ As we are here primarily dealing with claims by commercial purchasers for economic loss, the pertinent set of conflict of laws rules would be those applying to torts in general and not the respective provisions on product liability designed for consumer claims for personal injury and property damage.⁴¹

The law applicable to torts determines the admissibility of direct contractual recourse against the manufacturer. If the applicable conflict of law rule determined that French substantive law applied, an *action directe* would be possible; if Austrian substantive law applied the contract between the manufacturer and the initial seller might have protective effects for the ultimate buyer. Similarly, if the law of a U.S. state applied, a direct claim could be based on an implied warranty.

4 LAW APPLICABLE TO SCOPE AND CONTENT OF A MANUFACTURER'S LIABILITY

Having determined that a direct claim by the ultimate purchaser in a chain of contracts is admissible against the manufacturer, we still have to ascertain which law governs the scope and content of the manufacturer's liability vis-à-vis the non-privity party.

³⁸ *Jakob Handte & Co. GmbH v. Traitements mécano-chimiques des surfaces SA*, ECJ, 17 June 1992, C-26/91, (1992) *Rev. crit. DIP* 726 ff., with note by Hélène Gaudemet-Tallon; note by Larroumet, C. (1992) *JCP II* 21297; note by J.-M. Bischoff, (1993) *JDI* 469 ff.

³⁹ See Jungemeyer, S., *supra* fn 8, at p. 190 ff.; but see Carette, N., "Direct Contractual Claims" (2008) 4 *European Review of Private Law* 583, at p. 598; unclear in Beaumart, M., *supra* fn 33, at p. 163 (advocating classification as both contractual and tortious at the same time).

⁴⁰ Austrian Supreme Court, 29 October 1987, 7 Ob 623/87, (1988) *IPRax* 363, at pp. 364 ff.

⁴¹ In the European Union, the conflict of laws rules for product liability are set out in Art. 5 of the Regulation (EC) No. 864/2007 on the law applicable to non-contractual obligations (*Rome II Regulation*) which came into effect on 11 January 2009, whereas the conflict of law rules for general tort claims are stipulated in Art. 4 of the *Rome II Regulation*. It should be noted that the scope of 'product liability' in the *Rome II-Regulation* is wider than that of the *Products Liability Directive* (85/374/EEC) and the respective implementing legislation.

This question is relatively easy to answer with respect to an assignment of claims or an assumption of debts. In those cases, the law applicable to the assigned claim or the assumed debt remains unchanged.⁴² This means, in the case of an assignment, if the contract between the manufacturer and its initial buyer is governed by the CISG, or in the case of an assumption of debt, if the CISG is applicable to the contract from which the debt arises, the claim of the ultimate purchaser against the manufacturer is also governed by the CISG.

Ascertaining the applicable law becomes more challenging when turning to a manufacturer's liability based on concepts of *action directe*, implied warranty or contracts with protective effects, where the admissibility of a direct claim has been determined based on a tortious qualification. All concepts agree that the ultimate purchaser's direct claim is ultimately derived from the first contract between the manufacturer and its first buyer. Thus, the French Supreme Court has justified the *action directe* by relying on the so-called theory of accessories.⁴³ According to this doctrine, warranty claims against the seller are automatically transferred to any downstream buyer as an accessory to the goods sold. Similarly, U.S. courts have among other theories developed a concept of warranties running with the goods.⁴⁴ In case of a third party beneficiary contract or a contract with protective effects it is clear that any rights sound in the contract between the manufacturer and its buyer as well.⁴⁵

Whatever law is applicable to the first contract also governs the direct claims of the ultimate purchaser. Hence, whether the first contract is a domestic or an international one is decisive. The CISG applies to direct claims of the ultimate purchaser only if the first contract is a cross-border contract governed by the CISG. This result effectively safeguards the legitimate expectations of the manufacturer by ensuring that possible competing actions by its initial buyer and any remote purchaser are governed by the same law, thus preventing that any claims by the ultimate purchaser under a different law may exceed those afforded to the initial buyer under the first contract.

Identifying the applicable law can be even trickier in cases of manufacturers' guarantees and express warranties. As in these cases the relationship between the manufacturer and the ultimate purchaser is basically contractual in nature,⁴⁶ the law defining the scope and the extent of a claim coincides with the law determining its admissibility. Under modern conflict of laws theories, the contractual classification

⁴² See, e.g., Art. 12(2) of the 1980 Rome Convention on the law applicable to contractual obligations (80/934/EEC) and Art. 14(2) of the Regulation (EC) No. 593/2008 on the law applicable to contractual obligations (*Rome I Regulation*), which will apply as of 17 December 2009.

⁴³ Cass. civ., 12 November 1884, S. 1886 I 149; Ghestin, J., Jamin, M., and Billiau, Ch., *Traité de droit civil – Les effets du contrat*, 2001, Paris, No.1116, p. 1198.

⁴⁴ *Santor v. A. & M. Karagheusian, Inc.* (1965), *supra* fn 19 (warranty running with the article like a covenant running with the land).

⁴⁵ German Federal Supreme Court, 28 June 1979, 75 BGHZ, 75, 77ff.; Austrian Supreme Court, 4 February 1976, (1977) *Juristische Blätter* 146.

⁴⁶ See *supra*, at para. 3.2.

will usually lead to the law of the seat of the manufacturer as the jurisdiction with the most significant relationship to the transaction and the parties,⁴⁷ given the manufacturer is the party owing the characteristic performance.⁴⁸ The question that then arises is which law at the seat of the manufacturer applies? Is the duty owed by the manufacturer to the ultimate purchaser one arising from sales law? And if so, is it the sales law for domestic sales or in case of a CISG member State the one designed for international sales, the CISG?

In our view, the first question can undoubtedly be answered in the affirmative. The duties arising from a guarantee or express warranty, although not encompassing the primary duties of delivery and transfer of property under a sales contract, mirror those of a seller upon non-conformity of the goods. Thus, it seems appropriate to apply the very same set of rules as in an ordinary sales contract. In regard to the second question – the applicability of domestic sales law or CISG – it could be debatable whether it should be decisive if the first contract is purely domestic (manufacturer – exporter) or if it is international (manufacturer – importer). In our opinion, however, the fact that the parties to the guarantee itself have their places of business in different states must be controlling. It is irrelevant where exactly in the chain of contracts the cross-border contract can be found in the chain. This does not lead to an unjust result even if the manufacturer has contracted with its first buyer on the basis of domestic sales law. A manufacturer holding out its goods for export must be deemed to expect that remote purchasers rely on the guarantee wherever the goods are sold. If the manufacturer wishes to avoid such consequences, it is free to limit the guarantee in different ways. First, the manufacturer may limit the guarantee to buyers in certain countries only, in particular the country of the seat of the manufacturer itself.⁴⁹ Second, the manufacturer is able to include a choice of law clause into its guarantee with the further possibility of explicitly excluding the CISG according to Art. 6 CISG.⁵⁰ Finally, it is up to the

⁴⁷ See § 188 of the *Restatement of the Law, Second, Conflict of Laws (1971)*.

⁴⁸ See Art. 4(2) of the *Rome I-Regulation (593/2008/EC)*, which will apply as of 17 December 2009; see likewise Art. 4(2) of the *1980 Rome Convention on the law applicable to contractual obligations*; with respect to sales contracts see Art. 3(1) of the *1955 Hague Convention on the law applicable to international sales of goods*.

⁴⁹ See, e.g., U.S. *Limited Warranty Summary* for Fujitsu Scanner Products, available at: <<http://www.fujitsu.com/downloads/COMP/fcpa/scanners/warranty-summary.pdf>>: ‘All statements herein are valid only in the U.S. for U.S. residents [...]’; German *VELUX Herstellergarantie*, available at: <http://www.velux.de/Garantie/Herstellergarantie_RWA.htm>, at no. II: ‘The guarantee pertains to products situated in Germany [...]’; German *Audi Garantie*, available at: <<http://www.audi.de/etc/medialib/ngw/service/pdf.Par.0025.File.pdf/pdf.Par.0001.File.pdf>>, at para. 6: ‘If the car is delivered or registered in a region other than the EEA and Switzerland, the guarantee cannot be called upon’ (translation by the authors); U.S. *Nokia One-Year Limited Warranty*, available at: <<http://www.nokiausa.com/A4410055>>, at no. 3: ‘The limited warranty extends only to Consumers who purchase the Product in the United States of America’.

⁵⁰ The German *Guarantee for Fujitsu Siemens Computer Products*, available at: <http://www.actebis.com/pub/pdf/at/de/FSC_Garantie.pdf>, at p. 7, includes the following choice of law clause: ‘The guarantee is governed by and construed under the applicable laws of the country where the first purchase of the product by the ultimate purchaser takes place. The Convention on Contracts for the International Sale of Goods is not applicable’ (translation by the authors); see also *Apple One (1) Year*

manufacturer to circumscribe the possible remedies of the ultimate purchaser in detail so that any recourse to a default system becomes unnecessary.

5 PRACTICAL QUESTIONS WHEN APPLYING THE CISG TO DIRECT CONTRACTUAL CLAIMS OF THE ULTIMATE PURCHASER

As it has been determined that the CISG is applicable to direct claims of the ultimate purchaser against the manufacturer, there are further issues which consequently must be decided. These particularly include questions of inspection and notice according to Arts. 38 and 39 CISG as well as the foreseeability of loss within the damages provision of Art. 74 CISG. Again, a distinction should be made between the group of concepts of assignments, *action directe*, implied warranty, and contract with protective effects on the one hand and a guarantee or express warranty on the other hand. In the first group of cases the initial contract not only determines the applicable law but it also defines the scope of the manufacturer's liability. That means if the first buyer has lost its rights by failing to give timely notice of non-conformity, the ultimate buyer, as well, is left without any remedies. Similarly, the type and amount of losses, which the party in breach (e.g., the manufacturer) foresaw or ought to have foreseen at the time of conclusion of the contract in relation to the first buyer, limit the claim of the ultimate buyer, because the claim of the ultimate purchaser can never exceed the potential claims of the first purchaser.⁵¹

These considerations do not apply in cases of a guarantee or an express warranty to the ultimate purchaser. In these cases, the ultimate buyer's claim is independent from that of the first buyer. Usually, the guarantee itself will meticulously define the scope and possible remedies arising thereunder as well as the conditions that must be fulfilled for the ultimate purchaser to be able to rely on the guarantee. Any gaps in the guarantee must be filled by resorting to the provisions of the CISG as they would apply if the manufacturer and the remote purchaser were parties to a CISG sales contract. If, in a gap-filling context, the time of the conclusion of the contract is relevant – as is particularly the case in provisions referring to foreseeability – the decisive point in time should be the moment when the goods are leaving the manufacturer's sphere of influence. This is the last point in time for the manufacturer to react to foreseeable circumstances, to estimate its risks and to accordingly shape the express warranty and possibly adjust the price of the goods.

6 SUMMARY

Limited Warranty, available at: <<http://images.apple.com/legal/warranty/docs/ipodisight.pdf>>: 'This limited warranty is governed by and construed under the laws of the country in which the product purchase took place'; German *VELUX Herstellergarantie*, available at: <http://www.velux.de/Garantie/Herstellergarantie_RWA.htm>, at no. XII: 'German law applies to this guarantee' (translation by the authors).

⁵¹ For cases of *action directe*, Köhler, M., *supra* fn 17, at pp. 175-176, reaches the same conclusion.

This paper has answered three questions: how to determine the admissibility of contractual claims of non-privity parties in a chain of contracts in an international sales context; how to determine the scope and extent of these claims; and which practical implications arise when the CISG applies to the substance of such claims.

With regard to the admissibility of direct claims by a sub-purchaser against a manufacturer with whom it does not have privity of contract, it was first shown that the applicability of the CISG to any of the contracts involved does not have any influence on the question of admissibility. To determine the domestic law which decides whether or not such claims are admissible, three categories of claims have to be distinguished: the admissibility of claims arising out of an assignment or an assumption of debts, as a first category, is determined based on the forum's conflict of laws rules applicable to these concepts. Manufacturers' guarantees or express warranties, as a second category, have to be classified as contractual in nature with the consequence that in the absence of a choice of law clause usually the law of the seat of the manufacturer will be applicable. The third category is formed by claims based on an *action directe*, implied warranty or a contract with protective effects. These claims are tortious in nature and their admissibility is hence determined based on the conflict of laws rules for torts.

For claims based on assignment, assumption of debt, *action directe*, implied warranties or contracts with protective effects, the scope and content of the sub-buyer's claim are exclusively derived from and determined by a claim the manufacturer's first buyer in a chain of contracts might have asserted. If the CISG applies to the first contract in the chain, then it also applies to the claim of the remote purchaser who is further down the line in the chain of contracts. For claims arising out of manufacturers' guarantees or express warranties, the law governing their admissibility also governs their content; even though the relationship between the manufacturer and the ultimate buyer is not a sales contract, the claims are essentially sales claims and therefore also determined by sales law. Hence, the CISG will apply if with respect to the sub-purchaser and the manufacturer the prerequisites for the CISG's territorial sphere of application (Art. 1 CISG) are fulfilled. The manufacturer may of course avoid the application of the CISG by including a choice of law clause in the guarantee or by limiting the guarantee's territorial scope.

Where the CISG applies to contractual claims of non-privity parties, the following points are to be borne in mind. For claims based on assignment, assumption of debt, *action directe*, implied warranties or contracts with protective effects on the one hand, the sub-purchaser's rights against the manufacturer cannot exceed those which a direct buyer would have. For claims based on express warranties or guarantees, on the other hand, the remote purchaser's claim is independent of any earlier contracts in the chain and must be determined solely based on the relationship between the manufacturer and the sub-purchaser.