

Creditor's Fault: In Search of a Comparative Frame

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I. Introduction

In this article, I compare the role of the creditor's (promisee's) conduct in contractual relationships in US and European legal systems. Different approaches to comparative negligence¹ and mitigation are first considered, and then a more general analysis of doctrines dealing with the creditor's position in the contractual relationship and the role of cooperation is carried out.

In this area, legal systems display significant divergences – partly rooted in their historical antecedents, and partly related to different concepts of contracts and contractual relationships. Continental European systems (with significant differences between Germany and France) recognise a strong role for comparative negligence and the duty to cooperate, while common law jurisdictions (with important differences between England and the US) limit the scope of comparative negligence and the duty to cooperate whilst attributing a wider role to the duty to mitigate.²

The divergence between the Continental European and common law regimes can largely be explained by their different forms of regulatory capitalism, as market structures and contractual interdependencies especially in the context of business transactions may influence the emergence and operation of a system's comparative negligence rule.³ In particular the different role of the judiciary in relation to private autonomy and to contractual freedom can

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¹ The term 'comparative negligence' in the American legal system can be translated into non-absolute contributory negligence. Within the text it will be used as the partial legal defense that reduces the amount of damages that a plaintiff can recover in a negligence-based claim based upon the degree to which the plaintiff's own negligence contributed to cause the injury. **See: SMITH and ATIYAH**, *Atiyah's Introduction to the law of contract*, 6th ed., OUP, 2006, 398, and more below text and footnotes.

² For a comparative analysis, **see: PORAT**, "Contributory Negligence in Contract Law: Toward a Principled Approach", 28 *U. Brit. Colum. L. Rev.*, 1994, p. 141. In general comparative in fault in contract law has been denied in the US: **see: e.g. HAYSVILLE** U.S.D. No. 261 v. GAF Corp., 666 P.2d 192, 199 (Kan. 1983). I should clarify that, in relation to the US, I will examine only the Restatement 2d of contract, leaving out the UCC.

³ On the role of regulatory capitalism and its different models **J. BRAITHWAITE**, *Regulatory Capitalism: How it Works, Ideas for Making it Work Better*, Edward Elgar, 2008.

at least partly be explained by the different relationships between States and markets.⁴ The resulting comparative negligence and mitigation rules not only influence parties' *ex ante* risk allocation, but also have an impact on adjustments made in light of unanticipated events – including the choice between remaining in the contractual relationship versus deploying market alternatives. Where markets are thin and likely to fail, the relevance of the creditor's conduct will be heightened. As is common in many contractual relationships, new circumstances may require contract or market adaptations. Market prices of the traded commodity may increase or decrease to unexpected levels, new technologies may make the goods unsuitable for the buyer, or the seller may face an unexpected rise of production costs. But where markets are thin or where substitute performance is difficult to obtain due to high specific investments and/or interdependencies, the need for cooperation within the transaction will be amplified.

The duty to cooperate gains further importance in the case of collaborative contracts,⁵ wherein the exchange of performances is aimed at achieving a common objective unlike conventional sales contracts.⁶ In the context of 'business to business' transactions, where parties agree to co-design a product or jointly develop a research project, the role of the creditor in ensuring conforming performance by the debtor gains significance. The creditor's failure to cooperate may affect both the likelihood of breach and the consequences flowing therefrom. In some contractual relationships, such as joint ventures, the distinction between creditor and debtor may be difficult to maintain, and a failure to achieve the agreed upon outcome will often be the result of a lack of mutual cooperation.

As we shall see, the rules of comparative negligence and mitigation incentivise different types of behaviour among contracting parties. While the comparative negligence rule is primarily aimed at fostering contractual cooperation, mitigation encourages parties to seek alternative performance in the market.⁷

⁴ **See:** C. MILHAUPT and K. PISTOR, *Law and capitalism*, U. Chicago Press, 2008.

⁵ **See:** F. CAFAGGI, "Contractual Networks and the Small Business Act: Towards European Principles?", *Eur. Rev. of Contract Law*, 2008, vol. 4, p. 493.

⁶ **See:** R. J. GILSON, C.F. SABEL, & R.E. SCOTT, "Contracting for Innovation: Vertical Disintegration and Interfirm Collaboration", *Colum. L.R.*, 2009, vol. 109, p. 431.

⁷ **See:** C. J. GOETZ & R. E. SCOTT, "The Mitigation Principle: Toward A General Theory of Contractual Obligation" *Va. L. Rev.*, 1983, vol. 69, p. 967. (hereinafter **GOETZ & SCOTT**, "The Mitigation Principle").

Often within the contractual relationship performance is the outcome of a sequential game wherein the debtor and the creditor interact strategically. The creditor's conduct may precede or succeed the debtor's (promisor's) performance, and this interaction may generate reliance on the promise and its execution by the debtor which in turn may affect the decision-making process of the debtor concerning performance or breach. Reliance may occur before the contract is signed or after the promise becomes binding and legal systems give different weight to the role of reliance if it occurs before or after the contract is signed. In light of the fluid nature of the contractual relationship, the creditor's conduct should be analysed with regard to this sequential frame. Although the optimal level of a creditor's reliance and his related levels of investment in precautions and performance are not directly controlled by the doctrines of comparative negligence and mitigation, these doctrines play a significant role in shaping rules concerning the creditor's conduct.

II. Comparative negligence and mitigation in contract law compared

The core investigation concerns the relationship between comparative negligence and mitigation as regulatory principles of the creditor's conduct and its effect of debtor's decision making process. The first issue is whether these divergent rules concerning the creditor's conduct can be traced back to a unitary principle of cooperation among contracting parties, or if they instead perform different functions, varying in accordance with the nature of the contractual relationships and market structures. Three answers are currently provided by legal systems: (1) to combine comparative negligence and the duty to mitigate into a unitary principle; (2) to group them under a common principle of mitigation, but subdivide operational rules between the duty to mitigate and comparative negligence; and (3) to radically distinguish them by referring to different functions (*i.e.* deterrence and compensation).

In Continental Europe, legal systems like those of Germany, Austria and Italy adopt a unitary principle, differentiating between pre- and post-breach; while in other systems, comparative negligence and mitigation are distinguished. In the US, mitigation is well recognised while comparative negligence is not.⁸ In France, comparative negligence (*faute de*

⁸ **See:** Restatement (Second) of Contracts § 350. For general rule that there is no apportionment of contractual damages based upon comparative fault of parties, see *Farnsworth on Contracts*, vol. III, 3rd ed., 2004, § 12.8, pp. 195-196.

la victime or *du créancier*) has been adopted by the Cour de Cassation, but the duty to mitigate has been rejected.⁹ In England, the duty to mitigate is widely recognised while contributory negligence with apportionment, which was introduced in tort with the 1945 Act, is limited in contract common law.¹⁰ It should be underlined that even those jurisdictions which reject or limit comparative negligence in the context of a two-party contract often allow apportionment, based on fault, in multiparty contracts.¹¹

Comparative negligence and the duty to mitigate share the common feature of being defenses pleaded by the debtor. They are not affirmative claims, unlike the duty to cooperate, whose breach by the creditor can give rise to an obligation of the debtor to pay damages. There are differences between the two concerning the applicable standard: care in comparative negligence and reasonableness in mitigation. These differences may lead to different considerations concerning an individual party's ability to act in order to prevent the breach or to minimize its consequences. Reasonableness, in the context of mitigation, often allows subjective elements to be factored in, including, to a limited extent, impecuniosity. These elements are less frequently considered in comparative negligence. However, the key difference between comparative negligence and mitigation relates to creditor's expectations. In the case of comparative negligence, precautions by the creditor are based on the expectation of performance, not on that of breach. The opposite is true for mitigation, where the creditor is required to act upon the knowledge of breach or upon the expectation, after repudiation, that the debtor will breach. One additional difference between comparative negligence and mitigation, present in all legal systems to varying degrees, is that expenses incurred by the creditor to take precautions may not be recovered under comparative negligence, but will be recoverable under mitigation if deemed reasonable.

We find comparative negligence in systems that have opted for strict liability for the debtor as well as in fault-based regimes. Thus comparative negligence, when adopted, does not require a particular rule of debtor's liability, being compatible with both strict liability and fault. However, modes of damages' apportionment may change depending upon the debtor's liability regime in place. In a strict liability regime with comparative negligence, the debtor

⁹ C. ANDRE, *Le fait du créancier contractuel*, LGDJ, Bibliothèque de droit privé, 2002, S. REIFERGESTE, *Pour une obligation de minimiser le dommage*, PUAM, 2002.

¹⁰ See: E. PEEL, *Treitel, The Law of Contract*, 12th ed., London, Thomson Sweet & Maxwell, 2007, pp. 1064-1066.

¹¹ D. J. BUSSEL, "Liability for Concurrent Breach of Contract", *Washington University Law Quarterly*, 1995, vol. 73, p. 97, at p. 124 and p. 126.

will bear all losses but for those ‘attributable’ to the creditor’s negligence. In a negligence based regime, the creditor will bear all the losses from the breach but for those ‘caused’ by the debtor’s fault.

III. Comparative Negligence

Comparative negligence in contract is expressly recognised by legislation in Germany and Italy, Austria, the Netherlands and Switzerland.¹² Similar principles apply in Poland and Slovenia.¹³ In France, recognition has occurred through judicial interpretation.

The rule applied both to contractual and extracontractual liability is often framed within the broader context of causation and is explicitly associated with the limitation of damages.¹⁴ The creditor who has contributed to the breach (or whose conduct has increased the losses flowing therefrom) cannot be fully compensated.¹⁵

Creditor’s conduct may concern a duty to take precautions affecting probability of breach – *e.g.* a duty to provide information about the effects of debtor’s future performance on creditor’s economic activity, a duty to warn about risks associated with debtor’s performance or a duty to inspect the good or services and verify lack of conformity once performance is rendered.¹⁶ There is then a wide array of creditor’s conducts which do not directly affect the probability of breach, but instead impacts its consequences (*e.g.* the amount of losses).¹⁷

The creditor’s cooperation may often be necessary to the debtor’s performance. A failure to cooperate making performance more difficult or impossible may lead to the reduction of damages and/or to discharge of damages entirely. Even when the creditor’s

¹² In Germany, a general principle of contributory negligence, applying to both tort and contract, is provided for by § 254 BGB. In Italy it is regulated by art. 1227 CC. In Austria by § 1304 ABGB. In the Netherlands by art. 6:101 BW and in Switzerland by art. 44 CO.

¹³ In Poland art. 362 CC and in Slovenia art. 243-244 CC.

¹⁴ **See: G.H. TREITEL**, *Remedies for Breach of Contract (Courses of Action Open to a Party Aggrieved)*, Chapter 16, International Encyclopedia of Comparative Law (J.C.B. Mohr (Paul Siebeck), The Hague, Tübingen and Mouton, 1976, pp. 75-76.

¹⁵ Paradigmatic is § 254 BGB.

¹⁶ For a detailed examination concerning different groups of cases, **see: A. PORAT**, “Comparative Fault Defense in Contract Law”, *Mich. L. Rev.*, 2009, vol. 107, p. 1397 (hereinafter **PORAT**, “Comparative Fault Defense”, *o.c.*).

¹⁷ For this distinction **see: R. COOTER**, “Unity in Tort, Contract and Property: The Model of Precaution”, *Cal. L. Rev.*, 1985, vol. 73, p. 1 and **A. PORAT**, “Comparative Fault Defense”, *o.c.*

cooperation is not required, negligent or intentional conduct by the creditor that makes the debtor's performance more difficult may limit the creditor's recovery. The boundaries between comparative negligence associated with breach and impossibility due to creditor's negligent behaviour are not always clear-cut.¹⁸ When creditor's cooperation is 'necessary', a non-negligent failure by the creditor to cooperate may still place the entire burden on the debtor, while a negligent or intentional violation of the duty to cooperate may affect: (a) the choice of remedies available, *e.g.* making specific performance unavailable; (b) the level of recoverable damages; or (c) the possibility of creditor's discharge. In the latter case, the creditor may have contributed to making performance either more burdensome or partially or wholly impossible. This may occur due to the creditor's fault or even due to his faultless conduct. Legal systems attribute different roles to creditors' negligence which causes impossibility.¹⁹

In Germany, § 254 finds its origins in the principle of good faith.²⁰ In France, where no codified rules relating to comparative negligence exist, the negligent conduct of the creditor can diminish recoverable damages on the basis of causation even while no mitigation of damages is recognised on the basis of full compensation principle.²¹

In England, contributory negligence (equivalent to comparative negligence) as a means to apportion losses was introduced by statute in the area of tort law in 1945.²² Its application to contract law has been limited, however, in order to avoid shifting the task of risk allocation from parties to courts. The application of contributory negligence to contract is well accepted when a breach of contract coincides with a tort.²³ Contributory negligence has also been applied to those cases, as in service provision, where the standard of liability is care rather than strict liability. It does not apply when liability for breach of contract is strict and not associated with carelessness, and its applicability is disputed when the defendant is liable for a contractual duty of care but carelessness does not make him liable in tort.²⁴ In some

¹⁸ **F. CAFAGGI**, *Comparing comparative negligence in contract law: in search for a framework*, unpublished, on file with the author.

¹⁹ **F. CAFAGGI**, *Comparing comparative negligence in contract law: in search for a framework*, *o.c.*

²⁰ **See: R. ZIMMERMAN** and **S. WHITTAKER**, *Good Faith in European Contract Law*, Cambridge, Cambridge University Press, 2000, pp. 173-174.

²¹ **See: M. FABRE MAGNAN**, *Droit des obligations, 1 Contrat et engagement unilateral*, Themis de droit, PUF, 2008, pp. 661-662, **Y. M. LAITHIER**, *Etude Comparative sur l'inexécution du contrat*, LGDJ, 2004, **S. LE PAUTREMAT**, "Mitigation of damages: a French perspective", *ICLQ*, 2006, vol. 55, p. 205 ff.

²² "The Law Commission, Contributory negligence as a defence in contract", w.p. 219, London, 1993, para 1.4.

²³ *Forsikringsaktieselskapet Vesta v Butcher* [1989] AC 852 ("Vesta v Butcher").

²⁴ **See: G.H. TREITEL**, *An Outline of the Law of Contract*, London, Butterworths, 1995, p. 397.

circumstances, English Courts have apportioned damages under causation, thereby allowing for a similar result as would have been achieved under comparative negligence.²⁵

In the US, the application of comparative negligence to contractual liability has generally been rejected.²⁶ Although a small handful of courts have begun to explicitly recognise its applicability in certain circumstances, the majority of courts and the Restatement 2d of Contracts continue to hold the opposite view.²⁷

Among those legal systems that expressly recognise the principle of comparative negligence, many identify the degree of negligence as a criterion relevant to the apportionment of liability.²⁸ Thus, while the presence of debtor's fault affects the 'if' question of liability (*e.g.* whether the debtor can be held liable) regardless of the degree of fault, the level of creditor's fault is important to both the questions of 'if' and 'how much' liability will be attributed to the creditor. In some legal systems, creditor's negligence becomes relevant only when it is preponderant, *i.e.* beyond 50%.

Two concluding remarks should be made. First, those systems that have introduced a specific rule to apportion liability for breach of contract distinguish this case from that of causation. Comparative negligence is typically depicted as conduct that concurs to the breach without breaking the causal link. Second, there are no strong reasons to exclude apportionment based on causation, even in a pure strict liability regime where both parties have 'contributed' to the breach with no fault. For example, it is possible to allocate losses between parties by alternatively looking at comparative foreseeability.²⁹

IV. Mitigation

The principle of mitigation has been widely adopted, but its scope and domain vary across legal systems.³⁰ Mitigation is well recognised in common law jurisdictions, such as those of the US and England. Mitigation has been recognised within a general principle in

²⁵ **See:** *Tennant Radiant Heat Ltd v Warrington Development Corp* [1988] 1 E.G.L.R. 41.

²⁶ **See:** R. SCOTT, "(partial) defense of strict liability", *U. Mich. L. R.* 1381, 2009, vol. 107, p. 1381 and A. PORAT, *Comparative Fault Defense*, *o.c.*

²⁷ **See:** *e.g. Gateway Western Railway Co. v. Morrison Metalweld Process Corp.*, 46 F.3d 860 (8th Cir. 1995).

²⁸ **See:** the Italian Civil Code under art. 1227 para. 1.

²⁹ **See:** R. DANZIG, "*Hadley v. Baxendale: A Study in the Industrialization of the Law*", *J. LEG. STUD.*, 1975, vol. 4, p. 249.

³⁰ **See:** GOETZ & SCOTT, "The Mitigation Principle", *o.c.*, pp. 967-968.

Continental European countries such as Germany, Italy, Austria, the Netherlands, Poland, Slovenia and others. In France, mitigation has been rejected, although similar results may be attained through the principle of *faute de la victime*.³¹ This alternative route, however, allows substitute performance by a third-party at the expense of the debtor when judicially ordered.³² Outside of the European Union, the rule of mitigation is recognised in the new Russian Civil Code.³³

The scope of the mitigation rule, however, varies even within Continental European countries. In Germany, it includes two situations: first, a creditor cannot recover if she could have avoided the losses flowing from the debtor's breach at a reasonable cost; and second, damages are reduced to account for any gains accrued to the creditor as a result of the breach.

Other legal systems distinguish between cases in which the injured party has acted after the breach, increasing the amount of losses, and cases in which she has failed to reduce losses causally linked to the breach. In the former hypothesis, courts often refer to causation and consider the creditor's conduct to be an intervening cause, interrupting the causal link and thus preventing full recovery. In the second hypothesis, they frame the conduct as mitigation and exclude recovery of the losses that the injured party could have avoided with a reasonable effort.³⁴ In case of violations by the creditor, the difference concerns the liability standard, in case of compliance the difference relates to the costs of precautionary measures: on the creditor in comparative negligence, on the debtor in mitigation.

³¹ In two judgments of 19 June 2003, the French Supreme Court explicitly rejected the introduction of a general principle of mitigation in the French law of tort, thereby departing from the solutions reached in England and other legal systems: Cass 2ème civ (19 June 2003) No 930 FS-PBRI, *Xhaufnaire c/Decrept* and No 931 FS-PRBI, *Dibaoui c/ Flamand*, Bull Civ II No 203, D 2003 Jur 2396; Petites Affiches 2003, No 208, 16.

³² While the duty to mitigate imposes a legal obligation on the injured party without any need for judicial intervention, in France the creditor can seek an alternative performance at the expense of the debtor only if authorized by the judge. **See:** S. WHITTAKER, *Contributory Fault and Mitigation; Rights and Reasonableness: Comparisons between English and French Law* in L. TICHÝ, ed., *Causation in Law*, Univerzita Karlova v Praze, 2007 [hereinafter Whittaker, *Contributory Fault and Mitigation*] (p. 17 of the file with author).

³³ **See:** Art. 404 of the Russian Civil Code.

³⁴ In England, often even the duty to mitigate is framed under causation principle. **See:** S. WHITTAKER, *Contributory Fault and Mitigation, o.c.*, (p. 2 of the file with author).

Mitigation is generally required after breach has occurred, and forces the creditor to seek alternative performance in the market or, when alternative performance is unavailable, to act reasonably to minimise losses flowing from the breach.³⁵

Mitigation can occur in two cases: (a) where the contract has been terminated by the injured party after a material breach; or (b) where the obligations under the contract are still in force, and the injured party has not been discharged from performing its own obligation.

The duty to mitigate is generally referred to in the latter case, but in some legal systems it may also operate in the former. In the latter, the creditor will have to counterperform and seek alternative performance in the market. In the former, the content of the duty may be affected by the decision to terminate. The creditor faces some uncertainty stemming from the risk that termination was wrongful. If that proves to be the case, then seeking alternative performance may be deemed unreasonable mitigation and the creditor may have to bear the costs associated with its decision to seek such alternative performance.³⁶

Does mitigation impose a duty to deal with the breaching promisor? Rarely, a duty to mitigate will translate into a duty to renegotiate the contract after breach. More frequently, mitigation is framed as part of the duty of good faith or, in the international contract law context, the duty of cooperation.³⁷ The implications are related to criteria concerning the distribution of gains and losses following renegotiation.

When is mitigation reasonable? What is the standard for the mitigator? Generally speaking, the injured party is only required to take reasonable steps to mitigate. This reasonableness is measured both subjectively and objectively. At least two dimensions of reasonableness are considered: one relating to the performance of the specific contract and the costs of mitigation (*e.g.* repair or cure by the injured party), and the other relating to the market structure. The two dimensions are related when the Court has to define what constitutes substitute performance and how far the injured party must go in accepting

³⁵ In the US, mitigation duties arise after repudiation. **See:** *Edward M. Crough, Inc. v. Department of General Services*, 572 A.2d 457, 467 (D.C. 1990); Restatement (Second) § 350, comment B.

³⁶ In relation to England, **S. WHITTAKER**, **See:** *Contributory fault and mitigation, o.c.* (p. 11 of the file with author). For a more detailed analysis, **see:** **F. CAFAGGI**, *Comparing comparative negligence in contract law: in search for a framework*, unpublished, on file with the author.

³⁷ **See:** Unidroit Principles of International Commercial Contracts 2004, Article 5.1.3: (“Each party shall cooperate with the other party when such co-operation may reasonably be expected for the performance of that party’s obligations.”)

substitute performance. This issue concerns both the offer of a substitute performance by the debtor and the search for an alternative performance in the market.³⁸

Mitigation through cover is more likely to be reasonable when the market is competitive and alternative performances are easily available. The less competitive the market, the more difficult it becomes to find alternative performances and the more ‘unreasonable’ mitigation through cover becomes, forcing parties to find alternative solutions within the relationship. Thus, the market form is an independent variable that, via reasonableness, affects the existence and the breadth of the duty to mitigate.³⁹

The doctrine of mitigation, as it has particularly been applied in Continental Europe, has important drawbacks insofar as it fails to account for market form. If the market is competitive, it is generally accessible both to the debtor and the creditor. A duty should arise on the creditor only if it is cheaper for him to seek alternative performance than it is for the debtor. If the market is not competitive, it will be difficult for either party to seek alternative performance. In this case cover is unavailable and mitigation will consist of reducing the losses stemming from the breach by negotiating contractual modifications (*e.g.* reduced quantity, providing alternative goods, *etc.*). The current mitigation doctrine available in continental Europe, unlike in the US, does not provide a sufficiently clear menu of choices for cover between debtors and creditors interacting in competitive markets, and does not give clear indication of what should the promisee do when alternatives in the markets are unavailable.

V. Reasonable reliance

While the role of creditor’s reliance in contract law is widely recognised via several doctrines in the US, it is less relevant in Continental European systems, except during the precontractual stage. Beneficial reliance is protected by making promises enforceable or by ensuring damages if there is unreasonable refusal to conclude a contract. Detrimental reliance is discouraged through a number of doctrines, among which causation and foreseeability bear a primary role. To induce reasonable reliance implies discouraging over-investment by both parties: by the creditor seeking to maximise the gain from performance, and by the debtor in

³⁸ See: S. WHITTAKER, *Contributory Fault and Mitigation*, *o.c.*

³⁹ This is one of the most important insight of GOETZ & SCOTT, *The Mitigation Principle*, *o.c.* 1024.

precautions taken to avoid breach and in facing unanticipated circumstances. To a certain extent, protection of only 'reasonable' reliance may induce the creditor to take additional precautions in order to protect the profitability of his investments, thereby leading to similar results as those achieved by comparative negligence in Continental European systems.

The different doctrines that promote reasonable reliance operate as functional equivalents to comparative negligence only to a limited extent. They share with comparative negligence the fact that reasonable reliance becomes legally relevant only if the debtor breaches, and it reduces compensation only for those losses incurred by making reasonable commitments to take advantage of the expected performance. Unreasonable reliance, outside of breach, cannot constitute an affirmative claim for the debtor. It differs from comparative negligence because it deals predominantly with decisions influencing the consequences of excuses and breach and not the breach itself. In fact, conducts relevant under reasonable reliance concern more the consequences of the breach (L) than its probability (P). Though the issue is hotly debated, reasonableness related to reliance should not be associated with the probability of breach but with that of impossibility or impracticability of performance. Creditors should rely on performance by debtors and reasonableness should limit the level of investments in relation to impossibility due to force majeure and hardship or frustration. As in comparative negligence, when reasonable reliance applies, the creditor should expect performance unlike in mitigation when she reacts to a breach which has already materialised.

When reliance damages are granted instead of expectation damages,⁴⁰ two goals are pursued: protection of the creditor's interest and provision of incentives to rely reasonably on the promised performance. Absent comparative negligence, reliance damages may provide the creditor with better incentives than expectation damages to invest reasonably.

The fault standard, deployed to reduce recoverable damages in comparative negligence when the creditor is negligent, may bring about different results than the reasonableness standard used in reliance when the promisee has overrelied.

⁴⁰ Reliance damages is the measure of compensation given to a person who suffered an economic harm for acting in reliance on a party's promise who fails to fulfill its obligation, while expectation damages are damages recoverable from a breach of contract. The former is generally limited to incidental damages while the latter is composed of incidental damages and consequential damages.

VI. Causation

Comparative negligence, associated with causation as a means to apportion liability between contracting parties, plays an important role in Germany, in countries that follow the German system, as well as in Italy and France. In England, causation operates more as an alternative to comparative negligence.⁴¹ In general, causation does not lead to apportionment since it operates through either/or mechanisms.⁴² Only in rare cases have courts been willing to apportion losses under ‘comparative’ causation.⁴³

Causation as a means to allocate liability from breach has two dimensions: (a) the domain of the risk associated with performance; and (b) the risk’s distribution between the debtor and the creditor. When a loss is deemed to be too remote, courts conclude that the risk is not part of the contractual allocation and thus place the burden entirely on the creditor.⁴⁴ But remoteness can also be used to distribute the risk among parties. If the risk was contemplated by both parties, the creditor’s conduct may operate as an intervening cause, breaking the causal link.⁴⁵ More often, however, a lack of contemplation is framed within foreseeability. In this context, the relevant question concerns whether the risk, associated with the creditor’s conduct, was contemplated by the parties and, if so, how was that risk allocated.⁴⁶

Causation can thus have two different consequences on creditor’s conduct: (1) if the creditor’s conduct breaks the causal link, the debtor is not liable and the creditor bears all the losses; or (2) if she only contributes to the breach, liability is ‘shared’ and apportionment of damages follows. In the first scenario, what is really considered is the but for causality of the creditor’s conduct and negligence is not relevant. In the second scenario, the existence of fault and the degree of negligence are relevant to the apportionment of the consequences of the breach. However in this case references directly to comparative negligence are more frequent given the ‘resistance’ to apply comparative causation, deploying an apportionment criterion

⁴¹ In England, see: **The Law Commission**, “Contributory Negligence as a Defence in Contract”, 1993, **LAW COM. No. 219**, cit. § 3.9 and 3.10.

⁴² See: **A. S. BURROWS**, “Contributory Negligence in Contract: Ammunition for the Law Commission”, *L. Q. Rev.*, 1993, vol. 109, p. 175.

⁴³ See: *Tennant Radiant Heat*, [1988] 1 E.G.L.R. 41.

⁴⁴ In the US, see: e.g., *Suitt Constr. Co. v. Ripley's Aquarium, LLC*, 108 Fed. Appx. 309, 314 (6th Cir. 2004).

⁴⁵ In the US, see: *Suitt Constr. Co.*, 108 Fed. Appx. 309 for premise that only damages proximately caused by the debtor’s breach are recoverable to the creditor.

⁴⁶ In the US, see: Restatement (Second) of Contracts § 351, comment A.

regardless of relative fault of the parties. The second scenario is very rare since risk distribution in causation generally operates as an either/or rule.

VII. Foreseeability

Foreseeability as a means to allocate risks and liabilities between contracting parties plays an important role in France and Italy but not in Germany.⁴⁷ It has great relevance in Anglo-American law under the cases following the doctrine announced in *Hadley v. Baxendale*.⁴⁸ In particular, it has been used in the U.S, as an alternative to comparative negligence and as a means to control reasonable reliance.⁴⁹ The rule does not directly affect the role of the creditor but it can influence the allocation of risks and losses. However, there are several dimensions in which the doctrine of foreseeability may indirectly affect the creditor's conduct in relation to debtor's breach.

On the one hand, foreseeability incorporates the debtor's expectations concerning the creditors' conditions into the contract. These expectations may concern the creditor's needs but might also relate to his economic or physical conditions relevant for debtor's performance.

On the other hand, foreseeability reduces the creditor's incentive to opportunistically increase the losses related to a potential breach between the time of formation and the time of breach. For instance, additional investments aimed at 'exploiting' opportunities from the use of the good to be delivered by the debtor may not be recoverable because they are unforeseeable and thus not contemplated by the parties at the time of contract.⁵⁰

The foreseeability rule is aimed at promoting communication among parties for risks known to the creditor or that ought to be known at time of contracting.⁵¹ On the basis of the foreseeability rule, a risk and the occurrence of a loss can be transferred from the creditor to

⁴⁷ But see: creditor's duty to warn under § 254 II BGB.

⁴⁸ *Hadley v. Baxendale*, 9 Exch. 341, 156 Eng. Rep. 145 (1854).

⁴⁹ For the US, see: **B. HERMALIN**, **A. KATZ** and **R. CRASWELL**, "The Law and Economics of Contracts," in **M. POLINSKY** and **S. SHAVELL**, *Handbook on Foundations of Law and Economics*, Elsevier, 2007, p. 104

⁵⁰ See: Illustration 2 to Restatement (2d) § 351.

⁵¹ **I. AYRES** and **R. GERTNER**, "Filling Gaps in Incomplete Contracts: An Economic Theory of Default Rules", *Yale L. J.*, 1989, vol. 99, p. 87.

the debtor only if the former informs the latter, making him aware of its existence.⁵² If the creditor fails to inform the debtor about the specific contingencies, damages are not recoverable because unforeseeable. In this case only those losses associated with ordinary market ones can be recovered.⁵³ Whether the failure to inform depends on negligent conduct is in principle irrelevant when foreseeability is applied, unlike in the case of comparative negligence.

VIII. Explaining the differences between Anglo-American and continental Europe approaches

The degree of convergence or divergence between the US and Continental Europe depends on the level of analysis: if we consider only comparative negligence in contract, divergences are relatively high, whilst when mitigation is included, divergences decrease. Furthermore, if – when the debtor’s performance is rendered impossible due to the creditor’s own conduct – the creditor’s duty to cooperate is integrated into the analysis, divergences over the existence of a general principle further decrease. The brief and extremely synthetic examination of different doctrines across jurisdictions has shown that some of them combine allocation of liability and apportionment of damages whilst others allocate liability on the basis on an either-or criterion without apportioning damages. In the former, we should include comparative negligence, mitigation, reasonable reliance and, to a limited extent, foreseeability. Only indirectly, the reciprocal duties of cooperation and good faith constitute a means to apportion damages. Causation and impossibility deploy primarily either/or mechanisms, although for the latter fault and some type of apportionment are sometimes considered.⁵⁴

The Continental European approach, with important differences among its legal systems, adopts a cooperation principle highlighting the relevance of creditor’s pre- and post-breach conduct based on risk-sharing and leading towards loss apportionment.

The US seem to distinguish sharply between a creditor’s pre- and post-breach conduct, limiting the mitigation principle to the post-breach phase despite proposals to introduce

⁵² **See:** GOETZ & SCOTT, *The Mitigation Principle*, o.c.

⁵³ **See:** *Transfield Shipping Inc v. Mercator Shipping Inc. the Achilleas* [2009] 1 A.C.

⁵⁴ For broader and more detailed analysis **see:** F. CAFAGGI, *Comparing comparative negligence in contract law: in search for a framework*, unpublished, on file with the author.

comparative negligence principles in contract law.⁵⁵ However upon deeper scrutiny, the principle (not the rules!) of apportionment related to comparative fault emerges in several doctrines where part of the loss is allocated to the creditor primarily because the risk was initially borne by her or because the risks' allocation has shifted over time, due to unanticipated circumstances. In particular, reasonable reliance, and to some extent foreseeability when apportionment is allowed, seem to play similar functions to comparative negligence in allocating both liabilities and damages in the case of breach: providing incentives to adopt precautionary measures to tackle risks of non-performance and to avoid over-investments.⁵⁶

How can the differences between the US and England, on the one hand, and part of Continental Europe and international regimes, on the other, be explained?

There are three categories of complementary explanations: historical, philosophical and functional.

Historically, the departure from contributory negligence as a total bar from recovery in both contract and tort predates codifications in Continental Europe. The approach taken by European codifications relates to the law of obligations, including both contractual and extracontractual relationships. The reference point in the law of obligations is the creditor both as a promisee and as a potential victim of the breach. The regime referred to the law of obligations has been designed to be applicable to contractual and extracontractual settings.

The departure from contributory negligence and from binary risk allocation is much more recent in the US in the context of tort law. In contract law, the application of comparative negligence has been generally rejected while other doctrines, primarily those promoting reasonable reliance, foreseeability and causation, have operated as functional

⁵⁵ For proposals concerning the introduction of comparative negligence, **see**: **A. PORAT**, "The Contributory Negligence Defence and the Ability to Rely on the Contract", *L.Q.R.*, 1995, vol. 111, p. 228.

⁵⁶ For premise that the use of foreseeability functions in a similar fashion to comparative negligence on the part of creditor, **see** *Afram Export Corp. v. Metallurgiki Halyps, SA*, 772 F.2d 1358, 1368 (1985) (stating that debtor could not foresee "imprudent" conduct by creditor and thus damages attributable to creditor's imprudent conduct not recoverable) and *Rexnord Corp. v. DeWolff Boberg & Associates, Inc.*, 286 F.3d 1001, 1003-05 (7th Cir. 2002) (noting that the result in *Hadley* "may have depended on the mill's failure to have protected itself against the consequences of a delay by the carrier by having a spare part on hand" and there "was a sense in which the mill was the author of its own loss").

equivalents to affect the creditor's conduct and the allocation of risks which reduced the need for comparative negligence.

Though they may operate as functional equivalents, divergences are still relevant, going to the core of the different approaches to contractual relationships and contract law in Anglo-American and European continental systems, with all the internal distinctions pointed out earlier. Differences between the US and England – the two common law systems – seem to be more a matter of degree than a divergence of the foundations upon which they are grounded. Overall, considering the deployment of other doctrines, England seems to preserve the more traditional view of Anglo-American contract law as a risk allocation device despite the introduction of comparative negligence, whereas the growing importance of reliance in US contract law partially counteracts strong opposition in the US to comparative negligence.

The philosophical explanation for this divergence builds on the distinction between the higher emphasis on corrective justice in Continental Europe and the more realist and consequentialist approach in the US which is grounded on risk allocation. This distinction may contribute to explaining the use of different doctrines to achieve similar results. Comparative negligence, more so than mitigation, can be grounded on corrective justice,⁵⁷ reducing recoverable losses 'caused' by the negligent conduct of the creditor, whereas the use of foreseeability and mitigation can be better justified on consequentialist grounds. Comparative negligence, whose introduction can also be justified on efficiency grounds, recalls the concept of reciprocity and the obligation to 'protect' the other party's interest. Failure to do so would impose an additional and unfair burden on the debtor.

Beyond the historical and philosophical explanations there is perhaps a functional distinction that may further shed light on the different place of comparative negligence in contract and tort law in the U.S. and the (theoretically) uniform regime, based on the law of obligations, of some Continental European systems.

⁵⁷ On corrective justice as a foundation of continental contract law see: e.g. **R. ZIMMERMANN**, *Roman Law, Contemporary Law, European Law: The Civilian Tradition Today*, Oxford, Oxford University Press, 2001, and **J. GORDLEY**, *Foundations of Private Law: Property, Tort, Contract, Unjust Enrichment*, Oxford, Oxford University Press, 2006.. In general see: **A. T. VON MEHREN**, "A General View of Contract, Chapter 1", in **J.C.B. MOHR (Paul SIEBECK)**, *International Encyclopedia of Comparative Law*, The Hague, Tübingen and Mouton, 1982, pp. 64-65.

Contract law in the US and England is still predominantly seen as a risk allocation device.⁵⁸ While it is recognised that contract law can also perform other functions such as fostering cooperation and preventing opportunistic behavior, these other functions are seen as ancillary.⁵⁹ This could explain reluctance to adopt a comparative negligence regime which aims at fostering cooperation and is at odds with risk allocation. The duty to mitigate, distinguished from the rule of comparative negligence, reflects the idea that parties should use market alternatives when available to minimise losses or maximise gains stemming from new opportunities arising outside the contractual relationship. Thus, the duty to mitigate is perceived as compatible with risk allocation or fostering optimal risk allocation across different states of the world.

European systems focus more attention on the cooperative nature of the venture created when parties enter into contractual relationships and the opportunity to share the risks of non performance.⁶⁰ The relevance of the market structure and the availability of alternative options when one party is in breach bears a more limited role than that of cooperation. When the emphasis is on the cooperative venture then risk sharing, comparative negligence becomes more appropriate.

To what extent does the increased focus on risk allocation over cooperation in the US explain the resistance to the introduction of comparative negligence in US contract law? In theory risk allocation can occur by using either an either/or system (*e.g.*, strict liability or negligence without defence) or a ‘sharing’ system, where defences that include apportionment are allowed. In practice, however, US courts continue to be reluctant to address risk allocation through an apportionment-based, risk ‘sharing’ system.

⁵⁸ **See:** *e.g.*, O. W. HOLMES, *The Common Law* (Dover Publications, Inc., New York 1991), 299-301; A. SCHWARTZ & R. E. SCOTT, “Contract Theory and the Limits of Contract Law”, 113 *Yale L. J.* 541, 556 (2003); R. A. POSNER, “Let Us Never Blame a Contract Breaker”, 107 *Mich. L. Rev.* 1349 (2009).

⁵⁹ **See:** *Market Street Associates v. Frey*, 941 F.2d 588 (7th Cir. 1991); **see:** also R. A. POSNER, *Economic Analysis of Law*, 7th ed., 2007, pp. 94-95.

⁶⁰ On the role of different institutional environments in shaping contracting practices, **see:** S. DEAKIN, Ch. LANE, & F. WILKINSON, “Contract Law, Trust Relations, and Incentives for Co-operation: A Comparative Study” in S. DEAKIN & J. MICHIE (eds.) *Contracts, Co-operation, and Competition*, Oxford, Oxford University Press, 1997, pp. 105-139 and G. TEUBNER, “Legal Irritants: Good Faith in British Law or How Unifying Law Ends Up in New Divergences”, *Modern Law Review*, 1998, vol. 61, p. 11.

IX. Concluding remarks

In this paper I have shown that the great divergence concerning the rule of comparative negligence in contract law between England and the US on the one hand, and among European continental systems with the exception of France on the other, needs to be rethought. A wider range of doctrines beyond mitigation should be considered on the ground that they act, at least partially, as functional equivalents to comparative negligence.

The divergence diminishes if we move away from specific doctrines to the general principle of creditor's cooperation. This cooperation is relevant in many doctrines of contract law in the US, and to a lesser extent, England, although it has different scope in these legal systems. In England, where comparative negligence has limited application, the doctrines of causation and foreseeability provide some recognition of creditor's conduct and apportionment of losses. The narrow and very limited recognition of the rule of comparative negligence in the US is 'compensated' for by reference to other apportionment techniques in different doctrines such as those fostering reasonable reliance, mitigation and foreseeability.

In Continental Europe the doctrine of comparative negligence is widely recognised, and its influence has spread into international commercial laws such as CISG and Unidroit principles where both comparative negligence and mitigation are recognised. The principle of creditor's cooperation is well grounded in Continental European legal systems and has also found its way into the new proposal from PECL to DCFR.

The potential explanation for this divergence may vary if we consider the rule of comparative negligence or the principle of creditor's cooperation and its apportionment of losses regime as encompassing different doctrines. The recognition of the principle, under different doctrines but with different weight, does not eliminate the divergence, rather forces us to rethink its reasons. The lack of comparative negligence in the US, when considered along with the deployment of other forms of risk-sharing and apportionment of losses stemming from breach of contract, conforms to the idea that contract law is mainly directed at risk allocation. In European continental systems, the recognition of a general rule of comparative negligence and mitigation delineates a general principle based on the law of obligations, applicable to both contract and tort. Contractual relationships are generally characterised by a legal framework fostering higher level of cooperation. These divergences

have been explained with reference to different business practices and community norms which legal systems have internalised. This 'sociological' perspective can partly shed light on these divergences but needs to be complemented by a deeper understanding of the core function of contract law and business rules.