

***Something old, something new,
something borrowed, something blue?***

Applying the doctrine of concurrence on
European sales law and international air law

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List of abbreviations

AG	Advocate General to the Court of Justice of the European Union
BW	Burgerlijk Wetboek (Dutch Civil Code)
Cf.	<i>Confer</i> (“compare”)
CJEU	Court of Justice of the European Union, previously: European Court of Justice
EC	Treaty establishing the European Community
ECR	European Court Reports
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
E.g.	<i>Exempli gratia</i> (“for example”)
Et al.	<i>Et alii</i> (“and others”)
Ff.	<i>Foliis</i> (“and following”)
HR	Hoge Raad
Ibid.	<i>Ibidem</i> (“in the same place”)
LJN	Landelijk Jurisprudentie Nummer (Dutch court reports)
MvT	Explanatory memorandum (Memorie van Toelichting)
NJ	<i>Nederlandse Jurisprudentie</i> (journal)
NJB	<i>Nederlands Juristenblad</i> (journal)
Nyr	Not yet registered
Par.	Paragraph
RM Themis	<i>Rechtsgeleerd Magazijn Themis</i> (journal)
Rv.	Wetboek van burgerlijke rechtsvordering (Dutch Code of civil procedure)
RvdW	<i>Rechtspraak van de week</i> (journal)
TFEU	Treaty on the Functioning of the European Union
WPNR	<i>Weekblad voor Privaatrecht, Notariaat en Registratie</i> (journal)

1. Introduction

Do European airlines have to provide their passengers with unlimited assistance, even when their delay is caused by a major volcanic eruption? May a claimant escape into the national law of torts, in order to go beyond the rules of the harmonised Common European Sales Law?

Something old. In practice, parties and courts are often confronted with a patchwork of different applicable rules and remedies. Sometimes these rules lead to conflicts. Within Dutch private law, a particular doctrine is used to approach and solve such conflicts. Such a doctrine is needed to coordinate between the legal positions of the claimant and the defendant.

Something new. Meanwhile, the legal landscape has changed considerably. Some areas of private law are governed almost exclusively by international instruments. In addition, the European Union is expanding its legislative activities in different areas of private law as well. These developments call for reflection. One central question may be recognised: is the doctrine of concurrence, as developed within Dutch private law, still relevant to understand these developments? According to Floris Bakels, Vice President of the Dutch *Hoge Raad*, such an exercise will be unsuccessful:

'If one would attempt to understand these problems under the notion of concurrence, it would become endless.'¹

In this Thesis, I will examine the validity of this statement.

Something borrowed. This is done by borrowing the doctrine from Dutch private law, and applying it to two case studies. After a general introduction,² I will analyse conflicting rules in two areas of private law which are, or will become, to a large extent governed by international norms: (1) the obligations of parties to a sales contract, governed by European sales law,³ and (2) the rights and obligations of airlines and their passengers under a concluded carriage contract.⁴

Something blue. The analysis is carried out by using the following *blueprint*, which has been developed within Dutch private law. In principle, the claimant should be able to

¹ Bakels 2009, par. 3.1.: 'Zou men ook deze problematiek onder het begrip samenloop willen vatten, dan zou het overloos worden.'

² Chapter 2 of this Thesis.

³ Chapter 3 of this Thesis.

⁴ Chapter 4 of this Thesis.

pursue either of the applicable remedies, usually the one(s) most advantageous to his position (*free concurrence*). However, he *must* choose between them if simultaneous application would go against logic, or against the wording or intention of the law. The claimant does not have a choice if the law prescribes that one rule is to be applied *exclusively*. That is a tall order: *exclusive* application is awarded only when the law so prescribes or inevitably involves.

Finally, I hope to be able to answer the question of whether these criteria are still useful to approach and solve *new* problems of concurrence.⁵

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⁵ Chapter 5 of this Thesis.

2. The doctrine of concurrence

2.1. The heart of the debate: concurrence between contract and tort

Within private law the phenomenon *concurrence* (“*samenloop*”) has puzzled academics for quite some time.⁶ In 1966, Boukema was the first to conduct a comprehensive study on the subject.⁷ He came up with this definition in 1992:

‘There is concurrence of legal rules if two or more rules of the same legal order could be applied on the same legal facts.’⁸

Such a concurrence becomes problematic when the different rules lead to different legal results. One prime example, which has always been at the heart of the debate, is the overlap between contract law and tort law.⁹ In practice, parties could face the following situation:

Suppose a restorer agreed to renovate Rembrandt’s famous painting “*De Nachtwacht*” in time before the Rijksmuseum opens again in 2013. Unfortunately, carelessness of the restorer causes irreparable damage to one of the public’s most favourite canvases.

This breach of contract by the restorer could equally constitute a violation of the Rijksmuseum’s right to property, leading to liability in tort. In principle, the two regimes have different aims. As Von Bar and Drobnig put it:

‘Contract law is the basis for the increase of a party’s patrimony by receipt of money, goods or services, whereas tort law protects persons and the preservation of their patrimony.’¹⁰

In practice, both regimes often differ in terms of establishment, scope and prescription of liability.¹¹ One regime could be more advantageous for the claimant because it leads to *strict* liability instead of a liability based on *fault*.¹² The scope of liability may be

⁶ Cf. Van Goudoever 1917; Star Busmann 1925, pp. 181-186; Suijling 1934, p. 14 *et seq.*; Meijers 1947; Bregstein 1960; Wiersma 1960, pp. 229-238.

⁷ Boukema 1966.

⁸ E.g. Snijders 1973, p. 454; Reurich 2005, p. 93; Houben 2007, p. 25.

⁹ Cf. Nieuwenhuis 1982, p. 5.

¹⁰ Von Bar & Drobnig 2004, p. 26. See also Deakin *et al.* 2013, pp. 16-17; Krans 1999, pp. 33-36.

¹¹ Cf. Nieuwenhuis 1982, p. 6. It has to be noted, however, that the differences between the two regimes have been reduced with the introduction of the new Dutch Civil Code in 1992, see Castermans 2012b, par. 3.

¹² Cf. Nieuwenhuis 1982, p. 6.

different as well: damages for breach of contract aim to bring the claimant in a position as if the contract had been performed, whereas damages for tort mean to restore the claimant in its original position – as if no tort had been committed.¹³ Finally, one action may already be barred by a prescription period, while the other action could – theoretically – still be brought.¹⁴

The overlap between contract and tort poses problems to any private law system, but the solutions differ.¹⁵ Some legal systems confine the claimant to contract law, others provide him with the opportunity to invoke tort law as well.

The first route has been chosen by the French *Cour de Cassation*. Whenever a fault has been committed during the performance of a contract, the liability may only be based on contract law:

‘Les art. 1382 et suivants sont sans application lorsqu’il s’agit d’une faute commise dans l’exécution d’une obligation résultant d’un contrat.’¹⁶

This principle, called *non-cumul des responsabilités*, is applied by the Belgian *Hof van Cassatie* as well. As soon as the facts of the case qualify as a breach of contract, recourse to tort law is excluded. Only when there is a case of *negligence* causing *non-contractual damage*, an action in tort may be brought.¹⁷ Although it seemed as if this line of reasoning was abandoned in September 2006,¹⁸ it was reaffirmed only two months later.¹⁹

¹³ Cf. Krans 1999, pp. 33-36; Cartwright 2007, p. 49: ‘the quantification of recoverable loss proceeds on different bases in the two separate regimes’.

¹⁴ Cf. Nieuwenhuis 1982, p. 6.

¹⁵ Cf. Von Bar & Drobnig 2004, p. 198: ‘The questions of concurrence of actions (...) in particular in the relation between contract and tort, represent a problem which all EU member states are aware of.’

¹⁶ Cour de Cassation 11 January 1922, [1922] D.P. 1922. 1. 16. Reaffirmed in Cour de Cassation (Ch. civ. 2e) 26 May 1992, [1992] Bull. Civ. 1992, II, Nr. 154, S. 75; Cour de Cassation (Ch. civ. 1e) 19 March 2002, [2002] pourvoi n° 00-13971, CCC 2002, Nr. 106: ‘attendu qu’en statuant ainsi, alors qu’elle relevait l’existence d’un contrat de location entre les parties et que le manquement reproché au locataire ne pouvait permettre à la société Rhône location d’exercer une action contre celui-ci dans d’autres conditions que celles que lui ouvrait le contrat, la Cour d’appel a violé le texte susvisé’. See Brieskorn 2010, p. 218.

¹⁷ See Van Gerven & Covemaeker 2001, p. 202. See Hof van Cassatie 4 June 1973, [1971] R.W. 1971-1972, 371 (EBES); Hof van Cassatie 7 December 1973, [1973] R.W. 1973-1974, 1597 (Stuwadoors).

¹⁸ The First Chamber of the Hof van Cassatie acknowledged the possibility to bring an action in tort for non-contractual damage which constituted as a breach of contract at the same time: Hof van Cassatie 29 September 2006, [2006] R.W. 2006-2007, 1718.

¹⁹ The Third Chamber decided that, as a matter of principle, parties are not allowed to invoke tort law within the framework of their contractual relationship: ‘voor contractspartijen [bestaat] de principiële onmogelijkheid (...) om zich in het raam van hun contractuele verhouding op de regels van de buitencontractuele aansprakelijkheid te beroepen’, see Hof van Cassatie 27 November 2006, [2007] R.A.B.G. 2007, 1247-1257. Cf. Bocken 2007.

German and English private law take the opposite stance: the claimant has the *freedom to choose* between an action in contract and an action in tort, when both are possible on the same facts. The claimant is not precluded to bring an action in tort when the liability in contract has been barred or exempted:

‘Er ist insbesondere nicht gehindert, auf die Haftung aus unerlaubter Handlung zurückzugreifen, wenn vertragliche Ansprüche – etwa wegen eingetretener Verjährung oder einer nur sie erfassenden Haftungsfreizeichnung – nicht mehr bestehen.’²⁰

The *House of Lords* eventually²¹ followed this line of reasoning. Lord Goff of Chieveley expressed the “ratio decidendi”²² on behalf of the Lords:

‘[T]he plaintiff, who has available to him concurrent remedies in contract and tort, *may choose that remedy which appears to him to be the most advantageous*.’²³

Nieuwenhuis conveniently arranged the arguments for and against both systems.²⁴ A precedence of contract law over tort law (*non-cumul*) may be preferable because it is straightforward, uncluttered and favourable to the freedom of contract. It should not be accepted if parties, having concluded a contract, tried to “escape” into tort law.²⁵ On the other hand, a *free concurrence of actions* may be preferable because it acknowledges a pivotal task of private law: to equip citizens with certain rights, be they grounded in contract or in tort. The conclusion of a contract should not *a priori* lead to the exclusion of tort law.

What solution did the Dutch *Hoge Raad* choose? It decided that a successful action in tort could only be brought if the tort liability existed ‘independent from a

²⁰ Bundesgerichtshof 24 November 1976, [1976] BGHZ 67, p. 362 *et seq.*, my italics. This is still the doctrine under German law, see Zerres 2009, p. 314.

²¹ Earlier, in 1985, the House of Lords had expressly rejected the application of tort law within a contractual relationship: ‘Their Lordships do not believe that there is anything to the advantage of the law’s development in searching for a liability in tort where the parties are in a contractual relationship.’ See House of Lords 3 July 1985, [1986] A.C. 80 at 107, statement Lord Scarman (*Tai Hing Cotton Mill Ltd v. Liu Chong Hing Bank Ltd*).

²² Literally, the ‘reason for the decision’. It is this the part of a judgment, agreed upon by the majority of the judges, which constitutes precedence in English (private) law. See Cartwright 2007, p. 21.

²³ House of Lords 25 July 1994, [1995] 2 A.C. 145, at 184 (*Henderson v. Merrett Syndicates Ltd.*), my italics. In the same spirit: Irish Supreme Court, [1979] I.R. 249 (*Finlay v. Murtagh*); Supreme Court of Canada, [1986] 31 D.L.R. (4th) 481 (*Central Trust Co. v. Rafuse*). Cf. Ward 2010, p. 23.

²⁴ Nieuwenhuis 2008, pp. 77-78.

²⁵ This position has been defended by Boukema 1966, p. 121 *et seq.* Deakin *et al.* 2013, p. 19, also speak of ‘an attempt by the claimant to “escape” into tort as a way of going “beyond” what has been agreed in the contract’.

violation of contractual obligations'.²⁶ This approach seems to come close to the Belgian and French doctrine. However, upon reflection it turns out that this test is different. The purpose is to establish whether the facts of the case qualify as a tort *regardless* of the question whether there is a breach of contract as well.²⁷ If there is indeed overlap, the claimant may *choose* between two co-existing liabilities:

'When someone could, in relation to the same facts, be held liable both for collision [a special liability in tort, RdG] and on the basis of a contract of carriage, the other party may choose on which liability he wishes to ground a legal action. '²⁸

So, starting point is a free concurrence of actions, as is established practice in Germany and the United Kingdom.

2.2. The dividing line between contract and tort

Both solutions result in the precedence of one regime over the other. Either tort law is excluded as a matter of principle (*non-cumul*), or the least advantageous regime is excluded as a result of the claimant's choice (*free concurrence*).²⁹ Both solutions seem straightforward, but there is one complicating factor: the dividing line between contract and tort is 'by no means as clear as might be imagined'.³⁰

Modern contract lawyers question whether the division between contractual obligations, resulting wholly from an exchange of promises, and tortious obligations, imposed by the law, is still accurate. Conversely, tort lawyers struggle with certain cases of tortious liability where the parties are in a special (contractual) relationship.³¹ In 1974, Gilmore proclaimed 'the death of contract', stating that contract law 'is being reabsorbed into the mainstream of "tort"'.³² He was supported by Atiyah, who argued

²⁶ HR 9 December 1955, NJ 1956, 157 (*Bogaard/Vesta*). Cf. HR 6 April 1990, NJ 1991, 689 (*Van Gend & Loos/Vitesse*).

²⁷ Cf. Brunner in his case note under HR 6 April 1990, NJ 1991, 689 (*Van Gend & Loos/Vitesse*).

²⁸ HR 6 March 1959, NJ 1959, 349 (*Revenir/Bertha*): 'Indien iemand op grond van zekere feiten zowel ter zake van aanvaring als uit hoofde van een door hem gesloten sleepovereenkomst aansprakelijk kan worden gesteld, mag de wederpartij kiezen op welk van beide aansprakelijkheden hij een rechtsvordering wil bouwen.'

²⁹ Cf. Nieuwenhuis 2008, p. 82.

³⁰ Zimmermann 1996, p. 11. Cf. Bakels 1996, p. 44, who describes the law of obligations as 'fluent'; Howarth 2011, p. 848: 'the line between contractual and extra-contractual liability is not easy to draw'.

³¹ Cf. Deakin *et al.* 2013, p. 15.

³² Gilmore 1974, p. 87.

that the idea ‘that tort liabilities are wholly different from contractual liabilities because the latter arise from consensual obligations is not soundly based, either in logic or in history’.³³ With regard to Dutch private law, Vranken argued that ‘tort and contract have lost their meaning as dichotomous categories of the law of obligations’.³⁴ These findings are supported by the fact that one and the same legal issue is characterised as belonging to contract law in one country, while it is dealt with by tort law in another country.³⁵

If the dividing line between contract and tort is indeed blurred, could any doctrine of concurrence provide the clarity it aims for?³⁶ In the words of Deakin, Johnston and Markesinis:

‘Can it really be said that where there is such overlap between tort and contract the solution should in all instances be governed by formal categories shaped by tradition and that the claimant’s rights should depend upon whether his action was framed in one branch or the other?’³⁷

For Belgium and France, it is arguably most difficult to cope with this interaction. The principle of *non-cumul* may force courts to deny a contractual relationship in order to be able to apply tort law.³⁸ Yet, most problems have been solved by increasingly complementing the obligations arising from a contract with the requirements of equity, customs and the law on the basis of Article 1135 of the Belgian and French *Codes Civils*.³⁹

Conversely, the principle of *free concurrence* forces courts to limit the freedom of the claimant to bring any action he wishes, in order to do justice to the interests of the defendant.⁴⁰ In Germany, an exception is made when ‘the application of tort law would (...) *frustrate* the purpose of a contract law norm’.⁴¹

³³ Atiyah 1979, p. 505. That is why, according to Nieuwenhuis, an exclusion of one of the regimes would be to deny the open, fluent character of legal norms. Cf. Nieuwenhuis 1982, p. 15.

³⁴ Vranken 1995, nr. 124: ‘[o]nrechtmatige daad en contract hebben hun betekenis als dichotomische grondcategorieën van het verbintenissenrecht verloren.’

³⁵ E.g. medical accident cases in England are being dealt with by the law of torts, see Howarth 2011, p. 848. Cf. Von Bar & Drobnič 2004, p. 458.

³⁶ Cf. Nieuwenhuis’ critical remarks on the clarity of the alternative system: ‘De duidelijkheid van het alternatieve stelsel (óf wanprestatie óf onrechtmatige daad) is niet meer dan schijn. Zij berust op een grove vereenvoudiging van wat er in werkelijkheid gebeurt.’ See Nieuwenhuis 1982, p. 22.

³⁷ Deakin *et al.* 2013, pp. 17-18.

³⁸ Cf. Von Bar & Drobnič, pp. 40-41.

³⁹ For Belgium, see Van Gerven & Covemaeker 2001; for France, see Hesselink 1994.

⁴⁰ Cf. Nieuwenhuis 2007, p. 3.

⁴¹ Von Bar & Drobnič 2004, p. 201, my italics.

As Koch wrote:

‘Diese Regel [a free concurrence of actions, RdG] *soll jedoch keinen Bestand haben, wenn, als Folge konkurrierender Ansprüche, der Zweck einer Vorschrift unterlaufen wird*, was insbesondere bei Haftungsmilderungen und Verjährungsfragen relevant ist.’⁴²

In the United Kingdom, the concurrence between contract and tort is ‘subject (...) to ascertaining whether the tortious duty is *so inconsistent* with the applicable contract that, in accordance with ordinary principle, the parties must be taken to have agreed that the tortious remedy is to be limited or excluded’.⁴³ In most cases, tort law will therefore not afford greater protection, because a claimant may benefit from its application only *in the absence* of a limitation or exclusion of liability in the contract.⁴⁴

In the Netherlands, the *Hoge Raad* allows the claimant to bring an action in tort, but it does apply the special liability rules or prescription periods in contract law nonetheless.⁴⁵ According to Castermans and Krans, the heart of the problem is thus removed: ‘in the absence of different results, there is no problem of concurrence’.⁴⁶ For example, an employer may bring an action in tort against former directors or employees, but the establishment and scope of liability are governed by special rules, rooted in company and labour law.⁴⁷ And a buyer may bring an action in tort, but to the extent that it concerns the nonconformity of the delivered goods, it is governed by the (shorter) prescription periods in Article 7:23 of the Dutch Civil Code.⁴⁸ While applying tort law, the contractual relationship is taken into account.

⁴² Koch 1995, p. 227, my italics.

⁴³ House of Lords 25 July 1994, [1995] 2 A.C. 145, at 184 (*Henderson v. Merrett Syndicates Ltd.*), my italics. See also Cartwright 2007, p. 49: ‘the existence of a contract between the same parties may be relevant to whether a tort is in fact, committed’.

⁴⁴ Cf. O'Donovan 2005, pp. 197-198.

⁴⁵ For example, the employer may bring an action in tort against his employee, concerning a shortcoming on the side of the employee. However, the special liability rule of Art. 7:661 BW remains effective, leading to a higher threshold for liability on the side of the employee: HR 2 March 2007, NJ 2007, 240 (*Holding Nuts-bedrijf Westland/S c.s.*). And Art. 7:23 BW is applicable on any action or plea from the buyer, which is in fact grounded on non-conformity of the goods, also when it is based on tort law: HR 21 April 2006, NJ 2006, 272 (*Inno/Sluis*); HR 29 June 2007, NJ 2008, 606 (*Pouw/Visser*).

⁴⁶ Castermans & Krans 2009, p. 162: ‘Zonder uiteenlopende rechtsgevolgen is er geen samenloopprobleem.’

⁴⁷ HR 2 March 2007, NJ 2007, 240 (*Holding Nuts-bedrijf Westland/S c.s.*), par. 3.4.4. Here, it concerned the Articles 2:9 BW (director, not employee) and 7:661 BW (employees).

⁴⁸ HR 21 April 2006, NJ 2006, 272 (*Inno/Sluis*); HR 29 June 2007, NJ 2008, 606 (*Pouw/Visser*).

2.3. Criteria and criticism

Both doctrines are more nuanced than they seem at first sight. The *non-cumul* principle does leave room for the non-contractual context and even for (some) tort law, while a *free concurrence of actions* does not bring about the irrelevance of the contractual relationship between the parties.⁴⁹ The latter should even be seen ‘as a move towards attenuating the difference between contract and tort’.⁵⁰

Ultimately, the question whether a person or company is liable, either in contract or in tort, is not answered by such a doctrine, but is a matter of *interpretation*. This brings to mind critical remarks by Schoordijk:

‘Questions of concurrence do actually not exist. They are interpretative questions with a costly label. The word “concurrence” should be scrapped from the legal jargon.’⁵¹

Bakels has recently voiced criticism as well, stating that the doctrine does not force courts to reach a certain solution.⁵² Furthermore, he argued that the principle of *free concurrence* is only an expression of the existing principle of party autonomy.⁵³ Essentially, such criticism questions the usability of the doctrine as a *heuristic* method – as a means to ensure an impartial decision on every single case. It is questionable whether it is possible to find such methods at all.⁵⁴ What is possible, is to improve the *legitimation* of judgments about normative conflicts.⁵⁵ Better reasoning would lead to transparency and verifiability, but would also improve the rationality and quality of the judgment itself.⁵⁶

It seems that this is the purpose of the Dutch doctrine of concurrence: not to direct the outcome of each case,⁵⁷ but to guide the approach to conflicts of rules, and to substantiate the resulting judgment. Its approach is not based on maxims such as “lex

⁴⁹ With respect to Dutch private law, see Castermans 2012b, par. 4.

⁵⁰ Deakin *et al.* 2013, p. 18.

⁵¹ Schoordijk 1979, p. 58: ‘Vragen van samenloop bestaan eigenlijk niet. Het zijn interpretatieve vragen onder een duur etiket. Eigenlijk zou het woord ‘samenloop’ uit ons juridisch jargon dienen te verdwijnen.’

⁵² Bakels 2009, par. 14.

⁵³ Bakels 2009, par. 13.1. He refers to *free concurrence* with the term *alternativity*, and presented an alternative “step-by-step” plan as well, see Bakels 2009, par. 17-18.

⁵⁴ Cf. Scholten 1974, p. 76 and 130; Dworkin 1986, p. 256. Both authors emphasise that, especially in hard cases, the outcome will involve normative considerations.

⁵⁵ Cf. generally on the distinction between heuristics and legitimation: Nieuwenhuis 1976.

⁵⁶ Cf. Alexy 2009, pp. 394 *et seq.*; Gerards 2006, pp. 2-3; Nieuwenhuis 1976, p. 494 and 501.

⁵⁷ Snijders and Brunner already put the usability of the doctrine for this purpose in perspective, see Snijders 1973, p. 454; Brunner 1984, p.16.

specialis derogat legi generali”,⁵⁸ but on the substantive importance of the rules concerned.⁵⁹ Its criteria are explained by the *Hoge Raad* in the following excerpt:

‘When there is concurrence of multiple but distinctly applicable legal grounds on which the claimant may base his action, the basic principle is that these are applicable cumulatively, provided that the claimant may choose as he sees fit, whenever the legal grounds lead to different legal consequences which cannot be awarded at the same time. This basic principle is set aside when the law so prescribes or inevitably involves.’⁶⁰

Taking into account criticism on parts of this formulation,⁶¹ a correct outline of this *blueprint* seems to be the following. When multiple rules could be applied on the same legal facts, the claimant may choose which rule(s) he wishes to invoke (*free concurrence*). The court must then ascertain whether the rules, as chosen by the claimant, may be applied *cumulatively*. If that would go against logic, or against the wording or intention of the law, the claimant *must* choose. The claimant does not have a choice if the law prescribes that one rule is to be applied *exclusively*.⁶² That is a tall order: *exclusive* application is awarded only ‘when the law so prescribes or inevitably involves’.

⁵⁸ Even if clearly there is such a *genus-species* relationship between two rules, for example between Art. 3:45 BW (*Pauliana*) and Art. 6:162 BW (tortious liability), the general rule is not excluded because of the special character of the first. See Van Koppen 1998, pp. 21-22; and about the application of the *lex specialis* principle within Dutch private law generally Brunner 1984, pp. 14-15: ‘Veel ernstiger bezwaar nog lijkt me, dat het beginsel misleidend is, doordat het schijnt uit te drukken, dat een regeling op een deel van het gebied dat door een algemene regeling wordt bestreken, als bijzondere regeling in beginsel exclusief van toepassing is. En dat is een gevolgtrekking die onjuist is.’

⁵⁹ According to the legal philosopher Alexy, any conflict of rules may be solved either by making use of those maxims (“lex posterior derogat legi priori” or “lex specialis derogat legi generali”), or by considering the substantive importance of the conflicting rules, see Alexy 2009, p. 49.

⁶⁰ HR 15 June 2007, *NJ* 2007, 621, par. 4.2. (*Fernhout/Essent*): ‘Uitgangspunt bij samenloop van meer op zichzelf toepasselijke rechtsgronden voor een door eiser gesteld vorderingsrecht is dat deze cumulatief van toepassing zijn, met dien verstande dat, indien die rechtsgronden tot verschillende rechtsgevolgen leiden welke niet tegelijkertijd kunnen intreden, eiser daaruit naar eigen inzicht een keuze mag maken. Dit uitgangspunt lijdt slechts uitzondering indien de wet dat voorschrijft of onvermijdelijk meebrengt.’ Cf. Snijders 1973, p. 454.

⁶¹ The principle of party autonomy seems wrongly exposed. It seems as if parties may only choose if the legal consequences ‘cannot be awarded at the same time’. And if this is the case, it seems as if the claimant may ‘choose as he sees fit’. Both give false impressions, as Castermans and Krans have argued (see Castermans & Krans 2009, p. 158).

⁶² See for a similar scheme, albeit without explicitly mentioning *cumulation*: Castermans & Krans 2009, p. 159.

2.4. Concurrence in the multilevel legal order

Meanwhile, the legal landscape has changed considerably. Different layers of public law and European law are influencing private law.⁶³ Coordination between those layers has become increasingly important.⁶⁴ This has encouraged various authors to compare the different areas of law, in order to find common values, resemblances and familiar instruments.⁶⁵ The interaction between legal systems may not be a new phenomenon after all, and approved instruments of interpretation may very well be used.⁶⁶

So far, the *blueprint* has been used to solve conflicts within one constitutional level.⁶⁷ May its criteria be used to solve conflicts of rules belonging to *different* constitutional levels? According to Bakels, Vice President of the *Hoge Raad*, such an exercise will be unsuccessful:

‘If one would attempt to understand these problems under the notion of concurrence, it would become endless.’⁶⁸

Indeed, an attempt to use the *blueprint* to solve these conflicts is not just a matter of interpretation, but will involve constitutional principles, such as hierarchy and supremacy,⁶⁹ and will be complicated by the fact that ‘every normative system tends to favour its own rules over norms coming from an external normative order’.⁷⁰ Moreover,

⁶³ Several textbooks have been published about the interaction between European law and private law: Asser/Hartkamp 3-I* 2011, Hartkamp, Sieburgh & Keus 2007. In Belgium, the new *Algemeen Deel* is dedicated to ‘Private and public law in a multilayered framework of regulation, judicial interpretation and rule application’: Van Gerven & Lierman 2010. Cf. Castermans 2012a, about the influences of European law on the freedom of contract.

⁶⁴ Snijders 2012, p. 954. Snijders is a former Justice of the Dutch Supreme Court, and the former government commissioner in charge of the introduction of the new Dutch Civil Code in 1992.

⁶⁵ E.g. Scheltema & Scheltema 2003; Van Gerven & Lierman 2010; Smith 2011, referring to Vranken 1995, p. 75. Nieuwenhuis also compares concepts within private law with public law and international law: Nieuwenhuis 2013.

⁶⁶ Cf. Smith 2011, referring to Vranken 1995, p. 75.

⁶⁷ Cf. Hartkamp 2011, p. 157, and Chapter 2 of this Thesis. The application is identifiable in case law of the Court of Justice of the European Union (CJEU) as well, to the extent that the Court interprets concurring provisions of EU law. See Hartkamp 2011, p. 159 *et seq.* Hartkamp refers for example to the concurrence between free movement rights and competition law (Case C-415/93, *UEFA/Bosman*, [1995] ECR I-4921) or between different applicable directives (Case C-423/97, *Travel Vac SL/Sanchis*, [1999] ECR I-2195). See also Veldhoen 2013, par. 7.

⁶⁸ Cf. Bakels 2009, par. 3.1.: ‘Zou men ook deze problematiek onder het begrip samenloop willen vatten, dan zou het oeverloos worden.’

⁶⁹ Cf. Hartkamp 2011, p. 158.

⁷⁰ Cf. Ličková 2008, p. 469, on normative conflicts between EU law and international law: ‘It is relatively easy to identify solutions foreseen for normative conflicts within each of [the legal orders] separately. However, every normative system tends to favour its own legal rules over norms coming from an external normative order. Consequently, the resolution of the conflicts often favours the legal system of the forum.’

it is possible that different courts exert ultimate authority over each of the conflicting rules, which may lead to differences in application.

But let us not jump to conclusions. For one, this would ignore that also in constitutional law, an increasing number of authors argues that the outcome of a conflict of rules should mainly be directed by the *substance* of the norms involved, and not just by arguments of *hierarchy*. This may best be illustrated by referring to De Búrca, who distinguishes ‘two prevalent and broadly contrasting intellectual approaches (...) to the multiplication, overlap and conflict of normative orders in the global realm’.⁷¹ On the one end, there is the *strong constitutionalist approach*, advocating ‘some kind of systemic unity’ and proposing ‘an agreed hierarchy (...) to resolve conflicts of authority between levels and sites’.⁷² On the other end, there is the *strong pluralist approach*, emphasizing the plurality of diverse national and international normative systems, and favouring diversity and difference above either ‘sovereigntist or universal-harmonisation schemes’.⁷³

Within this debate, De Búrca proposes a *soft* constitutionalist approach, which ‘does not insist on a clear hierarchy of rules but rather on commonly negotiated and shared principles for addressing conflict’.⁷⁴ This brings to mind the following statement by Van Gerven and Lierman:

‘To determine the order, or rather the decisive character, of different legal orders and norms, hierarchy is but one factor and not even the most important one. It is more important to balance the fundamental values and interests represented by those norms, and the way they are being applied.’⁷⁵

The European system will typically require the Member States to give priority to their European commitment before any international one. Conversely, a number of international agreements oblige the same states to disregard any conflicting duties, including EU obligations.’

⁷¹ De Búrca 2010, p. 31. *See generally* on conflicts of rules between different legal orders: Barents 2009, Von Bogdandy 2008, Cuyvers 2011, Walker 2008.

⁷² De Búrca 2010, pp. 36-37.

⁷³ *Ibid.*, pp. 32-33.

⁷⁴ *Ibid.*, p. 39.

⁷⁵ Cf. Van Gerven & Lierman 2010, p. 170: ‘Om de rangorde, of beter het doorslaggevend karakter, van verschillende rechtsordes en rechtsnormen te bepalen is de hiërarchische rangorde maar één factor en niet eens de belangrijkste. Belangrijker is de afweging van fundamentele waarden en belangen waarvoor normen staan, en de manier waarop die waarden en normen uitwerking krijgen en worden toegepast.’ It has to be noted that Van Gerven and Lierman consider themselves as belonging to the, slightly different, school of *constitutional pluralism*. Within the debate on the (future) of (European) private law, others have used constitutional pluralism as a tool to better understand the interaction between different layers of private law as well. *See e.g.* Mak 2012, Sieburgh 2009.

On an abstract level, it seems as if the attempt to apply a *blueprint* of interpretation within the multilevel legal order is not ill-fated from the outset. But will it be helpful in practice?

In order to answer that question, two case studies are presented. First, attention is paid to the Common European Sales Law, a proposed optional code governing the rights and obligations of the parties under a sales contract. How will this sales law interact with national private law, and may the *blueprint* be used?⁷⁶

Then, another area of private law is studied: the rights and obligations of airlines and their passengers under a carriage contract. The concurrence between different applicable regulatory frameworks, both European and international, and especially the solutions by the Court of Justice of the European Union (CJEU), have caused controversy over recent years. Did the Court follow the *blueprint*?⁷⁷

⁷⁶ Chapter 3 of this Thesis.

⁷⁷ Chapter 4 of this Thesis.

3. Coordination between European and national private law

3.1. Introduction

New challenges lie ahead. According to the European Commission, private parties should be able to choose a Common European Sales Law (CESL) to govern their legal relationship. This makes the interaction between contractual and non-contractual law relevant once more. Should the concurrence between these different areas of law – some European, some national – be guided by the *blueprint*?

3.2. Background, objectives and scope of the CESL

During the past three decades, the EU legislator has regulated different areas of private law.⁷⁸ It has the competence to do so in the interest of the establishment and functioning of the internal market.⁷⁹ Initially, this objective was pursued by enforcing the protection of consumers, for example through directives on unfair terms, misleading advertising and consumer sales.⁸⁰ These interventions should lead to more “confident consumers”, who were discouraged to shop abroad by the differences between national laws.⁸¹

Because these directives all concerned *minimum* harmonisation, allowing Member States to maintain a higher standard of consumer protection, its impact ‘has not been the creation of a single, consistent and coherent body of consumer law common to all the EU Member States’.⁸² In many cases, these differences are even maintained and enforced by EU private international law, which entitles consumers to rely upon the law

⁷⁸ See generally Hondius 2011.

⁷⁹ Art. 114 (1) TFEU gives the EU the competence to ‘adopt the measures for the approximation of the provisions laid down by law, regulation or administrative action in Member States which have as their object the establishment and functioning of the internal market’. Although there is no general power to regulate the internal market under Art. 114 (1) TFEU (see Case C-376/98 Germany v European Parliament and Council [2000] ECR I-8419), this competence is relatively easily established, provided that there is some contribution to the internal market (see Wyatt 2009, p. 136). According to Craig & De Búrca, the CJEU ‘is now more willing to find that regulatory competence exists’ (see Craig & De Búrca 2011, p. 92).

⁸⁰ Council Directive 93/13/EEC of 5 Apr. 1993 on unfair terms in consumer contracts [1993] OJ L 95, p. 29; Council Directive 84/450/EEC of 10 Sep. 1984 relating to the approximation of the laws, regulation and administrative provisions of the Member States concerning misleading advertising [1984] OJ L 250, p. 17; Directive 99/44/EC of the European Parliament and of the Council of 25 May 1999 on certain aspects of the sale of consumer goods and associated guarantees [1999] OJ L 171, p. 12.

⁸¹ Critical about the “confident consumer” argument: Wilhelmsson 2004.

⁸² Twigg-Flesner 2011, p. 241. Cf. Collins 2013, p. 912.

of their home state, even when they have contracted under foreign law.⁸³

As a consequence, businesses were still confronted with differences between national laws. Therefore, the EU decided to strive for *maximum* harmonisation in its directives on unfair commercial practices and consumer rights.⁸⁴ Late 2011, the European Commission also launched a Proposal for a Regulation on a Common European Sales Law (CESL), which will be studied in this Chapter.

What is the aim of the instrument? According to the European Commission, parties should be able to choose for ‘a single uniform set of contract laws’ to govern ‘the full life cycle of a contract’.⁸⁵ This is expressed in the standard information notice, to be provided by the seller to the buyer before concluding the contract:

‘The contract you are about to conclude will be governed by the Common European Sales Law, which is an alternative system of national contract law available to consumers in cross border situations. These common rules are identical throughout the European Union, and have been designed to provide consumers with a high level of protection.’⁸⁶

The purpose is to create a *self-standing* regime of sales law. However, Recital 28 of the Regulation stresses that the CESL should not govern matters ‘outside the remits of contract law’ and stipulates that ‘[t]his Regulation should be without prejudice to the Union or national law in relation to any such matters’.⁸⁷ Recital 27 lists some examples:

‘These issues include legal personality, the invalidity of a contract arising from lack of capacity, illegality or immorality, the determination of the language of the contract, matters of non-discrimination, representation, plurality of debtors and creditors, change

⁸³ Cf. Art. 6 of the Regulation (EC) 593/2008 of the European Parliament and the Council of 17 Jun. 2008 on the law applicable to contractual obligations (Rome I Regulation) [2008] OJ L 177, p. 6.

⁸⁴ Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market [2005] OJ L 149, p. 22; Directive 2011/83/EU of the European Parliament and of the Council of 25 Oct. 2011 on consumer rights [2011] OJ L 304, p. 64. Cf. Collins 2013, p. 912.

⁸⁵ European Commission, Proposal for a Regulation of the European Parliament and of the Council on a Common European Sales Law, Brussels 11.10.2011, COM (2011) 635, p. 16, par. 6.

⁸⁶ Annex II (Standard Information Notice), COM (2011), 635, p. 114.

⁸⁷ Some areas are also mentioned in Recital 28: ‘For example, information duties which are imposed for the protection of health and safety or environmental reasons should remain outside the scope of the Common European Sales Law. This Regulation should further be without prejudice to the information requirements of Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market.’

of parties including assignment, set-off and merger, property law including the transfer of ownership, intellectual property law and the law of torts.’⁸⁸

Meanwhile, the drafters of the European Commission clearly intended to include consequential losses within the scope of the CESL as well.⁸⁹ An aggrieved party may be entitled to a sum of money ‘as compensation for loss, injury or damage’,⁹⁰ including ‘economic loss and non-economic loss in the form of pain and suffering’⁹¹ and ‘future loss which the debtor could expect to occur’.⁹² This is a core area in which contractual and tortious liability overlap.⁹³ ‘Classic’ problems of concurrence are to be expected, as the next paragraph will illustrate.

3.3. Differences in prescription and scope of liability

Suppose two parties have chosen the CESL to govern their contractual relationship.⁹⁴ When the delivered goods turn out to be defective, the buyer may invoke a patchwork of remedies, grounded both in contract law and in non-contractual law.

First of all, the CESL gives the buyer the possibility to avoid the contract because of mistake or fraud. In order for the avoidance to be effective, the seller has to be informed by the buyer in time: within *six months* in case of mistake, and within *one year* in case of fraud, threats and unfair exploitation.⁹⁵ These periods commence ‘after the avoiding party becomes aware of the relevant circumstances or becomes capable of acting freely’ and they are applicable both on a consumer sales contract (B2C) and a

⁸⁸ My italics.

⁸⁹ Some authors are very critical of the proposed definitions: ‘In placing loss of an economic and non-economic nature, injury, and damage on the same level, the proposed regulation confuses protected interests with heads of damage. (...) It is difficult to escape the conclusion that these provisions need thorough re-drafting.’ See Eidenmüller *et al.* 2012, p. 340. Interestingly, the international counterpart of the CESL, the UN Convention on Contracts for the International Sale of Goods (CISG), *excludes* liability for death or personal injury from its scope. See Art. 5 CISG.

⁹⁰ Art. 2 (g) RegCESL.

⁹¹ Art. 2 (c) RegCESL.

⁹² Art. 159 (2) CESL.

⁹³ Von Bar & Drobniig 2004, pp. 190-191: ‘A great number of the cases in which contractual and tortious liability compete, are made up of injuries to body or health, as well as breaches of ownership (in particular in the form of property damage), which the debtor causes to the obligee.’

⁹⁴ Their relationship will then be governed by 186 provisions, published as an Annex to the proposed Regulation, see European Commission, Proposal for a Regulation of the European Parliament and of the Council on a Common European Sales Law, Brussels 11.10.2011, COM (2011) 635, pp. 33-110.

⁹⁵ Art. 52 (2)(a-b) CESL.

business sales contract (B2B).⁹⁶

If a buyer is confronted with a defective product (*nonconformity*), the CESL gives him the right to require performance,⁹⁷ to withhold his own performance,⁹⁸ to terminate the contract⁹⁹ and to claim damages for loss caused by the non-performance.¹⁰⁰ These actions are governed by a *short* prescription period of two years and a *long* period of ten years, or, in the case of personal injuries, thirty years.¹⁰¹ Article 180 makes clear when these periods commence:

1. The short period of prescription begins to run from the time when the creditor has become, or could be expected to have become, aware of the facts as a result of which the right can be exercised.
2. The long period of prescription begins to run from the time when the debtor has to perform or, in the case of a right to damages, from the time of the act which gives rise to the right.

Unlike the consumer, the professional buyer is obliged to examine the goods and complain about their nonconformity.¹⁰² If he does not complain 'within a reasonable time',¹⁰³ and in any case two years after the delivery,¹⁰⁴ the professional buyer will *lose* his rights relating to the nonconformity.¹⁰⁵ This will also be the case 'if notice of termination is not given within a reasonable time'.¹⁰⁶

⁹⁶ Art. 52 (2) CESL.

⁹⁷ Art. 110 CESL.

⁹⁸ Art. 113 CESL.

⁹⁹ Art. 114 CESL.

¹⁰⁰ Art. 159 CESL. Note: the professional buyer may only terminate the contract 'if the seller's non-performance under the contract is fundamental', while the consumer may always terminate the contract, unless the non-performance is 'insignificant'. See Art. 114 CESL.

¹⁰¹ See Art. 179 CESL. The CESL does not clearly indicate whether remedies for non-performance are subject to prescription (see Thomas et al. 2012, p. 321), as is the case under Dutch private law (see Art. 3:311 BW). Therefore, co-rapporteurs of the Legal Affairs Committee (JURI) of the European Parliament (EP) propose to change Article 179 CESL, see Amendment 192, K-H. Lehne & L. Berlinguer, Draft Report on the proposal for a regulation of the European Parliament and of the Council on a Common European Sales Law (COM(2011) 635, Brussels, 6.3.2013).

¹⁰² Under Art. 121 (1) CESL, the professional buyer is obliged to examine the goods, or have them examined, 'within as short a period as is reasonable not exceeding 14 days'.

¹⁰³ Art. 122 (1) CESL.

¹⁰⁴ Art. 122 (2) CESL.

¹⁰⁵ Art. 122 (2) CESL. See the comments by Zoll in Schulze 2012, p. 531.

¹⁰⁶ Art. 119 (1) CESL. This obligation is only relevant to the professional buyer. The consumer must give notice of the termination (Art. 118 CESL), but according to Art. 119 (2)(a) CESL the period of prescription is not applicable to B2C contracts. It is not clear which period is applicable instead. Critical about this omission: Vogenauer 2012, p. 18, who proposes to include a period for consumers as well, to avoid a discussion about the time after which a termination by the consumer would not be accepted anymore,

Both parties and courts will be dazzled by this diversity. The law of statutory limitations already shows 'needless complexity',¹⁰⁷ and the CESL only adds to a trend of fragmentation.¹⁰⁸ To make things more complex, the buyer may be able to invoke non-contractual law against the seller as well. After all, the CESL only harmonises certain areas of contract law, notably sales law. This leads to problems of concurrence, because the applicable prescription periods differ from those under the CESL.

The buyer may first of all bring an action for damages based on product liability law (Art. 6:185 BW).¹⁰⁹ This action, based on an EU Directive, is subject to a prescription period of *three years*.¹¹⁰ Furthermore, he may invoke general tort law (Art. 6:162 BW), or argue a case of misleading advertising (Art. 6:194 BW). These actions are subject to a *short* period of *five years*, which commences on the day after the aggrieved party is aware of the damage and the liable person, and a *long* period of *twenty years*, which commences the day after the events which caused the damage.¹¹¹

To complicate things further, Dutch private law knows the possibility to put aside a prescription period in exceptional circumstances. The following facts gave rise to an important *Hoge Raad* judgment:

Mr Van Hese was employed as a painter with De Schelde from 16 March 1957 until 7 June 1963. During his work, he was exposed to asbestos. In the course of 1996, it was established that Van Hese suffered from mesothelioma, a type of cancer which is caused solely by the inhalation of asbestos. Van Hese brought proceedings against De Schelde, claiming both material and non-material damages. During the same year, Van Hese died at the age of 61.

The employer, De Schelde, claimed that the action for damages was barred because Van Hese was exposed to the asbestos almost forty years earlier. After careful consideration

because that would not be 'in accordance with good faith and fair dealing', as laid down in Art. 2 CESL. *See also* The Law Commission & Scottish Law Commission 2011, par. 4.136.

¹⁰⁷ The Law Commission 2001, p. 6.

¹⁰⁸ Critical about this trend: Smeehuijzen 2008, Ch. 14. With regard to the CESL, one is surprised by the fact that the European Commission proposes a short prescription period of *two years*, unlike the period of *three years* in the DCFR (Art. III-7:201), the UNIDROIT Principles (Art. 10.2-1) and the PECL (Art. 14:201 PECL).

¹⁰⁹ Although product liability law concerns the *producer* of a defective product, and not the seller, a company may be both producer and seller at the same time, leading to the concurrent applicability of both the CESL and product liability law.

¹¹⁰ Cf. Art. 6:191 (1) BW and Council Directive 85/374/EEC of 25 July 1985 on the approximation of the laws, regulations and administrative provisions of the Member States concerning liability for defective products.

¹¹¹ Cf. Art. 3:310 (1) BW and HR 31 October 2003, *NJ* 2006, 112, par. 3.4. (*Saelman*).

of Dutch and foreign literature and case law, the *Hoge Raad* decided that, in exceptional cases, the long period of prescription should not be applied strictly. Based on certain viewpoints, including the nature of the losses, the availability of insurance coverage and the behaviour of both parties, a court must assess whether a case is indeed that exceptional.¹¹²

In 2005, the *Hoge Raad* extended its reasoning to asbestos cases against producers.¹¹³ The chances for an asbestos producer to defend itself by invoking the long prescription period have thus been reduced significantly.¹¹⁴ This may be a relevant development for the liability of sellers under the CESL, if they have produced *and* sold products which pose serious risks to the bodily integrity of its buyers.¹¹⁵ If Dutch buyers become aware of their injury after the period of thirty years under the CESL,¹¹⁶ they may try to escape into Dutch tort law, in order to circumvent a strict application of the long period of prescription under the CESL.

Another problem of concurrence may arise as a result of the so-called *DES* judgment.¹¹⁷ The following events led to the dispute:

In 1974, the use of diethylstilboestrol (“DES”), which would prevent miscarriages and premature childbirths, was prohibited because the drug could cause particular forms of cancer to the daughters of those pregnant women at a later stage in their lives. Several victims initiated proceedings against several producers of DES, which had been active on the Dutch market at the time of the pregnancy of their mothers.

¹¹² HR 28 April 2000, *NJ* 2000, 430 (*Erven Van Hese/De Schelde*), par. 3.3.3. Cf. HR 20 October 2000, *NJ* 2001, 268 (*Soolsma/Hertel*); and HR 26 November 2004, *NJ* 2006, 228 (*De Jong/Optimodal*). Earlier, the Supreme Court denied the possibility to derogate from this long period of prescription in HR 3 November 1995, *NJ* 1998, 380, par. 3.4.

¹¹³ HR 25 november 2005, *NJ* 2009, 103 (*Erven Horsting/Eternit*). See Vloemans & Van den Heuvel 2013, par. 4. By now, different courts have disregarded the long period of prescription with regard to claims against producers of asbestos. See Court of Appeal 's-Hertogenbosch 25 March 2008, *NJ* 2009, 104; Court of Appeal 's-Gravenhage 3 April 2012, *JA* 2012, 118.

¹¹⁴ See Vloemans & Van den Heuvel 2013, par. 4. It has to be noted that, since 1 December 2007, an arrangement has been adopted by the Dutch State to compensate victims of mesothelioma, who not have a cause of action against an employer, because they did not incur the disease in paid employment (TNS arrangement). However, this compensation does not exonerate the producers in any way. The State may still seek compensation for the damage suffered by bringing proceedings against a producer on behalf of the victims. See Meijer & Lindenbergh 2008, par. 2.

¹¹⁵ Cf. Van Boom & Van Doorn 2006, p. 270.

¹¹⁶ This is the long period of prescription applicable on injuries, see Art. 180 (2) CESL. If the buyers become aware after *twenty years* (the long period of prescription under Dutch private law, see Art. 3:310 (1) BW), the CESL will be more favourable, offering another ten years time.

¹¹⁷ HR 9 October 1992, *NJ* 1994, 535 (“*DES daughters*”).

The *Hoge Raad* faced the difficult question whether the claimants could hold each of the producers jointly and severally liable for their *total amount of damages*. The Dutch Civil Code provides for such a rule (Art. 6:99 BW), but its application generally requires that it is clear which events have caused the damage, and that it is established that the defendant is responsible for one of those causes. Because this could not be established by the “DES daughters”, both the Court of First Instance and the Court of Appeal rejected their claims.

However, the *Hoge Raad* decided that no causal link between the sale of a product and the concrete losses of the victim was necessary. To protect the victim from having to bear his own risks because of problems of evidence,¹¹⁸ the *Hoge Raad* held that an individual producer could be held liable for the total amount of damages.¹¹⁹ An allocation based on market shares was explicitly rejected.¹²⁰ Consequently, not the victim, but the producer has to recover the costs from the other responsible producers. If Dutch buyers will be exposed to these kinds of health risks, they may try to escape into Dutch tort law, in order to circumvent a strict application of causation.

3.4. Applying the *blueprint*

How to solve these problems of concurrence? May we use the existing *blueprint*?

Interestingly, Recital 27 refers to the doctrine:

‘Furthermore, the issue of *whether concurrent contractual and non-contractual liability claims can be pursued together* falls outside the scope of the Common European Sales Law.’¹²¹

Of course, this statement could be conceived as referring to a narrow version of the doctrine, occupied not with interpretation, but with the preliminary question whether

¹¹⁸ HR 9 October 1992, *NJ* 1994, 535, par. 3.7.1. (“*DES daughters*”).

¹¹⁹ To that effect the victim is obliged to state and prove the following circumstances: (I) that the company has sold the relevant products in the relevant period and is liable for this wrongful act, (II) that this goes for one or several other producers as well, and (III) that the aggrieved party suffered damage related to damage caused by DES, but that it is impossible to retrieve which products have caused that damage. See HR 9 October 1992, *NJ* 1994, 535, par. 3.7.5. (“*DES daughters*”).

¹²⁰ This allocation was not accepted by the *Hoge Raad*, as it would mean that the victims would bear the risk to trace and sue all responsible companies, some of which may have gone bankrupt in the meantime or may not be traceable at all. See HR 9 October 1992, *NJ* 1994, 535, par. 3.7.2. and 3.8. (“*DES daughters*”).

¹²¹ My italics.

the claimant may bring any other available action (*free concurrence*), or whether he is confined to using the CESL (*non-cumul*). As we have seen, such a narrow reading of the doctrine is of little practical use, given the substantive interaction between contractual and non-contractual law.¹²²

Instead, I would argue that a broad version of the doctrine, including its standards of interpretation (the *blueprint*), could be helpful to coordinate between the different areas of law. Starting point will be a *free concurrence of actions*. A court must then examine whether the rules, as chosen by the claimant, may be applied *cumulatively*. If that would go against logic or the wording or intention of the law, the claimant *must* choose. The claimant may not “escape” a certain rule if the law prescribes its *exclusive* application.

With regard to the concurrence between remedies for nonconformity and those relating to mistake and fraud, such an enquiry will lead to the following result. First of all, the CESL confirms the freedom of the claimant to choose between these remedies:

‘A party who is entitled to a remedy under this Chapter [Chapter 5 on ‘Defects in consent’, RdG] in circumstances which afford that party a remedy for non-performance may pursue either of those remedies.’¹²³

The CESL does not prescribe that the shorter prescription period, applicable to the avoidance of the contract, is intended to be *exclusive*. Therefore, it is to be expected that a claimant may pursue a remedy relating to non-performance, also after expiry of his remedies relating to mistake and fraud.

What if the claimant tries to escape into Dutch tort law to avoid the prescription periods under the CESL? This is a well-known phenomenon within Dutch private law as well.¹²⁴ In different disputes before the *Hoge Raad*, the question was whether Article 7:23 BW,

¹²² See Chapter 2 of this Thesis, especially par. 2.4.-2.5.

¹²³ Art. 57 CESL. See Dannemann & Vogenauer 2013, p. 418.

¹²⁴ When delivered goods turn out to be defective (Art. 7:17 BW), Dutch private law also provides for a wide collection of remedies, grounded both in contract law and non-contractual law: delivery, repairment or replacement (Art. 7:22 BW), compensation for the damage under tort law (Art. 6:162 BW) or because of the non-performance (Art. 6:74 BW), avoidance because of fraud or mistake (Art. 3:44 and 6:228 BW) and compensation for damage resulting from misleading and comparative advertising (Art. 6:194 BW). Apart from that, the claimant may sue the producer or supplier of the goods (Art. 6:185 BW).

containing shorter prescription periods than those applicable on other actions,¹²⁵ should be applied also when the claimant brings an action in tort. After an enquiry into parliamentary history, the *Hoge Raad* decided that the legislator intended to determine a *uniform* period of prescription for

‘every cause of action and every defence by the buyer *which in fact relates to the nonconformity* of the delivered goods to the sales contract, also when the buyer grounds his claim on tort law’.¹²⁶

This judgment fits in with the general tendency as described in Paragraph 2.3. of this Thesis: the doctrine allows the application of tort law, but this should not frustrate the purpose of a contract law norm.¹²⁷ Therefore, a Dutch court will generally not allow the claimant to “escape” into tort law as a way of avoiding the prescription periods under the CESL.¹²⁸

Should that also be the case when the defective products, sold under a CESL contract, cause severe damage to the bodily integrity of the buyer? If the claimant brings an action in tort for such losses, should a Dutch court be able to apply the *Van Hese/De Schelde* and *DES* standards? Because consequential losses are included within the scope of the CESL, and because ‘only the [CESL] shall govern the matters addressed in its rules’,¹²⁹ the boundaries of the CESL are to be interpreted by the CJEU, guided by general principles of EU law. As Wendehorst wrote:

‘At the end of the day, it should be the ideas of *effet-utile* on the one hand and of *subsidiarity and proportionality* on the other that count, ie we have to ask whether the uniformity of results which the CESL (...) seeks to achieve throughout the EU would

¹²⁵ Following Art. 7:23 (1) BW, the right to bring an action related to a nonconformity is lost when the professional buyer does not complain within *reasonable time*, or when the consumer does not complain within *two months*. The complaint launches a period of prescription of *two years*, based on Art. 7:23 (2) BW. However, the cause of action grounded on fraud may be brought during a period of *three years* after discovery of the fraud, see Art. 3:52 (1)(c) and 3:44 (3) BW. Furthermore, actions in tort are subject to separate periods of prescription: a *short* period of *five years*, which commences on the day after the aggrieved party is aware of the damage and the liable person, and a *long* period of *twenty years*, which commences the day after the events which caused the damage, see Art. 3:310 (1) BW.

¹²⁶ HR 21 April 2006, NJ 2006, 272, par. 4.3. (*Inno Holding/Gemeente Sluis*), my italics. Affirmed in HR 23 November 2007, NJ 2008, 552, par. 4.8.2. (*Ploum/Smeets*). The *Hoge Raad* also decided that actions based on mistake were subject to the short prescription period, see HR 29 June 2007, RvdW 2007, 636, par. 3.8. (*Pouw/Visser*).

¹²⁷ See par. 2.3. of this Thesis.

¹²⁸ Cf. Art. 11 RegCESL.

¹²⁹ See Art. 11 RegCESL.

require the CESL (...) rules to be exclusive in a particular area or whether parallel regimes of an entirely different nature, in particular tort and property, must be tolerated.’¹³⁰

With regard to the derogation from a prescription period (*Van Hese/De Schelde*), the CJEU may reach a similar outcome, based on existing case law.¹³¹ In 1996, the European Court of Human Rights (ECtHR) decided in *Stubbings/UK* that limitations to the right to initiate court proceedings (Art. 6 ECHR) may not restrict that right ‘in such a way or to such an extent that the very essence of the right is impaired’.¹³² And although the CJEU admitted that limitation periods are a matter for national procedural law, it did note that in some competition cases ‘it would be impossible for any individual who has suffered harm after the expiry of the limitation period to bring an action’, because the limitation period expires ‘even before the infringement is brought to an end’.¹³³ These judgments give reason to believe that the concurrence of the CESL and national private law will not lead to problems here.¹³⁴

Contrary to the *Van Hese/De Schelde* solution, the *DES* judgment is not being supported at European level.¹³⁵ And contrary to the law of statutory limitations, the law of causality is not mentioned in the CESL. This is not surprising, as the drafters did not intend to provide for answers to every possible problem. Rather, they tried to come up with a comprehensible code on sales law, without seeking too much conflict with other areas of private law, notably tort law. Efforts to harmonise private law have so far concentrated on contract and consumer law, not on tort law.¹³⁶ The law of torts

¹³⁰ See the comments by Wendehorst in the following Commentary on the CESL: Schulze 2012, p. 70, my italics. Cf. Howarth 2011, p. 849, according to whom the question surrounding harmonisation in this area of law will always be ‘whether the degree of anomaly which results from cases crossing the contract-tort divide is sufficient to justify what otherwise would be a violation of the principle of subsidiarity.’ See generally on principles of EU law: Tridimas 2007.

¹³¹ The solution is not, however, supported in Germany and the United Kingdom, see Smeehuijzen 2008, pp. 337 *et seq.*

¹³² European Court of Human Rights 22 October 1996, [1996] ECHR Reports 1996-IV, p. 1487, par. 50 (*Stubbings v. United Kingdom*).

¹³³ Joined Cases C-295/04 to C-298/04, *Vincenzo Manfredi v. Lloyd Adriatico Assicurazioni SpA*, [2006] ECR I-6619, par. 79.

¹³⁴ Cf. Snijders 2009, par. 4, who is critical about the fact that these judgments have not been incorporated in the Principles of European Contract Law and in the Draft Common Frame of Reference.

¹³⁵ Cf. Nieuwenhuis 2010.

¹³⁶ Such efforts have only been pursued at an academic level, for example in Book IV of the Draft Common Frame of Reference. Although the Directive on Product Liability creates an “extra” level of liability, it ‘shall not affect any rights which an injured person may have according to the rules of the law of contractual or non-contractual liability’ (Art. 13), and therefore it does not harmonise the general law of torts. See

concerns a different economic and political reality, making it difficult to demonstrate the necessity of EU legislation.¹³⁷ Only one legislative instrument within the area of private law, also a Regulation,¹³⁸ clearly aims to *replace* the national law of torts with a ground for non-contractual liability at EU level.¹³⁹ But it immediately makes clear that the interpretation of key concepts is left to the applicable system of national private law.¹⁴⁰

Awarding damages for consequential losses is not an exclusive matter for the law of torts. It is a core area in which contractual and tortious liability overlap.¹⁴¹ For Dutch buyers, it is to be hoped that the Court will be sensitive of this overlap. Sometimes, the Court may reach similar solutions as under Dutch private law, by interpretation of the existing *acquis communautaire*. Sometimes, however, this would involve a very inventive interpretation of the CESL rules, which are silent or at least not explicit on some matters, such as causality.

Another option for the EU legislator, and for the CJEU, is to allow national doctrines of concurrence to be used for the coordination of the different areas of law. There is no risk of undermining the CESL because for the bigger part, the *blueprint* tends to ensure that the application of tort law is not frustrating the purpose of a contract law norm. It would only rarely, in exceptional cases, lead to a *real escape* into the Dutch law of torts, when the stakes are high and the basis for exclusive application of the CESL weak. As such, the *blueprint* would provide for a critical, but constructive eye to follow the process of harmonisation of sales law, so as to make sure that existing rights, obligations and defences are not passed by.

Council Directive 85/374/EEC of 25 July 1985 on the approximation of the laws, regulations and administrative provisions of the Member States concerning liability for defective products.

¹³⁷ Cf. Howarth 2011, pp. 848-851.

¹³⁸ Regulation (EC) No 1060/2009 of the European Parliament and of the Council of 16 September 2009 on credit rating agencies, amended by Regulation (EU) No 462/2013 of the European Parliament and of the Council of 21 May 2013 and Regulation (EU) No 513/2011 of the European Parliament and of the Council of 11 May 2011.

¹³⁹ Art. 35 (1) states: 'Where a credit rating agency has committed, intentionally or with gross negligence, any of the infringements listed in Annex III having an impact on a credit rating, an investor or issuer may claim damages from that credit rating agency for damage caused to it due to that infringement.'

¹⁴⁰ See Art. 35 (4): 'Terms such as "damage", "intention", "gross negligence", "reasonably relied", "due care", "impact", "reasonable" and "proportionate" which are referred to in this Article but are not defined, shall be interpreted and applied in accordance with the applicable national law as determined by the relevant rules of private international law.'

¹⁴¹ Von Bar & Drobnig 2004, pp. 190-191: 'A great number of the cases in which contractual and tortious liability compete, are made up of injuries to body or health, as well as breaches of ownership (in particular in the form of property damage), which the debtor causes to the obligee.'

3.5. Conclusion

As we have seen, the concurrence between the CESL and national private law may give rise to many 'classic' problems of concurrence. Because the CESL only governs some aspects of contract law, a claimant may ground his claim on national private law as well. As a result, prescription periods may vary and the scope of liability may be different. In this Chapter, I have argued that such problems of concurrence could very well be coordinated by using the existing *blueprint*. There is no risk of undermining the CESL. For the bigger part, the *blueprint* tends to ensure that the application of tort law is not frustrating the purpose of a contract law norm. It would only rarely lead to a *real escape* into the Dutch law of torts, when the stakes are high and the basis for exclusive application of the CESL weak. As such, the *blueprint* provides for a critical, but constructive eye to follow the process of harmonisation of sales law, so as to make sure that existing rights, obligations and defences are not passed by.

4. Coordination between international and European private law

4.1. Introduction

Now that the relevance of the doctrine of concurrence has been established for the coordination between a future European sales law and national private law, we turn to an entirely different topic: international air law. Problems of concurrence between different applicable regulatory frameworks, both European and international, have caused controversy over recent years. In this Chapter, it will be examined whether the CJEU has followed the *blueprint*, and if not, whether this would have led to a different result.

4.2. Objectives and scope of the Montreal Convention

Current air law is a showcase of multilevel regulation.¹⁴² It all started with the adoption of the Warsaw Convention in 1929. This Convention ‘applies to all international carriage of persons, luggage or goods performed by aircraft for reward’¹⁴³ and may not be excluded or limited in the carriage contract.¹⁴⁴ It obliges the airline to deliver goods and passengers unharmed and in time on their destination.¹⁴⁵ If the airline does not manage to do so, it is liable, unless it proves a case of extraordinary circumstances or negligence on the side of the injured passenger.¹⁴⁶ The Convention is intended to be a *uniform* code:

‘In the cases covered by Article 18 and 19 any action for damages, however founded, can only be brought subject to the conditions and limits set out in this Convention.’¹⁴⁷

As a result, the claimant may not ‘[avoid] the defences and limits of the Convention by not founding his claims on the contract of carriage e.g. by suing in tort’.¹⁴⁸

What is the exact scope of this uniform application? In 1996, the House of Lords

¹⁴² Cf. Haak 2010, p. 499. About the phenomenon of multilevel regulation: Wessel & Wouters 2008.

¹⁴³ Art. 1 (1) Convention for the Unification of Certain Rules Relating to International Carriage by Air, signed at Warsaw on 12 October 1929 (“Warsaw Convention”).

¹⁴⁴ Art. 25 Warsaw Convention.

¹⁴⁵ See Chapter III, Art. 17-19 Warsaw Convention.

¹⁴⁶ Art. 21 Warsaw Convention.

¹⁴⁷ Art. 24 (1) Warsaw Convention.

¹⁴⁸ Drion 1954, p. 71. *Similar*: Goedhuis 1937, p. 267.

issued an important judgment on that question. The following events gave rise to the dispute:

1 August 1990. Flight BA149, operated by British Airways, was scheduled to fly from London to Kuala Lumpur, via Kuwait and Chennai, India. Two hours before landing in Kuwait, Iraqi troops took control of the airport. For months, the passengers were kept as human shields in Kuwait City and Baghdad. Three years later, passengers Abnett and Sidhu brought proceedings against British Airways in Scotland and England, claiming they had suffered psychological damages.

Under Article 17 of the Warsaw Convention, their losses were not recoverable:

‘The carrier is liable for damage sustained in the event of the *death or wounding* of a passenger or any other *bodily injury* suffered by a passenger, if the *accident* which caused the damage so sustained *took place on board* the aircraft or *in the course of any of the operations* of embarking or disembarking.’

The passengers submitted that their case was not governed by the Warsaw Convention, because the damage had not been caused by an accident on board or during disembarking. In other words: they claimed that the facts of the case fell outside the scope of the Convention. However, the *House of Lords* held that the Convention also excludes every other possible route to compensation:

‘The intention seems to be to provide a secure regime, within which the restriction on the carrier's freedom of contract is to operate. Benefits are given to the passenger in return, but only in clearly defined circumstances to which the limits of liability set out by the Convention are to apply. To permit exceptions, whereby a passenger could sue outwith the Convention for losses sustained in the course of international carriage by air, would distort the whole system, even in cases for which the Convention did not create any liability on the part of the carrier.’¹⁴⁹

This line of reasoning has been affirmed by the House of Lords in 2005,¹⁵⁰ and was followed by the US Supreme Court in 1999.¹⁵¹ It is supported by the records of the

¹⁴⁹ Lord Hope of Craighead on behalf of all other Lord Justices (*ratio decidendi*) in House of Lords 12 December 1996, [1997], A.C. 430 H.L. at 444, (*Abnett v. British Airways PLC, Sidhu and Others v. British Airways PLC*), my italics.

¹⁵⁰ See House of Lords 8 December 2005, [2005], 2 C.L.C. 1083 (*Deep Vein Thrombosis v. Air Travel Group Litigation*).

negotiations (*travaux préparatoires*)¹⁵² and has been welcomed by some authors.¹⁵³

But there is criticism as well. The wording of the Warsaw Convention indicates that it only intends to regulate ‘certain rules relating to international carriage by air’.¹⁵⁴ Its *exclusive* application should therefore be limited to ‘the cases covered by Article 18 and 19’¹⁵⁵ and should not be extended to *all liability claims* for *all damages* suffered during international air transport.¹⁵⁶ This opposing view has been followed in France. The *Cour de Cassation* decided that the same damage, suffered by 65 French passengers during the same events in Kuwait, fell outside the scope of the Warsaw Convention and had to be judged under French private law, which directed at compensation.¹⁵⁷

Only six weeks before that judgment, the new Montreal Convention (1999) had been signed by 52 State parties.¹⁵⁸ It is a modernised and consolidated update of the Warsaw Convention, including roughly the same provisions. Article 29 of the Montreal Convention states:

‘In the carriage of passengers, baggage and cargo, any action for damages, *however founded, whether under this Convention or in contract or in tort or otherwise*, can only be brought subject to the conditions and such limits of liability as are set out in this Convention without prejudice to the question as to who are the persons who have the right to bring suit and what are their respective rights.’¹⁵⁹

This provision did not definitively settle the dispute on the scope of the Montreal Convention either. According to some authors, the wording confirms the broad

¹⁵¹ Supreme Court of the United States 12 January 1999, [1999] Nos. 525 U.S., 155 (*El Al Israel Airlines, Ltd. v. Tsui Yuan Tseng*). Opinion delivered by Justice Ginsburg: ‘[W]e hold that the Warsaw Convention precludes a passenger from maintaining an action for personal injury damages under local law when her claim does not satisfy the conditions for liability under the Convention.’

¹⁵² See Koning 2007, p. 306, referring to Horner & Legrez 1975, p. 213. For example, the English delegate Sir Alfred Dennis stated in the minutes of the 1929 Warsaw conference: ‘It’s a very important stipulation which touches upon the very substance of the Convention, because this excludes recourse to common law’.

¹⁵³ E.g. by Tompkins 2010, p. 47 and Wegter 2006.

¹⁵⁴ Convention for the Unification of *Certain Rules Relating to International Carriage by Air*, signed at Warsaw on 12 October 1929.

¹⁵⁵ Art. 24 (1) Warsaw Convention.

¹⁵⁶ See Koning 2007, pp. 308-315; McDonald 2010, pp. 220-222 and Phippard 1997, p. 396: ‘if taken at its most literal, [total exclusivity] may give rise to injustice’.

¹⁵⁷ Cour de Cassation 15 June 1999, No. de pourvoi 97-100268, Bulletin 242, p. 156. See Koning 2007, p. 314, and McDonald 2010, p. 217.

¹⁵⁸ Convention for the Unification of Certain Rules for International Carriage by Air, signed at Montreal, 28 May 1999 (“Montreal Convention”).

¹⁵⁹ My italics.

application as has been awarded to the Warsaw Convention in English and American jurisprudence.¹⁶⁰ Others maintain that the Montreal Convention should only govern those issues clearly within its material scope.¹⁶¹

4.3. Objectives and scope of Regulation 261/2004

The European Union was one of the first to accede to the Montreal Convention. The Council explained its intention in the relevant Council decision:

‘It is beneficial for European Community air carriers to operate under uniform and clear rules regarding their liability for damage and that such rules should be the same as those applicable to carriers from third countries.’¹⁶²

Until 2004, the EU and the Montreal Convention were on speaking terms. By then, the EU had adopted a body of legislation in the area of air transport, but outside the scope of the Convention,¹⁶³ or in line with its provisions.¹⁶⁴ However, the European Commission deemed further regulation necessary. The rights of passengers should be strengthened, since they were in a ‘weak negotiating position’, ‘frequently (...) unaware of the exact [contract] terms’ and ‘heavily [depending] on the efficiency and good will of the airline when things go wrong’.¹⁶⁵ Passengers should not only be able to rely on EU legislation in

¹⁶⁰ See Radošević 2013, p. 97. She refers to Tompkins Jr. & Whalen 2000 and the Minutes of the International Conference on Unification of Certain Rules for International Carriage by Air, held in Montreal, 10–28 May 1999 at 235.

¹⁶¹ See Koning 2007, p. 315.

¹⁶² Council Decision 2001/539/EC of 5 April 2001 on the conclusion by the European Community of the Convention for the Unification of Certain Rules for International Carriage by Air (the Montreal Convention) [OJ 2001 L 194/38].

¹⁶³ Council Regulation (EEC) N°. 295/91 of 4 February 1991 establishing common rules for a denied boarding compensation system in scheduled air transport, O.J. L36, 08.02.1999; Council Regulation (EEC) N°. 2299/89 establishing a code of conduct for computerised reservation systems. O.J. L220, 29.07.1989; as amended by Regulation (EEC) N°. 3089/93 of 29 October 1993, O.J. L17, 25.01.1995, and by Regulation (EC) N°. 323/99 of 8 February 1999, O.J. L40, 13.02.1999; Council Directive 90/314/EEC of 13 June 1990 on package travel, package holidays and package tours, O.J. L158, 23.06.1990.

¹⁶⁴ While liability in case of accidents was clearly regulated by the Warsaw Convention, the EU decided it ‘appropriate to remove all monetary limits of liability within the meaning of Article 22 (1) of the Warsaw Convention’ (Recital 7). This seems controversial, but it in fact brought the legislation in line with the new Montreal Convention, which abandons the absolute limit to liability in case of accidents in Art. 21. See Council Regulation (EC) N°. 2027/97 of 9 October 1997 on air carrier liability in the event of accidents, O.J. L285, 17.10.1997.

¹⁶⁵ Communication from the Commission to the European Parliament and the Council, *Protection of Air Passengers in the European Union*, COM(2000) 365 final, Brussels, 21.6.2000, par. 6.

the event of *denied boarding*, but also when they are confronted with *cancellation* and *delay*.¹⁶⁶

In 2004, Regulation 261/2004 (hereafter in this Chapter: “Regulation”) was adopted, covering those three situations.¹⁶⁷ It applies to all passengers departing from any airport within the EU, and to all passengers flying with a ‘Community carrier’ departing from any airport outside the EU to any airport within the EU.¹⁶⁸ Depending on the circumstances, the Regulation gives passengers a right to reimbursement, compensation and assistance.

Because the Montreal Convention does not include provisions on denied boarding and cancellation, it appears that these situations do not fall within the material scope of the Convention.¹⁶⁹ But clearly, there is concurrence between the Convention and the Regulation when it comes to the liability for damage caused by delay.¹⁷⁰ Interestingly, neither the European Commission nor the EU legislator reflected on this overlap in great detail. The European Commission did make a few remarkable observations in an early communication to the European Parliament and the Council:

‘While this legislation would harmonise law on contracts within the Community, *globally a patchwork of national rules would remain in force*. This obliges airlines to operate under different regimes and faces passengers with a *bewildering variety of rights and obligation*. Unlike shipping, or to some extent the railways, the aviation sector has not benefited from an international agreement on contracts, *with the exception of the Warsaw and Montreal Conventions*. (...) Without prejudice to Community measures, it is perhaps time

¹⁶⁶ In 1998, the Commission already proposed to extend the common rules for denied boarding to cancellation: Proposal for a Council Regulation (EC) amending Regulation (EEC) N°. 295/91 establishing common rules for a denied-boarding compensation system in scheduled air transport. COM(1998) 41 final, 30.01.1998.

¹⁶⁷ Regulation (EC) No 261/2004 of the European Parliament and of the Council of 11 February 2004 establishing common rules on compensation and assistance to passengers in the event of denied boarding and of cancellation or long delay of flights, and repealing Regulation (EEC) No 295/91 (*OJ* 2004 L 046/1).

¹⁶⁸ Art. 3 (1) Regulation.

¹⁶⁹ Cf. Koning 2013a, par. 2, and Radošević 2012, p. 107: ‘It is the view of this writer, reflecting the civil law system, that events of non-performance of the contract of carriage, that is denied boarding and cancellation, do not fall under the scope of applicability of the [the Montreal Convention] and thus do not trigger the liability rules of the Convention’. Meijer 2012, p. 145 is of a different opinion. He argues that cancellation and denied boarding often also lead to delay, and are therefore governed by the Convention as well.

¹⁷⁰ See Art. 19 Montreal Convention: ‘The carrier is liable for damage occasioned by delay in the carriage by air of passengers, baggage or cargo. (...)’

to consider the harmonisation of contract regimes at world level, a task that the International Civil Agent Organisation (ICAO) could undertake.’¹⁷¹

So, the Commission first acknowledged that the Regulation concerned a harmonisation of the law on contracts between airlines and passengers. Second, it recognised that the Warsaw and Montreal Conventions already provided for such a regime. Third, it admitted that globally a patchwork of different rules would remain in force after adoption of the Regulation.¹⁷²

Bearing in mind the commitment of the Council to ‘uniform and clear rules’ and the comment ‘that such rules should be the same as those applicable to carriers from third countries’,¹⁷³ it is remarkable that the Regulation was adopted without as much as batting an eyelid. In fact, the Montreal Convention was only mentioned in Recital 14 of the Regulation:

‘As under the Montreal Convention, obligations on operating air carriers should be limited or excluded in cases where an event has been caused by extraordinary circumstances which could not have been avoided even if all reasonable measures had been taken.’¹⁷⁴

However, the introduction of the Regulation did put the EU in a difficult position. One conflict with the Convention was already contained in the wording of the Regulation, as the next paragraph will illustrate.

4.4. A first problem: different standards for liability

On one point, the wording of the Regulation conflicted with the Convention. Under the *Convention*, the air carrier is liable for damage in the event of delay, *unless* it proves that the delay is caused by extraordinary circumstances:

¹⁷¹ Communication from the Commission to the European Parliament and the Council, *Protection of Air Passengers in the European Union*, COM(2000) 365 final, Brussels, 21.6.2000, par. 36, my italics.

¹⁷² This development is often called *fragmentation*, see Wessel & Wouters 2008, pp. 37-39.

¹⁷³ Signed on the basis of Art. 300 (2) EC. Approved on behalf of the Community by Council Decision 2001/539/EC of 5 April 2001 on the conclusion by the European Community of the Convention for the Unification of Certain Rules for International Carriage by Air (the Montreal Convention) (OJ 2001 L 194/38).

¹⁷⁴ Regulation (EC) No 261/2004 of the European Parliament and of the Council of 11 February 2004 establishing common rules on compensation and assistance to passengers in the event of denied boarding and of cancellation or long delay of flights, and repealing Regulation (EEC) No 295/91 (OJ 2004 L 046/1), Recital 14.

'The carrier is liable for damage occasioned by delay in the carriage by air of passengers, baggage or cargo. Nevertheless, the carrier *shall not be liable for damage* occasioned by delay if it proves that it and its servants and agents *took all measures that could reasonably be required to avoid the damage* or that it was *impossible for it or them to take such measures*.'¹⁷⁵

Article 6 of the *Regulation* obliges the air carrier to offer care and assistance in the event of delay, depending on the travel distance and the time of the delay.¹⁷⁶ The passenger must be provided with meals and refreshments, two phone calls, a hotel stay (if necessary) and reimbursement of the ticket price after five hours delay.¹⁷⁷ However, non-compliance with the obligations under the *Regulation* makes the air carrier *strictly* liable. In other words: while the *Convention* allows the airlines to avoid liability for these expenses, the *Regulation* does not.

The consequences are far-reaching. Immediately after the eruption of the *Eyjafjallajökull* volcano in 2010, the European Commission declared that passengers retained their rights to care and assistance.¹⁷⁸ It was estimated that around 10 million passengers were unable to travel as a result of the ash cloud, covering Europe's air space.¹⁷⁹ There was a fall in traffic of 64%, leading to a gross \$ 1.7 billion lost revenue for airlines worldwide.¹⁸⁰ The Association of European Airlines calculated that passenger rights had an extra impact of € 194 million on the cost figures.¹⁸¹

Before the ash cloud had covered European skies, this conflict of rules already led to legal proceedings. Immediately after implementation of the *Regulation* in the United

¹⁷⁵ Art. 19 of the *Convention*, my italics.

¹⁷⁶ Depending on the travel distance and time of delay. The obligations are "triggered" after two hours (<1500 km), three hours (>1500 km within EU or 1500-3500 km) and in any event after four hours. Cf. Article 6 (1)(a-c) *Regulation*.

¹⁷⁷ Subject to the requirements of Art. 6 (1), passengers have a right to meals and refreshments under Art. 9 (1)(a) and to two telephone calls, telex or fax messages, or e-mails free of charge under Art. 9 (2); when departure is the day after, they have a right to a hotel accommodation and transport between the airport and the hotel under Art. 9 (1)(b) and (c); when the delay is at least five hours, they have a right to reimbursement under Art. 8 (1)(a).

¹⁷⁸ Press Release by Siim Kallas, Vice-President of the European Commission in charge of transport, 'Air travel: volcanic ash cloud', 15 April 2010, MEMO/10/131 to be consulted via www.ec.europa.eu.

¹⁷⁹ Estimation by Eurocontrol, referred to in an information notice to the European Commission: *Conséquences du nuage de cendres généré par l'éruption volcanique survenue en Islande sur le trafic aérien - Etat de la situation*, SEC(2010) 533, 27 April 2010, par. 2.

¹⁸⁰ *Conséquences du nuage de cendres généré par l'éruption volcanique survenue en Islande sur le trafic aérien - Etat de la situation*, SEC(2010) 533, 27 April 2010, par. 12.

¹⁸¹ *Ibid.*, par. 1.

Kingdom, international airline associations *IATA*¹⁸² and *ELFAA*¹⁸³ brought judicial review proceedings against the Department for Transport. The High Court of Justice referred seven questions to the CJEU.¹⁸⁴ One of them concerned the conflict between *strict* liability (Regulation) and *fault* liability (Convention).¹⁸⁵ Because this issue is at the heart of the Regulation, which is entirely binding and directly applicable,¹⁸⁶ a solution had to come from the highest court within the European forum.¹⁸⁷ What if the *blueprint* is being used to solve this conflict?

4.5. Applying the *blueprint*

The first steps of the *blueprint* are relatively easy to take. As the Commission had noted, both regimes concern the harmonisation of the law on contracts in this area.¹⁸⁸ Hence, both regimes seem to be governing the same factual situations. This finding is supported by Article 12 (1) of the Regulation, which makes clear that the awards under the different instruments have to be levied:

¹⁸² The International Air Transport Association is a trade association, currently representing 240 airlines (84% of total air traffic) worldwide. See www.iata.org (last visited on 5 July 2013).

¹⁸³ The European Low Fares Airline Association is a non-profit organisation, currently representing 10 low fares airlines based in the EU (43% of scheduled intra-European traffic). See www.elfaa.com (last visited on 5 July 2013).

¹⁸⁴ Case C-344/04, *The Queen, on the application of International Air Transport Association and European Low Fares Airline Association v. Department for Transport*, [2006] ECR I-00403, par. 39 (“IATA and ELFAA”).

¹⁸⁵ *IATA and ELFAA*, par. 34-48. Articles 5-7 of the Regulation were challenged on other grounds as well: procedural irregularity, lack of legal certainty and inadequate reasoning, proportionality, breach of the principle of non-discrimination, and because payment of compensation in a fixed sum would be disproportionate, discriminatory and lacks adequate reasons. See Opinion AG Geelhoed in *IATA and ELFAA*, par. 22. These grounds are not being discussed here.

¹⁸⁶ Art. 288 TFEU.

¹⁸⁷ See Case 283/81, *Cilfit and Others*, [1982] ECR 3415, par. 21, Case 314/85, *Foto-Frost*, [1987] ECR 4199, par. 15. Derogation from statutory provisions is a familiar concept within Dutch private law, see *Castermans* 2012a, p. 6, referring to HR 29 April 1983, NJ 1983, 627 (*Spruijt/Sperry Rand Holland*); HR 1 July 1983, NJ 1984, 149 (*Herzfeld/Groen*); HR 20 January 1989, NJ 1989, 322 (*Wesselingh/Weisz*); HR 29 juni 1990, NJ 1991, 306 (*Schils/Ubachs*); HR 27 October 1995, NJ 1996, 254 (*Den Haan/The Box Fashion*); HR 21 March 2008, LJN BC1849, NJ 2008, 297 (*NSI/Uoti*). However, derogation from a Regulation is not possible, see Case 314/85, *Foto-Frost*, [1987] ECR 4199, par. 15. See also Joined Cases C-143/88 and C-92/89, *Zuckerfabrik Süderdithmarschen and Zuckerfabrik Soest*, [1991] ECR I-415, par. 17, and Case C-6/99, *Greenpeace France and Others*, [2000] ECR I-1651, par. 54.

¹⁸⁸ Communication from the Commission to the European Parliament and the Council, *Protection of Air Passengers in the European Union*, COM(2000) 365 final, Brussels, 21.6.2000, par. 36, my italics.

‘This Regulation shall apply without prejudice to a passenger’s rights to further compensation. The compensation granted under this Regulation may be deducted from such compensation.’

Following the *blueprint*, a claimant should be free to base his claim either on the Convention, or on the Regulation (*free concurrence*). Once it becomes clear that the Convention and the Regulation apply different standards, it has to be examined whether the claimant has the choice, or whether the law prescribes which regime should be applied.

In order to answer that question, one has to determine the status of the Montreal Convention within the EU legal order. After signature, this Convention became ‘binding upon the institutions of the Union and on its Member States’.¹⁸⁹ According to settled case law, the Convention thus became an integral part of the EU legal order.¹⁹⁰ It has been frequently debated and litigated whether such an international agreement, concluded by the EU, may be relied upon to challenge the validity of secondary EU legislation.¹⁹¹ The Court has developed two well-tried legal techniques to solve conflicts in this area.

A conflict must ‘so far as possible’ be *avoided* by using *consistent interpretation*.¹⁹² This was affirmed by the Court in a case of the European Commission against Germany:

‘[T]he primacy of international agreements concluded by the Community over provisions of secondary Community legislation means that such provisions must, so far as is possible, be *interpreted in a manner that is consistent with those agreements*.’¹⁹³

Is such an interpretation possible on the basis of the Regulation? Recital 14 provides for an excellent opportunity to straighten out the differences between the two regimes:

‘As under the Montreal Convention, obligations on operating air carriers should be limited or excluded in cases where an event has been caused by *extraordinary circumstances* which could not have been avoided even if all reasonable measures had been taken.’¹⁹⁴

¹⁸⁹ Cf. (then) Art. 300 (2) EC, currently Art. 216 (2) TFEU. The Montreal Convention was approved on behalf of the Community by Council Decision 2001/539/EC of 5 April 2001 on the conclusion by the European Community of the Convention for the Unification of Certain Rules for International Carriage by Air (the Montreal Convention) (OJ 2001 L 194/38). All Member States have also signed and ratified the Montreal Convention, see Koning 2007, p. 46, footnotes 170-171.

¹⁹⁰ Case 181/73, *Haegeman*, [1974] ECR 449, par. 5; Case 12/86, *Demirel* [1987] ECR 3719, par. 7.

¹⁹¹ See generally Eeckhout 2011, Ch. 9; and Craig & De Búrca 2011, pp. 344-351.

¹⁹² See Eeckhout 2011, p. 356, with references to case law.

¹⁹³ Case C-61/94 *Commission v. Germany* [1996] ECR I-3989, par. 52, my italics.

A second, even more powerful tool is to award the agreement *direct effect* within the EU legal order. If this is accepted by the Court, which is not always the case,¹⁹⁵ it means that the international agreement has to be applied, even in the face of inconsistent secondary EU law.¹⁹⁶ In its first judgment on the matter, the Court was ‘extremely succinct’.¹⁹⁷ After referring to the binding nature of international agreements as parts of the Community (now EU) legal order, the Court held:

‘As to those submissions, Articles 19, 22 and 29 of the Montreal Convention *are among the rules in the light of which the Court reviews the legality of acts* of the Community institutions since, first, neither the nature nor the broad logic of the Convention precludes this and, second, those three articles appear, as regards their content, to be unconditional and sufficiently precise.’¹⁹⁸

As a result, precedence of the Montreal Convention over any action for damages within its scope is provided both by its own conflict rule *and* by its direct effect within the EU legal order. The Montreal Convention has to be applied, even when that means that inconsistent secondary EU law is to be excluded. Applying the *blueprint* on these conflicts should therefore lead to the following result: a *free concurrence of actions*, available to the claimant, but subject to the special liability rules from the Convention.

4.6. A first answer: no overlap between the instruments

Interestingly, the European Parliament, the Council, the Commission and the UK government submitted that there was no conflict between the two instruments, because the Regulation did not concern compensation for damage within the meaning of the Convention. The instrument were separate systems, with different aims.¹⁹⁹

According to AG Geelhoed, there was ‘no doubt’ about the binding nature of the

¹⁹⁴ My italics.

¹⁹⁵ For example, WTO agreements have not been awarded direct effect by the Court, see Craig & De Búrca 2011, p. 344-349 and Case C-149/96, *Portugal v. Council*, [1999] ECR I-8395, par. 36-47.

¹⁹⁶ See Eeckhout 2011, p. 330; Craig & De Búrca 2011, p. 344.

¹⁹⁷ Eeckhout 2011, p. 352.

¹⁹⁸ Case C-344/04, *The Queen, on the application of International Air Transport Association and European Low Fares Airline Association v. Department for Transport*, [2006] ECR I-00403, par. 39 (“IATA and ELFAA”), my italics.

¹⁹⁹ See Opinion AG Geelhoed in *IATA and ELFAA*, par. 25-29.

Convention within the EU legal order.²⁰⁰ He argued that while it was clear that the Convention is exhaustive with respect to actions for damages,²⁰¹ it was also clear that the Regulation ‘does not deal with civil liability or actions for damages’.²⁰² An action for damages requires consideration on the occurrence and the amount of the damage, a causal link with the delay and the possibility of a defence.²⁰³ According to the AG, the purpose of the Regulation is different:

‘The objective of Article 6 is to protect passengers by obliging carriers to provide care and to assist stranded passengers, *regardless of whether there is damage*. There is no need to show any damage, and *any fault on the part of the air carrier is irrelevant for this purpose*. Consequently, there is no need for a defence either. (...) The obligation to provide a minimum of service during the delay, and thus the protection afforded to passengers, constitute rules of a public nature.’²⁰⁴

Therefore, the AG argued that Article 6 of the Regulation was not in conflict with the Montreal Convention. Furthermore, both instruments may be enforced separately before a civil court.²⁰⁵

The CJEU followed its AG and distinguished the two instruments as well. After having confirmed the binding nature of the Convention,²⁰⁶ the Court assumed that delay may, generally, cause two types of damage:

‘*First*, excessive delay will cause damage that is almost identical for every passenger, redress for which may take the form of standardised and immediate assistance or care for everybody concerned, through the provision, for example, of refreshments, meals and accommodation and of the opportunity to make telephone calls. *Second*, passengers are liable to suffer individual damage, inherent in the reason for travelling, redress for which requires a case-by-case assessment of the extent of the damage caused and can

²⁰⁰ *Ibid.*, par. 32.

²⁰¹ *Ibid.*, par. 43-45.

²⁰² *Ibid.*, par. 46.

²⁰³ *Ibid.*, par. 46.

²⁰⁴ *Ibid.*, par. 47-48, my italics.

²⁰⁵ *Ibid.*, par. 53.

²⁰⁶ Case C-344/04, *The Queen, on the application of International Air Transport Association and European Low Fares Airline Association v. Department for Transport*, [2006] ECR I-00403, par. 36-39 (“IATA and ELFAA”).

consequently only be the subject of compensation granted subsequently on an individual basis.’²⁰⁷

The Court held that the Regulation was a different ‘form of intervention’, aimed at reducing the damages at an ‘earlier stage’²⁰⁸ to prevent ‘the inconvenience inherent in the bringing of actions for damages before the courts’.²⁰⁹ According to the Court, the instruments were separate compensatory systems: there was no overlap, and therefore no conflict.

Consequently, the Court decided not to solve the conflict by using *consistent interpretation*, based on Recital 14:

‘[T]he wording of those recitals indeed gives the impression that, generally, operating air carriers should be released from all their obligations in the event of extraordinary circumstances, and it accordingly gives rise to a certain ambiguity between the intention thus expressed by the Community legislature and the actual content of Articles 5 and 6 of Regulation No 261/2004 which do not make this defence to liability so general in character. *However, such an ambiguity does not extend so far as to render incoherent the system set up by those two articles, which are themselves entirely unambiguous.*’²¹⁰

This approach raised criticism. According to Koning, the CJEU ‘ignored’ the international legal order, it did not show a sense of comparative law, it decided without substantive arguments that the Convention only deals with individual damage and it discounted ‘forty years of legal developments’ by concluding that the drafters of the Convention did not intend to shield carriers from further regulation.²¹¹

Harsh words, but not without reason. The attempts of the Court to draw a line between “public law” (Regulation) and “private law” (Convention) are ill-fated. Indeed, they are different compensatory systems, but they govern the *same situations*, and partly

²⁰⁷ *IATA and ELFAA*, par. 43, my italics.

²⁰⁸ *Ibid.*, par. 46.

²⁰⁹ *Ibid.*, par. 45.

²¹⁰ *Ibid.*, par. 76, referring to C-155/04, *Alliance for Natural Health and Others*, [2005] ECR I-06451, par. 91; Case C-136/04, *Deutsches Milch-Kontor*, [2005] ECR I-10095, par. 32; and Case C-162/97, *Nilsson and Others*, [1998] ECR I-7477, par. 54, my italics.

²¹¹ Cf. Koning 2013a, par. 4. Mok also disagrees with both the AG and the CJEU in his case note under *IATA and ELFAA*. See Mok 2006, par. 4: ‘In the event of cancellation and delay, the Regulation governs the legal relationship between private subjects, air carriers and their passengers, and thus has to this extent a private law character (consumer law).’ In Dutch: ‘De verordening regelt, voor de gevallen van annulering en vertraging, rechtsbetrekkingen tussen luchtvaartmaatschappijen en hun passagiers, dus tussen private rechtssubjecten en heeft in zoverre het karakter van privaatrecht (consumentenrecht).’

also the *same damages*. Both instruments are in fact relevant for civil liability, while both impose obligations on the parties to a carriage contract and both create possible claims and defences before civil courts. Therefore, differences between them must be bridged through recognition, not denial, of their overlap.²¹²

Would the Court have come to a different result if it had followed the *blueprint*? That remains to be seen. After all, the Court could still have decided that both instruments do not overlap and that, consequently, the application of the doctrine is not needed. After all, the *blueprint* does not compel courts to reach a certain result in a particular case.²¹³ On the other hand, it is established practice that the legal relationship between the parties should be governed not by formal categories of the law (contract/tort, Regulation/Convention), but by recognising their overlap and interaction. It is this spirit of coordination which is missing in this judgment of the Court. As the next paragraph will illustrate, the Court maintained a strict division between the instruments, and even created another conflict with the Convention.

4.7. A second problem: standardised compensation for delay

One of the more 'painful areas' within the Regulation concerned the difference in legal consequences between delay and cancellation.²¹⁴ When a flight is being cancelled, the air carrier has to pay standardised compensation, ranging from €250 to €600 and depending on the distance of the flight.²¹⁵ In the event of delay, the air carrier is only

²¹² See also Koning 2013b, p. 114.

²¹³ Par. 2.4. of this Thesis.

²¹⁴ Haak 2010, p. 503. According to Haak, the other painful area concerns the exact scope of the *force majeure* ('extraordinary circumstances'), which is not being discussed in this Thesis.

²¹⁵ Art. 7 Regulation: 'passengers shall receive compensation amounting to:

(a) EUR 250 for all flights of 1500 kilometres or less;

(b) EUR 400 for all intra-Community flights of more than 1500 kilometres, and for all other flights between 1500 and 3500 kilometres;

(c) EUR 600 for all flights not falling under (a) or (b)'.
Following Art. 5 (1)(c), there is no such right if:

(i) they are informed of the cancellation at least two weeks before the scheduled time of departure; or
(ii) they are informed of the cancellation between two weeks and seven days before the scheduled time of departure and are offered re-routing, allowing them to depart no more than two hours before the scheduled time of departure and to reach their final destination less than four hours after the scheduled time of arrival; or

(iii) they are informed of the cancellation less than seven days before the scheduled time of departure and are offered re-routing, allowing them to depart no more than one hour before the scheduled time of departure and to reach their final destination less than two hours after the scheduled time of arrival.'

obliged to provide care and assistance.

While drafting the Regulation, the Commission admitted that all passengers ‘suffer the same inconvenience and frustration’, whether resulting from delay, cancellation or denied boarding.²¹⁶ Yet, difference in treatment was justified, not because of a possible conflict with the Montreal Convention, but because the airline is not always responsible for delays, and because the solution of *passing-on* claims was difficult to regulate:

‘The Commission accepts that in these circumstances it would be technically impossible to legislate on financial compensation for delays, but will reflect on how to overcome these difficulties.’²¹⁷

As a result, passengers on delayed flights did not get the right to standardised compensation. One could imagine their dissatisfaction. Suppose two passengers each book a flight from Amsterdam to Paramaribo. One flight is cancelled, after which the passenger is rebooked and arrives at Paramaribo five hours later than planned. He gets €600 compensation. The flight of the other passenger has not been cancelled, but has a delay of 24 hours. The passenger receives care and assistance, but no compensation.²¹⁸

This difference in treatment was reason for the German Bundesgerichtshof and the Vienna Commercial Court to refer the following question to the CJEU: could a *delayed* flight be equated with a *cancelled* flight and if so, under what circumstances?²¹⁹

AG Sharpston considered the distinction between cancellation and delay to be at odds with the principle of equal treatment.²²⁰ However, in order to grant compensation also to delayed passengers, a dividing line had to be fixed between ‘the fortunate and the unfortunate’.²²¹ Such an assessment was up to the legislator, not to the Court:

²¹⁶ Communication from the Commission to the European Parliament and the Council, *Protection of Air Passengers in the European Union*, COM(2000) 365 final, Brussels, 21.6.2000, par. 43.

²¹⁷ Communication from the Commission to the European Parliament and the Council, *Protection of Air Passengers in the European Union*, COM(2000) 365 final, Brussels, 21.6.2000, par. 45, my italics.

²¹⁸ Similar examples were given by Van Dam 2010, par. 2, and by AG Sharpston in her Conclusion in *Sturgeon*, par. 53 and 55.

²¹⁹ Joined Cases C-402/07 and C-432/07, *Christopher Sturgeon, Gabriel Sturgeon & Alana Sturgeon v. Condor Flugdienst GmbH* (C-402/07) and *Stefan Böck & Cornelia Lepuschitz v. Air France SA* (C-432/07), [2009] ECR I-10923 (“*Sturgeon*”).

²²⁰ Conclusion AG Sharpston in *Sturgeon*, par. 62.

²²¹ *Ibid.*, par. 93.

‘Thus, the Community legislator can select a particular time-limit (23 and a half hours, 24 hours, 25 hours, or 48 hours – whatever it be) triggering a right to compensation. The Court cannot. Any figure one cared to pick would involve reading into the Regulation something it plainly does not contain and would be a judicial usurpation of the legislative prerogative.’²²²

Considering that the principle of equal treatment had not been discussed before the Court,²²³ and that the underlying problem is inherent to the structure of the Regulation²²⁴ and cannot be ‘fixed by interpretation, however constructive’,²²⁵ the AG advised the Court to reopen the oral procedure, to invite submissions by the Member States, the Commission, the European Parliament and the Council.²²⁶

The CJEU decided differently. First, it acknowledged that a flight with delay, however substantial, cannot be regarded a cancelled flight if it is operated according to the original planning.²²⁷ However, the passengers find themselves in ‘comparable situations’,²²⁸ leading to an unjustified difference in treatment, according to the Court.²²⁹

Instead of declaring the Regulation invalid or reopening the oral procedure, the Court awarded passengers on delayed flights a right to compensation when they suffer ‘a loss of time *equal to or in excess of three hours*’.²³⁰ Justification for this dividing line was found in the fact that re-routed passengers get compensated if they suffer the same delay.²³¹ Although the CJEU refrained from using the preamble in the abovementioned *IATA and ELFAA*-judgment, it used Recital 15 to substantiate its claim here.²³² Because the legislator mentioned delay and cancellation in the same breath for the purpose of

²²² *Ibid.*, par. 94.

²²³ *Ibid.*, par. 65.

²²⁴ *Ibid.*, par. 96.

²²⁵ *Ibid.*, par. 97. According to the AG, a solution through interpretation would go against legal certainty and demonstrate a ‘very teleological approach to consumer protection’, *cf.* Conclusion AG Sharpston, par. 91.

²²⁶ *Ibid.*, par. 97.

²²⁷ *Sturgeon*, par. 33-34.

²²⁸ *Ibid.*, par. 54.

²²⁹ *Ibid.*, par. 59.

²³⁰ *Ibid.*, par. 61, *my italics*.

²³¹ Under Article 5 (1)(c)(iii), these passengers get compensation if the carrier fails to re-route them on a flight which departs no more than one hour before the scheduled time of departure and reaches its final destination less than two hours after the scheduled time of arrival. Balfour is critical, calling the analogy ‘in fact not quite correct (...) because [these, RdG] passengers (...) will in fact arrive at their final destination up to two not three hours late’. See Balfour 2012, p. 381.

²³² Critical also Balfour 2012, p. 378.

defining 'extraordinary circumstances',²³³ the Court claimed that 'it must be held that the legislature also linked that notion [long delay, RdG] to the right to compensation'.²³⁴

As a result, the CJEU in fact *rewrote* the Regulation and *created* overlap with the Convention.²³⁵ Not surprisingly, this approach did lead to a torrent of criticism,²³⁶ while only few authors have defended the outcome of the case.²³⁷ Two lines of criticism may be recognised: (1) by interpreting *contra legem* the Court crossed the boundaries of its judicial function, and (2) the judgment conflicts with the Montreal Convention.²³⁸

With regard to the second argument, it is important to note that the Court did not pay attention to the Montreal Convention at all. Yet, the Convention stresses that an award for damages has to be *compensatory*:

'In any such action [for damages, RdG], punitive, exemplary or any other *non-compensatory* damages shall not be recoverable.'²³⁹

According to the Court, the Regulation is aimed at repairing '*damage consisting, for the passengers concerned, in a loss of time* which, given that it is irreversible, can be redressed only by compensation'.²⁴⁰ Interestingly, a 2008 impact assessment study, conducted for the European Commission, estimated the economic value of the loss of time because of delay to lie somewhere between €16 per hour (for leisure travellers) and €39 per hour (for business travellers) within the EU.²⁴¹ These values are significantly lower than the fixed compensation (starting at €250 after three hours) the CJEU awarded each passenger for their loss of time.

The airlines did not accept the decision by the CJEU. They refused to pay compensation in many cases, persuading different courts to stay proceedings and refer new questions

²³³ Recital 15 of the Regulation: 'Extraordinary circumstances should be deemed to exist where the impact of an air traffic management decision in relation to a particular aircraft on a particular day gives rise to a long delay, an overnight delay, or the cancellation of one or more flights by that aircraft, even though all reasonable measures had been taken by the air carrier concerned to avoid the delays or cancellations.'

²³⁴ *Sturgeon*, par. 43. Although the ECJ noted that compensation in the event of delay 'does not expressly follow from the wording of the Regulation', par. 41.

²³⁵ Also Van Dam, a proponent of the outcome, wrote that the Court has 'in fact added a new rule to the Regulation', see Van Dam 2010, par. 3.

²³⁶ Balfour 2010 & 2012, Haak 2010, Mendes de Leon 2010 & 2012, Mok 2010. For an overview of scholarly reactions see Garben 2013, par. 3.1.

²³⁷ Van Dam 2010; Lenaerts & Gutiérrez-Fons 2010 and Garben 2013.

²³⁸ See Garben 2013, p. 26.

²³⁹ Art. 29 (1) Montreal Convention, my italics.

²⁴⁰ *Sturgeon*, par. 52, my italics.

²⁴¹ Boon *et al.* 2008, pp. 29-30.

to the Court.²⁴² This led to the *Nelson*-judgment (2012), in which the Court was forced to look at the relationship between the two instruments once more. Having qualified the Regulation as a means to redress damage because of a loss of time in *Sturgeon*, it decided here that the loss of time is not damage, but an inconvenience:

'First of all, *a loss of time is not damage arising as a result of a delay, but is an inconvenience*, like other inconveniences inherent in cases of denied boarding, flight cancellation and long delay and encountered in them, such as lack of comfort or the fact of being temporarily denied means of communication normally available. (...) Next, a loss of time is *suffered identically by all passengers whose flights are delayed* and, consequently, it is possible to redress that loss by means of a standardised measure, without having to carry out any assessment of the individual situation of each passenger concerned. (...) Lastly, there is *not necessarily a causal link between*, on the one hand, *the actual delay* and, on the other, *the loss of time* considered relevant for the purpose of giving rise to a right to compensation under Regulation No 261/2004 or calculating the amount of that compensation.'²⁴³

The Court maintained and reinforced the strict, but rather artificial distinction between the two instruments. It decided to keep track, probably also to preserve its credibility²⁴⁴ and to avoid 'causing something like a legal and practical mess'.²⁴⁵

Would the Court have come to a different result if it had followed the *blueprint*? That remains to be seen. The *blueprint* still leaves room to decide that standardised compensation is implicit in the Regulation, and that this rule is not applicable to the same damages as the Convention is. On the other hand, the *blueprint* reminds us of the importance of coordination, rather than elimination, of legal rules. Regrettably, such an approach has not been followed in the present judgments, which leads to the denial of the defences of the airlines under the Montreal Convention.

It is this spirit of coordination which comes forward in a recent proposal by the European Commission, which suggests several adjustments to sober down the

²⁴² See Van Dam 2011, pp. 262-263; and Koning 2013b, pp. 113-114.

²⁴³ Joined Cases C-581/10 and C-629/10, *Nelson et al. v. Lufthansa* (C-581/10) and *TUI Travel et al. v. Civil Aviation authority*, judgment of 23 October 2012, nyr, par. 51-53, my italics. Questions referred by the Amtsgericht Köln and the High Court of Justice of England and Wales.

²⁴⁴ Cf. Garben 2013 and Koning 2013a, concluding remarks.

²⁴⁵ Van Dam 2011, p. 274.

Regulation. This is an indication that the interpretation by the CJEU has been unduly strict, as the next paragraph will illustrate.

4.8. The Commission proposal: reducing the conflict

Last March, the European Commission launched a proposal with adjustments to the Regulation.²⁴⁶ With regard to the problematic points discussed in the previous paragraphs, the proposal contains useful suggestions.

First of all, the Commission acknowledges that an unlimited obligation to provide care and assistance is out of sync with reality, because it 'exposes the airlines to significant (and unlimited) costs and practical problems for assistance and rerouting in the case of such large scale events'.²⁴⁷ Therefore, the Commission proposes a new paragraph to be added to Article 9 of the Regulation:

'If the operating air carrier can prove that the cancellation, delay or change of schedule is *caused by extraordinary circumstances* and that the cancellation, delay or change of schedule *could not have been avoided even if all reasonable measures had been taken*, it may *limit the total cost of accommodation* provided according to paragraph 1(b) to EUR 100 per night and per passenger and to a maximum of 3 nights.'²⁴⁸

Contrary to the Convention, an air carrier is still liable for some losses, even when caused by extraordinary circumstances. This is to be regretted from a systemic point of view, as it maintains two contradictory standards in the Convention and the Regulation in place. However, it is to be welcomed that the proposal substantially limits the tension.

²⁴⁶ Proposal for a Regulation of the European Parliament and of the Council amending Regulation (EC) No 261/2004 establishing common rules on compensation and assistance to passengers in the event of denied boarding and of cancellation or long delay of flights and Regulation (EC) No 2027/97 on air carrier liability in respect of the carriage of passengers and their baggage by air, COM (2013) final.

²⁴⁷ Commission Staff Working Document Impact Assessment Accompanying the document Proposal for a regulation of the European Parliament and of the Council amending Regulation (EC) No 261/2004 establishing common rules on compensation and assistance to passengers in the event of denied boarding and of cancellation or long delays of flights and Regulation (EC) No 2027/97 on air carrier liability in respect of the carriage of passengers and their baggage by air, SWD (2013) 62 final, Brussels 13.3.2013, par. 3.2.

²⁴⁸ Proposal for a Regulation of the European Parliament and of the Council amending Regulation (EC) No 261/2004 establishing common rules on compensation and assistance to passengers in the event of denied boarding and of cancellation or long delay of flights and Regulation (EC) No 2027/97 on air carrier liability in respect of the carriage of passengers and their baggage by air, COM (2013) final, p. 21, my italics.

What about the award of standardised compensation in the event of delay? Again, the CJEU seemed to have been too harsh on the position of the airlines in the eyes of the Commission:

‘[T]he amounts fixed in the Regulation can in many cases go beyond the value of the damage (i.e. loss of time) incurred by passengers as established by economic studies.’²⁴⁹

The Commission proposes to sober down the compensation scheme created by the Court. It considered two alternative measures: (1) to award passengers compensation, based on a percentage of the value of their ticket, or (2) compensation based on the length of the delay.²⁵⁰ Apart from practical problems,²⁵¹ these alternatives were rejected because the consistency with the Montreal Convention ‘cannot be taken for granted’ and an intervention by the CJEU could – apparently – be expected. With regard to the second measure, the Commission stated:

‘Even if the court were to consider fixed-rate compensation to be in line with the Montreal Convention as “standardised assistance” or something similar [as the CJEU did in “Sturgeon”, RdG], *there could be an argument that per-hour compensation conflicts, as it is less standardised and a closer proxy to the actual damage that the passenger has suffered.*’²⁵²

This is a poor assessment by the Commission's legal service. It suggests that the proposal could avoid inconsistency with the Convention by *not awarding* a compensation which is a closer proxy to the actual damage. In my opinion, the Commission could have removed the heart of the problem convincingly by tying the

²⁴⁹ Commission Staff Working Document Impact Assessment Accompanying the document Proposal for a regulation of the European Parliament and of the Council amending Regulation (EC) No 261/2004 establishing common rules on compensation and assistance to passengers in the event of denied boarding and of cancellation or long delays of flights and Regulation (EC) No 2027/97 on air carrier liability in respect of the carriage of passengers and their baggage by air, SWD (2013) 62 final, Brussels 13.3.2013, par. 4.2.2.

²⁵⁰ *Ibid.*, par. 11.

²⁵¹ The calculation of the flight price could be difficult when a passenger changes flights in-between and when he has a package deal with a tour operator. With respect to the second measure, the Commission saw practical problems in establishing the length of the delay, since that length is also dependent on the willingness of the passenger to accept an alternative flight.

²⁵² Commission Staff Working Document Impact Assessment Accompanying the document Proposal for a regulation of the European Parliament and of the Council amending Regulation (EC) No 261/2004 establishing common rules on compensation and assistance to passengers in the event of denied boarding and of cancellation or long delays of flights and Regulation (EC) No 2027/97 on air carrier liability in respect of the carriage of passengers and their baggage by air, SWD (2013) 62 final, Brussels 13.3.2013, Annex 11, my italics.

standardised compensation under the Regulation more closely to the actual losses, with economic assessments providing for a firm basis.²⁵³ Standardised compensation is not prohibited, as long as it approximates the actual losses.

Instead, the Commission chose a third alternative: to leave the current system in place, while only the “dividing time line”, after which a passenger has a right to compensation, is being raised to:

- (a) five hours or more after the scheduled time of arrival for all intra-Community journeys and for journeys to/from third countries of 3500 kilometres or less;
- (b) nine hours or more after the scheduled time of arrival for journeys to/from third countries between 3500 and 6000 kilometres;
- (c) twelve hours or more after the scheduled time of arrival for journeys to/from third countries of 6000 kilometres or more.²⁵⁴

It is doubtful whether this proposal will make it in the European Parliament, since it would mean a weakening of the current protection of passengers.²⁵⁵ However, from a systemic point of view it is to be welcomed that the Commission proposes to bring amount of damages closer to the actual damage suffered.

Nevertheless, the proposal does not end the discussion on the nature and overlap of both instruments. Also under the new Regulation, the existing uncertainty and confusion is not being dispelled. It would be desirable if the EU legislator would grab the opportunity to recognise the concurrence between the Regulation and the Convention. This could be done by including the following statement in the preamble:

‘This Regulation harmonises certain aspects of the contractual relationship between airlines and their passengers. Its rules are aimed to redress the minimum standardised

²⁵³ A 2008 impact assessment study, conducted for the European Commission, estimated the economic value of waiting time because of delay to lie between € 16 per hour (for leisure travellers) and € 39 per hour (for business travellers) within the EU. See Boon et al 2008, pp. 29-30. *See also* par. 4.7 of this Thesis.

²⁵⁴ Art. 6 (1)(ii), Proposal for a Regulation of the European Parliament and of the Council amending Regulation (EC) No 261/2004 establishing common rules on compensation and assistance to passengers in the event of denied boarding and of cancellation or long delay of flights and Regulation (EC) No 2027/97 on air carrier liability in respect of the carriage of passengers and their baggage by air, COM (2013) 130 final, 13.3.2013.

²⁵⁵ An article in the Dutch newspaper “de Volkskrant” (13 March 2013) quotes the chairman of the EP’s Commission on Transport and Tourism, who showed doubts whether the EP would agree with the proposal. See <http://www.volkskrant.nl/vk/nl/2664/Nieuws/article/detail/3408661/2013/03/13/Rech-ten-passagier-bij-vertraging-verbeterd-en-verslechterd.dhtml> (last visited 28 June 2013).

damage which every passenger suffers when confronted with delay, cancellation or denied boarding, so as to prevent a passenger the inconvenience of bringing court proceedings. Its rules are to be applied in consistency with the Montreal Convention. Those issues that are not regulated under the Convention, will be governed by the applicable national private law, within the remits of the Montreal Convention.'

As under Regulation 889/2002 on air carrier liability in the event of accidents, the following provision could be included:

'The liability of a Community air carrier in respect of passengers (...) shall be governed by all provisions of the Montreal Convention relevant to such liability.'²⁵⁶

Furthermore, Article 12 (1) of the current Regulation could be improved:

'This Regulation shall apply without prejudice to a passenger's rights to further compensation *under the Montreal Convention*. *The passenger may cumulate the available remedies under this Regulation and under the Montreal Convention. However, the passenger may not be compensated for the same damage twice. Therefore, the compensation granted under this Regulation may be deducted from such compensation.*'

Recognition of the concurrence would also clarify an inconsistency between the text of the current provision and the line of reasoning by the CJEU. Two sites may be recognised in literature: some authors argue that Article 12 (1) would make many claims for additional damages meaningless, because the fixed compensation (€250-600) must be deducted from that claim,²⁵⁷ while others argue that the amounts may be received cumulatively, because of the fact that the CJEU perceives the damages as being of an entirely different nature.²⁵⁸

By recognising the overlap of both instruments, debates of this kind are nipped in the bud. The passenger may then choose to sue either on the basis of the Convention or the Regulation, or both. If he already got compensated under the Regulation, he would be able to bring a successful claim under the Convention only for *additional* damage.

²⁵⁶ Regulation (EC) No 889/2002 of the European Parliament and of the Council of 13 May 2002 amending Council Regulation (EC) No 2027/97 on air carrier liability in the event of accidents, *Official Journal L 140*, 30/05/2002 P. 0002 - 0005, Art. 3 (1). See Case C-63/09, *Axel Walz v. Clickair SA*, [2010] ECR I-04239, in which the CJEU interprets Art. 22 (1) of the Montreal Convention.

²⁵⁷ See De Vos 2012, pp. 173-174.

²⁵⁸ See Radošević 2012, p. 106.

Some may oppose this approach, because it would mean that the CJEU has to take foreign case law into account when applying the Regulation. As a result, airlines will grasp every possibility to invite the CJEU to reconsider its interpretation. In my opinion, this argument should not be overdone. The Court may still very well play its own role, also when it engages in autonomous interpretation of the Convention. As the debate on the scope of the Convention showed, strict uniform application is illusory.²⁵⁹

It is more likely that airlines and courts will cooperate with the CJEU if the inconsistencies with the Convention are reduced, defendants are allowed to invoke their rights under the Convention and a proper level of convergence is reached through clear judgments by the Court. The Court may even lead by example in interpreting the provisions of the Convention. Finally, if airlines fail to comply with their basic obligations under the Regulation, nothing, not even the Convention,²⁶⁰ stands in the way of punitive sanctions by State authorities within the realms of administrative law.²⁶¹

²⁵⁹ See par. 4.2. See Smits 2013, pp. 6-7, on the difficulties of uniform interpretation of international sales law (CISG). See also Lord Wilberforce in House of Lords 14 February 1980, [1980] 1 All ER 556 (*Photo Production Ltd v Securicor Transport Ltd.*), at 562: 'To plead for complete uniformity may be to cry for the moon.' Furthermore, national courts are not obliged to refer preliminary questions if the correct application of EU law is 'so obvious as to leave no scope for any reasonable doubt as to the manner in which the question raised is to be resolved', subject to the condition that the national court is convinced that the matter is 'equally obvious to the courts of other Member States and to the Court of Justice', see Case 283/81, *CILFIT v. Ministry of Health*, [1982] ECR 3415, par. 16. This was an addition to the old *Da Costa* ruling, in which the Court decided that a preliminary ruling was not necessary when it had already issued an earlier judgment on an identical case. See Case 28/62, *Da Costa*, [1962] ECR 61.

²⁶⁰ Since the Convention only governs actions for damages between private parties to the carriage contract.

²⁶¹ The Regulation already responds to this need, by designating national enforcement bodies (NEB), responsible for the monitoring of compliance with the Regulation. In the Netherlands, the responsible enforcement body is the *Inspectie Leefomgeving en Transport*. The proposal also provides for stronger coordination and exchange of information between the NEBs, see Proposal for a Regulation of the European Parliament and of the Council amending Regulation (EC) No 261/2004 establishing common rules on compensation and assistance to passengers in the event of denied boarding and of cancellation or long delay of flights and Regulation (EC) No 2027/97 on air carrier liability in respect of the carriage of passengers and their baggage by air, COM (2013) 130 final, 13.3.2013, p. 8.

4.9. Conclusion

Current air law is a showcase of multilevel regulation. The rights and obligations of airlines and their passengers are governed both by the Montreal Convention and by EU Regulation 261/2004. As we have seen, the EU placed itself in a difficult position by adopting Regulation 261/2004 shortly after it had signed the Montreal Convention. Both instruments provide for different standards for liability. While the Convention allows the airlines to avoid liability for certain expenses during delay, the Regulation does not.

Although the CJEU affirmed the direct effect of the Montreal Convention within the EU legal order, and although consistent interpretation seemed possible, the Court decided to uphold the Regulation. It argued that both instruments are of a different nature, covering different heads of damage. It even expanded the Regulation by awarding delayed passengers standardised compensation, which goes beyond the actual damage suffered and therefore conflicts with the Convention.

Theoretically, it would have been possible to reach the same results by using the *blueprint*. After all, the Court could still have decided that both instruments do not overlap and that, consequently, the application of the doctrine is not needed. On the other hand, it is established practice that the legal relationship between the parties should be governed not by formal categories of the law (contract/tort, Regulation/Convention), but by recognising their overlap and interaction. It is this spirit of coordination which lacks in the judgments of the CJEU, but which does come forward in a recent proposal by the European Commission, which suggests several adjustments to sober down the Regulation.

To conclude, this Chapter has shown a prime example of a normative conflict between different legal orders. As we have seen, this conflict has not been solved satisfactorily by the CJEU. I would argue that, by using the traditional *blueprint*, such an outcome would have been less likely. The coherence and legitimisation of legislation and case law would be improved if such standards of interpretation would be used, both by the Court and the EU legislator.

5. Concluding remarks

In this Thesis, I have argued that the doctrine of concurrence is still relevant to understand new developments on the borderlines of international, European and Dutch private law.

Something old. As we have seen, these developments may not be that different from what we are used to. The Common European Sales Law, which – upon the agreement of the parties – will govern their legal relationship, provides for a good example. It leads to ‘classic’ problems of concurrence, because claimants may invoke national private law as well, leading to different prescription periods and different standards for liability. I have argued that such problems of concurrence could very well be coordinated by using the existing *blueprint*, to which the CESL refers. There is no risk of undermining the CESL because for the bigger part, the *blueprint* tends to ensure that the application of tort law is not frustrating the purpose of a contract law norm. It would only rarely lead to a *real escape* into the Dutch law of torts, when the stakes are high and the basis for exclusive application of the CESL weak.

Something new. Some areas of private law belong solely to the field of international and European law. In this Thesis, one prime example has been examined: the rights and obligations of airlines and their passengers under a carriage contract. The experiences with Regulation 261/2004 show that the CJEU sometimes prefers exclusive application of EU law, even if that seems inconsistent with other applicable instruments. I have argued that, by using the traditional *blueprint*, such an outcome would have been less likely. Although the recent proposal by the European Commission removes some tension, and shows that the CJEU has been unduly strict, confusion will remain as long as the two instruments are not aligned more closely.

Something borrowed, something blue? In the near future, the EU will continue to develop and adopt legislation governing the relationship between private parties, either directly or indirectly. As a result, their legal disputes will be regulated by different patchworks of applicable rules and remedies, grounded in different legal orders. The *blueprint* may prove to be a helpful method to understand and scrutinise these developments. It may clarify case law and legislation, and serve as inspiration for possible solutions. As such, the *blueprint* provides for a critical, but constructive eye to follow the process of harmonisation of private law, so as to make sure that existing

rights, obligations and defences are not passed by.

Finally, these developments make clear that the *blueprint* has not become insignificant. Applying it to *new* problems of concurrence does not make it 'endless', as Bakels argued. Indeed, after its application extended beyond the contract-tort divide, it is now beginning to cross the borders of national law. But so has private law itself, under the increasing influence of European and international law. This should encourage us to look for pragmatic solutions. To my mind, the *blueprint* is such a solution. It could lead to more coherence and better coordination, and its application should therefore be subject of further research. Well-tried legal techniques pose a valuable answer to the challenges in the current multilevel legal order.

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