Concurrence in European Private Law

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2 Concurrence in Private Law

2.1 Introduction

Does one legal rule affect the scope of application of another legal rule? This question has been examined by scholars for a long time.[1] Yet the topic remains a minefield when it comes to terminology. Having spent one afternoon in the legal library of an English university, a diligent student will have found contributions about concurrent duties,[2] concurrent rights,[3] concurrent liabilities,[4] and concurrent remedies,[5] causing him or her to wonder whether or not the authors are writing about the same subject. And even if the authors do use the same term, one cannot be certain that they capture the same meaning. Birks has revealed, for instance, that the use of the term 'remedy' has 'at least five different meanings loosely grouped around the relationship between disease and medicine'.[6] The experiences of students searching the shelves of libraries of other European universities will not be very different. Scholars struggle with the relationship between formal recitals and underlying substance.

If understanding the taxonomy of a single legal system can be considered difficult, perhaps even dreadful, then comparing the categories used in different legal systems must be thought of as an ordeal of jargon and drudgery. Accepting these difficulties, the first aim of this chapter is nonetheless to attempt to explain what lawyers write about when they write about concurrence in private law. Given the ultimate objective of this book, which is to use these insights as an aid in the analysis of the laws of the European Union, we will not adopt the perspective of one particular system of private law currently in force. We will not, for instance, follow the terminology of the French *Code Civil* (1804), the German *Bürgerliches Gesetzbuch* (1900), or the Dutch *Burgerlijk Wetboek* (1992). Nor will we rely upon soft law instruments drafted by lawyers working in different jurisdictions, such as the *Draft Common Frame of Reference*.[7] Rather, we will draw on insights from analytical jurisprudence and theories of law in order to understand what these systems have in common. What kinds of legal rules play a central role

1 See also *supra* section 1.1.
2 Taylor 2019.
3 Stevens 2007, p. 199-217.
4 Weir 1984; Davies 2018b.
5 Stevens 1996; Watterson 2003.
6 Birks 2000, p. 1.
7 See *supra* section 1.2.

when adjudicating disputes between individuals in modern systems of private law (sections 2.2-2.3)?

Having defined our subject more accurately, we will then examine how different legal systems determine the relationship between these rules. To this end, this chapter will first subject the well-known maxim *lex specialis derogat legi generali* to close scrutiny. This maxim is often relied upon in order to explain that specific rules trump the application of rules more general in scope. But when is that really the case? On closer analysis, it appears that the question as to whether a specific rule trumps the application of a rule more general in scope is a question of interpretation which cannot be answered on the basis of this maxim alone. The chapter argues that we must take the substance of the rules into account, and not merely their formal relationship (section 2.4).

Drawing on insights from different legal systems, the chapter then proposes an alternative scheme of analysis. This scheme starts from the premise that each applicable rule, however founded, should be realised to the greatest possible extent. In principle, then, each rule ought to have its intended legal effect once the necessary conditions have been established. An exception must be made, however, if cumulative application would lead to inconsistent outcomes and when the law prescribes that one of the rules applies exclusively (section 2.5). In conclusion, the chapter summarises the themes running through the various solutions to individual issues of concurrence (section 2.6).

2.2 Concurrence of legal rules

No legal regime is wholly self-contained. No matter what structure is adopted when splitting up the law into separate branches, it is inevitable that some cases will fall within several of the branches devised. In German literature, this phenomenon is known as *Normenkonkurrenz* or *Konkurrenz der Rechtssätze*. Larenz gives the following definition:

> 'Die Tatbestände mehrerer Rechtssätze können sich in vollem Umfang oder teilweise decken, so daβ ein und derselbe Sachverhalt von ihnen erfaβt wird. Man spricht dann von einem Zusammentreffen oder einer Konkurrenz der Rechtssätze.'[8]

Likewise, Goldie-Genicon refers to the overlap of *règles de droit*:

> 'Le concours de normes se caractérise par la vocation de plusieurs règles de droit à régir une même situation de fait. Plusieurs normes présentent une aptitude égale à résoudre le même litige.'[9]

8 Larenz 1992, p. 154.
9 Goldie-Genicon 2009, p. 155.

These statements indicate that the overlap of legal *rules* lies at the heart of the phenomenon concurrence.[10] In order to better understand the nature of this phenomenon, it is therefore important to understand how legal rules operate. This can best be explained by contrasting them with another type of legal norm: *principles*.

Rules and principles differ in their application. A rule *must* have its intended legal effect once its conditions are fulfilled and *cannot* have effect if its conditions are *not* fulfilled.[11] Under Article 1240 of the French Civil Code, for instance, any human action whatsoever which causes harm to another creates an obligation in the person by whose fault it occurred to make reparation for the harm caused.[12] Principles do not create such an obligation, but they do play an important role in determining whether an obligation exists on the basis of Article 1240 CC. As Dworkin has stated, principles provide *reasons* to argue in favour or against a particular outcome, but they do not lead to a certain outcome if certain conditions are established.[13] This is why Alexy calls principles 'optimization requirements'. They 'require that something be realized to the greatest extent possible given the legal and factual possibilities'.[14]

Understanding this distinction is important in the context of this book, because conflicts of either rules or principles are resolved in fundamentally different ways. When principles collide, they have to be balanced against each other.[15] Ultimately, one principle will outweigh the other. Under certain circumstances, the freedom of contract may, for instance, be of greater weight than the principle of equal treatment. This does not mean that the principle of equal treatment carries no weight at all, but only that it carries less weight than the freedom of contract in the given case. Rules, by contrast, do not have a dimension of weight. They are applicable 'in an all-or-nothing fashion'.[16] This means that a conflict between applicable rules can only be solved by amending or excluding one of them. To stick to the example: a contractual clause is either valid or it is null and void because

10 This conclusion is also drawn by: Von Tuhr 1923, p. 17-18; Dietz 1934, p. 17; Meijers 1948, p. 161; Boukema 1966, p. 2; Georgiades 1968, p. 98-99; Snijders 1973, p. 454; Pels Rijcken 1980, p. 1101; Brunner 1984, p. 1; Weir 1984, p. 3; Boukema 1992, p. 3-4; Schmid 1996; Klein 1997, p. 18-19; Burrows 1998, p. 20; Huber 2001, p. 177; Harris 2002, p. 575-576; Gruber 2004, p. 229-258; Nieuwenhuis 2007b, p. 3; Bakels 2009a, p. 337; Tricoire 2009, p. 11; Burrows 2011; Mauchle 2012, p. 934; Neuner 2012, p. 239; Mauclair 2013; Laroche 2014, p. 12; Cartwright 2017, p. 11; Davies 2018b; Castermans & Krans 2019, p. 1-6.

11 Scholten 1974, p. 12-13; Dworkin 1977, p. 24; MacCormick 1978, p. 19-52; Larenz 1992, p. 138-145; Smith 2004, p. 153; Alexy 2010, p. 48.

12 Art. 1240 CC. This translation is based on the translation by John Cartwright, Bénédicte Fauvarque-Cosson & Simon Whittaker, see www.textes.justice.gouv.fr/art_pix/THE-LAW-OF-CONTRACT-2-5-16.pdf.

13 Dworkin 1977, p. 25-26 and p. 72.

14 Alexy 2010, p. 47.

15 Dworkin 1977, p. 26-27; Alexy 2010, p. 49.

16 Dworkin 1977, p. 24.

it violates a rule that prohibits unequal treatment.[17] These outcomes are incompatible, so a choice must be made between them.

Here, the distinction between rules and principles is used for analytical purposes only. It is not our intention to suggest that the interpretation of legal rules is predetermined and fixed. There will be room for interpretation when deciding *whether* the facts fall within the scope of application of a legal rule and *whether* its conditions have been fulfilled.[18] Nor do we wish to suggest that rules will automatically be applied once their conditions have been fulfilled. Rules do not enforce themselves. Their application necessarily involves an exercise of choice by the parties concerned and by the courts who are, to some extent, bound by the facts stated by them.[19] The reader should be aware that the issue of concurrence may not arise if it has not been pleaded.[20]

Having established that the overlap of legal rules lies at the heart of the phenomenon of concurrence in private law, the next section will examine the kinds of rules which make up a modern system of private law. What kinds of rights and duties do they create?

2.3 Claims, powers, defences

The previous section examined the distinction between rules and principles, and explained that we are concerned with the concurrence of legal rules. And indeed, private relationships are governed by many different rules, from many different sources. Not all these rules, however, appear to be relevant in the present context. Therefore, this section will venture on an analysis of the kinds of rules which play a central role when adjudicating disputes between individuals in modern systems of private law.

According to one theory, articulated by John Austin (1790-1859) and endorsed by Hans Kelsen (1881-1973), the whole of the law – and thus of private law – can be reduced to rules which order individuals to do or not to do certain things. On this view, every rule 'properly so called' imposes a duty to obey a command on the threat of a sanction.[21] The attention is fixed on the rules which stipulate the sanction that follows in the event of non-

17 As stipulated by e.g. Art. 7:646 (11) BW.

18 This is uncontroversial (see e.g. Hart 1961, p. 12-13, 121-132; Scholten 1974, p. 7-12; Dworkin 1977, p. 81-130; MacCormick 1978, p. 36; Wiarda 1988, p. 19-31). It is a matter of contention whether these 'hard' cases should be decided on the basis of authoritative moral principles (Dworkin) or on the basis of authoritative social standards (Hart). It is beyond the scope of this section to consider this debate in detail.

19 As emphasised by, among others, Kelsen 1945, p. 81-83; Scholten 1974, p. 25; MacCormick 1978, p. 46-47.

20 See, among others, Guest 1961, p. 194-195; Nieuwenhuis 2007b, p. 1-6; Castermans & Krans 2009, p. 157-159; Bakels 2009a, p. 344; Burrows 2011, p. 3.

21 Austin 1880, p. 11-12; Kelsen 1945, p. 61.

compliance with a command.[22] Indeed, the threat of a sanction is essential. It surfaces again when Austin distinguishes 'primary' rights and duties from 'secondary' rights and duties. In his view, secondary rights and duties arise from violations of primary rights and duties. Austin calls these secondary rights 'remedial' and 'sanctioning'.[23]

It is questionable, however, whether the whole of law really be reduced to duties, commands, and sanctions. Herbert L.A. Hart (1907-1992) has rejected this view. He has pointed out that many rules do not impose duties but rather provide individuals with the possibility to create rights and duties.[24] In his view, any modern legal system consists of a union of both duty-imposing and power-conferring rules.[25] The same distinction has been made by the American jurist Wesley Newcomb Hohfeld (1879-1918).[26] Troubled as he was by the indiscriminate use of the words 'rights' and 'duties',[27] Hohfeld proposed a structure of eight 'correlative' concepts which can be arranged in two groups.[28] Within his theory of fundamental legal conceptions, the distinction between *claims* and *powers* plays a central role.

In its narrowest sense, Hohfeld used the term *right* (or *claim*) as the correlative of the term duty. If someone has a claim, another person is under a duty to behave in a certain way.[29] Consider, for instance, the claim for specific performance and the claim for compensation. From an analytical perspective, such a claim must be distinguished from a *power*, that is the capacity of a person to unilaterally create, modify or extinguish a legal position or relationship, and so to create, modify or extinguish claims and powers.[30] Consider, for instance, the termination of a contract for breach, the rescission of a contract for pre-contractual misrepresentation, and the possibility to extinguish a claim by setoff. The distinction between claims and powers becomes apparent if we take the view of the person affected. Hohfeld demonstrated that this person is not under a duty to behave in a certain way, but is subjected to the liability that the power will be exercised. In his view, therefore, the correlative of a power is not a duty but a liability.[31]

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22 For a contemporary example in the field of private law, see Van Nispen 2018, p. 1-2.

23 Austin 1880, p. 373-374. Kelsen 1945, p. 62-64, has argued that the order should be reversed. If the sanction is an essential element of the law, then the rules which stipulate sanctions must be called 'primary' and the other rules 'secondary'.

24 Hart 1961, p. 26-48.

25 Hart 1961, p. 77-96.

26 See also Hart 1972, p. 800-801. Hart was also inspired by Bentham, who distinguished between coercive laws and permissive laws, and within the latter category between liberties and powers (Bentham 1970, p. 200-201, 290-291).

27 Hohfeld 1913b, p. 28.

28 Lawson 1977, p. 2.

29 Hohfeld 1913b, p. 30-32; Hohfeld 1917, p. 717.

30 Hohfeld 1913b, p. 44-54.

31 As this is 'a well-known legal term with long-settled meanings', Pound 1959, p. 81, has suggested to use the term *risk* instead.

Hohfeld was not the first to distinguish claims and powers. He built on the works of John William Salmond (1862-1924),[32] who adopted the distinction, made by Bernhard Windscheid (1817-1892),[33] between claims and powers.[34] The first concept has been developed by Windscheid himself[35] and still forms the backbone of the German Civil Code, which defines the claim – the *Anspruch* – as 'Das Recht, von einem anderen ein Tun oder Unterlassen zu verlangen (…)'.[36] Under certain conditions, a person may be entitled to demand some performance from another person, such as specific performance,[37] restitution[38] or compensation.[39] The power of an individual to unilaterally create, modify or extinguish a legal position or relationship has been recognised as a separate legal concept ever since the works of Emil Seckel (1864-1924), who used the term *Gestaltungsrecht*.[40] This concept is not as established in other continental jurisdictions, although it is not unusual for a Dutch writer to refer to *wilsrechten*[41] or for a French writer to refer to *droits potestatifs*.[42]

In line with these theories, we will devote our attention not only to claims but also to powers. But we will also incorporate elements of a different character. For the relationship between two persons cannot be fully understood without paying attention to the position of the person affected by the existence of a *claim* or by the exercise of a *power*.[43] Consider the situation that a legal dispute arises and the case is taken to court. It is a well-established rule in all jurisdictions that if a matter is taken to court, it is up to the claimant to allege the elements of the relevant rule of law in order

32 Salmond 1902, p. 217-238.
33 Windscheid 1862, p. 81.
34 See, about the roots of Hohfeld's scheme, Kocourek 1920, p. 25; Pound 1959, p. 76-77; Frydrych 2018, p. 329-331.
35 Windscheid 1856, p. 3-7.
36 § 194 (1) BGB.
37 E.g. § 433 (1) BGB gives the buyer the right to demand from the seller the delivery of possession and ownership of the thing, free from material and legal defects (*Anspruch auf Übergabe und Übereignung einer mangelfreien Kaufsache*). In turn, § 433 (2) BGB gives the seller the right to demand from the buyer payment of the price and acceptance of the delivery of the thing (*Anspruch auf Kaufpreiszahlung und Abnahme der Kaufsache*).
38 E.g. § 985 BGB gives the owner the right to require the possessor to return the thing (*Herausgabeanspruch*).
39 E.g. § 823 (1) BGB gives the person that is intentionally or negligently injured by another party the right to claim compensation from that party for the resulting damage (*Schadensersatz aus unerlaubter Handlung*).
40 Seckel 1903. See about this development Hattenhauer 2011, p. 197 et seq., and about the distinction between *Ansprüche* and *Gestaltungsrechte* Neuner 2012, p. 219-223.
41 Rupke 1914; Drielsma 1940; Drielsma 1946; Meijers 1948, p. 266; Suijling 1948, p. 102-107; Drielsma 1975; Mellema-Kranenburg 1988, p. 8; Snijders 1999; Nieuwenhuis 2007a, p. 52-53; Biemans 2011, p. 193-195; Bartels & Van Mierlo 2013, no. 2; Spierings 2016; Verheul 2017; Van Nispen 2018, p. 52-54, 59-61; Verheul 2018.
42 Najjar 1967, p. 100 et seq.; Bénac-Schmidt 1983, p. 114 et seq.; Pomart-Nomdedeo 2010; Lefer 2016. See also Vaquer 2009, p. 496-497, with references to Italian and Spanish law.
43 See also *supra* section 1.3.

to obtain the result sought.[44] Even though he is not required to mention the rule by its name, it will be up to him to demonstrate – by reference to the relevant standards of proof – that the facts that are necessary for a certain rule to become operative have occurred and that the court must, therefore, conclude that a claim exists or that a power has been lawfully exercised.[45] In turn, the defendant may be able to rely upon a defence. And just as a single set of facts can, on the face of it, give rise to multiple claims or powers, so too may several defences arise in a given case.[46]

Some defences relate to procedural issues such as the competence of the court, the validity of the claim form, or the expiry of the period for appeal. In the present context, we are particularly interested in the defences pertaining to the merits of the case. The defendant may cast doubt on the facts presented by the claimant and argue that one or more elements of the cause of action in which the claimant sues are not present. Alternatively, he may rely upon a justification or an exemption. The defendant may also be able to prevent or limit the actual enforcement of the claim or power, for instance by pleading the defence of limitation of the right of action. The question to consider, is how these defences relate to each other and how they interact with the elements that make up a successful claim or power. We should, therefore, not only consider the rules that may serve as grounds of *claims* and *powers*, but also the rules that can be invoked as *defences*.[47]

It should be admitted at once that this vocabulary does have its limitations. On the one hand, it may be thought of as too specific because it does not cover all the laws in the codes and all the cases in the law reports. Emphasis is laid on claims, powers, and defences, and the remaining rules are seen through this particular lens. On the other hand, the vocabulary may be rejected because it is over inclusive and does not take into account the many fine distinctions existing within the separate categories. Indeed,

44 As noted by e.g. MacCormick 1978, p. 41-52. In most continental legal systems, this rule is enshrined in statutory provisions (e.g. in France in Art. 1353 CC; in the Netherlands in Art. 150 Rv). In Germany, the rule goes by the name of the *Normentheorie* (Rosenberg 1956, p. 153).

45 Unless, of course, the claimant requests a declaratory decision that he is *not* under a legal duty towards the defendant, or that the exercise of a power by the defendant was *not* valid.

46 Already noted by Von Tuhr 1923, p. 18. The defence stage has received more scholarly attention in recent years: Nieuwenhuis 1997, p. 15-16; Bakels 2009a, p. 337; Neuner 2012, p. 242-245; Goudkamp 2013, p. 19-20, 202; Smith 2016.

47 See also *supra* section 1.3.

the categories can be subdivided indefinitely[48] and may even coexist.[49] Finally, the terminology is not widely used in all legal systems that have been examined in the context of this research. In fact, thinking in terms of claims, powers, and defences is only deeply engrained in Germany.[50]

And yet it would be quite a task to make sense of the mass of legal rules if we were to approach the topic without this focus. Using the vocabulary allows for analysis and comparison.[51] It calls our attention to the rules that play a central role in private relationships – claims, powers, defences – whether they are statutory or judge-made, discovered or developed, available only inside the courts or also outside the courts. And when these rules overlap, their relationship must be determined.

2.4 General and specific rules: *lex specialis derogat legi generali*?

Having examined the kinds of rules we are dealing with – claims, powers, defences – we will now consider the situation where they overlap. Such an overlap does not give rise to problems as long as the application of the rules leads to the same outcome. Yet the rules may vary in certain ways, which may lead to different results. The question to consider is whether one legal rule affects the scope of application of another legal rule. In this context, it is often assumed that the specific rule trumps the application of the rule more general in scope. But when is that really the case?

The maxim *lex specialis derogat legi generali* or *specialia generalibus derogant* appeals more to civil lawyers than it does to common lawyers. Common lawyers focus on the facts of each case and on the particular rules established by courts in earlier decisions. They are not principally interested in systematic and abstract reasoning based on general rules of law.[52] By

48 This was recognised already by Hohfeld himself (see Hohfeld 1917, p. 712). As regards claims, for instance, further distinctions can be made between proprietary and obligatory claims (*dingliche und schuldrechtliche Ansprüche*), and still further between primary and secondary obligations (Pothier 1773, p. 80), or between legal and equitable relationships (Hohfeld 1913a, p. 553). Further distinctions can also be made at the defence stage, e.g. between procedural and meritorious defences, and within the latter category between defences pertaining to the existence of a claim (*Einwendungen*) and defences pertaining to its enforcement (*Einreden*), and again within the former category between justificatory and excusatory defences (Neuner 2012, p. 242-245). Consider also the distinction, made by Martín-Casals 2019a, p. 769, between 'absent element defences' and 'affirmative defences'. The first term refers to 'those cases where the claimant fails to establish a basic requirement of liability', the second term to defences that apply 'when all the requirements for liability are established'.

49 Some powers may in substance operate as a defence against the exercise of a claim or power. E.g. the defendant may elect to rescind the contract that forms the basis of the claim.

50 Ebers 2016, p. 53.

51 See also *supra* section 1.3.

52 Zweigert & Kötz 1992, p. 188.

contrast, civil lawyers have grown up with the idea that the answers to legal questions must be deduced from a comprehensive collection of statutory rules.[53] The German Civil Code may serve as an example. Its General Part contains basic rules common to the whole of private law. The four subsequent books provide general rules on obligations, property, family law, and succession. These books have been split up into divisions, titles, subtitles and chapters, each offering a set of rules for various factual situations. Obviously, such a codification is an inexhaustible source of controversy about the proper relationship of general and specific rules.

Thus, it is in the context of codifications that the maxim that specific rules derogate from general rules has attracted considerable attention and appreciation.[54] And it must be admitted that it only seems natural – perhaps even logical – to assume that specific rules have priority over general rules because the former must be considered exceptions to or special applications of the latter. In modern times, however, many writers warn that the application of the maxim is not self-evident. It has been branded as meaningless,[55] misleading,[56] overrated,[57] and utterly unreliable.[58] Indeed, one may wonder just how persuasive the maxim really is.

To begin with, the maxim can really only be relied upon when one rule is general and another rule is specific. It is widely accepted that this is only the case when the *lex specialis* contains all the elements of the *lex generalis* and at least one additional element. In other words: the general rule must embrace all the cases falling within the scope of the specific rule, but the specific rule may not embrace all the cases falling within the scope of the general rule.[59] The relationship between the Articles 6:2 (2) and 6:248 (2) BW may serve as an example. Both provisions state that a binding legal rule does not apply if this would be unacceptable according to standards of reasonableness and fairness. In two respects, Article 6:248 (2) BW is more specific in scope. First, it applies only to the parties to a contract whereas Article 6:2 (2) BW applies to all creditors and debtors. Secondly, it focuses only on the rules binding upon the contracting parties whereas Article 6:2 (2) BW embraces all rules binding upon creditors and debtors by virtue of statute, custom or legal act. Compared to Article 6:2 (2) BW, Article 6:248 (2) BW is clearly the more specific rule.

53 Zimmermann 1995, p. 96-97.
54 See e.g. Kamphuisen 1942; Van Oven 1961.
55 Boukema 1966, p. 35; Kisch 1975, p. 540.
56 Brunner 1984, p. 14-15; Goldie-Genicon 2009, p. 448.
57 Faust 2017.
58 Nieuwenhuis 1982, p. 35.
59 Lent 1912, p. 12; Dietz 1934, p. 22; Kamphuisen 1942, p. 326; Meijers 1948, p. 161; Gassin 1961, p. 91; Boukema 1966, p. 26; Brunner 1984, p. 17-18; Bydlinski 1991, p. 465; Boukema 1992, p. 7-11; Bergel 2001, p. 192; Huber 2001, p. 203-208; Goldie-Genicon 2009, p. 470; Laroche 2014, p. 308; Castermans & Krans 2019, p. 15.

The example underlines the limited value of the maxim. If the rules produce the same outcome, there is really no compelling reason why Article 6:248 (2) BW should automatically trump the application of Article 6:2 (2) BW. Moreover, the overlap can be considered harmless if the *lex specialis* merely complements the *lex generalis*.[60] Thus, it is clear that some conflict must exist in order for one of the rules to make way.[61] But even if a conflict exists, it cannot be taken for granted that the legislature intended the specific rule to trump the general rule. It may have been the intention to improve the position of the aggrieved party.

This implies that the substantive importance of the rules at issue must be considered.[62] Essentially, the question is whether the specific rule demands the subsidiarity of the general rule.[63] According to some writers, the specific rule is subsidiary in nature when its consequences are less advantageous for the claimant than the consequences imposed by the general rule.[64] If a choice would be allowed in these instances, the claimant will always avoid the application of the specific rule, so the argument runs. In practice it will, however, be hard to assess whether the specific rule is really less advantageous. Every rule has its merits and demerits.[65] And even if the specific rule appears to be less advantageous, it is not self-evident that the person concerned wishes to avoid the application of this rule. There may be practical reasons not to rely upon a particular rule, even if a more advantageous possibility is available too.[66]

A more convincing argument for excluding the general rule is that the intentions of the legislature would otherwise be undermined. The question to consider is whether the legislature has really intended a particular rule to be exhaustive.[67] This is a question of interpretation which must be answered on the basis of the wordings, structure, and aims of the rules at issue. Even when the legislature has intended a particular rule to be exhaustive, the other rule should only be excluded to the extent that this is necessary in order to do justice to these intentions, as the *Bundesgerichtshof* emphasises:

> 'Eine abweichende Beurteilung ist zwar geboten, wenn einer Vorschrift zu entnehmen ist, dass sie einen Sachverhalt erschöpfend regeln und dementsprechend die Haftung aus anderen Anspruchsgrundlagen ausschließen oder in bestimmter Hinsicht beschränken will (…).'[68]

60 Boukema 1966, p. 27-28; Boukema 1992, p. 11-12; Goldie-Genicon 2009, p. 471; Castermans & Krans 2019, p. 18.
61 Goldie-Genicon 2009, p. 471.
62 Alexy 2010, p. 49.
63 Dietz 1934.
64 Boukema 1966, p. 28-29.
65 As observed e.g. by Serinet 1996, p. 818; Huber 2001, p. 227; Goldie-Genicon 2009, p. 518.
66 Bussy-Dunaud 1988, p. 277; Leduc 2000, p. 23; Huber 2001, p. 209; Goldie-Genicon 2009, p. 476-477.
67 Castermans & Krans 2019, p. 17-21.
68 BGH 22 July 2014, KZR 27/13, at 53.

The foregoing illustrates that it is far from self-evident that a specific rule trumps the application of a rule more general in scope. Even if the general rule embraces all the cases falling within the scope of the specific rule, which is not always the case, the question as to whether the specific rule sets aside the general rule is a question of interpretation which cannot be answered by relying upon the maxim *lex specialis derogat legi generali*. Rather, we should start from the premise that each rule – whether general or specific in scope – should be realised to the greatest possible extent. The next section will demonstrate that this is, indeed, the approach taken in the legal systems under consideration.

2.5 An alternative scheme of analysis

Does one legal rule affect the scope of application of another legal rule? It appears that legal systems share a scheme of analysis by which this question can be debated and solved. Once a case falls within the substantive scope of multiple rules, the starting point is that each rule must be considered on its own merits and that no rule should be excluded in advance.[69] The *Bundesgerichtshof* in particular has stressed time and again that the conditions, content and enforcement of each claim must be assessed independently:

> 'Sofern eine Handlung die Tatbestände mehrerer anspruchsbegründender Normen erfüllt, treten die daraus resultierenden Ansprüche, soweit sie auf dasselbe Ziel gerichtet sind, grundsätzlich in so genannter echter Anspruchskonkurrenz nebeneinander, mit der Folge, dass jeder Anspruch nach seinen Voraussetzungen, seinem Inhalt und seiner Durchsetzung selbständig zu beurteilen ist und seinen eigenen Regeln folgt (…).'[70]

The underlying principle is that the objectives of each rule should be realised to the greatest possible extent. This basic principle implies that each rule ought to have its intended legal effect, provided, of course, that the necessary elements have been established. French lawyers refer to the principle of *cumul*,[71] German lawyers to *kumulative Konkurrenz*,[72] Dutch lawyers to *cumulatie*[73] and English lawyers to *cumulation* or *combination*.[74]

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69 Edelman 2002, p. 264; Cartwright 2017, p. 11. See also the statement by Lord Herschell in *Derry v. Peek* [1889] 14 App Cas 337 (HL), at 359-360.

70 BGH 22 July 2014, KZR 27/13, at 53. It is settled case law: BGH 16 May 2017, X ZR 120/15, at 13; BGH 19 October 2004, X ZR 142/03, at 7; BGH 11 February 2004, VIII ZR 386/02, at 12; BGH 16 September 1987, VIII ZR 334/86, at 17; BGH 28 April 1953, I ZR 47/52, at 4.

71 Carbonnier 1961, p. 332-333; Bussy-Dunaud 1988, p. 123-128; Goldie-Genicon 2009, p. 155; Tricoire 2009, p. 257-261; Laroche 2014, p. 369.

72 Enneccerus & Nipperdey 1952, p. 217; Larenz 1992, p. 157; Neuner 2012, p. 239-240.

73 Boukema 1966, p. 22; Snijders 1973, p. 454; Brunner 1984, p. 10; Boukema 1992, p. 11-12; Vranken 1998, no. 34; Bakels 2009a, p. 342; Hartkamp 2011, p. 154; Van Nispen 2018, p. 20.

74 Cartwright 1991, p. 141-148; Watterson 2003; Burrows 2004, p. 14-16; Burrows 2016, p. 163; Cartwright 2017, p. 17-18.

Many examples can be given. A contracting party may terminate the contract and also recover the losses resulting from the breach, as is the case under French law.[75] Or he may obtain rescission of the contract and also claim damages in the tort of deceit, as is the case under English law.[76] Under German law, the owner may claim back his object from the possessor, claim any profits made and also claim compensation if the object has been damaged.[77] In all these instances, the claims and powers can be accumulated if the party concerned so wishes. This does not mean that the application of one rule cannot impact upon the application of another rule.[78] The rescission of a contract may, for instance, affect the extent of the recoverable losses.[79] Likewise, an award of damages under one head of liability must be taken into account when assessing the quantum of damages under another head of liability.[80] But these are not sufficient reasons to exclude the application of one of these rules from the outset. To do so would be 'an unnecessarily blunt method of avoiding double recovery', as Burrows has argued.[81]

Sometimes, however, the rules cannot be applied cumulatively, but only alternatively. French lawyers use the term *option*,[82] German lawyers refer to *alternative Konkurrenz*[83] or to *elektive Konkurrenz*,[84] Dutch lawyers to *alternatiiteit*[85] and English lawyers to the *election* between *alternative* remedies.[86] Neuner gives the following explanation:

> 'Mitunter stellt das Gesetz jemandem zwei oder mehrere Ansprüche oder Gestaltungsrechte wahlweise zur Verfügung. (…) Die Rechtsfolgen der wahlweisen Ansprüche oder Gestaltungsrechte schließen sich aus, sie können also nicht nebeneinander verwirklicht werden. Der Berechtigte hat aber zunächst ein Bündel an Rechten.'[87]

There may be several reasons for rules to be alternatives. The legislature may, for instance, have designed the rules to be mutually exclusive.[88] Cumulative application may also lead to inconsistent outcomes. It is logically impos-

75 Art. 1217 CC.
76 *Archer v. Brown* [1985] Q.B. 401 at 415 et seq.; Cartwright 2017, p. 86-88.
77 § 985, § 987 and § 989 BGB.
78 Dietz 1934, p. 334; Boukema 1966, p. 22.
79 Cartwright 1991, p. 143; Cartwright 2017, p. 17.
80 Burrows 1998, p. 43-44.
81 Burrows 1998, p. 41.
82 Popesco-Albota 1933; Martine 1957; Bussy-Dunaud 1988, p. 117-123; Viney 1994; Goldie-Genicon 2009, p. 155; Tricoire 2009, p. 257-261; Abid Mnif 2014; Laroche 2014, p. 14.
83 Enneccerus & Nipperdey 1952, p. 217; Larenz 1992, p. 157.
84 Wiese 2017, p. 233-234.
85 Boukema 1966, p. 22; Snijders 1973, p. 454; Brunner 1984, p. 10; Boukema 1992, p. 12-13; Hartkamp 2011, p. 154; Van Nispen 2018, p. 20-21.
86 Stevens 1996; Watterson 2003.
87 Neuner 2012, p. 240.
88 E.g. section 2 (2) Misrepresentation Act 1967; § 284 and § 437 BGB; Art. 7:21 (1) BW; Art. 1217 CC; Art. 1644 CC.

sible to rescind a voidable contract and also terminate the same contract. Likewise, it is not possible to rescind a contract and also claim damages for breach of contract.[89] After all, rescission means that the contract is retrospectively reversed while termination and damages for breach presuppose the existence of a contractual relationship.[90] Another classic example is the impossible combination of termination for breach and specific performance of the same contract.[91] Similarly, it is not possible to set aside a general term and also nullify the same term.[92] One simply cannot have both.

Can two liability rules ever lead to inconsistent outcomes? Although a double recovery of the losses can – and should – often be prevented by adjusting the quantum of damages, some differences cannot be bridged at this stage. English law does not, for instance, permit the award of both an account of profits and compensatory damages for an intellectual property tort.[93] Nor may damages in contract and tort be combined. The reason is that the rules pull in different directions: damages in contract aim to bring the party in a position as if the contract had been performed (*positive* interest) whereas damages in tort aim to bring the party in a position as if no tort had been committed (*negative* interest).[94] The regimes may also differ with regard to incidental issues such as limitation, jurisdiction, proof, remoteness and the range of available defences.[95] In such situations, the claimant may be required to clarify which rule he wishes to rely upon as his first line of argument.

Sometimes, the law dictates that one of the rules takes priority. French lawyers describe this outcome with the term *non-cumul* or *exclusion*,[96] German lawyers refer to *normverdrängende Konkurrenz*[97] or *Gesetzeskonkurrenz*,[98] Dutch lawyers to *exclusiviteit*[99] and English lawyers to *exclusion*.[100] The principle of *non-cumul des responsabilités contractuelle et délictuelle* is

89 HR 11 October 2013, ECLI:NL:HR:2013:CA3765, *NJ* 2013/492 (*Vano/Foreburghstaete*), at 3.5.2.

90 Cartwright 2017, p. 18.

91 Burrows 1998, p. 41.

92 HR 14 June 2002, ECLI:NL:HR:2002:AE0659, *NJ* 2003/112 (*Bramer/Hofman Beheer*).

93 Burrows 1998, p. 42; Edelman 2002, p. 248. Along similar lines: HR 14 April 2000, ECLI:NL:HR:2000:AA5519, *NJ* 2000/489 (*HBS Trading/Spendax*), at 3.3.5.

94 See generally Van Gerven, Lever & Larouche 2000, p. 33. See also Cartwright 1991, p. 141; Boukema 1992, p. 18; Krans 1999, p. 131-132; Hartkamp 2011, p. 154.

95 For instance, a claim in deceit under English law cannot be met by a defence of contributory negligence, which might apply to a concurrent claim in negligence or under the Misrepresentation Act 1967. See Cartwright 2017, p. 158.

96 Goldie-Genicon 2009, p. 195; Tricoire 2009, p. 317-318.

97 Enneccerus & Nipperdey 1952, p. 217; Larenz 1992, p. 157;

98 Dietz 1934, p. 16. It must be noted that this term has also been used to describe the overlap of multiple rules rather than the exclusivity of one of them, e.g. by Lent 1912, p. 12 et seq.; Enneccerus & Nipperdey 1952, p. 217-218.

99 Boukema 1966, p. 22; Snijders 1973, p. 454; Brunner 1984, p. 10; Boukema 1992, p. 11-12; Bakels 2009a, p. 342; Hartkamp 2011, p. 154; Van Nispen 2018, p. 20; Castermans & Krans 2019, p. 91-114.

100 Burrows 1998, p. 20.

probably the most famous example: it prescribes that the French law of tort is not applicable to losses suffered in the context of a contractual relationship. Although German, Dutch and English courts have not chosen the same solution for this particular problem,[101] they do recognise the possibility of excluding one of the applicable rules. The courts do, however, use the technique with great restraint. The *Bundesgerichtshof* and the *Hoge Raad* focus on the will of the legislature: was the intention really to exclude the application of other available rules?[102] English law focuses on the will of the parties: did they really intend their relationship to be governed exclusively by the contract into which they entered?[103]

Instead of ignoring one of the applicable rules altogether, the courts may also adjust their scopes of application. The *Cour de Cassation*, for instance, declared the short time limit of Article 1648 CC – applicable to claims related to hidden defects of goods – also applicable to the *action en nullité pour erreur*.[104] Likewise, the *Hoge Raad* confirmed that the short time limit of Article 7:23 (2) BW – applicable to the buyer's claims and defences based on the breach of a sales contract – may also apply to claims based on extra-contractual liability, misrepresentation and fraud.[105] The *Bundesgerichtshof* has regularly used this technique too. It has decided, for instance, that the rule that the donor (*Schenker*, § 521 BGB), the lender (*Verleiher*, § 599 BGB) and the board (*Geschäftsführung*, § 680 BGB) can only be held liable in the event of wilful conduct (*Vorsatz*) or gross negligence (*grobe Fahrlässigkeit*) also applies to a tort claim against these people.[106] A similar approach has essentially been adopted by the Court of Appeal of England and Wales when it decided that the 'reasonable contemplation' test in contract also applies to a concurrent claim in negligence for pure economic loss,[107] and by the Supreme Court of the United Kingdom when it decided that the existence of a contract determines the scope of a concurrent equitable custodial duty.[108]

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101 This will be further explained in Chapter 3 of this book.

102 BGH 17 March 1987, VI ZR 282/85, at 37-38; BGH 12 December 1991, I ZR 212/89, at 10; BGH 22 July 2014, KZR 27/13, at 53; and HR 28 June 1957, *NJ* 1957/514, note L.E.H. Rutten (*Erba/Amsterdamsche Bank*); HR 15 November 2002, ECLI:NL:HR:2002:AE8194, *NJ* 2003/48, note J.B.M. Vranken (*A.V.O./Petri*), at 3.7.2; HR 15 June 2007, ECLI:NL:HR:2007:BA1414, *NJ* 2007/621, note K.F. Haak (*Fernhout/Essent*), at 4.2.

103 *Henderson v. Merrett Syndicates Ltd (No. 1)* [1995] 2 AC 145 (HL).

104 Cass. 1e Civ. 19 July 1960, *Bull. civ.*, I. no. 408; *RTD civ.* 1961. 332, note J. Carbonnier; Cass. 3e Civ. 11 February 1981, *Bull. civ.*, III, no. 31; *D.* 1981. IR. 440, note Ch. Larroumet. The *Cour de Cassation* later changed its position, see Goldie-Genicon 2009, p. 165-171.

105 HR 21 April 2006, ECLI:NL:HR:2006:AW2582, *NJ* 2006/272 (*Inno/Sluis*); HR 29 June 2007, ECLI:NL:HR:2007:AZ7617, *NJ* 2008/606, note J. Hijma (*Pouw/Visser*); HR 23 November 2007, ECLI:NL:HR:2007:BB3733, NJ 2008/552-553, note H.J. Snijders (*Ploum/Smeets*); HR 17 November 2017, ECLI:NL:HR:2017:2902, *NJ* 2017/438 (*MBS Raad*).

106 BGH 23 March 1966, BGHZ 46, 140; BGH 30 November 1972, NJW 1972, 475; BGH 20 November 1984, BGHZ 93, 23.

107 *Wellesley Partners LLP v. Withers LLP* [2015] EWCACiv 1146.

108 *AIB Group (UK) v. Mark Redler & Co Solicitors*, [2015] AC 1503 (UKSC), analysed in more detail by Taylor 2019, p. 36-41.

The resulting rule contains elements of both bodies of law but is quite different from its components. Writers have coined new terms to describe this effect, such as *contorts*,[109] *mixed* claims,[110] and *Anspruchsnormenkonkurrenz*.[111] Writers with a preference for all things dogmatic, however, argue that the resulting hybrids do not fit the existing categories of the law. Goldie-Genicon, for instance, strongly disapproves of the fusion of general and specific rules of contract:

> 'La mise en œuvre d'une telle technique a un effet radical : elle retire tout enjeu au concours d'actions. Le plaideur n'aura plus aucun intérêt à agir sur le terrain du droit commun. L'option entre les deux actions est maintenue, mais elle est illusoire. (…) Par une sorte de mariage contre nature, elle crée une action nouvelle qui emprunte aux deux corps de règles, et méconnait les contours de chaque action définis par le législateur.'[112]

It is clear that the 'fusion' of two bodies of law provokes strong reactions. Yet the approach has much to recommend it. Rather than defying the will of the legislature or acting contrary to precedent, the courts try to do justice to the objectives underlying each rule. They reduce the restrictions imposed by the prioritised rule to a minimum and retain as much of the other rule as possible. This may be particularly useful when the prioritised rule shows gaps and, hence, does not provide all the answers. As a result, the claimant may still benefit from the application of the rule of his choice. Contrary to what Goldie-Genicon contends, this choice has not become illusory: the claim is not declared inadmissible and the arguments have not been put forward without reason. At the same time, the defences invoked by the defendant are taken into account, even when they belong to a different legal regime.

The examples illustrate that the courts consider a total rejection of concurrence an unnecessarily blunt instrument. They strive to realise every applicable rule to the greatest possible extent. Consequently, the existence of alternative and exclusive rules is an exception which requires justification. It flows from this reasoning that the party concerned – usually the claimant – may rely on the most advantageous rule – usually a specific cause of action – unless the rules are incompatible or one of them applies exclusively. We have seen that the benefit of this choice may nonetheless be affected, because the content of one rule might affect the content of another rule.[113] This does not mean that the rules are identical in all respects, nor that one of the rules is swallowed up by the other. The rules continue to exist side by side, in accordance with the basic principle that each rule ought to have its intended effect.

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109 Gilmore 1974, p. 88, 90 and 94.
110 Snijders 1973; Nieuwenhuis 1982.
111 Georgiades 1968.
112 Goldie-Genicon 2009, p. 165.
113 Also observed by Taylor 2019, p. 21 and 45.

2.6 Conclusion

The purpose of this chapter was to uncover the principles that must be taken into account when solving issues of concurrence in private law. Before examining this question, we have first taken a step back and analysed in more detail the kinds of rules which play a central role when adjudicating disputes between individuals in modern systems of private law. Drawing on insights from analytical jurisprudence and general theories of law, this chapter has distinguished three categories of rules. We have examined the claims which entitle the individual to demand some performance from another individual, such as the claim for specific performance and the claim for compensation. Secondly, we have focused on the powers by which an individual may unilaterally create, modify or extinguish a legal position or relationship, such as the power to terminate a contract. Thirdly, we have adopted the perspective of the person affected and examined the defences by which the enforcement of such claims and powers can be prevented.

These claims, powers, and defences have been built up over the years, sometimes even without any serious consideration by legislatures or courts of adjacent rules and accompanying principles. And even when attempts have been made to build a coherent system, notably in codified systems of private law, the rules may still overlap. Such an overlap does not give rise to problems as long as the application of the rules leads to the same outcome. Yet the rules may vary in important ways, which may lead to different results. In such situations, the question is raised whether one rule affects the scope of application of another rule. This question arises regularly, both on the part of the claimant and on the part of the defendant. The problem of concurrence may be unwelcome, but it is clearly ineradicable.

The question is how we should solve it. One response is to assume that specific rules have precedence over rules more general in scope. This chapter has submitted that it is appropriate to adopt a cautious approach in this respect and to avoid jumping to this conclusion. To begin with, the maxim *lex specialis derogat legi generali* can really only be relied upon when one rule is general and another rule is specific. It is widely accepted that this is only the case when the general rule embraces all the cases falling within the scope of the specific rule. But even if that is the case, the question as to whether the specific rule trumps the general rule is a question of interpretation which cannot be answered by assuming that the specific rule will have priority. Rather, this chapter has argued that we should start from the premise that each rule – whether general or specific in scope – should be realised to the greatest possible extent.

The chapter has shown that this is, indeed, the approach taken in the legal systems under consideration. They share a number of basic responses when dealing with the availability of claims, powers, and defences in relationships between individuals. Together they provide a scheme of analysis by which issues of concurrence can be debated and solved. The starting point is that each applicable rule, however founded, should be realised to

the greatest possible extent. In principle, then, each rule ought to have its intended legal effect once the necessary conditions have been established. It flows from this reasoning that the claimant or defendant should have a free choice to invoke the rule that appears to him to be the most advantageous. An exception must be made, however, if cumulative application would lead to inconsistent outcomes which cannot exist concurrently. In such situations, an election between the available alternatives is required. The underlying reason is that the objectives of one rule cannot be realised if the other rule is also applied. For the same reason, the law sometimes prescribes that one of the rules applies exclusively, so that no election can be made at all.

Every case may spark a debate about whether the rules are incompatible or whether one of them applies exclusively. The outcome may differ depending on the content of the rules at issue. The next chapter illustrates this point by discussing a classic example of concurrence: the overlap of the laws of contract and tort. In doing so, the chapter considers in greater detail the reasons underlying the decision to permit or restrict the availability of claims, powers, and defences.