

Comparative spots on the law of lease

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1 INTRODUCTION

Legal science and especially the field of private law have in the last decades experienced a phase of basic comparative research focusing its subjects from a European perspective. In the year 1982 *Ole Lando* founded the Commission on European Contract Law that made it its aim to elaborate a set of rules on contract law. These rules should depict a model solution for a possible common contract law in the EU and reflect the contemporary contract law in Europe. For this purpose the work of the Commission on European Contract Law was strongly based on comparative research in the various jurisdictions. The outcomes of the Commission's efforts are the Principles on European Contract Law Part I–III (PECL), consisting of rules, comments and comparative notes.¹ The Commission on European Contract Law has fulfilled its tasks with Part III of PECL and has dissolved. From a methodological and structural view its work is continued by the Study Group on a European Civil Code (SGECC).² The SGECC started to work in the middle of the year 1999 and many of the former members of the Commission on European Contract Law are now members in the SGECC. The name of the SGECC expresses already that it is not only dealing with contract law. The final aim of the Study Group is an academic draft of a «European Civil Code».

In the latest past the European Commission has officially recognised the work of the SGECC: since May 2005 the SGECC is a part of the «Joint Network on European Private Law». This is a «Network of Excellence» funded by the European Commission. The task is to elaborate a «Common Frame of Reference» (CFR) that makes it (inter alia) possible to improve the existing directives concerning private law and that gives a guideline for both the future development of the *acquis* and the civil law legislation of the member states.³

How are these European developments connected with the University of Bergen and the premises in Håkonsgaten 3? The SGECC has several teams working on different subjects of the law of obligations and the core aspects of the law of property. These working teams are based in several EU-member states.⁴ One further working team of the SGECC is based outside the EU, namely in Norway at the University of Bergen, and is guided by Prof. *Kåre Lille-*

¹ *Lando/Beale*, Principles of European contract law Part I and II, The Hague, Kluwer Law Int., 2000, Part III, The Hague, Kluwer Law Int., 2003, translations to German: *von Bar/Zimmermann*, Grundregeln des Europäischen Vertragsrechts, I und II, Sellier. European Law Publishers, Munich, 2002, Part III, 2005. For further translations to Italian, Spanish, French and Dutch see introduction of the German translation.

² For detailed information about the Study Group on a European Civil Code (structure, different working teams, texts, meetings) see www.sgecc.net.

³ For further information about the political process, functions and structure of the CFR, see *Schmidt-Kessel*, Auf dem Weg zum Gemeinsamen Referenzrahmen: Anmerkungen zur Mitteilung der Kommission vom 11. Oktober 2004, GPR 2005, 2.

⁴ For a list of the working teams see http://www.sgecc.net/index.php?subsite=subsite_3&id=4.

holt.⁵ The task of the working team in Bergen is to elaborate the Principles of Lease of Goods (and Financial Leasing).

The author of this contribution is a member of the Bergen working-team since April 2005.⁶ The author's main task is to write comparative notes to the Principles of European law of lease. The comparative notes shall enable the national reader to see the relation between the Principles and his jurisdiction. Along these studies in lease law many results have been collected that are remarkable from a comparative point of view. This contribution spots three of them: The first one is concerned with the dogmatic basis of tacit prolongation (or tacit renewal) of a lease-contract; the second one with the question, if a lease contract has to have a determined term (and a maximum duration) or if lease contracts for an indefinite term are admissible; the third one is concerned with the different concepts for the obligation(s) of the lessor.

2 TACIT PROLONGATION/RENEWAL OF A LEASE-CONTRACT

The instrument of tacit prolongation or tacit renewal contains a legal solution for the following situation: the lease contract expires and neither party reacts to that; the lessee does not return the leased object and it remains available for his use; the lessor lets this happen without any reaction. This situation has been specifically addressed in Roman law, namely in the figure of the *relocatio tacita*.⁷ The dogmatic basis was a tacit or implied consent.⁸ The main task of the *relocatio tacita* in Roman law appears to be to find a foundation for the duty of the lessee to pay rent for the continued time of factual use,⁹ a purpose that, seen isolated from other problems connected with the situation, in nowadays continental European jurisdictions could well be solved by the rules on unjustified enrichment(s). Nevertheless the *relocatio tacita* has found its way into most of the various Civil Codes of Europe.¹⁰ But one has to see that this process of reproduction has taken place in different forms and with differences in details. One of the most obvious differences, that also explains the headline of this section, is that some jurisdictions regard the situation in question as a prolongation of the old contract whereas others regard it as a renewal (and therefore a new contract), and to a certain extent every solution has its own consequences. This contribution can not spot all differences in the reproduction and therefore restricts itself to the question of the dogmatic basis of tacit prolongation/renewal.

In many European jurisdictions the dogmatic basis for tacit prolongation or tacit renewal is seen in a refutable presumption in law: the inactivity of the parties in this special situation leads to the presumption of a declaration of will with the content that the parties wanted to

⁵ Further members of the working team are: Berte-Elen Konow, Tarjei Bjørkly, Andreas Fötschl, Andreas Meidell, Amund Tørum, and Anders Victorin (University of Stockholm).

⁶ From 1999 till 2005 the author was a member of the working team on extra-contractual obligations based at the European Legal Studies Institute at the University of Osnabrueck/Germany.

⁷ *Ulpian*, D. 19, 2, 13, 11.

⁸ *Zimmermann*, Law of Obligations, pp. 356 sq.

⁹ *Kaser*, Römische Privatrecht¹⁷, p. 203.

¹⁰ See § 545 BGB, § 1114 ABGB (Austrian «Allgemeines Bürgerliches Gesetzbuch»), Art. 266 sect. 2 Swiss OR, Art. 611 Greek CC, Art. 1738 French CC, Art. 1566 Span. CC, Art. 1597 Ital. CC, Art. 1536 Maltese CC, Art. 1056 Port. CC, Art. 674 Pol. CC, Art. 615 Slov. Code of Oblig., § 310 sect. 1 Est. CC, Art. 6.481 Lith. CC, § 431 sect. 2 Hung. CC, § 676 sect. 2 Czech/Slovak CC. The Latvian CC and the Common Law do not know a special instrument having its roots in the Roman *relocatio tacita*.

prolong or renew the contract. This is the case (inter alia) in Austria, Switzerland, France, Spain and Italy.¹¹ The situation is (or what will be shown later «was») different especially¹² in German Law: the dogmatic basis for § 545 BGB¹³ was seen as a fiction¹⁴, what means that the law links consequences to silence instead of declarations of will («*Schweigen an Erklärung Statt*»¹⁵). The consequences of this fiction were regarded as such in law and as independent of the will of the lessor and lessee.¹⁶ The notion was particularly then not applicable when an (implied) agreement was given.¹⁷

Two aspects have to be regarded to this situation. First, the practical impact of this dogmatic difference; and second the latest activities of the German legislator. Very often different dogmatic legal concepts do not lead to any differences in the results of the various rules. For an examination of the results some important factual issues shall be picked out. Of some practical importance is the question how to prevent tacit renewal/prolongation. Those jurisdictions working with a refutable presumption do regularly not mention the non-existence of a declared opposite will of any party as a specific part of the rule on tacit prolongation/renewal.¹⁸ It is simply said in judgments and literature that the presumption is refuted by every event that expresses the undoubtedly will of the lessor (or the lessee) not to continue the contract.¹⁹ In contrast to that the question of opposition is directly addressed in the BGB: according to § 545 sent. 1 BGB a prolongation is not taking place when the lessor or the lessee expresses an opposite will. The opposition is a declaration of will that has to show with no doubt that the declaring person does not want to continue the lease contract; the opposition can also be declared implicitly.²⁰ So, from the point of opposition the dogmatic divergence makes no difference. Further important issues connected with the dogmatic basis are legal capacity and the possibility to contest a declaration. For German law it is said that legal capacity is required, in spite of the fiction-concept²¹ and, most important, that the comparably broad possibility to contest a declaration under German law is excluded in the case of tacit

¹¹ See Würth in Rummel-ABGB I³, § 1114 nr. 4, Zihlmann in Honsell/Vogt/Wiegand, Kommentar zum OR I, Art. 266 nr. 2, Groslière, Rép. Civ. Dalloz, V° Bail, p. 41, nr. 659, 665, Albaladejo, Derecho Civil II¹², p. 654, nr. 23, Rescigno, Codice Civile I⁵, Art. 1596–1597, nr. 2, p. 1958.

¹² The following sentences are only concerned with German Law. In the preparation for this contribution no other jurisdiction could be found that would have followed the German example.

¹³ Before the *Mietrechtsreformgesetz* 2001 the relevant notion was found in § 568 BGB.

¹⁴ Reichsgericht, 5. May 1933, RGZ 140, 314, 316.

¹⁵ See Larenz, Allgemeiner Teil⁷, § 19 IV c., p. 361 et. sequ.

¹⁶ Larenz, Besonderer Teil I¹³, § 48 VI d., p. 265, Gitter, Gebrauchsüberlassungsverträge, p. 53.

¹⁷ Staudinger [-Emmerich], BGB, Bearb. 1997, § 568 nr. 12, with the example of non-application of § 568 BGB (old version) when the lessor lets the lessee go on in use and accepts the rent. In the jurisdictions that have a presumption as a basis it is regularly said, that the ongoing use of the lessee and the acceptance of the rent by the lessor does not necessarily lead to tacit prolongation/renewal, but will be the case in most such situations.

¹⁸ Here has to be mentioned that a rule like Art. 1739 French CC is not dealing with the opposition itself.

¹⁹ Würth in Rummel-ABGB I³, § 1114 nr. 4, Amar-Layani, «La tacite reconduction», D. 1996, chr. p. 143, 146, Díez-Picazol/Gullón, Sistema II⁹, p. 337, Cian/Trabucchi, Codice Civile⁷, § 1597, III., nr. 2.

²⁰ BGH 25 Jan. 1991, BGHZ 113, 290, 297, for details see Emmerich/Sonnenschein, Hk-Mietrecht⁸, § 545 nr. 5 et sequ.

²¹ In the opinion of some authors the concept of a fiction seems as a whole not convincing, because legal capacity of the parties is required for prolongation, see f. ex. Oetker/Maultzsch, Vertragliche Schuldverhältnisse, p. 314.

prolongation.²² So, here could be, with all cautiousness, the real reason for the fiction concept: it seems to be needed to avoid the very broad possibility for a contestation in case of mistake under German Law.²³ In the other jurisdictions legal capacity is already necessary because of the character of a presumption of a declaration and contestation of a declaration is not even discussed in connection with tacit prolongation/renewal. So, from a practical point of view the different dogmatic bases seem to have no impact also in these issues.

The second aspect mentioned is the latest activity of the German legislator. The legislator of the *Mietrechtsreformgesetz* 2001²⁴ was not satisfied with the fiction from a linguistic point of view²⁵ and changed the wording of § 568 BGB (old version) in the new relevant § 545 BGB in this respect. In the opinion of the legislator the same results can be reached with the simpler wording of just ordering the prolongation of the contract. But this reformulation did not (and also should not) change anything in substance.²⁶ The consequences of tacit prolongation are still seen as such in law; a mistake of the lessor or the lessee about the legal consequences of their conducts is still irrelevant and still § 545 German CC is seen not to cover cases of implied agreement; it is only applicable when otherwise non-contractual-rules (especially *Be-reicherungsrecht*) would govern the relationship of the parties.²⁷ Considering these circumstances it is somehow understandable that some authors still speak of a fiction in connection with the new wording of § 545 BGB,²⁸ but nevertheless others see in the new wording an irrefutable²⁹ presumption.³⁰ So, also in the naming of the dogmatic basis the systems are approaching and what was seen as a divergence at the outset are rather similar systems, when one looks at the contents.

3 DEFINITE TERM ESSENTIAL – INDEFINITE TERM ADMISSIBLE

Another remarkable difference that appears at first sight in the various systems of lease law in European Civil Codes is found in the question, if every lease contract has to have necessarily a definite end (with or without a maximum period) or if lease contracts for an indefinite period (and with an open end) are admissible. To this question five different basic solutions could be found in European jurisdictions:

²² *Weidenkaff* in Palandt-BGB⁶⁴, § 545 nr. 10

²³ Another explanation could be the following: Today it is clear, that the lack of «*Erklärungsbewußtsein*» leads normally to the possibility to contest the declaration (BGHZ 91, 324). But in the year 1933, when the fiction concept was first mentioned by the Reichsgerichtshof, the «*Erklärungsbewußtsein*» was seen as part of the «*Tatbestand*», so that it's lacking lead to the non-existence of a declaration of will (see therefore *Fötschl*, *Hilfeleistungsabreden und contrat d'assistance*, pp. 101 et sequ.). In the case of tacit prolongation it is very unclear if the parties really intended to declare their will by their inactivity and in the year 1933 that was not regarded to be sufficient for the conclusion of a contract, so that the fiction concept was needed at that time.

²⁴ BGBI. I 2001, 1149.

²⁵ BT-Drucks. 14/4553, p. 44: fiction appears «linguistically awkward».

²⁶ *Emmerich/Sonnenschein*, Hk-Mietrecht⁸, § 545 nr. 1.

²⁷ BT-Drucks. loc. cit.: the rules on unjustified enrichments or on owner-possessor-relationship would not be appropriate and would in most cases not correspond with the presumptive will of the parties.

²⁸ *Eckert* in Handkommentar-BGB², § 545 nr. 1.

²⁹ For the «irrefutable» character of the presumption one has to see, that § 545 BGB already mentions the opposition in its wording and incorporates by this way the «refutability».

³⁰ *Oetker/Maultzsch*, loc. cit.

The first model is to allow indefinite contracts and have no maximum period for contracts for a definite term; that is for example the solution in the Austrian ABGB, although § 1090 ABGB works with the same wording («*gewisse Zeit*») as the French CC in Art. 1709 («*certain temps*»). But whilst in French law this ambiguous term is understood to be a prohibition of perpetual contracts,³¹ it is interpreted in Austria in its other possible sense, namely that the lessee must be contractually bound at all, what means for at least some time; any temporal binding of the lessor suffices to fulfil the criteria.³² This represents already the second possible model: to have no explicit maximum period, allow indefinite contracts, but perpetual leases are declared inadmissible. Next to French law³³ this system is followed for example in the Swiss OR.³⁴ The third possible model would be to allow indefinite contracts and to work with a maximum period for definite periods (most common 30 years³⁵); in this third model every party has a right to extraordinary termination after the maximum period³⁶ or the contract is transformed after the maximum period into a contract for an indefinite period.³⁷ There is a fourth model found in European Codes that does in contrast to model 1–3 not allow contracts for an indefinite period. If a contract is made for an indefinite period, the term is given by law (ex-lege duration). This model is found in Italian³⁸ and in Spanish law³⁹. But what happens in these jurisdictions when the parties were not aware of these rules and tried to make a contract for an indefinite period? Then, as already mentioned, the law determines the dura-

³¹ Huet, *Contrats spéciaux*, nr. 21145, p. 633 e. sequ., with reference to the origin of the thought, that contracts can not be perpetual. The thought came up during the French Revolution.

³² Würth in Rummel-ABGB I³, § 1090 nr. 4.

³³ See note above.

³⁴ Zihlmann in Honsell/Vogt/Wiegand, *Kommentar OR I*, Art. 255 nr. 6. One has to see also, that perpetual bindings in contracts are often forbidden by general rules, see therefore as an example Art. 6.109 PECL (Contract for an Indefinite Period) and Art. 15.101 PECL, comment B («*übermäßige Dauer*»).

³⁵ See the following footnotes for German, Greek, Estonian law. Italian law also knows a maximum duration of 30 years, but does not allow indefinite contracts. According to Art. 1573 Ital. CC a contract of lease can not be stipulated for a period exceeding thirty years (with exceptions found in Art. 1607 and Art. 1629 Ital. CC for dwellings and rural real estates). If a contract is stipulated for a longer period or in perpetuity, it is reduced to the duration of thirty years. For considerations following later on in this text it is important to remark here that Spanish Law does not know a thirty years maximum period.

³⁶ § 544 German CC states, that in the case of a contract made for a period exceeding thirty years every party has a right to extraordinary termination after thirty years after the surrender of the leased object. The only consequence of this provision is the possibility of extraordinary termination after the maximum period (see therefore *Emmerich/Sonnenschein*, *Hk-Mietrecht*⁸, § 544 nr. 5).

³⁷ According to Art. 610 Greek CC a lease contract can be terminated after the lapse of thirty years by notice in conformity with the provisions on leases for an indefinite duration, if the contract was concluded for a period longer than thirty years or for the lifetime of one of the parties. § 318 sect. 1 Est. Law of Oblig. stipulates that either party may cancel a lease contract entered into for longer than thirty years (with an exception for contracts for the lifetime of a party, sect. 2) after thirty years. For the details of cancellation a reference is made to § 312 Est. Law of Oblig. (sect. 3); this provision is dealing with terms for ordinary cancellation of lease contract for unspecified term.

³⁸ Art. 1574 Ital. CC gives an ex-lege duration for contracts without a determine duration. See *Cian/Trabucchi*, *Codice Civile*⁷, Art. 1574, I, nr. 1: «*tutte le locazioni hanno una durata: o determinata pattizamente o fissata dalla legge*».

³⁹ See Art. 1543, 1577 and 1581 Span. CC. For further details and references to judgments of the Tribunal Supremo see *Díez-Picazo/Gullón*, *Sistema II*⁹, p. 331: «*Plazo determinado es lo contrario de la perpetuidad y de la indefinición.*»; but see also *Albaladejo*, *Derecho Civil II*¹², p. 631 et sequ., nr. 10: «*tiempo determinado*» in Art. 1543 CC is a «*frase non feliz, ya que realmente el tiempo puede ser indeterminado, y lo que no puede ser el arrendamiento es a perpetuidad*». So, in the opinion of *Albaladejo* contracts for an indefinite period are allowed.

tion of the contract and it is most probable, that the lessee simply goes on in using the thing after the unknown term and the lessor lets leave it like that. But here it is important to see that the described situation can be regarded as a case of tacit prolongation/renewal: According to Art. 1596 sect. 2 Ital. CC the lease with an *ex-lege* duration does not end, if a notice of termination is not given⁴⁰ and according to Art. 1597 sect. 1 Ital. CC the contract with an *ex-lege* duration is tacitly renewed if a notice of termination has not been given in accordance with Art. 1596 sect. 2 Ital. CC.⁴¹ The duration of the new lease is governed (again) by the *ex-lege* duration of Art. 1574 Ital. CC and tacit renewal can take place as many times as notice is not given in time. Of course, frankly spoken it is not very convincing to use tacit renewal for such a purpose, because in these cases the renewal is a consequence of the missing notice of termination and not of a presumption of declarations.⁴² However, for our purposes it is only important to see that tacit renewal in these cases leads to the fact that the mandatory definite *ex-lege* duration is by no means as definite as it seemed. And the only real difference that can be seen between the Italian system and the systems with contracts for an indefinite period is, that in the latter ones the notice of termination is followed by a period of notice before the contract ends, whereas in the Italian system notice of termination can only be given (with a period of notice) for special points in time. The difference in the various concepts of the European Civil Codes concerning mandatory definite and admission of indefinite periods is by far smaller than it seemed at the outset.

4 OBLIGATIONS OF THE LESSOR

The various European Civil Codes contain two different basic models for a concept of the obligation(s) of the lessor. Some Civil Codes enumerate singular obligations of the lessor. In these systems one finds generally three main obligations of the lessor: to deliver the thing (in good repair), to maintain it in that state and to assure to the lessee the peaceful enjoyment of the thing. Such an enumeration is for example found in Art. 1719 French CC and especially in those jurisdictions which were under some influence of the French Civil Code.⁴³ This model regards the delivery of the thing similar to sales law and contains a special notion on peaceful enjoyment for the dynamic aspect of the lease relationship.

The second model is to see the obligation of the lessor as a dynamic unity at the outset. In this view the lessor is obliged to make the thing available to the lessee for the contractually agreed use. The Austrian ABGB (§ 1090) appears to be the first one working with this unitary concept and it is also found in § 535 BGB and in many other Codes.⁴⁴

The question, if this conceptual difference has any practical consequences can not be examined here. But what can be shown is that the difference is not a simple question of codifica-

⁴⁰ This Art. reads rather complicated: «*La locazione senza determinazione di tempo non cessa, se prima della scadenza stabilita a norma dell'art. 1574 una delle parti non comunica all'altra disdetta*».

⁴¹ Art. 1597 sect. 1 Ital. CC: «*La locazione si ha per rinnovata ... se, trattandosi di locazione a tempo indeterminato, non è stata comunicata la disdetta a norma dell'articolo precedente.*» For Spanish Law see Art. 1566 Span. CC.

⁴² *Rescigno*, Codice Civile I⁵, Art. 1596-1597, nr. 3: «*La rubrica dell'art. 1597 è impropria perché nel caso in esame la riconduzione non deriva da una tacita (e presunta) volontà delle parti ma dal mancato assolvimento di un onere con effetti risolutivi*» (w.f.r.).

⁴³ Art. 1719 Bel. CC, Art. 1554 Span. CC, Art. 1539 Maltese CC, Art. 1575 Ital. CC.

⁴⁴ § 664 Czech/Slovak CC, Art. 256 sect. 1 Swiss OR, Art. 575 Greek CC, § 276 Est. Law of Oblig., Art. 662 Pol. CC, Art. 6.483 Lith. Law of Oblig.

tory aesthetics. A codification aims to be a system of correct, logically deductible and harmonized sentences. For this reason it is necessary to see if the different concepts of the lessor's obligation(s) are in itself correct; German and French law shall serve as a role model here.

The principal obligation of the lessor is found in § 535 sect. 1 sent. 1 BGB: the lessor is obliged to allow the lessee the use of the leased object during the lease period («*Mietzeit*»). Sentence 2 of § 535 sect. 1 BGB specifies, what the lessor has to do to fulfil this obligation: he has to hand over the leased object to the lessee in a state suitable to the agreed use and has to maintain it in that state during the lease period.⁴⁵ These sentences are free of any logical frictions.

Art. 1719 French CC enumerates the principal obligations of the lessor as already shown above. In French literature it is said, that this enumeration follows a chronological order.⁴⁶ But is this chronological order correct? For example: Art. 1720 French CC specifies the obligation to deliver; the lessor has to deliver «*la chose en bon état de réparations de toute espèce*». But according to Art. 1719 nr. 2 French CC the lessor has to maintain «*cette chose en état de servir à l'usage pour lequel elle a été louée*». Delivery and maintenance are separated only by one second; as soon as the lessor has delivered his obligation to maintain begins. Why are two different standards given for these obligations? The difference is seen in French literature but no explanation is given for it.⁴⁷ For Italian law arises the same problem.⁴⁸ But in Italian legal literature it is said, that the duty to deliver the thing in Art. 1575 nr. 1 Ital. CC is (in spite of the objective formula) understood as a concept referring to the agreed use.⁴⁹ So, it seems as if the chronological order runs out of order.

But it is more important to see, that a chronological order is not correct at the outset. *Bénabent* describes the enumeration of Art. 1719 French CC as deceptive in two ways: First, it is not complete,⁵⁰ second it pretends the obligations of the lessor to be parallel and independent one of each other, whereas in reality there is only one essential obligation of the lessor: to assure the lessee the peaceful enjoyment of the thing; all other obligations can be regarded as being just different means contributing to this aim.⁵¹ And if one compares the statements found to the obligation contained in Art. 1719 nr. 3 French CC⁵² with the statements to the

⁴⁵ «*Gebrauchsüberlassungs-, Gebrauchserhaltungs- und Instandhaltungspflicht*», see f.ex. *Oetker/Maultzsch*, Vertragliche Schuldverhältnisse, p. 278, *Larenz*, Besonderer Teil I¹³, § 48 II, p. 219.

⁴⁶ *Huet*, Contrats spéciaux, nr. 21160, *Malauriel/Aynès/Gautier*, Contrats spéciaux¹⁴, p. 427.

⁴⁷ *Groslière*, Rép. Civ. Dalloz, V° Bail, nr. 193.

⁴⁸ Art. 1575 nr. 1 Ital. CC demands delivery «*in buono stato di manutenzione*»; but nr. 2 stipulates to maintain the thing in a state to serve for the contractually agreed use.

⁴⁹ *Catelani*, Locazione³, p. 196: «*concetto relativo*» to the agreed use, *Cian/Trabucchi*, Codice Civile⁷, Art. 1575, II., nr. 1, *Rescigno*, Codice Civile I⁵, Art. 1575 nr. 3. For Belgium law, where the problem is also apparent, it is said, that the obligation to maintain the thing in a state to serve (for contractual use) implies to deliver it in the same state (*Haye/Vankerckhove*, Baux en général², nr. 575).

⁵⁰ The enumeration does not contain the guarantees and the obligation to secure, which are also found in the French CC.

⁵¹ *Bénabent*, Les contrats spéciaux⁶, nr. 334-3.

⁵² According to Art. 1719 nr. 3 CC the lessor is obliged to guarantee to the lessee a peaceful enjoyment for the duration of the lease. Normally this obligation is split up in two components: First, the lessor is bound not to make any personal act that disturbs the lessee in the use (*Bénabent*, contrats spéciaux⁶, nr. 336), what is seen as an obligation to omit (*Collart-Dutilleul/Delebecque*, contrats civils⁷, nr. 496, «*Gebrauchsbelassungspflicht*»), or as a prolongation of the delivery (loc. cit., 497) and constitutes the dynamic element of a lease; this is seen as an

obligation to allow the contractually agreed use during the lease period in German law, one can not overlook the similarities. From this can be summarized, that the system of enumeration of the lessor's obligation in a chronological order does not express the hierarchies correctly and that this has been recognised in French legal literature. Even if this might in many cases have no practical influence,⁵³ the unitary model seems to draw the picture of the lessor's obligations more precisely and should serve as a role model for a common European solution.

5 FINAL REMARKS

These spots are only examples of phenomenon's that appear very often in comparative law: Under point 2 and 3 it was shown that different dogmatic concepts and different expressions do not necessarily produce different results in the answering of functional questions. Moreover, very often despite these differences the results for functional questions are the same. The reason for this is that concepts are drawn and expressions are chosen with a specific, sometimes politically inspired, background, whereas functional questions are answered by courts; and in a court-yard dogmatic concepts are ousted by the necessity to find practical solutions that people can live with and this necessity knows no borders. Under point 4 it was shown that the European jurisdictions do not live isolated one from each other, but experience a vivid exchange of thoughts and ideas and learn from each other, even though the sources of an idea are not always declared. Ideas that are found in one jurisdiction are very often also present in another. From this it follows not only that the legal reasoning and the factual solutions for disputes under different legal systems are not as different as it might seem, but also that a «European Civil Code» is from a technical point of view feasible without revolutionary changes in the singular systems. The questions remain if the political will and the competence therefore exist. But these questions can be answered positively rather quick when the technical preparations are done and the right political mood has come. And that this political mood is in the future not as unrealistic as some opponents of a «European Civil Code» believe is shown by the «*Common Frame of Reference*» now requested of the European Commission. It shows the dissatisfaction of the European Commission with the *status quo* and that think-tanks in Brussels are at least running warm.

«*obligations essentielle du contrat*» (Huet, *contrats spéciaux*, nr. 21164, p. 658). The second component is of no importance in this connection.

⁵³ But problems can arise hypothetically, for example, if within the system of enumeration some obligations can be contracted away and others not, as it is the case in French law.