Diese Regeln sind aber wegen des unterschiedlichen, nämlich umgekehrten Sachverhalts im vorliegenden Fall nicht relevant, so dass auch im Lichte des Konzernrechts kein Grund ersichtlich ist, in concreto der klagenden Tochtergesellschaft die selbständige Rechtssubjektivität im Verhältnis zur Muttergesellschaft abzusprechen. Hieraus folgt, dass erstere aus der eventuellen vertraglichen Haftung der Beklagten gegenüber der Muttergesellschaft der Klägerin keinen Nutzen ziehen kann. Davon abgesehen sind auch die von Mutter- und Tochtergesellschaft erlittenen Schäden nicht identisch.

3. Schlussfolgerungen

Ein und dieselbe Handlung kann theoretisch ohne weiteres zugleich eine Vertragsverletzung gegenüber einer Vertragspartei und ein Delikt gegenüber einem Dritten darstellen.[38] Die ungarischen Haftungsregeln gelten ebenso wie auch die spezifische Exkulpationsregel sowohl für die Delikts- als auch die Vertragshaftung. Kann sich der Schädiger exkulpieren, weil er sich so verhalten hat, wie es in der gegebenen Lage erwartet werden kann, so handelte er nicht vorwerfbar und haftet folglich nicht gegenüber dem Geschädigten.

In dem Sachverhalt, welcher dem französischen Urteil zugrunde liegt, müssen nach ungarischem Recht hinsichtlich der deliktischen Haftung der Beklagten gegenüber der Klägerin die entscheidenden Fragen der Vorwerfbarkeit und der mit dem Schadenserfolg verbundenen Rechtswidrigkeit mit Rücksicht auf die Wettbewerbssituation beurteilt werden.

Es ist aber als Schlussfolgerung zu betonen, dass die Vertragsverletzung gegenüber einem Dritten für sich genommen die Vorwerfbarkeit bzw. Rechtswidrigkeit im Verhältnis zum Geschädigten nicht begründet, so dass hieraus nicht automatisch eine deliktische Haftung zugunsten von letzterem folgt. Als Hauptregel müssen also die Voraussetzungen eines Schadensersatzanspruchs in dem relativen Verhältnis zwischen Schädiger und Geschädigtem geprüft werden.

Portuguese case note

MARTA DOS SANTOS SILVA*

1. Description of the Facts

In December 1984 and January 1985, the SEFRB (*Société d'Exploitation Française de Recherches Bioderma*) granted to the pharmaceutical business Lipha (*Société*

[38] Vgl. EÖRSI, a.a.O. in Fußn. 9,S. 44.

* MARTA DOS SANTOS SILVA, Junior Researcher (*wissenschaftliche Mitarbeiterin*) at the European Legal Studies Institute, University of Osnabrück and member of the Working Team on Extra-Contractual Obligations and the Working Team on Trusts of the Study Group on a European Civil Code.
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Lyonnaise Industrielle Pharmaceutique) an exclusive licence for the commercialization of certain cosmetic products. In November 1991, Merck (*Merck Santé*) obtained a beneficial control of Lipha's capital which led SEFRB to make known its intention to revoke the concession contract. Following on from this, SEFRB and Lipha reached an agreement in June 1992 on a deal through which SEFRB took back its industrial property rights, while Lipha agreed to be bound by the terms of a non-competition agreement for the following two years.

To regain its position *vis-à-vis* the commercialization of cosmetic products, SEFRB created a subsidiary, Bioderma (*Bioderma S.A.R.L.*), and in the course of the same year Lipha began exercising activities in the cosmetology domain and placed concurrent products on the market in September 1993. In response to this, SEFRB and Bioderma brought judicial action against Lipha for breach of the agreement protocol the following year.

In decisions of 7 July 1995 and 25 February 1998, the Court of Appeal of Lyon found that Lipha had carried out acts amounting to unfair and disloyal competition.

In this context, Bioderma brought an action for reparation of the damages suffered by virtue of the breach of the agreement protocol. The Court of Commerce of Lyon rejected this request on 15 June 1998, but the same request was accepted by the Court of Appeal of Céans, which ordered an enquiry. Before the conclusions of that enquiry, Bioderma brought an action for reparation on the grounds of quasi-delictual liability, and in turn Lipha claimed the groundlessness of that request.

In a decision of 14 April 2000, the Court of Appeal of Lyon ordered Merck, which was exercising the rights of Lipha, to repair the loss caused to Bioderma, thus recognizing that the loss-suffering third party to a contract may invoke, for its own benefit, a situation created by a contract and bring an action, on the grounds of delictual liability, for reparation of the loss resulting from the breach of the contract.

Lipha contested this decision. The French Court of Cassation in turn annulled it and returned the proceedings to the Court of Appeal of Grenoble, as it considered that a loss-suffering third party could not, on the grounds of delictual liability, make use of the inexecution of the contract, except where that constitutes a breach of the general duty of *neminem laedere*. As the French Court of Cassation considered that this was not verified by the Court of Appeal, it considered that the decision of the latter lacked legal basis.

2. Consideration According to Portuguese Law

The decision under analysis gives rise to a multiplicity of legal questions.

The appreciation of all of them would be impossible in this instance, so I would limit myself to the basic issue which is whether the Portuguese legal system has a way for the loss-suffering third party to a contract to bring an action against one of the contractual partners.

One has to, therefore, verify whether and in which measure the rules of civil liability allow this, with reference to its different modalities: contractual[1] and extra-contractual.[2]

3. Scope of Application of Contractual Liability

3.1 The Principle of Relativity of the Effects of Contracts ('Relative Efficacy')

Contractual liability is aimed at protecting and accomplishing the expectations connected to the contractual link, that is to say, the fulfilment of the obligation. It is a liability which occurs between identifiable parties and which derives, therefore, from a specific contractual link established between them. The creditor is allowed to demand from the debtor the fulfilment of the obligation[3] and this, correspondingly, will result in the debtor being obliged to fulfil the contract with the creditor.[4]

This constitutes the corollary of the *relative efficacy* or the principle of relativity of the effects of contracts, expressly laid out in Article 406(2)[5] of the Portuguese Civil Code,[6] and which constitutes the main consequence of the prin-

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[1] *See* MENEZES LEITÃO, *Direito das Obrigações*, 4th ed., 2005, Vol. I, p. 329 *et seq.*; PIRES DE LIMA and ANTUNES VARELA, *Código Civil Anotado*, 4th ed., 1987, p. 576 *et seq.*; ALMEIDA COSTA, *Direito das Obrigações*, 9th ed., p. 701 *et seq.*; ANTUNES VARELA, *Das Obrigações em Geral*, 10th ed., 2000, Vol. I, p. 876 *et seq.* and GALVÃO TELLES, *Direito das Obrigações*, 7th ed., 1997, p. 329 *et seq.*

[2] Concerning this modality of liability *see* ANTUNES VARELA, *Das Obrigações ..., loc. cit.*, p. 525 *et seq*; ALMEIDA COSTA, *Direito das Obrigações, loc. cit.*, p. 493 *et seq*; MENEZES LEITÃO, *Direito das Obrigações, loc. cit.*, p. 271 *et seq.* and PIRES DE LIMA and ANTUNES VARELA, *Código Civil Anotado, loc. cit.*, p. 470 *et seq.*

[3] According to Menezes Cordeiro, 'the credit right is indubitably endowed with strong grounds ['*oponibilidade forte*'] in relation to the debtor'. *See* MENEZES CORDEIRO, *Direito das Obrigações*, 1986, p. 266. With a clearly relativist position, Vaz Serra argues that the interest of the creditor regarding the fulfilment seems to must be compensated by the debtor, even if, by a legal relationship existing on the date of the injury between the creditor and a third party, the mentioned interest had emerged in the person of the latter, and not in the person of the former, or have been transferred to them. *See* VAZ SERRA, 'O dever de indemnizar e o interesse de terceiros', Boletim do Ministério da Justiça Nr. 86, (1959), p. 105 *et seq.* I hope to develop this issue in Chapter 3.

[4] See Article 798 of the Portuguese Civil Code. In the sense that the legitimacy to invoke the contracts is limited to the parties *see Idem*, 'Efeitos dos contratos (princípios gerais)', Boletim ..., *loc. cit.*, Nr. 74, (1958), p. 334 *et seq.*; *Idem*, 'Responsabilidade de terceiros no não cumprimento de obrigações', Boletim ..., *loc. cit.*, Nr. 85, (1959), p. 345 *et seq.*; ABRANTES GERALDES, *Temas da Responsabilidade Civil*, 2005, Vol. II, p. 10; ANTUNES VARELA, *Das Obrigações ..., loc. cit.*, p. 172 *et seq.*; ABÍLIO NETO, *Código Civil Anotado*, 14th ed., 2004, p. 377. In case-law, as an example, *see Supremo Tribunal de Justiça*, 17 June 1969, Boletim ..., *loc. cit.*, Nr. 188, (1969), p. 146 *et seq.* Yet, not all the authors defend this position. *See* MENEZES CORDEIRO, *Direito das Obrigações, loc. cit.*, p. 251 *et seq.*; *Supremo Tribunal de Justiça*, 16 June 1964, Boletim ..., *loc. cit.*, Nr. 138, (1964), p. 342 *et seq.* and *Supremo Tribunal de Justiça*, 25 October 1993, Boletim ..., *loc. cit.*, Nr. 430, (1993), p. 455 *et seq.*

[5] This article provided that '(...) 2. In relation to third parties, the contract only produces effects on the cases and terms specially provided by law'.

[6] Hereinafter, in the absence of indication in contrary, the quoted articles are from the Portuguese Civil Code.