LIABILITY OF INFORMATION PROVIDERS: RECENT DEVELOPMENTS IN FRENCH LAW CONTRASTED WITH LOUISIANA CIVIL LAW OF LIABILITY AND UNITED STATES COMMON LAW OF TORTS

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INTRODUCTION

Information communicated to another person at his request, for instance by a stock market information service to its customer, or disseminated to the public by means of mass media, may cause loss or damage if it is inaccurate, biased, incomplete, or sometimes even simply when it is transmitted late. Moreover, the expansion of automated data processing services has resulted in increasing kinds of risks, and therefore the possibility of very serious consequences. The main hazard is commercial or economic loss, which can flow from incorrect financial, technical, or legal information, but the possibility of personal injuries is also a matter for concern.

Scope of the study: liability for economic loss or personal injury. This study does not encompass questions of liability for abuse of information, such as defamation or libel, which are generally well settled, but focuses mainly on damages caused by defective information and on situations akin to products liability, issues which are far less easy to tackle. The creation of a large range of information services available through Minitel in France, which includes various data banks and all sorts of interactive services, such as the recently publicized experimental services involving patients' medical records or detection of diseases, calls for consideration in that respect. In the United States, a case like *Daniel v. Dow Jones*,[1] involving false news provided by a computerized data base in the field of securities investment, shows that the issue is critical.

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1. 137 Misc.2d 94, 520 N.Y.S.2d 334 (N.Y. Civ. Ct. 1987), and on that case see also *infra*.

However, liability of information providers has rarely been addressed.[2] It is true that the examination of the subject raises a complex set of questions with many aspects, including the possibility of failure of technical means used to provide information, considerations relating to the quality of the content of the information, and even touching on freedom of expression. This is true even if we set aside the fact that the information provider may be held liable under numerous existing rules in communications law, such as those protecting private data or secrets of various kinds, or as a result of restrictions relative to commercial advertising.[3] Thus, companies using, processing, and transmitting data run the risk of being ordered to pay compensation on a number of counts in the course of exercising their activity.

The object of this article is to show how the French courts apply the general principles of delictual and contractual liability to the activity of information providers and to contrast that with the solutions given by Louisiana courts, where the same principles are laid down by the civil code, as well as in American common law jurisdictions. The comparison is significant because such liability is often found in

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2. In France, one of the major treatises on civil liability, LE TOURNEAU, LA RESPONSABILITÉ CIVILE (Dalloz 1982), which describes many factual situations, contains the word "information" in the index, but it refers to "consumer information" and to "duty to disclose" in a contractual relationship.

In the United States, P. KEETON, PROSSER AND KEETON ON THE LAW OF TORTS (5th ed. 1984), does not deal with the issue; a two-volume treatise like M. STUART MADDEN, PRODUCTS LIABILITY, (1988), contains no hint as to information providers' liability, neither in the index nor in the table of contents; however, J. PHILLIPS, PRODUCTS LIABILITY IN A NUTSHELL, 1-2 (1988), recognizes the problem under the heading, "What is a Product?": he states that product liability has been applied to writings such as mass-produced aircraft navigational charts, but that otherwise it has been held that a publisher has no duty to warn the public of defective ideas in a book published by it.

A law review article has been recently devoted to the topic, B. Sookman, *The Liability of Information Providers in Negligence*, 5 COMPUTER LAW and PRACTICE 141 (1988), which shows that in Canada a duty of care was imposed by a court on a computerized information provider in a case where a customer had been compelled to change the name of its corporation because of the failure of the data bank to reveal that this name was previously registered. *See* Canada Limited v. The Queen, 53 CPR (2d) 177 (1981).

3. On these questions see, in France, J. HUET et H. MAISL, *Le marché de l'information, in* DROIT DE L'INFORMATIQUE ET DES TÉLÉCOMMUNICATIONS, Ch. VI, (1989); in the U.S., GILLMOR AND BARRON, MASS COMMUNICATION LAW, CASES AND COMMENT (1984).

France, whereas the rule is generally to the contrary in the United States.

Liability of information providers in the United States. American courts are reluctant to admit the liability of information providers. The rule was established in *Jaillet v. Cashman*[4] in 1921, the landmark case on the subject. An investor sued Dow Jones & Co. when the latter carried an inaccurate report on its wire service that the U.S. Supreme Court had decided that stock dividends constituted taxable income. The investor believed that this would depress the market and sold his stocks. When the report was corrected forty-five minutes later, the market rose and the investor suffered financial losses. The Court held that the relationship of the ticker service to the public was the same as that of the publisher of a newspaper to the readers, and that the service provider was not liable for negligent mistakes as long as there was no contract or fiduciary relationship with the customer. The same solution was adopted in *Gutter v. Dow Jones, Inc.*,[5] decided in 1986 in a similar situation, as well as in many other cases.[6] These cases show that an important element in the debate is the number of persons who might suffer a loss: as Section 552.2 of the Restatement (second) of Torts puts it, the courts generally think that recovery is available only in instances where a limited group of persons might sustain damage.[7] Another way to phrase the requirement, as many cases do, is to say that a "special relationship"[8] with the plaintiff must exist in order to hold the

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4. 115 Misc. 383, 189 N.Y.S. 743 (1921), *aff'd*, 202 App. Div. 805, 194 N.Y.S. 947 (1922), *aff'd*, 235 N.Y. 511, 139 N.E. 714 (1923).

5. 490 N.E.2d 898 (Ohio 1986).

6. *See, e.g.*, Gale v. Value Line, Inc., 640 F. Supp. 967 (D. R.I. 1986) (financial publications' omission of certain information regarding particular securities); First Equity v. Standard & Poor's Corp., 670 F. Supp. 115 (S.D. N.Y. 1987), *aff'd*, 869 F.2d 175 (2nd Cir. 1989)(high priced publication marketed primarily to securities brokers, erroneous information).

7. RESTATEMENT (SECOND) OF TORTS, § 552.2 : "(1) One who supplies false information ... is subject to liability ... if he fails to exercise reasonable care ... (2) The liability ... is limited to loss suffered ... by one of a limited group of persons"; *see also* Gutter v. Dow Jones, Inc., 490 N.E.2d 898 (Ohio 1986), at 900.

8. On this "special relationship" limitation on liability, see Daniel v. Dow Jones, Inc., 137 Misc.2d 94, 520 N.Y.S.2d 334, 337 (N.Y. Civ. Ct. 1987).

information provider liable; this necessarily limits the number of persons entitled to obtain damages.

The most recent case in that line of decisions is *Daniel v. Dow Jones, Inc.*,[9] decided in 1987, which again dismissed the claim of a person who suffered economic damage because of false information. Relying on an electronic news service, the subscriber of that service was misled by a report that failed to specify that the price of a transaction involving the restructuring of an oil company, a Canadian corporation, was in Canadian and not in United States dollars. The plaintiff was not allowed compensation and the Court stated that, though "the advances of technology bring the defendant's service into the home or office of more than 200,000 persons; . . . there is no functional difference between the defendant's service and the distribution of a moderate distribution paper."[10]

It is most unlikely that a French court would so discharge the information provider of any obligation to compensate for the loss, absent a clear waiver of liability in the contract with the customer.[11]

The only instances of liability being imposed on the information provider in the United States involve error in navigational charts that led to air or sea accidents, and most often the charts originated from the U.S. Government. It was held that the Government, in publishing such charts, had the duty of using due care in their preparation and dissemination.[12] Moreover, private publishers of charts were even

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9. 137 Misc.2d 94, 520 N.Y.S.2d 334 (N.Y. Civ. Ct. 1987)

10. *Id.* at 337.

11. On French law, see *infra*, Part II; and on the utility of the waiver in Canadian law and practice, see B. Sookman, *supra* note 2, at 143 : "information providers ... can, and usually do, attempt to insulate themselves from liability in negligence."

12. *See* Reminga v. United States, 631 F.2d 449 (6th Cir. 1980). (Inaccurate information in an aeronautical chart, plane struck a wire, death of airplane passengers); Murray v. United States, 327 F. Supp. 835 (D. Utah 1971), *modified on other grounds*, 463 F.2d 208 (10th Cir. 1972); *see also* DeBarbelene Marine Corp. v. United States, 451 F.2d 140 (5th Cir. 1971)(sea chart obsolete, barge ruptured underwater natural gas pipe line, explosion and fire; however, Government had published notices advising of issuance of new updated charts, and so escaped liability); *but see* Sullivan v. United States, 299 F. Supp. 621 (N.D. Ala. 1968), *aff'd*, 411 F.2d 794 (5th Cir. 1969)(Government not liable for incorrect weather forecasts, this being an area of indeterminate reliability).

found strictly liable for the defect in their product when the chart contained contradictory or inaccurate information.[13]

In Louisiana, though there is a principle of liability of the utmost generality laid down in article 2315 of the Civil Code in words identical to those of the French code,[14] courts do not rely upon that principle in such circumstances. They prefer to cite common law precedents. In fact, in *Pittman v. Dow Jones, Inc.*,[15] decided in 1987, though the United States District Court for the Eastern District of Louisiana did cite article 2315 of the Civil Code, above all it heavily relied on *Gutter*, and on other cases of common law courts, stating that, "no duty in torts exists for a newspaper publisher to investigate its advertisers for the correctness of the ads placed in the publication."[16] The plaintiff claimed he lost $50,000 invested in a financial institution which went bankrupt. The institution had advertised in the *Wall Street Journal* proposing "jumbo" interest rates on deposits, and it was said that funds deposited were insured by the U.S. Government. This statement was false and the *Journal* was not aware of it. The court's decision was that a newspaper "has no duty whether by torts or contracts to investigate the accuracy of advertisements placed with it."[17] This decision is certainly sound as long as an advertisement does not consist of information created and shaped by the *Journal* itself for its readers; the advertisement should expose only the advertiser to liability. The same solution would likely be sustained in France. However, the reasoning and authorities given by the court show its

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13. *See* Aetna Casualty and Surety Co. v. Jeppesen & Co., 642 F.2d 339 (9th Cir. 1981)(inconsistency between scales of some graphic depictions, "chart unreasonably dangerous and a defective product," plane crashed in Las Vegas). In Brocklesby v. United States, 759 F.2d 794, *amended*, 767 F.2d 1288 (5th Cir. 1969), *cert. denied*, 474 U.S. 1101 (1986), there was a defect in a chart developed by the Government and published by Jeppesen, Jeppesen chart was a product and was defective, Jeppesen was unable to escape liability; *but see* Times Mirror Co. v. Sisk, 122 Ariz. 174, 593 P.2d 924 (Ariz. Ct. App. 1978)(mountain not shown on a chart drawn on the basis of information furnished by Federal Aviation Administration, Pan Am Cargo crashed: court held publisher liable, but avoided determining whether chart was a "product").

14. The French art. 1382 C. Civ. reads: "Tout fait quelconque de l'homme, qui cause à autrui un dommage, oblige celui par la faute duquel il est arrivé, à le réparer."

Art. 2315 of the Louisiana Civil Code reads: "Every act whatever of a man that causes damage to another obliges him by whose fault it happened to repair it."

15. 662 F. Supp. 921 (E.D. La. 1987), *aff'd*, 834 F.2d 1171 (5th Cir. 1987).

16. Pittman v. Dow Jones, Inc., 662 F.Supp. at 923.

17. *Id.* at 923.

adherence to the general rule at common law that publishers of newspapers, or any information providers, are not liable for damages caused by the information they disseminate.

Reasons for the difference with French law. Many reasons can explain the difference between, on the one hand, Louisiana civil law and U.S. common law,[18] and on the other, French civil law. Three should be emphasized. First, in the United States, the law of torts is still in a process of developing causes of action. The question "is there a duty of care?," which is one of the four questions flowing from the four requisites for an award of damages, can be given a negative answer in numerous cases, including the case of information provision by way of media. In France, on the contrary, this question does not arise. Only three conditions exist for somebody to be held liable: a fault, a damage, and a causal link. The scope of liability is wider and anyone who causes a loss or an injury to another as a result of his unreasonable conduct is under an obligation to repair the damage.

Second, the notion of contract is narrower in common law than in civil law, especially French civil law. French courts do not give the concept of privity too strict a meaning. This explains why the reader of a newspaper, or of a book, can be considered a buyer, in privity with the publisher, and as a consequence there can exist a contractual liability of the publisher to repair damages sustained by any reader.

Third, another reason for the difference is that, in the United States, the reluctance to impose liability on information providers is closely related to First Amendment considerations. In France, though

18. A striking picture of the difference between the two systems can be found in a comparison between the *Affaire de "La cigue,"* or "hemlock" case, Trib. gr. inst. de Paris, 28 mai 1986, *Soc. Fernand Nathan*, D.1986, flash, no. 25, REV. TRIM. DR. CIV. 1987, 552, obs. J. Huet, where the liability of the publisher of a book was upheld (see this case *infra*, examined in the text), and Cardozo v. True, 342 So.2d 1053 (Fla. Dist. Ct. App. 1977), *cert. denied*, 353 So.2d 674 (Fla. 1977), where that of a bookseller was not admitted. Although the French case involved a publisher and the American case a seller, both cases were decided in similar circumstances of omission of information on plants, the result of which was the injury or death of some readers.

freedom of speech is fully recognized as a constitutional principle embodied in the first *Déclaration des droits de l'Homme*, there is no such idea, at least not expressly stated in judicial opinions, that imposing a liability on information providers would act as a deterrent of the free flow of information.

However, if the principle of liability of information providers is accepted in France, it proves difficult to put into practice. Some preliminary observations will help in this regard.

The numerous parties contributing to the loss or damage. One of the difficulties is that, in situations where information is provided by modern electronic means, it is common for several defendants to be implicated in one single action for damages, usually two persons at least, e.g., both the information service provider and the data bank producer. It is probable that following the example of what happens in the field of product distribution,[19] the contractor who is the closest to the user will tend increasingly to have direct responsibility for the product, this party having then a right to sue his own supplier.[20]

Looking from another point of view, one may notice that often the role played by the user to whom the information is sent is often not at all neutral. The user is involved in the searches he does or, where he

19. In this connection, the distribution of information would be treated in the same way as distribution of goods, while, elsewhere, it would be treated rather like a supply of services.

20. In detail, however, the question of the liability of the information service provider who provides third parties with data calls for a more finely balanced analysis. A distinction must be drawn between (i) whether the intermediary involved has a purely technical task (in which case it does not seem that he can in any way be involved in the content of the service supplied to the third party (the producer remains entirely in control of this), but only liable for malfunctions linked with the technical implementation, such as the processing of software), and (ii) whether he is involved in the marketing of the services (which puts him in direct contact with the customers, with whom he would most often be contracting directly; it is to him that the user/victim would apply at the outset).) And so far as third parties likely to suffer loss as a result of defective information are concerned, the question would arise in similar terms; the information service provider may be held liable if the data is supplied under his name or trademark, and not if he remains entirely invisible in the operation (unless, here, too, he is proved to have been involved in the technical methods implemented).

is a patient receiving long-term treatment, participates in the process by supplying data himself, so that it will often be a very delicate matter to untangle the original cause of the loss. Moreover, there is a specific problem in some telematic communication systems offered to the public, such as free-access electronic mail-boxes in the so-called "Kiosque" system of the Minitel network. In this system the service is billed by the public operator which in turn pays the service provider the amount due.[21] Although it is evident that loss caused to third parties as a result of information exchanged is the liability of the actual users of the service who are also the authors of the data, it remains to be decided whether the provider of the service is of necessity totally free of responsibility.

The various categories of victims of defective information. Another factor contributing to the difficulty is that the data may affect a number of different people at the same time. Sometimes a person who has paid to obtain data for his use will be damaged: the victim is the person for whom the information is intended under a contract. In other cases, incorrect information is given about a third party: it is the subject of the information who will have grounds for complaint. Sometimes such a victim in fact is linked to the information provider by an agreement, for example, a tradesman who has asked to be included in a professional directory distributed to the general public, but whose name is omitted from the list or whose details are listed incorrectly. The situations are innumerable.

At the same time there is an overlap of contractual and non-contractual liability in this field. In French law, these differ from one another, in particular with respect to the possibility of restricting or excluding liability by means of special clauses.

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21. On the so-called "Kiosque" system, see J. HUET et H. MAISL, *La télématique*, in DROIT DE L'INFORMATIQUE ET DES TÉLÉCOMMUNICATIONS (1989). In the United States, since 1987, the Bell companies are allowed to provide this billing service, and, as long as telematics is not available as it is in France, it applies mainly to telephone services used by customers.

In addition, along the same lines, it can be noted that the existence of a contract does not always permit the liability to be limited. In the case of telematics services available on the Minitel network and passing through the so-called "kiosque" system,[22] the agreement concluded between the service provider and the user is most often an implied contract because the user has access to the service without previously contracting for it. In such circumstances limitation or waiver of liability seems extremely unlikely both in fact (for commercial reasons, as the process would not be very attractive), and in law (because a party who did not agree to the advertised clause might dispute its validity).

Lastly, the means of transmitting the data may be implicated in causing the loss. Even assuming that one can surmount the obstacle of the difficulty of proving that the incident was caused by the communication, rather than by the information system itself, compensation will not necessarily be obtained. Where the operators are public telecommunications authorities, liability is generally excluded or substantially reduced.[23] However, private companies operating so-called "value-added networks," particularly in the form of leased lines, often give a guarantee of high reliability.

Evolution of the law in France. No doubt, there must always have been liability based on incorrect or ill-transmitted data,[24]

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22 . About that system, see *supra*, text and note 21.

23. In France, article L. 37 of the Post & Telecommunications Code in both this field and that of the supply of lists of subscribers (*see infra*, Part II) limits the liability of telecommunications authorities to cases of serious fault. In the case of networks such as Transpac, which is operated by a private entity subsidiary of the public operator, liability is indirectly limited by the same legislation since, in the contract concluded with the user, the supplier is exempted from liability for acts outside its control, including defects in the means of transmission supplied by the authorities (Transpac contract, art. 9 Responsabilité-Risques); and *see* J. HUET et H. MAISL, *Les Télécommunications*, in DROIT DE L'INFORMATIQUE ET DES TÉLÉCOMMUNI-CATIONS (1989).

24. Examples of this kind of liability, rather than being sought in cases of copyright, which is traditionally considered to be a field where style is more important than the content, should be sought in the field of patents. One example is the transfer of an invention coupled with a guarantee against inherent defects. The guarantee can be implemented by the courts on the various occasions when loss is caused by a design fault

although this point has seldom been discussed.[25] But nowadays, the increasing importance of data processing in all sectors of commerce and society plus the new factor of interactive information services add a dimension to the problem that is quite different from the previous situation. And because of the lack of adequate points of reference, insurance against the resulting risks, which is so essential in many applications of this kind of activity,[26] seems very difficult to organize.

In France, a number of court cases have started the slow process of establishing the principles applicable to liability in the information sector. The evolution began with the *Branly*[27] case in 1951, and since that time various cases were decided relating to commercial information supplied by banks or specialized agents.[28] Then in the 1980s, the *Galande*[29] and *Polac*[30] cases, and finally the so-called *Affaire de "La cigue,"* or "hemlock" case (where the publisher of a book about wild plants was held liable for the death and injuries of

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rather than by faulty operation on the part of the transferee; *see, e.g.*, Cour de Cassation, Com. 24 juin 1975, D.1976, 193, note J. Schmidt (patented process of prefabricated panels with a defective seal). *See also* CHAVANNE et BURST, DROIT DE LA PROPRIÉTÉ INDUSTRIELLE, n° 211 (1980).

However, this kind of liability, when applied to data processing, is more closely analogous to liability for poor quality of processing tools, *e.g.*, software, and less analogous to product liability for the information itself. But it is true that both aspects are closely linked.

25. It is seldom discussed so far as the transmission of information is concerned, apart from cases involving the postal service and cases of delays or non-arrival of post; still the Authority's liability is also very strictly limited in this connection; *see* J. Huet, *Mandataires méfiez-vous du courrier postal*, 1986 REV. TRIM. DR. CIV. 134 (about Cour de Cassation, Civ. 1ère, 2 octobre 1984).

26. One thinks in particular of those information services that can affect users personally, directly or indirectly: e.g., medical diagnosis by computer, or, more simply, information given by Minitel about cosmetics.

27. Cour de Cassation, Civ. 27 février 1951, D. 1951. 329, note Desbois, J.C.P. II. 6193, note Mihura, a landmark case where the author of a book on the history of radio did not mention the name of a well-known scientist who had played a leading role in that field. The author was held liable and damages were awarded to the heirs of the scientist. *See infra*.

28. On these cases, see *infra*.

29. Trib. gr. inst. de Paris, 24 avril 1984, *Fiduciaire de France et autres v. Galande*, D.1985. I.R. p. 47, obs. H. Maisl, REV. TRIM. DR. CIV. 1984.517, obs. J. Huet.

30. Trib. gr. inst. de Paris, 29 janvier 1986, *affaire Polac*, D. 1986, flash, n° 10.

readers)[31] were decided, not to mention numerous precedents involving omissions or errors in telephone directories[32].

Anyway, these cases where liability has been discussed and often upheld simply are examples of the many different situations to which one has to apply the general principles of law contained in articles 1382 *et seq.* of the Civil Code[33] (for cases involving loss caused to third parties, raising questions of delictual liability), or articles 1137 and 1147 of the same code relating to dealings between contracting parties (where the liability is deemed to be of a contractual nature).

Distinction between liability of a technical nature and liability linked to the content of the information. In determining questions of liability, it is certainly necessary to classify separately those matters concerning the satisfactory technical functioning of the system operated by the supplier, in particular its availability.

In many situations when information is to be furnished, the loss or damage a user can suffer will frequently be minimal, and he will not envisage seeking compensation if he is able to have access to another source of data or to wait for the information. When the question of liability arises, it is generally in the context of a contractual relationship between the producer of the information itself and the information service provider who makes the service available to the customers: failures, especially if they are prolonged, then result in loss of turnover of business to the producer of the service. In principle, the parties provide for these consequences by appropriate clauses: they determine a rate of availability, restrict the maximum amount, and often exclude any right to compensation if the interruption in the service is caused by

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31. Trib. gr. inst. de Paris, 28 mai 1986, *Soc. Fernand Nathan*, D.1986, flash, n° 25, REV. TRIM. DR. CIV. 1987, 552, obs. J. Huet.

32. On these cases, see *infra*.

33. The wording of art. 1382 is the same as that of art. 2315 of the Louisiana Civil Code; *see supra* footnote 14.

the public telecommunications networks or power outages, both of which are presented as cases of *force majeure*.[34]

But all types of provisions may be included depending on the stakes. Between professionals, and for applications demanding the highest degree of reliability, strict guarantees are given. Stipulations of this kind are common in value-added networks[35] of a certain size.

In any case, a clause precisely defining liability from this point of view will be all the more necessary for detailing the obligations of the information service provider who, in view of its responsibility for the technical operation of the system, will tend to be held strictly liable towards the other contracting party. And the same argument may apply where the software used to process the data is supplied by a third party, and this software causes a malfunction. In such circumstances, when the data processed results in loss, the supplier of the data will not avoid having to pay compensation, although subsequently he may in turn be able to sue the person who supplied the software. Again, special provisions in the contract dealing with liability can prove useful.

Main division. In this study, the focus is on the subject of liability incurred by reason of the content of the information. In that respect, a convenient distinction can be drawn which reflects the case law developed on the above-mentioned articles of the French code. Although both sorts of activities may overlap, there is a tendency to examine separately the public communication services, which can more easily be classed with other mass media, and the supply of specialized data intended to meet the needs of professionals.[36] In the first

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34. Example of a clause in a telematics service contract concluded between a producer and an information service provider: "If, as a result of circumstances outside its control, X . . . is unable to perform the contract in whole or in part, it will not assume any liability as a result of this. It is hereby agreed between the parties that X . . . may not be held liable in any of the following events, although the following list is not exhaustive: company disputes, riot, war, storm, interruption of power supply."

35. The fact that this kind of network is extensively constructed using specialized lines provides for greater reliability; on these networks, *see* J. HUET et H. MAISL, *supra* note 23.

36. This distinction, which, moreover, is not very scientific and is based on an impression that the courts tend to treat cases from the two regimes differently, is