Contractual and non-contractual liability to damages (a comparison with foreign legislation)

In theory tort and contractual liability might seem to draw clear boundaries. The first one arises from breach of contract whereas tort being unrelated to any contractual obligation. However it is known that some legal systems, like the Czech law, do not differentiate between them and do not provide them with different rules. Does it only mean the differentiation is useless in these legal systems or does it suggest that there might be no reasonable grounds for distinction in other legal systems? How do tort and contractual liability differ?

Differences have to be weighed when area between tort and contract is considered. They are of significance when it comes to possibility or impossibility of choice in case of concurrence of tort and contract and they are important for liability to third parties of a contract.

I researched following legal systems: Czech law, German law, French law, Spanish law and Italian law. In each of them I examined these areas: contractual liability, liability to third party, tort liability, liability for behaviour contrary to bonos mores, and selected elements of tort liability with some remarks to some special rules for contractual liability: wrongfulness, fault, causation, damage and its compensation, and contractual limitations of liability. Each area includes comparative summary. I limited the scope of this thesis on general liability for damages and pecuniary (material) damages.

Within these limitations other than above mentioned differences can be identified, the most obvious being: possibility of limitation of liability, and condition of foreseeability of the extent of the damage. It must be said that however clear these differences appear from the respective civil codes, they generally blur under the influence of the jurisprudence. This seems to be true in general (with some exceptions like the established rule of non-concurrence non-cumul in French law). That brings again the question whether tort and contractual liability should be differentiated.

Under my observations I came to the conclusion that different rules for tort and contractual liability are justified by the quality of relationship between contractual parties. These qualities should nevertheless be considered with more delicate criteria than mere existence of a contract, especially in cases (recognized or not) of area between tort and contractual liability and in case of their concurrence. This moderate approach seems to be adopted by German courts.