THE CONCEPTUAL ANALYSIS OF 'CULPA IN CONTRAHENDO':

A CRITICAL STUDY IN EUROPEAN PRIVATE INTERNATIONAL LAW

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This thesis was submitted in partial fulfillment of the requirement for the degree of the Master of Laws (LL.M.) in International and Comparative Law at the School of Law, The University of Dublin, Trinity College.

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Summary

This study critically depicts the position on *culpa in contrahendo* in the European Private International Law. This critical description is based on the conceptual analysis of *culpa in contrahendo*. In this context, first, the conceptual elements and the legal character of *culpa in contrahendo* have been determined in consideration of the differences between the national legal systems and more broadly between the two main legal traditions (Common law and Civil law traditions), and hence, the rules on the determination of the competent court and applicable law in the European Private International Law has been analysed in this respect. To briefly summarize the study, first, the elements of *culpa in contrahendo* liability are the presence of the contract negotiations, breach of the pre-contractual duty of good faith, fault, damages, and causation-at-fact. The recognition and legal situation of the pre-contractual duty of good faith seems to be the main point of divergence between different legal systems. That is, in Common law systems the said duty is not recognized and therefore its breach is not sanctioned, whereas in most Civil law systems the duty is sanctioned. Nonetheless, it has also been ascertained that, the breach of the pre-contractual duty of good faith is being compensated under the institutions of promissory estoppel and misrepresentation in the Common law legal systems, albeit these institutions have more specific elements than those for the liability for *culpa in contrahendo*. Following the determination of the fact that the liability for *culpa in contrahendo* exists in most legal systems with varying scopes and names, it has been found that its legal characterization is different in every national legal system, and there are different theories in this respect. The most plausible of these theories is the one that defines the *culpa in contrahendo* as a fiduciary liability arising from a breach of a special proximity between the parties, and purports the application of contractual liability provisions in the absence of provisions specific to that responsibility. However, it has also been shown that different legal systems prefer to define *culpa in contrahendo* as a contractual or tort liability (France), or by adopting the case-by-case characterization (Portugal, UK, Ireland). Evaluating the European Private International Law rules under the light of this analysis, it has been found that, in its step-by-step development, the European Private International Law has, first, accordingly categorized the *culpa in contrahendo* as a non-contractual liability, but determined the applicable law as the law applicable to the contract that has been negotiated. It is important to note that the European Private International Law does not acknowledge or reject the pre-contractual duty of good faith, regarding the differences between Common law and Civil law systems.

List of Abbreviations

ABGB	Allgemeines Bürgerliches Gesetzbuch *(German: The Civil Code of Austria, enacted in 1811)*
ALR	Allgemeines Landrecht für die Preußischen Staaten *(German: General State Laws for the Prussian States, promulgated in 1894)*
BGB	Bürgerliches Gesetzbuch *(German: Code of Civil Law)*
BGE	Bundesgerichtsentscheid *(German: Swiss Federal Court)*
BGHZ	Entscheidungssammlung des Bundesgerichtshof in Zivilsachen *(German: Supreme Court Reporter for Civil Matters)*
C. Civ.	Le Code civil de français *(French: French Civil Code)*
DCFR	Draft Common Frame of Reference
ECR	European Court Reports
EU	European Union
PECL	Principles of European Contract Law
RGZ	Reichsgerichts in Zivilsachen *(German: Empire Court in Civil Matters)*

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334/00 Fonderie Officine Meccaniche Tacconi SpA v Heinrich Wagner Sinto Maschinenfabrik GmbH (HWS) [2002] ECR I-7357 Opinion of AG Geelhoed

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Consolidated version of the Treaty on the Functioning of the European Union [2012] OJ C326/49

France

Le Code civil de français (C. Civ) 1804

Germany

Bürgerliches Gesetzbuch (BGB) [English translation: 'German Civil Code (BGB)' (*Laws in the Internet, Federal Ministry of Justice and Consumer Protection*, 2015) <https://www.gesetze-im-internet.de/englisch_bgb/> accessed 1 June 2017]

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I. Introduction

I.1. Background

Any legal relationship established in line with the freedom of contract manifests the confidence of the parties for each other, before expressing their mutual intents to be bound and enshrining the obligations they assume towards each other. This confidence is the reliance that a party will not harm the other's property or immaterial rights, imposing a behavioral obligation on the parties that is independent from their performance obligations. Therewith, the behavioral obligation to treat one another 'honestly, fairly, and in good faith' appears to benefit from the same legal protection with the performance obligations arising from the contract itself, as 'the general duty of good faith' in the majority of the Civil law legal systems,[1] as well as as 'the implied covenant of good faith' in a portion of the Common law legal systems.[2] In view of the continuous development of technology and the increasing volume of commercial relations, the contract negotiations have also become increasingly complex, and it has therefore been debated that whether the confidence between parties should be afforded the same legal protection at this stage as well. Modern *culpa in contrahendo*, in a sense, is an institution that has been developed in this debate process.

Culpa in contrahendo, meaning 'the fault in contracting' in verbatim translation, extends the contractual duty of good faith (mentioned above) to the negotiations phase, and reveals a 'pre-contractual duty of good faith'. The *culpa in contrahendo* is yet to reach a general acceptance among the Civil law legal systems, where it emerged from, let alone reaching the universal acceptance that the contractual duty of good faith enjoys, it still provokes heated discussions. [3]

[1] David Thomas, 'Contractual Obligations Of Good Faith' (2012) 7 (3) Construction Law Internaitonal 31, 31-33.
[2] Michael H. Cohen, 'Reconstructing Breach Of The Implied Covenant Of Good Faith And Fair Dealing As A Tort' (1985) 73(4) California Law Review 1291, 1291; 1303.
[3] Richard Plender and Michael Wilderspin, *European Private International Law Of Obligations* (4th edn, Sweet & Maxwell 2015) 756; 758.

These discussion arise at two levels: First, whether the imposition of a duty of good faith to the negotiating parties is contrary to the freedom of contract; and second, whether the *culpa in contrahendo* liability arising from the breach of this pre-contractual duty should be resolved according to the provisions of the Contract Law or the Law of Tort. The first level of the discussions is emphasized in the Common law legal systems, where the *culpa in contrahendo* is still seen as an interference to the 'freedom of contracts' and as an impedance to 'economic development' and rejected as a ground of liability.[4] Nevertheless, this did not prevent the indemnification of damages resulting from breaches of the pre-contractual duty of good faith. The said indemnification is partially provided by the development of alternative grounds for liability to provide for the recovery of the damages arising from the breach of the 'disowned' pre-contractual duty.[5] The second level of the discussions concerns the Civil law legal systems, among whom there is no consensus on to which extent the breach of pre-contractual duty of good faith with regards to whether should be compensated, and whether it should be resolved under Law of Tort or Contract Law provisions; although they all acknowledge the pre-contractual duty of good faith.[6]

In addition to all these, the developing international economic relations and the increasing number of private international law disputes, in the context of the European Union have necessitated the European Union lawmakers to produce uniform practices and norms on the Private International Law dimension of *culpa in contrahendo.* This was done, among other subjects, in order to protect the transboundary relations between the peoples of the Member States. Due to the gradual emergence of the European Private International Law, however, the international jurisdiction over *culpa in contrahendo* could only be fully established at the beginning of the 2000's. Consequently, the conflict-of-laws rule on *culpa in contrahendo* has only been set up in 2007. Considering that the European Union membership includes countries from both the Civil law and Common law traditions, the regulation of *culpa in contrahendo* in the European Private International Law is interesting for the assessment of whether and how a bridge between these two legal traditions and many different national legal systems could be established.

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[4] Rodrigo Novoa, 'Culpa In Contrahendo: A Comparative Law Study: Chilean Law and The United Nations Convention On Contracts For The International Sales Of Goods (CISG)' (2005) 22(3) Arizona Journal of International & Comparative Law 583, 584-585.
[5] ibid 583.
[6] ibid 584.

I.2. Aims of the Research

The purpose of this research is to identify the needs that brought forth the *culpa in contrahendo* liability, to assess how various legal systems have responded to these needs, and to analyze whether the different responses have been reconciled at a common stake in the context of European Private International Law, and if so, how it has been achieved. In this direction, the aims of this research are determined as follows:

i. To provide a conceptual analysis of *culpa in contrahendo* and to evaluate the approaches of national legal systems and legal traditions (Common law and Civil law traditions) within the framework of this conceptual analysis.

ii. To identify or construe the 'best practice' in addressing *culpa in contrahendo* approach, utilizing the conceptual analysis and evaluations of the approaches of national legal systems and legal traditions.

iii. To examine the situation of *culpa in contrahendo* in European Private Law as well as to assess whether European Private International Law accommodates the approaches of different national systems and whether it is in line with the 'best practice'.

As the objective of this study is to examine the general characteristics and concepts of the national legal systems relating to *culpa in contrahendo,* in order to enable a comparison for the purpose of the better understanding of the situation in European Private International Law, this study will deal with the national legal systems to the extent that they relate to the definition and interpretation of the concepts of *culpa in contrahendo* and its legal character. The peculiarities of national legal systems and the theories about the details of *culpa in contrahendo* that do not directly relate with the research topic are excluded from the scope of this work.

I.3. Significance of the Research

It is hoped that this research will provide an invaluable resource for other researchers and fill a gap in the literature in the context of the analytical examination of *culpa in contrahendo*, the comparison of Common law and Civil law traditions in relation to *culpa in contrahendo*, and the detailed evaluation of European Private International Law norms and practice on *culpa in contrahendo.*

I.4. Research Methodology

This research is library-based. The research methodology here consists of two phases. The first phase is the collection of raw data from the primary sources such as national and international case law and legislation, as well as from the secondary sources such as related books, journals and electronic resources. The second step of the methodology is the processing of this raw data through the conceptual analysis technique, thus revealing new information, and better evaluating on the research topic. To elucidate, this second phase refers to the classification of unprocessed information acquired in the first phase, breaking the classified information down to its constituent parts to construe the relationship between these parts in the direction of the purpose of the research, and draw conclusions from the observation of this relationships.

I.5. Chapters Outline

This research consists of five chapters, outlined as follows:

- Chapter I is the introductory chapter of this study, and it clarifies issues such as the background, aims and research methodology.
- Chapter II addresses the historical development of *culpa in contrahendo*. First, the development of *culpa in contrahendo* in the Civil law tradition is examined from a period starting from the premises of *culpa in contrahendo* in Roman law until Jhering's conceptualization. Then, the development of pre-contractual liability in the Common law tradition is assessed, as well as compared with the development of *culpa in contrahendo* in the Civil law tradition.
- In Chapter III, the conceptual analysis of *culpa in contrahendo* is made. In this conceptual analysis, first the elements of *culpa in contrahendo* and the opinions on their definitions and scope are addressed. This is subsequently followed with an evaluation of the theories on the legal character of *culpa in contrahendo*.
- In Chapter IV, the situation of *culpa in contrahendo* in European Private International Law has been extensively addressed and critically examined. The examination was carried out separately for the international procedural law and the conflict of laws; the relationship between these two is construed in detail.
- Chapter V contains the general conclusions of the research.

II. Historical Development of Culpa in Contrahendo

The concept of *culpa in contrahendo* is identified by for the first time by Jhering in his article dated 1861,[7] however, the fault in contract negotiations and the liability ascertaining from it was not at all new-fangled in his day. Indeed, while creating his theory, Jhering has benefited from Roman law and the sources of his period, Civil Code of Austria (ABGB)[8] and the General State Laws for the Prussian States (ALR),[9] and legitimized his theory through these sources.[10] Further, it must be noted that although the development and conceptualization of the *culpa in contrahendo* came about from the Civil law tradition (which is the continuation of Roman Law tradition), the Common law tradition has also evolved to respond to the breach of good faith during the contract negotiations in the meantime. [11]

The explanation of the historical development of *culpa in contrahendo* is worthwhile for the better understanding of the problems that the *culpa in contrahendo* attempts to resolve, the legal relations it influences, and consequently its legal characterization through a sound legal comparison. Thus, in this chapter the historical development of *culpa in contrahendo* in both the Civil law and the Common law traditions will be addressed.

[7] Naomi Bass, 'Eleventh Hour Collapse: An Elements-Based Comparison Of The German Doctrine Of Culpa In 'Contrahendo' And Australian Principles Of Pre-Contractual Liability' (2009) 6 Macquarie Journal of Business Law 217, 219.
[8] *Allgemeines bürgerliches Gesetzbuch.*
[9] *Allgemeines Landrecht für die Preußischen Staaten.*
[10] Sylviane Colombo, 'The Present Differences Between The Civil Law And Common Law Worlds With Regard To Culpa In Contrahendo' (1993) 2 (4) Tilburg Foreign Law Review 341, 349.
[11] ibid 342.

II.1. Historical Development in Civil Law Tradition

II.1.1. Culpa in Contrahendo in Roman Law

In the classical Roman law, a separate form of liability for the damages arising from the fault in the contract negotiations had not been established. In this respect, the mentioned damages could only be compensated under the general ground of non-contractual liability. Moreover, the scope of this non-contractual liability was extremely narrow. According to Demircioğlu, this limitation was due to that the non-contractual liability, which was based on '*dolus*' rather than the fault, covered (wrongful) intention but excluded other forms of fault. [12] It is necessary to indicate that '*dolus*' based non-contractual liability also covered the damages arising from the intentional erroneous representation on the other party of the negotiations (deceit). Nevertheless, it was not able to provide for the remedy for damages that might arise during the contract negotiations, such as unintentional damages.[13]

However, Roman law scholars record that in due to the Empire's expanding borders and growing number and volume of commercial transactions within its boundaries, the '*dolus*' was later redefined 'the doing of anything that is contrary to good faith',[14] and its scope expanded to provide damages for some of the liabilities assessed under *culpa in contrahendo* liability today, such as the unintentional failure to disclose material facts that are vital for the contract, and as per Demircioğlu, the breakdown of contract negotiations.[15]

In the following period, a strict liability for the seller is foreseen, in the sale of slaves and livestock, for the non-disclosure of non-apparent defects. This practice enabled the buyer to claim damages under either *actio dolus* or *actio empti* (the buyer's action), the latter being a right of action arising from contracts.[16] While this practice is not directly related to the development of pre-contractual liability, it is important to note that for the first time that a pre-contractual duty (duty of disclosure) is subjected to provisions for contractual liability.

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[12] Huriye Reyhan Demircioğlu, *Sözleşme Görüşmelerindeki Kusurlu Davranıştan Doğan Sorumluluk (Culpa In Contrahendo Sorumluluğu)* (1st edn, Yetkin 2009) 55.

[13] George Long, 'Culpa', A Dictionary of Greek and Roman Antiquities (1st edn, John Murray 1875) 373 <http://penelope.uchicago.edu/Thayer/E/Roman/Texts/secondary/SMIGRA*/Culpa.html> accessed 5 June 2017.

[14] Huriye Reyhan Demircioğlu, *Sözleşme Görüşmelerindeki Kusurlu Davranıştan Doğan Sorumluluk (Culpa In Contrahendo Sorumluluğu)* (1st edn, Yetkin 2009) 56.

[15] ibid; İhsan Ulusan, 'Culpa in Contrahendo Üstüne', Prof. Ümit Yaşar Doğanay'ın Anısına Armağan (İstanbul Üniversitesi 1982) 287, 293.

[16] Huriye Reyhan Demircioğlu, *Sözleşme Görüşmelerindeki Kusurlu Davranıştan Doğan Sorumluluk (Culpa In Contrahendo Sorumluluğu)* (1st edn, Yetkin 2009) 58; Özcan Karadeniz Çelebican, *Roma Hukuku* (10th edn, Yetkin 2004) 303; Türkân Rado, *Roma Hukuku Dersleri: Borçlar Hukuku* (12nd edn, Filiz 2016) 130.

As it can be seen, it is not possible to state that in classical Roman law, a ground similar to the liability for *culpa in contrahendo* has developed except for a few precursors. In a real sense, the provisions of the Roman law for the recovery of pre-contractual damages are encountered in the Byzantine period legal sources.[17] There are two contingencies that collate the idea of the liability for *culpa in contrahendo* in *Corpus Iuris Civilis*, issued during this period.[18] The first of these contingencies is about the sale of a property that cannot be traded *(res extra commercium)* and it is translated as follows:

> The purchase of sacred and religious lands, and a public lands like a market-place or basilica, is void, if the buyer knows their quality, but if he is deceived by the seller buying them as being private or profane lands, he will have the action *ex empto*, on the ground that he is not being allowed to have what he bought, for the recovery of his damages resulting from the deception. [..] [19]

The second contingency, similarly, is related to the sale of an inheritance that either does not exist or does not belong the seller. This contingency provides for the recovery of the damages that the unknowing buyer has suffered, as follows:[20]

> […] if no inheritance belonged to the vendor much belongs to the buyer ought to be distinguished; and thus there indeed was an inheritance but it does not belong to vendor then let this be an estimate; if there is no [inheritance] about which they seem to have negotiated then he will owe the price and if he paid the money out against the thing then him get it from the seller, and also whatever the buyer has lost.[21]

In both of the contingencies, there are contracts of sale established pursuant to the appearance of a consensus of the buyer and seller on the money and subject of the contract. However, in both, the contracts of sale are invalid**.** In the first contingency, that is due to fact that the subject cannot be traded. Whereas in the second, the subject does not exist or does not belong to the seller. The recovery of the damages incurred by the buyer through *actio ex empto*, a contractual liability; does really recall *culpa in contrahendo*, making it agreeable that the first instances of the idea of *culpa in contrahendo* liability appear in the Byzantine law.

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[17] Reihnard Zimmermann, *The Law Of Obligations: Roman Foundations Of The Civilian Tradition* (2nd edn, Oxford University Press 1996) 243.
[18] Sylviane Colombo, 'The Present Differences Between The Civil Law And Common Law Worlds With Regard To Culpa In Contrahendo' (1993) 2(4) Tilburg Foreign Law Review 341, 350.
[19] Yoav Ben-Dror, 'The Perennial Ambiguity Of Culpa In Contrahendo' (1983) 27(2) The American Journal of Legal History 142, 159.
[20] ibid 170.
[21] ibid 179.

II.1.2. Culpa in Contrahendo in Early Modern Laws

Even after the Byzantine Empire had lost its power, the Roman law practice continued in much of the Continental Europe until the emergence of nation-states in the early modern period. These replaced the Roman law with laws enacted by their legislatives, albeit being inspired by the Roman law practices.[22] The General State Laws for the Prussian States (ALR) of 1794 and the Civil Code of Austria (ABGB) of 1811 were among the first of these laws, and contain provisions that helped to substantiate the idea of *culpa in contrahendo*.[23] It must be noted that these provisions were mainly in the General State Laws for the Prussian States (ALR) whereas only a single provision was found in the in the Civil Code of Austria (ABGB).

To start with, the provision found in the Civil Code of Austria (ABGB) is related to the impossibility at the beginning (*ab initio* impossibility):

> […] A person who, when entering into the contract was or should have been aware of the impossibility of its performance, is liable to the other innocent party suffered by him through his reliance upon the validity of the contract, provided that the other party was not aware thereof himself. […] [24]

According to this provision, performance obligations that are impossible cannot be the subject matter of a valid contract. Hereunder, the party who deceives the other side with the pledges on such performance obligations, or takes the time of the other party because of his ignorance of the impossibility of such obligations although he needed to have known that impossibility, or benefits from the damages on the other party is liable for all these against the other party.[25] This provision is essentially the same with one of the provisions in the General State Laws for the Prussian States (ALR), where provisions related to the pre-contractual liability were principally found in.[26]

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[22] Thomas Rüfner, 'Roman Law: Questions And Answers' *(Law Web Saarbrücken)* <http://archiv.jura.uni-saarland.de/Rechtsgeschichte/Ius.Romanum/RoemRFAQ-e.html#rezeption"> accessed 20 May 2017.

[23] Huriye Reyhan Demircioğlu, *Sözleşme Görüşmelerindeki Kusurlu Davranıştan Doğan Sorumluluk (Culpa In Contrahendo Sorumluluğu)* (1st edn, Yetkin 2009) 59; Ümit Gezder, *Türk/İsviçre Hukukunda Culpa in Contrahendo Sorumluluğu* (1st edn, Beta 2009) 17.

[24] ABGB § 878 [Translation from John Cartwright and Martijn Willem Hesselink *Precontractual Liability In European Private Law* (2nd edn, Cambridge University Press 2009) 22.]

[25] John Cartwright and Martijn Willem Hesselink, *Precontractual Liability In European Private Law* (2nd edn, Cambridge University Press 2009) 21, 23, 121, 162.

[26] Sylviane Colombo, 'The Present Differences Between The Civil Law And Common Law Worlds With Regard To Culpa In Contrahendo' (1993) 2 (4) Tilburg Foreign Law Review 341, 350.

To continue, one of the other provisions in the General State Laws for the Prussian States (ALR), provides that if a party is led to conclude a contract with an incompetent other party, the said party might request the recovery of damages arising from this situation, provided that he has been unable to disclose the other party's incompetence despite of having made the necessary investigation.[27]

Another provision of the said legislation, rules that if a party revokes his offer and fails to inform the other party within the time period stipulated by the law, he becomes liable for the damages arising from the costs the other party undertakes in preparation for the performance of a contract, provided that the other party has declared his acceptance in time. [28]

A last special provision found in the General State Laws for the Prussian States (ALR) regulates that the party who falls into delinquency due to his own fault is liable for the damages incurred by the other party, provided that this situation was unknown to the latter. [29]

In addition to these special provisions that deal with specific contingencies of *culpa in contrahendo* in the General State Laws for the Prussian States (ALR), there is also a general provision which almost provides for the general liability for *culpa in contrahendo.*[30] This general provision stipulates that the provisions relating to fault in the course of performance of a contract shall also apply if one of the parties breaches its obligations during the establishment of the contract.[31] Although this provision does not cover all of the possible contingencies of *culpa in contrahendo*, and it is too abstract, in view of the recognition of the idea of a general liability for *culpa in contrahendo,* it constitutes a major milestone in the historical development of *culpa in contrahendo.* [32]

Consequently, it is possible to propound that although then-contemporary laws regulated some of the contingencies of *culpa in contrahendo* and even ruled a general provision attributable to *culpa in contrahendo*; they did not provide for institutionalization of *culpa in contrahendo* as a general ground for liability covering all possible contingencies.

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[27] Birke Häcker, *Consequences Of Impaired Consent Transfers: A Structural Comparison Of English And German Law* (1st edn, Mohr Siebeck 2009) 95.
[28] Vladimir Monsalve-Caballero, 'The Legal And Historical Panorama Of Culpa In Contrahendo At Contractual Negotiations: An Approach From European And Latin American Law' (2013) Revista de Derecho 126,131.
[29] ibid.
[30] Ernst A. Kramer and Thomas Probst, *International Encylopedia Of Comparative Law Volume 7* (1st edn, Martinus Nijhoff 1981) 69.
[31] Reihnard Zimmermann, *The Law Of Obligations: Roman Foundations Of The Civilian Tradition* (2nd edn, Oxford University Press 1996) 245.
[32] ibid.

II.1.3. Conceptualization of Culpa in Contrahendo

The conceptualization of *culpa in contrahendo* is credited to Jhering as he identified the structural elements of *culpa in contrahendo* and coined the legal concept itself in his leading-edge article for the first time.[33] As such, it is imperative to briefly summarize Jhering's theory in order to have a better understanding of today's *culpa in contrahendo* liability.

Jhering begins his article by determining that it was not been possible to hold the party liable for the damages caused by his own fault (falling into error) during the establishment phase of a contract, leading to the invalidity of the contract.[34] He articulates that in such a situation, there would be no contract liability as the contract was invalid; and there is no tort liability, as some of the elements of tort would not be present.[35]

Naming the fault in this situation and similar others such as 'the fault in contract negotiations',[36] Jhering focuses on the nature of this fault while discussing under which ground of liability the damages arising from the said fault should be recovered. Thereafter, he argues that, as the *culpa in contrahendo* arises in connection with the contractual relationship, the damages arising from *culpa in contrahendo* should be recovered in accordance with the contract liability.[37] Accordingly, Jhering propounds that by entering contract negotiations, the parties undertake the duty to exercise due diligence in their relations with each other.[38] 'The duty to exercise due diligence' -being a behavioral obligation that is apart from the non-contractual duty of care (the negative obligation to 'do no harm')- can be regarded as a performance obligation that has a contractual character.[39] Hence, to Jhering, not only the existing contract relationships, but also some of the emerging ones should be protected by contract liability.[40]

Jhering's conceptualization, however, does not fully counterpoise today's *culpa in contrahendo,* as he has developed his theory on the basis of the contingencies found in the

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[33] Yoav Ben-Dror, 'The Perennial Ambiguity Of Culpa In Contrahendo' (1983) 27(2) The American Journal of Legal History 142, 143-144.
[34] Ümit Gezder, *Türk/İsviçre Hukukunda Culpa in Contrahendo Sorumluluğu* (1st edn, Beta 2009) 3-5.
[35] At this point, it must be noted that; in Jhering's time, the law of tort was still predominantly based on Roman law, which identified 'a direct damage on the property rights' as an element for the action for tort (*actio legis Aquiliae*). Türkân Rado, *Roma Hukuku Dersleri: Borçlar Hukuku* (12nd edn, Filiz 2016) 198.
[36] or, in Latin: '*culpa in contrahendo*'.
[37] Friedrich Kessler and Edith Fine, 'Culpa in Contrahendo, Bargaining in Good Faith, and Freedom Of Contract: A Comparative Study' (1964) 77(3) Harvard Law Review 401, 406.
[38] Michoński D, 'Contractual Or Delictual? On The Character Of Pre-Contractual Liability In Selected European Legal Systems' (2015) 20 Comparative Law Review 151, 153.
[39] ibid 154.
[40] Ümit Gezder, *Türk/İsviçre Hukukunda Culpa in Contrahendo Sorumluluğu* (1st edn, Beta 2009) 6.

laws of his era and the Roman law sources.[41] An important common characteristic of these contingencies, as it can be remembered, was 'the conclusion of contract' which was transposed into Jhering's conceptualization as a pre-requisite of the liability for *culpa in contrahendo*. In other words, to Jhering, if there was no contract, there could have been no *culpa in contrahendo* liability. [42]

Furthermore, Jhering put forward that the concluded contract must be invalid or voidable, as he found it as essentially unnecessary to develop a pre-contractual liability for valid contracts.[43] Although the contract concluded is invalid due to one of a certain set of reasons, it would continue to provide for an obligation on the compensation of damages, especially a compensation obligation to replace the disappearing performance obligation.[44] Henceforth, the liability for *culpa in contrahendo* arises only in the case of invalid contracts for where the performance obligations have never existed. Subsequently, the compensation demanded due to *culpa in contrahendo* cannot be directed to the vested interest in the performance of a contract; it is instead directed to the damages suffered due to the negation of the confidence in the validity of the contract. [45]

Although Jhering's theory has been criticized for limiting the scope of application of *culpa in contrahendo* to invalid contracts and the scope of liability to negation of the confidence in the validity of the contract,[46] it can nonetheless be accepted as the first step towards the development of today's *culpa in contrahendo* as it identifies the structural elements of *culpa in contrahendo* in the individual contingencies, and successfully transforms these into a general rule for the first time.[47]

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[41] Yoav Ben-Dror, 'The Perennial Ambiguity Of Culpa In Contrahendo' (1983) 27 (2) The American Journal of Legal History 142, 146.
[42] ibid 147.
[43] Allan E. Farnsworth, 'Negotiation of Contracts and Precontractual Liability: General Report' in Walter Stoffel and Paul Volken (eds), *Conflits et harmonisation: mélanges en l'honneur d'Alfred E. von Overbeck à l'occasion de son 65ème anniversaire* (Fribourg University 1990) 657, 666; İhsan Ulusan, 'Culpa in Contrahendo Üstüne', Prof. Ümit Yaşar Doğanay'ın Anısına Armağan (İstanbul Üniversitesi 1982) 287, 305; Ümit Gezder, *Türk/İsviçre Hukukunda Culpa in Contrahendo Sorumluluğu* (1st edn, Beta 2009) 6.
[44] İhsan Ulusan, 'Culpa in Contrahendo Üstüne', Prof. Ümit Yaşar Doğanay'ın Anısına Armağan (İstanbul Üniversitesi 1982) 287, 306; Ümit Gezder, *Türk/İsviçre Hukukunda Culpa in Contrahendo Sorumluluğu* (1st edn, Beta 2009) 6.
[45] Yoav Ben-Dror, 'The Perennial Ambiguity Of Culpa In Contrahendo' (1983) 27 The American Journal of Legal History 142, 150.
[46] ibid 151; Friedrich Kessler and Edith Fine, 'Culpa in Contrahendo, Bargaining in Good Faith, and Freedom Of Contract: A Comparative Study' (1964) 77(3) Harvard Law Review 401, 402.
[47] Michoński D, 'Contractual Or Delictual? On The Character Of Pre-Contractual Liability In Selected European Legal Systems' (2015) 20 Comparative Law Review 151, 153; Sylviane Colombo, 'The Present Differences Between The Civil Law And Common Law Worlds With Regard To Culpa In Contrahendo' (1993) 2(4) Tilburg

Culpa in contrahendo liability -emerging as a fruit of Jhering's pursuit of fairness that he felt to be lacking in some situations- has been constantly debated and expanded both in terms of its basic philosophy and its scope of application since then.

To sum up, in the classical Roman law, the starting point of today's Civil Law legal systems, since commercial life was not so advanced as to require such a liability, the reliance of the parties in each other was neither specifically protected nor sanctioned. However, along with the expansion of the Empire, although it is not explicitly protected, some kind of behavioral obligation to negotiate in good faith might be thought to arise. The Byzantine Law marks an important phase in the development of the idea of culpa in contrahendo. Indeed, in this period for the first time, albeit only for a limited number of contingencies, a protection for the reliance of the parties on each other and compensation for the damages arising from the breach of that reliance was imposed. Early Modern Statutes, which were discussed above can be considered to be at the same phase as well. Finally, Jhering's theory represents a new phase as it clearly identifies and conceives the reliance during the contract negotiations as a legal institution. With Jhering, the obligation of good faith during contract negotiations has begun to be discussed as a general pre-contractual obligation and has gone beyond individual facts. Nevertheless, some of his results are far from being an end-point in terms of the limitations he imposes on this obligation.

Foreign Law Review 341, 351; Yoav Ben-Dror, 'The Perennial Ambiguity Of Culpa In Contrahendo' (1983) 27 (2) The American Journal of Legal History 142, 143.

II.2. Historical Development in the Common Law Tradition

In the Common law tradition, there is no flat-out counterpart of *culpa in contrahendo* doctrine, as the duty imposed on the negotiating parties to act in good faith or, in other words, the pre-contractual duty of good faith is rejected as a general behavioral obligation which might form a liability for reliance of the parties.[48] In *Wilford v. Miles,* Lord Ackner expresses this as follows:

> There can be no duty to negotiate in good faith because, by entering into contract negotiations, a party has not given up the freedom to change his mind, he is entitled to pursue his own interest […] [49]

Nevertheless, it must be noted that the rejection of the liability arising from the breach of reliance is neither a primeval principle, nor without exceptions.

Indeed, even in the middle ages, one might observe tendencies in English law regarding reliance as a cause of liability. Kühne, in his work, argues that as the contractual liability in the law of the medieval periods were highly ritualized and formalized, the tendency to base a liability on reliance pave its way into English law at first through the tortious action of trespass, and later on through the action for general assumpsit. [50] It can be said that the general approach was to treat the negation of reliance as a breach of the informal promise to negotiate in good faith, and then enforcing this promises through some tort actions; therefore giving reliance a liability-creating impact. [51]

After these developments, the doctrines of '*caveat emptor*' and consideration have emerged. The '*caveat emptor*' doctrine, meaning 'let the buyer beware' in verbatim translation, expresses that the seller does not have any obligation to inform the buyer, and is free to let the buyer fall into delusion and is a fundamental principle of Anglo-American law. [52] The consideration doctrine, being another fundamental principle of the Anglo-American law of contracts, expresses the benefit that must be bargained for between the parties, and is the essential reason for a party entering into a contract.[53] Thereafter, it can be determined that the abovementioned initial approach, despite its promising nature, has gradually lost its influence

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[48] Alberto M. Musy, 'The Good Faith Principle In Contract Law and the Precontractual Duty To Disclose: Comparative Analysis of New Differences In Legal Cultures' (2001) 1(1) Global Jurist Advances 1, 6
[49] *Walford v. Miles* [1992] 2 AC 128.
[50] Gunther Kühne, 'Reliance, Promissory Estoppel and Culpa in Contrahendo: A Comparative Analysis' (1990) (10) Tel Aviv University Studies in Law 279, 280.
[51] ibid.
[52] Friedrich Kessler and Edith Fine, 'Culpa in Contrahendo, Bargaining in Good Faith, and Freedom Of Contract: A Comparative Study' (1964) 77(3) Harvard Law Review 401, 439-440.
[53] 'Consideration' <http://dictionary.law.com/Default.aspx?selected=305> accessed 12 June 2017.

with the expansion of the consideration doctrine and disappeared almost in the nineteenth century, [54] with the favoring of free trade over fair trade.[55] Since then, it is asserted that the Common law tradition alienated itself from the idea of pre-contractual liability, and therefore from the concept of *culpa in contrahendo*. However, as a result of the softening of these principles through virtually two exceptions, even in this tradition the *culpa in contrahendo* theories, damages caused by certain misconducts committed during the contract negotiations become compensable.

The first of these exceptions is the institution of misrepresentation, which prohibits making statements or representations that create a false opinion on the other party and brings an exception to the *caveat emptor* principle. In other words, although the parties are free to benefit from each other's ignorance or delinquency under the *caveat emptor* principle, they should not actively participate in the formation of such ignorance or delinquency; otherwise, the other party may seek compensation.[56]

The second exception is the institution of promissory estoppel, an equitable institution that brings an exception to the principle of consideration and allows for 'recovery on a promise made without consideration when the reliance on the promise was reasonable'.[57] Promissory estoppel has made it possible, under US law, to compensate for damages arising from a party's reliance onto the unrequited (not supported by consideration) promissory of the other party.[58] In the UK and Ireland, however, 'the courts have preserved estoppel as a shield and not converted it into a sword',[59] holding it to be a valid equitable defense but not an action for compensation.

The conditions required by Common law tradition for the operation of these exceptional institutions and their effects, naturally, do not fully correspond to the conditions and effects of the *culpa in contrahendo* liability in the Civil Law tradition. This is due to the these institutions having developed according to the priorities and needs of the Common law

[54] Alberto M. Musy, 'The Good Faith Principle In Contract Law and the Precontractual Duty To Disclose: Comparative Analysis of New Differences In Legal Cultures' (2001) 1(1) Global Jurist Advances 1, 6.
[55] Naomi Bass, 'Eleventh Hour Collapse: An Elements-Based Comparison Of The German Doctrine Of Culpa In 'Contrahendo' And Australian Principles Of Pre-Contractual Liability' (2009) 6 Macquarie Journal of Business Law 217, 236.
[56] Friedrich Kessler and Edith Fine, 'Culpa in Contrahendo, Bargaining in Good Faith, and Freedom Of Contract: A Comparative Study' (1964) 77(3) Harvard Law Review 401, 447.
[57] 'Promissory Estoppel' <https://www.law.cornell.edu/wex/promissory_estoppel> accessed 12 June 2017
[58] Gunther Kühne, 'Reliance, Promissory Estoppel and Culpa in Contrahendo: A Comparative Analysis' (1990) (10) Tel Aviv University Studies in Law 279, 289.
[59] ibid. 291.

tradition, which are very different from those of Civil law tradition.[60] Still, the very existence of these institutions and the historical development in Common law legal system demonstrates that the understanding of projecting a liability for contract negotiations is not limited to the Civil law tradition, and the apprehension of fair dealing in negotiations does also have an influence in Common law legal systems.

To sum up, in the Common law tradition, it can be said that in the early years, there was a tendency to regard the reliance in contract negotiations as a source of liability. This tendency however has been abandoned with the integration of 'consideration' and 'caveat emptor' principles; which were developed to prioritize freedom of contract and the dynamism in commercial life, sometimes to the expense of fairness. However, the inconvenience caused by the tight application of these principles led to emergence of exceptions. Today, the institution of misrepresentation in England and Ireland, and the institution of promissory estoppel in the US; provides strong means for eliminating losses arising from the breaches of reliance during the contract negotiations. Then, the Common Law tradition has come to the point to recognize the pre-contractual reliance and attach consequences to it, while at the same time avoiding naming it.

[60] Yoav Ben-Dror, 'The Perennial Ambiguity Of Culpa In Contrahendo' (1983) 27(2) The American Journal of Legal History 142, 194; Huriye Reyhan Demircioğlu, *Sözleşme Görüşmelerindeki Kusurlu Davranıştan Doğan Sorumluluk (Culpa In Contrahendo Sorumluluğu)* (1st edn, Yetkin 2009) 72.

II.3. Conclusion

Even although it has been first theorized and conceptualized by Jhering, it can be discerned that some situations that resemble *culpa in contrahendo* were granted protection in both Civil law and Common law traditions even before his theory, though based on different grounds and at the different rates. In this context, it can be said that the real cutting-edge aspect of Jhering's theory was that it provided *culpa in contrahendo* a real philosophical basis. The examination of the historical development of *culpa in contrahendo* in both legal systems has been considered to be fructuous, in terms of evaluating the underlying sensitivities, necessities and motivations behind this philosophical basis as well as recognizing its shortcomings where necessary. In this direction, the following convictions have been acquired regarding the historical development of the *culpa in contrahendo*:

1. In the historical development, both legal traditions can be said to acknowledge the mutual reliance between parties during the contract negotiations and the parties might suffer damages due to the breach of this reliance. As their structures and principles are different from each other, both legal traditions provide different tools for the recovery of these damages. As it will be discussed in the subsequent chapter, not even the legal systems within the same tradition have adopted a uniform tool.
2. As *culpa in contrahendo* itself has emerged as a response to the developing commercial life, and as both the commercial opportunities and communication methods has never been at this development of before; the development of *culpa in contrahendo* is not final and is expected to continue.

III. Conceptual Analysis of Culpa in Contrahendo

The *culpa in contrahendo* -whose historical development and conceptualization by Jhering was discussed above- is no longer solely in the domain of legal scholars, or confined within the boundaries of national laws. Nonetheless, to effectively illustrate and examine any international or supranational conception of the *culpa in contrahendo,* it is a prerequisite to carry out a conceptual analysis of *culpa in contrahendo*, and evaluate how the present-day national legal systems respond to the need that produced the *culpa in contrahendo* liability. In this chapter, this conceptual analysis and the approach of several national legal systems (from Civil law and Common law legal systems) are deliberated upon. This deliberation, for the sake of logical coherence, first covers the elements of *culpa in contrahendo* followed by its legal characterization.

III.1. Elements of Culpa in Contrahendo

Each national legal system has different preferences in terms of implication, regulation, and expression of *culpa in contrahendo.* Therefore, in order to assess *culpa in contrahendo* as a transnational conception and to intellectualise different theories for its legal characterization, it is *sine qua non* to identify and define the elements of *culpa in contrahendo*.

Liability arising from *culpa in contrahendo,* no matter how it is characterized, has elements other than both contractual liability and tort liability in addition to some elements common with those. Elements specific to *culpa in contrahendo* liability can be inferred directly from the term itself:[61] 'the status of contracting' or in other words 'contract negotiations', and 'the breach of the duty pertaining to the contract negotiations'.[62] The elements common to all grounds for liability, therefore existent also in *culpa in contrahendo* liability can be listed as 'fault', 'damages', and a 'causation-at-fact' between the two. [63]

III.1.1. Contract Negotiations

The conceptual prerequisite and keystone element of the *culpa in contrahendo* liability is the contract negotiations. [64] This keystone element is defined as the relation between parties for the establishment of a contract,[65] ascertaining to a special proximity.[66] Having implications on the decisions of the parties and leaving them vulnerable to each other's influence, this proximity creates a trust between parties. The proximity and therefore the trust are legally protected through the pre-contractual duty of good faith and obligations pertaining to it, forming the basis of the liability for *culpa in contrahendo*.[67]

What is also important in terms of the liability for *culpa in contrahendo* is the determination of the beginning and end of the contract negotiations. At the outset, there are various standpoints about the beginning of contract negotiations. The first standpoint purports that the said relation or the contract negotiations begin when the parties reciprocally declare

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[61] *Culpa in contrahendo* means 'fault in contracting' when translated from Latin into English.
[62] Süleyman Yalman, *Türk-İsviçre Hukukunda Sözleşme Görüşmelerinden Doğan Sorumluluk* (1st edn, Seçkin 2006) 84.
[63] Ümit Gezder, *Türk/İsviçre Hukukunda Culpa in Contrahendo Sorumluluğu* (1st edn, Beta 2009) 112.
[64] BGE 116 II 695, Regeste auf französisch. (Synopsis in the French language) (Switzerland)
[65] Ümit Gezder, *Türk/İsviçre Hukukunda Culpa in Contrahendo Sorumluluğu* (1st edn, Beta 2009) 34.
[66] Süleyman Yalman, *Türk-İsviçre Hukukunda Sözleşme Görüşmelerinden Doğan Sorumluluk* (1st edn, Seçkin 2006) 86.
[67] see below subheading III.1.2.

their intent to enter into negotiations.[68] Oppositely, the second standpoint asserts that the negotiations begin at latest with the offer; yet, they can begin earlier with the invitation to offer, [69] in both cases with a unilateral revelation of the intent to enter contract negotiations; without necessitating an explicit declaration of intent. As the parties enter contract negotiations to determine whether they have reciprocal intents to establish a contract; the first standpoint seems to be incompatible with reason. As a result, the contract negotiations begin with a party's awareness of the unilateral intent of the other party, however; the awareness of the party should be functional in the context of at least a tentative interest to establish a contract, as otherwise there is no possibility for actual negotiations.[70]

Consequently, in the practical context, it can be said that when a party enters to the domain of the other side with the interest to possibly establish a contract, the contract negotiations begin. To elaborate, in the ordinary flow of everyday life, the contract negotiations are rendered to have begun when a party walks into the business place of another party, as the first party would already have been aware of the intent of business owner.[71] In the well-known *Linoleumrollenfall*[72] decision, the German Imperial Court of Justice ruled accordingly as well. Briefly, in the facts of the said decision, a woman was in a shop to buy a roll of linoleum and was injured because of careless stacking of goods; and therefore was not able to establish a contract. The Court identified that the contract negotiations have begun as follows:

> That was no mere factual proceeding, a mere act of courtesy, but a legal relationship came into existence between the parties in preparation for a purchase; it bore a character similar to a contract and produced legal obligations in so far as both seller and prospective buyer came under a duty to observe the necessary care for the health and property of the other party. […][73]

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[68] Hamdi Yılmaz, 'Sözleşme Görüşmelerinde Kusur 'Culpa in Contrahendo' ve Sorumluluğun Hukuksal Niteliğinde Yeni Görüşler' (1985) XI(3) Yargıtay Dergisi 234, 238.

[69] Rodrigo Novoa, 'Culpa In Contrahendo: A Comparative Law Study: Chilean Law and The United Nations Convention On Contracts For The International Sales Of Goods (CISG)' (2005) 22(3) Arizona Journal of International & Comparative Law 583, 585.

[70] Süleyman Yalman, *Türk-İsviçre Hukukunda Sözleşme Görüşmelerinden Doğan Sorumluluk* (1st edn, Seçkin 2006), 102; Hamdi Yılmaz, 'Sözleşme Görüşmelerinde Kusur 'Culpa in Contrahendo' ve Sorumluluğun Hukuksal Niteliğinde Yeni Görüşler' (1985) XI(3) Yargıtay Dergisi 234, 238.

[71] Ümit Gezder, *Türk/İsviçre Hukukunda Culpa in Contrahendo Sorumluluğu* (1st edn, Beta 2009) 34.

[72] 07.12.1911 RGZ 78, 239 *Lineleumrollenfall* decision. [English translation of the decision: 'Translated Decisions, Germany' (*The University of Texas at Austin School of Law*, 1 December 2005) <https://law.utexas.edu/transnational/foreign-law-translations/german/case.php?id=807> accessed 1 June 2017.]

[73] ibid.

More recently, in the *Gemüseblatt*[74] decision, the German Federal Supreme Court has affirmed the position that has been established in the *Linoleumrollenfall* decision on the beginning of contract negotiations. [75]

Next, there is not much divergence about the end of the contract negotiations. Accordingly, the contract negotiations that have begun can end in two ways. First, the negotiations would end when the contract is established, as they would have fulfilled their objectives with the establishment of the contract. Second, the negotiations would also end when the parties decide to withdraw from negotiations, as the objective of the negotiations would have become impossible. For the liability for *culpa in contrahendo*, how these negotiations have ended, and whether or not they have ended with a valid contract is of no consequence. [76] If the breach of the duty with fault has been realized during the contract negotiations, regardless of the outcome of those negotiations, the liability for culpa in contrahendo arises. [77]

To sum up, the contract negotiations do not necessarily refer to the parties' confronting each other around a negotiation table. Inclusive of that, the contract negotiations in the context of *culpa in contrahendo* express the proximity between the parties, leading them to trust each other in the hope of a contract. This proximity begins with the first contact and ends with the end of the contacts, or with the establishment of a contract.

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[74] 28.01.1976 BGHZ 66, 51 *Gemüseblatt* decision. [English translation of the decision: 'Translated Decisions, Germany' (*University of Texas at Austin School of Law*, 1 December 2005) <https://law.utexas.edu/transnational/foreign-law-translations/german/case.php?id=796> accessed 1 June 2017.]

[75] Here, it must be noted that the *Gemüseblatt* decision was given on a set of facts almost identical to that in the *Lineloumrollenfall* decision.

[76] A standpoint of the theory characterizing *culpa in contrahendo* as a liability for the negotiated and envisaged contract -formulated by Jhering, the father of *culpa in contrahendo*-, puts forth that culpa in contrahendo liability arises only out of, and when the negotiations have yielded and invalid contract. This standpoint, which has been examined and criticized for its setbacks under heading III.2.2.2 of this work, is not anymore adopted under modern national legal systems.

[77] Süleyman Yalman, *Türk-İsviçre Hukukunda Sözleşme Görüşmelerinden Doğan Sorumluluk* (1st edn, Seçkin 2006) 84.

III.1.2. Breach of the Pre-Contractual Duty of Good Faith

The legal protection of the parties for their trust in each other due to the contract negotiations is embodied through the 'pre-contractual duty of good faith'. This duty refers to the behavioural obligations that are separate from both the contractual relationships and the general duty of care between parties that are not in any special relationship. As such, *culpa in contrahendo*, in the most general sense, is based on the duty of parties' to act in good faith during contract negotiations.

Although the duty itself is not of general acceptance, the behavioural obligations making it up are similarly enforced in most national legal systems. For this reason, first, the obligations that make up this duty are discussed, and then, the situation in different legal systems are examined.

III.1.2.1. Obligations Making-up the Pre-Contractual Duty of Good Faith

The pre-contractual duty of good faith, arising from the proximity between the parties, obliges the parties to behave in a certain manner during the contract negotiations. As such, this duty imposes style or behavioral obligations rather than performance obligations.[78] A violation of any of these behavioral obligations, to put it in the simplest terms, indicate the abuse or negation of a party's trust and good faith during the contract negotiations by the other party. The behavior obligations, can further be elucidated under the 'obligation of custody and conservation' and the 'obligation of seriousness'.

III.1.2.1.1. Obligation of Custody and Conservation

Per Novoa, 'the obligation of custody and conservation imposes upon the parties of the contract negotiations the duty to protect and take custody of all that has been given by the other party during preliminary negotiations'.[79] By indicating 'all that has been given by the other party', it is meant the personal, material and economic integrity of a party, which is exposed to the other party with beginning the contract negotiations should be inferred. This obligation is justified by the parties' anticipation of at least not to suffer from the contract negotiations, and it should be determined in terms of the degree of proximity that the parties have gained due to the negotiations. Thus, the mentioned obligation denotes the behavioural

[78] Yargıtay Hukuk Genel Kurulu E. 2012/13-1220, K. 2013/239 (Turkey)

[79] Rodrigo Novoa, 'Culpa In Contrahendo: A Comparative Law Study: Chilean Law and The United Nations Convention On Contracts For The International Sales Of Goods (CISG)' (2005) 22(3) Arizona Journal of International & Comparative Law 583, 593.

obligation to negotiate with care and by observing the interests of the other party to a certain extent.

The 'obligation to custody and conservation', or 'duty to protect all that has been given by the other party', in the first instance, predicates the duty to not to disclose the confidential information given by the other party, and not to misuse this information to serve one's own interests. Indeed, both the Principles of the European Contract Law[80] and the Draft Common Frame of Reference[81] -the comprehensive studies that yearn to identify the private law rules and practices that are common to most European states- noted that the pre-contractual duty of good faith also expresses the duty to not to disclose confidential information acquired during the contract negotiations.

Breach of this obligation might further be the case for several situations, first of which is when a party represents the relevant facts to the other party erroneously, inducing him into a contract. This situation is sanctioned under misrepresentation under the Common law legal systems and as the breach of the duty of not to deceive under Civil law legal systems.[82] Civil law scholars note agency without authority, intentional sales of defective products, and intentional misinformation about the features of the product as examples of the breach of the duty to not deceive. [83]

Second, the situations when a party does not inform the other party although he is obliged to do so, also account for the breach of the said obligation. Hereunder, it must be noted that this obligation does not refer to a general obligation to inform or a general duty of . On direct opposite, in principle, each party has to obtain information himself.[84] Nevertheless, the obligation to inform may, exceptionally, emerge as a reflection of obligation of custody and conservation for some situations. In Civil law legal systems; per the Supreme Federal Court of Switzerland, there is an obligation to inform the other party of the contract

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[80] 'Principles Of The European Contract Law' (*Commission on European Contract Law*) <https://www.trans-lex.org/400200/_/pecl/> accessed 31 May 2017, art 2.302.

[81] 'Definitions, Principles And Model Rules Of European Private Law: Draft Common Frame of Reference Outline Edition' (*Study Group on a European Civil Code and the Research Group on EC Private Law*) (1st edn, Sellier, European Law Publishers 2009), art II-3:302.

[82] see subheading III.1.2.2.

[83] Ümit Gezder, *Türk/İsviçre Hukukunda Culpa in Contrahendo Sorumluluğu* (1st edn, Beta 2009), 174.

[84] Ümit Gezder, *Türk/İsviçre Hukukunda Culpa in Contrahendo Sorumluluğu* (1st edn, Beta 2009), 176; Rodrigo Novoa, 'Culpa In Contrahendo: A Comparative Law Study: Chilean Law and The United Nations Convention On Contracts For The International Sales Of Goods (CISG)' (2005) 22(3) Arizona Journal of International & Comparative Law 583, 593; Friedrich Kessler and Edith Fine, 'Culpa in Contrahendo, Bargaining in Good Faith, and Freedom Of Contract: A Comparative Study' (1964) 77(3) Harvard Law Review 401, 440.

negotiations about 'the factors likely to influence his decision to conclude a contract or to conclude a contract under certain conditions',[85] unless the other party was supposed to know these factors himself.[86] In addition, in the Common law legal systems, it is argued that although there is no obligation to inform the other party, when the non-disclosure amounts up to create an erroneous impression on the party, the situation might embody a misrepresentation.[87]

To sum up, the obligation of custody and conservation commands that due to the trust arising from the proximity between the parties, the parties should observe and act upon each other's interests in situations where the other party is likely to be vulnerable. The obligation of custody of conservation can be assessed to connote out the duty of disclosure, the duty to not deceive, and the duty to not breach confidentiality.

III.1.2.1.2. Obligation of Seriousness

The other obligation arising from the pre-contractual duty of good faith is the obligation of seriousness.[88] This obligation requires each party to conduct the negotiations with the intention of establishing a contract, and to withdraw as soon as (s)he understands that establishment of the contract would not be possible.[89]

Breach of this obligation might be the case when a party withdraws from the contract negotiations. In principle, one can withdraw from the contract negotiations at any time without any justification.[90] Withdrawal constitutes a breach of the obligation of seriousness if the withdrawing party did never have intent to establish a contract and was temporizing the other party.[91] What is debatable here is at which stage the withdrawal from negotiations causes the liability for *culpa in contrahendo*. In the solution of this debate, the 'damages' element of *culpa in contrahendo* can be utilized with the test on whether the obligation of seriousness has been breached. That is, the breakdown of the negotiations can be regarded as a breach of this

[85] BGE 90 II 449, S. 455, E. 4. [The quotation from the decision is translated into English by the author of the present study.] (Switzerland)
[86] BGE 90 II 449, S. 456. (Switzerland)
[87] Friedrich Kessler and Edith Fine, 'Culpa in Contrahendo, Bargaining in Good Faith, and Freedom Of Contract: A Comparative Study' (1964) 77(3) Harvard Law Review 401, 441.
[88] Adana 3. Asliye Ticaret Mahkemesi No: 2011/196-2013/157 T:30.04.2013 (Turkey)
[89] Rodrigo Novoa, 'Culpa In Contrahendo: A Comparative Law Study: Chilean Law and The United Nations Convention On Contracts For The International Sales Of Goods (CISG)' (2005) 22(3) Arizona Journal of International & Comparative Law 583, 593.
[90] Fikret Eren, *Borçlar Hukuku Genel Hükümler* (8th edn, Yetkin 2003) 1085; BGE 105 II 75, Regeste auf französisch. (Synopsis in the French language) (Switzerland)
[91] Ümit Gezder, *Türk/İsviçre Hukukunda Culpa in Contrahendo Sorumluluğu* (1st edn, Beta 2009) 165.

obligation to the extent that it causes damages to the other party. For instance, breaking off when a contract is about to be established, would be assessed to constitute *culpa in contrahendo* as the other party is likely to suffer damages due to the costs incurred because of the strong hope that a contract will be established; whereas this would not be the case for the earlier stages of contract negotiations. Affirmatively, the European Court of Justice, in the Tacconi judgement where it has evaluated the pre-contractual liability, stated that the breakdown of negotiations would only constitute a ground for liability when the parties have legitimate expectations of the conclusion of a contract. [92]

III.1.2.2. Adoption of the Pre-Contractual Duty of Good Faith in Different Legal Systems

When it comes to the adoption of pre-contractual duty of good faith, there are differences between national legal systems, which can be primarily addressed in the light of the distinction between Civil law and Common law legal systems, and then under the divergence between different national legal systems. In the most general sense, the pre-contractual duty of good faith is well received by Civil law legal systems,[93] whereas the Common law legal systems refuse to acknowledge it as a general principle, 'inherently repugnant to the adversarial position of the parties when involved in negotiations'.[94] Despite this difference, through the institutions of promissory estoppel and misrepresentation, the Common law legal systems also indirectly accommodate this duty.[95]

Within the Civil law legal systems, there are two different approaches in terms of the regulation of this duty. In some national legal systems, the pre-contractual duty of good faith has been clearly transposed in the law; in some others the courts and the scholars have expounded it.

The German, Italian and Greek laws constitute the examples of the first approach, the legal systems where the duty is transposed into the statutes law. To begin with, for Germany, the pre-contractual duty has passed into law through two provisions of the BGB, after the amendments of 2002. First of these provisions, Section 241 (2) of the BGB states that 'An obligation may also, depending on its contents, oblige each party to take account of the rights,

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[92] Case C-334/00 *Fonderie Officine Meccaniche Tacconi SpA v Heinrich Wagner Sinto Maschinenfabrik GmbH (HWS)* [2002] ECR I-7357, Opinion of AG Geelhoed, paras 75-78.
[93] Alberto M. Musy, 'The Good Faith Principle In Contract Law and the Precontractual Duty To Disclose: Comparative Analysis of New Differences In Legal Cultures' (2001) 1(1) Global Jurist Advances 1, 2.
[94] *Walford v. Miles* [1992] 2 AC 128 (HL) 138 (Ackner LJ).
[95] Friedrich Kessler and Edith Fine, 'Culpa in Contrahendo, Bargaining in Good Faith, and Freedom Of Contract: A Comparative Study' (1964) 77(3) Harvard Law Review 401, 420.

legal interests and other interests of the other party' and the second provision; Section 311 (2) provides that this obligation also rises with the commencement of contract negotiations, the initiation of a contract and similar business contacts.[96] Thus, it can be stated that the BGB enacts the pre-contractual duty of good faith in detail, through the obligations that make-up the duty. The Greek and Italian codes, on the other hand, provide only for the general pre-contractual duty of good faith, and do not remark the obligations making-up the said duty. Simply, Article 197 of the Greek Civil Code provides that the negotiating parties shall adopt the conduct dictated by good faith;[97] and Article 1337 of the Italian Civil Code require parties to act in good faith during the negotiation and formation of a contract.[98]

The examples of the legal systems where the courts and the scholars acknowledge and implement pre-contractual duty, although it is not clearly expressed in the text of their statutes, include Swiss, Turkish and French legal systems. In Switzerland, the presence of a pre-contractual duty has been first acknowledged the Federal Supreme Court in 1901 and has since been referred to in its decisions, although the scope and characterization of this duty has changed as well.[99] In Turkey, where the Civil law is deeply influenced by the Swiss law, presence of a pre-contractual duty has first been raised by the scholars, [100] and later adopted in the decisions of the Court of Cassations.[101] Lastly, in France, the scholars have expanded the contractual duty to act in good faith to the contract negotiations, suggesting it as a limitation to the freedom of contract, although the courts have evaluated the breach of the said duty under the torts.[102]

The Common law legal systems, refusing to acknowledge the pre-contractual duty of good faith as a general principle, protect the said duty indirectly through the institutions of promissory estoppel and misrepresentation.

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[96] Bürgerliches Gesetzbuch (BGB). [English translation: 'German Civil Code (BGB)' (*Laws in the Internet, Federal Ministry of Justice and Consumer Protection*, 2015) <https://www.gesetze-im-internet.de/englisch_bgb/> accessed 1 June 2017]

[97] Emanuela Iftime, 'Good Faith in Greek Civil Code' (2015) 2(15) Journal of Public Administration, Finance and Law Special Issue 133, 135.

[98] Thomas Febbrajo, 'Good Faith And Pre-Contractual Liability In Italy: Recent Developments In The Interpretation Of Article 1337 Of The Italian Civil Code' (2016) 2 (2) The Italian Law Journal 291, 292.

[99] Ümit Gezder, *Türk/İsviçre Hukukunda Culpa in Contrahendo Sorumluluğu* (1st edn, Beta 2009), 20.

[100] Hamdi Yılmaz, 'Sözleşme Görüşmelerinde Kusur 'Culpa in Contrahendo' ve Sorumluluğun Hukuksal Niteliğinde Yeni Görüşler' (1985) XI(3) Yargıtay Dergisi 234, 241.

[101] Yargıtay 19. HD E:2005/1932 K: 2005/4790 T: 28.04.2005 (Turkey).

[102] Alberto M. Musy, 'The Good Faith Principle In Contract Law and the Precontractual Duty To Disclose: Comparative Analysis of New Differences In Legal Cultures' (2001) 1(1) Global Jurist Advances 1–17 3.

To begin with, in the US, since *Hoffman v. Red Owl Stores*[103] decision, promissory estoppel has been utilized to recover losses incurred due to the breach of good faith. Texas Supreme Court, in *Wheeler v. White* decision defines this function promissory estoppel as follows:

> The binding thread which runs through the cases applying promissory estoppel is the existence of promises designedly made to influence the conduct of the promisee, […] not necessarily constituting any actual performance of the contract itself, is something that must be done by promise before he could begin to perform, and was a fact known to the promisor.[104]

In Europe, the English courts first utilized promissory estoppel to enforce the pre-contractual duty in question in *High Trees*[105] case to protect the defendant, and a later decision affirmed that the estoppel could not be used as a ground for claims to compensation, cementing its position as an equitable defence.[106] Thus, although the pre-contractual duty of good faith is observable through the institution of promissory estoppel, it is not thoroughly protected by that institution under the English law.[107]

Instead, in the English law, the institution of misrepresentation evolved to provide the pre-contractual good faith a protection comparable to that under Civil law legal systems. To start with, misrepresentation aims to compensate the loss arising from a party's misleading representation of the facts on the other party, to induce him into a contract.[108] Early on, only the fraudulent misrepresentations would amount to an action for damages, whereas the negligent misrepresentations were marginalized.[109] Later, in *Hedley Byrne v Heller* case, negligent misrepresentations are identified as a breach of the duty of care enabling the claim for damages.[110] More than a decade after *Heller*, in *Box v. Midland Ltd.* case, the misrepresentations that did not end in a contract but incurred damages are included into the misrepresentation principles' area of application.[111]

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[103] *Hoffman v. Red Owl Stores* 133 N.W. 2d 267 (1965).
[104] *Wheeler v. White* 398 S.W. 2d 93 (Tex. 1966) 96.
[105] *Central London Property Trust Ltd v High Trees House Ltd* [1947] KB 130.
[106] *Amalgamated Investment Co v Texas Bank* [1982] QB 84.
[107] Similarly, the Irish courts, have accepted the estoppel as an equitable defence as well and not as a ground for compensation claims as well. see *Re: J.R.* [1993] ILRM 657.
[108] Gunther Kühne, 'Reliance, Promissory Estoppel and Culpa in Contrahendo: A Comparative Analysis' (1990) 10 Tel Aviv University Studies in Law 279, 289.
[109] *Derry v Peek* [1889] UKHL 1.
[110] *Hedley Byrne & Co. Ltd. v Heller & Partners Ltd.* [1964] A.C. 465.
[111] *Box v. Midland Bank Ltd.* [1979] 2 Lloyd's Law Reports 391.

Then, as of this day, for the English law, the misrepresentation institution ensures that the parties act in accordance with good faith during contract negotiations, regardless of the outcome of contract negotiations. Thus, although its legal significance is rejected, the pre-contractual duty of good faith is protected under the English Law.

Accordingly, in the Irish Law, the pre-contractual duty of good faith is indirectly protected under misrepresentation as well. Similar to the English courts, the Irish courts acknowledge that misrepresentations might constitute a ground for the claims for damages where a fiduciary relationship exists between the parties, even in the absence of a contract.[112]

Consequently, it is not disputable that both the Civil law and Common law national legal systems of Europe accommodate the pre-contractual duty of good faith, although the latter legal systems do not explicitly acknowledge this. In addition to the divergence between Civil law and Common law, and despite the broad accommodation of said duty, it can be determined that the definition, content, scope and appearance of this duty are also different in each national legal system. Nevertheless, it can be argued that two obligations arise almost everywhere from this duty, and therefore infringement of any of them almost always amounts to the breach of the pre-contractual duty of good faith.

III.1.3. Fault

Culpa in contrahendo, as the term 'culpa' points out, is a fault-based liability. Fault is defined as 'the mode of behaviour contrary to law, to willingly lead to an outcome contrary to law, or not to use the will to avoid the outcome contrary to law.'[113] The fault, as the definition suggests, may appear both intentionally and negligently. The intention denotes that the outcome contrary to law is known and desired, whereas negligence means the outcome is not desired, but the necessary care and attention is not shown to prevent it. Between the Civil law[114] and Common law[115] legal systems, there is no difference worth mentioning about the identification and classification of the fault in *culpa in contrahendo*, although in the Common law legal systems the fault is mostly defined in the context of tort liability.

[112] *Patrick Stafford v Denis Mahony, Desmond Smith and Robin Palmer* [1980] I.L.R.M. 53.
[113] Fikret Eren, *Borçlar Hukuku Genel Hükümler* (8th edn, Yetkin 2003) 529.
[114] Yargıtay 19. HD E: 2005/2865, K: 2005/11959 T:01.12.2005. (Turkey)
[115] 'Definition of Fault', (The Law Dictionary) <https://dictionary.thelaw.com/fault/> accessed 20 February 2017

In the context of the *culpa in contrahendo*, 'the breach of the pre-contractual duty of good faith' and 'fault' should not be considered as independent elements, but should be regarded as elements complementing each other. Indeed, the fault serves mainly in the determination and limitation of the pre-contractual duty of good faith. In this regard, the fault limits the *culpa in contrahendo* liability with the 'reasonable man' measure that is adopted in both Civil law[116] and Common law legal systems, defined by an English court as 'to not do something which a reasonable man, guided upon those considerations which ordinarily regulate the conduct of human affairs, would do, or doing something which a prudent and reasonable man would not do'.[117] Consequently, the breach of the pre-contractual duty of good faith due to the circumstances beyond the comprehension of 'reasonable man' does not cause *culpa in contrahendo* liability, while both the intentional and unreasonably negligent breach of the said duty does.[118]

III.1.4. Damages

The damages are defined as impairment of one's material or personal entity.[119] The damage on one's material entity is classified as 'the material damages', and on personal entity is denominated as 'immaterial damages'. 'The material damages' is further divided into three as the material damages on the person, the material damages on the objects and economic loss,[120] all of which indicate impairment in one's patrimony through the increases in debits, decreases in assets or the loss of earnings. [121]

As the material damages on the person signify a bodily injury and material damages on objects signifies a deformation or refraction; both of them refer to the damages on absolute rights, and as such they exemplify the breaches of the general duty of care, and likewise the immaterial damages, they can be compensated through tort liability.

Then, the economic losses cover the impairment of the relative rights and the pure economic losses. The relative rights denote the rights to demand performance of an obligation from another specified party; and until the claim is fulfilled, these do not have any outlook physically. Arising from the legal relations and the contracts between the parties, these rights

[116] Fikret Eren, *Borçlar Hukuku Genel Hükümler* (8th edn, Yetkin 2003) 1020.
[117] *Blyth v Birmingham Waterworks Co* [1856] EWHC Exch J65.
[118] Ümit Gezder, *Türk/İsviçre Hukukunda Culpa in Contrahendo Sorumluluğu* (1st edn, Beta 2009) 133.
[119] Fikret Eren, *Borçlar Hukuku Genel Hükümler* (8th edn, Yetkin 2003) 473.
[120] Süleyman Yalman, *Türk-İsviçre Hukukunda Sözleşme Görüşmelerinden Doğan Sorumluluk* (1st edn, Seçkin 2006) 86.
[121] Fikret Eren, *Borçlar Hukuku Genel Hükümler* (8th edn, Yetkin 2003) 1011.

to claim can be pleaded only between the parties of said relations, thus the name. Pure economic losses, therefore, indicate an impairment of interests that are not rights, such as loss of earnings and incurred expenses.

It is argued that the breach of the pre-contractual duty of good faith can lead up to any of the above-mentioned damages.[122] Nevertheless, it can be stated that the *culpa in contrahendo* liability fundamentally aims to provide for the recovery of pure economic losses, which cannot be claimed under neither tort nor contract liability. Likewise, the expressions such as 'the recovery of the damages incurred due to the legitimate expectations', or 'the damages arising from the negation of confidence', corroborate this statement.

III.1.5. Causation-at-fact

Causation-at-fact, in *culpa in contrahendo* liability, is the cause and effect relationship between the faulty breach of the pre-contractual duty of good faith and the damages. Causation-at fact is present when the specific breach of said duty, under the ordinary course of events and general life experiences is considered to be able to result in damages; thus, it is different from the empirical causation. In other words, the proper causation-at fact expresses a natural and adequate causation between the breach of the said duty and damages. [123]

[122] Süleyman Yalman, *Türk-İsviçre Hukukunda Sözleşme Görüşmelerinden Doğan Sorumluluk* (1st edn, Seçkin 2006) 87.
[123] Ümit Gezder, *Türk/İsviçre Hukukunda Culpa in Contrahendo Sorumluluğu* (1st edn, Beta 2009) 127.

III.2. Legal Characterization of Culpa in Contrahendo

Since the widespread recognition of the *culpa in contrahendo* as a ground for liability, the scholars and practitioners have been deliberating upon under the purview of which institution *culpa in contrahendo* falls, generating a number of theories. These theories have preliminarily addressed the liability for *culpa in contrahendo* as an exponent of either tort or contract liability; only in more recent times hinging upon other novel grounds for liability. Here, the legal character of *culpa in contrahendo* is intellectualized over an examination of the trailblazing ones among the said theories.

III.2.1. Tort Theory and Criticism

III.2.1.1. Tort Theory

The Tort Theory asserts that the liability for *culpa in contrahendo* should be characterized as tort liability. The proposition of the Tort Theory is that; before and without the conclusion of a contract; contract liability cannot be established, and when there is no contract liability, the losses can only be recovered under tort liability.[124] Thereby, the Tort Theory embarks to prove that the elements of tort liability concur with the elements of *culpa in contrahendo*.[125]

The understanding of the concept of tort is different between legal systems although its conceptual elements are similar. For the Common law legal systems, the elements of tort can be identified as the presence of a duty, breach of that duty (by an act or omission), damage, fault, and causation-at-fact.[126] In contrast, the Civil law legal systems have adopted different approaches within themselves in terms of analysis and regulation of tort. To begin with, in the German law, tort liability arises when a person 'knowingly or negligently injures the life, body, health, liberty, property, or any right of another person illegally'.[127] This legal system regulates act (or omission) and fault as the elements of tort; but limits the general duty of care, and therefore damages, to not to breach the other party's legal entity at the designated points. In the French Law; however, the tort liability arises when an act of one that causes damage to another, provided that the damages occurred due to the fault of the former, hence determining

[124] Ali Naim İnan, 'Mukavele Yapılırken İşlenen Kusurdan Dolayı Mesuliyetin Hukuki Sebeplerini İzah Eden Nazariyeler Üzerinde Mukayeseli Bir Çalışma' (1954) 45(7) Adalet Dergisi 878, 884.
[125] Ahmet Kılıçoğlu, *Borçlar Hukuku Genel Hükümler* (Turhan 2005) 60.
[126] Ronald B. Standler, 'Elements Of Torts In The USA' (2011) <http://www.rbs2.com/torts.pdf> accessed 2 April 2017 5.
[127] Ralph Dornfeld Owen, 'Tort Liability In German School Law' (1955) 20 (1) Law and Contemporary Problems 72, 73.

the breach of the general duty of care in regards to behaviour, and not limiting the scope of the said duty. [128] Therefore, among different legal systems, 'the presence of the duty' casts doubt on the claims of tort liability's inclusiveness of the *culpa in contrahendo* and different standpoints exist on the characteristics and substance of the duty violated in the *culpa in contrahendo*.

A standpoint views the duty violated in culpa in contrahendo as the general duty of care (*neminem leadere*).[129] According to this standpoint, the conduct of contract negotiations among definite persons do not constitute an adequate basis to characterize the *culpa in contrahendo* under a different ground of liability, as the general duty of care may also be violated against particular person.[130] Hereunder, this standpoint propounds that the liability for *culpa in contrahendo* is a ground for tort liability arising from the breach of abstract, *erga omnes* and general duty of care.

Another standpoint, following the systematic of German Tort Law which enumerates the grounds compensable under the tort law, asserts that the pre-contractual duty of good faith should not be regarded as a manifestation of the general duty of care, but rather as a constituent of it, along with the duties of not to violate another's right to life, right to integrity, rights *in personam*, and rights *in rem*.[131] Per this standpoint, the breach of pre-contractual duty of good faith is to be regarded as a breach of the said general duty even when no other constituent of the said general duty is infringed. Besides, this standpoint notes that the presence of exclusive legal relationship between parties is a prerequisite for the acknowledgement of the duty of good faith under the general duty of care, as is the case in *culpa in contrahendo.*[132] Henceforth, it acknowledges the presence of an exclusive legal relationship between parties and characterizes *culpa in contrahendo* as a ground for tort liability based on that acknowledgement.

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[128] Andre Tunc, 'A Codified Law Of Tort - The French Experience' (1979) 39 (4) Louisiana Law Review 1051, 1053; Le Code civil de français (C. Civ) 1804, Art. 1383.
[129] İhsan Ulusan, 'Culpa in Contrahendo Üstüne', *Prof. Ümit Yaşar Doğanay'ın Anısına Armağan* (İstanbul Üniversitesi, 1982) 287, 302.
[130] ibid 302.
[131] German Tort Law does not recognize e. g. loss of earnings as a ground compensable under tort liability; see Steven A. Mirmina, 'A Comparative Survey Of Culpa In Contrahendo, Focusing on Its Origins In Roman, German, and French Law as well as its Application in American Law' (1992) 8 Connecticut Journal of International Law 77, 84.
[132] Fikret Eren, *Borçlar Hukuku Genel Hükümler* (8th edn, Yetkin 2003) 555.

Given the legal systems of various European countries, it is possible to assert that the most striking examples of the characterization of *culpa in contrahendo* as a ground for tort liability are the English Law until 1976 and the French Law.

First, in England, the fault in contracting (*culpa in contrahendo*) was exclusively characterized under tort until *Esso* case in 1976; in which the court decided that the duty to negotiate with care is differentiated from the general duty of care and breach of that duty need not to only be claimed in the context of tort, transposing the misrepresentation to the context of the contract law as well.[133] That being said, purely economic losses have been acknowledged to be compensable under the misrepresentation even before that, in *Heller* case.[134]

Second, in France, the *culpa in contrahendo* is characterized as a tort liability because of the fact that the tort liability has been devised as the default ground for fault-based claims under the French law[135], and as the scope of damages that can be claimed under tort are able to cover the damages that might arise from the *culpa in contrahendo.*[136] In this respect, the French courts have construed that a reasonable person would negotiate in good faith, and the lack of the good faith during the negotiations would therefore be a tort.[137] To clarify, *Vilber-Lourmat vs. Gerteis* case[138] can be given as an example. In this case, the parties conducted negotiations for a sales contract over three months; and after three months, the seller terminated the negotiations abruptly and without a legitimate reason, selling the product to another buyer. The Court of Cassation of France, decided that the seller's 'wrongful termination of contract negotiations'[139] ascertained to a tort.[140] Here, it should be noted that, the Court of Cassation has narrowed the scope of the damages compensable under *culpa in contrahendo* in a more recent decision, where it stated that the for damages for the negation of the legitimate expectation to conclude a contract cannot be claimed under tort.[141]

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[133] *Esso Petroleum Company Limited v Philip Lionel Mardon,* [1976] QB 801.
[134] *Hedley Byrne & Co. Ltd. v Heller & Partners Ltd.* [1964] A.C. 465.
[135] Le Code civil de français (C. Civ) 1804, Art. 1382.
[136] Nadia E. Nedzel, 'A Comparative Study of Good Faith, Fair Dealing, and Precontractual Liability' (1997) 12 Tulane European & Civil law Forum 97, 114.
[137] ibid 116.
[138] *Etablissements Vilber-Lourmat S.A. v. Ste des Etablissements Albert et Robert Gerteis S.A,* Cour de Cassation, Chambre commerciale, du 20 mars 1972, 70-14154, Publié au bulletin.
[139] ibid.
[140] Steven A. Mirmina, 'A Comparative Survey Of Culpa In Contrahendo, Focusing on Its Origins In Roman, German, and French Law as well as its Application in American Law' (1992) 8 Connecticut Journal of International Law 77, 88.
[141] Cour de Cassation, Chambre commerciale, du 26 novembre 2003, 00-10.243 00-10.949, Publié au bulletin.

III.2.1.2. Criticism of Tort Theory

The theory that characterizes the *culpa in contrahendo* as a ground for tort liability can be criticized for several reasons. To begin with, the initial part of the proposition of the Tort Theory, 'before and without the conclusion of a contract; contract liability cannot be established' is well directed, as the elements and principles for the formation and validity of contract are precisely determined, and mentioning a valid and binding contract beyond these is illogical.

Still, the latter part of the proposition which states, 'when there is no contract liability, the losses can only be recovered under tort liability' is not always coherent as the tort liability also has definite elements. It is not disputed that the *culpa in contrahendo* holds 'act or omission', 'damage', 'fault' and 'causation-at-fact' elements of tort, yet whether the duty violated in *culpa in contrahendo* is the general duty of care in the context of tort liability is doubtable, as the general duty of care is expounded divergently in different national legal systems, which employ different methods for that. For instance; In the French law, breach of the general duty of care is comprehended as to damage another person unauthorizedly whereas in the German law it is understood as not to violate the rules in the statute which enumerates several grounds to elucidate the breach general duty of care.[142] *Culpa in contrahendo* also adversely affects economic or commercial interests that are not directly protected by law, but results in a loss, such as the loss of profits; thus, under the German law, those aggrieved by *culpa in contrahendo* might not always be able to draw from the general duty of care and consequently, the protection provided by tort liability might not be helpful for them. Moreover, although the comprehension of the general duty of care under the French law renders it possible to recover all losses incurred from *culpa in contrahendo* under the tort liability, it expands the range of torts to the detriment of the purpose of tort liability, imposing a duty of care even for unknowable interests of others.

The first standpoint, viewing the duty violated in the *culpa in contrahendo* as the general duty of care is impractical as it foresees a consequence similar to the comprehension under the French law which obliterates the objectivity of the tort liability.

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[142] Steven A. Mirmina, 'A Comparative Survey Of Culpa In Contrahendo, Focusing on Its Origins In Roman, German, and French Law as well as its Application in American Law' (1992) 8 Connecticut Journal of International Law 77, 90; Nadia E. Nedzel, 'A Comparative Study of Good Faith, Fair Dealing, and Precontractual Liability' (1997) 12 Tulane European & Civil law Forum 97, 115; İhsan Ulusan, 'Culpa in Contrahendo Üstüne', *Prof. Ümit Yaşar Doğanay'ın Anısına Armağan* (İstanbul Üniversitesi, 1982) 287, 303.

The second standpoint, viewing the breach of the duty of good faith as a constituent of the general duty of care; provides a remedy for the loss of profits or similar damages, yet by requiring the presence of an exclusive legal relationship as a prerequisite; proposes to expand the scope of tort liability to include liability in exclusive legal relationships; and conflicts with the *erga omnes* and abstract character of the general duty of care and tort liability.

In conclusion, characterization of the *culpa in contrahendo* as a ground of tort liability runs short. Despite the appeal at first glance, the elements of tort liability are not congruent with the elements of the *culpa in contrahendo* and including the *culpa in contrahendo* into the tort liability would either result in degeneration of tort liability or no remedy for some of the losses incurred by *culpa in contrahendo*.

III.2.2. Contract Theories and Criticism

III.2.2.1. Contract Theories

Contract Theories reflect the notion that *culpa in contrahendo* should be rendered as contract liability. Some of the views asserted in this direction suggest that the liability for *culpa in contrahendo* is related to the contract that the negotiations are aiming to establish,[143] whereas the others assess *culpa in contrahendo* as the liability for the breach of a contract separate from the one negotiated.[144] Thus, the Contract Theories can be evaluated under two theories, the Envisaged Contract Theory and the Stand-Alone Contract Theory.

III.2.2.1.1. Contemplated Contract Theory

The Contemplated Contract Theory bases the characterisation of *culpa in contrahendo* upon the negotiated and envisaged contract. Per this theory, duties pertaining to the contract negotiations are integrated within the envisaged contract; thus, liability for the contract negotiations is of the same legal character with the liability for the contract. Under the Contemplated Contract Theory, there are two standpoints; the first of which is based on the invalidity of the envisaged contract, and the second on its validity.

The first standpoint is based on the invalidity of the envisaged contract. This standpoint, adopted by Jhering constitutes the point of origin of *culpa in contrahendo*, which was first formulated in order to provide a remedy for the party who incurred losses due to the misbehaviour of the counterparty during contract negotiations that resulted in an invalid

[143] İhsan Ulusan, 'Culpa in Contrahendo Üstüne', *Prof. Ümit Yaşar Doğanay'ın Anısına Armağan* (İstanbul Üniversitesi, 1982) 287, 305.
[144] ibid 307.

contract. [145] Under this standpoint, the first duty undertaken by the parties entering the contract negotiations is to negotiate in good faith (to exercise due care) and this duty is based upon the contemplated contract, although it arises prior to the establishment of the said contract.[146] This standpoint views the duty to exercise due care as a behavioural obligation that reveals an obligation for compensation when its performance is no more possible.[147] Furthermore, to the proponents of this standpoint, the liability for *culpa in contrahendo* is contingent upon invalidity of the envisaged contract, as only through the invalidity of the envisaged contract, the duty of good faith (exercise due care) can be subrogated by the obligation to compensate. This standpoint suggests that as there are numerous remedies available for contract liability, it is unnecessary to propound a different ground of liability for the fault in contract negotiations leading to a valid contract. [148] On direct contrary, the other standpoint is based on the validity of the contract. This standpoint purports that in a validly established contract, establishment (contract negotiations) and performance stages form a meaningful whole, bringing about the contractual liability for the pre-contractual duties.[149] From this standpoint, the parties undertake the pre-contractual duty of care before the establishment of a contract, but the breach of this duty results in contractual liability only after the valid establishment of the contract.

In practice, it can be said that the German courts had adopted the Contemplated Contract Theory in a combination of these two standpoints for a short period of time, seeking 'the presence of a contract' for the liability of *culpa in contrahendo.* In one of its first decisions on the topic, the German Imperial Court of Justice expressed the view that the damages for

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[145] The first standpoint of the envisaged contract theory is formulated by Jhering, the father of the doctrine of *culpa in contrahendo* to eliminate what he saw as a gap in law. Steven A. Mirmina, 'A Comparative Survey Of Culpa In Contrahendo, Focusing on Its Origins In Roman, German, and French Law as well as its Application in American Law' (1992) 8 Connecticut Journal of International Law 77, 79.

[146] Jhering states, "The first step in the contract is the offer. Does the obligation of diligentsia in contrahendo already begin with it? Definitely, even if the offer is not accepted, one can still suffer negative consequences." *quoted from the translation in* Steven A. Mirmina, 'A Comparative Survey Of Culpa In Contrahendo, Focusing on Its Origins In Roman, German, and French Law as well as its Application in American Law' (1992) 8 Connecticut Journal of International Law 77, 83.

[147] Allan E. Farnsworth, 'Negotiation of Contracts and Precontractual Liability: General Report' in Walter Stoffel and Paul Volken (eds), *Conflits et harmonisation: mélanges en l'honneur d'Alfred E. von Overbeck à l'occasion de son 65ème anniversaire* (Fribourg University 1990) 657–680 666.

[148] İhsan Ulusan, 'Culpa in Contrahendo Üstüne', *Prof. Ümit Yaşar Doğanay'ın Anısına Armağan* (İstanbul Üniversitesi, 1982) 287, 305.

[149] ibid 306; Huriye Reyhan Demircioğlu, *Sözleşme Görüşmelerindeki Kusurlu Davranıştan Doğan Sorumluluk (Culpa In Contrahendo Sorumluluğu)* (1st edn, Yetkin 2009) 79.

culpa in contrahendo could only be claimed if 'a contract comes about',[150] although only fourteen years later, in another decision, it acknowledged that *culpa in contrahendo* could forms the basis of a claim of damages regardless of 'whether or not contractual obligations have come into existence'.[151]

III.2.2.1.2. Independent Contract Theory

The Independent Contract Theory, also named as the *Liability Contract Theory,* separates the duty of care for contract negotiations from the envisaged contract and puts forth that contract negotiations constitute a stand-alone contract, independent from the envisaged contract. [152] Under the Independent Contract Theory, by entering contract negotiations, the parties form an implied contract in which they reciprocally undertake a duty of care and duty to inform. [153] The independent, stand-alone contract, on which this theory predicates the basis of the *culpa in contrahendo,* does not enable one to demand performance of these duties; but enables the party injured from the breach of the duties to recover those damages from the counterparty, [154] hence the name 'Liability Contract'. With the Independent Contract Theory, the distinction between the validity and invalidity of the final contract, or whether such a contract has ever been concluded loses its importance as the theory identifies that both of the standpoints refer to the same facts and commits to subject same facts to the same grounds for liability.[155]

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[150] 05.04.1922 RGZ 104, 265. [English translation of the decision: Carola Pfau, 'Translated Decisions, Germany' (*University of Texas at Austin School of Law*, 1 December 2005) <https://law.utexas.edu/transnational/foreign-law-translations/german/case.php?id=887> accessed 1 June 2017.]

[151] 22.06.1936 RGZ 151, 357. [English translation of the decision: Irene Snook, 'Translated Decisions, Germany' (*University of Texas at Austin School of Law*) <https://law.utexas.edu/transnational/foreign-law-translations/german/case.php?id=1495> accessed 1 June 2017.]

[152] Ümit Gezder, *Türk/İsviçre Hukukunda Culpa in Contrahendo Sorumluluğu* (1st edn, Beta 2009) 67; İhsan Ulusan, 'Culpa in Contrahendo Üstüne', *Prof. Ümit Yaşar Doğanay'ın Anısına Armağan* (İstanbul Üniversitesi, 1982) 287, 307; Süleyman Yalman, Türk-İsviçre Hukukunda Sözleşme Görüşmelerinden Doğan Sorumluluk (Seçkin 2006) 74.

[153] Süleyman Yalman, *Türk-İsviçre Hukukunda Sözleşme Görüşmelerinden Doğan Sorumluluk* (1st edn, Seçkin 2006) 75.

[154] Ümit Gezder, *Türk/İsviçre Hukukunda Culpa in Contrahendo Sorumluluğu* (1st edn, Beta 2009), 67.

[155]Çiğdem Kırca, *Bilgi Vermeden Dolayı Üçüncü Kişiye Karşı Sorumluluk* (1st edn, Bankacılık ve Ticaret Hukuku Araştırma E. 2004) 166.

III.2.2.2. Criticism of Contract Theories

Contract Theories have made significant contributions for the development of *culpa in contrahendo* as they aspired for the distinct recognition of *culpa in contrahendo* as a ground for liability. Nonetheless, they can be criticised for several reasons as well.

To begin with, the Contemplated Contract Theory is not suitable for expressing the legal characterisation for its two setbacks, narrowing the liability for *culpa in contrahendo* too much and accommodating a paradoxical reasoning. First, the Envisaged Contract Theory initially deduces the scope of *culpa in contrahendo* liability to the cases where a contract has been established and then further narrows that scope to either validly or invalidly established contracts, in relation with the standpoints. Thus, under the Envisaged Contract Theory, damages arising from the situations where *culpa in contrahendo* caused the negotiations to end without yielding any contract cannot be recovered through liability for *culpa in contrahendo.* Second, the Envisaged Contract Theory is paradoxical as it bases the duties for contract negotiations on the ensuing contract; or in other words, it establishes the former on the latter - conflicting with all reason.

The Stand-Alone Contract Theory is also not suitable for expressing the legal characterization of *culpa in contrahendo* as well. Although it is agreeable to suggest that parties entering into contract negotiations reciprocally undertake some duties; it is not realistic to claim that those duties arise from a stand-alone and implied contract, as the contracts can only established by the parties' reciprocal and consentaneous declarations of intent. Declarations of intent might be explicit (predicated directly) or implicit (inferred from behaviours and circumstances), and at any rate they reveal a substantial intent. [156] In *culpa in contrahendo,* parties do not declare their intents to establish a stand-alone contract, and they do not have an implicit intent to do so, precluding the corner stone of the Stand-Alone Contract Theory. Hence, the Stand-Alone Contract Theory is not realistic as well.

In conclusion, although the Contract Theories have shaped the development of the *culpa in contrahendo* as a ground for liability, they have paradoxes and impracticalities that render legal characterization of *culpa in contrahendo* as a contractual liability unacceptable.

[156] Necip Kocayusufpaşaoğlu, *Borçlar Hukuku Genel Hükümler I: Hukuki İşlem, Sözleşme* (6th edn, Filiz 2014) 94.

III.2.3. Mixed Theories and Criticism

III.2.3.1. Mixed Theories

The Mixed Theories refrain from characterizing the liability for *culpa in contrahendo* as either tort or contract. These theories defend that *culpa in contrahendo* includes both contractual and extra-contractual elements in varying rates, and therefore an overall characterization of *culpa in contrahendo* as a ground for tort or contractual liability cannot be made. Furthermore, according to the Mixed Theories, as the characterization has no other outcome than designating which provisions apply and it is not the sole method for reaching that outcome; the overall legal characterization of the liability for *culpa in contrahendo* is not necessary.

The Mixed Theories feature two alternatives to overall legal characterization; the theory that suggests characterization of all modalities of *culpa in contrahendo* individually (Modalität Theory), and the theory that stipulates a case-by-case characterization of *culpa in contrahendo.*

III.2.3.1.1. Modalität Theory

Modalität Theory puts forth that instead of an overall legal characterization; each modality of *culpa in contrahendo* should be characterized individually. [157] This theory denotes the modalities for liability as the liability for the behaviours assisting persons, the statute of limitations, and the burden of proof. [158]

To the foundational standpoint of the Modalität Theory, the modalities should be examined on whether they have functional relations with the contract negotiations: The modalities that have functional relations with the contract negotiations should be characterized as the modalities of contractual liability, whereas the remaining should be characterized as the modalities of tort liability. [159] Then, this standpoint, in fact, assumes the tort liability as the general characterization for the modalities of *culpa in contrahendo* liability, pointing to the characterization as contractual liability as an exception for modalities bearing certain conditions. Under this standpoint, the liability for the behaviours of assisting persons, as it is based on damages made possible by the contract negotiations, shows a functional relation with the contract negotiations and therefore should be rendered under the contractual liability,

[157] Ümit Gezder, *Türk/İsviçre Hukukunda Culpa in Contrahendo Sorumluluğu* (1st edn, Beta 2009) 63.
[158] Süleyman Yalman, *Türk-İsviçre Hukukunda Sözleşme Görüşmelerinden Doğan Sorumluluk* (1st edn, Seçkin 2006) 80.
[159] ibid 80.

whereas such a functional relation is not present for the statute of limitations; deeming it as a modality of tort liability. This standpoint refuses to expound a general characterization for the modality of burden of proof as whether or not it has functional relations with the negotiations vary with the material facts. [160]

A later standpoint of this theory asserts the modalities of *culpa in contrahendo* have both contractual and extra-contractual traits at varying rates as well, and these modalities should be characterized by their preponderant trait. Under this standpoint, both the liability for the behaviours of assisting persons and the statute of limitations should be rendered under contractual liability as their contractual traits override the extra-contractual ones. [161]

III.2.3.1.2. Case-by-case Characterization Theory

The Case-by-Case Characterization Theory stipulates that each individual case of *culpa in contrahendo*, together with all its modalities, should be examined separately to determine whether its contractual elements overweigh its tortious elements or vice versa. [162] This theory bases the said examination on whether the damage is made possible by the contract negotiations; or in other words, on whether the damages have functional relations with the contract negotiations. [163] Accordingly; if the damage is made possible by the contract negotiations, the case should be characterized under contractual liability; and if the damage occurred due to a breach of the general duty of care, the case should be characterized under tort liability. For instance, under this theory, the case when a party incurs some expenses due to the confidence (about there was an accordance on all matters) evoked by the other party, should be characterized under contractual liability as the confidence and therefore the damage is conceived by the contract negotiations.

The legal systems that seem to conform to this theory are the Portuguese, English and Irish legal systems. In Portuguese Law, *culpa in contrahendo* is to be separately characterized for each case, assessing the misbehaviour, the damages caused by the misbehaviour and the

[160] Ümit Gezder, *Türk/İsviçre Hukukunda Culpa in Contrahendo Sorumluluğu* (1st edn, Beta 2009) 64; Süleyman Yalman, *Türk-İsviçre Hukukunda Sözleşme Görüşmelerinden Doğan Sorumluluk* (1st edn, Seçkin 2006) 79.
[161] Süleyman Yalman, *Türk-İsviçre Hukukunda Sözleşme Görüşmelerinden Doğan Sorumluluk* (1st edn, Seçkin 2006) 79; Fikret Eren, *Borçlar Hukuku Genel Hükümler* (8th edn, Yetkin 2003) 1086.
[162] Hamdi Yılmaz, 'Sözleşme Görüşmelerinde Kusur 'Culpa in Contrahendo' ve Sorumluluğun Hukuksal Niteliğinde Yeni Görüşler' (1985) XI(3) Yargıtay Dergisi 234, 247.
[163] ibid 248.

substantial connection between the misbehaviour and contract negotiations,[164] whereas in England, the case law suggests that in characterization of the equivalent of *culpa in contrahendo,* misrepresentation, this theory is adopted. Accordingly, in English Law the breach of pre-contractual duty can either be characterized under the tort of deceit, tort of negligence[165] or under the contract law, regarding the context and consequences of the specific breach.[166] Irish law can be said to be in alignment with English law in this context, since the *Stafford* case. [167]

III.2.3.2. Criticism of Mixed Theories

Mixed Theories have not been formulated for the purpose of the legal characterization of *culpa in contrahendo* but for covering an exigency in the application. Nonetheless, they are not even well directed for the practical purposes. Characterization of individual outlooks through benchmarking with other grounds of liability, when refraining from characterization of *culpa in contrahendo* they originate from is not a proper attitude and method for several reasons.

First, the suggestion of Modalität Theory which prescribes the characterization of *culpa in contrahendo* as partially contractual and partially tortious is contrary to the basic structure of liability law.[168] This structure has organized the types of liability to form a whole together with all their modalities, and to fulfil different objectives: Contractual liability aims to deal with the violations of obligations arising out of the contract between parties while the tort liability aims to attend the breaches of general duties that exist independent from the parties' intents. Although this structure allows a choice between the liability types in some cases, it does not accommodate co-application of them for different modalities of a case.

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[164] Dário Moura Vicente, 'Precontractual Liability in Private International Law: A Portuguese Perspective' (2003) 67(4) Rabels Zeitschrift für ausländisches und internationales Privatrecht / The Rabel Journal of Comparative and International Private Law 699, 716.
[165] *Hedley Byrne & Co. Ltd. v Heller & Partners Ltd.* [1964] A.C. 465.
[166] *Esso Petroleum Company Limited v Philip Lionel Mardon,* [1976] QB 801.
[167] *Patrick Stafford v Denis Mahony, Desmond Smith and Robin Palmer* [1980] I.L.R.M. 53.
[168] Hamdi Yılmaz, 'Sözleşme Görüşmelerinde Kusur 'Culpa in Contrahendo' ve Sorumluluğun Hukuksal Niteliğinde Yeni Görüşler' (1985) XI(3) Yargıtay Dergisi 234, 247.

Second, the stipulation of Case-by-case Characterization Theory is not proper as it would impair the legal certainty and would incur inconsistency between the cases of *culpa in contrahendo.*[169] Furthermore, with the test of functional relation, this theory draws the boundaries of *culpa in contrahendo,* which contradicts with its claim to refrain from characterizing.

In conclusion, the Mixed Theories are incoherent with the basic structure of liability law and unsuccessful even in their humble objective of coverıng a defect in application, opening the door for newer defects, such as complicating the designation of the applicable law in the context of Private International Law. This being the case, Mixed Theories cannot be accepted for the legal characterization of *culpa in contrahendo.*

III.2.4. Unconventional Theories and Criticism

III.2.4.1. Unconventional Theories

Unconventional Theories point out that, *culpa in contrahendo* does not entirely concur with the conventional types of liability, and therefore cannot be characterized under contractual or tortious liability. Thence, these theories extrapolate the liability for *culpa in contrahendo* on other grounds out of the structure of liability law.

III.2.4.1.1. Legal (Statutory) Liability Theory

To the Legal Liability Theory, at the beginning of contract negotiations, an exclusive relationship is established independent of the intents of parties, bringing forth behavioural duties only. The Legal Liability Theory suggests that the said relationship and behavioural duties arise from the duty of good faith prescribed in law, and therefore there is a statutory legal duty of pre-contractual good faith. [170] This Theory traces the presence of that relationship to the statutory instances of *culpa in contrahendo* under some national legal systems; such as that in Article 1599 of Code Civil[171] in the French law, which foresees that if the sales of an object belonging to another is voided, the buyer could claim damages; or Article 26 of Obligationenrecht[172] in the Swiss Law, which provides that the party who nullifies the

[169] ibid 246.
[170] İhsan Ulusan, 'Culpa in Contrahendo Üstüne', *Prof. Ümit Yaşar Doğanay'ın Anısına Armağan* (İstanbul Üniversitesi, 1982) 287, 310.
[171] Le Code civil de français (C. Civ) 1804, Art. 1599 (France).
[172] 220 Loi fédérale du 30 mars 1911 complétant le code civil suisse (Livre cinquième: Droit des obligations), Art. 26.

agreement, based on his own negligence, is liable for the damages incurred by the other party because of the nullification.

So then, the Legal Liability Theory characterizes contract negotiations as a legal relationship independent from the other two conventional sources for liability; this characterization implies the acceptance of the existence of liability relations, except for torts, that do not include performance obligations distinguishes between performance obligations and behavioural duties.

In Germany, since the amendments on BGB were enacted in 2002, the *culpa in contrahendo* is regarded as a legal (statutory) liability, bringing the duties of custody and conservation of the other party for pre-contractual situations.[173]

III.2.4.1.2. Fiduciary (Trust, Reliance) Liability Theory

The Fiduciary Liability Theory accepts the existence of liability relation put out by the Legal Liability theory, but argues that predicating this relation to the text of law does not answer the question of characterization; as the said relation leads to an exclusive relationship and a behavioural duty beyond the tort, and there is no contract between the parties.[174] Under this theory, the liability relation in *culpa in contrahendo* is a trust relationship, and the fiduciary liability arises when the rightful expectations -or trust- of those who have established a certain level of trust between them is nullified,[175] and aims to compensate the damages incurred from the nullification of the rightful trust. Moreover, as the trust relationship between parties is based on a conscious contact and not on a coincidental one; the fiduciary liability is closer to the contractual liability; thus the contractual liability provisions can be applied to *culpa in contrahendo* by the method of comparison. [176]

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[173] Ümit Gezder, *Türk/İsviçre Hukukunda Culpa in Contrahendo Sorumluluğu* (1st edn, Beta 2009) 19. The same conclusion can undisputedly be reached for Greece and Italy, as they also have codified the pre-contractual duty of good faith.

[174] Çiğdem Kırca, *Bilgi Vermeden Dolayı Üçüncü Kişiye Karşı Sorumluluk* (1st edn, Bankacılık ve Ticaret Hukuku Araştırma E. 2004) 137.

[175] Rona Serozan, *Borçlar Hukuku Genel Hükümler III: İfa,İfa Engelleri,Haksız Zenginleşme* (7th edn Filiz 2016) 216.

[176] Fikret Eren, *Borçlar Hukuku Genel Hükümler* (8th edn Yetkin 2003) 41, 1086; Çiğdem Kırca, *Bilgi Vermeden Dolayı Üçüncü Kişiye Karşı Sorumluluk* (1st edn, Bankacılık ve Ticaret Hukuku Araştırma E. 2004) 159; İhsan Ulusan, 'Culpa in Contrahendo Üstüne', *Prof. Ümit Yaşar Doğanay'ın Anısına Armağan* (İstanbul Üniversitesi, 1982) 287, 304.

Swiss law, since the *Swissair* decision of the Federal Supreme Court of Switzerland;[177] can be said to have adopted fiduciary liability as third type of liability between the contract and the tort; and the cases of *culpa in contrahendo* are regarded as perhaps the most important example of the fiduciary liability.[178]

In alignment with the Swiss Law, the Turkish law can also be determined to have employed the view that *culpa in contrahendo* liability arises in the breach of the fiduciary relationship between parties, effectively adopting the fiduciary liability theory.[179]

III.2.4.2. Criticism of Unconventional Theories

Unconventional Theories have been path breaking in the context of the legal characterization of *culpa in contrahendo* liability and their adoption is spreading, even so; both the Legal Liability and Fiduciary Liability Theories can be criticized for several reasons.

To begin with, the Legal Liability Theory fails to extrapolate the foundation of the liability of *culpa in contrahendo*; in other words, what justifies the duty of good faith and enacted instances of *culpa in contrahendo* is not expounded by this theory. Thus, the said theory would be of no avail under the legal systems that have not enacted the duty of good faith or instances of *culpa in contrahendo,* such as Ireland and the United Kingdom; the Common law legal systems.

Furthermore, the Fiduciary Liability Theory is criticized on the grounds that the trust cannot be the basis for a third type of liability, as the conventional types of liability also aim to protect the trust. Other criticisms to this theory, coming from the exponents from conventional theories, might suggest that a third type of liability is not necessary and the instances of *culpa in contrahendo* can be characterized under one or another of the conventional types of liability.

In conclusion, although the Legal Liability Theory is deficient, it forms the starting point of the Fiduciary Liability Theory; which constitutes the most adopted characterization of *culpa in contrahendo* through identifying *culpa in contrahendo* under a third, of its own kind (*sui generis*) liability.

[177] BGE 120 II 331, Regeste auf französisch. (Synopsis in the French language) (Switzerland)
[178] Ümit Gezder, *Türk/İsviçre Hukukunda Culpa in Contrahendo Sorumluluğu* (1st edn, Beta 2009) 88.
[179] Yargıtay 13. HD E: 2015/10155 K: 2015/19267 T:11.06.2015 (Turkey)

III.3. Conclusion

At present, albeit the liability for *culpa in contrahendo* has been recognized in a multitude of national legal systems, there is no concurrence about its legal characterization. Nevertheless, especially in view of the increasing number of international legal disputes, it is important both for practical and theoretical purposes to make a common characterization at least for Europe. In the context of this study, such a determination is indispensable for analysing and criticizing the content and scope of the relevant EU legal norms. Then, under the light of elements and theories discussed above, the following convictions have been acquired:

1. Contract negotiations make the parties more vulnerable to each other's influence than a random encounter. Nevertheless, the vulnerability here is less than that in the contractual relationships.
2. When starting the contract negotiations, parties expect at least not to be harmed by the other party; in other words, they trust each other in this regard.
3. With the abuse of this trust during the contract negotiations, the damages that come out from neither contracts nor torts might occur. From that, not only the loss of earnings, but also travel and other expenses incurred due to the trust in contract negotiations, etc. should be understood.
4. Then, fault in contracting (*culpa in contrahendo)* does not resemble the types of already present grounds of liability, in terms of the damage that has occurred and the vulnerability of the parties. Moreover, the situation here differs from the tort as there is a special trust between the parties, and it also differs from the contract is there is no agreement on any obligation between the parties.
5. Almost all legal systems, despite their different structures and basic principles; provide for compensation claims for the damages in that case; albeit at varying rates and through different methods. This points out that the parties' expectation to not suffer any damage during contract negotiations; also imposes upon the duty to avoid inflicting any harm on the other party, in other words, the duty to negotiate in good faith or pre-contractual duty of good faith.

6. As the breach of this duty is essentially a violation of trust, the most coherent explanation seems to belong to the theory of fiduciary liability. Nonetheless, the fiduciary responsibility does not bring in its own rules in terms of technical details; it is still on an abstract level. Thus, it cannot provide the satisfaction it provides on theoretical level on the practical level.
7. As the contractual liability provisions provide a wider protection and acknowledge the trust between parties; the opinion of fiduciary liability theorists pointing out the contractual liability provisions in the absence of a legal recognition of fiduciary liability is agreeable.
8. **Consequently, *culpa in contrahendo* can be characterized as its own kind, the fiduciary liability on the theoretical level. In application, this can be expounded as quasi-contractual liability; which is not to enforce but to recover the breach of a certain duty.**

IV. Culpa in Contrahendo in European Private International Law

Private International Law is the branch of law that addresses the resolution of disputes between private persons (natural and/or juridical) that have elements of internationality.[180] Hence, 'internationality' here does not necessarily indicate a uniformly accepted set of legal norms, but rather signifies that the subject matter of the said branch of law deals with the laws of more than one nation, or, in other words, has a foreign element.[181] Private International Law brings legal norms basically aimed to answer three questions: First, which State's court has the jurisdiction over the dispute; second, which State's law is the applicable law to the substance of the dispute; and third, how a foreign court decision can be recognized and enforced in another country.[182]

European Private International Law is no different in terms of the subjects addressed and aims, the term 'European' refers only to the source of the Private International Law norms.[183] Indeed, the European Union has asserted itself as an important actor in the Private International Law landscape of the continent: In view of the fact that each Member State of the European Union adopts different rules on certain issues in their national laws and that this situation might lead to certain legal uncertainties and difficulties in 'the proper functioning of the internal market', [184] especially when it comes to the law of obligations where disputes relate to more than one Member State, the harmonization of the Private International Law at Union level seems to have emerged as a necessity. Concurringly, the European Union has been establishing rules in the field of Private International Law since its inception in 1957, although these were in the form of closed agreements and not European Union instruments until the 1999 Amsterdam Treaty.[185]

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[180] Elements of internationality, or, in other words, elements of foreignness, indicate a significant transboundary aspect to the dispute. For instance, when a party is the citizen of a foreign State or the damage occurs in a foreign country, the dispute can be said to have an element of internationality (or foreigness). Phan Minh Dung and Giovanni Sartor, 'A Logical Model Of Private International Law', *International Conference on Deontic Logic in Computer Science* (Springer 2010) 229, 230.

[181] 'Private International Law' *(Department of Foreign Affairs and Trade - Ireland)* <https://www.dfa.ie/our-role-policies/international-priorities/international-law/private-international-law/> accessed 30 May 2017.

[182] ibid.

[183] European Parliament and Council Regulation no (EU) 1215/2012 of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast) [2012] OJ L351/1, recital 3.

[184] Ivana Kunda and Carlos Manuel Gonçalves de Melo Marinho, Practical Handbook On *European Private International Law* (European Union under the Civil Justice Programme 2010), 3.

[185] With the Amsterdam Treaty, the Private International Law matters have came under the European Union's shared competences, whereas before that it was only a subject of political cooperation. Aude Fiorini, 'The Evolution Of European Private International Law' (2008) 57 (4) International and Comparative Law Quarterly 969, 993.

Culpa in contrahendo in European Private International Law has also emerged gradually, hand in hand with the historical process of the development of European Private International Law. Although the European Court of Justice, in the context of Brussels Regime has discussed the jurisdiction over the *culpa in contrahendo* earlier, it took nearly four decades since the date of entry into force of the Brussels Convention[186] (the very first European Private International Law instrument) until the *culpa in contrahendo* has finally become a formally regulated European Private International Law concept in 2007, with the Rome II Regulation.[187] When it is taken into account that the single market developed so far as to necessitate harmonious regulation on the *culpa in contrahendo* in the context of Private International Law at Union level only later on, and that there are fundamental differences between the Member States when it comes to the legal characterization of *culpa in contrahendo* -not only between the Common law and Civil law legal systems but also between the Civil law legal systems themselves- it is not at all astonishing that *culpa in contrahendo* emerged as a legal concept of European Private International Law relatively recently.

In this chapter analyzing the *culpa in contrahendo* in European Private International Law, the situation of *culpa in contrahendo* under both the Brussels and the Rome regimes will be discussed, and their compatibility with the causal reality that has been identified in the previous chapters will be assessed.

[186] 1968 Brussels Convention on jurisdiction and the enforcement of judgments in civil and commercial matters (consolidated version) [1998] OJ C27/1.
[187] European Parliament and Council Regulation no. (EC) 864/2007 of 11 July 2007 on the law applicable to non-contractual obligations (Rome II) [2007] OJ L199/40, recital 30, art 12.

IV.1. Culpa in Contrahendo under the Brussels Regime

The Brussels Regime refers to the rules that clarify which Member State's courts has jurisdiction over a dispute, harmonize and detail the recognition and enforcement of foreign court decisions within European Private International Law. The Brussels Regime is named after the Brussels Convention of 1968. [188] The Brussels Convention was based on Article 220 of the Rome Treaty of 1957, which did not authorize the European Community to adopt instruments on the topic by its own but mandated that member states should negotiate such agreements between themselves.[189]

The scope of the Brussels Convention is limited to civil and commercial legal disputes, excluding the disputes relating to the legal capacity, family law, social security, bankruptcy and insolvency, and arbitration.[190] In its broadest terms, the said Convention is the first document that harmonizes the Member States' international procedural laws in terms of 'jurisdiction' and 'recognition and enforcement' within this scope.

In terms of recognition and enforcement, with the Brussels Convention, it has been adopted that the decisions of the court of a Member State will be recognized in any other Member State without any special procedure, [191] recognition and enforcement of such decisions shall not be refused except for the grounds determined by the Convention, [192] and the court decision of a Member State shall not be reviewed as to the substance under any circumstance by the courts of another Member State.[193] The harmonization and facilitation of the enforcement of foreign court decisions is not only of vital importance in terms of the functioning of the internal market and as a milestone in the development of the European International Procedural Law, but it is also significant in strengthening the position of *culpa in contrahendo,* or any European Private International Law notion that would later emerge with the establishment of the Rome Regime at the Union level.

[188] 1968 Brussels Convention on jurisdiction and the enforcement of judgments in civil and commercial matters (consolidated version) [1998] OJ C27/1. (1968 Brussels Convention)
[189] Aude Fiorini, 'The Evolution Of European Private International Law' (2008) 57 (4) International and Comparative Law Quarterly 969, 970; Treaty establishing the European Economic Community (TEEC), art 220.
[190] 1968 Brussels Convention, art 1.
[191] 1968 Brussels Convention, art 26.
[192] 1968 Brussels Convention, art 27.
[193] 1968 Brussels Convention, art 29.

Regarding the identification of the State jurisdiction, besides a general rule, the Brussels Convention determines special and exclusive jurisdictions[194] for various situations, and effectuates the choice of court agreements between parties.[195] In this respect, the general rule is that the courts of Member State in which the defendant is domiciled should have jurisdiction.[196] The special jurisdiction rules do not intercept this general rule, but authorize the courts of another Member State in addition to the court authorized by the said general rule; therefore they can be considered as the rules for alternative jurisdiction. Although a number of these special jurisdiction rules have been prescribed to protect the weaker party of the certain types of contracts,[197] the 1968 Brussels Convention also provides for alternative jurisdictions for general grounds of liability:

> A person domiciled in a Member State may, in another Member State, be sued:
> 1. in matters relating to a contract, in the courts for the place of performance of the obligation in question;
> […]
> 3. in matters relating to tort, delict or quasi-delict, in the courts for the place where the harmful event occurred or may occur[198]

With this provision, in respect to the matters relating to the tort (delict, quasi delict) and contracts, alternative jurisdictions have been designated in addition to the courts of the defendant's country of domicile. However, as these matters are neither defined nor limited (in terms of scope) in the Brussels Convention, identifying the alternative jurisdiction over the disputes regarding the liability for non-contractual but not strictly tortious grounds, such as *culpa in contrahendo,* has been left to the interpretation of the Member States' courts, therefore hindering the uniform application of rules for jurisdiction.

This shortcoming was overcome by a protocol that was added to the Brussels Convention in 1971,[199] which enabled the European Court of Justice to interpret of the Brussels Convention through preliminary questions procedure.[200]

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[194] 1968 Brussels Convention, art 16.

[195] Where one or both of the parties have their domicile in a Member State and provided at their agreement meets the formal requirements, and only on the matters over which the jurisdiction has not been exclusively determined in art 16 of the Convention. see 1968 Brussels Convention, arts 17, 18.

[196] 'Subject to the provisions of this Convention, persons domiciled in a Contracting State shall, whatever their nationality, be sued in the courts of that State. […]' 1968 Brussels Convention, art 2.

[197] Section 2 of the 1968 Brussels Convention, from Article 7 to Article 12a, brings forth the special jurisdiction rules on the matters relating to insurance. Similarly, Section 3 of the same Convention, from Article 13 to Article 15, regulates the special jurisdiction over consumer contracts.

[198] 1968 Brussels Convention, art 5.

[199] The protocol was added to the Brussels Convention before the Convention entered into force in 1972, and, as such forms an integral part of the Convention. 1968 Brussels Convention, art 65; Protocol of 3 June 1971 on the interpretation of the 1968 Convention by the Court of Justice (consolidated version) [1998] OJ C27/1, art 1.

From this date onwards, the European Court of Justice has gradually constructed these boundaries, through its judgments in a number of cases where it considered which disputes are related to the torts and which to the contracts in the context of the Brussels Convention. In spite of the fact that most of these decisions do not directly address the jurisdiction over *culpa in contrahendo,* their assessment is necessary terms of clarifying the interpretation of the Court of Justice.

In this direction, it is first necessary to address the *Peters v. ZNAV* case.[201] The preliminary questions which constitute the subject matter of this case were directed by the Supreme Court of the Netherlands over a dispute between an Association registered in Netherlands (the plaintiff), and one of its members registered in Germany (the defendant). The substance of the dispute was related to the payment of a sums payable arising from a decision taken by the organs of the Association.[202] Upon the defendant's assertion that the dispute did not arise from a contract, and therefore that the Dutch courts did not have jurisdiction under the Article 5 (1) of the Convention over the dispute concerned, the Supreme Court of the Netherlands asked the European Court of Justice to clarify whether obligations arising from membership relationships are contractual in the context of Brussels Convention and if so, whether the obligations arising from the decisions of the organs of the Association should be considered as contractual as well.[203] In its judgment that responded affirmatively to both questions, the Court of Justice stated that the 'matters relating to a contract' should be assessed independent of any national law, and interpreted in accordance with the systematics and purposes of the Brussels Convention.[204] The Court, finding that the purpose of Article 5 (1) is to ensure that the same courts have jurisdiction in all the disputes that might arise from a close relation such as a contract, has determined that the membership to an association creates a 'close links of the same kind' with contracts and decided that the jurisdiction over the disputes relating to the obligations arising from this membership can be decided under Article 5 (1) of the Convention.[205]

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[200] Protocol of 3 June 1971 on the interpretation of the 1968 Convention by the Court of Justice (consolidated version) [1998] OJ C27/1, arts 1, 3-5.
[201] Case 34/82 *Martin Peters Bauunternehmung GmbH v Zuid Nederlandse Aannemers Vereniging* [1983] ECR 987 (Peters v. ZNAV case).
[202] Peters v. ZNAV case, paras 2-5.
[203] Peters v. ZNAV case, para 6.
[204] Peters v. ZNAV case, para 9.
[205] Peters v. ZNAV case, paras 12,13.

Another case in the same direction is *Arcado v. Haviland*.[206] In this case, the preliminary question was directed by the Brussels Court of Appeals over a dispute between a sales agent registered in Belgium (the plaintiff) and the manufacturer registered in France (the defendant), relating to the payment of compensation and the remaining commission due to the wrongful termination of the independent commercial agency between them, by the manufacturer.[207] Upon the argument of the defendant that the controversy arose from a quasi-delict, and not from a contract, and therefore it falls within the scope of Article 5 (3); the Brussels Court of Appeals, contending that the issue was contractual, asked the Court of Justice to determine whether the disputes over the remuneration and payment of the remaining commission are contractual or not under the Brussels Convention.[208] The Court of Justice, in its judgment, has referred to the *Peters v. ZNAV* case where it decided that the 'matter relating to a contract' must be interpreted independently from any national law, in order to ensure 'the equality and uniformity of the rights and obligations arising out of the Convention for the Contracting States and the persons concerned'.[209] Furthermore, as both the claims for compensation and commission arose from an agreement between the parties, the Court decided that both of them are doubtlessly 'matters relating to a contract' in the context of Brussels Convention and they fall under the scope of Article 5 (1).[210]

The *Peters v. ZNAV* and *Arcado v. Haviland* judgments are crucial in showing that for the Brussels Regime; the European Court of Justice has adopted the principle to interpret the legal concepts of tort and contract in accordance with the structure and aims of the Brussels Convention, and independently from their configuration in any national law. This principle constitutes a milestone in the process of the development of an autonomous and hence uniform European Private International Law system. On the other hand, neither of these two cases is able to disclose the boundaries of 'matters relating to a contract' and 'matters relating to a tort' in the context of Brussels Convention, apart from disclosing that 'matters relating to a contract' should arise from a close link between parties. The boundaries of these matters have more lucidly been drawn step-by-step in the subsequent cases decided by the European Court of Justice.

[206] Case 9/87 *SPRL Arcado v SA Haviland* [1988] ECR 1539. (Arcado v. Haviland case)
[207] Arcado v. Haviland case, para 3.
[208] Arcado v. Haviland case, paras 6-8.
[209] Arcado v. Haviland case, paras 9-10.
[210] Arcado v. Haviland case, paras 12-14.

The first of these cases is *Kalfelis v Schröder*,[211] where the Federal Supreme Court of Germany directed preliminary questions to the European Court of Justice. The dispute that led to the preliminary questions in this case was between a natural person (the plaintiff), and a bank registered in Germany, another bank registered in Luxembourg, and another natural person with a joint-procuration holder in the bank in Germany (the defendants). The dispute, filed in a lawsuit before the German courts, was related to the plaintiff's demanding back the money he had paid to the defendants for a stock-exchange transaction that resulted in a total loss, basing his claim upon contractual liability, tort liability, and unjust enrichment.[212] On the defendants' objections to the jurisdiction, the German Federal Supreme Court asked the European Court of Justice, whether the tort in the sense of Article 5 (3) the Convention should be assessed as an independent concept or should it be interpreted under the law applicable to the case *(lex causae)*, and whether the Article 5 (3) entails jurisdiction over the claims that are not based on tort where a lawsuit is based on claims on contract and unjust enrichment in addition to a claim on tort, among others.[213] In its response to the first part of this question, the Court of Justice ascertained that the tort in the context of Article 5 (3), like the contract under Article 5 (1), must be regarded as a concept independent from any national law, and should be interpreted in accordance with the Convention's system and objectives. Moreover, here the Court has also defined the scope of the 'matters relating to a tort (delict, quasi-delict)' in the context of the Brussels Convention as covering 'all actions which seek to establish the liability of a defendant and which are not related to a 'contract' within the meaning of Article 5 (1).'[214] For the second part of the question, the Court of Justice has determined that Article 5 (3) provides an alternative jurisdiction only for 'matters relating to a tort' and the contractual claims do not fall under this jurisdiction even though they have factual connections with the claim of tort.[215] The Court of Justice based this determination on the fact that the special jurisdiction provisions of the Convention derogate from the general rule on jurisdiction and therefore should be interpreted in a restrictive manner. Furthermore, the European Court of Justice has also overturned the idea that filing claims in different courts for different aspects of the same dispute would lead to the inconsistency by stating that all claims arising from the

[211] Case 189/87 *Athanasios Kalfelis v Bankhaus Schröder, Münchmeyer, Hengst and Co. and others* [1988] ECR 5565. (Kalfelis v. Schröder case)
[212] Kalfelis v. Schröder case, para 3.
[213] Kalfelis v. Schröder case, paras 3-4.
[214] Kalfelis v. Schröder case, para 17.
[215] Kalfelis v. Schröder case, para 19.

same dispute might always be filed before the courts of the defendant's country of domicile,[216] per the general rule for jurisdiction, Article 2 of the Brussels Convention.[217] This judgment is important not only because it defines the tort as the general ground of liability and regards the contract as an exception to that, but also because it enshrines the rejection of *lex causae* characterization in addition to the rejection of *lex fori* characterization the Court enshrined in *Peters v. Znav* and *Arcado v. Haviland* judgements.

The second of these cases is the *Handte v. Traitements Mécano-chimiques des Surfaces*. In this case, the French Court of Cassation asked a question to the Court of Justice on the interpretation of Article 5 (1) of the Convention.[218] The court proceedings leading to the question resulted from a dispute between a sub-buyer registered in France (the plaintiff) and a manufacturer registered in Germany (the defendant), where the defendant argued that its liability for the defective product against the sub-buyer did not relate to contractual matters as there is no relation between it and the sub-buyer, and consequently asserted that the French courts did not have jurisdiction under the Article 5 (1) of the Brussels Convention.[219] Therefore, the question posed by the French Court of Cassation to the European Court of Justice concerned whether the contractual matters in Article 5 (1) of the Convention included the relationship of liability arising from defective goods between the manufacturer and the sub-buyer or not.[220] In its response, which clarified that the liability relation between the manufacturer and the sub-buyer is not contractual for the purposes of Brussels Convention,[221] the Court of Justice has drawn the boundaries of contractual matters under Article 5 (1) stating that they cannot be 'interpreted to cover a situation in which there is no obligation freely assumed by one party towards another.'[222]

The *Kalfelis v Schröder* and *Handte v. Traitements Mécano-chimiques* are important in terms of the determination the boundaries of contractual and tortious matters under the Convention and furthermore, in partial disclosure of the methodology of the European Private International Law. Firstly, it is possible to state that with these judgments, the 'matters relating to a tort (delict, quasi-delict)' is accepted as a default ground of 'special jurisdiction'.

[216] Kalfelis v. Schröder case, para 20.
[217] Case C-26/91 *Jakob Handte & Co. GmbH v Traitements Mécano-chimiques des Surfaces SA* [1992] ECR I-3967 (Handte v. TMCS case).
[218] Handte v. TMCS case, para 1.
[219] Handte v. TMCS case, para 7.
[220] Handte v. TMCS case, para 8.
[221] Handte v. TMCS case, para 16.
[222] Handte v. TMCS case, para 15.

Accordingly, if the issue that is subject to a dispute is not contractual, it can be regarded as a matter relating to a tort (delict, quasi-delict) without fulfilling any other criterion. In this respect, the condition for an issue to be identified as 'a matter relating to a contract' has been put forward as the presence of an obligation freely undertaken by a party against another. Second, in these cases, part of the methodology to be applied in the context of the European Private International Law has been put forward. Accordingly, the court of a Member State, when a dispute that has an element of internationality and falls under the scope of the Convention comes before it, shall first determine the legal character of the dispute and then determine whether it has jurisdiction under the relevant provisions of the Convention. Whereas this legal characterization is made in accordance with the law of the judge *(lex fori)* under the traditional Private International Law approach,[223] it is revealed that, with the Brussels Convention that this legal characterization should be made independently from any national law. Thus, with the Brussels Convention, it can be suggested that not only the uniform rules on jurisdiction and enforcement were brought, but also the first steps to a uniform and autonomous European Private International Law system have been taken.

Nevertheless, these judgments are not sufficient to determine whether the *culpa in contrahendo* is defined as a contractual or tortious matter in the context of the Brussels Convention. To that end, in addition to the clarification of the boundaries of contractual and tortious situations, the disclosure of the approach of the European Court of Justice to the *culpa in contrahendo* is necessary, that is, whether the Court regards *culpa in contrahendo* as an harm inflicted by one party against another or attaches a specific legal significance to the pre-contractual duty of good faith. The Court illustrates its approach to *culpa in contrahendo* in the context of Brussels Convention its judgment on the *Tacconi v. HWS*[224] case, where the Italian Court of Cassation directed the preliminary questions over a dispute between a company registered in Italy (the plaintiff) and a company registered in Germany (the defendant), arising from the plaintiff's claim for compensation for the losses incurred due to the defendant's breach of good faith.[225] In the events leading up to the proceedings before the Italian courts, the defendant had abruptly ended the protracted contract negotiations with the plaintiff, causing the plaintiff to suffer losses due to the expenses it had made in the

[223] Prem Kumar Agarwal, 'The Theory Of Characterization: A Critical Legal Study Perspective' (2015) 4 (3) Voice of Research 45, 45-47.
[224] Case C-334/00 *Fonderie Officine Meccaniche Tacconi SpA v Heinrich Wagner Sinto Maschinenfabrik GmbH (HWS)* [2002] ECR I-7357 (Tacconi v. HWS case).
[225] Tacconi v. HWS case, para 2.

expectation of the conclusion of the contract.[226] Upon the objection of the defendant to the jurisdiction of the Italian courts, the Italian Court of Cassation asked the European Court of Justice to clarify whether the breach of pre-contractual duty of good faith is a matter relating to a contract or a matter relating to tort in the context of the Brussels Convention.[227] Prior to the judgment of the Court, in his opinion on the case, Advocate-General Geelhoed has acknowledged the pre-contractual duty of good faith as an obligation different than the general duty of care in torts, however he has asserted that as the pre-contractual duty is not freely assumed by one of the parties it cannot be considered as a 'matter relating to a contract' in the sense of the Convention.[228] Still, the Advocate-General's opinion (which broke down the contract negotiations into gradual stages) has also noted that at the 'almost' contractual stage,[229] where 'it can be inferred from the circumstances'[230] that a pre-contractual duty is freely undertaken by the parties, regardless of its being expressly stated, the violation of the pre-contractual duty of good faith should be regarded a contractual matter. The Advocate-General has summarized his opinion as follows:

> An action for pre-contractual liability can be regarded as falling within the scope of matters relating to delict or quasi-delict within the meaning of Article 5(3) […] Where such action relates to an obligation which the other party has assumed towards the claimant, it must also be regarded as falling within the scope of matters relating to a contract within the meaning of Article 5(1) […][231]

Despite being expressed more indirectly, the Court of Justice's judgment is in alignment with the opinion of the Advocate-General. To start with, the Court has noted in the judgment that a contract must not necessarily have been concluded between parties in order to consider the dispute as a 'matter relating to a contract', however there must be an obligation freely assumed by the parties.[232] For the contract negotiations, the Court has stated that whether the parties have freely assumed such an obligation can only be understood by examining the negotiations, and when it cannot be ascertained that the said duty is freely undertaken from the negotiations; the international jurisdiction over the breach of the pre-contractual duty of good faith, should be examined under Article 5 (3) of the Convention.[233]

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[226] Tacconi v. HWS case, para 6.
[227] Tacconi v. HWS case, para 10.
[228] Tacconi v. HWS case, Opinion of AG Geelhoed, paras 75-78.
[229] Tacconi v. HWS case, Opinion of AG Geelhoed, para 84.
[230] Tacconi v. HWS case, Opinion of AG Geelhoed, para 83.
[231] Tacconi v. HWS case, Opinion of AG Geelhoed, para 86.
[232] Richard Plender and Michael Wilderspin, *European Private International Law Of Obligations* (4th edn, Sweet & Maxwell 2015) 757.
[233] Tacconi v. HWS case, paras 20, 27.

Hence, at this point, it can be determined that, in the context of the Brussels Regime, the claim for culpa in contrahendo liability is characterized as a matter relating to neither the contracts nor the torts. Clearly, the European Court of Justice accepts that the pre-contractual liability (liability for *culpa in contrahendo*) arises from a breach of an exclusive duty between the parties, but it rejects to regard the claims for *culpa in contrahendo* liability as a matter relating to a contract for the purposes of the Brussels Convention as it considers that the said duty is not freely and willingly undertaken by the parties. Since the Court of Justice interprets the special jurisdiction rule in Article 5 (3) of the Convention as not only covering the matters strictly covering the tort but also as a default or residual rule, it adopts that of the jurisdiction for *culpa in contrahendo* should be determined under this rule, unless it can be understood from the negotiations that the parties have freely and willingly undertook a pre-contractual duty. Ultimately, the European Court of Justice can be said to have accepted *culpa in contrahendo* as its own kind of *(sui generis)* liability, even though it eventually characterized *culpa in contrahendo* as a matter relating to tort (or more accurately non-contractual) due to its tendency to interpret the scope of contractual matters in the sense of Brussels Convention narrowly.

The European Union was given competence to legislate directly on some areas of civil law later on with the reforms brought by the Amsterdam Treaty of 1999, including private international law, under the Article 65 (2) of the EC Treaty.[234] In the context of the Brussels Regime, this competence led to the replacement of the Brussels Convention of 1968 with the Brussels I Regulation,[235] and most recently with the Brussels I Recast Regulation[236] that superseded the original Brussels I. With these regulations, the procedures for recognition and enforcement of foreign court decisions have been made even more relaxed, and the application of the choice-of-court agreements is facilitated;[237] however, when it comes to their systematic and rules for identifying the jurisdiction, they have virtually no difference from the 1968

[234] Treaty establishing the European Community (Consolidated version 2002) [2002] OJ C325/1, art 65 (2) (b), (c). This alternation in the competences of the EU has been reaffirmed in the Article 81 of the Treaty on the Functioning of the European Union (TFEU) of 2009, which regards the private international law as an area of shared competence of the Union under ordinary legislative procedure. Consolidated version of the Treaty on the Functioning of the European Union [2012] OJ C326/49; Aude Fiorini, 'The Evolution Of European Private International Law' (2008) 57 (4) International and Comparative Law Quarterly 969, 973-975.

[235] Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters [2001] OJ L12/1 (Brussels I Regulation).

[236] European Parliament and Council Regulation no (EU) 1215/2012 of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast) [2012] OJ L351/1 (Brussels I Recast Regulation).

[237] To that end, 1968 Brussels Convention arts 26-45; Brussels I Regulation, recital 17; Brussels I Recast Regulation, recitals 26-28 can be compared.

Convention. Such that, in Brussels I (Recast) Regulation, the Article 5 (1) of the Brussels Convention is transposed in in Article 7 (1), and Article 5 (3) of the said Convention is passed on to Article 7 (2) in verbatim.[238] Thus, when it is also taken into account that the European Court of Justice has not yet made a judgment on the determination of the special jurisdiction for the issues related to *culpa in contrahendo* under the said regulations, it should be accepted that both the interpretations of the Court regarding the 1968 Convention, and the evaluation made in the present study on the situation of *culpa in contrahendo* under the Convention also applies to these regulations.

In short, it seems that the Brussels Regime has opted to evaluate the legal concepts independently from the national laws, and it has classified the private law obligations as contractual and non-contractual rather than as contractual and tortious, even though the text of the Brussels Convention and subsequent regulations suggest otherwise. In this respect, as the basic character of contractual obligations in this system is established as the parties' assumption of the obligations in their own initiative and their explicit or implicit intent, the *culpa in contrahendo* has been classified as non-contractual and the alternative jurisdiction over it has been subjected to the Article 5 (3) of the Brussels Convention (or Article 7 (2) of the Brussels I Recast Regulation). Thereafter, it can be suggested that under the European Private International Law, the courts of the country where the damage has occurred (or might occur) have been designated jurisdiction in addition to the courts of the county where the defendant is domiciled, for the disputes that relate to the *culpa in contrahendo*.

[238] Brussels I Recast Regulation, art 7 (1), (2).

IV.2. Culpa in Contrahendo under the Rome Regime

The Rome Regime refers to a body of rules within the European Private International Law system for the determination of the law applicable to the substance of the dispute. [239] Like the Brussels Regime, the Rome Regime is also named after a convention: the Rome Convention of 1980. [240] This convention, only encompassing the determination of the applicable law to contractual obligations, has been superseded and modernized[241] by the Rome I Regulation[242] enacted by the European Union after the reforms brought by the Amsterdam Treaty. Furthermore, the Rome Regime only came to wholly complement the Brussels Regime upon the adoption of the Rome II Regulation on the applicable law to non-contractual obligations. [243]

The applicable law to *culpa in contrahendo* is regulated under Article 12 of the Rome II Regulation. However, as the legal notions in the context of European Private International Law are not in the same direction with the legal notions under the national laws, it is necessary to evaluate the background and characteristics of *culpa in contrahendo* in the context of Rome Regime in addition to the structure and content of the said provision of Rome II Regulation itself.

[239] Ivana Kunda and Carlos Manuel Gonçalves de Melo Marinho, Practical Handbook On *European Private International Law* (European Union under the Civil Justice Programme 2010), 6, 33.
[240] Convention on the law applicable to contractual obligations opened for signature in Rome on 19 June 1980 [1980] OJ L266/1.
[241] 'Contractual And Non-Contractual Obligations' (*European Commission*) <http://ec.europa.eu/justice/civil/commercial/obligations/index_en.htm> accessed 31 May 2017
[242] European Parliament and Council Regulation no. (EC) No 593/2008 of 17 June 2008 on the law applicable to contractual obligations (Rome I) [2008] OJ L177/6 (Rome I Regulation).
[243] European Parliament and Council Regulation no. (EC) 864/2007 of 11 July 2007 on the law applicable to non-contractual obligations (Rome II) [2007] OJ L199/40 (Rome II Regulation).

IV.2.1. Background of the European Conflict of Laws Norm

IV.2.1.1. Sources of Inspiration

With regard to the Brussels Regime, as discussed in detail above, the liability claims have been addressed under two categories; contractual and non-contractual, and under the case-law of the European Court of Justice it has been adopted that the pre-contractual liability should be characterized as a non-contractual matter as a general rule, albeit it is neither a contractual nor a tortious matter for determination of the special jurisdiction to be applied. This characterization is sufficient for the determination of the jurisdiction under the Brussels Regime; however, it runs short when it comes the determination of the law to be applied to the substance of the dispute. That is, the characterization as 'non-contractual obligation' by itself is too wide-ranging, including the unjust enrichment, tort liability and statutory liability among others, all of which might have their closest connection to different national laws. Thus, further elaboration of the legal character of the *culpa in contrahendo* liability in identifying the applicable national law is a requirement for a uniform and autonomous European Private International Law. Although this requirement was overcome by the provision on *culpa in contrahendo* in the Rome II Regulation, it has been argued that the said provision is motivated by some non-binding European Union legal sources, and these non-binding sources might shed light to the Union-level understanding of *culpa in contrahendo*. [244] These sources are the 'Principles of the European Contract Law' [245] and 'Draft Common Frame of Reference'. [246]

First, the 'Principles of European Contract Law' (hereinafter PECL) is a set of model rules prepared by an academic commission (Commission on European Contract Law) chaired by Professor Ole Lando. The PECL, as the name suggests, aims to clarify the principles of contract law that are common to the most of the member states of the European Union with a view to facilitate the intra-European trade, to strengthen the internal market, and constitute a link between Common law legal systems and Civil law legal systems within the European Union. The PECL deals with the topic in the chapter on formation of a contract, under the section titled 'Liability for negotiations'.[247] In the said section, it has been stated that 'who has negotiated or broken off negotiations contrary to good faith and fair dealing' should be liable

[244] Ionna Thoma, 'Culpa In Contrahendo In The Rome II Regulation' (2017) 61 Revue Hellenique de Droit International 669, 674.
[245] 'Principles Of The European Contract Law' (*Commission on European Contract Law*) <https://www.trans-lex.org/400200/_/pecl/> accessed 31 May 2017 (PECL).
[246] 'Definitions, Principles And Model Rules Of European Private Law: Draft Common Frame of Reference Outline Edition' (*Study Group on a European Civil Code and the Research Group on EC Private Law*) (1st edn, Sellier, European Law Publishers 2009) (DFCR).
[247] PECL, ch 2 s 3.

for the losses incurred by the other party.[248] Moreover, another article in the same section determines the same liability for the disclosure of the confidential information acquired during the contract negotiations.[249] While PECL does not answer the question on the legal character of *culpa in contrahendo*, it may constitute a reference to the scope and content of the provision on *culpa in contrahendo* in Rome II Regulation, as it expressly acknowledges the existence of the duty to negotiate in good faith and provides some examples of the breach of this duty.[250]

Second, the 'Draft Common Frame of Reference' (hereinafter DCFR) is a rather comprehensive body consisting of 'the principles which underpin the model rules; definitions of terms used in the model rules; and model rules on a number of areas of private law'[251] that is also produced by a cooperation of legal scholars. The DCFR is consulted both by the EU rule makers and national legislators when drafting legislation in the field of private law or amending existing provisions, and as such in can be regarded as a body of normative references.[252] In the DCFR, the pre-contractual duty of good faith is addressed in the same manner and structure with the PECL, with minor changes in wording.[253] However, the position of the DFCR as an unofficial toolbox for the European legislator greatly enhances its function as a reference when assessing the scope and content of European Conflict of Laws rule on *culpa in contrahendo*.

To summarize, it can be discerned that in these sources that are thought be inspirational to the European Private International Law, the existence of a pre-contractual duty of good faith is established and a separate liability for the breach of this duty is foreseen even though the *culpa in contrahendo* liability is not characterized. Further, it must be noted that these resources have illustrated some examples of the breach of the said duty: To disclose confidential information acquired during the negotiations, and to cause losses on the other

[248] PECL, art 2:301.
[249] PECL, art 2:302.
[250] Ionna Thoma, 'Culpa In Contrahendo In The Rome II Regulation' (2017) 61 Revue Hellenique de Droit International 669, 675.
[251] Lorna Richardson, 'The DCFR, Anyone?' (The Journal of the Law Society of Scotland, 20 January 2014) <http://www.journalonline.co.uk/Magazine/59-1/1013494.aspx> accessed 31 May 2017.
[252] Christian von Bar, 'A Common Frame Of Reference For The European Private International Law: Academic Efforts And Political Realities' (2008) 12 (1) Electronic Journal of Comparative Law <http://www.ejcl.org/121/art121-27.pdf> accessed 31 May 2017; Ionna Thoma, 'Culpa In Contrahendo In The Rome II Regulation' (2017) 61 Revue Hellenique de Droit International 669, 675; Lorna Richardson, 'The DCFR, Anyone?' (The Journal of the Law Society of Scotland, 20 January 2014) <http://www.journalonline.co.uk/Magazine/59-1/1013494.aspx> accessed 31 May 2017.
[253] DFCR, arts II-3:301, II-3:302.

party by breaking off the contract negotiations in bad faith, which are also stated as the examples of *culpa in contrahendo* in Rome II Regulation. [254]

IV.2.1.2. Framework: Organization of the European Private International Law

At the present day,[255] the European Private International Law ultimately largely is based on two regimes, the Brussels Regime on the jurisdictional and recognition/enforcement issues[256] and the Rome Regime on the determination of the national law to be applied to the substance of the dispute.[257] Both regimes, as mentioned above, are regulated by the EU Regulations legislated by the virtue of the reforms of Amsterdam Treaty, and due to the nature of EU regulations, they have replaced the national Private International Law systems of the member states within their territorial and thematic scopes. Given the dual structure of this new system and the traditionally national character of the Private International Law systems, a uniform European International Private Law System has also brought its own methodology and configuration. In order to better examine the European Conflict of Laws rule on *culpa in contrahendo*, it is necessary to address the methodology and configuration to the extent that they relate to the law applicable to *culpa in contrahendo*.

By outline, the methodology of the European Private International Law is not very different from the traditional Private International Law system. Accordingly, when a private international law dispute is brought before a national court who is bound to apply the European Private International Law, it is necessary for the national court to determine the legal character of the dispute first, and in the second stage it needs to determine if the dispute is under the jurisdiction of its country, if the country has jurisdiction, it also has to establish whether it is the competent court under its national laws to resolve the dispute. At the last stage, it is necessary for the court to resolve the dispute by identifying the national (substantive) law applicable to the substance of the dispute and resolve the dispute through the application of this law.

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[254] Rome II Regulation, recital 30.

[255] With the exception of a number of regulations on the inheritance law and various aspects of the family law that bring rules on both jurisdiction and applicable law. The Rome Regime further includes Rome III Regulation on the applicable law to certain family law relationships, and the European Private International Law system has expanded further through other regulations that regulate both the jurisdiction and applicable law on some other family law relationships and Inheritance Law disputes. see Aude Fiorini, 'The Evolution Of European Private International Law' (2008) 57 (4) International and Comparative Law Quarterly 969, 978-981.

[256] In other words, forms the European International Procedural Law.

[257] In other words, forms the European Conflict of Laws.

On the other hand, however, execution of these stages is peculiar to the European Private International Law, stemming from the issue of the characterization of the dispute. Characterization expresses the detection of the nature of the dispute in order to find whether the court has jurisdiction and which national law is to be applied to the substance of the dispute. In the traditional Private International Law, the court is expected to apply its own law *(lex fori)* to all matters that are not related to the merits of the dispute before them, including the rules on determination of the international jurisdiction and the legislation on conflict of laws. If the court is to determine its jurisdiction and applicable law to a dispute under its own law, naturally, it would classify the dispute according to the same law as well.[258] However, as the European Private International Law system displaces national law for determination of both the jurisdiction and applicable law, *lex fori* characterization loses its acceptability under this supranational system. To resolve this problem, and in view of the aim of the uniform application of European Private International Law through the Union, independent characterization is embraced instead of *lex fori* characterization. This principle, which was laid down in the above-mentioned decisions of the European Court of Justice on the interpretation the Brussels Convention,[259] has also acquired a statutory expression through being emphasized several points in the recitals of the Rome I and Rome II Regulations.[260] Independent characterization, referring the characterization of disputes without reference to the concepts and classifications of any national laws, is in line with the autonomy of the European Private International Law; however, since there is no binding common definitions for most of the legal concepts at the Union level, the independent characterization evolves with the implementation of the European Private International Law (through interpretations of the European Court of Justice) and the development and elaboration of the system by the European legislator.[261]

It has been described above that in which the European Private International Law system has been developing in stages, starting with the uniform rules on international procedural law (the Brussels Convention), followed by the enactment of norms on the conflict-of-laws in contractual obligations years after that, and rules relating to the applicable law of non-contractual obligations arising only in the last decade. Further, it has also been assessed

[258] Ernest G. Lorenzen, 'The Qualification, Classification, Or Characterization Problem In The Conflict Of Laws' (1941) 50 (5) The Yale Law Journal 743, 747.
[259] See the ECJ cases discussed under heading IV.1 of the present study.
[260] Rome II Regulation, recitals 11, 23, 26, 30; Rome I Regulation, recitals 22, 26, 29, 30.
[261] eg ibid.

above that the European Court of Justice has made a partial characterization of *culpa in contrahendo* for the uniform interpretation and implementation of the Brussels Convention, although this characterization was too wide-ranging for a justified determination of the applicable law to *culpa in contrahendo.* Nevertheless, the organization of the European Private International Law attaches importance to this partial characterization of the *culpa in contrahendo* in view of the European Conflict of Laws rule on the issue. At its most basic level, this importance is due to the fact that the Brussels Regime and the Rome Regime complement each other, which necessitates the characterizations under these regimes to be mutually consistent.[262] This necessity has also been made into law in the recitals of the Rome I and Rome II regulations.[263] Given that the Brussels Regime is older than the Rome Regime, this situation imposes an instructive function to the partial characterization made under the former.

The fundamental impact of this instructive function on the further characterization of *culpa in contrahendo* in terms of European Private International Law is the separation of the pre-contractual liability into two. This expresses the difference in the broader characterizations of the liability claims arising directly from contract negotiations, and the claims for liability arising from an obligation assumed by the parties in the course of these negotiations. In this respect, the liability claims for the first group are characterized as non-contractual and they are regulated within the scope of the Rome II Regulation, whereas the claims for the second group are regarded as contractual, and thus placed under the scope of Rome I Regulation. At this point, it should be noted that European Private International Law qualification, *culpa in contrahendo* and pre-contractual liability are not used interchangeably, instead, 'the obligation arising from dealings prior to contract' is preferred to refer to *culpa in contrahendo.* This is evidenced by the exclusion of 'the obligations arising out of dealings prior to the conclusion of a contract' in Article 1 (2) (i) of the Rome I Regulation,[264] and the definition of *culpa in contrahendo* as 'the obligations presenting a direct link with the dealings prior to the conclusion of a contract' in Rome II.[265] This arrangement is in parallel with the conviction acquired in the preceding chapter that determined that the duty, whose violation causes the *culpa in contrahendo* liability, is imposed not as not a result of the parties' explicit or implicit

[262] Ionna Thoma, 'Culpa In Contrahendo In The Rome II Regulation' (2017) 61 Revue Hellenique de Droit International 669, 677.
[263] Rome II Regulation, recital 7; Rome I Regulation, recital 7.
[264] Rome I Regulation.
[265] Rome II Regulation, recital 30.

intents, but because of their reliance on each other; and therefore it cannot be regarded as contractual *per se*.[266] In the event that the parties undertake such a duty during the contract negotiations with their explicit or implicit expressions of intent, they would have formed a negotiation contract. Nonetheless, although it is agreeable that the liability for the said duty in that case should be characterized as contractual liability, the etymological consistency of the broader classification of this event under the pre-contractual liability is highly debatable, and to some extent is unnecessary, as there is already a contract – even though it is not the one for whose conclusion the negotiations are being held. [267]

In addition, it should be noted that the Rome I and Rome II regulations are also complementary, this complementariness (in addition to the expansion of the subjects covered by the European Conflict of Laws) refers to the conceptual harmony and integrity between the two regulations. In terms of this study, this proves to be important as some of the relevant connecting factors in the Rome II Regulation can only be defined and determined by means of the guidelines provided by the Rome I Regulation. [268]

To sum up, it can be concluded that the arrangement of the *culpa in contrahendo* in the context of the European Conflict of Laws was influenced by the *sui generis* configuration of the European Private International Law, this influence being mainly the characterization of *culpa in contrahendo* as non-contractual, and the exclusion of any obligation assumed freely by the parties during contract negotiations from the scope of *culpa in contrahendo.*

[266] see headings III.1.1 and III.2.2 of the present study.

[267] Ionna Thoma, 'Culpa In Contrahendo In The Rome II Regulation' (2017) 61 Revue Hellenique de Droit International 669, 677-678.

[268] As it is discussed below, Article 12 (1) of the Rome II Regulation refers to the *lex contractus in negotio* as the applicable law to *culpa in contrahendo*, which can only be identified with reference to the provisions of the Rome I Regulation.

IV.2.2. Culpa in Contrahendo in Rome II Regulation

The conflict-of-laws rule over *culpa in contrahendo* is set out in Article 12 of the Rome II Regulation. With this norm, it can be said that European Private International Law system has been completed in terms of the disputes relating to *culpa in contrahendo.* This completion not only expresses the emergence of the rule for the determination of the applicable law, but also predicates the finalization of the characterization of *culpa in contrahendo,* which was achieved only partially under the Brussels Regime. Hence, to reveal the scope of the rule, it is necessary to address how the characterization is finalized as well. In this respect, the rule will be examined under the sections of 'object of the rule' and the 'connecting factors' in accordance with the customary form of conflict-of-laws rules.[269] Considering that the 'object of the rule' relates to the definition and scope of the legal relations, and the 'connecting factor' expresses the material facts that connect the 'object of the rule' to a national law, it is thought that this layout would also allow a comprehensive and understandable examination of the said rule.

IV.2.2.1. The Object of the Rule

'The object of the rule' refers to the legal relationship that is subject to a private international law rule.[270] In the Private International Law systems where the conflict-of-law rules themselves constitute a part of the national legal system, it is sufficient for a conflict-of-law rule to only specify the object of the rule without any definition, as the concept or case is detailed in other legislation and case law of the national legal system. In such a system, when a dispute comes before a court, as the court applies its own law (*lex fori*) when deciding the applicable law, it is mandatory to establish the nature of dispute under the law of the court (*lex fori*). However, although the national courts of the Member States of the European Union implement it, the European Private International Law is a supranational system that is not prepared in relation to any national legal system, necessitating the judges to interpret the objects of the conflict-of-laws rules independently from their national law systems. In such a system, naming the object of the rule without any specification would render the conflict-of-law rules for the issues that are not contained in all national legal systems equally (such as *culpa in contrahendo*) impracticable. Thus, it is necessary for the definitions (or guidelines)

[269] Ernst Rabel, *The Conflict Laws: A Comparative Study (Volume One: Introduction-Family Law)* (2nd edn, University of Michigan Law School 1958) 48-50.
[270] ibid 50.

that clarify which subjects can be characterized as the object of a rule to constitute an integral part of the European Private International Law system.

In accordance, the Article 12 of the Rome II Regulation, where the object of the rule has been specified as 'non-contractual obligation arising out of dealings as to whether or not the contract was actually concluded or not'[271] has been detailed the same regulation as follows:

> Culpa in contrahendo for the purposes of this Regulation is an autonomous concept and should not necessarily be interpreted within the meaning of national law. It should include the violation of the duty of disclosure and the breakdown of contractual negotiations. Article 12 covers only non-contractual obligations presenting a direct link with the dealings prior to the conclusion of a contract. This means that if, while a contract is being negotiated, a person suffers personal injury, Article 4 or other relevant provisions of this Regulation should apply.[272]

Thereby, both the independent characterization in the European Conflict of Laws is explicitly confirmed, and the characterization of *culpa in contrahendo* characterization in the European Private International Law context is finalized. Accordingly, in order for a dispute to be characterized as a *culpa in contrahendo* and to constitute the object of the conflict-of-laws rule in Article 12, it must be about a 'non-contractual' obligation, arise from the contract negotiations, and directly related to these negotiations. Then, in the context of the said conflict of law norm, it can be determined that a dispute must have three elements in order to be characterized as *culpa in contrahendo.*

The first of these elements is the presence of the contract negotiations. As elaborated before, contract negotiations refer to an exclusive relationship between the parties, for the purpose of the conclusion of a contract. This relationship creates a confidence between the parties that needs to be legally protected, and the liability for *culpa in contrahendo* is to ensure that this protection is provided.[273] Here, it is sufficient to draw attention to the fact that this element, which can be regarded as the cornerstone of *culpa in contrahendo*, is also present in the European conflict-of-laws-rule.

The second element is that the direct relation of the subject of the dispute to the contract negotiations. It is considered that the lack of reference to the pre-contractual duty of good faith in the regulations has been overcome by the inclusion of this element, due to two reasons. Firstly, the disputes that arise while the contract is being negotiated, but not due to the proximity provided by the contract negotiations are not covered by the pre-contractual duty of good faith (protected by the *culpa in contrahendo* liability) and are to be assessed under the

[271] Rome II Regulation, art 12 (1).
[272] Rome II Regulation, recital 30.
[273] see heading III.1.1 of the present study.

breach of the general duty of care, which are also referred by the Rome II Regulation to the Article 4 –which prescribes the applicable law to the torts- or to 'other relevant provisions'.[274] Secondly, the 'breakdown of negotiations' and 'violation of the duty of disclosure', which are given as examples of the disputes directly linked to the contract negotiations in the Regulation are in line with the obligations making-up the pre-contractual duty of good faith.[275] Here, it is believed that the reconciliation between Common law legal systems (that are reluctant to admit the existence of a pre-contractual duty of good faith) and most Civil law legal systems (that protect the said duty) is provided by the 'direct link to contract negotiations' element in the regulation.

The third and last element is the dispute's being related to a 'non-contractual' obligation. This means that the dispute should not be concerned with the obligations that the parties commit with their explicit or implicit declarations of intent.[276] Likewise, since *culpa in contrahendo* is related to a duty that parties do not undertake willingly, but imposed upon them to preserve their trust in each other, this element is not absurd as well.[277] If the parties willingly undertake any obligation during the negotiations, it, by definition, constitutes a contract and therefore should be considered under contractual liability, not under the *culpa in contrahendo*. Moreover, it should also be noted that, with the inclusion of the this element, the non-contractual characterization of *culpa in contrahendo* in the European Private International Law has been expressed once again.

To sum up, it can be concluded that the 'object of the rule' set out in Article 12 of Rome II Regulation purports characterization of the legal relations that are related to the breach of a duty arising from contract negotiations, on the condition that this duty is not freely and willingly assumed by the parties but imposed upon them to protect the special proximity between them, as *culpa in contrahendo*. It can be argued that when these elements are evaluated together with the phrase 'regardless of whether the contract is established' contained in the text of Article 12, 'the object of the rule' covers the disputes that have the elements of *culpa in contrahendo,* although it does not make any reference to other elements such as fault,

[274] Rome II Regulation, recital 30.
[275] ibid.
[276] see heading III.1.2.1 of the present study.
[277] Rome II Regulation, recital 11; Handte v. TMCS case, para 15.

damages, and causation-at-fact; possibly leaving the evaluation of those to the court, while resolving the issue under the applicable national law. [278]

IV.2.2.2. Connecting Factors

Connecting factors refer to material facts that link the object of the rule to a particular national law and, as such, they serve as the bridges between the object of the rule and the applicable law. [279] While the connecting factors are identified in accordance with the *lex fori* in the traditional Private International Law, under the autonomous European Private International Law, this identification must also be made independently from national law. For this reason, here, the connecting factors for the *culpa in contrahendo* under the Rome regime, and how these connecting factors are determined will be evaluated.

The connecting factor that determines the law applicable to *culpa in contrahendo* is regulated in Article 12 of the Rome II Regulation. However, before the applicable law is identified in accordance with Article 12, the courts should examine that whether the parties have chosen the applicable law themselves, according to Article 14, which gives the parties the autonomy to choose the applicable law to their disputes arising from non-contractual obligations. [280] For this reason, it is appropriate to briefly discourse on Article 14 before evaluating Article 12.

According to Article 14 of Rome II Regulation, the parties are entitled to choose the applicable law of the *culpa in contrahendo* related dispute, either before the dispute has arisen (if the negotiations are being conducted in the pursuit of a commercial activity), or after the dispute has arisen; without resorting to the connecting factors prescribed in Article 12. As such, Article 14 takes precedence over Article 12.[281]

It is only when the parties have not agreed upon the choice of law in accordance with Article 14, the connecting factors in Article 12 would be used to determine the applicable law, which introduces the hierarchical conflict-of-laws rule on *culpa in contrahendo*. In this two-tiered rule, the connecting factors in the second tier can only be used to identify the applicable law if the connecting factor of the first tier cannot be identified. The connecting factors in the second tier have no hierarchical order.

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[278] Ionna Thoma, 'Culpa In Contrahendo In The Rome II Regulation' (2017) 61 Revue Hellenique de Droit International 669, 680.
[279] Ernst Rabel, *The Conflict Laws: A Comparative Study (Volume One: Introduction-Family Law)* (2nd edn, University of Michigan Law School 1958), 48.
[280] Najib Hage-Chahine, 'Culpa In Contrahendo In European Private International Law' (2012) 32 (3) Northwestern Journal of International Law & Business 454, 497.
[281] ibid.

The first tier of the conflict-of-laws rule is as follows:

> 1. The law applicable to a non-contractual obligation arising from a non-contractual obligation arising out of dealings prior to the conclusion of a contract, regardless of whether the contract was actually concluded or not, shall be the law that applies to the contract or that would have been applicable to it had it been entered into. [282]

According to this paragraph, which has the outlook of a monolith conflict-of-laws rule, the first connecting factor is 'the law that applies to the contract or that would have been applicable to it had it been entered into' or, in other words, *lex contractus in negotio*. [283] Since the connecting factor here is the law applicable to an actual or contemplated contract, it should be further elucidated according to the Rome I Regulation, which sets the conflict-of-laws issue for contractual obligations. A learned author summarizes this elucidation as follows:

> Culpa in contrahendo is, thus, governed by the law chosen by the parties (article 3 of Rome I Regulation) and absent such choice by the law determined by article 4 of the Rome I Regulation (which is broadly speaking the law of the habitual residence/central administration of the party owing the characteristic performance). If the negotiations concern contracts of carriage, consumer contracts, insurance or employment contracts the respective articles of the Rome I Regulation find application. [284]

Then, there are three points of interest in this tier of the conflict-of-laws rule, first of which is the determination of the law applicable to *culpa in contrahendo* with reference to law applicable to (actual or contemplated) contract. This is in line with the convictions acquired on the chapter on the legal characterization of *culpa in contrahendo*, where it has been pointed out that contractual liability provisions should apply to *culpa in contrahendo,* although *culpa in contrahendo* itself cannot be characterized as a contractual ground of liability. [285] The second point of interest is the extension of the protection afforded to weaker party in determination of the applicable law for certain types of contracts to the negotiations for these contracts; since the respective articles of the Rome I Regulation on these specific contracts find application for *culpa in contrahendo* as well by the virtue of Article 12 (1) of Rome II Regulation. [286] The last point of interest is that, for the parties' autonomy in choice of law, both Article 3 of the Rome I Regulation and the Article 14 of the Rome II Regulation apply,

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[282] Rome II Regulation, art 12 (1).

[283] Najib Hage-Chahine, 'Culpa In Contrahendo In European Private International Law' (2012) 32 (3) Northwestern Journal of International Law & Business 454, 498-499.

[284] Ionna Thoma, 'Culpa In Contrahendo In The Rome II Regulation' (2017) 61 Revue Hellenique de Droit International 669, 682.

[285] see above heading III.3 of the present study.

[286] Such as the applicable law for the consumer contracts in the Article 6 of the Rome I Regulation, for the insurance contracts in the Article 7 of the same regulation, and finally for the individual employment contracts in the Article 8 of the said regulation.

mainly enabling the parties to decide on applicable law before the damage arises, regardless of whether they are engaged in a commercial activity or not. [287]

On rare occasions when the applicable law cannot be determined pursuant to Article 12 (1), the second tier of the conflict-of-laws rule, Article 12 (2) would be applied to identify the applicable law. This tier is as follows:

> 2. Where the law applicable cannot be determined on the basis of paragraph 1, it shall be:
> (a) the law of the country in which the damage occurs, irrespective of the country in which the event giving rise to the damage occurred and irrespective of the country or countries in which the indirect consequences of that event occurred; or
> (b) where the parties have their habitual residence in the same country at the time when the event giving rise to the damage occurs, the law of that country; or
> (c) where it is clear from all the circumstances of the case that the non-contractual obligation arising out of dealings prior to the conclusion of a contract is manifestly more closely connected with a country other than that indicated in points (a) and (b), the law of that other country. [288]

In this tier, three residual connecting factors are specified without any hierarchical order, leaving the determination of the most closely connected national law basically to the discretion of the courts, as reflected in the subparagraph (c). It is contended that any such determination of what constitutes a 'manifestly close connection' will in all probability be done on a case-by-case basis until clarification is promulgated by the European Court of Justice, since there is no test or guideline provided by the Rome I and Rome II regulations on the subject.[289] On the other hand, such a determination would only be necessitated where both 'the law of the country in which the damage occurs' and 'the law of the common habitual residence of the parties when the event giving raise to damage occurs' cannot be identified or are rendered irrelevant to the dispute, which seems like a distant possibility. [290]

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[287] Ionna Thoma, 'Culpa In Contrahendo In The Rome II Regulation' (2017) 61 Revue Hellenique de Droit International 669, 682.
[288] Rome II Regulation, art 12.
[289] Ionna Thoma, 'Culpa In Contrahendo In The Rome II Regulation' (2017) 61 Revue Hellenique de Droit International 669, 684; Najib Hage-Chahine, 'Culpa In Contrahendo In European Private International Law' (2012) 32 (3) Northwestern Journal of International Law & Business 454, 536.
[290] Richard Plender and Michael Wilderspin, *European Private International Law Of Obligations* (4th edn, Sweet & Maxwell 2015) 764

IV.3. Conclusion

This chapter has addressed the multi-faceted dimensions of the assessment of *culpa in contrahendo* in European Private International Law. Such an analysis reveals not only the theoretical aspect of the compromise reached between legal systems that attach legal significance to the doctrine and those who do not but also sheds light on how the determination of jurisdiction and applicable law in international disputes relating to *culpa in contrahendo* can be employed in a uniform manner by reference to the uniform rules set out in EU instruments. In this direction, the following convictions have been acquired on the situation of *culpa in contrahendo* in European Private International Law:

1. European Private International Law has mainly developed under two regimes, the Brussels Regime and the Rome Regime. The Brussels Regime, on jurisdiction and recognition/enforcement issues- emerged with the Brussels Convention in 1968, which was later evolved to the Brussels I (Recast) Regulation. On the other hand, the Rome Regime on the conflict of laws emerged later, and the uniform rule on the applicable law to *culpa in contrahendo* has only been brought by the enactment of the Rome II Regulation that entered into force in 2007. It has been acknowledged both in the decisions of the European Court of Justice and through the statutory expressions in the regulations that these two regimes complement each other not only in terms of the legal fields they regulate but also regarding the legal concepts employed. It has also been adopted in the same way that the legal concepts in the contexts of these regimes should be interpreted independently from any national law.
2. There is no provision on the classification of *culpa in contrahendo* in the statutory instruments of the Brussels Regime. Jurisdiction on matters related to *culpa in contrahendo* has been determined through the interpretation of the European Court of Justice. The Court first identified the boundaries of contractual matters under the Brussels Regime as matters relating to the obligations that parties have freely assumed and then defined the the tortious matters under the same regime as the issues relating to all non-contractual obligations. Ultimately, when a question on the determination of the jurisdiction of *culpa in contrahendo* was brought before the Court, it decided that *culpa in contrahendo*, albeit not being a tort, should be classified as a tortious matter for the purposes of the Brussels Regime. In this context, the courts that have jurisdiction over matters relating to *culpa in contrahendo* are the courts of the country where the damage occurred, courts of the country of habitual residence of the defendant.

3. The Rome Regime also imposed the contractual and non-contractual classification, and regulated the conflict-of-laws rule on *culpa in contrahendo* under the Rome II Regulation on the applicable law to non-contractual obligations. In the said regulation, which also embraced the practice to examine legal concepts independently from national law, what should be understood from the *culpa in contrahendo* in the context of European Private International Law has also been explained. Accordingly, the *culpa in contrahendo* has been defined as a non-contractual liability arising from, and directly related to contract negotiations. With reference to the Brussels Regime, the expression 'non-contractual' refers to the exclusion of the liability for any obligation that has been freely and willingly assumed by the parties from the scope of *culpa in contrahendo.*
4. It appears that this definition does not connote the 'damages', 'fault' and 'the breach of pre-contractual duty of good faith' elements that have been identified in the previous chapter of the present study. Due to the fact that the 'fault' and 'damages' are to be determined and measured in accordance with the applicable national law, and as these elements are common to almost all grounds of liability (except the strict liability situations), a uniform conflict-of-laws rule does not need the establish these two elements.
5. It is considered that 'the breach of pre-contractual duty of good faith' has not been identified in the Rome II Regulation in order to find a compromise between the legal systems that attribute a legal significance to such a meaning and those who refuse to do so. Still, the breakdown of the negotiations and disclosure of confidential information, which are pointed out as examples of the *culpa in contrahendo* in the recitals of the Rome II Regulation, have also been determined as instances of the breach of pre-contractual duty of good faith in DFCR and PECL, both of which are suggested to be inspiration sources for the Rome II Regulation. Likewise, the review in the preceding chapter of the present study has also identified these two events as the breach of the obligations making up the pre-contractual duty of good faith. Therefore, it should be concluded that the disputes that are covered by the provision on *culpa in contrahendo* in Rome II Regulation, do not differ significantly from the disagreements that are almost always regarded as *culpa in contrahendo* in the analytical context as well.

6. In Article 12 (1) of the Rome II Regulation, the primary applicable law to the *culpa in contrahendo*, given that the parties have not made an agreement on the choice of law in accordance with Article 14 of the same Regulation, is determined as *lex contractus in negotio* (the law that applies to the contract or that would have been applicable to it had it been entered into). This determination is consistent with the view that has been found agreeable in the preceding chapter as well, which asserted that although *culpa in contrahendo* is a non-contractual liability, the provisions for contractual liability should apply to the disputes relating to it in the absence of specific provisions.
7. Residual connecting factors to determine the applicable law to *culpa in contrahendo* in Article 12 (2) of the Rome II Regulation are named with reference to the tenet of Private International Law that envisages the application of the national law that is most strictly related with the substance of the dispute. However, as it does not set out the factors for how to determine the law most closely related to culpa in contrahendo; the rule in Article 12 (2) is deemed to be speculative and ambiguous.
8. **To sum up, the system of the European Private International Law, in the course of its gradual development, has been able to provide jurisdiction and conflict-of-law rules that are concurrent with the conceptual analysis of *culpa in contrahendo,* albeit with some deficiencies. Furthermore, it can be said that this system also accommodates different approaches to the *culpa in contrahendo.***

V. General Conclusions

In this study, the conceptual analysis of *culpa in contrahendo* was discussed and the situation of *culpa in contrahendo* with respect to European Private International Law was evaluated in the direction of this analysis.

A. The elements of *culpa in contrahendo* are contract negotiations, breach of pre-contractual duty of good faith, fault, damages, and causation-at-fact. The most important difference between the common law and the civil law traditions in relation to *culpa in contrahendo* is about the recognition of the pre-contractual duty of good faith, which also separates the approaches of different civil law systems from one another. There is no decisive difference in their approaches to other elements; however, here it is necessary to establish that the characterization of *culpa in contrahendo* (different in every country) that determines the scope of damages compensable under the *culpa in contrahendo.*

   - ❖ In the common law legal systems, it is discerned that the pre-contractual duty of good faith is rejected. This rejection leads to the determination that the *culpa in contrahendo* liability is not present in these systems. Nonetheless, it is also identified that there are a number of institutions in the Common law systems which enables the recovery of damages caused by a course of actions that would be considered as *culpa in contrahendo* in a Civil law legal system: estoppel and misrepresentation. However, it should be noted that these two institutions are 'special' and factual obligations rather than being general sources of liability. In the civil law legal systems, the existence of this duty appears to be largely accepted, the difference being related to the nature of the said duty and thus the characterization of the *culpa in contrahendo*. It can be said that the pre-contractual duty of good faith is composed of the obligations of custody, conservation, and seriousness.
   - ❖ It is thought that the reason for this difference is due to historical development. While Civil law systems aimed to establish a secure trading environment and regime, Common law systems, had already have a secure trade regime and order, and they were already looking to increase the volume of commercial activities so did not want to protect the negotiations and appall the negotiators.

B. In line with the distinct approaches to the elements of *culpa in contrahendo*, its legal character is also a point of discussion, subject to many theories. In the chronological order, these can be grouped, as contract theories, tort theory, mixed theories and unconventional theories. The first theory emerging is the contractual characterization theories, but today there are no countries that embrace these. The second theory is the theory that defends the tortious characterization of the *culpa in contrahendo.* This theory has been adopted and implemented by French courts for many years. The third group suggests, that the character of *culpa in contrahendo* should be determined separately for each and every occurrence, as a general characterization over the analysis of its elements by conceptual analysis is far too abstract in view of the facts of everyday life. Portugal, the United Kingdom and Ireland have been found to adopt a system of case-by-case characterization, under this third group of theories. The fourth group of theories argues that the *culpa in contrahendo* liability is a specific form of liability arising either from the statutes or from the trust between the parties, and suggests that contractual liability provisions should be substituted if there are no separate provisions on *culpa in contrahendo*, due to the fiduciary relationship between the parties. German and Swiss law seems to hold true to this theory.

   - ❖ In this research, it has been identified that the *culpa in contrahendo* is caused by the abuse of a particular proximity and trust between the parties, however, as the parties do not assume any obligation with their free will, it can neither be regarded as contractual or tortious liability. However, in the absence of separate provisions, substitution by contractual liability provisions is deemed to be necessary due to the presence of the trust and the exclusivity of the duty pertaining to that trust.

C. Still, in the context of European Private International Law, to adopt a uniform practice, all these differences need to be accommodated. The practice of the European Private International Law is examined in two aspects, under the Brussels (jurisdiction vs.) and Rome (law enforcement) regimes. Under the Brussels Regime, it appears that *culpa in contrahendo* is not regulated separately, but classified as non-contractual by the decisions of the European Court of Justice. Under the Rome Regime, the *culpa in contrahendo* has been characterized as a non-contractual dispute relating to contractual negotiations and to an obligation directly linked to these negotiations; and the law applicable has been determined as the law applicable to the final contract.

- It is considered that practice is in place because it does not refer to the pre-contractual duty of good faith, as it is not recognized in all legal systems. In addition, it is thought that its scope is determined in accordance with the common approaches of the national laws and the theoretical definition of *culpa in contrahendo*. Furthermore, the law applicable also seems to be determined in accordance with the understanding of the substitution by contractual liability provisions illustrated above. However, the part of the relevant provision in Rome II Regulation relating to the residual connecting factors to *culpa in contrahendo* is criticized extensively for uncertainty.

Under the light of these evaluations, the aim of the study seems to be fulfilled with a comprehensive theoretical analysis of *culpa in contrahendo* in relation to the national legal systems that has been provided.

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