Review of European and Comparative Law | 2024
Vol. 59, No. 4, 243–255
https://doi.org/10.31743/recl.17832
Received: 30 September 2024 | Accepted: 18 November 2024 | Published: 20 December 2024

Instructions to Perform in Contract Negotiations: Comparative and Interdisciplinary Approach

Erman Benli
PhD, Associate Professor, Faculty of Law, Department of Civil Law, Social Sciences University of Ankara; correspondence address: Hükümet Meydanı No: 2, 06050 Ulus, Altındağ/Ankara, Türkiye; e-mail: erman.benli@asbu.edu.tr
https://orcid.org/0000-0002-2277-2832

Keywords:
contract,
negotiation,
instructions
to perform,
reliance,
cheapest cost avoider

Abstract: Contract negotiation is the phase before the conclusion of the main contract. Although contract performance consists in the fulfilment of obligation, and therefore mostly occurs after the conclusion of a contract, in practice, contract negotiators may provide instructions to perform before contract conclusion, particularly in the sectors of national defense, construction and consulting services. This paper examines the legal consequences of instructions to perform provided during negotiations and whether or not they lead to the conclusion of the main contract. According to the legal policy of protection of the weaker party that in law and economics is consistent with the cheapest cost avoider principle and the Gunderson decision in the USA, a conclusion is reached that if the stronger party imposes the instructions to perform on the weaker party, it should be accepted that the main contract is concluded, because the stronger party in these type of cases will mostly be the cheapest cost avoider and should take the risk of non-reliance or incomplete reliance.

1. Introduction

Contract performance consists in the fulfilment of an obligation, which is why it mostly occurs after the conclusion of a contract. At this stage, performance has an important legal function of extinguishing an obligation

This is an open access article under the CC BY license
ISSN 2545-384X (Online)

in the narrow sense and obligational relation in a broad sense.[1] However, in practice, contract negotiators may provide instructions to perform before contract conclusion. Instructions to perform in contract negotiations are frequently provided in the defense industry, consulting services, construction services and other similar sectors. For instance, while the contract negotiations are ongoing, it may be the case that one of the negotiators sends instructions to the other party to start the performance and the other party begins preparations such as procuring goods and services and hiring employees in advance for the performance stage of the main contract.

The purpose of this paper is to examine and discuss the legal nature and consequences of instructions to perform in contract negotiations from the perspective of protection of the weaker party which is embraced as a fundamental and social-liberal principle in the law of obligations. The paper analyses the issue with regard to civil law and common law and compares both. There are numerous examples of protection of the weaker party in private law, specifically in the law of obligations. For example, in consumer protection law, weak consumers are protected by consumer law against professional sellers and providers.[2] It can be found in European legislation[3] in the form of formalities and withdrawal rights and also in Turkish consumer legislation.[4] Consumer credit contracts, for

1 It has two exceptions. First, performance does not extinguish an obligation if it is inconsistent with the obligation. Second, in continuous contracts (as in lease and employment contracts), monthly performance does not extinguish the whole obligational relation.

2 For different consumer protection policy models, see: Zeynep Dönmez, "Avrupa Birliği'nde Tüketici Hukuku Alanında Kanunlaştırma Hareketleri ve Tüketicinin Korunması Modelleri," *Marmara Üniversitesi Hukuk Fakültesi Hukuk Araştırmaları Dergisi: Özel Sayı Prof. Dr. Cevdet Yavuz'a Armağan* 7, no. 3 (2016): 964–67.

3 Directive (EU) No. 2019/2161 of the European Parliament and of the Council amending Council Directive 93/13/EEC and Directives 98/6/EC, 2005/29/EC and 2011/83/EU of the European Parliament and of the Council as regards the better enforcement and modernization of Union consumer protection rules, the Unfair Contract Terms Directive 93/13/EEC, the Price Indication Directive 98/6/EC, the Unfair Commercial Practices Directive 2005/29/EC, the Consumer Rights Directive 2011/83/EU.

4 Consumer Protection Law (Law No. 6502), The Product Safety and Technical Regulations (Law No. 7223), Regulation on distance contracts, Regulation on commercial advertisement and unfair commercial practices, Regulation on after-sales services and guarantees, Regulation on electronic commerce, Regulation on consumer arbitration committees.

instance, must be drawn up in writing and the professional party must provide all information on products to consumers including withdrawal rights in doorstep selling and distance sales, and consumers' rights of remedies against defective and unsafe goods and services and other similar information. Another example of the protection of the weak party is the principle of "objective good faith"[5] which is regulated by the civil codes of continental Europe and has the function of adjusting legal norms (*Billigskeitskorrektur*).[6] It finds application in cases where the provisions of the law are inadequate against socio-economic developments.

The remainder of the paper is organized as follows. Section 2 reviews the legal essentials of contract negotiations. In this section, the paper examines the starting moment of negotiations, the documents used in negotiations and the mutual obligations of negotiators. Section 3 discusses the nature and consequences of instructions to perform in terms of pre-contractual liability. Finally, Section 4 concludes.

2. Legal Essentials of Contract Negotiations

The negotiation phase allows parties to "test the feasibility of a mutually beneficial transaction."[7] Contract negotiations are set to be founded on

5 English version of the Swiss Civil Code (Schweizerisches Zivilgesetzbuch, ZGB) uses "good faith" both for Article 2 and Article 3. However, ZGB Article 2 is about objective good faith (principle of honesty) and ZGB Article 3 regulates subjective good faith. Today, the terms "objective" and "subjective" are not used in Turkey to refer to good faith. The term "good faith" in ZGB Article 2 and Turkish Code of Obligations (TCO) Article 2 indicate the "principle of honesty" that matches objective good faith. On the other hand, ZGB, Article 3 and TCO Article 3 regulate "good faith" that matches subjective good faith. Objective good faith and subjective good faith are different in terms of applicability and legal consequences. For detailed information on the difference, see: Hüseyin Hatemi, *Medeni Hukuk'a Giriş* (İstanbul: On İki Levha Yayıncılık, 2020), 187 ff.; Hasan Erman, *Medenî Hukuk Dersleri* (İstanbul: Der Yayınları, 2021), 101 ff.; M. Kemal Oğuzman and Nami Barlas, *Medenî Hukuk*, (İstanbul: On İki Levha Yayıncılık, 2021), 229 ff.

6 Wolfram Mauser, "Billigkeit. Zum Konzept der Modernität im 18. Jahrhundert," *Recherches germaniques*, no. 21 (1991): 49–77.

7 Eleonora Melato and Francesco Parisi, "A Law and Economics Perspective on Precontractual Liability," in *Precontractual Liability in European Private Law*, eds. John Cartwright and Martijn Hesselink (Cambridge: Cambridge University Press, 2009), 431.

mutual reliance[8] (interpersonal and institutional trust)[9] between negotiators that create obligational relations without regard to obligation based on (objective) good faith (Turkish Civil Code (TCC), Article 2).[10] Contract negotiations is the stage that precedes the main contract (promissory transaction, *borçlandırıcı işlem*). In this context, negotiators must act in good faith and not abuse the reliance of other party.[11] Although contract negotiations follow the common practice, except for hand-to-hand sales (*elden satış*) and hand-to-hand gifts (*elden bağışlama*), this phase is not regulated by Turkish or Swiss legislators.[12] However, its legal consequences are associated with pre-contractual liability[13] referred to as *culpa in contrahendo* in the civil law tradition.[14] On the other hand, neither English Law according to the Wal-

8 From a law and economics perspective, reliance of negotiators means "reliance investment" for a prospective contract and "a reliance investment increases both the expected benefits and the expected costs of the transaction" for each negotiator. See: Melato and Parisi, "A Law and Economics," 431–2.

9 Stefanie Jung and Peter Krebs, *The Essentials of Contract Negotiation* (Switzerland: Springer, 2019), 12. See also: John Klein and Carla Bachechi, "Precontractual Liability and the Duty of Good Faith Negotiation in International Transactions," *Houston Journal of International Law* 17, no. 1 (1994): 1–25.

10 Necip Kocayusufpaşaoğlu, *Borçlar Hukukuna Giriş – Hukukî İşlem – Sözleşme* (İstanbul: Filiz Kitabevi, 2017), 9.

11 Rona Serozan, *İfa – İfa Engelleri – Haksız Zenginleşme* (İstanbul: Filiz Kitabevi, 2016), 254–5; Michael Tegethoff, "Culpa in Contrahendo in German and Dutch Law – A Comparison of Precontractual Liability," *Maastricht Journal of European and Comparative Law* 5, no. 4 (1998): 342.

12 However, TCO Article 35 (Swiss Code of Obligations, OR Article 26) and TCO Article 47/1 (OR Article 39) are the legal rules relating to pre-contractual liability. See: M. Kemal Oğuzman and M. Turgut Öz, *Borçlar Hukuku Genel Hükümler* (İstanbul: Vedat Kitapçılık, 2022), 496–7; İlhan Helvacı, *Turkish Contract Law* (Switzerland: Springer International, 2017), 163.

13 As Melato and Parisi states, "the primary problem is therefore identifying a legal rule that would create incentives for optimal reliance, avoiding both under-investment (inefficient because it prevents the maximisation of the total surplus obtainable from the transaction) and over-investment (inefficient because it leads to a waste of resources when negotiations are unsuccessful)." See: Melato and Parisi, "A Law and Economics," 433.

14 Larry A. DiMatteo et al., *International Sales Law: A Critical Analysis of CISG Jurisprudence* (Cambridge: Cambridge University Press, 2005), 33; Gunther Kühne, "Reliance, Promissory Estoppel and Culpa in Contrahendo: A Comparative Analysis," *Tel-Aviv University Studies in Law* 10, (1990): 279–96; Oğuzman and Öz, *Borçlar*, 38 and 495 ff.; Serozan, *İfa*, 252 ff.; Jan Smits, "The Law of Contract," in *Introduction to Law*, eds. Jaap Hage, Antonia Waltermann, and Bram Akkermans (Switzerland: Springer International, 2017), 66; Nili Cohen, "From the Common Law to the Civil Law: The Experience of Israel," in *Precontractual Liability in*

ford and Others v. Miles and Another [1992] 2 AC 128 case[15] (hereinafter the Walford case), nor American Law does not embrace pre-contractual liability.[16] Lord Ackner argued that

> (…) the concept of a duty to carry on negotiations in good faith is inherently repugnant to the adversarial position of the parties when involved in negotiations. Each party to the negotiations is entitled to pursue his (or her) own interest (…). A duty to negotiate in good faith is as unworkable in practice as it is inherently inconsistent with the position of the negotiating parties (…).[17]

It shows that while the position of the common law system corresponds to classical liberalism, the civil law system coincides with social liberalism (*Sozialliberalismus*) in terms of the ideological infrastructure of legal and jurisprudential policy.

It is important to determine the starting point of contract negotiations because the obligations of the negotiators start at that moment. The starting point of contract negotiations is a controversial issue in the doctrine. Opinions on this subject are as follows:

– It starts when one negotiator offers to begin contract negotiations with the other party in order to conclude the main contract.[18]

European Private Law, eds. John Cartwright and Martijn Hesselink (Cambridge: Cambridge University Press, 2009), 400–1.

15 House of Lords, Walford and others v. Miles and another, accessed December 9, 2024, https://www.ius.uzh.ch/dam/jcr:0ad63435-bcb7-490f-ab7b-154d9acc497f/Walford%20v.%20Miles.pdf.

16 Cohen, "From the Common Law," 398. As DiMatteo et al. state, "According to American and English common law, a negotiating party owes no duty of good faith to the other party. One may terminate negotiations in bad faith without liability for the other parties' expenses. One major exception to this freedom of negotiation without liability is promissory estoppel or reliance theory (...) the American Uniform Commercial Code (UCC) mandates good faith only during the performance and enforcement of contracts. Good faith under the civil law system, however, means more than the breaking off of negotiations in bad faith." See: DiMatteo et al., *International Sales Law*, 32. Although the negotiation creates a positive surplus, pre-contractual liability may deter parties from negotiating, because it increases transaction costs that intimidate them. See: Melato and Parisi, "A Law and Economics," 433.

17 House of Lords, Walford and others v. Miles and another, accessed December 9, 2024, https://www.ius.uzh.ch/dam/jcr:0ad63435-bcb7-490f-ab7b-154d9acc497f/Walford%20v.%20Miles.pdf; see also: Smits, "The Law of Contract," 66.

18 Pelin Işıntan, "Sözleşme Müzakereleri" (PhD diss., Galatasaray University, İstanbul 2009), 11.

- It starts with an intention agreement of negotiators to begin contract negotiations.[19]
- It starts with a serious act of a negotiator in order to conclude the main contract.[20]
- It starts with the offeree's positive reaction.[21]
- It starts from the moment that one of the negotiators decides to contact the other negotiator.[22]
- It starts with acts that may lead to concluding the main contract according to law, customary law or local custom.[23]

A presumption should be accepted that contract negotiation starts if a negotiator contacts the other negotiator entering their social contact area. For example, if one of the negotiators enters the social contact area of the other negotiator who is a merchant, contract negotiation is presumed to start from the moment of entering the merchant's social contact area. The presumption must be refuted by the person who enters the merchant's social contact area.[24] On the other hand, if none of the negotiators is a merchant, the negotiation starts when the other negotiator accepts the first negotiator's declaration of negotiation (*müzâkere beyanı*).

Contract negotiations continue until one of the negotiators makes an offer to conclude the main contract. The starting of contract negotiations is not subject to any formal requirements.[25]

Negotiators may prepare a variety of documents some of which are legally binding and others are not. Documents used in negotiations are not *numerus clausus* (limited number), but most preferred documents can

19 Hamdi Yılmaz, "Sözleşme Görüşmelerinde Kusur "Culpa in Contrahendo" ve Sorumluluğun Hukuksal Niteliğinde Yeni Görüşler," *Yargıtay Dergisi* 11, no. 3 (1985): 238.

20 Erhan Adal, *Akit Öncesi Sorumluluk (Culpa in Contrahendo)* (İstanbul: İstanbul University, 1970), 27.

21 Kurt Ballerstedt, "Zur Haftung für culpa in contrahendo bei Geschäftsabschluß durch Stellvertreter," *Archiv für die civilistische praxis* 151, (1951): 506.

22 Işıntan, "Sözleşme Müzakereleri," 11, footnote 13.

23 Rainer Gonzenbach, *Culpa in Contrahendo im schweizerischen Vertragsrecht* (Bern: Verlag, 1987), 34.

24 For example, if (A) enters (B)'s tobacco shop (social contact area) only to ask for the address, then the presumption regarding the conclusion of the contract is refuted.

25 Işıntan, "Sözleşme Müzakereleri," 12.

be listed, such as the letter of intent (*niyet mektubu*), individual contracts (*münferit sözleşmeler*), memorandum of understanding (*mutabakat zaptı*, *Punktationen*), meeting notes (*toplantı notları*), gentlemen's agreement (*centilmen anlaşması*) and instructions to perform (*îfâ tâlimâtları*).

A letter of intent is a text consisting of a unilateral declaration sent by one party to the other during the negotiations, in which it commits itself to start or continue negotiations for the purpose of entering into a contract.[26] Even if the other party accepts the letter of intent, it is not binding, that is, it does not create an obligation for the parties to conclude a contract.[27] However, in some cases, "mutual letters of intent" may become legally binding. For example, it can provide grounds for establishing negotiation contracts or a preliminary contract that is concluded at the negotiation stage and is independent of the original contract. One of the ways used in practice is to prepare the letter of intent by dividing it into two parts – binding provisions and non-binding provisions.[28] The letter of intent is not subject to any formal requirements, but for the purpose of proof, it should be sent in written form.[29]

Negotiators may conclude individual contracts at the stage of contract negotiations. It is important to prevent conflicts that may arise in the future. In addition, if one of the negotiators breaches the obligations arising from the individual contracts, positive damages can be claimed instead of negative damages of *culpa in contrahendo* liability in principle.[30] Individual contracts concluded at the negotiation stage are as follows:[31]

– confidentiality or non-disclosure agreement (clauses *de confidentialité*): it is concluded when one of the parties needs to provide the other party with some information that it wants to be kept confidential;
– a non-negotiation agreement (exclusive negotiation clause, *clause d'exclusivité de la négociation)* – it is a contract stipulating that parallel

[26] Kocayusufpaşaoğlu, *Borçlar Hukukuna Giriş*, 111; Işıntan, "Sözleşme Müzakereleri," 72–3.
[27] Kocayusufpaşaoğlu, *Borçlar Hukukuna Giriş*, 111; Işıntan, "Sözleşme Müzakereleri," 74.
[28] Ibid., 76.
[29] Ibid., 73.
[30] However, in exceptional cases, the court can determine positive damages in *culpa in contrahendo* liability. If the fault of the person causing the damage is at the level of intent or gross negligence and if equity requires it, compensation for positive damage may be requested under *culpa in contrahendo* liability. Kocayusufpaşaoğlu, *Borçlar Hukukuna Giriş*, 9.
[31] Ibid., 170.

negotiations with a competitor should not be conducted for a certain period of time during negotiations;
– agreement regarding how to share the costs of the negotiations.

Negotiators may prepare a memorandum of understanding (*Punktationen*) which is a draft contract that establishes the issues on which they agree at a certain stage of the contract negotiations. As a rule, the draft contract is not binding, it can only be used to interpret the main contract in the future.

Meeting notes which include discussions of the parties are preferred by professionals. They are non-binding, i.e. they do not create any contractual obligations for the parties.

Gentlemen's agreements can be used frequently in corporate and professional commercial relations. They are not legally but morally binding. The main function of Gentlemen's agreements is to ensure that the negotiators can keep each other's commercial reputation under control and such agreements play an important role in the control of commercial ethics.[32]

For negotiators contract negotiations generate obligations that arise from the rule of good faith (TCC Article 2).[33] They are as follows:[34]
– obligation to initiate, conduct and continue the negotiations to the end of the stage;
– confidentiality obligation (financial information, trade secrets, technical secrets, know-how information, information obtained from market research, etc.);[35]
– obligation to share the costs of the negotiations (legal consultancy and supervision fees, travel and accommodation expenses of

[32] Işıntan, "Sözleşme Müzakereleri," 96, fn. 328; Kocayusufpaşaoğlu, *Borçlar Hukukuna Giriş*, 111–2.

[33] DiMatteo et al., *International Sales Law*, 27–8.

[34] Kocayusufpaşaoğlu, *Borçlar Hukukuna Giriş*, 9 and 737; Safa Reisoğlu, *Türk Borçlar Hukuku Genel Hükümler* (İstanbul: Beta Yayıncılık, 2014), 345; Burcu Oğuztürk, *Güven Sorumluluğu* (İstanbul: Vedat Kitapçılık, 2008), 95. For cases from Israel, see: "From the Common Law," 403 ff.

[35] Publicly available information and information held by competitors are not within the scope of trade secrets. See: 11th Civil Division of Turkish Court of Cassation, 28/10/2005, File No. 2005/11731, Decision No. 2005/10513 (www.kazanci.com.tr).

the negotiators, feasibility studies to be carried out for the negotiated transaction, etc.);
- obligation not to engage in parallel negotiations with others (exclusivity, *münhasırlık*, *exclusivité*);
- obligation not to harm the other negotiator;[36]
- obligation to provide correct information (*Pflichten bei Vertrags-verhandlungen*);[37]
- obligation not to commit oneself to an act that is impossible to perform;
- obligation not to terminate negotiations without reasonable justification or reasonable notice period.

If negotiations are individually contracted, breaching these individual contracts is subject to the rules of breach of contract (Turkish Code of Obligations (TCO Article 112 ff.). On the other hand, if negotiations are not individually contracted, breaching the behavioral obligations is subject to the liability of *culpa in contrahendo*. Even though the provisions of TCO Article 112 ff. are also applicable to the liability of *culpa in contrahendo*,[38] it is more advantageous that negotiators should have individually contracted negotiations. After all, the injured negotiator has the right to claim their positive damages, because, in the case of *culpa in contrahendo*, the injured negotiator can only claim their negative damages, but if equity so requires, the judge may increase the compensation to include positive damages.

---

36 As Helvacı states, "the negotiating parties must take precautionary measures in order to protect the assets and personal rights of each other." See: Helvacı, *Turkish Contract Law*, 12 and 162.

37 See: Dieter Medicus, *Allgemeiner Teil des BGB* (Heidelberg: Verlag, 2006), 176; Hans Stoll, "Haftungsfolgen fehlerhaften Erklärungen beim Vertragsschluss," in Gerhard Kegel and Marcus Lutter, *Ius inter nationes: Festschrift für Stefan Riesenfeld aus Anlaß seines 75. Geburtstages, Jurist* (Heidelberg, 1983), 275–99. See also: BGE 105 II 75, accessed September 30, 2024, https://www.bger.ch/ext/eurospider/live/de/php/aza/http/index.php?highlight_docid=atf%3A%2F%2F105-II-75%3Ade&lang=de&type=show_document&zoom=YES&.

38 However, some scholars stand for the traditional perspective that pre-contractual liability is governed by tort liability rules (TCO Article 49 ff.) because they argue that there is no contract at this stage. See: Hugo Oser and Wilhelm Schönenberger, *Kommentar zum Schweizerischen Zivilgesetzbuch*, Vol. 5, *Das Obligationenrecht, Erster Halbband: Art. 1–183* (Zürich: Schulthess, 1929), Articles 26–39.

Although the parties fail to conclude the contract or a voidable contract, pre-contractual liability continues.[39]

3. Instructions to Perform

While contract negotiations are ongoing, it may be the case that one of the parties sends instructions to the other party to start contract performance and the other party begins preparations for the performance stage of the main contract. Instructions to perform are common and specifically observable in various market sectors, especially the construction and defense industries. The main question is whether the instructions to perform in the negotiation phase lead to the conclusion of the main contract. Some scholars[40] argue that instructions to perform are a separate contract specific to the negotiation phase and providing them does not mean that the main contract is concluded. On the other hand, the author of this article agrees with the opinion which is based on the court decision of Gunderson & Sons, Inc. v. Albert L. Cohn 596 F. Supp. 379, D.C. Mass. 1984[41] (hereinafter: Gunderson case) that the conclusion of a main contract should be accepted in the case of instructions to perform.

In practice, instructions to perform are generally used as a "condition" that the stronger party offers to the other party in order to continue contract negotiations. The weaker party is forced to accept them in order to continue the talks and carry out the instructions to perform in order to conclude the main contract. It is consistent with the social-liberal legal policy that if the performance instructions at the negotiation phase are "imposed" on the weaker party, it is necessary to presume that the main contract has been concluded. On the other hand, if the performance instructions are given as a "recommendation" and not as an "imposition," then the presumption that the main contract has been concluded does not come to the fore. Therefore, if the other/weaker negotiator has fulfilled the recommended instructions to perform and the negotiations have a negative result, the other/weaker

39 Helvacı, *Turkish Contract Law*, 163.

40 Hasan Ayrancı, *Ön Sözleşme* (Ankara: Yetkin Yayınları, 2006), 94; Gül Doğan, *Ön Sözleşme (Sözleşme Yapma Vaadi)* (İstanbul: Yeditepe University, 2006), 83.

41 U.S. District Court for the District of Massachusetts, Gundersen & Son, Inc. v. Cohn, 596 F. Supp. 379 (D. Mass. 1984), accessed June 22, 2024, https://law.justia.com/cases/federal/district-courts/FSupp/596/379/1676951/.

negotiator cannot claim compensation from the person giving instructions. The author's view is consistent with the cheapest cost avoider (least-cost-avoider or best cost avoider) approach according to the economics of law in line with Katz's opinion that

> [f]or purposes of promoting optimal reliance in preliminary negotiations, the metaphor of the least-cost avoider is more useful than the algorithm of the Hand Formula. It is much easier for a tribunal to identify which party was in the better position to make the reliance decision than for the tribunal to make that decision itself after a dispute has arisen.[42]

4. Conclusion

According to *de lege lata* (what is), different legal families provide different solutions, but *de lege ferenda* (what should be) requires optimality, such as optimal pre-contractual reliance and liability for the maximization of social welfare. The author agrees with Melato's and Parisi's view that Calabresi's and Katz's cheapest cost avoider approach is more useful than Bebchuk and Ben Shahar's incentive model regarding searching for intermediate rules, because

> (…) none of the proposed intermediate rules resemble existing legal rules. The analysis is eminently 'normative', suggesting new legal solutions rather than analysing the efficiency of existing rules. For this reason, Bebchuk and Ben-Shahir's model will not be much used in the analysis of the following hypothetical cases.[43]

Therefore, the decision in the Gunderson case seems perfectly justified in stating that if the stronger party imposes the instructions to perform on the weaker party, it should be accepted that the main contract is concluded, because the stronger party in this type of case will mostly be the cheapest cost avoider (especially in the sectors of defense, construction, consulting

---

42 Avery Katz, "When Should an Offer Stick? The Economics of Promissory Estoppel in Preliminary Negotiations," *Yale Law Journal* 105, (1996): 1249 and 1271. See also: Bebchuk and Ben-Shahar's model: searching for an efficient "intermediate" rule that is based on parties' incentives for precontractual reliance. Lucian Arye Bebchuk and Omri Ben-Shahar, "Precontractual Reliance," *Journal of Legal Studies* 20, (2001): 423.

43 Melato and Parisi, "A Law and Economics," 439.

services and other similar areas) and should take the risk of non-reliance or incomplete reliance.

References

Adal, Erhan. *Akit Öncesi Sorumluluk (Culpa in Contrahendo)*. İstanbul: İstanbul University, 1970.

Ayrancı, Hasan. *Ön Sözleşme*. Ankara: Yetkin Yayınları, 2006.

Ballerstedt, Kurt. "Zur Haftung für culpa in contrahendo bei Geschäftsabschluβ durch Stellvertreter." *Archiv für die civilistische praxis* 151, (1951): 501–31.

Bebchuk, Lucian Arye, and Omri Ben-Shahar. "Precontractual Reliance." *Journal of Legal Studies* 20, (2001): 423–57.

Cohen, Nili. "From the Common Law to the Civil Law: The Experience of Israel." In *Precontractual Liability in European Private Law*, eds. John Cartwright and Martijn Hesselink, 389–430. Cambridge: Cambridge University Press, 2009.

DiMatteo, Larry A., L.J. Dhooge, Stephanie M. Greene, and V.G. Maurer. *International Sales Law: A Critical Analysis of CISG Jurisprudence*. Cambridge: Cambridge University Press, 2005.

Doğan, Gül. *Ön Sözleşme (Sözleşme Yapma Vaadi)*. İstanbul: Yeditepe University, 2006.

Dönmez, Zeynep. "Avrupa Birliği'nde Tüketici Hukuku Alanında Kanunlaştırma Hareketleri ve Tüketicinin Korunması Modelleri." *Marmara Üniversitesi Hukuk Fakültesi Hukuk Araştırmaları Dergisi: Özel Sayı Prof. Dr. Cevdet Yavuz'a Armağan* 7, no. 3 (2016): 953–68.

Erman, Hasan. *Medenî Hukuk Dersleri*. İstanbul: Der Yayınları, 2021.

Gonzenbach, Rainer. *Culpa in Contrahendo im schweizerischen Vertragsrecht*. Bern: Verlag, 1987.

Hatemi, Hüseyin. *Medeni Hukuk'a Giriş*. İstanbul: On İki Levha Yayıncılık, 2020.

Helvacı, İlhan. *Turkish Contract Law*. Switzerland: Springer International, 2017.

Işıntan, Pelin. "Sözleşme Müzakereleri." PhD diss., Galatasaray University, İstanbul 2009.

Jung, Stefanie, and Peter Krebs. *The Essentials of Contract Negotiation*. Switzerland: Springer, 2019.

Katz, Avery. "When Should an Offer Stick? The Economics of Promissory Estoppel in Preliminary Negotiations." *Yale Law Journal* 105, (1996): 1249–309.

Klein, John, and Carla Bachechi. "Precontractual Liability and the Duty of Good Faith Negotiation in International Transactions." *Houston Journal of International Law* 17, no. 1 (1994): 1–25.

Kocayusufpaşaoğlu, Necip. *Borçlar Hukukuna Giriş – Hukukî İşlem – Sözleşme*. İstanbul: Filiz Kitabevi, 2017.

Kühne, Gunther. "Reliance, Promissory Estoppel and Culpa in Contrahendo: A Comparative Analysis." *Tel-Aviv University Studies in Law* 10, (1990): 279–96.

Mauser, Wolfram. "Billigkeit. Zum Konzept der Modernität im 18. Jahrhundert." In *Recherches germaniques*, no. 21 (1991): 49–77.

Medicus, Dieter. *Allgemeiner Teil des BGB*. Heidelberg: Verlag, 2006.

Melato, Eleonora, and Francesco Parisi. "A Law and Economics Perspective on Precontractual Liability." In *Precontractual Liability in European Private Law*, edited by John Cartwright and Martijn Hesselink, 431–48. Cambridge: Cambridge University Press, 2009.

Oğuzman, M. Kemal, and M. Turgut Öz. *Borçlar Hukuku Genel Hükümler*. İstanbul: Vedat Kitapçılık, 2022.

Oğuzman, M. Kemal, and Nami Barlas. *Medenî Hukuk*. İstanbul: On İki Levha Yayıncılık, 2021.

Oğuztürk, Burcu. *Güven Sorumluluğu*. İstanbul: Vedat Kitapçılık, 2008.

Oser, Hugo, and Wilhelm Schönenberger. *Kommentar zum Schweizerischen Zivilgesetzbuch*. Vol. 5, *Das Obligationenrecht, Erster Halbband: Art. 1–183*. Zürich: Schulthess, 1929.

Reisoğlu, Safa. *Türk Borçlar Hukuku Genel Hükümler*. İstanbul: Beta Yayıncılık, 2014.

Serozan, Rona. *İfa – İfa Engelleri – Haksız Zenginleşme*. İstanbul: Filiz Kitabevi, 2016.

Smits, Jan. "The Law of Contract." In *Introduction to Law*, edited by Jaap Hage, Antonia Waltermann, and Bram Akkermans, 53–77. Switzerland: Springer International, 2017.

Stoll, Hans. "Haftungsfolgen fehlerhaften Erklärungen beim Vertragsschluss." In Gerhard Kegel and Marcus Lutter, *Ius inter nationes: Festschrift für Stefan Riesenfeld aus Anlaß seines 75. Geburtstages, Jurist*, 275–99. Heidelberg, 1983.

Tegethoff, Michael. "Culpa in Contrahendo in German and Dutch Law – A Comparison of Precontractual Liability." *Maastricht Journal of European and Comparative Law* 5, no. 4 (1998): 341–68.

Yılmaz, Hamdi. "Sözleşme Görüşmelerinde Kusur "Culpa in Contrahendo" ve Sorumluluğun Hukuksal Niteliğinde Yeni Görüşler." *Yargıtay Dergisi* 11, no. 3 (1985): 234–52.