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Culpa in Contrahendo: A Testimony to the Changing Methodologies in Private International Law

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Abstract: The concept of *culpa in contrahendo* traditionally encompasses cases of disloyal conduct by the parties during the negotiation stage of a contract. It applies to a broad range of factual scenarios. Furthermore, the legal nature of *culpa in contrahendo* has long been the subject of debate, with some legal systems favouring its classification as a contractual matter and others as a delict. In the realm of private international law, these issues present significant challenges in terms of legal characterization as aptly demonstrated by the well-known case of *Tacconi v. Wagner* (2002), in which the Court of Justice of the European Union (CJEU) delineated the application of Articles 5(1) and 5(3) of the Brussels Convention (now Articles 7(1) and 7(2) of the Brussels I bis Regulation). The CJEU favored a tort-based qualification for claims arising from the breach of pre-contractual duties, but only insofar as they were not grounded in "obligations freely assumed by one party towards another." Despite the stance taken by the CJEU – which reflects the traditional conflict-of-laws approach, strictly distinguishing torts from contracts – the EU legislator, in Article 12 of the Rome II Regulation (2007), adopted a solution that can be

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described as an "accessory connection." According to this provision, the law applicable to a non-contractual obligation arising from dealings prior to the conclusion of a contract – regardless of whether the contract was ultimately concluded – is the law that applies to the contract or that would have applied to it had it been entered into. Only in exceptional cases will the applicable law be determined by connecting factors traditionally associated with torts, such as the place of damage (Article 12(2)). Thus, regardless of the delictual nature of *culpa in contrahendo*, such obligations are governed by the law applicable to the contract, even in instances where the contract never materialized. The article explores various approaches to the conflict-of-law characterization of pre-contractual liability and contrasts them with the pragmatic method of identifying the spatial "center of gravity" of the relevant legal relationship. Additionally, the article examines how the "accessory connection" operates under Article 12 of the Rome II Regulation with respect to pre-contractual liability, highlighting its advantages. It argues that while the adopted solution does not entirely dispense with traditional conflict-of-laws characterization, it significantly diminishes its practical application, as the *lex contractus* will invariably apply. Consequently, the EU legislator favors an independent localization of the legal relationship based on pragmatic criteria – specifically, an accessory reference to the law applicable to the contract.

1. Introduction

The concept of the *culpa in contrahendo* (fault in negotiating) is often traced back to the XIX-century German scholar Rudolf von Ihering. In his 1861 article,[1] von Ihering advocated that the party, whose culpable actions during negotiations caused the invalidity of the contract or prevented its perfection, should be liable for the harm resulting therefrom.[2] Since then, it has spread

1 Rudolf von Ihering, "Culpa in contrahendo oder Schadenersatz bei nichtigen oder nicht zur Perfektion gelangten Verträgen," *Jahrbücher für die Dogmatik des Heutigen Römischen und Deutschen Privatrechts* 4 (1861).

2 For a recollection of von Ihering's original ideas see: Friedrich Kessler and Edith Fine, "Culpa in contrahendo, Bargaining in Good Faith, and Freedom of Contract: A Comparative Study,"

to many corners of the world, raising considerable interest among comparative[3] and private international law lawyers in particular.[4] Even more, since Ihering's original idea, the concept of pre-contractual liability has immensely grown in scope covering a wide variety of factual situations. Looking from

Harvard Law Review 77, no. 3 (1964): 401; Dieter Medicus, "Zur Entdeckungsgeschichte der 'culpa in contrahendo'," in *Festschrift für Max Kaser zum 80. Geburtstag* (Vienna: Böhlau, 1986), 169.

[3] Among some of the more important works in English, see e.g. John Cartwright and Martijn Hesselink, *Precontractual Liability in European Private Law* (Cambridge: Cambridge University Press, 2008); Kessler and Fine, "Culpa in contrahendo, Bargaining in Good Faith," 401; Jan von Hein, "Culpa in contrahendo," in *The Max Planck Encyclopedia of European Private Law,* 2 vols., eds. Jürgen Basedow, Klaus J. Hopt, and Reinhard Zimmermann (Oxford: Oxford University Press, 2012), 430; Paula Giliker, "A Role for Tort in Pre-contractual Negotiations? An Examination of English, French, and Canadian Law," *International & Comparative Law Quarterly* 52, no. 4 (2003): 969; Paula Giliker, *Pre-Contractual Liability in English and French Law* (The Hague: Kluwer Law International, 2002); Sylviane Colombo, "The Present Differences between the Civil Law and Common Law Worlds with Regard to Culpa in Contrahendo," *Tilburg Foreign Law Review* 2 (1992): 341; Ewoud H. Hondius, ed., *Precontractual Liability: Reports to the XIIIth International Congress of Comparative Law, Montreal, Canada, 18–24 August 1990* (Deventer: Kluwer Law and Taxation, 1991); 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," *Connecticut Journal of International Law* 8 (1992): 77; Gunther Kuhne, "Reliance, Promissory Estoppel and Culpa in Contrahendo: A Comparative Analysis," *Tel-Aviv University Studies in Law* 10, (1990): 279; E. Allan Farnsworth, "Precontractual Liability and Preliminary Agreements: Fair Dealing and Failed Negotiations," *Columbia Law Review* 87, no. 2 (1987): 217. In Polish doctrine of comparative law, see: Agnieszka Machnicka, *Przedkontraktowe porozumienia – umowa o negocjacje i list intencyjny. Studium prawnoporównawcze* (Warsaw: Wolters Kluwer, 2007); Dominik Michoński, "Contractual or Delictual? On the Character of Pre-contractual Liability in Selected European Legal Systems," *Comparative Law Review* 20, no. 2 (2015): 151; Maria–Anna Zachariasiewicz, "Culpa in contrahendo," in *System Prawa Handlowego*, vol. 9, *Międzynarodowe prawo handlowe*, ed. Wojciech Popiołek (Warsaw: C.H. Beck, 2013), 336; Maria–Anna Zachariasiewicz, "Zasada dobrej wiary jako kryterium oceny zachowania stron w toku negocjacji w ujęciu prawnoporównawczym: ('culpa in contrahendo')," in *Rozprawy prawnicze: księga pamiątkowa profesora Maksymiliana Pazdana*, eds. Leszek Ogiegło, Wojciech Popiołek, and Maciej Szpunar (Kraków: Zakamycze, 2005), 1501.

[4] For some of the more recent works see: Dário Moura Vicente, "Culpa in contrahendo and the Brussels Ibis Regulation," in *Research Handbook on the Brussels Ibis Regulation*, ed. Peter Mankowski (Cheltenham: Edward Elgar Publishing, 2020), 311; Najib Hage-Chahine, "Culpa in Contrahendo in European Private International Law: Another Look at Article 12 of the Rome II Regulation," *Northwestern Journal of International Law & Business* 32, no. 3 (2011); Vésela Andreeva Andreeva, "La culpa in contrahendo y el Reglamento 1215/2012: más preguntas que respuestas," *Revista electrónica de estudios internacionales (REEI)*, no. 44 (2022),

a broad comparative perspective, disloyal conduct of a party during contractual negotiations, which results in damage to the other party – whether followed by the contract's conclusion or not – can be anything: a breach of a pre-contractual agreement, a violation of the implied quasi-contractual duty to negotiate in good faith, a breach of a statutory obligation treated as a delict, a *sui generis* source of liability, or even a type of unjust enrichment leading to restitution obligations. As we will come to see, the only common feature of all instances usually classified under the heading of the pre-contractual liability is that the contested conduct of a party "arises out of the dealings prior to the conclusion of the contract" – to borrow the wording of Article 12 of the Rome II Regulation.[5] The pre-contractual liability became a "common bag" for a variety of obligations and standards, as long as they are reasonably linked to a prospective, or an already concluded, contract.

Irrespective of its international career, *culpa in contrahendo* remains a somewhat elusive, if not obscure, concept, both in how it is conceptualized and in what factual situations it covers. This remains true until this day despite the fact that intense scholarly studies investigated the nature and scope of the *culpa in contrahendo*, courts – albeit to various degrees (depending on the jurisdiction) – have embraced it,[6] and legislators enacted specific

https://dialnet.unirioja.es/servlet/articulo?codigo=8783260; Ivo Bach, in *Rome II Regulation: Pocket Commentary*, ed. Peter Huber (Köln: Otto Schmidt, 2011), 311; Luboš Tichý, in *Rome II Regulation*, eds. Ulrich Magnus and Peter Mankowski (Köln: Otto Schmidt, 2019), 408. In the Polish doctrine, see: Łukasz Żarnowiec, "Culpa in contrahendo," in *System Prawa Prywatnego*, vol. 20B, *Prawo prywatne międzynarodowe*, ed. Maksymilian Pazdan (Warsaw: C.H. Beck, 2014), 850; Maria-Anna Zachariasiewicz, in *Prawo prywatne międzynarodowe. Komentarz*, ed. Maksymilian Pazdan (Warsaw: C.H. Beck, 2018); Maria-Anna Zachariasiewicz, "Kwalifikacja 'culpa in contrahendo' w prawie prywatnym międzynarodowym," *Problemy Prawa Prywatnego Międzynarodowego* 3, (2008): 35; Łukasz Żarnowiec, "Prawo właściwe dla odpowiedzialności z tytułu culpa in contrahendo na podstawie przepisów rozporządzenia Parlamentu Europejskiej i Rady (WE)–Rzym II," *Europejski Przegląd Sądowy*, no. 2 (2010).

5 Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II) O.J. L 199/40.

6 Some of the often discussed cases include decisions of: German Bundesgerichtshof (BGH) of 20 June 1952, 6 BGHZ 330; German Reichsgericht (RG) of 7 December 1911, RGZ 78, 239; French Cour de Cassation of 20 March 1972 in case Etablissements Vilber-Lourmat v. Sté des Etablissements Albert et Robert Gerteis; French Cour de Cassation of 6 January 1998 in case Sandoz v. Poleval, JCP 1998 II 10066. Also in Poland, courts seem more and more confident to award damages on the basis of the *culpa in contrahendo*. See e.g. some recent decisions: of Court of Appeals in Szczecin of 10 June 2021, I AGa 97/20 (a volleyball sport

legal provisions[7] to provide for the liability arising therefrom. The concept was even included in the uniform model law codifications of the turn

club justifiably expected conclusion of the sponsoring contract and financing from a shipyard, and so made investments in personnel and equipment aiming at sportive excellence on the basis of that expectation; the court found that the shipyard may be liable for the damage incurred therefrom under the principle the *culpa in contrahendo*); of the District Court in Warsaw of 18 October 2022, XVI GC 788/19 (the plaintiff purported to seek a grant from EU funds which required that a promise of financing is obtained from the bank; the plaintiff negotiated a loan contract with the bank; eventually the bank did not issue a promise of the loan; although the bank knew much earlier that its own financial analyst had a negative opinion on the project, it carried on negotiations attempting also to induce the plaintiff to buy other products offered by the bank; the plaintiff was successful in recovering from the bank the costs incurred during negotiations, including in particular the costs of the plaintiff's advisor and costs of preparing the grant application).

7 In Germany, the legislator embraced *culpa in contrahendo* at the occasion of the reform of the law obligations in 2002. See §§ 280(1), 311(2) and 241(2) of the Bürgerliches Gesetzbuch (BGB). For a brief presentation of these rules see e.g. Jan von Hein, in Basedow, Hopt, and Zimmermann, *The Max Planck Encyclopedia*, 430; Vicente, "Culpa in contrahendo," 311. More recently, in the 2016 reform, the French legislator included specific rules to its Code Civil, providing for obligation to conduct negotiations in good faith and a right to seek damages by the injured party (Article 1104 and 1112). Analogical rules on *culpa in contrahendo* can also be found in the Civil Codes of Italy (Article 1337), Greece (Article 197), and Portugal (Article 227(1)). The Polish legislator introduced specific rules devoted to precontractual liability by amending the 1964 Civil Code on 14 February 2003 (Journal of Laws 2003, No. 49, item 408; hereafter: "KC"). Two rules modelled after PECL and UNIDROIT Principles were enacted. First, according to Article 72 §2 KC a party who commenced or conducted negotiations in breach of the rules of fair dealing, in particular with no intention to conclude a contract, is obliged to compensate for the damage which the other party suffered because it expected that the contract will be concluded. Second, under Article 72^1 KC the confidential information passed during negotiations is protected and the injured party is offered the right to seek damages or restitution of improperly obtained benefits. For the literature about Polish law in that respect, see especially: Przemysław Sobolewski, "Culpa in contrahendo w polskim prawie cywilnym," *Studia Iuridica*, no. 56 (2013): 37; Wojciech J. Kocot, "Culpa in Contrahendo as the General Ground for Precontractual Liability in Polish Civil Code," *OER Osteuropa Recht* 67, no. 2 (2021): 202; Maria-Anna Zachariasiewicz, "Culpa in contrahendo in Polish Law," in *Tort Law in Poland: Germany and Europe*, eds. Bettina Heiderhoff and Grzegorz Żmij (Munich: Sellier European Law Publisher, 2009); Marcin Krajewski, "Culpa in contrahendo," in *System Prawa Prywatnego*, vol. 5, *Prawo zobowiązań – część ogólna*, ed. Ewa Łętowska (Warsaw: C.H. Beck, 2006), 709 et seq.; Wojciech J. Kocot, *Odpowiedzialność przedkontraktowa* (Warsaw: C.H. Beck, 2013).

of the XXI century, such as the Principles of European Contract Law,[8] the UNIDROIT Principles of International Commercial Contracts,[9] and the Draft Common Frame of Reference.[10]

One should think that the theoretical difficulties surrounding the *culpa in contrahendo* could diminish its role in practice. Far from that. As the commercial relationships develop, the relevance of the pre-contractual liability grows. The complex nature of modern business dealings – especially in an international context – which manifests in a large number of involved parties, and the variety of interconnected contractual arrangements, render the negotiations longer and increase their cost. It thus raises risks associated thereto. The knowledge and information shared at the occasion of the negotiations are increasingly important. Consider in particular the role of the various types of third-party advisors (such as e.g. auditors, technical consultants, lawyers, or tax advisors) assisting parties in any major business transaction.

The final point in setting the stage for our discourse touches upon the limits of permissible interference of the courts with the freedom of contracting. The basic rule is – and must be – as reminded not only by common law courts[11] and many scholars on the continent,[12] but also by uniform

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8 Article 2:301 (negotiations contrary to good faith) and 2:302 (breach of confidentiality) [in the 2002 version of the Principles]. The Principles are available e.g. at: https://www.trans-lex.org/400200/_/pecl/.

9 Article 2.1.15 (negotiations in bad faith) and 2.1.16 (duty of confidentiality) [in 2016 version of the Principles]. The UNIDROIT Principles are available at the website of the International Institute for the Unification of Private Law, accessed November 6, 2024, https://www.unidroit.org/instruments/commercial-contracts/unidroit-principles-2016/.

10 Article-II.3:301(3) (liability for breaking off negotiations) and article II.-3:302 (dealing with confidential information).

11 See the much cited decision of the House of Lords in Walford v. Miles [1992] 2 AC 128, 138 ("the concept of a duty to carry on negotiations in good faith is inherently repugnant to the adversarial position of the parties (...). Each party to the negotiations is entitled (...) to threaten to withdraw from further negotiations or to withdraw in fact (...)"). Cf. E. Allan Farnsworth, "Duties of Good Faith and Fair Dealing under the Unidroit Principles, Relevant International Conventions, and National Laws," *Tulane Journal of International and Comparative Law* 3 (1995): 51; Giliker, "A Role for Tort," 978; William Tetley, "Good Faith in Contract: Particularly in the Contracts of Arbitration and Chartering," *Journal of Maritime Law and Commerce* 35, no. 4 (2004): points V–VII.

12 See, e.g.: Jan van Dunné, in Hondius, *Precontractual Liability*, 223; Martin Hesselink, in Cartwright and Hesselink, *Precontractual Liability in European Private Law*, 46; M. Fontaine, *Concluding Report*, in *Formation of Contracts and Precontractual Liability* (Paris:

rules laid down in PECL[13] and UNIDROIT Principles,[14] that each party is free to walk away from the negotiations, which have not produced a satisfactory draft of the intended contract. Consequently, in principle, each party must bear the risks associated with the negotiations and cover its costs. This rule competes, however, with a conviction that a party who created legitimate expectations of another that the contract will be concluded or that it will produce certain effects, should not be permitted to disrupt this trust without a justified cause and should make good for the damage caused.[15] Still, the latter should constitute an exception triggering liability only where fairness so demands. As a consequence, the belief that the limits on party freedom are set in advance by the rules of law competes with the conviction that legal regulations aim not so much at limiting freedom, but rather at protecting it from abuses.

The present article unfolds in three parts. First, we briefly show how the differences at the substantive law level cause difficulties in understanding the nature and scope of the precontractual liability. We then attempt to summarize various approaches to the characterization of the *culpa in contrahendo* in private international law. In the third part, we discuss and evaluate the approach taken by Article 12 of the Rome II Regulation. We argue, in particular, that the solution adopted by the EU legislators largely dispenses with the necessity to diligently carry out the conflict-of-law characterization, thereby altering the traditional methodology of private international law. Finally, we attempt to make some conclusions.

ICC Publishing, 1993), 344. In Polish literature: Marcin Krajewski, in *System*, 716; Ewa Wójtowicz, *Zawieranie umów między przedsiębiorcami* (Warsaw: Wolters Kluwer Polska, 2010), 148; Maria-Anna Zachariasiewicz, "Z rozważań nad naturą prawną culpa in contrahendo," in *Rozprawy z prawa prywatnego, prawa o notariacie i prawa europejskiego: ofiarowane Panu Rejentowi Romualdowi Sztykowi*, eds. Edward Drozd, Aleksander Oleszko, and Maksymilian Pazdan (Kluczbork: Klucz-DruK, 2007), 348.

13 Article 2:301(1): "A party is free to negotiate and is not liable for failure to reach an agreement."

14 Article 2.1.15(1) of the UNIDROIT Principles contains the exact same wording as Article 2:301(1) of PECL.

15 See, e.g.: Opinion of AG Geelhoed in case C-334/00 *Tacconi*, ECR 2000, I-7359, para. 55.

2. Difficulties in Conceptualizing the *Culpa in Contrahendo*

The first difficulty in conceptualizing pre-contractual liability arises from the fact that it is associated with a wide variety of factual patterns. Here, we will only deal with the most important types of circumstances.

The model scenario is described in Article 2.1.15 of the UNIDROIT Principles and Article 2:301 of PECL, namely breaking off negotiations in bad faith and thus causing harm to another, with the bad faith existing, in particular, where a party entered or continued negotiations with no real intention to reach agreement.[16] The basic assumption here is that certain wrongdoing – a behavior violating good faith and rules of fair dealing in business – or, possibly, even malice, may be attributed to the party, who breaks off negotiations.

A different situation is portrayed by Article 2.1.16 of the UNIDROIT Principles and 2:302 PECL. Here, the essence of the wrongdoing of a party lies in disclosing information given by the other party as confidential during negotiations or using such information for the party's purposes.

Next, the concept of pre-contractual negotiations covers also instances of providing the other party with false or misleading information, or, conversely – not providing required or otherwise crucial information, at the time of contracting. Such misrepresentation can either cause invalidity of the contract and a loss associated therewith (which was the setting originally contemplated by R. von Ihering) or, conversely, not affect the validity, but leave the other party with an unwanted and unprofitable contract, thus resulting in a loss.

Finally, we can talk about the *culpa in contrahendo* in situations where a party manipulates the rules of the contract formation. One example in this group of situations is when the offeror unjustifiably revokes an irrevocable offer, which results in a contract not being concluded and loss on the part of the other party who relied on the offer. This scenario may only occur under laws that oblige the offeror not to revoke an irrevocable offer, but do permit to treat such revocation as effective (and grant a *culpa in contrahendo* remedy).[17]

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16 Article 2.1.15(3) UNIDROIT Principles; Article 2:301(3) PECL.

17 This seems to be the case e.g. under French law. Conversely, under Polish law, an attempt to revoke an irrevocable offer is ineffective, with a result that the contract is concluded even

Second, an equally important fact underlying difficulties on a comparative law level is the different treatment afforded to pre-contractual wrongdoings in various legal systems. Traditionally, a distinction is made between legal systems in which liability for wrongful conduct during negotiations is based on a contractual basis, because the parties are deemed to be bound by duties of conduct that are contractual in nature[18] (Germany) and those that treat the *culpa in contrahendo* as essentially delictual (France,[19] Belgium, Poland,[20] Venezuela, Argentina, Quebec). The latter group of legal systems rejects the possibility of the existence of a special relationship between the partners at the negotiation stage, and thus provide a plaintiff only with a relief in tort. In many legal systems (Italy,[21] Spain, Portugal, Greece, Switzerland, Austria, the Netherlands,[22] and Japan), on the other hand, the liability for breach of good faith can be in contract or in tort, depending on the circumstances. Necessarily, the above picture is somewhat simplified for the present purposes. One should remember that often the different legal bases compete against each other within the same legal systems, as underlined by concepts such as the implied contract to negotiate in good faith, the idea of abuse of rights, the need to protect reliance, or the principle of good faith.

Different national treatment of the *culpa in contrahendo* depends foremost on the nature and function attributed to the delictual liability within a particular legal system.[23] The nature and function of tort law thus determine limits of when and what may the plaintiff recover on that basis. The search for other bases takes place in those legal systems where the tort

after the attempted revocation (provided that the acceptance is dispatched before the lapse of the period of validity of the offer in question).

18 See, e.g.: Vicente, "Culpa in contrahendo," 311.

19 See, e.g.: Opinion of AG Geelhoed in *Tacconi*, para. 61; Vicente, "Culpa in contrahendo," 313.

20 A view that liability for *culpa in contrahendo* has its basis in delict seems well established in Poland. See, e.g.: Żarnowiec, in Pazdan, *System*, vol. 20A, 850; Zbigniew Radwański and Adam Olejniczak, *Zobowiązania – część ogólna* (C.H. Beck, 2005), 132; Zachariasiewicz, "Culpa in contrahendo in Polish Law," 135; Sobolewski, "Culpa in contrahendo," 28.

21 Opinion of AG Geelhoed in *Tacconi*, para. 59.

22 Dutch law is specific in that it identifies three stages of negotiation. As the negotiations advance, breaking them off creates liability for the costs incurred by the other party (at the 2nd stage) or precludes the possibility to terminate negotiations entirely (3rd stage). See: Opinion of AG Geelhoed in *Tacconi*, para. 62.

23 Giliker, "A Role for Tort," 975.

law either does not cover cases of *culpa in contrahendo*, or, due to its shortcomings, does not constitute an adequate remedy and fails to protect the violated interests of the parties. The French (as well as Polish) model of a general and broadly defined tort formula, with precisely defined prerequisites for liability and a wide concept of damage (which includes purely economic loss), contrasts with the framework of tort liability in common law systems and German law. In the common law systems, the place of the general tort formula is occupied by specific types of torts. The case-by-case approach is accompanied by a reluctance to generalize and a belief that not all losses (especially pure economic loss) deserve compensation. Moreover, the recovery for losses, which would be characterized as *culpa in contrahendo* on the continent, in common law is often replaced by restitution for unjust enrichment.[24] A general duty of good faith that must be observed in negotiations is, nevertheless, rejected. In Germany, on the other hand, the weaknesses of tort law have led to affording the *culpa in contrahendo* a contractual nature.[25] Tort law protects – in principle – only certain goods and interests, such as life, health, liberty, or property (§ 823(1) BGB). The purely pecuniary damages are unavailable (*reiner Vermögensschaden*).[26] The preference for a contractual basis was further determined by the greater ease of establishing the liability of the wrongdoer. This includes a more favorable statute of limitations for the injured party and the burden of proof: the injured party only proves the violation of a specific pre-contractual obligation, while the burden of exculpation rests on the shoulders of the wrongdoer. The introduction of the *culpa in contrahendo* specific rules (§§ 280(1), 311(2) and 241(2)) in BGB in the 2002 reform of the law obligations has not changed that. The contractual characterization of the precontractual liability has, however, contributed to blurring the boundary between the pre-contractual and contractual stages and to equating negotiating duties with a contractual obligation, with similar remedies being available for their breach.

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24 von Hein, in Basedow, Hopt, and Zimmermann, *The Max Planck Encyclopedia*, 431.

25 See, e.g.: Gerhard Hohloch, "Culpa in contrahendo w prawie prywatnym międzynarodowym,"*Problemy Prawne Handlu Zagranicznego* 19/20, (2000): 15; von Hein, in Basedow, Hopt, and Zimmermann, *The Max Planck Encyclopedia*, 430.

26 von Hein, in Basedow, Hopt, and Zimmermann, *The Max Planck Encyclopedia*, 430.

As a last point in this section, one might remind that specific rules on the precontractual liability were included in the uniform rules of contract law, i.e. in the UNIDROIT Principles and PECL. This confirms a close relationship of the concept with the law of contracts, although should not – in our view – be treated as a confirmation of the contractual nature of the *culpa in contrahendo.*[27]

3. Characterization Criteria

Given the above-mentioned differences and complications, the problem at the private international law level was always how to characterize – as a contract, a delict, or otherwise – the instances of pre-contractual liability. The scholars have advocated and the courts have employed several criteria when dealing with instances of precontractual liability.

The most important (and most easily identifiable[28]) factor[29] – as laid out in the famous *Tacconi* judgment – is the source of the pre-contractual obligation, the breach of which causes loss to another party to negotiations. *Tacconi* was a case decided by the CJEU in 2002,[30] where the plaintiff (Tacconi) asked the Italian court to find that defendant (HWS) had unjustifiably refused to carry on the sale of a molding plant and hence had breached the duty to act in good faith. Tacconi requested the court to order HWS to pay compensation for the loss sustained. The Italian court had doubts whether such action to establish pre-contractual liability falls within the matters relating to tort, delict, or quasi-delict and thus is covered by Article 5(3) of the Brussels Convention[31] [now Article 7(2) of the Brussels I bis Regulation], or whether it should be classified as a "matter relating to a contract" and thus be covered by Article 5(1) of the Brussels Convention [now Article 7(1) of

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27 We would not go as far as to say that this evidences "affinity to German legal conceptions," as one author suggested (von Hein, in Basedow, Hopt, and Zimmermann, *The Max Planck Encyclopedia*, 432).

28 Which renders characterization process foreseeable for the parties. See: Hage-Chahine, "Culpa in Contrahendo," 480.

29 Simone Egeler, *Konsensprobleme im internationalen Schuldvertragsrecht* (St. Gallen: Dike-Verl 1994), 228; Zachariasiewicz, "Kwalifikacja," 42.

30 CJEU Judgment of 17 September 2002, Fonderie Officine Meccaniche Tacconi SpA v. Heinrich Wagner Sinto Maschinenfabrik GmbH (HWS), Case C-334/00, ECLI:EU:C:2002:499..

31 1968 Brussels Convention on jurisdiction and the enforcement of judgments in civil and commercial matters (OJ L299, 31 December 1972), 32.

the Brussels I bis Regulation]. The European Court ruled that if such action is not based on the breach of an "obligation freely assumed by one party towards another," but on the breach of the rules of law, which require parties to negotiate in good faith, then it must necessarily fall within the ambit of "matters relating to tort, delict or quasi-delict." Conversely, it results from the *Tacconi* judgment, that if a party has freely assumed obligations towards another on the occasion of negotiations, then the liability for their breach should be viewed as contractual.[32] The notion of the "obligation freely assumed" was central also in other (not relating to *culpa in contrahendo*) cases, in which the European Court was faced with a necessity to distinguish between actions falling under Article 7(1) or 7(2) of the Brussels regime on one hand,[33] or Article 7(1) and other provisions of Brussels I on the other.[34] It should be noted, however, that *Tacconi* was met with much criticism in the doctrine. Some argued, inter alia, that whether the duties such as those relied on by the plaintiff in *Tacconi* are freely assumed by the parties or not, should be immaterial for the characterization of the claim as contractual or non-contractual.[35] Nevertheless, it is clear that *Tacconi*, albeit decided under the Brussels Convention, constitutes a point of reference for the interpretation of Rome II and Rome I regulations.

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32 Hage-Chahine, "Culpa in Contrahendo," 467 and the literature cited therein supporting this reading of *Tacconi*.

33 CJEU Judgment of 17 June 1992, Jakob Handte & Co. GmbH v. Traitements Mécano-chimiques des Surfaces SA, Case C-26/91, ECLI:EU:C:1992:268 (action to establish liability brought by a sub-buyer of goods against the manufacturer does not fall within Article 5(1) of the Brussels Convention because there is no "obligation freely assumed"); CJEU Judgment of 13 March 2014, Marc Brogsitter v. Fabrication de Montres Normandes EURL and Karsten Fräßdorf, Case C-548/12, ECLI:EU:C:2014:148 (the action alleging unfair competition concerns "matters relating to a contract" for the purposes of the Brussels regime, if the conduct complained of may be considered a breach of the terms of the contract).

34 CJEU Judgment of 11 November 2020, Ellmes Property Services Limited v. SP, Case C-433/19, ECLI:EU:C:2020:900 (action brought by a co-owner against another co-owner); CJEU Judgment of 13 March 2013, Česká spořitelna, a.s. v. Gerald Feichter, Case C-419/11, ECLI:EU:C:2013:165 (claims under a promissory note fall within Article 5(1) of the Brussels Convention).

35 Vicente, "Culpa in contrahendo," 322; Dário Moura Vicente, "Precontractual Liability in Private International Law: A Portuguese Perspective," *Rabels Zeitschrift für ausländisches und internationales Privatrecht* 67, no. 4 (2003): 710.

The decisive characterization criterion here is thus the source of obligation. Contractual obligations result from acts of free will – they are "freely assumed" in the parlance of the CJEU – while delictual duties arise by operation of law, which imposes universal obligations for any party undertaking certain conduct. We ask whether there has been a violation of a positive duty of loyalty to the other partner, which is specific and more far-reaching than the general duty not to harm others, or whether there has been a violation of only a general prohibition against abusing negotiating freedom for one's interests or with the intent to harm another.

Albeit under the Brussels I bis Regulation and – by extension – also under Rome I and II Regulations – the decisive criterion is the source of obligation, one should also briefly mention other possible approaches.[36] One option is to rely on the basis for liability alleged by the plaintiff. If the plaintiff relies on the fault (bad faith understood in a subjective sense) of the wrongdoer, the action should be characterized as a delict. Conversely, if the liability is to be imposed even without the wrongdoer's culpability, the action is in contract.[37] Next, the characterization of the precontractual liability may depend on the phase of negotiations.[38] The more advanced they are, the more likely it is that the question of the liability for pre-contractual conduct is subsumed by the law applicable to the contract. That is particularly the case if the contract is eventually concluded, even if the action in question refers to occurrences preceding the contract. Furthermore, whether the action should be treated as delictual or contractual may depend on the remedy sought by the plaintiff.[39] If the action is related to the validity of the contract or seeks expectation damages (positive contractual interest), it should be characterized as contractual. If the plaintiff seeks reliance damage it is treated as tortious.

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36 See in more detail: Zachariasiewicz, "Kwalifikacja," 41.

37 Cf. Vicente, "Precontractual Liability," 712.

38 This approach seems favored in the Netherlands, where courts (see in particular judgment of the Hoge Raad of 18 June 1962 *Plas v. Valburg*, Nederlandse Jurisprudentie 1983, 723) distinguish between three phases of the negotiations, with the third justifying even a contractual remedy for expectation damages. See: Opinion of AG Geelhoed in *Tacconi*, para. 62.

39 This seems characteristic for at least some of the Anglo-American authors. See, e.g.: John O'Brien, *Conflict of Laws*, 2 ed. (London: Cavendish, 1999), 348; Eugene F. Scoles et al., *Conflict of Laws* (St. Paul: West Publishing Company, 1992).

Further, one more possible approach is to assess how close the links are between the alleged precontractual wrongdoing and the negotiated contract.[40] If the precontractual obligation is functionally related to the contract, it should be governed by the law applicable to the contract in question. This approach seems to favor the wide understanding of contractual matters and thus the contractual characterization.[41] As will be explained below – although not *per se* as a contractual attribution – the closeness of the links with the contract does play a supportive role under Article 12 of the Rome II Regulation.

Finally, according to some authors,[42] the characterization phase should be abandoned altogether, given that it is too complicated and does not lead to unequivocal results. The many characterization criteria make it possible to juggle them at will. Thus, it was suggested that one should dispense with the characterization and independently search for a natural "center of gravity" of the given relationship. If the pre-contractual liability is, functionally, closely related to a contract, the best option is to extend the application of *lex contractus* to the pre-contractual phase.

To be sure, in cases where the wrongdoing occurring prior to the contract is not sufficiently closely related to the contract, the starting point in a search for the "center of gravity" of the relationship may as well be the place of damage. That place then serves as a central factor in determining the applicable law, although the question remains: to which legal system does the preponderance of spatial connections point? One recent example

40 Cf. Andrew Dickinson, in Jürgen Basedow et al., *Encyclopedia of Private International Law*, vol. 1 (Cheltenham: Edward Elgar Publishing, 2017), 1565.

41 See: Peter Mankowski, "Die Qualifikation der culpa in contrahendo – Nagelprobe für den Vertragsbegriff des europäischen IZPR und IPR," *IPRax: Praxis des Internationalen Privat-und Verfahrensrechts*, no. 2 (2003): 128; Hohloch, "Culpa in contrahendo," 23; Michał Wojewoda, *Zakres prawa właściwego dla zobowiązań umownych. Nowa regulacja kolizyjna w konwencji rzymskiej z 1980 r.* (Warsaw: Wolters Kluwer, 2007), 213; Max Planck Institute for Foreign Private and Private International Law, "Comments on the European Commission's Green Paper on the Conversion of the Rome Convention of 1980 on the Law Applicable to Contractual Obligations into a Community Instrument and Its Modernization," *Rabels Zeitschrift für ausländisches und internationales Privatrecht* 68, no. 1 (2004): 94.

42 Egeler, *Konsensprobleme im internationalen Schuldvertragsrecht*, 231; Katrin Patrzek, *Die vertragsakzessorische Anknüpfung im Internationalen Privatrecht: dargestellt anhand des Deliktsrechts, der Geschäftsführung ohne Auftrag, des Bereicherungsrechts und der culpa in contrahendo* (München: VVF, 1992), 158.

of such an analysis is the decision of the English High Court in Jaffe & Anor Greybull Capital LLP & Ors.[43] In that case, the misrepresentation by a third party that induced the claimant to conclude a contract with the defendant was treated as delict for the purposes of Article 4 of Rome II. The applicability of Article 12 of Rome II appeared to have been contemplated by the Court but eventually rejected. In terms of determining the applicable law, the Court concluded:

> [299] Overall (...) the preferable analysis is that the applicable law is German Law. There are many immediate factors linking the case to Germany both in terms of direction, causation and ultimate feeling of the loss. (...)
>
> [300] In terms of direct damage, damage occurred when those misrepresentations took effect in the minds of those attending the meeting in Germany and were subsequently relied upon. The alleged key decisions were said to have been taken at the November meeting of Wirecard's Management Board; and this seems to have taken place in Germany. The direct links to Germany are simply much stronger than any links to this jurisdiction.

4. Article 12 of Rome II Regulation

Rome II Regulation contains a specific conflict-of-law rule regarding *culpa in contrahendo* in Article 12.[44] The fact that the concept was included in the Rome II and not in the Rome I Regulation (albeit with criticism from some, in particular German, authors[45]) shows that a delictual characterization of the pre-contractual liability eventually prevailed. Rome II follows *Tacconi* in that regard.[46] Moreover, Rome I expressly excludes from its scope "obligations arising out of dealings prior to the conclusion of a contract"

43 [2024] EWHC 2534 (Comm).

44 On the history behind the adoption of Article 12, see in particular: Hage-Chahine, "Culpa in Contrahendo," 459.

45 See, e.g.: Peter Mankowski, "Der Vorschlag für die Rom-I–Verordnung," *IPRax: Praxis des Internationalen Privat-und Verfahrensrechts* 26, no. 2 (2006): 101; Martin Schmidt-Kessel, "Zur culpa in contrahendo im Gemeinschaftsprivatrecht: Urteilsanmerkung zu EuGH, Urteil vom 17. September 2002-C-334/00," *Zeitschrift für europäisches Privatrecht* 12, no. 4 (2004): 1018.

46 See, e.g.: Hage-Chahine, "Culpa in Contrahendo," 468; von Hein, in Basedow, Hopt, and Zimmermann, *The Max Planck Encyclopedia*, 432; Żarnowiec, in Pazdan, *System*, vol. 20A, 851.

(Article 1(2)(i)), given that they are covered by Article 12 of Rome II (recital 10 to Rome I Regulation).[47] Nevertheless, as we will discuss below, Article 12 of the Rome II Regulation expresses a close affinity to contract via the connecting factor that it uses.

4.1. The Scope of Article 12

As made clear by Recital 30 to Rome II Regulation, the concept of the *culpa in contrahendo* under Article 12 should be treated as autonomous and so should not be interpreted according to the national law of any particular state. This autonomous approach to characterization comes as no surprise after *Tacconi*, where the European Court ruled that the term "matters relating to tort, delict or quasi-delict" – for purposes of the Brussels regime – should be interpreted independently.[48] Article 12 defines *culpa in contrahendo* as pertaining to "non-contractual obligation arising out of dealings prior to the conclusion of a contract, regardless of whether the contract was actually concluded or not." The definition seems fairly inclusive,[49] albeit somewhat vague[50]. However, four factors assist in determining its scope.

First, the wording of Article 12 makes clear that it only pertains to non-contractual obligations. In light of *Tacconi,* this is a visible indication that whenever the plaintiff, seeking damages for pre-contractual wrongdoing, relies on a "freely assumed obligation" – a pre-contractual agreement, a pre-negotiation agreement (taking forms of heads of agreement, memoranda of understanding, terms sheet, etc.), an agreement on confidentiality, or even a letter of intent (if it contains binding legal obligations) – the action should be viewed as in contract and thus falls outside Article 12

47 We agree, however, that Article 1(2)(i) Rome I excludes precontractual liability only insofar as it falls within the scope of Article 12 of Rome II. See a persuasive analysis by Hage-Chahine, "Culpa in Contrahendo," 469–73.

48 *Tacconi*, para. 19. See also: CJEU Judgment of 9 December 2021, HRVATSKE ŠUME d.o.o., Zagreb v. BP Europa SE, Case C-242/20, ECLI:EU:C:2021:985, para. 40.

49 Richard Plender and Michael Wilderspin, *The European Private International Law of Obligations* (London: Sweet & Maxwell, 2009), 734. A different view underlines, however, that the concept of *culpa in contrahendo* under Article 12 is narrower than the notion of a pre-contractual liability – Hage-Chahine, "Culpa in Contrahendo," 458.

50 Vicente ("Culpa in contrahendo," 314), for example, argues that Rome II Regulation "has not overcome the lack of a uniform notion of culpa in contrahendo in the European Union".

of Rome II (with the effect that the law applicable must be determined under Rome I Regulation).[51]

Second, the wording of Article 12 dispels doubts that its application does not depend on whether "the contract was actually concluded or not."[52] The liability for pre-contractual misconduct such as providing false information during negotiations or misuse of confidential information, given on that occasion, thus falls within Article 12, even if there is a binding contract between the parties governed by its own applicable law determined in accordance with Rome I Regulation.[53] Likewise, the application of Article 12 does not depend on whether the contract is valid or not.[54]

Third, some light on the coverage of Article 12 is shed by Recital 30. The recital mentions two specific types of pre-contractual wrongdoings, which are covered by Article 12, namely, the violation of the duty of disclosure and the breakdown of contractual negotiations. These examples should not be treated as in any way restrictive. We support the view,[55] that Article 12 covers all liability claims, which are based on: (a) conduct that affects the formation of the contract under negotiation, including misrepresentation[56] and causing damage to another (whether resulting in the invalidity of the contract or merely affecting its terms substantially), or (b) breach of pre-contractual duties, which does not affect the contract but cause damage to the other party (which includes unjustifiably breaking off negotiations, violating confidentiality or failure to disclose information), provided that these wrongdoings are not violations of the "freely assumed

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51 The law applicable to such precontractual agreements must be determined independently of the law applicable to the contract that is negotiated, although often the same law will in practice be applied by virtue of the conflict rules of Rome I. See: Hage-Chahine, "Culpa in Contrahendo," 485–9; Żarnowiec, in Pazdan, *System*, vol. 20A, 853.

52 See, e.g.: Plender and Wilderspin, *The European Private International Law*, 731. Contra Dickinson (in Basedow et al., Encyclopedia, 1, 1571), who holds that if the contract was actually concluded, the non-contractual obligations arising out of the pre-contractual dealings are governed by Rome I.

53 A different view holds, however, that precontractual information duties should be governed by the law applicable to the contract, as determined under Rome I Regulation. See on this: Żarnowiec, in Pazdan, *System*, vol. 20A, 853.

54 Żarnowiec, "Prawo właściwe dla odpowiedzialności," 24.

55 Hage-Chahine, "Culpa in Contrahendo," 494–6.

56 Cf. Dickinson, in Basedow et al., *Encyclopedia*, 1, para. 1571; Plender and Wilderspin, *The European Private International Law*, 733–4.

obligations." Article 12 does not, on the other hand, cover questions as to whether a valid contract has been formed,[57] including questions as to what constitutes misrepresentation and how it affects the contract[58] (which all fall within Rome I).

Fourth, recital 30 makes clear that Article 12 only covers non-contractual obligations "presenting a direct link" with the dealings prior to the conclusion of a contract.[59] Delicts, which are not sufficiently closely related to pre-contractual dealings (such as e.g. instances of a personal injury of a party to the negotiations), are thus not covered. They will fall within the general rule of Article 4 of the Rome II Regulation. The necessity to delimit the scopes of Articles 12 and 4 thus exists.[60] Consequently, if misrepresentation is made outside contractual negotiations, it might be more appropriate to apply Article 4 instead of Article 12.[61] Furthermore, it is doubtful whether Article 12 should apply to claims by a contracting party against a third party (e.g. an advisor), even if the claim alleges misrepresentation, which has induced the claimant to enter into the contract.[62] Tension at the characterization level, moreover, can be seen between Articles 12 and Article 10 (which deals with the law applicable to unjust enrichment). If the claim is for restitution of certain benefits received by the other party during negotiations but is not based on any illegal or culpable wrongdoing, it might be said to fall within the ambit of the latter provision[63]. As we will argue later, however, this is usually of little practical significance, since the putative *lex contractus* will govern such a claim in any event.

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57 Dickinson, in Basedow et al., *Encyclopedia*, 1, para. 1571.

58 Plender and Wilderspin, *The European Private International Law*, 735.

59 Vicente, "Culpa in contrahendo," 314; Dickinson, in Basedow et al., *Encyclopedia*, 1, para. 1571; Żarnowiec, in Pazdan, *System*, vol. 20A, 852.

60 More on this e.g. Bach, in Huber, *Rome II Regulation*, 313.

61 Albert V. Dicey, Lawrence A. Collins, and John H.C. Morris, *Dicey, Morris and Collins on the Conflict of Laws* (London: Sweet & Maxwell, 2012), §35–093.

62 To that effect: ibid., §35–093; Andrew Dickinson, *The Rome II Regulation: The Law Applicable to Non-contractual Obligations*, vol. 1 (Oxford University Press, USA, 2010), para. 12.08. This view seems supported (although not unequivocally) also by two English cases: *The Republic of Angola v. Perfectbit Ltd* [2018] EWHC 965 (Comm); *Jaffe & Anor Greybull Capital LLP & Ors* [2024] EWHC 2534 (Comm).

63 See: Dickinson, *The Rome II Regulation*, 1, 525; Dicey, Collins, and Morris, *Conflict of Laws*, §35–093.

4.2. The Law Applicable under Article 12

Article 12(1) of Rome II Regulation provides that the law applicable to a non-contractual obligation arising out of pre-contractual dealings "shall be the law that applies to the contract or that would have been applicable to it had it been entered into." Therefore, although the EU legislator chooses delictual characterization by including the relevant conflict rule in the Rome II Regulation, it subjects the *culpa in contrahendo* to the law applicable to the negotiated contract, which is to be determined according to conflict rules adopted in the Rome I Regulation[64]. In that regard, Rome II departs from *Tacconi* since it predominantly turns to the *lex contractus* instead of relying on the delictual connecting factors – such as the place of the harmful event – which are relevant under Article 7(2) of the Brussels I Regulation, deemed applicable by the European Court to cases of pre-contractual liability (absent "obligations freely assumed"). The solution adopted in Article 12(1) is often referred to as a principle of an accessory connection[65] or a "union" between the two laws.[66] A few brief comments should be made here concerning how this rule operates, before we move to expand on its merits.

First, it is worth underlying that by the very wording of Article 12(1), the *lex contractus* of the negotiated contract applies "regardless of whether the contract was actually concluded or not." If the contract was not finalized, e.g. because the negotiations were prematurely terminated, it will be the law that would putatively (hypothetically) apply to the contract.

Second, it is controversial whether such putative *lex contractus* might be determined under Article 3 of Rome I Regulation, i.e. on the basis of the choice of law that would have been part of the negotiated contract had it

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64 Nevertheless, if the parties have exercised their freedom under Article 14 of Rome II Regulation and submitted the non-contractual obligations arising out of dealings prior to the contract's conclusion to the law of their choice, this shall take precedence over *lex contractus* applied via Article 12(1). This seems an unlikely scenario in practice, however.

65 See, e.g.: von Hein, in Basedow, Hopt, and Zimmermann, *The Max Planck Encyclopedia*, 433; Bach, in Huber, *Rome II Regulation*, 319; Vicente, "Culpa in contrahendo," 323; Thomas Graziano, in Basedow et al., *Encyclopedia*, 1, 1712. The "accessory connection" as a conflict-of-laws solution for *culpa in contrahendo* was probably first proposed by Pierre Bourel, *Les conflits de lois en matiére d'obligations extracontractuelles* (Paris: LGDJ, 1961), 149.

66 Sylvain Bollée, "A la croisée des règlements Rome I et Rome II: la rupture des négociations contractuelles," *Recueil Dalloz*, no. 31 (2008): 2161.

been concluded. Some argue that this can never be the case, mainly because it would unfairly surprise the party who did not agree to the choice proposed by the other party.[67] Others take a more moderate position that the chosen law cannot be applied if there is a disagreement between the parties on this issue.[68] In our view, the very idea behind applying the putative law under Article 12 is that it is the law, which would hypothetically apply. As one author put it, "the court may evaluate the prospects" for an agreement on the applicable law.[69] In most cases, this should not come as a surprise to the parties that the law which they planned to apply for their contract by virtue of their own choice, will also cover any precontractual liability claims. Moreover, it should be remembered that the choice of law clause is treated as legally independent from the main contract.[70] Thus, even misrepresentation which affects the main contract does not necessarily affect the choice of law clause. If prerequisites for misrepresentation and their consequences concerning the contract might be governed by the *lex contractus* then there is nothing that prevents the application of that law under Article 12(1) to the action for damages caused by misrepresentation. We agree, however, that if the choice-of-law was a point of disagreement between the parties, then it cannot be used for purposes of Article 12(1) and so the *lex contractus* must be determined under Article 4 of the Rome I Regulation.[71]

Third, in the absence of the choice of law in the contract (or a putative contract), the pre-contractual liability under Article 12(1) will be governed by the law indicated on the basis of the objective connecting factors contained in Article 4 of Rome I Regulation.[72]

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67 Hage-Chahine, "Culpa in Contrahendo," 505–6, who believes that "the applicable law to the putative contract should always be determined on the basis of Article 4 of the Rome I Regulation."

68 Plender and Wilderspin, *The European Private International Law*, 736–7.

69 Bach, in Huber, *Rome II Regulation*, 320.

70 See, e.g.: Article 7 of the Principles on Choice of Law in International Commercial Contracts, The Hague 2015; Peter Nygh, *Autonomy in International Contracts* (Oxford: Oxford University Press, 1999), 86.

71 Similarly Żarnowiec, in Pazdan, *System*, vol. 20A, 854; Zachariasiewicz, in Pazdan, *Komentarz*, 968.

72 Unless the contract would have fallen within some of the specific rules of Article 5 (carriage), 6 (consumers), 7 (insurance) or 8 (employment), of Rome I Regulation.

If, on the other hand, "the law applicable cannot be determined on the basis of paragraph 1," Article 12(2) comes into play with its traditional, delictual connecting factors, analogous to those contained in Article 4 (with a chief role for the place of damage). What remains controversial is the exact circumstances that trigger the application of Article 12(2). In our view, situations where the law applicable on the basis of paragraph 1 (i.e., in accordance with Rome I) "cannot be determined" will be extremely rare.[73] After all, Rome I contains a cascade of connecting factors helpful in determining the *lex contractus*, including the escape clause in Article 4(3) and a subsidiary clause in Article 4(4), providing for the application of the law of the country with which the contract is most closely connected. Nevertheless, an example of a situation when it might prove problematic to establish that law is that of breaking off negotiations at a very early stage,[74] when it is still unclear what type of contract the parties envisaged, where it will be performed, or possibly even which exact companies from an international group will be parties to the contract.

4.3. Merits of the Accessory Connection

In our view, the principle of the accessory connection enshrined in Article 12(1) and constituting the leading conflict rule for *culpa in contrahendo* under Rome II presents several advantages.[75]

First, applying the same law to the negotiated contract and to the liability for pre-contractual wrongdoings that occurred during its negotiations, helps to overcome difficulties – apparent at the comparative law level – in characterizing the instances of the *culpa in contrahendo* as contractual or delictual. In this way, Article 12 of Rome II may be said to depart from the traditional, European-style conflict-of-law characterization process,[76] for it is no longer important whether the pre-contractual liability is viewed as a violation of the statutory duty (to negotiate in good faith, etc.) or as a breach of a contractual or quasi-contractual obligation resulting from the mere fact of entering the social relationship of negotiations. The EU

[73] Similarly Bach, in Huber, *Rome II Regulation*, 321 and the literature cited therein.

[74] Hage-Chahine, "Culpa in Contrahendo," 506.

[75] The "accessory connection" had its opponents too, even before Rome II was adopted. See e.g. Hohloch, "Culpa in contrahendo," 25.

[76] See: Hage-Chahine, "Culpa in Contrahendo," 461.

legislator thus opts for a pragmatic approach, whereby the functional link between the various instances of the pre-contractual wrongdoings and the negotiated contract overrides the necessity to clearly distinguish between a delictual and a contractual relationship. The characterization becomes an intellectual effort with little practical consequences. *Lex contractus* applies in any event.

Moreover, it should be noted that Article 10(1) of Rome II essentially also employs the accessory connection to determine the law applicable to unjust enrichment (by subjecting unjust enrichment claims concerning relationship arising out of a contract, that is closely connected with that unjust enrichment, to the law applicable to that contract).[77] Where no contract was formed yet (or the contract is deemed invalid) the law applicable to unjust enrichment under Article 10 would be that of the putative *lex contractus*.[78] Thus, the question of characterization of the claim for payment of the benefits improperly obtained by the other party at the pre-contractual stage – whether as restitution of unjust enrichment falling within the scope of Article 10 or as compensation for pre-contractual wrongdoings properly classified under Article 12 – loses its significance. The law applicable to the negotiated (or concluded and later found invalid) contract applies in any case.

To be sure, Article 12 does not dispense with the need for diligent characterization entirely. It remains important to distinguish, on the one hand, precontractual liability falling within its scope from liability for breaches of obligations freely assumed under precontractual agreements (subject to their own *lex contractus*), and on the other – from regular torts falling under Article 4 of Rome II.

As a side note, one might also observe that the characterization of the claim is still crucial under the Brussels I Regulation, given that it does not contain a specific rule concerning *culpa in contrahendo*. Under the *Tacconi* interpretation of the Brussels regime, the pre-contractual liability

77 See, e.g.: Marek Świerczyński and Łukasz Żarnowiec, in Pazdan, *Komentarz*, 950.

78 Application of Article 10(1) is not precluded by the fact that the contract, in connection with which, the payments were made, did not eventually come into life or is to be deemed invalid. See: Świerczyński and Żarnowiec, in Pazdan, *Komentarz*, 951; Stefan Leible and Matthias Lehmann, "Die neue EG-Verordnung über das auf außervertragliche Schuldverhältnisse anzuwendende Recht ('Rom II')," *Recht der internationalen Wirtschaft*, no. 10 (2007): 732.

can either be contractual (and thus fall within Article 7(1)), or delictual, if its source cannot be found in an "obligation freely assumed," but results merely from statutory duty, e.g. to negotiate in good faith (and thus fall within Article 7(2)). Since the two rules use diverging connecting factors, the application of those rules can provide jurisdictional competence to different courts.

Second, relying on *lex contractus* of the negotiated agreement helps to achieve harmony in dealing with questions concerning the existence (forming the consensus), validity, and effectiveness (e.g. how does the misrepresentation affect the contract), which are governed by *lex contractus* (as determined under Rome I) and those relating to the liability for damage caused by pre-contractual wrongdoings, which are subject to the law determined under Article 12 of the Rome II Regulation,[79] given that the latter is in principle (as long as Article 12(1) plays its role) the same law as the former.[80] The solution precludes difficult-to-reconcile outcomes, which could occur if, for example, the law applicable to the contract deemed the contract valid, while the law applicable to the *culpa in contrahendo* treated certain false representations as a ground for invalidating the contract, and held the defendant liable for misrepresentation.[81]

Third, the pre-contractual dealings in a situation where the contract was eventually concluded may potentially entitle the injured party to benefit both from contractual and delictual claims. This could be the case, e.g. if a party was given misleading information in a breach of statutory obligations to negotiate loyally and in good faith where, at the same time, such misleading information was transformed into a contractual term. The claimant could then benefit from a choice between concurrent claims. The position of different legal systems concerning the question of treatment of concurrent claims may, however, vary. Here again, applying

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79 On the dividing line between the *lex contractus* proper and the law governing the *culpa in contrahendo* (whether determined under Article 12(1) as *lex contractus* or Article 12(2) as *lex loci delicti commissi*), see: Bach, in Huber, *Rome II Regulation*, 314–5.

80 Plender and Wilderspin, *The European Private International Law*, 735; Goetz Schulze, in *Rome Regulations: Commentary on the European Rules of the Conflict of Laws*, ed. G.-P. Calliess (Alphen aan den Rijn: Wolters Kluwer Law & Business, 2011), 210; Żarnowiec, in Pazdan, *System*, vol. 20A, 855.

81 See a closer analysis of various patterns: Hage-Chahine, "Culpa in Contrahendo," 507 et seq.

the same law via the accessory principle to contractual and delictual claims helps to avoid friction between the two legal systems.[82]

Fourth, allowing the *lex contractus* to govern the *culpa in contrahendo* avoids difficulties with delictual connecting factors, which are often recognized as problematic and not warranting sufficient predictability in pre-contractual liability situations. Nevertheless, it is worth pointing out that when determining jurisdiction, it might still be necessary to apply delictual connecting factors, given that pre-contractual liability will often fall within Article 7(2) of the Brussels I bis Regulation.

Last but not least, placing the rule dealing with non-contractual obligations in the Rome II Regulation confirms the basic understanding that pre-contractual wrongdoing, which constitutes a violation of the rules of law (and not a freely assumed obligation) is delictual in nature. Still, the principle of accessory connection is not about simple subordination of the *culpa of contrahendo* to the law applicable to the contract, just because they are functionally related to the contract or arise at the final stage of negotiations. The pre-contractual relationship remains independent. Its nature remains intact. Yet, it is its direct link with the negotiated contract that raises in prominence above the outcome of the delictual characterization. Therefore, the principle of accessory connection does not promote the creation of a "third regime" ("third way") of liability. It recognizes a strong connection with the law applicable to the contemplated contract, nonetheless not rejecting the delictual nature of the *culpa in contrahendo*. All to ensure harmonization in dealing with pre-contractual and contractual obligations. It is truly a Judgment of Solomon.

Although we maintain the view that the creators of the Rome II Regulation have opted for the best solution when it comes to dealing with *culpa in contrahendo* in the private international law, the accessory principle too has its downsides. One is the risk of a tendency to blur in practice the boundaries between the pre-contractual phase and the contract, given that the court is not obliged to precisely distinguish between them for the purposes

[82] Graziano, in Basedow et al., *Encyclopedia*, 1, 1712. On the issue of concurrent claims in private International law see, in a Polish doctrine: Maksymilian Pazdan, "Zbieg odpowiedzialności cywilnej *ex contractu* i *ex delicto* w prawie prywatnym międzynarodowym," in *Rozprawy z prawa cywilnego. Księga pamiątkowa ku czci Witolda Czachórskiego*, eds. Jan Błeszyński and Jerzy Rajski (Warsaw: Państwowe Wydawnictwo Naukowe, 1985), 283 et seq.

of private international law. The other is a gradual expansion of the concept of pre-contractual liability in the domestic laws of various countries, as well as straining its delictual nature. Over time, it becomes a collective category for various positive obligations characteristic for the law of contracts as well as the prohibited types of conduct distinguishing the law of torts. This, however, comes as a natural cost of adopting the accessory connection. It must be accepted as a pragmatic solution to a difficult conflict-of-law problem. The paradox occurs: Article 12 constitutes a remedy to the occurring problems of characterization but at the same time it strengthens the mentioned tendencies.

5. Concluding Remarks: A Testimony to the Changing Methodologies in Private International Law

Despite the position taken by the CJEU in the *Tacconi* judgment, which appears to reflect the classic conflict-of-laws approach, strictly distinguishing torts from contracts, the EU legislator adopted a pragmatic solution in Article 12 of the Rome II Regulation, in the form of an "accessory connection." The rule is that the law applicable to pre-contractual liability – regardless of whether the contract was concluded – is, in principle, that of the putative *lex contractus*, i.e., the law that applies to the contract or that would have applied to it had it been concluded. Thus, regardless of the essentially delictual characterization of *culpa in contrahendo*, such matters are subject to the law applicable to the contract, even in cases where the contract never came into existence.

The adoption of the accessory principle in Article 12(1) of the Rome II Regulation represents, it is submitted, a departure from the traditional private international law paradigm. By subjecting the delictual relationship of *culpa in contrahendo* to the law applicable to the contract, the EU legislator may not have entirely eliminated the need for conflict-of-laws characterization but has diminished its role in practice. A functional link between liability for breach of pre-contractual duties and the contract becomes paramount, outweighing dogmatic classifications. This shift in priorities represents, it is argued, a lasting testimony to changing methodologies in European private international law.

In this context, it is important also to emphasize that the application of either Article 12(1) (which leads to the application of *lex contractus*) or

Article 12(2) (which involves the use of classic delictual connecting factors) does not depend on the inherent nature of the legal relationship in question (whether it constitutes a delict or a contract). Instead, the determination hinges on the appropriateness of the connecting factor in the context of conflict-of-law analysis.

The pursuit of compromise, along with simple and pragmatic solutions, is a logical approach in the formulation of the common, uniform private international law of the European Union. Likewise, it is both justified and consistent with contemporary developments in the field of conflict-of-laws to adopt rules that offer adequate flexibility. Granting a reasonable degree of discretion to the court enables it to consider the unique circumstances of each case.

It is also important to highlight the legislator's careful attention to the influence – albeit indirect – on the process of harmonizing the substantive laws of the Member States, despite the fact that this is not, strictly speaking, its primary mandate. The legislator's responsibility lies solely in seeking "fair" conflict-of-laws solutions, which involve determining the law most closely connected to the legal relationship in question – the law that naturally governs that relationship. By applying the same substantive law to the functionally related, although distinct (contractual or delictual) consequences arising from the same facts, friction can be avoided, thereby supporting justified and equitable decisions at the substantive law level. The rapprochement between conflict-of-laws justice and substantive justice appears to be an appropriate response to the demands of modern cross-border transactions.

Last but not least, it is interesting to observe how the objectives, such as honesty, transparency, and rationality, are safeguarded through instruments developed within the fields of contract law and tort law within the same legal system.

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