University Doctoral (PhD) Dissertation Abstract

The Law of sales transactions – A comparative analysis from international, European and Turkish perspectives

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1. Introduction

As international contracts become more common, businesses seek a legal system to settle disputes arising from differences between national contractual regimes and Turkey's national law. This research analyzes the correlation between Turkish Law and EU contract laws, particularly as Turkey and the EU negotiate the Customs Union (hereinafter "CU") Agreement. It is crucial to understand the differences between Turkish contract law and the common European contract law heritage.

The EU and Turkey share a significant trade relationship, with Turkey ranking as the fifth largest partner for EU imports and exports. To establish an acceptable legal order for all business parties, Turkey has modernized its business and contract law. The EU-Turkey CU, which began in 1995, is vital to Turkey's membership in the EU and to giving Turkey a greater share in the EU market. Contracts play a crucial role in cross-border commerce, and choice of law is essential to business relations between countries. Harmonization of contract and business law is a priority for the European Parliament and the EC, with draft Directives created for C2B contracts and financial transactions. The Common Frame of Reference and the European Contract Law are significant steps towards achieving this goal, as free market ideology and trade policies prioritize the freedom to contract to safeguard parties against risks and meet their economic goals.

My dissertation explores B2B contracts in the EU, focusing on common elements governed by international instruments like the United Nations Convention on the International Sale of Goods (hereinafter "the CISG") and Principles of European Contract Law (hereinafter "the PECL"). The latter reflects the majority position on contract law in EU member states, while the former regulates international sales transactions and has influenced general contract law in some EU countries. I excluded the Common European Sales Law, which mainly pertains to B2C transactions. The CISG may provide some common ground for B2B transactions between EU and Turkish businesses.

My research examines contract law doctrines, specifically *pacta sunt servanda* and good faith, in B2B relationships. I analyze case law using comparative methods to identify collisions, discrepancies, similarities, and potential improvements. Additionally, I scrutinize court decisions to target specific problems and understand how courts interpret and develop contract law institutions. My research aims to mirror leading court interpretations through individual cases to existing norms.

My hypothesis is that while Turkish contract law is considered to be a relatively modern one that builds mostly on European contract law heritage, some aspects of contract law principles and doctrines require further modernization and harmonization to the EU common cores. This especially true in the area of application of the contract law rules.

1.1 Research problem

To navigate international contracts effectively, a robust legal system is crucial to handle disputes arising from differences between national contractual regimes and Turkey's national law. Harmonizing laws is necessary to facilitate and enhance business relations in international business law. Despite the strong trade relationship between Turkey and the EU, notable differences still exist in legal concepts and institutions between the two. Familiarizing oneself with these differences is imperative for a successful trade relationship. While the EU lacks a unified contract law, international instruments such as CISG and PECL contain commonalities. Although CISG is binding for Turkey, France, and Germany, PECL is not binding even for EU member states. Nevertheless, exploring the European contract law heritage through PECL is essential as it reflects the majority position on contract law matters of EU member states. As Turkey's business and contract law has modernized in recent decades, understanding the differences between Turkey's core concepts and legal institutions and the common European contract law heritage is crucial.

1.2 Research goals

The main objectives of this thesis are as follows:

1. To examine the historical development of contract law in Turkey and the European Union.

2. To identify and analyze potential conflicts, discrepancies, and similarities among various contract laws, including PECL, CISG, French, German, English, and Turkish.

3. To investigate the practical application and interpretation of these norms and uncover major differences across different jurisdictions.

4. To determine the most appropriate applicable law for business persons between common law and civil law.

2. Facts

The differences in societal aspects make it difficult to effect change, especially in the economic and freedom areas among EU Member States, which affects business laws.[1] The harmonization of laws is essential to eliminate social, cultural, and political differences. Economic integration and EU business law cannot be separated from social, cultural, and political integration.[2] All integrations must be parallel to achieve a common EU business and contract law that aligns with Montesquieu's theory and drives the EU Common Market.

Turkey has a rich history of updating its business and contract laws to foster better business relationships with Europe.[3] Today, Turkey is eager to join the European Union and its Common Market,[4] and the CU Agreement is helping to facilitate the free movement of goods.[5] However, despite these efforts, Turkey's EU membership remains uncertain, prompting the need for modernization of the CU. In response, the World Bank and European Commission have conducted thorough studies on the potential impacts of modernizing the CU.[6] As such, it is critical that the CU agreement between Turkey and the EU be reviewed, in accordance with the principle of *clausula rebus sics stantibus*.

While Turkish business and contract law went through modernization in the past decades and the EU still has no unified or common contract law, it is important to understand how the core concepts and legal institutions in Turkey differ from the common European contract law heritage.

PECL is often used to address EU contract matters and can be adopted by EU and Turkish business partners. Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (hereinafter "the Rome 1") and Turkish Private International Law (hereinafter "the MÖHUK") have a choice

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[1]Kargı, Bilal (2012): *İnsan Düşüncesinde İktisadi Alanın (Yeniden) Yapılanması Üzerine Spekülasyonlar*, Gümüşhane Üniversitesi SBE Dergisi, Vol. 3, No. 6, pp.14-15, p.32; Şahin, Dilek (2017): *Ekonomik Özgürlükler Bakımından Türkiye'nin Avrupa Birliği Ülkeleri Arasındaki Yeri: İstatistiksel Bir Analiz*, Selçuk Üniversitesi İktisadi ve İdari Bilimler Fakültesi Sosyal Ekonomik Araştırmalar Dergisi, Vol.17, No.33, p.157, p.172

[2]Çal, Sedat (2008): *Halkbilim, Ekonomi ve Hukuk Üçgeninde Bir Gezinti…*, p.18 .Available at: http://www.idare.gen.tr/cal-halkbilim.pdf (Accessed: 5 February 2020)

[3] Gümüş, Musa (2013). *Osmanlı Devleti'nde Kanunlaştırma Hareketleri, İdeolojisi ve Kurumları*, Journal of History School, No.14, p.181.

[4] Tekin, Ümit Engin (2017): *Gümrük Birliği'nin Türk Ekonomisine Etkileri (1996-2016)*, Social Sciences Studies Journal, Vol.3, No.12, p.2100

[5] Karatas, Ihsan (2016): *The EU - Turkey Customs Union: Towards a Revision of the Legal and Institutional Framework?*, Ghent University, p.13. Available at: https://lib.ugent.be/fulltxt/RUG01/002/304/294/RUG01-002304294_2016_0001_AC.pdf (Accessed: 5 February 2020)

[6]Özkoç, Osman (2019): *Gümrük Birliği'nin Türkiye Ekonomisine Etkileri*, (Thesis), Ordu Üniversitesi, p.58 .Available at: http://earsiv.odu.edu.tr:8080/jspui/bitstream/11489/1013/1/10223677.pdf (Accessed: 3 February 2020); Togan, Sübidey: *Trade Policy Alternatives for Turkey* In: Hamilton, Daniel S. - Noi, Aylin Ünver - Altay, Serdar eds. (2018): *Turkey in the North Atlantic Marketplace*, Center for Transatlantic Relations, Washington, p.123

of law clause, and Turkish Constitution and Rome 1 recognize the freedom of contract principle.[7] While Rome 1 and MÖHUK both recognize the freedom of contract principle, they differ in their approach to defining applicable law in the absence of a choice of law clause. For greater flexibility, business partners from Turkey and the EU can fully or partially adopt PECL or other legal rules by including a choice of law clause. Additionally, parties may choose to exclude the rules of the CISG; however, it is important to explicitly exclude its application if parties do not wish to apply it.[8]

Although there are numerous similarities in the formation of contracts in PECL, CISG, and Turkish contract law, there are also notable differences. These differences include elements such as offer[9], acceptance[10], revocation[11], rejection[12], contract effectiveness

[7]Volker, Behr (2011): *Rome I Regulation a Mostly Unified Private International Law of Contractual Relationships within Most of the European Union*, Journal Of Law And Commerce, Vol.29, No.2, p.238; Kocasakal, Hatice Özdemir (2010): *Sözleşmelere Uygulanacak Hukukun MÖHUK m. 24. Çerçevesinde Tespiti ve Üçüncü Devletin Doğrudan Uygulanan Kuralları*, Milletlerarası Hukuk ve Milletlerarası Özel Hukuk Bülteni, Vol.30, No.1-2, pp.27-28, pp.43-44; Julicher, Manon - Henriques, Marina - Blai, Aina Amat - Policastro, Pasquale (2019): *Protection of the EU Charter for Private Legal Entities and Public Authorities? The Personal Scope of Fundamental Rights within Europe Compared*, Utrecht Law Review, Vol.15, No.1, p.7; Turkish Constitutional Court Decision (decision no. 2013/162, dated on 26.12.2013)

[8] Fezer, Tamas (2016): International Sale of Goods Slides, Manuscript; UNCITRAL (2012): *Digest of Case Law on the United Nations Convention on Contracts for the International Sale of Goods*, United Nations, New York, p.34. Available at: https://www.uncitral.org/pdf/english/clout/CISG-digest-2012-e.pdf (Accessed: 10 September 2017); Drago, Thomas J. - Zoccolillo, Alan F. (2002): *Be Explicit: Drafting Choice of Law Clauses in International Sale of Goods Contracts*. Available at: https://www.cisg.law.pace.edu/cisg/biblio/zoccolillo1.html (Accessed: 19 January 2019)

[9]Şeker, Muzaffer (2013): *6098 Sayılı Yeni Türk Borçlar Kanuna Göre Ismarlanmayan Şeyin Gönderilmesi (BK. 7)*, İstanbul Ticaret Üniversitesi Sosyal Bilimler Dergisi ,Vol.12, No.24, p.88; Butler, Allison E. (2003): *Comparative Editorial Article 11 CISG and PECL article 2:101(2)*. Available at: https://www.cisg.law.pace.edu/cisg/text/peclcomp11.html (Accessed: 5 October 2017); Kılıçoğlu, Ahmet M. (2008): *Türk Borçlar Kanunu Tasarısı'na Eleştiriler Rapor*, Türkiye Barolar Birliği Yayınları, Ankara, p.7; Cvetkovic, Predrag (2002): *The Characteristics of an Offer in CISG and PECL,* Pace International Law Review, Vol.14, No.1, p.130; Fézer, Tamas (2016): International Sale of Goods Slides, Manuscript.

[10]Carrara, Cecila - Kuckenburg, Joachim (2003): *Remarks on the manner in which the Principles of European Contract Law may be used to interpret or supplement Article 18 of the CISG*. Available at: https://www.cisg.law.pace.edu/cisg/text/peclcomp18.html (Accessed: 5 October 2017); Yılmaz, Yasemin Yücesoy (2017):*Viyana Satım Antlaşması Hükümlerine Göre Kabul (Acceptance According to Vienna Sales Contract Provisions)*, Türkiye Adalet Akademisi Dergisi , Vol.7, No:30, p.426.

[11]Akseli, N. Orkun (2003): *Editorial remarks on whether and the extent to which the Principles of European Contract Law (PECL) may be used to help interpret Article 16 of the CISG*. Available at: http://www.cisg.law.pace.edu/cisg/text/peclcomp16.html (Accessed: 18 October 2017); İşleten, Mehtap İpek (2013): *Milletlerarası Mal Satımına İlişkin Sözleşmeler Hakkında Birleşmiş Milletler Antlaşması (CISG) ve Türk Borçlar Kanunu Çerçevesinde Sözleşmenin Kurulması*, Galatasaray Üniversitesi Hukuk Fakültesi Dergisi, No.1, p.123

[12]Fézer, Tamas (2016): International Sale of Goods Slides, Manuscript.; Carrara Cecila - Kuckenburg Joachim (2003): *Remarks on the manner in which the Principles of European Contract Law may be used to interpret or supplement Article 17 of the CISG.* Available at: https://www.cisg.law.pace.edu/cisg/text/peclcomp17.html (Accessed: 10 October 2017); İşleten, Mehtap İpek (2013): *Milletlerarası Mal Satımına İlişkin Sözleşmeler Hakkında Birleşmiş Milletler Antlaşması (CISG) ve Türk Borçlar Kanunu Çerçevesinde Sözleşmenin Kurulması*, Galatasaray Üniversitesi Hukuk Fakültesi Dergisi, No.1, p.124

timeframes[13], and withdrawal times[14]. Turkish contract law is more aligned with PECL than with CISG in terms of contract formation, and PECL and the Turkish Code of Obligations (hereinafter "the TBK) are not limited to specific contract types, unlike CISG. PECL represents the predominant position of EU member states and played a role in the development of the TBK[15]. It is essential to consider these differences when navigating contracts in these legal frameworks. Additionally, the principle of freedom of contract is crucial in all of them, allowing business parties to adapt the laws to their contracts as they see fit. They can use the choice of law clause and even partially adapt the laws.[16]

Successfully navigating international business transactions requires a deep understanding of the concept of fundamental breach, which varies across legal systems. While some legal systems like English law, the PECL, and the CISG recognize fundamental breach[17], others like German, French[18], and Turkish Contract Law do not.[19] The main differences in fundamental breaches come from the differences between the common law and the civil law legal systems. So, we can see the concept of fundamental breach in English law, PECL, and CISG. The concept of fundamental breach shows an important difference, and they do not go for specific cases like non-performance or defective performance. English Law, PECL, and CISG use these two definitions, which are fundamental and other types of breaches. Therefore, they only have these distinctions, while Turkish, French, and German laws go for specific breach scenarios. The CISG, PECL, and English law govern the

[13]İşleten, Mehtap İpek (2013): *Milletlerarası Mal Satımına İlişkin Sözleşmeler Hakkında Birleşmiş Milletler Antlaşması (CISG) ve Türk Borçlar Kanunu Çerçevesinde Sözleşmenin Kurulması*, Galatasaray Üniversitesi Hukuk Fakültesi Dergisi, No.1, p.132; Viscasillas, Pilar Perales ed. (2007): *Match-up of CISG Article 23 with PECL Article 2:205 [Time of Conclusion of the Contract]*. Available at: https://www.cisg.law.pace.edu/cisg/text/peclcomp23.html (Accessed: 10 October 2017)

[14]Zorlu, Ramazan (2008): *Formation of the Contract According to CISG and Turkish Law Compared*, pp.11-12. Available at: http://www.akellawfirm.com/yayinlar/FORMATION_OF_THE_CONTRACT_ACCORDING_TO_CISG_AND_TURKISH_LAW_COMPARED.pdf (Accessed: 3 October 2017).

[15]Türk Borçlar Kanunu Tasarısı ve Adalet Komisyonu Raporu (1/499), 2008, p.2. Available at: https://www.tbmm.gov.tr/sirasayi/donem23/yil01/ss321.pdf (Accessed: 30 October 2018)

[16]Heiss, Helmut: *Party Autonomy: The Fundamental Principle in I. European PIL of Contracts* In: Ferrari, Franco - Leible, Stefan eds. (2009): *Rome I Regulation: The Law Applicable to Contractual Obligations in Europe*, Sellier, Munich, p.2

[17]El-Saghir, Hossam ed. (2000): *Guide to Article 25: Comparison with Principles of European Contract Law (PECL)*. Available at: https://cisgw3.law.pace.edu/cisg/text/peclcomp25.html (Accessed: 9 April 2018); Toker, Ali Gümrah (2013): *Viyana Satım Sözleşmesi (CISG) Uyarınca Sözleşmenin Esasli İhlali*, Milletlerarası Hukuk ve Milletlerarası Özel Hukuk Bülteni, Vol.33, No.1, p.219

[18] Uknevičiūtė, Sandra (2011): *The Concept of Fundamental Breach of the Contract in a Comparative Perspective*, (Thesis), Mykolas Romeris University, p.5. Available at: https://vb.mruni.eu/object/elaba:1884805/1884805.pdf (Accessed: 3 February 2020)

[19]Ergun, Cagdas Evrim (2002): *Comparative Study on the Buyer's Remedies Under the 1980 Vienna Sales Convention and Turkish Sales Law*. Available at: http://www.cisg.law.pace.edu/cisg/biblio/ergun.html (Accessed:5 January 2020)

permissible termination of serious breaches.[20] In CISG and PECL, the gravity of the breach is aligned with the 'intermediate term' concept in English law, where the expressed will in the contract is considered a condition. This leads to termination, instead of being viewed as a fundamental contractual obligation breach which can be interpreted objectively or subjectively.[21] Nonetheless, we know that differentiating between breaches of main and auxiliary obligations is critical to determining whether a contract can be terminated. German, Turkish, and French law clearly distinguish between the two[22], while English law, PECL, and CISG do not.[23] A breach of a main obligation is typically considered a fundamental breach of contract, while a violation of auxiliary obligations may or may not have the same consequences.[24] So, both breaches of main obligations and breaches of auxiliary obligations can be the subject of fundamental breach, as stated in the judgment of OLG Frankfurt.[25] However, in German, French, and Turkish law, termination of a contract is only allowed if the main obligation is not fulfilled[26], as was demonstrated in a Turkish Supreme of Appeal case.[27] It's important to understand the differences between civil and common law when terminating a contract. In common law, a breach of contract can result in damages, while civil law may

[20]Smits, Jan M. (2014): *Contract Law: A Comparative Introduction*, Edward Elgar, Cheltenham, p.230

[21]Uknevičiūtė, Sandra (2011): *The Concept of Fundamental Breach of the Contract in a Comparative Perspective*, (Thesis), Mykolas Romeris University, p.21,p.27,p.35. Available at: https://vb.mruni.eu/object/elaba:1884805/1884805.pdf (Accessed: 3 February 2020); Toker, Ali Gümrah (2013): *Viyana Satım Sözleşmesi (CISG) Uyarınca Sözleşmenin Esasli İhlali*, Milletlerarası Hukuk ve Milletlerarası Özel Hukuk Bülteni, Vol.33, No.1, p.219

[22]Turkish Supreme Court of Appeal for 13th Civil Circuit (decision no. 2002/12654, dated on 25.11.2002); Lando, Ole - Beale, Hugh eds. (2000): *Comment and notes on PECL 8:103*: *Fundamental Non-Performance*, Principles of European Contract Law: Parts I and II, Kluwer Law International. Available at: https://cisgw3.law.pace.edu/cisg/text/peclcomp25.html (Accessed: 9 April 2018); Uknevičiūtė, Sandra (2011): *The Concept of Fundamental Breach of the Contract in a Comparative Perspective*, (Thesis), Mykolas Romeris University, p.5. Available at: https://vb.mruni.eu/object/elaba:1884805/1884805.pdf (Accessed: 3 February 2020)

[23]Brunner, Christoph (2009): *Force Majeure and Hardship Under General Contract Principles: Exemption for Non-performance in International Arbitration*, Kluwer Law International, Netherlands, p.57

[24] Uknevičiūtė, Sandra (2011): *The Concept of Fundamental Breach of the Contract in a Comparative Perspective*, (Thesis), Mykolas Romeris University, p.53. Available at: https://vb.mruni.eu/object/elaba:1884805/1884805.pdf (Accessed: 3 February 2020)

[25]Kritzer, Albert H. (2012): *Case Presentation: Germany 17 September 1991 Appellate Court Frankfurt (Shoes case)*. Available at: http://cisgw3.law.pace.edu/cases/910917g1.html (Accessed: 29 Septermber 2017)

[26]Lando, Ole - Beale, Hugh eds. (2000): *Comment and notes on PECL 8:103*: *Fundamental Non-Performance*, Principles of European Contract Law: Parts I and II, Kluwer Law International. Available at: https://cisgw3.law.pace.edu/cisg/text/peclcomp25.html (Accessed: 9 April 2018); Turkish Supreme Court of Appeal for 13th Civil Circuit (decision no. 2002/12654, dated on 25.11.2002); Uknevičiūtė, Sandra (2011): *The Concept of Fundamental Breach of the Contract in a Comparative Perspective*, (Thesis), Mykolas Romeris University, p.5. Available at: https://vb.mruni.eu/object/elaba:1884805/1884805.pdf (Accessed: 3 February 2020)

[27] Turkish Supreme Court of Appeal for 13th Civil Circuit (decision no. 2002/12654, dated on 25.11.2002)

require specific performance with the help of a judge.[28] However, termination should only be used as a last resort for a fundamental breach. Legal remedies or damages may not be sufficient in some cases. The CISG, PECL, and English law all permit termination only in the event of a significant breach[29], which can be determined using an objective or subjective criterion. In English law, the expressed will in the contract is crucial in deciding whether termination is permissible[30], while in civil law countries, termination is only allowed if imperative rules of law permit it and undergoes contractual fairness and justice tests.[31] Therefore, a deep understanding of these differences in legal systems is crucial to effectively navigate international business transactions.

The compensation for positive and negative interests is clearly defined by various laws, including PECL, CISG, Turkish, German, French, and English.[32] Compensation for positive interest aims to restore the claimant to the same financial position they would have been in if the contract had been performed, including any lost profits.[33] Monetary compensation is typically utilized for this purpose.[34] Conversely, negative interest aims to restore the claimant to the position they were in before the transaction occurred by addressing their reliance interest.[35] Although French law does not regulate this, it is established through case law.[36] Parties may claim compensation for negative interest under PECL comment[37] and

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[28] Vettese, Maria Celeste: *Multinational companies and national contracts* In: Cordero-Moss, Giuditta ed. (2011): *Boilerplate Clauses, International Commercial Contracts and the Applicable Law*, Cambridge University Press, New York, p.25

[29]Smits, Jan M. (2014): *Contract Law: A Comparative Introduction*, Edward Elgar, Cheltenham, p.230

[30]Uknevičiūtė, Sandra (2011): *The Concept of Fundamental Breach of the Contract in a Comparative Perspective*, (Thesis), Mykolas Romeris University, p.21,p.27,p.35. Available at: https://vb.mruni.eu/object/elaba:1884805/1884805.pdf (Accessed: 3 February 2020)

[31]Chitashvili, Natia (2016): *The Concept of Fundamental Breach in Comparative Perspective and Its Impact on Georgian Contract Law*, Polish-Georgian Law Review, No.2, p.51, p.55

[32] Turkish Supreme Court Assembly of Civil Chambers (decision no. 2010/427, dated on 29.09.2010); Youngs, Raymond (2014): *English, French & German Comparative Law*, Routledge, New York, p.679; Hough, Tracey - Kühnel-Fitchen, Kathrin (2017): *Optimize Contract Law*, Routledge, New York, p.208; French Supreme Court, Civil Chamber 3 (Appeal number: 01-02.881, dated on 3 December 2002); Foreign Trade Court of Arbitration attached to the Serbian Chamber of Commerce, (Proceeding No: T - 9/07, dated on 23 January 2008). Available at: https://www.unilex.info/principles/case/1442#ITALIAN (Accessed: 29 May 2023); Liu, Chengwei (2005): *Effect of Avoidance: Perspectives from the CISG, UNIDROIT Principles and PECL and Case law*, Nordic Journal of Commercial Law, No.1, p.8; UNCITRAL (2012): *Digest of Case Law on the United Nations Convention on Contracts for the International Sale of Goods*, United Nations, New York, p.347. Available at: https://www.uncitral.org/pdf/english/clout/CISG-digest-2012-e.pdf (Accessed: 10 September 2017)

[33] Gotanda, John Y. (2004): *Recovering Lost Profits in International Disputes*, Georgetown Journal of International Law, Vol.36, No.1, p.66

[34]Schwenzer, Ingeborg - Hachem, Pascal - Kee, Christopher (2012): *Global Sales and Contract Law*, Oxford University Press, New York, p.605

[35] Gotanda, John Y. (2004): *Recovering Lost Profits in International Disputes*, Georgetown Journal of International Law, Vol.36, No.1, p.66

[36] French Supreme Court, Civil Chamber 3 (Appeal number: 01-02.881, dated on 3 December 2002); French Supreme Court, Civil Chamber 3 (Appeal number: 07-20.783, dated on 7 January 2009)

[37] Liu, Chengwei (2005): *Effect of Avoidance: Perspectives from the CISG, UNIDROIT Principles and PECL and Case law*, Nordic Journal of Commercial Law, No.1, p.8

CISG case law[38], although neither provide compensation for negative interest when a contract is terminated. It is important to note that Turkish and English law have some differences. Turkish business parties can only claim compensation for negative interest when a contract is terminated, according to the Turkish Supreme Court of Appeal.[39] In contrast, other legal systems allow parties to claim compensation for positive or negative interest. Additionally, *culpa in contrahendo* is not applicable in English law, while other business parties can demand compensation for negative interest based on the good faith principle, which is not enforced in English law.[40] To address this issue, it would be advantageous to apply French law. Turkish business parties can claim positive interest instead of negative interest, and English business parties can demand negative interest in the case of *culpa in contrahendo*. Also, both French and English law apply to contracts and torts.[41] Some in England suggest adopting French-style *culpa in contrahendo* for tort law.[42] It should also be noted that in England, termination takes effect immediately, and the defaulting party has no additional time to complete their obligations[43], which differs from other legal systems. So, notification is necessary in all others.[44] By considering these factors, comparable outcomes can be achieved more effectively.

Comparing fault-based liability systems in Turkish, French, and German law to strict liability systems in English Law, PECL, and CISG, it is clear that the latter is more effective in enforcing contractual obligations. In the former, businesses can avoid liability and damages through various options, but in the latter, parties have limited defenses, necessitating their

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[38] UNCITRAL (2012): *Digest of Case Law on the United Nations Convention on Contracts for the International Sale of Goods*, United Nations, New York, p.347. Available at: https://www.uncitral.org/pdf/english/clout/CISG-digest-2012-e.pdf (Accessed: 10 September 2017)

[39] Turkish Supreme Court Assembly of Civil Chambers (decision no. 2010/427, dated on 29.09.2010)

[40]Ataie, A (2018): *Negotiation damages: compensation for direct loss*, (Thesis), University of Oxford, p.1. Available at: https://ora.ox.ac.uk/objects/uuid:411f240a-c6a0-4ba4-8d04-89419a4b4a1f/download_file?file_format=application%2Fpdf&safe_filename=Final%2Bcopy-%2BDPhil.pdf&type_of_work=Thesis (Accessed: 30 May 2023)

[41] Winiger, Benedict - Koziol, Helmut - Koch, Bernhard A. - Zimmermann, Reinhard eds. (2011): *Digest of European Tort Law. Vol. 2 : Essential Cases on Damage*, De Gruyter, Berlin, p.301

[42] Hein, Jan von (2011): *Culpa in Contrahendo*, Available at: https://max-eup2012.mpipriv.de/index.php/Culpa_in_Contrahendo (Accessed: 10 June 2023)

[43] Rowan, Solene (2017) *The new French law of contract.* International and Comparative Law Quarterly, p.16. Available at: http://eprints.lse.ac.uk/75815/1/Rowan_New%20French%20law_2017.pdf (Accessed: 10 December 2019)

[44]Markesinis, Basil Sir - Unberath, Hannes - Johnston, Angus (2006): *The German Law of Contract: A Comparative Treatise*, Hart Publishing, Portland, p.357, p.380, pp.439-440; Rowan, Solene (2017) *The new French law of contract.* International and Comparative Law Quarterly, pp.15-16. Available at: http://eprints.lse.ac.uk/75815/1/Rowan_New%20French%20law_2017.pdf (Accessed: 10 December 2019); Rıgga, Gago Mealii (2019): *Comparative Analyis of Consequences of Breach of Contracts and the Implementation in Standard Construction Contracts*, *(Thesis),* Bursa Uludağ Üniversitesi, p.45. Available at: https://acikerisim.uludag.edu.tr/bitstream/11452/14728/1/Gago%20Meal%C4%B1%C4%B1%20R%C4%B1gga.pdf (Accessed: 10 June 2023)

obligation fulfillment under all circumstances. Consequently, the *pacta sunt servanda* principle is more robust in English Law, PECL, and CISG than in Turkish Law, French Law, and German Law. Good faith plays a crucial role, particularly in cases of *force majeure* and *clausa rebus sic stantibus*. So, these are exceptions of *pacta sunt servanda* principle.

The principle of *force majeure* is based on good faith. However, waiting for contract performance may not align with this principle in *force majeure* situations. Various legal systems, including German, Turkish, French laws, PECL, and CISG systems, regulate the good faith principle and *force majeure*.[45] The German Federal Supreme Court has provided a definition for *force majeure*, which is not legally defined in the BGB.[46] *Force majeure* has no legal doctrine in English law[47], although it can be incorporated as a clause in contracts. In English contract law, the *pacta sunt servanda* principle applies since there is no good faith principle. To achieve the same result, business parties should include a *force majeure* clause in their contracts. However, frustration cannot be applied if the contract contains such a *force majeure* clause.[48] Frustration in English law differs from the doctrine of *clausa rebus sic statantibus*. English contract law has no regulation on adapting the contract to changing circumstances, only on terminating it. However, adaptation or termination of contracts when circumstances change is possible in Turkish law, French law, German law, and in PECL.[49] CISG has no regulation on this matter as stated by District Court Monza.[50] In strict liability systems, personal circumstances cannot serve as an excuse for the breaching party. However, PECL and CISG regulate *force majeure*, while PECL regulates *clausa rebus sic statantibus* principle separately from English law. These instruments govern contracts and effectively combine elements from civil and common law systems. The application of good faith is

[45]Youngs, Raymond (2014): *English, French & German Comparative Law*, Routledge, New York, p.669; Bingöl, Fatma Itır (2008): *Uluslararası Ticari Satım Sözleşmelerinde Mücbir Sebep*, (Thesis), Dokuz Eylül Üniversitesi, p.34. Available at: https://acikerisim.deu.edu.tr/xmlui/bitstream/handle/20.500.12397/12285/249364.pdf?sequence=1&isAllowed=y (Accessed: 27 December 2016); Solutions by BELFOR (2019): *Force Majeure, what to do if?*. Available at: https://solutions.belfor.com/en-eu/force-majeure-what-do-if (Accessed: 10 December 2019); Lindström, Niklas (2006): *Changed Circumstances and Hardship in the International Sale of Goods*, Nordic Journal of Commercial Law, No.1, p.5; DiMatteo, Larry A. (2015): *Contractual Excuse Under the CISG: Impediment, Hardship, and the Excuse Doctrines*, Pace International Law Review, Vol.27, No.1, p.15

[46] Solutions by BELFOR (2019): *Force Majeure, what to do if?*. Available at: https://solutions.belfor.com/en-eu/force-majeure-what-do-if (Accessed: 10 December 2019)

[47]Knowles, Roger (2012): *200 Contractual Problems and their Solutions*, Wiley-Blackwell, UK, p.134

[48]Poole, Jill (2016): *Casebook on Contract Law*, Oxford University Press, New York,p.551

[49]Acar, Hakan (2008): *Unıdroıt ve Avrupa Borçlar Hukuku Prensipleri Işığında Aşırı İfa Güçlüğü*, Erzincan Üniversitesi Hukuk Fakültesi Dergisi, vol.12, No.1-2, p.115.

[50]UNCITRAL (2012): *Digest of Case Law on the United Nations Convention on Contracts for the International Sale of Goods*, United Nations, New York, p.391. Available at: https://www.uncitral.org/pdf/english/clout/CISG-digest-2012-e.pdf (Accessed: 10 September 2017); Italy 14 January 1993 District Court Monza (*Nuova Fucinati v. Fondmetall International*). Available at: http://cisgw3.law.pace.edu/cases/930114i3.html (Accessed: 5 December 2016)

subject to different rules in PECL and CISG, with CISG imposing certain restrictions. Good faith only applies in force majeure cases, but its scope is broader under PECL. So, PECL is more similar to French, Turkish and German law in this respect.

Under CISG, English, French, Turkish, and German law, it is crucial to prioritize a prudent merchant over an ordinary person in B2B relationships. So, case law shows similar results from the *clausa rebus sic stantibus* viewpoint[51], but there is no case law of PECL. In B2B relations where both parties are professionals, the application of the *clausa rebus sic stantibus* principle, which is rooted in good faith and protecting the weaker party[52], appears to be redundant. Also, this is related to foreseeability and adequate causation theories and can only be considered with an applicable method.

We can achieve four categories regarding foreseeability and adequate causation theories:

1. Foreseeability theory in English law and CISG.
2. Foreseeability theory in French law
3. Foreseeability theory in PECL
4. Adequate causation theory in German and Turkish laws.

The main difference between these categories is based on the application of different liability systems and the good faith principle. Foreseeability theory is applied in English law, CISG, French law, and PECL[53], while strict liability is present in English law, PECL, and CISG. French, German, and Turkish law follow fault-based liability. Causality supplements foreseeability in common law, but civil law limits liability using causality theories.[54] The

[51]Turkish Supreme Court Decision of Joint Chambers (decision no. 2003/340, dated on 07.05.2003); Rösler, Hannes (2007): *Hardship in German Codified Private Law: In Comparative Perspective to English, French and International Contract Law*, European Review of Private Law (ERPL), Vol. 15, p. 493; Mclnnis, J.A.: *Frustration and Force Majeure in Building Contracts* In: McKendrick, Ewan ed. (2013): *Force Majeure and Frustration of Contract*, Informa Law from Routledge, Abingdon, pp.205-206; CISG-AC Opinion No. 8, Calculation of Damages under CISG Articles 75 and 76. Rapporteur: Professor John Y. Gotanda, Villanova University School of Law, Villanova, Pennsylvania, USA. Adopted by the CISG-AC following its 12th meeting in Tokyo, Japan, on 15 November 2008. Available at: http://www.cisg.law.pace.edu/cisg/CISG-AC-op8.html (Accessed: 15 December 2019); ICC Arbitration Case No. 8128 of 1995 (*Chemical fertilizer case*). Available at: http://cisgw3.law.pace.edu/cases/958128i1.html (Accessed: 12 March 2019); Mudrić, Mišo (2013): *Standard form salvage contracts: the scope of the duty to exercise best endeavours*, The Journal of International Maritime Law, vol. 19, pp.485-486.

[52]Cherednychenko, Olha O. (2007): *Fundamental Rights, Contract Law and the Protection of the Weaker Party: A Comparative Analysis of the Constitutionalisation of Contract Law, with Emphasis on Risky Financial Transactions*, Sellier, München, p.298.

[53] Schwenzer, Ingeborg - Hachem, Pascal - Kee, Christopher (2012): *Global Sales and Contract Law*, Oxford University Press, New York, pp.595-597; Zeller, Bruno (2005): *Damages Under The Convention on Contracts For The International Sale Of Goods*, Oceana Publications, New York, p.91.

[54] Akşin, Gözde (2016): *Birleşmiş Milletler Viyana Satım Sözleşmesinin 74. Maddesine Göre Zararın Öngörülebilirliği Kriteri*, (Thesis), Ankara Üniversitesi, p.23. Available at: http://acikarsiv.ankara.edu.tr/browse/32172/Gozde_%20AKSIN.pdf.pdf (Accessed: 15 December 2019)

good faith principle is applied in PECL, French, Turkish, and German law but not in CISG and English law. Lastly, PECL follows strict liability, while French law follows fault-based liability.

Subjective and objective foreseeability are essential considerations when concluding a contract under French law, just as they are under English law.[55] However, under German and Turkish law, only objective foreseeability is considered, and the evaluation for adequate causality occurs at the time of contract breach.[56] On the other hand, the legal systems of France, Germany, and Turkey are similar in that they all consider intentional acts and gross negligence in foreseeability. They operate on a fault-based liability system and require the establishment of a causal relationship between a breach and the resulting damage. Additionally, the principle of good faith is applicable. Also, PECL shares similarities with English law, including aspects of French law. It also includes good faith and negligence as elements but has a strict liability, which is not interpreted as a fault-based liability system. So, fault plays a role in determining remedies for a breach in Civil Law, but it is used to determine whether mitigating circumstances could restrict or void strict liability.[57] On the other hand, the principle of foreseeability is also relevant in the CISG, just as it is in English law. So, French law's combination of civil law and common law systems makes the foreseeability theory in French law the optimal choice for business parties from both systems. By considering this and the prudent merchant rule, it is better to accept the foreseeability theory in French law to achieve similar results concerning the application of the *clausa rebus sic stantibus* principle.

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[55]Zeller, Bruno (2005): *Damages Under The Convention on Contracts For The International Sale Of Goods*, Oceana Publications, New York, p.91, p.95; Austria 14 January 2002 Supreme Court (Cooling system case). Available at: http://cisgw3.law.pace.edu/cases/020114a3.html (Accessed: 15 December 2019) ; Komarov, Alexander:*The Limitation of Contract Damages in Domestic Legal Systems and International Instruments* In: Saidov, Djakhongir - Cunnington, Ralph eds. (2008): *Contract Damages: Domestic and International Perspectives*, Hart Publishing, Oxford, pp. 252-253 ; McKendrick, Ewan (2017): *Contract Law*, Palgrave, London, p.457; Gotanda, John Y. (2006): *Damages in Lieu of Performance because of Breach of Contract*, Villanova University School of Law Working Paper Series, No.53, p.17; Akşin, Gözde (2016): *Birleşmiş Milletler Viyana Satım Sözleşmesinin 74. Maddesine Göre Zararın Öngörülebilirliği Kriteri*, (Thesis), Ankara Üniversitesi, p.27. Available at: http://acikarsiv.ankara.edu.tr/browse/32172/Gozde_%20AKSIN.pdf.pdf (Accessed: 15 December 2019);

[56]Akşin, Gözde (2016): *Birleşmiş Milletler Viyana Satım Sözleşmesinin 74. Maddesine Göre Zararın Öngörülebilirliği Kriteri*, (Thesis), Ankara Üniversitesi, p.83. Available at: http://acikarsiv.ankara.edu.tr/browse/32172/Gozde_%20AKSIN.pdf.pdf (Accessed: 15 December 2019); Saidov, Djakhongir (2008):*The Law of Damages in International Sales: The CISG and other International Instruments*, Hart Publishing, Portland, p.89

[57] Zeller, Bruno (2005): *Damages Under The Convention on Contracts For The International Sale Of Goods*, Oceana Publications, New York, p.47, p.91

It is crucial to distinguish between mitigation and contribution in contract breaches, according to English law, CISG, and PECL.[58] A thorough analysis of each case is necessary to determine if the reasonable person standard has been met for mitigation.[59] If not, the claimant cannot recover any part of their avoidable loss.[60] Turkish and German law requires the debtor to mitigate damages to some extent, and the court must also consider the aggrieved party's fault when determining compensation.[61] In Turkish and German law, contributory negligence is similar to mitigation. The avoidability and beyond-control criteria of civil law systems correspond to the fault requirement.[62] Although failure to mitigate is not a fault, it may be regarded as a form of the claimant's fault.[63] These principles are essential for a fair and just resolution of breach of contract cases. It is important to note that under French law, mitigation cannot yield outcomes similar to those in England.[64] While mitigating factors such as the behavior of both parties and a causal link may be taken into account, there are no set rules for comparative negligence. A creditor's negligence can result in a reduction of recoverable damages based on causation. It is also important to keep in mind that damages for preventable losses cannot be increased, and the plaintiff may receive reduced compensation if they fail to mitigate damages.[65] So, causation and negligence are considered, and there is a fault-based liability in French law as in German and Turkish law. So, it is better to apply French law, which emphasizes mitigation and is similar to German and Turkish contributory negligence. German and Turkish law also achieve similar results in mitigation through their

[58] Schwenzer, Ingeborg - Hachem, Pascal - Kee, Christopher (2012): *Global Sales and Contract Law*, Oxford University Press, New York, p.632;

[59] Aksoy, Hüseyin Can (2014): *Impossibility in Modern Private Law, A Comparative Study of German, Swiss and Turkish Laws and the Unification Instruments of Private Law*, Springer, p.105

[60] Youngs, Raymond (2014): *English, French & German Comparative Law*, Routledge, New York, pp.682-683

[61] Cafaggi, Fabrizio: *Creditor's Fault: In Search of a Comparative Frame* In: *Ben-Shahar*, *Omri - Porat*, *Ariel* eds. (2011): *Fault in American Contract Law*, Cambridge University Press, New York, p.242; Connellan, Clare - Oger-Gross, Elizabeth - André, Angélica: *Compensatory Damages Principles in Civil- and Common-Law Jurisdictions – Requirements, Underlying Principles and Limits* In: Trenor, John A. ed. (2017): *Guide to Damages in International Arbitration*, Law Business Research Ltd, London, p.16; Aksoy, Hüseyin Can (2014): *Impossibility in Modern Private Law, A Comparative Study of German, Swiss and Turkish Laws and the Unification Instruments of Private Law*, Springer, p.106; Helvacı, Ilhan (2017): *Turkish Contract Law*, Springer, pp.156-157

[62] Aksoy, Hüseyin Can (2014): *Impossibility in Modern Private Law, A Comparative Study of German, Swiss and Turkish Laws and the Unification Instruments of Private Law*, Springer, p.105

[63] Youngs, Raymond (2014): *English, French & German Comparative Law*, Routledge, New York, pp.682-683

[64] McGregor, Harvey:*The Role of Mitigation in the Assessment of Damages* In: Saidov, Djakhongir - Cunnington, Ralph eds. (2008): *Contract Damages: Domestic and International Perspectives*, Hart Publishing, Oxford, p. 330

[65] Connellan, Clare - Oger-Gross, Elizabeth - André, Angélica: *Compensatory Damages Principles in Civil- and Common-Law Jurisdictions – Requirements, Underlying Principles and Limits* In: Trenor, John A. ed. (2017): *Guide to Damages in International Arbitration*, Law Business Research Ltd, London, pp.16-17; Cafaggi, Fabrizio: *Creditor's Fault: In Search of a Comparative Frame* In: *Ben-Shahar*, *Omri - Porat*, *Ariel* eds. (2011): *Fault in American Contract Law*, Cambridge University Press, New York, p.242; Gotanda, John Y. (2006): *Damages in Lieu of Performance because of Breach of Contract*, Villanova University School of Law Working Paper Series, No.53, pp.19-20

regime on contributory negligence. Also, it is related to the method again, and it is better to accept the foreseeability theory in French law.

Concluding remarks

Harmonizing laws is crucial for improving international business relations. Therefore, it is imperative to harmonize the PECL in the European Union. Despite being a part of *lex mercatoria*, the lack of harmonization makes PECL non-binding, even for EU member states. However, it remains a vital aspect in exploring the European contract law heritage and represents the majority position on contract law matters of EU member states.

Based on the research conducted, it has been established that French contract law bears more similarity to PECL when compared to English, German, or Turkish contract laws. The differences that exist between French contract law and PECL are limited to liability system and mitigation. Despite the variances in the liability system, French contract law is almost identical to PECL, with the exception of a fault-based liability system. The study also revealed that French and English contract laws are moving towards the same direction but majorly differ in their liability systems.

In conclusion, French contract law combines elements of both common and civil law. Therefore, it is more suitable for business parties from both legal systems. Applying French law can lead to similar outcomes in terms of liability systems, especially in B2B relationships. Thus, following the method and elements of French contract law can offer an alternative to PECL, leading to harmonization between common and civil law.

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