DOKTORI (PhD) ÉRTEKEZÉS

Caglar Sahin

Debrecen
2023

DEBRECENI EGYETEM
MARTON GÉZA ÁLLAM- ÉS JOGTUDOMÁNYI DOKTORI ISKOLA

THE LAW OF SALES TRANSACTIONS - A COMPARATIVE ANALYSIS FROM INTERNATIONAL, EUROPEAN AND TURKISH PERSPECTIVES

Készítette:

Caglar Sahin

Témavezető:

Prof. Dr. Tamás Fézer
tudományos fokozat

A doktori program címe: Az állam és a jog változásai Közép- és Kelet-Európában

A doktori iskola vezetője: dr. Szabó Béla egyetemi tanár

A kézirat lezárva: 15 August 2023

DEBRECEN
2023

TABLE OF CONTENTS

ABBREVIATIONS

BGB : German Civil Code

CCF : French Civil Code

CIF : Cost, Insurance and Freight

CISG : The United Nations Convention on Contracts for the International Sale of Goods

CFR : Cost and Freight

CU : Customs Union

DDP : Delivered Duty Paid

Decision 1/95 : Decision 1/95 of the Association Council

ECJ : European Court of Justice

EEC : European Economic Community

EU : European Union

FCA : Free Carrier

FOB : Free On Board

FDI : Foreign Direct Investment

FTA : Free Trade Agreement

HGB : German Commercial Code

INCOTERMS : International Commercial Terms

MFN : Most Favored National Treatment

MÖHUK : Turkish Private International Law

PECL : Principles of European Contract Law

Rome I : Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations

ROOs : Rules of Origin

SGA : Sale of Goods Act (1979)

TEU : Treaty on European Union

TFEU : Treaty on the Functioning of the European Union

UNIDROIT : The International Institute for the Unification of Private Law

TBK :Turkish Code of Obligations

TMK :Turkish Civil Code

TTK :Turkish Commercial Code

Uniform Law on Sales:Uniform Law on the International Sales Act 1967 of Goods

UK	: United Kingdom
US	: United States
WTO	: World Trade Organization

INTRODUCTION

What needs the globalized world of the 21th century communicate to legislators? There is a general need coming from businesses to have some harmonization in terms of the cornerstone principles of contract law. Contract law obviously still remains as a national matter for most legal systems. With the development of international trade and the increase in the number of multinational companies, there is also an increase in the number of international business contracts that companies make with each other. With this change, companies have reservations about choosing a single national legal system. In this case, companies also expect the settlement of contractual disputes within a harmonious legal system. The main purpose of the research is to analyze how Turkish Law relates to contract laws in the EU. The topic is especially important since Turkey and the EU started to negotiate on the CU Agreement and the Turkish and the European companies have already started a new era in their relationships. This thesis, therefore, aims to examine where the biggest differences lay in between the regime of the EU in national contractual regimes and Turkish national law.

There is a big trade relation between EU and Turkey ongoing in the past few years. While Turkey is the EU's fifth largest trading partner from the viewpoint of imports and exports, the EU is the biggest partner of Turkey in exporting and importing products.

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.

Turkish business and contract law became westernized in the Ottoman ages, and the reason was to boost and assist the evolution and the flow of business relations with European countries. Therefore, business and contract law in the Ottoman Empire had started to significantly change and develop as the business relations with European countries became more and more active. The purpose is still the same today: to form an acceptable legal order for all business parties to secure their transactions. That is a *sine qua non* for creating a safe and predictable international business environment. EU–Turkey CU came into force on 31 December 1995 pursuant to Decision 1/95. The main aim of the Turkish government with the CU is that to have more shares in the EU market and to complete a crucial condition of Turkey's full membership for the EU. Turkey since the formation of the CU has adopted the EU rules and regulations on trade policy instruments and is effectively implementing them.

Contract law might be the driving factor cross-border commerce. Contracts include the articles which are mutually accepted by parties on their trade relation. It is binding for parties and it is based on dispute resolution by courts when dispute arises between the parties. Business relations between companies in the two countries still rely on the choice of law clause pointing to the application of a domestic regime. There is a connection with freedom of contract doctrine. The freedom to contract is the underpinning of *laissez-faire* economics and is a cornerstone of free market *libertarianism*. With the increasing importance of trade, many countries have reorganized their trade policies. With these regulations, countries have turned to policies that are less interventionist and give more freedom to the markets. Parties can implement everything into their contracts to protect themselves from risks that results from the lack of information and also that is how they serve their economic needs through the contract. Basically, under that doctrine of freedom of contract, we should put an emphasis on the economic needs of the parties, according to the concept of Adam Smith. The freedom of contract doctrine provides them the freedom that they can actually translate their business needs into the language of the law through their agreement. So, contract law might be the driving factor that facilitates cross-border commerce.

Starting from the 1980s, the European Parliament identified contract law and business law in general as important areas to harmonize. There is no original authorization on the harmonization of contract law derived from the TFEU. The European Commission, however, worked on draft Directives to harmonize these areas. Most of these Directives are about consumer to business contracts, financial transactions as they seem to be the most typical and used transactions. Action Plan for a more coherent European contract law produced in 2003 by EC and Common Frame of Reference was started to establish in accordance with this purpose and then also European Contract Law and revision of the acquis: the way forward published in 2004 by EC in accordance with this purpose and these were important steps in this way.

My dissertation primarily focuses on B2B contracts with a brief reference to consumer law. Although there is no unified contract law in the EU, there are identifiable common cores. The CISG and PECL are integral parts of *lex mercatoria*, internationally drafted instruments governing contracts that combine elements from both civil law and common law systems.

PECL is a fundamental point in exploring European contract law heritage. PECL is the result of the idea in creating a unified European contract law. The Commission on European Contract Law was established under the presidency of Ole Lando, therefore, the Commission is also known as the Lando Commission. PECL was published in three phases in 1995, 2000 and 2003. PECL is not adopted yet, however, it reflects the EU common contract law heritage.

PECL truly reflects the majority position on contract law matters of the EU member states and that is how the basics of contract law look like in these countries. It is not a binding legal instrument even for the EU member states, however, certainly signifies what those common course and common grounds are for contract law in the member states. PECL is fairly important to see how Turkish contract law differs from the so-called European values of contract law that PECL merged. In addition, while drafting the Turkish Code of Obligations Law, Turkey also took the PECL into consideration. Therefore, PECL is a snapshot of EU contract law heritage on formation, breach, remedies and on other fundamental questions.

Common European Sales Law was kind of an initiative of EU but it was never been addopted. The reason I left the Common European Sales Law out of discussion is that it mainly focuses on business to consumer transactions. Only when one party is a small or medium sized enterprise the Common European Sales Law intended to have any relevance. I have chosen to drop this idea as it does not relate to Turkey and is unlikely to have a significant impact on B2B transactions in EU member states. Additionally, since I am primarily focused on B2B transactions and this idea is more applicable to consumer law, I have decided not to pursue it.

I included the CISG because Turkey and almost all EU Member States are parties to this Convention. CISG is result of universalism with regard to international business and contract law. CISG was adopted in 11 April 1980 by 42 countries and the date of entry into force is 1 January 1988. CISG is ratified by 93 countries today. Turkey is one of the signatories to the CISG that entered into force in Turkey on 1 August 2011. In addition, while drafting the Turkish Code of Obligations Law, Turkey also took the CISG into consideration. In order to drag in some international perspective broader than the position of the EU, the CISG seemed to be obvious as the most important business law related treaty in the international arena. CISG is in close connection to general questions of contract law from a truly international perspective. CISG is definitely the most common legal column to govern international sales transactions of Turkish companies. CISG is binding for parties and it has to be ratified by parties as distinct from PECL. While the CISG is there to regulate international sales transactions, it had an impact on several general contract law issues in some EU Member States when reviewing their civil codes. So, CISG made its way into domestic legislation as well (e.g. Hungarian Civil Code contractual liability regime completely adopted the CISG method for all (including domestic) transactions and not just sales Act V of 2013 Art. 6:142). Therefore, I examined the CISG as a piece of international legislation that may provide for some common cores for B2B transactions even between EU and Turkish businesses.

I picked the underlying contract law doctrines that can be traced in the legal documents and the domestic laws I examined: *pacta sunt servanda* and the good faith principle. I compare these doctrines to the regulatory methods in the relationship of businesses. I intend to examine these doctrines purely from the business to business perspective like how these businesses can actually navigate around the *pacta sunt servanda* and freedom of contract principles.

In order to conduct a valid research, I followed the methods of comparative research and the analysis of case law. First, I made a historical comparison on how contract law developed in Turkey and in the European Union.

Then, I went for the norm comparison. I picked some of the most influential binding and non-binding documents the EU Member States primarily rely on when establishing their contract laws, I compared these to the application of the Turkish rules to identify collisions, discrepancies, similarities, and that I wish to provide for methods of future improvement.

Finally, I looked for case comparison to see how these norms are used and interpreted in practice. I looked for higher court decisions most obviously first the supreme court and if I did not find enough supreme court decisions to support my idea and I wanted to compare more, then I went down to higher court decisions targeting the specific problems like something which was not obvious coming from the norm from the text of the law. Contract law is a stable part of the legal system in most jurisdictions, however, courts constantly interpret and develop its institutions and concepts to suit modern business needs. This is why it is vitally important to see that despite the sometimes unchanged and old code norms, how courts move to a more universal and international interpretation of these principles. The thesis, therefore, takes advantage of the case-law method as well mirroring leading interpretations of the courts through individual cases to the 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.

I) THE HISTORICAL DEVELOPMENT OF TURKISH COMMERCIAL LAW IN THE OTTOMAN AGES

1.1) Ottoman Law before the Capitulations

Until the Tanzimat reform period of 1839–76, only one type of court existed in the Ottoman Empire. In keeping with Islamic law, this court had only one judge, trained in an imperial madrasa, and although it was possible to appeal a judgment, there was no regular multi-staged court structure. In practice, however, the Divan or Imperial Council, the Friday Court, and the court of the Kadıasker, the top judicial official in the empire, accepted and discussed appeals.[1] The general understanding of the Ottoman legal system is that everyone in the field of private law was governed according to the rules of law of their religions and nationalities, adhering to the principle of the personality of the law in the Middle Ages.[2] The reflection of legal pluralism in the Ottoman Empire has been seen in minority (non-Muslim) religious courts, which was an excellent opportunity to reach a fair judgment. This method can also be called simple legal pluralism because non-Muslims had a chance to choose their own religious or Islamic courts for their cases. So, there was a choice of law right.[3] So, we cannot say that a separate written law of code, regulation or court existed for handling business law matters at this time.

1.2) Ottoman Law After the Capitulations

In 1535, the first capitulation was made by Sultan Suleiman 1 (Sultan of the Ottoman Empire) and King Francis 1 (King of France). Then, many capitulations were made with other European countries.[4]

It appears that Muslims in the Ottoman Empire were unwilling to travel abroad before the end of the eighteenth century. While Europeans, from relatively early times, started commercial activities in the East, Eastern traders did not do the same in the West. The impetus for trade came from the West, and Western traders traveled and traded freely in Muslim countries. The Ottoman State gave trading privileges to boost trade activities in the Ottoman

[1] Ágoston, Gábor - Masters, Bruce (2009): *Encyclopedia of the Ottoman Empire*, Facts On File, New York, p.156
[2] Apaydın, Bahadır (2013): *Kapitülasyonlar ve Osmanlı - Türk Adli ve İdari Modernleşmesi*, Adalet Yayınevi, Ankara, p.107
[3] Tögel, Arif (2016): *Ottoman Human Rights Practice: A Model of Legal Pluralism*, Yıldırım Beyazıt Hukuk Dergisi, Vol.1, No.2, pp.212-213.
[4]Jupille, Joseph - Mattli, Walter - Snidal, Duncan (2013): *Institutional Choice and Global Commerce*, Cambridge University Press, New York, p. 108

territories by Western traders. There were political and economic reasons.[5] From the late eighteenth century onward, hundreds of thousands of non-Muslims, including merchants and financiers, switched jurisdiction by obtaining, for a fee, the legal status of a western nation. In the process, they became entitled to western tax reductions, and exemptions won through bilateral treaties known as "capitulations."[6] The economic rights and privileges of foreigners in the Ottoman Empire meant they were generally exempt from all taxes and duties. However, import and export duties were not in this scope. Tax power and authority is the primary criterion of the sovereignty of a state. Ottoman Empire became unable to exercise its taxing power during this period.[7]

There was a new judicial authority in the Ottoman legal system dealing exclusively with capitulations. The name of this entity was the Consular Court. This court was essentially established to handle business law matters.[8] Extraterritorial courts were the organs of Western legal expansion in non-Western countries. Extraterritoriality refers to a legal regime whereby a state claims exclusive jurisdiction over its citizens in another state. Even small Western countries could evade non-Western jurisdiction over their citizens using their court systems.[9] So, Ottoman Empire lost its jurisdiction over foreign merchants at this time.[10] As a good example, the British Supreme Court at Istanbul was the highest British court in the Ottoman Empire in this time.[11] Courts held by the consuls of one country, within the territory of another, under authority given by the treaty, for the settlement of civil cases.[12] However, the consul belonged to the executive branch rather than the judiciary, who rendered the decision.[13]

---

[5]Geyikdağı, V. Necla (2011): *Foreign Investment in the Ottoman Empire : International Trade and Relations 1854-1914*, I.B.Tauris Publishers, London ; New York, pp. 2-3

[6] Kuran, Timur (2004): *Why the Middle East is Economically Underdeveloped: Historical Mechanisms of Institutional Stagnation*, Journal of Economic Perspectives, Vol.18, No.3, p.85

[7] Apaydın, Bahadır (2013): *Kapitülasyonlar ve Osmanlı - Türk Adli ve İdari Modernleşmesi*, Adalet Yayınevi, Ankara, p.63, p.65

[8]Özkorkut, Nevin Ünal (2004): *Kapitülasyonların Osmanlı Devleti'nin Yargı Yetkisine Getirdiği Kısıtlamalar*, Ankara Üniversitesi Hukuk Fakültesi Dergisi, Vol.53, No.2, p.2.

[9] Kayaoğlu, Turan (2010): *Legal Imperialism: Sovereignty and Extraterritoriality in Japan, the Ottoman Empire, and China*, Cambridge University Press, New York, p.2.

[10] Jupille, Joseph - Mattli, Walter - Snidal, Duncan (2013): *Institutional Choice and Global Commerce*, Cambridge University Press, New York, p.108

[11] Kayaoğlu, Turan (2010): *Legal Imperialism: Sovereignty and Extraterritoriality in Japan, the Ottoman Empire, and China*, Cambridge University Press, New York, p.6

[12] Black, Henry Campbell (1979): *Black's Law Dictionary*, West Publishing Co., St. Paul, p.286.

[13] Kayaoğlu, Turan (2010): *Legal Imperialism: Sovereignty and Extraterritoriality in Japan, the Ottoman Empire, and China*, Cambridge University Press, New York, p.4

1.3) Ottoman Law After the Gülhane Imperial Rescript

The word tanzimat means "reforms," "rearrangement," and "re-organization," and in Ottoman history, the Tanzimat period refers to a time of Westernizing reforms from 1839 until 1876. Reforms began with the Gülhane Imperial Rescript and it was made and declared by the request of Sultan Abdülmecit in 1839. The Tanzimat ferman was proclaimed in the Gülhane, or rose garden, near the imperial Topkapı Palace. This is how it got its name, Gülhane Imperial Rescript.[14]

The establishment of commercial courts was started in 1840 with the establishment of the Trade Council in Istanbul. Later on, with two regulations prepared in 1847 and 1848, Trade Councils were turned into Mixed Commercial Courts[15] with the participation of foreign members in 1847. Judges could be Muslims or non-Muslims.[16] The head of the court was the Chief of Trade, and the court consisted of fourteen members. Seven were Ottoman citizens, and the other seven were foreign citizens.[17]

Western states wanted to apply their rules in the Ottoman Empire due to increased commercial activities. In this way, it could have been possible to conduct business in a legal environment familiar to the merchants as it reflected the standards of their own country.[18] However, since the increase and enlargement of commercial relations had become necessary, it required that commercial transactions were kept under regular legal regulations. However, more than the rules in force was needed. Therefore, it was necessary to legislate a law on which commercial procedures would depend, as stated in the introduction of *Ticaret Kanunname-i Hümayunu*.[19] *Ticaret Kanunname-i Hümayunu* was the first commercial code in Turkish Business Law's history and was legislated in 1850.[20] The law was enacted to rearrange commercial life in the western style. The French *Code de Commerce* No.1087 established the basis of the *Ticaret Kanunname-i Hümayunu* and was translated from the French *Code de Commerce*. Therefore, there were problems in practice because *Ticaret Kanunname-i*

[14] Ágoston, Gábor - Masters, Bruce (2009): *Encyclopedia of the Ottoman Empire*, Facts On File, New York, pp.553-554
[15]Aydın, M. Akif. (2001). *Türk Hukuk Tarihi*, Beta, İstanbul, p.426
[16]Özkorkut, Nevin Ünal (2004): *Kapitülasyonların Osmanlı Devleti'nin Yargı Yetkisine Getirdiği Kısıtlamalar*, Ankara Üniversitesi Hukuk Fakültesi Dergisi, Vol.53, No.2, p.90.
[17]Aydın, M. Akif. (2001). *Türk Hukuk Tarihi*, Beta, İstanbul, p.426
[18] Özbirecikli, Mehmet (2013): *Türkiye'de Ticaret Kanunlarında Denetim Anlayışı Üzerine Bir İnceleme*, Muhasebe ve Finans Tarihi Araştırmaları Dergisi, No.4, p.152.
[19] Gümüş, Musa (2013). *Osmanlı Devleti'nde Kanunlaştırma Hareketleri, İdeolojisi ve Kurumları*, Journal of History School, No.14, p.181.
[20] Özbirecikli, Mehmet (2013): *Türkiye'de Ticaret Kanunlarında Denetim Anlayışı Üzerine Bir İnceleme*, Muhasebe ve Finans Tarihi Araştırmaları Dergisi, No.4, p.152.

Hümayunu was almost like a mirror adaptation as it was criticized in the Justification of the Turkish Commercial Code No. 865 in 1926.[21]

Until the legislation of the commercial code in 1850, European commerce practices were applied in mixed commercial courts.[22] An addendum added to the commercial code in 1860 established commercial courts throughout the empire. With this prior arrangement, the courts consisted of a chief justice of the court to be appointed by the government and two permanent members to be appointed by the government, and also two temporary members to be chosen by the merchants. [23] Also, later on, toward the end of the century, the Ottoman Chamber of Commerce was established in 1880, and schools of commerce were launched in 1883.[24]

As examples of the importance of the *Ticaret Kanunname-i Hümayunu* in terms of business law was the following;

1- *Ticaret Kanunname-i Hümayunu* was the first adaptation of laws from Western countries, and this was not a coincidence.[25]

2- The French *Code de Commerce*, which constitutes the source of the *Ticaret Kanunname-i Hümayunu*, was legislated following the opinion of the French Revolution to abolish all class differences and privileges. It abolished the subjective system, which until then regarded commercial law as the law of the merchants' class, and replaced it with the objective system, which considered trade as the subject of law. So, *Ticaret Kanunname-i Hümayunu* was quoted from the French *Code de Commerce*, and the same principles and system have been adopted.[26]

3-*Ticaret Kanunname-i Hümayunu* did not have any general provisions regarding commercial papers. However, the trade bill took part for the first time in the concept of the Ottoman Law System. Chapter 6 of the law only provided provisions for trade bills. Two articles in this chapter (articles 144 and 145) were about bonds. It specified the matters that should be in terms of form in bonds and made the bond subject to the same provisions as trade bills in other respects.[27]

---

[21] Sırma, İbrahim (2011): *Osmanlı Anonim Şirketlerinde Kar Dağıtımı*, Akdeniz Üniversitesi Uluslararası Alanya İşletme Fakültesi Dergisi, Vol.3, No.2, p.119.

[22] Apaydın, Bahadır (2013): *Kapitülasyonlar ve Osmanlı - Türk Adli ve İdari Modernleşmesi*, Adalet Yayınevi, Ankara, p.132

[23]Aydın, M. Akif. (2001). *Türk Hukuk Tarihi*, Beta, İstanbul, p.426

[24] Ágoston, Gábor - Masters, Bruce (2009): *Encyclopedia of the Ottoman Empire*, Facts On File, New York, p.570

[25]Aydın, M. Akif. (2001). *Türk Hukuk Tarihi*, Beta, İstanbul, p.422-424

[26] Gümüş, Musa (2013). *Osmanlı Devleti'nde Kanunlaştırma Hareketleri, İdeolojisi ve Kurumları*, Journal of History School, No.14, p.182.

[27]İntan, Nurkut (1966): *Kaanunname-î Ticarete Göre Protestolar*, Ankara Üniversitesi Hukuk Fakültesi Dergisi, Volume 22, No.1, p.831

4-Three company types were regulated in the new Code. These were the Unlimited Company, Limited Partnership and Joint Stock Company.[28] However, there was no concept of a limited liability company in the French Code de Commerce back then (1807). Therefore, limited liability companies did not appear in the Ottoman legal system nor in the commercial code. Limited companies got acceptance in French commercial law only in 1925. To reflect these developments, the Limited Liability Company was adopted in the Turkish Commercial Code in 1926.[29]

5- Another point to mention here was that regulations were also adopted on purchase and sales conditions and the payment documents by *Ticaret Kanunname-i Hümayunu*. As a good example business of buying and selling products might arise with the contract and requirement of the bill of sale.[30]

II) EU BUSINESS LAW FROM THE VIEWPOINT OF MONTESQUIEU THEORY

"The Spirit of The Laws" is the famous work of Montesquieu. [31] Montesquieu defines Rules of social order, which name is The Spirit of The Laws, which are not just about legislation.[32] Constituent parts of the Spirit of The Laws are like this:

1. Climate and geographical location of country.

2. Social, economic, cultural and political circumstances of the country.[33]

All of them create the national character of the community.[34] All of them create the national character of the community. However, it is hard to change what we do in society. Montesquieu believed this was impossible because of cultural, social, economic, environmental, and political differences.[35]

[28]Sipahi, Barış - Küçük, İsmail (2011): *Türk Tİcaret Kanunları ve Muhasebenin Gelişimine Etkilerinin 160 Yıllık Öyküsü*, Muhasebe ve Finans Tarihi Araştırmaları Dergisi, No.1, p.184.
[29]Çeker, Mustafa (2015): *Limited Şirketlerde Ortak Sayısının Sınırlandırılması*, Ticaret ve Fikri Mülkiyet Hukuku Dergisi, Vol.1, No.1, p.59.
[30]Sipahi, Barış - Küçük, İsmail (2011): *Türk Tİcaret Kanunları ve Muhasebenin Gelişimine Etkilerinin 160 Yıllık Öyküsü*, Muhasebe ve Finans Tarihi Araştırmaları Dergisi, No.1, p.184.
[31]Karnıbüyük, Mustafa (2018): *Montesquieu'nün İklim Teorisi*, Sinop Üniversitesi Sosyal Bilimler Dergisi, Vol.2, No.2, p.249
[32]Gürkan, Ülker (1988): *Montesquieu ve Kanunların Ruhu (Hukuk Sosyolojisi Açısından Bir Değerlendirme)*, Ankara Hukuk Fakültesi Dergisi, Vol.40, No.1, p.12
[33]Kahn-Freund, Otto (1974): *On Use and Misuse of Comparative Law*, The Modern Law Review, Vol.37, No.1, p.7
[34]Karnıbüyük, Mustafa (2018): *Montesquieu'nün İklim Teorisi*, Sinop Üniversitesi Sosyal Bilimler Dergisi, Vol.2, No.2, p.249
[35]Kahn-Freund, Otto (1974): *On Use and Misuse of Comparative Law*, The Modern Law Review, Vol.37, No.1, p.7

I agree with Ülker Gülhan, and actually, the climate does not make changes.[36] Also, I agree with Otto Kahn-Freund. In these hundreds of years, the geographical, economic, social, and cultural elements have significantly lost, but the political factors have equally greatly gained importance.[37]

One of the sources of law is "Unified Law". Unification is an important goal in international relations. It can be in the form of "regional unification" or "universal unification". Remarkable results usually happened in case of regional unification and unification of international law rules for countries that are geographically close to each other. EU is a kind of regional unification. There is a unique form of approximation and harmonization of laws in the EU.[38] The EU Acquis is the total body of EU's legal system and rules, which are in force. Candidate countries have to implement this acquis as of the time of its accession because the candidate country is required to adopt the EU acquis as a whole.[39] Legislators have a role in organizing social life, but this is limited, and the legislator depends on the circumstances involved. Moreover, the primary duty of the legislator is not to preserve the situation determined by natural and social conditions but to change it for society when necessary. In doing so, he should also consider the characteristics of the society in which he lives according to the theory of Montesquieu.[40] The most important agreement on the road to European integration is TEU. TEU was essential in realizing a union that brought European peoples closer. With this treaty, the Community has focused on deepening in the social dimensions of the Community and political unity, with its initial goal of economic integration.[41] So, Every society is subject to the conditions of its environment. Therefore, when political, economic, and cultural variables change, also the rules of law will change automatically. In other words, as the laws are shaped by society, the society is shaped by the laws according to the theory of Montesquieu.[42]

Also, that is important from the viewpoint of EU Business Law, in my opinion. All decisions on any economic issues, such as investment, savings, and business preferences, are

---

[36]Gürkan, Ülker (1988): *Montesquieu ve Kanunların Ruhu (Hukuk Sosyolojisi Açısından Bir Değerlendirme)*, Ankara Üniversitesi Hukuk Fakültesi Dergisi, Vol.40, No.1, p.28

[37] Kahn-Freund, Otto (1974): *On Use and Misuse of Comparative Law*, The Modern Law Review, Vol.37, No.1, p.8

[38] Fézer, Tamas (2016): Sources and principles of international business law Slides, Manuscript.

[39]Republic of Turkey Ministry of Foreign Affairs Directorate for EU Affairs (2019): *FAQ for Negotiation Process*. Available at: https://www.ab.gov.tr/44460_en.html (Accessed: 5 February 2020)

[40] Gürkan, Ülker (1988): *Montesquieu ve Kanunların Ruhu (Hukuk Sosyolojisi Açısından Bir Değerlendirme)*, Ankara Hukuk Fakültesi Dergisi, Vol.40, No.1, pp.12-16.

[41] Tapan, Ruhi (1999): *Avrupa Birliği (AB) Hukukunun Kaynakları ve Ulusal Hukuka Etkileri Avrupa Adalet Divanı*, Sayıştay Dergisi, No.32, p.92.

[42]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)

our choices in the economic field. I agree with Bilal Kargı, and if the boundaries that predict all the determinant elements of human behavior in economic life and how this individual can behave in what economic issues are determined, it is possible to define the area formed by these boundaries as an economic field. The boundaries of this economic field are determined by many instruments, such as psychological, social, political, and cultural. So, as an example, if British, German, or French socialisms are different from each other, the conceptions of capitalism of all societies are also different, and therefore their economic fields are different.[43] Also, economic freedom means the production, distribution, or consumption of goods and services through all public stages without any restrictive or coercive intervention. In other words, economic freedom has been defined as freedom in which individuals can perform their economic activities freely without being exposed to constraints. Dilek Şahin used clustering analyses in her study and achieved four different clusters from the viewpoint of economic freedoms in 2015 in terms of the EU. So, as an example, Germany, Luxemburg, Hungary, and Romania were in different clusters from the viewpoint of economic freedoms in 2015 in this study.[44] In line with economic prosperity and its spread to society, law and economy must complement each other. The sound functioning of the economic system depends on meeting the needs and the existence of an effective legal system. Therefore, regulation of economic life in all aspects constitutes the subject of business law. The primary purpose of these rules regarding regulating economic life is to ensure the general and economic public order by protecting the economic activities of society and individuals.[45] So, if the economic fields and freedoms are different of the countries, their business laws are different in my opinion.

Therefore, economic integration and, accordingly, EU Business Law for all the member states of the EU can not be separated from others like social, cultural, and political integration. Therefore, for a common EU Business Law, all integrations between EU member states must coexist in terms of the theory of Montesquieu, in my opinion.

[43]Kargı, Bilal (2012): *İnsan Düşüncesinde İktisadi Alanın (Yeniden) Yapılanması Üzerine Spekülasyonlar*, Gümüşhane Üniversitesi SBE Dergisi, Vol. 3, No. 6, pp.14-15, p.32

[44]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

[45]Baykal, C. Murat (2008): Hukuk-Ekonomi İlişkisi ve Ekonomi Hukuku Üzerine, Ankara Barosu Dergisi, Vol.66, No.4, p.76, pp.84-85

III) TURKISH CONTRACT LAW

Turkish Civil Law is the most significant and extensive category of Turkish private law. The TMK, numbered 4721, and TBK, numbered 6098, are the primary sources of Turkish Civil Law.

The TMK is composed of four main books that follow seven preliminary articles. These sections include the 'Law of Persons,' 'Family Law,' 'Inheritance Law,' and 'Law of Property.' Additionally, the Law of Obligations, which is considered the fifth book of the TMK, is regulated under the TBK[46] in accordance with article 646 of TBK. As stated in article 646 of the TBK, 'This law is the fifth book of the Turkish Civil Code, dated 22/11/2001 and numbered 4721, and is its complement.'

In my opinion, the most significant regulation in TMK concerning contract law is the principle of good faith, which is clearly stated in article 2 of TMK. According to article 2 of TMK, 'Every person must act in good faith when exercising his/her rights and performing his/her obligations. The manifest abuse of a right is not protected by law.' Article 2 of TMK is a preliminary provision and is equally important as other provisions in the first seven preliminary articles of TMK. It is regarded as a general principle or provision that is applicable not only to civil law but also to other legal branches like debt enforcement and bankruptcy law, as well as the law of civil procedure. So, according to article 5 of TMK, the general provisions laid down in the TBK and TMK also apply to other legal relationships concerning private law, provided that their applications are appropriate to the nature of the legal relationship. The concept of good faith has a broad application in various areas of law. It is particularly relevant in interpreting laws and filling in gaps, forming, interpreting, and completing legal transactions, preventing fraud against the law, modifying and terminating contracts, determining the content of subsidiary liability, and ensuring that rights have not been abused.[47]

TBK is the legal branch that manages the connection between individuals who possess debt (debtors) and those who are owed money (creditors). According to the TBK, the debtor-creditor relationship between the two parties may arise from legal transactions such as the sale or lease contracts, tortious acts, or unjust enrichment.[48]

---

[46] Akıntürk, Turgut (2002): *Hukuka Giriş*, Anadolu Üniversitesi, Eskişehir, pp.59-60

[47]Uyar, Talih: *Yargıtay Kararlarında "Dürüstlük (Objektif İyiniyet)" Kuralı (MK.2/I) ve "Hakkın Kötüye Kullanılması Yasağı* (MK.2/II)" In: Gören, Zafer ed. (2000): *Prof. Dr. Seyfullah Edis'e Armağan*, Dokuz Eylül Üniversitesi, İzmir, pp.440-441

[48] Akıntürk, Turgut (2002): *Hukuka Giriş*, Anadolu Üniversitesi, Eskişehir, p.62

Contracts establish specific duties and create an obligation relationship between parties. This is regulated under the title of Contractual Obligation Relations in the first section of the first part of the TBK, titled General Provisions. The regulations can be found in articles 1 to 48 of TBK. These rules are applicable for every kind of contracts. So, general provisions of TBK may also be applied to contracts regarding family law or the law of inheritance. So, according to the article 5 of TMK, the general provisions laid down in the TBK and TMK also apply to other legal relationships concerning private law, provided that their applications are appropriate to the nature of the legal relationship.

One of the significant principles in contract law is the freedom of contract in my opinion. This principle is outlined in article 26 of the TBK within the general provisions. As per this article, the parties have the freedom to decide the terms of the contract, including their duties, obligations, rights, liabilities, remedies, and more. However, these terms must be in accordance with the law.

However, the TBK's second part includes regulations that pertain to specific contract types, such as sale contracts under the title 'private debt relations'.[49] It is important to note that if there is no regulation regarding the contractual relationship in general provisions, the regulations in the contract's provisions stipulated in the second part will be considered. However, in case there are regulations in both, the regulations in the second part will be given priority if there is any difference.[50]

TTK refers to the set of legal rules that govern commercial relationships between individuals.TTK is also a branch of law that can complement TMK according to the article 1 of TTK. According to the article 1 of TTK the Turkish Commercial Code is an integral part of the Turkish Civil Code dated 22/11/2001 and numbered 4721. TTK is composed of 10 introductory articles and 5 books that cover the following topics: commercial enterprise law, company law, negotiable instruments law, maritime law, and insurance law.[51]

Furthermore, when drafting the TTK, care was taken to ensure that it does not contradict the provisions of the TBK. As a result, contracts that fall under the TBK are not addressed in the TTK. For example, contracts like current account contracts, agency contracts, carriage contracts, and insurance contracts are only governed by the TTK. However, if two laws conflict,

[49] Helvacı, Ilhan (2017): *Turkish Contract Law*, Springer, p.vii, p.x, p.35
[50] Yavuz, Cevdet (1986): *Borçlar Hukuku Dersleri - Özel Borç İlişkileri*, Marmara Üniversitesi Hukuk Fakültesi, İstanbul, p.8
[51] Akıntürk, Turgut (2002): *Hukuka Giriş*, Anadolu Üniversitesi, Eskişehir, p.62

it's best to prioritize the provisions of the TTK as it holds a unique status compared to the TBK.[52]

I believe that one of the most important regulations in TTK regarding contract law is the prudent merchant rule, as outlined in article 18. According to article 18 of TTK, every merchant should behave like a prudent business person in all activities related to their business.

In Turkey, the legal system divides judicial justice into criminal justice and civil justice. Article 4 of The Establishment, Duties and Jurisdiction of First Instance Judicial Courts and Regional Courts of Justice Law No. 5235 states that there are various types of civil courts, such as civil courts of first instance, civil courts of peace, and other civil courts established through special laws. So, there are also other courts such as commercial courts of first instance, labor courts, family courts, juvenile courts, and consumer courts. The Civil Chambers of the Supreme Court is the court of the last instance in civil jurisdiction.[53]

I believe it's essential to discuss the connection between the Civil Court of First Instance and the Commercial Court of First Instance. The first instance courts can be categorized into two types: general courts and special courts. General courts handle all disputes related to private law, unless otherwise specified by the law. Special courts, on the other hand, are established to handle specific disputes between certain individuals or on certain subjects. Their responsibilities are restricted to those specific areas. The Civil Courts of First Instance fall under the category of general courts. As per Article 5/3 of the TTK, the commercial court of first instance has a jurisdiction relationship with the civil court of first instance and other civil courts. As a result, the procedural provisions related to the jurisdiction will be applicable. This regulation makes the commercial court of first instance a special court.

Article 2 of the HMK states that the civil court of first instance handles cases related to property rights, such as debt and damages, regardless of the value or amount of the subject in question. Meanwhile, article 5 of the TTK dictates that commercial courts of first instance are responsible for hearing all commercial cases, regardless of the value or amount being sued. Article 4 of the TTK and other special laws regulate which cases fall under the category of commercial cases, which are divided into two groups for evaluation. To fall under the first group, two conditions must be met: both parties involved in the dispute must be merchants, and the disagreement must be related to their commercial enterprises. The second group of cases,

[52] Yavuz, Cevdet (1986): *Borçlar Hukuku Dersleri - Özel Borç İlişkileri*, Marmara Üniversitesi Hukuk Fakültesi, İstanbul, pp.8-9

[53] Koçak, Özlem Süren (2009): *Türkiye'de Yargının Örgütlenmesi ve Adalet Sisteminin Problemleri*, Türkiye Barolar Birliği Dergisi, No:85, p.407

as stated in the TTK and special laws, are categorized as openly commercial and will be heard in commercial courts. These lawsuits will be brought to commercial courts regardless of whether the parties involved are merchants or if the dispute is related to a commercial enterprise. As an example, in cases of legal disputes concerning the acquisition of assets or business, business mergers or transformations, or bankruptcy, the commercial court of first instance will be responsible for resolving the issues. However, if it is unclear which court has jurisdiction, the civil court of first instance under article 2/2 of the HMK will be considered the competent court. Based on article 2/2 of HMK, the civil court of first instance is responsible for other cases and works unless otherwise specified by this law or other laws.[54]

In Turkey, the judicial system consists of three levels: first instance courts, regional courts of appeal, and supreme courts. The first instance courts handle cases at the initial level, while the Regional Courts of Appeal can review decisions made by these courts under article 341 of the HMK. The Supreme Court is the highest level in the HMK, and appeals can be made to this court after a decision has been reached by the Regional Courts of Appeal, as stated in article 361 of the HMK.[55]

There are civil law chambers in the Turkish Supreme Court. Also, the Turkish Supreme Court is composed of two important assemblies: the Assembly of Civil Chambers and the Grand Plenary Assembly. The Assembly of Civil Chambers has several significant responsibilities, including reviewing court decisions that resist the annulment decisions made by the Court of Cassation Chambers, dealing with any conflicts between civil chambers regarding final decisions made by the same or different regional courts of appeal, resolving case-law conflicts between the Civil Chambers, and finalizing conflicted judgments when one of the Chambers of the Supreme Court wishes to change a settled judicial decision or has given inconsistent decisions in similar events. The Grand Plenary Assembly is responsible for electing the Prime President, deputy presidents, heads of chambers, the General Prosecutor, and the Deputy General Prosecutor. Additionally, it makes decisions on finalizing conflicted judgments when there is a conflict between judgments of different chambers and assemblies.[56]

---

[54] Tahiroğlu, Fatih (2013): *Medeni Usul Hukukunda Görevli Mahkemenin Belirlenmesi*, *(Thesis),* İstanbul Üniversitesi, pp.52-53, p.58, pp.81-85. Available at: http://nek.istanbul.edu.tr:4444/ekos/TEZ/50962.pdf (Accessed: 17 May 2023)

[55] Tuğsavul, Melis Taşpolat (2018): *İstinaf İncelemesi Sonucunda Verilebilecek Kararlar*, Türkiye Barolar Birliği Dergisi, No:134, pp.314-315; Tahiroğlu, Fatih (2013): *Medeni Usul Hukukunda Görevli Mahkemenin Belirlenmesi*, *(Thesis),* İstanbul Üniversitesi, p.52. Available at: http://nek.istanbul.edu.tr:4444/ekos/TEZ/50962.pdf (Accessed: 17 May 2023)

[56] Akıntürk, Turgut (2002): *Hukuka Giriş*, Anadolu Üniversitesi, Eskişehir, p.329; Aksel, İsmail (2013): *Turkish Judicial System - Bodies, Duties and Officials*, The Ministry of Justice of Turkey The Department for Strategy Development, Ankara, p.36. Available at: https://rm.coe.int/turkish-judicial-system-bodies-duties-and-officials-by-ismail-aksel-ju/168078f25f (Accessed: 17 May 2023)

IV) CU AGREEMENT BETWEEN TURKEY AND EU

4.1) Free Movement of Goods Principle

Many countries have reorganized their trade policies with the increasing importance of trade. With these regulations, countries have turned to fewer interventionist policies that give more market freedom. With free trade, national markets are opened to foreign goods. In this case, it enables the markets to be more competitive. Adam Smith, the leader of classical economics, emphasized that the countries participating in trade will benefit from trade by considering the differences between countries participating in foreign trade. This view has evolved over time with the classical economists who followed Adam Smith.[57] According to Adam Smith's analysis, countries that do not have an absolute advantage over each other will not trade. However, David Ricardo has shown that even if a country does not have absolute cost advantages in the production of any good, that country can benefit from trade.[58]

Since the *travaux préparatoires* to the Treaty of Rome, it is largely undisputed that the EU law project of an internal market is conceptually based on classical free trade theory as formulated by Adam Smith and David Ricardo. This theory requires an open market, where production factors and products can move freely to where they are remunerated best. In other words: It is trade that is at the heart of the EU internal market.[59] Article 3(3) TEU provides that the EU 'shall establish an internal market'. Article 4(2) TFEU confirms that the competence to regulate it is shared between the EU and the Member States. The internal market is then defined in Article 26(2) TFEU as 'an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured in accordance with the provisions of the Treaties'.[60] ECJ considered the Treaty freedoms to be on a par with fundamental rights.[61] The

[57] Özel, Hasan Alp (2012): *Ticari Serbestleşmenin Teorik Temelleri ve Yeni Ticari Serbestleşme Teorileri*, Kırklareli Üniversitesi İ.İ.B.F. Dergisi, Vol.1, No.1, p.5

[58]Alper, Serdar (2014): *İhracat Performansı İle Uluslararası Rekabet Gücünün Yapısal Belirleyicileri Arasındaki İlişki: OECD ve BRIIC Ülkeleri Uygulaması*, (Thesis), Hacettepe Üniversitesi,p.11. Available at: http://openaccess.hacettepe.edu.tr:8080/xmlui/bitstream/handle/11655/2403/07d353ba-63b6-4bd5-a9df-6b0f24f21982.pdf?sequence=1&isAllowed=y (Accessed: 11 March 2020)

[59] Purnhagen, Kai (2013): *The Politics of Systematization in EU Product Safety Regulation: Market, State, Collectivity, and Integration*, Springer, New York-London, pp.135-136

[60] Shuibhne, Niamh Nic (2013): *The Coherence of EU Free Movement Law: Constitutional Responsibility and the Court of Justice*, Oxford University Press, Oxford, p.21

[61]de Boer, Nik J. (2013): *Fundamental Rights and the EU Internal Market: Just how Fundamental are the EU Treaty Freedoms? A Normative Enquiry Based on John Rawls' Political Philosophy*, Utrecht Law Review, Vol. 9, No. 1, p.148

free movement of goods chapter is one of the four fundamental freedoms of European Union. [62]

The provisions on the free movement of goods ensure that goods can move freely, with the consequence that those most favored by consumers will be most successful, irrespective of the country, thereby maximizing wealth-creation in the EU.[63] In this context, the aim is the free circulation of industrial goods that are placed on the internal market of the Union by member states and industrial goods that are imported to the Union according to specific rules without any technical barrier on trade within the Union.[64] From a legal point of view, the principle of the free movement of goods is a key element for the creation and development of the internal market. The principle is also at the heart of the EU policies. The role and importance of this principle can be traced in the benefits that the European citizens and companies have as a consequence of the creation of the internal market. As an example, EU companies can build a strong platform in an opened, diverse and competitive environment, and they can also manage to obtain the resources they need in order to be successful in other world markets, the creation of new jobs within the EU etc.[65]

4.2) Custom Union in Economic Integration

Economic Integration can take various forms and these can be ranged in a spectrum in which the degree of involvement of participating economies, one with another, becomes greater and greater. These are FTA, CU, Common Market and Economic Union.[66]

From the viewpoint of FTAs, member countries do not impose any trade barriers (zero tariffs) on goods produced within the union. However, each country keeps its own tariff barriers to trade with non-members.[67] CU is the one of exceptions of MFN but it is also the kind of FTA. Also may be that is a kind of FTA but it is different from it with the matter of common external tariff. Therefore, that is a type of trade bloc, which is composed of a free trade area with a common external tariff. The participant countries set up common external trade policy

[62]Republic of Turkey Ministry of Foreign Affairs Directorate for EU Affairs (2019): *Free Movement of Goods*. Available at: https://www.ab.gov.tr/66_en.html (5 February 2020)
[63]Craig, Paul - De Búrca, Gráinne (2011): *EU LAW Text, Cases, and Materials*, Oxford University Press, New York, p.582
[64]Republic of Turkey Ministry of Foreign Affairs Directorate for EU Affairs (2019): *Free Movement of Goods*. Available at: https://www.ab.gov.tr/66_en.html (5 February 2020)
[65] Berlingher, Daniel (2018): *Regulating Free Movement of Goods within the European Union*, Journal of legal studies, Vol. 21, No.35, p.62
[66]Craig, Paul - De Búrca, Gráinne (2011): *EU LAW Text, Cases, and Materials*, Oxford University Press, New York, pp.581-582
[67]Marinov, Eduard (2015): *Economic Determinants of Regional Integration in Developing Counties*, International Journal of Business and Management, Vol.3, No. 3, p.26

but in some cases, they use different import quotas. Common competition policy is also helpful to avoid competition deficiency.[68] There are ROOs, and ROOs specify a requirement that must be met for a particular good to originate in a given country or area and hence receive preferential tariff treatment. ROOs are necessary for FTAs to allow countries to maintain separate external tariffs. Without ROOs, FTAs would simply become equivalent to CUs where the common external tariff was equal to that of the lowest member country (abstracting from transportation costs).[69]

Common market implies that to the free movement of goods within the CU is added the free movement of the factors of production—labour, capital and enterprise.[70] In other words, common market has all the elements of the CU, and additionally, permits factors to move freely among member nations.[71] Besides this, to achieve this level of integration, it is necessary for the member states to remove all trade barriers (including non-tariff restrictions), as well as to have a certain level of coordination of some of the economic policies.[72] The abolition of customs duties and charges having an equivalent effect is central to the idea of a CU and a single market.[73] The reason for diversity is that the CU is not a Single Market of the EU, and there is a discrepancy in common external tariffs.[74]

Finally, there is the economic union. Economic Union is a common market with a complete unification of monetary and fiscal policy. There would be a common currency that a central authority would control, and in effect, the member states would become regions within the union.[75] Based on the common market, economic policies in different areas are integrated, common approaches are formed, and coordinated funding is provided. Eliminating discrimination is linked to a certain degree of coordination of national economic policies to remove the differences between them.[76]

---

[68] Fézer, Tamas (2016): Sources and principles of international business law Slides, Manuscript

[69]Clausing, Kimberly A. (2000): *Customs Unions and Free Trade Areas*, Journal of Economic Integration, Vol.15, No.3, p.424

[70]Craig, Paul - De Búrca, Gráinne (2011): *EU LAW Text, Cases, and Materials*, Oxford University Press, New York, p.582

[71] Sheer, Alain (1981): *A Survey of the Political Economy of Customs Unions*, Law and Contemporary Problems, Vol.44, No.3, p.33

[72]Marinov, Eduard (2015): *Economic Determinants of Regional Integration in Developing Counties*, International Journal of Business and Management, Vol.3, No. 3, p.26

[73]Craig, Paul - De Búrca, Gráinne (2011): *EU LAW Text, Cases, and Materials*, Oxford University Press, New York, p.611

[74] Bartha, Ildiko (2016): EU Internal Market Law 1 Slides, Manuscript.

[75]Craig, Paul - De Búrca, Gráinne (2011): *EU LAW Text, Cases, and Materials*, Oxford University Press, New York, p.582

[76]Marinov, Eduard (2015): *Economic Determinants of Regional Integration in Developing Counties*, International Journal of Business and Management, Vol.3, No. 3, p.26

4.3) Turkey-EU Custom Union Agreement

Ankara Agreement is an association agreement in type and was signed on 1 September 1963, and the official relation between Turkey and the EEC started with the Ankara Agreement. Ankara Agreement is significant because it forms the legal basis of the relations between Turkey and the EEC. It also marks the beginning of relations between them. Ankara Agreement is a sui generis international treaty. It is something less than admission but more than a mere trade treaty.[77] A key provision of that agreement was the commitment by Turkey to establish a Customs Union that would be applied to each member state.[78]

In fulfillment of this objective, the EU–Turkey Customs Union came into force on 31 December 1995 pursuant to Decision 1/95.[79] From that time onwards, Turkey became the first country to conclude a Customs Union with the EC without being a full member.[80] As a result of the Customs Union, Turkey has opened its internal market to the competition of the EU and third countries while guaranteeing free access of its exporters to the EU market.[81] By January 1996, Turkey lifted all customs tariffs on industrial goods imported from the EU and started applying the same tariff rate as the EU on goods imported from third countries, except for agricultural goods. The Agreement has also put forward reforms of the technical standards regime and competition policy.[82] Since the formation of the CU, Turkey has successfully adopted the EU rules and regulations on trade policy instruments and is effectively implementing them. The reforms have substantially decreased trade costs between the EU and Turkey and improved market access conditions for Turkish exports into the EU and EU exports into Turkey. However, there are still areas where Turkey needs alignment of its legislation and implementation with the acquis.[83] So, European Council decided to open accession negotiations with Turkey on 3 October 2005, and the accession to the EU requires harmonization of the

[77]Aybey, Ali (2004): *Turkey and the European Union Relations: A Historical Assessment*, Ankara Avrupa Çalışmalan Dergisi, Vol.4, No.1, p.22, p.24
[78]Kanbur, Mehmet - Bernat, Tomasz (2013): *Europeanization in Turkey and accession process to the European Union*, Journal of International Studies, Vol.6, No.2, p.80
[79] Willems, Arnoud R. - Kamau, Maryanne W. (2019): Levelling EU-Turkey Trade: An Assessment of the Asymmetrical Customs Union between the European Union and Turkey, p.76. Available at: https://www.sidley.com/-/media/publications/2019_inttlr_issue_2_offprint_willems_kamau.pdf (Accessed: 4 February 2020)
[80]Aybey, Ali (2004): *Turkey and the European Union Relations: A Historical Assessment*, Ankara Avrupa Çalışmalan Dergisi, Vol.4, No.1, p.27
[81] Kanbur, Mehmet - Bernat, Tomasz (2013): *Europeanization in Turkey and accession process to the European Union*, Journal of International Studies, Vol.6, No.2, p.83
[82]Akan, H. D. Mumcu - Balin, B. Engin (2016): *The European Union-Turkey Trade Relations under the Influence of Customs Union*, Journal of Economics, Business and Management, Vol. 4, No. 2, p.155
[83]Aytuğ, Hüseyin - Kütük, Merve Mavuş - Oduncu, Arif - Togan, Sübidey (2017): *Twenty Years of the EU-Turkey Customs Union: A Synthetic Control Method Analysis*, Journal of Common Market Studies, Vol.55, No.3, p.421

legislation to meet the standards of the legal system of the EU, the so-called *acquis communautaire*.[84] The application *ratione materiae* of Decision 1/95 only concerns the free movement of goods and the related issues. After all, Decision 1/95 did not refer to any other freedoms of the EC Treaty, and thus freedoms other than the free movement of goods (such as services and public procurement) remain out of the scope of the CU.[85]

From a different point of view, Sema Ay concluded that the CU Agreement is a milestone for Turkey. Nevertheless, due to the enable to open Turkey's domestic market to the EU with CU, it is thought to have lost bargaining power in membership. So, Turkey's EU membership has come to a deadlock under these circumstances.[86] However, CU is not a new type of agreement between Turkey and the EU. That is a stage of the consolidation process with the EU, which was begun with the Ankara Agreement. The government's main aim with the CU is to have more shares in the EU market and complete a necessary condition of Turkey's membership in the EU.[87] So, the integration of the Turkey-EU CU agreement must be seen as something other than FTA. It is an instrument to become a member of the EU and an economic harmonization process with Europe.[88]

Since 1996, the CU between Turkey and the EU covers only the areas in which the EU is competitive, such as industrial and processed agricultural products. Although it had a limited concept and problems emerged from its implementation, the positive effects of the CU on trading volume were undeniable for both parties, at first.[89] Also, there is a questionnaire result in the study of Hakan Tunç in 2017 about the effects of CU on Turkish International Business. It shows that participants of the questionnaire, regardless of their educational status and age range, believe that the CU positively affects exports and imports, as he concluded.[90] Moreover, I agree with Ela Çolpan Nart; she concluded that CU has a trade creation effect on trade with the EU, and CU has diverted trade from non-EU countries to EU countries according to the

[84] Petričušić, Antonija - Erkan, Ersin (2010) : *Constitutional Challenges Ahead the EU Accession: Analysis of the Croatian and Turkish Constitutional Provisions that Require Harmonization with the Acquis Communautaire*, Uluslararası Hukuk ve Politika, Vol.6, No.22, p146, p.148

[85] 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)

[86] Ay, Sema (2019): *Türkiye'nin Avrupa Birliği Çıkmazı: Gümrük Birliği Anlaşması Çerçevesinde Değerlendirmeler*, Tesam Akademi Dergisi, Vol.6, No.2, p.171

[87] Republic of Turkey Ministry of Foreign Affairs Directorate for EU Affairs (2019): *Customs Union*. Available at: https://www.ab.gov.tr/46234_en.html (5 February 2020)

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

[89] Bilgin, Azime Aslı (2018): *The Need for a Modernized EU-Turkey Customs Union: The Problems and the Solution Suggestions*, Athens Journal of Mediterranean Studies- Vol.4, No. 2, p.123

[90] Tunç, Hakan (2017): *Dış Ticaretin Gelişiminde Gümrük Birliği'nin Rolü, Bir Algı Araştırması*, AÇÜ Uluslararası Sosyal Bilimler Dergisi, Vol.3, No.1, p.96

analysis results in her study.[91] So, even today, there is significant trade between the EU and Turkey. So, Turkey is the EU's 5th largest trading partner in exports and imports. The EU is by far Turkey's number one import and export partner and source of FDI.[92]

However, until now, there have been many changes, and Turkey's EU membership is still uncertain.[93] Thus, the idea of modernization of the CU came to the fore. Recently, the World Bank and the European Commission prepared comprehensive studies on the effects of the modernization of the CU. While the former emphasizes that opportunities for widening Turkey's trade relationship with the EU should concentrate on liberalization of agriculture, services trade, and public procurement, the latter compares three options: 'no policy change,' 'CU modernization and FTA in additional areas' and 'Deep and Comprehensive FTA.' The Commission concludes that the preferred option is a modernization of the CU plus an FTA covering services, public procurement, and further agricultural liberalization.[94] The modernization of the Customs Union aims to find solutions to the systemic problems encountered within the Customs Union and expand the preferential commercial and economic relations with the EU to new areas such as agriculture, government procurement, services, and e-commerce.[95] The EU has followed the global trend of a proliferation of FTAs in the aftermath of stalled multilateral negotiations in the WTO. On the back of this trend, coupled with the adoption of the "Trade for all" policy, the EU has concluded an increasing number of FTAs with third countries.[96] Even within the scope of the increasing number of FTAs with the third countries that the EU has signed and started to implement in recent years, commercial relations on issues such as agriculture, services, and public procurement are more extensive than the EU-Turkey CU agreement.[97] Also, Turkey has adopted FTAs that the EU has or will conclude with

---

[91] Nart, Ela Çolpan (2010): *Gümrük Birliği'nin Türkiye'nin Dış Ticareti Üzerine Etkileri: Panel Veri Analizi*, Journal of Yaşar University, Vol.5, No.17, p.2882

[92]European Commission (2020): *Countries and regions: Turkey*. Available at: https://ec.europa.eu/trade/policy/countries-and-regions/countries/turkey/ (Accessed: 4 February 2020)

[93]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)

[94]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

[95]Özkoç, Osman (2019): *Gümrük Birliği'nin Türkiye Ekonomisine Etkileri*, (Thesis), Ordu Üniversitesi, pp.58-59.Available at: http://earsiv.odu.edu.tr:8080/jspui/bitstream/11489/1013/1/10223677.pdf (Accessed: 3 February 2020)

[96]Willems, Arnoud R. - Kamau, Maryanne W. (2019): Levelling EU-Turkey Trade: An Assessment of the Asymmetrical Customs Union between the European Union and Turkey, p.76. Available at: https://www.sidley.com/-/media/publications/2019_inttlr_issue_2_offprint_willems_kamau.pdf (Accessed: 4 February 2020)

[97]Özkoç, Osman (2019): *Gümrük Birliği'nin Türkiye Ekonomisine Etkileri*, (Thesis), Ordu Üniversitesi, p.59. Available at: http://earsiv.odu.edu.tr:8080/jspui/bitstream/11489/1013/1/10223677.pdf (Accessed: 3 February 2020)

third countries following the common customs policy. So, Turkey cannot establish unilateral negotiations with countries with which the EU has an agreement. Therefore, Turkey has to accept the agreement terms of the EU without the authority to negotiate, and that causes the trade creation effect to lose power in terms of Turkey.[98] Moreover, the preferential treatment given by Turkey is not subject to automatic or equivalent reciprocity from the EU's FTA partners. As a result, Turkey has to negotiate separate FTAs to obtain preferential access to the EU's FTA partners for its companies and products. However, some EU FTA partners (e.g., Mexico, South Africa, and Algeria) have not concluded similar arrangements with Turkey. Moreover, its negotiating position for Turkey with countries that have already concluded an FTA with the EU is weak because the duty level in Turkey is already zero. Therefore, with several new EU FTAs lurking, Turkey faces increased trade losses. A timely and effective solution is therefore needed to avert such losses.[99]

V)CHOICE OF LAW AND ADAPTING THE RULES OF PECL IN INTERNATIONAL, EUROPEAN AND TURKISH CONTRACT LAW

5.1) Unification and Harmonization

The unification of law of international trade can be defined as the process by which conflicting of two or more systems of national laws applicable to the same international legal transaction is replaced by a single rule.[100] Unification is an important goal in international relations. Unified Law is a source of international business law. It can be in the form of "regional unification" or "universal unification".

Universal unification has some results in periphery areas of law, like securities, intellectual property law. Among these universal unifications, the CISG is result of Universalism[101] with regard to international business and contract law.

[98]Tekin, Ümit Engin (2017): *Gümrük Birliği'nin Türk Ekonomisine Etkileri (1996-2016)*, Social Sciences Studies Journal, Vol.3, No.12, p.2101

[99] Willems, Arnoud R. - Kamau, Maryanne W. (2019): Levelling EU-Turkey Trade: An Assessment of the Asymmetrical Customs Union between the European Union and Turkey, p.76. Available at: https://www.sidley.com/-/media/publications/2019_inttlr_issue_2_offprint_willems_kamau.pdf (Accessed: 4 February 2020)

[100]UNCITRAL (1970): *Yearbook of the United Nations Commission on International Trade Law, 1970,* Vol. I, pp.13-17. Available at: http://www.uncitral.org/pdf/english/yearbooks/yb-1968-70-e/yb_1968_1970_e.pdf (Accessed: 1 June 2017)

[101]Bartha, Ildiko (2016): Regional Economic Integrations Slides, Manuscript.

Remarkable results usually happened in case of regional unification and unification of international law rules for countries that are geographically close to each other. EU is a kind of regional unification. There is a unique form of approximation and harmonization of laws in the EU.[102]

Unlike unification which contemplates the substitution of two or more legal systems with one single system, harmonization of law arises exclusively in comparative law literature, and especially in conjunction with interjurisdictional, private transactions. Harmonization seeks to effect an approximation or co-ordination of different legal provisions or systems by eliminating major differences and creating minimum requirements or standards.[103] In any case, without harmonization, unification cannot be achieved, therefore, a truly uniform manner of interpretation is necessary in order to ensure a somewhat unified approach. [104]

It must be mentioned, however, that the PECL has not been adopted so far, and it is very likely the document would never receive adoption in the European Union. Still, re-codifying approaches and slight amendments to national contract law in the past decade certainly prove the norms and the underlying principles of the PECL made a remarkable impact on the legislation of the member states. This is the reason the PECL may be used as a reflection on the common cores of contract law throughout the European Union.

However, unification of laws means implementation of homogeneous set of laws that are assigned by international organizations and embraced by separate states.[105] Therefore, if parliament or council adopts it, the PECL will become unified. Therefore, that means a single system of contract law in the EU and a unification based on these definitions, in my opinion. That is also because the direct effects of regulations are directly applicable and binding if we look from the viewpoint of that definition.

[102]Fezer, Tamas (2016): Sources and principles of international business law Slides, Manuscript.
[103] Cruz, Peter de (1999): *Comparative Law in a Changing World*, Cavendish Publishing, London, p.24
[104]Akseli, Orkun (2008). *Harmonisation of Secured Transactions Laws: A Comparative and International Perspective*, p.1. Available at:: http://ials.sas.ac.uk/sites/default/files/files/Research/Hart/WGH_2008_Abstracts.pdf (Accessed: 28 May 2017)
[105]Soni, Puja (2014): *The Benefits of Uniformity in International Commercial Law with Special Reference to the United Nations Convention on Contracts for the International Sale of Goods (1980)*. Available at: http://cisgw3.law.pace.edu/cisg/biblio/soni.html (Accessed: 20 May 2017)

5.2) PECL in regard to Harmonization of the Contract Law

PECL is in consequence of longing to create a contract law specific to Europe.[106] Two of the main reasons why PECL regulates from the viewpoint of my study:

a) Harmonization of the contract law in the EU,
b) Create a modern *lex mercatoria* in the EU.

However, that harmonization has not taken place yet.[107]

As we have seen, the aim is a harmonization of the PECL but an unaccomplished process. So, that is all about the EU for now, and if the harmonization process concludes, PECL can be a form of regional unification once adopted. So, the policy is EU Contract Law as a Regional Unification, and the doctrine is a harmonization of the PCEL, so PECL is about principles.

It is impossible to achieve a unified EU Contract Law even if it is adopted by the EU Parliament and the Council from the viewpoint of the Montesquieu Theory because of the social, cultural, political, and economic differences.[108] Nevertheless, as the laws (law) are shaped by society, laws can shape society according to Montesquieu's Theory,[109] and there is a way for the harmonization of the law as a doctrine to put away amendments between the EU member states and to be a union by this means.

Turkey has to implement the EU legal system because Turkey is required to adopt the EU legal system as a whole by the time the country joins the European Union.[110] If we think about Turkey, that is not important for now because there is no unified or at least harmonized contract law regime in the EU. However, Turkish Contract Law also benefited from PECL, and as an example, while drafting the TBK, it also benefited from PECL, as stated in the reasons of the Draft Bill of the TBK.[111]

---

[106] Apaydın, Eylem (2013): *Satım Hukuku Özelinde Uluslararası Sözleşme Hukukunun Birleştirilmesi Çalışmalarının KronolojisiThe Chronicles of Unifaction of International Contract Law, Particularly Sales Law*, Journal of Yaşar University, Vol.8, Special Issue, p.205.

[107]Apaydın, Eylem (2013): *Satım Hukuku Özelinde Uluslararası Sözleşme Hukukunun Birleştirilmesi Çalışmalarının KronolojisiThe Chronicles of Unifaction of International Contract Law, Particularly Sales Law*, Journal of Yaşar University, Vol.8, Special Issue, pp.240-241

[108]Kahn-Freund, Otto (1974): *On Use and Misuse of Comparative Law*, The Modern Law Review, Vol.37, No.1, pp.1-27

[109]Gürkan, Ülker (1988): *Montesquieu ve Kanunların Ruhu (Hukuk Sosyolojisi Açısından Bir Değerlendirme)*, Ankara Hukuk Fakültesi Dergisi, Vol.40, No.1, p.16.

[110]Republic of Turkey Ministry of Foreign Affairs Directorate for EU Affairs (2019): *FAQ for Negotiation Process*. Available at: https://www.ab.gov.tr/44460_en.html (5 February 2020)

[111]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)

5.3) PECL in regard to Lex Mercatoria

Lex Mercatoria (Law Merchant) started to be formed by the traders' quest to solve the disputes that would arise during international trade quickly and according to the merchants' customs in the Middle Ages. The importance of this international trade and the need for a body of practical rules governing trade led to the development of the *Lex Mercatoria*, a body of laws based on those customs and practices of merchants that were common throughout Europe.[112] *Lex Mercatoria* not only ruled the relationships between merchants but also it is a law created by merchants. Sometimes the *Lex Mercatoria* has been defined as a legal system created by the *mercantile societas*, which is separate from the statutory legal system, as the Italian Court of Cassation stated. In this way, trade usage has become customary law.[113]

At the core of the *lex mercatoria* is a set of autonomous commercial customs, which materialize in trade usages and commercial practices, including arbitral procedures and institutions.[114] Therefore, the *lex mercatoria* involved rules specific to the documentation of particular aspects of commercial transactions, including letters of credit, bills of exchange, and other negotiable instruments.[115] The most common argument supporting the usefulness of lex mercatoria suggests that commercial parties should prefer *Lex Mercatoria* to a national law because of the uncertainties generated by the conflict of laws. The reason is that modern choice of law rules has become too complex to predict which law will accurately govern the contract.[116] CISG and the PECL are parts of *lex mercatoria*.[117] In addition, these instruments are internationally drafted instruments governing contracts, which combine elements from civil law and common law systems.[118] The PECL contains general contractual principles applicable to

[112] Baskind, Eric - Osborne, Greg - Roach, Lee (2013): *Commercial Law*, Oxford University Press, Oxford, pp.7-8

[113] Galgano, Francesco (1995): *The New Lex Mercatoria*, Annual Survey of International & Comparative Law, Vol.2, No.1, pp.107-109

[114]Peter, Mazzacano (2008): *The Lex Mercatoria as Autonomous Law*, Comparative Research in Law & Political Economy, Vol.4, No.6, p.5.

[115]Dubay, Carolyn A. (2011): *Lex Mercatoria or the Law Merchant*, International Judicial Monitor. Available at: http://www.judicialmonitor.org/archive_summer2011/generalprinciples.html (Accessed: 18 May 2017)

[116] Cuniberti, Gilles (2014): *Three Theories of Lex Mercatoria*, Columbia Journal of Transnational Law, Vol.52, No.1, p.392

[117]Bucur, Loredana Ioana (2018): *Lex Mercatoria, Soft Law and a closer aproach of UNIDROIT Principles*, Law Review, Vol.8, No.2, p.305

[118]Chengwei, Liu (2003): *Remedies for Non-performance:Perspectives from CISG, UNIDROIT Principles & PECL*. Available at: http://www.cisg.law.pace.edu/cisg/biblio/chengwei.html (Accessed: 10 May 2017)

all varieties of contracts, regardless of subject matter.[119] PECL do not make distinctions between civil or commercial contracts.[120]

PECL is just a document, and it is not binding for EU member states, but the CISG is binding.

In addition, one important difference is that the PECL applies to contracts entered into by parties who belong to the EU member states, whereas the CISG applies universally.[121]

PECL is a document all about contract law. There is the aim to make harmonization of contract law in the EU. It is a part of *Lex Mercatoria*, like CISG. It is not harmonized yet, so there is an option for PECL in the EU. Therefore, there is no obligation in terms of PECL for contracting parties from EU member states, and contracting parties from EU member states can apply CISG in their international business relations.

5.4) PECL in regard to Freedom of Contract

5.4.1) Freedom of Contract Principle

The freedom to contract is the underpinning of *laissez-faire* economics and is a cornerstone of free market *libertarianism*. Through freedom of contract, individuals possess a general freedom to choose with whom to contract, whether to contract or not, and on which terms to contract.[122]

"Laissez Fair, Laissez Passer" is a principle of Adam Smith. His famous work regarding this issue is An Inquiry into the Nature and Causes of the Wealth of Nations(1776). Smith supported trade without force or constraint and free competition.[123] The performance of contracts was left for many ages to the faith of the contracting parties and the courts of justice of their kings seldom intermeddled in it as it is written in this book by Adam Smith.[124]

Let us look from the viewpoint of political and economic philosophies of laissez-faire liberalism and individualism. This classical law model is based on the assumption that parties

---

[119]Flechtner, Harry (2001): *Comparing the General Good Faith Provisions of the PECL and the UCC: Appearance and Reality*, Pace International Law Review, Vol.13, No.2, p.297

[120] Abera, Zena (2016): *Ethiopian Sales Law in the Light of International Laws and Principles of Contract*, Open Access Library Journal, Vol.3, No.8, p.4

[121] Messelu, Mamenie Endale (2016): *A Critical Analysis of Ethiopian Civil Code Governing Sale of Goods in the Light of International Convention and Principles*, Beijing Law Review, Vol.7, No.2, p.136

[122] Lista, Andrea (2017): International Commercial Sales: The Sale of Goods on Shipment Terms, Informa Law from Routledge, Oxon (Abingdon?), p.64

[123] Schumacher, Reinhard (2012): *Adam Smith's theory of absolute advantage and the use of doxography in the history of economics*, Erasmus Journal for Philosophy and Economics, Vol.5, No.2, pp. 59-63

[124] Smith, Adam (1977): *The Wealth of Nations - An Inquiry Into the Nature and Causes of the Wealth of Nations*, University Of Chicago Press, Chicago, p.137

generally have real freedom of choice and enjoy more or less equal bargaining power. Parties are thus free to accept or reject any terms of a contract. Contractual autonomy, and the parties' consent, are the primary legitimating factors behind the binding force of a contract.[125]

5.4.2) The principle of freedom of contract in the EU and in Turkey

Article 16 of the EU Charter of Fundamental Rights is the freedom to conduct business. This can be explained by the fact that the freedom to conduct a business does not only entail the freedom to exercise an economic or commercial activity but also encompasses the freedom of contract and free competition, the freedom to choose with whom to do business, and the freedom to determine the price of a service.[126] The effects of fundamental rights on contractual relationships can be established through legislation and case law.[127] So also, the recent jurisprudence of ECJ shows that it derives freedom of contract from the freedom to conduct a business.[128] As an example, in the Alemo-Herron case, the ECJ states that if the freedom of contract is seriously reduced, then an infringement of the freedom to conduct business is found in article 16 of the Charter.[129] Therefore, freedom of contract is not only a principle but a fundamental right in the EU. ECJ recognizes freedom of contract as a fundamental right in some cases. Constitutions of all European countries do not contain direct references to contractual freedom. However, that does not mean they are entirely neutral toward this principle.[130] As an example, the Constitution of Romania does not define economic freedom, but the case law of the Constitutional Court has set the pillars of its content. A facet of economic freedom is the guarantee of the possibility to perform acts of commerce. This pillar instituted by the case law draws a direct line between economic and contractual freedom.[131] Furthermore, the protection

[125]Mupangavanhu, Yeukai (2015): Fairness a slippery concept: *The common law of contract and the Consumer Protection Act 68 of 2008*, De Jure Law Journal, Vol.48, No.1, pp.116-117

[126] 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

[127]Mak, Chantal (2008): *Fundamental Rights in European Contract Law: A Comparison of the Impact of Fundamental Rights on Contractual Relationships in Germany, the Netherlands, Italy and England*, Kluwer Law International, (YER?), p.3

[128]Szwed, Marcin (2014): *Constitutional Protection of Freedom of Contract in the European Union, Poland and the United States and Its Potential Impact on the European Contract Law*, (Thesis), Central European University, p.38. Available at: www.etd.ceu.hu/2014/szwed_marcin.pdf (Accessed:8 June 2017)

[129]Oppenoorth, Eric (2015): *The introduction of the 'freedom of contract': A change in social direction of European Private Law?*, (Thesis), University of Amsterdam, p.40. Available at: http://www.scriptiesonline.uba.uva.nl/document/613640 (Accessed: 18 January 2019)

[130]Szwed, Marcin (2014): *Constitutional Protection of Freedom of Contract in the European Union, Poland and the United States and Its Potential Impact on the European Contract Law*, (Thesis), Central European University, p.9, pp.38-39. Available at: www.etd.ceu.hu/2014/szwed_marcin.pdf (Accessed:8 June 2017)

[131]Stanescu, Andreea-Teodora (2014): *The restrictions on economic freedom/free enterprise. The concept of unfair contractual terms in ECJ case law*, Curierul Judiciar. Available at: http://www.curieruljudiciar.ro/2014/04/30/the-

of citizens' rights is being expanded, with the Charter of Fundamental Rights adopted at the Nice European Council in 2000 merely as a 'solemn proclamation,' becoming legally binding with the Lisbon Treaty in 2009.[132] Therefore, freedom of contract is a general and binding principle in the EU in my opinion.

We can see the principle of freedom to contract in article 26 of the TBK and article 48 of the Turkish Constitution. Freedom of contract is the basis of the principle of free discretion in private law in Constitutional law, and people are free to settle their legal relations with their free will and contracts according to the freedom of contract as stated in the Turkish Constitutional Court Decision.[133] Therefore, in my opinion, freedom of contract is a general and binding principle in Turkey, as in the EU.

5.5) Using the Freedom of Contract Principle

PECL is not adopted; therefore, it is not binding. However, even if it would never be adopted or would serve as grounds for some future unification of contract laws in the EU, contracting parties residing in any country in the world, including Turkey, may include the principles of the PECL in their contracts, making use of the principle of freedom of contracts in my opinion.

The freedom of contract principle gives the right to decide about the shape and content of the contract.[134] If the parties put these principles into their contract, they will become a part of their contract. So, even if Turkey cannot be a member of the EU, parties from Turkey can benefit from these principles according to the principle of freedom of contract. So, the significant point is the application of the freedom of contract principle to the Turkey-EU business relation in terms of contract law, which can be done by using the choice of law clauses, in my opinion.

5.5.1) Choice of Law Clause in Concept of Freedom of Contract Principle

Choice of law is the question presented in determining what law should govern in conflicts of law. There are a number of different choice of law principles used by courts in

---

restrictions-on-economic-freedomfree-enterprise-the-concept-of-unfair-contractual-terms-in-ecj-case-law/ (Accessed: 25 May 2017)

[132]Christiansen, Thomas: *The EU reform process: from the European Constitution to the Lisbon Treaty* In: Carbone, Maurizio ed. (2010): *National Politics and European Integration: From the Constitution to the Lisbon Treaty*, Edward Elgar, Cheltenham, p.27

[133]Turkish Constitutional Court Decision (decision no. 2013/162, dated on 26.12.2013)

[134]Szwed, Marcin (2014): *Constitutional Protection of Freedom of Contract in the European Union, Poland and the United States and Its Potential Impact on the European Contract Law*, (Thesis), Central European University, p.7. Available at: www.etd.ceu.hu/2014/szwed_marcin.pdf (Accessed:8 June 2017)

determining the applicable law to apply; e.g. substantive vs. procedure distinction, center of gravity, *renvoi*, *lex fori*, grouping-of-contacts, place of most significant relationship.[135] In deciding which laws to apply to a dispute, a court will follow choice of law rules to determine if they should apply their own law or the law of another state.[136] A choice of law clause is a provision in a contract in which the parties stipulate that any dispute between them arising from the contract shall be determined in accordance with the law of a particular jurisdiction.[137] Freedom of contract makes it possible for the parties to have the autonomy to determine the applicable law under which their contract will be governed.[138] The possibility of the choice of law can be a powerful weapon for businesses since it allows them to place their transactions under the scope of the desired jurisdiction, in my opinion.

5.5.2) Choice of Law Clause in the EU and Turkish Legal Systems Considering CISG

If the buyer and seller have their places of business in different states and these states are the contracting parties of convention or the rules of private international law leads to the application of the law of a Contracting State by a choice of law clause, applicable rules will be the rules of the CISG. In addition, there must be an international sale of goods. However, the parties can exclude the CISG's application by using a choice of law clause in their contract.[139] Although there is no express support for this view on implicit exclusion of the application of the CISG in the language of the Convention, a majority of delegations were opposed to a proposal advanced during the diplomatic conference which would have permitted total or partial exclusion of the Convention only if done "expressly".[140] However, in the absence of the express exclusion of the CISG, the choice of law clause cannot exclude the application of CISG in practice. Therefore, I agree with Thomas J. Drago and Alan F. Zoccolillo, and the better way is the express exclusion of the application of the CISG in the contracts to be sure.[141] Therefore, there is a way to adapt the PECL to the international sale of goods contracts according to article

[135]Black, Henry Campbell (1979): *Black's Law Dictionary*, West Publishing Co., St. Paul, p.219.
[136]Fezer, Tamas (2016): Dispute Settlement Slides, Manuscript.
[137] Wild, Susan Ellis (2006): *Webster's New World Law Dictionary*, Wiley Publishing, Inc., Hoboken, p.71
[138] Zhang, Mo (2015): *Contractual Choice of Law in Contracts of Adhesion and Party Autonomy*, Akron Law Review, Vol.41, No.1, p.131
[139]Fezer, Tamas (2016): International Sale of Goods Slides, Manuscript.
[140]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)
[141] 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)

6 of the CISG by using the choice of law clause because of the exclusion of CISG, in my opinion.

Rome I Regulation has been adopted as one of the Union instruments for the proper functioning of the internal market.[142] Article 3 of the Rome 1 Regulation regulates the choice of law. That regulation is applied by courts in all Member States of the EU other than Denmark.[143] The parties are free to determine the law applicable to their contract by agreement according to the article 3 of the Rome 1 Regulation. The choice can be exercised either by an explicit or a tacit agreement. It does not require any specific form. The choice may refer to any law without restrictions. In particular, no relationship and no proximity of the contract to the law chosen are required. They may agree on a choice of law clause even after the main contract has been concluded or executed as long as such an ex post choice does not interfere with the rights acquired by third parties. Moreover, parties may submit different parts of the contract to different laws.[144]

There is a regulation in article 24 of the MÖHUK. That law is acceptable for contracts that include the element of foreignness, like the EU member states, if we look from the viewpoint of Turkey. One of the reasons for that regulation is the Rome Convention and the Rome 1 because of Turkey's negation process for being a member of the EU. The choice can be exercised either by an explicit or a tacit agreement, as in Rome 1, excluding the hypothetical agreement. The reason is that choice of law is an agreement between the parties.[145] According to MÖHUK, the parties may decide that the chosen law will apply to the whole or part of the contract. Also, parties may submit different parts of the contract to different laws, as stated in the justification of article 24 of the MÖHUK, which is similar to Rome 1, in my opinion. However, I agree with Arzu Alibaba; this freedom should be available for separable parts of the contract.[146] Also, that is the necessity of the freedom of contract principle, in my opinion. Also, the parties can make or change the choice of law at any time, according to article 24 of

[142]Yüksel, Burcu (2011): *The Relevance of the Rome I Regulation to International Commercial Arbitration in the European Union*, Journal of Private International Law, Vol.7, No.1, p.149.
[143]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.
[144]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
[145] 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
[146]Alibaba, Arzu (2005): *Milletlerarasi Unsurlu Sözleşmelerde Hukuk Seçimive Sınırlandırılması*, (Thesis), Ankara University, pp.198-199. Available at: http://acikarsiv.ankara.edu.tr/browse/1528/2156.pdf (20 January 2020)

the MÖHUK. The choice of law after the conclusion of the contract is effective backward, provided that the rights of third parties are reserved. So, that is also similar to Rome 1, in my opinion.

5.5.3 Applicable Law in the Absence of a Choice of Law

According to article 4 of Rome 1, there is a list of some contract types to determine the applicable law in the absence of choice. Except for that type of contract, the contract shall be governed by the law of the country with which it is most closely connected.[147] According to article 4 (a) of Rome, a contract for the sale of goods shall be governed by the law of the country where the seller has his habitual residence in the absence of choice. Where it is clear from all the circumstances of the case that there is a law more closely related to the contract, the contract is subject to this law.

According to article 24(4) of the MÖHUK, if parties do not choose the applicable law, the law of the country with which it is most closely connected shall govern the contract. There are also some lists on it, like Rome 1, in my opinion. That is the law of the debtor's workplace or the law of the debtor's place of residence in the absence of a workplace for commercial or professional activity contracts. That is about the home offices of the companies in this case, according to article 9 of the MÖHUK as stated in the justification of article 24 of the MÖHUK. If the debtor has more than one workplace, it is considered the workplace law, which has the tightest relationship with the contract in question. Where it is clear from all the circumstances of the case that there is a law more closely related to the contract, the contract is subject to this law.

While it is about the law of the habitual residence of the seller in Rome 1, it is about the law of the home offices of the companies or buyers in MÖHUK in the absence of a choice of law. So, there is a difference between them, in my opinion.

[147]Kocasakal, Hatice Özdemir (2012): *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.63-64.

VI) FORMATION OF THECONTRACT IN THE CONTEXT OF PECL, CISG AND TURKISH CONTRACT LAW

6.1) Model of contracting

There is an "offer-acceptance" model of contracting according to the articles 2:101 of the PECL, 14 of the CISG[148] and TBK.

As a difference, TBK mention to the mutual consent of the parties in respect of the formation of contract, CISG does not mention that and only mentions the indication of assent of the parties.[149] However, parties must agree on essential elements of an offer and there must be mutual consent of them according to the CISG.[150] When considered from this point of view, there is mutual consent of parties in a similar manner in terms of the PECL in my opinion. Therefore, parties agree on essential elements and determine their mutual rights and obligations according to the PECL.[151]

6.2) Conditions for the conclusion of a contract

A contract is concluded if the parties intend to be legally bound and they reach a sufficient agreement without any further requirement in accordance with the article 2:101(1) of the PECL. While drafting the TBK, also benefited from PECL as it is stated in the reasons of the Draft Bill of the TBK [152] and because of that I will make comparison in parallel with these conditions.

---

[148]Cvetkovic, Predrag (2002): *The Characteristics of an Offer in CISG and PECL,* Pace International Law Review, Vol.14, No.1, p.121.

[149]Zorlu, Ramazan (2008): *Formation of the Contract According to CISG and Turkish Law Compared*, p.4. Available at: http://www.akellawfirm.com/yayinlar/FORMATION_OF_THE_CONTRACT_ACCORDING_TO_CISG_AND_TURKISH_LAW_COMPARED.pdf (Accessed: 3 October 2017). While Zorlu's article is based on the Old Turkish Code of Obligations, his observations are still valid as the content of the analysed articles have not changed in the new Turkish Code of Obligations.

[150]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.113.

[151]Lando, Ole - Beale, Hugh eds. (2000): *Comments and Notes: PECL Article 2:103: Sufficient Agreement*, Principles of European Contract Law: Parts I and II, Kluwer Law International . Available at: http://www.cisg.law.pace.edu/cisg/text/peclcomp14.html(Accessed: 10 September 2017)

[152]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)

6.2.1) Intention to be legally bound

A contract is concluded, if the parties intend to be legally bound. It is regulated as a condition for concluding a contract in the article 2:101 of the PECL. It is also regulated in articles 3, 4 or 5 of the TBK.[153]

Intention to be bound is regulated as a criteria of an offer in the article 14 of the CISG as it is stated in the juridical decision of the District Court Zug in Switzerland. There was not an offer because of the term of "non-committed". The proposal contained that term and there is not an intention to be legally bound according to the decision of the court because the parties used that term.[154]

Therefore, intention to be legally bound and freedom seem to contradict. However, the intention to be legally bound is up to the parties' choice. That is about the freedom of contract principle.[155]

6.2.2) Sufficient agreement

There is sufficient agreement if the terms have been sufficiently defined by the parties so that the contract can be enforced or can be determined under these Principles as it is stated in article 2:103 of the PECL. Therefore, parties must agree on essential elements of the contract for to conclude a contract.[156] There is a similar regulation in article 2 of the TBK. So, if the parties cannot agree on the terms, contract is not concluded. There is not a regulation like that in the CISG but there are essential elements of purpose in article 14 of the CISG.[157]

Parties can agree about to write an unessential terms as an essential terms in their contracts as a natural consequence of the freedom of contract according to the TBK.[158] There

---

[153]Şahin, Turan (2011): *Elektronik Sözleşmelerin Kuruluşuna İlişkin İrade Beyanları ve Bu Beyanların Geri Alınması*, Türkiye Barolar Birliği Dergisi, Vol.24, No.95, p.356.

[154]UNCITRAL (2012): *Digest of Case Law on the United Nations Convention on Contracts for the International Sale of Goods*, United Nations, New York, p.92. Available at: https://www.uncitral.org/pdf/english/clout/CISG-digest-2012-e.pdf (Accessed: 10 September 2017); Berg, Jan Henning (2004): *Case Presentation: Switzerland 2 December 2004 District Court Zug (Dextrose case)*. Available at: http://cisgw3.law.pace.edu/cases/041202s1.html (Accessed: 10 October 2017)

[155]Ateş, Derya (2007): *Sözleşme Özgürlüğü Yönünden Dürüstlük Kuralları*, Türkiye Barolar Birliği Dergisi, Vol.20, No.72, pp.77-78.

[156]Lando, Ole - Beale, Hugh eds. (2000): *Comments and Notes: PECL Article 2:103: Sufficient Agreement*, Principles of European Contract Law: Parts I and II, Kluwer Law International . Available at: http://www.cisg.law.pace.edu/cisg/text/peclcomp14.html(Accessed: 10 September 2017)

[157]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.113

[158]Kocaağa, Köksal (2008): *Sözleşmenin Kurulabilmesi İçin Tarafların İrade Beyanları Arasındaki Uygunluğun Kapsamında Yer Alması Gereken Noktalar*, Türkiye Barolar Birliği Dergisi, Vol.21, No.79, p.84.

is similar regulation in article 2:103(2) of the PECL. In addition, that can be possible by the application of the CISG[159] and this is about the freedom of contract principle in my opinion.

"…the parties must agree on all terms, otherwise the contract cannot be concluded even the other party refuse that terms on the ground these are unessential…" with regard to the Turkish Supreme Court of Appeal for the 3rd Circuit. Therefore, all terms will be essential terms, if the parties would like to add them into their contracts.[160]

6.3) Freedom of Form Principle

Parties to international contracts need to be able to rely on their agreements. Therefore, they need to know whether there are any formal requirements, which have to be met for their agreement or its amendment to be valid.[161]

There is a freedom of form principle in terms of formation of the contract according to article 2:101(2) of the PECL, article 11 of the CISG[162] and article 12 of the TBK.[163]

However, there are some exceptions about the certain type of contracts according to article 12 of the TBK. As an example, sale of real property has to be in official form or the bailment contract must be in written form according to the TBK.[164] Also, the notes to PECL 2:101(2) acknowledge that specific contracts must be in writing or in a notarial document in order to be valid. Therefore, the form requirement of the contract comes into question this case.

I don't think it's necessary to have a public register for all types of movable property in transactions. Some national laws require registration for certain specific types of property, such as vehicles, ships, or planes, where ownership changes are involved. Since confidentiality and trade secrets are important to businesses, I wouldn't suggest expanding the coverage of public registration beyond these special cases in specific national laws for certain goods. It's not necessary for all types of goods.

---

[159] Cvetkovic, Predrag (2002): *The Characteristics of an Offer in CISG and PECL*, Pace International Law Review, Vol.14, No.1, p.129.

[160]Turkish Supreme Court of Appeal for the 3rd Civil Circuit (decision no. 1997/8864, dated on 15.09.1997).

[161]Niggemann, Chantal (2004): *Remarks on the manner in which the UNIDROIT Principles of International Commercial Contracts may be used to interpret or supplement Article 11 of the CISG*. Available at: https://www.cisg.law.pace.edu/cisg/text/anno-art-11.html (Accessed: 15 October 2017)

[162]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)

[163]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.133

[164]Kocaağa, Köksal (2008): *Sözleşmenin Kurulabilmesi İçin Tarafların İrade Beyanları Arasındaki Uygunluğun Kapsamında Yer Alması Gereken Noktalar*, Türkiye Barolar Birliği Dergisi, Vol.21, No.79, p.96

In addition, there is an exception of the CISG. Therefore, if the formal requirements of the contract at the national level are in question, contracting state of the CISG must make declaration about that after the ratification any time according to article 96 of the CISG[165] or the parties can exclude the CISG's application in their contract according to article 6 of the CISG.[166]

As a good example, there is a juridical decision of the Federal District Court (New Jersey) of the United States related to CISG. There were the citizens of US and Argentina as parties in the case."...Argentina's assent to the CISG, and its further declaration under Article 96 to opt out of Article 11, indicates that a written contract is required where one of the contracting parties has its principal place of business in Argentina..." as it is stated by the court.[167]

Differences between the PECL and CISG could be explained again by the different scope of applications of them. While CISG exclusively covers commercial sales, PECL is not restricted to commercial contracts[168] like the TBK and because of that, the CISG's model shall not apply for formal requirements in all other types of contracts, in my opinion.

6.4) Offer

An offer is a first intention and declaration of the intent of the offeror to another party in order to enter into contract.[169]

The freedom of form principle is able to be applied to the PECL, CISG[170] and TBK. So, if no form requirement is required for the contract, the proposal can be made in any way

[165]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)
[166]Fézer, Tamas (2016): International Sale of Goods Slides, Manuscript.
[167]UNCITRAL (2012): *Digest of Case Law on the United Nations Convention on Contracts for the International Sale of Goods*, United Nations, New York, p.74. Available at: https://www.uncitral.org/pdf/english/clout/CISG-digest-2012-e.pdf (Accessed: 10 September 2017); United States 7 October 2008 Federal District Court [New Jersey] (Forestal Guarani, S.A. v. Daros International, Inc.). Available at:https://www.cisg.law.pace.edu/cisg/wais/db/cases2/081007u1.html (Accessed: 20 October 2017)
[168]Cvetkovic, Predrag (2002): *The Characteristics of an Offer in CISG and PECL*, Pace International Law Review, Vol.14, No.1, pp.130-131
[169]Zorlu, Ramazan (2008): *Formation of the Contract According to CISG and Turkish Law Compared*, p.4. Available at: http://www.akellawfirm.com/yayinlar/FORMATION_OF_THE_CONTRACT_ACCORDING_TO_CISG_AND_TURKISH_LAW_COMPARED.pdf (Accessed: 3 October 2017).
[170]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)

according to the TBK [171] and PECL. However, the CISG is just about commercial contracts and sale of goods but there can be form requirement according to article 96 of the CISG.[172]

6.4.1) Essential Elements of Offer

Discrepancy is arisen in the legal concept of the CISG. CISG set the requirements for the definiteness of an offer. So, essential elements of an offer are clearly indicated in article 14(1) of the CISG as distinct from the PECL[173] and TBK. These are goods, quantity, and price according to the CISG.[174]

As a good example, there is a juridical decision of the Supreme Arbitration Court (or Presidium of Supreme Arbitration Court) of the Russian Federation related to the CISG. The goods were not identified in the agreement (the type and quantity of goods were not indicated), i.e. the subject of the contract was not specified and because of that, the contract was not concluded according to the juridical decision of court.[175]

Article 2:201 of the PECL establish minimum essential elements but do not set requirements for the definiteness of an offer like the CISG.[176] In addition, sale contracts in Turkish legal system must include some essential elements. These are subject of contract and price according to the TBK.[177] Therefore, CISG is about sale of goods and there is a similarity between the CISG and TBK from the viewpoint of that in my opinion.

In addition, there is an exemption in article 55 of the CISG. It is about the gap filling in respect of price, if the contract does not cover the price as an essential term. We can find similar regulations are in article 6:104 of the PECL[178] and article 233 of the TBK for to determine the

---

[171]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.

[172]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)

[173]Cvetkovic, Predrag (2002): *The Characteristics of an Offer in CISG and PECL*, Pace International Law Review, Vol.14, No.1,pp.123-124

[174]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.113

[175]Komarov, A. S. - Muranov, A. I. - Karetnaya, N. S. (2012): *CISG Case Presentation: Russia 15 April 2011 Supreme Arbitration Court (or Presidium of Supreme Arbitration Court) of the Russian Federation*. Available at: https://cisgw3.law.pace.edu/cisg/wais/db/cases2/110415r1.html (Accessed: 29 September 2017)

[176]Abera, Zena (2016): *Ethiopian Sales Law in the Light of International Laws and Principles of Contract*, Open Access Library Journal, Vol.3, No.8, p.4.

[177]Kocaağa, Köksal (2008): *Sözleşmenin Kurulabilmesi İçin Tarafların İrade Beyanları Arasındaki Uygunluğun Kapsamında Yer Alması Gereken Noktalar*, Türkiye Barolar Birliği Dergisi, Vol.21, No.79, p.81

[178]Vincze, Andrea (2004): *Remarks on whether and the extent to which the Principles of European Contract Law (PECL) may be used to help interpret Article 55 of the CISG*. Available at: https://www.cisg.law.pace.edu/cisg/text/peclcomp55.html (Accessed: 25 September 2017)

price. However, contract cannot be concluded, if the price is not determinable according to the TBK [179], CISG and PECL.[180]

"This is a contract for the international commercial sale of goods which, according to the provisions of article 55 of the CISG, is valid even if the contractual price is not expressly or implicitly defined on condition that the parties rely on "the price generally charged at the time of the conclusion of the contract for such goods sold under comparable circumstances in the trade concerned." with regard to the Appellate Court Frankfurt.[181]

That is regulated in article 233 of the TBK. TBK is difference from the CISG about the considered time for determination of the price. Price is determined considering at the performance time according to the TBK but it is determined considering at the conclusion time according to the CISG.[182] PECL is similar to the CISG from the viewpoint of that.[183] CISG protects the buyer from paying too much by that way and it does not permit the buyer to benefit from a very advantageous price.[184] Although this is the time of performance in the TBK, this opinion is also valid for TBK in my opinion because both regulations consider a specific time to determine the time of payment.

It is stated as "average market price at the time of performance and at the place of performance" in article 233(1) of the TBK. It is regulated as "average current market price at the place of performance" in the Swiss Code of Obligations and while drafting TBK, sentences of article 233(1) of the TBK are formed in accordance with the words of article 212(1) of the

[179]Nomer, Haluk Nami (2013): *Sözleşmedeki Esaslı Bir Nokta, Özellikle Karşılıklı Borç Doğuran Akitlerde İvazın Miktarı Belirlenmeksizin Sözleşme Kurulabilir Mi? (Is it Possible to Conclude a Contract in the Absence of an Essential Element, in Particular without Determining the Amount of Consideration in Bilateral Contracts?)*, E-Journal of Yaşar University, Vol.8, Special Issue, pp.2055-2057.

[180]Lando, Ole - Beale, Hugh eds. (2000): *Comments and Notes: PECL Article 6:104: Determination of Price*, Principles of European Contract Law: Parts I and II, Kluwer Law International. Available at: https://www.cisg.law.pace.edu/cisg/text/peclcomp55.html (Accessed: 25 September 2017)

[181]UNCITRAL (2012): *Digest of Case Law on the United Nations Convention on Contracts for the International Sale of Goods*, United Nations, New York, p.268. Available at: https://www.uncitral.org/pdf/english/clout/CISG-digest-2012-e.pdf (Accessed: 10 September 2017); Bulgaria 30 November 1998 Arbitration Case 14/98 (*Production of automobiles*). Available at: http://cisgw3.law.pace.edu/cases/981130bu.html (Accessed: 20 September 2017)

[182]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.114

[183]Vincze, Andrea (2004): *Remarks on whether and the extent to which the Principles of European Contract Law (PECL) may be used to help interpret Article 55 of the CISG*. Available at: https://www.cisg.law.pace.edu/cisg/text/peclcomp55.html (Accessed: 25 September 2017)

[184]UNCITRAL (2012): *Digest of Case Law on the United Nations Convention on Contracts for the International Sale of Goods*, United Nations, New York, p.269. Available at: https://www.uncitral.org/pdf/english/clout/CISG-digest-2012-e.pdf (Accessed: 10 September 2017); Switzerland 27 April 2007 Canton Appellate Court Valais (Oven case). Available at: http://cisgw3.law.pace.edu/cases/070427s1.html (Accessed: 2 November 2018)

Swiss Code of Obligations.[185] In addition, it was considered as a "current price" in the Turkish Supreme Court Decision of Joint Chambers (decision no. 1964/4, dated on 18.11.1964)[186] at the time when the Old TBK were in force. On the other hand, PECL uses "reasonable price" as a term. The wording in the CISG also refers to some kind of reasonable price that is about general price at the time of conclusion of the contract for goods sold under similar circumstances in trade concerned and reasonableness requirements of the PECL can be applied to the interpretation of Article 55 of the CISG.[187] When viewed from this aspect except the considered time for determination of the price, TBK regulation is similar to the CISG regulation[188] and also PECL regulation in my opinion because of the similarity between the PECL and CISG.

CISG and TBK are based on the principle of keeping the contracts, if the parties' intentions are to be legally bound.[189] In addition, PECL supports saving contracts[190] and parties' intention to be legally bound regulated as a condition in the PECL.

6.4.2) Public Offer

According to the article 14(1) of the CISG, offer must be addressed to one or more specific persons.[191] However, if the parties can be determined, that can be an offer in the CISG. Therefore, there is not necessary to be exactly specific.[192] In addition, proposals made to the public are invitations to negotiate, unless the contrary is clearly indicated.[193] An invitation for offer is a proposal for requesting other parties to make offers to the principal. Price forms

[185]Türk Borçlar Kanunu Tasarısı ve Adalet Komisyonu Raporu (1/499), 2008, p.110. Available at: https://www.tbmm.gov.tr/sirasayi/donem23/yil01/ss321.pdf (Accessed: 30 October 2018)
[186]Nomer, Haluk Nami (2013): *Sözleşmedeki Esaslı Bir Nokta, Özellikle Karşılıklı Borç Doğuran Akitlerde İvazın Miktarı Belirlenmeksizin Sözleşme Kurulabilir Mi? (Is it Possible to Conclude a Contract in the Absence of an Essential Element, in Particular without Determining the Amount of Consideration in Bilateral Contracts?)*, E-Journal of Yaşar University, Vol.8, Special Issue, pp.2060-2061
[187]Vincze, Andrea (2004): *Remarks on whether and the extent to which the Principles of European Contract Law (PECL) may be used to help interpret Article 55 of the CISG*. Available at: https://www.cisg.law.pace.edu/cisg/text/peclcomp55.html (Accessed: 25 September 2017)
[188]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.114
[189]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.118
[190]Vincze, Andrea (2004): *Remarks on whether and the extent to which the Principles of European Contract Law (PECL) may be used to help interpret Article 55 of the CISG*. Available at: https://www.cisg.law.pace.edu/cisg/text/peclcomp55.html (Accessed: 25 September 2017)
[191]Fézer, Tamas (2016): International Sale of Goods Slides, Manuscript.
[192]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, pp.115-119
[193]Fézer, Tamas (2016): International Sale of Goods Slides, Manuscript.

mailed, public notices of auction and tender, prospectuses and commercial advertisements, etc. are invitations for offer.[194]

Offer can be addressed one or more person according to the TBK and PECL regulations like CISG. However, public offer can be made as distinct from the CISG according to the article 8(2) of the TBK[195] and article 2:201(2) of the PECL.[196]

As an example, the bank made the announcement for debt collection on its website. However, it was not including all essential elements and offer must include. Therefore, it cannot be a public offer but because of that, it was an invitation to negotiate as it is stated by in the decision of Turkish Supreme Court of Appeal for the 11th Circuit.[197] Therefore, if it includes all essential elements, it could be a public offer. In addition, same situation is applicable to the PECL in my opinion because the necessity of essential elements of the offer according to the PECL.

Article 2:201(3) of the PECL protects the interest of consumers, who are in most cases the persons to whom such advertisements or similar proposals are intended.[198] In my opinion, this opinion also applies to TBK because with the acceptance of public offer, contract will be concluded according to the TBK and the seller and buyer will be bound by that. Therefore, that difference between them and CISG is important for the responsibility of the buyers. There is a French case as a good example. Customer chose a bottle of lemonade from the shelf and saw the price of it. Customer put it in a basket in the self-service shop and went to the cash-desk but bottle was exploded before payment. The sale was complete according to the Paris Court of Appeal in a decision which was upheld by the Cour de Cassation. If it was the CISG case, the contract could not be completed because the offer was not addressed to one or more specific persons in that case. However, if it was a case in Turkish Courts, the contract could be completed according to the TBK.[199] In my opinion, the contract could be completed in same

[194]Xie, Zheng (2008): *Case Presentation: China 13 June 2005 CIETAC Arbitration proceeding (Industrial general equipment case)*. Available at: https://www.cisg.law.pace.edu/cisg/wais/db/cases2/050613c1.html (Accessed: 27 October 2017)

[195]Kılıçoğlu, Ahmet M. (2008): *Türk Borçlar Kanunu Tasarısı'na Eleştiriler Rapor*, Türkiye Barolar Birliği Yayınları, Ankara, p.7.

[196]Cvetkovic, Predrag (2002): *The Characteristics of an Offer in CISG and PECL*, Pace International Law Review, Vol.14, No.1, p.130

[197]Turkish Supreme Court of Appeal for the 11th Civil Circuit (decision no. 2015/2107, dated on 17.02.2015).

[198]Cvetkovic, Predrag (2002): *The Characteristics of an Offer in CISG and PECL*, Pace International Law Review, Vol.14, No.1, p.131

[199]Zorlu, Ramazan (2008): *Formation of the Contract According to CISG and Turkish Law Compared*, p.10. Available at: http://www.akellawfirm.com/yayinlar/FORMATION_OF_THE_CONTRACT_ACCORDING_TO_CISG_AND_TURKISH_LAW_COMPARED.pdf (Accessed: 3 October 2017).

case according to the PECL because the public offer is regulated in the article 2:201(2) of the PECL.

On the other hand, if we accept all requests of consumers as an acceptance, that can cause inventory stock outs and bring problems between the buyer and sellers about the breach of contract. That can be about banks, companies etc.[200] As an example, that is why the companies use "limited in stock" term while make public offer in my opinion.

6.4.3) Revocation

Offer can be revoked anytime before the offeree dispatches an acceptance.[201] That is regulated in article 16 of the CISG and it is similar in article 2:202 of the PECL.[202] There is not a rule on revocation in the TBK. However, revocation may apply if it is agreed in the contract.[203] That is about the freedom of contract principle in my opinion.

In addition, PECL regulates the revocation of an offer made to the public as distinct from the CISG. Therefore, there is not a regulation about the public offer in the CISG.[204]

6.4.4) Withdrawal

An offer becomes effective only after it reaches the offeree.[205] Offer may be withdrawn if the withdrawal reaches the offeree before or at the same time as the offer according to article 15 of the CISG. In addition, it is similar in article 1:303(5) of the PECL[206] and article 10 of the TBK.[207]

The offer may be withdrawn after the offer reaches the offeree, if the offeree learned about withdrawal before the offer reached according to the article 10 of the TBK differently

---

[200]Kılıçoğlu, Ahmet M. (2008): *Türk Borçlar Kanunu Tasarısı'na Eleştiriler Rapor*, Türkiye Barolar Birliği Yayınları, Ankara, p.8

[201]Fézer, Tamas (2016): International Sale of Goods Slides, Manuscript.

[202]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)

[203]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

[204]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)

[205]Fézer, Tamas (2016): International Sale of Goods Slides, Manuscript.

[206]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)

[207]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.121

from the CISG[208] and also PECL in my opinion because of the similar regulations between the CISG and PECL.In the same situation, that can be about revocation of the offer according to article 16 of the CISG[209] and according to article 2:202 of the PECL in my opinion because it is also regulated in the PECL and similar to the CISG.

6.5) Acceptance

The statement made by or other conduct of the offeree-indicating assent to an offer is an acceptance according to article 18(1) of the CISG. In addition, there is a similar definition about the acceptance in article 2:104 of the PECL.[210] However, there is not a definition of acceptance in the TBK like the CISG.[211]

Acceptance must reach offeror to be a legal effect according to the PECL, CISG[212] and TBK.[213]

6.5.1) Reasonable Time

[208]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).

[209]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.121

[210]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)

[211]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.

[212]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)

[213]Zorlu, Ramazan (2008): *Formation of the Contract According to CISG and Turkish Law Compared*, p.13. Available at: http://www.akellawfirm.com/yayinlar/FORMATION_OF_THE_CONTRACT_ACCORDING_TO_CISG_AND_TURKISH_LAW_COMPARED.pdf (Accessed: 3 October 2017).

Acceptance must be reached by the offeror within a time limit or, if no time limit is fixed, within a reasonable time according to article 18 of the CISG.[214] It is similar in article 5 of the TBK[215] and articles 2:205 and 2:206 of the PECL.[216]

6.5.2) Form of an Acceptance

There is not a form for acceptance according to article 18(1) of the CISG and acceptance can be made by in written form, oral form or conducts.[217] Therefore, acceptance can be express or implied by conduct according to the 18(1) of the CISG, article 2:204 of the PECL[218] and TBK.[219] That is about the freedom of form principle from the viewpoint of acceptance in my opinion.

As an example, there is a juridical decision of Appellate Court Saarbrücken related to the CISG. There is an implicit acceptance of buyer and that happened when the buyer accepted the delivery from seller. Therefore, conduct came to be an acceptance in that case according to the juridical decision of court.[220]

6.5.3) Acceptance of an Oral Offer

According to article 18 (2) of the CISG, an oral offer must be accepted immediately unless the circumstances indicate otherwise. It is similar in the article 4 of the TBK. So, face-

[214]Zorlu, Ramazan (2008): *Formation of the Contract According to CISG and Turkish Law Compared*, p.13. Available at: http://www.akellawfirm.com/yayinlar/FORMATION_OF_THE_CONTRACT_ACCORDING_TO_CISG_AND_TURKISH_LAW_COMPARED.pdf (Accessed: 3 October 2017).

[215]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.127

[216]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)

[217]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

[218]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)

[219]Küçükpehlivan, Olcay (2006): *Sözleşmelerin İnternet Aracılığı İle Kurulması Ve Geçerliliği,* (Thesis), Ankara Üniversitesi, , p.74. Available at: http://acikarsiv.ankara.edu.tr/browse/1354/1956.pdf (Accessed: 23 October 2017)

[220]UNCITRAL (2012): *Digest of Case Law on the United Nations Convention on Contracts for the International Sale of Goods*, United Nations, New York, p.85. Available at: https://www.uncitral.org/pdf/english/clout/CISG-digest-2012-e.pdf (Accessed: 10 September 2017); Dimsey, Mariel (2007): *CISG Case Presentation: Germany 13 January 1993 Appellate Court Saarbrücken (Doors case).*Available at: https://cisgw3.law.pace.edu/cases/930113g1.html (Accessed: 19 October 2017)

to-face offer must be accepted immediately in order to be effective.[221] There is not a regulation about oral offer in the PECL[222] but it can be by applying freedom of contract principle in my opinion.

6.5.4) Official holidays and official non-working days

Official holidays and official non-working days occurring during the period are included in calculating the period. However, if the last day of the period is an official holiday or official non-working day at the address of the addressee, or at the place where a prescribed act is to be performed, the period is extended until the first following working day in that place. That is regulated in the article 1:304(2) of PECL. It is similar in the article 20(2) of the CISG[223] and article 93 of the TBK.[224]

6.5.5) Silence and Inactivity

According to article 18(1) of the CISG, silence or inactivity is not accepted as an intention of acceptance. Similar provision is in article Art. 2:204 (2) of the PECL[225] and it is similar in TBK in principle. However, if the parties agreed on it, it can be an acceptance for the TBK [226], PECL and CISG.[227] That is also about the freedom of contract principle in my opinion.

However, silence can be an acceptance because of the usages and practices between parties according to article 8 (3) of the CISG. We can see similar interpretation ways in the Turkish case law like it is stated in the decision of Turkish Supreme Court of Appeal for the

[221]Zorlu, Ramazan (2008): *Formation of the Contract According to CISG and Turkish Law Compared*, pp.15-16. Available at: http://www.akellawfirm.com/yayinlar/FORMATION_OF_THE_CONTRACT_ACCORDING_TO_CISG_AND_TURKISH_LAW_COMPARED.pdf (Accessed: 3 October 2017).

[222]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)

[223]Felemegas, John (2002): *Comparison between provisions of the CISG (Article 20) and the counterpart provisions of the Principles of European Contract Law*. Available at: https://www.cisg.law.pace.edu/cisg/text/peclcomp20.html (Accessed: 19 October 2017)

[224]Zorlu, Ramazan (2008): *Formation of the Contract According to CISG and Turkish Law Compared*, p.17. Available at: http://www.akellawfirm.com/yayinlar/FORMATION_OF_THE_CONTRACT_ACCORDING_TO_CISG_AND_TURKISH_LAW_COMPARED.pdf (Accessed: 3 October 2017).

[225]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)

[226]Küçükpehlivan, Olcay (2006): *Sözleşmelerin İnternet Aracılığı İle Kurulması Ve Geçerliliği,* (Thesis), Ankara Üniversitesi, , p.74. Available at: http://acikarsiv.ankara.edu.tr/browse/1354/1956.pdf (Accessed: 23 October 2017)

[227]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)

19th Circuit (decision no. 2012/184, dated on 16.01.2012)[228] and that is similar according to the PECL.[229]

As a good example, there is a juridical decision of Switzerland Commercial Court Zürich by name Plastic chips case related to CISG. There is an offer to modify the original contract and the buyer had not expressed any explicit consent. The court stated that silence or inactivity does not amount to acceptance according to the CISG but silence can be an acceptance with the other circumstances like other conducts or performs of the offeree.[230]

6.5.6) Acceptance without Notification

Performing of the act in time or regular time can be an acceptance and acceptance time will be the acting of performance time according to article 18(3) of the CISG. That is similar in articles 2:205(3) and 2:206(3) of the PECL.[231] That is also similar in the TBK.[232]

As an example, there is a juridical decision of Switzerland Commercial Court St. Gallen by name Lenses case related to the CISG. There was not a written document on the acceptance in the case but performance of the respective advance amount by buyer could be understood as an acceptance according to the court.[233] That decision can be also acceptable for the PECL and TBK as a performing act in my opinion because of the similarity of the CISG regulation's to PECL and TBK.

6.5.7) Late Acceptance

If the offeree does not dispatch acceptance in time, the acceptance will be ineffective. However, it can be effective according to article 21 of the CISG. There are two situations on it.

---

[228]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

[229]Lando, Ole - Beale, Hugh eds. (2000): *Comments and Notes: PECL Article 2:204: Acceptance* , Principles of European Contract Law: Parts I and II, Kluwer Law International . Available at: https://www.cisg.law.pace.edu/cisg/text/peclcomp18.html (Accessed: 5 October 2017)

[230]Switzerland 10 July 1996 Commercial Court Zürich (Plastic chips case). Available at: http://www.cisg.law.pace.edu/cisg/wais/db/cases2/960710s1.html (Accessed: 19 September 2017)

[231]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)

[232]Zorlu, Ramazan (2008): *Formation of the Contract According to CISG and Turkish Law Compared*, p.4. Available at: http://www.akellawfirm.com/yayinlar/FORMATION_OF_THE_CONTRACT_ACCORDING_TO_CISG_AND_TURKISH_LAW_COMPARED.pdf (Accessed: 3 October 2017).

[233]UNCITRAL (2012): *Digest of Case Law on the United Nations Convention on Contracts for the International Sale of Goods*, United Nations, New York, p.99. Available at: https://www.uncitral.org/pdf/english/clout/CISG-digest-2012-e.pdf (Accessed: 10 September 2017); Berg, Jan Henning (2007): *Case Presentation: Switzerland 29 April 2004 Commercial Court St. Gallen (Lenses case)*. Available at: https://www.cisg.law.pace.edu/cisg/wais/db/cases2/040429s1.html (Accessed: 9 October 2017)

Firstly, if the offeree is responsible for late acceptance, offeror must notice or inform the offeree immediately for an effectiveness of acceptance according to article 21(1) of the CISG[234] as it is stated in the juridical decision of Hamburg District Court as an example. In that case, offer was accepted by buyer not in time and late acceptance not having been confirmed without delay by Seller as required for effectiveness and because of that the acceptance was not effective.[235] It is regulated in a similar manner in article 2:207 of the PECL.[236]

Secondly, the reason of the late acceptance is the delay in transmission.[237] If the offeree sent acceptance in time and not responsible for late acceptance, offeror must inform or notice the offeree immediately for an ineffectiveness of acceptance according to article 21(2) of the CISG. It is regulated in a similar manner in the article 5(3) of the TBK [238] and in article 2:207 of the PECL.[239]

6.5.8) Withdraw of the Acceptance

An acceptance of an offer becomes effective at the moment the indication of assent reaches the offeror according to article 18(2) of the CISG. Therefore, acceptance may be withdrawn if the withdrawal reaches the offeror before or at the same time according to article

[234]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, pp.129-130

[235]Berg, Jan Henning (2007): *Case Presentation: Germany 21 December 2001 District Court Hamburg (Stones case)*. Available at: https://www.cisg.law.pace.edu/cisg/wais/db/cases2/011221g1.html (Accessed: 10 October 2017)

[236]Felemegas, John (2004): *Comparison between provisions of the CISG regarding late acceptance (Article 21) and the counterpart provisions of the PECL (Art. 2:207)*. Available at: https://www.cisg.law.pace.edu/cisg/text/peclcomp21.html (Accessed: 19 October 2017)

[237]Zorlu, Ramazan (2008): *Formation of the Contract According to CISG and Turkish Law Compared*, p.18. Available at: http://www.akellawfirm.com/yayinlar/FORMATION_OF_THE_CONTRACT_ACCORDING_TO_CISG_AND_TURKISH_LAW_COMPARED.pdf (Accessed: 3 October 2017).

[238]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.130

[239]Felemegas, John (2004): *Comparison between provisions of the CISG regarding late acceptance (Article 21) and the counterpart provisions of the PECL (Art. 2:207)*. Available at: https://www.cisg.law.pace.edu/cisg/text/peclcomp21.html (Accessed: 19 October 2017)

22 of the CISG.[240] It is regulated in a similar manner in article 1:303(5) of the PECL[241] and article 10 of the TBK.[242]

The acceptance may be withdrawn after the acceptance reaches the offeror, if the offeror learned about withdrawal before the acceptance reached according to article 10 of the TBK differently from the CISG[243] and PECL.[244]

6.5.9) Rejection

A rejection becomes effective when it reaches the offeror. If an offeree dispatches both a rejection and an acceptance at the same time, the one which reaches the offeror first will be the one given effect according to article 17 of the CISG[245] and article 2:203 of the PECL.[246] There is not a regulation about that in the TBK.[247] However, it can be possible by using freedom of contract principle and parties can put that in their contracts in my opinion.

6.6) Conclusion of the Contract

The acceptance becomes effective and therefore the contract is concluded when the indication of assent reaches the offeror according to articles 18 of the CISG and 2:205 of the PECL.[248] According to the TBK, the contract is to be concluded at the moment when the

---

[240]Felemegas, John (2004): *Comparison between provisions of the CISG regarding withdrawal of acceptance (Art. 22) and the counterpart provisions of the UNIDROIT Principles of International Commercial Contracts (Art. 2.10)*. Available at: https://www.cisg.law.pace.edu/cisg/text/anno-art-22.html (Accessed: 19 October 2017)

[241]Liu, Chengwei (2004): *Comparison of CISG Article 27 and counterpart notice provisions of the UNIDROIT Principles and PECL*. Available at: https://www.cisg.law.pace.edu/cisg/biblio/liu1.html (Accessed: 19 October 2017)

[242]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.131

[243]Zorlu, Ramazan (2008): *Formation of the Contract According to CISG and Turkish Law Compared*, p.19. Available at: http://www.akellawfirm.com/yayinlar/FORMATION_OF_THE_CONTRACT_ACCORDING_TO_CISG_AND_TURKISH_LAW_COMPARED.pdf (Accessed: 3 October 2017).

[244]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)

[245]Fézer, Tamas (2016): International Sale of Goods Slides, Manuscript.

[246]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)

[247]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

[248]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)

acceptance reaches the offeror.[249] Conclusion time of contract is same according to the CISG and TBK.[250] That is also same according to the PECL.[251] However, if the contract is concluded in the absence of parties, contract will be effective when the offeree dispatch the acceptance according to article 11 of the TBK as distinct from the CISG[252] and PECL.[253] So, contract will be effective another time from the conclusion time according to the TBK. In contrast, the contract will be effective at the time of the conclusion of the contract under the CISG[254] and PECL.[255]

Effectiveness of the contract between absentees is at the time of dispatch of the acceptance according to the article 10 of the Swiss Code of Obligations but the conclusion of the contract is at the moment when the acceptance reaches the offeror. From the legal point of view this difference of effectiveness is justified by the fact that the risk of posting the acceptance remains with the offeree until the mail reached the offeror's sphere of influence.[256] In my opinion, that is same according to the TBK because the Swiss Code of Obligations and TBK have similar articles from the viewpoint of the differences between the conclusion and effectiveness times of the contract.

---

[249]Zorlu, Ramazan (2008): *Formation of the Contract According to CISG and Turkish Law Compared*, p.21. Available at: http://www.akellawfirm.com/yayinlar/FORMATION_OF_THE_CONTRACT_ACCORDING_TO_CISG_AND_TURKISH_LAW_COMPARED.pdf (Accessed: 3 October 2017).

[250]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

[251]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)

[252]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

[253]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)

[254]Zorlu, Ramazan (2008): *Formation of the Contract According to CISG and Turkish Law Compared*, p.21. Available at: http://www.akellawfirm.com/yayinlar/FORMATION_OF_THE_CONTRACT_ACCORDING_TO_CISG_AND_TURKISH_LAW_COMPARED.pdf (Accessed: 3 October 2017).

[255]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)

[256]Wüst-Nast, Silvia (2011):*The Formation of an International Sales Contract of Investment Goods A Comparison between Swiss and English Law*, Thesis DAS Paralegalism, p.6. Available at: http://www.swissparalegal.ch/dokument/abschlussarbeit/vertragsrecht/international-sales-contract-of-investment-goods (Accessed: 1 December 2017)

VII) THE CONCEPT OF BREACH IN INTERNATIONAL EUROPEAN AND TURKISH CONTRACT LAW

7.1) Specific Performance

Damages and specific performance are closely related.[257] Specific performance is the primary remedy for breach of contract in civilian legal systems, whereas it is a secondary remedy in common law systems where damages are the primary remedy. Damages are the primary remedy, with specific performance being a secondary remedy, only available when damages would not provide adequate redress for the claimant. In this sense, specific performance remains a secondary remedy in English contract law.[258] Under the CISG, the remedy of specific performance is available to the seller and buyer. The former may sue the latter for payment of the purchase price and taking delivery of the goods. The buyer may claim delivery of the goods and, in case of non-conformity repair or, if the breach is fundamental, replacement. PECL, which does not contain specific sales law, more broadly refers to the performance of monetary and non-monetary obligations. However, the CISG, as well as the uniform projects, have attempted to accommodate concerns from common law by establishing certain exceptions to the availability of specific performance.[259] Unlike common law, the CISG starts from the premise that every obligation of a party corresponds with the right to specific performance of the obligee. However, to bridge the gap between the Continental European legal system, for which specific performance as contained in Article 28 (1st half s) CISG is the primary contractual remedy, and the common law-derived legal systems, Article 28 (2nd half s) CISG stipulates a limitation to the right to specific performance. According to Article 28 (2nd half s) CISG, a court is free not to enter a judgment for a specific performance if it would not do so under its own law in respect of similar contracts. In principle, the buyer can also demand performance in the form of further delivery when the goods received do not conform to the contract.[260] It is clear that PECL (9:102) does not go as far as English law, in that it does not require damages to be inadequate as a prerequisite to order specific performance, as English law does. Thus, damages in English law are regarded as the primary remedy, and only in cases

[257]Li, Wang Li (2012): *Comparative Law Study on the Specific Performance in International Commercial Contracts from the Relief Route*, International Conference on Economics, Business Innovation IPEDR, Vol.38, p.102.
[258] McKendrick, Ewan - Maxwell, Iain (2013): *Specific Performance in International Arbitration*, The Chinese Journal of Comparative Law, Vol.1, No.2, pp.200-201
[259] Schwenzer, Ingeborg - Hachem, Pascal - Kee, Christopher (2012): *Global Sales and Contract Law*, Oxford University Press, New York, p.544
[260] Schlechtriem, Peter - Butler, Petra (2009): *UN Law on International Sales: The UN Convention on the International Sale of Goods*, Springer, Berlin, p.92

of inadequacy is the aggrieved party is entitled to the right to require performance.[261] English-style contracts are written with common law remedies in mind. They ignore the fact that specific performance is the primary remedy in German law and that a party who wants to rely on a different remedy will normally have to do something to convert the primary claim for performance into a secondary claim for, say, damages or restitution, such as issuing a warning in case of delay or making time of the essence. (§323 BGB).[262] The approach of the Anglo-American legal systems is very different from the one of the Germanic and the French legal systems. At law, the creditor only had a right of specific enforcement in the case of the action of debt. In all other cases, he or she only had an action for damages.[263]

In civil law jurisdictions, it is self-evident that the contracting parties can claim the performance of the contract. This is so obvious that not all civil codes have, in fact, explicitly codified the rule. In Germany, it can be derived from article 241 (1) of the BGB, which states that the creditor is entitled 'to demand performance from the debtor' while according to article 1184 (2) of the CCF, a party can require the other 'to perform the contract in so far as this is still possible.'[264] Under German law, an obligee generally can always claim - and sue for - specific performance. This seems to be a fundamental difference between German and common law systems.[265] Also, in Turkish Law, if a debtor fails to perform an obligation, in principle, as long as the performance of the obligation is possible, the creditor may only demand and sue for specific performance of that obligation.[266] Also, the reforms in French Civil Law affirm the central place of specific performance as a remedy for breach of contract. Articles 1217 and 1221 state that, upon breach, the injured promisee can seek performance of the contract.[267] The French Code Civil makes a basic distinction between an" *obligation de faire*" (to do) and an "*obligation de donner*" (to give). The latter situation refers to the situation where the seller simply has to deliver the goods to the buyer while the former refers to the case where an act

[261]Uknevičiūtė, Sandra (2011): *The Concept of Fundamental Breach of the Contract in a Comparative Perspective*, (Thesis), Mykolas Romeris University, p.61. Available at: https://vb.mruni.eu/object/elaba:1884805/1884805.pdf (Accessed: 3 February 2020)
[262] Dannemann, Gerhard : *Common law-based contracts under German law* In: Cordero-Moss, Giuditta ed. (2011): *Boilerplate Clauses, International Commercial Contracts and the Applicable Law*, Cambridge University Press, New York, p.66
[263]Schwenzer, Ingeborg (1999): *Specific Performance and Damages According to the 1994 UNIDROIT Principles of International Commercial Contracts*, European Journal of Law Reform, Vol. 1, No. 3, p.290
[264]Smits, Jan M. (2014): *Contract Law: A Comparative Introduction*, Edward Elgar, Cheltenham, p.194
[265]Uknevičiūtė, Sandra (2011): *The Concept of Fundamental Breach of the Contract in a Comparative Perspective*, (Thesis), Mykolas Romeris University, p.57. Available at: https://vb.mruni.eu/object/elaba:1884805/1884805.pdf (Accessed: 3 February 2020)
[266] Helvacı, Ilhan (2017): *Turkish Contract Law*, Springer, p.145
[267] Rowan, Solene (2017) *The new French law of contract.* International and Comparative Law Quarterly, p.13 Available at: http://eprints.lse.ac.uk/75815/1/Rowan_New%20French%20law_2017.pdf (Accessed: 10 December 2019)

needs to be performed.[268] Whereas the natural remedy for an obligation to convey (*obligation de donner*) is specific performance, it is excluded in case of an obligation to do or not to do (*obligation de faire ou de ne pas faire*) according to Article 1142 Civil Code (CC), because in the latter case the obligation is automatically transformed into an obligation to pay damages.[269] In other saying, for contracts to give, the remedy is specific performance, and for contracts to do, the remedy is damages.[270] However, in the case of an obligation de *faire ou de ne pas faire* the French courts have found an indirect way to secure specific enforcement. The courts started to pronounce (at first *praeter legem*) judicial penalties (*astreintes*), by which the debtor has to pay a fixed sum to the creditor for each day that he or she remains in default.[271] Use of the astreinte for contracts to do resembles specific performance.[272]

7.2) Fundamental Breach Doctrine

Breach of contract is the failure, without legal excuse, to perform any promise which forms the whole or part of a contract. Prevention or hindrance by a party to contract of any occurrence or performance requisite under the contract for the creation or continuance of a right in favor of the other party or the discharge of a duty by him. Unequivocal, distinct, and absolute refusal to perform an agreement.[273] PECL and CISG differ from the Turkish Contract Law on this topic. That is because of the concept of "Fundamental Breach."

The doctrine of fundamental breach is chiefly predicated on the facts or assumption that a party to a contract or contract of sale has committed a misnomer in the contract that goes to the root of the contract, thereby knocking the bottom off its commercial relevance.

According to a fundamental breach, the injured party should lose interest in the fulfillment of the contract to such an extent that its interest can not be compensated by reimbursement of damages or any legal remedy stipulated by law. The conception of termination is a remedy of last resort. In Civil Law countries, it is only permissible to the extent

[268]Lando, Henrik - Rose, Caspar (2000): *On Specific Performance in Civil Law and Enforcement Costs*, Working Papers / Department of Finance. Copenhagen Business School, No.2000-10,p.13
[269] Schwenzer, Ingeborg (1999): *Specific Performance and Damages According to the 1994 UNIDROIT Principles of International Commercial Contracts*, European Journal of Law Reform, Vol. 1, No. 3, p.290
[270]Shavell, Steven (2006): *Specific Performance Versus Damages for Breach of Contract: An Economic Analysis*, Texas Law Review, Vol.84, No.4, p.862
[271]Schwenzer, Ingeborg (1999): *Specific Performance and Damages According to the 1994 UNIDROIT Principles of International Commercial Contracts*, European Journal of Law Reform, Vol. 1, No. 3, p.290
[272]Shavell, Steven (2006): *Specific Performance Versus Damages for Breach of Contract: An Economic Analysis*, Texas Law Review, Vol.84, No.4, p.862
[273] Black, Henry Campbell (1979): *Black's Law Dictionary*, West Publishing Co., St. Paul, p.171

stipulated by imperative rules of law, and moreover, it is subject to the tests of contractual fairness and justice.[274]

We can see the fundamental breach concept in article 25 of the CISG; a similar concept is in article 8:103 of the PECL. The main difference is in words between them. So, "Non-performance" is used as a "breach," and "fundamental non-performance" is similar to a "fundamental breach" in the PECL.[275] While there is a "strict compliance" word in PECL, it is "substantial deprivation" in CISG. The main difference between 'strict compliance' and 'substantial deprivation' is the requirement for detriment, which is not relevant to the 'strict compliance' criterion. This is because the obligation is the essence of the contract and proof of non-performance enough to constitute a fundamental breach.[276] However, it should be construed in a very wide way. In particular, it does not mean that the promisee must actually have suffered a loss or damage as a result of the breach. A breach may substantially deprive the buyer of what he was entitled to expect under the contract, although no actual damage was suffered. Suppose, for example, a contract where delivery was required by a fixed date and where it was made clear that time was of the essence. In that case, any delay in performance will substantially deprive the buyer of what he was entitled to expect under the contract.[277] Strict compliance with contractual obligations, as understood under PECL, resembles the common law notion of strict compliance with the 'conditions.' The contract's commercial background plays a crucial role in determining whether the term breached is a condition/ the essence of the contract.[278] The only substantial difference between article 8.103 and English law is that article 8.103(3) is confined to intentional breaches, whereas it is established in English law that even an unintentional breach may give rise to an anticipatory repudiation of the rest of the contract.[279] Also, the CISG has no provision similar to PECL article 8:103(c),

[274]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

[275]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)

[276] Uknevičiūtė, Sandra (2011): *The Concept of Fundamental Breach of the Contract in a Comparative Perspective*, (Thesis), Mykolas Romeris University, p.29. Available at: https://vb.mruni.eu/object/elaba:1884805/1884805.pdf (Accessed: 3 February 2020)

[277]Huber, Peter - Mullis, Alastair (2007): *The CISG: A new textbook for students and practitioners*, Sellier, Munich, pp.214-215

[278] Uknevičiūtė, Sandra (2011): *The Concept of Fundamental Breach of the Contract in a Comparative Perspective*, (Thesis), Mykolas Romeris University, p.29. Available at: https://vb.mruni.eu/object/elaba:1884805/1884805.pdf (Accessed: 3 February 2020)

[279]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)

which is confined to intentional non-performance[280] like in English Law, in my opinion. The concept of fundamental breach in drafting the CISG was a product of common and civil law thinking. Its origins in English law can be traced to the doctrine of "substantial performance." Because of the terminological correspondence between the English concept of fundamental breach and the CISG concept, the English doctrine has been falsely identified as the precursor of the CISG doctrine.[281] So, there is a fundamental breach concept also in English Law, and Common Law and French Law in this respect partly influence CISG.[282] However, the fundamental breach doctrine is not applied in German, French,[283] and Turkish Contract Law.[284]

7.3) Termination of the Contract

The effect of termination in most civil and common law jurisdictions is different. Common law will, in most cases, expect a damage recovery from a breach of contract, whereby the civil law may experience the intervention of a specific performance awarded by the judge.[285]

The CISG's drafters suggested a simpler system and united all the obligations in one section and all the remedies in another. The uniform concept of a breach has also been adopted in the PECL. There is a uniform concept of a breach and not a specific type in the CISG and PECL. PECL defines non-performance in a similar way to breach of contract used in the CISG in order to include all forms of defective performance, be it a complete failure to perform or a performance that is defective too early, too late, or never.[286] Similarly, the Common Law, including English Law, is also based on a general concept of breach of contract. Before the reform in 2002, German BGB had no unitary concept of breach of contract, and various types of the breach were categorized. However, the revised BGB has adopted a general concept of breach of duty. If a party deviates from the content of an obligation, this constitutes a breach of

[280]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)
[281] Spaic, Aneta: *Interpreting Fundamental Breach* In: DiMatteo, Larry A. ed. (2014): *International Sales Law : A Global Challenge*, Cambridge University Press, New York, p.241
[282] 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
[283] 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)
[284]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)
[285] 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
[286] Al-Hajaj, Amir (2015): *The Concept of Fundamental Breach and Avoidance under CISG*, (Thesis), Brunel University, p.11. Available at: https://bura.brunel.ac.uk/bitstream/2438/12043/1/FulltextThesis.pdf (Accessed:15 January 2020)

a party. This is equivalent to the general concept of non-performance under the CISG, PECL,[287] and also English Law, in my opinion. Also, French Law has a unitary concept of breach of contract. So, there is no distinction between the types of obligation and no distinction between the types of breach. If some distinctions are drawn between *obligation de donner* (obligation to transfer property/to deliver goods) and *obligation de faire et de ne pas faire*, it comes only from the concept of transfer of property. But this distinction does not lead to a distinction of breach of contract.[288] That is also a similar concept to PECL, CISG, English Law, and German Law, in my opinion. However, in Turkish Law, there is no unitary concept of breach of contract, and various types of breach were categorized, and the seller's rights are determined by the type of breach[289] as distinctly, in my opinion.

According to the PECL and CISG, while there is no distinction between breaches of main obligations and breaches auxiliary obligations, a basic distinction is made fundamental and other breaches of contract.[290] So, breaches of main obligations or breaches auxiliary obligations are both of them can be a subject of fundamental breach as it is stated in the judgment of OLG Frankfurt (*Oberlandesgericht Frankfurt am Main*)[291]. However, there is no regulation under that concept in Turkish Contract Law. Therefore, Turkish Contract Law differs from CISG and PECL from this point of view. There is discrimination in Turkish Contract Law, which makes a difference in the case results. We can illustrate that with a case of the Turkish Court of Appeals for the 13. Circuit.[292] In that case, the contract of the parties is based on selling a computer, and a dispute arises between the seller and buyer because of the internet service provision. That is accepted as an auxiliary obligation, and the court of appeals overrules a termination claim because of the lack of the main obligation.[293] There can be a civil conspiracy but not a subject of termination. However, it can be in the concept of fundamental breach doctrine, and termination could be possible distinctly according to the situation, in my opinion.

---

[287] Brunner, Christoph (2009): *Force Majeure and Hardship Under General Contract Principles: Exemption for Non-performance in International Arbitration*, Kluwer Law International, Netherlands, p.60

[288] Rémy-Corlay, Pauline: *Structural Elements of the French Civil Code* In: Grundmann, Stefan - Schauer, Martin eds. (2006): *The Architecture of European Codes and Contract Law*, Kluwer Law International, Netherlands, p.50

[289]Taştan, Furkan Güven (2019): *Viyana Satım Antlaşması'na (CISG) Göre Alıcının Sözleşmeyi İhlâli Halinde Satıcının Hakları*, Yıldırım Beyazıt Hukuk Dergisi, Vol.4, No.1, p.361

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

[291]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)

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

[293]Çınar, Nihal Ural (2006): *Tüketicinin Korunması Hakkında Kanun'a Göre Ayıba Karşı Tekeffül*, (Thesis), Istanbul Kültür Üniversitesi, p.119. Available at: https://openaccess.iku.edu.tr/bitstream/handle/11413/555/NihalUral%c3%87%c4%b1narYLtez.pdf?sequence=1&isAllowed=y (Accessed: 3 April 2018)

German Law is similar to Turkish Law, in my opinion, because German Law makes a distinction between the non-performance of the "main" obligation and a "subordinate" obligation; only the non-performance of the main obligation permits the aggrieved party to terminate the contract.[294] From this point of view, the approach of French Law is similar to Turkish Law and German Law, in my opinion, because there is no application of fundamental breach doctrine in French Law.[295] The common law system was effective in formulating the CISG system in this way. Because in the common law system, it is assumed that the obligor (the seller) guarantees that he will fulfill the debt undertaken by the contract in accordance with the performance elements. In other words, all obligations undertaken by the borrower are a guarantee commitment.[296] So, it is not important to breach main obligations or breach auxiliary obligations, and each one by itself is a guarantee commitment that creates the responsibility of the seller to breach of contract.[297] It is similar to the PECL and CISG, in my opinion. The fundamental breach of contract usually deals with the contract's central (main) obligation. Ancillary obligations are not the essence of the contract, but in certain cases, their violation may constitute a fundamental breach of the contract.[298] So, maybe the breach of the main obligation cannot be a fundamental breach out of necessary conditions concerning the above. Therefore, there must be conditions of fundamental breach. On the other hand, a breach of the auxiliary obligation can be a fundamental breach because of its importance to the parties.[299] As can be seen, it is not foregrounded the contractual obligation is breached, but the consequences of the breach and it is influenced by English Law in this respect, as it is stated in the Hong Kong Fir Shipping Co., Ltd. v. Kawasaki Kaisha, Ltd. case. Considerable deprivation of the benefits expected from the contract due to breach of the contract is taken into account. This case law

[294]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)

[295] 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)

[296] Uzun, Tuba Birinci (2014): *CISG Uygulamasında Tazminat Sorumluluğunun Sınırlandırılması*, Dokuz Eylül Üniversitesi Hukuk Fakültesi Dergisi, Vol.16, No.1, p.156.

[297]Gülel, İlhan (2019): *Viyana Satım Sözleşmesinin (CISG) İfa Engelleri Sistemi ve Bu Sistemde Alıcının Sahip Olduğu Haklar*, Türkiye Adalet Akademisi Dergisi, Vol.11, No.38, pp.167-168

[298] 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)

[299]Atamer, Yeşim M.: *Satıcının Sözleşmeye Aykırı Davranışı Ekseninde CISG'ın İfa Engelleri Sistemine Genel Bakış* In: Atamer, Yeşim M. ed. (2008): *Milletlerarası Satım Hukuku: Milletlerarası Mal Satımına İlişkin Sözleşmeler Hakkında Birleşmiş Milletler Antlaşması (CISG)*, On İki Levha Yayıncılık, İstanbul, p.242

has retained much of its influence in English law.[300] So, in the concrete event that comes up, the judge does not look at whether the contractual obligation breached is fundamental, but takes into account whether the consequences of the breach are fundamental.[301] English law makes the explicit distinction between terms that are 'essential' and that, in case of breach, allow termination (conditions) and terms that only allow a claim for damages (warranties). English law allows termination only in case of breach of a 'condition: The term 'condition' has different meanings in the law. What is meant by it here is that not all contractual terms are of equal importance.[302] A warranty is a lesser, subsidiary term of the contract, the breach of which gives rise to a claim for damages, but does not give an innocent party the right to terminate further performance of the contract. 'Condition is a contractual term, the breach of which gives the injured party to rescind the contract'. The contract may be terminated nonetheless depending on the amount of damages if breached term can be classified as a 'condition'. Whether the contractual term is a condition depends on the 'commercial importance of the term to the injured party'. Otherwise, 'the court will base its decision on its own view of the commercial importance of the term'.[303]

CISG, PECL and English law adopt a clear substantive criterion and only allow termination in case of a breach that is serious enough.[304] Seriousness of the breach under CISG and PECL are similar to the concept of 'intermediate term' in English law and might be interpreted using objective or subjective criterion. According to English law, the expressed will in the contract, determining the term as a condition, which leads to the termination, takes important place. Furthermore, freedom of contract prevails in English law. This was in contrast to French law, where only the courts had jurisdiction to terminate a contract. Therefore, the freedom of the contract prevailed among pacta sunt servanda principle.[305] After the reform in CCF, judicial termination is one of three options available to the injured promisee that are listed in article 1224. So, also there can be a termination pursuant to a right in the contract and also

[300] Atamer, Yeşim M.: *Satıcının Sözleşmeye Aykırı Davranışı Ekseninde CISG'ın İfa Engelleri Sistemine Genel Bakış* In: Atamer, Yeşim M. ed. (2008): *Milletlerarası Satım Hukuku: Milletlerarası Mal Satımına İlişkin Sözleşmeler Hakkında Birleşmiş Milletler Antlaşması (CISG)*, On İki Levha Yayıncılık, İstanbul, pp.233-234

[301] 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

[302] Smits, Jan M. (2014): *Contract Law: A Comparative Introduction*, Edward Elgar, Cheltenham, p.231

[303]Uknevičiūtė, Sandra (2011): *The Concept of Fundamental Breach of the Contract in a Comparative Perspective*, (Thesis), Mykolas Romeris University, p.25. Available at: https://vb.mruni.eu/object/elaba:1884805/1884805.pdf (Accessed: 3 February 2020)

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

[305]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)

the promisee can now terminate the contract where the breach is 'sufficiently serious', simply by notifying the defaulting promisor. The aim is to make it quicker, easier, and cheaper for the promisee to terminate. This can be attributed to a desire to promote economic efficiency in French law.[306] While determining whether the breach has a certain seriousness in French law, especially the hypothetical will of the parties has been kept in the foreground. If the breaching party foresees the breach of the contract at the time of the contract's formation, it can be assumed that he will not sign the contract. CISG is influenced by that formula, also.[307] Also, German law limits termination by requiring that the non-performance is serious enough or that the debtor was granted a second chance to perform, which he let pass. So, German law is eager to avoid termination for minor violations of the contract.[308] The same approach is adopted in Directive 1999/44/EC: the innocent party must first require that the goods are brought into conformity with the contract (Article 3(3)) and termination is not available in relation to 'minor' defects (Article 3(6)).[309] It is different in Turkish Law because a judge does not determine the results to be applied according to the seriousness of the breach, but it is about the type of breach in Turkish Law.[310]

There is the other thing to consider is about good faith principle. So, good faith principle will be considered by German courts according to the article 242 of the BGB[311], Turkish Courts according to the article 2 of the TBK[312], French courts according to the Article 1104 of the CCF in case of breach of the conract as distinctly. Also, there is a good faith principle in the article

[306] Rowan, Solene (2017) *The new French law of contract.* International and Comparative Law Quarterly, p.15 Available at: http://eprints.lse.ac.uk/75815/1/Rowan_New%20French%20law_2017.pdf (Accessed: 10 December 2019)
[307] Atamer, Yeşim M.: *Satıcının Sözleşmeye Aykırı Davranışı Ekseninde CISG'ın İfa Engelleri Sistemine Genel Bakış* In: Atamer, Yeşim M. ed. (2008): *Milletlerarası Satım Hukuku: Milletlerarası Mal Satımına İlişkin Sözleşmeler Hakkında Birleşmiş Milletler Antlaşması (CISG)*, On İki Levha Yayıncılık, İstanbul, pp.234
[308] Smits, Jan M. (2014): *Contract Law: A Comparative Introduction*, Edward Elgar, Cheltenham, p.230
[309] Markesinis, Basil Sir - Unberath, Hannes - Johnston, Angus (2006): *The German Law of Contract: A Comparative Treatise*, Hart Publishing, Portland, p.422
[310] Atamer, Yeşim M.: *Satıcının Sözleşmeye Aykırı Davranışı Ekseninde CISG'ın İfa Engelleri Sistemine Genel Bakış* In: Atamer, Yeşim M. ed. (2008): *Milletlerarası Satım Hukuku: Milletlerarası Mal Satımına İlişkin Sözleşmeler Hakkında Birleşmiş Milletler Antlaşması (CISG)*, On İki Levha Yayıncılık, İstanbul, p.229
[311] McKendrick, Ewan (2017): *Contract Law*, Palgrave, London, p.296
[312]Helvacı, Ilhan (2017): *Turkish Contract Law*, Springer, p.25

1.201 of the PECL.[313] Moreover, the fault will be considered by German courts[314], Turkish courts[315] and French courts in case of breach of the conract as distinctly.[316]

7.3.1) Nachfrist Doctrine

The law confers on the debtor the option to avoid negative consequences of a first non-performance by using a kind of second chance for performance. Continental legal systems have enshrined such cure-defense in technical solutions like the German *Nachfristlösung*.[317] Article 284 of the BGB provides that "if after his obligation is due, the debtor does not perform after a warning from the creditor, he is in default because of the warning..." The purpose of this notice is to warn the debtor that he is in delay. The notice may also specify a reasonable time within which the debtor is required to perform his obligation (grace period). The notice usually contains a statement of the claimant that he will not accept performance upon expire of the designated period. If the debtor fails to undertake action despite the notice, this will assist the creditor to prove the debtor's fault and recover damages.[318] According to German law, to settle the '*Nachfrist*' period is a general rule, an obligation. According to CISG and PECL, it is not a premature and obligatory step leading to termination. It is used only as an additional possibility for termination.[319] In German case law, a notice period of additional time that is too short will be enlarged de jure to a reasonable period of time unless the buyer, by the shortness of the stipulated period, demonstrates an intention to effectively provide no additional period. That extension of time is automatic, unlike similar notices under common law where a fresh notice may have to be served since a judicially-invalidated notice will be treated as having no effect as an example. Under German law, if the buyer requests a *Nachfrist*, the seller is obligated to respond to the request. Failure to do so results in an automatic grant of additional time.[320] In

---

[313] McKendrick, Ewan (2017): *Contract Law*, Palgrave, London, p.296

[314] Kiene, Sörren: *German Country Analysis: Part II* In: DiMatteo, Larry A. ed. (2014): *International Sales Law : A Global Challenge*, Cambridge University Press, New York, p.397

[315] Atamer, Yeşim M.: *Satıcının Sözleşmeye Aykırı Davranışı Ekseninde CISG'ın İfa Engelleri Sistemine Genel Bakış* In: Atamer, Yeşim M. ed. (2008): *Milletlerarası Satım Hukuku: Milletlerarası Mal Satımına İlişkin Sözleşmeler Hakkında Birleşmiş Milletler Antlaşması (CISG)*, On İki Levha Yayıncılık, İstanbul, p.253

[316] Lehmann, Matthias: *Damages and Interest* In: Penadés, Javier Plaza - Velencoso, Luz M. Martínez eds. (2015): *European Perspectives on the Common European Sales Law*, Springer, Switzerland, p.247

[317] Schmidt-Kessel, Martin - Silkens, Eva: *Breach of Contract* In: Penadés, Javier Plaza - Velencoso, Luz M. Martínez eds. (2015): *European Perspectives on the Common European Sales Law*, Springer, Switzerland, p.122

[318]Pejovic, Caslav (2001): *Civil Law and Common Law: Two Different Paths Leading to the Same Goal*, Victoria University of Wellington Law Review, Vol.32, No.3, pp.826-827

[319]Uknevičiūtė, Sandra (2011): *The Concept of Fundamental Breach of the Contract in a Comparative Perspective*, (Thesis), Mykolas Romeris University, p.36. Available at: https://vb.mruni.eu/object/elaba:1884805/1884805.pdf (Accessed: 3 February 2020)

[320]Duncan, John C. Jr. (2000): *Nachfrist Was Ist? Thinking Globally and Acting Locally: Considering Time Extension Principles of the U.N. Convention on Contracts for the International Sale of Goods in Revising the Uniform Commercial Code*, Brigham Young University Law Review, No.4, p.1388

common law systems, there is no requirement of notice of default and the general rule is that performance is due without notice. Instead, the debtor is bound to perform his obligation within reasonable time. For example, Sale of Goods Act 1979 section 29 (3) provides that "where under the contract of sale the seller is bound to send the goods to the buyer, but no time for sending them is fixed, the seller is bound to send them within a reasonable time."[321] According to French Law, the injured promisee must put the promisor on notice that performance must be effected within a reasonable period of time, failing which termination will follow. [322] That is similar to German and Turkish Law, in my opinion. In Turkish Law, the creditor should give time to the debtor if the debtor falls into default as a rule, with some exceptions.[323]

VIII) DAMNUM EMERGENS AND LUCRUM CESSANS

In some legal systems, damages for breach of contract are divided into positive interest and negative interest.[324] This distinction is also present in common law, where it is called reliance interest and expectation interest.[325] These terms are based on the principles of gains prevented (lucrum cessans) and actual loss suffered (damnum emergens) in Roman law. Positive interest is similar to the expectation measure in American contract law, which aims to fulfill the expectations created by a promise. Negative interest, on the other hand, is similar to the reliance measure.[326] Both concepts are considered damages, and they reflect the difference between the state of things before and after the breach of contract. This difference is the basis for the differentiation between lucrum cessans and damnum emergens.[327]

When a contract is breached, compensation for positive interest aims to put the claimant in the same financial position they would have been in if the contract had been performed,

---

[321]Pejovic, Caslav (2001): *Civil Law and Common Law: Two Different Paths Leading to the Same Goal*, Victoria University of Wellington Law Review, Vol.32, No.3, pp.826-827

[322] Rowan, Solene (2017) *The new French law of contract.* International and Comparative Law Quarterly, p.15 Available at: http://eprints.lse.ac.uk/75815/1/Rowan_New%20French%20law_2017.pdf (Accessed: 10 December 2019)

[323]Öz, M. Turgut (2013): Milletlerarası Mal Satımına İlişkin Sözleşmeler Hakkında Birleşmiş Milletler Antlaşması (CISG), Galatasaray Üniversitesi Hukuk Fakültesi Dergisi, No.1,p.13

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

[325] Fontaine, Marcel - De Ly, Filip (2006): *Drafting International Contracts*, Transnational Publishers, Ardsley, p.51

[326] Collins, David (2009). *Reliance Remedies at the International Centre for the Settlement of Investment Disputes*, Northwestern Journal of International Law & Business, Vol.29, No.1, p.199

[327] Schebesta, Hanna (2013): *Towards an EU Law of Damages: Towards an EU law of damages : damages claims for violations of EU public procurement law before national and European judges*, (Thesis), European University Institute, p.236. Available at: https://cadmus.eui.eu/bitstream/handle/1814/29598/2013_Shebesta.pdf?sequence=1&isAllowed=y (Accessed: 4 February 2020)

including any lost profits.[328] This means that the contract is effectively fulfilled through monetary compensation.[329] Negative interest, on the other hand, aims to restore the claimant to their position before the transaction occurred, focusing on their reliance interest. [330] It's possible for reliance loss to exceed expectation loss, as in cases where a seller loses out on a more profitable contract due to reliance on the first contract. Some legal systems limit recoverable reliance loss to the possible expectation loss.

Normally, expenses incurred due to reliance losses would have been incurred even if the contract was properly executed. Therefore, if the aggrieved party seeks compensation for reliance loss, they cannot also claim for expectation loss as this would amount to double compensation. In civil law legal systems with traditional structures, a party cannot claim expectation loss if they chose to avoid the contract.[331]

8.1) Turkish Law

In civil law systems, there are two types of expectations: actual loss (*damnum emergens*) and lost gains (*lucrum cessans*), which can also be referred to as positive and negative damage.[332] In my opinion, the Turkish judicial system uses the terms "positive damage" and "negative damage" instead of "positive interest" and "negative interest." So, discrimination exists in TBK. The Turkish Supreme Court Assembly of Civil Chambers has clarified a distinction in a recent decision. Under Article 125 of TBK, if a debt is not paid due to the obligor's contract default, the obligee has three options. They can either request performance and damages for delay in performance, give up performance and demand compensation for positive damage, or terminate the contract and claim negative damages.[333] So, It is not possible to compensate for positive and negative damages together at the same time.[334] Moreover, It is important to note that in order to receive compensation for any damage, whether positive or negative, the party at fault must be identified. According to a decision by the Turkish Supreme

---

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

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

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

[331] Schwenzer, Ingeborg - Hachem, Pascal - Kee, Christopher (2012): *Global Sales and Contract Law*, Oxford University Press, New York, pp.605-606, p.505

[332] Treitel, Guenter H.: *Contracts in General, Volume VII, Chapter 16: Remedies for Breach of Contract (Courses of Action Open to a Party Aggrieved)* In: Mehren, Arthur Von ed. (1976): *International Encyclopedia of Comparative Law*, J. C. B. Mohr, Paris, p.29

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

[334]Ergüne, Mehmet Serkan (2007): *Olumsuz Zarar, (Thesis)*, İstanbul Üniversitesi, p.29. Available at: http://nek.istanbul.edu.tr:4444/ekos/TEZ/42355.pdf (Accessed: 20 May 2023)

Court, the party without fault can claim compensation from the party at fault for any positive damage. If the debtor cannot prove their innocence, they will be obligated to compensate the creditor for any damage.[335] If a debtor defaults due to force majeure, they will not be held liable for any consequences resulting from the default. For instance, if the plaintiff terminates the contract, they will not be required to pay compensation for any negative damages. However, if the default is due to fault, the debtor will be held responsible for the consequences.[336]

Positive damage is the difference between the value of the obligee's assets had the obligation been performed as required and the value of the obligee's assets resulting from non-performance.[337] In legal contracts, damages can be either positive or negative. The Turkish Supreme Court Assembly of Civil Chambers defines positive damages as compensation for a loss instead of fulfilling the terms of the contract. This means that the contract remains in effect, but the obligee has the right to demand compensation instead of performance. It's important to note that positive damages can arise from non-performance of the obligation, but this does not terminate the contract.[338]

As an example, two parties had a franchise agreement in place. According to the agreement, the defendant company was obligated to solely purchase mineral and synthetic oils and related products from BP or a specific location, use them in their services, and sell and display them without altering their quality. The agreement also required the defendant to purchase a minimum of 70 tons of BP-branded products annually. However, the defendant failed to fulfill this minimum purchase requirement and used other brands of mineral oils, thereby violating the exclusivity condition. The plaintiff claimed a loss of profit, and the Supreme Court confirmed that the claim pertained to profit loss and positive damage.[339]

The second part of TBK, under the movable sales title Article 212 of the TBK, provides compensation for lost expectations, known as "positive interest," from the viewpoint of commercial sales. Under 212 of the TBK: ’In case of default by the seller, the general provisions regarding the obligor's default apply. In commercial sales that have been placed for a certain period of time for the transfer of possession, if the seller falls into default, the buyer is deemed to want to eliminate the loss resulting from the failure of the debt by giving up the transfer

[335] Turkish Supreme Court of Appeal for 15th Civil Circuit (decision no. 2015/1875, dated on 08.04.2015)
[336] Akıncı, Şahin (2020): Covid 19'un Borç İlişkilerine ve Bazı Borçlar Hukuku Sözleşmelerine Etkisi, İstanbul Ticaret Üniversitesi Sosyal Bilimler Dergisi, Covid-19 Hukuk Özel Sayısı, Vol.19, No:38, p.77
[337] Helvacı, Ilhan (2017): *Turkish Contract Law*, Springer, pp.188-189
[338] Turkish Supreme Court Assembly of Civil Chambers (decision no. 2010/427, dated on 29.09.2010)
[339] Turkish Supreme Court of Appeal for 11th Civil Circuit (decision no. 2014/15289, dated on 09.10.2014)

request. If the buyer intends to request the transfer of the sold item, he must immediately notify the seller at the end of the specified period'.

When dealing with commercial contracts that have no set end date, the buyer's rights will be determined by the general provisions for seller default. Specifically, in synallagmatic contracts, the buyer's rights will be regulated by Articles 125 of the TBK and its continuation, which outline the consequences of the obligor's default.[340] According to article 125 of TBK, the obligee is given three opportunities if the debt is not fulfilled due to the obligor's contract default. So, a buyer may immediately give up performance and demand compensation for positive damage, as stated in the abovementioned case.[341] On the other hand, when it comes to commercial sales, if a specific time for delivery is agreed upon in the contract and the seller fails to deliver the item by the end of that time period, the buyer may be entitled to compensation for positive damage. This is based on Article 212(2) of the TBK, which assumes that if the seller does not fulfill their delivery obligation within the specified timeframe, the buyer has given up on receiving the item and is seeking compensation for positive damage.[342] So here, the buyer gives up the performance and demands compensation for the positive damage, and this is in accordance with the Turkish Supreme Court Assembly of Civil Chambers definition from the viewpoint of positive damage as stated in the abovementioned case[343] in my opinion.

On the other hand, in cases where a creditor terminates the contract, he may incur damage due to the termination. This is referred to as negative damage. The creditor may demand compensation for damage that he would not have incurred if the contract had not been formed, such as expenses paid towards the conclusion of the contract.[344] If one party fails to fulfill their obligations under a contract, Article 125 of the TCO allows the other party to demand termination of the contract. However, according to Article 123 of the TBK, the creditor must first give the debtor a reasonable amount of time to fulfill their obligation. This is the last chance for the debtor to avoid serious consequences, as defaulting on contracts with mutual debts can have severe consequences. If the debtor does not fulfill their obligation within the allotted time, the creditor is entitled to compensation for any damages resulting from the contract's

[340] Vurucu, Cüneyt Gülabi (2010): *Ticari Satış Sözleşmesinde Satıcının Temerrüdü*, *(Thesis)*, İstanbul Üniversitesi, p.20. Available at: http://nek.istanbul.edu.tr:4444/ekos/TEZ/45950.pdf (Accessed: 20 May 2023)
[341] Turkish Supreme Court Assembly of Civil Chambers (decision no. 2010/427, dated on 29.09.2010)
[342] Bani, Mehmet Hulusi (2015): *Ticari Satımda Satıcının Temerrüdü*, *(Thesis),* İstanbul Kültür Üniversitesi, pp.84-85. Available at: https://acikerisim.iku.edu.tr/server/api/core/bitstreams/19abe9a9-7d1c-4f2c-9332-e462e0aecfd2/content (Accessed: 20 May 2023)
[343] Turkish Supreme Court Assembly of Civil Chambers (decision no. 2010/427, dated on 29.09.2010)
[344] Helvacı, Ilhan (2017): *Turkish Contract Law*, Springer, p.177

invalidity.[345] This is because once the contract is terminated and voided, any losses resulting from non-performance of the debt cannot be claimed again. The Turkish Supreme Court Assembly of Civil Chambers allows for the recovery of negative damages in such cases.[346] According to the Turkish Supreme Court of Appeal for the 3rd Civil Circuit, negative damage is the loss incurred due to the contract being incomplete or invalid, while positive damage is the loss incurred due to non-performance.[347]

In a legal case involving the claim for loss of profit arising from the franchise agreement, the Turkish Supreme Court has considered this matter. During the trial, the plaintiff's attorney argued that the defendant violated the franchise agreement by selling products not supplied by the client. The commercial court of first instance ruled in favor of the plaintiff, awarding them profit loss and justifying the termination. However, the Turkish Supreme Court of Appeal reversed this decision, stating that only negative damages can be claimed in case of contract termination.[348]

Turkish Supreme Court gave examples of negative damage in another case. Therefore, it is accepted that the following will be included in the concept of negative damage:

a- Expenses related to the conclusion of the contract: such as legal fees, postage expenses, notary fees,

b- Expenses incurred for the performance and acceptance of the contract,

c- Loss incurred due to the performance of the contract, such as loss of the contractual property on the way

d- Loss incurred due to missing another contract opportunity by relying upon the contract's validity. For example, while the goods purchased under an invalid contract could be purchased from someone else for 100 ₺, now 120 ₺ can be purchased.

d- Loss incurred due to non-performance of another contract,

e- Cost of proceedings.[349]

However, the negative damage cannot exceed the loss of profit arising from the terminated contract, as stated by the Turkish Supreme Court of Appeal in another decision.[350]

---

[345]Öcal, Merve Ekinci (2019): *Sözleşmeden Dönme Halinde Menfî Zarar, (Thesis),* Başkent Üniversitesi, pp.5-6. Available at: http://acikerisim.baskent.edu.tr/bitstream/handle/11727/6348/10323840.pdf?sequence=1&isAllowed=y (Accessed: 10 June 2023)

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

[347] Turkish Supreme Court of Appeal for 3rd Civil Circuit (decision no. 2013/16744, dated on 27.11.2013)

[348] Turkish Supreme Court of Appeal for 11th Civil Circuit (decision no. 2014/15289, dated on 09.10.2014)

[349] Turkish Supreme Court Assembly of Civil Chambers (decision no. 1990/1, dated on 17.01.1990); Gök, Yaşar (2001*): 2886 sayılı Devlet İhale Kanunu Kapsamında Yürütülen Yapım İşlerine İlişkin Sözleşmelerin Feshi ve Doğurduğu Hukuki Sonuçlar*, Sayıştay Dergisi , No.40, p.17

[350] Turkish Supreme Court of Appeal for 15th Civil Circuit (decision no. 1993/3691, dated on 28.09.1993)

In Turkey, if one party ends a contract and the other party believes it was wrongful termination, they have the option to pursue legal action to claim positive or negative interest, as determined by the Turkish Supreme Court of Appeal.[351] The effectiveness of the termination will be evaluated by the court, and if the defaulting party challenges the remedy, it may be denied. However, the court may compel performance and uphold the validity of the contract. The aggrieved party can also seek a court order to enforce performance, and they may be protected from termination without just cause if they acted in good faith, according to the Turkish Supreme Court of Appeal.[352] The principle of good faith applies to both termination rights and abuse outcomes. Additionally, the aggrieved party may claim positive or negative interest by ending the contract, as explained by the Turkish Supreme Court of Appeal.[353]

Also, compensation for negative damage due to *culpa in contrahendo* is possible. The Supreme Court of Appeals defines this situation as "responsibility arising from contract negotiations." According to the Supreme Court of Appeals, establishing a contract is a process that involves negotiating its content, rights, and obligations. The length of these negotiations can vary. However, a legal relationship is formed between the parties at the beginning of negotiations, which is similar to a contractual trust relationship. This trust relationship is based on the principle of good faith, as stated in Article 2 of the TMK. Both parties must inform each other of the contract's content and conditions, act in good faith, take necessary precautions not to harm each other's property or personality values, and abide by protection obligations during negotiations. If either party violates these obligations and harms the other party as a result, they will be held liable for the damage caused.[354] In a separate instance, the Turkish Supreme Court determined that the plaintiff had invested funds with the expectation of entering into an agreement with the defendant. Nonetheless, the defendant awarded the distributorship to another entity, causing the plaintiff considerable financial harm. According to the regulations governing contractual negotiations, the court concluded that the plaintiff was entitled to seek compensation for their expenditures. The court's decision was based on the email exchanges between the parties.[355]

---

[351] Turkish Supreme Court of Appeal for 11th Civil Circuit (decision no. 2013/11760, dated on 05.06.2013)
[352] Turkish Supreme Court of Appeal for 11th Civil Circuit (decision no. 2016/2197, dated on 29.02.2016)
[353]Demirsatan, Barış (2019): *Türk Borçlar Kanunu Çerçevesinde Sözleşmenin Haksız Olarak Sona Erdirilmesi*, (Thesis), İstanbul Üniversitesi, p.34, p.51 p.110, p.121, pp.150-151, pp.161-166. Available at: http://nek.istanbul.edu.tr:4444/ekos/TEZ/ET001094.pdf (Accessed: 30 May 2023); Turkish Supreme Court of Appeal for 11th Civil Circuit (decision no. 2013/11760, dated on 05.06.2013)
[354] Turkish Supreme Court of Appeal for 13th Civil Circuit (decision no. 1995/9860, dated on 13.11.1995)
[355] Turkish Supreme Court of Appeal for 11nd Civil Circuit (decision no. 2021/2006, dated on 04.03.2021)

In situations where no legal relationship has been established, failing to fulfill the duty of care can result in "negative damage" under culpa in contrahendo liability. This responsibility is sometimes linked to reliance damage, which also involves negative damage.[356] So, the doctrine of culpa in contrahendo is a source of liability for negative damage. It is essential to note that the Turkish Supreme Court has acknowledged the existence of negative damage, which arises from the loss of trust that occurs when a contract is not fulfilled despite the belief that it would be.[357] So, in another case, the Turkish Supreme Court defines negative damage as the loss suffered due to an incomplete or invalid contract.[358] In another decision, the Supreme Court of Appeals has made a ruling that parties involved in a null and void contract can only demand compensation for negative damages. This means they can only demand compensation for expenses incurred due to the voided contract, and the loss of earnings resulting from missed contract opportunities. They cannot demand compensation for positive losses, which are the benefits they would have received if the contract had been performed.[359] However, in contract negotiations, the concept of fault refers to any faulty behavior before the contract is finalized. This means that any such behavior must have been committed at the latest during the conclusion of the contract. However, if there is any faulty behavior after the legal relationship has been established, it does not fall under *culpa in contrahendo* liability. In addition, if there is a breach of trust in the creditor after the contract has been established, it is not considered a breach of trust in the contract's validity (*culpa in contrahendo*). Rather, it is a breach of trust in the creditor's expectation that the established legal relationship will continue.[360]

As stated above, in commercial contracts without a set end date, the buyer's rights are determined by the general provisions for when the seller defaults. This includes synallagmatic contracts, which are covered by Article 125 of the TBK and its continuation. If the seller defaults, the buyer can terminate the contract and claim compensation for any negative damages.

In commercial sales where delivery time is agreed upon, the process is governed by article 212 of the TBK. This article also refers to article 123 of the TBK, which allows the buyer

---

[356] Görener, Aylin (2019): *Culpa In Contrahendo Sorumluluğu*, İstanbul Ticaret Üniversitesi Sosyal Bilimler Dergisi, Vol.18, No.36, pp.76-77

[357] Öcal, Merve Ekinci (2019): *Sözleşmeden Dönme Halinde Menfi Zarar, (Thesis),* Başkent Üniversitesi, p.78, p.81. Available at: http://acikerisim.baskent.edu.tr/bitstream/handle/11727/6348/10323840.pdf?sequence=1&isAllowed=y (Accessed: 10 June 2023); Turkish Supreme Court of Appeal for 15th Civil Circuit (decision no. 2018/4992, dated on 11.12.2018)

[358] Turkish Supreme Court of Appeal for 3rd Civil Circuit (decision no. 2013/16744, dated on 27.11.2013)

[359] Turkish Supreme Court of Appeal for 11nd Civil Circuit (decision no. 1990/1087, dated on 20.02.1990)

[360]Ergüne, Mehmet Serkan (2007): *Olumsuz Zarar, (Thesis),* İstanbul Üniversitesi, pp.121-122. Available at: http://nek.istanbul.edu.tr:4444/ekos/TEZ/42355.pdf (Accessed: 25 May 2023)

to terminate the sales contract.In the event that the buyer wishes to terminate the sales contract due to default, article 123 of the TBK must be applied. It is imperative that the buyer provides a reasonable period for the seller to rectify the situation.[361] However, if the buyer decides to terminate regardless, they are entitled to claim compensation for negative damages as stipulated in articles 123 and 125 of the TBK.[362]

8.2) German Law

Discrimination exists in BGB, and compensation may be awarded for either lost expectation of fulfillment (positive interest) or disappointed reliance on the contract (negative interest). However, in the latter case, compensation cannot usually exceed what the positive interest would have been.[363] Moreover, The critical point here is the necessity of the fault element to claim compensation for positive or negative damage. German law thus imposes liability for presumed fault; ie it is for the debtor to show that he has not been at fault if he wishes to escape liability.[364]

Positive interest describes the plaintiff's interest to be awarded the equivalent of the promised bargain of a contract.[365] Article 281 (3) of the BGB protects the expectation or positive interest by allowing for the right to claim damages instead of performance. This means that if performance ultimately fails, such as when it is impossible under article 275 of BGB or the promisor cannot perform against the will of the promisee, the promisee can claim damages instead of performance under article 281 (4) of BGB. However, it is important to note that the priority is still given to enforced performance, as these provisions aim to ensure fair treatment for all parties involved.[366]

Article 252 of the BGB provides compensation for lost expectations, which is known as "positive interest". Under 252 of the BGB: 'The harm to be compensated for also includes lost profit. Profit counts as lost if, according to the ordinary course of things or according to the special circumstances, in particular, according to arrangements and provisions which have been

---

[361] Topaloğlu, Mustafa: *Milletlerarası Mal Satımlarında Sözleşmeden Dönme* In: Sarı, Selahattin – Gencer, Alp H. – Sözen, İlyas eds. (2015): *International Conference of Eurasian Economies*, Kazan, p.616

[362] Tekben, Tuğçe (2016): *Alacaklı Temerrüdünün Hukuki Sonuçları*, Marmara Üniversitesi Hukuk Fakültesi Hukuk Araştırmaları Dergisi, vol.22 ,no.3 ,p.2617

[363] Youngs, Raymond (2014): *English, French & German Comparative Law*, Routledge, New York, p.679

[364] Markesinis, Basil Sir - Unberath, Hannes - Johnston, Angus (2006): *The German Law of Contract: A Comparative Treatise*, Hart Publishing, Portland, p.446

[365] Alexander, Martin - Hösker, Carsten: *Germany* In: Bird, Nicholas ed. (2019): *The Professional Negligence Law Review*, The Law Reviews, London p.59

[366] Markesinis, Basil Sir - Unberath, Hannes - Johnston, Angus (2006): *The German Law of Contract: A Comparative Treatise*, Hart Publishing, Portland, p.470

made, it could be expected with probability'.[367] On the other hand, Article 376(2) of the HGB complements this rule. It states that the creditor of a commercial sales transaction can claim compensation for the difference in the price agreed upon and the (achievable) market price at the time and place delivery was due if the parties agreed upon a fixed delivery date.[368] However, where there is no fixed delivery date, and article 376 of the HGB does not apply, the loss calculation will be according to article 252 of the BGB.[369] In my opinion, this regulation is similar to article 212 of the TBK regarding its different regulations where a certain time is foreseen.

In a legal case involving the cancellation of the "Mi" analysis device project in 1991, the German Federal Supreme Court cited Article 252. The plaintiff filed a lawsuit seeking damages and held the debtor responsible for the loss of profits. An expert witness confirmed that the plaintiff suffered significant financial losses resulting from a failed sales plan, with only 17 out of 60 devices repaired. As per Article 252, Sentence 2 of the BGB, damages cannot be denied if the potential for harm was foreseen. The court will therefore assess the plaintiff's interest in the devices and determine the amount of lost profits.[370]

In other csse, the German Federal Supreme Court provided an explanation of the calculation method for positive interest in a case where a seller guaranteed a profitable financial situation but failed to deliver, resulting in damages of at least 500,000 Deutsche Mark. The court differentiated between two types of claims for damages: positive interest and negative interest. In regards to positive interest, the court ruled that the buyer's loss should be calculated by comparing the actual value of the company to what it would have been if the financial statements warranty was fulfilled and there were no significant changes to the buyer's financial situation. The Federal Court found an error in the lower court's damage claim calculation and referred the case for a new decision.[371]

On the other hand, negative interest describes the plaintiff's interest to be awarded the loss resulting from the plaintiff's belief in contractual declaration or avowal.[372] This is defined

[367]Youngs, Raymond (2014): *English, French & German Comparative Law*, Routledge, New York, p.517, p.679
[368] Wurmnest, Wolfgang: *Contract Law* In: Zekoll, Joachim - Wagner, Gerhard eds. (2019): *Introduction to German Law*, Kluwer Law International B.V, The Netherlands, p.249
[369]Atamer, Yeşim M.(2013): *Zararın Soyut Yöntem ile Hesaplanması ve Bu Hesabın CISG Madde 74 ve 76 Örneğinde Mahrum Kalınan Kâr Talebi ile İlişkisi*, Galatasaray Üniversitesi Hukuk Fakültesi Dergisi, No.1, p.144
[370] German Federal Supreme Court (case no. X ZR 134/04, dated on 26.07.2005)
[371] Altenkirch, Markus (2017): *Germany: Calculation of Damages for a Breach of a Financial Statements Warranty*, Global Arbitration News. Available at: https://globalarbitrationnews.com/calculation-of-damages-for-a-breach-of-a-financial-statements-warranty/; German Federal Supreme Court (case no. VIII ZR 120/ 04, dated on 15.03.2006)
[372] Alexander, Martin - Hösker, Carsten: *Germany* In: Bird, Nicholas ed. (2019): *The Professional Negligence Law Review*, The Law Reviews, London p.59

in Article 284 of the BGB, which allows for the reimbursement of abortive expenditure in certain circumstances.[373] The promisee may recover expenses made in reliance on the obligation of performance that are frustrated due to a failure of performance, instead of claiming damages as a substitute for performance. [374] So, according to the article 323 of the BGB, if a creditor has given a specific time frame for a debtor to fulfill their obligation and that time has passed without completion, the creditor has the option to terminate the contract or still insist on fulfillment. The creditor can only forfeit their claim for performance if they terminate the contract. In a mutual contract, compensation can still be claimed after termination, as stated in article 325 of the BGB.[375] So, compensation for reliance interest can be claimed by terminating the contract, as stated in one German case law[376] and similar to Turkish law, in my opinion.

However, if one party to a bilateral contract wants to terminate the contract and receive compensation for their expected interest, they can use Article 323 of the BGB to terminate and Article 281 of the BGB to support their claim for damages. This claim for damages is instead of performance, as the claim to specific performance has been given up.[377] So, German law is different from Turkish law from this point, in my opinion. So, German law allows the creditor to demand compensation for positive damage when terminating the contract. Termination does not prevent the recovery of expectation loss, or expenses incurred in reliance on the contract can also be recovered. However, in Turkish law, only negative interest compensation can be claimed in case of contract termination.[378]

In commercial sales, Article 376(1) of the HGB is a complementary rule, in my opinion. If it is agreed that one party's performance is to be completed at a specific time or within a specific period, the other party can terminate the contract or demand compensation if the performance is not completed on time. They can only demand performance if they notify the other party immediately after the agreed-upon timeframe. If the debtor fails to fulfill their obligation within the agreed timeframe, Article 376(1) of the HGB permits terminating the contract and recovering damages. Article 280(1) of the BGB outlines the general principle of liability for damages, including expenses incurred from reliance on the contract. This is one of the aspects covered by the general principle of liability for damages outlined in Article 280 (1)

[373] Youngs, Raymond (2014): *English, French & German Comparative Law*, Routledge, New York, p.679
[374] Markesinis, Basil Sir - Unberath, Hannes - Johnston, Angus (2006): *The German Law of Contract: A Comparative Treatise*, Hart Publishing, Portland, p.460, p.462
[375] Lowisch, Manfred (2003): *New Law of Obligations in Germany*, Ritsumeikan Law Review, No.20, pp.146-147
[376] German Federal Supreme Court (case no. VIII ZR 275/ 04, dated on 20.07.2005)
[377] Ernst, Wolfgang: *New Rules of Breach of Contract in Germany* In: Bell, John - Dashwood, Alan - Spencer, John – Ward, Angela eds. (2004): *Cambridge Yearbook of European Legal Studies Vol 5, 2002-2003*, Hart Publishing, Portland, p.344
[378] Turkish Supreme Court of Appeal for 11th Civil Circuit (decision no. 2014/15289, dated on 09.10.2014)

of the BGB. Article 376 of the HGB contains a rule to essentially the same effect.[379] If there is no set delivery date and Article 376 of the HGB does not apply, then Article 284 of the BGB will apply, as seen in the case law below. In my opinion, this regulation is similar to article 212 of the TBK regarding its different regulations where a certain time is foreseen.

A legal case involving a defective vehicle purchase in 2002 resulted in the German Federal Supreme Court citing Article 284 of the BGB. The plaintiff bought the car from the defendant for commercial use but found multiple defects after taking it over. To seek reimbursement of expenses, the plaintiff filed an action to terminate the purchase contract due to the defect. The court clarified that Article 284 of the BGB supports claims for reimbursement of such expenses made for commercial or non-commercial purposes. Moreover, according to Article 284 of the German Civil Code, the buyer of a defective product who terminates the purchase contract due to the defect is entitled to reimbursement of futile expenses. The case discussed the plaintiff's reimbursement of expenses for additional equipment like cruise control, car phone, and navigation system for the defective car. The court decided that the plaintiff could also be compensated for these expenses, apart from the transfer and registration costs.

The decision also mentioned that the person who was harmed cannot demand compensation for both their expected losses and their expenses.Therefore, in this case, the German Federal Supreme Court state that the injured party cannot demand both compensations instead of performance and reimbursement of expenses and thus double compensation for the same financial disadvantage.[380]

On the other hand, in the case where German Federal Court provided a calculation method for positive interest mentioned earlier, the calculation method for the negative interest was also explained. In that case, a seller promised a profitable financial outcome but did not deliver, resulting in damages of at least 500,000 Deutsche Mark. The Court determined that negative interest should be calculated by comparing the actual purchase price with what the buyer would have paid if the financial statements were accurate.[381]

Also in Germany, if one party ends a contract and the other party believes it was wrongful termination, they can claim positive or negative interest as in Turkish law, in my opinion. The court will determine the effectiveness of the termination and may deny the remedy

[379]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

[380] German Federal Supreme Court (case no. VIII ZR 275/ 04, dated on 20.07.2005)

[381] Altenkirch, Markus (2017): *Germany: Calculation of Damages for a Breach of a Financial Statements Warranty*, Global Arbitration News. Available at: https://globalarbitrationnews.com/calculation-of-damages-for-a-breach-of-a-financial-statements-warranty/; German Federal Supreme Court (case no. VIII ZR 120/ 04, dated on 15.03.2006)

if the defaulting party challenges it as in one German case. However, the court may compel performance and keep the contract valid. The defaulting party can enforce performance through a court order, and good faith can protect them from termination without just cause. So, the right of termination derived from good faith, according to the article 242 of the BGB. Additionally, the aggrieved party can claim positive interest or negative interest by terminating the contract[382] similarly as explained. This is similar to Turkish law, in my opinion. However, aggrieved party can claim positive interest also by terminating contract as distinct from Turkish law, in my opinion.

Also, in case of invalidity of the transactions the reliance interest may be protected.[383] For instance, a claim based on *culpa in contrahendo* under article 311 of the BGB may entitle the creditor to recover any loss he has made in relying on an invalid contract.[384] The German Federal Supreme Court also expressed this issue in the abovementioned decision, and, according to the Court, negative interest can be obtained in cases of *culpa in contrahendo*, i.e., in cases of misrepresentations during the contract negotiations.[385] So, *culpa in contrahendo* is accepted in German law as in Turkish law, and in this respect, compensation for negative damage is possible based on this. So, pre-contractual expenses can also be considered in the compensation calculation. According to article 241(2) of the BGB, according to its content, the obligation can oblige each party to consider the rights, objects of legal protection, and interests of the other party. Also, according to article 311(2) of the BGB, An obligation with obligations under Section 241 (2) also arises through:

1. the start of contract negotiations,

2. the initiation of a contract in which one party grants the other party the opportunity to influence its rights, objects of legal protection, and interests or entrusts these to the other party concerning a possible legal relationship, or

---

[382] Markesinis, Basil Sir - Unberath, Hannes - Johnston, Angus (2006): *The German Law of Contract: A Comparative Treatise*, Hart Publishing, Portland, p.403, pp.432-433; Hondius, Ewoud - Heutger, Viola – Jeloschek, Christoph – Sivesand, Hanna – Wiewiorowska, Aneta (2008): *Principles of European Law: Sales (PEL S)*, Sellier European Law Publishers , Munich, p.242; Demirsatan, Barış (2019): *Türk Borçlar Kanunu Çerçevesinde Sözleşmenin Haksız Olarak Sona Erdirilmesi*, (Thesis), İstanbul Üniversitesi, pp.94-95, pp.115-116, pp.150-151, pp.161-166. Available at: http://nek.istanbul.edu.tr:4444/ekos/TEZ/ET001094.pdf (Accessed: 30 May 2023)

[383] Treitel, Guenter H.: *Contracts in General, Volume VII, Chapter 16: Remedies for Breach of Contract (Courses of Action Open to a Party Aggrieved)* In: Mehren, Arthur Von ed. (1976): *International Encyclopedia of Comparative Law*, J. C. B. Mohr, Paris, p.32

[384] Markesinis, Basil Sir - Unberath, Hannes - Johnston, Angus (2006): *The German Law of Contract: A Comparative Treatise*, Hart Publishing, Portland, p.469

[385] Altenkirch, Markus (2017): *Germany: Calculation of Damages for a Breach of a Financial Statements Warranty*, Global Arbitration News. Available at: https://globalarbitrationnews.com/calculation-of-damages-for-a-breach-of-a-financial-statements-warranty/; German Federal Supreme Court (case no. VIII ZR 120/ 04, dated on 15.03.2006)

3. similar business contacts.[386]

So, if one party breaks off the negotiations without cause, this party may be liable for damages caused by the breach of justifiable trust. A party is only liable for damages if (s)he breaks off negotiations after having culpably evoked or nourished the other's trust in a future conclusion of a contract. If the parties make a pre-contact, and the conditions of the pre-contract are fulfilled, the performance of the contract should be the solution to a dispute[387], as in Turkish law, as stated above. In other words, article 284 of the BGB protects reliance on the performance of the contract.[388]

When no contract eventuates, there are many cases where the Code allows a claim for the plaintiff's negative interest, i.e., reliance damages. As an example, in a legal case back in 1922, the First Civil Senate of the German Supreme Court referred to culpa in contrahendo. The case involved a sales contract negotiation for crystallized tartaric acid, where both parties used words that seemed to match but meant them in a different sense, resulting in no agreement. As a result, the plaintiff cannot demand performance, and the question was whether there was room for a claim for damages. The court stated that the damage does not consist of the interest in performance but in the so-called negative interest in the contract. Therefore, the claimant should only receive compensation for the damage suffered due to the misleading opponent's language, assuming in good faith that the defendant wanted to sell. The compensation will depend on the situation of the case, and equity does not require awarding the claimant the profit that it would have made if a contract had been concluded.[389] In German law, a party who culpably breaks off negotiations without just cause or on irrelevant grounds, having created an expectation on the part of another party that a contract will certainly be entered into, is liable for the negative contractual interest as stated in Opinion of Advocate General in case C-334/00.[390] So, this is similar to Turkish law.

Turkish and German law are very similar, including the relationships between their commercial code and the code of obligations, in my opinion. Only difference on negative

---

[386] Özyakışır, Özkan – Ganbari, Muhammed Kiomers (2020): *Sözleşme Öncesi Görüşmelerin Kesilmesi Bağlamında Culpa In Contrahendo Sorumluluğu ve Olumsuz Zarar*, Selçuk Üniversitesi Hukuk Fakültesi Dergisi, Vol.28, No:2, pp.751-752

[387] Gezder, Ümit (2016): *Pre-Contractual Liability*, Medeniyet Law Review, Vol.1, No:1, p.319

[388] Markesinis, Basil Sir - Unberath, Hannes - Johnston, Angus (2006): *The German Law of Contract: A Comparative Treatise*, Hart Publishing, Portland, p.443

[389] Markesinis, Basil Sir - Unberath, Hannes - Johnston, Angus (2006): *The German Law of Contract: A Comparative Treatise*, Hart Publishing, Portland, pp.565-567; Civil Senate I at the German Supreme Court (case no. I 307/21, dated on 05.04.1922)

[390] Opinion of Advocate General Geelhoed in case C-334/00, Fonderie Officine Meccaniche Tacconi SpA v Heinrich Wagner Sinto Maschinenfabrik GmbH (HWS)

interest because while only negative interest can be claimed in case of termination in Turkish law, positive interest or negative interest can be claimed in case of termination in German law.

8.3) English Law

Discrimination exists in English law. Expectation loss is based upon the idea that the claimant is entitled to be placed – in so far as money can achieve this – in the position he would have expected to be in had the contract been properly performed, as stated in the Robinson v Harman case.[391] The Robinson v Harman case is well-known for its definition of contract damages. Parke B, stated that the common law rule for damages in breach of contract cases is to compensate the injured party with money to restore them to the same position they would have been in if the contract had been fulfilled.[392] In this sense, the positions of English law, German law,[393] and Tukish law converge in my opinion. So, as an example, in the same case, Harman illegally leased a house he did not have the authority to rent out. The property belonged to his father's trust, and only the trustees had the right to grant a lease. Robinson rightfully took legal action against Harman for breaching their contract, particularly regarding ownership. Harman's inadmissible evidence led to a ruling in Robinson's favor, causing him to suffer significant financial losses from legal fees and missed profit opportunities. Despite agreeing to cover Robinson's legal expenses, Harman failed to take accountability for the missed opportunities. Harman's appeal to the Exchequer Chamber was unsuccessful, and damages were awarded to Robinson as a result.[394]

When it comes to assessing damages for expectation interest, different methods are used. In English law, the party that has been wronged can claim the difference between the contract price and the market or current price at the time when the goods were supposed to be delivered, as outlined in sections 50(2) and 51(2) of the SGA. This means that the estimated loss resulting directly and naturally from the breach of contract by the buyer or seller is used to measure damages. In contrast, in German and Turkish law, the aggrieved party can normally claim the difference between the contract price and the market or current price as damages for

[391] Hough, Tracey - Kühnel-Fitchen, Kathrin (2017): *Optimize Contract Law*, Routledge, New York, p.208
[392]Winterton, David (2011): *A performance-oriented account of money awards for breach of contract*, (Thesis), University of Oxford, p.19. Available at: https://ora.ox.ac.uk/objects/uuid:c676c838-9d16-498a-a3a8-148c2c28b9e5/download_file?file_format=application%2Fpdf&safe_filename=THESIS01&type_of_work=Thesis (Accessed: 30 May 2023); Robinson v. Harman (1848) 1 Exch 850
[393] Markesinis, Basil Sir - Unberath, Hannes - Johnston, Angus (2006): *The German Law of Contract: A Comparative Treatise*, Hart Publishing, Portland, p.442
[394] Arvind, T.T. (2019): *Contract Law*, Oxford University Press, New York, p.473; Robinson v. Harman (1848) 1 Exch 850

non-performance. Ultimately, the difference between Turkish, German, and English law is less significant than it appears at first sight.[395]

On the other hand, reliance loss means that the claimant claims the expenses he incurred by relying on the proper performance of the contract.[396] However, when it comes to negative interest or reliance loss, differences can be seen. In my opinion, the main difference is because of the different liability systems and the applicability of good faith. So, when no contract results, *culpa in contrahendo* is not exist in English law as distinct from German law[397] and also Turkish law in my opinion. So, *culpa in contrahendo* is based on the good faith principle mentioned in Turkish and German law. However, good faith is not applicable in English law as distinctly. So, there is no compensation for reliance interest related to *culpa in contrahendo* as in Turkish and German law because of that, in my opinion.

Also, Turkish and German law protects not the reliance on the contract but reliance on its performance. However, in English law, the damages awarded were the expense lost due to the breach; thus, they included pre-contractual expenditures made worthless by the breach, as in Anglia Television v. Reed case. [398] In my opinion, the variation in protection for reliance is linked to the contrasting liability systems in common and civil law. It is worth noting that English law enforces strict liability[399], and there is a fundamental breach concept[400], whereas German and Turkish law imposes fault-based liability[401]. So, under English law, compensation liability remains constant regardless of contract type. The legal recourse for breach of contract

---

[395] Markesinis, Basil Sir - Unberath, Hannes - Johnston, Angus (2006): *The German Law of Contract: A Comparative Treatise*, Hart Publishing, Portland, p.480; Arslan, Çisil Durgun (2019): *Türk Hukuku ile Karşılaştırmalı Olarak İngiliz Hukukunda İfa Menfaati Kavramı Merkezinde Yaptırımlar*, (Thesis), Marmara Üniversitesi, pp.135-139. Available at: https://acikbilim.yok.gov.tr/bitstream/handle/20.500.12812/307846/yokAcikBilim_10304449.pdf?sequence=-1 (Accessed: 30 May 2023)

[396] Hough, Tracey - Kühnel-Fitchen, Kathrin (2017): *Optimize Contract Law*, Routledge, New York, p.211

[397] Banakas, Stathis (2009): *Liability for Contractual Negotiations in English Law: Looking for the Litmus Test*, InDret, Vol. 1, p.5

[398] Markesinis, Basil Sir - Unberath, Hannes - Johnston, Angus (2006): *The German Law of Contract: A Comparative Treatise*, Hart Publishing, Portland, p.443; Çisil Durgun (2019): *Türk Hukuku ile Karşılaştırmalı Olarak İngiliz Hukukunda İfa Menfaati Kavramı Merkezinde Yaptırımlar*, (Thesis), Marmara Üniversitesi, pp.135-139. Available at: https://acikbilim.yok.gov.tr/bitstream/handle/20.500.12812/307846/yokAcikBilim_10304449.pdf?sequence=-1 (Accessed: 30 May 2023)

[399] Youngs, Raymond (2014): *English, French & German Comparative Law*, Routledge, New York, p.662

[400] 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

[401]Erdem, H. Ercüment (2013): *Viyana Satım Antlaşması'na Göre Alıcı ve Satıcının Borçlarının İhlalinin Sonuçları ve Türk Hukuku İle Karşılaştırılması*, Galatasaray Üniversitesi Hukuk Fakültesi Dergisi, No.1,p.265; Koşar, Günhan (2019): *Haksız Fiil Sorumluluğunda Kusur ve Etkisi*, (Thesis), Hacettepe Üniversitesi, p28. Available at: http://www.openaccess.hacettepe.edu.tr:8080/xmlui/bitstream/handle/11655/7694/10243347.pdf?sequence=2&isAllowed=n (Accessed: 27 December 2021)

is the obligation to compensate for damages incurred by the creditor. If the obligee breaches the contract and the creditor cannot receive the benefit expected from the contract to a significant extent, termination is an option. Otherwise, compensation is the only viable claim. The remedies available depend on the significance of the contract condition breached by the debtor. In the English legal system, the debtor's liability for compensation is not dependent on fault or default.[402] So, in English law, the damages awarded were the expense lost due to the breach, distinct from them, in my opinion. In Anglia Television v. Reed case, an actor backed out of a TV play contract, causing the production to be abandoned. The claimants sued the actor for damages, and the court ruled that they could claim pre-contract expenses that were likely to be wasted.[403] So, compensation for reliance interest related to pre-contractual expenditures is possible, in my opinion. The topic of discussion is *culpa in contrahendo* in Turkish and German law, in my opinion. However, in Turkish and German law, if the creditor violates trust after the contract has been established, it is not considered a breach of trust in the contract's validity (*culpa in contrahendo*). In simpler terms, if the parties agree on the terms of the contract beforehand and those conditions are met, any disputes should be resolved by fulfilling the terms of the contract.[404]

In England, there are no strict procedural requirements for terminating a contract without legal assistance, unlike in TBK or BBG, in my opinion. To end the contract, the injured party simply needs to inform the defaulting party, either orally or in writing, that they are ending the agreement, as seen in the Vitol SA v Norelf Ltd case. No reason needs to be given as long as there is a valid reason for termination, and the injured party has the right to terminate, as demonstrated in the SNCB Holding v UBS AG case. The termination takes effect immediately, and the defaulting party has no extra time to perform their obligations.[405] So, under English law, the party that has been wronged can terminate the contract and file a damage claim right

[402] Sayın, Ceren (2019): *Viyana Satım Sözleşmesi'nde Satıcının Ayıptan Doğan Sorumluluğu*, (Thesis), Ankara Üniversitesi, pp.10-12. Available at: https://dspace.ankara.edu.tr/xmlui/bitstream/handle/20.500.12575/72096/?sequence=1&isAllowed=y (Accessed: 30 May 2023)

[403] Poole, Jill (2016): *Casebook on Contract Law*, Oxford University Press, New York, p.390; Anglia Television Ltd v Reed [1972] 1 QB 60

[404]Ergüne, Mehmet Serkan (2007): *Olumsuz Zarar, (Thesis),* İstanbul Üniversitesi, pp.121-122. Available at: http://nek.istanbul.edu.tr:4444/ekos/TEZ/42355.pdf (Accessed: 25 May 2023); Gezder, Ümit (2016): *Pre-Contractual Liability*, Medeniyet Law Review, Vol.1, No:1, p.319

[405] 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)

away. However, it is necessary to provide due notice before taking any action, in German[406] and Turkish law. So, in my opinion, it can not be immediately as in English law.

Also, a plaintiff could recover expectation loss or reliance loss, but not both in English law, as stated in Cullinane v British Rema Manufacturing case.[407] So, English law is similar to Turkish and German law from this point, in my opinion. However, in case of contract termination, the innocent party can elect to claim for either expectation loss or reliance loss.[408] This is similar to German law as distinct from Turkish law, in my opinion. So, in Turkish law, only negative interest compensation can be claimed in case of contract termination, as stated by the Turkish Supreme Court.[409]

Moreover, the award of reliance damages should not put the claimant in a position better than that he would have been in had the contract been performed as stated in the Omak Maritime Ltd v Mamola Challenger Shipping Co Ltd. case.[410] In other words, the claimant will be allowed to recover no more than his expectation loss, as stated in the PJ Spillings (Builders) Ltd v Bonus Flooring Ltd case. In this case, court held that reliance damages were not available as they would lead to the claimant recovering more than he would have made had the contract been performed.[411] Also, English law is similar to Turkish and German law from this point in my opinion.

Under English law, if one party ends a contract and the other party believes it was wrongful termination, they can claim positive or negative interest as in German and Turkish law, in my opinion. There is concept of anticipatory breach in English law. Anticipatory breach of contract occurs when one party expresses a clear refusal or serious breach before the performance date. The innocent party has the right to terminate the contract and seek damages without delay, as established in Hochster v De La Tour (1853).[412] In a contract without an ending provision, repudiatory breaches can occur. These serious breaches allow the innocent party to end the contract without responsibility for damages. Under English law, the innocent

[406] Beale, Hugh - Fauvarque-Cosson, Bénédicte - Rutgers, Jacobien – Vogenauer, Stefan (2019): *Cases, Materials and Text on Contract Law*, Hart Publishing, Oxford, p.1025
[407] Cullinane v. British "Rema" Manufacturing Co. Ltd. [1954] 1 Q.B. 292
[408] Anglia Television Ltd v Reed [1972] 1 QB 60; Treitel, Guenter H.: *Contracts in General, Volume VII, Chapter 16: Remedies for Breach of Contract (Courses of Action Open to a Party Aggrieved)* In: Mehren, Arthur Von ed. (1976): *International Encyclopedia of Comparative Law*, J. C. B. Mohr, Paris, p.31
[409] Turkish Supreme Court of Appeal for 11th Civil Circuit (decision no. 2014/15289, dated on 09.10.2014)
[410] Omak Maritime Ltd v Mamola Challenger Shipping Co Ltd. [2010] EWHC 2026 (Comm)
[411] Arvind, T.T. (2019): *Contract Law*, Oxford University Press, New York, p.488.
[412]Hough, Tracey - Kühnel-Fitchen, Kathrin (2017): *Optimize Contract Law*, Routledge, New York, p.182

party has the option to affirm or terminate the contract[413], and if they choose termination, here the damage will be equal to the difference between the contract price and the price as on the date of communication.[414] They can seek "loss of bargain" damages to compensate for the lost opportunity due to the contract's early termination, as in the Lombard North Central plc v Butterworth case. Additionally, depending on the case's circumstances, the party may also be able to recover "lost profits."[415] To claim loss of profits, one must show what they would have earned if the contract had been fulfilled. SGA provides guidelines for this, but other methods may be used in certain situations, such as when the buyer plans to resell the goods or if unforeseen events impact the compensation. In order to make a claim for loss of bargain, it is necessary to demonstrate that the amount being claimed accurately represents the losses incurred. The courts may grant damages for either the difference in value or the expenses incurred in repairing losses resulting from the lost bargain.[416]

Loss of profit is a crucial issue under English law when it comes to contracts. Expectation loss can apply to both loss of profit and loss of bargain. Civil law systems distinguish between two types of expectations: actual loss (*damnum emergens*) and lost gains (*lucrum cessans*). Sometimes same distinction is said to be between positive and negative damage. However, it must not be confused with the distinction between positive (expectation) and negative (reliance) interest. Negative damage, like loss of profit, can be included in positive interest or negative interest if the aggrieved party forgoes making a profitable use of the contract's subject matter in reliance on the defaulting party's promise. The terms *damnum emergens* and *lucrum cessans* are not commonly used in practice, but they are the French, Turkish, and German equivalents of the two types of expectations. [417] In my opinion, the aggrieved party can claim compensation for positive or negative interest by terminating the contract, similar to German law. However, in Turkish law, only negative interest can be claimed through contract termination.

However, according to Turkish law, the difference mentioned earlier cannot be described in the same way. In the Turkish judicial system, "positive damage" and "negative

---

[413] Mugerwa, Florence (2020): *It's not me, it's you: terminating English law contracts*. Available at: http://disputeresolutionblog.practicallaw.com/its-not-me-its-you-terminating-english-law-contracts/ (Accessed: 10 June 2023)

[414] Sheth, Tejpal (2012): *Business Law*, Pearson, Delhi, p.146

[415] Mugerwa, Florence (2020): *It's not me, it's you: terminating English law contracts*. Available at: http://disputeresolutionblog.practicallaw.com/its-not-me-its-you-terminating-english-law-contracts/ (Accessed: 10 June 2023)

[416] Hough, Tracey - Kühnel-Fitchen, Kathrin (2017): *Optimize Contract Law*, Routledge, New York, pp.209-210

[417] Treitel, Guenter H.: *Contracts in General, Volume VII, Chapter 16: Remedies for Breach of Contract (Courses of Action Open to a Party Aggrieved)* In: Mehren, Arthur Von ed. (1976): *International Encyclopedia of Comparative Law*, J. C. B. Mohr, Paris, p.29

damage" are the preferred terminologies instead of "positive interest" and "negative interest." This means that when referring to a loss of profit, for example, the Turkish Supreme Court categorizes it as "positive damage,"[418] whereas it might be considered "positive interest" but classified as "negative damage" in an English court.[419] Therefore, in the Turkish Supreme Court, "positive damage" unequivocally represents "positive interest," in my opinion.

Moreover, in England, if the injured promisee elects to terminate following a repudiatory breach of contract, he does not need any order from the court. The court only has a role to play if the defaulting promisor wishes to challenge termination and to argue ancillary issues such as competing claims to compensatory damages. In English law, the remedy for wrongful termination is not to compel performance but damages.[420] So, in England, while the seller can not compel the buyer to take delivery by specific performance, he is entitled to damages for non-acceptance of the goods according to the article 37(1) of the SGA.[421]Also, the defaulting promisor is also unable to invoke the principle of good faith to challenge termination.[422] So, good faith is not applied in English law, as distinct from Turkish and German law.

On the other hand, in English law, there is a type of loss called restitutionary loss. Reliance and restitution are two principles that can be used alternatively. Their main purpose is to restore the aggrieved party to the position they would have been in if the contract had never taken place.[423] Restitutionary loss seeks to recover any benefit that the defendant gained by not performing their contractual obligations. The purpose of this type of loss is to restore both parties back to their original positions before the contract was made. If a claim is made under the restitutionary loss, the court may order the defendant to pay the profits they gained by breaching the contract to the claimant.[424] In other words, Restitution is a solution intended to restore a party to the same position they would have been in if no contract had been formed and

[418] Turkish Supreme Court of Appeal for 11th Civil Circuit (decision no. 2014/15289, dated on 09.10.2014)
[419] Treitel, Guenter H.: *Contracts in General, Volume VII, Chapter 16: Remedies for Breach of Contract (Courses of Action Open to a Party Aggrieved)* In: Mehren, Arthur Von ed. (1976): *International Encyclopedia of Comparative Law*, J. C. B. Mohr, Paris, p.29
[420] 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)
[421] Hondius, Ewoud - Heutger, Viola – Jeloschek, Christoph – Sivesand, Hanna – Wiewiorowska, Aneta (2008): *Principles of European Law: Sales (PEL S)*, Sellier European Law Publishers , Munich, p.242
[422]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)
[423] Treitel, Guenter H.: *Contracts in General, Volume VII, Chapter 16: Remedies for Breach of Contract (Courses of Action Open to a Party Aggrieved)* In: Mehren, Arthur Von ed. (1976): *International Encyclopedia of Comparative Law*, J. C. B. Mohr, Paris, p.28
[424] Hough, Tracey - Kühnel-Fitchen, Kathrin (2017): *Optimize Contract Law*, Routledge, New York, p.212

reimburse the plaintiff for what they lost, as described in the CLN Prop., Inc. v. Republic Serv., Inc. case.[425] Restitution and unjust enrichment are inextricably intertwined.[426]

The concepts of unjust enrichment and restitutionary loss are closely related. When someone receives a payment that results in a gain, it creates a right to restitution. This is known as the law of gain-based recovery and is different from the law of compensation, which focuses on loss-based recovery. An unjust enrichment always leads to a right to restitution in English law, as this is the only type of right that can exist in such cases. The law of gain-based recovery covers more than just unjust enrichment and encompasses any situation where a gain is received that creates a right to restitution.[427]

In English law, there is no compensation for reliance damages regarding *culpa in contrahendo*. Nevertheless, unjust enrichment can serve as a remedy for such cases. For example, negotiation damages can be seen as a form of unjust enrichment.[428] It has also been suggested in English legal literature that cases where one party has made investments because he or she trusted in the formation of a contract should be solved by applying principles of unjust enrichment.[429] As an example, in the case of Strand Electric and Engineering Co Ltd v Brisford Entertainments Ltd, the defendant held onto the claimant's switchboards during a theater sale negotiation. As a result, the claimant filed a lawsuit to retrieve the switchboards or receive their monetary value, along with compensation for the duration the defendant had them. The Court of Appeal granted full market hire rate as restitutionary damages.[430] However, this institution is not meant to compensate for the loss that occurred on the side of the trusting party but rather aims to reverse any enrichment on the part of the party breaking off the negotiations.[431]

In situations where one person benefits unfairly at the expense of another, it's referred to as unjust enrichment. To remedy this, the individual who has gained an unfair advantage

[425] Perillo, Joseph M. C. (2011): *Restitution in a Contractual Context and the Restatement (Third) of Restitution & Unjust Enrichment*, Washington and Lee Law Review, Vol.68, No.3, p.1007

[426] Vohryzek, Ana (2009): *Unjust Enrichment Unjustly Ignored: Opportunities and Pitfalls in Bringing Unjust Enrichment Claims under ICSID*, Loyola of Los Angeles International and Comparative Law Review, Vol.31, No.3, p.506

[427] Burrows, Andrew - McKendrick, Ewan - Edelman, James (2007): *Cases and Materials on the Law of Restitution*, Oxford University Press, New York, p.47

[428]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)

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

[430] Strand Electric and Engineering Co Ltd v Brisford Entertainments Ltd [1952]

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

must return the benefit to the affected party.[432] By pursuing both unjust enrichment and tort claims, the plaintiff can recover more than just their loss. It's important to note that even if there are other remedies available such as those provided by a contract or tort law, the defendant must still return any profits gained from the plaintiff's loss. Additionally, if the defendant intentionally harmed the plaintiff, they must return any extra profit. The amount of recovery is based on the defendant's gain, which may be greater than the plaintiff's loss. For instance, if a thief invests stolen money and makes a profit, the recovery amount under unjust enrichment is greater than what would be recovered under tort law.[433]

In English law, *quasi ex contractu* plays a significant role in cases involving unjust enrichment, in my opinion. This concept allows for the recovery of damages even when no actual contract exists, but it is necessary to do so. It is important to note that *quasi ex contractu* is not an actual contract, but rather an obligation that the law creates when a party holds money or assets that it would be unjust to keep. The law must address this obligation, which arises from a moral injustice that would otherwise go unpunished. These obligations come about due to circumstances, rather than the consent or intention of the parties involved. Some writers may consider *quasi ex contractu* as permitted transactions, which give rise to obligations through presumed consent.[434]

In the case of Moses v. Macferlan, one objection to Mose's action for restitution was that it was 'impossible to presume any contract to refund money which the defendant recovered by an adverse suit.' To which Lord Mansfield answered: 'If the defendant be under an obligation, from the ties of natural justice, to refund, the law implies a debt and gives the action, founded in the equity of the plaintiff's case, as it were upon a contract (*quasi ex contractu*, as the Roman law expresses it).[435] According to the legal case of Moses v. Macferlan, plaintiffs have the right to take legal action if they provided a benefit to the defendant that it would be unfair to keep. This applies to situations involving mistakes or misreliance on a contract, involvement in the defendant's affairs, or coercion. It's important to note that even if there is no

[432] Weinrib, Ernest J. (2005): *Restoring Restitution*, Virginia Law Review, Vol. 91, No. 3, p.864
[433] Barton, Todd (2004): *Filling in the Gaps in Civil Liability: The Development of Unjust Enrichment in Rhode Island*, Roger Williams University Law Review, Vol.9, No.2, pp.700-702
[434] Black, Henry Campbell (1979): *Black's Law Dictionary*, West Publishing Co., St. Paul, p.293; Wharton, Henry – Fish, Asa I. eds. (1856): *American Law Register Volume 4 from November 1855 to November 1856*, University of Pennsylvania Press, Philadelphia, p.327
[435] Birks, Peter (1985): *An Introduction to the Law of Restitution*, Oxford University Press, New York, p.32; Moses v Macferlan (1760) 2 Burr 1005

contractual liability, plaintiffs can still sue in a quasi-contractual manner through general assumpsit.[436]

As another example, in the case of Factor v. Peabody Tailoring System, the agreement between the defendant and plaintiff was deemed invalid as it lacked specific details about the garment, resulting in a mutual misunderstanding between them. Consequently, the plaintiff is entitled to recover any payments made towards the contract.[437] So, in sales contract, if a buyer pays for goods in a sales contract but doesn't receive them due to the seller's failure to reach an agreement, the buyer has the right to obtain a *quasi-contractual* recovery. This was established in the case of Factor v. Peabody Tailoring System. The seller may still be required to provide relief even if there is no expressed or implied contract. To prove the absence of an express contract and failed negotiations, it may be necessary to demonstrate a change in business ownership without an assignment of contracts. Regardless, the seller is obliged to compensate for the delivered goods through quasi-contractual means.[438]

Although evidence of a contract is not required by the plaintiff, it is possible that other non-tortious and non-contractual claims could be considered as quasi-contractual. Nevertheless, the full scope of quasi-contract remains somewhat unclear. Modern writers are in agreement that quasi-contract only pertains to obligations arising from unjust enrichment, rather than all other unrelated events that do not fall under torts or contracts.[439] So, the concept of quasi contract is based on restitution. If it were to include obligations beyond unjust enrichment, it would go beyond the scope of restitution. When focusing solely on the unjust enrichment aspect of quasi contract law, the principles of recovery should remain consistent regardless of the subject matter. The key factor is whether unjust enrichment exists, and if so, recovery should be permitted.[440] However, it's important to be aware that this organization does not provide compensation for any losses incurred by the party placing trust in it. Its sole purpose is to recover any profits obtained by the party that has terminated the negotiations, as stated earlier.[441]

---

[436] Anderson, Arthur (1937): *Quasi Contractual Recovery in the Law of Sales*, Minnesota Law Review, Vol.21, p.532
[437] Factor v. Peabody Tailoring System, (1922) 177 Wis. 238, 187 N. W. 984
[438] Anderson, Arthur (1937): *Quasi Contractual Recovery in the Law of Sales*, Minnesota Law Review, Vol.21, p.533, pp.558-559
[439] Birks, Peter (1985): *An Introduction to the Law of Restitution*, Oxford University Press, New York, p.32
[440] Anderson, Arthur (1937): *Quasi Contractual Recovery in the Law of Sales*, Minnesota Law Review, Vol.21, p.32, p.568
[441] Hein, Jan von (2011): *Culpa in Contrahendo*, Available at: https://max-eup2012.mpipriv.de/index.php/Culpa_in_Contrahendo (Accessed: 10 June 2023)

On the other hand, it is possible to observe a connection between *quasi ex contractu* and *culpa in contrahendo* in Louisiana case law in the US, even though it may not be present in English law. Culpa in contrahendo can be defined as a "fault in contracting" that results in a quasi-contractual obligation to pay for any losses incurred. The main goal is to provide compensation to someone who relied on a non-binding contract and made decisions based on it.[442]

It's important to note that while individuals in Turkey and Germany can seek compensation for negative interest due to *culpa in contrahendo*, this option is not recognized under English law. For those in England, *quasi ex contractu* is a suitable alternative to consider, in my opinion.

Also, the claimant chooses which of the three heads of loss (expectation loss, reliance loss or restitutionary loss) his damages claim falls under; he cannot receive compensation more than once for any given type of contractual loss.[443] So, in my opinion, this is also similar to Turkish and English law concerning *culpa in contrahendo* because if there is a breach of trust in the creditor after the contract has been established, it is not considered a breach of trust in the contract's validity (*culpa in contrahendo*) in Turkish and German law.

8.4) French Law

French law does not distinguish between loss of expectations (positive interest) and reliance loss (negative interest).[444]

According to article 1231(2) of the CCF, the damages and interest due to the creditor are, in general, the loss he has incurred and the gain of which he has been deprived, except for the exceptions and modifications below. Therefore, the application of the restrictions on damages set out in articles 1231(3) and 1231(4) depends on whether the non-performance is a result of the dol of the debtor.[445] According to the article 1231(1) of the CCF, debtor will be responsible for paying compensation for non-performance of the obligation.

Article 1231 of the CCF concerns contractual matters, but the rule it states has always been held to apply equally to liability in tort,[446] and this approach is similar to English law, in

---

[442] Nedzel, Nadia E. (1997): *A Comparative Study of Good Faith, Fair Dealing, and Precontractual Liability*, Tulane European and Civil Law Forum, Vol. 12, No. 97, p.144

[443] Hough, Tracey - Kühnel-Fitchen, Kathrin (2017): *Optimize Contract Law*, Routledge, New York, p.208

[444] Youngs, Raymond (2014): *English, French & German Comparative Law*, Routledge, New York, p.678

[445] Swain, Warren: *The Common law and the Code civil: the curious case of the law of contract* In: Moréteau, Olivier - Masferrer, Aniceto – Modéer, Kjell A. eds. (2019): *Comparative Legal History*, Edward Elgar Publishing, Cheltenham, p.391

[446] 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

my opinion. The result of this is that the courts do not need to make any formal distinction between *damnum emergens* and *lucrum cessans*. However, there are some exceptional cases; as a good example, French Supreme Court made that distinction on 3 December 2002 in one case. In this case, the plaintiff and defendant engaged in a legal dispute after the defendant unjustly removed the plaintiff from their joint business venture. The French Supreme Court's verdict made it clear that the plaintiff did not receive duplicate compensation for the same loss. The ruling acknowledged that the plaintiff suffered two distinct types of damage - financial loss resulting from investment in the business premises and loss of potential profits due to the inability to operate the planned business. These were categorized as positive interest (*damnum emergence*) and loss of profit (*lucrum cessans*), respectively. So, in general, French courts do not differentiate between *damnum emergence* and *lucrum cessans* when awarding compensation. However, there may be occasions when courts do make this distinction, as in this particular case. Nonetheless, this is rare and merely emphasizes the fact that both positive damage and loss of profit are eligible for compensation without any debate.[447] So, simultaneous compensation for both expectation loss and reliance loss is impossible in French law as in German, Turkish, and English law, in my opinion.

Another reason is that the French Supreme Court will only review an assessment of damages by a lower court if that court has applied the wrong principles of law.[448] As an example, in a legal case, a real estate company and tenant were in a legal dispute over a lease transfer. The French Supreme Court ruled that ending pre-contractual talks cannot justify losing the chance to benefit from the contract. The case was returned to the Court of Appeal of Douai.[449]

In addition, P. Jourdain states as follows: 'Although our case law does not distinguish between what is referred to abroad as positive and negative damages, it does not hesitate in awarding to the victim the damages which are necessary for him to be placed in the position in which he would have found himself had the contract been duly performed (positive interest) and is not content merely to place him in the state in which he would have found himself had the contract not been entered into (negative interest).'[450]

---

[447] 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; French Supreme Court, Civil Chamber 3 (Appeal number: 01-02.881, dated on 3 December 2002).

[448] Treitel, Guenter H.: *Contracts in General, Volume VII, Chapter 16: Remedies for Breach of Contract (Courses of Action Open to a Party Aggrieved)* In: Mehren, Arthur Von ed. (1976): *International Encyclopedia of Comparative Law*, J. C. B. Mohr, Paris, pp.32-33

[449] French Supreme Court, Civil Chamber 3 (Appeal number: 07-20.783, dated on 7 January 2009).

[450] Fauvarque-Cosson, Bénédicte - Mazeaud, Denis (2008): *European contract law: Materials for a common frame of reference: Terminology, guiding principles, model rules*, Sellier, Munich, p.300

However, in my opinion, French law differs from Turkish law in that the creditor can demand compensation for positive interest when terminating the contract, as stated in CCF.[451] Termination does not preclude recovery of expectation loss, and expenses incurred in reliance on the contract can be recovered.[452] This is similar to German and English law, in my opinion. However, in Turkish law, only negative interest compensation can be claimed in case of contract termination, as stated by the Turkish Supreme Court.[453] Also, according to article 1226 of the CCF, upon breach, the injured promisee must notify the promisor that performance must be effected within a reasonable period, failing which termination will follow. Also, in the French Commercial Code, commercial sales are regulated similarly. According to Article L 442-1 of the French Commercial Code, terminating established commercial relationships without prior notice to the other party is prohibited. This applies to commercial sales and is strictly regulated. So, there is scope for the notice to allow the defaulting promisor additional time to perform, effectively giving him a second chance.[454] So, in French, German, and Turkish law, it's important to give a notice before taking any action. This is different from English law where immediate action is allowed, in my opinion.

If a contract is terminated by one party in France, the other party may claim positive or negative interest, similar to German, Turkish, and English law, in my opinion. The court will assess the termination's validity and may reject the remedy if the defaulting party challenges it. However, the court may also enforce performance and maintain the contract's validity. The defaulting party can request performance through a court order, and good faith can protect them from termination without just cause.[455] Alternatively, the aggrieved party may terminate the contract and damages can be paid. Article 1228 allows for compensatory damages as an alternative to compelling performance. This compensation covers losses resulting from the

[451]Öcal, Merve Ekinci (2019): *Sözleşmeden Dönme Halinde Menfi Zarar, (Thesis),* Başkent Üniversitesi, p.86. Available at: http://acikerisim.baskent.edu.tr/bitstream/handle/11727/6348/10323840.pdf?sequence=1&isAllowed=y (Accessed: 10 June 2023)

[452]Treitel, Guenter H.: *Contracts in General, Volume VII, Chapter 16: Remedies for Breach of Contract (Courses of Action Open to a Party Aggrieved)* In: Mehren, Arthur Von ed. (1976): *International Encyclopedia of Comparative Law*, J. C. B. Mohr, Paris, p.33

[453] Turkish Supreme Court of Appeal for 11th Civil Circuit (decision no. 2014/15289, dated on 09.10.2014)

[454] 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)

[455]Rowan, Solene (2017) *The new French law of contract.* International and Comparative Law Quarterly, p.15. Available at: http://eprints.lse.ac.uk/75815/1/Rowan_New%20French%20law_2017.pdf (Accessed: 10 December 2019)

breach and wrongful termination[456], including positive or negative interest as mentioned above, similar to English and German law, in my opinion. However, in Turkish law, only negative interest can be claimed through contract termination.

Also, in my opinion, French law protects not the reliance on the contract but reliance on its performance, similar to Turkish and German law, as can be seen above in the definition of the French Supreme Court.[457] Also, as mentioned earlier, article 1231(1) of the CCF states that a debtor will be responsible for compensating for the non-performance of the obligation. In my opinion, this is because of the fault-based liability system, where a fundamental breach is not overlooked.

There is a fault-based liability system and good faith principle in French law[458] as in German and Turkish law. According to Article 1104 of the CCF, contracts must be negotiated, formed, and performed in good faith. Therefore, there is a concept of *culpa in contrahendo* (fault in contractual negotiations) based on the good faith principle as in German[459] and Turkish law, in my opinion. Under article 1112 of the CCF: The initiative, progress, and termination of pre-contractual negotiations are free. They must imperatively meet the requirements of good faith. In the event of a fault committed in the negotiations, the compensation for the resulting damage cannot be intended to compensate for the loss of the advantages expected from the contract not concluded, nor the loss of the chance to obtain these advantages. So, it is regulated in article 1112 of the CCF, and there is a limitation with compensation for negative interest.[460] So, compensation for negative interest is possible, following a system similar to Turkish and German law, in my opinion. As an example, in a legal case, the French Supreme Court decided that terminating pre-contractual negotiations cannot be used as a reason for losing the opportunity to benefit from the agreement.[461] In another case, the French Supreme Court has ruled that if a fault is made during the termination of preliminary negotiations, it will not result in the loss of potential profits expected from the final

[456] Rowan, Solene: *Termination for Contractual Non-performance* In: Cartwright, John - Whittaker, Simon eds. (2017): *The Code Napoléon Rewritten: French Contract Law after the 2016 Reforms*, Hart Publishing, Oxford, p.324

[457] French Supreme Court, Civil Chamber 3 (Appeal number: 01-02.881, dated on 3 December 2002).

[458] Koşar, Günhan (2019): *Haksız Fiil Sorumluluğunda Kusur ve Etkisi*, (Thesis), Hacettepe Üniversitesi, p36. Available at: http://www.openaccess.hacettepe.edu.tr:8080/xmlui/bitstream/handle/11655/7694/10243347.pdf?sequence=2&isAllowed=n (Accessed: 27 December 2021); Youngs, Raymond (2014): *English, French & German Comparative Law*, Routledge, New York, pp.81-82

[459] Youngs, Raymond (2014): *English, French & German Comparative Law*, Routledge, New York, p.552

[460] Vicente, Dário Moura (2021): *Comparative Law of Obligations*, Edward Elgar Publishing, Cheltenham, p.66

[461]French Supreme Court, Civil Chamber 3 (Appeal number: 07-20.783, dated on 7 January 2009).

contract.[462] This is similar to Turkish, German, and English law because pre-contractual remedies differ after the contract's conclusion, in my opinion. Also, negative interest is protected in the case of *culpa in contrahendo*.

Also, in England, a minority opinion suggests solving the problem under tort law, as in France. It should be noted that resolving the issue through tort law, as proposed by some, may be challenging. Unlike the CCF, English tort law does not have a general clause. The liability grounds established through case law are only comprehensible within their historical context, making it difficult to determine where discontinuation of contractual negotiations falls under tort law.[463]

So, abortive expenditure by one contracting party can be recovered from the other under this principle when negotiations for a contract are unjustifiably terminated.[464] According to the decisions of the French Supreme Court, such a fault could consist in:

1. breach of duties of conduct (of information, loyalty, or others) binding on the parties during the preliminaries to the contract;
2. causing the unenforceability of the contract;
3. a party breaking off negotiations at an advanced stage.

To illustrate a situation in which negotiations were terminated after progressing significantly,[465] in 1987, an individual was running a business at a leased drinking establishment owned by the defendant. When the plaintiff purchased the business from the individual, they did not fulfill the lease agreement, causing the defendant to refuse rent payments. This led to the business going bankrupt. The defendant offered to transfer the lease after outstanding payments were settled, but negotiations failed due to new demands. The Court found that the defendant unjustly ended negotiations.[466]

8.5) PECL

Discrimination is not regulated as in Turkish and German law in my opinion. The general rule is that the expectation interest is compensated in the PECL.[467] Article 9.501 of the PECL essentially entitles an injured party to recover damages for non performance unless the

[462] French Supreme Court, Commercial Chamber, (Appeal number: 00-10.243, 00-10.949, dated on 26 november 2003).
[463] Hein, Jan von (2011): *Culpa in Contrahendo*, Available at: https://max-eup2012.mpipriv.de/index.php/Culpa_in_Contrahendo (Accessed: 10 June 2023)
[464] Youngs, Raymond (2014): *English, French & German Comparative Law*, Routledge, New York, p.552
[465] Vicente, Dário Moura (2021): *Comparative Law of Obligations*, Edward Elgar Publishing, Cheltenham, p.66
[466] French Supreme Court, Commercial Chamber, (Appeal number: 91-18.842, dated on 22 February 1994) .
[467] Gündüz, Şefika Deren (2019): *Olumlu zarar, (Thesis)*, İstanbul Üniversitesi, p.226. Available at: http://nek.istanbul.edu.tr:4444/ekos/TEZ/ET001096.pdf (Accessed: 29 May 2023)

default is excused.[468] The nature of general compensation for breach of contract envisaged in Article 9:502 PECL corresponds to positive interest.[469] According to article 9:502 of the PECL, the general measure of damages is such sum as will put the aggrieved party as nearly as possible into the position in which it would have been if the contract had been duly performed. Such damages cover the loss which the aggrieved party has suffered and the gain of which it has been deprived. So, the PECL have chosen for the expectation interest as the basis for damages which means that the aggrieved party has to be put in the same position as if the contract had been performed,[470] as in Turkish, German, French and English law, in my opinion. When calculating the loss from a breached contract, the difference between the creditor's current assets and what they would have had if the contract had not been breached is considered.[471] As is observed in comment A, in a contract for sale this principle is usually applied by measuring the difference between the contract price and the market or current price.[472]

There is no case law of PECL, but an arbitration case is cited in terms of expectation interest. In a specific arbitration case, an Italian and Serbian company had a contract to purchase sugar, requiring a certificate of origin. The Serbian company failed to provide the certificate, resulting in the Italian company paying import duties and VAT. The Italian company filed a claim, and the Tribunal ruled in their favor, awarding damages and interest according to contract laws. The Tribunal cited Articles 9.501 and 9.502 of the PECL, which state that damages must compensate the aggrieved party if the contract had been properly fulfilled. The Tribunal found that the Serbian company should have foreseen the consequences of not fulfilling their contractual duties, such as making the Italian company responsible for penalties and customs costs.[473]

---

[468]Rıgga, Gago Mealii (2019): *Comparative Analyis of Consequences of Breach of Contracts and the Implementation in Standard Construction Contracts, (Thesis),* Uludağ Üniversitesi, p.31. Available at: https://acikerisim.uludag.edu.tr/bitstream/11452/14728/1/Gago%20Meal%C4%B1%C4%B1%20R%C4%B1gga.pdf (Accessed: 29 May 2023)

[469]Infante Ruiz, Francisco José - Oliva Blázquez, Francisco (2022*): Contracts Contrary to Fundamental Principles and Mandatory Rules of European Contract Law*, InDret, Vol. 2, p.45

[470] Schelhaas, H.N.: *Liability for negotiations* In: Busch, Danny - Hondius, Ewoud - Kooten, Hugo van - Schelhaas, Harriët - Schrama, Wendy eds. (2002): *The Principles of European Contract Law and Dutch Law*, Kluwer Law International, Hague, p.403

[471]Gündüz, Şefika Deren (2019): *Olumlu zarar, (Thesis),* İstanbul Üniversitesi, p.226. Available at: http://nek.istanbul.edu.tr:4444/ekos/TEZ/ET001096.pdf (Accessed: 29 May 2023)

[472]Schelhaas, H.N.: *Liability for negotiations* In: Busch, Danny - Hondius, Ewoud - Kooten, Hugo van - Schelhaas, Harriët - Schrama, Wendy eds. (2002): *The Principles of European Contract Law and Dutch Law*, Kluwer Law International, Hague, p.403

[473] 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)

Moreover, in the same case, the Foreign Trade Court of Arbitration attached to the Serbian Chamber of Commerce stated that there are no fundamental differences between the PECL and CISG in regard to the damage that occurred due to a breach of a contract.[474] So, loss resulting directly and naturally from the breach of contract by the buyer or seller is used to measure damages as in English law, in my opinion.

Article 9:502 of the PECL does not provide compensation for negative interest when a contract is terminated, only for positive interest.[475] So, PECL state that termination releases both parties from their obligation to carry out future performance, thus having prospective effect. This is different from avoidance, which has retroactive effect, meaning that the contract is considered to have never been concluded. So, PECL agree that termination does not have retroactive effect, and a terminated contract should not be treated as never having been made. So, if the contract had never been made, the aggrieved party might be precluded from claiming damages for loss of its expectations as stated in PECL Comment.[476] It's crucial to note that in legal systems such as German and French, ending a contract may not mean it's entirely over. In the theory of civilian tradition, termination is generally seen as a retrospective action, but there may still be recognized "after effects" of the contract. This means that the contract is dissolved, but it may not cease to exist completely. On the other hand, under the common law understanding, termination only operates prospectively.[477] The laws in Germany, England, and France are similar to PECL in terms of contract termination, in my opinion. So, in German, English, and French laws, termination does not have a retroactive effect.[478] In my opinion, this approach is similar to that adopted in PECL.

Also, according to the TBK, in Turkish law, creditors cannot retroactively terminate contracts with ongoing obligations. They can only end the contract going forward (*ex nunc*) similarly to others. So, if the contract is terminated early, the creditor can also demand compensation for resulting damages according to Article 126 of the TBK.[479] However, the Turkish Supreme Court has ruled that if a contract is terminated and no longer exists, any claims

---

[474] 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)

[475] Gündüz, Şefika Deren (2019): *Olumlu zarar, (Thesis)*, İstanbul Üniversitesi, p.226. Available at: http://nek.istanbul.edu.tr:4444/ekos/TEZ/ET001096.pdf (Accessed: 29 May 2023)

[476] 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

[477] Häcker, Birke: Contract and Conveyance: *The Further Repercussions of Different Transfer Systems* In: Cartwright, John - López y López, Ángel M eds. (2021): *Property and Contract: Comparative Reflections on English Law and Spanish Law*, Hart Publishing, Oxford, p.114

[478] Vicente, Dário Moura (2021): *Comparative Law of Obligations*, Edward Elgar Publishing, Cheltenham, p.226

[479] Helvacı, Ilhan (2017): *Turkish Contract Law*, Springer, pp.178

for positive damage (positive interest) based on the contract are not valid.[480] Based on the PECL comment, terminating a contract with retroactive effect is the same as canceling it. This may prevent the party from seeking compensation for any loss of expected benefits. It seems that this court decision has contributed to this result, in my opinion. This differs from the PECL, German, English and French laws which allows creditors to demand compensation for positive interest when terminating a contract, in my opinion. It is important to note that under Turkish law, handling positive interest has significant implications for various matters. For instance, the Turkish Supreme Court has clearly stated that the penalty for delayed performance, as stated in the contract, is considered positive damage (positive interest) and can only be claimed while the contract is still in effect. However, it should be noted that in a specific case where contract termination was requested and granted, the court ruled that the penal clause in the terminated contract was no longer enforceable, and neither party could request it.[481] Furthermore, the Turkish Supreme Court has stated that a penalty for delayed performance in the form of positive damage (positive interest) cannot be demanded in the event of contract termination. A penalty clause, also referred to as a contract penalty, is an agreement wherein the debtor agrees to pay the creditor if the contractual debt is not fulfilled. However, as the penalty clause is a component of the contract, it cannot be claimed once the contract is terminated. The employer is not entitled to any rights from the contract or the attached penalty clause.[482] So, in these cases, the penal clause is considered a form of positive interest, and thus claim for positive interest is not available upon the termination of a contract. In my opinion, if an individual is eligible to receive compensation for positive interest, it's possible that a penalty clause could be considered from another point of view. According to court decisions, it's important to understand that terminating a contract means it's as if the contract never existed. This means that no one has the right to seek compensation for any damages caused by the loss of expected benefits. Based on the PECL comment, I believe that terminating a contract has a retroactive effect in these cases. So, according to Turkish law, individuals can only request negative interest when a contract is terminated.

Therefore, the distinction between positive and negative interest cannot be found in the article 9:502 of the PECL.[483] However, comment G states that article 9:502 of the PECL, which regulates the general measure of damages, does not apply in the case of liability for negotiations.

[480] Turkish Supreme Court of Appeal for 15th Civil Circuit (decision no. 1996/821, dated on 14.02.1996)
[481] Turkish Supreme Court of Appeal for 15th Civil Circuit (decision no. 1996/821, dated on 14.02.1996)
[482]Turkish Supreme Court of Appeal for 15th Civil Circuit (decision no. 2014/1611, dated on 06.03.2014)
[483] Gündüz, Şefika Deren (2019): *Olumlu zarar, (Thesis),* İstanbul Üniversitesi, p.226. Available at: http://nek.istanbul.edu.tr:4444/ekos/TEZ/ET001096.pdf (Accessed: 29 May 2023)

Thus a party can be held liable for losses including expenses incurred, the work done, and the losses on transactions entered into in reliance of the expected contract (reliance interest). Loss of opportunities can also sometimes form part of this compensation.[484] Also as an example, under article 4: 117 (1): A party who avoids a contract under this Chapter may recover from the other party damages so as to put the avoiding party as nearly as possible into the same position as if it had not concluded the contract, provided that the other party knew or ought to have known of the mistake, fraud, threat or taking of excessive benefit or unfair advantage. Also, under article 15:105 (1): A party to a contract which is rendered ineffective under Articles 15:101 or 15:102 may recover from the other party damages putting the first party as nearly as possible into the same position as if the contract had not been concluded, provided that the other party knew or ought to have known of the reason for the ineffectiveness. These provisions specify that the party who suffered damage will be restored to the position they would have been in if the contract had never been made.[485] So, we can see also distinction in PECL as in Turkish, German, French and English law, in my opinion. However, double compensation is not possible[486] as in Turkish, German, French and English law, in my opinion. Also, terminating a contract is only allowed if there is a fundamental breach. The CISG and common law have influenced the fundamental breach criteria. This termination will not affect the creditor's right to claim negative interest. Therefore, the option to claim negative interest will still be available to the creditor.[487]

Also, termination by notice is allowed the Article 9:303 of the PECL. So, there is scope for the notice to allow the defaulting promisor additional time to perform, effectively giving him a second chance[488] as in Turkish, German, and French law, in my opinion. Also, Article 9:301 of the PECL entitles the aggrieved party to terminate the contract if nonperformance of the other party is fundamental or in the case of delay in performance of a non-fundamental obligation, the aggrieved party after giving a notice fixing an additional period of time of

[484]Mak, C.: *Liability for negotiations* In: Busch, Danny - Hondius, Ewoud - Kooten, Hugo van - Schelhaas, Harriët - Schrama, Wendy eds. (2002): *The Principles of European Contract Law and Dutch Law*, Kluwer Law International, Hague, p.130

[485] Gündüz, Şefika Deren (2019): *Olumlu zarar, (Thesis),* İstanbul Üniversitesi, p.63. Available at: http://nek.istanbul.edu.tr:4444/ekos/TEZ/ET001096.pdf (Accessed: 29 May 2023)

[486] Geest, Gerrit De: *Specific Performances, Damages and Unforeseen Contingencies in the Draft Common Frame of Reference* In: Chirico, Filomena – Larouche, Pierre eds. (2010): *Economic Analysis of the DCFR: The work of the Economic Impact Group within CoPECL*, Sellier European Law Publishers GmbH, Munich, p.128

[487] Gündüz, Şefika Deren (2019): *Olumlu zarar, (Thesis),* İstanbul Üniversitesi, p.63, p.223, p.226. Available at: http://nek.istanbul.edu.tr:4444/ekos/TEZ/ET001096.pdf (Accessed: 29 May 2023)

[488] 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)

reasonable length, it may terminate the contract at the end of the period of notice, if the failure persists.[489] So, there is scope for the notice to allow the defaulting promisor additional time to perform, effectively giving him a second chance. This is similar to French,[490] Turkish and German law, in my opinion. So, in PECL, French, German, and Turkish law, it's important to give a notice before taking any action. This is different from English law where immediate action is allowed, in my opinion.

However, as mentioned in English law, the damages awarded were the expense lost due to the breach in PECL, in my opinion, because there is a strict liability and fundamental breach concept as distinct from Turkish, French, and German law. So, while determining the responsibility of the parties arising from the breach, neither the fault nor the type of breach of contract is considered. So, in contrast, English Law, PECL, and CISG use the definitions of fundamental breach and other types of breaches, while Turkish law, French law, and German law focus on specific breach scenarios, as mentioned in the previous chapter.

Under PECL, if one party ends a contract and the other party believes it was wrongful termination, they can claim positive or negative interest as in English, German and Turkish law, in my opinion. Also, under PECL, The Lando Commission made a decision to depart from the common law principle that damages are the usual remedy, and instead established that specific performance can be demanded by the aggrieved party without needing exceptional circumstances. As per Article 9:102, Comment D, the court is obligated to grant the remedy of performance, and cannot use its discretion to deny it. Additionally, even if national courts are not accustomed to granting performance under their own laws, they are required to do so in accordance with this principle.[491] So, this is similar to Turkish, German and French law, in my opinion. Also the good faith can protect them from termination without just cause as in Turkish, German and French law, in my opinion. For instance, article 9:103(a) of the PECL prohibits termination due to a minor breach of obligation. The law presumes good faith, and the party accusing the other of not acting in good faith must prove their case in court.[492] In PECL, there is the option to make compensation claims either alongside other rights or independently. In

[489] Rıgga, Gago Mealii (2019): *Comparative Analyis of Consequences of Breach of Contracts and the Implementation in Standard Construction Contracts, (Thesis)*, Bursa Uludağ Üniversitesi, p.42. 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)

[490] 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)

[491] Hesselink, Martijn W.(2002): *The New European Private Law: Essays on the Future of Private Law in Europe*, Kluwer Law International, Hague, p.131

[492] Lando, Ole (2001): *Salient Features of the Principles of European Contract Law: A Comparison with the UCC*, Pace International Law Review, Vol.13, No.2, p.356

order to determine the loss, it is necessary to calculate the difference between the creditor's current assets and what they would have had if there had been no breach. This helps to compensate for any positive interest that may have been lost. The rule is compensation for positive interest.[493] However, it can be also compensation for negative interest as mentioned above. So, in my opinion, under German, English, and French law, the aggrieved party has the option to claim positive or negative interest by terminating the agreement. However, in Turkish law, only negative interest can be claimed through contract termination.

In my opinion, it is possible to receive compensation for negative interest resulting from *culpa in contrahendo* as in Turkish, French, and German law.[494] So, as stated in comment G, article 9:502 will not be applied, and compensation for reliance interest is possible. In my opinion, it is important to distinguish between the period before a contract is concluded and after it is established. If there is a breach of trust by the creditor after the contract is established, it should not be considered a breach of trust in the contract's validity (known as culpa in contrahendo) as it is in German, French, and Turkish law.

According to Ole Lando, who is considered the father of the principles, the obligation to act with good faith and honesty applies not only to the establishment and performance of the contract, but also to the negotiations leading up to it. It is considered a violation of these principles if one party negotiates a contract without the actual intention to enter into it. The PECL recognizes the principle of good faith, which is distinct from English law, and culpa in contrahendo is based on good faith in Turkish, French, and German law. In accordance with article 1:201, both parties are obligated to act with good faith and fair dealing. Additionally, according to article 1:202, both parties must cooperate to fully implement the contract, which is seen as an extension of the principle of good faith.[495]

If one party acts in bad faith during negotiations, they will be liable for any losses suffered by the other party, as stated in article 2:301 of the PECL. Breach of confidentiality during negotiations can also result in compensation for loss suffered and benefit received by

[493]Gündüz, Şefika Deren (2019): *Olumlu zarar, (Thesis),* İstanbul Üniversitesi p.226. Available at: http://nek.istanbul.edu.tr:4444/ekos/TEZ/ET001096.pdf (Accessed: 29 May 2023)

[494]Mak, C.: *Liability for negotiations* In: Busch, Danny - Hondius, Ewoud - Kooten, Hugo van - Schelhaas, Harriët - Schrama, Wendy eds. (2002): *The Principles of European Contract Law and Dutch Law*, Kluwer Law International, Hague, p.130

[495] Ayhan İzmirli, Lâle (2017): *Lex Mercatoria'da Culpa in Contrahendo Sorumluluğu*, Milletlerarası Hukuk ve Milletlerarası Özel Hukuk Bülteni, Vol.37, No.2, pp.211-212

the other party, according to article 2:302 of the PECL.[496] This is especially important for B2B transactions, as confidentiality and trade secrets are important to businesses, in my opinion.

8.6) CISG

Discrimination is not regulated as in Turkish and German law in my opinion. The basic rule is that the expectation interest is compensated in the article 74 of the CISG as in PECL.[497] In cases of breach of contract, articles 74 and 77 of the CISG determine the amount of damages that must be paid. The compensation should be equal to the loss suffered by the non-breaching party, including lost profits. This is referred to as the expectation interest, which aims to put the non-breaching party in the same position they would have been in had the contract been effectively performed.[498] As a good example, we can see that the wording of article 74 of the CISG clearly indicates that the corresponding claim for damages compensates for the pecuniary interest in the due performance of the contract (expectation interest, *positives Interesse*) as it is stated in the decision of Appellate Court St. Gallen.[499] So, this regulation way is similar to the PECL, in my opinion. On the other hand, there is an expectation interest as in PECL, Turkish, German, French and English law, in my opinion. Articles 75 and 76 of the CISG relate to the calculation of actual loss only in the case of contract termination. In all other cases, CISG article 74 should be used to calculate damages.[500] An aggrieved party can claim damages for loss of expected benefits when a contract is breached. To calculate damages, refer to Articles 75 and 76 of the CISG. There are two ways to calculate damages: compare the contract price to the actual transaction price of a replacement item bought within a reasonable amount of time after the breach, or compare the contract price to the reasonable market price of a hypothetical replacement item that could have been bought at the time of the breach.[501] Therefore, if the contract is terminated, the compensation claim will be raised in the first place according to

---

[496] Yıldırım, Ayşe Elif (2017): *The concept of pre-contractual duties and a comparison between the draft common frame of reference, English and Turkish legal systems*, Ankara Avrupa Çalışmaları Dergisi, Vol.16, No.2, pp.175-176

[497] Gündüz, Şefika Deren (2019): *Olumlu zarar, (Thesis),* İstanbul Üniversitesi, p.226. Available at: http://nek.istanbul.edu.tr:4444/ekos/TEZ/ET001096.pdf (Accessed: 29 May 2023)

[498] Cenini, Marta - Parisi, Francesco: *An Economic Analysis of the CISG* In: Janssen, Andre - Meyer, Olaf eds. (2009): *CISG Methodology*, Sellier, Munich, p.165

[499] Switzerland 13 May 2008 Appellate Court St. Gallen (*Skid chains and adaptors case*). Available at: http://cisgw3.law.pace.edu/cases/080513s1.html (Accessed: 10 September 2019)

[500] Gündüz, Şefika Deren (2019): *Olumlu zarar, (Thesis),* İstanbul Üniversitesi, p.229. Available at: http://nek.istanbul.edu.tr:4444/ekos/TEZ/ET001096.pdf (Accessed: 29 May 2023)

[501] Nielsen, Lasse Schulz (2022): *Damages under Article 74 of the CISG: An analysis of the different types of damages that can be claimed under Article 74 of the CISG as a consequence of a breach, (Thesis),* Aalborg University, pp.16. Available at: https://projekter.aau.dk/projekter/files/473883586/Master_s_Thesis___Damages_under_Article_74_of_the_CISG.pdf (Accessed: 30 May 2023)

Article 75 or Article 76 provisions. In addition, all other damages that cannot be compensated in this context will be compensated under Article 74 of the general provision.[502] Moreover, neither Article 75 nor Article 76 prevent the seller from claiming damages under Article 74 even if the contract is avoided, as stated by the Austrian Supreme Court. [503]

According to the CISG Advisory Council Opinion No.6, an aggrieved party may not recover lost profits for lost volume under Article 74 and, in addition, damages under Article 75's substitute transaction formula because, in that circumstance, the aggrieved party would receive a double recovery.[504] So, double compensation is not possible as in German, Turkish, French, English law, and PECL, in my opinion.

According to article 74 of the CISG, the reach of damages is a no-fault liability and full compensation for any sum equal to the loss from the breach. Pursuant to Article 74 CISG, the damages must be result from the seller's breach as stated by The Superior Court of Quebec.[505] So, loss resulting directly and naturally from the breach of contract by the buyer or seller is used to measure damages as in English law and PECL, in my opinion.

Article 74 of the CISG does not provide compensation for negative interest when a contract is terminated, only for positive interest. Therefore, the distinction between positive and negative interest cannot be found in the article 74 of the CISG, as in the PECL.[506] The CISG Article 81 does not specify whether avoidance has *ex nunc* or *ex tunc* effect, but CISG agree that termination does not have retroactive effect, and a terminated contract should not be treated as never having been made. This is different from avoidance, which has retroactive effect, meaning that the contract is considered to have never been concluded. So, this is similar to PECL.[507] However, as an example, article 76 of the CISG abstract calculation of the buyer's

---

[502] Gürkan, Selin (2015): *Türk Satım Hukuku ile karşılaştırmalı olarak CISG uyarınca tazminatın hesaplanması*, (Thesis), İstanbul Bilgi Üniversitesi, p.127. Available at: http://openaccess.bilgi.edu.tr:8080/xmlui/bitstream/handle/11411/743/T%c3%bcrk%20Sat%c4%b1m%20Hukuku%20%c4%b0le%20Kar%c5%9f%c4%b1la%c5%9ft%c4%b1rmal%c4%b1%20Olarak%2c%20CISG%20Uyar%c4%b1nca%20Tazminat%c4%b1n%20H....pdf?sequence=3&isAllowed=y (Accessed: 9 December 2019)

[503] Austrian Supreme Court (Reference number: 1Ob292/99v, dated on 28.04.2000). Available at: https://www.uncitral.org/clout/clout/data/aut/clout_case_427_leg-1652.html (Accessed: 30 May 2023)

[504]CISG-AC Opinion No 6, Calculation of Damages under CISG Article 74. Rapporteur: Professor John Y. Gotanda, Villanova University School of Law, Villanova, Pennsylvania, USA. Adopted by the CISG-AC at its Spring 2006 meeting in Stockholm, Sweden. Available at: https://cisgac.com/opinions/cisgac-opinion-no1-copy-copy-3/ (Accessed: 3 June 2023)

[505] Nielsen, Lasse Schulz (2022): *Damages under Article 74 of the CISG: An analysis of the different types of damages that can be claimed under Article 74 of the CISG as a consequence of a breach, (Thesis),* Aalborg University, pp.12-13. Available at: https://projekter.aau.dk/projekter/files/473883586/Master_s_Thesis___Damages_under_Article_74_of_the_CISG.pdf (Accessed: 30 May 2023); Hewlett-Packard France v Matrox Graphics Inc., 2020 QCCS 78

[506] Gündüz, Şefika Deren (2019): *Olumlu zarar, (Thesis),* İstanbul Üniversitesi, p.226. Available at: http://nek.istanbul.edu.tr:4444/ekos/TEZ/ET001096.pdf (Accessed: 29 May 2023)

[507] 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

loss means calculating the difference between the contract price and the market price of the goods in question. This difference represents the loss sustained (*damnum emergens* or negative interest).[508] So, for instance, in a contract for the sale of goods, the damnum emergens or negative interest may be measured by the difference between the contract price and the market price, which also represents the performance interest.[509] So, decisions sometimes refer to the classification of damages under domestic law,[510] and it is possible to see this definition in case law from the viewpoint of that. In this respect, it is similar to the French law in my opinion because we can see it in the case law there as well. As an example, in the case mentioned above, a German seller sold jewelry to two Austrian buyers who did not pay on time. The seller gave them extra time but eventually claimed damages. The Austrian Supreme Court ruled that the seller could choose how to calculate damages and could still claim damages even if the contract was avoided.[511] In another example, the Austrian Supreme Court stated that damages might be set off against the contractual price and follow the principle of foreseeability and full compensation, including loss of profit and consequential loss if not excluded by the agreement.[512] So, reliance interest includes consequential losses that are not too remote since one person would not have suffered if not entered the contract with another.[513] However, double compensation is not possible, as mentioned above. Also, according to the CISG Advisory Council Opinion No 6, damages must not place the aggrieved party in a better position than it would have enjoyed if the contract had been properly performed.[514]

[508]Schwenzer, Ingeborg - Hachem, Pascal - Kee, Christopher (2012): *Global Sales and Contract Law*, Oxford University Press, New York, p.604

[509] 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.14.

[510] 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)

[511] 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); Austrian Supreme Court (Reference number: 1Ob292/99v, dated on 28.04.2000). Available at: https://www.uncitral.org/clout/clout/data/aut/clout_case_427_leg-1652.html (Accessed: 30 May 2023)

[512]Austrian Supreme Court (Reference number: 7Ob 301/01t, dated on 14.01.2002). Available at: https://www.uncitral.org/clout/clout/data/aut/clout_case_541_leg-1423.html (Accessed: 30 May 2023)

[513] Hutchison, Dale (2004). *Back to basics: reliance damages for breach of contract revisited*: notes. South African Law Journal, Vol.121, No.1, p.56

[514] CISG-AC Opinion No 6, Calculation of Damages under CISG Article 74. Rapporteur: Professor John Y. Gotanda, Villanova University School of Law, Villanova, Pennsylvania, USA. Adopted by the CISG-AC at its Spring 2006 meeting in Stockholm, Sweden. Available at: https://cisgac.com/opinions/cisgac-opinion-no1-copy-copy-3/ (Accessed: 3 June 2023)

Also, if a fundamental breach occurs or is likely to occur, the non-breaching party may seek to suspend performance under Article 71 or to avoid the contract under Article 72 .[515] So, as mentioned in English law and PECL, damages awarded for breaches in CISG are based on the expenses lost as a result. This is because strict liability and fundamental breach concepts differ from Turkish, French, and German law, in my opinion. When determining responsibility for a breach, neither fault nor the type of breach is considered. Instead, legal consequences are based on the severity of the breach rather than the legal facts behind why or which obligations the buyer and seller breached in CISG.[516]

According to Article 26 of the CISG, the buyer must inform the seller in writing to terminate the contract. In other words, the contract will only end if the other party is notified. The right to terminate the contract depends on the buyer's declaration, so they can choose to continue with the contract even if there are reasons to end it.[517] So, there is scope for the notice to allow the defaulting promisor additional time to perform, effectively giving him a second chance. [518] So, in CISG, PECL, French, German, and Turkish law, it's important to give a notice before taking any action. This is different from English law where immediate action is allowed, in my opinion.

Also, in CISG, in case of termination, compensation for positive interest or negative interest is possible.[519] This is similar to PECL, German, French, and English law, in my opinion. However, in Turkish law, an aggrieved party can claim compensation for only negative interest in case of contract termination.[520]

Under CISG, if one party ends a contract and the other party believes it was wrongful termination, they can claim positive or negative interest as in PECL, English, German and

---

[515] DiMatteo, Larry A. – Dhooge, Lucien J. - Greene, Stephanie – Maurer, Virginia G. - Pagnattaro, Marisa Anne (2005): *International Sales Law: A Critical Analysis of CISG Jurisprudence*, Cambridge University Press, New York, pp.128-129

[516] Sayın, Ceren (2019): *Viyana Satım Sözleşmesi'nde Satıcının Ayıptan Doğan Sorumluluğu*, (Thesis), Ankara Üniversitesi, pp.89-90. Available at: https://dspace.ankara.edu.tr/xmlui/bitstream/handle/20.500.12575/72096/?sequence=1&isAllowed=y (Accessed: 30 May 2023)

[517]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)

[518] 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)

[519]Öcal, Merve Ekinci (2019): *Sözleşmeden Dönme Halinde Menfi Zarar, (Thesis)*, Başkent Üniversitesi, p.27. Available at: http://acikerisim.baskent.edu.tr/bitstream/handle/11727/6348/10323840.pdf?sequence=1&isAllowed=y (Accessed: 10 June 2023)

[520] Turkish Supreme Court of Appeal for 11th Civil Circuit (decision no. 2014/15289, dated on 09.10.2014)

Turkish law, in my opinion. The court may compel performance and keep the contract valid. The defaulting party can enforce performance through a court order according to the article 62[521] and 46[522] of the CISG. So, this is similar to PECL, Turkish, French and German law, in my opinion. However, according to the CISG, a court can order specific performance if it would be permitted under the domestic law of the country where the court is located. However, the enforcement of this order is up to the discretion of the domestic court. If the domestic law permits specific performance, the court must grant it as long as the necessary conditions are met. Conversely, if the domestic law does not allow it, then the aggrieved party cannot request it. The court has the power to decide whether or not to grant performance relief under the CISG. Therefore, the application of CISG in England may differ from how it is applied in Turkey, Germany, and France.[523] Also, Good faith can be used to challenge termination in CISG, similar to PECL, Turkey, Germany, and France. For instance, in an arbitration case, it was argued that the seller acted in good faith throughout the relevant period, whereas the buyer violated the good faith principle outlined in Article 7 of the CISG and Article 242 of the German Civil Code by not promptly reporting the delay in delivery as a material breach of the agreement and failing to exercise its right to claim a breach. Thus, the seller had a reasonable expectation that the buyer had waived its right to complain about the breach. The arbitrator concluded that the buyer's termination of the contract was not legitimate.[524] In CISG, there is the option to make compensation claims either alongside other rights or independently. To calculate the loss, needing to determine the difference between the current assets of the creditor and what they would have had if there had been no breach. This is done to compensate for any positive interest caused. The rule is compensation for positive interest.[525] However, it can be also compensation for negative interest as mentioned above. So, the aggrieved party can claim positive interest or negative interest by terminating the contract. As an example, in the Marques Roque Joachim v. Manin Riviere case, the Court of Appeal of Grenoble ruled that the obligation to restore a party to what they reasonably expected when entering a contract is a general obligation that must be

[521] Hondius, Ewoud - Heutger, Viola – Jeloschek, Christoph – Sivesand, Hanna – Wiewiorowska, Aneta (2008): *Principles of European Law: Sales (PEL S)*, Sellier European Law Publishers , Munich, p.242
[522] 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, Switzerland, p.126
[523] Shen, Jianming (1996): *The Remedy of Requiring Performance under the CISG and the Relevance of Domestic Rules*, Arizona Journal of International and Comparative Law, Vol.13, No.2, p.261, pp.267-268
[524] Schill, Stephan W. ed. (2022): *Final award in case no. 2019/d*, Yearbook Commercial Arbitration, Volume XLVII 2022, Kluwer Law International BV, Netherlands pp.91-92
[525]Gündüz, Şefika Deren (2019): *Olumlu zarar, (Thesis)*, İstanbul Üniversitesi p.226. Available at: http://nek.istanbul.edu.tr:4444/ekos/TEZ/ET001096.pdf (Accessed: 29 May 2023)

fulfilled using all available means.[526] In another arbitration case, the arbitrator held that the buyer's contract termination had been unlawful. The arbitrator ruled that the loss should be calculated based on the difference between the agreed price and current market value at contract termination, per the CISG. [527] However, it can be also negative interest as stated above. So, in my opinion, the aggrieved party can claim compensation for positive or negative interest by terminating the contract, similar to PECL, German law, French and English law. However, in Turkish law, only negative interest can be claimed through contract termination.

The concept of *culpa in contrahendo* is not addressed in the CISG. When the Treaty was being developed, suggestions to include this breach of obligation arising from pre-contractual negotiation were rejected. Instead, such claims were accepted within the scope of non-contractual liability in various legal systems.[528] For instance, a U.S. court ruled that the CISG does not govern non-contractual claims,[529] but these may be evaluated under the national legal rules applicable under the rules of private international law.[530] Good faith, which is regulated under Article 7 of the CISG, serves as the basis for culpa in contrahendo. Although the CISG does not regulate culpa in contrahendo, Article 7(2) stipulates that questions not expressly settled in the Convention are to be settled in conformity with the general principles on which it is based or, in the absence of such principles, in conformity with the law applicable by virtue of the rules of private international law. As such, good faith can be used as an underlying principle to fill gaps under Article 7(2).[531] The principle of *culpa in contrahendo* can be used in countries like Turkey, Germany, and France, where the concept of good faith is

[526] Poillot-Peruzzetto, Sylvaine: *French Perspective of the CISG* In: DiMatteo, Larry A. ed. (2014): *International Sales Law : A Global Challenge*, Cambridge University Press, New York, p.350

[527] Schill, Stephan W. ed. (2021): *Final award in case no. ICC-FA-2021-072*, Yearbook Commercial Arbitration, Volume XLVI 2021, Kluwer Law International BV, Netherlands, pp.100-101

[528] Gürkan, Selin (2015): *Türk Satım Hukuku ile karşılaştırmalı olarak CISG uyarınca tazminatın hesaplanması*, (Thesis), İstanbul Bilgi Üniversitesi, p.8. Available at: http://openaccess.bilgi.edu.tr:8080/xmlui/bitstream/handle/11411/743/T%c3%bcrk%20Sat%c4%b1m%20Hukuku%20%c4%b0le%20Kar%c5%9f%c4%b1la%c5%9ft%c4%b1rmal%c4%b1%20Olarak%2c%20CISG%20Uyar%c4%b1nca%20Tazminat%c4%b1n%20H....pdf?sequence=3&isAllowed=y (Accessed: 9 December 2019)

[529] U.S. [Federal] District Court for the Eastern District of Pennsylvania (Reference number: 99-6384, dated on 29/08/2000). Available at: https://www.uncitral.org/clout/clout/data/usa/clout_case_420_leg-1644.html (Accessed: 30 May 2023)

[530] Gürkan, Selin (2015): *Türk Satım Hukuku ile karşılaştırmalı olarak CISG uyarınca tazminatın hesaplanması*, (Thesis), İstanbul Bilgi Üniversitesi, p.8. Available at: http://openaccess.bilgi.edu.tr:8080/xmlui/bitstream/handle/11411/743/T%c3%bcrk%20Sat%c4%b1m%20Hukuku%20%c4%b0le%20Kar%c5%9f%c4%b1la%c5%9ft%c4%b1rmal%c4%b1%20Olarak%2c%20CISG%20Uyar%c4%b1nca%20Tazminat%c4%b1n%20H....pdf?sequence=3&isAllowed=y (Accessed: 9 December 2019)

[531] Pedersen, Marie Hummelshøj - Rossen, Anne (2019): *Precontractual liability under the CISG: An analysis of whether there is a basis for precontractual liability in the United Nations Convention on Contracts for the International Sale of Goods and if so, how the content of such liability may be determined and which types of damages may be compensated, (Thesis)*, Aalborg University, pp.16-17. Available at: https://projekter.aau.dk/projekter/files/305675224/Master_s_Thesis___Anne_Rossen_og_Marie_Hummelshoj_Pedersen.pdf (Accessed: 30 May 2023)

important and the courts have jurisdiction, in my opinion. As an example, in a case where the CISG is applied, the Frankfurt Higher Regional Court held that the seller might be liable if the buyer was induced to rely on the possibility of concluding a contract or if the parties had already partially fulfilled the agreement. In such cases, the non-breaching party could claim damages for pre-contractual liability.[532] So, *culpa in contrahendo* can be applied in civil law countries such as Turkey, France, and Germany, in my opinion.

Also, similarly, in my opinion, termination regarding CISG can be challenged in countries like Turkey, Germany, and France by invoking the concept of good faith, which is highly valued in their courts. However, in England, even if the CISG is applied, a promisor who defaults cannot use the principle of good faith to contest termination, in my opinion.

IX)THE CONCEPT OF LIABILITY IN INTERNATIONAL EUROPEAN AND TURKISH CONTRACT LAW

9.1) Liability Systems

There can be two kinds of liability systems in international business law. One is strict liability, and the other one is a fault-based liability. In a fault-based system, the seller will not be liable for any loss that the buyer suffers because he has not acted intentionally or negligently. In a system of strict liability, by contrast, he will owe damages because the impediment was not "beyond his control."[533]

The general rule is that the performance obligation is strict in English Law. There is, in principle, a guarantee of performance, and failure to perform for whatever reason will usually be a breach of a contract in English Law.[534] CISG adopts the Common Law approach more closely than the Civil Law approach. A fault is not mentioned in the CISG as a factor for any remedy whatsoever.[535] Under PECL, the liability for breach of contract is, in principle, strict. The PECL bind the basic rule on the fulfillment and compensation requirements to the absence of an excuse, and in article 8:108 (1), they add: "(1) A party's non-performance is excused if it proves that it is due to an impediment beyond its control and that it could not reasonably have

[532] The Frankfurt Higher Regional Court (case no. 10 U 80/93, dated on 04.03.1994). Available at: https://www.unilex.info/cisg/case/205 (Accessed: 30 May 2023)
[533]Lehmann, Matthias: *Damages and Interest* In: Penadés, Javier Plaza - Velencoso, Luz M. Martínez eds. (2015): *European Perspectives on the Common European Sales Law*, Springer, Switzerland, pp.247-248
[534] Youngs, Raymond (2014): *English, French & German Comparative Law*, Routledge, New York, p.662
[535] Zeller, Bruno (2005): *Damages Under The Convention on Contracts For The International Sale Of Goods*, Oceana Publications, New York, p.48

been expected to take the impediment into account at the time of the conclusion of the contract, or to have avoided or overcome the impediment or its consequences."[536]

The BGB and HGB do not apply the concept of strict liability but stipulate a fault-based liability for damages. Under German law, a seller is only liable for damages if he or she has deliberately or negligently breached his or her contractual obligations.[537] Similarly, the liability for breach of contract is, in principle, fault-based liability in Turkish Law.[538]

French law occupies a position between two systems,[539] but French law, in principle, also follows the model of fault-based liability,[540] and the fault is more relevant in the requirement of contractual liability in French Law.[541] However, while the law places the burden to prove fault on the claimant in France, the burden is on the breaching party to prove the lack of fault in Germany[542] and Turkey. The burden of proving faultlessness to the breaching party is a factor that reduces the effect of the fault doctrine in German and Turkish Laws.[543]

While fault plays a role in determining the remedies for a breach in Civil Law, it is a substantive issue in Common Law. Arguably therefore the common law starts with the premise of strict liability but consequently looks fault to ascertain whether there could be extenuating circumstances, which can either restrict or negate strict liability.[544]

9.2) Methods for Limiting the Liability for Damages

9.2.1) Foreseeability

The concept of foreseeability is the most frequently used instrument to limit liability for damages. It is employed both by legal systems which follow a fault-based liability system

---

[536]Von Bar, Christian - Drobnig, Ulrich (2004)*: The Interaction of Contract Law and Tort and Property Law in Europe: A Comparative Study*, Sellier, München,p.54

[537] Kiene, Sörren: *German Country Analysis: Part II* In: DiMatteo, Larry A. ed. (2014): *International Sales Law : A Global Challenge*, Cambridge University Press, New York, p.397

[538] Atamer, Yeşim M.: *Satıcının Sözleşmeye Aykırı Davranışı Ekseninde CISG'ın İfa Engelleri Sistemine Genel Bakış* In: Atamer, Yeşim M. ed. (2008): *Milletlerarası Satım Hukuku: Milletlerarası Mal Satımına İlişkin Sözleşmeler Hakkında Birleşmiş Milletler Antlaşması (CISG)*, On İki Levha Yayıncılık, İstanbul, p.253

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

[540] Lehmann, Matthias: *Damages and Interest* In: Penadés, Javier Plaza - Velencoso, Luz M. Martínez eds. (2015): *European Perspectives on the Common European Sales Law*, Springer, Switzerland, p.247

[541] Zeller, Bruno (2005): *Damages Under The Convention on Contracts For The International Sale Of Goods*, Oceana Publications, New York, p.48

[542] 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.18

[543] Atamer, Yeşim M.: *Satıcının Sözleşmeye Aykırı Davranışı Ekseninde CISG'ın İfa Engelleri Sistemine Genel Bakış* In: Atamer, Yeşim M. ed. (2008): *Milletlerarası Satım Hukuku: Milletlerarası Mal Satımına İlişkin Sözleşmeler Hakkında Birleşmiş Milletler Antlaşması (CISG)*, On İki Levha Yayıncılık, İstanbul, p.253

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

as well as those operating on a strict liability basis. In those latter systems, the foreseeability test naturally receives greater attention than in fault-based liability systems, where much of the debate focuses on the concept of fault. From a comparative-historical perspective, the foreseeability rule was first codified in the CCF of 1804. From there, it traveled into other domestic legal systems heavily influenced by French law. The breakthrough of the foreseeability rule in common law jurisdictions came with the English case, *Hadley v Baxendale*.[545] Also, the principle was restated in other cases, notably Victoria Laundry v Newman Industries case.[546] Also, at the international level, the foreseeability rule was adopted both by uniform law and projects as in CISG.[547] The rule in Hadley v Baxendale provides, in essence, that damages may be recovered when a loss is one that arises naturally, that is, in the usual course of things, or, otherwise, if this loss has been in the contemplation of the parties.[548] Also, in common law jurisdictions, recovery of losses is limited by the remoteness test. In other words, the contract breacher is not liable for losses that are found to be too remote from the actual breach. It is undisputed that the principal test for remoteness is the foreseeability rule as adopted in Hadley v Baxendale.[549] The doctrine of remoteness limits the right of the innocent party to recover damages to which he would otherwise be entitled. The general test is that the claimant can only recover in respect of losses which were within the reasonable contemplation of the parties at the time of entry into the contract.[550] The court adopted the foreseeability rule as the appropriate test to determine liability for damages - more precisely to determine, whether the loss sustained was too remote.[551] To define knowledge the court relied on two rules established in Hadley v Baxendale case, namely imputed knowledge and knowledge which is actually known or possessed by the parties. Furthermore it ought to be noted that foresseability was measured at the time when the contract was made.[552] In Hadley v Baxendale (1854), it was decided that loss, in order to be compensatable, must either:

---

[545] Schwenzer, Ingeborg - Hachem, Pascal - Kee, Christopher (2012): *Global Sales and Contract Law*, Oxford University Press, New York, pp.595-596

[546] Zeller, Bruno (2005): *Damages Under The Convention on Contracts For The International Sale Of Goods*, Oceana Publications, New York, p.90.

[547] Schwenzer, Ingeborg - Hachem, Pascal - Kee, Christopher (2012): *Global Sales and Contract Law*, Oxford University Press, New York, p.597

[548] 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, p. 252

[549] Schwenzer, Ingeborg - Hachem, Pascal - Kee, Christopher (2012): *Global Sales and Contract Law*, Oxford University Press, New York, p.597

[550] McKendrick, Ewan (2017): *Contract Law*, Palgrave, London, p.457

[551] Schwenzer, Ingeborg - Hachem, Pascal - Kee, Christopher (2012): *Global Sales and Contract Law*, Oxford University Press, New York, p.597

[552]Zeller, Bruno (2005): *Damages Under The Convention on Contracts For The International Sale Of Goods*, Oceana Publications, New York, p.94.

(a) a rise 'naturally—that is, according the usual course of things' from the breach of contract (which means it must be reasonably foreseeable). [553] To qualify as a loss which has occurred 'naturally' there must have been a 'serious possibility' or a 'real danger' or a 'very substantial' probability that the loss would ocur as it is stated in Heron 2 case.[554]

(b) result from abnormal circumstances, if they 'may reasonably be supposed to have been in the contemplation of both parties at the time they made the contract as the probable result of the breach' (which means that the defendant must have had sufficient notice of these to make the loss foreseeable).[555] The defendant must at least know of the special circumstances, and there is some suggestion in the case law that the claimant must go further and establish that the defendant agreed to assume liability for the exceptional loss. [556]

In common law systems, the former category refers to the loss which any reasonable person in the defendant's position could have foreseen. The latter category refers to the loss which could have been foreseen by a reasonable person with the same knowledge of special circumstances as the defendant had (for example, knowledge of the purpose for which the aggrieved party wanted the subject matter of the contract). [557]

Article 74 of the CISG imposes the limiting factor of foreseeability. The most important element contained in article 74 is knowledge measured at the time of contract was concluded and not at the time of breach[558] as in English Law. So, that is the difference from, Turkish and German adequate causality because of the wordings of code of laws points the time of breach of contract in my opinion. There is not requirement of fault under the article 74 of the CISG as it is stated in the decision of Supreme Court of Austria (*Oberster Gerichtshof*).[559] The common law system has adopted a compensation system that is independent of the fault, and this understanding is also included in the CISG. In the common law system, causality is complementary to foreseeability only in the account of liability charge.[560] The foreseeability rule in the CISG considers both what is foreseeable by the parties (subjectively) and what is

[553] Youngs, Raymond (2014): *English, French & German Comparative Law*, Routledge, New York, p.680
[554] McKendrick, Ewan (2017): *Contract Law*, Palgrave, London, p.457
[555] Youngs, Raymond (2014): *English, French & German Comparative Law*, Routledge, New York, p.680
[556] McKendrick, Ewan (2017): *Contract Law*, Palgrave, London, p.458
[557]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
[558]Zeller, Bruno (2005): *Damages Under The Convention on Contracts For The International Sale Of Goods*, Oceana Publications, New York, p.91.
[559]Austria 14 January 2002 Supreme Court (Cooling system case). Available at: http://cisgw3.law.pace.edu/cases/020114a3.html (Accessed: 15 December 2019)
[560] 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)

foreseeable objectively, as stated in the decision of the Supreme Court of Austria (*Oberster Gerichtshof*).[561] Here, the significant point is gathered as to whose foreseeability will be considered in determining damages under the contract. The person required to foresee the possible consequences of breach of contract under Article 74 of the CISG is the party who breached the contract. It is argued that at this point, the Treaty departs from the common law legal system because, in the common law legal system, the foreseeability of both sides of the contract is taken into consideration in determining the damages which can be compensated in case of breach of the contract as it is in *Hadley v. Baxendale* case. However, in the doctrine, it is stated that this difference between the common law legal system and the Treaty does not lead to different results in terms of practice because the courts emphasize whether the breaching party of the contract has foreseen the damage as in Czarnikow Ltd. v. Koufos (The Heron II) case.[562]

Like common law countries, many civil law countries require some form of causation before liability attaches. In general, under the French model, causation is employed under the concept of foreseeability. Under French law, a respondent is liable only for damages *"which were foreseen or which could have been foreseen at the time of the contract,"* except in cases of a willful breach. The foreseeability requirement, which applies to both the type of damages and to the amount of damages, has the effect of limiting damages, especially for lost profits. In addition to the requirement that damages be foreseeable, French law also requires that damages be the direct result of the breach.[563] The approach of limiting the loss to foreseeable damages is included in Article 1150 of the CCF. According to this criterion, this principle shall be applicable in respect of the damages that are foreseen or foreseeable by a prudent person in the same position as the debtor. This determination is made by considering the subjective criteria. However, the practices between the parties and usages in commercial life are also considered.[564] It is similar to CISG but because of just considers the foreseeability of the breaching party as distinct from the common law system.[565] The claimant's fault may totally

[561] Zeller, Bruno (2005): *Damages Under The Convention on Contracts For The International Sale Of Goods*, Oceana Publications, New York, 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)
[562] Uzun, Tuba Birinci (2014): *CISG Uygulamasında Tazminat Sorumluluğunun Sınırlandırılması*, Dokuz Eylül Üniversitesi Hukuk Fakültesi Dergisi, Vol.16, No.1, pp.163-164.
[563] 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.
[564] 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)
[565] Zeller, Bruno (2005): *Damages Under The Convention on Contracts For The International Sale Of Goods*, Oceana Publications, New York, p.95.

or partially exonerate the defendant in French Law.[566] In common law systems, a fault is not considered to be an element of contractual liability[567] as in CISG.[568] In France, the equation of intentional acts and gross negligence has a particularly strong impact on the relevance of the foreseeability rule. In order, the protect the weaker parties, the French Supreme Court continuously broadened its understanding of intentional acts. However, in addition to the traditional understanding of fault in the sense of the Roman culpa, the French Supreme Court assumes gross negligence and, thus, an intentional act also in situations where a principal obligation of the contract is breached or where the breach has particularly severe consequences.[569]

Article 9:503 of PECL, though essentially repeating the elements of CISG, adds the sentence "unless the non-performance was intentional or grossly negligent." So, PECL includes the element of negligence into the principle of foreseeability which has been ruled out by CISG[570] and English law, but it is similar to French Law from the viewpoint of that, in my opinion. In this case, the damages for which the non-performing party is liable are not limited by the foreseeability rule, and the full damage has to be compensated, even if unforeseeable.[571] Also, PECL is similar to CISG and French Law and just considers the foreseeability of a breaching party as distinct from the common law system.

The important point to be mentioned here is that when it comes to business-to-business relations, the concept of prudent merchant or businessman will be considered instead of ordinary or regular people, in my opinion. That is in the concept of duty of care.[572] We can see

[566] Youngs, Raymond (2014): *English, French & German Comparative Law*, Routledge, New York, p.681

[567]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. 255

[568]Austria 14 January 2002 Supreme Court (Cooling system case). Available at: http://cisgw3.law.pace.edu/cases/020114a3.html (Accessed: 15 December 2019)

[569] Schwenzer, Ingeborg - Hachem, Pascal - Kee, Christopher (2012): *Global Sales and Contract Law*, Oxford University Press, New York, p.599

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

[571]Lando, Ole - Beale, Hugh eds. (2000): *Comments and Notes: PECL Article 9:503: Foreseeability*, Principles of European Contract Law: Parts I and II, Kluwer Law International . Available at: http://cisgw3.law.pace.edu/cisg/text/peclcomp74.html (Accessed: 28 February 2020)

[572] Gümüş, Mustafa Alper (2016): *6102 Sayılı Türk Ticaret Kanunu (TTK) m. 18/II'de Yer Alan "Basiretli İş Adamı (Tacir) Davranışı" Ölçütünün İyiniyetin (TMK m.3) Varlığının Belirlenmesindeki İşlevi*, Marmara Üniversitesi Hukuk Fakültesi Hukuk Araştırmaları Dergisi, Vol.22, No.3, p.1224.

that in the case law of CISG,[573] the case law of English Law,[574] and the case law of French Law.[575] There is no case law of PECL, but it could be similar because of foreseeability theory, in my opinion.

9.2.2) Adequate Causation

Despite a positive attitude to the 'foreseeability' test in national codifications in the years following the enactment of the CCF and its introduction in the English common law, the concept of limiting damages was rejected in an important segment of continental legal tradition—German law. The BGB, adopted almost 100 years after the Code Napoleon, opted for a different standard—'causation.' This method of limiting damages is used in domestic legal systems that have been developing under the influence of the BGB. Its starting point is the initial assumption that a debtor is liable for loss caused by his default.[576] German law still limits damages through the concept of adequate causation. The test for whether adequate causation exists has been expressed as whether "the obligor's default, as judged by ordinary human standards at the time of its occurrence, render, more likely, damages of the kind actually suffered."[577] In other words, whether or not the breach has significantly increased an objective probability of the loss must be judged from the standpoint of an experienced observer. Knowledge of all the circumstances of which a person of that kind ought to have, as well as any special knowledge possessed by the breaching party, will be imputed to such an observer.[578] The result may often be similar to that obtained by application of the test of foreseeability, except in certain special cases in which the outcome will usually benefit the claimant.[579] Indeed, this theory is valid in Turkish and German law doctrine and practice.[580] So, adequate causation is also adopted in Turkish Law with reference to relation of causality. This theory was developed with the aim of eliminating the injustices that can be caused by unjustly extending

[573] 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)

[574]Howard, M.N.: *Frustration and Shipping Law—Old Problems, New Contexts* In: McKendrick, Ewan ed. (2013): *Force Majeure and Frustration of Contract*, Informa Law from Routledge, Abingdon, pp.132-133

[575]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.

[576] 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

[577] 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.17-18.

[578] Saidov, Djakhongir (2008):*The Law of Damages in International Sales: The CISG and other International Instruments*, Hart Publishing, Portland, p.89

[579] Youngs, Raymond (2014): *English, French & German Comparative Law*, Routledge, New York, p.682

[580]Eren, Fikret (1975): *Sorumluluk Hukuku Açısından Uygun İlliyet Bağı Teorisi*, Ankara Üniversitesi Hukuk Fakültesi Yayınları, Ankara, p.51

the area of responsibility. Adequate causation is defined as the logical causal relation between a breach and the damage that it can cause according to general experience and the normal course of events. A significant point is the objective acceptability of the cause-and-effect relationship between the breach and damage according to the ordinary course of events but not the foreseeability of the result of the breach by the breaching party.[581] The theory of adequate causation does indeed, on its face, not ask whether the loss was foreseeable but rather whether the breach increased the risk that such a consequence may occur.[582]

While the adequate causality theory was initially called a pure theory of causality, it is suggested to be an imputation theory or, in other words, a theory of liability according to the prevailing opinion today. This applies not only to adequate causality theory but also to all theories of legal causation. In fact, it is about determining to what extent the person can be held fairly responsible for the consequences of a condition, as stated in a German Federal Court judgment, because the task of these theories is to attribute a particular result to a particular person.[583]

Contractual liability is, in principle, based on the fault in Turkish and German Laws[584] as distinct from English Law, PECL, and CISG, in my opinion. So, the common law system has adopted a compensation system that is independent of the fault, and this understanding is also included in the CISG. In the common law system, causality is complementary to foreseeability only in the account of liability charge. In the civil law system, where fault-based liability is adopted, causality theories have been adopted to limit liability distinctly.[585] As a good example in one case, the German Federal Court applied the theory of the purpose of the contract alongside 'adequate cause': i.e., it sought to limit liability to what is justified in the light of the violated contractual duty.[586] Also, the foreseeability of the damage is an element of

---

[581] Gürkan, Selin (2015): *Türk Satım Hukuku ile karşılaştırmalı olarak CISG uyarınca tazminatın hesaplanması*, (Thesis), İstanbul Bilgi Üniversitesi, p.20, Available at: http://openaccess.bilgi.edu.tr:8080/xmlui/bitstream/handle/11411/743/T%c3%bcrk%20Sat%c4%b1m%20Hukuku%20%c4%b0le%20Kar%c5%9f%c4%b1la%c5%9ft%c4%b1rmal%c4%b1%20Olarak%2c%20CISG%20Uyar%c4%b1nca%20Tazminat%c4%b1n%20H....pdf?sequence=3&isAllowed=y (Accessed: 9 December 2019)

[582] Markesinis, Basil Sir - Unberath, Hannes - Johnston, Angus (2006): *The German Law of Contract: A Comparative Treatise*, Hart Publishing, Portland, p.474

[583] Eren, Fikret (1975): *Sorumluluk Hukuku Açısından Uygun İlliyet Bağı Teorisi*, Ankara Üniversitesi Hukuk Fakültesi Yayınları, Ankara, p.55-56

[584]Atamer, Yeşim M.: *Satıcının Sözleşmeye Aykırı Davranışı Ekseninde CISG'ın İfa Engelleri Sistemine Genel Bakış* In: Atamer, Yeşim M. ed. (2008): *Milletlerarası Satım Hukuku: Milletlerarası Mal Satımına İlişkin Sözleşmeler Hakkında Birleşmiş Milletler Antlaşması (CISG)*, On İki Levha Yayıncılık, İstanbul, p.253

[585] 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)

[586] Markesinis, Basil Sir - Unberath, Hannes - Johnston, Angus (2006): *The German Law of Contract: A Comparative Treatise*, Hart Publishing, Portland, p.89

the fault and not related to the causal relation, and adequate causal relation is not about the foreseeability of the damage, and it does not matter if it is expected to occur according to the normal course of events and general experience. The important thing is to know whether a particular outcome can be considered as a result of a particular cause, as it is stated by the German Federal Court. So, there is an adequate causal relation in German Law[587] and Turkish Law, and it is another fault element. Adequate causal relation holds liable the person causing the loss for the appropriate and typical consequences of his or her behavior in an objective possibility.[588] So, that is also different from English Law, CISG, and PECL because there is a strict liability in them, in my opinion, but there is a fault-based liability also in French Law.

According to the adequate causality theory, the moment of evaluation for adequate causality is the time when the breach of the contract occurs. Also, according to the acknowledged opinion in Turkish law, also the later moment after the breach of the contract is considered in the establishment of adequate causality. On the other hand, the moment of implementing the foreseeability test is at the time of the conclusion of a contract.[589]

When it comes to business-to-business relations, the concept of prudent merchant or businessman will be considered instead of ordinary or regular people as it is in CISG, French Law, and English Law, in my opinion, and that is in the concept of duty of care.[590] We can see that in Turkish Law[591] and German Law.[592]

So, there is just an objective evaluation in German and Turkish Law as distinct from CISG, PECL, and English Law, in my opinion. The concept of care as a provision in connection with the breach of contract is that the obligor's obligation is to perform the primary obligations and not breach the contract. The concept of care in the sense of fault functions to determine the fault element of the contractual liability with an objective evaluation method based on the average behavior of any prudent merchant in the same position as the obligor. Under the above view, the objective care measure sought for breach of contract is always higher than the

---

[587] Eren, Fikret (1975): *Sorumluluk Hukuku Açısından Uygun İlliyet Bağı Teorisi*, Ankara Üniversitesi Hukuk Fakültesi Yayınları, Ankara, p.119.

[588]Uzun, Tuba Birinci (2014): *CISG Uygulamasında Tazminat Sorumluluğunun Sınırlandırılması*, Dokuz Eylül Üniversitesi Hukuk Fakültesi Dergisi, Vol.16, No.1, p.183

[589]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)

[590] Gümüş, Mustafa Alper (2016): *6102 Sayılı Türk Ticaret Kanunu (TTK) m. 18/II'de Yer Alan "Basiretli İş Adamı (Tacir) Davranışı" Ölçütünün İyiniyetin (TMK m.3) Varlığının Belirlenmesindeki İşlevi*, Marmara Üniversitesi Hukuk Fakültesi Hukuk Araştırmaları Dergisi, Vol.22, No.3, p.1224.

[591]Turkish Supreme Court Decision of Joint Chambers (decision no. 2003/340, dated on 07.05.2003)

[592]Gümüş, Mustafa Alper (2016): *6102 Sayılı Türk Ticaret Kanunu (TTK) m. 18/II'de Yer Alan "Basiretli İş Adamı (Tacir) Davranışı" Ölçütünün İyiniyetin (TMK m.3) Varlığının Belirlenmesindeki İşlevi*, Marmara Üniversitesi Hukuk Fakültesi Hukuk Araştırmaları Dergisi, Vol.22, No.3, p.1227.

objective care measure sought to determine the breach. Therefore, the determination of the breach of the contract is based on the highest care of the ideal obligor of profession-specific and constitutes a breach of contract by considering each behavior that deviates from the most appropriate behavior to be expected from the ideal debtor according to the concrete case. On the other hand, as a rule, if the obligor does not show the average behavior expected from him in the present case, which is specific to the profession, this will suffice to be considered careless from the fault point of view. As a good example, a criterion of acting as a prudent merchant is described as a criterion of fault according to the past decision of the Turkish Supreme Court of Civil Chamber.[593]

The practical effect of the theory of 'adequate causation' and of a formal rejection of the principle of foreseeability may give one reason to think that such an approach creates insufficient protection for the defendant. As a means of improving this position, a general provision on good faith in section 242 of the BGB has sometimes been used to limit the defendant's liability.[594] We can see that also similarly in Turkish jurisdictions, and good faith has sometimes been used to limit the defendant's liability, as the Turkish Supreme Court of Appeal 11th Civil Circuit stated in one decision.[595]

The CISG restricted the application of good faith to the interpretation of the Convention according to article 7, while showing good faith is not a requirement when performing the contract. However, the parties have to perform with good faith according to article1:201 of the PECL.[596] The concept of good faith is mentioned in the CCF, but they have not had the influence that the concept of good faith has had in Germany.[597] However, English law has not adopted a general doctrine of good faith.[598] In common law systems, a fault is not considered an element of contractual liability. The general position is that once a breach is established, it makes no difference whether the breach was committed deliberately, negligently, or innocently or

[593]Gümüş, Mustafa Alper (2016): *6102 Sayılı Türk Ticaret Kanunu (TTK) m. 18/II'de Yer Alan "Basiretli İş Adamı (Tacir) Davranışı" Ölçütünün İyiniyetin (TMK m.3) Varlığının Belirlenmesindeki İşlevi*, Marmara Üniversitesi Hukuk Fakültesi Hukuk Araştırmaları Dergisi, Vol.22, No.3, pp.1224-1225.

[594] 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, p. 253

[595] Gümüş, Mustafa Alper (2016): *6102 Sayılı Türk Ticaret Kanunu (TTK) m. 18/II'de Yer Alan "Basiretli İş Adamı (Tacir) Davranışı" Ölçütünün İyiniyetin (TMK m.3) Varlığının Belirlenmesindeki İşlevi*, Marmara Üniversitesi Hukuk Fakültesi Hukuk Araştırmaları Dergisi, Vol.22, No.3, pp.1231-1232.

[596]Felemegas, John ed. (2001). *Remarks on good faith and fair dealing.* Available at: http://cisgw3.law.pace.edu/cisg/text/peclcomp7.html (10 December 2019)

[597] Youngs, Raymond (2014): *English, French & German Comparative Law*, Routledge, New York, pp.81-82

[598] Friedmann, Daniel: *Economic Aspects of Damages and Specific Performance Compared* In: Saidov, Djakhongir - Cunnington, Ralph eds. (2008): *Contract Damages: Domestic and International Perspectives*, Hart Publishing, Oxford, p. 80

whether the party in default acted in good faith or in bad.[599] From the viewpoint of common law, as in England, The courts have shown a marked reluctance to compensate for loss arising from risks that it was no part of the professional's duty to protect against. The prominence of this principle when assessing a professional's liability tends to displace legal devices that are used elsewhere for limiting damages. (e.g., arguments that loss is too remote or not sufficiently foreseeable)[600]

9.2.3) Mitigation

The rule is simple: the aggrieved is required to take all reasonable steps to cut down and reduce his loss consequent on the breach of contract and may not claim for any part of the loss which is due to his neglect of taking such steps. Indeed, some regard this as the only true mitigation; it is mitigation proper. Yet, despite its central aspect within mitigation, the term makes no appearance in Continental legal systems. [601]

The claimant is not required to 'take any step which a reasonable and prudent man would not ordinarily take in the course of his business' as stated in the British Westinghouse Co v Underground Electric Ry Co case, and he is only obliged to take reasonable steps to minimize his loss.[602] Similar to the foreseeability assessment, the reference should be made to the reasonable person with a case-by-case analysis as well.[603] So, we have to consider the knowledge of prudent merchants for Turkish, German, English, and French business partners, in my opinion.

The claimant is not under a duty to mitigate and failure to mitigate is not really fault, but the claimant should not recover the part of his or her loss that he or she could reasonably have avoided.[604] Several European legal systems recognize the notion of a "mitigation requirement" (that is not to be assimilated to duty since it is not due to others). This requirement imposes two types of behavior: the first one, negative, requires a party not to act in a way that might aggravate the damage caused, and the second one, positive, dictates that a party should

---

[599] Komarov, Alexander:*The Limitation of Contract Damages in Domestic Legal Systems and International Instrument* In: Saidov, Djakhongir - Cunnington, Ralph eds. (2008): *Contract Damages: Domestic and International Perspectives*, Hart Publishing, Oxford, p. 255

[600] Bird, Nicholas - Howe, Bryony: *England and Wales* In: Bird, Nicholas ed. (2019): *The Professional Negligence Law Review*, The Law Reviews, London, pp.46-47

[601] 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, pp. 330-331

[602] McKendrick, Ewan (2017): *Contract Law*, Palgrave, London, p.455

[603] 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

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

take measures to reduce the damage.[605] A party cannot be sued for failing to mitigate; rather, the non-breaching party is simply barred from claiming that amount of loss that it could have avoided by taking a mitigating step. For this reason, those losses which could have been mitigated are sometimes spoken of as "avoidable losses."[606] To some extent, the avoidability criterion of Unification Instruments and the beyond control criterion corresponds to the fault requirement of the civil law systems.[607]

There is no uniform approach to the reduction of damages due to the failure of claimants to use reasonable efforts to mitigate their losses. However, the rules in civil law countries often achieve the same result by refusing to award damages if a claimant's losses were caused by the claimant's reckless attitude or by reducing damages in accordance with the extent of the claimant's fault.[608] As is the case in some domestic legal systems, the international instruments provide that damages may be reduced to the extent that the loss could have been reduced or mitigated by the aggrieved party.[609]

What amounts to a reasonable measure to mitigate loss depends on the particular circumstances of the case. However, it can generally be said that, for example, there is no need to incur disproportionately high costs, take financial risks, sacrifice other property, or for the aggrieved party to endanger its own commercial reputation.[610]

9.2.3.1) English Law

In common law jurisdictions the concepts of mitigation and contribution to breach of contract are clearly distinguished as in Uzinterimpex JSC v Standard Bank Plc case. [611] In common law jurisdictions, the concepts of mitigation and contribution to the breach of contract are clearly distinguished, as in Uzinterimpex JSC v Standard Bank Plc case. Essentially,

---

[605] Fauvarque-Cosson, Bénédicte - Mazeaud, Denis (2008): *European contract law: Materials for a common frame of reference: Terminology, guiding principles, model rules*, Sellier, Munich, p.241.

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

[607] 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

[608] 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.

[609] Gürkan, Selin (2015): *Türk Satım Hukuku ile karşılaştırmalı olarak CISG uyarınca tazminatın hesaplanması*, (Thesis), İstanbul Bilgi Üniversitesi, p.113 , Available at: http://openaccess.bilgi.edu.tr:8080/xmlui/bitstream/handle/11411/743/T%c3%bcrk%20Sat%c4%b1m%20Hukuku%20%c4%b0le%20Kar%c5%9f%c4%b1la%c5%9ft%c4%b1rmal%c4%b1%20Olarak%2c%20CISG%20Uyar%c4%b1nca%20Tazminat%c4%b1n%20H....pdf?sequence=3&isAllowed=y (Accessed: 9 December 2019)

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

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

mitigation has the effect that the claimant can only recover those losses he could not have avoided by taking reasonable steps after accepting that the contract is at an end. What amounts to reasonable steps is a question of fact and thus depends upon the circumstances of each case as stated in Payzu v Saunders case.[612] So, compensation cannot be recovered in so far as it results from an unreasonable failure on the part of the claimant to take appropriate steps to mitigate his or her loss. But the claimant is entitled to recover expenses reasonably incurred in mitigating his or her loss, and if the claimant makes reasonable attempts to mitigate that loss and, in doing so, increases it, the increased loss may be recoverable.[613] The purpose of this principle is to preclude wastefulness on the claimant's part at the respondent's expense. Typically, the burden is on the respondent to prove that the claimant failed to take the appropriate mitigation measures. In England, a claimant may be precluded from recovering damages for loss that the claimant could have avoided through appropriate measures.[614]

Its application to contract law has been limited, however, to avoid shifting the task of risk allocation from parties to courts. The application of contributory negligence to a contract is well accepted when a breach of the contract coincides with a tort. However, it does not apply when liability for breach of contract is strict and not associated with carelessness, and it is applicability disputed when the defendant is liable for a contractual duty of care, but carelessness does not make him liable in tort. In some circumstances, English Courts have apportioned damages under causation, thereby allowing for a similar result as would have been achieved under comparative negligence as in Tennant Radiant Heat Ltd v Warrington Development Corporation case.[615]

While this is common because the aggrieved party has, in his own interests, take the necessary steps in mitigation, it can also be because, with the way to mitigation being so clear, mitigation has become incorporated into the normal measure of damages. Thus, if a seller fails to deliver the goods contracted for, the buyer cannot sit back on a rising market or wait till his sub-sale to a third party has fallen through but must go into the market with all reasonable speed and buy equivalent goods there. This mitigating step was incorporated in the normal measure of damages by section 51(3) of the Sale of Goods Act 1893 (now the Sale of Goods Act 1979), which states that for a seller's breach by non-delivery, the prima facie measure of damages,

[612] Hough, Tracey - Kühnel-Fitchen, Kathrin (2017): *Optimize Contract Law*, Routledge, New York, p.215
[613] Youngs, Raymond (2014): *English, French & German Comparative Law*, Routledge, New York, p.682
[614]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.12-13.
[615] 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, pp.242-243

where there is an available market, is the difference between the contract price and the market price at the time the goods should have been delivered or, if no such time is fixed, at the time of refusal to deliver. Section 50(3) has the equivalent provision, with necessary changes, for breach by the buyer by non-acceptance of the goods so that the seller is required to move into the market and sell elsewhere.[616]

The rules usually referred to under the heading of the 'duty to migrate' are:

(1) The claimant can only recover damages for those losses caused by the defendant's breach which he could not have avoided by taking reasonable steps.

(2) The claimant cannot recover for mitigated/ avoided losses, even if he took more steps to avoid losses than could be reasonably expected of him under point.

(3) The claimant can recover further losses or expenses incurred in taking reasonable steps to mitigate the loss caused by the defendant's breach of contract. [617]

9.2.3.2) German Law

In Germany, article 254 of the BGB finds its origin in the good faith principle.[618] Under German law, for instance, there is no duty to mitigate per se, but a similar result is achieved through the regime on contributory negligence. Article 254 of the BGB makes the entitlement and scope of damages depending on the circumstances, in particular when a fault or negligence of the aggrieved party has contributed to the occurrence or the amount of damages.[619] Failure to mitigate loss may be regarded as a form of claimant's fault under article 254 of the BGB, which would lead to a reduction in the compensation to which he or she would otherwise be entitled. For instance, where it is clear that the seller of goods is not going to perform, the buyer commits contributory fault if he does not rescind and enter into a new contract.[620] Other European systems are similar to the German in accepting the concept but not the term.[621]

---

[616] 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, pp. 332-333

[617] Hough, Tracey - Kühnel-Fitchen, Kathrin (2017): *Optimize Contract Law*, Routledge, New York, p.215

[618] 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

[619] 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.

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

[621] 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

According to article 254 (1) BGB, the award of compensation is reduced accordingly to the extent that the aggrieved party has caused the loss. This involves a balancing evaluation of the parties' contribution to the loss. According to article 254 (2) BGB, there are two situations. Firstly, if the fault of the plaintiff consisted only of an omission to warn the defendant of the danger of unusually high damage, which the defendant neither knew nor ought to have known, the award will be reduced accordingly. Secondly, if the plaintiff has omitted to avert or mitigate the loss, the award of damages is also reduced accordingly. [622]

9.2.3.3) CISG

We can see that in article 77 of the CISG. Concepts of mitigation and contribution to breach of contract are clearly distinguished in the CISG, like English Law.[623]

The CISG provides that '[a] party who relies on a breach of contract must take such measures as are reasonable in the circumstances to mitigate the loss, including loss of profit, resulting from the breach. If he fails to take such measures, the party in breach may claim a reduction in the damages in the amount by which the loss should have been mitigated'.[624] If an aggrieved party does not request damages, whether by way of an affirmative claim or by way of set-off, article 77 does not apply as stated in the decision of the Austrian Supreme Court.[625]

The obligation to mitigate damages exists only regarding damages claims and not regarding claims regarding the performance of the contract. What the obligation to mitigate damages entails depends on the circumstances in the particular case, which means it depends on the conduct of a reasonable person in the shoes of the creditor who has a damages claim. Trade usages and practices (Article 9 CISG), as well as special habits between the parties, must be taken into account. Especially the obligation to mitigate can mean that the creditor has to make a timely cover purchase or to repair a defect before the defect can cause consequential damage to other property of the creditor.[626]

---

[622]Markesinis, Basil Sir - Unberath, Hannes - Johnston, Angus (2006): *The German Law of Contract: A Comparative Treatise*, Hart Publishing, Portland, pp.475-476

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

[624]Saidov, Djakhongir (2008):*The Law of Damages in International Sales: The CISG and other International Instruments*, Hart Publishing, Portland, p.125

[625]UNCITRAL (2012): *Digest of Case Law on the United Nations Convention on Contracts for the International Sale of Goods*, United Nations, New York, p.368. Available at: https://www.uncitral.org/pdf/english/clout/CISG-digest-2012-e.pdf (Accessed: 10 September 2017); Austria 9 March 2000 Supreme Court (*Roofing material case*). Available at: http://cisgw3.law.pace.edu/cases/000309a3.html (Accessed: 10 December 2018)

[626] Schlechtriem, Peter - Butler, Petra (2009): *UN Law on International Sales: The UN Convention on the International Sale of Goods*, Springer, Berlin, p.p.220-221

CISG may not expressly provide for general principles of fair dealing and good faith. Nevertheless, the CISG is now increasingly viewed as reflecting a general principle of good faith, and, if this is correct, then the mitigation rule in the CISG can also be justified as a specific manifestation of a general principle of good faith.[627] An aggrieved party claiming damages must mitigate them by taking those steps that a reasonable creditor acting in good faith would take under the circumstances.[628]

9.2.3.4) Turkish Law

The good-faith principle would, to some extent, require the debtor to mitigate damages in Turkish Law as in German Law.[629] The court, while determining the extent of the compensation, must also take into account the aggrieved party's fault according to article 52 (1) of the TBK. If the injured party consented to the breach of the contract or caused or increased the damage or exacerbated the debtor's position, then the judge may reduce the compensation or may dismiss the claim. Moreover, the judge may reduce the compensation in cases where the debtor would be impoverished were he to pay the full compensation, provided that the debtor is at slight fault and equity requires it according to article 52 (2) of the TBK.[630] In the meantime, the equity criterion should be observed for both parties, i.e., how the damaged party will be affected by the reduction of compensation. The contributory negligence term is not explicitly included in the law, but it is settled in both doctrine and judicial decisions[631] as a term in the decisions of the Turkish Supreme Court of Appeal for the 17th Civil Circuit[632] or Turkish Supreme Court of Appeal for the 3rd Civil Circuit.[633]

Here, the criterion is the measures that can be expected from a reasonable person who is in the same personal, professional and social situation as the aggrieved party to reduce the damage. When determining reasonable measures, all the features of the concrete event are taken

---

[627]Saidov, Djakhongir (2008):*The Law of Damages in International Sales: The CISG and other International Instruments*, Hart Publishing, Portland, p.128

[628]UNCITRAL (2012): *Digest of Case Law on the United Nations Convention on Contracts for the International Sale of Goods*, United Nations, New York, p.368. Available at: https://www.uncitral.org/pdf/english/clout/CISG-digest-2012-e.pdf (Accessed: 10 September 2017); Austria 6 February 1996 Supreme Court (Propane case). Available at: http://cisgw3.law.pace.edu/cases/960206a3.html (Accessed: 10 December 2018)

[629]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

[630]Helvacı, Ilhan (2017): *Turkish Contract Law*, Springer, pp.156-157

[631] Çelebi, Funda : *Haksiz Fiil Sorumluluğu (Unsurlar, Tazminat, Hukuka Aykiriliği Kaldiran Haller, Zamanaşımı, Yargılama)* In: Belen, Herdem – Altay, İsmail eds. (2014): *Prof. Dr. İsmet Sungurbey'e Armağan, Borçlar Kanunu Genel Hükümler Konferansları, C. II, Haksız Fiilden Doğan Borç İlişkileri, Borç İlişkisinin Üçüncü Kişilere Etkisi, Borçların ve Borç İlişkilerinin Sona Ermesi, Zamanaşımı, 28-29 Nisan 2012*, İstanbul Barosu Yayınları ,İstanbul, pp.24-25

[632] Turkish Supreme Court of Appeal for 17th Civil Circuit (decision no. 2018/10877, dated on 19.11.2018)

[633] Turkish Supreme Court of Appeal for 3rd Civil Circuit (decision no. 2015/17050, dated on 02.11.2015)

into account. In this respect, it is evaluated how suitable a measure can be to reduce the damage. In other words, objective criteria related to the measure, such as effectiveness, cost, and market conditions, are evaluated.[634]

9.2.3.5) French Law

The principle of mitigation of damages does not clearly exist in France. However, the attribution of damages being a question of fact lies within the *appréciation souveraine des juges du fond*, which means the French judges could practically take this argument into account without saying so.[635] French law so far has rejected the idea of mitigation to arrive at results similar to those reached in England; reliance has had to be placed on other principles, such as causation, good faith, and, in particular, fault—*faute de la victime*. That no mitigation requirement in France has recently been expressly decided in two cases, though they were decisions not quite at the highest level and decisions in delict rather than in contract.[636] There may be a reduction in compensation where there has been a failure to mitigate. This, however, is not based on a 'duty' to mitigate on the part of the claimant, but on the ground that this part of the harm was not caused by the defendant, or perhaps on no explicit basis.[637] Various avenues have been considered to integrate the idea of mitigation into French law. Some judges have considered the aggrieved party's behavior, particularly his or her inertia, in assessing damages, relying on the judge's discretion. Commentators have also referred to the obligation of good faith in this context. However, the better legal justification appears to be the requirement for a causal link to establish the damages. If the amount of damages would have been lower had the aggrieved party has taken some action or, on the contrary, refrained from taking any, then the aggrieved party should not be entitled to the amount of damages that it requests. This reasoning can be easily applied in connection with the judge's full discretion to assess damages.[638] So, in France, where no codified rules related to comparative negligence exist, the negligent conduct of the creditor can diminish recoverable damages based on causation even while no mitigation

[634]Kurt, L. Müjde (2015): *Zarar görenin zararı azaltma külfeti*, Ankara Üniversitesi Hukuk Fakültesi Dergisi, Vol.64, No.3, p.781.
[635]Bussani, Mauro - Palmer, Vernon Valentine: *The case studies* In: Bussani, Mauro - Palmer, Vernon Valentine eds. (2003): *Pure Economic Loss in Europe*, Cambridge University Press, New York, p.328
[636] 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

[637] Youngs, Raymond (2014): *English, French & German Comparative Law*, Routledge, New York, pp.682-683
[638] 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.

of damages is recognized based on the full compensation principle.[639] In France, it is accepted that the claimant "should not be allowed to increase damages for losses which were avoidable." [640]

9.2.4.6) PECL

Concepts of mitigation and contribution to the breach of contract are clearly distinguished in the PECL, like CISG and English Law. [641] Similarly, article 9:505 (1) of the PECL provide that '[t]he non-performing party is not liable for loss suffered by the aggrieved party to the extent that the aggrieved party could have reduced the loss by taking reasonable steps'. [642] The commentary shows that this situation covers two sets of circumstances: 'either ... [when] the aggrieved party incurs unnecessary or unreasonable expenditure or ... [when] it fails to take reasonable steps which would result in reduction of loss or in offsetting gains'.[643]

PECL does not mention mitigation. Article 9:505, where the concept makes its appearance, is headed 'Reduction of Loss', and it cannot be said that, as might be thought, the reason for using this expression is to allow the sub-article to cover both mitigation by, and fault of, the party suffering the breach of contract because contributory negligence is catered for independently by the previous sub-article, Art 9:504, which is headed 'Loss Attributable to Aggrieved Party'. [644] So, according to the Comment to Article 9:504, not only is a claimant precluded from collecting damages for non-performance to which it contributed, but a claimant is also precluded from collecting damages for additional loss after a non-performance for which it was not responsible if it exacerbates the adverse effects of the non-performance.[645]

PECL is concerned because they expressly impose a general duty to act following 'good faith and fair dealing'. The mitigation rule can be said to be a specific manifestation of these standards. This view of the mitigation rule is further re-affirmed by the 'duty to cooperate',

---

[639] 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

[640] 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.

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

[642]Saidov, Djakhongir (2008):*The Law of Damages in International Sales: The CISG and other International Instruments*, Hart Publishing, Portland, p.125

[643] Fauvarque-Cosson, Bénédicte - Mazeaud, Denis (2008): *European contract law: Materials for a common frame of reference: Terminology, guiding principles, model rules*, Sellier, Munich, p.556.

[644] 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

[645] 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.66-67

imposed by the PECL, which implies an obligation to take into account to some extent the legitimate interests of the other party as well as by art 1:302 PECL, which shows the connection between the mitigation rule and good faith by providing that reasonableness (the notion which underlies the mitigation rule) 'is to be judged by what persons acting in good faith and in the same situation as the parties would consider to be reasonable'.[646]

X) ADAPTATION OF CONTRACTS IN INTERNATIONAL EUROPEAN AND TURKISH CONTRACT LAW

10.1) Theorical Approach

There are two exceptions of pacta sunt servanda principle and these are *force majeure* and *clausa rebus sic stantibus*. The principle of *pacta sund servanda* requires that contracts be fulfilled precisely. On the other hand, the principle of contractual justice requires that the contract be fulfilled under the conditions requested by the parties when making the contract. So, it requires that the balance between the parties' performances be maintained throughout the contract period when concluding a contract. This conflict is resolved with the doctrine of *clausula rebus sic stantibus*.[647]

The main idea behind resorting to fundamental rights in contract law disputes is the protection of the weaker party.[648] Freedoms of contract and weaker party's protection have traditionally been understood as antagonistic, conflicting principles. Legislative rules or doctrines providing remedies against unconscionable contracts are mostly seen as exceptions to the principle of freedom of contract.[649] So, while traditional contract law is based on *pacta sunt servanda* principle, modern contract law tends to recognize that where there is a significant degree of imbalance between the parties, a real freedom of contract on the part of the weaker party is absent.[650] As a good example, *imprévision* was not applied to French private contract

---

[646] Saidov, Djakhongir (2008):*The Law of Damages in International Sales: The CISG and other International Instruments*, Hart Publishing, Portland, pp.125-128

[647]Bingöl, Fatma Itır (2008): *Uluslararası Ticari Satım Sözleşmelerinde Mücbir Sebep*, (Thesis), Dokuz Eylül Üniversitesi, pp.20-21. Available at: https://acikerisim.deu.edu.tr/xmlui/bitstream/handle/20.500.12397/12285/249364.pdf?sequence=1&isAllowed=y (Accessed: 27 December 2016)

[648]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.

[649] Ciacchi, Aurelia Colombi (2010): *Party Autonomy as a Fundamental Right in the European Union*, European Review of Contract Law, Vol.6, No.3, pp.303-304

[650]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.10

law at the time of the old CCF because the *imprévision* was seen against article 1134 of the old CCF, which was about the *pacta sunt servanda* principle as stated in the decision of French *Canal de Craponne* case.[651] In my opinion, this is a traditional contract law perspective, and that perspective excludes the requirement of good faith in the performance of contracts as stated in the *Société française des pétroles BP v. Huard* case.[652] However, CCF was reformed in 2016, and the reason for the reform's application of *imprévision* in French private contract law is related to protecting the weaker contracting party.[653] Therefore, this is a modern contract law perspective, in my opinion.

In addition, protecting the weaker party requires legal and social policy concerning the good faith principle (*principe général de bonne foi*) in French Law.[654] Therefore, *clausa rebus sic stantibus* principle is based on the good faith principle according to the CCF,[655] such as in related articles of BGB[656] and Turkish contract law,[657] and also it is similar in PECL in my opinion because the good faith principle is also regulated in PECL.[658] So, sometimes insisting on applying *pacta sunt servanda* principle can be contrary to *the good faith* principle because of the change of circumstances, and *clausa rebus sic stantibus* principle can be a way to solve that, as stated by the Turkish Supreme Court of Appeals for the 13th Civil Circuit.[659]

10.2) Adaptation of Contracts to Change of Circumstances

10.2.1) French Law

Adapting the contract to change circumstances is under the name of *imprévision* in the French Legal System. *Imprévision* means unforseeability in English. *Théorie de l'imprévision* in French Legal System is based on *clausa rebus sic stantibus* principle. This

[651]D. 1876. 1. 193 Case De Gallifet v. Commune de Pélissanne. Available at: https://law.utexas.edu/transnational/foreign-law-translations/french/case.php?id=1186 (Accessed: 9 November 2018)
[652]JCP 1993. II. 22614 Case Société française des pétroles BP v. Huard. Available at: https://law.utexas.edu/transnational/foreign-law-translations/french/case.php?id=1159 (Accessed: 9 November 2018)
[653]Rudnick, Brown (2017): *Recent reform of the French Civil Code*, Construction Law International, Vol.12, No.1, p.40.
[654] Tüzüner, Özlem - Öz, Kerem (2015): *Aşırı İfa Güçlüğüne İlişkin İçtihat İncelemesi*, Ankara Barosu Dergisi, Vol.73, No.3, p.426.
[655] Tüzüner, Özlem - Öz, Kerem (2015): *Aşırı İfa Güçlüğüne İlişkin İçtihat İncelemesi*, Ankara Barosu Dergisi, Vol.73, No.3, p.426.
[656]Güven, Koray (2016): *Hukuk Çevreleri Ayrımında Alman Hukuku'nun Yeri ve Temel Özellikleri*, Ankara Üniversitesi Hukuk Fakültesi Dergisi Vol.65, No.3, p.860.
[657]Türk Borçlar Kanunu Tasarısı ve Adalet Komisyonu Raporu (1/499), 2008, p.77. Available at: https://www.tbmm.gov.tr/sirasayi/donem23/yil01/ss321.pdf (Accessed: 30 October 2018)
[658] McKendrick, Ewan (2017): *Contract Law*, Palgrave, London, p.296
[659]Turkish Supreme Court of Appeal for 13th Civil Circuit (decision no. 2014/18895, dated on 13.06.2014).

principle is applied first time by the decision of the *Conseil d'Etat* in the French *Compagnie générale d'éclairage de Bordeaux* case in 1916. So, *théorie de l'imprévision* arises out of that decision and definitions in the case.[660] *İmprévision* means that the contract shall not bind the parties if the conditions existing at the time of the conclusion of the contract are changed significantly, and this is called "*Clausula Rebus Sic Stantibus*" as stated by the Turkish Assembly of Civil Chambers.[661] *Imprevision* is not a case of *force majeure* as stated in the *Compagnie générale d'éclairage de Bordeaux* case.[662] So, *Force majeure* and *imprévision* are accepted as distinct from each other according to French Lawyers. So, while the obligation ends without compensation according to the *force majeure*, the adaptation is made to keep the contract standing according to the *imprévision*.[663]

CCF was reformed in 2016, and *imprévision* is regulated for the first time in article 1195 of the CCF in a way that can be applied in French private contract law as distinct from Old CCF. That new article is also regulated by the inspiration of article 6:111 of the PECL with others.[664] If a change of circumstances that were unforeseeable at the time of the conclusion of the contract renders performance excessively onerous for a party who had not accepted to assume the risk of such a change, the contract can be revised or ended by the court as it is stated in that article. According to the *Imprévision*, unforseeability means that if the parties do not foresee the possibility of a change or they are not in a position to foresee.[665]

However, parties must first renegotiate the contract, and *if renegotiation is refused or falls through*, the court can be addressed according to article 1195 of the CCF. Otherwise, the parties can not apply to the courts directly. Similarly, it is regulated as a duty to renegotiate in

[660]Fucci, Frederick R. (2006): *Hardship and Changed Circumstances as Grounds for Adjustment or Non-Performance of Contract: Practical Considerations in International Infrastructure Investment and Finance*, American Bar Association Section of International Law Spring Meeting, New York, pp.3-5. Available at: https://files.arnoldporter.com/hardship_excuse_article.pdf (Accessed: 19 November 2018)

[661]Turkish Supreme Court Decision of Joint Chambers (decision no. 2003/340, dated on 07.05.2003).

[662]30 mars 1916 - Compagnie générale d'éclairage de Bordeaux - Rec. Lebon p. 125. Available at: http://www.conseil-etat.fr/Decisions-Avis-Publications/Decisions/Les-decisions-les-plus-importantes-du-Conseil-d-Etat/30-mars-1916-Compagnie-generale-d-eclairage-de-Bordeaux (Accessed: 08 December 2018)

[663]Tüzüner, Özlem - Öz, Kerem (2015): *Aşırı İfa Güçlüğüne İlişkin İçtihat İncelemesi*, Ankara Barosu Dergisi, Vol.73, No.3, p.448

[664]Smits, Jan M. - Calomme, Caroline (2016): *The Reform of the French Law of Obligations: Les Jeux Sont Faits*, Maastricht European Private Law Institute Working Paper, No.2016/05, pp.7-8.

[665]Cashin-Ritaine, Eleanor (2005): *Emprevizyon, Hardship ve İşlem Temelinin Çökmesi: Pacta Sunt Servanda ve Alman-Fransız Hukuki İlişkilerinde Sözleşmelerin Uyarlanmasına Giden Yollar*, İstanbul Üniversitesi Hukuk Fakültesi Mecmuası, Vol.63, No.1-2, p.330.

the PECL[666] as distinct from German and English contract law[667] and 138 of the TBK.[668] The parties may agree to terminate the contract on such date and under such conditions as they determine or ask the court to revise it. Where the parties fail to agree within a reasonable time, the court may, on the request of one party, revise the contract or terminate it on such a date and subject to such conditions as it determines.[669]

There are words that "performance excessively onerous" in the CCF, but there is no clear definition of what will be considered as "excessively onerous." Therefore, that will be interpreted by the courts.[670] It is also stated as “performance excessively onerous” in the PECL, like the CCF’s words. Therefore, extremely onerous means an obstacle of one degree less than impossibility. According to the commendatory, there is a major imbalance in the contract within the particular economic context. Therefore, the contract must be “overturned by events” so that performance will involve ‘exorbitant costs’ for one of the parties. Reference is made to the French concept of *imprévision* at the time of Old CCF.[671]

10.2.2) German Law

Adaptation of the contract to change of circumstances is under the name of *geschäftsgrundlage* in article 313 of the BGB. German Supreme Court (*the Reichsgericht*) recognized Oertmann’s theory of the *Geschäftsgrundlage* first time in the *Vigognespinnerei* case in 1923.[672] According to the G*eschäftsgrundlage* opinion, it is not every serious shift in equivalence that justifies departing from the contract, but only such a shift as a reasonable person would see as going far beyond the risk assumed and as negating nearly the entire interest which the affected party had in the transaction. There is a requirement of fundamental and radical change in the relevant circumstances. What is really required is such a

[666]Smits, Jan M. - Calomme, Caroline (2016): *The Reform of the French Law of Obligations: Les Jeux Sont Faits*, Maastricht European Private Law Institute Working Paper, No.2016/05, pp.7-8.
[667]Rösler, Hannes (2008): *Alman ve Uluslararası Sözleşme Hukukunda Değişen ve Öngörülemeyen Koşullar*, İstanbul Üniversitesi Hukuk Fakültesi Mecmuası, Vol.66, No.1, p361.
[668] Süzgün, Selin Gülbahar (2018): *Sözleşmenin Değişen Şartlara Uyarlanması*, (Thesis), Ankara Üniversitesi, p.91. Available at: https://dspace.ankara.edu.tr/xmlui/bitstream/handle/123456789/68725/499572.pdf?sequence=1&isAllowed=y (Accessed:3 February 2019)
[669] Rowan, Solene (2017) *The new French law of contract.* International and Comparative Law Quarterly, p.12 Available at: http://eprints.lse.ac.uk/75815/1/Rowan_New%20French%20law_2017.pdf (Accessed: 10 December 2019)
[670]Downe , Alexis (2016): *The Reform of French Contract Law: A Critical Overview*, Revista da Faculdade de Direito –UFPR, Vol.61, No.1, p.56.
[671]Backhaus, Richard (2004): *The Limits of the Duty to Perform in the Principles of European Contract Law*, Electronic Journal of Comparative Law, vol.8, No.1, pp.9-10. Available at: https://www.ejcl.org/81/art81-2.PDF (Accessed: 23 November 2018)
[672]Rösler, Hannes (2008): *Alman ve Uluslararası Sözleşme Hukukunda Değişen ve Öngörülemeyen Koşullar*, İstanbul Üniversitesi Hukuk Fakültesi Mecmuası, Vol.66, No.1, p355.

fundamental and radical change in the relevant circumstances that it would be an intolerable result quite inconsistent with law and justice to hold the party to the contract. Therefore, not every adverse modification of the prior relationship of equivalence, unforeseen by the parties at the time of the contract, justifies a departure from the principle that contracts must be adhered to ("*pacta sunt servanda*") as it is stated by German Court.[673] It is conditioned to that if the parties would not have entered into the contract or would have entered into it with different contents if they had foreseen this change as stated in article 313 of the BGB. However, there is no clear definition of the measure of fundamental and radical change or when. Therefore, it differs from case to case in German Courts. In addition, it must not work due to the party's fault, as stated in the BGH NJW 2005 case.[674] As a good example, there was an oil crisis in 1973 in Germany, and the oil company refused to perform of contract. However, a change of circumstances because of the crisis could be foreseeable, according to the German Federal Supreme Court (Bundesgerichtshof – BGH), and the oil supplier was at fault for the financial losses he had suffered.[675] In my opinion, it is similar to the Turkish Supreme Court of Appeal Civil Circuit decisions. As a good example, a change of circumstances because of the decline in the value of Turkish currency against the dollar and other foreign currencies and economic crises are foreseeable in the Turkish Assembly of Civil Chambers decision.[676]

Article 313 (1) of the BGB is about circumstances which are changed after conclusion of the contract as it is regulated. However, Article 313 (2) of the BGB allows adjustment also in case of a mutual error of the parties as to the factual foundations of the contract while article 6:111 of the PECL requires a change of circumstances after conclusion of the contract.[677] If unknown to either party circumstances which make the contract excessively onerous for one of them already existed at that date, the rules on mistake will apply according to articles 4:103 and 4:105 of PECL.[678] Article 138 of the TBK is also about a change of circumstances after the conclusion of a contract, as distinct from article 313(2) of the BGB. If there is a hardship

[673]BGH NJW 1959, 2203 V. Civil Senate. Available at: https://law.utexas.edu/transnational/foreign-law-translations/german/case.php?id=942 (Accessed: 9 November 2018)
[674]İnce, Nurten (2016): *Alman Hukukunda İfa İmkansızlığı ile İşlem Temelinin Bozulması Arasındaki İlişki*, Legal Hukuk Dergisi, Vol.14, No.165, pp.4857-4865.
[675]Rösler, Hannes (2007): *Hardship in German Codified Private Law: In Comparative Perspective to English, French and International Contract Law*, European Review of Private Law, Vol. 15, No.4, p. 493.
[676]Turkish Supreme Court Decision of Joint Chambers (decision no. 2014/900, dated on 12.11.2014).
[677]Birks, Peter (2000): *At the Expense of the Claimant: Direct and Indirect Enrichment in English Law*, Oxford U Comparative L Forum 2. Available at:https://ouclf.iuscomp.org/the-german-act-to-modernize-the-law-of-obligations-in-the-context-of-common-principles-and-structures-of-the-law-of-obligations-in-europe/ (Accessed: 10 November 2018)
[678]Lando, Ole - Beale, Hugh eds. (2000): *Comments and Notes: PECL Article 6:111: Change of Circumstances*, Principles of European Contract Law: Parts I and II, Kluwer Law International . Available at: http://www.cisg.law.pace.edu/cisg/text/peclcomp79.html (Accessed: 10 November 2018)

situation at the time of the conclusion of the contract, and even if the parties do not know that, it is excluded from the concept of article 138 of the TBK, and it can be about error according to article 30 and the rest of the TBK as Turkish Supreme Court of Appeal 13th Civil Circuit stated it.[679] It is also excluded from the concept of article 1195 of the CCF, and these are accepted as the condition for the validity of a contract in French Law.[680] In addition, article 313 (2) of the BGB is the counterpart of the English doctrine of common mistake.[681] However, a common mistake is not in the same meaning as frustration, and frustration requires a change of circumstances after the conclusion of the contract, as stated by the court.[682] Therefore, there is a similarity between the PECL, Turkish Contract Law, Law Reform (Frustrated Contracts) Act 1943, and CCF as distinct from German BGB from the viewpoint of that, in my opinion.

There can be an adaptation of the contract or termination of the contract according to article 313 of the BGB as such in CCF, in my opinion.

10.2.2.1) Clausa rebus sic stantibus and Geschäftsgrundlage

Clausa rebus sic stantibus and *geschäftsgrundlage* are not in same meaning. While *geschäftsgrundlage* includes the present situation and also the continuation and reappearance of this situation, *clausa rebus sic stantibus* takes into account only the circumstances following the formation of the contract. This shows that the theory of *geschäftsgrundlage* basis is broader than the theory of *clausula rebus sic stantibus*.[683] When viewed from this aspect, there is a *clausa rebus sic stantibus* principle in article 6:111 of the PECL, article 138 of the TBK, and Law Reform (Frustrated Contracts) Act 1943 in my opinion, because all of them take into account only circumstances following the formation of the contract like CCF. Also, if we consider just article 313 (1) of the BGB, there is a *clausa rebus sic stantibus* principle from the viewpoint of that opinion in my opinion.

10.2.3) PECL

[679]Turkish Supreme Court of Appeal for 13th Civil Circuit (decision no. 2014/18895, dated on 13.06.2014).
[680]Cashin-Ritaine, Eleanor (2005): *Emprevizyon, Hardship ve İşlem Temelinin Çökmesi: Pacta Sunt Servanda ve Alman-Fransız Hukuki İlişkilerinde Sözleşmelerin Uyarlanmasına Giden Yollar*, İstanbul Üniversitesi Hukuk Fakültesi Mecmuası, Vol.63, No.1-2, p.331
[681]Chung, Gordon (2017): *A Comparative Analysis of the Frustration Rule: Possibility of Reconciliation Between Hong Kong-English 'Hands-off Approach' and German 'Interventionist Mechanism'*, European Review of Private Law, Vol.25, No.1, p.131.
[682]Teacher, Law. (2013). *Amalgamated Investment v John Walker - Case Summary*. Available at: https://www.lawteacher.net/cases/amalgamated-investment-v-john-walker.php (Accessed: 13 November 2018)
[683]Arat, Ayşe (2006): *Sözleşmenin Değişen Şartlara Uyarlanması*, (Thesis), Selçuk Üniversitesi, p.63. Available at:http://acikerisimarsiv.selcuk.edu.tr:8080/xmlui/bitstream/handle/123456789/9264/211058.pdf?sequence=1&isAllowed=y (Accessed: 8 November 2018)

Article 6:111, paragraph 2, of the PECL excuses performance when: (1) it has become excessively onerous; (2) due to a change of circumstances that occurred after the contract was formed; (3) the change of circumstances was not one that could reasonably have been taken into account at the time the contract was formed; and (4) the risk of the changed circumstances was not one which the affected party should be required to bear. [684] The change of circumstances must have occurred after the contract was made. The obligation to renegotiate is like it is in CCF. If the parties' negotiations do not succeed, either of the parties may bring the matter before the court. There can be an adaptation of the contract to change of circumstances and termination of the contract as such in CCF and BGB. The condition is that the change of circumstances must have occurred after the contract was made. If unknown to either party circumstance which makes the contract excessively onerous for one of them already existed at that date, the rules on mistake will apply, see Articles 4:103 and 4:105.[685]

10.2.4) CISG

Article 4 of the Vienna Convention states that "this Convention governs only the formation of the contract of sale and the rights and obligations of the seller and the buyer arising from such a contract," and it specifies that "except as otherwise expressly provided in this Convention, it is not concerned with (a) the validity of the contract" or "(b) the effect which the contract may have on the property in the goods sold." The text does not say anything about clausa rebus sic stantibus or hardship because CISG only focuses on these parts, which are about formation and breach. Nothing else, and in between, there is nothing regulated in CISG as it is stated by District Court Monza. [686]

10.2.5) Turkish Law

Adaptation of the contract to changed circumstances is under the name of *Aşırı İfa Güçlüğü* as it is written in article 138 of the TBK. Although *Aşırı İfa Güçlüğü* means hardship

[684]Spivack, Carla (2006): *Of Shrinking Sweatsuits and Poison Vine Wax: A Comparison of Basis for Excuse under U.C.C. Sec. 2-615 and CISG Article 79*, University of Pennsylvania Journal of International Law, Vol. 27, No. 3, p.774 .

[685]Lando, Ole - Beale, Hugh eds. (2000): *Comments and Notes: PECL Article 6:111: Change of Circumstances*, Principles of European Contract Law: Parts I and II, Kluwer Law International . Available at: http://www.cisg.law.pace.edu/cisg/text/peclcomp79.html (Accessed: 10 November 2018)

[686] 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)

in the English language, it is accepted as a collapse of the underlying basis of the transaction, as stated in the decision of the Turkish Supreme Court of Assembly of Civil Chambers,[687] and that is in the meaning of *geschäftsgrundlage* in the German language. Therefore, it is written as a part of *geschäftsgrundlage* in the TBK, but German and Turkish legal systems are not completely the same from the viewpoint of change of circumstances. While drafting TBK, the difference is stated like that if circumstances do not compose the hardship contract is excluded from article 138 of the TBK. Therefore, change of circumstances is about hardship as it is the name of the title in the TBK as distinct from *geschäftsgrundlage*.[688] There is a *clausa rebus sic stantibus* in TBK.[689] There can be an adaptation of the contract to a change of circumstances or termination of the contract according to article 138 of the TBK, like BGB, CCF, and PECL.

There must be an unforeseen and unpredictable extraordinary situation in the TBK. The events that occurred during the performance of the contract should be extraordinary. It can be like war, economic crises, or natural disasters. It is based on *imprévision* (unforseeability) theory. However, it is applicable if the debt is not impossible but is extremely difficult for the obligor, as stated by the Turkish Supreme Court of Appeals for the 13th Civil Circuit.[690] *Aşırı İfa Güçlü* (Hardship) must not necessarily lead to economic loss or severe damage to the debtor. Therefore, in the article, it is considered sufficient if the request for debt performance changes against the debtor to the extent that it violates good faith. Of course, the other party's situation will also be considered in this assessment, as stated by the Turkish Supreme Court of Appeals for the 13th Civil Circuit.[691] However, in my opinion, there is no clear definition, and the courts will interpret that by using expert opinion, as stated by the Turkish Supreme Court of Appeals for the 13th Circuit.[692] As a good example, it is emphasized that the depreciation of the Turkish Lira in foreign currency borrowings is easily foreseeable in the decision of the Turkish Supreme Court of Appeal for the 13th Civil Circuit.[693]

Lastly, according to the words of article 138 of the TBK, that principle finds application area only for the obligor as distinct from words of the 313 of the BGB[694] and also from related articles of PECL and CCF as stated in their articles as words, in my opinion. However, article

[687]Turkish Supreme Court Decision of Joint Chambers (decision no. 2014/900, dated on 12.11.2014).
[688]Türk Borçlar Kanunu Tasarısı ve Adalet Komisyonu Raporu (1/499), 2008, p.273. Available at: https://www.tbmm.gov.tr/sirasayi/donem23/yil01/ss321.pdf (Accessed: 30 October 2018)
[689]Turkish Supreme Court Decision of Joint Chambers (decision no. 2014/900, dated on 12.11.2014).
[690]Turkish Supreme Court of Appeal for 13th Civil Circuit (decision no. 2014/18895, dated on 13.06.2014).
[691]Turkish Supreme Court of Appeal for 13th Civil Circuit (decision no. 2013/2623, dated on 07.02.2013).
[692]Turkish Supreme Court of Appeal for 13th Civil Circuit (decision no. 2013/2623, dated on 07.02.2013).
[693]Turkish Supreme Court of Appeal for 13th Civil Circuit (decision no. 2014/18895, dated on 13.06.2014).
[694]Aybay, Memet Erdem (2016): *Sözleşmenin Değişen Koşullara Göre Uyarlanması (Yargıtay Hukuk Genel Kurulu Kararı İncelemesi)*, Marmara Üniversitesi Hukuk Fakültesi Hukuk Araştırmaları Dergisi, Vol.22, No.3, p.337.

138 of the TBK should not be considered as the obligor only has the right to do so because article 344 of the TBK refers to article 138 of the TBK, and it is regulated both for the tenant and the landlord/landlady. So, it must also be assumed that the obligee may request adaptation.[695]

10.2.6) English Law

English contract law is based on the doctrine of impossibility, and impossibility is based on of act of god. The leading case was *Taylor v. Caldwell* in 1863.[696] There is a regulation in the Law Reform (Frustrated Contracts) Act 1943 in terms of English contract law. Frustration basically means *geschäftsgrundlage* in the German language, and it is in the meaning of collapse, the underlying basis of the transaction as a word like it is used as a word in TBK and German BGB articles**,** in my opinion.

Frustration occurs when without the fault of either party,[697] some reasonably unforeseeable event occurs which makes the contract impossible or unlawful to perform or radically different from what the parties originally intended.[698] In addition, the frustration of a contract only takes place where there supervenes an event "for which the contract makes no sufficient provision." Where the contract either specifically deals with the supervening event or, though it does not precisely refer to or cover the event, nevertheless pieces of evidence that the parties contemplated that event and made provision for it or allocated the risk in respect of it, frustration will be excluded.[699] It occurs after the formation of a contract,[700] and frustration brings the contract to an end forthwith, without more and automatically.[701]

Firstly, it is different from the viewpoint of the doctrine of *force majeure,* and there is no legal doctrine that applies to force majeure in English Law,[702] but it can be as a clause in the contracts. However, the frustration doctrine applies only in the absence of an express provision

[695]Doğan, Gülmelahat (2014): *Aşırı İfa Güçlüğü Nedeniyle Sözleşmenin Değişen Koşullara Uyarlanması*, Türkiye Barolar Birliği Dergisi, Vol.111, p.23.
[696]Acar, Hakan (2008): *Unıdroıt ve Avrupa Borçlar Hukuku Prensipleri Işığında Aşırı İfa Güçlüğü,* Erzincan Üniversitesi Hukuk Fakültesi Dergisi, vol.12, No.1-2, p.114.

[697]James v The Greytree Trust [1996] UKEAT 699_95_1701 (17 January 1996). Available at: https://www.bailii.org/uk/cases/UKEAT/1996/699_95_1701.html (Accessed: 10 November 2018)
[698]Collins v. Secretary of State for Trade and Industry [2001] UKEAT 1460_99_3101 (31 January 2001). Available at: https://www.bailii.org/uk/cases/UKEAT/2001/1460_99_3101.html (Accessed: 10 November 2018)
[699]Bunge SA v Kyla Shipping Company Ltd [2012] EWHC 3522 (Comm) (10 December 2012). Available at: https://www.bailii.org/ew/cases/EWHC/Comm/2012/3522.html (Accessed: 10 November 2018)
[700]Zuphen v. Kelly Technical Services (Ireland) Ltd. [2000] IEHC 117 (24th May, 2000). Available at: https://www.bailii.org/ie/cases/IEHC/2000/117.html (Accessed: 10 November 2018)
[701]Robert Purvis Plant Hire Ltd v Brewster & Ors [2009] ScotCS CSOH_28 (27 February 2009). Available at: http://www.bailii.org/scot/cases/ScotCS/2009/2009CSOH28.html (Accessed: 10 November 2018)
[702]Knowles, Roger (2012): *200 Contractual Problems and their Solutions,* Wiley-Blackwell, UK, p.134

in the contract allocating the risk. Therefore, if the contract contains such a *force majeure* clause covering the event that has occurred, that clause will govern and not the frustration doctrine.[703] The consequence of force majeure is the exclusion of liability of a party for nonperformance of the contract. In civil law, the liability is based on fault, and the party will not be liable in case of force majeure. On the other hand, in common law, force majeure leads to the termination of the contract and not to the exoneration of a party from liability.[704] As a good example, the clause merely went to define the extent of the carrier's obligation; it did not operate as a defense to a breach as it is stated in the G. H. Renton & Co. Ltd. v. Palmyra Trading Corp. of Panama [1957] A.C. 149 case.[705] However, actually, force majeure is a defense to a claim for breach of contract as in CCF[706] distinctly, in my opinion. So, that is about the freedom of contract principle, in my opinion. It is not like CCF, BGB, PECL, and TBK because there is a *force majeure* in the BGB, CCF, TBK, and PECL as distinct from Law Reform (Frustrated Contracts) Act 1943, in my opinion.

Secondly, there are some exceptions from the viewpoint of some type contracts. Section 2(5) of the Law Reform (Frustrated Contracts) Act 1943 provides that this Act shall not apply

(a)to any charterparty, except a time charterparty or a charterparty by way of demise, or to any contract (other than a charterparty) for the carriage of goods by sea ; or

(b)to any contract of insurance, save as is provided by subsection (5) of the foregoing section ; or

(c)to any contract to which section seven of the Sale of Goods Act, 1893 (which avoids contracts for the sale of specific goods which perish before the risk has passed to the buyer) applies, or to any other contract for the sale, or for the sale and delivery, of specific goods, where the contract is frustrated by reason of the fact that the goods have perished.

The exceptions contained in paragraphs (a) and (b) reflect well-established rules, although paragraph (c) is rather puzzling because it excludes from the Act cases where the cause of the frustration is the fact that the goods have perished, but it does not exclude cases where the cause of frustration is some other cause, such as illegality.[707] So, as an example, in the context of shipping contracts, frustration can take various forms ranging from the impossibility

[703]Poole, Jill (2016): *Casebook on Contract Law*, Oxford University Press, New York,p.551
[704] Pejovic, Caslav (2001): *Civil Law and Common Law: Two Different Paths Leading to the Same Goal*, Victoria University of Wellington Law Review, Vol.32, No.3, pp.823-824
[705]Swadling, William: *The Judicial Construction of Force Majeure Clauses* In: McKendrick, Ewan ed. (2013): *Force Majeure and Frustration of Contract*, Informa Law from Routledge, Abingdon, p.10
[706]Knowles, Roger (2012): *200 Contractual Problems and their Solutions*, Wiley-Blackwell, UK, pp.133-134
[707] McKendrick, Ewan: *The Consequences of Frustration—The Law Reform (Frustrated Contracts) Act 1943* In: McKendrick, Ewan ed. (2013): *Force Majeure and Frustration of Contract*, Informa Law from Routledge, Abingdon, pp.242-243

of performance or supervening illegality to inordinate delay, and a contract will also be frustrated when a subsequent change in the law renders further performance illegal.[708]

Thirdly, there is no regulation about an adaptation of the contract to change of circumstances in English contract law[709] as distinct from BGB, PECL, CCF, and TBK, in my opinion, but a way for to discharging from the further performance of the contract as stated in the Law Reform (Frustrated Contracts) Act 1943. So it is in the meaning of termination of a contract. However, as stated in the codes' words, there is a way to adapt or terminate the contract in the BGB, PECL, CCF, and TBK.

Fourthly, if there is a sufficient provision in the contract, frustration cannot occur, which is about the freedom of contract principle, in my opinion. In the beginning, I dealt with that issue, and adaptation of the contract to changed circumstances is about good faith and protecting the weaker party. In my opinion, there is no way to make special provisions in the BGB, PECL, CCF, and TBK for sufficient provision in a contract like Law Reform (Frustrated Contracts) Act 1943 because it is against the good faith principle. However, there is no regulation about adapting the contract to a change of circumstances in English contract law,[710] and maybe because of that, in my opinion.

Fifthly, there is another way to apply frustration except for the impossibility of performance, and it is essential to the doctrine of frustration that the performance of the contract in the new situation should be fundamentally different from that originally contemplated. In deciding whether that is the case, it is necessary to have regard to the general nature of the contract as well as its specific terms, the context in which it was made, and the contemplation of the parties as to the range of circumstances in which it might come to be performed. There is a good example from *J. Lauritzen A.S. v Wijsmuller B.V. (The 'Super Servant Two')* case. Wijsmuller intended to perform the contract using 'Super Servant Two,' but after the contract had been made, 'Super Servant Two' sank. However, there is a Super Servant One, which is another specialized vessel. Therefore, the loss of 'Super Servant Two' did not render performance impossible or fundamentally different because, according to the contract terms, the defendants could have satisfied their obligation by using Super Servant One after Super

[708]Wilson, John F (2010): *Carriage of Goods by Sea*, Longman, Harlow, p.39
[709]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.
[710] 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.

Servant Two had sunk.[711] It is not hardship, inconvenience, or material loss that calls the principle of frustration into play. There must also be such a change in the significance of the obligation that the thing that was undertaken would, if performed, be different from that contracted for. The courts do not wish to allow a party to appeal to the doctrine of frustration to escape from what has proved to be a bad bargain: frustration is 'not likely to be invoked to relieve contracting parties of the normal consequences of imprudent commercial bargains.'[712] It is stated first time in the *Krell v. Henry* case (coronation case) in 1903. However, that is also about impossibility doctrine. Expected benefits on the contract came to be impossible in that case.[713] There is the loss of expected benefits for the future because of changed circumstances on the contract in the *Krell v. Henry* case and not like the decrease in value or come to being more expensive etc. Therefore, that does not make a difference in the situation of change of circumstances. Therefore, that is also different from TBK, CCF, BGB, and PECL because of the possibility of change of circumstances except for impossibility, as stated in the codes, in my opinion.

Sixthly, frustration brings the contract to an end forthwith, without more and automatically.[714] However, it depends on renegotiation or requests from the court according to the TBK, CCF, BGB, and PECL as distinct from Law Reform (Frustrated Contracts) Act 1943, in my opinion.

10.3)Force Majeure

Generally, the rule is stated that the event must render performance absolutely impossible to constitute force majeure.[715] Force majeure (*vis major*) covers extraordinary events or circumstances—for example, natural disasters such as hurricanes, floods, earthquakes, volcanic eruptions, lightning strikes, etc. or social or commercial disruptions such as war, strikes, riots, interdictions of importation or exportation—that are beyond the control of the debtor and therefore prevent the performance of the obligation.[716] The principle has been laid

[711]Poole, Jill (2016): *Casebook on Contract Law*, Oxford University Press, New York,p.553; CTI Group Inc v Transclear SA [2008] EWCA Civ 856 (22 July 2008). Available at: http://www.bailii.org/ew/cases/EWCA/Civ/2008/856.html (Accessed: 10 November 2018)
[712]Ringsend Property Ltd -v- Donatex Ltd & Anor [2009] IEHC 568 (18 December 2009). Available at: http://www.bailii.org/ie/cases/IEHC/2009/H568.html (Accessed: 10 November 2018)
[713]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.
[714]Robert Purvis Plant Hire Ltd v Brewster & Ors [2009] ScotCS CSOH_28 (27 February 2009). Available at: http://www.bailii.org/scot/cases/ScotCS/2009/2009CSOH28.html (Accessed: 10 November 2018)
[715]Smith, J. Denson (1936): *Impossibility of Performance as an Excuse in French Law: The Doctrine of Force Majeure*, The Yale Law Journal, Vol.45, No.3, p. 454
[716] Helvacı, Ilhan (2017): *Turkish Contract Law*, Springer, p.153

down many times that "force majeure refers to events which make performance impossible, not to those which only make it more onerous." There is, therefore, no room for a doctrine of frustration or for the German concepts of economic impossibility or disappearance of the basis of the transaction.[717] In such cases, it is not the contract's adaptation but the contract's termination.[718] Also, there are fortuitous events are different from force *majeure*. A fortuitous event is any event that was not foreseen, but if it had been foreseen, it could have been avoided; on the other hand, force majeure is any event beyond the parties' control, whether or not it is foreseen.[719] Also, there is the distinction can be traced back to Roman law: "This rule of *genus non perit* means that in case so-called generic goods are sold, there can never be a case of absolute impossibility." Thus, in the area of fungible goods, the impossibility excuse, as strictly interpreted in the Common Law and the French force majeure principle denies that "any" performance is impossible to undertake.[720] Also, it is similar, in my opinion, to German law [721], Turkish law[722], CISG[723] and PECL.[724]

The doctrine of frustration in English Law is different from the viewpoint of the doctrine of *force majeure*, and there is no legal doctrine that applies to force majeure in English Law,[725] but it can be as a clause in the contracts. However, the frustration doctrine applies only in the absence of an express provision in the contract allocating the risk. Therefore, if the contract contains such a *force majeure* clause covering the event that has occurred, that clause will govern and not the frustration doctrine.[726] So, that is about the freedom of contract principle, in my opinion. The consequence of force majeure is the exclusion of liability of a party for nonperformance of the contract. In civil law, the liability is based on fault, and the party will not be liable in case of force majeure. On the other hand, in common law, force majeure leads

[717]Nicholas, Barry: *Force Majeure in French Law* In: McKendrick, Ewan ed. (2013): *Force Majeure and Frustration of Contract*, Informa Law from Routledge, Abingdon, p.25
[718]Cashin-Ritaine, Eleanor (2005): *Emprevizyon, Hardship ve İşlem Temelinin Çökmesi: Pacta Sunt Servanda ve Alman-Fransız Hukuki İlişkilerinde Sözleşmelerin Uyarlanmasına Giden Yollar*, İstanbul Üniversitesi Hukuk Fakültesi Mecmuası, Vol.63, No.1-2, p.330
[719] Helvacı, Ilhan (2017): *Turkish Contract Law*, Springer, p.153
[720]DiMatteo, Larry A. (2015): *Contractual Excuse Under the CISG: Impediment, Hardship, and the Excuse Doctrines*, Pace International Law Review, Vol.27, No.1, p.277
[721]Pieck, Manfred (1996): *A Study of the Significant Aspects of German Contract Law, Annual Survey of International & Comparative Law*, Vol.3, No.1, p.124
[722]Helvacı, Ilhan (2017): *Turkish Contract Law*, Springer, p.206
[723]Dönmez, Cansu (2019*): The Buyer's and Seller's Exclusion From Liability Under the CISG and Its Comparision with the Turkish Law of Obligations*, Public and Private International Law Bulletin, Vol.39, No.1, pp.123-124
[724]Smits, Jan M. (2014): *Contract Law: A Comparative Introduction*, Edward Elgar, Cheltenham, pp.205-206
[725]Knowles, Roger (2012): *200 Contractual Problems and their Solutions*, Wiley-Blackwell, UK, p.134
[726]Poole, Jill (2016): *Casebook on Contract Law*, Oxford University Press, New York,p.551

to the termination of the contract and not to the exoneration of a party from liability.[727] As a good example, the clause merely defined the extent of the carrier's obligation; it did not operate as a defense to a breach as stated in the G. H. Renton & Co. Ltd. v. Palmyra Trading Corp. of Panama [1957] A.C. 149 case.[728] However, actually, force majeure is a defense to a claim for breach of contract as in CCF [729] distinctly, in my opinion. In my opinion, it is not like CCF, BGB, PECL, CISG, and TBK because no legal doctrine applies to force majeure in English Law.

Article 79 of the CISG states four different conditions that all must be fulfilled in order to make an exemption possible: 1) An impediment, 2) beyond control, 3) that could not reasonably have been taken into account at the time of the conclusion of the contract and 4) the consequences of which could not have been avoided or overcome. These conditions are the traditional elements of force majeure and it seems that Article 79 is primarily intended for that type of situations.[730] The title to Article 8:108, "Excuse Due to an Impediment" uses both the words "excuse" and "impediment." Its core provision mimics CISG Article 79: "non-performance is excused if it is due to an impediment beyond [a party's] control and that it could not reasonably have been expected to take the impediment into account at the time of the conclusion of the contract, or to have avoided or overcome the impediment or its consequences."[731]

However, there is no fault-based liability in CISG and PECL as in Turkish, German, or French Law. Therefore, from this point of view, these international instruments are similar to English Law, and the situation for them can be like using *a force majeure* clause in English Law, in my opinion. So, the doctrine of force *majeure* in PECL and CISG is not about the exclusion of liability of a party for nonperformance but leads to the termination of the contract as in English Law because of strict liability, in my opinion.

In France Civil Code, force majeure is regulated in article 1218 of CCF. A contracting party can be relieved of a contractual obligation only by force majeure, *cas fortuit*, or an external cause, that is, an unforeseeable and unpreventable event for which he was not

[727] Pejovic, Caslav (2001): *Civil Law and Common Law: Two Different Paths Leading to the Same Goal*, Victoria University of Wellington Law Review, Vol.32, No.3, pp.823-824
[728]Swadling, William: *The Judicial Construction of Force Majeure Clauses* In: McKendrick, Ewan ed. (2013): *Force Majeure and Frustration of Contract*, Informa Law from Routledge, Abingdon, p.10
[729]Knowles, Roger (2012): *200 Contractual Problems and their Solutions*, Wiley-Blackwell, UK, pp.133-134
[730] Lindström, Niklas (2006): *Changed Circumstances and Hardship in the International Sale of Goods*, Nordic Journal of Commercial Law, No.1, p.5
[731]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

responsible, which makes the performance of the obligation impossible.[732] It can be best described as 'all or nothing' position – the contract is either possible and thus performed as agreed or impossible, thereby either terminated fully or partially by operation of law or suspended in cases of temporary impossibility. French law takes into account only physical or legal impossibility. To qualify as force majeure, the event preventing performance must have been both unforeseeable and irresistible. If the event was foreseeable, provision for it should have been made in the contract, or the obligation ought not to have been assumed.[733] The central principles which the courts have recognized are that in order to constitute force majeure, an event (to use a neutral term) must have been (a) irresistible, (b) unforeseeable, and (c) external to the debtor, and must (d) have made performance impossible and not merely more onerous or difficult.[734] That definition is similar to the doctrine of force *majeure* in Turkish Law,[735] which is regulated in article 136 of the TBK. According to article 136 of the TBK, if the debtor is not responsible for the impossibility of the performance, then the debtor is released from his obligation.

German law has a concept similar to force majeure, which is the concept of 'contractual impossibility.' Such a concept is composed of two distinct doctrines. The first doctrine is known as 'the collapse of the bases of the contract,' which is, to a great extent, similar to the doctrine of 'hardship.' The other doctrine is the 'objective impossibility,' codified under Article 275 of the BGB (Impossibility for which one is not responsible).[736] Article 275(1) of the BGB directly provides that a claim for performance is excluded to the extent that performance is impossible for the obligor or any other person. As follows from the above provision, the impossibility of performance relieves the party from the claim of specific performance, regardless of whether such a party causes impossibility. For the purposes of applying Article 275(1) of the BGB, it is also irrelevant whether impossibility is initial or subsequent, objective or subjective, partial or

[732]Youngs, Raymond (2014): *English, French & German Comparative Law*, Routledge, New York, p.669
[733]Swadling, William: *The Judicial Construction of Force Majeure Clauses* In: McKendrick, Ewan ed. (2013): *Force Majeure and Frustration of Contract*, Informa Law from Routledge, Abingdon, p.6
[734]Nicholas, Barry: *Force Majeure in French Law* In: McKendrick, Ewan ed. (2013): *Force Majeure and Frustration of Contract*, Informa Law from Routledge, Abingdon, p.24
[735] 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)
[736]Samerezeldin, A. - Helw, Amr Abu (2017): *Force Majeure Concept in Construction Contracts Under Civil and Common Laws*, p.25. Available at: http://www.worldresearchlibrary.org/up_proc/pdf/1059-150848355024-27.pdf (Accessed: 18 February 2020)

total.[737] The term f*orce majeure* is not legally defined within the BGB, but the German Federal Supreme Court defines the term in its recent jurisdiction as an incident coming from outside with no operational connection that cannot be prevented by the utmost care that can be reasonably expected.[738] Sometimes, the courts would release a party from the performance of an obligation only if it had become impossible, although this could cover economic impossibility—that is, where performance would be completely different. In other cases, the courts have relieved a party from a performance that would be unreasonable to expect. This would not normally include a rise in prices or a fall in the value of money unless the result was intolerable.[739] There is the expression *höhere gewalt* used in German Law in response to the concept of force majeure. However, since economic impossibility is included in the *höhere gewalt*, it is accepted that it is broader than force majeure.[740] However, economic impossibility is not in the concept of the doctrine of *force majeure*.[741]

10.4) Economic Loss Doctrine

Economic loss refers to the monetary damages that would be recoverable in a normal contract suit, as opposed to physical damages to a person (personal injury) or property that are only recoverable in a tort suit. The doctrine preserves the important distinction between contract and tort law.[742] As generally understood in the law and economics literature, the economic loss rule states that a plaintiff cannot recover damages for a pure financial loss.[743]

Here the word "pure" plays a central role, for if there is an economic loss that is connected to the slightest damage to the person or property of the plaintiff (provided that all other conditions of liability are met), then the latter is called consequential economic loss and the whole set of damages may be recovered without question. Moreover, consequential

---

[737]Kokorin, Ilya - van der Weide, Jeroen (2015*): Force Majeure and Unforeseen Change of Circumstances. The Case of Embargoes and Currency Fluctuations (Russian, German and French Approaches)*, Russian Law Journal, Vol.3, No.3, p.59

[738] 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)

[739]Youngs, Raymond (2014): *English, French & German Comparative Law*, Routledge, New York, p.671

[740] 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)

[741]Nicholas, Barry: *Force Majeure in French Law* In: McKendrick, Ewan ed. (2013): *Force Majeure and Frustration of Contract*, Informa Law from Routledge, Abingdon, p.25

[742] Goodman, Jeffrey L. - Peacock, Daniel R. - Rutan, Kevin J. (2019): *A Guide to Understanding the Economic Loss Doctrine*, Drake Law Review, Vol.67, No.1, pp.2-3

[743] Parisi, Francesco: *Liability for Pure Financial Loss: Revisiting the Economic Foundations of a Legal Doctrine* In: Bussani, Mauro - Palmer, Vernon Valentine eds. (2003): *Pure Economic Loss in Europe*, Cambridge University Press, New York, p.75

economic loss (sometimes also termed parasitic loss) is recoverable because it presupposes the existence of physical injuries, whereas pure economic loss strikes the victim's wallet and nothing else.[744] The second approach is that pure economic loss is harm suffered without infringement of a legally protected right or interest.[745]

There are different notions of pure economic loss, and moreover, present-day Europe does not even share a common notion of what constitutes "pure economic loss." As an example, English lawyers would define "pure economic loss" as any loss not occurring consequent to damage to the physical integrity of a person or a tangible thing. A German lawyer, for their part, would describe "pure economic loss" as any loss not consequential to the infringement of a right, thus excluding many losses from the notion of pure economic loss, which in other countries would be seen as typical examples for this category.[746] French law has no restriction concerning the pure economic loss, but a person who causes pure economic loss is liable only under rather strict prerequisites, for example, intent, according to French law.[747] So, there can be a possibility to compensate for the pure economic loss in French Law. On the other hand, there is no compensation for pure economic loss in Turkish law's general understanding and system. In my opinion, the main reason for this is similar to the German approach because there is no infringement of a right under the current Turkish law. However, because of the good faith principle, there can be a possibility of compensating the pure economic loss in Turkish Contract Law.[748] There is good faith principle also in the German and French contract saws, and there can be a possibility of compensating the pure economic loss like Turkish Contract Law as distinct from English Contract Law, in my opinion. So, following the principle of total reparation, compensation encompasses economic loss, consequential damages, and damages resulting from a breach of interest in the performance of the contract. The losses encompassed as economic loss or consequential damages are, for example, transport, telephone, storage costs, and costs for complaint handling management, as well as losses caused by exchange rate

[744] Bussani, Mauro - Palmer, Vernon Valentine: *The Notion of Pure Economic Loss and Its Setting* In: Bussani, Mauro - Palmer, Vernon Valentine eds. (2003): *Pure Economic Loss in Europe*, Cambridge University Press, New York, pp.5-6

[745] Koziol, Helmut (2006): *Recovery for Economic Loss in the European Union*, Arizona Law Review, Vol.48, No.4, p.872

[746]Von Bar, Christian - Drobnig, Ulrich (2004)*: The Interaction of Contract Law and Tort and Property Law in Europe: A Comparative Study*, Sellier, München,pp.29-30

[747] Koziol, Helmut (2006): *Recovery for Economic Loss in the European Union*, Arizona Law Review, Vol.48, No.4, p. 874

[748] Benli, Erman (2010): *Ekonomik Zarar*, Galatasaray Üniversitesi Hukuk Fakültesi Dergisi, Prof. Dr. Köksal Bayraktar'a Armağan, Vol.2, No.1, p.1080.

fluctuations.[749] So, article 74 of the CISG is most significant regarding indirect (consequential) loss, including lost profits and other purely economic loss as stated in the decision of the Commercial Court (*Handelsgericht des Kantons*) of Zürich.[750] That is also different from pure economic loss doctrine in English Law, in my opinion. Also, PECL refrains from providing for an autonomous category of pure economic loss. PECL dismisses a *tertium genus* of liability between contractual and noncontractual, namely liability based upon reliance. The only exception to the non-recognition by the PECL of "pure economic loss" as an autonomous category is a rule on the integration of *culpa in contrahendo* in the overall system.[751]

10.5) Effect of Prudent Merchant Rule

Clausa rebus sic stantibus and *force majeure* exclude the *pacta sunt servanda* principle. However, when it comes to being business to business relations, there can not be an exclusion for pacta sunt servanda principle. In my opinion, there can be similar results in English Law, German Law, French Law, Turkish Law, CISG, and PECL from this point by the application of prudent merchant rule.

As a good example, economic risk has to do with the fluctuation of the value of goods on the market. The market price of the goods, as well as the currency exchange rate, could fluctuate after the conclusion of the contract. Later, market price fluctuations bring advantages or disadvantages to the buyer or seller.[752]

There could be the recovery as *clausa rebus sic stantibus* and *force majeure* principles for these damages. However, in my opinion, it can not be like that in business to business relations. So, the adaptation of the contract to changed circumstances is regulated in article 138 of the TBK and article 313 of the BGB. However, interpretation is made by the national courts of Germany and Turkey, and these court interpretations are similar regarding economic risks in international business law, in my opinion. As a good example, there was an oil crisis in 1973 in Germany, and the oil company refused to perform of contract. However, a change of circumstances because of the crisis could be foreseeable, according to the German Federal

---

[749]Kiene, Sörren: *German Country Analysis: Part II* In: DiMatteo, Larry A. ed. (2014): *International Sales Law : A Global Challenge*, Cambridge University Press, New York, p.391

[750] Lookofsky, Joseph M. (2007): *Consequential Damages in CISG Context*, Pace International Law Review, Vol.19, No.1, pp.74-75; Switzerland 5 February 1997 Commercial Court Zürich (*Sunflower oil case*). Available at: http://cisgw3.law.pace.edu/cases/970205s1.html

[751] Silva, Marta Santos (2017): *The Draft Common Frame of Reference as a "Toolbox" for Domestic Courts: A Solution to the Pure Economic Loss Problem from a Comparative Perspective*, Springer, p.218

[752] Erauw, Johan: *Observations on Passing of Risk* In: Ferrari,Franco - Flechtner, Harry - Brand, Ronald eds. (2004): *The Draft Uncitral Digest And Beyond: Cases, Analysis And Unresolved Issues in the U.N. Sales Convention*, Sellier, München, p.296

Supreme Court, and the oil supplier was at fault for the financial losses he had suffered.[753] In my opinion, it is similar to the Turkish Supreme Court of Appeal Civil Circuit decisions. As a good example, a change of circumstances because of the decline in the value of Turkish currency against the dollar and other foreign currencies is foreseeable in the decision of the Turkish Assembly of Civil Chambers.[754] The reason for that is to be a prudent merchant, as stated by the Turkish Assembly of Civil Chambers in other case, and merchants should take the necessary measures.[755] Every merchant should act as a prudent merchant according to article 18(2) of the TTK, and similar regulation is in article 347 of the HGB.[756] In addition, the party concerned by the potential change is responsible for taking precautionary measures according to the decision of the German Federal Supreme Court.[757] In my opinion, this is similar to the Turkish Assembly of Civil Chambers' approach to being a prudent merchant. In addition, because of the unforeseeability factor, there cannot be force majeure too because the unforeseeability factor is also the necessary factor for force majeure according to articles 136 and 137 of TBK and article 275 of the BGB, in my opinion. In my opinion, we can see a similar approach and interpretation in French law as stated in the 3rd Civil Chamber of the French Supreme Court decision.[758]

English law does not recognize *force majeure* doctrine as distinct from CISG, CCF, BGB, TBK, and PECL. However, it can be used as clauses in contracts in English law.[759] So, that is about the freedom of contract principle, in my opinion. There was an absolute liability and *pacta sunt servanda* principle in English Law. After Taylor v. Caldwell case, it turns into a strict liability. So, because of impossibility, the promisor is exempted from liability. In addition, the contract ended as distinct from TBK and BGB. There is no contract adaptation, and it depends on the impossibility of the promisor's obligations.[760] English contract law has a regulation in the Law Reform (Frustrated Contracts) Act 1943. However, some court

[753]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.
[754]Turkish Supreme Court Decision of Joint Chambers (decision no. 2014/900, dated on 12.11.2014)
[755]Turkish Supreme Court Decision of Joint Chambers (decision no. 2003/340, dated on 07.05.2003)
[756]Gümüş, Mustafa Alper (2016): *6102 Sayılı Türk Ticaret Kanunu (TTK) m. 18/II'de Yer Alan "Basiretli İş Adamı (Tacir) Davranışı" Ölçütünün İyiniyetin (TMK m.3) Varlığının Belirlenmesindeki İşlevi*, Marmara Üniversitesi Hukuk Fakültesi Hukuk Araştırmaları Dergisi, Vol.22, No.3, p.1227.
[757]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.
[758]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.
[759]McKendrick, Ewan: *Force Majeure and Frustration—Their Relationship and a Comparative Assessment* In: McKendrick, Ewan ed. (2013): *Force Majeure and Frustration of Contract*, Informa Law from Routledge, Abingdon, pp.33-34
[760]Nicholas, Barry: *Force Majeure in French Law* In: McKendrick, Ewan ed. (2013): *Force Majeure and Frustration of Contract*, Informa Law from Routledge, Abingdon, pp.29-31

interpretations are similar to German, French, and Turkish case laws on economic risks, in my opinion. Therefore, even in the face of cost increases %100, frustration was not accepted in some cases decided in England, as in the Transatlantic Finance Corp. v. U.S.A case.[761] So, firstly there is no damage to the person or property, and all about the victim's wallet and nothing else. Also, there is no infringement of a legally protected right or interest. So, that could be acceptable in the pure economic loss doctrine approach of English Law, in my opinion. In my opinion, we can see a similar approach to the prudent merchant rule of TTK, CCF, and HGB in the case law of the UK as it was in the Bank Line v. Capel case from the viewpoint of English case law. While testing the frustration situation in the case, the court considered what a reasonably prudent commercial man would have thought.[762]

Force majeure is regulated in article 79 of the CISG, but there is no regulation on the *clausa rebus sic stantibus* principle in CISG, as stated by District Court Monza.[763] There is a similar approach in terms of German and Turkish Courts' interpretations of economic risks in the case law of CISG. As a good example, the buyer asked the seller to stop delivering goods after the conclusion of the contract because of the reasons that the market conditions became worse, the buyer had problems with the distribution and the storage of the goods, the USA dollar quotation had increased, and the construction business had been in depression. The difficulties listed by the buyer were part of the commercial risk that each party carries to the contract; this obligation cannot be unilaterally transferred to the other party, as the Arbitration Tribunal of the Bulgarian Chamber of Commerce & Industry states it.[764] Also, according to article 75 of the CISG, an aggrieved party must act as a "careful and prudent businessman" while observing the relevant trade practices as stated in one ICC Arbitration Case.[765]

---

[761]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

[762]Howard, M.N.: *Frustration and Shipping Law—Old Problems, New Contexts* In: McKendrick, Ewan ed. (2013): *Force Majeure and Frustration of Contract*, Informa Law from Routledge, Abingdon, pp.132-133

[763]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)

[764]UNCITRAL (2012): *Digest of Case Law on the United Nations Convention on Contracts for the International Sale of Goods*, United Nations, New York, p.390. Available at: https://www.uncitral.org/pdf/english/clout/CISG-digest-2012-e.pdf (Accessed: 10 September 2017); Bulgaria 12 February 1998 Arbitration Case 11/1996 (*Steel ropes case*). Available at: http://cisgw3.law.pace.edu/cases/980212bu.html (Accessed: 10 December 2018)

[765] 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)

So, courts' interpretations in respect of *force majeure* and *clausa rebus sic stantibus* are similar in Turkish, French, CISG, and German case laws by applying the prudent merchant rule. There is no case law for PECL, but if it was, we could achieve the same result by applying the foreseeability doctrine of PECL, in my opinion. So, prudent merchant rule extends the liability in Civil Law Systems and can not let the application of *clausa rebus sic stantibus* and *force majeure* principles in German, Turkish and French case-laws, unlike other situations other than the business-to-business relations that would normally be applied, in my opinion. That is also similar to CISG as an international instrument from the viewpoint of *force majeure*, in my opinion.

XI)RISK ALLOCATION AND OWNERSHIP RIGHT IN INTERNATIONAL BUSINESS LAW AND EFFECTS OF INCOTERMS

11.1) Regulations on Risk Allocation for Movable Goods

11.1.1) Inland Sea Sales and CISG

Firstly, PECL does not contain provisions concerning the delivery of goods.[766] Turkey, France, and Germany are the participating countries of the CISG.[767] However, they can exclude the application of CISG from their contract. If they do not, CISG will be applied. However, if parties wish to apply CISG, that can not be possible for some kinds of goods according to article 2 of the CISG. Therefore, as an example, if there is an aircraft trade, the Convention does not apply to the parties' relations as the Russian Federation Chamber of Commerce and Industry states it.[768] However, England has not ratified CISG[769] distinctively from Turkey, Germany, and France.

According to the old article of TBK, the risk of loss or damage to the goods was passed to the buyer at the conclusion of the contract. Therefore, a buyer would be responsible even

[766] Laemmli, Thomas (2014): *Transfer of Ownership in International Sales of Goods, (Thesis)*, University of Cape Town, p.21. Available at: https://open.uct.ac.za/bitstream/handle/11427/4434/thesis_law_lmmtho001.pdf?sequence=1&isAllowed=y (Accessed: 12 March 2019)

[767]Kritzer, Albert H. (2016): *CISG: Table of Contracting States*. Available at: https://www.cisg.law.pace.edu/cisg/countries/cntries.html (Accessed: 8 March 2019)

[768]UNCITRAL (2012): *Digest of Case Law on the United Nations Convention on Contracts for the International Sale of Goods*, United Nations, New York, p.18. Available at: https://www.uncitral.org/pdf/english/clout/CISG-digest-2012-e.pdf (Accessed: 10 September 2017); Russia 2 September 1997 Arbitration proceeding 255/1996. Available at: http://cisgw3.law.pace.edu/cases/970902r1.html (Accessed: 10 March 2019)

[769]Zhou, Qi: *The CISG and English Sales Law: An Unfair Competition* In: DiMatteo, Larry A. ed. (2014): *International Sales Law: A Global Challenge*, Cambridge University Press, New York, p.669

before delivery after the contract is concluded. It is also similar in CCF, in my opinion, because according to article 1196 of the CCF, the risk is passed to the buyer at the conclusion of the contract. In other words, when the thing and the price have been agreed upon[770] as a rule. It can be similar to the SGA, in my opinion. The reason for that, according to section 20 (1) of the SGA, the risk passes to the buyer with the transfer of property as a rule in England, and according to section 18 of the SGA, the property can be passed to the buyer when the contract is made, and buyer can be an owner even before payment because of that. So therefore, if the goods burn down, as stated in Tarling v. Baxter case, the buyer will still be responsible for payment because the buyer is liable for risks.[771] However, a general rule is that the property will transfer when the parties intend it to transfer, according to section 17 of the SGA. That is about the freedom of contract principle, in my opinion. However, if there is no intention on it, it will be solved by applying section 18 of the SGA, and it can be at the time of the conclusion of the contract or later time according to these rules in this section.[772] Therefore, SGA can also be different from CCF, in my opinion. Also, there is written about possibilities to transfer of property, whether delivery made or not in this section as stated in article 1196 of the CCF, and it is different from TBK, CISG, and BBG from the viewpoint of the passing of the risk in my opinion. That was seen as unfair while drafting the new TBK, as stated in the Justification of article 208 of the TBK, and it is changed.

According to article 208 (1) of the TBK, a seller will be responsible because of the risks until the transfer of possession. Justification of article 208 specifies that in the rules which apply to CISG, it is accepted that the risk of damage is passed to the buyer at the time of delivery, and that is why article 208 is considered the time of the transfer of possession.[773] In addition, according to article 446 of the BGB, the risk of accidental destruction and accidental deterioration passes to the buyer upon delivery of the thing sold, and CISG has similar regulations according to article 69.[774]

In addition, according to 446 of the BGB, if the buyer is in default of acceptance of delivery, this is equivalent to delivery. According to the justification of article 208 of the TBK,

---

[770]Al-Anbaki, Majid H. K. (1978): *Passing of property in C.I.F. & F.O.B. contracts (comparative study)*, (Thesis), University of Glasgow, p.246, p.305. Available at: http://theses.gla.ac.uk/3990/1/1978Al-AnbakiPhD.pdf (Accessed: 12 March 2019)

[771]Kouladis, Nicholas (2006): *Principles of Law Relating to International Trade*, Springer, New York, pp.157-158

[772]Scottish Law Commission Report on Sale of Goods Forming Part of a Bulk (Scot Law Com No 145), (1993). Available at: http://www.bailii.org/scot/other/SLC/Report/1993/145.html (Accessed: 3 March 2019)

[773]Türk Borçlar Kanunu Tasarısı ve Adalet Komisyonu Raporu (1/499), 2008, p.12. Available at: https://www.tbmm.gov.tr/sirasayi/donem23/yil01/ss321.pdf (Accessed: 30 October 2018)

[774]Demir, Bahadır (2014): *Transition of Damage in Contract of Sale*, International Journal of Social Sciences, Vol.3, No. 5, Special Issue, p.27.

Article 208 (2) of the TBK is similar to this article. According to article 447 of the BGB, if the seller, at the request of the buyer, ships the thing sold to another place than the place of performance, the risk passes to the buyer as soon as the seller has handed the thing over to the forwarder, carrier or other person or body specified to carry out the shipment. It is also similar to article 208 (3) of the TBK, according to the justification of article 208 of the TBK. In addition, it is similar to article 67 of the CISG.[775]

CISG, BGB, and TBK have similar regulations, and TBK and BGB regulations are harmonized by the effect of CISG, in my opinion. However, in my opinion, CCF and SGA regulations are not similar to CISG, BGB, and TBK.

11.1.2) Overseas Sales and INCOTERMS

Trade terms are standardized terms used in sales contracts that describe the time, place, and manner of the transfer of goods from the seller to the buyer. INCOTERMS are the most widely used trade terms published by the International Chamber of Commerce.[776]

CISG incorporates INCOTERMS through article 9(2). Even if the usage of INCOTERMS is not global, the fact that they are well known in international trade means that they are incorporated through article 9(2), as the United States Court of Appeals states.[777] Therefore, if parties do not put specific INCOTERM in their contracts, interpretation can be made by using article 8 of the CISG to find which version of a term the parties reasonably meant or by using article 9 of the CISG by providing evidence that a certain standard of trade terms definitions is a trade custom.[778] In addition, applicable national laws will take part to fill the gaps according to article 7(2) of the CISG, and the national law so applicable may look to the INCOTERMS for guidance on the meaning of trade terms.[779] However, opinions differ as to whether INCOTERMS amount to an international custom.[780] Moreover, if the parties do not use the jurisdiction clause, the place of jurisdiction will be determined according to article 31

[775]Türk Borçlar Kanunu Tasarısı ve Adalet Komisyonu Raporu (1/499), 2008, p.12. Available at: https://www.tbmm.gov.tr/sirasayi/donem23/yil01/ss321.pdf (Accessed: 30 October 2018)
[776]Fézer, Tamas (2016): Transportation Slides, Manuscript.
[777]United States 11 June 2003 Federal Appellate Court [5th Circuit] (*BP Oil International v. Empresa Estatal Petroleos de Ecuador*). Available at: http://cisgw3.law.pace.edu/cases/030611u1.html (Accessed: 12 March 2019)
[778]Andersen, Camilla Baasch: *Macro-Systematic Interpretation of Uniform Commercial Law: The Interrelation of the CISG and Other Uniform Sources* In: Janssen, Andre - Meyer, Olaf eds. (2009): *CISG Methodology*, Sellier, Munich, p.251
[779]Johan Erauw: *Observations on passing of risk* In: Ferrari,Franco - Flechtner, Harry - Brand, Ronald A. eds. (2004): *The Draft Uncitral Digest And Beyond: Cases, Analysis And Unresolved Issues in the U.N. Sales Convention*, Sellier, München, p.304
[780]Andersen, Camilla Baasch: *Macro-Systematic Interpretation of Uniform Commercial Law: The Interrelation of the CISG and Other Uniform Sources* In: Janssen, Andre - Meyer, Olaf eds. (2009): *CISG Methodology*, Sellier, Munich, p.251

of the CISG. However, It is about article 5 of the Brussels I Regulation for EU member states, and under this provision, it has been held that article 31 of the CISG can no longer serve as a basis for jurisdiction. Also, as an example, if they use a price-delivery term (such as a term defined in the INCOTERMS), it defines the place of performance and excludes the Convention's rule as stated in the decision of Appellate Court Paris.[781] As a good example, German Supreme Court made a similar interpretation in 2012, in my opinion. In the German case, INCOTERMS can exclude article 31 of the CISG and defines the place of performance according to the decision of the German Supreme Court. In the German case, the legal place of performance would have been South Korea, according to article 31 of the CISG. However, there was the DDP as an INCOTERM, and the place of performance was changed because of that, and it was in the jurisdiction of Germany. Therefore, INCOTERMS can exclude article 31 of the CISG from the viewpoint of German jurisdiction.[782] Trade terms generally determine who takes the economic risk of providing carriage, and contracts including such a trade term generally "involve carriage" in the contract in the language of article 67 of the CISG.[783] FOB, CIF, CFR, FCA, and list price ex works are consistent with article 67 of the CISG in some case laws.[784]

Overseas sales were regulated in the old TTK, and if business partners did not put a specific INCOTERM in their contracts, overseas sales would be about FOB or CIF INCOTERMS. There is no equivalent article in the new TTK like it was in the old TTK.[785] However, the Turkish Supreme Court of Appeal 7th Civil Circuit referred to this repealed article of old TTK and INCOTERMS and considered FOB and CIF INCOTERMS in one case in 2013. Therefore, if business partners do not put a term on their contracts, overseas sales will be about FOB and CIF according to this repealed article of old TTK and as a rule in INCOTERMS from the viewpoint of existing TTK as stated in the decision of Turkish Supreme Court of Appeal in

[781]UNCITRAL (2012): *Digest of Case Law on the United Nations Convention on Contracts for the International Sale of Goods*, United Nations, New York, p.132 (Accessed: 10 September 2017); France 18 March 1998 Appellate Court Paris (*Franco-africaine v. More*). Available at: http://cisgw3.law.pace.edu/cases/980318f1.html (Accessed: 10 December 2018)

[782]German Federal Supreme Court (case no. VIII ZR 108/12, dated on 07.11.2012)

[783]Johan Erauw: *Observations on passing of risk* In: Ferrari,Franco - Flechtner, Harry - Brand, Ronald A. eds. (2004): *The Draft Uncitral Digest And Beyond: Cases, Analysis And Unresolved Issues in the U.N. Sales Convention*, Sellier, München, p.301

[784]UNCITRAL (2012): *Digest of Case Law on the United Nations Convention on Contracts for the International Sale of Goods*, United Nations, New York, p.321 (Accessed: 10 September 2017)

[785]TTK Tasarısı ve Gerekçesi (1/1138), 2005, p.82. Available at: https://www2.tbmm.gov.tr/d22/1/1-1138.pdf (Accessed: 13 March 2019)

this case. Therefore, the risk of loss or damage to the goods passes when the goods are shipped according to the FOB and CIF INCOTERMS.[786]

From the viewpoint of the passing of risk in overseas sales, the French judiciary and jurisprudence follow a different way from the CCF, in my opinion. The property and risks pass to the buyer at the port of loading (shipment) as in the case of FOB and CIF INCOTERMS, according to the well-known practice in French jurisprudence. This opinion is the most common one in the French judiciary and jurisprudence. Therefore, property transfer entails the transfer of risk in the thing as stated in article 1196 of the CCF.[787] In my opinion, this interpretation of French courts is similar to the Turkish Supreme Courts' interpretation because FOB or CIF INCOTERMS are considered in terms of the passing of the risks and property in the absence of the parties intentions.[788]

Trade terms are generally interpreted concerning trade usage or even customary law by German Courts. However, these usages tend to differ from one place to the other and from one branch of trade to another, leading to divergent and clashing interpretations. It is possible to interpret a trade term concerning INCOTERMS by German Courts.[789] In the case of the United States District Court, the plaintiff's expert stated that a clause FOB without specific reference to INCOTERMS was to be interpreted according to INCOTERMS simply because the INCOTERMS included a clause FOB according to the decision of the German Supreme Court. Conceding that commercial practice attains the force of law under section 346 of the HGB, the plaintiffs' expert concludes that the opinion of the German Supreme Court amounts to saying that the INCOTERMS definitions in Germany have the force of law as trade custom.[790] Moreover, INCOTERMS exclude article 31 of the CISG and define the place of performance according to the decision of the German Supreme Court. So, the place of jurisdiction is determined according to the INCOTERMS in German jurisdiction.[791]

---

[786]Turkish Supreme Court of Appeal 7th Civil Circuit (decision no. 2013/659, dated on 31.01.2013)

[787]Al-Anbaki, Majid H. K. (1978): *Passing of property in C.I.F. & F.O.B. contracts (comparative study)*, (Thesis), University of Glasgow, pp.261-264, p.313. Available at: http://theses.gla.ac.uk/3990/1/1978Al-AnbakiPhD.pdf (Accessed: 12 March 2019)

[788]Turkish Supreme Court of Appeal 7th Civil Circuit (decision no. 2013/659, dated on 31.01.2013).

[789]Coetzee, Juana (2010): *INCOTERMS as a form of standardisation in international sales law: an analysis of the interplay between mercantile custom and substantive sales law with specific reference to the passing of risk*, (Thesis), University of Stellenbosch, p.77. Available at: https://scholar.sun.ac.za/bitstream/handle/10019.1/5222/coetzee_incoterms_2010.pdf?sequence=2&isAllowed=y (Accessed: 12 March 2019)

[790]United States 26 March 2002 U.S. District Court, S.D., New York (*St. Paul Guardian Insurance Co., et al. v. Neuromed Medical Systems & Support, et al.*). Available at: http://www.unilex.info/cisg/case/730 (Accessed: 12 March 2019)

[791]German Federal Supreme Court (case no. VIII ZR 108/12, dated on 07.11.2012)

From the viewpoint of the passing of risk in overseas sales, English law follows a different way from the SGA, as the French judiciary and jurisprudence follow a different way from the CCF, in my opinion. According to article 97 of the Uniform Law on Sales, the risk shall pass to the buyer when delivery of the goods is effected following the provisions of the contract and the present law. This rule has been applied in England for a long time.[792] However, in the absence of evidence to the contrary, an English judge will apply trade terms solely as defined in his own common law practices. In English law, a trade term is never an INCOTERMS unless it says so. Otherwise, it is a trade term as understood in common law.[793] In addition, England is not a party of CISG as distinct from France, Turkey, and Germany, and article 31 of the CISG discussion cannot be evaluated in respect of England.

Turkish and French case laws are similar, and if business parties do not put specific INCOTERMS in their contracts, the property and risks pass to the buyer, as in the case of FOB and CIF INCOTERMS, as stated in French and Turkish case laws. Also, German case law can be similar to them somehow, but Uniform Law on Sales is not like them in terms of INCOTERMS, in my opinion.

11.2) Passing of Property and Risk Allocation Relation

Firstly, PECL does not regulate the passing of the property. The PECL does not contain provisions concerning the delivery of the goods.[794] Parties can use freedom of contract principle and can make more similar to their contracts in practice in my opinion. In addition, using INCOTERMS can exclude CISG from the viewpoint of the passing of the risks, but other issues like the passing of the property are out of the concept of INCOTERMS and even CISG.[795] Therefore, there is a need to consider national laws.

When we consider the transfer of risks and property relations in terms of CCF and SGA, it is also crucial for business partners in international business law. According to section 20

[792]Al-Anbaki, Majid H. K. (1978): *Passing of property in C.I.F. & F.O.B. contracts (comparative study),* (Thesis), University of Glasgow, pp. 310-311. Available at: http://theses.gla.ac.uk/3990/1/1978Al-AnbakiPhD.pdf/ (Accessed: 12 March 2019)

[793]Andersen, Camilla Baasch: *Macro-Systematic Interpretation of Uniform Commercial Law: The Interrelation of the CISG and Other Uniform Sources* In: Janssen, Andre - Meyer, Olaf eds. (2009): *CISG Methodology*, Sellier, Munich, p.251

[794] Laemmli, Thomas (2014): *Transfer of Ownership in International Sales of Goods, (Thesis),* University of Cape Town, p.21. Available at: https://open.uct.ac.za/bitstream/handle/11427/4434/thesis_law_lmmtho001.pdf?sequence=1&isAllowed=y (Accessed: 12 March 2019)

[795]Kayibanda, Richard (2013): *Passing of Property in Goods in Contracts of International Sale of Goods*, The Estey Centre Journal of International Law and Trade Policy, Vol.14, No:2, pp.72-73.

(1) of the SGA, the risk passes to the buyer with the transfer of property as a rule in England. Therefore, this relation between the passing of ownership and risks makes it necessary to deal with this issue in international business law. According to section 18 of the SGA, there is an unconditional contract for selling specific goods in a deliverable state. The property in the goods passes to the buyer when the contract is made. So, the buyer can be an owner even before payment. Therefore, if the goods burn down before the buyer has taken them away, the buyer will still be responsible for payment, as stated in Tarling v. Baxter case. So, the buyer was still liable to pay the price because he became the owner when the contract was made, and it was immaterial that no delivery of the goods had been made.[796] It is also similar to article 1196 of the CCF because the transfer of property time is the conclusion of the contract time in the CCF. There is written about possibilities to transfer of property, whether delivery made or not in this section as stated in article 1196 of the CCF, but it can be by delivery of goods according to article 929 of the BGB or by the transfer of possession according to the article 763 of the TBK as distinctly. The general rule is that the property will transfer when the parties intend it to transfer, according to section 17 of the SGA. It is also similar to article 1196 of CCF because it is written that the parties' will may defer this transfer. Therefore, that is about the freedom of contract principle, in my opinion. However, if there is no intention, it will be solved by applying section 18 of the SGA. It can be at the time of the conclusion of the contract or later time according to the rules in this section. However, goods must be specific for to transfer of property according to section 16 of the SGA because otherwise, the property can not be transferred to the buyer unless and until the goods are ascertained. [797] In my opinion, it is also similar and necessary to transfer property with the principle of specification in German law,[798] as stated similarly in article 1585 of the CCF[799] and the principle of certainty in Turkish law in my opinion.

However, INCOTERMS play an important role in determining the time of property transfer because INCOTERMS determine the time of delivery of the goods. In addition, according to section 17 of the SGA, it can be possible if the parties intend to transfer the

[796]Kouladis, Nicholas (2006): *Principles of Law Relating to International Trade*, Springer, New York, pp.157-158

[797]Scottish Law Commission Report on Sale of Goods Forming Part of a Bulk (Scot Law Com No 145), (1993). Available at: http://www.bailii.org/scot/other/SLC/Report/1993/145.html (Accessed: 3 March 2019)

[798]Faber, Wolfgang - Lurger, Brigitta eds. (2011): *National Reports on the Transfer of Movables in Europe: Germany, Greece, Lithuania, Hungary*, Sellier, Munich, p.18.

[799]Al-Anbaki, Majid H. K. (1978): *Passing of property in C.I.F. & F.O.B. contracts (comparative study)*, (Thesis), University of Glasgow, pp. 306. Available at: http://theses.gla.ac.uk/3990/1/1978Al-AnbakiPhD.pdf (Accessed: 12 March 2019)

property on the delivery of the goods.[800] Even if there is no intention, courts in England can interpret the intentions of the parties in the face of INCOTERMS as it was in *Carlos* Faderspiel & Co. SA *v. Charles Twigg* & Co. Ltd. It was the shipment time in the case of FOB INCOTERMS by the application of section 18 of the SGA in this case.[801] In addition, risk and property pass simultaneously according to the CCF, and risk passes at the time of shipment as an example according to the FOB or CIF INCOTERMS, which can be possible in French jurisdiction.[802] It is more important for German and Turkish business law because the deliveries of goods are necessary for property transfer. As a good example, the transfer of risks and property time is accepted simultaneously as a shipment time from the viewpoint of FOB or CIF INCOTERMS in the Turkish Supreme Court Decision. Furthermore, it was important in this case because of the right to compensation.[803]

Using INCOTERMS can make it more similar also from the viewpoint of the passing of the property, in my opinion. Therefore, while it is important to determine delivery time from the viewpoint of ownership in German and Turkish laws, it can be similar by using INCOTERMS in English and French laws.

[800]Laemmli, Thomas (2014): *Transfer of Ownership in International Sales of Goods, (Thesis)*, University of Cape Town, p.23. Available at: https://open.uct.ac.za/bitstream/handle/11427/4434/thesis_law_lmmtho001.pdf?sequence=1&isAllowed=y (Accessed: 12 March 2019)

[801]Coetzee, Juana (2010): *INCOTERMS as a form of standardisation in international sales law: an analysis of the interplay between mercantile custom and substantive sales law with specific reference to the passing of risk*, (Thesis), University of Stellenbosch, p.43. Available at: https://scholar.sun.ac.za/bitstream/handle/10019.1/5222/coetzee_incoterms_2010.pdf?sequence=2&isAllowed=y (Accessed: 12 March 2019)

[802]Al-Anbaki, Majid H. K. (1978): *Passing of property in C.I.F. & F.O.B. contracts (comparative study)*, (Thesis), University of Glasgow, pp.261-264, p.313. Available at: http://theses.gla.ac.uk/3990/1/1978Al-AnbakiPhD.pdf (Accessed: 12 March 2019)

[803]Turkish Supreme Court of Appeal 7th Civil Circuit (decision no. 2013/659, dated on 31.01.2013)

CONCLUSION

It is hard to change what you do in society due to the always existing differences like cultural, social, economic, environmental and political diversity, according to the theory of Montesquieu. Also, that is similarly important from the viewpoints of the differences of the areas of economy and freedoms in the Member States of the European Union. Therefore, the differences in the areas of economy and freedoms also lead to differences between business laws of EU Member States. Treaty on European Union (hereinafter "TEU") was an important step in the realization of a Union that brings European people closer to each other. Also, as the laws are shaped by the society, the society is shaped by the laws. Harmonization of the laws of the EU Member States is an important instrument to remove the existing social, cultural and political differences. However, economic integration and accordingly EU business and contract law for all EU members can not be separated from social, cultural and political integrations. All integrations must be parallel in the EU members in order to reach a common EU business and contract law that can effectively drive the EU Common Market in terms of the theory of Montesquieu.

Turkish business and contract law became westernized in the Ottoman ages, and the reason was to boost and assist the evolution and the flow of business relations with European countries. This goal behind modernization in Turkey remains the same today. In order to aim of to be a member of the EU and to be the partner of EU Common Market by this way is the policy of the Turkish Government and Customs Union (hereinafter "CU") is a doctrine to achieve that result as CU Agreement is a step closer for Turkey to be a member of the EU and to enter to the Single European Market. On the other hand, both of Turkey and the EU are important trade partners, therefore, CU effects on that. Moreover, the CU Agreement is relevant to ensure free movement of goods. However, up until now it has been a lot of changes and Turkey's EU full membership is still uncertain. Since 1996, the CU between Turkey and the EU covers only the areas in which the EU is competitive, such as industrial and processed agricultural products and it had a limited concept. So, it can be expanded the preferential commercial and economic relations with the EU to new areas such as agriculture, government procurement, services and e-commerce in today's conditions. Also, Turkey has adopted FTAs that the EU has or will conclude with third countries and Turkey has to accept agreement terms

of the EU without the authority to negotiate and that causes the trade creation effect to lose power in terms of Turkey. Moreover, Turkey has to negotiate separate FTAs to obtain preferential access to the EU's FTA partners for its companies and products but the negotiating position for Turkey with countries that have already concluded an FTA with the EU is weak. Therefore, the CU agreement between Turkey and EU should be subject to review as it is required by the old contract law principle, *clausula rebus sics stantibus*.

While Principles of European Contract Law (hereinafter "the PECL") is not a binding legal instrument in business relations, it seems to reflect the majority of the EU in respect of contractual matters. However, business partners from EU and Turkey can adapt it in their business relations and it can be binding for them by this way. 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") both adopt the choice of law clause. In addition, Turkish Constitution and Rome 1 include the freedom of contract principle as a fundamental right in contract law. There is, however, some difference between the two regimes when it comes to define the applicable law in the absence of a choice of law clause in the contract. While it is about the law of the habitual residence of the seller in Rome 1, it is about the law of the home offices of the companies or buyer in MÖHUK in the absence of choice of law. Therefore, we can adapt the rules of PECL or any other legal rules partly or completely to business partners from Turkey and the EU by using choice of law clause according to the freedom of contract principle. Even if there are binding rules of the United Nations Convention on the International Sale of Goods (hereinafter "the CISG") on the contract, parties can exclude the rules of CISG. However, in the absence of the expressly incorporated exclusion of the CISG, a choice of law clause will not rule the application of CISG out in the parties' transaction in practice, therefore, it is advisable to expressly exclude the application of the CISG if the parties wish not to apply it.

There are many similarities between the PECL, the CISG and Turkish contract law from the viewpoint of the formation of contract. Some differences are about essential elements of an offer, silence as an implied acceptance, public offer, revocation of an offer, rejection of an acceptance, effectiveness time of the contract, withdrawal of an offer and acceptance times. Turkish contract law has similarities with PECL more than with CISG in respect of the formation of contract and so PECL and Turkish Code of Obligations (hereinafter "the TBK) are not restricted to specific contract types in contrary to the CISG. In addition, PECL is not a domestic legal instrument like Turkish contract law or the national contract laws in the EU

member states. Furthermore, PECL reflects the hopefully majority position of EU member states and while drafting the TBK, it also benefited from the PECL's approaches.

The main differences about fundamental breach come from the differences between the common law and the civil law legal systems. We can see the similarity between the PECL and CISG that come from their legal concepts because both of them are results of universalism. In addition, Turkish Contract Law, French Law and German Law are domestic laws and that can be the reason for why they may differ significantly from the approach of the international documents. Also, English Law, being a common law system, is different in terms of the concept of breach and English Law is similar to PECL and CISG. However, there are some differences between English Law, PECL and CISG from the viewpoint of fundamental breach. PECL is confined to intentional breaches that is distinct from the solutions of English Law and CISG. Moreover, the substantial deprivation case in CISG is different from the method of the PECL and of English Law as there is the requirement for detriment which is not relevant for the 'strict compliance' criterion in PECL and in English Law.

The concept for fundamental breach shows and important difference in Turkish Contract Law, French Law, German Law, English Law, the CISG and the PECL. They do not really go for specific cases like non-performance or defective performance. English Law, PECL and CISG actually use these two definitions, which are fundamental breach and other type of breaches. Therefore, they only have these distinctions while Turkish Contract Law, French Law and German Law go for specific breach scenarios.

Usually when it comes to the fault-based liability systems, it actually gives more potential to businesses that breach a contract to avoid liability and to avoid paying damages. English Law, PECL and CISG systems that support strict liability based contractual breach scenarios actually protect businesses more. The breaching party has very limited options to call the defense. Therefore, no matter of what, the parties under the strict liability regime have to perform their obligations and because of that the *pacta sund servanda* principle in English Law, PECL and CISG is stronger than it is in Turkish Law, French Law and in German Law. In fault-based liability system like Turkish Law, French Law and German Law, they favor special personal circumstances of the breaching party.

Turkish Law, French Law and German Law target all types of contracts. They apply for business to business, business to consumer, consumer to consumer relations. That is why fault-based liability is classic in these contract law regimes. However, CISG and PECL aim to target business to business relations. Also, English Law targets all types of contracts, however, the difference is coming from the genuinely common law nature of this system that makes us

conclude the CISG and PECL are more similar to common law in this respect. English Law, CISG and PECL do not favor excuses, defenses. English Law, PECL and CISG do not want to give the parties a free pass because of their personal circumstances changed like why the parties could not deliver on time or they could not make perfect products. They actually want to be force their promises completely as it was originally agreed in the contract.

In certain legal systems, compensation for contract breaches is classified into positive and negative interest, following the principles of gains prevented (*lucrum cessans*) and actual loss suffered (*damnum emergens*) in Roman law. Positive interest aims to fully compensate the claimant for any financial losses incurred due to a contract not being fulfilled, including lost profits. On the other hand, negative interest focuses on the claimant's reliance interest and aims to restore them to their pre-transaction position.

In Turkish law, there are two types of interest: positive and negative. If someone suffers harm due to positive damage, they can claim compensation, or they can terminate the contract and claim negative damages. However, they cannot do both at the same time. Turkish law also protects reliance on contract performance for compensation related to negative interest. If one party is at fault, the other party can claim compensation. This is regulated in both the TBK and Turkish Commercial Code (hereinafter “the TTK). In commercial sales, TTK applies if the parties agree on a fixed delivery date, while TBK applies in other cases. If a contract is terminated, the aggrieved party can only claim compensation for negative interests. The aggrieved party must notify the promisor within a reasonable period that performance is necessary, or termination will occur. If a contract is wrongfully terminated in Turkey, the court can reject the remedy if the defaulting party challenges it. However, they can also enforce the contract and compel performance. Good faith can protect the defaulting party from termination without just cause. They can also claim negative interest by terminating the contract. Turkish law allows for compensation for negative damage caused by *culpa in contrahendo*. If there is a breach of trust in the creditor after the contract is established, it is not considered a breach of trust in the contract's validity (*culpa in contrahendo*).

In German law, there is a distinction between positive and negative interest. If an aggrieved party seeks compensation, they can claim for positive damage or terminate the contract and claim for negative or positive damage, which differs from Turkish law. Additionally, German law protects the reliance on the contract's performance in regard to compensation for negative interest. Similarly to Turkish law, German law also has fault-based liability and does not allow an aggrieved party to claim both positive and negative damage simultaneously. The regulation of commercial sales is also similar in both German and Turkish

law, with German Commercial Code (hereinafter "the HGB") applying if the parties agreed upon a fixed delivery date and German Civil Code (hereinafter "the BGB") applying in all other cases. In German law, the aggrieved party must notify the promisor that performance must be effected within a reasonable period, or termination will follow. If the contract is terminated, the aggrieved party can claim compensation for negative or positive interests, as distinct from Turkish law. If a contract is wrongfully terminated in Germany, the court can reject the remedy if the defaulting party challenges it. However, they can also enforce the contract and compel performance. Good faith can protect the defaulting party from termination without just cause. They can also claim positive or negative interest by terminating the contract. This is similar to Turkish law, but in Turkish law, the party can only claim compensation for negative interest in a distinct manner. Furthermore, German law allows for compensation for negative damage due to *culpa in contrahendo*, as in Turkish law. However, if there is a breach of trust in the creditor after the contract has been established, it is not considered a breach of trust in the contract's validity (*culpa in contrahendo*), as in Turkish law.

Positive and negative interest are distinguished in English law. If a party is harmed, they can claim compensation for positive damage or terminate the contract and claim negative or positive damages, as in German law. However, in England, a party cannot claim both positive and negative damage at the same time, as in German and Turkish law. In England, there are no strict procedural requirements for terminating a contract without legal assistance, unlike in TBK or BBG. Termination takes effect immediately, and the defaulting party has no extra time to perform their obligations, unlike Turkish and German law. So, under English law, the aggrieved party can terminate the contract and file for damages immediately. In England, if a contract is terminated wrongfully, the aggrieved party has the right to claim positive or negative interest by terminating the contract, similar to German law. The promisee can terminate the contract without a court order if there is a repudiatory breach. Wrongful termination is remedied through damages, not through forcing performance, and good faith cannot be used to dispute termination. So, this is different from Turkish and German law. Damages awarded in English law include pre-contractual expenditures made worthless by the breach, which is distinct from Turkish and German law. There is a concept of strict liability and fundamental breach in English law, and the remedies available depend on the significance of the contract condition breached by the debtor. In the English legal system, the debtor's liability for compensation is not dependent on fault or default. Compensation for negative damage due to *culpa in contrahendo* is not possible in English law, which is different from German and Turkish law. So, good faith

is not applicable in English law. In English law, the approach taken is different, using *quasi ex contractu* instead of *culpa in contrahendo*.

In French law, there are two types of damages: positive and negative. If someone is harmed, they can claim positive damages or terminate the contract and claim either negative or positive damages. This is similar to English and German law. French law also protects reliance on the performance of the contract when claiming compensation for negative damages, as in Turkish and German law. So, fault-based liability is considered in French, Turkish, and German law. However, in French law, someone cannot claim both positive and negative damages simultaneously, as in Turkish, German, and English law. The French Civil Code (hereinafter "the CCF") rule applies to both contractual and tort liability in French law, similarly to English law. The courts do not need to formally distinguish between positive and negative damages in French law, but it is done in case-law, similar to English law. In French law, the aggrieved party must notify the promisor of the need for performance within a reasonable period, or termination will follow, as in German and Turkish law. Compensation for negative or positive damages can be claimed if the contract is terminated. If a contract is wrongfully terminated in France, the court can reject the remedy if the defaulting party challenges it. However, they can also enforce the contract and compel performance. Good faith can protect the defaulting party from termination without just cause. They can also claim positive or negative interest by terminating the contract. This is similar to English, German and Turkish law, but in Turkish law, the aggrieved party can only claim compensation for negative interest in a distinct manner. Compensation for negative damage due to *culpa in contrahendo* is possible in French law, as in Turkish and German law. If there is a breach of trust after the contract has been established, it is not considered a breach of trust in the contract's validity (*culpa in contrahendo*) as in Turkish and German law.

In PECL, there is a distinction between positive and negative interest, which allows the aggrieved party to claim compensation for positive damage or terminate the contract and claim either negative or positive damages. This is similar to English, French and German law. The general rule in PECL is that the expectation interest is compensated, and article 9:502 does not provide for compensation for negative damage when a contract is terminated. However, some other articles of PECL and comment G allow for the possibility of claiming negative interest, including reliance interest and loss of opportunities. It is important to note that the aggrieved party cannot claim both positive and negative damages simultaneously, and termination is only allowed in cases of fundamental breach. The option to claim negative damages will still be available to the creditor even after termination. There is also a requirement in PECL for the

aggrieved party to notify the promisor of the need for performance within a reasonable period before terminating the contract. If a contract is wrongfully terminated according to the PECL, the court can reject the remedy if the defaulting party challenges it. However, they can also enforce the contract and compel performance. Good faith can protect the defaulting party from termination without just cause. They can also claim positive or negative interest by terminating the contract. This is similar to French, English, German and Turkish law, but in Turkish law, the aggrieved party can only claim compensation for negative interest in a distinct manner. Compensation for negative damage due to *culpa in contrahendo* is possible in PECL, as in Turkish, German, and French law. However, it is important to distinguish between the period before a contract is concluded and after it is established. If there is a breach of trust by the creditor after the contract is established, it should not be considered a breach of trust in the contract's validity (known as *culpa in contrahendo*) as it is in German, French, and Turkish law. PECL also includes the concepts of strict liability and fundamental breach, which are similar to English law. Damages are awarded to cover the expenses lost in case of breach, but pre-contractual expenditures fall under the *culpa in contrahendo*, recognized as a separate concept in PECL but not in English law.

In the CISG, there are two types of interest: positive and negative. If an aggrieved party is seeking compensation, they can either claim positive damages or terminate the contract and claim negative or positive damages, depending on the situation. This is similar to English, French and German law. Generally, the CISG compensates for the expectation interest, which is similar to PECL. However, negative interest can be found in some articles of the CISG and in case-law. This is similar to the approach taken in French law opinion because we can also see it in the case law there. An aggrieved party cannot claim both positive and negative damages at the same time, as is the case in Turkish, German, French, English, and PECL law. If an aggrieved party wants to terminate the contract, they must notify the promisor that performance must be completed within a reasonable period. If this does not happen, termination will follow. Compensation for positive or negative interest is possible in case of termination, as seen in case-law, which is similar to PECL, German, French, and English law. If a contract is wrongfully terminated according to the CISG, the court can reject the remedy if the defaulting party challenges it. However, they can also enforce the contract and compel performance. However, under the CISG, a court can order specific performance if domestic law allows it. The decision to enforce this order is up to the domestic court. If specific performance is not allowed, the aggrieved party cannot request it. The court has the authority to decide whether to grant performance relief. Therefore, the application of CISG in England may differ from how it is

applied in Turkey, Germany, and France. Good faith can protect the defaulting party from termination without just cause. However, in countries such as Turkey, Germany, and France, the concept of good faith holds great importance in their courts and can be used to challenge the termination of CISG. However, in England, even if CISG is applied, the defaulting party cannot use the principle of good faith to contest termination. Therefore, good faith is not applicable in England. They can also claim positive or negative interest by terminating the contract. This is similar to French, English, German and Turkish law, but in Turkish law, the aggrieved party can only claim compensation for negative interest in a distinct manner. Additionally, compensation for negative damage due to *culpa in contrahendo* is possible in the CISG. Some jurisdictions, such as Germany, France, and Turkey, allow for negative interest compensation in case of *culpa in contrahendo* under the CISG based on private international law and court interpretations. However, this is not the case in English law. The concepts of strict liability and fundamental breach are present in the CISG and are similar to English law. In case of breach, damages are awarded to cover the expenses lost. However, pre-contractual expenditures fall under the *culpa in contrahendo*, which is recognized as a separate concept by some courts in the CISG, but not in English law.

There is a foreseeability theory that limits the scope of liability in English Law, PECL, CISG and French Law, while there is an adequate causation theory in Turkish Law and in German Law. PECL includes the elements of negligence into the principle of foreseeability and liability is not limited by the foreseeability rule as distinct from CISG and English Law. However, it is similar to French Law. Intention and gross neglience are in the concept of the consideration of fault-based liability systems and it is normal for French Law because there is a fault-based liability system in French Law. On the other hand, the PECL follows a strict liability system. There is not a case law for to evaluate the status of PECL in practice but there is French case law where the interpretation of intentional acts is broader than in other civil law regimes. That also makes similarity to the strict liability approach and the one reason could be that the application and effect of foreseeability theory in French case law. Also, if there was a case law attached to PECL, there could probably be similarity to French case law in practice because of the similarity of the substantive laws. Also, PECL, CISG and French Law just consider the foreseeability of the breaching party as distinct from English Law in foreseeability theory. Also, Turkish Law and German Law just consider the foreseeability of breaching party in adequate causation theory.

Adequate causation is defined as the logical causal relation between the breach and the loss which it can cause according to general experience and normal course of events but not the

foreseeability of the damage by the breaching party as it is the beacon theory in systems following the foreseeability approach. In the common law system, causality is complementary to foreseeability only in the account of liability charge. In civil law systems where the fault-based liability is adopted, causality theories have been adopted to limit the scope of liability. While there is an objective test that limits the scope of liability in adequate causation theory, objective and subjective tests are both applied in countries following the foreseeability theory. The reason for this difference is that the adequate causation theory defines the knowledge for liability in a much broader concept than foreseeability theory does. While the foreseeability theory is going to determine the liability, adequate causation theory limits it and comes to conclusion. However, adequate causation theory limits the concept of this definition by the application of fault-based liability and of the good faith principle. Also, foreseeability is an element of fault and not related to the adequate causal relation which is another element of fault in Turkish Law and in German Law. It does not matter if the loss is expected to occur under the normal course of events and based on general experience. The important thing is to know whether a particular outcome can be considered as a result of a particular cause from the viewpoint of adequate causal relation as distinct from the strict liability system in English Law, CISG and PECL. Fault-based liability and the good faith principle are also present along with the foreseeability theory in French Law, while, similar to them, intention and gross negligence are both accepted along with the foreseeability theory in PECL. Also, there is a good faith principle in PECL like it is in French Law, Turkish Law and German Law as distinct from English Law and CISG. Also, in business to business relations, foreseeability is considered from the viewpoint of the prudent merchant rule in Turkish Law, English Law, German Law, French Law and CISG. It could also be similar for PECL because of the foreseeability theory that exists there, if there would be a case law attached to the PECL.

According to the adequate causality theory, moment of evaluation for adequate causality is the time when the breach of the contract occurs. On the other hand, the moment of the implementation of foreseeability test is at the time of the conclusion of the contract.

There is no uniform approach to the mitigation of damages, however, legal systems and the international documents examined throughout the research often achieve the same result by refusing to award damages if a claimant's losses were caused by the claimant's reckless attitude, or they simply reduce the amount of damages by the contribution of the claimant. However, it is in accordance with the extent of the claimant's fault in the fault-based liability systems as distinctly. The court, while determining the extent of the compensation, must also take into account the aggrieved party's fault.

So far, French law has entirely rejected the idea of mitigation so that, to arrive at results similar to those reached in England, reliance has had to be placed on other principles, such as causation, good faith and, in particular, fault—*faute de la victime*. However, English law has not adopted a general doctrine of good faith and there is not fault-based liability principle in English Law. Therefore, these cannot be used by English Law as distinct from French Law. Concepts of mitigation and contribution to breach of contract are clearly distinguished in the CISG like English Law and PECL. Under German law, for instance, there is no duty to mitigate per se, however, a similar result is achieved through the regime on contributory negligence. The term contributory negligence is not explicitly included in Turkish law, rather it is settled in both doctrine and in judicial decisions.

In Germany, article 254 of the BGB finds its origin in the good faith principle. The good faith principle would to some extent require the debtor to mitigate damages in Turkish Law as it is in German Law. PECL are concerned, because they expressly impose a general duty to act in accordance with 'good faith and fair dealing', the mitigation rule can be said to be a specific manifestation of these standards. Commentators have also referred to the obligation of good faith in this context in French Law. CISG may do not expressly provide for general principles of fair dealing and good faith. Nevertheless, the CISG is now increasingly viewed as reflecting a general principle of good faith and, if this is correct, then the mitigation rule in the CISG can also be justified as a specific manifestation of a general principle of good faith. Also, English law has not adopted a general doctrine of good faith while English Law can be viewed as reflecting to a general principle of good faith as it can be for CISG.

Modification of terms or termination of contracts when circumstances are changed is possible in Turkish Law, French Law and German Law as Civil Laws and even in PECL as an international instrument, however, there is not any regulation on that in CISG. *Geschäftsgrundlage* in German Law also allows adjustment in case of a mutual error of the parties as to the factual foundations of the contract as distinct from others and it is not in the concept of doctrine of *clausa rebus sic statantibus*. It is also regulated in different articles in CCF, PECL and TBK but not under the concept of doctrine of *clausa rebus sic stantibus* as distinctly. Also, the basis of *geschäftsgrundlage* is broader than *clausa rebus sic stantibus* because while *clausa rebus sic stantibus* takes into account only the events following the formation of the contract, it is about before or after and present time in *geschäftsgrundlage*. Therefore, if we look at article 313 (1) of BGB alone, that is about the doctrine of *clausa rebus sic stantibus*. Also, there is a duty to renegotiate in French Law and PECL as distinct from others.

Frustration in English Law is different from the doctrine of *clausa rebus sic statantibus*. Keeping the contract stand by modification of terms is not possible in English Law and so only way is termination of contracts and contracts are ending automatically in English Law as distinct from others. In English Law, frustration is only possible when contract come to be an impossible or unlawful stage to perform, or it is radically different from what the parties originally intended, however, less than impossibility changings in contracts are not in the concept of frustration as distinctly. Also, *force majeure* is usually used as a defense against the claim for liability for breach. In this case, frustration is not about breach basically. Frustration is closer to *clausa rebus sic stantibus* and frustration would more like to free parties from the performance of the contract. Therefore, frustration is not similar to *force majeure*. One of the most important reasons for this distinction is that *clausa rebus sic stantibus* principle is based on good faith principle in CCF, BGB, PECL and TBK. However, good faith is not required in English Law and CISG. So, *clausa rebus sic stantibus* principle is not accepted also in CISG. Also, the other reason can be explained with *pacta sunt servanda* principle and it is more articulated in English Law and in the CISG. Actually, it could be the same for PECL because of the strict liability system in this situation, so good faith principle makes PECL more similar to Civil Law and especially similar to French Law due to the necessity of the duty to renegotiate from the viewpoint of *clausa rebus sic stantibus* principle.

Force majeure is applicable in Turkish Law, French Law and German Law as Civil Laws and even in PECL and CISG as international instruments. *Höhere gewalt* in German Law also includes economic impossibility that is distinct from the others, however, it is not in the concept of doctrine of *force majeure*. Also, the concept of *höhere gewalt* is broader than *force majeure*. F*orce majeure,* on the other hand, is not applicable in English Law while it can be an incorporated term through the application of the freedom of contract principle. Even if there is a term in the contract, the doctrine of *force majeure* will be different from Turkish, German and French Laws because there is not fault based liability system in English Law. So, it is not defense to a breach and not one that leads to the exoneration of a party from liability as it is in fault-based liability systems. Instead, it leads to the termination of the contract. The reason for this distinction in English Law can be explained through the good faith principle and the strong *pacta sunt servanda* principle. Actually, while the good faith principle is not required in CISG like English Law, there is a doctrine of *force majeure* in the concept of CISG. So, CISG is seen as under the influence of the good faith principle from the viewpoint of the doctrine of *force majeure*. Also, there is no fault-based liability system in PECL and CISG like it is also missing in English Law and that also makes them different from Turkish Law, German Law and French

Law. F*orce majeure* in PECL and CISG is more similar to *force majeure* clauses in English Law because of the strict liability system.

Pure economic loss doctrine is accepted in English Law. There is good faith principle in the Turkish Law, German Law and French Law and there can be a possibility for to compensate the pure economic loss as distinct from English Law. We usually have the pure economic loss doctrine in common law systems, however it is not classic in civil law. We may draw a connection only under the common law regime from the viewpoint of the changing circumstances otherwise in civil law only cares about these changing circumstances whether they qualified for a defense of breach the contract. So, that is about *clausa rebus sic stantibus* and *force majeure* in Turkish Law, German Law and French Law as civil laws. There are also *clausa rebus sic stantibus* and *force majeure* in PECL and *force majeure* in CISG but these are not qualified as defense for breach as they are in fault based liability. Even so pure economic loss is not recognized by the PECL as an autonomous category and there can be compensation in CISG too.

However, there is the prudent merchant rule in Turkish Law, German Law and French Law as Civil Laws and in English Law as Common Law and also in CISG as an international instrument. Also, it can be by the application of foreseeability doctrine in PECL. Prudent merchant rule extents the liability in Civil Law Systems and can not let the application of *clausa rebus sic stantibus* and *force majeure* principles in German, Turkish and French case-laws when there are business to business relations. That is also similar in CISG as an international instrument from the viewpoint of *force majeure*. Also, there can be a similar result with economic loss doctrine of English Law as it is in case laws of French Law, Turkish Law, German Law, CISG and English Law in respect to economic risks.

There is no provision concerning the delivery of goods in PECL as distinct from Turkish Law, French Law, German Law, English Law and CISG. While risk allocation in inland sea sales are regulated in similar manner in the CISG, BGB and TBK as distinct from CCF and Sale of Goods Act (1979) (hereinafter "the SGA"). Therefore, we can say that it is harmonized between BGB and TBK by the effect of CISG as distinct from CCF and SGA. French and English jurisdictions are following different ways in oversea sales as distinct from inland sea sales and we can see similar jurisdictions on over sea sales in international business law including common law. That is because of the universal harmonization on oversea sales by the effect of *lex mercatoria*.

There can be possibility to use International Commercial Terms (hereinafter "the INCOTERMS") in their contracts for German, French, English and Turkish business parties.

That is possible through the freedom of contract principle. However, there can be some differences from the viewpoint of risk allocation in overseas sales in terms of INCOTERMS according to the English, French, Turkish and German business laws. So, while Turkish and French jurisdictions usually are similar in the type of INCOTERMS in case of the absence of specific INCOTERMS in the contracts, German jurisdiction can be similar to them somehow while Uniform Law on Sales is not like them in terms of INCOTERMS. Because of that, it might be better to include specific INCOTERMS into their contracts for business parties. Moreover, parties can achieve similar results in their jurisdictions from the viewpoint of passing of the ownership rights by using INCOTERMS. So, INCOTERMS determine the time of delivery of the goods and while it determines the time ownership rights in German and Turkish jurisdictions, there can be similar results by the interpretation of courts from the viewpoint of French and English courts. We can say that INCOTERMS take an important role on risk allocation and also to determine the ownership rights. In addition to these, if the parties are the participating countries of the CISG, we have to consider that INCOTERMS can exclude article 31 of the CISG in international business law in terms of the determination of the place of jurisdiction in the absence of jurisdiction clause in contracts as we can see in German and French jurisdictions. So, we can tell that the intentions of the business parties on INCOTERMS cannot be just about the risk allocations because these intentions also can be considered in terms of the passing of the property rights and the determination the place of jurisdiction in the absence of jurisdiction clause in contracts.

Finally, while CISG is similar to English contract law more than PECL, PECL is similar to French contract law more than CISG as international instruments. Among all the most different one is English contract law because while English contract law is a common law but French contract law, German contract law and Turkish contract law are civil laws but also French contract law is similar to English contract law more than to Turkish contract law and German contract law. If we look from the viewpoint of civil laws, Turkish contract law and German contract law are similar to each other more than French contract law.

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.

We can adapt the rules of PECL or any other legal rules partly or completely to business partners from Turkey and the EU by using choice of law clause according to the freedom of contract principle. Even if there are binding rules of CISG on the contract, parties can exclude

the rules of CISG. There is the better way expressly exclude the application of the CISG. That is about the freedom of contract.

PECL reflects the hopefully majority position of EU member states and while drafting the TBK, it also benefited from the PECL's approaches. Therefore, if we take a closer look at the rules from the viewpoint of business partners residing in the EU and Turkey, application of the solutions set in the PECL can be more familiar and impartial than the inclusion of their domestic laws; this might also be beneficial for both sides of the bargain. There can be some differences between the domestic contract laws of EU member states' and Turkish contract law. Therefore, business partners from Turkey and EU can find common ways by the application of the PECL's solutions in their contracts and so the Turkish contracting party can achieve more contractual rights like revocation of an offer or rejection of an acceptance through the application of the PECL. While the PECL is not a binding piece of legal instrument, freedom of contract to the parties may be extended to a limit to include all solutions the PECL might offer and incorporate them into the bargain.

The main differences about fundamental breach come from the differences between the common law and the civil law legal systems. There is a fault based liability system in Turkish law as other civil law systems like German and French contract laws in the ordinary course of things.

Different legal systems, including PECL, CISG, Turkish, German, French, and English law, distinguish between positive and negative interest. However, PECL, CISG, Turkish, German, French, and English law do not allow for compensation for both positive and negative interests simultaneously.

Turkish and German law are similar in their commercial code and code of obligations, while French and English law apply the same rules to contractual and tort liability matters. When a contract ends, compensation for positive or negative interest can be claimed in PECL, CISG, French, German, and English law. However, only negative interest compensation is possible under Turkish law. Termination and avoidance of a contract have different effects in different legal systems. Avoidance has a retroactive effect, meaning the contract is considered never to have been concluded in PECL, CISG, Turkish, French, German, and English law. However, Turkish law accepts compensation for negative interest in both cases. Turkish parties benefit more from accepting compensation for positive interest as an alternative to negative interest. It is crucial to acknowledge that Turkish law differs from the laws of English, French, and German. Nevertheless, the CISG has contributed to certain similarities amongst the latter

three. As a result, there has been a level of harmonization between English, German, and French law.

In PECL, CISG, Turkish, German, and French law, notifying the promisor of the need to perform within a reasonable period can result in termination if they fail to comply. So, The notice serves as a means to grant the defaulting party an additional opportunity to meet their obligations, essentially providing them with a second chance. As a result, there has been a degree of harmonization between them under the CISG. However, in English law, termination takes immediate effect, and the defaulting party has no extra time to perform their obligations. So, it is crucial to provide a notice prior to taking any action in CISG, PECL, French, German, and Turkish law. However, under English law, the aggrieved party can terminate the contract and file for damages immediately.

If a contract is terminated wrongfully in England, the aggrieved party has the option to claim positive or negative interest by terminating the contract. This is similar to laws in PECL, CISG, French, and German law. However, Turkish law allows compensation for negative interest only. Good faith can protect the defaulting party from termination without just cause in PECL, CISG, Turkish, German, and French law, but not in English law. However, in countries such as Turkey, Germany, and France, the concept of good faith holds great importance in their courts and can be used to challenge the termination of CISG. In England, even if CISG is applied, the defaulting party cannot use the principle of good faith to contest termination. Therefore, good faith is not applicable in England. In case of wrongful termination, the court can reject the remedy if the defaulting party challenges it, but can enforce the contract and compel performance in PECL, CISG, Turkish, German, and French law. However, under the CISG, a court can order specific performance if allowed by domestic law. The court has the final say on enforcement, and if specific performance is not allowed, the aggrieved party cannot request it. Therefore, the application of CISG in England may differ from how it is applied in Turkey, Germany, and France. However, in England, the promisee has the right to terminate the contract without a court order if there is a repudiatory breach, but wrongful termination is remedied through damages and not through forcing performance in English law. Therefore, the regulations in CISG and PECL, Turkish, German, and French law are similar to each other but different from English law concerning wrongful termination of contracts.

Compensation for negative interest can be claimed in case of *culpa in contrahendo* in CISG, PECL, Turkish, German, and French law. However, English law takes a different approach through *quasi ex contractu* and does not use this principle. The concept of *culpa in contrahendo*, which is based on good faith, is not recognized in English law. Although some in

England suggest resolving such issues through tort law, as is done in France. On the other hand, *culpa in contrahendo* is a legal principle that is interpreted differently by courts and private international law within the CISG. It's important to note that compensation for *culpa in contrahendo* is only available in jurisdictions where it is permitted, such as Germany, France, and Turkey. Additionally, the interpretation of this principle may vary between courts and private international law within the CISG, so it is not always guaranteed.

Turkish, French, and German laws protect not the reliance on a contract, but the reliance on its performance. In contrast, English law awards damages for the expenses lost due to the breach, including pre-contractual expenditures that become worthless. This difference in protection for reliance is linked to the liability systems in common and civil law. English law enforces strict liability, and there is a fundamental breach concept. Meanwhile, German and Turkish law impose fault-based liability. Under English law, compensation liability remains constant regardless of contract type. The remedies available depend on the significance of the breached contract condition. The concepts of strict liability and fundamental breach are present in both PECL and CISG, which are similar to English law. In case of breach, damages are awarded to cover the expenses lost. However, pre-contractual expenditures fall under the *culpa in contrahendo*, which is recognized as a separate concept in PECL and CISG but not in English law. Nonetheless, *culpa in contrahendo* is a legal principle that is interpreted differently by courts and private international law within the CISG. The interpretation of English courts in English jurisdictions may also differ.

French law could be a viable solution when dealing with business disputes between civil and common law backgrounds. Individuals with a background in English law may find Article 1231 of CCF useful since it covers topics like contracts and tort liability that are similar to those found in the English legal system. This is especially beneficial for those who are already familiar with English law as it simplifies their understanding of the CCF. There are various laws, such as PECL, CISG, English law, and German law, which allow for claiming positive or negative interest compensation, even if the contract is terminated. However, under Turkish law, only negative interest compensation is possible in case of termination. Therefore, the Turkish parties may benefit more from accepting compensation for positive interest as an alternative. Notification is required under French law, PECL, CISG, Turkish law, and German law. French law recognizes *culpa in contrahendo*, which is not the case in English law. However, some suggest using tort law to solve this issue in England, which is a similar approach to what is taken in France. In France, if the defaulting promisor challenges the termination, the court can deny the remedy and compel performance, allowing the contract to remain in effect. Good faith

can also be invoked to protect against termination without good cause, much like in PECL, CISG, Turkish, and German law. Additionally, France, Germany, and Turkey apply CISG in a similar way, but there may be discrepancies in how England handles it.

We usually have the pure economic loss doctrine in common law systems, however it is not classic in civil law. We may draw a connection only under the common law regime from the viewpoint of the changing circumstances otherwise in civil law only cares about these changing circumstances whether they qualified for a defense of breach the contract. So, that is about *clausa rebus sic stantibus* and *force majeure* in Turkish Law. That is about the defense to a breach and that leads to the exoneration of a party from liability in Turkish contract law as in other fault-based liability systems like German and French contract laws in the ordinary course of things.

As generally understood in the law and economics literature, the economic loss rule states that a plaintiff cannot recover damages for a pure financial loss. Pure economic loss is harm suffered without infringement of a legally protected right or interest.

English lawyers would define pure economic loss as any loss not occurring consequent to damage to the physical integrity of a person or a tangible thing. Europe does not even have a common notion of what constitutes pure economic loss. French law has no restriction concerning the pure economic loss, but a person who causes pure economic loss is liable only under rather strict prerequisites, for example, intent, according to French Law. A German lawyer, for their part, would describe pure economic loss as any loss not consequential to the infringement of a right, thus excluding many losses from the notion of pure economic loss, which in other countries would be seen as typical examples for this category. There is no compensation for pure economic loss in Turkish law's general understanding and system. The main reason is that there is no infringement of a right according to Turkish law in force. That is similar to German law. However, because of the good faith principle, there can be a possibility of compensating the pure economic loss in Turkish law. There is good faith principle also in the German and French Contract Laws, and there can be a possibility of compensating the pure economic loss as in Turkish law as distinct from English Law. Also, article 74 of the CISG is most significant regarding indirect (consequential) loss, including lost profits and other purely economic losses.

So, it is better to accept the pure economic loss approach in French law when considering common and civil law together in international business law. So, there is no restriction concerning pure economic loss as distinct from German, Turkish, CISG, and English law. However, a person who causes pure economic loss is liable only under rather strict

prerequisites. So, on the one hand, recovering damages for a pure financial loss ceases to be impossible, as distinct from English law. Also, on the other hand, it does not exclude many losses from the notion of pure economic loss by limiting it to the consequential to the infringement case only, as distinct from German and Turkish law. Also, by applying prudent merchant rule in B2B relations, there will be similar results in practice. So, the common way is found that is suitable for both business parties from common law and civil law systems in this way.

The concept of *force majeure* has its origins in Roman law. The *force majeure* principle is regulated and applicable in German, French, and Turkish contract laws, which are civil law legal systems. Also, it is regulated in CISG and PECL, which are *lex marcetoria*. However, while it is not regulated in English law, which is a common law legal system, it can be applied by applying the freedom of contract principle.

The *bona fides* principle is essential in applying *the force majeure* principle. So, although there are different liabilities systems, it is still regulated in German, Turkish, and French contract laws and also in PECL and CISG. So, these legal systems include *the bona fides* principle. So, *the force majeure* principle is based on *the bona fides* principle, and in case of force majeure, waiting for the performance of the contract will not comply with the *bona fides* principle. However, although it is not regulated in English law, it can be applied by the application of the freedom of contract principle. However, it is based on *the pacta sunt servanda* principle in English law because there is no *bona fides* principle in English contract law. In other words, it is a consequence of adherence to the contract, and the implementation of *the bona fides* principle takes place at the parties' request in English contract law.

So, considering it is also possible in English law, it is better to put a force majeure clause in their contracts for business parties to achieve the same result.

However, the frustration doctrine applies only in the absence of an express provision in the contract allocating the risk. Therefore, if the contract contains such a *force majeure* clause covering the event that has occurred, that clause will govern and not the frustration doctrine.

Frustration in English Law differs from the doctrine of *clausa rebus sic statantibus*. There is no regulation about an adaptation of the contract to change of circumstances in English contract law as distinct from BGB, PECL, CCF, and TBK but a way for discharging from the further performance of the. So it is in the meaning of termination of a contract. However, there is a way to adapt or terminate the contract in the BGB, PECL, CCF, and TBK.

Adaptation or termination of contracts when circumstances are changed is possible in Turkish law, French law, German law, and in PECL. However, there is not any regulation on

that in CISG. There is a duty to renegotiate as distinct from others in French law and PECL. Also, the basis of *geschäftsgrundlage* in German law is broader than *clausa rebus sic stantibus* because while *clausa rebus sic stantibus* takes into account only the events following the formation of the contract, it is about before or after and present time in *geschäftsgrundlage*.

Also, frustration brings the contract to an end forthwith, without more and automatically. However, it depends on renegotiation or requests from the court according to the TBK, CCF, BGB, and PECL as distinct from Law Reform (Frustrated Contracts) Act 1943. Keeping the stand-by contract modification of terms is not possible in English Law. Adapting the contract to changed circumstances is about good faith and protecting the weaker party. However, English law has no good faith principle as distinct from BGB, PECL, CCF, and TBK.

Also, in English Law, frustration is only possible when the contract comes to be an impossible or unlawful stage to perform, or it is radically different from what the parties originally intended. However, less-than-impossible contract changes are not distinctly in the concept of frustration.

So, usually, when it comes to fault-based liability systems, it actually gives more potential to businesses that breach a contract to avoid liability and to avoid paying damages. English Law, PECL, and CISG systems that support strict liability-based contractual breach scenarios actually protect businesses more. The breaching party has very limited options to call the defense. English Law, PECL, and CISG do not want to give the parties a free pass because of their personal circumstances changed. *Clausa rebus sic statantibus* principle is regulated in PECL, but there is still a fundamental breach concept and strict liability in PECL.

However, in B2B relationships, the concept of a prudent merchant or businessman will be considered instead of ordinary or regular people in CISG, English, French, Turkish, and German law. So, similar results occur in practice. However, there is no case law of PECL, and it needs to be clarified in practice. *Clausa rebus sic stantibus* principle is based on good faith, and the reason is protecting the weaker party. However, there are professionals in B2B relations, and there is no need to protect the weaker party as in B2C or C2C relations. That is also related to methods for limiting the liability. So, it can only be thought of 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 that they have different liability systems. So there is a foreseeability theory in English law, CISG, French law, and PECL. However, while there is strict liability in English law, PECL, and CISG, it is a fault-based liability in French, German, and Turkish law. In the common law system, causality is complementary to foreseeability only in the account of liability charge. In the civil law system, where fault-based liability is adopted, causality theories have been adopted to limit liability. On the other hand, the good faith principle is applicable in PECL and French law as in Turkish and German law, unlike CISG and English law. However, there is strict liability in PECL, but it is a fault-based liability in French law.

Moreover, adequate causation is defined as the logical causal relation between a breach and the damage that it can cause according to general experience and the ordinary course of events. So, a causal relation between a breach and damage is also considered by French law. However, objective and subjective foreseeability are considered together in foreseeability theory in French law as distinct from German and Turkish law. So, only objective foreseeability is considered in German and Turkish law. Also, in French law, the equation of intentional acts and gross negligence has a particularly strong impact on the relevance of the foreseeability rule. So, it is again because there is a fault-based liability in French law. However, PECL also includes the element of negligence in the principle of foreseeability as in French law, but there is a strict liability in PECL. Also, in the common law system, as in England, foreseeability or knowledge is considered from the viewpoint of both parties, but it is just about breaching parties according to the CISG, PECL, Turkish law, French law, and German law. However, this difference does not lead to different results in terms of practice, as stated in the doctrine. Also, a moment of evaluation for adequate causality is the time when the breach of the contract occurs. On the other hand, the moment of evaluation for foreseeability theory is at the time of the conclusion of the contract. Lastly, in B2B relationships, the concept of a prudent merchant or businessman will be considered instead of ordinary or regular people in CISG, English, French, Turkish, and German law. So, similar results occur in practice.

Firstly there are similarities between English law and French law. So, both subjective foreseeability and objective foreseeability are considered. Besides that, the moment of evaluation for foreseeability is at the time of the conclusion of a contract. However, on the other hand, there are similarities between French law and German law, and Turkish law. So, intentional acts and gross negligence are considered in terms of foreseeability, and there is a fault-based liability system. Besides that, the causal relation between a breach and the damage is considered, and the good faith principle is applicable. Thus, French law combines elements

from civil law and common law systems, and it is better to accept the foreseeability theory in French law between business parties from common law and civil law systems.

Also, by considering this and prudent merchant rule, it is better to accept the foreseeability theory in French law to achieve similar results regarding the application of *Clausa rebus sic stantibus* principle.

When it comes to mitigation, similar to the foreseeability assessment, the reference should be made to the reasonable person with a case-by-case analysis as well. So, we have to consider the knowledge of prudent merchants for Turkish, German, English, and French business partners.

Mitigation is regulated and clearly distinguished from contribution to the breach of contract in English law, CISG, and PECL. The obligation to mitigate damages exists only regarding damages claims and not regarding claims in regard to the performance of the contract, as in English law and CISG. The claimant is not under a duty to mitigate, and failure to mitigate is not a fault, but the claimant should not recover the part of his or her loss that he or she could reasonably have avoided. It does not clearly exist in French, German, and Turkish law. However, a similar result is achieved through the regime on contributory negligence in German and Turkish law. The contributory negligence term is not explicitly included in Turkish law but is settled in both doctrine and judicial decisions. To some extent, the avoidability criterion of Unification Instruments and the beyond control criterion corresponds to the fault requirement of the civil law systems. Failure to mitigate is not a fault, but failure to mitigate loss may be regarded as a form of claimant's fault. The principle of mitigation of damages does not clearly exist in France. French law so far has rejected the idea of mitigation to arrive at results similar to those reached in England. Various avenues have been considered to integrate the idea of mitigation into French law. The better legal justification appears to be the requirement for a causal link to establish the damages. So, in France, where no codified rules related to comparative negligence exist, the negligent conduct of the creditor can diminish recoverable damages based on causation even while no mitigation of damages is recognized based on the full compensation principle. So, in France, it is accepted that the claimant "should not be allowed to increase damages for losses which were avoidable." So, causation and negligence are considered, and it is a fault-based liability. Also, it is seen as contributory negligence whether the idea is about mitigation.

So, it is better to apply French law again related to mitigation. So, it is about the idea of mitigation and is seen as contributory negligence in French law. Also, a similar result to mitigation is achieved through the regime on contributory negligence in German and Turkish

law. Also, it is related to the method again, and it is better to accept the foreseeability theory in French law, as stated above. So, we have to consider the knowledge of prudent merchants for Turkish, German, English, and French business partners in B2B relations. So, the same results are achieved by applying prudent merchant rule in practice according to English law, French law, German law, Turkish law, and CISG. So, when there is not a weaker party to protect, good faith can not be applied. So, it is better to apply French law again related to mitigation between business parties from common law and civil law systems.

Risk allocation is regulated similarly in the CISG, BGB, and TBK as distinct from CCF and SGA. So, it is harmonized between BGB and TBK by the effect of CISG. However, on the other hand, we can see similar case laws on overseas sales in international business law, including common law.

Using the INCOTERMS is important from the viewpoint of determining ownership rights, especially from the viewpoint of BGB and TMK. So, INCOTERMS determine the time of delivery of the goods and the time ownership rights according to BGB and TMK. Moreover, risk and property pass simultaneously during delivery, according to the BGB and TMK. However, CCF and SGA have different regulations on property transfer, and even it can be at the time of the conclusion of the contract before delivery. However, the same result can be achieved in overseas sales by using specific INCOTERMS in contracts. So, first of all, risk and property pass simultaneously according to French case law, BGB, TBK, TMK, and as a rule in SGA. On the other hand, if business parties do not put a specific INCOTERM in their contracts, the property and risks pass to the buyer, as in the case of FOB and CIF INCOTERMS, as stated in French and Turkish case laws. Also, German case law can be identical to them somehow. However, Uniform Law on Sales is unlike them because a trade term is never an INCOTERMS unless it says so. So, if business parties put FOB or CIF INCOTERMS in their contracts, the result will be the same. So, INCOTERMS plays an important role in risk allocation and determining ownership rights.

Moreover, CISG incorporates INCOTERMS. Therefore, if parties do not put specific INCOTERM in their contracts, interpretation can be made by using CISG. In addition to these, if the parties are the participating countries of the CISG, we have to consider that INCOTERMS can exclude article 31 of the CISG in international business law in terms of the determination of the place of jurisdiction in the absence of jurisdiction clause in contracts as we can see in German and French case laws. So, the intentions of the business parties on INCOTERMS are about more than just the risk allocations. Therefore, these intentions can also be considered in terms of the passing of property rights and the determination of the place of jurisdiction in the

absence of a jurisdiction clause in contracts. Besides these, in terms of EU member states, under article 5 of the Brussels I Regulation, it has been held that article 31 of the CISG can no longer serve as a basis for jurisdiction.

So, it is better to put a specific INCOTERMS and jurisdiction clause in their contracts for business parties. FOB and CIF INCOTERMS are better because if business parties do not put specific INCOTERMS on their contracts, the property and risks pass to the buyer, as in FOB and CIF INCOTERMS, as stated in French and Turkish case laws. So, risk and property pass simultaneously. Also, risk and property pass simultaneously according to BGB and, as a rule, in SGA. This way, the business parties will reach the same result from the viewpoint of the passing of risk and property.

One reason for the harmonization of laws is to boost and assist the evolution and the flow of business relations in international business law. The aim is a harmonization of the PECL in the EU. PECL is a part of *lex mercatoria*, like CISG, but not harmonized yet. Therefore, PECL is not binding even for member states of the EU. However, PECL is a fundamental point for exploring European contract law heritage and reflects the majority position on contract law matters of the EU member states, which is how contract law looks like in these countries.

French contract law is similar to PECL more than English, German, and Turkish contract laws. There are differences only in liability system and mitigation between French contract law and PECL. Also, PECL does not contain provisions concerning the delivery of goods. So, the aim is to harmonize contract law with PECL in the EU. However, there is strict liability in PECL. Therefore, considering the harmonization aim and similarity between French contract law and PECL, it can be said that French contract law is what PECL can almost be but with the difference of a fault-based liability system.

French and English contract laws go in the same direction as possible. However, the differences mainly arise from the difference in the liability systems between them.

French contract law combines common and civil law elements. Therefore, the application of French contract law between business parties from common law and civil law systems is more appropriate for both parties. Moreover, especially in B2B relations, by applying French law, similar results can be achieved regarding strict and fault-based liability systems. So, following the method and elements of French contract law can lead to harmonization between common and civil law as an alternative to PECL from the viewpoint of fault-based liability systems as in German and Turkish contract law.

BIBLIOGRAPHY

30 mars 1916 - Compagnie générale d'éclairage de Bordeaux - Rec. Lebon p. 125. Available at: http://www.conseil-etat.fr/Decisions-Avis-Publications/Decisions/Les-decisions-les-plus-importantes-du-Conseil-d-Etat/30-mars-1916-Compagnie-generale-d-eclairage-de-Bordeaux (Accessed: 08 December 2018)

Abera, Zena (2016): *Ethiopian Sales Law in the Light of International Laws and Principles of Contract*, Open Access Library Journal, Vol.3, No.8.

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

Ágoston, Gábor - Masters, Bruce (2009): *Encyclopedia of the Ottoman Empire*, Facts On File, New York, p.156

Akan, H. D. Mumcu - Balin, B. Engin (2016): *The European Union-Turkey Trade Relations under the Influence of Customs Union*, Journal of Economics, Business and Management, Vol. 4, No. 2.

Akıncı, Şahin (2020): Covid 19'un Borç İlişkilerine ve Bazı Borçlar Hukuku Sözleşmelerine Etkisi, İstanbul Ticaret Üniversitesi Sosyal Bilimler Dergisi, Covid-19 Hukuk Özel Sayısı, Vol.19, No:38.

Akıntürk, Turgut (2002): *Hukuka Giriş*, Anadolu Üniversitesi, Eskişehir

Aksel, İsmail (2013): *Turkish Judicial System - Bodies, Duties and Officials*, The Ministry of Justice of Turkey The Department for Strategy Development, Ankara. Available at: https://rm.coe.int/turkish-judicial-system-bodies-duties-and-officials-by-ismail-aksel-ju/168078f25f (Accessed: 17 May 2023)

Akseli, Orkun (2008). *Harmonisation of Secured Transactions Laws: A Comparative and International Perspective,* p.1. Available at:: http://ials.sas.ac.uk/sites/default/files/files/Research/Hart/WGH_2008_Abstracts.pdf (Accessed: 28 May 2017)

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)

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, Switzerland

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

Al-Anbaki, Majid H. K. (1978): *Passing of property in C.I.F. & F.O.B. contracts (comparative study),* (Thesis), University of Glasgow. Available at: http://theses.gla.ac.uk/3990/1/1978Al-AnbakiPhD.pdf (Accessed: 12 March 2019)

Al-Hajaj, Amir (2015): *The Concept of Fundamental Breach and Avoidance under CISG*, (Thesis), Brunel University, p.11. Available at: https://bura.brunel.ac.uk/bitstream/2438/12043/1/FulltextThesis.pdf (Accessed:15 January 2020)

Alexander, Martin - Hösker, Carsten: *Germany* In: Bird, Nicholas ed. (2019): *The Professional Negligence Law Review,* The Law Reviews, London, pp.55-67

Alibaba, Arzu (2005): *Milletlerarasi Unsurlu Sözleşmelerde Hukuk Seçimive Sınırlandırılması*, (Thesis), Ankara University. Available at: http://acikarsiv.ankara.edu.tr/browse/1528/2156.pdf (20 January 2020)

Alper, Serdar (2014): *İhracat Performansı İle Uluslararası Rekabet Gücünün Yapısal Belirleyicileri Arasındaki İlişki: OECD ve BRIIC Ülkeleri Uygulaması*, (Thesis), Hacettepe Üniversitesi. Available at: http://openaccess.hacettepe.edu.tr:8080/xmlui/bitstream/handle/11655/2403/07d353ba-63b6-4bd5-a9df-6b0f24f21982.pdf?sequence=1&isAllowed=y (Accessed: 11 March 2020)

Altenkirch, Markus (2017): *Germany: Calculation of Damages for a Breach of a Financial Statements Warranty*, Global Arbitration News. Available at: https://globalarbitrationnews.com/calculation-of-damages-for-a-breach-of-a-financial-statements-warranty/

Anderson, Arthur (1937): *Quasi Contractual Recovery in the Law of Sales*, Minnesota Law Review, Vol.21

Andersen, Camilla Baasch: *Macro-Systematic Interpretation of Uniform Commercial Law: The Interrelation of the CISG and Other Uniform Sources* In: Janssen, Andre - Meyer, Olaf eds. (2009): *CISG Methodology*, Sellier, Munich, pp.207-260

Anglia Television Ltd v Reed [1972] 1 QB 60

Anık, Gülgün (2005): *Borçlunun Temerrüdünden Dolayı Sözleşmeden Dönme*, Türkiye Barolar Birliği Dergisi, No.59.

Apaydın, Bahadır (2013): *Kapitülasyonlar ve Osmanlı - Türk Adli ve İdari Modernleşmesi,* Adalet Yayınevi, Ankara.

Apaydın, Eylem (2013): *Satım Hukuku Özelinde Uluslararası Sözleşme Hukukunun Birleştirilmesi Çalışmalarının KronolojisiThe Chronicles of Unifaction of International Contract Law, Particularly Sales Law*, Journal of Yaşar University, Vol.8, Special Issue.

Arat, Ayşe (2006): *Sözleşmenin Değişen Şartlara Uyarlanması*, (Thesis), Selçuk Üniversitesi. Available at:http://acikerisimarsiv.selcuk.edu.tr:8080/xmlui/bitstream/handle/123456789/9264/211058.pdf?sequence=1&isAllowed=y (Accessed: 8 November 2018)

Arslan, Çisil Durgun (2019): *Türk Hukuku ile Karşılaştırmalı Olarak İngiliz Hukukunda İfa Menfaati Kavramı Merkezinde Yaptırımlar,* (Thesis), Marmara Üniversitesi. Available at: https://acikbilim.yok.gov.tr/bitstream/handle/20.500.12812/307846/yokAcikBilim_10304449.pdf?sequence=-1 (Accessed: 30 May 2023)

Arvind, T.T. (2019): *Contract Law,* Oxford University Press, New York.

Ataie, A (2018): *Negotiation damages: compensation for direct loss,* (Thesis), University of Oxford. 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)

Atamer, Yeşim M.*: Satıcının Sözleşmeye Aykırı Davranışı Ekseninde CISG'ın İfa Engelleri Sistemine Genel Bakış In:* Atamer, Yeşim M. ed. (2008): *Milletlerarası Satım Hukuku: Milletlerarası Mal Satımına İlişkin Sözleşmeler Hakkında Birleşmiş Milletler Antlaşması (CISG)*, On İki Levha Yayıncılık, İstanbul, pp.221-266

Atamer, Yeşim M.(2013): *Zararın Soyut Yöntem ile Hesaplanması ve Bu Hesabın CISG Madde 74 ve 76 Örneğinde Mahrum Kalınan Kâr Talebi ile İlişkisi*, Galatasaray Üniversitesi Hukuk Fakültesi Dergisi, No.1

Ateş, Derya (2007): *Sözleşme Özgürlüğü Yönünden Dürüstlük Kuralları*, Türkiye Barolar Birliği Dergisi, Vol.20, No.72.

Austria 6 February 1996 Supreme Court (Propane case). Available at: http://cisgw3.law.pace.edu/cases/960206a3.html (Accessed: 10 December 2018)

Austria 9 March 2000 Supreme Court (*Roofing material case*). Available at: http://cisgw3.law.pace.edu/cases/000309a3.html (Accessed: 10 December 2018)

Austria 14 January 2002 Supreme Court (Cooling system case). Available at: http://cisgw3.law.pace.edu/cases/020114a3.html (Accessed: 15 December 2019)

Austrian Supreme Court (Reference number: 1Ob292/99v, dated on 28.04.2000). Available at: https://www.uncitral.org/clout/clout/data/aut/clout_case_427_leg-1652.html (Accessed: 30 May 2023)

Austrian Supreme Court (Reference number: 7Ob 301/01t, dated on 14.01.2002). Available at: https://www.uncitral.org/clout/clout/data/aut/clout_case_541_leg-1423.html (Accessed: 30 May 2023)

Ay, Sema (2019): *Türkiye'nin Avrupa Birliği Çıkmazı: Gümrük Birliği Anlaşması Çerçevesinde Değerlendirmeler*, Tesam Akademi Dergisi, Vol.6, No.2.

Aybay, Memet Erdem (2016): *Sözleşmenin Değişen Koşullara Göre Uyarlanması (Yargıtay Hukuk Genel Kurulu Kararı İncelemesi)*, Marmara Üniversitesi Hukuk Fakültesi Hukuk Araştırmaları Dergisi, Vol.22, No.3.

Aybey, Ali (2004): *Turkey and the European Union Relations: A Historical Assessment*, Ankara Avrupa Çalışmalan Dergisi, Vol.4, No.1.

Aydın, M. Akif. (2001). *Türk Hukuk Tarihi*, Beta, İstanbul.

Ayhan İzmirli, Lâle (2017): *Lex Mercatoria'da Culpa in Contrahendo Sorumluluğu*, Milletlerarası Hukuk ve Milletlerarası Özel Hukuk Bülteni, Vol.37, No.2

Aytuğ, Hüseyin - Kütük, Merve Mavuş - Oduncu, Arif - Togan, Sübidey (2017): *Twenty Years of the EU-Turkey Customs Union: A Synthetic Control Method Analysis*, Journal of Common Market Studies, Vol.55, No.3.

Backhaus, Richard (2004): *The Limits of the Duty to Perform in the Principles of European Contract Law*, Electronic Journal of Comparative Law, vol.8, No.1. Available at: https://www.ejcl.org/81/art81-2.PDF (Accessed: 23 November 2018)

Banakas, Stathis (2009): *Liability for Contractual Negotiations in English Law: Looking for the Litmus Test*, InDret, Vol. 1

Bani, Mehmet Hulusi (2015): *Ticari Satımda Satıcının Temerrüdü*, (Thesis), İstanbul Kültür Üniversitesi. Available at: https://acikerisim.iku.edu.tr/server/api/core/bitstreams/19abe9a9-7d1c-4f2c-9332-e462e0aecfd2/content (Accessed: 20 May 2023)

Beale, Hugh - Fauvarque-Cosson, Bénédicte - Rutgers, Jacobien – Vogenauer, Stefan (2019): *Cases, Materials and Text on Contract Law*, Hart Publishing, Oxford

Bartha, Ildiko (2016): EU Internal Market Law 1 Slides, Manuscript.

Bartha, Ildiko (2016): Regional Economic Integrations Slides, Manuscript.

Barton, Todd (2004): *Filling in the Gaps in Civil Liability: The Development of Unjust Enrichment in Rhode Island*, Roger Williams University Law Review, Vol.9, No.2

Baskind, Eric - Osborne, Greg - Roach, Lee (2013): *Commercial Law*, Oxford University Press, Oxford.

Baykal, C. Murat (2008): Hukuk-Ekonomi İlişkisi ve Ekonomi Hukuku Üzerine, Ankara Barosu Dergisi, Vol.66, No.4, pp.84-85

Benli, Erman (2010): *Ekonomik Zarar*, Galatasaray Üniversitesi Hukuk Fakültesi Dergisi, Prof. Dr. Köksal Bayraktar'a Armağan, Vol.2, No.1.

Berg, Jan Henning (2004): *Case Presentation: Switzerland 2 December 2004 District Court Zug (Dextrose case)*. Available at: http://cisgw3.law.pace.edu/cases/041202s1.html (Accessed: 10 October 2017)

Berg, Jan Henning (2007): *Case Presentation: Switzerland 29 April 2004 Commercial Court St. Gallen (Lenses case)*. Available at: https://www.cisg.law.pace.edu/cisg/wais/db/cases2/040429s1.html (Accessed: 9 October 2017)

Berg, Jan Henning (2007): *Case Presentation: Germany 21 December 2001 District Court Hamburg (Stones case)*. Available at: https://www.cisg.law.pace.edu/cisg/wais/db/cases2/011221g1.html (Accessed: 10 October 2017)

Berlingher, Daniel (2018): *Regulating Free Movement of Goods within the European Union*, Journal of legal studies, Vol. 21, No.35.

BGH NJW 1959, 2203 V. Civil Senate. Available at: https://law.utexas.edu/transnational/foreign-law-translations/german/case.php?id=942 (Accessed: 9 November 2018)

Bilgin, Azime Aslı (2018): *The Need for a Modernized EU-Turkey Customs Union: The Problems and the Solution Suggestions*, Athens Journal of Mediterranean Studies- Vol.4, No. 2.

Bingöl, Fatma Itır (2008): *Uluslararası Ticari Satım Sözleşmelerinde Mücbir Sebep*, (Thesis), Dokuz Eylül Üniversitesi. Available at:

https://acikerisim.deu.edu.tr/xmlui/bitstream/handle/20.500.12397/12285/249364.pdf?sequence=1&isAllowed=y (Accessed: 27 December 2016)

Bird, Nicholas - Howe, Bryony: *England and Wales* In: Bird, Nicholas ed. (2019): *The Professional Negligence Law Review*, The Law Reviews, London, pp.44-54

Birks, Peter (1985): *An Introduction to the Law of Restitution*, Oxford University Press, New York

Birks, Peter (2000): *At the Expense of the Claimant: Direct and Indirect Enrichment in English Law*, Oxford U Comparative L Forum 2. Available at:https://ouclf.iuscomp.org/the-german-act-to-modernize-the-law-of-obligations-in-the-context-of-common-principles-and-structures-of-the-law-of-obligations-in-europe/ (Accessed: 10 November 2018)

Black, Henry Campbell (1979): *Black's Law Dictionary*, West Publishing Co., St. Paul.

Blase, Friedrich - Höttler, Philipp eds**.** (2004): *Remarks on the Damages Provisions in the CISG, Principles of European Contract Law (PECL) and UNIDROIT Principles of International Commercial Contracts (UPICC)*. Available at: http://cisgw3.law.pace.edu/cisg/text/peclcomp74.html (Accessed: 3 February 2020)

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

Bucur, Loredana Ioana (2018): *Lex Mercatoria, Soft Law and a closer aproach of UNIDROIT Principles*, Law Review, Vol.8, No.2.

Bulgaria 12 February 1998 Arbitration Case 11/1996 (*Steel ropes case*). Available at: http://cisgw3.law.pace.edu/cases/980212bu.html (Accessed: 10 December 2018)

Bulgaria 30 November 1998 Arbitration Case 14/98 (*Production of automobiles*). Available at: http://cisgw3.law.pace.edu/cases/981130bu.html (Accessed: 20 September 2017)

Bunge SA v Kyla Shipping Company Ltd [2012] EWHC 3522 (Comm) (10 December 2012). Available at: https://www.bailii.org/ew/cases/EWHC/Comm/2012/3522.html (Accessed: 10 November 2018)

Burrows, Andrew - McKendrick, Ewan - Edelman, James (2007): *Cases and Materials on the Law of Restitution,* Oxford University Press, New York

Bussani, Mauro - Palmer, Vernon Valentine: *The case studies* In: Bussani, Mauro - Palmer, Vernon Valentine eds. (2003): *Pure Economic Loss in Europe*, Cambridge University Press, New York, pp.171-520

Bussani, Mauro - Palmer, Vernon Valentine: *The Notion of Pure Economic Loss and Its Setting* In: Bussani, Mauro - Palmer, Vernon Valentine eds. (2003): *Pure Economic Loss in Europe*, Cambridge University Press, New York, pp.3-24

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)

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, pp.237-254

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)

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)

Cashin-Ritaine, Eleanor (2001): *Emprevizyon, Hardship ve İşlem Temelinin Çökmesi: Pacta Sunt Servanda ve Alman-Fransız Hukuki İlişkilerinde Sözleşmelerin Uyarlanmasına Giden Yollar*, İstanbul Üniversitesi Hukuk Fakültesi Mecmuası, Vol.63, No.1-2.

Cenini, Marta - Parisi, Francesco: *An Economic Analysis of the CISG* In: Janssen, Andre - Meyer, Olaf eds. (2009): *CISG Methodology*, Sellier, Munich

Chengwei, Liu (2003): *Remedies for Non-performance:Perspectives from CISG, UNIDROIT Principles & PECL*. Available at: http://www.cisg.law.pace.edu/cisg/biblio/chengwei.html (Accessed: 10 May 2017)

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.

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

Christiansen, Thomas: *The EU reform process: from the European Constitution to the Lisbon Treaty* In: Carbone, Maurizio ed. (2010): *National Politics and European Integration: From the Constitution to the Lisbon Treaty*, Edward Elgar, Cheltenham, pp.16-33

Chung, Gordon (2017): *A Comparative Analysis of the Frustration Rule: Possibility of Reconciliation Between Hong Kong-English 'Hands-off Approach' and German 'Interventionist Mechanism'*, European Review of Private Law, Vol.25, No.1.

CISG-AC Opinion No 6, Calculation of Damages under CISG Article 74. Rapporteur: Professor John Y. Gotanda, Villanova University School of Law, Villanova, Pennsylvania, USA. Adopted by the CISG-AC at its Spring 2006 meeting in Stockholm, Sweden. Available at: https://cisgac.com/opinions/cisgac-opinion-no1-copy-copy-3/ (Accessed: 3 June 2023)

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)

Ciacchi, Aurelia Colombi (2010): *Party Autonomy as a Fundamental Right in the European Union***,** European Review of Contract Law, Vol.6, No.3.

Civil Senate I at the German Supreme Court (case no. I 307/21, dated on 05.04.1922)

Clausing, Kimberly A. (2000): *Customs Unions and Free Trade Areas*, Journal of Economic Integration, Vol.15, No.3.

Coetzee, Juana (2010): *INCOTERMS as a form of standardisation in international sales law: an analysis of the interplay between mercantile custom and substantive sales law with specific reference to the passing of risk*, (Thesis), University of Stellenbosch. Available at: https://scholar.sun.ac.za/bitstream/handle/10019.1/5222/coetzee_incoterms_2010.pdf?sequence=2&isAllowed=y (Accessed: 12 March 2019)

Collins, David (2009). *Reliance Remedies at the International Centre for the Settlement of Investment Disputes*, Northwestern Journal of International Law & Business, Vol.29, No.1.

Collins v. Secretary of State for Trade and Industry [2001] UKEAT 1460_99_3101 (31 January 2001). Available at: https://www.bailii.org/uk/cases/UKEAT/2001/1460_99_3101.html (Accessed: 10 November 2018)

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.7-22

Cotton, Samantha (1999): *Remedies for breach of contract*. Available at: https://uk.practicallaw.thomsonreuters.com/7-101-0603 (Accessed: 3 February 2020)

Craig, Paul - De Búrca, Gráinne (2011): *EU LAW Text, Cases, and Materials*, Oxford University Press, New York.

Cruz, Peter de (1999): *Comparative Law in a Changing World*, Cavendish Publishing, London.

Cullinane v. British "Rema" Manufacturing Co. Ltd. [1954] 1 Q.B. 292

Cuniberti, Gilles (2014): *Three Theories of Lex Mercatoria*, Columbia Journal of Transnational Law, Vol.52, No.1.

Cvetkovic, Predrag (2002): *The Characteristics of an Offer in CISG and PECL*, Pace International Law Review, Vol.14, No.1.

CTI Group Inc v Transclear SA [2008] EWCA Civ 856 (22 July 2008). Available at: http://www.bailii.org/ew/cases/EWCA/Civ/2008/856.html (Accessed: 10 November 2018)

Çakırca, Seda İrem (2011): *Türk Sorumluluk Hukukunda Yansıma Zararı Kuramı*, (Thesis), İstanbul Üniversitesi, p.16. Available at: http://nek.istanbul.edu.tr:4444/ekos/TEZ/47883.pdf (Accessed: 3 February 2020)

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

Çeker, Mustafa (2015): *Limited Şirketlerde Ortak Sayısının Sınırlandırılması*, Ticaret ve Fikri Mülkiyet Hukuku Dergisi, Vol.1, No.1.

Çelebi, Funda : *Haksiz Fiil Sorumluluğu (Unsurlar, Tazminat, Hukuka Aykiriliği Kaldiran Haller, Zamanaşımı, Yargılama)* In: Belen, Herdem – Altay, İsmail eds. (2014): *Prof. Dr. İsmet Sungurbey'e Armağan, Borçlar Kanunu Genel Hükümler Konferansları, C. II, Haksız Fiilden Doğan Borç İlişkileri, Borç İlişkisinin Üçüncü Kişilere Etkisi, Borçların ve Borç İlişkilerinin Sona Ermesi, Zamanaşımı, 28-29 Nisan 2012*, İstanbul Barosu Yayınları, İstanbul, pp.13-27

Çınar, Nihal Ural (2006): *Tüketicinin Korunması Hakkında Kanun'a Göre Ayıba Karşı Tekeffül*, (Thesis), Istanbul Kültür Üniversitesi. Available at: https://openaccess.iku.edu.tr/bitstream/handle/11413/555/NihalUral%c3%87%c4%b1narYLtez.pdf?sequence=1&isAllowed=y (Accessed: 3 April 2018)

D. 1876. 1. 193 Case De Gallifet v. Commune de Pélissanne. Available at: https://law.utexas.edu/transnational/foreign-law-translations/french/case.php?id=1186 (Accessed: 9 November 2018)

Dannemann, Gerhard : *Common law-based contracts under German law* In: Cordero-Moss, Giuditta ed. (2011): *Boilerplate Clauses, International Commercial Contracts and the Applicable Law*, Cambridge University Press, New York, pp.62-79

de Boer, Nik J. (2013): *Fundamental Rights and the EU Internal Market: Just how Fundamental are the EU Treaty Freedoms? A Normative Enquiry Based on John Rawls' Political Philosophy*, Utrecht Law Review, Vol. 9, No. 1,

Demir, Bahadır (2014): *Transition of Damage in Contract of Sale*, International Journal of Social Sciences, Vol.3, No. 5, Special Issue.

Demirsatan, Barış (2019): *Türk Borçlar Kanunu Çerçevesinde Sözleşmenin Haksız Olarak Sona Erdirilmesi*, (Thesis), İstanbul Üniversitesi. Available at: http://nek.istanbul.edu.tr:4444/ekos/TEZ/ET001094.pdf (Accessed: 30 May 2023)

DiMatteo, Larry A. – Dhooge, Lucien J. - Greene, Stephanie – Maurer, Virginia G. - Pagnattaro, Marisa Anne (2005): *International Sales Law: A Critical Analysis of CISG Jurisprudence*, Cambridge University Press, New York

DiMatteo, Larry A. (2015): *Contractual Excuse Under the CISG: Impediment, Hardship, and the Excuse Doctrines*, Pace International Law Review, Vol.27, No.1.

Dimsey, Mariel (2007): *CISG Case Presentation: Germany 13 January 1993 Appellate Court Saarbrücken (Doors case).*Available at: https://cisgw3.law.pace.edu/cases/930113g1.html (Accessed: 19 October 2017)

Doğan, Gülmelahat (2014): *Aşırı İfa Güçlüğü Nedeniyle Sözleşmenin Değişen Koşullara Uyarlanması*, Türkiye Barolar Birliği Dergisi, Vol.111.

Downe , Alexis (2016): *The Reform of French Contract Law: A Critical Overview*, Revista da Faculdade de Direito –UFPR, Vol.61, No.1.

Dönmez, Cansu (2019*): The Buyer's and Seller's Exclusion From Liability Under the CISG and Its Comparision with the Turkish Law of Obligations,* Public and Private International Law Bulletin, Vol.39, No.1.

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)

Dubay, Carolyn A. (2011): *Lex Mercatoria or the Law Merchant*, International Judicial Monitor. Available at: http://www.judicialmonitor.org/archive_summer2011/generalprinciples.html (Accessed: 18 May 2017)

Duncan, John C. Jr. (2000): *Nachfrist Was Ist? Thinking Globally and Acting Locally: Considering Time Extension Principles of the U.N. Convention on Contracts for the International Sale of Goods in Revising the Uniform Commercial Code*, Brigham Young University Law Review, No.4.

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)

Erauw, Johan: *Observations on Passing of Risk* In: Ferrari,Franco - Flechtner, Harry - Brand, Ronald eds. (2004): *The Draft Uncitral Digest And Beyond: Cases, Analysis And Unresolved Issues in the U.N. Sales Convention,* Sellier, München, pp.292-318

Erdem, H. Ercüment (2013): *Viyana Satım Antlaşması'na Göre Alıcı ve Satıcının Borçlarının İhlalinin Sonuçları ve Türk Hukuku İle Karşılaştırılması*, Galatasaray Üniversitesi Hukuk Fakültesi Dergisi, No.1

Eren, Fikret (1975): *Sorumluluk Hukuku Açısından Uygun İlliyet Bağı Teorisi*, *Ankara Üniversitesi Hukuk Fakültesi* Yayınları, Ankara.

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)

Ergüne, Mehmet Serkan (2007): *Olumsuz Zarar*, (Thesis), İstanbul Üniversitesi. Available at: http://nek.istanbul.edu.tr:4444/ekos/TEZ/42355.pdf (Accessed: 20 May 2023)

Ernst, Wolfgang: *New Rules of Breach of Contract in Germany* In: Bell, John - Dashwood, Alan - Spencer, John – Ward, Angela eds. (2004): *Cambridge Yearbook of European Legal Studies Vol 5, 2002-2003*, Hart Publishing, Portland, pp.333-356

European Commission (2020): *Countries and regions: Turkey*. Available at: https://ec.europa.eu/trade/policy/countries-and-regions/countries/turkey/ (Accessed: 4 February 2020)

Faber, Wolfgang - Lurger, Brigitta eds. (2011): *National Reports on the Transfer of Movables in Europe: Germany, Greece, Lithuania, Hungary*, Sellier, Munich.

Factor v. Peabody Tailoring System, (1922) 177 Wis. 238, 187 N. W. 984

Fages, Fabrice - Saarinen, Myria : *France* In: Bierman, Steven M. ed. (2019): *The Complex Commercial Litigation Law Review*, The Law Reviews, London, pp.71-87

Fauvarque-Cosson, Bénédicte - Mazeaud, Denis (2008): *European contract law: Materials for a common frame of reference: Terminology, guiding principles, model rules*, Sellier, Munich.

Felemegas, John ed. (2001). *Remarks on good faith and fair dealing.* Available at: http://cisgw3.law.pace.edu/cisg/text/peclcomp7.html (10 December 2019)

Felemegas, John (2002): *Comparison between provisions of the CISG (Article 20) and the counterpart provisions of the Principles of European Contract Law*. Available at: https://www.cisg.law.pace.edu/cisg/text/peclcomp20.html (Accessed: 19 October 2017)

Felemegas, John (2004): *Comparison between provisions of the CISG regarding late acceptance (Article 21) and the counterpart provisions of the PECL (Art. 2:207).* Available at: https://www.cisg.law.pace.edu/cisg/text/peclcomp21.html (Accessed: 19 October 2017)

Felemegas, John (2004): *Comparison between provisions of the CISG regarding withdrawal of acceptance (Art. 22) and the counterpart provisions of the UNIDROIT Principles of International Commercial Contracts (Art. 2.10).* Available at: https://www.cisg.law.pace.edu/cisg/text/anno-art-22.html (Accessed: 19 October 2017)

Fezer, Tamas (2016): Dispute Settlement Slides, Manuscript.

Fezer, Tamas (2016): International Sale of Goods Slides, Manuscript.

Fézer, Tamas (2016): Sources and principles of international business law Slides, Manuscript.

Fézer, Tamas (2016): Transportation Slides, Manuscript.

Flechtner, Harry (2001): *Comparing the General Good Faith Provisions of the PECL and the UCC: Appearance and Reality*, Pace International Law Review, Vol.13, No.2.

Fontaine, Marcel - De Ly, Filip (2006): *Drafting International Contracts*, Transnational Publishers, Ardsley.

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)

France 18 March 1998 Appellate Court Paris (*Franco-africaine v. More*). Available at: http://cisgw3.law.pace.edu/cases/980318f1.html (Accessed: 10 December 2018)

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).

French Supreme Court, Commercial Chamber, (Appeal number: 91-18.842, dated on 22 February 1994)

French Supreme Court, Commercial Chamber, (Appeal number: 00-10.243, 00-10.949, dated on 26 november 2003)

Friedmann, Daniel: *Economic Aspects of Damages and Specific Performance Compared* In: Saidov, Djakhongir - Cunnington, Ralph eds. (2008): *Contract Damages: Domestic and International Perspectives*, Hart Publishing, Oxford, pp.65-90

Fucci, Frederick R. (2006): *Hardship and Changed Circumstances as Grounds for Adjustment or Non-Performance of Contract: Practical Considerations in International Infrastructure Investment and Finance*, American Bar Association Section of International Law Spring Meeting, New York, pp.3-5. Available at: https://files.arnoldporter.com/hardship_excuse_article.pdf (Accessed: 19 November 2018)

Galgano, Francesco (1995): *The New Lex Mercatoria*, Annual Survey of International & Comparative Law, Vol.2, No.1.

Geest, Gerrit De: *Specific Performances, Damages and Unforeseen Contingencies in the Draft Common Frame of Reference* In: Chirico, Filomena – Larouche, Pierre eds. (2010): *Economic Analysis of the DCFR: The work of the Economic Impact Group within CoPECL*, Sellier European Law Publishers GmbH, Munich, pp.123-133

German Federal Supreme Court (case no. VIII ZR 275/ 04, dated on 20.07.2005)

German Federal Supreme Court (case no. X ZR 134/04, dated on 26.07.2005)

German Federal Supreme Court (case no. VIII ZR 120/ 04, dated on 15.03.2006)

German Federal Supreme Court (case no. VIII ZR 108/12, dated on 07.11.2012)

Geyikdağı, V. Necla (2011): *Foreign Investment in the Ottoman Empire : International Trade and Relations 1854-1914*, I.B.Tauris Publishers, London ; New York.

Gezder, Ümit (2016): *Pre-Contractual Liability*, Medeniyet Law Review, Vol.1, No:1

Goodman, Jeffrey L. - Peacock, Daniel R. - Rutan, Kevin J. (2019): *A Guide to Understanding the Economic Loss Doctrine*, Drake Law Review, Vol.67, No.1.

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

Gotanda, John Y. (2006): *Damages in Lieu of Performance because of Breach of Contract*, Villanova University School of Law Working Paper Series, No.53.

Gök, Yaşar (2001*): 2886 sayılı Devlet İhale Kanunu Kapsamında Yürütülen Yapım İşlerine İlişkin Sözleşmelerin Feshi ve Doğurduğu Hukuki Sonuçlar*, Sayıştay Dergisi , No.40

Görener, Aylin (2019): *Culpa In Contrahendo Sorumluluğu*, İstanbul Ticaret Üniversitesi Sosyal Bilimler Dergisi, Vol.18, No.36

Gülel, İlhan (2019): *Viyana Satım Sözleşmesinin (CISG) İfa Engelleri Sistemi ve Bu Sistemde Alıcının Sahip Olduğu Haklar*, Türkiye Adalet Akademisi Dergisi, Vol.11, No.38.

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

Gümüş, Mustafa Alper (2016): *6102 Sayılı Türk Ticaret Kanunu (TTK) m. 18/II'de Yer Alan "Basiretli İş Adamı (Tacir) Davranışı" Ölçütünün İyiniyetin (TMK m.3) Varlığının Belirlenmesindeki İşlevi*, Marmara Üniversitesi Hukuk Fakültesi Hukuk Araştırmaları Dergisi, Vol.22, No.3.

Gündüz, Şefika Deren (2019): *Olumlu zarar*, (Thesis), İstanbul Üniversitesi. Available at: http://nek.istanbul.edu.tr:4444/ekos/TEZ/ET001096.pdf (Accessed: 29 May 2023)

Gürkan, Selin (2015): *Türk Satım Hukuku ile karşılaştırmalı olarak CISG uyarınca tazminatın hesaplanması*, (Thesis), İstanbul Bilgi Üniversitesi. Available at: http://openaccess.bilgi.edu.tr:8080/xmlui/bitstream/handle/11411/743/T%c3%bcrk%20Sat%c4%b1m%20Hukuku%20%c4%b0le%20Kar%c5%9f%c4%b1la%c5%9ft%c4%b1rmal%c4%b1%20Olarak%2c%20CISG%20Uyar%c4%b1nca%20Tazminat%c4%b1n%20H....pdf?sequence=3&isAllowed=y (Accessed: 9 December 2019)

Gürkan, Ülker (1988): *Montesquieu ve Kanunların Ruhu (Hukuk Sosyolojisi Açısından Bir Değerlendirme)*, Ankara Hukuk Fakültesi Dergisi, Vol.40, No.1.

Güven, Koray (2016): *Hukuk Çevreleri Ayrımında Alman Hukuku'nun Yeri ve Temel Özellikleri*, Ankara Üniversitesi Hukuk Fakültesi Dergisi Vol.65, No.3.

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

Häcker, Birke: Contract and Conveyance: *The Further Repercussions of Different Transfer Systems* In: Cartwright, John - López y López, Ángel M eds. (2021): *Property and Contract: Comparative Reflections on English Law and Spanish Law*, Hart Publishing, Oxford, pp.89-136

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, pp.1-16

Helvacı, Ilhan (2017): *Turkish Contract Law*, Springer.

Hesselink, Martijn W.(2002): *The New European Private Law: Essays on the Future of Private Law in Europe*, Kluwer Law International, Hague

Hewlett-Packard France v Matrox Graphics Inc., 2020 QCCS 78

Hondius, Ewoud - Heutger, Viola – Jeloschek, Christoph – Sivesand, Hanna – Wiewiorowska, Aneta (2008): *Principles of European Law: Sales (PEL S)*, Sellier European Law Publishers , Munich

Hough, Tracey - Kühnel-Fitchen, Kathrin (2017): *Optimize Contract Law*, Routledge, New York.

Howard, M.N.: *Frustration and Shipping Law—Old Problems, New Contexts* In: McKendrick, Ewan ed. (2013): *Force Majeure and Frustration of Contract*, Informa Law from Routledge, Abingdon, pp.123-138

Huber, Peter - Mullis, Alastair (2007): *The CISG: A new textbook for students and practitioners*, Sellier, Munich.

Hutchison, Dale (2004). *Back to basics: reliance damages for breach of contract revisited*: notes. South African Law Journal, Vol.121, No.1

ICC Arbitration Case No. 8128 of 1995 (*Chemical fertilizer case*). Available at: http://cisgw3.law.pace.edu/cases/958128i1.html (Accessed: 12 March 2019)

İnce, Nurten (2016): *Alman Hukukunda İfa İmkansızlığı ile İşlem Temelinin Bozulması Arasındaki İlişki*, Legal Hukuk Dergisi, Vol.14, No.165.

Infante Ruiz, Francisco José - Oliva Blázquez, Francisco (2022*): Contracts Contrary to Fundamental Principles and Mandatory Rules of European Contract Law*, InDret, Vol. 2

İntan, Nurkut (1966): *Kaanunname-î Ticarete Göre Protestolar*, Ankara Üniversitesi Hukuk Fakültesi Dergisi, Volume 22, No.1.

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.

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)

James v The Greytree Trust [1996] UKEAT 699_95_1701 (17 January 1996). Available at: https://www.bailii.org/uk/cases/UKEAT/1996/699_95_1701.html (Accessed: 10 November 2018)

JCP 1993. II. 22614 Case Société française des pétroles BP v. Huard. Available at: https://law.utexas.edu/transnational/foreign-law-translations/french/case.php?id=1159 (Accessed: 9 November 2018)

Johan Erauw: *Observations on passing of risk* In: Ferrari,Franco - Flechtner, Harry - Brand, Ronald A. eds. (2004): *The Draft Uncitral Digest And Beyond: Cases, Analysis And Unresolved Issues in the U.N. Sales Convention,* Sellier, München, pp.292-318

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.

Jupille, Joseph - Mattli, Walter - Snidal, Duncan (2013): *Institutional Choice and Global Commerce*, Cambridge University Press, New York.

Kahn-Freund, Otto (1974): *On Use and Misuse of Comparative Law*, The Modern Law Review, Vol.37, No.1.

Kanbur, Mehmet - Bernat, Tomasz (2013): *Europeanization in Turkey and accession process to the European Union*, Journal of International Studies, Vol.6, No.2.

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

Kargı, Bilal (2012): *İnsan Düşüncesinde İktisadi Alanın (Yeniden) Yapılanması Üzerine Spekülasyonlar*, Gümüşhane Üniversitesi SBE Dergisi, Vol. 3, No. 6.

Karnıbüyük, Mustafa (2018): *Montesquieu'nün İklim Teorisi*, Sinop Üniversitesi Sosyal Bilimler Dergisi, Vol.2, No.2.

Kayaoğlu, Turan (2010): *Legal Imperialism: Sovereignty and Extraterritoriality in Japan, the Ottoman Empire, and China*, Cambridge University Press, New York.

Kayibanda, Richard (2013): *Passing of Property in Goods in Contracts of International Sale of Goods*, The Estey Centre Journal of International Law and Trade Policy, Vol.14, No:2.

Kılıçoğlu, Ahmet M. (2008): *Türk Borçlar Kanunu Tasarısı'na Eleştiriler Rapor*, Türkiye Barolar Birliği Yayınları, Ankara.

Kiene, Sörren: *German Country Analysis: Part II* In: DiMatteo, Larry A. ed. (2014): *International Sales Law : A Global Challenge*, Cambridge University Press, New York, pp.377-398

Knowles, Roger (2012): *200 Contractual Problems and their Solutions*, Wiley-Blackwell, UK.

Kocaağa, Köksal (2008): *Sözleşmenin Kurulabilmesi İçin Tarafların İrade Beyanları Arasındaki Uygunluğun Kapsamında Yer Alması Gereken Noktalar*, Türkiye Barolar Birliği Dergisi, Vol.21, No.79.

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.

Koçak, Özlem Süren (2009): *Türkiye'de Yargının Örgütlenmesi ve Adalet Sisteminin Problemleri*, Türkiye Barolar Birliği Dergisi, No:85

Kokorin, Ilya - van der Weide, Jeroen (2015*): Force Majeure and Unforeseen Change of Circumstances. The Case of Embargoes and Currency Fluctuations (Russian, German and French Approaches)*, Russian Law Journal, Vol.3, No.3.

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.245-264

Komarov, A. S. - Muranov, A. I. - Karetnaya, N. S. (2012): *CISG Case Presentation: Russia 15 April 2011 Supreme Arbitration Court (or Presidium of Supreme Arbitration Court) of the Russian Federation*. Available at: https://cisgw3.law.pace.edu/cisg/wais/db/cases2/110415r1.html (Accessed: 29 September 2017)

Koşar, Günhan (2019): *Haksız Fiil Sorumluluğunda Kusur ve Etkisi*, (Thesis), Hacettepe Üniversitesi. Available at: http://www.openaccess.hacettepe.edu.tr:8080/xmlui/bitstream/handle/11655/7694/10243347.pdf?sequence=2&isAllowed=n (Accessed: 27 December 2021)

Kouladis, Nicholas (2006): *Principles of Law Relating to International Trade*, Springer, New York.

Koziol, Helmut (2006): *Recovery for Economic Loss in the European Union*, Arizona Law Review, Vol.48, No.4.

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)

Kritzer, Albert H. (2016): *CISG: Table of Contracting States*. Available at: https://www.cisg.law.pace.edu/cisg/countries/cntries.html (Accessed: 8 March 2019)

Kuran, Timur (2004): *Why the Middle East is Economically Underdeveloped: Historical Mechanisms of Institutional Stagnation*, Journal of Economic Perspectives, Vol.18, No.3.

Kurt, L. Müjde (2015): *Zarar görenin zararı azaltma külfeti*, Ankara Üniversitesi Hukuk Fakültesi Dergisi, Vol.64, No.3.

Küçükpehlivan, Olcay (2006): *Sözleşmelerin İnternet Aracılığı İle Kurulması Ve Geçerliliği,* (Thesis), Ankara Üniversitesi, p.74. Available at: http://acikarsiv.ankara.edu.tr/browse/1354/1956.pdf (Accessed: 23 October 2017)

Laemmli, Thomas (2014): *Transfer of Ownership in International Sales of Goods, (Thesis),* University of Cape Town, p.23. Available at: https://open.uct.ac.za/bitstream/handle/11427/4434/thesis_law_lmmtho001.pdf?sequence=1&isAllowed=y (Accessed: 12 March 2019)

Lando, Henrik - Rose, Caspar (2000): *On Specific Performance in Civil Law and Enforcement Costs,* Working Papers / Department of Finance. Copenhagen Business School, No.2000-10.

Lando, Ole (2001): *Salient Features of the Principles of European Contract Law: A Comparison with the UCC*, Pace International Law Review, Vol.13, No.2

Lando, Ole - Beale, Hugh eds. (2000): *Comments and Notes: PECL Article 2:103: Sufficient Agreement*, Principles of European Contract Law: Parts I and II, Kluwer Law International . Available at: http://www.cisg.law.pace.edu/cisg/text/peclcomp14.html(Accessed: 10 September 2017)

Lando, Ole - Beale, Hugh eds. (2000): *Comments and Notes: PECL Article 2:204: Acceptance* , Principles of European Contract Law: Parts I and II, Kluwer Law International . Available at: https://www.cisg.law.pace.edu/cisg/text/peclcomp18.html (Accessed: 5 October 2017)

Lando, Ole - Beale, Hugh eds. (2000): *Comments and Notes: PECL Article 6:104: Determination of Price*, Principles of European Contract Law: Parts I and II, Kluwer Law International. Available at: https://www.cisg.law.pace.edu/cisg/text/peclcomp55.html (Accessed: 25 September 2017)

Lando, Ole - Beale, Hugh eds. (2000): *Comments and Notes: PECL Article 6:111: Change of Circumstances*, Principles of European Contract Law: Parts I and II, Kluwer Law International . Available at: http://www.cisg.law.pace.edu/cisg/text/peclcomp79.html (Accessed: 10 November 2018)

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)

Lando, Ole - Beale, Hugh eds. (2000): *Comments and Notes: PECL Article 9:503: Foreseeability*, Principles of European Contract Law: Parts I and II, Kluwer Law International . Available at: http://cisgw3.law.pace.edu/cisg/text/peclcomp74.html (Accessed: 28 February 2020)

Lehmann, Matthias: *Damages and Interest* In: Penadés, Javier Plaza - Velencoso, Luz M. Martínez eds. (2015): *European Perspectives on the Common European Sales Law*, Springer, Switzerland, pp.243-261

Lista, Andrea (2017): International Commercial Sales: The Sale of Goods on Shipment Terms, Informa Law from Routledge, Oxon, p.64

Li, Wang Li (2012): *Comparative Law Study on the Specific Performance in International Commercial Contracts from the Relief Route*, International Conference on Economics, Business Innovation IPEDR, Vol.38.

Lindström, Niklas (2006): *Changed Circumstances and Hardship in the International Sale of Goods*, Nordic Journal of Commercial Law, No.1.

Liu, Chengwei (2004): *Comparison of CISG Article 27 and counterpart notice provisions of the UNIDROIT Principles and PECL*. Available at: https://www.cisg.law.pace.edu/cisg/biblio/liu1.html (Accessed: 19 October 2017)

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

Lookofsky, Joseph M. (2007): *Consequential Damages in CISG Context*, Pace International Law Review, Vol.19, No.1.

Lowisch, Manfred (2003): *New Law of Obligations in Germany*, Ritsumeikan Law Review, No.20

Mak, C.: *Liability for negotiations* In: Busch, Danny - Hondius, Ewoud - Kooten, Hugo van - Schelhaas, Harriët - Schrama, Wendy eds. (2002): *The Principles of European Contract Law and Dutch Law*, Kluwer Law International, Hague, pp. 129-135

Mak, Chantal (2008): *Fundamental Rights in European Contract Law: A Comparison of the Impact of Fundamental Rights on Contractual Relationships in Germany, the Netherlands, Italy and England*, Kluwer Law International.

Marinov, Eduard (2015): *Economic Determinants of Regional Integration in Developing Counties*, International Journal of Business and Management, Vol.3, No. 3.

Markesinis, Basil Sir - Unberath, Hannes - Johnston, Angus (2006): *The German Law of Contract: A Comparative Treatise*, Hart Publishing, Portland.

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, pp.329-346

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.195-219

McKendrick, Ewan: *Force Majeure and Frustration—Their Relationship and a Comparative Assessment* In: McKendrick, Ewan ed. (2013): *Force Majeure and Frustration of Contract*, Informa Law from Routledge, Abingdon, pp.33-54

McKendrick, Ewan: *The Consequences of Frustration—The Law Reform (Frustrated Contracts) Act 1943* In: McKendrick, Ewan ed. (2013): *Force Majeure and Frustration of Contract*, Informa Law from Routledge, Abingdon, pp.223-244

McKendrick, Ewan (2017): *Contract Law*, Palgrave, London.

McKendrick, Ewan - Maxwell, Iain (2013): *Specific Performance in International Arbitration*, The Chinese Journal of Comparative Law, Vol.1, No.2.

Messelu, Mamenie Endale (2016): *A Critical Analysis of Ethiopian Civil Code Governing Sale of Goods in the Light of International Convention and Principles*, Beijing Law Review, Vol.7, No.2.

Moses v Macferlan (1760) 2 Burr 1005

Mudrić, Mišo (2013): *Standard form salvage contracts: the scope of the duty to exercise best endeavours*, The Journal of International Maritime Law, vol. 19.

Mugerwa, Florence (2020): *It's not me, it's you: terminating English law contracts*. Available at: http://disputeresolutionblog.practicallaw.com/its-not-me-its-you-terminating-english-law-contracts/ (Accessed: 10 June 2023)

Mupangavanhu, Yeukai (2015): Fairness a slippery concept: *The common law of contract and the Consumer Protection Act 68 of 2008*, De Jure Law Journal, Vol.48, No.1.

Nart, Ela Çolpan (2010): *Gümrük Birliği'nin Türkiye'nin Dış Ticareti Üzerine Etkileri: Panel Veri Analizi*, Journal of Yaşar University, Vol.5, No.17.

Nedzel, Nadia E. (1997): *A Comparative Study of Good Faith, Fair Dealing, and Precontractual Liability*, Tulane European and Civil Law Forum, Vol. 12, No. 97

Nicholas, Barry: *Force Majeure in French Law* In: McKendrick, Ewan ed. (2013): *Force Majeure and Frustration of Contract*, Informa Law from Routledge, Abingdon, pp.21-31

Nielsen, Lasse Schulz (2022): *Damages under Article 74 of the CISG: An analysis of the different types of damages that can be claimed under Article 74 of the CISG as a consequence of a breach*, (Thesis), Aalborg University. Available at: https://projekter.aau.dk/projekter/files/473883586/Master_s_Thesis___Damages_under_Article_74_of_the_CISG.pdf (Accessed: 30 May 2023)

Niggemann, Chantal (2004): *Remarks on the manner in which the UNIDROIT Principles of International Commercial Contracts may be used to interpret or supplement Article 11 of the CISG*. Available at: https://www.cisg.law.pace.edu/cisg/text/anno-art-11.html (Accessed: 15 October 2017)

Nomer, Haluk Nami (2013): *Sözleşmedeki Esaslı Bir Nokta, Özellikle Karşılıklı Borç Doğuran Akitlerde İvazın Miktarı Belirlenmeksizin Sözleşme Kurulabilir Mi? (Is it Possible to Conclude a Contract in the Absence of an Essential Element, in Particular without Determining the Amount of Consideration in Bilateral Contracts?)*, E-Journal of Yaşar University, Vol.8, Special Issue.

Omak Maritime Ltd v Mamola Challenger Shipping Co Ltd. [2010] EWHC 2026 (Comm)

Opinion of Advocate General Geelhoed in case C-334/00, Fonderie Officine Meccaniche Tacconi SpA v Heinrich Wagner Sinto Maschinenfabrik GmbH (HWS)

Oppenoorth, Eric (2015): *The introduction of the 'freedom of contract': A change in social direction of European Private Law?*, (Thesis), University of Amsterdam, p.40. Available at: http://www.scriptiesonline.uba.uva.nl/document/613640 (Accessed: 18 January 2019)

Öcal, Merve Ekinci (2019): *Sözleşmeden Dönme Halinde Menfi Zarar*, (Thesis), Başkent Üniversitesi. Available at: http://acikerisim.baskent.edu.tr/bitstream/handle/11727/6348/10323840.pdf?sequence=1&isAllowed=y (Accessed: 10 June 2023)

Öz, M. Turgut (2013): Milletlerarası Mal Satımına İlişkin Sözleşmeler Hakkında Birleşmiş Milletler Antlaşması (CISG), Galatasaray Üniversitesi Hukuk Fakültesi Dergisi, No.1.

Özbirecikli, Mehmet (2013): *Türkiye'de Ticaret Kanunlarında Denetim Anlayışı Üzerine Bir İnceleme*, Muhasebe ve Finans Tarihi Araştırmaları Dergisi, No.4.

Özel, Hasan Alp (2012): *Ticari Serbestleşmenin Teorik Temelleri ve Yeni Ticari Serbestleşme Teorileri*, Kırklareli Üniversitesi İ.İ.B.F. Dergisi, Vol.1, No.1.

Özkoç, Osman (2019): *Gümrük Birliği'nin Türkiye Ekonomisine Etkileri*, (Thesis), Ordu Üniversitesi. Available at: http://earsiv.odu.edu.tr:8080/jspui/bitstream/11489/1013/1/10223677.pdf (Accessed: 3 February 2020)

Özkorkut, Nevin Ünal (2004): *Kapitülasyonların Osmanlı Devleti'nin Yargı Yetkisine Getirdiği Kısıtlamalar*, Ankara Üniversitesi Hukuk Fakültesi Dergisi, Vol.53, No.2.

Özyakışır, Özkan – Ganbari, Muhammed Kiomers (2020): *Sözleşme Öncesi Görüşmelerin Kesilmesi Bağlamında Culpa In Contrahendo Sorumluluğu ve Olumsuz Zarar*, Selçuk Üniversitesi Hukuk Fakültesi Dergisi, Vol.28, No:2

Parisi, Francesco: *Liability for Pure Financial Loss: Revisiting the Economic Foundations of a Legal Doctrine* In: Bussani, Mauro - Palmer, Vernon Valentine eds. (2003): *Pure Economic Loss in Europe*, Cambridge University Press, New York, pp.75-93

Pedersen, Marie Hummelshøj - Rossen, Anne (2019): *Precontractual liability under the CISG: An analysis of whether there is a basis for precontractual liability in the United Nations Convention on Contracts for the International Sale of Goods and if so, how the content of such liability may be determined and which types of damages may be compensated*, (Thesis), Aalborg University. Available at: https://projekter.aau.dk/projekter/files/305675224/Master_s_Thesis___Anne_Rossen_og_Marie_Hummelshoj_Pedersen.pdf (Accessed: 30 May 2023)

Pejovic, Caslav (2001): *Civil Law and Common Law: Two Different Paths Leading to the Same Goal*, Victoria University of Wellington Law Review, Vol.32, No.3.

Perillo, Joseph M. C. (2011): *Restitution in a Contractual Context and the Restatement (Third) of Restitution & Unjust Enrichment*, Washington and Lee Law Review, Vol.68, No.3

Peter, Mazzacano (2008): *The Lex Mercatoria as Autonomous Law*, Comparative Research in Law & Political Economy, Vol.4, No.6, p.5.

Petričušić, Antonija - Erkan, Ersin (2010) : *Constitutional Challenges Ahead the EU Accession: Analysis of the Croatian and Turkish Constitutional Provisions that Require Harmonization with the Acquis Communautaire***,** Uluslararası Hukuk ve Politika, Vol.6, No.22.

Pieck, Manfred (1996): *A Study of the Significant Aspects of German Contract Law, Annual Survey of International & Comparative Law*, Vol.3, No.1.

Poillot-Peruzzetto, Sylvaine: *French Perspective of the CISG* In: DiMatteo, Larry A. ed. (2014): *International Sales Law : A Global Challenge*, Cambridge University Press, New York, pp.338-360

Poole, Jill (2016): *Casebook on Contract Law*, Oxford University Press, New York.

Purnhagen, Kai (2013): *The Politics of Systematization in EU Product Safety Regulation: Market, State, Collectivity, and Integration*, Springer, New York-London.

Rémy-Corlay, Pauline: *Structural Elements of the French Civil Code* In: Grundmann, Stefan - Schauer, Martin eds. (2006): *The Architecture of European Codes and Contract Law*, Kluwer Law International, Netherlands, pp.33-56

Republic of Turkey Ministry of Foreign Affairs Directorate for EU Affairs (2019): *Customs Union*. Available at: https://www.ab.gov.tr/46234_en.html (5 February 2020)

Republic of Turkey Ministry of Foreign Affairs Directorate for EU Affairs (2019): *FAQ for Negotiation Process*. Available at: https://www.ab.gov.tr/44460_en.html (5 February 2020)

Republic of Turkey Ministry of Foreign Affairs Directorate for EU Affairs (2019): *Free Movement of Goods*. Available at: https://www.ab.gov.tr/66_en.html (5 February 2020)

Rıgga, Gago Mealii (2019): *Comparative Analyis of Consequences of Breach of Contracts and the Implementation in Standard Construction Contracts*, (Thesis), Bursa Uludağ Üniversitesi. 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)

Ringsend Property Ltd -v- Donatex Ltd & Anor [2009] IEHC 568 (18 December 2009). Available at: http://www.bailii.org/ie/cases/IEHC/2009/H568.html (Accessed: 10 November 2018)

Robert Purvis Plant Hire Ltd v Brewster & Ors [2009] ScotCS CSOH_28 (27 February 2009). Available at: http://www.bailii.org/scot/cases/ScotCS/2009/2009CSOH28.html (Accessed: 10 November 2018)

Robinson v. Harman (1848) 1 Exch 850

Rowan, Solene: *Termination for Contractual Non-performance* In: Cartwright, John - Whittaker, Simon eds. (2017): *The Code Napoléon Rewritten: French Contract Law after the 2016 Reforms*, Hart Publishing, Oxford, pp.317-338

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

Knowles, Roger (2012): *200 Contractual Problems and their Solutions*, Wiley-Blackwell, UK.

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.

Rösler, Hannes (2008): *Alman ve Uluslararası Sözleşme Hukukunda Değişen ve Öngörülemeyen Koşullar*, İstanbul Üniversitesi Hukuk Fakültesi Mecmuası, Vol.66, No.1.

Rudnick, Brown (2017): *Recent reform of the French Civil Code*, Construction Law International, Vol.12, No.1.

Russia 2 September 1997 Arbitration proceeding 255/1996. Available at: http://cisgw3.law.pace.edu/cases/970902r1.html (Accessed: 10 March 2019)

Saidov, Djakhongir (2008):*The Law of Damages in International Sales: The CISG and other International Instruments*, Hart Publishing, Portland.

Samerezeldin, A. - Helw, Amr Abu (2017): *Force Majeure Concept in Construction Contracts Under Civil and Common Laws*. Available at: http://www.worldresearchlibrary.org/up_proc/pdf/1059-150848355024-27.pdf (Accessed: 18 February 2020)

Sayın, Ceren (2019): *Viyana Satım Sözleşmesi'nde Satıcının Ayıptan Doğan Sorumluluğu*, (Thesis), Ankara Üniversitesi. Available at: https://dspace.ankara.edu.tr/xmlui/bitstream/handle/20.500.12575/72096/?sequence=1&isAllowed=y (Accessed: 30 May 2023)

Schebesta, Hanna (2013): *Towards an EU Law of Damages: Towards an EU law of damages : damages claims for violations of EU public procurement law before national and European judges*, (Thesis), European University Institute. Available at: https://cadmus.eui.eu/bitstream/handle/1814/29598/2013_Shebesta.pdf?sequence=1&isAllowed=y (Accessed: 4 February 2020)

Schelhaas, H.N.: *Liability for negotiations* In: Busch, Danny - Hondius, Ewoud - Kooten, Hugo van - Schelhaas, Harriët - Schrama, Wendy eds. (2002): *The Principles of European Contract Law and Dutch Law*, Kluwer Law International, Hague, pp. 397-437

Schill, Stephan W. ed. (2021): *Final award in case no. ICC-FA-2021-072*, Yearbook Commercial Arbitration, Volume XLVI 2021, Kluwer Law International BV, Netherlands

Schill, Stephan W. ed. (2022): *Final award in case no. 2019/d*, Yearbook Commercial Arbitration, Volume XLVII 2022, Kluwer Law International BV, Netherlands

Schlechtriem, Peter - Butler, Petra (2009): *UN Law on International Sales: The UN Convention on the International Sale of Goods*, Springer, Berlin.

Schmidt-Kessel, Martin - Silkens, Eva: *Breach of Contract* In: Penadés, Javier Plaza - Velencoso, Luz M. Martínez eds. (2015): *European Perspectives on the Common European Sales Law*, Springer, Switzerland, pp.111-135

Schumacher, Reinhard (2012): *Adam Smith's theory of absolute advantage and the use of doxography in the history of economics*, Erasmus Journal for Philosophy and Economics, Vol.5, No.2.

Schwenzer, Ingeborg (1999): *Specific Performance and Damages According to the 1994 UNIDROIT Principles of International Commercial Contracts*, European Journal of Law Reform, Vol. 1, No. 3.

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

Scottish Law Commission Report on Sale of Goods Forming Part of a Bulk (Scot Law Com No 145), (1993). Available at: http://www.bailii.org/scot/other/SLC/Report/1993/145.html (Accessed: 3 March 2019)

Shavell, Steven (2006): *Specific Performance Versus Damages for Breach of Contract: An Economic Analysis*, Texas Law Review, Vol.84, No.4.

Sheer, Alain (1981): *A Survey of the Political Economy of Customs Unions*, Law and Contemporary Problems, Vol.44, No.3

Shen, Jianming (1996): *The Remedy of Requiring Performance under the CISG and the Relevance of Domestic Rules*, Arizona Journal of International and Comparative Law, Vol.13, No.2

Sheth, Tejpal (2012): *Business Law*, Pearson, Delhi

Shuibhne, Niamh Nic (2013): *The Coherence of EU Free Movement Law: Constitutional Responsibility and the Court of Justice*, Oxford University Press, Oxford.

Sırma, İbrahim (2011): *Osmanlı Anonim Şirketlerinde Kar Dağıtımı*, Akdeniz Üniversitesi Uluslararası Alanya İşletme Fakültesi Dergisi, Vol.3, No.2.

Silva, Marta Santos (2017): *The Draft Common Frame of Reference as a "Toolbox" for Domestic Courts: A Solution to the Pure Economic Loss Problem from a Comparative Perspective*, Springer, p.218

Sipahi, Barış - Küçük, İsmail (2011): *Türk Tİcaret Kanunları ve Muhasebenin Gelişimine Etkilerinin 160 Yıllık Öyküsü*, Muhasebe ve Finans Tarihi Araştırmaları Dergisi, No.1.

Smith, Adam (1977): *The Wealth of Nations - An Inquiry Into the Nature and Causes of the Wealth of Nations*, University Of Chicago Press, Chicago.

Smith, J. Denson (1936): *Impossibility of Performance as an Excuse in French Law: The Doctrine of Force Majeure*, The Yale Law Journal, Vol.45, No.3.

Smits, Jan M. (2014): *Contract Law: A Comparative Introduction*, Edward Elgar, Cheltenham.

Smits, Jan M. - Calomme, Caroline (2016): *The Reform of the French Law of Obligations: Les Jeux Sont Faits*, Maastricht European Private Law Institute Working Paper, No.2016/05.

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)

Soni, Puja (2014): *The Benefits of Uniformity in International Commercial Law with Special Reference to the United Nations Convention on Contracts for the International Sale of Goods (1980)*. Available at: http://cisgw3.law.pace.edu/cisg/biblio/soni.html (Accessed: 20 May 2017)

Spaic, Aneta: *Interpreting Fundamental Breach* In: DiMatteo, Larry A. ed. (2014): *International Sales Law : A Global Challenge*, Cambridge University Press, New York, pp.237-253

Spivack, Carla (2006): *Of Shrinking Sweatsuits and Poison Vine Wax: A Comparison of Basis for Excuse under U.C.C. Sec. 2-615 and CISG Article 79*, University of Pennsylvania Journal of International Law, Vol. 27, No. 3.

Stanescu, Andreea-Teodora (2014): *The restrictions on economic freedom/free enterprise. The concept of unfair contractual terms in ECJ case law*, Curierul Judiciar. Available at: http://www.curieruljudiciar.ro/2014/04/30/the-restrictions-on-economic-freedomfree-enterprise-the-concept-of-unfair-contractual-terms-in-ecj-case-law/ (Accessed: 25 May 2017)

Strand Electric & Engineering Co Ltd v Brisford Entertainments Ltd [1952] 2 QB 246

Süzgün, Selin Gülbahar (2018): *Sözleşmenin Değişen Şartlara Uyarlanması*, (Thesis), Ankara Üniversitesi, p.91. Available at: https://dspace.ankara.edu.tr/xmlui/bitstream/handle/123456789/68725/499572.pdf?sequence=1&isAllowed=y (Accessed:3 February 2019)

Swadling, William: *The Judicial Construction of Force Majeure Clauses* In: McKendrick, Ewan ed. (2013): *Force Majeure and Frustration of Contract*, Informa Law from Routledge, Abingdon, pp.3-19

Swain, Warren: *The Common law and the Code civil: the curious case of the law of contract* In: Moréteau, Olivier - Masferrer, Aniceto – Modéer, Kjell A. eds. (2019): *Comparative Legal History*, Edward Elgar Publishing, Cheltenham, pp.379-399

Switzerland 10 July 1996 Commercial Court Zürich (Plastic chips case). Available at: http://www.cisg.law.pace.edu/cisg/wais/db/cases2/960710s1.html (Accessed: 19 September 2017)

Switzerland 5 February 1997 Commercial Court Zürich (*Sunflower oil case*). Available at: http://cisgw3.law.pace.edu/cases/970205s1.html

Switzerland 27 April 2007 Canton Appellate Court Valais (Oven case). Available at: http://cisgw3.law.pace.edu/cases/070427s1.html (Accessed: 2 November 2018)

Switzerland 13 May 2008 Appellate Court St. Gallen (*Skid chains and adaptors case*). Available at: http://cisgw3.law.pace.edu/cases/080513s1.html (Accessed: 10 September 2019)

Szwed, Marcin (2014): *Constitutional Protection of Freedom of Contract in the European Union, Poland and the United States and Its Potential Impact on the European Contract Law*, (Thesis), Central European University. Available at: www.etd.ceu.hu/2014/szwed_marcin.pdf (Accessed:8 June 2017)

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.

Şahin, Turan (2011): *Elektronik Sözleşmelerin Kuruluşuna İlişkin İrade Beyanları ve Bu Beyanların Geri Alınması*, Türkiye Barolar Birliği Dergisi, Vol.24, No.95.

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.

Tahiroğlu, Fatih (2013): *Medeni Usul Hukukunda Görevli Mahkemenin Belirlenmesi*, *(Thesis)*, İstanbul Üniversitesi. Available at: http://nek.istanbul.edu.tr:4444/ekos/TEZ/50962.pdf (Accessed: 17 May 2023)

Tapan, Ruhi (1999): *Avrupa Birliği (AB) Hukukunun Kaynakları ve Ulusal Hukuka Etkileri Avrupa Adalet Divanı*, Sayıştay Dergisi, No.32.

Taştan, Furkan Güven (2019): *Viyana Satım Antlaşması'na (CISG) Göre Alıcının Sözleşmeyi İhlâli Halinde Satıcının Hakları*, Yıldırım Beyazıt Hukuk Dergisi, Vol.4, No.1.

Teacher, Law. (2013). *Amalgamated Investment v John Walker - Case Summary*. Available at: https://www.lawteacher.net/cases/amalgamated-investment-v-john-walker.php (Accessed: 13 November 2018)

Tekben, Tuğçe (2016): *Alacaklı Temerrüdünün Hukuki Sonuçları*, Marmara Üniversitesi Hukuk Fakültesi Hukuk Araştırmaları Dergisi, vol.22 ,no.3

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

The Frankfurt Higher Regional Court (case no. 10 U 80/93, dated on 04.03.1994). Available at: https://www.unilex.info/cisg/case/205 (Accessed: 30 May 2023)

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, pp.105-135

Toker, Ali Gümrah (2013): *Viyana Satım Sözleşmesi (CISG) Uyarınca Sözleşmenin Esasli İhlali*, Milletlerarası Hukuk ve Milletlerarası Özel Hukuk Bülteni, Vol.33, No.1.

Topaloğlu, Mustafa: *Milletlerarası Mal Satımlarında Sözleşmeden Dönme* In: Sarı, Selahattin – Gencer, Alp H. – Sözen, İlyas eds. (2015): *International Conference of Eurasian Economies*, Kazan, pp.615-619

Tögel, Arif (2016): *Ottoman Human Rights Practice: A Model of Legal Pluralism*, Yıldırım Beyazıt Hukuk Dergisi, Vol.1, No.2.

Treitel, Guenter H.: *Contracts in General, Volume VII, Chapter 16: Remedies for Breach of Contract (Courses of Action Open to a Party Aggrieved)* In: Mehren, Arthur Von ed. (1976): *International Encyclopedia of Comparative Law*, J. C. B. Mohr, Paris

TTK Tasarısı ve Gerekçesi (1/1138), 2005. Available at: https://www2.tbmm.gov.tr/d22/1/1-1138.pdf (Accessed: 13 March 2019)

Tuğsavul, Melis Taşpolat (2018): *İstinaf İncelemesi Sonucunda Verilebilecek Kararlar*, Türkiye Barolar Birliği Dergisi, No:134

Tunç, Hakan (2017): *Dış Ticaretin Gelişiminde Gümrük Birliği'nin Rolü, Bir Algı Araştırması*, AÇÜ Uluslararası Sosyal Bilimler Dergisi, Vol.3, No.1, p.96.

Turkish Constitutional Court Decision (decision no. 2013/162, dated on 26.12.2013)

Turkish Supreme Court of Appeal for 3rd Civil Circuit (decision no. 1997/8864, dated on 15.09.1997).

Turkish Supreme Court of Appeal for 3rd Civil Circuit (decision no. 2013/16744, dated on 27.11.2013)

Turkish Supreme Court of Appeal for 3rd Civil Circuit (decision no. 2015/17050, dated on 02.11.2015)

Turkish Supreme Court of Appeal for 7th Civil Circuit (decision no. 2013/659, dated on 31.01.2013)

Turkish Supreme Court of Appeal for 11nd Civil Circuit (decision no. 1990/1087, dated on 20.02.1990)

Turkish Supreme Court of Appeal for 11th Civil Circuit (decision no. 2013/11760, dated on 05.06.2013)

Turkish Supreme Court of Appeal for 11th Civil Circuit (decision no. 2014/15289, dated on 09.10.2014)

Turkish Supreme Court of Appeal for 11th Civil Circuit (decision no. 2015/2107, dated on 17.02.2015).

Turkish Supreme Court of Appeal for 11th Civil Circuit (decision no. 2016/2197, dated on 29.02.2016)

Turkish Supreme Court of Appeal for 11nd Civil Circuit (decision no. 2021/2006, dated on 04.03.2021)

Turkish Supreme Court of Appeal for 13th Civil Circuit (decision no. 1995/9860, dated on 13.11.1995)

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

Turkish Supreme Court of Appeal for 13th Civil Circuit (decision no. 2013/2623, dated on 07.02.2013).

Turkish Supreme Court of Appeal for 13th Civil Circuit (decision no. 2014/18895, dated on 13.06.2014).

Turkish Supreme Court of Appeal for 15th Civil Circuit (decision no. 1993/3691, dated on 28.09.1993)

Turkish Supreme Court of Appeal for 15th Civil Circuit (decision no. 1996/821, dated on 14.02.1996)

Turkish Supreme Court of Appeal for 15th Civil Circuit (decision no. 2014/1611, dated on 06.03.2014)

Turkish Supreme Court of Appeal for 15th Civil Circuit (decision no. 2015/1875, dated on 08.04.2015)

Turkish Supreme Court of Appeal for 15th Civil Circuit (decision no. 2018/4992, dated on 11.12.2018)

Turkish Supreme Court of Appeal for 17th Civil Circuit (decision no. 2018/10877, dated on 19.11.2018)

Turkish Supreme Court Assembly of Civil Chambers (decision no. 1990/1, dated on 17.01.1990)

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

Turkish Supreme Court Decision of Joint Chambers (decision no. 2003/340, dated on 07.05.2003)

Turkish Supreme Court Decision of Joint Chambers (decision no. 2014/900, dated on 12.11.2014).

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

Tüzüner, Özlem - Öz, Kerem (2015): *Aşırı İfa Güçlüğüne İlişkin İçtihat İncelemesi*, Ankara Barosu Dergisi, Vol.73, No.3.

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

UNCITRAL (1970): *Yearbook of the United Nations Commission on International Trade Law, 1970*, Vol. I, pp.13-17. Available at: http://www.uncitral.org/pdf/english/yearbooks/yb-1968-70-e/yb_1968_1970_e.pdf (Accessed: 1 June 2017)

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

United States 26 March 2002 U.S. District Court, S.D., New York (*St. Paul Guardian Insurance Co., et al. v. Neuromed Medical Systems & Support, et al.*). Available at: http://www.unilex.info/cisg/case/730 (Accessed: 12 March 2019)

United States 11 June 2003 Federal Appellate Court [5th Circuit] (*BP Oil International v. Empresa Estatal Petroleos de Ecuador*). Available at: http://cisgw3.law.pace.edu/cases/030611u1.html (Accessed: 12 March 2019)

United States 7 October 2008 Federal District Court [New Jersey] (Forestal Guarani, S.A. v. Daros International, Inc.). Available at:https://www.cisg.law.pace.edu/cisg/wais/db/cases2/081007u1.html (Accessed: 20 October 2017)

U.S. [Federal] District Court for the Eastern District of Pennsylvania (Reference number: 99-6384, dated on 29/08/2000). Available at: https://www.uncitral.org/clout/clout/data/usa/clout_case_420_leg-1644.html (Accessed: 30 May 2023)

Uyar, Talih: *Yargıtay Kararlarında "Dürüstlük (Objektif İyiniyet)" Kuralı (MK.2/I) ve "Hakkın Kötüye Kullanılması Yasağı* (MK.2/II)" In: Gören, Zafer ed. (2000): *Prof. Dr. Seyfullah Edis'e Armağan*, Dokuz Eylül Üniversitesi, İzmir

Uzun, Tuba Birinci (2014): *CISG Uygulamasında Tazminat Sorumluluğunun Sınırlandırılması*, Dokuz Eylül Üniversitesi Hukuk Fakültesi Dergisi, Vol.16, No.1.

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, pp.20-31

Vicente, Dário Moura (2021): *Comparative Law of Obligations*, Edward Elgar Publishing, Cheltenham

Vincze, Andrea (2004): *Remarks on whether and the extent to which the Principles of European Contract Law (PECL) may be used to help interpret Article 55 of the CISG*. Available at: https://www.cisg.law.pace.edu/cisg/text/peclcomp55.html (Accessed: 25 September 2017)

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)

Vohryzek, Ana (2009): *Unjust Enrichment Unjustly Ignored: Opportunities and Pitfalls in Bringing Unjust Enrichment Claims under ICSID*, Loyola of Los Angeles International and Comparative Law Review, Vol.31, No.3

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.

Von Bar, Christian - Drobnig, Ulrich (2004)*: The Interaction of Contract Law and Tort and Property Law in Europe: A Comparative Study*, Sellier, München.

Vurucu, Cüneyt Gülabi (2010): *Ticari Satış Sözleşmesinde Satıcının Temerrüdü*, (Thesis), İstanbul Üniversitesi. Available at: http://nek.istanbul.edu.tr:4444/ekos/TEZ/45950.pdf (Accessed: 20 May 2023)

Weinrib, Ernest J. (2005): *Restoring Restitution*, Virginia Law Review, Vol. 91, No. 3

Wild, Susan Ellis (2006): *Webster's New World Law Dictionary*, Wiley Publishing, Inc., Hoboken.

Willems, Arnoud R. - Kamau, Maryanne W. (2019): *Levelling EU-Turkey Trade: An Assessment of the Asymmetrical Customs Union between the European Union and Turkey.* Available at: https://www.sidley.com/-/media/publications/2019_inttlr_issue_2_offprint_willems_kamau.pdf (Accessed: 4 February 2020)

Wilson, John F (2010): *Carriage of Goods by Sea*, Longman, Harlow.

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.

Winterton, David (2011): *A performance-oriented account of money awards for breach of contract*, (Thesis), University of Oxford. Available at:

https://ora.ox.ac.uk/objects/uuid:c676c838-9d16-498a-a3a8-148c2c28b9e5/download_file?file_format=application%2Fpdf&safe_filename=THESIS01&type_of_work=Thesis (Accessed: 30 May 2023)

Wurmnest, Wolfgang: *Contract Law* In: Zekoll, Joachim - Wagner, Gerhard eds. (2019): *Introduction to German Law*, Kluwer Law International B.V, The Netherlands, pp.199-268

Wüst-Nast, Silvia (2011):*The Formation of an International Sales Contract of Investment Goods A Comparison between Swiss and English Law*, Thesis DAS Paralegalism, p.6. Available at: http://www.swissparalegal.ch/dokument/abschlussarbeit/vertragsrecht/international-sales-contract-of-investment-goods (Accessed: 1 December 2017)

Xie, Zheng (2008): *Case Presentation: China 13 June 2005 CIETAC Arbitration proceeding (Industrial general equipment case)*. Available at: https://www.cisg.law.pace.edu/cisg/wais/db/cases2/050613c1.html (Accessed: 27 October 2017)

Yavuz, Cevdet (1986): *Borçlar Hukuku Dersleri - Özel Borç İlişkileri*, Marmara Üniversitesi Hukuk Fakültesi, İstanbul

Yıldırım, Ayşe Elif (2017): *The concept of pre-contractual duties and a comparison between the draft common frame of reference, English and Turkish legal systems*, Ankara Avrupa Çalışmaları Dergisi, Vol.16, No.2

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.

Youngs, Raymond (2014): *English, French & German Comparative Law*, Routledge, New York.

Yüksel, Burcu (2011): *The Relevance of the Rome I Regulation to International Commercial Arbitration in the European Union*, Journal of Private International Law, Vol.7, No.1.

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

Zhang, Mo (2015): *Contractual Choice of Law in Contracts of Adhesion and Party Autonomy*, Akron Law Review, Vol.41, No.1.

Zhou, Qi: *The CISG and English Sales Law: An Unfair Competition* In: DiMatteo, Larry A. ed. (2014): *International Sales Law: A Global Challenge*, Cambridge University Press, New York, pp.669-682

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

Zuphen v. Kelly Technical Services (Ireland) Ltd. [2000] IEHC 117 (24th May, 2000). Available at: https://www.bailii.org/ie/cases/IEHC/2000/117.html (Accessed: 10 November 2018)