Name: Harald Ick
Student Nr.: ICKHAR001

Degree: Master of Laws
In approved courses and minor dissertation
Title: The German "culpa in contrahendo"
Supervisor: Prof. Dale Hutchison
Date: 30.07.1998

"Research dissertation presented for the approval of Senate in fulfilment of part of the requirements for the degree of Master of Laws in approved courses and a minor dissertation. The other part of the requirement for this degree was the completion of a programme of courses"

Signed by candidate

Table of Contents

Table of Cases

Decisions of the Imperial Court

RG Urteil v. 07.12.1911	RGZ 78, 239
RG Urteil v. 05.02.1922	RGZ 104, 265

Decisions of the Federal Supreme Court

BGH Urteil v. 18.09.1955	BGHZ 16, 334
BGH Urteil v. 10.10.1955	BHGZ 18, 248
BGH Urteil v. 26.09.1961	NJW 1962, 31
BGH Urteil v. 31.01.1962	NJW 1962, 1196
BGH Urteil v. 18.12.1964	NJW 1965, 532
BGH Urteil v. 29.01.1965	NJW 1965, 812
BGH Urteil v. 14.07.1967	NJW 1967, 2199
BGH Urteil v. 27.10.1967	NJW 1968, 39
BGH Urteil v. 22.02.1968	NJW 1968, 986
BGH Urteil v. 26.11.1968	NJW 1969, 269
BGH Urteil v. 23.04.1969	NJW 1969, 1625
BGH Urteil v. 30.09.1969	LM Nr. 11a, § 823 (Es) BGB
BGH Urteil v. 27.02.1974	NJW 1974, 849
BGH Urteil v. 18.10.1974	NJW 1975, 43
BGH Urteil v. 12.11.1974	BGHZ 63, 382
BGH Urteil v. 12.06.1975	NJW 1975, 1774
BGH Urteil v. 28.01.1976	BGHZ 66, 51
BGH Urteil v. 02.12.1976	NJW 1977, 376
BGH Urteil v. 23.05.1977	NJW 1977, 1536
BGH Urteil v. 08.06.1978	NJW 1978, 1802
BGH Urteil v. 07.02.1980	NJW 1980, 1683
BGH Urteil v. 12.12.1980	NJW 1981, 1035
BGH Urteil v. 16.01.1985	NJW 1985 1771
BGH Urteil v. 11.03.1986	Betriebs-Berater (BB) 1986, 1185
BGH Urteil v. 12.11.1986	NJW 1987, 639
BGH Urteil v. 20.03.1987	NJW 1987, 2511
BGH Urteil v. 08.04.1988	NJW-RR 1988, 458

BGH Urteil v. 28.03.1990 NJW 1990, 1659
BGH Urteil v. 25.08.1990 BGHZ 111, 80
BGH Urteil v. 03.07.1992 NJW 1992, 2564
BGH Urteil v. 14.01.1993 NJW 1993, 1324

Books and Essays

Walter Erman, Kommentar zum BGB, 1. Band, 7. Auflage, Münster 1981.

Rudolf Ihering, "Culpa in contrahendo" oder "Schadensersatz bei nichtigen oder nicht zur Perfektion gelngten Verträgen", in Ihering Jahrbücher Nr. 4 von 1861, p. 1 - 106.

Karl Larenz, "Bemerkungen zur Haftung für 'culpa in contrahendo'", in Festschrift für Kurt Ballerstedt, Berlin 1975, p. 397 - 419.

Karl Larenz, Lehrbuch des Schuldrechts, Band I, Allgemeiner Teil, München 1979.

B.S. Markesinis, The German Law of Torts, 3rd edtion, Oxford 1994.

Dieter Medicus, Schuldrecht I, Allgemeiner Teil, München 1981.

Benno Mugdan, Die gesamten Materialien zum Bürgerlichen Gesetzbuch für das Deutsche Reich, Band 2, Recht der Schuldverhältniss, Berlin 1899.

Otto Palandt, Kommentar zum BGB, 54. Auflage, München 1995.

Hans Stoll, "Vertrauensschutz bei einseitigen Leistungsversprechen", in Festschrift für Werner Flume, Band I, Köln 1978, p. 741 - 773.

The German "culpa in contrahendo"

I. Introduction

In German law the contractual liability of the debtor[1] requires an obligation, this is expressed within the German civil code which formulates 'an obligatory relationship'. For this reason, any fault (Verschulden) committed before or during the conclusion of a contract, can only be an unlawful act, in the circumstances of the law of delict.[2] However certain problems in the law of delict arise, such as the enumeration principle, exculpatory proof, burden of proof and prescription times[3]. These problems caused unsatisfactory results in special constellations since the German Civil Code (BGB) was enacted in 1900. Therefore, the courts and the legal writers in addition to the written code, and without consent or refusal by the legislator, developed the concept of 'culpa in contrahendo' as 'fault during the negotiations of a contract' (Verschulden bei Vertragsverhandlungen).

This doctrine was initiated by the famous German jurist Rudolf Ihering in 1861.[4] Today, the liability for culpa in contrahendo is common law. It is not really based on an analogy to certain provisions of the BGB, though there are some similarities, but rather a creative development of the law by the judges.[5] The concept of 'culpa in contrahendo' means: that the actual start of contractual negotiations or the start of a contractual contact can be the reason to establish certain duties of protection and care; and a violation of such a duty can create the same liability as the breach of a contractual duty of care. The reason for that is seen in the expectations of the potential contract partner who, when starting the negotiations of the contract, relies on the fact that he is

---

[1] According to the German terminology, a person who is entitled to the performance of an obligation is called the 'creditor' (Gläubiger), and the person who is under the obligation is called the 'debtor' (Schuldner). I will use the terms debtor and creditor in this sense, though in ordinary English they have a somewhat narrower meaning.

[2] Erman-Battes § 276 Nr. 110.

[3] I will deal with these problems in more detail under section III - IV.

[4] Ihering, IherJb. 4 (1861), p. 1 - 106.

[5] Larenz, Schuldrecht, § 9 I, p. 91.

dealing with an honest and loyal person. It is said that this general expectation of honesty deserves the protection of the legal order, because otherwise frictionless business transactions would not be possible.[6] In other cases a certain trust caused by the contract partner is the reason for a duty of care. The standard for these duties is the principle of good faith.[7] The actual start of contractual negotiations or the start of a contractual contact, therefore, creates a legal relationship between the potential future contractors, which does not include the (primary) duty of performance, but the (secondary) duty to act in a certain way. In other words, culpa in contrahendo is a legal obligation, which arises in the precontractual phase and does not give a right to claim performance but compensation.

This is the concept of culpa in contrahendo as it is described in a basic law book and as German law students learn in their first year. The students are told that culpa in contrahendo is just another claim, like the right to claim the price in a contract of purchase. The longer one studies the more complicated this principle becomes. Despite the fact, that culpa in contrahendo has been discussed for more than 100 years and its existence and principles are not in question, the topic is still controversial and frequently debated. This is because different groups of cases are combined under the heading 'culpa in contrahendo'. The right to claim compensation is always based on culpa in contrahendo but the dogmatic background is very different. Therefore, one has to discuss the different groups of cases and the different ideas behind the solutions separately. Hence it is imperative to give a short historic introduction of the concept founded by Ihering in 1861.

II. The historic concept of 'culpa in contrahendo' according to Ihering

The title of Ihering's essay is "Compensation for damage in case of void or non-concluded contracts".[8] He explains that his starting point was a problem, he spoke in his

---

[6] Larenz, Schuldrecht, § 9 I, p. 94.

[7] § 242 The debtor is bound to effect the performance according to the requirements of good faith, ordinary usage being taken into consideration.

[8] Ihering, IherJb. 4 (1861), p. 1 - 106.

lectures about "essential mistakes in a declaration of intention". This issue perplexed him due to questions which he could not answer satisfactorily. The question was as follows: "*Whether the party who made a mistake has to compensate the loss suffered by the other party who acted in the faith of the validity of the declaration?*"

Ihering cites the case of a party who wanted to order 100 pounds of a certain good, but confounds the pound-sign with the hundredweight-sign. Subsequently 100 hundredweight instead of 100 pounds were delivered and, of course, refused by him. The question arose as to who had to pay for the useless paid package and transport costs?

There is no doubt, that the contract is void if he can prove that he indeed made a mistake when ordering 100 hundredweight. However based on Roman law, Ihering could not find an equitable solution to the question above. Since the contract was void, the principles of contractual culpa were not applicable and neither was the non-contractual, the actio legis Aquiliae. On first sight, therefore, the party who did nothing wrong has to pay his expenses. This result was hard to accept for Ihering and the reason for his deductive research on this problem.

His primary conclusion in solving the problem was that the invalidity of the contract terminates, the claim for performance, but that does not necessarily mean that the invalidity has no consequences at all. In cases where the goods are already in possession of the potential buyer, he has to give them back. Ihering draws the conclusion that the invalidity of a contract can create certain duties of which one of them well might be to pay compensation.[9]

He goes on and gives more examples with which he was confronted:

[9]Ihering, IherJb. 4 (1861), p. 29.

Person X wants to buy 1/4 box of cigars. To order these he sends a messenger. The messenger makes a mistake and orders 4 boxes. At the time when the 4 boxes arrive X refuses to accept them. Who of the three parties has to bear the expenses?
Bank A orders bank B with a telegram (1850s) to sell certain government securities. Somehow during the transport of the wire "sell" is changed to "buy"[10]. The next day the stocks lose value and therefore the loss is quite considerable. Can A compensate its loss?

All these cases convinced Ihering that the sole invalidity of the contract following Roman law could not be a just solution, but had to be handled in connection with compensation for damage. But he was thinking about a distinction between errors in spelling, mistakes of messengers or telegrams which cause a duty to compensate and the acting without obligation in the normal circumstances of life (somebody is doing a friend a favour). Ihering discovered that the special reason for a duty to compensate is founded on the aspect, that the error or mistake occurs while the parties intend to conclude a contract, and the party who suffers a loss relies on the outer circumstances and fulfils the supposed contract. With this, Ihering states, he found a clear distinction of the culpa in question, namely the culpa by concluding a contract: culpa in contrahendo.[11] It is the intended conclusion of a contract which is seemingly or in the outer course of events already concluded what repeats in all the cases and is the basic principle.

He concludes that not only existing, but also contracts in the process of conclusion have to be under the protection of the rules about "culpa". Otherwise the contractual commerce would be without a remedy and potential contract parties could be victims of the carelessness of the other party. The "culpa in contrahendo" is nothing but the contractual culpa with a special direction. In one sentence Ihering sums up:

---

[10] In German the words are "verkaufen" and "kaufen", so the prefix gets lost.
[11] Ihering, IherJb. 4 (1861), p. 7.

the order of the contractual 'diligentia' is in force for concluded contracts as for to be concluded contracts, and its violation establishes the contractual claim for compensation in both cases.[12]

After developing the theoretical framework and concluding his result in one sentence, Ihering goes on to put his idea to the test by applying his theory to various cases. Therefore, he distinguishes three groups of cases:

1) inability of the subject;

2) inability of the object;

3) uncertainty of the contractual declaration of intention.

The first group describes a contracting party, which is under incapacity for acts-in-the-law (because of infancy under the age of seven or guardianship on the ground of insanity) or restricted capacity for acts-in-the-law (because of minority at an age between seven and twenty-four or -in 1861- because of being a woman).

The second group deals with cases in which the object of the sale never existed or no longer exists in the moment of the conclusion of the contract, or is legally impossible to sell.

In the last group Ihering investigates the problems related to the declarations of intention. He examines in particular the occurrence of a discrepancy between real and apparent intention,

(a) where the expression of the intention is not seriously meant,

(b) the declared intention does not express the real intention of the declarent (including the error of the messenger) and causes someonelse's error,

(c)the declarent when making the declaration was under a mistaken assumption as to certain facts (declarant own error).

---

[12]Ihering, IherJb. 4 (1861), p. 42.

In all three cases, the contract is void (with the exception where the expression of intention is not seriously meant) and the legal consequence -according to Ihering- should be compensation for damages. Despite the fact that Ihering hopes that his case studies were exhaustive, he concludes his essay with the invitation to every reader to write to him and add further case studies whenever his idea of culpa in contrahendo is applicable.[13]

This is basically the summary of Ihering's essay written some 137 years ago. It is the first written examination and is still called the foundation of the concept of culpa in contrahendo. But as I will reveal within this paper, the concrete problems and case studies Ihering was dealing with have almost nothing to do with the controversial discussion about the applicability of the theory of culpa in contrahendo in certain case groups todays. Here I can state that all the cases and problems Ihering investigated were solved by the legislator in 1900 in the BGB.

In the first group (inability of the subject) the legislator did not follow Ihering's idea of a duty to compensate. The protection of the persons under in- or restricted capacity was deemed to be of higher value and, therefore, no compensation is granted.

With the second group (inability of the object) is dealt in §§ 306 - 309 BGB:[14]
§ 306. A contract for an impossible performance is void.
§ 307. A person who, in concluding a contract for an impossible performance, knew or ought to have known that it was impossible, is bound to award compensation for any damage which the other party has sustained by relying upon the validity of the contract; not, however, beyond the value of the interest which the other party has in the validity of the contract. The duty to award compensation does not arise if the other party knew or ought to have known of the impossibility.

[13]Ihering, IherJb. 4 (1861), p. 106
[14]All translations of German laws are from Chung Hui Wang, The German Civil Code, 1907.

§ 309. If a contract is contrary to a statutory prohibition[15]*, the provisions of 307, 308, apply mutatis mutandis.*

The same result is reached in the third group by applying §§ 119 -122 BGB:

§ 119. A person who, when making a declaration of intention, was under a mistake as to its purpose, or did not intend to make a declaration of that purpose at all, may avoid the declaration if it is to be supposed that he would not have made it with knowledge of the state of affairs and with intelligent appreciation of the case.[16]

§ 120. A declaration of intention which has been incorrectly transmitted by the person or institution employed for its transmission may be avoided under the same conditions as a declaration of intention made under mistake in § 119.

§122 If a declaration of intention is void under 118,[17] *or avoided under 119, 120, the declarant shall, if the declaration was required to be made to another, compensate him or any third party for any damage which the other or the third party has sustained by relying upon the validity of the declaration; not, however, beyond the value of the interest which the other or the third party has in the validity of the declaration.*

The duty to award compensation does not arise if the person injured knew of the ground on which the declaration was void or voidable, or would have known of it but for his own negligence (i.e., ought to have known it).

The legislator in 1900 understood the problems Ihering was raising in 1861 and made precise provisions to deal with them. The legislator did not provide for a general rule such as the "one-sentence-summary" Ihering concluded with. Probably because he thought all problems were exhaustively regulated. But over the time of almost 140 years other problems evolved and the courts and legal writers tried to apply the basic

---

[15] See §§ 134, 135, 138, 139 BGB.

[16] The question whether the mistake was one of fact or of law, or whether it was due to negligence or not, is immaterial.

[17] § 118. A declaration of intention not seriously intended, which is made in the expectation that it will be understood not to be seriously intended, is void.

principle worked out by Ihering. Ihering's invitation to submit other cases and groups of cases was therefore very successful.

III. Development of different case-groups

To understand the related problems it is necessary to give a short overview about the law of obligation in general and the delict provisions in specific.

1. Law of obligation

In German law contract and tort are seen as species of the wider notion of obligation. Codal provisions or other reasons have forced the lawyers, while not abandoning the search for doctrinal clarity, to cross the boundaries in an attempt to find a solution to a problem. The law of obligations[18] regulated in the BGB recognises contractual obligations, formed by offer and acceptance such as sales of goods, lease and agreements related to work and service etc., and legal obligations caused due to acts-in-the-law, like unjustified enrichment, unlawful act in the law of delict and management of affairs without Mandate. The general provisions of the law of obligations are in principle applicable to both groups. The moment a contract is concluded a contractual obligatory relation exists between the parties of the contract; as soon as a delict is committed a legal obligatory relation exists between the wrongdoer and the person whose rights have been violated[19]. In the course of these contractual or legal obligatory relations e.g. § 278 is applicable as an important norm to ascribe wrongful acts of the employee to the employer. However, before the wrongful act is committed or before a contract is concluded neither of the general provisions of the law of obligations are

[18]The German term "Schuldverhältnis" is probably better translated with 'obligatory relation'.

[19]It is important to point out that the wrongful act itself is not covered by the general provisions of the law of obligations. Only when the act is committed the special relationship comes into existence. To clarify this I want to give a short example:
- An employer E damages the car of a third person T. T has a delictual claim against E.
- The employee X of E in the course of the employment damages T's car. T has two claims, one against X and one against E. But if E can proove that the special requirements of the delictual norm § 831 are met, than only X has to pay.
- E damages T's car. The legal obligation comes into existence. X as E's employee repairs the car. X does a bad job, which causes further damage. In this case § 831 is not applicable but § 278 which gives E no possibility to exonerate himself.

applicable. The legal obligation of the culpa in contrahendo begins with the actual start of the commercial contact.

This is why the concept of the culpa in contrahendo is so important. It covers a period of time which may otherwise leave the parties without protection.

2. Law of delict

As mentioned above, the law of delict was the main reason for the discovery of the concept of culpa in contrahendo since the BGB was enforced.[20] Two funamental decisions of the legislator in 1900 caused in certain cases, results which do not satisfy the sense of justice todays. These are the troublesome enumeration principle in § 823 and the exculpatory proof in § 831. Further problems which are of less importance are the differences in relation to the burden of proof and prescription times.

(a) Enumeration principle

The German law of delict only protects under § 823 BGB the enumerated rights of life, body, health, freedom, property, or any other (absolute) right, which excludes pure economic loss.[21] Pure economic loss in this sense may be described as loss that does not result from damage to property or impairment of personality on the one hand and loss that refers to such a damage, but which does not involve the plaintiff's property or person, on the other hand. The non-recognition of pure economic loss as a compensatable type of harm under § 823 BGB because of the enumeration principle forced German lawyers to apply the rules of contract law. An extension of the tort law itself is not possible due to the clear words and intention of § 823 BGB. Only in cases where a person wilfully causes damage to another in a manner contra bonos mores is he bound to compensate for pure economic loss (§826).

---

[20] Erman-Battes § 276 Nr. 110.

[21] But of course not consequential economic loss provided in § 253 BGB which reads as follows:
§ 253 The compensation required to be made includes also lost profits. Profit is demand to have been lost which could have been expected with probability according to the ordinary course of things or according to the particular circumstances, e.g., according to the preparations and previsions made.

(b) Vicarious liability

German vicarious liability following from § 831 BGB is restricted, since § 831 BGB includes the employer's exculpatory proof. That means that the employer is only liable if he cannot show that he was careful in the selection, instruction, and training of his employees and that he properly supplied them with the right kind of equipment or, failing that, the damage or injury would have occurred even if he had fulfilled the above-mentioned duties. This possibility of the exculpatory proof limits the employer's vicarious liability severely despite the fact that producing the evidence that the employee was properly selected, instructed, and supervised may sometimes be a heavy burden for employers.

(c) Burden of proof

In principle in the law of delict, the victim is required to have proof of the wrongful act, causation and fault of the wrongdoer. In contrast to this the general law of obligation provides in § 282:

"*If it is disputed whether the impossibility of performance is the result of a circumstance for which the debtor is responsible, the burden of proof is upon the debtor.*"

The consequences of this I will discuss with concrete cases under IV.

(d) Prescription times

The regular period of prescription is thirty years (§195)[22]. This rule applies in general to the claim of culpa in contrahendo. The law of delict rules in § 852:

"*The claim of compensation for any damage arising from an unlawful act is barred by prescription in three years from the time at which the injured party has knowledge of the injury and of the identity of the person bound to make compensation; in the absence of such knowledge, in thirty years from the commission of the act.*"

---

[22]There are several exceptions of this rule, especially §§ 196, 197 as general rules, and the specific rules of e.g.: sale (477), ordinary lease (558), contract for work (638), order (786), obligation to bearer (801).

(e) Consequences thereof

The different regulation of the burden of proof and prescription might have been seen as desirable aspects of the applicability of contract law and the culpa in contrahendo but they are not the reason for the foundation to find the solution to certain problems in the law of contract. These effects merely follow the decision, once it has been made, between contract or delict.

But the two restricting factors enumeration principle and exculpatory proof, arose from general principles of the law of delict and from specific provision of the law of vicarious liability on the other hand, were (and still are) subject to never-ending discussions and reformatory efforts. Since no legislative reform has ever occurred, the German courts and legal authors were eager to discover ways to bypass these effects. One of the solutions was to develop an extension of the applicability of contract law to the precontractual phase through the concept of culpa in contrahendo. The application of contract law is one way to reach both aims: (i) avoiding the exculpatory proof by applying § 278 BGB; (ii) recognition of pure economic loss in the law of contract.

(i) Applying § 278 BGB

The provision reads as follows:

§ 278. A debtor is responsible for the fault of his statutory agent, and of persons whom he employs in fulfilling his obligation, to the same extent as for his own fault.[23]..."

It thus imposes upon the debtor 'strict' liability for faults of the persons he uses in the course of fulfilling his contractual obligations. The possibility of exoneration, which can be found in § 831 BGB, is absent in this case.

---

[23] The responsibility for his own fault is stated in § 276 BGB, which reads as follows:
§ 276 A debtor is responsible, unless it is otherwise provided, forwilfull default and negligence. A person who does not exercise ordinary care acts negligently... .

(ii) Recoverable pure economic loss

As stated above pure economic loss is not a compensatable form of harm under § 823 BGB and, therefore, neither under § 831 BGB . In a contractual claim, however, it is recoverable.

This is the two-sided background of deficits in the law of delict which are the reason to apply the concept of culpa in contrahendo. Due to these very different aspects, very different groups of cases have developed.

The first category has no relationship with duties, which are related to the intended contract, either in its conclusion or its contents, but with the duty of care for not causing any harm to the other party's rights, such as life, body and property, which are exposed to the influence of the contracting parties because of the contractual negotiations. In the second category the precontractual duty of care lies in the creating of a certain trust with regard to the future possible contract and has consequences for the contract itself. The first group competes with the law of delict, the second with the contractual rules codified in the BGB. The former is related to the problematic 'exculpatory proof', the latter to the problematic 'pure economic loss'.

IV. Duties without relation to the intended contract

1. Precedents

First of all, I will give examples of typical cases and important milestone-decisions within this group.

(1.) The first case is the famous linoleum case which was brought before the Reichsgericht in 1911:[24]

After making several purchases in the defendant company's department store, the plaintiff went on to the linoleum department to buy linoleum floor-cover. She

[24] RGZ 78, 239.

mentioned this to W, the sales assistant who served there, and looked through the patterns which he displayed for her to make a choice. W, in order to pull out the roll she pointed to, put two others aside. They fell, hit the plaintiff and her child, and struck both of them to the floor. The purchase of the linoleum was not completed because, in the plaintiff's words, she became seriously disturbed by the fall.

The court argued: "W was acting for the defendant company when he entered into negotiation with the plaintiff. The plaintiff had asked for a piece of linoleum to be laid out for inspection and purchase. W had acceded to her request in order to make a sale. The proposal and its acceptance had for their purpose the conclusion of a sale, and therefore the production of a legal transaction. That was no mere factual proceeding, a mere act of courtesy, but a legal relationship came into existence between the parties in preparation for a purchase; it bore a character similar to a contract and produced legal obligations in so far as both seller and prospective buyer came under a duty to observe the necessary care for the health and property of the other party in displaying and inspecting the goods. .... It would be contrary to the general feeling of justice if in cases where the person in charge of the business of displaying or laying out goods for exhibition, sampling, trial, or the like carelessly injures a prospective purchaser, the proprietor of the business -with whom the prospector wished to make a purchase- should be answerable only under § 831 and not unconditionally (..under § 278..), so that the injured person should, if the proprietor succeeds in exonerating himself, be referred to the usually impecunious employee."

The other cases were decided by the Federal Supreme Court.

(2.) Banana skin case[25]

The customer of a warehouse, while walking around, fell over a banana skin and was seriously injured. In this judgement the Federal Supreme Court deals mainly with the question of the burden of proof. The culpa in contrahendo as the justification of the claim is only mentioned in one sentence. The Court held, "that the customer, who

[25]BGH NJW 1962, 31.

enters the sphere, which is controlled by the shop with the intention to conclude a contract, has from the moment when he steps into the shop the right of contractual protection of his personal safety".

With this decision the Federal Supreme Court goes one step further than the Reichsgericht in the reasoning of the Linoleum-case, because the plaintiff was not even in contractual negotiation with a sales assistant. The mere fact of entering the shop with the intention to buy is enough to create a duty to care.

(3.) Vegetable leaf case[26]

The plaintiff, who at the time of the accident was fourteen years old of age, went with her mother to a branch of the defendant's, a small self-service store. Whilst her mother, after selecting her goods, stood at the till, the plaintiff went round to the packing counter to help her mother pack the goods. In doing so she fell to the floor and suffered an injury which necessitated lengthy treatment. Alleging that she had slipped on a vegetable leaf, she sued the defendant for breach of his duty to provide safe access. The Court explains: "Liability for culpa in contrahendo, which in cases like the present one is more favourable to a plaintiff than the general liability in delict for breach of the duty to provide safe access -because of the increased liability for employees (§ 278 in contrast to § 831), the longer limitation period (§ 195 in contrast to § 852), and the reversal of the burden of proof (§ 282)- rests on a legal obligation created by way of supplement to the written law. It arises from the process of bargaining for a contract and is largely independent of the actual conclusion or efficacy of a contract. The liability for a breach of the duties of protection and care arising from this obligation finds, in cases of the present kind, its justification in the fact that the injured party entered the other party's sphere of influence for the purpose of negotiating for a contract and can therefore rely on an enhanced carefulness in the other party to the negotiation. This is borne out exactly by the present case in which the mother entered the sales department of the defendant for the purpose of making a purchase and in

[26]BGHZ 66, 51.

doing so had to subject herself to a risk involved in the increased congestion, especially near the till, in a self-service store." The Court goes on according to the banana skin case and clarifying its message, "it is, however, always a presupposition of liability for culpa in contrahendo in this type of contract of sale that the injured party enters the sales department with the purpose of contracting or of entering into 'business contacts' -and therefore at least as a possible customer, though perhaps without a fixed intention to purchase. ... The line may be difficult to draw in particular cases, above all because it depends on the difficult proof of unexpressed intention. In the present case, however, it is beyond dispute that the plaintiff from the start did not intend to make a contract herself but only to accompany her mother and help her in buying. A direct application of liability for fault in concluding a contract with the defendant is therefore excluded." Nevertheless, was the defendant liable on the reason of culpa in contrahendo, because of the concept of contract with protective effects vis-à-vis third parties.

(4.) Floor-covering case[27]

The plaintiff fell in the warehouse of the defendant company while standing in front of shelves and studying the goods. The reason for the fall was a defective piece of the floor covering which at that position was loose. Under the floor-covering were grains which caused the effect of her wearing roller-skates. The plaintiff was seriously injured.

The Court held that the defendant company had the duty to use a floor-covering which could not develop into a danger to the customers. The concept of culpa in contrahendo is not explained or established but merely founded as the justification of the claim in one sentence by referring to the vegetable leaf case mentioned above.

(5.) Staircase to consulting room[28]

---

[27]BGH BB 1986, 1185.

[28]LM Nr. 11a, § 823 (Es) BGB.

The consulting room of a doctor was only attainable over a staircase which was in bad safety conditions. On her way home, the plaintiff, after consulting the defendant doctor, fell on the staircase and was seriously injured.
The Federal Supreme Court held, that the doctor, because of opening the consulting room to his customers, was responsible for the safety of the steps besides the houseowner and that this duty of care could result from the contractual relationship to his patients.

(6.) Motor boat case[29]
A slightly different case -because it deals with damage to the property of the plaintiff and not injury to the body- case was brought forward to the Federal Supreme Court in 1976. The plaintiff was the owner of a motor boat; the defendant was running a shipyard. After discovering a leak the plaintiff brought his boat to the defendant's shipyard. Since the ship was in danger of sinking, it was lifted out of the water on a special trailer. Later the plaintiff told the defendant that he intended to sell his ship, but was not sure yet, if he would let it be repaired or not. Thereupon the boat was taken off the trailer and put on ground with supporting pillars. Two weeks later the boat toppled over and was severely damaged. A repairing or storage contract was not concluded between the parties.
The Court held that the defendant had the same duty of protection and care during the contractual negotiations which he would have had after the conclusion of the contract. And this duty included the duty of proper storage to avoid damage to the plaintiff's property.

2. Duty of care in this case group
On first sight it is obvious that the facts of these constellations compete with cases which usually would appear to be solved in the law of delict. Injured persons, damaged property; this is the typical domain of tort law. This is made even clearer when one

[29]BGH NJW 1977, 376.

looks upon the fact, that in German law, one of the fertile sources of the development of liability for omissions and, indeed, of the whole law of tort, was the development of the idea that a preceding dangerous (or potentially dangerous) activity or state of affairs, should give rise to a duty of care. From this idea, the courts slowly but steadily developed the famous Verkehrssicherungspflichten. The term Verkehrssicherungs-pflicht is not easy to translate, but its meaning can be summarised by saying that whoever by his activity or through his property establishes in everyday life, a source of potential danger which is likely to affect the interests and rights of others, is obliged to ensure their protection against the risk thus created by him.[30]

In a number of cases, in particular the banana skin case, the breached contractual duty is identical to an ordinary Verkehrssicherungspflicht. As mentioned above, every-body owes this duty of care and protection, if one opens a private sphere to the public. A person must make sure make sure that the source of potential danger does not cause any damage. One can see that the special trust brought forward to the potential contract partner is not an important relevant factor. For example the women who is on her way to or from the consulting rooms of a doctor expects that the staircase is safe; but she does not think about the particular person who is responsible for this, whether it is the doctor or the houseowner. She does not trust one more than the other. If both are responsible for the condition of the staircase, it is not easy to see why one would be liable in contract and the other liable in tort, since it seems to be the same duty of care. In the warehouse cases the customer expects, of course, that he will not be injured by a sales-assistant or in some other way, but this is a more general expectation. The expectation has nothing to do with a special trust towards the owner of the department store on which the customer relies.

This can be clarified and illustrated if one takes the situation of a person who whilst standing in front of a shop-window, studying the window display, gets injured as the display lighting falls down. Should the injured person have a different claim only

---

[30]Palandt, § 823 Nr. 58.

because in one case he intended to enter the shop and in the other he just wanted to pass by?

The only reason why in these cases the courts applied the culpa in contrahendo is the deficit of § 831.

The vicarious liability of the employer for the wrongful act of his employee since the Imperial sanction on August 18th, 1896, is provided in § 831 of the BGB, and remains unchanged for over 100 years. This provision was the result of a serious and long discussion between scholars of contradicting opinions. The principe behind the debate was that 'the present legal community is conscious that a person who employs another to do any work, has to take care that through this work no damage is done to a third party, because the performance is also a matter concerning the employer'[31]. However the question was, to what extent should the employer be responsible for the damage caused by his employee, and, more concretely, whether the liability of the employer should be one with or without own fault.

The discussed arguments, among others, were the comparable provision 1834 of the Code Napoleon and the applicability of the law of representation. More importantly it was a discussion on policy factors as to whom should be burdened with the harm.

The refused petition rejecting the requirement of fault on the side of the employer stated[32]:

"Compared to earlier times the industrial enterprises have seen an unexpected development in the last half of the 19th century, which the law could not have foreseen. With the nature of the different enterprises numerous, before unknown, dangers, are involved which will proliferate even more with the increasing compactness of the population. One has not thought about compensation of damages caused by those enterprises yet, one has left the injured person with the prejudices alone."

---

[31] Benno Mugdan, Die gesamten Materialien zum Bürgerlichen Gesetzbuch für das Deutsche Reich, Band 2, Recht der Schuldverhältniss, Berlin 1899, page 1092: 'Dem rechtsbewußtsein der Gegenwart entspreche der Satz, daß derjenige, der sich eines Anderen zu einer Verrichtung bediene, dafür sorgen müßte, daß durch die Ausführung der Verrichtung ein Dritter nicht Schaden erleide; denn die Ausführung sei auch Angelegenheit des Geschäftsherrn ....'

[32] ibid 1093.

The starting point has to be the principle of political economics, that every business has to carry the burden that is attached to it. Only those enterprises have a right to exist, which can pay the foreseeable damages from the profit. That they are n a position to calculate the costs of possible future damages in their price fixing. Finally the small industrialist, who does all the work on his own, is discriminated against in favour of bigger industrialists who have people working for them.

In the resolution, however, via majority voting the principle of the culpa in eligendo was established.[33] The majority conceded that the refused petition had indeed included the legitimate element that the person who has the advantages of a business, has to compensate for the damages resulting from this business. The majority however denied the possibility to lay down this concern in the Civil Code. The solution rather had to be found in specialised legislation[34], which was only able to take into consideration technical standards, compulsory insurance, and the efficiency of the smaller industry.

With this decision the legislator wanted to protect the interests of the small industry, the rising middle class, which is still the backbone of the German industry, by avoiding increased economic burdens. Provision § 831 of the BGB therefore reads as follows[35]:

§ 831. A person who employs another to do any work is bound to compensate for any damages which the other unlawfully causes to a third party in the performance of his work. The duty to compensate does not arise if the employer has exercised ordinary care in the selection of the employee, and where he has to supply appliances or implements or to superintend the work, has also exercised ordinary care as regards

---

[33] ibid 1094.

[34] For example the Imperial Libility Act of 1871 which had imposed strict liability on railway companies and overtake the notion of fault.

[35] The German version reads as follows:
(1) Wer einen anderen zu einer Verrichtung bestellt, ist zum Ersatze des Schadens verpflichtet, den der andere in Ausführung der Verrichtung einem Dritten widerrechtlich zufügt. Die Ersatzpflicht tritt nicht ein, wenn der Geschäftsherr bei der Auswahl der bestellten Person und, sofern er Vorrichtungen oder Gerätschaften zu beschaffen oder die Ausführung der Verrichtung zu leisten hat, bei der Beschaffung oder Leistung die im Verkehr erforderliche Sorgfalt beobachtet, oder wenn der Schaden auch bei der Anwendung dieser Sorgfalt entstanden sein würde.
(2) Die gleiche Verantwortichkeit trifft denjenigen, wecher für den Geschäftsherren die Besorgung eines der in Abs. 1 Satz 1 bezeichneten Geschäfte durch Vertrag übernimmt.

such supply or superintendence, or if the damage would have arisen, notwithstanding the exercise of such care.

The same responsibility attaches to a person who, by contract with the employer, undertakes to take charge of any of the affairs specified in par.1, sentence 2.

The outcome of the legislative process resulted in the exculpatory proof, with which the courts are not satisfied. The policy considerations have changed in 100 years, but § 831 remains unchanged. This is why culpa in contrahendo is used to solve these cases: to give the plaintiff a solvent debtor in a contractual claim, because the delictual claim against the employer is unsuccessful (exculpatory proof) and unproductive against the employee (no money). However, the court made contractual solution has the great disadvantage, that § 847 (compensation for pain and suffering) is not applicable, even though the cases are actually 'delict cases' and compensation for pain and suffering is the real reason for the plaintiff to sue, since in Germany, the loss caused by the incident to the plaintiff's health or property is usually insured.

3. Burden of proof

As expressed above, the different kinds of the burden of proof in contract and delict was one of the desired effects of the applicability of culpa in contrahendo. Though the wording of § 282, which regulates the burden of proof in the event of 'impossibility of performance', does not seem to fit the circumstances with which the culpa in contrahendo is deals with, the Federal Supreme Court held that § 282 is analogously applicable in certain situations. The Court states that the burden of proof is related to "areas of organisation and potential dangers and responsibility"[36]. With this interpretation of the burden of proof the plaintiff in the vegetable leaf case only has to prove that she slipped on a vegetable leaf, but she does not have to proof that it was the defendant's fault, because this will be presumed unless he can prove otherwise.

---

[36]"Beweislastverteilung nach Organisations-, Gefahren- und Verantwortungsbereichen", BGH NJW 1987, 639 (640).

This situation was more favourable for a plaintiff than a delictual claim until the famous Hühnerpest-Fall[37] (chicken pest case). Alhough the case is considered to be a case of 'product liability' it provides general conclusions to the burden of proof in the law of delict.

The plaintiff in that case, who ran a chicken-farm, had her chickens inoculated against fowl pest by the vet, Dr H. A few days later fowl pest broke out. More than 4000 chickens died and over 100 had to be slaughtered. The plaintiff claimed compensation for the damage from the defendants, vaccine manufacturers, whose vaccine XY had been used by the vet.

It is important for one to be aware of the distinction between 'causation of the damage' and 'fault'. The Court points out, that "it is not in question that even in 'product liability' the injured party must prove that the damage was caused by a defect in the product. The plaintiff had therefore to show that the fowl pest broke out among the chickens because the vaccine originated with the defendant company and contained active viruses when delivered".

That proof was considered by the Court of Appeal to have been furnished. The Court goes on: "It is true that the injured party who relies on § 823 sec.1 will have to allege and if necessary prove not only the causal connection between his damage and the conduct of the doer, but also his fault." After considering this general rule the Federal Supreme Court explains then the rule of evidence and burden of proof related to the circumstances of these cases. It states:

"The possibility of proving the subjective conditions depends appreciably on how far the injured party can elucidate the detailed course of events. That is however especially difficult when it relates to antecedents which played a part in the business of manufacturing the products. The Courts for a long time came to the help of the injured party by contenting themselves with proof of a chain of causation, which, according to human experience, indicates an organisational fault in the manufacturer. All the same, one cannot stop at this point in considering claims for damages for 'product liability'....

---

[37]BGH NJW 1969, 269.

The producer is better able to explain the facts or to bear the consequences of being unable to offer an explanation. He surveys the fields of production, determines and organises the manufacturing process and the control of delivering the finished products. The size of the business, its complicated, departmentalised organisation, its involved technical, chemical, or biological processes and the like make it practically impossible for the injured party to ascertain the cause of the defect. He is therefore unable to lay the facts before the judge in such a way that he can decide with certainty whether the management is to be blamed for neglect or whether it is a case of a mistake in manufacture for which a workman is at fault, or a single breakdown that may happen at any time, or defect in development that was unforeseeable in the existing state of technology or science. But if the unknown cause lies within the scope of the producer, it is also within the scope of his risks. In that case it is appropriate and expected of him that the risk of not being able to prove his innocence should lie with him. Such rules of evidence have always been applied to contractual or quasi-contractual relations of a special legal character between the injured party and doer of damage. No obvious reason can be given why they should not also apply to delict, if the reasons for them apply."

The same result was reached via a slightly different argument by the Federal Supreme Court produce in the floor-covering case mentioned previously. In addition to considering culpa and contrahendo as the grounds for the claim, the court also proves the requirements of a delictual claim and concludes, that since the plaintiff proved the causation of the damage to be the loose floor-covering it is the defendants obligation to prove his innocence. The Court expressly states that this can not be derived from § 282 because this provision is not applicable in the law of delict, but it results from the rule of prima facie evidence which is in favour of the plaintiff in cases like this.

As a result one can see that the burden of proof has no significance anymore for trying to make contract law applicable through the concept of culpa in contrahendo. The

Federal Supreme Court has, in a series of decisions when dealing with these kind of cases, brought the rule of evidence in contract and delict into line. For the burden of proof today it makes no difference nowadays, for example, the vegetable leaf case is decided in a contractual or delictual claim.

4. Conclusion

There are duties of care and protection which are general duties and which arise against everybody who breaches such a duty. The compliance or non-compliance with them should be a matter of the law of delict. On the other hand there are special contractual duties which can only arise between the parties of the contract. For these duties the contractual framework has to apply. The Courtmade solution is only a product of the unwanted effect of the exculpatory proof. Therefore, that problem should be solved by the legislator. The cases of this group, because they belong virtually to the law of delict, do not provide us with a clue in the finding of the "real reason" of the liability under culpa in contrahendo.

V. Duties related to the intended contract

Contrary to the cases in the previous chapter, the constellations I will deal with now do not cause any problems of concurrens with the law of delict. This is because the fault in the precontractual phase results in economic loss of the injured party. These cases have nothing to do with delict, employer, or exoneration. Trusting in good faith on the future conclusion of the contract the plaintiff makes a loss, because of e.g. unnecessary expenses, a future rise in prices, or increasing costs. In most of the cases the plaintiff has a purely economic loss which cannot be recovered via a tort claim and involved a contract which is not yet concluded. Applying culpa in contrahendo and liability in the precontractual phase is the plaintiffs only chance for compensation.

There are three different constellations which must be distinguished:
-damage is caused through the termination of the contractual negotiations;
-damage is caused through the invalidity of the contract;
-damage is caused through a disadvantageous contract.

All three groups deal with economic loss. Therefore, I will open by briefly illustrating how the German contract law provides for 'measure of damages'.
When pecuniary damages are payable they are assessed on the following principles:
(1.) as a general rule compensation must be paid for loss of profit as well as for other loss. Such profit as, according to the ordinary course of events, and in view of the preparations and precautions of the parties, might reasonably have been expected, is deemed to have been lost (§ 252);
(2.) in certain cases a party injured by the fact that an agreement is invalid, has a claim to be indemnified for the actual loss suffered by him in consequences of his belief in its validity. The interest in the agreement for which he is entitled to compensation is called the 'negative' interest (§§ 122, 179 II, 307) in contradistinction to the 'positive' interest or the 'interest of performance' (Erfüllungsinteresse) to which a party is entitled in the case of a valid agreement.[38]

1. Termination of contractual negotiations

In contrast to the previous group of cases this first constellation deals with the potential cause of damage which is inherent while negotiating a contract. The expectation of the one party on the conclusion of a contract has been disappointed because the other party does not allow the contract to come into final existence. This problem can arise from two different backgrounds. One set of circumstances leads to a normal contract which comes into existence by accepting the offer, and other circumstances create a contract for which a form is prescribed by law with the effect that even an agreement on all necessary points of the contract is void without the form.

---

[38]Palandt, Vor § 249 Nr. 16, 17.

A legal claim on conclusion of a contract exists only in the case of a duty to contract, e.g. electricity supplier. This claim is however independent of contractual negotiations and has nothing to do with fault. A claim for damages, therefore, could only result from the delict provision § 826[39], if one party intentionally harms the other party with contractual negotiations, e.g. the faked intention to negotiate only to keep the other person away from another possible contract. In addition, the German Civil Code operates with the binding effect of an offer (§ 145)[40]: The receiver of such an offer can unilaterally conclude the contract with his acceptance during the binding period. In this respect the law may be regarded as cautions: in case of doubt the period of acceptance is rather short (§ 147), the acceptance with changes is deemed to be a rejection (§ 150) and therefore ceases the offer (§ 146). Furthermore, the settlement of certain points of the contract does not cause a binding effect (§ 154) and the remaining of an agreed form prevents the conclusion (§ 154). In addition to that and with regard to the form § 125 provides that, "*a juristic act* (e.g. a contract)*which is not in the form prescribed by law is void*".

Despite this precise framework surrounding contractual negotiations and binding or non-binding situations, the problem of "termination of contractual negotiations" plays an important role in the decisions of the Federal Supreme Court concerning the applicability of the concept of culpa in contrahendo. All cases in this group have a

---

[39] § 826. A person who wilfully causes damage to another in a manner contra bonos mores is bound to compensate the other for the damage.

[40] § 145. If aperson offers to another the making of a contract he is bound by the offer, unless he has excluded this obligation.

§ 146. An offer ceases to be binding if it is declined to the offerer, or if it is not accetpted in his favour in due time according to §§ 147 to 149.

§ 147. An offer made to a person who is present may be accepted only there and then. This applies also to an offer made by one person to another on the telephone. An offer made to a person who is not present may be accepted only before the moment when the offerer may expect to receive an answer under ordinary circustances.

§ 150. If the acceptance of an offer arrives out of time it is deemed to be a new offer. An acceptance with amplificationc, limitations, or other alterations is deemed to be a refusal coupled with a new offer.

§ 154. So long as the parties have not agreed upon all points a contract upon which, according to the declaration of even one party, agreement is essential, the contract is, in case of doubt, not concluded. An understanding concerning particular points is not binding, even if they have been noted down. If authentication of the contemplated contract has been agreed upon, in case of doubt the contract is not concluded until the authentication has taken place.

common ground in that the parties have knowledge that they did not conclude a final agreement or that the form prescribed by law is still outstanding. But somehow did the one party give the other party the impression that the future conclusion of the contract would definately occur, and as a result therefrom the other party incurred expenses. The question arises: Why should a party of mere contractual negotiations rely on the future conclusion of the contract even though he has no claim to demand the conclusion?

A simple example illustrates the above question: A from Johannesburg wants to buy a house in Cape Town from B. They agree on the price and details over the telephone. In German law the sales contract of property requires judicial or notarial authentication (§ 313). Therefore, A flies down to Cape Town to conclude the contract in the necessary form. Arriving in Cape Town B tells A that he changed his mind and does not want to sell anymore, or that he has sold already to somebody else, or simply wants more money. Should A be able to compensate the costs for the flight?

Cases decided by the Federal Supreme Court are for example:

The plaintiff was in contractual negotiations with a member M of the board of the defendant company regarding manufacture under license. For the use of this license the plaintiff wanted to build a new plant. M knew, following their correspondence on estimated costs, building plans, questions of calculation, that the plaintiff was already investing and causing costs. The conclusion was that the license was not granted.[41]

Three other cases[42] with the same simplified background are:

The defendant, a municipality, was in contractual negotiations with the plaintiff, which was a big building company which builds complexes for complete districts, to lease or sell public land including future building permissions. The potential contract partner started to plan huge projects. After planning and replanning over years the municipality

---

[41]BGH NJW 1975, 1774.

[42]BGH NJW 1980, 1683; BGH NJW 1978,1802; BGHZ 92, 164.

stopped the negotiations and presented a different concept for the area in question which left no room for the ideas of the plaintiff.

The Federal Supreme Court states in all these cases[43] as a general rule, that:
"Already during the negotiations about the conclusion of a contract does every party owe the duty to take consideration for the legitimate interests of the other party, because of the contractual-like mutual trust caused by negotiating with each other. This includes the non-termination of the negotiations without a reason, if earlier the one party caused the trust of the other, that the contract would be concluded for sure. In case that the one negotiating party breaches this duty with fault, a claim for compensation of damages might occur under culpa in contrahendo for the negative interest. This principle is also in force for negotiating about sales contracts dealing with property, which need the form prescribed in § 313. The mere fact of uncertainty about some aspects of the contract does not alone necessarily excludes the claim for damages.... Of course, does not any termination causes the duty to pay compensation. Contractual negotiations have usually the aim to find out whether a binding contract with the discussed contents can be concluded. With the negotiations the parties have in general the expectation that they hopefully reach an agreement. Therefore, everybody who negotiates with another person could cause the more or less certain expectation, that he is willing to bind himself by the mere fact that he is negotiating. This alone cannot restrict the 'freedom to contract' or 'non-contract' and does not cause a claim based on culpa in contrahendo."

According to the Federal Supreme Court the decisive difference between sanctionless termination of negotiations and one which causes a duty to compensate is founded in the termination for no reason while on the other hand a trust was caused with fault that the contract will certainly be concluded during the negotiations.

---

[43]BGH NJW 1975, 1774; BGH NJW 1980, 1683; BGH NJW 1978, 1802; BGHZ 92, 164.

If one takes a closer look at the three requirements,

- termination for no reason,
- fault,
- causing trust of certain conclusion,

which the Federal Supreme Court deems to be necessary for a claim based on culpa in contrahendo in the circumstances of termination of contractual negotiations, some questions arise.

(a) Distinction of two different concepts

With regard to the first requirement the Court always uses the formula "termination without any reason". Though after determining the decisions one can doubt that this criteria is in fact of any relevance; or, even more, the termination with a reason might have the same consequences, if the other requirements are met.

The simplified example of the house-sale in Cape Town may illustrate this. Should it make any difference if the seller B does not want to sell any more because:

- he just changed his mind;
- he got a better offer;
- he suddenly finds himself in financial problems and needs the house;
- he wanted to buy another house for himself, but the contract is void and, therefore, he wants to stay in his house.

I think, even if the terminating party has a more or less good reason the Court will still consider the concept of culpa in contrahendo, and it does so for example in a case in 1978[44] and in one from 1980[45]. In both cases the Court gives first the whole concept as cited above, as being related to each other, and then on page 1802 it states that the question of "no reason" does not arise in this particular case, and on page 1684 it examines first a concept of fault and denies it in the particular case and after that

[44]BGH NJW 1978, 1802.
[45]BGH NJW 1980, 1683.

considers the concept of "no reason". Based on this, it is quite obvious that the Federal Supreme Court with his one long formula is actually introducing two different concepts. Sometimes culpa in contrahendo is applicable in case of ***termination for no reason + causing trust of certain conclusion*** and sometimes in case of ***fault + causing trust of certain conclusion***.. Slightly different is the view of Stoll[46], who considers 'no good reason' as fault. In his view the termination without a very good reason means termination with fault, if the 'trust-requirement' is met. In conclusion there is no difference, because with this they follow in principle the second category with different arguments.

(b) Termination without fault

In the first constellation no fault is required. It is based on the concept of § 122. As mentioned above, the reason for the duty to compensate provided for in § 122 flows from the idea that in case of a wrong declaration of intention the mistaken party must be able to avoid the contract, but the misled party, which relied on the declaration, must have a remedy for the useless expenses. This concept has no relation with 'culpa' but is a mere compensation for disappointed trust.[47] The same applies in the cases of termination for no reason. Therefore, I do not think that culpa in contrahendo is the appropriate heading for these cases, because there is no 'culpa'. However the cases are also different from the 'declaration cases' with regard to the situation. If a person declares his intention and makes a mistake, he intended originally to be bound, he wanted to conclude a contract; but it appears that he made or caused a mistake with his declaration. In a situation like that he should be burdened with the consequences. That sounds just, and leaves no grounds for complaint. But if two parties are negotiating a contract, they are in an area of a fundamental freedom to contract or not to contract. To decide if a party's reason is sufficient to terminate the negotiations seems to be impossible and hampers the exercise of the freedom to do with your property what

[46]Stoll, Festschrif f. Flume I, p. 754.
[47]Palndt, § 122 Nr. 4.

ever you want to do. In such a situation there should be in principle no duty to compensate, if the contract is not concluded and no fault however has occurred. The Federal Supreme Court follows in this at least in cases where a prescribed form is outstanding[48], because the law wants to protect and warn the parties with the necessity of a form. With a duty to compensate the Court would bypass the intention of the legislator to leave the binding effect of a contract until the form is fulfilled, because it would pressurise on the parties to conclude to avoid to pay compensation. In extreme cases the principle of good faith may be used to find a just solution, but culpa in contrahendo should certainly not be considered as to be the doctrinal background for a solution in these circumstances.

(c) Termination with fault

This other concept is at least based on fault of the terminating party. Fault in relation to "causing trust of certain conclusion" can only mean that (i) the one party causes the trust with fault or (ii) that after causing the trust he terminates the negotiations with fault:

(i) If one party causes trust of a certain conclusion with fault, this gives rise to a situation, where the party actively makes certain statements about the ongoing negotiations and his intentions about the intended conclusion of the contract which in that situation he should not have made, because he knew (intentionally) or ought to have know (negligently) that he cannot or will not conclude the contract, or passively omits to inform the other party of certain facts which might have been of importance to the other party, because knowledge of those facts would have made that party less certain about the future contract.

As mentioned above, in the case of intention § 826 is applicable anyway, and culpa in contrahendo does not give any advantages beyond that. The constellation of a party

[48]BGH NJW 1975, 43 (44).

ought to know that he cannot conclude the intended contract is not easy to imagine, and does therefore not leave much room for its applicability. The only cases which can occur are cases with a lack of power to conclude on the side of that party, either because of the need of an extra permission (like for the sale of a house which is listed under a preservation order) or because of rules concerning the law of agency. Of far more relevance is the situation where the party negligently omits to inform the other party of important factors. This situation considers a "real" culpa in contrahendo case: the parties are in contractual negotiations, one party breaches the duty to inform properly of the relevant factors concerning the conclusion of the contract, this party knew or ought to have known that this factor might have changed the expectations of the other party, and by causing in this wrongful way a certain trust damages occurr. This duty to inform of all circumstances which are of importance for the contract is a typical precontractual duty.

(ii) If one terminates the negotiations with fault after causing the special trust without fault, this produces a situation in which the terminating party creates the special trust on which the other party relies in good faith, or simplified, the terminating party believes at a stage of the negotiations itself that the contract will definately be concluded, and only later hindrances arise which are caused by this party with fault.

I will demonstrate this point in the case of the house-sale: If B sells the house to Z he cannot sell it to A anymore. It is his fault that the negotiations have to be terminated. But in the moment of the telephone conversation B might very well have intended to sell the house to A, so there is no fault concerning the creation of trust, but a fault in disappointing the trust. This is a simple case of an intentionally caused termination. The cases can be less clear: B had the faithful intention to sell the house, because he wants to buy a bigger house for himself, but while A is on the plane, B's financial situation changes dramatically because he loses his money. Three different scenarios might be:

(1.) B played roulette. He put all his money on red, which gives him an almost 50:50 chance to win or to loose. B looses.

(2.) B invested all his money in risky shares on the stock exchange. The chances of loosing everything were 25:75. At the time when he needs money and he wants to sell them, their value is almost nothing.

(3.) B invested in secure insurance stocks. Due to an unforeseeable earthquake the insurance company becomes bankrupt. Again B looses his money.

The question arises: does somebody, who created a certain trust, have the obligation to live his life differently or more carefully, so that he does not disappoint the trust? Can already the faithful intention to conclude a contract influence basic freedoms?

In my opinion, the answer can only be no. Of course, the commercial intercourse is a matter of giving and taking trust. If one party says that he will conclude the contract the other party should be able to rely on that. Otherwise trade would not be possible. The other party can expect that the one party does not intentend to terminate the possible conclusion of the contract. This is a matter of good faith and bona mores and a solution depends on the facts each individual case. But a duty of care that the contract can be concluded before it is concluded is too far reaching. Such a duty would imply that the one party is already, from the moment of the creation of the certain trust burdened with the duty to make the contract possible. In the case that B looses his money at the roulette table one can say, to take a 50:50 chance is negligent, therefore, B terminated the conclusion of the contract with fault. What about cases in which the chances are 25:75 or 75:25? Should that make any difference? The answer can only be found in the weighting of trust and risk. The conclusion of a contract must give certainty about rights and obligations, but in the precontractual phase both parties only owe each other "fair play". A should be protected in his trust on B's intention, but A carries also the normal risks of life that circumstances are changing. Another example may show that even clearer: B wants to sell his car to A. They agree on all details but they agree that the contract is only valid when a certain form is fulfilled. On his way to

A -to fulfil this form-, B negligently causes an accident and the car is destroyed. A already bought some new equipment for the car which is now useless. In this situation A is to blame for nothing but causing an accident.

The mere fact of an honest intention and the creation of a certain trust should not imply any duties of care. Before the conclusion of a contract the parties carry the normal risks of life, that the situation of the other party changes. Even if this "change" is caused negligently culpa in contrahendo should not be applicable, because the parties do not owe a special care in their own affairs in the precontractual phase. The parties can live their lives more or less as they wish to. Things change only when one party causes the "change" intentionally. This is not, however, culpa in contrahendo but, as mentioned above, good faith and bona mores.

(d) Conclusion

In the first group of cases regarding duties related to the intended contract the "termination of contractual negotiations", one can see that these cases do not represent a homogenous group. Only the constellation discussed under (c.)(i) can be considered as a proper example of the applicability of culpa in contrahendo. If somebody creates a certain trust and he should have known better, he breaches the duty to care. In the other situations the individual freedom of the contracting parties to be bound or not to be bound without consequences should be of a higher value. It is just another general risk of life to be disappointed in some circumstances. The other party is not breaching a duty but lives its life and exercises the freedom of contract.

2. Invalidity of the contract

In the previous group one party terminated the contractual negotiations before a final agreement was reached. We are now dealing with cases in which the negotiations -at least in the opinion of one of the parties- resulted in the conclusion of a contract. This party does not rely on a future settlement, but a valid contract. The damage is caused due to the fact that the contract is void from the beginning or avoided later.

These are exactly the kind of cases Ihering was considering at the time he wrote his essay. As shown above, the legislator was aware of the problem of invalid contracts and the damage resulting from them. The three main provisions dealing with such situations are §§ 122, 179, and 307[49]. These regulations, however, are based on different backgrounds and do not follow the same doctrinal ideas. One can distinguish between liability with fault in § 307 and without fault in §§ 122 and 179. Furthermore, the kind of compensation differs between the positive interest (§ 179 (1)) and negative interest (§§ 122, 179 (2), 307). In particular the distinction between liability with or without fault is of great importance. The legislator installed two different concepts, one of pure reliance on the declaration, the so called Vertrauenshaftung (trust-liability), and one of reliance that the other party does not cause any damage with fault, the so called Verschuldenshaftung (fault-liability).[50] The idea of culpa in contrahendo is, of course, a concept of culpable conduct, an act or omission with fault. For the examination of the applicability of culpa in contrahendo it is important to consider the fact, that the legislator provided for different solutions for different situations of invalid contracts. The three provisions, however, have a common ground in that the reason for the invalidity of the contract originates in the sphere of one of the parties. In contrast to that, culpa in contrahendo with regard to invalid contracts is also considered in cases of general invalidity reasons. For purposes of transparency I will deal with personal and general invalidity reasons separately.

---

[49]§§ 122 and 307 are cited above under II.. § 179 reads as follows:
§ 179. (1) A person who has entered into a contract as agent is, if has not given proof of his authority, bound to the other party at his election either to carry out the contract or to compensate him, if the principal refuses to ratify the contract.
(2) If the agent did not know that he had no authority, he is bound to compensate only for the damage which the other party has sustained by relying upon the authority; not, however, beyond the value of the interest which the other party has in the validity of the contract.
(3) The agent is not liable, if the other party knew or ought to have known of the absence of authority. The agent is also not liable if he was limited in disposing capacity, unless he has acted with the consent of his statutory agent.
[50]Larenz, Festschrift f. Ballerstedt, p. 418.

(a) Personal invalidity reasons

The three provisions in the BGB §§ 122, 179, and 307 deal with such personal invalidity reasons: § 122 with a mistake in the declaration of intention; § 179 with a lack of authority; § 307 with the impossibility of performance. As mentioned above, only § 307 is based on fault and, therefore, would be a proper case of applicability of culpa in contrahendo[51]. Besides the codified regulations there is not much room for cases of culpa in contrahendo related to personal invalidity reasons.

The Reichsgericht decided in a case where the agreement suffered under an unknown dissent between offer and acceptance (Versteckter Einigungsmangel § 155)[52], that: "the party who declares negligently its intention in a way to cause a wrong understanding of the other party is obliged to pay compensation for the negative interest"[53]. A more typical case was brought before the Federal Supreme Court in 1955[54]: B was constantly buying goods from A. Both were living in Germany, but B was a so called 'currency alien'. At that time (1948) every contract with an alien needed -to be valid- a special permission of the foreign exchange control office according to Article 1 Military Government Statute 53. B negligently omitted to inform A about his status as a 'currency alien' and the fact of the need of a permission. In another case[55], the contract in question was contra bona mores and therefore void[56], because it was extremely unilateral in favour of the one (dictating) party. The Court found the reason for liability in the precontractual duty of care as regards to the other party to not disappoint the trust to conclude a valid contract.

---

[51] If it would not have been codified.

[52] § 155. If the parties to a contract which they regard as concluded have in fact not agreed upon one point concerning which an agreement should have been arrived at, that which is agreed upon is valid if it is to be inferred that the contract would have been concluded even without a settlement of this point.

[53] RGZ 104, 265 (267).

[54] BGHZ 18, 248 - 253.

[55] BGH NJW 1987, 639 - 640.

[56] § 138. A juristic act which is contra bona mores is void.

When Ihering asked the readers of his essay for submission of more cases, he would have probably wished for cases like these. The parties are in contractual negotiations, a void contract is concluded through the fault of one party, and the other party suffers a loss because he relied on the contract. The law of delict cannot help because it does not protect pure economic loss, the law of contract is not yet applicable, and the special provisions such as § 307 are only dealing with certain constellations. The legislator could have regulated cases like those in a matter as provided in § 307. A law would have to be like the following:

§ 307 a. A person who, in concluding a contract, knows or ought to have known that the contract is void or voidable, is bound to make compensation for any damage which the other party has sustained by relying upon the validity of the contract.. The duty to make compensation does not arise if the other party knew or ought to have known of the reason, which makes the contract void or voidable.

The legislator in 1900 did not formulate this in the Civil Code for what ever reason, probably because he did not identify the problem as such. It is, however, quite obvious that he would have been willing to protect such interests, because it is basically the same situation as in §§ 306 and 309. The concept of culpa in contrahendo is able to offer a just solution and is in conformity with the idea of the BGB.

(b) General invalidity reasons

In the series of decisions of the Federal Supreme Court only one general invalidity reason is of importance: irregularity of the form prescribed by law with the consequence of a void contract (§ 125). In principle one can say, that it is a matter of everybody's own interest to secure the fulfilment of the prescribed form and not a duty of one party to the other.[57] Nevertheless, the case law for this problem is rich and the solutions are not uniform.

[57]Palandt, § 276 Nr. 77.

(i) Good Faith

In the first instance the Federal Supreme Court is examining the invalidity of the contract under the principle of good faith. Despite the fact that the law in § 125 expressly provides that 'a juristic act which is not in the form prescribed by law is void', the Court states in several decisions[58] that: "the invalidity of a contract caused by the lack of a form prescribed by law does not apply in certain circumstances if otherwise the result is incompatible with the principle of good faith; but this exemption only applies in very special cases, when under consideration of the parties, their relationship, and all other relevant facts of the case a different solution would not only be hard for the affected party but unbearable with the common sense of justice".

One can see that a solution based on good faith is and should be only a very exceptional. The legislator demands in certain circumstances a form for the contract for good reasons such as to warn and protect the parties, to create certainty, and secure previous advice. If this form is not followed the contract has to be in principle void. With this the courts are very restrictive. By denying the maintenance of the contract nothing is said about a possible liability.

(ii) Culpa in contrahendo

If the one party intentionally deceives the other regarding a necessary form to be in a better position to fulfil or avoid the contract as he wishes, than the party is liable for the positive interest. This constellation might also be a case of the applicability of good faith. The real problem are the cases in which the one party negligently omits to inform the other party. Here it is important to see that the first question should not be that of negligence even though 'culpa' in culpa in contrahendo indicates this, but the breach of a duty. Under which circumstances is the one party obliged to inform about a necessary form or, even more, to take care that the form is followed? Under which assumptions can we ascribe the lack of the form to one of the parties? As mentioned above, the

[58]BGHZ 16, 334; BGH NJW 1968, 39; BGH NJW 1965, 813; BGH NJW 1975, 43.

starting point to answer this question is that every party, which wishes to conclude a contract, has to take care of its own interest and therefore has to assure that necessary forms are observed. In principle there is no duty which can cause liability if a general invalidity reason is concerned. Despite this, a duty can arise from law (e.g. between parents and their children), contract or previous conduct. The only point of interest for culpa in contrahendo is the duty following from previous conduct. This duty again deals with the creation of trust in circumstances where the party should have known better. One of the leading cases decided by the Federal Supreme Court is based on the following facts: the plaintiff was a huge building company of public utility; the defendant bought one of the houses of the plaintiff. The plaintiff presented their own written standard contract, which the defendant signed. The contract is according to §§ 313, 125 void. The Court states: "the plaintiff induced the defendant to conclude a void contract, because they presented their self-made contract form for signature, of which the defendant thought, with that everything would be in order. The plaintiff omitted to inform of the necessary notarial form of the agreement. With that she breached the duty of care which came into existence with the start of the contractual negotiations."[59] One can draw the same conclusion in cases where the one party asks for the requirement of a special form and the other party denies negligently its necessity. This disappointed trust which the one party puts in the information of the other party, creates the breach of a duty of care. This constellation is similar to the one discussed under V.1.(c): There the party creates a certain trust that the contract will be concluded even though he ought to have known that it will not; here the party causes the trust that the contract is concluded in the right form even though he ought to have known that this is not yet so. In both groups there is in principle no liability: I am allowed to terminate contractual negotiations; I am allowed not to know that a form prescribed by law is necessary. But with what the one party does or says he steps out of this area of no liability, because he creates more than the "normal expectation" of an honest contractual contact, he creates a certain trust on which the other party is allowed to rely

[59]BGH NJW 1965, 812 (814).

on. The one party transfers the general expectation of honesty into an expectation of special trust related to his previous conduct. By doing this, one can also say that the general invalidity reasons becomes a personal one, because with his behaviour he undertakes a certain responsibility for the general invalidity reason. Therefore, the same solution has to apply. In circumstances like this it is justifiable to install a liability of culpa in contrahendo even in cases of general invalidity reasons.

VI. Disadvantageous contracts

In the two constellations of the previous chapter the damage was caused irrespective of the conclusion of a contract or because of a void conclusion of a contract. But it is also possible that the contents of a valid contract contains the damage. This problem becomes more and more important since the topic of consumer protection is of growing relevance. In the most frequent case, the one contracting party induces the other party to conclude the contract through wrong or incomplete information.

1. Decedents

To illustrate the problems I will present some relevant cases decided by the Federal Supreme Court:

(1) The plaintiff, a credit bank dealing with credits for car sales, granted Z a loan for his business not related to the purchase of a car under the condition of real and personal securities. The defendant concluded the contract of suretyship with the plaintiff to give the necessary personal security for this loan. For the real security Z transferred ownership of two old excavators to the plaintiff. The defendant believed that he was providing a security for the purchase of two new excavators, because of the use of a misleading printed contract form by the plaintiff and the negotiations. If his conception had been right, the risk would have been very low, since the value of the loan would have been equivalent to the value of the excavators. But the excavators were in fact of lower value and, worse, they were not even Z's.

The Court held that the plaintiff, according to the principles of culpa in contrahendo, would be responsible with regard to the defendant, if he caused negligently the wrong idea of the defendant about the kind of the loan (for the business instead for the purchase of two new excavators) and the risk of the suretyship.[60]

(2) The plaintiff, a property broker, entered into a contract with the defendant, who wanted to sell his property as fast as possible. In contrary to the 'standard' contract of brokerage they concluded an 'exclusive' (Alleinauftrag) one, which bears the consequence that the party of such a contract is not allowed to sell the property on its own but only exclusive through the broker. If the party sells without the help of the broker, however, a fee is due. The defendant concluded this 'exclusive' contract only because the plaintiff explained, after expressly asked about the consequences, that it would be a mere formality and that he, the plaintiff, would not be like this.
The Court held: "The plaintiff had no general duty to explain the relevance and the consequences of an exclusive brokerage contract. But since the defendant asked him, why he has to sign an exclusive contract, the defendant could expect that the plaintiff would inform him properly."[61]

(3) The plaintiff sold a circular saw (for industrial purposes) to the defendant. The new saw was meant to replace an old one in the plant of the defendant. During the negotiations the defendant informed the sales assistant of the plaintiff that the new saw had to stand on the same place as the old one before. Thereupon, the assistant measured the spot and said it would be enough space. The defendant got the exact proportions only after conclusion of the contract with the plan of the foundation. The saw was 80 cm too wide and thereof reaching into the way of the railway embankment laid next to it.

---

[60]BHG NJW 1968, 986 (987).
[61]BGH NJW 1969, 1625 (1626).

The Court stated: "The sales assistant of the plaintiff recognised that it was of major importance for the defendant that the saw could not be placed at any other spot than the old one. If he nevertheless, despite his knowledge of the technical facts, gives wrong advice about the possible instalment, he breaches a duty of care at least negligently."[62]

(4) The plaintiff intended to buy a freehold flat form the defendant, a big housing construction company. For that purpose they concluded a special contract, a so called participation contract, in which the plaintiff binds himself to pay 3% of the purchase price as a down payment. This amount is not refundable in the event that the final notarial sales contract is not concluded. Only after concluding the 'participation contract' and payment of the deposit, the plaintiff realised that he would not be able to afford the monthly instalments; the intended contract did not come into existence. The plaintiff claims that he would not have concluded the 'participation contract', if the defendant had informed him properly.
The Court held: "..during the negotiations of a contract the duty exists to inform the other party about all circumstances of the intended contract which can hamper the purpose of the contract and, therefore, are of essential importance for the decision to conclude the contract. The experienced representative of the defendant, which is also in the business of mere advice, could have seen that the conception of the plaintiff to pay for the freehold flat would not have worked and was therefore obliged to inform about the monthly instalments, especially because the plaintiff belongs to the social weaker part of the population."[63]

This list could be extend as much as desired. The case law is rich, but it is basically always the same situation as found in the four cases. With a solution based on the principles of culpa in contrahendo, however, several questions arise.

---

[62]BGH NJW 1962, 1197 (1198).
[63]BGH NJW 1974, 849 (851).

2. Special remedies for liability for defects

On first sight it is hard to see why the principle of culpa in contrahendo should be applicable even though a valid contract is concluded. The German Civil Code provides expressly for the particular kinds of obligations specific remedies for liability for defects. One would think that the court made solution is irrelevant as soon as the special remedies apply. To understand the possible concurrence of culpa and contrahendo and other remedies, I will give a short overview about the special remedies in a contract of purchase.

If goods delivered by the vendor are not of the quality required in the contract, the programme has not been correctly fulfilled. The buyer may have acquired both ownership and possession, but he cannot use the property as planned; indeed, it may be altogether useless. There is a defect in the item purchased (§ 459[64]): the watch does not work, the canned food is inedible, the house has dry rot. In all these cases there has been delivery of possession and transfer of ownership, but the buyer's expectations have not been fulfilled, and the balance between price and value has been upset. The general rules on disturbance of performance are not applied here; instead, there are special rules for liability for defects, which go back to the practice of the market courts in ancient Rome. The basic idea is that, whatever may be prescribed by the rules on non-performance, the buyer of defective goods can return them against repayment of the price (Wandelung) or else have the purchase price diminished (Minderung). There is no need to show that the vendor was in any way responsible for the defect, but if less need be proved for this remedy than under the general provisions for disturbance of performance, the rights arising out of defects are correspondingly less far-reaching: the transaction may be undone or the price reduced, but no damages are allowable on this count.

---

[64] § 459. The seller of a thing warrants the purchaser that, at the time when the risk passes to the purchaser, it is free from defects which diminish or destroy its value or fitness for its ordinary use or the use presupposed in the contract. An insignificant diminution in value or fitness is not taken into consideration.

The seller also warrants that, at the time the risk passes, the thing has the promised qualities.

This special liability depends on there being a defect in the thing (§459). The defect must be present in the thing, at least in embryo, at the time that the risk passes, and it must adversely affect the value or usefulness of the thing. According to the prevailing view, the test of whether a thing is defective or not is a subjective one, and turns on the use to which both parties to the contract of sale contemplated that the thing was to be put.[65] For example, if a buyer orders crates of specified dimensions rather than crates for a specified purpose, crates which are adequate for normal purposes will not be defective even if they are not sturdy enough to carry books. But if the buyer orders book crates, the purpose of the thing has been determined, and if the crates which are delivered prove to be too weak for the purpose, the buyer can give them back and reclaim the price he has paid. Any deviation in quality that affects the value or use of the thing constitutes a defect: a picture which is sold as the work of an old master but turns out to be a forgery, a plot of land which cannot be built on because the subsoil is unsuitable or because a public highway is to go through it, or gas which can only be used with great difficulty because its pressure is not constant.

In all these cases it is easy to imagine contractual negotiations in which the seller negligently does not inform completely or does not answer properly. Following the previous said would mean, that culpa in contrahendo concurs with the special remedies. But the Federal Supreme Court does not allow this conclusion. As a matter of fact, culpa in contrahendo is not applicable in case that the fault of the purchaser is related to the condition (defect or promised qualities) of the item.[66] But it is also true that the principle of culpa in contrahendo does apply if the fault is related to something else than defects or promised qualities. This distinction can be very difficult. For example in the case of the circular saw (mentioned under VI.1.(3)), the famous legal writer Medicus[67], in contradiction to the Federal Supreme Court and another famous jurist

[65]Palandt § 459 Nr..
[66]This does not apply if the purchaser acts intentionally, BGH NJW 1992, 2564 (2565).
[67]Medicus JuS 1965, 211.

Larenz[68], is of the opinion that the non-placebility of the saw at the intended place is a defect, and therefore culpa in contrahendo is not applicable. In two cases with similar background regarding a plot of land un-suitable for building the Court considers in one case[69] this factor as a defect and therefore applies § 459 and in the other case[70] it does not even mention § 459 but bases its solution on culpa in contrahendo. In a further case[71] the Court had to decide, if the reputation (or in that case the bad reputation) could be a defect of the pub and hotel. After long discussion the Court left the decision open because the claim could be based on another claim; but the case, nevertheless, shows the difficulties in certain circumstances to draw a line between a defect in the sense of § 459 and other relevant factors, which make a contract unwanted and can be the ground of culpa in contrahendo, for example: wrong information about income and expenditure of a piece of land[72]; to omit that the sold machine will not be allowed in the certain rooms because of provisions to avoid accidents[73]; wrong information about the fact that the vat is already paid in a foreign country[74]. There are, however, no uncertainties in the distinction if the problematic factor has nothing to do with the condition of the item, like in the case about the monthly payments to buy a freehold flat (VI.1.(4)).

As a general rule with regard to the relationship between culpa and contrahendo and special remedies of the particular kinds of obligation one can say that the special remedies are of prime importance. Only if they are not applicable in the circumstances of the case culpa in contrahendo can close the gap which the legislator left. Than a claim can be successful be based on the ground that one party breached a duty to inform, a duty to give proper advice, or a duty to reveal, which arose during the contractual negotiations.

---

[68]Larenz, Festschrift f. Ballerstedt, p. 410.
[69]BGH NJW 1965, 532 (533).
[70]BGH NJW 1981, 1035 (1035).
[71]BGH NJW 1992, 2564 (2565).
[72]BHN NJW-RR 88, 458.
[73]BGH NJW 85, 1771.
[74]BGHZ 111, 80.

3. Legal consequences

In this chapter about disadvantageous contracts we are dealing with a concluded contracts. Therefore, the legal consequences which the party desires differ from the cases we examined so far, where no final contract comes into existents. In contrast to the mere compensation for unnecessary expenses in those, here the interest of the party can be satisfied in two different ways: (a) to undo the contract (and compensation for unnecessary expenses); (b) to change the contract.

(a) Undo the contract

In general the party which is unhappy with the disadvantageous contract wants to be freed from the obligation promised in the contract or, if the party has already paid, wants his money back. This legal consequence is based on the principle that a person who is bound to make compensation shall bring about the condition which would have exist if the circumstances making him liable to compensate had not occurred (§ 249). In case of a disadvantageous contract restitution in kind means non-existents of the contract and compensation for expenses. That is for example what happened in the four cases mentioned under VI.1..

In case of compensation in form of "undo the contract" the problem arises as to how this competes with the right to avoid a contract in case of deceit in § 123 (and of lesser importance § 119 sec.2).[75] Deceit arises when a contractor creates a false impression or mistake in the mind of the other party and thereby causes him to make the declaration, or at least to make it in the form he did. The deceitful party must be conscious of what he is doing, but he need not intend to cause any harm. Deceit may result either from a positive act or from an omission, that is, from the presentation of false facts or the

[75] § 123. A person who has been induced to make a declaration of intention by deceit or unlawfully by threats may avoid the declaration.
§ 124. The avoidance of a declaration of intention voidable under § 123 may take place only within the period of one year.
§ 119 II. A mistake concerning any characteristics of the person or thing which are regarded in ordinary dealings as essential is also deemed to be a mistake concerning the purpot of the declaration.
§ 120. The avoidance must be made, in the case provided for by § 119, without delay.

suppression of true ones. Omission constitutes deceit only if there is a duty to inform. Such a duty may arise from the contractual negotiations, especially if the contractor asks questions, but there is no general duty to volunteer information about the characteristics of merchandise being sold. The courts have, however, held that such a duty exists in the case of sales of used cars, for example, to the extent that the purchaser cannot inform himself of these characteristics on the spot. In particular, this is true of the accident history of a well maintained car and of the accuracy of the mileage indicated on the odometer. A car salesman who knows of an accident or of an alteration of the odometer must inform the purchaser, even if he does not inquire about it, or he will be held liable for deceit by omission and the purchaser may rescind.[76]

The only difference between the avoidance of a contract on the ground of deceit and the restitution in kind based on culpa in contrahendo is the degree of fault. § 123 requires intention, culpa in contrahendo only negligence. The cases are basically very much the same. It must also be considered that, the different prescription times cause unjustified results. In case of intention the deceived party can only avoid the contract in the period of one year (§ 124), but the claim to 'undo the contract' based on culpa and contrahendo and mere negligence last for 30 years. The fact that culpa in contrahendo is all the more applicable in case of an intentional breach of a duty to care would give the party in case of intentional misinformation for 30 years the right to avoid the contract on the ground of culpa in contrahendo, even though the special avoidance reason of deceit regulated in § 123 only gives a time period of one year. The Federal Supreme Court accepts this consequence. The Court expressly states that the two remedies of culpa and contrahendo and § 123 exist simultaneously side by side.[77]

[76]BGHZ 63, 382 (387).
[77]BGH NJW 1962, 1197 (1198).

(b) Change the contract

The remedy of restitution in kind with 'undo the contract' and compensation for useless expenses is the usually chosen consequence. In the case that the entitled party however wants to comply with the contract, the Federal Supreme Court states in a series of decisions: "the mislead party is to be treated as if he had been able -with knowledge of all relevant factors- to conclude the contract with a better price. For this it is irrelevant, as to whether the other party would have agreed on these different conditions; it is only important how the mislead party would have reacted. The amount of compensation, therefore, is the difference between the price the buyer paid in trust of the information given by the purchaser and the price he would have paid with knowing the disadvantages of the contract."[78]

This solution is quite surprising since it grants, indeed, the positive interest[79], which applies in no other case of culpa in contrahendo. That kind of damage calculation is not in accordance with § 249 and the idea of restitution in kind. It is also in contrast to the special remedy provided for in § 463, which gives a claim for the positive interest only in case of a guarantee or fraud.[80] Nevertheless, the Federal Supreme Court does not hesitates with calculating the damage in the prescribed way. The Court gives no explanation or discussion that its solutions regarding the change of the disadvantageous contract is more than unusual. It is unusual because if one takes a closer look at the actual reasoning in these cases it becomes clear that the Court in fact uses the formula for calculating the positive interest but, nevertheless, uses a different starting point. The Court wants to grant the negative interest, but the negative interest appears only in cases where a contract is void or not concluded. The Court also wants to help the party to keep the contract valid, because the party does not want to 'undo the contract' for

---

[78]BGH NJW 1993, 1323 (1325); BGH NJW 1977, 1536 (1538); BGH NJW 1990, 1659 (1661); BGH NJW 1987, 2511 (2512).

[79]The formula of the positive interest, 'that the innocent party should be put in the position he would have been in if the contract had been duly performed', can easily be read in the formulation of the Federal Supreme Court.

[80]§ 463. If a promised quality in the thing sold was absent at the time of purchase, the purchaser may demand compensation for non-performance, instead of cancellation or reduction. The same rule applies if the seller has fraudulently concealed a defect.

several reasons: e.g. the party already built a house, or is happy with the rest of the contract. Therefore, the Court creates compensation for positive interest but within its own rules. It is more or less in between positive and negative interest and forms a calculation of its own. The difference is, that the positive interest based on culpa in contrahendo only covers the damage resulting from the reliance on the trust. From the moment that the innocent party finds out that he concluded a disadvantageous contract and sticks to it further expenses are not related to the trust, but to his own decision. The party could have 'undo the contract' but does not want to do this; that is his choice and has nothing to do with trust anymore. Normal compensation for the positive interest has nothing to do with trust. The party can recover all damages related to the contract.

A case decided by the Federal Supreme Court may clear this up:
The seller of a piece of land gave negligently wrong information about its suitability for building. The price paid was 20.000 DM. If the buyer had known about the real condition of the ground, he would have paid only 10.000 DM. The buyer did not want to undo the contract for what ever reasons. To build the house on the ground caused extra expenses of 18.000 DM, which would have not occurred, if the ground had been of the quality originally expected by the buyer. The compensation based on the positive interest in case of promised quality or fraud (§ 463) would be 18.000 DM, because that is the damage resulting from the fact that the piece of land is not proper suitable for building. Based on culpa in contrahendo, however, the Court granted only 10.000; the difference between the price without knowledge and the fictional price with knowledge. The reason for that is, that the trust of the buyer is only related the value of the piece of land. After realising the quality problem he makes his further expenses without relying on a trust caused by the seller.[81]

With the 'change of the contract' based on the principle of culpa in contrahendo in case of disadvantageous contracts the Federal Supreme Court develops a new kind of

[81]BHG NJW 1981, 1035-1036.

positive interest. It is born out of the problem that a negative interest in existing contracts can not be calculated, because the formula[82] requires the non-existence of the contract. Based on that, the Court grants compensation for the damage which is caused through reliance on trust and calculates the difference between the purchase price with a fictitious agreement on an appropriate price.

4. Conclusion

One can see that in this group of cases several problems appear, which still need much doctrinal background discussion. It is also the group with the highest relevance, because it happens every day that one party feels unhappy with a contract because of a lack of knowledge in the moment of the conclusion of the contract. The principle of culpa in contrahendo competes here necessarily with parts of the statutory provisions caused by the fact that the legislator had the intention to codify the remedies in case of bad performance related to a contract exhaustively. The borderlines are not always certain and the results sometimes problematic. Nevertheless, the duty of care in this constellation as a duty to inform properly about the relevant facts especially when asked for is quite clear.

VII. Conclusion

Overall one can see that under the principle of culpa in contrahendo quite different case groups are discussed. The constellations are too unhomogeneous to include them all in one formula. There is always a duty to inform or to act in a certain way caused by the actual start of contractual negotiations, but the requirements and the consequences of such a duty vary with the different backgrounds. Furthermore, the Federal Supreme Court applies culpa in contrahendo in cases which are not proper doctrinal examples (to bypass other problems; IV) and in cases where other solutions appear to be more

[82]Negative interest means: that the innocent party should be put in the position he would have been in if he had not relied on the validity of the contract.

appropriate or no compensation at all should be granted (V.). The pure idea of culpa and contrahendo according to Ihering is only touched in the constellations of 'termination of contractual negotiations after causing a certain trust with fault' and 'personal invalidity reasons'. Despite the fact that culpa in contrahendo is discussed for more than 130 years, the applicability of this Courtmade solution is still rather vague. At the moment it serves, like the principle of good faith, more the purpose to close all kind of gaps which appear after the Civil Code is for almost 100 years unchanged in force. The legislator is not willing or not able to codify a consent or a refusal with regard to some of the ideas of the courts. Therefore, it will further on be the task of the courts to give the principle of culpa in contrahendo shape and contour. In some case groups the courts are on the correct path in others they should think rather about the doctrinal background again and base their solutions on different reasons.