

THE RIGHT OF WITHDRAWAL IN DISTANCE CONTRACTS**Mesafeli Sözleşmelerde Cayma Hakkı**Assoc. Prof. Dr. Ümit GEZDER*****1. Introduction**

Consumer protection is not a new phenomenon; indeed it is hundreds of years old¹. Consumer protective legislation is an important issue, linked with human rights, and a problem, which must be addressed internationally².

The importance of Consumer Protection within the European Union (hereafter EU) has been emphasized in the Treaty of Rome. Thus art. 3 (s) mentions “a contribution to the strengthening of consumer protection”, and the Community under art. 129a is obliged to “contribute to the attainment of a high level of consumer protection”³.

As a result of this, the EU Parliament and Council have issued a number of directives, as well as a number of regulations. Of importance here is the now repealed Directive 97/7/EC of the European Parliament and of the Council of 20th May 1997 on the

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** Istanbul Medeniyet University, Faculty of Law, Department of Civil Law

¹ Geraint G. **Howells**/Iain **Ramsay**/Thomas **Wilhelmsson**, in: Geraint G. **Howells**, Iain **Ramsay**, and Thomas **Wilhelmsson** with David **Kraft** (ed.), *Handbook of research on international consumer law*, Edward Elgar Publishing, 2010 (hereafter **Howells et.al.**), p. 4.

² Iris **Benöhr** and Hans-W. **Micklitz** in **Howells et.al.**, p. 18.

³ Treaty on European Union (92/C 191/01).

Protection of Consumers in respect of Distance Contracts (hereafter the Distance Contracts Directive)⁴, and the Directive 2011/83/EU of The European Parliament And of the Council of 25th October 2011 on consumer rights, amending Council Directive 93/13/EEC and Directive 1999/44/EC of the European Parliament and of the Council and repealing Council Directive 85/577/EEC and Directive 97/7/EC of the European Parliament and of the Council (hereafter the Consumer Rights Directive)⁵.

According to art. 31 of the Consumer Rights Directive, Directive 85/577/EEC (the Doorstep Directive) and Directive 97/7/EC, (the Distance Contracts Directive) as amended by Directive 2002/65/EC of the European Parliament and of the Council of 23rd September 2002 concerning the distance marketing of consumer financial services (1) and by Directives 2005/29/EC and 2007/64/EC, will be repealed as of 13th June 2014.

Any references to the repealed directives shall be construed as references to the Consumer Rights Directive and shall be read in accordance with the correlation table set out in Annex II of it.

The EU member states are required to transpose the directives, but may choose their own method of doing it. Some issue whole new laws, others choose to amend existing laws⁶.

1.1. Consumer Protection Legislation in Turkey

In Turkey *Tüketicinin Korunması Hakkında Kanun* (the Consumer Protection Act, hereafter, CPA) of 1995, Law No. 4077, was introduced in 1995. In 2003 an amendment was prepared with the

⁴ Official Journal L 144, 04th June 1997, p. 19-27.

⁵ Official Journal L 304/64, 22nd November 2011, pp. 64-88.

⁶ For a full analysis on the legislative techniques of the member states see: EC Consumer Law Compendium - Comparative Analysis - Edited by Hans **Schulte-Nölke** in co-operation with Christian **Twigg-Flesner** and Martin **Ebers**, February 2008, Universität Bielefeld (hereafter EC Consumer Law Compendium). Available on: http://ec.europa.eu/consumers/rights/docs/consumer_law_compendium_comparative_analysis_en_final.pdf (Last visited April 30th 2013).

objective of harmonization with the EU-directives concerning the EU Consumer Law. Regulations specifying the rules have been issued⁷. As yet no amendments have been made to harmonize the CPA according to the Consumer Rights Directive.

2. Consumer protection through Right of Withdrawal

2.1. Right of Withdrawal in general

Most contract legislation contains a rule about right of withdrawal. However, this is a rule, which must not be confused with the Right of Withdrawal in Consumer Legislation. Where the general right to withdraw a declaration is depending on its not having been received by its addressee⁸, the consumer's Right of Withdrawal is a right to withdraw from an already concluded contract⁹.

2.2. Objections against a Right of Withdrawal

There are several authors, especially Swiss, who do not agree that the consumer needs protection in the form of a right to withdraw from a Distance Contract without any grounds.

Switzerland has since 1991 recognised the consumer's Right of Withdrawal for Doorstep Selling Contracts, according to art. 40a-f of the Swiss Obligation Law (hereafter OR). However, Schwab states that since the 'surprise factor' of the Doorstep Selling Contract situation is not present in a Distance Contract situation, there should not be a right to withdraw from the latter¹⁰. Other reasons given are

⁷ See further below part 5.

⁸ Peter **Rott**, "Harmonising Different Rights of Withdrawal: Can German Law Serve as an Example for EC Consumer Law?", 7 **German Law Journal**, p. 1109-1136 (2006), available at <http://www.germanlawjournal.com/index.php?pageID=11&artID=782> (Last visited April 30th 2013).

⁹ For the status of the contract see below part 3.2.

¹⁰ Karin F. **Schwab**, *Die Übernahme von Allgemeinen Geschäftsbedingungen in elektronisch abgeschlossene Verträge*, Schultess Juristische Medien AG, Zürich 2001 (Dissertation), p. 61.

that the Right of Withdrawal is against the principle of *pacta sunt servanda*¹¹, and that the Right of Withdrawal is an unnecessary and serious attack on the principles of Contract Law^{12 13}.

2.3. Arguments for establishing the Right of Withdrawal in Distance Contracts

Others argue that the Right of Withdrawal¹⁴ is one of the most necessary of the protective measures taken to shield the consumer in Distance Contracts. The consumer is considered to be in need of additional time to reconsider the contract¹⁵.

A reason for the consumer's need for this protection is that although in Distance Contracts the risk of an unexpected approach is not present in the same measure as in Doorstep Selling¹⁶, the fact that

¹¹ Rainer **Gonzenbach**, ““Pacta sunt servanda” oder neues Licht auf einem alten Grundsatz – Notizen zu einem Konsumentenschutzproblem”, **ZSR** 1987 I, p. 437-438, p. 462.

¹² Heinrich **Honsell**/Thomas **Pietruszak**, “Der Vernehmlassungsentwurf zu einem Bundesgesetz über den elektronischen Geschäftsverkehr”, **AJP** 7/2001, p. 779.

¹³ Identical, as well as several other, arguments against a Right of Withdrawal have been brought forward in USA, see Orville C. **Walker**, Jr./Neil M. **Ford**, “Can “Cooling-Off Laws” Really Protect the Consumer?”, **The Journal of Marketing**, American Marketing Association, Vol. 34, No. 2, Apr., 1970, pp. 53-58.

¹⁴ Also named cooling-off period, right of cancellation, right to rescind, disaffirm or revoke the contract, see Pamaria **Rekaiti**/Roger **van den Bergh**, “Cooling –Off Periods in the Consumer Laws of the EC Member States”, **Journal of Consumer Policy** (Kluwer Academic Publishers) 23, 2000, p. 371.

¹⁵ Christian **Twigg-Flesner** and Reiner **Schulze** in **Howells et.al.**, p. 150.

¹⁶ See, Helmut **Köhler**, “Die Rechte des Verbrauchers beim Teleshopping (TV-Shopping, Internet-Shopping)”, **NJW** 1998, p. 187; Norbert **Reich**, “Die neue Richtlinie 97/7/EG über den Verbraucherschutz bei Vertragsabschlüssen im Fernabsatz”, **EuZW** 1997, p. 581; Hans-Werner **Moritz**, “Quo vadis elektronischer Geschäftsverkehr”, **CR** 2000, p. 63; Arthur **Waldenberger**, “Grenzen des Verbraucherschutzes beim Abschluß von Verträgen im Internet”, **BB** 1996, p. 2367.

it is possible to reach directly to the consumer's home by using the means of distance communication makes it easy to affect her/him¹⁷. The consumer will be less at guard in her/his own home. Also a Distance Contract just as much as a Doorstep Selling Contract carries the danger that the consumer might make an impetuous and un-informed decision. Just as the Doorstep Seller may use pressure by claiming that the offer is limited both as to time and number, a web-page or televised offer may be presented in the same manner.

The means of distance communication make it possible to conclude contracts very fast; if the contract is negotiated and concluded by telephone, it will be difficult for the consumer to note down the details of the contract as well as information about the goods/service and the supplier. While browsing on the internet it is possible to bind oneself to a contract simply by clicking a mouse just once, thus entering into an obligation in a few seconds¹⁸. Consequently the consumer very easily can find her/himself having made a binding contract that s/he has not really considered the implications of. It will often be very difficult for the consumer to prove that s/he clicked the 'accept' button by mistake.

Further, where in a Doorstep Selling situation the consumer often will be presented with the object of sale, thus having a chance to inspect it however fleetingly, in Distance Selling even this is not possible. The consumer is not able to actually see the product or ascertain the nature of the service provided before concluding the contract¹⁹, and has only indirect or superficial connection with the seller/supplier²⁰. Only after the goods are delivered, can the consumer examine them. This, according to Willingmann²¹, is the

¹⁷ Begleitbericht zum Entwurf, p. 15.

¹⁸ Begleitbericht zum Entwurf, p. 15.

¹⁹ The Distance Contracts Directive Recital 14.

²⁰ Begleitbericht zum Entwurf, p. 15.

²¹ Armin Willingmann, "Auf dem Weg zu einem einheitlichen Vertriebsrecht für Waren und Dienstleistungen in der Europäischen Union? - Die Richtlinie über den Verbraucherschutz bei Vertragsabschlüssen im Fernabsatz (97/7/EG)", *VuR* 12/1998, p. 399.

only right reason for accepting the Right of Withdrawal from Distance Contracts. That is also the reason given in the preamble of the Consumer Rights Directive, (37):

“Since in the case of distance sales, the consumer is not able to see the goods before concluding the contract, he should have a right of withdrawal.”

The Right of Withdrawal has been given to the consumer in order to give her/him a certain time within which s/he may examine both the goods or services, and what the obligations entail. If within this time limit s/he finds that the goods or services are not as expected or that the obligation includes too heavy burdens, or even simply decides that s/he does not really want the purchased goods or services, s/he may exercise the Right of Withdrawal²².

However true it is that an unconditional, though time limited, right to withdraw is against the general principles of Contract Law, in my opinion the principle of consumer protection is more important. As stated in C-89/91, *Shearson Lehmann Hutton Inc. v TVB Treuhandgesellschaft für Vermögensverwaltung und Beteiligungen mbH*, Paragraph 18, the EU-regulations concerning consumers are “inspired by the concern to protect the consumer as the party deemed to be economically weaker and less experienced in legal matters than the other party to the contract...”

Further, it is not right to object to the birth of new principles solely in the name of protecting older principles.

3. Coining the term

In the first draft of the Distance Contracts Directive the EU Commission used the expression “thinking period” instead of “Right of Withdrawal.”²³ During the preparation of the Distance Contracts

²² Begleitbericht zum Entwurf, s. 15.

²³ For further information about the draft of the Distance Contracts Directive see, Gerald **Mai**, “Wertpapierhandel im Internet – Besondere Rechte und Pflichten der Vertragsparteien im Rahmen von Internet-Brokerage”, **CR** 3/2002, p. 200 etc.; Birgit **Roth/Götz Schulze**, “Verbraucherschutz im

Directive it was discussed which of the two expressions would be the more correct. The legal qualification of the Right of Withdrawal, however, was not discussed during the preparation, and the only mention of the understanding of the Right of Withdrawal as a right of *annulment* or right of *termination* is found in the proposed amendment of the European Parliament, Abl. 1993 C 176/90, where it is demanded that art. 6 at least must mention the "Auslösungsrecht" of art. 11²⁴.

The directive ensured a possibility to retreat from an already concluded contract solely based on the fact that there is a consumer-provider relation²⁵.

3.1. "Thinking Period" versus "Right of Withdrawal"

The concept "thinking period" is very different from the concept of "Right of Withdrawal." If the "thinking period" expression had been chosen, the aim of protecting the consumer would not have been achieved, because it would have entailed that the contract could not have been accepted as being concluded within the thinking period, and the consumer consequently could not demand delivery of the good in order to examine it²⁶. The intention behind choosing the phrase "Right of Withdrawal" was that there should be no doubt as to whether the contract is concluded or not²⁷, but the consumer should be granted a period which became known

Electronic Commerce - Schutzmechanismen und grenzüberschreitende Geschäfte nach dem Referentenentwurf eines Fernabsatzgesetzes", **RIW** 1999, p. 927 etc.

²⁴ **Micklitz**, p. 29.

²⁵ Helmut **Dohmann**, Die Praxis des E-Business: technische, betriebswirtschaftliche und rechtliche Aspekte, Vieweg, 2002, p. 217.

²⁶ Hans-W. **Micklitz**/Norbert **Reich**, "Umsetzung der EG - Fernabsatzrichtlinie", **BB** 1999, p. 2094; **Willingmann**, p. 400-401.

²⁷ The Distance Contracts Directive art. 6, p. 1: Right of Withdrawal - ... in which to withdraw from the contract the exercise of his Right of Withdrawal...

as the “cooling off period”²⁸. However, there was discussion in German theory about whether the contract would be binding or not during the cooling off period²⁹.

3.2. The legal status of the contract during the cooling off period

Some German authors earlier claimed that there is uncertainty as to whether the contract is binding or not during this period, and that the uncertainty doesn’t end until either the cooling off period ends or the consumer exercises the Right of Withdrawal³⁰.

According to older theory the German concept of *schwebende wirksamkeit* (pending effect), implied that the validity of the contract was postponed, which would constitute a problem because such a postponed validity would affect the consumer’s right to delivery as well as the suppliers right to payment³¹.

This was not compatible with the rules of the Distance Contracts Directive. Therefore the concept of pending contract had to be altered³².

Today the exercise of the Right of Withdrawal is explained to have the effect to extinguish all contractual obligations³³ – thus implying that up until the right is exercised or the period ends there are contractual obligations. Likewise Mankowski states that the fact that the German lawmakers see the effect of introducing the Right of Withdrawal as being that all consumer contracts forthwith would be

²⁸ Communication of Sept. 21, 2006.

²⁹ See Karl **Larenz**/Manfred **Wolf**, *Allgemeiner Teil des Bürgerlichen Rechts*, 8. Aufl., München, Verlag C.H. Beck, 1997, p. 730; Michael H. **Meub**, “Fernabsatz und E-Commerce nach neuem Recht”, **DB** 2002, p. 361.

³⁰ Christian **Twigg-Flesner** and Reiner **Schulze** in **Howells et.al.**, p. 151.

³¹ See **Rott**, p. 1114.

³² **Rott**, p. 1114.

³³ Marco **Loos**, in: Geraint **Howells**/Reiner **Schulze** (eds.), *Modernising and harmonising consumer contract law*, Sellier european law publ., 2009, (hereafter **Howells/Schulze**), p. 239.

pending, as long as the cooling off period runs, but **is not bound anymore** implies that until the right is used, the consumer is bound by the contract³⁴. The consumer must be bound by the contract just as much as the supplier³⁵. Today there is no discussion about whether pending contract means that there is a concluded, binding contract³⁶. It is very clear from the wording of art. 12 of the Consumer Rights Directive:

“Effects of withdrawal

The exercise of the right of withdrawal shall terminate the obligations of the parties:

(a) to perform the distance or off-premises contract; or

(b) to conclude the distance or off-premises contract, in cases where an offer was made by the consumer.”

4. Consumer Protection through Right of Withdrawal from Distance Contracts according to EU Directives before and after 2011

Where originally Mail Order and Tele-Sales were in focus when Distance Contracts were discussed, today it is primarily e-commerce. In EU e-commerce is second only to direct retail sales³⁷.

The Distance Contracts Directive ensured a minimum level of protection³⁸ for all EU-consumers, since it imposed mandatory rules concerning Distance Contracts and distance communication techniques. The Distance Contracts Directive brought important

³⁴ Peter **Mankowski**, *Beseitigungsrechte*, Mohr Siebeck, Tübingen 2003, p. 33.

³⁵ **Mankowski**, pp. 35-36. For discussion about whether *Wiederrufsrecht* is the same as *Rücktritt* see pp. 33-68. Critical about the synonymous use of the two words esp. p. 55.

³⁶ See for example Julia **Andrzejewski**, *Die Umsetzung Der Fernabsatzrichtlinie in Deutschland und in Polen*, Peter Lang, 2008, p. 28, fn. 62.

³⁷ COMMISSION STAFF WORKING DOCUMENT Report on cross-border e-commerce in the EU pp. 5-6. http://ec.europa.eu/consumers/strategy/docs/com_staff_wp2009_en.pdf (Last visited April 30th 2013).

³⁸ Preamble of the Distance Contracts Directive (4).

provisions ensuring, among other rights, the Right of Withdrawal, thus allowing the consumer to renounce the contract without penalty and without giving any reason. According to the Distance Contracts Directive art. 12, p. 1, the consumer could not waive this right. Member States according to art. 12, p.2 had to take measures to ensure that the consumer did not lose the protection granted by the Directive, so that the seller/supplier would be tempted to make it invalid in his general terms and conditions³⁹.

4.1. Fragmentation of the rules

Most EU member states have not been content with the minimum level, but have used the right to take measures to ensure a higher level of protection for consumers in their country. The consumer protection was thus governed by various EU-directives and several different national regulations. This fragmentation of the national laws led to reluctance on the part of the business to enter wholeheartedly into cross border consumer sales⁴⁰. As is stated in the preamble of the Consumer Rights Directive (44), the different ways of applying the Right of Withdrawal has been detrimental to the cross-boarder distance sales for many traders. One example is the different length of the period within which the consumer may withdraw without giving any grounds. In some countries it was '7 working days', some expressly excluded Saturdays from this, in others the period was 10 or 14 'days', and in Germany simply 2

³⁹ Oliver **Frei**, *Der Abschluss von Konsumentenverträgen im Internet*, Zürich 2001, p. 193-194. For criticism of this see Hans-W. **Micklitz**, *Das Recht der Europäischen Union -Richtlinie 97/7/EG des Europäischen Parlaments und des Rates über den Verbraucherschutz bei Vertragsabschlüssen im Fernabsatz (Fernabsatzrichtlinie)*, Ed. Manfred **Wolf**, München 2000, p. 40-41.

⁴⁰ COMMISSION STAFF WORKING DOCUMENT, accompanying the proposal for a directive on consumer rights Impact Assessment Report, p.2. http://ec.europa.eu/consumers/rights/docs/impact_assessment_report_en.pdf (Last visited April 30th 2013).

weeks⁴¹. The German *Bürgerliches Gesetzbuch* (Civil Law, hereafter BGB) now in BGB § 355 (2) gives the timelimit as 14 days.

Further, the fact that the Doorstep Selling Directive, the Timeshare Directive, and the Distance Contracts Directive each gave a different time-limit for the Right of Withdrawal was originally not deemed to be a problem, but with time became one. The reason for this is that for example a Timeshare Contact might very well include elements of service, bringing it under 2 different set of rules⁴².

4.2. The Directive on Consumer Rights

The majority of businesses, consumer groups, lawyers, other actors in the field of consumer protection as well as governments had expressed a wish for uniformity and full harmonization⁴³. Following the wishes, the EU Parliament drafted the new directive on Consumer Rights in order to reduce the mass of 'Piecemeal Legislation'⁴⁴. This introduces more legal certainty and lead to a reduction of the barriers currently existing in cross border commerce within the EU, as is expressed in the preamble (7):

"Full harmonisation of some key regulatory aspects should considerably increase legal certainty for both consumers and traders. Both consumers and traders should be able to rely on a single regulatory framework based on clearly defined legal concepts

⁴¹ See Communication from the Commission to the Council, the European Parliament and the European Economic and Social Committee on the implementation of Directive 1997/7/EC of the European Parliament and of the Council of 20th May 1997 on the Protection of Consumers in respect of Distance Contracts of September 21st 2006 (hereafter Communication of Sept. 21st 2006), Paragraph 7 and Annex IV, Length Of The Cooling off Period in the Member States.

⁴² Dirk **Staudenmayer**, "The Commission Communication on European Contract Law and the Future Prospects", **The International and Comparative Law Quarterly**, Vol. 51, No. 3 (Jul., 2002), Cambridge University Press, p. 677.

⁴³ **Howells/Schulze**, p. 237.

⁴⁴ **Staudenmayer**, p. 674.

regulating certain aspects of business-to-consumer contracts across the Union. The effect of such harmonisation should be to eliminate the barriers stemming from the fragmentation of the rules and to complete the internal market in this area. Those barriers can only be eliminated by establishing uniform rules at Union level. Furthermore consumers should enjoy a high common level of protection across the Union.”

The EU Member States are given two years to implement the rules of the Consumer Rights Directive⁴⁵.

5. Right of Withdrawal in the Turkish Legislation

Turkish Contract Law, like most other Contract Laws, does not permit a general right to withdraw from a contract, on the contrary, the principle of *pacta sunt servanda* is the general rule. The contract parties will be bound by the contract as they agreed to. For example in a Sales Contract the seller has an obligation to deliver the sale subject-matter, and the buyer has an obligation to pay the agreed purchase price. As a general rule only under certain circumstances may one of the parties withdraw, once the contract is concluded.

However, also in Turkish law there are special provisions for some Consumer Contracts, for example Distance Contracts, where the consumer has a right to withdraw from the contract within a certain period, without giving any reason.

5.1. The Turkish Consumer Protection Act

The Consumer Protection Act, CPA, has undergone several changes since its introduction in 1995. The latest amendments took effect on June 14th 2003, Law No. 4822⁴⁶. CPA has 34 articles. Art.9/A of CPA, which was added in 2003, is the only rule in CPA regarding Distance Contracts. As Art.9/A paragraph 2 and Art.31 of CPA

⁴⁵ http://ec.europa.eu/consumers/rights/docs/cons_rights_citizen_summary_en.pdf (Last visited April 30th 2013).

⁴⁶ See http://www.sanayi.gov.tr/Files/Mevzuat/tuketici_korunmasi-13042010210536.pdf (Last visited April 30th 2013).

require, the Ministry (of Industry and Commerce (Art.2/a of CPA)) prepared a regulation, the aim of which is to regulate procedures and essences of the application of CPA on Distance Contracts: *Mesafeli Sözleşmeler Uygulama Usul Ve Esasları Hakkında Yönetmelik* (The Regulation of Procedures and Basic Principles of Application on Distance Contracts). It was published in the Official Gazette⁴⁷ on June 13th 2003 with the number 25137. With this the Distance Contracts Directive was implemented in Turkish Law. Several amendments were introduced October 9th 2007, and most recently a new regulation, *Mesafeli Sözleşmelere Dair Yönetmelik* (Regulation about Distance Contracts, hereafter the Turkish Regulation), Number 27866 was published in the Official Gazette March 6th 2011.

The Right of Withdrawal is stated in art. 7:

In Distance Contracts the consumer has the right to withdraw from the contract within seven days, without showing any reason and without any paying any penalty. It is sufficient to inform about the use of the right to withdraw in writing or by use of a durable medium within this period.

5.2. Right of Withdrawal in Turkish Law

Art. 7 of the Turkish Regulation uses an expression similar to Right of Withdrawal: *sözleşmeden cayma hakkına sahiptir* (has the Right of Withdrawal from the contract). The use of this expression shows clearly that the intention was not to give the consumer a right to withdraw from his declaration of intention (the un-concluded contract), but to give the consumer a right to annul the already concluded contract. This corresponds to the right given by the Distance Contracts Directive art. 6, p.1 and the right given by the Consumer Rights Directive art. 9, p.1.

Thus, similar to the German and the Swiss understanding of the status of the contract during the cooling off period⁴⁸, the contract is

⁴⁷ Available on <http://www.resmigazete.gov.tr/> (Last visited April 30th 2013).

⁴⁸ For this opinion see, Rainer **Gonzenbach**, *Kommentar zum Schweizerischen Privatrecht – Obligationenrecht I - Art. 1 - 539 OR*, Ed. Heinrich **Honsell**/

concluded and binding for both parties until the Right of Withdrawal is exercised. In case of the contract not being concluded yet, the concept of binding offer in the sense of *Türk Borçlar Kanunu* (Turkish Obligation Law) would be applied.

The consumer has the right to withdraw without showing any reason and without being obliged to pay any penalty. The fact that the consumer can exercise the right unilaterally and avoid legal effects shows that it is truly an annulment and the effect is *ex tunc*.

6. Conclusion

Comparing the Turkish rules for the Right of Withdrawal for consumers in Distance Contracts with the Consumer Rights Directive it is clear that the effect of the exercise of the right to withdraw is the same in the EU memberstates as in Turkey. However, the Turkish consumers who enter into Distance Contracts within Turkey are subject to a much shorter timelimit within which to exercise the Right of Withdrawal, than are the consumers who enter into a Distance Contract with a supplier in an EU member state.

Nedim Peter **Vogt**/Wolfgang **Wiegend**, Zweite Auflage, Helbing & Lichtenhahn, Basel und Frankfurt 1996, p. 326; Ingeborg **Schwenzer**, *Schweizerisches Obligationenrecht - Allgemeiner Teil*, Vierte, überarbeitete Auflage, Stämpfli Verlag AG, Bern 2006, p. 209; **Micklitz**, p. 33-34.

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