PRE-CONTRACTUAL LIABILITY

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Abstract:

The close connection that arises from business contact and negotiations entails a danger that one of the negotiation partners influences the other partner negatively and causes him damage. This both shows the need for, and is justification of, protective rules. Jhering formulated the concept of *culpa in contrahendo*, or fault in contract negotiations, in 1861. The concept has developed over time, and by means of numerous court decisions is now an accepted basis for liability in German law, as well as in the law of other countries. The article briefly describes the concept of pre-contractual liability as it was formulated by Jhering, whereupon it describes the pre-contractual liability rules as they have evolved in German law, with reference to Swiss authors also, where relevant.

Key words: Pre-contractual liability**;** Culpa in contrahendo liability

I. The background for pre-contractual liability

The close connection that arises from business contact and negotiations entails a danger that one of the negotiation partners influences the other partner negatively and causes him damage. This both shows the need for, and is justification of, protective rules.

The doctrine of liability based on culpa in contrahendo[1] was established by **Rudolf von Jhering**[2] in his famous article "*Culpa in*

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[1] In current German law renamed 'Verschulden bei Vertragsschluss', fault at conclusion of contract. For culpa in contrahendo-liability in Turkish/Swiss law see: Ümit **Gezder, Türk/İsviçre Hukukunda Culpa in contrahendo Sorumluluğu,** Beta, İstanbul 2009.

contrahendo oder Schadensersatz bei nichtigen oder nicht zur Perfektion gelangten Verträgen"[3] published in 1861. In this article Jhering developed his theory of the need for compensation in cases, where one contract party suffers an injury because the contract is void or ineffective as a result of the fault of the other party.

A negotiation partner must for example be able to trust both the correctness and completeness of the information when information is exchanged during the negotiations, and to rely on the recipient of the information not to pass it on to others[4]. The negotiation partner who behaves in a faulty way is liable towards the other party for damages when he infringes any duty arising from the relations.

Since Jhering introduced the culpa in contrahendo-concept as a legal concept it has had a profound influence on the German contract law[5]. Originally culpa in contrahendo was only applied on pre-contractual problems, or where a contract due to faults was not effectively concluded. However, during time it was used in court practise also where a contract had effectively been concluded, but where one party

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[2] For Jhering's three most important articles "Geist des römischen Rechts", "Kampf ums Recht" and "Zweck im Recht" see: Theodor **Bühler-Reimann,** *"Zum Problem der "culpa in contrahendo" – Rechtfertigt es die culpa in contrahendo, die herkömmliche Einteilung der Haftung in eine vertragliche und in eine außervertragliche aufzugeben?"*, **SJZ** 75 (1979), p. 357. About Jhering see: Franz **Wieacker**/Christian **Wollschläger** (Herausgegeben), **Jherings Erbe – Göttinger Symposion zur 150. Wiederkehr des Geburtstags von Rudolph von Jhering,** Vandenhoeck & Ruprecht, Göttingen 1970.

[3] Rudolf von **Jhering,** *"Culpa in contrahendo oder Schadensersatz bei nichtigen oder nicht zur Perfection gelangten Verträgen"*, **Jahrbücher für die Dogmatik des heutigen römischen und deutschen Privatrechts,** Vierter Band, Jena 1861, p. 1 ff. The journal was established by Jhering and is known as "**Jherings Jahrbücher**" (**Bühler,** p. 357 and fn. 6).

[4] Karl **Larenz**/ Manfred **Wolf, Allgemeiner Teil des Bürgerlichen Rechts,** 9. Auflage, Verlag C.H. Beck, München 2004, § 31 N 3.

[5] Friedrich **Kessler**/Edith **Fine,** *"Culpa in contrahendo, Bargaining in Good Faith, and Freedom of Contract: A Comparative Study"*, **Harvard Law Review** 77 (1964), p. 401.

deliberately or due to negligence had given false or misleading information, or given no information where there was a duty to disclose "failure to warn" (Aufklärungspflichtverleistung)[6]. The concept of faults in contract negotiations has developed over time and by means of numerous court decisions is now an accepted basis for liability[7].

The complicated problems of liability for wrongful and harmful actions during the pre-contractual phase leading to injuries awoke interest in the doctrine and court decisions of several other countries[8]. Until 2002 where § 311 paragraph 2 was added to the BGB, the general attitude towards developing solutions to the problems of pre-contractual liability was to either leave it up to the courts[9], or not address the problem, or without recognising any general connection give a pragmatic and individual answer to each case[10]. Criticism of the concept of pre-contractual liability is still prevalent, in spite of the fact that the German law makers thus incorporated it in BGB[11]. Only a few other countries have prepared a specific article to find a solution for these problems[12].

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[6] Bernd **Mertens,** *"Culpa in contrahendo beim zustande gekommenen Kaufvertrag nach der Schuldrechtsreform"*, **AcP** 203/2003, p. 819.
[7] **Mertens,** p. 821.
[8] See: Rainer **Gonzenbach, Culpa in contrahendo im schweizerischen Vertragsrecht,** Verlag Stämpfli & Cie AG, Bern 1987, s. 3; **Bühler,** p. 357.
[9] Martijn W. **Hesselink,** *"Dutch case note", in: "Cour de Cass., 26.11.2003 – 'Perte de Chance' (Expectation Interest) and Liability of a Third Person in Case of Breaking Off Negotiations"*, **European Review of Private Law** 3-2005, p. 444.
[10] See: Bruno Stephan **Kreis, Haftung für culpa in contrahendo,** Diss. Basel 1946 (Maschinenschrift), p. 5; **Bühler,** p. 357.
[11] See: **Gezder,** p. 18.
[12] See: **Bühler,** p. 357.

II. Legal character of pre-contractual liability (Culpa in contrahendo liability) according to Jhering [13]

In his article about culpa in contrahendo, Jhering as his initial point used the question of whether in a case regarding an essential fault, the party at fault should be liable towards the other party for compensation[14]. According to Jhering, since there was no satisfactory solution to be found in the principles of Roman Law that were applied in his time, there was a gap in Roman Law on this point[15].

Jhering was of the opinion that the close relation between the negotiating parties during the formation of a contract, which arose from the "intended" and "outwardly seemingly concluded" contract[16], gave the culpa in contrahendo liability a nature of contractual liability[17]. According to him, since the natural reason for beginning, and the aim of, negotiations is to form a contract, the sphere of contractual obligations must be expanded to include the negotiations. If one party falsely (culpably), creates the scenery of a valid contract relationship, he is liable for compensation for the injury that the other party may suffer as a result of relying on the scenery[18].

Jhering's theory may be summarised as: "The rule of contractual solicitude is valid both for realised and for future contract relations, wherefore the breach of this rule in both cases establishes the basis for

[13] For more information see: **Gezder,** p. 59 etc.
[14] **Jhering,** p. 1, 2. See also Ramon **Mabillard, Gesellschaftsrechtliche Aspekte der Vertragsverhandlungen – Eine Untersuchung der Culpa in contrahendo,** Helbing & Lichtenhahn, Basel-Genf-München 2004, p. 66.
[15] **Jhering,** p. 5, 8 etc.; See also **Mabillard,** p. 66.
[16] **Jhering,** p. 26.
[17] André **Wahrenberger, Vorvertragliche Aufklärungspflichten im Schuldrecht (unter besonderer Berücksichtigung des Kaufrechts) – Zugleich ein Beitrag zur Lehre von der culpa in contrahendo,** Schulthess Polygraphischer Verlag, Zürich 1992, p. 32.
[18] **Jhering,** p. 7, 34-35, 42.

a contractual complaint."[19] In short, Jhering developed a theory of the negotiation parties' being contractually bound to show the 'necessary solicitude'[20], and according to this theory the party who by breaching this rule commits a culpa in contrahendo is liable for the injury the other party suffers as a result of trusting the first party[21].

III. Pre-contractual liability in Swiss Obligation Law (OR)

Although the term culpa in contrahendo is used in court decisions and in literature, it is not used in the Swiss Obligation Law (OR), where the rules regulating pre-contractual liability are found in articles 23-31, under the heading 'Mängel des Vertragsabschlusses', defects of the contract.

Generally, the Swiss rules for pre-contractual liability are similar to the German rules. Pre-contractual liability requires that there has been a business contact between two parties, by which a relation with an increased state of confidence has been established[22], and that the pre-contractual duties of care and consideration have been neglected. If one party by an action or omission causes the other party a damage, and it can be established that there is a causal relation between the injury and the pre-contractual behaviour, there is pre-contractual liability. As a general rule, the law does not protect an expectation that a party provides a service without a contractual obligation. However, under special circumstances a relation of confidence may have been

[19] **Jhering,** p. 52.
[20] E. Allan **Farnsworth,** *"Negotiation of Contracts and Precontractual Liability: General Report"*, in: **Conflits et harmonisation Kollision und Vereinheitlichung Conflicts and Harmonization,** Mélanges en l'honneur d' Alfred E. von Overbeck, Éditions Universitaires Fribourg, Suisse 1990, p. 666.
[21] **Farnsworth,** p. 666.
[22] BGE 116 II 695, 698; BGE 105 II 75, 80.

established, which justifies that the party should be compensated for the expenses made[23].

If a party continues negotiations without any real intention of concluding a contract, (s)he will be liable for any damage suffered by the other party as a result of relying on the contract[24]. The same applies if a party becomes aware that it will not be possible to conclude the contract, but nevertheless continues negotiations, thereby causing damage to the interest of the other party. In this case there is both omission of information[25], and non-compliance with the duties of care and consideration[26].

IV. Pre-contractual liability in German Civil Code (BGB)

It is vain to search the BGB as well as newer court decisions for the expression 'culpa in contrahendo', as German lawyers no longer use the expression, but use the term 'Verschulden bei Vertragsschluss', fault at conclusion of contract. However, former court practice can still be used in interpretation[27].

BGB § 311 paragraph 2 states that initiating contract negotiations causes the formation of an obligation relation with duties of care and consideration in negotiation relations as set out in BGB § 241 paragraph 2. Violation of these duties can cause pre-contractual liability.

A. Fault

[23] BGE 133 III 449.
[24] BGE 105 II 75; I. Zivilabteilung, 03.02. 2003: 4C. 320/2002/md. (https://eskript.unibas.ch/fileadmin/docs/BGE/4C3202002.pdf (27.10.2016)).
[25] BGE 40 II 370.
[26] BGE 36 II 193, 203.
[27] See **Larenz/Wolf,** § 31 N 3.

Fault can consist of failure to disclose[28], failure to make the other party aware of a misunderstanding[29], misinformation, insincerity in the negotiations, or persuasion of the other party to conclude a contract on terms that are a violation of moral principles[30].

B. Does the pre-contractual relation establish a duty to perform?

Generally, a pre-contractual relation will not establish a mutual duty to perform, but merely a duty of care and consideration (BGB § 241 paragraph 2). Thus, for example, the freedom to conclude or abstain from concluding a contract of transfer of real estate applies right up till the moment of notarization[31]. However, in certain cases, such as if one party to the negotiations holds a position of monopoly, this party may have a duty to perform if any one party meets the criteria fixed by the monopoly holder[32].

C. Confidence relationship as basis for pre-contractual obligations?

The legal basis for special obligations of the pre-contractual and business contacts has been seen as the confidence relationship between the parties[33]. However, duty of care can exist without there being confidence, which can especially be seen when one party is dependent on the products or deliveries of the other and therefore must negotiate a contract (compulsory relationship). During negotiations he has a right to expect the care of the other, even though

[28] BGH, V ZR 112/96 (München), NJW 198, Heft 13, p. 898.
[29] BGHZ 139, 177, 184; BGH, VII ZR 11/ 79, NJW 1980, 180; VII ZR 188/ 84, NJW-RR 1986, 569.
[30] BGH VIII ZR 111/99, NJW 2000, Heft 17, pp. 1254-1256, BGH VIII ZR 280/85, NJW 1987, Heft 11, p. 639.
[31] OLG Köln OLGR 2003, 39, 40.
[32] BGH, 20.09.2011, II ZR 23/14.
[33] See especially Claus-Wilhelm **Canaris,** *"Schutzgesetze – Verkehrspflichten – Schutzpflicten",* in: **Festschrift für Karl Larenz zum 80. Geburtstag,** C.H. Beck'sche Verlagsbuchhandlung, München 1983, p. 90 etc.

he may not have any special confidence in the other. The close contact that you must enter into when you are beginning a business contact with another party is decisive for the existence of a duty of care.

BGB § 311 paragraph 2, N 2 does not discern between a confidence relationship and a compulsory relationship. Thus legal relations of negotiations and business contacts do not require confidence[34].

An objective breach of the duty of care does not necessarily constitute fault, if there is no need for the protection of confidence. If for example a party has been warned against a risk by others than the negotiation partner, it is not necessary to repeat the warning.

V. How does a case of pre-contractual liability arise?

If no valid contract is concluded at the end of negotiations and it is not as a result of an agreement to end negotiations, the cause is found in the pre-contractual phase: one of the parties is at fault. The result of fault at conclusion of the contract may be either that there is not even a seemingly effective contract, or that a contract is concluded, but it is, or later becomes invalid, and one of the parties suffers damages as a result[35], or it can even happen that there is an effective contract, but because of the fault of one party it is (more) burdensome for the other than what was justifiably expected by this party[36].

The legal relationship of negotiations of contracts is not restricted to the sphere of obligation law. It is valid for any kind of contracts be it in Property, Family or Inheritance Law[37].

A. Pre-contractual obligations

[34] For former law see: BGH NJW 2001, p. 3698 (**Larenz/Wolf,** § 31 N 4).
[35] Dieter **Medicus, Schuldrecht I – Allgemeiner Teil,** 17. Auflage, Verlag C.H. Beck, München 2006, p. 49.
[36] **Medicus,** p. 51.
[37] **Larenz/Wolf,** § 31 N 5.

There is no general obligation to disclose information to the other party. On the contrary the *caveat emptor*-principle applies, that is: a potential party to a contract is required to obtain the necessary information himself[38]. Liability for damages resulting from pre-contractual behaviour thus does not require the existence of a duty to disclose; however, if one party withholds information he is liable for the ensuing damages[39].

BGB § 241 paragraph 2 likewise does not mention any duty to disclose. However, such duties may be subsumed under the general obligation of good conduct, which demands consideration of the other parties' rights, goods and interests[40], or if there is a grave conflict of interest[41]. According to the Civil Procedure Regulation (ZPO) § 138, *if* information is given, it has to be correct and complete.

The duty to disclose does not include all information[42]. The seller is not obliged to inform the buyer of formal requirements for special kinds of contracts during the negotiations, if such requirements may be presumed to be generally known. Eg. if the subject of negotiation is conveyance of real estate, the seller would not be obliged to inform the other about the formal requirement of registration in the land register, or that a pre-contract regarding real estate needs notarisation to be valid; however, in an individual case it may come under the duty to disclose[43].

Likewise, the seller has no duty to inform the buyer that the value of the sales object is considerably lower than the price demanded. On the

[38] OLG Brandenburg, 09.04.2008, 4 U 204/06.
(Vorinstanz: LG Frankfurt (Oder) - 13 O 230/05 - 15.11.2006).
[39] See eg. BGH, V ZR 394/99 - OLG Karlsruhe, BGH, 17.10.2006, XI ZR 205/05.
http://www.lrz-muenchen.de/~Lorenz/urteile/vzr394_99.htm (12.09.2009)
[40] **Mertens,** p. 820; BGH, V ZR 264/05.
[41] OLG Brandenburg, 09.04.2008, 4 U 204/06.
[42] BGH, II ZR 277/09.
[43] **Medicus,** p. 50; BGH, V ZR 53/64, NJW 1965, Heft 18, p. 812.

contrary, the seller in general has a right to suppose that the buyer in his own interest has researched what the contract entails[44].

B. Omitting or withholding information

Good conduct/fair dealing may entail duty to make the other party aware that he is in error[45]. According to prevailing opinion the duty to disclose includes information about circumstances which may frustrate the other parties' aim and is of substantial importance for his decision, if such information can be expected[46]. An issue prospectus must for example contain factually correct and complete information that will or may be of significant importance for the potential investor[47]. Withholding important information obtained before the negotiation phase has formally ended constitutes violation of the duty to disclose, even when only the formal finalizing (notarization of the contract) remains[48].

The duty to disclose may in an individual case include duty to inform the other party of circumstances, which he must be supposed to be insufficiently aware of[49], and/or obviously has not been able to fully understand the implications of[50].

There is no breach of duty to disclose if the other party knows or ought to know the facts, or should have been able to realise them[51]. It is the injured party who has to prove breach of the duty to disclose. However, the injurer may be exculpated if he shows that the injured

[44] BGH, V ZR 308/02 (Hamburg), NJW 2003, Heft 25, p. 812.
[45] BGH, V ZR 264/05 II 3. a); BGHZ 139, 177, 184; BGH, VII ZR 11/ 79, NJW 1980, 180; BGH, VII ZR 188/ 84, NJW-RR 1986, 569.
[46] BGH, V ZR 264/05.
[47] BGH, 01.03.2004, II ZR 88/02; 23.10.2012, II ZR 294/11.
[48] BGH, 17.01.2008, III ZR 224/06.
[49] BGH, V ZR 394/99; BGH, 08.11.2007, IX ZR 5/06; BGH, 06.11.2008, III ZR 279/07.
[50] BGH, V ZR 402/99, NJW 2001, Heft 28, p 2021.
[51] BGH, V ZR 264/05; V ZR 322/99.

party in any case would have concluded the contract on the same terms[52].

In case of infringement of the duty to disclose, the injured party may claim that the contract be null and void, even if he did not suffer any damage[53].

C. Insincerity

It is considered a breach of good conduct to initiate or continue negotiations without any intention of actually concluding a contract[54].

VI. Causality

One condition for pre-contractual liability is that there must be a causal relation between the injury and the pre-contractual behaviour. The accepted theory is the Adequate Causal Link theory[55]. According to this theory the Adequacy Principle must be applied here just as it must in the evaluation of the injury[56]. For there to be an Adequate Causal Link the link has to be natural, that is, the condition for pre-contractual liability is that the causal link between violation of an obligation and an injury has to be both natural and adequate[57]. If there

[52] BGH, V ZR 402/99.
[53] BGH, V ZR 112/96 (München), NJW 198, Heft 13, p. 898.
[54] BGH, 06.02.1969 - II ZR 86/67.
[55] **Gonzenbach,** s. 138. For this theory see: Karl **Oftinger/**Emil W. **Stark, Schweizerisches Haftpflichtrecht, Erster Band: Allgemeiner Teil,** 5. Auflage, Schulthess Polygraphischer Verlag, Zürich 1995, pp. 109**.**
[56] **Gonzenbach,** p. 138. For the function of the Adequate Causal Link see: Heinz **Rey, Ausservertragliches Haftpflichtrecht,** 4. Auflage, Schulthess, Zürich 2008, N 522.
[57] See: **Rey,** N 530; Stephan **Hartmann, Die vorvertraglichen Informationspflichten und ihre Verletzung – Klassisches Vertragsrecht und modernes Konsumentenschutzrecht,** Universitätsverlag, Freiburg Schweiz 2001, N 268.

is a natural causal link its possible adequacy must be evaluated by the court [58].

VII. Damage

If one party breaks off the negotiations without just cause, this party may be liable for damages caused by the breach of justifiable trust. A party is only liable for damages, if (s)he breaks off negotiations after having culpably evoked or nourished the other's trust in a future conclusion of a contract[59]. In such a case the injured party will normally be entitled to compensation for interest due to reliance of trustworthiness (negative (i.e. reliance) interest), but in some cases there may be grounds for awarding interest in the performance of the contract (positive interest)[60]. If the parties make a pre-contact, and the conditions of the pre-contract are fulfilled, performance of the contract should be the solution to a dispute[61].

VIII. Measuring damages if liability is proven

A. Generally

Where the duty to disclose has been violated, generally the injured party can only be compensated for damage caused by breach of trust (the reliance interest)[62]. According to consistent court decisions this includes useless expenses[63]. The injured party has to be restored to the

[58] See: **Rey,** N 530.
[59] Rudolf **Nirk,** *"Culpa in contrahendo – eine richterliche Rechtsfortbildung – in der Rechtssprechung des Bundesgerichtshofes"*, in: **Festschrift für Philipp Möhring zum 65. Geburtstag,** C.H. Beck'sche Verlagsbuchhandlung, München und Berlin 1965, p. 391.
[60] **Medicus,** p. 49.
[61] **Medicus,** p. 49, BGHZ 120, 281, LM H. 2/2002 VOB Teil A Nr. 30 .
[62] BGHZ 114, 87, 94; 142, 51, 62; BGH, XI ZR 235/99, ZfIR 2001, 286, 288; Senatsurt. v. 6. April 2001, V ZR 394/99.
[63] BGHZ 99, 182 (201) = NJW 1987, 831.

circumstances he was in "at the time he learned of the circumstances that were decisive for his decision to contract"[64].

In a leading case the conveyance of a real estate was void because of omission both of notarisation of the pre-contract and registration of the subsequent conveyance. The injured party could not be given ownership over the property in question. Since more than six years had passed from the conclusion of the contract, the value of real estate had increased considerably. Therefore, the injured party would not be "in the like circumstance" as before conclusion of the contract if he had only been given the exact sum that was paid. The court decided that he be given a sum sufficient to acquire a real estate of similar value as the first, with deduction of the sum he would be likely to have paid for rent during the time he had occupied the house in question[65].

B. Reliance interest

1. Generally

Where the duty to disclose has been violated, the injured party in general cannot claim adjustment of the contract. He may choose between having the contract cancelled if he suffered a pecuniary loss[66], or to uphold the disadvantageous contract and liquidate the remaining reliance interest.

The reliance interest is to be calculated according to the situation the injured party would have been in, had he known the true circumstances of the case, that is: he would have been able to conclude the contract at a for him more favourable price. The compensation amounts to the sum found by subtracting the true price

[64] BGH, V ZR 264/ 05.
[65] BGH V ZR 53/64, NJW 1965, Heft 18, p. 812.
[66] BGH, V ZR 29/96, VIII ZR 111/99.

from the paid overprice. In this situation the injured party will not have to prove that the other party would have concluded the contract even at the lower price[67].

The aim is not to adjust the contract to the new situation, it is to calculate the reduced damage caused by breach of trust (the reliance interest)[68].

2. Adjustment

As a general rule the injured party cannot claim adjustment of the contract, but may only claim that the contract be upheld and compensation for the damage caused by breach of trust (Vertrauensschaden)[69].

However, the compensation may also consist in the injured party's being placed as if he had concluded a more profitable contract with the other party. In such a case the injured party must lift the difficult burden of proof that such a contract would have been concluded[70].

In some cases, where both parties have unknowingly applied a wrong basis for calculation, one party may be obliged to accept an increase of the sum he has pledged to pay, if the aim of the contract is to obtain a common goal, which goes beyond the exchange of goods, and may only be reached if the correct basis for calculation is provided[71]. There has to be strong reasons for such an adjustment.

C. Positive interest?

[67] BGH, V ZR 264/ 05.
[68] BGH, Urteil vom 19.05.2006 - V ZR 264/05.
[69] BGH, V ZR 264/05.
[70] BGH, V ZR 264/ 05; V ZR 394/ 99.
[71] Senatsurt. v. 19. November 1971, V ZR 103/69, NJW 1972, 152, 153 f.; opposite BGH, Urteil v. 20.03.1981 - V ZR 71/80 (KG).

Generally, in pre-contractual liability situations the compensation will be the negative interest. However, positive interest can be demanded in exceptional cases, if it is proven that had the injurious action not taken place, the injured party would have concluded another, more profitable contract[72]. The injured party has the burden of proof. Such proof can only be dispensed from where the subject is contracts for services or manufacture (Werkvertrage), and the buyer has not been made aware of deficiencies and as a result has paid an over-price. In such a case the buyer does not have to show further proof, but is to be placed as if he had concluded at the lower price[73].

If such proof cannot be shown, the injured party who wants to uphold the contract may as negative interest demand to be placed in the like situation he would have been in, had he know the true circumstances, that is as if he had concluded the contract at a more favourable price[74].

IX. Conclusion

Since Jhering introduced the culpa in contrahendo concept as a legal concept Its impact has reached beyond the German law of contracts. The concept of faults in contract negotiations developed over time in practice, and by means of numerous court decisions became an accepted basis for liability. It is now regulated in the German Civil Code (BGB) § 311 paragraph 2, although not specifically under the name of culpa in contrahendo. The complicated problems of liability for wrongful and harmful actions during the pre-contractual phase leading to damages awoke interest in several other countries, and has had influence on their doctrine and court decisions.

[72] BGH, V ZR 394/99 - OLG Karlsruhe; BGH, V ZR 264/05.
[73] BGH, V ZR 264/05, I, II.
[74] BGH, V ZR 394/99 - OLG Karlsruhe; BGH, V ZR 264/05.

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