RELIANCE IN THE BREAKING-OFF OF CONTRACTUAL NEGOTIATIONS

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Trust and Expectation in a Comparative Perspective

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FOREWORD

We are delighted to introduce this book, which has been developed from the very successful doctoral thesis which Professor Zuloaga defended at the University of Oxford in 2017. We first saw her work as a Master's student when she took our course on comparative contract law in the MJur at Oxford, and later we shared the supervision of her research for her DPhil thesis.

Professor Zuloaga has put her own stamp on the topic of precontractual liability. Indeed, before she came to Oxford, her interest had already been sparked during the studies for her law degree at the Universidad Adolfo Ibáñez in Santiago, Chile, where she wrote a dissertation on this general area, published as *Teoría de la Responsabilidad Precontractual: Aplicaciones en la Formación del Consentimiento de los Contratos* (Santiago, Legal Publishing Chile, 2008). Her work for the doctoral thesis – presented now in this book – takes her research to a broader and significantly deeper level. It offers an English-speaking audience a Latin American perspective on the topic, introducing readers to the Chilean approach to precontractual liability, as well as the more well-known approaches taken in the continental European civil law systems such as German and French law. But it also addresses head-on the difficulties which arise from comparing the approaches taken by civil law systems and common law systems to precontractual liability for breaking off negotiations.

Professor Zuloaga's theme is 'reliance' in the process of negotiations; 'reliance' is a term that has to be examined carefully, and Professor Zuloaga finds in it two distinct but related dimensions, 'trust-based' reliance and 'expectation-based' reliance. Her argument is that the other party's 'reliance' can justify the imposition of liability on the party who breaks off negotiations – but that such notions of reliance already underlie the approaches to precontractual liability taken by the civil law systems which she selects for detailed study, i.e., her 'selected jurisdictions' (Germany, France and Chile). This enables her to break away from the traditional language of the duty of 'good faith' in negotiations, and thereby to frame the arguments for the imposition of precontractual liability in terms which might be more acceptable to those in systems which traditionally take a sharply contrasting approach to precontractual liability, such as English law (the system which she uses as her 'contrasting jurisdiction').

This is not a book which sets out to teach English lawyers how they should re-think their law on precontractual liability; but it is designed to help them to understand how they might go about doing so, and to provide some tools

(and to remove some traditional barriers) to facilitate reform. In her Preface, Professor Zuloaga says:

> it is not the aim of the book to argue that the paradigm case [i.e., the core case of breaking off negotiations, which is the focus of the study] should be protected by the contrasting jurisdiction, but only to show that it could be protected through reliance, a notion which is already part of the current solutions provided by this jurisdiction in other precontractual cases. Moreover, like the Common Core Project, the argument is neither in favour nor against harmonisation; but it shows a tool (in the notion of reliance) that would be useful to achieve some degree of harmonisation in this area.

This is comparative law as it should be done: helping us to understand what really underlies our systems' approaches to the law.

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University of Oxford

Stefan Vogenauer
Director, Max Planck Institute for European History
Frankfurt

May 2019

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I would like to express my sincere gratitude to Professors Stefan Vogenauer and John Cartwright, who, at different stages, supervised my DPhil, for believing in my project and encouraging me to get it published. I will always be grateful to them for sharing their knowledge with me, for their willingness to meet with me (in Oxford, Hamburg and Santiago), for reading my work thoroughly and for giving me timely and constructive advice. But, above all, I wish to thank them for their kindness and understanding. Their belief in me and in my project was vital to being able to finalise it and now publish it.

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Santiago, Chile, June 2019

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LIST OF ABBREVIATIONS

AA	*Ars Aequi*
ACQP	Acquis Principles
AEPL	Academy of European Private Lawyers
App Cas	Appeal Cases
BAG	*Bundesarbeitsgericht* (German Federal Supreme Court for Labour Law)
BB	*Der Betriebsberater*
BGB	*Bürgerliches Gesetzbuch* (German Civil Code)
BGH	*Bundesgerichtshof* (German Federal Supreme Court)
BGHZ	*Entscheidungen des Bundesgerichtshofs in Zivilsachen*
BLR	Building Law Reports
Bull civ	*Bulletin civil de la Cour de cassation*
Bull Joly	*Bulletin Joly Sociétés*
Burr	Burrow's Reports
CA	*Cour d'appel* (France), *Corte de Apelaciones* (Chile), Court of Appeal (England)
Cass civ (1, 2, 3)	*Cour de cassation, Chambre civile* (first, second, third chamber)
Cass com	*Cour de cassation, Chambre commerciale*
CCC	*Contrats, concurrence, consommation*
Cciv	*Code civil* (French Civil Code)
CCivCh	*Código Civil Chileno* (Chilean Civil Code)
CComCh	*Código de Comercio Chileno* (Chilean Commercial Code)
Ccomm	*Code de Commerce* (French Commercial Code)
CESL	Common European Sales Law
cf.	compare
Ch/ChD	Chancery Division
cic	*culpa in contrahendo*
CISG	Convention on Contracts for the International Sale of Goods
CJ	Chief Justice
CLR	Commonwealth Law Reports (Australia)
ColumJEurL	Columbia Journal of European Law
ColumLRev	Columbia Law Review

Com Ct	Commercial Court
ConstLJ	Construction Law Journal
CS	*Corte Suprema* (Chilean Supreme Court)
D	*Recueil Dalloz* or *Dalloz Sirey*
DCFR	Draft Common Frame of Reference
DH	*Dalloz, Recueil hebdomadaire de jurisprudence*
DTZ	*Deutsch-Deutsche Rechts-Zeitschrift*
edn.	edition
EGLR	Estates Gazette Law Reports
ERPL	European Review of Private Law
EU	European Union
EWCA Civ	England and Wales Court of Appeal, Civil Division
EWHC	England and Wales High Court
ff.	and following
FS	Feasibility Study
Gaz Pal	*Gazette du Palais*
HarvLRev	Harvard Law Review
HCA	High Court of Australia
HL	House of Lords
HL Sc	House of Lords (appeal from Scotland)
HR	*Hoge Raad* (Netherlands Supreme Court)
IBLJ	International Business Law Journal
ICC	International Chamber of Commerce
ICLQ	International & Comparative Law Quarterly
IR	*informations rapides*
J	Justice
JCP	*Jurisclasseur périodique, édition générale*
JCP éd E	*Jurisclasseur périodique, édition entreprise et affaires*
JLC	*Juzgado de Letras Civil*
Jur	*Jurisprudence*
JZ	*Juristenzeitung*
KB	King's Bench Division
KCLJ	King's College Law Journal
LGDJ	*Librairie générale de droit et de jurisprudence*
LJ	Law Journal/Lord Justice
LM	*Lindenmaier-Möhring, Nachschlagewerk des Bundesgerichtshofs*
LPDC	*Ley sobre Protección de los Derechos de los Consumidores*
LR	Law Reports
M&A	Mergers and Acquisitions
MOU	Memorandum of Understanding

MR	Master of the Rolls
NJ	*Nederlandse Jurisprudentie*
NJW	*Neue Juristische Wochenschrift*
NJW-RR	*Neue Juristische Wochenschrift, Rechtsprechungs-Report Zivilrecht*
Off. Cmt.	Official Comment to PICC
PA	*Les Petites Affiches*
para./paras.	paragraph/paragraphs
PC	Privy Council
PCC	*Principes Contractuels Communs*
PECL	Principles of European Contract Law
PICC	Principles of International Commercial Contracts
PLACL	Principles of Latin American Contract Law
PLDC	*Principios Latinoamericanos de Derecho de los Contratos*
pt.	part
PUAM	*Presses Universitaires d'Aix-Marseille*
PUF	*Presses Universitaires de France*
QB	Queen's Bench Division
RDyJ	*Revista de Derecho y Jurisprudencia*
Req	*Chambre de requêtes* of the *Cour de cassation*
rev.	revised
RG	*Reichsgericht*
RGZ	*Entscheidungen des Reichsgerichts in Zivilsachen*
RTDciv	*Revue Trimestrielle de Droit Civil*
RTDcom	*Revue Trimestrielle de Droit Commercial*
SCR	Supreme Court Reports, Canada
sub-s./sub-ss.	subsection/subsections
T.	*Tomo* (volume)
tr.	translator
UCC	Uniform Commercial Code
UKHL	United Kingdom House of Lords
UN	United Nations
UNIDROIT	International Institute for the Unification of Private Law
UNSWLJ	University of New South Wales Law Journal
US	United States of America
UTCCR	Unfair Terms in Consumer Contracts Regulations
UWOLRev	University of Western Ontario Law Review
WL	Westlaw Transcripts
WM	*Wertpapiermitteilungen, Zeitschrift für Wirtschafts-und Bankrecht*

PREFACE

The aim of this book is to explore precontractual liability for breaking off negotiations and to discover its theoretical basis, offering an analysis which is detached from problematic notions, such as good faith and abuse of rights (which have traditionally been claimed as bases of this liability), and finding its basis, instead, in the notion of 'reliance'. The objective is to contribute to the comparative analysis of this area of liability, removing the hurdles that obstruct the view of the core notion that is operating at its heart. Thus, it will be argued that by shifting the analysis to the notion of reliance, jurisdictions that are currently reticent in acknowledging this liability could embrace and implement it.

I. SCOPE

The scope of this book is limited in several aspects. First, the focus is on finding the doctrinal basis of precontractual liability for breaking off negotiations. Thus, remedies are only dealt with briefly in order to show that they correspond to the reliance basis.

Secondly, the analysis is limited to the 'selected jurisdictions': Germany, France and Chile. Germany and France have been selected because they are, respectively, the leading European jurisdictions of the Germanic and Franco-Roman legal families of the civil law system,[1] and because both have contributed crucially to the development of the doctrine of precontractual liability. Chile has been selected because it is a leading jurisdiction in Latin America which has had a particularly interesting reception process of this doctrine, taking elements both from the German and the French developments.[2] Additionally, by selecting Chile, precontractual liability is taken out of its typically European dimension and placed in a more global context, in order to demonstrate the relevance of the topic. English law is analysed as a 'contrasting jurisdiction' in that, as opposed to the selected jurisdictions, it does not provide a remedy in what will be called the

1 Hein Kötz, 'Legal Families' in Jürgen Basedow and others (eds.), *The Max Planck Encyclopedia of European Private Law*, vol. II (OUP, 2012) p. 1063.

2 See Ch. 2 s. I 2 (c).

'paradigm case'.[3] Harmonisation instruments are only analysed in relation to the reliance-based remedies that they provide.[4]

A third limitation is that the focus of the book is on the 'paradigm case': where no contract (not even a preliminary one) has been entered into; no preliminary works have been done, but expenses have been incurred; there is no intention to harm; and one party has relied on an expectation of the future conclusion of the contract under negotiation, that the other party has given rise to. The paradigm case has been chosen because it is the scenario where it is most difficult to justify the imposition of liability for breaking off negotiations, even in the selected jurisdictions, as it goes beyond the 'clear-cut cases'.[5] At the same time, it is the core case which evidences the operation of reliance. Additionally, it evidences a discord between the selected jurisdictions, on the one hand, and the contrasting jurisdiction, on the other hand, because although the latter does provide relief in some specific situations of broken negotiations, it does not in the paradigm case. Cartwright gives a useful example of the paradigm case: an Englishman who ran a business which he was planning to expand globally and who was looking for international partners entered into negotiations in this regard with persons from different nationalities whom he met at an international business convention. After intense negotiations, the Englishman told each of the other persons that he was sure that he would be able to enter into a contract with them as soon as they had agreed all the final details. Consequently, each of the other negotiating parties incurred significant expenses in preparation for this new business venture. However, after some time, the Englishman notified each of them that he had found a better partner in their respective countries.[6]

Other case scenarios which can be placed under the label of 'precontractual liability' are excluded from the direct scope of this work, although they might sometimes be mentioned (particularly the specific scenarios where English law currently provides relief). For instance, 'sham negotiations', i.e. cases where there is a clear intention to harm or no intention to contract (for example, the defendant never intended to contract but gave the impression that he did, or at some stage during the negotiations lost the intention to contract but did not inform the other party and continued to give the impression that he did intend

3 Defined in next para.

4 In Ch. 6 s. IV 1 (b).

5 Ingeborg Schwenzer, Pascal Hachem and Christopher Kee, *Global Sales and Contract Law* (OUP, 2012) p. 280.

6 John Cartwright, 'The English Law of Contract: Time for Review?' (2009) 17 ERPL 155, also published as John Cartwright, *The English Law of Contract: Time for Review?* (EM Meijers Instituut, 2009). Another example is situation 3 in case 7 in John Cartwright and Martijn Hesselink (eds.), *Precontractual Liability in European Private Law* (CUP, 2008) p. 192.

to contract, or conducted parallel negotiations but pretended that he did not do so).[7] Also cases which cannot properly be classified as 'breaking off' negotiations, although negotiations might have been broken off (for instance, cases of breach of confidentiality or of breach of information duties); and cases where there is no breaking-off of 'negotiations' (for example, revocation of an offer, withdrawal of an acceptance, cases where the precontractual period is regulated by a tender procedure, cases where a valid contract was entered into, and cases of personal harm suffered during negotiations).

Thus, the book is limited to situations where one negotiating party breaks off, withdraws from or refuses to continue with negotiations for the conclusion of a contract, excluding negotiations for the conclusion of other types of agreements or instruments. The notion of 'negotiations' is not easy to define, as it corresponds to a period that takes place before a contract is entered into where flexibility is required in order to accommodate the different situations that can occur. However, throughout this work, negotiations will be understood as referring both to a period that begins when one person approaches another or when they simultaneously approach each other in order to discuss the possible conclusion of a contract, and to the discussions and relationship that forms between the negotiating parties by their exchange of information and communications, with the aim of exploring the possibilities and laying down the conditions under which they would be prepared to contract.

It is important to bear in mind two particular situations which could fit into the factual scenario of the paradigm case, but where there is usually no room for precontractual liability. First, in some cases custom or commercial practices determine who bears the risk of failed negotiations. For instance, regarding the services provided by certain professionals or tradesmen, it might be the local custom that a first estimate or a first consultation is provided free of charge or that certain precontractual work is done at the professional's expense;[8] and, regarding certain negotiations with or between businesses it might be considered that the costs are already included in the 'general expenditures of the firm'.[9] Secondly, in some cases (for example M&A transactions between companies)

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7 John Cartwright, *Contract Law: An Introduction to the English Law of Contract for the Civil Lawyer* (3rd edn., Hart, 2016) p. 84; e.g. cases 1 and 2 in Cartwright and Hesselink (n. 6) pp. 21, 64.

8 Ewan McKendrick, 'Work Done in Anticipation of a Contract Which Does Not Materialise' in W.R. Cornish and others (eds.), *Restitution, Past, Present and Future: Essays in Honour of Gareth Jones* (Hart Publishing, 1998) p. 167; editors' comparative observations to case 4 in Cartwright and Hesselink (n. 6) p. 137.

9 This view has been particularly prominent in French law, e.g. Joanna Schmidt-Szalewski, 'France' in Ewoud H. Hondius (ed.), *Precontractual Liability: Reports to the XIIIth Congress International Academy of Comparative Law, Montreal, Canada, 18–24 August 1990* (Kluwer Law, 1991) p. 150; see Ch. 4, text to (n. 282) below.

the risk of incurring liability for broken negotiations is usually lower because the negotiating parties are advised by legal counsel and normally enter into preliminary agreements (such as MOUs or letters of intent) where they expressly regulate or exclude liability for precontractual work or expenses.[10] This is not to say that liability can never arise in such situations, but it is more difficult for the requirements of liability to be fulfilled.

There are further limitations on the scope of this book. Its focus is on private law contracts, not covering issues of public law or regulatory law (such as contracts with public authorities, public tenders and competition law scenarios). Because the paradigm case is purely precontractual, the book does not deal with preliminary agreements, precontracts or preparatory contracts. Additionally, it does not deal with consumer law because the paradigm case is based on negotiations between parties with equal bargaining power. Therefore, the cases mentioned will generally refer to situations of broken negotiations for the conclusion of contracts between businesses or contracts between individuals, i.e. the book encompasses both commercial and non-commercial contracts but excludes consumer contracts.

II. METHODOLOGY

The comparative nature of this book necessarily calls for a comparative methodology. The methodology used combines elements from Zweigert and Kötz's 'functional equivalence'[11] and from the 'common core method' of the Trento Common Core Project.[12]

The book shows that there is a functional equivalence between the selected jurisdictions in that, through different regimes of liability (contractual in the case of Germany and delictual in the case of France and Chile), they provide reliance-based protection in cases of broken negotiations and, particularly, in the paradigm case. However, it also demonstrates that there is only a limited functional equivalence between the selected jurisdictions and the contrasting jurisdiction, regarding the specific cases where English law grants relief, and no functional equivalence regarding the paradigm case because English law does not provide relief in such a case. At the same time, the book argues that, in the

10 Precontractual agreements are analysed in detail by E. Allan Farnsworth, 'Precontractual Liability and Preliminary Agreements: Fair Dealing and Failed Negotiations' (1987) 87 ColumLRev 217, pp. 249 ff. Also, Héctor Marín Narros, *Estudio de los Principales Acuerdos Precontractuales con Modelos en Inglés y en Español* (Bosch Editor, 2012).

11 Konrad Zweigert and Hein Kötz, *Introduction to Comparative Law* (Tony Weir tr., 3rd rev. edn., Clarendon Press, 1998) ch. 3.

12 Mauro Bussani and Ugo Mattei, 'The Common Core Approach to European Private Law' (1997–1998) 3 ColumJEurL 339.

selected jurisdictions, reliance is the common core that explains the rationale for imposing precontractual liability for breaking off negotiations, especially in the paradigm case, and that this notion is perfectly able to explain the reasoning behind the imposition of liability in the particular cases of broken negotiations where English law grants relief. Consequently, it shows that reliance has the potential of being the common core of precontractual liability for breaking off negotiations, also with regard to the contrasting jurisdiction, if the latter were to embrace the paradigm case on the basis of the protection of reliance.

Nevertheless, it is not the aim of the book to argue that the paradigm case should be protected by the contrasting jurisdiction, but only to show that it could be protected through reliance, a notion which is already part of the current solutions provided by this jurisdiction in other precontractual cases. Moreover, like the Common Core Project,[13] the argument is neither in favour nor against harmonisation; but it shows a tool (in the notion of reliance) that would be useful to achieve some degree of harmonisation in this area.

The book is structured in seven chapters. The first chapter provides an introduction and the second chapter deals with the fundamental principles that underlie the theory of precontractual liability for breaking off negotiations and its historical origins. Each selected jurisdiction is analysed separately in one chapter (third, fourth and fifth chapters, respectively). In each of these chapters a similar structure is followed, establishing the predominance of the reliance basis over other bases of precontractual liability for breaking off negotiations, analysing the requirements for this liability to arise and the particular situation of negotiations for the conclusion of formal contracts. In each of these chapters comparative observations are made where relevant. However, it is the sixth chapter which brings together the findings of the selected jurisdictions, undertaking a detailed comparative analysis of the reliance approach as to the basis, requirements and remedies of this liability. Finally, the seventh chapter argues that the reliance approach would allow this liability to be implemented in the contrasting jurisdiction if it desired to provide relief in the paradigm case.

III. NOTE ON TRANSLATIONS

With regard to German law, the BGB, in English, is available at <https://www.gesetze-im-internet.de/englisch_bgb/index.html>.

Regarding French law, the French text of the new articles of the *Code civil* cited throughout the book is taken from <https://www.legifrance.gouv.fr>. The English translations of these articles, other legislation, reform projects, cases and

[13] Bussani and Mattei (n. 12) p. 341.

literature are acknowledged throughout the book. Any other translations from French into English that are not attributed to another author were made by the author.

The text in Spanish of the different Chilean Codes and legislation can be found in Spanish in the website of the National Congress Library (*Biblioteca del Congreso Nacional*): <https://www.leychile.cl/Consulta/homebasico>. Throughout the book, all translations from Spanish into English were made by the author.