RELIANCE, PROMISSORY ESTOPPEL AND CULPA IN CONTRAHENDO: A COMPARATIVE ANALYSIS

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Introduction

In most modern legal systems the law of obligations has evolved into the traditional two-lane subdivision of liability under contract law. Not infrequently these two causes of action are delictual liability, each other. When thinking of contractual and tortious or even opposed to we instinctively do not associate them with reliance, which is a creditor-oriented factor, but with circumstances primarily originated in the debtor's sphere. Contractual liability arises where the debtor has made a promise as part of a contract, and tortious liability is incurred where the debtor has committed a civil wrong thereby interfering with the creditor's sphere of rights and interests. It is only the 20th century that has seen the rise of causes of action in which emphasis has shifted to the creditor and where his reliance has emerged as a separate and independent element of liability. Promissory estoppel and culpa in contrahendo are the most important ones.

I. Contract, Tort and Reliance in Historical Perspective

Contrary to the traditional dichotomal approach, legal history shows that there has not always been a clear dividing line between contract and tort and that reliance has played at least a catalytic role in shaping causes of action regarded as either contractual or tortious.
1. Anglo-American Law

In Anglo-American law the history of general contractual liability deserves particular attention. As contractual remedies, the medieval period provided only the writ of covenant and the writ of debt which were both highly formalized and ritualized. The enforcement of informal promises found its way into English law by way of the tortious action of trespass on the case and matured to the general action for assumpsit based on the idea of liability for duties promised and undertaken. On the other hand, the action for deceit, originally designed as a remedy against defaulting on promises, was superseded by liability for warranties within a contractual relationship and, after losing its contractual function, drifted away into the realm of general tort law.

On the other hand, the action for deceit, originally designed as a remedy against defaulting on promises, was superseded by liability for warranties within a contractual relationship and, after losing its contractual function, drifted away into the realm of general tort law. During the 19th century the formative impact of the reliance idea almost came to a halt. Contract law was dominated by the consideration doctrine in its narrow bargain conception; and a reinforcement of reliance by way of tort law was blocked in 1889 by the House of Lords when, in Derry v. Peek, it declined to extend the action for deceit beyond the limits of intentional misrepresentation.

2. German Law

German law, on the other hand, can look back to a more solidified tradition of distinction between contract and tort law as a result of its Roman law ancestry. Contract law was able to evolve unhampered by the technicalities of the consideration doctrine but, in the 19th century, was equally repugnant to absorbing reliance aspects. This was mainly due to the overwhelming influence of the concept of private autonomy philosophically underpinned by the dogma of free will. When, in 1861, Rudolf von Ihering discovered culpa in contrahendo in his famous article entitled "Culpa in contrahendo oder Schadenersatz bei nichtigen oder nicht zur Perfektion gelangten Verträgen", one of his main concerns was liability for damages arising out of revocation of offers which, under the German common law, were regarded as revocable. This problem was solved under the German Civil Code of 1896/ 1900 when offers were made binding, within certain limits of course. Apart from this, the German Civil Code explicitly awards reliance damages in connection with the contractual process mainly in two specific instances; 1) under Art. 122 the addressee of a declaration of intention (Willenserklärung) is entitled to reliance damages in case the declaration is rescinded afterwards for mistake; and 2) under Art. 307 a party to a contract which is void because of impossibility of performance may recover reliance damages if the other party knew or should have known of the impossibility. The road to expanded recovery of reliance damages under tort law was impassable since, according to Art. 823 par. 1 of the Civil Code, only intentional or negligent interference with another person's tangible interest (absolutes Recht) results in liability. Mere economic or pecuniary loss gives a cause of action solely where the tortfeasor acts intentionally and in disregard of good moral standards (Art. 826 Civil Code). Reliance, however, is a very significant element as a defense, both under the doctrine of equitable estoppel and its German counterpart, the doctrine of venire contra factum proprium or self-contradictory conduct.

II. The Rise of Promissory Estoppel and Culpa in Contrahendo

The first decades of this century are characterized by a remarkable and growing influence of both promissory estoppel and culpa in contrahendo in the United States and Germany respectively. Interestingly enough, this is only partly attributable to an increased reliance consciousness. During their initial and formative stages both doctrines fulfilled distinct functions in their legal Systems to redress real or presumed policy deficits.

1. Promissory Estoppel in the United States.

In the United States promissory estoppel took over the tack to make up for the reliance deficit as produced by the bargain and exchange philosophy of the consideration principle. It became an instrument to enforce gratuitous promises where the promisee, in relying on the promise, changed his position and incurred financial losses. Thus, promissory estoppel served to enforce gratuitous promises, which, under traditional consideration doctrine, would not have been enforceable mainly in four types of situations:

- intrafamily promises if the promisee, on the basis of the promise, has incurred expenses, e.g., promises of
reimbursement for expenses in undertaking a trip;\textsuperscript{13}

- promises to transfer land, if the promisee has taken possession of the land and made improvements;\textsuperscript{14}

- gratuitous agencies and bailments, if things entrusted to the promisor are damaged or destroyed;\textsuperscript{15} and

- charitable subscriptions.\textsuperscript{16}

Apart from the fact that in many decisions relating to these fact patterns the consideration requirement is stretched to its near-invisibility and that in charitable subscriptions many courts have outrightly abandoned it, the wealth of pertinent case law generated Section 90 of the First Restatement of Contracts in 1934:

\begin{quote}
A promise which the promisor should reasonably expect to induce action or forbearance of a definite and substantial character on the part of the promisee and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise.
\end{quote}

### 2. German Law

Under German law the types of situations just described did not give rise to fundamental doctrinal problems. In the absence of a consideration requirement accepted promises are binding. Where they are of a donative character, they require notarization\textsuperscript{17} - in its function as an indicator of seriousness, an interesting equivalent to consideration.\textsuperscript{18} When the donation is perfected, the contract not complying with the notarization requirement becomes fully operative.\textsuperscript{19}

Quite contrary to promissary estoppel, culpa in contrahendo, deprived of its reliance-oriented function in the firm offer problem about which Ihering was concerned, primarily gained judicial appeal in clear-cut tortious situations of invasion of another person's tangible interests. The line of decisions was opened by the Supreme Court, the Reichsgericht, in 1911 with the famous linoleum roll case.\textsuperscript{20} In this case, a department score customer who had already made purchases in the store entered the linoleum section. In the course of dealing with the department store's employee the customer was hit and injured by a falling linoleum roll. She sued the store owner.

The court did not, as one might expect, proceed on a tort basis but construed that a quasi-contractual relationship between the score owner and the customer concluded at the moment the customer entered the store. The reason simply was to evade the rules of delictual liability which, in vicarious liability cases under Art. 831, allow the master to exculpate himself for the tortious acts of his servant, whereas a debtor who uses a servant to perform his duties towards the creditor is subject to absolute liability for his servant's misconduct under Art. 278. This court practice circumvents a tort rule regarded as undesirable policywise,\textsuperscript{21} and could not emerge in Anglo-American law given absolute vicarious liability under tort principles.\textsuperscript{22}

### III. Modern Trends: Recovery of Economic Loss in the Contractual Process?

In later periods of this century other fact patterns have come to the fore in German and Common Law which cut across the boundaries of contract and tort law and where culpa in contrahendo and promissory estoppel play an important role: the liability for negligently causing economic or pecuniary loss in the course of the contractual process. The once clear-cut borderline between all (contractual liability after conclusion) and nothing (no liability before conclusion) has been increasingly blurred by considerations of protecting reliance invested in the course of contractual dealings which never came to fruition. Culpa in contrahendo and promissory estoppel are the doctrinal tools applied in German\textsuperscript{23} and American\textsuperscript{24} jurisprudence respectively.

#### 1. German Law

In its first decision after the enactment of the Civil Code, the German Supreme Court, Reichsgericht, in 1909, followed the traditional path.\textsuperscript{25} In this case the parties negotiated the sale of two pieces of land. After the defendant and potential purchaser had declared their readiness to work out a settlement on a tracing problem with the neighbors, plaintiff and
defendant fixed the price at 190,000 Reichsmark. Defendant, however, made the conclusion of the contract contingent on
the extension of a mortgage with which one of the pieces was encumbered. The plaintiff reminded the defendant that the
extension would cause considerable expenses. But defendant replied: "When I tell you I'll buy the land, I'll do it, I am a
serious buyer." Relying on this statement the plaintiff got involved in dealings over the extension of the mortgage which
she finally succeeded in obtaining after incurring considerable expenses. Afterwards the defendant, however, declined to
sign a notarized contract. While the plaintiff asserted that there was no reason given whatsoever, the defendant argued
that the pieces of land were without interest to him since the tracing problem was left unsolved. The Supreme Court
dismissed the action for recovery of the expenses incurred

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for the extension of the mortgage. The court argued that liability for culpa in contrahendo would apply only on the basis of
a tort claim. A tortious conduct required either fraud or intentional causation of economic loss in violation of good moral
standards. A tort action would only lie in a case where a negotiating party, while declaring its readiness to enter into a
contract, in fact intends to do the contrary. The inducement of expenses short of that did not violate good moral
standards.

It was not until 1934 that the Reichsgericht saw the need for reinforcing the reliance aspect. Its decision of January 19,
1934\(^2\) involved a case in which the plaintiff had unsettled claims amounting to more than 60,000 Reichsmark against a
limited liability company of which the defendant was the sole and managing partner. The plaintiff had turned to defendant
for payment and security and the latter had agreed to provide security. This assurance also related to future supply of
goods which consisted of newsprint. The defendant also transferred to plaintiff a nonexistent mortgage. Thereafter the
plaintiff supplied to defendant further items of newsprint worth around 47,000 Reichsmark. The Supreme Court refused to
enforce the promise as such for indefiniteness. But it granted recovery of damages under the culpa in contrahendo-
doctrine. The court argued that there has to be liability under culpa in contrahendo if, during the contractual bargaining
process, a party negligently raises the other party's hope for a possible conclusion of a contract - a hope that is
objectively unfounded - and thereby foreseeably induces the other party to make expenses that are to serve the
prospective contract but which are useless unless a contract is made. Delictual relief under Art. 826 Civil Code was
explicitly considered as too narrow.

After World War II the Bundesgerichtshof, the Supreme Civil Court of the Federal Republic of Germany, carried on the
judicial tradition initiated by the Reichsgericht. During the 1950s pertinent opinions were predicated on the proposition
that liability for culpa in contrahendo will lie where a partner in a contractual process carelessly raises the expectation in
the other party that a contract will be made. For example, in a decision of March 4, 1955\(^5\) dealing with an uncompleted
real estate sales contract, the court stated that relief on a culpa in contrahendo basis does not require a complete
meeting of the minds. It is sufficient that the party seeking recovery had

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reason to conclude from the other party's conduct that a contract will be made. As to the type of recoverable damage the
court also held that relief may be granted for financial losses suffered by not entering into a contract with a third party.

Although some opinions in the 1950s and 60s already seem to indicate what was to emerge later, it was not until 1969
that the Supreme Court handed down a decision which revealed a noticeable shift in argument.\(^8\) In this case, the
defendants and a certain Dr. S. were partners in a general partnership which later was to continue as a limited
partnership. One of the defendants applied to the plaintiff with whom business relations already existed, and asked her to
acquire an interest in the partnership in order to overcome solvency problems. The plaintiff granted a loan and the
defendant, in a notarized form, promised to take the plaintiff as a partner. They agreed on the basic terms under which
the enlarged partnership should continue as a limited partnership. Dr. S. did not agree with these arrangements and the
defendant informed the plaintiff about these difficulties. Nonetheless, he continued negotiations with the plaintiff. They
culminated in a short memo saying that the restructuring of the partnership should be completed as soon as possible on
the terms listed in detail. The plaintiff then sent over an elaborate partnership contract asking for countersignature. The
management of the partnership, however, informed the plaintiff that it could not finalize negotiations because of Dr. S's
disagreement. After Dr. S. left the partnership, defendants asked plaintiff to enter into negotiations an adjusting the
contract to the changed circumstances. These negotiations failed because the plaintiff disagreed. She sued for damages
in compensation of losses incurred as a result of her not having become a partner.

The remarkable aspect of the opinion is that, for the first time, the Supreme Court unequivocally broadened the basis of
recovery under the culpa in contrahendo concept. Besides the already traditional rule that careless inducement of
reliance gives rise to a claim, it recognized that a late rupture of negotiations and frustration of reliance investment without prior carelessness will entail liability, provided the rupture is not supported by a valid reason (in German: triftiger Grund). The court even went so far as to draw an analogy between this latter rule and Art. 122 of the Civil Code which, as already mentioned, provides for recovery of reliance damages after rescission of a contract for mistake.

In the aftermath of this decision, courts increasingly tend to emphasize this aspect of imputable inducement of reliance action in conjunction with subsequent conduct by the party which ruptures contract negotiations and, thereby, renders useless prior expenses of the other party. In particular, the Supreme Court in repeated decisions concerning dealings between public entities and private investors on the development of land and entrepreneurial settlement has stressed the principle that culpa in contrahendo remedies are available wherever a partner to an envisaged contract breaks off negotiations without valid reason after previously having induced the other party's reliance on the contract to be concluded. In judicial practice a sufficient basis of reliance has been seen where one party, with the other's consent, already has acted in part performance, where there has been almost complete agreement on all terms, and where the party which has suffered detrimental losses previously had been asked or encouraged by the other party to incur expenses or show a conduct that is justifiable only on the basis of an operative contract.

The latest decision of the Supreme Court in connection with rupture of contractual negotiations dates from February 22, 1989. In this case, the parties - two publishing companies - had entertained dealings that were to lead to a takeover of two journals by the plaintiff. In the course of these dealings several drafts for the intended contract were exchanged, among them a paper by defendant labelled "Offer". The plaintiff had investigated the economic situation of the two journals with the help of a chartered accountant and charged an attorney with filing registration with the Federal Cartel Office and drafting the contract. When the plaintiff accepted the "offer", the defendant broke off negotiations and the plaintiff sought recovery for its expenses, mostly fees for the attorney and accountant. The Supreme Court reaffirmed its general two-tier culpa in contrahendo doctrine but seemed to slightly restrict recovery of damages. The plaintiff was not granted reimbursement of all its expenses incurred after the moment when the parties had agreed on all essential terms, but only of chose expenses incurred after the defendant's conduct had made the contract appear certain to be concluded. Beyond this little restrictive nuance, the case shows how much the increasing complexity of modern transactions and the growing volume of pre-contractual expenses adds practical weight to the reliance factor in culpa in contrahendo situations.

In sum, one can say, that in the context of situations involving rupture of negotiations, German law applies culpa in contrahendo in two alternative forms the common elements of which are violation of a pre-contractual duty by one party and the inducement of reliance action to the detriment of the other. In the first alternative, the violation of the duty regards the contractual process before a break-off, and in the second, the break-off itself constitutes a violation of duty. While the first alternative is an offspring of delictual liability for negligence, the second is a derivative of the venire contra factum proprium doctrine. The duty violated stops short of a duty to contract. It is a duty not to rupture negotiations for other than valid reasons.

2. United States Law

In the United States the type of patterns just discussed have come to be dealt with under the doctrine of promissory estoppel. The last decades have brought a considerable expansion of its range of application which, by far, exceeds the function of providing a substitute for consideration. During the 1940s, promissory estoppel increasingly found its way into non-gratuitous commercial contexts. In this respect its original task was to render offers, particularly in a unilateral contract situation, irrevocable where the addressee had changed his position - a parallel to the problem Ihering was concerned about in 1861. The problem very often arose in situations involving bids made by subcontractors to a general contractor. White in 1933 the US Circuit Court of Appeals for the Second Circuit in James Baird Co. v. Gimbel Bros. had insisted on the revocability of bids, a host of later decisions relied on promissory estoppel to make bids irrevocable. In more recent Gases promissory estoppel has been used to tope with the rupture type of fact pattern discussed with regard to German law. Most instances dealt with applications for franchises and dealerships. In Goodman v. Dicker, decided in 1948 by the District of Columbia Court of Appeals, the defendant, a distributor of a radio manufacturer, had
made representations to the plaintiff that his application for a franchise had been accepted and that the franchise would be granted. The promised supply of 30 to 40 radios were not received. Instead, the plaintiff was informed that the franchise would not be granted. The court, reasoning on a general estoppel theory, awarded damages for expenses which the plaintiff had incurred in reliance upon the promise to grant the franchise. In the 1958 decision of *Chrysler Corp. v. Quimby*, the defendant had assured the plaintiff that if he took certain steps, namely, to buy fifty-one percent of the stock held by the main shareholder of the retail corporation and to transfer it to a trustee, he would be granted a dealership that, in fact, was not granted. At the time the assurances were made, the defendant had no intention of granting the dealership. The Supreme Court of Delaware awarded contract damages for a period up to the moment the dealership would have been terminable.

During the 1960s promissory estoppel gained still wider acceptance when

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the leading case of *Hoffman v. Red Owl Stores* was handed down in 1965 by the Wisconsin Supreme Court. This case involved problems of termination of contractual negotiations. The plaintiff was assured that he would be granted a supermarket franchise if he took certain steps and raised $18,000 worth of capital. The plaintiff acted accordingly: he sold his bakery, purchased a grocery store to gain experience and resold it, acquired an option on land for building a franchised outlet, and moved his residence near to the place where he was to take over the franchise. He raised the recommended amount of capital by borrowing the major portion of it from his father-in-law. This course of action was approved by defendant's agent. Later, however, defendant's superior agents insisted that plaintiff's credit standing was impaired by this loan and demanded that the plaintiff procure from his father-in-law a statement that these funds were an outright gift. The plaintiff refused to follow suit and brought an action for damages. The court rendered judgement in favour of plaintiff and awarded reliance damages on almost all items. The novel factor was that the franchise itself and its terms were still unsettled in several respects, when the action in reliance was shown. The court explicitly relied on Section.90 of the Restatement of Contracts and dissociated promissory estoppel as applied in this instance from its function to serve as a substitute for consideration. The court viewed promissory estoppel as being extracontractual in nature.

Other Courts in the U.S. have adopted promissory estoppel as applied in *Hoffman* in situations of unperfected contractual dealings as an Instrument of recovery for pecuniary losses suffered in reliance on pre-contractual assurances. In 1966 the Texas Supreme Court in *Wheeler v. White* summed up the legal value judgement underlying modern promissory estoppel in words that could equally stem from the Federal German Supreme Court:

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The binding thread which runs through the cases applying promissory estoppel is the existence of promises designedly made to influence the conduct of the promisee, tacitly encouraging the conduct, which conduct, although not necessarily constituting any actual performance of the contract itself, is something that must be done by promisee before he could begin to perform, and was a fact known to the promisor.

Under the impact of this court practice Section 90 of the Restatement Second of Contracts was reworded in 1981. There are four differentes between the two Restatements:

- The "action or forbearance" induced by the promisor must no longer be of "a definite and substantial character";
- Enforcement is made more flexible by the wording: "The remedy for breach may be limited as justice requires",
- The protection has been extended beyond the promisee to include third persons, and
- Consideration is outrightly abandoned as a prerequisite for the enforcement of charitable subscriptions and marriage settlements.

3. English Law

Under comparative aspects it is highly interesting to briefly review the state of English law as to liability for economic loss incurred in pre-contractual negotiations. Unlike American law, English law has more strictly abided by the consideration requirement and never adopted the theory of promissory estoppel in its broad spectrum of application. Nonetheless,
English law has stretched the traditional doctrine of equitable estoppel and extended it beyond Statements of facts to include promises. The leading case is Central London Property Trust Ltd v. High Trees House, Ltd decided in 1947 by the Kings Bench. It involved an agreement to reduce a rental which was not supported by consideration, as a defense against an action for the full, unreduced rental. The agreement was held to be a valid defense under the equitable estoppel doctrine because of defendant's reliance on the agreement. But English Courts have preserved estoppel as a shield and not converted it into a sword. Reliance has been reinforced by embarking on a road that has also been used occasionally by American courts, that is, the delictual liability for negligent misrepresentation. The House of Lords in 1964 in the landmark decision of Hedley Byrne & Co. v. Heller & Partners Ltd. overruled Derry v. Peek and carried liability for misrepresentation beyond the narrow boundaries of fraud to include negligent misrepresentation. The next step followed in 1976 when the Court of Appeal in Esso Petroleum Co. Ltd. v. Mardon moved liability for misrepresentation into the realm of contract law. According to this decision the special relationship-type of situation required for negligent misrepresentation may also be found in a contractual relationship and liability for breach of warranty does not preclude negligent misrepresentation. In Esso Petroleum a lease was concluded on the basis of misleading statements on the estimated throughput of petrol in a petrol filling station.

It was only a question of time until a court would apply negligent misrepresentation principles to a situation where misleading statements foiled the making of a contract. That is what happened in 1979 when the High Court decided Box v. Midland Bank Ltd. In this case plaintiff sued the defendant bank for recovery of damages for financial losses he had incurred relying on predictions by an agent of the bank about the outcome of the plaintiff's application to a regional office for a loan of up to 45,000 Pound Sterling. The loan was not granted and the prospects for its approval had been very bad from the beginning. This case and the others reviewed above support the conclusion that English law has strengthened reliance protection in pre-contractual relations by way of extending delictual liability under the umbrella of negligent misrepresentation.

4. Conclusion

The preceding analysis of German, American and English case law justifies the conclusion that, during the last decades, all three respective jurisdictions are characterized by a far reaching convergence in their practical results in dealing with the problems of pre-contractual duties of care between negotiating partners. This convergence has been achieved by implementations of legal concepts such as culpa in contrahendo, promissory estoppel and negligent misrepresentation, which initially were designed to make up for reliance deficits inherent in the classical notions and doctrines of freedom of contract, consideration and deceit.

IV. Rupture of Negotiations: The Confluence of Delictual (Negligence) and Estoppel Elements

A close analysis of case materials in the field of liability for failure or rupture of contractual negotiations shows that this area is characterized by the confluence of delictual (negligence) and estoppel elements. The fact that here both concepts merge almost indistinguishably has largely contributed to the uncertainties and confusion which surround the solution of specific consequential problems, for example, the measure of damages and the significance to be attached to the element of foreseeability of damage or fault.

1. The Delictual Branch

The delictual branch, in essence, is an extension of tortious negligence to liability for pecuniary loss as a result of not living up to a duty of care towards the other party and to good bargaining standards. The duty, in particular, encompasses the duty not to mislead the other party about the prospects for the formation of a contract and to disclose the circumstances which a party recognizes or should recognize as relevant for the other party's conduct with regard to a change of position. Causation of
pecuniary loss in violation of a precontractual duty of care, in particular a duty of disclosure, is the characteristic of this delictual branch of the rupture complex. It appears that practical results in case law will be, by and large, the same under American, English and German law.

2. The Estoppel Branch

The second tier is liability for losses as a result of unsuccessful termination of contract negotiations without prior violation of a duty of care in the bargaining process. Here liability is grounded in the *estoppel* or *venire contra factum proprium* idea and caused by the rupture as such. Undoubtedly, this facet is much more problematical, since here the equally fundamental concepts of estoppel/venire contra factum proprium and freedom of contract in its freedom from contract aspect are directly confronted. Modern German court practice has been criticized by a number of German scholars for too strictly reducing freedom of contract. And the Bundesgerichtshof is still groping its way between the Scylla of venire contra factum proprium and the charybdis of freedom of contract. Nothing can better illuminate this conflict than the uncertainties and controversies about what constitutes a "valid" ("triftig") reason for terminating an unperfected precontractual relationship. Does, for example, an alternative offer justify a break-off? Does it have to be more favourable in Order to be a "valid reason"? The Supreme Court is divided and so are scholars.

In German court practice and doctrine the overall trend appears to slowly move in the direction of precontractual liability at the expense of freedom of contract. Once reliance-inducing statements have been made and the other party's position has changed, the perspective no longer seems to be the limitation of freedom of contract but its restoration under exceptional circumstances (analogy to clausula rebus sic stantibus or frustration?). The difference may be more one of formulation than of substance - the glass is half-filled instead of half-empty - but it shows the change in approach. The strong judicial reliance protection in Germany invites speculation about the underlying causes.

It is tempting to indulge in looking for parallel developments in public law which increasingly influence private law thinking. To mention a few examples: administrative discretion - a public law sister of freedom of contract - has long been continuously restricted under the doctrine of "reduction of discretion to zero" in view of prior administrative conduct; the reliance principle is a constitutionally binding postulate of justice and the constitutional principle of proportionality (Verhältnismässigkeit) is becoming a sort of all-embracing super principle with the tendency to erode all-or-nothing rules in favour of intermediate and compromise positions. In this respect, the award of reliance damages constitutes an attractive intermediate position between the all (normal contractual liability) and the nothing under traditional contract doctrine.

The degrees of reliance protection under the estoppel or venire contra factum proprium approach in American and German jurisprudence respectively are fairly coextensive. English law, however, has not yet reforged the shield of estoppel into a sword and the concept of misrepresentation appears to be out of reach of these fact patterns.

3. Areas of Overlap

Despite this basic Separation of the two conceptual foundations of liability of reliance damages incurred in cases of unsuccessful contractual dealings, there may be *areas of overlap*. This may occur where a party refuses to conclude a contract for a reason which cannot be regarded as "valid" and, at the same time, the party should have known that reliance was being induced. This is particularly so because the duty to disclose circumstances essential to the other party continues up to the moment of refusal to consummate the contract. Among those circumstances which need disclosure, the readiness to contract is not the least important one. It appears possible that English law, by extending the duties of disclosure within the negligent misrepresentation frame, may still have some room to move closer to the level of reliance protection under German and American law.

V. Concluding Observations

The preceding analysis has shown that in the law of contracts the idea of reliance has considerably advanced both in the United States and Germany in the last decades. Further significant expansion is not to be expected. The reason is that, within a competitive legal and economic order, freedom not to make a contract has to be substantially preserved. The evolution in both jurisdictions will probably concentrate on a case-by-case concretization of specific problems such as the
extent of duties of disclosure in precontractual relationships and the measure of damages.

Present case law, however, is already rather cumbersome in practice because duties and risks involved in precontractual dealings with their continually increasing potential of financial losses are almost unpredictable. It is, therefore, no surprise that parties increasingly tend to an autonomous allocation of duties and risks either by unilateral statements or by agreement. Such devices as "letter of intent" or "memorandum of understanding" or specific precontractual agreements on reimbursement of certain preparatory expenditures are evidence of this trend. It reflects the need to infuse some predictability and calculability into the relationship between contracting parties.

* Professor of Law, Technical University of Clausthal, Honorary Professor of Law, University of Göttingen Faculty of Law, Germany.
2 Ibid. at 291.
4 Simpson, supra n. 3 at 210, with abundant authority. The interrelation of tort and contract is well evidenced by the doctrine that where the commission of a tort results in the unjust enrichment of the defendant at the plaintiff's expense, the plaintiff may disregard, "waive", the tort action, and sue instead on a theoretical and fictitious contract for restitution of the benefits which the defendant has received through the defendant's tortious conduct, see Prosser/Keeton, Law of Torts, (5th ed. 1984) at 672.
5 See Prosser/Keeton, supra n. 4 at 727.
9 In the 19th century Pandects doctrine the contract often was regarded as a "Willensvereinigung" (unification of wills); see, e.g., Windscheid, Pandektenrecht, vol. I §69 N. 2.
11 The doctrine dates back to Roman law (Dig. 1, 7, 25 pr.) and is regarded to be embodied in the principle of good faith (Art. 242 Civil Code).
12 See Calamari/Perillo, supra n. 6 at 203.
13 See e.g., Devecmon v. Shaw, 69 Md. 199, 14 A. 464 (1888).
14 See e.g., Grier v. Grier, 131 Kan. 760, 293 P. 759 (1930).
17 Art. 518 par. 1 Civil Code.
18 See the comparative discussion in Zweigert/Kötz, supra n. 1 at 72, 79.
19 Art. 518 par. 2 Civil Code.
20 Entscheidungen des Reichsgerichts (RGZ) vol. 78 at 239. This discussion has been followed by other courts ever since.
21 Another example of this tort-evasive shift to contractual mechanisms is the extension of the third party beneficiary to contracts with third parties as beneficiaries of mere protective effects (Vertrag mit Schutzwirkung für Dritte). By this mechanism a debtor, under certain circumstances, is held to owe a duty of care not only to his creditor but also to a third party beneficiary closely related to the creditor, e.g., family relatives. Breach of the duty of care makes the debtor liable to the third party under contractual, not only delictual remedies. See Zweigert/Kötz, supra n. 1 at 145 et. seq.
22 See Prosser/Keeton, supra n. 4 at 501.
23 For recent comprehensive analysis of German case law and doctrine see Küpper, Das Scheitern von Vertragsverhandlungen als Fallgruppe der culpa in contrahendo, 1988.
25 Leipziger Zeitschrift für Deutsches Recht (LZ) 1910 col. 80 No. 2.
26 RGZ 143, 219.
27 Betrieb (1955) 479.
29 See e.g., BGHZ 71, 386, 395: Contractual negotiations between a Municipality and a cooperative building society for an agreement according to which the society was to pay the municipality an amount of money for the increased municipal infrastructural burden and to transfer property to the municipality. Later the municipality changed its planning concept to
the effect that the development project became impractical. The society sued for recovery of expenses incurred in the planning process. The Supreme Court denied damages because it saw no pre-contractual duty of information violated for other than valid reasons for the break-off of negotiations. The freedom of planning by the local legislator was regarded as a general justification for changing planning concepts. In BGHZ 92, 164, 176, the municipality had entered into negotiations with a construction company on an urban development project in the area. The municipality was to transfer real estate to interested buyers. Later, the municipality changed its guidelines for the sale of municipal real estate after the company had incurred considerable expenses for initial planning procedures. The Supreme Court awarded damages on the ground that the municipality, in light of the state of cooperation with the company, had no valid reason when changing its guidelines.

30 See e.g., BGH in: Monatsschrift für Deutsches Recht (MDR) (1961) 49.
31 See e.g., BGH in: Neue Juristische Wochenschrift (NJW) (1975) 1774.
32 See e.g., BGHZ 92, 164, 176.
33 See e.g., BGH in: Wertpapier-Mitteilungen (1967) 798: acquisition of furnishings for a tavern.
34 Published in Lindenmaier-Möhring (LM), §276 (Fa) BGB Nr. 102.
35 It is primarily this aspect of the modern tort law practice which has raised criticism from many of the German scholars; See Emmerich in Münchener Kommentar zum Bürgerlichen Gesetzbuch, (2d ed., 1985) marg. n. 75 introd. to §275 with further references. One of the key arguments is that freedom of contract in its freedom from contract aspect is too much depreciated by requiring a "valid reason" for the rupture of contractual dealings. This is held to be particularly true where the validity of the envisaged contract depends on formal requirements (notarization in case of contracts for the transfer of real estate or company shares); See in this respect Emmerich, loc. cit., and Landgericht Heilbronn, Betrieb (1989) 1227, Oberlandesgericht Stuttgart, Betrieb (1989) 1817; Kapp, Betrieb (1989) 1224 and Küpper, Betrieb (1990) 2460.
36 See the in-depth-analysis by Küpper, supra n. 23 at 173.
37 James Baird Co. v. Gimbel Bros., 64 F. 2d 344 (1933).
40 Chrysler Corp. v. Quimby, 144 A. 2d 123 (1958).
42 The court held it to be incorrect to regard an action grounded on promissory estoppel as the equivalent of a breach of contract action, 133 N. W. 2d 274 (1965).
44 Supra n. 43 at 96.
48 Derry v. Peek, (1889) 14 A.C. 337, 58 L.J.Ch. 864.
51 This diagnosis of convergence may have its implications on the characterization of this complex under choice of law methodology with a tendency to favor a functional instead of a conceptual approach. At the same time the convergence may encourage tendencies to extend the realm of unified contract law. According to the prevailing opinion, questions of culpa in contrahendo are not covered by the "Vienna Convention on Contracts for the International Sale of Goods' of April 11, 1980 (See: G. Eörsi, "A Proposal for the 1980 Vienna Convention on Contracts for the International Sale of Goods," 31 Am. J. Comp. L. 333 (1983) (348-349). However, certain instances of breach of precontractual duties or culpa in contrahendo might arguably be brought within the ambit of the convention via the principle of good faith embodied in Art. 7 par. 1. This could be achieved by using the gap-filling device of Art. 7 par. 2 under which gaps in the convention shall primarily be filled by using the general principles underlying the Convention and only in the second place by recourse to the national laws applicable through choice-of-law mechanisms; see Bonell, "Vertragsverhandlungen und culpa in contrahendo nach dem Wiener Kaufrechtsübereinkommen," in: Recht der Internationalen Wirtschaft (1990) 693, 699.
52 The dichotomy of the two aspects has been elaborated at length by Küpper, supra n. 23 at 173-261.
53 See supra n. 35 for references.
54 One decision (BGH, Wertpapier-Mitteilungen (1974) 508, 510). in an obiter dictum, refers to a more favorable alternative offer as a valid reason, where as in another decision (Wertpapier-Mitteilungen [1975] 923), the Court does not consider this possibility at all.
Thus, Stoll (Festschrift für E. von Caemmerer, [1978] 435, 450) criticizes BGH, Wertpapier-Mitteilungen (1974) 508, 510, arguing that the legal relevante of reliance-inducing change of position is worth nothing if the offeror can free himself so easily from the effect of his statements. According to Stoll a party that has induced reliance investment has a “valid reason” only where it would be discharged from liability under normal principles of contract law, e.g., impossibility. Medicus, Gutachten und Vorschläge zur Überarbeitung des Schuldrechts, Ministry of Justice (ed.), vol. I, 1981, 479, 500, on the other hand, argues that beyond the limits of a legally binding offer (Art. 145 Civil Code) there is freedom to desist from concluding a contract without the culpa in contrahendo sanction. Küpper, supra n. 23 at 245, takes an intermediate position: The right not to conclude because of a supervening alternative offer exists as long as an essential term of the contract is unsettled.

The analogous application of clausula rebus sic stantibus standards as “valid reason” is, e.g., advocated by Nirk, Festschrift für Philipp Möhring (75th birthday), (1975) 71, 84.


Estoppel is a principle “to be used as a shield and not as a sword”: Combe v. Combe (1951) 2 K.B. 215, 224 (Birkett, L.J.).

Referring Principles:

IV.8.1 - Principle of pre-contractual liability