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Culpa in Contrahendo: A Comparative Analysis of Pre-Contractual Liability in Different Legal Systems

Abstract

The term "Culpa in contrahendo", meaning "pre-contractual liability", was first introduced by the German jurist Rudolf von Jhering in 1861. Although this doctrine later became widely recognized and is now an integral part of almost all legal systems, there is still no unified approach regarding its content and the basis for its formation. In fact, the absence of a uniform approach is largely due to the fact that culpa in contrahendo is applied in countries belonging to different legal systems. In civil law (continental law) jurisdictions, this doctrine is primarily reflected as an expression of the duty to act in good faith during the pre-contractual negotiation phase. However, courts in common law jurisdictions (Anglo-Saxon law) consider that pre-contractual liability may be regulated based on various legal grounds, depending on the circumstances of the case. This article analyzes the origin and development of the culpa in contrahendo doctrine, the different approaches taken in various legal systems, judicial decisions from different jurisdictions, and the essential elements required for establishing pre-contractual liability. Furthermore, the article examines the relevant provisions and existing gaps in national legislation regarding pre-contractual liability and discusses the necessary legal reforms to address these gaps.

Keywords: *culpa in contrahendo, elements of culpa in contrahendo, honesty, preliminary negotiations, negative damages*

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Culpa in Contrahendo: Müqaviləyəqədərki məsuliyyətin müxtəlif hüquq sistemlərində müqayisəli hüquqi təhlili

Xülasə

"Culpa in contrahendo"- "müqaviləyə qədərki məsuliyyət" termini ilk dəfə 1861-ci ildə Almaniyalı hüquqşünas Rudolf von Jhering tərəfindən işlədilmişdir. Bu doktrina sonradan geniş yayılaraq, demək olar ki, bütün dövlətlərin hüquq sisteminin ayrılmaz tərkib hissəsini təşkil etsə də, onun məzmununa, bu məsuliyyətin formalaşma əsaslarına münasibətdə hələ də vahid bir yanaşma mövcud deyildir. Əslində, belə bir yanaşmanın formalaşdırılmasının mümkün olmaması daha çox Culpa in contrahendonun tətbiq edildiyi ölkələrin müxtəlif hüquq sisteminə mənsub olmasından irəli gəlir. Belə ki, qitə (kontinental və ya sivil hüquq) hüquq sisteminə mənsub olan ölkələrin qanunvericiliyində bu doktrina daha çox müqaviləyəqədərki danışıqlar mərhələsində vicdanlılıq prinsipinə əməl etmənin bir təzahürü kimi öz əksini tapır. Ümumi hüquq (ingilis sakson) sisteminə aid olan ölkələrin məhkəmələri isə hesab edirlər ki, müqaviləyəqədərki məsuliyyətin tənzimlənməsi işin hallarından asılı olaraq müxtəlif əsaslara söykənə bilər. Məqalədə "culpa in contrahendonun" yaranma və inkişaf tarixi, müxtəlif dövlətlərin qanunvericiliklərində bu məsələnin tənzimlənmə üsulları, fərqli hüquq sisteminə aid məhkəmələrin qərarları, müqaviləyəqədərki məsuliyyətin formalaşması üçün zəruri olan elementlərin hər biri ayrılıqda təhlil edilmişdir. Həmçinin qarşılıqlı olaraq, milli qanunvericilikdə müqaviləyəqədərki məsuliyyətin nizamlanması sahəsində mövcud olan normalara və bu sahədəki boşluqlara, həmin boşluqların aradan qaldırılması üçün zəruri olan dəyişikliklərə də toxunulmuşdur.

Açar sözlər: *müqaviləyəqədərki məsuliyyət, müqaviləyəqədərki məsuliyyətin elementləri, vicdanlılıq, ilkin danışıqlar, neqativ ziyan*

Introduction

In ancient Rome, the obligations originated from contracts, the ex contractu, or from delicts, ex delicto. Contracts were instruments to trade, while delicts were acts with fault, punishable by law and burdened by private obligations (Mustafaraj, 2019, p. 81). But not all obligations arise from contracts (ex contractu) or delicts (ex delicto). There were situations where obligations arose in ways that resembled contractual or delictual relationships but did not fully meet their legal definitions. To address these cases, Roman jurists introduced the concepts of quasi-contracts (quasi ex contractu) and quasi-delicts (quasi ex delicto). Roman law contains rules that relate to trust, care, information, and responsibility in case of failure of performance.

Although Roman law does not provide the pre-contractual stage, these rules can be interpreted as part of the concept of culpa in contrahendo whereby the doctrine of culpa and controversy delivered by Jhering has also stemmed (Mustafaraj, 2019, p. 81).

Jhering first recognized duty of good faith in the precontractual stage in his famous article called "Culpa in Contrahendo" published in1861. The impact of this article has been wide. When asked about precontractual liability and the duty of good faith and fair dealing in civilian jurisdictions, comparatists and jurist immediately refer to Jhering's concept of culpa in contrahendo (Arunachalam, 2002).

Jhering advanced the thesis that damages should be recoverable against the party whose blameworthy conduct during negotiations for a contract brought about its invalidity or prevented its perfection (Kessler & Fine, 1964, p. 401).

Jhering argued that as in the case of existing contractual relationships, even in the case of negotiating to sign a contract, the parties should be protected from the rules not to act with negligence (Ben-Dror, 1983, p. 147). Jhering advocated the idea that these are contractual obligations because the contracting party passes from the sphere of negative extra contractual obligations to the positive sphere of contracts. Since the purpose and natural outcome of entering into negotiations is the conclusion of a contract, the contractual obligations extend to the negotiation stage. If one party creates by its fault, a seemingly non-existent contract, it must compensate the other party for the damage caused by the belief in that appearance.

The theory behind this doctrine is not limited to the German legal system - it has also been incorporated into the legal frameworks of most civil law countries through statutory provisions. For example, under French law, liability typically lies where one party enters into negotiations without having any intent to contract, yet creates a reasonable expectation in the other party that a contract will be forthcoming so that the other incurs substantial precontractual expenses (Nedzel, 1997, p. 139).

Research

1. Culpa in Contrahendo in different state legislations

İtaly Law

In Italy, Article 1337 of the Italian Civil Code expressly establishes a duty of good faith governing pre-contractual negotiations. It states that the parties, during the negotiation and formation of a contract, must act in good faith. Furthermore, Article 1338 of the same code establishes that the party who knows or should know of the existence of an invalidity in the contract and does not inform the other party must restore damages to the party who was confident in the validity of the contract (Novoa, 2005, p. 586).

Swiss Law

Swiss law provides a clear and structured approach to the regulation of culpa in contrahendo. It defines the pre-contractual phase as the period during which parties explore the possibility of forming a contract, negotiate its terms, and take necessary steps toward its conclusion. This phase begins when one party initiates contact with another for contractual purposes and ends either when the offer is rejected or when the contract is finalized. Swiss law recognizes that negotiations establish a legal relationship between the parties, imposing pre-contractual liability when one party causes harm to the other by violating pre-contractual obligations. These obligations arise from the principle of good faith, which governs interactions between parties.

English law

In English law, no pre-contractual liability can be spoken of unless a contract is completed. English law follows a liberal approach, viewing individuals as independent economic agents who take risks and bear the consequences of their decisions. Unlike civil law jurisdictions, English law does not impose general duties of good faith, disclosure, or confidentiality during negotiations. Instead, it adopts an "all-or-nothing" approach—either parties are negotiating freely without legal obligations, or they are bound by a contract and can seek protection in court (Michonski, 2016, p. 158).

The landmark case Walford v. Miles (House of Lords) established that a general duty of good faith does not exist in English law. In this case, Miles (the seller) promised Walford (the potential buyer) not to consider other offers if Walford provided a letter of comfort from his bank, which he did. However, Miles breached this promise by selling to a third party. The House of Lords ruled that such a lock-out agreement must specify a time frame; otherwise, it is unenforceable due to uncertainty. Additionally, the court emphasized that parties in negotiations have conflicting interests and are free to withdraw at any time. Thus, there is no implied duty to negotiate in good faith under English law.

In Petromec v. Petroleo, however, the House of Lords, having distinguished the case from Walford v. Miles, deviated from the precedent stated therein and allowed the two parties to enter a binding agreement which expressly stated the rather general obligation of conducting negotiations in good faith. However, the legal status of such an agreement hinges upon a clear formulation of the parties' obligations (a detailed explanation of what the parties mean by good and bad faith) and the judges' ability to determine the nature, scope and consequences of the breach. The tendency to acknowledge adequately concretised good faith veiled in the parties' will seems to be steadily gaining judicial acclaim (Michonski, 2016, p. 159-160).

American law

Courts under a common law system approach pre-contractual liability in a different way. They consider that possible bases of precontractual liability in such a situation can be grouped under four headings: first, unjust enrichment; second, misrepresentation; third, specific promise [Promissory Estoppel]; and fourth, general obligation (Novoa, 2005, p. 588).

For example, Misrepresentation is a significant factor that might result in legal repercussions in courts that use the common law system. If a party makes false statements or representations during the pre-contractual period, and the other party relies on these misrepresentations to its detriment, then the party that made the false statements may be held accountable for the injury that was caused as a result of the misrepresentations. Similar to the previous example, negligence during the pre-contractual phase, such as failing to exercise reasonable care when making statements or disclosures, can also result in legal repercussions (Triyadi, 2023).

Elements of Culpa in Contrahendo

Elements of Culpa in Contrahendo are: (1) preliminary negotiations; (2) a breach of the duty to bargain in good faith; (3) causation-in-fact; and (4) compensable damages.

Preliminary negotiations

A contract is not a legal transaction that is established instantly. The formation of a contract requires the existence of a process. Before a contract is formed, the parties engage in negotiations regarding its content, terms, and the rights and obligations it entails. The length of these negotiations may vary depending on the nature of the contract, circumstances, and conditions (Arıkan, 2009, p. 59).

At the pre-contractual stage the parties are usually not bound by any agreement regarding the procedure for contract formation. It has always been conventional that the contract formation procedure is informal and based on usages and ethical rules established in a particular business community. Therefore, the law initially abstained from interfering with the contract formation procedure and did not impose any obligations on the parties as to the manner in which such negotiations should be conducted. The only contract formation procedure that with the passage of time the law came to recognize was the classic procedure (by means of making an offer and its acceptance). As concerns the procedure for contract formation through negotiations, for a long time the law remained completely silent (Kucher, 2004, p. 6).

The **venturesome (aleatory) theory** of pre-contractual negotiations is based on the idea that each party assumes its own risks during the negotiation process. This theory relies on three fundamental assumptions.

First, any interference in the contract formation process before the parties have undertaken contractual obligations or committed a tort would violate the freedom of contract principle, which is a core aspect of contract law. Second, imposing restrictions on negotiations could discourage parties from engaging in discussions, potentially leading to fewer contracts. However, economic studies have earnestly proved that not only will such interference not be a deterrent, but it can actually result in the growth of the number of contracts, as the parties to the negotiations would know the game rules and would thus feel more comfortable and confident when commencing negotiations (Bebchuk & Ben-Shahar, 1996). Third, the theory maintains that unless a party’s conduct falls within formal legal rules, it should be considered legally indifferent and have no legal consequences.

A breach of the duty to bargain in good faith

Even where the doctrine of **good faith is accepted**, there are wide differences of opinion over the meaning of the term good faith. For example, U.S. courts, in order to justify their decisions based on the good faith doctrine, have typically applied one of three different definitions of good faith (Farnsworth, 1995, p. 59). The first, Justice Antonin Scalia viewed it as merely reinforcing basic contract principles, particularly in implying terms in agreements. Second, Robert Summers introduced an "excluder" analysis, defining good faith as the absence of bad faith behaviors like evading the spirit of the bargain or interfering with performance. Third, Steven Burton, in contrast, proposed the “foregone opportunity” theory, arguing that good faith restricts a party from using discretion to regain opportunities sacrificed when the contract was formed.

The duty to negotiate in good faith imposes essential obligations on parties during pre-contractual discussions. These include maintaining confidentiality (**obligation of reserve**), safeguarding exchanged materials (**obligation of custody and conservation**), and engaging in negotiations with a genuine intent to reach an agreement (**obligation of seriousness**). A breach of these duties can result in legal consequences, ensuring fairness and preventing harm during the negotiation process.

Causation-in-fact

In both civil and common law jurisdictions, the plaintiff must establish a direct link between the defendant's actions or omissions and the damage suffered (**causation-in-fact**). While often overlooked in pre-contractual liability cases, causation can become complex if the defendant argues that the plaintiff’s misconduct led to the breakdown of negotiations. In such situations, both parties' behavior must be evaluated, and if both are at fault, liability may be apportioned under a contributory negligence standard.

Compensable damages

Jhering discussion contained two lines of thought, which greatly influenced civilian legal systems: (1) liability for fault (culpa) in contracting, and (2) classification of damages in to **positive and negative damages** (Nedzel, 1997, p. 113)

In the culpa in contrahendo doctrine, **injury is a last element**, as liability cannot arise without actual damage. Similar to common law torts and civil law extra-contractual liability, mere bad faith in negotiations does not automatically lead to responsibility unless it causes harm. Even if a party unlawfully withdraws from negotiations, no liability arises unless the other party suffers a tangible loss. As highlighted in Satellite III, courts have recognized that unjust termination of pre-contractual negotiations may result in extra-contractual liability, but only if damages can be proven.

The Satellite III case illustrates the scope of damages under the culpa in contrahendo doctrine. The court examined various Civil Code commentators and requested memoranda from both parties, revealing divergent views on damages. Plaintiffs argued that willful withdrawal from negotiations should result in reliance (negative) damages, whereas bad faith negotiations should lead to expectation (positive) damages. However, the court favored a passive approach, recognizing only negative contractual interest, which includes expenses incurred due to reliance on negotiations but excludes lost opportunities. This aligns with German doctrine, which focuses on damage to trust and reliance costs rather than lost profits.

Culpa in Contrahendo in Azerbaijan Legislation

Culpa in Contrahendo in Azerbaijan Legislation is regulated by Article 386 of Civil Code.

386.1. Except for cases where an obligation arises due to causing damage, unjust enrichment, or other grounds provided by this Code, an obligation must be based on a contract between its participants.

386.2. Obligations specified in Article 385 of this Code may also arise from the preparation of a contract.

386.3. A participant in negotiations may demand compensation from another participant for expenses incurred in attempting to conclude a contract if the contract was not concluded due to a fault of the another participant (Azərbaycan Respublikasının Mülki Məcəlləsi).

If we interpret the phrase "based on the preparation of a contract" separately in a textual manner, it may cause confusion. However, it is clearly evident that this provision applies to culpa in contrahendo, and considering this, the phrase should be understood as "based on contract negotiations". Therefore, it is appropriate to amend the provision related to pre-contractual liability in the Civil Code of the Republic of Azerbaijan. First and foremost, this should be implemented by modifying the phrase "obligations may also arise based on the preparation of a contract" to "obligations may also arise based on contract negotiations." This is necessary because if culpa in contrahendo is applied in the law, it must be implemented more clearly so that the provision can be correctly interpreted textually as well (Əmirli, 2015, p. 64-65).

Conclusion

The doctrine of culpa in contrahendo plays a significant role in shaping pre-contractual liability across different legal systems. While civil law jurisdictions, such as Germany and Switzerland, recognize a well-defined framework that imposes duties of good faith and fair dealing during negotiations, common law systems, particularly English law, take a more restrictive approach, rejecting a general duty to negotiate in good faith. Instead, English law adheres to the principle of freedom of contract, allowing parties to withdraw from negotiations without liability unless specific contractual obligations or misrepresentations exist.

One of the core challenges in applying culpa in contrahendo is determining causation and damages. Courts must assess whether a party’s wrongful conduct directly resulted in the other party’s loss. The civil law approach often compensates only for negative interest (reliance damages)—covering costs incurred due to trust in negotiations—whereas expectation damages (positive interest) are typically excluded. This distinction highlights the passive nature of pre-contractual liability, as it aims to restore the injured party to their prior position rather than enforce the lost contractual benefits.

The regulation of culpa in contrahendo in Azerbaijan is now expressly recognized by law, as in other civil law jurisdictions. However, textual ambiguities in Civil Code can create interpretation challenges. In order to ensure legal certainty in this area, it is necessary for the Civil Code to more precisely express the provision that encompasses culpa in contrahendo. If culpa in contrahendo is recognized in law, it must be expressly and unambiguously formulated so that its textual interpretation aligns with its doctrinal application.

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