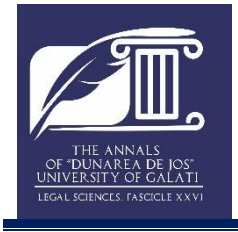

Bona Fides in Negotiations. Markers of Comparative Law

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Abstract: This article analyses the concept of the obligation of good faith in the pre-contractual stage, that of the negotiations, by presenting the internal normative framework, which imposes this obligation on the formation of various contracts, such as civil, commercial, individual work, administrative, etc. Afterwards, it focuses on commenting on the particularities of this obligation, in correlation with the other pre-contractual obligations, highlighting the regime of legal liability in the event of their non-compliance, in the form of domestic and European doctrinal and jurisprudential references, which will be presented in the second part of the paper some benchmarks of comparative law, through references to English, German and American law, from the perspective of respecting this obligation of bona fides.

Keywords: negotiations; the obligation of good faith; bona fides; the precontractual stage

1. Introduction

Prior to the conclusion of a contract, depending on the type of legal act considered, there could be a stage of negotiations or not, the last case in which specialized literature brings into question the presence of an adhesion contract (Bercea, 2020, p. 368) in which the contractual clauses are imposed through unilateral, they cannot be negotiated, but only accepted as such (Pop, 2008, p. 96).

The leitmotif of this paper, however, lies in the negotiated contracts and the existing obligations in this pre-contractual stage, especially the obligation of good faith, with its particularities, a concept with a rich nuance of the abstract, not defined anywhere in the domestic legislation, and outlined from different perspectives of doctrine.

In this sense, the French legal literature associated the notion of bona fides with equity (Tallon, 1994, pp. notes 8-9), the desire to be guided by the principles of equity and to act as such when concluding and executing the contract, that it is a moral obligation, which does not need legislative support (Magdelain, 2014, p. 777). The

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American literature contextualizes this obligation in the present economic premises, in the sense of not pursuing profit at the expense of the contractual partner, being aware of the fact that one's own actions will prejudicice him (Houh, 2005, p. 49), and the Romanian literature considers this obligation to be the foundation of commitments of any nature (Gherasim, 1981, p. 11), a conformity between internal and external, in the sense of expressing what you really think, believe and feel about the real intentions regarding the existing contractual relations (Gavrilescu, 2015, p. 13).

Thus, although there is no unanimously accepted definition for good faith, its non-compliance is likely to attract delictual liability, in the case of causing damages to the other party, since at that moment a contract is not validly formed, in order to incur contractual liability . As a consequence, it remains for the wisdom of the court to establish the non-compliance with this paradigm so often invoked in the doctrine and in judicial practice and so difficult to fit into a legal institution, it being omnipresent both in the branch of private law and that of public law.

However, the perspectives from which bona fides is viewed are interesting, as it can acquire new meanings when it is "translated" from one legal system to another, and this is exactly what we set out to analyze, what is the meaning of good faith in this pre-contractual stage in the view of the foreign legislator. But, until that point, we will present the normative framework that establishes this obligation, we will continue with its particularities in correlation with the other obligations at this stage, namely the obligation of confidentiality and information, presenting the way in which liability materializes in their non-compliance. Last but not least, we will refer to some jurisprudential references from the practice of domestic courts and the Court of Justice of the European Union.

2. Normative Framework

Good faith enjoys a wide scope of coverage in terms of regulation, starting with art. 1.183 Civil Code, the common law in the matter, which contains an imperative provision, that of negotiating in good faith, offering a counterexample example of bona fides, the one in which negotiations are initiated and carried out without the intention of concluding the said contract (Belu Magdo, 2021, p. 58), and the factual situations that can be derived from this example are numerous, such as the desire for the opposing party to undertake expenses with the negotiation without any practical purpose, the unavailability of some goods belonging to the other party, etc.

Internally, we find various headquarters of the matter, from the provisions of the Labor Code,[1] which, in art. 37, expressly provides that the rights and obligations regarding labor relations will be compulsorily negotiated, together with other provisions of the same normative act that establish the obligation or the possibility to negotiate, and, by way of teleological interpretation, it is inferred that they will be applied accordingly the provisions of the Civil Code regarding the obligation of good faith. Also, also from the sphere of labor law, the Social Dialogue Law,[2] in Title VI, Chapter I, provides the normative framework for the negotiation of collective labor contracts, providing in art. 99 (1) that when negotiating contractual clauses the parties are free and equal, characteristics that inspire the lack of pressure or subordination likely to influence good faith.

Also, in the matter of insolvency, we find this stage of negotiations regarding the restructuring plan between the debtor, together with the bankruptcy administrator, and his creditors, in the form of individual or collective negotiations, according to art. 26 of the Insolvency Law.[3]

In public law, when concluding administrative contracts, the negotiation of contractual clauses is also required, although the specificity of these acts consists in the existing subordination relationship between the individual and the public authority (Puie, 2009, p. 30). Thus, the Law on public procurement provides[4], inter alia, a form of conclusion of this type of contract that involves negotiation, this being the competitive negotiation, which takes place in two mandatory stages: the first for submitting requests for participation and selecting applications and the second to assess their compliance with the tender and negotiation conditions (Mătă, 2019, p. 97), in which, of course, there must be good faith on the part of both parties.

At the European level, in primary law represented by the Charter of Fundamental Rights of the European Union, in art. 28, it is stipulated that workers and employers have the right to negotiate and conclude collective agreements, without the obligation of good faith being expressly provided for. In secondary law, there are numerous normative acts that provide for this pre-contractual stage which is inextricably associated with bona fides, among which we mention the Regulation on the negotiation and implementation of agreements regulating air services between Member States and third countries[5], the Decision on negotiations on basic

[1] Law no. 53 of 24.01.2003 regarding The Labor Code, Official Monitor no. 345 of 18.05.2011.
[2] Law no. 367 of 19.12.2022 regarding social dialogue, Official Monitor no. 1238 of 22.12.2022.
[3] Law no. 85 of 25.06.2014 on insolvency prevention and insolvency procedures, Official Monitor no. 466 of 25.06.2014.
[4] Law no. 98 of 19.05.2016 on public procurement, Official Monitor no. 390 of 23.05.2016.
[5] Regulation no. 847/2004 of the European Parliament and of the Council of 29.04.2004 on the negotiation and implementation of agreements regulating air services between member states and third countries, J.O. L 157/7.

telecommunications[1], Decision on negotiations on maritime transport services[2], Decision on negotiations on the movement of natural persons[3], Directive on electronic commerce[4], Directive on unfair terms in contracts concluded with consumers, the latter stipulating that the professional acts fairly and fairly to the other side[5].

At the international level, we find art. 2.1.15. from the UNIDROIT Principles on International Commercial Contracts from 2016[6], which stipulates the obligation to negotiate in good faith, and the structure of the article is similar to that of the Civil Code, as the example of the person in bad faith who initiates or continues negotiations without the intention of to conclude the contract and legal patrimonial liability for damages caused to the contractual partner.

There is also the United Nations Convention on Contracts for the International Sale of Goods, which in art. 7 provides that the interpretation of the contract will take into account its international character and the need to promote its uniform application, as well as to ensure respect for good faith in international trade (Iftimie, 2014, p. 532).

3. Bona Fides Pre-Contractual Stage

In this section, we will analyze the particularities of pre-contractual obligations, and the correlation between them. In this sense, according to art. 1.183-1.184 Civil Code, these are the obligations of good faith and confidentiality, but specialized literature has introduced the obligation to inform in this category (Baias, 2021, p. 1407), and in the system of the old civil code the two were not even expressly provided for, but interpreted in a doctrinal way (Patulea, 1998, p. 75).

In this sense, the obligation to negotiate in good faith was appreciated as the legal basis of legal relations (Anca & Eremia, 1965), representing a loyal behavior towards

[1] Decision of 15.04.1994 regarding negotiations on basic telecommunications, Special Edition of the Official Journal of 01.01.2007.
[2] Decision of 15.04.1994 regarding negotiations on maritime transport services, Special Edition of the Official Journal of 01.01.2007
[3] Decision of 15.04.1994 regarding the negotiations regarding the movement of natural persons, Special Edition of the Official Journal of 01.01.2007.
[4] Directive no. 2000/31/EC of the European Parliament and of the Council of June 8, 2000 on certain legal aspects of information society services, especially electronic commerce, on the internal market, J.O. L 178/1.
[5] Directive no. 93/13/CEE of the Council of April 5, 1993 regarding abusive clauses in contracts concluded with consumers, J.O. L 095/29.
[6] UNDROIT Principles on International Commercial Contracts, 2016, https://www.unidroit.org/wp-content/uploads/2021/06/Unidroit-Principles-2016-Romanian-bl.pdf.

the other party in building a relationship based on fair intention and mutual trust (Cosmovici, 1989, p. 251). To illustrate some of the circumscribed conditions of this obligation, we refer to the Draft European Code of Contracts, which under art. 6 provided that it is contrary to good faith to untimely interrupt the negotiations, if the essential elements have already been negotiated so that the contract could be concluded in the near future (Noşlăcan, 2023, p. 124).

There was also the question of the legal nature of this obligation, whether it is of result or means or diligence. The framing is extremely important from the perspective of the legal liability that will be incurred, since only in the case of the second form of the obligation is the proof of the fact that he did not make all efforts to reach the intended goal. In this context, it was found in the French literature that the obligation to start negotiations is a result, and the obligation to carry out negotiations is a means, precisely for the reason that the party that interrupts the negotiations cannot be held liable, if it does not do so faith, but Eastern legal literature tends to qualify this obligation uniformly as one of result, since the result is to carry out the negotiations on the terms set by the parties, and not to conclude the contract (Cimil, 2011, p. 12).

At the same time, from the perspective of proving bad faith, it was deemed necessary to overturn the relative presumption of good faith, a probatio diabolica, given the predominantly verbal character of this stage, but also the purely psychological element of bad faith (Săuleanu, 2023, p. 35). These aspects must result, however, objectively, from the externalization of the will, through his conduct, so as to convince a third person, the court, of the existence of bad faith, of course, depending on the particularities of the factual situation.

In this context, we wonder when the negotiations could be interrupted, justifiably and without prejudice, and what would be the premises of such an attitude. In order to give an answer to these questions, we must start from the idea that there are situations in which the right to terminate negotiations can be refused by the other party, since it would be an optional right that can be waived based on a unilateral commitment or a contract (Pop, 2008, p. 99) which would attract contractual liability (Bîtcă & Curarari, 2015, p. 73). As a consequence, in order not to be held liable for the interruption of negotiations, these acts must be absent, as well as provisions establishing an imperative norm to negotiate, the most frequent being found in the sphere of labor relations (Bîtcă & Curarari, 2015, p. 73) where, as I have shown in the previous section, rights and obligations in labor relations must be negotiated, and not imposed unilaterally, a rule extremely often violated in the current socio-economic reality.

In the absence of these documents, domestic and international law allow the interruption of negotiations, but a lot of factors must be analyzed such as the time

when it appeared, the reason, the effects produced on the patrimony of the contractual partner, etc., in order not to create bad faith.

The extremely close correlation between the presumption of good faith and the appearance in law, the true principle of error communis facit ius, in the sense of the production of legal effects assessed as valid as a result of this common and invincible error regarding the existing contractual relationship, has been expressed in the specialized literature between the parties (Lula, 1997, p. 23).

In relation to the obligation to negotiate in good faith, the obligation of confidentiality consists in the prohibition of disclosing to third parties an information found during the negotiations, which has a secret character, regardless of whether the contract will be concluded or not (Vasilescu, 2017, p. 296), which inspires the fact that this obligation extends to the conclusion of the contract or not, which would entitle us to question whether or not it is a perpetual obligation. The answer, from our perspective, is negative, since the prohibition of the transmission of information exists until the moment it becomes accessible to the public, regardless of what source, or until the moment when the obligation can be removed based on the law or with the consent of the party, for example the situation testimonial evidence in the civil process.

During this time, the information implies a positive obligation, to transmit relevant information in order to conclude the contract to the other party, essential for the other party, to the extent that it could not be found out in any other way than from it (Veres, 2020, p. 34). Thus, the similarities between these two last mentioned obligations are given by the premises in which they are executed, namely in the context where the information is both confidential and essential for the conclusion of the contract, so that if he had known them, he would not have concluded the contract.

As a result of non-compliance with these obligations, tortious civil liability will be incurred, the party that withdrew from the negotiations being obliged to pay the damages that may consist of the losses suffered and the damage not achieved (Albu, 1993, p. 40), the loss of an opportunity, since the asset that was the material object of the act was unavailable, and the injured party did not carry out negotiations with third parties, there is the possibility that at that moment it would have contracted, if it had not been engaged in negotiations with it, but the factual situation must be analyzed very carefully, in order to establish as clearly as possible which it was the probability that those eventual contracts from which he would have obtained the unrealized profit would be concluded.

Thus, although there are opinions according to which the damage will consist only in the loss suffered (damnum emergens) (Neculaescu, 2010, p. 56), we adhere to the idea according to which, to the extent that the unrealized benefit satisfies the

requirements imposed on the element represented by the damage in the general theory of tortious liability, namely to be the result of the wrongful act, directly, repairable, unrepairable, cert (Pop, Popa, & Vidu, 2012).

Last but not least, of all the four existing factors for criminal liability, the illegal act, the damage, the causal link and the guilt, the latter presents the greatest difficulties in judicial practice, so that not even the provisions of the Civil Code, which stipulates that one will be responsible for the lightest form of fault, culpa levissima (Floare, 2012), since in some cases it might not even exist, which would exclude civil liability.

From the perspective of the possible remedies (Miron, 2023, pp. 12-13) that the parties could resort to, it would be reparation in kind, by concluding the designed contract, voluntarily or by force, this last case only if there is a pre-contractual instrument of the unilateral or bilateral promise type.

4. Jurisprudence

We begin this section with some benchmarks from the judicial practice of domestic courts, which have ruled on how good faith should be understood in the pre-contractual stage, then we will make the transition to the jurisprudence of the Court of Justice of the European Union (hereinafter , CJEU).

In this sense, the High Court of Cassation and Justice (hereinafter, ÎCCJ) rejected as unfounded an appeal based on the wrong application of the law, through the wrong requalification of the negotiation protocol that provided for the conditions under which the price, the good, the term will be determined of handing over and signing the contract, but not the guarantees. The Court of Appeal held that this protocol did not constitute a promise to sell, as there was no agreement on all the essential elements. Also, the court considered that the obligation to negotiate is one of the result, to carry out the negotiations, and by the unjustified interruption of the negotiations, bad faith was proven, therefore the delictual liability will be incurred, and not the possibility of requesting the court to pronounce a decision to take the place of the contract (High Court, decision no. 1651/20.09.2022, section II civil , 2022).

In another case, the ÎCCJ ruled that the professional violated his obligation to negotiate the contract in good faith in the conditions where the variable interest clause gives the professional, in an unfair way, the right to adjust the loan interest in his favor , without the respondent having the representation of the elements by which the interest rate is determined, as well as the economic effects they imply, and

by the lack of effective access to how the interest rate varies, positions the consumer in a situation of inferiority[1].

The court considered that the negotiation of a contract involves a sequence of offers and counter-offers, and the simple fact that the other party accepted without coming up with a counter-offer does not transform the contract into a non-negotiated one, since the lack of dialogue between the contractual partners is a consequence of the lack of interest from the side of the acceptor, even if we refer to the relationships in the banking sphere[2].

Remaining in the banking sphere, but moving the temporal premise from the negotiation in order to conclude the contract to the negotiation in order to adapt the contract, from the perspective of rebalancing the parties' benefits and recalculating the penal interest, the court found that the notification sent cannot lead to the creation of an obligation for the underwriter to to comply with the consumer's requests by adapting the contract in the manner unilaterally established by him, and by the fact that the bank nevertheless accepted and tried to rebalance the contract by sending an offer to the plaintiff, not accepted by him, it cannot be inferred a breach of the obligation of good faith -faith in negotiations[3].

Moving on to the jurisprudence of the CJEU, we will also make brief references to its decisions offered in the exercise of the power to resolve preliminary questions. Thus, in a case the Court established that Article 3 para. (1) of Directive 93/13 must be interpreted in the sense that a clause of a loan contract concluded between a consumer and a financial institution, which requires the consumer to pay an granting commission, may create a significant imbalance between rights and obligations to the detriment of the consumer to the parties deriving from the contract, despite the requirement of good faith, when the financial institution does not demonstrate that this commission corresponds to services provided and expenses it incurred, an aspect whose verification rests with the referring court[4]. Under this aspect, it can be seen how the perspective offered in the previous sections is materialized according to which good faith must also be analyzed in relation to

[1] High Court, decision no. 873/12.04.2022, section II civil https://www.scj.ro/1093/Detalii-jurisprudenta?customQuery%5B0%5D.Key=id&customQuery%5B0%5D.Value=198949#highlight=##%20negociere%20bun%C4%83-credin%C8%9B%C4%83.

[2] Gorj Court, decision no. 80/25.02.2023, section I civil https://www.rejust.ro/juris/de9d9559e.

[3] Târgu Mureş Court, decision no. 35/06.01.2023, civil section https://www.rejust.ro/juris/4e6386g86.

[4] CJEU, ECLI:EU:C:2020:578, C-224/19 & C-259/19, CY vs Caixa Bank S.A. and LG, PK vs Bilbao Vizcaya Argentaria S.A. Bank, 16.07.2020. https://curia.europa.eu/juris/document/document.jsf?text=&docid=228668&pageIndex=0&doclang=RO&mode=lst&dir=&occ=first&part=1&cid=1120354.

the profit that one party pursues at the expense of the other, even if it is a trader, to the extent that it acts clearly unfair.

Also with regard to relations with consumers, in the establishment of contractual clauses, the reflection of good faith can also take place through the way in which the contractual provision is drafted, the Court establishing that a clause is expressed clearly and intelligibly when the amount is effectively indicated the granting commission, the calculation method, the due date, the possibility that the nature of the services actually provided can be understood or deduced from the contract considered as a whole[1].

Last but not least, the domestic legislation that allows the consumer to request the revocation of the credit agreement within a maximum of one month from the execution of the obligations, if he erroneously received information in the pre-contractual stage regarding this right and how which is exercised, is not contrary to European law, since, according to the way in which the provision is formulated, the idea is suggested that the existence of the mentioned legal effects presupposes that the respective consumer has exercised his right of revocation with regard to a contract that is being executed, given that after full execution of the contract there is no longer any obligation[2].

5. Comparative Law

In this section, we will analyze some benchmarks of comparative law, by commenting on the vision of the English, German and American legislator.

In this sense, in English law it is difficult to configure bad faith, since it starts from the premise that this pre-contractual stage is one of risk (Floare, 2012, p. 138), so any failure that might exist cannot be brought to the charge of a party automatically. This does not mean, however, that the courts do not intervene energetically in the situation of finding a violation of this obligation, only that there is a different conception regarding the intensity of the intention and the effects produced, the literature finding a complex of factors that circumscribe the concept of bad faith, among which the violation of the obligation to adopt fair conduct in relation to the contractual partner. As a result, the opinion was expressed that there is no single

[1] CJEU, ECLI:EU:C:2019:820, C-621/17, Gyula Kiss vs CIB Bank Zrt., Emil Kiss, Gyuláné Kiss, 03.10.2019. https://curia.europa.eu/juris/document/document.jsf?text=&docid=218628&pageIndex=0&doclang=RO&mode=lst&dir=&occ=first&part=1&cid=1122412.

[2] CJEU, ECLI:EU:C:2008:215, C 412/06, Annelore Hamilton vs Volksbank Filder eG, 10.04.2008. https://curia.europa.eu/juris/document/document.jsf?text=&docid=71052&pageIndex=0&doclang=RO&mode=lst&dir=&occ=first&part=1&cid=1123285.

principle of good faith as in Romanian law, as a universal solution, but a multitude of rules that affect this pre-contractual stage (Andrews, 2011, p. 20).

For example, in one case, the court held that it is contrary to good faith for one party to ambiguously withdraw the offer, after it has been accepted by the other party[1], on the grounds that it made a mistake that the recipient did not even know he knew and could not reasonably have known when he accepted it. We observe, therefore, that a certain seriousness is necessary to attract tortious liability for the failure of negotiations, since, if we put the principle of good faith and that of autonomy of will, the latter seems to tilt the table more than the other.

In German law, culpa in contrahendo is presented as a result of negligent misrepresentation, a form similar to error, which, however, is caused by the other party without intention, and not with intent, which implies malicious manipulations (Markesinis, Unberath, & Johnston, 2006, p. 103) and the desire to induce in error. As a consequence, for failure to comply with the obligation to correctly inform the contractual partner, even though there is no bad faith, delictual liability is incurred, and not the possibility of action in court to cancel the contract concluded under these conditions. What we can interpret from this norm is that the German legislator has a different vision than that of the Romanian one, being more demanding with the parties of the future contract, in the conditions where, for the engagement of delictual liability, one is responsible for the lightest form of fault, and in -in an action for contractual liability and in an action for annulment, the burden of proof involves a much greater effort.

However, a distinction is made between this form of tortious liability and that based on art. 242 German Civil Code (BGB), where liability is limited to "pure economic loss" and only if there was intent to harm and not mere negligence (McKendrick, 2017, p. 99). In this last case, as in English law, a priority is given to contractual freedom, in the form of the right to conclude or refuse to conclude a contract, by way of consequence, in the absence of a legal provision that compels these negotiations to take place, not a tort action can be successfully brought based solely on the refusal to continue negotiations.

Last but not least, in American law, in the pre-contractual stage, emphasis is placed on a certain equality in the parties' services (adequacy), since, although, in principle, the parties have the freedom to determine whether a business is profitable or not, an imbalance major would inspire the existence of bad faith on the part of a party who tries to harm the contractual partner (Turner, 2014, p. 51). This concept is similar to the injury in Romanian law, with the differences that the conditions for retaining the

[1] Centrovincial Estates plc v Merchant Investors Assurance Co Ltd [1983], Com LR 158, 17–19, 26 in (McKendrick, 2017, p. 17).

injury are much stricter, and the incidental sanction is cancellation, and not tortious liability, since a contract has already been concluded.

It also analyzes the real intention of the parties to create legal relations with binding effects, in other words, if both parties sincerely wanted to conclude that contract. This intention can only be analyzed through the objective filter, the way the parties discussed, their conduct during and after the negotiations, how quickly they stopped the negotiations, the reason why they resorted to this option[1].

6. Conclusions

Negotiation is an essential component of the "destiny" of a contract, as it reflects with amazing precision the internal will of the parties as to how they want their future law to look, inter partes, and the most important aspect is given by the content of the contract, the totality of the rights and obligations that the parties undertake to fulfill in favor of the other party, reciprocally, if we are in the presence of a synalagmatic contract.

However, this stage is completely missing in many areas of law, such as labor relations and those with consumers, and this reality entitles us to raise some questions about the principle of equality that governs private law and its legal force in these situations.

We also note the importance that the CJEU gives to negotiation in good faith, through the transparency of information and the lack of intention to profit at the expense of the contractual partner, assumptions taken up in comparative law, which takes bona fides to its depth, in correlation with loyalty, fairness and honesty. It remains to formulate a proposal for a law ferenda to the Romanian legislator regarding the development of the principle of good faith, by offering several examples to circumscribe it in the part dedicated to the formation of the contract, so that there is no exaggerated freedom for the court in assessing good faith, which subsequently produce a non-unitary interpretation of the law.

[1] Supreme Court in RTS Flexible Systems Ltd v Molkerei Alois Muller, [2010] SC 14; [2010] 1 WLR 753, in (Stone & Devenney, 2015, p. 142).

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