The Legal and Historical Panorama of Culpa in Contrahendo at Contractual Negotiations. An Approach from European and Latin American Law

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Resumen

The article aims to present a historical analysis of legal developments of the fault in contrahendo, in Europe and Latin America. In turn, it seeks to show how at present, despite the growing concern for law and jurisprudence on the issue in national legislation and in the processes of unification and harmonization, the construction unit and dogmatic precontractual responsibility remains a matter pending.

Keywords: Culpa in contrahendo, pre-contractual responsibility, contractual formation, pre-contractual dealings,

Abstract

El artículo tiene como objeto hacer un análisis histórico de la evolución legal de la culpa in contrahendo en el ámbito europeo y latinoamericano. A su vez, pretende demostrar cómo en la actualidad a pesar de la creciente preocupación legal y jurisprudencial, desde los nacientes procesos de unificación y armonización, la construcción y unidad dogmática de la responsabilidad precontractual por ruptura injustificada de las negociaciones sigue siendo una materia pendiente

Palabras clave: Culpa in contrahendo, responsabilidad precontractual, formación contractual, tratos preliminares.

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INTRODUCTION

Although the doctrine of *culpa in contrahendo* appeared in 1861 within the European legal system – when Ihering[1] identified a legal remedy on the form of recovery action, vested on a party whose interests were harmed by hoping that a contract would come about, yet it was void-,[2] Faggella[3] is the first civil lawyer, around 1906, studying the abrogation of preliminary negotiations. The latter included the contract negotiations under the scope of pre-contractual liability. By the end of the nineteenth century, the majority of Italian scholars adhered to a principle of non-binding pre-contractual negotiations, and consequently the principle of no liability for the rescinding party.[4] Therefore, at the event of breached negotiations the applicable dogma accepted was freedom of contract. Yet, few scholars defended a theory of pre-contractual liability, based upon hypothesis such as *la rottura delle trattative, la revoca della proposta, la vendita di cose altrui,*[…].[5]

Italian jurisprudence and scholars alike, facing problems arising from the eventual damage caused at the formation phase, relied on article 1151 of the repealed 1865 Civil Code -which corresponds to article 2043 in the current Code – which is the rule prescribing tortious hypothe-

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[1] Rudolf Ihering, *De la culpa in contrahendo ou des dommages –interdi dans les conventions nulls ou restées imparfaites, in* 2 OUVRES CHOISIS DE R. VON IHERING 1, 1-100 (De Meulenaere trans., 1893). The original title was *Culpa in contrahendo oder Schadenersatz bei nichtigen oder nicht zur Perfection gelangten Verträgen",* 4 *Jahrbucher für die Gomatik des heutigen römischen und deutschen Rechts* (1861). Ihering discuss the issue of culpa in contrahendo at his famous work *Geist des römischen Rechts auf den verschiedenen Stufen seiner Entwicklung.*

[2] Given the lack of solutions observed by Ihering, he searched the Roman texts and compilations of *Digesto* looking for a legal action that would grant to the affected party damages caused by a contractual expectation. Thus, he explored the institution of contractual nullification arising from error -which would affect the party's will formation- from the innocent party's perspective, because then no legal action existed concerning liability flowing from a defect of the will. See Ihering, *supra* note 1, at 2.

[3] g. Faggella, , *Dei Periodi precontrattualli e Della loro vera ed escatta costruzione scientifica, in* 4 Studi giuridici in onore di Carlo fadda 217 (1906). G., Faggella, *Fundamento giuridico Della responsabilità in tema di trattative contrattuali,* Arch. Giur., 128 (1909). *Il periodi precontratuali e la responsabilità precontrattuale*", *Arch. Giur*., 18 (1918).

[4] As it was said by Carrara. CARRARA, LA FORMAZIONE DEI CONTRATTI 2 (1915).

[5] D. RUBINO, LA FATTISPECIE E GLI EFFETTI GIURIDICI PRELIMINARY 45 (1939).

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ses.[6] Later, and with the impossibility of framing the *culpa in contrahendo* hypothesis within the structure of article 1151 – regarding the transgression of an absolute right - , many authors[7] and some judicial decisions stated a new solution to the problem, given a general restricted interpretation of tort law. These circumstances led Faggella to resume his work on German studies, then opening their influence upon the French and the Italian legal systems.[8]

Faggella's work, all ups and downs aside, encompassed a landmark point within the Italian legal culture, and the European one likewise. Within a short period of twenty years, many judicial decisions invoked his work, systematically and reiteratively, when adjudication on the topic was required.[9] Notwithstanding the heavy criticism directed to Faggella's work – especially his theory concerning a *tacit agreement*[10] –,

[6] C.c. art. 2043. "Risarcimento per fatto illecito. Qualunque fatto doloso o colposo, che cagiona ad altri un danno ingiusto, obbliga colui che ha commesso il fatto a risarcire il danno."

[7] Cuffaro maintains that, between the end of the nineteenth century and the beginning of the twentieth, some scholars, such as Coviello and Rubino, appealed to the necessity of punishing cases of breaking-off negotiations, wrong information, or unexplained circumstances alleged to hold a contract void. See Cuffaro, *Responsabilita Precontrattuale, in* ENCICLOPEDIA DEL DIRITTO, Vol. XXXIX, 1265 (1988).

[8] The works of the Italian author were resumed and modified by Saleilles. The latter was the one whom introduced the topic in France, because until then, within the civil school up to the end of the eighteenth century, it was generally accepted that consent would arise from the concurrence of both offer and acceptance, with total disregard of the pourparlers. R. Saleilles, *De la Responsabilite Precontractuelle,* R.T.D.Civ 712 (1907).

[9] During the first twenty five years of the twentieth century Italian jurispredence adopted the theses of Faggella. For instance, *Trib. de Napoli*, (March 31 1909), *Dir. comm.*, 1910, 1 vol. II, 48, with notes from E. Albertario, E., 48; App. Napoli, (March 27 1911), *Mov. Giur.*, 1911, 113; *Cass*. Roma, (February 23 1916), in *Giur. itl*, 1916, 1, 475; Cass. Napoli,(May 9 1916), *Dir. giur.*, 1917, 89. Yet, the most relevant is the cassation decision delivered on January 6 1925, *R.D.C.o.*, 1925, 428, where the Court stated that *"la parte che, senza giustificato motivo recede dalle trattative precontrattuali debe risarcire l'atra parte delle spense incontrate, dovendosi intendere che il consenso a trattare per la conclusione di un contratto comporti l'impegno, se non a concluyere il contratto definitivo, certo a non recedere senza giustificato motivo*". The case was brought before the Corte di Cassazione, as an appeal against the decision rendered by the Tribunale di Napoli, in which Faggella was cited. Trib. Napoli 31.3.09, *D.C.*, 1910, 2, 428.

[10] It affirms that the duty to compensate arises not from fault – as maintained by Ihering – but from the transgression of the agreement – whether tacit or express – reached by the parties in order to start negotiations. Thus, said transgression may occur without the existence of either intention or negligence, since " it is enough the arbitrary abandonment with no motive from the dealings." FAGELLA, *supra* note 4, at 277.

one cannot ignore the fact that his doctrine still applicable and valid at instances such as the *correttezza contractual* principle and recovery of damages caused during the formation phase. Italy's jurisprudential debate arising from opposition or acceptance of Faggella's doctrine, led to the adoption of rules inspired by him, at the enactment in 1942 of the first modern European codes – the Codice Civile – . These rules favored a doctrinarian movement, which at the end was previous to some notions such as good faith, the *corretezza,* and the duty of loyalty.

Consequently, the legislatures of some countries tried to overcome any dispute then enacting direct rules on the issue. Thus, they established norms prescribing liability for damages upon the party guilty for invalidating the contract, as for instance those ones contained in the German civil code, the Swiss obligations code, and the 1950 Czech code. These provisions would perpetuate the liability based on *culpa in contrahendo* at some modern legal systems, and likewise would be the first restriction introduced upon freedom of contract in the negotiations' stage.[11] Currently, however, few legal systems present such a kind of liability and its development has been grounded on judicial recognition. Therefore, this doctrine's legal implications and considerations fluctuate and, furthermore, depend on historical constructions, legal evolution, particular attachment to classic damages' nature and theories.

Hence, the present essay finds its sources both on civil law norms and exceptional norms of contractual statutes. But, it would exclude the regulation of consumption, given that such regulation is the result of rules on the subject adopted by the end of the 1980s and therefore, not related to the classic movements of the nineteenth century. Thus, my argument is that the absence of doctrinal unity regarding the dogmatic principles and consequences of pre-contractual liability has created an excessive regulation upon the negotiation stage within the civil law systems.

[11] F. BENATTI, CULPA IN CONTRAHENDO 30 (1987).

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Due to the challenge posed by researching on a new doctrine such as *culpa in contrahendo*, I decided to undertake a study on its historic evolution. Hence, I analyzed the three main scholars who were engaged with the topic in three different countries, i.e. Germany, Italy, and France. Regarding Germany, I explored the works of Ihering and his sources. He focused especially on *Digesto* and the rules over a case where one party would not state the *extra commercium* condition of the goods.[12] Concerning Italy, I analyzed the theoretical foundations of Faggella,[13] as well as the impact of Italian doctrines in French jurisprudence and scholars. Finally, concerning France I studied the work of Saleilles,[14] who ratified a powerful classical tradition and also strongly defended that dogma concerning freedom of negotiations at the pre-contractual stage.

Given that a detailed study of the historical evolution of pre-contractual liability is already published,[15] I would like to introduce, in the present essay, the current legal regulation at those countries recognizing *culpa in contrahendo* as an institution. Furthermore, I will explore the recent attempts on the subject made by the European Parliament and by the Council of the European Union as well – Council Regula-

[12] According to Benatti, and to Perez as well, the problem was studied by Domat back in the eighteenth century. See F. BENATTI, A RESPONSABILIDADE PRE-CONTRACTUAL 13 (Vera Jardim trans., 1970). Alfonso Perez, *La Responsabilidad Precontractual*, R.C.D.I. 888-892 (1971). Domat wrote that "les conventions qui se trouvent nulles par quelque cause dont un des contractans doive repondré, comme s'il a aliene une chose sacree au publique ont cet effet, quoique nulles, d'obliger aux dommages et interest celui qui y donne lieu." J. DOMAT, 1 LES LOIS CIVILES DANS LEUR ORDRE NATUREL 44 (1777). Ihering revealed that his interpretation was not original at all, because the 1794 Prussian Civil Code (*Allgemeines Landrecht für die Koniglichen Preussichen Staaten)* prescribed the same duties during both the preliminary stage and the performance of the contract. Likewise, he identified similar provisions at the 1811 Austrian Civil Code (*Allgemeines Bürgerliches Gesetzbuch)*, where several paragraphs – 248, 866, 869, and 878 – established the duty to compensate for any acts performed during the preliminary stage. Ihering, *supra* note 2, at 39.

[13] It should be noted that the doctrine elaborated by Faggella was the result of one decade of scientific effort. He was focused on answering his detractors and critics, and he published his essays on many different Italian journals. These publications were analyzed by few French scholars, then raising the relevance of a topic clearly disregarded by the prior classical doctrines.

[14] Saleilles, *supra* note 9, at 697 -751.

[15] Vladimir Monsalve, *Evolucion de la Responsabilidad Precontractual por tratos preliminares en el sistema contractual Europeo*, 25 REVISTA IUSTA 107 (2006) (Colombia).

tions Rome I[16] and Rome II[17] – . Likewise, since part of my research has been focused on the impact of *culpa in contrahendo* in other legal systems, it was necessary to analyze its influence upon common law, Latin American Law, and Spanish Law.

THE LEGAL CONSTRUCTION OF CULPA IN CONTRAHENDO IN EUROPEAN LAW:

The legal adoption of the *culpa in contrahendo* doctrine is a recent phenomenon. In fact, few European legal systems include it, and they do it in the form of the prescribing general rules on the topic, such as the regulation of party's activities during the contract's formation phase. Said rules are contained in article 197 of 1940 Greek Civil Code, articles 1337 and 1338 Italian Civil Code, and article 227 Portuguese Civil Code. The 1896 German Civil Code did not include any rules, yet with the statute reforming obligations law, on November 26th 2001, now it presents the doctrine in paragraph 311, Sec. 2.

The rules of the Civil Code of Greece say that

> *Au tours des négociations, pour la conclusion d'un contrat, les parties se doivent mutuellement la conduite dictée par la bonne foi et les usages dans le rapports d'affaires.* (Art. 197)
>
> *Celui qui a cause, par sa faute, un préjudice à l'autre partie, au cours des négociations, pour la conclusion d'un contrat, este tenu a réparation même si le contrat n'a pas été conclu. La disposition relative à la prescription des réclamations nées d'actes illicites s'applique para analogie à la prescription de cette réclamation*[18] (Art. 198)

On the other hand, the Civil Code of Italy prescribes that

[16] 2008 O.J. (L 177) 6. Regulation on the law applicable to contractual obligations.

[17] 2007 O.J. (L 199) 40. Regulation on the law applicable to non-contractual obligations.

[18] I would like to remark that the applicable statute of limitations is the one applicable to non-contractual illicit acts, then five years, instead of the general rule of twenty years (art. 249).

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> *Trattative e responsabilità precontrattuale. Le parti, nello svolgimento delle trattative e nella formazione del contratto, devono comportarsi secondo buona fede* (Art. 1337)
>
> *Conoscenza delle cause d'invalidità La parte che, conoscendo o dovendo conoscere l'esistenza di una causa d'invalidità del contratto, non ne ha dato notizia all'altra parte è tenuta a risarcire il danno da questa risentito per avere confidato, senza sua colpa, nella validità del contratto.*(Art. 1338).

Notwithstanding the existence of a statute protecting a party affected by damages, the Italian Code included these provisions as part of a new tendency intended to replace the so-called *general clauses.* From the inclusion of these provisions flows the notion concerning the Italian Code as a modern one, because it is attached to an idea sustaining that human behavior under good faith should be regarded, and such consideration reveals the progress of law. Indeed, it is possible to relate progress to law, as it is related to any other expression of the human spirit.[19]

Influenced by the Italian codification – which was general upon other European ones[20] –, article 227 of the Portuguese Civil Code[21] affirms that

> *(Culpa na formação dos contratos) 1. Quem negoceia com outrem para conclusão de um contrato deve, tanto nos preliminares como na formação dele, proceder segundo as regras da boa fé, so pena de responder pelos danos que culposamente causar à outra parte[22]".*

[19] BENATTI, *supra* note 12, at 306.

[20] Under the 1867 Civil Code, many scholars expressed interest on the issue. For instance Moreira maintains that *culpa in contrahendo* would be contained in paragraph 307 of the German Civil Code. See A. MENEZES CORDEIRO, 1 A BOA FE NO DEREITO CIVIL, 571 (1984); C. Mota Pinto, *A Responsabilidade Pre-Negocial pela nao Conclusao dos Contratos,* XIV BOLETIM DA FACULDADE DE DIREITO DA UNIVERSIDADE DE COIMBRA 143 (1966) (Portugal).

[21] In the 1966 Code, the provision concerning *culpa in contrahendo* is regulated at book 1 – formation of juristic acts – .

[22] The person entering into contractual negotiations, shall act according to the rules of good faith during both the preliminary dealings and the formation phase; otherwise, he shall be liable for damages caused upon the other bforhis fault.

The previous article establishes a duty to act according to good faith, as it is the case on comparative law – especially Italian law and German jurisprudence[23] –. Here, the notion of good faith should be understood as an objective rule upon human action, since it classifies behavior as honest, right, and loyal – acting according to good faith[24] –. Therefore, the duty of acting in accordance with good faith is present, and independent from whether the parties would conclude a contract.

Although it is certain that the provisions mentioned above are the only enactments concerning *culpa in contrahendo*, it is also true that the doctrine was taken into account at the time of designing normative bodies at these countries. Furthermore, the novelty presented by this legislation may suggest a growing interest by European scholars for the regulation – and intervention – on the parties' actions during contractual negotiations. That interest was evidenced by the *B.G.B.*[25] in which many articles regulated issues of *culpa in contrahendo*, despite the lack of specific provisions on the code enacted on January 1st 1900. Prior to 2001, however, the doctrine was developed intensively by a judicial movement which, at the end, meant its incorporation into the German legal system.[26]

The 2001 reform[27] was an endorsement of the judicial and doctrinal movement arisen from Ihering's work, and especially upon his theory

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[23] Mota Pinto, *supra* note 21, at 343.

[24] P. Sobral de Nacimento, *A Responsabilidade Pre-contratual pela Ruptura das Negociaccoes,* in 4 ESTUDOS EM HOMENAGEM AO PROF. DOCTOR INOCENCIO GALVAO TELLES 234 (2003).

[25] Bügerliches Gesetzbuch [BGB] [Civil Code] (F.R.G.).

[26] The same phenomenon occured with many other figures present at the German law of obligations, such as the ground's disappearance of the juristic act, the positive damage upon contractual pretension, or the withdrawal from long-term obligations due to a relevant cause. Their relevance was so evident that the reform's drafters were compelled to insert them within the legal system. Yet, as Dauner-Lieb alerts, their legal incorporation may lead to empty norms (normhülsen) which would be endangered by judicial interpretation. Furthermore, notwithstanding the effort undertaken by the German legislature, the legal certainty and transparency intended by the codification were not attained. Daunier-Lieb, *Die geplante Schuldrechts modernisierung-Burchbruch oder SchnellschuB*, J.Z. 18 (2001).

[27] According to Ebers, the reform of Bügerliches Gesetzbuch [BGB] expresses a recodification on the one hand; on the other, reflects a phenomenon known as *Europeization of law*. M. Ebers, *La*

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concerning the necessity of norms towards the regulation of liability due to defects in a presumably valid contract.[28] Furthermore, there was a growing opinion for the protection of the party entering into bargaining, without requiring the conclusion of a contract. The breach of certain duties, and especially those pertaining to behavior – such as loyalty and its concretion on the duties of information, discretion, and secrecy –, may harm the other party or his agent. And when the harm is present, the party causing it should be sustained responsible for breaching the negotiation's duties.[29]

The statute reforming the law of obligations, enacted on November 26th 2001, included the following provision at paragraph 311, Sec. 2:

> *Ein Schuldverhaltnis mit Pflichten nach. 241 abs. 2 entsteht auch durch [...], 2. die Andahnung eines Vertrags, bei welcher der eine Teil im Hinblick auf eine etwaige rechtsgeschaftliche Beziehung dem anderen Teil die Moglichkeit zur Einwirking auf seine Rechte, Rechtsguter und Interessen gewahrt oder ihm diese anvertraut, oder 3. ahnliche geschaftliche kontakte*[30]".

Reforma y Europeizacion del derecho aleman de obligaciones, in LA ARMONIZACION DEL DERECHO DE OBLIGACIONES EN EUROPA 43 (2006).

28 Asua Gonzalez affirms that a review of the materials discussed during the prepartation of the Bügerliches Gesetzbuch [BGB], demonstrates that such was the first terminology used for liability arising from defects in a presumably valid contract. C. ASUA GONZALEZ, LA CULPA IN CONTRAHENDO 32 (1989).

29 The two great categories concerning special pre-contractual obligations, i.e. duties of protection and duties of loyalty, are left behind. This distinction is perfectly made in several studies of comparative law. See Michael Tegethoff, *Culpa in Contrahendo in German and Dutch Law,* 5 MJ 357 (1998). Markesinis, Lorenz, and Dannemann propose three kinds of pre-contractual obligations, which are equivalent to those mentioned before. Currently, these obligations are valid and their application's scope has been extended. The duties of protection then, include a right to be informed and the duty to inform. They are not conditions related to a concluded contract, but rather they comprise independent obligations which may be enforced during the negotiation phase. MARKESINIS, B.S. ET AL, THE GERMAN LAW OF OBLIGATIONS 64 (1997).

30 "An obligation relationship with duties under paragraph 241, Sec. 2 also arises from the initiation of a contract, in which initiation of one party, regarding a possible relationship in the nature of a legal transaction, grants to the other party the possibility of exerting an effect on his rights, legal entitlements and interests, or entrusts these to him."

One should note that, since this reform, the *B.G.B.* stresses that obligatory affairs may arise from other social affairs related to contract, which may create duties, and not only from a contract itself. Thus, both paragraph 311, Sec. 2 and the title where it is contained make no reference to *contract* – before, beginning with 305, many paragraphs stated obligatory affairs deriving from a contract –, yet instead declaring obligatory affairs related to negotiation *(Rechtsgeschäfliche Schuldverhältnisse*). Currently, paragraph 305 is transcribed literally, and scholars label it as a legal relationship of contractual negotiation *(Rechtsverhältnis der Vertragsverhandlungen)*, which creates duties and is in accordance with the obligations of paragraph 241, Sec. 2.[31]

According to section 2 of paragraph 311, *culpa in contrahendo* includes cases where a legal relationship arising from the formation phase is present, and more precisely at the preparation of a contract, the potential negotiation, and any similar bargaining contact. In the first event – preparation of a contract –, a contract may, or may not, be concluded. In the second event – the potential negotiation –, predicts a mere invitation to enter into a contract. All other events not foreseen on the prior classifications may be in the third one, but only when the contact creates an obligatory relationship. The latter hypothesis is ample, obscure, and insubstantial, which, together with its problems related to a practical use,[32] helped to label *culpa in contrahendo* as an open doctrine.[33] Notwithstanding the existence of many judicial holdings referring to issues of *culpa in contrahendo*, the statute reforming the law of obligations does not mention clue topics. For instance, there is no treatment

[31] Within the reform the text referred is section 1, and then section 2 says that "the obligation relationship can, according to its content, oblige each party to have regard to the rights, legal entitlements and interests of the other party." Therefore, pre-contractual duties similar to those contractual ones may arise from damages caused during the preparation of a contract. The affected party may have the right to demand compensation, due to the transgression of duty, according to article 280.

[32] As it is maintained by Dohrmann, Ehmann, and Sutschet. K.J. Albiez Dohrmann, *Un Nuevo Derecho de Obligaciones. La Reforma 2002 del B.G.B.,* A.D.C. 1192 (2002). HORST EHMANN & HOLGER SUTSCHET, LA REFORMA DEL B.G.B. , MODERNIZACION DEL DERECHO ALEMAN DE OBLIGACIONES, 49 (2006).

[33] EHMANN & SUTSCHET, *supra* note 33, at 203.

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of the content and extent of pre-contractual duties, and especially those ones concerning protection. Canaris,[34] however, maintains that the term *interests* of section 2 paragraph 311 was included by his initiative, and with the aim of connecting *freedom of decision* within the scope of *culpa in contrahendo.*

Likewise, it is noteworthy to highlight the inclusion of *culpa in contrahendo* of a third party, at the last section of paragraph 311. The provision acknowledges that a third party may be liable if using confidence to influence someone to enter into a contract. The norm is so broad, providing many angles for the creation of obligatory legal affairs, that perhaps it will be developed by certain judicial holdings.

An obligation to compensate at the event of invalidity, due to error and lack of seriousness on the declaration, was established in different provisions. For instance, articles 122, 523. Sec. I, and 524 of *B.G.B.* prescribed that, if the debtor intentionally hides any defect of the goods delivered, the party is compelled to compensate for the harm caused upon the other. Article 600 says that when one party intentionally refrains from informing the goods' defects, then he is required to compensate for the damages caused, as he is in the similar circumstances of article 694.

In Germany a norm exists – article 823 *B.G.B.* – providing for a legal obligation to compensate for damages caused upon life, body, health, liberty, or any other protected right or property, by actions based whether on intention or negligence. Yet, that provision was not used in cases concerning pre-contractual negotiations, since the latter usually involve economic damages. Consequently, many scholars denied the applicability of *culpa in contrahendo* within many European legal systems. Nevertheless, the debate was finished by the reform of the German Code, given that it includes a concrete norm in harmony with the contractual nature of *culpa in contrahendo,* hence denying extensi-

[34] CLAUS-WILHELM CANARIS, DIE REFORM DES RECHTS DER LEISTUNGSSTÖRUNGEN 519 (2001).

ve responsibility. In fact, the question of extensive responsibility was debated and opposed by many scholars, those influenced by classical and conservative doctrines of European civil law. They even strongly defended general clauses of compensation, a figure that never existed in German law and which remains absent until today.[35]

Likewise, it should be noted that the German statute for the regulation of the general negotiations' conditions of 1976 – AGB-Gesetz – acknowledges the existence of liability flowing from transgression of precontractual duties. The same law considers void any clause limiting or excluding responsibility derived from damages, due to a severe culpable action.

On the other hand, the Swiss obligations' code contains rules of invalidity due to *culpa in contrahendo*, although without undertaking precontractual liability. The code says that

> *Erreur commise par négligence. La partie qui invoque son erreur pour se soustraire à l'effet du contrat est tenue de réparer le dommage résultant de l'invalidité de la convention si l'erreur provient de sa propre faute, à moins que l'autre partie n'ait connu ou dû connaître l'erreur. Le juge peut, si l'équité l'exige, allouer des dommages intérêts plus considérables à la partie lésée* (Art. 26).
>
> *Erreur d'un intermédiaire. Les règles concernant l'erreur s'appliquent par analogie, lorsque la volonté d'une des parties a été inexactement transmise par un messager ou quelque autre intermédiaire (*Art. 27, Sec. 5).

Outside the European context, Israel also presents statutory regulation on the matter. Thus, contract law in Israel has a specific regulation of

[35] Yet, given that Communitarian law is both influent and binding, scholars acknowledge the presence of those rules. For instance, the reformed article 276 prescribes that the debtor is responsible for intention and fault, even precising some exceptions applicable to fault-based liability. Furthermore, the provision demands from the debtor the necessary care in human affairs, and also states that the debtor cannot be released in advanced from liability for intention.

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parties' behavior during the preparation of a contract. Indeed, article 12 of Knesset Statute affirms that

> *Individuals who have entered into negotiations for a contract must act according to good faith (tom lev) and to customs (bederech mekubelet).* (Art. 12, Sec. a)
>
> *The party not acting in accordance to good faith and to customs, has the legal obligation to compensate for damages caused during the contract negotiations.*
>
> (Art. 12, Sec. b)

This provision is the result of codification in Israel, and it was perceived then as the most revolutionary norm concerning contract law.[36] In general, Israeli jurisprudence and scholars have been nurtured, on the matter, both by foreign legislation and judicial holdings. Consequently, there the figure of *culpa in contrahendo* is built upon the European notions of trust and good faith. Hence, the inclusion of this legal provision with all its especial features is noteworthy.[37]

Amongst the countries lacking specific legislation on the issue is France. There, the regulation of *culpa in contrahendo* is grounded on article 1382 of the Napoleonic Code, which states that *tout fait quelconque de l'homme, qui cause autrui un dommage, oblige celui par la faute duquel il est arrive à le réparer*. The norm is understood as one of the most orthodox theories within the civil law context, because it sustains contractual liability. Thus, if a contract is concluded, but damages originated at the

[36] A. Rabello, *La theorie de la culpa in contrahendo, et la loi Israelienne sur les contrats 1973*, 49 R.I.D.C 42 (1997).

[37] It should be noted that this Israeli provision combines two clue precepts derived from Italian and German doctrines. It introduces, as a novelty, the notion of good faith and customs – proper institutions in the German school –. According to Rabello, the distinction is relevant because customs would reveal whether good faith exists in a specific circumstance. See Rabello, *supra* note 37, at 43. In general, the issue concerning the breach-off negotiations was discussed by the Israeli jurisprudence, and it is understood that the legal provision does not impose a duty to conclude a contract upon those negotiating it. But it does forbid the unjust interruption of dealings, and likewise recognizes the existence of information duties at the pre-contractual phase.

formation stage appear, then there is contractual liability, and the unjustified break-off *pourparlers* would be aquilian. Consequently, freedom of contract governs, and the acceptance of pre-contractual harm is very rare. Thus, the landmark affirmation of Carbonnier summarizing the French panorama: *pas de contrat vaut mieux qu'un mauvais contrat.*[38] In Spain only one provision concerning *culpa in contrahendo* does exist. Furthermore, it is a norm within public law, pertaining to public contracts, where pre-contractual liability is considered. Article 47 Decree 25 1975 refers to those actions prior to the contract, imposing the duty of compensation upon the guilty party, when the latter is guilty of voiding the contract. For any event related to pre-contractual negotiations, as well as general events of liability arising at the formation phase, the governing rules are those ones contained in articles 1902 and 7, Sec. 1., as follows:

> *The party causing damages, either by action or omission, with the mediation of guilt or negligence, should compensate the harm.* (Art. 1902).

Al rights must be exercised according to rules of good faith. (Art. 7, Sec. 1). As it was explained, in Spanish and French law[39] the breaching of pre-contractual negotiations is approached through general statements, modeled by the general aquilian formula. These systems recognize compensation due to any harm caused during pre-contractual actions and negotiations, although with no specific provisions. Therefore, the problems appearing at Spain and France are stated in a very different way than those existing in Germany, Italy, Portugal, and Switzerland, then leading to quite diverse results attained by their tribunals.

[38] J. CARBONNIER, 4 DROIT CIVIL – THEORIE DES OBLIGATIONS 104 (1963).

[39] From any possible approach towards the topic, whether from scholars or the judiciary, the French adopt the most rigid one. They present a rigid opinion regarding recognition of *culpa in contrahendo*, and any obligation to compensate arising from the breach-off pourparlers. The French panorama has no legal antecedents on the issue, and it lacks regulations related to offer's issuance and validity. This, however, has not impeded a doctrine endorsing the principle of liability, which arises from damages caused during the stage of consent's formation.

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Despite the restricted nature of the regulation of *culpa in contrahendo* in the European scope, one should note that in some modern legal systems – particularly those concerned with substantive justice – the judiciary recognizes the relevance of protecting the 'weak' party to a contract, as well as it is important and necessary to defend the individual who acted according to good faith and the rules of commercial loyalty. Hence, it is commendable that many judges and tribunals, grounded on extensive and integrative constructions, apply principles of *solidarity* to the realm of European private law. And this particular feature comprises a noteworthy evolution on the matter.

Finally, within the European Union, some rules regarding conflict of norms referring to damages either on tort law or contract law, were enacted in order to clarify the most controversial issues of *culpa in contrahendo*. Yet, unfortunately as it will be seen, the results were conflicting. For instance, Regulation Rome I – on the law applicable to contractual obligations – tried to solve the debate, affirming that

> *Obligations arising out of dealings prior to the conclusion of the contract are covered by Article 12 of Regulation (EC) No 864/2007. Such obligations should therefore be excluded from the scope of this regulation.*[40]

On the other hand, Regulation Rome II – on the law applicable to non-contractual obligations – states in article 12 that

> Culpa in Contrahendo: *The law applicable to a non-contractual obligation arising out of dealings prior to the conclusion of a contract, regardless of whether the contract was actually concluded or not, shall be the law that applies to the contract or that would have been applicable to it had it been entered into.*[41]

The enactment of the latter reflects the immense debate arising within Europe concerning the nature of *culpa in contrahendo*, especially when

[40] 2008 O.J. (L 177) 6.

[41] 2007 O.J. (L 199) 40.

until then no Private International Law rule existed on the topic at all. It is regrettable that this rule is so complex and unclear, given that it is impossible to infer which cases may be framed within *culpa in contrahendo*. There is no consensus regarding these cases,[42] as for instance some authors sustain that *culpa in contrahendo* includes any harm caused during the contract's formation stage, while others maintain that it covers some harms discovered after the conclusion of a contract, such as hidden defects.

On the other hand, notwithstanding that the preliminary statements on the European Regulations cited affirm to be in accordance with the jurisprudence of the Court of Justice of the European Union, the high tribunal decided to uphold the contractual character of *culpa in contrahendo* in holding from 2002.[43] Thus, the legal provisions cited aid to the growth of the debate, given the inconsistence between affirming that the events of *culpa in contrahendo* must be treated as non-contractual in character, and maintaining that the law applicable shall be the law that applies to the contract or that would have been applicable to it had it been entered into. It does entail further complexity for those events in which parties may establish the law of the place where the break-off occurred. Such a provision is empty and unpractical according to the applicable law, as it is incoherent with the nature aimed to regulate. Thus, one should inquire how it is possible to affirm that the harm caused during the formation stage is non-contractual, while simultaneously maintaining that the law applicable shall be the law that applies to the contract or that would have been applicable to it had it been entered into?

On the other hand, paragraph 2, Section a) of Regulation Rome II may allow a case in which one party would have an unjustified advantage. In fact, the rule foresees the offer – or invitation for a contract – located in one state, and the recipient of that offer located in another state.

[42] Vladimir Monsalve, *Disertación para una nueva construcción en Colombia de la culpa in contrahendo,* 27 REVISTA DE DERECHO, 41 (2007) (Colombia).

[43] 2002 E.C.R. 2002/C 47/2001.

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Given that the parties have not chosen the law of the place where the break-off occurs, then the governing law shall be the one of the place where the damage is caused.[44] Therefore, contrary to the lack of protection resulting from a conflict of laws – in which the law governing would be the one of the place where the offer was made, under the authority of its legislation and judges – the Regulation poses a better option for the otherwise unprotected party. Although said unjustified advantage may be eliminated if the parties – performing their freedom of contract – choose the law where the break-off would happen, it is unlikely to occur given that by definition, the negotiation stage is characterized by informality and consensus.

Despite the constant concern demonstrated by the legislators of the European Community on the matter, *culpa in contrahendo* presents a deep conceptual complexity. This complexity creates a non-coordination situation, both within the Communitarian law and within the different European nations.

INFLUENCE UPON LATIN AMERICAN LAW:

In Latin American few law studies exist concerning the doctrine of *culpa in contrahendo*, yet some legal systems in the region have included it in their legislation. It should be noted that there is a new tendency aiming at the reformation of both civil and commercial legislation, and recent codifications have introduced the legal notions of pre-contractual liability present in Germany and Italy. The presence of these notions is noteworthy, and it varies from one country to another. For instance, the legislation in Colombia and Paraguay just transcribes the classical statements of the doctrine, while the one in Cuba and Bolivia allows precise rules upon issues not even considered before, such as *quantum indemnizatorio.* Nevertheless, in countries with immense civil

[44] 2007 O.J. (L 199) 40, Art. 12, Sec. 2a: "Where the law applicable cannot be determined on the basis of paragraph 1, it shall be: (a) The law of the country in which the damage occurs, irrespective of the country in which the event giving rise to the damage occurred and irrespective of the country or countries in which the indirect consequences of that event occurred."

tradition – such as Argentina and Chile – the absence of regulation on the matter is evident, and given the weight of the Napoleonic Code, no potential reformation appears on the horizon.

Article 863 of Colombian Commerce Code prescribes that "Parties shall act according to good faith, and with no fault, during the pre-contractual phase, otherwise they shall compensate for the damages caused." On the other hand, article 689 Civil Code of Paraguay states that "both during the negotiations and formation of the contract, parties shall behave in accordance to good faith." Article 690 of the same code establishes that "the party with knowledge, or who shall have knowledge, about an element to affect the contract's validity, withholding it from the other, should have the legal obligation to compensate; provided that the innocent party trusted on the validity of the contract without fault."

In Bolivia, article 465 Civil Code recognizes the existence of pre-contractual liability as follows: "both during preliminary dealings and at the formation phase, parties shall act according to good faith; otherwise, they shall compensate for any damage arising from negligence, imprudence, or omission to disclose causes that may affect the contract's validity." In other countries, the references to the doctrine are contained at different statutes. For instance some provisions of the 2003 Cuban Decree for Economic and Commercial Contracts refer to the issue. Hence, article 5 affirms that

> *Preliminary Dealings and Pre-contractual Liability: Parties may engage on negotiations or preliminary dealings, in order to come into a future contract, yet these do not encompass an offer. Anyone is free to break-off the preliminary dealings, with no liability. Nevertheless, the individual who has acted in bad faith is liable for damages caused upon the other party. These damages arise from the failure to conclude said contract, or from the fact that the innocent party could not conclude an alternative offer and contract.*
>
> *Entering into dealings or continuing them with no intention for concluding the contract, is considered bad faith.*

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As it was said above, in Argentina no provision concerning pre-contractual liability was included in the Civil Code written by Dalmacio Velez Sarfield in 1869. Yet, the 1998 code project affirms in article 920 that "parties shall act according to good faith, in order to avoid the unjust invalidation of dealings, even if no offer has been issued yet. The breaching of this duty entails compensation due to the damage caused upon negative interest."

Summarizing, one may note the novelty of current projects and provisions that recognize pre-contractual liability in Latin American law. They present, in fact, strong influences from Germany and Italy. But, many Latin American systems went beyond the mere transcription of European rules. They tried to develop better legal techniques and constructions in order to achieve the enactment of more specific norms, especially concerning capital issues of the doctrine such as contractual behavior, rescinding limits, applicable periods, objective criteria, and the enumeration of disloyal actions. Thus, it may be stated that concerning *culpa in contrahendo*, Latin American law has achieved more dynamism and advances than the law in Europe. Yet, I would like to note that, notwithstanding the existence of this normative framework, there is little interest from both scholars and tribunals on matters of pre-contractual liability and preliminary dealings, as it is demonstrated by the few practical references on the topic.

CONCLUSIONS

Although preliminary dealings were debated and analyzed by many studies during the last two centuries, currently they are institutions immersed in a panorama characterized by the lack of protection or legal obligation. This panorama is present both in the classic legal systems – those civil law systems in each country, resulting from codification movements – and in the new legal frameworks. Some important advances have been made with regard to *culpa in contrahendo* either at national or Communitarian levels, however I am of the opinion that normative modifications are likewise necessary.

A singular contrast exists between the absence of legal texts, and the growing attention gained by pre-contractual problems. Without a doubt, legal systems currently are facing new challenges concerning markets and the characteristics of global contracts, adapting themselves to surrounding circumstances such as commercial globalization or economic inequalities affecting parties. Therefore, in many occasions it is required to use inventive processes to construct the statute. In many others it would be necessary the enactment of European norms for the regulation of pre-contractual institutions, beyond the existing ones regarding conflict of laws. Current regulations are based on previous judicial decisions, thus approaching the topic either from insufficient legal notions or from diverse jurisprudential interpretations. Hence, new rules should be adopted for any possible case, in order to overcome the lack of uniform and consolidated criteria regarding *culpa in contrahendo.*

The correct operation of markets demands legal certainty and legal predictability. And this aim may be achieved only through a fortified contract's formation stage, with clear regulations concerning contractual behavior, behavior's secondary duties, events framed within *culpa in contrahendo*, *quantum indemnizatorio*, and the character of the duties.

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