

Independence of Pre-Contractual Legal Relations: Genesis, Doctrinal Debates, and the Place in the System of Civil Law Regulation

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Abstract: This article examines the issue of the independence of pre-contractual legal relations within the mechanism of civil law regulation of foreign economic activity. The article analyzes the genesis of the doctrine of pre-contractual liability, beginning with the concept of culpa in contrahendo as formulated by R. von Jhering, and traces its subsequent development in the law of continental European states and common law systems. Particular attention is devoted to the scholarly debate concerning the legal nature of pre-contractual relations and their place within the system of civil law. On the basis of a comparative legal analysis of the legislation of Germany, France, and the Russian Federation, as well as international unification instruments, the article substantiates the conclusion that an independent institution of pre-contractual liability has taken shape. The problems of regulating pre-contractual relations under the law of the Republic of Uzbekistan in the context of the development of foreign economic activity and the attraction of foreign investment are considered separately. The article concludes that the formation of a systematic mechanism for the legal regulation of pre-contractual relations in national legislation is necessary.

Keywords: pre-contractual liability, pre-contractual relations, culpa in contrahendo, good faith, negotiation process, reliance interest, foreign economic activity, civil law.

The contemporary development of international trade and the deepening of cross-border economic relations have substantially elevated the role of the negotiation process in the conclusion of commercial contracts. In the context of globalization, a significant portion of the legally relevant actions of participants in commercial transactions takes place even before the moment a contract is concluded at the stage of establishing business contacts, exchanging commercial information, conducting negotiations, and agreeing upon the terms of a future transaction. Although formal contractual obligations arise only upon the parties reaching an agreement, it is precisely at the pre-contractual stage that relations capable of giving rise to independent legal consequences are formed.

This issue is of particular relevance in the sphere of foreign economic activity, where the preparation of contracts is accompanied by complex negotiations, the involvement of consultants, the conduct of legal and financial due diligence, and significant expenditure by the parties. In such circumstances, bad-faith conduct on the part of one of the participants in the negotiation process may lead to substantial economic losses. It is precisely this need for legal protection of negotiating parties that has driven the formation, within modern civil law doctrine, of the institution of pre-contractual liability.

The relevance of studying this issue for the Republic of Uzbekistan is conditioned by the active development of foreign economic activity and the ongoing economic reforms in the country. In the Address of the President of the Republic of Uzbekistan to the Oliy Majlis and the people of Uzbekistan of 26 December 2025, the necessity of ensuring reliable legal protection for entrepreneurs and investors, as well as further improving the mechanisms of state and parliamentary oversight of their rights, is emphasised. These provisions attest to the priority accorded to the development of effective legal

instruments for regulating entrepreneurial activity, including the improvement of civil law mechanisms for regulating economic relations. [1]

The historical formation of the institution of pre-contractual liability is associated above all with the development of German civil law doctrine in the nineteenth century. A key role in the establishment of this concept was played by the work of the German jurist Rudolf von Jhering, "Culpa in contrahendo, or Compensation for Damages in Respect of Void Contracts or Contracts that Have Not Reached Final Completion," published in 1861. In that study, the scholar substantiated the necessity of imposing liability upon a person who, in the course of concluding a contract, acts in bad faith and thereby causes harm to a prospective counterparty. [2]

The central idea formulated by Jhering was that the very act of the parties entering into negotiations creates a special relationship of trust between them. A breach of that trust through bad-faith conduct may give rise to an obligation to compensate for the harm caused. In this way, Jhering was the first to provide a theoretical basis for the existence of a special category of obligations arising even before the moment of contract conclusion.

Initially, the German Civil Code of 1896 did not contain special provisions governing pre-contractual relations. Nevertheless, German courts actively applied the concept of culpa in contrahendo to fill gaps in the legislation. Through judicial practice, the position gradually emerged that the parties' entry into negotiations creates a special obligatory relationship grounded in trust between the prospective counterparties.

The definitive legislative consolidation of this concept occurred in the course of the reform of German law of obligations. The Law on the Modernisation of the Law of Obligations of 2001 introduced into the German Civil Code provisions expressly governing pre-contractual relations. In particular, § 311(2) BGB established that obligations may arise already as a result of the initiation of business contacts or the commencement of contract negotiations. [3]

The development of German pre-contractual liability doctrine exerted a considerable influence on the formation of analogous approaches in the law of other continental European states. In the French legal system, the corresponding ideas were for a long time not codified as an independent institution, and the conduct of parties at the negotiation stage was regulated primarily through judicial practice. French courts developed the approach that the unjustified and bad-faith termination of negotiations (*rupture abusive des pourparlers*) may constitute an abuse of right and attract tortious liability on the part of the wrongdoer. It was only in the course of the French contract law reform of 2016 that these provisions received direct legislative codification: Article 1112 of the French Civil Code (*Code civil*) established the duty of parties to conduct negotiations in good faith, thereby institutionalising the principle of liability for bad-faith conduct at the pre-contractual stage. [4]

Similar tendencies are observed in the law of post-Soviet states. In particular, as a result of the reform of Russian civil legislation in 2015, Article 434.1 was introduced into the Civil Code of the Russian Federation, consolidating the obligation of parties to conduct negotiations in good faith and providing for liability in the event of bad-faith conduct in negotiations. [5]

The development of the institution of pre-contractual liability is reflected not only in national legal orders, but also in international unification instruments. In contemporary conditions, the regulation of pre-contractual relations is gradually taking shape at the supranational level as well. Thus, the UNIDROIT Principles of International Commercial Contracts establish the duty of parties to conduct negotiations in good faith and provide for liability in the event of bad-faith conduct or termination of negotiations (Art. 2.1.15). [6]

An analogous approach is enshrined in the Principles of European Contract Law (PECL), which provide that a party who has negotiated or broken off negotiations in bad faith is liable for the losses caused

thereby. [7] These provisions reflect the tendency towards recognition of the legal significance of the pre-contractual stage and the necessity of protecting the trust of parties to the negotiation process.

This development continued in the Draft Common Frame of Reference (DCFR) of Model Rules of European Private Law, which explicitly provides for the duty of parties to act in good faith during negotiations and for liability for losses caused by bad-faith conduct. [8]

The formation of such norms in international and European instruments demonstrates that the negotiation process is gradually ceasing to be regarded exclusively as a factual stage of contract conclusion and is acquiring independent legal significance. At the same time, common law systems maintain a more restrained approach: English and American law traditionally proceeds from the principle of freedom of contract negotiations and does not recognise the existence of a general duty to negotiate in good faith. As E. Allan Farnsworth notes, within the framework of common law, liability for failed negotiations arises, as a rule, only within the confines of specific legal constructs, such as misrepresentation, promissory estoppel, or negligent misstatement, and not on the basis of a general doctrine of pre-contractual liability. [9] A comparison of these approaches intensifies the scholarly debate on the legal nature of pre-contractual relations and their place in the system of civil law, which has led to the formation of various doctrinal models for characterising pre-contractual liability.

In contrast to the aforementioned legal systems, the legislation of the Republic of Uzbekistan does not yet contain special provisions directly governing pre-contractual relations. Although the Civil Code in force establishes general principles of civil law, including the principle of good faith on the part of participants in civil legal relations, specific mechanisms of liability for bad-faith conduct of negotiations are absent from it.

The historical development of the institution of pre-contractual liability has naturally led to the posing of a more complex theoretical question: what is the legal nature of the relations arising between the parties prior to the conclusion of a contract? It is at this stage that the most acute divergence of approaches manifests itself in civil law doctrine. If, at the level of practical necessity, the protection of a negotiating party who has suffered losses as a result of a counterparty's bad-faith conduct is now virtually uncontested, the question of the legal characterisation of such liability continues to remain debatable. In comparative law literature, three principal models for characterising pre-contractual liability are traditionally distinguished: the tortious model, the obligatory (quasi-contractual) model, and the independent model of pre-contractual legal relations.

The first position proceeds from the premise that pre-contractual liability is, in its legal nature, a species of tortious liability. The logic of this approach is grounded in the classical civil law axiom that, prior to the conclusion of a contract, no contractual obligation exists between the parties, and consequently any harm caused may be characterised exclusively as a non-contractual wrong. Such a formulation of the question was long characteristic of legal orders in which there was no general duty to negotiate in good faith. In Anglo-American doctrine, this very argument served as the basis for denying the existence of a general pre-contractual duty. Thus, Kessler and Fine observed that the common law does not know a direct equivalent of the German construction of culpa in contrahendo, although many of its functions are discharged through other private law institutions. [10] A similar view was expressed by E. Allan Farnsworth, who emphasised that, within common law, liability for bad-faith negotiations arises in a fragmentary and indirect manner, but not through the recognition of a general pre-contractual duty of good faith. [11]

Despite its certain logical consistency, the tortious conception reveals a number of significant limitations. First, it does not explain why liability arises not towards an indeterminate circle of persons, but exclusively towards the specific participant in negotiations with whom a special factual and informational nexus has already been formed. Second, the tortious model does not sufficiently account for the specific nature of

pre-contractual trust arising from an organised negotiation process. Finally, many of the duties characteristic of the pre-contractual stage such as the disclosure of material information, the maintenance of confidentiality, consistency of conduct, and the inadmissibility of creating a false impression of readiness to conclude a contract by their content go beyond the classical tortious formula of "do no harm."

The second position associates pre-contractual liability with the obligatory nature of the relations between the parties to negotiations. Proponents of this approach proceed from the premise that the very fact of the parties entering into serious negotiations is capable of giving rise to a special legal bond. This bond is not yet the main contract, but it does create certain mutual duties between the parties.

Among such duties are, in particular, requirements of good-faith conduct in negotiations, disclosure of material information, maintenance of confidentiality, and the inadmissibility of misleading the counterparty as to one's intention to conclude a contract. A breach of these duties is therefore regarded not as the ordinary infliction of harm upon a third party, but as a violation of the obligatory relationship that has arisen between the participants in negotiations. [11]

The most consistent development of this approach has occurred in German law and doctrine. In the current version of the German Civil Code (§ 311(2) BGB), it is expressly established that obligatory relations may arise already as a result of the initiation of business contacts or the commencement of negotiations for the conclusion of a contract. The legislator thereby recognised that a special legal bond may arise between prospective counterparties even before the conclusion of the main contract. [13]

Such an understanding of pre-contractual liability was developed in the works of representatives of German civil doctrine Claus-Wilhelm Canaris and Dieter Medicus who treated the duties of good-faith conduct in negotiations as part of the system of the law of obligations. [12][13]

At the same time, the contractual characterisation of pre-contractual liability raises certain theoretical questions. The main difficulty lies in the fact that an obligation, in the classical sense, is grounded in the agreement of the parties, whereas at the negotiation stage such agreement may not yet exist. Moreover, an excessive conflation of pre-contractual and contractual liability may lead to a blurring of the different types of protected interest. In the pre-contractual sphere, it is above all the reliance interest of the party who has incurred expenses in anticipation of good-faith negotiations that is protected, whereas contractual liability is directed towards protecting the interest in the performance of the contract itself. [14]

For this reason, the third position according to which pre-contractual relations constitute an independent legal construction, not fully reducible either to tort or to contract has gained considerable support in modern civil law literature.

Paula Giliker, analysing the regulation of pre-contractual liability in French and English law, notes that neither the tortious nor the contractual model is fully capable of explaining the mechanism of risk allocation in the negotiation process. In her view, liability at the pre-contractual stage is formed at the intersection of several principles freedom of negotiation, protection of trust, and the requirement of good faith which testifies to the existence of a special legal construction that cannot be accommodated within the traditional categories of civil law. [16]

In a similar vein, John Cartwright and Martijn Hesselink, in their comparative legal study of European private law, emphasise that the pre-contractual stage represents a special legal zone in which different legal orders employ various doctrinal characterisations, yet in practice address a single question: to what extent must one party bear responsibility for having generated in the other party a reasonable expectation that a future contract would be concluded. [14]

Analogous conclusions are contained in the works of Reinhard Zimmermann and Simon Whittaker on the role of the principle of good faith in European contract law. The researchers draw attention to the fact that the pre-contractual stage particularly vividly demonstrates the limitations of the traditional opposition

between contractual and non-contractual liability, since the legal bond arising between the parties is not grounded in a contract already concluded, yet cannot be reduced to an ordinary tort either. Such a bond is formed as a result of the parties' entry into negotiations and presupposes the emergence of mutual duties of good-faith conduct directed towards the protection of the trust of participants in the negotiation process. In this connection, pre-contractual relations occupy an intermediate position in the system of civil law and are regarded as a special element of the mechanism of civil law regulation, ensuring the legal protection of the parties' interests at the stage of formation of a future contractual obligation. [16]

Proponents of the independent model most consistently explain the specifics of the pre-contractual legal relation. First, such a legal relation arises not from an already concluded contract, but from the legally significant entry of the parties into the negotiation process. Second, it is directed not towards the performance of a contractual result as such, but towards ensuring an appropriate standard of conduct in the course of achieving or failing to achieve that result. Third, the object of protection here is above all the reliance interest of the negotiating party, rather than the expectation interest in the performance of the contract. Finally, the content of the pre-contractual legal relation encompasses duties of an organisational and protective character: disclosure of material information, maintenance of confidentiality, consistency of conduct in negotiations, inadmissibility of fictitious negotiations, and impermissibility of abusing the right to terminate negotiations. The combination of these characteristics renders the characterisation of pre-contractual liability as a species of ordinary tort or as a form of incomplete contractual obligation particularly problematic.

The issue of the legal nature of pre-contractual relations is directly connected with the question of their place in the system of civil law. As Reinhard Zimmermann notes, the pre-contractual stage vividly demonstrates the limitations of the traditional opposition between contractual and non-contractual liability, since the legal bond arising between the parties is not based on an already concluded contract, yet cannot be reduced to an ordinary tort. Such a bond is formed as a result of the parties' entry into negotiations and presupposes the emergence of mutual duties of good-faith conduct directed towards the protection of the trust of negotiating parties. In this connection, pre-contractual relations occupy an intermediate position in the system of civil law and are regarded as a special element of the mechanism of civil law regulation, ensuring the legal protection of the parties' interests at the stage of formation of a future contractual obligation. [16]

An analysis of the current civil legislation of the Republic of Uzbekistan reveals a number of issues associated with the regulation of pre-contractual relations. First and foremost, it should be noted that national law lacks special provisions directly governing the negotiation stage and establishing grounds for liability in the event of bad-faith conduct therein. The current legislation lacks a clearly formulated legal mechanism for the protection of parties to negotiations which would allow for compensation for losses incurred as a result of a counterparty's bad-faith conduct at the pre-contractual stage.

Moreover, the legislation does not provide sufficient legal certainty as to the conduct of the parties in the course of negotiations. In particular, it does not establish the duties of participants in the negotiation process to act in good faith, to disclose information material to the future contract, to maintain the confidentiality of information received, or to refrain from bad-faith termination of negotiations after having given the other party a reasonable expectation that the contract would be concluded.

A further issue is the absence of systematic regulation of the pre-contractual stage in the context of the development of foreign economic activity. In conditions of active attraction of foreign investment and the expansion of international economic cooperation, the absence of clear rules governing the conduct of the parties at the negotiation stage may reduce the level of legal certainty and trust among participants in civil transactions.

Finally, the current national regulation in this sphere lags, to a certain degree, behind modern trends in the

development of civil and private international law. Unlike a number of foreign legal orders and international unification instruments, in which pre-contractual relations are regarded as a legally significant stage of obligation formation, the legislation of the Republic of Uzbekistan does not yet contain a comprehensive mechanism for the legal regulation of pre-contractual relations.

The study conducted leads to the conclusion that the contemporary development of civil law is characterised by a tendency towards the recognition of pre-contractual relations as a legally significant stage of contractual obligation formation. In this connection, the formation within the legislation of the Republic of Uzbekistan of a systematic mechanism for the legal regulation of pre-contractual relations presents itself as an objectively necessary condition for enhancing legal certainty in entrepreneurial activity and reinforcing the trust of participants in civil transactions.

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