

PRE-CONTRACTUAL LIABILITY

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Abstract

This article examines the legal framework governing the pre-contractual period, defined as the interval of negotiations and operations preceding the formal conclusion of a contract. It analyses the nature of obligations arising during this phase, which may be statutory or conventional, determining whether the resulting liability is tortious or contractual. Central to the study is the concept of culpa in contrahendo, which aligns Romanian law with a unified European legal tradition. The research provides a comparative perspective, noting that Germany treats pre-contractual liability as contractual, Italy views it primarily as tortious, and English law generally does not recognize it as a distinct institution. Additionally, the article discusses the application of Article 12 of Regulation (EC) No 864/2007 (Rome II) regarding the law applicable to these obligations. Ultimately, liability is shown to be grounded in the breach of specific duties such as good faith, disclosure, and loyalty.

1. THE CONCEPT OF THE PRE-CONTRACTUAL PERIOD

By the *pre-contractual period* one shall understand the interval antecedent to the conclusion of the contract, comprising the ensemble of juridical acts and operations undertaken with a view to the formation of the legal transaction. This pre-contractual stage may encompass a variety of preparatory or preliminary instruments through which the parties structure the conduct of negotiations or formalize the stage attained in their discussions. Such instruments may generate heterogeneous juridical effects, ranging from mere gentlemen's agreements to undertakings of a more binding and enforceable nature.¹

For the purpose of determining the legal regime governing the pre-contractual phase², it is incumbent to examine the nature of the obligations arising at this juncture, with reference to their juridical source. Accordingly, the obligations assumed in the course of contractual negotiations may be of a statutory nature – deriving from explicit legislative provisions or

¹ L. Pop, *Treatise on Civil Law. Obligations. Volume I. General Legal Regime (Tratat de drept civil. Obligațiile. Volumul I. Regimul juridic general)*, CH Beck Publishing, Bucharest, 2006, p. 94–95.

² *Idem*, p. 97-98.

inferred from the general framework of legal norms – or of a conventional nature, arising from the parties' express covenants.

Article 1349: Tort Liability³

“(1) Every person has the duty to observe the rules of conduct imposed by law or by local custom and shall refrain, through actions or omissions, from infringing upon the rights or legitimate interests of other persons.”

Article 1350: Contractual Liability⁴

“(1) Every person must perform the obligations which he or she has undertaken by contract.”

The legal regime applicable shall consequently be determined by the source of the obligation breached. In the event of a breach of a statutory obligation, liability shall be tortious, in accordance with the general rules governing extra-contractual civil liability. Conversely, where a conventional obligation assumed under a preparatory contract is infringed, liability shall be contractual in nature, being subject to the provisions of the respective contract.⁵

With regard to the determination of the law governing the pre-contractual phase, in situations where the parties negotiate a contract containing elements of extraneity, legal scholarship consistently holds that the law applicable to the pre-contractual phase is the same as the law governing the projected principal contract, in accordance with the relevant conflict-of-laws rules.⁶

2. THE IMPOSITION OF LIABILITY ON PARTIES DURING THE PRE-CONTRACTUAL PERIOD IN THE CONTEXT OF ROMANIAN AND INTERNATIONAL LAW

Pre-contractual liability remains a subject of intense debate, both in comparative law and in domestic legal doctrine. Nonetheless, scholarship has reached a conceptual consensus regarding the nature and content of this form of liability, particularly owing to the development of a unified conception at the European and international levels, as reflected in modern doctrinal codifications. This theoretical synthesis, consecrated under the designation of *culpa in contrahendo*, has exerted a visible influence upon the provisions of the current Romanian Civil

³ Art. 1349 para. (1) of Law no. 287/2009, *Romanian Civil Code of 2009*.

⁴ Art. 1350 para. (1) of Law no. 287/2009, *Romanian Civil Code of 2009*.

⁵ Reference is made to Articles 1349 and 1350 of Law no. 287/2009, *Romanian Civil Code of 2009*.

⁶ See A. Bonomi, *The Rome I Regulation on the Law Applicable to Contractual Obligations – Some General Remarks*, in *Yearbook of Private International Law*, vol. X/2008, p. 165.

Code, thereby aligning it with a consolidated legal tradition found within the so-called “European common law” of pre-contractual obligations.⁷

The institution of the non-contractual obligation⁸, enshrined in Article 12 of Regulation (EC) No 864/2007 (Rome II), constitutes an autonomous concept that must be interpreted uniformly across the European Union, albeit not possessing an entirely independent meaning. By incorporating provisions on *culpa in contrahendo* within Article 12, the European legislator sought to establish comprehensive extra-contractual regulations, as emphasized in Recital (29) of the Regulation. Through *culpa in contrahendo*, a juridical obligation arises solely from the initiation of negotiations with a view to the conclusion of a contract.

2.1. Liability through *culpa in contrahendo* in the context of romanian law⁹

The notion of *culpa in contrahendo* constitutes, in essence, a mnemonic device¹⁰ employed to designate the entirety of forms of legal liability associated with the parties’ conduct during the pre-contractual stage, that is, prior to the actual conclusion of the contract. At the same time, this expression is used to articulate a response to the question of the juridical nature of pre-contractual liability – whether it is tortious, contractual, or governed by a sui generis regime.¹¹

Although, in a strict formulation, it would be more accurate to speak of “liability for fault in contracting,” legal scholarship, case law, and legislation employ the term *culpa in contrahendo* to encompass all hypotheses in which an autonomous form of liability is recognized, deriving from the breach of obligations arising during negotiations – irrespective of whether the contract has ultimately been concluded, and irrespective of whether, once concluded, it is valid or void.

The juxtaposition between *culpa in contrahendo* and contractual liability becomes particularly relevant, from a substantive perspective, in situations where the contract has been

⁷ M. Nicolae, *Formarea progresivă a contractului. Acte și contracte preliminare (Progressive Formation of the Contract. Preliminary Acts and Contracts)*, in I.F. Popa, *Culpa in contrahendo în dreptul român (Culpa in Contrahendo in Romanian Law)*, Universul Juridic Publishing, Bucharest 2012, p. 497.

⁸ M. Nicolae, *Formarea progresivă a contractului. Acte și contracte preliminare (Progressive Formation of the Contract. Preliminary Acts and Contracts)*, în D.A. Popescu, *Despre culpa in contrahendo. O perspectivă preponderent de drept internațional privat (Culpa in Contrahendo: A Predominantly Private International Law Perspective)*, Universul Juridic Publishing, Bucharest 2011, p. 553.

⁹ *Idem* p. 498-551.

¹⁰ V. Y. Ben-Dror, *The Perennial Ambiguity of Culpa in Contrahendo*, in *The American Journal of Legal History*, Vol. 27, No. 2, April 1983, p. 142.

¹¹ V. J. von Hein, *Culpa in Contrahendo*, in *The Max Planck Encyclopedia of European Private Law*, Vol. I, Oxford University Press, 2012, p. 430.

concluded despite a prior deviation from the duty of loyalty specific to the pre-contractual stage. In such circumstances, the Romanian legal system allows for either reliance upon pre-contractual tortious liability – for instance, pre-contractual fraud (*dolus*), or the invocation of proper contractual liability, where non-performance originates in unlawful conduct preceding the conclusion of the contract – for example, a defect fraudulently concealed already during the negotiation phase.

In the latter case, pre-contractual tortious liability is absorbed into contractual liability – as would occur where the buyer pursues solely an action for warranty against hidden defects, even though the defect was known to and deliberately concealed by the seller during negotiations.

On a secondary plane, one must also take into account contractual liability which may arise even during the formation of a contract, where specific obligations stemming from preliminary agreements or preparatory covenants are not performed, thereby giving rise to *culpa in contrahendo*.

The pre-contractual period is no longer governed, in contemporary legal doctrine, by the relativism of general obligations characteristic of tort liability – such as that enshrined in Article 1349 of the Civil Code – but rather by a set of specific duties which, although not always qualifying as obligations in the strict sense, presuppose the existence of a determinable creditor and debtor: namely, the negotiating partners or the contracting parties. Compliance with these duties gives rise to a distinct juridical relationship – the pre-contractual relationship – which is differentiated both from tortious liability and from proper contractual liability, thereby shaping an autonomous legal relation between the parties to the negotiation.

For analysis, consider the following case¹²: a natural person benefits from public utility services – specifically, water supply and sewerage – prior to the formal conclusion of a contract with the provider, but refuses or delays payment for the services rendered. The central legal issue lies in determining the nature of the obligations arising during the pre-contractual period and the juridical basis of civil liability for these prestations.

In this matter, the claimant – a commercial company providing water and sewerage services – argued that although the written contract was only signed on 26 June 2012, the

¹² Sentence of 5 September 2017, Botoșani Court, Civil Division, available at: <https://sintact.ro/#!/jurisprudence/530841229/1/sentinta-nr-3615-2017-din-05-sept-2017-judecatoria-botosani-actiune-in-raspundere-contractuala-civil?pit=2025-06-06&keyword=raspunderea%20in%20perioada%20precontractuala&cm=SREST>, accessed on 07.06.2025, at 03:02.

defendant had been benefiting from services since 1 October 2010. Nevertheless, the defendant failed to fulfil his payment obligation, thereby generating outstanding debt and penalties.

The court was thus called upon to assess whether the mere use of services prior to the signing of the contract entails a statutory obligation to pay and, consequently, civil liability. In this respect, the legal basis invoked was Article 30(3) and (4) of Law No. 241/2006, which stipulates that users of water supply and sewerage services are bound to pay their value, even in the absence of a written contract, provided that they have in fact benefited from such services.

This regulation reflects a special legal regime that compensates for the absence of a written agreement, grounding itself either in a form of quasi-delictual civil liability or in the existence of a statutory obligation arising from the factual enjoyment of a regulated service without contesting or refusing it. In this sense, the user becomes a debtor by operation of law, while the provider is entitled to invoice and pursue the recovery of outstanding debts, including penalties.

Thus, during the pre-contractual period, the obligation to pay does not originate in a contract but in the use of services pursuant to the law – which renders unnecessary the proof of express consent. The passive conduct of the defendant – tacit acceptance of the services and the absence of any challenge to the invoices – is interpreted as an implicit confirmation of the de facto relationship and of the payment obligation.

In conclusion, the civil liability of the user during the pre-contractual period is grounded in the statutory provisions governing public utility services, coupled with his conduct evidencing acceptance of the benefit. Such liability does not presuppose fault in the strict sense, but arises *ex lege* and has an objective character, being conditioned solely upon the actual performance of the service and the absence of payment.

2.2. Liability through *culpa in contrahendo* in the context of private international law¹³

For the purpose of a comparative analysis of the institution of *culpa in contrahendo*, we shall summarize the concepts developed across various legal systems and international doctrinal approaches.

In German law, the institution of pre-contractual civil liability has, since its inception, been assimilated to the legal regime of contractual liability. This doctrinal and jurisprudential

¹³ M. Nicolae, op. cit. D.A. Popescu, p. 552-630.

classification rests upon the necessity of affording effective protection to the party engaged in negotiations, with respect to the damages caused prior to the formal conclusion of a contract.

A landmark decision in this field is the so-called *Linoleumrollenfall*¹⁴, in which the German courts admitted the possibility of holding an entrepreneur liable for the unlawful acts of his agents, pursuant to § 831 BGB, without requiring proof of his direct fault¹⁵. This solution was grounded in the idea of extending contractual liability to the pre-contractual stage, with a view to ensuring reparation for damages suffered by the other party – for instance, bodily injury or property damage – who stood in a relationship of trust with the prospective contracting party.

Furthermore, in order to avoid evidentiary difficulties associated with proving the intent required under § 826 BGB, German case law preferred to base liability in the pre-contractual phase upon a legal framework akin to contractual liability, thereby offering a more accessible avenue for the recovery of damages.

This approach reflects a doctrinal and jurisprudential evolution directed towards safeguarding the legitimate expectations of parties engaged in negotiations, and consecrates the idea that the mere undertaking of the process of contract formation generates, in itself, obligations of conduct – such as loyalty, disclosure, and diligence – the breach of which entails liability for the party causing the harm, regardless of the valid conclusion of the contract proper.¹⁶

In a decision delivered in 2011, the Federal Supreme Court of Germany (*Bundesgerichtshof*) reaffirmed that the seller's pre-contractual duty of disclosure is not deemed fulfilled merely by handing over relevant documents, where the seller cannot legitimately and reasonably rely, in light of the circumstances of the case, on the buyer's careful examination thereof for the purpose of making an informed contractual decision. In other words, the mere provision of documentation does not exonerate the seller from his duties of disclosure and clarification, as set forth in §§ 311(2) and 241(2) BGB, which govern pre-contractual relations and the obligations inherent therein.

Duties of warning and advisory care are intensified during the pre-contractual phase, and their breach may trigger the seller's liability under *culpa in contrahendo*, particularly when material defects of the good are either concealed or misrepresented through positive statements.

¹⁴ Reichsgericht (RG), *Judgment of 7 December 1911* – VI 240/11 – RGZ 78, 239–241.

¹⁵ See: “A person who intentionally causes harm to another in a manner contrary to good morals is obliged to compensate the other person for the damage caused”, cited from Art. 826 BGB.

¹⁶ U. Magnus, *The Borderlines of Tort Law in Germany*, in M. Martin-Casals, *Interactions with Contract Law*, Intersentia Publishing, Cambridge 2019, p. 196.

However, to the extent that these aspects fall within the legal regime of statutory warranty for defects, the buyer's claims for non-performance of pre-contractual obligations are absorbed by the special rules on liability for defects, pursuant to the principle of specificity. Only in cases where the omitted or misrepresented information does not concern the agreed quality of the good, but rather extrinsic aspects of the contract, does the possibility remain to bring an action for damages based on *culpa in contrahendo*.

This jurisprudence emphasizes the essential distinction between the regime of warranty for defects and autonomous pre-contractual liability, thereby reaffirming the complex and nuanced nature of the protection afforded to parties during the contract formation stage under German law of obligations.

In Italian law, pre-contractual liability arising from *culpa in contrahendo* is consistently classified, both by the predominant doctrine and national jurisprudence¹⁷, as a form of tortious liability (*responsabilità aquiliana*). This classification is based on the notion of breaching a general rule of conduct, which requires that the process of contractual negotiation be carried out in good faith and in accordance with the standards of correct and loyal behaviour.¹⁸

Accordingly, *culpa* at the pre-contractual stage is seen as an infringement of the general principle of *neminem laedere* – the duty not to harm others – enshrined in Article 2043 of the Italian Civil Code¹⁹, which imposes the obligation to repair any damage caused by illicit conduct. Thus, liability for *culpa in contractu negotiatione* does not presuppose the existence of a valid contract but is based exclusively on the breach of a legal duty of correct and prudent conduct during contract formation.

In a significant decision of 12 July 2016²⁰, the Italian Court of Cassation consolidated the theory of the “qualified social contact,” inspired by the German doctrine of *de facto* contractual relations. The innovation lies in the fact that liability for *culpa in contrahendo* is no longer strictly grounded on tortious fault but on the breach of good faith. This generates reciprocal protective obligations between the parties during negotiations, conditioned on the existence of a shared purpose, which endows the social contact with a “qualified” legal character.

¹⁷ Italian Court of Cassation, Civil Section, Judgment No. 1000 of 16 January 2013, Rome 2013

¹⁸ Italian Court of Cassation, United Sections, Decision No. 9645/2001, Rome 2001

¹⁹ C.M. Bianca, *Diritto civile*, vol. 3, *Il contratto*, Giuffrè Publishing, Milan 2019, p. 159

²⁰ Italian Court of Cassation, First Civil Section, Judgment No. 14188 of 12 July 2016, Rome 2016

In English law, pre-contractual liability is not recognized as a distinct institution. Until the contract is concluded, the parties in negotiation have no legal obligations toward each other, and the general principle is the absence of any duty to disclose information during commercial negotiations. The only exception arises when the parties expressly assume specific obligations during negotiations – for example, through letters of intent, heads of terms, or confidentiality clauses. In the absence of such express agreements, no liability can be incurred, as established by English jurisprudence, which emphasizes that “the general principle that there is no duty to disclose information in the context of negotiations concerning an ordinary commercial contract (...) remains one of the foundations of our contract law.”²¹ The reluctance of English law to recognize the principle of good faith as a general norm applicable to negotiation and contract performance does not appear to rest on an absolute doctrinal foundation, but rather derives from pragmatic considerations linked to the legal tradition and the concern to maintain a predictable contractual framework²². Good faith is perceived as a vague concept, susceptible to broad interpretation, which could encourage judicial interventionism and undermine the stability of the principle of freedom of contract.

For the purpose of establishing a uniform approach at the European Union level regarding this type of pre-contractual fault, one can focus on Article 12 of Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (“Rome II”), which is entirely dedicated to *culpa in contrahendo*. It provides:²³

“(1) The law applicable to non-contractual obligations arising from agreements concluded prior to the signature of a contract, whether or not that contract is actually concluded, shall be the law applicable to the contract in question or the law that would have been applicable to the contract had it been concluded.

(2) Where the law applicable cannot be determined under paragraph (1), the applicable law shall be:

(a) the law of the country in which the damage occurs, irrespective of the country in which the event causing the damage takes place and irrespective of the country or countries in which the indirect consequences of that event are felt;

²¹ Court of Appeal, Civil Division, *Banque Financière de la Cité SA v. Westgate Insurance Co Ltd.* London 1988, (1989) 2 All E.R. 952, available at: <https://www.studocu.com/row/document/kampala-international-university/insurance-law/banque-v-westgate-insurance/6576510>, accessed on: 07.06.2025, at 07:30.

²² V. *Chitty on Contracts*, 32nd Edition, vol. I, Sweet & Maxwell Publishing, London 2015, p. 327

²³ Cited in M. Nicolae, op. cit. D. A. Popescu, p. 571

(b) where the parties have their habitual residence in the same country at the time the event causing the damage occurs, the law of that country;

(c) where, from all the circumstances of the case, it is clear that the non-contractual obligation arising from agreements concluded prior to the conclusion of a contract is manifestly more closely connected with another country than the countries referred to in points (a) and (b), the law of that other country shall apply.”²⁴

The Court of Justice of the European Union has consistently emphasized the importance of the principles of transparency and contractual loyalty, especially in the context of public procurement. In case C-267/18²⁵, *Delta Antrepriză de Construcții*, the CJEU held that an economic operator has an obligation to provide complete and accurate information to the contracting authority concerning any relevant situation, particularly where there is a risk of misperception regarding the manner in which it fulfils its obligations. Unauthorized subcontracting, which led to the termination of a previous contract, was considered a serious breach, sufficient to justify exclusion from a new procurement procedure – provided that the operator had the opportunity to demonstrate corrective measures taken, in accordance with the rights of defence and the principle of proportionality.

FINAL CONCLUSIONS

The pre-contractual period is governed by the binding force of the commitments undertaken by the parties in the preliminary instruments executed by them. It encompasses the key stages leading to the conclusion of a civil contract – the expression of intent, negotiation, offer and acceptance, and the meeting of the minds. During this period, the parties are bound by legal obligations – such as good faith in negotiations, confidentiality, pre-contractual disclosure, and similar duties. Based on these obligations, both the object of the contract and the object of the obligation are examined in the light of the purpose of the contract, as a condition for its validity.

Ultimately, in the absence of legally and morally required conduct during the pre-contractual period, the parties may incur civil liability under *culpa in contrahendo*, which may pertain to either the tortious or the contractual nature of liability.

²⁴ Cited from Art. 12 of *Regulation (EC) No. 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations* (Rome II).

²⁵ Judgment of the Court of 3 October 2019, Case C-267/18.

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