Confidentiality - A Two-Appeal Principle

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Abstract

This article analysis relates to the creation of conditions for the conclusion of the contract.This is the moment when the negotiating parties determine whether there will be a contract or not. This is the stage that in the best case is finalized with the contract signing.Known as the pre-contractual stage, it is considered as the foundation of the contractual relationship.Conduct in good faith at the stage of entering into a contract would also avoid causing potential damages and liability".- ***The first part gives*** , of Completion of the contract in good faith, is a legal requirement under the Civil Laë tradition, but unlike the requirement for pre-contractual trust, finds place in the Common Law tradition.In this part of the study, the detailed treatment of the manner of performance of the contract will be set aside, focusing mainly on the obligations that dictate its fulfillment in good faith and the liability incurred in the event of its absence . ***The second part*** is concentrated, Contract Interpretation. The third part will be treated as a brief and comparative overview of the common law of Civil Law in the interpretation of the contract, taking into account the main interpretative criteria, to underline the main differences between them. Among all the criteria, the focus will be on trust, which is sanctioned as a special criterion of interpretation by the Civil Law countries. ***The fourth part*** analysis the validity of the contract.In this last part of the chapter, I will try to clarify the confusion created between the rules of contract validity and the rules of conduct, as well as the role and impact of the breach of the trust principle in the validity of the contract. **Conclusions** .Regarding the situations that arise for the damage that comes to the parties from non-fulfillment of obligations and breach of the principle of good faith during the contract's formation, it is necessary to clarify how the type of damage that came during the pre-contractual phase and which interest has failed to realize one of the parties. In fact, this is a genuine duty of the court which, as the case may be, must specify exactly: the responsibility of the parties, the interest that has been violated, the type of damage that has been caused.

Keywords*:* contract law ,internal law ,contractual relation,internal contract interpretation, civil law

Introduction

I. Negotiating between parties or pre-contractual stage

The first part relates to the creation of the conditions for the conclusion of the contract. This is the moment when the negotiating parties determine whether there will be a contract or not. This is the stage that in the best case is finalized with the contract signing. Known as the pre-contractual stage, it is considered as the foundation of the contractual relationship. This is one reason that attention focuses on how parties behave or interact with one another. The definition of the terms of the contract is carried out at this stage and it is related both to the interpretation of the contract and to the manner in which it will be fulfilled. Conduct in good faith at the conclusion of the contract would also avoid causing potential damages and liability.

II. Fulfillment of the contract.

The fulfillment of the contract in good faith is a legal requirement under the Civil Law tradition, but unlike the requirement for pre-contractual trust, it also finds place in the Common Law tradition. In this part of the study, detailed treatment on the way of performance of the contract will be set aside, focusing mainly on the duties that dictate its fulfillment in good faith and the liability incurred in the event of a lack of confidence. Also, in this section the respective positions of different legislation regarding remedies for correcting violations of contractual obligations will be clarified.

III. Contract Interpretation.

The third part will be treated as a brief overview of the common law and civil law traditions in the interpretation of the contract, taking into account the main interpretative criteria, to highlight the main differences between them. Among all the criteria, the focus will be on trust, which is sanctioned as a special criterion of interpretation by the Civil Law countries.

IV. Validity of the contract.

In this last part of the chapter, I will try to clarify the confusion created between the rules of contract validity and the rules of conduct, as well as the role and impact of the breach of the trust principle in the validity of the contract.

1. GOOD FAITH IN THE SIGNING OF THE CONTRACT

At the pre-contractual stage, there is potentially a contract. At this stage, interaction of the parties is required to discuss and decide on the terms and conditions of the contract. During the negotiations, the parties have serious intent on signing the contract, whether at the conclusion of the contract, will either fall or disagree on its connection. The purpose should be visible and understood by the other party. Essential Negotiations of the contract (essentialia negotii) are those for which the parties have to agree that it is considered complete, although other less important elements are left to be dealt with later or can be are also entrusted to third persons.[1]

The pre-contractual phase is of particular importance because at this stage a legal action is being prepared, with the consequences of which the parties will remain bound. Despite its success, this stage is characterized by many efforts to reach the point of contact of the various interests of the parties.

Towards the conclusion of the contract

Negotiation for conclusion of the contract serves to create it under those conditions that would reflect the realization of the interests of the parties, interests in the business world of economic character. When the parties cooperate for the creation of the contract, they step by step go towards its completion. Termination or conclusion of the contract is the long-awaited moment of the parties, which have long gone to reach it. Until the contract is concluded, at least two main moments differ: offer (proposal) and acceptance, which constitute a mutual consent for the conclusion of the contract and mark the beginning and end of a successful pre-contractual phase.[2]

1.1.1 The offer (the proposal)

The offer (proposal) is addressed to the party that is required to be contracted (except for the case of public offers). The Albanian Civil Code does not provide any definition for the offer. Meanwhile, a definition of the offer is found in US RSLC, according to which: "The offer is the manifestation of the will to enter into a deal, made in order to justify another person to understand that his adoption to the deal is invited and will finish it".[3]This shows that the offer "as a manifestation" refers to the external willingness to contract, expressed in such a way as to create the expectation of the conviction that the intention is to enter into a contract. The offer provides the receiver with a special power. After the offer is made, the decision to terminate the contract is in the hands of the receiver. Offer as such, is different from false promises or simple statement of purpose.

Promotional advertisements of any kind can not constitute an offer. The offer, to be considered such, must be serious and distinguished from the preliminary discussions. There are also similar "invitation to treat" offers that come from Latin invitatioadofferendum, which differ from the classic offer for contract signing. These are money supply because they express willingness to negotiate, which can be well illustrated with the auction, the request for proposal in the case of a

[1]Cărpenaru, S. D. (2012). The Conclusion of the Contract from the Perspective of the New Civil Code. Lex ET Scientia. Juridical Series 12 (1). f. 8 https://www.google.al

[2]In Common Law countries, unlike the Civil Law countries, another element is required when forming the contract. This element is expressed with the term "consideration" and expresses everything that is promised to the other party and may take the form of things, services, money, promise of action or waiver of future actions. There is no definition for the term "consideration" but essentially contains an exchange, quid pro quo..

[3] Restatement (Second) of the Law of Contracts, § 24

public procurement, or the advertising of various goods. In the latter case, this is the best setting, as in a store where some goods are sold there is uncertainty whether the seller or buyer is the person who makes the offer.

Generally, the offer is valid when it contains the essential elements of the contract, which is required to be completed. During a negotiation, two are the most important offers: (1) the first offer, which marks the beginning of the negotiations and (2) the last offer, the one that is accepted. The offer must be clear and can be expressed once. It is final and should be accepted as it is. In the Common Law, Contract Law is also known as the "mirror image rule", so acceptance must be no more than the exact coverage of the offer. Efforts to change the offer constitute a counter-off or a new offer, which undoubtedly extends the negotiation time.

According to the German Civil Code, the acceptance of the offer, which is accompanied by changes (extensions, restrictions, or modifications) is considered a refusal, combined with a new offer. The offer, which is accepted late, will be considered a new offer. The new offer, according to the Italian Civil Code, will be considered acceptance received not according to the initial offer. So, during the negotiations many counter-offers can be made, which contain real willingness to contract. The goal of the parties is to conclude a contract with favorable terms for them, so they invest time and make enough efforts to achieve this goal.

1.1.2 Acceptance

Acceptance marks the end of negotiations. According to RSCL: "acceptance is the manifestation of the consent to the terms, made by the receiving party in an invitation or requested manner by the offerer".[1]Offer acceptance means there is nothing left to discuss about the contract. The receiving party agrees on what the offer is and that acceptance can not be changed later, without charging the party with the corresponding responsibility. When the receiving party expresses the offer's acceptance, in one of the ways provided in the law, also considering the type of contract, must be confident in the decision it has received. Admission means that the parties from that moment and in the future will stay connected to fulfill all that is stated in the contract. Because a good deal of contracts is complex and linked to long terms, decision-making becomes even more difficult.In the United States, it is important to receive acceptance from the receiver and no special way of expressing acceptance (in words, actions, and using any means appropriately) is required, except when a tenderer has designated a form set, which is nevertheless considered more as a suggestion than as a limitation. This is also the attitude of the English courts, where the manner of acceptance is set in favor of the host. In the Yates Building Co Ltd v. R J Pulleyn& Sons (York) Ltd. (1975), the offerer had requested that the admission be notified in writing and sent by registered mail. The receiver sent the notification of receipt in writing, but by simple mail and the court considered that the receipt was effective. In England, acceptance generally is effective at the moment the bidder becomes aware of it.

In England, acceptance generally is effective at the moment the offerer becomes aware of it. In Germany, the Civil Code established the rule of acceptance of entry, while in France the legislature did not set a precise time for effective admission, fluctuating between the moment the receipt was initiated by the receiver and the moment of his arrival to the offerer.[2]However, the court's attitude is in favor of informing the offerer of the acceptance, being told by the latter.[3]

1.1.3 Offer's Destiny

As soon as an offer is made, its destinycan not be determined, but the offeror may stipulate the terms within which the offer may be accepted or refused. The receiver decides on the offer. The Albanian Civil Code provides in detail how the offeror and receiver's response to the offer will enable the termination or not of the contract. Since the negotiation phase starts from making an offer, it is legally recognized the obligation of the person making the offer to stay tied to it except when that tie is excluded.[4]

The obligation to stay tied to the offer makes it possible for the offeror to be serious in his proposal and not to make offers without the intention of concluding a contract. The relationship created between the offeror who has started a concrete offer and the other negotiating party is a relationship that pays the offering party and suspends his expectations towards the

[1]Restatement (Second) of the Law of Contracts, § 50
[2] Rodolfo, S. (2004). Formation of Contracts Në A. Hartkamp, M. Hesselink, E. Hondius, C. Joustra, E. du Perron& M. Veldman (Eds.), vep. e cit., page 358-359
[3]Suraniti, D. M. The Contract
[4]Civil Code of the Republic of Albania, article 665, paragraph 2

conclusion of the contract. This waiting period should be long enough to allow the other party to consider and evaluate the offer, but on the other hand, it should be reasonably short to allow the offeror to realize his interests with another party. The deadline for accepting the offer is logically imposed by the nature of the agreemen.[1]

The Albanian Civil Code provides for some options, which set the deadline, though not with the time periods expressed in the unit of time (days, months, years) common to this code. Thus, when a deadline for acceptance is not set, the offer is valid until the time usually or according to circumstances it is necessary for the receiver to reach the other party's response. When the receiver is present, the proposal must be received immediately. By contrast, the offer loses power. When a deadline for the receipt is set, the response must come within the deadline. When it does not arrive within the deadline, but acceptance may have been initiated on time, the termination or not of the contract is in the hands of the proposer, who if he / she does not wish to remain bound, must immediately notify the recipient. When acceptance is delayed, the proposer may call it valid, promptly notifying the other party.

If the offerer does not receive a positive response within the deadline, it is generally believed that the offer has not been accepted or has been rejected. This means there will be no contract agreement. But there is also the possibility that the contract is called concluded at the end of the deadline. These are those contracts, which only contain the obligation of the offeror. The deadline, in this case, serves to refuse the offer from the receiver. If the offer is refused, the contract will not be signed.

The offerwhich is accepted, but that is not compatible with its content, is called a refusal and at the same time as a new proposal.[2]The contract will not be concluded even when the proposal for its conclusion or acceptance for its conclusion is withdrawn by the offeror or the receiver before reaching the other party.[3]Withdrawal comes after the offerer has started his or her acceptance of the proposal, but is carried out to stop the arrival at the other party, so, before it arrives, in order to avoid any possible engagement or responsibility.

In England, when a deadline for the offer acceptance is set, it may be revoked at any time before the deadline expires. This means that, in order to accept the offer, the receiver must reply within the deadline. If no deadline is set, the offer is valid until it is accepted for a reasonable period of time. The offer falls in the case of the death of any of the contracting parties.

In Italy, the offer can be revoked until the contract is completed and arrives at the receiverbefore the acceptance. Delayed offer acceptance may be considered by the offeror by notifying the receiver immediately, as usually the acceptance must be made within the established deadlines or required by the type of contract or custom.The Italian Civil Code also provides for an irrevocable offer, which remains so even in the event of the death or loss of the offeror's ability (unless the nature of the contract or other circumstances causes the offer to miss the effects) when the offeror is obliged to keep the offer valid. The German Civil Code provides that the offer is of no value if it is refused or is not accepted: (1) immediately, when the offer is made in the presence of the receiver or by using telephone and other means of technology, (2) within the time limit that the offeror awaits under the circumstances (3) within the deadline set by the offeror.

The position of the French courts in relation to the validity of the offer is the same as the legal provisions of other Civil Law legislation, according to which the offeror submitting a deadline is bound up to its conclusion, while the lack of time limit setting causes to wait for a time that is needed, according to reasonable standards. The offeror will be held liable if it revokes the offer within the specified time limit or the time it takes. The offer can not be revoked even if it is declared irrevocable.

In the USA, acceptance of the offer may also be done through the performance of the actions and no notice is required to arrive at the offerors, unless expressly requested or promised. If the offeror determines the place, time and manner of acceptance, they must be met, upon his request.

RSCL draws the attention of the receiver that, in the case of acceptance of the offer and of submission or notification of acceptance to the offeror, he must be cautious and take measures not to err with the means it selects to realize it.

In the USA, in exceptional cases, the receiver’s silence is valid as an acceptance.

[1]Civil Code of the Republic of Albania, article 664
[2]Civil Code of the Republic of Albania, article 670
[3]Civil Code of the Republic of Albania, article 668

Cases in which:

Receiver benefits from the provided services with the reasonable possibility to refuse them and the reason for knowing that they are offered with the expectation of compensation;

the offeror has stated or has given the receiver reasons to understand that acceptance can be manifested through silence or inaction and the receiver by staying silent or inactive intends to accept the offer;

when due to previous agreements it is reasonable that the receiver should notify the offeror if it did not intend to accept, they anticipate that silence is considered as acceptance and is exhaustive.

Since 1870, in France, the Cassation Court has come to the conclusion that "the silence of one party can not create an obligation for it, in the absence of any other circumstance." However, since then, the principle of silence per se does not constitute acceptance; several times it has been reaffirmed by the Cassation Court; but some exceptions have been applied to it, which are dedicated to the trial of specific court cases. Through the exceptions it is decided that silence can be considered acceptance in the cases of previous business relationships when both parties belong to the same professional environment, where there are customs that give such meaning to silence, or when the offer is made in the exclusive interest of the person to whom it is addressed.

In all situations where the offeror does not set a time limit for the receiver of an offer and when it is legally stipulated that it must be accepted within a reasonable time, that is customary and consistent with the specific circumstances, it must be borne in mind that the "time" starts to move from the moment the receiver has received the offer. The offerer must also count the time the receiver needs to decide and express the acceptance, which should be sufficient. But for goods, or services whose quality or price varies by day, it is understood that the offer is valid for such a short period of time. It should be noted, however, that a contract may be such even without offering or acceptance, since after long and complex negotiations it is sometimes almost impossible to find the final offer or final acceptance.

1.2 Theories about the moment of contract signing

The pre-contractual phase takes place until the conclusion of the contract. The contract is called concluded when the parties have mutually expressed their will, in one of the forms known by law[1], by agreeing to all its essential conditions. So, it can be said "at the moment of acceptance of the offer", but the truth is that there may be different views for the exact moment when acceptance takes effect. There is no need to be discussed at this time on contracts that are completed when both parties are present or others that are concluded via phone or other means such as FaceTime.[2]

Among the theories about the moment of entering into a contract, Albanian legislation recognizes the moment when acceptance reaches the offerer. The arrival of the response to the Offerer (within the time limit or within the time, as circumstances or usually are required) constitutes the moment when the offerer's waiting time expires. This means that upon the arrival of the response, the situation reaches one of the solutions: (1) the answer is negative and the contract will not be completed or (2) the answer is positive and the contract is called concluded. According to Semini, this theory has practical value: "because it is easier to determine and document the moment of arrival of the answer compared to the moment of effective knowledge of it."

In England the moment of the conclusion of the contract "varies" with regard to the terms on which the contract is formed. Just as in the USA, the distinction is made between the contracts concluded when the parties are present and the communication is immediate and when the communication is not immediate. In this case, the conclusion of the contract is deemed to be when the effective receipt is communicated to the offerer by the receiver. The use of postal service is reasonable and only when it is reasonable to use postal service to display acceptance, the "postal rule" can be applied. So, the "postal rule" itself is an exception and can be used mainly when the offer is sent by mail. If the postal service is used, the contract will be deemed signed when the receipt is posted and there is no need for more communication. In the USA this rule is expressed in the term "mailbox rule". In this case the receipt theory is no longer accepted as the moment of conclusion of the contract but so is the expedition theory instead.

[1]According to the Civil Code of the Republic of Albania, Article 676, paragraph 2, the known and accepted ways of expressing the will are expression or silence

[2]Smits, J. M. (2014). Contract Law: A Comparative Introduction, Edward Elgar Publishing, Cheltenham, page. 58

One exception to the general rule concerns the application of the Electronic Communications Act, which determines the exact moment in which an electronic contract has been concluded, unless the parties have otherwise provided.

Electronic contracts are concluded when both conditions are met: the person (receiver) receives a notification that the receipt has arrived and has beenreceived,and confirms the receipt of the notification by them. These communications are considered effective when the receiving party is able to access them. With the 2005 additions to the Civil Code of France, which refer to the conclusion of the contracts electronically, the receiver should be given the opportunity to check the details, the price and to fix possible errors before confirming and acknowledging the acceptance. Confirmation of acceptance shall be considered taken when the party to whom it is addressed has the opportunity to have access to it.

Contractual Freedom and Interruption of Negotiations

During the pre-contractual period, contractual freedom is expressed in several directions: each of the parties individually and independently decides whether to enter into the relevant negotiations (taking into consideration the type of contract and the other party) and the parties in cooperation (not always) and with consensus decide on the terms of the contract. This is also described as "positive contractual freedom", expressing that the parties are free to create a binding force contract that reflects their will. Between these two moments there is another way of showing contractual freedom, which is dictated by the negotiation process and at the same time determines their destiny.

Along the negotiation process, the parties have the right, based on contractual freedom, to assess whether their efforts towards concluding the contract should be interrupted or should further continue. This is called "negative contractual freedom", which implies that the parties are not charged with obligations for as long as no binding force contract has been concluded, known as such from the Common Law countries. If the parties did not enjoy this freedom as they entered negotiations, they could be harmedin realizing their business interests. The parties are able to appreciate that reaching a certain point of negotiation, extending their stay beyond a reasonable period of time, the behavior of the respective party or other causes would not produce fruitful results and the conclusion of the contract.

Therefore, on this basis, reasonable and pragmatic reflection, the parties enjoy the right to withdraw from negotiations, reducing other unnecessary costs. For this reason, the parties generally are not responsible for the destiny of negotiations and the termination of the contract, as they are inclined to reach a favorable agreement, giving priority to their interests. For each of the parties it is important to reach an agreement, whether it will be achieved with the party they have negotiated to a certain point or with a third party that may be interested in concluding the contract more quickly and with better conditions. But parties can be held accountable if they concludethe negotiations in bad faith.

If it is established that there was bad faith by one party in the conclusion of the negotiations and the other party has suffered damage, responsibility implies their indemnity. The Supreme Court of the Netherlands (Hoge Raad) in the case of Plas v. Valburg (1983) was able to artificially break the three-stage the negotiation process by adapting the respective responsibility for the conclusion of the negotiations at each stage:

At the initial stage, the parties are free to interrupt the negotiations without having the responsibility and the need to compensate the other party.

At the stage of substantive negotiations, even though the parties are still free to interrupt the negotiations under the good faith criterion, they can do so by offsetting (all or part of) the other party's expenses, such as compensation for missed opportunities such as the damage that has come to the other party that has not entered into a contract with a third party.

The interruption of the negotiations at the conclusion of the pre-contractual phase is against the good faith, since the other party can reasonably expect to conclude the contract as a result of the negotiations. Responsibility, in the case of the interruption of the negotiations by one party, is expressed in the compensation of the expenses of the other party and in some cases the missing profit or the obligation to continue the negotiations.

1.4 The determination of interest and damage in contract formation

Regarding the situations that arise for the damage that comes to the parties from the non-fulfillment of the obligations and from the breach of the principle of good faith during the contract's formation, it is necessary to clarify how the type of damage that came during the pre-contractual phase can be determined and which interest has failed to realize one of the parties. In fact, this is a genuine duty of the court, which, as the case may be, must specify exactly:

the liability of the parties, the interest that has been violated, the type of damage that has been caused, and the extent and manner of compensation for the damage. The costs incurred by the injured party, which have a concrete value, expressed in money, are clearly visible. While other damage such as the damage to reputation or competition is more difficult to be "valued" by the court and to "be translated" into the language of compensation, therefore generally in money. The legal doctrine of civil liability distinguishes three kinds of interests that may be violated, depending on the type of responsibility: contractual or extra-contractual:

The expectation interest, which means that the party has the expectation to reach the position that would have been if the contract had been completed.

Reliance interest, which means that the party has the expectation to maintain the state and not to further exacerbate it.

Restitution interest. This interest unites two elements: (1) trust from the one to whom something had been promised and (2) the benefit,that has the person who has made the promise. Otherwise it can be expressed as the one that is earned by the person who has promised and that is lost by him, to whom is promised to carry out an action. While the expected interest is future-oriented, it can not be offset except through contractual liability.

The other two interests are oriented in the past and generally the interest of trust is compensated in cases of extra-contractual liability. The restitution interest does not in essence have the compensation of the injured party's damages, but the withdrawal of the benefits the party has committed as a result of unlawful actions. During the efforts to conclude the contract, the parties are exposed to various injuries, which may arise not because the contract will not be completed, but referring to the conduct of the guilty party during the negotiations. These damages may be material or non-material.Generally one party must afford the negotiation costs itself.

1.5 **Conclusion**

However, if in good faith the contract is concluded, the party makes expenditures or performs work that exceeds what is normally expected by the offeror and makes it with his consent or request, the other party has to pay the costs or compensate the work if the contract is not concluded for the interruption of the negotiations without any reasonable cause. The party claiming material damage directly during the pre-contractual phase may claim to be compensated for any expenses incurred by it and which according to it was "necessary" to be performed during the negotiations.

The court, in making a decision, must be correct in determining the obligation to compensate, not relying solely on the requests of one party's claims. A criterion for assessing whether the expenses incurred by one party during the negotiation will be translated into a liability for compensation by the party who has caused the damage, is the justification of the expenses as reasonable, based on the necessity or need to be made in that moment and not after the contract had been concluded.

Expenditures, which were necessary, such as in connection with the preparation of the documentation for a real estate or travel expenses for the negotiation, are expenses that will be compensated. The amount of compensation will be proportionate to the progress of negotiations and the "harmful" conduct of the other party.

The more negotiations have progressed, the more reasonable conviction that the contract will be completed will arise. While if the behavior of a party is considered guilty, intentional or negligent, it will affect the amount of compensation.

The assessment of immaterial damages is more difficult as different persons hold different attitudes towards them; some are more susceptible to damage to reputation, good name, customer credibility, or loss of better opportunities for termination of the contract or for establishing new relationships.

However, the purpose of pre-contractual liability is to restore the injured party to the situation that was before the start of the negotiations. In order to assess the damage, a negative interest must be determined, meaning that one of the parties can not claim to be placed under the terms "as if the contract had been concluded".

These conditions are hypothetical and do not constitute a point of reference for calculating real damage. As Jhering has defined, in the explanation of the culpa in contrahendo, the party, which had entrusted the validity of the contract, can not

be indemnified to the promised value of expected interest, but can return the status quo through compensation of negative interest or reasonable interest.[1]

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