

CULPA IN CONTRAHENDO IN ENGLISH LAW

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INTRODUCTION¹

Both civil law and common law systems impose a duty of good faith and fair dealing in the contract performance.² However the two legal systems vary in the extent of and the approaches to impose this duty. While the civil law system has doctrinized its approach to this issue in the famous German doctrine of *culpa in contrahendo*, the common law system has various approaches.³ Moreover, even within the common law system, countries do not have the same approaches to the good faith in contract performance, especially in terms of the extent of this duty and how to impose it. Whereas, the Barazarte & Ewen's part focused on the current application of *culpa in contrahendo* in the United States and compared it with Italy and Venezuela, this expanded essay will discuss about the application of *culpa in contrahendo* doctrine in England, another major legal system of common law. Whereas *culpa in contrahendo* doctrine could be applied in a wide scope ranging from franchising agreements to personal injury and property damages⁴, in this essay, we limit in discussing the application of the English courts in commercial contracts. We also try to point out the differences in application of English and American courts and explain the reasons for those differences.

This paper is divided into three major sections, in the first and second sections, we briefly summarize the German doctrine of *culpa in contrahendo* and its application in the United States. The more details information about these issues could be found in an excerpt from Barazarte & Ewen's paper attached herein as an appendix. The third section will discuss the two approaches through the law of tort and the law of contract of English courts. The conclusion will discuss about the differences between the view of the American and English courts in this issue.

¹ This essay is based on and as an expanded part of the paper of Virgilio Barazarte (L.L.M. student) and Jonas Ewen (J.D. Student) submitted to Professor Boris Kozolchyk, Jame E. Rogers College of Law, the University of Arizona on April 27, 2004. This paper is about the application of the German *culpa in contrahendo* doctrine in the legal system of the United States, Italy and Venezuela [hereinafter Barazarte & Ewen]. A part of Barzarte & Ewen's paper (about German doctrine and its application in the legal system of the United States) is attached in the APPENDIX of this essay.

² Barazarte & Ewen, *Id.* at i.

³ For a comparative analysis of the *culpa in contrahendo* origin and application in the United States and Germany, see Steven A. Mirmina, *A Comparative Survey of Culpa In Contrahendo, Focusing on its Origins in Roman, German, and French Law as well as its Application in American Law*, 8 Conn. J. Int'l L. 77, 81 (Fall 1992).

⁴ Professor E. Allan Farnsworth has proposed a long list of transaction to which *culpa in contrahendo* could be applied. See E. Allan Farnsworth, *Precontractual Liability and Preliminary Agreements: Fair Dealing and Failed Negotiation*, 87 Col. L. Rev. 217, at 287-293 (1987).

THE GERMAN DOCTRINE OF CULPA IN CONTRAHENDO

Rudolph von Jhering, a 19th century German legal professor, is the author of *culpa in contrahendo* doctrine which has its roots in ancient Roman law. His doctrine⁵ can be briefly summarized as follows: a party who, through culpable conduct, prevents a contract from being formed or causes the contract to be invalid, should be liable for damages suffered by the innocent party who relied on the validity of the forthcoming contract.⁶ *Culpa in contrahendo* doctrine has strong influence in civil law countries especially Germany and Italy.⁷

THE APPLICATION OF CULPA IN CONTRAHENDO IN THE UNITED STATES

Although the American legal system embraced the notion of duty of good faith in contracting, that duty is not extended to negotiation period⁸. Instead of using a single doctrine of good faith covering both the periods prior to and after conclusion of a contract, the American legal system uses two approaches through tort law and contract law (the “promissory estoppel” approach). Considering the approaches of American law, Kessler and Fine declared “the common law appears to have no counterpart to the German doctrine of *culpa in contrahendo*” but it has other functional similarities to the civil law *culpa in contrahendo* doctrine.⁹

A common tendency is the courts in the United States (with the exception of Louisiana and Puerto Rico, where there exist mixed-system jurisdiction and the *culpa in contrahendo* is applied) have been reluctant to adopt this doctrine and this hesitance seems to remain in the near future.¹⁰

⁵ See Rudolf von Jhering, *4 Jahrbucher Fur Die Dogmatik Des Heutigen Romischen Un Deutschen Privatrechts I*, (1861) reprinted in I von Jhering, *Gesammelte Aufsätze* 327 (1881).

⁶ Mirmina, *supra* n.3 at 79.

⁷ See generally Mirmina, *supra* n.3 and Barazarte & Ewen, *supra* n.2.

⁸ Mirmina, *supra* n.3 at 93.

⁹ Fredrich Kessler & Edith Fine, *Culpa in Contrahendo, Bargaining in Good Faith, and Freedom of Contract: A Comparative Study*, 77 Harv. L. Rev. 401, 439 (1964).

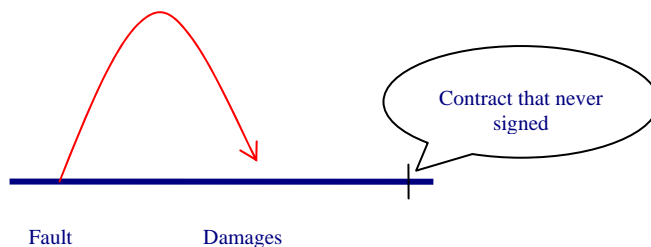
¹⁰ Barazarte & Ewen, *supra* n. 3 at xxvi.

CULPA IN CONTRAHENDO IN ENGLISH LAW

Pre-contractual liability in English law v. culpa in contrahendo

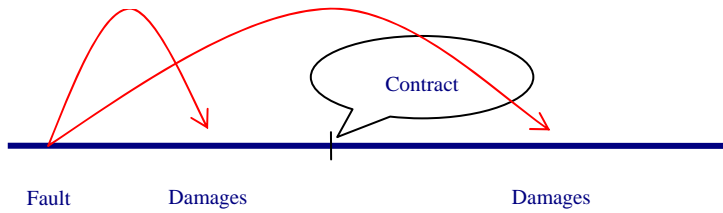
First of all, we should note that the *culpa in contrahendo* doctrine does not exist in common law system. The pre-contractual liability is considered as being the closest to liability in *culpa in contrahendo*. However, the meaning of pre-contractual liability is broader than that of the liability in *culpa in contrahendo*. *Culpa in contrahendo*, which can be translated as “fault in the negotiation process”, limits it to the liabilities incurred by blameworthy conduct of a party in the negotiation process. This means the conduct incurs during the negotiation and the damages for the innocent party also incurs during this period. (See Figure 1)

Figure 1. Culpa in contrahendo



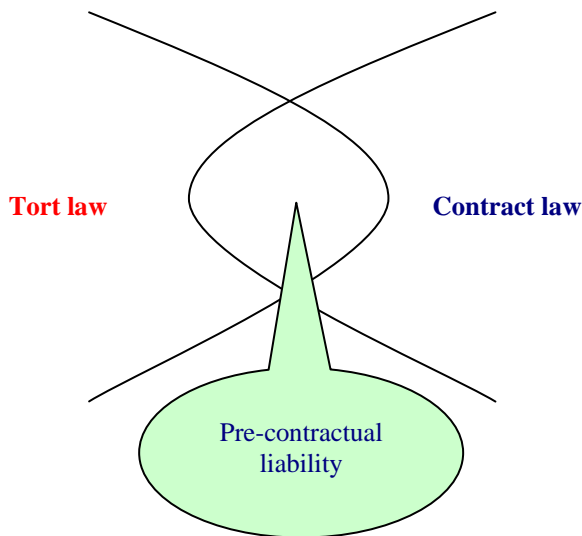
While, the pre-contractual liability in English law is similar to *culpa in contrahendo* where the fault also incurs during the negotiation state, the damages of the innocent party caused by that fault could be incurred prior to or after the contract conclusion. For example, a company announces a bid for a residential development in its land (although it is not able to finance that project). A construction company wins the bid and carries out some works believing that the project owner is financially capable. However, after the contract is signed, the former finds out that it was misrepresented by the later about its financial capability.

Figure 2. Pre-contractual liability in English law



Therefore, it is necessary to keep in mind that in the discussion about pre-contractual liability below we are discussing about something similar but not exactly the same as the liability in *culpa in contrahendo*.

Figure 3: Pre-contractual liability is lying between English contract and tort laws



Like American legal system, English legal system has two approaches to pre-contractual liability. Professor Dietrich, in his comparative study about pre-contractual liability and *culpa in contrahendo*, proposed that the issue of *culpa in contrahendo* in common law (common law in general which includes English, American, Australian common law) should be considered “as lying between contract and tort and drawing on ideas and principles from both categories.”¹¹ However, in my opinion, that is the pre-contractual liability, not *culpa in contrahendo* lying in the overlapped area between the tort and the contract law. (See Figure 3) The reason is, as illustrated below, the English courts are

reluctant to extend the boundaries of the contract law beyond the point of time of signing

¹¹ J. Dietrich, *Classifying Precontractual Liability: a Comparative Analysis*, 21 Leg. Stud. 153, 191 (2001), available at <http://www.heinonline.org/HOL/Page?handle=hein.journals/legstd21&size=2&collection=journals&id=155>. (accessed May 9, 2004).

contract. Therefore, pre-contractual liability should be the one in the grey area between the contract and the tort law as the fault of this liability incurs in negotiation period why its damage could be either prior to or after the contract conclusion.

As discussed below, claims for pre-contractual liability (the *culpa in contrahendo* liability type) are not normally successful due to the English courts' reasoning on (i) the freedom of contract and (ii) their reluctance to award damages for pure economic loss in tort.¹²

Tort law and pre-contractual liability where the contract negotiation has been broken off

Before a contract is concluded, as the English contract law does not extend to the negotiation stage, claimants usually resort to tort law for their recovery of damages. Professor Giliker commented on the pre-contractual liability as follows:

“A claim for pre-contractual expenses is essentially one for pure economic loss and English law adopts a restrictive approach to such claims. The spectre of 'liability in an indeterminate amount for an indeterminate time to an indeterminate class' continues to haunt English tort law. In seeking recovery, the claimant must therefore identify a tort for which the courts are prepared to award damages for pure economic loss. As a result of the English system of nominate torts, the emphasis immediately falls on finding a tort which provides a suitable 'fit' rather than a more principled consideration of the merits of the particular case. The most logical options would appear to lie with the intentional torts protecting economic interests (the so-called 'economic torts'), for which damages for pure economic loss are awarded without question, or with the tort of negligence.”¹³

Reviewing the tort law of England, Giliker concluded that misrepresentation tort of fraud or deceit appeared “to be the sole economic tort applicable in this context [pre-contractual liability], and to this may be added the tort of negligent misrepresentation”¹⁴.

Box 1. Misrepresentation tort of fraud or deceit.

The plaintiff has to establish five following elements in a common law action of deceit¹⁵:

1. There must be a representation of fact made by words or conduct.
2. The representation must be made with the intention that it should be acted upon by the plaintiff, or by a class of persons which includes the plaintiff, in the manner which resulted in damage to him.
3. It must be proved that the plaintiff has acted upon the false statement.
4. It must be proved that the plaintiff suffered damage by so doing.
5. The representation must be made with knowledge that it is or may be false. It must be willfully false, or at least made in the absence of any genuine belief that it is true.

¹² Paula Giliker, *A Role For Tort In Pre-Contractual Negotiations? An Examination Of English, French, And Canadian Law*, Int'l Comp. L. Q. (Oct. 2003) [English cite ICLQ 52.4 (969)] (available at LEXIS and at http://www3.oup.co.uk/iclqaj/hdb/Volume_52/Issue_04/pdf/520969.pdf).

¹³ *Id.* at 974 [footnote omitted].

¹⁴ *Id.* at 975.

However, Giliker herself ascertained that English courts were very reluctant in delivering award for damages in pre-contractual liability cases.¹⁶ In my opinion, the reasons behind this reluctance are (i) the suspicion of English courts with respect to the meaning as well as its role of “good faith” notion in the negotiation period, and (ii) the old strong belief of English courts in the rule protecting the freedom of parties to negotiate contracts without the risk of incurring legal liability¹⁷.

Good faith in negotiation period

The landmark case *Walford v. Miles*¹⁸ is an outstanding illustration of this suspicion. In this case, the Lord Acker of the House of Lords, with the consent of the majority of other judges, stated that: “...while negotiations are in existence either party is entitled to withdraw from those negotiations, at any time and for any reason.”¹⁹ His explanation for this statement is based on an analysis of the role of “good faith” in the negotiation period and it is interesting that he also made a comparison with a decision of an American court on the same issue:

“... Although the cases in the United States did not speak with one voice your Lordships' attention was drawn to the decision of the United States' Court of Appeal, Third Circuit, in *Channel Home Centers, Division of Grace Retail Corporation v. Grossman*(1986) 795 F. 2d 291 as being "the clearest example" of the American cases in the appellants' favour. That case raised the issue whether an agreement to negotiate in good faith, if supported by consideration, is an enforceable contract. I do not find the decision of any assistance. While accepting that an agreement to agree is not an enforceable contract, the Court of Appeal appears to have proceeded on the basis that an agreement to negotiate in good faith is synonymous with an agreement to use best endeavours and as the latter is enforceable, so is the former. This appears to me, with respect, to be an unsustainable proposition. The reason why an agreement to negotiate, like an agreement to agree, is unenforceable, is simply because it lacks the necessary certainty. The same does not apply to an agreement to use best endeavours. This uncertainty is demonstrated in the instant case by the provision which it is said has to be implied in the agreement for the determination of the negotiations. How can a court be expected to decide whether, subjectively, a proper reason existed for the termination of negotiations? The answer suggested depends upon whether the negotiations have been determined "in good faith." However the concept of a duty to carry on negotiations in good faith is inherently repugnant to the adversarial position of the parties when involved in negotiations. Each party to the negotiations is entitled to pursue his (or her) own interest, so long as he avoids making misrepresentations. To advance that interest he must be entitled, if he

¹⁵ *Bradford Building Society v. Borders* [1941] 2 All E.R. 205, 211, *per* Lord Maugham, summarized by W.V.H. Rogers in *Winfield & Jolowicz on Tort*, 281 (14th ed. Sweet & Maxwell 1994).

¹⁶ Giliker, *supra* n. 12 at 989.

¹⁷ The rule of freedom of contract traces its roots to the very beginning of the British Empire (1770) and is one of the elements contributing to the rise and the greatness of the empire. See generally, P. S. Atiyah, *The Rise and Fall of Freedom of Contract*, (Clarendon Press. Oxford 1979).

¹⁸ *Walford v. Miles* [1992] 2 AC 128. In this case, the plaintiff and the defendant, in a negotiation for selling the defendant's company to the plaintiff, had an oral agreement that the defendant would not negotiate to sell his company with other party. However, the defendant broke this agreement and sold its company to a third party. The plaintiff then sought for damage caused by breach of the oral agreement and misrepresentation.

¹⁹ *Id.*

thinks it appropriate, to threaten to withdraw from further negotiations or to withdraw in fact, in the hope that the opposite party may seek to reopen the negotiations by offering him improved terms. Mr. Naughton²⁰, of course, accepts that the agreement upon which he relies does not contain a duty to complete the negotiations. But that still leaves the vital question - how is a vendor ever to know that he is entitled to withdraw from further negotiations? How is the court to police such an "agreement?" A duty to negotiate in good faith is as unworkable in practice as it is inherently inconsistent with the position of a negotiating party. It is here that the uncertainty lies. In my judgment, while negotiations are in existence either party is entitled to withdraw from those negotiations, at any time and for any reason. There can be thus no obligation to continue to negotiate until there is a "proper reason" to withdraw. Accordingly a bare agreement to negotiate has no legal content."²¹

However, the House of Lords in *Walford* held the defendant liable for his misrepresentation.

It's worth noticing that the damage for misrepresentation in English law is to "put [the awardee] into the position in which he would have been if the fraudulent statement had not been made, not that in which he would have been if it had been true, and the defendant must make reparation the actual losses which flow from his deceit"²²

So, it is clearly that, while the English courts do not apply the "good faith" notion into the negotiation period, but they also try to limit the award of damages in actual losses avoiding an unreasonable windfall for the claimant.

Freedom of parties to negotiate contracts without the risk of incurring legal liability:

Some English lawyers have failed in efforts to convince English court to apply a principle enunciated by judge Sheppard of Australian Municipal Council, which read as follows:

"...where two parties proceed upon the joint assumption that a contract will be entered into between them, and one does work beneficial for the project, and thus in the interests of the two parties, which work he would not be expected, in other circumstances, to do gratuitously, he will be entitled to compensation or restitution, if the other party unilaterally decides to abandon the project, not for any reason associated with bona fide disagreement concerning the terms of the contract to be entered into, but for reasons which, however valid, pertain only to his own position and do not relate at all to that of the other party."²³

Judge Rattee in the landmark case *Regalian Properties plc v London Docklands Development Corporation*²⁴ said "...the principle enunciated by Sheppard J ...is not established by any English authority." He went further explaining:

²⁰ Mr. Naughton is the plaintiff's attorney [author's footnote].

²¹ *Walford v. Miles*, *supra* n.18 [emphasized by author].

²² Rogers, *supra* n.15 at 289 [footnote omitted].

²³ *Sabemo Pty Ltd v North Sydney Municipal Council* [1977] 2 NSWLR 880 at 902-903 [emphasized by author].

²⁴ [1995] 1 All ER 1005, [1995] 1 WLR 212, 45 Con LR 37, [1995] 11 Const LJ 127. In this case, the defendant opened a bid for a residential development in its land. The plaintiff won the bid and then expended a certain amount of money in hiring professional companies for designing and other services. However, due to several reasons (i.e. the wide fluctuations in residential property market values and the defendant's difficulties in securing vacant possession of the whole of the land), no contract was concluded and the site was never

“...however much the parties expect a contract between them to materialise, both [parties] enter negotiations expressly (whether by use of the words 'subject to contract' or otherwise) on terms that each party is free to withdraw from the negotiations at any time ... Each party to such negotiations must be taken to know ... that pending the conclusion of a binding contract any cost incurred by him in preparation for the intended contract will be incurred at his own risk in the sense that he will have no recompense for those costs if no contract results.”²⁵

In another case, *Easat Antennas Limited v Racal Defence Electronics Limited* in March 20, 2000²⁶, where the parties did not expressly agree that each party is free to withdraw from the negotiation, the court awarded the claimant a quantum meruit for the damages that he had suffered when the defendant broke the negotiation.²⁷

Through the above cases it can be seen that where it is possible, English courts would try it best to protect the freedom of parties to negotiate contract; and the bad faith party could be saved from its liability in breaking off negotiation by adding some terms that would be consider as an expression of the freedom to withdraw from negotiation. In *Regalian*, a term “subject to contract” was enough to address this freedom.²⁸

Sub-conclusion

As mentioned above, English courts are very reluctant in delivering award for damages with respect to the pre-contractual liability because of their different view of “good faith” notion in negotiation stage and the old and long live tradition of freedom to contract. Thus, the issue of pre-contractual tort-based liability, according to Giliker, is a not one of law, but of policy.²⁹

developed. The plaintiffs later brought an action against the defendant seeking to recover the expenses which they had paid to in respect of the proposed development and in preparation for the intended contract.

²⁵ *Id.* [emphasized by author].

²⁶ Transcript (available at LEXIS). In this case, the defendant, for the purpose of applying for a tender for supplying a new type of military radar for the English government, has agreed with the claimant in an agreement that it would be the sub-supplier for the defendant if the later won the bid. The claimant, believing in a contract would be concluded with the defendant, carried out in advance its research and then provided to the defendant with the technical design to submit as a part of bidding application to the government. The defendant then won the bid, but it signed contract with another company, violating its agreement with the claimant. The claimant then sued the defendant to the court.

²⁷ *Id.*

²⁸ In this case, the defendant sent the plaintiff a letter to inform his bid award with a letter headed “Subject to contract”. Under the defendant’s title the first paragraph of the letter was in the following terms:

“Further to your submission of 11 June 1986 in respect of the above, I am pleased to inform you that the Corporation’s Board has accepted your company’s offer for this site, **subject to:**

(1) Contract

(2) The District Valuer’s ...”

Supra n. 25 (emphasized by author).

²⁹ Giliker, *supra* n.12 at 992.

Contract law

Like American law, there is a contractual approach towards pre-contractual liability in English law. However, unlike the American law, where the promissory estoppel approach is used as a substitution for *culpa in contrahendo*³⁰, the English courts do not follow that way (This issue will be discussed later.) In brief, the English law has some functional tools to deal with pre-contractual liability but it cannot be said that the *culpa in contrahendo* is applied in any forms. So, this section is not to discuss about the application of *culpa in contrahendo* in England but about why all tools used by English contract law to deal with pre-contractual liability cannot be seen as an English-style of Jhering's doctrine.

In case the agreement between parties is not a complete contract as required by the law (and therefore, can be considered as a contract has not been signed), the courts may enforce an objectively discernible intention of contract, whilst accepting that some (inessential) terms of that agreement need to be implied.³¹ In *Butler Machine Tool Co Ltd v. Ex-cell-O Corporation (England) Ltd*,³² the two parties used their own standard form in a transaction. The difference between the terms of these forms led to a dispute about the price payable. The English Court of Appeal in this case held that a contract existed in the terms of a standard form. This holding in fact showed the view of the court, when possible, to enforce an incomplete agreement where the two parties have intention to contract. This holding has been criticized by many that it extends the boundaries of contract law too far.³³ However, the intention of parties to enter into a contract in this case greatly differs from the parties' intention in the *culpa in contrahendo* as in the later, the fault party does not have the real intention to conclude a contract.

So what the English contract law would say in the case one party does not want to conclude the contract (in other words has no intention to contract) and the contract does not satisfy the requirements of contract formation? In this case, the court cannot enforce the "intention to contract", and therefore, where there is no contract, the tort law would be the answer for possible remedies.

Other remedies of contract law in relation to pre-contractual liability such as misrepresentation, mistake and unjust enrichment are applied where a contract has been concluded, and therefore, cannot be considered as an application of *culpa in contrahendo*.³⁴

It is worthy to note that, where the promissory estoppel is used by American court to hold a fault party responsible for the damage of the innocent party,³⁵ the promissory estoppel in

³⁰ Barazarte & Ewen, *supra* n.1 at ix.

³¹ Dietrich, *supra* n.11 at 159.

³² [1979] 1 WLR 401, [1979] 1 All ER 965.

³³ Dietrich, *supra* n.11 at 160.

³⁴ For the misrepresentation see Misrepresentation Act 1967. For mistake see generally G.H. Treitel, *Trade Law of Contract*, 213-253 (7th ed. Stevens & Sons 1987). For unjust enrichment see *Id.* at 586.

³⁵ Barazarte & Ewen, *supra* n.1 at viii-ix.

English law could be used that way. The estoppel doctrine in English law does not give rise to cause of action but only to a defense.³⁶ Treitel gave an example as follows: “Thus if A agrees to let a house to B, representing that the drains are sound when they are not, B cannot rely on the doctrine of estoppel to found a claim for damages against A. But the doctrine could provide B with a defense: for example, if A, immediately after the execution of the lease, brought an action for breach of covenant to repair. Such a defence could be pleaded even though B had affirmed (and not rescinded) the lease.”³⁷

CONCLUSION

In summary, the pre-contractual liability in English law is broader than the liability in *culpa in contrahendo*. The English courts are very reluctant in delivering award for damages with respect to the pre-contractual liability because of their special view of “good faith” notion in negotiation stage and the old and long live tradition of freedom to contract. The English law also differs from American law on the point that it does not apply the doctrine of promissory estoppel in the way used by American courts which could be considered as rather similar to the *culpa in contrahendo* doctrine.

³⁶ Treitel, *supra* n.34 at 91: “The point was settle in *Combe v. Combe*, where a husband during divorce proceedings promised to pay £100 per annum to his wife who, in reliance on this promise, forbore from applying to the court for maintenance. It was held that the equitable doctrine did not enable her to enforce the husband’s promise since it did not ‘create new causes of action where none existed before.’ The justification for this limitation on the scope of the equitable doctrine is ‘that it would be wrong to extend the doctrine of promissory estoppel, whatever its precise limits at the present day, to the extent of abolishing in this back-handed way the doctrine of consideration”.

³⁷ *Id.* at 311 [footnote omitted].

APPENDIX

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Comparative Commercial Law
Final Examination
April 27, 2004

Introduction

Civilian law and common law systems both impose a duty of good faith and fair dealing in the contract performance. These systems vary greatly, however, with regard to the question of whether a duty of good faith and fair dealing applies to pre-contractual relationships. This paper presents an overview of culpa in contrahendo, a German doctrine that provides a remedy for pre-contractual liability. This paper will also examine what role, if any, the culpa in contrahendo doctrine has played in the United States' traditionally common law system, with a particular focus on the jurisdictions of Louisiana and Puerto Rico, as well as recent developments in California. Culpa in contrahendo has extended beyond Germany, as many civilian jurisdictions today impose a duty of good faith in pre-contractual negotiations. This paper will conclude by presenting an analysis of the culpa in contrahendo doctrine and its applicability to pre-contractual fault settings under the civilian law systems of Venezuela and Italy.

Culpa in Contrahendo: A Doctrinal Overview

The doctrine of culpa in contrahendo, which means, "fault in negotiation" traces its roots to ancient Roman law, and is derived from the work of a 19th century German legal professor, Rudolph von Jhering.³⁸ In civil law countries at the time, the highest position of legal authority was that of the professor. Law originated in the universities and Jhering formulated the doctrine of culpa in contrahendo as a remedy for situations that were not sufficiently covered by the common law of the time, the *Gemeines Recht*.³⁹ Specifically, Jhering's doctrine contained two principal lines of thought: (1) liability for fault (culpa) in contracting, and (2) classification of damages into positive and negative damages.⁴⁰

Jhering, in his 1861 article "*Culpa in contrahendo, oder Schadensersatz bei nichtigen oder nicht zur Perfektion gelangten Verträgen*," proposed that a party who, through culpable conduct, prevents a contract from being formed or causes the contract to be invalid, should be liable for damages suffered by the innocent party who relied on the validity of the forthcoming contract.⁴¹ Thus, the doctrine provides a remedy for pre-contractual liability. Damages are not based on the contract, since the blameworthy party

³⁸ Diane M. Goderre, *International Negotiations Gone Sour: Precontractual Liability under the United Nations Sales Convention*, 66 U. Cin. L. Rev. 258, 266 (1997).

³⁹ Steven A. Mirmina, *A Comparative Survey of Culpa In Contrahendo, Focusing on its Origins in Roman, German, and French Law as well as its Application in American Law*, 8 Conn. J. Int'l L. 77, 81 (Fall 1992).

⁴⁰ Nadia E. Nedzel, *A Comparative Study of Good Faith, Fair Dealing, and Precontractual Liability*, 12 Tul. Eur. & Civ. L.F. 97, 113 (Winter, 1997).

⁴¹ *Id.* At 77.

avoids the agreement. Rather, the damages are based on the negative interest of the innocent party. Jhering also applied culpa in contrahendo to situations other than the commercial setting. For example, if a party makes an offer though not intending for the offer to be serious, if a party makes a unilateral mistake in transmitting an offer, or if a party knew or should have known of an existing impossibility, this conduct would render the party liable for the negative interest of the innocent party who relied on the contract's validity.⁴² Culpa in contrahendo causes of action do not require proof of scienter or intent to deceive to allow a plaintiff to recover. The doctrine may also be used to allow recovery in cases of mere pecuniary loss.⁴³

The culpa in contrahendo rationale Jhering advanced strongly influenced the development of many civil law systems. This is particularly true for the German legal system. For example, German Civil Code Sections 306-309, under which an agreement may be avoided on the grounds of impossibility or illegality, makes the avoiding party, if he knew or should have known of the impossibility or illegality, responsible for the other party's reliance interest unless the latter was equally knowledgeable.⁴⁴ In addition to Germany, the culpa in contrahendo doctrine has profoundly influenced European and Latin-American civil-law systems, as well as some socialist systems. This doctrine has even laid its roots in the United States. Both the civil codes of Louisiana and Puerto Rico, have, in some form, adopted the doctrine of culpa in contrahendo.⁴⁵

Contract Negotiation under Early United States Law

According to Friedrich Kessler <http://tldb.uni-koeln.de/php/ - fn1> and Edith Fine, authors of an influential 1964 article about culpa in contrahendo, in contrast to the civil law, of caveat venditor ("let the seller beware"), the common law has long adhered to the principle of caveat emptor ("let the buyer beware"). The famous maxim found its most frequent expression in nineteenth-century sales law. "The celebrated case of Smith v. Hughes (1871) held 'there is no legal obligation on the vendor to inform the purchaser that he is under a mistake, not induced by the act of the vendor.'⁴⁶

Until the 20th century, the principle of good faith was not part of American common law and, for example, Oliver Wendell Holmes, in his renowned commentary *The Common Law* (1881) makes no mention whatsoever of good faith.⁴⁷ Although references to good

⁴² *Id.* At 83.

⁴³ *Id.* At 92.

⁴⁴ Arthur Taylor von Mehre & James R. Gordley, *The Civil Law System: An Introduction to the Comparative Study of Law 2nd Edition*, 839 (Little, Brown & Co., 1977).

⁴⁵ Goderre, *supra* n. 1, at 268.

⁴⁶ Friedrich Kessler & Edith Fine, *Culpa in Contrahendo, Bargaining in Good Faith, and Freedom of Contract: A Comparative Study*, 77 *Harv. L. Rev.* 401, 439 (1964).

⁴⁷ William Tetley, *Good Faith in Contract Particularly in the Contracts of Arbitration and Chartering*, McGill University, 2004, citing: O.W. Holmes, *The Common Law* (Boston: Little, Brown & Co., 1881).

faith as an implied obligation already appeared in decisions dating from the turn of the 20th century, the American Law Institute failed to consider general principle of good faith performance in the drafting of the Restatement (First) of Contracts the 1920s. It can be said, however, that the idea of a general contractual obligation to act in good faith, accompanied by specific arguments on the merits of such an approach, has become part of American legal consciousness since the second half of the 20th century.⁴⁸ The step towards its conscious adoption, and, thus, towards a modern idea of general clauses, did not occur until Karl Llewellyn's conceptualization of a general principle of good faith contractual performance and enforcement in the Uniform Commercial Code ("U.C.C.") Section 1-203.⁴⁹

Through the recognition of the good faith principle, but also in many other ways, the U.C.C. aimed at a major doctrinal and jurisprudential shift away from the traditional contract doctrine based on the will theory and the caveat-emptor-principle into the direction of commercial fair dealing and judicial flexibility.⁵⁰ Today, certain implied warranties have developed in the sale of goods law, which, to a certain extent, have reduced the effect of "caveat emptor" in sales law.

The Culpa in Contrahendo Doctrine and Current United States Law

In contrasting common law to many civil law countries, Kessler^{<http://tldb.uni-koeln.de/php/-fn1>} and Fine declared "the common law appears to have no counterpart to the German doctrine of culpa in contrahendo."⁵¹ However, Kessler and Fine maintain that the common law possesses many functional similarities to the civil law culpa in contrahendo doctrine, including contractual doctrines like firm offers, mistake, misrepresentation, negligence, estoppel, implied contract, and unconscionability.⁵²

With the exception of 2 jurisdictions, Louisiana and Puerto Rico, whose law is often described as mixed-civilian (a mixed common and civil law system), courts in the United States have been reluctant to apply the culpa in contrahendo doctrine. This has led some scholars to declare that current American tort remedies for pre-contractual liability are ineffective. Traditionally, black letter rules of contract such as the U.C.C. and the Restatements, which impose a general duty of good faith, do not extend this duty to negotiations and do not permit recovery before a contract is formed.

The U.C.C., which was strongly influenced by Karl Llewellyn (who was extremely familiar with German law), fails to protect the negotiation stage of contracts. Although the U.C.C. emphasizes the importance of good faith and fair dealing, which is highlighted by Section 1-203's declaration that, "every contract imposes an obligation of good faith in its performance or enforcement ... good faith is a basic principle running through this

⁴⁸ Marietta Auer, "Good Faith" and its German Sources: A Structural Framework for the "Good Faith" Debate in General Contract Law and under the Uniform Commercial Code, 12 (2001).

⁴⁹ *Id.* At 13.

⁵⁰ *Id.* At 14.

⁵¹ Kessler & Fine, *supra* n. 9, at 440.

⁵² Auer, *supra* n. 11, at 18.

Act,”⁵³ the majority view is that the obligation of good faith does not extend to mere contract negotiation. Although some courts have utilized U.C.C. Section 1-103’s emphasis on equity (“the principles of law and equity . . . shall supplement its provisions”)⁵⁴ to compel good faith in the negotiation state of contracts, critics of this approach claim it is a “piecemeal interpretation of equity” that counters the U.C.C.’s purpose of uniformity in the law.⁵⁵

The Restatements take an approach similar to the U.C.C., with regard to pre-contract negotiation. The Restatement (Second) of Torts does not provide a comprehensive remedy for bad faith in the negotiation stage of contracts. Instead, the Restatement (Second) of Torts only provides remedies for the aggrieved party when a contract was actually consummated. For example, Section 525 only allows recovery in cases of fraud where litigants were persuaded and have actually entered a contract through misrepresentation.⁵⁶

The Restatement (Second) of Contracts’ Section 90, known as “promissory estoppel” is probably the closest doctrinal approach to culpa in contrahendo that has been widely adopted in the United States.⁵⁷ Promissory estoppel acts as a substitute for consideration. So, if a party relies to his or her detriment on a wanton promise, courts could allow the party to recover. There are three questions that courts typically examine before promissory estoppel may be applied:

- (1) Was there a promise that the promisor should reasonably expect to induce action or forbearance of a definite and substantial character on the part of the promisee?
- (2) Did the promise induce such action or forbearance?
- (3) Can injustice be avoided only by enforcement of the promise?⁵⁸

Hoffman V. Red Owl Stores, a 1965 Wisconsin Supreme Court decision, is an early and often cited example, where an American court imposed the promissory estoppel doctrine. In Hoffman, there were lengthy negotiations about the prospective franchise of a supermarket. The negotiations collapsed after Mr. Hoffman, a franchisee who had relied on a promise that he could obtain a Red Owl Stores franchise for \$18,000 cash, was later

⁵³ Uniform Commercial Code §1-203.

⁵⁴ Uniform Commercial Code §1-103.

⁵⁵ Mirmina, supra n. 2, at 93.

⁵⁶ Restatement (Second) of Torts, §525.

⁵⁷ Restatement (Second) of Contracts, §90.

⁵⁸ Benjamin F. Boyer, *Promissory Estoppel: Requirements and Limitations of the Doctrine*, 98 U. Pa. L. Rev. 459, 460 (1950).

informed that Red Owl increased his franchise fee to \$34,000. Mr. Hoffman had taken action to open the store, had sold a grocery store he owned and had rented a new home. The court found Red Owl liable and Hoffman recovered reliance damages based on promissory estoppel.

Advocates of the culpa in contrahendo doctrine claim that although promissory estoppel works well for many cases, it is not a reliable remedy for preliminary negotiations. These advocates raise the issue that promissory estoppel rewards only the aggrieved party's reliance interest, whereas under a culpa in contrahendo remedy, all damages suffered by an innocent party in reliance on an apparent contract or negotiation must be compensated (including lost profits and loss of other opportunities).⁵⁹

⁵⁹ Mirmina, supra n. 2, at 99.

Adoption of the Culpa in Contrahendo Doctrine by Puerto Rico and Louisiana

Puerto Rico's civil code incorporates the culpa in contrahendo doctrine and imposes liability when a party acts in a tortious or wrongful manner during preliminary negotiations.⁶⁰ Puerto Rico recognizes culpa in contrahendo as mandating a pre-contractual duty of good faith: "an unjust withdrawal [or termination of] the pre-contractual phase [of negotiations] may result in extra-contractual liability under Article 1802 of the Civil Code."⁶¹

In a 2003 decision, *Ysiem Corporation v. Commercial Net Lease Realty*, the United States Court of Appeals for the First Circuit affirmed Puerto Rico's acceptance of the doctrine of culpa in contrahendo. Ysiem owned a parcel of land that it attempted to lease to Commercial Net, who in turn planned to sublease the land to OfficeMax. Commercial Net signed a letter of intent to lease the property from Yseim, and when lease negotiations between the parties failed, Ysiem brought a diversity action seeking specific performance or damages. The First Circuit stated:

"the governing law in this case is that of Puerto Rico where the somewhat broader doctrine of culpa in contrahendo applies. Under this doctrine, negotiations toward an agreement can - - even without a letter of intent - - readily give rise to mutual expectations that the parties will bargain in good faith and refrain from misconduct."⁶²

Louisiana, sold to the United States in 1803, is a jurisdiction based on the Napoleonic Code. This Code was adopted by the Louisiana legislature in 1808. It is interesting to note that Louisiana originally rejected promissory estoppel as a foreign, common law concept. Further, although culpa in contrahendo has been noted and discussed by Louisiana courts, the Louisiana Civil Code has never affirmatively adopted the doctrine.⁶³

Although Louisiana's Civil Code has no provision that expressly cites the doctrine of culpa in contrahendo, scholars have referenced several Louisiana Code Articles as having applied the doctrine. For example, Article 2452 states, "'the sale of a thing belonging to another is null; it may give rise to damage, when the buyer knew not that the thing belongs to another person.' Thus, if Seller mistakenly (or fraudulently) sells property [not belonging to seller] to Buyer, Buyer may sue Seller for his reliance damages."⁶⁴ Article 2452 exemplifies the principle of culpa in contrahendo, in the sense that a party becomes

⁶⁰ See *Whirlpool Corp. v. U.M.C.O. Int'l Corp.*, 748 F. Supp. 1557, 1562 (S.D. Fla. 1990). The court cites to *Tommy Muniz, Inc. v. Comité Organizador de los VIII Juegos Panamericanos (COPAN)*, 113 D.P.R. 517, 529, 13 Official Translations 666, 679 (1982) (emphasizing that a duty of good faith during negotiations imposes liability for damages caused by an unjustified withdrawal from negotiations).

⁶¹ *Satellite Broadcasting Cable, Inc. v. Telefonica de Espana*, 807 F. Supp. 218, 220 (1992).

⁶² *Ysiem Corp. v. Commercial Net Lease Realty*, 328 F.3d 20 (1st Cir. 2003).

⁶³ Nedzel, *supra* n. 3, at 113.

⁶⁴ Mirmina, *supra* n. 2, at 91.

liable for loss to his co-contractor although the latter cannot recover the full benefit of his bargain because the contract is null or relatively null.⁶⁵

An examination of Louisiana case law revealed approximately a dozen cases at the state appellate and supreme court that discussed culpa in contrahendo, and several mentioned it as a valid cause of action.⁶⁶ Louisiana courts have explicitly said that culpa in contrahendo is "the civilian equivalent of the common law concept of promissory estoppel."⁶⁷ As with Puerto Rico, Louisiana courts have described culpa in contrahendo as the civilian equivalent of promissory estoppel, but with a limit: the doctrine is used to compensate one party for expenses incurred in reliance "on another party's offer to form a unilateral contract where that offer is withdrawn before acceptance."⁶⁸ Alternately, Louisiana has described culpa in contrahendo as "a fault in contracting which gives rise to a quasi-contractual obligation to pay the loss so incurred. The essential purpose is to afford a recovery to a person who has changed his position in reliance upon a nonenforceable contract."⁶⁹ Finally, the Louisiana court in a 2003 case affirmed the state's continued acceptance of culpa in contrahendo, by stating: "Our courts have long recognized the German theory of culpa in contrahendo, which permits a plaintiff to recover damages which result from his change of position caused by reliance upon an unenforceable contract."⁷⁰

Recent Developments in the State of California

In a recent (and as of now unpublished) California case, Buettner, et al v. Bertelsmann AG, one theory advanced by the plaintiffs was the doctrine of culpa in contrahendo. The case stems from a joint venture the German media group Bertelsmann entered with AOL in 1995 to establish AOL Europe. The former Bertelsmann executives, Jan Henric Buettner and Andreas von Blottnitz, both Germans, helped create the deal and claimed Thomas Middelhoff, then a senior Bertelsmann executive, promised the two an equity stake in the company. The jury, which heard the case in superior court in Santa Barbara, Calif., found that Bertelsmann and Middelhoff violated oral and written contracts with Buettner and von Blottnitz, and that Bertelsmann owed the two former executives at least \$244.3 million.⁷¹

⁶⁵ Shael Herman, *Detrimental Reliance in Louisiana Law – Past, Present, and Future (?): The Code Drafter's Perspective*, 58 Tul. L. Rev. 707, 744 (1984).

⁶⁶ *Id.* At 92.

⁶⁷ David V. Snyder, *Comparative Law in Action: Promissory Estoppel, The Civil Law, and the Mixed Jurisdiction*, 15 Ariz. J. Int'l & Comp. L. 695, 704 (1998), citing: *Snyder v. Champion Realty Corp.*, 631 F.2d 1253, 1255 (5th Cir. 1980), and *Kethley v. Draughon Bus. College, Inc.*, 535 So. 2d 502, 506-07 (La. Ct. App. 2d Cir. 1988).

⁶⁸ *Snyder v. Champion RITY Corp.*, 631 F.2d 1253, 1255-56 (5th Cir. 1980).

⁶⁹ *Coleman v. Bossier City*, 305 So. 2d 444, 447 (La. 1974).

⁷⁰ *Starco Meats, Inc v. Bryan Foods*, 2003 U.S. Dist. LEXIS 4452 (2003).

⁷¹ The Washington Times, *Jury: Bertelsmann owes 2 ex-execs millions*, December 12, 2003, <<http://washingtontimes.com/upi-breaking/20031212-082554-2269r.htm>>.

On January 30, 2004, the California judge awarded Buettner and von Blottnitz 104.6 million euros each, plus interest. Bertelsmann stated it would challenge the ruling on the payment and request a new trial.⁷² It is important to note that the jury's verdict questionnaire reveals that the jury voted 12-0 in favor of plaintiff Buettner on his culpa in contrahendo claim, and that the jury awarded Buettner a total of 12 million euros on his culpa in contrahendo claim.⁷³

The California jury's awarding of damages on the culpa in contrahendo claim in the Buettner case is interesting because California has for many years refused to adopt the doctrine. For example, in 1992, the California Court of Appeals, in Racine & Laramie, Ltd v. Department of Parks and Recreation, refused to award the plaintiff relief under his culpa in contrahendo argument. In this case, the court explicitly stated that the problem with the plaintiff's "reliance on this thesis [culpa in contrahendo] is that it has never been accepted in Anglo-American jurisprudence."⁷⁴ Given California's longtime refusal to accept the culpa in contrahendo doctrine, the award on that doctrine may be overturned. However, the Buettner case illustrates that American plaintiffs in jurisdictions outside of Louisiana and Puerto Rico may find success in asserting culpa in contrahendo claims in the future.

Brief History of Pre-Contractual Fault in Venezuela and Italy

The current Venezuelan civil code is the code of 1982, which is a reform of the country's code of 1942. The code of 1942 evolved from several prior civil codes, including the code of 1873. The code of 1873, similarly, was inspired in the Italian code of 1865. A modified version of the 1873 code was adopted in 1896 to make the code more appropriate for the Venezuelan society. This code still embraced the principles of the Italian doctrine, and also added provisions from the French doctrine. Thereafter, three more reforms or codes were adopted: the codes of 1904, 1916 and 1922. The current Venezuelan civil code remains substantially similar to the Italian code of 1865.

The current Italian civil code is the code of 1942, which evolved from the country's code of 1865. The 1942 Italian code essentially abandoned the classical French Model in the regulation of contracts, and instead, follows the influence of the German Pandekten School. But interestingly, the Italian code of 1942 does not faithfully follow the German doctrine of culpa in contrahendo. Rather, the current Italian code adopted in our view a mitigated approach to the pre-contractual dealings probably still in tune with the previous code. The code imposes over the parties the duty of good faith to be observed during negotiations and formation of the contract as part of the pre-contractual responsibility. The application and development of that norm has been object of tension between the Italian doctrine that was influenced by the German doctrine and the Italian judges who were influenced by the French doctrine and courts. In fact, the doctrinal and judicial

⁷² ABC News Online, *Media giant challenges fine from US judge*, February 2, 2004, <<http://www.abc.net.au/news/newsitems/s1036045.htm>>.

⁷³ http://www.sbcourts.org/general_info/decisions/121203Buettner_Bertelsmann.pdf (accessed April 10, 2004).

⁷⁴ *Racine & Laramie, Ltd v. Dept. of Parks & Recreation*, 14 Cal. Rptr. 2d 335, 339 (1992).

development of the pre-contractual duty of good faith has not always been in harmony and pacific and based on it different hypothesis of pre-contractual responsibility associated with the doctrine of culpa in contrahendo has been developed. Unlike Italy's civil code, the Venezuelan civil code does not have an equivalent provision. The Italian code explicitly regulates the duty faith on the pre-contractual stage while the Venezuelan code instead has a general presumption of good faith dealings in its Article 789⁷⁵. Finally, the Italian civil code of 1942 and the Venezuelan civil code of 1982 regulate the extra-contractual fault (pre-contractual fault) in similar terms and the nature of the culpa in contrahendo on both systems will be matter of analysis in the next pages.

The Culpa in Contrahendo Doctrine in the Venezuelan and Italian Civil Codes

Unlike Puerto Rico's civil code, the Venezuelan code does not have provisions that expressly incorporate the culpa in contrahendo doctrine. Instead, the Venezuelan civil code takes an approach similar to that of Louisiana, which follows the Napoleonic code and has never codified the doctrine. The Venezuelan Supreme Tribunal of Justice has discussed the culpa in contrahendo doctrine. The Venezuelan jurisprudence discusses the culpa in contrahendo as an interpretation of Article 1,185, which has the following elements:

- (1) The subject at fault has acted imprudently (which is the culpa Aquiliana: "*in lege aquilia et levissima culpa venit*") causing damage to another person,
- (2) The subject at fault is obliged to repair the damage.⁷⁶

Unlike Venezuela's code, the Italian civil code goes farther, and as stated above, expressly imposes a duty of good faith on the parties during the contract's formation and negotiation.⁷⁷ Article 1,337 has the following elements:

- (1) The subject of the article is "all parties,"
- (2) During the negotiation and formation of the contract (pre-contractual stage, for that reason, the article is also label as pre-contractual responsibility),

⁷⁵ Article 789 of the Venezuelan civil code at its first paragraph reads: "The good faith is always presumed and who alleges bad faith must prove it."

⁷⁶ Article 1,185 of the Venezuelan civil code reads: "The person that with intention, negligence or imprudence has caused a damage to another person, is obliged to repair it."

⁷⁷ Article 1,337 of the Italian civil code reads: "The parties, during the negotiations and formation of the contract, must conduct themselves with good faith."

- (3) The parties must conduct themselves with good faith (duty of good faith).

In interpreting Article 1,337 of the Italian civil code of 1942, the Italian jurisprudence and doctrine has identified at least three concrete and different hypotheses of pre-contractual responsibility and has explored the nature of the culpa in contrahendo doctrine⁷⁸ within the hypotheses. The following are the hypotheses:

- (1) **Theory of Contractual Nature:** from the negotiations arises a relevant juridical relationship between the parties who are obliged to conduct themselves with good faith. Since this duty is between specific and definite parties, the violation of the duty cannot be the same as Article 2,043⁷⁹ (*obligation to indemnify for damages arising from an illicit act or tort liability*) of the Italian civil code. In fact, the 2,043 apply to subjects that before the illicit act arose were not linked by any relationship.
- (2) **Theory of Extra-Contractual Nature:** the contract is not yet concluded during the negotiation stage, so the duty of the parties to conduct themselves with good faith imposed by Article 1,337 is no different than a specification of the generic duty of *neminem laedere* of which the Article 2,043 of the Italian civil code.
- (3) **Theory of the Tertium Genus:** the pre-contractual responsibility has a specific discipline that is rooted in the singularity of the violations performed during the stage of negotiations and cannot be assimilated to the two traditional forms of responsibility.

⁷⁸ Mariacristina Cefaratti, *Diritto & Diritti*, < <http://www.diritto.it/articoli/amministrativo/cefaratti1.html>> (accessed April 4, 2004).

⁷⁹ Article 2,043 of the Italian civil code reads: "Any illicit act, intentional or negligent, that causes an unjust damage, obliges the person that caused it to indemnify the damages."

In Italy there is a split between the contractual nature theory followed by the doctrine and the extra-contractual nature theory followed by the jurisprudence. The tertium genus doctrine has very few followers. More specifically, the Italian jurisprudence discussed the doctrine of culpa in contrahendo, and stated that the doctrine is a valid cause of action, while interpreting Article 1,338.⁸⁰ Article 1,338 regulates extra-contractual (including the pre-contractual) fault.

The elements required by Article 1,338 are:

- (1) The subject at fault knows or should know of the existence of the cause of contract's invalidity.
- (2) The subject at fault does not notify the other subject of the contract's invalidity.
- (3) The non-at fault subject suffered damages as a result of trusting the subject at fault.
- (4) The non-at fault subject must be free of fault.

The Culpa in Contrahendo Doctrine in the Venezuelan and Italian Jurisprudence

In Venezuela, the Tribunal Supreme of Justice is the highest Court of Venezuela and one of its roles is the interpretation of the law. In Italy, the Supreme Court of Cassation has the jurisdiction to review decisions passed by lower courts in questions of law. Both courts have reviewed the doctrine of culpa in contrahendo, and an analysis of the approach that each court has taken with regard to the doctrine follows.

In Venezuela, a relevant discussion of the culpa in contrahendo doctrine can be found in a recent decision of the Venezuelan Supreme Tribunal of Justice, 23-21 Oficina Tecnica de Construcciones C.A. v. Banco Union et al.⁸¹ While interpreting Article 1,185 of the Venezuelan civil code, the tribunal points out that the notion of culpa in both faults is the same: lack of diligence. But it underlines the difference between the contractual fault and

⁸⁰ Article 1,338 of the Italian civil code reads: "The subject that knows or should know of the existence of the cause of invalidity of the contract and do not notify the other subject which suffered damages because it trusted without fault the validity of the contract shall indemnify."

⁸¹ Venezuelan Supreme Tribunal of Justice, Decisions, <<http://www.tsj.gov.ve/Decisiones/scc/Febrero/RC-0072-050202-99973-99034.htm>> (accessed March 22, 2004).

the extra contractual (pre-contractual) fault or culpa Aquiliana.⁸² The following differences are noted:

- (1) While in the contractual applies to parties in a contract in the extra contractual there are not parties to a contract because there is not contract;
- (2) In the application of a scale of grades lies the most significant distinction between the faults in the view of the tribunal. The scale applies to the evaluation of the contractual fault, which is based on the diligence that the debtor should have performed based on the benefit or the pact. While in the Aquiliana, there are not grade since there is a lack of a correlative and precedent pact.

More specifically, the Tribunal Supreme of Justice cites Giorgi to clarify that when a debtor contracts into an impossible obligation and hides or dissimulates to the creditor, the impossibility to execute impedes the formation of the contract. “In this case, secondly the tribunal, we cannot talk of contractual fault and if in this case the obligation to indemnify arises it is based on an obligation founded on an extra contractual fault.” Finally, the Tribunal adds that there can also be culpa in contrahendo when the contract is ineffective or invalid due to other defects, either objective or subjective. But in any case, the contract can be guided back to the bad faith or failure to disclose by the debtor. The Supreme Tribunal of Justice in this particular case did not apply Article 1,185 of the civil code (extra contractual fault) because it found that there was a valid contract between the parties.

On the other hand, in the Italian system and as stated above the Italian jurisprudence, incorporates the doctrine of the culpa in contrahendo as an interpretation of Articles 1,337, 1,338 and 2,043. In addition, the Italian Court of Cassation⁸³ has delineated the

⁸² In this respect the decision cites the Belgian doctrine explained by the author Depage in his Tratado Elemental de Derecho Civil Belga, for which the distinction between both faults is based on the relationship that in the contractual fault the parties are linked by a contract while in the Aquiliana would not exist since the status of party to a contract and third party are incompatible. Also the decision cites Giorgi and his book *Teoria de las Obligaciones* to further clarify that even if the notion of fault is always the same: lack of diligence; it is also true that the ancient tradition has distinguished between contractual and non-contractual fault (Aquiliana).

⁸³ Paola Cisano, *The Cardozo Electronic Law Bulletin*, <<http://www.jus.unitn.it/cardozo/Review/Contract/Cisano.html>> (accessed March 16, 2004).

limits of the extra contractual (pre-contractual) fault in the following terms: “the subject at fault is the subject that with ordinary diligence should or could know the cause of the invalidity of the contract and has the obligation to notify the defects to the other subject which has the duty to act diligently in order for his or her conduct be deemed as the conduct of a trusty non-at fault subject. The lack of this last specific conduct bars the verification and application of the culpa in contrahendo.”⁸⁴

The Italian Jurisprudence had developed the damages recoverable by the non-at fault party. In fact, the Italian jurisprudence distinguished between two different interests the *recoverable positive interest* and the *negative interest*. The first interest is based on Articles 1,218 and 1,223 of the Italian civil code, which regulate the contractual responsibility and allow the creditor to be placed in the same situation of that of an exact execution of the obligation. The second is a jurisprudential evolution and comprises the expenditures incurred in order to conclude a contract that was never concluded or culpa in contrahendo. Both interests have two components: *danno emergente* and *lucro cessans*. In its culpa in contrahendo hypothesis, the Italian Court of Cassation⁸⁵ defined the *danno emergente* (actual damage) as the expenses incurred during the failed negotiation, and the Court defined *lucro cessans* as the losses suffered from the foregone opportunities of contracts with similar or greater advantages than the contract that was never concluded.

On the other hand, the Italian lower courts had applied the doctrine of culpa in contrahendo to areas of contracts not regulated by statutes, such as franchising. In a decision by the city of Chieti District Court, it was stated that: “when negotiations have reached a certain advanced stage of conclusiveness, non-provision of a guarantee by the perspective franchise (who had not previously been informed of such prerequisite) is not a reason for withdrawal.”⁸⁶

Finally, the evolution of the application of the doctrine of culpa in contrahendo has even been applied to the Italian public administration. As matter of fact, the Italian Court of Cassation⁸⁷, interpreting Article 2,043, has extended the application of the pre-contractual responsibility to the Italian public administration in the following terms:

“from the traditional interpretation of the Article 2,043 of the Italian civil code that identifies the unjust damage with the injury to a subjective right . . . derives a relevant limitation of the responsibility of public administration in case of illicit exercise of the public function that has caused damages to a private party. But such as island of immunity and privilege, we have to pin point, cannot be pair with the most elemental claim for justice.”⁸⁸

⁸⁴ *Id.*

⁸⁵ Mariacristina Cefaratti <<http://www.diritto.it/articoli/amministrativo/cefaratti1.html>>.

⁸⁶ Aldo Frignani, *The Cardozo Electronic Law Bulletin, Franchising in Italy*

<http://www.jus.unitn.it/cardozo/Review/Business/Frignani-1997/Mendel.htm> (accessed April 5, 2004).

⁸⁷ Mariacristina Cefaratti <<http://www.diritto.it/articoli/amministrativo/cefaratti1.html>>.

⁸⁸ *Id.*

Conclusion

As the above analysis demonstrates, the civil law systems of Venezuela and Italy both readily utilize the doctrine of culpa in contrahendo as a remedy for pre-contractual fault. In contrast, with the exception of the mixed-system jurisdictions of Louisiana and Puerto Rico, courts in the common law United States have been reluctant to adopt the culpa in contrahendo doctrine. Although some American plaintiffs have more recently asserted culpa in contrahendo claims in jurisdictions outside of Louisiana and Puerto Rico, it is doubtful that United States courts will embrace the doctrine in the near future.

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