

THE PRE-CONTRACTUAL PHASE AND THE NEGOTIATIONS REGARDING THE CONTRACT IN THE ROMANIAN CIVIL CODE

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Abstract: The pre-contractual negotiation stage is represented by the “exploratory period” when future contracting parties exchange points of view, formulating and discussing the proposals in order to determine the content of the contract, without the assurance that the contract will be closed. This is an essential phase and both the balance of the potential contract and the quality of the contract depend on its development and success.

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1. Generalities

The pre-contractual negotiation stage is represented by the “exploratory period” when future contracting parties exchange points of view, formulating and discussing the proposals in order to determine the content of the contract, without the assurance that the contract will be closed. This is an essential phase and both the balance of the potential contract and the quality of the contract depend on its development and success¹.

The pre-contractual stage may suppose a progression or a regression in achieving the contractual agreement, that is may or may not lead to closing a contract. Regardless of the final solution of this stage, it takes place in the light of the freedom in negotiating which is addressed in article 1183, line (1) Civil Code, according to which “the parties have the freedom to initiate, develop and break negotiations and cannot be held responsible for failure”. This freedom of negotiation is characterized by the parties’ right to choose their own negotiation partners, to interrupt pre-contractual debates whenever they consider adequate, to accept or to refuse signing a contract after having finished

1 Fr. Terre, Ph. Simpler, Y. Lequette in Fl. I. Mangu, *Contracte civile si administrative de valorificare a fondurilor europene*, Editura Eikon, Cluj-Napoca, 2013, p. 110.

negotiations². In fact, we can see here the application of freedom of rightful subjects who can close any contract, for which they can negotiate when, how much and how they want. The rightful subjects who get involved in negotiations are free to do so by occasional representatives, as well as professionals³ (for example, real estate agencies, car dealers, lawyers).

The contractual freedom allows parties of a future convention to put up rules to be applied when negotiating⁴ the contract that finalizes the process of negotiations.

Also, the substantial freedom of negotiation implies a total freedom of expressing the intention to enter into contracts for possible contractual negotiations. That is why basically announcements are published and spread, physically or virtually, advertising or presenting characteristics of goods and services, as well as informing partners about possible tariffs and prices. Such documents are not considered contractual writings, and the responsibility of those who circulate them is strictly tortious⁵.

2. Juridical conditions applicable to the pre-contractual stage

When establishing the juridical conditions applicable to the pre-contractual stage, it is necessary to consider the sources of incidental obligations, that is, if they are stipulated by law or if they are created by parties (contravention obligations).

Thus, if we speak about breaking legal obligations, responsibility is extra-contractual, tortious, whereas, if we deal with breaking a contractual obligation, responsibility is contractual, under the provisions in the preparatory contract that was signed⁶.

The law that is applied to the pre-contractual stage is considered to be the law applicable to the projected contract. Thus, regardless of the characterization of responsibility described above, the national law which is applicable will be that of the final contract, according to article 12 Rome Regulations II regarding the applicable law to extra-

2 Ph. Malaurie, L. Aynes, Ph. Stoffel-Munck in L. Pop, I. Fl. Popa, S.I. Vidu, *Tratat elementar de drept civil. Obligatiile*, Editura Universul juridic, Bucuresti 2012, p.91.

3 P. Vasilescu. *Drept Civil*. Editura Hamangiu. Bucuresti, 2012, p. 278.

4 M. Fabre-Magnan in P. Vasilescu. *Drept Civil*. Editura Hamangiu. Bucuresti, 2012, p. 576.

5 P. Vasilescu. *Drept Civil. Obligatii*. Editura Hamangiu. Bucuresti, 2012, p. 278.

6 L. Pop, I. Fl. Popa, S.I. Vidu, *Tratat elementar de drept civil. Obligatiile*, Editura Universul juridic, Bucuresti 2012, p.98.

contractual obligations, the only condition being that breaking obligations to enter the notion of *culpa in contrahendo*⁷. Thus, the law applicable to the pre-contractual stage is finally determined by the rules established by article 2 and the following from the Regulations Roma I regarding the law applicable to contractual obligations⁸.

The negotiations describe a factual situation, and juridical, not psychologically, sociologically or economically, it is interesting to see the behavior of those engaged in such contractual negotiations⁹. The pre-contractual freedom is under certain limits that are given by the presence of some legal or conventional explicit or implicit obligations.

3. Specific obligations to pre-contractual stage

When speaking about specific obligations to pre-contractual stage, we refer both to legal obligations and to a series of obligations that can be implied from these and which can be characterized as implicit obligations. Another category of obligations can be the result of preparatory conventions closed by parties in the negotiation phase. Such obligations are:

a. The obligation of good will. It is a legal obligation, provided by article 1183 (2) Civil Code, according to which “the party that is involved in a negotiation must respect the requirements of good will. The parties cannot agree upon excluding this obligation”. This obligation is a mandatory obligation which supposes that parties cannot eliminate or restrict it.

From the good-will obligation we can imply numerous obligations, sometimes called “implicit”, the most significant one being pre-contractual information.

b. The obligation of confidentiality is the second legal obligation retained in the negotiation phase. It is stipulated in article 1184 Civil Code, according to which “when confidential information is communicated to a party during negotiations, the other party must not divulge it and not use it for its own interest, whether the contract is closed or not. Breaking this obligation attracts responsibility of the guilty party”. This time, due to the fact that we speak about a

7 I. Bach, P. Huber in L. Pop, I. Fl. Popa, S.I. Vidu, *Tratat elementar de drept civil. Obligatiile*, Editura Universul juridic, Bucuresti 2012, p.98.

8 A. Bonomi in L. Pop, I. Fl. Popa, S.I. Vidu, *Tratat elementar de drept civil. Obligatiile*, Editura Universul juridic, Bucuresti 2012, p.98.

9 P. Vasilescu. *Drept Civil. Obligatii*. Editura Hamangiu. Bucuresti, 2012, p. 275.

disposition, parties can derogate from the provisions of article 1184 Civil Code, allowing the use of obligations obtained during negotiations and during relations with other persons, possible during other negotiations. This permission is equivalent to a requalification of information exchanged as not being confidential.

c. *The obligation of pre-contractual information* is not clearly stipulated, but the theory of vices of consent leads to holding in this pre-contractual phase of this obligation, being legal and implicit¹⁰, implied from the general obligation of good-will. The object of the obligation of information is given by a sum of information related to future contract and which is considered important to closing a contract.

The obligation of information is considered to be an obligation of result, that is, the one who owes it must be sure that transmitting information is realized and thus, the purpose of obligation was realized, as well as being sure that the recipient of information has understood the information that was provided¹¹ to him.

d. There are also *contractual obligations and obligations resulted from preparatory conventions*, closed before organizing the pre-contractual phase, for example: the obligation to negotiate, to continue negotiations, to be honest, to have exclusive right on negotiations, to assist, to bear certain pre-contractual costs, etc.¹².

4. Classification of pre-contractual negotiations

Pre-contractual negotiations can be of two sorts, according to the way they are organized, such as: free negotiations or common negotiations (governed by the common law – article 1182-1185 Civil code) and negotiations organized conventionally or contractually (by rules established by parties).

5. Free or common negotiations

Due to the fact that they are not organized conventionally, the juridical stage of initiation, development or/ and breaking negotiations

10 L. Pop, I. Fl. Popa, S.I. Vidu, *Tratat elementar de drept civil. Obligatiile*, Editura Universul juridic, Bucuresti 2012, p.93.

11 L. Pop, I. Fl. Popa, S.I. Vidu, *Tratat elementar de drept civil. Obligatiile*, Editura Universul juridic, Bucuresti 2012, p.94.

12 L. Pop, I. Fl. Popa, S.I. Vidu, *Tratat elementar de drept civil. Obligatiile*, Editura Universul juridic, Bucuresti 2012, p.94.

is governed by the norms of common law represented, as we have already demonstrated, by article 1182-1185 Civil Code.

The pre-contractual stage of negotiation must be characterized by at least the same characteristics that define the contractual stage¹³. Thus, if we speak about the freedom to contract, that has no other limits than law, public order and good manners, there must be freedom to negotiate, within the same limits, universally valid, to which we referred above.

This right to free initiation, development and breaking of negotiations is considered, along with the right to contractual freedom, an essential piece in modern market economy, conferring to parts, among other things, the faculty to bear simultaneous negotiations with more potential partners, with the finality to compare various offers received, to choose the most advantageous and to break discussions with those who do not fulfill expectancies of the one involved in negotiations¹⁴.

6. Conventionally organized negotiations

In the pre-contractual stage, discussion partners may close different kinds of conventions, which can be generically called “preparatory contracts” and which have the role to prepare the future definitive contract from the point of view of its content¹⁵.

These contracts can be grouped in three categories, according to the nature and the intensity of obligation:

- a. preparatory contracts that result into the obligation of negotiation (negotiation contracts);
- b. preparatory contracts that have as an object a preferential obligation;
- c. preparatory contracts that generate an obligation to close a definitive contract.

7. Negotiation contracts

Negotiation contracts (also called negotiation agreements, agreement in principle, negotiation pact etc.) have as an object the conventional organization of rapport between parties in the negotiation

13 Fl. I. Mangu. Contracte civile si administrative de valorificare a fondurilor europene. Editura Eikon, Cluj-Napoca, 2013. P.111

14 Fl. I. Mangu. Contracte civile si administrative de valorificare a fondurilor europene. Editura Eikon, Cluj-Napoca, 2013. P.112

15 Fl. I. Mangu. Contracte civile si administrative de valorificare a fondurilor europene. Editura Eikon, Cluj-Napoca, 2013. P.118

phase of the definitive contract. Their main aim is to organize negotiations (already started or the ones that will be initiated) in the sense that conditions and development modalities should be determined, to confer the whole security desired to close a definitive contract¹⁶.

The negotiation agreement is defined in literature as being the contract where the parties engage to negotiate willingly the signing of a future contract, whose elements are not yet established or are only partially outlined¹⁷.

In fact, the obligation of negotiation can result either from a contract or in a negotiation clause inserted in a contract.

As far as the effects of such a convention are concerned, the main obligation that results into an agreement in principle is that to negotiate, to have discussions in order to close a future definitive contract, with conditions that will be revealed during negotiations. That is why, breaking it will conduct to paying damages-interests to the injured party due to the contractual civil responsibility or to abuse of rights¹⁸.

8. Partial agreement or scores

If negotiations stretch on a longer period, the parties may come to an agreement regarding certain elements of the future definitive contract. These elements to which the parties agree not to return unilaterally, not to bring them back into discussion, are pointed to within the partial agreement. This partial agreement represents an act of will, partial and definitive, on which parties agree not to return unilaterally. Thus, during negotiations, more scores can be closed, every time the partners come to a consensus regarding elements of the future definitive contract.

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16 Fl. I. Mangu. *Contracte civile si administrative de valorificare a fondurilor europene*. Editura Eikon, Cluj-Napoca, 2013. P.118.

17 J. Goicovici in Fl. I. Mangu. *Contracte civile si administrative de valorificare a fondurilor europene*. Editura Eikon, Cluj-Napoca, 2013. P.119.

18 J. Flour, J. L. Aubert, E. Savaux in Fl. I. Mangu. *Contracte civile si administrative de valorificare a fondurilor europene*. Editura Eikon, Cluj-Napoca, 2013. P.120.