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Application of the experience of Germany regarding apre-contractual liability for recodification (update) civil legislation of Ukraine

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A. General provisions regarding the recodification (updating) of Civil legislation of Ukraine

In 2020, the Cabinet of Ministers of Ukraine approved the Concept recodification (updating) of the Civil Code of Ukraine" (hereinafter - Concept). This is due to a number of economic, political and legal reasons factors and prerequisites. At the same time, we are talking about fundamental and systemic

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update of all books of the Civil Code of Ukraine of 2003 (hereinafter – CC of Ukraine) taking into account the legislative experience in this area, (mainly, Germany and France), as well as other EU countries. Authors of the Concept updates of the CC of Ukraine claim that the need for recodification stems from the logic of the further systemic transformation of society, including regarding formation of a real and effective market economy as integral component of civil society and European integration orientation of all components of society[1]. The term "recodification" is used by the representatives of the Working Group in the sense of systemic essential meaningful and structural innovations of the current code (or group of codes and laws), without creation of a new[2].

Analyzing the prerequisites and grounds for the initiation of recodification of civil legislation, the main reason for the recodification is the need to increase legal certainty as a component of the principle the rule of law. It is legal certainty that is the factor behind which can be used to determine compliance (or inconsistency) of legislation to the needs of social life, its the possibility (or impossibility) of contributing to the satisfaction of the subjects' needs rights in the corresponding. Legal certainty is felt absolutely all segments of our society and its members, since civil law – this is the area of legal regulation that applies to any person, any legal entity and public entity. And not just any and everyone and always, because the legal regulation of property, contracts, compensation for damage and other aspects of our existence is demanded by all[3]. In turn, the task of science is to develop as wide as possible spectrum of possibilities for solving a specific legal problem on based on the use of the law of different legal systems, and the legislator must choose the most acceptable solution for Ukraine. One of these problem is to resolve the issue regarding the place of the pre-contract responsibility in the updated civil legislation of Ukraine.

B. Regarding the determination of the place of pre-contractual liability in the updated Civil Code of Ukraine, taking into account experience of Germany

An important issue related to the institution of pre-contractual responsibility, there is a determination of his place in the system of obligations, his nature: whether it belongs to the contract, to the tort or is independent a type of non-negotiable obligations. Since the institution of pre-contractual responsibility originates from German doctrine and judicial practice, it is appropriate to consider the nature of culpa in contrahendo from the German law and order.

[1] Концепція оновлення Цивільного кодексу України. Київ: Видавничий дім “АртЕк” [The concept of updating the Civil Code of Ukraine. Kyiv: Publishing house "ArtEk"], 2020, 128 p.

[2] Довгерт А. Рекодифікація Цивільного кодексу України. Право України. 2019. Вип. 1. С. 5. [Dovgert A. Recodification of the Civil Code of Ukraine. Law of Ukraine. 2019. Issue 1. P. 5].

[3] Спасибо-Фатєєва І. В. З приводу концепції щодо модернізації Цивільного кодексу України (рекодифікації). [Spasibo-Fateeva I. V. Regarding the concept of modernization of the Civil Code of Ukraine (recodification)].URL: https://sud.ua/ru/news/blog/157375-z-privodu-kontseptsiyi-schodo-modernizatsiyi-tsivilnogo-kodeksu-ukrayini-rekodifikatsiyi.

There were two types of tort liability in Germany lawsuits: act. de dolo (with intentional damage) or act. Legis Aquiae (in case of physical damage, but with any form of fault). This one circumstances necessitated the creation of some kind of "hybrid" of the above-mentioned lawsuits, which would have been borrowed from the first - lack of instruction on the form of causing damage, and from the second, the possibility of liability for careless behavior, this lawsuit became culpa in contrahendo[4].

The tort law of Germany did not know sanctions for the reduction of property in general, as a result of the costs of concluding the contract, which never arose, and no operated on the principle of general tort (§ 823 of the German Civil Code Provisions (hereinafter referred to as GCC)), which did not allow R. von Iering to speak about the tortious nature of the liability he investigated. It is caused by this the need to attribute this concept to the institutions of contract law, which is confirmed by the following argument: entering into negotiations, a person leaves the sphere of non-negotiable relations, which are characterized solely the obligation to refrain from misconduct, and enters into pre-contractual sphere, which entails acceptance by the parties also positive duties – to act with the appropriate level of prudence and care in relation to the counterparty.

R. von Iering concludes about the contractual nature of the culpa in contrahendo, since, when concluding a contract, the parties undertake not only the obligation to perform the deed, but also the obligation to be ready and make an effort to do it. In the presence of any defect during the conclusion of the deed, it is impossible to perform another of the above duties. Since the contractual obligation is violated, the claim that appears, must also have a contractual nature. These considerations find confirmation in the fact that the invalidity of the contract provides the absence of all consequences of the deed, only related to the practical purpose contract. Obligations of a different kind: to return the transferred item, deposit or to compensate for losses related to the preliminary performance of the contract, - remain.

Therefore, the German courts have developed a category of mutual trust which similar to contractual relations and in respect of which it is allowed to apply contractual regime in case of culpa in contrahendo. Here it should be understood that scientists, from with which some panels of the Federal Court agreed, held that

interrupted negotiations are not a case of culpa in contrahendo, but a defense trust. This opinion provides that §123 BGB should be applied per by analogy instead of the rules on contractual liability.

In addition, German jurisprudence has extended the application doctrines of pre-contractual liability beyond indemnity only purely property (material) damages - began to be covered by practice cases of damage to the property or health of the counterparty. The beginning of this was laid down by the

[4] Jhering R.v. Culpa in contrahendo oder Schadensersatz bei nichtigen oder nicht zur Perfektion gelangten Verträgen, in: Jherings Jahrbücher, Bd. 4. 1861.

Linoleumfall case (07.12.1911): *during the inspection of building materials in the seller's premises, rolls of linoleum fell on the buyer, and he was injured. The court found that the seller, being a professional market participant, was negligent in his pre-contractual obligations to ensure the safety of a potential counterparty*[5].

During the reform of the law of obligation in Germany in 2001, article on pre-contractual liability (§ 311) was placed in the section of the GCC, dedicated to obligations from the contract, which by means of systematic analysis of the code allows us to talk about the legislator's attitude to this institution as close to contract law. Tort claims may be filed next to pre-contractual liability requirements.

In addition to the existence of a pre-contractual obligation on grounds responsibilities are:

- breach of duty;
- losses;
- causal relationship;
- wines.

Clauses 1-3 of § 311 of the GCC list the compositions in which it occurs pre-contractual responsibility (through negotiations; involvement in contract (a classic example of which is the entry of a potential client to seller's premises); through other business contacts), but there is no list comprehensive, abstract formulations allow to expand it practically. An example of such an extension is inclusion the need to protect the interests of third parties who are not parties to the contract, but related to the plaintiff, in the field of pre-contractual liability (if, let's assume that not only a potential person will enter the seller's premises the buyer, but also his relatives, who thus "face" the future contract). The possibility of pre-contractual liability of a third party directly enshrined in the law (item 3 § 311 of the GCC).

Clause 2 § 241 of the GCC lists some possible violations, the list of which is not exhaustive. These include: termination of negotiations, if as a result of the negotiations and actions of the party that terminated them, the other party has objective and reasonable expectations that it will be concluded, on the basis of which it makes any investments in future performance (expenses for such investments can be demanded from the counterparty who refused the contract without a reason), opposition of the violator of validity contract (in cases where the circumstance that caused the invalidity the transaction is within the sphere of influence of the party to the contract; when she appeared as a result of the fact that the party did not inform the other about it existence), violation of the obligation to provide the necessary information. This is an obligation enshrined in § 242 of the GCC, according to which the scope the necessary provision of information depends on the circumstances of a specific case and should be determined taking into account the principle of "good intentions". To such

[5] Zimmermann R. The Law of Obligations. Cape Town, 1990. P. 138.

information, as a rule, refers to information about important in view of conclusion of the contract, the circumstances, about the properties of the subject of the contract, are available obstacles to the execution of the transaction, etc.

It should be noted that §241 (2) refers to pre-contractual obligations and obligations to take into account the interests of the parties during the performance of the contract. Back in 1902, the Berlin lawyer Hermann Staub proposed the institution of liability for "positive breach of contract", which was later accepted by the highest German court[6].We are talking about cases when the obligation is fulfilled, but in such a way that the creditor is harmed. For example: a painter flawlessly performs painting work, but at the same time damages the door with his ladder, lamps and furniture in the customer's apartment; the nanny is good at taking care of the children, but constantly tries to include extra hours for the payroll[7].

In modern German law, the most common approach to nature culpa in contrahendo as a sui generis institution[8]. It would be unfair oblige the party that entered into negotiations and caused in connection with losses due to the bad faith behavior of the counterparty, to suffer them without any compensation from the guilty party. Due to the fact that there are similar losses autonomous from the future contract, and possible even in its absence of the following agreement, there are reasonable doubts about the nature damages as contractual. At the same time, recourse to tort liability would mean recognition in Germany of the obligation to compensate purely economic damages in non-negotiable relations, which would contradict the tort model the rights of Germany in general. German jurists concluded that culpa in contrahendo is a special institution designed to establish prohibition damage to the economic interests of the counterparty in the course of negotiations, a also ensure the possibility of recovery of damages on the basis of the provided unscrupulous party of trust[9].

In this regard, an interesting approach developed by judicial practice in Germany regarding public procurement tenders. In most cases a competition participant who suffered from a violation by a state body, who conducts the competition, obligations of good faith, has the right to demand damages based on "adverse interest" which usually means reimbursement of costs incurred in connection with participation in the competition. Such a right arises, in particular, if the state body unreasonably canceled the competition, or, say, did not provide financing for purchases that were expected, and did not inform the participants that purchases from this reasons may not occur. At the same time, the

[6] Lorenz W. Reform of the German law of breach of contract // Edin. L. R. 1997. 1 (3). P. 320.
[7] Zimmermann R. Remedies for non-performance: the revised German law of obligations, viewed against the background of the principles of European contract law // Edin. L. R. 2002. 6 (3). P. 291.
[8] Markesinis B., Unberath H., Johnston A. The German Law of Contract. A Comparative Treatise. Second Edition. Hart Publishing, Oxford and Portland, Oregon, 2006. P. 91-93.
[9] Markesinis B., Unberath H., Johnston A. The German Law of Contract. A Comparative Treatise. Second Edition. Hart Publishing, Oxford and Portland, Oregon, 2006. P. 97.

participant does not have the right to demand damages if he knew or should have known about violation by a state body, but took part in the competition.

This approach is justified by a clear lack of trust on the part of participant[10], that is, the participant could not rely on the good faith of the state body, and therefore, he could not suffer losses from the violation of the duty to act in good faith.

For the same reason, by the way, the potential participant of the competition does not have a claim, if the state body, in violation of the legislation on public procurement, concluded a contract with a contractor without announcing a tender at all[11]. Normally, a bidder can claim damages only on the basis of adverse interest, since the bidder cannot expect to be awarded the purchase even if its bid was the most advantageous. A public body may be forced to enter into a contract, as this is prevented by the principle of freedom of contract. At the same time, the participant can claim damages based on positive interest, in particular including the lost benefit from the contract, if it proves that there would be no violation of public procurement awarded to him. Examples are cases where public procurement are awarded to another participant whose offer was lower attractive, or when, after cancellation of the competition, the contract is concluded with a supplier who did not participate in the competition at all[12].

Thus, the institution of culpa in contrahendo in German law arose as a result of judicial law-making as a result of a rather broad interpretation of the GCC.

C. International legislation regarding the doctrine of culpa in contrahendo

The spread of the doctrine of culpa in contrahendo is facilitated by the international law making Yes, in the Principles of International Commercial Contracts (UNIDROIT Principles) contains Article 2.15 ("Unfair negotiations" *1. The party is free to negotiate and is not responsible for failure to agree. 2. However, the party conducting or interrupting negotiations in bad faith, is responsible for the losses caused to the other party. 3. In particular, a party's entry into negotiations or negotiations is unconscionable continuation in the absence of an intention to reach an agreement with the other party)* which establishes a model of pre-contractual liability.

Therefore, the modern trend of the development of the pre-contractual institution responsibility is gradually replaced by the doctrine of culpa in contrahendo "delict" and "contractual" approaches from

[10] Rubach-Larsen A. Damages under German law for infringement of EU procurement law // P.P.L.R. 2006. No. 4. P. 188.
[11] Rubach-Larsen A. Damages under German law for infringement of EU procurement law // P.P.L.R. 2006. No. 4. P. 193.
[12] Rubach-Larsen A. Damages under German law for infringement of EU procurement law // P.P.L.R. 2006. No. 4. P. 193

national law are different countries. A clear example of this is the establishment of culpa in contrahendo in Regulations (EC) № 864/2007 of the European Parliament and the Council of the European Union on the law applicable to non-negotiables obligations (Rome II Regulations)[13]. The specified Rules directly applied in the territory of EU member states (except Denmark) from 11 January 2009.

However, it should be noted that some states (for example, Portugal) generally did not develop a unified position in the practice of application pre-contractual liability. In some specific situations, she is defined as contractual, in others as delict. Differences in legislation restrained the development of international trade and demanded unified approach to solving the conflict issue. From agreed the choice of the conflict of law rule also depends on the position between the states. Absence practically agreed position is affected by the predictability of the court's decision.

Choice of law applicable to pre-contractual liability, related to the difficulties of determining the most significant criterion (closely related to this legal relationship) moment or fact. First of all, this applies to such collision links as the place of damage or location of the parties to the pre-contractual legal relationship. Criteria the choice of law to be applied was made an urgent task unification of the conflict issue that was resolved as a result of the adoption Regulation of the European Parliament and the Council of the European Union from July 11, 2007 № 864/2007 "On the law applicable to of non-contractual obligations" (hereinafter - the Rome II Regulation), which contains a special conflict of law rule applicable to culpa in contrahendo (Article 12). As a result of the entry into force of the Rome II Regulation in a direct reference to proper appeared in many acts of the EU member states application of the provisions of the Regulation.

The development trend of pre-contractual conflict regulation relations is the consolidation of the principle of the autonomy of the will of the parties. This is evidenced Regulation Rome II, in Article 14, it is allowed to be concluded by the parties agreement on the choice of law applicable to of pre-contractual liability, as well as accepted within the framework of the Hague Convention conference on international private law, Hague principles regarding choice of law applicable to international commercial contracts, according to which the principle of autonomy of the will of the parties extends to pre-contractual relations of the parties.

[13] Regulation (EC) No. 864/2007 of the European Parliament and of the Council on the law applicable to noncontractual obligations (Rome II) URL: http://eurlex.europa.eu/smartapi/cgi/sga_doc?smartapi!celexplus!prod!DocNumber&lg=en&type_doc=Regula tion&an_doc=2007&nu_doc=864).

D. Regarding pre-contractual civil liability legislation of Ukraine

It should be noted that the Central Committee of Ukraine does not directly establish the institute pre-contractual liability, however, specified in certain provisions the legal institution still manifests itself. Yes, up to the established norms pre-contractual liability can be attributed to the provisions of Art. 229 ("Legal consequences of a deed committed under the influence of a mistake") and Art. 241 ("Commitment of acts in excess of authority"). In particular, in accordance with Part 2 of Art. 229 of the Civil Code of Ukraine, in case of recognition of the deed a person who made a mistake as a result of his own negligence is invalid, is obliged to compensate the second party for the damages caused to it. The party which contributed to the mistake by her careless behavior, is obliged to compensate the other party for damages caused to it. General legal the basis for this is the provisions of Part 2 of Art. 216 of the Civil Code of Ukraine, which establish if in connection with the commission of an invalid deed to the other party or losses and moral damage caused to a third person, they are subject to

compensation by the guilty party. Also part 2 of Art. 635 of the Civil Code of Ukraine ("Preliminary Agreement") is defined as a party that is unreasonable evades the conclusion of the contract, must compensate the other party damages caused by delay, unless otherwise established by the previous one contract or acts of civil legislation.

According to modern scholars, pre-contractual liability is not can be classified as neither contractual nor delict: contractual liability cannot arise in the absence of an agreement between the parties of a valid contract, and tort law, which provides for a different sequence events (illegal actions - damage to interests protected by law, subject to compensation), it turns out to be unsuitable for formulation rules on pre-contractual liability.

We believe that pre-contractual legal relations are an independent type of legal relations and have a complex structure combining elements of contractual and non-contractual obligations. The absence of a formal basis in the form of a signed contract does not allow us to unambiguously state the contractual nature of pre-contractual relations. At the same time, the appeal to contractual structures and the implementation of legal actions aimed at establishing contractual relationships indicate the presence of a contractual element in the structure of pre-contractual relations. The specified circumstance does not allow us to unequivocally define pre-contractual relations as having a non-negotiable nature, despite the absence of a concluded contract, due to the fact that the parties enter into pre-contractual legal relations through the implementation of lawful actions and of their own free will (which is not characteristic of non-negotiable relations). A non-negotiable element of pre-contractual relations is damage caused by dishonest behavior during negotiations (non-negotiable damage).

Thus, pre-contractual relations are independent legal relations in the system of private law, which have a special legal nature, which is evidenced by the presence of an independent subject, pre-contractual

rights, obligations of the parties, civil liability for the violation of their obligations by the parties, as well as a system of norms material legal and conflict regulation in the national legislation of different countries.

E. The role of the principle of good faith in pre-contractual relations (Ukrainian and international experience)

In pre-contractual relations, important issues are: 1) to the extent that the parties may be bound by an obligation to continue negotiations to achieve a common goal, which is to conclude final contract? 2) Can the party that interrupted negotiations without valid reasons, be responsible to the other party for caused material damage? 3) Are the parties obligated in the relationship between to act in good faith. According to Hans-Joachim Schramm, the central tasks of the system of private law belong to the provision stable legal relations. This principle includes two aspects: firstly, the protection of good faith, and, secondly, the stability of the contractual relations In addition, the concept of the duty to act in good faith was the basis for determining do the obligation to provide relevant information before entering into a contract and for liability in connection with violation of contractual obligations[14]. The principle of good faith determines the orientation of the behavior of the participants in civil legal relations, it has serve as the ultimate goal of applying the civil-legal mechanism regulation of public relations. Therefore, the vast majority of civilian legal norms should be based on good faith as the main requirement to behavior of participants in civil legal relations. Changes made to the Central Committee of Ukraine and the current laws regulating civil legal relations should be followed to evaluate precisely in view of the necessity of good faith implementation participants of their rights and obligations. Therefore, the norms of civil rights that regulate the appropriate type of social relations (property and non-property, organizational, corporate, etc.), must carry with them the potential of good faith to transfer its regulatory influence to the behavior of their participants[15]. In this context, it should be added that it is special the principle of good faith is important in pre-contractual agreements legal relations, it applies to the actions and intentions of the persons who discovered the desire to conclude a basic contract. Yes, in one of the cases the Supreme Court of Ukraine noted that the pre-contractual obligation of the insured to provide the insurer reliable information about the objects of insurance and risk factors is a manifestation of the highest good faith (the doctrine of uberrima fides) and is related

[14] Шрамм Ганс-Йоахим. Методичні міркування щодо імплементації концепцій іноземного права до українського цивільного права. Гармонізація приватно-правового законодавства України із законодавством країн ЄС. Матеріали IX Міжнародного цивілістичного форуму (м. Харків 11-12 квітня 2019 р,). Київ.: ТОВ «Знання» [Schramm Hans-Joachim. Methodological considerations regarding the implementation of concepts of foreign law to Ukrainian civil law. Harmonization of private law legislation of Ukraine with legislation of EU countries. Materials of the IX International Civil Forum (Kharkov, April 11-12, 2019 r,). Kyiv.: Znannia LLC], 2019. P. 32.

[15] Тобота Ю.А. Принцип справедливості, добросовісності і розумності у цивільному праві: моногр. Х.: Харк. Нац. пед. ун-т імені Г. С. Сковороди [Tobota Yu.A. The principle of justice, good faith and reasonableness in civil law: monogr. H.: Hark. National Pedagogical University named after H. S. Skovoroda], 2020. P. 52.

with the risky nature of the insurance contract. Essentially the insurer necessary information to assess the insurance risk. The insignificance of the second of the insurance contract is associated with non-fulfillment of the pre-contract an obligation that is essential for the performance of the future contract insurance. Civil legislation does not contain an indication of which the standard of disclosure of information by the future insured should be applied Taking into account the principles of civil law, it should be done conclusion that for the disclosure of information by the future policyholder the construction of "reasonable risk communication" must be applied; that is, the prospective insured must provide information that he knows or should know about the object insured[16].

Regarding the provision of pre-contractual information, in Directive 2014/17/EU provisions are established taking into account the maximum harmonization in communication with provision of pre-contractual information with use standardized format of the European standardized information form (ESIS) and APRC 17 calculation[17]. In particular, member states may maintain or introduce national provisions in areas such as contractual law relating to the validity of credit agreements, property law, land registration, contractual information and, in cases where they are not governed by this Directive, in matters arising after signing a contract.

Commission Recommendations 2001/193/EC states that pre-contractual information must be provided to consumers by lenders who offer home loans, the Commission undertook to monitor compliance with the Voluntary Code of Conduct regarding the pre-contractual information for housing loans containing ESIS, which provides the consumer personalized information about the credit agreement provided to him.

The evidence gathered by the Commission highlighted the need to revise the content and format ESIS to ensure its clarity, comprehensibility and content of all information, necessary for consumers. Directive 2002/65/EU provides possibility of transmission of pre-contractual information by the supplier after concluding a contract[18].

In § 242 of the Civil Code, it is provided that "the debtor is obliged to fulfill the obligations in good faith, taking into account the customs of civil turnover". This provision became the basis for the formation of a general warning. In the doctrine, there is no unity of opinion regarding the

[16] Resolution of the Central Committee of the Supreme Court dated March 10, 2021 in case No. 753/731/16. URL: https://verdictum.ligazakon.net/document/95502347.

[17] On credit agreements for consumers relating to residential real estate and amendments to Directive 2008/48/EC and 2013/36/EC and to Regulation (EC) No. 1093/2010: Directive of the European of the Parliament and the Council 2014/17/EU dated February 4. 2014 URL: https://zakon.rada.gov.ua/laws/show/984_004-14#Text.

[18] On Remote Implementation of Consumer Financial Services and Amendments to the Council Directive 90/619/EEC and Directives 97/7/EC and 98/27/EC: Directive 2002/65/EC of the European Parliament and of the Council 23.09. 2002 URL: https://zakon.rada.gov.ua/laws/show/994_b31#Text.

understanding of the general warning with other norms of law, but only emphasizes that this legal category is characterized by "increased uncertainty" or represents an "undefined norm of law"[19]. Unlike German law in theory and the practice of other national legal systems good faith considered as a general principle of law.

To solve the problem, the principle of good faith, was reflected in Clause 1 of Art. 7 of the Vienna Convention and received development as a generally accepted international standard according to which it is necessary to promote good faith in international trade, including at the stage of negotiations. Conscientiousness, according to O. O. Kot, should be qualified as a general requirement for the action of the contracting parties[20]. At the same time, good faith is honesty, lack of desire to lead in misleading the counterparty, trying to establish the true meaning of the international contract The principles of good faith interpretation directly follow from of the "pacta sunt servanda" principle, since the performance is in good faith contractual obligations is possible only if the contract is carried out in accordance with an adequate understanding[21].

Therefore, the principle of good faith acts as a regulator pre-contractual relations, determines the limits of the autonomy of the subjects' will civil law and freedom of contract, and for its violation is established responsibility[22]. Yes, the Australian Court of Appeal in Renard Construction (ME) Ltd. v. Minister for Public Works was based on the principle good faith, which is used in contractual disputes in Europe and the USA.

The court noted the existence of factors contributing to recognition good faith as an implicit obligation in contractual relations. One of of the listed factors was Art. 7 (1) of the Convention. The court

[19] Grundmann S., Mazeaud D. General clauses and standards in European contract law: comparative law, EC law and contract law codification. Kluvver Law International. 2005. P. 30.
[20] Кот О. О. Порівняльний аналіз норм Конвенції Організації Об'єднаних Націй Про договори міжнародної купівлі-продажу товарів і Цивільного Кодексу України. Право України. [Kot O. O. Comparative analysis of the norms of the Convention of the United Nations Organization on Treaties of International purchase and sale of goods and the Civil Code of Ukraine]. *Law of Ukraine*. 2016. No. 5. P. 31.
[21] Гуменчук А. М. Принцип добросовісного виконання договорів у міжнародному приватному праві. [Humenchuk A. M. The principle of good faith performance of contracts in private international law]. URL: http://dspace.onua.edu.ua/bitstream/handle/11300/3398/%D0%93%D1%83%D0%BC%D0%B5%D0%BD%D1%87%D1%83%D0%BA.pdf?sequence=1&isAllowed=y.
[22] Канзафарова І. С., Федорко М. С. Інститут переддоговірної відповідальності в світлі ре кодифікації цивільного законодавства України. Правова держава. [Kanzafarova I. S., Fedorko M. S. Institute of pre-contractual liability in the light of the re-codification of the civil legislation of Ukraine. Constitutional state]. №. 40. 2020. С. 74 (74-83).

recognized that the provision of this article can be used not only in questions court interpretation of the Convention, but also as a general duty to act in good faith in contractual relations[23].

A similar interpretation is also contained in the SARL Bri Production case "Bonaventure" v. Societe Pan African Export, considered by the Appellate the court of France. In this case, the US buyer sued the seller from France for breach of contract. The parties agreed that the product will be resold to a South American distributor, but, in fact, the buyer began to resell the product to a distributor in Spain.

The buyer later hid this fact from the seller. When the seller found that a certain part of the goods had been sold to Spain, he refused pay the next part of the funds. The buyer sued for infringement terms of the contract, and the seller filed a counterclaim. The court decided that the matter is governed by the Convention. Making decisions in favor seller, the Court referred to Art. 7 (1), establishing that the actions of the buyer were incompatible with the principle of good faith in international trade. This the case once again proves that international courts interpret good faith according to Art. 7 as a general principle on which Convention is based[24].

Thus, the fact that the parties at the pre-contractual stage must act in good faith (honestly), intend to enter into a contract.

It should be noted that the principle of good faith behavior on at the pre-contractual stage received the most complete regulatory approval in acts of non-state unification, which include the UNIDROIT Principles, Principles of European contract law, Model rules of European law, Code of European contract law, Principles Trans-Lex. At the level of the European Union, separate provisions on

the possibility of such liability is contained in the Directives, aimed mainly at the protection of consumer rights, and relate to mainly providing information about goods, works, services[25].

According to the approach adopted in the specified documents, the parties are free to negotiate and are not responsible for failure to agree. However, the party that interrupts in bad faith negotiations, is responsible for the damage caused to the other party (culpa in contrahendo (Article 2:301 Principles of European Contract Law,).

[23] Novoa, R. Culpa in Contrahendo: A comparative Law study: Chilean Law and the United Nations Convention on Contracts of the International Sales of Goods. URL: www.ajicl.org/ajicl2005/vol223/ARTICLE%20-%20novoa%20formatted.pdf>.
[24]Goderre, D.M. International Negotiations Gone Sour: Precontractual Liability under the United Nations Sale Convention. URL: www.cisg.law.pace.edu/cisg/biblio/goderre.html>.
[25] Directive No. 2008/48 / EC of the European Parliament and of the Council on consumer credit agreements and repealing Council Directive 87/102 / EEC (2008 April 23) Retrieved from: https://zakon.rada.gov.ua/laws/show/994_b19#Text.

According to the UNIDROIT Principles, bad faith is, in particular, admission or the continuation of negotiations by one of the parties when the intention is not to reach agreements with the other party (Article 2.1.15 of the Principles).

A special case of unfair negotiations, which directly specified in clause 3 of this article, consists in the fact that the party enters into negotiates or continues to negotiate without intending to enter into a contract with the other side Other cases occur when one party intentionally or recklessly misleads another party as to the nature or terms of the proposed contract whether or not it does so, presenting false information or concealing the circumstances of taking into account the nature of the parties and/or the contract must be brought to known to the other.

An example in German law enforcement practice can be the following case study: parties (municipality and trading company scrap metal) entered into negotiations, the subject of which was the lease land plot. Having reached a compromise and received the signature of the company, the municipality allowed the company to use the land for specified goals before the official conclusion of the contract. Municipality, as established the court, maliciously delayed the moment of signing the agreement from his side After some time, as the municipality expected, another appeared the counterparty, offering more favorable terms, and the municipality, citing the non-conclusion of the contract, demanded dismissal from the company land plot. The court recognized the actions of the municipality as unconscionable, since he reasonably convinced the counterparty that the contract will be concluded, but avoided signing the contract, despite numerous reminder of the company.

The right to terminate negotiations is also subject to the principle good faith and fair business practices. If an offer is made, it may be revoked only within the limits established in Art. 2.1. 4. But even before reaching this stage or in the event that the negotiation process does not allows establishing the sequence of offer and acceptance, the party cannot terminate negotiations suddenly and without proper grounds. The onset the moment after which it is impossible to turn back, of course, depends on specific circumstances, especially from the extent to which the other party, based on the conduct of the first party, had reason to rely on positive outcome of the negotiations, as well as from the number of issues that relate to the future contract, which the parties have already reached agreement[26].

The Supreme Court of Ukraine notes that a pre-contractual dispute is a dispute that arises in the event of a party's evasion or refusal to conclude a contract as a whole or disagreement with its individual terms. Referral of a pre-contractual dispute to a court is possible only when at least one of the parties

[26] Сулейменов М.К. Гражданское право Республики Казахстан: опыт теоретического исследования. Том 2. Часть вторая. Теоретическая. Раздел 1. Общие проблемы гражданского права. Алматы [Suleymenov M.K. Civil law of the Republic of Kazakhstan: theoretical research study. Volume 2. Part II. Theoretical. Section 1. General problems of civil law. Almaty], 2016. P. 222-224.

is obliged to conclude it due to a direct instruction of the law or on the basis of a mandatory act plan. In other cases, the dispute about the conclusion of the contract or the terms of the contract can be considered by the commercial court only with the mutual consent of the parties or if the parties are bound by the obligation to conclude the contract on the basis of a prior agreement between them[27].

The Principles of European Contract Law also have a special place attributed to the principle of good faith (Article 1:105). According to the principle good faith is interpreted in European law contracts Good faith is recognized as a basis for obligations parties to the contract. In particular, Art. 6:102 provides that in addition to the established of provisions, the contract by default may contain provisions which are determined based on: a) the intentions of the parties; b) the nature and purpose of the contract; c) the principle of good faith. According to Art. 8:109 legal remedies in case defaults may be excluded or limited, only if the requirement of exclusion or limitation is not inconsistent with the principle good faith.

Legislative consolidation of good faith, reasonableness and justice in Art. 3 of the Civil Code of Ukraine allows the free use of these categories as regulators at the level of law enforcement practice of all courts of Ukraine. Thus, the Grand Chamber of the Supreme Court determined that good faith is a certain standard of behavior characterized by honesty, openness and respect for the interests of the other party to the contract or relevant legal relationship. The principle of good faith

stipulates that the parties must act in good faith when exercising their rights and fulfilling their obligations under the contract and/or obligations established by law.[28]. In Article I.-1:103 Principles, definitions and model the rules of European private law indicate that behavior which is contrary to good faith and honest business practice, is, in particular, behavior that does not correspond to previous statements or behavior of the party, for conditions that the other party acting to his detriment reasonably relies on of them[29].

Having analyzed the legislation and practice of Ukraine and European countries (mainly Germany), the concept of the principle of good faith, based on general custom, changing to the norms of national law, changed depending on mentality, culture and customs. Each legal system has its own peculiarities

[27] Ruling of the Commercial Court of Cassation as part of the Supreme Court dated September 30, 2021, court case No. 906/1205/20. URL: http://reyestr.court.gov.ua/Review/ https://reyestr.court.gov.ua/Review/100033996.
[28] Постанова ВС від 14.12.2021 у справі №147/66/17 [Resolution of the Supreme Court dated 14.12.2021 in case No. 147/66/17] URL: http://iplex.com.ua/doc.php?regnum=102892553&red=1000035541ca781e0f74d5777f9e8d2324a630&d=5.
[29] Добросовісність і доктрина заборони суперечливої поведінки: постанова ОП КЦС від 10 квітня 2019 року у справі № 390/34/17 [Good faith and the doctrine of the prohibition of contradictory behavior: the resolution of the OP KCS dated April 10, 2019 in case No. 390/34/17].

in the content and application of the principle of good faith, however, when implemented in each, it fulfills its main function - ensuring the proper fulfillment of the rights and obligations of counterparties and third parties. In this regard, all the above-mentioned approaches serve as designations of one legal phenomenon - the principle of good faith. Good faith is a certain proper (honest) behavior of subjects of civil legal relations at the pre-contractual stage, at the stage of conclusion of the contract and its execution. In cases of dishonest behavior, the subject is subject to civil liability. Civil liability in this context should be considered as measures to influence an unscrupulous subject of civil legal relations at the pre-contractual stage, at the stage of conclusion of the contract and its execution.

F. Application of the doctrine of venire contra factum proprium (prohibition of controversial behavior) in Ukraine

In most European legal systems, it is considered that contradicts the pre-contractual good faith of entering into negotiations without any intention to enter into a contract. If a party, for example, enters into negotiations with the sole purpose of obtaining information about commercial the secret of the other party or with the sole purpose of preventing it from entering into a contract contract with a competitor. In this case, the responsibility can be based on § 826 BGB.

When deciding cases, the Supreme Court of Ukraine applies the doctrine of venire contra factum proprium (prohibition of contradictory behavior), which is based on the Roman theory - "non concedit venire contra factum proprium" (no one can act contrary to his previous behavior). The doctrine of venire contra factum proprium is based on the principle of good faith. Conduct contrary to good faith and fair business practices includes, in particular, conduct that is inconsistent with a party's prior statements or conduct, provided that the other party acting to its detriment reasonably relies on them.

The decision of the Supreme Court of Ukraine dated April 10, 2019 states that the actions of the plaintiff, who on December 24, 2013 concluded an additional agreement to the land lease agreement dated November 19, 2007, and subsequently applied to the court to declare the land lease agreement dated November 19, 2007 invalid, contradict his previous behavior (concluding an additional agreement and receiving payment for the use of the land plot) and is in bad faith. The land lease agreement dated November 19, 2007 was concluded after the parties had fulfilled all essential conditions, and this happened on November 19, 2007 during the life of the lessor and under his signature, and there are no grounds to consider the disputed agreement invalid[30]. (Doctrine of venire contra factum proprium).

[30] Постанова ВС у складі Об'єднаної палати Касаційного цивільного суду від 10 квітня 2019 року у справі № 390/34/17 (провадження № 61-22315сво18) [Resolution of the Supreme Court as part of the Joint Chamber of the Civil Court of Cassation dated April 10, 2019 in case No. 390/34/17 (proceedings No. 61-22315svo18)]URL: https://verdictum.ligazakon.net/document/81263995.

At the stage of conducting pre-contractual negotiations, behavior at the stage of the future contract is recognized as good faith, if they act with the honest purpose of concluding a contract and without the purpose of misleading the counterparties during negotiations. At the stage of concluding the contract of accession, the good faith behavior of the parties to which they join involves the avoidance of actions that lead to the exclusion from the contract of the terms of their responsibility for breach of obligations and non-fulfillment of other conditions specified in the contract, which are clearly burdensome for the parties that joined[31]. Thus, according to the contract of accession (Article 787 of the CC of Ukraine), the terms of which are established by one of the parties (in this case, the lessor) in forms or other standard forms, which can be concluded only by joining the second party to the proposed contract as a whole. The other party cannot offer its terms of the contract (Part 1 of Article 634 of the CC of Ukraine). Thus, the parties to the accession agreement – the entrepreneur and the consumer – are economically unequal. This creates an opportunity for the economically stronger party to impose its conditions on the economically weaker party. Therefore, quite often such contracts express the economic advantage of the party that sets the terms.

Thus, in one of the cases regarding the recognition of the credit agreement and the mortgage agreement as invalid, the fact of obtaining a loan in foreign currency was established by the Ukrainian court. The borrower did not deny that the bank provided her with US dollars, but referred to the violation of the requirements of the Law of Ukraine "On the Protection of Consumer Rights". The borrower emphasized that she was misled, because before concluding the contract, the bank did not inform her of the estimated total cost of the loan and did not warn her that she was the one who bears the currency risks during the fulfillment of obligations. When deciding the case, the Supreme Court referred to the doctrine of venire contra factum proprium. One of the reasons for the refusal is the contradictory behavior of the plaintiff due to the reference to the pretense of the credit agreement in terms of the lending currency[32].

Based on the content of Part 5 of Art. 12 of the Civil Code of Ukraine regarding good faith participants in civil relations, we can draw a conclusion: presumption good faith in these relations takes place only when the law established consequences of a person exercising his rights in bad faith.

[31] Павленко Д. Г. Принцип добросовісності в договірних зобов'язаннях: автореф. дис. … канд. юрид. наук: 12.00.03. Київ [Pavlenko D. G. The principle of good faith in contractual obligations: autoref. thesis ... candidate law Sciences: 12.00.03. Kyiv], 2009. P. 14-15.

[32] Resolution of the Supreme Court of April 8, 2021 in case No. 402/1185/15-ts URL: http://iplex.com.ua/doc.php?regnum=96207872&red=1000035f9e486b58d13e08e6eeec061a4bef9d&d=5.

Accordingly, if the law does not establish such consequences, then there are none presumption of good faith. If there is a direct link in the Central Committee of Ukraine on the legal consequences of the unscrupulous behavior of the civilian participant relations, the presumption of good faith applies[33].

G. General conclusion

According to the Concept of recodification (updating) of Civil of the Code of Ukraine, the Working Group suggested paying attention institution of culpa in contrahendo in the chapter on non-contractual obligations.

Having studied the experience of Germany, we believe that the institute's culpa in contrahendo should be allocated a place in the general provisions on contractual obligations. The confirmation of this thesis is the fact that culpa in contrahendo is used in practical activities in pre-contractual situations legal relations (stages of agreements, negotiations), which should be built on the principle of good faith, and in cases of bad faith actions, to the unscrupulous party of pre-contractual legal relations must measures of operational impact, namely compensation, should be applied material damage caused by dishonest behavior on

the pre-contractual stage of the conclusion of the contract. In this context needs extended interpretation at the legislative level of the principle good faith, as it is fundamental in pre-contractual, contractual and non-contractual legal relations.

Therefore, the institution of culpa in contrahendo has both contractual and non-negotiable nature.

[33] Тобота Ю.А. Принцип справедливості, добросовісності і розумності у цивільному праві: моногр. Х.: Харк. Нац.. пед.. ун-т імені Г. С. Сковороди, [Tobota Yu. A. The principle of justice, good faith and reasonableness in civil law: monogr. H.: Hark. H.S. Skovoroda National Pedagogical University], 2020. С. 59

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