A COMPARATIVE STUDY OF THE THEORY OF PRECONTRACTUAL RESPONSIBILITY

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JHERING may rightly be regarded as the founder of the theory under discussion for he it was who suggested that if for some reason or another a contract is not concluded, then the question would arise as to whether one of the parties was to blame for this during the negotiations and therefore liable to pay an indemnity to the other party.

The basis of his thesis is the tacit preliminary agreement of mutual responsibility which is intimately connected with the future contract.

Such a general theory was based on certain passages in the Digest relating to sale which is null *ab initio*, and was later extended to cases where contracts were frustrated owing to the unjustified falling out of one of the parties.

In spite of the fact that Jhering's theory of *culpa in contrahendo* is based on *culpa*, several writers point out that the passages from the Digest which he actually quoted, refer to 'bad faith'. In reality 'bad faith' lies somewhere between malice and negligence and it provided for the successful action of a plaintiff who, though unable to prove *dolus* on the part of the defendant, brought evidence to show that objectively the defendant was in bad faith.

CLASSIFICATION:

Glancing at the question of classification, Carbonnier says that when a contract has been annulled because of fraud, an action for precontractual responsibility would be classified as a contractual sanction. On the other hand, when a case arises of abrupt termination of negotiations, which means that no contract has been con-

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cluded at all, it would be regarded as delictual, for it would result from the non-performance of the legal obligation of *neminem laedere.*

Assuming the doctrine of precontractual liability to be part of Maltese law, one wonders whether it is contractual, quasi-contractual or delictual in nature. Precontractual responsibility is not deemed to be contractual, because the obligation to negotiate in accordance with the rules of good faith not only precedes the obligation that emerges from the future contract, but it subsists on its own even if the future contract remains inexistent.

Secondly, the immediate cause of a quasi-contract is the performance of a lawful and voluntary act which gives rise to a reciprocal obligation between the parties independently of the identity between their acts of volition. The quasi-contracts of *negotiorum gestio* and *indebiti solutio* have, as their essential element, the material advantage which one party procures in favour of another. On the contrary, precontractual responsibility implies that one of the parties has suffered some form of damage as a result of the other party's dishonest behaviour.

Thirdly, delict and quasi-delict are causes of obligations because a person causing damage is bound to make good such damage on the precept of natural justice, *neminem laedere.* Since the notions of delict and quasi-delict are wide enough to include any unjust act that causes harm, then the dishonest acts of a negotiating party causing harm could be classified as delictual in nature.

THE GERMAN POSITION:

The German Civil Code in article 242 states, 'The debtor is obliged to satisfy his obligation in the way that *good faith*, with respect to the usual customs, necessitates'.

Cohn[1] writes, 'the principles of contractual liability have been extended by numerous court decisions so as to cover cases in which a contract has not in fact been concluded, but where the parties have entered into legal relations with a view to concluding a contract. This is *culpa in contrahendo* first brought to light by Jhering'. He then goes on to cite a case decided by the Old Imperial Court:

Miss B. went to the department store of Messrs. C. & Co. to buy food. On the way to the food department she crossed the carpet department where, owing to the negligence of a shop assistant, a carpet fell down and injured her. Precontractual damages were awarded to Miss B. on the ground that she was 'about to contract'

[1] A Manual of German Law (Part 1) 2nd edition, p. 123.

in the food department, that is, she was in the precontractual stage.

Such a case quoted as an example of the theory is extremely weird. It would seem to be a case of tortious liability, namely whether or not the owners of the store were diligent in employing the assistant.

THE ELEMENTS OF THE DOCTRINE:

The first element that the concept of precontractual liability involves is the relationship that exists before the conclusion of the contract together with the intention to conclude such contract. Such intention is seen to be important in relation to the 'sphere of the contract'. For example, Miss B. was in the sphere of her contract when she got hurt, but where X and Y entered a shop to steal and to shelter from the rain respectively, the court said that they were not in the sphere of a contract and therefore, the first requirement of the theory was missing, disallowing them to sue for precontractual damages.

The second element is the violation of a minor obligation of the precontractual stage and we meet with the third element in article 276 of the German Civil Code which provides for the intention or negligence of the defendant.

Whereas Jhering's theory was based on honest acts, we notice here a radical departure, since article 276 specifically provides for cases of negligence. And, when we remember that article 242 of the same German Civil Code provides for good faith, we wonder whether good faith includes cases of negligence, or whether we ought to adopt a special criterion to the meaning of negligence, or whether the German legislature was not aware of the conflict arising.

THE CONCEPT OF VOLITION AND THE THEORY OF NEGATIVE INTEREST:

Stammler and Chironi held that when two persons negotiate they enter into a precontract which implies an element of volition on the part of the initiating party to such negotiations. Although this theory was originally acceptable to Windscheid, he later repudiated it on the basis that the obligation to make good damages, resulting from an abrupt and unjustifiable termination of negotiations, is not the consequence of any volition at all.

During the 'trattative precontrattuali' the parties guarantee that in all honesty and trust they would both seek to reach a beneficial conclusion. Their interest is not the positive one, of seeing a final contract executed, but a *negative* one, that their tacit pre-

contract be not violated. This so-called 'interesse negativo' propounded by Jhering and adhered to by Torrente covers the eventual loss suffered by the damaged party – a loss that he would not have suffered had he not participated in the negotiation.

The negative interest is also met with in German law where the effect of the action relating to precontractual liability is

(a) indemnification up to the limit suffered, and

(b) any other profit that could have been made during such precontractual negotiations.

A literal translation of the German text is 'interest out of the confidence in the contract' which is wide enough to tally with Cohn's words, namely, that: 'the consequence of a violation of a semi-contractual relation arising from the preparation of a contract is the duty on the part of the responsible party to compensate the other party for *any damage caused* to this party either wilfully or negligently'.

It seems fit to conclude that if the injured party is a buyer he is to be indemnified for the loss suffered for not having looked elsewhere for the necessary merchandise, while if the injured party is the vendor he should be indemnified for the loss suffered in turning down other offers.

THE FRENCH POSITION:

The French Cour de Cassation applied the theory of 'interesse negativo' in a judgement given on the 4th August 1930 on the basis of the following facts: Plaintiffs, several booksellers, had gone to the appointed place at the specified time, in accordance with an advertisement in the papers for a public auction sale of books. No sooner had they got there than the auction was cancelled. The court reimbursed them all travelling expenses and any gain these booksellers might have made if they had attended another auction sale advertised for the same day.

It will be seen that the court did not hesitate to give a wide interpretation to the negative interest.

The fact that the French civil code contains no specific provision for the application of precontractual liability has not hindered the Cour de Cassation from applying it on the basis of 'abus de droit' or 'erreur'.

ABUSE OF RIGHT:

'La jurisprudence a, au contraire, toujours reconnu qu'une faute peut-être commise dans l'exercise d'un droit et donner lieu à

l'application des articles 1382 et 1383'.[2]
Section 1382 provides: 'Tout fait quelconque de l'homme qui cause à autrui un dommage, oblige celui par la faute duquel il est arrivé, à la reparer'.
and section 1383 states: 'Chacun est responsable du dommage qu'il a causé non seulement par son fait, mais encore par sa negligence ou par son imprudence'.

Similar to the German position we notice that both malice and negligence of a defendant are grounds for abuse of right and, similarly, a basis for precontractual liability.

In a 1972 case, the Cour de Cassation calculated the damages, in a successful action for precontractual liability, on the basis of tort. Plaintiff had gone to the USA to look at machines he was interested in buying from the defendant. No sooner had he done so, after lengthy negotiations, than defendant sold them to a third party under a contract which prohibited him from selling to anybody else. The court held that this was a case of precontractual liability for no contract whatsoever had been formed, since the offer was revoked before the acceptance was communicated.

ERROR:

A claim for precontractual damages could arise when a contract is annulled because of a mistake committed by one of the parties during the negotiating stage. This side of the French view is similar to the very rigid approach taken in classical Roman Law where protection was unadequate because it only gave damages where there was some semblance of a contract, although a void one. In Justinian's time, the relevant action was the *actio ex contractu* granted in case of nullity of a contract. *Culpa* was considered to appertain to the stage of a completed contract.

The Cour de Cassation in 1972 held that plaintiff was entitled to claim precontractual damages where a contract was annulled because of a mistake committed by defendant during negotiations. A Japanese film producer and a French distributor signed a contract only to find out it was null and void because the Japanese defendant had failed to take the necessary steps regarding Japanese exchange control regulations that were required to validitate the contract.

It appears that both French and German law would benefit by the enactment of a specific provision regulating precontractual liability. What was said before about the meaning of the word *negligent* in the German Code, would apply to the French position rela-

[2] Alex Weill: Droit Civil, edition Dalloz, 1971.

ting to abuse of right and error. Offhand, it appears to be too harsh to apply precontractual damages to cases of negligence.

THE ITALIAN POSITION:

In 1942 the Italian legislature enacted article 1337, 'Le parti nello svolgimento delle trattative e nella formazione del contratto, devono comportarsi *secondo buona fede*'.

This section has been constantly interpreted to require three elements, which are very neatly laid down in a judgment of the Corte di Cassazione of the 30th January 1976:

(a) *l'affidamento* fondato su elementi obiettivi ed inequivoci, di una delle parti nella conclusione del contratto;

(b) il *recesso* dell'atto contraente *senza giusta causa*, cioè quando sia effetto di malafede o non sia determinato dal comportamento dell'altra parte;[3]

(c) il danno risarcibile, consistente nel cosidetto *interesse negativo*, che comprende *le spese sostenute* in provisione della stipula del contratto *ed altre simili*.

There have been certain Italian judgments founding a claim for precontractual damages successfully based on the negligence of the defendant. It must be pointed out that the blanket provision article 2043 states,

'Qualunque fatto doloso o colposo, che cagiona ad altri un danno ingiusto, obbliga colui che ha commesso il fatto a risarcire il danno'.

Taking our minds back to section 1337 we realise that in spite of the fact that there already was a section so wide as to cover cases of *dolus* and *culpa*, the Italian legislature still saw fit to introduce section 1337 based on good faith and referring specifically to precontractual responsibility.

A corollary duty is imposed under section 1338, which states that a party who knows or who is in a position to know of the existence of any cause of invalidity is bound to inform the other party of the existence of such cause. The non-performance of this obligation renders the damaging party liable for the damages which are eventually suffered as a result of such an omission. One must not reach the unfounded conclusion that this is the only case where pre-contractual liability arises. After all it is section

[3] This implies that if the hope of reaching a favourable conclusion is frustrated by supervening accidental causes, which make the obligation too onerous for one party, he would be justified in falling out of the negotiations.

1337 which caters for the concept and lays down a wide basis for the action by the words 'good faith'.

The problem of interpretation raised by the word 'negligence' was seen and provided for. It is true that the phrase 'good faith' is to be interpreted by the courts, but it is clear that the situation is more well-defined now than it was during the pre-1942 legal position.

On the 5th September, 1952, the Corte di Cassazione, stated that the obligation of negotiating in good faith implies that there is no need for the court to establish a fraudulent intention. This is in keeping with section 1338 because lack of deligence and prudence is sufficient to give rise to bad faith. However, there are certain judgements of the Italian supreme Court[4] to the effect that to the obligation of any one of the negotiating parties to disclose a cause of invalidity corresponds that obligation of the other party to exercise the necessary amount of diligence, through which he himself would have come to know of the existence of such cause of invalidity.

Glancing at the theoretical aspect of the whole matter, some writers consider that every negotiation has a contract in itself, known as the precontract. Thus as soon as we negotiate, we creare a contract, the object of which is that we bind ourselves reciprocally to collaborate and reach a fruitful conclusion. After all, the law does not enumerate the number of contracts we can enter into, and a contract *de ineundo contractu* is a contract just as well.

Other writers say that this begs the question. It extends the notion of contract far too much. If we admit that there must be a *vinculum juris* in a contract, i.e. there must be an intention to bind oneself, what one does in reality is to endeavour to see whether there is a basis for a *vinculum juris* to be created. If anything, they say that one creates a quasi-contractual situation, not in the sense of *negotiorum gestio* or *indebiti solutio*, but in the sense that one's position *seems to look like* that of a contract.

THE MALTESE POSITION:

Turning to the local scene, the problem came to the fore in 1965 in *Giuffrida v Borg Olivier*. Plaintiffs, an Italian company, had been negotiating with the Maltese Government for the grant of land

[4] Corte di Cassazione: 9 Novembre 1956
Corte di Cassazione: 30 Maggio 1959
Corte di Cassazione: 27 Marzo 1963

on emphyteusis. Defendants claimed that plaintiffs failed to comply with the terms set to them, and since the Government refused to negotiate further it withdrew its letter of intent with regard to the emphyteutical concession.

Plaintiffs wanted the court in the first place to declare that they had in fact abided by all the terms set to them and secondly to annul the withdrawal of the letter of intent made by defendants, the Maltese Government.

The First Hall of the Civil Court adopted the line that there was no contract (because neither the exact location nor the ground rent, two elements necessary for the contract of emphyteusis, had been agreed upon) and therefore it could not go into the matter.

But the Court of Appeal did not dismiss the case as speedily as the First Hall Civil Court did. It said that it could not go into the matter of executive discretion. It also said that it would not state whether the theory of precontractual responsibility was part of Maltese law or not.

The sad side of the case is that if plaintiffs had claimed precontractual damages we would have had a judgment on the position at local law. We can look on the brighter side of things by saying that at least the Court of Appeal refused to talk about it and did not ignore it as the lower court did.

Four years later, in 1969, the case of *Pullen v Matysik* arose. Plaintiff sued the Manager of the Malta Hilton for damages after the defendant told him that it would be possible for plaintiff to move into a boutique at the Hilton Hotel after Hertz, the former tenants, wanted to terminate the contract of lease. Instead of allowing Hertz to look for an alternative tenant, Matysik entered into precontractual negotiations with Pullen, who was in India at the time. On the pretext that Hertz wanted to terminate the lease, Matysik advised Pullen to come to Malta. However, no agreement was signed regarding the verbal agreement for a four year lease between Pullen and Matysik and no sooner had plaintiff come to Malta than Hertz said he did not after all want to leave the boutique unless Pullen bought the stock of clothes he had left over. After Pullen agreed to do so Hertz nevertheless decided to continue with the lease.

Therefore Pullen sued Matysik for damages and defendant asked the court to bring Hertz into the suit as well. The Court agreed to such demand.

The First Hall Civil Court said that there was no contract formed because a lease for an urban tenement of four years requires a written agreement *ad validitatem* and not merely *ad pro-*

bationem tantum.[5] Since no such agreement existed it could definitely not be a case of contractual responsibility and therefore the liability to pay compensation arises from the degree of attention that each party assumes even during the precontractual stage. There was no express mention of the doctrine by the judge, but it was clearly implied. In fact the damages that were awarded were restricted 'to the actual losses they incurred up to the time that the negotiations broke down ... *and are not to include* any profits which plaintiffs would have derived from the concession of the boutique, as in this way they would be benefitting from an obligation which never came into existence.'

It ought to be pointed out that the restricted award of damages was an implication of the theory under discussion, for in both contracts and torts the amount of damages that is awarded is unrestricted.

It is true that section 1088 of our Civil Code provides for 'the loss of actual wages *or other earnings*', which is what Pullen also demanded as the profit he would have made if he were given the four year lease of the boutique. But our law, through section 1088, caters for cases when persons are physically injured or killed and thus prevented from working according to their respective ability. It would be wrong if our courts were to apply this section to tally with the meaning of 'damages' as understood in precontractual responsibility.

The problems met with in relation to the word 'negligence' arise here too, for the Court declared both Matysik and Hertz liable equally: the former because he was negligent in not realising what legal consequence would arise if he could not eventually give Pullen the shop on lease, and the latter because he acted in bad faith when he capriciously withdrew from the negotiations and refused to terminate the lease even after Pullen agreed to buy over his stock of clothes.

At no time did the judge expressly mention that the theory of precontractual liability is part of Maltese law. But because it was implied, mainly through the amount of damages awarded, certain lawyers and students might conclude, from what the Court had to say, that negligence, as well as bad faith, would constitute the basis for the action, if ever incorporated expressly into our law.

Whether such a point of view is adopted or not, it still remains evident that the line between negligence and bad faith is a very thin one indeed. The writer suggests that the Maltese legislature

[5] Section 1277 (1)(e) Maltese Civil Code.

should follow the path chosen in 1942 by the Italian Parliament. This would not only give our courts the push they seem to need to recognise and apply the doctrine, but it would also lay down 'good faith', a very sound basis, as a guide to the criteria the courts would look to.

It seems up to now that a main reason for the lack of interest by our judiciary in the concept of *culpa in contrahendo* may be attributed to the fact that it might infringe the freedom pertaining to the parties in the 'negotiation' stage. If applied with caution, however, the theory would, on the contrary, enhance the principle of the liberty of contracting, for society must have some form of protection against dishonest traders.