PRE-CONTRACTUAL RESPONSIBILITY FOR EXTRAORDINARY TRANSACTIONS IN COMMON LAW COUNTRIES

RESPONSABILIDAD PRECONTRACTUAL PARA TRANSACCIONES EXTRAORDINARIAS EN PAÍSES DE DERECHO CONSUETUDINARIO

***Dimitris LIAKOPOULOS*[88]**

Abstract: In the common law system and in the area of pre-contractual liability, the conduct of the parties in the negotiation phase (and, in particular, the obligations of conduct in good faith, and the cases of unjustified-withdrawal from negotiations), and the legislation has demonstrated an attitude that we could almost define as "indifferent" towards any pre-contractual liability (except in cases where one of the paciscenti had been guilty of having committed a "tort"). On the contrary, once an agreement has been entered into the parties, it is possible to find rules that expressly sanction obligations of good faith for the parties involved. This work seeks to analyze and concretise through jurisprudence and with a comparative method a profound analysis of the pre-contractual liability system. The method that has been used is comparative (both of doctrine and jurisprudence) to various common law systems and many times also from the European Union system.
Palabras clave: derecho consuetudinario, derecho contractual, responsabilidad precontractual; Derecho contractual de los Estados Unidos, derecho contractual de Inglaterra, buena fe.

Resumen: En el sistema de derecho consuetudinario y en el ámbito de la responsabilidad precontractual, la conducta de las partes en la fase de negociación (y, en particular, las obligaciones de conducta de buena fe y los casos de retirada injustificada de las negociaciones), y la legislación ha demostrado una actitud que casi podríamos definir como "indiferente" hacia cualquier responsabilidad precontractual (excepto en los casos en que uno de los paciscenti hubiera sido culpable de haber cometido un "agravio"). Por el contrario, una vez que se ha firmado un acuerdo entre las partes, es posible encontrar reglas que sancionen expresamente las obligaciones de buena fe para las partes involucradas. Este trabajo busca analizar y concretar a través de la jurisprudencia y con un método comparativo un análisis profundo del sistema de responsabilidad precontractual. El método que se ha utilizado es comparativo (tanto de doctrina como de jurisprudencia) con varios sistemas de derecho consuetudinario y muchas veces también con el sistema de la Unión Europea.
Key words: common law, contract law, pre-contractual responsibility; US contract law, England contract law, good faith.

INTRODUCTION

Doctrine and jurisprudence, both American and Anglo-Saxon, have for some time denied the existence of obligations in the pre-contractual negotiation phase, for fear that the imposition of any

[88]Full Professor of European Union Law at the Fletcher School-Tufts University (MA in international law and MA of Arts in Law and diplomacy). Full Professor of International and European Criminal and Procedural Law at the De Haagse Hogenschool-The Hague. Professor of International law in Massachusetts School of Law. Attorney at Law a New York and Bruxelles. ORCID ID: 0000-0002-1048-6468. The present work is updated until January 2020. (email: profd.liakopoulos.984@gmail.com).

obligation of conduct, or responsibility, could represent a disincentive or, in any case, limit the freedom to contract affiliates. In particular, the jurisprudence, on more than one occasion, has refused to impose any behavioral obligation in the phase prior to the conclusion of the contract (in compliance with the fundamental principle, there particularly felt, of the "freedom to contract"[89] and, of pre-contractual, except in cases in which these canons are expressly established by the legislator). Only in recent decades it has been possible to observe a change in attitude by the English and US courts towards those cases concerning behavior which, according to local terminology, we can define which are contrary to good faith (where the most common is represented by the unjustified exit from the negotiations)[90]. Several judgments have in fact begun to affirm a pre-contractual liability for those parties who, at this stage, had not behaved correctly, as well as to establish certain obligations of the same in the phase of negotiations. The thesis that marries the assertion of a pre-contractual liability for violation of the obligations of good faith has started to emerge.

The present work seeks to analyze and concretise through jurisprudence and with a comparative method a profound analysis of the pre-contractual liability system. The method that has been used is comparative (both of doctrine and jurisprudence) to various common law systems and many times also from the European Union system.

THE US EXPERIENCE. THE NOTION OF CONTRACT

The common law countries' approach to the issue of pre-contractual liability is far from that of civil law countries. In particular, especially the English legal system is still inclined towards a more restrictive position towards the culpa in contrahendo, in general, and the principle of good faith, in particular. In the US experience, on the other hand, it is possible to notice in the past a more "open" approach and inclined to recognize, in certain circumstances, a liability similar to that deriving.

In order to better understand the reasons for this difference of views, it is useful to start by briefly outlining the essential features of the meaning of what, under US law, is defined as "contract"[91]. This, in fact, allows us to better understand the differences between the systems in question. Precisely, it is possible to notice a different approach between the definition of contract and, therefore, the meeting of two wills concerning a patrimonial relationship. In common law the contract is an exchange, to which a party it allows for the advantage (or consideration) that it will

[89]With reference to two cases in which the obligation to behave in good faith stemmed from the signing of a letter of intent, see Esso Petroleum v Mardon, (1976), Q.B. 801, and English v Dedham Vale (1978) I W.L.R. 93. In doctrine, P. Atiyah, (1989). *An introduction to the law of contract,* Clarendon Press, London, according to which: "There are some signs of a tendency to impose duties on parties in the course of negotiation and (…) occasionally, such duties may be imposed even where no main contract eventually is formed". Ancora, in tema di promissory estoppel, see Hoffman v Red Owl Stores Inc., 133 N. W.2d 267 (Wisconsin, 1965). For further details, see also: T. Hough, E. Kirk, (2018). *Contract law,* ed. Routledge, London & New York. R. Stone, J. Devenney, (2014). *Text, cases and materials of contract law*, ed. Routledge, London & New York, pp. 336ss. G. Dannemann, S. Vogenauer, (2013). *The common european sales law in context. Interactions with english and german law,* Oxford University Press, Oxford, pp. 236ss. B. Denyer-Green, N. Ubhi, (2013). *Development and planning law,* Taylor & Francis, New York, London, pp. 77ss. P. Devonshire, (2015). "Account of profits for dishonest assistance", in *The Cambridge Law Journal,* 74 (2), pp. 226ss. J. Steadman, S. Sprague, (2015). *Common law contract law: A practical guide for the civil law lawyer*, Wolters Kluwer, Milano, P.A. Alces, (2011). *A theory of contract law. Empirical insights and moral psychology,* Oxford University Press, Oxford. J.E. Jr. Murray, (2011). *Murray of contracts,* LexisNexis, New York.

[90]A different discussion applies in the event that these behaviors are implemented following the stipulation of a contract. In this case, in fact, the duty of the parties to behave in good faith has also been affirmed in common law systems, see among the many: Mallozzi v. Carapelli, (1975), I Lloyd's Rep. 229

[91]E. Allan Farnsworth, (2004). *Contracts,* Aspen publishers, New York, pag. 3.

receive from the promissory (which could also consist in a sacrifice of the latter). Using the words of Second Restatement, the contract is a promise that is enforceable according to the law (or, in any case, recognized in some way as an exchange) is connected to it. In the absence of a consideration, in fact, the American courts have been "unwilling to enforce a promise unless the promisee has given the promisor something in return for it"[92].The centrality of the exchange as a characterizing element of the contract already emerges from this first analysis. A simple promise of facere, against which the promissory has offered nothing in return, cannot therefore be activated and will have no legal consequence. The other elements characterizing the contract are represented by the assent to be obliged (intention to be bound or intention to create legal relations) and by its determination. The definiteness requirement derives from the remedial nature of the common law, focused on compensation for damages deriving from contractual breach. In the absence of definiteness, it would not be possible to calculate the damage to be compensated in order to put the promissory in the position in which it would have been if the promise had been kept (so-called expectation interests, as opposed to reliance interests, assimilable, albeit not in a completely correct way, to our binomial negative-positive interests). The requirement of the absent, however, stems from the fact that becoming contractually responsible requires the consent of the subject who undertakes. The consent, of course, must be bilateral and, therefore, must come from both sides (mutuality).

The way in which the promises of the paciscenti are externalized, ceasing to be mere mental reservations, is that of offering an acceptance. The offer, in fact, is nothing more than a promise by a person who has the intention to be bound, which is followed by an acceptance, which is nothing more than a manifestation of consent to that promise[93]. When you have an offer and an acceptance, you have a contract[94]. It is therefore possible to draw a dividing line when the parties are not contractually bound but having made a promise, they become contractually bound. Only from this moment does the (contractual) liability arise. First, both parties are free to withdraw from the negotiations and, in particular, the promoter is free to revoke the offer at any time before acceptance of the promissory arrives.

Consent, or absent, is central to the formation of a contract, both in relation to the willingness or not to bind, and with regard to the terms of this bond and, therefore, to the content of the contract. Just as one party is free to make an offer as he likes it, the other is free to accept it or not. This is the principle of freedom to contract, which, in the negative, is offset by the principle of freedom not to contract, already mentioned, according to which the parties are free to decide whether to bind or not, whether to accept or not, and whether to withdraw the offer. The result is a strong uncertainty of the phase preceding the conclusion of the contract and, consequently, the irrelevance of what happens in the negotiation phase, due the possibility that these are interrupted at any time. Consequently, the American courts have generally not imposed on the parties, at this stage, pre-contractual responsibilities, since the latter are aware that a possible assignment is not of legal relevance and, therefore, worthy of protection. This is also due to the fear that, if the parties were bound by duties to behave in a certain way during the negotiations prior to the conclusion of the contract, there would have been a chilling effect that would have discouraged the parties for fear of incurring liability unintended and unwanted. We are therefore quite distant from our own thinking

[92]E. Allan Farnsworth, *Contracts,* op. cit., pag. 3.

[93]it is common to analyse the process in terms of two distinct steps: first, a manifestation of assent that is called an offer, made by one party (the offeror) to another (the offeree); and second, a manifestation of assent in response that is called an acceptance, made by the offeree to the offeror"; E. Allan Farnsworth, (2004). Contracts, op. cit. pag. 110.

[94] "According to orthodox contract doctrine, neither party to a contractual negotiation is bound until an offer has been accepted and a contract has been formed"; E. Allan Farnsworth, W. F. Young, C. Sanger, (2001). *Contracts, cases and materials,* Foundation Press, New York, pp. 223ss.

that, the fact that we can go free from any liability during the negotiation phase would be a disincentive for honest affiliates, who would risk being damaged by unlawful, but unpunished, conduct of their own counterparty, because carried out in the absence of a contractual relationship between them.

The scenario changes considerably once a contract has been concluded between the parties. In this case, in fact, the party that has been damaged by illicit behavior held by its counterpart during the prodromal negotiations at the conclusion of the contract, has contractual remedies available to protect its own interests, such as duress, undue influence, misrepresentation and unconscionability. Furthermore, once a contract is in force between the parties, the U.S. legal system recognizes the duty of the parties to behave according to good faith and fair dealing. In fact, the (Second) Restatement of Contracts § 205 provides that "every contract imposes upon each party a duty of good faith and fair dealing in its performance and its enforcement"[95]. Similarly, the Uniform Commercial Code article 1-general provisions (2001) part 3; Territorial applicability and general rules § 1-304. Obligation of Good Faith states that: "Every contract or duty within the Uniform Commercial Code imposes an obligation of good faith in its performance and enforcement"[96]. However, such provisions are completely missing with reference to the phase prior to the conclusion of the contract[97]. The general rule, at this stage, is that "a party to precontractual negotiations may break them off without liability at any time and for any reason-a change of heart, circumstances, a better deal-or for no reason at all (...) in terms of time, effort and expense"[98]. The only protection available to a party in the negotiation phase, consequently, according to the classic scheme of formation of the contract by offer and acceptance, consists in being able to accept the offer before it is revoked. On the contrary, if he prefers to rely on the counterparty promise, he will have to bear the risk that it will cease at any time before his acceptance and, consequently, will have to bear all the costs prior to the conclusion of the contract, which therefore does not may be held against a counterparty. In short, there is no protection for reliance interests, other than that which the party itself can confer on them with its own behavior.

The negotiation phase, as a consequence, is characterized by a strong uncertainty, not so far from that which characterizes gambling, where those who bet on the one hand can grab the profits deriving from the win, but until then they will have to bear in exclusive losses to be able to play[99].

---

[95]The comment affirms that: “Good faith performance. Subterfuges and evasions violate the obligation of good faith in performance even though the actor believes his conduct to be justified. But the obligation goes further: bad faith may be overt or may consist of inaction, and fair dealing may require more than honesty. A complete catalogue of types of bad faith is impossible, but the following types are among those which have been recognized in judicial decisions: evasion of the spirit of the bargain, lack of diligence and slacking off, willful rendering of imperfect performance, abuse of a power to specify terms, and interference with or failure to cooperate in the other party’s performance”.

[96]In addition, a definition of good faith is provided in § 1- 201 (b) (20) which “honesty in fact and the observance of reasonable commercial standards of fair dealing”.

[97]Although a duty of fair dealing is now generally imposed on the parties to a contract, that duty is not formulated so as to extend to precontractual negotiations”, E. Allan Farnsworth, (1987). “Precontractual liability and preliminary agreements: Fair dealing and failed negotiations”, in *Columbia Law Review*, 87, pp. 242ss. A. Kramer, (2010). *Contract law: An index and digest of published writings,* Bloomsbury Publishing, New York, pp. 13ss. M. Davies, D.V. Snyder, (2014). *International transactions in goods. Global sales in comparative context,* Oxford University Press, Oxford, pp. 77ss.

[98]E. Allan Farnsworth, (1987). *Precontractual liability and preliminary agreements*, op. cit.

[99]According to the words of Judge Barry in the William Lacey (Hounslow) Limited v Davis [1957] 1 WLR 932 case in relation to the possible recovery of the expenses incurred to win a contract, the disappointed contractor “undertakes this work as a gamble, and its cost is part of the overhead expenses of his business which he hopes will be met out of the profits of such contracts as are made”. For further details, see also: A. Lodder, (2012). *Enrichment in the law of unjust enirchment and restitution,* Bloomsbury Publishing, New York. A. BURR, (2016). *Delay and disruption in construction contracts,* CRC Press, New York, pp. 198ss. D. Taylor, R. Taylor, (2017). *Contract law directions*, Oxford University Press, Oxford.

Exceptions to this approach in the American world are rare. One of these cases is represented by the discipline of national collective labor agreements, governed by federal law. Specifically, the National Labor Relations Act, 29 U.S.C. in § 158 (d)[100] requires employers and workers in a union to undertake collective bargaining in good faith. Another exception, this time of a jurisprudential matrix, can be found in relations between private and public administration. The reference is to the case of Heyer Products Co. v. United States 140 F. Supp. 409 (Ct. Cl. 1956)[101], where the judges stated that the government is burdened by the obligation to take into consideration all the offers it receives for the award of a contract, under penalty of having to reimburse the expenses incurred to carry out the offer (and not, however, those relating to lost profits, differing in this from the administrative jurisprudence which has gone so far as to affirm the responsibility of the public client with regard to the loss of chances and the compensation of the relative positive interest). Finally, duties of conducting in good faith and so as not to cause damage to one's counterpart characterize the contracts, not related to business negotiations, but characterized by a relationship of trust between the parties, which requires the parties to act according to the canon of the uberrimae fides or utmost good faith.

PRECONTRACTUAL LIABILITY IN AMERICAN LAW

The traditional mechanism of forming a contract is that of an offer and an acceptance. However, while it may be suitable for simpler transactions, in which the formation of the contract is immediate, it is not suitable for being applied to more complex cases, characterized by long negotiations before a contract can be reached, and where not always it is possible to identify an offer and an acceptance, intended in the traditional sense. Rather, the parties come to a contract through a gradual process, during which the parties exchange different drafts of the contract, which are gradually perfected according to their own wishes until they reach a version that corresponds to the intent of both parties involved, signed at closing[102]. When the contract is concluded, it is clear that the parties have given their consent and intend to create legal relations, and any responsibilities will be governed by the contractual remedies. But in the event that this does not happen, the traditional US approach offered, as seen, very little protection[103]. This with the passage of time and the expansion of the importance of the contract in the business world has started to create many problems and related questions, which traditional doctrine was struggling to answer[104]. Thus, the importance of the existing relationships between economic operators begins to spread, which go beyond the single contract, and are characterized by the durability of the relationships over an often

[100]"Obligation to bargain collectively: For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession".

[101]F.W. Claybrook, (1997). "Good faith in the termination and formation of federal contracts", in *Maryland Law Review,* 56, pp. 559ss.

[102]R. B. Schlesinger, P. G. Bonassies, (1968). *Formation of contracts: A study of the common core of legal systems,* Oceana Publications, New York, pag. 1585. P.G. Monateri, (2017). *Comparative contract law,* Edward Elgar Publishers, Cheltenham, pp. 449ss.

[103]This is somewhat particular if we consider that this form of contract formation is typical of the Anglo-Saxon experience, which introduced the structure of due diligence-signing-closing.

[104]"May a disappointed party have a claim against the other party for having failed to conform to a standard of fair dealing? If so, what is the meaning of fair dealing in this context? And may the disappointed party get restitution?"; E. Allan Farnsworth, (1987). *Precontractual liability,* op. cit. pag. 219.

significant period of time, relationships that are therefore difficult to be subsumed under the "immediate" and "momentary" scheme of the offer and acceptance[105]. Furthermore, the latter scheme is not reconciled with the expectations arising from the parties when the negotiations aimed at concluding a contract[106] extend over time, a problem that obviously is absent in case of simultaneous offer and acceptance[107].

As regards the legislative formant, the problems related to the culpa in contrahendo begin to arouse some interest even when drafting codification works, at least in the field of commercial law (probably the only sector that had the importance and the strength to introduce these discussions). In the first draft of the Uniform Commercial Code, in fact, a discrimination was made between good faith in an objective and subjective sense that can be requested by the economic operators concerned by the code. The first involved the obligation for the latter to comply with commonly accepted commercial practices and based on the principle of reasonableness, the second, however, referred to the principle of "de facto honesty". However, out of fear that such forecasts could negatively impact the practices of commercial negotiations, the final text of 1952 did not resume a similar distinction, merely referring to the principle of subjective good faith, already known from the experience of common law, but silent, instead, on objective good faith. Even today in the Uniform Commercial Code there is absolutely no reference to the principle of good faith in the context of negotiations[108] although several articles have been added that refer to the principle of good faith in an objective sense[109]. This has not gone without criticisms[110], but the reluctance towards the introduction of generic principles of difficult enucleation and specification appears to be

[105]K. Llewellyn, (1939). "Our case law of offer and acceptance", in *Yale Law Journal,* 48, pp. 779ss. A. Corbin, (1917). "Offer and acceptance, and some of the resulting legal relations", in *Yale Law Journal,* 26, pp. 169ss. T. F. Jiely, (1975). "The art of the negelcted obvious in products liability cases: Some thoughts on Llewellyn 's the common law tradition", in *De Paul Law Review*, 24, pp. 916ss. T.C. Grey, (2014). *Formalism and pragmatism in american law,* ed. Brill, The Hague, pp. 40ss. T.E. George, R. Korobkin, (2017). *A common law approach to contract*, Aspen Publishers, New York, pp. 124ss. R.R. Orsinger, (2015). *The rise of modern American contract law,* ed. Orsinger, Texas, B.D. Morant, L.A. Di Matteo, (2010). "Contracts in context and contracts as context", in *Wake Forest Law,* 45, pp. 554ss. M. Furmston, G.J. Tolhurst, (2010). *Contract formation: Law and practice,* Oxford University Press, Oxford. C.L. Knapp, N.M. Crystal, H.G. Prince, (2012). *Problems in contract law: Cases and materials,* Aspen Publishers, New York.

[106]R. S. Summers, (1968). ""Good faith" in general contract law and the sales provisions of the Uniform Commercial Code", in *Virginia Law Review*, 54 (2), pag. 207. F. Kessler, E. Fine, (1964). "Culpa in Contrahendo, bargaining in good faith, and freedom of contract: A comparative study", in *Harvard Law Review,* 77, pp. 401ss. W.D. Duncan, (2012). *Joint ventures law in Australia,* Federation Press, Australia, pp. 108ss. E. Mcjendrick, (2013). *Force majeure and frustration of contract,* ed. Routledge, London & New York. J. Morgan, (2015). *Great debates in contract law,* Palgrave Macmillan, London. N. Jansen, R. Zimmermann, (2018). *Commentaries on european contract laws,* Oxford University Press, Oxford, pp. 348ss. G.J. Marsden, G. Isiedel, (2017). "The duty to negotiate in good faith: Are BATNA strategies legal?", in *Berkeley Business Law Journal,* 15, pp. 133ss.

[107]C. Perry, (2016). "Good faith in english and us contract law: divergent theories, practical similarities", in *Business Law International,* 17 (1), pp. 27ss. A. Arnow-Richman, (2015). "Mainstreaming employment contract law: The common law case for reasonable notice of termination", in *Florida Law Review*, 66 (4), pp. 1516ss.

[108]United States v. Braunstein, 75 F. Supp. I37 (S.D.N.Y. I947), appeal dismissed, 168 F.2d 749 (2nd Cir. 1948).

[109]References are to cases where there is a contract between the parties (Section 1-201 (19) defines good faith as a: "honesty in fact and the observance of reasonable commercial standards of fair dealing") and commercial sales (see Section 2-103 (b) is affirmed that: "in the case of a merchant means honesty in fact and the observance of reasonable commercial standards of fair dealing in the trade").

[110]E. M. S. Houh, (2005). "The doctrine of good faith in contract law: A (nearly) empty vessel?", in *Utah Law Review,* 1, pp. 54ss. E.M.S. Houh, (2003). "Critical interventions: Toward an expansive equality approach to the doctrine of good faith in contract law", in *Cornell Law Review*, 88, pp. 1025ss. A. Beckers, (2016). "Regulating corporate regulators through contract law? The case of corporate social responsibility Codes of conduct," *EUI Working Paper MWP* 2016/12. M.N. Browne, L. Biksacky, (2013). "Unconsionability and the contingent assumptions of contract theory", in *Michigan State Law Review,* 211 (1), pp. 218ss.

predominant, an activity that in turn required the reference to further indefinite principles, such as fair dealing and reasonableness, moreover, it is subjected to an excessively large extent to the hermeneutic activity of the judges[111]. Noteworthy is the position taken by the US doctrine, which has read the principle of objective good faith as an "implied term" of the contract that requires the cooperation of the parties to the contract so that their counterparty does not see their reasonable disappointed expectations[112]. This idea has also followed in jurisprudence, starting from the leading Tymshare v. Covell case decided by judge Scalia[113]. The Second Restatement of Contracts, on the other hand, dedicated a specific section to the notion of good faith, § 205, entitled Duty of good faith and fair dealing, which imposes on the parties to a contract the duty to behave in good faith[114]. Although, even in this case, there is no express reference to this obligation in the negotiation phase, the comment on the relevant section is certainly important and seems to open some glimmer of recognition of some pre-contractual liability in the American legal system, albeit still in a nutshell. Therefore, the full text is reported: "Good faith in negotiation. This Section, like Uniform Commercial Code § 1-203, does not deal with good faith in the formation of a contract. Bad faith in negotiation, although not within the scope of this Section (...) moreover, remedies for bad faith in the absence of agreement are found in the law of torts or restitution"[115].

Even in American law it was possible to meet the concept of good faith in the context of negotiations and, in the absence of an organic discipline, there were heterogeneous remedies deemed sufficient to perform the same function as the discipline of the culpa in contrahendo. More or less in the same years, a professor from New York[116] wondered about the possibility of introducing an obligation to negotiate by behaving according to good faith (the so-called contract to bargain)[117], thus filling the legislative gap by means of an absolutely volitional basis, renouncing to the cardinal

[111]Good faith, according to this approach: "'has no general meaning or meanings of its own" and would only serve to "exclude many heterogenous forms of bad faith"; R. S. Summers, (1968). ""Good Faith", in general contract law and the sales provisions of the Uniform Commercial Code", op. cit., pp., 196ss. S.J. Burton, (1980). "Breach of contract and the common law duty to perform in good faith", in *Harvard Law Review*, 94. D. Markovits, (2014). Good faith as contracts core value, in D. Markovits, *Contract law and legal methods,* Oxford University Press, Oxford, pp. 276ss. L.E. Trakman, K. Sharma, (2014). *The binding force of agreeements to negotiate in good faith*, in "The Cambridge Law Journal", 73 (3), pp. 600ss.

[112]E. Allan Farnsworth, (1962). "Good faith performance and commercial reasonableness under the Uniform Commercial Code", in *University of Chicago Law Review,* 30, pp. 667ss.

[113]727 F.2d 1145, 234 U.S. App. D.C. 46 (1984), where the judges defined good faith as a means of identifying, within the contract, an implicit obligation not to undertake qualifiable conduct such as bad faith. This duty of conduct would be precisely implicit within each contract.

[114]Which is stated that: "Notions of good faith and fair dealing are frequently expressed in the American contract law affecting preliminary negotiations, firm offers, mistake, and misrepresentation, and that the doctrines of negligence, estoppel, and implied contract, among others, have at the same time served many of the doctrinal functions of culpa in contrahendo (…) over the last decades notions of good faith and fair dealing have undergone a steady process of further expansion, particularly in the field of public construction contracts".

[115]The approach that can be had towards this introduction appears twofold: if, on the one hand, we can rejoice that there is finally some sort of recognition of the pre-contractual responsibility, however soft, on the other, it could criticize how this call does nothing but underline that in the American system there is no general principle of good faith in negotiations, and that single remedies will be sought in the (fragmentary) existing legislation (the so-called piecemeal solutions), however, it is unlikely that a judge will settle a dispute by referring to this comment.

[116]C. Knapp, (1969). "Enforcing the contract to bargain", in *New York University Law Review*, 44, pp. 674ss. C.L. Knapp, N.M. Crystal, H.G. Prince, (2012). *Problems in contract law: Cases and materials,* op. cit.

[117]The author refers that: "any situation where two or more parties have commenced negotiations looking toward a particular exchange, have reached actual agreement on some important terms of the proposed exchange, have delayed agreement on other terms of real importance (...) The case is decidedly similar to that achieved during the negotiations of extraordinary transactions, where the function performed by the contract to bargain is similar to that of the letter of intent or, in general, of a preliminary agreement.

principle of freedom to contract[118]. In this way, in the event of non-fulfillment, it would be possible to order a party to pay damages for having relied on compliance with the inter partes agreement (and, therefore, reliance interests). In any case, we are far from the civil law systems, where such an obligation is imposed by external, legal or jurisprudential sources.

Finally, the American courts, in recent decades, have started to have a less restrictive attitude with regard to the possibility of recognizing a pre-contractual liability for the party who has not behaved correctly, drawing on heterogeneous remedies (it has been said, to regard, of "piecemeal solutions"), in the wake of what has been noted by the most authoritative doctrine. One of these quasi-contractual remedies is represented by the regulation of unjustified or unjust enrichment, resulting from negotiations. In such cases, a person improperly appropriates benefits in the negotiation phase aimed at signing a contract which, however, is not concluded. As contractual remedies were not available, the courts in some cases resorted to the figure of unjust enrichment to order a party to return the benefits received during the negotiations[119]. A second instrument with which protection has been provided for the assignment of a party during the negotiations is represented by the institution of misrepresentation. This time the leading case is represented by the Markov v. ABC Transfer & Storage Co. case[120]. Here, a property owner had made the then current tenant believe that he would renew the lease, which was now over, while he was simultaneously negotiating for the sale of the building. The landlord was obviously trying to make sure that the property did not remain empty, without therefore receiving the rent, during the period in which he was busy negotiating the sale and, above all, not to remain dry-mouthed if it had not gone successful. In this case, the judges of the Supreme Court of Washington deemed the landlord's behavior unlawful and sentenced him to pay damages within the limit of the reliance losses, including not only the costs faced for the sudden change of location, but also the lost profits (in how much the move had caused the tenant to lose a customer). The remedy for misrepresentation is however too specific to be able to act as general protection with reference to the hypothesis of pre-contractual liability, for which it is not required to make false or misleading declarations. A third tool that the American courts have resorted to to protect the party who has suffered damage due to incorrect behavior before the conclusion of the contract is represented by the use of the figure of the promissory estoppel[121], through which protection has been provided to those who, relying on a

[118]E. Allan Farnsworth, (1987). *Precontractual liability and preliminary agreements: fair dealing and failed negotiations,* op. cit., pp. 217ss, "(...) the hard question for American courts is not whether a court should undertake on its own to resolve a dispute over fair dealing (...)".

[119]The main hypotheses of restitution concern the ideas of which a part has appropriated during the negotiations, as well as the services received, prodromal to the future conclusion of a contract. An example is that of the architect who carries out activities in favor of a potential client in view of a future conclusion of a contract which, however, does not occur. In this case, the "impoverished" person's right to be returned the value equal to the benefit that the counterparty had obtained from these services was recognized (see Hill v. Waxberg, 237 F.2d 936 (9th Cir. 1956), has been noted as "few other courts have entertained claims for restitutions of benefits conferred during failed negotiations. Because a party's expenses during negotiations typically result in no benefit on the other party, such expenses have not often given rise to claims to restitution". E. Allan Farnsworth, (2004). *Contracts,* op. cit., pag. 194. E.M. Wwitzenboeck, (2012). *A legal framework from emerging business models: Dynamic network as collaborative contracts,* Edward Elgar Publishers, Cheltenham, S.L. Emanuel, (2015). *Emanuel law outlines for contracts,* Aspen Publishers, New York.

[120]457 P.2d 535 (Wash. 1969).

[121]According to Restatement First of Contracts § 90: " (...) A promise which the promisor should reasonably expect to induce action or forbearance of a definite and substantial character on the part of the promisee and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise". It therefore represented an exception to the principle established by § 75 (definition of consideration) according to which only a consideration was able to give legal significance to a promise which, otherwise, would have had no consequence. § 90 will then be modified with the second Restatement.

promise from a counterparty, which however did not meet the requirements to characterize itself as an actual offer, had incurred expenses in view of the future conclusion of the contract, which never took place. Although in the absence of a consideration, the promise was nevertheless considered binding, with a consequent obligation to pay compensation in the event of its violation. The Hoffman v. Red Owl Stores case[122], was decided by the Wisconsin Supreme Court in 1965. In this case, the Red Owl supermarket chain, through its representative, had promised to Mr. Hoffman, owner of a bakery, that he would offer him a franchise contract to open a shop if it had met certain requests (such as gaining experience, as well as investing some money in the business).

After about two years in which Mr. Hoffman had worked hard to gain the required experience (among other things, he had sold his bakery, bought and resold a small grocery store, changed city) always relying on the conclusion of a franchise agreement with Red Owl, the negotiations jumped completely when the representative of the latter increased Mr. Hoffman's request for funding to be able to win the contract. He therefore sued for the expenses he had incurred "in reliance on the assurance of a franchise"[123]. The problem was that Red Owl had never made an actual offer to Mr. Hoffman, no contract had been entered into and, according to the traditional approach, Red Owl had any right to withdraw from the negotiations when she had wanted. However, this situation seemed excessively unfair and the court found that, despite the absence of a contract between the parties, all the requirements established by § 90 had been respected[124].

Unless there is a specific remedy (such as those just illustrated of the enrichment without just cause, of the misleading representation or of the promissory estoppel to protect a specific promise) it is still not possible today to affirm the presence of a general principle of good faith and there is fear dealing resulting from the law to protect custody (or reliance). The issue appears purely cultural. It follows that the reluctance of the American courts to impose generic obligations of good faith on the parties in the negotiation phase would be largely justified. The random view of negotiations is well suited to a type of company that does not care about the result of individual transactions, which only affects the private individuals involved. For this reason, the only exception is represented by the discipline of national collective labor agreements, since in that specific case there is a general interest in the outcome of those negotiations. It follows that the imposition of a legislative obligation of good faith and fair dealing is not seen as something that would be able to improve the economic well-being of society, understood as individuals who negotiate with each other for the purpose of maximizing their own interest.

THE PACT OBLIGATION OF GOOD FAITH AND FAIR DEALING

The paragraph on precontractual liability within Farnsworth's work on contracts closes with a question about the possibility for contractors/paciscents, given the absence of a generic obligation to behave according to good faith in the phase of legislative or jurisprudential imposition negotiations, to autonomously limit its freedom to contract through an agreement to agree or to negotiate (contract to bargain). The question is certainly topical (especially in the context of extraordinary operations, but not only here) since, as seen above, this solution has found

[122]133 N.W.2d 267 (Wis. 1965). For further analysis, see: R.A. Hillman, (2012). *The richness of contract law: An analysis and critique of contemporary theories of contract law,* ed. Springer, Berlin, pp. 56ss. M.A. Eisenberg, (2018). *Foundational principles of contract law,* Oxford University Press, Oxford, pp. 208ss.

[123]N.W.2d 267 (Wis. 1965).

[124]"injustice would result here if plaintiffs were not granted some relief because of the failure of defendants to keep their promises which induced plaintiff to act to their detriment".

widespread practice, due to the complication and lengthening of the contract formation period, and overcoming the offer-acceptance combination.

As a result, American courts have increasingly seen claims for compensation from so-called reliance interests due to violations of pact agreements to conduct negotiations in a fair manner, although obviously this does not imply the duty to reach the conclusion of a contract but, at least, not to withdraw in an unjustified manner or, in any case, not to create in one's counterparty an expectation in the future signing of an agreement. Although it is still not possible to speak of uniformity in the approach that the courts have had with regard to the case studies in question, it seems that at least the trend is to recognize validity of agreements of this kind for two different orders of reasons: a) On the one hand , the validity of those preliminary agreements by which the parties autonomously decide to regulate their behavior in the negotiation phase, inspired by the canons of good faith, despite the absence of a legal obligation in this direction, has simply been recognized; b) on the other hand, in some cases, these preliminary agreements were considered true contracts, in that they contained all the elements required for this purpose, and from this the contractual liability of the interested parties was derived, which as we have seen , implies duties of good faith and fair dealing (we refer to the texts of the Second Restatement of Contracts and the Uniform Commercial Code). Obviously, the adoption of one rather than the other solution will largely depend on the literal content of the agreements taken into consideration from time to time, therefore it is not possible to affirm a general discipline but, rather, on a case-by-case basis. Significant in this regard is also the spread, in practice, of the use of the term "subject to contract" in order precisely to avoid that a judge can already believe that an agreement between the parties has already been fully reached, which therefore risk being bound by a text that they believed to have a lower scope. There is therefore an awareness by economic operators of the possibility (or perhaps it would be better to say, in their perspective, risk) that the courts scrutinize the behaviors and agreements entered into during negotiations with greater attention, sanctioning the incorrect behaviors in this phase in various ways.

However, the framework of the jurisprudential guidelines is still partially jagged, with negative consequences on the possibility of predicting what the judges' decisions will be in this regard. This entails an element of uncertainty which is certainly not what is desired by economic operators who, on the other hand, prefer common law systems as the governing law of their agreements precisely because they are aware of the greater importance assumed by the literal meaning of what has been agreed, which will hardly be subject to hermeneutic interpretations by the judges, as well as for the greater predictability of the law. This is particularly important in the commercial and business law sector, where economic operators do not tolerate intrusion by third parties (including judges) in the contractual texts stipulated by their lawyers. It appears, in the modest opinion of the writer, that there is a contradiction in terms in this situation. On the one hand, in fact, the traditional common law approach tends to eschew the application of those generic principles, such as those of good faith, analyzed in the present work, as they are intrinsically connected with the uncertainty deriving from their application on the other hand, however, it refuses, even if not always, to recognize the juridical value of individual agreements that impose the respect of these criteria in the specific case, ending up introducing precisely that element of uncertainty that was wanted to be avoided. Such fragmentation can be explained on the basis of merely geographical criteria, or relating to the cultural training of judges, on the basis of the universities of origin.

Turning to a brief examination of the jurisprudential cases that have been expressed on the topic, it should be noted as in the Teachers Ins. Annuity Ass'n v. Tribunes case the judges recognized as the agreement (commitment letter) with which the parties had undertaken to negotiate the future

contract in good faith "represented a binding preliminary commitment and obligated both sides to seek to conclude a final loan agreement upon the agreed terms by negotiating in good faith to resolve such additional terms as are customary in such agreements"[125]. The case concerned an action brought by a credit institution against a (potential) borrower who, by means of a preliminary agreement, had established the terms under which the institution would have provided a loan to the customer, subject to the preparation and execution of the related documentation and approval by the institution's board of directors. However, subsequently, the client had withdrawn from the negotiation, before the parties had reached an agreement on the final terms of the loan agreement, in a manner contrary to the obligation, falling on both parties by virtue of the commitment letter to continue the negotiations in good faith, as the withdrawal was due to the decline in interest rates during the negotiations. The question was therefore whether an agreement that did not contain all the elements of a contract could still bind the parties. On the one hand, there is the risk of limiting the parties' freedom to contract, and the desire to avoid that the parties find themselves bound before a real contract has been concluded ("a primary concern for courts in such disputes is to avoid trapping parties in surprise contractual obligations that they never intended"). On the other hand, however, the agreements with which the parties autonomously decide to bind themselves to a certain behavior in the negotiation phase and, therefore, even in the absence of a definitive contract as a source of obligations ("notwithstanding the importance of protecting negotiating parties from involuntary judicially imposed contract, it is equally important that courts enforce and preserve agreements that were intended as binding, despite a need for further documentation or further negotiation")[126]. In balancing these two opposing interests, the New York judges believe the free will to bind the parties to negotiate the terms of the future agreement in good faith, without this implying an obligation for the parties to bind to reach this result in in any case, as it could well be the case that, despite the good faith given, the parties are unable to reach an agreement on the elements still open, or that blameless changes in the circumstances lead to the loss of the interest of the parties in the conclusion of the contract. All this is not prevented by the pact obligation to behave in good faith in negotiations. Simply, the parties cannot unjustifiably withdraw from the negotiations, or retract on those points on which they have already given their consent with the preliminary agreement[127].

Particularly fertile ground, where the US courts have repeatedly affirmed the existence of the duties of good faith and fair dealing whose violation entails the conviction for having committed a specific tort[128], is certainly represented by that of insurance contracts[129], due to the specific relationships between the subjects involved, and the importance of this type of contract in the

[125]670 F. supp. 491, S.D.N.Y. (1987). L.R. Kling, E. Nugent, B. Van Dyke, (2019). *Negotiated acquisitions of companies, subsidiaries and divisions*, Law Journal Press, New York.

[126]J. M. Feinman, (2012). *The law of insurance claim practices: Beyond bad faith,* in "Tort Trial & Insurance Practice Law Journal", 47(2), 693ss.

[127]"What he may demand, however, is that his counterparty negotiate the open terms in good faith toward a final contract incorporating the agreed terms (...) The obligation does, however, bar a party from renouncing the deal, abandoning the negotiations, or insisting on conditions that do not conform to the preliminary agreement".

[128]F. supp. 491, S.D.N.Y. (1987). L.R. Kling, E. Nugent, B. Van Dyke, (2019) *Negotiated acquisitions of companies, subsidiaries and divisions*, op. cit., J. Steadman, S. Sprague, (2015). *Common law contract law: A practical guide for the civil law lawyer,* op. cit.

[129]"There has been much litigation over preliminary agreements. It is difficult to generalize about their legal effect. They cover a broad scope ranging in innumerable forms and variations from letters of intent which presuppose that no binding obligations will be placed upon any party until final contract documents have been signed, to firm binding commitments which, notwithstanding a need for a more detailed documentation of agreement, can bind the parties to adhere in good faith to the deal that has been agreed (...)".

modern world[130]. Another area in which it is possible to identify judgments in which bad faith tort has been used is that represented by employment contracts[131] (although there is also a uniform attitude by the courts in this sector)[132] due to the importance society from issues related to work and employment.

THE PRE-CONTRACTUAL LIABILITY IN THE CONTEXT OF EXTRAORDINARY OPERATIONS. THE ROLE OF THE LETTER OF INTENT

Particularly fertile ground for the analysis of pre-contractual contracts and the themes mentioned above is precisely that of the acquisition of shareholdings. Even if the commercial agreements sector does not have those traits (such as the fiduciary reletionship or the public interest in the outcome of the negotiations) typical of those sectors in which the American courts, more or less uniformly, have declared duties of good faith and fair dealing, it is possible to identify several rulings that recognized the validity of agreements that imposed such obligations on the parties to the negotiations. The difference in the case studies that we are going to examine is immediately evident: In these cases, the obligations from which the culpa in contrahendo may derive do not derive in a generic way from some obligation having an external source with respect to the agreements by the parties, but promotes mainly from this last. Two interesting cases are in fact represented by Itek Corp. v. Chicago Aerial Industries, 248 a.2d 625 (Del. 1968)[133] and Arcadian Phosphates, Inc. v. Arcadian Corp., 884 F.2d 69 (2nd Cir. 1989)[134].

[130]We have already said that the rationale behind the American disinterest in the problems of pre-contractual liability is to be connected to the general indifference towards the results of individual transactions between private individuals. In the case of insurance contracts, characterized by elements of public interest, however, the situation changes. The best known cases in this regard are represented by Crisci v. Security Insurance Co. 66 Cal. 2d 425 P.2d 173, 58 Cal. Rptr. 13 (1967) in J. M. Feinman, (2012). "The law of insurance claim practices: beyond bad faith", in *Tort Trial & Insurance Practice Law Journal,* 47 (2), pp. 693ss; and Gruenberg v. Aetna Insurance Co., 66 Cal. 2d 430, P.2d 177, 58 Cal. Rptr. 17 (1967). For further details, see: G.H. William Jrt., (1973). "Good faith and fair dealing in insurance contracts: Gruenberg v. Aetna Insurance Co.", in *Hastings Law Journal,* 25 (1), pp. 699ss. O. Neuman, (2018). *Hanbook on insurancce coverage disputes*, Wolters Kluwer, U.S., pp. 984ss.

[131]Cleary v. American Airlines, 111, Cal. App. 3d 443, 168 Cal Rptr. 722 (1980), which is referred: un breach of the implied covenant of good faith. E. Haggerty, (1987). "Breach of the implied covenant of good faith and fair dealing in employment contracts: From here to longevity and beyond. (California)", in Western State University Law Review, 14 (2), pp. 445ss.

[132]Arco Alaska, Inc., v. Akers, 753 P.2d 1150 (Alaska, 1988), where the judges stated that the doctrine of the implied covenant of good faith and fair dealing "creates uncertainty for contracting parties, foments litigation and threatens commercial development", E. J. RANDAL, (1994). "The implied covenant of good faith and fair dealing in Alaska: One court's license to override contractual expectations", in *Alaska Law Review,* 11, pp. 35ss. H.H. Perritt, (2019). *Employee dismissal law and practice,* Wolters Kluwer Law & Business, U.S., pag. 6.343.

[133]C. Lockhart, (1996) *Misleading or deceptive conduct: issues and trends,* The Federation Press, New York, pag. 12.

[134]L. R. Kling, E. T. Nugent, (2005) *Negotiated acquisitions of companies, subsidiaries and divisions*, in Law Journal Press, New York, pp. 6-13. See also in argument the next cases: Gillenardo v. Connor Broadcasting Delaware Co., 1999 Del. Super Lexis 530, which is affirmed that: "in Delaware the intention of the parties controls the creation of a good-faith duty to negotiate under a letter of intent"; Venture Associates Corp. v. Zenith Data Systems Corp., 96 F.3d, 275 (7th Circ. 1996); more recently, the binding nature of the agreement to negotiate in good faith has been supported in the case: SIGA Technologies Inc., v PharmAthene Inc., CA no. 2627 (of 24 May 2013). In this case the judges made a distinction between two different types of agreements: according to the first "parties agree on all the points that require negotiation (including whether to be bound) but agree to memorialize their agreement in a more formal document"; in the second "parties agree on certain major terms, but leave other terms open for further negotiation". The case submitted to the Delaware court fell into the second typology and, since in the specific case, the judges believed that an agreement would have been reached in the absence of the behavior of one of the parties based on bad faith, they sentenced the defendant to pay the expectations damanges, see: C. PERRY, (2016). *Good faith in english and us contract law,* op. cit., pag. 29. L.R. Kling, E. Nugent, B. Van Dyke, (2019). *Negotiated acquisitions of companies, subsidiaries and divisions*, op. cit.

The first case concerned the negotiation of the sale of the assets of Chicago Aerial Industries (CAI) to Itek. After many negotiations, the Cai decided to accept the offer made by Itek, subjecting it to four conditions: (i) The Itek obtained the necessary funding; (ii) a letter of intent is signed; (iii) the details of the sale were specified; (iv) all the necessary documents for the assignment were prepared in a satisfactory form for both parties. Once Itek had obtained the financing necessary to carry out the transaction, the parties signed a letter of intent, in which they envisaged that "Itek and CAI shall make every reasonable effort to agree upon and have prepared as quickly as possible a contract providing for the foregoing purchase by Itek and sale by CAI, subject to the approval of CAI stockholders, embodying the above terms and such other terms and conditions as the parties shall agree upon. If the parties fail to agree upon and execute such a contract, they shall be under no further obligation to one another"[135]. Once the letter of intent was signed, the parties continued the negotiations in order to define all the details of the transaction. At the same time, however, the majority shareholder of Cai came into contact with another potential buyer (Bourns Inc.), with whom he negotiated the sale of the same assets subject to interest by Itek. These negotiations resulted in a higher offer than the one previously presented, which Cai accepted, despite prior agreements with Itek, which was informed by fax that the operation would not continue to them due to generic "unforeseen circumstances"[136] and the impossibility of reaching an agreement on the final terms of the sale. Itek sued on the basis of the letter of intent, deemed binding, and on the violation by the CAI of the provision, contained therein, by virtue of which the parties had undertaken to continue the negotiations in good faith. In this case, the judges noted that "it is apparent that the parties obligated themselves to" make every reasonable effort "to agree upon a formal contract, and only if such effort failed were they absolved from" further obligation "for having" failed " to agree upon and execute a formal contract. We think these provisions (...) obligated each side to attempt in good faith to reach final and formal agreement"[137]. Since, in the present case, it was clear that the Cai had not done everything possible to continue the negotiations and find an agreement[138], but rather had done the exact opposite in order to free itself from this agreement and sell to the highest bidder, the judges they expressed themselves in favor of Itek, recognizing the possibility for the parties to agree in a pactic way to respect the principle of fear dealing and, therefore, the binding nature of the letter of intent.

Similarly, in the Arcadian case there was a debate about whether or not a memorandum of understanding should be part of a sale of a fertilization business to a joint venture. This memorandum contained the parties' agreement on the assets to be transferred, the price and the related payment timescales, an option for the seller to enter the buyer's capital and the deadlines for subsequent steps, including the closing date. The sale was subject to the approval of the boards of directors of both companies. Furthermore, the clause that most interests us here was the one

[135]The double reference to the possibility that the negotiations could fail, as well as the reference to a binding sales contract to be finalized in the future, are decisive in this sense.

[136]O. W. Holmes, (1897). "The path of the law", in *Harvard Law Review,* 10, pp. 457ss.

[137]Even if the viewing angle is specific (the loan agreements): "In the absence of such a formula the question whether a legally binding contract should arise as a matter of law depends on the intention of the parties and the surrounding circumstances. Indeed, it has been held that a document containing terms and conditions, but which is to be embodied in a formal written document may nevertheless constitute a complete and binding agreement. See Branca v Cobarro [1947] KB 854; Clipper Maritime Ltd v Shirlstar Container Transport Ltd, The Anemone [1987] 1 Lloyd's Rep. 456"; R.C. Tennekoon, (2009). *The law and regulation of international finance*, Bloomsbury Publishing, pag. 46. R. Megarry, C. Harpum, W. Wade, (2012). *The law of real property,* Sweet & Maxwell, London. H.W. Carter, (2013). *The construction of commercial contracts,* Bloomsbury Publishing, New York.

[138]C. Lockhart, (1996). Misleading or deceptive conduct: Issues and trends, op. cit., L. R. Kling, E. T. Nugent, (2005). *Negotiated acquisitions of companies, subsidiaries and divisions,* op. cit., pp. 6-13.

with which the parties undertook "to cooperate fully and work judiciously in order to expedite the closing date and consummate the sale of the business"[139]. Due to a sudden change in the market price of the reference asset, the selling party asked for a clear change in the terms in which it should have participated in the joint venture. Although, in the present case, the judges believed that, from the literal tenor of the memorandum, the unwillingness of at least one of the parties to bind themselves emerged, the decision of the judges is still interesting in that it is recognized, at least in the abstract, the possibility for the party disappointed to obtain protection through recourse to the institution of the promissory estoppel in order to obtain compensation for the expenses incurred due to the assignment placed against the promise of the counterparty to negotiate in good faith[140], a promise contained within the memorandum of understanding.

The most famous case in the matter, however, remains without a doubt the Texaco-Pennzoil affair[141]. Specifically, Pennzoil Co. (Pennzoil) launched at the end of 1983 a public purchase offer aimed at obtaining the majority of the shares (sixteen million) of the Getty Oil Company (Getty), for a consideration equal to $ 100 per share. Shortly thereafter, Pennzoil, Gordon Getty (majority shareholder of Getty with 40.2% of the outstanding shares) and J. Paul Getty Museum (a charitable trust, which held 11.8% of the shares, JPGM), agreed that the public offer be withdrawn, and a private negotiation aimed at the entry of Pennzoil into the minority capital of Getty was carried out. Following the negotiations, the parties signed a memorandum of agreement, under which Pennzoil would be 43% of Getty was due, and to Mr. Getty the remaining 57%. The terms of the memorandum were also subject to approval by Getty's board of directors. Following an initial refusal of the offer, deemed too low, and the subsequent increase in the purchase price of the shares, the memorandum was signed, and a press release was issued containing the main terms of the operation. The next day, however, Getty's chief investment banker contacted other potential buyers looking for a higher purchase price. The next day, Texaco's offer still arrived, which exceeded Pennzoil's previous offer, which was readily accepted by Getty's shareholders. Pennzoil then sued the Delaware Chancery Court to obtain an order requiring Getty to comply with the agreements made with the memorandum, as well as the injunction to sell the latter's shares to Texaco. The heart of the matter was represented by deciding whether the memorandum was already a definitive agreement, therefore able to bind the parties, or if instead a subsequent formalization of the parties' agreements was necessary, the memorandum being a simple preliminary non-binding agreement. Although the text of the memorandum was particularly precise, and the suspensive condition (the consent of the board of directors) had been fulfilled, Pennzoil's request was rejected, as particular importance was given to the need, also stated in the press release, which the parties signed a subsequent final merger agreement. Pennzoil then decided to take action against the third party who had "intruded", suing Texaco in Texas, Houston, for intentional interference with contractual relations and

[139]C. Perry, (2016). *Good faith in english and us contract law*, op. cit., pag. 29.

[140]"When appellants rejected Arcadian's proposed modification of the latter's equity position, appellants say Arcadian called of negotiations (…) thereby violating its promise to bargain in good faith. Because appellants' allegations raise genuine issues of material fact as to whether Arcadian made a clear, unambiguous promise to negotiate in good faith, whether appellants reasonably and foreseeably relied on that promise in entering into expenditures and collateral contracts with suppliers or others, and whether appellants thereby sustained an injury, the district court erred in granting summary judgment on their promissory estoppel class. R. M. Lloyd, (2005). "Pennzoil v. Texaco, twenty years after: lessons for business lawyers", in *Transactions: The Tennessee Journal of Business Law*, 6 (2), pp. 32ss. C.B. Mueller, (2017). *Twenty-first century procedure, Wolters Kluwer, U.S.* M. Galanter, (2014). *Why the haves come out ahead: The classic essay and new observations*, Quid Pro Books, Louisiana. D.A. Westbrook, (2015). *Between citizen and state. An introduction to the corporation,* ed. Routledge, London & New York, pp. 173ss.

[141]729 S.W.2d 768 (Tex. Civ. App. 1987). R. M. Llloyd, (2005). Pennzoil v. Texaco, twenty years after: Lessons for business lawyers, op. cit.,

inducement of breach of contract. The point was always the same: The presence of a contract between Pennzoil and Getty or not. This time, however, the judges came out in favor of a fully binding agreement between the parties, resulting in the defendant being sentenced to pay damages, plus the exceptional sum of three billion in punitive damages.

As anticipated, the judges have not always recognized the possibility for the parties to bind themselves to comply with good faith behavioral obligations through an agreement in the preliminary phase of the negotiations. In another case of share acquisition[142], according to Missisipi law, questions were raised as to whether the parties could bind themselves to deal in good faith. Although even in this case this possibility is not denied in the abstract, in the present case it was believed that the agreement signed by the parties was not able to eliminate the possibility of withdrawing from negotiations for any reason. In this regard, the judges specify how the Missisipi law "has never recognized contracts to negotiate nor contracts to make a contract" and, in any case, "an agreement to negotiate, even if recognized, does not bind a party to surrender his right to decide not to enter into another contract with the other party"[143].

In this case, the judges split the issue of the possibility of being forced to deal in good faith and the value (binding or otherwise) of a letter of intent. It is thus specified that "the test for determining whether a writing constitutes an enforceable contract is whether the parties have manifested an intention to be bound by its terms and whether the terms are sufficiently defined to be legally enforced"[144]. In the specific case, it was considered that the parties had not unequivocally manifested such a desire to bind themselves already by means of the letter of intent. This also in consideration of the numerous points left open by the latter, particularly relevant, especially in consideration of the complexity of the transaction. Other decisive elements in order to decide on the binding nature of the letter of intent were considered to be the prodromal conditions for the final approval and the need for further consents regarding the completion of the transaction. In this case, the reference to a "final definitive agreement" was considered indicative of the non-binding nature of the letter of intent.

The decision cited last falls within the category of the most "traditional" jurisprudential line of the caveat emptor which excludes the possibility of the parties to renounce the possibility of pursuing exclusively their interests in the negotiation phase, or of being sentenced to compensate the expenses that their own counterparty has supported at this stage in view of the future contract, as this can always protect itself by withdrawing itself from the negotiating table first. The traditional rule, expressed by the "all or nothing approach" formula, was reiterated even after Farnsworth's work in other cases. In particular, a significant passage of the Empro Manufacturing Co., Inc., v. Ball-Co Manufacturing, Inc. case: "Illinois, as Chicago Investment, Interway, and Feldman show, allows parties to approach agreement in stages, without fear that by reaching a preliminary understanding they have bargained away their privilege to disagree on the specifics. Approaching agreement by stages is a valuable method of doing business. So long as Illinois preserves the availability of this device, a federal court in a diversity case must send the disappointed party home empty handed. Empro claims that it is entitled at least to recover its "reliance expenditures", but the only expenditures it has identified are those normally associated with pre-contractual efforts: Its complaint mentions the expenses "in negotiating with defendants, in investigating and reviewing

[142]Knight v. Sharif v. Walsh, 875 F.2d 516 (5th Cir. 1989).
[143]Knight v. Sharif v. Walsh, 875 F.2d 516 (5th Cir. 1989).
[144]Knight v. Sharif v. Walsh, 875 F.2d 516 (5th Cir. 1989).

defendants business, and in preparing to acquire defendants' business"[145].

Furthermore, in a case of (failed) negotiations for the purchase of a group of companies in the food sector[146], the correctness of the behavior of the parties that aim to pursue only their own interest was reiterated, in the only limit represented by not committing a tort: "Good faith is no guide. In a business transaction both sides presumably try to get the best of the deal. That is the essence of bargaining and the free market. And in the context of this case, no legal rule bounds the run of business interest. So, one cannot characterize self-interest as bad faith. No particular demand in negotiations could be termed dishonest, even if it seemed outrageous to the other party. The proper recourse is to walk away from the bargaining table, not to sue for "bad faith" in negotiations"[147].

Furthermore, the imposition of a duty to negotiate in good faith, if admitted, would end up introducing an element of indefiniteness, contrary to one of the fundamental elements so that it can be said that there is an agreement between the parties (that, precisely, of definiteness), and would also indicate a lack of effective willingness of the parties to bind themselves[148].

The aforementioned demonstrate how that approach, originating from the economic analysis of law, which shuns any imposition of culpa duties in contrahending within the relationships between economic operators, is still widespread in the US courts, for fear that the imposition of pre-contractual liability can intimidate the latter and, consequently, have negative effects for the economy in general. This position appears to be criticized from two distinct points of view: First of all, if this approach could also be understandable with reference to any impositions at the legislative level, it would be justifiable in cases involving highly specialized subjects and where there are no excessive imbalances in the contractual positions of the parties, but it appears ill-suited to different situations, where greater protection of the contractually weaker part is preferable. Furthermore, if one understands the will not to impose such an obligation on a legislative level, it is still not understood why such an obligation cannot be left to the autonomy of the parties, leaving the parties free to decide on it. Secondly, the assumption that the parties pursue only their own interests, even if this could lead to a detriment of the interests of their counterpart, does not seem to be really the starting point of the transactions, at least not the only one, nor the the purpose of which the contract aims. The individualistic model, typical of the classical conception of the contract, does not appear in line with the most recent cooperative movements and models and aimed at guaranteeing greater social solidarity, also through the role played by private bargaining[149]. It has been argued that such an approach is not always the best, also with a view to maximizing one's interests[150].

---

[145]870 F.2d 423 (7th Cir. 1989).

[146]Feldman V. Allegheny International Inc., 850 F.2d 1217 (7th Cir. 1988). L.R. Kling, E. Nugent, B. Van Dyke, (2019). *Negotiated acquisitions of companies, subsidiaries and divisions*, op. cit., R.E. Barnett, N.B. Oman, (2016). *Contracts: Cases and doctrine,* Wolters Kluwer, U.S.

[147]E. Allan Farnsworth, (1962). "Good faith performance and commercial reasonableness under the Uniform Commercial Code", op. cit.

[148]M. K. Johnson, (1993). "Enforceability of precontractual agreements in Illinois: the need for a middle ground", in *Chicago-Kent Law Review*, 68 (2), pp. 939ss.

[149]B. Scott, C. Albert, (2015). "Contract's role in relational contracts", in *Virginia Law Review,* 101 (3), pp. 559ss. I. Macneil, D. Campbell, (2001). *The relational theory of contract: selected works of Ian Macneil,* Sweet & Maxwell, London.

[150]"Numerous material issues were left open by the parties for future negotiation: each party's representations and warranties, their duration, the amount and duration of the indemnities between the parties, the securities law protections, and the matters set forth above which were still at issue when the last meeting took place (…). All of these items were material to the risks and benefits of each party in a complex transaction". N. Andrews, (2011). *Contract law,* Cambridge University Press, Cambridge, pp. 13ss.

To summarize, the traditional American approach does not recognize any duty to behave in good faith during the negotiation phase, as each party aims to achieve its own interests only, and each is sufficiently protected by the right to withdraw from the negotiations at any time, as well as the presence of fragmented solutions within the American legal system[151]. Nonetheless, in recent years, overseas interpreters have begun to recognize that, in certain situations, it was not correct to leave the party who had behaved improperly during negotiations in a totally unpunished manner, without this leading to a specific offense. Consequently, although it continued to deny the absence of a generic principle, the parties, in those particularly complex cases where negotiations are particularly prolonged over time, have begun to admit the possibility of being practically bound to continue the negotiations by assuming conduct oriented towards the principles of good faith and fair dealing[152]. The validity of such agreements, however, will have to be examined on a case by case basis, on the basis of the main discrimination represented by the will of the parties. Depending on the court where you will end up fighting, and the applicable law, the criteria for assessing the validity of such agreements may vary, as far as it is possible to identify a common thread: according to New York state law, for example, It will be necessary to take into account: i) The reference made by the parties to the future drafting of a contractual agreement which is of a definitive nature[153]; ii) the fact that there has been at least a partial execution; iii) whether the transaction in question is so complicated as to require specific written clarifications; iv) whether essential points of the contract remain to be clarified[154], a theme that is intertwined with the general criterion of (v) definiteness of the agreements; finally, (vi) the possibility of deducing an intent to be bound from the overall literal tenor. According to Missisipi law (which is interpreted by the judges in a particularly restrictive way with reference to the issues under consideration)[155], however, the results of these tests may differ. This, moreover, is precisely what happened in the famous Texaco Inc., v. Pennzoil Co. case[156], where, as seen, there were two completely different results on the same issue. The guiding canon of certainty, therefore, so dear to the common law experience, does not seem to be fully respected.

THE ENGLISH EXPERIENCE

English contract law is the result mainly of the activity of the courts and the related sentences, while legislation has started to play a significant role only in the last decades. It has developed particularly in the last two centuries, with the increase in the centrality of the role played by the contract in society, due to the transition from a mainly agricultural to industrial economy.

[151]S.J. Burton, E. A. Andersen, (1995). *Contractual good faith,* Little Brown & Co, Boston, New York.

[152]F.2d 423 (7th Cir. 1989). The case concerned an exchange of letters of intent relating to the sale of the defendant's assets to the plaintiff, an operation subject to the approval of the buyer's board of directors (...) The judge, in denying efficacy to the letter of intent, had noted the importance of the expression, contained therein "subject to contract".

[153]Which is affirmed that: "Although it is often said that a mere reference in a preliminary agreement to a "formal agreement to follow" may be some evidence that the parties did not intend to be bound by the preliminary agreement, it is just as often said that it does not conclusively show this (...)"; E. Allan Farnsworth, (1987). *Precontratual liability*, op. cit. pag. 258.

[154]See in particular the case: Teachers Ins. Annuity Ass'n v. Tribune, op. cit.

[155]A. Hunt, (1986). "The theory of critical legal studies", in *Oxford Journal of Legal Studies*, 6 (1), R. M. Unger, (1986). The critical legal studies movement, Harvard University Press, Cambridge. In fact, we have seen how the simple reference contained in the letter of intent to a definitive future binding contract is considered sufficient and suitable element to support the non-binding nature of pre-contractual agreements through which the parties were obliged to continue the negotiations in good faith. American doctrine has also reached similar conclusions, which has noted the contradictory interpretations sometimes reached by overseas judges. See: A. Schwartz, R. E. Scott, (2007). "Precontractual liability and preliminary agreements", in *Harvard Law Review*, 120, pp. 663ss.

[156]J. Beatson, A. Burrows, J. Cartwright, (2016). *Anson's law of contract,* Oxford University Press, Oxford.

In a similar way to what was seen for the definition of contract in the US system (which derives from the experience of common law and, in particular, from the diffusion of the famous work of Blackston, Commentaries on the law of England), the concept of contract corresponds to an exchange of promises, one in consideration of the other, which have the fundamental characteristic of being enforceable and binding in accordance with the law. Its main function is that of "securing that the expectations created by a promise of future performance are fulfilled, or that compensation will be paid for its breach"[157]. The centrality of future expectations represents the reason why the rules aimed at ensuring the certainty of what has been agreed between the parties through the use of the figure of the contract and the predictability of the consequences of the parties' actions are particularly important. As regards the other essential elements of the contract, since they tend to coincide with those already analyzed in the previous chapter in relation to the American experience (definiteness, intention to create legal relations etc.) we will not dwell on them again, limiting ourselves to referring to the relative paragraph about it.

The traditional method of formulating the contract is represented by the offer and acceptance mechanism so, in their absence, it will not be possible to speak of a contract[158]. Offer that can be formulated according to the terms that are best believed and that, if not liked, can be rejected. Therefore, without consent, no liability can arise. These are the main traits of freedom to contract, already encountered previously in relation to the American experience, from which derives the counterpart of freedom not to contract and, consequently, the freedom to walk away until it is bound[159].

Already from this brief examination of the essential features of English contract law, it is clear that there is little room for concepts such as culpa in contrahendo and good faith during negotiations. The parts of a negotiation are seen as antagonistic subjects, each of which pursues its own exclusive interest. Until you push yourself to commit a specific tort, therefore, you cannot put any trust in the behavior assumed by your counterpart during the negotiations, the protection represented by the possibility of abandoning them being sufficient. This principle has been clearly expressed in what is peacefully considered the leading case with regard to negotiations in the Anglo-

[157]Other functions performed are that of facilitating the planning of what will be done in the future and foreseeing any contingencies, establishing the respective responsibilities and methods of performance of the service, as well as allocating the risks inherent in the transaction. See: J. Beatson, A. Burrows, J. Cartwright, (2016). Anson's law of contract, op. cit., pp. 3ss.

[158]British Steel Corporation v. Cleveland Bridge and Engineering Company [1984] 1 All ER 504. The case concerned a request for payment for goods that had been delivered under a letter of intent, in which, however, the price was not clearly specified nor the date of delivery of the same. Due to these inaccuracies, the letter of intent was not considered a real offer, capable of being accepted and, therefore, there was no contract between the parties. However, since the goods had been delivered, the plaintiff was entitled to an action to return the value of the service performed, see: A. Lodder, Enrichment in the law of unjust enrichment and restitution, op. cit., T.T. Arvind, (2017). *Contract law,* Oxford University Press, Oxford, pp. 51ss. C. Turner, (2014). *Key cases: Contract law,* ed. Routledge, London & New York. G. Brewer, (2003). Examining letters of intent, in Contract Journal, pp. 14ss. However, the solution just mentioned does not appear satisfactory for those cases where there has been a cost for one part, but without a corresponding benefit for the other. In such a scenario, it seems that there is no alternative but to bear the costs, as they are not recoverable, connected to the intrinsic alea of the negotiations. Cases where a letter of intent has been deemed to be so detailed that an agreement has been concluded between the parties is rare. See, in this regard, Wilson Smithett v. Bangladesh Sugar and Food Inds Corp., [1986] 1 Lloyd's Rep. 378, decided by judge Leggatt, particularly sensitive to issues related to the pre-contractual phase, S. Bickford-Smith, (2005). "Letters of intent", in *Solicitors Journal, 149, pp. 1403ss.* J. Chitty, H.G. Beale, (2012). *Chitty on contracts,* Sweet & Maxwell, London, 2012. S. Curtis, I. Gaunt, (2014). *The law of shipbuild*ing contracts, ed. Routledge, London & New York, pp. 10ss. J. Muellen, P. Davison, (2019). *Evaluating contract claims,* John Wiley & Sons, New York, pp. 559ss.

[159]N. Andrews, (2015). *Contract law,* Cambridge University Press, Cambridge, pp. 21ss.

Saxon case-law: The reference is clearly to the Walford v. Miles case[160]. There, judge Ackner stated that: "Each party to negotiations is entitled to pursue his (or her) own interest, so long he (or she) has avoids making misrepresentations. To advance that interest he must be entitled, if he thinks it appropriate, to (...) withdraw"[161].

If we add the general reluctance of common law jurists towards general principles, it is easy to understand and without any surprise that the English courts generally do not recognize any doctrine assimilable to the Jhegerian concept of culpa in contrahendo[162], nor of good faith in negotiations . Such notions are in fact excessively vague and difficult to define, as well as interpretation and consequent application. It is not surprising, therefore, that the English jurist is not accustomed to the concept of precontractual liability, to which usually there is not even a dedicated paragraph within the contract law manuals, nor monographs on the subject. On the other hand, the concept of good faith is more well-known, particularly in a subjective sense, while the objective one has regained strength thanks to European legislation, especially in the context of consumer discipline[163]. This, however, does not mean that the prodromal phase to the conclusion of a contract is a "jungle without rules". We know that English law has developed predominantly through case-law and, therefore, through jurisprudential decisions[164]. A remedial right, by force of circumstances, lends itself poorly to providing an organic discipline of an institution, rather lending its side to the development of fragmented solutions, through a more pathological approach, which affects the individual cases in which the problem arises, providing a specific solution, on a case-by-case basis. We therefore find that jagged range of inorganic solutions, or piecemeal solutions (such as the unjust enrichment, the promissory estoppel etc.) typical of the common law system, which characterizes and distinguishes the latter from most of the legal systems of the area of civil law. As noted by Lord Justice Bingham: "In many civil law systems, and perhaps in most legal systems outside the common law world, the law of obligations recognizes and enforces an overriding principle that in making and carrying out contracts parties should act in good faith (...) it is in essence a principle of fair and open dealing (...). English law has, characteristically, committed itself to no such overriding principle but has developed piecemeal solutions to demonstrated problems of unfairness"[165].

THE DUTY OF GOOD FAITH (…)

The concept of (subjective) good faith finds fertile ground in which to develop in English common law thanks to the activity of the Court of Chancery as an equity court. The jurisdiction of this court, referring to Christian moral principles and aimed at cleaning up souls, as well as an expression of the king's conscience, can only be the natural seat where such a principle can assert itself[166].

[160][1992] 2 AC 128, HL.

[161][1992] 2 AC 128, HL.

[162]P. Gilker, (2003). "A role for tort in pre-contractual negotiations? An examination of english, french and canadian law", in *The International and Comparative Law Quarterly,* 52 (4), pp. 969ss

[163]"The doctrine of good faith was first required to be considered in English contract law in the 1990s, with the European Directive on Unfair Terms in Consumer Contracts (93/13 EEC) (Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts OJ L 95, 21.4.1993, p. 29–34)"; C. Perry, (2016). Good faith in english and us contract law, op. cit., pag. 32. B. Aňoveros Terrada, (2003).. "Restrictions on jurisdiction clauses in consumer contracts within the EU", in *Oxford University Comparative Law Forum.*

[164]"The development of English law generally [occurred] by the case-law method"; J. F. O'Connor, (1990). *Good faith in english law*, Dartmouth Publishing Co. Ltd., Aldershot, pag. 101.

[165] Interfoto Picture Library Ltd. V. Stiletto Visual Programmes Ltd., [1987] EWCA Civ. 6.

[166]To be precise, it was noted that the concept of good faith had already developed in canon law studied by clerics: "The Court of Chancery, then, was not the first (nor the only) court in the history of English law to refer specifically to the

Nonetheless, it did not have the luck it found in other systems, such as ours. Already in the Middle Ages, the firm adherence to the rule of law and the opportunistic and selfish vision of man, where the most clever prevailed, rowed against the spread of such a principle[167]. The systematic difficulties associated with defining the principle of good faith were certainly not helpful. In fact, in order to describe good faith, other general principles were used, such as honesty, fairness and reasonableness. Furthermore, with reference to objective good faith, the contract did not play a predominant role during the very first evolution of the Anglo-Saxon society, more focused on the importance of real estate ownership (in particular, the land that was the basis for the remuneration of the medieval feudal system thanks to which King William I the conqueror kept close the knights who had supported him in the conquest of England)[168], and related disputes, while the contractual disputes were unlikely to disturb the peace of the kingdom (and of the King). However, the concepts of objective, and above all subjective, good faith are not alien to the English jurist. But while the latter nevertheless had a following, the first, being seen as a possible source of unwanted responsibility, has tended to be opposed.

Although there is no general principle in English law that governs the execution (nor, even less, the formation) of contracts subjecting it to compliance with the principle of good faith (it has been recently stated that "there is no general doctrine of good faith in English contract law")[169], if we proceed with an analysis by contractual typologies, we note that there are specific areas in which this concept operates[170]. This is the case, for example, of contracts characterized by fiduciary relationships, as in agency relationships, where the agent is expected to act in good faith, informing

concepts of good faith and coscience, but the general perception of the major role of the Chancellor and the Court of Chancery in the development of these concepts is quite justified". See, J. F. O'Connor, (1990). *Good faith in english law,* op. cit. pag. 2.

[167]Year books no. 12 of Edward II (Selden Society, vol. 65, 1950), pag. 4.

[168]Judge Leggatt spent a large part of the sentence in an attempt to motivate why English law should recognize good faith as an implied contract term, of which a significant passage is reported "123. Three main reasons have been given for what Professor McKendrick has called the "traditional English hostility" towards a doctrine of good faith: see E. Mckendrick, (2017). *Contract law*, Palgrave Macmillan, New York, London, pp. 221-222. The first is the one referred the passage quoted: that the preferred method of English law is to proceed incrementally by fashioning particular solutions in response to particular problems rather than by enforcing broad overarching principles. A second reason is that English law is said to embody an ethos of individualism, whereby the parties are free to pursue their own self-interest not only in negotiating but also in performing contracts provided they do not act in breach of a term of the contract.

[169]In refusing, however, if indeed it does refuse, to recognise any such general obligation of good faith, this jurisdiction would appear to be swimming against the tide. As noted by Bingham Law Journal in the Interfoto case, a general principle of good faith (derived from Roman law) is recognised by most civil law systems-including those of Germany, France and Italy. From that source references to good faith have already entered into English law via EU legislation. For example, the Unfair Terms in Consumer Contracts Regulations 1999, which give effect to a European directive, contain a requirement of good faith. Several other examples of legislation implementing EU directives. Attempts to harmonise the contract law of EU member states, such as the Principles of European Contract Law proposed by the Lando Commission and the European Commission's proposed Regulation for a Common European Sales Law on which consultation is currently taking place, also embody a general duty to act in accordance with good faith and fair dealing. There can be little doubt that the penetration of this principle into English law and the pressures towards a more unified European law of contract in which the principle plays a significant role will continue to increase. E. Mckendrick, (2017). *Contract law,* op. cit.,

[170]Compass Group UK and Ireland Ltd. v Mid-Essex Hospital Services NHS Trust Ltd., [2012] EWCA Civ. For further details, see: J. Bailey, (2018). *Construction law, costs and contemporary developments. Drawing the treads together. A festshrift for Lord justice Jackso*n, Bloomsbury Publishing, New York, pp. 171ss. L. Gullifer, S. Vogenauer, (2014). *English and european pespectives of contract and commercial law. Essays in honour of Hugh Beale,* Bloomsbury Publishing, New York, pp. 1001-102. M. Chen-Wishart, (2018). *Contract law,* Oxford University Press, Oxford, pp. 409, 586ss. M.A. Clarke, R.J.A. Hooley, R.J.C. Munday, (2017). *Commerical law. Text, cases and materials*, Oxford University Press, Oxford, D. Foxton, (2017). "A good faith goodbye? Good faith obligations and contractual termination rights", in *Lloyd's Maritime and Commercial Law Quarterly*, 3, pp. 360ss.

the principal of all the relevant circumstances, or when he is left discretion in acting. Another example is represented by that of insurance contracts, where the Marine Insurance Act 1906 (modified by the Consumer Insurance (Disclosure and Representations Act) 2012 and by the Insurance Act 2015) in art. 17 establishes that "A contract of marine insurance is a contract based upon the utmost good faith"[171].

From the point of view of the doctrinal formant, an important role is played by the doctrine of the implied terms, which was used, for example, to justify the prohibition of unreasonable unilateral changes in the loan contracts[172], or in relation to a procedure of offer, requiring the organizer to conduct the latter in good faith[173]. In the Yam Seng Pte Ltd. v. International Trade Corp. Ltd. case[174] the judge Lord George Andrew Midsomer Leggatt has expressed himself in favor of a more energetic use of the implied term of good faith, which goes beyond the mere prohibition of lying, and in favor

[171]It would be a mistake, moreover, to suppose that willingness to recognise a doctrine of good faith in the performance of contracts reflects a divide between civil law and common law systems or between continental paternalism and Anglo-Saxon individualism. Any such notion is gainsaid by that fact that such a doctrine has long been recognised in the United States. The New York Court of Appeals said in 1918: "Every contract implies good faith and fair dealing between the parties to it": Wigand v Bachmann-Bechtel Brewing Co, 222 NY 272 at 277. The Uniform Commercial Code, first promulgated in 1951 and which has been adopted by many States, provides in section 1-203 that "every contract or duty within this Act imposes an obligation of good faith in its performance or enforcement." Similarly, the Restatement (Second) of Contracts states in section 205 that "every contract imposes upon each party a duty of good faith and fair dealing in its performance and enforcement". For further analysis, see also: A. Burrows, (2018). *A casebook on contract*, Bloomsbury publishing, New York. R. Stone, J. Devenney, (2017). *Text cases and materials on contract law*, Taylor & Francis, New York, pp. 253ss.

[172]In recent years the concept has been gaining ground in other common law jurisdictions. Canadian courts have proceeded cautiously in recognising duties of good faith in the performance of commercial contracts but have, at least in some situations, been willing to imply such duties with a view to securing the performance and enforcement of the contract or, as it is sometimes put, to ensure that parties do not act in a way that eviscerates or defeats the objectives of the agreement that they have entered into: see e.g. Transamerica Life Inc v ING Canada Inc (2003) 68 OR (3d) 457, 468. See also in argument: L. Dimatteo, M. Hogg, (2015). *Comparative contract law. British and American perspectives,* Oxford University Press, Oxford.

[173]Although the High Court has not yet considered the question (and declined to do so in Royal Botanic Gardens and Domain Trust v Sydney City Council (2002) 186 ALR 289) there has been clear recognition of the duty of good faith in a substantial body of Australian case law, including further significant decisions of the New South Wales Court of Appeal in Alcatel Australia Ltd v Scarcella (1998) 44 NSWLR 349, Burger King Corp v Hungry Jack's Pty Ltd [2001] NSWCA 187 and Vodafone Pacific Ltd v Mobile Innovations Ltd [2004] NSWCA 15. For further analysis, see also: A. Burrows, (2018). *A casebook on contract,* op. cit., R. Stone, J. Devenney, (2017). *Text cases and materials on cotnract law,* op. cit., T. Neumann, (2012). Th*e duty to cooperate in international sales. The scope and role of article 80 CISG*, De Gruyter Editions, Berlin. Y. Quiang Han, (2016). *Policy holder's reasonable expectations,* Bloomsbury Publishing, New York, pp. 76ss. E. Mckendreck, Q. Liu, (2015). *Contract law: Australian edition,* Macimillan editions, London. J.W. Carter, (2013). *The construction of commercial contracts,* op. cit., M. Freedland, A. Bogg, D. Cabrelli, (2016). *The contract of employment,* Oxford University Press, Oxford. A. Stewart, W. Shain, K. Fairweather, (2019). *Contract law: Principles and context,* Cambridge University Press, Cambridge. N. James, T. Thomas, (2020). *Business law*, Wiley & Sons, New York, pp. 20ss. E.M. Weitzenboeck, (2012). *A legal framework from emerging business models: Dynamic network as collaborative contracts,* op. cit., D. Thampapillai, V. Tan, C. Bozzi, (2015). *Australian commercial law*, Cambridge University Press, Cambridge, pp. 257ss.

[174]Paragon Finance Plc. V. Nash, [2001] EWCA Civ. 1466. In Australia the existence of a contractual duty of good faith is now well established, although the limits and precise juridical basis of the doctrine remain unsettled. The springboard for this development has been the decision of the New South Wales Court of Appeal in Renard Constructions (ME) Pty v Minister for Public Works (1992) 44 NSWLR 349, where Priestley JA said (at 95) that: "(...) People generally, including judges and other lawyers, from all strands of the community, have grown used to the courts applying standards of fairness to contract which are wholly consistent with the existence in all contracts of a duty upon the parties of good faith and fair dealing in its performance. In my view this is in these days the expected standard, and anything less is contrary to prevailing community expectations (...)". For further analysis, see also: T. Neumann, (2012). *The duty to cooperate in international sales. The scope and role of article 80 CISG,* op. cit., R. Cranston, T. Van Sante, (2018). *Principles of banking law*, Oxford University Press, Oxford. A. Burrows, (2013). *English private law*, Oxford University Press, Oxford, pp. 530ss. M.L. Ahmadu, R. Hughes, (2017). Commercial law and practice in the South Pacific, Taylor & Francis, New York.

of the use of the concept of fair dealing, especially in those contracts that require mutual trust between the parties, so-called "relational contracts"[175], such as joint venture agreements[176], franchise agreements, as well as long-term distribution agreements. Even without resorting to the figure of the implied term, the Anglo-Saxon jurisprudence has sporadically enunciated principles of good faith, on the basis of which the conduct of the parties has been assessed[177]. However, there is no lack of opposite judgments, in which the judges refused to infer an obligation of good faith in the performance of the contract[178].

The jurisprudence also resorted to other remedies to protect specific cases of violation of good faith, similarly to what happened in the United States, through the use of the figure of the equitable estoppel[179], of unjust enrichment, duress, undue influence, misrepresentation etc.

Even at the legislative level, the realization that the power relations between the parties were often unbalanced has gradually led to the introduction of specific obligations related to the more general duty to behave according to good faith: The Carriage of the Sea Act of 1924, the Hire and Purchase Act of 1938, the Sale of Goods Act of 1893, up to the Unfair Contract Terms Act of 1977[180].

---

[175]Pratt Contractors Ltd. V. Transit New Zealand, [2005] 2 NZLR 43. In New Zealand a doctrine of good faith is not yet established law but it has its advocates: see in particular the dissenting judgment of Thomas J in Bobux Marketing Ltd v Raynor Marketing Ltd [2002] 1 NZLR 506 at 517. For further analysis, see also: A. Robertson, M. Tilbury, (2016). *The common law of obligations. Divergence and unity,* Bloomsbury Publishing, New York. S. Todd, J. Finn, (2019). *Contract law in New Zealand*, Kluwer Law International, New York.

[176]Under English law a duty of good faith is implied by law as an incident of certain categories of contract, for example contracts of employment and contracts between partners or others whose relationship is characterised as a fiduciary one. I doubt that English law has reached the stage, however, where it is ready to recognise a requirement of good faith as a duty implied by law, even as a default rule, into all commercial contracts. Nevertheless, there seems to me to be no difficulty, following the established methodology of English law for the implication of terms in fact, in implying such a duty in any ordinary commercial contract based on the presumed intention of the parties". R. Stone, J. Devenney, (2017). *Text, cases and materials of contract law,* op. cit.

[177]Interfoto Picture Library Limited v Stiletto Visual Programmes Limited, op. cit. concerns a case in which an advertising agency had requested some photographs for a presentation. The actor then sent 47 slides to which he attached a delivery note specifying how they should be returned within 14 days, starting from which a penalty of £ 5 per day per slide would be charged. The agency, however, did not notice the note and returned the slides two weeks late (...) "The tendency of the English authorities has, I think, been to look at the nature of the transaction in question and the character of the parties to it; to consider what notice the party alleged to be bound was given of the particular condition said to bind him; and to resolve whether in all the circumstances it is fair to hold him bound by the condition in question. This may yield a result not very different from the civil law principle of good faith, at any rate so far as the formation of the contract is concerned (...)". R. Stone, J. Devenney, Text, cases and materials of contract law, op. cit.,

[178]See in particular the next cases: Hamsard 3147 Ltd. v Boots UK Ltd., [2013] EWHC 3251 (Pat); J. Poole, (2016). *Textbook on contract law*, Oxford University Press, Oxford. R. Merkin, S. Sainter, (2019). *Poole's casebook on contract law,* Oxford University Press, Oxford. TSG Building Services v South Anglia Housing [2013] EWHC 1151 (TCC); J. Bailey, (2016). *Construction law,* Taylor & Francis, New York, pp. 3176. J. Pickavance, (2015). *A practical guide to construction adjudication*, Wiley & Sons, New York. D. Royce, (2016). *Adjudication in construction law*, CRC Press, New York. Acer Investment Management V Mansion Group [2014] EWHC 3011 (QB); R. Brownsword, R.A.J. Van Gestel, H.W. Micklitz, (2017). *Contract and regulation. A handbook on new methods of law,* Edward Elgar Publishers, Cheltenham, pp. 221ss. J. Beatson, A.S. Burrows, J. Cartwrigt, (2016). *Anson's law of contract*, op. cit., pp. 166ss. Myers v Kestrel Acquisitions [2015] EWHC 916 (Ch). G. VIRGO, S. WORTHINGTON, (2017). *Commercial remedies,* Cambridge University Press, Cambridge. A. Dyson, J. Goudkamp, F. Wilmot-Smith, (2017). *Defences in contract,* Bloomsbury Publishing, New York. R. Cranston, T. Van Sante, (2018). *Principles of banking law*, op. cit.,

[179]As in the case: Central London Property Trust v High Trees House Ltd [1947] KB 130.

[180]W.V.H. Rogers, M. G. Clarke, (1978). *The unfair contract terms Act 1977,* Sweet & Maxwell, London. S. Whittaker, R. Zimmermann, (2000). *Good faith in European contract law,* Cambridge University Press, Cambridge, pp. 47ss. S. Deakin, B. Markesinis, (2019). *Markesinis and Deakin's tort law,* Oxford University Press, Oxford. N. Jansen, R. Zimmermann, (2018). *Commentaries on european contract laws*, op. cit., Which, in the sixteenth recital, as well as in art. 3. (1), expressly mentions the principle of good faith: "Whereas the assessment, according to the general criteria chosen, of the unfair

In particular, English contract law has certainly undergone Community influence, especially in the discipline of contracts with consumers. Think of Directive 93/13/EEC of 5 April 1993 (concerning unfair terms in consumer contracts), implemented by the Unfair Terms in Consumer Contracts Regulations in 1999 (SI 1999/2083), subsequently revoked by the Consumer Rights Act of 2015. However, it should be noted that the influence exercised by the Directive in question is limited by several considerations: first of all, the Consumer Rights Act which implements it regulates only the execution of the contract, but is silent with reference to the scope of the negotiations (similarly to as we have seen speaking of the United States Uniform Commercial Code); secondly, the scope of application is that of contracts with consumers, from which business contracts (so-called arm's lenght transactions), subject of this work, are therefore excluded. Consequently, the doctrine was divided on the effective entry (or not) of the principle of good faith in English law[181]. Without saying that the future scenarios relating to the exit of England from the European Union cast a further shadow on the influence that EU legislation will be able to exercise in the future.

THE DUTY TO NEGOTIATE IN GOOD FAITH

Although, as seen above, the concept of good faith in general has encountered, especially recently, a certain diffusion in the English system, it cannot be said the same with reference to the application to the negotiation phase. The principle of freedom not to contract, as well as the binomial presence-absence of the contract (derived from the all or nothing approach) precluded the spread of such responsibility[182]. The English jurists consider the various remedies developed by their jurisprudence satisfactory. Recognizing such an obligation would entangle the courts in complex investigations into the reasons that led to the negotiations failing, as well as entailing the impossible exercise of calculating the damages deriving from the violation of the duty in question (the negotiations would have concluded or would have in any case failed If successful, what exactly would they lead to?)[183]. Indeed, it is believed that it would increase litigation and disputes, increasing uncertainty and decreasing the predictability of the law. It is then difficult to identify a consideration capable of supporting the validity of such a stipulation. Not only, therefore, English law does not recognize the principle of good faith in the negotiation phase, but does not even consider an agreement with which the parties bind themselves to negotiate the terms of the main contract in good faith. This is the maxim that emerges from the most significant case of contractual liability in England: The aforementioned Walford v. Miles case. However, it seems contradictory to affirm, on the one hand, that the parties are free to decide when to bind themselves[184], on the other hand, to

character of terms, in particular in sale or supply activities of a public nature providing collective services which take account of solidarity among users, must be supplemented by a means of making an overall evaluation of the different interests involved; whereas this constitutes the requirement of good faith.

[181]R. Brownsword, N. J. Hird, G. Howells, (1999). *Good faith in contract: Concept and context*, Ashgate Publishing, Dartmouth, G. Teubner, (1998). "Legal irritants: Good faith in British law or how unifying law ends up in new divergencies", in *The Modern Law Review,* 61 (1). M. Durovic, (2016). *European law on unfair commercial practices and contract law*, Bloomsbury Publishing, New York, pp. 77ss.

[182]"The basic principle of freedom to contract (which includes the freedom not to contract), and the absence of any legally relevant intermediate stage between contract and no-contract, often makes it difficult to identify a possible cause of action for breaches of good faith in the negotiation stage"; J. F. O'Connor, (1990). *Good faith in english law,* op. cit., pag. 36.

[183]According to the words of an English judge, with regard to the validity of a contract with which the parties had bound themselves to negotiate between them: "a contract to negotiate (…) is too uncertain to have any binding force. No court could estimate the damages because no one can tell whether the negotiations would be successful or would fall through: or if successful, what the result would be", Courtney & Fairbairn Ltd. v Tolaini Brothers (Hotels) Ltd. [1975] 1W.L.R. 297. R. Stone, J. Devenney, (2017). *Text, cases and materials of contract law, o*p. cit.,

[184]Pagnan S.p.A. v. Feed Products Ltd. [1987] 2 Lloyd's Rep 615, where the judges emphasize how the parties are "the

limit this possibility to the use of the contract. Such a conclusion appears to empty of content the premise from which it moves. If the parties are truly free to decide "when" to bind themselves, it is not clear why they cannot also decide "how".

Returning to the Walford v. Miles dispute, in that case the parties signed a preliminary agreement in order to regulate the conduct of negotiations relating to the sale of a photographic activity. The seller/defendant, in particular, had undertaken to contract the assignment only with the plaintiff, while the main sale agreement contained the wording "subject to contract" and was therefore not binding. The agreed price was two million. Since the current owner of the business was ill, and did not want to assist the buyer once the transfer was completed, he, in violation of the agreements, sold the business to a third party, who, unlike the plaintiff, did not need any assistance in running the business in the post-sale period. The House of Lord (now Supreme Court) rejected the application, considering the agreement on the negotiations excessively vague and uncertain, in particular in that it did not specify the duration of the lock-out agreement. In the words of the judges "the reason why an agreement to negotiate, like an agreement to agree, is unenforceable, is simply because it lacks the necessary certainty (...). How can a court be expected to decide whether, subjectively, a proper reason existed for the termination of negotiations? (...) [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? (...) Accordingly, a bare agreement to negotiate has no legal content"[185].

The principles expressed by the aforementioned sentence are still current in overseas legal thinking. More recently, in fact, the non-binding nature of an agreement to negotiate has been confirmed in the Barbudev v. Eurocom Cable Management Bulgaria Eood case[186] (relating, inter alia, to an acquisition case). Likewise, the agreement with which the parties undertake to use the "best" or "reasonable endeavors" was considered not enforceable in order to reach an agreement, as excessively uncertain and indeterminate[187]. Furthermore, in the Shaker v Vistajet Group Holding SA case[188]

The judges refused to give effect to a letter of intent under which the seller would have to return a deposit to the buyer in the event that, despite the exercise of good faith189 and commitment to do everything possible, the parties had not been able to reach an agreement. The court found such commitments impossible to enforce as there were no objective criteria by which to assess whether a part had acted unreasonably since "a duty to negotiate in good faith is unworkable because it is

masters of their contractual fate".

[185]Pagnan S.p.A. v. Feed Products Ltd. [1987] 2 Lloyd's Rep 615.

[186][2012] EWCA Civ. 548. Conformi, Shaker v Vistajet Group Holdings SA [2012] EWHC 1329 (Comm); C.E. Mitchell, (2013). *Contract law and contract practice: Bridging the gap between legal reasoning and commercial expectation,* Bloomsbury Publishing, New York, pp. 116ss. [2012] 2 Lloyd's Rep; jet2.com v Blackpool Airport Ltd [2012] EWCA Civ 417; R. Brownsword, R.A.J. Van Gestel, H.W. Micklitz, (2017). *Contract and regulation. A handbook on new methods of law,* op. cit., J.W. Carter, (2018). *Carter's breach of contract,* Bloomsbury Publishing, New York. O. Gürses, (2016). *Marine insurance law,* ed. Routlege, New York. [2012] 2 All ER (Comm) 1053. A. Mandaraka-Sheppard, (2013). Modern maritime law. Managing risks and liabilities, Routledge, New York. M. CLARK, (2013). *Maritime law evolving,* Bloomsbury Publishing, New York.

[187]London & Regional Investments Ltd. v. TBI plc. [2002] EWCA Civ. 355, S. Duncan, (2007). "Equitable fraud in non-contractual agreements over land", in *King's Law Journal,* 18 (1), pp. 168ss. J.A. O'Sullivan, J. Hilliard, (2012). *The law of contract,* Oxford University Press, Oxford. Y. Khailiew, (2017). *Rationalising constructive trusts,* Bloomsbury Publishing, New York, pp. 222ss.

[188][2012] EWHC 1329 (Comm) (Teare J.). R. Merkin, S. Sainter, (2019). *Poole's casebook on contract law,* op. cit., T.T. Arvind, (2017) *Contract law,* op. cit., A. Trukhtanov, (2017). *Contractual estoppel,* Routledge, New York, 2017. N. Andrews, (2016). *Arbitration and contract law: Common law perspectives,* ed. Springer, Berlin.

[189]T.T. Arvind, (2017). *Contract law*, op. cit.

inherently inconsistent with the position of a negotiating party"[190]. However, when there is already a fully valid main agreement between the parties, there has been a partial execution of the same and the parties sign a further ancillary agreement with which they bind to negotiate among themselves marginal issues, within the framework of a more complex transaction, such an agreement to agree was deemed valid[191]. Likewise, a lock-out agreement was deemed effective which obliged the parties not to negotiate with third parties for a period of two weeks[192]. There are also two judgments: The Petromec Inc v. Petroleo Brasileiro SA Petrobras[193], where, although the judges in the present case considered that the agreement to negotiate in good faith was not enforceable because it was formulated too vaguely, in a obiter the possibility has not been excluded, in the abstract, that such a stipulation could be considered valid and effective[194]; and the Knatchbull-Hugessen & ors. v SISU Capital Ltd case[195]. However isolated the judgments cited above may have found support from part of the doctrine, which stated that "if English courts are to address the economic significance of agreements to negotiate in contemporary business, including in crossborder dealings, they will be under growing pressure to reconsider their unenforceability in English law"[196]. So something seems to be moving[197].

---

[190]MRI Trading AG v. Erdenet Mining Corp. LLC [2013] EWCA Civ. 156. C.E. Mitchell, (2013). *Contract law and contract practice: Bridging the gap betwqeen legal reasoning and commerical expectation*, Bloomsbury publishing, New York. M. Chen-Wishart, (2018). *Contract law*, op. cit.

[191]MRI Trading AG v. Erdenet Mining Corp. LLC [2013] EWCA Civ. 156.

[192]Pitt v. PHH Asset Management Ltd., [1994] 1 WLR 327. For further analysis, see also: M. Wilkie, P. Luxton, R. Malcolm, (2015). *Land law,* Oxford University Press, Oxford, pp. 66ss. J. Cartweigt, (2016). *Contract law: An introduction of the english law of contract for the civil lawyer,* Bloomsbury Publishing, New York, E. Mckendrick, (2017). *Force majeure and frustration of contract,* op. cit.,

[193][2005] EWCA Civ 891. J. Steadman, S. Sprague, (2015). *Common law contract law: A practical guide for the civil law lawyer,* op. cit.

[194]"it is not irrelevant that it is an express obligation which is part of a complex agreement drafted by City of London solicitors and issued under the imprint of Linklater & Paines (as Linklaters were then known). It would be a strong thing to declare unenforceable a clause into which the parties have deliberately and expressly entered. I have already observed that it is of comparatively narrow scope. To decide that it has "no legal content" to use Lord Ackner's phrase would be for the law deliberately to defeat the reasonable expectations of honest men, to adapt slightly the title of Lord Steyn's Sultan Azlan Shah lecture delivered in Kuala Lumpur on 24th October 1996 (113 LQR 433 (1977)). At page 439 Lord Steyn hoped that the House of Lords might reconsider Walford v Miles with the benefit of fuller argument. That is not an option open to this court. I would only say that I do not consider that Walford v Miles binds us to hold that the express obligation to negotiate as contained in clause 12.4 of the Supervision Agreement is completely without legal substance". However, this passage does not seem to have left a significant mark, also in consideration of the Barbudev case, which after seven years diverged from the judgment in comment. J. Cartwrigt, (2016). *Contract law: An introduction of the english law of contract for the civil lawyer,* op. cit.,

[195][2014] EWHC 1194 (QB). Again, the judges seem to recognize in abstract the possibility for the parties to bind themselves to negotiate in good faith. T.T. Arvind, (2017). *Contract law*, op. cit.

[196]L. Trakman, K. Sharma, (2014). "The binding force of agreements to negotiate in good faith", op. cit., pp. 598ss. According to the authors, the obstacles of a legal nature to the recognition of the effectiveness of the agreements to negotiate have been too much emphasized while, considering their commercial value deriving from the application of the same, the time would have come for the common law courts to recognize their legal value. See also in argument: P.S. Davies, (2016). *JC Smith's the law of contract,* Oxford University Press, Oxford, pp. 288ss.

[197]Furthermore, in a dispute concerning a procedural aspect, concerning the respect of the conditions under which it was possible to resort to an arbitration clause, it was considered that the provision that required the parties to undertake friendly discussions before proceeding with the arbitration was binding, insofar as it was deemed sufficiently certain, thus allowing the court to depart from the Walford case. However, it should be noted that the clause in question was part of a definitive contract and not an agreement to negotiate. Therefore, although certainly interesting and noteworthy, the scope of the decision appears nevertheless limited. Emirates Trading Agency LLC v Prime Mineral Exports Private Ltd, [2014] EWHC 2104. For further analysis: T. Kono, M. Hiscock, A. Reich, (2018). *Transnational commercial and consumer law: Current trends in international business law,* ed. Springer, Berlin, pp. 185ss. E. Kajkowska, (2017). *Enforceability of multi-tiered dispute resolution clauses*, Bloomsbury Publishing, New York, pp. 40ss.

It should be noted that there was no lack of criticism in the Walford case[198]. According to one author, in particular, an agreement with which we are bound to negotiate in good faith could be considered valid if the parties, with it, demonstrate their willingness to create "legal relations", as well as criteria, implicit or explicit, which regulate such an agreement[199]. Furthermore, it has been questioned whether it is correct that the courts refuse to recognize and to a commercial promise to which both parties have wished to give effect[200]. Critical remarks have been made against decisions such as those of the Walford case also by Farnsworth who, a few years earlier, had declared that "some courts have refused to enforce such agreements to negotiate, even where the parties have explicitly undertaken an obligation of fair dealing. These decisions are wrong. Courts generally enforce private agreements that do not offend public policy. They have not balked at enforcing obligations of fair dealing in connection with negotiation under the regimes of ultimate agreement and agreement with open terms. There is no adequate reason to refuse to give effect to the explicit intention of the parties to an agreement to negotiate"[201]. However, both in British doctrine and jurisprudence, such positions still appear to be the minority.

In conclusion, it can be affirmed that in English law, if on the one hand there is an expansion of the figure of good faith, in the context of all the formants of law, although there remains a certain reluctance towards generic principles that are difficult to identify on the other, the approach to issues of pre-contractual liability and culpa in contrahendo still appears restrictive, albeit with some glimpse in the presence of certain circumstances. The validity and effectiveness of letters of intent drawn up in a precise and, as far as possible complete way, as well as the use of expressions that demonstrate in a certain way the intention of the parties to be bound to contract in good faith, with a specific counterpart, within specific time limits, it no longer appears peregrine as it used to be. However, given the partially contradictory attitude taken by the courts (where there is a majority of conservative decisions, but not in the absence of more permissive motions) it does not seem that professional operators can still fully rely on the binding nature of such agreements.

THE ROLE OF THE BREAK-UP FEE CLAUSE IN M & A TRANSACTIONS. REFLEXIVE IDEAS

At the end of the previous paragraph we have seen how, despite the use of letters of intent with which the parties have bound themselves to negotiate with each other in good faith, this does not guarantee that such an agreement is, first of all, respected and, secondly, declared binding and enforceable by a British judge. For this reason, the practice has adopted different solutions in order to protect itself from unexpected spills from negotiations in the context of extraordinary operations. The theme, as already mentioned, is particularly relevant because in this type of transaction the parties face very significant expenses in the negotiation phase, which expect to recover only if the

[198]J. Steyn, (1997). "Contract law: Fulfilling the reasonable expectations of honest man", in *The Law Quarterly Review,* 113, pp. 433ss, who, on the one hand, recognizes the centrality of the concept of good faith, on the other, believes that English law, although it does not expressly express a similar principle, has developed over time solutions capable of adequately protecting reasonable credit lines of the parts.

[199]H. Hoskins, (2014). *Contractual obligations to negotiate in good faith: Faithfulness to the agreed common purpose,* in "The Law Quarterly Review", 130, pp. 131ss. A. Berg, (2003). "Promises to negotiate in good faith", in *The Law Quarterly Review*, 119, pp. 357ss. L. Gullifer, S. Vogenauer, (2014). *English and european pespectives of contract and commercial law. Essays in honour of Hugh Beale*, op. cit., A. Burrows, E. Peel, (2010). *Contract formation and parties,* Oxford University Press, Oxford, pp. 56ss.

[200]R. P. Buckley, (1993). "Walford v. Miles: False certainty about uncertainty-an Australian perspective", in *Journal Contract Law,* 6, pp. 58ss, according to the Author, the approach of the Australian law on the subject would be more flexible.

[201] E. Allan Farnsworth, (1987). *Precontractual liability,* op. cit., pag. 286.

transaction ends while, in the opposite case, they they will be hopelessly lost.

Since, as seen, the possibility of limiting the counterpart's right to walk away appears to be very limited in the common law experience, one of the tools that has been developed by economic operators, especially in the American reality, is represented by the so-called break- up fee[202] clauses (and by their counterpart, the reverse break-up fee clauses)[203]. With a similar clause, the parties to an M&A transaction establish that, given the seller's freedom to withdraw from the negotiations (or accept the offer of a third party), if the transaction is not concluded for similar reasons to the latter, the selling party will have to pay the disappointed buyer a sum, identified in the clause, which has the function of helping the buyer to recover, at least partially, the amounts invested in the negotiations aimed at carrying out the deal (and, therefore, the costs of the advisors, the wasted time and the opportunities given up)[204]. Such an agreement certainly has the consequence of making the operation take in a very serious way, given that the sums that you may be forced to pay can also be very high[205]. Basically, the value of the break-up fee in the American reality is between 3% and 5% of the overall value of the transaction, depending on its nature[206],while in England the values are lower[207]. However, the application of such provisions is not without complications: Even in England, there is the general principle that prohibits financial assistance from companies in relation to the acquisition of treasury shares; in the event that the sum to be paid is excessively high, the judges may consider it a penalty. At present, the terrain of investigation still appears relatively meager[208], but the validity of such agreements does not seem to be in dispute[209]. Certainly useful for the civil law jurist would be a sentence that deals precisely with the theme of the legitimacy of similar contractual provisions, comparing them to the non-binding nature of the agreements to negotiate in good faith.

---

[202]Sometimes called termination fees, inducement fees, bust-up fees, and drop-dead fees.

[203]While break-up fees are the responsibility of the seller, reverse break-up fees are the responsibility of the buyer who withdraws from the negotiations.

[204]Below is a standard example for cases of share acquisitions “Breakup Fee. In the event that this Agreement is terminated by Seller pursuant to Section, Seller shall pay to Purchaser a fee (the “Breakup Fee”) equal to Percent (%) of the Initial Cash Consideration, such fee to be payable on the closing of the Alternative Transaction (...) such payment will be made by wire transfer in immediately available funds to an account designated by Purchaser. Purchaser shall have the right to be paid the Breakup Fee from the first proceeds (...) as a catalyst for other Qualified Bids (...)”.

[205]Consider the American case in which the Cerberus private equity fund paid the extraordinary sum of $ 100 million following the failure to complete the acquisition of United Rentals Inc. (for a consideration of four billion); Cerberus Agrees To Pay United Rentals $100M Breakup Fee, Financial Wire, Dec. 26, 2007, pag. 1. D. Cumming, (2012). *The oxford handbook of private equity,* Oxford University Press, Oxford.

[206]In this regard, the public or private nature of the target, the fact that a stock purchase or an asset purchase etc. were being carried out will affect In general, the values are higher in the cases of reverse break-up fees to compensate for the fact that, in this case, in the end, no operation was concluded. Breakup Fees-Picking Your Number, in Kirkland M&A Update, September 6, 2012. With reference to England, it should be noted that break-up fee clauses (but not reverse) are no longer allowed (with rare exceptions) in cases relating to listed companies, following the 2011 reform of the UK Takeover Code, for the fear that such protection mechanisms might discourage competitiveness between bidders. D. Cumming, (2012). *The oxford handbook of private equity,* op. cit.

[207]Consider that when the company is listed in London, the Listing Rules of the UK Listing Authority (now part of the Financial Conduct Authority) impose a limit of 1% on the value of the break-up fee.

[208]O. Grosskopf, B. Medina, (2007). “A revised economic theory of disclosure duties and break-up fees in contract law”, in *Stanford Journal Law Business & Finance*, 13, pp. 148ss. G. De Geest, (2011). *Contract law and economic,* Edward Elgar Publishers, Cheltenham, pp. 54ss. O. Grosskopf, (2011). “Dividing the surplus upon termination: The case of relational contracts”, in *American Business Law Journal,* 48 (1).

[209]The validity of a break-up fee worth several million, but in any case equal to 3% of the total value of the entire operation, was considered valid by the Court of Chancery del Delaware: Southeastern Pennsylvania Transportation Authority v. Abbvie Inc., 2015 Del. Ch. Lexis 110 (Del. Ch. Apr. 2015).

Finally, it should be noted that the clause in question does not seem to have found particular diffusion in our legal system, also given the different discipline relating to the negotiation phase. However, the issue arouses interest, and it is conceivable that in our system the regulation of similar clauses would meet the same limits present in the English system.

C**ONCLUSIONS**

It is easy to see how the relationship between private entities, between consumers and professionals is an account, quite the opposite is the relationship between economic operators, industrial realities, private equity funds that manage millions of euros. In these circumstances, those assumptions that justify a discipline based more on the principles of good faith seem to be lacking. But this is precisely the sector in which the most recourse to pre-contractual agreements is used, and where the counterparties' incorrect behavior is most contested in the negotiation phase. You may not feel the lack of good faith, but certainly the practice indicates a need for greater certainty with regard to the rules of the game. It therefore seems positive that the sentences that recognize the validity of those letters of intent that bind the parties to keep certain attitudes, to stick to what has been said, are increasing. On the other hand, those who do not yet intend to commit themselves, can always clearly demonstrate this in writing, declaring that the agreements reached up to that moment are not binding, and each party has the right to seek better luck elsewhere (or with someone else). The doctrine, especially in the United States, also deals with issues related to pre-contractual liability with increasing regularity, and seems to be overcoming the line that embraces absolute freedom from the contract. On the other hand, the path to reach a contract is, nowadays, in the business world, so long and complex, that before reaching it, you risk navigating for a long time without any hold. If the introduction into the world of common law of a principle of good faith could still wreak havoc, as those systems are not yet ready to implement it, the recognition of the binding nature of letters of intent is already a significant first step. If it is true that economic operators prefer to decide autonomously from which moment to be bound, and therefore when to sign a contract, without external interference, that they are also free to choose according to which criteria to play until then.

In any case, the best solution still seems to be identified, but the path taken appears correct. Along this path, the use of the theories developed within the economic analysis of law, game theory and other meta-juridical doctrines, such as those briefly mentioned in this work, seems to play a significant role in understanding, first, the mechanisms underlying reality, and power, then, to help identify better regulation of reality. With this in mind, the application of decision analysis to m & a operations takes on particular importance, an experiment that at present seems still never attempted, but desirable.