LEGAL ANALYSIS OF PRE-CONTRACTUAL NEGOTIATIONS UNDER RWANDAN CONTRACT LAW: A COMPARISON OF COMMON LAW AND CIVIL LAW SYSTEMS

By

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DECLARATION

I, UFITINEMA Alphonsine, a student at Kigali Independent University (ULK), Post-graduate studies, Master's in International Economics and Business Law do hereby declare that this final dissertation entitled **"Legal analysis of pre-contractual negotiation under Rwandan contract law: a comparison of common law and civil law systems"**, under the supervision of Dr. MBONIGABA Callixte, is my original work to the fulfillment of Master's Degree in law and it has never been presented partially or fully by anybody else at any University or High Learning Institution nor elsewhere for any academic qualification. Where any other persons' works have been used, references and bibliography have been acknowledged.

Date……/……. /…….

Signature ……

UFITINEMA Alphonsine

DECLARATION BY THE SUPERVISOR

I, Dr. MBONIGABA Callixte, appointed supervisor of the work presented in this dissertation entitled **"Legal Analysis of pre-contractual negotiation under Rwandan contract law: a comparison of common law and civil law systems"**, hereby confirm that I have supervised this thesis and that submission is made with my approval.

Date: ……/……. /……..

Signature: …….

Dr. MBONIGABA Callixte

DEDICATION

To Almighty God,

To my lovely husband and children,

To my extended family,

To my workmate, colleagues and friends,

May the Almighty God, bless all of them extremely

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It is with my highest pleasure to take this opportunity to acknowledge all who have contributed to this study. First of all, I sincerely that Almighty God and his Son Jesus Christ for strong protection and direction to me during my studies till at the completion of this dissertation.

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End.

UFITINEMA Alphonsine

LIST OF ABBREVIATIONS AND ACRONYMS

Art. : Article
BGB : German Civil Code (BürgerlichesGesetzbuch)
CFR : Common Frame of Reference
CISG : Convention on contracts for the International Sale of Goods
DCFR : Draft Common Frame of Reference
Dr. : Doctor
ECJ : European Court of Justice
EU : European Union
Ibid : Ibidem
Id : Idem
KFC : Kigali Financial Center
OHADA : Organization for Harmonization of Business Law in Africa
p./pp. : page/pages
PECL : Principles of European Contract law
Supra : As cited before
U.C.C : Uniform Commercial Code
UK : United Kingdom
ULK : Université Libre de Kigali
UN : United nations
UNIDROIT : International Institute for the Unification of Private Law
UPICC : UNIDROIT Principles of International Commercial Contracts
USA : United States of America

ABSTRACT

Pre-contractual negotiations play a pivotal role in determining the fate of an envisaged contract and are therefore of utmost significance because it serves as the foundation upon which the entire contractual relationship is built. Successful pre-contractual negotiations lay the groundwork for a harmonious contractual relationship and minimize the likelihood of disputes and conflicts down the road. Conversely, the failure to conduct these negotiations carefully and in good faith can lead to misunderstandings, mistrust, and even potential legal liabilities. This dissertation concerns the legal analysis of pre-contractual negotiations within the framework of Rwandan contract laws.

The research scrutinizes the existing legal provisions governing the pre-contractual phase in Rwanda, assessing their efficacy in fostering trust among negotiating parties, safeguarding them against potential risks and examining how liabilities occurred during the negotiation process are addressed. However, a comparative analysis was used to know better how pre-contractual negotiations are regulated in other jurisdictions. This study deals with the contract and its formation in general by looking on governing principles, an overview of the pre-contractual negotiations in common law and civil law and mainly the situation of Rwanda which brings better knowledge on how pre-contractual negotiations should work in Rwandan contractual legal framework and see whether the improvement can be added to the law.

It was found that the Rwandan contract law is limited in its treatment of pre-contractual negotiations. Notably absent in Rwandan contract law is a requirement for good faith during negotiations and a delineation of the duties and responsibilities of negotiating parties. This absence raises significant concerns, particularly when parties involved in negotiations cause harm or incur losses, as there are no specific legal remedies available to address such situations. In line with this context, this research underscores the need for a more robust legal framework in Rwandan contract law to govern pre-contractual negotiations effectively by incorporating the principles of good faith, clear duties of negotiating parties and mechanisms to address liabilities.

Key words: *Contract, pre-contractual negotiations, good faith, freedom of contract, pre-contractual liability (culpa in contrahendo), etc.*

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CHAPTER ONE: GENERAL INTRODUCTION

1.1. Introduction

The contract, as fundamental instruments of legal relationships, serve as the bedrock upon which countless interactions and transactions between individuals, businesses, and entities operate. The contract holds the power to generate rights and obligations that shape the dynamics of societies and economies.[1] From simple everyday transactions to complex commercial dealings, contracts weave the fabric of legal relationships and provide the essential framework within which parties operate.

At the heart of every contract lies a pivotal phase that often remains veiled from the spotlight, "**the pre-contractual negotiation period"**. Pre-contractual period is a crucial phase of interaction, discussion, and deliberation acts as the conduit through which contracts are born. During this phase, parties explore terms, assess benefits, and determine the scope of their engagement.[2] It is this prelude that lays the foundation for the eventual contract and its subsequent implementation. This research aims to analyse, legally, pre-contractual negotiation in Rwandan context.

The period of negotiation may be short or long depending on parties involved, nature of negotiated contract, capacity of negotiators, etc, especially, in substantial transactions, negotiations often occur gradually as parties work towards a formal agreement, dedicating more time and resources as they progress. Modern commercial studies emphasize that the negotiation phase holds significant importance and should not be overlooked.[3]

[1]Younis. M. Al Nuaimi, *Setting the Stage and Pre-Contract Negotiations in International Contracts by College of Rights*, University of Tikrit, Salahuddin, Iraq, (2020,) P 11.
[2]Ayşe Elif YILDIRIM, *The concept of pre-contractual duties and a comparison between the draft common frame of reference, english and turkish legal systems,* Ankara AvrupaÇalışmalarıDergisi, (2017), P.172.
[3]Paula Giliker, *A Role For Tort In Pre-Contractual Negotiations? An Examination Of English, French, And Canadian Law,* International and Comparative Law Quarterly (2003), P.2.

It is necessary to look on the concept of pre-contractual negotiations in the context of Rwandan law, as a country well-known for its progressive legal reforms, with purpose to place great emphasis on creating a conducive environment for business activities while ensuring fairness and equity in contractual relationships.[4]

As a well-structured negotiation period can pave the way for contracts that endure the tests of time, forming the backbone of harmonious legal relationships, this study covers not only the legal intricacies of pre-contractual negotiation in Rwandan legal context but also the broader implications of well-organized pre-contractual negotiation processes.

1.2. Background and significance of the study

It is interesting to have a look on the historical background of the pre-contractual negotiations, not only under Rwandan legal system but also in different legal systems. Persons, either natural or legal, conclude contracts in relationship with others. They often start by negotiations which help them to reach the agreement with full knowledge of their commitments.

The pre-contractual negotiations in Rwandan legal context is not of long history as it would be in many other countries around the World. The legislator has a clear determination to precise the legal framework of pre-contractual negotiation in order to make Rwanda a favorable environment for the businesses and attract more investment.

The pre-contractual negotiations were introduced in Rwanda legal context by the Law n° 45/2011 of 25/11/2011 governing contracts.[5] Before that period, even if negotiations were conducted, but there was no legal provision regulating that concept. The civil code book III which governed the formation and performance of contract did not have any provision in relation to contract negotiation.

[4]In line of transforming Rwanda into an international financial destination for investors seeking opportunities across the African continent known as Kigali Financial center (KFC), a number of business laws were amended including company law, partnership law, consumer protection law, financial law, insolvency law and others. Therefore, the pre-contractual phase should not be left behind. For more information look on https://kifc.rw/legal/

[5]Law n° 45/2011 of 25/11/2011 governing contracts, Official Gazette nº 04bis of 23/01/2012.

After the adoption of the law governing contract in Rwanda in 2011, other laws in relation to contract formation incorporated the term negotiation. Those are Law n° 030/2021 of 30/06/2021 governing the organisation of insurance business[6], Law nº 66/2018 of 30/08/2018 regulating labour in Rwanda[7], Law n° 031/2022 of 21/11/2022 governing public procurement[8] and Ministerial Instructions nº 612/08.11 of 16/04/2014 setting up modalities for drafting, negotiating, requesting for opinions, signing and managing contracts as amended to date.[9]

Throughout this cycle of incorporating the process of negotiation of contract, the purpose of the legislator was to provide clear legal provisions governing conducts and behaviors of negotiating parties during contract negotiation with a view to avoid deceptive practices and potential risks that may come from their unethical behaviors. The above mentioned laws vary on a number of legal provision regulating pre-contractual negotiation, but they do not all mention, in a clear way, how negotiations are conducted, the obligations of negotiating parties if any and the possible remedies for parties who suffer losses or damages during the period of contract negotiation.

1.3. Problem statement

In Rwandan legal context, the Law n° 45/2011 of 25/11/2011 governing contracts provides for the course of contract negotiation[10]. It is a new concept introduced in Rwanda because till the adoption of the law governing contracts, the contract formation and performance was regulated by the civil code book III which did not regulate the period of negotiation. The negotiation was introduced in Rwandan contract law to help the progress of negotiation and harmonize its process across the country.

[6] Law n° 030/2021 of 30/06/2021 governing the organisation of insurance business, Official Gazette n° 29 of 02/08/2021.
[7] Law nº 66/2018 of 30/08/2018 regulating labour in Rwanda, Official Gazette No. Special of 06/09/2018.
[8] Law n° 031/2022 of 21/11/2022 governing public procurement, Official Gazette nº Special of 22/11/2022.
[9] Ministerial Instructions nº 612/08.11 of 16/04/2014 setting up modalities for drafting, negotiating, requesting for opinions, signing and managing contracts as amended to date, Official Gazette n° 18 of 05/05/2014.
[10] See art. 76, Law n° 45/2011 of 25/11/2011 governing contracts, supra note 5.

This is demonstrated by the fact that various countries have already legal provisions in relation to contract negotiation in their laws, for instance in Italian, France, Belgium, German, etc.[11]

During the period of negotiation, parties trust each other and each party expects not to be harmed by the other party. This is why, information that a party obtained from his or her partner is considered as reliable and it is usual for one party to commence performance of contractual obligations prior to formal conclusion of the contract due to many reasons which may include that of convenience, meeting deadlines or to demonstrate commitment to the transaction. Should a contract fail to be recognised at law, one can ask himself or herself how a party harmed during negotiation can get compensation. As Rwanda, with a system where a judge, in deciding a case before himself or herself, bases, firstly, on written law, it is necessary that the issue must be clearly aligned because it would be unjust if a party harmed during contract negotiation is not granted some relief due to acts of his or her partner. The laws of foreigner countries which regulates pre-contractual negotiation, provide for all matters in relation to contract negotiation, including governing principles, rights and duties of negotiating parties and the liabilities as above mentioned for the case of German, Belgium, France, Estonia, etc.

The common law and civil law systems consider pre-contractual negotiations as an important period for the success of the contract formation. Even those systems treat differently the pre-contractual phase, with regard to the duties and liability of negotiating parties, they are all against a party who may misbehave during that period and recognize the liability in such case.

The law governing contracts in Rwanda define the negotiation as conducts of the parties prior to the formation of a contract which establishes a common basis of understanding that enables them to define their intention and which is used to interpret, supplement or qualify the contract.[12] The negotiation is reflect in a single article (article 76) of the law governing contracts, and it only provides for the definition and the role of negotiation.

[11] See German law of obligation, (2002), Belgium Civil Code of 28 April 2022 containing book 1 "General provisions" and book 5 "Obligations", Code civil Français, Dernière modification: 2020-09-01 éd. du 2020-09-26; CIV.CODE [C. Civ], Italy; Code civil Libanais (1932).

[12] Ibid.

In Rwandan legal context, the contract formation and performance is governed by the principle of freedom of contract but subject to good faith principle, otherwise a party is liable for damages caused to his or her partner.[13] One can ask himself or herself if that freedom is extended to the period of negotiation? If it is the case, an issue about its extent arise (is it absolute?), how parties may be protected against misbehaviors of their respective partners, and if during negotiation, a party is entitled to any right or subject to any obligation.

While the definition and role of negotiation are recognized, the legislative framework remains largely silent on the specifics of pre-contractual negotiations. The Rwandan contract law of 2011 leaves a number of issues unclear with regard to this new concept, concerning the principle governing parties during negotiation, duties or obligations of parties during that period, the liabilities in case of breach of pre-contractual obligations, etc.

The lacks of clarity in the law governing contracts gives rise to significant uncertainties and potential risks for parties engaged in contract negotiations. The absence of comprehensive legal provisions defining the duties of parties and the consequences of non-compliance during this phase creates a legal vacuum that can lead to disputes, commercial inefficiencies and a lack of confidence in the contract formation process.

the lack of legal safeguards leaves parties vulnerable to potential exploitation, misrepresentation, and even abrupt termination of negotiations without clear legal consequences. This hinders the establishment of a fair and transparent negotiation environment, potentially deterring parties from engaging in meaningful negotiations and hindering economic growth and development.

This thesis focused on determining what the current status of pre-contractual negotiation in Rwandan law of contract. Several other questions were considered in the scope of this study in order to reach a sensible and useful conclusion. The approach of the courts was determined in order to establish whether the current position is satisfactory or to see whether further development is necessary, and if so, which direction is best suited for Rwandan contract law.

[13] M.Ngagi A., *Cours de droit civil des obligations, Manuel pour étudiants* (2004), p. 156.

1.4. Research questions

In the light of the foregoing, this study intended to investigate the following question: ***"How pre-contractual negotiations are regulated under Rwandan contract laws?"***. In order to answer this general question, a number of specific questions were investigated:

1. *What is pre-contractual negotiations under Rwandan law and how does it compare to international best practices and other legal systems?*
2. *What are the key principles and objectives of pre-contractual negotiations within the context of Rwandan contract law?*
3. *To what extent do parties engaged in pre-contractual negotiations have a duty to act in good faith and provide accurate information under Rwandan law? How is this duty defined and enforced?*
4. *How the liability of persons misbehaved in contract negotiation can be engaged and what remedies are available to parties who have suffered losses or damages under Rwandan law?*

1.5. Objectives of the study

Notwithstanding a large body of literature on pre-contractual negotiations around the world, little has been recorded against it under Rwandan contract laws. Foreign countries laws require that contract negotiations be conducted in good faith which prohibits negotiating partners to break off negotiations arbitrary and also obliges them to negotiate in accordance with their real intention. They also provide other duties for negotiating partners during that phase and liabilities in case of damage caused during contract negotiation.[14]

The Rwandan contract law only define negotiation and provide its role, but it does not provide any principle guiding contract negotiation, obligations and liabilities of parties. The general objective of this study was to conduct a comprehensive legal analysis of pre-contractual negotiations under Rwandan contract law, with a comparative study of relevant laws in other countries and

[14] For example, See Art.5.15&5.16, Belgium Civil Code, *supra* note 11, See Art. 1112&1112-1 of French civil code of 2016.

international legal instruments. This analysis aimed to explore the implications of the current legal gap, both in terms of the challenges parties encounter and the broader impact on contractual relationships.

By analysing comparative legal frameworks, international best practices, and the experiences of other jurisdictions, this research, specifically, sought to provide valuable insights into the necessary elements for a comprehensive legislative approach to pre-contractual negotiations in Rwandan contract law. Such provisions are essential to establish a balanced legal framework that ensures the rights and responsibilities of parties, promotes fairness and fosters a conducive environment for effective and reliable contract formation.

In Rwandan contract law, although the definition and the role of pre-contractual negotiations is acknowledged, yet the absence of clear statutory guidelines defining the obligations and liabilities of parties during this crucial phase has led to a lack of certainty and potential risks. This research also addressed the pressing need for clear and comprehensive provisions on pre-contractual negotiations under Rwandan law, aiming to contribute to the development of a robust legal framework that enhances contractual certainty, encourages investment, and facilitates sustainable economic growth in Rwanda.

This research aimed again to examine the foundational principles and objectives of pre-contractual negotiations within Rwandan law and to assess the existing legal framework in comparison to international best practices and similar legal systems. It explored the extent of the duty to act in good faith and provide accurate information during pre-contractual negotiations, exploring how this duty is defined and enforced in practice.

Finally, the research will identify lessons that can be applied to the development of a robust legal framework for pre-contractual negotiations in Rwandan law. Ultimately, the study seeks to offer recommendations of legal reform of contractual negotiation for the establishment of clear and effective legal provisions that promote fairness, enhance contractual certainty, and encourage economic growth through improved pre-contractual negotiation practices in Rwanda.

1.6. Research techniques

With regard research techniques, in order to collect data about this subject, the study was carried out by using documentary technique which helped to read various related international instruments, domestic laws, case laws, library books, online books, journal articles and other materials from electronic sources in order to collect data.

1.7. Research methodology

In order to attain the objectives of this study, different techniques and methods were used. The documentary technique was used in collecting data from different written documents relevant to the topic including law texts, books, journal articles and case laws. After collecting data from above mentioned sources, the exegetic method was used to interpret various legal provisions from various relevant legislations. Another important method used in this research is analytic method which was used to analysis different elements of data collected. Finally, the synthetic method was used in structuring the collected data in a coherent manner.

Hence, since the research examined basically the Law n° 45/2011 of 25/11/2011 governing contracts gazetted in the Official Gazette nº 04bis of 23/01/2012, a comparative method was used by looking on in force and repealed Rwandan laws governing specific contracts or specific domains namely the Law n° 030/2021 of 30/06/2021 governing the organisation of insurance business, Official Gazette n° 29 of 02/08/2021, Law nº 66/2018 of 30/08/2018 regulating labour in Rwanda, Official Gazette No. Special of 06/09/2018, Law n° 031/2022 of 21/11/2022 governing public procurement, Official Gazette nº Special of 22/11/2022, Ministerial Instructions nº 612/08.11 of 16/04/2014 setting up modalities for drafting, negotiating, requesting for opinions, signing and managing contracts as amended to date, Official Gazette nº 18 of 05/05/2014 and the Decree of 30/07/1888 on contracts or conventional obligations known as civil code book III repealed in 2019 by the Law nº 020/2019 of 22/08/2019 repealing all legal instruments brought into force before the date of independence.

It is clear that Rwandan legal system cannot stand in isolation from the external influences, the reason why foreign national and international legal instruments were used throughout this work, to know the status of pre-contractual negotiations, by referring to civil and common law systems. Therefore, there was a comparison of Rwandan laws with those from France as a country with recent law governing obligations, Germany as a country in which the first scholar of pre-contractual liability Rudolf von Jhering is a national and others laws of countries, in civil law system and the laws of USA, Australia and England and Wales as famous countries of common law system. Also, international legal instruments namely Unidroit principles of international commercial contract, Convention on Contracts for International Sale of Goods, Draft Common Flame Reference, Restatement (second) of contracts, the Principles of European Contract and Uniform Commercial Code were examined to look what they provide.

1.8. Scope of the study

This research concerns legal analysis of pre-contractual negotiations under Rwandan contract law: a comparison of common law and civil law systems. It concentrates on the phase before the formal contract is formed. The research examined the principles governing pre-contractual negotiations and duties of negotiating parties which all help to build a trustfully relationship between negotiating parties and influence the formation and validity of contracts and the liability in case of behaving contrary.

As a scope of the study, there was an analysis of repealed and the in force Rwandan laws governing contract to see how they provide for the pre-contractual negotiations. There was also a comparison to the treatment of pre-contractual negotiations in Rwandan law with both common law and civil law systems by referring to laws and judicial precedents to see their respective positions in handling cases arisen from pre-contractual negotiations. The study evaluated the impacts of the lack of detailed provisions regulating pre-contractual negotiation in Rwandan context whether on the country in general considering its vision to be the center of business and on negotiating parties particularly, considering aspects such as their rights, interests and the effectiveness of litigation proceedings.

The study also evaluated the impact of regulating pre-contractual negotiations in Rwandan context to promote the business and investment in the country and to facilitate negotiating partners in having a conducive environment while negotiating.

1.9. Structure of the Research study

This study consists of five chapters. Chapter One relates to General Introduction, that encompasses introduction of the topic, background and significance of the study, problem statement, research questions, objectives of the study, research methodology, the scope and structure of the study. Chapter 2 discuss how a contract is formed and what is a validity in which it is discussed the principles governing the contract formation and the elements of a valid contract. Chapters 3 talks about pre-contractual negotiations and the principle of good faith under which the legal nature of pre-contractual negotiations and the liabilities arising thereto, in civil and common law systems were discussed. Chapter 4 of this study analyses the pre-contractual negotiations under Rwandan laws. Chapter 5 contains the general conclusion and recommendations of the study.

CHAPTER TWO: CONTRACT FORMATION AND ITS VALIDITY

In the realm of business and legal transactions, contracts serve as the bedrock upon which commercial relationships are built.[15] A contract is a legally binding agreement between two or more parties that outlines their rights and obligations, creating a framework within which they will interact.[16] The formation of a contract is a critical process that sets the stage for the ensuing business dealings, and its validity hinges on adhering to certain governing principles.

Contract conclusion is processed by the period of negotiation, which is an important period for the success of a contract. Before analyzing the notion of preliminary negotiations, it is important to analyze in a general way, a contract and how a valid contract is formed.

2.1. Definition of key concepts

In order to put this study in context, it is imperative to clarify some concepts which will guide the substantive discussions in the next chapters. The concepts that will be defined and discussed in this chapter are contract, negotiations, contract negotiation, pre-contractual negotiation and pre-contractual liability.

2.1.1. A contract

Contracts play a vital role in facilitating the circulation and distribution of resources within the economy, which makes them one of the most significant institutions. The impact of contracts extends across various aspects of daily life.[17]

[15]Contract Law & Business Transactions, accessed at https://www.justia.com/business-operations/managing-your-business/contracts-and-transactions/ [1st August 2023].
[16] Ibid.
[17] Lalit Jain, Importance of contract in business & lawyer in contract drafting (2020), accessed at https://taxguru.in/corporate-law/importance-contract-business-lawyers-contract-drafting.html [1st August 2023].

From that extended role of a contract in our daily life, many scholars and legal systems defined a contract. A contract can be defined as "an agreement between two or more persons which creates an obligation to do or not to do a particular thing.[18]

Moreover, the Restatement Second of Contracts defines a contract as "a promise or a set of promises for the breach of which the law gives a remedy, or the performance of which the law in some way recognized as a duty."[19]

Under the Uniform Commercial Code (U.C.C)., the term "contract" refers to a legal obligation which results from an agreement between the parties as affected by the Code Section 1- 201(12).[20]

Under Rwandan law, according to Law nº 045/2011 of 25/11/2011 governing contracts the word "contract" is defined as a promise or a set of promises the performance of which the law recognizes as obligation and the breach of which the law provides a remedy.[21]

A contract may be defined as an exchange relationship created by oral or written agreement between two or more persons, containing at least one promise, and recognized in law as enforceable.[22]

In this definition, various elements which constitute a contract appears. Those are the following:

1. **An oral or written agreement between two or more persons**: It means that a contract may be written or oral and it is made of a voluntary and consensual agreement existing at least between two parties.[23]

[18]CONTRACTS: BASIC PRINCIPLES, accessed at https://www.shsu.edu/klett/CONTRACTS%20BASIC%20PRINCIPLES%20ch%2010%20new.htm, [20 August 2023].
[19] Restatement (second) of contracts § 1 (1981).
[20]U.C.C. §1-201(12) states that "'*contracts", as distinguished from "agreement", means the total legal obligation that results from the parties' agreement as determined by [the Uniform Commercial Code] as supplemented by any other applicable laws*."
[21] Art. 2 (1), Law nº 045/2011 of 25/11/2011 governing contracts, *supra* note 5.
[22] Brian A.B, *Contract: Examples and explanations*, 7th edition (2017), pp. 44-45.
[23] Ibid.

2. **An exchange relationship**: It means that the parties bind themselves to each other for the common purpose of the contract whether a contract lasts for a short time or a long time, the important thing of the contract is the **exchange**.[24]

3. **At least one promise**: In a contract, each of the contracting party pledges to act or refrain from acting in a specified way at some future time expressly or impliedly.[25]

4. **Enforceability**: by contracting, parties create a kind of personalized "statute" that governs their transaction which is often described as an act of private lawmaking.[26]

2.1.2. Negotiations

The word negotiation may be defined in different ways depending on negotiating parties and their domain of negotiation whether it is in business, diplomacy, law and personal relationships.

Generally, negotiation is the process of communicating and interacting with two or more parties in order to establish a mutually acceptable agreement. It entails the exchange of proposals, points of view, and concessions with the goal of resolving disputes and reaching a satisfying conclusion.[27]

Negotiation refers to a form of decision making in which two or more parties talk with one another in an effort to resolve their opposing interests.[28]

In commercial transaction, negotiation may be defined as a communication process that people use to plan transactions and resolve their conflicts for commercial purpose.[29]

[24] Ibid.
[25] Ibid.
[26] Ibid.
[27] Fisher R., Ury W. and Patton B., *Getting to Yes: Negotiating Agreement Without Giving In,* Penguin (2011). P. 20.
[28] Edward C Tomlinson and Roy J Lewicki, *The negotiation of contractual agreements*, USA (2015), p. 85.
[29] ITHIWAT M, *the role of good faith in pre-contractual liability*, master's thesis, Thammasat university (2020), p.10.

Most successful negotiators start off assuming win-win negotiation known as integrative. Good negotiators, in negotiation, aim a situation where both sides feel they won. Negotiations tend to go much better if both sides perceive they are in a win-win situation or both sides approach the negotiation wanting to "create value" or satisfy both their own needs and the other's needs.[30] This means that by negotiation, we expect to obtain not only an agreement but a good agreement.

In order to achieve an integrative or a win- win negotiation, a negotiating party must prepare negotiation, build the relationship with the other negotiator, exchange information with them, invent and explore options for win-win and reach an agreement.[31]

2.1.3. Contract negotiation

Contract negotiation refers to a specific type of negotiation that focuses the process of reaching a mutual agreement between two or more parties regarding the terms and conditions of a contract. It involves discussions, deliberations, and compromises aimed at defining the rights, obligations, and responsibilities of the involved parties.[32] The objective of contract negotiation is to ensure that the final contract accurately represents the interests and objectives of all parties engaged in the negotiation process.[33]

Successful negotiation plays a substantial role to bring together mutual understanding and satisfaction of the common interests of all parties involved in the contract.[34]

A good contract needs to start with honest and fair negotiations among the parties involved.[35]
A well-deliberated negotiation provides the best opportunity to produce a well-drafted contract that contains salient points covering all aspects of a contract, and which ultimately helps avoiding

[30]Wertheim E, *Negotiations and Resolving Conflicts: An Overview*, accessed at https://www.europarc.org/communication-skills/pdf/Negotiation%20Skills.pdf , [7th July 2023].
[31]Edward C T and Roy J L, *supra* note 28, p. 86.
[32]What Is Contract Negotiation? accessed at https://oboloo.com/blog/what-is-contract-negotiation-definition/ [10th July 2013].
[33]Stark J., *The Only Negotiating Guide You'll Ever Need: 101 Ways to Win Every Time in Any Situation*. Broadway Books, (2015).
[34]Marsh P, *Contract Negotiation Handbook*, 3rd ed, Gower Publication (2001).
[35]Younis. M. Al N, *supra* note 1, p. 19.

afterward disagreement and preserve a friendly long-term relationship among the parties.[36]
For the success of a balanced negotiation, negotiators must be conscious of the overall situation in which the negotiation takes place.[37]

After analyzing definition of a contract and that of contract negotiation, one can conclude that a contract is a voluntary agreement between parties whereby a promise or set of promises is granted whereas contract negotiation is the process that leads to this voluntary agreement.[38]

2.1.4. Pre-contractual negotiation

Many contracts are preceded by a period of negotiations. During that period, the parties discuss the contractual project; they exchange their point of view on the obligations that can be subscribed by the them to the contract. This is done before the contract is concluded.

The Rwandan laws do not define the term "pre-contractual negotiation" but they state when they are conducted and provides its purpose. The Rwandan law governing contract states that "*a negotiation is a conduct between the parties prior to the formation of the contract which establishes a common basis of understanding that enables them to define their intention. A negotiation shall be used to interpret, supplement or qualify the contract*".[39]

To know the definition of the term pre-contractual negotiations, it necessary to make a recourse to the definition provided by scholars. According to some of them, pre-contractual negotiation is the negotiating period that occurs before the parties engaged in a contract achieve a final agreement.[40] It entails preliminary conversations, information exchanges, and negotiations aimed at determining the contract's key terms, conditions, and scope.[41]

[36]Younis. M. Al N, *supra* note 1, p. 2.
[37]Idid.
[38]Edward C T and Roy J L, *supra* note 28, p. 85.
[39]Art. 2 (1), Law n° 045/2011 of 25/11/2011 governing contracts, *supra* note 5.
[40] Healy P. and Siedel G, *Negotiating Business Transactions: An Extended Simulation Course*. West Academic Publishing, (2018).
[41] Ibid.

Pre-contractual negotiation is critical for clarifying expectations, detecting potential issues, and laying the groundwork for the final contract.[42]

In a summary, pre-contractual negotiation is negotiation that precedes the conclusion of a contract during which the parties discuss its opportunity and its terms.[43] The course of negotiations is likely to be composed of a variety of statements, predictions, assertions, requests, representations and promises of both parties.

Pre-contractual period is an important phase for negotiating parties and they must well understand that negotiation process is important framework in finalizing a contract.[44]

Negotiations are governed by freedom of contract[45] "which leaves the parties free to conclude a contract or not and to determine its content". This period, in common law, is inspired by maximum freedom of action whereas, in civil law, the contracting parties are already required to comply with conduct in accordance with the principles of good faith.

2.1.5. pre-contractual liability

Pre-contractual liability is a liability that arises out of a harmful conduct that occurred during the period of formation of a contract.[46]The word "pre-contractual" indicates that this liability relates to the period that precedes the formation of the contract. The pre-contractual liability or "*cupla in contrahendo* [47]" was developed by a German lawyer Rudolf Von Jhering in 1861.[48]According to this concept of *Culpa in contrahendo*, a negotiating party who influence his or her partner

[42]Ibid.
[43] Olivier R., *Le processus d'uniformisation du droit privé Européen et la responsabilité précontractuelle, master'sthesis, Université de Neuchâtel, (2009*), p 58.
[44]Younis. M. Al N, *supra* note 1, p. 19.
[45] Art. 2.1.15(1), *Unidroit principles of international commercial contracts*, 2016, Art. 2:301(1), *principles of European contract law*, part I, II and III (2002), Art. 1112, *code civil Français, supra* note 11.
[46] Alan Schwartz and Robert E. Scott, *Precontractual Liability and Preliminary Agreements*, 120 HARV. L. REV. 661 (2007).
[47]***Culpa in contrahendo*** is a Latin expression meaning "fault in conclusion of a contract". It is an important concept in contract law for many civil law countries, which recognize a clear duty to negotiate with care, and not to lead a negotiating partner to act to his detriment before a firm contract is concluded.
[48]Ayşe Elif YILDIRIM, *supra* note 2, p. 175-176.

negatively during negotiation and cause him or her damage commits a fault in contract negotiation and his or her behaviors need protective rules for the victim against injury that he or she suffered as a result of trusting the other party.[49]

He stated that even though there is no contract between the parties at the stage of negotiations, there is some sort of legal relationship. Therefore, in case a party commits fault during that period, he or she will be liable of damages.[50]

"*Culpa in contrahendo*" functions as a broad principle that permits the court to transfer the pure economic losses suffered by the plaintiff as a result of the defendant's negligence during contract negotiations that never reached in the formation of an actual contract.[51] The opening of negotiation creates between parties a legal relationship which imposes to parties obligations and non-compliance with those obligations lead to liability.

Pre-contractual liability or *culpa in contrahendo* is based on the idea that parties engaged in contract negotiation must act in good faith. Therefore, acting in good faith may be extended to this period where a contract does not exist in certain. For example, it may be necessary that relevant information be disclosed to the other party to ensure the conclusion of a contract. But different legal systems give different relevance to this act in good faith during the pre-contractual phase and demand respect in different levels.[52]

The commencement of contract negotiation creates a legal connection between the negotiators and imposes reciprocal duties on them.[53]For example, in certain conditions, one party will need to reveal to his or her partner relevant information in order to ensure the conclusion of a contract.

[49] Farnsworth E. A., "*Negotiation of Contracts and Precontractual Liability*: General Report", in: Conflits et harmonisationKollision und Vereinheitlichung Conflicts and Harmonization, Mélanges enl'honneur d' Alfred E. von Overbeck, ÉditionsUniversitaires Fribourg, Suisse 1990, p. 666.

[50] Von Jhering, "Culpa in ContrahendooderSchadensersatzbeinichtingenodernichtzur Perfection gelangtenVertragen" Jahrbücherfür die Dogmatik des heutigenrömischen und deutschenPrivatrechts IV (1861), p 1.

[51] B. S. Markesinis- W. Lorenz- G. Danneman, *The German Law of Obligations,* Volume I The Law of Contract and Restitution (Oxford: Clarendon Press (1997), pp. 64-65.

[52] Ayşe Elif YILDIRIM, *supra* note 2, p. 175.

[53] ROUILLER N., *Culpa in contrahendo et liberté de rompre les négociations : existe-t-il des devoirs précontractuels hors de l'obligation d'information ? L'identification exacte du devoir violé et ses conséquences (*2006), p. 166.

He or she may also need to incur some expenses for the same purpose.

Pre contractual liability is imposed when a party acts in bad faith during negotiation and causes damage to the other party. For example, in case one party negotiates without intention of reaching a final agreement or when a party break off negotiations without legitimate reason, he or she will be liable.[54]

Normally parties start to negotiate with purpose to conclude a contract. If the contract is concluded, the purpose is achieved and the contract will be performed in the next stage. However, in some cases the negotiation if broken off and no contract follows. Because good faith requires parties to act in good faith while negotiating, if a party breaks off the negotiations without legitimate reason he or she will be liable for damage.[55]

2.2. Contract formation and governing principles

2.2.1. Contract formation

The essence of a contract involves the commitment of one party to another, such as a debtor to a creditor, representing two individuals whose interests often diverge and compete.[56]

A contract aims at creating, modifying, transfer or extinguishing obligations. It is therefore a link, that parties wanted to create and to produce legal effects.[57]

[54]Principle of pre-contractualliability, trans-lexprinciple, accessed at https://www.trans-lex.org/939000/_/principle-of-pre-contractual-liability/ [5thJune 2023]

[55] Mirian KeneOmalu, 'Precontractual Agreements in The Energy and Natural Resources Industries - Legal Implications and Basis for Liability (Civil Law, Common Law and Islamic Law)' (2000) (Jul), Journal of Business Law, pp. 303-331.

[56] Id, p. 22.

[57] Ibid.

2.2.1.1. Elements for formation of a valid contract

a. In common law perspective

In common law, there are 3 basic essentials to the creation of a contract which are the agreement, the contractual intention and the consideration.[58]

The agreement is reached when one party makes an offer, which is accepted by another party.[59]In order to bring about an enforceable contract, the parties must, through a process of offer and acceptance, enter into an agreement, whose terms are sufficiently certain to allow for legal enforcement, with the intention that the agreement be legally binding.

In the case law opposing Moran and University College Salford, an offer was defined as an expression of willingness to contract on specified terms, made with the intention that it is to be binding once accepted by the person to whom it is addressed. There must be an objective manifestation of intent by the offeror to be bound by the offer if accepted by the other party. Therefore, the offeror will be bound if his words or conduct are such as to induce a reasonable third party observer to believe that he intends to be bound, even if in fact he has no such intention.[60]

An acceptance is a final and unqualified expression of assent to the terms of an offer. There must be an objective manifestation, by the recipient of the offer, of an intention to be bound by its terms. An offer must be accepted in accordance with its precise terms if it is to form an agreement.[61] In case an offer was accepted by the offeree, a binding contract is created and it has to be performed by both parties with regards to their respective commitments or obligations. This was the basis of liability of University in case between Moran and University College Salford because its offer to study was not executed after its acceptance by Moran (the Offeree).[62]

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[58]Michael Furmston, the law of contract, 4th edition (2010), P. 255.

[59] Ibid.

[60]Moran v University College Salford (No 2) (1993).

[61] Allen &Overy, *Basic principles of English contract law*, accessed at https://www.a4id.org/wp-content/uploads/2016/10/A4ID-english-contract-law-at-a-glance.pdf [2rd August 2023]

[62]Moran v University College Salford, *supra* note 60.

With regards to consideration, in most cases, in common law, a promise is not legally binding as a contract unless it is backed by consideration (or made as a deed). Consideration refers to "something of value" that is exchanged for a promise and is necessary to make the promise enforceable as a contract.[63] This typically involves either a disadvantage to the person to whom the promise is made, as he or she give something of value, and/or an advantage to the person making the promise, as they receive something of value.[64]

The last element for formation of a valid contract in common law is intention. Contractual intention requires that parties, in contracting, intend their agreement to be legally binding.[65] This means that an agreement is not binding as a contract if it was made without an intention to create legal intentions even though it was supported by consideration. As example, numerous social arrangements do not qualify as contracts since they lack the intention to be legally enforceable. Likewise, various domestic arrangements, like those between spouses or parents and children, lack legal force because the involved parties did not intend for them to hold any legal implications.

b. In civil law perspective

As there is considerable diversity among civil law systems worldwide, the requirements for the validity of a contract can vary significantly from one country to another. However, there are common elements that all civil law countries require for validity of a contract. Among others, the intention of parties, the consent and the legal subject of the contract.

The intent (intention) of both parties to create a legal relationship between them is the first element for a valid contract. Parties must bear in mind that they are going to be bound by their commitments. That is the legal relationship which is enforceable. The absence of intention of parties makes the contract not enforceable.[66]

[63]Allen &Overy, *supra* note 61.
[64] Ibid.
[65]Ibid.
[66] Art II.–4:101, DCFR requires, for a contract to be validly formed, the intend to enter into a binding legal relationship or bring about some other legal effect; and the agreement.

The second element for a valid contract is the consent of the parties. For a contract to be valid, there must be genuine and voluntary consent from both parties without any undue influence, mistake, or misrepresentation.[67]

Legal object is also another element required for validity of a contract.[68] For a contract to be valid, its subject matter must be lawful and not prohibited by law or public policy. Contracts with illegal objects or purposes are invalid.

A contract, to be valid, requires the capacity of contracting parties. However, there is no universal capacity because countries regulate differently the age of capacity.[69]

The consideration is not a requirement for a valid contract which constitutes a difference with common law countries. The absence of a strict consideration requirement in civil law does not mean that contracts in civil law systems lack enforceability or that mutual obligations are not taken into account. It simply reflects a different legal approach to the formation and enforceability of contracts compared to common law systems.[70] The consideration was also excluded among elements for a valid contract by the Convention on Contracts International Sale of Goods (CISG) which found it as irrelevant since contracts concerned by that convention require reciprocal commitments.[71]

Some civil law countries require a cause as element for a valid contract. The cause in same cases function as consideration required in common law system.

[67]Art. 3.1.2, Unidroit principles, *supra* note 45, Art. 1128, Code civil Français, *supra* note 11.
[68] See art. 1385 of civil code Civil of Québec updated to December 11, 2020; Art. 5.27 of Belgium Civil Code, *supra* note 11, and art. 1128 of French civil code of 2016.
[69] Art. 104, BGB provides that *a person is incapable to contract if he is not yet seven years old*, Art. 1146 of French civil code provides that *are incapable an unemancipated minor or an incapacitated adult*; art. 153 of Civil code of Québec (Updated to December 11, 2020) provides that "*Full age or the age of majority is 18 years",* Art. 14 of the civil code of Swaziland sets the age of majority to 18 years old.
[70]Comment one to Art.3.1.2 of Unidroit principles, *supra* note 45.
[71] See art, UN Convention on contract for International Sale of Goods (2010).

The law governing contracts in Rwanda provides for mutual assent, capacity to contract, object matter of the contract, and licit cause as requirements for a valid contract.[72] By analyzing the requirements for a valid contract under Rwandan law, one can conclude that it was more influence by civil law system because even though it provides for consideration, the consideration is valuable if it was established as such by parties.[73]

2.2.2. Objectives of contract formation

The principal purpose of the law of contracts is to protect reasonable expectations engendered by promises. The law is not so much concerned to carry out the will of the promisor as to protect the expectation of the promise. Also the contract has as objective to create a legal relations on which there has been considerable disagreement among writers.[74]

The essence of contract is agreement. Contract is a jural relation that is founded upon agreement which is the manifestation of a mutual concordance between the parties as to the existence, nature and scope of their rights and duties.[75]

A contract is a legally recognized agreement between two or more persons giving rise to obligations that may be enforced in the courts by that agreement, parties create a legal rule or a set of legal rules, a legal regime binding as regards themselves.[76]

It might be suggested, through the device of contract, parties legislate for themselves that is to say, they create a miniature legal system by and under which they are governed. As it has been said, contract is a form of legal institution.[77] By entering into contract, parties bring themselves within the ambit of such institution. The parties are taking advantage of the law, and a recognized legal institution, in order to create certain legal consequences.[78]

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[72] Art. 4, law n°45/2011 of 25/11/2011 governing contracts, supra note 5.
[73] Id, art. 33.
[74] WADDAMSS.M., The law of contracts, second edition, Toronto, 1984, pp. 109&113.
[75] Treitel G.H, law of contract, 9th ed. (1995), pp.1-5.
[76] FridmanG.H.L., Q.C, F.RS.C, MA., B.C.L, LL.M, *the law of contract in Canada*, University of Western Ontario, 4thed (1999), p. 5.
[77] MacCormick, *Law as institutional Fact*, (1974), p.90.
[78] FridmanG.H.L., *supra* note 76, p. 6.

2.2.3. Principles of contract formation

2.2.3.1. Principle of freedom of contract or parties' autonomy

The contract is governed by the principle of autonomy of will (will of parties) or contractual freedom. The will is the fundamental element of contracts.[79]

In 19th century, the common law saw the freedom of contract in the theory of will of a contact or "*laissez faire"* liberalism.[80] It means that the parties are the best judges of their own interests and if they freely entered into a contract, the only function of the law was to inforce it. Based on freedom of contract principle, a contract concluded by parties cannot be challenged on the ground that its effect was unfair or socially undesirable.

In modern common law, the freedom of contract principle continued to have a considerable support. The principle, in English law, is that parties are free to contract as they may think fit.
The Lord Diplock said that a basic principle of the common law contract is that parties to a contract are free to determine for themselves what primary obligations they will accept.[81]

In European law the principle of freedom of contract was recognized as a general principle of civil law by the European court of Justice.[82] Art 16 of EU Charter of Fundamental Right and has been set by the EC Commission as a fundamental point of reference for the future development of European contract law.[83]

[79]Hess-Fallon B.et Simo N A.-M., *Droit civil*, 7ième éd., Paris, Dalloz, 2003, p. 197 ; Heudebert-Bouvier N., *Droit civil et commercial*, 5e éd., Paris, PUF, 2002, p. 162.
[80] Dicey A.V., *Law and opinion in England*, 2nded (1914), pp.190-158.
[81]Eurico SpA v Philipp Brothers (1987)2 pp. 215-218.
[82] Spain v European Commission (C-240/9) (1999), p. 99.
[83] EC Commission, First Annual Progress Report on European Contract Law and the acquis Review Com (2005), 456 final par. 2, 6&3.

In 1793, while preparing the initial French Civil Code, Cambacérès stated that the right to enter into agreements simply allows individuals to select the means of their own happiness.[84] This emphasizes the significance of personal will in contractual agreements and, by extension, the concept of freedom in such agreements. However, it should be noted that the revolutionary ideology at that time recognized only a basic form of mutual consent that governed the creation of contracts.[85]

Freedom of contract is the famous principle of contract law. It is defined as the power of parties to enter contracts and to formulate the terms of the contractual relationship.[86] it refers to the liberty of parties to conclude or not conclude a contract.[87] This means that contractual relations must be governed by the free will of involved parties and that the legislator must only intervene in limited cases. A person cannot be forced to commit himself or herself if he or she does not wish to neither be imposed a co-contracting party or a clause that he or she does not wish.

In its institutional interpretation, freedom of contract encompasses the freedom of individuals to engage in agreements with one another and the importance of upholding the integrity of those agreements. In a narrower context, it emphasizes the freedom to negotiate terms, asserting that the law should value and uphold the parties' own choices and preferences as reflected in their transactions and the specific terms they mutually agreed upon.[88] It follows that freedom of contract in the narrow sense argues for a minimalist approach both to the categories of transaction that are treated as illegal and to the kinds of terms that are black-listed as void and unenforceable.

George Jessel MR said that: *If there is one thing which more than another public policy requires it is that men of all age and competent understanding shall have the utmost liberty of contracting, and that their contracts when entered into freely and voluntarily shall be held sacred and shall be*

[84] Les pourparlers et les avant-contrats, Extrait du polycopié de droit des Obligations (2023), accessed at https://www.prepa-isp.fr/wp-content/uploads/2022/12/CRFPA-2023-Extrait-du-polycopie-de-droit-des-obligations.pdf [14thJune 2023]
[85] Ibid.
[86]Brian A.B, *supra* note 22, p 53.
[87]Kottenhagen R.J.P, *from freedom of contract to forcing parties to agreement*, Rotterdam Institute of Private Law (2006) P. 1.
[88]Michael Furmston, *supra* note 58, P. 32.

enforceable by courts of justice. Therefore, you have this paramount public policy to consider that you are not lightly to interfere with this freedom of contract. An over restrictive approach disallows options that should be available to the parties and illegitimately trims the parties 'autonomy.[89]

The judge George, in various case laws, stated that freedom of contract requires legislative and judicial restraint. This means that legislatures and courts should be slow to limit the kinds of transactions or the kind of terms that the parties can agree upon within the domain of contract because the freedom of contract enjoins that the parties shall have the utmost liberty of contracting.[90]

Moreover, Barkhuizen v Napier case law[91] provides illustrative support to the freedom of parties in determining the content of their contract. That case was opposing the insurer (the respondent) and the insured (the applicant) and it resulted from a short term contract concluded between them. The provision referred to necessitated that the person making the claim initiate legal action within a span of 90 days following the denial of the claim by the insurance company. The insured instituted action in a High Court in disregard of that time-limit and the insurer raised a special plea that it had been released from liability under the contract, since the applicant had failed to comply with the time limit. The applicant replicated that the time-limitation clause was unconstitutional and unenforceable because it violated his right under the Constitution of the Republic of South Africa to have the matter decided by a court.[92]

The High Court decided in favour of the applicant and an appeal was made and the Supreme Court of Appeal where it was found that the Constitution does not prevent time-limitation in contracts that were entered into freely and voluntarily. An applicant appealed before the Constitutional Court which held subject to considerations of reasonableness and fairness, time-limitation clauses in contracts are permissible and that it would be unreasonable if it gives short time to seek judicial

[89] Id., P. 33.
[90] In Federal commerce and Navigation Co Ltd v Tradax Export SA.
[91] Barkhuizen v Napier, Constitutional Court of South Africa, 2007 (5) SA 323 (CC).
[92] Section 34 of the Constitution of South Africa provided that:"*Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum*."

redress and in that case it is contrary to public policy. In this case the court concluded that 90 days' limitation was sufficient and the applicant has no reason and proof for his non-compliance. The court concluded that enforcement of the clause would not be contrary to public policy and the appeal was dismissed. The court concluded that the will of parties prime in case it is reasonable and not contrary to public policy.[93]

The starting point of freedom of contract or party autonomy is reflected both in EU private international law and in EU substantive law provisions which qualify its application in the interests of protecting 'weaker parties' such as consumers.[94] It prohibits the abuse of freedom of contract.

The principle of freedom of contract is also provided in other various legal instruments worldwide whether internationals or nationals.

The Unidroit principles of international commercial contract states that "the parties are free to enter into a contract and to determine its content."[95]The Principles of European Contract Law (PECL) state that parties are free to enter into a contract and to determine its contents, subject to the requirements of good faith and fair dealing, and the mandatory rules established by these Principles.[96]

The Lebanon civil codes states that parties are free to settle their legal relation, subject to the requirement of public order and good morals and by considering legal provisions which are imperative. Almost the same is provided by the French civil.[97]

The principle of freedom of contract is of a greater importance in the context of contractual relationship. It confers to a party the rights to determine the person to whom he or she may conclude with and the terms of their transactions. However, the principles of freedom of contract is not without limits because the liberty conferred to parties is subjected to the requirements of good faith, fair dealing and established mandatory rules.[98]

[93]Barkhuizen v Napier, *supra* note 91.
[94]European Parliament and of the council. (2008). the law applicable to the contractual obligations "Rome I". regulation EC No 593/2008, art. 3.
[95] Article 1.1, *Unidroit principles*, *supra* note 45.
[96] Art.1:102, *The principles of European contract law*, *supra* note 45.
[97] Art. 166, *code civil Libanais*, *supra* note 11;Art 1102, *code civil Français*, *supra* note 11.
[98] Art 1.102, Par.2, *The principles of European contract law*, *supra* note 45.

The mandatory rules referred to are those of national, supranational and international level which, according to the relevant rules of private international law, are applicable irrespective of the law governing the contract,[99] aimed at protecting the rights of other contracting party or the general interests.

Since the freedom of contract principle is based on will of parties, the duty of good faith limits that parties' will in order to prevent them from abusing contractual rules. Will theory refers to the voluntary action of an individual in giving their agreement or consent to be legally bound. John Wightman elucidates it as the deliberate exercise of the parties' liberty to either enter into a contract or refrain from doing so, which greatly supports their obligation to uphold the agreement when it is enforced by the court.[100]

The principle of freedom of contract means that the will of parties is the sole determinant of their obligation. In this perspective, legal obligation arises only when it originates from the will of parties. It places a person at the center of contract formation, suggesting that the contract and its effects are entirely created by the will of the contracting parties only.[101]

The principle of freedom of contract has as effects that a contract is the result of the will of the contracting parties, that every contracting party enjoys freedom, granting him or her to act as he or she please and has full control over the content and effects of his or her contracts. It also results that once freely entered into and conceived, a contract holds the same weight as the law itself and it is called convention-law or the law of the parties. Lastly, the freedom of contract results that the majority of laws governing contracts are supplementary and serve to interpret the intentions of the parties involved.[102]

The freedom of contact was found to be not absolute. For purpose of protecting public interests and consumers, the contracting parties are subject to compliance with some rules. Those are rules of public order and other which are mandatory.

[99] Art 1.103, *The principles of European contract law*, *supra* note 45.
[100]Wightman J., *Contract- A Critical Commentary,* London: Pluto Press, (1996), p.19.
[101] M.Ngagi A., *supra note 13*, p. 23.
[102]M.Ngagi A., *supra* note 13, p. 23-24.

Mandatory rules aim at protecting incapable persons while public order mean all the values considered essential and good for the development of a given community. It is a variable and elastic notion.[103]

Also, the freedom of contract has been undermined by State intervention. The raisonfor such intervention is that not only the freedom of a contract must be protected, but also the security and equity that the law must ensure to people.[104]The State also has to intervene with purpose to liberate, due to social and economic transformations which have gradually created a gap between formal equality and real equality. In addition, individuals with limited expertise often struggle to protect their own interests effectively, hesitating to acknowledge their lack of knowledge or vulnerability. Consequently, a growing disparity arises between those who possess knowledge and those who lack it.[105] This divide can lead to unfairness and injustice, which can only be rectified through mandatory regulations. Finally, there is a pressing need to enter into contracts due to the fast-paced nature of our world. This acceleration of social interactions results in hurried contractual decisions, sometime harsh and with complex clauses.[106]

Other decline to the principle of freedom of contract has found its basis in the sense that some contracts are imposed to parties (such as insurance for vehicles) without their free will to the fact that they are obliged to contract, others must comply to formalities imposed by law (formal contract)without that a contract is invalid or without effect and others are beforehand drafted and one party must only accept the terms without discussion (contract of adhesion, standard contract) as it is provided for by the theory of will.[107] Also the evolution of the notion public order prohibits the formation of same contracts regardless of the will of contracting parties.[108]

[103]M.Ngagi A., *supra* note 13, p. 24.
[104] Imane HILANI, C*ours de la théorie générale des obligations,* Faculté des Sciences Juridiques Economique et Sociales Casablanca, 2017-2018*,* P.39 ; M.Ngagi A., *supra* note 13, p. 25.
[105] Id.*,* P.39
[106]M.Ngagi A., *supra* note 13, p. 25.
[107]Id., p. 26.
[108]Imane HILANI, *supra* note 104*,* P.39.

When the principle of freedom of contract is utilized in pre-contractual negotiations, it signifies the liberty to refrain from concluding the intended agreement. There is no a requirement to conclude the contract, even if negotiations have commenced with that intention.[109]

If no exclusivity in conducting negotiation has been agreed upon, the parties can engage in several negotiations without the need to inform their respective counterparts.[110] Similarly, it has been determined that merely entering into a contract, even if knowingly, with someone who is in negotiations with another party does not automatically imply a fault that could hold the person responsible, unless there is an intention to cause harm or fraudulent actions are involved.[111]

2.2.3.2. Principle of good faith or contractual fairness

Defining the principle of good faith in a thorough manner has been challenging. Legal scholars use various terms like honesty in reality, decency, fairness, and fair dealing to describe it.[112]

Good faith is commonly regarded as an adaptable standard, a principle whose specific meaning cannot be predetermined in a general manner but instead relies on the particular context of the situation in which it is to be employed. Its interpretation necessitates a case-specific approach to bring it into practical and concrete application. Moreover, attempts have been made to define good faith by these notions; as unconscionability, fairness, fair conduct, reasonable standards of fair dealing, decency, reasonableness, decent behavior, a common ethical sense, a spirit of solidarity, community standards of fairness, honesty in fact.[113]

[109]Ghestin J., Loiseau G., Serinet Y. M., : La formation du contrat : Le contrat, le consentement, T 1, 4 éd. (2013), p. 513.
[110] Id. p.514.
[111] Cass. Com., 26 novembre 2003, Bull. Civ. IV, n°186, D 2004, p. 869, note A S Dupre- DalleMagne, RDC 2004, p. 257, note D. Mazeaud, RTD Civ. 2004, p. 80, obs. J. Mestre et B. Fages.
[112]Ebrahim Shoarian and Mahsa Jafari, Good Faith Principle in Contract Law: A Comparative Study under Sharī'ah, Islamic Law Jurisdictions with Emphasis on Iranian Law (2021), p.2.
[113] Keily Troy: *Good Faith and The Vienna Convention On Contracts for The International Sale of Goods* (CISG) (1999), p.19.

According to Black's Law Dictionary good faith is a concept lacking any precise legal or statutory definition. It involves various aspects, including honest belief, the absence of malice and the absence of design to defraud or to seek an unconscionable advantage.[114]

Professor Tetley defines good faith as "just and honest conduct, which should be expected of the parties in their dealings, one with another and even with the third parties, who may be implicated or subsequently involved.[115]

The principle of good faith has its origins in Roman law and it is also recognized in some common law jurisdictions particularly in relation to the execution and implementation of obligations.[116]

The concept of "good faith" is not explicitly defined in Rwandan law. However, it is used in various provisions within contract law without any definition. Various Rwandan legal instruments oblige parties to act in good faith. As example, article 64 of the law of contract provides that *Contracts made in accordance with the law shall be binding between parties. They may only be revoked at the consent of the parties or for reasons based on law. They shall be performed in* ***good faith***. Article 70 of the same law requires good faith and fair dealing as obligation in contract execution by providing that "*Each party shall have obligation to perform the contract in* ***good faith and fair dealing*** *between parties"*.[117]

Article 87 of the Law n° 030/2021 of 30/06/2021 governing the organisation of insurance business states that[118] *"an insurance contract is based on utmost good faith between the parties to the contract. It is considered to include a provision that each party to the contract must act with good faith towards the other party in respect of any matter arising under, or in connection with the contract".*

[114] Black's Law Dictionary, 11th ed. (2019).
[115] William Tetley, *Good Faith in Contract: Particularly in the Contracts of Arbitration and Chartering* (2004), Journal of Maritime Law and Commerce, vol. 35, no 4, p. 561.
[116] See Sections 1-304 of the Uniform Commercial Code.
[117] See Art. 64, Law n°45/2011 of 25/11/2011 governing contracts, *supra* note *5.*
[118] See art. 87 of the Law n° 030/2021 of 30/06/2021governing the organisation of insurance business, *supra* note 6.

Various global contract law instruments such as the Principles of European Contract Law (PECL), the UNIDROIT Principles of International Commercial Contracts (UPICC) and the Draft Common Framework of Reference (DCFR) specified that contracts should be executed and interpreted in accordance with the principle of good faith. However, the term good faith does not have a universal definition.[119]

The article 1-201 (20) of U.C.C. (Uniform Commercial Code) defines good faith as: "honesty in fact and the observance of reasonable commercial standards of fair dealing" while its article 1-302 (b) states that: *"The obligations of good faith, diligence, reasonableness, and care prescribed by [the Uniform Commercial Code] may not be disclaimed by agreement. The parties, by agreement, may determine the standards by which the performance of those obligations is to be measured if those standards are not manifestly unreasonable."*

Beyond the sphere of contract law, good faith sometimes affects almost all private law such as family law, property law, land law, laws governing inheritance and gifts, etc. It means that intended field of application of the principle of good faith might be called traditional obligations of a patrimonial law nature in the field of private law, and corresponding rights.[120]

Acting in good faith may entail the obligation for both parties involved in a contract to maintain honesty throughout the entire process, including negotiation, execution, and even interpretation of the contract.[121]

In common law system, as Lord Brown-Wilkinson observed, throughout common law world it is a matter of controversy to extent obligations of good faith are to be found in contractual relationships.[122]Common law countries have taken various position with regard to relevance of good faith in creation of performance of contract.

[119] See Art. 1:106, art 1:201 and art 5:102 of PECL, see Articles 1.7, art 3.1.4, art 7.1.6 and art 7.4.13 of Unidroit principles, *supra* note 45 and Art. 0-302 of DCFR (Performance in good faith).
[120]Comments to Art. 1: 102: Principles of European contract law, *supra* note 45.
[121]Ebrahim Shoarian and Mahsa Jafari, *supra* note 112, p.2.
[122]Sweet & Maxwell, Chitty on contracts, volume I, *General principles*, (2008), P. 22.

The English was has committed itself to not have such overriding principle but has developed piecemeal solutions in response to demonstrated problems of unfairness. Under English law, each party is expected to look after his or her own interest is not generally under a duty to inform. The general duty that he or she has, is that of not misleading(misrepresentation).[123]
In the United States, the Restatement (Second) of contracts requires that every contract imposes each party a duty of good faith and fear dealing in its performance and enforcement. [124]

The courts and scholars in Australia hold that an agreement to negotiate in good faith may be contractually enforceable.[125]In Canadian, there is no duty to negotiate in good faith and it is yet uncertain whether there is any legal requirement that a party must perform his or her obligations in good faith.[126] However, in case Bhasin v. Hrynew, 2014 SCC 71, the Supreme Court of Canada established that good faith contractual performance serves as a fundamental principle in Canadian common law. This entails a duty for contract parties to act honestly when fulfilling their contractual obligations.[127]

Common law has made its contribution, as said by Bingham LJ in Interfoto Picture Library ltd v Stiletto Visual Programmes Ltd (1989), by holding that certain clauses of contract require the utmost good faith, by treating as irrecoverable what purport to be agreed estimates of damage but are in truth a disguised penalty for breach and in many other ways.[128]

In civil law system, the principle of good faith was provided for in many legal instruments. The PECL provides that in exercising his rights and performing his duties each party must act in accordance with good faith and fair dealing. The parties my not exclude or limit this duty.[129]

[123]Geoffrey Samuel, law of obligations, UK (2010), P.87-88.
[124] See par. 205, Restatement (second) of contracts, *supra* note 19.
[125] Carter J.W. and Harland D.J, Contract law in Australia, 4th ed. (2002), pp. 270-272, 1809 and 1842.
[126]Sweet & Maxwell, Chitty on contracts, volume I, GENERAL PRINCIPLES, (2008), P. 22.
[127]Bhasin v. Hrynew, 2014 SCC 71, [2014] 3 S.C.R. 494.
[128]Interfoto Picture Library ltd v Stiletto Visual Programmes Ltd (1989), QB 433, P. 439.
[129] See Also Art 1.7 of Unidroit principles *supra* note 45, according to which both parties should act in accordance with good faith and fair dealing in international trade.

for example, in France, good faith imposes duty of loyalty, duty of cooperation, duty to inform and to collaborate. Good faith was used to construct a philosophy of *solidarisme contractuel* in which a contracting party has to further not just his own interests but interests of his co-party[130]

In civil law system, good faith principle was extended beyond the contractual obligations to pre-contractual domain as it is provided for by PECL and Unidroit principles that a negotiating party who break of negotiation in bad faith is liable.[131]

The Principle of good faith sets behavioral standards for contractual relationships, obliging parties to act honestly and sincerely to avoid harm to the other party's interests. This involves preventing actions that could unfairly surprise or damage the other party

[130]Geoffrey Samuel, law of obligations, UK (2010), P.87.
[131] Art 2:301 of PICL.

CHAPTER THREE: PRE-CONTRACTUAL NEGOTIATIONS AND THE PRINCIPLE OF GOOD FAITH

3.1. Legal nature of pre-contractual negotiations in contract formation and its background

There was a time where a contract was made by the meeting of an offer and an acceptance.[132] Negotiation periods were generally short and do not worthy of legislative attention. Today, the market has changed and the modern contract making process is often a set of very complex agreements and usually involves big amounts of money. The negotiations may last for months or even years.[133]There is not a simple offer and an acceptance anymore, but there are offers, counter-offers, partial agreements etc and the agreement is reached only at the end of the discussion.[134]Negotiation may be finished with the conclusion of a contract or continue even after the conclusion of a contract.

The conclusion of a contract inevitably entails a pre-contractual period of interpersonal interaction. The nature of pre-contractual relationship's is debatable. Some people consider it as merely a social relationship, while others perceive it as a legal relationship.

Nowadays modern contract law recognizes negotiations as a separate contract formation procedure. This is based on fact that a balance has to be found between freedom of contract recognized as governing principle of contract formation and the protection of rights and interests of the parties entering in negotiation.[135]

In this section, we are going to look how the two system, civil law system and common law system, treats the pre-contractual negotiations, obligations of negotiating parties during that period and the liability arising from non-compliance with those obligations.

[132]TedoradzeIrakli, The Principle of Freedom of Contract, Pre-Contractual Obligations Legal Review English, EU and US Law, vol. 13, 2017, p. 66.
[133] Ibid.
[134]Kottenhagen R.J.P, *supra* note 87, PP. 1 and 5.
[135] Id., P. 6.

3.2. Pre-contractual negotiations in civil law system

In civil law countries, pre-contractual negotiation is governed by the principle of freedom of contract. Parties are free not only to decide with whom and when to enter into negotiations, but also how negotiation is to be conducted with a view to conclude a contract. Any negotiating party may also freely terminate negotiations if he or she wishes so.[136]

However, even though civil countries recognize the principle of freedom of contract, they also require that negotiation be conducted in good faith. Parties must imperatively negotiate in good faith.[137]

During the negotiation phase, good faith imposes or prohibits certain behaviors. Thus, it is prohibited for a party to enter into negotiation knowing that negotiation will not arrive at its purpose, particularly due to the fact that the party does not have a serious intention of contracting or is not the owner of relevant right. Good faith also prohibits a negotiating party to continue negotiations knowing that he or she will not conclude with the prospective partner, a fortiori when a party continue them while having initiated parallel negotiations which he or she brings to a successful conclusion elsewhere.[138]

The right to break off negotiations is also subject to the principle of good faith and fair dealing. During negotiation process, a party may no longer be free to break off negotiations abruptly and without justification. The breaking off itself is not sanctioned, but the manner in which it is done, as judged in regard with the duty to negotiate in good faith.

[136]Guillemard S.,*De la phase préalable à la formation de certains contrats*, Volume 24, N° 2, (1993), P.174.
[137] Art. 2:301, *Principles of European contract law*, supra note 45.
[138] DE CONINCK BERTRAND, Le droit commun de la rupture des négociations précontractuelles, in: FONTAINE MARCEL (édit.), Le processus de formation du contrat, contributions comparatives et interdisciplinaires à l'harmonisation du droit européen, Bruxelles 2002, p. 25.

The negotiating parties' trust in each other with regard to the seriousness, completeness and accuracy of their reciprocal declarations merits specific legal protection. The civil law system provides that, during pre-contractual negotiations, parties must act in good faith and failure to do so, the party must be liable for pre-contractual liability also known as "*culpa in contrahendo*".

Pre-contractual conversations are governed by numerous legal concepts and norms that control the formation and validity of contracts under civil law systems. These principles are intended to assure the fairness, good faith, and protection of all parties involved in the negotiating process. Those are the following:

Good Faith and Fair Dealing: Civil law systems generally emphasize the principle of good faith and fair dealing during pre-contractual negotiations. Parties are expected to act honestly, fairly, and transparently in their negotiations, disclosing relevant information and not misleading the other party.[139]

Pre-Contractual Liability: Civil law system recognizes the concept of pre-contractual liability, known as *culpa in contrahendo*. This doctrine holds that parties have a duty to conduct negotiations with care, and they may be held liable for damages caused by a breach of this duty. However, the scope and extent of pre-contractual liability can vary between jurisdictions.[140]

Disclosure and Misrepresentation: Civil law systems often require parties to disclose relevant information that could materially affect the other party's decision to enter into a contract. Failure to disclose such information may be considered a breach of good faith. Additionally, if a party makes false statements or misrepresents material facts during negotiations, it may give rise to a claim for misrepresentation.[141]

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[139]NAMMOUR F., CABRILLAC R., CABRILLAC S. et LÉCUYER H., Droit des Obligations, Droit français – Droit libanais : Perspectives Européennes et internationales, 1[e]édition, (2006),P.69 ; Radu Stancu, *L'évolution de la responsabilité civile dans la phase précontractuelle : Comparaison entre le droit civil Français et le droit civil roumain à la lumière du droit Européen*, PHD Thesis (2015), p.86.

[140] Rodrigo Novoa, *culpa in contrahendo: a comparative law study: Chilean law and the United Nations convention on contracts for the international sales of goods (CISG)*, Arizona Journal of International & Comparative Law, Vol. 22, No. 3 (2005), P.584-585.

[141]Valeria De Lorenzi, *Pre-contractual objective good faith and information. Duties of information*, (2021).

Termination of Negotiations: In civil law systems, negotiations can be terminated at any time before the formation of a contract, unless the parties have entered into a binding preliminary agreement. However, parties may be required to act in good faith and provide reasonable notice of termination to avoid potential liability.[142]

3.2.1. Negotiation in good faith

The success of negotiations and the longevity of agreements depend on the presence of good faith among all involved parties. Good faith facilitates the resolution of differences by providing a solution that respects everyone's interests, thereby fostering trust and fostering harmonious relationships. Generally, good faith engenders fairness, mutual assurance, and the establishment of enduring connections between the parties involved.[143]

Rwandan law governing contracts only requires good faith in performance of a contract.[144] With regard to pre-contractual negotiation, that law is silent. This means that during negotiation, parties may behave in any way without any obligation and liability. However, the law governing labor in Rwanda requires that collective agreement be negotiated in good faith and also provides with duties which must be complied with during negotiations such as duty of information and duty of confidentiality.[145] This means that only labor law requires good faith during negotiation of collective agreement.

The element of good faith encompasses more easily the requirement not to act out of pure malice. The fair dealing element refers more easily to fairness in fact, regardless of motivation.[146] It requires that parties in negotiation be fair and honest and in case the contract is concluded, also perform their respective obligations and enforce their rights honestly and fairly.

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[142]DE CONINCK BERTRAND, *Le droit commun de la rupture des négociations précontractuelles, in: FONTAINE MARCEL (édit.), Le processus de formation du contrat, contributions comparatives et interdisciplinaires à l'harmonisation du droit européen*, Bruxelles (2002), p. 25.

[143] Younis. M. Al N, supra note 1, p.9.

[144] Art. 64 of law n° 45/2011 OF 25/11/2011 governing contract states that contracts made in accordance with the lawshall be performed in good faith.

[145] Art. 93 of lawn°66/2018 of 30/08/2018regulating labour in Rwanda states that "*Parties to the negotiation of a collective agreement negotiate in good faith"*.

[146]Comments to Art. 1: 102: *Principles of European contract law*,*supra* note 45, p. 304.

To ensure the satisfaction and mutual benefit of both parties, it is crucial to assign proper significance to good faith within a contract.

In nowadays, the principle of good faith has been developed and influenced in the Civil Law system e.g. French and German law especially in the case of pre-contractual liability which has been considering as legal obligation. It is recognized as the important element of pre-contractual liability principle in legal system. It was primary suggested by Saleilles, the French lawyer who developed the pre-contractual liability or *culpa in contrahendo* next to Jhering. They all stated that the good faith and fair dealing should be applied in the preliminary contractual phase and that a party who acts in bad faith during that period should be liable.[147]

The courts of Estonia in clarifying the content of the obligation to negotiate in good faith stated that negotiations in bad faith preclude the party entering into the negotiations without a willingness to enter into the contract and the negotiations being held for purposes not consistent with the principle of good faith, such as with the aim of obtaining sensitive business information from the other party that such party would not disclose but for the negotiations or in order to prevent the other party entering into an agreement with a concurring third party. It is also bad faith to terminate negotiation arbitrary.[148]

Good faith can be used as a doctrine to suppress the judgement of negotiating parties over verdicts affecting them, their duties and rights in commitment of performance, whether it is a commercial or non-commercial contracts.[149]

Applications of the requirements of good faith and fair dealing during negotiation gives parties the duty not to negotiate a contract with no real intention of reaching an agreement with the other party, not to disclose confidential information given by the other party in the course of negotiations, and not to exploit unfairly the other party's dependence, economic distress or other weakness.[150] From the duty to negotiate in good faith arises also the following duties:

[147]ITHIWAT M,*supra* note 29, P.20.
[148]Martin Käerdi, The Development of the Concept of Pre-contractual Duties in Estonian Law (2008), p. 211.
[149]Younis. M. Al N, supra note 1, p.10.
[150]Comments to Art. 1: 102: *Principles of European contract law*,*supra* note 45, p. 304.

3.2.1.1. Duty to negotiate seriously

The duty to negotiate seriously requires a party not to conduct negotiations in such a way as to give the impression that his or her intention to conclude is stronger than it actually is. It involves conducting negotiations in alignment with one's true intentions.[151]

The duty to negotiate seriously prohibits a party to enter negotiating without intending to conclude a contract. It also prohibits a party from breaking off negotiations where the other party's reliance that a contract would be concluded is induced unfairly.[152] All those acts are against good faith principle. Many other acts or behaviors are against the duty to negotiate seriously such as to give unreserved agreement to conclude a contract which requires particular formalities and then refuse to observe the formalities required for its perfection.[153] Similarly, a person does not negotiate seriously if he or she negligently or intentionally authorizes the conclusion of a contract which is formally invalid while he or she knew or ought to know that his or her co-contracting party has confidence in the validity of the contract.[154] It is the same when the person knows or should know that the conclusion of a valid contract is simply impossible, like the impossibility of the object for example.[155]Therefore, it is a fault to engage negotiations or continue them when their prospects for success are bleak.[156]

3.2.1.2. Duty of information

The most important duty during pre-contractual negotiation is the duty of disclosure. A party is required to disclosure to his or her partner all material information that the later can await in good faith. The party, in accordance to the principle of good faith and fair dealing, has to provide to the other all relevant information whose knowledge is apparently material to that other party.[157]

[151] ROUILLER N., *supra note* 53, p. 170.
[152] Nicola W. Palmieri, '*Good Faith Disclosure Required During Pre-Contractual Negotiations*' (1993), p. 24.
[153] Olivier R., *supra* note 53, 60.
[154] Ibid.
[155] Ibid.
[156] Ibid.
[157] Art 15(2), Law of Obligation Act of Estonian, 2002.

Those are information which must influence the process of negotiation, the decision to conclude a contract and its validity.[158] For example, there is duty to inform if partners knows or should know that the subject matter of the contract is impossible or unlawful and that the other is not in a position or does not have the duty to know it. The same applies in case the subject matter of the contract has defects.[159] The concerned information are those which are essentially information that one of the parties knows or should know is essential in the eyes of the other party, likely to influence the process of the negotiations or the conclusion of the contract, to cause its cancellation or its nullity or whose delivery would be able to prevent the conclusion, because the party which would obtain them would, legitimately, break off the negotiations.

When assessing the necessity of disclosing information, consideration must be given to whether the holder of information knew that the other party has interest in specific information that he or she has, whether both parties possess specialized expertise and knowledge, the expenses involved in obtaining the information, and whether the recipient party could have acquired the information through an alternative means.[160]

The French civil code of 2016 introduce a duty of information or duty to disclosure. The duty of information which was provided for by other laws such as consumer law was also introduced in pre-contractual negotiation independently with the obligation of good faith and it is applicable to any negotiating party. The purpose of introducing such obligation, is to provide balance of contractual relations among negotiating parties.[161] It arises when one party has information that is decisive to the consent of other party and where that party is legitimately ignorant or places its trust in that party. The obligation extends to information that has a direct and necessary link to the content of the contract or the quality of the parties. However, the estimated value of the contracted service is excluded from the duty to inform. The obligation of information during negotiation is mandatory and parties cannot limit or exclude it.[162]

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[158] Cf. p.ex. art. 7 al. 1 du projet GANDOLFI : « *au cours des tractations, chacune des parties a le devoir d'informer l'autre sur chaque circonstance de fait et de droit dont elle a connaissance ou dont elle doit avoir connaissance et qui permet à l'autre de se rendre compte de la validité du contrat et de l'intérêt à le conclure* »

[159] Olivier R., *supra* note 43, p. 64.

[160] Martin Käerdi, *supra* note 148, p.214.

[161] Rapport au Président de la République relatif à l'ordonnance n° 2016-131 du 10 février 2016 portant réforme du droit des contrats, du régime général et de la preuve des obligations available at zalewski-sicard.fr - Réforme du droit des contrats, du régime général et de la preuve des obligations (google.com), accessed on 4th July 2023.

[162] Art. 1112-1, *Code civil Français*, supra note 11.

While law governing contracts in Rwanda is silent with regard to pre-contractual duties, the law regulating labor in Rwanda provides for duty of information during contract negotiation. It states that: "*Every party must have access to the other party's information relating to the negotiation subject matter"*.[163] This duty gives the negotiating parties reciprocal rights and obligations to have and provide information during negotiation.

3.2.1.3. Duty of confidentiality

Negotiating parties have a duty of keeping information received during negotiations as confidential.[164]The information considered as confidential during negotiation is that declared as such by a party. This means that, if a party wants that the information that he or she give during negotiation be kept as confidential, he or she must say so and specify that information is secret and cannot be used by third persons. Even in the absence of such declaration, if the other party knows or could reasonably expect that the information is confidential, that party is under the duty not the disclose information to third parties. In case of a breach of confidential duty, the other party may ask for the compensation of damages incurred.[165]

In cases which relate to the nature of legal relationship, it is justifiable to recognize a general duty of confidentiality. This duty arises from the establishment of a special relationship of trust during negotiations. For example, when dealing with potential clients, banks are bound by an ancillary obligation of discretion. Similar obligations apply to negotiations involving doctors, lawyers, and other trustees, where confidentiality is governed by ethical and legal provisions.[166]

The Rwandan labor law also provides for duty of confidentiality during negotiation of collective agreement. Paragraph 3 of Article 93 states that information requested for the purpose of negotiation of a collective agreement must not be disclosed to any third party without prior written consent of the concerned parties.[167] Pre-contractual duties is a specialty of law nº 66/2018 of

[163]Art. 93 par. 2, law nº 66/2018 of 30/08/2018 regulating labour in Rwanda, *supra* note 7.
[164] See TRANS-LEX principle nº IV.6.13 (duty of confidentiality), ANIL ÖZTÜRK,*The conceptual analysis of 'culpa in contrahendo': A critical study in European private international law*, (2017), p.22.
[165] See Art II.-3:302 of DCFR.
[166] Art. II.-3:302(2) DCFR.
[167]Art. 93 par. 3, law nº 66/2018 of 30/08/2018 regulating labour in Rwanda, *supra* note 7.

30/08/2018 regulating labour in Rwanda. Other laws, generally inspired with contract law during their drafting are silent with regards to pre-contractual duties or duties during negotiations.

It's important to note that the specific regulations and legal doctrines related to pre-contractual negotiations can vary among different civil law countries. Here's how pre-contractual it is regulated in some countries of civil law systems.

a. Germany

Germany is the country where the principle of good faith achieved its most significant advancement. German law emphasizes on the principle of good faith in pre-contractual negotiations. The German Civil Code (BürgerlichesGesetzbuch, BGB) provides the duty to negotiate in good faith. Its article 242 states that an obligor has a duty to perform according to the requirements of good faith, taking customary practice into consideration.[168] That article has extended beyond the solely principle of performing a prestation in good faith and become a general principle in German law to the fact that it acquired a much greater scope. It became a general clause and a superior principle of legal equity.[169] In general, the principle of good faith became a central pillar of the German law[170] and it is obvious that this principle applies even at pre-contractual level.

The principle of good faith during contract negotiations come from the *culpa in contrahendo* theory introduced in Germany by Von Jhering. The German Civil Code (BGB) later established and elaborated on this concept, with additional refinements provided by legal doctrine and court precedents. Finally, on January 1, 2002, a law was enacted to modernize the law of obligations, officially incorporating the pre-existing pre-contractual liability principle into Article 311, Paragraph 2 of the BGB.[171]

[168] Art. 242, German civil code (BGB), 1896.
[169]Olivier R., *supra* note 43, p. 79.
[170] Id. p.80.
[171]Ibid.

Article 311 of the German new law of obligation of 2002, which regulated the pre-contractual negotiations, recognizes that the pre-contractual relationship gives rise to an obligation to behave fairly.

The special relationship between negotiating parties gives rise to two types of pre-contractual duties. The first one is the duty to respect the trust of others and the second one is the duty to protect.[172]

The first duty is made of duty to negotiate seriously, that of information and confidentiality. The second obligation is the specialty of German. Because of the trust relationship established during the negotiation, the parties must behave in such a way as not to endanger the physical integrity or property of the other. A first group of situations of pre-contractual obligation of protection tries to ensure that one party to the negotiation does not jeopardize the other's right to life, health, liberty, and property. Also, a party who opens its establishment to the public and do commerce must ensure that its premises are free of any dangers and risks of damage to the other party's legal assets.[173]

b. Switzerland

Pre-contractual negotiation in Switzerland is governed by the principle of freedom of contract. Each party is free to conclude a contract or not. If a negotiating party incurs expenses due to negotiation, he or she does so at his or her own risk because it is only a contract which creates obligations.[174] The pre-contractual phase is governed by the principle by which a party is not liable in case he or she break off negotiation.[175]

However, the Switzerland law also imposes to negotiating parties an obligation to inform. Each negotiating party has an obligation to inform the other of the circumstances likely to influence its decision to conclude the contract or which may lead him or her to conclude it under specific

[172]DE CONINCK B, *Le droit commun de la rupture des négociations précontractuelles, in:FONTAINE MARCEL (édit.), Le processus de formation du contrat, contributions comparatives et interdisciplinaires à l'harmonisation du droit européen*, Bruxelles 2002, p.55.
[173]Olivier R., *supra* note 43, p 83.
[174] Rouiller N., Droit suisse des obligations et Principes du droit européen des contrats, Lausanne, 2007, P. 262.
[175]Id., P. 264.

conditions.[176] This obligation requires one negotiating party to inform the other all relevant information which may influence its decision.

The scope of this obligation presents issues. One can ask him or herself if a negotiating party must inform the other all information related to the upcoming contract. To answer that question, it was provided that the obligation of information does not include information that the other party is supposed to know.[177] The obligation of information includes an obligation not to hide the other negotiating party about information that he or she does not know and even not supposed to know. A party is also prohibited to provide wrong or false information and is required to correct those which may mislead the other negotiating party.[178]

c. France

Before the reform of French civil code of 2016, the pre-contractual negotiation phase was not regulated. With the new French civil code of 2016, the French recognized and regulated the pre-contractual phase due to cases presented before courts resulting to breakdown of pre-contractual negotiations. The 2016 French civil code provided for principles which governs pre-contractual negotiation phase.

The first principle relates to the freedom of pre-contractual negotiations, rooted in the broader concept of contractual liberty. Article 1112 of the French civil code asserts that parties have the freedom to initiate, continue and terminate or breaking off pre-contractual negotiations. The second principle is that of good faith which must govern these negotiations. According to the above mentioned article, negotiations must, obligatorily, adhere to the standard of good faith.[179]

The French legal system includes a mandate for contracts to embody fairness and equity during their formation. It provides that during the contract negotiation phase, the involved parties are obliged to deal in good faith and fair dealing. While the French civil code grants parties the freedom to enter into a contract, it emphasizes the necessity of doing so in good faith.[180]

[176]Id., P. 268.
[177] Rouiller N., supra note 174, P. 268.
[178] Rouiller N., supra note 174, P. 269.
[179]Art. 1112, *Code civil Français*, *supra* note 11.
[180] Art. 1112, *Code civil Français*, *supra* note 11.

Before the reform of French civil code of 2016, the French law only requires good faith in the performance of contracts. However, for the protection of economic interests, the weaker party and for promoting business, the good faith principle was required during pre-contractual negotiation to restrict the freedom of contract principle. The requirement of good faith during pre-contractual negotiations is mandatory and parties cannot contract out of it.[181]

3.3. Pre-contractual negotiation in common law system

In common law system, pre-contractual negotiation is widely regarded as an important feature of contract creation, but it does not always result in legally binding duties between the parties.

It is commonly asserted that the common law system does not acknowledge either the broad concept of *culpa in contrahendo* or the general principle of good faith in the formation of contracts.[182]Within this framework, it is inherent that until a contract is concluded, the parties engaged in negotiations have the freedom to withdraw at any time, without any restrictions. Similarly, there is no prohibition on a party engaging in simultaneous negotiations with another party and subsequently making an independent choice regarding their contractual partner.[183] When entering into negotiations, a party understand that he or she does so with full awareness that she or she does such negotiation at his or her own risks until a contract is officially concluded. He or she is not entitled to make any demands or claims against his or her negotiating partner.[184]

The norms and procedures governing pre-contractual negotiations differ from one jurisdiction to the next. Here are examples of how some common law countries consider pre-contractual negotiation.

[181] Ibid.
[182] BRASSEUR P., et al, *Le processus de formation du contrat : Contributions comparatives et interdisciplinaires à l'harmonisation du droit européen*, (2002), p.67.
[183] Ibid.
[184] Ibid.

3.3.1. United States

In the United States, pre-contractual negotiation is generally governed by the principle of freedom of contract. Parties have the freedom to negotiate and discuss the terms of a potential contract without creating any binding obligations until a formal agreement is reached. During that period, negotiating parties are free to quit negotiation without any effect.[185]

In the United States, specific provisions incorporated the principle of good faith, but solely in the performance of contract. For instance, the UCC, Section 1-203, explicitly states that "Every contract or duty covered by this Act imposes a duty of good faith in its performance and enforcement." Also, Restatement second of Contracts, section 205 provides that every contract imposes upon each party a duty of good faith and fair dealing in its performance and enforcement.[186]

United States' courts have refused to regulate the existence of a duty of good faith in pre-contractual negotiation to the motive that there is no enforceable contract. However, the American law provides for grounds for pre-contractual liabilities. Those are unjust enrichment, misrepresentation or breach of confidence and promissory estoppels occurred during pre-contractual phase.[187]

3.3.2. Australia

In Australia, pre-contractual negotiation is generally considered to be non-binding unless the parties specifically intend to be legally bound during the negotiation stage. This intention to create legal relations can be demonstrated through the use of formal agreements, letters of offer, or other written documentation. Australian law accept that a party should be allowed to withdraw from pre-contractual negotiations without incurring any liability, otherwise the process of free bargaining would be seriously debilitated.[188]

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[185]Farnsworth, E. A., Young, W. A., & Sanger, J. W. (2012). Contracts: Cases and Materials.
[186] See section 205, Restatement second of Contracts (1981).
[187]Tedoradze Irakli, *supra* note 132, p. 68.
[188]Geoffrey Walker and Parker, Statements and Negotiations Prior to Signing a Contract: Are you Bound by Them? Australian Construction Law Newsletter, P. 28.

Taking an example of negotiation of a construction contract, where a builder prepares a tender in normal way, the risk that this may not be accepted rests with him. He will not ordinarily be entitled to recover from the prospective employer the expenses of tendering unless he or she is ultimately awarded the contract.[189]

On the other side, where the tenderer executes work which goes beyond the mere preparation of a tender, in the anticipation common to both parties that he or she will ultimately be awarded the contract, the tenderer may be entitled to restitution of any benefit thus conferred when the contract fails to eventuate. In such cases the builder should be entitled to his or her expenses in performing this preliminary work, although not to any element of profit, provided that the defendant has been enriched by the receipt of some benefits, his or her enrichment has occurred at the expense of the plaintiff and that it is unjust for the defendant to retain the benefit without recompensing the plaintiff.[190]

In Sabemo Ltd vs North Sydney Municipal Council (1977)[191], two parties intended to enter into a contract under which the second party would do work for the first on a project that the later initiated. The second party did work at the request of the first party. The work was preparatory and conducted in anticipation of a contract being entered into. The first party subsequently decided to abandon the project for his or her own reasons irrespective of works done by the second party. The court ordered the first party to restitute the second one all expenses incurred.[192]From that case, it was recognized that there are cases where an obligation to pay will be imposed irrespective that the parties to a transaction, actual or proposed, did not intend, expressly or impliedly, that such an obligation should arise only for the fact that the one party was enriched to the detriment of the other.

[189] Ibid.
[190] Ibid.
[191]Sabemo Ltd v North Sydney Municipal Council (1977).
[192]Ibid.

In Australia, certain pre-contractual conduct such as mistake, misrepresentation, unconscionability, good faith estoppel, *quantum meruit* give rise to obligation of restitution and damages for the victim.[193]

3.3.3. England and Wales

It was affirmed that, in Walford v. Miles case, in English law there is not duty to negotiate in good faith. The house of Lords clearly precised that English law does not recognize the obligation to negotiate in good faith.[194] This happened when the appellant argued that there should be the duty to continue negotiation in good faith.

In the Walford v. Miles case parties interred into negotiation where Miles wanted to sell his photographic processing business to Walford. During negotiation, they concluded an agreement that the Miles will not inter into any negotiation with third party while Walford was negotiating a loan from the bank. But meanwhile, the Miles sold the business to third party. Walford brought the case to court arguing that Miles breached lock-out agreement. The court concluded that "*a contract not to negotiate with third party for an unspecified time is unenforceable for a lack of certainty and it is not possible to make good that uncertainty by implying into the agreement a duty to conduct pre-contractual negotiations in good faith. An agreement to negotiate in good faith is itself too uncertain to be enforceable and would be repugnant to the adversarial position of the parties during negotiation.*[195]

It can be viewed that English law has not accepted the pre-contractual liability and the notion of negotiation in good faith implied from the statement of Lord Ackner unlike the Civil Law system countries i.e. Germany, Italy, or France which are accepted the duty to negotiation in good faith in preliminary agreement as prescribed such principle as the general law.[196]

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[193] Martin Luitingh, expanding contractors' claims: the impact of unjust enrichment on contract, Australian construction law newsletter, 2002 accessed at Expanding Contractors' Claims - Martin Luitingh Barrister [1st July 2023].

[194]Walford v. Miles [1992] 2 A.C. 128.

[195] Ibid.

[196]Karel Osiris Coffi DOGUE, *jalons pour un cadre de référence OHADA en droit des contrats*, Thèse de doctorat, faculté de droit, Université de Montréal, (2013), p. 285; MR. ITHIWAT METHATHAM, *supra* note 29, P.53.

In English, the principle is that, when they are negotiations, each party is entitled to withdraw from negotiation at any time and for any reason without waiting that there is proper reason to withdraw.

3.4. Comparing interests in pre-contractual phase

Most common-law systems regard freedom to terminate negotiations as a fundamental right, essential for promoting economic growth, because it provides the assurance that a party is not at risk of pre-contractual liability.[197] The rationale behind the common-law approach is that if liability is readily imposed during the pre-contractual phase it will threaten economic growth, because parties are less likely to enter into contractual negotiations for fear of legal sanction and as a result less commercial transactions will be entered into.[198]

However, liability for reliance losses in certain circumstances may be appropriate and even necessary to promote efficient transactions. Economic studies have revealed that the absence of any form of pre-contractual liability can discourage parties from entering into negotiations or investing therein, for fear that their sunk costs will be wasted if the other party can break off negotiations at any stage and for any reason without incurring liability. Early investment in negotiations (pre-contractual reliance) can improve both the efficiency of the transaction and increase its profitability for both parties.[199]This in and of itself does not justify the intervention of the law to impose legal liability so as to protect pre-contractual reliance, but it does indicate that regulating the pre-contractual phase in a manner that promotes commerce rather than hinders it, requires the development of a very fine balance between freedom of negotiation and the imposition of liability to protect the interests of parties to negotiations.[200]

[197]Tedoradze Irakli, *supra* note 132, P. 62, 63 & 67; Farnsworth E. A.: Pre-contractual Liability and Preliminary Agreements: Fair Dealing and Failed Negotiations, vol 87 Colum. L. Rev.217, (1987), p. 290.
[198] Schwartz A.& Scott R.E: *Precontractual Liability and Preliminary Agreements* (2007), P 120.
[199] MacFarlane: Pre-Contractual Liability in Contract Law (2010), pp. 99-100.
[200]Tedoradze Irakli, *supra* note 132, p. 67.

3.5. Liability arising from pre-contractual negotiation

The pre-contractual liability in which the party are liable is considered from the period incurred before the formation of contract. Generally, the principle of freedom of negotiation applies during contract negotiation. Parties are free to negotiate the contract and cannot incur any liability for not concluding the contract.[201]This means that party is free to say no and to break off negotiation at any time. In the Hong Kong (A.G.) v. Humphreys Estate (1986)[202], the case opposing the government of Hong Kong and Humphreys Estate (HKL), the Judicial Committee of the Privy Council held that the Humphreys Estate who was the developer was entitled to withdraw from negotiation. The case arose from negotiation between mentioned parties where the Hong Kong Government reached an agreement with a developer concerning the exchange of land and buildings. The government would acquire 83 flats, forming part of the Tregunter property belonging to HKL, and in exchange HKL would take from the government a Crown lease of property known as Queen's Gardens and be granted the right to develop Queen's Gardens and certain adjoining property already held by HKL.

An agreement was reached subject to contract later. Steps were taken and money expended by the government on the basis of the transaction. The contract was not concluded and the developer withdrew from negotiations. The Hong Kong government contended that both parties were estopped from refusing to give effect to the agreement in principle. However, the court conclude that the defendant has right to withdraw from negotiation.[203]

The freedom of negotiation principle is balanced with the principle of good faith. The good faith principle prohibits parties to negotiate or breaking off negotiation in bad faith. It is bad faith to inter or continue negotiation not intending to reach the agreement and insisting on contract terms clearly unreasonable that they could not have been advanced with any expectation of acceptance.[204]

[201]Principle of pre-contractual liability, Trans-Lex Principle ,available at https://www.trans-lex.org/939000/_/principle-of-pre-contractual-liability/ accessed on 12 August 2023.
[202]Hong Kong (A.G.) v. Humphreys Estate (Queen's Gardens) Ltd., (1986), p.125 .
[203] Ibid.
[204] Ibid

That liability is divided into two types which are the liability arising from negotiation process and that arising from preliminary agreement.[205]

With regards to the negotiation phase, both the Civil and Common Law Systems take it as crucial in systems for concluding contract terms between parties. This includes making promises to contract or agreeing to reach an agreement. During negotiation, parties cannot seek damages or legal remedies if the agreement fails to materialize because a formal contract hasn't been formed yet.[206]

In the business world, the preliminary agreement marks the end of negotiations, requiring parties to commit to the final engagement immediately. Two types of preliminary agreements exist: one streamlines the conclusion of the final contract, particularly in cases where complex business operations necessitate separating critical issues from numerous other contractual aspects, while the other brings satisfaction to parties through mutual agreement or promise to agree. Therefore, negotiation is highly significant in business operations, and pre-contractual liability requires the use of documents or contracts to support and formalize the conclusions reached after the negotiation phase.[207]

Civil law systems and common-law systems differ vastly in their approach of regulating the pre-contractual phase, particularly insofar as it concerns freedom to break off negotiations and the imposition of a duty of good faith; this impacts whether there will be liability and if so the basis for such liability.

In this section, we are going to look the basis of pre-contractual liability and how the two system, civil law and common law systems, regulate pre-contractual liability.

[205]ITHIWAT M., *supra* note 29, P.13.
[206] Ibid.
[207] Id., P.14.

3.5.1. Basis of pre-contractual liability

During pre-contractual phase, a party may behave in a way that causes damage to the other. Generally, different legal systems have regulated bad behavior in pre-contractual phase as source of liability and they were supported by scholars. The issue is to know the basis of such liability.

Two trends appeared to explain the basis of pre-contractual liability. Some scholars and legal systems consider pre-contractual liability as contractual (arising from a contract) while others consider it to be tortious (arising from tort or delict).[208]However, there are other who consider pre-contractual liabilities as mixed liability. According to them, the pre-contractual liabilities may arise from a contract and from tort at the same time.[209]

In view of scholars and legal systems that consider pre-contractual liability as part of tort law, they say that pre-contractual obligations are based on principles of negligence or other tortious actions. The argument is that during the negotiation phase, parties owe each other a duty of care not to cause economic loss or harm through misleading representations, fraudulent acts or other wrongful conduct. If one party negligently or intentionally misrepresents facts during negotiations, causing the other party to suffer economic losses, the injured party can seek remedies under tort law.[210]

On the other hand, those who consider pre-contractual liability to be of contractual nature say that parties involved in pre-contractual negotiations owe each other certain duties based on the principle of good faith and fair dealing. They argue that even before a formal contract is formed, parties have an obligation to negotiate in good faith, to be honest in their communications, and to refrain from engaging in conduct that would undermine the bargaining process or undermine the reliance of the other party. If a party breaches those duties, he or she will be liable.[211]

[208] Id., P.18.
[209]ANIL ÖZTÜRK, *supra* note 164, P.75.
[210] Guillemard S., *surpa note 136*, P. 175 & 182.
[211] Ibid.

In the following party, we are going to analyze how those systems and scholars found the basis of pre-contractual liability.

3.5.1.1. A contract as source of pre-contractual liability

The time leading up to the finalization of a contract involves bilateral negotiations and commitments. Parties are bound to address the legal aspect of civil responsibility resulting from any violations during the negotiation phase. The concept of contractual responsibility or *culpa in contrahendo* aims to protect trust, ensure stability in transactions and balance conflicting interests based on the principle of good faith prior to the contract.[212] As the legal system governing the pre-contractual phase has evolved, it has led to the development of numerous binding agreements, known as "semi contracts," which closely resemble actual contracts in the legal sense.[213]

In determining pre-contractual liability as contractual, some suggest that the liability relates to the contract that the negotiations are aiming to establish, whereas others suggest that the liability relates to the breach of a contract separate from the one negotiated.[214]

The ones who consider pre-contractual liability to relate to the envisaged contract have two standpoints related to whether the envisaged contract is invalid or valid. The first standpoint, which was developed by the jurist Jhering in 1861[215]aims to remedy the one who suffered a loss from his or her counterpart due to his or her misbehavior during contract negotiation and resulted in invalidity of a contract. According to Jhering, the pre-contractual liability is based on non-compliance with the duty to negotiate in good faith the envisaged contract even though it arises before the formation of a contract. Therefore, the responsibility for *culpa in contrahendo* depends on the potential contract being invalid. It is only when the envisaged contract is deemed invalid that the obligation to act in good faith can be replaced by the duty to provide compensation.[216]

[212]Ayşe Elif YILDIRIM, supra note 2, P.1.
[213]Françoise LABARTHE, *La notion de document contractuel*, Paris, L.G.D.J., 1994, p.130.
[214] ANIL ÖZTÜRK, *supra* note 164, p.34.
[215]Luiz Fernando KUYVEN, *La responsabilité précontractuelle dans le commerce international : Fondement et règles applicables dans une perspective d'harmonisation* (2010), P.99.
[216]ANIL ÖZTÜRK, *supra* note 164, p.34-35.

The other standpoint is that in case a contract is valid. According to that standpoint, the parties are liable for violation of duty of care undertaken prior to formation of the contract after the formation of a contract.[217]

The Jurist Jhering found that the development of trade relations has led to produce type of legal issues that laws did not regulated. Therefore, it is necessary to protect a party who acted in good faith in the negotiation process and trusted in his or her partner. Therefore, according to him, the pre-contractual liability arises from a contract.[218]

According to the ones who suggest that pre-contractual liability constitute a liability arising from a stand-alone contract, independent from the envisaged contract known as "independent Contract Theory", separate the envisaged contract from the duty of care required during negotiation.[219] They argue that in negotiation, parties form an implied contract where they undertake the duty of care and to inform reciprocally, which allow the suffered party to claim damage from his or her counterpart.[220]

The Thai legal professor Paijit Punyapan, viewed that if the formation of contract has entered into force, then the liability should be based on the contract law (contractual liability).[221]

Even though the pre-contractual liability has occurred before the formation of contract, the obligation of party during the negotiation also has already occurred according to the general law because the party has breached the good faith and fair dealing principle. The offer of party can be liable to the offeror if breaking off the negotiation without a valid reason or unjustified withdraw and causing the other party which has occurred the advance expense i.e. preparation costs in order response to the offeror, the acceptance should be able to claim the other party for the expense incurred.[222]

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[217]Id. P. 35
[218]Valérie Blanc, La responsabilité précontractuelle, *perspectives Québécoise et internationale*, Mémoire présenté à la Faculté des études supérieures de l'université de Montréal, 2008. p 7.
[219]ANIL ÖZTÜRK, *supra* note 164, p.36.
[220] Ibid.
[221] ITHIWAT M., *supra* note 29, P.12.
[222]Id., P.19.

The Supreme Court of Estonian concluded that the breach of duties arising from pre-contractual negotiation entitles the parties to the same remedies as the breach of any contractual obligation. Consequently, the liability for violating pre-contractual duties relies on identical principles and provisions as the liability for violating contractual obligations. It is essential to emphasize that pre-contractual liability, like contractual liability, is a form of strict liability, rather than negligence, which is characteristic of general tort liability.[223]

3.5.1.2. Tort as source of pre-contractual liability

In the theory, the pre-contractual liability is still argued whether this kind of obligation should be categorized as tortious liability or contractual. Some lawyers said that the pre-contractual liability cannot be categorized under the contract law as the contractual liability because the obligation has occurred before the contract formation and the preliminary obligation has sourced from the good faith principle, therefore, it should be out of the scope in contract law.[224] In this case, pre-contractual liability is nothing more than a specific form of a general duty of care whose breach leads to a liability under tort law. Therefore, the pre-contractual liability should be characterized as tort liability.

The supporters of this idea say that before the formation of a contract and in case no contract has been concluded, contractual liability cannot be established. In that case, the only source to recover expenses and losses suffered must be tort liability.[225]

Professor Geoffrey Samuel is with opinion that those who are in negotiation are liable based on the legal ground of good faith principle and tort principle.[226] Grotius said that pre-contractual liability find its basis on tort and it has no relationship with a contract.[227]

[223]Martin Käerdi, supra note 148, p. 211.
[224] ITHIWAT M., *supra* note 29, P.18.
[225]ANIL ÖZTÜRK, *The conceptual analysis of 'culpa in contrahendo': a critical study in European private international law*, Thesis (2017), p.30.
[226]Geoffrey Samuel, Law of Obligations and Legal Remedies, 2nd Ed, (2000).
[227] Olivier R., *supra* note 43, 73-74.

The European Court of Justice ("ECJ"), in theC-334/00 *Tacconi v Wagner* (2002) case[228], decided on the pre-contractual duties. ECJ, in that case, decided that the pre-contractual liability is a non-contractual obligation that arises out of tort, delict or quasi-delict.

3.5.1.3. Mixed liability (theory)

Some scholars and legal systems consider pre-contractual liability as mixed, recognized as mixed theory, which means the combination of both tort and contract law principles. This perspective enable parties to pursue claims based on tort for particular forms of misconduct that occur before entering into a contract, as it also acknowledges distinct contractual obligations and remedies that arise during the negotiation process.[229]

The Mixed Theories take a nuanced approach to define *culpa in contrahendo*, avoiding strict categorization as either a tort or a contractual matter. They argue that *culpa in contrahendo* contains elements from both contractual and extra-contractual in varying rates, making a definitive classification for tort or contractual liability impossible.[230] They contend that the overall legal characterization of *culpa in contrahendo* is unnecessary since its main purpose is to designate applicable provisions, and this can be achieved through other means. Instead, the Mixed Theories propose two alternatives: one involves individual characterization of each modality of *culpa in contrahendo* and the other advocates for a case-by-case approach to its characterization.[231]

To sum up, the legal status of pre-contractual liability in each country are different depending on the historical and legal ground. This solely depends on each country to be implicated and applied the law with the pre-contractual liability case by case basis. Even though many countries consider pre-contractual liability to be either of contractual or tortious basis, there are also some countries which consider it to be as of special source such as German which has, through case law, developed other basis of pre-contractual liability where it concluded that it is neither tort nor contractual responsibility, instead it has special and independent status since 2002 amendments on BGB.[232]

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[228]Judgment of 17 September 2002, Tacconi, Case C-334/00,ECLI:EU:C:2002:499.
[229]ITHIWAT M., *supra* note 29, P.12.
[230]ANIL ÖZTÜRK, The conceptual analysis of 'culpa in contrahendo': a critical study in European private international law, (2017), P.38.
[231] Ibid.
[232]The German has provided for the duty to perform in good faith in its civil code (BGB), Art 242, which was extend to pre-contractual negotiation. The same conclusion can undisputedly be reached for France and Italy, as they have

3.5.2. Liability for pre-contractual negotiation in civil law countries

Many of civil law countries' rules provide that a party is free to negotiate and is not liable for failure to reach an agreement. However, a party who has negotiated or broken off negotiation contrary to good faith and fair dealing is liable for the losses caused to the other party. It is contrary to good faith and fair dealing, in particular, for a party to enter into or continue negotiations if no real intention of reaching an agreement with the other party was there.[233] If a party break of negotiation in such circumstances, will incur liability.

It is also contrary to good faith, any fraudulent misrepresentation. It can be classified among fraudulent misrepresentation, someone's fraudulent behaviors who starts negotiation to prevent other negotiating party to conduct other negotiation while knowing that he or she does not have intention to conclude a contract. A person who begins negotiation, must have a serious intention to arrive at its purpose.[234]

A party who continues negotiation knowing that he or she will not contract, or who does not inform his or her negotiating partner of the change of mind can be reprehensible in the same way as taking the initiative to enter into negotiations with a competitor for the sole purpose of preventing this competitor from carrying out another business elsewhere.[235]Pre-contractual liability is classified differently in different civil law jurisdictions. We are going to look how some countries of civil law system regulate that liability.

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also codified the pre-contractual duty of good faith in their respective civil code, See also Michel PÉDAMON, *Le contraten droit allemand*, 2e éd., Paris, L.G.D.J., 2004, p. 34.

[233] Art. 2.1.15, *Unidroit principles*, *supra* note 45; Art. 2:301, *principles of European contract law*, *supra* note 45.

[234] Art. 2.1.15, *Unidroit principles*, supra note 45.

[235] Olivier R., *supra* note 43, p 89.

3.5.2.1. France

In French law, the freedom of contract is provided as a principle during contract formation process.[236]Every person is free to contract or not to contract, to choose his or her co-contractor and to determine the content and form of the contract within the limits set by law except rules of public order which must be respected. Each party to the pre-contractual negotiations is free to conclude or not to conclude the envisaged contract and the breaking of negotiations is not punishable. However, the same law provides that a contract must be negotiated, concluded and executed in good faith.[237]The good faith required during negotiation period, obliges negotiating party not to behave in a way which may damage the partner. The negotiating party is prohibited from initiating negotiation while he or she knows that negotiation will not arrive at its objective. He or she is also prohibited to break of negotiation arbitrary, etc.

The French Court of Appeal of Riom (10.6.1992 RJDA 1992, No 893, p. 732) cited that [238]"*it is still true that when the negotiation has reached a length and level of intensity such that one party may legitimately believe that the other is about to conclude the contract and in readiness encourages him or her to incur certain expenses, breaking off such negotiations is wrong, causes loss and gives rise to reparation"*. The court held liable Rover-France and condemn him for just over 3 million FF for breaking off negotiations for a distribution agreement.

The basis for such liability were:
- the advanced stage of negotiations;
- the work already undertaken;
- the suddenness of withdrawal from the negotiating process.[239]

[236] Art. 1102, *code civil Français*, *supra* note 11.
[237] Id. Art. 1104.
[238] Paula Giliker, *supra* note 3, p.6.
[239]Kottenhagen R.J.P, *supra* note 87, P. 13.

In *arrêt Manoukian, la cour de cassation*[240] held liable shareholders of a company to damages due to arbitrary breaking off of negotiation. In that case, the company Alain Manoukian had entered into negotiations with the shareholders of another company with a view to acquiring the shares making up the capital of this company. After six months of negotiations, several meetings and exchanges of letters, a "draft agreement" had been established. However, the shareholders of the company eventually sold their shares to a third party company (*Les Complices*).[241]

The company Manoukian sued the selling shareholders and *Les Complices* for liability in order to obtain compensation for the damage resulting from the abusive termination of negotiation. The court of appeal of Paris limited liability to shareholder who sold their shares object of negotiation and only to the expenses of negotiation and preparatory studies. The court of appeal rejected liability of *les Complices* on argument that mere fact of contracting, knowingly, with a person who has entered into negotiations with a third party does not constitute, in itself, a fault likely to engage the responsibility of its author and unless it is dictated by the intention to harm or is accompanied by fraudulent maneuvers. The decision was appealed against but the *cour de cassation* retained the decision of the court of appeal.[242]

The French civil code provides that a breach of pre-contractual duty to inform is sanctioned to damages.[243] It may also lead to annulment of the contract if it can be shown that the other party's consent was vitiated by the wrongful failure to inform.[244]This means that a party who has negotiated for a long with the other and who later discover a decisive information hold by the that other party but not disclosed to him or her, may refuse to conclude a contract and claim for damages resulting from loss suffered due to non-complying with obligation of information.

This is explained by the case *Pourvoi n° 18-25.474 du 10 février 2021* of *la Cour de cassation*[245] where the court held a franchisor liable to damages due to non-compliance by the franchisor of pre-contractual obligation of obligation to provide information to the franchisee.

[240] Arrêt Manoukian, Cour de cassation, 26 novembre 2003.
[241]Ibid.
[242]Ibid.
[243]Art. 1112-1, *Code civil Français*, *supra* note 11.
[244]Ibid.
[245] Pourvoi n° 18-25.474 du 10 février 2021 de la cour de cassation.

The court concluded that pre-contractual obligation to provide information, include the obligation to provide non mistaken or non-erroneous information. In this case, although the franchisor provided information but that information was mistaken or erroneous and prevented the franchisee to realize his or her objectives. franchisee sued the franchisor for providing information which are erroneous and not realistic which lead the franchisee to be liquidated and the court settled the case in his or her favor.[246]

It is also provided that a person who without permission makes use of or discloses confidential information obtained in the course of pre-contractual negotiations is liable under the conditions provided for by provisions related pre-contractual liability.[247]

French courts accept that negotiation has a period of risk. However, they acknowledge the need for intervention at a certain stage to establish specific obligations of proper conduct, such as fairness and good faith, upon the parties involved. Hence, there is a clear distinction between the initial phase of risk in negotiations and the subsequent stage where the progress of negotiations has reached a point where a relationship of trust exists between the parties.[248]

The criterion of good faith has been incorporated into the aims of pre-contractual relations in French case laws. In case law *Civ. 3ème, 19 janvier 2022, pourvoi n° 20-13.951* of *cour de cassation de Paris*,[249] the court condemned the buyer to pay damages to the seller for breach of duty of good faith and loyalty during negotiation. In that case, a promise to sale occupied immovable was made. The price for sale in case immovable is occupied differs with that of non-occupied. The promise to sale was made at the time the immovable were occupied and on conditions that the sale contract will be made in the same conditions. Before the conclusion of the contract of sale, an agreement passed between the lessee and the buyer to leave the immovable. The seller, at the time of sale, was not informed of the agreement between the buyer and the lessee to leave the immovable and the sale contract was concluded as if the immovable is occupied and at the price of occupied one.

[246]Ibid.
[247] Art. 1112-2, *Code civil Français*, supra note 11.
[248] Paula Giliker, *supra* note 3, p.7.
[249]Pourvoi n° 20-13.951 de la cour de cassation de Paris, Civ. 3ème, 19 janvier 2022.

After realizing the bad faith of the buyer, the seller bought a case to court and the court concluded that there was a breach of duty of good faith and loyalty resulting from the fact that the buyer did not inform the seller of the non-occupancy of immovable so that he or she can sale the immovable at the price of non-occupied one. The buyer was condemned to pay damaged due to non-complying with the duty of good faith.[250]

3.5.2.2. Germany

According to article 311 of German law of obligation, the pre-contractual liability arises as a result of entry into contractual negotiations, preparations undertaken with a view to creating a contractual relationship if one party permits the other party to affect his or her rights, his or her legally protected interests or other interests or entrusts them to that party or in similar business contacts.[251]

The mere act of engaging into discussions or even making preparations for the conclusion of a contract generates a distinctive legal relationship between those who participate in it, which create obligations and the willful breach of which gives rise to liability for those involved.[252]

In summary, German law expressly preserves a regime of liability based on the good faith that the parties in negotiation owe each other by virtue of the special legal relationship which is established from the preparations with a view to concluding a contract.

In the case of "BGH, Urteil v. 22.11.2018 - III ZR 51/18,[253]" the German Federal Court of Justice (Bundesgerichtshof, BGH) addressed pre-contractual obligations and the duty of information.
In this case, the plaintiff and the defendant were negotiating a contract for the sale of shares in a company. During the negotiations, the defendant failed to disclose material information regarding the financial situation of the company. The plaintiff argued that the defendant's failure to provide this information constituted a breach of the pre-contractual duty of information.[254]

[250] Ibid.
[251] Art. 311, German law of obligation, 2002.
[252] Olivier R., *supra* note 43, p 81.
[253] BGH, Urteil v. 22.11.2018 - III ZR 51/18
[254] Ibid.

The German Federal Court of Justice (BGH) held that the duty of information arises during contract negotiations when one party has information that is relevant to the other party's decision-making process. The court emphasized that parties engaged in negotiations have an obligation to disclose material facts that could influence the decision to enter into the contract.

In this specific case, the court found that the defendant had failed to fulfill its pre-contractual duty of information by not disclosing the relevant financial information about the company. Consequently, the court ruled in favor of the plaintiff and awarded damages for the defendant's breach of the duty of information.[255]

3.5.2.3. Switzerland

Although negotiation phase is governed by the principle of freedom of negotiation, in some cases, a negotiating party may be held liable for pre-contractual behaviors. This is in case one party assures the other that the contract will be concluded.[256] Here, there is pre-contractual obligation. The liability also exists in case a party indicates to the other that the contract will be concluded if the latter fulfills a specific requirement.[257] By this condition, a party may incur expenses in order to meet requirements. If negotiation is broken off, the party may be liable.

The liability arises also in case a party negotiate contrary to good faith.[258] The Switzerland case law provides that all negations must be conducted in accordance to good faith. To behave in good faith requires all negotiating parties to negotiate seriously and in accordance with its true intentions during negotiation.[259] This duty implies not entering into or pursuing negotiations with the intention of not concluding the contract; it also implies not conducting negotiation in a way as to make people believe that their will to conclude is stronger than in reality.[260]

[255] Ibid.
[256] Rouiller N., *supra* note 174, P. 264.
[257] Id., P. 264.
[258] Id., P. 266-267.
[259] Ibid.
[260] Ibid.

In case "Swiss Federal Supreme Court, Decision 4A_534/2016 of 19 April 2017",[261] the court addressed the duty of good faith and fair dealing in pre-contractual negotiations.
The case involved a dispute between two parties engaged in negotiations for the sale of a company. The plaintiff argued that the defendant had breached its pre-contractual duty of good faith by abruptly terminating the negotiations without reasonable cause, even though the parties had made substantial progress towards reaching an agreement.[262]The Swiss Federal Supreme Court affirmed the importance of good faith in pre-contractual negotiations. It stated that during the negotiation phase, parties are expected to act honestly, fairly, and in accordance with the principle of good faith. They should refrain from engaging in conduct that would harm the legitimate interests of the other party.

In this specific case, the court found that the defendant's abrupt termination of the negotiations without reasonable cause constituted a violation of the pre-contractual duty of good faith. As a result, the court held the defendant liable for damages caused by its breach of the duty of good faith.[263]

The non-compliance with obligation to inform may lead to conclusion of a contract with defect and leads to annulment of a contract or, in case detected before the end of negotiation, be a source of liability for damages to the fact that the negotiation period generated expenses or caused the victim to lost alternative opportunities.[264]

3.5.3. Liability arising from pre-contractual negotiation in common law system

Pre-contractual liability has until recently been an unfamiliar concept in common law systems and most of these systems therefore neither have a single source of pre-contractual liability, nor have they developed a special set of rules that are generally applicable to the pre-contractual phase.[265]

[261] Decision 4A_534/2016 of 19 April 2017, Swiss Federal Supreme Court, p. 228.
[262] Ibid.
[263] Ibid.
[264]Rouiller N., *supra* note 174, pp. 270-271.
[265]Brittany Lily Evelyn Kleinhans, Pre-Contractual Agreements, 2020, p.6.

Pre-contractual liability in this context refers specifically to non-contractual liability imposed for conduct that causes loss in the course of contractual negotiations prior to contract formation.[266]

Pre-contractual expenses can take on two different forms. Firstly, a party may incur costs by performing work, rendering services or delivering goods.[267] Such performance or preparation usually takes place when negotiations give rise to an expectation that a contract will materialize. Secondly, a negotiating party may expend time and resources in the course of negotiations, often referred to as "investment costs"[268] that are necessary to evaluate the other party's "commercial abilities and assess the profitability and feasibility of the transaction".[269] Such expenses are incurred in reliance that negotiations will result in the conclusion of a contract. If negotiations are broken off such expenditure will be wasted.

The problem related to the allocation of risks and liabilities in case of breaking down negotiation in result of blameworthy conduct of one of the parties arise. The common law system has a different approach with civil law system.

Generally, common law system does not require good faith during pre-contractual negotiation. The common law system does not recognize the concept of *culpa in contrahendo* and fight against liability resulting from pre-contractual phase. Each negotiating party must fight for his or her interests and nothing prevent him or her to carry at the same time two or more negotiations to look which will favor him or her. A negotiating party must negotiate at his or her own risks because during negotiation, a party may at any time and at any risk break of negotiation without incurring liability.[270] This is explained by the case British Steel Corpn v Cleveland Bridge and Engineering Co Ltd (British Steel), in which the claimant claimed compensation for goods supplied during negotiation and no contract materializes latter. In this case, the judge concluded that: [271]"*however*

[266]Ibid.
[267]J Dietrich, Classifying Precontractual Liability: A Comparative Analysis" (2001) 21 Legal Stud, p, 153.
[268]Schwartz & Scott 2007 Harv L Rev 663-664, 676-677.
[269] Creed JM, *Integrating Preliminary Agreements into the Interference Torts*, (2010), Columbia Law Review, vol. 110, p. 1270.
[270] FARNSWORTH E. ALLAN, Pre-contractual Liability and Preliminary Agreements: Fair Dealing and Failed Negotiations, vol 87 Colum. L. Rev.217, 1987, p. 221.
[271]Paula Giliker, supra note 3, p.2.

much the parties expect a contract between them to materialise, both enter negotiations expressly … on terms that each party is free to withdraw from the negotiations at any time … any cost incurred by either party in preparation for the intended contract will be incurred at his own risk."

The concept of good faith in common law applies during contract execution and it is limited there. The obligation to act in good faith during pre-contractual negotiation applies on limited cases where a contract, due to its nature, require an obligation of information, for example insurance.[272]

However, in some cases, common law system may arrive at the same results as that imposed by good faith in civil law during pre-contractual negotiation, due to particular laws.[273] Certain cases may be at the basis of imposing pre-contractual liability even though there is no requirement of negotiating in good faith in common law. Those are promissory estoppel, unjust enrichment and misrepresentation or breach of confidence. In the following part, we are going to look how some countries of common law jurisdiction considers pre-contractual negotiations.

3.5.3.1.USA

Under the doctrine of promissory estoppels recognized in USA, only negative interests can be recovered, damages based on loss of profits is considered inappropriate because estoppel is not the equivalent of breach of contract.[274]

The basic concept of estoppel is that a person is precluded from retracting a statement upon which another has relied. As definition, estoppel can be defined in this way: where one person (the representor) has made a representation to another person (the representee) in words or by act and conduct, or (being under a duty to the representee to speak or act) by silence or inaction, with the intention (actual or presumptive), and with the result, of inducing the representee on the faith of such representation to alter his position to his detriment, the representor, in any litigation which may afterwards take the place between him and the representee, is estopped, as against the

[272] Olivier R., *supra* note 43, p 85.
[273] Id., p 84.
[274] Tedoradze Irakli, *supra* note 132, p. 69.

representee, from making or attempting to establish by evidence, any averment substantially at variance with his former representation, if the representee at the proper time and, in the proper manner, objects thereto.[275]

The court of Appeal, in the Crabb v Arun case,[276] held that the plaintiff (Crubb) has right to access point of his premise under the doctrine of proprietary estoppel. In this case, the plaintiff bought the premise with promise that he will be granted access to a certain point. After buying, he need to divide his property into 2 portion so that it can serve two different use. At the same time, he realizes that the access point granted will not serve that purpose and he need another access point and that was an issue before court. His argument based on assurance that he had by the Council that he would have access at point B from the Council's land and was content to rely on that assurance. The defendant argued that since there is no consideration payed for access point, the plaintiff has no right to additional access point. However, the court concluded that, under proprietary estoppel, he has right to additional access point.

Promissory estoppel is the prohibition of contradicting oneself to the detriment of others. It prohibits taking advantage of one's own contradictions which functions as a blocking mechanism like an end of inadmissibility.[277]

The court argued that one negotiating party cannot without liability breach a promise made during negotiations, if the other party relied on that promise.[278] Leading case is Hofmann v. Red Owl Store (133 N.W. 2d 267 (Wis. 1965))[279] where the court held liable a supermarket which broken down negotiation with a claimant promised to sell a franchise and incurred expenses. Also in the case Goodman et al. v. Dicker et al. the United States Court of Appeals - District of Columbia held that even no contract was concluded, Dicker based on Goodman's statements and behavior and take action in reliance on Goodman's representations. Therefore, Goodman was estopped from denying the existence of a contract.[280] The court awarded damages to Dicker.

[275] Spencer Bower on the law relating to estoppel by representation, 3rd ed., by turner, London (1977), p. 9.
[276] Crabb v Arun District Council 1975, p. 187-188.
[277] Olivier R., *supra* note 43, p 86.
[278] Kottenhagen R.J.P., *supra* note 87, P.6.
[279] Hofmann v. Red Owl Store, Inc., 133 N.W. 2d 267 (Wis. 1965).
[280] Goodman et al. v. Dicker et al.(1948).

Promissory estoppel is largely recognized in USA even at pre-contractual level and it is a source of action for a person victim of acts in contradiction with promissory estoppel.[281]

A famous case of Drennan v. Star Panning Co (202)[282] helps to better understand the effects in the matter. In that case, a party makes a call for tenders to a subcontractor for the construction of a site. It receives an offer from the latter which is the lowest and which it takes into account in its calculations in order to submit its own offer to the project owner. After acceptance by the project owner, the contractor goes to the subcontractor to confirm the acceptance of his offer. The subcontractor replied that he had made a calculation error and that he or she could not carry out this offer, which he or she claimed to have had the right to revoke since it had not yet been accepted. The Court ruled that this subcontractor should have expected that its offer, provided it was actually the lowest would be used by the contractor in its relations with its co-contractor.

The California Supreme Court emphasized that the subcontractor "*induced action of a definite and substantial character on the part of the promisee*", also had an interest in the contractor accepting his offer in order to be able to - even submit an interesting offer to his or her contractor and that, moreover, the contractor being himself bound by his offer, it is fair that he, at least, has the opportunity to accept the subcontractor's offer after the general contract has been awarded to them. The court ruled that the sub-contractor has to accept the contract in order to avoid promissory estoppel.[283]

Another source of pre-contractual liability in USA in unjust enrichment.[284] Unjust enrichment is a legal principle that prevents one party from benefiting at the expense of another when there is no legal justification for that benefit. A party in negotiation is prohibited to enrich himself or herself unfairly at the expense of the other.[285] Whoever, during negotiation, benefits from goods and services may be obliged to compensate the other party, even if the contract is not concluded.[286] It was judged on this basis that lost preparatory expenses should be compensated.

[281] Olivier R., *supra* note 43, p 88.
[282]Drennan v. Star Panning Co (202) (1958).
[283] Ibid.
[284]Tedoradze Irakli, *supra* note 132, P.68.
[285]Luiz Fernando KUYVEN, *supra* note 215, P. 394.
[286] BRASSEURP. et al., *supra* note 182, p.74.

Pre-contractual liability arising from unjust enrichment occurs if one party incurs expenses or provides services with the expectation of entering into a contract, but the contract is not ultimately formed.

In order to prevent unjust enrichment, laws of common law system provide for liability where the extent of the remedy extends to the benefits received by the party who breaks off the negotiations.[287]

These are often benefits related to services rendered or ideas revealed during negotiations. An example is that of an architect or a construction company that provides services to the project owner during the planning phase and finally see the contract awarded to a third party. It was judged, in this case, that the lost preparatory expenses should be compensated. The action is not based on contractual liability, since there is no contract, but on the specific basis of the law of restitution which requires the establishment of unjust enrichment.[288]

In Precision Testing Laboratories v. Kenyon Corp., 644 F. Supp. 1327 (S.D.N.Y. 1986)**,**[289]Ellis sued Kenyon claiming unjust enrichment. That case arose from contract negotiation conducted between Ellis and Kenyon to develop emission systems for imported automobiles. During negotiation, Ellis provided substantial labor and technical work in bringing Kenyon's test carto certification level. Meanwhile, the negotiation fell through without conclusion of a contract. The US District Court for the Southern District of New York ruled in favor of Ellis because his services were designed to benefit Kenyon and the issuance of a certificate of conformity by the Environmental Protection Administration was clearly such a benefit. The court concluded that even though Ellis got experience from that work, but it cannot be compensated to the length of time he and his technicians spent working toward bringing Kenyon's car to certification level.

[287] Olivier R., *supra* note 43, p 88.
[288] Id., p 89.
[289]Precision Testing Laboratories v. Kenyon Corp., 644 F. Supp. 1327 (S.D.N.Y. 1986).

In general, unjust enrichment claims are based on the theory that it would be unfair for one party to retain a benefit obtained from another without compensating that party.[290] However, the specific requirements for a successful unjust enrichment claim can vary among jurisdictions.

To recover damages based on unjust enrichment, a claimant typically needs to prove the following elements:

1. The defendant received a benefit;
2. The claimant conferred the benefit upon the defendant;
3. The defendant's retention of the benefit would be unjust; and
4. The claimant did not provide the benefit as a gift or donation.[291]

The last ground for pre-contractual liability in USA is misrepresentation. Tort of fraudulent misrepresentation is the common law protection against damage caused to a party who took into account a false representation made by another party who knew it to be false and intended the first to take it into account.[292] The measure of damages for misrepresentation is reliance interest, expectation interest and lost opportunities. It is most likely that in pre-contractual situation reliance damages are granted.

In Markov v. ABC Transfer & Storage Co. case,[293] where the lessor was sued due to misrepresentation and deception during negotiation of lease contract, the Supreme Court of Washington granted damages requested to the lessee. In this case the lessor of a warehouse negotiated with the lessee for the renew of lease contract for three years while at the same time he was negotiating with other person for the sale of that warehouse. The purpose of the lessor was to see the warehouse occupied during negotiation and in case negotiation for sale fails, to renew the

[290]Alyona N. Kucher, *pre-contractual liability: protecting the rights of the parties engaged in negotiations* (2004) Pp. 34-35.
[291]Restitution for unjust enrichment—elements of the claim, available at https://www.lexisnexis.co.uk/legal/guidance/restitution-for-unjust-enrichment-elements-of-the-claim accessed on 30th June 2023
[292] Olivier R., *supra* note 43, p 90.
[293]Markov v. ABC Transfer & Storage Co. (1969).

lease contract. Before the conclusion of sale contract, the potential buyer gave a notice to the lessee to vacate the warehouse. The lessee sued the lessor for fraud where the Supreme Court of Washington concluded that the lessor has fraudulently promised to renew the lease and to negotiate the amount of rental in good faith. The court awarded damages to the lessee based on reliance losses incurred, which include expenses incurred due to move to another warehouse and profit lost due to lessee's clients not informed of his location because no time granted for preparation of that move.

3.5.3.2. England and Wales

English law does not provide the pre-contractual liability during the negotiation process, but it preferred to adopt the piecemeal solution instead of relying on good faith principle to override the fact.

The courts in English acknowledge the principle of contractual freedom and demonstrate a hesitancy to award damages for purely economic losses through tort law. While these arguments share some common ground, contractual freedom encompasses the freedom to negotiate and safeguard one's own interests, with both parties recognizing that they are assuming risks.[294]

While courts have been reluctant to recognize the principle of negotiating in good faith, there are certain grounds where pursuing negotiations or seeking damages for the termination of negotiations is feasible. This happens in case the court may determine that a collateral contract exists, which grants certain rights during the negotiation process, even if the main contract has not been finalized. Also a party may be eligible for restitution relief on the basis that the other party has received a benefit from the transaction, for which they should compensate the plaintiff, even in the absence of a formal contract (referred to as unjust enrichment); and lastly, a party can be held liable for the losses incurred by the other party in cases of fraudulent or negligent misrepresentation.[295]

[294]Paula Giliker, *supra* note 3, p.9.
[295]TedoradzeIrakli, *supra note 132*, p. 68, Kottenhagen R.J.P, *supra* note 87, P. 6-7.

At present, English law, permits only limited recovery, which rests primarily on the law of restitution and unjust enrichment.[296] However, the appropriate mean adopted for recovery of pre-contractual expenses resulted from abusive and wrongful conducts of a negotiating party, is the tort law.[297]

In the case of *William Lacey (Hounslow) Ltd v Davis*,[298] a party claimed restitution due to unjust enrichment. In that case, the claimants were builders that made preparations with considerable cost for rebuilding premises that they were negotiating to take over for reconstruction from the owners, who sold the premises to a third party instead of going ahead with the reconstruction. The England Court of Queen's Bench held that the claimants were entitled to an award *quantum meruit* for the work they had done due to the breaking off of negotiations by the defendant.[299]

The theory of promissory estoppel makes it possible to legally sanction, which means to give binding legal effect, to an event of the negotiation, the promise, outside the contract.[300]

[296]Paula Giliker, *supra* note 3, p.2.
[297]Id., p.3.
[298]*William Lacey (Hounslow) Ltd v Davis (1957).*
[299] Ibid.
[300] Good faith, accessed at file:///C:/Users/pc/Desktop/Thesis%20documents%20II/good%20faith%20principle.pdf [1st July 2023].

CHAPTER FOUR: PRE-CONTRACTUAL NEGOTIATIONS UNDER RWANDAN LAW

4.1. Historical background of contract law in Rwanda

In Rwanda, Contract law, like in many other countries, has evolved over time to reflect the changing social, economic, and legal landscapes. contracts play a vital role in Rwandans life. It manifests into various aspects of their routines and interactions.

Till 2011, contracts, their formation and execution were regulated by Decree of 30/07/1888 on contracts or conventional obligations known as civil code book III[301]repealed in 2019 by the Law nº 020/2019 of 22/08/2019 repealing all legal instruments brought into force before the date of independence. That civil code book III provided for the sources of obligations, there a contract included, general principles governing contracts, requirements for formation of a valid contract and the performance of a contract.[302]

The civil code book III, in its article 8, provided that, to be legally formed, a contract must fulfill the following four essential conditions: "*the consent of parties, the capacity of parties to contract, the certain object and the licit or lawful cause of obligation*".[303]

The consent of parties must come from a person who is free and it has to be clear. Article 9 of the Civil Code Book III provided that there is no valid consent if the consent was given by mistake or was extorted by violence or fraud.[304]Those grounds constitute defects of the consent and give harmed party the possibility to seek, in court, the cancellation of the contract.
The civil code book III required good faith during contract execution. Article 33 stated that Contracts made in accordance with the law shall be binding between parties and shall be performed in good faith.[305]

[301] Décret du 30 Juillet 1888 relatif au contrats et des obligations conventionnelles.
[302]Ibid.
[303]Id. art. 8.
[304]Id. art. 9.
[305]Id. art. 33.

By analyzing the Civil Code Book III, it is clear that the legislator considered a contract from its formation and the period before the formation of a contract was leave out. The legislator does not want to pay attention to the pre-contractual phase and one can assume that the parties enjoyed the full liberty and powers during that period.

As we discussed before in this work, a contract is a result of discussions between parties, which may be long or short depending on negotiating parties or the nature of a contract, subject of negotiation. During that period, certain behaviors or conducts are required to negotiating parties which will help them to achieve their target in a successful way for both parties.

In negotiations, parties may make promise as manifestation of commitment to conclude a contract, one of them may engages expenses which will help him or her to win the game. All of those things require that negotiating partners act honestly during their reciprocal relations not only during their contractual relationship but also during negotiations, otherwise one party may be harmed with the misbehavior of his or her partner, and as generally recognized, he or she needs to recompensed. One can assume that, during that period, parties act as they want and the issue which remain, is that related to reparation of pre-contractual damage. An issue is about liability arising from pre-contractual negotiations. The question is whether a harmed party, during negotiations, may find compensation or not under civil code book III.

However, a part from contractual and conventional obligations, the civil code book III also provided for non-contractual obligations and tortious liability. In its article 258, which was the basis of all unspecified liability, the Civil Code Book III provided that every act of a person which cause harm to another person obliges the author of the act to do reparation.[306]

The answer to the question of liability might be found in article 258 of the civil code book III which was more general and applicable to all matters. A party harmed, whether as a result of breaking off negotiations arbitrary or as a result of expenses incurred, may apply for recompense to the court based on that article.

[306]Id. art. 258.

So, even the legislator did not introduce the nation of pre-contractual relationships, the one harmed as a result of misbehaving during those relationships might got recompense.

In 2011, a new law, [307]the Law n°45/2011 of 25/11/2011 governing contracts, was published in Rwanda. That law constitutes one part of the civil code book III which relates to contracts. It incorporated a part related to principles governing contracts and it is the one which governs contracts formation and execution till now.

The new law governing contracts, introduced new many things in context of contracts in Rwanda. Among them there are offer and acceptance, which reflect the consent of contracting parties, the consideration and negotiation which is the subject of our study.

4.2. Pre-contractual negotiations under Rwandan contract law and governing principles

The term negotiation was introduced in the Law n°45/2011 of 25/11/2011 governing contracts. Its Article 76 talks about the course of negotiation. Paragraph One of this article states that "*a negotiation is a conduct between the parties prior to the formation of the contract which establishes a common basis of understanding that enables them to define their intention*."[308]This article gave the definition of the term in order to make people understand the meaning of it. It gives orientation to negotiating parties.

Paragraph two of article of the Law n°45/2011 of 25/11/2011 governing contracts provides for purpose of negotiation where it states that: "*A negotiation shall be used to interpret, supplement or qualify the contract*."[309]This means that in case there is a misunderstanding related to a concluded contract, parties or the judge may refer to negotiation of parties to find the real intent of parties.

[307] See Law n°45/2011 of 25/11/2011 governing contracts, supra note 5.
[308] See Art. 76, Law n°45/2011 of 25/11/2011 governing contracts, supra note 5.
[309] Ibid.

Pre-contractual negotiations are only regulated in a single article "76" of the Law n°45/2011 of 25/11/2011 governing contracts. Except the definition and the role of negotiations, nothing else was provided for by the that article. One can assume that the principle of freedom of contract which govern contract formation and execution, is also extended in pre-contractual phase and leads the parties, during negotiation, to act at their own risks. In many countries which regulate pre-contractual period, their laws give guidelines which help parties to conduct negotiations peacefully and without any loss for both parties. Those guidelines give parties the full confidence to their respective partners and remove the fear of risks during negotiations. Among many things provided by those laws, there are the principles governing contract negotiations, which are the principle of freedom of negotiation and that of good faith during negotiation, and the duties of negotiating parties which include that of disclosure or information and that of confidentiality etc., and their liabilities in case they failed to comply with those duties.[310]

Article 76 of the Rwandan law governing contract leave loopholes with regards to provisions related to pre-contractual negotiations. It only reflects one point of the term, the meaning of pre-contractual negotiations and their purpose, while there are many other points which need to be clarified by the law. The Rwandan law governing contract does not require good faith during contract negotiations. It does not even mention any duty of a negotiating party during that period. The legislator did not mention any principle governing pre-contractual negotiations. This means that parties act as they wish. They may engage or break off negotiation whenever they want, which may be at the basis of risks for parties engaged in pre-contractual negotiations in case one of them incurred expenses or suffered a loss as a result of engaging in negotiation, if there is a lack of clear legal provisions governing their conduct and behavior.

Moreover, by taking a look at foreign perspective, article 5.14 of Belgium civil code provides for freedom of contract which is extended to negotiations as it is expressed in its article 5.15, paragraph one. [311]However, the freedom of negotiation is balanced by the requirement of good faith during negotiations. Its article 5.15, provides that parties, during negotiations, have to act in accordance

[310] See Art.5.14, 5.15&5.16, Belgium Civil Code, *supra* note 11; See Art. 1112&1112-1 of French civil code of 2016.
[311]See Art.5.14, 5.15&5.16, *supra* note 11, See Art. 1112&1112-1 of French civil code of 2016.

with requirements of good faith.[312] The parties have to provide each other with the information required to be given by law, good faith and custom in light of the capacity of the parties, their reasonable expectations and the subject matter of the contract.[313] This shows that parties have to abide with some obligations which lead to the successful negotiation and in case of breaking off negotiation arbitrary, the party harmed may get recompense.

In the same line, the civil code act prohibits a person to engage in negotiations in bad faith, in particular if the person has no real intention of entering into a contract or if he or she break off negotiations in bad faith.[314]

Other laws, in relation to contract formation, enacted in Rwanda after the law governing the contract of 2011 incorporated the word **"negotiation"**. Those laws are the Law n°011/2016 of 02/05/2016 establishing the association of procurement professionals and determining its organization and functioning, in article 43 indicating activities that procurement professionals are allowed to carry out (among them include contract negotiation)[315], the Law n° 66/2018 of 30/08/2018 regulating labour in Rwanda, in its article 93 which relates to negotiation of collective agreements,[316] and the Law N° 031/2022 Of 21/11/2022 governing Public Procurement in its article 67 entitled "negotiations between the procuring entity and selected consultant" which relates to the negotiation between procuring entity and the selected consultant in public procurements.[317] Also the Ministerial Instructions n° 612/08.11 of 16/04/2014 setting up modalities for drafting, negotiating, requesting for opinions, signing and managing contracts as amended to date used the word negotiation in art 24 (indicates those who negotiate public contracts), Article 30 (setting steps to be considered in contract negotiations), etc.[318]

[312]See Art. 5.15, Belgium Law containing Book 5 "Obligations" of the Civil Code of 28 APRIL 2022.
[313]See Art. 5.16, Law containing Book 5 "Obligations"*supra* note 312.
[314]See section 14 of Law of Obligations Act of Estonia, (2002).
[315] See Art 43, Law n°011/2016 of 02/05/2016 establishing the association of procurement professionals and determining its organization and functioning, Official Gazette n°21 of 23/05/2016.
[316]See Art 93, Law n° 66/2018 of 30/08/2018 regulating labour in Rwanda, *supra* note 7.
[317]See Art 67, law n° 031/2022 of 21/11/2022 governing public procurement, *supra* note 8.
[318] See Art 24, 30, 34, etc., Ministerial Instructions n° 612/08.11 of 16/04/2014 setting up modalities for drafting, negotiating, requesting for opinions, signing and managing contracts as amended to date, *supra* note 9.

However, the Law n° 66/2018 of 30/08/2018 regulating labour in Rwanda went beyond the provision of the law governing contracts in relation to contract negotiation and provides for duties of negotiating parties in case of negotiation of collective agreements. Its article 93 provides for negotiating modalities. It states that: "*parties to the negotiation of a collective agreement negotiate in good faith. Every party must have access to the other party's information relating to the negotiation subject matter"*.[319] Paragraph 2 of this article provides for a duty of confidentiality during negotiation of collective agreement. It prohibits the disclosure of information obtained for purpose of negotiation of collective agreement subject to conditions set out in that paragraph.[320]

The law governing public procurement provides for nothing with regards to principles governing contract negotiation but it only prohibits to conduct simultaneously negotiations with several consultants.[321]

The Rwandan law governing contracts does not require parties to provide each other information during negotiations while the duty of information is a vital aspect of contract negotiations which help to ensure fairness, transparency, and informed decision-making among parties. It reflects the broader principles of honesty, integrity, and equity in contractual relationships and contributes to the overall effectiveness and legitimacy of contract law which leads to the stability and durability of contractual relationship.[322]

As Rwanda continues to develop and modernize, the influence of contracts is becoming even more pronounced, facilitating economic growth, foreign investment, and harmonious exchanges. The Rwandan journey towards development required many things to be changed. It is necessary that the promotion of investment which is the key goal of Rwanda be supported by laws in which both investors, the citizens and the country find protection since all process bringing to investment is surrounded with negotiation, either between the country and the investor or between the investor and the citizens who will be involved in investor's activities. Also, with the target of Rwanda to make it a center of business, it necessary that all parties involved, especially the weaker ones, be

[319] See Par. 1 of art 93, Law n° 66/2018 of 30/08/2018 regulating labour in Rwanda, *supra* note 7.
[320] See Par. 2 of art 93, Law n° 66/2018 of 30/08/2018 regulating labour in Rwanda, supra note 7.
[321] See Par. 4 of art 67, Law n° 031/2022 of 21/11/2022 governing public procurement, supra note 8.
[322] Valeria De Lorenzi, *supra* note 141.

guaranteed with protective laws and rules. Accordingly, this bring the attention of the Rwandan legislator to adopt laws, especially that regulating pre-contractual negotiation which will help negotiating parties to be in comfortable zone while negotiating due to the hope that they may find protective measures resulting from laws in case of misbehavior or misconduct of their respective partners.

The good faith must be the basis of all contractual relations. The legislator must require good faith not only during contract formation and performance but also during its negotiation. It is necessary that the freedom in contract negotiation be balanced with the principle of good faith in Rwandan legal context. It necessary that the law governing contracts in Rwanda be in this line to provide guidelines to negotiating parties by providing boundaries to their conducts during negotiations period as it is the case for other countries such as France, Belgium, German, etc. This requires the changing of Rwandan law governing contracts to incorporate that provision.

The Rwanda, as country which uses, in a big part, civil law system where decisions of a courts are based on laws in a book (written laws), it is necessary that the legislature regulates everything in order to promote access to justice for all and avoid inconsistency which may appear in judicial decisions.

Another reason which may drive our legislator to clarify the pre-contractual negotiation, is the promotion of investment which is the target of our country and also the protection of weaker party during negotiation because most of the time the partners in negotiation are not on the same footing and do not have the same knowledge in the career.

The loophole in Rwandan contract law leads the court, in the judgment IMPACT PHARMA LTD v IJABO CLINICS[323], not to consider pre-contractual phase while it was the argument of the defendant. The case started in commercial court where the plaintiff (IJABO CLINICS) sued IMPACT PHARMA LTD to sell him a machine to be used in laboratory which is not operating. The plaintiff argued that in order to buy the machine, he was not informed that the machine was of the secondhand, its software was changed and that it uses *human reagents*. The commercial

[323]RCOMA 00064/2021/HCC.

court decided that IMPACT PHARMA LTD mislead the IJABO CLINICS while concluding the contract and annul the contract also order it to pay damage.

IMPACT PHARMA LTD appealed against the decision in Commercial High Court arguing that the contract was concluded in accordance with the law therefore it is not subject to annulment. The commercial High Court, in deciding, concluded that since the contract was concluded in compliance with article 4 of the contract law (which provides the General requirements for the formation of a contract), it has to be respected by the parties as a law, based on article 64 of the same law[324].The court did not examine and decide on issue of not complying with the duty of information during contract negotiation raised by IJABO CLINIC.

4.3. Status of pre-contractual liability under Rwandan law

Due to freedom of contract principle which enable everyone to choose whether or not he or she want to engage in a contract, the failure of the negotiation cannot be criticized. However, during negotiations, behaviors of one of the parties might cause harm to his or her partner prompting him or her to pursue compensation.

When parties enter contract negotiations, a relationship of trust emerges regardless whether the contract will follow or not as it is expressed by the German scholar Rudolf von Jhering who stated that although there is no formal contract which exists between the parties involved in negotiations, there is certain legal relationship and in case a party commits fault during the negotiations, he or she will be liable of damages.[325]

In Rwandan context, till 2011, the year of adoption of the law governing contracts, as above mentioned, there was no provisions related to contract negotiation in civil book III which governed

[324] Art 4 of the Law n°45/2011 of 25/11/2011 governing contracts provides that the general requirements for the formation of a contract are *mutual assent, capacity to contract, object matter of the contract and licit cause*. Article 64 of that law provides that contracts made in accordance with the law shall be binding between parties and hey may only be revoked at the consent of the parties or for reasons based on law. They shall be performed in good faith.

[325]Bénédicte Fauvarque-Cosson and Denis Mazeaud, ed., European Contract Law: Materials for a Common Frame of Reference: Terminology, Guiding Principles, Model Rules (2008), p. 187.

the formation of a contract. One can think that the period of negotiation was a period of risks where each of the negotiating party engages at his or her own risks as a result of the principle of freedom of contract. There can be an assumption that there was an issue of liability arising from pre-contractual negotiation since that period was not regulated. However, pre-contractual liability, at that time, was covered by tort law which was the part of the civil code book III. Article 258 of the civil code book III provided the liability for a person's act that causes harm to a third party.[326] This article was of general application and it does not have a limited or a specific scope. The party harmed due to abusive conduct of his or her partner, during negotiation phase, might find recompense based on that article. He or she had to prove the fault, damage and the causal link between the fault and the damage as condition or basis of tort liability.[327]

There was a belief that pre-contractual liability will continue to be covered by tort law in the civil code book III and even that it will be well regulated as it can be deducted from provisions of article 162 of the law governing contracts which states that *Decree of 30/07/1888 on contracts or conventional obligations shall remain effective for no contractual obligations, special contracts, civil liabilities, limitations, until the publication of specific laws governing those matters.*[328]After abolishing the civil code in 2019 by the Law nº 020/2019 of 22/08/2019 repealing all legal instruments brought into force before the date of independence, a loophole in legal provisions regulating pre-contractual liability arises because the civil code book III was abolished before the publication of laws specified in that article.

Since Rwandan contract law has no provision regulating pre-contractual liability and there is no other legal instrument which provides that, there is a vacuum regarding pre-contractual liability and its basis in Rwandan judicial system which is based, generally, on written laws, where a judge, in deciding a case before him or her, firstly, bases on written law. It is clear that a party who is prejudiced in pre-contractual negotiation may remain without recompense while justice must prime in all domains for the development of all communities.

[326] See Art. 258, civil code book III.
[327]Cause, préjudice et lien de causalité comme base de la responsabilité délictuelle.
[328] Art. 162, Law n°45/2011 of 25/11/2011 governing contracts, supra note 5.

The absence of legal provision on pre-contractual negotiation leads courts in considering only arguments of parties from the formation of a contract and not taking the time to look on relationship of parties during negotiation. This appeared in case opposing IMPACT PHARMA LTD v. IJABO CLINICS above mentioned where the court did not consider arguments of the IJAB0 CLINICS of failure to comply with pre-contractual duty on side of IMPANCT PHARMA LTD and only examine the issue from the contract formation where the court only looked on the validity of a contract by examining elements of a valid contract provided for in article 4 of law governing contract and rules in favor of IMPACT PHARMA LTD basing on article 64 of the law governing contract. Also in case RCOM01130/2020/TC[329] opposing KABATSI Jean Marie v. EQUITY BANK RWANDA LTD while the bank arguing that there was a mistake in drafting a loan between the bank and the client Kabatsi with regard to the duration a payment of a loan where instead of being 48 months it had to be 60 months as it was shown by loan application form of the client, repayment plan, loan Evaluation and Loan authorization form which all show that the loan had to be payed within 60 months instead of 48 as it was mistaken in a contract drafted.

Many countries require parties to act in good faith during negotiations and also put on them other duties that they must comply with in order to preserve a good relationship between them and the failure to comply with those duties bring the party liable to pay damages. They provide that good faith principle must guide parties' relationship in contract negotiation otherwise parties may be held accountable for creating baseless contract expectations through negligence or from breaking off negotiations arbitrary. Parties must take necessary precautions for each other's safety and property protection.

For example, in Belgium, a negotiating party is liable in case of incorrect termination of negotiation and when there was creation of expectation that the contract would be concluded beyond any doubt or in case of breach of an obligation to provide information.[330]

[329]RCOM01130/2020/TC.

[330] See Art. 5.17, Law containing Book 5 "Obligations" of the Civil Code of 28 APRIL 2022.

In France, a negotiating party is liable when he or she did not comply with the duty of good faith. Good faith comply the duty of information or known as the duty of disclosure and in case he or she does not keep secrecy of information obtained during negotiation.[331]

Under German law, a negotiating party is liable to damaged resulting from his or her fault committed during negotiation. Also a third party may be held liable for influencing in negotiation and contract conclusion.[332]Article 337 of Italian Civil Code provides for negotiation and pre-contractual responsibility. It states that *"The parties, in the negotiation and formation of the contract must behave in accordance with good faith."*[333]

From legal provisions on pre-contractual liability, courts held liable persons for not complying with pre-contractual duties. In case opposing Cyberchron Corp. versus Calldata Systems Development, inc.[334] the court ordered the defendant to pay reliance damages for reason of commencing work even though negotiations fail.

The case resulted from negotiation of contract introduced between Cyberchron (who is the plaintiff) and Calldata Systems Development, Inc. (who is the defendant) where Cyberchron had to provide customized computer hardware for military and civilian use to Calldata which has its parent Grumman. Before reaching an agreement of negotiation, the Plaintiff commenced constructing some of the equipment for computer stations and he was encouraged by the defendant. Later on, the defendant, sent a purchase order form to Plaintiff that set forth certain weight specifications. Defendant never accepted the purchase order terms and resulted in breaking off of negotiation.[335]

The plaintiff brought a case before the court and the trial court found that Grumman encouraged Plaintiff to continue even though the weight issue had not been resolved and therefore, reasonable reliance upon the promise and an unconscionable injury and the resulting injustice could only be

[331] See, art 1112-1&1112-2, Code civil Français,*supra* note 11.
[332] See art. 311(2)& 311(3), BGB.
[333]See art. 1338, CIV. CODE [C. Civ] (Italy).
[334]Cyberchron Corp. v. Calldata Systems Development, 831 F. Supp. 94 (E.D.N.Y. 1993).
[335]Ibid

remedied by invoking promissory estoppel. The plaintiff was granted the right to seek compensation for the duration during which Grumman had instructed the plaintiff to continue with production as if an agreement on the terms had been reached.

In case "*arrêt du Tribunal fédéral, Ire Cour civile. 16 juin 2011. 4A_202/2011"*[336], the federal court in Switzerland has confirmed pre-contractual liability. This is explained by the fact that a party should not adopt an attitude that contradicts its genuine goals, as this may falsely raise the other party's expectations of reaching an agreement and prompt them to proceed in that direction.[337]

Since there is no clear provisions in Rwandan contract law governing contracts, negotiating parties suffer form that loophole and found no remedies because after abolishing the civil code book III in 2019 with the Law nº 020/2019 of 22/08/2019 repealing all legal instruments brought into force before the date of independence, an issue of liability arising from pre-contractual negotiation manifested due to the fact that the civil code book III which parties might rely on, in its part related to tort law, to look for justice in case of pre-contractual harm, was no longer in existence.

As Rwanda continues to strengthen its position in the global market[338], ensuring that negotiations are conducted with clarity, transparency, and adherence to legal principles becomes paramount. It is necessary that the legislature enacts law which will provide guidance to judges in ruling on cases arising from pre-contractual negotiations and which will help them to avoid different treatment of parties and diversity of decisions for those cases.

[336] Arrêt du Tribunal fédéral, Ire Cour civile. 16 juin 2011. 4A_202/2011.

[337] Christophe Wilhelm, *Le Tribunal fédéral suisse confirme le risque d'une responsabilité précontractuelle*, accessed at https://www.wg-avocats.ch/actualites/droit-des-contrats/le-tribunal-federal-suisse-confirme-le-risque-dune-responsabilite-precontractuelle/{15.8.2023}.

[338]See the Rwanda vision 2050 where Rwanda targets to develop export dynamism, promote regional integration and capitalize on regional and global opportunities; RWANDA'S DEVELOPMENT-DRIVEN TRADE POLICY FRAMEWORK Prepared by the United Nations Conference on Trade and Development (UNCTAD) and the Ministry of Trade and Industry of Rwanda (2010).

CHAPTER FIVE: GENERAL CONCLUSION AND RECOOMENDATIONS

This concluding chapter is subdivided into two parties namely the general conclusion and the recommendations.

5.1. Summary of finding of precedent chapters

Pre-contractual negotiations are a crucial phase in the formation of contracts, serving as the foundation for the contractual relationship. It is period during which expected contract partners interact by exchanging their views which will help them to conclude the contract or not.

Several studies have suggested that in contemporary business negotiations, the duration of the negotiation process should not be disregarded. Especially in extensive or intricate transactions, negotiations may occur in multiple stages, spanning a significant period of time, as the parties gradually work towards reaching a formal agreement and invest more time and resources. In such situations, it is not uncommon for one party to initiate work or begin production of goods before the contract is formally executed. This can be due to convenience, the need to meet strict deadlines, or to demonstrate commitment to the transaction. In the event that the contract is not legally recognized, given the level of commitment involved, often induced either explicitly or implicitly by the other party, it is natural for the affected party to seek compensation to recover any losses incurred.[339] Therefore, a strong contract should commence with sincere and equitable discussions among the participating parties. It is vital that all parties involved possess a clear understanding of the negotiation process as a crucial framework for successfully concluding a contract.

The incorporated provision in relation to contract negotiation in the Law no 045/2011 of 25/11/2011 governing contracts. That law in its article 76 define the negotiation and provides its purpose.

[339] Paula Giliker, supra note 3, p.1.

Despite the definition of negotiation and its role during contract formation and performance process, the analysis of pre-contractual negotiation under Rwandan contract laws reveals a significant gap in legal provisions and judicial consideration. While the definition and purpose of pre-contractual negotiation are recognized, there exists a lack of specific legal guidelines and judicial scrutiny of this pivotal phase in the contract formation process. This tasked the researcher to make a legal analysis of pre-contractual negotiations in Rwanda, so as to determine and study the foreign practice, and legal framework of pre-contractual negotiations in order to improve the Rwandan legal framework, as the law provides little information about pre-contractual negotiations. This dissertation serves to be a main work under the legal analysis of pre-contractual negotiations in Rwandan context.

The main research questions under this study have been to describe and legally analyze the following issues:

1. *What is pre-contractual negotiations under Rwandan law and how does it compare to international best practices and other legal systems?*

2. *What are the key principles and objectives of pre-contractual negotiations within the context of Rwandan contract law?*

3. *To what extent do parties engaged in pre-contractual negotiations have a duty to act in good faith and provide accurate information under Rwandan law? How is this duty defined and enforced?*

4. *How the liability of persons misbehaved in contract negotiation can be engaged and what remedies are available to parties who have suffered losses or damages under Rwandan law?*

To answer these questions, chapter one of this dissertation has been influenced by the conceptualization of the research project within Rwandan context and on the globe. Since the pre-contractual negotiations aims the formation of a contract, the researcher found it better to have a

look on contract. Chapter two examined how a contract is formed by looking especially on conditions for a valid contract in civil law and common law system and governing principles. Chapter three analysed pre-contractual negotiations worldwide together with the principle of good faith as key principle required during contract formation and performance by looking if it can be extended to pre-contractual negotiations. The analysis was made by comparing the civil law and common law systems. Chapter four focused on analysing pre-contractual negotiations under Rwandan contract law. Chapter five deals with conclusion and recommendations.

5.2. Answers to research questions

In order to know what is pre-contractual negotiations under Rwandan lawby comparison to international best practices and other legal systems, it was found that the above mentioned Rwandan law governing contract provides only the definition of negotiations however, while other laws of foreigner countries apart from defining the concept, they also provide for principles governing negotiations and duties of negotiating parties. This leads parties, during negotiations, acting as they wish, which may be at the basis of misconducts and loss for negotiation parties and the courts lacks the basis in deciding the case brought to court.

Rwandan contract laws, while acknowledging the importance of pre-contractual negotiation, do not comprehensively address the rights, obligations, and liabilities of parties during this phase as Rwanda's current contract laws do not provide specific provisions to govern those aspects. Courts tend to focus primarily on the relationship formed after the contract is concluded, largely overlooking the complexities and nuances of negotiation dynamics that may influence the final agreement. Furthermore, the absence of legal consequences for misconduct during negotiations leaves parties vulnerable to unfair practices without recourse.

It was found that the Rwandan contract law does not provides for any principle governing contract negotiation. It does not oblige the principle of good faith during contract negotiation. One can assume that the principle of freedom of contract recognized in contract formation is also extended to pre-contractual phase contract and this can lead to misbehaviors and loss of negotiating parties. However, the principle of good faith is of key importance in civil law systems where parties are

required to negotiation accordingly and failure to do so lead to the party to be liable. The common law on its side, even does not require negotiations to be conducted in good faith, it prohibits misconducts during negotiation.

The Rwandan contract law, also does not provides for any duty for negotiating parties and this can hinder business acceleration due to the fear of deceptive practices during negotiations. Due to the lack of any provision regulating duties of negotiation parties, it leads to non-liability for acts committed during negotiation and no remedies are available to parties who have suffered losses or damages under Rwandan law.

The absence of clear rules governing the conduct of parties during negotiations and the limited examination of negotiation-related arguments in court have created an environment of uncertainty and potential injustice.

All of those lacuna may be at the basis of hindering investment in Rwanda, mistreatment in contract negotiations which bring parties to suffer without remedies.

The need for clear provisions governing pre-contractual negotiations in Rwandan law becomes evident in the context of the risks that parties may face due to misunderstandings, failed negotiations, and the subsequent inability to finalize contracts with a view to contribute to the development of a robust legal framework that supports effective contract formation and cultivates an environment of trust and certainty for all stakeholders involved.

Bridging the gaps in Rwanda's contract law pertaining to pre-contractual negotiation is crucial to creating a balanced and just legal framework. By addressing these gaps Rwanda can establish a legal framework that safeguards parties during the pre-contractual phase and that promotes fairness, transparency, and accountability during the negotiation phase.

5.3. Recommendations

After analyzing how pre-contractual negotiations are regulated in Rwandan contract laws, there is a need for clear provisions governing pre-contractual negotiations in the context of the risks that parties may face due to misunderstandings, failed negotiations, and the subsequent inability to finalize contracts. Therefore, it is essential for Rwandan legislators to consider introducing specific provisions within Rwandan contract laws that address the pre-contractual negotiation phase. This could include guidelines for good faith negotiations, obligations of disclosure, and potential consequences for parties who engage in deceptive or fraudulent conduct during negotiations. By establishing clear rules, legislators can provide a framework that encourages fair and transparent negotiations and which will also empower courts to address disputes arising from pre-contractual negotiations with clarity and fairness.

Drawing inspiration from international contract law principles, Rwandan legislator could consider aligning its legal framework with internationally recognized standards such as the Unidroit principles of international Commercial contract, Uniform commercial code and UN Convention on Contracts for the International Sale of Goods (CISG). These standards often provide detailed rules and considerations for pre-contractual negotiation, fostering consistency and predictability in cross-border transactions. Moreover, the incorporation of international standards and best practices related to pre-contractual negotiation can contribute to a more comprehensive and cohesive legal ecosystem. By harmonizing Rwandan contract laws with international principles, legislators can bridge the gap and provide a level playing field for negotiations.

Courts should expand their scope of review to encompass the pre-contractual phase, allowing parties to present arguments related to negotiation misconduct, misrepresentation, and other relevant issues. By recognizing the impact of negotiation dynamics on the final contract, courts can ensure equitable outcomes and hold parties accountable for their actions during pre-contractual phase.

Finally, the Rwandan authorities in charges of business and investment must increase awareness among legal practitioners, negotiators, and business professionals about the significance of pre-contractual negotiation in fostering the culture of transparency and fairness. They must organize seminars, workshops and legal education programs to contribute to better negotiation practices and informed decision-making.

5.4. Scope for further research

I recommend researchers to conduct their research on impact of pre-contractual negotiations on vulnerable parties. In this research, they may look on how Rwandan law protect parties who may be in a weaker negotiating position during pre-contractual discussions by looking of there are there specific provisions or doctrines aimed at safeguarding their interests.

They may also research on evidentiary value of pre-contractual communications. In this case they will look on how communications and documents from pre-contractual negotiations treated as evidence in Rwandan courts and their significance in contract disputes.

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