

The Legal Basis for Contractual Liability in Moldovan Civil Law and in Comparative Law

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Abstract

The article argues, from a comparative perspective, that the normative foundation of pre-contractual liability in Moldovan civil law derives from the interpretation of the general principle of good faith. This form of liability does not have an autonomous character and cannot be situated in an intermediate sphere between contractual and tortious liability. The paper demonstrates that the concept of liability for breach of contract is inapplicable in cases of unjustified termination of negotiations, since no contract exists, but only the breach of a legal duty of loyal and good-faith conduct. The compensatory regime is limited to damage consisting in the impairment of the other party's legitimate expectations, excluding lost profits, which brings this form of liability closer to the theory of loss of a chance. Although the Civil Code does not expressly define the pre-contractual relationship, doctrinal analysis leads to the qualification of pre-contractual liability as a form of tort liability. This solution aligns Moldovan law with European trends, influenced by the French doctrine of responsabilité précontractuelle and the German model, united by the same axiological values: good faith, loyalty, and the protection of legitimate expectations.

Keywords: pre-contractual; fault; good faith, negotiation, liability; unjustified; damage.

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1. Introduction

Pre-contractual liability³ is a relatively new legal institution in the legal system of the Republic of Moldova, resulting tacitly from the reform of the Civil Code of the Republic of Moldova (Law No. 1107 of June 6, 2002, republished on March 2, 2019).

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³ Contextual, on the legal consequences arising from the breach of pre-contractual obligations, particularly with regard to duties of information, loyalty, and the protection of legitimate expectations, see Sergiu Bivol and Ion Bîtcă, „Clauza de neconcurență în raporturile de reprezentare comercială” [“The Non-Competition Clause in Commercial Representation Relations”], *Vector European* no. 2 (2024): 6–9.

This process of modernizing the law of obligations was influenced by trends in European continental law, in particular the German model (*culpa in contrahendo*) and the French model (*responsabilité précontractuelle*)⁴.

According to Article 1025(2) of the Civil Code, a person involved in negotiations has the obligation to negotiate in good faith and not to break off negotiations contrary to this obligation. Failure to comply with this obligation entails liability for the damage caused to the other party, according to paragraph (3). This provision expressly establishes the obligation of loyal conduct in the pre-contractual stage and establishes legal liability for breach of good faith, applicable even before the conclusion of the contract. This provision expressly establishes the obligation of loyal conduct in the pre-contractual stage and establishes legal liability for breach of good faith, applicable even before the conclusion of a final contract.

This approach is consistent with comparative continental European solutions. In German law, the doctrine of *culpa in contrahendo*, codified following the 2002 reform of the *Bürgerliches Gesetzbuch*, imposes pre-contractual duties of protection, information, and loyalty, the breach of which gives rise to tort-based liability even in the absence of a concluded contract. Similarly, French law, following the 2016 reform of the *Code civil*, expressly recognizes pre-contractual liability for the abusive termination of negotiations grounded in the principle of good faith (*bonne foi*), while limiting compensation to the loss suffered and excluding expected profits. These comparative models confirm that Article 1025(2) of the Moldovan Civil Code aligns with a broader European trend that treats good faith as a binding normative standard governing the pre-contractual phase and sanctions its violation independently of contractual formation⁵.

The importance of this topic stems from its innovative nature within Moldovan civil law. Until the 2019 reform of the Civil Code, the legislation did not expressly provide for such a form of liability, and solutions were deduced through case law or doctrine, by analogy with tort liability. Currently, although the institution is regulated by law, judicial practice remains inconsistent, and doctrinal interpretation is not uniform regarding the nature and basis of this liability.

Thus, it can be observed that in Moldovan law, “*pre-contractual liability*, although enshrined in legislation, does not yet have a well-defined doctrinal and practical outline, often being assimilated to tort liability”. On the other hand, part of the doctrine is tempted to consider that pre-contractual liability should be viewed as an “*autonomous institution, specific to the stages of contract formation*”. This divergence

⁴ For a comprehensive view see Martijn Willem Hesselink, *Justifying Contract in Europe: Political Philosophies of European Contract Law*. Oxford: Oxford University Press, 2021, p. 20 et seq.; Reinhard Zimmermann, *The Law of Obligations: Roman Foundations of the Civilian Tradition*. Oxford: Oxford University Press, 1996. p. 37 et seq.; or Sanket Vora, “Dance of the Deal: Exploring *Culpa in Contrahendo* and ECJ Jurisprudence,” *Global Journal of Politics and Law Research* 11, no. 3 (2023): 42–53, <https://doi.org/10.37745/gjplr.2013/vol11n34253>.

⁵ See different approaches in Hasan Muhammad Mansour Alrashid. “Appraising Party Autonomy in Conflict-of-Laws Rules in International Consumer and Employment Contracts: A Critical Analysis of the Kuwaiti Legal Framework.” *Journal of Private International Law* 21 (1), 2025: 153–84. doi: 10.1080/17441048.2025.2479921.

of opinion reflects the need for an in-depth analysis of the legal basis of the institution and its relationship with the general principle of good faith, enshrined in Article 10 of the Civil Code.

Therefore, this study is justified by its contribution to the conceptual clarification of pre-contractual liability, as well as by the need to highlight the legislative gaps and doctrinal inconsistencies that currently exist.

The main purpose of the research is to clarify the legal nature and basis of pre-contractual liability in Moldovan civil law through an integrated analysis of the provisions of the Civil Code, national and comparative doctrine, and judicial practice (where available).

In particular, the research aims to establish the relationship between the principle of good faith, enshrined in Article 10 of the Civil Code, and the special rules governing pre-contractual negotiations, provided for in Article 1025 of the Civil Code, as well as identifying the legal nature of the obligation of loyal conduct, namely whether it gives rise to tortious, contractual, or autonomous liability.

2. The Normative Basis of Pre-Contractual Liability in the Civil Law of the Republic of Moldova

Pre-contractual liability is a legal mechanism through which the law protects the legitimate trust of the parties during negotiations and aligns their behavior with the principle of good faith. In the civil law of the Republic of Moldova, this form of liability is mainly regulated by Article 1025 of the Civil Code, which establishes the obligation to negotiate in good faith and prohibits the termination of negotiations contrary to this obligation. According to paragraph (2) of the article, any contractual clause that excludes or limits this obligation is absolutely null and void. In the event of a breach of the obligation of good faith, paragraph (3) of the same article provides that the injured party may claim compensation for the damage suffered as a result of the legitimate expectation that a contract would be concluded. At the same time, the law limits compensation for damages to the damage suffered on the basis of the belief that the contract would have been concluded (negative interest), excluding compensation for loss of anticipated profit, except in cases where the act was committed intentionally or with gross negligence, in which case missed opportunities to conclude a contract with third parties may also be covered.

This regulatory approach reflects a broader convergence within contemporary European private law. Recent comparative scholarship emphasizes that modern civil law systems increasingly conceptualize pre-contractual liability as a mechanism for safeguarding legitimate trust rather than as a derivative form of contractual liability. In German-influenced systems, post-reform interpretations of *culpa in contrahendo* confirm that liability arises from the autonomous breach of a legally imposed duty of good-faith conduct during negotiations, irrespective of whether a contract is ultimately concluded. Similarly, recent analyses of French and EU contract law underline that compensation for pre-contractual misconduct is generally confined to negative interest, with the exclusion of expected profits serving as a structural safeguard against

transforming negotiation duties into de facto contractual obligations⁶. These developments confirm that Article 1025 of the Moldovan Civil Code is consistent with current European trends that balance freedom of contract with the protection of legitimate expectations through a narrowly tailored, trust-based model of pre-contractual liability.

In doctrine, good faith is considered “*the ethical source of pre-contractual liability*”, which is the fundamental principle governing the formation, execution, and termination of civil rights and obligations, as enshrined in Article 10 of the Civil Code. Therefore, pre-contractual liability can be interpreted as a concretisation of the principle of good faith in the negotiation stage, through the protection of legitimate expectations and by limiting abusive intervention by the parties in the pre-contractual process.

Pre-contractual liability also correlates with the general provisions on tort liability. Thus, Articles 1998–2002 of the Civil Code establish the grounds for tort liability, including the obligation to repair damage caused by fault and preventive measures in case of danger of future damage (Art. 2000). From this point of view, the rules on pre-contractual liability can be considered a special form of tortious liability, applicable in the context of pre-contractual relations.

There are also certain legislative gaps and areas of divergent interpretation. The Civil Code does not exhaustively define the limits of quantifying damages in pre-contractual relationships and does not expressly specify the criteria applicable in complex negotiations between professionals and consumers⁷.

2.1. Legal Regulation

We consider that pre-contractual liability is expressly regulated in the Civil Code of the Republic of Moldova, by Article 1025 of the Civil Code, introduced by Law No. 133 of November 15, 2018, in force since March 1, 2019, as part of the reform to modernize the law of obligations.

According to Article 1025 para. 2 of the Civil Code, a person involved in negotiations has the obligation to negotiate in good faith and not to break off negotiations contrary to this obligation. Failure to comply with this obligation entails liability for the damage caused to the other party (paragraph 3). This provision expressly establishes, for the first time in national law, the obligation of loyal conduct during the

⁶ Stefan Grundmann. “Trust, Information and Pre-contractual Liability.” *European Review of Contract Law* 18, no. 3 (2022): 244–260. <https://doi.org/10.1515/ercl-2022-2047>; Mengyuan Cheng, Guoliang Liu, Yongshun Xu, and Ming Chi, “Enhancing Trust Between PPP Partners: The Role of Contractual Functions and Information Transparency,” *SAGE Open* 11, no. 3 (July 2021), <https://doi.org/10.1177/21582440211038245>; Florence Karaba, Jens K. Roehrich, Steve Conway, and Jack Turner. 2023. “Information Sharing in Public-Private Relationships: The Role of Boundary Objects in Contracts.” *Public Management Review* 25 (11): 2166–90. doi: 10.1080/14719037.2022.2065344.

⁷ For a study regarding the relations between professionals and consumers, see: Ion Bîtcă, Ion Spănu, Sergiu Bivol, Rodica Moscalu, *Dreptul consumatorului [Consumer Law]*. University Course, Lyceum Publishing House, Chişinău, 2025, p. 75 et seq.; Ion Bîtcă, Sergiu Bivol, „Garantiile personale acordate de consumator” [„Personal Guarantees Granted by the Consumer”], *Vector European*, no. 1, 2024: 5-8, USEM, Chişinău, E-ISSN 2587-358X.

pre-contractual negotiation stage, providing a legal basis for sanctioning abusive or unfair conduct during the pre-contractual phase.

In addition, from the provisions of Article 1025(4) of the Civil Code, we can identify typical cases in which behavior is considered contrary to good faith, such as:

- initiating or continuing negotiations without real intention to conclude the contract.

- unjustified interruption of negotiations.

- providing inaccurate or incomplete information.

These cases are not exhaustive, which allows the court to interpret bad faith conduct in a flexible and contextual manner. However, there is a legislative gap regarding the criteria for assessing the “*justification*” for interrupting negotiations, which leaves room for divergent interpretations in practice.

At the same time, the Civil Code also regulates the legal effects of pre-contractual negotiations that evolve into a preliminary contract or final contract, through Articles 999 and 1000 of the Civil Code. Thus, Article 999 of the Civil Code defines the preliminary contract and establishes that the mere obligation to negotiate does not constitute a preliminary contract (paragraph 5), and Article 1000 of the Civil Code gives the beneficiary the right to request the court to issue a judgment replacing the final contract only in the case of an actual preliminary contract, not in the case of pre-contractual negotiations or agreements that do not have this legal value.

Through this integrated regulation, the Civil Code of the Republic of Moldova clarifies the limits of pre-contractual liability, delineates the situations in which negotiations generate liability, and establishes the legal framework for the protection of the legitimate expectations of the parties, while maintaining the distinction between the legal effects of the preliminary contract and the final contract.

This legislative clarification is in line with recent comparative developments in European private law, which increasingly emphasize a functional and trust-oriented understanding of pre-contractual liability. Contemporary scholarship highlights that modern civil codes seek to strike a balance between safeguarding legitimate expectations arising during negotiations and preserving the structural autonomy of contractual consent. Rather than blurring the boundary between pre-contractual and contractual liability, recent European doctrine confirms that pre-contractual liability operates as an *ex ante* corrective mechanism, aimed at disciplining opportunistic behavior without imposing the full effects of contractual commitment. In this sense, the Moldovan approach resonates with broader European trends that conceptualize pre-contractual liability as a narrowly circumscribed instrument grounded in good faith, transparency, and the protection of reliance interests, while clearly distinguishing it from the legal regime applicable to concluded contracts⁸.

Finally, Article 1025(3) of the Civil Code delimits the scope of compensation

⁸ See Tom Hick, *Liability Law for Failed Contract Negotiations: A Comparative, Structural, and Historical Analysis*, 1st ed. (London: Routledge, 2025), <https://doi.org/10.4324/9781003599166>, p. 150 et seq. Also, see Stefan Grundmann, *op. cit.*, 244–260, <https://doi.org/10.1515/ercl-2022-2047>; Martijn Willem Hesselink, *op. cit.*, 2021, pp. 187–205.

for breach of the obligation of good faith, specifying that damages shall be awarded based on the injured party's legitimate expectation that the contract would have been concluded, without including anticipated profits.

This provision limits liability to negative interest or trust interest, which means that the injured party may claim compensation for expenses incurred and loss of a reasonable opportunity, but not for unrealized gains resulting from the failure to conclude the contract.

In legal doctrine, this limitation is justified by avoiding the equivalence of pre-contractual liability with contractual liability.

The pre-contractual liability regime is directly related to the general principle of good faith, enshrined in Article 10 of the Civil Code, which states that civil rights must be exercised and civil obligations must be fulfilled in good faith. In the context of pre-contractual negotiations, this principle constitutes the legal basis for the obligation of loyal conduct regulated by Article 1025 of the Civil Code, so that any breach of good faith entails liability for the damage caused to the other party, in accordance with the rules on negative interest.

This rule is a general principle of law governing the entire sphere of civil relations, both in the pre-contractual phase and in the performance or termination of the contract.

In legal doctrine, good faith is described as the “*ethical source of pre-contractual liability*”, as it underpins the obligation of loyalty and cooperation between the parties even before the contract is formed.

At the same time, part of the doctrine argues that Article 10 of the Civil Code exercises a complementary, rather than a subsidiary, function in relation to the special rules of Article 1025 of the Civil Code, as it establishes the general principle of civil conduct, while the special provisions regulate specific situations of breach of the duty of loyal conduct in the pre-contractual phase.

In theory, the provisions of Article 1025 of the Civil Code represent a legislative embodiment of the general principle of contractual loyalty, inspired by the German doctrine of *culpa in contrahendo*, but adapted to the context and particularities of the civil law system of the Republic of Moldova.

Article 1025(1) of the Civil Code stipulates the obligation of the parties to negotiate in good faith and prohibits the termination of negotiations contrary to this obligation: “The parties are obliged to negotiate in good faith. Breaking off negotiations, contrary to good faith, entails liability for the damage caused to the other party”.

In accordance with this provision, failure to comply with the obligation of good faith gives rise to pre-contractual civil liability, limited to compensation for negative interest, also known as “compensation for legitimate expectations”. Negative interest aims to compensate for losses incurred by the affected party because of the negotiations, without including the profit that the party could have obtained under the contract that might have been concluded. This limitation aims to balance the protection of the parties and contractual freedom, avoiding the imposition of disproportionate liability on the party that decides not to conclude the contract.

Article 1025(3) of the Civil Code clarifies the limits of damages: “Damages do not cover anticipated profits. However, in cases of intent or gross negligence, they may include the loss of a reasonable opportunity to conclude a contract with a third party”.

Thus, the law introduces an exception in favor of victims of seriously breached negotiations, allowing compensation to be extended to include the loss of reasonable opportunities. This provision reflects the principle of proportionality and recognizes the existence of situations in which the guilty party's conduct may cause damage greater than the simple loss of trust.

Article 1025(2) and (6) of the Civil Code implicitly regulates the obligation of confidentiality and the protection of legitimate expectations in negotiations, namely: paragraph (2) enshrines the principle of loyal cooperation and the protection of information obtained during negotiations, and paragraph (6) provides for the possibility for the parties to establish, by express agreement, additional limits on their mutual obligations during the pre-contractual stage, including measures to secure sensitive information.

2.2. Reference to the General Principle of Good Faith

The principle of good faith is one of the essential foundations of civil law in the Republic of Moldova, being expressly enshrined in Article 10 of the Civil Code (C. civ.), which provides: “*Good faith is a fundamental principle in the formation, execution, and termination of civil rights and obligations*”.

This provision has a general normative value, applicable to all civil legal relationships, including the pre-contractual stage. In this context, pre-contractual liability can be interpreted as a concretization of the principle of good faith in the sphere of negotiations. More specifically, the obligation of the parties to negotiate in good faith, provided for in Article 1025 of the Civil Code, aims to protect the legitimate expectations of the parties involved, preventing abuse and damage resulting from the unjustified interruption of negotiations.

At the same time, although general, the principle of good faith does not always provide precise criteria for assessing the conduct of the parties in the pre-contractual stage, which may lead to differences in interpretation in the application of Article 1025 of the Civil Code in practice. In particular, the assessment of “good faith” in relation to the breakdown of negotiations may depend on the specific circumstances of each case, and the Civil Code does not provide concrete indicators for determining the degree of fault or intent of the party⁹.

Therefore, pre-contractual liability must be viewed as a concrete expression of the general principle of good faith, adapted to the particularities of the pre-contractual stage, with the role of protecting legitimate expectations and discouraging unfair

⁹ Nick Sage. “Contractual Liability and the Theory of Contract Law.” *King’s Law Journal* 30 (3), 2019: 459–88. doi: 10.1080/09615768.2019.1686224. A detailed and up-to-date comparative analysis can be found here Thomas D. Musgrave, *Force Majeure and the Law: Acts of God in Comparative and Historical Perspective*, 1st ed. (London: Routledge, 2025), <https://doi.org/10.4324/9781003533450>.

behavior, without hindering the freedom of negotiation and the final decision of the parties.

3. Doctrinal Foundations of Pre-Contractual Liability

The analysis of pre-contractual liability has excelled in specialist doctrine as a frontier legal institution, situated between the sphere of tortious liability and that of contractual liability, with the aim of sanctioning the unfair conduct of the parties during the negotiations preceding the conclusion of the contract. This is based on the idea that, although there is not yet a contractual relationship between the parties, their legal interaction requires conduct governed by the principle of good faith and loyalty in negotiations, expressly enshrined in Article 10 of the Moldovan Civil Code and detailed in the special rules of Article 1025 of the Moldovan Civil Code, which establish the obligation to negotiate in good faith and not to break off negotiations contrary to this.

Throughout the evolution of civil law, legal doctrine¹⁰ has shown a constant interest in identifying a coherent legal basis for pre-contractual liability, which has led to the formulation of distinct theories aimed at explaining its nature and basis. In this context, several reference doctrinal concepts have emerged, among which Rudolf von Jhering's theory, which attributes a contractual character to pre-contractual liability, Bernhard Windscheid's theory, which supports the tortious nature of this liability, Marcel Planiol's theory, based on the idea of fault in the exercise of freedom to contract, and Flagella's theory, which proposes a mixed approach, situated at the confluence of contractual and tortious liability. These concepts have contributed significantly to clarifying the functions and legal regime of liability for acts committed in the pre-contractual stage, providing the premises for the development of a unified theory in modern doctrine.

3.1. Jhering's Theory of Fault in Negotiation (*Culpa in Contrahendo*)

The origin of the theory of *culpa in contrahendo* can be found in German doctrine, having been formulated for the first time by Rudolf von Jhering in his 1861 work entitled "*Culpa in contrahendo oder Schadensersatz bei nichtigen oder nicht zur Perfektion gelangten Verträgen*".

The theory developed by Rudolf von Jhering represented a turning point in the configuration of the legal regime of pre-contractual liability, proposing an original conception of its nature. According to the author, liability for acts committed during negotiations is not tortious but contractual in nature, as it is based on a tacit agreement between the parties, known as *culpa in contrahendo*. By virtue of this agreement, each

¹⁰ For a study on this subject, see Marco Torsello. "Precontractual Liability and Preliminary Agreements." Chapter. In Larry A. DiMatteo (ed.) *International Sales Law: A Global Challenge*, 630–46. Cambridge: Cambridge University Press, 2014, <https://doi.org/10.1017/CBO9781139103923.048>; or Ann-Sophie Vandenberghe and Mitja Kovac. "Illuminating the Development of Precontractual Liability: A Comparative Law and Economics Analysis", *European Journal of Comparative Law and Governance* 8, 1 (2021): 26–45, doi: <https://doi.org/10.1163/22134514-bja10013>.

party undertakes to behave diligently (*diligentia in contrahendo*) and to be liable for damages caused to the other party by breaching the obligation of good faith in the process of forming the contract. At the same time, Jhering considers that liability also extends to guaranteeing the validity of the legal act, in the sense that the party causing the annulment of the contract may be held liable for damages. Although his theory has been criticized for the artificial nature of the alleged tacit agreement, which would be difficult to accept in practice, it has contributed significantly to the doctrinal foundation of the idea of protecting legitimate expectations in pre-contractual relationships. In terms of the extent of compensation, Jhering proposes compensation for the negative interest in the contract (*negative Vertragsinteresse*), which includes both actual losses (*damnum emergens*) and unrealized benefits (*lucrum cessans*). In terms of its content, this theory occupies an intermediate position between the doctrine that bases liability on gross negligence or fraud and Windscheid's theory, which qualifies it as tortious liability.

Thus, the theory was conceived as an intermediate solution between contractual and tortious liability, to cover the gap in legal protection that exists in cases where culpable conduct during negotiations causes damage but cannot be sanctioned by the traditional instruments of civil liability. In doctrine¹¹, this construction is regarded as “a conceptual innovation intended to transpose the ethics of loyalty into the legal sphere of obligations”.

In Moldovan civil law, the culpa *in contrahendo* theory has been adopted and transposed into legislation through the provisions of Article 1025 of the Civil Code, Basic Text, Article 1025 para. (2) of the Civil Code, establishes that “the person engaged in negotiations has the obligation to negotiate in good faith and not to break off negotiations contrary to good faith”, and according to para. (3) “a person who breaches this obligation is liable to the other person for the damage suffered on the basis of the belief that the contract would have been concluded”.

This regulation expressly establishes liability for negligence in negotiations, placing it within the legal obligation of good faith. Therefore, pre-contractual liability is not based on a contract – which has not yet been concluded – but on the breach of a legal obligation of conduct, derived from the general principle of Article 10 of the Civil Code, according to which “civil rights must be exercised, and civil obligations must be performed in good faith”.

As far as we are concerned, we believe that Moldovan legislation expressly recognizes the German origin of the institution of pre-contractual liability. We consider that the institution of pre-contractual liability represents the transposition into Moldovan law of the German principle of culpa *in contrahendo*, being based on the idea of abuse of trust and failure to act in good faith in negotiations.

However, there are differences of interpretation in national doctrine regarding the exact nature of the breached obligation. Some authors consider it a legal obligation of conduct, derived directly from the law, independent of the will of the parties (argument based on the imperative wording of Article 1025 of the Civil Code). Others,

¹¹ Karl Larenz, *Lehrbuch des Schuldrechts*, C.H. Beck Verlag, Munich, 1981, p. 134.

however, argue that a *sui generis* civil law relationship arises between the parties, stemming from the conduct manifested during the negotiations (pre-contractual relations – the score), which gives this obligation a quasi-contractual character.

The doctrine also reveals a legislative gap regarding the precise moment when this obligation arises: the Civil Code does not specify whether it arises from the moment of the first manifestation of intent (invitation to negotiate) or only from the moment when negotiations actually begin. This theoretical uncertainty may have practical consequences in determining liability for the untimely interruption of negotiations (pre-contractual relations).

3.2. Windscheid's Theory – Contractual Risk Theory

In 19th-century German doctrine, Bernhard Windscheid (1817–1892) stood out for his distinct conception of the nature of pre-contractual liability, which differed from that formulated by Rudolf von Jhering. According to confirmed doctrinal sources, Windscheid rejected the contractual nature of *culpa in contrahendo* liability proposed by Jhering, arguing instead that the liability that may arise during negotiations is tortious in nature (*unerlaubte Handlung*). This doctrinal orientation is based on the principle that, until the conclusion of the contract, there is no contractual legal relationship between the parties, so that damage caused at this stage must be analyzed in light of the general rules on unlawful acts¹².

In later doctrine, this concept was interpreted as an early form of what modern legal literature has called “*contractual risk theory*”, in the sense that the person who initiates or participates in negotiations assumes certain legal risks inherent in the contract formation process. However, this formulation is deductive and is not expressly found in Windscheid's texts. The term “*theory of contractual risk*” was later used by legal scholars to designate the idea that the risks of pre-contractual activity must be borne by the person who generates them through their initiative, even in the absence of fault. In this interpretation, the theory takes on an objective character, in the sense that liability for damage caused is no longer conditional on the existence of subjective fault but is based on the mere assumption of the risk derived from participation in the negotiation process.

In contrast to Jhering's theory, which bases pre-contractual liability on a tacit agreement and the existence of contractual *fault in contrahendo*, Windscheid's theory is classified as an objective theory of liability. Under this theory, the person who initiates the pre-contractual legal relationship bears the consequences of the damage caused to the other party, regardless of its nature, based on the principle of assumed risk (*Gefahrtragung*).

¹² See also: Bernhard Windscheid, *Lehrbuch des Pandektenrechts*, 9th ed., Literarische anstalt Rütten & Leoning, Frankfurt am Main, 1906, §§ 241, 285; Hans Brox, Wolf-Dietrich Walker, *Allgemeiner Teil des BGB*, München: Vahlen, 2021. https://doi.org/10.15358/978_3800665365, pp. 103–105; Jan von Hein, „Culpa in contrahendo”, in Jürgen Basedow, Klaus J. Hopt and Reinhard Zimmermann (eds.) *Max Planck Encyclopedia of European Private Law*, Oxford University Press, 2012, https://max-eup2012.mpipriv.de/index.php/Culpa_in_Contrahendo.

In contemporary comparative literature, this theory is analyzed in relation to the principle of good faith (*Treu und Glauben*), subsequently enshrined in Article 242 of the *Bürgerliches Gesetzbuch* (BGB), and the current provisions of Article 311(2) BGB, which require the parties to respect the rights and interests of the other party during the negotiation phase. However, it should be noted that these rules were only introduced after the codification of the BGB in 1900 and do not reflect Windscheid's original conception, but rather a subsequent doctrinal development under the influence of Jhering.

In the Republic of Moldova, the Civil Code does not expressly enshrine a theory of contractual risk applicable to pre-contractual negotiations. Article 1025 of the Civil Code imposes an obligation to negotiate in good faith and prohibits the termination of negotiations contrary to this obligation but does not indicate the legal nature of the liability applicable in the event of a breach of this obligation. This represents a legislative gap that allows for divergent interpretations in doctrine, some oriented towards the tortious nature of liability (in line with Windscheid), others towards the contractual nature (in the spirit of Jhering's theory).

Therefore, Windscheid's theory contributes to understanding the objective dimension of pre-contractual liability, providing a theoretical basis for analyzing legal risk during negotiations. However, its application in contemporary law requires methodological caution, as the formulation "*theory of contractual risk*" is a modern doctrinal reconstruction and not an explicit concept in the author's work.

3.3. Planiol's Theory on the Basis of Pre-Contractual Liability

Within classical French doctrine, Marcel Planiol formulated a theory that is essential to understanding the basis of civil liability, according to which fault consists in the failure to fulfill a preexisting obligation. In his view, legal liability cannot exist in the absence of a specific obligation prior to the act causing the damage¹³.

This concept excludes the possibility of "intermediate" liability, placed between the two traditional categories. Thus, according to Planiol's theory, the party complaining of the untimely breakdown of negotiations must prove the existence of a specific obligation, arising previously and breached by the other party. In other words, liability for acts committed in the pre-contractual phase can only be incurred to the extent that there has been a breach of a pre-existing legal or contractual obligation.

Although Planiol admits that entering negotiations generates a set of special obligations, these are considered an extension of the general obligations of good faith and prudence, without constituting an autonomous source of obligations. From this perspective, negotiations require increased diligence on the part of the parties, conceptually like what Rudolf von Jhering called diligence *in contrahendo* – a notion that refers to prudent and loyal conduct during negotiations.

¹³ Marcel Planiol, *Traité élémentaire de droit civil*, vol. II, 12th ed., Paris: Librairie Générale de Droit et de Jurisprudence, 1939, nos. 870–872; Laurent Aynès, Philippe Malaurie, Philippe Stoffel-Munck, *Droit des obligations*, 13^e édition, Librairie Générale de Droit et de Jurisprudence, Paris, 2024, pp. 57–59.

In opposition to this view, subsequent doctrine attempted to substantiate pre-contractual liability through other legal constructions, such as the theory of mandate, business management, or unilateral commitment of will. However, these theories were rejected by most authors because of their artificial nature and the difficulty of justifying pre-contractual legal relationships through mechanisms intended for other institutions of the law of obligations.¹⁴

From a contemporary perspective, Planiol's vision continues to influence the doctrinal interpretation of provisions on pre-contractual liability, including in Moldovan law. Article 1025 of the Civil Code of the Republic of Moldova imposes on the parties the obligation to negotiate in good faith and prohibits breach of this obligation but does not clarify the legal nature of the liability applicable in case of breach of this obligation. The absence of an express reference to the provisions on contractual liability (Art. 901 et seq. of the Civil Code) or tortious liability (Articles 1998 et seq. of the Civil Code) leaves open the theoretical question raised by Planiol concerning the legal nature of obligations during the negotiation phase and the exact distinction between the two classic forms of liability.

Therefore, Planiol's theory provides a logical and coherent conceptual framework, but it is limited in that it refuses to recognize an autonomous regime of pre-contractual liability. This position was later superseded by Italian scholars (such as Gabriele Faggella), who argued for the existence of an independent form of liability based on culpa *in contrahendo*, but the fundamental principles formulated by Planiol remain indispensable in any doctrinal analysis of the institution.

3.4. Faggella's Theory on Pre-Contractual Liability

In early 20th century Italian doctrine, Gabriele Faggella made a significant contribution to the reflection on liability in the negotiation phase, being recognized for investigating the issue of "unjustified breakdown of negotiations" (*la rottura delle trattative*) as a potential source of liability.

Faggella proposed a three-part division of the pre-contractual period: first phase: preliminary negotiations; second phase: drafting the offer; third phase: issuing the offer¹⁵.

In the first phase – preliminary negotiations – the parties attempt to reach agreements on the elements of the future contract, but these initial agreements, although collaborative in nature, are not automatically considered binding agreements. Some Italian legal scholars suggest that these agreements "are not true contracts" in the sense that they lack binding force.

However, the interpretation that all such agreements are exclusively "subject to inventory" is a speculative extrapolation, not clearly confirmed by Faggella.

¹⁴ Laurent Aynès, Philippe Malaurie, Philippe Stoffel-Munck, *op. cit.*, pp. 59–61; Jean-Luc Aubert, *Le contrat. Droit des obligations*, 2^{ème} édition, Dalloz, Paris, 2000, pp. 45–47.

¹⁵ James Goudkamp and Eleni Katsampouka. "Tort Liability for Contractual Liability." *The Cambridge Law Journal* 84, no. 2 (2025): 279–91. <https://doi.org/10.1017/S0008197325100706>. Marco Torsello, *op. cit.*, 630–46.

In the second phase – formulation of the final offer – the parties, usually those who initiated the negotiations, reflect on the prepared agreement and submit the “final” offer. During this period, according to legal doctrine, the parties' confidence that the agreement will be concluded increases.

As regards the third phase – the issuance of the offer – Faggella paid particular attention to it, but the precise details concerning all the legal effects relate more to the formation of the contract and exceed the scope of our discussion.

According to Faggella's theory, the basis of pre-contractual liability does not lie strictly in fault or in the non-performance of an obligation arising from a tacit agreement, but in the very involvement of the parties in the pre-contractual work. By entering negotiations, the parties would, in Faggella's view, conclude a guaranteed agreement whereby they undertake to act in good faith and loyalty and not to interrupt the negotiations without legitimate reason.

Faggella argues that liability would arise in the event of an “arbitrary refusal to continue negotiations”.

Faggella's theory has not been without criticism. One of the main objections concerns the fact that the tripartite subdivision of the pre-contractual period may not be found in all types of contract negotiations, e.g., in many cases, the “offer preparation” phase is missing or incomplete.

Furthermore, the concept of “arbitrary refusal” has been criticized as vague and susceptible to abuse by both parties and courts – a problem of doctrinal and practical clarity.

Furthermore, Faggella has been criticized for assuming a “legal source” of pre-contractual obligations that did not actually exist in the Italian code at the time – which raises the issue of a lag in the formal legislative framework. This constitutes a legislative gap in the sense that the rule on liability for negotiations was not clearly codified in Italy at the time the theory was developed.

Faggella's theory made two essential contributions:

- recognition of the fact that preliminary negotiations can create legal effects even before a formal offer is made, and

- emphasizing the idea that pre-contractual liability must be proportional to the degree of progress in the negotiations, with greater liability the closer the parties have progressed toward the contract.

At the same time, there remains a divergent doctrinal interpretation regarding the exact legal nature of liability (contractual vs. tortious) and the limits of damage (e.g., whether it includes “lost opportunities” *lucrum cessans*), issues on which Faggella himself did not provide exhaustive formulations.

Although Faggella's theory has not been fully transposed into Italian law or other laws in the form proposed, it has profoundly influenced the evolution of doctrine and case law on pre-contractual liability. Comparative law recognises that, in many systems, it is necessary to protect the legitimate expectations of the parties during negotiations (e.g. Articles 1337 and 1338 of the Italian Civil Code).

For the law of the Republic of Moldova, the lack of an express provision establishing liability for unjustified termination of negotiations constitutes a legislative

gap and requires an interpretative adaptation inspired by comparative doctrine.

3.5. Doctrinal Analysis in Moldovan Civil Law

In Moldovan legal doctrine¹⁶, the institution of pre-contractual liability began to be systematically analyzed after the 2019 reform of the Civil Code, which, in Article 1025, expressly enshrined the obligation to negotiate in good faith and the liability for breaching it. The introduction of this rule represented an important step in the process of modernizing the law of obligations by recognizing the principle of loyalty in the pre-contractual stage as the basis for civil liability.

However, the exact legal nature of pre-contractual liability remains a subject of doctrinal debate, as the Civil Code does not expressly specify whether this liability is contractual, tortious, or autonomous. The differences in interpretation are because Article 1025 of the Civil Code establishes a legal obligation of conduct, rather than one derived from an actual contractual relationship, thus placing the institution in an intermediate area between the two classic forms of civil liability.

The lack of a clear distinction between the types of liability applicable in the pre-contractual negotiation phase reveals a conceptual uncertainty in the civil law of the Republic of Moldova. Indeed, Article 1025 of the Civil Code – which establishes the obligation to negotiate in good faith and prohibits the unjustified termination of negotiations – does not expressly refer to the provisions on liability for non-performance of obligations (Articles 901 et seq. Civil Code) or those governing tort liability (Art. 1998 et seq. Civil Code).

This legislative silence would allow for divergent interpretations regarding the legal nature of pre-contractual liability – whether it should be classified as tortious liability, as a form of compensation for non-contractual damage caused by a breach of a general legal obligation of conduct, or whether it constitutes an autonomous liability derived from a legal obligation of good faith specific to the negotiation stage¹⁷.

Therefore, although Article 1025(3) of the Civil Code expressly enshrines the right to compensation for damage caused by a breach of the obligation of good faith, the Civil Code does not specify the exact legal basis for this liability, leaving the solution to the discretion of doctrine and case law. The doctrine has not yet reached a consensus on the legal basis for this liability, with some authors arguing that it is based on the principle of good faith, while others argue that it is based on the principle of good faith and good faith.

¹⁶ Concerning the conditions of pre-contractual liability, see: Ion Bîtcă, Vitalie Curarari, „Condițiile refuzului de a negocia” [„The conditions of refusal to negotiate”], *Vector European* no. 1/2015, pp. 72–78, https://usem.md/uploads/files/Activitate_%C8%98tiin%C8%9Bific%C4%83_USEM/Vector/Vector_European_2015_1.pdf.

¹⁷ Larry A. DiMatteo, Lucien Dhooge, Stephanie Greene, Virginia Maurer, and Marisa Pagnattaro. “Breach of Contract by Seller.” Chapter. In Larry A. DiMatteo, Lucien Dhooge, Stephanie Greene, Virginia Maurer, Marisa Pagnattaro (eds.) *International Sales Law: A Critical Analysis of CISG Jurisprudence*, 132–39. Cambridge: Cambridge University Press, 2005.

4. The Legal Nature of Pre-Contractual Liability

Pre-contractual liability is characterized by the protection of the legitimate expectations of the parties and by the general limitation of damages to the restoration of legitimate expectations, in accordance with Article 1025(3) of the Civil Code, with the proviso that, in cases of intent or gross negligence, it may also cover the loss of a reasonable opportunity to conclude a contract with a third party. However, the court of first instance erred in law when it held that the defendant was liable for damages in the amount of 100% of the purchase price of the property, since the plaintiff's claim was based on the fact that the defendant had failed to fulfill its obligation to transfer the property to the plaintiff.

4.1. The Tort Theory of Pre-Contractual Liability

Tort theory considers that pre-contractual liability is based on civil tort liability, which means that it arises in the absence of a contract and is based on compensation for damage caused by unlawful conduct, with fault. The main argument of this theory is that the absence of an actual contract excludes the application of contractual liability, and the legal protection of the parties is achieved on the basis of the legal obligations of conduct imposed during the negotiation stage.

This approach is supported by classical French doctrine, which enshrines the idea of *responsabilité précontractuelle* based on tortious liability, in accordance with Article 1240 of the French Civil Code (formerly Article 1382 of the Civil Code), which establishes liability for damage caused by unlawful acts.

In Moldovan law, this theory can be correlated with Articles 1998–2002 of the Civil Code, which regulate general tort liability, as well as with Article 1025 of the Civil Code, which enshrines the obligation to negotiate in good faith and establishes liability for damage caused by breach of this obligation.

4.2. Contractual Theory of Pre-Contractual Liability

Contractual theory considers that pre-contractual liability is based on obligations arising from pre-contractual relationships, equating to a certain extent with contractual liability, even in the absence of a definitive contract. This approach is based on the idea that negotiations bind the parties through obligations of conduct and cooperation, and failure to comply with them may give rise to liability for damage caused to the other party.

Contractual theory argues that pre-contractual liability is based on the contractual proximity between the parties, even before the actual conclusion of a definitive contract. The central argument of this theory is that, during the negotiation stage, the parties are in a relationship of cooperation and interdependence, which justifies the application of certain contractual principles, such as good faith (Article 10 of the Civil Code) and the foreseeability of damage, to protect the legitimate expectations of the parties. This approach could be supported by the consideration that

pre-contractual relations generate “*proxime contractuale*” obligations, justifying the analogous application of contractual rules and compensation for damage caused by failure to comply with negotiation obligations¹⁸.

In Moldovan law, however, this theory must be analyzed considering Article 999(5) of the Civil Code, which states that “*a stipulation whereby the parties undertake to negotiate with a view to concluding or amending a contract does not constitute a preliminary contract*”. This shows that agreements reached by the parties in the pre-contractual stage – such as negotiations or agreed points – do not generate a preliminary contract and, therefore, failure to conclude the planned contract does not entitle the aggrieved party to request the court to issue a decision that would take the place of a final contract, in accordance with Article 1000 of the Civil Code.

Therefore, the application of contractual principles in pre-contractual negotiations is speculative, as Moldovan law does not transform pure negotiations into contracts or preliminary contracts.

4.3. The Autonomous (Eclectic) Theory of Pre-Contractual Liability

In the theoretical analysis of pre-contractual liability in Moldovan civil law, a key aspect is determining its legal basis in the absence of a concluded contract. As long as the negotiations have not resulted in a valid agreement, there can be no contractual liability in the strict sense, since there is no agreement between the parties, which is an indispensable element for the formation of a contract according to Article 992 of the Civil Code, which provides that a contract is concluded by agreement between the parties.

In this context, Article 1025(2) and (3) of the Civil Code establishes an autonomous legal obligation of conduct: the parties engaged in negotiations have a duty to act in good faith and not to break off negotiations contrary to this, and breach of this obligation gives rise to liability for the damage caused to the other party.

It follows that the obligation of good faith does not arise from the will of the parties, but directly from the law, as an expression of the general principle of exercising civil rights in good faith, provided for in Article 10 of the Civil Code. Consequently, liability for breach of this obligation is legal and autonomous, distinct from contractual liability, which excludes the direct application of the rules on non-performance of contractual obligations.

The autonomous theory considers that pre-contractual liability is an independent legal institution, distinct from both contractual liability and tortious liability. The central argument of this theory is that, although liability derives from unlawful conduct during the negotiation stage, it does not depend on the existence of an actual contract or a preliminary contract but is based on a breach of the legal

¹⁸ Sergiu Baies, Gheorghe Mitu, Octavian Cazac, Valentina Cebotari, Sorin Bruma, Oxana Robu, Ion Cretu, *Drept civil. Teoria generală a obligațiilor* [Civil law. General theory of obligations], Tipografia centrală, Chișinău, 2015, pp. 188–190.

obligation of loyal conduct in pre-contractual relations¹⁹.

In Moldovan law, pre-contractual liability is based on the legal obligations imposed on the parties during negotiations and does not depend on their express will. It can be viewed as a form of autonomous and specialized civil liability, distinct from contractual and tort liability, with a specific character adapted to the pre-contractual context.

This approach allows for the integration of the principles of good faith (Art. 10 of the Civil Code) and the protection of legitimate expectations, without transforming pre-contractual negotiations into contracts or preliminary contracts, in accordance with Art. 1025 of the Civil Code and with the clarification that “*the stipulation by which the parties undertake to negotiate with a view to concluding or amending a contract does not constitute a preliminary contract*” (Art. 999 para. (5) of the Civil Code). Consequently, failure to conclude the proposed contract does not confer the right to request the court to issue a judgment equivalent to the final contract (Article 1000(3) of the Civil Code).

From a deductive perspective, we could argue that, in situations where the parties are at an advanced stage of negotiations – with a substantial exchange of offers, information, or preliminary promises – an autonomous pre-contractual legal relationship would be established, governed by the principle of good faith provided for in Article 10 of the Civil Code. This principle requires the parties to refrain from any conduct that could unfairly prejudice the other party, thus creating an obligation of loyalty and prudence, even in the absence of a contract.

However, this conclusion is based on doctrinal interpretations, as the Civil Code of the Republic of Moldova does not expressly recognize the existence of a “pre-contractual relationship” as an autonomous legal institution. The provisions of Article 1025 of the Civil Code regulate the parties' obligation to negotiate in good faith and provide for liability for damage caused by a breach of this obligation, including by breaking off negotiations contrary to the principle of good faith. However, the law does not define the legal nature of the relationship between the parties in the pre-contractual phase. In the absence of express regulation, the consideration of pre-contractual liability as a form of autonomous, eclectic liability, combining elements of contractual and tortious liability, remains a doctrinal construct that has not been consistently confirmed by the case law of the courts of the Republic of Moldova.

Therefore, through deductive analysis, it can be argued that pre-contractual liability essentially falls under the legal regime of tort liability, being based on the breach of the obligation to negotiate in good faith and, by extension, on the general principle of good faith enshrined in Article 10 of the Civil Code. This liability does not derive from the will of the parties and does not create autonomous rights²⁰.

¹⁹ Sébastien De Rey, and Lei Chen. “Non-Monetary Relief for Breach of Contract: A European Perspective on Chinese Contract Law.” *Asia Pacific Law Review* 29 (2), 2021: 325–45. doi: 10.1080/10192557.2022.2033086.

²⁰ James Gordley, “Damages for Breach of Contract: The Legacy of Conceptualism,” in Luca Siliquini-Cinelli, Davide Gianti, Mauro Balestrieri (eds.), *The Grand Strategy of Comparative Law*, 1st ed. (London: Routledge, 2024), Chapter 7. Also, see Cristina Elena Popa Tache and Cătălin-Silviu Săraru, “Yesterday

4.4. Correlation Between Pre-Contractual Liability and Tort Liability

As far as we are concerned, we consider that pre-contractual liability can be conceptualized as a specific form of tort liability, applicable in the context of pre-contractual negotiations. This derives from the general principles of liability for unlawful acts, regulated in Articles 1998–2002 of the Civil Code of the Republic of Moldova (C. civ.), and involves compensation for damage caused by unlawful conduct, with fault, in the relations between the parties involved in the negotiations.

These provisions may be applied analogously in the pre-contractual stage, in situations where there is a risk of disclosure of confidential information or other actions contrary to good faith, providing the parties with legal protection before actual damage occurs.

The majority of legal scholars emphasize that pre-contractual liability is a concrete manifestation of tort liability in negotiations, serving both compensatory and preventive purposes. Thus, pre-contractual liability represents an adaptation of the principle of tortious liability to pre-contractual legal relationships, protecting the legitimate trust of the parties and discouraging unfair behavior.

In Moldovan law, this correlation is inferred by interpretation. The Moldovan Civil Code does not explicitly provide for the application of Articles 1998–2002 of the Civil Code in pre-contractual negotiations, which may lead to divergent interpretations in practice. In addition, pre-contractual liability is distinguished by limiting damages to “the loss suffered on the basis of the belief that the contract would have been concluded” (Art. 1025(3) of the Civil Code) and by the emphasis on good faith, aspects that are not explicitly regulated in the context of general tort liability.

Therefore, pre-contractual liability can be viewed as a special tortious liability, applying the general principles of liability for unlawful acts, but adapted to the particularities of negotiations and the protection of legitimate expectations, considering legislative gaps and interpretative differences.

5. Conclusions

Pre-contractual liability is a relatively new legal institution in Moldovan civil law, expressly enshrined in Article 1025 of the Civil Code, resulting from the modernization of the law of obligations and influenced by European models, in particular the German doctrine of *culpa in contrahendo* and French pre-contractual liability.

This form of liability is based on the legal obligation to negotiate in good faith and not to break off negotiations contrary to this obligation, and its violation entails

liability for the damage caused to the other party, generally limited to compensation for negative interest, with the possibility of extending compensation in cases of intent or gross negligence.

The general principle of good faith, enshrined in Article 10 of the Civil Code, constitutes the legal basis for the obligation of loyal conduct in the pre-contractual stage, as specified in the special provisions of Article 1025 of the Civil Code, which protect the legitimate trust of the parties and discourage unfair conduct.

Comparative doctrinal analysis reveals the existence of several theories regarding the nature of pre-contractual liability: Jhering's theory, based on *culpa in contrahendo*, which confers a contractual character on liability; Windscheid's theory, which qualifies it as tortious or strict liability; Planiol's theory, which bases it on pre-existing obligations, and Faggella's theory, which proposes an autonomous form of liability proportional to the degree of progress in the negotiations.

In Moldovan law, although Article 1025 of the Civil Code regulates pre-contractual liability, its exact legal nature remains debatable: legal doctrine is divided between the tortious, contractual, and autonomous approaches, and judicial practice has not yet provided uniform interpretations.

There are certain legislative gaps, including: the precise definition of the moment when the obligation of good faith arises, the criteria for assessing the justified interruption of negotiations, and the clear distinction between pre-contractual liability and other forms of civil liability.

Overall, pre-contractual liability is a mechanism for protecting legitimate expectations and strengthening loyalty in negotiations, complementing contractual and tort liability. However, further doctrinal and jurisprudential clarification is needed to define its conceptual and practical scope.

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