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BONA FIDEI PRINCIPLE ACCORDING UNITED STATES OF AMERICA DOCTRINE AND LEGISLATION

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ABSTRACT: *Unlike ordinary English law, American customary law has moved in another direction. The first attempts to recognize and incorporate into the US law the concept of trust in America have started since the 1950s, and certainly are entirely devoted to one of the leading drafters of the Unicity Trade Code, Llewelyn. Llewely's obedience to the importance of integrating bona fidei was formed mainly under the influence of the Continental Legal School, the interest that the jurisprudence of the civilized countries of law had shown for this principle but also under the influence of the German Law School scholars who are considered as the fathers of the doctrine of culpa in contrahendo.*

KEYWORDS: Bona Fidei Principle, Doctrine, Legislaton, Unicity Trade Code

INTRODUCTION

Brief Overview on the Welfare Clause

Unlike ordinary English law, American customary law has moved in another direction. The first attempts to recognize and incorporate into the US law the concept of trust in America have started since the 1950s, and certainly are entirely devoted to one of the leading drafters of the Unicity Trade Code, Llewelyn. Llewely's obedience to the importance of integrating bonafidei was formed mainly under the influence of the Continental Legal School, the interest that the jurisprudence of the civilized countries of law had shown for this principle but also under the influence of the German Law School scholars who are considered as the fathers of the doctrine of *culpa in contrahendo*.

The first version of the official text of the Single Commercial Code was adopted in 1962. However, the drafting process dates back much earlier than this date. Llewelyn, through his work, sought to incorporate into a modern American contractor a foreign concept until then in order to achieve what he called "commercial decency". Given this purpose, the first draft of the Code in 1950 included a very broad definition of trust, which consisted in respecting commercial standards and honesty in fact. However, this broad definition faced strong resistance. In particular, the American Chamber of Commerce, the Corporate, Banks and Trade Legislation Section, called for a narrow definition of the trust principle and called into question "commercial standards" as its way of assessing it. In conclusion, in 1952 the drafters of the code made a compromise of the two opposite attitudes. On the one hand, they accepted the proposal of the American Chamber of Commerce by restricting the sense of trust just as honestly in fact (Article 1 of the Unique Commercial Code). On the other hand, in Article 2 of the Code, they imposed on traders the simultaneous obligation to act honestly and to apply reasonable commercial standards. This provision refers only to the operators acting on the commercial trader's quality, making it clear that in all other cases, if the contracting parties do not have such status, their actions are analyzed under the provisions of Article 1 of the Code.

For a long time, the interaction and link between the provisions of Article 1 and Article 2 of the Code was unclear. On the one hand, it was understandable that trust was given a narrow

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meaning by defining it as an honest act, but on the other hand it seemed that the code expanded this definition in the case of contracting parties acting on the quality of the trader. This ambiguity found solution with the revision of several code provisions in 2001, including its Article 1. The revision of Article 1 resulted in a complete change in the attitude of the code to the concept of trust, by accepting a broad understanding of it. Thus, trust was now defined as "honesty in fact" and respecting reasonable commercial standards of fair market interaction. " This definition clearly reflects the similarity with the definition given by the first draft of the code in 1950 and indicates that Llewelyn's aspirations for a broad definition of this concept were met.

This change in attitude is not just formal. Above all, it means that respect for trust will now be analyzed not only through the subjective standard - to act honestly - but also through an objective standard - to enforce reasonable commercial interaction requirements in the market. However, for a concept so abstract and defined through "open" terms, with a strong moral character, one can naturally ask the question of how these two standards differ from each other? What are the criteria used by the court to conclude whether the party has implemented the requirements of the action honestly and the observance of reasonable commercial standards? Traditionally, the US courts have admitted that honesty in action is determined by the real will of the party. This means that the party could act negligently or naïve, but regardless of its conduct, it would be considered in good faith if the real purpose of the party was not to harm the other party. This standard of appreciation introduced by American courts is called the "pure heart, empty head" standard. In applying the subjective standard of trust - acting honestly - the court must therefore consider in particular (1) the state of mind (2) the motives of the party (3) whether the party has acted or not in trust.

The incorporation of the second standard - the observance of reasonable commercial demands - seems to have significantly changed the way in which the court treats trust. Thus, in any case, the court may decide that the obligation to act in good faith has been violated even though the purpose of the party has no such thing (that is, the requirement of pure heart, empty head), if the consequence of the acts of the party has been the violation of reasonable commercial fair trade standards. It is obvious that this second standard brings a very large change in the enacting clause of the court's decision regarding the non-violation of the principle of trust.

The Unique Commercial Code was the first legal act in American law which referred to the concept of trust, but it is not the only act. In drafting the Restatement of Contract Act of 1921, drafters of the act also made efforts to include trust in its content, but without success. As we have mentioned above, this was only done in 1962 with K. U.T. The 1981 Contracts Act did, however, take a turn and, following the steps of the regulation provided by the code, included in its content the "general contractual obligation to act honestly and fairly in the fulfillment of contractual obligations." The comments accompanying the act described this final step towards conscientious acceptance of trust as a general clause in US contract law.

The second stage after the explicit recognition of the trust by the legislation was the theoretical and scholarly elaboration of the term on the basis of the existing common law principles. The contribution of scholars like Kessler and Summers in this aspect has been of particular importance. The works of the first intended to point out the transformation of American contractual law from the sphere of individualism to that of social concerns of the 20th century, thus showing that the alleged differences between the civil systems of law and those of customary law are not so big. Summers, on the other hand, was the first to deal with theoretical

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confidence-building in American contract law. His "Excluder approach of good faith" has been one of the top supportive pillars of US Supreme Courts in fiduciary analysis.

Based on the above, it is clear that the difference between the British and US common law treaty is clear. Although part of the same legal family, they hold differing attitudes to this concept of pronounced moral character. The United States has opted for the direct recognition of this principle and its inclusion in legislation, unlike England, which no explicit legal reference has been made to it.

Bona fiedei in pre-contractual negotiations.

If we talk about trust in the pre-contractual period in the United States, the situation is unclear. Both the 1981 Contract Act and the Single Commercial Code do not contain any express predictions regarding confidence in the stage of pre-contract negotiations. Thus, accepting the obligation to act in good faith in the preliminary talks remains a discretionary decision of the court. If the courts acknowledge the existence of such an obligation then they automatically extend the meaning of the provisions of the Contracts Act and the Single Commercial Code, beyond their initial content and give confidence to the value of a general principle, a characteristic model for civilian countries law.

The American doctrine, based on solutions given case-by-case jurisprudence, has distinguished four regimes that regulate the parties' responsibility in case of termination of preliminary negotiations: the two extreme regimes that are negotiating and the final agreement and two intermediate regimes that may be the result of a preliminary agreement, open-term agreement or agreement to negotiate. The analysis of these regimes will give us a complete overview of the reasons why one party may be held responsible for the discontinuation of the preliminary negotiations and in the last analysis we will give an answer if on the basis of these cases on the basis of which the responsibility arises whether or not a general obligation of the parties to negotiate in good faith.

Negotiation

Traditionally, American courts have emphasized the party's freedom to negotiate without the risk of a pre-contractual liability. Under the classical rules of the bid and the offer, there is no basis for the emergence of such a liability until the contract enters into force by accepting the proposal. Until acceptance is granted, the bidder is free to withdraw. The American jurisprudence for a long time maintained the view that parties at the pre-contractual stage are exempt from any contractual liability or not, thus giving the concept of "freedom to negotiate" a very broad understanding. In this case, a court's reluctance to impose responsibility has been observed. Although the obligation to act in good faith extends throughout the life of the contract, it does not reach until the preliminary negotiations.

From the aspect of the law, the problem of liability arising from the failure of negotiations is solved in the light of the rules of supply and demand. No protection is provided for the party to whom the bid is addressed if the latter has been revoked by the bidder. The potential recipient is considered protected through the "opportunity" he has to accept the offer. While he has not yet accepted the offer until the Bidder has withdrawn it, it is considered that he has taken over the risk of such withdrawal and consequently any claim for reparation would collapse. The parties during the preliminary negotiations are free to withdraw without any kind of liability

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due to changing the terms because they require more favorable contractual conditions or even without cause.

However, despite the lack of legal regulation of this situation, recent decades have seen a court attempt to impose liability in case of discontinuation of preliminary talks in breach of the trust obligation. Three are the main causes that US courts have considered to be the source of such a responsibility. In fact, it is often said of a fourth cause, entirely created by doctrinal analysis and still not strongly supported by jurisprudence. The first three reasons for the emergence of accountability are unpaid prosperity, erroneous factual presentation, and the particular promises given during the negotiations, while the fourth cause relates to the overall obligations arising from the negotiations.

CONCLUSIONS

1. The American system represents a tremendous diversity in the context of the terror of the *culpa in contrahendo*, as the trade and business relations in this country are very developed.

2. In this framework i conclude that this system is a system based on the German doctrine but has its own deviations and we see them, for example in the Trade Act.

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