SIGNIFICANCE OF PRE-CONTRACT NEGOTIATIONS: A CRITICAL ANALYSIS

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Introduction:

Pre-contract negotiations serve as a crucial stage in the formation of business agreements and contractual relationships. These preliminary discussions between parties involved in a potential contract lay the foundation for establishing terms, conditions, and expectations. This article aims to critically analyse the significance of pre-contract negotiations by examining their benefits, challenges, and implications in various contexts, such as legal, commercial, and relational aspects. By delving into this critical analysis, we can gain a deeper understanding of the importance of effective pre-contract negotiations in ensuring successful business transactions. It is necessary to reveal some information to conclude a healthy contract during the phase of negotiation. Accordingly, a relationship basing on mutual trust needs to be formed between parties. The duties regarding this relationship have been named as "pre-contractual duties" or "culpa in contrahendo" under legal scholarship. If any party fails to fulfil this trust some liabilities may occur, depending on the legal system we are operating in. There are different approaches from different legal systems. This paper aims to compare the outcome of the study of the European scholars, the Draft Common Frame of Reference, a common law states the United Kingdom and a civil law state Turkey and point out the main differences in approaches to pre-contractual duties.

One of the fundamental aspects of pre-contract negotiations is effective communication. Clear and concise communication allows parties to articulate their expectations, needs, and concerns, fostering a shared understanding of the proposed contractual terms. By engaging in open and transparent dialogue, the parties can avoid misunderstandings, reduce the risk of disputes, and increase the likelihood of reaching mutually agreeable terms.

Pre-contractual duties have been regulated differently by different legal regimes. We can divide these regimes into four groups: -

1. **Tort:** According to this group, the pre-contractual duties arise due to the obligation not to violate a person's rights or causing damage by not paying attention to the duty of care. It could be said that here with this view of the regime of pre-contractual duties, the specifics of the pre-contractual relations have been disregarded and only the general duty of care has been accepted as the basis. For example, we see this type of understanding in the legal systems of France, Spain, and Portugal.
2. **Contractual:** Here, different from the understanding of tort as a regime to regulate pre-contractual duties, the pre-contractual relations are being regarded as a specific type of relation, an extension of the contractual obligations. The contract that is to be concluded and the pre-contractual duties form an entirety. Therefore, the party who has liabilities for the contract also has liabilities for the pre-contractual negotiations. This type of understanding could be seen under the legal system of Germany and Austria.
3. **Independent Transaction:** This type of understanding does not rely pre-contractual duties to contractual duties but regards it as a transaction independent from the contract. This, for instance can be seen in the Greek legal system.
4. **No liability:** This understanding could be seen in the common law systems because these systems do not accept pre-contractual duties as a legal concept. Even though pre-contractual duties have not been accepted as a part of the legal system in common law systems, there are several other institutions that may help to protect the party who has suffered losses.[1] English legal system could be regarded as an example.

In general, the pre-contractual phase can be defined as the process of negotiation that leads to the conclusion (or non-conclusion) of a contract. From this phase, some legal consequences may arise. Although the process is imaginable, the way that every legal system investigates this phase can influence the rules on offer and acceptance[2]. Most of the states that work with market-economy accept certain freedoms, such as freedom of contract, freedom of competition, freedom of association. These freedoms would ensure the functioning of the system. Pre-contractual duties come as an extension of the freedom of contract[3].

For the first time, the German scholar Rudolf von Jhering has analysed the term "pre-

[1] Bénédicte Fauvarque-Cosson and Denis Mazeaud, ed., European Contract Law: Materials for a Common Frame of Reference: Terminology, Guiding Principles, Model Rules (Munich: European Law Publishers, 2008),187.
[2] Sjef Van Erp, "The Pre-Contractual Duties," in Towards European Civil Code, ed. Arthur Hartkamp et. al., Revised and Expanded 2nd ed. (The Hague: Kluwer Law International, 1998): 202.
[3] Ibid.,203.

contractual negotiations"[4] in his academic paper published in 1861[5]. He stated that although there is no contract between the parties at the stage of negotiations, there is some sort of legal relationship and in case a party commits fault during the negotiations, that respective party will be liable of damages[6].

In every legal system that accepts the freedom to enter into contract, there is also a freedom to decide its content. In every legal system there is an offer and an acceptance which ensures the certainty of the start of the contract[7].

When considering pre-negotiations, it is necessary to place it in the context of the whole negotiation process. Whilst the pre-negotiations stage itself has distinct features with its various stages and uses, it is part of a much wider process. It is suggested that "Pre-negotiations provide parties an opportunity to approach and to be involved in the managing of significant issues, including conflicts, without risk of a formal commitment" (Pantev 2000, p.53). This allows parties to prepare themselves for a negotiation process whilst not being bound to any decisions or actions, and so providing a way of avoiding formal negotiations which may be counterproductive or useless to parties involved. Furthermore, it has been suggested that it is the pre-negotiations period which "enables parties to move from conflicting perceptions and behaviours to co-operative perceptions and behaviours"[8]

Benefits of Pre-Contract Negotiations:

1. Clarity and Precision in Contractual Terms: Through pre-contract negotiations, parties can refine and clarify the terms of the agreement. This includes specifying obligations, performance standards, timelines, payment terms, and other critical aspects. Clear and precise contractual terms reduce the likelihood of ambiguities and disputes during the execution of the contract.
2. Risk Mitigation and Dispute Prevention: Pre-contract negotiations provide an opportunity to identify and address potential risks and uncertainties. By discussing and negotiating risk allocation, mitigation measures, and dispute resolution mechanisms,

[4] Fauvarque-Cosson and Mazeaud ed., European Contract Law, 185; Süleyman Yalman, Türk-İsviçre Hukukunda Sözleşme Görüşmelerinden Doğan Sorumluluk (Ankara: SeçkinYayınları, 2006),15.
[5] Von Jhering, "Culpa in Contrahendo oder Schadensersatz beinichtingen oder nicht zur Perfection gelangten Vertragen" Jahrbücherfür die Dogmatik des heutigenrömischen und deutschen Privatrechts IV(1861):1
[6] Ibid.as cited in Fauvarque-Cosson and Mazeaud ed., European Contract Law,185.
[7] It should be mentioned that there are differences between legal systems in what constitutes an offer or an acceptance. Van Erp, "The Pre-Contractual Duties," 204
[8] (Zartman 1989, p.7)

parties can proactively manage risks and minimize the likelihood of conflicts arising in the future.

3. Cost and Time Efficiency: Engaging in pre-contract negotiations allows parties to streamline the contract formation process. By addressing key issues in advance, the negotiation phase can help save time and resources that would otherwise be expended on resolving disagreements and making modifications during the contract execution stage.
4. Building Trust and Enhancing Relationships: Pre-contract negotiations provide an environment for building trust and rapport between parties[9]. By engaging in open and honest discussions, parties can establish a foundation of mutual respect and understanding. This, in turn, contributes to stronger business relationships and lays the groundwork for successful collaboration[10].

The Court of Appeal has held, in *Proforce Recruit Ltd v The Rugby Group Ltd*[11], that a dispute concerning the meaning of an undefined term (which itself had no natural or ordinary meaning) in a written agreement should proceed to trial rather than being determined summarily. In making this decision, the court commented that pre-contract negotiations may be admitted in evidence for the purpose of identifying the meaning that the parties incorporated into their written agreement and that it was arguable that an entire agreement clause did not preclude the use of pre-contract evidence in ascertaining the meaning of the written terms of the contract.

Stages of Pre-Contract Negotiations:

The stages of pre-negotiations can vary depending on the context and complexity of the negotiation process. However, the following stages are commonly involved in pre-negotiations:

Preparation: In this initial stage, each party prepares for the negotiation by gathering relevant information and conducting internal assessments. This may include identifying goals and objectives, assessing strengths and weaknesses, analysing market conditions, and determining the desired outcomes of the negotiation.

[9] Christian von Bar and Eric Clive, Principles, Definitions and Model Rules of European Private Law: Draft Common Frame of Reference (DCFR) Full Edition. Vol. I (Munich: European Law Publishers, 2009),16.
[10] Ibid.
[11] [2006] EWCA Civ 69

Information Exchange: During this stage, the parties engage in the exchange of information to establish a mutual understanding of the issues at hand. This may involve sharing relevant documents, data, and other pertinent information that can inform the negotiation process. Open and transparent communication facilitates the identification of common interests and areas of potential agreement.

Relationship Building: Building rapport and establishing a positive working relationship between the parties is crucial for effective negotiations. This stage involves creating an environment of trust and mutual respect. It may include informal discussions, social interactions, and activities aimed at fostering goodwill and understanding between the parties.

Exploration of Interests: In this stage, the parties focus on identifying and understanding their respective interests and needs. They delve deeper into the underlying motivations, concerns, and priorities that drive their negotiation positions. Exploring common ground and shared interests helps lay the foundation for potential agreements and solutions.

Setting Objectives and Parameters: Once the parties have a better understanding of their interests, they can begin setting specific objectives and defining parameters for the negotiation. This includes establishing clear goals, defining boundaries, and determining the scope of the negotiation. It helps create a framework for the subsequent negotiation process.

Proposal Development: At this stage, each party formulates and develops its proposals or offers. Proposals are drafted based on the identified interests and objectives, taking into consideration the information exchanged and the parameters set. Careful thought is given to the structure, content, and language of the proposals to enhance clarity and facilitate subsequent negotiations.

Testing the Waters: Before engaging in formal negotiations, parties may engage in informal discussions or preliminary meetings to test the viability of their proposals. These discussions provide an opportunity to gauge the other party's response, identify potential areas of agreement, and assess the feasibility of reaching a mutually satisfactory outcome.

Assessing Alternatives and Risks: Parties also consider alternative options and assess the potential risks associated with the negotiation. This stage involves evaluating fallback positions, analysing potential obstacles, and identifying potential concessions or trade-offs that may be necessary to achieve a satisfactory agreement.

Decision-Making and Authorization: Before proceeding to formal negotiations, each party typically seeks internal approval or authorization to proceed. This may involve obtaining approval from higher management or relevant stakeholders to ensure alignment with organizational goals and strategies.

Commencement of Formal Negotiations: Once the pre-negotiation stage is complete, formal negotiations commence based on the groundwork laid during the pre-negotiation phase. The pre-negotiation stage sets the stage for a more focused and productive negotiation process, with the parties better prepared to engage in substantive discussions and seek mutually beneficial outcomes.

It is important to note that these stages are not always strictly sequential and can overlap or vary depending on the specific negotiation context. The pre-negotiation stage is a dynamic and iterative process that lays the groundwork for the subsequent negotiation phase.

Challenges in Pre-Contract Negotiations:

Power Imbalance and Negotiation Dynamics: Power imbalances between negotiating parties can create challenges. Parties with stronger bargaining positions may exert undue pressure or influence on weaker counterparts, potentially leading to unfair contractual terms. Recognizing and addressing power disparities is essential to ensure equitable negotiations.

Information Asymmetry and Strategic Behaviour: Information asymmetry, where one party possesses more information than the other, can create challenges in pre-contract negotiations. Parties may engage in strategic behaviour, withholding or manipulating information to gain a more favourable position. Transparent and open communication can help mitigate these challenges.

Cultural and Language Barriers: Negotiating with parties from diverse cultural backgrounds or language proficiency levels can pose challenges. Varied communication styles, norms, and language barriers may hinder effective understanding and lead to misunderstandings. Cultural sensitivity and the use of interpreters or translators can help overcome these obstacles.

Legal and Ethical Considerations: Pre-contract negotiations should adhere to legal and ethical standards. Parties must ensure compliance with applicable laws, regulations, and industry standards. Additionally, ethical considerations, such as honesty, integrity, and fairness, should guide the negotiation process to foster trust and legitimacy.

Case Studies

To effectively examine the use of pre-negotiations two main case studies have been selected to provide a broad illustration: The Arab-Israeli conflict (also known as the Middle East Crisis) and the North American Free Trade agreement (NAFTA). It is necessary to consider a brief background of these two conflicts and the events leading up to the need for diplomatic negotiations and use of pre-negotiations to place these examples in context.

The Arab-Israeli conflict is an ongoing conflict of over one hundred years of political tensions and open hostilities in the Middle East. The central issue of the conflict is over the creation of the modern state of Israel. Even though the conflict has been occurring for an excess of one hundred years it is worth noting that Israel only became a Sovereign State in 1948. In recent times there has been a shift to a more Israeli- Palestinian focused conflict though most of the Middle East is still at odds over the territory issue. It is this ongoing conflict which led to the two sets of pre-negotiations in the 1970s which resulted in the Camp David Summit which are of relevance.

Conclusion:

Pre-contractual negotiations or prior negotiations between the parties while entering into an agreement are not admissible unless the terms of the contract are later found to be ambiguous or absurd when applied to facts. It is important that the ambiguity should not be so obvious and, on its face, to bring the intention of the party into question.

Again, when the terms of the contract are plain and straightforward, producing evidence to show that they mean something different than what is expressed therein is prohibited. Hence, Courts admit evidence only when there is latent ambiguity found in a contract.

The rule of best evidence guides admissibility of evidence, hence, where negotiations have been documented, the courts would prefer such documentary evidence over oral evidence. However, when it is required by the law to mandatorily have something in a documentary form, producing oral evidence is prohibited in such circumstances.

However, where the negotiations are in the form of oral statements only, they shall comply with Section 92 IEA before the court can allow their admission. It is important that they are

not varying the written contract unless the oral evidence is being produced by a third party to the contract.