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QUALIFICATION OF PRE-CONTRACTUAL LIABILITY AND THE VALUE OF LOST OPPORTUNITY AS A FORM OF LOSSES

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Annotation. *The article examines the problem of compensation for the value of lost opportunity at the pre-contractual stage. It has been determined that such measure of recovery depends on the nature of pre-contractual liability. However, although the Supreme Court of Lithuania recognizes the possibility for the aggrieved party of pre-contractual negotiations to recover the value of lost opportunity, the motivation of the Supreme Court's decisions is too incoherent. Moreover, Lithuanian courts have not yet adopted any methods of awarding and calculation of the damages. The conclusion of the analysis is that in cases of breach of the general obligation of good faith in pre-contractual negotiations, the Supreme Court of Lithuania allows the recovery*

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of lost opportunity, i.e. awards delictual damages. The same motivation applies even in certain cases where there is a possibility of broadening the scope of pre-contractual liability by applying contractual damages.

The article provides a general description of doctrine culpa in contrahendo, setting forth the basic elements of the doctrine, introduces the practical significance of this doctrine for the pre-contractual stage. Further, the Principles of International Commercial Contracts are broadly discussed. Finally, it provides a comprehensive analysis of the nature of the pre-contractual liability and determines the lost opportunity calculation principles.

Keywords: *civil law, pre-contractual liability, the value of lost opportunity, contractual liability, delictual liability.*

Introduction

Discussions on pre-contractual civil liability started in the end of the XIX century, when German lawyer R. Ihering formed and based *culpa in contrahendo* doctrine. The discussions have not been finished, because it is hard to form a uniform opinion on the nature of this liability. On the other hand, this liability is inexistent in the common law system countries. This is related to an interpretation of contractual freedom, which is much wider than in the continental law system: it is claimed that a person may terminate negotiations at any moment and it does not raise any liability. On the other hand, conclusion of contracts demands much time and finances from the parties participating in negotiations. Thus, in order to protect a negotiating party acting in good faith, it is important to determine the conditions of pre-contractual civil liability, including the form and extent of the loss to be compensated.

Article 6.163 part 3 of the Lithuanian Civil Code provides that a party, who acts in bad faith during negotiations must compensate the damages inflicted to the other party. In accordance with Article 6.249 (1) of the Civil Code, direct and indirect damages must be compensated.

The main objective of the research is to examine when the value of the lost opportunity should be awarded in cases of pre-contractual liability. The article discusses argumentation of court decisions in cases of the Supreme Court of Lithuania – *UAB "Vingis cinema" v UAB "Eika"*[1], *Z. Semenejeva v 553 GNSB,*

1 *UAB Vingio kino teatras v UAB Eika* (2005) No. 3K-3-38. Supreme Court of Lithuania.

UAB „Biveka"[2], *V. Š. v A. N. and A. N.*[3], *E. Mikutavičius v R. Kaupas*[4] – and from a comparative perspective, analyses the situations described in the Commentary on the UNIDROIT Principles of International Commercial Contracts.

Although A. Ivanauskas had already analyzed legal aspects of compensation for the value of the lost opportunity in pre-contractual relations[5], he did not provide a thorough analysis of the legal nature of pre-contractual liability. In our opinion, it is necessary in order to determine, in which cases the value of the lost opportunity should be awarded in pre-contractual relations. On the other hand, in authors' opinion, the position of the Supreme Court of Lithuania in determining and awarding the value of the lost opportunity in pre-contractual relations is not sufficiently motivated and could even be considered critically. In publications of foreign authors, compensation of the value of the lost opportunity is described as a method of compensation for damages inflicted by contract infringement; however, it is not analyzed in the context of infringement of pre-contractual obligations. Moreover, the nature of pre-contractual civil liability in Lithuania has never been thoroughly analyzed. Therefore, with the view of continuing the discussion on compensation of relevant losses in pre-contractual relations, which was started in Lithuanian legal literature, and to make the pre-contractual losses predictable for the parties, we have undertaken this research.

Comparative, descriptive and content analysis qualitative methods of data processing have been used for the purposes of the research.

1. The notion and legal meaning of pre-contractual relations

Article 6.162 (1) of the Civil Code of the Republic of Lithuania provides that a contract is concluded by the proposal (offer) and the assent (acceptance), but most often parties negotiate the conclusion of a contract[6].

During negotiations, "parties exchange information that identifies them and their interests (e.g. information regarding the company size, share capital, branches, type of activity, technologies, financial means, and etc.), various documents, drafts, proposals, and so on"[7]. Negotiations often can involve numbers of

2 *Ž. Semenejeva v 553 GNSB* (2002) No. 3K-7-1156. Supreme Court of Lithuania.

3 *V. Š. v A. N. and A. N.* (2006) No. K-P-382. Supreme Court of Lithuania.

4 *E. Mikutavičius v R. Kaupas* (2006) No. 3K-3-585. Supreme Court of Lithuania.

5 Ivanauskas, A. Prarastos galimybės piniginė vertė. *Justitia*, 2007, Nr. 1.

6 *UAB Vingio kino teatras v UAB Eika.*

7 Mikelėnas, V. *Sutarčių teisė. Bendrieji sutarčių teisės klausimai: lyginamoji studija*. Vilnius: Justitia, 1996, p. 122.

specialists of various fields and continue for several years. *"Thus the traditional "offer and acceptance" scheme of a contract conclusion is frequently preceded by stage of negotiations, which may be long or short, easy or difficult. Offer and acceptance in these cases are formulated only in final stage of negotiations."*[8] Therefore, while the modern process of contract formation has become more complex, the boundary between offer and acceptance is disappearing, and parties reach an agreement step-by-step, after several stages.[9]

The relations of parties during negotiations are called pre-contractual relations. The Swiss law provides for the following definition of pre-contractual relationships: the preliminary phase of discussions during which the parties examine the possibility of concluding a contract, negotiate certain clauses and take all necessary measures for the conclusion is called "pre-contractual phase"[10]. This stage starts when parties start mutual connection aimed at contract conclusion and finishes with a refusal of an offer or conclusion of a contract[11].

With the development of international economic cooperation, and the increase of the number of complex contracts, which amount to tens and hundreds million USD, the pre-contractual relationships are becoming more and more important[12]. While negotiating contract clauses regarding the "exploitation of the natural resources, large construction objects …, mergers of gigantic companies or the purchase or sale of their shares"[13] the parties spend tremendous amounts of money, and disclose their commercial secrets to each other.

The party which invests in negotiations believes that the expenses incurred during the pre-contractual phase will be covered by the profit derived from a concluded contract. However, negotiations are not always finished with conclusion of a contract, and consequences of termination of negotiations are usually painful[14]. Factual circumstances of cases decided by Lithuanian and foreign courts demonstrate that sometimes a party reasonably expects that a contract will be concluded and therefore acquires equipment, orders expensive projects, pays high fees for

8 Mikelėnas, V. *Sutarčių teisė. Bendrieji sutarčių teisės klausimai: lyginamoji studija*. Vilnius: Justitia, 1996, p. 122.

9 Farnsworth, E. A. Precontractual Liability and Preliminary Agreements: Fair Dealing and Failed Negotiations. *Columbia Law Review*. 1987, 217: 219.

10 Novoa, R. 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*. 2005, Vol. 22, No. 3: 586. Citation in the text: International Chamber of Commerce, Formation of Contracts and Pre-contractual Liability 69. 1990.

11 *Ibid.*

12 Mikelėnas, V. *Sutarčių teisė,* p. 123.

13 *Ibid.*, p. 123.

14 *Ibid.*, p. 122.

lawyers' consultations and incurs other expenses, and the other party terminates the negotiations and unreasonably refuses to conclude the contract. How should relations of parties and legal effects of their actions be evaluated in such cases?[15] On one hand, the principle of freedom of contract[16] establishes that *"not only do the parties have a right to decide freely with whom to start negotiations regarding the conclusion of a contract, but they also have a right to terminate launched negotiations, if it can be clearly seen that an agreement will not be reached and the clauses offered by the other party are unacceptable"*[17].

On the other hand, a distinguished German lawyer R. Ihering in 1861 provided his view on the solution of the problem in his article "*Culpa in contrahendo, oder Schadensersatz bei nichtigen oder nicht zur Perfektion gelangten Verträgen*", in which he formulated and grounded the *culpa in contrahendo* doctrine. R. Ihering is considered to be the founder of the pre-contractual civil liability.

2. The grounding of pre-contractual liability: the genesis of Culpa in Contrahendo doctrine

The essence of *Culpa in Contrahendo* doctrine is described by the claim that if wrongful actions of a party at the pre-contractual stage cause a contract to be deemed void or cancel its conclusion, the party must compensate damages[18]. The legal doctrine provides that liability for the loss suffered by a party of a prospective contract is also called pre-contractual liability[19].

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15 Mikelėnas, V. *Sutarčių teisė,* p. 123.

16 Mikelėnas, V. claims „... the principle of freedom of contract is a logical outcome of the will doctrine." (Mikelėnas, V. *Sutarčių teisė,* p. 34). This doctrine establishes that a contract is an outcome of the will of two persons. (Nicholas, B. *The French Law of Contracts*. Second edition Clarendon Press Oxford, 1992, p. 32. Mikelėnas, V. also notes: „... it is natural that if the will of parties is considered as the main contract element, the right of parties to freely decide whether to conclude a contract and to freely determine the content of a contract, is acknowledged. Four aspects of the freedom of contract principle are usually analyzed: freedom to conclude a contract; freedom to refuse to conclude a contract; freedom to determine the content of a contract, i.e. the contract clauses; freedom to conclude contracts that are not provided for in the legislation, if these contracts are not against the law and good morals". (Mikelėnas, V. *op cit.,* p. 34). Article 6.165 (2) of the Civil Code also establishes that it is forbidden to force a person into a contract, because that would infringe the principle of contract freedom. (Civil Code of the Republic of Lithuania. *Official Gazette*. 2000. No. VIII-1864.)

17 Bakonas, A., et al. *Commentary to the Civil Code of the Republic of Lithuania*. The Sixth Book, Law on Obligations (I). Vol. 1, First edition. Vilnius: Justitia, 2003, p. 207.

18 Kessler, F.; Fine, E. Culpa in Contrahendo, Bargaining in Good Faith, and Freedom of Contract: a Comparative Study. *Harvard Law Review*. 1964, 77: 401.

19 Mikelėnas, V. *Civilinės atsakomybės problemos: lyginamieji aspektai*. Vilnius: Justitia, 1995, p. 47.

In the opinion of R. Ihering, the German legal system (also called *Gemeines Recht*) had significant drawbacks, because trade and its relevant problems did not receive enough attention[20]. For example, R. Ihering was interested in cases, where a buyer was not held responsible for transportation costs of goods that he refused to accept, because he had carelessly ordered too many. According to R. Ihering, parties of pre-contractual relationships must act in accordance with necessary prudence, diligence ("*necessary diligentia*")[21]. If a party violates this duty by own wrongful actions, the aggrieved party must be restated to the original position by compensation of negative interest[22].

R. Ihering analyzed two aspects: the first aspect – effect of *culpa* on validity of a contract, concluded by mistake or in absence of will[23], and the second – classification of damages (negative and positive)[24]. In the beginning of the XX century, French lawyer R. Saleilles had further developed this doctrine and argued that parties must act in good faith during negotiations and that a party, which unjustifiably terminates negotiations, must compensate negative interest or reliance damages[25]. Friedrich Kessler and Edith Fine claim that in accordance with adjustments proposed by R. Saleilles, the substance of *culpa in contrahendo* doctrine is: parties must act in good faith during negotiations; the party responsible[26] for infringement of this requirement must compensate the damages of the other party in an amount equal to the breach of the aggrieved party's reliance[27].

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20 Kessler, F., Fine, E. *op cit*., p. 402.

21 Colombo, S. The Present Differences between the Civil Law and Common Law Worlds with Regard to Culpa in Contrahendo. *Tilburg Foreign Law Review*. 1993, Vol. 2, No. 4, p. 350.

22 Kessler, F. *Harvard Law Review*, p. 402.

23 Colombo, S. claims that R. Ihering suggested to apply culpa in contrahendo doctrine in these situations (Colombo, S., p. 351).

24 Nedzel, N. E. A Comparative Study of Good Faith, Fair Dealing and Precontractual Liability. *Tulane European & Civil Law Forum*. 1997, 12: 113.

25 Farnsworth, E. A. *Columbia Law Review*, p. 240.

26 Colombo S. noted that in accordance with R. Saleilles, pre-contractual liability also occurs in cases, where fault was absent. R. Saleilles claimed that only the fact that a party agrees to negotiate presupposes an obligation to act in good faith. Intense discussions were raised by Article 1382 of the Civil Code of France, which provides that a person who inflicted damages to another person by any actions (tout fait quelconque de l'homme), must compensate it. Some scientists "tout fait quelconque de l'homme" interpreted so widely that this lead them to conclusion that "any actions" do not include fault. In comparison, requirement of fault *(Verschuldensprinzip* in German*)* for a civil liability to arise is strictly established by the BGB (Bürgerliches Gesetzbuch) or Article 823 of the Civil Code of Germany, this requirement is also provided in Article 2043 of the Civil Code of Italy (Colombo, S. *op. cit*., p. 353–354).

27 Kessler, F.; Fine, E. *op. cit*., p. 401.

Therefore, in accordance with the concepts of R. Ihering and R. Saleilles, the doctrine of *culpa in contrahendo* is applicable in situations where three basic elements are present: 1) pre-contractual relations, 2) violation of the obligation to act in good faith, 3) damages.

The authors of the German Civil Code did not approve of the doctrine and it was not established in the Civil Code. However, the doctrine was supported by the courts, which broadened the application of the obligation to act in good faith, as provided for in Article 242 of the BGB (Bürgerliches Gesetzbuch) or German Civil Code (debtor must fulfill his obligations in good faith and in accordance with the customs) to the pre-contractual relationships, thus creating a whole set of new precedents[28]. Being successfully applied by the German courts, the doctrine has spread to almost all of the continental law legal systems.

However, only in few countries, the civil legal systems establish the doctrine *culpa in contrahendo* directly in legal acts. The requirement to act in good faith during negotiations is provided for in Article 1337 of the Italian Civil Code, Article 12 of the Israeli Contract Law (General Part) 5733-1973, Article 197 of the Greek Civil Code[29], Article 1198 of the Argentina Civil Code[30], Article 227 of the Portuguese Civil Code[31]. Notably, the Civil Code of Lithuania, which entered into force on the 1 of July 2001, establishes *culpa in contrahendo* doctrine in Article 6.163 (3)[32].

Although the Civil Codes of France, Belgium, and Luxemburg impose the obligation of good faith only on contract parties, the legal doctrine and the court practice also apply this norm to pre-contractual relations[33].

The doctrine is not recognized in common law countries. This is related to different interpretation of a contract in common law and civil law countries. In the common law legal system, the formation of a contract is regulated by the so-called objectivism theory. According to this theory, an expression of consent is the main element of contractual liability and not the consent itself (as a psychological element). Thus in common law legal system, with the view of ensuring the efficiency of trade and the security of transactions, only a formal consent is taken

28 Colombo, S. *Tilburg Foreign Law Review*, p. 351-352. „The first case, in which a court applied *culpa in contrahendo* doctrine, was heard by the Supreme Court of Germany. In this case, the court ... ruled that the owner of a shop must compensate damages of a customer, injured in the shop by a falling linoleum roll" (Mikelėnas, V. *Sutarčių teisė,* p. 161).

29 Colombo, S., *op cit*., p. 352-353.

30 Novoa, R. *Arizona Journal of International & Comparative Law*, p. 586.

31 Lando, O.; Beale, H. (eds.). *Principles of European Contract Law. Parts I and II*. The Hague: Kluwer Law International, 2000, p. 118.

32 This article establishes that parties of precontractual relations must act in good faith.

33 Lando, O.; Beale, H., *op cit*., p. 118.

into consideration[34]. The obligation of good faith is imposed only on parties of a contract[35], which is considered to be concluded when the parties agree upon all material conditions. This means that a person may simultaneously negotiate with several partners, conclude a contract with one of them, and terminate negotiations with the others. The party, which has terminated negotiations, does not face any legal consequences[36]. Thus the ethics is separated from the law[37]. Since functioning and individualism of free market are considered as dominating values, the obligation to act in good faith during negotiations is not recognized in common law countries[38].

The continental law is heavily influenced by the will theory, where subjective, psychological element –will of the parties – is the material element of a contract;[39] therefore, the courts are inclined to analyze real intentions of the parties and not the formal aspects. Therefore, the obligation of good faith, applicable only inasmuch as enforcement of a contract is concerned (for instance, as provided for in the Civil Code of France) is applicable also during the stage of contract

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34 Nicholas, B. *The French Law of Contracts*, p. 48.

35 Mikelėnas, V. *Sutarčių teisė*, p. 128. Uniform Commercial Code § 1-304 establishes that every contract must be enforced without a violation of the principle of good faith ("obligation of good faith in ... performance or enforcement"), (The American Law Institute and National Conference of Commissioners on Uniform State Laws, Uniform Commercial Code. 2004). Restatement (Second) of Contracts § 205 establishes the same thing: every contract must be enforced in accordance with good faith and fair dealing principles ("duty of good faith and fair dealing in ... performance and enforcement"), (Restatement (Second) of Contracts, as adopted and promulgated by the American Law Institute at Washington, D.C., May 17, 1979, St. Paul, Minn. American Law Institute Publishers, 1981). Nevertheless, duty of good faith during the conclusion of a contract is not established in the legislation or recognized by the courts.

36 Mikelėnas, V. *Sutarčių teisė,* p. 128.

37 Colombo, S. *Tilburg Foreign Law Review*, p. 342.

38 Although the common law system does not recognize an obligation to act in good faith during pre-contractual relations, the common law system courts often rule with the same results as the civil law system courts, by applying *culpa in contrahendo doctrine,* though applying a different basis of liability. For instance, V Mikelėnas claims that in England „ actions of a party, by which a delict is committed during negotiations, incur delictual civil liability. In these cases a claim for compensation of damages inflicted by termination of negotiations could be based on delictual civil liability rules. The basis to apply delictual liability could be a delict of various types, inflicted during contract negotiations." V. Mikelėnas claims that these delicts could be: misrepresentation, duress or undue influence, breach of confidence. (Mikelėnas, V. *Sutarčių teisė,* p. 127–133). Although the legal doctrine of the USA allows a party to terminate negotiations, but in accordance with E. Allan Farnsworth, abuse of the freedom of contract principle is a basis to apply pre-contractual civil liability. He formulated three bases for an appearance of this liability: unjust enrichment, misrepresentation, specific performance. (Farnsworth, E. A., p. 229-239).

39 Mikelėnas, V. *op cit.,* p. 18.

formation, because it is aimed at ensuring the component of the will (the consent) to conclude a contract[40].

To summarize the doctrine of *culpa in contrahendo* in the context of recoverable damages, it must be noted that the doctrine establishes only the recovery of negative interest, which is typical for delictual liability. Therefore, to provide an answer to this research's question on possibilities for judicial recovery of the value of the lost opportunity in pre-contractual relations, it is necessary to analyze which category of liability (i.e. contractual or delictual) is applicable to the losses in question.

3. The nature of pre-contractual liability: dichotomy of contractual / delictual liability

Article 6.163 of the Lithuanian Civil Code (the Code) establishes that "a party who begins or negotiates in bad faith, shall be liable for the damages caused to the other party." However, the Code does not establish which type of liability – contractual or delictual is the basis of the obligation to compensate damages. The question of determining the type of applicable civil liability is important, because contractual and delictual liability provide for different limitation periods, different types of recoverable damages and principles of calculation.

Although compensation of damages under contractual or delictual liability is based on the principle of *restitutio in integrum*[41], in order to determine the type and the amount of the losses, it is necessary to determine what interests have been violated. The legal doctrine of civil liability distinguishes three types of interests that may be infringed, depending on the type of liability – contractual or delictual: 1) reliance interest, 2) expectation interest, 3) restitution interest[42]. For instance, when expectation interest is violated, the aggrieved party may base its claim on expectations. These damages are awarded only in cases of contractual liability,

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40 Nicholas, B. *The French Law of Contracts*, p. 48.

41 Full compensation of damages (Article 6.251 of the Civil Code).

42 S. Selelionytė Drukteinienė claims that „the main difference is related to the nature of protected interests, i.e. the contract law protects the expectation interest and the delictual law protects the reliance interest. The expectation interest means that a party expects to appear in a position where it would have been, if the contract was properly implemented, thus the contract law aims to ensure that an injured party would appear in this position. The reliance interest means that a person expects to remain in the present position, i.e. believes that the position will not get worse. Thus the delictual liability aims to put a person back in the same position where he would have remained, if there was no delict. Thus, the objective of contract liability is to ensure the fulfillment of a promise, and the objective of delictual liability – to ensure *status quo*". Selelionytė-Drukteinienė, S. Deliktinės ir sutartinės atsakomybės konkurencija. *Justitia.* 2008, 1: 67.

in order to place the aggrieved party back in the position where he would have been, if the contract had been enforced; therefore the authors call these damages future-oriented. On the other hand, violation of reliance interest presupposes damages that are oriented to the past. Compensation of these damages aims to put the injured person back in the position, which existed before a violation of reliance interest took place. Reliance damages are usually awarded in cases of delictual liability and also in some contractual liability cases. Restitution interest is also oriented to the past. However, it does not aim to cover the injured person's damages but to withdraw the profit that the wrongful party had acquired in the course of its unlawful actions.[43]

For example, the Supreme Court of Lithuania (hereinafter - the Court) in case *Ž. Semenejeva v 553 GNSB, UAB "Biveka"* held that in case it is determined that the claimant had sustained damages in pre-contractual relations, in order to determine the type of civil liability for the damages sustained in pre-contractual relations, the **indication** whether **general legal norms,** applicable to all legal relations, **have not been infringed,** should be used as a **criterion**. *If the obligation to act in good faith or the obligation not to abuse one's rights and not to inflict damage to the other party is violated,* ***the delictual liability should be applied,*** since these are the obligations of a general nature, which are valid in the context of both contractual and non-contractual relations. In our opinion, the Court's established criterion for determining whether the liability is contractual or delictual is too abstract, because (as the Court itself notes) these general obligations are typical for both contractual and non-contractual relationships.

In another case *UAB "Vingio kino teatras" v UAB "Eika"*[44], the Court stressed that "in the course of negotiations regarding contract conclusion, the main mutual obligation of the parties is the obligation to act in good faith."[45] According to the Court, in case this obligation is violated, the party acting in bad faith must compensate to the other party the damages inflicted "due to the breach of legitimate reliance". Although the Court did not analyze the nature of pre-contractual liability in this case, the analysis of the Court's arguments regarding compensation of damages leads to a conclusion that by referring to the damages inflicted "due to the breach of legitimate reliance", the Court identified reliance damages, which are compensated, as it was discussed above, in accordance with the rules of delictual liability. The Court underlined that in the process of adopting its decision, it has relied upon the UNIDROIT Principles of International Commercial Contracts.

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43 Cassels, J.; Adjin-Tettey, E. *Essentials of Canadian law. Remedies: the law of damages*. Toronto: Irwin Law Inc., 2000, p. 7.

44 *UAB Vingio kino teatras v UAB Eika.*

45 *Ibid*.

Article 2.1.15 (2) of UNIDROIT Principles of International Commercial Contracts provides that "a party who negotiates or breaks off negotiations in bad faith is liable for the losses caused to the other party"[46]. Although UNIDROIT Principles of International Commercial Contracts do not reveal the precise meaning of the term "losses", a systematic analysis of Article 7.4.2 (1), which provides that the term "harm" includes both the loss and the gain[47], leads to a conclusion that when the principle of good faith is violated in pre-contractual relationships, UNIDROIT Principles of International Commercial Contracts provide for compensation of direct losses only, provided that the parties have not agreed otherwise. The authors of UNIDROIT Principles of International Commercial Contracts state that the aggrieved party is entitled to claim compensation of its expenses related to negotiations, which are called "reliance damages" or "negative interest" in the common law legal systems[48]. Negative interest constitutes the difference between a creditor's position, which existed before the beginning of negotiations, during which a debtor acted in bad faith, and the creditor's position after the debtor's termination of the negotiations[49]. Negative interest includes both expenses and losses that were incurred as a consequence of the creditor's breached reliance[50]. In other words, the delictual liability is applicable in this case, and its main function is to put the creditor back in the position, in which he would have been, if the violation had not occurred. This is done by compensating reliance damages or negative interest.

The Commentary on the UNIDROIT Principles of International Commercial Contracts also stresses that in accordance with the general rule, the aggrieved party can not claim compensation of the profit that it did not receive, but which could have been received, had the contract been concluded[51]. In the common law legal system these damages are called positive interest or expectation interest. The positive interest means the gain, which a creditor would have received, if the contract had been concluded.[52] In the continental legal system, analogous damages are compensated in accordance with the rules of contractual civil liability.

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46 UNIDROIT Principles of International Commercial Contracts. International Institute for the Unification of Private Law. Rome. 2004, Art. 2.1.15. (2).

47 The injured party may claim full compensation for non-fulfillment. The damages include the loss and the gain that a person would have received, if wrongful actions did not take place (*Ibid*., Article 7.4.2. (2).

48 *Ibid*.

49 Ben-Dror, Y. The Perennial Ambiguity of Culpa in Contrahendo. 27 *American Journal of Legal History*. 1983, 142:181.

50 *Ibid*.

51 UNIDROIT Principles of International Commercial Contracts, Art. 2.1.15. (2).

52 Ben-Dror, Y., *op cit*., p. 148-49.

The proposition that in cases of violation in pre-contractual stage, only direct damages but not the gain of which the aggrieved party was deprived of must be compensated, is related to the reasoning that the purpose of the compensation is not to penalize the debtor, but to compensate the creditor's damages. Furthermore, if the profit of which the aggrieved party was deprived of is awarded, the party would receive the benefit of the bargain,[53] although it is not completely certain that the contract would have been concluded. Therefore, in case a contract was not concluded, it is impossible to calculate the profit of which the aggrieved party was deprived of[54]. It should be noted that in cases *Z. Semenejeva v 553 GNSB, UAB "Biveka", UAB "Vingio kino teatras" v UAB "Eika" and V. Š. v A. N. and A. N.,* the Supreme Court of Lithuania applied consistent reasoning, while ruling on questions of pre-contractual civil liability and awarded damages **typical for delictual liability**.

In case *V. Š. v A. N. and A. N.,* the plenary session of chamber of judges of the Supreme Court of Lithuania rejected the claim for compensation of the gain, which was lost due to a violation during pre-contractual stage[55]. The Court claimed that "it is often complicated to establish and even more so – to prove the amount of indirect damages"[56]. On the other hand, the proposition that the pre-contractual liability is delictual, leads to a conclusion that it is irrelevant to prove indirect damages, because these damages are not typical for delictual liability. This shows that the reasoning applied by the courts of Lithuania in cases of pre-contractual liability lacks theoretical grounding of the nature of liability in question, and this hinders formation of uniform court practice.

In our opinion, the argumentation that under certain circumstances the pre-contractual liability should be evaluated as **contractual**, is equally important. According to prof. V. Mikelėnas, "if parties of pre-contractual relations undertake to perform certain actions or to abstain from these actions, the damages, inflicted as a result of violation of this obligation, should be compensated according to the rules of **contractual** liability".[57] The practice of the European Court of Justice also supports such position.

In particular, the European Court of Justice (hereinafter – the ECJ) has taken an interesting stance on the question of pre-contractual civil liability in case of *Fonderie Officine Meccaniche Tacconi SpA v. Heinrich Wagner Sinto Maschinenfabrik GmbH (HWS)*[58], submitted by the Supreme Court of Cassation of

53 Farnsworth, E. A. *Columbia Law Review*, p. 223.

54 *Ibid.*

55 *V. Š. v A. N. and A. N.* Hereinafter the plenary session of judges of the Supreme Court of Lithuania – the Supreme Court of Lithuania.

56 *Ibid.*

57 Mikelėnas, V. *Sutarčių teisė,* p. 49–50.

58 Case C-334/00, *Fonderie Officine Meccaniche Tacconi SpA v. Heinrich Wagner Sinto Maschinenfabrik GmbH (HWS)* [2002] ECR I-07357.

Italy under a preliminary reference procedure. The claimant, an Italian company Fonderie Officine Meccaniche Tacconi SpA (hereinafter – Tacconi) demanded to declare a contract on sale of industrial equipment between the defendant, a German company Heinrich Wagner Sinto Maschinenfabrik GmbH (hereinafter - HWS) and a leasing company B.N. Commercio e Finanza SpA (hereinafter - BN) in respect of which (the equipment) BN and Tacconi had already concluded a leasing contract (with the agreement of HWS), had not been concluded, because HWS unjustifiably refused to carry out the sale. According to the claimant, HWS thereby infringed legitimate expectations of Tacconi, which had relied on the conclusion of the sales contract. The ECJ stated that in accordance with the Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters (hereinafter – the Convention), the cases where "*on the occasion of negotiations with a view to the formation of a contract and by a possible breach of rules of law, in particular the rule which requires the parties to act in good faith in such negotiations, an action founded on the pre-contractual liability of the defendant is a matter relating to tort, delict or quasi-delict within the meaning of Article 5(3) of the Convention*". However, *according to ECJ, if in the pre-contractual stage the parties undertook certain obligations in respect of each other*, *the* ***issue of liability is to be decided only according to the rules on contractual civil liability*** (Article 5(1) of the Convention). The ECJ stated that taking into consideration the fact that there was no freely assumed obligation by HWS towards Tacconi, the question of HWS liability should be decided under Article 5(3) of the Convention, which means that the liability based on delictual liability rules will apply to the defendant.

It must be noted that in point 22 of the judgment, the ECJ reiterated that while Article 5(1) of the Convention does not require a contract to have been concluded, it is nevertheless essential to identify an obligation for that provision to apply. This means that if there was a preliminary contract, the ECJ would decide that the liability of the offending party is of contractual nature. This judgment is important for Lithuania, because the provisions of Article 5(3) of the Convention are implemented in the Council Regulation on **jurisdiction and the recognition and enforcement of judgments in civil and commercial matters.**

French courts decide pre-contractual liability questions similarly to the ECJ. Article 1382 of the Civil Code of France establishes civil liability for the acts that cause damage to another party.[59] Article 1134 of the Civil Code establishes an obligation to perform a concluded contract in good faith; however, in both legal doctrine and court practice this norm has been applied to pre-contractual relati-

59 Kessler, F.; Fine, E. Harvard Law Review, p. 407.

ons.[60] In France, in case of violation of the obligation to act in good faith during negotiations, the damages are compensated in accordance with the rules on delictual liability[61]. However, if parties sign pre-contractual documents, the contractual civil liability damages are awarded[62]. The pre-contractual documents include all written documents – "protocols of intentions, memorandums of understanding or any other written documents, which clearly state intentions of the parties"[63]. The courts consider them as sufficient evidence to prove that obligatory relationships, based upon a previously reached agreement, exist between the parties.

It is interesting that in the Netherlands, a party that unjustifiably terminates negotiations that have reached an advance stage, will be held liable in accordance with the rules on contractual civil liability, even if there are no signed documents binding the parties[64]. In Germany, the courts apply the rules on contractual civil

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60 Mikelėnas, V. *Sutarčių teisė,* p. 147; Colombo, S., p. 353.

61 „A classical example of application of prie-contractual delictual civil liability is a case of *Cour de cassatios* of France, decided on 20 of March 1972. The plaintiff negotiated with a company holding exclusive rights to supply equipment produced in USA, to France. After the plaintiff traveled to the USA and viewed the equipment, the negotiations continued. The plaintiff asked a company to send some additional information. However, the company did not reply to the potential buyer and terminated the negotiations without any motives. After two weeks the company sold the equipment to plaintiff's competitors. The court satisfied the legal claim for damages and held that the defendant has terminated the negotiations unjustifiably and thus infringed the general obligation to act in good faith by its actions " (Mikelėnas, V., *op cit.,* p. 147).

62 „This conclusion is logical, in consideration of the definition of contract, provided for in Article 1101 of the Civil Code of France: „A contract is an agreement, by witch one or more persons undertakes to give something, to do something or not to do something for another person or persons"... Thus, according to the French law, a promise to conclude a contract in the future or to start contract negotiations is already a contractual obligation. For instance, parties negotiated on establishment of a company. They discussed the future company's fields of activity, agreed upon the authorized capital of the company, type of shares, value of shares, the principles of conclusion of the board of directors. However, one party terminated the negotiations without a serious reason. The court decided that the parties had reached a pre-contractual agreement. A promise to conclude a contract on establishment of a company (*promesse de contrat)* and formalization of this promise in writing (*avant – contrats)* means that contractual obligatory relations have been established. Therefore the party that unjustifiably refuses to enforce a pre-contractual agreement is infringing its pre-contractual obligations and must compensate damages of the other party" (Mikelėnas, V. *Sutarčių teisė,* p. 148–149).

63 Mikelėnas, V. *Sutarčių teisė,* p. 149.

64 „...In 1982, the Supreme Court of the Netherlands in case *Plas v Valburg* held that ... it is necessary to distinguish three phases of contract conclusion: first – initial stage of negotiations, where the parties have a right to terminate the negotiations freely and there is no obligation to compensation damages; second: intermediary, when parties also can also terminate negotiations, but must compensate the expenses of the other party; third – the concluding or final stage, when parties cannot terminate negotiations, because that would be contrary to the principle of good faith. Considering specific circumstances of a case, in the concluding phase of negotiations, a

liability in all cases, where damages were sustained in pre-contractual relations. This is related to the fact that in German legal system, delictual liability does not include damages to proprietary interests[65].

The Lithuanian courts, however, decide the questions of pre-contractual liability (given that there are documents signed by the parties and binding on them) differently than the ECJ or the French courts. There are two more decisions of the Supreme Court of Lithuania, which are worth to mention in this regard.

In case *V. Š. v A. N. and A. N.,* the claimant had concluded a preliminary contract with the defendant. Under the preliminary contract, the defendant undertook to sell to the claimant a part of a plot of land for LTL 32,000. Before the conclusion of a contract, the claimant had transferred an advance payment and undertook to pay the remaining part of the price upon the conclusion of the main sale-purchase contract, validated by a notary. When the set term has run out, the defendants refused to conclude the main sale-purchase contract because it was unprofitable for them to sell the plot for the agreed price. The claimant then asked the court to confirm the conclusion of the main sale-purchase agreement.

The plenary session of the board of the judges of the Supreme Court of Lithuania held that a preliminary contract cannot be considered as a document binding the parties. „... in the final phase of pre-contractual relationships –at the time of conclusion of the preliminary contract – there can be no absolute certainty that the main contract will be concluded and executed, since various circumstances may be determinative"[66]. According to the Court, signing a pre-contractual document is rather "a proof of a serious intention to conclude the contract"[67], but it can not be viewed as the main contract, violation of which could be a basis for the contractual civil liability to arise. The Court stressed that in deciding the questions regarding the aggrieved party's right to claim compensation of damages, the fundamental criterion is the evaluation whether the party that had refused to conclude the main contract, acted in good faith. Analysis of the position of the Court leads to a conclusion that a violation of a preliminary contract should be evaluated in the con-

party can reasonably expect that a contract has been concluded or that negotiations will culminate in the conclusion of a contract. A party which unjustifiably terminates negotiations must compensate the other party's direct losses and lost income (lucrum cessans)" (Mikelėnas, V. *Sutarčių teisė,* p. 145–146).

65 Article 823 of the Civil Code of Germany (BGB) provides for compensation of damages, inflicted to life, body, freedom, property, i.e. absolute rights, which do not include proprietary interests (German Civil Code, enacted on 18 August 1896, entered into force on January 1,1900, last version promulgated on 2 January 2002. *Federal Law Gazette*. [Bundesgesetzblatt] I p. 42, 2909; 2003 I p. 738).

66 *V. Š. v A. N. and A. N.*

67 *Ibid.*

text of the obligation to act in good faith, because "the party, which unreasonably terminated the negotiations, by its prior actions (i.e. signing the preliminary contract) created the aggrieved party's reasonable expectations and trust that the [main] contract will surely be concluded, … [and] the party acting in bad faith should compensate the damages caused by the breach of legitimate reliance"[68]. Accordingly, as regards compensation of damages caused to the aggrieved party, the Court held that a violation of the obligation to act in good faith (i.e. delict) is the basis for the civil liability and not a violation of the contract.

Such position of the Court could be considered leading to a conclusion that conclusion of a preliminary contract does not create contractual relationships between the parties in Lithuania; nevertheless, in case *E. Mikutavičius v. R. Kaupas*[69] the Court has adopted a contrary decision. In this case, the parties concluded a preliminary contract regarding the sale of a land plot and the defendant did not fulfill his obligation to sell the land plot before the set deadline. Differently from the *V. Š. v A. N. and A. N.* case, the Court decided that "*according to… the preliminary contract, the party that unjustifiably failed to conclude the main contract regarding the sale of the land plot within the set term, has violated its contractual obligations and must pay penalties (fine) to the aggrieved party*"[70]. Since penalties are applied in accordance with contractual liability rules (Article 6.258 of the Lithuanian Civil Code), it s obvious that in this case, the Court applied the rules on contractual liability in the pre-contractual relations.

Evaluating the decisions of the Supreme Court of Lithuania in discussed cases, it should be noted that as regards written binding agreements of the parties, a rather controversial practice is being formed in respect of pre-contractual civil liability. On the other hand, the consistency of application of legal norms to pre-contractual relations is of special importance, since preliminary contracts have become very popular in Lithuania.

In our opinion, taking into consideration the nature of a preliminary contract, the nature of damages recoverable under a preliminary contract, the jurisprudence of ECJ and foreign courts, in cases where the parties sign pre-contractual documents (e.g. preliminary contract) the courts should apply the rules on **contractual** civil liability. Of course, this should be done only if a preliminary contract in question fulfils all requirements established by law.

Having determined the nature of pre-contractual liability, we can proceed to examination of the question regarding the recoverable damages in pre-con-

68 *V. Š. v A. N. and A. N.*

69 *E. Mikutavičius v R. Kaupas*.

70 *Ibid.*

tractual relationships. The purpose of this study is to discuss the possibilities of compensation of the value of the lost opportunity. Thus we will further examine the possibility (besides compensation of the direct damages) to apply the novelty – compensation of the value of the lost opportunity in the context of the cases decided by the Supreme Court of Lithuania, which has held in this regard: "*pre-contractual obligations can be breached in such factual and legal circumstances, where the principles of justice, reasonableness, and good faith require that the aggrieved party acting in good faith in pre-contractual relations is compensated not only the direct expenses incurred in the course of direct negotiations, but also the value of the specific lost opportunity*"[71]. The lost opportunity damages are a part of the institute of reliance damages, because the party acting in good faith *relies* on the negotiating partner and therefore looses an opportunity to conclude a similar contract with another partner. Therefore, the compensation of the value of the lost opportunity puts the aggrieved party in the position, in which it would have been, if the delict had not be committed by the negotiation partner acting in bad faith. Therefore, the award of such damages should be considered in cases where there were no preliminary contract concluded between the parties to negotiations. On the other hand, the analysis of jurisprudence of the Supreme Court of Lithuania shows that these damages are questioned irrespective of their nature.

4. The analysis of possibilities of awarding the value of lost opportunity in pre-contractual liability cases

According to the Supreme Court of Lithuania, "[t]he value of the lost opportunity in pre-contractual relations can be determined by applying the principle of price difference provided in the Article 6.258(5) of the Civil Code of Lithuania"[72]. This article establishes that "[w]here the aggrieved party dissolves the contract on the grounds that the other party has violated it and makes a replacement transaction within a reasonable time, it may claim from the guilty party the difference between the price of the original contract and the price of the replacement transaction as well as damages for any further loss". Let us analyze whether the position of the Supreme Court of Lithuania in applying Article 6.258(5) to determine the value of the lost opportunity is well-grounded. First, a question arises whether it is really possible to compare situations where 1) the main contract had already been concluded and later terminated due to the fault of one of the parties, and a replacement contract has been concluded and 2) the main contract had not

71 *E. Mikutavičius v R. Kaupas*. The Supreme Court of Lithuania had also ruled on the compensation of monetary value of lost opportunity in case *UAB Vingio kino teatras v UAB Eika.*

72 *Ibid.*

been concluded and it was expected to be concluded but was not, because of the fault of one of the parties, and the aggrieved party later concludes a replacement contract on less favorable terms. If such situations could be considered as comparable, which prices should be compared in the second case?

The Court's position on this question is not entirely clear: *„...in certain cases of violations of pre-contractual obligations, there could be sufficient basis to award the aggrieved party acting in good faith not only the direct expenses but also the value of the lost opportunity, which must be based on real, proven, unavoidable, and not expected (hypothetical) income or expenses*". The position of the Court is vague, thus we should analyze the source, on which the Courts relies deciding on the compensation of the value of the lost opportunity – the UNIDROIT Principles of International Commercial Contracts.

As mentioned earlier, in accordance with the UNIDROIT Principles of International Commercial Contracts, in case a principle of good faith is breached during the negotiation stage, the negative interest or reliance damages are recoverable. These damages also cover the lost opportunity, since the aggrieved party trusts the negotiation partner and therefore refuses to pursue the options of other transactions[73]. The authors of the Commentary on the UNIDROIT Principles of International Commercial Contracts clearly state that the aggrieved party should be compensated direct damages and the value of the lost opportunity *to conclude the contract with a third person*[74]. The following situation is analyzed in the Commentary as an example of damages, which may be compensated in this case:

A hears that B is selling his restaurant. A begins negotiations with B but A does not intend to purchase the restaurant. Instead, A wants to prevent B from concluding the contract with C, because C is a competitor of A's. When C buys another restaurant, A terminates the negotiations and B sells the restaurant for a lower price than the price that was offered by C[75]. In accordance with the Commentary on the UNIDROIT Principles of International Commercial Contracts, A is liable to B for the difference in price (the difference between the price offered by C and the price for which the restaurant was actually sold).

It must be noted that in this situation there was a specific third person – C, who not only negotiated with the seller, but also offered a real price, and due to the party acting in bad faith – A, who did not have a genuine intention to conclude the contract – the seller B lost a very *real, not a hypothetical* transaction.

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73 See Farnsworth, E. A. *Columbia Law Review*, p. 223-229. One of the first articles on the lost opportunity: Fuller, L. L.; William R. Perdue. The Reliance Interest in Contract Damages. Yale Law Journal. 1936, 46: 52.

74 UNIDROIT Principles of International Commercial Contracts. Art. 2.1.15. (2).

75 *Ibid.*

Lets us compare this situation with the case *UAB "Vingio kino teatras" v UAB "Eika"*. In this case, the defendant UAB "Eika" acted in bad faith and thus the claimant was forced to terminate the negotiations and later concluded a replacement contract with UAB "Senovė", which was LTL 1,925,000 more expensive than the contract which would have been concluded with UAB "Eika". Differently than the hypothetical situation with a restaurant, the facts of the case Therefore, on the basis of this analysis, it could be concluded that the lost opportunity could be compensated only if the claimant proves that he preferred the defendant over other specific options, which he refused[76].

Another difference between a hypothetical situation presented in the Commentary on the UNIDROIT Principles of International Commercial Contracts and case is that in the situation with a restaurant, the seller suffered losses because the buyer acted in bad faith and with the *direct intent,* deliberately seeking to prevent the seller from selling the restaurant. Therefore, in this situation all elements necessary for the civil liability are present: unlawful action (negotiations in bad faith and termination of negotiations), causal link, fault and damages. However, in case *UAB „Vingio kino teatras" v. UAB „Eika"* there were no facts to prove that bigger price of contract with UAB „Senovė" was a result the respondent's UAB „Eika" negotiations led n bad faith. Consequently, if the price of the replacement contract is higher, for instance, due to economic factors, is the compensation of the lost opportunity possible? The opinion of the Court is important in this regard: "[*only those losses can be compensated, which are caused by actions or omissions of the person, who violated his obligation, i.e. the losses that were inflicted by specific actions of a specific person. ... It should be noted that losses can be caused or influenced by objective (i.e. independent from the will of the parties) factors – economic processes in the country, for instance, swift and unforeseen changes in prices, especially in the real estate market. However, these factors alone should not become the basis of a claim for compensation of the lost opportunity*[77].

Reflecting on this position of the Supreme Court of Lithuania, it should be noted that in case On the other hand, another example from the Commentary on the UNIDROIT Principles of International Commercial Contracts should be discussed in this context and compared to the case

76 If a plaintiff is successful in proving that UAB "XXX" offered a more favorable price, which he rejected because of negotiations with a defendant, then according to the described situation, the compensated amount would be calculated in the following way (without direct losses): from the price of the replacing contract with UAB "Senovė" (the bigger price) subtract the price suggested by UAB "XXX" (which is smaller and more favorable). The resulting amount is the value of the lost opportunity.

77 *V. Š. v A. N. and A. N.*

A enters into negotiations regarding a bank loan with a branch of bank B. At the last minute it becomes clear that the branch office had no authority to determine the conditions of the loan and the head office of the bank has decided not to approve the grant of the loan. A, who could in the meantime have obtained the loan from another bank during the period of negotiations, may claim compensation of expenses entailed by the negotiations and the profit that it would have received during the period of delay.

If we apply this situation to the case *UAB „Vingio kino teatras" v UAB „Eika",* the claimant could demand the compensation of the gain which he has not received during the period of repetitive negotiations with UAB „Senovė", provided that he can prove that during the period of negotiations, he could have reached a real agreement with another partner.

Summarizing the examples provided in the Commentary on the UNIDROIT Principles of International Commercial Contracts, illustrating case where a claimant may claim compensation of the value of the lost opportunity, two options can be distinguished. In first case, a party acting in bad faith and with direct intent terminates negotiations and the other party looses the opportunity to conclude a contract with a third person. It should be noted that there must be a causal link between the actions of the partner of negotiations acting in bad faith and the losses of the aggrieved party, and the transaction with a third person that has not been concluded must not be a hypothetical one but one that could be proven. The aggrieved party may claim compensation of damages in amount of the difference between the price of the contract that has not been concluded with a third person and the price of the replacement contract.

In the other case, due to the defendant's actions in bad faith, the aggrieved party loses time, during which it could conclude a contract with a third person and receive profit. The aggrieved party may claim lost profit, which it would have received during the period of delay.

Analyzing the position of the Court in the context of UNIDROIT Principles of International Commercial Contracts, the Court's expression that the value of the lost opportunity must be based on "*real, proven, unavoidable and not hypothetical income or expenses*" means that a claimant has to prove he has lost an opportunity to conclude a *real* contract with a *third person*. Also the damages of the claimant must be the result of the unlawful actions of the defendant; objective factors, such as a change in prices, are not sufficient basis to claim compensation of a lost opportunity.

In case *E. Mikutavičius v R. Kaupas,* the Court also touched upon the issue of compensation of the value of a lost opportunity. In this case the parties concluded a preliminary contract, according to which the defendant undertook to sell to

the claimant until a set deadline a land plot for LTL 20,000. The contract established that in case the defendant fails to fulfill its obligations and avoids conclusion of the main contract, it must return the advance payment to the claimant and also pay a fine of LTL 100,000. The defendant did not fulfill its obligation to sell the land plot within the set term. The claimant asked the court to adjudge the penalty of LTL 100,000, stating that this is the amount of damages that he has sustained – the profit lost due to the rapid growth of prices in the real estate market. The Court awarded the damages in the amount of LTL 20,000 to the claimant, because, according to the Court, the claimant did not prove the amount of lost profit. The Court stressed that "[b]ecause the Civil Code does not provide for punitive penalties, the sum of the penalty claimed by the claimant should be included into the damages suffered and not exceed them". On the basis of Article 6.37 of the Civil Code, the Court decreased the sum of penalty until "the sum which does not exceed the price of the main contract, LTL 20,000".

The Court concluded: *"... it is established in the case that the defendant Romualdas Kaupas did not conclude the main contract regarding the sale of the land plot before the set deadline and thus violated his obligations towards the claimant. The claimant due to the defendant's fault lost the opportunity to purchase the land plot for the price established by the preliminary contract - LTL 20,000, therefore this amount is to be considered the value of the opportunity to conclude the main contract, lost by the claimant."*

Such conclusion of the Court could be criticized because the Court ignored the fact that the lost opportunity also means lost chance to conclude a contract with a third person and mixed up the concepts of the defendant and the third person. Moreover, the Court also used a new concept – "lost opportunity to conclude *the main contract*". This concept could be found neither in UNIDROIT Principles of International Commercial Contracts, nor in foreign literature on the subject. The decision of the Court in this case clearly shows that the Court does not relate compensation of the value of the lost opportunity to the nature of the pre-contractual civil liability.

Summarizing the case-law of the Court, it should be noticed that the compensation of the value of the lost opportunity depends on the type of pre-contractual civil liability. The Supreme Court of Lithuania recognizes that in case of negotiations in bad faith, the aggrieved party may demand compensation of the value of the lost opportunity. That is, the Court endorses compensation of these damages in case of violation of the general obligation to act in good faith, which is typical for delictual liability. However, the Court has not yet adopted a decision, which would establish the rules on calculation of these damages. On the other hand, because in Lithuania during the pre-contractual stage of relations, the

parties assume contractual obligations, i.e. preliminary contracts are concluded in written form, it is likely that in the light of the case-practice of the ECJ and foreign courts, the damages will be awarded in accordance with the rules on contractual civil liability and not delictual civil liability. This would mean broadening of the scope of the pre-contractual liability and the damages accordingly compensated, since the aggrieved party could expect to satisfy its reliance interest.

Conclusions

Summarizing the analysis presented above, it could be concluded that:

1. Pre-contractual civil liability is liability for the damages inflicted to one of the parties to a future contract before its conclusion. Pre-contractual liability is related to *culpa in contrahendo* doctrine. The essence of the doctrine is: the parties must act in good faith during negotiations regarding the conclusion of a contract; in case of violation of this obligation, the offending party must compensate to the aggrieved party the negative interest or the reliance damages. The doctrine is applicable in situations where three material elements are present: 1) pre-contractual relationships, 2) violation of the obligation to act in good faith, 3) damages. This doctrine is applied in Lithuania.

2. The nature of the pre-contractual civil liability – contractual or delictual – is understood differently in different countries. The analysis of the case-law of the ECJ and the courts of countries of continental legal systems regarding the nature of the preliminary contracts, it could be concluded that the tendency is to apply delictual civil liability in situations where the obligation to act in good faith is violated and the parties have not assumed any obligations towards each other. Contractual civil liability is applied in cases where the parties finalize the results of the negotiations in the pre-contractual document.

3. Analyzing the decisions of the Court regarding the pre-contractual liability it could be observed that the Court's argumentation in applying contractual or delictual liability lacks foundation. Analyzing the nature of damages awarded by the Court, damages for the "breach of legitimate reliance", in the context of the UNIDROIT Principles of International Commercial Contracts, it was determined that the Court applied delictual civil liability. The Court thus is forming a non-uniform practice regarding the nature of pre-contractual civil liability in cases where a preliminary contract between the parties exists. The decision of the plenary session of the chamber of judges of the Supreme Court of Lithuania in case *Ž. Semenejeva v 553 GNSB, UAB "Biveka"* establishes that in cases of a violation of a general obligation to negotiate in good faith, provided that there are no binding contractual relations between the parties, the delictual civil liability must be applied. In case *V. Š. v A. N. and A. N.,* the Supreme Court did not consider

preliminary contract as a document that binds the parties, and adopted a decision on recovery of damages, ruling that the basis of pre-contractual civil liability is a breach of the obligation to act in good faith (i.e. a *delict*) and not a breach of a contract. In analogous case *E. Mikutavičius v R. Kaupas,* the Supreme Court decided that the defendant has breached his *contractual* obligations.

4. Summarizing of case-law of the Supreme Court of Lithuania leads to a cocnlusion that compensation of the value of the lost opportunity depends on the qualification of the prie-contractual liability. The Supreme Court of Lithuanian acknowledged that when negotiations have been led in bad faith, the aggrieved party may demand for compensation of the value of the lost opportunity. Thus the Court provides for compensation of these damages in cases where the general obligation to act in good faith has been breached, which is typical for delictual liability. However, the Court has not yet adopted a decision, basing the calculation of such damages.

4.1. After an analysis of UNIDROIT Principles of International Commercial Contracts, two types of cases have been established, where a claimant may demand for compensation of the value of the lost opportunity: 1. a claimant has lost a possibility to conclude **a transaction** with a third person. There must be a causal link between the conduct of negotiating partner, acting in bad faith, and the claimant's damages, and the contract that has not been concluded with the third person must be real, i.e. it must be proven. A claimant may demand for compensation of damages, equal to the difference between prices of contract that has not been concluded with a third person and a replacing contract. 2. Negotiations with respondent takes away claimant‘s time, which could have been used to conclude a contract and receive profits. A claimant can ask for compensation of profit that he has not received and that he would have received during the period of delay.

4.2. Analysis of the Court‘s position in the context of UNIDROIT Principles of International Commercial Contracts, reveals that the Court's statement that the value of the lost opportunity must be based on real, proven, unavoidable and not expected (hypothetical) income or expenses" means that claimant looses a possibility to conclude a real contract with a third person. Comparison of UNIDROIT Principles of International Commercial Contracts with the case *UAB „Vingio kino teatras“ v UAB „Eika“* leads to a conclusion that according to the factual circumstances of the case, the claimant could not claim for compensation of the value of the lost opportunity, because 1. There were no evidence that the claimant chose the respondent over a possibility of another transaction 2. There

were no evidence that price of the claimant's substituting contract was bigger because the respondent was acting in bad faith.

5. In accordance with the settled case-law in Lithuania, when contractual obligations are undertaken in the phase of prie-contractual relations, i.e. preliminary contracts are concluded (valid only in written form), it is likely that according to the case law of other countries and the European Court of Justice, the loss would be compensated under contractual liability and not delictual liability rules. This would mean widening of contractual liability, and thus, broadening the concept of recoverable damages, because an aggrieved party could satisfy its expectation interest.

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IKISUTARTINĖS ATSAKOMYBĖS KVALIFIKAVIMAS IR PRARASTOS GALIMYBĖS PINIGINĖ VERTĖ KAIP NUOSTOLIŲ FORMA

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Santrauka. *Straipsnyje analizuojama, kokiais atvejais priteistina prarastos galimybės piniginė vertė ikisutartinės atsakomybės bylose. Pirmoje straipsnio dalyje aptariama ikisutartinių santykių samprata. Nors Civiliniame kodekse nustatyta, kad sutartis sudaroma pateikiant pasiūlymą (ofertą) ir priimant pasiūlymą (akceptą), tačiau dažniausiai šalys dėl sutarties sudarymo derasi. Derybų metu tarp šalių susiklostę santykiai vadinami ikisutartiniais. Ikisutartinių santykių fazė prasideda, kai šalys užmezga tarpusavio ryšį turint tikslą sudaryti sutartį, ir baigiasi, kai pasiūlymas atmetamas ar pasirašoma sutartis.*

Antroje straipsnio dalyje pristatoma culpa in contrahendo doktrinos genezė. R. Ihering, jis laikomas ikisutartinės civilinės atsakomybės pradininku, suformulavo ir pagrindė šią doktriną. Tik nedaugelio šalių civilinė teisė tiesiogiai teisės aktuose įtvirtina culpa in contrahendo doktriną, bet teismų praktikoje ji yra taikoma labai plačiai. Kita vertus, bendrosios teisės šalyse minėta doktrina nepripažįstama. Culpa

in contrahendo numato tik negatyvių nuostolių atlyginimą, kurie iš esmės būdingi deliktinei atsakomybei.

Trečioje straipsnio dalyje remiantis Lietuvos ir užsienio doktrina ir teismų praktika analizuojama ikisutartinės civilinės atsakomybės prigimtis. Kadangi kodeksas nenumato, kokia civilinės atsakomybės rūšis – sutartinė ar deliktinė – taikoma, pažeidus tarp šalių sudarytą preliminarią sutartį, svarbu teisingai kvalifikuoti civilinės atsakomybės rūšį, kadangi sutartinė ir deliktinė atsakomybė gina skirtingus interesus, taigi ir numato nevienodas priteistinų nuostolių rūšis bei nuostolių apskaičiavimo principus.

Ketvirtoje straipsnio dalyje analizuojama, kokiais atvejais prarastos galimybės piniginė vertė priteisiama ikisutartinės atsakomybės bylose Lietuvos Aukščiausiojo Teismo praktikoje bei lyginama su UNIDROIT Tarptautinių komercinių sutarčių principų komentare pateiktais pavyzdžiais. Nors prarastos galimybės nuostoliai priklauso pasitikėjimo nuostolių (angl. reliance damages) institutui priteistinais deliktinės atsakomybės atvejais, tačiau Lietuvos Aukščiausiojo Teismo praktikos analizė rodo, kad šie nuostoliai bylose kvestionuojami nepaisant atsakomybės prigimties.

***Reikšminiai žodžiai**: civilinė teisė, ikisutartinė atsakomybė, prarastos galimybės piniginė vertė, sutartinė atsakomybė, deliktinė atsakomybė.*

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