

## REVIEW: RELIANCE IN THE BREAKING-OFF OF CONTRACTUAL NEGOTIATIONS

IÑIGO DE LA MAZA GAZMURI\*

Isabel ZULOAGA, *Reliance in the Breaking-Off of Contractual Negotiations. Trust and Expectation in a Comparative Perspective* (Intersentia, 2019).

### I. THE EXCESS LIES IN THE EXTREMES<sup>1</sup>

In *Walford v Miles*,<sup>2</sup> a 1992 decision of the House of Lords, Lord Ackner pointed out that:

(...) the concept of a duty to carry on negotiations in good faith is inherently repugnant to the adversarial position of the parties when involved in negotiations. Each party to the negotiations is entitled to pursue his own interest, so long as he avoids making misrepresentations.<sup>3</sup>

As for the pre-contractual duties of information, the Italian professor Francesco Galgano has indicated that:

In these cases, good faith assumes, above all, the nature of a duty of information on the part of one party with respect to the other: each of them has the duty to inform the other about the circumstances that are unknown to it and that may be decisive for providing its consent (those that if were known to the other party, the latter would not have entered into the contract or would have done it under different conditions). Thus, for example, it is contrary to good faith not to inform - while selling a piece of land for construction - that one is aware about a project for changing the land planning, which will modify the land use in that area...; or (in the opposite hypothesis) not to say that one is aware of a modification of the land planning - in process of approval - that makes such land buildable and rises

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\* Universidad Diego Portales, Chile (inigo.delamaza@udp.cl). Translated by Fluent Traducciones.

1 See this aspect in DE LA MAZA (2020), *passim*.

2 [1992] 2 AC 128.

3 *Walford v Miles* (1992), p. 173.

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the price significantly, while negotiating the price for purchasing an agricultural land.<sup>4</sup>

Both are extremes, and therefore, shall be avoided. It is not a good public policy to treat parties negotiating a contract as if they were sociopaths, but neither is it a good public policy to require them to behave like philanthropists, *in medio veritas est*.

A careful reading of the book of Professor Isabel Zuloaga's doctoral thesis provides good input to consider things this way, which is useful to combine the risks involved in, both, a kind of outburst of good faith and the skepticism of English law regarding it.

## II. THE GREY AREA

As Zuloaga points out at the beginning of her book, her analytical efforts are focused on one of the potential variations of unilateral withdrawal of preliminary negotiations; which she calls the "paradigm case" (p. xxxiv). This case occurs when there is a negotiation (not yet ended in any type of contract, neither preparatory nor definitive), in which expenses have been made and there is no intention of harming, but one of the parties - who has given the other party the trust to believe that they will enter into the contract - withdraws (p. xxxiv).

In my opinion, what makes really the scenario offered by the author interesting in terms of civil liability is that such scenario is -using Hart's terminology- a sort of "grey area" between contractual liability and tort law.

It is true that there is no contract yet, and therefore, it seems not possible to demand from the party intense duties of collaboration, which are reflected in obligations when dealing with contract law. However, neither this is a paradigmatic

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4 GALGANO (1992), p. 461 (however, the perspective about fraud by omission of the author in the same work is more moderated, see *ibid.*, p. 309) In the same vein, regarding to the cognoscibility error, Pietrobon has argued: "The general application of the principle of good faith should lead to not protect the obviously disloyal position of the person becoming aware of other's error - which has a decisive force over the other party - and, despite of this, remains silent and enters into the contract anyways (PIETROBON, p. 126). In the same vein, regarding preliminary negotiations, Betti has pointed out that "the reciprocal duty of loyalty and pre-business probity, which eventually imposes not only negative duties, but also positive duties, consisting of revealing the reality of things, the way each one knows them, according to each knowledge and consciousness (BETTI, p. 92).

situation of non-contractual offenses, where prior to committing an offense (let us imagine a run over) there is not any relationship between the parties.

In some way, the scenario described in Zuloaga's paradigm case is to be found somewhere in the *continuum* between two extremes: the typical scenario of a contract (e.g., a purchase and sale) and the tort (such as a road accident). Therefore, this "grey area" implies neither the perspective of collaboration between the parties, arising after a contract is entered into, nor the perspective of indifference between the parties, typical of tort liability, are fully adequate here.

Thus, if I am not mistaken, Zuloaga intends to shade light over this "grey area" with the idea of trust.

### III. THE DISCREET CHARM OF THE COMPARATIVE METHOD

This is an extremely attractive enterprise, with an outcome for which the author is to be congratulated, among other things, because she offers no more than what she is willing to give.

Zuloaga's approach belongs to one of the versions of the comparative method, which allows her to show that, regarding her paradigmatic case, there is no functional equivalence, on the one hand, between the German, French and Chilean law perspective and the English approach, on the other.

Of course, it is very valuable what the author achieves, since one thing is to assert such an idea - which seems relatively intuitive - but another one is to prove it with the care and clarity she did.

However -and here there is no criticism, but I simply try to confirm the facts- some other extremes are scarcely discussed, such as the characterization of negotiations from a more multidisciplinary perspective (economic, philosophical, sociological, etc.), what contributes to evaluate if the idea of trust is appropriate when shading light in the mentioned "grey area".

On the other hand, the idea of trust -worked on in depth in Zuloaga's thesis- is extremely correct, in my opinion. Also, the distinction between "trust dimension" and "expectation dimension" is intriguing, although, for the purposes of her work, the only relevant is the latter. Likewise, another correct idea - although not original - is that the reproach consists of creating an appearance that falls away later. Likewise, there are important pages addressing the topic of legitimacy of trust, which although scarcely theoretical, they point out objective circumstances

from which such legitimacy can be drawn (pp. 156-158). However, there is no coordination between the legitimacy of the trust and the unjustified withdrawal, since -as in all legal systems- liability requires fault. It is true that such fault can be sought through the creation of trust, but it happens that what triggers liability is the withdrawal, so the study about how justified or unjustified is the withdrawal seems necessary, and I didn't find it in the thesis.<sup>5</sup>

Finally, it is very likely that something about good faith may still be added; namely, that the distinction between objective and subjective good faith seems to be worth to be left out, and it is better to establish a distinction between the general principle and its manifestations instead. Also, the idea that good faith may remain unused during the period of preliminary negotiations and be replaced by trust may cast doubts on a continental reader as well (p. 165). In fact, it seems to me that such a reader would point out that the requirements of the general principle of good faith are expressed by the concept of trust, when dealing with the question of preliminary negotiations. Additionally, for this reader to leave out the good faith would probably seem futile, unless it is explained that in this way it would be more acceptable in the English legal system.

In short, using the comparative method, Professor Isabel Zuloaga has made a valuable contribution for readers from the continental world as well as for those in the common law. Referring to the beginning, when she presents the requirements of good faith during the contractual phase in a moderated manner, balancing the two eventually adversarial positions of the two parties, she combines the risks of the philanthropic position, illustrated by Galgano. On the other hand, the common law reader may learn that, perhaps, the inherent repugnancy of Lord Ackner for good faith shall be diminished if it is presented in a sober and intelligent way, as Professor Zuloaga does.

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5 This topic is addressed, indirectly though, on pages 148-149.

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