How Far Does the Dynamic Doctrine Go? Looking for the Basis of Precontractual Liability in the CISG

Anne Rossen,[*] Marie Hummelshøj Pedersen,[**]

& Thomas Neumann[***]

[*] Master of Laws, assistant attorney at Kammeradvokaten/Poul Schmidt, e-mail: annerossen@hotmail.com.

[**] Master of Laws, legal officer at the danish Ministry of Justice, Department of Civil Affairs, e-mail: mariehummelshoej@hotmail.com.

[***] PhD, Master of Laws, Associate Professor Department of Law, Aalborg University, e-mail: thn@law.aau.dk. orcid.org/0000-0002-0477-7429.

1. INTRODUCTION

Imagine the businessman who enters into contract negotiations with the purpose of gaining otherwise confidential knowledge about a competitor's trade practices. Is he liable to pay the other party's negotiation costs when the negotiations are broken off? The question is answered differently in domestic legal systems and it is understandable that one might attempt to classify the situation as either a contractual one or one of tort.[1] The problem of such a binary view is often that *"[…] the parties are no longer strangers to each other as presumed by tort law, nor are they parties to a contract which contract law requires to trigger all the rights and duties […]",*[2] hence a third alternative way is used in some legal systems.[3] The inherent conundrums of precontractual liability are familiar in most domestic legal systems, but they also turn overly complex if the parties are located in each their jurisdiction. This article analyses whether the United Nations Convention on Contracts for the International Sale of Goods (CISG) governs any precontractual questions. Precontractual liability under the CISG has been discussed sparsely in the literature and since the Convention neither expressly deals with nor excludes precontractual liablity it leaves a gap of knowledge. A further examination of the Convention's applicability to precontractual liability, what the legal foundation of such precontractual duties may be, and what such duties may consist of is desired.

Some authors have relied upon Art. 16(2) CISG as a basis for also imposing precontractual liability under the CISG.[4] For instance, accepting a wrongfully revoked offer and hereafter claiming damages could arguably be impractical under certain circumstances. Imagine the following scenario: The offeror has offered to buy machinery at a certain price and promised to hold the offer open for two months, giving the offeree time to start the process of designing the machinery to determine whether it would be possible to sell it at the offered price. If the offeror then revokes the offer before the expiry of the two months, the offeree would already have had expenses, but would not yet be ready to accept the offer since

---

[1] Hans Henrik Edlund, 'Culpa in Contrahendo: Tortious Liability, Breach of Contract or an Autonomous Legal Instrument?'. European Business Law Review 30, no. 5 (2019), 815-822.; Ingeborg Schwenzer, Pascal Hachem and Christoffer Kee, *Global Sales and Contract Law* (1. Edn, Oxford University Press 2012) 275.

[2] Schwenzer/Hachem/Kee, *Global Sales* (n 1) 275.

[3] This is the approach in Germany, according to Schwenzer/Hachem/Kee, *Global Sales* (n 1) 283.

[4] Silvia Gil-Wallin, 'Liability Under Pre-Contractual Agreements and Their Application Under Colombian Law and the CISG' Nordic Journal of Commercial Law (2007/1) 19-20; Diane Madeline Goderre 'International Negotiations Gone Sour: Precontractual liability under the United Nations Sales Convention' 66 U. Cincinnati Law Review 1997 258-281, 281;John O. Honnold, *Uniform Law for International Sales under the 1980 United Nations Convention* (3rd edn. Kluwer Law International 1999) 167-168.

the designing and examination process is not yet completed.[5] An acceptance of the offer would require further expenses for the offeree in order to finish the designing and examination process to a level where the offeree would be able to accept the offer at the offered price. These expenses may or may not be compensated after having pursued a damage claim through a lawsuit.[6] The offeree would then be in the unfortunate situation of having to choose between stopping the process with a loss or continue the process with increased expenses risking not being able to be reimbursed for these expenses through a lawsuit. It may be argued that the CISG in a situation like this provides no effective remedy, leaving a gap in the CISG. This gap may be filled by settling the matter in accordance with Art. 7(2) CISG by giving the offeree the remedy of claiming damages directly for wrongful revocation of the offer.[7] This would arguably be in line with the protection provided for in Art. 71 and 72 CISG, regarding anticipatory breach, although these provisions would not be directly applicable unless a contract has been concluded.[8] In this scenario the CISG encompasses precontractual liability since it provides for damages although no contract has been concluded. However, precontractual liability often denotes more than this single example and comprises any prior negotiations not necessarily involving offer and acceptance.[9] The precontractual liability that may be based upon Art. 16(2) CISG and its analogical application may still be limited. Hence, the question arises whether there is support elsewhere in the CISG for establishing precontractual liablility or whether the matter is excluded altogether leaving aside the one example described above.

It may be argued that the precontractual liability that may be derived from Art. 16(2) reaches further than mere liability for wrongful revocation of an offer. It may also be argued that this protection might extend to negotiations and the withdrawal from them due to the similarities between these situations. If a party relies upon the negotiations and suffers a loss when the other party withdraws, it may be unjustified for the other party to withdraw. The party withdrawing may then be held liable for the unjustified withdrawal from the negotiations.[10] Imagine for example the situation where a party never intended to enter into a contract, but makes the proposition to contract only to gain access to confidential information, to distract or to make the other party make futile efforts. In that situation, a contract would never be concluded, and the aggrieved party may be left with a loss and in addition he may have granted the buyer access to

---

[5] This example is constructed by Honnold in Honnold, *Uniform Law* (n 4) 167.

[6] Honnold, *Uniform Law* (n 4) 167.

[7] Honnold, *Uniform Law* (n 4) 168.

[8] Honnold, *Uniform Law* (n 4) 168, note 22.

[9] Albert H. Kritzer (ed.), *Pre-Contract formation*, available at: Pace Law School Institute of International Commercial Law
https://www.cisg.law.pace.edu/cisg/biblio/kritzer1.html (accessed 11 May 2020).

[10] Gil-Wallin, *Liability* (n 4) 19-20.

confidential information. Would an adjudicator be able to award the aggrieved party damages on the basis of precontractual liability in such situation?

Taking into account that the purpose of the CISG is to remove legal barriers in international trade and to promote uniformity and certainty in international trade,[11] it could be argued that it is in accordance with this purpose to let the scope of the CISG reach as far as possible and thereby encompass more aspects of precontractual liability. Since precontractual liability is dealt with very differently in the domestic laws of the different contracting states[12] it would presumably promote uniformity and remove legal barriers if the CISG applied to the issue.

In relation to domestic law, it has been noted that *"[t]he existence and scope of pre-contractual duties depend on what stance a legal system takes towards the general principle of good faith."*[13] This is similar to that of the CISG where good faith is relevant in two aspects. First, Art. 7(1) in which good faith is mentioned as a tool of interpretation. How Art. 7(1) is to be understood may affect the role of good faith and whether an analogical interpretation of Art. 16(2) CISG is allowed, thus forming a foundation for precontractual duties under the CISG. Second, if the precontractual liability is considered within the scope of the Convention in accordance with Art. 4 CISG, but without it being settled, Art. 7(2) permits the use of underlying principles. One of such principles could potentially be a principle of good faith and fair dealing. However, whether or not precontractual liability is even within the scope of the CISG is often overlooked in the debate,[14] but is nonetheless crucial.

Consequently, the analysis of the present paper is two-fold. First, it is analysed whether precontractual liability falls within the scope of the CISG. Second, presupposing that the answer to the first question is affirmative, it is analysed whether the notion of good faith in the CISG provides enough footing for the CISG to deal with more precontractual issues than the Art. 16-example explained previously. This paper predominantly focuses on establishing the legal foundation for precontractual liability under the CISG and does not seek to determine the effects of breaching precontractual duties in detail as this exceeds the limits of the paper.

Furthermore, Art. 81(2) CISG and Art. 84 CISG could possibly provide a basis for some form of precontractual liability under the CISG,

---

[11] See CISG Preamble and the UNCITRAL website 'United Nations Convention on Contracts for the International Sale of Goods (Vienna, 1980) (CISG)' at https://uncitral.un.org/en/texts/salegoods/conventions/sale_of_goods/cisg (accessed 11 May 2020).

[12] Lisa Spagnolo, 'Opening Pandora's Box: Good Faith and Precontractual Liability in the CISG, Opening Pandora's Box: Good Faith and Precontractual Liability in the CISG.' 21 Temple International and Comparative Law Journal 2007 261–310, 282-283.

[13] Schwenzer/Hachem/Kee, *Global Sales*, p. 278.

[14] Spagnolo, *Pandora's Box* (n 12) 293.

that does not necessarily require acts in bad faith or contrary to good faith. However, none of these provisions have been subject of independent study as good faith is presumed to be the most plausible road to include precontractual liablity under the Convention.

2. SCOPE OF APPLICATION

Before discussing any possible duty to act in good faith under the CISG it is paramount to determine whether the Convention may be extended to the precontractual phase, and thereby whether precontractual liability falls within the scope of the CISG. As mentioned previously this is an issue sometimes overlooked in scholarship.[15]

Since precontractual liability is not expressly excluded by virtue of Art. 2-5 CISG[16] it is relevant to consider whether the issue is encompassed by the wording 'formation of the contract' or 'rights and obligations' arising from such a contract in accordance with Art. 4 CISG. When formation of the contract is governed by the CISG the question might be asked: *"Is not precontract formation a part of formation of the contract?"*[17]

It may be argued, that precontractual liability is outside the scope of the CISG, since there is no contract between the parties. The provisions that contain remedies in CISG Part III all appear to presuppose that a contract is concluded. Damages provided for in Art. 74 CISG, for instance, provides only for *"damages for breach of contract"*. It may, therefore, be argued that CISG Part III and the remedies contained therein do not apply unless a contract is concluded and that everything that happens prior to the conclusion is not really to be considered within the scope of the CISG[18] leaving remedies on the basis of precontractual liability outside the scope of the Convention. In contrast, however, CISG Part II does apply to the determination of whether a proposal is sufficiently definite to constitute an offer[19] and whether such offer has been accepted,[20] and thereby whether a contract is in fact concluded.[21] The CISG therefore also applies in some situations, although a contract may never have been concluded. Consequently, the precontractual phase could be governed by the CISG and a breach of precontractual duties could lead to damages following an analogical application of the Conventions rules in Part III and through application of underlying principles.

According to the wording of Art. 4 CISG the Convention *"governs only"* the formation of the contract and the rights and obligations of the

---

[15] Spagnolo, *Pandora's Box* (n 12) 293.

[16] Camilla Baasch Andersen, Francesco G. Mazzotta, and Bruno Zeller, *A Practitioner's Guide to the CISG* (1st edn. Juris 2010) 78.

[17] Kritzer, *Pre-Contract Formation* (n 9).

[18] Spagnolo, *Pandora's Box* (n 12) 303 here referring to Schlechtriem in *Workshop* 230.

[19] CISG Art. 14.

[20] CISG Art. 18-19.

[21] CISG Art. 23.

parties arising from such. However, one could argue that the wording should be read as *"governs without doubt"*,[22] since the CISG also contains provisions not directly related to formation of contracts or rights and obligations of the parties.[23] As demonstrated above, some parts of the CISG applies also to situations where no contract is formed. Though the present authors are sceptical, one could argue that a more liberal interpretation of the wording of Art. 4 seems appropriate and that it therefore cannot be concluded that precontractual liability is excluded from the scope of the Convention merely from the wording of Art. 4 and the wording *'formation of contract'*.

The close connection between negotiations and contract formation may make the issue of precontractual liability internal rather than external to the CISG.[24] How close that connection is will however depend on the progress of the negotiations and it will be quite difficult to determine exactly when this connection is sufficiently close to make the issue internal to the CISG.

When consulting the legislative history it is seen that the issue of precontractual liability was in fact considered. At the 8th session of the Working Group, a suggestion to include a provision that would give a party the right to claim compensation if the other party had violated a duty of care customary in the preparation of a contract was introduced: *'In case a party violates the duties of care customary in the preparation and formation of a contract of sale, the other party may claim compensation for the costs borne by it.'*[25]

Delegates in favour found that it recognised duties on the parties prior to the conclusion of the contract and provided sanctions in case of violation. The majority of the delegates, however, were in opposition to this proposal and expressed the concern that the provision was too uncertain and might negatively affect the number of countries choosing to ratify the Convention.[26] The suggestion was rejected at the 9th session of the Working Group.[27] At the 1980 Diplomatic Conference the German Democratic Republic suggested to include a quite similar provision: *"Where in the course of the preliminary negotiations or the formation of a contract a*

---

[22] Ingeborg Schwenzer (ed.) *Schlechtriem & Schwenzer, Commentary on the UN Convention on the International Sale of Goods (CISG)* (4th edn. Oxford University Press 2016) 74.

[23] Schlechtriem/Schwenzer, *Commentary* (n 22) 74. Here reference is made to Art. 7, 8, 9, 11, 29 CISG.

[24] Spagnolo, *Pandora's Box* (n 12) 298.

[25] UNCITRAL YB IX (1978), A/CN.9/SER.A/1978, 66, para. 70 reprinted in John O. Honnold, *Documentary History of the Uniform Law for International Sales. The studies, deliberations and decisions that led to the 1980 United Nations Convention with introductions and explanations* (Kluwer Law and Taxation Publishers 1989) 298

[26] UNCITRAL YB IX (1978), A/CN.9/SER.A/1978, 67, paras. 84-85 reprinted in Honnold, *Documentary History* (n 25) 299.

[27] UNCITRAL YB IX (1978), A/CN.9/SER.A/1978, 67, para. 86 reprinted in Honnold, *Documentary History* (n 25) 299.

party fails in his duty to take reasonable care, the other party is entitled to claim compensation for his expenses".[28]

Some delegates supported the proposal,[29] but a majority did not.[30] The delegates supporting the proposal considered the existing text to not sufficiently take into account the cases where no contract was concluded, but where one party might abuse its position and cause damage to the other party.[31] Those in opposition considered it too far-reaching, and that it was yet another attempt to include the concept of good faith despite the lengthy discussions regarding this concept.[32] This proposal was also rejected.[33] Had any of the above mentioned provisions been included in the CISG, it would have contained an express reference to precontractual duties on the parties to act in good faith.[34] As was the case with the general discussion on whether and how to include a good faith reference in the CISG, the delegates strongly disagreed on the question of precontractual liability in the CISG. The question of the application of the CISG to the precontractual phase, therefore, remains an open discussion.

Notwithstanding the drafting history, the salient question is whether courts have subsequently considered precontractual liability to be a matter within the Convention's scope. In a German court decision,[35] the court had the opportunity to address the issue of precontractual liability in a contract governed by the CISG. The court decided that no contract had been concluded according to the CISG, and then decided whether the buyer had a claim under the domestic doctrine of 'culpa in contrahendo'. The court did not explicitly establish that precontractual liability was outside the scope of the CISG, but this would appear to be implied since the court decided on this matter by recourse to domestic law with no further references to the CISG. The decision could indicate that the court found the issue clearly outside the scope of the CISG, but could as well be an expression of a homeward trend. When the court decided on the issue of contract formation the court decided the dispute upon the BGB[36] and stated: *"This is consistent with the provisions of the CISG, which apply in the present case".*[37] The court continued to make references to the BGB and

---

[28] Spagnolo, *Pandora's Box* (n 12) 272.

[29] United Nations Conference on Contracts for the International Sale of Goods, Vienna, 10 March-II April 1980, Official Records / UN DOC. A/CONF. 97/19, 294-295, paras. 80, 84.

[30] A/CONF. 97/19 (n 29) 294-295, paras. 81, 82, 83, 85.

[31] A/CONF. 97/19 (n 29) 294-295, paras. 80, 84.

[32] A/CONF. 97/19 (n 29) 294-295, paras. 81, 85.

[33] A/CONF. 97/19 (n 29) 295, paras. 86, 87.

[34] Spagnolo, *Pandora's Box* (n 12) 273.

[35] 4 March 1994 Appellate Court Frankfurt, Germany case no. 10 U 80/93.

[36] German domestic contract law, Bürgerliches Gesetzbuch (BGB).

[37] (n 35). Original German quote reads: *"Dies stimmt mit der Regelung des Einheitlichen UN-Kaufrechts (CISG) überein, das vorliegend Anwendung findet"* available at http://www.unilex.info/cisg/case/205 (accessed 11 May 2020).

subsequently to the CISG thus openly admitting to a homeward trend. Consequently, the persuasive weight of the court decision is less.

In a U.S. court decision,[38] the court considered a contract to be governed by the CISG, but applied domestic law to determine whether one of the parties had claims arising from the precontractual phase. The court expressly debated the scope of CISG preemption, but found the CISG not to preempt claims based on promissory estoppel, except for those addressed by Art. 16(2)(b) CISG. The court also found claims based on negligence and negligent misrepresentation outside the scope of the CISG.

In a Greek court decision,[39] the court also considered the scope of the CISG and noted: *"The issue of pre-contractual (established during the negotiations) liability, according to the opinion that this Court adopts, is not regulated by the CISG, except for the cases in which the CISG regulates specifically an issue for the period before the conclusion of the contract (e.g., CISG Article 16(2))."*

As there does not seem to be case law where courts have applied the CISG to impose precontractual liability, it may be concluded that courts seem to find issues of precontractual liability, except for situations encompassed by Art. 16(2), outside the scope of the CISG. However, one should carefully consider whether the few court decisions available are subject to some degree of homeward trend. This seems in line with the general assumption that domestic courts prefer a narrow interpretation of the CISG.[40]

The majority opinion among scholars is that precontractual liability falls outside the scope of the CISG,[41] and some scholars even outright reject that precontractual liability is within the scope of the CISG without further discussion.[42] A minority, on the other hand, is of the opposite opinion.[43] One author has stated that the intention of the drafters of the CISG was to impose a duty of good faith on the parties that extends to the beginning of the negotiations,[44] however when looking at the drafting history, this is hardly the case. Based on the preparatory works the CISG

---

[38] *Geneva Pharmaceuticals Technology Corp. v. Barr Laboratories, Inc. et al. / Apothecon, Inc. v. Barr Laboratories, Inc. et al.* 10 May 2002 U.S. District Court for the Southern District of New York [federal court of 1st instance], United States.

[39] *Bullet-proof vest case* 2009 Multi-Member Court of First Instance of Athens, Greece, Decision 4505/2009. English editorial analysis available at: http://cisgw3.law.pace.edu/cases/094505gr.html (accessed 11 May 2020).

[40] Joseph Lookofsky, 'Not Running Wild with the CISG' 29 Journal of Law and Commerce 2011, 143.

[41] For authors observing this divergence see Gil-Wallin, *Liability* (n 4) 14; Kritzer, *Pre-Contract Formation* (n 9); Spagnolo, *Pandora's Box* (n 12) 293.

[42] Andersen et al., *Practitioner's Guide* (n 16) 52; Christoph Brunner and Benjamin Gottlieb, *Commentary on the UN Sales Law (CISG)* (1st edn. Wolters Kluwer 2019) 119-120.

[43] For authors observing this divergence see Gil-Wallin, *Liability* (n 4) 14; Kritzer, *Pre-Contract Formation* (n 9); Spagnolo, *Pandora's Box* (n 12) 293.

[44] Gil-Wallin, *Liability* (n 4) 20.

was arguably not meant to encompass issues of precontractual liability, leaving this to be resolved by domestic law.[45] The role of good faith was extensively discussed during the drafting as well as whether to include an express reference to precontractual liability. The delegates could not agree on such inclusion and deliberately left it out. The drafting of the CISG was however long and difficult. An amendment would equally be. It may, therefore, be argued that the legislative history should not carry much weight since the CISG is a living instrument that must evolve over time[46] to avoid that the Convention becomes *"a prisoner of the past"*.[47] As the borders of the Convention are not always crystal clear many provisions are open-ended. The question of whether precontractual liability is within the Convention should be answered by applying the autonomous interpretation method mandated in Art. 7(1) and subsequently combined with Art. 7(2), that allows for gap-filling and development of the Convention.[48]

The CISG reflects the society and available knowledge at the time of the drafting and not every possible development could have been taken into account, such as new electronic means of communication.[49] The CISG must be able to adapt to meet these new circumstances, so as not to become 'petrified'.[50] However, some issues were in fact foreseen by the drafters. They were discussed and deliberately rejected. Precontractual liability is an example of such an issue.[51] In these cases, it may be argued that it would be wrong to let the CISG expand in scope and to reintroduce such issues into the CISG.[52] Expanding the scope of the CISG to encompass precontractual liability may, therefore, be *"overstepping the spirit of the international consensus"*.[53] It was most likely the differences between common law and civil law approaches that were the reason why the drafters of the CISG could not agree to include a reference to precontractual liability.[54] In regard to good faith in bargaining, there was not and there is currently no international common core of the concept.[55] It may be an oversimplicifcation to divide the approaches into civil law

---

45 Peter Schlechtriem, *Uniform Sales Law - The UN-Convention on Contracts for the International Sale of Goods* (Manz 1986) 57.

46 Bruno Zeller, 'The Observance of Good Faith in International Trade' in André Janssen and Olaf Meyer, *CISG Methodology* (Sellier. european law publishers, 2009) 138.

47 Spagnolo, *Pandora's Box* (n 12) 288.

48 Spagnolo, *Pandora's Box* (n 12) 288.

49 Andersen et al. *Practitioner's Guide* (n 16) 78-79; Schlechtriem/Schwenzer, *Commentary* (n 22) 133; Spagnolo, *Pandora's Box* (n 12) 287.

50 Spagnolo, *Pandora's Box* (n 12) 288.

51 Spagnolo, *Pandora's Box* (n 12) 287.

52 Andersen et al. *Practitioner's Guide* (n 16) 78.

53 Spagnolo, *Pandora's Box* (n 12) 287.

54 Gil-Wallin, *Liability* (n 4) 13; Goderre, *Negotiations* (n 4) 266.

55 Schwenzer/Hachem/Kee, *Global Sales* (n 1) 280-281; Spagnolo, *Pandora's Box* (n 12) 282-283.

and common law, as there are differences among the approaches to precontractual liablity among common law countries as well as among civil law countries. However, there are general differences between common law and civil law systems which makes this classification beneficial. While civil law systems generally have acknowledged a duty to act in good faith during negotiations as a basis for imposing precontractual liability,[56] common law systems have not acknowledged such a general duty during the negotiations. Common law countries have however moved towards acknowledging some precontractual duties.[57] This development was still at its early stages at the time the CISG was drafted.[58] Had the CISG been drafted today, then one may wonder if the delegates would have agreed to expressly include at least some precontractual duties. If one accepts that the CISG should be applied in a way that lets the Convention evolve and adapt to new circumstances, it could be argued that the scope of the CISG should be expanded to encompass at least some precontractual duties, at least to the extent that these may now be an expression of an international common core.

When taking into account that the purpose of the CISG is to remove legal barriers in international trade and to promote uniformity and certainty in international trade,[59] it is arguably in line with the purpose of the CISG to let the scope encompass some precontractual liability. Expanding the scope of the CISG to encompass precontractual liability would promote uniformity and predictability since the issue would be governed by a uniform law familiar to the parties rather than diverging domestic laws.[60] If applying domestic law the result would likely be different in the various jurisdictions due to the different approaches in common law and civil law systems.[61] The expansion of the scope of the CISG could in addition decrease transaction costs as the parties would not have to familiarise themselves with domestic laws on precontractual liability,[62] which would be in accordance with the purpose of the CISG.[63] Theoretically, extending the scope of the CISG would improve

---

[56] Goderre, *Negotiations* (n 4) 267.

[57] Goderre, *Negotiations* (n 4) 270*;* Farnsworth, *Precontractual Liability* (n 176) 222; Spagnolo, *Pandora's Box* (n 12) 268.

[58] Spagnolo, *Pandora's Box* (n 12) 268.

[59] See CISG Preamble and the UNCITRAL website 'United Nations Convention on Contracts for the International Sale of Goods (Vienna, 1980) (CISG)' at https://uncitral.un.org/en/texts/salegoods/conventions/sale_of_goods/cisg (accessed 11 May 2020).

[60] Spagnolo, *Pandora's Box* (n 12) 281; Gil-Wallin, *Liability* (n 4) 18-19.

[61] Gil-Wallin, *Liability* (n 4) 18.

[62] Spagnolo, *Pandora's Box* (n 12) 282.

[63] United Nations Commission on International Trade Law, United Nations Convention on Contracts for the International Sale of Goods (Vienna, 1980) (CISG), https://uncitral.un.org/en/texts/salegoods/conventions/sale_of_goods/cisg (accessed 11 May 2020).

predictability and certainty, at least to the extent that the CISG preempts domestic law, so that the domestic law does not apply either exclusively or concurrently with the CISG.[64] The fact that precontractual liability may be based on good faith and that the content of good faith has not yet been clearly defined in relation to the Convention may, however, bring uncertainty to the CISG and its application. Adjudicators may apply good faith differently and parties may therefore not be able to predict their legal status, and thus uniformity is not in fact promoted.[65] If the CISG seems to be an unpredictable instrument to contracting parties, these parties may be more inclined to opt out of the CISG or less inclined to opt in.[66] It may also affect the amount of non-Contracting States that will choose to become parties to the Convention in the future, as was also one of the concerns expressed when a proposal for an express inclusion of precontractual liability in the CISG was suggested during the drafting of the CISG.[67] There is, however, no signs of States being reluctant to become parties to the Convention. On the contrary, an ever increasing amount of states either ratify the Convention of remove reservations made upon ratification.

Those arguing in favour of an extensive interpretation, letting the CISG develop and expand in scope to obtain greater formal uniformity, rather than dwelling in the legislative history, must do so accepting greater uncertainty and thereby the risk of decreased substantive uniformity.[68] On the other hand, opponents of such approach, in preferring predictability and certainty, will trade greater formal uniformity in favour of substantive uniformity and respect for the original compromise.[69] Art. 7(1) CISG requires the interpreter to have regard for the need to promote uniformity "*in its application*". This could indicate that the purpose of the CISG is to promote substantive uniformity within the sphere of the CISG, rather than in general to promote uniformity in all aspects of international trade.

The CISG is a convention concerning international 'sale of goods'. It is thereby concerned with sales law, not tort law. Precontractual liability is a liability resembling tort law while still being closely connected to contract law. Precontractual liability is a type of liability that in some legal

---

[64] Spagnolo, *Pandora's Box* (n 12) 282-283. However, alone the issue of determining whether and when the CISG preempts domestic law could cause uncertainty, despite that theoretically expanded uniformity is achieved, see Spagnolo, *Pandora's Box* (n 12) 283. The question of preemption is beyond the framework of this article.

[65] Spagnolo, *Pandora's Box* (n 12) 281, 283.

[66] Spagnolo, *Pandora's Box* (n 12) 309-310.

[67] UNCITRAL YB IX (1978), A/CN.9/SER.A/1978, 67, para. 85 reprinted in Honnold, *Documentary History* (n 25) 299.

[68] Formal uniformity is regarded as a theoretical quantitative uniformity used to describe "*the field of coverage of uniform law on paper*", whereas substantive uniformity is regarded as an actual uniformity used to describe "*the quality of uniformity achieved within that field*", see Spagnolo, *Pandora's Box* (n 12) 281.

[69] Spagnolo, *Pandora's Box* (n 12) 289.

systems is characterized as a contractual liability, while in others it is considered tortious or a third unique type.[70] Such differences in the domestic classifications should not be decisive of whether precontractual liability falls within the scope of the Convention, but perhaps it is contributing to the confusion as to whether it does.

It becomes apparent that answering whether precontractual liability is considered within the scope of the CISG is not simple. Whether it will be considered within the scope will mainly depend on whether the legislative history is considered decisive, or whether instead the CISG is interpreted extensively and allowed to evolve to encompass such liability. However, even with an extensive interpretation, there must be limits as to how far the CISG scope may be allowed to expand. Part of the answer may lie in an analysis of whether the Convention can provide any footing for precontractual liability to exist. Such footing would most likely be found in the concept of good faith.

3. THE NOTION OF GOOD FAITH AS IMPOSING DUTIES ON THE PARTIES IN THE PRECONTRACTUAL STAGE

Good faith in the Convention is a somewhat controversial topic. Good faith is mentioned merely once in the Convention text, in Article 7. Boiled down, it can be said that there are three approaches to good faith in the Convention. First, according to a literal understanding of Art. 7(1) the interpreter will find that the observance of good faith is only applicable to the interpretation of the Convention text. Consequently, the provision does not impose a direct duty on the parties.[71] The interpreter may in this regard furthermore reject the perception that good faith is a general principle underlying the CISG.[72] Second, the interpreter finds that good faith is an underlying principle to be used for gap-filling in accordance with Art. 7(2).[73] Third, Art. 7(1) is not to be understood literally, meaning that it imposes a duty directly on the parties.[74] Which interpretation one prefers determines whether Art. 7 and good faith may be considered a basis for precontractual liability under the CISG. In essence, this is a question whether one adheres to a dynamic doctrine and how far one is willing to take it. For the purpose of determining whether precontractual liability has enough of a footing in the CISG it is necessary to explore the closely linked concept of good faith further.

---

[70] Michael Joachim Bonell, 'The law governing international commercial contracts and the actual role of the UNIDROIT Principles' (Oxford University Press on behalf of UNIDROIT) 23 Uniform Law Review 2018, 15–41, 192, with note 55; Schlechtriem/Schwenzer, *Commentary* (n 22) 258; Schwenzer/Hachem/Kee, *Global Sales* (n 1) 283-284.

[71] Spagnolo, *Pandora's Box* (n 12) 274.

[72] Goderre, *Negotiations* (n 4) 275-276.

[73] Goderre, *Negotiations* (n 4) 276-278; Spagnolo, *Pandora's Box* (n 12) 274-275.

[74] Goderre, *Negotiations* (n 4) 278-280; Spagnolo, *Pandora's Box* (n 12) 275-277.

3.1. GOOD FAITH THROUGH INTERPRETATION ACCORDING TO ARTICLE 7(1)

The black letter wording of Art. 7(1) CISG suggests that the good faith requirement only applies to adjudicators when they interpret the Convention text, but not to the relationship between the parties. However, the wording of Art. 7(1) is ambiguous as to how this interpretation is to be conducted. How should the adjudicator exactly interpret the provisions with regard to the need to promote the observance of good faith? Therefore, the question of whether Art. 7(1) additionally imposes a duty on the parties has been discussed.[75]

As the wording of Art. 7(1) provides little guidance, one may consult the drafting history. In 1969 UNCITRAL established the Working Group that prepared a draft of the provisions that later became the CISG.[76] At the 8th session of the Working Group, a direct duty on the parties to act in good faith in the course of the formation of the contract was suggested.[77] At the 9th session of the Working Group and at the 11th session of the Commission this concept was discussed and some argued for deleting any reference to good faith, since it was vague and lacked sanctions and therefore would increase uncertainty, while others found it implicit and therefore unnecessary. Others again found good faith to be a well recognised principle and feared that leaving out a reference to good faith would send the wrong signals.[78] The Commission established a second Working Group with the purpose of drafting a compromise of these different opinions.[79] A draft was proposed that essentially equals what later became Art. 7(1) CISG. With that good faith was instead included as an interpretive concept, rather than a duty on the parties, as an attempt to find an acceptable compromise.[80] This suggestion was the one presented at the 1980 Diplomatic Conference.[81] At this conference, the delegates discussed the suggested article and two proposals for amendments.[82] An Italian proposal to require the parties to observe the principles of good faith in the formation and performance of the

---

[75] Spagnolo, *Pandora's Box* (n 12) 274-279.
[76] Honnold, *Documentary History* (n 25) 3.
[77] UNCITRAL YB IX (1978), A/CN.9/SER.A/1978, 66, para. 70 reprinted in Honnold, *Documentary History* (n 25) 298.
[78] UNCITRAL YB IX (1978), A/CN.9/SER.A/1978, 66-67, paras. 73- 77, 35, paras. 44-48 reprinted in Honnold, *Documentary History* (n 25) 298-299, 369.
[79] UNCITRAL YB IX (1978), A/CN.9/SER.A/1978, 36, para 55 reprinted in Honnold, *Documentary History* (n 25) 370.
[80] UNCITRAL YB IX (1978), A/CN.9/SER.A/1978, 36, paras. 56-60 reprinted in Honnold, *Documentary History* (n 25) 370.
[81] A/CONF. 97/19 (n 29) 5, Art. 6.
[82] A/CONF. 97/19 (n 29) 257-259, paras. 40-57.

contract[83] and a Norwegian proposal to move the notion of good faith to what eventually became Art. 8(3) CISG[84] were both rejected. Some delegates supported these proposals[85] while other delegates, although some moderately supportive, would prefer the existing text of the article.[86] Some delegates found that although it would be desirable for parties to behave in good faith, they were unable to support the Italian suggestion since it was of uncertain meaning, dangerous in practice, and since it provided no sanctions in the event of failure to comply.[87] Some delegates considered the proposals unnecessary as good faith was already understood to be an underlying principle implicit in any legal transaction[88]. The existing text had already been discussed at length by the UNCITRAL Working Group prior to the 1980 Diplomatic Conference, and the existing text represented a compromise.[89] Due to the various opinions expressed by the delegates, no agreement could be reached on any of the proposals for amendments, and retention of the existing text was agreed upon.[90] Consequently, the drafting history is of little assistance in clarifying the concept of good faith in the CISG.

While the delegates could not agree on an explicit inclusion of a duty on the parties to observe good faith, the delegates did not unanimously agree that this duty should not be imposed on the parties either. Even though the text of Art. 7(1) CISG appears to be a compromise, it rather masks the continuing disagreement among the drafters, and "*this Pandora's box gave the mere illusion of a compromise*".[91] The discussion of whether this duty lies inherent within the CISG is therefore still open, although the existing text of Art. 7(1) does not explicitly impose a duty directly on the parties.

In regard to the understanding of the notion of good faith, the legislative history is, as becomes apparent from the above, inconclusive. It has been argued that the preparatory works in general often are inconclusive and seldom provide the answer to complex issues.[92] Furthermore, it has been argued that the preparatory works are "*frozen in time*" while the CISG is a "*living instrument*",[93] to be understood in light of

---

[83] A/CONF. 97/19 (n 29) 87, Italy (A/CONF.97/C.1IL.59). Interestingly this proposal was very similar to the one already suggested at the 8th session of the Working Group and rejected in the 11th session of the Commission.
[84] A/CONF. 97/19 (n 29) 87, Norway (A/CONF.97IC.1IL.28).
[85] A/CONF. 97/19 (n 29) 258, paras. 43-44.
[86] A/CONF. 97/19 (n 29) 258, paras. 45, 46, 48, 49, 52.
[87] A/CONF. 97/19 (n 29) 258, paras. 47, 50.
[88] A/CONF. 97/19 (n 29) 258-259, paras. 51, 53.
[89] A/CONF. 97/19 (n 29) 257-259, paras. 40, 45, 49, 50.
[90] A/CONF. 97/19 (n 29) 259, paras. 54-57.
[91] Spagnolo, *Pandora's Box* (n 12) 273-174.
[92] Joseph Lookofsky, *Understanding the CISG* (5th edn. DJØF Publishing Copenhagen 2017) 31.
[93] Zeller, *Good Faith* (n 46) 138.

current scholarly works and case law. Therefore, what the drafters discussed may generally carry little weight when assessing the understanding and extent of good faith,[94] and other relevant sources must be consulted.

Scholars have expressed varying views on the notion of good faith.[95] Although a duty on the parties to observe good faith is not expressly evident in Art. 7(1) CISG, it is advocated among some scholars that the good faith requirement in Art. 7(1), in addition to imposing a duty on adjudicators, also imposes a duty directly on the parties.[96] Scholars advocating this view argue that the parties' conduct and contract must be interpreted in accordance with the observance of good faith, either because the interpretation of the CISG and the contract is inseparable, or because Art. 7(1) is additionally directed at the parties as well as the adjudicator.[97] Some scholars may not reach as far as to outright conclude that good faith may be imposed as a direct positive duty, but acknowledge that good faith reaches further than merely being an interpretive tool, and in addition, governs rights and obligations of the parties.[98] In opposition other scholars have advanced a more narrow view of the wording of the provision's text; "*[i]n the interpretation of this Convention*" which in connection with the drafting history of Art. 7 CISG entails that the requirement to observe good faith cannot be applied to the parties' conduct, but merely to the interpretation of the CISG.[99]

Regardless of the fact that it does not appear directly from the black letter wording of the CISG, the obligation to interpret the provisions with regard to the observance of good faith will ultimately influence the relationship between the parties. The obligation to interpret with regard to good faith must ultimately affect the obligations of the parties,[100] as "*good faith cannot exist in a vacuum and must be anchored to parties' behaviour if used to interpret provisions*".[101] Thereby, although a literal reading of Art. 7(1) CISG indicates that the good faith requirement only applies to the interpretation of the CISG, the concept of good faith may necessarily be

---

[94] Zeller, *Good Faith* (n 46) 138.

[95] Spagnolo, *Pandora's Box* (n 12) 274-279.

[96] Schlechtriem/Schwenzer, *Commentary* (n 22) 121 (not itself following this position). For a description of this view see Bonell, *Art. 7*, p. 84; Spagnolo, *Pandora's Box* (n 12) 275-277.

[97] Spagnolo, *Pandora's Box* (n 12) 276.

[98] Zeller, *Good Faith* (n 46) 148.

[99] Camilla Baasch Andersen, 'Good Faith? Good Grief!' 17 International Trade and Business Law Review 2014 310-321, 317-318; Andersen et al., *Practitioner's Guide* (n 16) 76; Farnsworth, *Duties* (n 124) 55-56; Schlechtriem/Schwenzer, *Commentary* (n 22) 126-127; Spagnolo, *Pandora's Box* (n 12) 274.

[100] Schlechtriem/Schwenzer, *Commentary* (n 22) 127; Spagnolo, *Pandora's Box* (n 12) 278-279.

[101] Andersen, *Good Grief* (n 99) 318.

linked to the parties' behaviour.[102] The extent of the notion of good faith is debatable, but many seem to support that good faith, in one way or another, to a greater or lesser extent, may reach beyond strict applicability only to the interpretation of the CISG.[103] and will at least indirectly be linked to the parties' behaviour and their obligations.

When looking at court practice it appears that domestic courts most often impose a standard of behaviour on the contracting parties when good faith is utilized, rather than merely referring to good faith as an interpretive tool.[104] This supports the view that good faith, at least to some extent, reaches beyond the mere interpretation of the CISG text. This could partly answer how exactly the adjudicator should interpret the provisions with regard to the need to promote the observance of good faith. The provisions must necessarily at least be interpreted in relation to the parties' behaviour, rights and obligations, but may additionally impose a direct duty on the parties, either due to the good faith reference in Art. 7(1) or possibly as an underlying principle of the CISG according to Art. 7(2). Considering the debated and debatable concept of good faith in relation to Art. 7(1) CISG, the footing that one may find in Art. 7(1) to let a precontractual liablity develop seems to be an unstable one. If a proper leg-up is to be found, it could perhaps be in an underlying principle of a more flexible nature.

It may be argued that if good faith is considered a general principle on which the CISG is based in the sense of Art. 7(2) CISG then the significance of whether Art. 7(1) imposes a duty directly on the parties or only imposes a duty on adjudicators might be lessened and has been referred to as an "*arguably 'academic' distinction*".[105] Whether good faith is an underlying principle on which the CISG is based is therefore also highly relevant in assessing whether Art. 7 and good faith may provide a basis for precontractual liability under the CISG.

3.2. GOOD FAITH AS A GENERAL PRINCIPLE ACCORDING TO ARTICLE 7(2)

Art. 7(2) CISG demands that gaps in the convention be settled using the principles on which the CISG is based before resorting to any domestic law alternative. The question is now whether good faith is such a general principle, and whether it provides firmer ground for imposing a duty on the parties to observe good faith than good faith as an

---

[102] Andersen, *Good Grief* (n 99) 317-318; Andersen et al., *Practitioner's Guide* (n 16) 76-77; Lookofsky, *CISG* (n 92) 36-37; Schlechtriem/Schwenzer, *Commentary* (n 22) 126-127; Zeller, *Good Faith* (n 46) 140.

[103] Spagnolo, *Pandora's Box* (n 12) 278-279.

[104] Thomas Neumann, 'The Roots and Fruits of Good Faith in Domestic Court Practice' 31 Pace International Law Review 59, 2018, 81. This survey merely examines domestic court practices and not arbitration practice and did not examine domestic courts of every contracting state to the CISG. See in this regard (n 104) 73-75.

[105] Lookofsky, *CISG* (n 92) 37.

interpretative tool according to Art. 7(1) CISG. The wording of Art. 7(2) itself provides no guidance on how to determine the general principles, or whether good faith may be such.

It may be a starting point to consult the legislative history to see whether it was discussed which principles may be considered underlying principles of the CISG, or at least how such principles should be derived. The UNCITRAL Working Group that prepared what eventually became Art. 7(1), did not draft Art. 7(2). What became Art. 7(2) was not suggested until the 1980 Diplomatic Conference. Bulgaria,[106] Czechoslovakia,[107] and Italy[108] made proposals for a subsection (2), suggesting how to settle matters governed by, but not expressly settled in the CISG. The three proposals were all rejected and the German Democratic Republic suggested what essentially became Art. 7(2),[109] and this proposal was adopted.[110] During the discussions, the delegates favoured this proposal, although some were concerned that a reference to general principles was dangerous,[111] that such would be difficult to discern,[112] and that it might lead to excessive freedom in interpreting what those principles are.[113] There were no discussions among the delegates on how to derive such general principles,[114] and the legislative history does therefore not provide any guidance in this regard. The delegates who rejected an express requirement for the parties to observe good faith or an express reference to good faith in what later became Art. 8(3) CISG expressed that the Convention already referred to general principles[115] and that good faith was already to be understood as such principle.[116] This may, therefore, support good faith as a general principle on which the CISG is based.

While good faith is merely mentioned once in the CISG,[117] which could lead to the impression that good faith does not constitute an underlying principle, the Secretariat itself referred to the observance of good faith as a 'principle' in The Secretariat Commentary[118] and notes that

---

106 A/CONF. 97/19 (n 29) 87, Bulgaria (A/CONF.97/C.1IL.16).
107 A/CONF. 97/19 (n 29) 87, Czechoslovakia (A/CONF.97/C.1IL.15).
108 A/CONF. 97/19 (n 29) 87, Italy (A/CONF.97/C.1IL.59).
109 A/CONF. 97/19 (n 29) 87, 256, paras. 25-26.
110 A/CONF. 97/19 (n 29) 87, 257, para. 35.
111 A/CONF. 97/19 (n 29) 255, para. 12.
112 A/CONF. 97/19 (n 29) 256, para. 17.
113 A/CONF. 97/19 (n 29) 257, para. 28.
114 A/CONF. 97/19 (n 29) 254-257, paras. 1-37.
115 A/CONF. 97/19 (n 29) 258, para. 51.
116 A/CONF. 97/19 (n 29) 258-259, para. 53.
117 Art. 7(1) CISG.
118 There is no official commentary to the CISG, but the Secretariat Commentary to the 1978 draft included in the Official Records, can provide guidance as to the understanding of the 1980 Convention text. It is, however, not a conclusive authority, since the 1978 draft that was presented at the 1980 Vienna Conference was modified and therefore not

numerous of the provisions in the CISG are manifestations of the requirement to observe good faith.[119] After listing several examples of provisions the Secretariat states that: "*The principle of good faith is, however, broader than these examples and applies to all aspects of the interpretation and application of the provisions of this Convention.*"[120] This supports the view, that good faith is a principle on which the CISG is based.[121] It must, however, be noted, that when the provision that later became Art. 7(1) was drafted, and the compromise on the good faith reference was first reached, the subsection that later became Art. 7(2) had not yet been suggested. Subsection (2) was first introduced at the 1980 Diplomatic Conference.[122] Therefore, the Draft that the Secretariat commented on in The Secretariat Commentary did not yet contain what later became Art. 7(2). The Secretariat did therefore not have this later provision in mind, and the applicability of general principles as a gap-filling mechanism when commenting on the Draft. The temporal disorder in which Art. 7(1) and 7(2) were drafted has been referred to as contributing to "*good faith's phoenix-like quality*",[123] which may have caused the uncertainty of the role of good faith.

Some scholars reject good faith as a general principle[124], by arguing that Art. 7 CISG only permits good faith to be consulted when interpreting the provisions of the CISG, but that "*it is not a general principle in itself; certainly not one with the power and flexibility to determine outcomes of cases*".[125] In support of this, it is argued that the drafting history of the CISG is clear to the extent that the drafters rejected good faith as a general principle,[126] and that it would be "*a perversion of the compromise to let a general principle of good faith in by the back door*".[127] As mentioned above, the preparatory works does not explicitly list which principles are to be considered underlying principles, and it was not explicitly discussed whether good faith was such. It might not be correct to state that it is clear, that a general principle of good faith was outright rejected. The rejection

---

the final version of the CISG. See Secretariat Commentary and Lookofsky, *CISG* (n 92) 31.

119 Neumann, *Roots and Fruits* (n 104) 63; Commentary on the Draft Convention on Contracts for the International Sale of Goods prepared by the Secretariat ("Secretariat Commentary") / UN DOC. A/CONF. 97/5, 14-66, contained in Official Records / UN DOC. A/CONF. 97/19, 18.

120 Secretariat Commentary (n 119) 18.

121 Neumann, *Roots and Fruits* (n 104) 63.

122 A/CONF. 97/19 (n 29) 87, 254-257, paras. 1-37.

123 Spagnolo, *Pandora's Box* (n 12) 273.

124 Andersen, *Good Grief* (n 99) 318; Allan Farnsworth, 'Duties of Good Faith and Fair Dealing under the UNIDROIT Principles, Relevant International Conventions and National Laws' Tulane Journal og International and Comparative Law 1995, 56.

125 Andersen, *Good Grief* (n 99) 318.

126 Andersen, *Good Grief* (n 99) 318.

127 Farnsworth, *Duties* (n 124) 56.

of an express reference to good faith beyond the mere interpretation of the CISG does not necessarily make it clear, that good faith was not already inherent in the CISG itself, as also indicated by some of the delegates at the 1980 Diplomatic Conference.[128] Furthermore, it has been argued that the search for general principles is not bound to the specific intent of the drafters, since this is not expressly required by Art. 7 itself. Art. 7(2) must rather be interpreted according to the broader purposes of the CISG as expressed in 7(1).[129] It has also been argued, that the CISG is capable of adapting and that its underlying principles should be interpreted as being able to evolve with change.[130] Again, the matter can be boiled down to which degree one adheres to a dynamic doctrine.

Some scholars are not directly opposed to good faith as a general principle, but regard it as too vague and abstract to have any independent legal impact. Instead, more specific principles, such as a duty to communicate, which are more specific and therefore more suited to fill gaps, can be derived from the principle of good faith.[131]

Many scholars, however, refer directly to good faith as a generally acknowledged underlying principle of the CISG.[132] Sometimes defined negatively to exclude behaviour in bad faith, and sometimes considered having a positive role requiring behaviour in good faith.[133]

The principle of good faith is sometimes derived from Art. 7(1),[134] but more often the principle is derived from numerous provisions of the CISG, that may be considered an expression of such.[135] The latter may find more support in The Secretariat Commentary that refers to numerous provisions as manifestations of good faith.[136] Good faith as an underlying principle also finds support in the UNCITRAL Case Law Digest, which refers to several court cases, in which courts have referred to 'the principle of good faith'.[137] A study of the utilisation of good faith additionally shows that when courts refer to good faith and when imposing a standard of

---

128 A/CONF. 97/19 (n 29) 258-259, paras. 51, 53.

129 Shani Salama, 'Pragmatic Responses to Interpretive Impediments: Article 7 of the CISG, an Inter-American Application' 38 University of Miami Inter-American Law Review 225, 2006, 242.

130 Salama, *Pragmatic Responses* (n 129) 242.

131 Spagnolo, *Pandora's Box* (n 12) 276.

132 Spagnolo, *Pandora's Box* (n 12) 274-275; Lookofsky, *CISG* (n 92) 37; Andersen et al., *Practitioner's Guide* (n 16) 89; Schlechtriem/Schwenzer, *Commentary* (n 22) 135.

133 Spagnolo, *Pandora's Box* (n 12) 275.

134 André Janssen and Sörren Claas Kiene, 'The CISG and Its General Principles' in André Janssen and Olaf Meyer *CISG Methodology* (Sellier. european law publishers 2009) 270-273.

135 Schlechtriem/Schwenzer, *Commentary* (n 22) 135; Spagnolo, *Pandora's Box* (n 12) 274-275.

136 Secretariat Commentary (n 119) 18.

137 Digest of Case Law on the United Nations Convention on Contracts for the International Sale of Goods, UNCITRAL, United Nations, 2016 edition 43.

behaviour on the parties, the courts most often do so with reference to good faith being an underlying principle of the CISG.[138] Among the diverging opinions on good faith as a general principle, this position, therefore, seems to be the most reasoned.

When relying on good faith in the application of the CISG it must first be clarified whether one relies on an interpretation in accordance with Art. 7(1) or gap-filling in accordance with Art. 7(2). Arguably only a strict distinction provides for a correct application of the CISG.[139] Art. 7 contains three possible understandings of the extent of the notion of good faith. First, that Art. 7(1) is merely an interpretative tool, although indirectly affecting the obligations of the parties. Secondly, that Art. 7(1) imposes a direct duty on the parties to observe good faith. Thirdly, that Art. 7(2) provides for good faith being a general principle used for gap-filling. If the adjudicator follows the first understanding, the interpretation with regard to good faith is naturally limited to the present provisions in the CISG. If the parties do not have a positive duty to act in good faith, beyond what appears from the present provisions, Art. 7(1) may not solely provide a basis for precontractual liability, but may only do so in combination with an interpretation of other provisions in the CISG, such as Art. 16(2) CISG. If on the other hand the adjudicator follows the second understanding, and thereby finds there to be a positive duty on the parties, the content of such duty is not expressly settled in the CISG and must therefore constitute a gap to be filled by virtue of Art. 7(2). If the adjudicator follows the third understanding, and thereby finds that good faith is a general principle underlying the CISG, the content of such principle must equally be settled. With this line of argument, it might be reasoned that regardless of which of the two latter understandings the adjudicator applies, the result of the given case might not differ. The two latter understandings both leave the door open to a broader perception of precontractual liability under the CISG than mere liability for wrongful revocation of an offer. This naturally provides that one accepts that precontractual liability may fall within the scope of the CISG in the first place as described further above.

3.3. DETERMINING THE CONTENT OF THE POTENTIAL DUTY TO OBSERVE GOOD FAITH

As the CISG aims to reach uniformity in practice it would be unproblematic to apply any rule that is already uniform across all domestic systems. However, there does not appear to be a common core of the

---

[138] Neumann, *Roots and Fruits* (n 104) 77, 81. This survey merely examines domestic court practices and not arbitration practice and did not examine domestic courts of every Contracting State to the CISG. See in this regard pp. 73-75, 78. A general principle of good faith has also been acknowledged in arbitral practice, see in this regard Goderre, *Negotiations* (n 4) 278.

[139] Janssen/Kiene, *General Principles* (n 134) 273.

concept 'good faith' across domestic systems[140] that one can rely on. If one were to find that there is a gap in the CISG in this regard, and that no underlying principles are capable of filling it, domestic law would instead settle it with diverging results. When gap-filling the adjudicator must not overlook the obligation in Art. 7(1) to interpret the CISG having regard to its international character and the need to promote uniformity.[141] The adjudicator must therefore thoroughly search for underlying principles to fill the gap, or rather fill out the content of the concept of good faith, rather than resorting to the possibly diverging domestic laws.[142] Only such approach will properly have regard for the international character of the CISG and promote uniformity.[143] The role of UPICC, PECL and TLP in relation to underlying principles of the CISG is highly debated[144] and the question essentially is to which degree these soft law instruments may assist in establishing the content of the duty to act in good faith.

3.3.1 RELEVANCE OF SOFT LAW INSTRUMENTS

First, a word of caution. UPICC, PECL and TLP have a wider scope and may also apply to issues not covered by the CISG. If an expression of an underlying principle is to be found thoroughly described in soft law rules, one may be inclined to apply such as part of the CISG without further consideration. It must, however, be remembered, that just because a provision might be an expression of an underlying principle of the CISG, it may only be used to fill a gap, if there is, in fact, a gap to fill. Utilising an underlying principle to determine whether an issue is within the scope of the CISG would entail the risk of expanding the scope of the CISG beyond its borders.[145] UPICC, PECL or TLP may not be used as gap-filler, if an issue is outside the scope of the CISG as there simply is no gap to fill.

On one hand, the instruments themselves do not prohibit their use as gap-fillers of the CISG. The Preamble of UPICC states that the Principles "*may be used to interpret or supplement international uniform law instruments*". In the official comments to the Preamble it is described that adjudicators increasingly apply UPICC to interpret and supplement such

---

140 Neumann, *Roots and Fruits* (n 104) 68-69.

141 Pilar Perales Viscasillas, 'The Role of the UNIDROIT Principles and the PECL in the Interpretation and Gap-filling of CISG' in André Janssen and Olaf Meyer *CISG Methodology* (Sellier. european law publishers, 2009) 293.

142 John Felemegas, *An International Approach to the Interpretation of the United Nations Convention on Contracts for the International Sale of Goods (1980) as Uniform Sales Law* (1st edn. Cambridge University Press 2007) 37-38.

143 Felemegas, *International Approach* (n 142) 35, 38.

144 Regarding UPICC and PECL see Viscasillas, *UPICC and PECL* (n 141) 288; Regarding UPICC, see Bonell, *UPICC* (n 70) 32-33; Michael Joachim Bonell, *An International Restatement of Contract Law: The Unidroit Principles of International Commercial Contracts* (3rd edn. Transnational Publishers 2005) 232-233.

145 Spagnolo, *Pandora's Box* (n 12) 305-306.

instruments with reference to autonomous and internationally uniform principles, an approach expressed in Art. 7 CISG.[146] Such instruments must include the CISG.[147] PECL equally in Art. 1:101(4), although less clearly, indicate that they may be used as a tool of interpretation or gap-filler, by stating that they may "*provide a solution to the issue raised where the system or rules of law applicable do not do so*".[148] TLP have no such general provision proclaiming its use, but it has been argued that TLP may equally be used "*to allow for an autonomous interpretation of and for the filling of internal gaps in international conventions and other uniform law instruments*".[149]

On the other hand, some scholars disagree on the role of UPICC in the interpretation and gap-filling of the CISG, but it seems that not much attention is generally being paid to PECL.[150] Also in case law it seems that much more attention is given to UPICC than PECL.[151] Interestingly, even less attention is given to TLP.[152]

Some scholars argue that no external principles, such as the above mentioned, rather than principles derived from the CISG itself, should be used to interpret or gap-fill. It is argued that they are not to be considered principles on which the CISG is based because they were drafted later than the CISG. The CISG cannot be based on a set of rules not existing at the time of its drafting.[153]

Other scholars do find that instruments such as UPICC are to be considered underlying principles, since they are considered expressions of general principles of international commercial contracts.[154] It is argued that due to similarities in the origin and substance of these instruments and the CISG, and due to a common purpose of unifying international commercial law, the temporal mismatch in regard to the different points in time they were drafted, should not hinder their use. The reference to principles on which the CISG "*is based*" should be subject to a broader interpretation.[155] It is argued that the search for general principles of the

---

146 UPICC, pp. 4-5, Preamble, comment 5.
147 Viscasillas, *UPICC and PECL* (n 141) 289.
148 Viscasillas, *UPICC and PECL* (n 141) 289.
149 Viscasillas, *UPICC and PECL* (n 141) 301, note 43; Klaus Peter Berger, 'Lex Mercatoria Online: the CENTRAL Transnational Law Database at www.tldb.de' 18 Arbitration International 1, March 1st, 2002, 83–94, 91.
150 Viscasillas, *UPICC and PECL* (n 141) 296.
151 Bonell, *Restatement* (n 144) 354-356.
152 See for instance Viscasillas, *UPICC and PECL* merely mentioning TLP in a footnote, see (n 141) 301, note 43.
153 Andersen et al., *Practitioner's Guide* (n 16) 89-90; Bonell, *Restatement* (n 144) 232; Bonell, *UPICC* (n 70) 32-33; Peter Huber and Alastair Mullis, *The CISG A new textbook for students and practitioners* (Sellier. european law publishers 2007) 35-36; Viscasillas, *UPICC and PECL* (n 141) 296.
154 Bonell, *Restatement* (n 144) 233; Bonell (n 70) 33; Gil-Wallin, *Liability* (n 4) 15; Viscasillas, *UPICC and PECL* (n 141) 296-297.
155 Felemegas, *International Approach* (n 142) 33; Salama, *Pragmatic Responses* (n 129) 243.

CISG should not be limited to those which can be derived from the CISG itself, due to the need to have regard for its international character in accordance with Art. 7(1) CISG.[156]

As a position in between these two polar opposites, some scholars have more cautiously argued that instruments such as UPICC are not always, but nonetheless sometimes, applicable in interpreting or gap-filling the CISG, or that they may be applied to determine the meaning of an underlying principle,[157] such as good faith.[158] These instruments might be useful and could be applied to support the CISG, but not to add additional features to it.[159] UPICC, or other such instruments, may be used to interpret or gap-fill the CISG to the extent that the matter is governed by, but not settled in it, and that the relevant provision is to be considered an expression of a principle underlying both UPICC and the CISG.[160] Despite the diverging scholarly opinions regarding the applicability of soft law instruments to interpret or gap-fill, adjudicators do not seem to pay much attention to theoretical distinctions as to when the instruments are applicable, but often uses UPICC without justifying on which grounds they are applicable.[161]

It may not be possible to conclude that UPICC, PECL or TLP are always or never applicable when interpreting the CISG in accordance with Art. 7(1) or when gap-filling in accordance with Art. 7(2). A case-by-case assessment must, therefore, determine their applicability. UPICC, PECL and TLP all have general provisions requiring parties to act in accordance with good faith in UPICC Art. 1.7, PECL Art. 1:201 and TLP no. I.1.1. Although no exact definition of this duty is provided, they all furthermore provide examples of what it means to act in 'bad faith' or 'contrary to good faith' in UPICC Art. 2.1.15, PECL Art. 2:301 and TLP no. IV.8.1.

Since the prevailing view is that soft law instruments may be used to interpret or gap-fill the CISG to the extent that the relevant provision is to be considered an expression of a principle underlying both the soft law

---

156 Gil-Wallin, *Liability* (n 4) 15-16; Salama, *Pragmatic Responses* (n 129) 242.

157 Felemegas, *International Approach* (n 142) 33-34; Bonell, *Restatement* (n 144) 233; Bonell, *UPICC* (n 70) 33; Herbert Kronke, 'The UN Sales Convention, The UNIDROIT Contract Principles and the Way Beyond' 25 Journal of Law and Commerce 2005-06 451-465, 457-458.

158 Huber/Mullis, *CISG* (n 153) 36; Peter Schlechtriem and Ingeborg Schwenzer, *Commentary on the UN Convention on the International Sale of Goods (CISG)* (2nd edn. Oxford university Press 2005) 109-110; Viscasillas, *UPICC and PECL* (n 141) 297-298, with note 34.

159 Andersen et al., *Practitioner's Guide* (n 16) 90; Schlechtriem/Schwenzer, *Commentary* (n 22) 137-138.

160 Bonell, *Restatement* (n 144) 233, 317-237; Bonell, *UPICC* (n 70) 33; Felemegas, *International Approach* (n 142) 33-34, 37; Kronke, *UPICC* (n 157) 458.

161 Bonell, *UPICC* (n 70) 33-34.

instrument and the CISG,[162] it must be assessed whether UPICC Art. 2.1.15, PECL Art. 2:301 and TLP no. IV.8.1 are expressions of principles also underlying the CISG. It may be argued that this is the case with reference to these provisions being expressions of a general duty to act in good faith also expressed in UPICC, PECL, and TLP and that such a duty may be considered a general principle on which the CISG is also based.[163]

It has been described, that there are provisions in such soft law instruments that are to be considered "*fleshing out bones already present in the skeletal structure of the uniform law*", and that there are provisions that have "*bones and accompanying flesh*" that may not be fixed to the uniform law in question[164]. In the first instance, the soft law instruments relevant may be used to interpret and gap-fill the CISG. They may often provide comments and illustrations, that may contribute to the understanding of the CISG, and thereby fleshing out its bones. With regard to the second instance, it is more doubtful whether they may be used to interpret and gap-fill.[165] It must, therefore, be assessed whether one is merely filling out details missing in the CISG, or trying to force something into it that has no basis in the CISG itself. It could be argued, that UPICC Art. 2.1.15, PECL Art. 2:301 and TLP no. IV.8.1 are fleshing out the bones of the CISG, in the sense that good faith is an underlying principle, being one of the bones in the CISG. The soft law instruments and the accompanying comments and examples could then be used to flesh out that bone. On the other hand, it is questionable whether the duty to act in good faith may be extended to the precontractual phase, especially considered the legislative history. In that sense, it could be considered an attempt to force new bones and accompanying flesh into the already fully boned skeleton that is the CISG. During the drafting of the CISG, precontractual liability was thoroughly discussed, but the drafters decided not to include an express provision. Therefore, it is persuasive to consider the inclusion of such liability as an attempt to force new bones into the CISG. Whether this should be allowed depends on whether one advocates letting the CISG evolve and expand in scope to let it adapt to new developments and thereby letting the CISG skeleton grow.

UPICC has been referred to as a private codification or 'restatement' of international contract law,[166] however, UPICC do not only represent tradition but also innovation. To the extent that UPICC do not follow a common core of principles already generally accepted, but rather express

---

162 Regarding UPICC see Bonell, *Restatement* (n 144) 233, 317-237; Bonell, *UPICC* (n 70) 33; Kronke, *UPICC* (n 157) 458. Regarding UPICC and PECL see Felemegas, *International Approach* (n 142) 33-34, 37.

163 Regarding UPICC 2.1.15 see Bonell, *Restatement* (n 144) 322.

164 Felemegas, *International Approach* (n 142) 32. The metaphor is ascribed to Albert H. Kritzer.

165 Felemegas, *International Approach* (n 142) 32-33.

166 Eckart J. Brödermann, *UNIDROIT Principles of International Commercial Contracts, An Article-by-Article commentary* (1st edn. Kluwer Law International BV 2018), 3.

the solution the drafters found to be the best, they instead become a 'prestatement'.[167] The adjudicator must pay attention to which provisions are mere 'restatements' and which are 'prestatements'. A 'prestatement' may not necessarily be applicable when gap-filling the CISG. The above quoted provisions regarding precontractual liability may be considered such 'prestatements',[168] since no similar provisions are to be found in the CISG, and have been referred to as the "*most spectacular deviation from the CISG template*".[169] Although the provisions deviate from the CISG template, a common core could have developed, so that while the provisions may have been prestatements to begin with, they could over time become restatements.

There are some provisions in the above described soft law rules, which are familiar to civil law systems, but not recognised in common law systems, as well as the other way around.[170] The precontractual liability described in UPICC, PECL and TLP resembles the civil law approach rather than the common law approach.[171] Even if the CISG may evolve, it should only do so as far as to resemble an international common core.[172] It may be too much of a stretch to let such a broad concept of precontractual liability, as described in UPICC, PECL, and TLP, be encompassed, when this does not reflect either what was agreed at the drafting stage or an international common core.

In civil law systems, good faith as a basis for imposing precontractual liability is generally acknowledged, either by statutory law or general principles of law.[173] The approach adopted by most civil law systems is the doctrine of 'culpa in contrahendo'[174] which has been generally defined as a duty to "*deal in good faith with each other during the negotiation stage, or else face liability, customarily to the extent of the wronged party's reliance.*"[175] Such a general duty to act in good faith during negotiations has not been recognised as a

---

167 Bonell, *UPICC* (n 70) 22; Kronke, *UPICC* (n 157) 458-459.

168 Regarding UPICC Art. 2.1.15 see Bonell, *UPICC* (n 70) 22 and Kronke, *UPICC* (n 157) 456, and 458-459, with note 21.

169 Regarding UPICC Art. 1.7 and 2.1.15(2) see Kronke, *UPICC* (n 157) 456.

170 Regarding UPICC see Bonell, *UPICC* (n 70) 22.

171 Regarding UPICC see Bonell, *UPICC* (n 70) 22*;* Goderre, *Negotiations* (n 4) 274; Regarding UPICC and PECL see Spagnolo, *Pandora's Box* (n 12) 304.

172 Kritzer, *Pre-Contract-Formation* (n 9).

173 Goderre, *Negotiations* (n 4) 267; Rodrigo Novoa, '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, Vol. 22, No. 3, 2005, pp. 583-612, 592.

174 Novoa, *Culpa in Contrahendo* (n 173), 584-585.

175 Friedrich Kessler and Edith Fine, 'Culpa in Contrahendo, Bargaining in Good Faith and Freedom of Contract: A Comparative Study' 77 Harvard Law Review, 1963/64 401-449, 401.

basis for imposing liability in common law systems.[176] Common law countries have, however, moved towards acknowledging some types of precontractual duties to act in good faith, for instance in the U.S. courts have recognised three types of precontractual duties. First, misrepresentation, which involves misinformation as to the intent to come to an agreement. Secondly, promissory estoppel, which involves a promise which the other party has detrimentally relied upon, and thirdly, unjust enrichment, which involves restitution of benefits gained during the negotiations.[177] Common for both civil law and common law systems is, however, that no liability is imposed for merely breaking off negotiations.[178] It is not the purpose of this article to investigate the differences in the civil law and common law approaches, nor to point out the specific situations in which a party would be held liable under either of these approaches. It is furthermore not the purpose of this article to examine to what extent there is an international common core regarding precontractual liability and the specific prerequisites required to impose liability under such common core. It will therefore merely be pointed out that such differences in the domestic approaches and the extent of an international common core must affect the extent to which precontractual liability may be imposed under the CISG. It may be argued that the CISG may only develop to let precontractual liability be imposed under the Convention to the extent that it reflects what is commonly acknowledged internationally.

Since an amendment of the CISG would be lengthy and difficult it would be preferable to let the CISG develop to stay in line with a common core in international trade, instead of risking having a uniform law instrument that may become outdated. It would be preferable if adjudicators were able to determine the extent of an international common core regarding precontractual liability, and to only impose liability to such extent, but that would certainly be a difficult task. It has been argued that although there is different terminology in domestic laws concerning precontractual liability the result of the case may in many situations be the same,[179] and therefore it may be reasonable to apply UPICC Art. 2.1.15, PECL Art. 2:301 and TLP no. IV.8.1 as a possible expression of such common core. To have regard to the need to promote uniformity in the application of the CISG, it would seem preferable if adjudicators looked to acknowledged international instruments easily

---

176 Allan Farnsworth, 'Precontractual Liability and Preliminary Agreements: Fair Dealing and Failed Negotiations' 87 Columbia Law Review no. 2, Mar., 1987 217-294, 222; Goderre, *Negotiations* (n 4) 270; Spagnolo, *Pandora's Box* (n 12) 268.

177 Farnsworth, *Precontractual Liability* (n 176) 222; Goderre, *Negotiations* (n 4) 270; Novoa, *Culpa in Contrahendo* (n 173) 288, note 21; Regarding unjust enrichment and estoppel see Spagnolo, *Pandora's Box* (n 12) 268.

178 Schwenzer/Hachem/Kee, *Global Sales* (n 1) 280.

179 Schwenzer/Hachem/Kee, *Global Sales* (n 1) 278; Goderre, *Negotiations* (n 4) 266; Kessler/Fine, *Culpa in Contrahendo* (n 175) 401.

accessible rather than to find inspiration in the adjudicators own domestic law. To promote uniformity in the application of the CISG, adjudicators must unanimously apply the same sources and in this regard UPICC, PECL and TLP provide a helpful tool.

3.3.2 GOOD FAITH IN LIGHT OF SOFT LAW

If the provisions in UPICC, PECL, and TLP are applied to fill out the content of the duty to act in good faith during the negotiations, the content of these provisions must be discerned. Common is that they all make it clear, that the parties are free to negotiate and will not generally be held liable for the mere failure to reach an agreement. This is in line with a general principle of freedom of contract.[180] This freedom is however not unlimited, since it must not conflict with good faith.[181] What can at least be considered common in regard to UPICC Art. 2.1.15, PECL Art. 2:301 and TLP no. IV.8.1 is that the situations encompassed require behaviour in bad faith, behaviour contrary to good faith or some kind of negligence. This is in line with the fact that it has internationally been recognised that merely breaking off negotiations does not impose liability. These considerations would therefore also apply if precontractual liability were to be imposed under the CISG on the basis of Art. 7 and the notion of good faith. Common is furthermore, that a party who negotiates or breaks off negotiations in bad faith, or contrary to good faith, is liable for the losses caused to the other party. UPICC, PECL and TLP all prescribe the same express example of what in particular will be considered bad faith or behavior contrary to good faith; to enter into or continue negotiations with no intention to reach an agreement.

UPICC 2016 comments provide further examples and illustrations of such acts. For instance entering into negotiations with the sole purpose of preventing the other party from contracting with a competitor, but not itself wishing to contract.[182] The comments to UPICC furthermore describe that it will be bad faith to deliberately or by negligence mislead the other party, either by actually misrepresenting facts or by not disclosing facts which should have been disclosed.[183] This would, for instance, be if a party continues negotiations while knowing of circumstances that would prevent the conclusion or fulfillment of the contract but not disclosing such information.[184] TLP is worded a bit differently than UPICC and PECL explicitly mentioning that the other party must be left with the justified assumption that a contract would be concluded, and exemplifies that it is bad faith if a party insists on so clearly

---

[180] UPICC Art. 1.1, PECL Art. 1:102 and TLP No. IV.1.1.

[181] UPICC Art. 1.7 and 2.1.15, comment 2, PECL Article 1:201 and TLP No. I.1.1 and IV.8.1, comment 1 at https://www.trans-lex.org/939000 (accessed 12 May 2020).

[182] UPICC 2.1.15, comment 2, illustration 1.

[183] UPICC 2.1.15, comment 2.

[184] UPICC 2.1.15, comment 2, illustration 2 and 3.

unreasonable terms so that a contract could not be expected to be concluded, in case that party gains an advantage from such behavior.[185] These are merely examples of what negotiating in bad faith or contrary to good faith is. There may be situations that would equally qualify as such behaviour although not encompassed by the provided examples, and these less clear situations are difficult to discern. It is exactly one of the issues of good faith and precontractual liability, that even if the precontractual phase is considered within the scope of the CISG, the determination of the precise content of the duty to act in good faith during the negotiations is difficult. Even if soft law instruments can be consulted as means to determine the content of the duty to act in good faith, it is still not clear exactly what behaviour would result in liability. There does not seem to be any case law where precontractual liability has been imposed under the CISG, with or without the use of soft law instruments,[186] why it would be impossible exhaustively and in detail to describe the content of such potential liability. It could be helpful to examine case law concerning precontractual liability under UPICC, PECL, and TLP in constructing a clarification of the content of the duty to act in good faith during the negotiations, but this is beyond the framework of this article.

4. CONCLUSION

In the introduction it was asked; would it not be in accordance with the purpose of the CISG, which is to remove legal barriers in international trade and promote uniformity and certainty, to let the scope of the CISG reach as far as possible and thereby encompass a precontractual liability broader than mere liability for wrongful revocation of an offer? However, when answering this question it becomes clear that it must be taken into consideration that the concept of uniformity has two aspects and that promoting formal uniformity might entail the risk of decreasing substantive uniformity.

The question of whether precontractual liability may be imposed under the CISG, besides liability for wrongful revocation of an offer, is not to be answered by a simple yes or no. The question must be answered having regard to the international character of the CISG, the need to promote uniformity in its application and the observance of good faith in international trade in accordance with Art. 7(1) CISG.

A basis for precontractual liability under the CISG may follow from an interpretation of the notion of good faith as expressed in Art 7(1) or by considering good faith to be an underlying principle of the CISG in accordance with Art. 7(2). The main obstacle when determining whether

---

185 TLP No. IV.8.1, comment 2 and 3 at https://www.trans-lex.org/939000 (accessed 12 May 2020).

186 The following CISG Case Law Databases has been researched: http://www.cisg-online.ch/; https://www.uncitral.org/clout/; http://www.cisg.law.pace.edu/; http://www.unilex.info/ (accessed 12 May 2020).

precontractual liability may be imposed under the CISG is whether it is within its scope and thereby whether a duty to act in good faith may be extended to the precontractual phase. This is doubtful. One of the main issues in this regard is that the phase prior to offer and acceptance is not clearly governed by the CISG. Another issue is that the drafters considered including an express provision providing for precontractual liability, but rejected such. This indicates a deliberate exclusion from the scope of the CISG. To overcome the issue, one must allow the CISG to evolve and expand in scope to keep up with the international development in trade and sales law. Whether precontractual liability will be considered within the scope of the CISG will therefore mainly depend on whether the legislative history is considered decisive, or whether instead the CISG is interpreted extensively and allowed to evolve to encompass such liability. There must be limits to the extent to which the CISG should be allowed to evolve in areas originally expressly excluded and given the lengthy discussions and disagreement on good faith and precontractual liability, the CISG should not be allowed to evolve to encompass precontractual liability. The road to precontractual liability goes through the uncertainties as to scope, as to the role of good faith as an interpretative tool, and as to the existence of, and contents of, a principle of good faith. Letting the CISG encompass precontractual liability beyond the one situation covered by Art. 16 could endanger the uniformity instead of enhancing it. Considering that including precontractual liability per se under the scope of the CISG stands on debated and debatable views on scope, interpretation, and principles, the present authors conclude that there is not enough sturdy footing for such a view.

If one despite this should find that precontractual liability is within the scope of the CISG it is suggested that precontractual liability may only be imposed to the extent that an international common core is discernible. As an international common core might be difficult to discern, adjudicators must consider the same sources to promote uniformity in the application of the CISG. In this regard UPICC, PECL or TLP provide helpful tools to fill out the missing details in the CISG, but only to the extent that such does not expand the scope of the CISG. But even with the help from soft law instruments, the content of precontractual liability is difficult to define. However, what can surely be concluded is that the mere withdrawal from negotiations will not impose liability. There must be an act in bad faith, contrary to good faith or some kind of negligence involved. Further details of such liability are difficult to determine, and since no case law exists to fill in the blanks, a definitive answer does not exist.

Whether the CISG can encompass precontractual liability is one among many interesting discussions when it comes to the CISG. While the present authors remain critical towards considering precontractual liability within the scope of the CISG, the answer is far from simple and

may change over time as the dynamic doctrine is a more fruitful approach than a restrive one.

This paper mainly focused on Art 16(2) CISG and Art. 7 CISG in relation to precontractual liability under the CISG because these provisions may provide a basis for precontractual liability under the Convention. However, other provisions in the CISG may also to some extent be relevant to this discussion of precontractual liability.

Art. 8 CISG must be utilised to interpret the statements and conduct of a party. Statements and conduct of a party must be interpreted according to his intent or the understanding of a reasonable person according to Art. 8(1) and 8(2). Statements and conduct of a party during the negotiations may lead the other party to rely on such and to assume a serious intent to reach an agreement, and consequently suffer a loss due to such reliance when the other party withdraws from the negotiations.[187] Art. 8 is therefore a necessary part of the equation in determining whether a party may be held liable under the CISG in conjunction with art. 7.[188]

All things considered, it is concluded that the CISG does in fact deal with one specific situation of what could be classified as precontractual liablity according to Art. 16. However, the Convention is generally not able to deal with all situations of precontractual liablity as the legal grounds for allowing it to is too erratic. For situations not covered by Art. 16, one must therefore rely on the otherwise applicable domestic law.

---

[187] Gil-Wallin, *Liability* (n 4) 16-18.

[188] Gil-Wallin, *Liability* (n 4) 16-17; Goderre, *Negotiations* (n 4) 280; John Klein and Carla Bachechi, 'Precontractual Liability and the Duty of Good Faith Negotiation in International Transactions' 17 Houston Journal of International Law, no. 1, 1994, 22.