Master's Thesis

Precontractual liability under the CISG

An analysis of whether there is a basis for precontractual liability in the United Nations Convention on Contracts for the International Sale of Goods and if so, how the content of such liability may be determined and which types of damages may be compensated

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Resumé

Formålet med dette speciale er at undersøge hvorvidt der kan pålægges prækontraktuelt ansvar i medfør af den internationale købelov,[1] og herefter i mindre grad at klarlægge indholdet af et sådant ansvar samt at fastlægge hvilken erstatning der i så fald kan kræves.

Specialet gør brug af den retsdogmatiske metode, og da den internationale købelov har international karakter, er også den særlige metode, som denne lov selv foreskriver i art. 7, anvendt til at besvare det stillede forskningsspørgsmål. Ved fortolkning af den internationale købelov, og afgørelse af spørgsmål som denne ikke udtrykkeligt tager stilling til, tager dette speciale derfor hensyn til lovens internationale karakter, til behovet for at fremme en ensartet anvendelse af den og til iagttagelse af god forretningsskik i international handel. Dette speciale vil derfor anvende ordlyden af den engelske autentiske version[2] af loven til fortolkning, forarbejder til den internationale købelov, international retspraksis og litteratur, ligesom specialet vil tage internationale soft law-instrumenter i betragtning, i den udstrækning dette kan tillades i medfør af loven.

Flere bestemmelser i den internationale købelov kan muligvis danne grundlag for prækontraktuelt ansvar, herunder den internationale købelov art. 7 og 'iagttagelse af god forretningsskik',[3] art. 8, art. 16(2), art. 81(2) og art. 84. Disse bestemmelser er i dette speciale undersøgt individuelt, med henblik på at klarlægge om hver enkelt bestemmelse kan danne grundlag for prækontraktuelt ansvar. Specialet undersøger herunder for hver bestemmelse, hvorvidt denne kan udstrækkes til at finde anvendelse på den prækontraktuelle fase. Hvorvidt den prækontraktuelle fase er underkastet loven er ofte overset i litteraturen, men bliver afgørende for hvorvidt der kan pålægges prækontraktuelt ansvar i medfør af loven. Specialet undersøger i mindre omfang, hvordan indholdet af prækontraktuelt ansvar skal fastlægges i medfør af disse bestemmelser, herunder betingelserne for at ifalde ansvar efter disse bestemmelser. Dette speciale undersøger dernæst, tillige i mindre omfang, hvorvidt den internationale købelovs del III, og de heri fastsatte sanktioner, kan anvendes analogt i tilfælde af prækontraktuelt ansvar i medfør af loven, eller om der findes almindelige grundsætninger, som loven bygger på, som kan anvendes til at fastlægge sanktioner for prækontraktuelt ansvar.

[1] LBK nr. 1224 af 21/11/2014 og United Nations Convention on Contracts for the International Sale of Goods (Vienna, 1980)

[2] Der findes 6 autentiske sprogversioner; arabisk, kinesisk, engelsk, fransk, russisk og spansk

[3] Formuleringen 'god forretningsskik' er den danske oversættelse af 'good faith' i den engelske version af konventionen

1. Introduction

Man have been trading with each other for millennia. However, trade does nowadays no longer just consist of the exchange of gold, spices or pelts, but has expanded to entail complex international transactions and simultaneously have the legislation around the world evolved to consist of diverging domestic sets of rules. As an effect of this expansion, merchants who come from countries with different legal systems, legislation and traditions, and who wish to trade with one another, are at risk of having their contract governed by a set of rules completely different from those of their own place of business. And in world with increasing globalization, certainty and predictability in international trade is paramount.

Uniform sales legislation can prevent this uncertainty by offering a common set of rules to govern the parties' contract either by default or by choice. As a consequence, parties who can easier predict their legal status may be more inclined to enter into contracts and global trade will as a result increase, which can promote economic prosperity. Nations that trade together will become mutually dependent and will benefit from the increased global trade, and they may therefore be less inclined to enter into conflicts. Promoting certainty in international trade is therefore desirable and uniform legislation may be a helpful tool.

The United Nations Convention on Contracts for the International Sale of Goods[4] (hereinafter the CISG or the Convention) is an example of such legislation. The CISG was prepared by The United Nations Commission on International Trade Law (UNCITRAL), adopted in Vienna in 1980 and entered into force in 1988.[5] The CISG governs formation of contracts and the rights and obligations of the parties in international sales of goods.[6] When both parties to a sale of goods have their places of business in a CISG Contracting State, and when the dispute concerns an issue governed by the CISG, it applies directly without recourse to rules of private international law to determine the applicable law. This increases predictability of international transactions.[7] The CISG has gained widespread acceptance among countries of different geographical location and legal traditions and as of May 2019 the CISG has entered into force in 91 states.[8]

The purpose of the CISG is expressed in its Preamble. According to the Preamble, the purpose is to promote friendly relations among States by contributing to remove legal barriers in international trade and to promote the development of such. This purpose will be pursued by the adoption of uniform rules governing international contracts that takes into account the different social, economic and legal systems. It is furthermore stated on the UNCITRAL website that the purpose of the CISG is to provide a modern and fair regime for international contracts, to promote uniformity and certainty in international sale of goods and to decrease transaction costs.[9] The purpose of promoting uniformity in international trade may also be inferred from Art. 7(1) CISG, which commands the interpreter to have regard to the need to promote uniformity

[4] United Nations Convention on Contracts for the International Sale of Goods (Vienna, 1980)
[5] Lookofsky, *CISG*, p. 1; Explanatory note, pp. 33-34
[6] Lookofsky, *CISG*, p. 1; Schlechtriem/Schwenzer, *Commentary*, p. 74
[7] https://uncitral.un.org/en/texts/salegoods/conventions/sale_of_goods/cisg
[8] https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=X-10&chapter=10&lang=en; Lookofsky, *CISG*, p. 1; Explanatory note, p. 34
[9] https://uncitral.un.org/en/texts/salegoods/conventions/sale_of_goods/cisg

when interpreting the CISG. From this provision it could also be inferred that it may be a purpose of the CISG to promote the observance of good faith in international trade.

Since the CISG came into effect, various issues regarding its scope of application and interpretation have been discussed. An issue that has given rise to debate is the distinction between which matters are not governed by the CISG and which matters are governed, but not expressly settled in it. Another issue that has given rise to debate, is how to settle matters governed by, but not expressly settled in the CISG. It has in this regard been discussed whether precontractual liability is a matter governed, and if so, how the matter is to be settled.

When assessing the relationship between two parties, they may either be considered to have a contract, thus contractual rights and obligations arises, or they may be considered strangers with no obligations towards one another. However, this distinction may not be black and white. In a scenario in between, the parties may not have concluded a contract, but may have entered into negotiations and are therefore not complete strangers. Precontractual liability concerns this grey area. The question then arises whether the parties have certain obligations at this stage, and if so, what kind of obligations, and what happens in case of failure to comply.[10]

Imagine this scenario: A seller located in Denmark is contacted by a potential buyer located in Germany.[11] The buyer lets the seller believe that she wishes to buy a large amount of goods while expressing the hope for a long-term relationship. During the negotiations the seller has different expenses, including flight tickets, legal advice and expenses due to a thorough credit analysis, and in addition to this the seller refrains from entering into contracts with other potential buyers due to a limited stock, and thereby losing potential profit. Furthermore, the seller had expected a profit from the contract, that he had come to assume would be the result of the negotiations. However, the buyer never intended to enter into a contract, but makes the proposition only to gain access to confidential information. A contract was never concluded, and the seller was left with several expenses and no profit, and he had in addition granted the buyer access to confidential information. The question that the seller will then ask, is whether the adjudicator can award him damages on the basis of precontractual liability and which types of damages may be compensated. The answer to this question might differ depending on whether this is determined by the CISG or otherwise applicable law.

To impose precontractual liability under any law would presumably require the presence of preliminary negotiations, a basis for imposing such liability, compensable damages and causation in fact.[12] The issue of precontractual liability could arise in various situations and the above is merely one example. Common for these situations is that a loss has occurred in relation to the negotiation of a contract. However, whether liability for this loss requires culpa, bad faith or other subjective prerequisites, as well as which types of damages may be awarded, is dependent on the applicable law.

Taken into account that the purpose of the CISG is to remove legal barriers in international trade and to promote uniformity and certainty, would it not be in accordance with this purpose to

[10] Schwenzer/Hachem/Kee, *Global Sales*, p. 275
[11] Both Denmark and Germany are CISG Contracting States, see https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=X-10&chapter=10&lang=en
[12] Gil-Wallin, *Liability* pp. 17-18

let the scope of the CISG reach as far as possible? The question of precontractual liability is dealt with very differently in the domestic laws of the different Contracting States[13] and it would presumably promote uniformity and remove legal barriers if the CISG applied to the issue rather than the very different domestic laws. In this context it could be interesting to examine whether precontractual liability is a matter governed by the CISG, and provided that it is, what the content of such liability is and how the disappointed party may be compensated. This thesis will, due to a necessary delimitation of the subject, primarily focus on examining whether there is a basis for precontractual liability in the CISG, and to a lesser extent examine how the content of such liability may be determined and which damages may be compensated.

[13] Spagnolo, *Pandora's Box*, pp. 282-283

2. Research question

On the basis of the above described considerations the following research question will be examined;

Is there a basis for precontractual liability in the CISG, and if so, how may the content of such liability be determined, and which types of damages may be compensated?

3. Method

To answer the question of whether there is a basis for precontractual liability in the CISG, the procedure of this thesis will be to examine which provisions could possibly be a basis for such liability. There are more provisions in the CISG which could provide a basis for precontractual liability, including Art. 7 and 'the observance of good faith', Art. 8, Art. 16(2), Art. 81(2) and Art. 84. For each provision it will be examined whether the matter is governed by the CISG. If the matter is not governed, the question of precontractual liability must be settled by recourse to the domestic or otherwise applicable law. If precontractual liability is governed, it must be clarified whether it is a matter governed by and settled in the CISG, or governed by, but not settled in it, since it affects the approach that must be taken to answer the question. If precontractual liability is governed and settled, the question will be answered by virtue of Art. 7(1) CISG and thereby by an interpretation of the provisions in the CISG. If precontractual liability is governed, but not settled, the question will be answered by virtue of Art. 7(2) CISG and thereby by the general principles on which the CISG is based or, in the absence of such, by the otherwise applicable law. When it is established whether there is a basis for precontractual liability in the CISG and whether the issue is governed, the procedure of this thesis is to a lesser extent to examine how the content of such liability may be determined and which types of damages that may be compensated. Also in regard to content and damages, it must be determined whether the matter is settled in the CISG, and thereby whether the question may be answered by virtue of Art. 7(1) or Art. 7(2).

To answer the research question the legal method to be used must be established. The legal dogmatic method consists of analysing and describing the current state of law on a given subject in a given jurisdiction.[14] The relevant legal sources and interpretation methods will therefore be used to analyse and describe whether there is a basis for precontractual liability in the CISG, how the content of such liability may be determined and which types of damages may be compensated. In order to do so, the relevant legal sources and interpretation methods must be determined. These may vary depending on the subject matter as well as the jurisdiction. It must in this regard be kept in mind that the CISG is an international convention, and thus any domestic interpretation methods and any legal domestic methods or traditions determining the relevant legal sources, may not be determinative of the interpretation methods and sources relevant in an international aspect. Instead of applying a domestic legal method to determine the current state of law, which may not be suitable, the relevant method for that specific convention must be determined. Therefore, the relevant interpretation methods and legal sources must be located in regard to the interpretation and gap-filling of the CISG. The CISG itself provides guidance in Art. 7 as to how its provisions must be interpreted and the relevant sources for the interpretation of matters governed and settled, and gap-filling of matters governed, but not settled.

Before the CISG is consulted, however, it must be determined whether the parties have derogated from or varied the effect of any of the provisions in the CISG in accordance with Art. 6 CISG. The parties' intentions must be interpreted in accordance with Art. 8 CISG, and the intention to derogate prevails over the interpretation of the provisions. Furthermore, the parties are bound by any usage to which they have agreed and by any practices which they have

[14] Munk-Hansen, *Retsvidenskabsteori*, pp. 64, 204

established between themselves according to Art. 9(1) CISG. The parties are also considered to have impliedly made applicable a usage of which the parties knew or ought to have known and which in international trade is widely known, unless they have otherwise agreed according to Art. 9(2) CISG. Such usages are also to prevail over the interpretation of the provisions.[15] In this thesis the default position is examined; a situation where the parties have not derogated from or varied the effects of the CISG and where there are no applicable usages or practices established between the parties.

Art. 7(1) CISG gives instructions for the interpretation of the Convention text. In the interpretation, the interpreter is to have 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'. The CISG however does not provide the specific method to be used for interpretation.[16]

Naturally the black letter wording of the Convention text is the starting point when interpreting.[17] There are 6 official language versions of the CISG,[18] all equally authentic.[19] The wording of these 6 versions may differ. Since the preliminary work on the CISG was carried out primarily in English and French, it has been argued that it is reasonable to give priority to these versions. Since English was the language used by the drafting committee a majority even gives priority only to the English version.[20] It would naturally be of preference if all of the official language versions were consulted when interpreting the wording of the provisions. However, due to language barriers, the English version will be the starting point in this thesis, unless any discrepancies in the different versions are pointed out.

Besides an interpretation merely based on the black letter wording, it is widely accepted that a provision may also be interpreted in light of the purpose of the CISG, the purpose and systematic position of the specific provision, the historical context of the CISG and by comparative law.[21] Since the wording of the CISG is often ambiguous and the result of a compromise, and since a literal reading of the provisions may lead to irrational results, other sources than the provisions itself, such as the purpose expressed in the preamble, the preparatory works, case law, scholarly works and international soft law instruments, must be consulted when interpreting.[22] Besides the mere wording of the CISG, these sources will therefore be consulted when answering the research question. Within the specific subject of this thesis, precontractual liability under the CISG, very little case law is available. To the extent that such exists and is available it will be consulted, but as a result of the limited amount of such, other relevant sources will to a greater extent be consulted.

As described above, it may be necessary to consult the preparatory works of the CISG when interpreting the provisions. The majority of the preparatory works are to be found in the Official Records containing Documents of the Conference and Summary Records of the Plenary

[15] Schlechtriem/Schwenzer, *Commentary*, p. 134
[16] Brunner/Gottlieb, *Commentary*, p. 83; Schlechtriem/Schwenzer, *Commentary*, p. 129
[17] Brunner/Gottlieb, *Commentary*, p. 85; Schlechtriem/Schwenzer, *Commentary*, p. 129
[18] Arabic, Chinese, English, French, Russian and Spanish
[19] Testimonium of the CISG Convention text
[20] Brunner/Gottlieb, *Commentary*, pp. 85-86; Schlechtriem/Schwenzer, *Commentary*, pp. 24, 129
[21] Brunner/Gottlieb, *Commentary*, p. 85; Schlechtriem/Schwenzer, *Commentary*, pp. 129-132
[22] Lookofsky, *CISG*, pp. 29-36; Schlechtriem/Schwenzer, *Commentary*, pp. 129-132.

Meetings and of the Meetings of the Main Committees.[23] There is no official commentary to the CISG, but the Secretariat Commentary to the 1978 draft[24] included in the Official Records, can provide guidance as to the understanding of the 1980 Convention text, although it is not a conclusive authority.[25] It must be kept in mind when relying on legislative works, that the CISG was adopted in 1980.[26] As society and sales law is developing, the impact of the legislative works may become less convincing in certain areas over time.[27] Therefore, this development must be taken into consideration when assessing the contribution of the legislative works. It must also be kept in mind that the legislative works often consists of diverging opinions from the different delegates and may therefore often be inconclusive.[28] In this thesis the legislative works will be consulted when assessing whether there is a basis for precontractual liability in the CISG, but bearing in mind, that it will only provide one piece of the puzzle.

When interpreting the CISG in accordance with the above described method, the interpreter is, as mentioned above, to have 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'.

To have regard to the international character of the CISG, the 'homeward trend' must be avoided.[29] This 'homeward trend' expresses a tendency among courts interpreting the CISG to project their own domestic law onto the provisions of the CISG, assuming that the provisions of the CISG are to be understood in the same way as the corresponding provisions in the domestic law.[30] It is presumed that the drafters of the CISG intended for the language of the CISG to be neutral, and that the choice of wording is the result of a compromise and must not be identified to any specific domestic law.[31] Instead the interpreter must interpret the provisions of the CISG independently from the understanding of domestic legal terms, also referred to as an autonomous interpretation.[32] The concept of precontractual liability in any specific domestic law will therefore not be determinative when assessing precontractual liability under the CISG, unless it expresses an international common core.

To have regard to the need to promote uniformity in the application of the CISG, one must not solely take one's own domestic case law into account. One must apply a uniform interpretation by attributing the same meaning to the Convention text as courts from other Contracting States have, and by considering case law from other Contracting States as well.[33] An international treaty that is uniform throughout the Contracting States will not necessarily be applied uniformly by the domestic courts, especially if these resort to domestic law when interpreting the CISG. However, there is no international supreme court that is competent to decide on the interpretation as a last instance, and whose decisions domestic courts could look to when

[23] OR
[24] This draft was presented at the 1980 Vienna Conference where it was modified, and it is therefore not the final version of the CISG. See Secretariat Commentary
[25] Lookofsky, *CISG*, p. 31
[26] Explanatory note, pp. 33-34
[27] Schlechtriem/Schwenzer, *Commentary*, p. 130
[28] Lookofsky, *CISG*, p. 31
[29] *Id.*, p. 29
[30] Ferrari, *Homeward Trend*, p. 23; Lookofsky/Flechtner, *Worst Decision*, p. 201
[31] Ferrari, *Homeward Trend*, pp. 18-19 with note 27
[32] Schlechtriem/Schwenzer, *Commentary*, p. 122
[33] Lookofsky, *CISG*, pp. 32-34

interpreting the CISG. To have regard to the international character and the need to promote uniformity in the application of the CISG is therefore indeed a difficult job, and it has been compared to the job of "*members of an orchestra without a conductor*".[34]

Foreign case law is not binding and can only be considered to have persuasive effect. Whether a decision is considered to be persuasive may depend on various factors, but weight should be given to the persuasiveness of the reasoning in the decision, the soundness of the result and whether the result is generally supported in other jurisdictions.[35] Some scholars have furthermore advocated, that the authority of the tribunal that has rendered the decision is a factor.[36] It has however by other scholars been advocated, that it should not matter whether the decision was rendered by a Supreme Court or a lower district court, as long as it has not been overturned by a higher court. The decision is removed from the hierarchy in domestic context when considered as an international source, and it is therefore advocated that attention should rather be given to the reasoning in the decision and the soundness of the result.[37] In this regard, it hinders a full understanding of the foreign case law, and thereby a full understanding of the CISG, that some domestic courts may not always elaborate on the reasoning behind the result of their decisions.[38] To have regard to the need to promote uniformity in the application of the CISG one must as well as international case law consider international scholarly sources. This has been referred to as a 'global jurisconsultorium'.[39] When consulting scholarly works, it must be kept in mind that it only expresses the opinion of one or a few authors and is not a conclusive authority.

In theory, when assessing whether damages for precontractual liability may be awarded under the CISG, case law and literature from all Contracting States should be consulted. However due to several barriers it is not possible in this thesis. Case law from different Contracting States can be difficult to obtain since each State may not necessarily have a public database containing all case law, and even if this was the case, the reader may not understand the language. To overcome this barrier various online platforms have collected international CISG case law and have translated either the award or an abstract thereof, which contributes to a uniform application of the CISG.[40] Furthermore UNCITRAL has published a Case Law Digest[41] in which case law from the different Contracting States is organised according the each provision of the CISG. Despite this, not all possibly relevant case law is available on these platforms or in the Case Law Digest. Furthermore, some arbitral awards are confidential and not publicly available. Therefore, it is not possible for this thesis to take into account every possibly relevant piece of case law. Lastly, as the CISG is an international instrument, some scholarly works are written in foreign languages. Due to language barriers this thesis will not be able to take into account such works. The question might therefore arise, whether this thesis is able to fully answer the research question when not all relevant material can be taken into account. It would naturally be

[34] Schlechtriem, *Bundesgerichtshof*, Preliminary remarks
[35] Lookofsky, *CISG*, p. 34; Lookofsky/Flechtner, *Worst Decision*, pp. 200-201
[36] *Id.*
[37] Andersen et al., *Practitioner's Guide*, pp. xix-xxi
[38] This less transparent approach may be observed in Danish case law, see Neumann, *Extie du Hardrais*, p. 420
[39] Andersen et al., *Practitioner's Guide*, p. xvii
[40] UNILEX (http://www.unilex.info/), CISG-online (http://www.cisg-online.ch/), Pace Law School CISG Database (http://www.cisg.law.pace.edu/) or CLOUT Database (https://www.uncitral.org/clout/)
[41] Case Law Digest

of preference if all materials could be consulted, but as the above mentioned platforms and the Case Law Digest contains reference to a large amount of case law, and as most well-acknowledged scholars have produced works in English, it will be possible to thoroughly examine the research question, albeit not guaranteeing that there does not exist relevant materials not taken into account.

The final instruction in Art. 7(1) CISG is to interpret the CISG with regard to the need to promote the observance of good faith in international trade. The wording of Art. 7(1) indicates its applicability only to the interpretation of the Convention text, and not to the contractual relationship between the parties. However, it has been advocated that the CISG in addition directly imposes a duty of good faith on the parties. Considerable critique of this view has however also been expressed.[42] The understanding of the notion of good faith is one of the main discussions when assessing whether damages due to precontractual liability can be awarded under the CISG, why it will not be elaborated further here, but instead throughout the thesis.

Art. 7(2) CISG gives instructions for gap-filling of matters governed by the CISG, but not expressly settled in it. In these situations, the matter is to be settled in conformity with the general principles on which the CISG is based, or in the absence of such, by the otherwise applicable law. To determine these general principles, the mandate in Art. 7(1) must still be observed and the general principles must therefore be derived 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. Furthermore, the sources mentioned above are also relevant when determining the general principles on which the CISG is based; the purpose expressed in the preamble, the preparatory works, international case law, international scholarly works and international soft law instruments. The extent to which these sources may be used to determine the general principles, and the content of such, is also one of the main discussions when assessing whether damages due to precontractual liability can be awarded under the CISG, why it will not be elaborated further here, but instead throughout the thesis.

[42] Schlechtriem/Schwenzer, *Commentary*, p. 121

4. Sphere of application of the CISG

To determine whether the CISG applies in a given situation, it must be determined whether the contract in question is a contract governed by the CISG and whether the matter at hand is governed. The CISG applies by default to matters governed by it, being the formation of contracts and the rights and obligations of the parties, when the contract concerns international sales of goods.[43] In the following the terms 'international', 'sale' and 'goods' will be elaborated. Furthermore, the distinction between matters governed and not governed, and the distinction between matters settled or not settled, will be elaborated.

4.1 'International' Sale of Goods

A sale is considered 'international' if the requirements in Art. 1(1) CISG are met.[44] Art. 1(1) contains two alternative options for the applicability of the CISG. According to Art. 1(1) the CISG applies to contracts of sale of goods between parties whose places of business are in different States at the conclusion of the contract either (a) when both States are Contracting States or (b) when the rules of private international law lead to the application of the law of a Contracting State.

According to Art. 1(1)(a) the CISG applies when the parties have their places of business in different States and both States are CISG Contracting States. In these situations, the CISG applies automatically and the adjudicator does not have to resort to rules of private international law to determine whether the CISG is applicable.[45] Given the increasing number of Contracting States, which includes the majority of the largest trade nations in the world,[46] Art. 1(1)(a) will often lead to the CISG being applicable, provided that the transaction in question falls within the sphere of the CISG in other aspects.[47]

According to Art. 1(1)(b) the CISG applies when the rules of private international law lead to the application of the law of a Contracting State. In these situations, the adjudicator will have to apply the private international law rules of the forum to determine the applicable law and thereby whether the CISG applies.[48] If the private international law rules of the forum point to the law of a Contracting State the CISG is applicable even if neither or only one of the parties has its place of business in a Contracting State.[49]

Pursuant to Art. 92, 93, 94 and 95 CISG Contracting States can make reservations which limit the sphere of application of the CISG. Under Art. 92 a State can declare not to be bound by Part II or Part III[50] and is to that extent not considered to be a Contracting State.[51] Under Art. 93, if a

[43] CISG Art. 1-6
[44] Ferrari, *Applicability*, pp. 41-42; Lookofsky, *CISG*, p. 12
[45] Ferrari, *Applicability*, pp. 60-62; Lookofsky, *CISG*, pp. 12-13
[46] Schlechtriem/Schwenzer, *Commentary*, p. 29
[47] Ferrari, *Applicability*, p. 62; Lookofsky, *CISG*, p. 16
[48] Schlechtriem/Schwenzer, *Commentary*, p. 29
[49] Ferrari, *Applicability*, pp. 72-73; Schlechtriem/Schwenzer, *Commentary*, p. 39-40; Secretariat Commentary, p. 15, Art. 1, no. 7
[50] No CISG Contracting States at the moment has such reservation, see https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=X-10&chapter=10&lang=en

Contracting State has two or more territorial units, it may declare that the CISG is applicable to some, but not all of its units, and those units will consequently not be considered as Contracting States.[52] Furthermore, under Art. 94 two or more Contracting States, which have the same or closely related legal rules on matters governed by the CISG, may declare that the CISG is not applicable where both parties have their places of business in those States, but does not remove a State's status as a Contracting State.[53]Pursuant to Art. 95 CISG a Contracting State may upon ratification make the reservation that it will not be bound by Art. 1(1)(b), so that when a State has made such reservation, adjudicators in this State are not bound by the rule in Art. 1(1)(b).[54]

To the extent that a Contracting State has made an Art. 92 reservation and thus excluded CISG Part II, precontractual liability derived from Part II may not be imposed under the CISG, since that State is not in this regard considered a Contracting State. This equally applies regarding CISG Part III and precontractual liability derived from here. As of May 2019 no Contracting States have such reservation,[55] why this question is currently merely theoretical.

4.2 'Sale' of 'Goods'

For the CISG to apply to a contract by default, it is not sufficient that the contract is international, and that the CISG thereby applies by virtue of Art. 1 CISG. The transaction must also be classified as a 'sale' of 'goods'. However, neither 'sale' nor 'goods' is defined in the CISG.[56]

The first question that must be addressed is whether the subject of the contract is considered 'goods' within the meaning of the CISG. 'Goods' are generally considered to be tangible and movable things, but it is debated whether intangible things can also qualify as 'goods' under the CISG, such as computer software.[57] However, the CISG excludes certain sales, even though they would otherwise be classified as sales of 'goods'.

Some sales of 'goods' are excluded on the basis of the intended use of the goods.[58] According to Art. 2(a) the CISG does not apply to sales of goods bought for personal, family or household use, unless the seller neither knew nor ought to have known that they were bought for such use. However, in sales with dual purposes, being sales with both a commercial and a consumer aspect, the CISG applies. Only when the intention of personal use is exclusive is the CISG not applicable.[59] As a result the CISG generally governs sales between merchants, excluding most non-commercial sales.[60]

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[51] Schlechtriem/Schwenzer, *Commentary*, p. 38
[52] *Id.*, pp. 38-39
[53] Ferrari, *Applicability,* p. 71; Schlechtriem/Schwenzer, *Commentary*, p. 39
[54] Lookofsky, *CISG*, p. 15
[55] https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=X-10&chapter=10&lang=en
[56] Lookofsky, *CISG*, pp. 16-17
[57] *Id.,* pp. 16-17, 19-21; Andersen et al., *Practitioner's Guide*, pp. 34-35; Schlechtriem/Schwenzer, *Commentary*, pp. 34-35
[58] Andersen et al., *Practitioner's Guide*, pp. 35-36
[59] This has been established in a court decision from Denmark, 19 October 2007, District Court of Copenhagen, case no. BS 01-6B-2625/2005
[60] Andersen et al., *Practitioner's Guide*, pp. 35-36; Lookofsky, *CISG*, pp. 16-17

Certain sales of 'goods' are excluded on the basis of the nature of the transaction.[61] According to Art. 2(b) and 2(c) the CISG does not apply to sales by auction or sales on execution or otherwise by authority of law. Furthermore, certain sales of 'goods' are excluded on the basis of the nature of the goods.[62] According to Art. 2(d)-(f) the CISG does not apply to sales of stocks, shares, investment securities, negotiable instruments, money, ships, vessels, hovercraft, aircraft or electricity.

The second question that must be addressed, is whether the transaction can be considered a 'sale' within the meaning of the CISG. It can be inferred from the Convention text that a 'sale' involves delivery of goods, transfer of property in them, as well as payment of the price.[63] Therefore a lease is not considered a 'sale'.[64] Franchising contracts and distribution contracts are generally considered to be excluded as well.[65] The prevailing opinion is that also barter contracts are excluded.[66] A contract for the provision of services is not to be considered a 'sale', however mixed transactions involving both goods and services, might be. Art. 3(1) CISG states that contracts for the supply of goods to be manufactured or produced are considered 'sales' unless the party who orders the goods supplies a substantial part of the necessary materials. Furthermore, according to Art. 3(2) the CISG does not apply to contracts in which the preponderant part of the obligations of the party who furnishes the goods consists in the supply of labour or other services.

It should be noted that, even if the contract is considered to be an 'international sale of goods', the parties may exclude the application of the CISG in whole or in part according to Art. 6 CISG.[67] Furthermore, in situations where the CISG would not apply by default, parties to a contract can choose to contract in to the CISG due the general principle of freedom of contract.[68]

4.3 Matters not governed by the CISG

When it has been established that the sale is an 'international sale of goods', it must furthermore be determined whether the matter is governed by the CISG.

According to Art. 4 CISG, the CISG does not govern all aspects of an 'international sale of goods', but only the formation of the contract and the rights and obligations of the parties arising from the contract. In this regard, the relevant provisions are found in Part II and Part III of the CISG. Certain issues are exempt from the field of application of the CISG by virtue of Art. 4(a)-(b) and Art. 5 CISG. According to Art. 4(a)-(b) the CISG is not concerned with validity and with the effect the contract may have on the property in the goods. According to Art. 5 the CISG

[61] Andersen et al., *Practitioner's Guide*, pp. 37-38
[62] *Id.,* pp. 34-36
[63] Art. 30 CISG and Art. 53 CISG; Lookofsky, *CISG*, pp. 16-17
[64] Ferrari, *Applicability*, p. 107; Lookofsky, *CISG*, p. 18
[65] Ferrari, *Applicability*, pp. 103-115; Lookofsky, *CISG*, p. 18; Schlechtriem/Schwenzer, *Commentary*, pp. 30-33
[66] Ferrari, *Applicability*, pp. 106-107; Schlechtriem/Schwenzer, *Commentary*, p. 31
[67] Andersen et al., *Practitioner's Guide*, pp. 63-67; Lookofsky, *CISG*, pp. 25-27; Schlechtriem/Schwenzer, *Commentary*, pp. 102-115
[68] Lookofsky, *CISG*, pp. 27-28

does not apply to liability of the seller for death or personal injury caused by the goods to any person.

If an issue, which is not governed by the CISG, arises in a dispute, the adjudicator must settle this issue by applying the private international law rules of the forum to determine the applicable law.[69] Matters which are not governed by the CISG are often referred to as 'external gaps' or 'lacuna intra legem'.[70]

In relation to precontractual liability it is especially relevant to determine whether such may be encompassed by the wording 'formation of contract', or whether it, although not encompassed by this wording, may still be an issue governed by the CISG. This discussion will not be elaborated here, but will be analysed below at section 5.1.3.

If concluded that precontractual liability falls within the scope of the CISG, it does not mean that any possible type of precontractual liability is governed. In accordance with Art. 4(a) any type of precontractual liability that would be classified as a validity issue, fraud for instance, must still be considered outside the scope of the CISG.[71]

4.4 Matters governed by the CISG

Distinguishing between matters governed by the CISG and matters not governed, is not necessarily as simple as determining whether the issue concerns 'formation of the contract' and 'the rights and obligations' of the parties, and whether the issue is specifically excluded according to Art. 4-5 CISG. There may be issues which are governed, although not encompassed specifically by these categories, and there may be issues excluded from the sphere of application although encompassed by this wording. A difficulty is therefore to distinguish between matters that are governed, but not settled by the CISG, as opposed to matters not governed.[72] Whether a matter is governed but not settled, or simply not governed, will sometimes depend on the interpreter and which approach to interpretation the interpreter favours. Scholars who favour an 'expansionistic'[73] interpretation will be more inclined to find a matter governed, but not settled, as opposed to not governed, to avoid resorting to domestic law. On the contrary, scholars who favour a narrow interpretation will be more inclined to find a matter not governed and thereby resort to non-Convention rules.[74] There seem to be a tendency that scholars generally prefer a more expansive interpretation of the CISG, while courts seem to favour a more narrow interpretation.[75]

[69] Schlechtriem/Schwenzer, *Commentary*, p. 76
[70] Janssen/Kiene, *General Principles*, pp. 263-264. The expression 'external gap' as a synonym for a matter not governed by the CISG has been criticised since an issue outside the scope may not rightly be categorised as a 'gap'. See in this regard Janssen/Kiene, *General Principles*, pp. 264-265
[71] Kritzer, *Pre-Contract Formation*
[72] Janssen/Kiene, *General Principles*, p. 261; Lookofsky, *CISG*, pp. 39-41; Schlechtriem/Schwenzer, *Commentary*, p. 133
[73] Term generally used by Lookofsky, see for instance Lookofsky, *CISG*, p. 42 and Lookofsky, *Not Running Wild*
[74] Lookofsky, *CISG*, p. 42
[75] Lookofsky, *Not Running Wild*, p. 143

If it has been determined that the matter is governed by the CISG, it must be determined whether the matter is expressly settled in it, since this will determine whether the issue shall be solved merely by virtue if Art. 7(1) or additionally by virtue of Art. 7(2). If the matter is expressly settled in the CISG, the answer to the solution is to be found in the Convention text itself. The task for the adjudicator in these cases is to solely subsume the facts of the case within the Convention rules.[76] When a matter is settled in the CISG and the specific provisions are to be interpreted, this interpretation must be conducted in accordance with Art. 7(1) CISG. If the adjudicator decides that a given matter is governed by, but not expressly settled in the CISG, Art. 7(2) prescribes that the matter is to be settled in conformity with the general principles on which the CISG is based. The adjudicator must therefore ascertain which principles are to be considered such. Only when no principle can be found to settle the matter, recourse can be taken to the otherwise applicable law. Matters which are governed by, but not expressly settled in the CISG, are often referred to as 'internal gaps' or 'lacuna praeter legem'.[77] A difficulty is, however, to distinguish between matters that are governed and where an interpretation of a provision leads to the matter being settled, as opposed to matters governed, but not settled. The distinction between an extensive or 'expansionistic' interpretation, including interpretation by analogy, and gap-filling by the use of general principles, is difficult, and in many cases the situation can be considered an issue which can be resolved by either extensive interpretation or gap-filling. The result may very well be the same thus making the distinction theoretical.[78]

[76] Lookofsky, *CISG*, p. 39
[77] Janssen/Kiene, *General Principles*, p. 264; Schlechtriem/Schwenzer, *Commentary*, p. 132
[78] Lookofsky, *Convention Interpretation*, p. 52; Schlechtriem/Schwenzer, *Commentary*, p. 133

5. The legal basis for precontractual liability under the CISG

The purpose of this thesis is mainly to examine whether there is a basis for precontractual liability in the CISG. To answer this question, the different possible roads to precontractual liability must be examined, including whether these may be extended to the precontractual phase, since precontractual liability may or may not be encompassed by the wording 'formation of contract' in Art. 4 CISG.

The answer to these questions will be determinative of whether precontractual liability may be imposed under the CISG, but will not be determinative of whether precontractual liability can be imposed at all. If precontractual liability is not governed by the CISG, precontractual liability may still be imposed according to the otherwise applicable law. The applicable law depends on the forum and its private international law rules or any choice of law made by the parties,[79] and this may be either domestic or international law or soft law rules such as the UNIDROIT Principles on International Commercial Contracts (UPICC)[80], the Principles of European Contract Law (PECL)[81] or the TransLex-Principles (TLP).[82]

The purpose of this thesis is not to conduct an analysis of any domestic laws on precontractual liability nor to exhaustively analyse and compare civil law and common law traditions or any applicable soft law rules in this regard. The analysis will accordingly focus on the applicability of the CISG in regard to precontractual liability, and to a lesser extent on the content of such liability and which damages that may be awarded.

The question of whether there is a basis for precontractual liability in the CISG has been discussed by various scholars.[83] Not only do the different scholars disagree on this question, but the approach followed by the different scholars vary. The approach most scholars seem to favour is that a basis for precontractual liability may be derived through a potential duty on the parties to negotiate in good faith. This approach will therefore first be examined. Subsequently, other possible roads to precontractual liability, that have been given less attention in the various scholarly works, will be examined.

5.1 Art. 7 CISG and a duty to observe good faith as a road to precontractual liability

To answer the question of whether a duty to negotiate in good faith may be a road to precontractual liability under the CISG, Art. 7 CISG must be examined to determine whether it imposes a duty on the parties to observe good faith. Art. 7(1) CISG contains a set of

[79] Spagnolo, *Pandora's Box*, p. 281, with note 133
[80] UNIDROIT Principles of International Commercial Contracts 2016 (UPICC)
[81] The Principles of European Contract Law, 1999, by the Commission on European Contract Law (PECL)
[82] Trans-Lex Principles as presented on Trans-Lex.org (TLP)
[83] See for instance Gil-Wallin, *Liability*; Goderre, *Negotiations*; Kritzer, *Pre-Contract Formation*; Novoa, *Culpa in Contrahendo;* Spagnolo, *Pandora's Box*

requirements that the adjudicator needs to observe when interpreting the CISG. In addition to the international character and the need to promote uniformity, Art. 7(1) requires that regard is to be had to the observance of good faith in international trade. Art. 7(2) CISG prescribes that questions concerning matters governed, but not expressly settled, are to be interpreted in accordance with the underlying principles of the CISG. The notion of good faith may provide a road to precontractual liability under the CISG, if it is interpreted as entailing a requirement on the parties to conduct negotiations in good faith. The question may therefore be asked whether Art. 7(1), rather than just being regarded when interpreting the CISG, also imposes a duty on the parties to act in good faith, and/or whether good faith can be considered an underlying principle of the CISG to be used for gap-filling in accordance with Art. 7(2). If that is the case, it must be established whether the duty to act in good faith can be extended to the precontractual phase, subsequently the content of such duty must be established.

There are mainly three ways of interpreting Art. 7 CISG with regard to good faith. The first interpretation is a literal reading of Art. 7(1) where the interpreter will find that the observance of good faith is only applicable to the interpretation of the Convention text. The interpreter will not find that Art. 7(1) imposes a direct duty on the parties.[84] The interpreter may in this regard furthermore reject the perception that good faith is a general principle underlying the CISG.[85] The second interpretation is also a literal reading of Art. 7(1) not imposing a direct duty on the parties, but contrary to the first interpretation, the interpreter will find that good faith can be considered an underlying principle to be used for gap-filling in accordance with Art. 7(2).[86] The interpreter may also apply a third interpretation, where Art. 7(1) is not interpreted literally and find that the phrase requiring the observance of good faith in Art. 7(1) also imposes a duty directly on the parties.[87]

Which interpretation the interpreter follows will be determinative of whether Art. 7 and good faith may be considered a basis for precontractual liability under the CISG. If neither Art. 7(1) nor Art. 7(2) CISG directly or indirectly imposes a duty to act in good faith on the parties, the trail ends here. If on the other hand such a duty may be imposed on the parties, whether the interpreter finds that a duty on the parties to act in good faith may be extended to the precontractual phase, will ultimately determine whether the question of precontractual liability will be answered by the CISG or the otherwise applicable law.[88]

5.1.1 Does the observance of good faith in accordance with Art. 7(1) CISG only apply to the interpretation of the CISG provisions or does it additionally impose a duty directly on the parties?

Art. 7(1) CISG reads:

[84] Spagnolo, *Pandora's Box*, p. 274
[85] Goderre, *Negotiations*, pp. 275-276
[86] *Id.*, pp. 276-278; Spagnolo, *Pandora's Box*, pp. 274-275
[87] Goderre, *Negotiations*, pp. 278-280; Spagnolo, *Pandora's Box*, pp. 275-277
[88] Goderre, *Negotiations*, pp. 279-280

"In the interpretation of this Convention, regard is to be had to its international character and to the need to promote uniformity in its -application and the observance of good faith in international trade".

The black letter wording of Art. 7(1) 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 whether Art. 7(1) additionally imposes a duty on the parties has been discussed.[89]

A starting point, when the black letter wording of the provision provides no more guidance, would be consult the legislative history to discern what the drafters intended. The CISG drafting history consists of three stages; the UNCITRAL Working Group (1970-1977), the full Commission reviewing the work done by the Working Group (1977-1978) and The Diplomatic Conference (1980).[90] In 1969 UNCITRAL established the Working Group that prepared a draft of the provisions that later became the CISG.[91] 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.[92] 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 wrong signals.[93] The Commission established a second Working Group with the purpose of drafting a compromise of these different opinions.[94] 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.[95] This suggestion was the one presented at the 1980 Diplomatic Conference.[96] At this conference the delegates discussed the suggested article and two proposals for amendments.[97] An Italian proposal suggested an amendment requiring parties to observe the principles of good faith in the formation and performance of the contract[98] and a Norwegian proposal suggested to move the notion of good faith to what eventually became Art. 8(3) CISG.[99] Both proposals were

[89] Spagnolo, *Pandora's Box*, pp. 274-279
[90] Honnold, *Documentary History*, p. 2
[91] *Id.,* p. 3
[92] UNCITRAL YB IX (1978), A/CN.9/SER.A/1978, p. 66, para. 70 reprinted in Honnold, *Documentary History*, p. 298
[93] UNCITRAL YB IX (1978), A/CN.9/SER.A/1978, p. 66-67, paras. 73- 77, p. 35, paras. 44-48 reprinted in Honnold, *Documentary History*, pp. 298-299, 369
[94] UNCITRAL YB IX (1978), A/CN.9/SER.A/1978, p. 36, para 55 reprinted in Honnold, *Documentary History*, p. 370
[95] UNCITRAL YB IX (1978), A/CN.9/SER.A/1978, p. 36, paras. 56-60 reprinted in Honnold, *Documentary History*, p. 370
[96] OR, p. 5, Art. 6
[97] OR, pp. 257-259, paras. 40-57
[98] OR, p. 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
[99] OR, p. 87, Norway (A/CONF.97IC.1IL.28)

rejected. Some delegates supported these proposals.[100] Other delegates, although some moderately supportive, would prefer the existing text of the article.[101] 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 event of failure to comply.[102] Some delegates considered the proposals unnecessary as good faith was already understood to be an underlying principle implicit in any legal transaction.[103] 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.[104] 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.[105]

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) appears a compromise, it rather masks the continuing disagreement among the drafters, and *"this Pandora's box gave the mere illusion of a compromise"*.[106] The discussion of whether this duty lies inherent within the CISG is therefore still open, although the existing text of Art. 7(1) CISG does not explicitly impose a duty on the parties.

In regard to the understanding of the notion of good faith, the legislative history is inconclusive. It has been argued that the preparatory works in general often are inconclusive and seldom provides the answer to complex issues.[107] Furthermore, it has been argued that the preparatory works are *"frozen in time"* while the CISG is a *"living instrument"*,[108] to be understood in light of current scholarly works and case law. Therefore, what the drafters discussed may carry little weight when assessing the understanding and extent of good faith,[109] and other relevant sources must be consulted.

Among scholars different views on the notion of good faith have been expressed.[110] Although a duty on the parties to observe good faith is not expressly evident in Art. 7(1) CISG, it is advocated among 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.[111] 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

[100] OR, p. 258, paras. 43-44
[101] OR, p. 258, paras. 45, 46, 48, 49, 52
[102] OR, p. 258, paras. 47, 50
[103] OR, pp. 258-259, paras. 51, 53
[104] OR, pp. 257-259, paras. 40, 45, 49, 50
[105] OR, p. 259, paras. 54-57
[106] Spagnolo, *Pandora's Box*, pp. 273-174
[107] Lookofsky, *CISG*, p. 31
[108] Zeller, *Good Faith*, p. 138
[109] *Id.*
[110] Spagnolo, *Pandora's Box*, pp. 274-279
[111] Schlechtriem/Schwenzer, *Commentary*, p. 121 (not itself following this position). For a description of this view see Bonell, *Art. 7*, p. 84; Spagnolo, *Pandora's Box*, pp. 275-277

adjudicator.[112] Some scholars may not reach as far as to outright conclude that good faith may be imposed as a direct positive duty, but nonetheless acknowledge that good faith reaches further than merely being an interpretive tool, and in addition governs rights and obligations of the parties.[113]

In opposition it has more strictly been argued that the black letter wording of the Convention text "*In the interpretation of this Convention*" 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 only to the interpretation of the CISG.[114] It may be argued, in accordance with what some of the delegates stated at the 1980 Diplomatic Conference, that imposing a general duty on the parties to act in good faith would lead to uncertainty, also due to the lack of sanctions.[115]

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,[116] as *"good faith cannot exist in a vacuum and must be anchored to parties' behaviour if used to interpret provisions"*.[117] 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 linked to the parties' behaviour.[118] 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 a strict applicability only to the interpretation of the CISG,[119] and will at least indirectly be linked to the parties behaviour and their obligations.

When looking at caselaw, to either confirm or deny such understanding, it appears that domestic courts when utilising good faith most often imposes a standard of behaviour on the contracting parties, rather than merely referring to good faith as in interpretive tool.[120] 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 the question phrased above in regard to 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).

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[112] Spagnolo, *Pandora's Box*, p. 276
[113] Zeller, *Good Faith*, p. 148
[114] Andersen, *Good Grief,* pp. 317-318; Andersen et al., *Practitioner's Guide*, p. 76; Farnsworth, *Duties*, pp. 55-56; Schlechtriem/Schwenzer, *Commentary*, pp. 126-127; Spagnolo, *Pandora's Box*, p. 274
[115] OR, p. 258, paras. 47, 50
[116] Schlechtriem/Schwenzer, *Commentary*, p. 127; Spagnolo, *Pandora's Box*, pp. 278-279
[117] Andersen, *Good Grief,* p. 318
[118] *Id.,* pp. 317-318; Andersen et al., *Practitioner's Guide*, pp. 76-77; Lookofsky, *CISG*, pp. 36-37; Schlechtriem/Schwenzer, *Commentary*, pp. 126-127; Zeller, *Good Faith*, p. 140
[119] Spagnolo, *Pandora's Box*, pp. 278-279
[120] Neumann, *Roots and Fruits*, p. 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

It may be argued that if good faith is considered a general principle on which the CISG is based in accordance with Art. 7(2) CISG, then the significance of whether Art. 7(1) imposes a duty on the parties, or only imposes a duty on adjudicators, might be lessened and has been referred to as an "*arguably 'academic' distinction*".[121] Whether good faith is an underlying principle on which the CISG is based is therefore also relevant in assessing whether Art. 7 and good faith may be a road to precontractual liability under the CISG.

5.1.2 Is good faith a principle on which the CISG is based which may be used to fill gaps in the CISG in accordance with Art. 7(2) CISG?

Art. 7(2) CISG reads:

"Questions concerning matters governed by this Convention which are not expressly settled in it are to be settled in conformity with the general principles on which it is based or, in the absence of such principles, in conformity with the law applicable by virtue of the rules of private -international law".

According to Art. 7(2) matters governed by the CISG, but not expressly settled in it, are to be settled in conformity with the general principles on which it is based. Therefore, the question may arise, whether good faith is a such, and whether this may impose a duty on the parties to observe good faith. The black letter wording of Art. 7(2) itself provides no guidance on how to determine the general principles, or whether good faith may be a 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,[122] Czechoslovakia[123] and Italy[124] made proposals for a subsection (2), suggesting how to settle matters governed by, but not expressly settled in the CISG. The three proposals were rejected and the German Democratic Republic suggested what essentially became Art. 7(2),[125] and this proposal was adopted.[126] During the discussions, the delegates favoured this proposal, although some were concerned that a reference to general principles was dangerous, [127] that such would be difficult to discern,[128] and that it might lead to excessive freedom in interpreting what those principles are.[129] There were no discussions among the delegates on how to derive such principles,[130] and the legislative history does therefore not provide guidance in this regard. Some delegates, when rejecting expressly requiring the parties to observe good faith or an express reference to good faith in determining the intent of a party,

[121] Lookofsky, *CISG*, p. 37
[122] OR, p. 87, Bulgaria (A/CONF.97/C.1IL.16)
[123] OR, p. 87, Czechoslovakia (A/CONF.97/C.1IL.15)
[124] OR, p. 87, Italy (A/CONF.97/C.1IL.59)
[125] OR, pp. 87, 256, paras. 25-26
[126] OR, pp. 87, 257, para. 35
[127] OR, p. 255, para. 12
[128] OR, p. 256, para. 17
[129] OR, p. 257, para. 28
[130] OR, pp. 254-257, paras. 1-37

expressed that the Convention already referred to general principles[131] and that good faith was already to be understood as such principle.[132] This may therefore support good faith as a general principle on which the CISG is based.

Good faith is merely mentioned once in the CISG,[133] which could lead to the impression that good faith does not constitute an underlying principle. If this was the case, one would expect it to appear expressly several times in the Convention text. On the other hand, the Secretariat itself refers to the observance of good faith as a 'principle' in The Secretariat Commentary, and notes that numerous of the provisions are manifestations of the requirement to observe good faith.[134] 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."*[135] This supports the view, that good faith is a principle on which the CISG is based.[136] 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. This subsection was first introduced at the 1980 Diplomatic Conference,[137] where the content of Art. 7(1) was not essentially amended. Therefore, the Draft that the Secretariat has 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*",[138] which may have caused the uncertainty of the role of good faith.

Some scholars reject good faith as a general principle,[139] by arguing that Art. 7 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*".[140] 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,[141] and that it would be "*a perversion of the compromise to let a general principle of good faith in by the back door*".[142] 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 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

[131] OR, p 258, para. 51
[132] OR, pp. 258-259, para. 53
[133] In Art. 7(1) CISG
[134] Neumann, *Roots and Fruits*, p. 63; Secretariat Commentary, p. 18
[135] Secretariat Commentary, p. 18
[136] Neumann, *Roots and Fruits*, p. 63
[137] OR, pp. 87, 254-257, paras. 1-37
[138] Spagnolo, *Pandora's Box*, p. 273
[139] Andersen, *Good Grief*, p. 318; Farnsworth, *Duties*, p. 56
[140] Andersen, *Good Grief*, p. 318
[141] *Id.*
[142] Farnsworth, *Duties*, p. 56

Conference.[143] 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).[144] It has in addition been argued, that the CISG is capable of adapting and that its underlying principles should be interpreted as being able to evolve with change.[145]

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 concrete and therefore more suited to fill gaps, can be derived from the principle of good faith.[146]

Many scholars, however, refer directly to good faith as a generally acknowledged underlying principle of the CISG.[147] Sometimes defined negatively so as to exclude behaviour in bad faith, and sometimes considered having a positive role requiring behaviour in good faith.[148] The principle of good faith is sometimes derived from Art. 7(1),[149] but more often the principle is derived from numerous provisions of the CISG, that may be considered an expression of such.[150] The latter may find more support in The Secretariat Commentary that refers to numerous provisions as manifestations of good faith.[151] 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'.[152] A study of the utilisation of good faith additionally shows that when courts refer to good faith and when imposing a standard of behaviour on the parties, the courts most often do so with reference to good faith being an underlying principle of the CISG.[153] 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.[154] Art. 7 contains three possible understandings of the extent of the notion of good faith. First, that Art. 7(1) is merely an interpretive 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

[143] OR, pp. 258-259, paras. 51, 53
[144] Salama, *Pragmatic Responses*, p. 242
[145] *Id.*
[146] Spagnolo, *Pandora's Box*, p. 276
[147] *Id.*, pp. 274-275; Lookofsky, *CISG*, p. 37; Andersen et al., *Practitioner's Guide*, p 89; Schlechtriem/Schwenzer, *Commentary*, p. 135
[148] Spagnolo, *Pandora's Box*, p. 275
[149] Janssen/Kiene, *General Principles*, pp. 270-273
[150] Schlechtriem/Schwenzer, *Commentary*, p. 135; Spagnolo, *Pandora's Box*, pp. 274-275
[151] Secretariat Commentary, p. 18
[152] Case Law Digest, p. 43
[153] Neumann, *Roots and Fruits*, pp. 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*, p. 278
[154] Janssen/Kiene, *General Principles*, p. 273

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[155] provide a basis for precontractual liability. 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 precontractual liability under the CISG, provided that precontractual liability falls within the scope of the CISG.

5.1.3 Can a potential duty to observe good faith be extended to the precontractual negotiations?

Aside from the above described discussions regarding the duty of good faith, it is imperative to determine whether such may be extended to the precontractual phase, and thereby whether precontractual liability falls within the scope of the CISG. This is an issue sometimes overlooked in the debate.[156]

With regard to whether precontractual liability is to be considered within the scope of the CISG, it must first be determined 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, since precontractual liability is not expressly excluded by virtue of Art. 2-5 CISG.[157] 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?"*[158]

In its Part II the CISG contains provisions regarding offer and acceptance as well as invitations to make an offer. The negotiation phase naturally lies prior to a contract being concluded. The question then arises whether this phase is encompassed by the wording 'formation of contract', despite that these negotiations may not necessarily contain an offer or even an invitation to make such. 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[159] leaving remedies on the basis of precontractual liability outside the scope. On the other hand CISG Part II does apply to the determination of whether a proposal is sufficiently definite to constitute an offer[160] and whether such offer has

[155] Art. 7(1) CISG and the observance of good faith in the interpretation may still, in combination with other provisions, lead to precontractual liability under the CISG. See sections 5.2-5.4
[156] Spagnolo, *Pandora's Box*, p. 293
[157] Andersen et al. *Practitioner's Guide*, p. 78
[158] Kritzer, *Pre-Contract Formation*
[159] Spagnolo, *Pandora's Box*, p. 303 here referring to Schlechtriem in *Workshop*, p. 230
[160] CISG Art. 14

been accepted,[161] and thereby whether a contract is in fact concluded.[162] The CISG therefore also applies in some situations, although a contract may never have been concluded. Therefore, it could be argued that the precontractual phase is governed by the CISG, and that damages on the basis of a breach of a duty in this phase therefore, although not directly regulated in CISG Part III, could be awarded on the basis of an analogical interpretation of the provisions in CISG Part III or gap-filling by Art. 7(2).

The black letter wording of Art. 4 CISG prescribes that the CISG *"governs only"* the formation of the contract and the rights and obligations of the parties arising from such a contract. However, it could be argued that this phrasing instead should be read as *"governs without doubt"*,[163] since the CISG also contains provisions not directly related to formation of contracts or rights and obligations of the parties.[164] It may therefore be argued that precontractual liability is not excluded from the scope of the CISG based on the mere fact that it may not clearly be encompassed by the wording 'formation of contract'. This, combined with the fact that CISG is also applicable to some situations where no contract is concluded, as described above, could possibly provide support for a more liberal interpretation of the phrase 'formation of contract' to also encompass the negotiation phase. It may additionally be argued that the close connection between negotiations and contract formation makes the issue internal rather than external to the CISG.[165] On the other hand, how close that connection is will 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.

On the basis of the above discussed, it becomes apparent that the mere wording of the CISG does not provide a clear answer to whether precontractual liability is within the scope. When the matter is not clearly excluded, it must be examined why the matter is not expressly settled in the CISG, and whether this is because it was not meant to be governed at all. Some matters are not expressly settled, because they were considered, but deliberately left out, and some matters were not even considered. The answer to whether an issue was considered, but left out, and therefore might not have been meant to be governed by the CISG, may be found by consulting the legislative history.[166]

During the drafting of the CISG 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;[167]

"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."[168]

[161] CISG Art. 18-19
[162] CISG Art. 23
[163] Schlechtriem/Schwenzer, *Commentary*, p. 74.
[164] *Id.* Here reference is made to Art. 7, 8, 9, 11, 29 CISG
[165] Spagnolo, *Pandora's Box*, p. 298
[166] Andersen et al. *Practitioner's Guide*, p. 78
[167] UNCITRAL YB IX (1978), A/CN.9/SER.A/1978, p. 66, para. 70 reprinted in Honnold, *Documentary History*, p. 298
[168] *Id.*

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 amount of countries choosing to ratify the Convention.[169] The suggestion was rejected at the 9th session of the Working Group.[170] At the 1980 Diplomatic Conference the German Democratic Republic suggested to include a quite similar provision;[171]

"Where in the course of the preliminary negotiations or the formation of a contract a party fails in his duty to take reasonable care, the other party is entitled to claim compensation for his expenses".[172]

Some delegates supported the proposal,[173] but a majority did not.[174] 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.[175] 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.[176] This proposal was also rejected.[177] 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.[178] As was the case with Art. 1-6 CISG, where certain issues, such as validity, was deliberately left outside the scope of the CISG, the scope may have been minimised regarding precontractual liability to instead ensure a wider acceptance among states.[179] As was the case with the general discussion on whether and how to include a good faith reference in the CISG, the question of its application to the precontractual phase remains an open discussion.

In a German court decision[180] 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 is 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. This could be an indication that the court found the issue clearly outside the scope of the CISG, but could also suggest following the 'homeward trend'. When the court decided on

[169] UNCITRAL YB IX (1978), A/CN.9/SER.A/1978, p. 67, paras. 84-85 reprinted in Honnold, *Documentary History*, p. 299
[170] UNCITRAL YB IX (1978), A/CN.9/SER.A/1978, p. 67, para. 86 reprinted in Honnold, *Documentary History*, p. 299
[171] Spagnolo, *Pandora's Box*, p. 272
[172] *Id.*
[173] OR, pp. 294-295, paras. 80, 84
[174] OR, pp. 294-295, paras. 81, 82, 83, 85
[175] OR, pp. 294-295, paras. 80, 84
[176] OR, pp. 294-295, paras. 81, 85
[177] OR, p. 295, paras. 86, 87
[178] Spagnolo, *Pandora's Box*, p. 273
[179] *Id.*, pp. 267, 273
[180] Germany, 4 March 1994, Appellate Court Frankfurt, case no. 10 U 80/93

the issue of contract formation the court decided the case based on the BGB[181] and stated *"This is consistent with the provisions of the CISG, which apply in the present case".*[182] The court continued to make references to BGB and subsequently to the CISG indicating a 'homeward trend'. In a U.S. court decision[183] the court equally 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[184] 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))*." These court decisions most likely appear on CISG case law databases because they contain references to the CISG. There is presumably case law based on international contracts concerning precontractual liability, but where the courts have referred directly to domestic law without mentioning the CISG. Such case law would most likely not make its way to CISG case law databases. As there, on the contrary, 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 outside the scope if the CISG, although this could sometimes also be due to a 'homeward trend'. This seems in line with the general assumption that domestic courts prefer a narrow interpretation of the CISG.

The majority opinion among scholars is also, in line with the available case law, that precontractual liability falls outside the scope of the CISG,[185] and some scholars even outright reject that precontractual liability is within the scope of the CISG without further discussion.[186] A minority on the other hand is, however, of the opposite opinion,[187] in line with the general assumption that scholars may sometimes prefer a more extensive interpretation of the CISG than the domestic courts. 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,[188] however when looking at the drafting history, this is presumably not the case. Based on the preparatory works it can be argued, that the CISG was not meant to encompass issues of precontractual liability, leaving this to be resolved by domestic law.[189] The role of good

[181] German domestic contract law, Bürgerliches Gesetzbuch
[182] http://cisgw3.law.pace.edu/cases/940304g1.html. 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
[183] United States, 10 May 2002, U.S. District Court for the Southern District of New York [federal court of 1st instance], Geneva Pharmaceuticals Technology Corp. v. Barr Laboratories, Inc. et al. / Apothecon, Inc. v. Barr Laboratories, Inc. et al.
[184] Greece, 2009, Multi-Member Court of First Instance of Athens, Decision 4505/2009 (*Bullet-proof vest case*)
[185] For authors observing this divergence see Gil-Wallin, *Liability*, p. 14; Kritzer, *Pre-Contract Formation*; Spagnolo, *Pandora's Box*, p. 293
[186] Andersen et al., *Practitioner's Guide*, p. 52; Brunner/Gottlieb, *Commentary*, pp. 119-120
[187] For authors observing this divergence see Gil-Wallin, *Liability*, p. 14; Kritzer, *Pre-Contract Formation*; Spagnolo, *Pandora's Box*, p. 293
[188] Gil-Wallin, *Liability*, p. 20
[189] Schlechtriem, *Uniform Sales Law*, p. 57

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 an inclusion and deliberately left it out. It may, however, be argued that the legislative history should not carry much weight since the CISG is a living instrument that must evolve over time.[190] The drafting of the CISG was long and difficult. Equally would an amendment be. The CISG was drafted at one point in time and needs to evolve to match development in society so to not become *"a prisoner of the past".*[191] The CISG contains many open-ended provisions as well as internal gaps. The autonomous interpretation method mandated in Art. 7(1) combined with Art. 7(2), that allows for gap-filling, could be applied to let the CISG adapt to such development.[192]

There are two types of matters not expressly settled in the CISG, although not expressly excluded from the scope by virtue of Art. 2-5 CISG. There are issues which were considered and left open, and there are issues which were not at all considered.[193] To let the CISG evolve is useful when society has developed in a way that the drafters could not foresee or may have overlooked. 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. This would be the case for technical development such as new electronic means of communication.[194] The CISG must be able to adapt to meet these new circumstances, so as not to become 'petrified'.[195] On the other hand, some issues were in fact foreseen, discussed and deliberately rejected. Precontractual liability is an example of such.[196] Expanding the scope of the CISG to encompass precontractual liability may therefore be *"overstepping the spirit of the international consensus*.[197] In these cases, it may be argued that it would be wrong to let the CISG expand in scope and reintroduce such issues to the CISG.[198]

In regard to precontractual liability and good faith in bargaining there is no international common core,[199] and neither was there when the CISG was drafted. Especially there were differences between the approach in common law and civil countries. Most likely these differences were part of the reason that the drafters of the CISG could not agree to include a reference to precontractual liability.[200] It may not be as simple as to divide the approaches into civil law and common law, as there will of course also be differences 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,[201] common law systems have not acknowledged such a general duty during the negotiations. Common law countries have however moved towards acknowledging

[190] Zeller, *Good Faith*, p. 138
[191] Spagnolo, *Pandora's Box*, p. 288
[192] *Id.*
[193] Andersen et al. *Practitioner's Guide*, p. 78
[194] *Id.*, pp. 78-79; Schwenzer, *Commentary*, p. 133; Spagnolo, *Pandora's Box*, p. 287
[195] Spagnolo, *Pandora's Box*, p. 288
[196] *Id.*, p. 287
[197] *Id.*
[198] Andersen et al. *Practitioner's Guide*, p. 78
[199] Schwenzer/Hachem/Kee, *Global Sales*, pp. 280-281; Spagnolo, *Pandora's Box*, pp. 282-283
[200] Gil-Wallin, *Liability*, p. 13; Goderre, *Negotiations*, p. 266
[201] Goderre, *Negotiations*, p. 267

some precontractual duties.[202] This development was still at its early stages at the time the CISG was drafted.[203] If the CISG had been drafted today, then maybe the delegates could have agreed to expressly include at least some precontractual duties. If argued that the CISG should be applied in a way that lets the CISG evolve and adapt to new circumstances, it might therefore further be argued that the scope of the CISG should be expanded to encompass at least these precontractual duties. It may be argued that it would not be wrong to reintroduce solutions to the CISG that were not originally agreed to be included, if these are now an expression of an international common core, especially since an amendment of the CISG would be difficult.

As described above in section 1, the purpose of the CISG is to break down legal barriers and to promote certainty and uniformity in international trade.[204] Would it then not be in accordance with this purpose to let the scope of the CISG evolve and reach as far as possible and to encompass precontractual liability? In this regard, it may be relevant to distinguish between 'formal uniformity' and 'substantive uniformity'.[205] 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".* [206] It is argued that the best development for precontractual liability under the CISG is the one that increases substantive uniformity by minimising the amount of contracting parties opting out of the CISG, and possibly increasing the amount of parties opting in.[207]

It may be argued that 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.[208] 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.[209] 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,[210] which also would be in accordance with the purpose of the CISG.[211] Theoretically, extending the scope of the CISG would improve 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.[212] On the other hand, the fact that precontractual liability may be based on good faith and that the content of good faith has not yet been clearly defined, may bring uncertainty to the CISG and its application. Adjudicators may

[202] *Id., p. 270;* Farnsworth, *Precontractual Liability*, p. 222; Spagnolo, *Pandora's Box*, p. 268
[203] Spagnolo, *Pandora's Box*, p. 268
[204] CISG Preamble, Art. 7(1) CISG and the UNCITRAL website https://uncitral.un.org/en/texts/salegoods/conventions/sale_of_goods/cisg
[205] This terminology is used by Lisa Spagnolo in Spagnolo, *Pandora's Box*
[206] Spagnolo, *Pandora's Box*, p. 281
[207] *Id.*, pp. 279, 309-310
[208] *Id.*, p. 281; Gil-Wallin, *Liability*, pp. 18-19
[209] Gil-Wallin, *Liability*, p. 18
[210] Spagnolo, *Pandora's Box*, p. 282
[211] UNCITRAL website https://uncitral.un.org/en/texts/salegoods/conventions/sale_of_goods/cisg
[212] Spagnolo, *Pandora's Box*, pp. 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*, p. 283. The question of preemption is beyond the framework of this thesis.

apply good faith differently and parties may therefore not be able to predict their legal status, and thus uniformity is not in fact promoted.[213] 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.[214] 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.[215] There does, however, not seem to be a tendency that States are reluctant to become parties to the Convention.[216]

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. 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.[217] 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'. CISG 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 systems is characterized as a contractual liability, while in others it is considered tortious.[218] Due to such differences the domestic classifications should not be determinative of whether precontractual liability falls within the scope of the CISG, but is perhaps contributing to the confusion as to whether it does. The distinction between tort and contract has also lead to much debate concerning the scope of CISG preemption, in other words, whether the CISG exclusively applies to precontractual liability, whether the CISG and domestic law can apply concurrently, or whether domestic law exclusively applies.[219] This discussion is certainly interesting, but beyond the framework of this thesis, as the purpose of this thesis mainly is to examine whether there is a basis for precontractual liability in the CISG, and not to determine whether the CISG may then preempt domestic law in this regard.

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

[213] Spagnolo, *Pandora's Box*, pp. 281, 283
[214] *Id.,* pp. 309-310
[215] UNCITRAL YB IX (1978), A/CN.9/SER.A/1978, p. 67, para. 85 reprinted in Honnold, *Documentary History*, p. 299
[216] Just in the time that this thesis has been written (February-May 2019) two States have become parties to the CISG (Democratic People's Republic of Korea and Liechtenstein) see https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=X-10&chapter=10&lang=en
[217] Spagnolo, *Pandora's Box*, p. 289
[218] Bonell, *Restatement*, p. 192, with note 55; Schlechtriem/Schwenzer, *Commentary*, p. 258; Schwenzer/Hachem/Kee, *Global Sales*, pp. 283-284
[219] Spagnolo, *Pandora's Box*, p. 300

an extensive interpretation there must be limits as to how far the CISG scope may be allowed to expand.

5.1.4 How may the content of the duty to observe good faith during the negotiations be determined and may soft law instruments assist in filling out such content?

Whether one may come to the conclusion that a duty to act in good faith is imposed on the parties by virtue of Art. 7(1) CISG or due to gap-filling by a general principle of good faith by virtue of Art. 7(2) CISG, and that it is within the scope of the CISG, the content of such duty is not expressly settled.

The black letter wording of "*the need to promote […] the observance of good faith*" in Art. 7(1) provides little guidance as to its exact content. One of the purposes of the CISG is to promote uniformity. To do so, the CISG must be interpreted, and gaps must be filled, taking into account its international character, by applying internationally acknowledged principles rather than to resort to possibly diverging domestic laws.[220] Soft law instruments, such as UPICC, PECL and TLP, all contain approaches to precontractual liability, which may be expressions of good faith. It may therefore be asked whether these soft law rules, or at least the relevant provisions therein, may may assist in filling out the content of the duty to act in good faith, and thereby be a road to precontractual liability under the CISG.

First of all, the CISG has a limited scope. UPICC, PECL and TLP have a wider scope and may also apply to issues such as validity. 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.[221] UPICC, PECL or TLP may not be used as gap-filler, if an issue is outside the scope of the CISG. There simply is no gap to fill.

If the adjudicator has concluded that there is a gap to fill, it must be filled by underlying principles, or subsequently otherwise applicable law. There does not appear to be a common domestic core of the concept 'good faith'.[222] 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 miss the obligation in Art. 7(1) to interpret the CISG having regard to its international character and the need to promote uniformity.[223] The adjudicator must therefore thoroughly search for underlying principles to fill the gap, or rather fill out the content of 'good faith', rather than resorting to the possibly diverging domestic laws.[224] Only such approach will properly have regard for the

[220] Felemegas, *International Approach*, p. 23
[221] Spagnolo, *Pandora's Box*, pp. 305-306
[222] Neumann, *Roots and Fruits*, pp. 68-69
[223] Viscasillas, *UPICC and PECL*, p. 293
[224] Felemegas, *International Approach*, pp. 37-38

international character of the CISG and promote uniformity.[225] Whether UPICC, PECL and TLP generally can be considered an expression of underlying principles of the CISG, and to what extent they can be used as gap-fillers, is highly debated.[226]

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 instruments with reference to autonomous and internationally uniform principles, an approach expressed in Art. 7 CISG.[227] Such instruments must include the CISG.[228] 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*".[229] 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*".[230]

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.[231] Also in case law it seems that much more attention is given to UPICC than PECL.[232] Even less attention is given to TLP.[233]

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.[234]

Other scholars, on the contrary, 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.[235] 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 point 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.[236] It is argued that the search for general principles of the CISG should not be limited to those which can be derived from the CISG itself,

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[225] *Id.*, pp. 35, 38
[226] Regarding UPICC and PECL see Viscasillas, *UPICC and PECL*, p. 288; Regarding UPICC, see Bonell, *UPICC*, pp. 32-33; Bonell, *Restatement*, pp. 232-233
[227] UPICC, pp. 4-5, Preamble, comment 5
[228] Viscasillas, *UPICC and PECL*, p. 289
[229] *Id.*
[230] *Id.,* p. 301, note 43; Berger, *Lex Mercatoria*, p. 91
[231] Viscasillas, *UPICC and PECL*, p. 296
[232] Bonell, *Restatement*, pp. 354-356
[233] See for instance Viscasillas, *UPICC and PECL* merely mentioning TLP in a footnote, see p. 301, note 43
[234] Andersen et al., *Practitioner's Guide*, pp. 89-90; Bonell, *Restatement*, p. 232; Bonell, *UPICC*, pp. 32-33; Huber/Mullis, *CISG*, pp. 35-36; Viscasillas, *UPICC and PECL*, p. 296
[235] Bonell, *Restatement*, p. 233; Bonell, *UPICC*, p. 33; Gil-Wallin, *Liability,* p. 15; Viscasillas, *UPICC and PECL*, pp. 296-297
[236] Felemegas, *International Approach*, p. 33; Salama, *Pragmatic Responses*, p. 243

due to the need to have regard for its international character in accordance with Art. 7(1) CISG.[237]

As a position in between these two extremes, 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[238], such as good faith.[239] These instruments might be useful and could be applied to support the CISG, but not to add additional features to it.[240] 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.[241] 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.[242]

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':

UPICC Art. 2.1.15 reads:
"(1) A party is free to negotiate and is not liable for failure to reach an agreement.
(2) However, a party who negotiates or breaks off negotiations in bad faith is liable for the losses caused to the other party.
(3) It is bad faith, in particular, for a party to enter into or continue negotiations when intending not to reach an agreement with the other party."

PECL Art. 2:301 reads:
"(1) A party is free to negotiate and is not liable for failure to reach an agreement.
(2) However, a party who has negotiated or broken off negotiations contrary to good faith and fair dealing is liable for the losses caused to the other party.
(3) It is contrary to good faith and fair dealing, in particular, for a party to enter into or continue negotiations with no real intention of reaching an agreement with the other party."

TLP no. IV.8.1 reads:

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[237] Gil-Wallin, *Liability*, pp. 15-16; Salama, *Pragmatic Responses*, p. 242
[238] Felemegas, *International Approach*, pp. 33-34; Bonell, *Restatement*, p. 233; Bonell, *UPICC*, p. 33; Kronke, *UPICC*, pp. 457-458
[239] Huber/Mullis, *CISG*, p. 36; Schlechtriem/Schwenzer, *Commentary*, 2nd edition, pp. 109-110; Viscasillas, *UPICC and PECL*, pp. 297-298, with note 34
[240] Andersen et al., *Practitioner's Guide*, p. 90; Schlechtriem/Schwenzer, *Commentary*, pp. 137-138
[241] Bonell, *Restatement*, pp. 233, 317-237; Bonell, *UPICC*, p. 33; Felemegas, *International Approach*, pp. 33-34, 37; Kronke, *UPICC*, p. 458
[242] Bonell, *UPICC*, pp. 33-34

"(a) A party is free to negotiate a contract and is not liable for failure to reach agreement with the other side.
(b) A party who breaks off contract-negotiations in bad faith is liable for the losses caused to the other party ("culpa in contrahendo").
(c) It is bad faith, in particular, for a party to enter into or continue negotiations when intending not to reach an agreement with the other party while leaving the other party under the justified assumption that a contract would be concluded. The same applies if a party insists on contract terms so clearly unreasonable that they could not have been advanced with any expectation of acceptance, provided that there is some demonstrable advantage to be gained for that party by avoiding the contemplated transaction."

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 instrument and the CISG,[243] it must be assessed whether the above quoted provisions 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.[244]

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.[245] 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.[246] 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 the above quoted provisions 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.

[243] Regarding UPICC see Bonell, *Restatement*, pp. 233, 317-237; Bonell, *UPICC*, p. 33; Kronke, *UPICC*, p. 458. Regarding UPICC and PECL see Felemegas, *International Approach*, pp. 33-34, 37
[244] Regarding UPICC 2.1.15 see Bonell, *Restatement*, p. 322
[245] Felemegas, *International Approach*, p. 32. The metaphor belongs to Albert H. Kritzer, see p. 32, note 132
[246] Felemegas, *International Approach*, pp. 32-33

UPICC has been referred to as a private codification or 'restatement' of international contract law,[247] 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 the solution the drafters found to be the best, they instead become a 'prestatement'.[248] The adjudicator must pay attention to which provisions are merely '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',[249] 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*".[250] 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.[251] The precontractual liability described in UPICC, PECL and TLP resembles the civil law approach rather than the common law approach.[252] Even if the CISG may evolve, it should only do so as far as to resemble an international common core.[253] 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.[254] The approach adopted by most civil law systems is the doctrine of 'culpa in contrahendo'[255] which has been generally defined as at 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.*"[256] Such a general duty to act in good faith during negotiations has not been recognised as a basis for imposing liability in common law systems.[257] 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

[247] Brödermann, *UPICC*, p. 3
[248] Bonell, *UPICC*, p. 22; Kronke, *UPICC*, pp. 458-459
[249] Regarding UPICC Art. 2.1.15 see Bonell, *UPICC*, p. 22 and Kronke, *UPICC*, p. 456, pp.458-459, with note 21
[250] Regarding UPICC Art. 1.7 and 2.1.15(2) see Kronke, *UPICC*, p. 456
[251] Regarding UPICC see Bonell, *UPICC*, p. 22
[252] Regarding UPICC see *Id.;* Goderre, *Negotiations*, p. 274; Regarding UPICC and PECL see Spagnolo, *Pandora's Box*, p. 304
[253] Kritzer, *Pre-Contract-Formation*
[254] Goderre, *Negotiations*, p. 267; Novoa, *Culpa in Contrahendo*, p. 592
[255] Novoa, *Culpa in Contrahendo*, pp. 584-585
[256] Kessler/Fine, *Culpa in Contrahendo,* p. 401
[257] Farnsworth, *Precontractual Liability* p. 222; Goderre, *Negotiations*, p. 270; Spagnolo, *Pandora's Box*, p. 268

enrichment, which involves restitution of benefits gained during the negotiations.[258] Common for both civil law and common law systems is, however, that no liability is imposed for merely breaking off negotiations.[259] Due to a necessary delimitation of the subject it is not the purpose of this thesis 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 thesis 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 CISG 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,[260] and therefore it may be reasonable to apply the above quoted soft law instruments 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 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.

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 for the mere failure to reach an agreement. This is in line with a general principle of freedom of contract.[261] This freedom is however not unlimited, since it must not conflict with good faith.[262] What can at least be considered common in regard to the above cited provisions 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 is 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 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 will in particular

[258] Farnsworth, *Precontractual Liability*, p. 222; Goderre, *Negotiations*, p. 270; Novoa, *Culpa in Contrahendo*, p. 288, note 21; Regarding unjust enrichment and estoppel see Spagnolo, *Pandora's Box*, p. 268
[259] Schwenzer/Hachem/Kee, *Global Sales*, p. 280
[260] *Id.*, p. 278; Goderre, *Negotiations*, p. 266; Kessler/Fine, *Culpa in Contrahendo,* p. 401
[261] UPICC Art. 1.1, PECL Art. 1:102 and TLP No. IV.1.1
[262] 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

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.[263] 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.[264] 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. [265] 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 furthermore exemplifies that it is bad faith if a party insists on so clearly unreasonable terms so that a contract could not be expected to be concluded, in case that party gains an advantage from such behaviour.[266] 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 was imposed under the CISG, with or without the use of soft law instruments,[267] 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 thesis due to a necessary delimitation.

Besides Art. 7 CISG and a duty to observe good faith as a road to precontractual liability, other provisions in the CISG may also be possible roads.

5.2 Art. 8 CISG as a road to precontractual liability

Art. 8 CISG reads:

"*(1) For the purposes of this Convention statements made by and other conduct of a party are to be interpreted according to his intent where the other party knew or could not have been unaware what that intent was.*

[263] UPICC 2.1.15, comment 2, illustration 1
[264] *Id.*, comment 2
[265] *Id.*, comment 2, illustration 2 and 3
[266] TLP No. IV.8.1, comment 2 and 3 at https://www.trans-lex.org/939000
[267] 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/

(2) If the preceding paragraph is not applicable, statements made by and other conduct of a party are to be interpreted according to the -understanding that a reasonable person of the same kind as the other party would have had in the same circumstances.
(3) *In determining the intent of a party or the understanding a reasonable person would have had, due consideration is to be given to all relevant circumstances of the case including the negotiations, any practices which the parties have established between themselves, usages and any subsequent conduct of the parties.*"

It has been argued that Art. 8(3) CISG may be a basis for precontractual liability,[268] although this only seems briefly described in scholarly works. In determining the intent of a party due consideration must be given to the negotiations according to Art. 8(3), and this provision must be interpreted having regard for the need to promote the observance of good faith in accordance with Art. 7(1) CISG. It has been argued that "*Although the Convention does not expressly state that parties are bound to precontractual agreements, Article 8 may be interpreted as allowing the court to bind the parties based on their intent*".[269] This is argued with reference to the fact that U.S. courts have referred to the parties' intent in order to bind them to their preliminary agreement, when they have agreed on all issues requiring negotiations, using similar wording as appears from Art. 8 CISG.[270] The scholars expressing this view[271] is from the U.S. and may therefore be inclined to adopt the view taken by U.S. courts. When referring to court practice from one's own jurisdiction one must be careful as to not interpret the CISG according to domestic law, rather than to have regard for its international character, and thereby fall victim to the 'homeward trend'.

If the preliminary agreements are interpreted according to the intent of the parties and the parties intended to be bound by the preliminary agreement, and the courts on this basis bind the parties to this agreement, a contract is concluded. In this situation, the parties will be bound to the agreement, and in case of breach, will be able to claim remedies as provided for by the CISG, including specific performance and damages consisting of the expectation interest.[272] The question may be asked whether this can rightly be characterised as precontractual liability when a contract is concluded, rather than simply liability for breach of contract. This is doubtful. Art. 8(3) CISG may therefore not independently serve as a basis for precontractual liability under the CISG.[273]

In a slightly different manner, it has been argued that Art. 8 CISG is relevant in regard to precontractual liability under the CISG. Art. 8 may not in itself provide the basis for precontractual liability, but it has been argued that Art. 8 in conjunction with Art. 7 CISG provides the basis for such.[274] Art. 8 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 in the precontractual phase may lead the other party to rely on such and to assume a

[268] Goderre, *Negotiations*, p. 280; Klein/Bachechi, *Precontractual Liability*, p. 22
[269] Klein/Bachechi, *Precontractual Liability*, p. 22
[270] *Id.,* pp. 9, 22; Goderre, *Negotiations*, p. 280
[271] Carla Bachechi, Diane Goderre, John Klein
[272] See generally Art. 45 and 61 CISG, for specific performance see Art. 46 and 62 CISG and for damages see Art. 74-77 CISG
[273] Schlechtriem/Schwenzer, *Commentary*, p. 225
[274] Gil-Wallin, *Liability*, pp. 16-17

serious intent to reach an agreement, and consequently suffer a loss due to such reliance when the other party withdraws from the negotiations.[275] Art. 8 is therefore a necessary part of the equation in determining whether a party may be held liable under the CISG. This way of utilising Art. 8 in regard to precontractual liability seems more proper and in line with the method provided for in Art. 7(1).

5.3 Art. 16(2) CISG as a road to precontractual liability

Art. 16(2) CISG reads:

"*However, an offer cannot be revoked:*
(a) if it indicates, whether by stating a fixed time for acceptance or otherwise, that it is irrevocable; or
(b) if it was reasonable for the offeree to rely on the offer as being irrevocable and the offeree has acted in reliance on the offer."

Some authors have relied upon Art. 16(2) as a basis for imposing precontractual liability.[276] The CISG governs the issue of whether a revocation of an offer is effective, and thereby whether the offer is rightfully revoked according to Art. 16. As a remedy for wrongful revocation the CISG provides as the only remedy that the offeree can hold the offer open and accept it, since it has not effectively been revoked. The offeree may claim damages or other available remedies, if the offeror then breaches the contract. He can also immediately treat the wrongful revocation of the offer as a refusal to perform that would result in a fundamental breach, declare the contract avoided in accordance with Art. 72 CISG and claim damages in accordance with Art. 74-77 CISG,[277] and restitution for what has already been supplied in accordance with Art. 81(2) CISG, as well as to be accounted for benefits the other party has received in accordance with Art. 84 CISG. However, this could arguably be impractical under certain circumstances. For instance, if 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 he would able to sell it at the offered price. If the offeror then revokes the offer after two weeks, the offeree would already have held expenses, but would not yet be ready to accept the offer since the designing and examination process is not yet completed.[278] An acceptance of the offer would require further expenses for the offeree to bear, since he would have to finish the designing and examination process, before knowing whether he would be able to accept the offer at the offered price. These expenses may or may not be compensated after having pursued the damage claim through a lawsuit.[279] The offeree would then be in the unfortunate situation of having to choose between stopping the process and bearing the already held expenses itself, 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 in accordance with Art. 7(2) CISG by giving the offeree the remedy of claiming damages

[275] *Id.*, pp. 16-18
[276] *Id.*, pp. 19-20; Goderre, *Negotiations*, p. 281; Honnold, *Uniform law*, pp. 167-168
[277] Schlechtriem/Schwenzer, *Commentary*, pp. 326-327
[278] This example is constructed by Honnold in Honnold, *Uniform Law*, p. 167
[279] Honnold, *Uniform law*, p. 167

directly for wrongful revocation of the offer.[280] 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 is concluded.[281]

It may be argued, that everything that happens prior to the conclusion of a contract is not really to be considered within the scope of the CISG[282] leaving the remedies on the basis of precontractual liability, also on the basis of Art. 16(2) CISG for wrongful revocation, outside the scope of the CISG. However, offer and acceptance is governed by Part II of the CISG, and precontractual liability for wrongful revocation of an offer is therefore most likely to be considered within the scope of the CISG. What would traditionally be characterised as precontractual liability is, however, related to the prior negotiations, not necessarily involving offer and acceptance.[283] The precontractual liability that may be provided for under Art. 16(2) CISG as described here, is therefore one of much more limited reach, than if precontractual liability would be provided for under Art. 7 CISG and a duty to act in good faith during the negotiations as described in section 5.1.

It may also further be argued that the precontractual liability that may be derived from Art. 16(2) reaches further than merely being a liability for wrongful revocation of an offer. It may be argued that this protection might also be extended to precontractual agreements and the withdrawal from such, due to the similarities between these situations. If a party acts in reliance on negotiations and will suffer a loss if the other party withdraws from the negotiations, 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.[284] The precontractual liability that may then be provided for due to an analogical interpretation of Art. 16(2) will therefore be broader in scope than as described above and may resemble precontractual liability as may be provided for under Art. 7 CISG and a duty to act in good faith during the negotiations as described in section 5.1. It may, however, then be doubtful whether it would be considered an issue within the scope of the CISG.

5.4 Art. 81(2) and 84 CISG as a road to precontractual liability

Art. 81(2) CISG reads in its relevant parts:

"*(2) A party who has performed the contract either wholly or in part may claim restitution from the other party of whatever the first party has supplied or paid under the contract.*"

Art. 81(2) CISG provides for restitution in case of avoidance of the contract when a party has already performed the contract. Art. 81 presupposes that a contract has been concluded and thereafter avoided. It has, however, been argued that if a contract has been created 'implied-in-law' a party may rely upon Art. 81 to claim restitution when the other party has obtained a benefit, since it would be considered within the scope of the CISG when a contract is created

[280] *Id.*, p. 168
[281] *Id.*, p. 168, note 22
[282] Spagnolo, *Pandora's Box*, p. 303 here referring to Schlechtriem in *Workshop*, p. 230
[283] Kritzer, *Pre-Contract Formation*
[284] Gil-Wallin, *Liability*, pp. 19-20

'implied-in-law'.[285] In the scholarly work expressing this argument, the argument is one among others and is only given very little attention, and there does not seem to be other scholarly works addressing this specific argument in favour of precontractual liability. Moreover, the article is from 1997 and if the argument was persuasive one would expect it to be noticed by other scholars and courts. However, since the argument has been put forward, it deserves to be put to the test. The term 'implied-in-law' appears to be derived from U.S. law and does not appear under the CISG. An 'implied-in-law' contract in U.S. law is created by law in the absence of an agreement between the parties to prevent unjust enrichment and is constructed for the purpose of remedy only.[286] If the negotiations are to be treated as having led to a concluded contract, it would seem logical to consider the issue within the scope of the CISG. However, an 'implied-in-law' contract is a term derived from domestic law and applying such domestic term to the CISG, assuming such term would be applicable under the CISG as well, would not be a correct method to apply. This would be an expression of the 'homeward trend' and should be avoided. Instead, determining whether Art. 81 CISG is applicable must be assessed in accordance with Art. 7 CISG.

Part II of the CISG provides the rules on formation of contracts and it is according to these provisions, that it is to be determined whether a contract has been concluded. The CISG has no provisions providing for a contract being considered concluded on the basis of the theory of contracts 'implied-in-law'. If a contract is concluded on the basis of Part II CISG, a party has the right to claim the available remedies under the CISG in case of breach. In that case precontractual liability will not become relevant.

On the other hand, if no contract has been concluded, the provisions in the CISG may be applicable by virtue of an analogical interpretation in accordance with Art. 7(1) or gap-filling by Art. 7(2), but only if the issue is to be considered within the scope of the CISG. Art. 81(2) CISG provides for restitution of goods or payment in the event of avoidance. Art. 84 CISG additionally provides that the seller is bound to pay interest on the purchase sum and that the buyer must account the seller for all benefits derived from the goods. The question may therefore be asked whether Art. 81(2) and Art. 84 may be applied by analogy in accordance with Art. 7(1) CISG when a party withdraws from negotiations, and/or whether Art. 84 establishes a general principle of restitution for unjust enrichment under the CISG to be used for gap-filling. Art. 81(2) and 84 does not require acts in bad faith or contrary to good faith, so if this may be an alternative road to precontractual liability, it would potentially cover situations that would not be encompassed by the road provided for by Art. 7 CISG and the notion of good faith.

In determining whether Art. 81(2) and 84 is applicable to the matter, it must be determined whether the matter is governed by the CISG. It must therefore be determined whether the precontractual phase is governed in the absence of offer and acceptance. This determination has largely been discussed at section 5.1.3, and the considerations discussed there will generally be applicable also in regard to this matter. However, with regard to whether a duty to act in good faith could be extended to the precontractual phase, the delegates did in fact discuss the issue and rejected any proposals to expressly include such a provision. With regard to restitution of goods and benefits received in the precontractual phase, this was not an issue discussed by the drafters. It could therefore be argued that, since the matter was not discussed

[285] Goderre, *Negotiations*, p. 281
[286] https://www.law.cornell.edu/wex/quasi_contract_%28or_quasi-contract%29

and deliberately left out, the legislative history does not necessarily support the exclusion of the issue from the scope. The matter may have been overlooked and it may therefore be argued that the matter could be within the scope of the CISG. On the other hand it can be argued, that seeing that the drafters could not agree to include precontractual liability based on a requirement to act in good faith, they would presumably have been less inclined to include a claim of restitution in the precontractual phase in cases where the parties may in fact have acted in good faith. Regardless, it is questionable whether the precontractual phase, prior to offer and acceptance, is within the scope of the CISG.

If it is concluded that the matter is within the scope of the CISG, it would seem a convincing argument to let Art. 81(2) and 84 apply either by analogy in accordance with Art. 7(1) or to conclude that there is a gap to be filled in accordance with Art. 7(2). It has been asserted by at least one court decision that Art 84(2) establishes a general principle of restitution of unjust enrichment in case of avoidance,[287] and it may therefore be argued that unjust enrichment is a general principle, beyond merely avoidance, derived from Art. 84 to be used for gap-filling.

The question of whether Art. 81 and 84 may be a basis for precontractual liability, will most likely be determined by whether or not the issue falls within the scope of the CISG, which seems doubtful. There does not seem to be scholarly works, besides the above described, that address this road to precontractual liability, nor does there seem to be case law supporting this road. It may very well be, that this is because most scholars and courts will, without further consideration, find the matter to be outside the scope of the CISG.

[287] Case Law Digest, p. 391, with note 35 and the case Greece, 2009, Multi-Member Court of First Instance of Athens, Decision 4505/2009 (*Bullet-proof vest case*), English editorial analysis, section 2.2.16

6. Calculation of damages under the CISG in case of precontractual liability, provided that such liability falls within the scope of the CISG

The calculation of damages due to precontractual liability under the CISG has not been given much attention in the scholarly works, most likely because many scholars find precontractual liability to be outside the scope of the CISG, hence calculation of damages under the CISG becomes superfluous. Furthermore, no case law seems to have imposed liability under the CISG,[288] why the courts have not had an opportunity to calculate such damages. A little has however been written, as well as it will be possible to draw parallels to the existing provisions in the CISG, as well as domestic law or international soft law instruments.

To claim damages for breach of contract under the CISG, there must naturally have been an actual loss and the loss suffered must be a consequence of the breach, so-called causation in fact.[289] This would naturally equally apply, if precontractual liability were to be imposed under the CISG, and there must therefore equally have been suffered an actual loss and there must be causation between that loss and the acts or negligence committed by the other party during the negotiations.

There is no specific provision in the CISG that provides for damages in case of precontractual liability, and the provisions in the CISG all refer to damages for failure to perform an obligation arising out of a contract. The remedies provided for in the CISG Part III, such as damages under Art. 74 CISG, requires a 'breach of contract'. Such provisions would therefore appear to not be applicable when no contract is concluded.[290] On the other hand, Art. 7(1) leaves room for an interpretation by analogy and Art. 7(2) provides the necessary authority to fill internal gaps. A remedy on the basis of precontractual liability must therefore be derived either through interpretation or gap-filling. Furthermore, Art. 45(1)(b) and 61(1)(b) CISG provides for damages according to Art. 74-77 CISG if the other party fails to perform any of its obligations under the contract 'or this Convention'. If precontractual liability can be imposed under the CISG this arguably provides a strong argument for the use for Art. 74-77, not only in regard to breach of contract, but also in case of breach of other obligations under the CISG, such as precontractual duties.[291]

Art. 74 CISG provides for damages for breach of contract equal to the 'loss', including 'loss of profit', suffered by the other party 'as a consequence of the breach'. The purpose of Art. 74 is to compensate the disappointed party by putting it in the position it would have been in, had the contract been performed as agreed upon. In case of violation of precontractual duties, the disappointed party would usually be compensated by being put in the position it would have been in, had the other party not behaved contrary to the required standards.[292] It may be

[288] 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/
[289] Gil-Wallin, *Liability*, pp. 17-18; Lookofsky, *CISG*, p. 139, with note 170
[290] Kritzer, *Pre-contract Formation*
[291] *Id.*, note 24; Rosenberg, *Uniformity*, pp. 455-456
[292] Kritzer, *Pre-contract Formation*

argued, that if applied by analogy, Art. 74 CISG would be sufficiently flexible to also cover losses for precontractual liability.[293] It has been argued that the 'loss' that may be compensated in case of precontractual liability is the expenses that the injured party had in prospect of the expected contract, and that the 'loss of profit' is the loss suffered for the lost opportunity of contracting with others. Also it is argued that the requirement that the loss must be 'as a consequence of' provides only for damages for expenses when they are justified, and only for the loss of profit in cases where it was justifiable not to pursue those other opportunities in light of the current negotiations.[294]

It may also be argued that there is an underlying principle to be derived from Art. 74 CISG providing for 'full compensation'. This is supported by the fact that some domestic court decisions have stated that the CISG is based on a principle of full compensation for losses for breach of contract.[295] Such principle may therefore also be used to fill the gap consisting of the lack of provisions providing for damages in case of precontractual liability, presumably by putting the party in the position it would have been in, had the other party not behaved contrary to the required standards.

This may be supported by several factors. First, during the legislative history of the CISG, when an express provision regarding precontractual liability was suggested, damages for such was also discussed. The two suggestions to include precontractual liability in the CISG both solely provided for recovery of expenses, but not for loss of profit, by providing for compensation for "*the costs borne by it*"[296] or "*his expenses*".[297] It was however also suggested, during the discussions of the first of these proposals, to include other damages such as loss of profit,[298] however both of the written proposals suggested otherwise.

Furthermore, in domestic court practice there seem to be an international tendency that precontractual liability will only result in damages equal to the 'negative contract interest', including the restitution interest and reliance interest, rather than a 'positive fulfilment interest', including the expectation interest.[299] As described in section 5.1.4, for instance U.S. courts have recognised the theory of misrepresentation, promissory estoppel, and unjust enrichment.[300] In such situations the courts have limited damages to the restitution interest, by returning the unjustly received benefit to the disappointed party, or the reliance interest, by putting the disappointed party in the position in which it would have been in, had it not relied on the promise

[293] *Id.*
[294] *Id.,* citing Michael Joachim Bonell, "Formation of Contracts and Precontractual Liability under the Vienna Convention on International Sale of Goods", *Formation of contracts an precontractual liability* (ICC Publishing Pub. No. 440/9 (1990), pp. 167-171
[295] Case Law Digest, p. 44, with note 67
[296] UNCITRAL YB IX (1978), A/CN.9/SER.A/1978, p. 66, para. 70 reprinted in Honnold, *Documentary History*, p. 298
[297] Spagnolo, *Pandora's Box*, p. 272
[298] UNCITRAL YB IX (1978), A/CN.9/SER.A/1978, p. 67, para. 84 reprinted in Honnold, *Documentary History*, p. 299
[299] Schwenzer/Hachem/Kee, *Global Sales*, p. 284-287. For a description of those terms in general see Zeller, *Damages*, pp. 46-49
[300] Farnsworth, *Precontractual Liability*, p. 222; Goderre, *Negotiations*, p. 270; Novoa, *Culpa in Contrahendo*, p. 588, note 21; Regarding unjust enrichment and estoppel see Spagnolo, *Pandora's Box*, p. 268

or the misrepresentation. The expectation interest is on the other hand not awarded.[301] Under the doctrine of 'culpa in contrahendo', which is recognised in many civil law systems,[302] the damages that may be awarded in case of precontractual liability is also the 'reliance damages'.[303] Furthermore, according to UPICC Art. 2.1.15 only "*losses caused to the other party*" is compensated. Such loss is limited to the expenses incurred in the negotiations and the lost opportunity to conclude another contract, being the reliance or negative interest, and does not include the profit obtained had the original contract been concluded, being the expectation or positive interest.[304]

When both domestic case law in common law and civil law jurisdictions, international scholarly works and international 'restatements' such as UPICC all points to the same result regarding damages for precontractual liability, it must be safe to conclude, that if precontractual liability may be imposed under the CISG, the damages will consist of the restitution interest and reliance interest, but not the expectation interest.

It has been argued that the principle of mitigation of loss in Art. 77 CISG would equally be applicable in case of damage claims on the basis of precontractual liability.[305] Losses recoverable under Art. 74 are limited by the duty to mitigate losses in Art. 77.[306] According to Art. 77 the party who relies on a breach of contract must take reasonable measures to mitigate the loss, and failing to do so, the party in breach may claim a reduction in the damages corresponding to what could have been mitigated. Even though Art. 77 concerns damage claims in case of breach of contract, it can be argued that if precontractual liability is considered within the scope of the CISG, the duty to mitigate losses in Art. 77 must be applied by analogy. Loss that could reasonably have been mitigated in relation to precontractual liability would for instance be future expenses that could have been limited or avoided, or other opportunities that could have been pursued, as soon as the disappointed party had reason to believe that the other party may not be willing to conclude the contract.[307]

It has similarly been argued that the requirement in Art. 74, that the claim for damages may not exceed the loss which the party in breach foresaw or ought to have foreseen as a consequence of the breach at the time of the conclusion of the contract, would be applicable to damage claims for precontractual liability as well.[308] Foreseeability is assessed on the basis of the information available to the party in breach at the time of the conclusion of the contract.[309] Since no contract has been concluded in case of precontractual liability, the relevant time for determining whether the damages were foreseeable must be found by analogy. The most logical solution would arguably be the point in time when it is justified for the disappointed party to rely on a positive outcome of the negotiations.[310]

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[301] Goderre, *Negotiations*, pp. 270-271; Farnsworth, *Precontractual Liability*, pp. 223-224
[302] Novoa, *Culpa in Contrahendo*, p. 585
[303] Schwenzer/Hachem/Kee, *Global Sales*, pp. 285-286
[304] UPICC, p. 60, Art. 2.1.15, comment 2
[305] Kritzer, *Pre-contract Formation*
[306] Lookofsky, *CISG*, p. 166
[307] Kritzer, *Pre-contract Formation*
[308] *Id.*
[309] Lookofsky, *CISG*, p. 140
[310] Kritzer, *Pre-contract Formation*

As mentioned in section 4.1, Contracting States may make a reservation declaring not be bound by either Part II or Part III of the CISG, and the provisions providing for damages are located in Part III. When precontractual liability under the CISG has been derived from Part II, which is the case if it has been derived from Art. 7(1), Art. 7(2), Art. 8(3) or Art. 16(2) CISG, the question may arise if remedies may be derived from an analogical application of provisions in Part III or gap-filling by the use of general principles derived from Part III, if the private international law rules points a Contracting State with an Art. 92 reservation declaring not to be bound by Part. III.[311] In such situations the adjudicator can arguably only apply an interpretation of the provisions in Part II and gap-fill with principles derived from Part II to determine the available remedies, and in the absence of such the question of damages must be settled by the otherwise applicable law.[312] As of May 2019 no Contracting States have such reservation,[313] why this question is currently merely theoretical.

As described in section 5.4, in case of avoidance of a contract under the CISG, a party may claim restitution of what has already been supplied according to Art. 81(2) CISG, supplemented by interest on an amount of money paid or benefits which the other party has derived from goods received according to 84 CISG. It may therefore be argued that if a party has received goods during the negotiations, the other party may be claim those returned in case of withdrawal from the negotiations, as well as be accounted for benefits derived from such goods, by virtue of an analogical application of Art. 81(2) and 84 or by gap-filling with a general principle of 'restitution of unjust enrichment'.

[311] *Id.*, note 15
[312] *Id.*
[313] https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=X-10&chapter=10&lang=en

7. Conclusion

In the introduction the question 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? However, when answering this question it becomes clear that it must be taken into consideration that the concept of uniformity has two aspects, and promoting formal uniformity might entail the risk of decreasing substantive uniformity.

The question of whether precontractual liability may be imposed under the CISG is not to be answered by a simple yes or no. There are different possible roads to such liability, and each must be assessed individually 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 possible road to precontractual liability is through an interpretation of the notion of good faith as expressed in Art 7(1) as imposing a duty not only on the adjudicator, but on the parties as well, or by considering good faith to be an underlying principle of the CISG in accordance with Art. 7(2). This possible road to precontractual liability will naturally require that such a duty may also be extended to the precontractual phase, and one of the main obstacles in this regard is that the phase prior to offer and acceptance is not clearly governed by the CISG. Another obstacle is that the drafters considered including express provisions regarding a duty on the parties to act in good faith, as well as express provisions providing for precontractual liability, but rejected such. This indicates a deliberate exclusion from the scope of the CISG. To overcome such obstacle, one must allow the CISG to evolve and expand in scope to keep up with the international development in trade and sales law.

Another road to precontractual liability under the CISG, that has been considered, is Art 8 CISG. Art. 8 may not independently serve as a basis for precontractual liability, but must instead be utilised to interpret the statements and conduct of a party. It is therefore, although not an independent source, a necessary part of the equation in determining whether a party may be held liable under the CISG.

Another road to precontractual liability is Art. 16(2) CISG. Art 16 (2) provides quite a convincing argument in favor of precontractual liability, by providing for precontractual damages in cases of revocation of an irrevocable offer, when it is impractical to be reimbursed by accepting the offer and then claim damages. Such road has quite a limited scope compared to other possible roads, since it requires an offer. It nonetheless provides a strong case, since such a situation will be within the scope of the CISG. Whether it would also be within the scope of the CISG, if extended to withdrawal from the mere negotiations, is doubtful.

Another road to precontractual liability under the CISG is Art 81(2) and 84 CISG and a principle of restitution of unjust enrichment. It has been argued that a party may claim restitution on the basis of an ‘implied-in-law’ contract, however such term is not known to the CISG. On the other hand, if the precontractual phase is within the scope of the CISG, Art. 81(2) and Art. 84 may be applied by analogy, or by gap-filling with a principle of restitution of unjust enrichment, to provide for restitution of what has been conferred to the other party during the negotiations as

well as benefits received. This could provide a possible road to precontractual liability not requiring acts in bad faith or contrary to good faith, but it is doubtful whether this situation would be within the scope of the CISG.

Common for all the possible roads to precontractual liability under the CISG, aside from possibly the restitution of unjust enrichment, 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. The further details of such liability is difficult to determine, and since no case law exists to fill in the blanks, a definitive answer does not exist. To promote uniformity in the application of the CISG, adjudicators must take the same sources into consideration, and in this regard UPICC, PECL or TLP may 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.

The main obstacle when determining whether precontractual liability may be imposed under the CISG is whether it is within its scope. This is doubtful, except for the situation regarding Art. 16(2) where it would be impractical to accept an irrevocable offer. Whether precontractual liability will be considered within the scope of the CISG 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. 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 evolve to encompass precontractual liability. Letting the CISG encompass such liability would put the substantive uniformity of the CISG at risk due to the uncertainty of the content of such. Only a liability on the basis of Art. 16(2), in cases of revocation of an irrevocable offer, should be allowed, since such a situation is within the scope of the CISG. If, despite this, adjudicators should impose precontractual liability under the CISG on other grounds, they should only do so to the extent an international common core is discernible. As an international common core might be difficult to discern, international soft law instruments might be helpful to ensure uniformity in the application of the CISG.

If precontractual liability may be imposed under the CISG, a party may claim damages, caused by the acts or negligence committed by the other party, consisting of the restitution interest and reliance interest, but not the expectation interest, according to art. 74 analogically or by gap-filling with a general principle of ‘full compensation’. A party must however only claim such damages to the extent that he could not reasonably have been expected to mitigate such loss according to Art. 77 analogically. A party may furthermore only claim damages which the other party foresaw or ought to have foreseen at the point in time when it was justified for the party to rely on a positive outcome of the negotiations according to Art. 74 analogically. A party may further claim restitution of goods and benefits which has been conferred to the other party during the negotiations according to Art. 81(2) and 84 CISG analogically or by gap-filling with a general principle of ‘restitution of unjust enrichment’.

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8.2 Table of Case Law

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Germany, 4 March 1994	Appellate Court Frankfurt, case no. 10 U 80/93	German decision available at: http://www.unilex.info/cisg/case/205 English translation available at: http://cisgw3.law.pace.edu/cases/940304g1.htm
Greece, 2009	Multi-Member Court of First Instance of Athens, Decision 4505/2009 (*Bullet-proof vest case*)	English editorial analysis available at: http://cisgw3.law.pace.edu/cases/094505gr.html
United States, 10 May 2002	U.S. District Court for the Southern District of New York [federal court of 1st instance], Geneva Pharmaceuticals Technology Corp. v. Barr Laboratories, Inc. et al. / Apothecon, Inc. v. Barr Laboratories, Inc. et al.	Available at http://www.cisg.law.pace.edu/cisg/wais/db/cases2/020510u1.html

8.3 Table of Statutes and Soft Law Instruments

CISG	United Nations Convention on Contracts for the International Sale of Goods (Vienna, 1980)
PECL	The Principles of European Contract Law, 1999, by the Commission on European Contract Law, published in Ole Lando & Hugh Beale eds., Principles of European Contract Law: Parts I and II, Kluwer Law International (2000)
TransLex	Trans-Lex Principles as presented on Trans-Lex.org
UPICC	UNIDROIT Principles of International Commercial Contracts 2016, International Institute for the Unification of Private Law (UNIDROIT), Rome, 2016

8.4 Webpages

CISG Case Law Databases:

CISG-online: http://www.cisg-online.ch/
CLOUT Database: https://www.uncitral.org/clout/
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UNILEX: http://www.unilex.info/

Other webpages referred to:

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