CHAPTER 3
PRECONTRACTUAL LIABILITY IN THE CIVIL LAW
Ádám Fuglinszky

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Part I: Precontractual Conduct and Liability

A. Topics Covered

The first part of Chapter 3 covers precontractual liability as it is known and provided
for in the respective legal systems based either on statutory law or on case law that
relies on general principles and some codified institutions other than the explicit culpa
in contrahendo (such as abuse of rights, venire contra factum proprium, torts, etc.).

In Section B. (Introductory Note) – among the fundamental and structural issues of
precontractual liability – the need for and the justification of precontractual liability is
presented first (B.I.) based on the protracted nature of negotiations and on the fact that
both parties give each other the increasing possibility of affecting the other’s rights and
interests in the course of negotiations. The two fundamental principles, contractual free-
dom and (negotiating in) good faith are tackled next (B.II., → mn. 9 f.): meanwhile, the
legislator or the judge keeps trying to find the right balance, i.e. the freedom to contract
bounded by good faith. The evaluation of precontractual liability follows, including a
brief analysis on the differences between the Civil Law and Common Law perspective
(B.III., → mn. 11 ff.). Attention is given next to the evergreen classification of precon-
tractual liability as underlying contracts or torts or being a sui generis liability regime
(B.IV., → mn. 19 ff.); followed by the enumeration of didactic and regulatory approaches
in jurisprudence and practice (scope of protection; particular precontractual duties; pro-

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visions – remedies in particular – adjusted to the faith of the negotiated contract as non-concluded, concluded but invalid, concluded but disadvantageous) as reflected in the respective legal systems and soft laws (B.V., → mn. 24 ff.).

Section E. (Sampling of Laws) is not restricted to the mere presentation of the texts but also short explanations are added at a general level regarding the structures and characteristic features of the statutory (or soft law) regimes in order to put the laws into context. The features discussed here are not repeated subsequently in the commentaries section.

The Commentary section (E) contains analyses of the best-known and prevalent groups of cases that can trigger precontractual liability. The analysis starts with the relationship of CISG with precontractual liability including references to those Articles that supersede the culpa in contrahendo liability of the applicable domestic law (F.I.). The particular precontractual duties and their breach are next elaborated on (F.II., → mn. 88 ff.), with detailed analyses on the breaking off negotiations, information duties and confidentiality. Within each subsection, soft law- and country-specific issues follow the presentations of general findings. The Commentary section ends with the remedies available, in general terms and with special regard to damages (F.III., → mn. 121 ff.).

Finally, illustrations contribute to a deeper and practice-oriented understanding of the subject matter (G).

B. Introductory Note

I. Contractual Negotiations and the ‘Grey Area’ towards Final Agreement

Contractual negotiations and the formation of the contract can constitute a ‘more or less lengthy process in the course of which both parties give each other the possibility of affecting the other’s rights and interests’. Though this may less apply to staples and commodities, it definitely does to large-scale or complex transactions, where negotiations ‘may take place in stages’ moving gradually towards a formal agreement and parties ‘becoming increasingly committed in terms of time and expense’. Therefore, ‘agreement is not often given at a single, sudden moment in time’; it is frequently reached ‘in a piecemeal fashion after several rounds with a succession of drafts’. The ‘magic moment’ or ‘on-off view’ of offer and acceptance is replaced by the disappearance of the sharp borderline between the precontractual and contractual stage, by the integration of the precontractual and contractual stage: where the final phase of negotiations merges into the contract.

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6 Nedzel, 101.
The procedure starts with obtaining and exchanging information, and identifying the needs and interests of the parties, and their similarities and differences regarding expectations from the contract to be concluded. The parties try to test the feasibility and forecast the profitability of the anticipated transaction (and to hold out if the circumstances, or their changes make it unprofitable). After having found compromises on the essential points, refining the contract terms follows. The documents drafted during this process are far more than an offer (counter-offer) and acceptance.

When parties enter into contractual negotiations, they are in a ‘grey area’ of the agreement ‘in the making’, which means that they are no longer strangers underlying the expectation of *neminem laedere* only, nor are they yet parties to a contract that would trigger ‘all the rights and duties envisaged for contractual relationships’. The intensity of their relations is weaker compared with where there is an existing contract and therefore their expectations and duties are also weaker and ‘less definitive as regards the content’. However, as they get closer and their mutual vulnerability increases due to opening themselves up to the other in the course of negotiations, the increased risks necessitate a higher duty of care (than those of general tort law): a contract-like relationship of trust therefore comes into being, from which mutual protective obligations arise, i.e. duties to have reasonable regard for the legitimate interest of the other party.

It is not unusual that a party starts preparations for the performance of the contract or even commences production in order to meet the deadline already negotiated or to demonstrate commitment. This happens often as a result of the other party’s express or implicit inducement. This vulnerability and mutual trust of the parties justifies judicial control and deserves (an increased level of) protection in Civil Law, regardless of whether a (valid) contract is concluded in the end. As negotiations progress, instead of the once ‘binary system’ (of contract-liability, no contract-no liability) Civil Law is characterised by a ‘trinary system’ of three zones: the no liability zone, the precontractual liability zone and finally the contractual liability zone.

In the Dutch scholarship, the progress of contractual negotiation has been compared to an invisible magnetic field ‘where parties may inadvertently lose the possibility of avoiding obligations’.

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13 Cartwright & Hesselink, 454. Accordingly, the form and the scope of protection will not be the same either, id. 451.
16 Giliker, 970.
17 Zuloaga, 74. Cartwright & Hesselink, 454; Looschelders, 40.
II. Fundamental Principles:
Contractual Freedom v. Good Faith in Negotiations

Contractual freedom, a fundamental principle of contract law, also includes (besides the freedom to enter into negotiations, conclude contracts and conduct parallel negotiations) the freedom from contract, i.e. the freedom to break off negotiations. The simple fact that the parties started negotiations 'cannot tie them together'. They are generally also free to decide 'how and for how long to proceed with their efforts to reach an agreement', they may enter into negotiations even if they feel uncertain as to whether they will eventually make a contract. Contractual freedom is also efficient from the law and economics' point of view: it allows testing the feasibility of a mutually beneficial transaction while enabling the parties to consider more valuable alternative options (business partners) and to make up their mind, if needed, due to the ever changing market circumstances.

However, contractual freedom may collide with the mutual reliance in the honesty of the negotiating parties that stems from the duty to bargain in good faith. Parties engaged in negotiations therefore owe each other certain duties and must take some account of each other's interest. A core issue of this Chapter is 'how far the freedom to break off negotiations goes and at which point the creation of the negotiating partner's confidence in the perfection of the deal attains dominance'. Having regard for the other party's interest does not mean denying or foregoing one's own interest, even less preferring the other party's interest; therefore, realistic commercial self-interest is generally a legitimate reason for breaking off contractual negotiations. The other party's legitimate interest shall be safeguarded as long as this does not unfairly limit the legitimate interest of the acting party. Therefore, a healthy balance between freedom of contract and precontractual good faith should be maintained. Finding this balance, i.e. 'freedom to contract bounded by good faith' lies – for example – at the 'heart of European soft law texts' (PECL, DCFR) and this compromise 'is now almost commonplace'.

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20 With reference to French law cf. Pannebakker, 78: freedom of contract is a constitutional principle, implying in particular freedom of commerce.
21 Schwenzer, Hachem & Kee, 280.
25 Cartwright & Hesselink, 453.
27 Cartwright & Hesselink, 453.
28 With reference to French law cf. Zuloaga, 162.
30 With reference to French and Dutch law cf. Pannebakker, 236. With other words: The proper economics of the negotiating process should be preserved. Cartwright & Hesselink, 482.
31 Febbrajo, 298.
III. Evaluation of Precontractual Liability

1. General Acceptance in Civil Law

Besides the considerations presented above, the idea of precontractual liability (as a consequence of a breach of the requirement to negotiate in good faith) reflects an emphasis on morality, and social solidarity. Moreover, law and economics also provides some support in stating that the protection of precontractual investments can be very efficient, especially with regard to complex projects. It is argued that the requirement to negotiate in good faith contributes to curbing opportunistic behaviour and thereby enables the parties to save contracting costs and write shorter contracts than their Common Law colleagues because the statutory rules or case law on precontractual liability promotes efficient precontractual investment (by protecting those investments in the event of the other party’s wrongdoing) without ‘imposing on the parties the transaction costs of making a collateral contract.’ In other words, ‘unrestrained right to terminate negotiations or conduct them in bad faith might induce cheating, retaliation and instances of opportunistic behaviour,’ which again increases transactional costs and ‘deadweight social loss.’ Precontractual reliance protected by the law is mutually beneficial, since contributes to saving transactional costs and thereby increases the contractual surplus. Appropriately dosed precontractual liability can fine-tune reliance investments in the course of negotiations; while the complete lack of such liability puts the whole risk on the parties, creating an incentive to under-invest, while excessive or strict liability leads to excessive reliance and over-investment. Neither corresponds to the requirement of efficiency. Hence, precontractual liability should be adjusted to trigger and support efficient reliance investments in the precontractual stage, i.e. as far as the potential benefit (in proportion to the chance that the contract will be formed) exceeds the potential loss (in proportion to the chance that the contract will not be formed).

Having some rules on precontractual liability seems to be more efficient than leaving its regulation completely to the parties, because most negotiations – with special regard to sales contracts – are basically not covered or structured by preliminary agreements (precontractual documents agreed upon by the parties). Scholars warn however that relying on statutory rules or established case law on precontractual liability can be a double-edged sword since, if the applicable standard is not clear and coherent, it

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34 Cohen, 401.
35 Febbrajo, 297-98.
38 Kovac, Subsection 2.2.
39 McFarlane, ‘The Protection of Pre-Contractual Reliance: A Way Forward’, 10 Oxford University Commonwealth Law Journal (2010) 95, 100. Additionally, if the transactional costs are lower, the party is willing to invest more time and money into finding the most beneficial transaction, which again increases the level of exchange of goods and services and thereby that of welfare. See Kovac, Subsection 2.1.
40 Melato & Parisi, 432-33.
41 Schwenger, Hachem & Kee, 276. However, exaggerated precontractual liability may have a chilling effect on the commercial community and the contracting parties. Wei & Yu, ‘Rethinking Pre-Contractual Liability in China – One Step beyond China’s Latest Judicial Interpretation’, 43 Hong Kong Law Journal (2013) 279, 305.
obfuscates the contractual process and is itself an obstacle to business.\textsuperscript{42} Uncertainty is the source of disutility and is responsible for increased transactional costs.\textsuperscript{43}

A thorough comparative analysis revealed that two core elements of precontractual liability can be considered the \textit{common core} of – at least – the European Civil Law tradition: first, the existence and acceptance of the \textit{general precontractual good faith} requirement; and second that remedies are basically restricted to the \textit{reliance interest}.\textsuperscript{44}

2. Reluctance of Common Law Regarding Precontractual Good Faith

Traditional Common Law is generally reluctant to accept the good faith requirement at the negotiating (and formation) stage and is characterised by the \textit{‘aleatory view’}, which means that parties enter into contractual negotiations at their own risk and therefore they bear all consequences and losses if no contract is entered into. Any limitation of the freedom of contract ‘might discourage parties from entering negotiations’\textsuperscript{45} (chilling effect). Misrepresentation, duress, undue influence and unconscionability serve as general limitations on improper (pre)contractual behaviour,\textsuperscript{46} but, apart from them, a party enjoys absolute freedom to walk away at any time for any reason or even without indicating any reason. The moment that freedom of contract is lost is when the contract itself is formed.\textsuperscript{48}

In contrast with the moralising Civil Law approach, the Common Law approach is governed by individualism and by the primacy of \textit{certainty}; \textit{predictability} is preferred to absolute justice.\textsuperscript{49} The good faith principle and its extension to the precontractual phase is also criticised for its uncertain character and vagueness. The enactment or application of such an elastic standard can encourage unnecessary litigation and again: hesitancy to engage in business.\textsuperscript{50}

Nevertheless, it is highlighted in scholarship that the Civil Law and the Common Law approach converge in a way. Besides misrepresentation, a couple of other institutions have been developed or retuned in Common Law in order to cover cases that underlie precontractual good faith in the Civil Law tradition. Promissory or equitable estoppel in the USA and Australia,\textsuperscript{51} implied ancillary contract in anticipation of an incomplete main contract, constructive trust, restitution, tort law and unjust enrichment are highlighted.\textsuperscript{52} In sum, the principles, rules and standards under Civil Law defining the duty to act in good faith have a similar content as the ‘exceptions to the no duty rule’ at Common Law;\textsuperscript{53} as if the two approaches were the inverses of each other but pointing at the same conclusion: Civil Law ‘postulates an \textit{a priori} assumption of limitation of freedom of action in the bargaining process subject to excuses or justifications exempting from liability’, while Common Law seems to be based on \textit{a priori} freedom in the bargaining process, subject to special rules imposing liability.\textsuperscript{54}

\begin{thebibliography}{99}
\bibitem{42} Nedzel, 157.
\bibitem{43} Kovac, Subsection 2.1.
\bibitem{44} Cartwright & Hesselink, 485; Dietrich, 180.
\bibitem{45} Farnsworth, 221; Melato & Parisi, 433.
\bibitem{46} McFarlane, 99.
\bibitem{47} Farnsworth, 221; Giliker, 82.
\bibitem{48} Cartwright & Hesselink, 451.
\bibitem{49} Zuloaga, 3-4. Ideas of morality shall not be confused with legal principles, see the overview provided by Nedzel, 109.
\bibitem{50} Nedzel, 157.
\bibitem{51} Schwenzer, Hachem & Kee, 275.
\bibitem{52} Dietrich, 155.
\bibitem{53} Dietrich, 180.
\bibitem{54} Cohen, 401.
\end{thebibliography}
As a result, there is a greater need in the Common Law tradition for private ordering of the precontractual stage by drafting and using precontractual documents.\(^{55}\) (See Part 2 of this Chapter). For further details on the Common Law approach see Chapter 4.

### IV. Classification of Precontractual Liability: Contract, Tort or sui generis?

The highly controversial classification of precontractual liability is mainly based on historical factors in each legal system and on the variety and complexity of cases\(^{56}\) subsumed under the respective precontractual regime. Classification is a significant issue, because prescription (limitation) periods and the burden of proof often depend on the contractual or extracontractual nature of the remedy in several legal systems.

One of the best examples to demonstrate what is at stake is the solution of German law, wherein the doctrine of *culpa in contrahendo* was invented and extended in order to overcome the weaknesses of the law of delict and thereby to cover major gaps in legal protection.\(^{57}\) The 2001 reform of the German law of obligations clearly put the concept on the contractual track with reference to the similarity between the duties of care arising in the precontractual stage and those arising in a contractual relationship already entered into,\(^{58}\) despite the fact that at least the protection of the party's person (life and health) and property (i.e. personal injury and property damage) are covered by the law of delict in most legal systems,\(^{59}\) while the duties of disclosure and the (exceptional) liability for breaking off negotiations are contract-like.\(^{60}\) This division seems to be confirmed also by Recital 30 of the Rome II Regulation on the law applicable to non-contractual obligations, according to which *culpa in contrahendo* 'should include the violation of the duty of disclosure and the breakdown of contractual negotiations.' Article 12 of the Regulation covers 'only non-contractual obligations presenting a direct link with the dealings prior to the conclusion of a contract.' Therefore, if a person suffers personal injury while a contract is being negotiated, it is not Article 12 of the Regulation on *culpa in contrahendo*, but the general rules on torts/delicts (or other relevant provisions) of the Rome II Regulation that should apply. Meanwhile, precontractual liability is conceptualised within a contractual framework in both PICC and PECL.

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\(^{55}\) Pargendler, 188.

\(^{56}\) Culpa in contrahendo covers a great range of disparate cases. With reference to German law cf. Looschelders, 29.

\(^{57}\) Cf. the lack of liability for pure economic losses or the possibility of exemption from liability in case of damages caused by the negligent conduct of a vicarious agent; Looschelders, 30; von Hein, 430.

\(^{58}\) Looschelders, 31; Zoll, 41. Austria follows the German approach to similar reasons with the difference that no special rules were enacted, cf. Cartwright & Hesselink, 458.


\(^{60}\) von Hein, 431.
Precontractual liability is subsumed under the law of delict in some legal systems, for example in Italy, France (also after the 2016 reform of the law of obligations) and Israel. In others there is no uniform view on its affiliation. The respective Articles 197 and 198 of the Greek Civil Code are considered as either quasi-contractual, or as quasi-delictual or as a sui generis liability regime (that forms a special kind between contractual and delictual liability), though the latter view is followed by most academics. In Dutch law, where there is no explicit statutory rule on precontractual good faith, court decisions are based either on tort or on bona fides (reasonableness and fairness) or on both (or on any combination of the two); sometimes the duty to act in good faith is understood in the case law as a duty of contractual nature. Chinese scholars classify four groups of cases as primarily tortious (no genuine intent to make a contract; fruitless negotiations resulting from one party’s fault; conclusion of a void or voidable contract; conclusion of a valid but disadvantageous contract), while the category of breaking off negotiations is understood as a genuine reliance liability (a sui generis notion of fault) based on venire contra factum proprium. Others in China consider all aspects of culpa in contrahendo as a special, independent basis for liability, being neither contractual nor delictual.

Whatever the official or predominant classification in the given legal system is, as far as the genuine nature of precontractual liability is concerned, it is located somewhere between contract and tort as an intermediate area, representing the ‘many shades of grey’ in liability law. It is certain that the respective remedies cannot be drawn upon contract law, since the contract is not yet formed and the relevant duties are not dependent on the formation of the contract anyway; however the precontractual duties (of care, of information, etc.) go beyond tort liability too; first, since they are not owed to the public in general (i.e. to everyone) but only to the party it is in negotiation with; and second, delictual liability to provide for damages arises only once the wrongful act is committed, while precontractual liability is triggered as soon as the negotiations commence. The interim nature of precontractual liability is acknowledged even in those legal systems where there is a firm approach on culpa in contrahendo, such as in German law: it is about a statutory obligation (a contract-like but not contractual legal relationship, a self-standing non-contractual right) without primary performance

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61 Zoll, 43; Magri, ‘Pre-Contractual Liability in Italy between Tort and Contract Law. Some Comparative Remarks’, 23 Revista Brasileira Direito Civil (2020) 101, 112, 114, 117-18, 124. Some scholars in Italy however strike a blow for the contractual classification with reference to a so-called ‘social contact’ (contatto sociale) upon which precontractual liability is based (even the Corte di Cassazione takes recourse to contract law in some judgments). However, the prevailing view supports the delictual affiliation, since it concerns a general duty to act in good faith based directly on the general (statutory) duty to act in good faith.

62 Zoll, 43; Zuloaga, 4, 57-58, 144: though Article 1112 of the Code Civil does not specify delictual liability as the basis of the applicable remedies, but it is unanimously held in legal scholarship that liability attached to the breach of precontractual duties remains delictual.

63 According to Cohen, 402 Article 12 of the 1973 Contract Law is substantially tortious, because the duty to act in good faith is imposed by law and the remedy is basically restricted to reliance damages. Remarkable is however the chameleon-like nature of precontractual liability, because in the exceptional event of expectation damages being awarded, liability changes colour and becomes contractual. Seemingly, the remedy retroactively determines the nature of liability.

64 Cartwright & Hesselink, 38, 459; Statopoulos & Karampatzos, 78.

65 Pannebakker, 67-78.

66 Ding, 509-10.


68 Dietrich, 174-75; Ersoy, 65-66.
duties, whereupon relative protection duties arise by the commencement of contract negotiations, the initiation of a contract or by similar business contacts.\textsuperscript{69}

The interim nature of precontractual liability between contract and tort can be made into a virtue, since ideas can be drawn from both.\textsuperscript{70} Sometimes liability is based more on ‘fundamental principles at the core of contract law’ (and is therefore more contract-like), sometimes the other way round (and is more tort-like): but the liability-producing factors of both in combination are sufficient to ‘substantiate liability in some form’,\textsuperscript{71} in a way that a ‘broader than usual contractual liability may be justified by further factors normally associated with establishing a claim in tort’ and \textit{vice versa}. This viewpoint might support practitioners in interpreting the respective statutory rules or the applicable case law on precontractual liability and in identifying the scope of the respective duty and the appropriate remedy.\textsuperscript{72}

\section*{V. Didactic and Regulatory Approaches}

Though the root of precontractual duties (of care to have reasonable regard for the legitimate interest of the other) and precontractual liability if in breach thereof lies in the parties' increasing mutual vulnerability, \textit{culpa in contrahendo} applies to a very heterogeneous array of cases that are difficult to classify.\textsuperscript{73} Different criteria apply and the various criteria become mixed up with each other as part of the historically-conditioned statutory (or judge-made law) frameworks. The first criterion is the \textit{object and scope of protection}, i.e. which values acknowledged by society are covered and protected by the respective rules or case law. Another path is to sort according to the \textit{types of duties} required to be fulfilled in the course of (pre)contractual negotiations. Another perspective is provided by listing the \textit{outcome of the negotiations}, above all the consequence of the one party's breach of its precontractual duties (no contract; contract not effective; invalid contract; valid but disadvantageous contract). It is worth paying attention to the \textit{legal institutions} and doctrines applied by the legal systems to cover precontractual duties and to observe the differences between the solutions according to their abstractness. In some legal systems, precontractual liability is based on the general principle of good faith (or on its explicit subcategory of precontractual good faith), while particular duties are enumerated elsewhere and a combination of these various approaches is also quite common. Legal systems vary regarding the level of abstraction of the solutions developed, how many and what particular points of reference have been specified and decided upon by the legislator and to what extent does the law in action have to be reliant on the interpretation and discretion of the judge. Since all legal systems have their own historical development, it leads to diversity in how precontractual liability (or its case groups) is covered by which legal institution. Regarding German law, the principle of good faith, \textit{venire contra factum proprium} (prohibition of going against one's

\begin{itemize}
  \item \textsuperscript{69} With an overview on scholarship Ersoy, 67. The remedies are contractual or a least contract-like. With reference to the DCFR cf. Pannebakker, 292.
  \item \textsuperscript{70} Dietrich, 175.
  \item \textsuperscript{71} Dietrich, 184.
  \item \textsuperscript{72} Dietrich, 186-87. The contract-like or tort-like character of a particular duty can assist in finding the scope of the respective duty and also the appropriate remedy; for example, if the reasons for liability lie closer to contract and the parties were very near to the conclusion of contract then a remedy 'protecting the plaintiff's positive or contractual expectations may be appropriate.' However, if liability seems to be based on tort law concepts and factors then probably only reliance losses shall be compensated.
  \item \textsuperscript{73} Dietrich, 176.
\end{itemize}
own earlier actions), abuse of rights; and regarding French law, croyance (confiance) légitime, legitimate expectations (attente légitime); theory of appearance (l'apparence), the prohibition of venire contra factum proprium, the principle of coherence, abuse of rights (abus de droit) and good faith (bonne foi) can be mentioned.

1. Objects and Scope of the Protection

Being aware of the object and scope of protection and of the protected values is essential, since there is a correlation between the scope of precontractual duties and the extent of liability. The scope of liability should be adjusted to and limited by the protective purpose of the breached duty. The scope can also serve as a basis while applying and interpreting one precontractual duty or another. By and large, the protected scope can be generalised as the reliance and trust between the parties in negotiations, because all objects of protection can be traced back and are related thereto. However, several subcategories can be identified.

a) Integrity of the Other Party’s Person and Assets

First, one of the protected scopes is the integrity and safekeeping of the other party’s person, property, other assets and economic (financial) interests. Besides taking care of person and property, other duties and their infringements belong here too; for example, the breach of confidentiality of information provided during negotiations. The disclosure or improper use of confidential information can definitely harm the other party’s economic interests, mainly causing pure economic losses.

b) Mutual Trust and Reliance

The second object of protection is the mutual trust and reliance of the parties in the narrower sense, which covers the requirement of consistency (consistent behaviour during negotiations) and loyalty towards each other. The most important group of cases is that of breaking off negotiations (without a justified reason after having induced a reasonable reliance on the certain or at least highly likely formation of the final contract). Protection of reliance is not restricted to the one-to-one relationship between the negotiating parties but also possesses macro dimension at the gross level of the overall economy and society. Reliance, confidence, is a key element of smooth commercial intercourse and contributes significantly to the operability and efficiency of business. Only if mutual reliance is present, respected and, if needed, protected at the micro level can the big mosaic of reliance on reasonable and honest commercial intercourse be postulated at the macro level.

c) Decision-making Autonomy

Third, one of the core protected values of precontractual duties and liability is decision-making autonomy, i.e. the free and informed decision of the parties to transact.

74 Zuloaga, 42-46.
75 Zuloaga, 68-87.
76 Schwenzer, Hachem & Kee, 284.
77 Dietrich, 188 with reference to the theory of protected purpose in German law.
78 As highlighted above, the protection of the other party’s person and property is covered in the majority of the legal systems by the law of delict and not by culpa in contrahendo. Germany is different for historical reasons and for the gaps in German tort law.
79 Zuloaga, 25; Ersoy, 73-74.
80 Ding, 510.
Their right ‘to know and to want’, in order the final agreement reflects their ‘healthy and genuine’ will to conclude the contract with the appropriate content and terms. The information (disclosure) duties are connected to this object of protection, which is also called as the transparency requirement during negotiations.

d) Other Protected Values

Besides the three core scopes of protection above, other values and policy goals are also assisted by precontractual duties and liability. Some authors highlight the social values behind protecting the reliance and mutual trust between the parties, ‘be it desirable from the parties’ perspectives or not’. Others underline the contribution to general economic welfare through the security of transactions. First, the greater and closer the trust, the less transactional costs arise, since there is no need to spend on investigating the other party’s real intentions and to litigate expenses arising through breach of trust; in this way, time and money can be saved and invested for other purposes. Second, only agreements based on informed decisions can contribute to the efficient allocation of resources. Again others emphasise European and national regulatory policies. As far as information duties are concerned – as with regard to many other areas – an internal market can only be achieved if the same standards of protection apply. Besides individual informed transaction decisions, information duties also serve general market transparency, and they support the smooth transition between the precontractual phase and the conclusion of the final contract.

2. Enumeration of Precontractual Duties

Another approach frequently referred to is listing several particular precontractual duties. Some of them can be one-to-one assigned to one of the protected scopes, while others are related to several of them or overlap each other or overlap the protected scopes themselves. For example, the breach of the duty not to behave inconsistently during negotiations, in particular not to break off negotiations (without a justified reason after having induced a reasonable reliance on the certain or at least highly likely formation of the final contract) can also be seen as an infringement of the information duty: the party in breach misleads the other party about its willingness to contract or fails to disclose that the contract cannot, will not be concluded.

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83 Pargendler, 153.
84 Li, ‘The Legal Status of Pre-Contractual Liability: Contrasting Responses from German and English Law’, 12 National Taiwan University Law Review (2017), 127, 165.
85 Ersoy, 73.
86 Lehmann, 701 with reference to law & economics scholarship.
87 Lehmann, 702.
88 Von Hein, 431.
90 Looschelders, 35.
a) Duty of Protection

In some legal systems (for example in Germany and Austria), precontractual liability involves the duty to exercise proper care in protecting the other party’s person, property and assets, in sum: protective obligations (Schutzpflichten, Obhutspflichten).

b) Duty of Loyalty and Consistent Behaviour

The obligations connected to the protection of mutual trust and reliance are often referred to as the duties of mutual care based on reliance; in other words duty of loyalty and duty of consistent behaviour, i.e. duty not to behave inconsistently (such as breaking off advanced negotiations without good reason despite having induced the reasonable reliance that the contract will certainly or at least is highly likely to be concluded; this is why it is also called the duty of consistency or coherence).

c) Duty of Information

All legal systems analysed here acknowledge some sort of duty to inform (disclosure). The breach of the duty to inform can be twofold: either an omission, a passive conduct, i.e. not disclosing any information that is covered by the duty; or the supply of misleading (imprecise, incorrect or inadequate) information (thus an active conduct). The consequences are different if the breach results in the invalidity of the contract, and if the contract remains valid but contains disadvantageous terms from the one party’s point of view.\(^91\) If the one party does not inform the other party that it made up its mind and does not intend to continue negotiating, this omission also qualifies as a breach of the duty to inform; however, it overlaps with the former category, because such circumstances necessarily lead to the breaking off of negotiations.

d) Duty of Confidentiality

The duty of confidentiality is also explicitly highlighted in many legal systems. If the party discloses confidential information or uses it improperly for its own purposes, its conduct can also be classified as the breach of the first category, that of the duty to safeguard the other party’s assets and economic interests.

e) Other Duties in Accordance with Good Faith

\(^\text{ea)}\) As it is explicitly provided for in many legal systems and soft law instruments, it is bad faith in particular for a party to enter into or continue negotiations when having no intention to reach an agreement with the other party (at all). The party doing so is certainly led by some malice aforethought, such as manipulating the price; obtaining some confidential information; preventing the other party from negotiating with other market players, etc.\(^92\) It is, for example, contrary to good faith to request an offer that is expensive to prepare if it has already decided to reject it.\(^93\) A bank acted in bad faith (according to a published Chinese judgment) when it offered a loan provided that the client carried out the restructuring agreed upon and paid off an earlier loan (in a smaller amount). The client carried out the restructuring and paid back the loan, but the bank broke off the negotiations. The bank’s true intention was to force the client to restructure

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\(^92\) Ersoy, 47-48; Pannebakker, 89 with reference to French law.

\(^93\) Kötz, 33. This conduct overlaps however with the case group of breaking off negotiations.
and get the earlier loan paid back. It is contrary to good faith to encourage the other party to make investments already in the precontractual stage if the party inducing the other one to do so lacks a firm intention to contract.

Another conduct in bad faith is to delay some action required to go ahead with the negotiations and in this way causing additional costs and other kind of losses to the other party.

In Italy and China another group of cases is highlighted, namely that of public tendering cases, where the tendering procedure is set aside by the court or the project can no longer be realised for technical reasons or the contract cannot be concluded due to lack of funds. This group of cases however overlaps with breaking off negotiations and therefore with culpa in contrahendo. The same stands true for Germany (as in several other countries in the EU and beyond). § 181 of the German Act against Restraints of Competition (GWB) provides for a special claim for damages arising from reliance. According to this special provision: ‘If the contracting authority has violated a provision intended to protect undertakings, the undertaking may claim damages for the costs incurred in connection with the preparation of the tender or the participation in a procurement procedure if, without such violation, the undertaking would have had a real chance of being awarded the contract after assessment of the tenders, and provided that such chance was impaired as a consequence of the violation. Further claims for damages shall remain unaffected.’ The last sentence opens the floor to the application of culpa in contrahendo besides the special provision for other fact patterns that do not underlie § 181 GWB. Such case groups include unjustified suspension of the public procurement; infringement of the provisions on selection of the best bid for irrelevant ‘reasons’; the public authority’s failure to inform the bidders on the lack of financial background for the contractual works; application of the national regime instead of the EU-wide, etc. The remedies are basically restricted to negative interest, unless the claimant can prove that it would have obtained the assignment but for the infringement of public bidding rules.

3. The Outcome: Faith of the Contract – Overlaps with Invalidity and Non-conformity

When the remedies are explained, the faith of the contract matters in particular. The heads and amount of damages can be different if the negotiations were broken off, i.e. no contract was entered into; if the contract was concluded but did not become effective; if the contract was concluded but it is invalid; and finally if the contract was (validly) formed but with disadvantageous terms from one party’s perspective.

Information duties are linked mainly to cases where a contract was concluded, but is either invalid or valid but disadvantageous from one party’s point of view.

Claims based on breaking off negotiations are consequently connected to cases where the contract was not concluded in the end.

Finally, there are duties for which, if they are broken, the remedies (damages) do not depend on the outcome: they have to be obeyed and fulfilled regardless of whether the contract is concluded or not. The heads and amount of damages depends only on the

94 Ding, 491.
95 Pannebakker, 89.
96 Cf. for a notable and undue delay in Italian law, Febbrajo, 299.
97 Ding, 497.
98 Febbrajo, 308-309.
100 Similarly, Zuloaga, 162; Han, 166; Ersoy, 46-56.
losses suffered, such as the duty to protect the other party’s person and property and the duty of confidentiality.

a) Overlap No. 1: Invalidity

In those legal systems wherein causing the invalidity of the contract fraudulently or negligently by not disclosing any essential circumstances or in any other way, is covered by precontractual liability, there is necessarily an interference with the applicable rules on invalidity (nullity, voidability, etc.) of contracts, based mainly on the absence of or vitiated consent. This interference can be manifold. In some legal systems, precontractual liability is evaluated as a supplement to those rules on defects in consent that were felt too narrow.¹⁰¹ For example, negligent misrepresentation is not a vitiating factor that renders a contract voidable under Chinese law and therefore precontractual liability fills the gap. The same stands true if the party fails to rescind the contract (though they could) before the deadline provided for in the law or does not want to rescind the contract, but still wishes to be compensated for the losses suffered. In cases of fraud and duress, damages based on the void contract and precontractual liability provide concurrent liabilities and the party can rely on both.¹⁰²

Elsewhere, the bypass of some restrictive invalidity rules is feared in the jurisprudence: for example, rescission of the contract in German law is conditional on wilful deceit and can only be exercised within a statutory deadline. Nonetheless, precontractual liability can also be relied on in the event of negligent deceit and regardless of the deadline, according to the prevailing view in the jurisprudence and case law.¹⁰³

By contrast, the commentators on PECL drew a sharp line between misrepresentation and precontractual liability. If the contract is concluded, misrepresentation entails consequences for its validity; however, if the contract is not concluded, the conduct falls within the scope of precontractual liability (Article 2:301 PECL). Misrepresentation and other vitiation of consent aims to obtain a contract while the improper conduct that underlies precontractual liability follows other aims than reaching an agreement.¹⁰⁴

As French scholars underline: the breach of information duties can be (must be) negligent only, since fraudulent information-giving is covered by Articles 1137 ff. Code Civil. The relationship between precontractual duties and mistake (Articles 1130 ff. Code Civil) is unclear.¹⁰⁵ Article 1112-1(6) Code Civil clarifies, however, that, in addition to imposing precontractual liability, the failure to fulfil the information duty may lead to annulment of the contract under the conditions provided by Articles 1130 Code Civil and following.

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¹⁰² Ding, 500-501. Scholars in China report interference with tort law too and highlight the uncertainty regarding the recoverability of pure economic losses (like in German tort law) and promote the reference to precontractual liability instead. See Ding, 502-503, 510-11. Similarly, Han, 166-67.
¹⁰³ Ersoy, 54-55. However, the status quo is highly controversial (the reference to culpa in contrahendo in particular), with special regard to the relationship of precontractual liability and the voidability of contract due to wilful deceit according to §§ 123-124 BGB. Cf. Emmerich, para. 77-78.
¹⁰⁴ See the analysis by Pannebakker, 303; and the commentaries themselves: Lando & Beale, 189. However this separation did not succeed entirely, see the critical analysis by Harke, 'Irrtum und culpa in contrahendo in den Grundregeln des Europäischen Vertragsrechts: Eine Kritik', 14 Zeitschrift für Europäisches Privatrecht (2006) 326.
¹⁰⁵ Sefton-Green, 64, 65. Even more problematic it is that fraud does not presuppose an obligation of information either; see in this respect id. 66-67; and that mistake as to value is excluded from the scope of the duty to inform but it seems to be included in the context of fraud, cf. de Vincelles with accurate analysis on the (potential) contradictions, 104-105.
b) Overlap No. 2: Non-conformity

A similar issue arises on the relationship between precontractual liability and the provisions on *impossibility*, *defective performance* and *warranty*, if the party in breach provided false information on the quality or characteristic of the performance, i.e. of the contractual goods and the other party’s expectations became part of the contract due to the respective provisions. The prevailing view in German law, for example, is that warranty (*Gewährleistung*) is paramount for *culpa in contrahendo*, so that the deadlines and other restrictions cannot be circumvented by reference to precontractual liability. 106

Summary on the correlation between the protected scope, the respective duty and the impact on the contract:

<table>
<thead>
<tr>
<th>The protected value / Scope and object of protection</th>
<th>The respective precontractual duty</th>
<th>Impact of the breach on the faith of the contract</th>
</tr>
</thead>
<tbody>
<tr>
<td>Integrity of the other party’s person, property, assets and economic interests</td>
<td>Duty to exercise proper care in protecting the other party’s person, property and assets</td>
<td>This duty applies regardless of whether the contract is concluded or not.</td>
</tr>
<tr>
<td></td>
<td>Duty of confidentiality</td>
<td></td>
</tr>
<tr>
<td>Mutual trust and reliance, honesty and loyalty (in negotiations)</td>
<td>Duty of loyalty and duty of consistent behaviour, (in particular not to break off advanced negotiations without good reason despite having induced the reasonable reliance that the contract would certainly or highly likely be concluded)</td>
<td>The contract is not concluded.</td>
</tr>
<tr>
<td>Decision-making autonomy, free and informed transaction decision</td>
<td>Duty of information (disclosure)</td>
<td>The contract is invalid.</td>
</tr>
<tr>
<td></td>
<td></td>
<td>The contract is valid but disadvantageous.</td>
</tr>
</tbody>
</table>

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4. Good Faith as an Umbrella Principle v. Particular Duties

In some legal systems, due to their traditions, there are specific statutory rules on precontractual liability (such as Greece, Portugal and Italy, Germany since 2001 and France since the 2016 reform of obligations). Precontractual duties and the consequences of their breach are derived from the general principle of good faith elsewhere (such as in Spain and the Netherlands), requiring an increased level of judicial activism. 107 The codification techniques vary according to the abstraction level, from the general clause of good faith to the provisions of particular precontractual duties including sometimes also some hints on the applicable remedies.

a) General Clauses: Pros and Cons

aa) General clauses, such as the requirement of good faith (and fair dealing), are praised for openness, flexibility and dynamics, and for being able to reflect the diversity and many shades of life and legal relationships. Good faith is unsurprisingly an umbrel-
la principle, a vehicle ‘for adaptation of the codified law to changing social values’, simultaneously channelling the moralisation of law,\textsuperscript{108} or a ‘big empty envelope into which a lot of concrete circumstances can be folded.’\textsuperscript{109} The duties of information, confidentiality, loyalty (i.e. to refrain from inconsistent behaviour) and transparency (of the risks of non-conclusion) were also hived off from (precontractual) good faith and can be identified as deriving from it,\textsuperscript{110} therefore good faith can still play a role in their interpretation. Some particular rules are singled out from the good faith requirement in legislation ‘because of the judicial experience in handling similar cases.’\textsuperscript{111}

\textit{ab)} On the other hand, the general requirement of good faith and fair dealing is criticised as being vague and too elusive: having a fluid content and different meanings ‘as we move from a context to another’,\textsuperscript{112} and being responsible for the uncertainty and unpredictability of the law, both on the judiciary’s and on the contracting parties’ side, since general clauses like this create ‘a potential for an incoherent, uneven application’. The requirement of good faith and fair dealing is a standard ‘easy to create, difficult to apply’ in contrast with particular rules (precontractual duties) that are difficult to create and easier to apply; and if there are lacunae between the rules, they can be still filled by general principles. Rules also have the advantage of being easy to predict.\textsuperscript{113} Certainly, the flexibility and elasticity of the general clause on good faith is a Janus-faced phenomenon, but there are scholars who accept or even appreciate the lack of stability as the fair price for reflecting the many ‘shades of grey’.

With reference to Article 42(1) and 42(2) of the former Chinese contract law (now Article 500 (1) and (2) Chinese Civil Code) Wei & Yu, 285.\textsuperscript{114} Others accept the indispensability of good faith as a general clause but urge its concretisation.\textsuperscript{115} However, this takes place on a case-by-case basis, using the ‘judgement, prudence and wisdom of the judge’ and herewith the snake swallows its own tail: there is a high risk of diverging interpretations and uneven application.\textsuperscript{116} Latin American legal systems – though strongly influenced by German and Italian law on precontractual liability – strove to achieve the enactment of more specific norms instead of the well-known general clauses in order to meet the demands of correct market operation for legal certainty and predictability. Rescinding limits, objective criteria and the enumeration of ‘disloyal actions’ are provided for in their respective laws.\textsuperscript{117} The same can be observed in some Central and Eastern European countries that codified or recodified their Civil Laws much later than when the classic civil codes of Western Europe entered into force and could therefore build on ‘western’ experiences and court practice.\textsuperscript{118}

\textsuperscript{108} Pannebakker, 270.
\textsuperscript{109} Sefton-Green, 60.
\textsuperscript{110} Zuloaga, 83, 162.
\textsuperscript{111} With reference to Article 42(1) and 42(2) of the former Chinese contract law (now Article 500 (1) and (2) Chinese Civil Code) Wei & Yu, 285.
\textsuperscript{113} Cohen, 423, 428-29. According to him, this is the price for the inclusion of a standard of moral behaviour into the contractual arena.
\textsuperscript{114} Dietrich, 185.
\textsuperscript{115} Lehmann, 711 with reference to Article II.-7:201 and II.-7:205 DCFR.
\textsuperscript{116} Zuloaga, 161.
b) Variations on (Precontractual) Good Faith: Objective or Subjective?

ba) The scope and margin of judicial discretion regarding good faith appears in several issues and they need clarification. The first is whether the subjective or the objective sense prevails. Subjective good faith requires honesty in fact (state of mind of not knowing certain facts or believing they are acting correctly and obeying the rules), while objective good faith refers to the compliance with standards of fair dealing, i.e. a standard of conduct that is required or expected from an individual.\footnote{119} In this sense, good faith and fair dealing is a moral standard; a normative concept 'that contains generic reference to normative ideas spontaneously shared in society about what is right,'\footnote{120} and 'what is expected of a reasonable person on the basis of moral, social and commercial norms prevailing in the community in which the transaction takes place.'\footnote{121}

The relevant laws and soft laws vary in their emphasis on the objective or subjective aspect. As summarized in the scholarship,\footnote{122} PICC focuses on the objective approach, requiring an autonomous and restrictive interpretation according to the goals and characteristics of international trade; moreover, it is content with the absence of bad faith.\footnote{123} The commentaries on PECL clarify that ‘good faith and fair dealing’ as a complex formulation converges on the French bonne foi and the German Treu und Glauben, and the two parts also have their own meanings: good faith is honesty and fairness in mind, while fair dealing refers to an objective test of fairness.\footnote{124} DCFR rather seems to refer to the subjective aspect,\footnote{125} wherein honesty and openness aim to prevent dishonest conduct, cheating and acting out of malice. PECL and DCFR set a positive requirement of negotiating in good faith. The objective approach prevails in Greek law,\footnote{126} Italian law\footnote{127} and in French law,\footnote{128} where three requirements are derived from good faith: loyalty (prohibition of causing harm during negotiations or by withdrawal from negotiations); consistent behaviour and transparency (providing each other with information).\footnote{129}

bb) The notion and content of good faith reflects the constitutional, social and even political background of the legal system in question, too. The requirement of good faith can be traced back to the constitutional principle of social solidarity in Italy.\footnote{130} The yardstick of good faith in China includes the potential impact of the respective conduct on society at large. The goal is to strike a balance between the individual interests of the negotiating parties and the interest of society.\footnote{131} Another aspiration of the Chinese legislator by means of good faith is to find the balance between the ‘Good Samaritan and the adversarial businessman’\footnote{132}
C. Statement of Issues

The issues covered by this Chapter can be raised at two levels. The first refers to the general and theoretical aspects on the roots, justification and features of precontractual liability. Among many others, the following questions shall be asked and answered as far as possible (see section B. Introductory note).

- At what stage, under what circumstances and in what level of intensity of exchange is judicial control necessary and justified by issues of mutual trust and vulnerability emerging during the precontractual negotiations?

- How and to what extent does the general or precontractual good faith requirement counterbalance contractual freedom? How can this compromise (checks & balances) be identified and shaped while having morality, social values (sometimes constitutional principles) and also economic efficiency in mind?

- Can the classification of precontractual liability in the respective legal systems and soft law instruments be traced back to historical factors only? Does the classification as a tort, contract or sui generis liability regime matter beyond theoretical and didactical considerations, with special regard to the heads and scope of recoverable losses, prescription, etc.? Do any supplementary legal institutions apply to losses suffered at the precontractual stage (abuse of rights, *venire contra factum proprium*, etc.) and, if yes, which ones and why?

- Does the interim nature of precontractual liability (lying between contract and tort) enable the legislator or the judge to develop innovative crossover solutions, sometimes inspired by contract law and sometimes by tort law?

- Does which pattern is followed by the respective legal system in shaping precontractual liability have an impact on the merits and on the outcome of legal disputes? Does it matter whether the concept of precontractual liability is structured alongside the protected scope and interests (i – integrity of the other party’s person, property, assets and economic interests; ii – mutual trust and reliance, honesty and loyalty in negotiations; iii – decision-making autonomy, free and informed transaction decision); or according to the respective precontractual duties (i – duty to exercise proper care in protecting the other party’s person, property and assets; ii – duty of confidentiality; iii – duty of loyalty and duty of consistent behaviour; iv – duty of information); or pursuant to the faith of the contract if the respective precontractual duty is broken (i – not concluded; ii – invalid; iii – valid but disadvantageous)? If the respective legal systems mix those approaches, why and how does this impact the outcome of legal disputes?

- How does whether precontractual liability is explicitly provided for in statutory law or, on the contrary, it is shaped by judge-made law with reference to general principles and already existing legal institutions influence the results?

- What does precontractual good faith mean including its nature as being objective or subjective or both? What kind of explicit precontractual duties hived off the good faith principle?

The second level focuses on the substance, details and peculiarities of precontractual liability in an analytical and comparative perspective. The issues discussed here (see section F. Commentary) are as follows:

- Does the CISG cover precontractual liability? Where the CISG regulates or reflects some particular aspects that can arise in the precontractual stage or subject matters that necessarily interfere with precontractual liability (such as Articles 1(2), 2(a),
8(3), 15(2), 16, 35, 40 CISG), do these provisions supersede the precontractual liability of the applicable law or can they coexist in one way or another?

- What combinations of circumstances trigger precontractual liability in the event of **breaking off negotiations** – not only having the good faith principle in mind but also the statement that no altruistic transactions are required by law? Is precontractual liability the rule or the exception in the event of breaking off? If reliance is accepted to be the reason for liability, which factors raise this to a reasonable reliance induced by the party that subsequently broke off? Which factors and at which level of intensity justify the reasonableness of reliance (duration, agreement on a smaller or bigger proportion of essential terms, certainty of the future contract’s coming into being, status of the parties being professionals or laypeople, etc.)? Which reasons are accepted as good and reasonable for breaking off negotiations, despite having reached an advanced level and agreement on most of the essential terms? Is precontractual liability a fault-based or a strict liability? How do formality requirements influence the application of the respective provisions related to breaking off contractual negotiations?

- What is the relationship between precontractual **duties of information** and the rules on invalidity and the provisions on non-conformity due to false statements or failure to provide information? Do the latter overrule the former or are these regimes complementary? On what circumstances do the existence and level (intensity) of information duties depend, since the rule is that both parties have to obtain the information needed at their own expense? How do the professional status of the parties, the B2B or B2C character of the anticipated contract, how easily each party can obtain the information and whether the information is essential from the perspective of the contractual goal to be achieved by the party, *inter alia*, influence the scope and strictness of information duties? Does the information duty only exist on demand; or are there situations in which the party is obliged to provide information automatically at its own initiative and, if so, what are they? Is only actual knowledge (the party already has) covered or can the party be expected to obtain information (does not yet know) if this party can access the information in a simpler way (or at a lower cost)? Where does the information duty end in order not to loose the possibility to make a good bargain?

- What kinds of information qualify as confidential? What are the legal bases of **confidentiality** (reference by the parties, trade secret laws, implied confidentiality)? Is the confidentiality requirement binding for a definite or indefinite period of time?

- Do the **remedies** correlate with the scope of precontractual duties and expectations and if so how? Besides **damages**, are other types of remedies available, for example **injunctions** (related to confidentiality) or **specific performance** (such as a court order to negotiate)? Can several remedies be activated cumulatively? What is the relationship between the scope and type of remedies and the faith of the negotiated contract (concluded, non-concluded, concluded but invalid, etc.)? Under what preconditions can compensation be provided for expectation interest? Does expectation interest limit reliance interest? If the coverage of reliance interest only is the rule, which heads of losses are to be compensated for thereunder? Does the contributory fault of the other party matter?

C. Statement of Issues
D. International Sales Transactions

According to the prevailing view, the CISG does not cover precontractual liability and so the parties are exposed to the uncertainties of this area and to the volatile case law of the applicable domestic law, unless they draft and agree upon a precontractual instrument (see the second part of this Chapter).

E. Sampling of Laws

I. CISG

Article 1
(2) The fact that the parties have their places of business in different States is to be disregarded whenever this fact does not appear either from the contract or from any dealings between, or from information disclosed by, the parties at any time before or at the conclusion of the contract.

Article 2
This Convention does not apply to sales:
(a) of goods bought for personal, family or household use, unless the seller, at any time before or at the conclusion of the contract, neither knew nor ought to have known that the goods were bought for any such use;

Article 7
(1) 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.
(2) 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.

Article 8
(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.

Article 15
(2) An offer, even if it is irrevocable, may be withdrawn if the withdrawal reaches the offeree before or at the same time as the offer.

Article 16
(2) 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.

Article 40
The seller is not entitled to rely on the provisions of articles 38 and 39 if the lack of conformity relates to facts of which he knew or could not have been unaware and which he did not disclose to the buyer.

II. UNIDROIT Principles of International Commercial Contract (PICC)

Article 1.7 (Good faith and fair dealing)
(1) Each party must act in accordance with good faith and fair dealing in international trade.
(2) The parties may not exclude or limit this duty.
Article 1.8 (Inconsistent behaviour)
A party cannot act inconsistently with an understanding it has caused the other party to have and upon which that other party reasonably has acted in reliance to its detriment.

Article 2.1.15 (Negotiations in bad faith)
(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.

Article 2.1.16 (Duty of confidentiality)
Where information is given as confidential by one party in the course of negotiations, the other party is under a duty not to disclose that information or to use it improperly for its own purposes, whether or not a contract is subsequently concluded. Where appropriate, the remedy for breach of that duty may include compensation based on the benefit received by the other party.

III. Principles of European Contract Law (PECL)

Article 1:201: Good Faith and Fair Dealing
(1) Each party must act in accordance with good faith and fair dealing.
(2) The parties may not exclude or limit this duty.

Article 2:301: Negotiations Contrary to Good Faith
(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.

Article 2:302: Breach of Confidentiality
If confidential information is given by one party in the course of negotiations, the other party is under a duty not to disclose that information or use it for its own purposes whether or not a contract is subsequently concluded. The remedy for breach of this duty may include compensation for loss suffered and restitution of the benefit received by the other party.

PICC and PECL follow a similar pattern. The general (mandatory) requirement of good faith and fair dealing is set in both soft law instruments and certainly applies in the negotiation process, though PICC restricts its scope to international trade.

PECL does not explicitly provide for the prohibition of inconsistent behaviour, with an understanding induced by the party and reasonably relied on by the other party, as with Article 1.8 PICC (one of the illustrations regarding Article 1.8 PECL refers explicitly to the precontractual phase); this is nonetheless presented as a part of the general good faith requirement in the official commentary of PECL. According to the commentaries on PECL, good faith is presumed: the burden of proof lies with the party that alleges the non-compliance therewith.

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133 UNIDROIT Principles, 18; Lando & Beale, 113.
134 UNIDROIT Principles, 22: During negotiations over a lengthy period the one party – induced to do so by the other party by letting the party understand that the negotiations were completed – started to demolish the old building on the other party's premises and to build the new one. The other party – being aware all of this – indicated later that there were still additional terms to negotiate.
135 Lando & Beale, 114.
136 Lando & Beale, 116.
As far as the specific rules on the precontractual stage and liability are concerned, the usual approach applies: PICC and PECL do not specify any particular duties (apart from confidentiality); the freedom of contract is counterbalanced by the general good faith and fair dealing requirement that also applies to negotiating and breaking off negotiations. The lack of real intention to reach an agreement is a genuine example of acting in bad faith. The respective articles also cover contentually the substance of not disclosing or misrepresenting facts and in this way misleading the other party as to the nature or terms of the contract to be concluded.

As is referred to in the scholarship, Article 2.1.15(2)-(3) PICC are not mandatory rules and may be waived or limited by the parties, if the disclaimer is not 'grossly unfair' according to Article 7.1.6 PECL and does not infringe the requirement of consistent behaviour according to Article 1.8 PECL.

These provisions are supplemented with a strict rule on confidentiality, whereas even benefit-based remedy can be triggered in the event of breach.

IV. German Bürgerliches Gesetzbuch

Section 241: Duties arising from an obligation
(2) An obligation may also, depending on its contents, oblige each party to take account of the rights, legal interests and other interests of the other party.

Section 280: Damages for breach of duty
(1) If the obligor breaches a duty arising from the obligation, the obligee may demand damages for the damage caused thereby. This does not apply if the obligor is not responsible for the breach of duty.

Section 311: Obligations created by legal transaction and obligations similar to legal transactions
(2) An obligation with duties under section 241 (2) also comes into existence by
1. the commencement of contract negotiations
2. the initiation of a contract where one party, with regard to a potential contractual relationship, gives the other party the possibility of affecting his rights, legal interests and other interests, or entrusts these to him, or
3. similar business contacts.
(3) An obligation with duties under section 241 (2) may also come into existence in relation to persons who are not themselves intended to be parties to the contract. Such an obligation comes into existence in particular if the third party, by laying claim to being given a particularly high degree of trust, substantially influences the pre-contract negotiations or the entering into of the contract.

The German approach is very much characterised by the pioneering idea composed by Rudolf von Jhering, who came to the conclusion that 'obligations of loyal and considerate conduct' can arise even without the conclusion of a valid contract. Jhering focused mainly on the gap in legal protection of one party, if the other caused the invalidity of the contract. Later on the idea of culpa in contrahendo was referred to in order to counterbalance the cautious and restrained coverage of the German law of delict, basically not including compensation for pure economic loss and allowing the exculpation of the principal in the event the vicarious agent caused losses to a third party, if the principal could prove that they had chosen and supervised the agent with

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137 Cf. Pannebakker, 299 with reference to other sources.
138 UNIDROIT Principles, 60.
139 Pannebakker, 302.
140 For the English translation of the respective terms see Looschelders, 29. For the original see Jhering, 'Culpa in contrahendo oder Schadensersatz bei nichtigen oder nicht zur Perfection gelangten Verträgen', 4 Jherings Jahrbücher (1861), 1.
Precontractual duties and liability have been codified law since the reform of the law of obligations in 2001. The (now contractual) liability is fault-based and fault is presumed.

According to some scholars, a *timely gradation* of the *negotiation process* is reflected by the statutory regime, in line with the progression of the negotiations. Section 311 Para 2 No. 3 BGB (similar business contact) matches the beginning stage of negotiations, wherein only duties of protection arise, while No. 1 (commencement of contract negotiations) is a more advanced stage wherein further duties of protection and care and additionally duties of information evolve. (No. 2 – initiation of a contract – provides for duties of protection regarding the other party’s person and interests with the same intensity during the whole process of negotiation, regardless of their progression.)

Other scholars point out that the relationship between the three provisions is unclear and controversial, since (for example) the initiation of a contract involves commencement of contract negotiations.

- Similar business contacts (No. 3) are not mere social contacts; however, they do not have to be aimed at the conclusion of any particular contract: even if there is a contract in sight but it is not yet initiated, just prepared, this also qualifies as a business contact. The notion of business contact covers also situations wherein no conclusion of contract is considered at all.
- The commencement of contract negotiations (No. 1) presupposes mutual intent to conclude a contract. It is sufficient if bilateral preparatory negotiations have begun, even if no offer is yet made.
- The ‘initiation of a contract where one party, with regard to a potential contractual relationship, gives the other party the possibility of affecting his rights, legal interests and other interests, or entrusts these to him’ (No. 2) is considered to be a small general clause that shall be interpreted broadly and also applies if the parties do not have a firm intention to conclude a particular contract, but they consider to conclude a contract in general, such as the one party enters the other’s shop having the conclusion of some contract in mind.

The analyses on Section 311 Para 2 BGB in the jurisprudence either draw upon the respective duties including their breach (duties of protection and care of the other party’s person and interests; breaking off negotiations; duty to inform; duty of confidentiality) or are provided in accordance with the faith of the contract, emphasising the conclusion of an invalid or of a valid but disadvantageous contract whereas this perception is the other side of breaching the duty to inform. The faith of the contract (not concluded, invalid, valid but disadvantageous) is often coupled with the applicable remedies, i.e. damages in particular.

- The volume and heads of damages do not depend on the faith of the contract as far as the duty of protection of the other party’s person and interests or the duty of confidentiality are breached.

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141 Looschelders, 30.
142 Ersoy, 56.
144 Emmerich, para. 42.
145 Looschelders, 32; Ersoy, 42-43; Emmerich, para. 43-47.
146 Bergjan, 398-400; Schulze, 15-16.
147 Looschelders 36-37.
– There is however a correlation if the contract was finally not concluded (breaking off negotiations); or was concluded but is invalid: damages are restricted to negative (reliance) interest unless the party can prove that the contract would have been (validly) concluded in the absence of the breach of precontractual duties. The same applies to the group of cases where the contract was concluded but is seen as disadvantageous from the one party’s perspective.  

Injunctive relief can be granted if the disclosure or inappropriate use of confidential information (obtained during the negotiations) threatens.  

V. French Code Civil

Art. 1104.
Contracts must be negotiated, formed and performed in good faith. This provision is a matter of public policy.

Art. 1112.
The commencement, continuation and breaking-off of precontractual negotiations are free from control. They must mandatorily satisfy the requirements of good faith.

In case of fault committed during the negotiations, the reparation of the resulting loss is not calculated so as to compensate the loss of benefits, which were expected from the contract that was not concluded nor the loss of the chance to obtain such benefits.

Art. 1112-1.
The party who knows information which is of decisive importance for the consent of the other, must inform him of it where the latter legitimately does not know the information or relies on the contracting party.

However, this duty to inform does not apply to an assessment of the value of the act of performance.

Information is of decisive importance if it has a direct and necessary relationship with the content of the contract or the status of the parties.

A person who claims that information was due to him has the burden of proving that the other party had the duty to provide it, and that other party has the burden of proving that he has provided it.

The parties may neither limit nor exclude this duty.

In addition to imposing liability on the party who had the duty to inform, his failure to fulfil the duty may lead to annulment of the contract under the conditions provided by articles 1130 and following.

Art. 1112-2.
A person who without permission makes use of or discloses confidential information obtained in the course of negotiations incurs liability under the conditions set out by the general law.

Art. 1116.
An offer may not be withdrawn before the expiry of any period fixed by the offeror or, if no such period has been fixed, the end of a reasonable period.

The withdrawal of an offer in contravention of this prohibition prevents the contract being concluded.

The person who thus withdraws an offer incurs extra-contractual liability under the conditions set out by the general law, and has no obligation to compensate the loss of profits, which were expected from the contract.

Art. 1240.
Any human action whatsoever which causes harm to another creates an obligation in the person by whose fault it occurred to make reparation for it.

148 Ersoy, 46-54.
149 Ersoy, 58-59.
Art. 1241.

Everyone is liable for harm, which he has caused not only by his action, but also by his failure to act or his lack of care.\(^{150}\)

The 2016 reform of the law of obligations completely reshaped precontractual liability. The aim was to have a more certain and market-friendly regime.\(^ {151}\) The set of rules presented combines general clauses (good faith, precontractual good faith) and particular precontractual duties (duty of information, confidentiality – the latter inspired by PICC, PECL and DCFR\(^ {152}\)). Precontractual liability is still considered part of the law of delict (tort law), therefore Articles 1240-1241 Code Civil apply to damages. The general and the precontractual good faith principle and the information obligation are mandatory rules.

Four special distinctive features of the reconsidered French approach shall be highlighted here:

- First, in the event of fault during negotiations, awarding expectation interest related to the anticipated contract that was finally not concluded (i.e. loss of benefits and loss of chance in this respect) is explicitly excluded. This is in line with the approach of other legal systems; remarkable is, however, the explicit codification of this restriction.
- Second, the duty to inform does not apply to an assessment of the value of the act of performance. This is not different to the approach of other legal systems, though the statutory fixing of it seems to be unique.
- Third, unpermitted withdrawal of an offer explicitly triggers a claim for damages (Article 1116 Code Civil), but again, excluding the loss of profit expected from the contract.
- Fourth, scholars also emphasise the independence of the information duty (Article 1112-1 Code Civil) from both the good faith requirement and from defects in consent (fraud, etc.).\(^ {153}\)

Article 1112 Code Civil is still considered as an open norm that accommodates the ‘ethics of negotiation’, including the requirements of loyalty (conduct with the intent to harm is prohibited), consistency of conduct (obligation to be coherent, i.e. expectation of acting in a manner consistent with one’s own previous behaviour) and transparency (obligation of information crucial to the decision on the negotiated contract).\(^ {154}\) From a slightly different perspective, precontractual fault means a conduct not in line with

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\(^{150}\) As far as Articles 1240 and 1241 are concerned, when closing this Chapter, there is an ongoing reform on extracontractual liability in France. The English translation of the first draft bill submitted by the minister of justice back in 2017 can be accessed here: [http://www.textes.justice.gouv.fr/art_pix/ref orm_bill_on_civil_liability_march_2017.pdf](http://www.textes.justice.gouv.fr/art_pix/ref orm_bill_on_civil_liability_march_2017.pdf). Another draft bill submitted to the Senate in July 2020 by senators can be accessed (in French) here: [http://www.senat.fr/dossier-legislatif/ppl19-678.html](http://www.senat.fr/dossier-legislatif/ppl19-678.html). The English translation of the proposed new text of Articles 1240-1241 are as follows:

Article 1240: A person is liable for the harm caused by his fault.

Article 1241: A violation of a legislative requirement or a failure in the general duty of care or diligence constitutes a fault.

Draft Article 1241 ‘which is intended to provide a definition of fault for the first time’ seems to be in line with earlier academic writings on the nature and content of fault. See Dugué, ‘The Definition of Civil Fault’, in: Borghetti & Whittaker, *French Civil Liability in Comparative Perspective* (2019), p. 80, 84. The author thanks Michel Cannarsa for the kind support and information on the status quo of the reform and for the resources indicated.

\(^{151}\) Sefton-Green, 60.

\(^ {152}\) De Vincelles, 91.

\(^{153}\) De Vincelles, 80, 86-87.

\(^{154}\) Pannebakker, 80.
the standard of the reasonable negotiator. In scholarship, three main types of wrongful behaviour are specified: entering into or continuing negotiations without a real intention to conclude the contract; behaving wrongfully during negotiations; and suddenly breaking off the (advanced) negotiations without legitimate reason when the other party had good reason to expect the imminent conclusion of the contract.\footnote{Zuloaga, 63, 84.}

VI. Spanish Código Civil

Article 7

1. Rights must be exercised in accordance with the requirements of good faith.
2. The law does not support abuse of rights or antisocial exercise thereof. Any act or omission which, as a result of the author’s intention, its purpose or the circumstances in which it is performed manifestly exceeds the normal limits to exercise a right, with damage to a third party, shall give rise to the corresponding compensation and the adoption of judicial or administrative measures preventing persistence in such abuse.

Article 1101

Persons who, in the performance of their obligations, should incur in wilful misconduct, negligence or default, and those who in any way should contravene the content of the obligation shall be subject to compensation of any damages caused.

Article 1902

The person who, as a result of an action or omission, causes damage to another by his fault or negligence shall be obliged to repair the damaged caused.

The precontractual stage is not explicitly covered in the Spanish Civil Code. Precontractual duties are derived from the general requirement of good faith and from the prohibition of the abuse of rights. If (precontractual) liability is triggered, then the fault-based general clause of tort law applies. Commentators remark that if the negotiations were advanced and the probability of a successful outcome was so high that it induced a legitimate confidence that a contract would certainly be concluded, Spanish courts tend to find that the contract had already been concluded orally instead of awarding damages for breach of the general duty of good faith.\footnote{Zimmermann & Whittaker, \textit{Good Faith in European Contract Law} (2000), p. 244-45. With reference to tort law and to the abuse of rights cf. Cartwright & Hesselink, 54, 61.}

VII. Italian Codice Civile

Article 1337 Negotiations and Precontractual Liability

The parties in the conduct of negotiations and the formation of the contract shall conduct themselves according to good faith.

Article 1338 Knowledge of the Reasons of Invalidity

A party who knows or should know the existence of a reason for invalidity of the contract and does not give notice to the other party is bound to compensate for the damages suffered by the latter in relying without fault, on the validity of the contract.

The Italian approach mixes the technique of a general clause (\textit{buona fede nelle trattative}: to act in good faith in negotiations, which covers the requirements of \textit{correttezza} – duty of fair play; \textit{serietà} – reliability and \textit{solidarietà} – cooperation)\footnote{Cartwright & Hesselink, 45.} and of a particular duty, namely that of information on the reason for invalidity. Damages shall be paid
if the other party relied on the validity of the contract without fault. Remarkable is that the duty to inform is restricted to potential invalidity; however, a broad (extending) interpretation can be based on the general good faith requirement. If the party terminates the negotiations without good reason (recesso ingiustificato dalle trattative – unjustified withdrawal from negotiations), this can trigger liability as provided for in Article 1337 Codice Civile, and, according to the traditional approach, only these two groups of cases were covered by the Italian statutory regime. The conclusion of a valid contract precluded precontractual liability, because the misbehaviour of the party was considered to have been absorbed by the concluded (and valid) contract until this wall was broken through with reference to delay during the negotiations and to valid but disadvantageous contracts due to the party’s omission to provide all relevant information (or to any other conduct in bad faith) causing ‘decrease in profitability’ and ‘increase of economic burden’ (such as the loss of a tax benefit). Case law thus extended the scope of Article 1337 Codice Civile significantly, and it now covers a variety of cases, such as the impossibility to conclude the contract caused by fault or unfairness of one of the parties. Compensation is basically restricted to the negative interest (interesse negativo), at least if there is no contract or the contract is invalid.

### VIII. Netherlands Burgerlijk Wetboek

**Article 3:296** Legal action to claim specific performance

1. Where a person is legally obliged towards another person to give, to do or not to do something, the court shall order him, upon a request or claim of the entitled person, to carry out this specific performance, unless something else results from law, the nature of the obligation or a juridical act.

**Article 6:2** Reasonableness and fairness within the relationship between the creditor and debtor

1. The creditor and debtor must behave themselves towards each other in accordance with the standards of reasonableness and fairness.
2. A rule in force between a creditor and his debtor by virtue of law, common practice or a juridical act does not apply as far as this would be unacceptable, in the circumstances, by standards of reasonableness and fairness.

**Article 6:248** Legal effects arising from law, usage or the standards of reasonableness and fairness

1. An agreement not only has the legal effects which parties have agreed upon, but also those which, to the nature of the agreement, arise from law, usage (common practice) or the standards of reasonableness and fairness.
2. A rule, to be observed by parties as a result of their agreement, is not applicable insofar this, given the circumstances, would be unacceptable to standards of reasonableness and fairness.

The Dutch Civil Code does not specify any particular precontractual duty; precontractual liability is based on the requirement of reasonableness and fairness (redelijkheid en billijkheid). Nevertheless, Dutch law seems to have the most expansive approach since, according to the (since then heavily criticised and finely graduated) Plas/Valburg case, at the very late (third stage) of negotiations, the parties are no longer free to break

158 Febbrajo, 291-92; Cartwright & Hesselink, 44-45.
159 The request for compensation based on precontractual liability was denied if the contract was concluded but the seller did not inform the buyer of the requirement to obtain an import licence; the seller failed to disclose that no building works could be carried out on the piece of land sold; the seller did not mention that the used cars were imported from abroad. See Febbrajo, 294.
160 Febbrajo, 292-94.
161 Febbrajo, 298-301. Magri, 114-16.
162 Magri, 113.
163 Febbrajo, 293, 306.
off negotiations and therefore, besides awarding compensation for expectation interests, even specific performance – i.e. the continuation of negotiations – can be ordered.\textsuperscript{164} The misuse of confidential information is however qualified as tort.\textsuperscript{165}

IX. Chinese Law

Article 7

All civil subjects engaging in civil activities shall observe the principle of good faith, adhere to honesty and keep their commitments.

Article 157

After a juridical act is void, revoked, or determined as having no binding force, the property obtained by the actor as a result of the act shall be restituted; if restitution is impossible or unnecessary, indemnification shall be made at an estimated price. The party at fault shall compensate the other party for any loss suffered as a result of the act; or if both parties are at fault, they shall assume corresponding liabilities respectively, except as otherwise provided for by any law.

Article 500

A party shall be liable for compensation if it falls under any of the following circumstances when concluding a contract, thereby causing any losses to the other party:

1. Negotiating the contract in bad faith under the pretext of concluding a contract;
2. Deliberately concealing important facts relating to the conclusion of the contract or providing false information;
3. Having any other act in violation of the principle of good faith.

Article 501

Trade secrets known by the contracting parties in the course of concluding the contract; or other confidential information shall not be disclosed or improperly used, no matter the contract has been concluded or not. Whoever discloses or improperly uses such trade secrets or information and thus causes losses to the other party shall be liable for compensation.

X. Interpretation II of the Supreme People’s Court of Several Issues concerning the Application of the Chinese Contract Law (prior to the New Civil Code)

Article 8

After the formation of a contract which does not become effective until it is approved or registered under a relevant law or administrative regulation, if the party which has the obligation to apply to go through the approval or registration formalities fails to do so under the relevant law or contractual provisions, such failure shall fall within the scope of ‘taking any other act contrary to the principle of good faith’, and the people's court may, as the case may be, and upon the request of the opposite party, rule that the opposite party shall go through the relevant formalities by itself. However, the other party shall be liable for compensating the opposite party for the expenses incurred thereof and the losses actually caused to the opposite party.

Scholars emphasise that Italian and German law significantly influenced the Chinese legislator; however, the enacted rules tend to reflect the reception of PICC and PECL.\textsuperscript{166}

\textsuperscript{164} Cartwright & Hesselink, 468-69. The controversial and sometimes bracketed Plas/Valburg judgment from 1995 distinguished three stages. The parties are free to break off at the first stage. The party breaking off at the second stage owes the other party the expenses incurred during negotiations. If the party wants to walk away in the third – final – stage (without a justified reason) then remedies include expectation interest and also a negotiation order can be awarded, id. 48.

\textsuperscript{165} Pannebakker, 50-51.

\textsuperscript{166} Durovic, ‘Harmonization of Contract Law in Eastern and South-Eastern Asia: What Can Be Learned from the CISG and the ECL Experience?', 7 Global Journal of Comparative Law (2018) 207, 228; Ding, 487.
Articles 500 and 501 of the CCC contain the identical text as Articles 42 and 43 of the former Chinese Contract Law.

The general requirement of good faith is provided for in Article 7 and is referred to regarding the precontractual phase in general in Article 500(3). The latter is a catchall provision. Article 500(1) and 500(2) of the CCC specify a contrario two particular precontractual duties; first not to negotiate in bad faith, i.e. not to purport the conclusion of the contract in particular (prohibition of sham);\footnote{Li, 166.} and second, within the frame of the duty to inform: to provide information on all important facts and provide only true and accurate information (i.e. not to conceal important facts and not to provide false information, which requirement is equal to the prohibition of intentional misrepresentation and of intentional non-disclosure to induce the other party to conclude the contract).\footnote{Li, 166.} Both provisions cover fraudulent misrepresentation: one about the intent (to make a contract) and the other one about any material information relevant to the conclusion of the contract.\footnote{Ding, 488.} Another particular duty is provided for in Article 501 of the CCC, the duty of confidentiality.

Article 157 of the CCC covers those cases where the contract is void, revoked or does not have binding force – among other things – as a result of breaching the information duty. Articles 157 and 500(2) of the CCC provide concurrent liabilities, but there is no hierarchy between the two; the plaintiff can rely on both simultaneously.\footnote{Ding, 500-501.}

The catchall provision of Article 500(3) of the CCC is concretised in both case law and by professional background organisations supporting legislative bodies. The Research office of the Standing Committee of the National People's Congress summarised the conducts that are not in line with the requirement of good faith. There are also such duties and circumstances on the list that are however covered by Article 500(1) and (2) of the CCC too.\footnote{Wei & Yu, 283.} Scholars generally report five groups of cases, whereas the groups cited there overlap again in part with the misrepresentation-centred preceding Articles. The five groups are as follows:

- negotiation in bad faith with no genuine intent to make a contract;
- breaking off negotiations without justification;
- fruitless negotiations resulting from one party’s fault (the party failed to comply with the procedural requirements of public bidding; or has intentionally or negligently caused ab initio impossibility of performance; or failed to apply for planning permission; one party fraudulently or negligently misrepresented or has failed to disclose a relevant fact);
- conclusion of a void or voidable contract (again, fraudulent misrepresentation and duress);

\footnote{Li, 166.}
\footnote{Ding, 488.}
\footnote{Ding, 500-501.}
\footnote{Wei & Yu, 283.}
F. Commentary

I. The CISG and Precontractual Liability

1. Is Precontractual Liability Covered by the CISG?

The CISG generally does not regulate contractual negotiations, i.e. the precontractual stage as such, apart from a couple of specific provisions specified below in the next subsection. The CISG does not contain an explicit provision or general requirement to act in good faith, neither in general, nor in particular related to precontractual negotiations. Article 7(1) CISG includes good faith only as a factor to have regard to in the interpretation of the Convention. Article 7(2) CISG offers the general principles on which the Convention is based to settle questions governed by the Convention but not expressly regulated by it. This is the result of a hard-won (awkward or statesmanlike) compromise between the opposing views of Civil Law and Common Law. Unsurprisingly, the controversies (pros and cons, discussion, etc.) during the preparation and drafting of CISG de lege ferenda, survived and continued to affect de lege lata. Article 7 CISG is only the mere illusion of compromise. The question asked in the course of the drafting – whether the CISG shall cover the precontractual stage and contain a general duty to act in good faith to be also projected to the negotiations – was transformed into the issue of whether the CISG does cover precontractual liability and a general duty to act in good faith during the negotiations. According to the prevailing view with reference to the plain wording and drafting history, the answer is a firm no. The CISG (if it applies) supersedes the applicable (domestic) law in all matters regulated by the CISG from a functional perspective but, as far as culpa in contrahendo in general (i.e. apart from the particular issues yet covered by the CISG) is concerned, the applicable (domestic) law prevails, since precontractual liability as such is not governed by the CISG at all.

a) Reasons in favour of CISG’s Coverage

Nonetheless, several arguable and justifiable views other than the prevailing one are represented in scholarship; for example, although as long as the offer can be revoked according to the CISG, there is no precontractual liability, but if the one party induced a bond of trust that the contract would be concluded and the other party relied on

172 Ding, 491-503.
177 Magnus, para. 43.
178 Spagnolo, 266 with reference to external gaps in general.
that in fact then the latter is entitled to be compensated for the reliance interest based on the CISG itself, even if the contract was not concluded in the end, since a general principle can be drawn upon a couple of articles of the CISG wherein the protection of trust and reliance is involved (such as Articles 16(2)(b), 29(2) second sentence and 35(2)(b) CISG). More or less the same pros and cons are considered to this day as were while the CISG was in the making. The pros can be summarised as follows: the precontractual stage is considered by some supporters as an internal gap that can be filled by the general principles of CISG, i.e. by good faith, inter alia; the issues dealt with in negotiations are inseparable from the contract formation, therefore the scope shall be extended to cover the former; precontractual liability is pulled in under the CISG if Article 16(2)(b) CISG applies: according to this, an offer cannot be revoked 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 (venire contra factum proprium); good faith is universally recognised as a fundamental principle and allows flexibility while encourages a high standard of behaviour for reducing unfair trade practices, omitting good faith is therefore a wrong signal to parties. Moreover, the CISG shall not be captured as ‘a prisoner of the past’.

b) Reasons against the CISG’s Coverage

Opponents highlighted the vagueness of good faith, which increases uncertainty, and if good faith is indeed implicit in all business laws and international trade then it is superfluous to create an explicit provision on it anyway. Moreover, broad and extensive interpretation can be seen as ‘overstepping the spirit of international consensus’. It is incorrect to utilise general principles of the CISG to decide upon whether an issue is in fact an external or internal gap; this is a kind of Munchausen-stunt. Instead, recourse to domestic law is obligatory as far as external gaps are concerned, otherwise anything ‘within the potential reach’ of internal interpretive methods ‘is by definition internal to the CISG’. Article 7(2) CISG ‘gives no mandate to stretch the CISG beyond matters governed by it.’

One of the most convincing points against the extension of CISG and of the good faith requirement to the negotiating stage is that the immanent uncertainty can discourage the contracting parties from keeping their contract under the CISG, because clarity and certainty about rule outcomes is ‘much more important to commercial parties at the drafting stage than the particular legal shape of outcomes’, as whatever the outcome, it can be dealt with through pricing or insurance. If the scope of CISG were extended to the precontractual stage, the parties would be tempted to opt out due to the vagueness of precontractual good faith. If the risk allocation of liability (and the value of the contractual bargain) cannot be predicted then no rational decisions can be made due to the uncertainty, which causes further inefficiencies and the increase of transaction costs. Therefore the narrower scope (excluding precontractual good faith) encourages more frequent use of the CISG.

179 Magnus, para. 42, 43.
180 Pannebakker, 282-284.
181 Spagnolo, 270.
182 Spagnolo, 288.
183 Spagnolo, 270.
184 Spagnolo, 287.
185 Spagnolo, 305.
186 Spagnolo, 305-306.
187 Spagnolo, 308.
188 Spagnolo, 285-86, 290, 292, 309.
2. Precontractual Liability and the CISG: Interrelationship and Connecting Factors

a) Having Regard to Precontractual Negotiations

The interconnected relationship between the CISG and the precontractual stage (though basically not covered) is twofold. First, there are some provisions of the CISG that order the precontractual negotiations to be taken into account to some extent. Article 8(3) CISG requires – among other things – the consideration of the negotiations in determining the intent of a party. The same applies to the recognisability of the international character of the contract according to Article 1(2) CISG and of the fact that the buyer is a consumer (Article 2(a) CISG). This phenomenon can be called pulling in or considering the precontractual negotiations in interpreting and evaluating the awareness of the parties of some specific aspects related to the transaction.

b) CISG Supersedes Domestic Law on Precontractual Liability

Second, as referred to above: the CISG supersedes the applicable (domestic) law in all matters regulated by the CISG from a functional perspective, therefore some CISG provisions definitely and explicitly squeeze out the reference to domestic culpa in contrahendo. This is remarkable, because the CISG does not cover precontractual liability in a positive sense, but can deactivate domestic rules on the same matter in a negative sense. This can be called (domestic) precontractual liability overridden by the CISG.

ba) According to Article 15(2) CISG ‘An offer, even if it is irrevocable, may be withdrawn if the withdrawal reaches the offeree before or at the same time as the offer.’ Therefore breaking off negotiations is explicitly allowed and, according to the prevailing view, this clear position of the CISG can neither be circumvented with reference to the protection of trust and reliance based on the CISG itself, nor to culpa in contrahendo as provided for in the (applicable) domestic law.

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189 Magnus, para. 42.
190 Illescas Ortiz, 46.
191 Huber, Art 4 CISG, in: MüKo BGB online edition (2019), para. 29. Regarding this situation, the priority of the CISG over domestic law (cf. subsection 1.2.b. below) is twofold. First, because of the general approach that the CISG supersedes the applicable domestic law regarding all subject matters within its scope. Second, as it is referred to above (B.V.3., → mn. 46.) regarding German law, contractual remedies on non-conformity override precontractual liability anyway, also within the domestic law.
193 See the different view represented by Magnus, para. 42-43. In our understanding, there could and should be room for a more sophisticated and graded view. The consequence as such, that the offer...
In the same way, Article 16 CISG also supersedes any recourse to the precontractual liability regime of the (applicable) domestic law. If the revocation of the offer was in line with Article 16 CISG, no liability arises whatsoever. If revocation was not possible then the contract is concluded by the acceptance of the other party, and if the party that made the offer rejects performance, that triggers contractual liability according to the CISG. There is no room for recourse to domestic culpa in contrahendo in this case either.\textsuperscript{194}

Another example is Article 35 CISG (conformity of the goods, providing false information on the features of the goods or not mentioning defects in the goods): precontractual liability based on the applicable domestic law is understood to be superseded; in other words, the contractual good is defective and contractual liability under the CISG absorbs precontractual liability (governed by the applicable domestic law), unless the seller’s misrepresentation was intentional (which opens the possibility of recourse to the culpa in contrahendo of the applicable domestic law that is frequently covered by tort law).\textsuperscript{195}

c) Duties of Protection not Covered by the CISG

Since the CISG does not cover the duty of protection during negotiations regarding the person and property of the other party, culpa in contrahendo (or tort law) of the applicable domestic law governs this issue.\textsuperscript{196}

II. Precontractual Duties and Their Breach

1. Breaking Off Negotiations

a) General Findings

As analysed above (B.II., → mn. 9.) contractual freedom and, as a part of it, freedom from contract or freedom not to contract prevails, breaking off negotiations in itself therefore does not justify any (precontractual) liability. Parallel negotiations are not forbidden per se either (unless the parties themselves agree upon exclusivity for the period of negotiations).\textsuperscript{197} The basis of liability is the disappointment of the reasonable (legitimate) reliance of the one party on the imminent (and in some legal systems such as Germany: certain) conclusion of the negotiated contract induced or encouraged by the other party’s conduct or omission of revealing the change of mind, heart or circumstances as quickly as possible, through an unexpected breaking off (or refusing to continue) the negotiations for no good (justifiable) reason (or not indicating any reason

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\textsuperscript{194} Schroeter, 79, 130; Ferrari, Article 16 CISG, in: Kröll, Mistelis & Perales Viscasillas, \textit{UN Convention on Contracts for the International Sales of Goods} (2\textsuperscript{nd} edn. 2018), para. 24. But if the offerer committed an intentional tort then the recourse to domestic tort law is the only way to be awarded damages; such conducts do not belong to the scope of the CISG. Id. para. 25.

\textsuperscript{195} Huber, para. 29; Magnus, para. 43. Similarly Schroeter, 79. See also Perales Viscasillas, Article 7 CISG, in: Kröll, Mistelis & Perales Viscasillas, \textit{UN Convention on Contracts for the International Sales of Goods} (2\textsuperscript{nd} edn. 2018), para. 36.

\textsuperscript{196} Schroeter, 79.

\textsuperscript{197} Pannebakker, 293, 299 with reference to PECL.
or just a fictitious or irrelevant reason). The combination of inducing (intentionally or negligently) and then disappointing that legitimate expectation triggers (a fault based) liability that is – according to comparative experience – exceptional, since the mere fact that the parties entered into negotiations does not, cannot, tie them together. Frustrated expenses and perhaps foregone opportunities have to be compensated for, provided the expenses and other decisions of the ‘innocent’ party were reasonable and proportional to the status and degree of the negotiations. This combination of facts justifies the shifting of economic risk (of the failure of negotiations) from the innocent party to the party that breaks off the negotiations as soon as the innocent party is entitled to rely on the future conclusion of the contract created or encouraged by the party subsequently breaking off.

Clearly, the details are elaborated on either in commentaries and doctrinal treatises or in case law; however, there is a soft law instrument, the European Contract Code drafted by the Academy of European Private Lawyers (AEPL Code), Article 6(3) of which explicitly lays down the cornerstones of precontractual liability in the event of breaking off negotiations in such detail as no other statute or soft law instrument: ‘If in the course of negotiations the parties have already considered the essentials of the contract whose conclusion is predictable, either party who breaks off negotiations without justifiable grounds, having created reasonable confidence in the other, is acting contrary to good faith.’ This provision highlights factors that are indeed significant in all legal systems concerned; however, they do not have such an accentuated, special status as in the cited provision (such as having considered the essentials).

The key element is however the reasonable reliance induced by the party subsequently breaking off negotiations and doing so without a justifiable reason. The approach is strongly fact-based at the discretion of the trial judge.

The party’s conduct creating or at least encouraging the reliance includes conduct in a wide sense, i.e. express or implied declarations or behaviour, such as making promises, statements or assurances of the imminent success of the negotiations; adopting certain attitudes, even towards third parties, indicating the conclusion of the future contract (i.e. signs of commitment given).

On the other hand, inaction or omissions can have the same effect, such as ‘failing to warn, inform or explain’ the other party that it is still open and uncertain whether the contract will be concluded or not providing the information as quickly as possible on the circumstances, considerations, etc. that have changed. A spectacular example is the failure to notify the other party that the party (subsequently) breaking off has already concluded a contract with a third party (parallel negotiations as such are not generally prohibited by law).

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198 For a summary cf. Zuloaga, 1, 153-54; Kötz, 37.
199 Schwenzer, Hachem & Kee, 280.
200 Dietrich, 177-78.
201 Dietrich, 181.
202 Zuloaga, 155-56. with reference to Chinese case law, Ding, 496.
204 Similarly, in the Italian case law, cf. Febbrajo, 292; Magri, 112. Also in the Chinese case law based on Article 500(3) of the Civil Code – identical to the former Article 42(3) Chinese Contract Law, cf. Ding, 492-93.
205 Cf. Ding, 496 with reference to Chinese law.
206 Cf. Pannebakker, 45-46 with reference to Dutch case law (the party introduced its would-be dealer as its dealer already, although the final contract was not yet concluded). Similarly, Zuloaga, 89 with reference to French law.
207 Zuloaga, 153-54.
It is controversial whether the party breaking off subsequently is necessarily expected to be aware of the reliance it induced or not: this question is answered partly in the negative, partly in the affirmative. According to the latter view, the reliance shall not just be reasonable, but also foreseeable to the other party. However it is difficult to imagine circumstances wherein the other party’s reliance is not obvious to the party.

Knowing that the contract cannot be (will not be) concluded anyway, because there is no real intention to do so or there is a non-recoverable obstacle to conclude (and to perform) the contract, but still negotiating equals to fraud, deceit, etc.

There must be direct causal connection between the reliance and the party’s (later breaking off) encouraging conduct.

**ab) Reasonable reliance** is understood objectively: i.e. it depends on whether a reasonable person in similar circumstances ‘would be justified to expect the future conclusion of the contract’ induced by conduct of the other party who then later breaks off. Personal hopes, desires, feelings or beliefs are not sufficient, otherwise each party would be bound from the beginning of the negotiations as if the contract had already been concluded.

The conduct of the party subsequently breaking off, and of the other (innocent) party and objective circumstances matter while judging on the reasonableness. As it is indicated in scholarship, more or less the same circumstances are taken into account in all (Civil Law) legal systems, although their relevance and the degree of intensity required is different.

- Among other things, previous contractual relations, advertising activity and the parties’ professions (and whether they are businesspeople or individuals) matter. Professionals and businesspeople – between themselves in particular – can claim damages only exceptionally and with more difficulty than consumers.
- The degree of advancement of the negotiations is an important indicator (being correlated, but not in lockstep with the length and level of intensity of the negotiations): the more advanced they are, the more reasonable the reliance is (‘the advancement of negotiations in substance – and not in time – is relevant’; in this sense, short and intense negotiations can also be seen as advanced if the parties agree quickly upon the majority of the essential terms and, for example, this is accompanied by the payment of 10% of the price). Although agreement on all essential elements is not required (since this can equal the final contract), once more, the higher the level of agreement reached on the terms (in particular if there is already an agreement on the majority of the essential terms), the more reasonable the reliance is.
- Even a ‘lesser expectation’ can suffice if the party (breaking off later) requests specific tasks or explicitly that expenses should be incurred or directly instructs the party to commence with the performance of the contract although not yet

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208 Zuloaga, 71, with reference to French law.
209 Zuloaga, 155.
210 Zuloaga, 152.
211 Zuloaga, 157-58. With special regard to French law.
212 Cf. Pannebakker, 44 with reference to Dutch case law; and in the same way with reference to French law, 85 and to PICC, 301. Zuloaga, 69-70 with reference to French law. In the same way in the Chinese case law, cf. Ding, 493.
213 Cf. with reference to French case law, Pannebakker, 85.
214 Zuloaga, 157. With reference to German law in particular, 38, and to French law 88. See also Pannebakker, 302 with reference to PICC.
215 Cf. Ding, 494 with reference to Chinese case law.
concluded, or even if the ‘innocent’ party starts to perform the anticipated contract by its own decision, of which the other party is aware but does not intervene or indicate its doubts on the future of the contract,\textsuperscript{218} or even accepts the partial performance.\textsuperscript{219}

- The reliance is not justifiable (reasonable) if ‘the party expressly manifested its doubt or unwillingness to commit’; if there are still many issues pending (some essentials too); obstacles to conclude are present and the parties are aware of them; or parallel negotiations with other parties take place simultaneously and the other party knows of that, etc.\textsuperscript{220}

- The passage of time is a double edged sword, since the length of the negotiations – in particular in connection with their advancement – is an indicator for the reasonableness of the reliance; however, if there is no improvement after a reasonable time, the negotiations have become stuck, then the longer the ‘no-load running’ goes on, the less justified the reliance can be.\textsuperscript{221}

- General or sector-specific business usage also matters if it is about the reasonableness of the reliance.\textsuperscript{222}

\textit{ac) The more sudden, abrupt and unexpected the party breaks off sans raison légitime, brutalement et unilatéralement}\textsuperscript{223} (in combination with the circumstances analysed above), the higher the likeliness of precontractual liability. The party breaking off the negotiations can still exempt themselves from liability by showing a \textit{justifiable} and \textit{good reason} for having broken off, since following commercial self-interest is still legitimate, altruism is not required in commercial intercourse. As such, no over-stringent requirements on the reason (being good or justifiable) shall be imposed,\textsuperscript{224} in order to avoid the indirect enforcement of the conclusion of the contract by imposing a harsh liability that would undermine contractual freedom.\textsuperscript{225} This approach makes it obvious again that precontractual liability for breaking off negotiations is an exceptional phenomenon.

\textbf{98} The more advanced the negotiations, the more necessary it is to provide a serious and objectively justified (i.e. substantial) reason for breaking off.\textsuperscript{226} However, even very advanced negotiations can be broken off if there is a well-justified serious reason. The more the reason relates to any objective circumstance of the case, the more it qualifies as justified and legitimate; less so if the reason referred to is particular to the party breaking off.\textsuperscript{227}

- The changing economic circumstances (such as the unpredictable increase of the costs of performance of the anticipated contract), changes in the relevant market, the (negative) results of feasibility studies (such as the party not meeting certain technical requirements or the results of a legal or financial audit not giving confidence), deterioration of the financial background of the other party (permanent lack

\begin{footnotes}
\textsuperscript{218} Similarly, Dietrich, 181. However, the mere knowledge that the other party has incurred expenses in itself does not trigger precontractual liability for breaking off in German law, cf. Zuloaga, 38.

\textsuperscript{219} Zuloaga, 69 with reference to French law.

\textsuperscript{220} Zuloaga, 158. Similarly, Emmerich, para. 178.

\textsuperscript{221} Emmerich, para. 177.

\textsuperscript{222} Cf. Ding, 494 with reference to Chinese case law.

\textsuperscript{223} Kötz, 37 citing French judgments.

\textsuperscript{224} Bergjan, 398 with reference to German law. Good reason exempts the party having broken off from liability even if it was at fault in awakening the other party’s expectation, cf. Zuloaga, 35.

\textsuperscript{225} Emmerich, para. 177. Similarly, with reference to Dutch law Pannebakker, 41.

\textsuperscript{226} Zuloaga, 69, 91, 92 with reference to French law. The same way Pannebakker, 87.

\textsuperscript{227} Zuloaga, 91 with reference to French law.
\end{footnotes}
of funding necessary to perform the anticipated contract) or just a better offer from a third party (enticing with more profitable conditions) justify the walking away, while changes in the internal policy of the party generally do not.\textsuperscript{228} 

- However, the result can be different, if although a better offer was made, but negotiations extended over a long period of time or the party (breaking off later) requested the other party to incur specific expenses.\textsuperscript{229} 

- Circumstances that would also justify the rescission of a (concluded) contract or that can be traced back to impediments within the other party's sphere (or at least they are not within the withdrawing party's sphere) also justify breaking off,\textsuperscript{230} such as physical or legal impossibility of performance (for example the law changes and renders the object of the contract untradeable).\textsuperscript{231} 

- The same way, the inflexible and unreasonable attitude of the other party (such as not providing the documents reasonably required by the other party several times in order to check financial situation and the technical conformity; or rejecting numerous subsequent offer from the party later breaking off), any profound disagreement of the parties or the sudden major modification of the proposals (for example the party in charge for the drafting of the final document unexpectedly reflects its own position therein instead of that agreed upon earlier) can also justify the breaking off.\textsuperscript{232} 

\textit{ad}) The liability is fault-based and fault corresponds with the (intentional or negligent) creation and subsequent disappointment of 'an expectation on which the other party legitimately relied'.\textsuperscript{233} Fault is understood in an abstract and objective manner; negligence suffices, i.e. no qualified fault is required. It is generally the party breaking off that has to exempt itself from liability, either because the fault is presumed (as being contractual as in German law), or even if it is not presumed, but is framed as an exemption to prove a good reason for breaking off (as in French law).\textsuperscript{234} The fault requirement is projected either to the creation of the reasonable reliance or to the breaking off (to be precise, to the circumstances of and reasons for breaking off) or to the combination of the two. Whichever statutory precondition fault is connected with, the case law of the respective legal systems show convergence.\textsuperscript{235} 

\textit{ae}) Expenses are only recoverable if they were substantial in extent (to the defendant’s actual or possible knowledge) and a reasonable man would have made them under the circumstances.\textsuperscript{236} Reliance plays a double role related to breaking off negotiations: besides imposing liability, it is also a defining element of the scope of liability (reliance interest, cf. subsection F.III. on remedies below).\textsuperscript{237}

\textsuperscript{228} Pannebakker, 88-89, 236. See also id. 46-47: a general worsening of the economic situation in the hotels market was regarded as a justified reason in the Dutch case law. With reference to the better offer from a third party in German law cf. Emmerich, para. 177. Similarly, with reference to French law Zuloaga, 92-93. 

\textsuperscript{229} Zuloaga with reference to German law, 40. 

\textsuperscript{230} Dietrich, 179. With reference to German law see Zuloaga, 40. 

\textsuperscript{231} This example is drawn upon Chinese case law, cf. Ding, 493. 

\textsuperscript{232} Pannebakker, 46, 88-89 with reference to Dutch and French case law and also Zuloaga, 91, 92 with reference to French law. 

\textsuperscript{233} Zuloaga, 153. With reference to German law see Emmerich, para. 182, rejecting the opposite view on strict reliance-liability. See also Sefton-Green, 60 with reference to French law. 

\textsuperscript{234} Zuloaga, 145, 149. With reference to French law id. 64, 66. With reference to German law also Bergjan, 399. 

\textsuperscript{235} Zuloaga, 145-46. With reference to German law 35-36, and to French law 66-67. 

\textsuperscript{236} Kötz, 37. 

\textsuperscript{237} Cartwright & Hesselink, 454.
b) Soft Law and Country-Specific Observations

ba) Article 1.8 PICC (prohibition of inconsistent behaviour), based on the reasonable reliance of the other party, definitely applies to the negotiation stage, as is confirmed in the official commentary.\textsuperscript{238} In compliance with the general findings above, the party’s understanding may result from any representation made, from conduct or silence of the party in breach, provided in the latter case there was reasonable expectation to speak (to correct a known error, etc.). The interpretation of this duty and its breach is obviously fact-based.\textsuperscript{239} Though not covered explicitly, the commentaries on Article 1:201 PECL (Good Faith and Fair Dealing) include reasonable reliance.\textsuperscript{240} Once an offer has been made, it can only be revoked within the limits of Article 2.1.4. PICC. Apart from that, abrupt breaking off negotiations is prohibited and triggers precontractual liability if there is no justification.\textsuperscript{241} Breaking off contrary to good faith triggers precontractual liability as well, according to Article 2:301 PECL, this is confirmed by the official commentary.\textsuperscript{242}

bb) The German approach seems to be slightly more rigorous than other legal systems. The reliance is considered as reasonable only if the certain conclusion of the (particular) anticipated contract can be expected among the circumstances.\textsuperscript{243} German scholars emphasise that the reliance shall be reasonable, from both a subjective (the party’s personal belief in the conclusion of the contract) and objective perspective (the belief must be founded on objective circumstances).\textsuperscript{244} If a contract is binding only if some statutory formal requirements are met (such as the notarial authentication of a contract on sales of land), the prevailing view is that the reliance on the other party’s conduct can never be justified, because everyone is expected to know that there will be no binding contract until the formality requirement is met, otherwise the purposes of the formality would be undermined (protection from over-hasty decisions, prevention of difficulties regarding proof). As far as formalities are concerned, any precontractual liability is only triggered if there is a particularly grave breach of the other party’s trust (such as pretence of the willingness to contract in the lack of such intent) and intentional conduct is presupposed.\textsuperscript{245}

\textsuperscript{238} See Illustration No. 1. The parties negotiated over a lengthy period of time, the one party wishes to lease the other party’s land. The lessor reasonably understands that the negotiations are completed and commences to demolish an old building and engages contractors to build a new one as discussed earlier. The lessee is aware of this and does not stop it, but later indicates that there are additional terms to be discussed. Cf. UNIDROIT principles, 22.

\textsuperscript{239} UNIDROIT Principles, 21-22.

\textsuperscript{240} Lando & Beale, 114.

\textsuperscript{241} UNIDROIT Principles, 62, see also illustration No. 5: the one party assures the other one to grant a franchise if the former makes extensive preparations and is ready to invest a concrete sum. When all is ready for the signing of the final agreement, the franchisor indicates that the would-be franchisee must invest a substantially higher sum. The would-be franchisee is entitled to be compensated for the expenses incurred so far.

\textsuperscript{242} See also Illustration No. 3. The one negotiating party invites the other one to develop software. In the course of the negotiations, the would-be supplier provides the other party with drafts, calculations and other documents. Shortly before the expected conclusion of a contract, the party breaking off invites a third party to make a bid and places all the precontractual documentation provided by the would-be supplier at the disposal of this third party, who can therefore give a better offer. The party breaking off is liable for the negotiating party’s expenses. Cf. Lando & Beale, 190.

\textsuperscript{243} Zuloaga, 28, 31, 36, 152-53.

\textsuperscript{244} Cf. the summary given by Zuloaga, 38.

\textsuperscript{245} Emmerich, para. 179. Zuloaga, 47-49. More complicated is the event of the final agreement is being reached but without fulfilling the formality requirement, in particular if one party induced the reliance of the other that no form was required or the form requirement would be fulfilled. Cf. the analysis provided by Zuloaga, 49-54 on the pendular case law developed by the German Bundesgerichtshof (and
bc) French courts clearly put a stronger emphasis on the status of the parties, and if they are professionals (businesspeople) then the courts seem to be more reluctant to impose liability; breaking off negotiations among professionals rarely leads to liability, unless there are some significant justifying circumstances, such as the long period of time and a particular level of intensity of the negotiations. (In contrast to the claims of laypeople towards whom the professional's superior knowledge awakens a higher level of confidence.) From a professional's perspective, precontractual risks are part of the risque d'entreprise.\textsuperscript{246} This view is reflected in the attitude of the courts in 'imposing more stringent requirements for the configuration of fault where the claimant is a professional.'\textsuperscript{247} The inducement and disappointment of the party's reasonable reliance is covered by various concepts – criticised in scholarship as lacking clear-cut definitions and conceptual clarity – such as legitimate belief (croyance légitime) and legitimate confidence and trust (confiance légitime).\textsuperscript{248} However their content and application converges to the general findings above. In French law, duties imposing standards of honesty and loyalty instead arise when negotiations have reached a more advanced level, in contrast with German law, where they emerge from the very moment when the parties commence negotiations.\textsuperscript{249} French courts seem to attribute higher importance to the suddenness of breaking off (regarding this in contrast to the advanced level of negotiations) than their colleagues in other legal systems.\textsuperscript{250} It is reported as a peculiarity of the French approach that the mere loss of confidence can qualify as a legitimate reason to break off negotiations.\textsuperscript{251} In contrast with German law, formality requirements (if at all) do not change the general approach to breaking off negotiations.\textsuperscript{252}

bd) As already referred to above (E. X., \rightarrow mn. 72) the Chinese Supreme People's Court provided an interpretation on the special situation if a contract does not become effective until it is approved or registered. If the party that is obliged to take care of approval or registration fails to do so then the court may, as the case may be and upon the request of the opposite party, rule that the opposite party shall go through the relevant formalities by itself. 'However, the other party shall be liable for compensating the opposite party for the expenses incurred thereof and the losses actually caused to the opposite party.' Since formality requirements are significant in Chinese private law, on the criticism of legal scholarship thereupon). Specific performance may be ordered – even in the event of serious breach of the duty of loyalty – only if the invalidity would create an absolutely unbearable result, i.e. would seriously endanger the innocent party's economic viability. If insisting on invalidity is not unbearable but 'only' harsh then 'only' damages have to be awarded: including however expectation interests. The circumvention of the formality requirement is still feared.

\textsuperscript{246} Zuloaga, 89-90.
\textsuperscript{247} Zuloaga, 65.
\textsuperscript{248} Zuloaga, 68.
\textsuperscript{249} Zuloaga, 82-83. French courts seem to exclude liability more easily at the beginning of the negotiations than when negotiations lasted for a longer period, cf. Pannebakker, 85; but this is apparently not different in the other legal systems analysed here.
\textsuperscript{250} Zuloaga, 70, 73, 89. With numerous examples on 'rude and abrupt break off' cf. Pannebakker, 86-87: negotiations lasted more than a year and included a feasibility study; however, the one party refused three final proposals without giving an explanation and broke off the negotiations; breaking off after four years of negotiations without any reason; negotiations were broken off on the same day as when signing the final contract was due to take place; the one party thought that the other party had lost its willingness to contract and broke off without indicating this suspicion towards the other party.
\textsuperscript{251} Zuloaga, 92.
\textsuperscript{252} Zuloaga, 93-96.
the same approach applies if there is no duty to obtain approval or registration but the contract cannot become effective while it is not formalised as required by law.²⁵³

2. Duty of Information

a) General Findings

The precontractual obligation of information or disclosure (and the consequences of its breach) is a complex issue. Its interference with invalidity and warranty rights has already been pointed out (B.V.3., → mn. 42 ff.), and can be traced back to the cross-connection of the failure to fulfil the information duty (concealment of relevant information or providing false information) and the conclusion of an invalid contract or a valid, but obviously disadvantageous contract. False or incomplete precontractual statements (with special regard to the features of the contractual goods) can influence contractual expectations, become part of the sales contract and trigger remedies for non-conformity.²⁵⁴ Moreover, there are two lines that come together in legislative policy; on the one hand, the intensive expansion of (European) consumer contract law with quite a few peculiarities and a genuine matrix of legal sanctions; and on the other hand the ‘ordinary’ duty to inform towards everyone, i.e. not limited to the weaker party, private persons or consumers.

Though the scope, intensity and depth of information duties are different according to the status (consumer, professional, trader, etc.) of the receiving party, there are some common roots of information duties of all kinds. These duties are all the more important since products become increasingly complex and some products (such as software) exist only virtually. Additionally, the more specific the respective good is, the more there is superior knowledge on the supplier’s or provider’s side. Finally, even if there is a mutual lack of (specific) information, the supplier or provider can obtain the necessary information much more easily and at significantly lower cost (because it is a ‘repeat player’, in contrast with the buyer for whom the contract is frequently ‘one off’). Having this in mind, standards of social ethics and the constant striving for economic welfare also justify the imposition of information duties.²⁵⁵

a) Status of the parties

The status of the parties indeed matters, hence there is a lower level of required information in B2B contracts, since traders and professionals are presumed to be familiar with the contractual goods and to have sufficient levels of expertise and professional advisory background (of lawyers, accountants, technical specialists, etc.).²⁵⁶ As such, they clearly do not owe information duties towards each other as far as ordinary products – familiar to both – are concerned. In borderline cases, the parties’ respective competencies need to be balanced regarding the product’s characteristics. Information duties can arise, for example, if the contract will cover innovative and newly developed products and therefore not even a professional buyer has sufficient competence to assess that particular product’s features.²⁵⁷

²⁵³ Ding, 495, 496-97. The author refers to contracts for the transfer of urban-land use rights separated from the ownership of the building; to contracts for the transfer of exploration or mining rights and to types of transactions with foreign participation.

²⁵⁴ Schwenzer, Hachem & Kee, 279. Contractual remedies prevail in German law, thus precontractual liability applies only if the respective information did not become part of the contract, cf. Emmerich, para. 75, 79-82.

²⁵⁵ Lehmann, 700-701.

²⁵⁶ Illescas Ortiz, 50.

²⁵⁷ Cf. Pannebakker, 83 with reference to French case law. The author highlights that the other party also has a duty to inform: i.e. is expected to unveil its exact expectations regarding the product.
ab) Apart from the particular (European) rules on broad information duties in B2C contracts, the prevailing view is that there is no general precontractual information duty. Each party is responsible for obtaining the information needed (and generally accessible such as market conditions, etc.) in order to make a reasonable transaction decision. (The duty to tell the truth, i.e. not to provide false information remains unaffected.) This restriction applies in two aspects: first it impacts the events and situations wherein a duty to inform arises at all; and second, it clearly determines the scope and depth of the information to be provided.

ac) However, a duty to inform can arise if the information needed clearly influences the one party’s decision to conclude the contract or not (and this is or should be obvious to the other party), but this party does not have access to the respective information, while the other party is already aware of it or can access it and easily obtain the information without any significant costs. (The latter scenario is controversial and the outcome is rather fact-based, as to whether any duty to inform only exists if the party has actual knowledge of the respective information or it can also be expected to obtain information.) A contrario, there is no duty to inform if the party itself can also obtain the information needed without any major inconvenience. Superiority of expertise on the one party’s side is also an indication regarding the duty of information, just like the general and commercial public view on whether the provision of information can reasonably be expected from the other party. Long-term contractual cooperation and the higher (extraordinary) economic volume of the contractual transaction can also indicate the duty to inform. A duty to inform also arises if the one party indicates that it needs counselling or guidance, or the other party realises that the party intends to incur expenses or demonstrates reliance on the statement of the other party, and the latter knows or should be aware of that the party lacks some further important details or that the previous statement was false or just incomplete or inaccurate; in other words, the party is or was acting under some misapprehension; it cannot be allowed by law that the other party knowingly takes advantage of the first party’s ignorance or mistake.

ad) On the scope and depth of the information duty, Article II.-3:101 DCFR is remarkable. Respectively, not all information needs to be provided but only those ‘concerning the goods, other assets or services to be supplied as the other person can reasonably expect, taking into account the standards of quality and performance which would be normal under the circumstances.’ If the other person is also a business – so Article II.-3:101(2) DCFR – the reasonable expectation depends on ‘whether the failure to provide the information would deviate from good commercial practice.’

258 Cf. Pannebakker with reference to PICC, 294; and Febbrajo, 311 with reference to Italian law: there is no general duty to inform in all situations and regarding all information. Similarly, Emmerich, para. 64 with reference to German law.
259 Emmerich, para. 65.
260 Emmerich, para. 66; Bergjan, 399.
261 Looschelders, 36-37. This question is answered in the negative in the German case law, cf. Emmerich, para. 70.
262 Emmerich, para. 79.
263 Ersoy, 52-53; Emmerich, para. 79; Bergjan, 399.
264 Cf. Emmerich, para. 68 with reference to German law; Bergjan, 399.
265 Schwenzer, Hachem & Kee, 279.
266 Cf. Emmerich, para. 66; Bergjan, 399.
267 Lohsse, 85-86. This however interferes with the specific duty to warn on the potential invalidity of the future contract. Emmerich, para. 77.
As mentioned above, the duty to inform only covers information that is crucial from the other party's perspective in deciding whether to contract or not. Information on the feasibility of performance, including the special risks attached to the planned transaction, certainly belongs here.268

The legal systems analysed here expect the parties to warn the other if the contract would be invalid, provided the cause of invalidity falls within their sphere of responsibility (risk).269

General statutory requirements, such as formalities, need not be disclosed explicitly, since those kinds of information are generally accessible to everyone, unless one party induced the other to rely on the validity of the future contract or one party can have a more accurate and up-to-date knowledge on the (potential) cause of invalidity270 (even more so if only one party – having its seat in the respective country – is aware of the need for a special official permit to proceed with the performance of the planned contract, but not the other – foreign – party).271

The information duty definitely does not cover the party's calculation, i.e. the value (profitability) of the transaction and the party does not have to update or rectify the other party's imaginations in this respect. In some legal systems – such as German law – this conclusion can be drawn from the published judgments,272 while it is explicitly provided for (i.e. is statutory law) in others, such as France in Article 1112-1(2) Code Civil: 'However, this duty to inform does not apply to an assessment of the value of the act of performance.' This has to do with the common understanding that the parties shall not be deprived of the possibility to make a bargain. A remarkable exception applies in the court practice of public bidding in some legal systems. In the event of miscalculation by the bidder, the recipient of the bid has to warn the bidder of the mistake, provided the miscalculation was recognisable.273

b) Country-Specific Issues

ba) The French approach to the duty to inform since the 2016 reform is remarkable: the explicit and detailed formulation of Article 1112-1 Code Civil is autonomous, i.e. independent from the general requirement of good faith, and also from fraud and has a mandatory character.274 The duty applies to all types of contracts (i.e. to negotiations regarding all types of contracts) and to all parties (i.e. the scope is not restricted to B2C contracts). The main characteristics of these new provisions are as follows.

Only actual (positive) knowledge triggers the information duty, thus there is no such duty if the party is not aware of the respective information (but could obtain it). The scholarship is divided on this point; some spot therein the legislator's intent to 'lessen the burden of the information giver' in order to make the regime more

268 Emmerich, para. 70, 74-75, 83-84 with a couple of examples: water inrush into the mine with a negative impact on the shares’ value; the way the house under sale was used so far has recently been prohibited by authorities; construction works were performed without the necessary building permit; high likelihood of the neighbours’ chicanery; the fact that the tenants refused to move out of the flat; the existence of odour nuisance due to a sewage plant; the car does not have any insurance coverage; the plant is working without the necessary official permit; the revenues from the land will significantly decrease in the foreseeable future; the tentative time for delivery was frequently exceeded; etc.

269 Cf. Looschelders, 36; Ersoy, 50; Emmerich, para. 71-72 with reference to German law. Magri, 113 with reference to Italian law. Illescas Ortiz, 49.

270 Emmerich, para. 73.

271 Cf. Pannebakker with reference to PICC, 294.

272 Emmerich, para. 84.

273 With reference to German law cf. Emmerich, para. 58.

274 Sefton-Green, 61; De Vincelles, 81, 86.
market-friendly, while others are of the view that ‘constructive knowledge’ or ‘implied knowledge’ is still part of the system, hence the text does not prevent the courts from upholding their earlier case law based on them.

- The information must be of decisive importance, ‘which means if it has a direct and necessary relationship with the content of the contract or the status of the parties.’ The relationship of the information being decisive with the text of Article 1130(1) Code Civil (Defects in Consent: ‘without them, one of the parties would not have contracted or would have contracted on substantially different terms’) is unclear.

- An additional precondition of the duty is that the other party ‘legitimately does not know the information or relies on the contracting party’, which is called (and translated) in French scholarship as the ‘legitimate ignorance or legitimate reliance’. Ignorance is legitimate – and this is in line with the general findings presented above – if it is more difficult (from a physical or financial point of view) for one party to obtain the information than the other, on whom the duty to inform is conferred.

bb) The duty of information (or disclosure) is understood in a broad sense in Chinese law. Besides the duty not to conceal the truth and to ensure accuracy of representation, it includes the duties to reply to any inquiries and to give reminders of any circumstances within the party’s knowledge that would frustrate the purpose of the future contract. If one party incurs or increases a risk, it shall notify the other party immediately. The disclosure of any material facts relevant to the conclusion of the contract is required. The duty is breached, for example

- if the party does not disclose that it did not receive permission to sell the property or did not apply for planning permission;

- or concealed that hostile local villagers earlier committed violence at the construction site and therefore there is still a risk of violence (and they subsequently destroyed the plaintiff’s excavation machine);

- or did not inform the other party that the government subsidy (granted to first-hand buyers of residential properties) that the latter reasonably expects will not be due, because the seller already sold the property at an earlier occasion (but failed to execute the contract) and this has resulted in the loss of the subsidy (since the buyer cannot qualify as a first-hand buyer).

c) DCFR and CESL: Consumer Protection Based on Information Duties

Though DCFR and CESL are not dealt with in detail in this Chapter, they are worth a brief mention, since they reflect a unique approach compared to those of PICC, PECL and the respective legal systems. They are both distinctive for including very detailed provisions on precontractual information duties and on a bundle of various remedies attached to various precontractual situations if the information duty is not fulfilled, in line with the previous European consumer contract law directives (prolongation of the withdrawal period; consumer-friendly rules on restitution; self-adjustment of the

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275 See the summary provided by Sefton-Green, 63.
276 De Vincelles, 83.
277 De Vincelles, 82.
278 De Vincelles, 91.
279 Li, 167.
280 Ding, 498.
281 Ding, 501-502.
contract to the precontractual statements of the parties and specified third parties; additional charges cannot apply if the party was not informed). 283

DCFR includes specific rules on consumer contracts and extends these to all types of contracts here and there, but does not relinquish the general principle of precontractual good faith either. Chapter 3 consists of detailed duties to inform and provisions to prevent input errors and on acknowledge of receipt, which is followed by the general good faith requirement. 284 By contrast, there are no general duties of negotiations in the CESL; 285 the focus is on the specific rules on information obligation, inspired by the consumer contract legislation of the EU. 286

Both DCFR and CESL received heavy criticism regarding the internal incoherence of the rules on information duties (lack of accuracy and misguided policy decisions) and the external incoherence and incompatibility of those rules with other institutions provided for in other parts of the same instrument (for example, the remedies). 287

3. Confidentiality

The majority of European civil codes do not include an explicit provision on confidentiality; however, Article 2.1.16 PICC; Article 2:302 PECL; Article 1112-2 Code Civil, and Article 501 CCC have such a specific rule. In the lack of such a specific provision, the duty of confidentiality regarding information obtained during negotiations can be derived from the general or precontractual good faith requirement. 290 The duty of confidentiality lies with the parties independently from whether a contract is subsequently concluded or not. The breach of this duty is if the party discloses (confidential) information or uses it improperly for its own purposes. The respective soft law instruments highlight that the period of time during the duty of confidentiality applies cannot be too long, otherwise the applicable laws on the prohibition of restrictive trade practices might intervene. 291 In most legal systems, parallel regimes protect confidential information:

283 Zoll, 51-55; Lohsse, 87.
284 Cf. the structural overview at Giliker, 86.
285 However, the very general requirement of good faith and fair dealing is present in CESL (see Article 2 and also in other articles such as 23, 48, 49) and this involves a genuine uncertainty, because courts could feel tempted to extend the good faith requirement to the precontractual stage and then there could be a significant divergence in the domestic courts' interpretation. Cf. Giliker, 94, 96, 99-101.
286 For a summary cf. Giliker, 90-94.
287 Cf. Lehmann, 705: the situations covered by Article II-3:103 DCFR are imprecise, not at the same level of abstraction, the term 'nature of the transaction' in particular raises more questions than it answers. Article II-3:102 DCFR is not in line with the other provisions in the same Chapter, with special regard to Article II-3:103; however, the remedies are largely identical; see id. 707. Article II-3:109 is vast, since it includes remedies applicable to completely different situations (extension of the withdrawal period, adjustment of the contract to the reasonable expectations of the party, damages and finally all these without prejudice to any remedy that may be available under the rule of mistake), id. 712.
288 Article II-3:101 DCFR applies only to businesses. According to Lehmann, 709, this is one-sided and biased. Giliker, 96-99 makes objection to the CESL's focus on information duties as the sole tool to deal with inequality of bargaining power.
289 Lehmann, 706 complains about a chaos of remedies with reference to the relationship between precontractual duties and non-conformity. Moreover, the author stresses that the detailed rules on information duties do not supersede good faith as a general clause with indeterminate content, id. 711. Additionally, see the criticism on the relationship of precontractual duties to avoidance based on vitiated consent, Article II-7:201ff. DCFR, id. 713; moreover, the shorter deadlines of avoidance can be circumvented through reference to precontractual liability, id. 714. Giliker, 95 raises that CESL does not apply if the contract is finally not concluded and in this event the applicable domestic law on precontractual liability prevails.
290 However, there are legal systems wherein the inappropriate use of confidential information does not underlie precontractual liability, but general tort law. Cf. Pannebakker, 38 with reference to Dutch law.
291 UNIDROIT Principles, 64.
alongside precontractual (or, in general, civil) liability unfair competition rules apply, which can also serve as the basis of damage claims.

**a) Confidentiality is the Exception**

Not all pieces of information qualify as confidential; therefore, there is no general duty to keep all information exchanged during the negotiations as confidential,\(^{292}\) quite the opposite: the *rule* is originally to consider such information as *non-confidential*, therefore disclosing it to third parties or using it for other purposes (and for its own profit) is generally permitted. Disclosure to third parties can serve as a tactic in negotiations.\(^{293}\) The illustrations attached to PICC and PECL confirm this: the offer for installation of air-conditioning systems can be shared with other bidders in order to motivate them to provide a better offer.\(^{294}\)

**b) Overlap with Trade Secret Rules**

However, this preliminary finding is significantly shaded by the fact that the duty of confidentiality is not restricted to protected intellectual property rights, and there is a correlation with the regimes on the protection of *trade secrets* in the respective legal systems.\(^{295}\) In the Directive (EU) 2016/943 on the protection of undisclosed know-how and business information (trade secrets) against their unlawful acquisition, use and disclosure was to be implemented, therefore the harmonised rules on the protection of know-how and business information apply accordingly and the kinds of information within the scope of the implementing laws certainly qualify as confidential (well beyond IP rights, such as production processes and inventions not covered by patents, client lists, sales techniques, commercial know-how, etc.).\(^{296}\) Business secrecy is also explicitly protected in China in the respective unfair competition legislation.\(^{297}\)

**c) Express or Implied Confidentiality**

Besides trade secret protection laws being able to indicate or imply confidentiality, information is confidential if the party providing it *expressly declares* so (and the other party at least implicitly agrees to treat it as confidential); or additionally – at least the official commentaries on PICC and PECL indicate so – if the *confidential character* is *implied* by the particular nature of the information (as being highly business-sensitive, relating to the core of the parties’ business activity)\(^{298}\) or by the professional qualification of the parties (even in the absence of an explicit declaration), and the other party is or should be aware of these circumstances. Implied confidentiality applies if, for example, leading car manufacturers plan to establish a joint venture and one of them reveals it is planning a new car design;\(^{299}\) or the one party gives some information to the other during negotiations on the essential features of the know-how to be transferred if the final contract is concluded, but sends the documents by registered mail to the private address of the other party.

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\(^{292}\) Illescas Ortiz, 50; De Vincelles, 91 with reference to French law, and the author expresses concern that the French legislator did not define the scope of confidential information, therefore the courts will have to specify it in the absence of confidentiality clauses.

\(^{293}\) Pannebakker, 308-309.

\(^{294}\) UNIDROIT Principles, 63. See Lando & Beale, 194 with reference to PECL.

\(^{295}\) Pannebakker, 84 with reference to French law: *secret des affaires*. See also Ding, 489 with reference to Chinese law.

\(^{296}\) See the Italian report in Cartwright & Hesselink, 351.

\(^{297}\) Han, 160.

\(^{298}\) Pannebakker, 310.

\(^{299}\) UNIDROIT Principles, 63-64.
of the party and talks about the know-how only when they are alone.  

The essence of these considerations on the implication of the confidential nature is abstracted in Article II.-3:302(2) DCFR: ‘In this Article, “confidential information” means information which, either from its nature or the circumstances in which it was obtained, the party receiving the information knows or could reasonably be expected to know is confidential to the other party.' In other words, entrusted business-sensitive information with obvious economic significance (irrespective of whether protected by other provisions of the law) are generally treated as confidential, and that again converges to the general protection of trade secrets.

### III. Remedies

121 The presentation of remedies is the same way as diverse as the enumeration of case groups according to the protected interests (scope), particular duties and the outcome of the negotiations (no contract; invalid contract; valid but disadvantageous contract, see B.V.). It is sometimes unclear whether one or more statements in the available analyses apply only to one of the relevant case groups or to precontractual liability as a whole. A good starting point is however that the extent of liability (heads and amount of damages) shall correspond with the scope of the precontractual duty that has been breached. Besides damages, analysis shall be provided next on whether other remedies (such as injunctions, specific performance, etc.) can apply. Convergence can be discovered in many aspects among the legal systems and soft law instruments analysed here, but the same or very similar result is shaped differently or at different levels of abstraction or in different sources of law. Article 1112(2) Code Civil expressly excludes the compensation of the expectation interest of the parties: ‘the reparation of the resulting loss is not calculated so as to compensate the loss of benefits that were expected from the contract that was not concluded.’ In other legal systems, there is no such explicit statutory provision, but the same result is achieved in case law by means of general restrictions on damages to be paid or with a high standard of proof.

#### 1. General Findings

122 Compensation in terms of money, i.e. damages is the primary remedy. Besides being much more in line with the principle of party autonomy and contractual freedom, awarding ‘only’ damages instead of specific performance, i.e. judicial enforcement of the conclusion of the contract, is more efficient from an economic perspective too: since most of the goods are standardised, at least the (would-be) buyer of standard goods can easily cover itself in the market from the compensation paid by the (would-be) seller and in this way the conclusion of unwanted and often inefficient contracts can be avoided.

a) **Negative or Reliance Interest**

123 Damages are basically restricted to the negative or reliance interest (Vertrauensschaden) in most cases. This finding is made either in a general manner or is attached to the events of breaking off negotiations and of the one party’s contribution to the inva-

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300 Lando & Beale, 194.
301 Cf. the Greek report in Cartwright & Hesselink, 348.
302 Schwenzer, Hachem & Kee, 284.
303 Lehmann, 703-704.
304 UNIDROIT Principles, 60, Kötz, 36; Ding, 504 and Han, 167 both with reference to Chinese law.
lidity of the contract or not disclosing the reasons for invalidity (breach of information duties). The distinction between negative and positive interest is not crucial if the duty of confidentiality has been breached or if personal injury and property damage are subsumed under the *culpa in contrahendo* regime in the respective legal system; compensation does not depend on the existence or validity of the contract regarding these groups of cases. Apart from the latter finding, the restriction of compensation to the reliance interest seems to be a common denominator in the respective (Civil Law) legal systems and soft law instruments. The reason is that the contractual expectation is generally not created until the contract has been formed and therefore no such remedy that indirectly protects the future contract or even indirectly enforces its performance can be awarded.

Compensation for the reliance interest means that the (innocent) party is to be put into as good a position as it was in before the contract was made or in the position it would have been if the contract had never been made or if there had not been negotiations regarding it, no duties had been breached or the other party had not relied on the conclusion of the contract at all.

The negative or reliance interest includes on the one hand

- the expenses incurred during negotiations in view of the future conclusion of the contract, such as travel and accommodation costs, expenses of preparatory and feasibility studies (legal, financial and technical and also marketing research), third-party consultancy services (legal, technical, etc. experts), costs of obtaining authorisation from public authorities and the costs of works or services already performed in reliance of the future contract.

- On the other hand, lost profit and lost opportunity to conclude an alternative contract with a third party is also mostly recognised as recoverable, but the standard of proof differs from one legal system to the other, and is generally high; however, if the party succeeds, reliance interest likely converges with expectation interest and the distinction loses its significance.

Finally, it is controversial whether the amount of expectation interest shall be considered as a cap on compensation for reliance interest or not. Convincing views support this; for example, if the negative interest exceeds the contractual expectation then it *prima facie* makes no economic sense to enter into this contract. Nonetheless, compensation is basically not capped by the value of expectation interests in the respective legal systems.

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305 Looschelders, 39. With reference to German law see also Emmerich, para. 201 and Ersoy, 51.
307 Italian scholars are sceptical regarding the possibility of exact distinction between negative and positive interest, which is in particular difficult to maintain as far as valid but disadvantageous contracts are concerned, according to which the losses are to be assessed on a case-by-case basis. Cf. Febbroajo, 305-306.
308 Similarly, Zuloaga, 8.
309 Cartwright & Hesselink, 469; Looschelders, 39; Zuloaga, 180 with reference to Article 1112(2) Code Civil, Emmerich, para. 201.
310 Zuloaga, 171.
311 Looschelders, 39.
312 Schwenzer, Hachem & Kee, 286; Zuloaga, 171; Lando & Beale, 191; Pannebakker, 261.
313 Zuloaga, 171; Emmerich, para. 213 with reference to German law.
314 Similarly, Febbroajo, 305-306.
315 Wei & Yu, 298.
316 Zuloaga, 172. This is the prevailing view in Germany, cf. Ersoy, 51. See also Febbroajo, 305-306 with reference to Italian law. This issue is extremely controversial in China; see Ding, 504 with reference to
b) Positive or Expectation Interest

Expectation losses (related to the negotiated but not concluded or concluded but invalid contract) are extremely rarely awarded.\(^{317}\) As referred to above, Article 1112(2) Code Civil explicitly excludes their compensation. Where not explicitly excluded, a high standard of proof applies, i.e. it must clearly be proved that the (valid) contract would have been concluded (at all) and on different, more advantageous terms if no precontractual duty (primarily: information duty) had been breached.\(^{318}\) Consequently, expectation interest is very rarely compensated for, but there are some published cases, for example those of breach of public bidding rules, because the offeror can sometimes prove that it would have certainly been awarded the contract if the correct tendering procedure had been followed.\(^{319}\) Even if the party succeeds in proving these circumstances, reductions due to future uncertainties apply in some legal systems, because the contract – even if it had been concluded in line with the innocent party’s expectations – would be exposed to general changes and risks created in the economy.\(^{320}\) Expectation interest is remedied indirectly if the expectations induced by the false representation of the party become part of the contract and therefore non-conformity triggers ‘normal’ contractual remedies.\(^{321}\)

c) Contributory Fault

Contributory fault of the party who suffers losses justifies proportional deductions from damages.\(^{322}\) If the party is not cautious about spending money related to the future contract, for example overstocks the goods to be supplied (provided the contract is concluded) in an excessive amount that risks its financial stability and forces the party to commence reorganisation proceedings. In the case law, this was considered a contributory fault justifying the reduction of damages by 50%.\(^{323}\)

2. Soft law and Country-Specific Issues

a) PICC and PECL

Article 1.8 PICC prohibits inconsistent behaviour; its consequence can be the creation, loss, suspension or modification of rights. The official commentary on Article 1.8 PICC provides for a peculiar approach on the remedies for breach of the duty to act consistently and not to the contrary of the other party’s reasonable reliance. Being precluded to do so is only one way to preserve the other party’s interests; alternative remedies include giving reasonable notice before changing course or to compensate the other party for costs and losses suffered by the inconsistent behaviour.\(^{324}\) The remedy – both in PICC and PECL – if the duty of confidentiality is broken is remarkable:

doctrinal opinions and some court practice in favour of this limitation, but the cited author omits the legal basis of this practice. See also Han, 167-168: the prevailing view is that no such cap applies.

\(^{317}\) ‘Only granted exceptionally’, see Kötz, 39. Very controversial, see Emmerich, para. 201 with reference to German law.

\(^{318}\) Schwenzer, Hachem & Kee, 286-87; Bergjan, 400 and Ersoy, 53-54, 57 with reference to German law; Stathopoulos & Karampatzos, 81-82 with reference to Greek Civil Law.

\(^{319}\) With reference to the German case law Zuloaga, 181 and Ersoy, 52.

\(^{320}\) Stathopoulos & Karampatzos, 82 with reference to Greek law.

\(^{321}\) Schwenzer, Hachem & Kee, 286-87.

\(^{322}\) Zuloaga, 174. with reference to French law; Ding, 506-507 with reference to Chinese law; Emmerich, para. 204 with reference to German law, however the author reports the case law as to be reserved and mild towards the injured party.

\(^{323}\) See Pannebakker, 107 with reference to the French case law.

\(^{324}\) UNIDROIT Principles, 21, 23.
it may include compensation based on benefits received regardless of the other party
suffering any loss or not. According to the commentaries: the injured party may seek an
injunction (in accordance with the applicable law) if the confidential information has
not yet been disclosed.325

b) German Law

One peculiarity of the German case law is that specific performance is sometimes
granted by the courts with reference to the principle of \textit{venire contra factum proprium}
in the so-called lack of formality cases, which is tantamount to specific performance
of an invalid contract. If one party induced the reliance of the other that no form was
required or the form would be fulfilled, specific performance may be ordered, if the
invalidity would create an absolute unbearable result.326 Injunction is also conceivable if
no confidential information has been disclosed yet, but there is a reasonable threat of
it.327 Another distinctive feature is the presumption of a causal connection between the
breach of the duty to inform and the losses suffered.328

c) French Law

French law329 does not differentiate between reliance (negative) and expectation
(positive) interest. Total compensation (\textit{réparation intégrale}) applies, provided the losses
were direct and certain consequences of the breach of the respective precontractual duty.
Nonetheless, the result is not different from the mainstream presented above.

Some French judgments differentiate between general costs that always arise if
someone negotiates with others and specific costs connected to the particular future
transaction and tend to restrict damages to the latter category. Imprudently incurred
costs are excluded from compensation, as are those expenses that remain useful for the
party.

Article 1112(2) Code Civil expressly excludes compensation of the expectation inter-
est of the parties from the negotiated contract. Scholars however draw attention to two
restrictions in interpreting this provision.

- First, they suggest it should not be understood broadly, because the restriction is
  attached to ‘fault committed during the negotiations’, but not to the breach of other
  particular precontractual duties, such as the duty of confidentiality.
- Second, the restriction shall not be misunderstood in a way that no loss of profit
  or loss of chance from an alternative contract with a third party (i.e. other than
  the negotiated contract) can be awarded either.330 The standard of proof is high,
even if the claim is about loss of chance: the existence of an interested third party
and the seriousness of the chance to enter into contact with that party must be
proved.331 If this applies, the court calculates the compensation in proportion with
the probability of success.

325 UNIDROIT Principles, 64; Lando & Beale, 194. Article II.-3:302(3) DCFR explicitly provides for this
remedy: 'A party who reasonably anticipates a breach of the duty may obtain a court order prohibiting it.'
326 Zuloaga, 49-54, 182.
327 Ersoy, 58-59.
329 See the summary presented by Zuloaga, 172-74 and Pannebakker, 103-108.
330 Pannebakker, 105, 263. With reference to the latter issue see Sefton-Green, 60, 65.
331 Pannebakker, 106 reports cases however wherein the plaintiff successfully claimed its losses (of
chance) while having been locked out of the market during the (subsequently failed and broken) negoti-
ations and therefore not being able to enter into contract with another party – for example – to find
another investor.
French courts are definitely reluctant to award specific performance,\textsuperscript{332} which is in line with the constitutional significance of contractual freedom.

d) Law of Netherlands

Dutch law\textsuperscript{333} differs slightly from the mainstream regarding the recoverable costs incurred during negotiations: namely only those costs that could have been reflected (discounted) in the price of the failed contract can be compensated for. The recoverable losses are theoretically not limited to the negative interest; however, damages rarely if ever include loss of profit from the negotiated contract in court practice.\textsuperscript{334}

Another distinctive feature of Dutch law is specific performance, i.e. if breaking off is unacceptable, the court can issue a court order that the parties shall continue negotiations. This injunction can be coupled with a judicial penalty, with a prohibition of negotiations with third parties or with the appointment of a mediator. However, the order is limited in time and is considered to require a reasonable, real and open exchange between the parties and providing each other sufficient time to react. The court does not issue an order to negotiate if it no longer makes sense, for example because the parties’ relationship became hostile, the contract could be terminated unilaterally anyway immediately or shortly after conclusion or the party who broke off already concluded the contract with a third party. The court imposes a best effort duty (\textit{obligation de moyens}) on the parties to negotiate and to reach an agreement if possible, if such an order is issued.\textsuperscript{335}

The \textit{prima facie} generosity of the remedies is counterbalanced by the fact that Dutch courts apply a high threshold for precontractual liability to be triggered at all.\textsuperscript{336}

e) Chinese Law

Chinese law is characterised by the controversies over whether the expectation value shall be considered as a cap on reliance damages (see above III.1.a.) and by a kind of hesitation on the recoverability of the so-called indirect loss, which includes the lost gain as a result of loss of opportunity to contract with a third party; the prevailing view in the case law is in favour of recovering this head of loss.\textsuperscript{337}

Another specificity of the Chinese approach is the substituted specific performance\textsuperscript{338} provided for in Article 8 of Interpretation II of the Supreme People’s Court of Several Issues concerning the Application of the Chinese Contract Law, which means the court entitles the opposite party to go through the relevant formalities needed for the contract to be effective by itself, if the party in breach fails to do so. In this way, the party entitled to self-help in turning to the competent authorities for permission or registration by itself can transform the concluded but (without permission or authorization) ineffective contract into an effective one, i.e. save the contract and make it survive and in doing so the party can enjoy expectation interest upon performance.\textsuperscript{339}
In the event of the breach of confidentiality duties, Chinese courts also award benefit-based compensation.340

G. Illustrations

This Section presents illustrations from and beyond sales law. Cases related to other types of contracts are inserted too because the controversies and legal issues that arise can also appear in sales contract disputes.

I. Enter or Continue Negotiations without True Intent to Conclude the Contract

1. Enter into Negotiation in order to get Previous Loan Paid Back

Based on the Chinese ‘Nong’an Shengxiang Yumi Co Ltd (Shengxiang) v. Jilin Branch of Agriculture Development Bank of China (ADBC Jilin Branch) and Changchunshi Kangrun Shengwu Keji Co Ltd (Kangrun)’ case as presented by Ding:341 the parties ‘were negotiating a RMB 200 million loan contract. ADBC Jilin Branch preliminarily agreed to provide a loan to Shengxiang if the latter restructured Kangrun and paid off a RMB 21.2 million loan that Kangrun owed to ADBC Jilin Branch. After Shengxiang carried out the restructuring and paid off the due loan for Kangrun, ADBC Jilin Branch broke off negotiations with Shengxiang.’

The court decided that the bank was liable for ‘negotiating in bad faith under the pretext of concluding a contract’ (now Article 500(1) of the CCC). The bank never wanted to reach an agreement on the new loan, but only to eliminate its non-performing loan.

2. Entering into Negotiations in order to prevent an Agreement with a Third Party

Based on Illustration No. 1. on Article 2.1.15 PICC:342 ‘A learns of B’s intention to sell its restaurant. A, who has no intention whatsoever of buying the restaurant, nevertheless enters into lengthy negotiations with B for the sole purpose of preventing B from selling the restaurant to C, a competitor of A’s.’

According to the official commentary, A is liable to B for B’s losses that may include the difference in price and whatever other losses may be established. A similar hypothetical is the first one elaborated on by Cartwright and Hesselink343 wherein a third party is negotiating with B to buy B’s premises located opposite A’s bookshop (for €1.2 m) in order to open a bookshop, and therefore A, who does not want to have a competitor so close by, pretends to buy the premises for a higher price (€1.5 m). After the withdrawal of the competitor, A also breaks off negotiations and B can sell the premises for only €1 m. As the editors report, all legal systems concerned granted damages as a remedy, restricted however to the reliance interest. There is also diversity regarding which circumstance the liability is based upon: the starting of negotiations, the party’s conduct

340 Han, 170.
341 Ding, 491.
342 UNIDROIT Principles, 190.
343 See Cartwright & Hesselink, 21ff (Case 1: Negotiations for premises for a bookshop).
during negotiations, the breaking off, a particular state of mind or the misrepresentation of the party, etc.

3. Entering into Negotiations with Aim of Obtaining Information

Based on Illustration No. 1. on Article 2:301 PECL:\textsuperscript{344} ‘A intends to enter the trade as a competitor of B. He enters into negotiations with B claiming to be interested in becoming B’s sales manager. B pays A’s travel expenses and the cost of a short training programme for A, which A wished to join, before signing the contract. When A has got the information about B’s sales and production methods, which he can use as a future competitor of B’s, he breaks off negotiations and starts his own enterprise.’

According to the official commentary on PECL, A is liable to B for the costs B incurred in paying A’s travel and tuition. The same applies if A originally wanted to become B’s sales manager but made up their mind later on and from that very moment wanted only to access that information. Besides, this case can trigger A’s liability for breach of confidentiality if the confidential nature of the sales and production methods was indicated by A or could be implied or falls within the scope of the applicable trade secret regulations.

4. Continue Negotiations despite having concluded a Contract with a Third Party

Based on the French ‘Manoukian’ case as presented by Pannebakker:\textsuperscript{345} ‘In spring 1997, a design company, Alain Manoukian, entered into negotiations with X and Y, both shareholders of the company Stuck, regarding the sale of Stuck’s shares. The negotiations proceeded until November 1997, but on November 24, Alain Manoukian learned that on November 10, X had consented to sell the shares in Stuck to a third party, the company Les Complices. Alain Manoukian made a claim against X for a fault in negotiations. It claimed damage resulting from a late communication by X of his decision to conclude a contract with a third party.’

The Cour de cassation held X liable, because he only informed Manoukian that he was not willing to conclude the contract after having concluded a contract on the same matter with a third party.

II. Breaking off Negotiations

1. Perception of Conclusion of Contract followed by New Terms

Based on Illustration No. 1 on Article 1.8 PICC:\textsuperscript{346} ‘A has negotiated with B over a lengthy period for a contract of lease of B’s land under which B is to demolish a building and construct a new one to A’s specification. A communicates with B in terms that induce B reasonably to understand that their contract negotiations have been completed, and that B can begin performance. B then demolishes the building and engages contractors to build the new building. A is aware of this and does nothing to stop it. A later indicates to B that there are additional terms still to be negotiated.’

\textsuperscript{344} Lando & Beale, 61.
\textsuperscript{345} Pannebakker, 85-86.
\textsuperscript{346} UNIDROIT Principles, 22.
Though this hypothetical illustrates Article 1.8 PICC on inconsistent behaviour and the remedy is that ‘A will be precluded from departing from B’s understanding’; the hypothetical nevertheless also fits as a breaking-off case, justifying B’s claim for damages.

2. Higher Investments Suddenly Requested

Based on Illustration No. 5 on Article 2.1.15. PICC:347 ‘A assures B of the grant of a franchise if B takes steps to gain experience and is prepared to invest USD 300,000. During the next two years B makes extensive preparations with a view to concluding the contract, always with A’s assurance that B will be granted the franchise. When all is ready for the signing of the agreement, A informs B that the latter must invest a substantially higher sum.’

If B refuses to invest more and A rejects the conclusion of the contract, then B is entitled to recover from A the expenses incurred with a view to the conclusion of the contract. The same case, but slightly more elaborate can be found under illustration 4 to Article 2:301 PECL. Joining the franchise network means operating a grocery shop and the would-be franchisee makes the requested investment, sells its small bakery store, moves to another town and buys a lot to set up the new business. The outcome of the hypothetical is the same.348

3. No Authority to Sign

Based on Illustration No. 3 on Article 2.1.15 PICC:349 ‘A enters into lengthy negotiations for a bank loan from B’s branch office. At the last minute the branch office discloses that it had no authority to sign and that its head office has decided not to approve the draft agreement.’ A could in the meantime have obtained the loan from another bank.

According to the PICC commentary, A is entitled to recover the expenses entailed by the negotiations and the profits it would have made during the delay before obtaining the loan from the other bank. A similar case from Sweden was reported in Zimmermann’s and Whittaker’s treatise:350 a Swedish businessperson started negotiations with the main shareholder of a Colombian company on employment post as a manager. On 30th June the main shareholder sent a cable message and asked the would-be manager to serve from 1st July. The businessperson moved to Colombia and took up the post. However, the approval of the general meeting for the employment was needed by the 15th July, but that did not happen due to the conflict between the two main shareholders. The court granted the expenses of the businessperson incurred in relation with the move to Colombia. The main reason was that the shareholder who sent the message should have known that there could be some doubt on the engagement of the new manager; nevertheless, the businessperson was instructed to come to Colombia and to take up the post.

4. Uncertainty of the Owners351

‘B enters into negotiations with A about a piece of land that B wants to buy from A on which to build a house. A thinks he is the sole owner of the land. When the parties have

347 UNIDROIT Principles, 62.
348 Lando & Beale, 191.
349 UNIDROIT Principles, 61.
350 Zimmermann & Whittaker (Swedish report), 253-54.
351 Based on Case 3 (Mistake about ownership of land to be sold) in Cartwright & Hesselink, 93ff.
reached agreement they make an appointment to sign the sale contract on 2 December. On 1 December A finds out that the land of which he thought he was the sole owner by inheritance from his father is in fact owned jointly by him together with his two sisters who do not agree to the sale of it. A therefore does not sign the sale contract. B has incurred expenses in negotiations (estate agents’ fees, travel tickets to visit the land) and has had an architect make drawings for the house. What liability (in contract, tort, restitution, or any other form of liability), if any, does A have to B? Cartwright and Hesselink report significant differences regarding this hypothetical. The one issue is how formality requirements influence the outcome (cf. the different approaches thereon, for example in Germany and France, above F.II.1.b). Another controversial aspect is whether A’s misbelief that he was the sole owner does constitute fault or not and therefore whether liability shall be imposed on A or not. Some legal systems deny liability due to lack of fault while others grant it (Greece, Italy, the Netherlands, etc.), because A did not clarify the ownership before entering into negotiations on the sale. There is also divergence on the scope of recoverable losses; in some legal systems, the recoverability of the architect’s fees is rejected with reference to the lack of proximate cause (such as Greece). B’s contributory fault is also considered in some legal systems (Italy, Portugal).

5. Discretion to Disagree on Open Essential Terms and Late Stage Termination of Negotiations

Based on the Chinese ‘Liu’ case as presented by Novaretti, Having decided to open a pharmacy, a company signed a letter of intent for the employment of Liu, defining the latter’s role and tasks to be performed in the pharmacy. The letter, however, failed to specify details such as remuneration and starting date, details, which were left to be identified in the employment contract. Following the signature of the letter of intent, the company identified the premises for the pharmacy and obtained the necessary licenses while Liu, as agreed, set out to obtain his certification as a pharmacist. However, following a number of attempts and mediation by competent authorities, the negotiating parties failed to agree on the issues left undefined, particularly the remuneration aspect and the duration of the employment. Asserting bad faith on the part of the company, Liu withdrew from the negotiations, forcing the company to find another pharmacist, thus delaying the pharmacy’s opening. The company sued Liu, seeking the reimbursement of incurred expenditures (Liu’s training, certification fees, and medical expenses) as well as for the losses associated with the delayed opening.

The court rejected the claim. Since some essential elements were still open, the letter of intent does not qualify as the final employment agreement. Liu did not infringe the good faith requirement, since he only exercised his right based on contractual freedom. The withdrawal of Liu was justified both from his personal view and from the societal perspective.

6. Advance Payment and Reasonable Reliance

Based on the Lithuanian ‘V. Š. v A. N. and A. N.’ case as presented by Kiršienė and Leonova, the claimant had concluded a preliminary contract with the defendant. Under the preliminary contract, the defendant undertook to sell to the claimant a part of a plot of land for LTL 32,000. Before the conclusion of a contract, the claimant had

352 Novaretti, 969-70.
353 Kiršienė & Leonova, Qualification of Pre-contractual Liability and the Value of Lost Opportunity as a Form of Losses, 11 Jurisprudencia – Jurisprudence (2009), 221, 235-36.
transferred an advance payment and undertook to pay the remaining part of the price upon the conclusion of the main sale-purchase contract, validated by a notary. When the set term has run out, the defendants refused to conclude the main sale-purchase contract because it was unprofitable for them to sell the plot for the agreed price. The claimant then asked the court to confirm the conclusion of the main sale-purchase agreement.

The courts (including the Supreme Court of Lithuania) stated that the final contract was not yet concluded and the preliminary contract was not binding, in the sense that there was no absolute certainty about concluding and executing the main contract. The court thus did not attribute binding force to the preliminary contract in itself, by which the court could have declared the existence of a contract. However, the existence of the preliminary contract (together with other circumstances such as the advance payment) can be considered as a ‘proof of a serious intention to conclude the contract’ and the non-performance of the preliminary agreement is contrary to good faith, because the reasonable reliance of the other party was induced.

7. A Borderline Case

‘A, the country’s leading department store, is negotiating with B for B to build a new shopping centre in which A is to rent substantial premises for a new flagship store. During the negotiations, before the contract for A’s lease is concluded, B begins the building of the shopping centre, including elements of design and construction which follow the indications which A has given of the layout it will wish to have. A knows that B has begun the building works. When the building work is far advanced, A breaks off negotiations because it has then done a survey of the likely client base, and has decided that a store in that location would not, in fact, be sufficiently profitable. B is left with a shopping centre which he would not have built without a tenant such as A to form the focus for the centre; and he now has a building which is so constructed and organised that he cannot find any alternative department store as the tenant. What liability (in contract, tort, restitution, or any other form of liability), if any, does A have to B?’

Whatever the decision of the respective court is, there would be a controversial and probably split decision. On the one hand, the circumstances that A indicates the layout, connives at the commencement of construction works (and does not warn B to stop until the survey is evaluated), breaks off at a late stage of negotiations and first and foremost postpones the survey to a later date after providing B with the requested layout, speak for A’s liability. On the other hand, good economic reasons justify breaking off in all legal systems concerned and the parties are both professionals. Unsurprisingly, Cartwright and Hesselink detect a wide range of scatter in the results. The majority – they report – would award remedy, but restricted to the reliance losses (and granting compensation for reinstating the building or loss of chance for having lost other possible tenants is the exception). Reduction due to B’s contributory fault also appears in the reports.

8. A Liberal Approach in favour of Contractual Freedom

Based on the German ‘Newspaper’ case as presented by Dietrich, The plaintiff was negotiating with the defendants for the sale of two newspapers published by the defendants. Approval of the purchase by the plaintiff’s parent company was necessary

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354 Based on Case 8 (A shopping centre without a tenant) in Cartwright & Hesselink, 233ff.
before a contract could be finalised and, pursuant to gaining such approval, a ‘detailed offer’ from the defendant seller was sought by the plaintiff. The defendants provided such an ‘offer’ on 3 March 1986. On 7 April 1986, the parent company gave its approval to the plaintiff to go-ahead with the purchase. The plaintiff informed the defendants of this approval on 10 March 1986. Consequently, the plaintiff’s lawyer drafted a notice of intended purchase required by a regulatory body, and prepared a draft agreement. After a further draft agreement was prepared by the plaintiff’s lawyers, incorporating amendments made by the defendants, a meeting was held on 18 April 1986 at which the parties reached agreement on the outstanding essential terms of the contract. Consequent upon this meeting, a third draft of agreement was prepared by the plaintiff’s lawyers. On 28 April 1986, the plaintiff informed the defendants in writing of its intention to accept their ‘offer’ of 3 March 1986. On the same day, the defendants replied by telephone that they were no longer prepared to sell. The plaintiff proceeded to claim nearly DM 106,000 in damages, consisting mostly of legal fees and accountants’ fees.’

While damages would probably have been granted in the majority of the legal systems, the German Federal Supreme Court (Bundesgerichtshof) rejected the claim. The court underlined that ‘generally, each party has to carry its own expenses incurred in the course of negotiating a prospective contract. The risk that the contract does not later ensue and that the expenses incurred thus prove to be wasted lies with each negotiating party.’ The mere expectation does not suffice, despite the parties having agreed upon outstanding matters. Instead, the plaintiff had to show that the defendants had induced the belief the contract would, with certainty, be finalised. The judgment represents the German approach very well, insisting on the reasonable reliance induced by the party breaking off on the certain conclusion of the contract.

### 9. Public Bidding

‘A, a private company, wants to have a swimming pool built and organises a public bidding for the construction contract. As published statements include the rules of the bidding process A proposes to follow for submission of bids, and its method of acceptance, and a statement that A will give the contract to the lowest bidder. B submits a bid, which follows the rules of the bidding process, but A awards the contract to C. B had incurred expenses in preparing its bid. What liability (in contract, tort, restitution, or any other form of liability), if any, does A have to B if: (i) B’s bid was the lowest, but either (a) A failed properly to consider the bid, because an administrative error within A’s organisation led to the bid not being considered by those within the company who were taking the decision; or (b) A always intended to give the contract to C; (ii) B’s bid was not the lowest, but A had failed properly to consider it because an administrative error within A’s organisation led to the bid not being considered by those within the company who were taking the decision.’

In Cartwright’s and Hesselink’s treatise, most of the reporters presented the implementation of EU directives on public bidding and the special remedies related thereto. Besides, as far as the residual application of precontractual liability matters (if the case is not within the scope of special public procurement rules), remedy was given if the bid was the lowest, regardless of the grade of fault (except France where the reporter expressed doubts on faute if ‘only’ an administrative mistake occurred) and was rejected if the bid was not the lowest due to lack of proximate cause. The analysed legal systems diverged over awarding only reliance or also expectation damages.

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356 Based on Case 10 in Cartwright & Hesselink, 275 ff.
III. Duty of Information

1. Harvester’s Capacity

‘A contracts to sell a harvesting machine to B, a farmer, which B requires to enable him to harvest his asparagus crop. In the pre-contractual negotiations, A told B that the machine would be able to harvest one acre a day, but when B comes to use it he discovers that it can only harvest half an acre a day. B is unable to obtain an alternative machine in time to save the half of the crop that cannot be harvested before it is ruined. He now also has a machine, which he knows will be inadequate for next year’s harvest. What liability (in contract, tort, restitution, or any other form of liability), if any, does A have to B? Would it make a difference if A had made no statements about the capacity of the machine, but instead during the negotiations B told A that he expected that the machine would be able to harvest one acre a day?’

This hypothetical makes the reader aware of the Bermuda triangle of precontractual information duties, invalidity based on mistake or misrepresentation and breach of contract with regard to non-conformity and warranty of quality. According to Cartwright’s and Hesselink’s analysis, all legal systems referred to give a remedy to A (in Germany, however, only specific performance in sales law applies unless the misrepresentation was fraudulent) and the contractual remedies seem to override precontractual liability. They do not identify a difference between active false representation and passive failure to inform (except in Germany, where duty to inform is not imposed to the seller among the circumstances of the hypothetical).

2. Duty to Inform Does Not Require Disclosure of Value

Based on the French ‘Baldus’ case as presented by Sefton-Green: ‘a seller sold some negatives to a buyer who was aware of the identity of the photographer (of some renown) and the corresponding value of the negatives, whereas the seller was not. The buyer kept this valuable information to himself. The seller attempted to annul the contract on the basis of fraudulent concealment by the buyer as to the value of the subject matter of the sale, but failed.’

This case can be seen as the predecessor of Article 1112-1(2) Code Civil after the 2016 reform, according to which the duty to inform does not apply ‘to an assessment of the value of the act of performance.’ The same approach prevails in other legal systems, such as Germany.

3. Hostile Villagers

Based on the Chinese ‘Zhou v. Huang’ case as presented by Ding: ‘the parties made a subcontract for service under which Zhou carried out excavation work at a construction site by using his own excavating machine. Zhou’s machine was subsequently destroyed by local villagers who had land disputes with the construction operator, from whom Huang undertook the excavation work. Although Huang noticed that local villagers had committed violence at the construction site before, he negligently failed to inform Zhou of the potential risk during the negotiations. Zhou therefore sued Huang for precontractual liability for the failure of disclosure.’

357 Based on Case 13 in Cartwright & Hesselink, 362 ff.
358 Sefton-Green, 67 fn. 44.
359 Ding, 501-502.
The claim was upheld by the court. The reasoning underlined that had the defendant disclosed to the plaintiff the potential risk of violence committed by local villagers at the construction site, the plaintiff might have tried to negotiate a better deal by requesting a countermeasure to address this risk.

4. Lost Governmental Subsidy

Based on the Chinese ‘Lin and Yang v. Chengdu Chenguang Fangdichan Kaifa Co Ltd’ case as presented by Ding:360 ‘the defendant failed to disclose to the plaintiffs during negotiations the fact that the defendant had intended to sell the same real estate property to a third party but failed to execute it. Because the name of the buyer was changed from the third party to the plaintiffs in the record of the local administration of real estate, the plaintiffs could not enjoy a certain amount of government subsidies to buyers of first-hand residential properties according to the local administrative regulations. After concluding a real estate property sale contract with the defendant, the plaintiffs noticed the defendant’s non-disclosure and claimed damages under the doctrine of precontractual liability.’

The court awarded damages but reduced the amount due to the plaintiff’s contributory fault. There was a somewhat similar case in Italy wherein the seller informed the buyer that the planned sale of an industrial machine fell within the scope of a tax benefit, but in fact that benefit had been suspended by the government a few months earlier. The Corte di Cassazione awarded the amount of the ‘lost’ tax benefit as ‘decrease in profitability.’361

5. Missing Import Licence

Based on Illustration No. 2. on Article 2.1.15 PICC:362 ‘A, who is negotiating with B for the promotion of the purchase of military equipment by the armed forces of B’s country, learns that B will not receive the necessary import licence from its own governmental authorities, a pre-requisite for permission to pay B’s fees. A does not reveal this fact to B and finally concludes the contract, which, however, cannot be enforced by reason of the missing licences.’

A is liable to B for the costs incurred after A had learned of the impossibility of obtaining the required licence.

IV. Confidentiality

1. No General Duty of Confidentiality in Absence of Indication, Implication or Applicable Trade Secret Provisions

Based on Illustration No.1 on Article 2.1.16 PICC:363 ‘A invites B and C, producers of air-conditioning systems, to submit offers for the installation of such a system. In their offers B and C also provide some technical details regarding the functioning of their respective systems, with a view to enhancing the merits of their products. A decides to reject B’s offer and to continue negotiations only with C. Is A free to use the information contained in B’s offer in order to induce C to propose more favourable conditions?’

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360 Ding, 502.
361 Febbrajo, 302.
362 UNIDROIT Principles, 61.
363 UNIDROIT Principles, 63. A very similar hypothetical (though on the design of a new form of computer chips) is elaborated on under case 12 at Cartwright & Hesselink, 336. ff.
In the absence of agreement on confidentiality or indication by B on the confidentiality of the offer and if the content does not qualify in itself as trade secret (know-how), then A is free to use the information included in B’s offer. There is a similar hypothetical attached to Article 2:301 PECL (illustration 3), with the difference that the subject matter of the negotiated contract is software development and B and C are not invited in parallel, but first B and C only after the documentation had been submitted by B to A. The commentary on PECL underlines that if considerable expenses are incurred during the negotiations in supplying detailed documentation and the negotiations are broken off shortly before the conclusion of the contract is expected to take place, then A is liable – if not for breach of confidentiality but – for B’s expenses in preparing the documentation.

2. Implied Confidentiality: Sensitivity of the Information

Based on Illustration No. 3 on Article 2.1.16 PICC: A is interested in entering into a joint venture agreement with B or C, the two leading car manufacturers in country X. Negotiations progress with B in particular, and A receives fairly detailed information relating to B’s plans for a new car design. B does not expressly request A to treat this information as confidential. Is A under a duty not to disclose it to C or to use those plans for its own production process should the negotiations not result in the conclusion of a contract?

According to the official commentary, the business-sensitive information related to the new car design is deemed to be confidential even without explicit indication, because it is directly affiliated with the core professional business activity of the party; i.e. confidentiality is implied.

3. Implied Confidentiality: Conspirative Communication

Based on Illustration on Article 2:302 PECL: A has offered to acquire B’s know-how for the use of special plastic bags in the dyeing industry. During negotiations B must give A some information about the essential features of the know-how in order to enable A to assess its value. Although B has not expressly requested A to treat the information given as confidential, he has sent the written documentation to A at A’s personal address and by registered mail, and B has only talked to A about it when they were alone. Is the information given confidential?

Yes it is, according to the official commentary on PECL. The receiving party ought to know under such circumstances that the providing party treats the information given as confidential and expects the same from the other party.

V. Missing Planning Permission

Based on the Chinese ‘Zhang Shao’an v. Zhou Wei’ case as presented by Ding: the plaintiff Zhang paid RMB 150,000 to the defendant Zhou after they came to a preliminary agreement on the sale of real estate property. However, the negotiations failed because Zhou had negligently failed to apply for planning permission for the construction of that property.

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364 Lando & Beale, 190.
365 UNIDROIT Principles, 64.
366 Lando & Beale, 194.
367 Ding, 497-98.
The court held that Zhou should bear precontractual liability, since he had breached his precontractual obligation to obtain planning permission as a land developer.

H. Cross References & Additional Commentary

The Common Law approach on precontractual liability is analysed in Chapter 4 (Precontractual liability in the Common Law). Closely related to this Chapter are the following: Chapter 7 on formalities (among other things: how do formal requirements and non-compliance with them influence the liability for breaking off negotiations), Chapter 8 on formation of contracts (when and how does the precontractual stage end and turns into an existing contract), Chapter 11 on validity (the breach of precontractual information duties can qualify as an issue of invalidity due to mistake, misrepresentation, fraud, etc. and therefore there can be a concurrence or uncertain interrelation between the remedies of invalidity and precontractual liability), Chapter 14 on conformity of goods and Chapter 16 on examination and notice of non-conformity (making false statement in the precontractual stage or not warning the buyer on the lack of one or more specific features of the contractual goods can be channelled into the buyer’s contractual expectations and result in non-conformity), Chapter 19 on remedies and damages (if precontractual misrepresentation refers to quality or a feature of the contractual goods that becomes part of the contract, the non-conformity with these qualities and features qualifies as a breach of contract and triggers the respective remedies, such as specific performance that generally prevails over precontractual liability).

I. Practitioner Tips & Contract Clauses

In order to keep precontractual negotiations transparent and to avoid precontractual liability, it is advised to identify those essential elements without which one or both parties are not willing to see the contract as concluded. The same way, it is useful to take minutes or draft follow-up memos in and after negotiations in order to document the statements made and to make the parties aware of the stand of the negotiations. If one party drafts the minutes, it is advised to have them confirmed by the other party in order to avoid misunderstandings and issues already closed being reopened. The parties should avoid making supportive statements on the future conclusion of the contract if they know that essential issues are still open or the results of financial and legal audits, due diligence, feasibility studies, etc. have not yet arrived or have not yet been evaluated. They also need to refrain from unnecessary supportive statements if they negotiate parallelly with several partners. Both parties should make inquiries as to whether some particular approvals from authorities are needed to conclude or to perform the contract. That particular party on site shall provide the other party with all information on local laws and customary standards. The other party must urge that this information be handed over. The provision of information is advised to be documented.

J. Additional Sources (Bibliography)

A. Topics Covered

This second part of Chapter 3 covers the contractual arrangement of precontractual duties and liability by drafting and agreeing upon precontractual instruments (PCIs) in order to supersede the vague general clauses of *culpa in contrahendo* and to control (limit or exclude) the risks that may arise due to the breach of precontractual duties and to create a tailor-made bundle of duties and remedies (or their absence) that best fits the parties' intentions.

In Section B (Introductory Note on the preliminary and general findings) the usefulness and advantages of PCIs are presented first (B.I., → mn. 191 ff.), followed by an attempt to define the notion of PCIs, despite the chaotic diversity of terms and taxonomy (B.II., → mn. 194 ff.). Legal effects of PCIs are analysed next (B.III., → mn. 197 ff.), distinguishing between primary effects (if the respective PCI is binding) and secondary effects (being taken into consideration in the course of the application of the statutory provisions on precontractual liability even if the respective PCI is not binding). Last but not least, the various types of PCIs are enumerated (B.IV., → mn. 200 ff.).

More substantive information is provided in Section F (Commentary), wherein the typical clauses frequently provided for in PCIs are presented with their legal background and application in practice, such as agreement to negotiate in good faith (F.I., → mn. 206 ff.); provision on the non-binding character of negotiations (F.II., → mn. 209 ff.); final contract within the discretion of one party (F.III., → mn. 211 ff.); exclusivity (F.IV., → mn. 214 ff.); confidentiality (F.V., → mn. 217); distribution of costs and limitation of liability (F.VI., → mn. 218 ff.); and dispute resolution (F.VII., → mn. 223). Three illustrations (G., → mn. 224 ff.) and a couple of sample clauses (I.,→ mn. 233 ff.) are added as inspiration and support for practitioners.
B. Introductory Note

I. Why Are Precontractual Instruments Needed?

As the previous part demonstrated, precontractual liability involves a high level of uncertainty and courts have a broad margin of discretion and evaluation. Legal uncertainty discourages businesspeople to invest, to enter into transactions and increases transactional costs. Precontractual instruments (such as letter of intent also called ‘safe harbour’) are drafted by the parties to concretise precontractual obligations and to set up tailor-made standards of conduct during negotiations, including remedies, and to ‘precipitate unsecured financial interests, unwanted obligations and liability’. Degree of certainty can be increased and time and money can be saved by setting up the conducts and rules to be complied with during negotiations and the legal consequences of non-observance, by limiting or even restricting risks and liability in most of the cases as far as the applicable law makes it possible. If precontractual instruments are drafted and accepted, the reliance of the parties on the transparent and loyal manner of negotiations is encouraged, which has a relaxing and inspiring effect on precontractual investments to the benefit of both parties if the deal is made. Precontractual instruments may also deter unreasonable expectations and reliance by preventing misunderstanding and contributing to the conclusion of clearer contracts. The required pattern of conducts set up in advance supports building up mutual trust between the parties and encourages also the more open sharing of views and information.

Setting up tailor-made standards of conduct in the negotiation period means precluding the use of various strategies and tactics or setting concrete limits upon their use or, to the contrary, allow them to be freely exercised. Any kind of limitation on the negotiating parties’ freedom results in restricting or precluding of one or more specific bargaining tactics. Parallel negotiations foster competition in general and among the potential partners in particular. Exclusivity precludes the possibility of baiting the parties negotiating in parallel to make better and better bids. Confidentiality prevents the parties from sharing the information received (as confidential) with other potential partners and in this way fostering competition and also from the weapon of exerting pressure on the other party by public announcement on the ongoing negotiations. Limiting or excluding liability generally enables the parties to follow more liberal or even aggressive negotiation tactics, which however come up against the wall of general and mandatory good faith and similar requirements provided for in the applicable law.

Needless to say, negotiating and drafting precontractual instruments is also a time- and cost-consuming procedure, therefore opting for or against doing so is a question of economies of scale. The higher the value and the volume of the deal, the more complex

368 Pannebakker, 111.
369 Pannebakker, 5, 7, 340.
370 DiMatteo, in this book, Chapter 4, para. 90.
371 Bergjan, 395.
372 McFarlane, 99.
373 DiMatteo, para. 93.
374 DiMatteo, para. 94.
375 Pannebakker, 329, 340.
376 Pannebakker, 329, 339.
377 Pannebakker, 339.
378 Pannebakker, 340.
the goods and the transaction are,\textsuperscript{379} so the more sense it makes to invest time and money in setting up the legal frames of the negotiations in the form of a PCI.

## II. What is a Precontractual Instrument?

As it is rightly stated in the doctrine, a kind of ‘terminological anarchy’\textsuperscript{380} (commit-
ment letter, binder, agreements in principle, heads of agreement, letter of intent, memo-
randum of understanding, accords de pourparlers, avant-contracts, accord provisoire etc.) is present: it is difficult to identify a common denominator for all kinds of preliminary instruments. A general and overall definition seems easily to be meaningless (such as: ‘pre-contractual written instrument that reflects preliminary agreements or understand-
ings of one or more parties to a future contract’\textsuperscript{381} while a more accurate and substanti-
ated notion immediately requires a classification of and distinction between the various types or focused reference to the content. For example, if reference is made to the con-
tent, such as PCIs either deal with certain precise aspects of the negotiations or with the progressive formation of the future contract\textsuperscript{382} or similarly: whether PCIs only include a plan for the remaining negotiations (management of negotiations or the dynamic constituent) or also present an opportunity to memorialise the terms already agreed upon (substantive constituent)\textsuperscript{383} then the view is divided since preliminary agreements do not necessarily contain both of them. (Consequently, are those agreements still PCIs that include substantive constituents?) Elsewhere, it is highlighted that the focus is on ‘how the future possible agreement would be negotiated’ and not so much on what is negoti-
ated (i.e. it is not the substance that matters)\textsuperscript{384} If precontractual instruments are required to be binding and stand-alone (i.e. severable or separable from the other content)\textsuperscript{385} another distinction is overlooked, namely that between soft (non-binding) and hard (binding) letters of intent.\textsuperscript{386} In contrast, letter of intent and memorandum of understanding (Grundsatzvereinbarung, accord de principe) are referred to elsewhere as genuinely non-binding,\textsuperscript{387} without any consideration of being soft or hard.

As a starting point, the tentative description provided by Pannebakker can be quoted: ‘letter of intent represents a pattern that emerges at the level of business self-regulation and stems from the attempts by private parties to frame the dynamics of complex nego-
tiations and mitigate the financial risks involved by the use of private regulation.’\textsuperscript{388}

In some legal systems, it is recognised that a contract to make a contract may be concluded (Vorvertrag in German law, or precontrato in Spanish law), which grants an actionable right to demand the conclusion of the main contract, provided the parties

\textsuperscript{379} Similarly, Spagnolo, 280.
\textsuperscript{380} Pannebakker, 2.
\textsuperscript{381} Pannebakker, 2.
\textsuperscript{382} Pannebakker, 3.
\textsuperscript{383} DiMatteo, para. 93. Pannebakker, 31.
\textsuperscript{384} Pannebakker, 334.
\textsuperscript{385} Pannebakker, 34.
\textsuperscript{386} Bergjan, 396. See the interrelation of this classification with Section 311 BGB: if there was a soft PCI only then Section 311(2) No. 3 applies (similar business contacts), which means that only duties of protection are imposed on the parties. However, if the parties entered into a hard PCI then this qualifies already as the commencement of contract negotiations according to No. 1, imposing also information duties on the parties. Cf. Bergjan, 401.
\textsuperscript{388} Pannebakker, 4.
agreed upon all essential elements in the first contract. These agreements are not dealt with in this Chapter.

III. Legal Effects of Precontractual Instruments

The function, content and legal effects of precontractual instruments are described as a ‘bottom up’, ‘natural’ or ‘evolutionary convergence’, resulting in a ‘non-codified trade usage’, ‘a pattern of repetitive behaviour among merchants’ to evolve. The legal relevance of precontractual instruments is twofold. First, contractual freedom enables the parties to conclude such legally binding preliminary agreements (with stand-alone, i.e. severable and separable duties) up to the general mandatory barriers of Civil Law, such as the requirement of good faith and fair dealing, good morals, reasonableness and fairness, etc. If the precontractual relationship of the parties is shaped by their mutual agreement, the remedies turn to be contractual, even if the culpa in contrahendo regime of the applicable law underlies the law of delict. Care should be taken in legal systems wherein the law of delict qualifies as a mandatory regime (such as France), because it cannot be set aside by any contractual means.

Second, if the respective culpa in contrahendo regime is not superseded entirely by the preliminary agreement, the existence of such an agreement can directly influence the interpretation and application of the precontractual liability rules. For example, if a hard (i.e. binding – related to some duties at least) precontractual instrument has been concluded by and between the parties, this contributes significantly to the reliance of the parties on the conclusion of the final contract, and the subsequent breaking off of the negotiations is more likely to trigger liability (in the absence of a justifiable reason on the breaking party’s side), provided liability itself was not excluded by the same instrument.

IV. Types of Precontractual Instruments

One of the mostly cited distinctive issues is the binding force of precontractual instruments, also being referred to as soft and hard instruments. Binding elements must be sufficiently precise to be enforced (certainty of terms) and the parties’ intention to be bound needs to be clearly present. It can happen that the binding or non-binding nature of the PCI is a matter of debate between the parties and is subject to interpretation by the court. The more sophisticated the parties and the PCI are, the more the interpretation can be restricted to the literal meaning of the text; otherwise, all relevant circumstances have to be taken into account, such as the issues still needing to be agreed upon, customs and habits of the relevant sector, etc. Sticking to the literal meaning is preferred because it appears to provide more certainty, which is the primary goal of drafting PCIs in any form.

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389 Cartwright & Hesselink, 35, 185.
390 Pannebakker, 272.
391 Pannebakker, 96.
392 Bergjan, 398-99 with reference to German law.
393 Kötz, 34; Wei & Yu, 300 with reference to Chinese law.
394 Wei & Yu, 300.
395 Pannebakker, 50, and 244 with reference to Dutch law.
396 Pannebakker, 344-45.
Another classification focuses on the temporal and logical distance to the final agreement (in terms of form and content) and presents certain combinations of content and binding force. First, there are PCIs equivalent to the final sales contract on the merits, but without observance of the formal requirements. If this is so, either of the parties can require the court to order the other to formalise the agreement. Second, the PCI is not that much equivalent (close) to the final contract if some important elements are still pending, although the parties have already agreed upon many contractual terms. Third, options – quite common in financial sales and in organised commodity markets – must contain all necessary elements of the final sales contract and reflect the clear intention of the offeror to sell the goods; therefore, the faith of the final contract depends solely on the free and unilateral decision of the other party, whether it makes use of the option or not. Options are generally transferable. Finally, fourth, some PCIs just clarify the status of the negotiations, but there is no firm intention to be bound yet, even if key features of the future contract are specified therein.

Again other analyses put the emphasis on the content and distinguish between PCIs where the parties try to keep their negotiations non-binding and free from any regulation, be it contractual or extracontractual, until the final contract is concluded (subject to contract); more specifically, until the contract is entered into in a special form (subject to form); where they specify the manner in which the negotiations shall be continued, frequently with a short reference only to some general requirements such as bona fides; and where the parties create particular stand-alone duties confined to the negotiation process and limited in time, such as confidentiality, exclusivity, distribution of costs, limitations of liability (if the negotiations fail), and dispute resolution (jurisdiction and arbitration clauses). Remedies in the event of breach of the specified duties can be also adjusted to the parties’ mutual understanding.

C. Statement of Issues

- Negotiating and drafting PCIs takes time and money and therefore increases transactional costs. When and under what circumstances is it yet worth to do so? Why and how can PCIs reduce uncertainties and risks in the event that the negotiations fail? How do PCIs serve the parties’ intent to allow or exclude particular negotiating tactics?
- Which are the so-called stand-alone (severable) clauses forming part of PCIs? Under what conditions do they have binding force? If the PCI or some specific clauses therein are not enforceable, how can they be taken into account in the interpretation and application of statutory provisions on precontractual duties and liability?
- Is the literal meaning of PCIs sufficient to interpret their content and the parties’ intentions? How far can and should the circumstances before and during drafting the PCI be taken into consideration regarding their interpretation?
- Since drafting and concluding PCIs is based on party autonomy and contractual freedom, which are the general restrictions on the parties’ creativity in drafting PCIs?

397 Illescas Ortiz, 53-56.
398 Illescas Ortiz, 54 with reference to Spanish (Article 1279 Código Civil) and Italian law (Article 1351, 2645bis, 2932 Codice Civile).
399 Similarly, Pannebakker, 47-48 with reference to Dutch law: (trunk contract) the missing terms can be implied by the court or agreed upon by the parties later on.
400 Illescas Ortiz, 55.
401 Cf. Illescas Ortiz, 55-56 with reference to Chinese law.
402 Pannebakker, 8.
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(such as good faith and fair dealing, reasonableness and fairness, mandatory liability for intentional harm, etc.)?

– In what respect is the contractually undertaken duty to negotiate (in good faith) different and more than the same duty based on the law?
– Can the parties keep the precontractual negotiations non-binding and outside of judicial supervision?
– What are the generally accepted methods and routines of reallocations of costs (if the negotiations fail and no contract is concluded in the end) and of excluding or limiting liability (such as caps, restrictions on the amount of damages to be paid or on the heads of losses to be compensated for, etc.)?
– Besides paying damages, are any other remedies (injunctions, specific performance, etc.) available if duties provided for in the PCI are broken? If yes, in relation to which type of clauses?

D. International Sales Transactions

Since the CISG does not cover precontractual liability according to the prevailing view, there is a significant level of uncertainty in this field of law and the outcome of legal disputes is therefore rather unpredictable. Therefore, if lengthy negotiations are anticipated regarding transactions of high value or of complex goods, ‘prudent parties negotiating a prospective cross-border sale’ should seriously consider privatising and contractualising their precontractual duties and liability.403 It is not a coincidence that precontractual instruments gained enormous significance in the second half of the 20th Century, the period of ‘transnationalisation and regionalisation of law’ triggered by global trade and interdependent relations.404

E. Sampling of Laws

I. UNIDROIT Principles of International Commercial Contract (PICC)

Article 2.1.13
Where in the course of negotiations one of the parties insists that the contract is not concluded until there is agreement on specific matters or in a particular form, no contract is concluded before agreement is reached on those matters or in that form.

Article 5.3.1
A contract or a contractual obligation may be made conditional upon the occurrence of a future uncertain event, so that the contract or the contractual obligation only takes effect if the event occurs (suspensive condition) or comes to an end if the event occurs (resolutive condition).

II. Principles on European Contract Law (PECL)

Article 2:103: Sufficient Agreement
(2) However, if one of the parties refuses to conclude a contract unless the parties have agreed on some specific matter, there is no contract unless agreement on that matter has been reached.

403 DiMatteo, para. 90.
404 Pannebakker, 272.
III. French Code Civil

Art. 1123.

A pre-emption agreement is a contract by which a party undertakes that, in the event that he decides to enter into a contract, he will make the first proposal for that contract to the beneficiary of the pre-emption agreement.

Where a contract has been concluded with a third party in breach of a pre-emption agreement, the beneficiary of that agreement may obtain reparation of the loss that he has suffered. Where the third party knew of the existence of the pre-emption agreement and of the beneficiary's intention to take advantage of it, the beneficiary may also sue for nullity or may ask the court to substitute him for the third party in the contract that has been concluded.

The third party may give written notice to the beneficiary requiring him to confirm, within a period which the former fixes and which must be reasonable, the existence of a pre-emption agreement and whether he intends to take advantage of it.

Such a written notice must state that if he does not reply within that period, the beneficiary of the pre-emption agreement will no longer have the right to claim either to be substituted in any contract concluded with the third party, or nullity of the contract.

Art. 1124.

A unilateral promise is a contract by which one party, the promisor, grants another, the beneficiary, a right to have the option to conclude a contract whose essential elements are determined, and for the formation of which only the consent of the beneficiary is missing.

Revocation of the promise during the period allowed to the beneficiary to exercise the option does not prevent the formation of the contract, which was promised.

A contract concluded in breach of a unilateral promise with a third party who knew of its existence, is a nullity.

IV. Spanish Código civil

Article 1,279.

If the law should require execution of a public deed or another special form for the obligations inherent to a contract to be effective, the contracting parties may compel each other reciprocally to fulfil such form from the moment when consent has been given and the remaining requirements necessary for its validity are present.

V. The Interpretation of the Supreme People's Court on Issues Concerning the Application of Law for the Trial of Cases of Disputes over Sales Contracts in Chinese Contract Law

Article 2 Liability under Precontract

If a party signs a pre-contract such as subscription agreement, purchase order agreement, advance purchase order agreement, letter of intent or memorandum, which agrees that a sales and purchase contract will be entered into within a certain period in the future, and a party fails to perform the obligation of entering into a sales and purchase contract while the other party requests this party to assume the liability for the violation of the pre-contract or requests the rescission of the pre-contract and claims damages, the people's court shall uphold such request and claim.

F. Commentary

Those clauses frequently used in PCIs that can qualify as stand-alone and severable and are therefore generally binding between the parties will be analysed next.\textsuperscript{405}

\textsuperscript{405} This subsection follows the classification and analyses of Pannebakker.
I. Agreement to Negotiate and to Negotiate in Good Faith

If the parties do not provide for the specific content then such agreements or clauses have a rather symbolic character in repeating the standards of conduct that apply anyway. However, first the existence of such an explicitly assumed duty supports the imposition of liability in borderline cases and, second, non-compliance qualifies as breach of the agreement and triggers contractual liability.\(^\text{406}\) The duty to negotiate is considered to be an obligation of means (obligation de moyens), meaning that the parties must not sabotage the process of negotiations; they have to ensure that negotiations take place and use all available means (make serious efforts) to reach an agreement, such as always reading and analysing the other party’s proposals and to reply, but they are not bound to achieve a specific result, i.e. to conclude the final contract.\(^\text{407}\)

In some legal systems, the agreement to negotiate in good faith includes the duty to inform the other party if parallel negotiations with a third party have been started. Dutch scholars even derive a duty to provide the other party with a last chance, i.e. to let it know the offer provided by the third party and to let the other original negotiating party choose whether it is willing to take over the (better) conditions that were offered by the third party. Again in the Dutch law, an injunction (court order to negotiate) can be awarded under the same preconditions analysed in the first part of this Chapter (F.III.2.),\(^\text{408}\) but this is unthinkable in other legal systems such as in France.\(^\text{409}\)

Chinese law follows a different approach according to the relevant interpretation of the Peoples’ Supreme Court: if the parties signed a pre-contract (subscription agreement, purchase order agreement, advance purchase order agreement, letter of intent, memorandum) and they agreed to enter into a sales contract within a certain period of time, but one party fails to conclude the sales contract then the other party – besides terminating the pre-contract – can claim damages. This interpretation is remarkable, because first, the independent contractual validity of precontracts is acknowledged\(^\text{410}\) and second, there is no sign of having an obligation de moyens here.\(^\text{411}\)

II. Provision on the Non-binding Character of Negotiations

The parties may strive to keep the negotiations and their records as non-binding until the final contract is concluded or is concluded in a specific form and in this way to prevent the enforceability of the contract in the making. These are also called ‘subject to contract’, ‘subject to formal agreement’ or ‘not binding until formal agreement is executed’ clauses.\(^\text{412}\) The courts of the respective legal systems react differently: such agreements are more accepted in the Netherlands than in France. However, the general principle of reasonableness and fairness also applies in the former: the non-binding character can be disregarded if the outcome is not acceptable because it is not in line

\(^{406}\) Pannebakker, 236, 239 and with reference to Dutch law, 54; and to DCFR, 304. And therefore remedies can include expectation interests, cf. Zuloaga, 177 with reference to PICC, however, difficulties in proof shall not be disregarded.\(^{407}\) Pannebakker, 92, 100 with reference to French law and 318-19 with reference to PICC.\(^{408}\) Pannebakker, 53, 237.\(^{409}\) Pannebakker, 108. The same applies to PICC, PECL and DCFR id. 319.\(^{410}\) Wei & Yu, 286.\(^{411}\) Ding, 489.\(^{412}\) UNIDROIT Principles, 54-55.
with those requirements. French law seems to be more reluctant due to the mandatory (ordre public) character of extracontractual liability.\(^{413}\)

Article 2.1.13 PICC is remarkable in that it explicitly provides for this possibility to keep negotiations non-binding. The parties can insist on the non-existence of the contract until there is agreement on specific matters or in a particular form. If so, the parties have to express their insistence unequivocally.\(^{414}\) Article 2:103(2) PECL includes a similar possibility; however only the agreement on some specific matter is provided for and not that on a particular form.

### III. Final Contract within the Discretion of One Party

Another possibility is to leave the decision on the contract (including the withdrawal from negotiations) completely to the other party, i.e. at its discretion. This is useful in particular if some internal approval procedure is mandatory within one party’s organisation (‘subject to board approval’ clauses).\(^{415}\)

Article 5.3.1 PICC, on contracts made conditional on future uncertain events, also covers this possibility, as this is confirmed in the official commentary (‘condition entirely dependent on the will of the obligor’). As one of the illustrations highlights, if one of the terms states that a contract of sale will come into being if the one party decides to sell certain goods, then this party ‘is under no obligation, not even a conditional one, in view of the fact that it is within its unfettered discretion to decide whether or not it wants to sell the goods.’\(^{416}\)

Article 1124 Code Civil provides for a similar option under the title unilateral promise (promesse unilatérale): one party grants another a right to have the option to conclude a contract, the essential elements of which are determined, and for the formation of which only the consent of the party is missing.\(^{417}\) According to the case law – whereupon the explicit codification of unilateral promise was based within the frame of the 2016 reform of the law of obligations – options like this shall be provided only for a limited period of time.\(^{418}\) Article 1331 of the Italian Codice Civile (option) also explicitly provides for such an authorisation of the one party to decide on the faith of the contract.

### IV. Exclusivity

Exclusivity is a widespread stand-alone (severable) clause in PCIs, which is accepted by the courts and qualifies as enforceable. It is frequently coupled with the duty to negotiate. Exclusivity shall be limited in time; however, the expiration can be also implied by the courts and they can identify a point in time when the duty of exclusivity certainly must have expired because the negotiations have not progressed for a couple of

\(^{413}\) Pannebakker, 54-56 with reference to Dutch law; 99-100 with reference to France and see also her general conclusions and comparative findings: 240-245.

\(^{414}\) UNIDROIT Principles, 54. See also illustration No. 2, wherein one party insisted on the agreement in the matter that which party shall bear the costs of the publicity campaign.

\(^{415}\) Pannebakker 56-57 with reference to Dutch law. See also illustration No. 8: UNIDROIT Principles, 177.

\(^{416}\) Illustration No. 7, UNIDROIT Principles, 176.

\(^{417}\) Unilateral promises are criticized in French scholarship because they support – besides promoting investments – the speculations on the property market since such promises can be made fast (too fast), see Sefton-Green, 77.

\(^{418}\) Pannebakker, 95.
month or the parties have exhausted all options and means (i.e. made sufficient efforts) to negotiate any further but they did not manage to come closer to the conclusion of the final contract. The limited period in time can be adjusted to the duration of the due diligence process or – if the effect of the letter of intent is limited in time – to this time limitation.419

215 Exclusivity clauses have two little siblings.420 The one is called a sincerity clause, which does not exclude the possibility of conducting parallel negotiations but requires the party doing so to inform the other party.

The other one is a pre-emption agreement, which limits the party’s contractual freedom on the choice of the contractual partner. Article 1123 of the French Code Civil (as certainly many other civil codes) also contains such an instrument (pacte de préférence). According to French case law, a preemption right can be granted both for a definite or indefinite period of time. Besides damages, the party whose preemption right was infringed can claim nullity or that the court substitute this party for the third party in the contract that has been concluded, provided the third party knew of the existence of the pre-emption agreement and of the beneficiary’s intention to take advantage of it.421 In order to prevent nullity, the third party ‘may give written notice to the beneficiary requiring him to confirm, within a period which the former fixes and which must be reasonable, the existence of a pre-emption agreement and whether he intends to take advantage of it’ (Article 1123(3) Code Civil). If there is no answer, the beneficiary of the preemption right does not have the right to claim to be substituted or nullity (Article 1123(4) Code Civil).

V. Confidentiality

217 Since there is no general duty of confidentiality in the respective legal systems – apart from trade secrets and intellectual property rights – confidentiality clauses are frequently used and are severable and enforceable provisions within PCIs.422 The severability and binding force of such clauses (and also of other types of severable clauses such as dispute resolution) is acknowledged, even if the conclusion of the final contract is conditional on specific formality requirements.423 Besides ex post remedies, such as damages, ex ante reliefs, such as injunctions, can also be granted if confidential information has not yet been disclosed but there is an imminent threat.424 Confidentiality clauses – besides determining the scope, i.e. identifying the information that qualifies as confidential or, to the contrary, that are not – can include provisions that prohibit the disclosure even of the mere fact of negotiations (because the disclosure may have an impact on the shares to be sold), or make issuing any press release conditional on the other party’s consent, etc.

419 Pannebakker, 57-58 with reference to Dutch law, 249-250 and 344 in general.
420 Pannebakker, 100.
421 See the explanations given by Pannebakker, 93-94.
422 Cf. the summaries on Dutch and French laws provided by Pannebakker, 51, 58-59, 101, and in general 246-48.
424 Similarly, Pannebakker, 101 with reference to French law.
VI. Distribution of Costs and Limitation of Liability

The (re)allocation of costs of preparing contracts and exclusionary or limitation clauses on liability are crucial for keeping the risks of non-conclusion (with special regard to investments of time and money that can turn out to have been wasted) predictable, and to limit the parties’ financial exposure. They are generally severable and enforceable up to some general barriers based on good faith, good morals or reasonableness and fairness requirements and to the restrictions on contractual freedom related to the exclusion or limitation of liability.

The liability for intentional harm cannot be excluded or limited in the respective legal systems, and clauses that waive or limit liability can be prohibited if they are overall grossly unfair or infringe the requirement of consistent behaviour. The ordre public character and mandatory nature of tort law should also be borne in mind regarding French law. Difficulties can therefore arise on the distinction of duties, conducts and remedies covered by the PCI as a contract and other aspects that belong to the realm of tort law that cannot be set aside by mutual agreement of the parties.

In some legal systems the courts have the power to adjust the amount of excessive contractual penalties (‘break-up fees’) or similar measures provided for in the PCI, because such fees are expected to be proportional to the goal of the negotiated transaction.

As far as the reallocation of costs is concerned, the parties may fix that both parties bear their own costs irrespective of why those particular costs arose. In this event, the courts tend not to establish any liability. The parties can empower each other to claim all reasonable and proper costs if the other party breaks off negotiations or make the subsequent reimbursement conditional on the previous request, instruction or approval of the other party. The heads and amounts of the respective costs can be limited in the PCI.

Exclusion and limitation of liability is also quite common. The amount of damages to be paid can be capped and also liability for particular heads of losses can be excluded (loss of profit, loss of contract, loss of reputation).

VII. Dispute Resolution

Clauses related to dispute resolution (jurisdiction i.e. choice of forum, choice of law and arbitration clauses) are severable (and therefore to be assessed independently) and binding in the respective legal systems (also if included in PCIs). They are explicitly allowed by European legal instruments such as Article 25(5) Brussels I-bis Regulation (regarding choice of court clauses).

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425 Pannebakker, 253.
426 Pannebakker, 59-60 with reference to Dutch law and 255, 347 in general.
427 See Pannebakker, 302 with reference to PICC, however the latter can be disclaimed according to the prevailing view, id. 345. PECL seems to be more restrictive in this respect, id. 346.
428 Pannebakker, 255. However, the principle of non-cumul de responsabilité shall be also taken into account, id. 111.
429 Cf. Pannebakker, 252 with reference to Dutch case law and 110-11, 255 with reference to French law.
430 Pannebakker, 61 with reference to Dutch case law.
431 Pannebakker, 252 with reference to French case law.
432 Pannebakker, 250-53.
433 Pannebakker, 253-55.
434 Pannebakker, 256-260.
G. Illustrations

The official commentary on Article 2.1.13 PICC (Conclusion of contract dependent on agreement on specific matters or in a particular form) provides two illustrations that are worth citing here.435

Integrated summary of illustrations No. 1 and 2:

A agrees with B on all the terms which are essential to their intended contract for the distribution of A’s goods. When the question subsequently arises of who should bear the costs of the publicity campaign, neither party may claim that no contract has come into existence by reason of the silence of the contract on this point, as the missing term is not essential to the type of transaction in question and will be implied in fact or by law. However, if during the negotiations B repeatedly declares that the question of who should bear the cost of the publicity campaign must be settled expressly, then ‘notwithstanding their agreement on all the essential terms of the contract, no contract has come into existence between A and B since B had insisted that the conclusion of the contract was dependent on agreement regarding that specific term.’

Integrated summary of illustrations No. 3 and 4:

After prolonged negotiations A and B sign a “Memorandum of Understanding” containing the terms of an agreement for a joint venture for the exploration and exploitation of the continental shelf of country X. The parties agree that they will at a later stage draw up the agreement in formal documents to be signed and exchanged at a public ceremony. If the “Memorandum” already contains all the relevant terms of the agreement and the subsequent documents are intended merely to permit the agreement to be properly presented to the public, it may be taken that the contract was already concluded when the first written document was signed. However, if the “Memorandum of Understanding” contains a clause such as “Not binding until final agreement is executed” or the like, then ‘until the signing and the exchange of the formal documents there is no binding contract.’

The hypothetical drafted by Cartwright and Hesselink on Exclusivity is remarkable:

A and B are negotiating for the sale by A to B of A’s business. At the start of the negotiations, A agrees that ‘for a period of three months he will not negotiate with any third party nor consider any proposal from a third party with a view to concluding a contract for the sale of the business.’ During the negotiations between A and B the price is agreed (as €2 m) although there is no contract concluded because of other outstanding matters, including the question of whether B will continue to employ the whole of A’s workforce. After two months, A receives a proposal for the sale of the business from C, who agrees to take on the whole workforce and to pay a higher price (€3 m). A then breaks off the negotiations with B and, after conducting negotiations with C, concludes a contract with C for the sale of the business. During the negotiations, B had incurred accountants’ and lawyers’ fees in investigating the state of the business. The real value of the business, as established by independent experts, is €3 m. What liability (in contract, tort, restitution, or any other form of liability), if any, does A have to B? Would it make a difference if A had instead agreed that ‘he will negotiate with B in good faith and only break off the negotiations for a proper reason’?

The legal systems analysed in Cartwright’s and Hesselink’s treatise would provide a remedy in the first version but most of them would not do so in the second. The breach

435 UNIDROIT Principles, 54-55.
of an exclusivity agreement qualifies as a contract law case in most of the legal systems concerned but damages vary from one to another on whether they are restricted to the expenses incurred during negotiations or damages should be calculated on the basis of the lost chance to make a profit. The reporters also intensively address the causation; one of them (the German report) denies that there was a causal connection between the breach of the exclusivity clause and the losses.

H. Cross References & Additional Commentary

The Common Law approach on PCIs is covered in Chapter 4 (Precontractual liability in Common Law). Since precontractual agreements – having binding effect – are mostly treated as (normal) contracts with special duties and content, Chapter 7 on formalities and Chapter 8 on formation of contracts are therefore also related and relevant. Confidentiality is elaborated on in Chapter 29 too (Post contract and continuing obligations and rights).

I. Practitioner Tips & Contract Clauses

As referred to above, the more valuable and the more complex the transaction, the more negotiations are expected to be lengthy, the more uncertain the precontractual liability regime of the applicable law is, the more sense it makes to draft and sign a precontractual instrument. Vague statements and uncertain duties should be avoided in order to spare the parties and the court difficult interpretational stunts based on the circumstances. The parties’ intent should be clearly comprehensible on the basis of the text alone (literal meaning). It is useful to fix the period of validity or, if the PCI is agreed upon for an indefinite period of time, provisions of termination should be added. If the PCI is divided into binding and non-binding parts, the character of each provision must be clearly allocated into one or the other group. Some sample clauses follow next, based on the compilation by Pannebakker.437

I. Binding and Non-binding Parts

‘The terms of this Letter do not and are not intended to create binding legal obligations upon the parties hereto with the exception of this Clause and Clauses 5, 11 and 13 ...’438 (Choice of law and jurisdiction can be added: ‘which clauses shall be governed by French substantive law and are subject to the exclusive jurisdiction of French courts.’) ‘Seller and Purchaser acknowledge that this Letter of Intent proposal is not a binding agreement and that it is intended solely to establish the principal terms of the purchase and as a basis for the preparation of a binding Purchase and Sale Agreement [...] provided, however, that in consideration of Purchaser’s good faith efforts to review the due diligence material provided by Seller, Seller agrees to be bound to provide the required due diligence documents to Purchaser within the time required and to comply with the Non-Solicitation provision set forth above.’439

437 Pannebakker, 240-259. Many other sample clauses can be found for example at this website: https://www.lawinsider.com/clauses.
II. Confidentiality

236  ‘The terms and conditions set out in this Letter shall remain confidential between the parties and each party acknowledges that this Letter contains commercially sensitive information and agrees not to disclose same except to their respective Boards of Directors, advisers and employees or potential financiers of the Aircraft or as otherwise agreed between the parties or required by applicable law. No press release may be made by either party without the other party’s consent to the release and its content.’

237  ‘No announcements may be made about the Mirror’s possible involvement in the de Krant project without the Mirror’s prior approval.’

III. Exclusivity

238  ‘Seller and/or its representatives agree that it will not seek nor enter into a letter of intent or purchase agreement for sale of the Property with any third party for a period of sixty (60) days from the date this Letter of Intent is signed by both parties and becomes effective.’

239  ‘Seller agrees to negotiate with Purchaser exclusively during the next ninety (90) day period to complete a mutually agreeable Purchase & Sale Agreement. If the parties are unable to reach final agreement on the formal Purchase & Sale Agreement during such period, neither party shall have any further obligation to the other.’

IV. Reallocation of Costs, Limitations of Liability

240  ‘If for whatever reason we at any time give notice to cease work (in which event you shall as soon as practicable cease all work) we shall reimburse all reasonable and proper costs incurred by you in accordance with the terms of this letter.’

241  ‘... this letter would authorise expenditure on preliminaries and specialist design works up to a value of £50,000, but that this letter of intent does not cover construction works which will be the subject of a separate instruction.’

242  ‘Subject to the terms of this letter, ACC is authorised to proceed with the works up to a total value of £250,000 or any other sum which may subsequently be notified to you in writing by the BBC.’

243  ‘If DB breaches any of its obligations in this paragraph or if during the Lock-Out Period DB withdraws from negotiations with NBM for the sale of the Property, NBM shall be entitled to recover all of its costs and expenses relating to the investigation and nego-
tiation of the proposed acquisition by it of the Property, however in no case more than EUR 300,000.00 in total, without the possibility of any further claims of any kind of NBM.  

‘In the event that a Secondary Subcontract is not concluded we shall reimburse only your reasonable and substantiated direct costs of complying with this instruction until it is revoked. We will not reimburse any other expenditure cost or loss whatsoever. This limitation includes without derogating from the generality of the foregoing any claim for breach of contract, loss of profit, loss of contract, loss of expectation or otherwise.’

‘If, for any unforeseen reason, the contract should fail to proceed and be formalised, then any reasonable expenditure incurred by you in connection with the above will be reimbursed on a quantum meruit basis. Any such payment would strictly form the limit of our client’s commitment and our client would not be subject any further payment of compensation for damages for breach of contract.’

‘Clapham Park Homes Ltd do not undertake to reimburse any anticipated profits for the works as a whole, nor actual costs or actual or theoretically incurred general or specific overheads arising after the date of notification that no further work is to be carried out.’

J. Additional Sources

Ádám Fuglinszky


