

# **CULPA IN CONTRAHENDO: A COMPARATIVE LAW STUDY: CHILEAN LAW AND THE UNITED NATIONS CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS (CISG)**

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## **I. INTRODUCTION**

This paper will analyze the doctrine of *culpa in contrahendo*, including statutory provisions and case law adopted in different jurisdictions in which this theory has been applied. In doing so, this paper will provide a general description of the *culpa in contrahendo* doctrine, and then it will introduce the legal perspective of a judge facing a case of pre-contractual liability in Chile. Finally, it will analyze the applicability of the *culpa in contrahendo* doctrine under the United Nations Convention on Contracts for the International Sale of Goods (CISG) and how the Convention can affect the decision of a judge applying its rules instead of Chilean rules.

Section II of this paper will start by providing some of the most common definitions of *culpa in contrahendo* that have been used by different commentators and courts. It will also include a short historical background of the doctrine. Further, it will set forth the basic elements of *culpa in contrahendo*. Finally, the legal nature of the liability—tort or contractual liability—will be broadly discussed, including a comprehensive analysis of the damages that a plaintiff can recover with a *culpa in contrahendo* action.

Section III will set forth the facts of a hypothetical case that will become the basis of the discussion in the following sections. Section IV will give the perspective of a judge in Chile facing a case of pre-contractual liability as set forth in Section III. Despite the condition of the civil law system in Chile, this section will discuss not only Chilean statutory law but also some interesting court decisions.

Section V of this paper will analyze the applicability of the *culpa in contrahendo* doctrine in an international setting. For the purposes of this analysis, it will be presumed that the parties of the hypothetical case are citizens of different countries and that these countries have adopted the CISG. Even though this section focuses on CISG provisions, the International Institute for the Unification of Private Law, Principles of International Commercial Contracts (UNIDROIT Principles) will also be analyzed, along with some case law materials.

Finally, Section VI will summarize the main conclusions that can be extracted from the legal analyses made in this paper.

## **II. THE *CULPA IN CONTRAHENDO* DOCTRINE**

### **A. Definition and Historical Background**

Introduced in Germany by Von Jhering for the first time in the modern-law civil era in 1861, the doctrine of *culpa in contrahendo* advanced the thesis that “damages should be recoverable against the party whose blameworthy conduct during negotiations for a contract brought about its invalidity or prevented its perfection.”<sup>1</sup> At that time, the concern of Von Jhering was about the defective protection that the German common legal system—known as *Gemeines Recht*—provided to certain commerce problems. For example, Von Jhering’s concerns include the situation where a buyer was not found liable for the costs of transporting merchandise that had been rejected because he had inadvertently ordered more than he intended. This and other situations persuaded Von Jhering to raise the question “whether the ‘blameworthy’ party should not be held liable to the innocent party who had suffered damages relying on the validity of the contract.”<sup>2</sup>

The answer provided by Von Jhering in this kind of case was affirmative. He suggested that “the law . . . has to provide for the restoration of the status quo by giving the injured party his ‘negative interest’ or reliance damages. The careless promisor has only himself to blame when he has created for the other party the false appearance of a binding obligation.”<sup>3</sup>

Von Jhering himself was concerned primarily with the effect of *culpa* on contracts concluded by mistake and never applied his thesis to situations involving failed negotiations. It was a French scholar, Raymond Saleilles, who in 1907 advanced the view that after parties have entered into negotiations, both must act in good faith and neither can break off the negotiations arbitrarily without compensating the other for reliance damages.<sup>4</sup>

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1. Friedrich Kessler & Edith Fine, *Culpa in Contrahendo, Bargaining in Good Faith, and Freedom of Contract: A Comparative Study*, 77 HARV. L. REV. 401, 401 (1964).
2. *Id.* at 402.
3. *Id.*
4. E. Allan Farnsworth, *Precontractual Liability and Preliminary Agreements: Fair Dealing and Failed Negotiations*, 87 COLUM. L. REV. 217, 240 (1987).

It was the French approach that was adopted by most, if not all, civil law jurisdictions. As described by Friedrich Kessler and Edith Fine, the German doctrine of *culpa in contrahendo*, as amended by Saleilles, is “that contracting parties are under a duty . . . to deal in good faith with each other during the negotiation stage, or else face liability, customarily to the extent of the wronged party’s reliance.”<sup>5</sup>

Even though this doctrine was originally elaborated in Germany and afterwards amended by the French, the German Civil Code does not establish a provision setting forth this doctrine as a general principle. Nonetheless:

German courts have relied on Von Jhering’s thesis as [a] basis of precontractual liability. According to the *Bundesgerichtshof*, “a fault in contractual negotiations that renders one liable for damages can also exist in that one party awakes in the other confidence in the imminent coming into existence of a contract – subsequently not concluded – and thus causes the latter party to incur expenses.”<sup>6</sup>

Furthermore, it is generally accepted that the German legislature established this doctrine in different articles throughout the Civil Code, such as Articles 122, 179, 307, and 309. In applying these articles, “the German courts, especially the *Reichsgericht*, have recognized that the stage of contractual negotiations . . . engender[s] a relationship of trust between the parties similar to that arising from a contract, so that the parties are required to observe the customary standard of care.”<sup>7</sup>

Starting from Von Jhering’s doctrine as interpreted by the French, not only the German legal system, but almost all civil law countries, have statutes that follow this theory. France, Italy, Argentina, Bolivia, Switzerland, and the District of Puerto Rico are just some examples of such nations. Under French law, “liability typically lies where one party enters into negotiations without having any intent to contract, yet creates a reasonable expectation in the other party that a contract will be forthcoming so that the other incurs substantial precontractual expenses.”<sup>8</sup> The other situation where French law has found grounds for precontractual liability is “if the negotiations are well-advanced and one party breaks off negotiations out of pure caprice, in an arbitrary and unfair manner.”<sup>9</sup>

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5. Kessler & Fine, *supra* note 1, at 401.

6. *Id.*

7. ARTHUR T. VON MEHREN, *THE CIVIL LAW SYSTEM* 491 (Prentice-Hall 1957).

8. Nadia E. Nedzel, *A Comparative Study of Good Faith, Fair Dealing, and Precontractual Liability*, 12 *TUL. EUR. & CIV. L.F.* 97, 139 (1997).

9. *Id.*

In Italy, Article 1337 of the Italian Civil Code expressly establishes a duty of good faith governing pre-contractual negotiations. It states that the parties, during the negotiation and formation of a contract, must act in good faith.<sup>10</sup> Furthermore, Article 1338 of the same code establishes that the party who knows or should know of the existence of an invalidity in the contract and does not inform the other party must restore damages to the party who was confident in the validity of the contract.<sup>11</sup> In Argentina, the civil code requires that contracts be “made” as well as constructed and enforced in good faith.<sup>12</sup> Furthermore, courts have established that the existence of pre-contractual liability derived from the untimely and arbitrary withdrawal of the preliminary negotiations is admissible.<sup>13</sup> Like the Italian Civil Code, Article 465 of the Bolivian Civil Code provides that “[i]n the preliminary stages of negotiation and in the formation of the contract the parties shall conduct themselves in good faith and shall compensate for harm caused by negligence, imprudence or omission in giving notice of the causes that may void the contract.”<sup>14</sup>

Swiss law is particularly precise in regulating the *culpa in contrahendo* doctrine. Under Swiss law, “the preliminary phase of discussions during which the parties examine the possibility of concluding a contract, negotiate certain clauses and take all necessary measures for the conclusion is called ‘precontractual phase.’”<sup>15</sup> This phase begins as soon as a party gets in touch with another for the purpose of concluding a contract, and it ends when the offer is refused or when the contract is concluded. Swiss law establishes that “[t]he negotiations create between the parties a legal relationship which is called a

10. C.C. art. 1337 (Italy) (“*Le parti, nello svolgimento delle trattative e nella formazione del contratto, devono comportarsi secondo buona fede.*”).

11. *Id.* art. 1338 (“*La parte che, conoscendo o dovendo conoscere l’esistenza di una causa d’invalidità del contratto non ne ha dato notizia all’altra parte è tenuta a risarcire il danno da questa risentito per avere confidato, senza sua colpa, nella validità del contratto.*”).

12. Cód. Civ. art. 1198 (Arg.) (“*Los contratos deben celebrarse, interpretarse y ejecutarse de buena fe y de acuerdo con lo que verosíblemente las partes entendieron pudieron entender, obrando con cuidado y previsión.*”).

13. “*Cabe admitir la existencia de una responsabilidad precontractual, derivada de la ruptura intempestiva y arbitraria de las tratativas llevadas a cabo entre las partes para concluir el contrato.*” JURISPRUDENCIA EN LA LEY 416, Tomo “D” (1989) (judgment of Cámara Nacional Civil y Comercial Federal, Sala 2, May 2, 1989).

14. “(CULPA PRECONTRACTUAL). *En los tratos preliminares y en la formación del contrato las partes deben conducirse conforme a la buena fe, debiendo resarcir el daño que ocasionen por negligencia, imprudencia u omisión en advertir las causales que invaliden el contrato.*” Cód. Civ. art. 465 (Bol.) (translated by Walpex Trading Co. v. Yacimientos Petrolíferos Fiscales Bolivianos, 890 F.Supp. 300, 303 (S.D. New York 1995)).

15. INTERNATIONAL CHAMBER OF COMMERCE, FORMATION OF CONTRACTS AND PRECONTRACTUAL LIABILITY 69 (1990) [hereinafter ICC].

precontractual relationship.<sup>16</sup> Furthermore, Swiss law holds that “[p]recontractual liability is the obligation of a party to repair the damages caused to the other by a violation of precontractual duties,” and pre-contractual duties “are those implied by the rule of good faith.”<sup>17</sup> Finally, “[t]he Federal Tribunal (Highest Court) has explained that the basic principle underlying these legal provisions must be generalized if rules of good faith are to be respected in business relations.”<sup>18</sup>

In countries such as the United States and Canada, however, the situation is different. On one hand, and despite their common law systems, there are some states or provinces that have adopted both the civil law system and the doctrine of *culpa in contrahendo*, as well. This is the case in Puerto Rico. In fact, Puerto Rico’s courts and legislature have recognized the applicability of *culpa in contrahendo*. For example, in *Satellite Broadcast Cable, Inc. v. Telefónica de España*, the court ruled:

[P]arties which undertake negotiation of a contract are bound by a duty of good faith . . . [which] stems from a recognition that while parties are free to consummate contracts or withdraw from negotiations, an unjust withdrawal during the pre-contractual phase may result in extra-contractual liability under Article 1802 of the Civil Code.<sup>19</sup>

On the other hand, in those states or provinces where a common law system rules, the adoption of the *culpa in contrahendo* doctrine is not even debated. Professor Farnsworth has illustrated this, stating:

Some scholarly writers have generalized from the cases decided on grounds of misrepresentation and specific promise argue that a general obligation of fair dealing may arise out of the negotiations themselves, at least if the disappointed party has been led to believe that success is in prospect. Thus Summers wrote that if the courts follow Red Owl, “it will no longer be possible for one party to scuttle contract negotiations with impunity when the other has been induced to rely to his detriment on the prospect that the negotiations will succeed.”

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16. *Id.*

17. *Id.*

18. *Id.*

19. *Satellite Broad. Cable, Inc. v. Telefónica de España*, 807 F. Supp. 210, 216-17 (D.P.R. 1992). “*Obligación cuando se causa daño por culpa o negligencia. El que por acción u omisión causa daño a otro, interviniendo culpa o negligencia, esta obligado a reparar el daño causado. La imprudencia concurrente del perjudicado no exime de responsabilidad, pero conlleva la reducción de la indemnización.*” COD. CIV. art. 1802 (P.R.), available at <http://www.lexjuris.com/LEXLEX/lexcodigoc/lexcuasicontratos.htm>.

*American courts, however, have been unreceptive to these arguments and have declined to find a general obligation that would preclude a party from breaking off negotiations, even when success was in prospect. Their reluctance to do so is supported by the formulation of a general duty of good faith and fair dealing in both the Uniform Commercial Code and the Restatement (Second) of Contracts that, at least by negative implication, does not extend to negotiations.*<sup>20</sup>

Therefore, courts under a common law system approach pre-contractual liability in a different way. They consider that “[p]ossible bases of precontractual liability in such [a] situation can be grouped under four headings: first, unjust enrichment; second, misrepresentation; third, specific promise [Promissory Estoppel]; and fourth, general obligation.”<sup>21</sup> Also, some scholarly writers justify

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20. Farnsworth, *supra* note 4, at 239 (emphasis added).

21. ICC, *supra* note 14, at 18.

[Unjust Enrichment:] The duty to make restitution of benefits received during negotiations is perhaps the most fundamental ground for precontractual liability. A negotiating party may not with impunity unjustly appropriate such benefits to its own use. To prevent such unjust enrichment, the law imposes liability measured by the injured party's restitution interest. Claims to restitution commonly involve either ideas disclosed or services rendered during negotiations.

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[Misrepresentation:] Misrepresentation, another fundamental basis of precontractual liability, has been no more popular with claimants than restitution has been. A negotiating party may not with impunity fraudulently misrepresent its intention to come to terms. Such an assertion is one of fact—of a state of mind—and if fraudulent, it may be actionable in tort. But few such actions have been brought.

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[Specific Promise:] A more common basis for precontractual liability would seem to be the specific promises that one party makes to another in order to interest the other party in the negotiations. In the past two decades, American courts—in the vanguard of common law courts—have come to recognize that liability may be based on such a promise. This liability has been developed largely in cases arising out of negotiations between franchisors and prospective franchisees in which prospective franchisees have recovered reliance damages.

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[General Obligation:] American courts have, however, declined to generalize from cases decided on the ground of

this reluctance of the common law judges on the ground that *culpa in contrahendo* might interfere with freedom of contracts and economic development. For example, Nazler wrote that “underpinning the American rejection of a [general] precontractual duty of good faith is a concern that the imposition of the duty will open the flood gates of litigation and thus interfere with the freedom from contract, as well as discourage the free creation of new agreements.”<sup>22</sup>

## **B. Elements**

Having established the framework of *culpa in contrahendo*, now it is time to set forth its elements. Based upon the definitions cited above, it is fair to say that in order to have a case of *culpa in contrahendo*, there must be the following: (1) preliminary negotiations; (2) a breach of the duty to bargain in good faith; (3) causation-in-fact; and (4) compensable damages.

### **1. Preliminary Negotiations**

Establishing the scope of this first element is particularly important for a variety of reasons. The most important of them is its influence in the determination of the legal nature of *culpa in contrahendo*. As will be discussed later in this section, during the preliminary negotiations parties might perform some acts that can change their legal relationship, creating rights and obligations among them. The sources of these rights and obligations will determine the legal nature of the liability if one of them does not comply with the obligation or exercises the rights in an unlawful manner.<sup>23</sup>

To determine the range in which preliminary negotiations take place, it is necessary to refer to the law governing this period. The law governing the preliminary negotiation of a contract is commonly analyzed in terms of the classic rules of offer and acceptance. But at present, they have little to say about the complex processes that lead to major deals. Questions such as when a contract starts or when it ends are extremely difficult to answer by referring only to offer and acceptance. As described by Professor Farnsworth:

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misrepresentation and specific promise to conclude that a general obligation of fair dealing may arise out of the negotiations themselves, even if the disappointed party has been led to believe that success is in prospect.

*Id.* at 18-21.

22. Nedzel, *supra* note 8, at 137-38.

23. *Id.* at 118.

During the negotiation of [complex] deals there is often no offer or counter-offer for either party to accept, but rather a gradual process in which agreements are reached piecemeal in several 'rounds' with a succession of drafts. There may first be an exchange of information and an identification of the parties' interests and differences, then a series of compromises with tentative agreement on major points, and finally a refining of contract terms. The negotiations may begin with managers, who refrain from making offers because they want the terms of any binding commitment to be worked out by their lawyers. Once these original negotiators decide that they have settled those matters that they regard as important, they turn things over to their lawyers. The drafts prepared by the lawyers are not offers because the lawyers lack authority to make offers. When the ultimate agreement is reached, it is often expected that it will be embodied in a document or documents that will be exchanged by the parties at a closing.<sup>24</sup>

Even though the description cited above accurately describes many of today's complex negotiations, the classic rules of offer and acceptance are valid in many other national and international negotiations, particularly those relating to the trade of goods. Thus, it is fair to distinguish between those long and elaborate negotiations and the simple negotiations in the trade of goods.

In the former, if the parties sign and exchange documents at the closing, there is no question that they have given their assent to a contract. There is little occasion to apply the classic rules of offer and acceptance. But if the negotiations fail and no documents are signed and exchanged, a number of questions may arise that the classic rules of offer and acceptance do not address. May a disappointed party have a claim against the other party for having failed to conform to a standard of fair dealing? If so, what is the meaning of fair dealing in this context? And may the disappointed party get restitution, be reimbursed for out-of-pocket expenses, or recover for lost opportunities?<sup>25</sup> The latter case involves the simple trade of goods. There is a buyer and a seller. The buyer sends an offer to the seller. The seller responds with a simple acceptance or a counter-offer that, if accepted, renders the contract perfect.

Despite their clear differences, the parties in both of these types of preliminary negotiations might be bound by the duty to negotiate in good faith. As described by Friedrich Kessler and Edith Fine:

Even when an agreement has not been reached the law of contract can ill afford to deny protection to an innocent party

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24. Farnsworth, *supra* note 4, at 219.

25. *Id.* at 219-20.



against abuse of the privilege to break off. However much the various legal systems may differ in detail as to the scope of precontractual duties, they do not permit, broadly speaking, a party to break off negotiations with impunity in pursuance of a scheme never to come to terms. Under the civil law a party who has used negotiations solely to induce the other party to take a desired course of action and terminates them after his goal has been accomplished, will have to answer in damages to the party whom he has strung along. Our courts are also able to protect the victim in such a situation with the help of the doctrine[s] of misrepresentation and promissory estoppel.<sup>26</sup>

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26. Kessler & Fine, *supra* note 1, at 419-20.

Fraud and misrepresentation are types of conduct which clearly illustrate the operation of the *culpa in contrahendo* principle. Their place is in the category of mistake; the person guilty of fraud or misrepresentation either creates or takes advantage of mistake. The role within the contract system played by the two concepts will depend in large measure on its attitude with regard to unilateral mistake. A law of contracts which broadly allows rescission for unilateral mistake obviously will assign to fraud and certainly to misrepresentation a smaller function than will a legal order which regards unilateral mistake as either inoperative or confines its relevance within narrow limitations. The constant emphasis on the fraud or misrepresentation exception to the unilateral mistake rule in the common law literature is therefore not surprising. Nor is the tendency to expand the category of palpable error. But it would be rash to assume that in the civil law countries, by contrast, fraud and misrepresentation are relevant only in the context of damages. Despite the more liberal attitude of the civil law there are certain types of unilateral mistakes which remain unprotected unless they are caused by fraud. This is true, for instance, with regard to a so-called mistake in motive. Non-fraudulent misrepresentation also, as we shall see, is not a superfluous category because of the treatment of unilateral mistake.

*Id.* at 437-38.

It might be thought that misrepresentation as contrasted with fraud is a superfluous category in the civil law due to the treatment of unilateral mistake. But this is not true. The German experience is quite interesting in this respect. The German civil law, to be sure, has no express provision dealing with innocent misrepresentation as contrasted with fraud. The draftsmen of the code probably took the position that the interests of the mistaken party were sufficiently safeguarded by his privilege to rescind and by the provision that the mistaken party is not liable to pay reliance damages to a party who knows or should have

The differences between the systems are determined by the name and the source of the duty. In a civil law system, the duty to bargain in good faith is unanimously recognized either by statutory law or as a general principle of law as pre-contractual obligation. But in a common law system, this duty is not generally acknowledged. Some courts and scholars have recognized it as a general principle of law, but others have only accepted it as a contractual obligation or under the theory of promissory estoppel. In fact, as described by Nadia E. Nedzel, “[i]n the absence of any sort of binding agreement, precontractual liability in the United States is most commonly predicated on the theory of promissory estoppel.”<sup>27</sup>

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known of the mistake. And yet negligent misrepresentation has found recognition in the case law. The negligent causation of a mistake not only deprives the party causing the mistake of his right to claim reliance damages but exposes him in turn to reliance damage claims by the mistaken party.

In the common law countries relief for material misrepresentation has been continuously expanded. Initially the common law was quite reluctant to give damages to the victim of misrepresentation in the absence of fraud. Before the Judicature Act of 1873 the victim of an innocent misrepresentation was only protected at law if the misrepresentation had become a term of the contract or was such as to bring about the complete failure of consideration or, finally, was made recklessly and without care. Equity, however, aware of the injustice of allowing a person who has made a misrepresentation to retain the fruits of the bargain, was ready to grant relief by way of rescission or by permitting the victim to plead misrepresentation as a defense in an action for specific performance. With the fusion of law and equity the principles developed in equity were incorporated into the common law system.

*Id.* at 444-45. The principle that a promise made without consideration may nonetheless be enforced to prevent injustice if the promisor should have reasonably expected the promisee to rely on the promise and if the promisee did actually rely on the promise to his or her detriment is known as the doctrine of promissory estoppel.

The doctrine of Promissory Estoppel is equitable in origin and nature and arose to provide a remedy through the enforcement of a gratuitous promise. Promissory estoppel is distinct from equitable estoppel in that the representation at issue is promissory rather than a representation of fact. “Promissory estoppel and estoppel by conduct are two entirely distinct theories. The latter does not require a promise.”

ANN TAYLOR SCHWING, CALIFORNIA AFFIRMATIVE DEFENSES § 34:16, at 35 (1996) (quoting *Div. of Labor Law Enforcement v. Transpacific Transp. Co.*, 88 Cal. App. 3d 823, 829 (1979)).

27. Nedzel, *supra* note 8, at 128.

## 2. Breach of the Duty to Negotiate in Good Faith

Whether originated by the law or by the contract, the duty of negotiating in good faith creates rights and obligations for the parties. These rights and obligations vary and depend upon the legal business discussed. Despite their general application, different treatises have agreed on the most important of these rights and obligations: (a) the obligation of reserve; (b) the obligation of custody and conservation; and (c) the obligation of seriousness.<sup>28</sup>

The obligation of reserve requires keeping silent with respect to the facts and circumstances related to the personal or patrimonial sphere of the other party, if they had been known in the regular course of the negotiations. The obligation of custody and conservation imposes upon the parties the duty to protect and take custody of all that has been given by the other party during preliminary negotiations so that it may be analyzed by the contracting parties. Finally, the obligation of seriousness imposes a duty to initiate the negotiation with the firm intention of reaching an agreement, and to withdraw as soon as a party realizes that a final agreement cannot be reached.<sup>29</sup>

As established in the Puerto Rican case, *Satellite II*, although *COPAN* (a previous case) squarely recognized a cause of action when a party unjustly interrupts contractual negotiations and no contract has been perfected, the holding does not open the floodgates of litigation for those seeking court enforcement of nonexistent contracts. Rather, *COPAN* balances the general rule that:

“agreements need not be culminated and that, consequently, the interruption alone is not sufficient to impose liability” . . . with a recognition that certain behavior is actionable even absent a contract. To make this determination, it is necessary to examine the circumstances of the interruption, specifically: (1) the development of the negotiation; (2) how it began; (3) its course; (4) the conduct of the parties throughout the negotiation; (5) the stage at which the interruption took place; (6) the parties’ reasonable expectations to form a contract, as well as any other relevant circumstance under the facts of the case submitted to judicial scrutiny.”<sup>30</sup>

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28. José Manuel Barros Torres, *El Conocimiento del Riesgo en el Contrato de Seguros: Algunos Alcances Sobre la Carga o Deber de Información*, in *DERECHO DE LOS CONTRATOS* 189, 191-92 (Hernán Corral Talciani & Guillermo Acuña Sboccia eds., 2002).

29. *Id.*

30. *Satellite Broad. Cable, Inc. v. Telefónica de España*, 807 F. Supp. 210, 217 (D.P.R. 1992).

As described by Dominique Dreyer referring to Swiss law, “[t]he beginning of the negotiations creates for the parties a certain number of rights and duties: the parties must act in good faith. Their precontractual behavior must be correct.”<sup>31</sup> From this general principle, Swiss courts have drawn the following rules:

- (a) The duty to negotiate seriously: one must not open negotiations if one does not have a serious intention to conclude a contract with the other party.
- (b) The prohibition to deceive: a party may not deceive the other on facts which for this party have a decisive importance as to the conclusion of the contract or the adoption of certain clauses.
- (c) In general, there is no duty to inform the other party since each party is supposed to take care of its own interest. However, in certain circumstances, the rules of good faith may request that the other party be informed. In such a case, it must be informed correctly. The following factors will be taken into account to decide whether there is a duty to inform: the personality of the parties [and] the nature of the contract.

When there is a duty to inform, it means that:

- a party must reply to questions put by the other party about facts concerning the contract;
- when a party realize[s] that the other party is relying on erroneous facts, it must bring its attention to it unless it concerns facts that the other party could have noticed if it had acted with the necessary care.<sup>32</sup>

Finally, withdrawal from the negotiation in itself is not punishable. There must have been something unlawful in it, such as, *inter alia*, not disclosing trustworthy information, not having the intention of reaching an agreement, or continuing the negotiation after realizing that a final agreement cannot be reached. Furthermore, “[i]n a pre-contractual situation, fault is not merely wrongful behavior that would not have been committed by a reasonable man under the same circumstances, that fault must also be obvious and indisputable.”<sup>33</sup> In fact, as further explained by Nadia E. Nedzel:

“[I]t would amount to a serious injury towards individual freedom and business security if one could easily be liable for breach of negotiations and dealing with a competitor; the

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31. ICC, *supra* note 14, at 71 (emphasis in original).

32. *Id.* at 71-72 (emphasis in original).

33. Nedzel, *supra* note 8, at 138.

precontractual fault must, in other words, be obvious and indisputable.” In other words, the fault must be an act bad enough to overcome the party’s interest in freedom from contract, though the bad act need not be intentional. While professionals who deal with consumers are held to a higher standard, in France, as in the United States, a mere rupture of negotiations will not by itself lead to liability.<sup>34</sup>

### 3. Causation-in-Fact

In a civil law jurisdiction as in a common law one, the plaintiff must prove that the defendant’s act or failure to act was the instrumentality of the damage. Despite the fact that this element is not usually discussed in pre-contractual liability cases, it “may be somewhat more complicated than first appears when a defendant argues that his breach of the negotiations was caused by the plaintiff’s misbehavior.”<sup>35</sup> In such a case, causation must be determined by analyzing both parties’ behavior. If both parties are found guilty of wrongful conduct, “then liability may be shared under a contributory negligence standard.”<sup>36</sup>

### 4. Injury

Injury is the last element of *culpa in contrahendo* doctrine. “As with common law torts [and civil law extra-contractual liability], unless there is damage, there cannot be tort [or extra-contractual liability].”<sup>37</sup> If there is no injury to one of the parties, even an unlawful breaking off of the negotiation does not generate responsibility because there is nothing to be recovered. Hence, the mere existence of a breach of the duty to negotiate in good faith does not generate immediate liability. As mentioned by Judge Perez-Gimenez in his opinion in *Satellite III*, “[i]n *Satellite II*, this Court recognized that under *Producciones Tommy Muniz v. Copan* . . . an unjust withdrawal [or termination from] the pre-contractual phase [of negotiations] may result in extra-contractual liability . . . .”<sup>38</sup>

One of the problems that arises when analyzing the measure of recovery in a pre-contractual liability situation is that “[t]he law of precontractual liability is

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34. *Id.* (citing JOANNA SCHMIDT-SZAKEWSJU, FORMATION OF CONTRACTS AND PRECONTRACTUAL LIABILITY 96 (1991)).

35. *Id.* at 140.

36. *Id.*

37. *Id.*

38. *Satellite Broad. Cable, Inc. v. Telefónica de España*, 807 F. Supp. 218, 220 (D.P.R. 1992).

relatively undeveloped, even on the grounds that are already recognized. This may be due in part to the considerable uncertainty that surrounds the measure of recovery under any of these grounds.”<sup>39</sup> In any case, *Satellite III* is a particularly illustrative case about the scope of damages that a court is allowed to recognize when *culpa in contrahendo* is applied.<sup>40</sup> In determining damages, the Court turned to numerous Civil Code commentators that have made pronouncements on the issue of the proper scope of damages.<sup>41</sup> Both parties were requested by the Court to submit memoranda of law regarding the scope of damages.<sup>42</sup> The positions of the parties were “as divergent as night and day. Plaintiffs argue[d] that a party who willfully and maliciously withdraws from precontractual negotiations is liable for ‘negative’ or reliance damages while a party who merely negotiates in bad faith is liable for ‘positive’ or expectation damages.”<sup>43</sup> On the other hand, defendants argued that Justice Davila correctly interpreted the majority opinion’s view of damages in his own concurring opinion.

I believe I should also pronounce myself on the type of damage that should be compensated in these cases. We have a good example in the opinion of the Italian Court of Cassation, as summarized by Mariano Alonso Perez: “precontractual liability does not suppose the recovery of all the contractual damages sustained by the other party, but only of those comprised within the so-called negative interest”—*id quod interest contractum initium non fuisse*—that is to say, those expenses incurred by the other party in foresight of the future contract—travel, expertise, advise, etc.—as well as the losses caused by not being able to take advantage of favorable opportunities to exercise a contract with other persons.<sup>44</sup>

In support of plaintiff’s claim, his memorandum cited two commentators, the first of whom was Alberto Manzanares. Manzanares stated, “[i]nitiating the negotiations with the purpose of causing harm, constitutes by itself an illicit act that clearly can be encompassed within the concept of extra[ ] contractual [tort] or aquiline liability.”<sup>45</sup>

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39. Farnsworth, *supra* note 4, at 223.

40. See *Satellite Broad. Cable, Inc.*, 807 F. Supp. at 220.

41. *Id.*

42. *Id.* at 219-20.

43. *Id.* at 220.

44. *Id.* at 221.

45. *Id.* at 220 (quoting Plaintiff’s Memorandum, 6, which quoted Alberto Manzanares, *La Responsabilidad Pre-Contractual en la Hipotesis de Ruptura Injustificada de las Negociaciones Preliminares*, XXXVIII ANUARIO DE DERECHO CIVIL 687, 689 (1984)) (translated by the court).

The other commentator that plaintiff used as support for his claim was Alfonso De Cossio y Corral, who established:

Whenever [willful misconduct] results in harmful consequences, an action for total indemnification for willful misconduct will arise . . . . *The indemnification will therefore not be limited to the merely negative contractual interest; but it will be extensive to the harms and injuries of every kind, foreseeable and non-foreseeable that could have followed the willful misconduct or omission.*<sup>46</sup>

On the other hand, defendant's arguments also found support from some Spanish-speaking commentators.<sup>47</sup> The first cited by defendants was Diez-Picazo, who, "[a]lthough . . . recogniz[ing] that, conceptually, the scope of damages may include either negative contractual interest (reliance damages) or positive contractual interest (expectation damages), he favor[ed] the former."<sup>48</sup> In Diez-Picazo's opinion, "the party in breach is responsible for costs and disbursements resulting from (1) the violation of the duty of good faith in the bargaining process and (2) the affront for the other party's integrity."<sup>49</sup> He stated:

The doctrine of *culpa in contrahendo* [promissory estoppel] is a passive one because damages under said doctrine include the so-called "negative contractual interest," but not the positive interest. . . . [T]he negative contractual interest [is that damage which] must be compensated as a result of the sterility of a given negotiation. The German doctrine considers the same as "damage to the trust [between the parties]," that is, damages caused by the betrayal of the good faith, belief in the seriousness and honesty of another. It includes, of course, expenses and disbursements undertaken as a result of the execution of the projected contract. By contrast, it seems not to include the loss of other more favorable offers that were made during that time [pre-contractual negotiations].<sup>50</sup>

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46. See *Satellite Broad. Cable, Inc. v. Telefónica de España*, 807 F. Supp. 218, 220 (D.P.R. 1992) (quoting Pls.'s Mem. 7, which quoted Alfonso de Cossio y Corral, *EL DOLO EN EL DERECHO CIVIL* 301 (1955) (Spain)) (translated by the Court) (emphasis added by plaintiffs).

47. *Id.* at 221.

48. *Id.*

49. *Id.*

50. *Id.* (quoting DIEZ-PICAZO, *FUNDAMENTOS DEL DERECHO CIVIL PATRIMONIAL* 192 (Vol. I 1979)) (translated by the court).

Defendants also pointed out that commentator Alonso Perez agreed with this position, stating the following:

Precontractual responsibility does not call for the redress of all contractual damages suffered by the injured party but only those damages encompassed by the so-called "negative interest" . . . that is, the expenditures incurred by the injured party in reliance on the future contract—trips, expert reports, advise, etc. . . .<sup>51</sup>

Finally, defendants' position found support from commentator Pedro F. Estenza-Escobar, who stated:

If we sustain that the party that intentionally causes damage to another during preliminary negotiations incurs in a civil offense, a tort, liability will extend only to the damages caused, so that the injured party may be restored to the same position it was prior to the commencement of the negotiations [negative or reliance interest].<sup>52</sup>

After analyzing the positions of both parties, the Court decided that the defendant's arguments were more persuasive. The Court held:

While local civil jurisprudence conceptualizes malicious pre-contractual negotiations as a tort, it does not call for expectation damages. This Court recognizes the conceptual possibility of expanding the scope of damages but refuses to do so absent a clear legislative pronouncement on the subject. Any other holding would usurp legislative power for the judiciary. The commentary of Alfonso de Cossio y Corral and Justice Diaz-Cruz's dissenting opinion notwithstanding, this Court believes that willful misconduct in the termination or withdrawal from pre-contractual negotiations gives rise to liability in the form of reliance damages. This is because the injured party relied to its detriment and, as in promissory estoppel, the party is entitled to recoup those costs genuinely and reasonably incurred in the pre-contractual negotiations.<sup>53</sup>

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51. *Id.* (quoting Alonso Pérez, *La Responsabilidad Precontractual*, 47 Rev. Critica de Derecho Inmobiliario 859, 905 (1971)) (translated by the court).

52. *See* *Satellite Broad. Cable, Inc. v. Telefónica de España*, 807 F. Supp. 218, 221 (D.P.R. 1992) (quoting Pedro F. Estenza-Escobar, *La Responsabilidad Precontractual en Derecho Puertorriqueno*, 7 Rev. Der. Puertorriqueno 105, 106 (1963)).

53. *Id.* at 222.



### C. Legal Nature

The origin of the duty to negotiate in good faith can change during preliminary negotiations. It can originate in the law (from a statute or as a general principle of law) and later become a contract obligation. In a long and complicated negotiation, where there is not a clear offer, the origin of the duty to bargain in good faith can change from the law to a contract if the parties have agreed to an *agreement to negotiate* or other type of preliminary agreement recognized by the law.<sup>54</sup> “Under an agreement to negotiate, the parties negotiate with the knowledge that if they fail to reach ultimate agreement they will not be bound. The parties to an agreement to negotiate do, however, undertake a general obligation of fair dealing in their negotiations.”<sup>55</sup> On the other hand, by the classic offer-and-acceptance rule, the origin of the duty to negotiate in good faith can only come from the law because there is no contract.

It is here that the analyses from civil law and common law standpoints may reach different conclusions. While the civil law system will always recognize the existence of the duty to negotiate in good faith, the common law system will only recognize it if the parties have created the duty to negotiate through an agreement or other document. It is not surprising then that “European courts have been more willing than American ones to accept scholarly proposals for precontractual liability based on a general obligation of fair dealing.”<sup>56</sup>

It is because of this difference that in a civil law system *culpa in contrahendo* is commonly classified as a tort. The unlawful conduct would have generally breached a statutory provision—or the general principle of law—rather than a contract obligation. The only possibility of not pursuing the action in tort is if the parties had agreed to a written contract in which they had established a duty to bargain in good faith. Only under those specific circumstances is a court likely to conclude that the legal nature of the liability is contractual. On the other hand, in a common law system, the unlawful behavior during the negotiation process would likely have breached a contract obligation between the parties. Since this system generally does not recognize a duty to observe good faith during negotiations, the duty is held to have arisen from a contract. Because of this, “[i]n the absence of any sort of binding agreement, pre-contractual liability in the United States is most commonly predicated on the theory of promissory estoppel.”<sup>57</sup>

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54. For a comprehensive analysis of these preliminary agreements and the differences in their enforceability under the common law system of the United States and the civil law system of France, see Nedzel, *supra* note 8, at 118-27.

55. Farnsworth, *supra* note 4, at 263.

56. *Id.* at 239.

57. Nedzel, *supra* note 8, at 128.

This problem of qualification plays an important role with respect to the statute of limitation and the burden of proof. Regarding the statute of limitation, terms will vary depending upon the type of liability. In the case of Chile, if it is a case of contractual liability, Article 2515 of the Civil Code establishes a term of five years.<sup>58</sup> But if it qualifies as a tort, Article 2332 of the same code establishes a term of four years.<sup>59</sup> Under Swiss law, "it will be one year (art. 60 Co) if this liability is considered as delictual (aquilian) [tort], whereas it will be [] ten years (art. 127 Co), if the liability is considered as contractual."<sup>60</sup> Finally, the burdens of proof in a tort case and in a contractual liability case will be different. In a matter of contractual liability, the plaintiff must prove only the damage and the violation of a contractual obligation. Under tort law, the plaintiff must prove the damages, the unlawfulness, the causality, and the fault of the other party.<sup>61</sup>

### III. HYPOTHETICAL CASE

Trees Co. is a wood-producing company that is selling its entire 2003 production of wood. The wood is stored in a storeroom located in a distant place up in the mountains. On January 15, 2004, Trees Co. sent an email to all its customers saying: "Trees Co. is offering its entire 2003 wood production for a price no less than US\$2 per cubic meter of wood. The 2003 production is approximately three million cubic meters of wood. Interested clients shall send letters to Mr. John McAllen, Trees Co.'s CEO, by February 28, 2004, demonstrating their interest in buying the wood. A final contract is expected in mid-April after inspection of the condition of the wood by the interested clients, and a final determination of the wood cubic meters to be sold, both to be performed no later than March 15, 2004. Fifteen days after the inspection and the determination mentioned above, interested clients should send a statement with their offer. The contract will be adjudicated no later than April 10, 2004, in favor of the client who has offered the best price above US\$2."

Wood Co. and Chip Co. responded to the offer on February 27, 2004, indicating they were interested in participating in this process. On March 15, 2004, representatives from Wood Co. joined Trees Co.'s personnel to perform the inspection and the final determination of cubic meters of wood to be sold, a process that lasted almost three days and was paid for by the interested clients. Chip Co.'s staff did not show up at the meeting. Instead, the company sent a letter to Trees Co.'s CEO saying it wanted to withdraw from the negotiation process.

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58. COD. CIV art. 2515 (Chile) ("*Este tipo es en general de tres años para las acciones ejecutivas y de cinco para las ordinarias.*").

59. *Id.* art. 2332 ("*Las acciones que concede este título por daño o dolo, prescriben en cuatro años contados desde la perpetración del acto.*").

60. ICC, *supra* note 14, at 70.

61. *Id.*

Wood Co. expended about US\$100,000 in the evaluation and determination process, and on March 30, 2004, sent its final offer of US\$2.10 per cubic meter of wood to Trees Co.

On April 10, 2004, Mr. McAllen called Wood Co. and told its representative that the adjudication date had been put off due to internal problems that would be resolved soon. Even though Wood Co.'s representative insistently asked Mr. McAllen about the nature of the problems that the company was facing, Mr. McAllen refused to disclose the information. Finally, on May 3, 2004, and after several telephone conversations, Mr. McAllen, acting on behalf of Trees Co., sent an official communication to its client indicating that Trees Co. would not adjudicate the contract because its board of directors had decided that Trees Co. had other uses for the wood.

Wood Co. believed that Trees Co. breached its duty to bargain in good faith during the negotiation process, so it sued Trees Co. During disclosure for the trial it was established that Trees Co.'s board of directors had been analyzing different possible uses for its 2003 wood production since January 20, 2004, just five days after the invitation to participate in this negotiation process. One of the options discussed by the board was selling its 2003 production to a non-related company, but the other one was selling the wood to Tables Trees Co., Trees Co.'s subsidiary. This alternative was communicated neither to Wood Co. nor to Chip Co. at the time they responded to the offer. It was also established during disclosure that Trees Co.'s board of directors decided to sell the 2003 wood production to its subsidiary at its March 10, 2004 meeting, five days before the wood evaluation and cubic meter determination. Wood Co. argued that Trees Co.'s obligation was to inform it of this alternative option from the beginning. Furthermore, the failure to communicate the board's March decision before the performance of the wood inspection and determination process demonstrated that Trees Co. negotiated in bad faith and caused unfair damages to Wood Co.

Trees Co. argued that it did not breach any of its duties, and that its resolution to sell the 2003 production to its subsidiary instead of Wood Co. was protected by the freedom-to-contract principle. Furthermore, Wood Co. knew that it would have to spend some money on this process, and if any other company would have proposed a better price, it would have lost its money anyway. Finally, Trees Co. argued that neither Wood Co. nor Chip Co. asked if it was analyzing other possibilities besides selling the wood.

#### CHILEAN LAW<sup>62</sup>

Under Chilean statutory law, the pre-contractual phase is not regulated by the Civil Code as it is supposed to be. Instead, it is regulated by the Commercial Code. As established in the preamble to the Chilean Commercial Code, civil

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62. For the purposes of this section, Trees Co. and Wood Co. have their principal places of business in Chile.

legislation has not regulated this area of law. As recognized by the Talca Court of Appeal, citing Hugo Rosende A., the rules provided by the Commercial Code specifically regulate this situation and fulfill the existing gap in our civil legislation.<sup>63</sup> Articles 99 and 100 of the aforementioned code are considered the

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63. Jorge Wahl Silva, *Aspectos en la Formación del Consentimiento en los Contratos Electrónicos. Derecho Chileno y Tendencias en el Derecho Comparado*, in *DERECHO DE LOS CONTRATOS* 131, 135 (Hernán Corral Talciani & Guillermo Acuña Sboccia eds., 2002). See also Ilustre Corte de Apelaciones de Talca [ICA Talca] [Talca Appeal Court], Nov. 8, 1999, “Espinoza v. Bobadilla” (Chile).

*. . . la intención del legislador fue dar aplicación general a las normas sobre formación del consentimiento. . .*

*En segundo lugar, el problema que plantea la doctrina tradicional respecto de la imposibilidad de aplicar las normas de formación del consentimiento a los contratos civiles, por tratarse de normas de excepción y por existir un precepto general en el Código Civil que reglamenta las obligaciones que nacen sin convención, debe ser resuelto de conformidad con las normas que a continuación se indican.*

*Existe al parecer un conflicto entre dos leyes incluidas en distintos cuerpos de leyes, el artículo 2.284, ubicado en el Código Civil pero que reglamenta genéricamente las obligaciones nacidas en ausencia de convención, y las normas del Código de Comercio en materia de formación de consentimiento que reglamentan específicamente una cuestión no prevista en el derecho común. Sin embargo, este conflicto es sólo aparente. En primer lugar, por la naturaleza del artículo 2.284 del Código Civil que se limita a indicar genéricamente las fuentes de las obligaciones, en ausencia de convención; en segundo lugar, porque dicho artículo no indica de qué naturaleza es la obligación que de las citadas fuentes nace; en tercer lugar, si bien, en principio, son obligaciones extracontractuales, esta sola circunstancia no autoriza a sostener que, en materia de responsabilidad civil, sean las disposiciones que reglamentan la responsabilidad delictual las que deben aplicarse a las obligaciones legales y cuasicontractuales, según creemos haberlo demostrado en el Capítulo I.*

*En consecuencia, debe reconocerse que del cotejo de ambos preceptos resulta que el artículo 2.284 se limitó a indicar las fuentes de las obligaciones nacidas fuera de convención y que los artículos 97 a 106 del Código de Comercio se refieren específicamente a las obligaciones que pueden nacer de alguna de dichas fuentes en la formación del consentimiento . . .*

*En nuestra opinión, la única interpretación correcta residiría en las normas del Código de Comercio, pues son éstas las que reglamentan específicamente la situación que se examina y son, además, las llamadas a llenar un vacío en la legislación civil, de acuerdo con los términos del Mensaje del Código de Comercio. Por*

basis for the *culpa in contrahendo* doctrine in Chile. Even though these statutory provisions do not explicitly establish a general duty to bargain in good faith, both commentators and courts have agreed that the general duty to bargain in good faith can be established with these two provisions.<sup>64</sup> Articles 99 and 100 establish that the offeror can withdraw his offer at any time before the offeree's acceptance.<sup>65</sup> But under these circumstances, the offeree can recover for any damages that the withdrawal may cause.<sup>66</sup> As previously noted, commentators in Chile have agreed on some of the most important and generally applicable rights and obligations in a pre-contractual negotiation. One of these obligations is the obligation of seriousness, which requires parties to initiate the negotiation with the firm intention of reaching an agreement and to interrupt negotiations as soon as a party realizes that a final agreement cannot be reached.<sup>67</sup>

Even though the case law regarding pre-contractual liability in Chile has been scarce, in *Espinoza v. Bobadilla* the Appellate Court of Talca established that the principles of good faith and equity are the basis for the pre-contractual liability doctrine, and its breach creates the right to recover damages.<sup>68</sup> In this case, which

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*último, no puede olvidarse el fundamento que sirve de base a la responsabilidad en el período precontractual, fundamento que debe encontrarse en la buena fe y en la equidad, cuya violación da derecho a solicitar indemnización.*

*Id.*

64. Carlos Pizarro, *Taller de la Buena Fe Contractual y Otras Instituciones*, <http://www.udp.cl/derecho/estudiantes/apuntes/buenafe.PDF>; see also Ilustre Corte de Apelaciones de Talca [ICA Talca] [Talca Appeal Court], Nov. 8, 1999, "*Espinoza v. Bobadilla*" (Chile).

65. Cód. COM. art. 99 (Chile), available at <http://weblegis.bcn.cl/legis2/legis.asp?id=3>:

*El proponente puede arrepentirse en el tiempo medio entre el envío de la propuesta y la aceptación, salvo que al hacerla se hubiere comprometido a esperar contestación o a no disponer del objeto del contrato, sino después de desechada o de transcurrido un determinado plazo. El arrepentimiento no se presume.*

66. *Id.* art. 100 ("*La retractación tempestiva impone al proponente la obligación de indemnizar los gastos que la persona a quien fue encaminada la propuesta hubiere hecho, y los daños y perjuicios que hubiere sufrido. Sin embargo, el proponente podrá exonerarse de la obligación de indemnizar, cumpliendo el contrato propuesto.*").

67. See Torres, *supra* note 27.

68. *Por último, no puede olvidarse el fundamento que sirve de base a la responsabilidad en el período precontractual, fundamento que debe encontrarse en la buena fe y en la equidad, cuya violación da derecho a solicitar indemnización.*

....

concerned a transaction in real property, the defendant's withdrawal from the negotiation was seen by the Court as a breach of the duty to bargain in good faith. It was established by the Court that the parties agreed on the land to be sold and on the price. Furthermore, the defendant symbolically delivered the land and received the money. Finally, the plaintiff performed expensive improvements to the land, relying on the seriousness of the negotiations. Hence, the defendant's unexpected refusal to sign the formal selling contract required by law was seen by the Court as an act of bad faith meriting recovery by the plaintiff.<sup>69</sup>

In addition, the Primer Juzgado Civil de Concepción (First Civil Tribunal of Concepción) established that although the parties have the right to unilaterally withdraw from negotiations in the pre-contractual phase, this right is limited by the good faith principle that imposes on the parties the duty to act in a faithful and honest manner. If one party breaches this duty, the other party has the right to recover damages.<sup>70</sup> Finally, the tribunal, citing Hugo Rosende Alvarez and Arturo

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*Los sentenciadores participan del criterio expuesto en la antes parcialmente transcrita monografía, sin perjuicio de lo cual consideran que cualquiera sea la doctrina que se siga, vale decir, sea que se estime que en casos como el de autos se aplican las normas atinentes a la responsabilidad contractual, sea que se estime que son pertinentes las que conciernen a los delitos y cuasidelitos, resulta evidente que el fundamento de aquella responsabilidad es el del respeto a la buena fe y a la lealtad, que han de regir las relaciones habidas entre quienes llevan a cabo negociaciones encaminadas a la celebración de un determinado contrato, buena fe cuya violación acarrea a su autor la obligación de resarcir los perjuicios que así haya irrogado a su contraparte.*

Ilustre Corte de Apelaciones de Talca [ICA Talca] [Talca Appeal Court], Nov. 8, 1999, "Espinoza v. Bobadilla" (Chile) (emphasis added).

69. *Id.* It is important to point out that under Chilean law, a contract for the sale of real property must be issued in a public document; if not, the contract does not exist.

70. *Que tal corito se entiende en la doctrina moderna -a diferencia de la tradicional- si bien en las fases de las tratativas los pre-contratante, tienen derecho a desistirse unilateralmente de las conversaciones, esta libertad se encuentra limitada en virtud del deber de las partes a obrar dentro de los límites de la buena fe, la que debe manifestarse en una conducta leal y honesta, vale decir, en una conducta mínima que no atente contra los intereses de la contraparte, que respete el patrimonio ajeno y que guarde armonía con los intereses en conflicto...La sociabilidad y la ética exigen un mínimo de lealtad y honestidad dentro del libre juego de los intereses privados, cuya infracción presenta una cierta analogía con el dolo por omisión, pues no se impide que la otra parte persista en su desconocimiento de la realidad, esto es, en una expectativa que debe disolverse. De ahí la obligación de resarcir.*

Alessandri R., established that this liability must be qualified as a tort.<sup>71</sup> Regarding damages, courts in Chile have followed the same approach taken by the District Court of Puerto Rico in *Satellite III*,<sup>72</sup> allowing only the negative interest. The Primer Juzgado Civil de Concepción established that pre-contractual liability does not support the recovery of all the contractual damages sustained by the other party, but only those so-called "provoked expenses."<sup>73</sup>

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Primer Juzgado Civil de Concepción [1st J.C. Concepción] [First Civil Tribunal of Concepción] Apr. 13, 1999, "Empresa de Telecomunicaciones Asintec S.A. v. Club Hípico de Concepción S.A." (Chile) (citations omitted).

71. *Esa violación del deber de comportarse leal, honesta y correctamente en que incurrió lademandada, le es obviamente imputable e importa a lo menos un obrar culposo, de lo que se deduce que con su conducta incurrió en la comisión de un acto ilícito que, dado el grado de avance de las negociaciones y la apariencia de seriedad creada a la demandante—tal como luego se dirá—causó daño a ésta. La responsabilidad de la demandada, entonces, nace en el entorno pre-contractual, pero es de naturaleza extracontractual, porque no existe en el caso sub-lite convención expresa entre las partes sobre gastos o riesgos que se produzcan en este período previo al contrato . . . . En el mismo sentido que las tratativas se rigen por las normas de la responsabilidad extracontractual, se pronuncia don Arturo Alessandri R.*

*Id.* para. 27 (internal citations omitted).

72. See *Satellite Broad. Cable, Inc. v. Telefónica de España*, 807 F. Supp. 218, 220 (D.P.R. 1992).

73. *Sin embargo, cabe desde ya advertir que en la etapa de las tratativas el daño a resarcir se limita a los gastos y pérdidas que hayan sido estrictamente dependientes de aquéllas, vale decir, en la situación de autos a los denominados en doctrina "gastos provocados", o sea, los que encuentran fundamento en la voluntad de ambas partes o respecto de los cuales se haya creado al actor la apariencia de ser indispensables para la prosecución del proceso negocial, excluyéndose así los llamados "gastos espontáneos", esto es, los que se hayan efectuado fuera del ámbito de los supuestos anteriores, ya que éstos deben ser considerados como efectuados en provecho propio, en este caso, del actor.*

*Así, en la especie, desde luego, procede desestimar las pretensiones de lucro cesante y daño moral que formula la actora, desde que éstos no se conforman al concepto de gastos provocados, máxime que el primero se lo hace consistir únicamente en las probables ganancias esperadas con motivo del contrato definitivo, contrato que no llegó a formarse y del cual, entonces, no pueden extraerse consecuencias jurídicas y, el segundo, porque tampoco se ha acreditado en forma clara y fehaciente la supuesta vulneración al prestigio comercial con ocasión directa del desistimiento de la demandada en contratar.*

In the hypothetical case, considering the statutory provisions, commentator opinions, and case law mentioned above, a court in Chile would likely conclude that Trees Co. breached its duty to negotiate in good faith. Even though Trees Co. could have entered the negotiation with the firm intention of reaching an agreement, it did not withdraw as soon as it realized that a final agreement could not be reached. Furthermore, Trees Co.'s failure to properly and promptly inform Wood Co. about its board of directors' decision to sell the 2003 production of wood to its subsidiary was an act of bad faith. Regarding the causation and injury requirements in a pre-contractual liability case, it is fair to conclude that a court in Chile would probably consider that the damages suffered by Wood Co. were the direct consequence of Trees Co.'s bad faith action during the negotiation phase. If Trees Co. had properly and promptly informed Wood Co. about its board's decision, Wood Co. would not have spent US\$100,000 in performing the evaluation and determination process. Hence, if Trees Co. had not acted in bad faith, Wood Co. would not have suffered injury in the hypothetical case.

## V. ANSWER UNDER THE CISG<sup>74</sup>

This section will analyze the applicability of *culpa in contrahendo* in its international dimension. So far, the analysis has been based only on negotiations among parties that have their principle places of business within the same jurisdiction. But what happens with international transactions? Do the same rules apply to both parties? Despite a short reference to the UNIDROIT Principles,<sup>75</sup> this paper will focus on the applicability of the *culpa in contrahendo* doctrine in the CISG.

Before the enactment of international agreements such as the CISG, countries decided international contract cases according to their own laws. As a result, contracting parties experienced uncertainty as to how a contract, or its negotiation process, would be interpreted if it became the subject of litigation. Regarding the pre-contractual phase, the international application of the duty of good faith and fair dealing has been recognized by the UNIDROIT Principles.

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Primer Juzgado Civil de Concepción [1st J.C. Concepción] [First Civil Tribunal of Concepción] Apr. 13, 1999, "Empresa de Telecomunicaciones Asintec S.A. v. Club Hípico de Concepción, S.A." (Chile).

74. Final Act of the United Nations Convention on Contracts for the International Sale of Goods, U.N. Doc. A/Conf. 97/18 (Apr. 11, 1980) [hereinafter CISG]. For the purposes of this section, Trees Co. has its principal place of business in Chile and Wood Co. has its principal place of business in the US, which has adopted the CISG.

75. Int'l Inst. for the Unification of Private Law (UNIDROIT), Principles of International Commercial Contracts (1994), available at <http://www.unidroit.org/english/principles/contracts/principles2004/blackletter2004.pdf>.



However, the UNIDROIT Principles are more likely to regulate the international trade of services rather than the international trade of goods. As noted by Professor Farnsworth:

The Preamble of the Principles announces that they “set forth general rules for international commercial contracts.” However, because the Vienna Sales Convention is rapidly occupying the field of international commercial contracts with respect to the international sale of goods, the Principles are therefore more likely to have their impact in connection with international contracts for services.

The Principles' main provisions on good faith are found in Articles 1.7 and 2.15. Article 1.7 states that “[e]ach party must act in accordance with good faith and fair dealing in international trade,” and “[t]he parties may not exclude or limit this duty.” Article 2.15 provides:

- (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 intending not to reach an agreement with the other party.<sup>76</sup>

As for the CISG, it has been noted:

[it] contains no explicit provision that imposes a duty of good faith on the parties to international contracts. Article 7(1), however, provides that “[i]n 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.”<sup>77</sup>

The inclusion of a general duty of good faith in the CISG was hardly debated. As the drafting history shows:

Arguments Supporting a Duty of Good Faith indicate[] that there were numerous arguments both supporting and opposing a provision that would place a duty on the parties to act in good

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76. E. Allan Farnsworth, *Duties of Good Faith and Fair Dealing Under the UNIDROIT Principles, Relevant International Conventions, and National Laws*, 3 TUL. J. INT'L & COMP. L. 47, 48-49 (1995).

77. *Id.* at 55 (quoting CISG, art. 7(1)).

faith. First, those delegates who supported the provision argued that good faith is a universally recognized principle because many national commercial codes contained similar good-faith obligations which had been instrumental in the development of trade rules. In light of the number of countries represented, which generally adhere to and approve of an obligation of good faith in international transactions, the delegates argued that it would be appropriate to extend this duty of good faith to negotiations in the text of the Convention. Additionally, the delegates observed that public international law recognizes the concept of good faith and the United Nations Charter specifically refers to it. Therefore, some delegates feared that if the provision were deleted, UNCITRAL would be criticized as generally opposing good faith principles in international trade. This fear merited special concern due to the increase in commercial trade involving developing countries.<sup>78</sup>

On the other hand, the Arguments Against a Duty of Good Faith state:

Some delegates disapproved of the provision because the term "good faith" is exclusively moral in nature and, therefore, does not belong in an international treaty. Because the Convention will be interpreted by courts in nations all over the world, delegates feared that a moral and subjective concept such as good faith would result in a multitude of interpretations. Reliance by courts upon their own legal and social understanding of the terms would result in nonuniform interpretation of the provision. Opponents of the provision argued that the uncertainty which could result would be potentially injurious to international trade. Conversely, other delegates who opposed the provision felt that the requirement of acting in good faith was implicit in all laws regulating business activity and they, therefore, perceived the provision to be superfluous. The failure of the provision to specify sanctions for noncompliance also concerned some delegates because again, they foresaw the possibility of nonuniformity in application. Remedies would fall to the national courts, inevitably resulting in inconsistent treatment. Additionally, opponents argued that good faith provisions, along with the appropriate sanctions for

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78. Diane Madeline Goderre, *International Negotiations Gone Sour: Precontractual Liability under the United Nations Sale Convention*, 66 U. CIN. L. REV. 257, 262 (1997).

noncompliance, belong in a convention on the validity of contracts and not in a convention on formation.<sup>79</sup>

Since delegates were so divided on the issue, the UNCITRAL established a second working group to prepare an alternative to the original good faith provision. Keeping in mind that the convention was supposed to represent the interests of all countries involved, the group's goal was to formulate a document that a majority of the countries would enact. Inside the working group several suggestions were given.

One suggestion was to incorporate the provision as written into the preamble rather than to incorporate it as its own article. The delegates did not favor this proposal because placing the provision in the preamble would have been essentially equivalent to deleting it, as it would have no binding effect upon the parties. A second proposal was to incorporate the good faith requirement in the rules of interpretation of the statements and conduct of the parties. However, this approach too was rejected by the delegates.<sup>80</sup>

Finally, the delegates settled their differences and agreed on imposing a duty of good faith in the interpretation and application of the provisions of the Convention. In spite of some objections, delegates generally agreed that the new Article 7(1) was a realistic compromise solution.<sup>81</sup>

Despite the intention of the CISG to promote uniformity, no provision expressly addresses the issue of pre-contractual liability. Unfortunately, therefore, it will be possible to have different rulings about the same issue. "If courts find that this area of law is unsettled or not addressed under the Convention, they are to base their decisions upon the general principles of the Convention or, in the absence of applicable general principles, may apply local law to supplement the existing Convention provisions."<sup>82</sup> As noted by Diane Madeline Goderre, courts may interpret Article 7(1) of the Convention in three different ways. First, "courts could read the text of Article 7(1) literally, finding that its mandate regards only the duty of the decision maker to take into account the need to promote the observance of good faith in international trade."<sup>83</sup> With this interpretation, courts would be most favorable to the view of those delegates that did not want to include a reference to good faith in the CISG. The problem with this interpretation is that the CISG's goal of uniformity would fail. Nevertheless,

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79. *Id.* at 263-64.

80. *Id.* at 264.

81. *Id.* at 265.

82. *Id.* at 274.

83. *Id.*

“[n]o decisions governed by the Convention have articulated this interpretation of Article 7, though it is likely that courts have interpreted it in this manner without reducing it to writing.”<sup>84</sup>

The second probable interpretation, noted by Goderre, established the following:

[C]ourts could find under Article 7(2) that there is a gap in the text of the Convention concerning duties of good faith and could extract that duty of good faith from the general principles on which the Convention is based. Because Article 7(1) includes a general provision of good-faith in interpreting the Convention, good faith may appear to be one of the “general principles” underlying the Convention as a whole and courts may, under this interpretation, hold parties to that duty.<sup>85</sup>

There is a good amount of case law indicating that this is the most likely interpretation of Article 7:

In the Australian Court of Appeals case [*Renard Construction (ME) Ltd. v. Minister for Public Works*], the judge discussed the concept of good faith as it is applied in contract cases in both Europe and the United States. In his discussion, he noted the existence of several factors that may cause Australia and, perhaps England, to recognize good faith as an implied duty in contracts. One of the factors he listed was Article 7(1) of the Convention. By citing to Article 7(1), the judge appeared to assume that good faith was not only to be used in interpreting the Convention, but also that a general duty of good faith was implied in contracts under the Convention.<sup>86</sup>

Another case that advanced this interpretation was the French case *SARL Bri Production “Bonaventure” v. Societe Pan African Export*.<sup>87</sup>

In that case, a buyer from the United States sued a French seller in a French court of appeals for breach of contract. The parties had agreed that the products would be resold to a South

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84. Goderre, *supra* note 77, at 275.

85. *Id.*

86. *Id.*

87. Cour d’appel [CA] [regional court of appeal] Grenoble, Feb. 22, 1995, D. 93-3275 (Fr.), *abstract available at*

<http://daccessdds.un.org/doc/UNDOC/GEN/V96/879/59/PDF/V9687959.pdf?OpenElement>

American distributor but, in fact, the buyer began to resell to a distributor in Spain. The buyer later misrepresented this fact to the seller. When the seller discovered that some of the goods had been sold in Spain, he refused to deliver the final installments. The buyer sued for breach of contract and the seller countersued. The court held that the case was governed by the Convention. In making its decision in favor of the seller, the court relied on Article 7(1). The court found that the buyer's actions were inconsistent with the principle of good faith (*bonne foi*) in international commerce as decreed by Article 7(1) of the Convention. This case once again indicates that international courts are interpreting good faith under Article 7 to be one of the general principles of the Convention.<sup>88</sup>

Finally, a third interpretation is that courts would “find that good faith is a general principle of the Convention due to the increasing influence of the UNIDROIT Principles.”<sup>89</sup> Since the primary purpose of the UNIDROIT Principles is to provide specific guidelines for the interpretation and application of uniform law instruments, such as CISG, the adoption of the pre-contractual duty to bargain in good faith by the UNIDROIT Principles might persuade a court that this duty is also present under the CISG.

Taking into consideration these three probable interpretations, a court in Chile would have a very hard time deciding whether or not to apply *culpa in contrahendo* in a case where the CISG must be applied. Nevertheless, “civil-law systems are more apt to place an implied duty of good faith upon the parties” during the pre-contractual phase.<sup>90</sup> Furthermore, “the case law established thus far may indicate the tendency of judges and arbiters to rely on the interpretation of Article 7, which supports both their country's preference in the drafting of Article 7 and their established legal traditions.”<sup>91</sup> Therefore, it is fair to conclude that a Chilean court might be willing to apply the duty to bargain in good faith even in cases where the parties have their principle places of business in different countries.

In conclusion, despite some confusion regarding whether the CISG must be applied to the hypothetical case set forth in Section III of this paper, the holding of a Chilean court might not be different from the one established in Section IV. In fact, a court in Chile would probably conclude that under both the rules of the Commercial Code of Chile and the CISG, Trees Co. was under a duty to inform Wood Co. about its board's decision to sell the 2003 wood production to its subsidiary in order to prevent Wood Co.'s damages.

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88. Goderre, *supra* note 77, at 276-77.

89. *Id.* at 277.

90. *Id.* at 278.

91. *Id.*

## VI. CONCLUSION

As was established in Section II, the *culpa in contrahendo* doctrine has been adopted in both civil and common law systems. Despite some differences in its requirements and legal classification, both systems impose on parties a duty to negotiate in good faith. While civil law jurisdictions generally recognize this duty as a general principle of law, some of them have specific provisions establishing its framework. Common law countries are more reluctant to apply the *culpa in contrahendo* doctrine, giving more deference to the freedom-of-contract principle.

Where the international applicability of the *culpa in contrahendo* doctrine is concerned, it is clear that the UNIDROIT Principles contemplate its application, as do countries such as Bolivia and Italy. Nevertheless, the CISG did not do so explicitly, leaving this issue of pre-contractual liability in international sales unsettled. It will be up to each court to interpret whether or not the *culpa in contrahendo* doctrine applies to negotiations where parties have their principle places of business in different states and both have ratified the CISG.

