OPENING PANDORA'S BOX: GOOD FAITH AND PRECONTRACTUAL LIABILITY IN THE CISG

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I. INTRODUCTION

An issue that remains unresolved in relation to the United Nations Convention on Contracts for the International Sale of Goods (CISG)[1] is the role played by good faith. As its name implies, the CISG governs the formation of certain contracts across international boundaries. Because its good faith provision applies to formation, it might follow that the CISG deals with precontractual liability.[2] Of those who have considered this question, a minority argue that it does.[3] However, it is not the aim of this Article to answer that question. Instead, this Article seeks to critically assess the interpretive methodologies of both sides, identify often-unspoken policy choices behind those views, and consider the potential effects of those policies on the CISG's future as a viable and frequent choice of law.

This Article suggests that within these policy choices there exists an "efficiency dilemma," comprising certain cost-benefit trade-offs. The balance achieved within the "efficiency dilemma" by interpretive policy choices could, in addition to other variables, affect the rate with which parties choose to opt out of the CISG. It is argued that the debate on expansion of the CISG to encompass precontractual liability could benefit from a more open consideration of these trade-offs. Party perceptions of these trade-offs are proposed as a normative tool for assessing competing interpretations at the CISG's extremities, especially in relation to precontractual liability.

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1. United Nations Convention on Contracts for the International Sale of Goods, Apr. 11, 1980, 1489 U.N.T.S. 3 [hereinafter CISG].

2. Albert H. Kritzer (ed.), *Pre-Contract Formation*, n.d., http://cisgw3.law.pace.edu/cisg/biblio/kritzer1.html.

3. *Id.*; *see also* Michael Joachim Bonell, *Vertragsverhandlungen und culpa in contrahendo nach dem Wiener Kaufrechtsübereinkommen* [*Contract Negotiations and* culpa in contrahendo *Under the Vienna Sales Convention*], 36 RECHT DER INTERNATIONALEN WIRTSCHAFT 693, *passim* (1990) (F.R.G.), *available at* http://tldb.uni-koeln.de/php/pub_show_document.php?Pubdocid=119600; Diane Madeline Goderre, *International Negotiations Gone Sour: Precontractual Liability Under the United Nations Sales Convention*, 66 U. CIN. L. REV. 257, 279-80 (1997) (contending that precontractual good faith can be imposed under the CISG pursuant to theories such as detrimental reliance and restitution).

After tracing the growth of the CISG's concept of good faith from historical compromise to current views, this Article identifies a series of economic trade-offs that lie behind the debate in the form of the "efficiency dilemma," and uses this to highlight differences in the methods employed by scholars.

The Article examines the extent to which scholars focus on scope and their reliance on the autonomous internal interpretive methods[4] that are so vital to ensuring uniformity in the CISG's application.[5] It then asks whether reliance upon the internal interpretive methodology has obscured the preliminary question: are precontractual issues external or internal to the CISG?[6]

It suggests that both the methods of interpretation and their outcomes could affect the frequency with which the CISG is utilized and concludes that party perceptions of cost-benefit trade-offs provide a further norm to be taken into account when determining the direction ahead for precontractual issues, in a manner more likely to maximize actual or practical harmonization.

A. Background to CISG

Prepared by the United Nations Commission on Trade Law (UNCITRAL or "Commission") in 1980, the CISG established a uniform international law for the sale of goods. The vast array of divergent national sales law across the world, together with uncertainties inherent in conflict of laws, had long been seen as an

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4. The CISG's autonomous internal interpretive methodology encompasses the avoidance of gaps, use of gap-filling techniques, and abstinence from utilization of domestic law for interpretive purposes. *See infra* Part I(B) (Interpretive Method) and accompanying text.

5. Adherence to the internal interpretive technique has in some cases quelled the "homeward trend," whereby courts resort too readily to familiar domestic law concepts rather than CISG concepts and CISG case law from foreign jurisdictions. *See, e.g.*, Al Palazzo S.r.l. v. Bernardaud di Limoges S.A., Trib. di Rimini, 26 nov. 2002, n.3095, *translated at* CISG Case Presentation, http://cisgw3.law.pace.edu/cases/021126i3.html; Rheinland Versicherungen v. Atlarex, Trib. di Vigevano, 12 july 2000, n.405, Guir. It. 2000, 280 (Italy), *translated in* 20 J.L. & COM. 209 (2001). Courts, however, occasionally make a "homeward retreat" after providing methodological lip service. *See, e.g.*, Schmitz-Werke GmbH & Co. v. Rockland Indus., Inc., No. 00-1125 (4th Cir. June 21, 2002), *available at* http://cisgw3.law.pace.edu/cases/ 020621u1.html (holding that domestic state law would apply absent a finding of "controlling language" in the CISG); Monica Kilian, *CISG and the Problem with Common Law Jurisdictions*, 10 J. TRANSNAT'L L. & POL'Y 217, 227 (2001) (noting that U.S. courts "seem to go out of their way to find that CISG does not apply").

6. Some, however, have expressly considered this preliminary question. *See, e.g.*, Franco Ferrari, *Uniform Interpretation of the 1980 Uniform Sales Law*, 24 GA. J. INT'L & COMP. L. 183, 214-15 (1994) (mentioning the need to limit good faith standards of behavior by reference to the CISG's "scope of application *ratione materiae*"); Helen Elizabeth Hartnell, *Rousing the Sleeping Dog: The Validity Exception to the Convention on Contracts for the International Sale of Goods*, 18 YALE J. INT'L L. 1, 11-14, 53-54 (1993) (observing that after establishing that the CISG's applicability in a dispute, a tribunal's first task is to determine whether the issue in question falls within its scope); Peter Schlechtriem, *The Borderland of Tort and Contract—Opening a New Frontier?*, 21 CORNELL INT'L L.J. 467, *passim* (1988) (analyzing whether various issues are internal or external to the CISG and addressing issues of concurrence and exclusivity); Bonell, *supra* note 3, at 699-702 (analyzing whether *culpa in contrahendo* fits within the scope of the CISG and on what basis).

obstacle to international trade.[7] Thus, the CISG, like its less successful predecessors—the Convention Relating to a Uniform Law on the International Sale of Goods ("ULIS")[8] and the Convention Relating to a Uniform Law on the Formation of Contracts for the International Sale of Goods ("ULF")[9]—set out to provide a single uniform law for international trade in goods that would reduce the costs of dealing with unfamiliar foreign sales law. The CISG has attracted seventy signatory nations, including the United States, China, Canada, Australia, and almost all the European countries.[10] In addition, it has influenced many domestic law reforms around the globe as well as international "soft law."[11]

As a choice of law, the CISG provides a neutral,[12] internationally-recognized option familiar to arbitrators. By comparison to a domestic law that is often unfamiliar to one or both parties to an international transaction, CISG rules are easily accessible and relatively simple. Unlike domestic law, it is specifically designed for international trade. Furthermore, it gives parties the flexibility to tailor the law to their own requirements.[13]

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7. Jernej Sekolec, *Digest of Case Law on the UN Sales Convention: The Combined Wisdom of Judges and Arbitrators Promoting Uniform Interpretations of the Convention*, *in* THE DRAFT UNCITRAL DIGEST AND BEYOND: CASES, ANALYSIS, AND UNRESOLVED ISSUES IN THE U.N. SALES CONVENTION 1, 4 (Franco Ferrari et al. eds., 2004) [hereinafter DRAFT UNCITRAL DIGEST] (citing G.A. Res. 2205 (XXI), pmbl., U.N. GAOR, 21st Sess., Supp. No. 16, U.N. Doc. A/6316 (Dec. 17, 1966). *But see* Roy Goode, *Contract and Commercial Law: The Logic and Limits of Harmonisation*, *in* INTERNATIONAL CONTRACT LAW 2003: ARTICLES ON VARIOUS ASPECTS OF TRANSNATIONAL CONTRACT LAW 309, 319 (F. Willem Grosheide & Ewoud Hondius eds., 2004) [hereinafter INTERNATIONAL CONTRACT LAW 2003] (questioning the assumption that divergent dispositive contract law is problematic); Michael Bridge, *Uniformity and Diversity in the Law of International Sale*, 15 PACE INT'L L. REV. 55, 56 (2003) (supporting the applicability of a diversity of contract law to suit a variety of transactions).

8. Convention Relating to a Uniform Law on the International Sale of Goods, July 1, 1964, 834 U.N.T.S. 107, *reprinted in* 13 AM. J. COMP. L. 451, 453 (1964).

9. Convention Relating to A Uniform Law on the Formation of Contracts for the International Sale of Goods, July 1, 1964, 834 U.N.T.S. 169, *reprinted in* 13 AM. J. COMP. L. 453, 474 (1964).

10. United Nations Commission on International Trade Law [UNCITRAL], Average Instrument Ratification Rate, http://www.uncitral.org/uncitral/en/uncitral_texts/sale_goods/1980CISG.html (follow "Status map - provided by LegaCarta, the International Trade Centre's (ITC) database" hyperlink). Notably, the United Kingdom and Japan are not signatories. *Id.*

11. International Institute for the Unification of Private Law [UNIDROIT], *Principles of International Commercial Contracts* (2004), *available at* http://www.unidroit.org/english/principles/contracts/principles2004/blackletter2004.pdf [hereinafter *UNIDROIT Principles*]; COMMISSION ON EUROPEAN CONTRACT LAW, PRINCIPLES OF EUROPEAN CONTRACT LAW, PARTS I AND II (Ole Lando & Hugh Beale eds., 2000), *available at* http://www.cisg.law.pace.edu/cisg/text/textef.html; COMMISSION ON EUROPEAN CONTRACT LAW, PRINCIPLES OF EUROPEAN CONTRACT LAW, PART III (Ole Lando et. al. eds., 2003), *available at* http://www.cisg.law.pace.edu/cisg/text/textef.html [hereinafter PECL].

12. *See* Frank Diedrich, *Maintaining Uniformity in International Uniform Law via Autonomous Interpretation: Software Contracts and the CISG*, 8 PACE INT'L L. REV. 303, 305 (1996) (describing the CISG as an "ideal compromise" in contrast to local or domestic law).

13. CISG, *supra* note 1, art. 6. The article allows parties to derogate from the CISG's

The CISG's application can come as a surprise. Certain types of sales are excluded, including, *inter alia*, auctions and contracts for electricity.[14] Exceptions aside, however, unless the parties' choice of law clause indicates otherwise, the CISG will apply to a contract for the sale of goods between parties having their places of business in different member states, described in the CISG as Contracting States.[15] Thus, it will normally apply to a contract of sale between parties from the United States and Australia,[16] both Contracting States. The CISG will also apply when only one or neither party is from a Contracting State if the forum's conflict of laws rules result in the application of the law of a Contracting State.[17] Contracting States, however, are given an option to declare a reservation under Article 95 of the CISG, stating that they are not bound by this indirect means of application.[18] As a result, it is less certain that the CISG would apply to a contract between United States and Japanese traders[19] because Japan is not a Contracting State and the United States has declared an Article 95 reservation.[20]

B. Interpretive Method

As uniform law, the CISG must be interpreted autonomously and not through a domestic lens. Article 7(1) requires consideration of the CISG's "international character" and the "need to promote uniformity" in its application.[21] This implies that the CISG's legislative history, international case law, and scholarship should inform courts and tribunals applying its provisions.

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provisions or to completely exclude its application. *Id.*

14. CISG, *supra* note 1, arts. 2-3. Franco Ferrari notes, "[e]ven though auction sales are not subject to the CISG, this does not mean that sales at commodity exchanges are excluded from the CISG's sphere of application. Indeed, the sales at commodity exchanges being 'rather rapid-fire communication of offer and acceptances,' they cannot be considered as auction sales." Franco Ferrari, *What Sources of Law for Contracts for the International Sale of Goods? Why One has to Look Beyond the CISG*, 25 INT'L REV. L. & ECON. 314, 322 n.64 (2005) (*quoting* JOHN O. HONNOLD, UNIFORM LAW FOR INTERNATIONAL SALES UNDER THE 1980 UNITED NATIONS CONVENTION 48 n.3 (3d ed., 1999)).

15. CISG, *supra* note 1, art. 1(1)(a); *see also* Franco Ferrari, *The CISG's Sphere of Application: Articles 1-3 and 10*, *in* DRAFT UNCITRAL DIGEST, *supra* note 7, at 21, 31 (expressing a need for establishing the transaction's internationality).

16. The CISG would apply, provided that the parties' respective places of business were apparent before or at the conclusion of the contract. CISG, *supra* note 1, art. 1(2).

17. *Id.* art. 1(1)(b).

18. Article 95 reservations result in Contracting States not being bound by Article 1(1)(b) of the CISG. *Id.* art. 95.

19. *See* Ferrari, *supra* note 14, at 328 (discussing a similar hypothetical); Ferrari, *supra* note 15, at 52.

20. Japan is now likely to accede to the CISG in 2008. Hiroo Sono, *Japan's Accession to the CISG: The Asia Factor*, 21 PACE INT' L. REV. ___ (2008) (forthcoming), 25 ZEITSCHRIFT FUER JAPANISCHES RECHT/JOURNAL OF JAPANESE LAW ___ (2008) (forthcoming).

21. CISG, *supra* note 1, art. 7(1).

Unlike the common law, in which legislation traditionally is strictly read,[22] the CISG invites a more flexible approach.[23] The accepted interpretive method is not literal, but purposive.[24]

Article 7(2) breaks any interpretive deadlock in one of three ways. Initially, internal gaps can be filled by analogical extensions of specific provisions.[25] Otherwise, internal gaps can be filled by reference to the general principles upon which the CISG is based.[26] These principles have wider application across the CISG and are extracted from its provisions.[27] General principles derived in this way can be found in scholarly works on the CISG; more controversially, many argue that they can be found within the UNIDROIT Principles.[28] Finally, if all of

22. Kilian, *supra* note 5, at 228; *see also* Michael Joachim Bonell, *Article 7, in* COMMENTARY ON THE INTERNATIONAL SALES LAW: THE 1980 VIENNA SALES CONVENTION 65, 77-78 (Cessare Massimo Bianca & Michael Joachim Bonell eds., 1987) (stating that in common law systems, statutes are interpreted "in a very strict sense" and that general principles derived from case law are used for statutory gap-filling as opposed to the civil law approach of deriving general principles from the legislation itself). It should be noted that in more recent times since the CISG was created, most common law jurisdictions have at least introduced interpretive provisions encouraging a more purposive approach. *See, e.g.*, Acts Interpretation Act, 1901, ss 15AA, 15 AB (Austl.); Interpretation Act, R.S.B.C., ch. 238, s. 8 (1996) (Can.). In addition, common law courts increasingly refer to scholarly works. *See, e.g.*, Westdeutsche Landesbank Girozentrale v. Islington London Borough Council, [1996] A.C. 669 (H.L.) (appeal taken from Eng.) (U.K.) (referring to scholarly works).

23. *See generally* Ferrari, *supra* note 6 (providing a thoughtful exposition on those methods); Bonell, *supra* note 22, at 79 (focusing on liberal interpretation and analogical reasoning).

24. *See* Kilian, *supra* note 5, at 228-29 (stating that "[n]arrow interpretation . . . does not sit well with the international character of the Convention.").

25. Bonell, *supra* note 22, at 78; Franco Ferrari, *Interpretation of the Convention and Gap Filling: Article 7, in* DRAFT UNCITRAL DIGEST, *supra* note 7, at 138, 160; FRITZ ENDERLEIN & DIETRICH MASKOW, INTERNATIONAL SALES LAW 58-59 (1992).

26. CISG, *supra* note 1, art. 7(2).

27. Bonell, *supra* note 22, at 78; *see also* Jan Hellner, *Gap Filling by Analogy: Art. 7 of the U.N. Sales Convention in its Historical Context, in* STUDIES IN INTERNATIONAL LAW: FESTSKRIFT TIL LARS HJERNER 219, 220 (Lars A.E. Hjerner ed., 1990), *available at* http://www.cisg.law.pace.edu/cisg/text/hellner.html (pointing out that the use of analogy and general principles in gap-filling is indistinguishable at times).

28. Some scholars believe the UNIDROIT Principles serve as a source of general principles for CISG gap-filling. *See* John Felemegas, *The United Nations Convention on Contracts for the International Sale of Goods: Article 7 and Uniform Interpretation, in* REVIEW OF THE CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS (CISG) 115, 291-94 (Pace Int'l L. Rev. ed., 2001) (asserting that the UNIDROIT principles have been and should continue to be applied by tribunals to interpret the CISG); Michael Joachim Bonell, *The UNIDROIT Principles of International Contracts and the CISG: Alternative or Complementary Instrument?*, 1 UNIF. L. REV. 26, 33-36 (1996) (arguing that the UNIDROIT Principles may be used to interpret and supplement some aspects of the CISG); Ulrich Magnus, *General Principles of UN-Sales Law*, 59 RABELS ZEITSCHRIFT 492 (1995), *available at* http://cisgw3.law.pace.edu/cisg/text/magnus.html [hereinafter Magnus, *General Principles*] (characterizing the UNIDROIT Principles as "additional general principles" in the context of the CISG because of correspondence between them and the provisions and general principles of the CISG); Ulrich Magnus, *Remarks on Good Faith, available at* http://cisgw3.law.pace.edu/cisg/principles/

these avenues fail, internal gaps can be filled by recourse to the applicable domestic law,[29] ascertained by the forum's conflict of laws rules. Since the goal of international uniformity is paramount, recourse to domestic law is provided only as a last resort.[30] These considerations are collectively indicative of the interpretive method for all matters governed by the CISG (hereinafter referred to as the "internal interpretive method").[31]

A very different position exists in relation to external gaps. If an issue is not governed by the CISG, then the internal interpretive method has no application.[32] External gaps must be filled by recourse to the applicable domestic law alone.[33] Lawyers drafting choice of law and forum clauses need to be aware of other sources of law that might apply to such "external" issues, including validity and the passing of property.[34]

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uni7.html [hereinafter Magnus, *Remarks*] (arguing that there are only "slight gradual differences" to the CISG and UNIDROIT approaches to good faith); *see also* Ulrich Magnus, *Comparative Editorial Remarks on the Provisions Regarding Good Faith in CISG Article 7(1) and the UNIDROIT Principles Article 1.7*, *in* AN INTERNATIONAL APPROACH TO THE INTERPRETATION OF THE UNITED NATIONS CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS (1980) AS UNIFORM SALES LAW 45, 46 (John Felemegas ed., 2007) (making similar arguments in the discussion of CISG good faith). *But see* Ferrari, *supra* note 25, at 171 (arguing that supporting comments are often accompanied by a warning that the UNIDROIT Principles go further than the CISG); Troy Keily, *Good Faith and the Vienna Convention on Contracts for the International Sale of Goods*, 3 VINDOBONA J. 15, 35 (1999) (describing the argument that the UNIDROIT Principles can provide general principles for use in CISG interpretation as "flimsy" and reiterating the warning that UNIDROIT Principles go "well beyond the CISG").

29. Alternatively, depending on the forum, its conflict rules, and any choices of subsidiary laws made by the parties, supranational rules such as the UNIDROIT Principles might apply. Throughout this Article, reference will be to recourse to "domestic law,' for the sake of convenience, although I do not discount the possible application of supranational laws.

30. *See* Gyula Eörsi, *General Provisions*, *in* INTERNATIONAL SALES: THE UNITED NATIONS CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS 2-01, 2-04 (Nina M. Galston & Hans Smit eds., 1984) (stating that "no recourse to national law should be admitted in interpretation" (citation omitted)); Bonell, *supra* note 22, at 74-75 (discouraging resort to domestic law or principles in interpreting the CISG based on the CISG's "international character" and ultimate aim of global uniformity).

31. The internal interpretative method has also been referred to as the "implied 'interpretative paradigm.'" Kilian, *supra* note 5, at 229 (citation omitted).

32. *See* Ferrari, *supra* note 15, at 21 ("Indeed, unless it has been decided . . . that the CISG applies at all, neither the Convention's substantive provisions, nor its provisions on interpretation . . . can be used to solve any dispute.").

33. *UNCITRAL Digest of Case Law on the United Nations Convention on the International Sale of Goods (Article 7)* 4, U.N. Doc. No. A/CN.9/SER.C/DIGEST/CISG/7 (2004) [hereinafter *UNCITRAL Digest of Case Law (Article 7)*]; Bonell, *supra* note 22, at 83; *see also* Ferrari, *supra* note 25, at 158, 171 (noting the obligatory nature of resort to private international law where general principles do not lead to a solution); Joseph Lookofsky, *Walking the Article 7(2) Tightrope Between CISG and Domestic Law*, 25 J.L. & COM. 87, 90 (2006) [hereinafter Lookofsky, *Tightrope*] (mentioning that only non-CISG rules and principles can address external matters); JOSEPH LOOKOFSKY, UNDERSTANDING THE CISG IN THE USA 20 (1995) [hereinafter LOOKOFSKY, UNDERSTANDING] (same); Hartnell, *supra* note 6, at 18 (arguing that in the case of questions of validity, domestic law would apply since the CISG does not address the issue).

34. CISG, *supra* note 1, arts. 4-5; Ferrari, *supra* note 14, at 340.

How does one determine whether an issue is external or internal? While some shopping lists of particular issues exist,[35] the basis for the classification is often left unstated. Whether or not precontractual liability is governed by the CISG or domestic law is often linked to the history behind Article 7(1), which contains the CISG's only reference to good faith.[36]

II. LEGISLATIVE HISTORY OF ARTICLE 7

No convention possessing such wide acceptance across so many legal traditions could have been achieved without compromise. UNCITRAL was painfully aware of the failure of the CISG's predecessors in attaining widespread acceptance; as a result, it established drafting committees comprised of representatives from various legal systems and geographic regions.[37] This made broader acceptance of the end product more likely, but also made compromise much more difficult to achieve.[38]

Drafters sometimes dealt with this difficulty by excluding more controversial issues from the CISG's scope.[39] The clearest indication of this strategy is in the modest field of CISG application found in Articles 1-6. The express exclusion of certain "hot potatoes," such as property and validity under Article 4 and the numerous reservations made available to Contracting States, exemplify the drafters' strategy.[40]

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35. *E.g., UNCITRAL Digest of Case Law on the United Nations Convention on the International Sale of Goods (Article 4)* 5-6, U.N. Doc A/CN.9/SER.C/DIGEST/CISG/4 (2004).

36. CISG, *supra* note 1, art. 7(1).

37. *See* Alejandro Garro, *Reconciliation of Legal Traditions in the U.N. Convention on Contracts for the International Sale of Goods*, 23 INT'L LAW. 443, 443 (1989); Disa Sim, *The Scope and Application of Good Faith in the Vienna Convention on Contracts for the International Sale of Goods* (Sept. 2001), http://cisgw3.law.pace.edu/cisg/biblio/sim1.html, at 4, 5-6 (discussing the inclusion of representation of common law, civil law, socialist, and capitalist countries in drafting committees); Kazuaki Sono, *The Vienna Sales Convention: History and Perspective*, *in* INTERNATIONAL SALE OF GOODS: DUBROVNIK LECTURES 1, 3 (Petar Šarčevic & Paul Volken eds., 1986) [hereinafter DUBROVNIK LECTURES] (noting that responses to UNCITRAL questionnaires indicated the lack of "global representation" at their creation as one reason that the ULIS and ULF did not succeed).

38. Sim, *supra* note 37, at 4 (remarking that the CISG's "strength was also its weakness. The diverse representation multiplied the number of potential fault lines and increaed the scope for disagreement); Garro, *supra* note 37, at 443.

39. Bonell, *supra* note 28, at 28; *see also* Goode, *supra* note 7, at 314 (stating, "[i]t is better to have a limited target that is achievable than a grand design that is not."). Stefan Kröll notes that some issues were "too controversial" for inclusion in the CISG due to greatly divergent domestic laws; thus drafters aimed for a "widely acceptable" CISG rather than a "complete but controversial text." Stefan Kröll, *Selected Problems Concerning the CISG's Scope of Application*, 25 J.L. & COM. 39, 39 (2005).

40. *See* CISG, *supra* note 1, arts. 92-95. Although Article 4 excludes certain issues from the CISG's scope, it only excludes them "except as otherwise expressly provided in this Convention": *Id.* art. 4. Thus, aspects of validity touched upon by the formation provisions and formalities (Article 11) fall within the CISG's scope.

Good faith also became a flash point for disagreement. This was hardly surprising since, even today, the creation of a final contract is considered a more dramatic legal event in common law than in civil law systems.[41] Common law traditionally takes an aleatory view—parties generally enter negotiations at their own risk and bear any consequent losses.[42] A different philosophy prevails in civil systems, where the focus is on the relationship between parties; consequentially, courts are more inclined to consider the parties legally bound at an earlier stage of the negotiation process.[43] General principles of precontractual liability still generate suspicion in common law countries, reflecting the absence of a general doctrine of good faith in bargaining.[44] Although the starkness of this contrast has been ameliorated more recently by common law developments in estoppel and unjust enrichment, many of these developments were still in their infancy at the time that the CISG was drafted.[45] Against this backdrop, the CISG debates approached the application of good faith in three stages.

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41. Ralph B. Lake, *Letters of Intent: A Comparative Examination Under English, U.S., French and West German Law*, 18 GEO. WASH. J. INT'L L. & ECON. 331, 342 (1984); *see also* John Klein & Carla Bachechi, *Precontractual Liability and the Duty of Good Faith Negotiation in International Transactions*, 17 HOUS. J. INT'L L. 1, 17 (1994) (emphasizing that common law systems assign greater significance to the economic consequences of the contractual agreement, thereby seeking greater formality as a prerequisite to enforceability).

42. E. Allan Farnsworth, *Precontractual Liability and Preliminary Agreements: Fair Dealing and Failed Negotiations*, 87 COLUM. L. REV. 217, 221 (1987) (using the term "aleatory" to describe the view that "a party that enters negotiations in the hope of the gain that will result from ultimate agreement bears the risk of whatever loss results if the other party breaks off the negotiations.").

43. Lake, *supra* note 41, at 342. *See* J.F. O'CONNOR, GOOD FAITH IN INTERNATIONAL LAW 111 (1991) (noting that some civil law systems impose duties of good faith during precontractual negotiations); 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, 57 (1995) (finding that civil law systems have been willing to impose liability on a negotiating party who is responsible for failure to conclude a contract); Klein & Bachechi, *supra* note 41, at 17 (explaining the willingness of civil law systems to impose liability at an earlier stage due to differences in contract philosophies and noting the focus in civil law on relationships between parties); Goderre, *supra* note 3, at 265 (arguing that despite different views on the role of good faith in precontractual liability, establishing such liability tends to be the same, provided there is detriment to the reliant party); *see also* Simon Whittaker & Reinhard Zimmermann, *Coming to Terms with Good Faith*, *in* GOOD FAITH IN EUROPEAN CONTRACT LAW 653 (Simon Whittaker & Reinhard Zimmermann eds., 2000) (creating an overview of results of comparative case studies). *See generally* Friedrich Kessler & Edith Fine, *Culpa in Contrahendo, Bargaining in Good Faith, and Freedom of Contract: A Comparative Study*, 77 HARV. L. REV. 401 (1964) (recognizing that under the theory of *culpa in contrahendo*, damages should be recoverable against the party whose blameworthy conduct during negotiations prevented the contract's perfection).

44. Ewoud H. Hondius, *Pre-Contractual Liability*, *in* INTERNATIONAL CONTRACT LAW 2003, *supra* note 7, at 8-9; Farnsworth, *supra* note 42, at 221.

45. *See, e.g.*, Lake, *supra* note 41, at 346 (commenting on previous reluctance toward recognizing precontractual liability in England).

A. Stage One

Good faith first appeared in the following form tabled at the eighth session of the Working Group:

> I. In the course of the formation of the contract the parties must observe the principles of fair dealing and act in good faith. [Conduct violating these principles is devoid of any legal protection.][46]
> II. The exclusion of liability for damage caused intentionally or with gross negligence is void.
> III. In case a party violates the duties of care customary in the preparation and formation of a contract of sale, the other party may claim compensation for the costs borne by it.[47]

During the ninth session, the second and third paragraphs were rejected.[48] It was feared that the wider acceptability of the CISG would be jeopardized by the vagueness of these paragraphs as well as by the ban on exemption clauses, given that in the commercial arena merchants might agree to exemptions in exchange for price reductions.[49]

An amended version of the first paragraph found the support of a slim majority and later became draft Article 5: "In the course of the formation of the contract the parties must observe the principles of fair dealing and act in good faith."[50]

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46. The brackets were used because informal consultations suggested opposition to the second sentence by representatives supportive of the first sentence of paragraph I. *Report of the Working Group on the International Sale of Goods on the Work of its Ninth Session*, ¶ 70 n.8, U.N. Doc. A/CN.9/142 [hereinafter *Ninth Session Report of the Working Group*], *reprinted in* [1978] 9 Y.B. UNCITRAL 66, U.N. Doc. No. A/CN.9/SER.A/1978, U.N. Sales No. E.80.V.8, (*reprinted in* JOHN O. HONNOLD, DOCUMENTARY HISTORY OF THE UNIFORM LAW FOR INTERNATIONAL SALES 298 (1989)).

47. This proposal was a Hungarian suggestion combined with a third paragraph suggested by East Germany. *Id.* ¶ 70 nn.8-9 (citation omitted), *reprinted in* [1978] 9 Y.B. UNCITRAL 66, U.N. Doc. No. A/CN.9/SER.A/1978, U.N. Sales No. E.80.V.8 (*reprinted in* JOHN O. HONNOLD, DOCUMENTARY HISTORY OF THE UNIFORM LAW FOR INTERNATIONAL SALES 298 (1989)).

48. *Id.* ¶¶ 83, 86, *reprinted in* [1978] 9 Y.B. UNCITRAL 67, U.N. Doc. No. A/CN.9/SER.A/1978, U.N. Sales No. E.80.V.8 (*reprinted in* JOHN O. HONNOLD, DOCUMENTARY HISTORY OF THE UNIFORM LAW FOR INTERNATIONAL SALES 299 (1989)).

49. *Id.* ¶¶ 80-81, 85, *reprinted in* [1978] 9 Y.B. UNCITRAL 67, U.N. Doc. No. A/CN.9/SER.A/1978, U.N. Sales No. E.80.V.8 (*reprinted in* JOHN O. HONNOLD, DOCUMENTARY HISTORY OF THE UNIFORM LAW FOR INTERNATIONAL SALES 299 (1989)) (expressing concerns that Paragraph II could create uncertainty and make the CISG less widely acceptable, and noting that a ban on exemptions might be appropriate for consumer transactions, but not merchant practices).

50. *Id.* ¶¶ 73-77, *reprinted in* [1978] 9 Y.B. UNCITRAL 66-67, U.N. Doc. No. A/CN.9/SER.A/1978, U.N. Sales No. E.80.V.8 (*reprinted in* JOHN O. HONNOLD, DOCUMENTARY HISTORY OF THE UNIFORM LAW FOR INTERNATIONAL SALES 298-99 (1989)); Gyula Eörsi,

B. Stage Two

What followed has been described as a "fierce counterattack."[51] At the eleventh session of the Commission in 1978, many argued for deleting any reference to good faith on grounds that it was too vague; that it would decrease uniformity by tempting reference to domestic good faith concepts; that it would increase uncertainty; and that it was implicit in all business laws and thus superfluous.[52] Some pointed to the lack of specific sanctions and argued that it would be more appropriately included in a separate convention dealing with validity.[53]

Supporters argued that good faith was universally recognized as a fundamental principle of public international law—consequently omitting it might send the wrong signal to parties involved in international trade.[54] Good faith, they argued, would afford flexibility by allowing courts to fashion individually-tailored sanctions, encourage high standards of behavior, and reduce discriminatory or undesirable trade practices.[55] They further argued that the concept of good faith would be incrementally clarified through case law.[56]

Some supporters cautioned that the reference to "fair dealing" might elevate current international business practices to the status of law despite the perception that these were often unfair to developing countries.[57] Thus, the reference was replaced with "international cooperation."[58]

Problems of Unifying Law on the Formation of Contracts for the International Sale of Goods, 27 AM. J. COMP. L. 311, 313 (1979); Sim, *supra* note 37, at 14.

51. Sim, *supra* note 37, at 14.

52. Sim, *supra* note 37, at 15; Peter Winship, *Commentary on Professor Kastely's Rhetorical Analysis*, 8 NW. J. INT'L L. & BUS. 623, 631 (1988) (noting that some supporters of good faith considered its inclusion "unnecessary").

53. *1978 Draft Convention: Summary of Deliberations of the Commission on the Draft Convention on the Formation of Contracts for the International Sale of Goods*, Annex I, ¶ 45, U.N. Doc. A/33/17, *reprinted in* [1978] 9 Y.B. UNCITRAL 35, U.N. Doc. No. A/CN.9/SER.A/1978, U.N. Sales No. E.80.V.8 [hereinafter *Summary of Deliberations*] (*reprinted in* JOHN O. HONNOLD, DOCUMENTARY HISTORY OF THE UNIFORM LAW FOR INTERNATIONAL SALES 369 (1989)).

54. *Id.* Annex I, ¶ 46, *reprinted in* [1978] 9 Y.B. UNCITRAL 35, U.N. Doc. No. A/CN.9/SER.A/1978, U.N. Sales No. E.80.V.8 (*reprinted in* JOHN O. HONNOLD, DOCUMENTARY HISTORY OF THE UNIFORM LAW FOR INTERNATIONAL SALES 369 (1989)).

55. *Id.* Annex I, ¶¶ 46-48, *reprinted in* [1978] 9 Y.B. UNCITRAL 35, U.N. Doc. No. A/CN.9/SER.A/1978, U.N. Sales No. E.80.V.8 (*reprinted in* JOHN O. HONNOLD, DOCUMENTARY HISTORY OF THE UNIFORM LAW FOR INTERNATIONAL SALES 369 (1989); *see also* Klein & Bachechi, *supra* note 41, at 19-20 (summarizing the Working Group's arguments for and against the inclusion of good faith).

56. Winship, *supra* note 52, 631-31.

57. *Summary of Deliberations*, Annex I, ¶ 49, *reprinted in* [1978] 9 Y.B. UNCITRAL 35, U.N. Doc. No. A/CN.9/SER.A/1978, U.N. Sales No. E.80.V.8 (*reprinted in* JOHN O. HONNOLD, DOCUMENTARY HISTORY OF THE UNIFORM LAW FOR INTERNATIONAL SALES 369 (1989)).

58. *Id.* Annex I, ¶¶ 49-52, *reprinted in* [1978] 9 Y.B. UNCITRAL 35, U.N. Doc. No. A/CN.9/SER.A/1978, U.N. Sales No. E.80.V.8 (*reprinted in* JOHN O. HONNOLD, DOCUMENTARY HISTORY OF THE UNIFORM LAW FOR INTERNATIONAL SALES 369 (1989)); Sim, *supra* note 37, at 15.

A Working Group was set up to find a solution to the stalemate. It considered three compromises. Placement of good faith within the preamble was rejected as was its inclusion in a provision on interpretation of statements and conduct.[59]

Finally, in a move that led most involved to believe the "clause was dead,"[60] the Working Group decided to include good faith as an interpretive concept.[61] After minor amendments,[62] the newly numbered draft Article 6 was adopted by the Commission in the following form:

> In the interpretation and application of the provisions of this Convention, regard is to be had to its international character and to the need to promote uniformity and the observance of good faith in international trade.[63]

This "uneasy compromise"[64] is essentially the same as the eventual Article 7(1) of the CISG.[65]

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59. *Id.* Annex I, ¶ 54, *reprinted in* [1978] 9 Y.B. UNCITRAL 35, U.N. Doc. No. A/CN.9/SER.A/1978, U.N. Sales No. E.80.V.8 (*reprinted in* JOHN O. HONNOLD, DOCUMENTARY HISTORY OF THE UNIFORM LAW FOR INTERNATIONAL SALES 370 (1989)); Sim, *supra* note 37, at 14.

60. Eörsi, *supra* note 30, at 2-6.

61. *Summary of Deliberations*, *supra* note 53, ¶ 56, *reprinted in* [1978] 9 Y.B. UNCITRAL 36, U.N. Doc. No. A/CN.9/SER.A/1978, U.N. Sales No. E.80.V.8 (*reprinted in* JOHN O. HONNOLD, DOCUMENTARY HISTORY OF THE UNIFORM LAW FOR INTERNATIONAL SALES 370 (1989)). Gyula Eörsi maintains that good faith "survived, though exiled to a remote province when it was shifted to the article on interpretation." Gyula Eörsi, *A Propos the 1980 Vienna Convention on Contracts for the International Sale of Goods*, 31 AM. J. COMP. L. 333, 349 (1983).

62. The Working Group proposed that the language of Article 5 of the draft Convention on the Formation of Contracts for the International Sale of Goods include the "need . . . to observe good faith in international trade." *Summary of Deliberations*, *supra* note 53, ¶ 56, *reprinted in* [1978] 9 Y.B. UNCITRAL 36, U.N. Doc. No. A/CN.9/SER.A/1978, U.N. Sales No. E.80.V.8 (*reprinted in* JOHN O. HONNOLD, DOCUMENTARY HISTORY OF THE UNIFORM LAW FOR INTERNATIONAL SALES 370 (1989)).

63. Two previously separate documents, the Draft Convention on the Formation of Contracts for the International Sale of Goods and the Draft CISG, were merged to form one document. Article 5 of the former was merged with Article 13 of the latter, yielding Article 6 of a new Draft Convention on Contracts for the International Sale of Goods. *Id.* ¶ 60, *reprinted in* [1978] 9 Y.B. UNCITRAL 36, U.N. Doc. No. A/CN.9/SER.A/1978, U.N. Sales No. E.80.V.8 (*reprinted in* JOHN O. HONNOLD, DOCUMENTARY HISTORY OF THE UNIFORM LAW FOR INTERNATIONAL SALES 370 (1989)).

64. Eörsi, *supra* note 50, at 314.

65. Draft Article 6 is the same as Article 7(1) of the CISG, with the minor omission of the phrase "and application."

C. Stage Three

The last ditch onslaught was at the 1980 Diplomatic Conference, convened by the U.N. General Assembly to work on the draft Convention. Canada proposed that good faith be made non-excludable unless the CISG itself was completely excluded.[66] A proposal from Norway attempted to link good faith to contract interpretation rather than to interpretation of the CISG by moving it to draft Article 7(3),[67] within the provision on the parties' intent which ultimately became Article 8. Italy proposed a new article that would make good faith apply to formation, interpretation, and performance of the contract.[68] An intriguing proposal was suggested by one of the co-founders of good faith within the CISG, the German Democratic Republic,[69] which sought the following form of precontractual liability:

> Where in the course of the preliminary negotiations or the formation of a contract a party fails in his duty to take reasonable care, the other party is entitled to claim compensation for his expenses.[70]

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66. *Canadian Proposed Amendment to Article 6 of the Draft Convention on the International Sale of Goods*, U.N. Doc. A/CONF.97/C.1/L.10 (Mar. 12, 1980) [hereinafter *Canadian Proposal*]; *see also* 1980 Diplomatic Conference, Mar. 10-Apr. 11, 1980, *Third Meeting of the First Committee of the Diplomatic Conference*, ¶¶ 53-65, U.N. Doc. A/CONF.97/C.1/SR.3 (Mar. 12, 1980) [hereinafter *Third Meeting Record*] (summary record of deliberations on Canada's proposal), *reprinted in* JOHN O. HONNOLD, DOCUMENTARY HISTORY OF THE UNIFORM LAW FOR INTERNATIONAL SALES 468-69 (1989).

67. Article 7(3) of the Draft Convention concerned intent of the parties.. *Norweigan Proposed Amendment to Articles 6-7 of the Draft Convention on the International Sale of Goods*, U.N. Doc. A/CONF.97/C.1/L.28 (Mar. 13, 1980); *see also* 1980 Diplomatic Conference, Mar. 10-Apr. 11, 1980, *Fifth Meeting of the First Committee of the Diplomatic Conference*, ¶ 41, U.N. Doc. A/CONF.97/C.1/SR.5 (Mar. 13, 1980) [hereinafter *Fifth Meeting Record*] (comments by the Norwegian representative concerning Norway's proposal to transfer the reference to good faith from Article 6 to Article 7(3)), *reprinted in* JOHN O. HONNOLD, DOCUMENTARY HISTORY OF THE UNIFORM LAW FOR INTERNATIONAL SALES 478-79 (1989).

68. *Italian Proposed Amendment to Article 6 of the Draft Convention on the International Sale of Goods*, U.N. Doc. A/CONF.97/C.1/L.59 (Mar. 13, 1980); *see also Fifth Meeting Record*, *supra* note 67, ¶ 40 (introduction by Italian representative of Italy's proposal for a new Article 6), *reprinted in* JOHN O. HONNOLD, DOCUMENTARY HISTORY OF THE UNIFORM LAW FOR INTERNATIONAL SALES 478 (1989).

69. *See Ninth Session Report of the Working Group*, *supra* note 46, ¶ 70 nn.8-9, *reprinted in* [1978] 9 Y.B. UNCITRAL 66, U.N. Doc. No. A/CN.9/SER.A/1978, U.N. Sales No. E.80.V.8, (*reprinted in* JOHN O. HONNOLD, DOCUMENTARY HISTORY OF THE UNIFORM LAW FOR INTERNATIONAL SALES 298 (1989)).

70. *East German Proposed Amendment to Article 12 of the Draft Convention on the International Sale of Goods*, U.N. Doc. A/CONF.97/C.1/L.95 (Mar. 18, 1980); *see also* 1980 Diplomatic Conference, Mar. 10-Apr. 11, 1980, *Eleventh Meeting of the First Committee of the Diplomatic Conference*, ¶¶ 77-87, U.N. Doc. A/CONF.97/C.1/SR.11 (Mar. 18, 1980) (summary of discussion considering the East German proposal for a new Article 12), *reprinted in* JOHN O. HONNOLD, DOCUMENTARY HISTORY OF THE UNIFORM LAW FOR INTERNATIONAL SALES 515-16 (1989).

The failure of these proposals after only minor debate reflected the feeling that the compromise had been "hard-won."[71] Reopening the "awkward,"[72] "strange,"[73] and even "mysterious"[74] solution to the rift[75] between common and civil law lawyers in the shape of Article 7(1) could potentially unravel the nascent CISG. It was better to keep such mischief shut tight within the Pandora's box that was Article 7(1).

Arguably, the compromise sought to contain the impact of good faith. Had either the third paragraph of the eighth session's original proposal or the final East German proposal succeeded, then the CISG would have contained express provisions imposing a substantive precontractual good faith obligation, including a duty to negotiate in good faith. Like Articles 1-6,[76] however, a potentially larger scope for good faith was abandoned to ensure more widespread acceptability among participants. The end result is an apparent trade-off: a reduced area of formal uniformity for the sake of the ultimate success of the entire project. Arguably, a narrow scope for good faith is simply part of the historical bargain struck by Contracting States.

How has this shaky compromise fared since the deal was done? Far from being dead, most authors favor an "expansive role for good faith."[77] Interestingly, when the good faith compromise in Article 7(1) was struck, a gap-filling provision had not yet been envisaged.[78] Article 7(2) was only inserted during the latest stage of drafting.[79] Perhaps this temporal mismatch has contributed to good faith's phoenix-like quality.

The revival, however, can largely be attributed to a phenomenon observed by Professor Eörsi—that the hard-won compromise on good faith has always masked continuing disagreement amongst drafters.[80] With vague wording capable of

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71. Bonell, *supra* note 22, at 83.

72. Sim, *supra* note 37, at 5.

73. Eörsi, *supra* note 61, at 349.

74. MICHAEL BRIDGE, THE INTERNATIONAL SALE OF GOODS: LAW AND PRACTICE 59 (1999) (describing the solution as "something of a mystery").

75. The issue of good faith "sharply divided the Commission." *Summary of Deliberations*, *supra* note 53, Annex I ¶ 57, *reprinted in* [1978] 9 Y.B. UNCITRAL 35, U.N. Doc. No. A/CN.9/SER.A/1978, U.N. Sales No. E.80.V.8 (*reprinted in* JOHN O. HONNOLD, DOCUMENTARY HISTORY OF THE UNIFORM LAW FOR INTERNATIONAL SALES 369 (1989)).

76. *See* Clayton P. Gillette & Robert E. Scott, *The Political Economy of International Sales Law*, 25 INT'L REV. L. & ECON. 446, 461 (2005) (arguing that UNCITRAL's objective was to attract a larger number of signatories to the CISG than its predecessor agreements by compromising certain legal principles); Kilian, *supra* note 5, at 218 (suggesting an inverse relationship between CISG's scope of application and level of acceptance).

77. *E.g.*, Michael P. Van Alstine, *Dynamic Treaty Interpretation*, 146 U. PA. L. REV. 687, 780 (1998) (claiming the emergence of a "new consensus" supporting a more expansive role).

78. Eörsi, *supra* note 30, at 2-9.

79. JOHN O. HONNOLD, UNIFORM LAW FOR INTERNATIONAL SALES UNDER THE 1980 UNITED NATIONS CONVENTION 102 (3d ed. 1999).

80. *See* Eörsi, *supra* note 50, at 323 (viewing Article 6 of the draft Convention as an example of a failure to reach a "real compromise"); Eörsi, *supra* note 61, at 349 (arguing that

multiple meanings,[81] Article 7(1) was an attempt to please everyone with the result that this Pandora's box gave the mere illusion of compromise. The nature of good faith in the CISG and the extent of its precontractual application therefore remained debatable.

III. THE ROLE OF GOOD FAITH IN THE CISG

A range of arguments claim that good faith in the CISG is:

1. an aid to interpreting the CISG itself;
2. a general principle to assist in gap-filling;
3. a direct, positive obligation imposed upon parties;
4. a collective term denoting derivative general principles for gap-filling;
5. a product of international usages or practices established by the parties; or
6. an independent source of rights and obligations which may contradict or extend the CISG.

Of course, it should be noted that most of these arguments are not mutually exclusive, and supporters of one view will often support one or two of the others.

The first view is unanimously supported. Some writers, however, go further. Garnering support from the legislative history and a literal stance on the wording of Article 7(1), they confine good faith to this role alone, restricting it to an interpretive tool to be used only in cases of textual ambiguity. Ironically, this interpretation restricts a provision said to promote flexibility. Only a minority of commentators and cases support this restrictive take on the first view.[82]

The second is the most widely accepted of the arguments.[83] Drawn either from numerous provisions[84] or less commonly from Article 7(1) itself,[85] good faith

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everyone in the Working Group possessed a similar view); Bonell, *supra* note 28, at 29 (claiming Article 7(1) "hide[s] the lack of any real consensus").

81. *See* Bonell, *supra* note 28, at 29 (describing Article 7(1) as "vague and ambiguous"); Arthur Rosett, *Critical Reflections on the United Nations Convention for the International Sale of Goods*, 45 OHIO ST. L.J. 265, 290 (1984) (questioning whether the "potentially mischievous concept" of good faith is truly within the scope of the CISG's language due to the disagreement on its scope).

82. W v. R, Arbitral Award No. 8611/HV/JK, ICC Ct. of Arb., (23 Jan. 1997), *available at* http://www.unilex.info/case.cfm?pid=1&do=case&id=229&step=FullText; HONNOLD, *supra* note 14, at 100; Farnsworth, *supra* note 43, at 56-57.

83. BRIDGE, *supra* note 74, at 59-60; Peter Schlechtriem, *Commentary to Article 7*, *in* COMMENTARY ON THE UN CONVENTION ON THE INTERNATIONAL SALE OF GOODS (CISG) 95 (Peter Schlechtriem & Ingeborg Schwenzer eds., 2d ed. 2005) [hereinafter CISG COMMENTARY]; Bonell, *supra* note 22, at 85; Van Alstine, *supra* note 77, at 780-81; Winship, *supra* note 52, at 634. *See also* Ferrari, *supra* note 25, at 155 n.102 (noting courts seem to favor good faith as a general principle).

84. *See Secretariat Commentary on the 1978 Draft*, C.7, U.N. Doc. A/CONF.97/5 (Mar. 14, 1979), *reprinted in* JOHN O. HONNOLD, DOCUMENTARY HISTORY OF THE UNIFORM LAW FOR INTERNATIONAL SALES 408 (1989) (interpreting good faith to be a general principle present in articles throughout the draft Convention). The draft articles referred to by the Secretariat Commentary later became Articles 16(2)(b), 21(2), 29(2), 37, 38, 40, 49(2), 64(2), 82, and 85-88.

is stated to be a general principle of the CISG,[86] sometimes manifested in derivative principles such as reasonableness.[87] This view argues that good faith can be used for gap-filling pursuant to Article 7(2) in addition to aiding interpretion, although these roles may overlap.

As a subset of the second view perhaps, Professor Disa Sim identifies a more conservative role for good faith: it is a mere prerequisite to the exercise of other CISG rights. A party might lose the right to avoid or seek specific performance if exercised in bad faith,[88] such as contractual avoidance motivated by a swing in market conditions.[89] This view defines good faith negatively in accordance with Professor Robert Summers' famous "excluder analysis,"[90] so that its role is to exclude various forms of bad faith.

Yet when discussed as a general principle, good faith has been accorded a positive role in internal gap-filling. Professor Peter Winship's example is Article 34, which fails to specify the hand-over location for documents relating to the goods that the seller is bound to hand-over. He argues that the general principle of good faith would gap-fill to require them to be presented "at a place that is convenient for the buyer," but would not allow the buyer to "arbitrarily refuse presentment of the documents no matter where presented."[91]

Diametrically opposed is the third view, which considers good faith to be a positive and substantive duty imposed directly on the parties by Article 7(1).[92]

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85. Amy H. Kastely, *Unification and Community: A Rhetorical Analysis of the United Nations Sales Convention*, 8 NW. J. INT'L L. & BUS. 574, 607; Keily, *supra* note 28, at 28 (noting additions to specific provisions).

86. *Secretariat Commentary on the 1978 Draft*, *supra* note 84, C.7, *reprinted in* JOHN O. HONNOLD, DOCUMENTARY HISTORY OF THE UNIFORM LAW FOR INTERNATIONAL SALES 408 (1989); *see also UNCITRAL Digest of Article 7 Case Law*, n.19, U.N. Doc. A/CN.9/SER.C/DIGEST/CISG/7 (Jun. 8, 2004), *available at* http://www.cisg.law.pace.edu/cisg/text/digest-art-07.html (list of court cases holding that good faith is a general principle of the CISG).

87. Schlechtriem, *supra* note 83, at 104 n.50; Sim, *supra* note 37, at 24 (commenting on this position). *See also* Keily, *supra* note 28, at 29; Michael Bridge, *Good Faith in Commercial Contracts*, *in* GOOD FAITH IN CONTRACT 139, 162 (Roger Brownsword et al. eds., 1999) (commenting that the language of the EC Directive 93/13/EEC requiring good faith in consumer contracts "will be translated into the language of reasonableness" (referring to Council Directive 93/13/EEC, 1993 O.J. (L95/29), and "the requirement of good faith" in particular)).

88. Sim, *supra* note 37, at 15 (commenting on R. Motor s.n.c. v. M. Auto Vertriebs GmbH, Oberlandesgericht [Regional Court of Appeals], München, Feb. 8, 1995, 7 U 1720/94 (F.R.G.), in which a buyer was unable to avoid the contract); s*ee also* Keily, *supra* note 28, at 24.

89. HONNOLD, *supra* note 14, at 101.

90. *See generally* Robert S. Summers, *"Good Faith" in General Contract Law and the Sale Provisions of the Uniform Commercial Code*, 54 VA L. REV. 195 (1968).

91. Winship, *supra* note 52, at 634.

92. ENDERLEIN & MASKOW, *supra* note 25, at 54-55; Bonell, *supra* note 3, at 700; Bonell, *supra* note 22, at 85 ("[Good faith in the CISG] may even impose on the parties additional obligations of a positive character"); Fritz Enderlein, *Rights and Obligations of the Seller Under the UN Convention on Contracts for the International Sale of Goods*, *in* DUBROVNIK LECTURES, *supra* note 37, at 133, 136; Van Alstine, *supra* note 77, at 781; Winship, *supra* note 52, at 634;

Proponents argue conduct and contracts must be interpreted in accordance with good faith, either because the CISG forms an integral part of the contract[93] or because Article 7(1) is addressed to parties as well as tribunals and courts.[94] Critics point out that this is inconsistent with the rejection of legislative proposals to impose direct good faith obligations on the contracting parties.[95]

The fourth view argues that good faith is simply a collective term without real legal impact and is held by those who highlight the amorphous nature of good faith[96] in a manner reminiscent of the legislative debates. They argue that at such high levels of abstraction, good faith has so many meanings that it becomes meaningless.[97] Professors Michael Bridge,[98] John Klein, and Sim argue that more specific principles derived from good faith—such as a duty to communicate, a duty to facilitate rather than frustrate performance,[99] and estoppel—are better suited to both gap-filling and interpretation than a broader, vaguer, general principle of good faith.[100] Sim concludes that CISG good faith is a convenient, non-legal, collective term for these principles and confines it to a mere theoretical "unifying thread."[101]

The fifth view looks beyond Article 7 to the practices and usages of the international parties as potential sources of good faith duties.[102] Admittedly, this

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Magnus, *Remarks*, *supra* note 28; Magnus, *General Principles*, *supra* note 28, pt. 5b(3). *But see* Ferrari, *supra* note 6, at 215 (rejecting the argument that good faith imposes additional obligations on parties).

93. ENDERLEIN & MASKOW, *supra* note 25, at 54; Eörsi, *supra* note 30, at 2-8 (maintaining that the interpretation of the CISG and the contract cannot be separated, since the CISG "constitutes the law of the parties insofar as they do not make use of Article 6 on freedom of contract"). Indeed, Professors John Honnold and Kazauki Sono state that the CISG plays a supplemental role, supplying solutions where the parties themselves have not done so within the contract. HONNOLD, *supra* note 79, at 4; Sono, *supra* note 37, at 14. *But see* Sim, *supra* note 37, at 26 (asserting that the distinction between interpretation of the CISG and the contract should be maintained); Michael Bridge, *A Commentary on Articles 1-13 and 78*, *in* DRAFT UNCITRAL DIGEST, *supra* note 7, at 235, 253 (stating that "article 7(1) applies to the interpretation of the Convention and not of the contract.").

94. *See* Bonell, *supra* note 22, at 84 (agreeing with the view that Article 7(1) is directed not only to judges and arbitrators but also to parties).

95. Sim, *supra* note 37, at 26. *See* discussion of CISG's legislative history, *see supra* notes 37 and accompanying text.

96. Farnsworth, *supra* note 43, at 61 (referring to the term amorphous in relation to CISG good faith); Sim, *supra* note 37, at 23.

97. Bridge, *supra* note 93, at 251; Sim, *supra* note 37, at 19-21; *see also* Duncan Kennedy, *The Political Stakes in "Merely Technical" Issues of Contract Law*, 10 EUR. REV. PRIVATE L. 7, 19 (2002) (arguing that "the phrase good faith has no content at all"); Whittaker & Zimmermann, *supra* note 42, at 701 (stating that while good faith has meaning, "precise definition is impossible").

98. Bridge, *supra* note 87, at 139, 143, 147, 148 (discussing good faith generally, and expressing preference for confronting "particular problems" with "well-tested tools of contract law" rather than a "broad standard of good faith").

99. John Klein, *Good Faith in International Transactions*, 15 LIVERPOOL L. REV. 115, 125-33 (1993); Sim, *supra* note 37, at 24, 25, 28.

100. Sim, *supra* note 37, at 32.

101. *Id.* at 18, 25.

102. Sim, *supra* note 37, at 16-17.

view looks to the potential source of good faith rather than its role. If applicable, however, practices and usages not expressly excluded by the parties would impose overriding substantive duties directly upon the parties in accordance with Article 9(1) & (2);[103] such duties could involve good faith notions. This bears some similarity to the third view, albeit the direct duties in each case are derived from different sources. Ultimately the argument draws little support. Sim concludes that Article 9 is an "unsafe" foundation for good faith obligations.[104]

The sixth view argues that good faith can act as an independent source of rights and obligations that may contradict or extend the CISG. This view could arguably arise from good faith as a gap-filler or more readily as a direct general obligation.[105] Based on a supposed "common core" of domestic good faith, this approach has both supporters[106] and detractors[107] but receives only peripheral attention.

In practice, good faith's different roles within the CISG are not entirely clear. Good faith tends to cut across defined roles even in domestic settings;[108] some

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103. Provided the conditions within Article 9(1)-(2) are met, usages and/or practices will override the text of the CISG.

104. *Id.* at 19-21.

105. The *Bonaventure* case could be seen as extension of the CISG through the perception of good faith as a direct obligation on parties. The French court determined, *inter alia*, that the buyer's action in commencing proceedings in circumstances where the buyer was clearly at fault was contrary to good faith requirements of Article 7 and thus awarded damages for *abus de procedure*. SARL Bri Production 'Bonaventure' v. Société Pan African Export, Cour d'Appel [CA] [Regional Court of Appeal] Grenoble, Com., No. 53, Feb. 22, 1995, J.D.I., 1995, 632, note Beraudo (Fr.), *reprinted in* J. DU DROIT INT'L 632 (1995) (Fr.), *translated at* http://cisgw3.law.pace.edu/cases/950222f1.html.

106. HONNOLD, *supra* note 14, at 100; Rolf Herber, *Article 7*, *in* COMMENTARY ON THE UN CONVENTION ON THE INTERNATIONAL SALE OF GOODS (CISG) 65 (Peter Schlechtriem ed., Geoffrey Thomas trans., Clarendon Press 1st ed. 1998); Bonell, *supra* note 3, at 700; Keily, *supra* note 28, at 32.

107. Sim, *supra* note 37, at 18-33; Peter Schlechtriem, *Good Faith in German Law and in International Uniform Laws*, *in* SAGGI, CONFERENZE E SEMINARI 1, 3-4 (Michael Joachim Bonell ed., Centro di studi e ricerche di diritto comparator e straniero No. 24, 1997), *available at* w3.uniroma1.it/idc/centro/publications/24schlechtriem.pdf; Schlechtriem, *supra* note 83, at 100.

108. *See* Martijn W. Hesselink, *The Concept of Good Faith*, *in* INTERNATIONAL CONTRACT LAW 2003, *supra* note 7, at 93, 101-02 (outlining three traditional functions of good faith in most systems: interpretation, supplementation, limitation/correction); Werner F. Ebke & Bettina M. Steinhauer, *The Doctrine of Good Faith in German Contract Law*, *in* GOOD FAITH AND FAULT IN CONTRACT LAW 171, 172-189 (Jack Beatson & Daniel Friedmann eds., 1995) (detailing the roles of good faith in German contract law); *see also* Schlechtriem, *supra* note 107, at 6-12 (commenting on the advance of German good faith (*Treu und Glauben*) from humble beginnings as minor gap-filling tool to a concept encompassing multiple significant roles—from interpretation to supplementation and correction of both legislation and contracts). For a study in the contrast between the surface operation of good faith as a direct obligation in the UCC (having remedial effect) and its operation as an interpretive tool (having only directive effect), see Harry Flechtner, *Comparing the General Good Faith Provisions of the PECL and the UCC: Appearance and Reality*, 13 PACE INT'L L. REV. 295, 302 (2001).

argue that this is due to its inherently reductionist character.[109] One theory suggests that civil law good faith, in truth, acts as a mask for the judge's role in interpreting, supplementing, and correcting abstract rules that are not susceptible to short-term legislative alteration.[110] Good faith has allowed courts, faced with all-encompassing yet aging codes, to supplement or even override their texts and thereby create new law.[111] Through rationalization and objectification, good faith is said to make this process more palatable,[112] particularly since civil tradition holds that courts do not create, but only apply the law.[113] The manner in which good faith responds to "weak spots" in a rigid legal system has been likened to *ius honorarium* in Roman law and the early development of equity in England[114] in response to the rigidities and difficulties in common law forms of action and procedure. In their domestic settings, good faith and equity can both act as mechanisms for law reform.[115]

At the very least, a number of observations can be made about the inability to firmly assign a particular view to CISG good faith. To the extent that good faith negatively qualifies any exercise of CISG rights, it necessarily overrides express provisions granting those rights. Many of those who take the first or second view but reject direct duties of good faith still concede that positive obligations are at least indirectly imposed by good faith's role in interpretation or gap-filling,[116] since the outcome of these processes inevitably requires parties to act in good

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109. *See* Farnsworth, *supra* note 43, at 60 (describing civil law lawyers' "unsettling tendency to use the doctrine of good faith as a cloak with which to envelop other doctrines.").

110. Hesselink, *supra* note 108, at 111.

111. Ebke & Steinhauer, *supra* note 108, at 172 (detailing creation of a new action for breach of contract in Germany through the supplemental quality of good faith); Schlechtriem, *supra* note 107, at 5 (commenting in 1997 on the aging *Burgerliches Gesetzbuch* [BGB] and how good faith enabled courts to very often override "the text and meaning of special provisions"); *see also* Ewan McKendrick, *Good Faith: A Matter of Principle?*, *in* GOOD FAITH IN CONTRACT AND PROPERTY 39, 56 n.75 (A.D.M. Forte ed. 1999) (quoting Daniel Friedmann, *Good Faith and Remedies for Breach of Contract*, in GOOD FAITH AND FAULT IN CONTRACT LAW, *supra* note 108, at 399, 399-400) (commenting on good faith's potential "to bring about change and reform" and the greater need for this flexibility in a codified and therefore often rigid system as opposed to a common law system where fluidity is afforded by greater reliance on caselaw).

112. Hesselink, *supra* note 108, at 122-24; *see* Simon Whittaker & Reinhard Zimmermann, *Good Faith in European Contract Law: Surveying the Legal Landscape*, in Whittaker & Zimmerman, *supra* note 43, at 32 (concluding that § 242 BGB "is often needed merely for a transitory phase until a new rule is sufficiently well established to be able to stand on its own legs. . . . All in all, therefore, [it is] . . . an invitation, or reminder, for courts to do what they do anyway and have always done: to specify, supplement and modify the law.").

113. Hesselink, *supra* note 108, at 112.

114. Hesselink, *supra* note 108, at 120; Martin J. Schermaier, *Bona Fides in Roman Contract Law*, *in* Whittaker & Zimmermann, *supra* note 43, at 63, 65; Whittaker & Zimmerman, *supra* note 43, at 669, 675, 697.

115. Hesselink, *supra* note 108, at 120-24; Schermaier, *supra* note 114, at 63-64; Whittaker & Zimmerman, *supra* note 43, at 697.

116. BRIDGE, *supra* note 74, at 59-60; Bridge, *supra* note 93, at 252; Winship, *supra* note 52, at 634; Van Alstine, *supra* note 77, at 765, 779 (expanding on "true" as opposed to "hidden" gap-filling); *see also* Bonell, *supra* note 22, at 85 (making a similar observation). Professor Michael Joachim Bonell, however, supports the third view. *See supra* note 94.

faith.[117] Likewise, as has been previously pointed out, it is difficult to completely separate CISG interpretation from contractual interpretation.[118] Thus, substantive obligations are likely to arise through even the most conservative views, albeit indirectly,[119] and "the distinction . . . is likely to prove more apparent than real."[120]

One can only conclude that the role of good faith in the CISG remains inconclusive at best.[121] While the historically conservative position on good faith—as a strictly interpretive mechanism—no longer dominates, it remains open as to whether good faith can now reach into the precontractual period either through general principles or directly imposed obligations.

As the legal theory of good faith in the CISG has not been set in stone yet, precontractual good faith is still capable of developing in a number of different directions. The best direction is one that maximizes actual harmonization by helping to minimize the number of parties opting-out from the CISG regime. If the chosen direction impacts the frequency with which the CISG is utilized by lessening its desirability as choice of law, then this effect should also play a part in the rationale behind the future development of good faith.

It is important to consider the impact of expanding CISG good faith into the precontractual period on the economic position of parties, since they will ultimately determine the success of the CISG through their choice of law and ability to opt out of the CISG regime. If it has the effect of reducing transaction costs, then such an expansion in theory should be supported by those keen to uphold the CISG's aims, and vice versa.

IV. THE EFFICIENCY DILEMMA: THE COSTS AND BENEFITS OF EXPANSION OF CISG GOOD FAITH INTO PRECONTRACTUAL LIABILITY

The theoretical equation behind the CISG is the assumption that increased uniformity of law will promote international trade and global wealth through reduced transaction costs, fostered by improved legal neutrality, predictability, stability, and accessibility of the law.[122] The premise is that the CISG is "more

117. Keily, *supra* note 28, at 24-25; Bonell, *supra* note 22, at 84; *see* Franco Ferrari, *Scope of Application: Articles 4-5*, *in* DRAFT UNCITRAL DIGEST, *supra* note 7, at 96, 155 (arguing that the parties' behavior must be measured against a good faith standard where an obligation already exists under the CISG).

118. ENDERLEIN & MASKOW, *supra* note 25, at 54; HONNOLD, *supra* note 79, at 3-4; Eörsi, *supra* note 30, at 2-8; Kazauki Sono, *supra* note 37, at 14; *see also* Magnus, *Remarks*, *supra* note 28 (asserting the maxim of good faith applies to the interpretation of the CISG, the contract and the contractual relationship). *But see* Bridge, *supra* note 93, at 253 (stating that "article 7(1) applies to the interpretation of the Convention and not of the contract."); Sim, *supra* note 37, at 26 (asserting that the distinction between interpretation of the CISG and the contract should be maintained).

119. Keily, *supra* note 28, at 23; ENDERLEIN & MASKOW, *supra* note 25, at 54.

120. LOOKOFSKY, UNDERSTANDING, *supra* note 33, at 19.

121. For an outline of similar confusion in the role of good faith in the context of international public law, see O'CONNOR, *supra* note 43, at 121-22.

122. *See, e.g.*, Sekolec, *supra* note 7, at 1-2 (maintaining that these benefits of reduced

efficient"[123] than a choice of domestic law since it reduces or eliminates costs associated with reaching agreement on a choice of law (or of dealing with conflict of laws rules if there is no agreement), costs of familiarization with foreign law by at least one party (or possibly two if a neutral domestic law is chosen),[124] and the difficulty of proof of law in a foreign jurisdiction.[125] If we accept this premised equation of enhanced transactional efficiency (compared to domestic law) as the bedrock upon which the CISG rests, then something else becomes apparent. The historical and current good faith debates spring from different and often subconscious perceptions about how manipulation of the good faith factor affects this overall equation of CISG-enhanced efficiency.

By this I do not claim that all proponents for various forms of good faith are cognizant of the potential for good faith to affect the efficiency of the CISG in comparison with domestic law—far from it. Arguments grounded in fairness or certainty, however, relate back to this fundamental equation. In this Article, I address the tensions embodied in the debate on precontractual good faith.

This issue is of great importance. Modern transactions are increasingly complex. This results in lengthy negotiations punctuated by various preliminary memoranda of understanding, letters of intent, and preparatory work and expense.[126] In complex and protracted negotiations, it is difficult to pinpoint exactly when a contract is formed. Theoretical offer-acceptance patterns are not easily discernible and contracts tend to "gradually ripen."[127] This can be partially attributed to technological advancements in goods themselves.[128] Even in less

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transaction costs are contingent upon uniform interpretation of the CISG); Diedrich, *supra* note 12, at 304 (predicting the potential benefits from applying the CISG rather than domestic law to international software contracts); Filip De Ly, *Opting Out: Some Observations on the Occasion of the CISG's 25th Anniversary*, *in* QUO VADIS CISG? – CELEBRATING THE 25TH ANNIVERSARY OF THE UNITED NATIONS CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS 26, 40 (Franco Ferrari ed., 2005) (arguing that the CISG "entails reduced transaction costs, facilitates contract management and has psychological and cross-cultural advantages over domestic sales law").

123. Winship, *supra* note 52, at 629- 30.

124. *Id.*; *see* Diedrich, *supra* note 12, at 304 (viewing the CISG as a preferable alternative to interpreting contracts via one party's domestic laws or even a neutral domestic law).

125. De Ly, *supra* note 122, at 37; Winship, *supra* note 52, at 629-30.

126. Hondius, *supra* note 44, at 9; Farnsworth, *supra* note 42, at 249-50; *see* Lake, *supra* note 41, at 331-32 (describing different types of letters of intent).

127. Rosett, *supra* note 81, at 292; *see also* Bonell, *supra* note 3, at 695-96 (referring to lengthy negotiations without clearly ascertainable offer or acceptance and consequent doubt as to whether or when a contract is concluded); Harry M. Flechtner (ed.), *Transcript of a Workshop on the Sales Convention: Leading CISG Scholars Discuss Contract Formation, Validity, Excuse for Hardship, Avoidance, Nachfrist, Contract Interpretation, Parol Evidence, Analogical Application, and Much More*, 18 J.L. & COM. 191, 219-20 (1999) [hereinafter *Workshop*] (Peter Schlechtriem's comments transcribed by Harry M. Flechtner); *see also* Peter Schlechtriem, *Introduction to Articles 14-24*, *in* CISG COMMENTARY, *supra* note 83, at 176.

128. As goods themselves become more sophisticated, so do contractual negotiations for their sale. For example, compare typewriters with computers and mobile phones with their fixed-point/landline counterparts. In each case specifications, compatibility, capacities, features and accessories are more complex: *accord* Lake, *supra* note 41, at 332, n.11 (referring to sale and installation of high-tech equipment).

lengthy negotiations, however, reliance on statements or conduct before a contract is concluded raises similar issues. This type of behavior is more likely in the context of the longer-term relationships prevalent in global trade. Should such issues fall within the scope of the CISG?

On the one hand, general "amorphous" good faith concepts are said to bring uncertainty and confusion about the content of the CISG.[129] This could undermine the predictability and uniformity of its application, decreasing the ability of parties to accurately allocate risks in the transactions it regulates and increasing transaction costs.[130] Conversely, it could be argued that precontractual good faith duties would expand the CISG's reach, which would enhance overall uniformity[131] and predictability and thus reduce transaction costs. Clearly, each side is employing different concepts of efficiency and uniformity.

These tensions can be isolated in at least three ways. First, there is a trade-off between greater quantities of uniformity engendered by a precontractual expansion and greater qualitative uniformity. This might be summarized as the tension between formal and substantive uniformity. In this Article, formal uniformity is used to denote the field of coverage of uniform law on paper (formal/theoretical uniformity) while substantive uniformity is used to refer to the quality of the uniformity achieved within that field (substantive/actual uniformity).[132] Secondly, trade-offs also exist between ex ante efficiency and ex post fairness. The benefits of precontractual expansion appear to differ, depending on whether they are measured at the negotiation, drafting, or litigation stages. Finally, there are trade-offs between historical stability and progressive evolution of the law. In each case, there are implications for transaction costs, whose reduction represents a major aim of the CISG. I will argue that some of these implications are more likely to impact the CISG's future than others.

A. Formal v. Substantive Uniformity from an Efficiency Perspective

In reality, the situation is not one of all or nothing. Without the expansion of the CISG, precontractual liability might still arise by virtue of the residually applicable domestic law.[133] Therefore, the question should not be framed in terms of the costs and benefits of precontractual duties *per se*, but rather the relative pros

129. Sim, *supra* note 37, at 36; Bridge, *supra* note 87, at 140.

130. Sim, *supra* note 37, at 36; Farnsworth, *supra* note 42, at 242-43.

131. HONNOLD, *supra* note 79, at 168 (supporting the need to develop a remedy for wrongfully revoked offers by reference to the goal of uniformity); *see also* Schlechtriem, *supra* note 127, at 176, 183 (observing that problems with resolving precontractual issues due to "diverging domestic laws" could be avoided by careful application of the CISG).

132. *See* Gillette & Scott, *supra* note 76, *passim* (utilizing similar definitions).

133. Depending on the forum, its conflict rules, and any choices of subsidiary laws made by the parties, precontractual liability might alternatively arise under supranational rules such as the UNIDROIT Principles, which contain rules relating to precontractual liability. *See infra* note 268 and accompanying text.

and cons of having the CISG rather than domestic law provide precontractual answers.

The main argument in favor of the CISG adopting this role is that it adds an extra dimension of formal uniformity.[134] Increased "geographic" coverage by the CISG arguably improves certainty, as it extends to the new territory of precontractual liability, those benefits of uniformity which inspired the CISG's creation in the first place. Thus, the identity of the applicable precontractual law would no longer be determined by unpredictable domestic conflict of laws rules. A single uniform default law in the precontractual area would replace a patchwork of alternative domestic laws that possess varying degrees and styles of precontractual liability. This would decrease the costs of familiarization with foreign domestic precontractual laws[135] to the benefit of at least one party at the negotiation stage.[136] Wider coverage of the CISG might increase its attractiveness, thus reducing the time and costs involved in reaching agreement on a choice of law.[137] A precontractual doctrine of good faith could provide flexibility and reliance by parties upon this flexibility could decrease drafting costs by reducing the need to assiduously insert a contractual term to cover every contingency.[138] Unity of the law of contract and the precontractual law would arguably aid coherency between contractual and precontractual remedies. The extension of good faith in this way theoretically improves efficiency and certainty. Transaction costs are reduced due to enhanced predictability about which law applies, improved coherence between remedies, and decreased reliance on multiple foreign laws. Moreover, the extension of good faith adds to fairness by giving tribunals the flexibility to distribute the precontractual burden in a uniform manner where contracts do not arise.

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134. Diedrich, *supra* note 12, at 309.

135. *See* De Ly, *supra* note 122, at 37 (commenting on costs and listing the limited means for parties to protect themselves during the precontractual stage under the CISG as a disadvantage).

136. A uniform law could conceivably benefit both parties. An example of this scenario is when the alternative to uniform law would be a neutral domestic law, the latter choice increasing transaction costs for both parties. The validity of any agreed choice of law must be considered in light of any mandatory domestic laws. Further, in the absence of a preliminary contract, application of precontractual law will normally be by default, since in other cases, a contract will not have been concluded.

137. *See* De Ly, *supra* note 122, at 36-37 (commenting that the CISG would form a "common platform" that would save time and promote fairness for parties from multiple countries).

138. *See* Omri Ben-Shahar, *An Ex-Ante View of the Battle of the Forms: Inducing Parties to Draft Reasonable Terms*, 25 INT'L REV. L. & ECON. 350, 351 (2005) (noting the potential reduction in drafting costs by increased gap-fillers); Sim, *supra* note 37, at 6; *see also* Joseph M. Perillo, *Hardship and its Impact on Contractual Obligations: A Comparative Analysis*, *in* SAGGI, CONFERENZE E SEMINARI (Michael Joachim Bonell ed., Centro di studi e ricerche di diritto comparator e straniero No. 20, 1996), *available at* http://soi.cnr.it/~crdcs/crdcs/perillo.htm (commenting on the extreme length of American contracts, which reflect the attempt to anticipate "every possible calamity" in the context of hardship).

Expansion of the CISG's scope naturally reduces the uncertainty of potentially diverse domestic precontractual remedies,[139] but only to the extent that the CISG can effectively displace them at an early stage. For example, the benefit of reduced drafting costs quickly disappears if domestic law applies mandatorily, either exclusively or concurrently with the CISG. In the precontractual zone, there are a number of laws that might be considered mandatory. Given the multitudinous range of possible domestic law overlaps, just defining the stage in negotiations at which preemption occurs poses difficulties that could undermine some of the certainty of expanded uniformity.[140]

Convergence in domestic laws on precontractual liability would answer the conflicts argument. If domestic laws display reasonably uniform outcomes, then the policy behind ever-increasing colonization by the CISG is not warranted. Despite this, it seems that there are still substantial differences in domestic laws regarding precontractual liability.[141]

It could be argued that certainty would be hampered by an overextension of the CISG. At least one author views good faith as a problem to be "minimized" so as to avoid "long term chaos."[142] Unlike many other manifestations of good faith, the lack of specific provisions upon which to anchor the CISG's precontractual coverage and consequent dependence upon amorphous concepts of good faith as the basis of liability could increase uncertainty. The concern is that the CISG could generally "lapse into generality and vagueness,"[143] with consequently-reduced predictability of legal outcomes for parties.[144] A slow and gradual

139. John Klein and Carla Bachechi argue that a lack of uniformity in precontractual liability has increased tranaction costs by sparking overly cautious use of preliminary agreements and litigation and that Article 7, which emphasizes uniform application, could be "read expansively" to impose legal precontractual obligations. Klein & Bachechi, *supra* note 41, at 20-23.

140. *See, e.g.*, Farnsworth, *supra* note 42, at 243 (commenting in the context of the potential for a general domestic obligation of fair dealing in a common law system and the uncertainty created by the difficulty when it might arise in negotiations).

141. *See* Shahdeen Malik, *Offer: Revocable or Irrevocable. Will Art. 16 of the Convention on Contracts for the International Sale Ensure Uniformity?*, 25 INDIAN J. INT'L L. 26, 47 (1985) (arguing such claims could be adjudicated with the same results under different domestic laws); Whittaker & Zimmermann, *supra* note 43, at 656 (commenting on responses of various systems to a case scenario involving a broken negotiations and arguing that "all legal systems allowed some recourse for the person who had undertaken work . . . in reliance on the contract going ahead, though they differed considerably as to the juristic basis on which they did so"); Goderre, *supra* note 3, at 265 (arguing the civil and common law positions on precontractual liability are fairly similar where there is detrimental reliance); *see also* Roy Goode, *The Concept of Good Faith in English Law*, *in* SAGGI, CONFERENZE E SEMINARI 5-6 (Michael Joachim Bonell ed., Centro di studi e ricerche di diritto comparator e straniero No. 2, 1992) (on file with author) (summarizing the cases where good faith is not as relevant in English law as in Italian law).

142. Sim, *supra* note 37, at 30, 34.

143. *Id.* at 6.

144. *See* Goode, *supra* note 141, at 6 (stating that "the predictability of the legal outcome of a case is more important than absolute justice" in English law).

expansion of the CISG through good faith could exacerbate this indeterminacy.[145] Expansion of good faith into the precontractual area could make it harder to predict how the CISG interacts with residual domestic law. Accordingly, some suggest a resort to domestic law is generally preferable to the "loose cannon" of good faith.[146]

In this view, the extension of good faith to precontractual matters would increase uncertainty and negatively affect ex ante efficiency. Rather than reducing negotiation time and costs, the gains available from the CISG's uniformity would be diffused by its uncertain expansion into the precontractual zone and the consequent diverse and uncertain effect on its interaction with domestic law. Those drafting contracts would face a more difficult task in allocating risk and accounting for all possible contingencies within the contract, thus pushing up transaction costs.[147] Reduced predictability of outcomes would then undermine the CISG's main objective of promoting substantive uniformity.[148] Therefore, this argument contrasts the geographic or formal quantity of uniformity against its inherent quality.

B. Efficiency vs. Fairness from a Timing Perspective

Part of the attraction in expanding the CISG into the precontractual zone is the prospect of improved fairness, at least in those cases where the patchwork of domestic laws does not otherwise resolve "unfair" situations. In this sense, it might desirable to use the CISG to prevent the abuse of weaker parties—for example, by risk-shifting in standard term contracts—where there has been no real opportunity to negotiate individual terms, either due to the inequality of bargaining power, skill or experience, or more likely, because of disinterest in doing so due to the time and money such negotiations would entail.[149] It could be argued that fostering long-term relationships[150] and mutual trust is beneficial because it might encourage more trade, particularly in a global environment.

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145. *See* Schlechtriem, *supra* note 107, at 18 (commenting that past experience in Germany has evidenced the fact that good faith can be "abused by judges to exercise personal prejudices and biases.").

146. Sim, *supra* note 37, at 25; *see* De Ly, *supra* note 122, at 40 (describing the CISG as a set of "open-ended rules").

147. Sim, *supra* note 37, at 25; Justice Steyn, *The Role of Good Faith and Fair Dealing in Contract Law: A Hair-Shirt Philosophy?*, DENNING L.J. 131, 140 (1991) (arguing against a role for good faith in commercial contracts on a certainty of risk allocation basis).

148. Sim, *supra* note 37, at 25, 30.

149. Professors Konrad Zweigert and Hein Kötz note the cost savings from reliance on gap-filling by the law rather than individual negotiation for "every imaginable contingency," the futility of individual negotiation in the face of superior bargaining power, and the significance of advocacy for the protection of weaker parties by control of business terms in European legal policy. KONRAD ZWEIGERT & HEIN KÖTZ, INTRODUCTION TO COMPARATIVE LAW 334 & 326 (Tony Weir trans., Clarendon 3d ed. 1998).

150. Notably, however, the CISG will not normally apply to "framework contracts" unless they create obligations to deliver goods and meet the other CISG requirements. Schlechtriem, *supra* note 127, at 184-5.

Of course, such fairness has a price, primarily seen as increased uncertainty and its associated costs. The tension here pits liberalist freedom of contract against contractual justice, characterized by the socialization of contract law. An extreme example of this dichotomy can be seen in the modern European retreat from the natural-law-inspired concept of *laesio enormis*, dealing with gross disparity,[151] whereby contracts could be avoided if the price was less than half the true value (just price or market price) of the item sold; this concept is largely seen now as inappropriate in "an economy dominated by liberalism."[152]

Fairness itself can be either procedural or substantive.[153] These often intersect, however, and the distinction is not strictly adhered to in practice.[154] This is especially true in a precontractual sense, where unfairness during the process of concluding a contract, such as unfair pressure or parallel negotiation, might also provide the substantive basis for an independent precontractual cause of action.

Yet the characterization of the clash between fairness versus certainty and efficiency is overly simplistic. It fails to recognize that efficiencies could arise from fairness itself—for example, from the fostering of long-term relations between trading partners. It also fails to recognize that it is necessary to specify the point at which the costs and benefits are being assessed along the transaction timeline in order to get an accurate picture of how the trade-off works.

As Professor Ronald Brand points out regarding excuse for non-performance,[155] part of the difficulty in assessing whether strict rules are preferable to flexible ones is that contrary conclusions might be drawn, depending on the point at which the rules are tested. Brand argues that stricter laws provide greater predictability at the contract drafting stage.[156] This allows parties to accurately allocate contractual risk. It reduces the burden on drafters to deal with every uncertain eventuality within the contract itself, thereby decreasing transaction costs.[157] For commercial parties, clarity and certainty about rule outcomes carry more weight at the drafting stage than the particular legal shape of outcomes, which can still be dealt with at this stage through the pricing mechanism or

151. Ernst A. Kramer, *Chapter 11: Defects in the Contracting Process*, *in* INTERNATIONAL ENCYCLOPEDIA OF COMPARATIVE LAW 64 (Arthur von Mehren ed., 2001). *Contra UNIDROIT Principles*, *supra* note 11, art. 3.10 (addressing situations of gross disparity, unconscionability, and avoidance or adaption); PECL, *supra* note 11, art. 4:110 (describing avoidance for gross disparity from standard terms).

152. ZWEIGERT & KÖTZ, *supra* note 149, at 329.

153. *Id.* at 328.

154. *Id.*

155. Ronald A. Brand, *Article 79 and a Transactions Test Analysis of the CISG*, *in* DRAFT UNCITRAL DIGEST, *supra* note 7, at 392, 396 (discussing excuse for nonperformance under Article 79 on a strict or liberal basis).

156. *Id.*, (citing Harold J. Berman, *Excuse for Nonperformance in the Light of Contract Practices in International Trade*, 63 COLUM. L. REV. 1413 (1963)).

157. Brand, *supra* note 155, at 397.

insurance.[158] Cost savings at the drafting stage can be termed "ex ante" efficiencies because they are realized before the contract is concluded.

Yet, as Professor Brand argues, when tested at the point of litigation, flexible rules give the court or tribunal more freedom in allocating the contractual burden, thereby improving "fairness."[159] He also argues that this can reduce litigation expenses,[160] although how this might occur is not altogether obvious. For precontractual issues, the "fairness" argument carries even more force, since flexible rules enable the court to distribute burdens that are borne before parties reach agreement on risk allocation and, in some situations, distribute them if they fail to reach an agreement. This can be termed "ex post" fairness, since its tangible benefits only accrue upon judgment.

In the present context, there is a further relevant time for assessment—the predrafting negotiation stage. Knowledge that some precontractual protections exist could encourage and expedite trade by giving parties reassurance that, under some circumstances, investments can be recouped despite the failure to reach a contractual agreement. Negotiation costs might also be decreased if it is known that the law will adequately fill any gaps and facilitate formation.[161] If this holds true, then there would be ex ante efficiencies from the effect of precontractual good faith rules in reducing transaction costs.

There are a number of problems with the arguments that precontractual good faith in the CISG would improve either ex post fairness or ex ante efficiency. Ex post fairness will only be improved to the extent that domestic laws do not offer the same or even "fairer" rules. Further, the ex ante savings will not be realized if the vagueness of good-faith-based precontractual rules prevents parties from relying upon them. Thus, John Wightman argues that normative accuracy and calculability are affected differently by good faith. He generally argues that good faith is a standard, and as such, it has the benefit of ensuring outcomes comply more closely with the normative value of the law.[162] In other words, he elaborates on why outcomes are "fairer" at the ex post stage. He also points out, however, that this has negative implications for commercial parties who are trying to predict risks and liabilities, making them less calculable in advance.[163] That is, although one might expect good faith to create more ex post fairness, it might also increase uncertainty and ex ante costs at the drafting stage.

158. Rosett, *supra* note 81, at 270, 283 (arguing that Incoterms and UCP rules have been successful partly because they allocate risks through such methods); *see also* Goode, *supra* note 141, at 6.

159. Brand, *supra* note 155, at 396-97.

160. *Id.*

161. ZWEIGERT & KÖTZ, *supra* note 149, at 327.

162. John Wightman, *Good Faith and Pluralism in the Law of Contract*, *in* GOOD FAITH IN CONTRACT, *supra* note 87, at 41, 47-48.

163. *Id.*

In summary, the expansion of precontractual liability in the CISG could produce set of tensions discernible at various stages of the contracting process:

1. ex ante savings from flexibility (*negotiation stage*);
2. ex ante increased costs from flexibility (*drafting stage*);
3. ex ante savings from improved certainty (*drafting stage*);
4. ex post improvements in fairness from flexibility (*litigation stage*).

It is difficult to assess these tensions. To begin with, theoretical costs and benefits are not easily identifiable and the practical effects of good faith duties might be unexpected or difficult to measure. For example, fully-informed markets in theory help maximize economic efficiency; thus in theory, it follows that greater precontractual information is desirable.[164] In practice, however, a disclosure rule might actually discourage the acquisition of information by the party under a duty to disclose.[165] Likewise, it could be said that laws prohibiting bad faith might encourage negotiation and trade or, conversely, have an undesirable "chilling" effect on entry into negotiations,[166] especially for complex deals due to liability fears. While one might remain skeptical about the likelihood of either effect on negotiations, a further perspective should be considered.

C. Stability v. Evolution from an Historical Perspective

It can be argued that the CISG was never intended to deal with liability arising from the negotiation stage. Historically, it was the fragile compromise of good faith as a mere interpretive tool that saved the day; this limitation should be respected. Such an extension is not mere evolution in the face of new circumstances. Unlike emails or software contracts, for example, precontractual liability was not "*terra incognita*,"[167] but something hotly debated and deliberately abandoned by the CISG's drafters.[168] Therefore, a precontractual expansion might be seen as overstepping the spirit of the international consensus[169] and perhaps as overriding the CISG's express terms, resulting in a possible violation of treaty obligations.[170]

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164. Hondius, *supra* note 44, at 10.

165. *Id.*

166. Farnsworth, *supra* note 42, at 243.

167. *See* Frank Diedrich, *The CISG and Computer Software Revisited*, 6 VINDOBONA J. SUPP. 55, 55 (2002) (coining the term in relation to software).

168. Sim, *supra* note 37, at 13, 26; *see also supra* Part II (legislative history of Article 7); Schlechtriem, *supra* note 107, at 10-15 (pointing out in the German context the difference between evolution of an aging Code for unforeseen circumstances as opposed to the creation of new obligations and correction of its text).

169. Keily, *supra* note 28, at 28; Farnsworth, *supra* note 43, at 56 (arguing that even recognition of good faith as a general principle would be a "perversion of the compromise" struck by the delegates).

170. *See* Schlechtriem, *supra* note 6, at 468-69 (stating that legislatures or courts of CISG Contracting States would violate their obligations under the Convention by granting domestic contractual or tort remedies inconsistent with its provisions).

This historical perspective clashes with the need for the CISG to evolve so that it does not become a prisoner of the past. A narrow, restrictive reading would be inappropriate for an international convention.[171] It has been argued that the CISG is a living document[172] and must adapt to prevent its "petrification,"[173] particularly since the possibility of amendment is remote. Its open-ended provisions and autonomous interpretive mandate allow for great flexibility and, arguably, should be used to overcome its textual shortcomings in the area of precontractual liability. Growing support for this view might be expected; since the time the CISG was drafted, many common law jurisdictions have demonstrated an increased willingness to overcome their previous suspicion of precontractual good faith, at least in limited and specific ways, through increased recognition of estoppel, unconscionability, unjust enrichment, and agreements to negotiate.[174]

One objection to the evolution argument is that even if one were to abandon fidelity to the drafter's original inhibitions, a lack of specific tools will hamper such an expansion from proceeding in a predictable and logical manner. Unless it is accepted that Article 7(1) independently imposes substantive duties directly upon parties,[175] the CISG contains no provision upon which an interpretation of precontractual duties could be based.[176] Its provisions relate to the formation, performance and enforcement of contractual duties. The exercise of precontractual expansion would be potentially more reconstructive than interpretive, ironically reminiscent of judicial adaptation of contracts—that great suspicion of common lawyers in relation to good faith.[177] While fears of adaptation may be far-fetched,[178] the absence of provisions upon which to base precontractual liability

171. Keily, *supra* note 28, at 40.

172. Bonell, *supra* note 22, at 90.

173. Diedrich, *supra* note 167, at 60; Magnus, *General Principles*, *supra* note 28, pt. 4a; Keily, *supra* note 28, at 40.

174. Keily, *supra* note 28, at 37-39; *see also* Farnsworth, *supra* note 42, *passim* (remarking on the extent of such inroads into common law *caveat emptor* theory).

175. This is the third view of good faith discussed. *See supra* notes 92-95 and accompanying text. Arguing that the CISG can support precontractual obligations, Bonell relies upon this view of good faith as one of the bases for duties during the negotiation process. Bonell, *supra* note 3, at 700; *see also* Kritzer, *supra* note 2 (providing commentary on Bonell's analysis). Even if one accepts Article 7(1) as a potential basis, the argument can still be made that it provides insufficient specificity as to content or scope of such duties and therefore increase uncertainty.

176. Bonell, *supra* note 3, at 693; *see* Kritzer, *supra* note 2 (commenting that the CISG can "only artificially" be made to apply to precontractual fact patterns); *see also* Schlechtriem, *supra* note 83, at 103 (holding the view that "if the principles discernible are too vague to allow rules on specific issues, these matters must be regarded as not being governed by the CISG.").

177. Writing on the Principles of European Contract Law ("PECL"), Professor Harry Flechtner describes the good faith in the form of "peremptory judicial power to make or alter the parties' agreement" as at the heart of the "traditional distrust in the English common law tradition. . . ." Flechtner, *supra* note 108, at 310, 323; *see also* Bridge, *supra* note 87, at 140 (commenting that good faith generally gives "too much power to the individual judge" and that it represents "[v]isceral justice").

178. *See* Schlechtriem, *supra* note 107, at 10-11 (anticipating advocacy for renegotiation and adjustment for hardship cases in the CISG); *see also Workshop*, *supra* note 127, at 234-36

raises the specter of uncertainty, which could feed into ex ante transaction costs or worse still, prompt common law practitioners to advise clients to "opt out."

D. Summary

Ultimately, what emerges is a series of tensions between the following considerations: historical fidelity and evolutionary development; formal and substantive uniformity; and between different temporal assessments of trade-offs between fairness, certainty, and efficiency.

There are efficiency and certainty gains and losses in each case. Collectively, the trade-offs involved can be conveniently labeled in this Article as the "efficiency dilemma."

By stretching the CISG to cover precontractual matters, expansionists effectively, but often subconsciously, advocate acceptance of greater internal uncertainty as the price for increased formal uniformity. In this sense, they are prepared to trade a certain amount of quality for greater quantities of uniformity and accept some ex ante increases in transaction costs at the drafting stage, in order to gain decreased costs at the negotiation stage and greater fairness and flexibility at the ex post litigation stage.

By advocating the CISG's confinement from precontractual issues, opponents of expansion are, again, often subconsciously inclined to sacrifice potentially greater formal uniformity in favor of improved substantive uniformity, preferring precision in the scope and contents of the CISG and its interaction with domestic law over geographic quantities of uniformity. They are effectively willing to trade increased costs at the negotiation stage and some flexibility and fairness at the ex post litigation stage for reduced transaction costs at the ex ante drafting stage.

How should this dilemma be resolved in relation to precontractual good faith? What weighting should we place on each of the trade-offs identified above?

My inclination is towards quality of uniformity rather than quantity. I am also inclined, in relation to precontractual issues, towards giving those cost-benefit trade-offs relevant to the drafting stage greater weight than those at other stages. Aggregated together, the trade-offs across all assessment stages are likely to be evenly balanced in theory, but only those perceived by parties will affect their choice of law. I would argue that choices of law are agreed upon at the drafting

(suggesting that duties of renegotiation or adaption remedies for hardship within Article 79 of the CISG as perhaps a "stretch too far" and the distrust in some systems of judges remaking contracts). The CISG Advisory Council ("CISG-AC") recently touched on this matter, citing Professor Peter Schlechtriem's comments. CISG-AC Opinion No. 7, *Exemption of Liability for Damages under Article 70 of the CISG*, Rapporteur: Prof. Alejandro M. Garro, adopted by the CISG-AC at its 11th meeting in Wuhan, People's Republic of China, 12 October 2007, *available at* http://cisgw3.law.pace.edu/cisg/CISG-AC-op7.html. Although it ultimately left open the issue of judicial adjustment or revision of contracts in cases of hardship, the CISG-AC suggested that the possibility might be supported through either Article 7(1) or, more likely, pursuant to Article 79(5), despite the lack of guidelines in the CISG. *Id.*

stage for most transactions, not during early negotiations.[179] Therefore, the drafting stage is the crucial point for opting out of the CISG. At that point, the relevance of any cost-benefits perceptible at the negotiation stage will have been overtaken by the course of the transaction, and any cost-benefits perceptible at a hypothetical litigation stage on the basis of precontractual events will seem a distant prospect. Amongst all of the trade-off outcomes identified above, the utmost concern of parties considering a choice of law provision is likely to be those ex ante efficiencies associated with drafting, rather than those associated with the negotiation phase or ex post fairness.

This leaves us with a significantly smaller number of "efficiency dilemma" trade-offs highly relevant to the choice of law *and* bearing upon expansion of precontractual liability in the CISG: ex ante efficiencies within the formal-substantive uniformity trade-off as assessed at the drafting stage. Naturally, other factors can and do impact upon the choice of law, such as familiarity and bargaining strength, but these are not susceptible to interpretive manipulation.

All other things being equal, a uniform law is likely to be more attractive at the drafting stage if it enables parties to accurately predict the allocation of risks of liability pursuant to the contract and the consequent value of the contractual bargain. Provided they are not unexpected, any form of potential liability or risks can be accommodated by adjustments to price, insurance, or hedging. Uncertainty naturally reduces the calculability of the law.[180] Inefficiencies will arise when such decisions cannot be made rationally due to the uncertainty or complexity of the applicable law or its interaction with other laws.

Further, the drafting-stage benefits for parties of gap-filling through flexibility in the law are unlikely to off-set this concern for predictibility of risks, given the uncertainty of the legislative foundation for such flexibility.

Unlike other areas of the CISG within which good faith might operate, the problem of uncertainty and incalculability in the case of precontractual liability is especially exacerbated by the absence of any specific provisions dealing with the precontractual period. This is because the lack of "scaffolding"[181] for any potential precontractual liability could increase uncertainty for parties at the point at which they make their choice of law. Inadequate specificity about the content of an obligation in advance makes the task of rational price-setting at the drafting stage extremely challenging.[182]

For these reasons, parties faced with a choice of law negotiation are likely to prefer increased substantive, rather than formal, uniformity. This conclusion is backed up by Professors Clayton Gillette and Robert Scott, who generally argue that commercial actors prefer a narrower scope of application for uniform law if

179. In fact, many multiuse standard form terms are drafted years before the particular transaction is contemplated.

180. Wightman, *supra* note 162, at 41, 47-49.

181. *Workshop*, *supra* note 127, at 230 (referring to a lack of general principles, rather than provisions, upon which to base precontractual liability).

182. Kennedy, *supra* note 97, at 19 (explaining that circumstances under which good faith obligations of altruism arise cannot be "fully specified in advance").

this results in more precise rules since it reduces contracting costs,[183] especially where domestic laws sharply diverge.[184] They further contend that the manner of the CISG's promulgation has encouraged vague standards rather than precise rules, contrary to the preferences of commercial parties, and that this ambiguity has increased contracting costs.[185] Professor Arthur Rosett, bemoaning the effect of diplomatic gloss of the type evident in the good faith compromise in Article 7(1), contrasts this ambiguity with the needs of CISG users for precision so that they can assess risks and set prices.[186] Likewise, Professor Winship states that the simplicity of scope is one of the two characteristics of the CISG that encourage its use.[187]

The conclusion also draws support from civil lawyers who generally criticize the evolution of good faith in some domestic systems from its original form as a "de minimis" gap-filler[188] to a source,[189] or at least a "mouthpiece,"[190] for new laws that can override pre-existing legislation[191] or expand it to create new causes of action within an aging but all-encompassing code.[192] These observations, however, do not mean that good faith has no useful role to play. On the contrary, as a part of the internal interpretive armory, good faith has a central role in facilitating flexibility and development of the CISG. It is important, however, that these tasks not be confused with the role of expanding a non-exhaustive code to

183. Gillette & Scott, *supra* note 76, at 458 (arguing parties prefer a narrower scope for default rules and prefer default rules to standards, on the basis that rules are more predictable and therefore likely to reduce contracting costs).

184. *See id.* at 461 (considering the exclusion of subjects where domestic law varies most widely from the CISG as "compromise").

185. *Id. passim.*

186. Rosett, *supra* note 81, at 270.

187. Winship, *supra* note 52, at 629-30 (identifying the other characteristic as party autonomy in contract formation).

188. *See* Ebke & Steinhauer, *supra* note 108, at 171 (stating that good faith in Germany grew from "little more than a legislative acorn"). Professor Peter Schlechtriem outlines good faith's transition in German law (*Treu und Glauben*) from gap-filler for trivial legislative omissions to a source of new remedies, including for adjustment of contracts, creation of duties of renegotiation, and for completion or overriding correction of legislation. Schlechtriem, *supra* note 107, at 6-12. He also notes that good faith plays a number of roles across German law, the CISG, and the UNIDROIT Principles, not all of which apply to the CISG: clarification of legislation; development of new meaning for words and phrases in old legislation in order to adapt it to new circumstances; provision of "minima" obligations for contracts; contractual supplementation where necessary to support the main contractual aims; and imposition of obligations aimed at protection of parties. *Id.*

189. Ebke & Steinhauer, *supra* note 108, at 172-177 (detailing the rise of "positive *Vertragsverletzung*," or positive breach of contract, which was unknown to German law prior to 1907).

190. Hesselink, *supra* note 108, at 122.

191. Schlechtriem, *supra* note 107, at 7 (commenting on how good faith, embodied in § 242 BGB, enabled German courts to "overrid[e] the text and meaning of special provisions").

192. *See* Ebke & Steinhauer, *supra* note 108, at 190 (interpreting good faith's function as a judicial lawmaking basis as a sign that German courts are becoming more openly creative and pragmatic).

capture new ground, unless we are prepared to view good faith as a general clause in the civil tradition and remain fully cognizant of the consequences that this could hold for the future of the CISG as an attractive choice of law.

I agree with Professor Bonell that the CISG should not be shackled to its past; rather, it should evolve where appropriate. Given that precontractual good faith could go in either direction, however, a choice presently exists. Further, given the historic impasse and doctrinal range of views, that choice primarily requires resolution on non-historic and non-doctrinal grounds. I would argue that expanding the CISG's scope to the precontractual phase should be resisted on the grounds that it will increase those ex ante costs that parties are most concerned about at the time when choices of law are made, those costs being further amplified by the lack of any precontractual "scaffolding" or structure. After all, the perception of contracting parties, rather than doctrinal potential, is critical to the rate at which the CISG is utilized. While the idea of a "one-stop shop" seems attractive in theory, if parties at the drafting stage perceive the scope and contents of the CISG as uncertain, then they will be unable to accurately and appropriately identify risks, set prices or insure, with the result that they will be more likely to opt out. The greater this uncertainty, the more "repugnant"[193] the CISG is likely to become to potential users. Should this occur, the expansion, for all its theoretical attraction, will do more harm than good to levels of actual harmonization.

Of course, this argument does not hold true for cases where the CISG applies by default. It does not alter the likelihood that those with superior bargaining power will force a choice of law provision more familiar to them than the other party. Nor does it affect mutual choice of law decisions based on habit or unfamiliarity. These decisions, however, are not affected by the direction taken by good faith, since none of them turn on the CISG's substantive content. Arguably then, these cases will not ultimately determine the success or failure of the CISG. That fate will be determined by the rate of deliberative opt-outs (or opt-ins) of those who have considered matters at the heart of the "efficiency dilemma".

The above analysis demonstrates that the debate over expanding the CISG's scope to cover precontractual issues is not simply part of an esoteric tug-of-war between "treaty activists" and "strict constructionists,"[194] but something that could have an impact upon the frequency with which the CISG is utilized. Therefore, it would be wrong to generally label those who reject expansion as "inapposite" common law literalists,[195] since the preference for a more narrow scope can be motivated by a policy of encouraging more frequent use of the CISG in practice.

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193. Bridge, *supra* note 87, at 163.

194. LOOKOFSKY, UNDERSTANDING, *supra* note 33, at 22; *see* Sim, *supra* note 37, at 26 (explaining the dilemma as one between civilian lawyers pushing for substantive good faith outcomes and common lawyers continuing to resist them).

195. Bernard Audit, *The Vienna Sales Convention and the Lex Mercatoria, in* LEX MERCATORIA AND ARBITRATION 173, 187 (Thomas E. Carbonneau ed., 1998) (using the term "inapposite" to describe the traditional common law approach to statutory interpretation in the CISG context); *see also* Kilian, *supra* note 5, at 228-29.

V. METHODOLOGY OF SCHOLARSHIP ON CISG PRECONTRACTUAL LIABILITY

While opinion weighs against the idea that precontractual issues fall within the CISG's scope,[196] a minority believe otherwise. This is not surprising, given the historical illusion of compromise on good faith; the range of views on the role of good faith; and the underlying tensions inherent in the trade-offs within the "efficiency dilemma" between substantive and formal uniformity, historical fidelity and evolutionary development, and ex ante efficiencies versus ex post fairness.

Yet while all of these trade-offs of extrinsic factors undoubtedly assist in justifying both majority and minority opinions on whether precontractual liability should fall within the CISG's scope, little attention is given to them in the debate. What is even more surprising is how often the issue of scope is absent from discussions altogether given its centrality in the debate.

A. Minority Group One: By Use of Internal Interpretive Methodology Alone

Despite the absence of express provisions within the CISG imposing precontractual liability[197] and the perception by some that CISG good faith does not expressly impose duties upon parties, certain scholars have overcome these obstacles by relying on the internal interpretive method. Thus, through a process of liberal interpretation of CISG provisions, analogical extension, and/or application of general principles of good faith, some argue that concrete precontractual duties arise pursuant to the CISG.

Many authors and cases confirm a general principle of estoppel within the CISG. This principle is variously referred to as a prohibition against *venire contra factum proprium*, or inconsistent conduct;[198] protection of reasonable reliance;[199] or prohibition against abuse of formal legal rights.[200] These theories are drawn by analogy from Articles 16(2)(b), 29(2), 50(2), and 80.[201] General principles can be used for gap-filling in accordance with Article 7(2).[202] The question is whether

196. *E.g.*, Kritzer, *supra* note 2 (observing the prevailing view that precontractual liability is outside the CISG's scope); *see infra* Part V(C) and note 262.

197. BRIDGE, *supra* note 74, at 73; Goderre, *supra* note 3, at 274.

198. *E.g.*, Arbitral Award, Internationalies Schiedsgericht der Bundeskammer der gewerblichen Wirtschaft [International Arbitral Tribunal of the Federal Chamber of the Commercial Economy], Wien, June 15, 1994, SCH-4318 (Austria) *available at* http://cisgw3.law.pace.edu/cases/940615a4.html; Oberlandesgericht [Regional Court of Appeals], Karlsruhe, June 25, 1997, 1 U 280/96 (F.R.G.), *available at* http://www.unilex.info/case.cfm?pid=1&id=296&do=case; Arbitral Award, Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry, July 27, 1999, No. 302/1996 (Russ.), *available at* http://cisgw3.law.pace.edu/cases/990727r1.html.

199. Schlechtriem, *supra* note 83, at 104; Magnus, *General Principles*, *supra* note 28, pt. 5b(4).

200. Magnus, *General Principles*, *supra* note 28, pt. 5b(3); *see* Peter Schlechtriem, *Commentary to Article 24*, *in* CISG COMMENTARY, *supra* note 83, at 278 n.62.

201. Magnus, *General Principles*, *supra* note 28, at pt. 5b(3).

202. CISG, *supra* note 1, art. 7(2).

analogical extensions and these general principles can support the idea that precontractual liability might exist within the CISG.

Diane Goderre believes that they can. After reviewing a range of mechanisms by which precontractual liability might arise within the CISG, including through direct duties of good faith under Article 7(1) and indirect duties arising through a good faith general principle pursuant to Article 7(2),[203] she ultimately concludes that good faith will find expression within the CISG based on specific common law theories by analogical extension of certain CISG provisions, rather than through a broader, civil-style direct duty of good faith.[204] In this way, Goderre believes that a theory of detrimental reliance could impose precontractual liability by reference to Article 16(2); precontractual obligations could arise on the basis of implied contract by extension of restitution concepts in Article 81.[205] Goderre also suggests that an interpretation of letters of intent under Article 8 could result in CISG precontractual liability.[206] Klein and Carla Bachechi also argue for an expansive interpretation of the CISG and conclude that factors outlined in Article 8(3) could result in binding preliminary agreements.[207]

Professor John Honnold suggests room within the CISG for some form of obligation like *culpa in contrahendo*,[208] and in particular, relief for wrongfully

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203. Goderre, *supra* note 3, at 274-79 (for a discussion corresponding with the second and third views of good faith within the CISG, *see supra* notes 83-95 and accompanying text).

204. *Id.* at 274-81.

205. *Id.* at 280.

206. *Id.* at 279. It is unclear whether Goderre has in mind precontractual liability in a similar nature to that under a preliminary agreement and "unilateral binding declaration of will," which can form the basis of a claim for expectation damages under French law. ZWEIGERT & KÖTZ, *supra* note 149, at 360; *infra* note 208; Malik, *supra* note 141, at 47. A breach of a preliminary agreement in a European civil law system can lead to a remedy of expectation damages. *See* Klein & Bachechi, *supra* note 41, at 18 (forming this view by hypothetically analyzing *Texaco, Inc. v. Pennzoil, Co.*, 729 S.W.2d 768 (Tex. App. 1987) under civil law principles).

207. Klein & Bachechi, *supra* note 41, at 3, 22. John Klein contrasts the civil law duty to negotiate in good faith with the common law approach, but concludes that the latter may give rise to a similar duty "by *implying* the existence of a contract." Klein, *supra* note 99, at 135.

208. *Culpa in contrahendo* "means fault in negotiating." Lake, *supra* note 41, at 352. The theory was first advanced by Rudolf von Ihering in Germany in 1861 to soften the "will theory" or subjective "meeting of the minds" theory of contract, which he felt left too many commercial contracts invalid. Kessler & Fine, *supra* note 43, at 402. To overcome the weaknesses with German delictual law, Ihering resorted to the device of "implied contract," or *pactum de contrahendo*, between parties, with the objective of "conduct[ing] . . . negotiations in good faith." Hondius, *supra* note 44, at 16; *see also* ARTHUR TAYLOR VON MEHREN & JAMES RUSSELL GORDLEY, THE CIVIL LAW SYSTEM 837-838 (2d ed. 1977) (quoting Ihering's view that a "general obligation to observe 'the necessary diligentia'" arises when commencing contract negotiations). The underlying theory of *culpa in contrahendo* is that once the parties enter negotiations, they enter a relationship of trust and confidence, such that they are bound to take precautions to protect the other party's interests and will be liable if they negligently create expectations that they know or should know cannot be realized. Kessler & Fine, *supra* note 43, at 404. Relief can therefore be granted against a party that "awakes in the other [party] confidence in the imminent coming into existence of a contract—subsequently not concluded—and thus causes the latter party to incur expenses." Bundesgerichtshof [BGH] [Federal Court of Justice] ,

July 14, 1967, Nachschlagewerk des Bundesgerichtshof (F.R.G.), *translated in* ARTHUR TAYLOR VON MEHREN & JAMES RUSSELL GORDLEY, THE CIVIL LAW SYSTEM 842 (2d ed. 1977); *see also* BGH, Nov. 18, 1974, Nachschlagewerk des Bundesgerichtshof (F.R.G.), *translated in* ARTHUR TAYLOR VON MEHREN & JAMES RUSSELL GORDLEY, THE CIVIL LAW SYSTEM 843 (2d ed. 1977) (finding liable the "party who refused to conclude the contract . . . without an appropriate gound, [after leading] the other party [to] justifiably count[] on the conclusion of the contract and, in consequence, take[] on commercial disadvantages."); ZWEIGERT & KÖTZ, *supra* note 149, at 377 (finding a potential claim for *culpa in contrahendo* where one party has assured the other of the existence of a contract, but the former knows or should have known that the latter "would naïvely arrange his affairs on the basis of that assurance, notably by forgoing the chance of doing business elsewhere"); Farnsworth, *supra* note 42, at 239 (noting that some scholarly writers have developed this view based on cases dealing with misrepresentation and specific promise).

Thirty years after Ihering expounded upon *culpa in contrahendo*, the doctrine found its way indirectly into the BGB of 1891. Lake, *supra* note 41, at 352. This prompted its development into a more generalized theory of precontractual law by courts and commentators. *See, e.g.*, VON MEHREN & GORDLEY, *supra*, at 839-43 (tracing application of the doctrine within the German legal system). Raymond Saleilles first applied *culpa in contrahendo* to termination of negotiations in 1907, Farnsworth, *supra* note 42, at 240, and the doctrine has influenced the majority of civil law jurisdictions. Goderre, *supra* note 3, at 266-67; Kessler & Fine, *supra* note 43, at 406-07; *see* Hondius, *supra* note 44, at 7-8 (identifying the influences of Saleilles and Italian lawyer Gabriele Faggella upon Italian, French, and Latin American law); Farnsworth, *supra* note 43, at 58 (noting that while Ihering did not apply *culpa in contrahendo* to failed negotiations, most civil law systems have circumvented the problem by using good faith). *But see* Whittaker & Zimmermann, *supra* note 43, at 657 (commenting on the narrowness of the doctrine in Sweden).

In France, precontractual liability has developed in analogous fashion in tort through *fante delictuelle*, pursuant to Articles 1382 and 1383 of the French Civil Code. *E.g.*, *Establissements Vilber-Lourmat S.A. v. Sté des Etablissements Albert et Robert Gerteis S.A.*, Cour de cassation, Chamebre commerciale et financiére [Cass. com.][Court of Ordinary Jurisdiction], Mar. 20, 1972, Bull. civ. IV no. 93 (Fr.) *translated in* ARTHUR TAYLOR VON MEHREN & JAMES RUSSELL GORDLEY, THE CIVIL LAW SYSTEM 846 (2d ed. 1977); Kramer, *supra* note 151, at 57; Lake, *supra* note 41, at 351. The general theory of *abus du droit*, rather than good faith, "permeates" French private law and informs precontractual liability, although it is "closely related" with the latter. *See* Whittaker & Zimmerman, *supra* note 43, at 675 (concluding that in some respects, the difference between the doctrines of good faith and abuse of rights is "no more than one of technique, contingent on an institutional arrangement."). Note, however, the competing French theory for damages ("*avant contrat*") relating to the negotiation stage of "precontract," which provides relief for premature withdrawal of contractual offers on the basis of a breach of a parallel contract formed when the principal offer reaches the offeree. *E.g.*, A. COLIN & H. CAPITANT, COURS ELÉLEMENTAIRE DE DROIT CIVIL FRANCAIS 35-36 (L. Julliot de la Morandiére ed., 10th ed., 1948) *translated in* ARTHUR TAYLOR VON MEHREN & JAMES RUSSELL GORDLEY, THE CIVIL LAW SYSTEM 875-76 (2d ed. 1977) (citing Court d'appel [Regional Court of Appeal] Colmar, Feb. 4, 1936, D. 1936, 187) (Fr.); *see supra* note 206 (discussing expectation damages under the latter head, as opposed to the more common reliance damages under the former cause of action).

In Germany, the French approach is reversed. Good faith is the more general theory that has permeated private and public law while its cousin, the abuse of rights, exists within § 226 BGB and is rarely used. Whittaker & Zimmerman, *supra* note 43, at 695, 675. German law has most extensively applied *culpa in contrahendo* and anchored it in the good faith principle. Kessler & Fine, *supra* note 43, at 403-04. Pursuant to *culpa in contrahendo*, a party may be liable if it prevents formation of a contract by failing to act in good faith or negligence—for example, by making itself unavailable during the period it promised to keep an offer open or by misinforming

revoked offers.[209] Nonetheless, Honnold concludes elsewhere that *culpa in contrahendo*, in the form of liability for breaking off negotiations in bad faith, is outside the scope of the CISG.[210] For this reason, Honnold ultimately falls within the majority view despite the above comments.

With differing degrees of tentativeness, Professors Gert Reinhart and Rosett argue that *culpa in contrahendo*-style duties of good faith in negotiations arise through Article 7(1).[211] Other authors describe a duty to inform or disclose within the CISG based on a general principle of good faith,[212] with some going so far as to propose duties not to prevent a contract from forming in bad faith on this basis.[213]

Authors in this group look solely within the confines of the CISG to determine, as a matter of internal interpretation and gap-filling, whether the CISG contains duties pertaining to the precontractual phase.[214] Essentially, they presume the question of precontractual duties can be characterized as an internal gap; that is, a gap *praeter legem*. Thus, they base precontractual expansion on the flexible

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the other party. Goderre, *supra* note 3, at 266. Entry into negotiations without intent to contract or breaking negotiations in bad faith can result in liability under *culpa in contrahendo*. Lake, *supra* note 41, at 353. Although the "mere breaking off of negotiations . . . does not, without more, constitute a fault in contract negotiations," liability will be established where "conduct improperly . . . awoke or encouraged the trust that the contract would certainly be concluded." BGH, July 13, 1967, *supra*, *translated in* ARTHUR TAYLOR VON MEHREN & JAMES RUSSELL GORDLEY, THE CIVIL LAW SYSTEM 842 (2d ed. 1977). The doctrine provides relief for nondisclosure of material fact (where a party is aware that information is important but unavailable to the other party) and negligently-caused unilateral mistake resulting in detrimental reliance on existence of a contract, and also provides that offers are binding unless otherwise specified (at least in Germany). Kessler & Fine, *supra* note 43, at 404-405, 421, 428; *see generally* Kramer, *supra* note 151, at 57.

209. HONNOLD, *supra* note 79, at 168 n.22 (suggesting a potential damages remedy within the CISG for wrongfully revoked offers); *see also* LOOKOFSKY, UNDERSTANDING, *supra* note 33, at 22 n.79 (commenting on Honnold's eventual "bold" approach to Article 7(2)).

210. *Workshop*, *supra* note 127, at 230. Honnold at times seems to conclude that *culpa in contrahendo* falls outside the CISG's scope. *See* HONNOLD, *supra* note 79, at 54 (claiming that precontractual losses incurred due to reliance on nonpromissory representations arising in franchise and dealership relationships likely do not "arise out of a 'contract of sale of goods'" and thus fall outside the CISG's scope).

211. Gert Reinhart, *Development of a Law for the International Sale of Goods*, 14 CUMB. L. REV. 89, 100 (1984); Rosett, *supra* note 81, at 290-91; *see also* Pedro Silva-Ruiz, *Some Remarks about the 1980 Vienna Convention on Contracts for the International Sale of Goods – Emphasis on Puerto Rico*, 6 ARIZ. J. INT'L & COMP. L. 137, 141 (1987) (indicating agreement with Rosett).

212. Schlechtriem, *supra* note 83, at 107 n.73 (citing ANNETTE KOCK, NEBENPFLICHTEN IM UN-KAUFRECHT 174, (1995)) as basing such duties "simply on the principle of good faith and fair dealing"). Klein also locates "omnipresent" good faith in duties to inform and cooperate within the CISG, but identifies them as connected with specific articles. Klein, *supra* note 99, *passim*.

213. Schlechtriem, *supra* note 127, at 182 n.33 (citing Christoph Schmid, Das Zusammenspiel von Einheitlichem UN-Kaufrect und Nationalem Recht. Lükenfullung und Normenkonkurrenz (1995) (unpublished dissertation, University of München) as supporting on the basis of gap-filling in accordance with Article 7(2), various precontractual duties including a duty of good faith in negotiations and duty not to prevent the formation of a contract in bad faith).

214. Honnold looks beyond internal interpretive methods separately in discussing precontractual issues. *See infra* Part V(C).

and liberal interpretive approach encouraged in the case of internal gaps.[215] They leave unsaid, however, why precontractual liability should be considered an internal rather than external gap warranting such liberal treatment.

B. Minority Group Two: By Internal Interpretive Method but Acknowledging Scope

Professor Michael Joachim Bonell and Silvia Gil-Wallin also treat the matter as one of internal interpretation. Unlike the first group of authors, however, they directly address the CISG's scope within their analyses.

It is noteworthy that Gil-Wallin, who substantially concurs with Bonell's doctrinal analysis,[216] justifies her position on scope with two arguments. First, she argues that a broad scope is necessary to prevent losses caused by an unjustified withdrawal from negotiations.[217] Secondly, she contends that coverage of precontractual issues by the CISG improves uniformity over and above the variety of domestic laws that are otherwise determinative of the issue.[218] These brief justifications both relate to some of the "efficiency dilemma" factors discussed above, consistent with appeals to ex post fairness and greater formal uniformity. While she takes these extrinsic factor arguments no further, this is an unusually frank glimpse into the underlying policy justifications behind the minority view of precontractual liability.

In contrast to the first group, Bonell also openly discusses scope. Bonell, the vanguard of the minority view, rejects the historical deletion of a precontractual provision as determinative of the CISG's scope and argues for CISG liability in situations governed analogous to some of those covered by *culpa in contrahendo* but not expressly dealt with by the CISG.[219] He specifically acknowledges that, although the CISG seems unsuited to the task at first sight, such liability could extend to expectation damages under Article 74 despite the absence of a contract.[220]

Bonell relies on a wide view of good faith in Article 7(1) and a general principle of good faith operating through Article 7(2) as a source of positive obligations of good faith during negotiations.[221] He contends that even in the

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215. For an encouragement of the need for a liberal and flexible approach, see Bonell, *supra* note 22, at 73. Some have argued that this flexible approach has led to an "expansion bias" within the CISG. Steven Walt, *The CISG's Expansion Bias: A Comment on Franco Ferrari*, 25 INT'L REV. L. & ECON. 342, *passim* (2005).

216. Silvia Gil-Wallin, *Liability under Pre-contractual Agreements and Their Application under Colombian Law and the CISG*, NORDIC J. COM. L. 1, 20 (2007).

217. *Id.* at 13.

218. *Id.* at 18.

219. Bonell, *supra* note 3, at 699.

220. *Id.* at 701.

221. Bonell thus takes the third view of good faith within the CISG. *See* discussion, *supra* notes 92-95 and accompanying text; Bonell, *supra* note 22, at 81. Gil-Wallin differs slightly at this point. She argues that the UNIDROIT Principles and the PECL both contain provisions for precontractual liability; this "general principle" should also apply to extend the CISG through

absence of offer and acceptance, application of the CISG is not precluded.[222] Bonell further asserts that some matters are so closely related to the conclusion of the contract that they can be regulated by the CISG.[223] For example, he argues that parties are under an obligation to act in good faith when negotiating contracts and that CISG liability might arise for failures of disclosure or the bad-faith prevention of the conclusion of a contract.[224] In cases of a refusal to continue negotiations or preliminary agreements made "subject to contract," CISG liability would depend upon the parties' intent, determinable by reference to such matters as the type of business; the complexity of the deal; the stage of negotiations reached; the usages relating to formation; the wording of any merger clause; and whether performance has started.[225]

Bonell not only relies on good faith as the basis for precontractual liability, but also on the general principle of party autonomy evident in Article 6. On that basis, he argues that the CISG's reach can be extended by the parties themselves to precontractual obligations that have been agreed between them.[226]

This analysis is clearly preferable to that of the first group. Rather than simply assume that precontractual liability forms an internal gap, Bonell openly and directly addresses the question as to whether it fits within the scope of the CISG before proceeding to treat it as an internal issue able to attract expansive internal interpretive methods.

Thus, the broad scope proposed by Bonell is doctrinally justified in two ways: by extending the CISG's innate scope through party autonomy and, at the heart of his argument, by employing the third view of good faith as imposing direct and positive additional obligations upon parties. Thus, Bonell constructs precontractual liability as a matter governed by the CISG through analogy. The potential for precontractual liability to fall within the CISG's scope is based on doctrinal potential: that the matter "could simply be"[227] internal if a wide view of Article 7(1) and/or the capacity of a general principle of good faith operating through Article 7(2) are taken. The "close connection" between negotiation and contract conclusion is therefore sufficient to brand the issue "internal."[228]

Article 7(2). Gil-Wallin, *supra* note 216, at 16.

222. Bonell, *supra* note 3, at 695, 700; *see also* Oberlandesgericht [Regional Court of Appeals], München, Mar. 8, 1995, 7 U 5460/94, *in UNCITRAL Digest of Case Law UNCITRAL Texts* 5-6, U.N. Doc. No. A/CN.9/SER.C/ABSTRACTS/10 (stating that "other forms of consent are possible" under the CISG as long as they constitute "a mutual binding arrangement," notwithstanding an Article 92 reservation making the formation provisions of Part II of the CISG inapplicable).

223. Bonell, *supra* note 3, at 695.

224. *Id.* at 700-701. *See also* Peter Schlechtriem, *Commentary to Article 4*, in CISG COMMENTARY, *supra* note 83, at 75 n.43 (contrasting Bonell's proposed application of Article 7(1) when bad faith prevents contract formation to application of the domestic laws of *culpa in contrahendo* or tort).

225. Bonell, *supra* note 3, at 697-98.

226. *Id.* at 695, 700.

227. Kritzer, *supra* note 2 (translating Bonell's "minority opinion").

228. Bonell, *supra* note 3, at 695.

Nonetheless, one might ask: does this represent a self-fulfilling prophecy? Perhaps not—the use of internal interpretive methods to address the question of internality or externality does not necessarily mean the answer is a foregone conclusion. Undeniably, however, internal interpretive methods contain inherent expansive tendencies due to their use of analogy, so it could be argued that the method of the first and second groups contains at least a strong tautological bias toward internality.

C. Majority Group Three: By the Interplay between CISG and Domestic Law

Another way of addressing the internal/external question is by reframing it as a matter of the relations between the CISG and domestic law at the formation stage. In relation to a particular issue, does the CISG exclusively apply and preempt domestic law or apply concurrently with domestic law; or does domestic law alone govern the issue? As discussed above, precontractual liability is not an all-or-nothing proposition.

Like Bonell, Honnold paints the CISG's scope broadly so that it might cover issues arising from the relationship between the parties to the sales transaction beyond just contractual issues.[229] This initially led Honnold to take a cautious but positive approach to precontractual liability within the CISG[230] before ultimately adopting the majority view.[231]

Honnold's method clearly looks to two factors: interpretive stability and the interplay between domestic law and the CISG. In regard to the latter, Honnold argues that domestic precontractual issues are either "dealt with or excluded" by CISG formation provisions.[232] For Honnold, domestic precontractual remedies become available only if courts or tribunals hold that CISG remedies are not

229. HONNOLD, *supra* note 79, at 105-07 (stating that "various provisions of the [CISG] are inconsistent with a technical and narrow view of "contract" and *evince a broader view of the relationship* between the parties to a sales transaction." (emphasis added)).

230. *See id.* at 168 n.22 (suggesting that a tribunal could improve uniformity by gap-filling within the CISG to address the need for a damages remedy for losses caused by wrongful revocation). *See also* LOOKOFSKY, UNDERSTANDING, *supra* note 33, at 22 n.79 (commenting on Honnold's eventual "bold" approach to Article 7(2)).

231. *Workshop*, *supra* note 127, at 230. *See* HONNOLD, *supra* note 79, at 54 (claiming that precontractual issues in franchise relationships likely fall outside the CISG's scope).

232. *See* HONNOLD, *supra* note 79, at 54 (stating that *culpa in contrahendo* issues are so diverse that "they are either dealt with or excluded by provisions of Part II on Formation of Contract").

available.[233] This indicates that Honnold considers CISG remedies and domestic precontractual remedies to be mutually exclusive.

In a slightly different way, Professor Peter Schlechtriem agrees that they are mutually exclusive. While preemption turns on availability of remedies under the CISG for Honnold, however, preemption turns on whether or not an offer has been made for Schlechtriem. He argues that the CISG should have exclusivity in cases of overlap[234] in order to prevent it from being pushed aside by means of classification by courts keen to accommodate a "homeward trend."[235] Schlechtriem cites *culpa in contrahendo* as one such threat to the CISG's integrity.[236] Once an offer is made, whether revocable or not, Schlechtriem argues that the CISG "circumscribe[s] the field,"[237] and domestic precontractual[238] laws such as *culpa in contrahendo* are displaced.[239] Professor Joseph Lookofsky identifies this as an assumption of the domestic law's "preëmption" by the exclusive application of the CISG,[240] as opposed to allowing domestic law to compete or apply concurrently with the CISG.[241]

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233. Honnold contrasts the positions that a tribunal might take in relation to the need for a damages remedy for wrongfully revoked offers: either the tribunal or court could develop a remedy pursuant to Article 16(2) through application of general principles in accordance with Article 7(2) *or, if* the tribunal or court declines such an interpretation, through recourse to the domestic law for such a remedy, but working from the baseline assumption that the revocation was "wrongful" on the basis of the CISG. *Id.* at 168 n.22. By posing the two courses that a tribunal or court might take as alternatives, Honnold demonstrates precontractual liability under either CISG or domestic law as mutually exclusive.

234. In matters regulated by the CISG, Schlechtriem finds that courts have little leeway in granting remedies based in tort law. Schlechtriem, *supra* note 6, at 468.

235. *Id.*; Peter Schlechtriem, *Introduction*, *in* CISG COMMENTARY, *supra* note 83, at 1, 6-8, (arguing that reliance on domestic remedies could disrupt the CISG's formation rules and remedies).

236. Schlechtriem, *supra* note 235, at 7. In *Borderland*, Schlechtriem cites *culpa in contrahendo* and various forms of tortious misrepresentation as threats. Schlechtriem, *supra* note 6 at 472, 474.

237. Schlechtriem holds this view in the context of tort-contract overlaps. Schlechtriem, *supra* note 6, at 470-71.

238. While *culpa in contrahendo* is considered a contractual doctrine under German law, this classification is not helpful for present purposes. Therefore, it is grouped with other domestic actions as "precontractual" for analytical convenience in this Article.

239. Schlechtriem, *supra* note 127, at 183; Peter Schlechtriem, *Commentary to Article 16*, *in* CISG COMMENTARY, *supra* note 83, at 213. Bridge agrees that the integrity of the CISG would be affected if relief for wrongful revocation were to be available under general domestic contract law. BRIDGE, *supra* note 74, at 73.

240. Professor Joseph Lookofsky, however, questions this assumption due to lack of "persuasive precedents." Lookofsky, *Tightrope*, *supra* note 33, at 101.

241. Joseph Lookofsky, *In Dubio Pro Conventione? Some Thoughts about Opt-Outs, Computer Programs and Preemption under the 1980 Vienna Sales Convention (CISG)*, 13 DUKE J. COMP. & INT'L L. 263, 265 (2003). In each of the hypothetical examples provided by Lookofsky, *id.* at 281-82 (exculpatory clause), 284 (negligent misrepresentation of quality), 286 (consequential damage situation), however, a CISG-governed contract is formed.

Yet Schlechtriem acknowledges that the CISG contains no rules governing negotiations.[242] Therefore, he ultimately concedes that some domestic laws that are "compatible" with the CISG may apply concurrently.[243] For Schlechtriem, however, domestic *culpa in contrahendo* is simply not compatible in most cases.[244]

The only situation in which Schlechtriem finds any room for domestic *culpa in contrahendo* (other than for fraud) is when the parties have "not been moving towards a contract through corresponding offer and acceptance."[245] He states that "[s]ince the CISG does not govern the situation where . . . [the] contractual procedure is broken off before the stage of 'offer' and 'acceptance' has been reached . . . the only possibility is for recourse to domestic law via Article 7(2)."[246] Yet within the quoted statement and elsewhere, Schlechtriem strongly contends that precontractual issues are external to the CISG.[247] If that is indeed the case, then recourse to domestic law would not be through Article 7(2), but by virtue of the very fact that the issue is external.[248]

Obviously, Schlechtriem and Honnold construe scope of application differently. Moreover, they also perceive the way that scope affects preemption differently. While Honnold maintains a synchronicity between preemption and scope, Schlechtriem disconnects preemption from the scope of application by precluding recourse to incompatible domestic precontractual laws once an offer is made, despite the fact that parties cannot access remedies within the narrowly

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242. Schlechtriem points out the absence of appropriate rules in the CISG governing the parties' conduct when they are concluding a contract, but warns against automatic recourse to general principles on the misuse of rights familiar to German jurists. Schlechtriem, *supra* note 200, at 278.

243. In situations concerning communications between parties during contract formation, Schlechtriem implies that recourse to domestic rules will be needed if interpretive rules based on Articles 7 and 24 cannot be developed. *See id.* at 279. Examples of such domestic precontractual laws include duties imposed under E.C. directives, tort, delict, and *culpa in contrahendo* where compatible. Schlechtriem, *supra* note 224, at 74-75; Schlechtriem, *supra* note 127, at 184. *But see* Schlechtriem, *supra* note 224, at 183 n.36, (arguing that *culpa in contrahendo* is rarely compatible); Schlechtriem, *supra* note 200, at 279 (emphasizing that the "goal" for CISG commentators and practitioners should be to avoid recourse to domestic rules by establishing interpretive rules for Article 24); Filip De Ly, *Sources of International Sales: An Eclectic Model*, 25 J.L. & COM. 1, 3 (2005) (discussing E.U. directives dealing with business-to-business transactions).

244. *See* Peter Schlechtriem, *Commentary to Article 5*, *in* CISG COMMENTARY, *supra* note 83, at 81 (stating that the CISG applies exclusively where the buyer's interest is purely economic in nature and created only by the sales contract, even if extracontractual claims may be available under domestic law); Schlechtriem, *supra* note 127, at 184 (allowing for domestic law remedies to apply only where breaking off negotiations and prevention of contract formation was done fraudulently).

245. Schlechtriem, *supra* note 127, at 183 n.36.

246. *Id.*

247. *Id.* at 182-83. Only at one point does Schlechtriem cautiously acknowledge the possibility of "careful development" of precontractual duties under the CISG through Article 7(1)-(2). *Id.* at 183. He explores this possibility this no further, however.

248. *Workshop*, *supra* note 127, at 229.

constructed CISG scope unless a contract exists. Without acceptance of the offer, Schlechtriem argues that both CISG and domestic remedies are foregone.[249] Schlechtriem holds that certain domestic actions must remain unavailable even if a contract does not come to fruition in order to protect and preserve the CISG's structure. Thus he argues that even if a revocable offer is properly revoked before acceptance, domestic *culpa in contrahendo* would still not become available, lest a offer, revocable in accordance with Article 16(1), be converted into an irrevocable one by threats of recourse to domestic law.[250]

Implicit in this concept of compatibility is the fact that Schlechtriem adopts a wide-ranging, preemptive quality for the CISG. Laws are incompatible if related "to the seller's actual (typical and atypical) obligations, in particular as regards quality of the goods . . . ."[251] Torts are incompatible if they deal with economic interests created by the contract.[252] In other words, domestic laws are incompatible if they perform functions tied to enforcement of the contract.

In discussing the interplay between the CISG and domestic precontractual law, Schlechtriem accepts that precontractual issues are external to the CISG. This allows him to limit internal interpretive methods accordingly within a more narrow scope of application[253] despite wider preemption of domestic law. Rather than

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249. Schlechtriem, *supra* note 239, at 213-14. Schlechtriem reasons that, if, according to his argument, domestic remedies such as *culpa in contrahendo* are preempted by reason of a CISG offer being made, then the offeree "might be sometimes in a difficult position having to accept or forego remedies." *Id.* Even if an offer is revocable, its revocation "should not give rise to claims for damages under domestic law" since the alternative of allowing recourse to domestic law in such cases would facilitate threats of domestic damages claims which would "pressure the offeror into maintaining in force an offer that was revocable under the CISG," *Id.* This would jeopardize the compromise achieved in Article 16. *Id.* This argument can be linked to the argument that "Article 19 elevates the content of an offer to the content of the contract and in the end contractual interpretation is equivalent to offer interpretation." *Id. See also* Martin Schmidt-Kessel, *Commentary to Article 8, in* CISG COMMENTARY, *supra* note 83, at 113. *Contra* Malik, *supra* note 141, at 47 (advocating offeree choice between forcing the contract or pursuing domestic remedies).

250. Schlechtriem, *supra* note 239, at 214. Although it eventually held that a case for *culpa in contrahendo* did not arise on the facts, a German court was effectively prepared to apply the domestic law on this issue after concluding that a CISG contract had failed to arise on the basis of the various negotiations. Oberlandesgericht [OLG] [Provincial Court of Appeal], Frankfurt am Main, Mar. 4, 1994, 10 U 80/93 (F.R.G.). The court did not consider Schlechtriem's commentary on this particular point. Elsewhere, Schlechtriem offers a more interesting analysis. *See* Schlechtriem, *supra* note 6, at 472 (suggesting the possibility that an allowable revocation pursuant to Article 16(1) might not attract liability under domestic law in any event, since it is not "wrongful" under the CISG). In cases of fraud, Schlechtriem allows recourse to domestic law on the basis that fraud is outside the CISG's scope. *Id.* Schlechtriem, however, excludes tort or delict remedies once an offer has been made. *Id.* at 213-14; *Workshop*, *supra* note 127, at 475

251. Schlechtriem, *supra* note 224, at 74-75 .

252. *Id.* at 81.

253. While maintaining his opposition to precontractual liability within the CISG, Schlechtriem observes that careful development of precontractual liability pursuant to Article 7(2) could improve uniformity. *See supra* note 247. More ambivalently, Honnold canvasses the possibility of CISG liability for reliance on wrongfully revoked offers. *See supra* notes 230-231 and accompanying text.

utilizing general principles of prohibition against *venire contra factum proprium* ("contradictory behavior")[254] or prohibition against the abuse of rights[255] as a basis for finding precontractual liability within the CISG, Schlechtriem employs them for the purpose of interpreting formation provisions to determine whether a contract exists (although not always expressly by reference to a general principle).[256] Thus, formation is pivotal, and "everything [that] happens before the conclusion of the contract . . . isn't really governed by the [CISG],"[257] although it may well cause domestic precontractual liability to be preempted nonetheless. Functional grounds aimed at preserving the structural integrity of the CISG underpin Schlechtriem's analysis. He also cites the divergence between various domestic approaches to precontractual liability[258] and historical fidelity as justifications for his interpretation.[259] Contrary to the first two groups, Schlechtriem characterizes the use of liberal internal interpretive techniques, and general principles in particular, to extend the CISG into precontractual territory as "very uncertain and dangerous."[260]

On the other hand, Honnold views scope more broadly, giving internal interpretive methods more freedom to find precontractual liability within the CISG. Therefore, to arrive at the majority view, Honnold reins in the bolting horse of the internal interpretive method by turning to an absence of general principles upon which to base precontractual liability and the potential effect of upholding such liability in this context. He warns that advocating precontractual liability within the CISG under these circumstances would result in an obligation altogether too vague to encourage "the kind of uniformity that the [CISG] was designed to produce."[261] Ultimately, both Schlechtriem and Honnold favor substantive over greater formal uniformity.

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254. Schlechtriem applies *nemo potest venire contra factum proprium* instead as a general principle in resolving the question of whether declarations in Part III of the CISG are to be considered as binding or not. Peter Schlechtriem, *Commentary to Article 27*, *in* CISG COMMENTARY, *supra* note 83, at 306, 314-15.

255. *E.g.*, Schlechtriem, *supra* note 200, at 278 n.62.

256. Where communication of acceptance has been hindered by the addressee to prevent contract formation, for example, Schlechtriem prefers that Article 24 be constructed to promote good faith in accord with Article 7(1), or that general principles be utilized to gap-fill Article 24 pursuant to Article 7(2) to prevent application of *culpa in contrahendo* by ensuring that the CISG covers such situations *Id.* at 278-79.

257. Schlechtriem, transcribed in *Workshop*, *supra* note 127, at 230. Schlechtriem clearly confirms his view in discussing the case study involving a letter-of-intent scenario. *Id.* at 221-24.

258. *Id.* at 228-29.

259. Schlechtriem, *supra* note 235, at 182-84.

260. Schlechtriem, transcribed in *Workshop*, *supra* note 127, at 231.

261. *Id.* at 236.

D. Majority Group Four: By Outright Denial, Historical, and Comparative Absence Approaches

That the "CISG does not govern the precontractual phase"[262] is normally asserted on historical grounds and the primary rejection of the German Democratic Republic proposal during drafting.[263]

Some authors also derive support from the differences between the CISG and other international rules.[264] The UNIDROIT Principles[265] and the Principles of European Contract Law ("PECL")[266] explicitly reject the traditional common law "aleatory"[267] stance on negotiations. They apply a duty of good faith and fair dealing to every stage of the parties' relations; parties are specifically made liable for losses caused by breaking off negotiations in bad faith.[268] Thus, the position taken under the UNIDROIT Principles and the PECL is ostensibly closer to the civil law notion of good faith and precontractual liability.[269] By comparison, there

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262. *E.g.*, Magnus, *Remarks*, *supra* note 28, § 2(c)(aa). Kritzer himself simply states, "Damages for precontractual liability appear to remain subject to regulation by applicable domestic law, not the Convention." Albert H. Kritzer, *Precontractual Liability*, *in* GUIDE TO PRACTICAL APPLICATIONS OF THE UNITED NATIONS CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS (Albert H. Kritzer ed., 1994), *available at* http://cisgw3.law.pace.edu/cisg/biblio/kritzer2.html#contract.

263. *See, e.g.*, Pilar Perales Viscasillas, *Comments on the Draft Digest Relating to Articles 14-24 and 66-70*, *in* DRAFT UNCITRAL DIGEST, *supra* note 7, at 264-65; Schlechtriem, *supra* note 235, at 183.

264. *See, e.g.*, Magnus, *Remarks*, *supra* note 28, § 2(c)(aa) (noting that the CISG does not establish a duty of good faith in relation to negotiations, in contrast with the UNIDROIT Principles); *see also* Felemegas, *supra* note 28, at 311 n.743 (referring to the imposition of liability for bad faith negotiation by the UNIDROIT Principles (1994 version) (Article 2.1.15) and ongoing duty of confidentiality regardless of whether a contract is formed or not (Article 2.1.16)).

265. *See, e.g.*, *UNIDROIT Principles*, *supra* note 11, arts 1.7 (non-excludable general duty of good faith), 1.8 (inconsistent behavior), 2.1.15 (liability for failure of good faith in negotiations), 3.5(1) (consequences of failure to alert mistaken party), 3.10 (gross disparity, unconscionability and avoidance/adaption), 4.8 (supplying omitted terms), 6.2.1-3 (hardship, renegotiation/orders for termination and adaption). Farnsworth, however, notes the variance in language used throughout the UNIDROIT Principles. Farnsworth, *supra* note 43, at 49-50.

266. *See, e.g.*, PECL, *supra* note 11, arts. 1:201 (non-excludable general duty of good faith), 2:301 (liability for negotiations conducted or terminated in bad faith), 4:103 (consequences of failure to alert mistaken party), 4:109 (avoidance and court-ordered adaption of unconscionable contract), 4:110 (avoidance for gross disparity from standard terms), 6:111 (hardship and renegotiation/orders for termination/adaption), 8:108 (force majeure).

267. Farnsworth, *supra* note 42, at 221.

268. "Bad faith" is defined by the UNIDROIT Principles to include the entry or continuation of negotiations without intent to reach agreement, or the deliberate or breaking off negotiations in bad faith. *UNIDROIT Principles*, *supra* note 11, arts. 1.7, 2.1.15. The PECL provides for the same liability, but uses the phrase "contrary to good faith and fair dealing" rather than "bad faith." PECL, *supra* note 11, art. 2:301.

269. Farnsworth, *supra* note 43, at 63 (likening the general duty of good faith in both performance and negotiation imposed by the UNIDROIT Principles to the civil law view). Farnsworth hypothetically argues, however, that the UNIDROIT Principles could not succeed in imposing precontractual liability, at least insofar as they would have only applied by virtue of the agreement of the parties; here, the failure to conclude negotiations would preclude the express

is no express provision for precontractual liability within the CISG,[270] nor does it explicitly impose a duty of good faith upon parties.[271]

VI. WHY LOOKING WITHIN IS NOT ENOUGH

It is easy to allow the natural allure of greater harmonization to overshadow a fundamental point. The internal interpretive rules contained within Article 7(2) affect only matters "governed" by the CISG.[272] For matters it does not govern—that is, external gaps—the use of general principles is not sanctioned by Article 7(2). Instead, for external gaps, recourse to domestic law is not only permissible, "but even obligatory."[273] For this reason, it would be incorrect in my opinion to utilize general principles to determine whether an issue is in fact an external gap.

The sticking point is that the CISG is not an exhaustive code. It represents an intermediate model, whereby uniform substantive rules are balanced against domestic law.[274] It is not monolithic or fully self-contained.[275] The CISG takes a hybrid rather than "true code approach."[276] Domestic rules are preempted, but only in relation to matters within the CISG's scope of application and even then, only to the extent solutions can be found within the CISG.[277]

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reference as a liability trigger. *Id.* at 58-59. The argument that the UNIDROIT Principles mirror the civil law position can be countered by reference to the contextual approach taken in many civil jurisdictions, whereby the commercial nature of parties can be taken into account to soften the effect of good faith rules. Jan H. Dalhuisen, DALHUISEN ON INTERNATIONAL COMMERCIAL, FINANCIAL AND TRADE LAW 165 (2000).

270. *See supra* note 197 and accompanying text.

271. BRIDGE, *supra* note 74, at 59; Farnsworth, *supra* note 43, at 55; Winship, *supra* note 52, at 631, 633.

272. Lookofsky, *Tightrope*, *supra* note 33, at 89.

273. *See supra* note 33 and accompanying text.

274. De Ly, *supra* note 243, at 2-3, 7-8; *see also* Ferrari, *supra* note 14, at 340 (arguing that it is important for practitioners to be aware that the CISG constitutes an "incomplete set of default rules"); Kröll, *supra* note 39, at 39 (recognizing that the CISG is "not a comprehensive code regulating all matters falling within its sphere of application"); Marco Torsello, *Substantive and Jurisdictional Aspects of International Contract Remedies: A Comment on Avery Katz*, 25 INT'L REV. L. & ECON. 397, 400 (2005) (disclaiming the idea that the CISG "aim[s] at entirely displacing domestic rules governing an international sale of goods falling within the scope of the [CISG]"). *Contra* Eörsi, *supra* note 30, at 2-5.

275. *See* De Ly, *supra* note 243, at 1, 3 (stating that the CISG "interacts and leaves room for rules from other origins," therefore "endors[ing] an eclectic model in the field of uniform law.").

276. Mindful of the criticisms of the stance taken by ULIS as a "code" rather than a "true" or "meta-code" approach, the CISG drafters deliberately sought a combined approach in Article 7(2), which "combines recourse to general principles with an eventual recourse to the rules of international private law." Ferrari, *supra* note 6, at 215, 218-20. Where no general principle can be found, "one not only is allowed to make recourse to the rules of private international law: one is obliged to do so." *Id.* at 228.

277. *See* Joseph Lookofsky, *Impediments and Hardship in International Sales: A Commentary on Catherine Kessedjian's "Competing Approaches to Force Majeure and Hardship,"*, 25 INT'L REV. L. & ECON. 434, 442 (2005) (perceiving preemption problems where the "black-letter Convention rule" does not "clearly govern" an issue in international sales law). Ferrari states that "the parties' behaviour must be measured on a good faith standard, limited by

Regardless of the reasonableness of the forms of liability proposed by the first group of authors, the allure seems to have had its effect. In assuming that precontractual issues are internal to the CISG without first analyzing whether this is the case, the first group treats the CISG as an all-encompassing code. The use of general principles or analogies to interpret scope not only ignores the words of limitation in Article 7(2) regarding internal gaps, but erases them altogether by also allowing the use of general principles to expand the CISG's scope to capture external gaps, almost by stealth. Such an approach assumes that anything within the potential reach of internal interpretive methods is by definition internal to the CISG, regardless of scope. The result is a silent preemption by expansion.

By contrast, the second group of authors openly acknowledges that scope is an issue when they discuss the need to read scope expansively. The effect is overt preemption by expansion. While Bonell's approach is consistent with arguments within the "efficiency dilemma" in favor of greater formal uniformity,[278] extrinsic factors are not used to justify his premise that precontractual issues *might* be governed by the CISG. Instead, internal interpretive techniques are used to demonstrate the feasibility of their internality. As part of this process, general principles are openly utilized to actively expand the CISG to precontractual forms of liability.

VII. LIMITS ON LOOKING WITHOUT: PROBLEMS IN DEFINING SCOPE AND ITS EFFECT

The final two groups both begin with the premise that precontractual liability is generally external to the CISG. The last group offer the absence of express provisions and legislative history as justifications for this conclusion. Again, this corresponds with one of the extrinsic factor trade-offs in the "efficiency dilemma," but the evolution-stability trade-off is seldom openly or fully discussed.

The functional comparisons by Schlechtriem offer the most tangible justification on the issue of whether precontractual issues are internal or external. It would be a mistake to describe Schlechtriem's model as expansionist on the basis of his wide approach to preemption; he confines the CISG's scope narrowly by arguing that its remedies are not attracted unless formation occurs.

Despite the references to structural integrity and comparative function, as well as appeals to historical fidelity, Schlechtriem does not examine any extrinsic effects arising from his stance on scope in terms of costs and benefits for parties. Nevertheless, Schlechtriem's analysis is consistent with a preference for substantive uniformity over increased formal uniformity.

While not offering the same detailed analysis, Honnold does succinctly link the debate to the "efficiency dilemma." He comments that uncertainty about the CISG's external borders can engender doubt about the CISG's entire content,

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the Convention's scope of application *ratione materiae*." Ferrari, *supra* note 6, at 215. Note that recourse to domestic rules is also permitted under Article 7(2), where interpretive and gap-filling methods fail to find an internal solution. CISG, *supra* note 1, art. 7(2).

278. *See supra* Part IV(A) for a discussion of the efficiency perspective.

encourage a lack of detailed reasoning by courts and tribunals,[279] and give the impression of uncertainty. Therefore, Honnold advocates a flexible internal interpretation approach, but a strict approach for outer boundaries as the "sharp edges"[280]—arguably in direct contrast to his original, but not final, position on precontractual liability.

Schlechtriem and the final group of authors indirectly hint at this when they argue that an absence of provisions provides a good indication of potential externality.[281] By contrast, Honnold does not point to an absence of provisions, but instead to an absence of general principles as the reason why expansion would lead to uncertainty. Ironically, in doing so, he arguably extends the role of internal interpretive techniques to the separate task of determining whether an external gap exists—in the same way as the first group did, but with a different outcome. Yet it is Honnold who makes the clearest of links between uncertainty and deterioration in quality of uniformity.[282]

The prediction of uncertainty through expansion and the lack of detailed reasoning as to what constitutes an external gap seems to have resonated in practice. Stefan Kröll points out that in most cases concerned with scope, "no detailed reasoning is given why certain issues fall within or outside the scope of application of the CISG."[283]

VIII. CONCLUSION

In this Article, I have suggested that interpretive methods used to justify views on precontractual coverage could be critically assessed and that implicit underlying policy choices could be identified in each case. I have also suggested that the effect of both methods of interpretation and their outcomes could affect utilization of the CISG as a choice of law. The latter can be used as a normative tool in determining the future direction of good faith in the CISG, particularly in the context of expansion of the CISG into precontractual good faith.

In terms of methodology, I would argue that more open attention to scope is needed. The first group of authors demonstrate an inherent danger in the internal interpretive method. Absent any preliminary reckoning with scope, their focus predisposes the CISG to unchecked expansion. This could result in the CISG

279. *Id.*

280. HONNOLD, *supra* note 79, at 62. Honnold describes the CISG's provisions concerning sphere of application as "sharp-edged." *Id.* at 113. With regards to sphere of application, Honnold says that "precise drafting and strict construction are useful"; otherwise, "doubt about the applicability of the [CISG] produces uncertainty as to all of the problems governed by [it]." *Id.* Honnold, however, occasionally seems to reconsider this position. For example, he supports precontractual liability for wrongful revocation of an offer. *See supra* note 230.

281. Schlechtriem, *supra* note 83, at 103 (arguing that "if the principles discernible are too vague to allow rules on specific issues, these matters must be regarded as not being governed by the CISG."). *See also* Kritzer, *supra* note 2 (commenting that the CISG can "only be artificially" made to apply to precontractual fact patterns).

282. For a discussion on formal versus substantive uniformity, *see supra* Part I.

283. Kröll, *supra* note 39, at 56.

being unduly stretched[284] or worse, unwittingly stretched beyond its scope.[285] Those who employ analogy and general principles to flesh out the possibility of CISG precontractual liability without first addressing its scope risk the possibility of applying internal interpretive methods to an external gap. After all, Article 7(2) gives no mandate to stretch the CISG beyond matters governed by it;[286] it does quite the contrary. As Honnold himself points out, the "broad analogical approach . . . does not apply to . . . Articles 1-6" and thus there are no provisions "authorizing analogical extension of its outer boundaries."[287]

Both the first and last groups make unspoken presumptions about scope. The first group has silently relegated it to a subordinate position. The effect is that scope is as broad as required to fit any potential internal interpretation. The last group instead adopted a presumption that a narrow scope applies, sometimes on historical or other grounds. Yet neither the reduction of scope to a default position nor history alone will help the CISG survive or prosper into the future.

At the very least, justification should be given for the interpretive methodology chosen or rejected. This rationale must amount to more than a mere presumption that an issue is either internal or external to the CISG. At its best, the rationale should link extrinsic factor trade-offs in the "efficiency dilemma" with a clearly reasoned doctrinal position on scope. The question of scope warrants primary and extensive attention in every discussion involving precontractual liability before any application of either internal interpretive techniques or domestic law is undertaken. Otherwise, the CISG becomes the loser, as its scope is either silently broadened or narrowed without identification of policy arguments or weighing of the costs or benefits behind such a position. For this reason, the *methods* of the first and last groups, irrespective of whether one agrees with their final conclusions, should be rejected.

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284. Others express similar concern at the overstretching of interpretive techniques. *See* HONNOLD, *supra* note 79, at 62 (cautioning against "doubtful interpretations" that would extend the CISG's scope by application of general principles and analogical extension to expand the CISG to areas that it does not "govern"); Lookofsky, *Tightrope*, *supra* note 33, at 103; Magnus, *General Principles*, *supra* note 28, pt. 4a (expressing concern regarding interpretation of the CISG by recourse to general principles found outside it rather than those general principles upon which it "is based").

285. *See, e.g.*, Ferrari, *supra* note 6, at 214-15 (expressing his concern that viewing good faith as a general principle underlying the CISG risks imposing "additional obligations of a positive character" upon parties); *see also* Lookofsky, *Tightrope*, *supra* note 33, at 103 (expressing concern over covert techniques to expansively interpret CISG, albeit without regard to precontractual matters).

286. Many authors commenting on Article 7(2) make this remark. *See, e.g.*, Bonell, *supra* note 22, at 75 (stating that "a first condition for the existence of a gap in the sense of Article 7(2) is that the case at hand relates to 'matters governed by [the CISG]'"). *See also* Ferrari, *supra* note 14, at 21; Ferrari, *supra* note 25, at 158.

287. Honnold further states that "[i]ndeed, . . . such a proposal would have received short shrift [from drafters] and for good reason: doubt about the Convention's outer boundaries generates uncertainty as to nearly every substantive issue that can arise in an international sale. HONNOLD, *supra* note 79, at 62.

The remaining approaches acknowledge the proximity of precontractual issues to the edge of the CISG's scope. Therefore, they attempt to justify either application of internal interpretive methods or a conclusion of externality by initially examining which side of the border the particular precontractual issue falls. Bonell's analysis discusses scope in a forthright manner with a strong internal doctrinal emphasis, while Schlechtriem adopts a narrow scope of application, backed up by analysis of preemption, structural integrity, functionality, and an appeal to historical fidelity.

It may be that the best approach combines these strengths of open discussion of scope and functional analysis to resolve the dual questions of appropriate interpretive tools and applicable law in cases of precontractual liability, beginning with an overt examination of the preliminary interpretive question: is this issue internal or external to the CISG's scope? Regardless of whether one takes an essentially restrictive or expansive view of scope, an open discussion about it must precede acceptance or denial of internal interpretative techniques. The veracity of both sides of the "efficiency dilemma" and the need for greater certainty and precision of reasoning by courts and tribunals demand no less.

Yet some of the conclusions that can be drawn from the "efficiency dilemma" tell us something far more fundamental. The direction that good faith takes could impact the viability of the CISG itself. The ability of the contracting parties to opt out of the CISG therefore imposes a certain pragmatic extrinsic discipline on the development of good faith, especially in the precontractual context. If more than one outcome is theoretically feasible, then we should arguably develop the CISG in a way that minimizes the likelihood that parties will choose to opt out of the harmonized law in order to maximize harmonization in practice. Thus parties' perceptions of trade-offs within the "efficiency dilemma" should be a source of normative guidance for the CISG's development. At the time when they make their choice of law decisions, if parties are inclined to value ex ante certainty and efficiency at the drafting stage over other factors within the dilemma such as ex post fairness and ex ante savings at the negotiation stage, development of good faith in the CISG should proceed on a cautionary basis if the CISG's goals are to be achieved.

There is room for a broad role for good faith within the CISG. Indeed, flexible developments in good faith within the CISG and in other areas might enhance its attractiveness as a choice of law. Specifically in relation to precontractual liability, however, from an outward-looking, realist perspective, the better view is that a strict scope will enhance the CISG's attractiveness as a choice of law. This is because the lack of legislative provisions upon which to base CISG precontractual liability significantly heightens uncertainty of such expansion, which in turn increases transaction costs for parties when viewed at the drafting stage—the time at which the choice of law is made. A narrow and more certain scope will therefore best serve the needs of potential CISG users who value substantive over formal uniformity at the drafting stage. Arguably, this should lead to greater use of the CISG through less opting out and perhaps more opting in,

which will enhance actual harmonization by maximizing the frequency with which the harmonized law is utilized.

We should be careful not to lightly dismiss the normative value of choice of law decisions based on party perceptions of cost-benefit trade-offs, even if these are not articulated in precise terms. In discussing the scope of the CISG, where doctrinal arguments are finely balanced or scholarly opinions are widely spread,[288] consideration of cost-benefit trade-offs between extrinsic factors within the "efficiency dilemma" can provide a useful aid to interpretation. At the borders of the CISG, it represents a further normative tool in guiding the development of the CISG. This is an entirely appropriate approach when one remembers that the genesis of the CISG was to reduce transaction costs and enhance the efficiency of global trade.

288. Garro, *supra* note 37, at pt. II(B)(4) (observing that "[a]lmost everybody disagrees as to the impact, if any, that the principle of good faith may have on the behavior of parties to an international contract for the sale of goods").