

**A COMPARATIVE STUDY OF RELIANCE IN THE
UNILATERAL BREAKING-OFF OF CONTRACTUAL
NEGOTIATIONS**

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ABSTRACT

This thesis explores the theoretical basis of precontractual liability for the unilateral breaking-off of negotiations, by undertaking a comparative study between three selected jurisdictions (Germany, France and Chile). It defines a 'paradigm case' and focuses on it in order to find the theoretical basis of this liability. Traditionally, precontractual liability for breaking off negotiations has been founded upon or at least linked with the notion of good faith. This thesis, however, argues that in the selected jurisdictions the true basis of this liability is the notion of 'reliance' and distinguishes two dimensions of reliance (referring to them as 'trust-based' and 'expectation-based'). It analyses the relationship between these dimensions arguing that in the selected jurisdictions the trust-dimension merges with the general principle of good faith and that the expectation-dimension emanates from the trust-dimension. This thesis argues that this innovative approach to the theoretical analysis of the foundation of this liability could have important practical consequences in jurisdictions which do not embrace a general principle of good faith. It focuses on English law, as a contrasting jurisdiction to the selected jurisdictions, in that it rejects a general principle of good faith and, especially, the notion of a duty to negotiate in good faith, which is generally considered to lead necessarily to the rejection of a general principle of precontractual liability. This thesis demonstrates that while English law can provide protection for certain cases of precontractual liability, it currently does not protect the paradigm case. It argues that if the analysis is shifted from good faith to the notion of reliance, English law could develop one or more of its particular solutions in order to protect the paradigm case, if it desired to do so, and explores how such a development could be implemented without establishing a general principle of precontractual liability.

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NOTE ON TRANSLATIONS

Unfortunately, I do not speak nor read German; therefore, regarding German law materials, I have relied on English, Spanish and Portuguese translations (which are acknowledged throughout the thesis) and on materials in German that were translated for me into English (by Professor Stefan Vogenauer, who was my former supervisor) or Spanish (by Professor Erika Isler of Universidad Bernardo O'Higgins, Santiago de Chile). The BGB, in English, is available at https://www.gesetze-im-internet.de/englisch_bgb/index.html.

Regarding French law, the French text of the new articles of the *Code civil* cited throughout the thesis is taken from <https://www.legifrance.gouv.fr>. The English translations of these articles, other legislation, reform projects, cases and literature are acknowledged throughout the thesis. Any other translations from French into English that are not attributed to another author were made by me.

The text in Spanish of the different Chilean Codes and legislation can be found in Spanish in the website of the National Congress Library (*Biblioteca del Congreso Nacional*): <https://www.leychile.cl/Consulta/homebasico>. Throughout the thesis, all translations from Spanish into English were made by me.

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TABLE OF ABBREVIATIONS

AA: *Ars Aequi*
 ACQP: Acquis Principles
 AEPL: Academy of European Private Lawyers
 App Cas: Appeal Cases
 art/arts: article/articles
 BAG: *Bundesarbeitsgericht* (German Federal Supreme Court for Labour Law)
 BB: *Der Betriebsberater*
 BGB: *Bürgerliches Gesetzbuch* (German Civil Code)
 BGH: *Bundesgerichtshof* (German Federal Supreme Court)
 BGHZ: *Entscheidungen des Bundesgerichtshofs in Zivilsachen*
 BLR: Building Law Reports
 Bull civ: *Bulletin civil de la Cour de cassation*
 Bull Joly: *Bulletin Joly Sociétés*
 Burr: Burrow's Reports
 CA: *Cour d'appel* (France), *Corte de Apelaciones* (Chile), Court of Appeal (England)
 Cass civ (1, 2, 3): *Cour de cassation, Chambre civile* (first, second, third chamber)
 Cass com: *Cour de cassation, Chambre commerciale*
 CCC: *Contrats, concurrence, consommation*
 Cciv: *Code civil* (French Civil Code)
 CCivCh: *Código Civil Chileno* (Chilean Civil Code)
 CComCh: *Código de Comercio Chileno* (Chilean Commercial Code)
 Ccomm: *Code de Commerce* (French Commercial Code)
 CESL: Common European Sales Law
 cf: compare
 ch/chs: chapter/chapters
 Ch/ChD: Chancery Division
 cic: *culpa in contrahendo*
 CISG: Convention on Contracts for the International Sale of Goods
 CJ: Chief Justice
 CLR: Commonwealth Law Reports (Australia)
 ColumJeurL: Columbia Journal of European Law
 ColumLRev: Columbia Law Review
 Com Ct: Commercial Court
 ConstLJ: Construction Law Journal
 CS: *Corte Suprema* (Chilean Supreme Court)
 CUP: Cambridge University Press
 D: *Recueil Dalloz* or *Dalloz Sirey*
 DCFR: Draft Common Frame of Reference
 DH: *Dalloz, Recueil hebdomadaire de jurisprudence*
 DTZ: *Deutsch-Deutsche Rechts-Zeitschrift*
 ed/eds: editor/editors
 edn: edition
 eg: for example
 EGLR: Estates Gazette Law Reports
 ERPL: European Review of Private Law
 EU: European Union

EWCA Civ: England and Wales Court of Appeal, Civil Division
 EWHC: England and Wales High Court
 ff: and following
 fn: footnote (external to the thesis)
 FS: Feasibility Study
 Gaz Pal: *Gazette du Palais*
 HarvLRev: Harvard Law Review
 HCA: High Court of Australia
 HL: House of Lords
 HL Sc: House of Lords (appeal from Scotland)
 HR: *Hoge Raad* (Netherlands Supreme Court)
 ICC: International Chamber of Commerce
 ie: that is
 IR: *informations rapides*
 J: Justice
 JCP: *Jurisclasseur périodique, édition générale*
 JCP éd E: *Jurisclasseur périodique, édition entreprise et affaires*
 JLC: *Juzgado de Letras Civil*
 Jur: *Jurisprudence*
 JZ: *Juristenzeitung*
 KB: King's Bench Division
 KCLJ: King's College Law Journal
 LGDJ: *Librairie générale de droit et de jurisprudence*
 LJ: Law Journal / Lord Justice
 LM: *Lindenmaier-Möhring, Nachschlagewerk des Bundesgerichtshofs*
 LPDC: *Ley sobre Protección de los Derechos de los Consumidores*
 LR: Law Reports
 M&A: Mergers and Acquisitions
 MOU: Memorandum of Understanding
 MR: Master of the Rolls
 MUJ: Markesinis, Unberath and Johnston
 n/nn: footnote/footnotes (internal to the thesis)
 NJ: *Nederlandse Jurisprudentie*
 NJW: *Neue Juristische Wochenschrift*
 NJW-RR: *Neue Juristische Wochenschrift, Rechtsprechungs-Report Zivilrecht*
 no: number
 Off Cmt: Official Comment to PICC
 OUP: Oxford University Press
 p/pp: page/pages
 PA: *Les Petites Affiches*
 para/paras: paragraph/paragraphs
 PC: Privy Council
 PCC: *Principes Contractuels Communs*
 PECL: Principles of European Contract Law
 PICC: Principles of International Commercial Contracts
 pt: part
 PUAM: *Presses Universitaires d'Aix-Marseille*
 PUF: *Presses Universitaires de France*
 QB: Queen's Bench Division
 R2ndC: Restatement (Second) of Contracts

RDyJ: *Revista de Derecho y Jurisprudencia*
Req: *Chambre de requêtes of the Cour de cassation*
rev: revised
RG: *Reichsgericht*
RGZ: *Entscheidungen des Reichsgerichts in Zivilsachen*
RTDciv: *Revue Trimestrielle de Droit Civil*
RTDcom: *Revue Trimestrielle de Droit Commercial*
s/ss: section/sections
SCR: Supreme Court Reports, Canada
sub-s/sub-ss: subsection/subsections
T: *Tomo* (volume)
tr: translator
UCC: Uniform Commercial Code
UKHL: United Kingdom House of Lords
UN: United Nations
UNIDROIT: International Institute for the Unification of Private Law
UNSWLJ: University of New South Wales Law Journal
US: United States of America
UTCCR: Unfair Terms in Consumer Contracts Regulations
UWOLRev: University of Western Ontario Law Review
vcfp: venire contra factum proprium
vol/vols: volume/volumes
WL: Westlaw Transcripts
WM: *Wertpapiermitteilungen, Zeitschrift für Wirtschafts- und Bankrecht*

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CHAPTER I – INTRODUCTION

The aim of the thesis is to explore precontractual liability for breaking off negotiations and to discover its theoretical basis, offering an analysis which is detached from problematic notions, such as good faith and abuse of rights (which have traditionally been claimed as bases of this liability); finding its basis, instead, in the notion of ‘reliance’. The objective is to contribute to the comparative analysis of this area of liability, removing the hurdles that obstruct the view of the core notion that is operating at its heart. Thus, it will be argued that by shifting the analysis to the notion of reliance, jurisdictions that are currently reticent to acknowledge this liability could embrace and implement it.

I Scope

The scope of this thesis is limited in several aspects. First, the research is focused on finding the doctrinal basis of precontractual liability for breaking off negotiations. Thus, remedies are only dealt with briefly in order to show that they correspond to the reliance basis.

Secondly, the research is limited to the ‘selected jurisdictions’: Germany, France and Chile. Germany and France have been selected because they are, respectively, the leading European jurisdictions of the Germanic and Franco-Roman legal families of the civil law system,¹ and because both have crucially contributed to the development of the doctrine of precontractual liability. Chile has been selected because it is a leading jurisdiction in Latin America which has had a particularly

¹ Hein Kötz, ‘Legal Families’ in Jürgen Basedow and others (eds), *The Max Planck Encyclopedia of European Private Law*, vol II (OUP 2012) 1063.

interesting reception process of this doctrine, taking elements both from the German and the French developments.² Additionally, by selecting Chile, precontractual liability is taken out of its typically European dimension and placed in a more global context, in order to demonstrate the relevance of the topic. English law is analysed as a ‘contrasting jurisdiction’ in that, as opposed to the selected jurisdictions, it does not provide a remedy in what will be called the ‘paradigm case’.³ Harmonisation instruments are only analysed in relation to the reliance-based remedies that they provide.⁴

A third limitation is that the focus of the thesis is on the ‘paradigm case’: where no contract (not even a preliminary one) has been entered into; no preliminary works have been done, but expenses have been incurred; there is no intention to harm; and one party has relied on an expectation of the future conclusion of the contract under negotiation, that the other party has given rise to. The paradigm case has been chosen because it is the scenario where it is most difficult to justify the imposition of liability for breaking off negotiations, even in the selected jurisdictions, as it goes beyond the ‘clear-cut cases’.⁵ At the same time, it is the core case which evidences the operation of reliance. Additionally, it evidences a discord between the selected jurisdictions, on the one hand, and the contrasting jurisdiction, on the other hand, because although the latter does provide relief in some specific situations of broken negotiations, it does not in the paradigm case. Cartwright gives a useful example of the paradigm case: an Englishman who ran a business which he was planning to expand globally and who was looking for international partners entered into

² This ch s III 2 (c) below.

³ Defined in next para.

⁴ Ch V s IV 1 (b).

⁵ Ingeborg Schwenzer, Pascal Hachem and Christopher Kee, *Global Sales and Contract Law* (OUP 2012) 280.

negotiations in this regard with persons from different nationalities whom he met at an international business convention. After intense negotiations, the Englishman told each of the other persons that he was sure that he would be able to enter into a contract with them as soon as they had agreed all the final details. Consequently, each of the other negotiating parties incurred significant expenses in preparation for this new business venture. However, after some time, the Englishman notified each of them that he had found a better partner in their respective countries.⁶

Other case scenarios which can be placed under the label of ‘precontractual liability’ are excluded from the direct scope of this thesis, although they might sometimes be mentioned (particularly the specific scenarios where English law currently provides relief). For instance, ‘sham negotiations’, ie, cases where there is a clear intention to harm or no intention to contract (for example, the defendant never intended to contract but gave the impression that he did, or at some stage during the negotiations lost the intention to contract but did not inform the other party and continued to give the impression that he did intend to contract, or conducted parallel negotiations but pretended that he did not do so).⁷ Also cases which cannot properly be classified as of ‘breaking off’ negotiations, although negotiations might have been broken off (for instance, cases of breach of confidentiality or of breach of information duties); and cases where there is no breaking-off of ‘negotiations’ (for example, revocation of an offer, withdrawal of an acceptance, cases where the precontractual period is regulated by a tender procedure, cases where a valid contract was entered into, and cases of personal harm suffered during negotiations).

⁶ John Cartwright, ‘The English Law of Contract: Time for Review?’ (2009) 17 ERPL 155, also published as John Cartwright, *The English Law of Contract: Time for Review?* (EM Meijers Instituut 2009). Another example is situation 3 in case 7 in John Cartwright and Martijn Hesselink (eds), *Precontractual Liability in European Private Law* (CUP 2008) 192.

⁷ John Cartwright, *Contract Law: An Introduction to the English Law of Contract for the Civil Lawyer* (3rd edn, Hart 2016) 84; eg, cases 1 and 2 in Cartwright and Hesselink (n 6) 21, 64.

Thus, the thesis is limited to situations where one negotiating party breaks off, withdraws from or refuses to continue with negotiations for the conclusion of a contract, excluding negotiations for the conclusion of other types of agreements or instruments. The notion of 'negotiations' is not easy to define as it corresponds to a period that takes place before a contract is entered into where flexibility is required in order to accommodate the different situations that can occur. However, throughout this thesis, negotiations will be understood as referring both to a period that begins when one person approaches another or when they simultaneously approach each other in order to discuss the possible conclusion of a contract, and to the discussions and relationship that forms between the negotiating parties by their exchange of information and communications, with the aim of exploring the possibilities and laying down the conditions under which they would be prepared to contract.

It is important to bear in mind two particular situations which could fit into the factual scenario of the paradigm case, but where there is usually no room for precontractual liability. First, in some cases custom or commercial practices determine who bears the risk of failed negotiations. For instance, regarding the services provided by certain professionals or tradesmen, it might be the local custom that a first estimate or a first consultation is provided free of charge or that certain precontractual work is done at the professional's expense;⁸ and, regarding certain negotiations with or between businesses it might be considered that the costs are already included in the 'general expenditures of the firm'.⁹ Secondly, in some cases

⁸ Ewan McKendrick, 'Work Done in Anticipation of a Contract Which Does Not Materialise' in W R Cornish and others (eds), *Restitution, Past, Present and Future: Essays in Honour of Gareth Jones* (Hart Publishing 1998) 167; editors' comparative observations to case 4 in Cartwright and Hesselink (n 6) 137.

⁹ This view has been particularly prominent in French law, eg, Joanna Schmidt-Szalewski, 'France' in Ewoud H Hondius (ed), *Precontractual Liability: Reports to the XIIIth Congress International Academy of Comparative Law, Montreal, Canada, 18-24 August 1990* (Kluwer Law 1991) 150; see text to (n 581).

(for example M&A transactions between companies) the risk of incurring liability for broken negotiations is usually lower because the negotiating parties are advised by legal counsel and normally enter into preliminary agreements (such as MOUs or letters of intent) where they expressly regulate or exclude liability for precontractual work or expenses.¹⁰ This is not to say that liability can never arise in such situations, but it is more difficult for the requirements of liability to be fulfilled.

There are further limitations on the scope of the thesis. Its focus is on private law contracts, not covering issues of public law or regulatory law (such as contracts with public authorities, public tenders and competition law scenarios). Because the paradigm case is purely precontractual, the thesis does not deal with preliminary agreements, precontracts or preparatory contracts. Additionally, it does not deal with consumer law because the paradigm case is based on negotiations between parties with equal bargaining power. Therefore, the cases mentioned will generally refer to situations of broken negotiations for the conclusion of contracts between businesses or contracts between individuals, ie, the thesis encompasses both commercial and non-commercial contracts but excludes consumer contracts.

II Methodology

The comparative nature of the thesis necessarily calls for a comparative methodology. The methodology used combines elements from Zweigert and Kötz's 'functional

¹⁰ Precontractual agreements are analysed in detail by E Allan Farnsworth, 'Precontractual Liability and Preliminary Agreements: Fair Dealing and Failed Negotiations' (1987) 87 ColumLRev 217, 249ff.

equivalence'¹¹ and from the 'common core method' of the Trento Common Core Project.¹²

The thesis shows that there is a functional equivalence between the selected jurisdictions in that, through different regimes of liability (contractual in the case of Germany and delictual in the case of France and Chile), they provide reliance-based protection in cases of broken negotiations and, particularly, in the paradigm case. However, it also demonstrates that there is only a limited functional equivalence between the selected jurisdictions and the contrasting jurisdiction regarding the specific cases where English law grants relief, and no functional equivalence regarding the paradigm case because English law does not provide relief in such a case. At the same time, the thesis argues that, in the selected jurisdictions, reliance is the common core that explains the rationale for imposing precontractual liability for breaking off negotiations, especially in the paradigm case, and that this notion is perfectly able to explain the reasoning behind the imposition of liability in the particular cases of broken negotiations where English law grants relief. Consequently, reliance has the potential of being the common core of liability also with regard to the contrasting jurisdiction, if it were to embrace the paradigm case on the basis of the protection of reliance.

Nevertheless, it is not the aim of the thesis to argue that the paradigm case should be protected by the contrasting jurisdiction, but only to show that it could be protected through reliance, a notion which is already part of the current solutions provided by this jurisdiction in other precontractual cases. Moreover, like the

¹¹ Konrad Zweigert and Hein Kötz, *Introduction to Comparative Law* (Tony Weir tr, 3rd rev edn, Clarendon Press 1998) ch 3.

¹² Mauro Bussani and Ugo Mattei, 'The Common Core Approach to European Private Law' (1997-1998) 3 *ColumJEurL* 339.

Common Core Project,¹³ this thesis argues neither in favour nor against harmonisation; it shows a tool (in the notion of reliance) that would be useful to achieve some degree of harmonisation in this area.

The thesis is structured in seven chapters. The first and final chapters correspond, respectively, to the Introduction and Conclusions. Each selected jurisdiction is analysed separately in one chapter (second, third and fourth chapters, respectively). In each of these chapters a similar structure is followed, establishing the predominance of the reliance basis over other bases of precontractual liability for breaking off negotiations, analysing the requirements for this liability to arise and the particular situation of negotiations for the conclusion of formal contracts. In each of these chapters comparative observations are made where relevant. However, it is the fifth chapter which brings together the findings of the selected jurisdictions, undertaking a detailed comparative analysis of the reliance approach as to the basis, requirements and remedies of this liability. Finally, the sixth chapter argues that the reliance approach would allow this liability to be implemented in the contrasting jurisdiction if it desired to provide relief in the paradigm case.

III Reliance

1 Notion and dimensions

This thesis does not deal with the theory of reliance which has been put forward as the foundation of the binding force of contracts,¹⁴ but it will show that the notion of reliance applied in the precontractual period has a similar content in that it refers to a

¹³ Bussani and Mattei (n 12) 341.

¹⁴ For details, Hugh Beale and others, *Ius Commune Casebooks for the Common Law of Europe: Cases, Materials and Text on Contract Law* (2nd edn, Hart 2010) 72ff; for an analysis of the 'reliance model' in contrast to the 'exchange model', Hugh Collins, *The Law of Contract* (4th edn, LexisNexis 2003) ch 5.

trust that is placed on an expectation: not that a contract has been concluded, but that a contract will be concluded. The use of ‘reliance’ throughout the thesis is loose and non-technical, except where it is stated otherwise, in order to encompass these notions of trust and expectation, so that this one term (which can be translated as *Vertrauen*, *croyance/confiance*, and *confianza* in the selected jurisdictions) includes all these notions.

The thesis argues that there are two dimensions of reliance in cases of broken negotiations, referring to them as ‘trust-based reliance’ and ‘expectation-based reliance’. The former seeks to highlight the element of trust which exists or should exist between negotiating parties and the latter focuses on a specific expectation in the future conclusion of the contract under negotiation (‘the negotiated contract’). Both dimensions, as well as their interaction, are identified in each selected jurisdiction and in the contrasting jurisdiction and analysed in detail in the comparative chapter.

2 On the origins of the doctrine of precontractual liability

A historical study of this doctrine in the selected jurisdictions is outside the scope of this thesis which focuses on the current state of the law in each jurisdiction. Nevertheless, it is relevant to point out briefly that the notion of reliance has been present from the conception of the doctrine in Germany and France, and, in the case of Chile, to provide a succinct historical account of the reception of the doctrine, particularly in the case of breaking off negotiations.

(a) German law

Von Jhering, in his article on *culpa in contrahendo* (*cic*), published in the second half of the nineteenth century,¹⁵ developed his theory of fault in contracting, drawing inspiration from Roman law. He applied his theory in certain situations of null contracts, and in certain cases of contracts that were not finally concluded due the withdrawal or the expiry of the offer. According to his theory, with the emission of an offer an obligation of *diligentia in contrahendo* arises, an obligation which does not disappear if the contract is afterwards declared null or turns out to not have been concluded. Consequently, a party who breaches this obligation is liable in contract to the other party who has suffered losses by legitimately relying on the validity or conclusion of the contract. The measure of liability is the ‘negative contractual interest’ which seeks to place the claimant in the position he would have been in if he had not relied on the null contract, and includes the compensation of expenses and lost opportunities to contract with other persons.¹⁶ It can be seen that the protection of reliance ‘placed on the mere semblance of a contract’¹⁷ is at the heart of Jhering’s

¹⁵ Rudolf von Jhering, ‘*Culpa in contrahendo, oder Schadensersatz bei nichtigen oder nicht zur Perfektion gelangten Verträgen*’ (1861) 4 *Jahrbücher für die Dogmatik des heutigen römischen und deutschen Privatrechts* 1; translated into French by O de Meulenaere, ‘*De la culpa in contrahendo ou des dommages-intérêts dans les conventions nulles ou imparfaites*’ (1893) II *Oeuvres choisies* 1. The author has had access to a translation into Portuguese, Rudolf von Jhering, *Culpa in contrahendo ou Indemnização em Contratos Nulos ou Não Chegados à Perfeição* (Paulo Mota Pinto tr, Almedina 2008).

¹⁶ In contrast to the ‘negative contractual interest’ is the ‘positive contractual interest’ which seeks to place the claimant in the position he would have been in if the contract had been valid. These categories must not be confused with those of *damnum emergens* and *lucrum cessans*, respectively; Catalina Salgado Ramírez, ‘Breve Introducción a la Responsabilidad Precontractual en la Teoría de Rudolf von Jhering’ in Emilssen González de Cancino, Édgar Cortés Moncayo and Felipe Navia Arroyo (eds), *Estudios de Derecho Civil en Memoria de Fernando Hinestrosa*, vol I (Universidad Externado de Colombia 2014) 748-750. See text to (n 1123).

¹⁷ Reinhard Zimmermann, *Roman Law, Contemporary Law, European Law: The Civilian Tradition Today* (OUP 2001) 88.

theory.¹⁸ It is also important to note that his theory did not consider liability for broken negotiations.¹⁹

The drafters of the German Civil Code (BGB) took up Jhering's idea of compensating the reliance interest in the case of null contracts in several specific provisions,²⁰ but not as a general principle. However, academic writers and the courts developed and expanded Jhering's theory of *cic*²¹ and, through the principle of good faith,²² were able to provide a legal basis²³ for new cases of *cic*, such as the breaking-off of negotiations (where the protection of reliance remained a core element).²⁴

(b) French law

Saleilles, in his article on precontractual liability, published at the beginning of the twentieth century,²⁵ approved of Faggella's²⁶ novel proposition that negotiations have legal value and that breaking them off can lead to precontractual liability. He

¹⁸ Reliance is referred to as *confianza* in Salgado Ramírez (n 16) especially 747 fn 85.

¹⁹ *Ius Commune* (n 14) 371.

²⁰ §§122, 179(2), 307, 309 BGB. The latter two examples disappeared with the 2001 reform of the BGB, see (n 76).

²¹ For an analysis of this evolution, Zimmermann (n 17) 88-92; Alfredo Mordechai Rabello, 'The Theory Concerning Culpa in Contrahendo Precontractual Liability: From Roman Law to the German Legal System - A Hundred Years After the Death of Jhering' in Alfredo Mordechai Rabello (ed), *European Legal Traditions and Israel* (Harry and Michael Sacher Institute for Legislative Research and Comparative Law, Hebrew University of Jerusalem 1994) 142-144; Clara Asúa González, *La Culpa in Contrahendo: Tratamiento en el Derecho Alemán y Presencia en Otros Ordenamientos* (Universidad del País Vasco 1989) 40-52.

²² Sylviane Colombo, 'The Implications of Good Faith in Culpa in Contrahendo' (JSD thesis, Yale Law School 1990) 98-100.

²³ §242 BGB, see text to (n 209).

²⁴ Ch II s II 1.

²⁵ Raymond Saleilles, 'De la Responsabilité Précontractuelle à propos d'une Étude Nouvelle sur la Matière' (1907) 6 RTDCiv 697.

²⁶ Gabriele Faggella, 'Dei Periodi Precontrattuali e della loro Vera ed Esatta Costruzione Scientifica' in *Studi Giuridici in Onore di Carlo Fadda*, vol III (1906). His work considerably influenced the French and Latin American developments of precontractual liability: Ewoud H Hondius, 'General Report' in Ewoud H Hondius (ed), *Precontractual Liability: Reports to the XIIIth Congress International Academy of Comparative Law, Montreal, Canada, 18-24 August 1990* (Kluwer Law 1991) 5.

explained that Faggella rejected Jhering's theory of *cic* in that he considered that this liability did not rest on the notion of fault but on a guarantee implied by a voluntary assent.²⁷ Following Faggella, he argued that 'the fact alone that one has consented to negotiate requires each of the two parties to act in accordance with commercial equity and good faith',²⁸ and that this consent gives rise to an expectation (*attente*) and security (*sécurité*) which an arbitrary withdrawal from negotiations destroys. Therefore, equity demands that the party who has frustrated the legitimate assurances (*assurances légitimes*) to which he has given rise, be liable for the loss caused; loss which is restricted to the expenses incurred on the basis of the previous consent to negotiate. Saleilles followed Fagella in rejecting Jhering's negative contractual interest as the measure of liability in this stage of the precontractual period.²⁹

Saleilles' theory encompassed expectation-based reliance in the destruction of a legitimate expectation, and trust-based reliance in the *confiance* placed on the other party when entering a business relationship with him.³⁰

(c) Chilean law

Chilean 'civil law' (*Derecho Civil*)³¹ was codified in the mid-nineteenth century in the *Código Civil* (enacted in 1855 and in force since 1857).³² The author of the Chilean

²⁷ Saleilles (n 25) 725.

²⁸ Saleilles (n 25) 718, as translated by Arthur von Mehren, 'The Formation of Contracts' in *International Encyclopedia of Comparative Law*, vol VII (JCB Mohr (Paul Siebeck) and Martinus Nijhoff Publishers 1992) ch 9, 65.

²⁹ Saleilles (n 25) 722-724, 735.

³⁰ Saleilles (n 25) 735, 741.

³¹ An area of private law which covers a variety of subjects, ranging from obligations, legal acts and contracts to delictual liability, property law, succession law, family law and the person as a subject of law.

³² For a detailed account of its codification, Alejandro Guzmán Brito, *Andrés Bello Codificador: Historia de la Fijación y Codificación del Derecho Civil en Chile* vol I (Ediciones de la Universidad de Chile 1982). For a brief analysis, Jan Kleinheisterkamp, 'Latin America, Influence of European Private Law' in Jürgen Basedow and others (eds), *The Max Planck Encyclopedia of European Private Law*, vol II (OUP 2012) 1033.

Civil Code (CCivCh), Andrés Bello, took a Roman law based approach in structuring and drafting the Code which, consequently, belongs to the Roman legal tradition.³³ He relied on different sources, amongst which the French *Code civil* (Cciv) had great influence, particularly with regard to the law of obligations, and he also drew inspiration from French legal scholars (especially Pothier).³⁴ Therefore, Chilean civil law is considered to belong to the Franco-Roman legal tradition.³⁵ This explains why, since its codification, *la jurisprudencia*³⁶ and *la doctrina*³⁷ looked towards French law in order to interpret and develop Chilean civil law.³⁸ The influence of French law and other relevant European jurisdictions, such as German law, continued after the codification.

A particular example is the reception by Chilean civil law of the doctrine of precontractual liability.³⁹ The Chilean Civil Code was enacted before the publication

³³ Guzmán Brito (n 32) 421.

³⁴ Guzmán Brito (n 32) 422-424. Other important sources were, eg, the *Siete Partidas* and the *Corpus Iuris Civilis*, *ibid* 415. A German influence is found in the real estate registration system introduced by the CCivCh: Rodrigo Barcia Lehmann, 'La Influencia del *Code Civil* y del Derecho Alemán en el Sistema Patrimonial Chileno: Sistema de Derechos Reales y Personales' in Juan Andrés Varas Braun and others (eds), *Estudios de Derecho Civil: Jornadas Nacionales de Derecho Civil 2005-2009*, vol I (Abeledo Perrot Legal Publishing Chile 2011) 450.

³⁵ Arturo Alessandri, Manuel Somarriva and Antonio Vodanovic, *Tratado de Derecho Civil: Partes Preliminar y General*, vol I (7th edn, Editorial Jurídica de Chile 2005) 94.

³⁶ Case law is not a source of law, although a particular judicial decision is binding on the individual parties to the dispute (art 3(2) CCivCh). There is no doctrine of *stare decisis* but the lower courts tend to follow the decisions of the higher courts (Courts of Appeal and Supreme Court), particularly when the judgments of the latter set a particular trend.

³⁷ The thinking of legal scholars (Chilean and foreigners) expressed in their writings have a relevant role in the Chilean legal system because, although they are not a source of law, they are often cited in judicial filings and judgments. This will be evidenced throughout Ch IV.

³⁸ Mauricio Tapia Rodríguez, *Código Civil 1855-2005: Evolución y Perspectivas* (Editorial Jurídica de Chile 2005) 29-30; Ramón Domínguez Águila, 'La Influencia de la Doctrina Francesa en el Derecho Chileno' in Carlos Pizarro Wilson and Mauricio Tapia Rodríguez (eds), *Cuadernos de Análisis Jurídicos, Colección Derecho Privado II: De la Codificación a la Descodificación* (Ediciones Universidad Diego Portales 2005).

³⁹ A Chilean legal scholar who, despite being critical of the import into Chilean law of foreign notions that have originated under the specific characteristics of foreign legal systems, recognises that precontractual liability is an example of the reception phenomenon is Pedro Pablo Vergara Varas, 'La Responsabilidad Precontractual: Un Necesario Desvarío para Enfrentar la Cultura del Litigio' in Hugo Fábrega Vega (ed), *Estudios Jurídicos en Homenaje*

in Germany of Jhering's article on *cic* (in 1861) and, consequently, the doctrine of *cic* could not have been included in it. However, an article of the CCivCh that deals with defects of consent has been interpreted as establishing precontractual liability in the case of an invalid contract due to mistake regarding the person with whom one intended to contract.⁴⁰ Another article of the CCivCh (relating to the invalidity of a contract of sale of a nonexistent thing) has also been interpreted as giving rise to precontractual liability.⁴¹ The Chilean Commercial Code (CComCh) (enacted in 1865 and in force since 1867) did not include the specific situations of *cic* conceived by Jhering,⁴² but a renowned Chilean legal scholar⁴³ saw in two articles of this Code (establishing liability of the offeror for revocation of his offer and liability of the offeror for failure to give prompt notice to the offeree of his late acceptance) a confirmation of the theory of *cic*.⁴⁴

A landmark in the reception of precontractual liability for breaking off negotiations was the publication in 1908 of a translation into Spanish of Saleilles'

a los Profesores Fernando Fueyo Laneri, Avelino León Hurtado, Francisco Merino Scheihing, Fernando Mujica Bezanilla, Hugo Rosende Subiabre (Ediciones Universidad del Desarrollo 2007) 118.

⁴⁰ art 1455(2) ('But in this case the person with whom a contract has been entered into by mistake will have the right to be compensated for the losses it suffered in good faith due to the annulment of the contract'); eg, Luis Claro Solar, *Explicaciones de Derecho Civil Chileno y Comparado*, vol XI De las Obligaciones II (Imprenta Nascimento 1937) 180; Augusto Fuentes de la Sotta, 'La Responsabilidad por el Hecho de Otro en Materia Contractual' (Licenciado en Ciencias Jurídicas thesis, Universidad de Chile 1938) 43-45; Arturo Alessandri Rodríguez, *De los Contratos* (reprint 1993 1st edn, Editorial Jurídica de Chile 2004) 156; against, Orlando Tapia Suárez, 'De la Responsabilidad Civil en General y de la Responsabilidad Delictual entre los Contratantes' (Licenciado en Ciencias Jurídicas thesis, Universidad de Concepción 1941) 411.

⁴¹ art 1814(3) ('A person who knowingly sold a thing that did not exist in the whole or in a considerable part will compensate the losses to the buyer in good faith'); eg, Fuentes (n 40) 43, 45; Alessandri Rodríguez (n 40) 156; Carlos Ducci, *Derecho Civil: Parte General* (4th edn, Editorial Jurídica de Chile 2005) 256; against, Tapia Suárez (n 40) 413.

⁴² See (a) above.

⁴³ Claro Solar (n 40) 532-533 fn 145.

⁴⁴ Respectively, art 100(1) ('The effective revocation imposes on the offeror the obligation to compensate the expenses incurred by the person to whom the offer was directed at, and the losses that that person suffered') and art 98(3) ('In case of late acceptance, the offeror is obliged, under liability for damages, to give prompt notice of his withdrawal').

article on precontractual liability⁴⁵ in the most authoritative Chilean law journal (which regularly published translations of French articles first published in the *Revue Trimestrielle de Droit Civil*).⁴⁶ In the 1930s two theses from the Universidad de Chile were published where this liability was analysed. In both there is a clear influence of Saleilles' doctrine of *responsabilité précontractuelle*⁴⁷ and the notion of *confianza* is used to justify the imposition of liability. One thesis argued that the sole act of entering into negotiations with another person instils in that person a *confianza* that the negotiations will continue until the preparation of a non-binding draft of the contract and that, if the other party breaks off, he is responsible for having misled such *confianza*.⁴⁸ The other thesis argued that the liability that can arise before the emission of an offer is born from commercial equity and involves the compensation of the losses caused by the *confianza* or security in the conclusion of a contract.⁴⁹

A judgment dated 25 August 1948 seems to be the first in Chile to refer to precontractual liability,⁵⁰ defining it as:

⁴⁵ (n 25). Earlier, a thesis from the Universidad de Chile recognised the notion of *cic* regarding invalid contracts (citing examples from the BGB) and considered it to be a type of contractual fault, Rafael Cañas O'Rian, 'De la Culpa Civil' (Licenciado en la Facultad de Leyes thesis, Universidad de Chile 1904) 8-10.

⁴⁶ Raymond Saleilles, 'De la Responsabilidad Precontractual a propósito de un Estudio sobre la Materia' (1908) V *Revista de Derecho y Jurisprudencia* 127.

⁴⁷ See (b) above.

⁴⁸ Sara Eiler, *De la Formación del Consentimiento en los Contratos* (Editorial Nascimento 1935) 72.

⁴⁹ Manuel Risueño, *De las Obligaciones Precontractuales* (Soc Imp y Lito Universo 1933) 60.

⁵⁰ CA Santiago, *Caja de Crédito Popular con Schiavetti viuda de Maino*, RDyJ, T 46, 1949, Second Part, Second Section; p 175 below.

[A]ccording to legal scholars it is such that is born from commercial equity, that has the effect of having to indemnify the losses caused by the trust [*confianza*] in the formation of the contract, or by the withdrawal of the offer to conclude the proposed contract, violating the security provided that the contract was to come into effect (...)

Despite this initial recognition of liability for breaking off negotiations, some Chilean authors rejected it,⁵¹ or only accepted that there could be liability if a delict was committed during negotiations, or only gave room to precontractual liability in the cases regulated in the Commercial Code or in the invalidity cases of the Civil Code.⁵² Others, however, recognised that, at least theoretically, liability could arise in the negotiations that preceded an offer,⁵³ particularly for breaking them off.⁵⁴

The next milestone in the reception process was a book published in 1979,⁵⁵ where the author recognised that breaking off negotiations is a trigger for precontractual liability if there is negligence or fraud, and where the works of Jhering, Faggella and Saleilles (among other German, Italian and French legal scholars) were analysed. The author did not refer to *confianza* as the basis of this liability but rather

⁵¹ eg, Hernán Larraín Ríos, *Lecciones de Derecho Civil* (Editorial Jurídica de Chile 1994) 257.

⁵² p 13 above; eg, Tapia Suárez (n 40) 365-366, 411; Fuentes (n 40) 43; Avelino León Hurtado, *La Voluntad y la Capacidad en los Actos Jurídicos* (4th edn, Editorial Jurídica de Chile 1991) 58, 60; Alessandri Rodríguez (n 40) 156-159.

⁵³ Raúl Varela, *Derecho Comercial: Obligaciones y Contratos*, vol III (Editorial Universitaria SA 1966) 8-9.

⁵⁴ Mario Rossel, 'La Indemnización de Perjuicios en la Formación del Consentimiento y en el Contrato de Transporte Terrestre' (Licenciado en Ciencias Jurídicas y Sociales thesis, Universidad de Chile 1966) 28ff, following Faggella and Saleilles, but concluding that because Chilean legislation does not expressly recognise this liability, it cannot arise in Chilean law.

⁵⁵ Hugo Rosende Álvarez, *Algunas Consideraciones sobre la Responsabilidad Precontractual* (Ediciones Universitarias de Valparaíso 1979), with a prologue by the renowned Chilean professor Fernando Fueyo.

to the breach of a duty of good faith.⁵⁶ In a 1990 judgment the Court of Appeal of Santiago referred to this book as the classic work on the subject.⁵⁷

From the mid-nineties onwards an increasing number of judgments referred to precontractual liability for breaking off negotiations and several specialized books, articles and case notes were published on precontractual liability in general and on breaking off negotiations in particular. These will be referred to in the Chilean law chapter where the continued reception of European ideas, particularly French and German, will be highlighted.⁵⁸ For now, it suffices to say that the notion of *confianza* has been increasingly used to explain this liability.⁵⁹

IV Freedom and liability

Before analysing the selected jurisdictions and the contrasting jurisdiction, it is important to understand that they all have the same starting point but reach a different outcome with regard to the paradigm case.

They all start from the same guiding principle: freedom of contract or, rather, a negative freedom of contract (‘freedom from contract’)⁶⁰ which leads to freedom to break off negotiations.⁶¹ In each of the selected jurisdictions it is possible to say that the principle of good faith tempers this freedom and, consequently, that a party who

⁵⁶ Rosende (n 55) 79.

⁵⁷ 27 June 1990, *Sociedad Industrial y Comercial Fabril Maderera Patagonia Ltda con Ministro de Bienes Nacionales*, Gaceta Jurídica 1990 no 121.

⁵⁸ Ch IV s I.

⁵⁹ Ch IV s II 1.

⁶⁰ Nili Cohen, ‘Pre-Contractual Duties: Two Freedoms and the Contract to Negotiate’ in J Beatson and Daniel Friedmann (eds), *Good Faith and Fault in Contract Law* (Clarendon Press 1995) 27.

⁶¹ In Germany, Basil Markesinis, Hannes Unberath and Angus Johnston, *The German Law of Contract: A Comparative Treatise* (2nd edn, Hart 2006) 99; in France, new art 1112 Cciv; in Chile, Enrique Barros Bourie, *Tratado de Responsabilidad Extracontractual* (Editorial Jurídica de Chile 2006) 1008; in English law, H G Beale (ed) *Chitty on Contracts*, vol I (32nd edn, Sweet & Maxwell / Thomson Reuters 2015) 327.

breaks off negotiations may be held liable.⁶² It appears that the division between the selected jurisdictions, on the one hand, and the contrasting jurisdiction, on the other hand, begins here, because the latter does not recognise a general principle of good faith.⁶³ This thesis will argue, however, that the recognition (or not) of a principle of good faith does not necessarily have to influence the recognition of precontractual liability, ie, that this liability can be detached from good faith and can operate in a system, like the contrasting jurisdiction, that only recognises good faith in particular situations.

It is important to bear in mind several points. First, in the selected jurisdictions liability for breaking off negotiations is only imposed in exceptional circumstances,⁶⁴ and the imposition of liability in the paradigm case is subject to exacting requirements precisely because it is the case scenario where it is most difficult to justify the granting of relief.⁶⁵ At the same time, it is the case which best evidences the balance that must be found between the freedom to break off and the protection of reliance.⁶⁶ This leads to a second point, which is that, unless one is bound by contract or by law to enter into a contract, the freedom not to contract always remains. Thus, the freedom to break off negotiations also always remains. In the selected jurisdictions, the question raised by precontractual liability for breaking off negotiations does not relate to whether one party can be forced to enter into a contract he does not want, but to whether compensation can be sought by the other party. Although the argument can be made that imposing liability on the party that breaks off forces him, to some extent,

⁶² Schwenzer, Hachem and Kee (n 5) 280.

⁶³ p 260 below.

⁶⁴ *Ius Commune* (n 14) 381.

⁶⁵ Text to (n 5).

⁶⁶ Similarly, Schwenzer, Hachem and Kee (n 5) 280.

to decide to contract rather than pay damages, there is little to support it. This leads to a third point, that the extent of the compensation is limited and does not correspond to the protection of the interest in the benefits that the contract would have produced but to the protection of the interest of the party that has relied on an expectation generated by the other party.⁶⁷

This thesis will show that if these points are kept in mind, the reservations that jurisdictions, such as the contrasting one, have towards precontractual liability for breaking off negotiations, particularly in the paradigm case, might be overcome.

⁶⁷

Ch V s IV.

CHAPTER II - RELIANCE IN THE BREAKING-OFF OF NEGOTIATIONS IN GERMAN LAW

According to the theory of *cic*,⁶⁸ from the moment that negotiating parties enter into contractual negotiations, a special relationship (*Sonderrechtsverhältnis*) arises between them by virtue of the law which imposes on both parties duties of protection and loyalty (*Schutzpflichten*).⁶⁹ The culpable violation of these duties may give rise to liability for *cic* which is governed by the rules of contractual liability (§§276ff BGB).⁷⁰ In the current German legal scholarship, the notion of precontractual liability imposed by law is rationalised as a reliance-based ‘relationship of obligation’ imposed by law (*gesetzliches Schuldverhältnis*).⁷¹ The reliance basis of the doctrine of precontractual liability has also been recognised by the courts. For instance, the *Bundesgerichtshof* has stated that this doctrine is ultimately based upon ‘reliance that does not materialize’ (*enttäushtes Vertrauen*).⁷² The idea underlying the judgments that refer to *cic* liability in its different groups of cases is that of a general duty to answer for the disappointed trust (*enttäushtes Vertrauen*) of others in the valid conclusion of a contract.⁷³ Indeed, in cases of liability for breaking off negotiations there is an expectation as to the future conclusion of a contract that has been

⁶⁸ Ch I s III 2 (a).

⁶⁹ Stephan Lorenz and Wolfgang Vogelsang, case 1, in Cartwright and Hesselink (n 6) 33; *Ius Commune* (n 14) 374; BGH, 16 March 1954, LM §276 BGB (Fa) no 3, translated extract in von Mehren (n 28) para 121.

⁷⁰ *Ius Commune* (n 14) 374, 384-385; Lorenz and Vogelsang, case 1, in Cartwright and Hesselink (n 6) 33.

⁷¹ MUJ (n 61) 92, 119.

⁷² BGH, 12 December 1980, NJW 1981, 1036, as quoted by Werner F Ebke, ‘Federal Republic of Germany’ in ICC (ed), *Formation of Contracts and Precontractual Liability* (ICC Publishing 1990) 48 fn 18.

⁷³ Dário Moura Vicente, *Da Responsabilidade Pré-Contratual em Direito Internacional Privado* (Almedina 2001) 250, 336.

disappointed.⁷⁴ Some authors have gone as far as to conceive *cic* as a possible ground of ‘reliance liability’ (*Vertrauenshaftung*) which would be a ‘third way’ (*dritte Spur*) between contract and delict.⁷⁵

Although the principles of *cic* were codified in 2001⁷⁶ (‘the 2001 reform’) and, consequently, precontractual liability now has a statutory basis in German law (§§241(2), 280(1), 311(2)(3) BGB), these paragraphs must be interpreted in relation to the case law which preceded the 2001 reform as, with the codification of these provisions, the legislator intended neither to change the rules of *cic* that had been previously developed by the courts nor to impede their further development by future case law.⁷⁷ These paragraphs state:

⁷⁴ eg, BGH, 14 July 1967, LM §276 BGB (Fa) no 23, translated extract in Arthur von Mehren and James Gordley, *The Civil Law System: An Introduction to the Comparative Study of Law* (2d edn, Little, Brown and Company 1977) 842; BGH, 22 February 1989, NJW-RR 1989, 627 (*The newspaper* case), translation in James Gordley and Arthur von Mehren, *An Introduction to the Comparative Study of Private Law: Readings, Cases, Materials* (CUP 2006) 444-447.

⁷⁵ Canaris, ‘Ansprüche wegen “positiver Vertragsverletzung” und “Schutzwirkung für Dritte” bei nichtigen Verträgen’ [1965] JZ 475, as cited by Moura Vicente (n 73) 337; text to (n 132).

⁷⁶ Modernization of the Law of Obligations Act of 26 November 2001, which entered into force on 1 January 2002; Reinhard Zimmermann, *The New German Law of Obligations: Historical and Comparative Perspectives* (OUP 2005) 1.

⁷⁷ Lorenz and Vogelsang, case 1, in Cartwright and Hesselink (n 6) 34; MUJ (n 61) 93; Zimmermann, *The New German Law* (n 76) 3; Clara Asúa González and José Javier Hualde Sánchez, ‘Codificación de la *Culpa in Contrahendo* en el Derecho Alemán’ in Antonio Cabanillas Sánchez and others (eds), *Estudios Jurídicos en Homenaje al Profesor Luis Díez-Picazo*, vol II (Thomson Civitas 2003) 1418.

§311: Obligations created by legal transaction and similar obligations (2) An obligation with duties in accordance with §241(2) also arises as a result of 1. entry into contractual negotiations, 2. preparations undertaken with a view to creating a contractual relationship if one party permits the other party to affect his rights, his legally protected interest or other interests or entrusts them to that party, or 3. similar business contact. (3) An obligation with duties under §241(2) may also come into existence in relation to persons who are not themselves intended to be parties to the contract. Such an obligation comes into existence in particular if the third party, by laying claim to being given a particularly high degree of trust, substantially influences the pre-contract negotiations or the entering into of the contract.

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

§280: Damages for breach of duty (1) If the obligor breaches a duty arising from the obligation, the obligee may demand damages for the damage caused thereby. This does not apply if the obligor is not responsible for the breach of duty.⁷⁸

From the outset, it is possible to see that the notion of *Vertrauen*, which can be translated as trust or reliance, has a paramount place in the German view of precontractual liability and particularly in the breaking-off of negotiations. The extent of the role it plays and its interaction with other well-known doctrines of the German legal system will be analysed below. The chapter will begin by looking at the precontractual relationship (which is a relationship of reliance) and the precontractual duties that emanate from it (section I). It will continue with the analysis of the requirements of precontractual liability for breaking off negotiations, focusing on the reliance element (section II). It will argue that reliance (*Vertrauen*) is the theoretical basis of this liability, although the chapter will also explore other theoretical bases which have been put forward, particularly good faith and *venire contra factum proprium* (section III). The chapter will finally analyse the distinct situation of

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Translations from *Ius Commune* (n 14) 374, 835 and from the German Federal Ministry of Justice website http://www.gesetze-im-internet.de/englisch_bgb/.

breaking off negotiations for the conclusion of a formal contract and lack of formality cases, as these are some of the most controversial cases in this area and also have a strong reliance element (section IV). The chapter will argue that reliance is the key element for there to be *cic* liability for breaking off negotiations in German law.

I The precontractual relationship and precontractual duties

What has been described as a ‘special relationship of trust’ arises when negotiating parties start to negotiate and which requires them to consider each other’s interests.⁷⁹ This relationship imposes on each negotiating party special duties of care, the negligent violation of which can lead to precontractual liability.⁸⁰ The reliance basis of this relationship and the duties that it entails regarding the breaking-off of negotiations will be analysed below.

1 The precontractual relationship

Even before the 2001 reform, the courts had already developed the idea that the beginning of contractual negotiations led to the creation of a contract-like relationship of trust (*vertragsähnliches Vertrauensverhältnis*), from which mutual protective obligations originate.⁸¹

For example, the *Reichsgericht*, in a 1928 judgment, stated that:

the courts, (...), have recognized that the stage of contractual negotiations, even when they do not lead to the conclusion of a contract, engender a relationship of trust between the parties similar to

⁷⁹ Hein Kötz, *European Contract Law Vol 1: Formation, Validity, and Content of Contracts; Contract and Third Parties* (Tony Weir tr, Clarendon Press 1997) 35.

⁸⁰ BS Markesinis, Werner Lorenz and Gerhard Dannemann, *The German Law of Obligations, Volume I The Law of Contracts and Restitution: A Comparative Introduction* (Clarendon Press 1997) 64.

⁸¹ Peer Zumbansen, ‘The Law of Contracts’ in Mathias Reimann and Joachim Zekoll (eds), *Introduction to German Law* (2nd edn, Kluwer Law International 2005) 196.

that arising from a contract, so that the parties are required to observe the customary standard of care.⁸²

Along the same lines and in an emblematic case dealing with the breaking-off of negotiations, the *Bundesgerichtshof* held, in a 1970 judgment, that even at the stage of negotiations for the conclusion of a contract, negotiating parties owe each other a duty to have reasonable regard for the legitimate interests of the other party, in view of the relationship of trust created by the negotiations, which is analogous to that existing in a contractual relationship.⁸³ Later on, the *Bundesgerichtshof* stated that precontractual liability ultimately results from a ‘relationship of mutual trust and confidence’ (*gegenseitiges Vertrauensverhältnis*).⁸⁴ The relevance of the existence of a relationship of trust and confidence in the precontractual stage for the configuration of precontractual liability in German law, was noticed by comparative legal scholars at the early stages of the development of the theory. For example, in the sixties, Kessler and Fine wrote that ‘Once parties enter into negotiations for a contract, the sweeping language of the cases informs us, a relationship of trust and confidence comes into existence, irrespective of whether they succeed or fail’.⁸⁵ More recent legal scholars have reaffirmed this finding.⁸⁶

⁸² RG, 1 March 1928, RGZ 120, 249, 251, translated extract in Arthur von Mehren, *The Civil Law System: Cases and Materials for the Comparative Study of Law* (Prentice-Hall 1957) 491.

⁸³ BGH, 10 July 1970, NJW 1970, 1840 (*The letter case*), translation in *Ius Commune* (n 14) 383-384. BGH 14 July 1967 (n 74) also refers to a ‘contract-like relationship of trust’.

⁸⁴ BGH, 12 November 1986, BGHZ 99, 101, quoted by Ebke (n 72) 39, 48 fn 18.

⁸⁵ Friedrich Kessler and Edith Fine, ‘Culpa in Contrahendo, Bargaining in Good Faith, and Freedom of Contract: A Comparative Study’ (1964) 77 HarvLRev 401, 404; eg, BGH, 20 June 1952, BGHZ 6, 330, translation in MUJ (n 61) 607-609; RG 1 March 1928 (n 82); RG, 28 November 1923, RGZ 107, 357, 360-63; RG, 5 April 1922, RGZ 104, 265; RG, 24 September 1918, RGZ 95, 58, 60-61.

⁸⁶ eg, Nigel Foster and Satish Sule, *German Legal System and Laws* (4th edn, OUP 2010) 471; Bertrand de Coninck, ‘Le Droit Commun de la Rupture des Négociations Précontractuelles’ in Marcel Fontaine (ed), *Le Processus de Formation du Contrat: Contributions Comparatives et Interdisciplinaires à L’Harmonisation du Droit Européen* (Bruylant LGDJ 2002) 54; Mordechai Rabello (n 21) 144; Ebke (n 72) 39.

Although this relationship is often referred to as ‘of trust and confidence’, the content of these notions sometimes varies regarding their orientation. Generally, the object of the trust and confidence is that each of the negotiating parties is able to rely on the fact that the other party will not violate the duties that arise from the precontractual relationship.⁸⁷ Here, the trust dimension of reliance is evidenced in that the negotiating parties place trust or confidence on each other (on their persons) and on their conduct throughout the negotiations. Although they are not yet bound by a contract, they are not complete strangers;⁸⁸ they are involved in a relationship that entitles them to rely on one another and imposes duties on each of them as to their conduct during the negotiations, particularly the duty to take each other’s interests into account. In this way, Larenz stated that the mere fact of beginning negotiations gives rise to special duties of care and consideration between the parties; an expectation of honest treatment (*Redlichkeitserwartung*) arises and this expectation deserves protection by the legal order as, without it, smooth commercial intercourse (*ein reibungsloser Geschäftsverkehr*) would be impossible.⁸⁹ However, the expectation dimension of reliance is also present in that, because a relationship of trust and confidence exists between the negotiating parties, one party is liable if he negligently created the expectation in the other that a contract would be concluded, although he knew or should have known that the expectation could not be realised.⁹⁰

It is important to understand that this idea of a relationship forming between the negotiating parties from the moment that they enter into negotiations is necessary

⁸⁷ Asúa (n 21) 61, 62.

⁸⁸ Asúa (n 21) 62.

⁸⁹ Larenz, *Lehrbuch des Schuldrechts*, vol I Allgemeiner Teil (13th edn, 1982) §9 I p 101, as cited by von Mehren, ‘Formation’ (n 28) para 122.

⁹⁰ Kessler and Fine (n 85) 404; eg, RG, 19 January 1934, RGZ 143, 219, English translation in Gordley and von Mehren (n 74) 443-444.

in German law in order to bring the precontractual stage closer to the contractual sphere and, thus, be able to sustain that precontractual liability is governed by the rules of contractual relations.⁹¹ It was established early on that this liability cannot be governed by the law of delict.⁹²

The German law of delict presents certain characteristics that have been described as ‘inadequacies’, ‘shortcomings’ or ‘weaknesses’.⁹³ A first weakness, which is decisive in the scenario of *cic* liability for broken negotiations, is that pure economic loss (which is the type of loss generally caused in situations of liability for broken negotiations) is not recoverable (§823(1) BGB) unless the damage is caused wilfully and in a manner contrary to public policy (§826 BGB). Therefore, wasted expenditure and foregone opportunities caused in cases of liability for broken negotiations will not generally be recoverable in delict.⁹⁴ A second shortcoming of the German law of delict, which is decisive in *cic* liability for personal injury cases, is that there is no real vicarious liability, as §831(1) BGB allows the employer to exonerate himself from liability by showing that he carefully selected and supervised his employee, whereas, in contract, §278 BGB imputes the negligence of the employee to the employer without the possibility of exoneration for the latter.⁹⁵ The contractual regime presents a further advantage in that it shifts the burden of proof to

⁹¹ p 9 above.

⁹² Asúa (n 21) 37; Béatrice Jaluzot, *La Bonne Foi dans les Contrats: Étude Comparative des Droit Français, Allemand et Japonais* (Dalloz 2001) 529.

⁹³ Jan Peter Schmidt, ‘Sentencias famosas: Alemania. Sobre el caso de los “rollos de linóleo”’ (2013) 24 *Revista de Derecho Privado Universidad Externado de Colombia* 329; Jan von Hein, ‘Culpa in Contrahendo’ in Jürgen Basedow and others (eds), *The Max Planck Encyclopedia of European Private Law*, vol I (OUP 2012) 430; *Ius Commune* (n 14) 385; Basil S Markesinis and Hannes Unberath, *The German Law of Torts: A Comparative Treatise* (4th edn, Hart Publishing 2002) 59; Werner Lorenz, ‘Germany’ in Ewoud H Hondius (ed), *Precontractual Liability: Reports to the XIIIth Congress International Academy of Comparative Law, Montreal, Canada, 18-24 August 1990* (Kluwer Law 1991) 163; Ebke (n 72) 42; Kessler and Fine (n 85) 406.

⁹⁴ von Mehren, ‘Formation’ (n 28) para 121.

⁹⁵ MUJ (n 61) 95, 450.

the defendant in respect of the presence of fault,⁹⁶ or rather in respect of the absence of fault, as §280(1) second sentence BGB⁹⁷ imposes liability for presumed fault, which means that it is for the debtor to show that he has not been at fault in order to escape liability.⁹⁸

Consequently, the more favourable contractual regime⁹⁹ was an important incentive for the German courts to establish the existence of a relationship of mutual trust between the negotiating parties, similar to a contractual relationship, in order to apply the contractual regime to cases of *cic*.¹⁰⁰ The need to resort to the notion of a contract-like relationship between negotiating parties is not present in jurisdictions such as France and Chile, which, unlike German law, have a general principle of delictual liability covering situations of pure economic loss.¹⁰¹

2 Precontractual duties

The 2001 reform codified the judge-made law concept of *cic* developed from the principle of reliance; particularly in §241(2) BGB, where it established the previously implied duty to take account of the rights, legal interests and other interests of the other party, and in §311(2)(3) BGB, where it provided that this duty also arises out of

⁹⁶ von Hein (n 93) 431.

⁹⁷ Text to (n 78).

⁹⁸ MUJ (n 61) 446; Peter Huber, 'Contract Formation and Non-Performance in German Law' in Reiner Schulze and Fryderyk Zoll (eds), *The Law of Obligations in Europe: A New Wave of Codifications* (Sellier 2013) 202.

⁹⁹ MUJ (n 61) 96, point out that there used to be another advantage in the application of the contractual regime regarding the prescription period: contractual claims had a 30 year period whereas delictual claims had a 3 year period. Today, however, the period is 3 years in both cases (§195 BGB).

¹⁰⁰ *Ius Commune* (n 14) 385. Also, Peter Jung, 'La Protection de la Confiance en Droit Allemand des Contrats' in Bénédicte Fauvarque-Cosson and Peter Jung (eds), *La Confiance: 11èmes Journées Bilatérales Franco-allemandes, Paris, 22 et 23 Novembre 2012* (Société de Législation Comparée 2013) 35.

¹⁰¹ Moura Vicente (n 73) 256-257; Hélène Aubry, *L'influence du Droit Communautaire sur le Droit Français des Contrats* (PUAM 2002) 327; Ch III p 68; Ch IV p 129.

obligations similar to legal transactions.¹⁰² In other words, the reform recognised the notion of a precontractual relationship that gives rise to precontractual duties.¹⁰³ Although the codification does not contain all the details and requirements of *cic* that have been developed in the case law, these provisions do provide a normative basis for the recognition of the precontractual duties which had been previously identified by legal scholars as originating from the precontractual relationship of trust, and for a compensation claim in case of breach of such duties.¹⁰⁴

According to §311(2)1, from the moment of entering into contractual negotiations, an obligation with duties in accordance with §241(2) arises. In §241(2), the Code, for the first time, expressly provided for an abstract and general obligation, mutually owed between the parties, to respect the rights and interests of the other party, depending on the content of the relationship of obligation, thereby confirming the previous practice of the courts of implying protective obligations (*Schutzpflichten*) into contracts.¹⁰⁵ The protective obligation (*Schutzpflicht*), in abstract terms, means that one party should not violate the rights and interests of the other party, and broadly speaking, is derived from the principle of *neminem laedere*.¹⁰⁶

It is important to realise that, although *Schutzpflichten* have traditionally been linked to the protection against bodily harm, *Schutzpflichten* based upon a special relationship between the parties are not restricted to the protection of rights (such as bodily integrity), since the more significant branch in the development of the notion

¹⁰² Carsten Herresthal, '10 Years after the Reform of the Law of Obligations in Germany - The Position of the Law of Obligations in German Law' in Reiner Schulze and Fryderyk Zoll (eds), *The Law of Obligations in Europe: A New Wave of Codifications* (Sellier 2013) 191.

¹⁰³ Carlo Castronovo, 'Precontractual Liability' in José Lebre de Freitas and others (eds), *Estudos em Homenagem ao Professor Doutor Carlos Ferreira de Almeida*, vol II (Almedina 2011) 231.

¹⁰⁴ Zumbansen (n 81) 196; Asúa and Hualde (n 77) 1419-1420.

¹⁰⁵ MUJ (n 61) 128, 447.

¹⁰⁶ MUJ (n 61) 126.

of *Schutzpflichten* has been the gradual increase in recognition of duties aimed at the protection of financial interests, particularly the protection against pure economic loss.¹⁰⁷ These protective duties may arise in the precontractual context and, depending on the case, they may consist of duties not to harm the other party's person or property, to provide the other party with certain types of information, and not to break off very advanced negotiations.¹⁰⁸

Therefore, the variety of *cic* case groups that have been developed in the case law are generally grouped under either duties of protection or duties of loyalty (also referred to as duties to respect the trust of others), and one subgroup within the latter is formed by cases of broken negotiations.¹⁰⁹ Another classification distinguishes between duties of information or disclosure (*Aufklärungs- und Auskunftspflichten*) and duties of conservation or to exercise proper care (*Obhuts- und Fürsorgepflichten*),¹¹⁰ with broken negotiations cases falling into the broadly understood duty of information which has as one of the possible criteria to determine its extension the trust or reliance that has been raised in the other party.¹¹¹

In breaking off negotiations cases these duties of loyalty (or information) may be characterised as duties of care based upon mutual reliance,¹¹² emanating from the special relationship of trust that arises between the negotiating parties as soon as they enter into contractual negotiations. The duty to have regard for the legitimate interests

¹⁰⁷ Lorenz (n 93) 177.

¹⁰⁸ *Ius Commune* (n 14) 374.

¹⁰⁹ Michael Tegethoff, 'Culpa in Contrahendo in German and Dutch Law - a Comparison of Precontractual Liability' (1998) 5 Maastricht Journal of European and Comparative Law 341, 353; de Coninck (n 86) 55-56.

¹¹⁰ Florian Faust and Volker Wiese, 'Protecting Legitimate Expectations The German Perspective' in Bénédicte Fauvarque-Cosson (ed), *La Confiance Légitime et L'Estoppel*, vol 4 (Société de Législation Comparée 2007) 123-124.

¹¹¹ Asúa (n 21) 63-64.

¹¹² Lorenz (n 93) 177.

of the other party includes an obligation not to break off negotiations without good reason once one party has induced or encouraged in the other a confident expectation that the contract will definitely be concluded.¹¹³ The culpable violation of such a duty may give rise to liability for *cic* according to the requirements that will be analysed in the next section.

II The requirements of precontractual liability for breaking off negotiations

Legal scholars have listed the requirements for a successful claim of *cic* for breaking off negotiations, and amongst these elements the notions of reliance and expectation are prominent. These requirements are (i) that the negotiating parties entered into a precontractual relationship, having entered into negotiations with a view to concluding a contract; (ii) that one negotiating party, negligently or intentionally, created an expectation in the other that a contract would be (and not merely might be) concluded; (iii) that the claimant was induced to rely on this expectation by the defendant, incurring expenses or foregoing opportunities in a way which was detrimental for him; and (iv) that the defendant broke off the negotiations without a justifiable reason.¹¹⁴ The elements set out in numbers (ii) and (iii) can be jointly described as the requirement of expectation-based reliance.

The requirement of reliance, particularly in its expectation-dimension, also features prominently in the case law of the *Bundesgerichtshof* on liability for breaking off negotiations. For instance, in a 1967 judgment, it held that

¹¹³ *The letter* (n 83) 384; Asúa (n 21) 155-156.

¹¹⁴ Joachim Dietrich, 'Classifying Precontractual Liability: A Comparative Analysis' (2001) 21 *Legal Studies* 153, 177ff. Also, Moura Vicente (n 73) 249; Asúa (n 21) 71, 156.

[A] fault in contractual negotiations that renders one liable for damages can also exist in that one party awakes in the other confidence in the imminent coming into existence of a contract – subsequently not concluded – and thus causes the latter party to incur expenses (...).¹¹⁵

Then, in a 1975 judgment, the court again referred to the expectation-dimension of reliance, stating that

[T]he groundless breaking off of contractual negotiations gives rise to an obligation to compensate for harm caused by violation of trust if the person who breaks off the negotiations had previously, by his conduct, awakened or supported the confidence that the contract would certainly come into existence (...).¹¹⁶

According to this case law, three conditions must be met: (i) one negotiating party must have led the other to believe that the conclusion of the contract was certain; (ii) expenses were incurred by the latter in view of the future conclusion of the contract; and (iii) subsequently, the party who led the other to believe in the conclusion of the contract broke off the negotiations without a good reason.¹¹⁷

The precontractual relationship of trust that arises when negotiations are entered into and the precontractual duties that emanate from it have been dealt with above;¹¹⁸ therefore, the remaining requirements will be examined below, placing particular emphasis on the reliance element.

¹¹⁵ BGH 14 July 1967 (n 74).

¹¹⁶ BGH, 12 June 1975, NJW 1975, 1774, English translation in MUJ (n 61) 609-610; in Raymond Youngs, *Sourcebook on German Law* (2nd edn, Cavendish 2002) 393-395; and in The University of Texas at Austin's website (www.utexas.edu/law/academics/centers/transnational/work_new/german/case.php?id=1489). Other examples are: BGH, 6 February 1969, LM §276 BGB (Fa) no 28, translated extract in von Mehren and Gordley (n 74) 843; *The letter* case (n 83); *The newspaper* case (n 74); earlier, RG 19 January 1934 (n 90); RG 1 March 1928 (n 82).

¹¹⁷ MUJ (n 61) 100. Similarly, Cornelia Feldmann and Manfred Löwisch, '§ 311' in Heinz-Peter Mansel (ed), *J von Staudingers Kommentar zum Bürgerlichen Gesetzbuch*, vol Buch 2: Recht der Schuldverhältnisse (Sellier 2012) para 134.

¹¹⁸ Ch II s I.

1 The (culpable) creation of an expectation and inducement of reliance

The theory of *cic* protects the aggrieved party's reliance interest (*Vertrauensschaden*) and it is said that the scope of this liability 'mirrors its rationale which is not to be found in a party's refraining from a bargain but in his creation of legitimate expectations within the other party that a contract would be brought about'.¹¹⁹ The *Reichsgericht*¹²⁰ and the *Bundesgerichtshof*¹²¹ have accepted the view that liability arises when, during the course of negotiations, one party arouses in the other the trust that the conclusion of the negotiated contract is imminent and the latter is thereby induced to incur expenditure.¹²²

Within this requirement of the creation of an expectation of the future conclusion of the negotiated contract and the inducement of reliance on such an expectation by the defendant in the claimant, it is necessary to determine whether an element of fault is required in order to incur in this type of liability and, if so, where it is to be found. It is also crucial to determine the content of the expectation and to explore which criteria can establish the reasonableness or legitimacy of the claimant's reliance on the expectation created by the defendant.

(a) A fault-based liability

Starting from von Jhering's theory, *cic* has been established by German courts as a general fault-based remedy for loss occurring in the context of contractual

¹¹⁹ Lorenz and Vogelsang, case 1, in Cartwright and Hesselink (n 6) 36. Also Kessler and Fine (n 85) 404.

¹²⁰ eg, RG 19 January 1934 (n 90).

¹²¹ eg, BGH 16 March 1954 (n 69); BGH 14 July 1967 (n 74); and judgments cited in (n 116) above.

¹²² BGH 16 March 1954 (n 69).

negotiations,¹²³ applying §276 BGB.¹²⁴ This paragraph of the Code lays down fault as the basis of liability in the law of obligations generally.¹²⁵ Thus, it is said that liability for *cic*, in keeping with the generally applicable principle governing contractual liability in German law, presupposes fault (at least negligence) and that since the standards of negligence are objective, ‘it is sufficient that the party to be held liable deviated from the standards of care and fairness expected under the circumstances’.¹²⁶

Therefore, only a party who by his fault has made the other party expect that a contract will certainly be concluded, but then without good reason (*ohne triftigen Grund*) or for non-pertinent motives (*sachfremde Erwägungen*) breaks off the negotiations, is liable.¹²⁷ This fault is manifested in the fact that a person negligently or fraudulently created the expectation on the part of another that a contract would be concluded, although he knew or should have known that this expectation could not be fulfilled.¹²⁸ In this way, in a 1962 judgment, the *Bundesgerichtshof* held that compensation is only awarded where one party ‘through his earlier behavior, has wrongfully (*schuldhaft*) aroused or nourished the trust that the contract was certain to be concluded’.¹²⁹ Along the same lines, in *The letter* case, the court stated that the culpable breach of the duty to have reasonable regard for the legitimate interests of the other party, including an obligation not to break off negotiations without good reason once that party has induced or encouraged in the other a confident expectation that the contract will definitely be concluded, may give rise, on the basis of the

¹²³ MUJ (n 61) 94-95; Asúa (n 21) 79ff.

¹²⁴ eg, RG 19 January 1934 (n 90); Huber (n 98) 202; Lorenz (n 93) 166.

¹²⁵ MUJ (n 61) 95.

¹²⁶ Kessler and Fine (n 85) 406. Also MUJ (n 61) 99, 448.

¹²⁷ *Ius Commune* (n 14) 384-385.

¹²⁸ Ebke (n 72) 42; Kessler and Fine (n 85) 404.

¹²⁹ BGH, 17 May 1962, BB 1962, 816, quoted by von Mehren, ‘Formation’ (n 28) para 121. Also, BGH 14 July 1967 (n 74); RG 19 January 1934 (n 90) 444.

doctrine of *cic*, to liability to compensate the other party for the damage suffered by him as a result of its reliance on that expectation.¹³⁰

However, it must be noted that, previously to the 2001 reform, some German authors¹³¹ took a different view, in that they considered that liability for breaking off negotiations should not be based on the doctrine of *cic* and, consequently, on fault, but on the protection of reliance (*Vertrauenshaftung*).¹³² In their opinion, the absence of a duty to conclude a contract implied that breaking off negotiations could never constitute fault and, therefore, liability should not be based on the violation of a pre-contractual duty.¹³³

Under this approach there is a strong analogy with §122 BGB, according to which, if the mistaken party avoids the contract, the other party (as long as he is innocent) can claim his reliance interest, but capped at the value of the expectation interest. Although this paragraph compensates the other party's reliance interest in the case of a failed contract, it establishes a strict liability¹³⁴ as it does not depend on a negligent or otherwise blameworthy behaviour of the party avoiding the declaration.¹³⁵ Paying compensation to the other party is the 'price' to be paid for having the contract set aside.¹³⁶ Thus, it is argued that in §122 the underlying

¹³⁰ BGH 10 July 1970 (n 83) 384.

¹³¹ eg, Ballerstedt, Canaris and Larenz, cited by Hugh Beale and others, *Cases, Materials and Text on Contract Law* (Hart 2002) 254.

¹³² *Ius Commune* (n 14) 385; Beale and others, *Contract Law* (n 131) 254. Some Spanish legal scholars, eg, María Paz García Rubio and Marta Otero Crespo, 'La Responsabilidad Precontractual en el Derecho Contractual Europeo' (2010) 2 *InDret Revista para el Análisis del Derecho* 1, 4, 26, refer to *cic* liability in German law in terms of *Vertrauenshaftung*. This view is also explained in Asúa (n 21) 162.

¹³³ Beale and others, *Contract Law* (n 131) 254.

¹³⁴ MUJ (n 61) 94; Zimmermann, *The Civilian Tradition* (n 17) 89.

¹³⁵ Faust and Wiese (n 110) 122; *Ius Commune* (n 14) 422-423.

¹³⁶ MUJ (n 61) 94.

principle is not the fault-based doctrine of *cic* but the reliance principle.¹³⁷ However, *cic* and §122 are connected by the principle that justified reliance is entitled to legal protection.¹³⁸

Some of the *Bundesgerichtshof*'s Senates adopted this *Vertrauenshaftung* approach.¹³⁹ For instance, in a 1969 decision, the *Bundesgerichtshof* held that damages were recoverable if the breaking-off of negotiations was 'without plausible or weighty ground' (*ohne triftigen Grund*) and the injured party's reliance on the ultimate conclusion of the contract was reasonable and induced by the other party's conduct.¹⁴⁰ In this case the court drew an express analogy to §122 BGB and based its decision on the disappointment of trust:

If thereafter he refuses to contract without an appropriate ground and thus disappoints the trust that has been awakened in the other's party, the factual and legal situation is similar to a case in which a contract has, (...), come into existence, but one party later impugns it because of error.¹⁴¹

In a 1975 decision, the *Bundesgerichtshof* held that 'The basis of liability for fault in contractual negotiations is disappointed trust'.¹⁴² And in *The newspaper* case, the *Bundesgerichtshof* maintained this view, holding that liability for losses suffered at the precontractual stage arises only if one of the parties, in the course of the negotiations, creates the impression in the other party, and the latter actually and reasonably relies upon it, that the contract will be concluded, but nevertheless breaks

¹³⁷ *Ius Commune* (n 14) 423.

¹³⁸ von Mehren, 'Formation' (n 28) para 26.

¹³⁹ eg, BGH 6 February 1969 (n 116), BGH 12 June 1975 (n 116), BGH 22 February 1989 (n 74).

¹⁴⁰ BGH 6 February 1969 (n 116), as quoted by von Mehren, 'Formation' (n 28) para 121.

¹⁴¹ BGH 6 February 1969 (n 116).

¹⁴² BGH 12 June 1975, translation in Youngs (n 116) 395. The translation in The University of Texas at Austin's website (n 116) refers to 'disappointed expectations'.

off the negotiations without reasonable grounds.¹⁴³ The court used the language of ‘trust’ (*Vertrauen*) stating that

A duty to pay compensation only exists when a partner to the negotiations is accountable for awakening in the other party the trust – justifiable from his point of view – that a contract will certainly come to be, and then breaks off contractual negotiations without a sufficient reason (...).¹⁴⁴

Therefore, according to this decision, precontractual liability can arise as a result of the disappointment of an expectation of the future conclusion of the negotiated contract where negotiations are broken off without good reason, it not being necessary to show any culpable creation of such an expectation.¹⁴⁵

Thus, it can be seen that the difference between the *cic* and the *Vertrauenshaftung* approach is that only under *cic* is fault required, but the other elements of liability remain the same under both views (one party has made the other expect that a contract will certainly be concluded and has broken off the negotiations without good reason).¹⁴⁶ It has been pointed out that the practical importance of this difference is very limited because it is difficult to imagine a situation where a party who breaks off negotiations without a good reason, after having induced the other party to believe that a contract would certainly be concluded, has not acted at least negligently.¹⁴⁷

Some authors, commenting on *The newspaper* decision, have pointed out that, although according to this judgment it is not necessary to show a culpable creation of the expectation, it is still necessary to show a legitimate or justifiable expectation

¹⁴³ BGH 22 February 1989 (n 74), as explained by Ebke (n 72) 43.

¹⁴⁴ BGH 22 February 1989 (n 74) 446.

¹⁴⁵ Dietrich (n 114) 178.

¹⁴⁶ Beale and others, *Contract Law* (n 131) 255.

¹⁴⁷ Beale and others, *Contract Law* (n 131) 255.

(*berechtigte Vertrauen*) on the part of the claimant that a contract will be concluded, and that it is difficult to conceive of situations where such an expectation might be established without words or conduct on the part of the defendant which, objectively seen, could reasonably give rise to such an expectation.¹⁴⁸ Therefore, engaging in such conduct by the defendant where the conclusion of the contract is not a certainty (unless there is a good reason that justifies the defendant's breaking-off), must surely be negligent.¹⁴⁹

Consequently, although the discussion between a fault-based or a reliance-based approach can maintain a theoretical relevance, in practice it has none today, because since the 2001 reform it is undeniable that *cic* is a fault-based liability¹⁵⁰ and as liability for breaking off negotiations is a type of *cic* liability, it is also undeniably fault-based.¹⁵¹ Furthermore, the fact that *cic* is a fault-based liability does not exclude the operation of reliance; quite the contrary, reliance is an essential requirement in the configuration of *cic* liability for the breaking-off of negotiations.¹⁵² Reliance on an expectation of the future conclusion of the negotiated contract is the key aspect of precontractual liability for broken negotiations and whether this can be termed as 'culpable' is of secondary importance in that it most likely can (even if not in a technical sense).¹⁵³

¹⁴⁸ Dietrich (n 114) 178.

¹⁴⁹ Dietrich (n 114) 178.

¹⁵⁰ Breach of a precontractual duty must be due to negligence or intention (§280(1) and §276 BGB considered jointly with §311(2) BGB), Faust and Wiese (n 110) 124; Huber (n 98) 202; MUJ (n 61) 313.

¹⁵¹ *Ius Commune* (n 14) 384-385.

¹⁵² p 29 above.

¹⁵³ MUJ (n 61) 101, referring to *The newspaper* case (n 74), point out that it is disputed whether fault 'in the technical sense' is necessary.

(b) *The place of fault*

Having established that *cic* is a fault-based liability which requires reliance, it must be pointed out that there is still some room for debate as to where the fault lies: whether in awakening an expectation of the future conclusion of the contract under negotiation where there is no sound basis for a contract being finally concluded, or whether in the subsequent breaking-off of the negotiations without good reason once a culpable creation of such an expectation has taken place.¹⁵⁴

Some scholars even state that fault only relates to the breaking-off and not to the inducement of reliance in the other party¹⁵⁵ and they base this on cases such as *The newspaper* where negligence in the creation of the expectation was not required but where breaking off negotiations without reasonable grounds was still required for liability to arise.¹⁵⁶ Therefore, according to this view, one party must not induce the other to incur expenses by encouraging his hopes that a contract will be concluded (even though, from an objective point of view, this hope is completely futile), regardless of whether the legitimate expectations of the other party were raised culpably or not.¹⁵⁷ It must be emphasised that, even according to this view, this is not a case of strict liability (as argued by the *Vertrauenshaftung* writers mentioned above)¹⁵⁸ since the *culpa* (fault) necessary for a claim in *cic* is established by the fact of breaking off negotiations without a good reason.¹⁵⁹

¹⁵⁴ Dietrich (n 114) 177.

¹⁵⁵ eg, Reinhard Zimmermann and Dirk Verse, case 3, in Reinhard Zimmermann and Simon Whittaker (eds), *Good Faith in European Contract Law* (CUP 2000) 237.

¹⁵⁶ Dietrich (n 114) 178, referring to BGH 22 February 1989 (n 74).

¹⁵⁷ Lorenz and Vogelsang, case 1, in Cartwright and Hesselink (n 6) 35, referring to BGH 22 February 1989 (n 74).

¹⁵⁸ (n 131) above.

¹⁵⁹ Lorenz and Vogelsang, case 1, in Cartwright and Hesselink (n 6) 35.

It has been argued that the relevance of distinguishing between fault in the creation of an expectation that a contract will be concluded and fault in the breaking-off of negotiations after having created this expectation might be a ‘moot point’, in that both the creation of an expectation and its subsequent disappointment are needed in order for liability to arise and that culpability may be found in a combination of both of these elements.¹⁶⁰ However, it is suggested that distinguishing between fault at the level of the creation of the expectation and fault at the level of the breaking-off might be relevant in order to assess whether the requirements of *cic* liability for breaking off negotiations are satisfied.

In this way, it appears that fault will normally be found in the culpable creation of an expectation that a contract will be concluded and in the subsequent breaking-off without a good reason. But, as established in *The newspaper* case,¹⁶¹ liability for breaking off negotiations could also arise where fault is only present in the breaking-off (lack of a good reason) and not in the creation of the expectation. Liability will not normally arise in the opposite case, ie, where fault is present in the creation of the expectation (negligent inducement of reliance) but not in the breaking-off (because there is a good reason for breaking off).¹⁶² This is due to the fact that *cic* liability requires the presence of both elements: creation of an expectation and breaking off negotiations without good reason. Therefore, if there is a good reason for breaking off, even if the expectation of the future conclusion of the contract was created negligently, there would be, in principle, no liability.

¹⁶⁰ Dietrich (n 114) 177-178.

¹⁶¹ BGH 22 February 1989 (n 74).

¹⁶² In exceptional cases, *dolus* (intentional conduct) in the creation of the expectation can lead to liability even if there was a good reason to break off; see text to (n 260) below in relation to breaking off negotiations for the conclusion of a formal contract.

Nevertheless, it is suggested that fault in the creation of the expectation has the potential of influencing the courts' assessment of the 'goodness' or 'badness' of the reason for breaking off¹⁶³ and, in this way, expectation-based reliance could influence the assessment of the motive. Ultimately, this is because the basis of *cic* liability for breaking off negotiations is expectation-based reliance. Thus, it is suggested that in certain cases (which will most likely be exceptional) a negligently induced expectation of the conclusion of the negotiated contract could outweigh the normally 'good' reason for breaking off; ie, the strength of expectation-based reliance could allow the judges to consider as 'bad' or as 'non-exculpating' a reason which would normally be considered as 'good' (and which would have excluded liability). The following hypothetical example is proposed: two businessmen (A and B) have been negotiating for some time the sublease of a machine by A to B. The machine is owned by C (the current lessor) who is not involved in the negotiations. The negotiations are well advanced and the future sublessee (B) has incurred significant expenses under the expectation that the contract will be concluded, expectation which has been negligently induced by the current lessee and future sublessor (A) who has constantly assured B that the contract will be concluded as soon as he obtains permission to sublet from C; permission which he assures B he is sure to obtain. Before they conclude the sublease, A informs B that he cannot continue the negotiations because C has denied his permission. Although the reason for breaking off appears to be a good reason, as A is legally impeded from subletting without C's permission (§540 BGB), the relevance of B's reliance on the expectation created by A's negligence could, in theory, allow the court to find that the negotiations have been broken off without good reason and that the requirements of *cic* liability have been met.

¹⁶³

See sub-s 2 below.

It can be concluded that although distinguishing between fault in the creation of an expectation of the future conclusion of the negotiated contract and fault in breaking off is not usually relevant, as the fault requirement is normally found in a combination of these elements, the distinction may be relevant in cases where fault in the breaking-off suffices, in cases where fault (in the form of *dolus*) in the creation of the expectation suffices, and in cases where fault in the creation of the expectation could potentially influence the assessment of the reason for breaking off and the ultimate finding of liability.

(c) The content of the expectation

In German law it is emphasised that the expectation or belief which must be created by one negotiating party in the other is that the contract will be concluded with certainty.¹⁶⁴ In *The newspaper* case, the court stated that in order for the risk to be shifted, the claimant needed to show more than merely an expectation that the contract might be concluded, but instead had to show that the defendant had induced the belief that the contract would, with certainty, be concluded.¹⁶⁵ The court held that:

An express declaration is not required. But the defendant must at least have made its firm will to conclude a contract to appear clearly. That could be accepted, for example, if the third defendant had encouraged the plaintiff to take measures that would only be of use if a contract should arise (...).¹⁶⁶

It has been pointed out that this requirement in German law may go even further than in other jurisdictions, but that, alternatively, it may be understood that the required expectation or belief varies according to the nature of the reliance of the

¹⁶⁴ Dietrich (n 114) 181; *Ius Commune* (n 14) 413; BGH 14 July 1967 (n 74); BGH 12 June 1975 (n 116).

¹⁶⁵ Dietrich (n 114) 181, explaining BGH 22 February 1989 (n 74).

¹⁶⁶ BGH 22 February 1989 (n 74) 447. See text to (n 144) above.

claimant.¹⁶⁷ Therefore, in some situations (for instance, where the defendant has requested specific, onerous tasks or where the claimant has acted in part performance of the anticipated contract with the defendant's knowledge) a lesser expectation may suffice, whereas in other situations (for example, where the claimant has incurred preliminary expenses of his own accord) the expectation induced by the defendant may need to be one of the certain conclusion of the negotiated contract.¹⁶⁸ Other scholars have also argued for flexibility in the requirement that the expectation is that the negotiated contract will definitely be entered into, indicating that a party is liable for *cic* if he led the other party legitimately to believe 'that a contract would (almost) certainly be concluded' but then, without good reason, refused to go ahead.¹⁶⁹

It seems that this alternative, more flexible understanding of the content of the expectation as to the future conclusion of the negotiated contract is the better approach for protecting the reliance interest of the aggrieved party.

(d) The reliance must be justified (positive criteria)

The claimant's reliance on an expectation of the future conclusion of the negotiated contract must be legitimate or reasonable,¹⁷⁰ ie, it must have been justified in the circumstances of the case, and it must have been induced by a representation, silence or conduct of the party who subsequently breaks off the negotiations.¹⁷¹

In many cases there are objective circumstances which can be categorised as positive criteria for founding the reasonableness of the reliance and, hence, for finding

¹⁶⁷ Dietrich (n 114) 181.

¹⁶⁸ Dietrich (n 114) 181.

¹⁶⁹ Lorenz and Vogelsang, case 7, in Cartwright and Hesselink (n 6) 203.

¹⁷⁰ eg, BGH 6 February 1969 (n 116), as cited by von Mehren, 'Formation' (n 28) para 121, refers to a 'reasonable reliance'; BGH 12 June 1975, translation in Youngs (n 116) 393, to a 'justified expectation'; BGH 22 February 1989 (n 74) 446 to a 'justifiable trust'.

¹⁷¹ *Ius Commune* (n 14) 413.

liability. For instance, the long duration of the negotiations or the very advanced stage that they have reached seem to be decisive¹⁷² or, at least, relevant objective factors. However, *cic* liability is not established by the mere lengthy prolongation of the negotiations.¹⁷³ An example of an objective factor justifying the belief in the future conclusion of the negotiated contract is the advanced stage of negotiations where agreement on the essential terms of the future contract has been reached.¹⁷⁴ Nevertheless, it must be noted that the *Bundesgerichtshof* does not require agreement on all essential points of the contract for there to be *cic* liability.¹⁷⁵ In this way, in *The letter* case, the court held that ‘The fact that the parties had not yet agreed all the details of the contract to be concluded does not of itself preclude liability in damages (...)’.¹⁷⁶ Knowledge that the other party has incurred expenses relying on the expectation of the future conclusion of the negotiated contract is also a relevant factor,¹⁷⁷ but liability does not arise from the mere fact of knowing that the other party has already incurred considerable expenses.¹⁷⁸

The test for determining the legitimacy of the expectation that a contract will be concluded is said to be both objective and subjective. Subjective in that it entails a belief in the future conclusion of the contract and objective in that the belief must be founded on objective circumstances.¹⁷⁹ Consequently, if there are no objective reasons for the aggrieved party’s belief, he cannot legitimately assume that a contract is very

¹⁷² *Ius Commune* (n 14) 413.

¹⁷³ MUJ (n 61) 101; eg, BGH, 7 December 2000, NJW-RR 2001, 381; *The newspaper* case (n 74) 446.

¹⁷⁴ Lorenz and Vogelsang, case 7, in Cartwright and Hesselink (n 6) 204.

¹⁷⁵ *Ius Commune* (n 14) 414, 384.

¹⁷⁶ BGH 10 July 1970 (n 83) 384.

¹⁷⁷ BGH, 18 October 1974, NJW 1975, 43, translated text in *Ius Commune* (n 14) 219-221.

¹⁷⁸ *Ius Commune* (n 14) 384; von Mehren, ‘Formation’ (n 28) para 121; eg, RG, 24 February 1931, RGZ 132, 26; BGH 17 May 1962 (n 129); BGH 14 July 1967 (n 74).

¹⁷⁹ Lorenz and Vogelsang, case 7, in Cartwright and Hesselink (n 6) 204.

likely to be concluded.¹⁸⁰ However, some argue that the assessment is entirely objective in that the trust or belief must not be understood as a real and personal one, but as a ‘general expectation of honesty’ (*allgemeine Redlichkeitserwartung*) of a negotiating party, the protection of which is essential to the fluidity of trade.¹⁸¹ Others have even concluded that the *Bundesgerichtshof* does not determine when trust has been improperly aroused under an objective test but requires that a ‘special trust’ has been created.¹⁸² It seems that despite the differences in defining the test for the legitimacy of the trust or belief, the end-result is the same because the objective circumstances of the case are those which allow the judges to determine the reasonableness or legitimacy of the reliance.

It can be seen that there is some ambiguity as to defining the criteria that entitle a negotiating party to reasonably rely on the expectation of the future conclusion of the negotiated contract, and this has been the subject of criticism by German legal scholars. Medicus, for instance, stated that the *Bundesgerichtshof* ‘has not (...) given an exact general formulation of the circumstances in which a negotiating party is able to rely on the conclusion of the contract’.¹⁸³ Nevertheless, it is clear that there are some objective circumstances which, if present in a particular case, allow the courts to find that the claimant legitimately relied on the expectation of the future conclusion of the negotiated contract, induced by the defendant.

¹⁸⁰ *ibid* 204.

¹⁸¹ Larenz (n 89) 106, as quoted by Moura Vicente (n 73) 337.

¹⁸² Nirk, ‘Culpa in Contrahendo - Eine geglückte richterliche Rechtsfortbildung - Quo Vadis?’ in Hefermehl (ed), *Festschrift Philipp Möhring* (1975) 76, as cited by von Mehren, ‘Formation’ (n 28) para 122.

¹⁸³ Medicus, ‘Verschulden bei Vertragsverhandlungen’ in Bundesminister der Justiz (ed), *Gutachten und Vorschläge zur Überarbeitung des Schuldrechts I* (Haymanns 1981) 496, quoted by von Mehren, ‘Formation’ (n 28) para 122.

To sum up the analysis of the reliance element, it can be concluded that the culpable disappointment of legitimate reliance is the basis and key requirement of *cic* liability for broken negotiations.¹⁸⁴ The emphasis in the case law and in the writings of legal scholars is mainly on the expectation dimension of reliance, ie, in the creation of an expectation that a contract will be concluded and inducement of reliance on such an expectation.¹⁸⁵ However, the trust dimension is also present in the relationship of trust and confidence that arises between negotiating parties which allows each party to place trust on the conduct of the other.¹⁸⁶

2 Breaking off without a justified reason (negative criterion)

In addition to the precontractual relationship and the reliance requirement analysed above,¹⁸⁷ the lack of a good reason for breaking off is required for precontractual liability to arise. This negative criterion (the reason for breaking off being unwarranted) serves to establish liability. Consequently, if a negotiating party legitimately relied on the expectation that a contract would be concluded, created by the other party's conduct, it is crucial to determine whether the reasons asserted by such party (who then broke off the negotiations) for breaking them off are well-founded; the onus of proof lying with the party who broke off.¹⁸⁸

The breaking-off is generally considered well-founded if, for the party who broke off, the conclusion of the contract under the circumstances of the case would be 'unconscionable'.¹⁸⁹ An example would be where the reason given by the party

¹⁸⁴ eg, Jung (n 100) 48; de Coninck (n 86) 58-59.

¹⁸⁵ eg, cases cited in (n 116) above.

¹⁸⁶ This ch s I 1 above.

¹⁸⁷ ss I and II 1.

¹⁸⁸ Lorenz and Vogelsang, case 7, in Cartwright and Hesselink (n 6) 204.

¹⁸⁹ Lorenz and Vogelsang, case 7, in Cartwright and Hesselink (n 6) 204.

breaking off would also frustrate an already concluded contract.¹⁹⁰ A better offer from a third party may be regarded as a good reason for breaking off, but where negotiations have extended over a long period of time or where one party has requested the other to incur precontractual expenses, a better offer from another party may not always justify the breaking-off.¹⁹¹ It is stated that, in general, the standard for accepting a good reason to break off negotiations should not be ‘pitched too high’.¹⁹²

German courts have taken the view that in situations where one negotiating party has led the other to count on the conclusion of the contract, it is a breach of duty to break off negotiations and put forward ‘either no reason at all or only reasons which are irrelevant or factitious’.¹⁹³ In several judgements the *Bundesgerichtshof* has referred to breaking off negotiations ‘without good reason’¹⁹⁴ or ‘without a sufficient reason’.¹⁹⁵ In a 1969 decision, the *Bundesgerichtshof* held that damages were recoverable if the breaking-off was ‘without plausible or weighty ground (*ohne triftigen Grund*)’¹⁹⁶ and in later judgments it has referred to its 1969 decision and repeated the *ohne triftigen Grund* formula.¹⁹⁷ Legal scholars have criticised the ‘plausible or weighty ground’ test as vague and without content¹⁹⁸ and have provided

¹⁹⁰ Lorenz and Vogelsang, case 7, in Cartwright and Hesselink (n 6) 204; *Staudinger* (n 117) para 137.

¹⁹¹ Zimmermann and Verse, case 3, in Zimmermann and Whittaker (n 155) 237.

¹⁹² Zimmermann and Verse, case 3, in Zimmermann and Whittaker (n 155) 237. See text to (n 163) above for the possible influence of fault in the creation of an expectation in the assessment of the reason for breaking off.

¹⁹³ Kötz, *European Contract Law* (n 79) 39, citing, eg, BGH, 8 June 1978, BGHZ 71, 386; BGH, 7 February 1980, BGHZ 76, 343, NJW 1980, 1683; BGH, 8 October 1982, WM 1982, 1436.

¹⁹⁴ eg, BGH 10 July 1970 (n 83) 384; BGH 12 June 1975 (n 116) as translated in MUJ (n 61) 609-610.

¹⁹⁵ eg, BGH 22 February 1989 (n 74) 446.

¹⁹⁶ BGH 6 February 1969 (n 116), quoted by von Mehren, ‘Formation’ (n 28) para 121.

¹⁹⁷ eg, BGH 18 October 1974 (n 177); BGH, 9 November 2012, NJW 2013, 928.

¹⁹⁸ eg, Stoll, ‘Tatbestände und Funktionen der Haftung für Culpa in Contrahendo’ in Ficker (ed), *Festschrift Ernst von Caemmerer* (1978) 449, as cited by von Mehren, ‘Formation’ (n 28) para 122.

different answers to the question of what is a plausible or weighty ground (*triftigen Grund*).¹⁹⁹ Some, for example, find such a ground only where the basic assumptions on which a party negotiated have disappeared.²⁰⁰ Others suggest that an acceptable ground for breaking off should be found only in circumstances that would excuse a party under a legal duty to contract from concluding the contract.²⁰¹

Although it is not entirely clear what exactly will constitute a good reason for breaking off negotiations, it has been noted that it seems that any grounds which would justify avoidance of a completed contract will also justify a refusal to enter into a contract; thus, a good reason for breaking off negotiations will generally be found where a contract fails due to any impediment originating from the claimant's sphere.²⁰² It has also been pointed out that it appears that even if there is a good reason for breaking off, the 'guilty' party is still under an obligation to 'warn' the other party that he no longer intends to continue with the negotiations, if he has led the other party to believe that he will conclude the contract and knows that the other party has relied on that incurring expenses.²⁰³ Finally, reasons that have nothing to do with the negotiations cannot justify the breaking-off.²⁰⁴

¹⁹⁹ von Mehren, 'Formation' (n 28) para 122.

²⁰⁰ Nirk (n 182) 84, cited by von Mehren, 'Formation' (n 28) para 122.

²⁰¹ Stoll (n 198) 450, cited by von Mehren, 'Formation' (n 28) para 122.

²⁰² Dietrich (n 114) 179.

²⁰³ MUJ (n 61) 101; eg, BGH, 29 March 1996, NJW 1996, 1884, translated text in MUJ (n 61) 610-612.

²⁰⁴ *Ius Commune* (n 14) 414; *Staudinger* (n 117) para 137; eg, BGH 7 February 1980 (n 193).

III Other theoretical bases of precontractual liability for breaking off negotiations

In cases of broken negotiations, reliance-based *cic* is not the only doctrine that has a role to play, as other fundamental principles of German law, such as good faith and *venire contra factum proprium*, have also been used as bases to explain the imposition of precontractual liability in such cases. German law, unlike French law, has not developed an ‘overarching theory’ of abuse of rights (despite having a provision on abuse of rights in §226 BGB)²⁰⁵ and, consequently, this doctrine has not been advanced as a possible basis of this type of liability, although a reference to the ‘inadmissible exercise of legal rights’ has been made in at least one judgment relating to lack of formality cases.²⁰⁶ In German law, preference has been given to the principle of good faith which was developed at an earlier stage and much more extensively than in French law.²⁰⁷ This section will therefore explore the role that good faith and *venire contra factum proprium* play in the imposition of *cic* liability for breaking off negotiations and how they interact with its reliance basis.

1 Good Faith

Good faith (*Treu und Glauben*) has a historical connection with the development of the doctrine of *cic* in German law. Because the drafters of the BGB did not incorporate *cic* into the code as a general provision, the courts and legal scholars, in developing a general doctrine of *cic* from the few provisions of the code that

²⁰⁵ Simon Whittaker and Reinhard Zimmermann, ‘Coming to Terms with Good Faith’ in Reinhard Zimmermann and Simon Whittaker (eds), *Good Faith in European Contract Law* (CUP 2000) 694. See Ch III s II 2 for the abuse of rights analysis in French law.

²⁰⁶ Jaluzot (n 92) 367, referring to BGH, 27 October 1967, BGHZ 48, 396, translation in MUJ (n 61) 593-594, and in *Ius Commune* (n 14) 422. See text to (n 277) below.

²⁰⁷ Whittaker and Zimmermann, ‘Coming to Terms’ (n 205) 694; Whittaker and Zimmermann, ‘Good Faith in European Contract Law: Surveying the Legal Landscape’ in Zimmermann and Whittaker (n 155) 23, 33.

assimilated Jhering's idea of *cic* liability, needed to find a legal basis in the BGB that supported this development.²⁰⁸ This purpose was served by §242 BGB and *cic* became 'anchored' in the principle of good faith.²⁰⁹

German law has a general clause of good faith in §242 BGB which permeates the whole law of contracts.²¹⁰ Despite its wording, which is limited to the manner of performance of the debtor,²¹¹ the principle of good faith contained in §242 is considered to apply to the precontractual stage.²¹² §242 has been used as a legal basis to give rise to a host of ancillary or supplementary duties that may arise under a contract (for instance, duties of information, documentation, cooperation, protection, disclosure) and that can also arise in the precontractual stage.²¹³ In this way, it is said that liability for breaking off negotiations derives from the breach by a negotiating party of its duties to act in good faith towards the other.²¹⁴ Under this view, the precontractual duties that emanate from the precontractual relationship are considered to ultimately derive from the principle of good faith.²¹⁵ After the 2001 reform, it has been said that the duty of bargaining in good faith as the basis of the doctrine of *cic* has been established by virtue of the law (§241(2) in combination with §311(2) BGB).²¹⁶

²⁰⁸ Ch I s III 2 (a).

²⁰⁹ Kessler and Fine (n 85) 404.

²¹⁰ MUJ (n 61) 121, 119.

²¹¹ '§242: Performance in accordance with the principle of good faith. The debtor must perform his obligation in accordance with the requirements of good faith, taking into account the prevailing practice'; translation from *Ius Commune* (n 14) 775.

²¹² MUJ (n 61) 24, 99.

²¹³ Whittaker and Zimmermann, 'Surveying' (n 207) 24.

²¹⁴ MUJ (n 61) 99.

²¹⁵ Moura Vicente (n 73) 249; s I above.

²¹⁶ Lorenz and Vogelsang, case 6, in Cartwright and Hesselink (n 6) 173.

Even if it is considered that the principle of good faith is the basis of liability for breaking off negotiations, it must be realised that good faith interacts with the notion of reliance. Thus, it is considered that the protection of legitimate reliance is based on the principle of good faith,²¹⁷ that *Vertrauen* is the ultimate element protected by good faith and that *Vertrauen* is often constituted by the expectations of the parties.²¹⁸ Indeed, the protection of reliance has an important place in the application of §242.²¹⁹ Consequently, it is said that a party is entitled to rely on the conclusion of a future contract only if the other party is in breach of his duty to bargain in good faith, ie, if he has (i) entered into, (ii) continued with or (iii) broken off the negotiations in contravention of the standard of good faith.²²⁰ In the case of breaking off negotiations, the party who ends them is in breach of his duty to bargain in good faith if in the course of the negotiations he made the other party believe that a contract would certainly be concluded, but then, without good reason, refuses to go ahead.²²¹ Breaking off negotiations after having induced in the other party expectation-based reliance, amounts to a breach of good faith. Therefore, it can be seen that the liability of the party who breaks off negotiations in a manner contrary to good faith is a liability not for the breaking-off, but for breaking off after inducing the other party's reliance that the contract would be concluded.²²² It is important to note that when phrasing this liability in terms of breach of the duty to bargain in good faith, the two essential elements that are required for *cic* liability to arise in the breaking-off of negotiations do not change (creation of an expectation that a contract

²¹⁷ Jung (n 100) 43.

²¹⁸ Jaluzot (n 92) 86-87. Similarly, Whittaker and Zimmermann, 'Surveying' (n 207) 31.

²¹⁹ Jaluzot (n 92) 147.

²²⁰ Lorenz and Vogelsang, case 1, in Cartwright and Hesselink (n 6) 35; eg, BGH, 10 January 1996, WM 1996, 738.

²²¹ Lorenz and Vogelsang, case 1, in Cartwright and Hesselink (n 6) 35; eg, *The letter* (n 83) 384.

²²² *Ius Commune* (n 14) 381.

will be concluded and breaking off without good reason after having created this expectation in the other party).

Hence, it appears that good faith is not truly the basis of *cic* liability for breaking off negotiations. While some authors, in their comparative analysis of precontractual negotiations, describe all the different scenarios of precontractual liability (including the breaking-off of negotiations) as types of conduct contrary to precontractual good faith, in the particular case of Germany they point out that none of the different dogmatic bases of precontractual duties that have been suggested by legal scholars, among which are *Treu und Glauben* (good faith) and the *Vertrauensprinzip* (reliance principle), can be said to have been generally accepted.²²³ Others lean towards the reliance basis, stressing that, even though, in a way, liability for *cic* can also be seen as an emanation of §242 BGB (because the close relationship between negotiating parties is considered, in good faith, to give rise to special duties), when discussing *cic*, German legal authors do not usually refer to ‘good faith’ but rather to ‘[reasonable] reliance’.²²⁴ This is reaffirmed by the previous analysis of the requirements of liability for breaking off negotiations (creation of an expectation and breaking off without good reason), which are not phrased in terms of breach of a good faith duty and where the notion of good faith is hardly mentioned, whereas the notion of reliance is repeatedly used.²²⁵

This distancing from good faith can be explained by the fact that *cic* is one of many institutions originally based on the general good faith clause that ‘started to lead

²²³ *Ius Commune* (n 14) 374, 376, 381.

²²⁴ Whittaker and Zimmermann, ‘Surveying’ (n 207) 27 fn 115.

²²⁵ s II above.

an independent life',²²⁶ even before the 2001 reform. Thus, not only in the case of *cic* but also in relation to other legal doctrines, it is said 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: so that 'figuratively speaking, the statutory foundation of § 242 could be withdrawn without any risk of having the judge-made edifice collapse'.²²⁷

Following from this development, and before the 2001 reform, it was said that the approach of German law combined the application of the principle of good faith with an independent notion of *cic*, in that good faith was the legal basis (§242 BGB) for the recognition of a precontractual duty, but *cic* provided the legal basis (§276 BGB) for the remedy of its breach.²²⁸ However, the courts rarely followed this tiered argument given by legal scholars and usually based the doctrine of *cic* and precontractual duties directly on §276 without resorting to §242.²²⁹ Therefore, it was stated that precontractual liability in German law was less and less linked to good faith.²³⁰ Today, after the 2001 reform which codified the case law on *cic*,²³¹ it is even clearer that it is no longer necessary to find its basis in §242 BGB,²³² notwithstanding the fact that the origin of *cic* in German law can still be historically related to the precept of good faith.²³³

²²⁶ Whittaker and Zimmermann, 'Surveying' (n 207) 31.

²²⁷ Whittaker and Zimmermann, 'Surveying' (n 207) 32, quoting Hein Kötz, 'Towards a European Civil Code: The Duty of Good Faith' in Peter Cane and Jane Stapleton (eds), *The Law of Obligations: Essays in Celebration of John Fleming* (Clarendon Press 1998) 250.

²²⁸ Editors' comparative observations to case1, Zimmermann and Whittaker (n 155) 204. Also Jaluzot (n 92) 524-525.

²²⁹ Jaluzot (n 92) 361, 368, 525.

²³⁰ Jaluzot (n 92) 368.

²³¹ Text to (n 78) above; MUJ (n 61) 24.

²³² Zimmermann, *The New German Law* (n 76) 3-4; Martijn W Hesselink, 'The Concept of Good Faith' in Arthur S Hartkamp and others (eds), *Towards a European Civil Code* (4th edn, Kluwer Law International 2011) 645.

²³³ Ch I s III 2 (a).

Nevertheless, it is relevant to determine whether good faith still has a role to play in defining the precontractual duties whose breach is remedied by *cic*,²³⁴ or whether the configuration of these duties is today possible without resorting to the notion of good faith, on the basis of §241(2) BGB. This will be analysed in Chapter V, where it will be argued that although good faith historically served to explain the development and expansion of the doctrine of *cic*, the latter is not inextricably linked with the former and can function independently from it.²³⁵

2 *Venire contra factum proprium*

Liability for broken negotiations can also be seen as flowing from the prohibition of going against one's own actions, *venire contra factum proprium* (*vcfp*), as deduced from §242 BGB. Under this rationale, liability will be imposed where one negotiating party, by his conduct, created in the other the expectation that the negotiated contract would be concluded and subsequently contradicted his previous conduct by breaking off negotiations without a good reason.²³⁶

The concept of *vcfp* is generally thought to be embedded in the broader principle of good faith (§242), which is one of the 'blanket clauses' (*Generalklauseln*) of the BGB.²³⁷ For this reason, it is said that the concept of *vcfp* appears vague and in need of interpretation in order to be rendered more precise.²³⁸ The rationale behind *vcfp* is controversial, particularly its justification in the principle of good faith, which

²³⁴ As was held before the reform by, eg, Zimmermann and Whittaker (n 155) 257 in their comparative observations to case 3; Zimmermann and Verse, case 1, in Zimmermann and Whittaker (n 155) 173; Asúa (n 21) 62-64.

²³⁵ Ch V s III 3.

²³⁶ eg, Zimmermann and Verse, case 3, in Zimmermann and Whittaker (n 155) 237; Tegethoff (n 109) 356; Mordechai Rabello (n 21) 151.

²³⁷ Faust and Wiese (n 110) 116; Whittaker and Zimmermann, 'Surveying' (n 207) 24-25.

²³⁸ Faust and Wiese (n 110) 116.

is why the prohibition of *vcfp* nowadays is frequently attributed to the protection of legitimate expectations²³⁹ and legitimate reliance.²⁴⁰ The prohibition of *vcfp* is also linked to the notion of abuse of rights (which in turn is another emanation of good faith) in that a person exercising a right must not contradict his own previous conduct, provided that he had induced reliance in the debtor.²⁴¹

In order to apply the concept of *vcfp*, the following elements are required (i) a conduct by one person which induced someone else's reliance and (ii) a subsequent conduct by the first person which conflicts with its previous conduct and which would destroy arrangements the second person could have reasonably made.²⁴² These elements can normally be found in cases of broken negotiations where the party who broke off had previously induced reliance in the other as to the future conclusion of the negotiated contract.

However, situations which are considered to fall under the principle of *vcfp* lead to liability for the expectation interest (resulting in the party who contradicted itself being bound), whereas situations covered under the principle of *cic* normally lead to liability for the reliance interest.²⁴³ In this way, it can be seen that the notion of *vcfp* is not an appropriate basis of liability for broken negotiations. Nevertheless, sometimes it is difficult to determine whether to apply the rules of *cic* or the principle of *vcfp* and this is particularly evident in lack of form cases.²⁴⁴

²³⁹ Faust and Wiese (n 110) 116 citing, eg, Hohloch, Larenz and Wolf, Roth.

²⁴⁰ Jung (n 100) 38.

²⁴¹ MUJ (n 61) 123.

²⁴² Faust and Wiese (n 110) 116, citing BGH, 6 March 1985, NJW 1985, 2589.

²⁴³ Faust and Wiese (n 110) 124; *Ius Commune* (n 14) 408-409; Ch V s IV 1 (a).

²⁴⁴ Faust and Wiese (n 110) 118, 124. See text to (n 278).

Therefore, to conclude this section, it is suggested that neither good faith nor *vcfp* are the true bases of *cic* liability for breaking off negotiations in German law. Although *vcfp* has a reliance-based rationale which could be equated to the one found in cases of liability for broken negotiations, the remedy it leads to is not the appropriate one for these cases. And although good faith might have a role to play in defining the duties whose breach would lead to *cic* liability, at the core of this liability is the reliance element which is its true basis.

IV Breaking off negotiations for the conclusion of a formal contract and lack of formality cases

The breaking-off of negotiations subcategory of *cic* cases, generally relates to negotiations for the conclusion of a consensual contract, which does not require any type of formality to be valid. However, the negotiations that are subsequently broken off could also relate to the future conclusion of a ‘formal contract’, ie, a contract which is binding only if a certain formal requirement is met.²⁴⁵ In this scenario, *cic* liability is also possible and it will be argued that the reliance element acquires an even greater relevance. Cases of ‘breaking off negotiations for the conclusion of a formal contract’ must be distinguished from what will be called ‘lack of formality’ cases in that, in the latter, an agreement has been reached, whereas, in the former, the parties are still at the stage of negotiating an agreement.²⁴⁶ Nevertheless, both types of cases fall into the broader category of *cic* for failed contracts.²⁴⁷ Lack of formality cases also fall into the broader category of *cic* liability derived from the flawed

²⁴⁵ *Ius Commune* (n 14) 414.

²⁴⁶ *Ius Commune* (n 14) 423-424.

²⁴⁷ MUJ (n 61) 99ff.

conclusion of a contract leading to its invalidity.²⁴⁸ It will be shown that although in lack of formality cases good faith plays a very relevant role, reliance is still significant.

1 Breaking off negotiations for the conclusion of a formal contract

Even though German law is based on the principle of consensualism, it has rules on formalities which are meant to protect the parties ‘by ensuring that they enter legal transactions only after serious consideration of the consequences of their acts’.²⁴⁹ One type of formality is the notarial authentication (*notarielle Beurkundung*)²⁵⁰ and among the transactions subject to this formality is the contract of sale of land (§311b(1) BGB). The focus of this section will be on this contract as it is very relevant in practice and in the case law.

When negotiations conducted in view of concluding a formal contract (such as the sale of land) are broken off by one party, it has been suggested that the party breaking off cannot be made liable because the other party is never justified in relying on the imminent conclusion of such a contract, since he should know that there will be no binding contract before the formal requirement is fulfilled.²⁵¹ It has also been argued that liability in such a case would undermine the purpose of the form requirement, which is to protect a party from over-hasty decisions,²⁵² particularly in cases of potentially ‘dangerous’ transactions such as the sale of land.²⁵³

²⁴⁸ MUJ (n 61) 99-100. *Ius Commune* (n 14) 418, refers to these cases as of ‘knowingly entering an invalid contract’, emphasising the breach of a duty to inform or warn the other party of the invalidity.

²⁴⁹ MUJ (n 61) 81.

²⁵⁰ MUJ (n 61) 83.

²⁵¹ *Ius Commune* (n 14) 414.

²⁵² *ibid* 414.

²⁵³ MUJ (n 61) 84.

However, the *Bundesgerichtshof* has held that a party who breaks off negotiations for the conclusion of a formal contract can be liable in *cic*. For example, in a 1967 decision, it held that:

The (...) purposes of the formal requirements of BGB §313 [now §311b(1) BGB] (...), in negotiations for the conclusions of contracts for the sale of realty do not exempt the parties from the duties that arise for them from entering into contractual negotiations and from the thus created contract-like relationship of trust. Each party owes the other the fulfillment of the duties of informing and clarifying (...) and can in the event of a faulty violation of these duties be liable to compensate for the reliance interest (...).²⁵⁴

It has been argued that liability can arise in this scenario because the party breaking off is not liable for the breaking-off itself, but for inducing the other party to act on the belief that a contract would be concluded, ie, the fault lies in inducing reliance, not in refusing to conclude the contract. And in providing compensation of the reliance interest, this liability does not undermine the form requirement.²⁵⁵

Nevertheless, some legal scholars have disapproved of these decisions in very strong terms and have suggested that in cases where the result would be truly unbearable, §242 BGB could provide a solution.²⁵⁶ The *Bundesgerichtshof*, in a 1996 judgment,²⁵⁷ applied these ideas in deciding whether a claim for compensation for loss in the breaking-off of negotiations for the conclusion of a contract of sale of land could be successful, and sought to solve the problem by referring to the line of cases where good faith has been used ‘to do away with formal requirements’.²⁵⁸ It made clear that in the case of negotiations for a formal contract, the conduct of the party breaking off only gives rise to liability if he has deliberately failed in his duty to

²⁵⁴ BGH 14 July 1967 (n 74). Similarly, BGH 10 July 1970 (n 83) 384.

²⁵⁵ *Ius Commune* (n 14) 414-415.

²⁵⁶ eg, Medicus (n 183) 192, 499, as cited in *Ius Commune* (n 14) 414.

²⁵⁷ BGH 29 March 1996 (n 203).

²⁵⁸ MUJ (n 61) 101. This line of cases is analysed in sub-s 2 below.

bargain in good faith,²⁵⁹ which amounts to requiring *dolus* for a claim based on *cic*.²⁶⁰

Thus, it is said that liability will only arise if breaking off negotiations can be regarded as a particularly grave breach of the other party's trust and that, at the very least, this presupposes intentional conduct.²⁶¹ The court held that:

In so far as this follows from the defendant's conduct being a particularly serious breach of good faith, only an intentional violation of the duty of good faith can as a rule be considered as a basis for a claim to compensation for harm under *culpa in contrahendo*, as it amounts to a person pretending to be ready to conclude a contract when he is not (...).²⁶²

This seems to be the current view.²⁶³ In these cases, the extreme relevance of the reliance element is evidenced, as its presence influences the courts in providing relief in situations where normally there would not be any liability. This supports the claim that, ultimately, the essential element for there to be precontractual liability for breaking off negotiations is the notion of reliance. It is also important to realise that in these cases fault is not required at the level of the breaking-off but at the level of the creation of the expectation. However, it seems that negligence will not suffice and that an increased degree of fault is required in order to reconcile the imposition of liability with the purpose of the form requirement.²⁶⁴

²⁵⁹ Lorenz and Vogelsang, case 3, in Cartwright and Hesselink (n 6) 99, referring to BGH 29 March 1996 (n 203).

²⁶⁰ Zimmermann and Verse, case 3, in Zimmermann and Whittaker (n 155) 237, referring to the same judgment.

²⁶¹ MUJ (n 61) 101.

²⁶² BGH 29 March 1996 (n 203) 611. Similarly, BGH 9 November 2012 (n 197) refers to a particularly serious (and usually intentional) breach of a duty of loyalty.

²⁶³ *Staudinger* (n 117) para 136.

²⁶⁴ MUJ (n 61) 101. Also, Peter Mankowski and Michael Müller, 'Formation' in Stefan Leible and Matthias Lehmann (eds), *European Contract Law and German Law* (Kluwer Law International 2014) 113.

2 Lack of formality cases

In these cases an agreement has been reached but without fulfilling the form required for the contract to be valid. Where form is required, its absence will typically make the transaction void (§125 BGB). Nevertheless, a considerable amount of case law has developed in relation to the absence of form in the context of §311b(1) BGB, which has tried to mitigate the rigour of the rule of nullity in certain deserving cases.²⁶⁵ This line of cases has used good faith ‘to do away with formal requirements’²⁶⁶ in order to protect the party who was induced by the other party to trust that no form was required or that the form would be fulfilled.²⁶⁷ In these cases, although good faith plays a key role, reliance remains prominent in that one party made the other rely on the conclusion of the contract and then refused to fulfil the required formality. Therefore, along with the principle of good faith, there is a ‘strong reliance element’.²⁶⁸

According to this case law, in situations where the vendor intentionally or even negligently induced the purchaser to believe that no form was needed, to allow the vendor to reclaim the property, or to deny the purchaser his claim to performance because of the lack of form, could be contrary to good faith.²⁶⁹ Most of these cases have to do with the question whether, according to the principle of good faith (§242 BGB), a party is entitled to specific performance despite the absence of form (ie, whether the other party’s claim of lack of form is contrary to good faith), and the

²⁶⁵ MUJ (n 61) 85. Also Zweigert and Kötz (n 11) 375.

²⁶⁶ (n 258) above. This type of cases may also be classified within the violation of a duty to bargain in good faith, particularly of the precontractual duty to contribute to the conclusion of a valid contract: Lorenz (n 93) 171.

²⁶⁷ Asúa (n 21) 158, 160; Zimmermann and Whittaker (n 155) 290, in their comparative observations to cases 4 and 5.

²⁶⁸ Lorenz (n 93) 167.

²⁶⁹ MUJ (n 61) 85.

problem of a claim for damages based upon *cic* is only dealt with subsidiarily.²⁷⁰ Particularly in §242 relief cases, ‘reliance is essential’.²⁷¹

This line of cases started in 1927 with the *Edelmann* decision of the *Reichsgericht*, which held that a plea of violation of good faith or malice ‘requires that a party who opposes a plea of lack of form must have been mistaken concerning the legal requirement of form and that this mistake was caused wilfully or negligently (§276 BGB) by the other party to the transaction’.²⁷² The claim failed on the facts of the case because both parties were aware of the need to observe the formalities. The court reasoned that the defendant’s word as a nobleman could not have induced the claimant’s reliance on a valid contract since the claimant knew that pre-emption clauses require certification by a notary.²⁷³ Additionally, the court found that the defendants could not be said to have acted culpably at the time when the disputed promises were made, as they had the serious intention at that time to honour their promises and made such promises with this intention in mind.²⁷⁴

In 1967, the *Bundesgerichtshof* issued a contrasting decision in a case with very similar facts to the *Edelmann* decision.²⁷⁵ The court considered that, even though the claimant knew of the lack of formality, the defendant’s behaviour was sufficient to make the claimant rely on the validity of the contract. The court also held that, as in

²⁷⁰ Lorenz and Vogelsang, case 11, in Cartwright and Hesselink (n 6) 318. See p 62 below.

²⁷¹ Arthur von Mehren, ‘Formal Requirements’ in *International Encyclopedia of Comparative Law*, vol VII (JCB Mohr (Paul Siebeck) and Martinus Nijhoff Publishers 1998) ch 10 paras 183, 211-214, pointing out that German law takes into account several interdependent factors, such as the awareness of the formal requirement, the egregious conduct of one party and the extent of reliance of the other.

²⁷² RG, 21 May 1927, RGZ 117, 121 (*Word as a nobleman*), translation in MUJ (n 61) 591-593, 592.

²⁷³ Faust and Wiese (n 110) 117.

²⁷⁴ (n 272) 592.

²⁷⁵ BGH 27 October 1967 (n 206).

cases where one party makes the other erroneously believe that a contract is not subject to form requirements, the defendant was barred by good faith (§242 BGB) to deny its contractual liability since such a denial would amount to *vcfp*.²⁷⁶ The court stated that to argue that the defective form of the contract renders it null and void ‘constitutes an inadmissible exercise of its legal rights’.²⁷⁷

There is some doubt as to whether in these types of cases the principle of *vcfp* should lead to the expectation interest, because these cases could also be dealt with under the principle of *cic*.²⁷⁸ In this 1967 case the court upheld the ruling that the defendant be condemned to convey the premises to the claimant, ordering specific enforcement of the contract.²⁷⁹ The court also clarified when a contract of sale which is void for lack of form will be binding according to good faith, stating that ‘the practice is that this is only the case if not to recognise the contract as valid would lead to a result which would be unbearable for the purchaser and would not only affect him harshly’.²⁸⁰ These conditions were regarded as fulfilled in this case, as there was a strong reliance element²⁸¹ in that one contracting party had given up his own way of life in reliance on the promise made by the other or had assumed a new way of life, which he would have to give up, if the existence of the contract was denied.²⁸² This decision stands out as an example of bold judicial intervention which set aside the

²⁷⁶ Faust and Wiese (n 110) 118, explaining BGH 27 October 1967 (n 206).

²⁷⁷ BGH 27 October 1967 (n 206), as translated in *Ius Commune* (n 14) 422.

²⁷⁸ Faust and Wiese (n 110) 118; text to (n 244) above.

²⁷⁹ BGH 27 October 1967 (n 206).

²⁸⁰ (n 206), as translated in MUJ (n 61) 594.

²⁸¹ A ‘relationship of trust’ according to Jung (n 100) 39.

²⁸² BGH 27 October 1967 (n 206), as per translation in MUJ (n 61) 594.

rules of formalities, using an abuse of rights argument that served to justify a cause of action to protect the performance interest.²⁸³

These two decisions of the RG and of the BGH²⁸⁴ have been subject to much criticism by German legal scholars, as, although it is generally accepted that in cases of lack of form the fraudulent or malicious behaviour of one party gives rise to liability for the expectation interest if the other party is not aware of the form requirement,²⁸⁵ it is highly questionable whether the defendant should also be held liable in cases where the defendant exploited his social or commercial superiority in order to make the claimant refrain from observing a form requirement of which the claimant knew.²⁸⁶

It has been the consistent practice of the *Bundesgerichtshof* that specific performance of the contract may only be ordered if the invalidity of the contract for lack of formality would create an ‘absolutely unbearable result’ (*schlechthin untragbares Ergebnis*) for the innocent party and not merely a ‘harsh one’ (*nicht bloß ein hartes Ergebnis*).²⁸⁷ This is considered to be the case only (i) if there is a very strong breach of the duty of regard and loyalty by the party claiming the lack of form; or (ii) if the invalidity of the contract would seriously endanger the innocent party’s economic viability.²⁸⁸ The distinction between ‘an absolutely unbearable result’ and a

²⁸³ MUJ (n 61) 85, 124.

²⁸⁴ RG 21 May 1927 (n 272) and BGH 27 October 1967 (n 206).

²⁸⁵ Faust and Wiese (n 110) 118, citing Canaris, *Die Vertrauenshaftung im deutschen Privatrecht* (1971) 277, and Hertel, ‘§125’ in *Staudinger Kommentar zum BGB* (2004) para 112.

²⁸⁶ Faust and Wiese (n 110) 118, citing Larenz and Wolf, *Allgemeiner Teil des Bürgerlichen Rechts* (9th edn, 2004) §27 para 73, and Reinicke, [1968] NJW 43. Also von Mehren, ‘Formal Requirements’ (n 271) para 211.

²⁸⁷ Lorenz and Vogelsang, case 11, in Cartwright and Hesselink (n 6) 318; eg, BGH 27 October 1967 (n 206); text to (n 280) above.

²⁸⁸ Lorenz and Vogelsang, case 11, in Cartwright and Hesselink (n 6) 318. Also, von Mehren, ‘Formal Requirements’ (n 271) para 209; eg, BGH, 23 June 1994, DTZ 1994, 339; BGH, 27

result which is ‘harsh but not unbearable’ is disapproved of by most legal scholars because no clear borderline can be drawn.²⁸⁹

A 1972 judgment²⁹⁰ gives a good illustration of what the courts have in mind when deciding these cases, as the *Bundesgerichtshof* considered that the particular and exceptional circumstances of the case (the advanced years of the claimant, the purpose of the transaction, and the fact that compensation for damages would be an inadequate remedy given the possibility of imminent death) all ‘weighed heavily’ in favour of allowing the claimant to insist on the conveyance of the property.²⁹¹ The court highlighted the strong reliance element in the case in that the claimant was an ordinary craftsman and member of the housing co-operative (the defendant), whom he trusted with the choice of a correct and legally sound form for their contract and, consequently, trusted in the validity of the contract.²⁹²

A party arguing the lack of form of an agreement may be liable for damages on the ground of *cic* if the invalidity of the contract is in fact harsh but not unbearable for the other party, but this action only lies in exceptional circumstances.²⁹³ Liability on the ground of *cic* only arises if the party asserting the lack of form was under a duty to take care of the other party’s interest in the validity of the contract (*Betreuungspflicht*) and, thus, should have informed the other party of the formality

June 1988, NJW 1989, 166; BGH, 19 November 1982, BGHZ 85, 315, 319; BGH 27 October 1967 (n 206); BGH, 3 December 1958, BGHZ 29, 6, 10.

²⁸⁹ Lorenz and Vogelsang, case 11, in Cartwright and Hesselink (n 6) 318-319 fn 26, citing, eg, Larenz and Wolf, *Allgemeiner Teil des Bürgerlichen Rechts* (8th edn, 1997) §27 para 47. Also Lorenz (n 93) 167 fn 18.

²⁹⁰ BGH, 21 April 1972, NJW 1972, 1189, translation in MUJ (n 61) 595-597, and in *Ius Commune* (n 14) 221- 222.

²⁹¹ MUJ (n 61) 86.

²⁹² BGH 21 April 1972 (n 290). Also, von Mehren, ‘Formal Requirements’ (n 271) para 213.

²⁹³ Lorenz and Vogelsang, case 11, in Cartwright and Hesselink (n 6) 319; Lorenz (n 93) 167.

requirements.²⁹⁴ This duty of care is breached where one party knew or should have known of the formal requirement and the other party did not know and was not under a duty to inquire regarding formal requirements, and the former negligently failed to inform the latter.²⁹⁵

This was the situation in a 1965 case,²⁹⁶ where the *Bundesgerichtshof* held that *vcfp* was inapplicable because the claimant did not act maliciously or fraudulently and because the eviction did not put an intolerable burden on the defendants, but found that the claimant had negligently violated a duty to inform the defendants of the formality requirement and was, therefore, liable under *cic*.²⁹⁷ This information duty has been approved of where one party knows that the other is commercially inexperienced and that he relies on his legal expertise in relation to the perfection of the contract (such as in the 1965 case).²⁹⁸ In this case, emphasis was placed on the existence of a relationship of trust between the parties.²⁹⁹ Accordingly, the reason for *cic* liability is not to be found in the refusal to perfect the contract but in the fact that one party has made the other party legitimately believe that a valid contract has already been concluded.³⁰⁰ However, this 1965 decision has been heavily criticised in the legal literature because it provided for compensation of the expectation interest; and this, even if only in monetary form, is said to circumvent the form requirement.³⁰¹

²⁹⁴ Lorenz and Vogelsang, case 11, in Cartwright and Hesselink (n 6) 319.

²⁹⁵ von Mehren, 'Formal Requirements' (n 271) para 215.

²⁹⁶ BGH, 29 January 1965, NJW 1965, 812, translation in *Ius Commune* (n 14) 420-422.

²⁹⁷ Referring to this case, Faust and Wiese (n 110) 125; von Mehren, 'Formal Requirements' (n 271) para 216.

²⁹⁸ Lorenz and Vogelsang, case 11, in Cartwright and Hesselink (n 6) 319.

²⁹⁹ (n 296) 421; von Mehren, 'Formal Requirements' (n 271) para 215.

³⁰⁰ Lorenz and Vogelsang, case 11, in Cartwright and Hesselink (n 6) 319.

³⁰¹ Faust and Wiese (n 110) 125, citing Flume, *Allgemeiner Teil des Bürgerlichen Rechts II* (4th edn, 1992) §15 III 4c dd, and Larenz, 'Bemerkungen zur Haftung für "culpa in contrahendo"' in *Festschrift für Ballerstedt* (1975) 397, 404ff; *Ius Commune* (n 14) 423.

In a 1974 case, the *Bundesgerichtshof* found that neither relief under §242 BGB nor under *cic* could be provided. It agreed with the lower courts that relief under §242 was inapplicable because the financial consequences of the nullity were harsh but not intolerable and held that ‘[f]rom the point of view of good faith the present conduct of the defendants did not conflict with their past conduct’;³⁰² hence, there was no *vcfp*. As to the claim for damages, it was dismissed because the requirement that a fault was committed by the defendant was not satisfied. Additionally, the court held that precedents, such as its 6 February 1969 judgment, where the court drew an analogy to §122 BGB in a case of compensation for *cic*,³⁰³ cannot be applied to situations where the law lays down a formal requirement and that requirement is not met.³⁰⁴ This decision serves to emphasise that the blameworthiness of each of the parties’ conduct in causing a formally defective contract to be concluded and relied upon is decisive when seeking relief under *cic*.³⁰⁵

As can be seen, both in cases of breaking off negotiations for the conclusion of a formal contract and in lack of formality cases (and within this second category both in §242-relief cases that lead to specific performance, and in *cic*-relief cases that lead to damages), reliance plays a fundamental role, as the courts, due to the presence of a strong reliance element which needs protection, have found a way to provide remedies in situations where normally no protection would have been provided.

³⁰² BGH 18 October 1974 (n 177) 220.

³⁰³ Text to (n 141) above.

³⁰⁴ (n 177) 220-221.

³⁰⁵ von Mehren, ‘Formal Requirements’ (n 271) para 215.

V Conclusions

Reliance on an induced belief or expectation of the future conclusion of the negotiated contract is an essential requirement of *cic* liability for breaking off negotiations in German law and it is also the theoretical basis of this liability. Although the focus is on the expectation dimension of reliance (the justified belief in the future conclusion of the contract), the trust dimension of reliance is also present in the relationship of mutual trust and confidence (*gegenseitiges Vertrauensverhältnis*) which arises between negotiating parties from the moment they enter into contractual negotiations. The reliance element is also crucial in cases of broken negotiations for the conclusion of a formal contract and in lack of formality cases, although in the latter good faith also plays a fundamental role. In general, regarding liability for breaking off negotiations, good faith appears to play a role in defining the precontractual duties of the parties which must not be breached.

CHAPTER III - RELIANCE IN THE BREAKING-OFF OF NEGOTIATIONS IN FRENCH LAW

After several projects to reform the French law of contract and obligations were prepared by academics and by the Ministry of Justice,³⁰⁶ *Ordonnance* no 2016-131 of 10 February 2016 on the reform of the law of contract, the general regime of obligations and proof of obligations was published on 11 February 2016 in the Official Journal ('the 2016 reform').³⁰⁷ This substantial reform of the *Code civil* came into force on 1 October 2016 and is applicable to contracts entered into from that date onwards.³⁰⁸ The reform introduced significant modifications to the law of contract and obligations in general, but the most relevant for this thesis are the new general 'Introductory Provisions',³⁰⁹ amongst which new article 1104 expressly establishes that contracts must be negotiated in good faith,³¹⁰ and the new chapter on 'Formation

³⁰⁶ *Avant-projet de réforme du droit des obligations et de la prescription* ('*Avant-projet Catala*'), English translation in John Cartwright, Stefan Vogenauer and Simon Whittaker (eds), *Reforming the French Law of Obligations: Comparative Reflections on the Avant-projet de réforme du droit des obligations et de la prescription* ('the *Avant-projet Catala*') (Hart Publishing 2009); *Projet Terré pour une réforme du droit des contrats* ('*Projet Terré Contrats*'), text in François Terré (ed) *Pour une Réforme du Droit des Contrats* (Daloz 2009); *Ministère de la Justice, Projet de réforme du droit des contrats* (July 2008, May 2009) ('2008 *Projet de réforme*' and '2009 *Projet de réforme*'), 2009 Project in http://droit.wester.ouisse.free.fr/textes/TD_contrats/projet_contrats_mai_2009.pdf; *Avant-Projet de Reforme du Droit des Obligations, Document de Travail* (23 October 2013) ('*Document de Travail*'); *Projet d'ordonnance du portant réforme du droit des contrats, du régime général et de la preuve des obligations* (25 February 2015) ('*Projet d'ordonnance*'), in http://www.justice.gouv.fr/publication/j21_projet_ord_reforme_contrats_2015.pdf, English translation by John Cartwright, Bénédicte Fauvarque-Cosson and Simon Whittaker, in http://www.textes.justice.gouv.fr/art_pix/Draft-Ordonnance-for-the-Reform-of-the-Civil-Codepdf.pdf.

³⁰⁷ Text available in <https://www.legifrance.gouv.fr>; English translation by John Cartwright, Bénédicte Fauvarque-Cosson and Simon Whittaker, commissioned by the *Direction des affaires civiles et du sceau, Ministère de la Justice, République française*, available in http://www.textes.justice.gouv.fr/art_pix/THE-LAW-OF-CONTRACT-2-5-16.pdf.

³⁰⁸ art 9 *Ordonnance* no 2016-131 (n 307).

³⁰⁹ Ch I of Sub-Title I ('Contract') of Title III ('The Sources of Obligations').

³¹⁰ See text to (n 512) below.

of Contracts'³¹¹ where new article 1112 expressly recognises liability for breaking off negotiations:

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

In case of fault committed during the negotiations, the reparation of the resulting loss is not calculated so as to compensate the loss of benefits which were expected from the contract that was not concluded.

This is the first article of Sub-section 1 ('Negotiations') of Section I ('Conclusion of Contracts') of Chapter II,³¹² which contains two other articles that may also give rise to other cases of precontractual liability: article 1112-1 on the general duty of precontractual information (expressly introducing the notion of *confiance* between contracting parties) and article 1112-2 on the use or disclosure of confidential information. This Sub-section codified the rules that had been developed by the case law which, consequently, should remain authoritative.³¹³ Unlike some of its corresponding articles in the reform projects,³¹⁴ article 1112 does not expressly

³¹¹ Ch II of Sub-Title I of Title III.

³¹² The other Sub-ss of S I are 2 ('Offer and Acceptance'), 3 ('Pre-emption Agreements and Unilateral Promises') and 4 ('Special Provisions Governing Contracts made by Electronic Means').

³¹³ Ministère de la Justice, *Rapport au Président de la République relatif à l'ordonnance n° 2016-131 du 10 février 2016 portant réforme du droit des contrats, du régime général et de la preuve des obligations* (Journal Officiel 2016) 9; Bruno Dondero, 'La Réforme du Droit des Contrats: Ordonnance n° 2016-131 du 10 Février 2016' (2016) 19 JCP éd E 1283 no 26, referring to new art 1112; Laurent Leveneur, 'Présentation Générale de la Réforme du Droit des Contrats, du Régime Général et de la Preuve des Obligations' (2016) 5 CCC dossier 2 no 27; Peter Rosher, 'French Contract Law Reform' (2016) 17 Business Law International 59, 70.

³¹⁴ eg, art 1111 *Projet d'ordonnance* (n 306) ('The commencement, continuation and breaking-off of precontractual negotiations are free from control. They must satisfy the requirements of good faith. The person who is at fault in the conduct or breaking-off of the negotiations must make reparation on the basis of extra-contractual liability. Damages are not calculated so as to compensate the loss of profits which were expected from the contract that has not been concluded'); art 11 *Document de Travail* (n 306) ('principle of freedom of precontractual negotiations', the text of the art is the same as of the aforementioned art 1111); art 16 of the 2009 and art 20 of the 2008 *Projet de réforme* (n 306) share the same text: 'The commencement, continuation and breaking-off of precontractual negotiations are free from control. The person who is at fault in the conduct or breaking-off of the negotiations must

indicate that reparation must be made on the basis of delictual liability.³¹⁵ Nevertheless, since *la jurisprudence* (the case law) and *la doctrine* (the writings of legal scholars) have from early on established that precontractual liability has a delictual nature,³¹⁶ it will continue to be of this nature, unless there is a contractual regulation of the precontractual phase.³¹⁷ Therefore, it will continue to be governed by the general principle of delictual liability established in new articles 1240 and 1241 Cciv (they correspond, respectively, to previous articles 1382 and 1383, whose numeration has changed but not their text) which state that:

make reparation on the basis of delictual liability. The fault is especially established when one party has commenced or has continued negotiations without intention of reaching an agreement. Damages are not calculated so as to compensate the loss of profits which were expected from the contract that has not been concluded’.

³¹⁵ In this aspect it resembles art 24 *Projet Terré Contrats* (n 306) (‘The commencement, continuation and breaking-off of negotiations are free, but they must satisfy the requirements of good faith. Fault in the exercise of the ability to break off is a source of liability. It is especially established when one party has commenced or has continued negotiations without having a real intention of reaching an agreement. In no case can damages compensate the loss of profits which were expected from the contract that has not been concluded’); and art 1104 *Avant-projet Catala* (n 306) (‘The parties are free to begin, continue and break off negotiations, but these must satisfy the requirements of good faith. A break-down in negotiations can give rise to liability only if it is attributable to the bad faith or fault of one of the parties’).

³¹⁶ eg, Cass com, 20 March 1972, Bull civ IV no 93, JCP 1973 II 17543, note Schmidt (*Gerteis c Vilbert-Lourmat*) (*The Hydrotile machine*), translation in *Ius Commune* (n 14) 385-387; in Gordley and von Mehren (n 74) 440-441; and in von Mehren and Gordley (n 74) 846; Cass civ 3, 3 October 1972, Bull civ III no 491, RTDciv 1977, 127, note Durry (*Monoprix*), translation in *Ius Commune* (n 14) 387; Cass com, 11 January 1984, Bull civ IV no 16; Cass com, 7 April 1998, D 1999, 514, note Chauvel, JCP éd E 1999, 579, note Schmidt-Szalewski (*Sté Laboratoires Sandoz c Sté Poleval*); CA Paris, 10 March 2000, JCP 2001 II 10470, note Violet; Cass com, 12 February 2002, CCC 2002, no 90, note Leveneur; Olivier Deshayes and Grégory Maître, case 1, in Cartwright and Hesselink (n 6) 28; Jacques Ghestin, *Traité de Droit Civil: La Formation du Contrat*, vol I Le contrat - Le Consentement (4th edn, LGDJ 2013) 530; François Terré, Philippe Simler and Yves Lequette, *Droit Civil: Les Obligations* (11th edn, Dalloz 2013) 203; Philippe Malaurie, Laurent Aynès and Philippe Stoffel-Munck, *Droit des Obligations* (8th edn, LGDJ 2016) 268.

³¹⁷ *Rapport au Président* (n 313) 9.

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

Article 1241: Everyone is liable for harm which he has caused not only by his action, but also by his failure to act or his lack of care.³¹⁸

These articles deal with the law of civil delict and quasi-delict (*délit* and *quasi-délit*), classification which respectively reflects the distinction between intentional fault and unintentional fault (also characterised as recklessness or negligence), which is identified in article 1241 Cciv.³¹⁹ The law of delict and quasi-delict is based on a single principle of the utmost generality: any fault which causes damage is actionable.³²⁰ For liability to arise under these articles, the fulfilment of three cumulative conditions is required: fault, harm and causation between fault and harm.³²¹ Therefore, these requirements must be met and proved for liability for breaking off negotiations to arise.³²²

Particular emphasis will be placed on the analysis of the fault requirement, as it is within the configuration of precontractual fault that the reliance element is present in the French view of precontractual liability for breaking off negotiations. The reliance element is embodied in the notions of ‘*croyance légitime*’ (legitimate

³¹⁸ Translation from Cartwright, Fauvarque-Cosson and Whittaker (n 307).

³¹⁹ Jean-Sébastien Borghetti, ‘*The Definition of la faute in the Avant-projet de réforme*’ in John Cartwright, Stefan Vogenauer and Simon Whittaker (eds), *Reforming the French Law of Obligations: Comparative Reflections on the Avant-projet de réforme du droit des obligations et de la prescription (‘the Avant-projet Catala’)* (Hart Publishing 2009) 273.

³²⁰ Barry Nicholas, *The French Law of Contract* (2nd edn, Clarendon 1992) 30.

³²¹ Deshayes and Maître, case 1, in Cartwright and Hesselink (n 6) 28.

³²² Joanna Schmidt, *Négociation et Conclusion de Contrats* (Dalloz 1982) 105; Aubry (n 101) 327-328.

belief) and ‘*confiance légitime*’ (legitimate confidence or trust) found in the case law³²³ and in the writings of legal scholars³²⁴ relating to this liability.

The chapter will begin with an analysis of precontractual fault (section I). It will continue with an examination of the theoretical bases of liability for breaking off negotiations, arguing in favour of *croyance légitime* and *confiance légitime* as opposed to the more traditional notions of abuse of rights and good faith (section II). It will then look at the positive and negative criteria for the finding of liability (section III). It will continue with the analysis of breaking off negotiations for the conclusion of formal contracts and lack of formality cases, in order to compare the situation in France with the developments of German law in this area (section IV). The chapter will argue that reliance is a relevant element for there to be liability for breaking off negotiations in French law, although not to the extent that it is in German law.

I Precontractual fault

Liability for breaking off negotiations can only arise if there is precontractual fault.³²⁵

This is expressly recognised in new article 1112 which refers to ‘fault committed

³²³ eg, Cass com, 31 March 1992, Bull civ IV no 145 p 102; CA Riom, 10 June 1992, RTDciv 1993, 343, note Mestre, appeal rejected by Cass com, 11 October 1994, no 92-17860 (SA *Auto 26 c SA Rover-France*); Cass com, 26 November 2003, Bull civ IV no 186, JCP éd E 2004, 738, note Stoffel-Munck (*Manoukian c X et Les Complices*), translation in *Ius Commune* (n 14) 378-379.

³²⁴ eg, Joanna Schmidt, ‘La Sanction de la Faute Précontractuelle’ (1974) 72 RTDciv 46, 53-54; Schmidt, *Négociation* (n 322) 108; Joanna Schmidt, ‘L’évolution de la Responsabilité Précontractuelle en Droit Français’ in Günter Weick (ed), *Entwicklung des Deliktsrechts in rechtsvergleichender Sicht* (Metzner 1987) 148; Joanna Schmidt, ‘La Période Précontractuelle en Droit Français’ (1990) 42 Revue Internationale de Droit Comparé 545, 551; Patrice Jourdain, ‘Rapport Français’ in Association Henri Capitant (ed), *La Bonne Foi: (Journées Louisianaises) Tome XLIII* 1992 (Litec 1994) 128; Patrick Chauvel, ‘Note on Cass com 7 January 1997 and 22 April 1997’ D 1998 Jur 45, para 11; Philippe Stoffel-Munck, *L’Abus dans le Contrat: Essai d’une Théorie* (LGDJ 2000) 111, 207; Denis Mazeaud, ‘La Confiance Légitime et L’Estoppel: Rapport Français’ in Bénédicte Fauvarque-Cosson (ed), *La Confiance Légitime et L’Estoppel*, vol 4 (Société de Législation Comparée 2007) 251-252; Philippe Stoffel-Munck, ‘Thème 1: Les Pourparlers’ (Séminaire en Droit des Contrats, Master 2 Droit Privé Général, Université Paris 1 Panthéon Sorbonne, 2011) 4; Bertrand Fages, ‘Existe-t-il un *Vertrauensschutz* en Droit Français des Contrats?’ in Bénédicte Fauvarque-Cosson and Peter Jung (eds), *La Confiance: 11èmes Journées Bilatérales Franco-allemandes, Paris, 22 et 23 Novembre 2012* (Société de Législation Comparée 2013) 24-25.

during the negotiations.’³²⁶ It is therefore necessary to analyse the meaning of precontractual fault, the need (or not) for it to be qualified and the place where it is found in the breaking-off of negotiations, in order to subsequently understand the relation and interaction of fault with other doctrines which are traditionally (or even recently) referred to as bases of precontractual liability (*croyance légitime* and *confiance légitime*, *abus de droit*, good faith).

1 The meaning of precontractual fault

There is no specific definition of ‘precontractual fault’ and it must be subsumed under the general definition of delictual fault.³²⁷ New article 1112, unlike some of its predecessors in the reform projects,³²⁸ does not provide examples of precontractual fault. Fault is not defined by the *Code civil*³²⁹ and the 2016 reform has not changed this, despite the fact that some of the reform projects provided definitions of civil fault.³³⁰ The *Cour de cassation* has preferred not to tie itself to a particular definition

³²⁵ Schmidt, ‘La Sanction’ (n 324) 52.

³²⁶ p 67 above.

³²⁷ Joanna Schmidt-Szalewski, ‘France’ in ICC (ed), *Formation of Contracts and Precontractual Liability* (ICC Publishing 1990) 95; ‘France’ in Hondius (n 9) 150; ‘Période Précontractuelle’ (n 324) 550.

³²⁸ eg, art 16 of the 2009 and art 20 of the 2008 *Projet de réforme* (n 314) and art 24 *Projet Terré Contrats* (n 315) all mention as an example of precontractual fault, commencing or continuing negotiations without intention of reaching an agreement.

³²⁹ Borghetti (n 319) 273.

³³⁰ eg, art 1352(2) *Avant-projet Catala* (n 306) (‘Fault consists of breach of a rule of conduct imposed by legislation or regulation or failure to conform to a general duty of care and diligence’); art 5 *Projet Terré pour une réforme du droit de la responsabilité civile* (‘*Projet Terré Responsabilité*’) (‘Fault consists in, voluntarily or negligently, committing an unlawful act. An act is unlawful when it violates a rule of conduct imposed by law or by the general duty of care and diligence’), text in François Terré (ed) *Pour une Réforme du Droit de la Responsabilité Civile* (Dalloz 2011). A new draft project on the reform of civil liability was launched by the Ministry of Justice on 29 April 2016 (*Avant-projet de loi réforme de la responsabilité civile*), text available in http://www.textes.justice.gouv.fr/art_pix/avpjl-responsabilite-civile.pdf. Art 1242 of this project: ‘Fault consists in the violation of a rule of conduct imposed by law or the breach of the general duty of care and diligence’.

and academic writers have not reached agreement on this issue either.³³¹ This is an area where French law seems to lack conceptual clarity, as the different explanations provided by *la doctrine* are somewhat hazy and not clearly distinguishable from each other.

Nevertheless, three main views can be identified. The first defines fault under a breach of duty model. Planiol suggested that fault should be defined as breach of a pre-existing obligation.³³² However, the use of the term ‘obligation’ has been criticised, as this term today is used in reference to the contractual context.³³³ Therefore, a number of writers argue that the term ‘obligation’ should be replaced with that of ‘duty’ and state that delictual fault consists in the breach of a pre-existing duty.³³⁴ But even here there is disagreement as to whether fault should be defined as the breach of a ‘legal duty’³³⁵ or just ‘a duty’.³³⁶ The definition of delictual fault as the non-performance of a pre-existing legal duty has been criticised for being inaccurate and vague.³³⁷

Despite this criticism, it must be noted that even though the concept of duty is not used to define and control the circumstances in which liability for fault may arise (in contrast to the ‘duty of care’ in the English tort of negligence),³³⁸ this concept is

³³¹ Borghetti (n 319) 273, 278.

³³² Marcel Planiol, *Traité Élémentaire de Droit Civil*, vol II (3rd edn, LGDJ 1949) 324.

³³³ Borghetti (n 319) 278.

³³⁴ Borghetti (n 319) 278. Some still prefer to refer to breach of an obligation, eg, Aubry (n 101) 332.

³³⁵ eg, Deshayes and Maître, case 1, in Cartwright and Hesselink (n 6) 28.

³³⁶ eg, Geneviève Viney and Patrice Jourdain, *Traité de Droit Civil: Les Conditions de la Responsabilité* (4th edn, LGDJ 2013) 445, 450-451.

³³⁷ Malaurie, Aynès and Stoffel-Munck (n 316) 43.

³³⁸ Ch VI p 291.

sometimes used to define what fault may be.³³⁹ Therefore, ‘while delictual fault may exist in the absence of breach of a duty, breach of a duty will constitute delictual fault’.³⁴⁰ However, the courts and in particular the *Cour de cassation* do not always specify the nature of the duty that has been breached when they make a finding of fault.³⁴¹

A second view, supported by authors who criticise the definition of fault as breach of a duty,³⁴² defines fault as contravention of a diligence standard, as behaviour different from that of a reasonably diligent person.³⁴³ Fault is thus generally regarded as conduct below the standard of a reasonable man (*un homme normalement avisé*) in the same situation as the defendant.³⁴⁴ This standard was also characterised as the ‘good father of a family’ (*bon père de famille*).³⁴⁵ The assessment of fault is abstract and objective, made by comparing the conduct of the party under scrutiny with the behaviour of a normally diligent man placed in the same circumstances.³⁴⁶ However, while in principle the courts take an objective standard in deciding what a

³³⁹ John Bell, Sophie Boyron and Simon Whittaker, *Principles of French Law* (2nd edn, OUP 2008) 365.

³⁴⁰ Bell, Boyron and Whittaker (n 339) 365.

³⁴¹ Borghetti (n 319) 279.

³⁴² eg, Noël Dejean de la Bâtie, ‘Responsabilité Délictuelle’ in André Ponsard and Ibrahim Fadlallah (eds), *Aubry et Rau: Droit Civil Français*, vol VI-2 (8th edn, Librairies Techniques 1989) 44 fn 9.

³⁴³ Borghetti (n 319) 278.

³⁴⁴ eg, Henri Mazeaud, Léon Mazeaud and André Tunc, *Traité Théorique et Pratique de la Responsabilité Civile Délictuelle et Contractuelle*, vol I (6th edn, Éditions Montchrestien 1965) 504; Dejean de la Bâtie (n 342) 45; Paula Giliker, ‘A Role for Tort in Pre-Contractual Negotiations? An Examination of English, French, and Canadian Law’ (2003) 52 ICLQ 969, 979.

³⁴⁵ Borghetti (n 319) 278.

³⁴⁶ Malaurie, Aynès and Stoffel-Munck (n 316) 44; Aubry (n 101) 333; Chauvel (n 324) para 9; Schmidt, *Négociation* (n 322) 107; Schmidt, ‘La Sanction’ (n 324) 52.

reasonable man ought to do in any particular circumstance, the looseness of this definition allows considerable room for manoeuvre.³⁴⁷

Finally, a third view adopts a reconciliation approach. Some authors point out that the clash between the two previous definitions of fault is less a matter of substance than of terminology.³⁴⁸ They try to reconcile the definitions of fault by stating that the authors who take the second view (fault as a departure from an expected conduct), necessarily refer to a norm (which is expressed in the conduct of a good father of a family) and, in this way, they are actually defining fault as breach of a rule.³⁴⁹ According to this view, it seems that almost all French legal scholars agree on a definition of fault as breach of a norm recognised by the law³⁵⁰ or breach of a general norm of behaviour.³⁵¹

Consequently, many authors consider that there is a ‘general norm of social conduct requiring individuals to behave with care and diligence in all circumstances’,³⁵² which is sometimes called a ‘general rule of civility’³⁵³ or a ‘fundamental rule of behaviour’ implicit in articles 1382 and 1383 (new articles 1240 and 1241) Cciv.³⁵⁴ The path taken by courts and writers in France is that a negotiator’s liability for misconduct is based on breach of the general duty of care³⁵⁵

³⁴⁷ Bell, Boyron and Whittaker (n 339) 365.

³⁴⁸ Viney and Jourdain (n 336) 445.

³⁴⁹ Borghetti (n 319) 278.

³⁵⁰ Borghetti (n 319) 278.

³⁵¹ Viney and Jourdain (n 336) 457; Deshayes and Maître, case 1, in Cartwright and Hesselink (n 6) 28.

³⁵² Viney and Jourdain (n 336) 457.

³⁵³ Jean Darbellay, *Théorie Générale de L’Illicéité en Droit Civil et en Droit Pénal* (Éditions Universitaires 1955) 161.

³⁵⁴ Marc Puech, *L’Illicéité dans la Responsabilité Civile Extracontractuelle* (LGDJ 1973) 45-46. This is explained by Borghetti (n 319) 278-279.

³⁵⁵ Kötz, *European Contract Law* (n 79) 35.

and the generality of article 1382 (new article 1240) Cciv allows the courts, with the assistance of *la doctrine*, to regulate precontractual behaviour and impose a minimum standard of conduct outside the contractual regime.³⁵⁶

Precontractual fault is therefore defined in relation to an abstract model, the standard of the ‘reasonable negotiator’ who acts in an honest and loyal manner.³⁵⁷ In the negotiation phase, precontractual fault can be found in three main types of wrongful behaviour: (i) to enter into or maintain negotiations without a real intention to conclude a contract; (ii) to behave wrongfully towards the other party during the negotiations; and (iii) to suddenly break off the negotiations when the other party had good reason to think that the contract was going to be concluded.³⁵⁸ This third situation is the ‘usual case’ of fault in breaking off negotiations, ie, where the belief in the success of the negotiations has legitimately arisen in the victim of the break-off and the author of the break-off cannot justify it by a legitimate reason.³⁵⁹ It is in this scenario where the expectation-dimension of reliance is recognised. These examples are very general and the existence of fault is left to the judge’s interpretation, according to the particular circumstances of the case.³⁶⁰ The criteria to determine whether there is a culpable breaking-off are not established by the *Cour de cassation*; it is a question of fact over which the *Cour* does not have control.³⁶¹ The *Cour*,

³⁵⁶ Paula Giliker, *Pre-contractual Liability in English and French Law* (Kluwer Law International 2002) 122.

³⁵⁷ Joanna Schmidt-Szalewski, ‘Note on Cass com 7 April 1998’ JCP éd E 1999, 579; Patrick Chauvel, ‘Note on Cass com 7 April 1998’ D 1999, 514, para 12.

³⁵⁸ Deshayes and Maître, case 1, in Cartwright and Hesselink (n 6) 29.

³⁵⁹ Stoffel-Munck, ‘Les Pourparlers’ (n 324) 4.

³⁶⁰ Deshayes and Maître, case 1, in Cartwright and Hesselink (n 6) 29. See this ch s III 1 below.

³⁶¹ Schmidt, ‘La Sanction’ (n 324) 52.

however, exercises its control over the legal characterisation of the blameworthy behaviour.³⁶²

2 The need of a ‘qualified’ fault?

The *Code civil* adopts a wide concept of ‘*faute*’ that covers both intentionally and negligently committed harm.³⁶³ In cases of breaking off negotiations, since ‘precontractual fault’ is subsumed under the general notion of ‘delictual fault’,³⁶⁴ the gravity of the fault does not matter, ie, it is not necessary for the claimant to show either an intentional or a serious wrongdoing on the part of the defendant because, in theory, even the slightest fault may lead to liability.³⁶⁵ However, because liability for breaking off negotiations is a specific area of delictual liability, it could be asked whether a certain particularity, in the form of a supplementary requirement, should exist? This would translate into the need for a ‘qualified fault’: either an intention to cause harm or acting in bad faith, during the negotiations.³⁶⁶ There is nothing in article 1382 (new article 1240) to suggest such a requirement, but the courts have considered whether liability in the absence of such an intention would extend precontractual liability too far.³⁶⁷

The *Cour de cassation*, in its 1972 judgment in the *Monoprix* case, established that delictual liability for breaking off negotiations does not require negotiations to have been broken off with an intention to cause harm to the other party;³⁶⁸ it

³⁶² Schmidt, *Négociation* (n 322) 111; Dejean de la Bâtie (n 342) 45.

³⁶³ Giliker, *Pre-contractual* (n 356) 120; text to (n 319) above.

³⁶⁴ sub-s 1 above.

³⁶⁵ Deshayes and Maître, case 1, in Cartwright and Hesselink (n 6) 28; Schmidt-Szalewski, ‘France’ in Hondius (n 9) 150; Schmidt, ‘Période Précontractuelle’ (n 324) 550.

³⁶⁶ As explained by Chauvel (n 324) para 5.

³⁶⁷ Giliker, *Pre-contractual* (n 356) 124.

³⁶⁸ Cass civ 3 October 1972 (n 316).

considered that negligence was sufficient.³⁶⁹ In this case negotiations for the purchase of land had been lengthy, the prospective buyer (a supermarket company) had requested the owner of the land to do works on the property, and subsequently withdrew from the negotiations.³⁷⁰ The court decided that even though the party breaking off had no wrongful intention, his behaviour in pursuing the negotiations was sufficient to hold him liable for delictual liability.³⁷¹ Therefore, the existence of an intention to cause harm is a sufficient but not necessary condition for the imposition of precontractual liability.³⁷²

Nevertheless, a later judgment of the *Cour de cassation* contradicted *Monoprix* in that, in the absence of an intention to cause harm (*volonté de nuire*), it appeared to require at least bad faith in the course of negotiations.³⁷³ This decision received little support from *la doctrine*, which chose to distinguish it on its facts,³⁷⁴ and has not been followed by the *Cour de cassation*.³⁷⁵ The defendant was an elderly man who had entered negotiations with the claimant (a property developer) for the sale of his land and the negotiations failed due to the refusal of his co-owner to approve the sale. The claimant was unaware of the existence of the co-owner and argued that the defendant was at fault in failing to inform him of this fact. The defendant had agreed in principle to sell his land to the claimant and although no price

³⁶⁹ Kötz, *European Contract Law* (n 79) 40.

³⁷⁰ Bell, Boyron and Whittaker (n 339) 306.

³⁷¹ Deshayes and Maître, case 8, in Cartwright and Hesselink (n 6) 238.

³⁷² eg, Ghestin (n 316) 562; Giliker, *Pre-contractual* (n 356) 125; Chauvel (n 324) para 6.

³⁷³ Cass civ 1, 12 April 1976, Bull civ I no 122 p 98, RTDciv 1977, 127, note Durré.

³⁷⁴ Giliker, *Pre-contractual* (n 356) 124; eg, Georges Durré, 'Note on Cass civ 3 October 1972 and Cass civ 12 April 1976' RTDciv 1977, 127, 129.

³⁷⁵ eg, Cass com, 12 October 1993, no 91-19456; Cass com, 22 February 1994, Bull civ IV no 79 p 61 (a *légèreté blâmable* was sufficient to find an abuse of the right to break off negotiations); Cass com, 11 July 2000, Bull Joly 2000 no 288, note Saintourens, PA 2001 no 57 p 19, note Dagorne-Labbé.

had been agreed yet, the claimant had proceeded to purchase a neighbouring lot and had had an architect draw up plans for both properties.³⁷⁶

Due to the circumstances of the case, considerations of justice rather than of authority prevailed in this judgment,³⁷⁷ as the *Cour* was not prepared to condemn the defendant (who believed he was the sole owner) and relied on his lack of malicious intent and that he was not in bad faith in agreeing to the sale in principle, in order to justify a ‘sympathetic treatment of his plight’.³⁷⁸ The outcome of the case was fair, because the claimant should not have taken the enormous risk of buying the neighbouring lot without checking the title of the land (as he could easily have done) and he should not have relied on what was said by the defendant (an elderly man inexperienced in land deals).³⁷⁹ The case could also be viewed as an example of the attitude of the courts in imposing more stringent requirements for the configuration of fault where the claimant is a professional.³⁸⁰

This case is an example of the use of the notion of ‘bad faith’ (*mauvaise foi*) in precontractual liability cases. The difficulty with this notion is that it does not have a precise definition, thus its content has had to be defined by *la doctrine*, and its characterisation is left to the appreciation of the judges.³⁸¹ A further difficulty is that it can take either a subjective or an objective meaning.³⁸² It has been argued that in this case the court is referring to a subjective notion of bad faith.³⁸³ In this way, it can be

³⁷⁶ Facts explained in Kötz, *European Contract Law* (n 79) 39; in Schmidt, *Négociation* (n 322) 109.

³⁷⁷ Schmidt, *Négociation* (n 322) 109-110.

³⁷⁸ Giliker, *Pre-contractual* (n 356) 124-125; Kötz, *European Contract Law* (n 79) 40.

³⁷⁹ Kötz, *European Contract Law* (n 79) 40; Durré (n 374) 129.

³⁸⁰ Schmidt, *Négociation* (n 322) 110; p 112 below.

³⁸¹ Jaluzot (n 92) 368.

³⁸² Subjective bad faith is based on the notion of intention, Jaluzot (n 92) 94-96.

³⁸³ Chauvel (n 324) paras 7-8.

understood that most authors conclude from precontractual liability cases³⁸⁴ that a party is liable for breaking off negotiations not only if he intended to harm the other party, but also if he ‘acted in bad faith’, as they are referring to objective bad faith, which becomes merged or confused with the notion of ‘*faute*’ in terms of negligence.³⁸⁵ It is bad faith, in particular, to break off negotiations all of a sudden, without a good reason, at a point where the other party could reasonably expect the conclusion of the contract.³⁸⁶

In conclusion, fault has not been specially qualified with regard to breaking off negotiations, it simply corresponds to the application of articles 1382 and 1383 (new articles 1240 and 1241) Cciv,³⁸⁷ and breaking off can be blameworthy even if it is due to a simple negligence.³⁸⁸

3 The place of precontractual fault

Where one party breaks off the negotiations and the other party had good reason to trust that the contract was to be concluded, it is necessary to understand where the fault lies: in the breaking-off itself, in the circumstances that lead to the breaking-off, in the inducement of reliance on an expectation, or in a combination of these criteria.

Since the decision of the *Cour de cassation* in *Manoukian*, which referred to ‘the circumstances constituting fault in the exercise of the right unilaterally to break

³⁸⁴ eg, *Hydrotile* (n 316); *Monoprix* (n 316); Cass civ 12 April 1976 (n 373); Cass com, 22 April 1997, D 1998 Jur 45, note Chauvel (*Mabo & Co c Iveco France & Co*); *Manoukian* (n 323).

³⁸⁵ Yannick Dagorne-Labbé, ‘Note on Cass com 11 July 2000’ PA 2001 no 57 p 19.

³⁸⁶ *Ius Commune* (n 14) 388; eg, Terré, Simler and Lequette (n 316) 201-202; Ghestin (n 316) 537-538; Anne Danis-Fatôme, *Apparence et Contrat* (LGDJ 2004) 481; Jourdain (n 324) 128.

³⁸⁷ Chauvel (n 324) para 8.

³⁸⁸ Schmidt, *Négociation* (n 322) 111; Schmidt, ‘Période Précontractuelle’ (n 324) 550; Danis-Fatôme (n 386) 481; de Coninck (n 86) 25.

off precontractual negotiations’,³⁸⁹ it has been argued that it is not the breaking-off itself that constitutes an abuse or fault but the circumstances which lead to it.³⁹⁰ It is said that, in *Manoukian*, the fault lies in having led the other party to believe (*avoir laissé croire*) that the outcome of the negotiations would be successful,³⁹¹ while remaining silent about the fact that an agreement had already been concluded with a third party.³⁹² Deshayes distinguishes between ‘fault for breaking off’ (*faute de rupture*) and ‘fault during the breaking-off’ (*faute dans la rupture*) or ‘fault in negotiating’ (*faute de négociation*) and argues that the former does not exist and that only the latter is conceivable; fault which is foreign to the break-off but committed or revealed in relation to it.³⁹³ Even before *Manoukian*, some authors argued that because it expresses the exercise of a freedom, the breaking-off cannot in itself constitute a fault, and that it is the blameworthy character of the implementation of the negotiations that can justify the existence of an obligation to compensate.³⁹⁴

The *Cour de cassation* confirmed *Manoukian* in a 2006 judgment³⁹⁵ and commenting on this case in its annual report, the court observed that the right of the parties to break off negotiations freely leads to exclude any causal relation between the loss of a chance to benefit from the negotiated contract and the circumstances of

³⁸⁹ Cass com 26 November 2003 (n 323).

³⁹⁰ *Ius Commune* (n 14) 381.

³⁹¹ Philippe Stoffel-Munck, ‘Note on Cass com 26 November 2003’ JCP éd E 2004, 738; text to (n 426) below.

³⁹² François Guy Trébulle, ‘Note on Cass com 26 November 2003’ Droit des Sociétés no 3 2004 no 37.

³⁹³ Olivier Deshayes, ‘Le Dommage Précontractuel’ (2004) 2 RTDcom 187, para 16. This distinction is criticised as artificial by Ghestin (n 316) 566.

³⁹⁴ eg, Aubry (n 101) 333.

³⁹⁵ Cass civ 3, 28 June 2006, Bull civ III no 164 p 136, JCP 2006 II 10130, note Deshayes. Also in Cass civ 3, 7 January 2009, Bull civ III no 5, RTDciv 2009, 113, note Fages; Cass com, 18 September 2012, Bull civ IV no 163; Cass civ 3, 19 September 2012, Revue des Contrats 2013 no 1 p 98, note Deshayes.

the breaking-off where the fault lies.³⁹⁶ This has been interpreted by some in terms that the decision to break off in itself can never constitute fault³⁹⁷ and that fault lies in the manner of the breaking-off.³⁹⁸ However, before *Manoukian*, in cases where the breaking-off was done in a sudden, abrupt or unpredictable manner it could be argued that the breaking-off itself constituted fault.³⁹⁹ And, after *Manoukian*, Ghestin still argues that in most cases it is the decision itself to break off that is culpable (to have broken off in a blameworthy or abusive way), but that its culpable character is recognised and characterised in relation to the circumstances or reasons for this decision.⁴⁰⁰

The *Manoukian* line of case law has been reaffirmed by new article 1112(2) Cciv in that the fault lies in the exercise of the right to break off and not in the breaking-off itself.⁴⁰¹ Thus, it seems that the place of fault is found in the circumstances which lead to the breaking-off and not in the breaking-off itself. However, it is still possible to consider that the fault lies in the conduct, during the negotiations, of the party who ultimately breaks them off, in inducing a *croyance* or *confiance légitime* in the other party, and that this fault can be evidenced in the presence of certain typical objective circumstances.⁴⁰²

³⁹⁶ Cour de cassation, *Rapport Annuel 2006* (La Documentation Française 2006) 399-400, in https://www.courdecassation.fr/publications_26/rapport_annuel_36/rapport_2006_2284/.

³⁹⁷ Olivier Deshayes, 'Note on Cass com 18 September 2012 and Cass civ 19 September 2012' *Revue des Contrats* 2013 no 1 p 98, 99; Olivier Deshayes, 'Note on Cass civ 28 June 2006' *JCP* 2006 II 10130, 1511; Deshayes, 'Dommage Précontractuel' (n 393) para 36.

³⁹⁸ Olivier Deshayes, 'La Rupture des Pourparlers' (2008) 203 PA 4.

³⁹⁹ Chauvel (n 324) para 13; Jaluzot (n 92) 363; eg, Cass com 22 April 1997 (n 384); Cass com, 7 January 1997, D 1998 Jur 45, note Chauvel (*Eurolocatique & Co c Banque franco-allemande*); CA Rennes, 29 April 1992, Bull Joly 1993 no 132, note Daigre.

⁴⁰⁰ Ghestin (n 316) 562-563.

⁴⁰¹ According to *Rapport au Président* (n 313) 9.

⁴⁰² This 'reliance view' is analysed in s II 1 below and these circumstances are analysed in s III 1 below.

II Theoretical bases of precontractual liability for breaking off negotiations

At least three different doctrines of French private law have been put forward as possible bases for the delictual liability arising from breaking off negotiations: abuse of rights, good faith, and *croyance légitime/confiance légitime*. This section will argue that the appropriate basis of this liability is ‘reliance’ expressed in terms of *croyance légitime/confiance légitime*. This section will also look at the abuse of rights and good faith explanations, analysing how they interact with the notion of reliance and why they should yield to the reliance account. From the outset, it must be noted that this is not an area of great conceptual clarity in that there are no clear-cut definitions of the concepts and they often intertwine.⁴⁰³

1 *Croyance légitime/confiance légitime*

Under this basis, the party who breaks off negotiations is not liable for breaking off but for inducing and then disappointing the other party’s reliance that the negotiated contract would be concluded.⁴⁰⁴ The claimant can thus argue that the defendant had induced in him an ‘excessive confidence’ that they were going to conclude the contract.⁴⁰⁵ The concepts of ‘*croyance légitime*’ (legitimate belief) and ‘*confiance légitime*’ (legitimate confidence or trust) have been proposed by some French authors as criteria for revealing the fault of the party breaking off negotiations.⁴⁰⁶ It is through the use of these concepts that the notion of reliance is recognised in

⁴⁰³ eg, abuse, fault, good faith, bad faith, are all ‘neighbour’ notions which are difficult to define, Malaurie, Aynès and Stoffel-Munck (n 316) 257.

⁴⁰⁴ *Ius Commune* (n 14) 381. See text to (n 402) above.

⁴⁰⁵ Horatia Muir-Watt, Ruth Sefton-Green and Stéphane Reifegerste, case 3, in Zimmermann and Whittaker (n 155) 240.

⁴⁰⁶ Deshayes and Maître, case 7, in Cartwright and Hesselink (n 6) 202; eg, authors cited in (n 324) above.

precontractual liability for breaking off negotiations in French law, as it is held that ‘[t]he concept of “legitimate belief” may be related to a certain extent to the common law concept of *reliance*.’⁴⁰⁷ These concepts are generally used interchangeably⁴⁰⁸ but some authors prefer to use the notion of *confiance légitime* rather than *croyance légitime*.⁴⁰⁹ Sometimes these notions are used within other doctrines, such as the doctrines of appearance, coherence and legitimate expectations. The meaning, operation and relevance of these notions and their relation to the concept of ‘reliance’ in the configuration of liability for breaking off negotiations is analysed below.

(a) *Croyance légitime*

The criterion of ‘legitimate belief’ tends to focus on the victim of the break-off, in that as soon as the victim had good reasons to believe that the negotiated contract was to be concluded, breaking off should be considered wrongful.⁴¹⁰ The belief relates to the future conclusion of the contract (to the expectation dimension of reliance). However, any belief will not do; the belief must be legitimate or reasonable.

The *croyance légitime* may be induced by the conduct of the party who breaks off the negotiations.⁴¹¹ Examples are (i) dangling the prospect of the certain conclusion of the contract to the disappointed party,⁴¹² or (ii) acting as if the transaction was already made (for instance by letting the other party begin

⁴⁰⁷ Deshayes and Maître, case 7, in Cartwright and Hesselink (n 6) 202 fn 19 (also case 5, 145 fn 12).

⁴⁰⁸ eg, Ghestin (n 316) 536-537; Stoffel-Munck, ‘Note on Cass com 26 November 2003’ (n 391); Danis-Fatôme (n 386) 479.

⁴⁰⁹ eg, D Mazeaud (n 324).

⁴¹⁰ Deshayes and Maître, case 7, in Cartwright and Hesselink (n 6) 202 fn 19.

⁴¹¹ This para follows Stoffel-Munck, ‘Les Pourparlers’ (n 324) 4.

⁴¹² eg, Cass com, 15 October 2002, no 00-13738; CA Rennes, 8 July 1929, DH 1929 p 548. Also, Schmidt, ‘La Sanction’ (n 324) 53.

performance, or by accepting partial performance,⁴¹³ or by presenting the other negotiating party as his associate),⁴¹⁴ or (iii) by the existence of an established climate of trust (*'climat de confiance'*) between the negotiating parties.⁴¹⁵

The *croyance légitime* may also be induced by the existence of certain objective circumstances which influence the assessment of the legitimate belief in the ultimate success of the negotiations, among which the length and high level of advancement of the negotiations must be highlighted.⁴¹⁶ The more advanced the negotiations, the more the *croyance* of the other party in the success of the negotiations is legitimised and the more necessary it will become to provide a serious and objective motive to break off without incurring liability.⁴¹⁷ On the contrary, there are elements which are unfavourable to the finding of a *croyance légitime*, such as the existence of contextual risks or unexpected obstacles (*'aléas'*) or the known existence of negotiations with third parties.⁴¹⁸ In the *Adjani* case, the court found that there had been no wrongful breaking-off because:

[N]othing permits one to say that Mlle Adjani led the *Société Sofracima* to believe with certainty that she would give her consent and sign the contract, (...) shows the reticence of Mlle Adjani, her refusal to commit herself, and the absence of all the things necessary for her to agree to the proposal.⁴¹⁹

The courts have expressly recognised the influence of this 'legitimate belief' on the fulfilment of the fault requirement in some cases of liability for broken

⁴¹³ eg, CA Paris 10 March 2000 (n 316).

⁴¹⁴ eg, Cass com 11 July 2000 (n 375).

⁴¹⁵ eg, CA Riom 10 June 1992 (n 323).

⁴¹⁶ eg, Cass com, 18 January 2011, no 09-14617; *Manoukian* (n 323); CA Riom 10 June 1992 (n 323); CA Rennes 29 April 1992 (n 399). See s III 1 below.

⁴¹⁷ Stoffel-Munck, 'Les Pourparlers' (n 324) 7.

⁴¹⁸ Stoffel-Munck, 'Les Pourparlers' (n 324) 6.

⁴¹⁹ CA Paris, 13 December 1984, RTDciv 1986, 97, note Mestre (*Société Sofracima c Isabelle Adjani*), translated text from Gordley and von Mehren (n 74) 443. See text to (n 446) below. Similarly, Cass com, 5 May 2009, no 08-10474.

negotiations.⁴²⁰ Thus, some judgments have established that fault consists in making the other party legitimately believe (*faire croire légitimement*) that they were about to conclude the contract.⁴²¹ For instance, the Court of Appeal of Riom held that:

[W]hen (...) [negotiations] have reached a length and level of intensity such that one party may legitimately believe that the other is about to conclude the contract and in readiness encourages him to incur certain expenses, breaking off such negotiations is wrong, causes loss and gives rise to reparation.⁴²²

This judgment requires a combination of inducement of reliance by the conduct of the defendant and the presence of objective circumstances, such as the length and level of intensity of the negotiations, in order to found the legitimacy of the *croyance* of the claimant. Other judgments place emphasis on the conduct of the author of the break-off rather than on the belief of the victim of the break-off and refer to the conduct of suggesting or leading the other party to believe (*laisser croire*) that the author of the break-off would contract.⁴²³ Hence, fault generally consists in a sudden U-turn, putting an end to lengthy negotiations which had led the other party to believe in the upcoming conclusion of the contract.⁴²⁴

The *Manoukian* judgment⁴²⁵ (in the particular scenario of parallel negotiations) provides an example of the expectation-based reliance involved in *croyance légitime*, in that the *Cour de cassation*, upholding the decision of the Paris *cour d'appel*, considered that the claimant was entitled to believe that the defendants

⁴²⁰ Deshayes and Maître, case 7, in Cartwright and Hesselink (n 6) 202; eg, Cass com 31 March 1992 (n 323).

⁴²¹ Danis-Fatôme (n 386) 483.

⁴²² CA Riom 10 June 1992 (n 323), translated quote by Giliker, *Pre-contractual* (n 356) 124. Also, Cass civ 3, 7 October 1997, no 96-10380.

⁴²³ Danis-Fatôme (n 386) 483 fn 401; eg, Cass com 31 March 1992 (n 323); CA Paris 10 March 2000 (n 316); *Manoukian* (n 323); Cass com, 13 October 2009, no 08-16634.

⁴²⁴ Malaurie, Aynès and Stoffel-Munck (n 316) 268.

⁴²⁵ Cass com 26 November 2003 (n 323).

would conclude the contract. The court placed emphasis on the facts that a draft agreement settling most of the differences between them had been reached, and that the defendants had delayed informing the claimant that a contract had already been concluded with a third party, while letting him believe that the delay in concluding the contract with him was only due to a formality.⁴²⁶

(b) Confiance légitime

The ‘legitimate belief’ can also be phrased in terms of legitimately trusting that the negotiated contract will be concluded and, so, the notion of *croyance légitime* merges with that of *confiance légitime* regarding liability for broken negotiations. Hence, all that has been said in (a) above in relation to *croyance légitime* is applicable to *confiance légitime*. However, it is important to analyse the particular views on the notion of *confiance légitime* developed by some French legal scholars who base this liability on this notion.

Professor Schmidt-Szalewski has proposed the principle of ‘*confiance légitime trompée*’ (betrayed legitimate trust) as the criterion of fault in the imposition of liability for broken negotiations.⁴²⁷ This concept was first used by Emmanuel Lévy to explain the basis of liability in general, and a specific example he gave was the *confiance* inspired in the offeree by the promise made by the offeror that he would maintain his offer; *confiance* which was deceived if the offeror did not maintain his offer, making him liable.⁴²⁸ Schmidt-Szalewski’s criterion of *confiance légitime trompée*, which defines precontractual fault, is an illustration of the general notion of

⁴²⁶ John Cartwright, ‘Cour de Cass, 26.11.2003 - ‘*Perte de Chance*’ (Expectation Interest) and Liability of a Third Person in Case of Breaking Off Negotiations: English Case Note’ (2005) 13 ERPL 455, 457; *Ius Commune* (n 14) 379.

⁴²⁷ See references to Schmidt in (nn 322, 324) above.

⁴²⁸ Emmanuel Lévy, *La Vision Socialiste du Droit* (Marcel Giard 1926) 61-63, 80; Emmanuel Lévy, *Les Fondements du Droit* (Librairie Félix Alcan 1933) 51.

delictual fault.⁴²⁹ Fault consists in deceiving the trust (*tromper la confiance*) in the conclusion of the negotiated contract created in one of the negotiating parties.⁴³⁰ The degree of trust between the parties increases as negotiations develop towards reaching an agreement.⁴³¹ This criterion, however, presents the danger of leading to the admission of too broad a liability to the detriment of the principle of freedom of contract.⁴³² It is, therefore, necessary to control the application of the notion of *confiance* and to admit its consequences only if the analysis of the facts of the case shows the existence of a ‘serious, legitimate, and foreseeable’ confidence (*confiance*) created by the conduct of one of the negotiating parties.⁴³³ The appreciation of the legitimacy of *confiance* can be compared with the ‘excusable’ character of mistake, in that the analysis must rest on circumstances of fact.⁴³⁴ Two factors are particularly relevant in determining the legitimacy of *confiance*: the more or less advanced character of the negotiations and the position of the victim of the break-off (whether he is a professional or a layman).⁴³⁵ Through the notion of *confiance*, French law admits, in an implicit manner, an analogous notion to that of ‘substantial reliance’ in the doctrine of estoppel used by US courts in the treatment of problems of precontractual liability, where a promise is broadly understood as ‘any conduct that brings about an expectation of a contract’.⁴³⁶

⁴²⁹ Schmidt, ‘Période Précontractuelle’ (n 324) 554.

⁴³⁰ Schmidt, ‘La Sanction’ (n 324) 57.

⁴³¹ Schmidt, ‘L'évolution’ (n 324) 149; ‘Période Précontractuelle’ (n 324) 551. Also, Terré, Simler and Lequette (n 316) 201-202.

⁴³² Schmidt, *Négociation* (n 322) 108.

⁴³³ Schmidt, *Négociation* (n 322) 108. Translation of Schmidt in von Mehren, ‘Formation’ (n 28) para 123.

⁴³⁴ Schmidt, *Négociation* (n 322) 108.

⁴³⁵ Schmidt, *Négociation* (n 322) 108.

⁴³⁶ Schmidt, *Négociation* (n 322) 108 fn 9; ‘L'évolution’ (n 324) 149. Translation of Schmidt in von Mehren, ‘Formation’ (n 28) para 123 fn 495.

It is suggested that in Schmidt-Szalewski's criterion of *confiance légitime trompée* the notion of reliance manifests in both its dimensions. The trust-dimension is present in the trust between the parties which increases as negotiations develop, and the expectation-dimension is present in the legitimate confidence in the future conclusion of the negotiated contract which is deceived. One or both dimensions are highlighted in some author's interpretation of Schmidt-Szalewski's criterion. For instance, Giliker's analysis focuses on the trust dimension: liability will be imposed where the defendant has broken a relationship of trust or mutual confidence between the parties; confidence which does not arise easily. Freedom of contract remains the governing principle but intervention will be justified where the parties are in a close relationship of trust. There is a line that must be drawn between the period where negotiating parties act at their own risk and the stage where negotiations have advanced to a point where a relationship of trust and confidence exists. In the latter stage a party is at fault in breaking off negotiations abruptly and without warning.⁴³⁷ Danis-Fatôme highlights that the existence of negotiations creates a reciprocal *confiance* between the negotiating parties.⁴³⁸ Muir-Watt considers both dimensions of reliance, stating that an abusive break-off of negotiations disappoints the *confiance légitime* that the other party could place if not in the success of the negotiations, at least in the relationship that they imply.⁴³⁹ Deshayes focuses on the expectation dimension, referring to the protection of the legitimate *confiance* that the words or conduct of the party breaking off have given rise to in the other party.⁴⁴⁰

⁴³⁷ Giliker, *Pre-contractual* (n 356) 130-131, 132; Giliker, 'Tort' (n 344) 984.

⁴³⁸ Danis-Fatôme (n 386) 484.

⁴³⁹ Horatia Muir-Watt, 'Les Pourparlers: De la Confiance Trompée à la Relation de Confiance' in Pauline Rémy-Corlay and Dominique Fenouillet (eds), *Les Concepts Contractuels Français à L'heure des Principes du Droit Européen des Contrats* (Dalloz 2003) 61.

⁴⁴⁰ Deshayes, 'Dommage Précontractuel' (n 393) para 31. Also de Coninck (n 86) 52.

Confiance légitime trompée, which is the criterion of precontractual fault, plays a moralising role in the negotiations period.⁴⁴¹ Hence, liability will arise when, in the interest of justice, the law intervenes to protect the trust developed between the negotiating parties, where the claimant could reasonably expect the negotiated contract to be concluded, by providing a remedy for the detrimental reliance suffered.⁴⁴²

The notion of *confiance légitime* can be found underlying most judgments that relate to liability for broken negotiations,⁴⁴³ particularly in case law which refers to the advanced stage of negotiations and the suddenness with which an established relationship was terminated.⁴⁴⁴ For instance, in a 2003 decision, the *Cour de cassation* held that the defendant had provoked in the claimant a *confiance* in the conclusion of the negotiated contract and that the negotiations were sufficiently advanced for him to legitimately believe that they would succeed.⁴⁴⁵ In contrast, the *Adjani* case, where the liability of an actress for wrongful breaking-off of negotiations was rejected because there was nothing to allow to say that she had maintained the film company in the certainty that she would sign the contract, is an example of a case where the lack of legitimate *confiance* in the conclusion of the contract entails the rejection of liability.⁴⁴⁶ In a judgment of the Court of Appeal of Pau the criterion of *confiance* was implicitly recognised, in that the court rejected liability because it found that the

⁴⁴¹ Schmidt, 'Période Précontractuelle' (n 324) 566. Also, Dagorne-Labbé (n 385).

⁴⁴² Giliker, *Pre-contractual* (n 356) 132; Asúa (n 21) 240.

⁴⁴³ Schmidt, 'L'évolution' (n 324) 149; Danis-Fatôme (n 386) 482.

⁴⁴⁴ Giliker, *Pre-contractual* (n 356) 131; Franck Violet, 'Note on CA Paris 10 March 2000' JCP 2001 II 10470; Dagorne-Labbé (n 385); Arnaud Lecourt, 'Note on CA Agen 21 August 2002' JCP 2003 II 10162, 1830.

⁴⁴⁵ Cass com, 25 February 2003, no 01-12660.

⁴⁴⁶ CA Paris 13 December 1984 (n 419); eg, Danis-Fatôme (n 386) 483; Jacques Mestre, 'Note on CA Paris 13 December 1984' RTDciv 1986, 97, 100.

negotiations were too weak, implying that they could not give rise to a sufficiently founded *confiance* in the conclusion of the contract.⁴⁴⁷

Although most of the case law relating to liability for broken negotiations developed from the 1970s onwards,⁴⁴⁸ there are older cases imposing delictual liability for broken negotiations based on an implicit notion of *confiance légitime*. For instance, in an 1883 decision of the Court of Appeal of Paris it was found that the abrupt termination of negotiations, having one party given the other just reason to believe in the strength of their commercial relationship (trust-based reliance), amounted to delictual liability.⁴⁴⁹ And in 1893 the Court of Appeal of Dijon imposed liability on the author of the break-off, basing such liability on the assurances as to the future conclusion of the contract that he had made to the other party.⁴⁵⁰

The *Hydrotile machine* case⁴⁵¹ provides an example of the operation of *confiance légitime* in both dimensions of reliance, as, on the one hand, the defendant's knowledge of the claimant's expenses, his retention of an estimate required by the claimant, and his continuance of negotiations had induced the claimant to believe that a contract would ensue (expectation-dimension) and, on the other hand, as negotiations had made considerable progress, the claimant had incurred substantial expenses, in the belief that no obstacle existed to his purchase of the machine. If this latter belief is a consequence of the degree of trust which had developed between the parties (trust-dimension), then it is suggested that both levels of reliance are linked, in

⁴⁴⁷ CA Pau, 14 January 1969, D 1969, 716, translated text in Gordley and von Mehren (n 74) 442; Schmidt, *Négociation* (n 322) 108 fn 10.

⁴⁴⁸ Giliker, *Pre-contractual* (n 356) 132.

⁴⁴⁹ CA Paris, 13 February 1883, Gaz Pal 1883, 2, 414, as explained by Giliker, *Pre-contractual* (n 356) 122.

⁴⁵⁰ CA Dijon, 15 February 1893, Sirey 1894, 2, 144, as explained by Danis-Fatôme (n 386) 482-483.

⁴⁵¹ Cass com 20 March 1972 (n 316).

that trust in the other negotiating party allows the aggrieved party to believe in the future conclusion of the contract or justifies his *confiance* in the future conclusion of the contract.

(c) *Legitimate expectations*

Another notion which is connected to that of *confiance* and has been used to explain liability for broken negotiations is that of *attente légitime* (legitimate expectation). Hélène Aubry proposed a theory according to which the breach of the legitimate expectation of the other party in the future conclusion of the negotiated contract constitutes a fault which gives rise to the application of articles 1382 and 1383 Cciv (new articles 1240 and 1241), and is the basis of the obligation to compensate of the party who breaks off the negotiations.⁴⁵²

According to this view,⁴⁵³ in the period of precontractual negotiations, negotiating parties are no longer strangers because a factual relationship develops between them, and this justifies that their conduct is sometimes subject to the control of the courts. By engaging in precontractual negotiations, each negotiating party relies on his partner and a duty arises to not deceive the trust and the expectations that were raised by entering into the precontractual relationship. The expectation of the other party supposes an act of faith, as there can be no hope without trust (*confiance*), but this expectation must be legitimate for it to be taken into account by the courts. A legitimate expectation is such that is worthy of being taken into consideration by the law. Judges will have to focus on the events accompanying the precontractual period which are able to arouse the expectation of the future conclusion of the contract in the other party. Two criteria are particularly relevant: the quality of the parties and the

⁴⁵² Aubry (n 101) 323-324, 333.

⁴⁵³ This para follows Aubry (n 101) 323-338 (particularly 325, 332-336), also 251, 254.

level of advancement of the precontractual relation (the *Adjani* decision being an example of a case where the expectation of the future conclusion of the contract was not legitimate).⁴⁵⁴ *La doctrine* and *la jurisprudence* take into consideration the notions of *confiance* and legitimate expectations in the characterisation of precontractual fault and, so, the breach of the legitimate expectation of the other party is the basis of the case law regarding liability for broken negotiations.

This notion of legitimate expectations is very similar to that of *confiance/croyance légitime* and leads to the same effects in compensating for delictual liability. The notion of ‘legitimate expectation’ of French law can be compared to that of ‘reliance’ of Anglo-American jurisdictions.⁴⁵⁵

(d) Theory of appearance

The criterion of *confiance légitime trompée ou déçue* (deceived or disappointed legitimate trust) can also be found within the theory of ‘*l’apparence*’ which has been proposed by Anne Danis-Fatôme as an alternative pathway to explain precontractual liability for broken negotiations, independently of delictual liability.⁴⁵⁶

According to this view,⁴⁵⁷ a partial application of the theory of appearance has been made by French case law in the area of precontractual liability, by using the requirements of the theory of appearance (the notion of *confiance/croyance légitime trompée* as the criterion of fault) to establish the liability of the author of the break-off, but without endorsing its effects by refusing to compensate the damage consisting in the loss of the expected profits from the conclusion of the contract. The courts have

⁴⁵⁴ Text to (n 446) above.

⁴⁵⁵ Danis-Fatôme (n 386) 518.

⁴⁵⁶ Danis-Fatôme (n 386) 479-480.

⁴⁵⁷ This para follows Danis-Fatôme (n 386) 477-496 (particularly 480, 483, 486, 489, 493, 494).

imposed liability on the author of the break-off because he deceived the legitimate trust created in the other party of the future conclusion of the contract, having created an appearance of a will to conclude the contract that he did not follow. The courts should fully apply the theory of appearance and grant to the victim of the appearance that which he legitimately believed to obtain, ie, the expected benefits of the conclusion of the contract. This would lead to the imposition of the effects of the negotiated contract on the party who created the misleading appearance and broke off the negotiations deceiving the *confiance légitime* of the other party. This solution does not challenge freedom of contract because it does not establish the forced formation of a contract, as the obligations imposed on the author of the break-off do not have a contract as a source, but are imposed on the autonomous basis of the theory of appearance.

Although the theory of appearance is appealing in that it has as a goal protecting legal certainty,⁴⁵⁸ a theory which leads to the protection of the expectation interest could only be applicable in cases where one party believed that a contract was indeed concluded, and not in cases (such as the paradigm case) where one party legitimately believed that the contract would be concluded in the future.⁴⁵⁹

Some case law shows that fault can be found where a negotiator created an ‘appearance’ which led to the other party’s belief that the contract was going to be concluded.⁴⁶⁰ Whether this belief (*croyance*) is considered to be ‘legitimate’ depends on different factors such as the importance of the preparatory work, knowledge of

⁴⁵⁸ Danis-Fatôme (n 386) 493.

⁴⁵⁹ Ch V s IV 2.

⁴⁶⁰ Deshayes and Maître, case 4, in Cartwright and Hesselink (n 6) 121-122; eg, Cass com 11 July 2000 (n 375); CA Paris 10 March 2000 (n 316).

such work, the length of the negotiations, the abruptness of the breaking-off and whether the parties are professionals or non-professionals.⁴⁶¹

(e) Principles of venire contra factum proprium and of coherence

The principles of *vcfp* and of coherence have also been linked to the notion of *confiance légitime* and have been proposed as explanations of liability for broken negotiations.

Although the protection of *confiance légitime* is not a general principle of the French law of contract, it has many applications,⁴⁶² one of which is the prohibition of contradicting oneself to the detriment of another (*vcfp*).⁴⁶³ The courts are sensitive to the idea that an unpredictable and inconsistent party, whose acts or words are contradictory, and who deceives or misleads in this way the *confiance légitime* of the other party, must assume the consequences of his contradictions. The requirement of contractual coherence has application in the stage of formation of contracts, as the concept of *confiance légitime* is used to temper the principle of precontractual freedom which dominates the negotiation phase.

In several judgments,⁴⁶⁴ the *Cour de cassation* has decided that if, due to their duration, their advanced stage or the expenses that they have generated, the negotiations have engendered in the mind of one of the negotiators a *confiance légitime* in the conclusion of the negotiated contract, their brutal and unforeseeable

⁴⁶¹ Deshayes and Maître, cases 4 and 9, in Cartwright and Hesselink (n 6) 122, 257; Danis-Fatôme (n 386) 484. See s III 1 below.

⁴⁶² Fages (n 324) 29.

⁴⁶³ The following expresses ideas by D Mazeaud (n 324) 250-251.

⁴⁶⁴ eg, Cass com 22 April 1997 (n 384); Manoukian (n 323).

breaking-off entails the delictual liability of the ‘unreliable negotiator’, whose inconsistent behaviour should be sanctioned.⁴⁶⁵

The principle of coherence (*le principe de cohérence*) has also been put forward to explain different situations of precontractual liability. According to Houtcieff,⁴⁶⁶ although the freedom to break off negotiations remains intact, it does not authorise any kind of conduct. Fault in the exercise of the right to break off consists in deceiving the legitimate *confiance* in the future conclusion of the contract created in the other party. If this contradiction causes detriment to the other party, the remedy is delictual damages (not the ineffectiveness of the incoherent act which, he argues, is the remedy in cases of revocation of an offer).

It is interesting to note that the *Projet Terré Contrats* included an article which banned contradictory behaviour and expressly referred to the notion of *confiance légitime*.⁴⁶⁷ The 2016 reform, however, has not introduced a similar article into the *Code civil*.⁴⁶⁸

(f) Conclusions

The basis of liability for broken negotiations in French law is found in the notion of *croyance/confiance légitime* (legitimate belief or trust), which may be treated as one notion due to the fact that most judgments and authors use them interchangeably and do not provide a clear distinction between them. This notion also embodies that of legitimate expectations (*attentes légitimes*) in the future conclusion of the contract.

⁴⁶⁵ D Mazeaud (n 324) 251-252.

⁴⁶⁶ Dimitri Houtcieff, *Le Principe de Cohérence en Matière Contractuelle*, vol 2 (PUAM 2001) paras 868-869.

⁴⁶⁷ (n 306) ‘Article 6: A party cannot act in contradiction with his previous statements and conduct on the faith of which the other party has legitimately based himself. Mere tolerance is not enough to render trust legitimate’.

⁴⁶⁸ (n 307) above.

The concept of *croyance/confiance légitime* reflects the notion of reliance in both its dimensions; while *croyance légitime* is more oriented to the expectation-dimension, as it refers to a legitimate belief in the future conclusion of the contract, *confiance légitime* embodies both dimensions, as it refers to a trust developed between the negotiating parties which allows one of them to legitimately expect the future conclusion of the contract.

2 *Abus de droit*

French courts have been cautious in admitting the existence of precontractual liability in order to not unduly restrict the principle of freedom of contract.⁴⁶⁹ Under a traditional view, liability for breaking off negotiations is conceived as an exception to the rule that a party is always free to break off, and restrictions on the right to break off are considered as an exception to freedom of contract, which is justified by the abusiveness of the breaking-off.⁴⁷⁰ Consequently, attempts have been made to qualify precontractual fault⁴⁷¹ and recourse has been had to the doctrine of abuse of rights (*abus de droit*) as a basis of liability for breaking off negotiations.⁴⁷² It will be argued that although this account is present in the writings of part of *la doctrine* and in some judgments, it is not the appropriate basis for this liability as it does not explain its essence.

Ever since the initial suggestions made by French legal scholars at the beginning of the twentieth century that French law should recognise a general theory

⁴⁶⁹ Giliker, *Pre-contractual* (n 356) 124; Schmidt-Szalewski, 'France' in Hondius (n 9) 150; CA Riom 10 June 1992 (n 323).

⁴⁷⁰ *Ius Commune* (n 14) 381.

⁴⁷¹ This ch s I 2 above.

⁴⁷² As explained by, eg, Deshayes and Maître, case 1, in Cartwright and Hesselink (n 6) 28 fn 24; Aubry (n 101) 325; Jaluzot (n 92) 367.

of ‘abuse of rights’, no agreement has yet been reached as to its proper limits.⁴⁷³ The idea of abuse of contractual rights was recognised and seen as supported by article 1134(3) Cciv which ordered that contracts be performed in good faith.⁴⁷⁴ In addition, the idea that other rights associated with contracts (although not arising from them) were capable of being abused, particularly the right to refuse to conclude a contract where this was done in an abrupt fashion, after lengthy negotiations, was also recognised.⁴⁷⁵ In this situation, abuse of rights constitutes delictual fault and where it has caused harm it gives rise to damages for delictual liability, based on the generality of articles 1382 and 1383 (new articles 1240 and 1241) Cciv.⁴⁷⁶

Thus, some authors and judgments characterise precontractual fault in terms of *abus de droit*.⁴⁷⁷ Some commentators have taken the view that if a negotiating party has taken advantage of his freedom to negotiate, he has abused his ‘right to break off negotiations’⁴⁷⁸ and fault is found in the exercise of this right.⁴⁷⁹ It might be said that there exists a right to break off negotiations, but that this right is controlled in that liability arises in case of abuse.⁴⁸⁰ While a person may in principle freely withdraw from negotiations before a contract is concluded, he may not do so abusively.⁴⁸¹ Ghestin connects the notions of *confiance/croyance légitime* and abuse of right in that

⁴⁷³ Whittaker and Zimmermann, ‘Surveying’ (n 207) 34.

⁴⁷⁴ *ibid* 35. New art 1104 Cciv is analysed in sub-s 3 below.

⁴⁷⁵ *ibid* 35.

⁴⁷⁶ *ibid* 35; Bell, Boyron and Whittaker (n 339) 374.

⁴⁷⁷ As indicated by Aubry (n 101) 325.

⁴⁷⁸ As explained by Giliker, *Pre-contractual* (n 356) 131; eg, Georges Durry, ‘Note on Cass com 20 March 1972’ RTDciv 1972, 779, 780; Terré, Simler and Lequette (n 316) 201; Muriel Fabre-Magnan, *Droit des Obligations*, vol I: Contrat et Engagement Unilatéral (4th edn, PUF 2016) 270.

⁴⁷⁹ Ghestin (n 316) 532-533.

⁴⁸⁰ Chauvel (n 324) para 19.

⁴⁸¹ Bell, Boyron and Whittaker (n 339) 298.

when the former legitimately arises, the right to break off is abused.⁴⁸² The *Cour de cassation* has sometimes analysed liability for breaking off negotiations in terms of whether there was an abuse of the right to break off, and has considered that that will be the case where the negotiating party committed acts constituting fault in the exercise of such a right.⁴⁸³ The *Cour* has also referred expressly to the control that it exercises over the abuse of the right to break off negotiations by the defendant.⁴⁸⁴ In the *Hydrotile* case the Court stated that the judges below had established the ‘*rupture abusive des pourparlers*’ (abusive break-off of negotiations),⁴⁸⁵ and in a 1992 judgment the Court of Appeal of Rennes referred to ‘*l’abus de rupture des pourparlers*’ (the abuse in breaking off negotiations).⁴⁸⁶

There is a division in *la doctrine* with regard to the usefulness of the notion of abuse of rights as a basis of liability for breaking off negotiations. Although some argue that cases which have recognised this liability should be explained in terms of abuse of the exercise of the right to break off,⁴⁸⁷ others argue that the notion of abuse of the right to break off should be abandoned and other bases of liability (such as *confiance légitime trompée*⁴⁸⁸ or legitimate expectation)⁴⁸⁹ should be preferred. Schmidt states that it is debatable whether to talk of ‘abuse of right’ in relation to breaking off negotiations because the author of the break-off does not exercise a

⁴⁸² Ghestin (n 316) 536-537.

⁴⁸³ eg, Cass civ 3, 16 October 1973, D 1974 IR 35. As to the degree of fault required, see this ch s I 2 above, especially (n 375). As to whether the breaking-off itself constitutes an abuse, see this ch s I 3 above.

⁴⁸⁴ Cass com 7 January 1997 (n 399); Chauvel (n 324) para 19.

⁴⁸⁵ Cass com 20 March 1972 (n 316). Also, Cass com 11 July 2000 (n 375).

⁴⁸⁶ CA Rennes 29 April 1992 (n 399).

⁴⁸⁷ eg, Ghestin (n 316) 559-560; Durry, ‘Note on Cass com 20 March 1972’ (n 478).

⁴⁸⁸ eg, Giliker, *Pre-contractual* (n 356) 132.

⁴⁸⁹ eg, Aubry (n 101) 325.

‘defined and determined’ right but rather a simple freedom to not contract.⁴⁹⁰ Chauvel is of a similar view, indicating that the use of the notion of abuse of the right to break off negotiations is relatively uncommon in the case law,⁴⁹¹ and that it is not clear that the use of this notion is justified, as it is not really an abuse of right but rather an ‘abuse of liberty’, because before the conclusion of the contract the parties are not bound by any obligation imposed by law or by private agreement.⁴⁹² Furthermore, in cases like the paradigm case, it has been argued that an analysis in terms of abuse of right seems hardly useful.⁴⁹³ It has also been criticised that the understanding of abuse of rights is so flexible that it loses its specific features in relation to bad faith.⁴⁹⁴

Therefore, it seems that the better view is that the concept of abuse of rights ‘adds nothing new to the idea of fault’⁴⁹⁵ or is confused with delictual fault⁴⁹⁶ in the breaking-off of negotiations, and that the concepts of *croyance/confiance légitime* or legitimate expectations are more suited as criteria on which to base the fault of the party breaking off, as they truly reflect the reliance element which is at the essence of this liability. Additionally, the fact that the doctrine of abuse of rights is based on the principle of good faith (which will be argued below is not essential to the configuration of this liability), also supports the rejection of abuse of rights as the basis of this liability.⁴⁹⁷

⁴⁹⁰ Schmidt, *Négociation* (n 322) 108. Also, Aubry (n 101) 328, 329.

⁴⁹¹ Examples of cases that refer to it are: Cass com 11 July 2000 (n 375); Cass com 7 January 1997 (n 399); Cass com 22 February 1994 (n 375).

⁴⁹² Chauvel (n 324) para 19.

⁴⁹³ Stoffel-Munck, *L’Abus* (n 324) 111.

⁴⁹⁴ Aubry (n 101) 328.

⁴⁹⁵ eg, Schmidt, *Négociation* (n 322) 108; Chauvel (n 324) para 19; Danis-Fatôme (n 386) 481.

⁴⁹⁶ Aubry (n 101) 329.

⁴⁹⁷ The 2016 reform (n 307) did not introduce an article on abuse of rights, and the new draft project on the reform of civil liability (n 330) does not contemplate such an article either.

3 Good faith

The law of delict holds negotiating parties to a standard of proper conduct,⁴⁹⁸ which is generally referred to either positively in terms of a requirement of good faith or negatively in terms of abusing the right to break off negotiations.⁴⁹⁹ In this way, good faith (*bonne foi*) or bad faith (*mauvaise foi*) is also suggested as a basis of liability for breaking off negotiations. It will be argued that this standard, although useful in identifying the wrongful conduct of the negotiating parties, is not essential to founding this liability which has reliance at its core.

Before the 2016 reform, article 1134(3) Cciv established that contracts must be performed in good faith and the Cciv had no legal provision expressly establishing good faith in the formation of contracts. An earlier draft of article 1134(3) stated that '[contracts] must be contracted and performed in good faith'⁵⁰⁰ but the word 'contracted' (*contractées*) was struck out because Portalis found it superfluous.⁵⁰¹ Thus, it was said that the omission of creating contracts in good faith was made on formal rather than on substantive grounds.⁵⁰² Consequently, many scholars considered that article 1134(3) also applied to the formation of contracts.⁵⁰³ The courts and *la doctrine* began to 'import, in reliance on the general principle of delictual liability, a requirement of good faith or honesty and fair dealing into the pre-contractual negotiations'.⁵⁰⁴ It was argued that the duty of good faith was an integral part of the '*normes générales de comportement*', breach of which led to liability under articles

⁴⁹⁸ Text to (n 356).

⁴⁹⁹ Bell, Boyron and Whittaker (n 339) 305.

⁵⁰⁰ Bell, Boyron and Whittaker (n 339) 308 fn 97.

⁵⁰¹ Jaluzot (n 92) 132.

⁵⁰² Jacques Mestre, RTDciv 1988, 340.

⁵⁰³ eg, Jacques Mestre, RTDciv 1989, 739; Dagorne-Labbé (n 385).

⁵⁰⁴ Nicholas (n 320) 70.

1382 and 1383 Cciv.⁵⁰⁵ By virtue of the law of delict, the negotiating parties were considered to be subject to a duty to negotiate in good faith.⁵⁰⁶ It was, therefore, accepted that the principle of good faith extended to the negotiation of contracts, despite the limited terms of the Cciv,⁵⁰⁷ and the courts and most contemporary French authors recognised a general duty of pre-contractual good faith or a duty to negotiate in good faith,⁵⁰⁸ good faith understood as a norm of conduct which governs precontractual relations.⁵⁰⁹ Thus, while the starting point was that, in principle, negotiating parties were free to break off negotiations without liability at any stage, this was limited by developing a general ‘duty of loyalty’ during negotiations, a duty to negotiate in good faith.⁵¹⁰

The 2016 reform did not change this doctrinal and judicial development;⁵¹¹ on the contrary, it embraced it by introducing new article 1104 Cciv which expressly recognises that ‘Contracts must be negotiated, formed and performed in good faith. This provision is a matter of public policy’.⁵¹² This article is further reaffirmed by new article 1112 which expressly establishes that, from their beginning until their end, negotiations must mandatorily satisfy the requirements of good faith.⁵¹³ Unlike most

⁵⁰⁵ Deshayes and Maître, case 7, in Cartwright and Hesselink (n 6) 200 fn 16.

⁵⁰⁶ Cohen (n 60) 38.

⁵⁰⁷ eg, Whittaker and Zimmermann, ‘Surveying’ (n 207) 37; Jourdain (n 324) 122; Jaluzot (n 92) 359.

⁵⁰⁸ *Ius Commune* (n 14) 373; eg, Terré, Simler and Lequette (n 316) 201; Juliette Sénéchal, ‘Contract Formation and Non-performance in French Law’ in Reiner Schulze and Fryderyk Zoll (eds), *The Law of Obligations in Europe, A New Wave of Codifications* (Sellier 2013) 346, 351; Ghestin (n 316) 514; Danis-Fatôme (n 386) 481; Jourdain (n 324) 128, 131; Schmidt, *Négociation* (n 322) 107.

⁵⁰⁹ Jourdain (n 324) 132.

⁵¹⁰ eg, Muir-Watt, Sefton-Green and Reifegerste, case 3, in Zimmermann and Whittaker (n 155) 240, 241; Sénéchal (n 508) 352; Malaurie, Aynès and Stoffel-Munck (n 316) 268.

⁵¹¹ Rosher (n 313) 70.

⁵¹² (n 307).

⁵¹³ p 67 above.

of its predecessors in the different reform proposals,⁵¹⁴ new article 1104 Cciv indicates that it is a mandatory provision,⁵¹⁵ ie, parties cannot contract out of the requirements of good faith.⁵¹⁶ It does not, at least expressly, establish good faith as a principle but the fact that it is contained within the new general ‘Introductory Provisions’⁵¹⁷ sets the tone of good faith as a guiding principle even if not as an overriding principle.⁵¹⁸

Therefore, after the 2016 reform, it is still possible to state that delict sets a standard of behaviour to be followed during the negotiation period and that it is possible to identify certain duties which the parties must fulfil to avoid delictual liability,⁵¹⁹ but now these duties have a direct legal basis in new articles 1104 and 1112 Cciv. It is still valid to say that because the notion of good faith has vague contours, the needs of legal technique have required giving it a more defined content and this has been achieved by translating good faith into concrete duties that can be

⁵¹⁴ art 1104(1) *Avant-projet Catala* (n 315); art 18 *2008 Projet de réforme* (n 306) (‘Each of the parties must act in good faith’); art 6 *2009 Projet de réforme* (n 306) (‘Contracts must be formed and performed in good faith’); art 3 *Document de Travail* (n 306) (‘Contracts must be formed and performed in good faith’); art 1103 *Projet d’ordonnance* (n 306) (‘Contracts must be formed and performed in good faith’).

⁵¹⁵ Similarly, art 5 *Projet Terré Contrats* (n 306) (‘Contracts are formed and performed in good faith; the parties may not exclude or limit this duty’).

⁵¹⁶ Fabre-Magnan (n 478) 262.

⁵¹⁷ Text to (n 309).

⁵¹⁸ Malaurie, Aynès and Stoffel-Munck (n 316) 254. The *Avant-projet Catala* (n 315) did not elevate good faith to an overarching general principle of law, unlike art 18 *2008 Projet de réforme* (n 514) which codified good faith as a ‘guiding’ or ‘governing principle’ of contract law, Stefan Vogenauer, ‘The Avant-projet de réforme: An Overview’ in John Cartwright, Stefan Vogenauer and Simon Whittaker (eds), *Reforming the French Law of Obligations, Comparative Reflections on the Avant-projet de réforme du droit des obligations et de la prescription (the Avant-projet Catala)* (Hart Publishing 2009) 15, 19. The *2009 Projet de réforme* (n 306) removed the governing principles section but kept good faith in art 6 (n 514). Art 5 *Projet Terré Contrats* (n 515) did not explicitly ascribe to good faith the status of ‘governing principle’, Vogenauer (n 518) 20. Art 3 *Document de Travail* (n 514) had as heading ‘*principe de bonne foi*’. Art 1103 *Projet d’ordonnance* (n 514) kept the same text but eliminated the heading.

⁵¹⁹ Giliker, *Pre-contractual* (n 356) 123.

better grasped and given effect to by the law.⁵²⁰ In this way, French courts accept that negotiations involve a period of risk but that, at a certain point, intervention is necessary to impose duties of good conduct: ‘*obligations de loyauté et de bonne foi*’⁵²¹ (obligations of loyalty and good faith). Therefore, in French law (unlike German law where precontractual duties arise from the moment of entering into contractual negotiations)⁵²² duties imposing standards of honesty and loyalty arise only when negotiations have reached an advanced stage.

The courts have constructed *obligations de loyauté* (obligations of loyalty) and *obligations de co-opération* (obligations of cooperation) from the legal basis of good faith⁵²³ (initially article 1134(3) and now new articles 1104 and 1112 Cciv). French courts usually infer three types of duties from the general obligation of good faith in the negotiation stage: a duty to inform, a duty of confidentiality and a duty not to behave inconsistently during the negotiations.⁵²⁴ A duty of transparency of the risks of non-conclusion of the negotiations is also imposed.⁵²⁵ This duty of transparency, along with the duty of coherence, particularly relates to the *confiance/croyance légitime* basis of liability for breaking off negotiations.⁵²⁶ A more general classification divides precontractual duties into two main groups: (i) duties that emerge from good faith as an instrument of protection of consent, and (ii) duties that emerge from good faith guaranteeing the efficacy and security of negotiations.⁵²⁷ This second group is relevant in the paradigm case, as this good faith is aimed at

⁵²⁰ Jourdain (n 324) 122.

⁵²¹ Giliker, *Pre-contractual* (n 356) 105; eg, *Hydrotile* (n 316).

⁵²² Ch II p 27.

⁵²³ Whittaker and Zimmermann, ‘Surveying’ (n 207) 37; Hesselink (n 232) 624.

⁵²⁴ *Ius Commune* (n 14) 374.

⁵²⁵ Muir-Watt (n 439) 59.

⁵²⁶ This ch s II 1 above.

⁵²⁷ Jourdain (n 324) 122.

preventing all disloyalty that would lead to the failure of the completion of the negotiations or that would cause harm to the other party.⁵²⁸

The courts accept that good faith is required in contractual negotiations so that the defendant will not be permitted to betray the trust legitimately raised in the other negotiating party.⁵²⁹ The tendency is that French courts increasingly police whether the duty of good faith is respected.⁵³⁰ This is evidenced in the *Hydrotile* decision, where it was held that the defendant had deliberately not passed on the final estimate intended for the claimant and, without legitimate reason, had abruptly and unilaterally broken off their negotiations, which were at an advanced stage, knowing that the claimant had already incurred considerable expense, and having intentionally kept the claimant in a state of protracted uncertainty, thereby ‘infringing the rules of good faith in commercial relations’.⁵³¹ The Court of Appeal of Pau had already acknowledged that negotiating parties owe each other certain obligations of rectitude and good faith in negotiating, which relate not to the conclusion of the eventual contract but to the conduct of the negotiators themselves.⁵³²

A number of other cases also suggest a good faith basis of precontractual liability. For instance, in a 1997 decision, the *Cour de cassation* found that the defendant had brutally and unilaterally broken off very close negotiations, and had failed to comply with the rules of good faith in commercial relations.⁵³³ Chauvel,

⁵²⁸ Jourdain (n 324) 122.

⁵²⁹ Giliker, *Pre-contractual* (n 356) 137.

⁵³⁰ *Ius Commune* (n 14) 388.

⁵³¹ Cass com 20 March 1972 (n 316), translation from *Ius Commune* (n 14) 386.

⁵³² CA Pau 14 January 1969 (n 447).

⁵³³ Cass com 22 April 1997 (n 384); Jacques Mestre, ‘Note on Cass com 22 April 1997’ RTDciv 1997, 651, 652. Also, Cass com 18 January 2011 (n 416); CA Agen, 21 August 2002, JCP 2003 II 10162, note Lecourt.

commenting on this case,⁵³⁴ stressed that it is very clear that the terminology of ‘good faith’ refers to a system of norms which is entirely objective and independent of the state of mind of the party breaking off. He explained that the ‘failure to comply with good faith’ consists in behaviour which does not conform to that which the judge considers should be adopted by an honest partner who is normally concerned to observe the morality and the customs of business practice, and that the awareness, on the part of the author of the breaking-off, of the failure of his conduct to comply with these norms, does not have to be specially established. In the *Sandoz* case, the *Cour de cassation* found that in withdrawing at a late stage of the negotiation process with no good reason, Sandoz had shown a lack of fairness (*loyauté*).⁵³⁵

Because good faith operates as an objective standard, some basic principles which establish a framework for intervention for the courts can be found, and it is possible to identify forms of behaviour which the courts will condemn as contrary to the rules of good faith and loyalty in the negotiation process.⁵³⁶ Thus, bad faith will consist, in particular, in engaging in negotiations without having a serious intention to contract, in prolonging negotiations when there is no longer an intention to contract,⁵³⁷ and in breaking, without legitimate reason, suddenly and unilaterally, advanced negotiations.⁵³⁸ Expectation-based reliance can contribute to the finding of bad faith, in that ‘bad faith consists in putting an end to the negotiations, in circumstances causing loss, after having induced a belief in the other negotiating party

⁵³⁴ Chauvel (n 324) para 9.

⁵³⁵ Cass com 7 April 1998 (n 316). Also, Cass civ 1, 14 June 2000, CCC 2000, no 157, note Leveneur.

⁵³⁶ Giliker, ‘Tort’ (n 344) 991.

⁵³⁷ eg, *Manoukian* (n 323).

⁵³⁸ eg, *Hydrotile* (n 316). Ghestin (n 316) 538; Schmidt, ‘La Sanction’ (n 324) 53.

that a contract was going to be concluded'.⁵³⁹ In this way, breaking off negotiations when the other party could reasonably expect the contract to be concluded, will be considered to be at variance with good faith.⁵⁴⁰

It can be seen that there is a connection between bad faith and reliance, which explains why authors who hold that *croyance/confiance légitime* or legitimate expectations is the true basis of liability for broken negotiations, still use the argument of good faith to construct their theories, or why authors who seem to support a good faith basis still make use of the notion of reliance. For instance, Schmidt-Szalewski links her criterion of *confiance légitime trompée*⁵⁴¹ with the violation of the rules of good faith in that precontractual fault is established by bad faith behaviour (which can be labelled as precontractual wrongful behaviour), which consists of any behaviour that deceives the other party's confidence, such as breaking off negotiations when the author of the break-off had led the other party to reasonably expect the contract to be concluded or had aroused in the other party the *confiance* in the future conclusion of the agreement.⁵⁴² Schmidt-Szalewski defines precontractual fault on the basis of good faith, stating that '[a] reasonable man's behaviour of reference would consist of loyal and good faith negotiating'.⁵⁴³ Muir-Watt states that *confiance trompée* has emerged as the criterion and measure of the liability incurred for precontractual bad faith.⁵⁴⁴ Terré, Simler and Lequette indicate that the duty of loyalty imposed by good faith in the formation of contracts, generally means that when a party gives rise to a

⁵³⁹ CA Reims, 13 December 1989, Juris-Data no 049 587, quoted by Chauvel (n 324) para 11.

⁵⁴⁰ Hondius (n 26) 19, referring to *Hydrotile* (n 316).

⁵⁴¹ p 86 above.

⁵⁴² Schmidt, 'La Sanction' (n 324) 53, 57; *Négociation* (n 322) 107-108, 111; 'L'évolution' (n 324) 148; 'Période Précontractuelle' (n 324) 550; 'France' in Hondius (n 9) 150; 'France' in ICC (n 327) 96.

⁵⁴³ 'France' in Hondius (n 9) 150; *Négociation* (n 322) 107.

⁵⁴⁴ (n 439) 57.

relationship of *confiance* he must assume the consequences of deceiving it.⁵⁴⁵ Aubry connects the notion of legitimate expectations with good faith in that the general duty of good faith takes in the precontractual period a specific character: it imposes the duty to not deceive the trust and the expectations that were raised by entering into the precontractual relationship.⁵⁴⁶ Jourdain explains that the requirements of good faith increase with the *croyance légitime* of the negotiating parties in the conclusion of the contract which, in turn, increases as negotiations progress; therefore, the later in time the breaking-off takes place, the higher the risk of it constituting fault.⁵⁴⁷

A good faith basis of precontractual liability for breaking off negotiations is consistent with new articles 1104 and 1112 Cciv.⁵⁴⁸ It is also consistent with most of the earlier reform projects.⁵⁴⁹ However, neither the 2008 nor the 2009 *Projet de réforme du droit des contrats*, when regulating precontractual liability, referred to the notion of good faith,⁵⁵⁰ although they both recognised good faith.⁵⁵¹ It is also important to highlight that, before the 2016 reform, not all French decisions on breaking off negotiations referred expressly to good (or bad) faith. For instance, in the *Eurolocatique* decision the Court found fault without referring to good faith but relying on the abuse of the right to break off negotiations.⁵⁵² The choice between the doctrines of good faith and abuse of rights may depend on whether the *Cour de cassation* seeks to control the matter (abuse of rights is a question of law) or to leave it to the sovereign power of assessment of the lower courts (good faith is a question of

⁵⁴⁵ (n 316) 50, 201.

⁵⁴⁶ Aubry (n 101) 333.

⁵⁴⁷ Jourdain (n 324) 128.

⁵⁴⁸ Text to (nn 512, 513) above.

⁵⁴⁹ (nn 314, 315, 514, 515) above.

⁵⁵⁰ art 20 2008 *Projet de réforme* and art 16 2009 *Projet de réforme* (n 314).

⁵⁵¹ (n 518) above.

⁵⁵² Cass com 7 January 1997 (n 399). Also, Cass com 22 February 1994 (n 375).

fact).⁵⁵³ But it is also possible to consider that good faith was not the only principle influencing the courts' decisions in these cases.⁵⁵⁴ As has been analysed,⁵⁵⁵ the standard of good faith is not the only possible theoretical basis of liability for breaking off negotiations, as the required fault can also be founded on abuse of rights or under the notion of *croyance/confiance légitime*. In this way (and excluding the debatable basis of abuse of rights), the norm of behaviour imposed on negotiating parties can be interpreted in terms of a duty to negotiate in good faith or a duty not to breach a relationship of confidence and trust.⁵⁵⁶

Before the 2016 reform, the duty of good faith in the negotiation phase was often referred to but without much detail and, more frequently, the focus was directly on the type of blameworthy conduct, such as breaking off negotiations, without emphasising its assimilation with objective good faith.⁵⁵⁷ Or simply the breach of a good faith duty became immersed in the notion of delictual fault.⁵⁵⁸ After the 2016 reform came into force, it remains to be seen whether this approach will change. It is suggested that the courts will have to refer to good faith, as they will have articles 1104 and 1112 Cciv as legal bases for the imposition of precontractual liability. But because liability for breaking off negotiations remains delictual, it is suggested that the focus of the courts will continue to be on finding precontractual fault, fault which has a reliance basis through the operation of the notion of *croyance/confiance légitime*. The standard of good faith, which now has an undeniable legal basis, can

⁵⁵³ Whittaker and Zimmermann, 'Coming to Terms' (n 205) 695; Muir-Watt, Sefton-Green and Reifegerste, case 13, in Zimmermann and Whittaker (n 155) 394.

⁵⁵⁴ Giliker, *Pre-contractual* (n 356) 130.

⁵⁵⁵ This ch s II 1 and 2 above.

⁵⁵⁶ Giliker, *Pre-contractual* (n 356) 168.

⁵⁵⁷ Asúa (n 21) 238.

⁵⁵⁸ Jourdain (n 324) 128; text to (n 385) above.

assist the reliance element in tempering precontractual freedom and in providing guidance for the determination of wrongful behaviour in the negotiation phase. However, the standard of good faith is not essential to the theoretical explanation of the imposition of precontractual liability⁵⁵⁹ and can be subsumed by or merged with the reliance basis.⁵⁶⁰

III Criteria for finding liability

In addition to the different theoretical bases analysed in section II above, there are certain objective circumstances that lead to the breaking-off which in each particular case can help in finding precontractual fault. Under the *croyance/confiance légitime* basis, when there are difficulties in assessing the existence and measure of the trust, these circumstances help determine the legitimacy of the trust or expectation.⁵⁶¹ At the same time, there are also several groups of reasons which can exclude liability. These are explored below.

1 Objective circumstances for the finding of fault (positive criteria)

There are some objective circumstances, beyond the particularities of each case, which surround the breaking-off of negotiations that the courts look for in order to determine whether there has been a culpable breaking-off.⁵⁶² Fault is assessed with regard to the circumstances of the breaking-off.⁵⁶³ From the case law, two objective elements emerge that play an important part in the finding of fault and, therefore,

⁵⁵⁹ This is recognised by Ghestin (n 316) 563.

⁵⁶⁰ Ch V s III 3.

⁵⁶¹ Colombo (n 22) 105; Aubry (n 101) 334; Danis-Fatôme (n 386) 486.

⁵⁶² Chauvel (n 324) para 10; Bernard Saintourens, 'Note on Cass com 11 July 2000' Bull Joly 2000 no 288.

⁵⁶³ Deshayes and Maître, case 7, in Cartwright and Hesselink (n 6) 199, citing *Hydrotile* (n 316); Jourdain (n 324) 128; Schmidt, *Négociation* (n 322) 112.

liability: the advanced stage of negotiations and the abruptness or suddenness of the break-off.⁵⁶⁴ Some scholars add to these circumstances the quality of the parties, ie, whether they are professionals or laymen.⁵⁶⁵

Regarding the advancement of negotiations, their duration will often be a significant element in finding a culpable breaking-off and, even more so, if the party that broke off had created a belief in the future conclusion of the negotiated contract or had left the other party to incur expenditure.⁵⁶⁶ Psychologically, it is as if the obligation to conclude the contract becomes stronger and stronger with the passage of time, increasing the legitimate belief in a successful outcome.⁵⁶⁷ Other criteria relevant to assess the advancement of the negotiations are the agreement on the majority of the essential elements of the contract and the climate of *confiance* and optimism existing between the negotiating parties.⁵⁶⁸

The length of the negotiations was relevant in finding fault for breaking off in the *Eurolocatique* decision, where the Court found that the negotiations had taken place over a long period of time, and that the prolonged relationship between the parties had been voluntarily maintained in order to arrive at the final project of the negotiated contract.⁵⁶⁹ The use of the notion of a relationship between the parties, unlike German law, is not used to bring the precontractual stage closer to contract in

⁵⁶⁴ Chauvel (n 324) para 10; Violet (n 444); Lecourt (n 444) 1830.

⁵⁶⁵ Danis-Fatôme (n 386) 485; Aubry (n 101) 334-335; Schmidt, 'La Sanction' (n 324) 54; *Négociation* (n 322) 110; 'L'évolution' (n 324) 147-148; 'Période Précontractuelle' (n 324) 552.

⁵⁶⁶ Chauvel (n 324) para 11; eg, CA Agen 21 August 2002 (n 533); Cass com 11 July 2000 (n 375); CA Paris 10 March 2000 (n 316); Cass com 7 April 1998 (n 316); CA Riom 10 June 1992 (n 323); CA Rennes 29 April 1992 (n 399); *Hydrotile* (n 316).

⁵⁶⁷ Chauvel (n 324) para 11.

⁵⁶⁸ Stoffel-Munck, 'Les Pourparlers' (n 324) 3.

⁵⁶⁹ Cass com 7 January 1997 (n 399).

order to impose contractual liability⁵⁷⁰ but to establish the element of trust between negotiating parties (trust-dimension of reliance) which facilitates the finding of delictual liability. There is nothing absolute regarding the duration of negotiations, as they might have taken place over a short period of time, but be well advanced in terms of their subject-matter.⁵⁷¹ This was the situation in *Mabo*, where the difference in agreement which remained between the parties was not large.⁵⁷²

The degree of advancement of the negotiations is particularly relevant in Schmidt-Szalewski's criterion of *confiance légitime trompée*.⁵⁷³ Since the degree of *confiance* is greater as the negotiations are more advanced, negotiations where little progress has been made can be broken off at any moment without justification; but in advanced negotiations, as soon as one of the negotiating parties could reasonably believe that the contract would be concluded, the other party cannot break off without justification.⁵⁷⁴

Regarding the abruptness with which one of the parties broke off the negotiations, a number of judgments refer to this objective circumstance in order to establish fault.⁵⁷⁵ However, in itself, the abruptness of the breaking-off is not an imperative autonomous requirement and very often it is not specially relied upon by the courts (and the same applies to the length of negotiations).⁵⁷⁶ Finding fault is essentially a question of fact to which the advanced stage of the negotiations and the

⁵⁷⁰ Text to (n 91).

⁵⁷¹ eg, CA Agen 21 August 2002 (n 533); Cass civ 1, 6 January 1998, Bull civ I no 7 (*Ossona c Al Esayi*).

⁵⁷² Cass com 22 April 1997 (n 384); Chauvel (n 324) para 12.

⁵⁷³ p 86 above.

⁵⁷⁴ Schmidt, *Négociation* (n 322) 111-112; 'L'évolution' (n 324) 149; 'Période Précontractuelle' (n 324) 550-551.

⁵⁷⁵ Chauvel (n 324) para 13; eg, Cass com 22 April 1997 (n 384); Cass com 7 January 1997 (n 399); CA Rennes 29 April 1992 (n 399); *Hydrotile* (n 316).

⁵⁷⁶ Chauvel (n 324) para 13; Danis-Fatôme (n 386) 486.

suddenness in terminating them will all be relevant factors.⁵⁷⁷ Additional factors which indicate a relationship of confidence and trust during the negotiations and which, consequently, legitimise the expectation and justify liability are the intensity of the negotiations, signs of commitment given during the negotiations, work undertaken by the innocent party, and the encouragement provided by the other negotiating party.⁵⁷⁸

A third objective element is the professional or non-professional quality of the negotiating parties. If a layman breaks off the negotiations with a professional, it will be difficult to find the layman at fault as the *confiance* created in the professional is normally very limited as the latter is expected to recognise the risks involved in the precontractual stage (*risque d'entreprise*).⁵⁷⁹ In contrast, where the claimant is a layman suing a professional, the courts are more likely to find liability on the basis that the professional has abused the confidence placed in him due to his superior knowledge; the *confiance* created in the layman is considered to be greater than the ordinary *confiance*.⁵⁸⁰

Where both negotiating parties are professionals, it was rare for the breaking-off of negotiations to lead to liability, because the costs of unsuccessful negotiations are, in principle, considered to be part of the parties' general expenses, which they can incorporate into the price of contracts resulting from other successful negotiations.⁵⁸¹

A classic example of the reluctance to impose liability between two commercial

⁵⁷⁷ Giliker, *Pre-contractual* (n 356) 124; text to (n 361).

⁵⁷⁸ Giliker, *Pre-contractual* (n 356) 168; Danis-Fatôme (n 386) 484-486; eg, Cass com 7 April 1998 (n 316).

⁵⁷⁹ Giliker, *Pre-contractual* (n 356) 129; Schmidt, *Négociation* (n 322) 111; 'La Sanction' (n 324) 54-55; Aubry (n 101) 335; eg, Cass civ 12 April 1976 (n 373).

⁵⁸⁰ Terré, Simler and Lequette (n 316) 202; Giliker, *Pre-contractual* (n 356) 129; Schmidt, *Négociation* (n 322) 110; 'La Sanction' (n 324) 54.

⁵⁸¹ Ghestin (n 316) 529; Schmidt, *Négociation* (n 322) 106; *Ius Commune* (n 14) 415; von Mehren, 'Formation' (n 28) para 123.

parties is a 1969 decision of the Court of Appeal of Pau, where the court held that preliminary work and provision of an estimate fell within the acceptable precontractual risks, and that, where two professionals were negotiating, only fault which was patent and beyond discussion (*faute patente, indiscutable*) could lead to the imposition of delictual liability.⁵⁸² Some interpreted this to mean that a higher degree of fault than ordinary was required and that fault should be assessed not in relation to the conduct of a *bon père de famille* but in relation to a *bon professionnel* of the same area of expertise.⁵⁸³ However, in a commercial context, and particularly since the late nineties, it has been accepted that negotiations may give rise to relationships of trust and confidence, which, if abused, give rise to delictual liability.⁵⁸⁴ Where negotiations have advanced beyond the ordinary risk stage, for example having taken place over a long period of time and having reached a particular level of intensity, the courts have imposed liability despite the commercial status of the parties.⁵⁸⁵

The French Commercial Code (Ccomm), in article L442-6, I, 5°, regulates the sudden breaking-off of established commercial relations (*rupture brutale des relations commerciales établies*) which imposes on the author of the break-off the obligation to compensate the damage caused. Considering that this norm applies in the case of precontractual relations⁵⁸⁶ and that the sudden breaking-off of an

⁵⁸² 14 January 1969 (n 447); analysed by Giliker, *Pre-contractual* (n 356) 129.

⁵⁸³ eg, Schmidt, 'L'évolution' (n 324) 147-148; *Négociation* (n 322) 110; 'La Sanction' (n 324) 54.

⁵⁸⁴ Giliker, 'Tort' (n 344) 992; Kötz, *European Contract Law* (n 79) 39; Ghestin (n 316) 529-530.

⁵⁸⁵ Giliker, *Pre-contractual* (n 356) 129; eg, Cass com 11 July 2000 (n 375); *Sandoz* (n 316); *Mabo* (n 384); *Eurolocatique* (n 399).

⁵⁸⁶ Danis-Fatôme (n 386) 478; annotation no 14 to art L442-6 *Code de Commerce*, 111th ed, 2016, Dalloz.

established commercial relationship gives rise to liability of a delictual nature,⁵⁸⁷ it could be argued that precontractual liability can arise in this particular scenario.

2 Absence of a legitimate reason for breaking off (negative criterion)

French courts are sensitive to the absence of any legitimate justification for the breaking-off of negotiations.⁵⁸⁸ The breaking-off does not, as a matter of principle, have to be specially justified,⁵⁸⁹ ie, providing a reason when breaking off is not a requirement. However, the negative criterion of absence of a legitimate reason is an essential element of liability because the existence of a good reason may remove liability.⁵⁹⁰ In this way ‘the legitimate reason serves as a justifying factor for the breaking-off’.⁵⁹¹

Some judgments make express reference to the existence or absence of a ‘legitimate reason’ (*motif légitime*) for breaking off⁵⁹² and in others it can be implied that the court controls the reasons for the breaking-off, imposing liability where there is no legitimate reason.⁵⁹³ The *Cour de cassation* seems to ask for such a reason in its more recent decisions.⁵⁹⁴ If a reason is given, the court will have to determine whether

⁵⁸⁷ Annotation no 20 to art L442-6 Ccomm (n 586).

⁵⁸⁸ Chauvel (n 324) para 14.

⁵⁸⁹ *ibid* para 19.

⁵⁹⁰ Chauvel (n 324) para 14; Terré, Simler and Lequette (n 316) 202; Ghestin (n 316) 540-541; Deshayes and Maître, case 1, in Cartwright and Hesselink (n 6) 29; Danis-Fatôme (n 386) 487. Deshayes, ‘Rupture’ (n 398), argues that the absence of a legitimate reason brings into play a presumption of fact of the existence of fault in the circumstances of the breaking-off. Aubry (n 101) 336, holds the minority view that there could still be delictual liability even if there was a legitimate reason to break off.

⁵⁹¹ Chauvel (n 324) para 14.

⁵⁹² eg, CA Agen 21 August 2002 (n 533); Cass com 11 July 2000 (n 375); *Sandoz* (n 316); Cass com 7 January 1997 (n 399); Cass civ 3, 6 May 1996, no 94-13745; *Hydrotile* (n 316).

⁵⁹³ eg, Cass com 22 April 1997 (n 384).

⁵⁹⁴ Deshayes and Maître, case 1, in Cartwright and Hesselink (n 6) 29; eg, Cass com, 21 February 2012, no 11-10124; Cass com 18 January 2011 (n 416); Cass com 13 October 2009 (n 423); Cass com, 14 December 2004, no 02-10157.

it justifies the breaking-off of the negotiations.⁵⁹⁵ In cases where the breaking-off is at a late stage, the courts might require a ‘substantial justification’.⁵⁹⁶ Chauvel, from a study of the case law, divides these legitimate reasons into three groups: the risk which remains regarding the conclusion of the contract, the blockage of negotiations, and a major modification of the proposals.⁵⁹⁷ Ghestin points out that a reason is legitimate where it objectively relates to an element of the contract under negotiation and not to a situation that is particular to the party breaking off.⁵⁹⁸

The first group comprises situations where there is significant uncertainty as to whether the contract will be concluded and, as a result, each party must be conscious of the ‘risk of non-conclusion’.⁵⁹⁹ The negotiations might not have reached a level of development sufficient to give rise to an expectation of the future conclusion of the negotiated contract other than a ‘premature or even chimerical hope’.⁶⁰⁰ This is a manifestation of expectation-based reliance in that if the belief in the future conclusion of the contract is not reasonable, because there is still significant uncertainty as to its conclusion, there can be no liability.

The second group involves cases where negotiations were legitimately broken off as the inevitable result of a profound disagreement between the parties.⁶⁰¹ The third group includes cases where a party legitimately broke off the negotiations due to

⁵⁹⁵ Deshayes and Maître, case 1, in Cartwright and Hesselink (n 6) 29.

⁵⁹⁶ Editors’ comparative observations to case 8, Cartwright and Hesselink (n 6) 252.

⁵⁹⁷ Chauvel (n 324) para 15. Similarly, Violet (n 444).

⁵⁹⁸ Ghestin (n 316) 515. Similarly, Schmidt-Szalewski, ‘Note on Cass com 7 April 1998’ (n 357). Chauvel disagrees, ‘Note on Cass com 7 April 1998’ (n 357) para 12.

⁵⁹⁹ Chauvel (n 324) para 16.

⁶⁰⁰ *ibid* para 16.

⁶⁰¹ Chauvel (n 324) para 17; Danis-Fatôme (n 386) 487; eg, Cass com, 18 December 1990, no 89-15838.

an essential modification of the negotiated terms,⁶⁰² or due to a major modification in the expectations of one of the parties.⁶⁰³ An example is a significant and unpredictable increase in the cost of carrying out the work required by the other party.⁶⁰⁴ This will also be the case in a situation where there is a considerable deterioration in the financial position of one party, leaving the other to fear the worst.⁶⁰⁵ When the person of the other contracting party is a determining factor, it can even be argued that a mere ‘loss of confidence’ in the other party will be enough.⁶⁰⁶ In a case where negotiations broke down after one party had publicly (and unfoundedly) accused the other of falsifying accounting documents and threatened criminal proceedings, the court found that such a loss of confidence (*perte de confiance*) was a legitimate reason for breaking off negotiations.⁶⁰⁷ The trust-dimension of reliance is present in this type of legitimate reason: where the trust in the other party is lost, there is a good reason to break off. The test for an unexpected modification of the negotiated terms to be a legitimate reason for breaking off is that the modification must be of such a nature that, had the party breaking off known of it, he would not have entered the negotiations in the first place.⁶⁰⁸

According to the *confiance légitime trompée* basis of liability, the advancement of the negotiations influences the requirement to provide a (good) reason for breaking off,⁶⁰⁹ in that the defendant is required to show a good reason for

⁶⁰² Chauvel (n 324) para 18.

⁶⁰³ Deshayes and Maître, case 1, in Cartwright and Hesselink (n 6) 29 fn 29.

⁶⁰⁴ Cass civ 6 May 1996 (n 592).

⁶⁰⁵ Chauvel (n 324) para 18, citing Cass com, 23 October 1990, no 1215 Lexilaser.

⁶⁰⁶ Chauvel (n 324) para 18, citing CA Paris, 1 June 1995, no 022850 Juris-Data.

⁶⁰⁷ CA Orléans, 19 October 2000, JCP 2001 no 21, 2003.

⁶⁰⁸ Chauvel (n 324) para 18.

⁶⁰⁹ Schmidt, *Négociation* (n 322) 111-112. Similarly, Ghestin (n 316) 515-516; Chauvel, ‘Note on Cass com 7 April 1998’ (n 357) para 6.

withdrawing from advanced negotiations,⁶¹⁰ whereas, where the negotiations are not very advanced, there is no such requirement and a negotiating party can withdraw without a good reason or without providing a reason at all.⁶¹¹ If a climate of *confiance* has been created, the author of the break-off cannot escape liability without proving its justification.⁶¹² For example, in the *Sandoz* case the *Cour de cassation* found that withdrawing from advanced negotiations, which had lasted for several years, due to internal considerations of the pharmaceutical group which had nothing to do with the quality of the product, was not a legitimate reason for Sandoz's withdrawal.⁶¹³

The courts accept that breaking off at an advanced stage may be necessary for financial reasons,⁶¹⁴ due to a change in circumstances,⁶¹⁵ due to the inability of the other party to meet certain technical requirements,⁶¹⁶ or simply because the parties cannot agree on a particular point.⁶¹⁷ Economic differences and the possibility to conclude another contract in more favourable conditions are other examples of justified reasons for breaking off and exclude their blameworthy character.⁶¹⁸ Thus, a better offer from a third party can be a sufficient good reason for breaking off.⁶¹⁹

⁶¹⁰ eg, *Sandoz* (n 316); Ghestin (n 316) 543.

⁶¹¹ eg, Cass com, 12 January 1999, no 96-14604; Cass civ 3, 18 December 2012, no 10-30764; Cass civ 1, 20 December 2012, no 11-27340. Text to (n 574) above.

⁶¹² Danis-Fatôme (n 386) 486.

⁶¹³ Cass com 7 April 1998 (n 316).

⁶¹⁴ eg, Cass com, 4 April 1995, no 93-13832; Cass com, 20 November 2007, no 06-20332.

⁶¹⁵ CA Orléans 19 October 2000 (n 607).

⁶¹⁶ Cass com, 7 March 2006, no 04-17177.

⁶¹⁷ Giliker, *Pre-contractual* (n 356) 125; eg, Cass civ 2, 13 January 2005, no 03-15828.

⁶¹⁸ Schmidt, *Négociation* (n 322) 112.

⁶¹⁹ *Ius Commune* (n 14) 414.

IV Breaking off negotiations for the conclusion of a formal contract and lack of formality cases

The same distinction that has been made in the German law chapter⁶²⁰ must be made here in order to determine whether these case scenarios present any particularities in French law.

1 Breaking off negotiations for the conclusion of a formal contract

Liability for breaking off negotiations for the conclusion of a formal contract (be it a solemn or a real contract)⁶²¹ does not seem to be a special case within the topic of precontractual liability in French law.⁶²²

This is possibly explained by the fact that the sale of land (which is the contract where this issue typically arises in German law) is not a formal contract. The contract of sale is consensual and the validity of a contract for the sale of property is not subject to any particular formality requirement.⁶²³ In France, in contrast to Germany,⁶²⁴ Chile⁶²⁵ and England,⁶²⁶ an oral contract for the sale of land is valid and the buyer acquires title to the land without the need for any separate conveyance (article 1583 Cciv).⁶²⁷ The proprietary effect (*effet translatif*)⁶²⁸ of an oral sale of real

⁶²⁰ Ch II p 54.

⁶²¹ New art 1109 Cciv ‘A contract is consensual where it is formed by the mere exchange of consents, in whatever way they may be expressed. A contract is solemn where its validity is subject to form prescribed by legislation. A contract is real where its formation is subject to the delivery of a thing’ (n 307).

⁶²² *Ius Commune* (n 14) 415.

⁶²³ Deshayes and Maître, case 11, in Cartwright and Hesselink (n 6) 316.

⁶²⁴ Ch II p 55.

⁶²⁵ Ch IV p 171-172.

⁶²⁶ Ch VI p 243.

⁶²⁷ Kötz, *European Contract Law* (n 79) 90.

⁶²⁸ New art 1196 Cciv.

estate applies only between the parties, because the buyer of land who wishes his title to be good against the world must have an authenticated instrument⁶²⁹ in order to publish it in the land register.⁶³⁰

It appears that liability for breaking off negotiations for the conclusion of a sale of real estate presents no theoretical or practical differences with liability for breaking off negotiations for the conclusion of any other consensual contract. In *Monoprix*, a case of broken negotiations for the purchase of commercial premises, the *Cour de cassation* rejected the notion that an intention to cause harm to the other party was required.⁶³¹ However, as has been mentioned, a later judgment of the *Cour de cassation*, also in a case of broken negotiations for the sale of land, contradicted *Monoprix* and, in the absence of an intention to cause harm, appeared to require at least subjective bad faith in the course of negotiations.⁶³² In this case, where the defendant was not aware at the time of the negotiations that the land was not solely owned by him and where he would probably have discovered the real situation if he had looked for proof of his title to the property, his fault of negligence did not suffice to impose liability on him.⁶³³ Still, this judgment remains isolated, and it is generally considered that precontractual fault in breaking off negotiations is not qualified (without excluding from this general conclusion contracts for the sale of land).⁶³⁴ This

⁶²⁹ New arts 1369-1371 Cciv.

⁶³⁰ art 4(1) Decree no 55-22 of 4 January 1955; Zweigert and Kötz (n 11) 369.

⁶³¹ Cass civ 3 October 1972 (n 316); text to (n 368).

⁶³² Cass civ 12 April 1976 (n 373); p 77 above.

⁶³³ Deshayes and Maître, case 3, in Cartwright and Hesselink (n 6) 97.

⁶³⁴ Text to (nn 387, 388).

has been reaffirmed by more recent case law dealing with liability for broken negotiations for the sale of land.⁶³⁵

Regarding breaking off negotiations for the conclusion of a solemn contract, there does not seem to be a special treatment of these cases in French law. For instance, in an early case about a promise to transfer a notary's office, where the transfer was a solemn act required to be in writing (article 6 of *loi* 23 June 1841), it was considered that the refusal to carry out the promise could give rise to delictual damages.⁶³⁶

2 Lack of formality cases

In French law, the contract of sale of land presents no difficulties as it is a consensual contract. If negotiating parties have orally reached agreement as to the sale, the agreement produces full effect between them from the moment it is reached and the buyer has to be considered as the owner of the property.⁶³⁷ Following from article 1583 Cciv, which is applicable to any sale, the contract is enforceable and, consequently, there is no issue of delictual damage being suffered by the buyer.⁶³⁸ If the seller contests the agreement, the buyer will have to present proof of it according to new articles 1359-1362 Cciv, and if the seller refuses to transfer the property, the buyer will have the contractual remedies of new article 1217 Cciv.⁶³⁹

⁶³⁵ eg, Cass com, 9 November 2010, Bull civ IV no 172; Cass civ 28 June 2006 (n 395); Cass civ 13 January 2005 (n 617); earlier, Cass civ 1, 19 January 1977, D 1977 p 593, note Schmidt-Szalewski (*Humery c Epoux Gonzalès*).

⁶³⁶ CA Rennes 8 July 1929 (n 412).

⁶³⁷ Deshayes and Maître, case 11, in Cartwright and Hesselink (n 6) 316; text to (n 623) above.

⁶³⁸ *ibid* 316.

⁶³⁹ A different issue is the enforceability of the contract against third parties: text to (nn 629, 630).

But the question remains regarding formal contracts which have been agreed without complying with the required formality. It seems that in French law there is no distinct line of cases in this respect. Indeed, in a comparative study of good faith in different jurisdictions, including German and French law, reference is made to cases of inexplicable refusal to sign the definitive act, but no examples of French cases are provided.⁶⁴⁰ Furthermore, in the same study it is said that the argument, which is often accepted in German law, that if the consequences of an act are important, the act may be considered to be illicit by virtue of good faith, does not feature in French law.⁶⁴¹

Slightly altering the case scenario of an agreed sale of land, an example can be found in the case where an owner of land agrees to sell it to a buyer who has a certain time to give his answer, as this agreement is a unilateral promise of sale (*promesse unilatérale de vente*) of property, which is null if it is not recorded by an authenticated instrument or a signed instrument registered within ten days from the date of its acceptance by the beneficiary (article 1589-2 Cciv). Here, if the seller was aware of the formality requirement (or is a professional regarding sale of land) and knew that the buyer was ignorant of it, the seller might have an obligation to inform the buyer that the contract had to be registered to become fully valid, and if the seller deliberately keeps this information to himself, he would be liable under delict (new articles 1240 and 1241 Cciv). The solution would be the same where the seller misled the buyer about the formality requirement.⁶⁴² New article 1112-1 Cciv on the general duty of precontractual information may be applicable in such a case, leading to

⁶⁴⁰ Jaluzot (n 92) 364.

⁶⁴¹ *ibid* 89.

⁶⁴² Case scenario and solutions proposed by Deshayes and Maître, case 11, in Cartwright and Hesselink (n 6) 317. Asúa (n 21) 240 reaches the same solution under the heading of invalidity of a contract and breach of a duty of information. Also Schmidt, *Négociation* (n 322) 190, 192.

delictual compensation and, possibly, annulment of the contract. In theory, the judge could also decide that his judgment will serve as the act of sale, because the validity of the sale of real estate is not subject to a solemnity.⁶⁴³

Another example can be found in the oral promise of a gift of land which, according to article 931 Cciv, is void. If the promisor has allowed the promisee to live on the land and by his conduct has ‘*volontairement créé de faux espoirs dans l'esprit de celui-ci*’ (voluntarily awakened false hopes in the other party),⁶⁴⁴ he is guilty in delict and liable in damages under new articles 1240 and 1241 Cciv.⁶⁴⁵ Contractual relief could be given to the promisee if the court finds that the contract is onerous and not gratuitous, as in such case no notarization is necessary and the contract is perfectly valid.⁶⁴⁶

In conclusion, lack of formality cases do not represent an important problem in French law.⁶⁴⁷ It does not give special treatment to cases where, due to the defendant’s fraud or unintentional but careless conduct, an applicable formal requirement was not satisfied, and provides delictual relief for the economic loss caused to the claimant.⁶⁴⁸ Expectation-based reliance is protected with delictual liability in the same manner as it is protected in the breaking-off of negotiations. Unlike German law, the principle of good faith is not used to provide for specific performance of an agreement which lacks the required legal formality. However,

⁶⁴³ Malaurie, Aynès and Stoffel-Munck (n 316) 317.

⁶⁴⁴ CA Aix-en-Provence, 11 January 1983, D 1985, 169 note Légier.

⁶⁴⁵ Kötz, *European Contract Law* (n 79) 92 fn 66; Zweigert and Kötz (n 11) 377.

⁶⁴⁶ Req, 14 April 1863, D 1863, 363.

⁶⁴⁷ Zweigert and Kötz (n 11) 377.

⁶⁴⁸ von Mehren, ‘Formal Requirements’ (n 271) paras 188, 192, 219.

contractual relief for breach of a promise could be given in any case where a valid promise contract can be construed from the oral agreement.⁶⁴⁹

V Conclusions

Although the 2016 reform established good faith as the legal basis of precontractual liability for breaking off negotiations, the other doctrinal bases of this liability remain valid as they can be seen to emanate from good faith. Nevertheless, between the doctrine of abuse of rights and the criterion of legitimate belief or trust, only the latter embodies the essence of this liability and dominates the subject.⁶⁵⁰ It corresponds to the notion of ‘reliance’ in both its dimensions (dimensions which interact between themselves in that trust-based reliance justifies expectation-based reliance) and as such it has been used by the courts to establish fault and impose liability for breaking off negotiations. Even though it appears that the French approach concentrates either on the wrongdoing of the defendant or on the reliance on the future conclusion of the contract by the claimant,⁶⁵¹ the reliance approach is the more suitable one for explaining the imposition of delictual liability where one party has induced a legitimate *croyance/confiance* in the other (be it a legitimate belief in the future conclusion of the contract or a trust between the parties). Good faith can assist the reliance basis in determining the precontractual blameworthy behaviour but, at least theoretically, it is not an essential element to explain the imposition of liability. Finally, French law, unlike German law, does not present a special treatment of broken negotiations for the conclusion of formal contracts and lack of formality cases.

⁶⁴⁹ Schmidt, ‘Période Précontractuelle’ (n 324) 557.

⁶⁵⁰ Schmidt, ‘La Sanction’ (n 324) 72.

⁶⁵¹ Zimmermann and Whittaker (n 155) 257, comparative observations to case 3.

CHAPTER IV – RELIANCE IN THE BREAKING-OFF OF NEGOTIATIONS IN CHILEAN LAW

The doctrine of precontractual liability entered into Chilean law and has become established via a process of mixed reception of ideas emanating from the French doctrine of *responsabilité précontractuelle* and the German doctrine of *cic*.⁶⁵² This chapter will focus on the current state of precontractual liability for breaking off negotiations in Chilean law. Throughout the chapter it will be highlighted where Chilean law comes closer to German or to French law, but it will begin by referring to certain aspects of the doctrine of precontractual liability where it is clear that *la doctrina* and *la jurisprudencia* have taken elements from the German or from the French tradition and have sometimes combined these elements into a Chilean hybrid (section I). The chapter will continue with the analysis of the different theoretical bases that have been used to justify the imposition of precontractual liability for breaking off negotiations (section II), arguing in favour of the notion of *confianza*, which corresponds to the German notion of *Vertrauen* and the French notion of *croyance/confiance légitime* (II 1). The role that the principle of good faith (II 2) and the doctrine of abuse of rights (II 3) have played in providing a foundation for this liability will also be explored. The chapter will then look at the requirements of precontractual liability for breaking off negotiations that have been outlined by *la doctrina* and *la jurisprudencia* (section III). It will continue with the analysis of the particular scenarios of broken negotiations for the conclusion of a formal contract and lack of formality cases, as these seem to be the types of cases most frequently disputed before the courts (section IV). The chapter will argue that reliance, embodied

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Ch I s III 2 (c).

in the notion of *confianza*, is the core element of precontractual liability for breaking off negotiations in Chilean law.

I At the crossroads between German and French law

The doctrine of precontractual liability in Chilean law has continued to be mostly influenced by the developments of the doctrine in both German and French law. *La doctrina* and *la jurisprudencia*, when discussing precontractual liability for breaking off negotiations, frequently refer to legal scholars and judgments from these European jurisdictions. These references are sometimes made in order to reinforce the solutions reached by Chilean legal scholars⁶⁵³ or to point out the correspondence between the doctrine of precontractual liability applied by Chilean judgments and that applied by ‘the superior courts of countries of greater legal tradition’.⁶⁵⁴ What is more curious is that when *la doctrina* refer to foreign legal scholars in order to explain this type of liability in Chilean law, often citing German and French legal scholars⁶⁵⁵ to a similar degree, they tend to combine their solutions to apply them to Chilean law. For instance, a prominent Chilean scholar, in the introduction to the section of his treatise on extra-contractual liability that deals with liability for precontractual wrongs, after referring to the importance of the protection of *confianza*, indicates that the following paragraphs especially follow a paper by the German author Stoll and then, when

⁶⁵³ eg, Marcelo Barrientos Zamorano, *Daños y Deberes en las Tratativas Preliminares de un Contrato* (2nd edn, LegalPublishing 2010) 49-51.

⁶⁵⁴ Ramón Domínguez Benavente, Ramón Domínguez Águila and Carmen Domínguez Hidalgo, ‘Comentarios de Jurisprudencia 4’ (1996) 200 *Revista de Derecho* Universidad de Concepción 192, commenting on Cass com 22 April 1997 (n 384), in relation to CA Concepción, 5 June 1996, *Forestal Bío-Bío SA con Madesal*, rol 1374-93 (ratified by CS 28 January 1999), unpublished, case note in Ramón Domínguez Benavente, Ramón Domínguez Águila and Carmen Domínguez Hidalgo, ‘Comentarios de Jurisprudencia 1’ (1996) 199 *Revista de Derecho* Universidad de Concepción 179.

⁶⁵⁵ References are also usually made to Spanish, Italian and Argentinean authors, who, in turn, are normally influenced by the German and French doctrines of precontractual liability.

explaining cases that give rise to liability for breaking off negotiations, he cites a French book by Ghestin.⁶⁵⁶

In this section special attention will be paid to certain aspects of the doctrine of precontractual liability where German law and French law vary to some extent amongst themselves and where *la doctrina* and *la jurisprudencia*, although sometimes opting for the solution of one or the other, have also at times sought to combine elements taken from both European jurisdictions.

1 Legal recognition and nature of the liability

(a) Legal recognition

The Chilean Civil Code, following the original French Civil Code of 1804, does not refer to the negotiations for a contract and does not deal with the formation process of a contract. The Chilean Commercial Code regulates the formation of consent of commercial contracts in general (articles 97-106 CComCh) and, after a long discussion in *la doctrina* and *la jurisprudencia*,⁶⁵⁷ it was settled that these articles apply not only to commercial but also to civil contracts and not only to consensual civil contracts but also to real and solemn civil contracts.⁶⁵⁸ Some articles of the CCivCh and of the CComCh have been interpreted as giving rise to different hypotheses of precontractual liability.⁶⁵⁹ The Consumers' Rights Protection Law⁶⁶⁰

⁶⁵⁶ Barros Bourie (n 61) 1001 fn 59, 1010 fn 79.

⁶⁵⁷ Details in Rosende (n 55) ch IV.

⁶⁵⁸ art 1443 CCivCh ('The contract is real when, for it to be perfected, the delivery of the thing that is the object of the contract is necessary; it is solemn when it is subject to the observance of certain special formalities without which they produce no civil effect; and it is consensual when it is perfected by the sole agreement of the parties').

⁶⁵⁹ p 13 above. After a reform in 2013 of the CComCh, art 529 no 1 can be considered to give rise to precontractual liability of the insurer for breach of information duties regarding concluded insurance contracts; Marcelo Barrientos, 'Nuevos Deberes Precontractuales de Información en los Certificados de Cobertura Provisorio, Definitivo y la Propuesta del Contrato de Seguro' (2015) 22 Revista de Derecho 65, 85ff.

has introduced other possible cases of precontractual liability.⁶⁶¹ However, Chilean law, like French law before the 2016 reform,⁶⁶² lacks a legal provision recognising precontractual liability for breaking off negotiations.

Some Chilean legal scholars have argued that the CCivCh should be reformed to introduce the express recognition of precontractual liability for breaking off negotiations.⁶⁶³ One author, following article 1337 of the Italian Civil Code, has proposed a draft paragraph to be added to article 1545 of the CCivCh,⁶⁶⁴ stating that ‘The interested parties in preliminary negotiations aimed at the conclusion of a contract must act in good faith, and must compensate the other party for all losses if they act otherwise.’⁶⁶⁵ Others, also following article 1337 of the Italian Civil Code, have proposed a draft paragraph to be added at the beginning of article 1546 of the CCivCh,⁶⁶⁶ stating that ‘Parties must conduct themselves according to good faith in the development of negotiations and in the formation of a contract.’⁶⁶⁷ These are only academic proposals and, as yet, there is no bill before Congress contemplating such a reform of the Civil Code.

⁶⁶⁰ Ley 19496 de 7 Marzo 1997 sobre Protección de los Derechos de los Consumidores (LPDC).

⁶⁶¹ eg, arts 17E (compensation in case of nullity of certain clauses of an adhesion contract) and 17L (compensation where the consumer entered into a contract of financial services or products due to information provided by the supplier inducing mistake or false advertising) which also protect micro and small businesses as consumers.

⁶⁶² Text to (n 307).

⁶⁶³ eg, Risueño (n 49) 141.

⁶⁶⁴ Text to (n 817) below.

⁶⁶⁵ Álvaro Puelma Accorsi, ‘Ponencia Principal’ in Fundación Fernando Fueyo Laneri (ed), *Estudios sobre Reformas al Código Civil y Código de Comercio: Título Preliminar, Teoría de la Imprevisión, Contratos Preparatorios* (Editorial Jurídica de Chile 2000) 290.

⁶⁶⁶ Text in p 158 below.

⁶⁶⁷ Rafael Gómez Balmaceda and Hugo Rosende Álvarez, ‘Comentario Crítico’ in Fundación Fernando Fueyo Laneri (ed), *Estudios sobre Reformas al Código Civil y Código de Comercio: Título Preliminar, Teoría de la Imprevisión, Contratos Preparatorios* (Editorial Jurídica de Chile 2000) 305.

At a regional level, some Chilean legal scholars have been participating in an academic and non-binding project on the harmonisation of the Latin American Principles of Contract Law (*Principios Latinoamericanos de Derecho de los Contratos*), which includes a draft article recognising precontractual liability for breaking off negotiations.⁶⁶⁸

(b) Nature of the liability

The nature of precontractual liability in general has been much debated in Chilean law. Establishing its nature is extremely relevant as it determines the applicable regime of liability. The CCivCh establishes two general regimes of liability: contractual liability and delictual or extra-contractual liability.⁶⁶⁹ There are considerable differences between these regimes.⁶⁷⁰ Regarding liability for breaking off negotiations, its lack of express legal recognition makes the determination of its legal nature particularly difficult.

Legal scholars tend to distinguish between the different scenarios of precontractual liability in order to determine the nature of the liability. Therefore, it is considered that some particular cases are of a delictual nature while others are of a contractual nature or that, even if they are not truly of either nature, the legal regime of one or other type of liability is applicable depending on the particular case.⁶⁷¹

⁶⁶⁸ art 10 Withdrawal against good faith (1) Compensation must be provided for the loss caused by withdrawing from negotiations contravening the requirements of good faith. (2) In no event shall compensation be provided for the loss of the expected benefits of the contract that is not concluded. (3) A party that initiates or continues negotiations when not able or not intending to reach an agreement is specially required to provide this compensation (August 2016 version).

⁶⁶⁹ arts 1545ff and arts 2314ff CCivCh, respectively.

⁶⁷⁰ eg, with regard to the burden of proof, extent of compensation, and prescription periods. For details, Barros Bourie (n 61) §64; Pablo Rodríguez Grez, *Nuevas Tendencias de la Responsabilidad* (Abeledo Perrot 2011) 181ff.

⁶⁷¹ eg, Arturo Alessandri Rodríguez, *De la Responsabilidad Extracontractual en el Derecho Civil Chileno (Título 35 del Libro IV del Código Civil)* (Editorial Jurídica de Chile 2005) 45; Arturo

Which legal regime of liability is considered applicable often depends on which type of liability is considered to be the general regime of liability applicable to any case that does not have a typical contractual or delictual nature.⁶⁷²

In the case of liability for breaking off negotiations, the majority of *la doctrina* and *la jurisprudencia* consider that it is of a delictual nature or that the delictual regime of liability is applicable.⁶⁷³ The rules on delictual liability (articles 2314-2334) are located in Title XXXV ('Of delicts and quasi-delicts') of Book IV ('Of Obligations in General and of Contracts') of the CCivCh. Two articles, in particular, establish a general principle of delictual liability, according to which all losses (including purely economic losses) caused to a person by the intent or negligence of another person can be compensated:

Alessandri, Manuel Somarriva and Antonio Vodanovic, *Tratado de las Obligaciones*, vol 2 (2nd edn, Editorial Jurídica de Chile 2004) 362-363.

⁶⁷² Some consider that the contractual regime of liability is the general one, while the delictual regime is exceptional (eg, Alessandri Rodríguez, *Responsabilidad Extracontractual* (n 671) 43). Others consider that it is, in principle, the other way around (eg, Barros Bourie (n 61) 1068, 1071).

⁶⁷³ eg, Rosende (n 55) 60; Domínguez Benavente, Domínguez Águila and Domínguez Hidalgo, 'Comentarios de Jurisprudencia 1' (n 654) 182; Claudia Schmidt Hott and Solange Doyharçabal Casse, 'Chile' in Atilio Anibal Alterini and Roberto López Cabana (eds), *Enciclopedia de la Responsabilidad Civil*, vol II (Abeledo Perrot 1998) 217, 235; Alessandri Rodríguez, *Responsabilidad Extracontractual* (n 671) 45; Barrientos, *Daños* (n 653) 117; Rosario Celedón and Patricia Silberman, *Responsabilidad Precontractual por Ruptura de Negociaciones Contractuales* (Editorial Jurídica de Chile 2010) 132-133; Iñigo de la Maza, 'El Retiro Unilateral como un Caso de Responsabilidad Precontractual' in Iñigo de la Maza (ed), *Cuadernos de Análisis Jurídicos, Colección Derecho Privado III: Temas de Contratos* (Ediciones Universidad Diego Portales 2006) 131-133, 142; Iñigo de la Maza and Carlos Pizarro, *Responsabilidad Civil: Casos Prácticos* (5th edn, Abeledo Perrot 2010) 56; Rodríguez Grez (n 670) 199; Arturo Prado Puga, 'Sobre la Responsabilidad Civil Precontractual' (2015) 32 *Revista Actualidad Jurídica* 167, 172; CA Concepción 5 June 1996 (n 654); CA Concepción, 30 June 1999, *Sociedad Ruz de la Barra con Comar SA*, unpublished, case note in Ramón Domínguez Benavente, Ramón Domínguez Águila and Carmen Domínguez Hidalgo, 'Comentarios de Jurisprudencia 3' (1998) 204 *Revista de Derecho Universidad de Concepción* 187; CS, 24 September 2010, *Sociedad Comercial e Inmobiliaria Beckna Limitada con Corporación Municipal de Ancud*, rol 4895-2008; CS, 29 December 2011, *Jiménez Mira con Armijo Cerda*, rol 1872-2010, replacement judgment (as opposed to the cassation judgment).

Art 2314. He who has committed a delict or quasi-delict which has caused harm to another is under an obligation to indemnify; without prejudice to the punishment imposed by legislation for the delict or quasi-delict.

Art 2329 [first paragraph]. As a general rule all damage that can be attributed to the malice or negligence of another person must be repaired by it.

In establishing a general principle of delictual liability, Chilean law follows French law (and differs from German law),⁶⁷⁴ which explains why the view that precontractual liability for breaking off negotiations is of a delictual nature is predominant in both Chilean and French law⁶⁷⁵ and evidently differs from the contractual approach taken in German law.⁶⁷⁶ Some scholars concede that there is a ‘contractual likeness’ in the relationship that the negotiations give rise to between negotiating parties, and consider that this liability, although delictual, is essentially dominated by the principles of contract law.⁶⁷⁷ In some aspects, however, the Chilean law of delict is closer to the German law of delict. For instance, there is no vicarious liability; the fault of the employer is presumed when the fault of the employee is proved, but this presumption can be rebutted (although it is difficult to rebut in practice because of the exacting interpretation of the law applied by the courts) by proving that even acting with due diligence it would have been impossible to prevent the act that caused harm.⁶⁷⁸

In the majority view, in the absence of a contract (even a preliminary one), the malicious or culpable breaking-off of negotiations can give rise to a delict or quasi-

⁶⁷⁴ arts 2314 and 2329(1) CCivCh resemble new arts 1240 and 1241 Cciv (text to (n 318)); Barros Bourie (n 61) 19, 284, 286; Tapia Rodríguez (n 38) 276.

⁶⁷⁵ Text to (n 316).

⁶⁷⁶ Text to (n 70).

⁶⁷⁷ Barros Bourie (n 61) 1004, 1008; text to (n 697) below.

⁶⁷⁸ arts 2320 and 2322 CCivCh; Barros Bourie (n 61) 167, 168 fn 265, 179, 183 fn 311, 184; p 25 above.

delict if all the requirements of delictual liability are met ((i) a voluntary act by a capable person, (ii) carried out with intent or negligence, (iii) that caused another person to suffer harm).⁶⁷⁹ The difference between a delict and a quasi-delict is that in the former there is an intention to cause harm (*dolo*) whereas in the latter the conduct is only negligent (*culpa*).⁶⁸⁰ However, at least in theory, the consequences of both are the same according to the principle of the integral reparation of harm which compensates the victim for all the losses suffered, regardless of the seriousness of the illicit conduct.⁶⁸¹ It is commonly added by the supporters of this view that negotiations do not create any legal relationship between the negotiating parties and that since no legal or contractual obligation exists, only delictual liability is possible if indeed a delict or quasi-delict has been committed.⁶⁸²

There are also some minority views. They are influenced, to some extent and in different ways, by the German doctrine of *cic*. A Chilean author writing in the first half of the twentieth century, who was heavily influenced by Saleilles' doctrine of precontractual liability (who in turn was influenced by Jhering's doctrine of *cic*), particularly by the idea that there is a tacit pact accessory to the main contract, the breach of which gives rise to contractual liability,⁶⁸³ considered that precontractual liability for breaking off negotiations is of a contractual nature because there is a

⁶⁷⁹ Barros Bourie (n 61) 61-62; Alessandri Rodríguez, *Responsabilidad Extracontractual* (n 671) 95.

⁶⁸⁰ arts 1437 and 2284 CCivCh. The distinction between delict and quasi-delict is not used in modern French law, Bell, Boyron and Whittaker (n 339) 294 fn 1.

⁶⁸¹ *La jurisprudencia* considers that this principle is recognised in art 2329(1) CCivCh (text in p 130); Barros Bourie (n 61) 37-38, 255.

⁶⁸² Alessandri Rodríguez, *Responsabilidad Extracontractual* (n 671) 45.

⁶⁸³ Ch I s III 2.

contractual fault in the violation of the *confianza* or *seguridad* that the contract will be entered into, that has been created by the party breaking off.⁶⁸⁴

A Supreme Court judge has expressed his view, as a minority (although he agreed with the majority as to the outcome of the case), that precontractual liability, while it shares with delictual liability the non-existence of a legal tie, fits more appropriately within contractual liability which, in his opinion, is the general regime of civil liability which should apply by default.⁶⁸⁵

Another minority view, which has more supporters, argues that the true nature of precontractual liability in general and in the particular case of breaking off negotiations is special and autonomous; that it is not truly a contractual or a delictual liability but constitutes a *tertium genus* or a special type of liability.⁶⁸⁶ This approach is clearly inspired by German scholars.⁶⁸⁷ This view argues that liability for breaking off negotiations is not contractual because no contract has been concluded and is not delictual because the party who breaks off is exercising his freedom to act and is not truly committing a delict or quasi-delict; it is a liability that is based on special reasons or simply a different type of liability.⁶⁸⁸ It is argued that the nature of precontractual liability is of a special type. It presents some elements that are closer to contractual liability, such as the fact that negotiating parties are not strangers who only come into contact when an accident takes place (as is usual in delictual liability),

⁶⁸⁴ Risueño (n 49) 70-73.

⁶⁸⁵ Judge Sergio Muñoz Gajardo in CS 29 December 2011 (n 673).

⁶⁸⁶ eg, Eiler (n 48) 71; Fuentes (n 40) 28; Isabel Zuloaga Ríos, *Teoría de la Responsabilidad Precontractual. Aplicaciones en la Formación del Consentimiento de los Contratos* (3rd edn, Legal Publishing 2008) 124-126; Pablo Vivanco Luengo, 'Aspectos Relevantes de la Responsabilidad Precontractual por Ruptura Injustificada de Negociaciones Precontractuales' (2008) 17 *Revista de Derecho* 139, 145.

⁶⁸⁷ Text to (n 75).

⁶⁸⁸ Eiler (n 48) 71. Also, Antonio Vodanovic, *Manual de Derecho Civil: Parte Preliminar y General*, vol II (4th edn, LexisNexis 2006) 67-68, but referring to liability for revocation of an offer (art 100 CComCh).

but are familiar with each other because they have been involved in negotiations that have given rise to a special relationship between them. But it also presents some elements that are closer to delictual liability, such as the fact that no contract has been entered into (or if a contract has been entered into it has been declared null) and the general duty not to cause harm to another has been violated.⁶⁸⁹ Nevertheless, in the absence of a legal recognition of liability for breaking off negotiations, the application of the delictual regime seems the only viable option.⁶⁹⁰

Although the courts adhere to the majority view,⁶⁹¹ some judgments,⁶⁹² while recognising that liability for broken negotiations is governed by the Civil Code's articles on delictual liability,⁶⁹³ also base this liability on certain articles on formation of consent of the Commercial Code.⁶⁹⁴ This is rather curious (and unnecessary) because these articles of the CCivCh are a sufficient legal basis to impose this liability and because these articles of the CComCh deal with a specific scenario of precontractual liability (revocation of an offer) which differs from that of broken negotiations. However, the mentioning of these articles of the CComCh by the courts can be understood if it is borne in mind that a leading scholar on precontractual liability has argued that the principles contained in the articles of the CComCh on formation of consent are the *derecho común*⁶⁹⁵ regarding precontractual liability.⁶⁹⁶

⁶⁸⁹ Zuloaga Ríos (n 686) 124-125.

⁶⁹⁰ *ibid* 140.

⁶⁹¹ (n 673) above.

⁶⁹² eg, CS 24 September 2010 (n 673).

⁶⁹³ arts 2314 and 2329 (p 130).

⁶⁹⁴ arts 99 and 100 (n 44).

⁶⁹⁵ The literal translation is 'common law' and the expression must be understood as the law applicable to any case of precontractual liability and not just to the specific situations regulated in the CComCh.

⁶⁹⁶ Rosende (n 55) 111.

2 A special relationship which gives rise to precontractual duties

The delictual nature of precontractual liability (influenced by French law) is not considered incompatible with the existence of a relationship that gives rise to special duties between the negotiating parties (influenced by German law).

According to Barros Bourie, although the nature of liability for breaking off negotiations is delictual and a feature of delictual liability is that no previous relationship exists between the persons involved as they are strangers, a previous relationship exists in this case: negotiations. Negotiations are entered into when there is a business contact (*contacto negocial*) and, consequently, a business relationship (*relación negocial*) which is also a relationship of *confianza* and loyalty, originates. This relationship gives rise to reciprocal duties of loyalty and diligence.⁶⁹⁷ Other scholars also consider that negotiations are a precontractual legal relationship (*relación jurídica precontractual*) which can be described as a relationship of *confianza* (*relación de confianza*).⁶⁹⁸ Another indicates that the mere fact of being in social contact creates between negotiating parties a special legal relationship (*relación jurídica especial*) that gives rise to a reciprocal state of *confianza* that cannot be disappointed, and a reciprocal duty of loyalty and honesty originates that imposes positive and negative duties.⁶⁹⁹

The German influence in Chilean scholars in the use of notions such as ‘precontractual relationship’, a ‘social’ or ‘business contact’ and ‘precontractual

⁶⁹⁷ Barros Bourie (n 61) 19 fn 10, 118, 628, 979, 1004; text to (n 677) above. CA Arica, 17 August 2012, *Medina Cusi con ASOAGRO AG, rol 179-2012* (ratified by CS 10 October 2012) recognised that during negotiations there is a *contacto negocial* which imposes duties of protection, loyalty and diligence.

⁶⁹⁸ eg, Barrientos, *Daños* (n 653) 33, 49, 56; Cristián Boetsch Gillet, *La Buena Fe Contractual* (Editorial Jurídica de Chile 2011) 138.

⁶⁹⁹ Francisco Javier Saavedra Galleguillos, *Teoría del Consentimiento* (Editorial Jurídica ConoSur 1994) 265, 268.

duties' is clear.⁷⁰⁰ This influence is sometimes direct, in that German authors are cited to give strength to these ideas,⁷⁰¹ and sometimes indirect, through the reception of German legal thought by Spanish legal scholars who are cited by Chilean authors.⁷⁰²

In Chilean delictual law, the existence of a specific duty of care in relation to the victim is not necessary for liability to arise, because the violation of the general duty of care is enough.⁷⁰³ However, in certain cases, such as in precontractual negotiations, the precontractual relationship between negotiating parties gives rise to specific duties of care that go beyond the general duty not to harm others, and contributes to determine their intensity.⁷⁰⁴ The duties of care that arise during negotiations are mostly positive duties of conduct. These duties, unlike the general extra-contractual duties of care, are owed between parties who are not strangers because they are involved in the precontractual relationship. In the absence of a preliminary contract, these duties find their source in the law.⁷⁰⁵ Although there are some specific laws that impose precontractual duties (particularly of information),⁷⁰⁶ duties of care can always find their legal basis in the general articles of delictual liability.⁷⁰⁷ However, precontractual duties are usually said to emanate from the

⁷⁰⁰ Marcelo Barrientos Zamorano, 'Los Tratos Preliminares en la Relación Precontractual' (2008) 14 *Revista de Derecho de la Empresa* 9, 14.

⁷⁰¹ eg, Stoll is cited by Barros Bourie (n 61) 1001; Larenz by Saavedra (n 699) 265 and Boetsch (n 698) 138-139.

⁷⁰² eg, Barrientos, *Daños* (n 653) 116 citing Díez-Picazo, Roca Trías and Morales Moreno; Zuloaga Ríos (n 686) 77 citing Díez-Picazo.

⁷⁰³ Barros Bourie (n 61) 20, 118.

⁷⁰⁴ Barros Bourie (n 61) 118.

⁷⁰⁵ Ideas expressed by Barros Bourie (n 61) 131, 1003, 1069.

⁷⁰⁶ eg, LPDC.

⁷⁰⁷ arts 2314 and 2329(1) CCivCh. Similarly, de la Maza (n 673) 142.

principle of good faith and, consequently, they can also find their legal basis in article 1546 CCivCh.⁷⁰⁸

Precontractual duties are subject to different classifications. One classification, particularly reminiscent of the German doctrine of *cic*, identifies the following: duties of protection or security, duties of loyalty, duties of information and duties to avoid the inefficiency of a legal act.⁷⁰⁹ Other duties sometimes mentioned are: duties of secrecy, confidentiality or discretion, duties of custody and conservation, and the duty to warn about an essential mistake being made.⁷¹⁰

The precontractual relationship that gives rise to these special duties is not binding in that it does not impose on negotiating parties an obligation to enter into the contract under negotiation (unless some form of binding preliminary agreement has been entered into). But the precontractual relationship and the duties that it gives rise to are binding in that they should be observed because if they are breached, precontractual liability may arise. It must be stressed that the notion of precontractual relationship and duties that emanate from it used by Chilean scholars does not correspond to the technical meaning that it has in German law.⁷¹¹

A particularity of Chilean law is that a number of legal scholars and judgments, when listing the requirements for precontractual liability to arise, indicate the need for consent, agreement or intention of the negotiating parties in entering the negotiations,⁷¹² which suggests that some form of relationship exists between them.

⁷⁰⁸ This ch s II 2 below.

⁷⁰⁹ Barros Bourie (n 61) 1001.

⁷¹⁰ Barrientos, *Daños* (n 653) 76, 100, 105.

⁷¹¹ Ch II s I 1.

⁷¹² eg, Eiler (n 48) 72; Risueño (n 49) 62; Rossel (n 54) 31; Rosende (n 55) 59-60; Barrientos, *Daños* (n 653) 49; *Forestal Bío-Bío* (n 654); CA Santiago, 13 September 2005, *Inmobiliaria e Inversiones Montecarlo SA con Fisco de Chile*, Westlaw Chile CL/JUR/1895/2005; CA

This requirement seems to stem from the reception of Saleilles' theory of precontractual liability by Chilean legal scholars at the beginning of the twentieth century.⁷¹³ Risueño stated that it is a requirement for precontractual liability to arise that both parties agreed to enter into negotiations and that if this agreement (which is not necessarily a contract but creates a security in the conclusion of the contract) was violated, it gave rise to contractual fault.⁷¹⁴ Similarly, Eiler listed as a requirement for liability to arise that there was a reciprocal agreement to negotiate, because if the party breaking off had not previously consented, he could not be liable for the expenses incurred or other losses suffered by the other party, as he had not deceived the *confianza* of the other party.⁷¹⁵

More recent legal scholars and judgments have also listed the consent to negotiate as a requirement for liability to arise, arguing that this consent imposes on negotiating parties the obligation to act in accordance with commercial equity and good faith.⁷¹⁶ This argument is not convincing. Negotiating parties will be subject to the duty to negotiate in good faith from the mere fact of negotiating with each other.⁷¹⁷ An agreement to negotiate is not truly a requirement for precontractual liability for breaking off negotiations under Chilean law but is only a vestige of the influence of Saleilles' doctrine of precontractual liability in the initial reception of this doctrine into Chilean law.⁷¹⁸ There is no need to assimilate negotiations to a

Puerto Montt, 15 July 2008, *Sociedad Comercial e Inmobiliaria Beckna Limitada con Corporación Municipal de Ancud*, Legal Publishing no 39449, ratified by CS 24 September 2010 (n 673).

⁷¹³ Text to (nn 28, 45). This is clear in de la Maza and Pizarro (n 673) 51.

⁷¹⁴ Risueño (n 49) 62, 71-73, 142.

⁷¹⁵ Eiler (n 48) 72.

⁷¹⁶ eg, Rosende (n 55) 59-60, 78; Barrientos, *Daños* (n 653) 49; *Forestal Bío-Bío* (n 654).

⁷¹⁷ p 161 below.

⁷¹⁸ (n 713).

contractual relationship, as it is generally agreed that this liability is of a delictual nature.⁷¹⁹ In any case, if agreement or consent to negotiate is still required, this requirement is easily met in practice, as the mere fact of negotiating shows that there was consent in entering negotiations.

In conclusion, while the notion of a relationship of reliance that gives rise to precontractual duties between negotiating parties has an eminently German origin, some ideas taken from French legal scholars have also been incorporated by some Chilean authors and judgments in requiring consent or agreement to negotiate for precontractual liability to arise. This requirement seems incorrect or at least irrelevant in Chilean law, but it does contribute to the idea of the existence of a relationship between negotiating parties.

3 Precontractual fault

The requirements of delictual liability must be met for precontractual liability for breaking off negotiations to arise.⁷²⁰ The focus is on the element of fault. As in French law (even after the 2016 reform), there is no specific definition of ‘precontractual fault’ and, consequently, it must be subsumed under the notion of ‘delictual fault’.⁷²¹ The wide notion of fault (*culpa*) involves both intentional (*dolo*) and non-intentional or negligent (*culpa* or *negligencia*) fault.⁷²² Because the paradigm case is of a negligent breaking-off of negotiations, the analysis will be restricted to non-intentional fault and references to ‘fault’ (*culpa*) should be understood as to

⁷¹⁹ Text to (n 673).

⁷²⁰ Text to (n 679).

⁷²¹ Text to (n 327).

⁷²² Barros Bourie (n 61) 62, 75-76.

negligence. In the determination of the notion of delictual fault, French but also German influences can be seen.

The CCivCh classifies fault into three species (*culpa grave*, *culpa leve* and *culpa levísima*) in article 44. Although it is generally thought that this classification of the different degrees of fault is only applicable in contract law,⁷²³ other legal scholars consider that the definition of ‘slight fault’ (*culpa leve*) is the standard of conduct required in delict.⁷²⁴ Article 44, in its third and fourth paragraphs, indicates:

Slight fault, slight carelessness, light carelessness, is the lack of such diligence and care that men ordinarily employ in their own businesses. Fault or carelessness, without another description, means slight fault or carelessness. This type of fault is opposed to ordinary or medium diligence or care.

He who must manage a business like a good father of a family is responsible for this type of fault.

Therefore, negligence is essentially the lack of due care according to a standard or model of conduct.⁷²⁵ Due care is an objective notion in that the individual and subjective characteristics of a person are not taken into account but is determined according to a model of conduct. The imputation of fault is objective in that it is not a moral reproach to the author of the harm; the focus is not on the person but on his conduct. The assessment of the existence of fault is also objective in that the actual conduct of the author of the harm is compared to a general, flexible, abstract and objective standard of conduct that can be expected of a model type of person placed in the same circumstances. The pattern of conduct is that of the ‘prudent man’, the

⁷²³ Alessandri Rodríguez, *Responsabilidad Extracontractual* (n 671) 44; Arturo Alessandri, Manuel Somarriva and Antonio Vodanovic, *Tratado de Derecho Civil: Partes Preliminar y General*, vol II (7th edn, Editorial Jurídica de Chile 2005) 161.

⁷²⁴ eg, Barros Bourie (n 61) 80.

⁷²⁵ This para follows Barros Bourie (n 61) 28-29, 32, 37, 62, 72, 77-78, 80-81, 84-85, 119. Also Alessandri Rodríguez, *Responsabilidad Extracontractual* (n 671) 127.

‘reasonable person’, the ‘diligent person’, a ‘person who is not particularly heroic but is respectful’ or, using the language that comes from Roman law, that of a ‘good father (or mother) of a family’ (*buen padre (o madre) de familia*). Therefore, the standard of care is assessed on the basis of two paradigms that complement each other: a model type of person and the conduct that is rationally required. It is argued that the standard of *culpa leve* generally corresponds to the standards of care used in the French law of delict (model type of person) and in the German law of contract (socially required care).⁷²⁶ Some consider that fault involves the breach of a duty of care and accept Planiol’s definition of fault.⁷²⁷ The duty of care will be established on the basis of an estimation of the conduct that in those circumstances a reasonable and diligent person would have had. The legislator can establish concrete duties of care but, in the absence of a specific legal text, their determination in the particular case corresponds to the judges using the standard of the diligent person.⁷²⁸

The notion of delictual fault relates to the notions of reliance (*confianza*) and legitimate expectations (*expectativas legítimas*) which are suggested to be the true theoretical basis of precontractual liability for breaking off negotiations.⁷²⁹ The objective notion of fault strengthens reliance because it looks to the reasonable expectations that can be had in relation to the conduct of others, and in the construction of these expectations no regard can be had to the subjective characteristics of each person.⁷³⁰ Fault liability is based on the disregard of the

⁷²⁶ Barros Bourie (n 61) 81 fn 17, 82 fn 21.

⁷²⁷ Text to (n 332); eg, Barros Bourie (n 61) 95. Alessandri Rodríguez, *Responsabilidad Extracontractual* (n 671) 125, rejects Planiol’s definition of fault.

⁷²⁸ Barros Bourie (n 61) 28, 94-95, 97, 105-106.

⁷²⁹ This ch s II 1 below.

⁷³⁰ Barros Bourie (n 61) 79, 89.

legitimate expectation of the victim not to suffer wrongful harm due to the conduct of others.⁷³¹

Legal scholars do not place great emphasis in determining where the fault is placed in cases of liability for breaking off negotiations; that is, if in the conduct during negotiations or if in the breaking-off itself. Rosende Álvarez considered that it is not the actual breaking-off but the culpable conduct during negotiations that gives rise to liability.⁷³² In the more recent *doctrina* mention is usually made of two elements: (i) breaking off without a justified reason, (ii) after negligently or intentionally inducing and then disappointing a legitimate *confianza* in the other party.⁷³³ Some judgments consider that the breaking-off itself is abusive or arbitrary and, hence, culpable, but to reach this conclusion they also take into account the conduct of the parties during the negotiations.⁷³⁴ The Supreme Court has stated that the precontractual wrong is not found in the refusal to contract but in having negotiated in bad faith or with grave disregard of the interests of the other party and that, consequently, the loss is caused by having placed *confianza* in the diligence and good faith of the other party.⁷³⁵ In the same judgment the two elements previously mentioned were considered as requirements for precontractual liability to arise.⁷³⁶ Therefore, it seems that fault at both levels is required.

As to the proof of fault in cases of liability for breaking off negotiations, the general principle applies which is that delictual fault has to be proven by the

⁷³¹ Barros Bourie (n 61) 81, 106.

⁷³² (n 55) 75.

⁷³³ eg, Celedón and Silberman (n 673) 136; Barrientos, *Daños* (n 653) 58.

⁷³⁴ eg, *Forestal Bío-Bío* (n 654) *considerando* (ground of ruling) 5; CS, 12 April 2012, *Urrea Fuentes con Corpbanca*, rol 218-2011, replacement judgment *considerando* 3.

⁷³⁵ *Jiménez Mira* (n 673) *considerando* 8, citing Barros Bourie (n 61) 1007.

⁷³⁶ *Jiménez Mira* (n 673) *considerando* 7.

claimant.⁷³⁷ The claimant must prove the act or omission of the defendant and all the circumstances that will allow the judge to rule on the diligence or negligence of the defendant.⁷³⁸ It is debated whether article 2329 CCivCh establishes a presumption of fault for one's own act. However, even if it is recognised that such a presumption exists, it is highly unlikely that it could be applicable in cases of liability for breaking off negotiations, as it refers to situations of particularly dangerous activities or where the circumstances indicate *prima facie* that the harm has been caused by negligence.⁷³⁹

Finally, *la doctrina* is unanimous in considering that the characterisation of the act or omission as negligent, ie, determining whether the defendant breached a duty of care, is a question of law (*cuestión de derecho*) and is, therefore, subject to the *recurso de casación en el fondo* before the Supreme Court.⁷⁴⁰ The current position of the Supreme Court is not clear, but it frequently evaluates the facts of the case in order to characterise the conduct as culpable.⁷⁴¹

II Theoretical bases of precontractual liability for breaking off negotiations

The doctrinal basis of this liability is still subject to discussion among Chilean legal scholars and has also varied in the judgments of the courts. It is frequent that legal scholars and judgments combine different bases in order to justify the imposition of this liability. Thus, it is not surprising to find references to delictual fault, *confianza*,

⁷³⁷ Application of art 1698(1) CCivCh.

⁷³⁸ Barros Bourie (n 61) 140.

⁷³⁹ Barros Bourie (n 61) 151.

⁷⁴⁰ (n 824) below; eg, Barros Bourie (n 61) 145; Alessandri Rodríguez, *Responsabilidad Extracontractual* (n 671) 149-151, citing French legal scholars.

⁷⁴¹ Alessandri Rodríguez, *Responsabilidad Extracontractual* (n 671) 151-152; Barros Bourie (n 61) 146 fn 205.

breach of good faith and abuse of rights in the reasoning of a single legal scholar or judgment.⁷⁴² Three main doctrinal bases have been put forward: legitimate *confianza*, breach of good faith (or bad faith) and abuse of rights. These main bases sometimes encompass other arguments and are frequently combined. This section will argue that the appropriate basis to explain the rationale of precontractual liability for breaking off negotiations is ‘reliance’ expressed in the notion of legitimate *confianza*. Good faith and abuse of rights will also be analysed and particular emphasis will be placed on how they interact with *confianza* and whether *confianza* on its own is sufficient to justify this liability.

1 *Confianza legítima*

In the initial reception of the doctrine of precontractual liability into Chilean law it was seen that the notion of *confianza* was used in order to explain its rationale.⁷⁴³ In the current state of precontractual liability for breaking off negotiations in Chilean law, although reference is still made to other doctrinal arguments, the use of the notion of *confianza* has been increasing in the more recent *doctrina* and in judgments.

(a) *Confianza in la doctrina and la jurisprudencia*

Many renowned contemporary legal scholars and recent judgments refer to *confianza*, if not as the sole foundation of precontractual liability for breaking off negotiations, at least as part of the argument for the imposition of this liability, usually combining it with other legal and doctrinal bases.

⁷⁴² eg, in Barros Bourie (n 61) 1008-1012; *Forestal Bío-Bío* (n 654); *Ruz de la Barra* (n 673); CA Talca, 8 November 1999, *Luna Espinoza con Bobadilla Valenzuela*, quashed by CS, 22 November 2001, *rol* 2217-2000, *Gaceta Jurídica* 2001 no 257 p 56-74; *Jiménez Mira* (n 673).

⁷⁴³ Ch I s III 2 (c).

For instance, Barros Bourie, who holds that some cases of liability for breaking off negotiations can be understood as applications of the doctrine of abuse of rights⁷⁴⁴ and who also holds that bad faith gives rise to this liability,⁷⁴⁵ at the same time argues that the protection of *confianza* gives rise to certain hypotheses of liability when one party has created or nourished in the other party the *confianza* that the contract will certainly be entered into.⁷⁴⁶ The protected legal interest is *confianza* and it is the abuse of this *confianza* that founds this liability.⁷⁴⁷

De la Maza considers that the determining factor in order to characterise the precontractual period and, hence, solve the problem of accountability is the position of the parties. He argues that the pendulum of precontractual liability oscillates between two extremes: the self-interest and the *confianza* of the negotiating parties and that both should be protected in a balanced manner. The duty of conduct in the precontractual phase only requires a party not to disappoint the reasonable *confianza* of the other party. The disappointment of the *confianza* that is subject to protection constitutes the civil wrong, which can be denominated, depending on the circumstances, as fault (intentional or non-intentional), violation of good faith, breach of a duty to act properly or abuse of rights; and beyond the name, the determinant factor in the assessment of the wrong is to consider the nature of negotiations which is determined by the position of the parties.⁷⁴⁸

Barrientos enumerates as the first requirement of precontractual liability for breaking off negotiations the creation of a reasonable *confianza* in the conclusion of

⁷⁴⁴ p 166 below.

⁷⁴⁵ Text to (n 858) below.

⁷⁴⁶ (n 61) 1009.

⁷⁴⁷ Barros Bourie (n 61) 1010.

⁷⁴⁸ de la Maza (n 673) 134, 135 fn 11, 147.

the negotiated contract.⁷⁴⁹ Celedón and Silberman also refer to a *confianza* in the conclusion of the negotiated contract as an element that, alongside the absence of a justified reason, shapes the conduct of breaking off negotiations as a civil wrong.⁷⁵⁰

A relevant judgment which refers to *confianza* is that of the Court of Appeal of Concepción of 5 June 1996, ratified by the Supreme Court.⁷⁵¹ This is one of the most important Chilean judgments regarding precontractual liability, as it is the first to award damages to the claimant for the unilateral breaking-off of negotiations by the other party. Two groups of companies negotiated for over a year for the sale of plots of land for forest use of a value of millions of US dollars. They had exchanged the documents of title of the properties for their study, had studied them, made observations on them, had drafted and revised drafts of the promise of sale contract and of a mandate contract and had even set a date for the signing of the promise of sale contract. However, on that date the sellers communicated to the buyers that they were withdrawing from the negotiations because they had just sold the plots to a third party who had paid them a higher price than the price which had been agreed to be included in the promise of sale. In Chilean law, a promise to conclude a contract is valid as a preliminary contract if perfected with the legal formality of being in writing and sets a date or condition for the perfection of the promised contract and contains the essential elements of such contract, which in turn must not be a contract considered unenforceable by the law (article 1554 CCivCh).⁷⁵²

⁷⁴⁹ *Daños* (n 653) 51.

⁷⁵⁰ (n 673) 136. Similarly, Francisco Segura Riveiro, 'El Interés Indemnizable en las Hipótesis de Responsabilidad Precontractual' in Juan Andrés Varas Braun and others (eds), *Estudios de Derecho Civil: Jornadas Nacionales de Derecho Civil 2005-2009*, vol III (Abeledo Perrot 2011) 106.

⁷⁵¹ *Forestal Bío-Bío* (n 654).

⁷⁵² A promise contract is solemn (n 658), preliminary, and usually bilateral in that both parties are obliged to enter into the promised contract; the promised contract can be any type of

This judgment begins by stating that the claim is based on the precontractual liability of the defendant and provides different definitions of this liability from Chilean and foreign authors.⁷⁵³ It quotes a definition by a Spanish author who indicates that precontractual liability is ‘that which is incurred in by someone who (...) unjustifiably breaks off the preliminary negotiations, breaching duties of loyalty and *confianza* of which the other party was worthy’.⁷⁵⁴ It then quotes a Chilean author in order to establish that ‘(...) by the mere fact that persons enter into a relation with the purpose to negotiate the conclusion of a contract, a connection between them is established which creates a state of reciprocal *confianza* which must not be disappointed’.⁷⁵⁵

A scholar commenting on this case indicates that it demonstrates that, normally, negotiations imply collaboration between the negotiating parties which is only possible if they can trust (*confiar*) each other, even if to a minimal extent. Here, the parties collaborated in the negotiation and such collaboration was justified by the *confianza* in the other party. In his opinion, from the moment the parties agreed on the terms of the draft promise contract, the prospective buyers could legitimately rely (*confiar*) on its conclusion.⁷⁵⁶

A more recent judgment is of paramount importance because it is the first where the Supreme Court itself granted damages for precontractual liability for the breaking-off of negotiations based on the notion of *confianza* in connection with good

enforceable contract but the most common is the sale of real estate, René Abeliuk Manasevich, *Contrato de Promesa, de Opción y Otros Acuerdos Previos* (3rd edn, Abeledo Perrot 2012) 10, 21ff.

⁷⁵³ It is common for the courts to cite relevant Chilean authors and sometimes foreign authors as part of the grounds of ruling of their judgments.

⁷⁵⁴ Ricardo de Ángel Yagüez, *Tratado de Responsabilidad Civil* (1993), in *Forestal Bío-Bío* (n 654) *considerando* 1.

⁷⁵⁵ Saavedra (n 699), in *Forestal Bío-Bío* (n 654) *considerando* 4.

⁷⁵⁶ de la Maza (n 673) 136-137, 152.

faith.⁷⁵⁷ The claimant and the defendant negotiated for the sale of a supermarket. Due to a technical impossibility to conclude the sale, the negotiating parties agreed to enter into a promise of sale contract regarding the property. They had agreed on the sale price but were still in disagreement as to the payment of a balance of the price and as to the content of a penalty clause. They had agreed to sign the promise contract in a notary's office but the defendant did not attend and later indicated that he did not want to sign because it was not convenient to do so. The judgment considered that the negotiations had created a scenario of *confianza* in the claimant that the contract of promise of sale would be concluded.⁷⁵⁸

Another Supreme Court judgment⁷⁵⁹ also granted damages for precontractual liability, although the judgment is not entirely clear as to the specific ground on which it based the liability (whether breaking off negotiations, revoking an offer, revoking an acceptance or breaching a pre-agreement).⁷⁶⁰ The client of a bank applied to the bank to obtain a mortgage loan to buy a house. After a short time the bank informed him via email that the mortgage had been approved in its entirety and that an additional loan to make repairs to the property had also been approved. This was also communicated by the bank to the construction company who owned the property, with the bank requiring from that company legal and technical information about the property so that the bank could study it. The bank was told by the owner that because the mortgage loan had been approved, the owner would sign a promise contract with the bank's client regarding the sale of the property and the owner asked the bank to

⁷⁵⁷ 29 December 2011 (n 673); text to (n 841) below.

⁷⁵⁸ *ibid* *considerando* 9; text to (n 735) above.

⁷⁵⁹ CS 12 April 2012 (n 734).

⁷⁶⁰ The cassation judgment, reproduced in the replacement judgment (n 734), held that arts 100, 102, 105 CComCh had been breached by the CA, which would suggest that the liability is founded on the revocation of an offer.

confirm the amount of the loan and its duration, which the bank did. Under the conviction that the mortgage loan was approved, the client concluded the promise contract with the construction company and the latter physically delivered the property to the client, who proceeded to use the money from the additional loan to do works on the property. Ten months later, the bank communicated to its client that it would not approve the mortgage loan due to its financial burden. This led the construction company to ask the client to return the house and to pay an amount as rent for the period of time he had occupied it. Although the Supreme Court did not use the word *confianza*, the judgment has been interpreted as reaffirming the current line of case law established in *Jiménez Mira*⁷⁶¹ regarding precontractual liability for breaking off negotiations based on the protection of *confianza*.⁷⁶²

(b) The meaning and dimensions of confianza

It is suggested that *confianza* is the broad equivalent of the German notion of *Vertrauen* and the French notion of *croyance/confiance légitime*, all of which can ultimately be translated as ‘reliance’.⁷⁶³

For instance, a Chilean scholar has indicated that on the notion of *confianza*, the French author Ghestin should be consulted, seeming to imply that the concept of reasonable *confianza* directly corresponds to that of *confiance légitime*.⁷⁶⁴ There are powerful reasons to believe that *la doctrina* translate ‘reliance’ as *confianza*. For example, when explaining Jhering’s idea of the negative interest, which is also

⁷⁶¹ CS 29 December 2011 (n 673).

⁷⁶² Marcelo Barrientos, ‘Culpa *In Contrahendo* en Mutuo Hipotecario’ (2012) 39 *Revista Chilena de Derecho* 829, 839, 842 fn 32.

⁷⁶³ Chs II p 21 and III p 69-70.

⁷⁶⁴ de la Maza (n 673) 135 fn 11, citing Ghestin.

referred to by English speaking authors as the reliance interest,⁷⁶⁵ Chilean authors refer to the *interés negativo* or *interés de confianza*.⁷⁶⁶ Also, when explaining the reliance interest as understood in common law countries,⁷⁶⁷ the translation used is *interés de confianza*.⁷⁶⁸ And when discussing the extent of damages for precontractual liability, reliance losses⁷⁶⁹ are referred to as *gastos de confianza*⁷⁷⁰ or *daños de la confianza*.⁷⁷¹ But beyond the literal translation of the word ‘reliance’ into *confianza*, is the use of *confianza* in the same way as authors writing in English use ‘reliance’ when discussing precontractual liability for breaking off negotiations.

Chilean legal scholars use the language of *confianza* in a loose sense which can cover both the trust-dimension and the expectation-dimension of reliance. It is frequent for *confianza* to be used in the latter dimension; ie, as a reasonable or legitimate *confianza* that the contract would be concluded that was created in one party by the conduct of the other party.⁷⁷² A reply to the question ‘what is precontractual *confianza*?’ is that there is no legal definition of it and that it is an undetermined concept which allows different degrees of interpretation, but that ‘(...) a duty of *confianza in contrahendo* relates to the conviction that the conduct of one party reasonably generates in the other; that is to say, the certainty in the fulfilment of a determined legal act’.⁷⁷³

⁷⁶⁵ Text to (n 1128).

⁷⁶⁶ eg, Celedón and Silberman (n 673) 90; also Spanish authors Asúa and Hualde (n 77) 1429.

⁷⁶⁷ Text to (n 1122).

⁷⁶⁸ eg, Celedón and Silberman (n 673) 98 fn 162.

⁷⁶⁹ Text to (n 1125).

⁷⁷⁰ de la Maza (n 673) 146 fn 38.

⁷⁷¹ Barrientos, ‘Culpa’ (n 762) 842.

⁷⁷² eg, Barros Bourie (n 61) 1009; Barrientos, ‘Culpa’ (n 762) 839 commenting on CS 12 April 2012 (n 734); Barrientos, *Daños* (n 653) 51; de la Maza (n 673) 151; Celedón and Silberman (n 673) 148; Risueño (n 49) 60.

⁷⁷³ Barrientos, *Daños* (n 653) 55-56.

Some scholars believe that the *confianza* created or nourished by one party in the other relates to the fact that the contract will certainly or surely be entered into.⁷⁷⁴ This requirement would resemble that of German law.⁷⁷⁵ The better view is that this is not a requirement in Chilean law. It is sufficient that there is a high degree of *confianza* regarding the level of expectation that the negotiated contract will be entered into, but it is not necessary to reach the extreme of expecting that the contract will undoubtedly be entered into. A judgment of the Supreme Court would support this view because, while it cites Barros Bourie in several aspects, it does not expressly require that the *confianza* lie on the certain conclusion of the contract.⁷⁷⁶ In some cases the *confianza* might reach the point of having the conviction that the contract has been concluded.⁷⁷⁷

Sometimes *confianza* is used in its trust-dimension (even by the same legal scholars that refer to it in its expectation-dimension) as relying on the conduct of the other party or on a standard of conduct expected from the other party. This dimension relates to trusting that the other party will conduct itself according to the standard of good faith or in an honourable manner.⁷⁷⁸ One author refers to the iniquitous disappointment of the *confianza* in another person's honour, pointing out that negotiations consist of a process of laying the foundations of 'reciprocal conducts of *confianza*' between the negotiating parties.⁷⁷⁹ Another emphasises that collaboration between negotiating parties is only possible if they can trust that the other will not

⁷⁷⁴ eg, Barros Bourie (n 61) 1009; Celedón and Silberman (n 673) 140.

⁷⁷⁵ Text to (n 164).

⁷⁷⁶ 29 December 2011 (n 673) *considerando* 7.

⁷⁷⁷ Barros Bourie (n 61) 638. This often occurs in lack of formality cases (s IV 2).

⁷⁷⁸ Barros Bourie (n 61) 1007.

⁷⁷⁹ Barrientos, *Daños* (n 653) 55-56, 59, 64; Barrientos, 'Culpa' (n 762) 839.

engage in conduct which is not acceptable.⁷⁸⁰ The trust-dimension of *confianza* can also be applied to a very close and personal level of trust through the use of the notion of ‘interpersonal *confianza*’, which refers to the family or friendship ties between negotiating parties or parties who frequently contract with each other.⁷⁸¹

The Supreme Court has used the notion of *confianza* in a manner that encompasses both its dimensions. In the pivotal judgment of *Jiménez Mira*, the court referred to the creation in the other party of a *confianza* that the contract would be concluded and listed the creation of a reasonable *confianza* in the conclusion or perfection of the planned contract as the first element of precontractual liability.⁷⁸² This corresponds to the expectation-dimension of reliance. It also indicated that the damage is caused by the effects that follow from the *confianza* placed on the diligence and good faith of the other party.⁷⁸³ This corresponds to the trust-dimension of reliance.

In the landmark judgment of *Forestal Bío-Bío*⁷⁸⁴ both dimensions of reliance can be found in the way that the court reasoned on the basis of *confianza*. Citing foreign and Chilean legal scholars, it referred to the breach of duties of loyalty and *confianza* of which the other party was worthy and to a state of reciprocal *confianza* that must not be disappointed (which corresponds to the trust-dimension), and also referred to the legitimate expectations (*legítimas esperanzas*) that the contract would be concluded (which corresponds to the expectation-dimension).⁷⁸⁵ The expectation-dimension appears to be recognised in another judgment of the Court of Appeal of

⁷⁸⁰ de la Maza (n 673) 136, 147.

⁷⁸¹ *ibid* 137 fn 16.

⁷⁸² 29 December 2011 (n 673) *considerandos* 3, 7, 8, citing Barros Bourie and Barrientos.

⁷⁸³ *ibid considerando* 8, citing Barros Bourie.

⁷⁸⁴ CA Concepción 5 June 1996 (n 654).

⁷⁸⁵ *ibid considerandos* 1, 4, 5; text to (nn 754, 755) above.

Concepción which referred to the justified expectation (*fundada esperanza*) that the contract would be entered into⁷⁸⁶ and in an earlier judgment of the Court of Appeal of Santiago.⁷⁸⁷

(c) *Confianza and expectativa*

The notions of *confianza* and expectation (*expectativa*) are linked within the notion of precontractual fault⁷⁸⁸ and are also connected in the expectation-dimension of *confianza*.⁷⁸⁹

Some legal scholars, in order to explain the imposition of precontractual liability for breaking off negotiations, refer to the idea of acting in a manner which is inconsistent with the expectations generated in the other party in relation to the so-called ‘doctrine of one’s own act’ (*doctrina de los actos propios, venire contra factum proprium*). The objection to the conduct of the person that breaks off is based on the fact that it is contrary to good faith to act in a manner which is inconsistent with the *confianza* generated in another by one’s previous conduct. Therefore, by imposing liability on the party that has conducted himself in a way which is inconsistent with the sure expectations to which his own conduct had given rise to, the disappointment of the *confianza* that he had created in the other party is protected.⁷⁹⁰

Other scholars connect the doctrine of one’s own act with the doctrine of appearance regarding liability for breaking off negotiations. Thus, it is argued that the general rule is that each party must assume the risk that the other might break off, unless the party breaking off had created a different appearance in terms that the other

⁷⁸⁶ 30 June 1999 (n 673).

⁷⁸⁷ 25 August 1948 (n 50); p 14-15 above.

⁷⁸⁸ p 140 above.

⁷⁸⁹ p 150 above.

⁷⁹⁰ Celedón and Silberman (n 673) 122, explaining ideas by Barros Bourie (n 61).

party could reasonably rely on his intention to enter into the contract. What characterises the conduct of the withdrawing party is that it contradicts his previous acts, disappointing the reasonable expectations that he himself had created.⁷⁹¹

It is suggested that the doctrine of appearance is not an appropriate basis to explain liability for breaking off negotiations because the proper effect of this doctrine is to subject the party who created the appearance to it, allowing the other party to rely on such an appearance even if it does not correspond to reality.⁷⁹² If applied to a case of broken negotiations, the effect of this doctrine would at least give rise to expectation damages, whereas the proper remedy for precontractual liability is reliance damages.⁷⁹³ It also seems that the doctrine of one's own act is not the true basis of this liability because, according to this doctrine, the previous conduct of the party who then incurs in a contradictory conduct must reveal a determined legal position,⁷⁹⁴ and this is not the case in many situations of liability for breaking off negotiations because the legal position of the party breaking off (as to its intention to enter into a contract) is still undetermined.

(d) Creation of *confianza* and legitimacy of the *confianza*

One side of reliance is that the *confianza* in the future conclusion of the negotiated contract must have been created or at least nourished by the conduct of the party breaking off. The other side is that this *confianza* which is held by the other party must be legitimate or reasonable.

⁷⁹¹ de la Maza (n 673) 147, 151-152.

⁷⁹² Jorge López Santa María, *Los Contratos: Parte General* (5th edn, Abeledo Perrot 2010) 355 fn 671.

⁷⁹³ Ch V s IV 1 (a).

⁷⁹⁴ López Santa María (n 792) 354 fn 668.

Within the conduct of the party breaking off that creates or nourishes *confianza* in the other party, different and unlimited variables are possible. It is impossible to list all the forms of conduct that may create this *confianza* as it is a question that inevitably depends on the case.⁷⁹⁵ For example, the following have been mentioned: an express statement that the contract will be concluded or that the negotiations will be successful, a proposal to carry out certain acts that suppose that the contract will be concluded, a request to put an end to a current activity in view of the conclusion of the negotiated contract, a request or an authorisation to carry out repairs, construction, or generally to incur expenses.⁷⁹⁶ In *Forestal Bío-Bío* it was established as a fact of the case that the defendants had communicated to the claimants that since the beginning of the negotiations they had been driven by a spirit of *confianza* and seriousness and that they felt morally committed to them.⁷⁹⁷ In *Urrea* the bank had sent an email to the claimant stating that the mortgage loan had been approved.⁷⁹⁸

The sole creation or nourishment of reliance is not sufficient because this *confianza* must be legitimate, reasonable, well founded or justified (these words are used interchangeably).⁷⁹⁹ The legitimacy of *confianza* must be found through objective elements present in the circumstances of the case; that is, the assessment of its legitimacy is objective.⁸⁰⁰ The standard is whether an average person placed in similar circumstances would be led to expect the conclusion of the contract due to the

⁷⁹⁵ Similarly, de la Maza (n 673) 151.

⁷⁹⁶ Barros Bourie (n 61) 1011.

⁷⁹⁷ CA Concepción 5 June 1996 (n 654) *considerando* 9.

⁷⁹⁸ CS 12 April 2012 (n 734); p 147.

⁷⁹⁹ eg, de la Maza (n 673) 151; Barrientos, *Daños* (n 653) 51, 62-63, 116; Barrientos, 'Culpa' (n 762) 839.

⁸⁰⁰ Barrientos, *Daños* (n 653) 55.

other party's conduct.⁸⁰¹ The length, seriousness and advancement of the negotiations are often referred to.⁸⁰² It has been indicated that a 'state of *confianza* worthy of legal protection' is created only when the negotiations have reached a significant state of advancement and development which would have foreseeably allowed any of the negotiating parties to suppose that not only was there a relationship of *confianza* between them but also that this relationship led to rationally estimate as possible the conclusion of the future contract.⁸⁰³ In *Jiménez Mira* it was held that because the negotiations were quite advanced, the claimant could trust that the promise of sale contract would be concluded, proof of which was the fact that the parties had made an inventory of the merchandise, the claimant had requested an audit as to the profit projection and, especially, that they had agreed to sign the contract in a notary's office but the defendant did not attend.⁸⁰⁴ In *Forestal Bío-Bío* the court stated that when negotiations advance more than usual, they give rise to legitimate expectations in one party that the contract will take place (the parties had also agreed to sign the promise of sale contract at a notary's office with the claimants attending but not the defendants).⁸⁰⁵

Some authors⁸⁰⁶ indicate that agreement on all essential aspects of the negotiated contract is necessary for liability for breaking off negotiations to arise. This view should be rejected. Some level of agreement is necessary to show that the negotiations were reasonably advanced⁸⁰⁷ but it is not required that all the essential

⁸⁰¹ Barrientos, 'Tratos Preliminares' (n 700) 31-32.

⁸⁰² Barros Bourie (n 61) 1012.

⁸⁰³ Barrientos, *Daños* (n 653) 56.

⁸⁰⁴ CS 29 December 2011 (n 673) *considerando* 9; text to (n 758).

⁸⁰⁵ CA Concepción 5 June 1996 (n 654) *considerandos* 5, 9.

⁸⁰⁶ eg, Barros Bourie (n 61) 1010.

⁸⁰⁷ eg, Barrientos, *Daños* (n 653) 61.

elements have been agreed because if this was the case, and the negotiated contract is a consensual one,⁸⁰⁸ the contract would be concluded and any refusal to continue with its performance would constitute contractual liability.

The conduct of both negotiating parties during the negotiations is relevant to determine the legitimacy of *confianza*.⁸⁰⁹ One author, going further, has argued that regarding the conduct of the party who remains, as opposed to the party who withdraws, the judge must consider whether the appearance created by the latter was sufficiently intense to justify the former's *confianza*, and that it will be when it has an unequivocal character; ie, when it reveals beyond reasonable doubt an intention to conclude the contract.⁸¹⁰ It seems that the better view is that, while in some cases an appearance of an undoubted intention to contract may be present,⁸¹¹ the requirement for the legitimacy of *confianza* is less extreme and can be formulated in terms of what can reasonably be expected.⁸¹²

Finally, the level of experience or professional status of the negotiating parties is also sometimes mentioned⁸¹³ in that when one party is acting as an expert, professional or specialist, the *confianza* of the other party on its conduct is correspondingly higher.⁸¹⁴

⁸⁰⁸ (n 658) above.

⁸⁰⁹ René Abeliuk Manasevich, *Las Obligaciones* vol II (6th edn, LegalPublishing 2014) 1073 fn 1199.

⁸¹⁰ de la Maza (n 673) 147, 151-152.

⁸¹¹ eg, in lack of formality cases (s IV 2 below).

⁸¹² Similarly, Barrientos, *Daños* (n 653) 62, 117.

⁸¹³ eg, *Urrea* (n 734) cassation judgment *considerando* 7.

⁸¹⁴ Barros Bourie (n 61) 89.

(e) Conclusions

Although the notion of *confianza* appears entangled with other legal and theoretical bases of precontractual liability for breaking off negotiations, it is the true basis of this liability; it corresponds with the notion of reliance, and is used in much the same way as the notions of *Vertrauen* and *croyance/confiance légitime* are used in German and French law. *Confianza* reflects both dimensions of reliance: it is used to refer to a belief or expectation that a contract will be concluded, or that negotiations will be successful, or at least that negotiations will be carried out; and it is used in the sense of relying on the conduct of the other party, or on a standard of conduct expected from the other party, or trusting the other party's behaviour or morality. Sometimes application of both dimensions is made in a legal writing or judgment and sometimes application of only one dimension is made (typically the expectation-dimension). Consequently, *confianza* is inextricably linked to the notion of expectation.

2 Good faith

Good faith or the breach of good faith duties, in combination with other arguments, is frequently advocated by Chilean legal scholars and judgments to explain the imposition of liability for breaking off negotiations. This doctrinal basis does not exclude other legal or doctrinal bases and, in practice, it is always found combined with other foundations, particularly with delictual fault and *confianza*. It will be argued that although good faith can be a useful tool to determine the objectionable conduct, in practice it often gets confused with delictual fault and loses its autonomy.

The CCivCh only recognises that contracts must be performed in good faith, omitting any reference to their being negotiated or even concluded in good faith. Article 1546, located in Title XII 'Of the Effects of Obligations' of Book IV states

that ‘Contracts must be performed in good faith and, consequently, bind not only to what is expressed in them, but to all things that precisely emanate from the nature of the obligation, or that by law or custom belong to it.’ The first line of article 1546 states the same as the third paragraph of article 1134 of the *Code civil* (before the 2016 reform)⁸¹⁵ because, historically, the drafting of the former was taken from the latter.⁸¹⁶ Andrés Bello divided in two the content of article 1134 Cciv, leaving in article 1545 of the CCivCh the principle of the binding force of contracts and in article 1546 of the CCivCh the principle of good faith.⁸¹⁷

Despite the fact that article 1546 CCivCh does not expressly refer to the precontractual period, Chilean legal scholars, following the historical arguments given by French legal scholars as to the reason for the final drafting of article 1134(3) Cciv,⁸¹⁸ agree that article 1546 CCivCh contains the general principle of good faith which extends to all the phases in the life of a contract, including the precontractual period.⁸¹⁹ Barros Bourie argues that article 1546 CCivCh is analogous to §242 BGB,⁸²⁰ which is also interpreted to contain the general principle of good faith in German law.⁸²¹ *La jurisprudencia* has recognised that the principle of good faith (contained in article 1546) applies during the negotiations for a contract.⁸²²

⁸¹⁵ p 100 above.

⁸¹⁶ Ramón Domínguez Águila, ‘Comentarios de Jurisprudencia 1’ (2005) 217-218 *Revista de Derecho* Universidad de Concepción 305, 309; Fernando Fueyo Laneri, *Instituciones de Derecho Civil Moderno* (Editorial Jurídica de Chile 1990) 152.

⁸¹⁷ Domínguez Águila, ‘Comentarios de Jurisprudencia 1’ (n 816) 309.

⁸¹⁸ Text to (n 502).

⁸¹⁹ eg, Domínguez Águila, ‘Comentarios de Jurisprudencia 1’ (n 816) 309; López Santa María (n 792) 347 fn 651; René Ramos, *De la Responsabilidad Extracontractual* (4th edn, LegalPublishing 2008) 11; Boetsch (n 698) 137.

⁸²⁰ (n 61) 630 fn 50.

⁸²¹ Text to (n 210).

⁸²² eg, CS, 24 March 2016, *Pinochet con Luz Agro SA*, rol 2786-2015, Westlaw Online CL/JUR/1963/2016; CS, 26 August 2015, *Wilibaldo Moreno Loyola con Banco Santander Chile SA*, rol 26847-2014, Westlaw Online CL/JUR/4847/2015; CS 12 April 2012 (n 734)

However, the fact that article 1546 CCivCh does not expressly refer to the precontractual period poses a problem for providing a legal basis for the imposition of precontractual liability.⁸²³ The problem lies in the possibility to file a *recurso de casación en el fondo*⁸²⁴ because the Supreme Court, in a 2004 judgment, took the position that this motion can only be granted where there is an infraction of a ‘law’ in the technical sense of article 1 CCivCh and the breach of a general principle of law, like good faith, cannot be assimilated to the infraction of a legal precept.⁸²⁵ The court, rejecting such a motion, took a literal interpretation of article 1546 considering that its sphere of application is restricted to the performance of contracts and, consequently, only deals with matters of contractual liability.⁸²⁶ Legal scholars have strongly opposed the position taken by the Supreme Court in this judgment⁸²⁷ and, taking it into account, some have argued that precontractual liability (for breach of precontractual duties) is legally based on the articles on delictual liability (2314ff CCivCh).⁸²⁸ Others have argued for the need to reform article 1546.⁸²⁹ It appears that the position taken by the Supreme Court in this judgment, restricting the sphere of application of article 1546 to the performance of contracts, is an isolated one,

cassation judgment *considerando* 11; CS 29 December 2011 (n 673) *considerando* 4; CA Santiago, 29 November 2007, *Glide Diversiones Limitada con Compañía de Inversiones y Desarrollo Sur SA*, reaffirmed by CS 19 May 2008, Legal Publishing no 39372; CS, 11 June 2007, *Video Show System SA con Metrópolis Intercom SA*, rol 2049-2005 (in the minority vote); CS, 31 October 2006, *Banco Español de Crédito SA con Auca Forestal SA*, rol 3507-2003; CS, 31 May 2006, *Irribarra Varela con Inacap*, rol 1778-2006; CA Concepción 5 June 1996 (n 654) *considerando* 4.

⁸²³ Patricio-Ignacio Carvajal, ‘Prólogo’ in Barrientos, *Daños* (n 653) xi.

⁸²⁴ Motion that allows a case to go up to the Supreme Court based on the infraction of a law (art 767 Civil Procedure Code).

⁸²⁵ CS, 12 July 2004, *Empresa de Telecomunicaciones Asintec SA con Club Hípico de Concepción SA*, rol 2622-2000, RDyJ, 2004, Second Part, First Section, p 175-178.

⁸²⁶ *ibid* *considerando* 9.

⁸²⁷ eg, Domínguez Águila, ‘Comentarios de Jurisprudencia 1’ (n 816) 308.

⁸²⁸ eg, Barrientos, *Daños* (n 653) 58.

⁸²⁹ See p 127 above.

considering that more recent judgments recognise that article 1546 also applies to the precontractual period.⁸³⁰ But the difficulty of reaching the Supreme Court via a *recurso de casación en el fondo* based solely on the infraction of article 1546 applied to the precontractual period, remains. It is, therefore, advisable, in a case of liability for broken negotiations, to base this motion on the articles of the CCivCh on delictual liability.

La doctrina and *la jurisprudencia* usually distinguish between two notions of good faith: subjective and objective.⁸³¹ The objective notion of good faith, contained in article 1546 CCivCh, is a possible doctrinal basis of liability for breaking off negotiations. The standard of good faith in the negotiation period requires that negotiating parties conduct negotiations in a loyal and honest manner, notwithstanding the freedom they have to try to obtain advantages.⁸³² In *Forestal Bío-Bío* it was stated that, for the development of healthy negotiations, a just balance must be sought between two basic principles: freedom of withdrawal and the protection of the negotiating parties' assets. The solution must conform to equity which points to the existence of a liability that has good faith as its basis, which translates into an honest, loyal and true conduct, in accordance with the required collaboration.⁸³³

It must be recalled that some authors and judgments consider that consent to negotiate gives rise to the duty to negotiate in good faith.⁸³⁴ It seems an unnecessary complication to subject the birth of good faith in the negotiation period to the consent

⁸³⁰ (n 822) above.

⁸³¹ eg, López Santa María (n 792) 340ff; Alessandri, Somarriva and Vodanovic, *Derecho Civil* (n 723) 242; CS 11 June 2007 (n 822).

⁸³² Rosende (n 55) 74.

⁸³³ CA Concepción 5 June 1996 (n 654) *considerando* 5. Similarly, CA Concepción 30 June 1999 (n 673).

⁸³⁴ Text to (n 716).

of the parties when considering that the sole fact that they begin to negotiate subjects them to the general principle of good faith contained in article 1546 CCivCh.

The good faith standard of conduct imposes a series of precontractual duties on negotiating parties, such as duties of loyalty, information, diligence, honesty, collaboration, discretion and confidentiality.⁸³⁵ The duty of loyalty is particularly relevant⁸³⁶ as it requires that negotiations be carried out in good faith, ie, with the effective purpose to enter into a contract, and it also involves duties of care in putting an end to negotiations when reliance has been created in the other party that the contract will be concluded. The duty to negotiate in good faith requires that a purely strategic game, where each party seeks its own interest, is subjected to the limits imposed by minimum duties of loyalty that can be expected from an honest party. These duties cannot be precisely defined in advance because good faith is an open standard that can only be applied taking into account the circumstances of the case, particularly the relationship between the negotiating parties that arises with the negotiations. Good faith duties are more intense when negotiating parties have fewer real possibilities of protecting their own interests during the negotiations, so that they have to place a greater amount of *confianza* in the other party.⁸³⁷

In Chilean law, good faith on its own is not a sufficient legal basis of liability for breaking off negotiations.⁸³⁸ Therefore, it is usually accompanied by the notion of

⁸³⁵ eg, Barrientos, *Daños* (n 653) 52, 54; Barros Bourie (n 61) 1005; Boetsch (n 698) 139-142; Ramón Domínguez Águila, *Teoría General del Negocio Jurídico* (2nd edn, Editorial Jurídica de Chile 2013) 56ff.

⁸³⁶ The following corresponds to Barros Bourie (n 61) 1001, cited in *Jiménez Mira* (n 673) *considerando* 3.

⁸³⁷ Barros Bourie (n 61) 1026.

⁸³⁸ Text to (n 823).

delictual fault.⁸³⁹ In *Forestal Bío-Bío* it was stated that the violation of good faith conduct amounts to committing a wrongful act which causes harm under articles 2284 and 2314 CCivCh.⁸⁴⁰ In *Jiménez Mira* it was concluded that the defendant had acted in bad faith because his refusal to enter into the promise contract was untimely and without a legitimate justification (which amounted to negligent conduct), and articles 1546 and 2314ff CCivCh were cited as the legal basis for the imposition of liability.⁸⁴¹ Consequently, it is said that good faith and the principle of fault are the basis of this liability.⁸⁴² The problem is that it is not always clear where the fault lies: whether in the breach of the duty to negotiate in good faith⁸⁴³ or in the breaking-off itself.⁸⁴⁴

Good faith presents a ‘strong analogy’ with fault in that it is an open standard that needs to be concretised.⁸⁴⁵ Regarding fault, the concrete duty of care that emanates from the abstract standard of care can only be determined in relation to the circumstances of the case,⁸⁴⁶ and the same can be said about precontractual duties of good faith.⁸⁴⁷ Ultimately, delictual duties of care and precontractual duties of good faith emanate from the law⁸⁴⁸ and the specific legal norms seem to be articles 2314

⁸³⁹ An exception is CS 12 April 2012 (n 734) cassation judgment *considerandos* 13-14, where the court stated that good faith was the basis of precontractual liability and then ruled that the arts of the CComCh on revocation of an offer had been breached, without mentioning art 1546 (on good faith) or arts 2314ff (on delictual liability) CCivCh; (n 760) above. Also CA Talca 8 November 1999, quashed (for other reasons) by CS 22 November 2001 (n 742), which stated that good faith was the basis of precontractual liability and then ruled on the legal basis of arts 97 and 100 CComCh.

⁸⁴⁰ CA Concepción 5 June 1996 (n 654) *considerandos* 4-5.

⁸⁴¹ CS 29 December 2011 (n 673) *considerando* 9 and ruling.

⁸⁴² Domínguez Benavente, Domínguez Águila and Domínguez Hidalgo, ‘Comentarios de Jurisprudencia 1’ (n 654) 182-183.

⁸⁴³ eg, Rosende (n 55) 74.

⁸⁴⁴ Text to (n 734).

⁸⁴⁵ Barros Bourie (n 61) 1001.

⁸⁴⁶ *ibid* 86.

⁸⁴⁷ p 161 above.

⁸⁴⁸ Barros Bourie (n 61) 95; Barrientos, *Daños* (n 653) 118.

and 2329 CCivCh, considering that it is debatable whether article 1546 CCivCh can provide a solid legal basis for precontractual good faith.⁸⁴⁹ In practice, the notions of fault and good faith (or breach of it) can become confused.⁸⁵⁰ Thus, it is said that precontractual liability finds its basis in the breach of a general duty of conduct because the breach of precontractual good faith constitutes a breach of the general principle not to harm others.⁸⁵¹

Therefore, it is pertinent to ask whether a reference to good faith or breach of good faith adds anything. It seems that it does not add much. It allows the reasoning of the judgments to be framed on more specific duties (such as loyalty, honesty and information) than the general duty of care, but because they are all ultimately legally based on the articles on delictual liability, it appears that precontractual duties of good faith are more detailed duties of care. It has been argued that the debate about the need to impose positive duties of conduct based on good faith on negotiating parties who are not yet contractually bound is unnecessary because fault is enough to protect their interests.⁸⁵² However, this argument must be tempered in that it is still possible for good faith to play a role in identifying typical conduct during the negotiations and their termination that can constitute fault, depending on the circumstances of the case.

Good faith on its own is usually considered not to be a sufficient doctrinal basis of liability for breaking off negotiations. It often appears accompanied by the notion of *confianza*. It is said that precontractual good faith justifies *confianza*

⁸⁴⁹ Text to (n 838).

⁸⁵⁰ Boetsch (n 698) 168-169 highlights the differences between fault and bad faith.

⁸⁵¹ Barrientos, *Daños* (n 653) 118.

⁸⁵² Celedón and Silberman (n 673) 148. Barrientos, 'Tratos Preliminares' (n 700) 36 and Boetsch (n 698) 143 are of the contrary opinion.

because it is an essential requirement for the conduct of negotiations.⁸⁵³ Consequently, in order to violate the duty to negotiate in good faith, the reasonable expectations or the protection-worthy *confianza* of the other party must have been disappointed.⁸⁵⁴ It is argued that in the conflict between freedom and *confianza*, good faith requires the most basic respect from the other party and that even in legal systems which explicitly recognise precontractual duties which protect the *confianza* created in the other negotiating party, it is assumed that this cannot be a road for the birth of obligations without consent nor for the introduction of unforeseeable risks by the fact of initiating negotiations.⁸⁵⁵ In the conflict between the principle that without will there is no obligation and the principle of *confianza*, duties of collaboration based on good faith during negotiations (particularly duties of loyalty and discretion) have been recognised in order to mitigate the principle of *caveat emptor*, duties which allow for the protection of the *confianza* that one party has a right to place on the other, without imposing a duty to contract.⁸⁵⁶ The *confianza* which must be protected, beyond which is the ‘reign of *caveat emptor*’, is that negotiating parties can assume that certain forms of conduct are not acceptable and can trust that the other party will not engage in them, despite the fact that negotiations have an adversarial nature and persons who enter into them must do so knowing that the other party is there to obtain as great an advantage as possible.⁸⁵⁷

Barros Bourie, who holds a restrictive view of liability for breaking off negotiations, states that in the precontractual sphere the duty of care is most clearly

⁸⁵³ Barrientos, ‘Tratos Preliminares’ (n 700) 32.

⁸⁵⁴ de la Maza (n 673) 147.

⁸⁵⁵ Barros Bourie (n 61) 1002, cited in *Jiménez Mira* (n 673) *considerando* 5.

⁸⁵⁶ Barros Bourie (n 61) 1005.

⁸⁵⁷ de la Maza (n 673) 147.

expressed in the negative form of bad faith, which includes both deceit and the complete disregard of the *confianza* that has been created.⁸⁵⁸ Barrientos, who holds a broader view of this liability, considers that bad faith consists of initiating negotiations without a serious intention to contract, prolonging them without intending to contract, or unilaterally breaking them off without a justified reason,⁸⁵⁹ and that the intentional infringement of the *confianza* that has been created and which causes economic loss, also supposes disregard of good faith.⁸⁶⁰

In conclusion, good faith, on its own, does not constitute a sufficient legal or doctrinal basis to explain liability for breaking off negotiations in Chilean law and has been frequently linked to the concept of *confianza* in order to shape the wrongful act which will give rise to delictual liability.

3 Abuse of rights

This doctrine has also been received by *la doctrina* and *la jurisprudencia* despite it not being expressly regulated in Chilean law.⁸⁶¹ Some legal scholars⁸⁶² and judgments⁸⁶³ have used this doctrine, which has found a legal basis in the articles on delictual liability (2314ff CCivCh), to explain precontractual liability for breaking off negotiations. It will be argued that the doctrine of abuse of rights does not adequately explain the essence of this liability, at the core of which is not the abuse of a right.

⁸⁵⁸ Barros Bourie (n 61) 1002, cited in *Jiménez Mira* (n 673) *considerando* 5.

⁸⁵⁹ Barrientos, *Daños* (n 653) 51, cited in *Jiménez Mira* (n 673) *considerando* 5.

⁸⁶⁰ Barrientos, *Daños* (n 653) 55.

⁸⁶¹ Enrique Barros Bourie, 'Límites de los Derechos Subjetivos Privados. Introducción a la Doctrina del Abuso de Derecho' (1999) 7 *Revista Derecho y Humanidades* 11.

⁸⁶² eg, Barros Bourie, *Responsabilidad Extracontractual* (n 61) 632, 1008ff; Domínguez Benavente, Domínguez Águila and Domínguez Hidalgo, 'Comentarios de Jurisprudencia 1' (n 654) 181; Domínguez Benavente, Domínguez Águila and Domínguez Hidalgo, 'Comentarios de Jurisprudencia 3' (n 673) 187.

⁸⁶³ eg, CA Concepción 30 June 1999 (n 673); CA Talca 8 November 1999, quashed by CS 22 November 2001 (n 742).

The doctrine of abuse of rights⁸⁶⁴ has been understood as a corrective to the excessive or abnormal exercise of a right, in both a subjective (unequivocal intention to harm) and objective (assessment of the circumstances surrounding the exercise of a right according to minimum standards of sociability and loyalty) sense. The doctrine is exceptional in that it only applies in cases where the conduct of the holder of a right defies minimum standards of conduct, which are expressed in the general clauses of good customs (*buenas costumbres*, articles 1461 and 1467 CCivCh) and good faith (*buena fe*, article 1546 CCivCh).

The objective standard of good faith, in particular, limits the exercise of a right. Thus, the abuse of a right is associated to acting in a manner contrary to good faith. However, due to the indetermination of the general clauses on which it is based, the doctrine of abuse of rights is concretised in some typical groups of cases and one group is formed by cases of conduct contrary to one's own act (*vcfp*).⁸⁶⁵ The doctrine of one's own act is a typical application of the principle of good faith as a limit to the exercise of rights, protecting the notion of a justified *confianza*. In this way, the exercise of a right is contrary to good faith and, hence, abusive, when it does not correspond to the certain expectations that the holder of a right had generated in another person with its own conduct. Some cases of precontractual liability for breaking off negotiations can be understood as applications of the doctrine of abuse of rights for acting in a manner contrary to one's own acts. Such is the case when during the negotiations one party has created in the other the conviction that the contract will surely be entered into and the latter has acted accordingly to this expectation.

⁸⁶⁴ This para and the next two paras follow Barros Bourie, *Responsabilidad Extracontractual* (n 61) 626-629, 637-638, 1008-1012.

⁸⁶⁵ Text to (n 790) above.

Negotiations embody a special type of relationship where good faith gives rise to duties between negotiating parties that limit the right to put an end to these negotiations. The abuse of this right is manifested in abusive conduct that shows a serious disregard of the reliance (*confianza*) that has been created by one negotiating party in the other as to the future conclusion of the negotiated contract. For liability to arise, it is necessary that the disloyal conduct of the right holder is *culpable* (intentional or negligent) and this will be the case where it has seriously breached the reciprocal duties of respect owed between negotiating parties, abusing the *confianza* that it has created or encouraged in the other party.

The theory of abuse of rights is not helpful in explaining the rationale of liability for breaking off negotiations in Chilean law. The arguments for rejecting this theoretical basis are very much the same as those mentioned in French law.⁸⁶⁶ Particularly, the terminology of abuse of rights is not appropriate here as there is no legal ‘right’ to put an end to negotiations but rather a freedom (that flows from the general principle of freedom of contract) to not enter into a contract and, consequently, to put an end to negotiations.⁸⁶⁷ But, more importantly, the doctrine of abuse of rights, as it currently stands (unrecognised by Chilean legislation and underdeveloped by Chilean legal scholars and judgments), lacks the independence and precise contours that it would require to constitute a useful theoretical basis of precontractual liability, appearing subsumed within delictual liability and entangled with notions of good faith and *confianza*.

⁸⁶⁶ Ch III p 98-99.

⁸⁶⁷ Similarly, Barrientos, *Daños* (n 653) 55 fn 105; Celedón and Silberman (n 673) 121.

III The requirements of precontractual liability for breaking off negotiations

1 Different requirements

Legal scholars and judgments have listed different requirements for this liability to arise. Some of these requirements have already been rejected or questioned, particularly: consent to negotiate,⁸⁶⁸ that all essential elements of the contract have been agreed,⁸⁶⁹ and breach of a precontractual duty of good faith.⁸⁷⁰ Therefore, this section will focus on the requirements that undoubtedly must be met.

In *Jiménez Mira* the Supreme Court listed the following requirements: (i) the creation of a reasonable *confianza* in the conclusion or perfection of the contract under negotiation, (ii) the unjustified and untimely character of the break-off of the negotiations, (iii) harm caused to the assets of one of the parties, and (iv) a causal relationship between the harm suffered by one party and the *confianza* that was encouraged and then disappointed by the other party.⁸⁷¹ The first requirement has already been analysed above⁸⁷² and the third and fourth requirements are referred to in Chapter V.⁸⁷³ Therefore, the following subsections will focus on the second requirement, dividing it into two correlated components.

⁸⁶⁸ Text to (n 718).

⁸⁶⁹ p 155-156 above.

⁸⁷⁰ p 163 above.

⁸⁷¹ 29 December 2011 (n 673) *considerando* 7, citing Barrientos, *Daños* (n 653) 51.

⁸⁷² This ch s II 1.

⁸⁷³ s IV 1 (a).

2 The reason for breaking off

The party who breaks off the negotiations must justify his actions, providing a reason for doing so. If the reason for breaking off is a 'good' reason, his withdrawal is justified, this requirement for liability to arise will fail and, consequently, he will not be liable.

A good reason can be described as legitimate, reasonable or plausible and the following have been given as examples: a better offer from a third party,⁸⁷⁴ a more detailed study of the business that leads to the conclusion that the contract is not convenient, an illness that affects the benefit of entering into the contract, changes in market conditions,⁸⁷⁵ the impossibility to reach agreement on some aspect of the contract, the blameless loss of a right which is necessary to conclude the contract,⁸⁷⁶ and reaching the conviction that it will not be possible to provide the service that had been offered.⁸⁷⁷

The reason for breaking off is connected with the notions of good faith and *confianza*. If the party breaking off had a good reason to do so then he acted according to good faith and cannot be liable,⁸⁷⁸ and, on the contrary, the lack of a reason or a reason without merit implies the lack of good faith.⁸⁷⁹ In order to assess whether the reason to break off is justified, the degree of reasonable *confianza* that has been created in the victim of the break-off must be taken into consideration,

⁸⁷⁴ Domínguez Águila, *Negocio Jurídico* (n 835) 59-60.

⁸⁷⁵ Barros Bourie, *Responsabilidad Extracontractual* (n 61) 1011.

⁸⁷⁶ de la Maza (n 673) 150.

⁸⁷⁷ CA Concepción, 29 June 2000, *rol* 781-1999, *considerando* 21, reaffirmed by CS 12 July 2004 (n 825).

⁸⁷⁸ *ibid.*

⁸⁷⁹ *Urrea* (n 734) cassation judgment *considerando* 11; *Jiménez Mira* (n 673) *considerando* 9; text to (n 841).

because if no *confianza* has yet arisen, then the reason for breaking off cannot be unjust and no liability can ensue.⁸⁸⁰

3 The arbitrariness of the breaking-off

The reason for breaking off is intimately related with the characterisation of the breaking-off. Therefore, when the reason for breaking off is ‘bad’, ie, when it lacks any plausible basis or is unreasonable or illegitimate, then the break-off itself is considered unjust, arbitrary or abusive.⁸⁸¹ However, not only the reason for breaking off is relevant for characterising the breaking-off as arbitrary, because certain objective circumstances present in the case must also be taken into account.⁸⁸²

Typical circumstances are the length and degree of advancement of the negotiations, the conduct of the parties and the statements made by them.⁸⁸³ The fact that the break-off was untimely, unexpected, sudden or without notice is often mentioned.⁸⁸⁴ In *Forestal Bío-Bío* it was emphasised that the defendants had not given the claimants any notice of their intention to withdraw.⁸⁸⁵ In *Urrea* the Supreme Court focused on the conduct of the bank, particularly on the fact that it allowed a considerable amount of time to go by between informing its client that the mortgage loan had been approved and then informing him that the loan had finally not been approved.⁸⁸⁶ In a recent case, it was held that the withdrawal was justified and timely

⁸⁸⁰ Barrientos, *Daños* (n 653) 116; Celedón and Silberman (n 673) 50 fn 69.

⁸⁸¹ Barros Bourie, *Responsabilidad Extracontractual* (n 61) 1011 fn 81-82, citing German and French case law; Barrientos, *Daños* (n 653) 61-62; Domínguez Águila, *Negocio Jurídico* (n 835) 59.

⁸⁸² Segura (n 750) 107; Domínguez Águila, *Negocio Jurídico* (n 835) 60.

⁸⁸³ This ch s II 1 (d) above.

⁸⁸⁴ Segura (n 750) 106.

⁸⁸⁵ CA Concepción 5 June 1996 (n 654) *considerando* 14.

⁸⁸⁶ 12 April 2012 (n 734) replacement judgment *considerando* 3.

because after several years of negotiations the parties had been unable to agree on essentials elements of the contract under negotiation.⁸⁸⁷

In order to assess whether the reason for breaking off was justified or not, objective criteria that may be applied in similar cases must be used.⁸⁸⁸ Therefore, the view expressed in some judgments of the higher courts that determining whether the breaking-off was unjust or unjustified is subjective,⁸⁸⁹ should not be followed.

IV Breaking off negotiations for the conclusion of a formal contract and lack of formality cases

The same distinction that has been made in the German law and in the French law chapters⁸⁹⁰ must be made in Chilean law in order to explore whether these case scenarios present any particularities and whether the notion of *confianza* is present.

1 Breaking off negotiations for the conclusion of a formal contract

The principle of consensualism is one of the pillars of the Chilean law of contract.⁸⁹¹ However, different types of formalities are recognised by the law and among them are ‘solemnities’.⁸⁹² These are formalities without which a legal act cannot exist.⁸⁹³ The CCivCh defines solemn contracts in article 1443.⁸⁹⁴ A typical example of a solemn

⁸⁸⁷ CA Santiago, 10 October 2014, *Frutícola El Aromo SA con Camposano Ibarra*, rol 579-2014, *considerando* 6, ratified by CS, 5 March 2015, rol 30469-2014.

⁸⁸⁸ Barrientos, *Daños* (n 653) 116.

⁸⁸⁹ eg, *Urrea* (n 734) replacement judgment *considerando* 3; *Frutícola El Aromo* (n 887).

⁸⁹⁰ Ch II s IV, Ch III s IV.

⁸⁹¹ CS 12 April 2012 (n 734) cassation judgment *considerando* 5; Alessandri Rodríguez, *De los Contratos* (n 40) 32.

⁸⁹² López Santa María (n 792) 202ff.

⁸⁹³ Alessandri Rodríguez, *De los Contratos* (n 40) 32.

⁸⁹⁴ (n 658) above.

contract is the sale of real estate. The solemnity that must be fulfilled for this contract to exist is that it is issued by public deed before a public notary.⁸⁹⁵

The traditional view in *la doctrina*⁸⁹⁶ was that in solemn contracts (and in real contracts)⁸⁹⁷ consent was only formed with the fulfilment of the solemnity (or with the delivery of the thing) and that the only liability that could arise in the stage of formation of consent of these contracts was contractual liability for breach of a promise contract (which in itself is a solemn contract).⁸⁹⁸ Therefore, this view rejected the possibility of precontractual liability for breaking off negotiations for the conclusion of these types of contracts. This view also rejected the possibility that the liability for revocation of an offer established in the CComCh,⁸⁹⁹ could apply to these contracts because it considered that the rules on formation of consent established in the CComCh applied only to consensual contracts. In a 1948 judgment the Court of Appeal of Santiago embraced this traditional view.⁹⁰⁰

However, the modern view in *la doctrina* is that in solemn contracts (as well as in real contracts), consent is necessary but it is not sufficient for the contract to exist; ie, consent may be formed (agreement may be reached), but the contract will only exist when the solemnity is fulfilled (or the thing is delivered).⁹⁰¹ Therefore, it is perfectly possible that precontractual liability for breaking off negotiations for the

⁸⁹⁵ art 1801(1)(2) CCivCh.

⁸⁹⁶ Explained by Rosende (n 55) 102; Hugo Rosende, 'La Responsabilidad Precontractual en la Formación del Consentimiento en los Contratos Reales y Solemnes' in Fundación Fueyo (ed), *Instituciones Modernas de Derecho Civil: Homenaje al Profesor Fernando Fueyo Laneri* (Editorial Jurídica ConoSur 1996) 341-342.

⁸⁹⁷ (n 658) above.

⁸⁹⁸ (n 752) above.

⁸⁹⁹ (n 44) above.

⁹⁰⁰ *Caja de Crédito Popular* (n 50).

⁹⁰¹ eg, Luis Claro Solar, *Explicaciones de Derecho Civil Chileno y Comparado*, vol XI De las Obligaciones II (Editorial Jurídica de Chile 1992) 57, 113; Eiler (n 48) 152-153; Rosende, *Algunas Consideraciones* (n 55) 111; León Hurtado (n 52) 53; Ducci (n 41) 252.

conclusion of a solemn or a real contract may arise, and the rules of the CComCh on formation of consent (including liability for revocation of an offer) are also applicable to these contracts.⁹⁰² When consent has already been formed but one party refuses to fulfil the solemnity, it is a lack of formality case.⁹⁰³ But when consent has not yet been formed and one party breaks off the negotiations, it is a case of breaking off negotiations for the conclusion of a formal contract.

Such a case was *Forestal Bío-Bío*, where the Court of Appeal of Concepción explained the traditional and the modern views,⁹⁰⁴ and favoured the latter, awarding delictual damages for the breaking-off of negotiations for the sale of real estate, based on the notions of *confianza* and good faith.⁹⁰⁵ This case could be analysed as one of lack of formality because the parties had agreed to conclude a promise of sale contract and the defendants refused to fulfil its solemnity and broke off the negotiations. But because the ultimate aim of the negotiations was the conclusion of the final contract of sale and consent had not been reached regarding this contract, it seems more appropriate to categorise it as a case of broken negotiations for the conclusion of a solemn contract.

A similar case is *Jiménez Mira*⁹⁰⁶ where the parties had agreed to conclude a promise of sale contract and the defendant refused to fulfil its solemnity (they had not yet reached agreement on all aspects of the sale contract).⁹⁰⁷ The Supreme Court

⁹⁰² Rosende, *Algunas Consideraciones* (n 55) 113, 114.

⁹⁰³ sub-s 2 below.

⁹⁰⁴ 5 June 1996 (n 654) *considerandos* 2-5.

⁹⁰⁵ Text to (nn 751, 833) above.

⁹⁰⁶ CS 29 December 2011 (n 673).

⁹⁰⁷ p 147 above; Lilian San Martín, 'Responsabilidad Precontractual por Ruptura Injustificada de Negociaciones: "*Jiménez Mira, David Alejandro con Armijo Cerda, Antonio de los Ángeles*" Corte Suprema, Rol 1872/2010' (2013) 40 *Revista Chilena de Derecho* 317, analyses it as a lack of formality case.

invalidated of its own initiative for defect of form the Court of Appeal's judgment which had confirmed the first instance judgment which, in turn, had argued on the basis of the traditional view in order to reject the claim.⁹⁰⁸ The Supreme Court implicitly embraced the modern view declaring that the claim was based on precontractual liability and awarded damages for the defendant's unilateral breaking-off of negotiations, on the basis of *confianza* and good faith.⁹⁰⁹

In another case the Supreme Court held that consent to conclude a promise contract of sale of real estate had been reached but consent to conclude the final sale contract had not, and that this consideration alone was enough to reject the principal claim of contractual performance.⁹¹⁰ Regarding the alternative claim of damages for the defendant's untimely withdrawal from the negotiations, the Court concluded that it failed due to lack of proof of the losses suffered.⁹¹¹ The Court offered no other objection for this claim to succeed, which suggests that it embraced the modern view that an award of damages for breaking off negotiations for the conclusion of a solemn contract is possible if the requirements of this liability are met and proved. This is further supported by a recent case where the claim for delictual damages failed because the Court considered that the claimant did not prove that the defendants had culpably breached the duty of good faith in their withdrawal from the negotiations, although it recognised that the parties had created between them a *confianza* that the sale contract would be concluded.⁹¹²

⁹⁰⁸ 2nd JLC San Antonio, 28 October 2009, *rol* no 26108-2007, confirmed by CA Valparaíso, 5 January 2010, *rol* 2247-2009.

⁹⁰⁹ Text to (n 757).

⁹¹⁰ CS, 31 August 2012, *Territoria SA con Inmobiliaria Leja Limitada*, *rol* 3647-2012.

⁹¹¹ (n 910) replacement judgment *considerando* 13.

⁹¹² CS 5 March 2015 *considerando* 4 (n 887); text to (n 887).

It can be concluded that *la doctrina* and *la jurisprudencia* have embraced the modern view and that precontractual liability for breaking off negotiations for the conclusion of a solemn contract, can arise much in the same way that it can regarding consensual contracts, with *confianza* as one of its bases. Objections to this liability of the sort that have been adduced in German law⁹¹³ do not seem to be present in Chilean law.

2 Lack of formality cases

It appears that most cases that have come before the courts belong to this category.⁹¹⁴ The factual situation generally is that negotiating parties have agreed on all the elements of a sale contract of real estate, but one of the parties then refuses to fulfil the solemnity (the signing of the public deed in a notary's office).⁹¹⁵

Such a case was *Caja de Crédito Popular*,⁹¹⁶ where the parties had orally agreed to the sale of a property but, pending the fulfilment of the solemnity, the defendants refused to carry it out. The claimant sued for damages for revocation of an offer based on article 100 CComCh and, in the alternative, for damages for delictual liability for refusing to fulfil the solemnity to perfect the contract. The alleged loss was the fees paid to an architect and an engineer for the planning of the building that was to be built on the site and the increase in construction costs. The judgment expressly identified the situation regulated by article 100 CComCh as a case of precontractual liability and defined this liability on the basis of *confianza*⁹¹⁷ but,

⁹¹³ Text to (nn 251, 252).

⁹¹⁴ Barros Bourie, *Responsabilidad Extracontractual* (n 61) 1013, analyses these cases as precontractual liability for null contracts.

⁹¹⁵ Text to (n 895).

⁹¹⁶ CA Santiago 25 August 1948 (n 50).

⁹¹⁷ p 15 above.

embracing the traditional view, held that this article was not applicable in this case as this was a civil contract. Regarding the claim for delictual liability, the judgment held that no delict had been committed as it considered that the refusal to perfect the contract was ‘perfectly legitimate’,⁹¹⁸ being a mere consequence of the legitimate exercise of the right not to persevere in the negotiations, a right which was exercised within the rule of good faith. This judgment has been criticised for holding that the refusal to sign a public deed of sale, after all the elements of the contract were agreed, is a licit act.⁹¹⁹

Although legal scholars generally agree that these cases give rise to liability, there are two distinct views as to the legal regime which is applicable. On the one hand, Rosende Álvarez argues that the contractual regime is applicable. He explains that where consent is formed but the solemnity is not yet fulfilled, the contract does not exist, but there is a quasi-contractual⁹²⁰ relationship that gives rise to precontractual liability in case of withdrawal (which imposes an obligation to compensate the losses caused). This liability emanates from the articles of the CComCh on formation of consent because they are applicable to solemn (and real) contracts.⁹²¹ An agreement on all the elements of a solemn contract before the fulfillment of the solemnity is a *cierre de negocios* (a non-regulated type of pre-contract) which leads to the application of the rules of contractual liability.⁹²² On the other hand, Ducci argues that the refusal to perfect a contract where consent has been formed is an act of bad faith which violates the other party’s *confianza* on the word of

⁹¹⁸ (n 50) *considerando* 13.

⁹¹⁹ León Hurtado (n 52) 58-59.

⁹²⁰ *Quasicontratos* are one of the sources of obligations (arts 1437 and 2284 CCivCh).

⁹²¹ Text to (nn 695, 696).

⁹²² Rosende, *Algunas Consideraciones* (n 55) 106, 111; Rosende, ‘Responsabilidad Precontractual’ (n 896) 341. Similarly, Hernán Corral, *Lecciones de Responsabilidad Civil Extracontractual* (2nd edn, LegalPublishing 2013) 39.

the refusing party, and that this constitutes an illicit act which leads to the application of the delictual regime of liability.⁹²³

Lack of formality cases have often failed before the courts. It appears that in most cases this is because the claims have been wrongly framed in terms of contractual liability. *Luna Espinoza*⁹²⁴ is a case which, under the modern view, should have succeeded if the claim had been made on the basis of delictual liability. The negotiating parties (two individuals) orally agreed on all the elements of the sale of a property and the ‘buyer’ paid the price and the ‘seller’ delivered the property. Both parties knew that a public deed had to be signed before a notary but they postponed its signing until the seller could obtain a clear title of the property. When this happened the seller refused to sign the public deed alleging that there were differences in the boundaries that had been agreed. In the meantime, the buyer had done work on the land and had incurred significant expenses. The claimant buyer asked the court to declare that the defendant had to sign the public deed of sale and pay him damages. Declaring that the seller was obliged to sign the public deed was clearly inadmissible because no promise contract had been concluded.⁹²⁵ However, the first instance court and the Court of Appeal awarded damages, but on different grounds: the first instance judgment based them on the delictual liability of the defendant and the Court of Appeal on the precontractual liability of the defendant (without determining whether the damages were contractual or delictual).⁹²⁶

⁹²³ Ducci (n 41) 255. Similarly, de la Maza and Pizarro (n 673) 57-58; Corral (n 922) 39 (where the agreement does not constitute a valid non-regulated contract).

⁹²⁴ CS 22 November 2001 (n 742).

⁹²⁵ If a valid promise contract had been concluded and it had been breached, the remedy of specific performance (*ejecución forzada en naturaleza*) would have been available based on art 1553 CCivCh; Abeliuk, *Promesa* (n 752) 135-136, 155-156.

⁹²⁶ 1st JLC Talca 31 March 1997, quashed by CA Talca 8 November 1999 (n 742). The CA Talca expressly embraced the ideas formulated by Rosende: text to (n 922).

The Supreme Court held that the claimant's action was based on article 1489 CCivCh which establishes the right to sue for the resolution or specific performance of the contract, and damages, in case of a contractual breach. Thus, it invalidated of its own initiative the Court of Appeal's judgment and, in its replacement judgment, held that because the contract of sale had not been perfected and the existence of a promise of sale contract had not been proved, it was impossible to ask for contractual performance, and that because the compensation sought was for contractual breach it was also inadmissible. Therefore, it rejected the claim in all its parts.⁹²⁷ In *Territoria*,⁹²⁸ the Supreme Court pointed out that its judgment in *Luna Espinoza* followed the traditional doctrine on the formation of contractual consent.

Another case that failed is *Jorge Sepúlveda Rey con Banco del Desarrollo SA*,⁹²⁹ where consent regarding the purchase of a property by a farmer from a bank had been reached. The farmer was already in possession of the property, to the knowledge of the bank, because the farmer had paid an amount to the previous owner so that she could pay the bank the money that she owed and sell the property directly to him. But the previous owner did not pay the bank and the bank foreclosed the mortgage. The farmer asked the bank several times to conclude with him a promise of sale contract, but the bank said that it was not necessary and that the final sale contract would be concluded as soon as the farmer demonstrated that he had the funds to pay the initial instalment of the price. The farmer claimed he did this by giving a promissory note for the required amount to a public notary and also by paying an amount required by the bank to cover expenses. The bank sent to the same public notary a draft of the sale contract and when the farmer went to sign it (about a month

⁹²⁷ CS 22 November 2001 (n 742).

⁹²⁸ CS 31 August 2012 (n 910) replacement judgment *considerando* 10.

⁹²⁹ CS, 10 October 2006, *rol* 486-2004, Legal Publishing no 35392.

later) he found out that the bank had sold the property to another person who was, at that very same time, signing the public deed of sale. The farmer sued for contractual damages for the bank's breach of a preparatory sale contract.

The first instance judgment rejected the claim for lack of proof.⁹³⁰ The Court of Appeal,⁹³¹ embracing the traditional approach, held that the claimant had not shown that he had a true will to formalise his consent with the bank because, regarding real estate, binding agreements are governed by the rules of promise contracts established in article 1554 CCivCh, the requirements of which had not been met. It also held that the claimant had been reluctant to sign the public deed of sale. The Supreme Court, in the majority, agreed with the Court of Appeal in that the claimant never had a firm will to formalise its consent by signing the public deed of sale and concluded that no agreement that gave rise to obligations existed and that, consequently, no breach which gave rise to damages was possible.⁹³² The minority opinion was that contractual damages for breach of a preparatory contract different from a promise contract (*cierre de negocios*) should have been granted.⁹³³

Another example of a case that failed is *Sepúlveda González con Lacoste Morgado*.⁹³⁴ The parties negotiated for the sale of a property. According to the claimant, they orally agreed that they would conclude the sale contract at a later date. The claimant did improvements on the property and went to live there because it was agreed that the claimant would occupy the property under a lease pending the sale contract being concluded. The claimant asserted that he sent to the defendant a draft

⁹³⁰ 22nd JLC Santiago, 31 August 2000, *rol* 1804-1995.

⁹³¹ CA Santiago, 27 November 2003, *rol* 7900-2000.

⁹³² 10 October 2006 (n 929) *considerando* 8.

⁹³³ Judge Sergio Muñoz Gajardo (n 929), who appears to be following Rosende's argument: text to (n 922) above.

⁹³⁴ CS, 22 September 2011, *rol* 4170-2010.

of a promise of sale contract several times, but they did not sign it and, after a few months, the defendant told the claimant that she would only sell to him at a much higher price and that the rent for the lease was also a much higher amount than they had agreed. Consequently, the claimant vacated the property but owing the rent. The claimant sued for damages for ‘precontractual breaches’ relating to an ‘agreement of sale’. The Supreme Court reaffirmed the Court of Appeal’s judgment, which embraced the traditional view,⁹³⁵ and held that the claim failed because no written or oral promise of sale contract existed and it had not been proved that the parties had reached the agreement alleged by the claimant. It also held that it had not been claimed or proved that the negotiations were broken off in an untimely manner, but simply that the negotiations did not succeed. Finally, it held that article 2329 CCivCh had not been breached because this article had nothing to do with the claim, as the claim was for alleged breaches of precontractual agreements and not for the deceitful or negligent conduct of the defendant.⁹³⁶

In *Territoria*,⁹³⁷ the Supreme Court stated that due to its function to guide in legal matters, it would consider the hypothetical situation that consent to conclude the sale contract had been formed. It explained the traditional and the modern views on the formation of contractual consent⁹³⁸ and concluded that even under the modern view the claim of contractual enforcement had to fail. The appropriate remedy where a contract of sale of real estate has not been perfected due to the refusal of one of the parties to fulfil the solemnity, even though consent to conclude the contract has been reached, is an award of damages for precontractual liability (governed by the rules of

⁹³⁵ CA San Miguel, 7 April 2010, *rol* 17-2010.

⁹³⁶ CS 22 September 2011 (n 934) *considerandos* 10, 12-13.

⁹³⁷ CS 31 August 2012 (n 910) replacement judgment *considerandos* 4-12.

⁹³⁸ p 172-173 above.

delictual liability); not specific performance of a contract that has not been perfected. This is the case even if it is accepted (as the claimant argued) that an agreement to conclude a sale contract constitutes a valid unnamed contract (*contrato innominado*). Therefore, the Court appears to recognise that if the claim had been for delictual damages for the defendant's refusal to fulfil the solemnity of the sale contract, the claim might have succeeded if sufficient evidence of the losses suffered had been provided.⁹³⁹

This has been confirmed by a recent judgment of the Supreme Court⁹⁴⁰ in a case where the negotiating parties had reached agreement to conclude a sale contract of a flat but then the defendant 'buyer' refused to sign the public deed of sale. According to the claimant 'seller', a preparatory contract which gave rise to an obligation to enter into the sale contract, but which was different from a promise contract, had been entered into, and he sued for the resolution of this contract and damages for breach of contract. The Court rejected the claim holding that the only contract which can give rise to the obligation to enter into another contract is a promise contract. However, it expressly recognised that precontractual losses may be compensated under the rules of delictual liability, but that this claim had not been made.⁹⁴¹ Furthermore, damages for precontractual liability were granted in *Urrea*,⁹⁴² which could be categorised as a lack of formality case or as akin to this category, in that consent to conclude a mortgage loan was formed (a loan is a real contract),⁹⁴³ but

⁹³⁹ Text to (n 911).

⁹⁴⁰ CS, 23 September 2015, *Lange Haensgen con Ibáñez Santa María*, rol 1077-15.

⁹⁴¹ *ibid* *considerando* 8.

⁹⁴² CS 12 April 2012 (n 734); text to (n 760).

⁹⁴³ (n 658) above.

the mortgage loan was not concluded because the money was not given by the bank.⁹⁴⁴

The reason why many lack of formality cases have failed is because the claims have been made on a contractual basis. The motivation to sue under contract (either a preliminary contract or the final contract) is presumably because contractual liability gives rise to remedies that delictual liability does not.⁹⁴⁵ Suing under contract presents considerable obstacles because promise contracts are preparatory solemn contracts subject to strict requirements⁹⁴⁶ and although other preparatory consensual contracts are possible,⁹⁴⁷ they cannot impose the obligation to conclude another contract, because this is the realm of promise contracts and its requirements must not be undermined.⁹⁴⁸ Therefore, the better view, which finds support in *Territoria* and in *Lange*,⁹⁴⁹ is that the claim should be made for delictual damages for precontractual liability for the refusal to perfect the solemnity.

V Conclusions

Within the process of reception of the doctrine of precontractual liability into Chilean law, influences from French and German law have been especially relevant in order to shape this doctrine within the particularities of the Chilean legal system. Regarding precontractual liability for breaking off negotiations, the different theoretical bases

⁹⁴⁴ In a similar case the claim for damages for breach of a loan contract was rejected and it was held that the claim should have been for delictual damages, CA Rancagua, 16 September 2014, *Mendoza Lara con Banco Santander Banefe*, ratified by CS, 4 June 2015, *rol* 27186-2014.

⁹⁴⁵ p 228 below.

⁹⁴⁶ Text to (n 752).

⁹⁴⁷ eg, agreements granting pre-emptive rights, lock-out agreements, lock-in agreements, agreements that organise the negotiations (mentioned in *Lange* (n 940) *considerando* 8).

⁹⁴⁸ *Lange* (n 940) *considerando* 8.

⁹⁴⁹ Text to (nn 939, 941).

that have been put forward, which correspond to those mentioned in German and French law, are usually presented as complementing each other. Good faith, which is frequently mentioned by *la doctrina* and *la jurisprudencia*, is usually applied via the notion of *confianza* in both its dimensions. *Confianza* is a notion analogous to those used in German and in French law to refer to ‘reliance’ and is the better suited for explaining the rationale of this liability, which finds its legal basis in the general principle of delictual liability. The same is true in cases of broken negotiations for the conclusion of a formal contract and in lack of formality cases, which do not present the special treatment that they have in German law.

CHAPTER V – RELIANCE AS THE CORE ELEMENT OF PRECONTRACTUAL LIABILITY FOR BREAKING OFF NEGOTIATIONS

Following on from the study of reliance in the breaking-off of negotiations in each selected jurisdiction, this chapter brings together the findings of the three previous chapters and argues that reliance is the core notion of precontractual liability for breaking off negotiations. The chapter will first make a comparative analysis of the general characteristics of this liability in the selected jurisdictions (section I). Particular attention will be paid to the much-debated issue of the nature of this liability, that it is a fault-based liability, and the presence of other requirements shared by the selected jurisdictions. The chapter will then focus on the comparative analysis of the two more prominent bases of liability for breaking off negotiations in the selected jurisdictions: reliance and good faith. It will first examine, from a comparative perspective, the reliance basis, looking at its meaning, manifestations, genesis and justification, and showing that it is the core element that explains the imposition of this liability (section II). It will then address the role of good faith in the breaking-off of negotiations, focusing on determining whether it is an essential factor in the configuration of this liability or whether it could potentially be replaced or displaced by the reliance element (section III). The chapter will conclude with a comparative analysis of the remedies that the reliance-based approach gives rise to in the selected jurisdictions and also in certain harmonising instruments (section IV).

I General characteristics of precontractual liability for breaking off negotiations in the selected jurisdictions

From the previous chapters it is clear that the German doctrine of *cic* and the French doctrine of precontractual liability have some marked differences. It has also been shown that in receiving these doctrines, Chilean law has taken some elements from each of these jurisdictions and has developed them in light of the particularities of its legal system. Nevertheless, and despite the differences, the selected jurisdictions have many commonalities and provide for a similar protection in the breaking-off of negotiations. A summary of the general characteristics of this liability in the selected jurisdictions is presented below.

1 Nature of the liability

At a doctrinal level, the nature of precontractual liability is one of the most debated issues. In cases of broken negotiations, the lack of a contract and the fact that the parties are not strangers (as they have been engaged in negotiations) pose serious difficulties for the classification of this liability as belonging within or outside the realm of contract.⁹⁵⁰ Therefore, it is not surprising that a primary difference between the selected jurisdictions in their treatment of liability for breaking off negotiations is found in the nature of this liability and in its applicable legal regime.

In Germany, starting from Jhering's doctrine of *cic* and due to the particularities of its law of delict, it has long been held that the contractual regime applies to precontractual liability and this was reaffirmed by the 2001 reform.⁹⁵¹ But it is also accepted that *cic*, in its nature, is a *sui generis* concept, 'floating freely between

⁹⁵⁰ Schwenger, Hachem and Kee (n 5) 275, 283.

⁹⁵¹ p 9 and text to (n 70) above.

contract and tort’.⁹⁵² In France, by contrast, the delictual nature of precontractual liability and the applicability of the delictual regime are undisputed.⁹⁵³ In Chile, while the courts follow the French approach as to the delictual nature of this liability and the applicability of the delictual regime, some authors have voiced a preference for a third category of liability, following the German ‘third way’ (*dritte Spur*) language.⁹⁵⁴

Despite the fact that the leading civil law jurisdictions take polar positions regarding the nature of precontractual liability, this divergence does not affect their ability to reach similar levels of protection (in contract or in delict). Indeed, in spite of the ‘contractual’ or ‘delictual’ label, the requirements and remedies of this liability are very similar.⁹⁵⁵

2 A fault-based liability

In the selected jurisdictions precontractual liability emanates from the principle of *neminem laedere*⁹⁵⁶ and precontractual fault is required for liability for breaking off negotiations to arise.⁹⁵⁷ In all of them precontractual fault is not qualified, in that negligence suffices,⁹⁵⁸ and the assessment of negligence is abstract and objective.⁹⁵⁹ However, some differences can be identified.

First, there is an evident difference in the nature of precontractual fault which results from the divergence as to the nature of this liability.⁹⁶⁰ In France and Chile

⁹⁵² MUJ (n 61) 92.

⁹⁵³ Text to (n 316).

⁹⁵⁴ Text to (nn 673, 686).

⁹⁵⁵ This ch s II and s IV below.

⁹⁵⁶ MUJ (n 61) 312; Bell, Boyron and Whittaker (n 339) 367; Barrientos, *Daños* (n 653) 58.

⁹⁵⁷ Text to (nn 123, 325, 721).

⁹⁵⁸ Text to (nn 126, 388, 722).

⁹⁵⁹ Text to (nn 126, 346) and p 139.

⁹⁶⁰ This ch sub-s 1 above.

precontractual fault is considered to be of a delictual nature, while in Germany it is contractual.⁹⁶¹ This difference does not, however, affect the basic notion of fault as breach of a duty or a general standard.⁹⁶² Nevertheless, the divergence does have some practical impact, for instance, with regard to the burden of proof: in Germany, because precontractual fault is considered to be contractual, it is presumed, whereas in France and Chile, because it is considered to be delictual (and does not fall within special presumptions of fault), it has to be proved.⁹⁶³

Secondly, there is a theoretical distinction as to the place of precontractual fault. In German law, fault can be found at two levels: in the creation of the expectation of the future conclusion of the negotiated contract, and in the breaking-off; and the fault requirement is normally established by a combination of both.⁹⁶⁴ In French law, precontractual fault lies in the circumstances of the breaking-off and not in the breaking-off itself.⁹⁶⁵ In Chilean law, although little emphasis has been placed on this distinction, it seems that fault at both levels is required.⁹⁶⁶ Despite this theoretical difference, the results obtained in practice are much the same because in German and Chilean law fault is normally found in a combination of the levels, and in French law fault is normally found in a combination of the conduct of the party breaking off during the negotiations and additional objective circumstances (such as the abruptness of the breaking-off).

⁹⁶¹ Text to (nn 327, 721, 126).

⁹⁶² Text to (nn 126, 355, 728).

⁹⁶³ Text to (nn 98, 322, 737).

⁹⁶⁴ Text to (n 160) and p 40 above.

⁹⁶⁵ Text to (n 401).

⁹⁶⁶ p 141 above.

Therefore, there is a functional convergence between the selected jurisdictions regarding the fault requirement in cases of breaking off negotiations, despite the fact that they have some theoretical differences which may have some impact in practice.

3 Further requirements of liability

The fault requirement has been analysed in sub-section 2 above and the reliance requirement and the notion of good faith are analysed in sections II and III below. Here, mention will be made of other requirements that, to some degree, are present in all the selected jurisdictions.

(a) Existence of a precontractual relationship

An initial distinction must be made between the notions of ‘negotiations’ and ‘precontractual relationship’. It has been seen that ‘negotiations’ refers both to a time period and to the relationship that forms between negotiating parties.⁹⁶⁷ In the latter sense, the interaction and connection between the negotiating parties can be termed as a ‘precontractual relationship’ in order to highlight the fact that they are not strangers (as would normally be the case in a purely delictual scenario), and that they are connected to some extent, although not yet bound by an obligation to enter into a contract. In this broad sense, all the selected jurisdictions consider negotiations as a precontractual relationship. However, the notion of ‘precontractual relationship’ has a much more technical meaning in German law, as the commencement of negotiations gives rise to an obligation which imposes duties on the negotiating parties.⁹⁶⁸ Under this narrow sense, a precontractual relationship is required in German law, is not required in French law, and is sometimes incorrectly required in Chilean law.

⁹⁶⁷ p 4 above.

⁹⁶⁸ p 27 above.

In German law, the notion of ‘precontractual relationship’ acquires its true relevance as the source of the precontractual duties of the negotiating parties. Thus, determining the beginning of the negotiation period is particularly relevant for German law,⁹⁶⁹ as the beginning of negotiations involves the beginning of the precontractual relationship from which protective duties arise for the negotiating parties.⁹⁷⁰ This precontractual relationship is contract-like, which brings the precontractual phase closer to the contractual domain in order to apply the contractual regime due to the shortcomings of the law of delict.⁹⁷¹

In France and Chile the situation is much different. Their laws of delict allow for compensation of pure economic loss, they have general principles of delictual liability, and it is generally accepted that precontractual liability is subject to the delictual regime.⁹⁷² Consequently, there is no need to resort to a contract-like precontractual relationship in order to justify the imposition of precontractual liability. However, in both jurisdictions the notion of a precontractual relationship in the broad sense is perfectly acceptable and reference is sometimes made to a relationship of trust between the negotiating parties.⁹⁷³ Some Chilean authors and judgments require an agreement to enter into negotiations for liability to arise, which suggests the need for a contract-like relationship between the negotiating parties. It has been argued that this is incorrect or at least irrelevant as it will be satisfied by the mere fact of the existence of negotiations.⁹⁷⁴

⁹⁶⁹ On the notions of ‘social contact’ and ‘business contact’, Asúa and Hualde (n 77) 1421-1424.

⁹⁷⁰ Text to (nn 79, 80).

⁹⁷¹ Text to (nn 91, 92).

⁹⁷² Text to (nn 316, 673, 1165) and pp 68, 129, 226.

⁹⁷³ pp 88, 134 above.

⁹⁷⁴ p 136-138 above.

Therefore, in all the selected jurisdictions it is evidently a requirement of precontractual liability for breaking off negotiations that the parties have entered into negotiations, but care must be taken when characterising these negotiations as a precontractual relationship. The ‘precontractual relationship’ understood as a relationship of obligation from which duties emanate (the breach of which allows the imposition of contractual liability) only truly makes sense in German law, due to the need to have a ‘contractual likeness’ in the negotiations, but not in jurisdictions such as French and Chilean law where the delictual regime is applied to liability for breaking off negotiations. In the latter jurisdictions negotiations can be described as a precontractual relationship (of reliance) in the broad sense but not in the contract-like sense of German law. However, the fact remains that in French and Chilean law reference is also made to precontractual duties. If they do not emanate from a contract-like precontractual relationship, it must be determined from where they originate. This leads to the next requirement.

(b) Breach of precontractual duties

Although the language of violation of precontractual duties is common to all the selected jurisdictions, they use it with different degrees of clarity and relevance, with German law being the clearest as to why the breach of precontractual duties is needed in order to impose *cic* liability, and with French and Chilean law being far less clear as to the utility of framing liability for breaking off negotiations in terms of breach of precontractual duties. It must be recognised that although it is regularly said that negotiating parties are subject to precontractual duties, there is a difficulty in

determining where these duties emanate from in this ‘grey area’⁹⁷⁵ where negotiators are no longer strangers but are also not parties to a contract.

In German law it is clear that precontractual duties emanate from the precontractual relationship of trust and, after the 2001 reform, these duties also have a legal basis in §241(2) BGB.⁹⁷⁶ The reason for framing *cic* for breaking off negotiations in terms of breach of protective duties emanating from a contract-like precontractual relationship is evident due to the need to apply the contractual regime of liability. In French and Chilean law, where the delictual regime applies to liability for breaking off negotiations, it is not clear why the rationalisation of this liability should be done in terms of breach of precontractual duties.

In French law, the notion of breach of a duty is found in the definition of fault (although not all agree on such a definition)⁹⁷⁷ and in the breach of duties emanating from the principle of good faith which gives rise to precontractual liability.⁹⁷⁸ In Chile, reference to the breach of duties emanating from good faith is also sometimes made in the analysis of liability for breaking off negotiations.⁹⁷⁹ The relevance and necessity of these duties emanating from good faith as a basis of precontractual liability is analysed in section III 3 below.

(c) Bad reason for breaking off

Reference to an unjustified reason for breaking off or, on the contrary, to a legitimate reason for breaking off is made in all the selected jurisdictions, but with varying degrees of significance.

⁹⁷⁵ Schwenzer, Hachem and Kee (n 5) 275.

⁹⁷⁶ Text to (nn 102, 103).

⁹⁷⁷ p 72-73 above.

⁹⁷⁸ Text to (nn 519, 520).

⁹⁷⁹ p 157 above.

The lack of a good reason for breaking off is a requirement of liability for breaking off negotiations in German law.⁹⁸⁰ Indeed, fault at the level of the breaking-off is found in breaking off without a good reason.⁹⁸¹ Chilean authors and judgments seem to follow German law in this respect, mentioning the lack of a justified reason for breaking off as a requirement of precontractual liability.⁹⁸² In French law, breaking off without a justified reason is not formulated in terms of a requirement of precontractual liability, but the same result is reached by recognising that a legitimate reason that justifies the breaking-off excludes liability (ie, there is liability in the absence of a legitimate reason).⁹⁸³

Although this slightly different approach to the reason for breaking off in German and French law could have some impact on the burden of proof, it is suggested that the outcome will normally be the same. In German law, because the contractual regime applies, fault is presumed and, therefore, the defendant would have to prove a good reason for breaking off to destroy the presumption. In French law, because the delictual regime applies, fault must be proved and the claimant should have to prove that the defendant broke off without a legitimate reason, but because the reason for breaking off is not framed as a requirement but rather as an exemption from liability, it will fall to the defendant to prove a good reason for breaking off. Chilean law seems to be the odd one out, because since the delictual regime applies and fault must be proved, and the lack of a legitimate reason for breaking off is considered a requirement for liability to arise, the claimant would have to show that the defendant did not have a good reason for breaking off.

⁹⁸⁰ p 44 above.

⁹⁸¹ Text following (n 161).

⁹⁸² p 169 above.

⁹⁸³ p 114 above.

(d) The presence of certain objective circumstances

In all the selected jurisdictions use is made of certain objective circumstances in order to justify the reasonableness or legitimacy of the reliance or expectations of the other party (Germany and Chile)⁹⁸⁴ or to find the fault of the party breaking off (France).⁹⁸⁵ In French law, because the reliance element is found within the configuration of precontractual fault, the result is that these circumstances also serve to justify the reasonableness or legitimacy of the other party's reliance. These objective circumstances are analysed in section II 2 (b) below.

II Reliance as the key feature

It has been shown that in German, French and Chilean law the notion of reliance, embodied, respectively, in the concepts of *Vertrauen*, *confiance/croyance légitime* and *confianza*, is a core requirement of precontractual liability for breaking off negotiations and it has been argued that it is the appropriate theoretical basis of this liability.⁹⁸⁶ It has been seen that other doctrinal bases which have been put forward are not suitable for explaining the rationale (doctrine of abuse of rights in French and Chilean law)⁹⁸⁷ or the consequences (prohibition of *vcfp* in German law and theory of appearance in French law)⁹⁸⁸ of this liability and have thus been rejected. Therefore, this section and the next will focus on the remaining bases that have been suggested: reliance and good faith, advocating in favour of the former while recognising the role of the latter.

⁹⁸⁴ p 41 and text to (n 800).

⁹⁸⁵ Text to (n 562).

⁹⁸⁶ Chs II, III, IV, s V.

⁹⁸⁷ pp 99, 167 above.

⁹⁸⁸ p 53 and text to (n 459).

1 Understanding reliance

(a) The notion and dimensions of reliance

The language of ‘reliance’ present in the selected jurisdictions is difficult to define, as it is used quite loosely to encompass notions of trust, confidence, expectation and belief. It is used ‘in different contexts and in different senses’⁹⁸⁹ within the topic of precontractual liability and this contributes to the difficulty in determining the content and boundaries of reliance. This thesis has identified in all the selected jurisdictions two dimensions of reliance and has proposed to refer to them as ‘trust-based reliance’ and ‘expectation-based reliance’. Although the ideas evoked by each of these dimensions can be seen in the case law and in the writings of legal scholars in the selected jurisdictions, and in comparative studies,⁹⁹⁰ often it is not easy to distinguish them as they are intertwined, with the focus oscillating from one to the other. In order to truly understand what is meant by reliance in the breaking-off of negotiations and to provide a structure that can organise the ideas behind the notions of *Vertrauen*, *confiance/croyance légitime* and *confianza*, it is necessary to analyse the content of these dimensions and the interaction between them.

In the trust dimension of reliance, ‘trust’ refers to the confidence that negotiators place on each other when negotiating a contract. This should be understood from an objective perspective, in that they trust that each will observe certain expected standards of conduct. It is difficult to define in the abstract this trust dimension as it is a flexible notion that acquires a more tangible meaning in the particular case. The trust or confidence in the other party’s conduct or person can be

⁹⁸⁹ Cartwright and Hesselink (n 6) 454.

⁹⁹⁰ eg, in Cartwright and Hesselink (n 6) 455.

induced or nourished by the other party and can also arise due to the circumstances surrounding the negotiations.⁹⁹¹

In German law, the trust dimension of reliance is embodied in the precontractual relationship (defined as a relationship of mutual trust and confidence) and the duties emanating from it.⁹⁹² A specific application of trust-based reliance is found in §311(3) second sentence BGB which refers to a particularly high degree of reliance induced in respect of his own person by a person who is not intended to be party to the contract.⁹⁹³ While possible English translations of the wording of this provision can be ‘nourishing the trust of the other party’ or ‘inducing special trustworthiness’, these translations seem to point towards ethical duties, whereas the notion that the courts apply in these cases involving the liability of intermediaries is closer to the ‘reasonable reliance’ of English negligence cases.⁹⁹⁴ Defining the ‘normal’ standard of trust or reliance and, consequently, the ‘special’ reliance in these cases has not caused major problems in practice.⁹⁹⁵

In French and Chilean law, the notion of a precontractual relationship in the broad sense embodies the trust dimension of reliance.⁹⁹⁶ This relationship of trust and confidence between the negotiating parties reaffirms the idea that they are not strangers and are subject to certain standards of conduct. The notions of *confiance légitime* and *confianza* are wide enough to encompass trust-based reliance.⁹⁹⁷

⁹⁹¹ This ch sub-s 2 below.

⁹⁹² p 24 above.

⁹⁹³ Jung (n 100) 37.

⁹⁹⁴ MUJ (n 61) 104; text to (n 1496) below.

⁹⁹⁵ MUJ (n 61) 105.

⁹⁹⁶ Text to (n 973).

⁹⁹⁷ pp 88, 150 above.

The second dimension of reliance is ‘expectation-oriented’. Here, the focus is on a specific expectation of the future conclusion of the negotiated contract. Before analysing this dimension, it is necessary to establish the relationship between the two dimensions of reliance. The expectation dimension is a specific manifestation of the trust dimension, in that the expectation of the future conclusion of the contract presupposes the existence of trust between the negotiating parties.⁹⁹⁸ Therefore, expectation-based reliance emanates from trust-based reliance as a particular manifestation of it. Because the trust dimension is of a more general nature, it can operate in different scenarios of precontractual liability, whereas the expectation dimension is specific to cases of broken negotiations. Thus, it can be understood that in the selected jurisdictions, while mention of what is essentially trust-based reliance is sometimes made in breaking off cases, the key requirement for this liability to arise is expectation-based reliance.⁹⁹⁹ Consequently, the emphasis in this subsection and the next is on the expectation dimension of reliance, unless otherwise indicated.

In this dimension, ‘reliance’ is ‘inextricably linked’¹⁰⁰⁰ to the ‘expectation’ of the future conclusion of the negotiated contract, created in one party by the conduct of the other party during the negotiations. Although the notion of ‘expectation’ can be thought to have a subjective element, often referred to as a hope or belief in the future conclusion of the contract,¹⁰⁰¹ it should be objectively understood as a legitimate or reasonable expectation that arises in the other party from certain conduct of the party who breaks off, and should be objectively assessed in terms of whether a reasonable

⁹⁹⁸ Aubry (n 101) 251, indicates that the existence of an expectation presupposes an act of faith, in that there can be no hope without trust.

⁹⁹⁹ Text to (nn 185, 186); pp 96, 157 above.

¹⁰⁰⁰ Cartwright and Hesselink (n 6) 455.

¹⁰⁰¹ pp 40, 83, 157 above. Aubry (n 101) 251, states that an ‘expectation’ (*attente*) is a psychological notion that falls within the perceptions of the individual.

person in similar circumstances would be justified to expect the future conclusion of the contract.¹⁰⁰² Therefore, it is preferable to express this dimension of reliance as an ‘expectation’ in the success of the negotiations, rather than as a ‘hope’ or ‘belief’ in such success, as the latter notions seem too subjective, being linked to personal desires or feelings, and could also be confused with a subjective notion of good faith.¹⁰⁰³ It is also preferable to speak of giving rise to an ‘expectation’ rather than giving rise to a ‘mistaken belief’ or not informing of or correcting a ‘mistaken belief’, because situations of mistaken beliefs usually relate to other cases of precontractual liability (regarding null or even valid contracts).

This is a ‘precontractual expectation’ of the future conclusion of the contract under negotiation. It is not an expectation of the actual conclusion of such contract,¹⁰⁰⁴ nor is it a contractual expectation of the fulfilment of a contractual obligation. Because the final terms of the contract under negotiation are generally still not entirely agreed on and because there is no obligation to actually conclude the contract, it is clear that this precontractual expectation is ‘weaker’¹⁰⁰⁵ than a contractual expectation. But, this does not mean that the precontractual expectation is not worthy of protection, and the selected jurisdictions, as many others do, provide for its protection through the doctrine of *cic* or precontractual liability.¹⁰⁰⁶ However, they place stringent requirements for this liability to arise and restrict the protection only to

¹⁰⁰² Similarly, Vladimir Monsalve Caballero, ‘El Comportamiento del Contratante como Determinante para la Calificación de la Ruptura Injustificada de las Negociaciones: Visión desde el Derecho Europeo’ (2009) 119 *Vniversitas* 251, 273.

¹⁰⁰³ This ch s III 1 below.

¹⁰⁰⁴ In some lack of formality cases in German law, the aggrieved party actually believed that the contract had been validly concluded, see text to (n 292).

¹⁰⁰⁵ Cartwright and Hesselink (n 6) 454.

¹⁰⁰⁶ Cartwright and Hesselink’s comparative observations to cases 1 and 7 (n 6) 60-63, 229-232.

reasonable or legitimate expectations.¹⁰⁰⁷ German law seems to require more than the other selected jurisdictions, in that the expectation should normally be that the contract will certainly be concluded.¹⁰⁰⁸

(b) The essence of reliance

At the core of expectation-based reliance, which is the basis of precontractual liability for breaking off negotiations, is the protection of a legitimate expectation that has been disappointed.

The creation and subsequent disappointment of this expectation (on which the claimant legitimately relied) by the conduct of the defendant is the reason that makes him liable. Thus, it is generally recognised that it is not the breaking-off itself that gives rise to liability, but the conduct of the defendant in giving rise to an expectation of the future conclusion of the negotiated contract and then disappointing it by refusing to continue with the negotiations or breaking them off entirely.¹⁰⁰⁹ This approach is wholly consistent with the principle of freedom of contract which reigns in the selected jurisdictions: liability does not arise for failing to enter into a contract, as there is no obligation to enter into one,¹⁰¹⁰ but for culpably creating a legitimate expectation and then disappointing it without good reason.

Because the selected jurisdictions have fault-based doctrines of precontractual liability,¹⁰¹¹ the fault requirement must interact with expectation-based reliance. In this interaction, the notions of fault and reliance function together but without being interdependent. Consequently, fault is found in the wrongful (negligent and

¹⁰⁰⁷ This ch sub-s 2 (b) below.

¹⁰⁰⁸ Text to (n 164).

¹⁰⁰⁹ Text to (nn 160, 402, 733).

¹⁰¹⁰ p 17 above.

¹⁰¹¹ This ch s I 2 above.

intentional conduct) creation and subsequent disappointment of an expectation on which the other party legitimately relied.

2 Generating reliance and legitimately relying

In the selected jurisdictions, liability for breaking off negotiations will only arise when its requirements are met and expectation-based reliance is a core requirement. Therefore, it is necessary to establish what creates in the claimant the expectation that the negotiated contract will be concluded in order to then determine when the claimant may legitimately rely on this expectation.

(a) The creation of reliance

In general terms, it is the conduct of the defendant that triggers the claimant's reliance on the expectation of the future conclusion of the negotiated contract. This is the 'starting point' for the protection of this expectation.¹⁰¹² The word 'conduct' is being used in a wide sense. It can encompass different forms of actions,¹⁰¹³ which can range from express to implied declarations or behaviour, such as making promises, statements or assurances about the likely success of the negotiations and future conclusion of the contract,¹⁰¹⁴ or adopting certain attitudes towards the other party or regarding the other party (even before other people) that indicate the ultimate success

¹⁰¹² Faust and Wiese (n 110) 135.

¹⁰¹³ Asúa (n 21) 156, regarding German law, understands that it is a positive conduct which makes the other party trust in the future conclusion of the contract.

¹⁰¹⁴ eg, in Germany, BGH 12 June 1975 (n 116) ('making a promise', 'by the manner of his negotiations', 'by his conduct'); in France, Cass com 15 October 2002 (n 412) ('maintaining his [the other party's] confidence by the statement and reminder of their ambitious common prospects, by its orders and significant cash advances'); CA Rennes 8 July 1929 (n 412) ('having dangled in the eyes of the other party the expectation of an agreement'); CA Dijon 15 February 1893 (n 450) ('assurances'); in Chile, CS 12 April 2012 (n 734) (statement that the loan had been approved); CS 29 December 2011 (n 673) (agreement to conclude a promise contract).

of the negotiations.¹⁰¹⁵ It can also include inaction or omissions,¹⁰¹⁶ such as a failing to warn, inform or explain to the other party that it had not yet decided whether it would enter into the contract or had changed its mind about concluding the contract when knowing that the other party had already acted in reliance on its future conclusion,¹⁰¹⁷ or failing to inform the other party that it had already concluded the contract with a third party.¹⁰¹⁸

The defendant, through his conduct, creates or awakens in the claimant the expectation of the future conclusion of the contract which induces the claimant to rely on this expectation.¹⁰¹⁹ However, it is also possible that the expectation arose in the claimant due to reasons other than the conduct of the defendant. In these cases, the defendant may still be liable if he encouraged the claimant's reliance on such an expectation. In other words, the claimant's reliance on the expectation of the success of the negotiations must be directly caused by the defendant's conduct; it must be a consequence of the defendant's conduct.

A question which arises is whether it is a requirement for the defendant to know that this expectation has arisen in the claimant and that the latter has acted in

¹⁰¹⁵ eg, in Germany, BGH 22 February 1989 (n 74) ('the defendant had encouraged the plaintiff to take measures that would only be of use if a contract should arise'); in France, Cass com 11 July 2000 (n 375) ('did not hesitate to present [the other party] as his associate'); CA Paris 10 March 2000 (n 316) (letting the other party believe it had agreed and letting the work advance); in Chile, CA Talca 8 November 1999 (n 742) (the parties had performed the contract).

¹⁰¹⁶ Muir-Watt (n 439) 58.

¹⁰¹⁷ eg, in Germany, BGH 29 March 1996 (n 203) ('statement of final preparedness to contract', 'prior conduct', 'knowledge of the claimant's current works'); BGH 20 June 1952 (n 85) ('the defendant's statements and behaviour'); in France, Cass com 20 March 1972 (n 316) ('that company had already, to the other's knowledge, incurred considerable expense', 'intentionally kept that company in a state of protracted uncertainty'); in Chile, CA Concepción 5 June 1996 (n 654) ('the defendants did not give any notice to the claimant of their intention to withdraw').

¹⁰¹⁸ In France, Cass com 26 November 2003 (n 323) ('letting [the claimant] think', 'negotiations which they had never given the impression of abandoning').

¹⁰¹⁹ Text to (nn 171, 411) and p 153 above.

reliance upon it. Some cases mention the defendant's knowledge of the other party's expenditure, work or, in general, detrimental actions taken in reliance on the expectation of the future conclusion of the contract.¹⁰²⁰ The defendant's knowledge evidently supports finding him liable, but it cannot be said that it is a general requirement for the imposition of liability to show that the defendant knew of the claimant's reliance.¹⁰²¹ If the defendant knows that the other party has acted or will likely act in reliance, it can be argued that the defendant has a duty to inform or warn the claimant that it does not intend to continue with the negotiations.¹⁰²²

Knowledge of other aspects of the negotiations can also be relevant. For instance, creating or inducing the expectation of the future conclusion of the contract when knowing that the contract cannot or will not be concluded (for example because a requirement is lacking, there is an obstacle, or there is no intention to finally conclude the contract), normally amounts to fraud, deceit, intention to harm or bad faith on the part of the defendant.¹⁰²³ The knowledge of one or both parties as to the existence and fulfilment of formality requirements has particular relevance in breaking off negotiations for the conclusion of formal contracts cases and lack of formality cases in German law.¹⁰²⁴ And the claimant's knowledge of the state of the negotiations is relevant for assessing the reasonableness of his reliance.¹⁰²⁵

Although the language of 'risk' is not very common in the selected jurisdictions in the analysis of precontractual liability for breaking off negotiations, it is possible to formulate it under this perspective, stating that the economic risk of the

¹⁰²⁰ eg, (nn 1015, 1017).

¹⁰²¹ Text to (nn 178, 531, 796).

¹⁰²² Text to (nn 203, 525, 835).

¹⁰²³ Text to (nn 7, 1070, 1071).

¹⁰²⁴ Text to (nn 251, 286).

¹⁰²⁵ (b) below.

failure of the negotiations which, in principle, belongs to each negotiating party, shifts when the claimant is entitled to rely on the expectation of the future conclusion of the contract, created or encouraged by the defendant.¹⁰²⁶ At what moment this takes place is analysed below.

(b) Reasonableness/legitimacy of reliance

The creation or inducement of the claimant's expectation regarding the future conclusion of the contract by the conduct of the defendant is only one side of the reliance element. The other side, now from the claimant's perspective, is that this expectation and the claimant's actions based on it must be reasonable or legitimate. The notions of 'reasonable' and 'legitimate' are close in meaning but are not exactly the same.¹⁰²⁷ However, as they are normally used interchangeably in the selected jurisdictions, this approach will be followed. It is not enough for liability to arise for the claimant to assert that he expected that the contract would be concluded and consequently acted in reliance on such an expectation. Liability will only arise when such an expectation and the reliance placed on it are reasonable or legitimate.¹⁰²⁸

The negotiation process involves a period of uncertainty where the negotiators simply do not know whether the negotiations will succeed or fail; each will have their own views, beliefs and expectations as to the likely outcome of the negotiations. Therefore, in principle, relief will not be given to a party who claims that it relied on the success of the negotiations simply because it believed or hoped that that would be the case. In other words, a 'plain' expectation is not enough, only a 'legitimate' or 'reasonable' expectation will be protected. While 'legitimate' can be easily

¹⁰²⁶ Cartwright and Hesselink (n 6) 456.

¹⁰²⁷ Aubry (n 101) 255 fn 889.

¹⁰²⁸ Cartwright and Hesselink (n 6) 455-456.

understood as that which is in accordance with the law, there are difficulties in defining in the abstract what must be understood as a ‘legitimate expectation’. It has been rightly described as a general standard or ‘framework concept’ (*notion-cadre*) which must be positively and negatively defined by the case law.¹⁰²⁹ The same can be said in relation to the notion of a ‘reasonable’ (ie, that which is in accordance with reason or sound judgement) expectation.

The justification for the legitimacy or reasonableness of the claimant’s expectation-based reliance will be found in the conduct of the defendant (who created, encouraged or induced it),¹⁰³⁰ but also in the claimant’s own conduct in relying on the expectation, and in the presence of objective circumstances surrounding the negotiations. All these elements will allow the court to assess whether, in the particular case, it was reasonable or legitimate for the claimant to rely on an expectation of the future conclusion of the contract under negotiation.

In the selected jurisdictions, the courts and legal scholars recognise that the presence of certain objective circumstances surrounding the negotiations and their breaking-off can serve to found the reasonableness or legitimacy of the claimant’s reliance.¹⁰³¹ Although much the same circumstances are present in these jurisdictions, there are variances as to the degree of relevance attributed to them and the degree of intensity required of them.¹⁰³² Some of these circumstances are directly connected with the conduct of one or both parties during the negotiations, while others are more ‘external’ to the negotiation process. Examples of external circumstances that

¹⁰²⁹ Aubry (n 101) 250, 258.

¹⁰³⁰ (a) above.

¹⁰³¹ Some of these are listed in Vladimir Monsalve Caballero, ‘La Ruptura Injustificada de los Tratos Preliminares’ (Doctoral Thesis, Universidad de Salamanca 2008) 268ff.

¹⁰³² Cartwright and Hesselink (n 6) 477-478.

accentuate the trust in the other party are previous contractual relations, the negotiating parties' professions, advertising done by one of the parties, and each of the parties' reputation as a businessman or as an individual.¹⁰³³ Trust-based reliance will be particularly influenced by these external factors, while expectation-based reliance will be particularly influenced by the actual conduct of the parties during the specific negotiations taking place.

The length of the negotiations is a relevant circumstance to take into account, although it is not decisive because breaking off negotiations that have not lasted a long time can potentially give rise to liability.¹⁰³⁴ The degree of advancement of the negotiations is more significant; the more advanced they are, the higher the degree of trust that has developed between the negotiating parties and the more reasonable it is for the claimant to rely on the future conclusion of the contract.¹⁰³⁵ The level of agreement reached on the terms of the negotiated contract can evidence the degree of advancement of the negotiations, although in all the selected jurisdictions agreement on all essential elements of the negotiated contract is not required for liability for breaking off negotiations to arise.¹⁰³⁶ Knowledge that the other party has incurred expenses relying on the expectation of the future conclusion of the negotiated contract is also a relevant but not decisive circumstance.¹⁰³⁷

Another important circumstance, particularly in French law, is the status of the parties: whether one or both are professionals. It is generally considered that it is more difficult for a professional to claim legitimate reliance when dealing with a non-

¹⁰³³ Monsalve Caballero, 'Ruptura Injustificada' (n 1031) 254ff.

¹⁰³⁴ Text to (nn 173, 571, 802).

¹⁰³⁵ Text to (nn 172, 573, 803).

¹⁰³⁶ eg, in Germany, BGH 10 July 1970 (n 83); in France, Cass com 22 April 1997 (n 384); in Chile, p 155 above.

¹⁰³⁷ Text to (nn 1020, 1021).

professional than in the reverse situation, and liability arising between professionals used to be the exception.¹⁰³⁸ Reference to a similar criterion of the commercial experience of the parties can be seen in lack of formality cases in German law.¹⁰³⁹ The experience or professional status of the negotiating parties is also sometimes mentioned in Chilean law.¹⁰⁴⁰ Other circumstances which are sometimes mentioned are the climate of trust between the negotiating parties, the suddenness or abruptness of the breaking-off, and signs of commitment given during the negotiations.¹⁰⁴¹

Consequently, where there is nothing in the conduct of the defendant that could lead the other party to legitimately expect the future conclusion of the contract (particularly if the defendant expressly manifested its doubts or unwillingness to commit),¹⁰⁴² or where the circumstances surrounding the negotiations do not support the reasonableness of the claimant's reliance (for instance, if there are many issues still pending agreement, obstacles to conclude the contract exist, parallel negotiations with third parties are taking place to the claimant's knowledge), the claimant's expectation-based reliance will not be legitimate or reasonable and liability will not arise for the defendant.

To conclude this section, it must be stressed that although the analytical distinction between the two dimensions of reliance proposed by this thesis is not always easy to recognise in practice, it is very relevant. It allows us to distinguish between the specific requirement that explains the imposition of liability for breaking off negotiations and that is at the heart of this liability (expectation-based reliance)

¹⁰³⁸ p 112 above.

¹⁰³⁹ Text to (n 298).

¹⁰⁴⁰ Text to (n 813).

¹⁰⁴¹ Text to (nn 182, 568, 575, 578, 884).

¹⁰⁴² eg, CA Paris 13 December 1984 (n 419).

from the more generic and distant element (trust-based reliance) that serves to provide a justification for the existence of the first.

III The role of good faith

In the selected jurisdictions the notion of good faith (*Treu und Glauben* in German law, *bonne foi* or *mauvaise foi* in French law and *buena fe* or *mala fe* in Chilean law) is frequently mentioned as a basis of liability for breaking off negotiations. This section will first refer to the meaning of good faith and will then look at the theoretical relationship that good faith and reliance have when applied to this liability. It will conclude with an assessment as to whether good faith is an essential element in the configuration of this liability or whether its role is more auxiliary as a helpful (but not indispensable) tool for its development.

Good faith is a vast topic in all the selected jurisdictions with far-reaching impact in different areas of each legal system.¹⁰⁴³ Because the interest of this thesis in good faith only relates to its role in justifying liability for breaking off negotiations, the discussion that follows is not meant to be a study on good faith in general but only in its application to this liability.

1 The notion and dimensions of good faith

Although good faith is a concept which is difficult if not impossible to define in the abstract, it can be given a concrete content in different types of situations. However, some initial clarifications must be made before attempting to establish its meaning regarding liability for breaking off negotiations.

¹⁰⁴³ For an analysis of good faith in the contract law of the selected jurisdictions, Werner F Ebke and Bettina M Steinhauer, 'The Doctrine of Good Faith in German Contract Law' in Jack Beatson and Daniel Friedmann (eds), *Good Faith and Fault in Contract Law* (Clarendon Press 1995); Jourdain (n 324); López Santa María (n 792).

First, there are differences in the terminology for conceptually characterising good faith, for instance, as a (general) principle, a general clause, a rule, a norm, a standard. It has been correctly argued that these differences in theoretical conception are not very relevant.¹⁰⁴⁴ Indeed, the terminology is often not used consistently within and among the legal systems and, to some extent, all these terms can be used interchangeably in a legal system that has a general recognition of good faith. In the selected jurisdictions good faith is viewed as a general principle of contract law that governs all the stages of a contract (including its negotiation and formation), despite the fact that in most of them the legal recognition of good faith is expressed in limited terms.¹⁰⁴⁵ The legal norms that codify good faith have a distinctive feature in that they do not establish the facts to which they apply nor the effects that they produce.¹⁰⁴⁶ The content of these general or ‘open’ norms or clauses must be established by the courts through a process of ‘concretisation’ which is highly dependent on the circumstances of the case.¹⁰⁴⁷

The selected jurisdictions have a similar process of concretisation in that it involves an objective materialization of the abstract principle of good faith in the concrete case; the courts are not allowed to act arbitrarily and cannot rule based on personal or subjective beliefs or opinions. The process, however, is not identical: in Germany the approach is more inductive, whereas in France (and Chile) it is more deductive.¹⁰⁴⁸ In Germany, the courts have developed the law through the use of the

¹⁰⁴⁴ Hesselink (n 232) 622-623.

¹⁰⁴⁵ §242 BGB (n 211) and art 1546 CCivCh (p 158 above). This used to be the case in France before the 2016 reform, which introduced new art 1104 Cciv (text to n 512).

¹⁰⁴⁶ Hesselink (n 232) 622, thus, argues that they are not properly rules. New art 1112 Cciv (p 67 above) would be an exception.

¹⁰⁴⁷ Hesselink (n 232) 623-624; Jaluzot (n 92) 488ff.

¹⁰⁴⁸ Hesselink (n 232) 624.

general clause of good faith,¹⁰⁴⁹ and legal scholars have developed methods for analysing the decisions of the courts in a rational and objective manner, distinguishing the functions of good faith, identifying certain typical circumstances and establishing groups of cases where good faith has been applied (*Fallgruppen*),¹⁰⁵⁰ and one of these groups is formed by *cic* cases. In France and Chile, the use of good faith as a tool to develop the law has been much more recent and more restricted than in Germany,¹⁰⁵¹ but legal scholars have deduced from the general principle of good faith different duties that emanate from it, and have identified concrete manifestations of good faith, such as cases of precontractual liability, building a system into which the decisions of the courts are later inserted.¹⁰⁵²

Secondly, a primary distinction must be made between two dimensions of good faith: objective and subjective.¹⁰⁵³ Objective good faith refers to a standard of conduct that is required or expected from an individual, it ‘evokes ideas of rectitude, correction and loyalty’.¹⁰⁵⁴ It is a rule of behaviour that gives rise to objective standards, requiring parties to behave according to the requirements of good faith and

¹⁰⁴⁹ Whittaker and Zimmermann, ‘Surveying’ (n 207) 22ff.

¹⁰⁵⁰ Hesselink (n 232) 623; Whittaker and Zimmermann, ‘Surveying’ (n 207) 23.

¹⁰⁵¹ For France, Whittaker and Zimmermann, ‘Surveying’ (n 207) 34ff; for Chile, López Santa María (n 792) 351-352.

¹⁰⁵² Hesselink (n 232) 624; López Santa María (n 792) 347ff; Barros Bourie, *Responsabilidad Extracontractual* (n 61) 1001.

¹⁰⁵³ Some argue for a unitary notion of good faith, eg, Daniel Peñailillo Arévalo, *Obligaciones: Teoría General y Clasificaciones, La Resolución por Incumplimiento* (Editorial Jurídica de Chile 2003) 52; Francisco Javier Saavedra, ‘El Principio General de la Buena Fe’ in Fundación Fueyo (ed), *Instituciones Modernas de Derecho Civil: Homenaje al Profesor Fernando Fueyo Laneri* (Editorial Jurídica ConoSur 1996) 366. For a law-and-economics analysis considering subjective good faith as justifiable ignorance and objective good faith as not taking advantage, and viewing the arbitrary breaking-off of lengthy negotiations as an example of *ex-ante* opportunism, Ejan Mackaay, ‘Good Faith in Civil Law Systems: A Legal-Economic Analysis’ (2012) 18 *Revista Chilena de Derecho Privado* 149, 164-165; Ejan Mackaay, ‘Good Faith in Civil Law Systems: A Legal-Economic Analysis’ (2011) 74 *Cirano-Scientific Series* 1.

¹⁰⁵⁴ López Santa María (n 792) 340.

fair dealing.¹⁰⁵⁵ Subjective good faith refers to a psychological state of mind of not knowing of a certain fact or believing to be acting correctly or in accordance with the law (even if this is not the case).¹⁰⁵⁶ While subjective good faith is very relevant in other areas of the law, it is objective good faith which is primarily relevant for contract law.¹⁰⁵⁷ The good faith norms codified in the selected jurisdictions refer to objective good faith: to an objective standard of conduct that is required of contracting parties.¹⁰⁵⁸ Given that these norms also apply to the precontractual stage, this objective standard of conduct is also required of negotiating parties.¹⁰⁵⁹

Contractual (and precontractual) good faith can be considered to be a moral standard,¹⁰⁶⁰ but it corresponds to a ‘morality of duty’ as opposed to a ‘morality of aspiration’;¹⁰⁶¹ the objective of a morality of duty being ‘not to make of a person a saint or hero, but a citizen who fulfils the basic requirements of social life’.¹⁰⁶² Good faith is a normative concept that contains a generic reference to normative ideas spontaneously shared in society about what is right.¹⁰⁶³ Objective good faith is a flexible legal rule or a standard: instead of providing a rigid solution, it allows for a flexible parameter that must be concretised in each case by the judgment, prudence

¹⁰⁵⁵ Matthias E Storme, ‘Good Faith and Contents of Contracts in European Private Law’ in Santiago Espiau Espiau and Antoni Vaquer Aloy (eds), *Bases de un Derecho Contractual Europeo* (Tirant Lo Blanch 2003) 20.

¹⁰⁵⁶ Hesselink (n 232) 619; López Santa María (n 792) 340; Jourdain (n 324) 121.

¹⁰⁵⁷ Hesselink (n 232) 619; López Santa María (n 792) 343.

¹⁰⁵⁸ Hesselink (n 232) 619-620.

¹⁰⁵⁹ Text to (nn 214, 512, 513, 832).

¹⁰⁶⁰ Hesselink (n 232) 621; Jourdain (n 324) 121; Fueyo Laneri (n 816) 146.

¹⁰⁶¹ López Santa María (n 792) 345.

¹⁰⁶² Enrique Barros, ‘Derecho y Moral: Consideraciones A Propósito de la Teoría de los Delitos Económicos’ (1983) 10 Estudios Públicos 1, 13, developing on the notions formulated by Lon Fuller, *The Morality of Law* (Rev edn, Yale University Press 1969) 5ff.

¹⁰⁶³ Barros Bourie, *Responsabilidad Extracontractual* (n 61) 629-630.

and wisdom of the judge; therefore, it can take an empirically variable content but has a basic and fixed unity of meaning that must be obeyed by the judge.¹⁰⁶⁴

Precontractual good faith is a standard of conduct which requires negotiating parties to act in accordance with good faith. Different legal systems vary between requiring the promotion of good faith conduct or only the avoidance of bad faith conduct.¹⁰⁶⁵ German and Chilean law seem closer to the first model, while French law seems closer to the second (although this could change with the 2016 reform).¹⁰⁶⁶ Nevertheless, in cases of liability for breaking off negotiations they are able to reach a similar degree of protection.¹⁰⁶⁷ A further clarification must be made as to what is meant by ‘bad faith’.¹⁰⁶⁸ This terminology presents the difficulty of having a subjective and an objective sense. Subjectively, bad faith is understood as dishonesty in mind or intention to harm.¹⁰⁶⁹ Subjective bad faith is present in some precontractual liability cases, particularly those of ‘sham negotiations’.¹⁰⁷⁰ It can also be understood as ‘the opposite of good faith in the subjective meaning, indicating knowledge of what is not to be done and equally is done’.¹⁰⁷¹ Objective bad faith refers to acting in a manner contrary to good faith or not acting in good faith. For instance, one negotiating party should not make the other party’s position worse by behaving in an

¹⁰⁶⁴ López Santa María (n 792) 343.

¹⁰⁶⁵ Sjef van Erp, ‘A European "Culpa in Contrahendo" Doctrine? Towards a Model of Contract as a Legal Relationship and Situation-Specific Duties to Inform’ in Santiago Espiau Espiau and Antoni Vaquer Aloy (eds), *Bases de un Derecho Contractual Europeo* (Tirant Lo Blanch 2003) 74.

¹⁰⁶⁶ Text to (nn 214, 832, 539).

¹⁰⁶⁷ This ch s IV 1 (a) below.

¹⁰⁶⁸ In France, p 78-79 above. For a discussion of ‘bad faith’ in negotiations in the PICC, Isabel Zuloaga Ríos, ‘Article 2.1.15’ in Stefan Vogenauer (ed), *Commentary on the UNIDROIT Principles of International Commercial Contracts (PICC)* (2nd edn, OUP 2015) 351-354.

¹⁰⁶⁹ Storme (n 1055) 20; Whittaker and Zimmermann, ‘Coming to Terms’ (n 205) 691.

¹⁰⁷⁰ Text to (n 7).

¹⁰⁷¹ Castronovo (n 103) 233 fn 24.

unreasonable way or without any legitimate interest.¹⁰⁷² The objective meaning of precontractual bad faith is the relevant one in the paradigm case.

Consequently, the notion which needs to be given concrete meaning in the breaking-off of negotiations is ‘objective precontractual good faith (or bad faith)’. The standard of conduct required of precontractual parties is to behave honestly, correctly and loyally; to have regard for the other party’s interests, which does not mean denying or forgoing one’s own interests.¹⁰⁷³ Legal scholars have identified and classified and courts have applied different precontractual duties that are seen to emanate from the principle of good faith.¹⁰⁷⁴ These precontractual duties have been linked to different subgroups of precontractual liability: duties of information or disclosure are linked to cases of precontractual liability where a (valid or invalid) contract was concluded, duties of confidentiality to precontractual liability for disclosure or misuse of confidential information, and duties of loyalty and not to behave inconsistently to precontractual liability for breaking off negotiations.¹⁰⁷⁵ With regard to duties of loyalty and to not behave inconsistently, it is required that parties do not conduct themselves in a manner that creates legitimate expectations in the other party only for them to subsequently disappoint these expectations in an unjust manner.¹⁰⁷⁶

Precontractual duties have served the function of supplying an abstract standard of conduct with concrete content in the different scenarios of precontractual liability, particularly, in the breaking-off of negotiations. The courts are thus able to

¹⁰⁷² Whittaker and Zimmermann, ‘Coming to Terms’ (n 205) 692-693; eg, case 3 in Zimmermann and Whittaker (n 155).

¹⁰⁷³ Whittaker and Zimmermann, ‘Surveying’ (n 207) 31, 38.

¹⁰⁷⁴ Text to (nn 213, 520, 835).

¹⁰⁷⁵ Text to (nn 109, 526) and text following (n 836).

¹⁰⁷⁶ Text to (nn 221, 528) and text following (n 836).

objectively determine what type of conduct is contrary to that expected in the negotiation process in the concrete case, taking into account equity, usages and practices, and the requirements of society in general according to the model of a reasonable man.¹⁰⁷⁷

2 The relationship between good faith and reliance

In the selected jurisdictions it was seen that even if good faith is considered to be the basis of precontractual liability for breaking off negotiations, the notion of reliance is still present and, conversely, that even if reliance is considered to be the basis of this liability, the notion of good faith is still present.¹⁰⁷⁸ At least two relevant questions arise with regard to the relationship between good faith and reliance: how is this relationship structured? And can it be severed? The first question will be analysed here and the second in sub-section 3 below.

On the one hand, those who consider that good faith is the doctrinal basis of liability for breaking off negotiations recognise that reliance is a relevant element for establishing this liability.¹⁰⁷⁹ Therefore, it can be understood that cases of precontractual liability are analysed as cases of conduct contrary to good faith, where the expectation-based reliance induced by one party in the other is a relevant element for establishing the breach of a good faith duty and the ensuing liability for broken negotiations.¹⁰⁸⁰ On the other hand, those who consider that reliance is the doctrinal basis of this liability also generally recognise that it is linked (even if only

¹⁰⁷⁷ On the abstract assessment of objective good faith, as opposed to the concrete assessment of subjective good faith, López Santa María (n 792) 344. Also, Jourdain (n 324) 121.

¹⁰⁷⁸ pp 49, 106, 163 above.

¹⁰⁷⁹ (n 1078).

¹⁰⁸⁰ eg, the approach taken in *Ius Commune* (n 14) 376ff.

historically)¹⁰⁸¹ with the notion of good faith.¹⁰⁸² In this way, it can be understood that expectation-based reliance is seen as a particular manifestation of good faith, and that some see in bad faith conduct the fulfilment of the fault requirement of which reliance is part.¹⁰⁸³

At a more general level, in relation to the whole ‘life’ of the contract (including its negotiation and formation), the notions of good faith, reliance, trust, and expectation are frequently seen as being connected,¹⁰⁸⁴ with the border between these notions sometimes becoming blurred in the writings of legal scholars.¹⁰⁸⁵ Thus, it is stated that good faith is the basis of the trust that should inspire the conduct between contracting parties,¹⁰⁸⁶ that good faith establishes the protection of a certain degree of reliance in the conclusion of a valid and effective contract,¹⁰⁸⁷ that good faith implies and includes the protection of reasonable reliance,¹⁰⁸⁸ that acting in bad faith frustrates the justified expectations of another,¹⁰⁸⁹ and that good faith, in the exercise of discretionary contractual powers, manifests itself in the trust that one party places on the other and the loyalty that the latter should show to the former.¹⁰⁹⁰

¹⁰⁸¹ Particularly in Germany, text to (n 233).

¹⁰⁸² pp 106, 152 above.

¹⁰⁸³ Text to (nn 542, 854).

¹⁰⁸⁴ eg, Ana Quiñones Escámez, ‘Buena Fe y Lealtad Contractual’ in Sixto Sánchez Lorenzo (ed), *Derecho Contractual Comparado: Una Perspectiva Europea y Transnacional* (Thomson Reuters 2009) 356; Barros, ‘Derecho y Moral’ (n 1062) 21.

¹⁰⁸⁵ eg, Monsalve Caballero, ‘Comportamiento del Contratante’ (n 1002) 259, 270.

¹⁰⁸⁶ *ibid* 258.

¹⁰⁸⁷ Moura Vicente (n 73) 349.

¹⁰⁸⁸ Whittaker and Zimmermann, ‘Surveying’ (n 207) 31; Vladimir Monsalve Caballero, ‘La Buena Fe como Fundamento de los Deberes Precontractuales de Conducta: Una Doctrina Europea en Construcción’ (2008) 30 *Revista de Derecho* 30, 42.

¹⁰⁸⁹ Robert Summers, ‘“Good Faith” in General Contract Law and the Sales Provisions of the Uniform Commercial Code’ (1968) 54 *Virginia Law Review* 195, 263.

¹⁰⁹⁰ Javier Humberto Facco, ‘*Good Faith* en el Ejercicio de Poderes Contractuales Discrecionales (¿Un Punto de Contacto entre *Common Law* y *Civil Law*?)’ (2012) 22 *Revista de Derecho Privado* 149, 157.

This thesis suggests that in jurisdictions that acknowledge a general principle of good faith applying to the precontractual stage, such as the selected jurisdictions, expectation-based reliance can be considered to emanate from objective good faith, as a particular manifestation of it, because in these jurisdictions the notions of objective good faith and trust-based reliance are superimposed to such an extent that they become merged. Therefore, the relationship between good faith and reliance is twofold: on the one hand, there is a genus-to-species relationship between objective good faith and expectation-based reliance and, on the other hand, there is a fusion at the genus level between objective good faith and trust-based reliance. Thus, a negotiating party's reliance on an expectation of the future conclusion of the negotiated contract is a particular manifestation of the reliance and trust required to exist between negotiating parties, ie, of the good faith standard of conduct.

Nevertheless, some questions remain. Regarding jurisdictions that do not recognise a general principle of good faith, such as English law, can trust-based and expectation-based reliance exist and, if so, where do they emanate from? This will be analysed in Chapter VI section III 1 below. Regarding jurisdictions that do recognise a general principle of good faith, such as the selected jurisdictions, can the relationship between good faith and reliance in the breaking-off of negotiations be severed? This will be analysed below.

3 The need for good faith

The notion of good faith is generally thought to be intimately related to the doctrine of precontractual liability,¹⁰⁹¹ but it can be questioned whether good faith is truly an essential element of precontractual liability for breaking off negotiations, or whether

¹⁰⁹¹ Whittaker and Zimmermann, 'Coming to Terms' (n 205) 675-676.

this liability can be understood without resorting to good faith. This thesis argues for the latter conclusion.

Although the analysis of liability for breaking off negotiations has traditionally been framed in terms of good faith, the reality is that precontractual liability today functions very much independently from good faith.¹⁰⁹² In Germany, the doctrine of *cic* has gained not only doctrinal but also legal independence from good faith, and in Chile precontractual liability has been inserted into another legal basis (delictual liability) while retaining some degree of doctrinal independence from good faith.¹⁰⁹³ In France, with the 2016 reform, the new legal basis of this liability (art 1112 Cciv) establishes that the requirements of good faith must be satisfied, but, at the same time, maintains the fault requirement, and it has been suggested that it is likely that the courts will continue to focus on the configuration of fault (where the reliance element is found).¹⁰⁹⁴ Thus, in the selected jurisdictions, good faith is in the background¹⁰⁹⁵ because they accept a general principle of good faith that potentially serves as a ‘blanket’ that covers the doctrine of precontractual liability,¹⁰⁹⁶ but the latter, in its actual implementation and functioning, is very much independent from the first.

This phenomenon is clearest in Germany, where the relationship between good faith and the doctrine of *cic* is essentially historical.¹⁰⁹⁷ The general good faith

¹⁰⁹² Hesselink (n 232) 647.

¹⁰⁹³ Text to (n 232); p 165 above.

¹⁰⁹⁴ p 108 above.

¹⁰⁹⁵ van Erp (n 1065) 72.

¹⁰⁹⁶ E Allan Farnsworth, ‘Duties of Good Faith and Fair Dealing under the UNIDROIT Principles, Relevant International Conventions, and National Laws’ (1995) 3 *Tulane Journal of International and Comparative Law* 47, 60, observes the ‘unsettling tendency to use the doctrine of good faith as a cloak with which to envelop other doctrines’.

¹⁰⁹⁷ (n 1081) above; Mackaay (n 1053) 159, 171.

clause (§242 BGB) served the function of supplementation of duties¹⁰⁹⁸ in the precontractual stage, defining the precontractual duties whose breach is remedied by *cic*. However, this function of good faith in relation to *cic* is no longer needed. Since the 2001 reform, precontractual duties have their own legal basis in §241(2) in relation to §311(2)(3) BGB¹⁰⁹⁹ and any development of these duties by the courts can be made on the basis of these paragraphs. Even before the reform, courts normally based the doctrine of *cic* and precontractual duties on §276 rather than on §242 BGB.¹¹⁰⁰ It is true that good faith can be used to provide additional support to any new development that the doctrine of *cic* might have in the future, but it is clear that this role is only auxiliary and in no way essential to the establishment of precontractual liability for breaking off negotiations.

In France, the relationship between good faith and precontractual liability can also be traced to its historical origins.¹¹⁰¹ It has been seen that good faith is not always present in the analysis of liability for broken negotiations (with the caveat that good faith has acquired express recognition with the 2016 reform), and that the good faith basis of this liability competes with other doctrinal bases.¹¹⁰² Even if the good faith analysis is accepted (on its own or coexisting with any of the other bases) it is necessary to assess the role that it plays in the configuration of this liability. An initial difficulty is found in the fact that the principle of good faith (now expressly recognised in article 1104 Cciv) is contractual and it is undisputed that this liability is

¹⁰⁹⁸ Hesselink (n 232) 624ff, 638ff.

¹⁰⁹⁹ Text to (n 102).

¹¹⁰⁰ Text to (n 229).

¹¹⁰¹ Text to (n 28).

¹¹⁰² p 107-108 above.

delictual.¹¹⁰³ Before the 2016 reform it seems that this did not give rise to concern as it was accepted that good faith can operate in a non-contractual scenario with the law of delict condemning a failure to act in good faith.¹¹⁰⁴ This view will most likely remain unaltered.

A more significant difficulty is whether there is any actual difference between an analysis of precontractual liability phrased in terms of breach of good faith or in terms of delictual fault. It is suggested that a breach of good faith analysis in the precontractual period is redundant as breaches of good faith (or bad faith) are absorbed by or confused with delictual fault.¹¹⁰⁵ Before the 2016 reform, it was recognised that the presence of a general principle of delictual liability which applies to faults committed during the negotiation period rendered the intervention of good faith ‘partially superfluous’.¹¹⁰⁶ It was also found that even if the courts noted a violation of good faith, it was generally sanctioned under another legal basis, such as abuse of rights, which made the existence of good faith very vague because it depended on other institutions of contract law.¹¹⁰⁷ With the 2016 reform now in force, unless there is a radical shift in the case law, it is likely that the situation will remain unchanged, ie, that doctrinally the notion of good faith plays a role in the precontractual stage, particularly in defining the precontractual duties that govern the

¹¹⁰³ Text to (nn 316, 512).

¹¹⁰⁴ Whittaker and Zimmermann, ‘Coming to Terms’ (n 205) 684; Jaluzot (n 92) 361, 540, argued, however, that the rule of good faith should be limited to its domain of origin: contracts.

¹¹⁰⁵ Text to (n 558); similarly, Jaluzot (n 92) 540.

¹¹⁰⁶ Jaluzot (n 92) 361.

¹¹⁰⁷ *ibid* 372.

conduct of negotiating parties,¹¹⁰⁸ while in practice the analysis is centred on finding delictual fault which absorbs breaches of good faith.¹¹⁰⁹

In Chile,¹¹¹⁰ the situation is similar to that in France before the 2016 reform. The good faith basis is only one among others that have been argued to be the doctrinal basis of precontractual liability for breaking off negotiations. The article on good faith in the CCivCh refers to contractual good faith, while this type of liability is considered to be of a delictual nature or at least that the delictual regime applies to it. However, it is also accepted that good faith is a general principle of law that can apply outside of contract and the importance of good faith as the legal basis for the construction of precontractual duties is traditionally highlighted. Nevertheless, the analysis of the courts usually centres on the establishment of fault and the breach of good faith is generally mentioned to reinforce the finding of liability.

Consequently, in all the selected jurisdictions the argument can be made that good faith is not needed as a basis for the imposition of precontractual liability for breaking off negotiations, mainly because it is no longer performing its supplementing function. This function has already been performed by good faith in relation to precontractual liability and, today, the latter has evolved to achieve a certain degree of legal and doctrinal independence from the former. Legal independence is complete in Germany since the 2001 reform. In Chile, there is legal independence in that the legal basis used for the imposition of liability for breaking off negotiations has been the articles on delictual liability rather than the article on contractual good faith. In France, with the 2016 reform, there is no legal independence as new articles 1112 and

¹¹⁰⁸ Text to (nn 520, 1114).

¹¹⁰⁹ p 108 above.

¹¹¹⁰ Ch IV s II 2.

1104 Cciv expressly subject negotiations to the requirements of good faith. Regarding doctrinal independence, it is clearest in Germany where it is accepted that *cic* for breaking off negotiations is a reliance-based liability. In France and Chile, although good faith is traditionally mentioned as the basis of this liability, the reliance approach is also present and seems to be gaining ground.

The same conclusion can be reached in terms of the requirements that must be met for a solution to be considered to be an application of the good faith principle.¹¹¹¹ While the first requirement (to positively conform to the open norm) is met by the doctrine of precontractual liability in the selected jurisdictions, the second requirement (to not already follow from another firmly established norm) is not. Therefore, even though precontractual liability can be traced back to good faith, good faith is not truly necessary to justify this liability as more specific legal bases are found in the paragraphs on *cic* (in Germany), in the articles on delictual liability (in France and Chile), and in new article 1112 Cciv which, although requires the observance of good faith, subjects liability to the presence of fault (in France).¹¹¹² At a theoretical level, the doctrines of *cic* (in Germany) and precontractual liability (in France and Chile) ‘do the job’¹¹¹³ of good faith.

Nevertheless, one should not jump to the conclusion that good faith is completely irrelevant regarding precontractual liability for breaking off negotiations in the selected jurisdictions. First, it will always have the potential function, although in a somewhat indirect manner, of furthering the development of the doctrine. Secondly, it serves the function of providing additional validity to solutions that,

¹¹¹¹ Requirements indicated by Storme (n 1055) 19.

¹¹¹² Storme (n 1055) 19, albeit not referring specifically to the doctrine of precontractual liability.

¹¹¹³ Zimmermann, *The Civilian Tradition* (n 17) 172.

although more directly based or entirely based on other legal provisions or on other doctrinal bases, can also be linked to the general good faith principle. Thirdly, in jurisdictions like the selected ones it is a commonplace to state that the objective standard of good faith gives rise to and defines the precontractual duties whose breach entails precontractual liability.¹¹¹⁴ Currently, this would be its most relevant and active role.

Thus, it is necessary to pay special attention to this third role. In principle, for a lawyer from a civil law background, it does not give rise to any concern; on the contrary, because the courts and legal scholars feel comfortable with the language of good faith and because it is accepted that good faith is a general principle of law that applies to the precontractual stage, there is no need to question this affirmation. Yet, if a deeper analysis is made, it can be seen that, in practice, the terminology of breach of good faith duties does not materially influence the configuration of precontractual liability. The use of this language served or perhaps still serves the purpose of giving legitimacy to the doctrine of precontractual liability, but does not in practice define the establishment of this liability.

In Germany, it has been pointed out that the idea of a special relationship of mutual trust similar to a contractual relationship¹¹¹⁵ has been used in a (failed) attempt to limit the field of application of good faith, in that only where this ‘special connection’ exists between two or more people does their conduct have to meet the standard of good faith, which is higher than the general standard that exists between strangers (the violation of which leads to tort liability).¹¹¹⁶ Hence, good faith served

¹¹¹⁴ eg, Monsalve Caballero, ‘Buena Fe’ (n 1088) 47; Castronovo (n 103) 232, 234.

¹¹¹⁵ Text to (n 81).

¹¹¹⁶ Hesselink (n 232) 635.

the purpose of providing a legal basis that justified the imposition of a higher standard of conduct than that required in the non-contractual sphere to parties involved in a precontractual relationship governed by the contractual regime. This precontractual relationship gives rise to precontractual duties which could be said to emanate from good faith; but, after the 2001 reform, it is clear that their proper legal basis is in the legal provisions on *cic* liability. Therefore, *cic* liability for broken negotiations can today be easily understood and implemented without resorting to good faith.

In France and Chile the conclusion is the same, although there are some differences with the analysis in German law. A difference between German and Chilean law is that the latter does not have an express legal provision establishing precontractual liability, and a difference between German and French and Chilean law is that in the latter two this liability is considered to be of a delictual nature or at least governed by the law of delict. The theoretical question which remains is whether the notion of ‘breach of good faith duties’ brings something different to what is essentially a delictual scenario. In other words, does good faith, when applied in a non-contractual sphere, give rise to duties that are different from the ones that can be considered to emanate from delict?

In theory, this should be the case. Good faith should impose on negotiating parties duties which are more stringent than the general duty of care that emanates from delict.¹¹¹⁷ After all, they are not strangers; they are involved in negotiations which, although not binding, bring them close together. This is the view held by those (particularly in Chile) who argue that precontractual liability is, in effect, a special

¹¹¹⁷ This seems to be the case in Dutch law where the stages of the negotiation process start from a delictual scenario progressing to a contract-like liability, see van Erp (n 1065) 71-72.

type of liability which belongs somewhere between delict and contract.¹¹¹⁸ It is also the view held by those who believe that liability for breaking off negotiations is (or should be) of a contractual nature.¹¹¹⁹ In this way, it seems that it is still relevant to phrase this liability in terms of breach of precontractual duties of good faith, as they would require a higher standard of conduct than the general duty not to harm others.

However, as has been stated, in France and Chile the courts place particular emphasis in the fault element, with the notion of breach of good faith duties (or bad faith) becoming engulfed by it.¹¹²⁰ Therefore, although a terminology of breach of good faith duties (or bad faith) might be present, the courts in essence operate under the guidance of the legal provisions on delictual liability. Going even further, it is suggested that phrasing precontractual liability for breaking off negotiations in terms of breach of good faith duties is not strictly necessary in Chilean law (the same could be said of French law before the 2016 reform), as the fulfilment of the requirements of delictual liability is enough for precontractual liability to be imposed. If the language of breach of good faith duties is used it is basically to reaffirm the conclusion already reached on the basis of delict.

In the words of Kötz, ‘good faith is mentioned only as an afterthought and only to embellish a judgment based on other grounds’.¹¹²¹ While he is referring in general to some German cases, the statement can also be applied to the other selected jurisdictions regarding precontractual liability for breaking off negotiations.

¹¹¹⁸ Text to (n 686).

¹¹¹⁹ eg, Castronovo (n 103) 234.

¹¹²⁰ Text to (n 1105) and text following (n 1110).

¹¹²¹ Kötz, ‘Good Faith’ (n 227) 250.

IV Reliance-based remedies

That reliance is at the heart of precontractual liability for broken negotiations is further evidenced by the remedy generally available not only in the selected jurisdictions but also in certain harmonising instruments of private law: damages for the reliance interest. The protection that this liability provides is not aimed at forcing the negotiating parties to enter into a contract that one or both of them do not want, nor is it aimed at putting the claimant in a position as if the negotiated contract had been concluded; it is aimed at providing relief for the loss suffered by the claimant who relied on an expectation of the future conclusion of the negotiated contract induced by the defendant. This is the rule, but there are nuances and exceptions that must be explored.

1 Protection of the reliance interest

It is necessary to make some terminological precisions. Regarding damages for breach of contract, a distinction is made between the reliance (or negative) interest and the expectation (or positive) interest. The protection of the reliance interest attempts to put the injured party into as good a position as he was in before the contract was made or in the position in which he would have been if the contract had never been made, whereas the protection of the expectation interest attempts to put the injured party into as good a position as he would have been if the contract had been performed.¹¹²² This distinction does not necessarily correspond to that which differentiates between ‘losses caused’ (*damnum emergens*) and ‘gains prevented’ (*lucrum cessans*) because

¹¹²² Edwin Peel and GH Treitel, *The Law of Contract* (14th edn, Sweet & Maxwell 2015) 7; L L Fuller and William R Perdue, ‘The Reliance Interest in Contract Damages: 1’ (1936) 46 Yale LJ 52, 54.

both the expectation interest and the reliance interest can, at least in theory, include losses caused and gains prevented.¹¹²³

When the notions of expectation interest and reliance interest are applied in cases of precontractual liability, recovery of the former gives the claimant the financial equivalent of what he would have had if a valid contract had been entered into, including the profit he would have made, whereas recovery of the latter attempts to put the claimant back into the position he would have been in if no negotiations had taken place.¹¹²⁴ Therefore, reliance damages seek to compensate the injured party for the losses suffered by acting in reliance on the expectation of the future conclusion of the negotiated contract, and they generally include the expenses incurred during negotiations in view of the future conclusion of the contract (such as legal and travel expenses, cost of preparatory studies, plans, publicity) and may include the lost opportunity to conclude an alternative contract with a third party.¹¹²⁵ These heads of loss, however, present some particularities.

(a) In the selected jurisdictions

Precontractual liability for broken negotiations gives rise to a claim in contract (in Germany) or in delict (in France and Chile) for damages compensating the losses suffered by the claimant. In all of them it is true that '[a] claim for pre-contractual liability is essentially one for detrimental reliance. The claimant has invested time and money in the expectation of a contract which has failed to materialise.'¹¹²⁶

¹¹²³ Fuller and Perdue (n 1122) 55-56.

¹¹²⁴ *Ius Commune* (n 14) 401.

¹¹²⁵ *ibid* 401.

¹¹²⁶ Giliker, *Pre-contractual* (n 356) 105; Giliker, 'Tort' (n 344) 970.

In Germany, Jhering's notion of the 'negative contractual interest' formulated in the framework of his theory of *cic*¹¹²⁷ today persists as the 'reliance interest' (*Vertrauensschaden*), which is the interest generally protected in the wider theory of *cic* developed after Jhering.¹¹²⁸ Hence, *cic* liability for breaking off negotiations generally translates into reliance damages,¹¹²⁹ which normally compensate expenses incurred in justified reliance on an expectation that the negotiated contract would definitely be concluded.¹¹³⁰ For expenses to be compensated, a causal connection between the aggrieved party's legitimate expectation and the expenditure incurred must exist,¹¹³¹ but in cases of 'sham negotiations' the total reliance loss must be compensated.¹¹³² Foregone opportunities may be recovered,¹¹³³ but proving that another contract would have been concluded and proving the content of such contract will likely present some difficulties.¹¹³⁴ In some cases where a person resigned from his employment in justified reliance on the success of negotiations for a new job, lost opportunities (the wages he would have received if he had not given up his current position) have been compensated.¹¹³⁵ Unlike some other *cic* liability groups of cases,¹¹³⁶ *cic* liability for breaking off negotiations is not capped by the value of the expectation interest.¹¹³⁷

¹¹²⁷ Text to (n 16).

¹¹²⁸ MUJ (n 61) 93-95; Lorenz and Vogelsang, case 1, in Cartwright and Hesselink (n 6) 36.

¹¹²⁹ eg, BGH 10 July 1970 (n 83).

¹¹³⁰ Lorenz and Vogelsang, case 1, in Cartwright and Hesselink (n 6) 36; *Ius Commune* (n 14) 408; eg, BGH 14 July 1967 (n 74).

¹¹³¹ eg, BGH 22 February 1989 (n 74).

¹¹³² Lorenz and Vogelsang, case 1, in Cartwright and Hesselink (n 6) 36.

¹¹³³ Dietrich (n 114) 178; Asúa (n 21) 71, 164.

¹¹³⁴ Asúa (n 21) 70 fn 185.

¹¹³⁵ eg, BAG, 7 June 1963, NJW 1963, 1843, JZ 1964, 324; *Ius Commune* (n 14) 408.

¹¹³⁶ eg, those in §§122, 179(2) BGB; p 33 above.

¹¹³⁷ *Ius Commune* (n 14) 408.

In France, the general principles of delictual liability apply to precontractual liability. Consequently, according to the principle of *réparation intégrale*, the harm suffered and the damages awarded should correspond.¹¹³⁸ Therefore, losses suffered should be fully compensated but they must meet the general requirements of being direct and certain.¹¹³⁹ Unlike German law and common law jurisdictions, most courts and jurists do not distinguish between the expectation and the reliance interest in the award of damages.¹¹⁴⁰ Nevertheless, both in theory and in practice, the extent of the compensation awarded in cases of precontractual liability for broken negotiations corresponds to the protection of reliance.¹¹⁴¹ The principle is to put the claimant into the position he would have been in if the negotiations had not taken place.¹¹⁴² Damages for the harm suffered by the aggrieved party (which must be caused by the other party's fault) can include negotiation fees and expenses,¹¹⁴³ loss of opportunity, *préjudice moral* (non-economic harm), and a residual category of various types of harm.¹¹⁴⁴

Regarding fees and expenses, a distinction is sometimes made between 'general costs' (those which are always incurred by negotiating with others in order to stay in business) and specific costs incurred in the negotiation, in order to affirm that the latter may be compensated while the former should not be.¹¹⁴⁵ Imprudently

¹¹³⁸ Deshayes and Maître, case 1, in Cartwright and Hesselink (n 6) 31.

¹¹³⁹ Chauvel (n 324) para 20; Deshayes and Maître, case 1, in Cartwright and Hesselink (n 6) 31.

¹¹⁴⁰ Whittaker and Zimmermann, 'Coming to Terms' (n 205) 664 fn 41.

¹¹⁴¹ Some speak of '*intérêt négatif*', eg, Chauvel (n 324) para 21; Stoffel-Munck, 'Note on Cass com 26 November 2003' (n 391); Deshayes, 'Note on Cass civ 28 June 2006' (n 397) 151; Bertrand Fages, 'Note on Cass civ 7 January 2009' RTDciv 2009, 113.

¹¹⁴² Fabre-Magnan (n 478) 271.

¹¹⁴³ eg, Cass com 18 January 2011 (n 416); Cass com 13 October 2009 (n 423); *Manoukian* (n 323).

¹¹⁴⁴ Deshayes and Maître, case 1, in Cartwright and Hesselink (n 6) 29-31.

¹¹⁴⁵ eg, Schmidt, 'Période Précontractuelle' (n 324) 550; Deshayes and Maître, case 1, in Cartwright and Hesselink (n 6) 30 fn 32.

incurred expenses should be excluded¹¹⁴⁶ and compensation may be limited when the expenses incurred remain useful for the aggrieved party.¹¹⁴⁷ Regarding lost opportunities, a distinction is made between the loss of a chance to conclude a replacement contract with another party and the loss of the chance of concluding and benefitting from the contract under negotiation.¹¹⁴⁸ After *Manoukian*,¹¹⁴⁹ reaffirmed by the case law¹¹⁵⁰ and now also by article 1112(2) Cciv,¹¹⁵¹ the latter cannot be compensated because there is no causation between the harm (lost chance to make profits from the contract under negotiation) and fault (circumstances which constitute fault in the exercise of the right to break off).¹¹⁵² These decisions and new article 1112(2) Cciv, however, do not affect the former, ie, it is still possible to compensate the loss of the chance of concluding a replacement contract with another party,¹¹⁵³ as long as the aggrieved party proves the existence of an interested third party and the seriousness of the chance of concluding a contract with that party.¹¹⁵⁴ In determining the value of the lost chance the court will calculate the probability of success of the

¹¹⁴⁶ Ghestin (n 316) 552.

¹¹⁴⁷ Stoffel-Munck, 'Les Pourparlers' (n 324) 8.

¹¹⁴⁸ Ghestin (n 316) 554; Chauvel (n 324) para 27-28; Deshayes and Maître, case 1, in Cartwright and Hesselink (n 6) 30.

¹¹⁴⁹ Cass com 26 November 2003 (n 323).

¹¹⁵⁰ (n 395).

¹¹⁵¹ According to *Rapport au Président* (n 313) 9. See text to (n 1194) below.

¹¹⁵² Stoffel-Munck, 'Note on Cass com 26 November 2003' (n 391); Cartwright, 'English Case Note' (n 426) 459; text to (n 396).

¹¹⁵³ eg, Fabre-Magnan (n 478) 271; Sénéchal (n 508) 353; Terré, Simler and Lequette (n 316) 203; Ghestin (n 316) 554; Deshayes, 'Rupture' (n 398); Deshayes, 'Note on Cass civ 28 June 2006' (n 397) 1511; Stoffel-Munck, 'Note on Cass com 26 November 2003' (n 391); Trébulle, 'Note on Cass com 26 November 2003' (n 392); Cartwright, 'English Case Note' (n 426) 460; Chauvel, 'Note on Cass com 7 April 1998' (n 357) para 18. This is recognised in the *Rapport au Président* (n 313) 9, when referring to the precontractual liability to which art 1112-1 can give rise. Also, Dondero (n 313) para 27.

¹¹⁵⁴ Schmidt-Szalewski, 'Note on Cass com 7 April 1998' (n 357); eg, CA Rennes 29 April 1992 (n 399).

replacement contract,¹¹⁵⁵ and will apply a reduction percentage to the expected benefit of this contract.¹¹⁵⁶

The actual amount of damages that will be awarded in a case of liability for broken negotiations is difficult to predict because a general feature of the quantification of damages in French law is that it is a matter of fact that belongs to the sovereign power of the *juges du fond*.¹¹⁵⁷ If contributory fault of the aggrieved party is established, its recovery may be reduced.¹¹⁵⁸

In Chile, like in France, the general principles of delictual liability (including the principle of *reparación integral*)¹¹⁵⁹ apply to precontractual liability. The objective is to place the claimant in the position he would have been in if the illicit act had not been committed.¹¹⁶⁰ Therefore, only losses which meet the general requirements of being direct and certain can be compensated.¹¹⁶¹ A distinction between the expectation and the reliance interest is usually not made, but some legal scholars, following the German terminology, refer to *interés de confianza* (reliance interest) or *interés negativo* (negative interest) in order to explain the protection granted by precontractual liability, as opposed to the positive interest.¹¹⁶² Sometimes the negative interest and the positive interest are, respectively, confused with the notions of *daño emergente* (losses caused) and *lucro cesante* (gains prevented),¹¹⁶³

¹¹⁵⁵ Giliker, *Pre-contractual* (n 356) 130; Schmidt-Szalewski, 'Note on Cass com 7 April 1998' (n 357); Cartwright and Hesselink (n 6) 62-63.

¹¹⁵⁶ Deshayes, 'Dommage Précontractuel' (n 393) para 20.

¹¹⁵⁷ Fabre-Magnan (n 478) 271; Cartwright and Hesselink (n 6) 475-476; Schmidt, 'Période Précontractuelle' (n 324) 554.

¹¹⁵⁸ Bell, Boyron and Whittaker (n 339) 306 fn 85; eg, Cass com 15 October 2002 (n 412).

¹¹⁵⁹ Text to (n 681).

¹¹⁶⁰ CS 29 December 2011 (n 673).

¹¹⁶¹ Barros Bourie, *Responsabilidad Extracontractual* (n 61) 236, 245.

¹¹⁶² Text to (n 766); eg, San Martín (n 907) 322; Rosende, *Algunas Consideraciones* (n 55) 77.

¹¹⁶³ The better view is that these notions should not be confused, Segura (n 750) 111.

and there are differences in the content that legal scholars give to *daño emergente* and *lucro cesante* in a precontractual setting.¹¹⁶⁴ However, both legal scholars and courts agree that compensation includes expenses and costs incurred, lost opportunities and *daño moral* (harm to non-pecuniary interests).¹¹⁶⁵ Regarding expenses, a distinction is sometimes made between ‘provoked’ and ‘spontaneous’ expenses in that only the former may be compensated.¹¹⁶⁶ Regarding lost opportunities, it seems that only the lost opportunity to enter into a replacement contract may be compensated.¹¹⁶⁷ There must be a causal relation between the losses suffered by the claimant and the *confianza* that has been created by the other party,¹¹⁶⁸ and it is said that the just measure of compensation must be found in this *confianza*.¹¹⁶⁹ The quantification of damages is a matter of fact that cannot be reviewed by the Supreme Court.¹¹⁷⁰

(b) In harmonising instruments

Although the efforts to harmonise European contract law currently seem to have come to a standstill or, at least, to have been considerably watered-down,¹¹⁷¹ it is important to highlight that different harmonising instruments of contract law or of the law of

¹¹⁶⁴ cf, San Martín (n 907) 323; Celedón and Silberman (n 673) 139-140; Barrientos, *Daños* (n 653) 65; Zuloaga Ríos, *Responsabilidad Precontractual* (n 686) 167-168; Rosende, *Algunas Consideraciones* (n 55) 77.

¹¹⁶⁵ eg, CS 12 April 2012 (n 734); CS 29 December 2011 (n 673); Barros Bourie, *Responsabilidad Extracontractual* (n 61) 1007; de la Maza (n 673) 156; Segura (n 750) 112-114.

¹¹⁶⁶ Rosende, *Algunas Consideraciones* (n 55) 67-68.

¹¹⁶⁷ Barros Bourie, *Responsabilidad Extracontractual* (n 61) 1007; CS 12 April 2012 (n 734); CA Antofagasta, 12 January 2008, *Castillo Carvajal con Codelco Norte División Chuquicamata* (ended by settlement, CS 7 December 2009).

¹¹⁶⁸ CS 29 December 2011 (n 673); de la Maza (n 673) 157; Segura (n 750) 112.

¹¹⁶⁹ de la Maza and Pizarro (n 673) 52.

¹¹⁷⁰ Alessandri Rodríguez, *Responsabilidad Extracontractual* (n 671) 417-418.

¹¹⁷¹ The Proposal for a Regulation of the European Parliament and of the Council on a Common European Sales Law COM(2011) 635 (CESL) was withdrawn on 16 December 2014 by the EU Commission, and on 9 December 2015 a Proposal for a Directive of the European Parliament and of the Council on certain aspects concerning contracts for the supply of digital content COM(2015) 634 was published.

obligations, both at a European and at an international level, and in accordance with the general trend in the selected jurisdictions, provide for the protection of the reliance interest in their treatment of liability for breaking off negotiations.

Among international instruments of harmonisation,¹¹⁷² the 2010 UNIDROIT Principles of International Commercial Contracts (PICC)¹¹⁷³ state in article 2.1.15:

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

The Official Comments place special emphasis on the justified reliance of the other party on the successful outcome of the negotiations caused by the conduct of the party breaking off, in order to determine when a party may no longer be free to break off negotiations abruptly and without justification.¹¹⁷⁴ Where liability arises, it is limited to the compensation of the losses caused to the other party and these include the expenses incurred in the negotiations and the lost opportunity to conclude another contract with a third person (the reliance or negative interest).¹¹⁷⁵ The aggrieved party may generally not recover the profit which would have resulted had the original contract been concluded (expectation or positive interest).¹¹⁷⁶ However, if the parties had expressly agreed on a duty to negotiate in good faith, the remedies for breach of

¹¹⁷² The 1980 UN Convention on Contracts for the International Sale of Goods (CISG) does not have an art like art 2.1.15 PICC and it is arguable whether precontractual liability for breaking off negotiations falls outside the scope of the Convention.

¹¹⁷³ Text of the Principles and Official Comments available at <http://www.unilex.info>. There is a new edition under preparation of the 2016 UNIDROIT PICC: <http://www.unidroit.org/work-in-progress-studies/current-studies/long-term-contracts>.

¹¹⁷⁴ (n 1173) Off Cmt 3 to art 2.1.15, 61.

¹¹⁷⁵ (n 1173) Off Cmt 2 to art 2.1.15, 60.

¹¹⁷⁶ (n 1173) Off Cmt 2 to art 2.1.15, 60.

contract are available to them and these include the right to performance¹¹⁷⁷ and, presumably, expectation damages.¹¹⁷⁸

Among the instruments of harmonisation of European¹¹⁷⁹ contract law or the law of obligations, prepared by different study groups, the Feasibility Study for a Future Instrument in European Contract Law of 3 May 2011 (FS), prepared by the Commission Expert Group on European Contract Law, stated:

Article 27: Negotiations contrary to good faith and fair dealing (1) A person is free to negotiate and is not liable for failure to reach an agreement. (2) A person who is engaged in negotiations has a duty to negotiate in accordance with good faith and fair dealing and not to break off negotiations contrary to good faith and fair dealing. This duty may not be excluded or limited by contract. (3) A person who is in breach of the duty is liable for any loss caused to the other party by the breach. (4) It is contrary to good faith and fair dealing, in particular, for a person to enter into or continue negotiations with no real intention of reaching an agreement with the other party.¹¹⁸⁰

However, in a revised version of 19 August 2011¹¹⁸¹ (which is the direct predecessor of the CESL) there is no article on liability for breaking off negotiations.¹¹⁸²

The Draft Common Frame of Reference (DCFR)¹¹⁸³ states in article II.-3:301:

¹¹⁷⁷ (n 1173) Off Cmt 2 to art 2.1.15, 60. In the 2016 PICC (n 1173), Off Cmt 2 will be amended and a new Cmt 3 ('Agreement to Negotiate in Good Faith') will be created, but these amendments will not substantially modify what has been stated above.

¹¹⁷⁸ Zuloaga Ríos, 'Article 2.1.15' (n 1068).

¹¹⁷⁹ In Latin America an academic group has prepared a draft of Latin American Principles of Contract Law which contains an art on precontractual liability: (n 668).

¹¹⁸⁰ Available in http://ec.europa.eu/justice/contract/files/feasibility_study_final.pdf.

¹¹⁸¹ Available in http://ec.europa.eu/justice/contract/files/feasibility-study_en.pdf.

¹¹⁸² Likewise, the CESL (n 1171) does not have a comparable provision, but it can be argued that precontractual liability may arise under it because art 2(1) CESL imposes on the parties a duty to act in accordance with good faith and fair dealing (breach of which is sanctioned under art 2(2) CESL) and this duty is considered also to apply to the precontractual stage, eg, Hans Schulte-Nölke in Reiner Schulze (ed) *Common European Sales Law (CESL): Commentary* (CH Beck, Hart 2012) 86-87, 90-91; Reiner Schulze and Fryderyk Zoll, *European Contract Law* (CHBECK, Hart, Nomos 2016) 147.

Negotiations contrary to good faith and fair dealing (1) A person is free to negotiate and is not liable for failure to reach an agreement. (2) A person who is engaged in negotiations has a duty to negotiate in accordance with good faith and fair dealing and not to break off negotiations contrary to good faith and fair dealing. This duty may not be excluded or limited by contract. (3) A person who is in breach of the duty is liable for any loss caused to the other party by the breach. (4) It is contrary to good faith and fair dealing, in particular, for a person to enter into or continue negotiations with no real intention of reaching an agreement with the other party.

The heads of damages correspond to the reliance interest and include losses (expenses incurred, work done and loss on transactions made in reliance on the expected contract) and, in some cases, may include loss of opportunities.¹¹⁸⁴ The aggrieved party cannot claim to be put in the position as if the contract had been concluded and the remedy of specific performance is not available as it is considered that it might be impracticable to try to enforce specifically a duty to negotiate in good faith.¹¹⁸⁵

The Acquis Principles (ACQP)¹¹⁸⁶ state in article 2:103:

Negotiations contrary to good faith (1) A party is free to negotiate and is not liable for failing to reach an agreement. (2) However, a party who has conducted or discontinued negotiations contrary to good faith is liable for loss caused to the other party. (3) In particular, a party acts contrary to good faith if it enters into or continues negotiations with no real intention of reaching an agreement.

This article should be interpreted not only according to the requirements of good faith (art 2:101 ACQP) but also according to the legitimate expectations of the

¹¹⁸³ Christian von Bar and Eric Clive (eds), *Principles, Definitions and Model Rules of European Private Law: Draft Common Frame of Reference (DCFR) Full Edition*, vol 1 (OUP 2010).

¹¹⁸⁴ DCFR (n 1183) art II.-3:301 Comment H.

¹¹⁸⁵ DCFR (n 1183) art II.-3:301 Comments C and H.

¹¹⁸⁶ Research Group on the Existing EC Private Law (Acquis Group), *Principles of the Existing EC Contract Law (Acquis Principles): Contract II General Provisions, Delivery of Goods, Package Travel and Payment Services* (Sellier 2009).

other party (art 2:102 ACQP).¹¹⁸⁷ Paragraph (2) establishes a liability for loss which arises especially where one party encourages the other to make irreversible investments in advance and go beyond the regular risks inherent in the business. The aggrieved party can claim compensation for all the expenses incurred or work done in reliance on the contract under negotiation (reliance damages) and, in some cases, even non-pecuniary damages may be compensated; but it cannot claim compensation for its loss of profit.¹¹⁸⁸

The *Principes Contractuels Communs* (PCC), prepared by the *Société de Législation Comparée* and *Association Henri Capitant*,¹¹⁸⁹ state in article 2:101:

Duty to Negotiate in Good Faith and Fair Dealing (1) Parties are free to initiate, continue and break off pre-contractual negotiations, provided they act in accordance with the requirements of good faith and fair dealing. The failure of pre-contractual negotiations can only give rise to liability if it is the consequence of a fault or actions contrary to good faith and fair dealing of either party. (2) A party who enters into or pursues pre-contractual negotiations without the intention of concluding a contract, does not respect the requirement to negotiate in accordance with good faith and fair dealing. (3) A party who breaks off pre-contractual negotiations for no legitimate reason, while the other party could legitimately believe that a contract would be concluded, acts contrary to the requirements of good faith and fair dealing.

Although this article does not expressly refer to the extent of liability for breaking off negotiations, it seems clear that the reliance element expressed in paragraph (3) protects the reliance interest.

The Principles of European Contract Law (PECL)¹¹⁹⁰ state in article 2:301:

¹¹⁸⁷ ACQP (n 1186) art 2:103 Commentary 2, 112.

¹¹⁸⁸ ACQP (n 1186) art 2:103 Commentary 3, 113.

¹¹⁸⁹ English version in Bénédicte Fauvarque-Cosson and Denis Mazeaud (eds), *European Contract Law, Materials for a Common Frame of Reference: Terminology, Guiding Principles, Model Rules* (Sellier 2008) 575.

¹¹⁹⁰ Ole Lando and Hugh Beale (eds), *Principles of European Contract Law: Parts I and II Combined and Revised* (Kluwer Law International 2000).

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

The losses for which the party breaking off is liable include expenses incurred, work done, loss on transactions made in reliance of the expected contract, and may include loss of opportunities (reliance damages). The aggrieved party cannot claim to be put into the position in which he would have been if the contract had been concluded (expectation damages).¹¹⁹¹

Finally, the Academy of European Private Lawyers European Contract Code (AEPL Code)¹¹⁹² states in article 6:

Obligation of good faith 1. Each of the parties is free to undertake negotiations with a view to concluding a contract without being held at all responsible if said contract is not drawn up, unless his behaviour is contrary to good faith. 2. To enter into or continue negotiations with no real intention of concluding a contract is contrary to good faith. 3. If in the course of negotiations the parties have already considered the essentials of the contract whose conclusion is predictable, either party who breaks off negotiations without justifiable grounds, having created reasonable confidence in the other, is acting contrary to good faith. 4. If the situations considered in the above paragraphs occur, the party who acted contrary to good faith shall be liable for the harm he has caused to the other party to the extent of the costs the latter had to incur while the contract was being negotiated. Loss of opportunities caused by the negotiations underway shall also be made good.

Paragraph 3 is particularly relevant because it uses the notion of ‘reasonable confidence’ as an element to trigger the liability of the party breaking off and then paragraph 4 lists the heads of damages protected by this liability, which correspond to the reliance interest.

¹¹⁹¹ PECL (n 1190) art 2:301 Comment G.

¹¹⁹² Text in Oliver Radley-Gardner and others, *Fundamental Texts on European Private Law* (Hart 2003).

2 Generally no protection of the expectation interest

The expectation interest is usually not protected by precontractual liability for broken negotiations in the selected jurisdictions. There are, however, some particular scenarios, both in the selected jurisdictions and in other jurisdictions, where expectation damages or even specific performance of the contract are granted.

(a) *Expectation damages*

Because negotiating parties are not under an obligation to enter into the negotiated contract, precontractual liability for broken negotiations does not give rise to expectation damages in the selected jurisdictions.¹¹⁹³ In France, new article 1112(2) Cciv expressly excludes the compensation of the loss of the benefits which were expected from the contract that was not concluded, and this is meant to exclude not only expectation damages but also the loss of the chance to obtain the benefits of this contract, as compensation of these losses would otherwise lead to indirectly giving effect to a contract that has not been concluded.¹¹⁹⁴

In Germany, however, there are some *cic* groups of cases where expectation damages have been awarded. Although these cases are not technically of ‘broken negotiations’ they are closely related to them. For instance, in the field of public bidding, the positive interest was compensated in a case where the claimant would have certainly been awarded the contract if the defendant had followed the correct tendering procedure.¹¹⁹⁵ Also, in a lack of formality case where the invalidity of the

¹¹⁹³ eg, in Germany, BGH 6 February 1969 (n 116); in France, Fabre-Magnan (n 478) 271; Violet (n 444); Chauvel (n 324) para 25; in Chile, CS 29 December 2011 (n 673); Barros Bourie, *Responsabilidad Extracontractual* (n 61) 1007-1008; Segura (n 750) 113.

¹¹⁹⁴ *Rapport au Président* (n 313) 9.

¹¹⁹⁵ BGH, 25 November 1992, NJW 1993, 520 (*Oolitic Stones*), English translation in *Ius Commune* (n 14) 407-408.

contract was harsh but not unbearable for the aggrieved party (the defendants), *cic* liability was imposed on the claimant, but with the peculiarity that the expectation interest was protected (monetary compensation that would enable the defendants to acquire a house of equivalent value).¹¹⁹⁶ This decision has been criticised because monetary compensation of the expectation interest is said to circumvent the form requirement, but it has also been pointed out that compensation of the reliance interest might have led to the same result if the reasoning is based on compensation of a lost opportunity: if the defendants had not relied on the contract with the claimant they would have probably bought another house which would have also risen in value.¹¹⁹⁷

In other jurisdictions, both from the civil law and common law,¹¹⁹⁸ sometimes expectation damages are awarded in cases of broken negotiations. In Dutch law, the *Hoge Raad* has distinguished three stages in the negotiation process, with the particularity that in the third stage breaking off is in itself unlawful because the parties are truly no longer free to break off and, consequently, expectation damages may be awarded.¹¹⁹⁹ The elements which in Dutch law give rise to the third stage and to the protection of the expectation interest (justified reliance on an expectation of the future conclusion of the contract),¹²⁰⁰ in the selected jurisdictions only give rise to the protection of the reliance interest.¹²⁰¹

¹¹⁹⁶ BGH 29 January 1965 (n 296); p 63 above.

¹¹⁹⁷ Faust and Wiese (n 110) 125; Asúa (n 21) 72-73, 164-165.

¹¹⁹⁸ For Australian law, see p 296 below.

¹¹⁹⁹ HR 18 June 1982 (*Plas v Valburg*), NJ 1983, 723, note Brunner, AA 32 (1983) 758, note van Schilfgaarde; English translation in *Ius Commune* (n 14) 404-406. The *Plas v Valburg* doctrine has been limited by HR 14 June 1996 (*De Ruiterij v Ruiterij*), NJ 1997, 481, note HJS. Also, Martijn Hesselink, case 1, in Cartwright and Hesselink (n 6) 46-50.

¹²⁰⁰ *Plas v Valburg* (n 1199).

¹²⁰¹ Hesselink, case 1, in Cartwright and Hesselink (n 6) 48.

(b) Specific performance

Precontractual liability for broken negotiations, in the selected jurisdictions, does not give rise to the remedy of specific performance, either in the form of an order to continue negotiations or in the form of an order to conclude the contract (or to consider the contract as concluded).¹²⁰² In Germany, however, in lack of formality cases (which technically belong to cases of *cic* for an invalid contract, but can be assimilated to cases of *cic* for broken negotiations) the remedy granted by the courts, applying the principle of *vcfp*, is normally specific performance of the invalid contract.¹²⁰³ It has already been noted that there is no distinct line of lack of formality cases in French law, and in Chilean law, in cases which could be labelled as such, the remedy granted has been reliance damages.¹²⁰⁴

In other jurisdictions,¹²⁰⁵ specific performance is sometimes available. In Dutch law, breaking off in the third stage of negotiations¹²⁰⁶ may lead to a court order to continue negotiations¹²⁰⁷ and, according to some scholars, may even lead to a court order to actually conclude the contract.¹²⁰⁸

V Conclusions

Expectation-based reliance is the true basis of precontractual liability for breaking off negotiations in the selected jurisdictions. It explains the essence of this liability, acting

¹²⁰² eg, in Germany, eg, BGH, 19 October 1960, LM §276 BGB (Fa) no 11, NJW 61, 169; in France, Jourdain (n 324) 131; Terré, Simler and Lequette (n 316) 203; Malaurie, Aynès and Stoffel-Munck (n 316) 269; Fabre-Magnan (n 478) 271; in Chile, Barrientos, *Daños* (n 653) 111; text to (n 927) regarding CS 22 November 2001 (n 742).

¹²⁰³ eg, BGH 27 October 1967 (n 206); text to (n 279).

¹²⁰⁴ Text following (nn 648, 949).

¹²⁰⁵ For Australian and English law, see text to (nn 1614, 1628), respectively.

¹²⁰⁶ Text to (n 1199).

¹²⁰⁷ eg, Gerechtshof Amsterdam 7 May 1987 (*De Ziener*), NJ 1988, 430, English translation in *Ius Commune* (n 14) 415-417. Also Hesselink, case 1, in Cartwright and Hesselink (n 6) 47.

¹²⁰⁸ van Schilfgaarde in note to *Plas v Valburg* (n 1199); *Ius Commune* (n 14) 417.

as its trigger and also as its measure. The protection of reliance is found not only in the remedies granted in the selected jurisdictions but also in those awarded in transnational or regional harmonising instruments. In the selected jurisdictions the objective standard of good faith can peacefully coexist with reliance and, furthermore, it can become merged with the trust dimension of reliance from which expectation-based reliance emanates. However, in these jurisdictions precontractual liability for broken negotiations is able to stand on its own and function without resorting to good faith.¹²⁰⁹ While this finding does not lead to any substantial changes in the selected jurisdictions, it is of particular relevance for jurisdictions that do not embrace good faith in the precontractual stage, as will be seen in the next chapter.

¹²⁰⁹

Regarding new arts 1104 and 1112 Cciv, see p 108 above.

**CHAPTER VI – POTENTIAL CONSEQUENCES OF THE RELIANCE
APPROACH IN PRECONTRACTUAL LIABILITY FOR BREAKING OFF
NEGOTIATIONS FOR ENGLISH LAW**

Following on from the findings of the previous chapter, it is necessary to analyse the impact that the reliance approach could have in English law's treatment of liability for breaking off negotiations, particularly in the paradigm case. The chapter will first analyse the current position of English law regarding the treatment and solutions it provides for situations that in the selected jurisdictions would be considered as falling under the label of 'precontractual liability'. The focus is on whether its piecemeal solutions protect the paradigm case (section I). The chapter will then look at the notion of good faith in the common law world, particularly at English law's rejection of good faith during negotiations. It will argue that from this rejection it does not necessarily follow that the notion of precontractual liability should be also rejected (section II). The chapter will finally argue that the notion of reliance is already present in the piecemeal solutions currently available in English law, and that if the obstacle of good faith were to be removed and the emphasis shifted to the notion of reliance, the idea of liability for breaking off negotiations might face less opposition, exploring how such a liability in the paradigm case could be implemented (section III).

I The current position of English law

Even though English law does not recognise precontractual liability as a general principle of liability,¹²¹⁰ it provides relief in certain factual situations that in the selected jurisdictions would fall under the general principle of precontractual liability.

¹²¹⁰ Cartwright, *Introduction* (n 7) 74.

These ‘particular reason[s] for imposing liability’¹²¹¹ can be referred to as ‘piecemeal solutions’¹²¹² that allow for the recovery of losses incurred or benefits unjustly received during the precontractual phase. However, it must be considered whether English law can achieve the same or similar results as the selected jurisdictions, albeit through different techniques and using a different language, in cases of precontractual liability.¹²¹³ It will be argued that in many cases it can but that in the paradigm case,¹²¹⁴ English law, as it currently stands, does not provide a remedy.

1 Estoppel

English law recognises different forms of estoppel,¹²¹⁵ but only two types are relevant for determining whether they could provide a solution in cases of broken negotiations: promissory estoppel and proprietary estoppel.

The limitations that currently define promissory estoppel in English law do not allow it to provide relief in a case of broken negotiations.¹²¹⁶ The elements of promissory estoppel are: (i) a clear and unequivocal promise, (ii) the promisee has altered his position in reliance upon the promise (to his detriment), (iii) it is inequitable for the promisor to go back on his promise, (iv) the doctrine is limited to the variation of an existing contract in the absence of fresh consideration, (v) it cannot act as a cause of action, (vi) its effect is generally suspensory not extinctive.¹²¹⁷

¹²¹¹ Cartwright, *Introduction* (n 7) 84.

¹²¹² Using the language of Bingham LJ in *Interfoto Picture Library Ltd v Stiletto Visual Programmes Ltd* [1989] QB 433 (CA).

¹²¹³ Cartwright, ‘Time for Review’ (n 6) 171.

¹²¹⁴ Defined in p 2 above.

¹²¹⁵ Ewan McKendrick, *Contract Law* (11th edn, Palgrave 2015) 89ff.

¹²¹⁶ John Cartwright, *Formation and Variation of Contracts: The Agreement, Formalities, Consideration and Promissory Estoppel* (Sweet & Maxwell 2014) 19.

¹²¹⁷ Ewan McKendrick, *Contract Law: Text, Cases, and Materials* (7th edn, OUP 2016) 221ff; Cartwright, *Introduction* (n 7) 147ff.

The first limitation is requirement (iv). Promissory estoppel operates in the context of variations of existing contracts where no fresh consideration has been provided.¹²¹⁸ This is clearly not the case in situations of broken negotiations where, by definition, no contract has been concluded. The second limitation is found in requirement (v), often expressed in the well-known maxim that promissory estoppel can act as a shield but not as a sword.¹²¹⁹ The fact that promissory estoppel does not create a new cause of action, ie, that it is not a source of obligations,¹²²⁰ bars the typical effect of precontractual liability for broken negotiations which is to give rise to a claim of damages for the losses caused. This leads to a third limitation found in the effects of promissory estoppel (vi). It normally only produces a temporary effect of suspending the contractual rights of one party, even though it can sometimes have the effect of varying the contract permanently.¹²²¹ These effects are not applicable to situations of broken negotiations. A further limitation is found in requirement (i) because promissory estoppel is designed to prevent a party from going back on its promise, which consists of a representation of that party's intention not to enforce his full contractual rights against the other party.¹²²² In cases of broken negotiations, a promise (understood as a 'representation as to future conduct':¹²²³ as to the intention to conclude in the future the negotiated contract) can be made, but it is not a requirement because a justified expectation of the future conclusion of the negotiated

¹²¹⁸ *Ajayi v RT Briscoe (Nigeria) Ltd* [1964] 1 WLR 1326 (PC) 1330; Cartwright, *Formation and Variation* (n 1216) 345.

¹²¹⁹ *Combe v Combe* [1951] 2 KB 215 (CA) 224 (Birkett LJ).

¹²²⁰ *Combe v Combe* (n 1219); *Baird Textile Holdings Ltd v Marks & Spencer plc* [2001] EWCA Civ 274, [2002] 1 All ER (Comm) 737.

¹²²¹ *Central London Property Trust Ltd v High Trees House Ltd* [1947] KB 130 (KB); Cartwright, *Formation and Variation* (n 1216) 356, 359; McKendrick, *Text, Cases, and Materials* (n 1217) 223-224.

¹²²² Cartwright, *Formation and Variation* (n 1216) 346; McKendrick, *Text, Cases, and Materials* (n 1217) 222.

¹²²³ Cartwright, *Introduction* (n 7) 144.

contract may arise or be encouraged by the general conduct of the party that later breaks off.¹²²⁴

Regarding proprietary estoppel, within the line of cases where the promisee relies to his detriment on the promise made by a landowner that he has or will be given an interest in land¹²²⁵ (the ‘promise-based’ strand according to some authors)¹²²⁶ it seems, at a first glance, that this type of estoppel could potentially provide a solution in a case of broken negotiations. It is reasonable to think that the elements of proprietary estoppel ((i) a representation or assurance made to the claimant relating to the acquisition of an interest in property, typically in land, (ii) reliance on the representation or assurance by the claimant, and (iii) detriment to the claimant in consequence of his (reasonable) reliance on the representation or assurance)¹²²⁷ might be met in a case where a landowner was negotiating with a prospective buyer the sale of real estate (or other disposition of an interest in land) and where the landowner made a representation or assurance to the prospective buyer that the sale (or other disposition of an interest in land) would be concluded and the prospective buyer relied on that representation or assurance to his detriment, by incurring expenses or doing works on the property in view of the future conclusion of the contract, and where the landowner later broke off the negotiations.

Following the distinction made in the selected jurisdictions, it will be analysed whether proprietary estoppel can provide relief in two categories of cases. The first category corresponds to cases that have been termed as ‘broken negotiations for the

¹²²⁴ p 199-200 above.

¹²²⁵ McKendrick, *Text, Cases, and Materials* (n 1217) 227.

¹²²⁶ eg, Ben McFarlane, *The Law of Proprietary Estoppel* (OUP 2014); Adam Shaw-Mellors, ‘Proprietary Estoppel and the Enforcement of Promises: *Motivate Publishing FZ LLC v Hello Ltd* [2015] EWHC 1554 (Ch)’ [2015] *Conveyancer and Property Lawyer* 529.

¹²²⁷ *Thorner v Major* [2009] UKHL 18, [2009] 1 WLR 776 [29] (Lord Walker); McKendrick, *Text, Cases, and Materials* (n 1217) 227.

conclusion of a formal contract (for the sale of real estate)'.¹²²⁸ The doctrine of proprietary estoppel, in theory, could be applied to such cases because in English law a contract for the sale or other disposition of an interest in land must fulfil certain formalities: it must be made in writing and must be signed by all the parties.¹²²⁹ In practice, however, one particular case (*Cobbe v Yeoman's Row Management Ltd*)¹²³⁰ presents some difficulties for concluding that proprietary estoppel could provide relief in such cases. While *Cobbe* could be considered as a 'lack of formality' case,¹²³¹ it seems more appropriate to classify it within the first category¹²³² because the negotiating parties had only reached an oral agreement in principle regarding the purchase of a property (that contained the agreed core terms but there still remained other terms to be agreed) and they both knew that this agreement was not a legally enforceable contract and that further negotiations would be required to conclude the formal contract.

In *Cobbe* the House of Lords found that the elements of proprietary estoppel were not present and that no estoppel had arisen. It held that there was no expectation of a 'certain interest in land' but that the claimant's expectation was that further negotiations would take place and would lead to the conclusion of the formal contract;¹²³³ his expectation was 'to get a contract'.¹²³⁴ And even if he had an expectation of a 'certain interest in land', it was contingent on the grant of planning permission, on the course of further negotiations and on the conclusion of a formal

¹²²⁸ Chs II, III and IV, s IV 1.

¹²²⁹ s 2(1) Law of Property (Miscellaneous Provisions) Act 1989.

¹²³⁰ [2008] UKHL 55, [2008] 1 WLR 1752.

¹²³¹ Category analysed in p 245ff below.

¹²³² Supporting this view, Cartwright, *Formation and Variation* (n 1216) 170.

¹²³³ *Cobbe* (n 1230) [18], [20]-[21] (Lord Scott).

¹²³⁴ *Cobbe* (n 1230) [87] (Lord Walker).

written contract.¹²³⁵ The uncertainty of the claimant's interest and the fact that the negotiations were 'subject to contract' (even if those words were not used because such a reservation is not needed in an oral agreement for the sale of land, which is by statute void)¹²³⁶ were also obstacles for the claimant to be justified in relying on the oral agreement and on the defendant's conduct.¹²³⁷ An additional obstacle seems to be the fact that the claimant was an 'experienced property developer'¹²³⁸ (which brings to mind the 'professional' quality of the parties taken into account in French law).¹²³⁹

The decision of the House of Lords in *Cobbe* makes it difficult to consider that proprietary estoppel could ever provide relief in a case of broken negotiations for the sale of real estate. It has been argued that this is due to the fact that the interest that the claimant will receive is frequently still subject to negotiation.¹²⁴⁰ And, consequently, that proprietary estoppel could only provide relief in very limited cases where all the essential elements were agreed, where it is clear what property interest is to be granted to the claimant, and where the claimant thought that the defendant was fully committed (for example, if the negotiations were subject to contract and the defendant had waived this reservation, or if the defendant had made other representations such as that the documents of the negotiated contract had been signed).¹²⁴¹ An example where such requirements were met is *JT Developments Ltd v Quinn* (the claimant's proprietary interest was clear and there was no reservation).¹²⁴²

¹²³⁵ *Cobbe* (n 1230) [21] (Lord Scott).

¹²³⁶ *Cobbe* (n 1230) [27] (Lord Scott).

¹²³⁷ *Ius Commune* (n 14) 394.

¹²³⁸ *Cobbe* (n 1230) [27] (Lord Scott), [71], [91] (Lord Walker); text to (n 1251) below.

¹²³⁹ p 112 above.

¹²⁴⁰ *Ius Commune* (n 14) 394.

¹²⁴¹ *ibid* 389, 395.

¹²⁴² (1991) 62 P & CR 33 (CA).

In an earlier case (*Crabb v Arun District Council*),¹²⁴³ where the acts of the defendants were so unequivocal that they justified the claimant's reliance,¹²⁴⁴ proprietary estoppel was also able to provide relief. However, it seems that even in cases such as these, proprietary estoppel could today be refused if the court, following *Cobbe*, considered that the claimant's expectation was not 'of a certain interest in land' but 'to get a contract'. Additionally, these proprietary estoppel cases do not correspond to the paradigm case.

The second category corresponds to cases that have been termed as of 'lack of formality'.¹²⁴⁵ Before *Cobbe*, proprietary estoppel could provide relief in such cases. In *Yaxley v Gotts*¹²⁴⁶ the Court of Appeal, relying on, among others, a report of the Law Commission entitled 'Formalities for Contracts for Sales etc of Land' (Law Com No 164, 1987) which proposed section 2 of the Law of Property (Miscellaneous Provisions) Act 1989, considered that giving effect to an agreement which did not comply with this section through proprietary estoppel would not necessarily undermine the policy of the 1989 Act.¹²⁴⁷ After *Cobbe*, however, there is some uncertainty as to whether proprietary estoppel can provide relief in these cases¹²⁴⁸ because in *Cobbe*¹²⁴⁹ the House of Lords 'cast doubt on whether the doctrine of proprietary estoppel should be allowed to avoid the formality requirements of section 2 of the 1989 Act'.¹²⁵⁰ Following from *Cobbe* it might be concluded that this doctrine

¹²⁴³ [1976] Ch 179 (CA).

¹²⁴⁴ Lord Walker's comment on *Crabb* (n 1243) in *Cobbe* (n 1230) [79]; Ralph Gibson LJ's comments on *Crabb* (n 1243) in *JT Developments* (n 1242) 49.

¹²⁴⁵ Chs II, III and IV, s IV 2; eg, case 11 in Cartwright and Hesselink (n 6) 311.

¹²⁴⁶ [2000] Ch 162 (CA).

¹²⁴⁷ *Yaxley* (n 1246) 190-191 (Beldam LJ); Cartwright, *Formation and Variation* (n 1216) 169.

¹²⁴⁸ *Ius Commune* (n 14) 227.

¹²⁴⁹ (n 1230) [29] (Lord Scott).

¹²⁵⁰ Cartwright, *Introduction* (n 7) 130.

will not apply in cases of experienced commercial parties who knew the formality requirements and did not follow them¹²⁵¹ or in cases where the parties intended to make a formal contract but have not yet done so.¹²⁵²

Nevertheless, a more radical suggestion by Lord Scott (which did not take account of *Yaxley*¹²⁵³ and which was an obiter dictum) that proprietary estoppel can never be used to ‘render enforceable an agreement that statute has declared to be void’¹²⁵⁴ has not generally been followed.¹²⁵⁵ Furthermore, in *Cobbe* Lord Walker did not think it necessary or appropriate to consider the issue of the statutory formality.¹²⁵⁶ It has also been argued that the rule of section 2 only regulates the requirements for a valid contract; therefore, it does not apply in cases where the claim is based on another doctrine that is capable of giving rise to rights such as proprietary estoppel.¹²⁵⁷ This is consistent with the view taken by three of the judges in the Australian case of *Waltons Stores (Interstate) Ltd v Maher* who rejected the argument that an estoppel claim would be barred by section 54A of the Conveyancing Act 1919 (New South Wales) which imposed formality requirements on a contract for the sale

¹²⁵¹ *Cobbe* (n 1230) [27] (Lord Scott), [71], [91] (Lord Walker); Cartwright, *Introduction* (n 7) 130.

¹²⁵² *Cobbe* (n 1230) [18] (Lord Scott); Cartwright, *Introduction* (n 7) 130.

¹²⁵³ (n 1246).

¹²⁵⁴ *Cobbe* (n 1230) [29].

¹²⁵⁵ eg, *Whittaker v Kinnear* [2011] EWHC 1479 (QB), [2011] 2 P & CR DG20 [28]-[30]; Cartwright, *Formation and Variation* (n 1216) 171; McFarlane, *Proprietary Estoppel* (n 1226) 390.

¹²⁵⁶ (n 1230) [93].

¹²⁵⁷ McFarlane, *Proprietary Estoppel* (n 1226) 355-356, 364-365, 374; Ben McFarlane, ‘Proprietary Estoppel and Failed Contractual Negotiations’ [2005] Conveyancer and Property Lawyer 501, 512-513. Similarly, Lord Neuberger of Abbotsbury, ‘The Stuffing of Minerva’s Owl? Taxonomy and Taxidermy in Equity’ [2009] CLJ 537, 546. In *Matchmove Ltd v Dowding* [2016] EWCA Civ 1233, the CA held that an oral agreement for the sale of land was enforceable under a constructive trust and that *Cobbe* did not prevent this (the trial judge had reasoned on the basis of both proprietary estoppel and constructive trust, but the appeal was based only on constructive trust).

or other disposition of land or of an interest in land.¹²⁵⁸ However, even if it remains possible for proprietary estoppel to provide relief in lack of formality cases, this category does not correspond to the paradigm case.

2 Tort

English law does not have a general principle of tort liability (like German law and unlike French and Chilean law), but recognises a number of distinct torts.¹²⁵⁹ A claim for damages in tort based on a party's 'pre-contractual fault' can only be brought by proof of an established tort.¹²⁶⁰ The relevant ones for providing a solution in cases of broken negotiations are the tort of deceit and the tort of negligence, as both can operate in situations where one negotiating party made a false statement (a misrepresentation) on which the other relied and where no contract was concluded.¹²⁶¹

The tort of deceit could provide a remedy in some cases of broken negotiations. This tort requires that (i) the defendant fraudulently (ii) made a false representation to the claimant (iii) with the intention that the latter act on it and (iv) he did act on it and suffered loss.¹²⁶² The claimant must establish fraud (i), ie, that the defendant knew that his statement was false, or did not believe in its truth, or was reckless about its truth without caring whether it be true or false.¹²⁶³ The false statement (ii) can be made orally, in writing or by conduct, and although the statement has to be of existing fact, a declaration of future intention may be treated as a

¹²⁵⁸ (1988) 164 CLR 387 (HCA) 408 (Mason CJ and Wilson J), 433 (Brennan J); McFarlane, *Proprietary Estoppel* (n 1226) 365.

¹²⁵⁹ *Ius Commune* (n 14) 96.

¹²⁶⁰ *Chitty* (n 61) 132.

¹²⁶¹ Cartwright, *Formation and Variation* (n 1216) 20-21.

¹²⁶² Cartwright, case 1, in Cartwright and Hesselink (n 6) 24.

¹²⁶³ *Derry v Peek* (1889) 14 App Cas 337 (HL).

representation of a present state of mind¹²⁶⁴ and, in this way, a fraudulent misrepresentation of one's own intention is actionable in deceit.¹²⁶⁵ The defendant must intend that the claimant act on the statement (iii)¹²⁶⁶ and the claimant must act on the statement suffering loss (iv);¹²⁶⁷ therefore, there must be a causal link between the claimant's reliance on the misrepresentation and the losses claimed.¹²⁶⁸

These requirements might be met in a case of 'sham negotiations'¹²⁶⁹ where the negotiating party who later broke off fraudulently made a false statement to the other party during the negotiations about his intention to conclude the contract, intending for the other party to act upon such a statement, and which induced the other party to incur expenses or pass on other business opportunities.¹²⁷⁰ In *Cobbe*, although a claim in deceit was not made, Lord Scott considered whether it might have provided relief limited to consequential losses.¹²⁷¹ This tort, however, presents two particular obstacles to be a useful solution for cases of broken negotiations. First, fraud is very difficult to prove in English law.¹²⁷² Secondly, the factual scenario required for a tort of deceit to operate does not correspond to the paradigm case.

The tort of negligence could, in theory, provide a remedy in some cases of broken negotiations. This tort can cover different types of conduct and different types

¹²⁶⁴ Simon Deakin, Angus Johnston and Basil Markesinis, *Markesinis and Deakin's Tort Law* (7th edn, OUP 2013) 466-467.

¹²⁶⁵ Cartwright, *Introduction* (n 7) 86; *Edgington v Fitzmaurice* (1885) 29 ChD 459 (CA).

¹²⁶⁶ *Peek v Gurney* (1873) LR 6 HL 377.

¹²⁶⁷ Deakin, Johnston and Markesinis (n 1264) 469.

¹²⁶⁸ Cartwright, *Formation and Variation* (n 1216) 22.

¹²⁶⁹ Text to (n 7).

¹²⁷⁰ Cartwright, case 1, in Cartwright and Hesselink (n 6) 24-25; Cartwright, *Formation and Variation* (n 1216) 22. These heads of damages correspond to the reliance interest generally protected in the selected jurisdictions: text to (n 1126).

¹²⁷¹ (n 1230) [38].

¹²⁷² McKendrick, *Contract law* (n 1215) 230; Giliker, *Pre-contractual* (n 356) 106.

of harm.¹²⁷³ The relevant category of negligence for the purposes of applying it in the precontractual context is liability for pure economic loss caused by a negligent misstatement.¹²⁷⁴ Following the principle established by the House of Lords in *Hedley Byrne & Co Ltd v Heller & Partners Ltd*¹²⁷⁵ a claimant may bring an action for pure economic loss if the defendant owed him a duty to take reasonable care in the provision of information or advice and failed to fulfil his duty of care causing loss to the claimant.¹²⁷⁶ In order to determine when such a duty arises, Lord Reid referred to ‘special relationships’ between the claimant and the defendant

where it is plain that the party seeking information or advice was trusting the other to exercise such a degree of care as the circumstances required, where it was reasonable for him to do that, and where the other gave the information or advice when he knew or ought to have known that the inquirer was relying on him.¹²⁷⁷

Lord Devlin held that the categories of special relationships which may give rise to a duty to take care include relationships which are ‘equivalent to contract’, meaning ‘where there is an assumption of responsibility in circumstances in which, but for the absence of consideration, there would be a contract’.¹²⁷⁸ The basis for the imposition of liability that has been drawn from this case is that of ‘assumption of responsibility’, ie, the fact that the defendant had assumed responsibility towards the claimant.¹²⁷⁹ In later cases it was made clear that it is not enough for it to be foreseeable that the claimant or someone else in the same position might rely on the

¹²⁷³ Cartwright, *Introduction* (n 7) 39.

¹²⁷⁴ Deakin, Johnston and Markesinis (n 1264) 143ff.

¹²⁷⁵ [1964] AC 465 (HL).

¹²⁷⁶ Cartwright, *Formation and Variation* (n 1216) 23.

¹²⁷⁷ *Hedley Byrne* (n 1275) 486.

¹²⁷⁸ *Hedley Byrne* (n 1275) 528-529.

¹²⁷⁹ *Chitty* (n 61) 171; *Ius Commune* (n 14) 101.

information provided by the defendant.¹²⁸⁰ Thus, in *Caparo Industries plc v Dickman*¹²⁸¹ a test of ‘known reliance’ was established.¹²⁸² Lord Oliver listed the key elements of the test for establishing the duty of care: that the defendant should have known the purposes for which his statement might be used; that the claimant was a person who he should have realised might use it for that purpose; and that the claimant would rely on it without taking independent advice.¹²⁸³ Too much importance should not be placed on distinguishing between the tests of ‘known reliance’ and ‘assumption of responsibility’, as it has been pointed out that in cases that fall under the direct authority of *Caparo* both tests are two sides of the same coin: it is possible to describe the defendant’s duty as based on the responsibility he has assumed towards the claimant by making a statement which he knows the claimant will probably rely on for a particular purpose.¹²⁸⁴ Also in *Caparo*, Lord Bridge formulated the three-stage test to determine whether a duty of care is owed: foreseeability of damage, a relationship of proximity, and that it would be ‘fair, just and reasonable’ to impose a duty on one party for the benefit of the other.¹²⁸⁵

Hedley Byrne is a case where the ‘contractual environment’ of a claim in the tort of negligence, found in the ‘special relationship’ between the parties ‘equivalent to contract’, was considered a ground for the imposition of a duty of care, rather than a reason for rejecting one.¹²⁸⁶ This ‘special relationship’ which gives rise to the duty of care evokes the special relationship that arises in German law by the mere opening

¹²⁸⁰ *Ius Commune* (n 14) 101.

¹²⁸¹ [1990] 2 AC 605 (HL).

¹²⁸² John Cartwright, *Misrepresentation, Mistake and Non-Disclosure* (4th edn, Sweet & Maxwell 2016) 205.

¹²⁸³ *Caparo* (n 1281) 638; Cartwright, *Misrepresentation* (n 1282) 195.

¹²⁸⁴ Cartwright, *Misrepresentation* (n 1282) 205.

¹²⁸⁵ (n 1281) 617-618.

¹²⁸⁶ *Chitty* (n 61) 169.

of negotiations which also imposes duties of care.¹²⁸⁷ In both legal systems it seems that the use of a ‘special relationship’ attempts to bring liability closer to contract, in that the existence of a contract or something similar to it justifies the existence of liability. However, there are important differences. First, in German law *cic* liability is subject to the contractual regime,¹²⁸⁸ while this specific head of liability in English law is tortious. Secondly, in English law the existence of a ‘special relationship’ as the central requirement for a duty of care to arise has sometimes been explained as summing up the idea that what matters is that the information or advice has been issued in a specific commercial or professional context.¹²⁸⁹ Finally, German law establishes an abstract and general obligation between negotiating parties from which more specific duties of care emanate,¹²⁹⁰ whereas there is no authority in English cases for the imposition of a general duty of care in tort between negotiating parties.¹²⁹¹

A duty of care can arise and the tort of negligence can apply in the context of negotiations where one party makes statements which are within his sphere of specialist knowledge or skill, and which reasonably induce the other party to trust him and to act on the basis of such statements,¹²⁹² and to enter into a contract (such as in *Esso Petroleum Co Ltd v Mardon*).¹²⁹³ But the tort of negligence has only limited

¹²⁸⁷ Text to (n 80).

¹²⁸⁸ Text to (n 70).

¹²⁸⁹ Deakin, Johnston and Markesinis (n 1264) 144.

¹²⁹⁰ Text to (nn 105, 108).

¹²⁹¹ John Cartwright, ‘Protecting Legitimate Expectations and Estoppel: English Law’ in Bénédicte Fauvarque-Cosson (ed), *La Confiance Légitime et L'Estoppel*, vol 4 (Société de Législation Comparée 2007) 330.

¹²⁹² Cartwright, *Introduction* (n 7) 85.

¹²⁹³ [1976] QB 801 (CA).

applicability in cases of broken negotiations (where no contract was entered into).¹²⁹⁴ Such a case was *Box v Midland Bank Ltd*¹²⁹⁵ where the High Court awarded damages for the losses suffered by the claimant due to his reliance on the negligent misstatement of a bank manager who assured him that the consent of the head office to his application for a loan was a mere formality. Although some writers pointed to this case as an example of the expansion of the law of tort for negligent misrepresentations to promises made during negotiations where a final contract was not concluded,¹²⁹⁶ others have pointed out that this case remains an isolated one.¹²⁹⁷ Nevertheless, another example may be found in *Walford v Miles*,¹²⁹⁸ a case of broken negotiations where no enforceable contract was entered into and which, ironically, seems to embody English law's rejection of precontractual liability.¹²⁹⁹ In *Walford* the House of Lords affirmed the decision of the Court of Appeal which upheld the judge's award of damages for 'negligent misrepresentation' for the costs incurred by the claimants (which included the costs of preparing a draft sale agreement).¹³⁰⁰

Despite this award in *Walford*, the general view is that tort liability for economic loss suffered by reliance on a statement which is shown to be wrong arises only within the confines of the *Hedley Byrne* principle and does not apply between parties negotiating for a prospective contract: they cannot have a right of action in tort if during negotiations something is said on which they rely and a contract does not

¹²⁹⁴ Cartwright, case 3, in Cartwright and Hesselink (n 6) 95.

¹²⁹⁵ [1979] 2 Lloyd's Rep 391 (Com Ct), [1981] 1 Lloyd's Rep 434 (CA).

¹²⁹⁶ eg, Cohen (n 60) 55.

¹²⁹⁷ Giliker, 'Tort' (n 344) 977.

¹²⁹⁸ [1992] 2 AC 128 (HL).

¹²⁹⁹ This ch s II 2 below.

¹³⁰⁰ (1991) 62 P & CR 410 (CA) 427-428 (Stocker LJ), 431-433 (Dillon LJ); text to (n 1407).

result.¹³⁰¹ Liability in negligence could be claimed by a person to whom inaccurate information was supplied, and who was thereby induced to refuse to conclude a contract and who suffered losses as a result of relying on the misrepresentation.¹³⁰² But this example does not correspond to the paradigm case.

Therefore, the tort of negligence, in its current state, does not protect the paradigm case. In fact, the tort of negligence for pure economic loss caused by a negligent misstatement differs from the paradigm case, in particular, and generally from broken negotiations cases in several ways. First, this tort only covers false or inaccurate information or advice cases, as the duty imposed is to take reasonable care in the provision of information or advice in favour of a person who relies on it for a foreseeable purpose,¹³⁰³ and the scope of the duty has not been extended to a more general duty to respect the other negotiating party's interests.¹³⁰⁴ This does not correspond to broken negotiations cases, where it is not necessary for liability to arise for one party to provide information or advice to the other, where liability can arise even if no false statements were made, and where statements are usually of intention,¹³⁰⁵ which are not covered by the tort of negligence.¹³⁰⁶ Secondly, a misrepresentation must have been believed by the claimant in order to give rise to a remedy,¹³⁰⁷ whereas in cases of broken negotiations it is not required that the claimant believed that the contract would be concluded but rather that it was reasonable for him

¹³⁰¹ Glidewell LJ in *Glen-Mor Fashions Ltd v Jaeger Company Shops Ltd* (CA, 20 November 1991), as cited by Deakin, Johnston and Markesinis (n 1264) 146.

¹³⁰² Cartwright, *Introduction* (n 7) 85-86.

¹³⁰³ *ibid* 85-86.

¹³⁰⁴ Cartwright, *Formation and Variation* (n 1216) 19.

¹³⁰⁵ p 199-200 above.

¹³⁰⁶ Cartwright, *Formation and Variation* (n 1216) 23 fn 83.

¹³⁰⁷ Cartwright, *Introduction* (n 7) 176.

to expect that that would be the case.¹³⁰⁸ Regarding broken negotiations, the issue is not about an induced mistake (as is the case in misrepresentations),¹³⁰⁹ but about disappointed legitimate expectations.¹³¹⁰ Thirdly, unlike *Hedley Byrne* type cases, in situations of liability for broken negotiations it is not the case that there would be a contract but for the absence of consideration, as not all essential elements of the contract under negotiation might have been agreed.¹³¹¹ Finally, the line of cases following *Hedley Byrne* do not correspond to the paradigm case, they rather correspond to German law cases of *cic* liability of the agent,¹³¹² or to cases of liability of third parties for negligently providing false information.¹³¹³

3 Contract and restitution

Some legal scholars emphasise that ‘the courts have been able to place not insignificant limits on the ability of parties to withdraw from negotiations without incurring any liability for doing so’ through the law of contract and the law of restitution.¹³¹⁴ These solutions, however, will be dealt with briefly as the factual scenarios that give rise to their application do not correspond to the paradigm case.

Regarding the law of contract, in some cases the courts have found that the negotiating parties have in fact concluded a contract,¹³¹⁵ although not the main negotiated contract but a subsidiary contract and that, consequently, they are

¹³⁰⁸ p 202 above.

¹³⁰⁹ Cartwright, *Introduction* (n 7) 177.

¹³¹⁰ Text to (n 1009).

¹³¹¹ Text to (nn 1036, 1278).

¹³¹² MUJ (n 61) 104.

¹³¹³ Barros Bourie, *Responsabilidad Extracontractual* (n 61) 1030-1031.

¹³¹⁴ McKendrick, *Text, Cases, and Materials* (n 1217) 6.

¹³¹⁵ *ibid* 7.

contractually liable.¹³¹⁶ In *Blackpool and Fylde Aero Club Ltd v Blackpool Borough Council*¹³¹⁷ the Court of Appeal upheld the claimant's claim for damages for breach of contract because, on the particular facts of the case, there was an implied contract to consider conforming tenders. Scholars seem to agree that the limited protection provided by tort in the precontractual period has led the courts to find solutions in the law of contract in deserving cases. Some categorically state that in the framing of liability for disappointed precontractual expectations the only and rare protection offered by English law is the device of a collateral contract, such as the one in *Blackpool*,¹³¹⁸ and others refer to 'an occasional temptation in the courts to resort to the law of contract to found a claim for damages' in situations of precontractual fault.¹³¹⁹

During the negotiation of a contract, negotiating parties might enter into different forms of preliminary agreements in order to regulate some aspects of their negotiations.¹³²⁰ Their enforceability varies in English law. If they are considered to be binding, liability for breach of contract will arise. One type of agreement which is contractually binding is a 'lock-out' agreement (not to enter into a contract with a third party or not to negotiate with third parties) as long as it is supported by consideration and the 'lock-out' is for a defined or definable period of time.¹³²¹ Other agreements that can also be contractually binding are those that regulate which negotiating party will bear the cost of precontractual work done or expenses incurred

¹³¹⁶ Cartwright, *Introduction* (n 7) 86.

¹³¹⁷ [1990] 1 WLR 1195 (CA).

¹³¹⁸ Deakin, Johnston and Markesinis (n 1264) 146 fn 274.

¹³¹⁹ *Chitty* (n 61) 132. Similarly, McKendrick, *Text, Cases, and Materials* (n 1217) 7.

¹³²⁰ Cartwright, *Introduction* (n 7) 86.

¹³²¹ Cartwright, *Introduction* (n 7) 88; *Ius Commune* (n 14) 368. Eg, *Pitt v PHH Asset Management Ltd* [1994] 1 WLR 327 (CA). The lock-out agreement in *Walford* failed because it did not specify for how long it was to last, (n 1298) 139 (Lord Ackner).

in case the negotiations should fail.¹³²² Preliminary agreements that ‘lock-in’ the negotiating parties, such as agreements to agree and agreements to negotiate (in good faith) are held to be unenforceable for lack of certainty.¹³²³

During the negotiations an agreement could be reached in principle or could expressly be made ‘subject to contract’. The phrase ‘subject to contract’ (or similar) protects negotiating parties both from liability arising during the negotiations, as it means that each is free to withdraw at any time and that they know that pending the conclusion of a binding contract any cost incurred in preparation for such contract is at their own risk,¹³²⁴ and also from being bound by contract until a later stage, because the agreement is subject to the preparation and signing of a formal contract.¹³²⁵ In *Walford*¹³²⁶ the negotiations for the sale of a company and property were ‘subject to contract’ and this, to some extent, explains the result of the case.¹³²⁷

A contractual analysis is not applicable in the paradigm case because the negotiating parties have not reached a level of agreement that could allow a court to find that the contract under negotiation was in fact concluded, and they have not concluded any collateral or preliminary agreement.

The law of restitution can provide a solution in cases where a negotiating party has done precontractual work or incurred precontractual expenses in view of the

¹³²² Cartwright, *Formation and Variation* (n 1216) 30; Cartwright, ‘Legitimate Expectations’ (n 1291) 331.

¹³²³ *Courtney & Fairbairn Ltd v Tolaini Brothers (Hotels) Ltd* [1975] 1 WLR 297 (CA); *Walford* (n 1298) 138; *Ius Commune* (n 14) 365, 388-389; Cartwright, *Formation and Variation* (n 1216) 13. For details, Edwin Peel, ‘Agreements to Negotiate in Good Faith’ in Andrew Burrows and Edwin Peel (eds), *Contract Formation and Parties* (OUP 2010).

¹³²⁴ *Regalian Properties plc v London Docklands Development Corp* [1995] 1 WLR 212 (Ch) 231 (Rattee J).

¹³²⁵ Cartwright, *Introduction* (n 7) 79; *Ius Commune* (n 14) 359.

¹³²⁶ (n 1298).

¹³²⁷ *Chitty* (n 61) 287; analysed in s II 2 below.

contract under negotiation, at the request of the other party.¹³²⁸ In some cases of failed negotiations the courts have found that the negotiating parties concluded a contract regarding the work done,¹³²⁹ but in others they have provided a remedy in restitution on the basis that the defendant would otherwise be unjustly enriched at the claimant's expense.¹³³⁰ For example, in *William Lacey (Hounslow) Ltd v Davis*¹³³¹ a claim for payment on a *quantum meruit* basis succeeded for the performance of precontractual services at the defendant's request. In *Cobbe*,¹³³² although the proprietary estoppel claim failed,¹³³³ the House of Lords provided relief to the claimant by way of *quantum meruit* for his expenses and services in obtaining the planning permission. The amount of the *quantum meruit* represented the extent of the unjust enrichment for which the defendant company was held accountable.¹³³⁴ In *British Steel Corp v Cleveland Bridge and Engineering Co Ltd*¹³³⁵ the claimant's claim for payment on a *quantum meruit* basis succeeded for the accelerated performance of obligations to be imposed by the supply contract under negotiation, at the defendant's request. In *Regalian*,¹³³⁶ however, the claim in restitution failed not only because of the use of the words 'subject to contract',¹³³⁷ but also because the costs which the claimants sought to recover had resulted in no benefit to the defendant and had not been incurred by

¹³²⁸ Cartwright, *Introduction* (n 7) 92; eg, case 3 in Zimmermann and Whittaker (n 155) 236ff. Giliker, *Pre-contractual* (n 356) xxiv, focuses on the specific scenario of services undertaken in anticipation of a contract.

¹³²⁹ eg, *Brewer Street Investments Ltd v Barclays Woollen Co Ltd* [1954] 1 QB 428 (CA) (Somervell and Romer LJ).

¹³³⁰ Cartwright, *Formation and Variation* (n 1216) 37.

¹³³¹ [1957] 1 WLR 932 (QB).

¹³³² (n 1230).

¹³³³ p 243 above.

¹³³⁴ (n 1230) [42] (Lord Scott).

¹³³⁵ [1984] 1 All ER 504 (QB).

¹³³⁶ (n 1324).

¹³³⁷ p 256 above.

way of accelerated performance of an anticipated contract at the defendant's request, but for the purpose of the claimants putting themselves in a position to obtain and perform the contract.¹³³⁸

These restitution cases do not correspond to the paradigm case, where no preliminary work in anticipation of the contract has been done, at the request of the defendant. In the paradigm case there is no enrichment of the defendant at the expense of the claimant and this is fatal for a restitutionary claim.¹³³⁹ It has been pointed out that on the facts of *British Steel*¹³⁴⁰ there does not seem to have been any conduct which would give rise to precontractual liability in a continental court and that it was simply a case of no contract having ever been concluded.¹³⁴¹ Indeed, it seems that *British Steel* is not really a case of precontractual liability for broken negotiations because the elements of this liability are lacking, particularly that it appears that there was no unjustified breaking-off,¹³⁴² but simply that the parties failed to reach final agreement on the contract under negotiation. The same could perhaps be said about *Regalian*, where the negotiations broke down because the parties were unable to agree on the price and where there was truly no unilateral break-off.¹³⁴³

II Removing the obstacle of good faith

This section is not meant to be a comprehensive exposition of the notion of good faith in common law jurisdictions and particularly in English law. Rather, it explains why a

¹³³⁸ (n 1324) 216, 224, 225, 230 (Rattee J).

¹³³⁹ McKendrick, 'Work Done' (n 8) 172.

¹³⁴⁰ (n 1335).

¹³⁴¹ *Ius Commune* (n 14) 133.

¹³⁴² p 191 above.

¹³⁴³ (n 1324) 230 (Rattee J).

rejection of good faith in the precontractual period is seen as an obstacle to the acceptance of precontractual liability and argues that this should not be the case.

1 Good faith in the common law world

The acceptance of good faith in contract law in the common law world is not homogeneous. Some jurisdictions, such as the US and Australia, are situated on one side of the spectrum (the more liberal), while others, such as English law, are situated on the other side (the more conservative).

In the US, good faith in the performance and enforcement of contracts is recognised in the Restatement (Second) of Contracts (R2ndC) ('§205. Duty of Good Faith and Fair Dealing. Every contract imposes upon each party a duty of good faith and fair dealing in its performance and its enforcement')¹³⁴⁴ and in the Uniform Commercial Code (UCC) ('§1-304. Obligation of Good Faith. Every contract or duty within [the Uniform Commercial Code] imposes an obligation of good faith in its performance and enforcement').¹³⁴⁵ 'Good faith' is defined in §1-201(b)(20) UCC as 'honesty in fact and the observance of reasonable commercial standards of fair dealing'.¹³⁴⁶ This definition contains both a subjective and an objective element. These instruments, however, do not establish a good faith duty for the negotiation or the formation of a contract. Nevertheless, Comment (c) to §205 R2ndC recognises that bad faith in negotiations may be subject to sanctions¹³⁴⁷ and, indeed, the courts have provided some remedies for bad faith conduct during negotiations.¹³⁴⁸ Some

¹³⁴⁴ The American Law Institute, *Restatement of the Law Second: Contracts 2d*, vol 2 (American Law Institute Publishers 1981).

¹³⁴⁵ The American Law Institute and National Conference of Commissioners on Uniform State Laws, *Uniform Commercial Code* (2010-2011 edn, Thomson Reuters 2010).

¹³⁴⁶ (n 1345).

¹³⁴⁷ (n 1344) 100.

¹³⁴⁸ Text to (n 1600).

legal scholars are favourable to a requirement of good faith in negotiations in some specific instances,¹³⁴⁹ under the view that good faith should be understood as an ‘excluder’, with no general meaning of its own but excluding different forms of bad faith.¹³⁵⁰

In Australia there is considerable support from the courts and legal scholars for a requirement of good faith in contract law. It has been held that an agreement to negotiate in good faith may be enforceable and good faith in the performance of a contract has been seen in the general obligation to co-operate.¹³⁵¹ Some relief for improper conduct during the negotiations has been provided using the language of ‘unconscionability’.¹³⁵² Although ‘lack of good faith’ and ‘unconscionable conduct’ are held to be different standards of behaviour (unconscionable conduct will show a lack of good faith but the converse is not necessarily true),¹³⁵³ it is said that the language of unconscionability may not seem so very far removed from the principle of good faith known to civil law systems.¹³⁵⁴

Unlike the selected jurisdictions, the English law of contract does not recognise a general principle of good faith.¹³⁵⁵ And, unlike the other common law jurisdictions previously referred to, English law has taken a much more restrictive approach towards accepting a requirement of good faith between contracting parties.

¹³⁴⁹ Robert Summers, ‘The Conceptualisation of Good Faith in American Contract Law: A General Account’ in Reinhard Zimmermann and Simon Whittaker (eds), *Good Faith in European Contract Law* (CUP 2000) 121, 134, 136; Summers, ‘“Good Faith” in General Contract Law’ (n 1089) 220ff, 223, 225, providing as an example *Hoffman v Red Owl Stores Inc*, 26 Wis2d 683, 133 NW2d 267 (1965).

¹³⁵⁰ Summers, ‘“Good Faith” in General Contract Law’ (n 1089) 196.

¹³⁵¹ John W Carter, *Contract Law in Australia* (6th edn, LexisNexis Butterworths 2013) 23, 31-32, 99-100.

¹³⁵² eg, *Waltons Stores* (n 1258).

¹³⁵³ Carter (n 1351) 29.

¹³⁵⁴ Cartwright, *Introduction* (n 7) 83.

¹³⁵⁵ *Chitty* (n 61) 35.

It does not recognise a general duty to perform a contract in good faith, nor to exercise in good faith contractual rights, nor to renegotiate a contract in good faith, nor to negotiate a contract in good faith (this will be the focus of the next subsection).¹³⁵⁶

English contract law has not always been so resistant towards good faith. In a 1766 case Lord Mansfield referred to good faith in the formation of contracts.¹³⁵⁷ Although his view was later interpreted restrictively to apply only to duties of disclosure in contracts of insurance,¹³⁵⁸ it should not be denied that it reflected an element present in the sources of English commercial contract law.¹³⁵⁹ The position of the modern law of contract seems to be that ‘English law has, characteristically, committed itself to no such overriding principle [that in making and carrying out contracts parties should act in good faith] but has developed piecemeal solutions in response to demonstrated problems of unfairness’.¹³⁶⁰

In some types of contracts duties of good faith have been accepted both in their formation and performance.¹³⁶¹ At common law, parties to contracts of insurance owe each other duties of ‘the utmost good faith’ which impose on them extensive duties of disclosure, but this has been partly abrogated and amended by statute.¹³⁶² Contracts of partnership have been termed as ‘contracts of good faith’ meaning that negotiating parties owe each other duties of disclosure.¹³⁶³ In contracts arising from

¹³⁵⁶ Cartwright, *Introduction* (n 7) 64.

¹³⁵⁷ *Carter v Boehm* (1766) 3 Burr 1905, 1910.

¹³⁵⁸ Cartwright, ‘Time for Review’ (n 6) 159.

¹³⁵⁹ Whittaker and Zimmermann, ‘Surveying’ (n 207) 42.

¹³⁶⁰ *Interfoto* (n 1212) 439 (Bingham LJ).

¹³⁶¹ Cartwright, *Introduction* (n 7) 66.

¹³⁶² Consumer Insurance (Disclosure and Representations) Act 2012 and Insurance Act 2015; *Chitty* (n 61) 43.

¹³⁶³ *Chitty* (n 61) 43.

fiduciary relations, duties are imposed on one party to act other than in its own interest and these duties are sometimes put in terms of good faith.¹³⁶⁴ However, a good faith duty does not require one party to pursue the interests of the other at the expense of his own, like a fiduciary duty would require.¹³⁶⁵ In contracts of employment it has been accepted that a term is to be implied to the effect that the '[employer] [will] not, without reasonable and proper cause, conduct itself in a manner likely to destroy or seriously damage the relationship of confidence and trust between employer and employee'¹³⁶⁶ and the courts sometimes refer to this as an implied term requiring good faith and loyalty in both employer and employee.¹³⁶⁷ This relationship of confidence and trust seems similar to the relationship of trust created by negotiations in German law, in that they both entail duties of good faith and loyalty that require parties to consider the interests of the other but not to submit to them at the expense of their own.¹³⁶⁸

In a recent judgment at first instance Leggatt J argued that the traditional English hostility towards a doctrine of good faith in the performance of contracts is misplaced and that a duty to perform a contract in good faith could be implied as a term in fact in any ordinary commercial contract based on the presumed intention of the parties.¹³⁶⁹ In the context of the case, however, such a term was implied in a distribution agreement and it remains to be seen whether the courts will be willing to

¹³⁶⁴ *Chitty* (n 61) 43.

¹³⁶⁵ Roger Brownsword, 'Two Concepts of Good Faith' (1994) 7 *Journal of Contract Law* 197, 210. In the context of employment contracts, *Lonmar Global Risks Limited v West* [2010] EWHC 2878 (QB) [152] (Hickinbottom J).

¹³⁶⁶ *Malik v Bank of Credit and Commerce International SA* [1998] AC 20 (HL) 33-34 (Lord Nicholls).

¹³⁶⁷ *Chitty* (n 61) 52.

¹³⁶⁸ Text to (n 79).

¹³⁶⁹ *Yam Seng Pte Ltd v International Trade Corp Ltd* [2013] EWHC 111 (QB), [2013] 1 All ER (Comm) 1321, [131], [145], [153].

find that it can be implied in other types of contracts.¹³⁷⁰ In recent cases the courts have considered the proper approach to an express contractual term that requires the parties to act in good faith.¹³⁷¹ For instance, in a case before the Court of Appeal the interpretation of an express clause requiring the parties to cooperate with each other in good faith in a long-term contract to provide services was very much narrowed down.¹³⁷²

The notion of good faith entered into English law via EU legislation. A prominent example is the requirement of good faith in the test of unfair terms in consumer contracts under the Directive 93/13/EC on Unfair Terms in Consumer Contracts which was implemented into English law by the Unfair Terms in Consumer Contracts Regulations 1994 (SI 1994/3159), which were revoked and replaced by the UTCCR 1999 (SI 1999/2083), which, in turn, were revoked and replaced by the Consumer Rights Act 2015. The Act has kept the language of good faith in the fairness test (section 62(4) of Part 2). The courts did not experience particular difficulties in applying the objective criterion of good faith under the Regulations, recognising its European origin and not seeking to interpret it from a national perspective,¹³⁷³ and it is likely that this will continue to be the case under the Act.

It seems that for English law the main difficulty for recognising and applying the concept of good faith lies in identifying its meaning.¹³⁷⁴ The distinction between

¹³⁷⁰ Cartwright, *Introduction* (n 7) 67.

¹³⁷¹ *Chitty* (n 61) 46-49.

¹³⁷² *Mid Essex Hospital Services NHS Trust v Compass Group UK & Ireland Ltd* [2013] EWCA Civ 200, [2013] BLR 265 [106] (Jackson LJ), [154] (Beatson LJ); *Chitty* (n 61) 49.

¹³⁷³ McKendrick, *Text, Cases, and Materials* (n 1217) 463, 487; eg *Director General of Fair Trading v First National Bank Plc* [2001] UKHL 52, [2002] 1 AC 481, [36] (Lord Steyn).

¹³⁷⁴ Spectrum of possible meanings in Ewan McKendrick, 'The Meaning of "Good Faith"' in Mads Andenas and others (eds), *Liber Amicorum Guido Alpa: Private Law Beyond the National Systems* (British Institute of International and Comparative Law 2007).

subjective and objective good faith, which is clear in the selected jurisdictions,¹³⁷⁵ is not as clear in English law,¹³⁷⁶ and the fact that subjective good faith appears to be the relevant one instead of the objective standard of good faith, has had drastic consequences in the precontractual period.¹³⁷⁷ The courts have sometimes taken an incomplete and shifting view of what good faith means. In *Interfoto*, Bingham LJ defined good faith in terms that would be an acceptable approximation to its objective dimension for a civil lawyer:

(...) does not simply mean that they should not deceive each other, a principle which any legal system must recognise; its effect is perhaps most aptly conveyed by such metaphorical colloquialisms as ‘playing fair’, ‘coming clean’ or ‘putting one’s cards face upwards on the table.’ It is in essence a principle of fair and open dealing.¹³⁷⁸

But a crucial element of objective good faith was left out: that it is a standard of conduct. This aspect was recognised by Leggatt J in *Yam Seng*, where he stated that a key aspect of good faith is the observance of standards of commercial dealing and that the test of good faith is objective: although it is sensitive to the factual context, ‘it depends not on either party’s perception of whether particular conduct is improper but on whether in the particular context the conduct would be regarded as commercially unacceptable by reasonable and honest people’.¹³⁷⁹ In *Mid Essex Hospital Services*, however, Jackson LJ understood good faith only as acting honestly,¹³⁸⁰ which corresponds to English law’s subjective understanding of ‘good faith’ as absence of

¹³⁷⁵ p 208-209 above.

¹³⁷⁶ eg, Roy Goode, *The Concept of "Good Faith" in English Law* (Centro di studi e ricerche di diritto comparato e straniero 1992) 5-6.

¹³⁷⁷ p 267 below.

¹³⁷⁸ (n 1212) 439.

¹³⁷⁹ (n 1369) [138], [144].

¹³⁸⁰ (n 1372) [112].

dishonesty.¹³⁸¹ In *Petromec Inc v Petroleo Brasileiro SA Petrobras*¹³⁸² Longmore LJ brought bad faith close to fraud,¹³⁸³ whereas Leggatt J in *Yam Seng* recognised that not all bad faith conduct is dishonest.¹³⁸⁴ In the selected jurisdictions it is clear that bad faith can be understood not only subjectively (as dishonesty) but also objectively (acting in breach of good faith).¹³⁸⁵ Regarding the UTCCR, the House of Lords recognised that the requirement of good faith was an objective standard and in *First National Bank* equated it to a requirement of fair and open dealing.¹³⁸⁶ Lord Bingham indicated that good faith ‘looks to good standards of commercial morality and practice’ and Lord Steyn stated that ‘[a]ny purely procedural or even predominantly procedural interpretation of the requirement of good faith must be rejected.’¹³⁸⁷

2 English law’s rejection of a general duty to negotiate in good faith

Unlike the selected jurisdictions, English law does not recognise the notion of duties of good faith in the formation of contracts.¹³⁸⁸ Consequently, the notion of a duty to negotiate a contract in good faith has been rejected. However, there is some confusion between two separate issues which should be clearly distinguished: ‘the first issue’ is whether an agreement to negotiate (in good faith) which obliges the parties to engage in negotiations and to pursue them or to continue them is enforceable, and ‘the second issue’ is whether the conduct of negotiating parties during the negotiations is

¹³⁸¹ eg, *Director General of Fair Trading v First National Bank Plc* [2000] 1 WLR 98 (ChD) 109 (Evans-Lombe J).

¹³⁸² [2005] EWCA Civ 891, [2006] 1 Lloyd’s Rep 121.

¹³⁸³ (n 1382) [119].

¹³⁸⁴ (n 1369) [138].

¹³⁸⁵ p 210-211 above.

¹³⁸⁶ (n 1373) [17] (Lord Bingham), [36] (Lord Steyn).

¹³⁸⁷ *ibid.*

¹³⁸⁸ Cartwright, *Introduction* (n 7) 64; text to (n 1074).

regulated by duties (of good faith) even if no such agreement exists.¹³⁸⁹ Only the second issue is relevant in relation to the paradigm case.

The leading case that is cited to reject a duty to negotiate in good faith is *Walford v Miles*.¹³⁹⁰ It is suggested that this case only deals with the first issue, ie, with an implied or express contractual obligation that imposes a positive duty to (continue to) negotiate in good faith.¹³⁹¹ Nevertheless, on the basis of this case it has been understood that negotiating parties do not owe each other any duties of good faith which arise by virtue of the negotiations themselves;¹³⁹² ie, it has been extended to cover the second issue as well. In *Walford* an implied duty to continue to negotiate in good faith was rejected and even an express agreement to negotiate in good faith was considered too uncertain to be enforceable.¹³⁹³

There are two strands in Lord Ackner's reasoning, one is that the very content of a duty to negotiate in good faith is uncertain and the other is that the adversarial nature of the relationship between negotiating parties is inconsistent with such a duty.¹³⁹⁴ It is suggested that both arguments are unfounded. A duty to negotiate in good faith can work in practice despite the adversarial nature of the precontractual relationship. This is because objective good faith does not require a negotiating party

¹³⁸⁹ A distinction along these lines seems to be recognised by, eg, Johan Steyn, 'Contract Law: Fulfilling the Reasonable Expectations of Honest Men' (1997) 113 LQR 433, 439; Michael Furmston and GJ Tolhurst, *Contract Formation: Law and Practice* (OUP 2010) 370; JW Carter and MP Furmston, 'Good Faith and Fairness in the Negotiation of Contracts: Parts I and II' (1994) 8 Journal of Contract Law 1 and 93, 3-4; Clara Asúa, 'Negotiating in Good Faith and the Agreement to Negotiate (with Reference to the Decision of the House of Lords in the Case of *Walford v Miles*)' (1994) 2 ERPL 274, 281 fn 19.

¹³⁹⁰ (n 1298).

¹³⁹¹ Matthias Storme, 'Walfords Chances Under Belgian Law' (1994) 2 ERPL 315, 321, seems to interpret the case in this way.

¹³⁹² eg, Cartwright, *Introduction* (n 7) 75.

¹³⁹³ (n 1298) 138 (Lord Ackner); text to (n 1323).

¹³⁹⁴ (n 1298) 138; Cartwright, *Introduction* (n 7) 78; McKendrick, *Text, Cases, and Materials* (n 1217) 493.

to look after the interests of the other party or to subject its own interests to the interests of the other party (like a fiduciary duty would require);¹³⁹⁵ each party is always entitled to pursue its own interests but in doing so it must take account of or have regard to the legitimate interests of the other party.¹³⁹⁶ Furthermore, Lord Ackner envisaged only one possible model of negotiating: an antagonistic one, whereas, in practice, a spirit of cooperation is frequently present in commercial negotiations.¹³⁹⁷ As to the uncertainty of its content, this is simply not the case. Leggatt J in *Yam Seng* recognised that ‘[t]here is nothing unduly vague or unworkable’ about a duty of good faith.¹³⁹⁸ In the selected jurisdictions the courts have identified specific duties emanating from the general principle of good faith and are able to identify when the standard of conduct imposed by objective good faith has been breached.¹³⁹⁹

The most problematic assumption made in *Walford* is that the notion of good faith involved is a subjective one. It seems that the problem originated with the incorrect argument put forward by the claimant that the test to determine whether there was a proper reason to end the negotiations was a subjective one.¹⁴⁰⁰ Consequently, Lord Ackner questioned how a court could decide whether subjectively a proper reason existed.¹⁴⁰¹ The notion of good faith relevant here is an objective one,

¹³⁹⁵ Brownsword (n 1365) 212; McKendrick, ‘The Meaning of “Good Faith”’ (n 1374) 692; text to (n 1365).

¹³⁹⁶ This is recognised by, eg, Furmston and Tolhurst (1389) 372-373; Carter and Furmston (n 1389) 6-7; Hugh Beale, ‘Commentary on “Good Faith and Fairness in Failed Contract Negotiations”’ (1994) 8 *Journal of Contract Law* 120, 123; Brownsword (n 1365) 211; McKendrick, ‘The Meaning of “Good Faith”’ (n 1374) 693.

¹³⁹⁷ Beale, ‘Commentary’ (n 1396) 122.

¹³⁹⁸ (n 1369) [152]. Also, Steyn (n 1389) 439.

¹³⁹⁹ Text to (nn 1074, 1077).

¹⁴⁰⁰ (n 1298) 136.

¹⁴⁰¹ (n 1298) 138.

it is an objective standard of conduct and, as such, the courts in the selected jurisdictions have been able to identify which reasons for breaking off negotiations are reasonable or legitimate and which are not.¹⁴⁰²

Despite the criticism that *Walford* has received in England,¹⁴⁰³ in other common law jurisdictions,¹⁴⁰⁴ and in civil law jurisdictions,¹⁴⁰⁵ the actual outcome of the case appears to be ‘entirely appropriate on the facts’.¹⁴⁰⁶ The claimants were awarded an amount in respect of their wasted expenses as damages for the defendants’ misrepresentation that they would not go on negotiating with third parties (and not the much larger amount they were seeking as damages for breach of contract), even though the negotiations were subject to contract and the defendants may have had a good reason to break off.¹⁴⁰⁷ It has been noted that the Walfords would have probably lost their case before a German or French court¹⁴⁰⁸ (and also before a Chilean court). If a court in one of the selected jurisdictions were to consider that there was a good reason to break off, no liability would have been found, ie, not even expenses would have been recovered as the only interest that is usually protected is the reliance interest.¹⁴⁰⁹

¹⁴⁰² Ch V s I 3 (c). This is recognised by Cartwright, *Formation and Variation* (n 1216) 13 fn 23.

¹⁴⁰³ eg, Steyn (n 1389) 439; Alistair Mills and Rebecca Loveridge, ‘The Uncertain Future of *Walford v Miles*’ [2011] LMCLQ 528; Cohen (n 60) 52; Furmston and Tolhurst (1389) 400-402; Carter and Furmston (n 1389) 113-115; Beale, ‘Commentary’ (n 1396) 123; Brownsword (n 1365) 204-205; Ewan McKendrick, ‘Good Faith: A Matter of Principle?’ in ADM Forte (ed), *Good Faith in Contract and Property Law* (Hart Publishing 1999) 51-52.

¹⁴⁰⁴ eg, Ross Buckley, ‘Walford v Miles: False Certainty About Uncertainty - An Australian Perspective’ (1993) 6 Journal of Contract Law 58.

¹⁴⁰⁵ eg, Sjef van Erp, ‘Good Faith: A Concept “Unworkable in Practice”?’ (1992) 1 Tilburg Foreign Law Review 215.

¹⁴⁰⁶ Chitty (n 61) 287. Also, McKendrick, *Text, Cases, and Materials* (n 1217) 493.

¹⁴⁰⁷ *Ius Commune* (n 14) 367.

¹⁴⁰⁸ Kötz, ‘Good Faith’ (n 227) 253-254.

¹⁴⁰⁹ Text to (n 1126).

Regarding the first issue, *Walford* remains the authority for the rejection of an implied term to negotiate in good faith.¹⁴¹⁰ But it is not clear whether this is the case regarding an express term to negotiate in good faith. In *Petromec* the Court of Appeal considered that Lord Ackner's observations in *Walford* were not binding on it to determine the validity of an express obligation to negotiate in good faith between commercial parties, contained in a complex concluded contract drafted by London solicitors.¹⁴¹¹ Longmore LJ concluded that, although in the case the term was inapplicable as a matter of construction,¹⁴¹² it would be 'a strong thing' to declare such a term unenforceable as this would 'defeat the reasonable expectations of honest men'.¹⁴¹³ Regarding the second issue, *Walford* also remains the authority for the rejection of good faith duties governing the conduct of negotiating parties (although the facts of *Walford* should restrict it only to the first issue).¹⁴¹⁴ Apart from the reasons given in *Walford* to reject a duty to negotiate in good faith,¹⁴¹⁵ reasons relating to the differences in the business and legal culture between England and the continental countries,¹⁴¹⁶ and to the different types of cases litigated before the courts¹⁴¹⁷ have also been mentioned. As the second issue is the relevant one in the paradigm case, this will be the focus of what follows.

¹⁴¹⁰ *Yam Seng* only opened up the possibility of implying a term to perform in good faith; text to (n 1369).

¹⁴¹¹ (n 1382) [121] (Longmore LJ); *Chitty* (n 61) 45.

¹⁴¹² (n 1382) [112]-[113].

¹⁴¹³ (n 1382) [121], citing *Steyn* (n 1389).

¹⁴¹⁴ Text to (n 1391).

¹⁴¹⁵ Text to (n 1394).

¹⁴¹⁶ van Erp, 'A European "Culpa in Contrahendo" Doctrine' (n 1065) 73.

¹⁴¹⁷ Kötz, 'Good Faith' (n 227) 256.

Much has been written¹⁴¹⁸ and several arguments have been given for and against the recognition of a doctrine of good faith or a general duty of good faith in English contract law,¹⁴¹⁹ and three views have been identified: a negative one against adopting a general principle of good faith, a neutral one which inclines towards scepticism, and a positive one which supports the recognition of a general doctrine of good faith.¹⁴²⁰ Within the neutral view there are two versions: the indifference thesis which considers that it makes no difference whether English law operates with a general doctrine or with piecemeal solutions, and the equivalence thesis which states that there is a strict equivalence between a general doctrine and the piecemeal solutions.¹⁴²¹ Because the object here is to argue neither for nor against the recognition of a doctrine of good faith in English contract law, it suffices to point out that the neutral view, in both versions, is inaccurate and this is proven by English law's attitude towards liability for broken negotiations.

The piecemeal solutions available in English law are not equivalent to the solutions that good faith has provided in the selected jurisdictions to deal with these cases of precontractual liability, because the same results cannot always be reached. It has been shown that English law provides no relief in the paradigm case.¹⁴²² Therefore, it is not indifferent whether, in this area, English law operates with its

¹⁴¹⁸ Favours the adoption of a general requirement of good faith, eg, Brownsword (n 1365) 208; regarding Australian law, HK Lücke, 'Good Faith and Contractual Performance' in PD Finn (ed), *Essays on Contract* (Law Book Company Limited 1987). Against, eg, Lord Ackner in *Walford* (n 1298); regarding Canadian law, Michael G Bridge, 'Does Anglo-Canadian Contract Law Need a Doctrine of Good Faith?' (1984) 9 *Canadian Business Law Journal* 385.

¹⁴¹⁹ Arguments in, eg, Roger Brownsword, *Contract Law: Themes for the Twenty-First Century* (2nd edn, OUP 2006) ch 6; Cartwright, *Introduction* (n 7) 64-66, 75-79; Yam Seng (n 1369) [123], [146]-[152]; McKendrick, 'Good Faith' (n 1403).

¹⁴²⁰ Brownsword, *Contract Law* (n 1419); analysed in McKendrick, *Text, Cases, and Materials* (n 1217) 494-502.

¹⁴²¹ Brownsword, *Contract Law* (n 1419) 120-121.

¹⁴²² p 240 above.

limited piecemeal solutions or with a general doctrine of good faith as, in all likelihood, if a general doctrine had been accepted relief would have been given or at least would be possible in the paradigm case. It is common to find statements that the differences between English law and other legal systems regarding the treatment of good faith are more of legal form than of substance, and that conclusions that are reached in other legal systems through good faith can be reached in other ways by English law,¹⁴²³ but this is not entirely accurate as the lack of relief in the paradigm case shows. The difference, regarding duties of good faith during negotiations, seems to be not only of form but also of substance.¹⁴²⁴ Therefore, while it might be true that there is no need for a doctrine of good faith if there are other doctrines that ‘do the job’,¹⁴²⁵ the question is what happens when there are no such other doctrines.

A possible answer is that English law should recognise a general doctrine of good faith and that the breach of good faith duties during negotiations may give rise to liability,¹⁴²⁶ or that the absolute rejection of a duty to negotiate in good faith should be reconsidered.¹⁴²⁷ Although it has been stated that ‘[i]t is likely that, sooner or later, English contract law will come to accept the existence of a doctrine of good faith’,¹⁴²⁸ it is also likely that this recognition will be limited to the performance of a contract. Another possible answer is to say that nothing should be done; English law rejects good faith in the negotiation stage, only provides relief in particular established categories, and cases that fall outside their scope, like the paradigm case, are simply

¹⁴²³ eg, McKendrick, *Text, Cases, and Materials* (n 1217) 486.

¹⁴²⁴ Kötz, ‘Good Faith’ (n 227) 257; Cartwright, *Introduction* (n 7) 65.

¹⁴²⁵ Whittaker and Zimmermann, ‘Coming to Terms’ (n 205) 684.

¹⁴²⁶ McKendrick, *Text, Cases, and Materials* (n 1217) 7.

¹⁴²⁷ Steyn (n 1389) 438-439.

¹⁴²⁸ McKendrick, *Text, Cases, and Materials* (n 1217) 502.

not valued as deserving protection.¹⁴²⁹ But another possibility, which will be analysed next, is that the acceptance or refusal to provide relief in situations of precontractual liability is not necessarily connected to accepting or rejecting good faith in the precontractual stage.

3 The rejection of a general duty to negotiate in good faith does not have to imply the rejection of precontractual liability for breaking off negotiations

Precontractual liability, as a notion but not as a general theory,¹⁴³⁰ has recently been acknowledged by English legal scholars and it is generally conceived as being necessarily or at least partly connected with the notion of good faith.¹⁴³¹ It is considered that a general principle of precontractual liability cannot be accepted because a general principle of good faith is rejected.¹⁴³² When it is stated that English law recognises a very limited scope of duties between negotiating parties¹⁴³³ and this is connected to the argument that '[t]he existence and scope of pre-contractual duties depends on what stance a legal system takes towards the general principle of good faith',¹⁴³⁴ the inference seems to be that the absence of a general duty of good faith in

¹⁴²⁹ Cartwright, *Introduction* (n 7) 53, 54 fn 8.

¹⁴³⁰ John Cartwright, 'Negotiation and Renegotiation: An English Perspective' in John Cartwright, Stefan Vogenauer and Simon Whittaker (eds), *Reforming the French Law of Obligations: Comparative Reflections on the Avant-projet de réforme du droit des obligations et de la prescription ('the Avant-projet Catala')* (Hart Publishing 2009) 52.

¹⁴³¹ eg, Furmston and Tolhurst (1389) 381; Stathis Banakas, 'Liability for Contractual Negotiations in English Law: Looking for the Litmus Test' (2009) 1 *InDret* 1; *Chitty* (n 61) 128, 327: 'pre-contractual liability' is used in cases where a contract was entered into, and a new section included in the latest edn (ch 2 s 10) deals with 'liability when negotiations do not produce a contract'.

¹⁴³² *Chitty* (n 61) 133; Roy M Goode, 'England' in ICC (ed), *Formation of Contracts and Precontractual Liability* (ICC Publishing 1990) 59.

¹⁴³³ Cartwright, 'Time for Review' (n 6) 174.

¹⁴³⁴ Schwenger, Hachem and Kee (n 5) 278.

English law¹⁴³⁵ means the absence of specific precontractual duties of good faith, and this would be fatal to provide relief in situations of precontractual liability which do not fit into the particular liabilities recognised by English law. Indeed it is argued that even though there is no general duty to negotiate in good faith, there are ‘plenty of other ways of dealing with particular problems of unacceptable conduct occurring in the course of negotiations’¹⁴³⁶ where English law provides relief.¹⁴³⁷ And the explanation of cases that do not give rise to liability (like the paradigm case) lies in the rejection of a general duty to negotiate in good faith, which is said to reflect the values of English contract law.¹⁴³⁸

English law’s approach towards precontractual liability has led some scholars (both from the civil law and from the common law) to view some of English law’s piecemeal solutions as ultimately based on good faith or in accordance with good faith.¹⁴³⁹ And where these particular liabilities are not viewed as emanating from good faith it is still possible to draw parallels between them. For instance, in *Cobbe*, regarding proprietary estoppel, Lord Walker stated that it is

¹⁴³⁵ Text to (n 1355).

¹⁴³⁶ CA judgment in *Cobbe* [2006] EWCA Civ 1139, [2006] 1 WLR 2964 [4] (Mummery LJ). Similarly, Cohen (n 60) 31-32; *Chitty* (n 61) 328.

¹⁴³⁷ This ch s I above.

¹⁴³⁸ Cartwright, ‘Time for Review’ (n 6) 156, 174.

¹⁴³⁹ eg, Quiñones Escámez (n 1084) 370-371; McKendrick, *Text, Cases, and Materials* (n 1217) 6-7.

a flexible doctrine which the court can use, in appropriate circumstances, to prevent injustice caused by the vagaries and inconstancy of human nature. But it is not a sort of joker or wild card to be used whenever the court disapproves of the conduct of a litigant who seems to have the law on his side. Flexible though it is, the doctrine must be formulated and applied in a disciplined and principled way.¹⁴⁴⁰

The same could be said of good faith in the selected jurisdictions.¹⁴⁴¹ It should be noted that the role that proprietary estoppel plays (or could play) in providing relief in lack of formality cases in English law is played by good faith in German law.¹⁴⁴²

It has been argued that the concept of good faith should not keep common law and civil law lawyers divided.¹⁴⁴³ It has also been pointed out that where similar cases will not be decided in the same way in continental jurisdictions and in England, the explanation of the different result ‘must surely lie elsewhere than in the presence (...) and the absence (...) of a broad good faith standard’.¹⁴⁴⁴ Furthermore, it has been suggested that English law has no implicit objection to precontractual liability and that this is supported by the relief provided by its piecemeal solutions.¹⁴⁴⁵ Collins, starting from a narrow and subjective notion of good faith, has argued that the sources of precontractual obligations in English law can be conceived as deriving from a general principle which is better described as a duty to negotiate with care rather than as a principle to bargain in good faith.¹⁴⁴⁶ He concedes, however, that if good faith is

¹⁴⁴⁰ (n 1230) [46].

¹⁴⁴¹ Text to (n 1064).

¹⁴⁴² p 245-246 above; text to (n 266).

¹⁴⁴³ Hesselink (n 232) 648.

¹⁴⁴⁴ Kötz, ‘Good Faith’ (n 227) 250.

¹⁴⁴⁵ Giliker, ‘Tort’ (n 344) 972.

¹⁴⁴⁶ Collins (n 14) 181.

objectively understood as a standard of conduct (as it is in the selected jurisdictions) it might be equivalent to a duty to negotiate with care.¹⁴⁴⁷

It is necessary to go a step further. The better view is that in cases of broken negotiations, precontractual liability is based on a notion other than good faith (even objectively understood) and that the development of this liability in English law (if it were desired) would not require a change in its approach towards good faith, but a change of focus to another notion which is well known to it.

III Changing the focus to reliance and a possibility for development

It has been shown that in the selected jurisdictions good faith (or the breach of this objective standard) is not the true basis of precontractual liability because it is reliance that lies at its heart.¹⁴⁴⁸ The proposal is that in order to explain the solutions that English law provides in situations of precontractual liability and in order to consider a possible development of the law to grant relief in the paradigm case, it is not necessary to resort to the notion of good faith at all. There is no need to explain the imposition of this liability in terms of breach of good faith duties because the basis of this liability, particularly in the paradigm case, is the notion of reliance which is much more familiar to English law.

It might be argued that the courts are reluctant to overturn long-standing principles of the common law,¹⁴⁴⁹ but at least two counter-arguments are possible. First, it could be argued that there is no common law principle that refuses liability for broken negotiations. *Walford*¹⁴⁵⁰ should not be seen as an obstacle because this case

¹⁴⁴⁷ Collins (n 14) 219.

¹⁴⁴⁸ p 237-238.

¹⁴⁴⁹ Cartwright, *Introduction* (n 7) 143.

¹⁴⁵⁰ (n 1298).

centred around a positive duty to negotiate and this is not what breaking off negotiations cases are about, they are not concerned with whether negotiating parties are obliged to continue to negotiate and what the content of this obligation is (unless there is a preliminary agreement that imposes such an obligation). In the paradigm case *Walford* should be distinguished. The paradigm case has nothing to do with agreements to continue to negotiate (in good faith), whereas it is possible to argue that the authority of *Walford* should be restricted to the rejection of an implied (or even an express) duty to continue to negotiate in good faith emanating from an agreement.¹⁴⁵¹ Secondly, if the first counter-argument is rejected, it could still be argued that the common law principle that refuses liability for broken negotiations has been based on the rejection of good faith during negotiations. If the basis of this liability is shifted from the notion of good faith to the notion of reliance, the obstacle of good faith is removed and the way is clear for the recognition of precontractual liability for broken negotiations, not as a general principle of liability but as a possible liability in deserving cases.

This section will first highlight the fact that in English law, while a general principle of good faith is not recognised, both dimensions of reliance exist, although not as a matter of general principle but only in specific justified instances.¹⁴⁵² It will be shown that the current piecemeal solutions all involve to some extent the notion of reliance. The difference with the selected jurisdictions is that in English law the expectation dimension of reliance does not emanate from the trust dimension of reliance, which in the selected jurisdictions is equivalent to the principle of good

¹⁴⁵¹ Text to (nn 1391, 1414).

¹⁴⁵² This is recognised in Cartwright, 'Negotiation and Renegotiation' (n 1430) 55.

faith.¹⁴⁵³ This section will then address the most difficult obstacle for the acceptance of liability in the paradigm case in English law: on what basis to found the claim for damages. It will be seen that unless there is a development in the current law, there is no basis on which to found such a claim.

1 The existing reliance

Both legal scholars from a common law and a civil law background have pointed out that the notion of (reasonable) reliance recognised in the common law tradition is similar if not equivalent to the notion of reliance (embodied in the notions of *Vertrauen*,¹⁴⁵⁴ *confiance/croyance légitime*,¹⁴⁵⁵ and *confianza legítima*)¹⁴⁵⁶ present in the selected jurisdictions. These notions are also seen as equivalent or similar to the notion of reasonable expectations found in the common law tradition.¹⁴⁵⁷

Some have pointed out the closeness between objective good faith (in the civil law) and the reasonable expectations of the parties (in the common law)¹⁴⁵⁸ in the formation and in the performance of contracts.¹⁴⁵⁹ But in cases of precontractual liability for broken negotiations it is possible to focus solely on the related notions of reliance and expectations. Although it is clear that English law has not elevated reliance to a general principle of the law of contract, it is also clear that in the formation of contracts there are manifestations of the protection of one party's

¹⁴⁵³ p 214 above.

¹⁴⁵⁴ MUJ (n 61) 104-105; Markesinis and Unberath (n 93) 58.

¹⁴⁵⁵ Aubry (n 101) 253, 255 fn 889, 256; Deshayes and Maître, case 7, in Cartwright and Hesselink (n 6) 202 fn 19.

¹⁴⁵⁶ Barros Bourie, *Responsabilidad Extracontractual* (n 61) 1009.

¹⁴⁵⁷ eg, Aubry (n 101) 253, 255 fn 889, 256.

¹⁴⁵⁸ eg, Steyn (n 1389) 439; Brownsword, *Contract Law* (n 1419) 127.

¹⁴⁵⁹ eg, Whittaker and Zimmermann, 'Coming to Terms' (n 205) 676-677.

reasonable reliance on the other.¹⁴⁶⁰ The piecemeal solutions currently available for situations of precontractual liability¹⁴⁶¹ are a good example of this.

(a) Reliance in general

In some of the piecemeal solutions the notion of reliance is essential (as in promissory and proprietary estoppel) or at least very relevant for defining them (as in the torts of deceit and negligence).

The principle of *vcfp*, which protects legitimate expectations and which is sometimes argued to be the basis of precontractual liability in the selected jurisdictions,¹⁴⁶² finds an expression in the notion of estoppel.¹⁴⁶³ The protection of legitimate expectations is not a doctrine of English private law but is a doctrine under development in public law and it has been pointed out that there are close similarities (although also some significant differences) between the public law doctrine of legitimate expectations and the private law doctrine of estoppel.¹⁴⁶⁴ In both there is a clear and unambiguous promise, undertaking or representation by one party which creates in the other an expectation or belief, and the latter is allowed to hold the former to his representation because he has relied on it.¹⁴⁶⁵

The core principle of estoppel is reliance.¹⁴⁶⁶ In promissory estoppel it is the promisee's reliance on the promisor's promise not to enforce his strict legal rights, ie, the fact that the promisee has done something that he might not have done due to the

¹⁴⁶⁰ Cartwright, *Introduction* (n 7) 68; de Coninck (n 86) 34.

¹⁴⁶¹ This ch s I above.

¹⁴⁶² pp 52, 94, 152 above.

¹⁴⁶³ *Ius Commune* (n 14) 206.

¹⁴⁶⁴ Cartwright, 'Legitimate Expectations' (n 1291) 327.

¹⁴⁶⁵ *ibid* 327.

¹⁴⁶⁶ Cartwright, *Introduction* (n 7) 143, 149.

promisor's promise.¹⁴⁶⁷ In proprietary estoppel it is the claimant's reliance on a representation or assurance by the landowner relating to the acquisition of an interest in property:¹⁴⁶⁸ the landowner has created or encouraged an expectation that the claimant has or would have an interest in land and the latter has expended money on the property in reliance on that expectation, with the knowledge of the landowner.¹⁴⁶⁹ In broken negotiations the reliance element is different in that one negotiating party trusted the other ('trust-based reliance') and expected the future conclusion of the negotiated contract ('expectation-based reliance'), but it is the same in that that negotiating party did something which it would not have done (for instance, incurred expenses) if it had not been for the expectation generated by the other negotiating party who later broke off.¹⁴⁷⁰ Detrimental reliance is not evident in all cases of promissory estoppel,¹⁴⁷¹ is required in cases of proprietary estoppel,¹⁴⁷² and is also present in claims of precontractual liability for broken negotiations.¹⁴⁷³ There is a shared similarity in that in all it is inequitable or unconscionable for one party to do something: in promissory estoppel for the promisor to go back on his promise,¹⁴⁷⁴ in proprietary estoppel the conduct of the representor must be unconscionable,¹⁴⁷⁵ and in broken negotiations for a negotiator to break off after it had induced expectation-

¹⁴⁶⁷ Requirement (ii) in p 240 above.

¹⁴⁶⁸ Requirement (ii) in p 242 above.

¹⁴⁶⁹ eg, *JT Developments* (n 1242).

¹⁴⁷⁰ Text to (n 1019).

¹⁴⁷¹ McKendrick, *Text, Cases, and Materials* (n 1217) 222, 228.

¹⁴⁷² Requirement (iii) in p 242 above; Andrew Robertson, 'Estoppels and Rights-Creating Events: Beyond Wrongs and Promises' in Jason W Neyers, Richard Brunaugh and Stephen G A Pitel (eds), *Exploring Contract Law* (Hart Publishing 2009) 220-221.

¹⁴⁷³ Text to (n 1126).

¹⁴⁷⁴ Requirement (iii) in p 240 above; McKendrick, *Text, Cases, and Materials* (n 1217) 223.

¹⁴⁷⁵ *Cobbe* (n 1230) [92] (Lord Walker); Cartwright, 'Legitimate Expectations' (n 1291) 326.

based reliance in the other party.¹⁴⁷⁶ ‘Unconscionability’ or ‘unfairness’ in estoppel (like good faith and reliance in broken negotiations)¹⁴⁷⁷ is used as an ‘objective value judgment on *behaviour* (regardless of the state of mind of the individual in question)’,¹⁴⁷⁸ amounting to a moral judgment of the conduct of the promisor.¹⁴⁷⁹

The torts of deceit and negligence both have the effect of protecting the reliance of one negotiating party on a representation made by the other.¹⁴⁸⁰ In deceit the claimant must have relied on the misrepresentation, ie, the misrepresentation must have induced him to act and incur losses.¹⁴⁸¹ In negligence the notion of reliance is prominent in the test for establishing a duty of care.¹⁴⁸² It is also very relevant in providing the causal link between the defendant’s statement and the claimant’s loss.¹⁴⁸³ In *Caparo* Lord Oliver emphasised that what unites liability for negligent statements¹⁴⁸⁴ is that the damage ‘lies always in the reliance by somebody upon the accuracy of that which the word communicates and the loss or damage consequential upon that person having adopted a course of action upon the faith of it’.¹⁴⁸⁵ Under both torts the remedy provided is damages for the losses suffered in reliance on the fraudulent or negligent statement, but they are calculated on the basis of a test of directness in the case of deceit and on the basis of a test of foreseeability in the case of

¹⁴⁷⁶ p 198-199 above.

¹⁴⁷⁷ pp 194, 196, 209 above.

¹⁴⁷⁸ *Cobbe* (n 1230) [92] (Lord Walker).

¹⁴⁷⁹ *Collins* (n 14) 84.

¹⁴⁸⁰ Cartwright, ‘Legitimate Expectations’ (n 1291) 330.

¹⁴⁸¹ Text to (nn 1267, 1268).

¹⁴⁸² Text to (n 1284).

¹⁴⁸³ *Chitty* (n 61) 136.

¹⁴⁸⁴ Cartwright, *Misrepresentation* (n 1282) 193 fn 81.

¹⁴⁸⁵ (n 1281) 635.

negligence.¹⁴⁸⁶ This remedy corresponds to the reliance interest generally protected in the selected jurisdictions.¹⁴⁸⁷

(b) Trust-based reliance

Even though trust-based reliance does not exist as a general principle in English law (that could be equivalent to the principle of good faith in the selected jurisdictions), a trust element is present in some of its piecemeal solutions.

In some of the proprietary estoppel cases analysed above¹⁴⁸⁸ reference was made to the ‘close relationship’¹⁴⁸⁹ or ‘relationship of trust’¹⁴⁹⁰ between negotiating parties and to the fact that the promisee trusted the promisor.¹⁴⁹¹ English case law on proprietary estoppel, like German lack of formality cases, ‘gives great weight’ to reliance on the conduct of the other party.¹⁴⁹² In some of the tort of negligence cases analysed above,¹⁴⁹³ it was highlighted that one party reasonably trusted or relied on the other to exercise a degree of care as the circumstances required,¹⁴⁹⁴ and it has been pointed out that this duty of care only arises where the relative positions of the parties are such that the claimant is entitled to rely and does rely on what the other party says.¹⁴⁹⁵ In the context of *Hedley Byrne* liability, when a claimant reasonably relies on

¹⁴⁸⁶ Deakin, Johnston and Markesinis (n 1264) 254-255, 469; Cartwright, *Formation and Variation* (n 1216) 23.

¹⁴⁸⁷ Ch V s IV 1 (a).

¹⁴⁸⁸ This ch s I 1.

¹⁴⁸⁹ *Yaxley* (n 1246) 169 (Walker LJ).

¹⁴⁹⁰ *Cobbe* (n 1230) [89] (Lord Walker).

¹⁴⁹¹ *Yaxley* (n 1246) 169 (Walker LJ).

¹⁴⁹² MUJ (n 61) 86.

¹⁴⁹³ This ch s I 2.

¹⁴⁹⁴ eg, *Hedley Byrne* (n 1275), text to (n 1277); *Esso Petroleum* (n 1293), text to (n 1292).

¹⁴⁹⁵ Cartwright, *Introduction* (n 7) 85.

a statement it not only means that he uses it but also that he is entitled to trust in it.¹⁴⁹⁶ Regarding precontractual agreements, *Walford*¹⁴⁹⁷ has been criticised for the failure of the courts to act as guarantors of the trust element in contracting.¹⁴⁹⁸ In *Yam Seng* it was recognised that the expectation of honesty which underlies almost all contractual relationships is essential to commerce, which depends critically on trust, and that in this case there was a relationship dependent on the mutual trust of two individuals.¹⁴⁹⁹

This reasoning could be extended to precontractual relationships. McFarlane, who proposes a three-stage model of the precontractual relationship, recognises that in the second stage (where some form of agreement in principle has been reached) the liability that may arise supports the inherent trust in negotiations by preventing one party from abusing the other's trust.¹⁵⁰⁰ Other common law legal scholars, although focusing on US law, have argued that trust is an important factor even in arm's length negotiations, that interpersonal trust is one of the 'fundamental psychological conditions for the successful coordination of complex commercial transactions', and that there is a need for mechanisms that deter people from abusing such trust by incurring in opportunistic conduct.¹⁵⁰¹

¹⁴⁹⁶ John Cartwright, 'Liability in Negligence: New Directions or Old?' (1997) 13 ConstLJ 157, 159.

¹⁴⁹⁷ (n 1298).

¹⁴⁹⁸ Jo Shaw, 'Pre-contractual Negotiations in English Law: *Walford v Miles* and its Aftermath' (1994) 2 ERPL 269, 272.

¹⁴⁹⁹ (n 1369) [135], [171].

¹⁵⁰⁰ Ben McFarlane, 'The Protection of Pre-Contractual Reliance: A Way Forward?' (2010) 10 OUCLJ 95, 97, 101-102.

¹⁵⁰¹ G Richard Shell, 'Opportunism and Trust in the Negotiation of Commercial Contracts: Toward a New Cause of Action' (1991) 44 Vanderbilt Law Review 221, 225, 252 fn 138, 265. Also, Juliet P Kostritsky, 'Bargaining with Uncertainty, Moral Hazard, and Sunk Costs: A Default Rule for Precontractual Negotiations' (1993) 44 Hastings Law Journal 621, 650 fn 98, 680-681.

(c) Expectation-based reliance

It has been argued that in common law jurisdictions all cases imposing precontractual liability have common elements which are present irrespective of whether the courts have used contract, restitution, estoppel or tort.¹⁵⁰² They are (a) a belief (at least on the part of the claimant) that a contract exists, or an expectation of a future contract, (b) the claimant has relied detrimentally on that belief or expectation, and (c) the defendant's conduct is such that (i) an obligation to bear the risk of an incomplete agreement has been or will be assumed by the defendant, or (ii) the risk of an incomplete agreement is imposed upon the defendant.¹⁵⁰³ These elements do not differ significantly from the requirements for establishing a successful claim for precontractual liability for broken negotiations in civil law jurisdictions.¹⁵⁰⁴ Indeed, they embody the expectation-dimension of reliance identified in the selected jurisdictions.¹⁵⁰⁵

This dimension of reliance is present and is protected in some of English law's piecemeal solutions. Most noticeably in the type of restitution cases analysed above.¹⁵⁰⁶ McKendrick refers to the expectation of both parties that a contract would be concluded and the fact that such an expectation has not been fulfilled as the basis for intervention.¹⁵⁰⁷ In *William Lacey* the claimant was led to believe that he would receive the contract because he was told that his tender was the lowest and that he could expect to obtain the contract;¹⁵⁰⁸ consequently, his reliance on a contract yet to

¹⁵⁰² Dietrich (n 114) 164.

¹⁵⁰³ *ibid* 165-170.

¹⁵⁰⁴ *ibid* 179-180.

¹⁵⁰⁵ p 196 above.

¹⁵⁰⁶ p 256-257.

¹⁵⁰⁷ 'Work Done' (n 8) 181.

¹⁵⁰⁸ (n 1331) 934, 939 (Barry J).

be concluded was protected.¹⁵⁰⁹ In *British Steel* '[b]oth parties confidently expected a formal contract to eventuate'¹⁵¹⁰ and acted on that basis. And in *Cobbe* the defendant encouraged the claimant's expectation that the negotiations for the formal contract would be successful.¹⁵¹¹ In a case where a contractual solution was provided, reference was made to the 'confident assumptions of commercial parties',¹⁵¹² notion which can be related to expectation-based reliance.

In the proprietary estoppel cases analysed above¹⁵¹³ it is clear that one party encouraged an expectation in the other and the latter relied on it. For a claim in proprietary estoppel to be successful the expectation must be to obtain a 'right',¹⁵¹⁴ or a 'certain interest in land',¹⁵¹⁵ whereas in broken negotiations cases the expectation is that the negotiated contract will be concluded. Such was the expectation in *Cobbe*¹⁵¹⁶ and this is one of the reasons why the proprietary estoppel claim failed. However, proprietary estoppel cases and broken negotiations cases converge in that hopes are not enough,¹⁵¹⁷ a subjective belief is not enough,¹⁵¹⁸ what is required is a reasonable or legitimate expectation.¹⁵¹⁹ In the analysis of the concept of reliance within estoppel in general, Collins has indicated that detrimental reliance must be reasonable in all

¹⁵⁰⁹ Gareth Jones, 'Claims Arising Out of Anticipated Contracts Which Do Not Materialize' (1980) 18 UWOLRev 447, 456.

¹⁵¹⁰ (n 1335) 511 (Robert Goff J).

¹⁵¹¹ (n 1230) [18] (Lord Scott).

¹⁵¹² *Blackpool* (n 1317) 1201 (Bingham LJ).

¹⁵¹³ This ch s I 1.

¹⁵¹⁴ *Crabb* (n 1243) 186 (Lord Denning MR), 196 (Scarman LJ).

¹⁵¹⁵ *Cobbe* (n 1230) [20] (Lord Scott).

¹⁵¹⁶ Text to (nn 1233, 1234).

¹⁵¹⁷ *Cobbe* (n 1230) [66] (Lord Walker); *A-G of Hong Kong v Humphreys Estate (Queen's Gardens) Ltd* [1987] AC 114 (PC) 124.

¹⁵¹⁸ *JT Developments* (n 1242) 50 (Ralph Gibson LJ).

¹⁵¹⁹ *Crabb* (n 1243) 197 (Scarman LJ); p 202 above.

circumstances and this ‘reasonableness’ is defined by excluding situations where reliance is unreasonable.¹⁵²⁰

Although the language of ‘legitimate expectations’ is not commonly used in the private law of contract, the protection of an expectation created by one party and relied on by the other underlies, albeit not as a general principle, English law’s piecemeal solutions for cases of precontractual liability.¹⁵²¹ The legitimacy of an expectation created by a promise means that the promisee has been led to believe, on reasonable grounds, that he can rely on the expectation.¹⁵²² This is the meaning relevant in cases of broken negotiations. A narrower meaning, according to which an expectation is made legitimate by the fact that the promisee has provided consideration,¹⁵²³ is not applicable to these cases because they do not look towards the enforcement of a promise but only to the protection of detrimental reliance.¹⁵²⁴

It has been suggested that a defendant has created a ‘legitimate expectation of contract’ when, having regard to the relationship between the parties, he has conducted himself in a way which he should have foreseen would lead the claimant to reasonably act to his detriment, such as making a promise to enter into a contract in the future, to request the performance of services, or any act or omission that would foreseeably induce the claimant to reasonably believe that a binding contract would be entered into.¹⁵²⁵

¹⁵²⁰ (n 14) 75, 81-83.

¹⁵²¹ Cartwright, ‘Legitimate Expectations’ (n 1291) 321, 328-329, 332.

¹⁵²² *ibid* 335.

¹⁵²³ *ibid* 335.

¹⁵²⁴ Ch V s IV.

¹⁵²⁵ Geoffrey F Cauchi, ‘The Protection of the Reliance Interest and Anticipated Contracts Which Fail to Materialize’ (1981) 19 UWOLRev 237, 268, analysing Canadian, American and English law cases.

2 How to develop the law

The solutions currently on offer in English law for imposing liability for disappointed precontractual expectations are ‘rarely, if ever, available’¹⁵²⁶ and no relief is provided in the paradigm case.¹⁵²⁷ The aim of this thesis is not to try to convince English lawyers that a change of view is necessary. It has been stated that ‘it is inconceivable that either the legislative or the judiciary would consider the introduction of such a principle [*culpa in contrahendo* or *responsabilité précontractuelle*] to English law’,¹⁵²⁸ but other English scholars have stressed the need for review of this area of the law,¹⁵²⁹ have even recommended the recognition of precontractual liability,¹⁵³⁰ or at least have expressed a favourable view towards it.¹⁵³¹ The aim of this thesis is to explore how English law could grant relief in the paradigm case if it were ever desired. The rejection of good faith in the negotiation stage should not bar the possibility of providing protection in deserving cases of broken negotiations.¹⁵³² The issue is through which means relief might be provided. Considering that the protection of reliance on legitimate expectations is at the heart of these cases¹⁵³³ and that some of English law’s piecemeal solutions recognise and protect this expectation-based reliance,¹⁵³⁴ English law should not have difficulties in providing adequate

¹⁵²⁶ Deakin, Johnston and Markesinis (n 1264) 146 fn 274.

¹⁵²⁷ p 240 above.

¹⁵²⁸ DK Allen, ‘England’ in Ewoud H Hondius (ed), *Precontractual Liability: Reports to the XIIIth Congress International Academy of Comparative Law, Montreal, Canada, 18-24 August 1990* (Kluwer Law 1991) 143.

¹⁵²⁹ Cartwright, ‘Time for Review’ (n 6) 170.

¹⁵³⁰ Collins (n 14) 178.

¹⁵³¹ Beale, ‘Commentary’ (n 1396) 121, 123.

¹⁵³² This ch s II 3 above.

¹⁵³³ p 198 above.

¹⁵³⁴ This ch s III 1 (c) above.

protection to the paradigm case. Therefore, it is necessary to explore which piecemeal solution¹⁵³⁵ could be developed in order to provide relief in such a case.

(a) Contract and restitution

Because a contractual solution is not possible in the paradigm case,¹⁵³⁶ the development of a contractual approach will not be analysed here, but it suffices to say that currently English law provides protection in cases of broken negotiations where a collateral contract was found to be concluded.¹⁵³⁷ The possibility of obtaining relief is more uncertain in cases where a preliminary agreement was concluded because its enforceability depends on what type of agreement the courts consider it to be.¹⁵³⁸

Likewise, a restitutionary solution is not possible in the paradigm case.¹⁵³⁹ However, English law provides relief in cases where negotiations eventually failed and work was done in anticipation of the contract or expenses were incurred, at the request of the other negotiating party.¹⁵⁴⁰ In these cases some legal scholars defend the restitutionary analysis over other possible grounds of liability such as estoppel or tort,¹⁵⁴¹ while others argue in favour of other grounds such as contract.¹⁵⁴² Some have challenged the restitutionary analysis due to the existing difficulties in English law

¹⁵³⁵ This chapter above.

¹⁵³⁶ p 256 above.

¹⁵³⁷ Text to (n 1316).

¹⁵³⁸ p 255-256 above.

¹⁵³⁹ p 258 above.

¹⁵⁴⁰ p 256-257 above.

¹⁵⁴¹ eg, McKendrick, 'Work Done' (n 8) 189-190; James Edelman, 'Liability in Unjust Enrichment where a Contract Fails to Materialize' in Andrew Burrows and Edwin Peel (eds), *Contract Formation and Parties* (OUP 2010).

¹⁵⁴² eg, Steve Hedley, 'Work Done in Anticipation of a Contract Which Does Not Materialise: A Response' in W R Cornish and others (eds), *Restitution, Past, Present and Future: Essays in Honour of Gareth Jones* (Hart Publishing 1998) 195, 198; Dietrich (n 114) 164.

particularly in determining whether there is enrichment and whether it is unjust.¹⁵⁴³

Regarding enrichment, in some cases the courts have not required an objective benefit to have been conferred on the defendant by the claimant's work, but have concluded that the fact that the work was done at the defendant's request, in circumstances where the work was not intended to be done gratuitously, was sufficient to establish that he was enriched or had obtained a benefit for which he must pay.¹⁵⁴⁴ It has been pointed out that such a claim looks more like an implied contractual claim than a restitutionary claim.¹⁵⁴⁵

A prominent legal scholar on the law of restitution recognised that, in exceptional cases, it is attractive to protect a negotiating party's legitimate expectation based on a reasonable belief (derived from the other party's conduct) that a contract will eventually be concluded, even though the other party has not obtained a benefit.¹⁵⁴⁶ He argued, however, that the preferable approach to explain the imposition of liability might be through the extension of proprietary estoppel because it avoids the analysis of the meanings of 'benefit' or 'fault'.¹⁵⁴⁷ Similarly, another author has argued that promissory estoppel, as developed in Australia, is the better explanation because it focuses on the unconscionable conduct of the defendant (the true basis of liability) and provides more remedial flexibility.¹⁵⁴⁸

¹⁵⁴³ eg, Hedley, 'Work Done' (n 1542) 197; Steve Hedley, 'Restitution: Contract's Twin?' in Francis D Rose (ed), *Failure of Contracts: Contractual, Restitutionary and Proprietary Consequences* (Hart Publishing 1997) 267, 270-271; Giliker, *Pre-contractual* (n 356) 88-92, 164; Giliker, 'Tort' (n 344) 972-973; Dietrich (n 114) 163.

¹⁵⁴⁴ McKendrick, 'Work Done' (n 8) 175; Cartwright, *Formation and Variation* (n 1216) 37.

¹⁵⁴⁵ Cartwright, *Formation and Variation* (n 1216) 37 fn 175.

¹⁵⁴⁶ Jones (n 1509) 453. Also, Cauchi (n 1525) 251.

¹⁵⁴⁷ Jones (n 1509) 454, 457.

¹⁵⁴⁸ John Carter, 'Contract, Restitution and Promissory Estoppel' (1989) 12 UNSWLJ 30, 45.

In any case, the law of restitution requires the conferment of a benefit on the defendant for a claim to succeed (even if the enrichment is only found in the fact that the defendant requested the work)¹⁵⁴⁹ and, consequently, a restitutionary claim is for the benefit gained by the defendant at the claimant's expense.¹⁵⁵⁰ It is not aimed at protecting detrimental reliance, which is the interest protected in precontractual liability for broken negotiations.¹⁵⁵¹ Therefore, although in restitution cases expectation-based reliance is present, it is unlikely that restitution might be the way forward for protecting the paradigm case.

(b) Tort

Tort law offers limited protection in cases of precontractual liability.¹⁵⁵² Because the paradigm case does not correspond to the factual scenario required for the tort of deceit to operate,¹⁵⁵³ the focus of this subsection is on whether it is possible to develop the tort of negligence in order to provide relief in the paradigm case.

Establishing liability in negligence in cases of broken negotiations is very difficult because the courts are reluctant to award damages in tort in cases where the loss is purely financial.¹⁵⁵⁴ Thus, proposing the extension of this tort to cover the paradigm case appears to be an arduous task. While it has been pointed out that there is little support for recovery in tort,¹⁵⁵⁵ it has also been noted that because the nature

¹⁵⁴⁹ Text to (n 1544).

¹⁵⁵⁰ Jones (n 1509) 457.

¹⁵⁵¹ Ch V s IV 1; Dietrich (n 114) 161 fn 42; Kelvin Koh, 'A Principled Response to Pre-contractual Remuneration' (2012) 28 ConstLJ 277, 278-279, 294, proposes a model where promissory estoppel should be invoked in cases of detrimental reliance and restitution in cases of wrongful transfer of value.

¹⁵⁵² This ch s I 2 above.

¹⁵⁵³ p 248 above.

¹⁵⁵⁴ *Ius Commune* (n 14) 388; Giliker, *Pre-contractual* (n 356) 105.

¹⁵⁵⁵ Giliker, *Pre-contractual* (n 356) 96 fn 184; Giliker, 'Tort' (n 344) 978, 991; Furmston and Tolhurst (1389) 384, 404.

of the claim is one of detrimental reliance, it seems to fall more naturally within the law of tort than within the law of contract,¹⁵⁵⁶ and it has been argued that the duty of care during negotiations fits into the broader scheme of the law of tort.¹⁵⁵⁷ During the period of expansion of the tort of negligence that took place after *Hedley Byrne*,¹⁵⁵⁸ some legal scholars argued that it would not be unreasonable for the law of tort to protect the legitimate reliance interest of negotiating parties¹⁵⁵⁹ and some cases appeared to reaffirm this suggestion.¹⁵⁶⁰

Nevertheless, the dominant view remains that *Hedley Byrne* did not give rise to a general duty of care in relation to economic losses, that normally there is no duty of care under *Hedley Byrne* between business parties negotiating at arm's length,¹⁵⁶¹ that there is no general common law duty of care owed between negotiating parties during negotiations for a contract,¹⁵⁶² and that such a general duty (or even more particularised duties of care) are not likely to be developed due to the courts' reluctance to impose mutual duties on negotiating parties.¹⁵⁶³ This reluctance seems to stem from the courts' view of the nature of negotiations¹⁵⁶⁴ which, in turn, involves the rejection of a duty to negotiate in good faith.¹⁵⁶⁵ Hence, McKendrick has argued that if a duty to negotiate in good faith were recognised, then a sudden and unexplained withdrawal from negotiations might give rise to liability in tort for breach

¹⁵⁵⁶ Giliker, 'Tort' (n 344) 970, 973.

¹⁵⁵⁷ Collins (n 14) 182; text to (n 1446).

¹⁵⁵⁸ (n 1275); Deakin, Johnston and Markesinis (n 1264) 110.

¹⁵⁵⁹ Cauchi (n 1525) 271.

¹⁵⁶⁰ eg, *Esso Petroleum* (n 1293); *Box v Midland* (n 1295).

¹⁵⁶¹ Deakin, Johnston and Markesinis (n 1264) 110, 146.

¹⁵⁶² Cartwright, *Misrepresentation* (n 1282) 621-622 fn 200.

¹⁵⁶³ Cartwright, 'Legitimate Expectations' (n 1291) 330; Cartwright, case 6, in Cartwright and Hesselink (n 6) 168; Cartwright and Hesselink (n 6) 466.

¹⁵⁶⁴ Cartwright and Hesselink (n 6) 466.

¹⁵⁶⁵ *Walford* (n 1298).

of this duty; but that in the absence of such a duty there can be no general liability in tort.¹⁵⁶⁶

Several requirements would have to be met for the tort of negligence to be able to provide relief in the paradigm case: (i) the existence of a duty of care, (ii) breach of such duty, (iii) breaking off by one party, (iv) with absence of a justified reason, (v) reliance of the other party, and (vi) economic loss of the other party. Requirements (iii)-(vi) should not be problematic as their rationale (analysed in the selected jurisdictions)¹⁵⁶⁷ could be applicable in English law. Requirements (i) and (ii), however, present some difficulties.

In order to impose liability in negligence it is necessary to determine whether the defendant owed to the claimant a duty to take reasonable care and whether this duty has been breached.¹⁵⁶⁸ The first requirement is for the law to acknowledge a ‘duty situation’ but the courts have the power to create new ‘duty situations’.¹⁵⁶⁹ The courts have been able to use the tort of negligence to provide relief in novel claims for compensation because ‘[t]he conceptual structure of negligence is highly flexible and capable of general application’.¹⁵⁷⁰ In *Donoghue v Stevenson* Lord Macmillan stated that ‘the categories of negligence are never closed’¹⁵⁷¹ and in the same case Lord Atkin formulated the ‘neighbour principle’¹⁵⁷² in order to explain how a new category

¹⁵⁶⁶ McKendrick, ‘Work Done’ (n 8) 190.

¹⁵⁶⁷ Ch V ss I 3 (c), II, IV.

¹⁵⁶⁸ Cartwright, *Introduction* (n 7) 39, 181; Robert Stevens, ‘Restitution: Contract’s Twin? - A Comment’ in Francis D Rose (ed), *Failure of Contracts: Contractual, Restitutionary and Proprietary Consequences* (Hart Publishing 1997) 276.

¹⁵⁶⁹ Deakin, Johnston and Markesinis (n 1264) 102, 109.

¹⁵⁷⁰ *ibid* 99.

¹⁵⁷¹ [1932] AC 562 (HL Sc) 619.

¹⁵⁷² (n 1571) 580.

of duty could be found.¹⁵⁷³ Lord Devlin later developed this principle in *Hedley Byrne* as the ‘principle of proximity’.¹⁵⁷⁴ In each case, the formulation of these principles allowed the courts to extend the application of negligence to new categories of cases.¹⁵⁷⁵

Therefore, it is suggested that the courts could, if a case like the paradigm case came before them, recognise a mutual duty of care between negotiating parties which would be breached where one party induced in the other a reasonable or legitimate expectation that the negotiated contract would be concluded and then broke off the negotiations without a justified reason, and the other party suffered economic loss as a result of his reliance on this induced expectation. Furthermore, this duty and its breach could be framed without resorting to a duty to negotiate in good faith.¹⁵⁷⁶ Because the rationale of tort liability for negligent misstatements (*Hedley Byrne* type of cases) does not correspond to the rationale of liability for broken negotiations,¹⁵⁷⁷ it would be preferable for the courts to develop a new category of duty within the tort of negligence, rather than stretching the scope of *Hedley Byrne* in order to cover the paradigm case. In *Customs and Excise Commissioners v Barclays Bank plc*¹⁵⁷⁸ the House of Lords discussed the methodology for extending the scope of duties of care in the tort of negligence and it seems that the preferred method is by analogy with existing categories of liability.¹⁵⁷⁹

¹⁵⁷³ Cartwright, *Introduction* (n 7) 42; *Ius Commune* (n 14) 99.

¹⁵⁷⁴ (n 1275) 515, 524-525, 530-531; Paul Mitchell, ‘Hedley Byrne & Co Ltd v Heller & Partners Ltd (1963)’ in Charles Mitchell and Paul Mitchell (eds), *Landmark Cases in the Law of Tort* (Hart Publishing 2010) 176.

¹⁵⁷⁵ Cartwright, *Introduction* (n 7) 42-43.

¹⁵⁷⁶ p 276 above.

¹⁵⁷⁷ p 253-254 above.

¹⁵⁷⁸ [2006] UKHL 28, [2007] 1 AC 181.

¹⁵⁷⁹ Deakin, Johnston and Markesinis (n 1264) 115.

Breaking off negotiations is not a tort¹⁵⁸⁰ and the suggestion (if the law were to be developed) is not that any breaking-off would constitute a tort but that only in deserving cases, where all the requirements of liability are met,¹⁵⁸¹ breaking off negotiations could give rise to liability in negligence. This solution would bring English law closer to the French (and Chilean) delictual approach to cases of precontractual liability.¹⁵⁸² In fact, English tort of negligence cases and the paradigm case share several elements: there is a close relationship ('a pre-tort relationship of some kind')¹⁵⁸³ between the negotiating parties that justifies the imposition of a duty of care,¹⁵⁸⁴ the applicable standard in order to determine whether this duty has been breached is that of the reasonable man,¹⁵⁸⁵ it is foreseeable that the other negotiating party might suffer loss due to the conduct of the party who later breaks off,¹⁵⁸⁶ and there is reasonable reliance on the part of the claimant.¹⁵⁸⁷

However, the greatest obstacle appears to be that it is unlikely that the courts would find an assumption of responsibility between equal negotiating parties¹⁵⁸⁸ (as is the case in the paradigm case) and, consequently, no duty of care that might be breached could arise. It seems that the reluctance of the courts to develop a duty of care in the tort of negligence rests on the underlying principle that because the relationship between negotiating parties is inherently adversarial, courts should not

¹⁵⁸⁰ Cartwright, *Formation and Variation* (n 1216) 19.

¹⁵⁸¹ p 291 above.

¹⁵⁸² Text to (nn 316, 673).

¹⁵⁸³ Deakin, Johnston and Markesinis (n 1264) 113; cf p 188 above.

¹⁵⁸⁴ eg, *Donoghue* (n 1571); *Hedley Byrne* (n 1275); *Esso Petroleum* (n 1293) 827-828 (Ormrod LJ); *Ius Commune* (n 14) 100; Castronovo (n 103) 226-227; cf p 190 above.

¹⁵⁸⁵ eg, *Donoghue* (n 1571) 619 (Lord Macmillan); *Hedley Byrne* (n 1275) 486 (Lord Reid); cf text to (nn 1002, 1077).

¹⁵⁸⁶ *Hedley Byrne* (n 1275); cf text to (nn 433, 803).

¹⁵⁸⁷ Text to (n 1494); CA judgment in *Walford* (n 1300) 432 (Dillon LJ); cf p 202 above.

¹⁵⁸⁸ Text to (n 1279); Giliker, 'Tort' (n 344) 976.

develop implied duties that would alter that balance of risk.¹⁵⁸⁹ Nevertheless, even in *Walford*, where both parties were ‘men of business’,¹⁵⁹⁰ the courts were able to provide relief to the claimants via the tort of negligence¹⁵⁹¹ (although the language used by the Lords Justices evokes deceit).¹⁵⁹²

Therefore, the possibility to extend the tort of negligence to cover the paradigm case must not be rejected offhand. Considering that there have been periods where the courts have been more open to expand negligence,¹⁵⁹³ that the aim of precontractual liability of protecting detrimental reliance falls squarely into the realm of tort,¹⁵⁹⁴ and that the history of the law of negligence ‘exhibits a sturdy refusal to be confined by arbitrary forms and rules where justice indicates otherwise’,¹⁵⁹⁵ it is not unthinkable that if an appropriate case came before the courts they might be willing to provide relief via the development of the tort of negligence. *Yam Seng* might prove useful to this effect, as the argument made by Leggatt J in giving content to the objective standard of good faith¹⁵⁹⁶ is transferable to the tort of negligence in order to give content to a duty to take reasonable care in negotiating.

(c) Estoppel

In their current form, neither promissory nor proprietary estoppel can provide relief in the paradigm case.¹⁵⁹⁷ However, a development of estoppel, following the course

¹⁵⁸⁹ Cartwright, ‘Negotiation and Renegotiation’ (n 1430) 58.

¹⁵⁹⁰ [1990] 1 EGLR 212 (QB) 215.

¹⁵⁹¹ Text to (n 1300).

¹⁵⁹² (n 1300).

¹⁵⁹³ Text to (n 1558).

¹⁵⁹⁴ Text to (nn 1556, 1557).

¹⁵⁹⁵ *Norsk Pacific Steamship Co v Canadian National Railway Co* [1992] 1 SCR 1021 (Supreme Court of Canada) 1146 (McLachlin J).

¹⁵⁹⁶ Text to (n 1379).

¹⁵⁹⁷ This ch s I 1 above.

taken by other common law jurisdictions, would appear to be a viable option for English law to provide relief in the paradigm case. While estoppel (particularly proprietary estoppel) has more of an expectation flavour in English law than in Australia or the US, in all of these common law jurisdictions equitable estoppel is founded upon reliance¹⁵⁹⁸ and the remedy granted is often reliance damages.

Both the US and Australia have adopted promissory estoppel in a broader form than English law¹⁵⁹⁹ and this explains why they are able to use it to provide relief in cases of broken negotiations while English law cannot.¹⁶⁰⁰ In the US, *Hoffman v Red Owl*¹⁶⁰¹ remains the pivotal case in this area, where the Supreme Court of Wisconsin adopted the doctrine of promissory estoppel as stated in §90 of the Restatement (First) of Contracts.¹⁶⁰² It ruled that the promise which gives rise to the cause of action does not need to meet the requirements of a complete offer, and endorsed the view that where damages are awarded they should be only such as are necessary to prevent injustice and that their amount may be determined by the claimant's expenditure or change of position in reliance. It approved the items of damages which protected the claimant's reliance interest (actual losses and expenses) and confirmed that the claimant could not recover for loss of future profits because this is not a breach of contract action.¹⁶⁰³ Although compensation for lost

¹⁵⁹⁸ van Erp, 'A European "Culpa in Contrahendo" Doctrine' (n 1065) 70; Cartwright, *Introduction* (n 7) 154; text to (n 1628).

¹⁵⁹⁹ Cartwright, 'Time for Review' (n 6) 164.

¹⁶⁰⁰ Schwenzer, Hachem and Kee (n 5) 275; text to (n 1216).

¹⁶⁰¹ (n 1349).

¹⁶⁰² Now replaced by §90 R2ndC: 'Promise Reasonably Inducing Action or Forbearance. (1) A promise which the promisor should reasonably expect to induce action or forbearance on the part of the promisee or a third person and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise. The remedy granted for breach may be limited as justice requires', The American Law Institute, *Restatement of the Law Second: Contracts 2d*, vol 1 (American Law Institute Publishers 1981).

¹⁶⁰³ Illustration 10 to §90 R2ndC (n 1602) 245; Summers, '"Good Faith" in General Contract Law' (n 1089) 224.

opportunities was not pleaded, it is possible to argue that they should be a component of reliance damages.¹⁶⁰⁴

In Australia, the leading case is *Waltons Stores*,¹⁶⁰⁵ where the High Court of Australia adopted a broad doctrine of equitable estoppel (which may act as a cause of action and does not require a pre-existing legal relationship) capable of applying to precontractual negotiations.¹⁶⁰⁶ According to the line of reasoning of Mason CJ, Wilson J and Brennan J, the company was estopped from retreating from its implied promise to complete the contract, as it was unconscionable for it to stand by in silence, knowing that the claimants were relying to their detriment on an expectation that a binding contract would come into existence; inaction which constituted clear encouragement or inducement to the claimants to continue to act on the basis of such an expectation.¹⁶⁰⁷ Brennan J emphasised that the object of this equity is not to compel the estopped party to fulfil the other party's expectation but to avoid the detriment which, if the expectation goes unfulfilled, the relying party will suffer.¹⁶⁰⁸

Despite this stated object, the remedy granted was damages in lieu of specific performance, thus protecting the expectation interest.¹⁶⁰⁹ The dichotomy between the stated object and the relief given has been criticised by legal scholars who argue that there should be a correspondence between them resulting in the protection of the

¹⁶⁰⁴ E Allan Farnsworth, *Farnsworth on Contracts*, vol 1 (3rd edn, Aspen 2004) 390-391.

¹⁶⁰⁵ (n 1258).

¹⁶⁰⁶ Giliker, *Pre-contractual* (n 356) 154-155; Furmston and Tolhurst (1389) 387; Cartwright, case 8, in Cartwright and Hesselink (n 6) 236.

¹⁶⁰⁷ *Waltons* (n 1258) 407-408 (Mason CJ and Wilson J), 410, 430 (Brennan J). The test for liability in *Waltons* is similar to the one applied in continental jurisdictions, *Ius Commune* (n 14) 412.

¹⁶⁰⁸ *Waltons* (n 1258) 423, 433.

¹⁶⁰⁹ Donal Nolan, 'Following in their Footsteps: Equitable Estoppel in Australia and the United States' (2000) 11 KCLJ 202, 210; *Ius Commune* (n 14) 400.

reliance interest.¹⁶¹⁰ Nevertheless, the dichotomy may be understood if it is considered that *Waltons* is really a lack of formality case (because the terms of the negotiated contract had been agreed and only fulfillment of the formality requirement was pending)¹⁶¹¹ where detrimental reliance can only be adequately compensated by enforcement of the expectation.¹⁶¹² The court held that the company was estopped from denying that it was bound (although no binding contract for a lease had come into existence) and that it should be treated ‘as though it had executed and delivered the original deed’.¹⁶¹³ Therefore, the remedy would have been specific performance except for the fact that it was held in the lower courts to be no longer appropriate.¹⁶¹⁴

Some legal scholars have advocated for a clearer or more developed law of estoppel in English law. Nolan has argued that because the doctrines of promissory and proprietary estoppel remain underdeveloped in English law, this has resulted in an inadequate legal response to the problem of detrimental reliance on non-contractual statements of intention, concluding that it is possible and, perhaps, probable that English law will follow the path taken by American and Australian law towards a more fully developed doctrine of equitable estoppel.¹⁶¹⁵ McFarlane has criticised the limitation of proprietary estoppel to cases concerning the acquisition of rights in land, which prevent its general use as a means to protect precontractual reliance, and has proposed the extension of the reliance principle underlying some proprietary estoppel cases.¹⁶¹⁶ In a recent case it was considered that proprietary estoppel may be available

¹⁶¹⁰ eg, Giliker, *Pre-contractual* (n 356) 158-159.

¹⁶¹¹ (n 1258) 397 (Mason CJ and Wilson J).

¹⁶¹² Nolan (n 1609) 212.

¹⁶¹³ (n 1258) 430 (Brennan J).

¹⁶¹⁴ (n 1258) (Gaudron J); *Furmston and Tolhurst* (1389) 388.

¹⁶¹⁵ (n 1609) 222.

¹⁶¹⁶ McFarlane, ‘Pre-Contractual Reliance’ (n 1500) 117-118, 120, 122; text to (n 1626) below.

regarding the renewal of a licence of intellectual property rights (although it was not on the facts of the case)¹⁶¹⁷ and this has been viewed as supporting an extension of the promise-based strand of proprietary estoppel beyond land.¹⁶¹⁸ McFarlane and Robertson, commenting on *Cobbe*, have indicated that it would be unfortunate if proprietary estoppel (which they consider as the doctrine best equipped to protect reliance) were prevented from fulfilling that role in the future.¹⁶¹⁹

The idea of developing a general principle to unify the different types of estoppels and overcome their differences has been discussed in English case law and academic literature but has faced a generally negative response.¹⁶²⁰ However, the justification for the rule that promissory estoppel cannot create a cause of action while proprietary estoppel can, has been challenged.¹⁶²¹ The question has been raised whether English courts should follow *Waltons Stores*, where it was rejected that allowing promissory estoppel to give rise to a cause of action would undermine the doctrine of consideration.¹⁶²² Giliker has suggested that the strongest argument for providing a ground for recovery in precontractual liability cases is the development of a broad doctrine of equitable estoppel, capable of compensating detrimental reliance. She argues that the foundations already exist in English law cases where the conduct of one negotiating party encouraged the other to believe that he was no longer acting at his own risk, and that '[i]t would take merely one further step for the English courts

¹⁶¹⁷ *Motivate Publishing FZ LLC v Hello Ltd* [2015] EWHC 1554 (Ch), 2015 WL 3479918 [61], [73] (Birss J).

¹⁶¹⁸ Shaw-Mellors (n 1226) 536.

¹⁶¹⁹ Ben McFarlane and Andrew Robertson, 'The Death of Proprietary Estoppel' [2008] LMCLQ 449, 460.

¹⁶²⁰ McKendrick, *Text, Cases, and Materials* (n 1217) 228-229; Cartwright, *Formation and Variation* (n 1216) 389-390.

¹⁶²¹ eg, Nolan (n 1609) 207; McKendrick, *Text, Cases, and Materials* (n 1217) 225, 229, 242; Collins (n 14) 87; Giliker, *Pre-contractual* (n 356) 151.

¹⁶²² (n 1258) 427 (Brennan J).

to follow the lead of the Australian courts and recognise estoppel as a more satisfactory response to the question of pre-contractual negotiations and risk.¹⁶²³ The estoppel approach, in precontractual liability cases traditionally dealt with through the law of restitution, is also supported by Jones¹⁶²⁴ and Carter.¹⁶²⁵ McFarlane has argued that English law recognises a promissory principle that may provide non-contractual protection to precontractual reliance in cases where one negotiating party reasonably relied on a precontractual promise made by the other party, but that this principle is mainly implemented through proprietary estoppel which, unfortunately and unjustifiably, prevents it from applying more broadly.¹⁶²⁶

In proprietary estoppel cases the remedy awarded is ‘the minimum equity to do justice’¹⁶²⁷ but it normally tends towards the protection of the expectation interest by granting the representee the promised interest in land.¹⁶²⁸ In *Crabb* it was held that equity should be satisfied by granting the claimant a right of access and a right of way without any payment by the claimant,¹⁶²⁹ and in *Humphreys Estate* Lord Templeman considered that there was no difficulty in the court devising an order for specific performance if the agreement in principle had become binding by estoppel¹⁶³⁰ (which it had not). Sometimes the remedy will protect the representee’s reliance (reimbursement of expenditure incurred) rather than his expectation, particularly where the value of the expectation is disproportionate to the value of the detriment

¹⁶²³ Giliker, *Pre-contractual* (n 356) 138, 96, 103, 151.

¹⁶²⁴ Text to (n 1547).

¹⁶²⁵ Text to (n 1548).

¹⁶²⁶ McFarlane, ‘Pre-Contractual Reliance’ (n 1500) 95, 98, 105, 116, 122.

¹⁶²⁷ *Crabb* (n 1243) 198.

¹⁶²⁸ McKendrick, *Text, Cases, and Materials* (n 1217) 247; Cartwright, *Introduction* (n 7) 154 fn 121; *Ius Commune* (n 14) 417.

¹⁶²⁹ (n 1243).

¹⁶³⁰ (n 1517) 120.

incurred.¹⁶³¹ Furthermore, some argue that proprietary estoppel is aimed at protecting detrimental reliance, and that the award of expectation-based relief can be reconciled with this view because in some cases there is no other way to protect against detriment than by the enforcement of the promise.¹⁶³²

An additional argument in favour of explaining cases of precontractual liability as based on estoppel is the ‘unconscionability’ or ‘unfairness’ that underlies both doctrines.¹⁶³³ Emphasis on unconscionability would bring estoppel closer to the law of wrongs.¹⁶³⁴ In *Waltons* Brennan J noted that equitable estoppel complements the tortious remedies and enhances the remedies available to a party who has relied on what another has induced him to believe.¹⁶³⁵ And in the US legal scholars have noted that the decision in *Red Owl*, which allowed recovery based on reliance,¹⁶³⁶ might have been fitted into tort.¹⁶³⁷ It is also possible to draw a comparison between the application of a broad notion of estoppel that protects detrimental reliance and the use of delict in precontractual liability cases in French law.¹⁶³⁸ In Australia, in order to provide a basis for the doctrine of equitable estoppel that emerged after *Waltons*,¹⁶³⁹ Spence has defined a duty to ensure the reliability of induced assumptions, which gives rise to a primary obligation to prevent harm and to a secondary obligation to

¹⁶³¹ *Jennings v Rice* [2002] EWCA Civ 159, [2003] 1 P & CR 8 [21], [50]; Cartwright, *Formation and Variation* (n 1216) 331 fn 36; McFarlane, *Proprietary Estoppel* (n 1226) 445; Robertson (n 1472) 222.

¹⁶³² Robertson (n 1472) 223-224; McFarlane, *Proprietary Estoppel* (n 1226) 431, 438, 442-443.

¹⁶³³ Text to (nn 1474-1476).

¹⁶³⁴ Different views as to the nature of estoppel in McKendrick, *Text, Cases, and Materials* (n 1217) 242ff.

¹⁶³⁵ (n 1258) 427.

¹⁶³⁶ (n 1349); text to (n 1603).

¹⁶³⁷ E Allan Farnsworth, *Contracts* (4th edn, Aspen 2004) 197; Summers, ‘“Good Faith” in General Contract Law’ (n 1089) 258.

¹⁶³⁸ Giliker, *Pre-contractual* (n 356) 135, 157.

¹⁶³⁹ (n 1258).

compensate the relying party for the harm suffered, stressing that it is the inducement of reliance, rather than merely inducing an assumption, that brings about this duty.¹⁶⁴⁰ It has been noted that this duty should be qualified in that the assumption must be reasonable in the particular context.¹⁶⁴¹

This broad conception of estoppel corresponds with precontractual liability's aim to protect detrimental reliance in cases of broken negotiations in the selected jurisdictions (and in different harmonising instruments).¹⁶⁴² Therefore, it appears that as long as a cause of action emanating from estoppel in cases of broken negotiations is confined to the protection of detrimental reliance, there should be no concern of undermining contract law and the way would be cleared for the acceptance of a broader notion of estoppel.¹⁶⁴³ As such, developing promissory estoppel or eliminating the differences between it and proprietary estoppel could be a viable option for providing relief in broken negotiations cases, especially in the paradigm case, in English law.

It has been pointed out that it is not out of the question that the Supreme Court might be persuaded to allow promissory estoppel to create a new cause of action,¹⁶⁴⁴ or even that it is only a matter of time;¹⁶⁴⁵ yet, there is no clear indication that English courts are prepared to take promissory estoppel in the direction that the Australian or US courts have.¹⁶⁴⁶ The Court of Appeal has stated that if the law regarding estoppel

¹⁶⁴⁰ Michael Spence, *Protecting Reliance: The Emergent Doctrine of Equitable Estoppel* (Hart Publishing 1999) 1-2.

¹⁶⁴¹ Koh (n 1551) 280.

¹⁶⁴² Ch V s IV 1.

¹⁶⁴³ Giliker, *Pre-contractual* (n 356) 156.

¹⁶⁴⁴ Cartwright, *Introduction* (n 7) 83.

¹⁶⁴⁵ Collins (n 14) 88.

¹⁶⁴⁶ Cartwright, case 8, in Cartwright and Hesselink (n 6) 237.

is to be developed or corrected, this must be done by the Supreme Court.¹⁶⁴⁷ After *Cobbe*,¹⁶⁴⁸ which rejected the Court of Appeal's decision to grant relief via proprietary estoppel where one negotiating party had disappointed the expectation that he had given rise to in the other party about the future conclusion of a contract of sale of property,¹⁶⁴⁹ it is doubtful whether the Supreme Court will be willing to develop a doctrine of estoppel, beyond cases of negotiations for the sale of land, to impose liability where such an expectation has been raised and then disappointed by the unconscionable conduct of the defendant, causing detrimental reliance to the claimant.¹⁶⁵⁰ Additionally, some legal scholars disagree with the view that estoppel is the preferable explanation of precontractual liability cases. Dietrich, for instance, argues that the principles underlying the imposition of liability via estoppel are derivative from principles of contract and tort.¹⁶⁵¹ Giliker counter-argues that the factors¹⁶⁵² which Dietrich finds present in a 'grey area' between contract and tort can alternatively be explained in terms of estoppel, which would have the advantage of providing a single doctrine capable of explaining the case law.¹⁶⁵³

Even if the appropriate case came before the Supreme Court, and it decided to allow promissory estoppel to create a new cause of action, or to merge promissory and proprietary estoppel into a single doctrine of equitable estoppel, or to remove proprietary estoppel's limitation to cases concerning the acquisition of interests in land, other characteristics of these doctrines would still need to be modified in order

¹⁶⁴⁷ *Baird Textile v Marks & Spencer* (n 1220) [55] (Judge LJ).

¹⁶⁴⁸ (n 1230).

¹⁶⁴⁹ (n 1436) [7] (Mummery LJ).

¹⁶⁵⁰ Cartwright and Hesselink (n 6) 464, 468; *Ius Commune* (n 14) 400.

¹⁶⁵¹ Dietrich (n 114) 156 fn 17.

¹⁶⁵² Text to (n 1503).

¹⁶⁵³ Giliker, *Pre-contractual* (n 356) 96 fn 183.

for them to be able to provide relief in cases of broken negotiations. First, promissory estoppel is designed to grant relief in situations where a ‘promise’ was made and this notion appears to have a more technical and restricted meaning¹⁶⁵⁴ than in the selected jurisdictions. In the latter, the claimant’s expectation of the future conclusion of the negotiated contract emanates from the defendant’s ‘conduct’, a wide notion which includes explicit or implicit promises or behaviour;¹⁶⁵⁵ in general, saying or doing something but also refraining from saying or doing something that should have been said or done, which created or encouraged in the other party an expectation as to the future conclusion of the contract.¹⁶⁵⁶ Perhaps shifting the focus from the finding of a promise or undertaking to the more general notion of the conduct of the defendant (like in proprietary estoppel cases)¹⁶⁵⁷ would be required. However, McFarlane requires an agreement in principle and a promise that such an agreement will be honoured for liability to arise under an extended principle of proprietary estoppel.¹⁶⁵⁸ These elements are not required in broken negotiations cases in the selected jurisdictions.¹⁶⁵⁹ Because McFarlane categorises as promised-based¹⁶⁶⁰ the proprietary estoppel cases analysed above,¹⁶⁶¹ he concludes that, in the absence of a promise, the inducement or encouragement of an expectation cannot support a proprietary estoppel

¹⁶⁵⁴ Text to (n 1222).

¹⁶⁵⁵ van Erp, ‘A European "Culpa in Contrahendo" Doctrine’ (n 1065) 70.

¹⁶⁵⁶ p 199-200 above.

¹⁶⁵⁷ *Crabb* (n 1243) 189, 198; *Cobbe* (n 1230) [16].

¹⁶⁵⁸ McFarlane, ‘Pre-Contractual Reliance’ (n 1500) 105, 121; *Proprietary Estoppel* (n 1226) 71, 73, 88; ‘Failed Contractual Negotiations’ (n 1257) 503.

¹⁶⁵⁹ Text to (n 1036).

¹⁶⁶⁰ Text to (n 1226).

¹⁶⁶¹ This ch s I 1.

claim.¹⁶⁶² Robertson differs, arguing that proprietary estoppel is based on an induced assumption and not on a promise (the essence of which is a commitment).¹⁶⁶³

Secondly, the reasoning behind promissory and proprietary estoppel does not correspond to the reasoning of precontractual liability: promissory estoppel is about making promises binding in the absence of consideration or, at least, about preventing a person from acting inconsistently with his promise,¹⁶⁶⁴ and proprietary estoppel is about enforcing representations relating to the acquisition of an interest in property,¹⁶⁶⁵ whereas precontractual liability is about compensating losses caused by unjustly disappointing a legitimate expectation, not about forcing a person to conclude a contract.¹⁶⁶⁶ Restricting the remedy to the protection of the reliance interest might take care of this concern, although, in practice, sometimes the expectation interest is protected.¹⁶⁶⁷ Thirdly, legal scholars who advocate for promissory or equitable estoppel to provide a new cause of action in the context of precontractual liability or for the extension of the principle underlying proprietary estoppel, only refer to cases where services were performed or work was undertaken in anticipation of a contract that does not materialise,¹⁶⁶⁸ which do not correspond to the paradigm case.

In sum, it remains doubtful whether the courts will be willing to develop either promissory estoppel or promise-based proprietary estoppel in a way that would allow them to provide relief in the paradigm case, but it is not inconceivable that they might

¹⁶⁶² *Proprietary Estoppel* (n 1226) 47ff, 53.

¹⁶⁶³ (n 1472) 211, 213.

¹⁶⁶⁴ p 240-241 above.

¹⁶⁶⁵ p 242 above.

¹⁶⁶⁶ Ch V s IV.

¹⁶⁶⁷ In Australia, text to (n 1609); in England, text to (n 1628).

¹⁶⁶⁸ eg, Giliker (n 1328); Spence (n 1640) 87ff; McFarlane, 'Pre-Contractual Reliance' (n 1500) 120; McFarlane, *Proprietary Estoppel* (n 1226) 89.

decide to do so if the appropriate case came before them, and it is kept firmly in mind that the aim is to protect detrimental reliance.

(d) A new liability rule

Some American legal scholars have proposed the construction of a new liability rule to deal with situations of precontractual liability. One author has suggested a new cause of action denominated ‘opportunistic breach of the bargaining relationship’, which excludes normal negotiation costs from the category of compensable precontractual investments.¹⁶⁶⁹ Thus, it would not be useful in the paradigm case because it would not lead to the compensation of the type of losses that are generally compensated in this case.¹⁶⁷⁰ Another author has proposed a new legal default rule that would enforce an implicit commitment of the promisor that he will notify the promisee of changes in his willingness to negotiate or will assume some liability for the promisee’s reliance.¹⁶⁷¹ This liability rule would also not be useful in the paradigm case because it is designed to only compensate sunk costs requested by the promisor.¹⁶⁷² Finally, another legal scholar has proposed a new cause of action in contract for losses that result from reliance on negligent misrepresentations during negotiations, posing as an example *Red Owl* type cases,¹⁶⁷³ but recognising that this solution would require significant changes in the law of contract.¹⁶⁷⁴

¹⁶⁶⁹ Shell (n 1501) 276-278.

¹⁶⁷⁰ Ch V s IV 1.

¹⁶⁷¹ Kostritsky (n 1501) 630, 672, 681.

¹⁶⁷² *ibid* 682 fn 254.

¹⁶⁷³ Mark Gergen, ‘Liability for Mistake in Contract Formation’ (1990) 64 *Southern California Law Review* 1, 27, 38-39.

¹⁶⁷⁴ *ibid* 38.

Given the difficulties in developing from known grounds of liability a solution to protect the paradigm case,¹⁶⁷⁵ it seems unlikely that (should there be a desire to provide such protection by English law) the chosen tool would be an entirely new cause of action that cannot be classified as falling into one of the existing piecemeal solutions. Nevertheless, the creation of an entirely new cause of action would have the benefit of being free from the requirements of the existing piecemeal solutions that currently block the grant of relief in the paradigm case.

IV Conclusions

In English law the paradigm case does not give rise to liability. Focusing on good faith as the basis of liability arising during negotiations bars the vision of a notion that is already present in the solutions currently provided by English law in situations of precontractual liability: ‘reliance’ in both its dimensions. Rethinking this liability in terms of reliance rather than good faith could help to shed light on the fact that the reasoning behind the solutions provided by English law is not too different from the reasoning behind the solutions provided by other common law jurisdictions (US and Australia) and by civil law jurisdictions (particularly the selected jurisdictions). Therefore, if change in this area were desired, inspiration could be drawn from the reliance approach to precontractual liability for breaking off negotiations. It remains to be seen whether English courts will be willing to develop this area of the law and, if so, through which means they will do so. The tort of negligence and estoppel (provided that the remedy is confined to reliance damages) seem to be the strongest candidates. Between the two, it is suggested that liability in the paradigm case fits

¹⁶⁷⁵

This subsection (a), (b), (c) above.

better into the reasoning of negligence (breach of a duty of care) than into the reasoning of estoppel (going back on one's word).

CHAPTER VII – GENERAL CONCLUSIONS

It has been shown that the notion of reliance is the defining element of liability for breaking off negotiations in the selected jurisdictions, particularly in the paradigm case. In this way, the legitimate reliance of the claimant on the expectation of the future conclusion of the contract, induced by the party who then breaks off is the common factor that explains the rationale of this liability.¹⁶⁷⁶ Although the scope of this thesis has been limited to these jurisdictions, other studies have found that this notion is used to explain precontractual liability in many other jurisdictions.¹⁶⁷⁷ Some legal scholars go as far as stating that the disappointment of reliance is the common element to all doctrines relating to precontractual liability.¹⁶⁷⁸

This thesis has demonstrated that there is no functional equivalence between the selected jurisdictions, on the one hand, and the contrasting jurisdiction, on the other, regarding the paradigm case: the latter does not provide relief for it,¹⁶⁷⁹ while the former do. Following a combined common core and functional approach, this thesis has argued that reliance is the ‘higher concept’¹⁶⁸⁰ or ‘common core’¹⁶⁸¹ of liability for broken negotiations in the selected jurisdictions, and has shown that reliance is present in the particular liabilities where the contrasting jurisdiction provides relief in cases of broken negotiations.¹⁶⁸² Thus, reliance has the potential of

¹⁶⁷⁶ Similarly, Muir-Watt (n 439) 58-59.

¹⁶⁷⁷ eg, Cartwright and Hesselink (n 6) 454; Alberto Manzanares, ‘La Responsabilidad Precontractual en la Hipótesis de Ruptura Injustificada de las Negociaciones Preliminares’ (1984) 37 *Anuario de Derecho Civil* 687 (analysing Italian law in particular).

¹⁶⁷⁸ Barrientos, *Daños* (n 653) 55.

¹⁶⁷⁹ Ch VI s IV.

¹⁶⁸⁰ Zweigert and Kötz (n 11) 44.

¹⁶⁸¹ Bussani and Mattei (n 12) 340.

¹⁶⁸² Ch VI s III 1.

leading to a functional equivalence or a common core between the selected jurisdictions and the contrasting jurisdiction if the latter were to embrace a reliance approach to granting relief in the paradigm case.¹⁶⁸³

Throughout the thesis, the concept of reliance has been used in ‘a rather looser sense’¹⁶⁸⁴ in order to encompass the defining notions of the two dimensions of reliance that have been identified: trust and expectation. The distinction between the two dimensions of reliance in the field of precontractual liability for broken negotiations is very relevant because it shows how reliance interacts with good faith and how the two can be separated. It is here, in particular, that the thesis has aimed to demonstrate an innovative theoretical analysis that could have important practical consequences.

In the selected jurisdictions, it has been shown that trust-based reliance and objective good faith coincide and that expectation-based reliance emanates from them. The expectation dimension of reliance is the key element to explain precontractual liability for breaking off negotiations and, therefore, this liability can be theoretically explained on the sole basis of expectation-based reliance. However, it could be questioned why it is preferable to talk in terms of expectation-based reliance rather than, say, expectation-based good faith? Providing a convincing reason to prefer the former over the latter is difficult as they are both objective and abstract concepts that require definition in the concrete case. It is suggested that the answer is simple but significant: expectation-based reliance is more specific and accurate in

¹⁶⁸³ Similarly, Bénédicte Fauvarque-Cosson, ‘Negotiation and Renegotiation: A French Perspective’ in John Cartwright, Stefan Vogenauer and Simon Whittaker (eds), *Reforming the French Law of Obligations, Comparative Reflections on the Avant-projet de réforme du droit des obligations et de la prescription (‘the Avant-projet Catala’)* (Hart Publishing 2009) 41, referring to ‘disappointed trust’ and a ‘liability based on *reliance* and on loss suffered as a result of this reasonable trust’; de Coninck (n 86) 132-133, 137, referring to the protection of *confiance légitime*.

¹⁶⁸⁴ Cartwright and Hesselink (n 6) 454.

truly embodying the essence of this liability. Nevertheless, in view of their species-to-genus relationship, it is possible to have reliance and good faith peacefully coexisting in the selected jurisdictions.

The distinction between good faith and reliance acquires unique significance in the contrasting jurisdiction because, on the one hand, it has difficulties with the idea of good faith operating in the precontractual stage and, on the other hand, it is much more familiar with the notion of reliance. It has been shown that reliance, in both its dimensions, is a key notion present in many of the particular solutions currently provided by English law to solve precontractual liability cases.¹⁶⁸⁵ If the two dimension of reliance are severed, then it is possible to dispense with good faith and focus on the protection of expectation-based reliance. This shift from good faith to reliance could be the basis of a future development of English law in this area in order to provide relief in the paradigm case.

But the question remains whether English law is prepared or willing to move forward? It is prepared as it already has the tools to do so, but it does not seem, at the moment at least, to be willing to do so. One reason is the continued perception that precontractual liability is inextricably linked to good faith and since the latter is not generally accepted, particularly in the negotiation stage, the former cannot be accepted in general terms. The feasibility of precontractual liability functioning independently from good faith has already been shown. Yet, another reason appears to be that English law is firmly attached to the technique of applying a piecemeal approach rather than general principles and that, in their content, the particular solutions remain separate rather than forming a cohesive theory. However, it is not necessary to give up this preference for piecemeal solutions because English law

¹⁶⁸⁵

Text to (n 1682).

already has certain boxes into which precontractual liability in the paradigm case could be inserted. And it is not a question of introducing a foreign general principle (like good faith) but of using the existing boxes in a way that have not been used before (estoppel and the tort of negligence seem to be the best suited for such a development).¹⁶⁸⁶ Is this really so radical? It is no more radical than, for instance, *Hedley Byrne*¹⁶⁸⁷ was at its time.

Nevertheless, a more difficult reason remains, which is the stark English view of negotiations as a period where the risk of failure remains with each party, who appear as antagonists rather than as collaborators. Under this view, while English judges might accept that expectation-based reliance is the true basis of precontractual liability (instead of good faith), they might still consider that the paradigm case is not worthy of protection because the facts of such a case simply do not give rise to a legitimate expectation-based reliance that deserves relief. This is a real possibility which would lead to a partial functional equivalence between the selected jurisdictions and English law (regarding cases where English law currently provides relief), but not to a common core as English law would still not fall in line with the selected jurisdictions regarding the paradigm case. However, this forecast is not inevitable.

This thesis has shown that the fear of opening the floodgates is unfounded: precontractual liability for broken negotiations has operated in the selected jurisdictions under strict requirements, providing for reliance-based remedies, and without causing a flood of litigation.¹⁶⁸⁸ Additionally, a glimmer of hope of moving

¹⁶⁸⁶ Ch VI s IV.

¹⁶⁸⁷ (n 1275).

¹⁶⁸⁸ Ch V ss I and IV.

English law closer to the selected jurisdictions, without developing a general principle, is evidenced in *Yam Seng*.¹⁶⁸⁹ This case has demonstrated that it is possible to give content to good faith in the performance of contracts. Thus, it would be odd for it to be impossible to give content to good faith in the precontractual phase. Furthermore, if the troublesome notion of good faith is left aside and the emphasis is placed on protecting the reliance placed on a legitimate expectation, then it really seems that it is only a matter of having the right case come before the Supreme Court for it to decide whether it wants to embrace a broader potential for precontractual liability in order to provide relief in the paradigm case.

It could be argued that a stumbling block for English law would be determining at which point the precontractual phase should be protected,¹⁶⁹⁰ which does not mean that at this point liability will necessarily arise, but only that it might arise if certain requirements are met. It is here that the comparative analysis of the operation of reliance in the selected jurisdictions¹⁶⁹¹ might be useful for English lawyers and judges, as they could take inspiration from them, without following their solutions to the letter. For instance, while in German law the existence of a precontractual relationship marks the beginning of the potential protection provided by *cic*, in French and Chilean law it is sufficient that negotiations have begun because, outside of contract, protection is provided by the general principle of delictual liability.¹⁶⁹²

Another hurdle might be the issue of determining where the trigger for liability is found: in the manner of conducting the negotiations or in the manner of ending

¹⁶⁸⁹ (n 1369).

¹⁶⁹⁰ For a general discussion, Cartwright and Hesselink (n 6) 450-453.

¹⁶⁹¹ Ch V s II.

¹⁶⁹² Ch V s I 3 (a).

them. Again, inspiration might be taken from the selected jurisdictions, which all show that, although there may be some differences as to where the emphasis is placed, fault is found in conducting the negotiations in a manner that gives rise to a legitimate expectation of the future conclusion of the contract and in later breaking them off without a justified reason.¹⁶⁹³

Finally, another issue might be determining the appropriate remedy. But following the solutions of the selected jurisdictions, which correspond to those of the harmonising instruments that have been analysed,¹⁶⁹⁴ it is clear that the remedy in the paradigm case should be damages to the extent of the reliance interest.

To conclude, although this thesis has neither focused on nor argued for the need of harmonisation of this area of the law, which faces numerous difficulties,¹⁶⁹⁵ particularly considering that the UK will be leaving the EU¹⁶⁹⁶ and that, at the moment, efforts to harmonise contract law within the EU have been very much watered-down,¹⁶⁹⁷ it is still worthwhile to point out that it will be easier to find common ground and, hence, increase the chances of harmonisation, at least in the area of liability for broken negotiations, if the common language is that of reliance rather than that of good faith.¹⁶⁹⁸

¹⁶⁹³ Ch V s I 2.

¹⁶⁹⁴ Ch V s IV 1.

¹⁶⁹⁵ Schulze and Zoll (n 1182) 144.

¹⁶⁹⁶ As a result of the ‘Brexit’ referendum held on 23 June 2016.

¹⁶⁹⁷ (n 1171).

¹⁶⁹⁸ Similarly, de Coninck (n 86) 133, 137.

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