DEAL JUMPING IN CROSS-BORDER MERGER & ACQUISITION NEGOTIATIONS: A COMPARATIVE ANALYSIS OF PRE-CONTRACTUAL LIABILITY UNDER FRENCH, GERMAN, UNITED KINGDOM AND UNITED STATES LAW

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"Given the fact that the notion of pre-contractual liability does not exist in common law, some American companies have been very surprised to see damages claims petitioned against them and their liability involved because the law that had already been chosen – or could be determined through obvious clues – [established] the principle of this liability, which they ignored."[1]

I.
INTRODUCTION AND OBJECTIVES

In light of the global financial crisis of 2007-2008, and in light of the continued trend of volatility in equity and debt capital markets worldwide, deal failure in the global market for corporate control has become more than a regular occurrence.[2] The particular phenomenon of deal jumping—described as the breaking off of negotiations by either Buyer or Seller with Party X in pursuit of a more attractive deal with Party Y—has contributed significantly to the heightened risk of deal uncertainty and deal failure in the post-2007 financial world. The financial crisis has, indeed, served as a catalyst for

1. Jean-Flavien Lalive, "Contrats entre états ou entreprises étatiques et personnes privées: développements récents," 181 Recueil des Cours de l'Académie de Droit International de La Haye 40 (1983) *cited and translated in* Alain Couret & Bruno Dondero, The Breakdown of Negotiations in M&A Operations: A Comparative Approach (April 29-30, 2011). (Paper Presented to Third Annual Conference, Irish Society of Comparative Law).

2. *See* Charles Roxburgh et al., *Debt and Deleveraging: Uneven Progress on the Path to Growth*, MCKINSEY GLOBAL INSTITUTE, Jan. 2012, http://www.mckinsey.com/insights/mgi/research/financial_markets/uneven_progress_on_the_path_to_growth; *see also* Nick Vause et al., *European Bank Funding and Deleveraging*, BIS QUARTERLY REVIEW, Mar. 2012, http://www.bis.org/publ/qtrpdf/r_qt1203a.pdf; *see also* Robert Sher, *Why Half of All M&A Deals Fail, and What You Can Do About It*, FORBES (Mar. 19, 2012), http://www.forbes.com/sites/forbesleadershipforum/2012/03/19/why-half-of-all-ma-deals-fail-and-what-you-can-do-about-it; *see also* Shaun Rein, *Why Most M&A Deals End Up Badly*, FORBES (Jun. 16, 2009), http://www.forbes.com/2009/06/16/mergers-acquisitions-advice-leadership-ceonetwork-recession.html.

the deal jumping phenomenon, as it has provided incentives for both public and private firms to keep their transaction options open in order to hedge against the ever-present risk of financial instability arising from either circumstances particular to the specific acquirer/seller, or from macroeconomic sources of systemic risk.[3] While parties based in common law jurisdictions who conduct negotiations domestically with domestic counterparties are typically under the (correct) impression that pre-contractual negotiations and preliminary agreements designated as "non-binding" will not create any contractual liability, the situation may be different when these parties approach acquirers or acquisition targets based in civil law jurisdictions. In the latter case, liability may arise under contract- or tort-based regimes that establish an express or implicit duty to conduct negotiations in good faith.

This paper is focused on pre-contractual liability issues surrounding preliminary agreements in cross-border merger and acquisition (M&A) negotiations between parties transacting in the United States ("U.S.") and select Western European jurisdictions. The paper intends to fill a gap in comparative law scholarship on pre-contractual liability by analyzing the impact of differences between common law and civil law regimes on cross-border M&A transactions using the hypothetical scenario of a U.S. buyer headquartered in Delaware, with its place of business in New York City. This hypothetical buyer will begin and later break off negotiations with hypothetical Western European targets incorporated and operating in different jurisdictions, including France, Germany and the United Kingdom ("U.K."). The paper seeks to answer the following question: When would a domestic party engaged in cross-border M&A negotiations be held liable for walking away from negotiations with a foreign counterparty in order to pursue a deal with another, more attractive foreign counterparty? The paper will also consider the policy rationales underpinning each ju-

3. *See* Franklin Allen et al., *Cross-Border Banking in Europe: Implications for Financial Stability and Macroeconomic Policies*, CTR. FOR ECON. POLICY RESEARCH (2011); *see also* Darryll Hendricks et al., *Systemic Risk and the Financial System Background Paper*, NAT'L ACAD. OF SCI./FED. RESERVE BD. OF NEW YORK CONFERENCE ON NEW DIRECTIONS IN UNDERSTANDING SYSTEMIC RISK, May 2006; *see also* Mejra Festica et al., *The Macroeconomic Sources of Systemic Risk in the Banking Sectors of Five New EU Member States*, 35 J. BANKING & FIN. 310, 310-22 (2011).

risdiction's treatment of contractual freedom and risk in pre-contractual negotiations.

The paper is structured as follows: it begins with an introduction to the concept of pre-contractual liability as is currently understood in France, Germany, the U.K. and the U.S.; it then discusses the concept of preliminary agreements and letters of intent, and applies pre-contractual liability norms to preliminary agreements and letters of intent in cross-border M&A transactions; finally, it compares common law and civil law treatment of deal jumping and the breaking off of negotiations in cross-border M&A transactions, both before and after preliminary agreements have been concluded between transacting parties. The paper will conclude with remarks concerning the critical importance of familiarity with foreign law to transacting parties and their counsel in M&A transactional work. Such familiarity minimizes and mitigates the risk of unexpected pre-contractual liability issues that may arise because of stark differences between the custom and practice of the transacting parties' domestic jurisdictions and that of their international counterparts.

II.
THE CONCEPT OF PRE-CONTRACTUAL LIABILITY

Pre-contractual liability generally refers to liability for expenses incurred by transacting parties in the course of contractual negotiations that occur in the expectation of a finalized contract.[4] In the world of M&A transactions, where both strategic and financial buyers conduct detailed due diligence in order to determine whether a potential acquisition target will yield return on investment,[5] pre-contractual expenditures are common practice.[6] Such expenditures can include attorney

4. *See generally* E. Allan Farnsworth, *Precontractual Liability and Preliminary Agreements: Fair Dealing and Failed Negotiations*, 87 COLUM. L. REV. 217 (1987); *see also* PAULA GILIKER, PRE-CONTRACTUAL LIABILITY IN ENGLISH AND FRENCH LAW (Kluwer Law International, 1st ed. 2002).

5. For a detailed discussion of types of buyers in, and motivations for, M&A transactions, see WILLIAM J. CARNEY, MERGERS AND ACQUISITIONS: CASES AND MATERIALS (3d ed. 2011).

6. This topic is particularly relevant to large-scale investment projects requiring several phases of negotiations over a prolonged period of time, including private equity investments, which require detailed due diligence before closing. *See* GILIKER, *supra* note 4.

fees, banker fees and other significant costs necessary to facilitate the negotiation and deal closing process. Pre-contractual liability typically arises when negotiations for the particular contract in question are terminated by one party who decides that the potential transaction is no longer worth pursuing. Where negotiations have reached an advanced stage, the party seeking redress for expenses typically claims to have made reliance investments on the basis of reasonable expectations of a completed transaction. These expectations arise out of the other party's behavior during the negotiation process and/or through the content of signed preliminary agreements, including, most notably, letters of intent.

Both civil law and common law jurisdictions may reach similar outcomes in pre-contractual litigation.[7] The key difference between civil law and common law jurisdictions in the enforcement of pre-contractual liability lies not in the outcome but in the reasoning used by courts to reach particular decisions. Civil law countries, in stark contrast to common law countries, have treated the pre-contractual period of contract formation as one in which liability for expenditures can arise under negotiation duties of good faith and loyalty established under either contract-based (Germany) or tort-based (France) legal regimes.[8] Courts in common law jurisdictions, with the U.K. and U.S. as the most prominent examples, have treated the pre-contractual phase in contract formation differently, holding that parties have the right to enter and exit negotiations freely and without liability.[9] Within the common law world, however, divergence also exists among jurisdictions. Courts in some U.S. states, for example, have held that parties can be liable for breaking off negotiations in bad faith when preliminary agreements have been entered into.[10] In contrast, landmark case law in the U.K. holds that pre-contractual negotiations in circumstances where no preliminary agreements

7. Joachim Dietrich, *Classifying Precontractual Liability: A Comparative Analysis*, 21 LEGAL STUD. 153, 155 (2001).

8. *See* COMPARATIVE CONTRACT LAW: CASES, MATERIALS AND EXERCISES 150-90 (Kadner Graziano T. ed., Palgrave Macmillan 2009). *See also* Sylviane Colombo, *The Present Differences Between the Civil Law and Common Law Worlds with Regard to* Culpa in Contrahendo, 2 TILBURG FOREIGN L. REV. 341, (1992-1993).

9. GRAZIANO, *supra* note 8; Colombo, *supra* note 8.

10. *See also* Farnsworth, *supra* note 4.

have been entered into do not create an express duty to negotiate in good faith.[11] An implied duty of good faith and fair dealing, however, can be enforced in U.S. courts under particular circumstances.[12] As a result of the varying degrees of pre-contractual liability in common law systems, scholars have referred to the common law approach as "fragmented" and "piecemeal"[13] when compared to the more unified and predictable approaches under traditional continental European civil law systems.

The concept of pre-contractual liability implicates the broader notions of both freedom to contract and freedom not to contract, and it embodies the policy preferences of each jurisdiction with regard to these issues. While common law systems favor an approach to negotiations with no protective burdens or duties on negotiating parties that impinge upon their freedom to enter and exit negotiations without the risk of liability vis-à-vis their counterparties (the "adversarial" or "aleatory"[14] approach), civil law systems impose enforceable duties on negotiating parties designed to incentivize solidarity between contracting parties (the "protective" approach).[15] As a leading European comparative law scholar has recognized, the differences between the common law and civil law approaches to pre-contractual liability reflect deep socio-cultural

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11. Walford v. Miles, [1992] 2 A.C. 128 (H.L.).

12. *See* Shann v. Dunk, 84 F.3d 73, 82 (2d Cir. 1996) (citing Teachers Ins. & Annuity Ass'n of Am. v. Tribune Co., 670 F. Supp. 491, 498 (S.D.N.Y. 1987)); Itek Corp. v. Chi. Aerial Ind., Inc., 248 A.2d 625, 629 (Del. 1968).

13. *See* Dietrich, *supra* note 7, at 153 ("The common law has solved questions of liability arising in the context of precontractual negotiations by resort to a range of different doctrines and approaches, adopting in effect 'piecemeal' solutions to questions of precontractual liability.").

14. *See* Farnsworth, *supra* note 4, at 221 (Stating that "[a]t the root of this view of the precontractual period is . . . the common law's 'aleatory view' of negotiations: a party that enters negotiations in the hope of the gain that will result from ultimate agreement bears the risk of whatever loss results if the other party breaks off the negotiations. That loss includes out-of-pocket costs the disappointed party has incurred, any worsening of its situation, and any opportunities that it has lost as a result of the negotiations. All is hazarded on a successful outcome of the negotiations; all is lost on failure . . . . This aleatory view of negotiations rests upon a concern that limiting the freedom of negotiation might discourage parties from entering negotiations.") (internal quotations omitted).

15. Prof. Marco Torsello, Comparative Private Law Seminar, NYU School of Law (Sept. – Dec. 2011).

and religious norms underpinning the respective systems' historical views of the role of individual in society.[16] More specifically, while the civil law *culpa in contrahendo* approach (the German approach) reflects a sense of social solidarity through which individual members of a national community bear responsibility for other members of their community, the English common law approach reflects an emphasis on individual self-responsibility, with a preference for societal competition uninhibited by protective duties toward others.[17] In this author's opinion, a holistic understanding of the civil law and common law approaches to pre-contractual liability necessitates reference to these deep historic and socio-cultural norms that underlie and differentiate the contemporary legal rules that apply to cross-border M&A transactions. Appreciation of and, more importantly, respect for, the perception of transacting parties, legal counsel, judges, and policy makers in civil law jurisdictions will help to inform transactional planning and negotiation for common law-based parties.

Each approach treats the risk of failed negotiations differently, and this contrast is particularly relevant to parties engaged in cross-border M&A negotiations in legal jurisdictions that are characterized by starkly different contract formation norms. The mere commencement of a negotiation with a party based in France or Germany, for example, can impose a duty to negotiate in good faith that will ultimately shape the perception of negotiation behavior by both the negotiating counterparty and courts in those civil law jurisdictions. In common law jurisdictions, the issue of pre-contractual liability stemming from failed negotiations is typically analyzed through the traditional contract law lens of offer and acceptance, and as a consequence, is typically not recognized as a liability-creating issue by U.S. courts.[18] However, as U.S. legal scholar Allan Farnsworth and others have noted, the traditional notions of offer and acceptance do not fit perfectly within the realm of negotiations that are broken off before any specific offers have been made.[19] These concepts are particu-

16. *Id.*

17. *Id.*

18. *See* Farnsworth, *supra* note 4, at 222.

19. *Id.*; *see also* PRECONTRACTUAL LIABILITY IN EUROPEAN PRIVATE LAW 449-50 (John Cartwright & Martijn Hesselink eds., Cambridge Univ. Press 2009) ("The break-off of the negotiations may seem inevitable to the parties as they

larly useful in the context of M&A negotiations since preliminary discussions between target and acquirer commonly focus on synergies and other preliminary issues that do not lead to formal discussions regarding offer terms such as purchase price or post-closing corporate governance structures.

As scholars have indicated, two of the most common elements of a prima facie case of pre-contractual liability include (1) a reasonable belief or expectation on the part of the plaintiff that a contract exists or will be formed in the future, and (2) detrimental reliance by the plaintiff upon that belief or expectation,[20] most commonly in the form of direct and substantial costs incurred to facilitate closing of the contract. In the context of cross-border M&A transactions, the reasonability of one party's expectations of contract formation is the key difficulty in establishing a prima facie case of pre-contractual liability. This reasonability determination is influenced by the extent to which negotiations have progressed to an advanced stage, evidenced in many cases by the execution of preliminary agreements, which are manifested most commonly in the form of a letter of intent.[21]

III.
THE CONCEPTS OF PRELIMINARY AGREEMENTS AND LETTERS OF INTENT

Dissecting how and why an "agreement" could be characterized as "preliminary" is paramount to understanding when and how liability can arise from a pre-contractual relationship between parties to cross-border M&A negotiations. Precision,

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together realize that the contract will never be concluded . . . . Such 'negotiations' may occur in the kind of commercial setting where the negotiating parties have similar bargaining strength and a similar awareness of the commercial difficulties involved in the negotiations. But they may also occur between commercial parties whose relative bargaining strength and awareness is not equal; in a less commercial context, between a commercial party and a consumer; between two non-commercial parties (friends—or, at least, they started out as friends when the 'negotiations' began); or even—the most non-commercial example that one might ever conceive—the 'negotiations' for the 'contract' may not be negotiations at all, but an engagement, leading to a hoped-for marriage which never takes place.").

20. *See* Dietrich, *supra* note 7, at 165.

21. *See* Farnsworth *supra* note 4, at 3; *see also* LOU R. KLING & EILEEN T. NUGENT, NEGOTIATED AGREEMENTS OF COMPANIES, SUBSIDIARIES AND DIVISIONS (2003).

or lack thereof, in defining these agreements can influence the strength of pre-contractual arguments in litigation. As one scholar has indicated, "the pre-contractual phase is difficult to characterize and analyze in both legal and practical terms."[22] Defining preliminary agreements poses additional challenges, moreover, since there is debate in scholarly literature and legal practice as to their exact meaning. As Professor Torsello has explained, "[t]he notion of *preliminary agreements* . . . is not a normative notion, although it describes a common practice in both domestic and international commerce."[23] In addition to customary use in national and international business, the "notion is often used to identify an extremely diversified range of agreements" that range "from agreements which merely govern the parties' conduct during the negotiation, possibly leading to a contract of sale, to agreements which bind the parties to entering a future contract—the terms and conditions of which are, at least in part, agreed upon at the earlier stage."[24] While this ambiguity prevails in the literature, Professor Torsello has comprehensively encapsulated the plethora of preliminary agreements into three essential categories: those binding the parties to negotiate, those setting forth obligations during negotiations, and those binding the parties to conclude a final contract.[25] As such, whether a preliminary agreement exists will be dependent upon any obligations that have been, or can be said to have been, created during negotiations.

In determining whether enforceable pre-contractual obligations arise out of negotiations or definitive preliminary agreements, it is essential to understand the objectives and interests of the transacting parties[26] in engaging in preliminary discussions or signing preliminary agreements. The parties' goals can prove useful in identifying whether the circumstances surrounding the transaction in question can legitimately contribute to the creation of obligations and reasona-

22. PRECONTRACTUAL LIABILITY IN EUROPEAN PRIVATE LAW, *supra* note 19, at 449.

23. Marco Torsello, *Preliminary Agreements and CISG Contracts*, *in* DRAFTING CONTRACTS UNDER THE CISG 191, 191 (Harry M. Flechtner et al. eds., 2008).

24. *Id.* at 192.

25. *Id.* at 214.

26. The term "transacting parties" is used intentionally rather than "contracting parties" since the issue of whether or not a contract or binding pre-contractual agreement has been formed is at the center of this debate.

ble expectations between parties.[27] In the context of M&A transactions, the financial and/or strategic goals of the acquiror and target can be analyzed by courts in order to determine whether reasonable expectations have been created in preliminary negotiations, and, if so, whether they should be upheld in the context of litigation. Three types of preliminary agreements are typically entered into between parties in the M&A deal negotiation process: confidentiality agreements, standstill agreements, and letters of intent.[28] While confidentiality and standstill agreements are often used in conjunction with letters of intent, this paper will limit its analysis to letters of intent.[29]

A letter of intent is a written document signed by transacting parties declaring intent to execute an M&A agreement in the future subject to certain conditions precedent. Common conditions precedent include shareholder approval, board of director endorsement, and regulatory approval. In contrast to civil law jurisdictions, many courts in the U.S. have found letters of intent to be non-binding[30] and consider their enforce-

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27. *See* Torsello, *supra* note 23, at 216-17 ("The goals may be different ones, either alternatively present to the parties, or pursued in conjunction. The parties may simply want to memorialize the status of their negotiation, without any further commitment. As an alternative, the parties may want to create some sort of reciprocal linkage, but only based on the bonding effects of commercial reputation. In more articulated types of agreements, parties making relation-specific investments or disclosing valuable information may want to legally bind their counterparts to stand still in the negotiating process according to a negotiating agenda, and possibly to impose on them duties during the negotiation and even after its conclusion, irrespective of whether or not a final contract is concluded. At a more advanced stage of the negotiations, parties may want to bind themselves to the conclusion of a future contract, some marginal aspects of which have not yet been agreed upon, or to the conclusion of a fully-agreed-upon future contract, which is to be formalized, and to take effect, only at a later time.").

28. *See* CARNEY, *supra* note 5.

29. KLING & NUGENT, *supra* note 21, at § 6-1-2.

30. *See, e.g.*, A/S Apothekernes Laboratorium v. I.M.C. Chem. Group, Inc., 873 F.2d 155, 158 (7th Cir. 1989) ("[T]he purpose and function of a preliminary letter of intent is not to bind the parties to their ultimate contractual objective. Instead, it is only 'to provide the initial framework from which the parties might later negotiate a final . . . agreement, if the deal works out.'"); Rennick v. O.P.T.I.O.N. Care, Inc., 77 F.3d 309, 315 (9th Cir. 1996) ("As these authorities imply, calling a document "letter of intent" implies, unless circumstances suggest otherwise, that the parties intended it to

ability to be "one of the most difficult areas of contract law."[31] Adding to the complexity, the term "letter of intent" has been characterized by the Ninth Circuit Court of Appeals as "not a legal term of art."[32]

Letters of intent in the U.S. and U.K. are typically considered to be a non-binding expression in contemplation of a future contract. While parties transacting in the U.S. and U.K. may have almost complete freedom under domestic law to walk away from negotiations after signing a properly worded letter of intent, the same is not necessarily true for post-letter-of-intent negotiations involving parties based in civil law jurisdictions. Under the continental civil law approach, liability can also arise out of the letter of intent negotiations themselves as a result of duties to conduct negotiations in good faith. While the duty to negotiate in good faith is identified most strongly with German contract law, and particularly with the writings of German jurist Rudolph von Jhering,[33] France also considers letters of intent to create a duty to negotiate in good faith, but treats the breaking off of negotiations under tort law.

IV.
DEAL JUMPING AND CHOICE OF LAW IN CROSS-BORDER M&A TRANSACTIONS

The breaking off of negotiations and consequent failure of deals have become more commonplace in the wake of the financial crisis due to the continued volatility of global financial markets. One of the primary systemic catalysts responsible for the increased rate of post-2007 deal failure has been the scarcity of what was once an abundant supply of highly leveraged financing. The financial crisis alone, however, is not responsible for deal failure caused by broken negotiations, as buyers and sellers in times of financial stability also "do not hesitate to interrupt the negotiation if they consider that there is a chance for them to sell later at a better price."[34] As will be

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be a nonbinding expression in contemplation of a future contract, as opposed to its being a binding contract.").

31. Venture Assocs. v. Zenith Data Sys., 96 F.3d 275, 276 (7th Cir. 1996).

32. Rennick, 77 F.3d at 315.

33. *See* BASIL S. MARKESINIS & HANNES UNBERATH, GERMAN LAW OF TORTS: A COMPARATIVE TREATISE 25 (4th ed. 2002).

34. *See* Couret & Dondero, *supra* note 1.

discussed in further detail in this paper, buyers and sellers also choose to abandon a deal when they have found another more attractive transaction, even if the counterparty involved in the first deal has already made reliance-based investments.

"Deal jumping" specifically refers to the breaking off of negotiations after a letter of intent has been signed in order to pursue another, more attractive transaction. On the part of the target/seller, this takes place when the seller believes it can sell itself at a higher price, or when it finds a more attractive buyer. On the part of the buyer, this occurs when there is a more lucrative target available. The most common deal jumping scenario involves the buyer's escape from the transaction, which consequentially leaves the seller vulnerable to a variety of damages, including sunk financial costs stemming from investments made pursuant to expectations that the deal would close, a decrease in target share value in public capital markets, and intangible damages to the buyer's reputation and marketability. Such a jump can potentially impact an entire industry when and if the target is a particularly significant actor in a particular geographic and/or product market.[35]

Deal jumping in the context of M&A negotiations may lead to more liability than meets the eye. As French legal scholars Alain Couret and Bruno Dondero have recognized, for example, broken off negotiations in the context of M&A negotiations involving the purchase of a publicly traded target can be found to cause damages to three separate actors: (1) the controlling shareholder or group of controlling shareholders in the target corporation; (2) the target corporation in its capacity as a corporation; and (3) minority shareholders of the target corporation. Choice of law is another hidden issue that lurks in the background in the context of cross-border M&A negotiations. Where the law of one party's jurisdiction holds that pre-contractual negotiations and preliminary agreements are non-binding while the other party's jurisdiction takes the opposite stance, specification of an applicable substantive law becomes highly relevant to the mitigation of pre-contractual liability. More specifically, in order to avoid unexpected liability that would result from a legal dispute, transacting parties should be cautious and strategic in choosing the applicable substantive law that will govern their negotiations from the

35. *Id.*

very beginning of discussions. If transacting parties want to hedge against the risk of broken negotiations, an understanding of comparative pre-contractual liability in the cross-border M&A context must be complemented by an understanding of comparative and international choice of law rules. The substantive law that is chosen to apply to cross-border M&A negotiations is critical, as it can influence the potential liability of both the acquiror and target, including (1) whether the commencement of negotiations, or the entering into of an agreement to negotiate, creates legally enforceable duties, (2) whether the parties are under a duty to negotiate in good faith, (3) whether there is a duty to continue negotiations until there is a "proper" reason to withdraw, (4) whether the breaking off of negotiations can be considered to constitute a breach of a legal duty under contract or tort law, and (5) whether and which remedies are available to parties injured from a breaking off of negotiations.[36] As a consequence, it is important for parties to know from the commencement of their discussions whether the relevant jurisdictions allow for choice of law by transacting parties. All jurisdictions examined in this paper generally do honor choice of law provisions.[37] Therefore, if the parties desire to have maximum freedom to break off negotiations without encountering the risk of liability, they would benefit from choosing U.K. law, rather than French law, German law or the law of select U.S. states. If the parties desire a more rigid regime to govern their transaction that will provide heightened legal security against the risk of broken negotiations, the parties would benefit from choosing French or German law, as opposed to U.K. or select U.S. state law.

V.
PRESENTATION OF HYPOTHETICAL SCENARIOS FOR ANALYSIS

This paper focuses on pre-contractual liability issues arising during the preliminary negotiation stage of the M&A transaction process. It focuses, in particular, on the point in

36. *See* Couret & Dondero, *supra* note 1.

37. *See generally* FRANCO FERRARI & STEFAN KRÖLL, CONFLICT OF LAWS IN INTERNATIONAL ARBITRATION (Sellier, 1st ed. 2011). *See also* ROME I REGULATION: THE LAW APPLICABLE TO CONTRACTUAL OBLIGATIONS IN EUROPE (Franco Ferrari & Stefan Leible eds., 2010).

time after which transacting parties have begun negotiations and have signed, or are contemplating signing, a letter of intent to enter into a finalized merger agreement pending due diligence and receipt of regulatory approvals. The hypothetical U.S. buyer who breaks off negotiations with targets based in France, Germany and/or the U.K., both before and after signing a letter of intent, and particularly after it has found another more attractive deal which it has decided to jump toward, will be used as a central point of analysis. The paper will utilize hypothetical deal-jumping scenarios to illustrate the application of French, German, U.K. and U.S. law applicable to cross-border, pre-contractual M&A negotiations.

VI.
FRANCE

A. *Applicable Law*

In France, the law applicable to pre-contractual M&A negotiations derives from general provisions of the French Civil Code, as well as French case law. While the French Civil Code "makes no mention of pre-contractual liability,"[38] Articles 1382 and 1383 provide a general basis for pre-contractual liability under tort law notions of harm and causation. Article 1382 states that "any act of man which causes damage to another obliges the one by whose fault the damage occurred to provide reparations" [translation by author].[39] Article 1383 further provides that "everyone is liable for the damage he has caused, not only by his own act, but also by his negligence or imprudence" [translation by author].[40] The notion of fault is codified in the French Civil Code using the broad and abstract language of Articles 1382 and 1383, which have been applied by French courts to intentional and negligent harms that have

38. *See* GILIKER, *supra* note 4, at xxiv.

39. CODE CIVIL [C. CIV.] art. 1382 (Fr.) ("Tout fait quelconque de l'homme, qui cause à autrui un dommage, oblige celui par la faute duquel il est arrivé à le réparer.").

40. *Id.* art. 1383 ("Chacun est responsable du dommage qu'il a causé non seulement par son fait, mais encore par sa négligence ou par son imprudence.").

occurred in the context of pre-contractual negotiations.[41] Under French law, a plaintiff who can prove "fault, immediate, certain and direct loss and a causal link" will have met the prima facie requirements under French law to successfully make a tort claim.[42] Damages in these actions are awarded under the concept of *réparation intégrale* (full compensation), which can provide damages for lost financial opportunities during pre-contractual stages when the damages suffered are "certain and direct."[43] These damages are in stark contrast with U.S. and U.K. tort damages that often limit recovery to pure economic loss on policy grounds.[44] Some scholars note that the terms "*perte financière*" (financial loss), "*manque à gagner*" (inability to win), and "*perte de profit ou de bénéfices*" (loss of profit or benefits) are used interchangeably by French courts, adding further impetus to the extended scope of damages available to plaintiffs in pre-contractual negotiation liability cases in France.[45] The broad and flexible language of Article 1382 implies that French judges are empowered to determine on a case-by-case basis whether or not a defendant will be held liable for damages that occurred during the pre-contractual phase of negotiations with its counterparty.

Current French case law on pre-contractual liability issues derives from a landmark case of the Cour de Cassation, France's highest appellate court, of March, 20, 1972.[46] In that case, negotiations for the purchase of machinery began between Plaintiff, a French company, and Vilber Lourmat, the exclusive distributor in France of cement pipe manufacturing machines produced by Iowa-based U.S. firm Hydrotile Machinery. After Plaintiff incurred costs traveling to the U.S. to observe the machines, Plaintiff requested additional information from the exclusive distributor, which was not provided by Defendant. Afterwards, Defendant abruptly terminated negotiations over a telephone call, and subsequently entered into an

41. Paula Giliker, *A Role for Tort in Pre-Contractual Negotiations? An Examination of English, French, and Canadian Law*, 52 INT'L & COMP. L. Q. 969, 979 (Oct. 2003).

42. *Id.*

43. *Id.*

44. *See id.* at 980.

45. *Id.*

46. Cour de cassation [Cass.com.], Mar. 20, 1972, Bull. civ. IV, No. 70-14154 (Fr.).

exclusive sales contract with one of Plaintiff's competitors, including an agreement not to sell similar machines to any other firm in the plaintiff's region of business (Eastern France) for a period of 42 months.[47] It is worth noting that no letter of intent was entered into between parties in this case. The Court held that the breaking off of negotiations at an advanced pre-contractual stage constituted a violation of Article 1382. Moreover, the Court held that the withdrawal was abusive, unilateral, and without a legitimate reason, due to (1) Defendant's knowledge of the significant expenses incurred by the plaintiff, and (2) Defendant's voluntary continuation of negotiations, which were characterized by prolonged uncertainty in breach of the rules of good faith in commercial relations. This tort-based notion of withdrawal in bad faith from pre-contractual negotiations was later solidified and deepened by further French case law.

Following later developments in pre-contractual liability precedent, the Cour de Cassation added a further gloss on the applicable law with its April 7, 1998, *Sandoz* decision.[48] In that case, negotiations between the plaintiff, a French corporation, and the defendant, a Swiss corporation with a subsidiary in France, took place over a four-year period in which a number of product testings took place. Defendant withdrew from negotiations on the basis of internal reasons that bore no relation to the quality of Plaintiff's product. The Court ruled in favor of Plaintiff, holding that the freedom to break off negotiations is limited by duties of good faith and loyalty to one's commercial partners.[49] In pronouncing this rule of law, the Court held that Defendant violated the duties of good faith and loyalty by withdrawing from such advanced negotiations with no "legitimate motive."[50]

In response to *Sandoz*, scholars have commented that "it will be for the defendant to show a good reason for withdrawing from negotiations" that have progressed to advanced stages. On the contrary, where negotiations have not yet

47. *Id.*

48. Cass. Com., Apr. 7, 1998, pourvoi n° 95-20.361.

49. *Id.* ("La liberté de rompre à tout moment les pourparlers trouve sa limite dans le devoir de bonne foi et de loyauté de chacun des interlocuteurs.").

50. *Id.*

reached "advanced" stages there will generally be no such burden on the defendant.[51] Whether or not a negotiation is considered to have reached an "advanced" stage is an issue decided by French courts on a case-by-case basis. In one such case decided in 1999, where negotiations were broken off only a few months after negotiations began, the Court found withdrawal to be legitimate since the parties had not yet (1) defined the price nor the objectives of the transaction, (2) drafted a development plan, (3) concluded a shareholder agreement, (4) discussed control over portfolio companies, nor (5) come to a decision regarding the sale of properties being discussed. The Court held that since negotiations took place between "experienced professionals" who could not ignore the number of obstacles that needed to be overcome before reaching a final agreement, and who also were aware that the success of the project was closely linked and dependent upon the economic conditions of the time, the parties were under no duty to provide a legitimate justification for withdrawal, and were at no fault for "brutally" withdrawing from negotiations.[52]

Scholars have also pointed out that there are several general fact patterns which will trigger judicial intervention over withdrawal from pre-contractual negotiations under French law:[53] (1) where one party has no serious intent to conclude a contract,[54] demonstrated by certain situations where one party, dependent upon loan-based financing, continues negotiations with a counterparty who is under the false impression that the other can self-finance the transaction; (2) where a party who enters an advanced stage of negotiations does not "persevere" or "participate constructively in discussions," but rather breaks off negotiations "at the first obstacle placed in their path";[55] (3) where one party misuses confidential infor-

51. Cass. Com., Jan. 12, 1999, pourvoi n° 96-14604; *see also* Giliker, *supra* note 45, at 981.

52. *See* Giliker, *supra* note 45, at 980-81.

53. *See* Giliker, *supra* note 45, at 982-983; *see also* Couret & Dondero, *supra* note 1.

54. Cass. Civ., Jan. 6 1998, JCP 1998 II, cited in Giliker, *supra* note 45, at 982.

55. Cass. Com., Mar. 7, 1972, Bull. Civ. IV No. 83 (cited in Giliker, *supra* note 45, at 983).

mation acquired during the negotiation process,[56] inciting liability under the broad concept of "unfaithful competition";[57] (4) where parallel negotiations between a transacting party and at least two other separate counterparties precede the breaking off of negotiations;[58] (5) where there is no "legitimate" ground upon which the withdrawing party could have withdrawn from negotiations;[59] (6) where the withdrawal is considered to be "brutal";[60] and (7) where the withdrawing party "willfully maintain[s] negotiations in a state of uncertainty, knowing that the plaintiff [is] incurring costs."[61] In addition, "neither malice nor active deception on the part of the defendant is required for French courts to find bad faith."[62] As a consequence, if the plaintiff can prove that the defendant withdrew from M&A negotiations in bad faith under any one of the abovementioned categories, the exercise of the right to walk away from negotiations may give rise to liability in France. When negotiations are at advanced stages, such as those in *Sandoz*, the Court will consider withdrawal to be legitimate and in compliance with good faith when predicated upon (1) necessary financial reasons,[63] (2) changes in circumstances, including discovery of falsified information,[64] or (3) inability of the parties to agree upon a "particular point."[65] Despite the appearance of a formulaic approach to pre-contractual negotiations, there are no fixed criteria for predicting or determining liability for negotiation withdrawal, as "the question of liability will ultimately rest with the court in light of all the circumstances."[66] Nevertheless, the Cour de Cassation has pronounced general guidelines which could serve as a useful mechanism for probing the scope of potential liability, includ-

56. Cass. Com., Oct. 3, 1978, D. 1980 (cited in Giliker, *supra* note 45, at 983).

57. *Id.*

58. *Id.*

59. *Id.*

60. *Id.*

61. *Id.*

62. *Id.*

63. Cass. Com., Apr. 4, 1995, Lexilaser No. 749 (cited in Giliker, *supra* note 41, at 981).

64. Orléans, Oct. 19, 2000, JCP 2011 IV 2003 (cited in Giliker, *supra* note 41, at 981).

65. *See* Giliker, *supra* note 41, at 981.

66. *Id.*

ing whether (1) negotiations have progressed to advanced stages, (2) one party has incurred costs in reliance upon a belief that contract conclusion is likely, (3) one party has acted in bad faith, and/or (4) one party has abruptly broken off negotiations.[67]

A decision taken by the French Cour de Cassation in January 2011 provides guidance with particular regard to parallel negotiation liability.[68] In that case, a shareholder of French ice cream manufacturer Le Glacier Champenois (LGC) (the defendant) entered into a binding letter of intent to execute a share transfer agreement with the plaintiff subject to certain conditions precedent, and scheduled to take place during a one-week period. The share transfer agreement took the form of a French *promesse synallagmatique de cession d'actions*, under which both seller and buyer are respectively bound to sell and purchase the specified shares.[69] The letter of intent eventually expired because the share transfer agreement was not entered into by the parties during the originally specified timeframe; however, Plaintiff and Defendant continued to negotiate with each other over a period of approximately two months beyond the expiration of the letter of intent. During that time, the defendant seller entered into negotiations and signed a purchase agreement with another bidder, without informing Plaintiff of such discussions. Defendant then broke off negotiations with Plaintiff only one day before LGC shareholders voted to approve the sale of shares to the second bidder at a lower sale price. After the plaintiff learned about the transaction with the second bidder, Plaintiff sued Defendant for a wrongful breach of the letter of intent, which specified that the defendant seller was to negotiate exclusively with the plaintiff buyer. Despite Defendant's argument that the exclusivity clause contained in the letter of intent was no longer valid since the letter had expired, the French Court held that (1) the "unilateral, brutal and illegitimate" breaking off of negoti-

67. *Id.* at 982 (citing Cass. com. 7.1, Apr. 22, 1997, D 998.45).

68. Cass. com., Jan. 18, 2011, No. 09-14.617. *See also* Delphine Descamps & Robert C. MacDonald, *Withdrawing from Pre-Contractual Negotiations Under French Law: An Increased Risk*, 15 No. 5 M & A LAW. 10 (2011).

69. Louis Vogel, *Est-il risqué de signer une promesse synallagmatique lorsqu'on vend un fonds de commerce?*, L'EXPRESS (Oct. 25, 2006), http://lentreprise.lexpress.fr/contrat-de-travail/est-il-risque-de-signer-une-promesse-synallagmatique-lorsqu-on-vend-un-fonds-de-commerce_8775.html.

ations at an advanced stage with knowledge by defendant seller that the plaintiff buyer had incurred costs operating under the "reasonable belief" that the transaction had been concluded with Defendant, and (2) the voluntary continuation of negotiations by the plaintiff seller both (a) beyond the expiration date of the letter of intent, and (b) during a state of negotiations which was characterized by a "prolonged uncertainty," amounted to a tort in violation of the duty of good faith in commercial relations.[70]

Practitioners have interpreted the case to hold that the continuation of negotiations beyond the expiration date of the letter of intent creates an "independent duty to negotiate in good faith."[71] In addition, the case has been interpreted to implicitly hold that the continuation of negotiations creates an expectation that the terms of the letter of intent will still be applicable.[72] In the instant case, the defendant had a "moral (and thus legal) obligation either to act in accordance with [the] expectation [created by the letter of intent] or to disabuse the first bidder of it."[73] For this reason, the case could be interpreted as establishing the protection of an expectation interest in pre-contractual negotiations under French law. This rule can be applied to the context of cross-border M&A negotiations involving French firms, and is in distinct contrast to the rules of other jurisdictions that do not explicitly provide for protection of expectation interests. The case also stands for the principle that the duty to negotiate in good faith exists independently of whether or not the parties have agreed orally or in writing to conduct their negotiation behavior under such a standard.[74] The case exemplifies the long-held principle that parties who withdraw in "bad faith" from pre-contractual nego-

70. "Qui avait rompu sans raison légitime, brutalement et unilatéralement, les pourparlers avancés qu'il entretenait avec son partenaire qui avait déjà, à sa connaissance, engagé des frais et qu'il avait maintenu volontairement dans une incertitude prolongée en lui laissant croire que l'affaire allait être conclue à son profit, avait manqué aux règles de la bonne foi dans les relations commerciales et avait ainsi engagé sa responsabilité délictuelle." Cass. com., Jan. 18, 2011, No. 09-14.617.

71. *See* Descamps & MacDonald, *supra* note 68, at 1.

72. *Id.*

73. *Id.*

74. *Id.* (Noting that "[a] recent case decided by the French Supreme Court illustrates the stand-alone nature of the duty to negotiate in good faith.").

tiations governed under French law can be held liable under tort law for such withdrawal.[75] Since the notion of bad faith is interpreted broadly under French law, common law-based parties found to have withdrawn in bad faith from negotiations with French counterparties can be held liable for a larger scope of damages than they would expect in their home jurisdictions.[76] The abovementioned cases illustrate that the right to withdraw from pre-contractual negotiations in France is subjected to policy-based limitations stemming from the principle of good faith, detraction from which will lead to liability in tort.

From a comparative perspective, the independent duty to negotiate in good faith set forth under French law parallels the doctrine of promissory estoppel under U.S. law. While French law imposes a "duty to respect the counterparty's expectations" and U.S. law does not, French law and U.S. law are similar in providing damages for reliance interests but not damages for the lost benefit of the bargain.[77] However, the scope of damages under French law goes further than U.S. law by providing compensation for lost opportunities where the plaintiff can prove that another opportunity was lost specifically because of the wrongful act of the withdrawing party.[78] In addition, French courts provide compensation for damages when the wrongful conduct injures a plaintiff's reputation as a party that is able to close a deal.[79] As evidenced by the awarding of both reliance and expectation damages in the aforementioned cases, damages awarded by French courts in the context of withdrawal from M&A negotiations can go beyond the traditional expenses incurred by parties. In light of the consequences of bad-faith withdrawal from M&A negotiations under French law, and in light of the scope of damages available to plaintiffs, practitioners recommend that transacting parties include a break-up fee in their letters of intent to protect a

75. *See* Cass. com., Jan. 18, 2011, No. 09-14.617.

76. *See* Descamps & MacDonald, *supra* note 68.

77. *See* Descamps & MacDonald, *supra* note 68, at 2 (citing Cass. com. Nov. 26, 2003, No. 00-10.243 and Arcadian Phosphates, Inc. v. Arcadian Corp., 884 F.2d 69 (2d Cir. 1989)).

78. *See id.* at 2 (citing Cass. com. Jun. 18, 2002, No. 99-16.488).

79. *Id.*

withdrawing party from liability in the event that it decides to walk away from negotiations.[80]

B. *Application to Hypothetical Scenarios*

If a hypothetical U.S. company were involved in M&A negotiations with a target in France and did not sign a letter of intent, it may nevertheless be subject to tortious liability for walking away from negotiations under circumstances considered to amount to bad faith withdrawal. If the duration of the negotiations is considered to be non-advanced, the plaintiff would bear a higher burden of proving bad faith on the part of the defendant, since French case law has held that the defendant bears no burden of proving a good reason for withdrawal when negotiations have not yet reached an advanced stage. Nonetheless, if the plaintiff could establish that the defendant had no serious intent to conclude a contract, the defendant may be held liable. In addition, the plaintiff could also indicate that the defendant's intent in commencing negotiations was to maliciously gain access to the plaintiff's confidential information, and/or that withdrawal was brutal if defendant had knowledge that withdrawal would damage the plaintiff's reputation to be able to close a deal. The defendant could avoid liability in these circumstances when and if it could prove that either legitimate financial reasons existed for withdrawal, that circumstances had changed, or that both parties could not reach agreement upon specific transaction terms.

In the event that negotiations are deemed by courts to be "advanced," the defendant could be held liable for bad faith withdrawal even where no letter of intent has been signed. Analogizing to the Court's landmark 1972 case, if the plaintiff can demonstrate that the defendant had knowledge that the plaintiff incurred expenses, continued negotiations in such a way as to keep the state of play uncertain, and withdrew in a way that could be characterized by the courts as "unilateral, abusive, and without legitimate reason," the defendant would face liability.[81] The defendant could counter these arguments with factual evidence to the contrary, and justify its withdrawal on the basis of legitimate reasons.

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80. *Id.*

81. Cass. com. Mar. 20, 1972, No. 70-14154.

While a properly worded letter of intent stipulating its non-binding nature will typically not create liability under U.S. law, the opposite is not necessarily true under French law. As practitioners have noted, "a French court is more likely than a U.S. court to find that a letter of intent in which the substantive transaction terms are highly elaborated is actually a binding contract for the underlying transaction, despite express language to the contrary."[82] This would occur if the plaintiff could demonstrate that the defendant signed the letter with no serious intent to close the deal, that there were no legitimate grounds for withdrawal, and/or that parallel negotiations with a third party took place despite language in the letter of intent requiring exclusivity or loyalty to the plaintiff. The defendant could potentially make strong counterarguments if the closure of the deal was heavily dependent upon specific economic conditions and/or that reliance-based investments were not rational given the extent to which deal terms remained unsettled. Given the potential risk of liability for negotiations conducted before and after a letter of intent has been signed, U.S. parties who enter into negotiations with France-based counterparties should be well aware of their duty to negotiate in good faith.

VII.
GERMANY

A. *Applicable Law*

The German Civil Code, contained in the Bürgerliches Gesetzbuch (both hereinafter referred to collectively as the "BGB"), has recently codified the German legal doctrine of *culpa in contrahendo* (Latin for "fault in contracting") in BGB Sections 241, 280 and 311, following the major BGB reform project of 2002.[83] The doctrine of *culpa in contrahendo* originates from the teachings of German legal scholar Rudolf von Jhering whose article "*Culpa in contrahendo, oder Schadensersatz bei nichtigen oder nicht zur Perfektion gelangten Vertägen*" set forth the notion, based in ancient Roman law, that pre-con-

82. *Id.*

83. Peter Schlechtriem, *The German Act to Modernize the Law of Obligations in the Context of Common Principles and Structures of the Law of Obligations in Europe*, 2 OXFORD U. COMP. L. FORUM (2002), http://ouclf.iuscomp.org/articles/schlechtriem2.shtml.

tractual negotiations create a duty to conduct negotiations in good faith. This concept renders a party liable for damages suffered by a counterparty that result from reliance of the counterparty upon the breaching party's pre-contractual commitments.[84] The doctrine provides redress to the injured party through reliance damages (*Vertrauensschaden*), which restore the parties to their pre-contractual status quo positions. However, redress is limited to reliance damages and does not extend to expectation interests (*Erfüllungsinteresse*).[85] While the fundamental principles of *culpa in contrahendo* can today be found in post-2002 BGB provisions, the doctrine "developed largely independently of Code provisions by the German courts, in part relying on the considerable academic development of the topic."[86]

According to BGB §§ 311 and 241, the duty to negotiate in good faith arises from the commencement of contract negotiations. As is stated in §311(2), "an obligation with duties under §241(2) also comes into existence by (1) the commencement of contract negotiations, (2) the initiation of a contract where one party, with regard to a potential contractual relationship, gives the other party the possibility of affecting his rights, legal interests and other interests, or entrusts these to him, or (3) similar business contacts." According to §241(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." Furthermore, §280(1) states that "if the obligor breaches a duty arising from the obligation, the obligee may demand damages for the damage caused thereby." §241(2), when read in conjunction with both §280(1) and §311(2), therefore codifies the *culpa in contrahendo* doctrine's duty to negotiate in good faith and establishes the German pre-contractual liability regime.[87] According to the jurisprudence of the German Federal Court of Justice (*Bundesgerichtshof*), Germany's highest court, the pre-contractual liability regime, which requires negotiating parties to conduct negotiations in good faith, provides damages to parties injured a result of "an inopportune rupture of the con-

84. *See* Dietrich, *supra* note 7, at 174-75.
85. *See* Couret & Dondero, *supra* note 1.
86. *See* Dietrich, *supra* note 7, at 174-75.
87. *See* Couret & Dondero, *supra* note 1.

tract negotiations by one of the parties."[88] As a result of both the rules set forth in the BGB and the absence of a tortious liability regime for injuries resulting from pre-contractual negotiations, parties who break off negotiations with German targets will be held liable on a contractual or "quasi-contractual" basis.[89]

As Professor Marco Torsello has stated, the underlying rationale behind the German *culpa in contrahendo* doctrine is that the law intervenes in contractual relations in order to protect the transacting parties in the course of negotiations.[90] This notion is reflected in German contract law as a whole, which seeks to create a sense of solidarity between parties to a contract, and which stands in complete contrast to the adversarial nature embodied by English common law.[91] Unlike French law, which imposes pre-contractual liability on the basis of tort law, the German *culpa in contrahendo* doctrine is closer to contract law since the basis of liability is the initiative taken by transacting parties to enter into negotiations intended to culminate in a final contract.[92] Although there exists some scholarly debate as to whether *culpa in contrahendo* is more appropriately classified as a branch of contract law, tort law,[93] or of a "third lane" (*dritte Spur*) between contract and tort law,[94] German courts and German legal scholars have held that *culpa in contrahendo* liability is in fact closest to contract law,[95] since "these special duties are not owed the public in general" and "go beyond ordinary tort liability."[96]

88. *Id.*

89. *Id.*

90. *See* Torsello, *supra* note 15.

91. *Id.*

92. *Id.*

93. *See* Dietrich, *supra* note 7, at 175 ("[I]t is clear that some cases of liability for *culpa in contrahendo* are closer to liability in mainstream tort, and others closer to liability for breach of contract . . . .").

94. See Dietrich, *supra* note 7, at 175; *see also* MARKESINIS & UNBERATH, supra note 33, at 92 ("*Culpa in contrahendo* . . .is a concept *sui generis*, floating freely between contract and tort, sometimes acquiring the characteristics of one and sometimes of the other classic category of obligations.").

95. *See* Susanne Schmidt, *Der Abbruch von Vertragsverhandlungen im deutsch-schweizerischen Handels- und Wirtschaftsverkehr*, 88 (1994) (arguing that Bundesgerichtshof decision of 22 February 1989, JZ 1991 at 199 does not support *culpa in contrahendo* liability on the basis of a "third lane" between contract and tort, cited in Dietrich, *supra* note 7, n. 114).

96. *See* Dietrich, *supra* note 7, at 175.

Under German law, when parties have commenced negotiations with intent to transact in the future, they are deemed to have created a pre-contractual relationship through which they can detrimentally affect each other's economic interests (*gesteigerte Einwirkungsmöglichkeit*).[97] As such, a prima facie case for *culpa in contrahendo* liability arising from the breaking of negotiations can be established under German law when three conditions are met:[98] first, the defendant is shown to have "intentionally or negligently"[99]created an expectation by the plaintiff that a contract would be entered into; second, the plaintiff has incurred expenses on the basis of these expectations; and third, the defendant has broken off negotiations without good reason (*ohne triftigen Grund*) or just cause (*rechtfertigenden Grund*).[100] As scholars have held, "it is clear that it is the *manner* in which the negotiations are conducted (and not the decision to break them off) that is the basis of liability."[101] Under German law, moreover, a successful plaintiff will only be able to recover for reliance damages since specific performance is not available as a remedy in the context of pre-contractual negotiations.[102] As the Bundesgerichtshof has held, "a claim based on *culpa in contrahendo* is limited to the so-called reliance interest . . . neither lost profit nor additional costs of the alleged purchases are covered by the reliance interest."[103] As German case law demonstrates,[104] "reliance damages must be paid by a party who in the course of negotiations has made the other party believe that a contract will certainly

97. *Id.* at 177.

98. *See* MARKESINIS & UNBERATH, *supra* note 33, at 100.

99. *See* Dietrich, *supra* note 7, at 177.

100. *See* MARKESINIS & UNBERATH, *supra* note 33, at 100 (citing German case law). For scholarly commentary supporting the holdings of these cases, see 22 INTERNATIONAL ENCYCLOPEDIA OF COMPARATIVE LAW 9, para. 9-122 (A.T. Von Mehren, ed., 2008).

101. *See* MARKESINIS & UNBERATH, *supra* note 33, at 101.

102. R.J.P. Kottenhagen, *Freedom of Contract to Forcing Parties into Agreement: The Consequences of Breaking Negotiations in Different Legal Systems*, 12 IUS GENTIUM 58, 77 (2006).

103. *See* Landgericht [LG] [District Court of Bielefeld], Dec. 12, 2003, *available at* http://cisgw3.law.pace.edu/cases/031212g1.html (Ger.).

104. Bundesgerichtshof [BGH] [Federal Court of Justice] July 10, 1970, 23 NEUE JURISTISCHE WOCHENSCHRIFT [NJW] 1840, 1970 (Ger.); 28 NJW 1774, 1975; 49 NJW 1885, 1996.

be concluded, but then without good reason or from ulterior motives refuse to go ahead."[105]

In order for liability to arise, the plaintiff bears the burden of proving that the defendant created the expectation of a contract, either intentionally or negligently.[106] The breaking off of pre-contractual negotiations, however, can give rise to *culpa in contrahendo* liability for a defendant even if the plaintiff cannot establish that the defendant was at fault in creating the expectations.[107] In other words, the defendant need not have created the expectations with any particular form of malicious intent to be held liable for breaking off negotiations. As German case law has held, "liability can arise as a result of the falsification of expectations where negotiations are broken off without good cause . . . it is not necessary . . . to show any culpable creation of the expectation."[108] The defendant will be held to have broken off negotiations without good reason or justifiable cause when the defendant fails to provide the plaintiff with a timely warning that no contract will be completed, such that the plaintiff has no opportunity to avoid detrimental reliance.[109] As scholars have noted, while "it is not entirely clear as to what exactly will constitute a good cause for breaking off negotiations," it is "probably fair to surmise that a good cause for breaking off negotiations will generally be made out where a contract fails due to any impediment originating from the plaintiff's sphere."[110]

A landmark 1989 case of the German Bundesgerichtshof provides guidance on the limits to pre-contractual liability for the breaking off of M&A negotiations under German law.[111] In that case, the plaintiff buyer commenced negotiations with the defendant seller regarding the acquisition of two newspapers published by Defendant. In order to assist Plaintiff in receiving

105. Werner Lorenz, *Germany*, *in* PRECONTRACTUAL LIABILITY: REPORTS TO THE THIRTEENTH INTERNATIONAL CONGRESS OF COMPARATIVE LAW 161, 166 (Ewoud H. Hondius ed., 1991).

106. *See* Dietrich, *supra* note 7, at 178.

107. *Id.*

108. Bundesgerichtshof [BGH] [Federal Court of Justice] Feb. 22, 1989, 46 JURISTEN ZEITUNG [JZ] 199, 1991 (Ger.).

109. *See* Dietrich, *supra* note 7, at 179.

110. *Id.*

111. Bundesgerichtshof [BGH] [Federal Court of Justice] Feb. 22, 1989, 46 JURISTEN ZEITUNG [JZ] 1991, 199 (Ger.).

approval for the acquisition from Plaintiff's parent company, Defendant provided Plaintiff a supposedly detailed "offer." Upon receiving approval from its parent, Plaintiff informed Defendant that it wished to proceed and began drafting a final purchase agreement. After coming to an agreement on all outstanding contract terms with defendant, Plaintiff provided Defendant with a letter declaring in writing its unilateral intent to accept Defendant's purported "offer." That same day, Defendant informed Plaintiff that it was no longer interested in selling its newspapers to Plaintiff and broke off negotiations, after which Plaintiff sued for damages. The Court held for Defendant, stating that Defendant's communications did not amount to an offer and declaring that Plaintiff failed to prove that Defendant had "induced the belief [that] the contract would, with certainty, be finalized."[112] This case is particularly useful as a point of reference for cross-border M&A negotiations where the parties negotiate without signing a formal letter of intent. Where parties do sign a letter of intent (*Absichtserklärung*) with counterparties based in Germany, the *culpa in contrahendo* doctrine will also serve as a basis of pre-contractual liability where parties break off negotiations in bad faith. As scholars have written, "a false statement of fact in a letter of intent would give rise to liability under *culpa in contrahendo*," particularly one involving false statements regarding "the probability of concluding a final contract or [the] authority of negotiators."[113]

B. *Application to Hypothetical Scenarios*

Given the applicable sections of the BGB and select German case law, U.S. corporations that commence and subsequently break off negotiations with German targets both before and after a letter of intent has been signed will be subject to liability in the following situations. First, the U.S. party will be subject to protective duties toward its counterparty upon the commencement of negotiations under the *culpa in contrahendo* doctrine (BGB §241 and §311). As mentioned above, the protective duty to negotiate in good faith stems from notions of ancient Roman law, which function in the

112. *See* Dietrich, *supra* note 7, at 181.

113. Ugo Draetta & Ralph Lake, *Letters of Intent and Precontractual Liability*, 1993 INT'L BUS. L.J. 835, 853 (1993).

German civil law system to promote a mandatory policy of solidarity between contractual parties.[114] If the German target can establish the prima facie elements of pre-contractual *culpa in contrahendo* liability under BGB §280 by proving that (1) an intentional or negligent expectation was created by the defendant, (2) the plaintiff detrimentally relied on this expectation, and (3) the U.S. party withdrew from negotiations in bad faith (in other words, without *ohne triftigen Grund* or *rechtfertigenden Grund*), the U.S. party will be held liable for the plaintiff's reliance damages. The U.S. party could argue based upon particularized factual circumstances that its withdrawal from negotiations occurred for good reasons or just cause, but such an argument would necessitate the existence of an "impediment originating from the plaintiff's sphere."[115] In the context of withdrawal from negotiations with a German target where a letter of intent has been signed, the U.S. defendant would still be liable for reliance damages for a bad faith withdrawal under the *culpa in contrahendo* doctrine, regardless of any non-binding language in the letter of intent, since protective duties of good faith toward counterparties in contractual relationships are imposed in Germany at the commencement of negotiations. While the mere breaking off of negotiations would not in and of itself create liability in the event that the defendant has legitimate and justifiable reasons for disproving any theories of bad faith, the defendant's consideration of the interests of its counterparty would be scrutinized in depth by the German judiciary. As such, transacting parties who engage in pre-contractual negotiations with German targets need be aware that they may be held liable for *culpa in contrahendo*-based reliance damages when they decide to jump from one potential deal to another.

VIII.
UNITED KINGDOM

A. *Applicable Law*

The U.K. model of pre-contractual liability operates under the basic premise that the law should not interfere with the free behavior of the parties engaged in contractual or pre-

114. *See* Torsello, *supra* note 15.
115. *See* MARKESINIS & UNBERATH, *supra* note 33.

contractual negotiations. English common law, in particular, has traditionally treated pre-contractual liability as an issue of contract formation, and as such, pre-contractual relationships enjoy freedom from protective duties to negotiate in good faith. The English view is best summarized in *Walford v. Miles*:

> [T]he concept of a duty to carry on negotiations in good faith is inherently repugnant to the adversarial position of the parties when involved in negotiations. Each party to the negotiations is entitled to pursue his (or her) own interest, so long as he avoids making misrepresentations. To advance that interest he must be entitled, if he thinks it appropriate, to threaten to withdraw from further negotiations or to withdraw in fact in the hope that the opposite party may seek to reopen the negotiations by offering him improved terms.[116]

While the parties are obliged to perform their obligations in good faith under the terms of an existing contract,[117] there is no "obligation in English law to negotiate in good faith in the absence of a contract."[118] The embodiment of the adversarial approach to contractual relationships and negotiations in English law is further illustrated by one scholar's characterization of the English approach: "The traditional view of classical contract law is that the process of contract formation has hard edges."[119] This traditional "hard-edged" approach toward duties to negotiate in good faith under English law is rationalized by the lack of precision surrounding the notion of good faith and the difficulty of determining whether good faith reasons for withdrawal from negotiations exist in a particular case.[120] While there has been scholarly debate and some trend in English courts toward establishing what would resemble a

116. [1992] 2 A.C. 128 (H.L).

117. *See* Mallozzi v. Carapelli S.P.A., [1976] 1 Lloyd's Rep 407 (U.K.).

118. *See* Draetta & Lake, *supra* note 117, at 837 (citing Courtney & Fairbairn Ltd. v. Tolaini Bros. (Hotels) Ltd., [1975] 1 W.L.R. (A.C.) 297 at 302 (Eng.) ("When there is a fundamental matter left undecided and to be the subject of negotiation, there is no contract.").

119. P. S. ATIYAH, AN INTRODUCTION TO THE LAW OF CONTRACT 61 (3d ed. 1981).

120. *See* Walford v. Miles, 2 A.C. at 4 ("The reason why an agreement to negotiate, like an agreement to agree, is unenforceable is simply because it lacks the necessary certainty. How can a court be expected to decide

civil law–type duty to negotiate in good faith,[121] the adversarial approach continues to govern in England and Wales. Nevertheless, English courts have held transacting parties liable for reliance-based damages under tort law when parties have been found to have made "fraudulent or negligent" statements during negotiations,[122] or were proven to have commenced negotiations for the sole purpose of acquiring confidential information.[123]

B. *Application to Hypothetical Scenarios*

Considering the adversarial laissez-faire approach of English common law to pre-contractual negotiations, a hypothetical U.S. party who commences and breaks off M&A negotiations with a counterparty based in England, either before or after signing a letter of intent, will be subject to substantially less legal risk than would be the case in France or Germany. Since the commencement of negotiations does not automatically create a duty to negotiate in good faith with a transacting counterparty, a hypothetical U.S. acquiror would be free to exercise its right under English law to withdraw from negotiations either before or after a properly worded letter of intent has been signed since English law "does not recognise a contract to enter into a contract (when there is a fundamental term yet to be agreed)" nor does it "recognise a contract to negotiate . . . because it is too uncertain to have any binding force."[124] If the plaintiff were successful in proving, however, that the defendant fraudulently made statements during the course of negotiations, or was motivated by a malicious intent to acquire the counterparty's confidential information, the hy-

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whether, subjectively, a proper reason existed for the termination of negotiations?").

121. *See* Colombo, *supra* note 8; *see also* Nadia E. Nedzel, *A Comparative Study of Good Faith, Fair Dealing, and Precontractual Liability*, 12 TUL. EUR. & CIV. L.F. 97. For case law, *see* Esso Petroleum v. Mardon [1976] QB 801, and English v. Dedham Vale [1978] 1 W.L.R. 93.

122. Hedley Byrne & Co. v. Hefler & Partners Ltd., [1964] A.C. 465 (H.L.) (appeal taken from Eng.).

123. Saltman Eng'g Co. v. Campbell Eng'g Co., [1963] 3 All E.R. 413 (Eng.).

124. *See* Courtney and Fairbairn Ltd. v. Tolaini Brothers (Hotels) Ltd., [1975] 1 W.L.R. 297 (A.C.) at 301.

pothetical acquiror would be held liable under English tort law, and/or potentially English competition law.

IX.
UNITED STATES

A. *Applicable Law*

In contrast to the "all-or-nothing"[125] approach to pre-contractual liability under English common law, U.S. common law presents transacting parties with a relatively mixed regime characterized by a variety of approaches to pre-contractual liability and contract formation. The variation in approaches under U.S. law stems from the existence of 50 non-uniform state legal systems, each of which has adopted its own version of the Uniform Commercial Code ("U.C.C."). New York case law exemplifies the existence across many U.S. jurisdictions of a "boilerplate"[126] duty of good faith that applies to the performance of existing contractual obligations, which consists of "an implied covenant that neither party shall do anything which will have the effect of destroying or injuring the right of the other party to receive the fruits of the contract."[127] Both U.C.C. Section 1-304[128] and Section 205[129] of the Restatement (Second) of Contracts ("Restatement (Second)") provide for a duty of good faith in contract performance. While neither the U.C.C. nor Restatement (Second) refer explicitly to duties to negotiate in good faith during pre-contractual phases of negotiations, commentary to Section 205 of the Restatement (Second) states that bad faith in negotiations "may be subject to sanctions."[130] New York case law specifically provides that in circumstances involving either "misrepresentation, duress, undue influence or unconscionability," courts may enforce a

125. *See* Draetta & Lake, *supra* note 113, at 836.

126. *See* Nedzel, *supra* note 121, at n.13.

127. Kirke LaShelle Co. v. Paul Armstrong Co., 263 N.Y. 79, 87 (1933), cited in Nedzel, *supra* note 121.

128. "Every contract or duty within [the Uniform Commercial Code] imposes an obligation of good faith in its performance and enforcement."

129. "Every contract imposes upon each party a duty of good faith and fair dealing in its performance and its enforcement."

130. RESTATEMENT (SECOND) OF CONTRACTS § 205, cmt. C.

"duty of good faith . . . to remedy pre-contractual bad faith after an enforceable contract has been entered into."[131]

While explicit language regarding a duty to conduct pre-contractual negotiations in good faith is missing from the traditional sources of U.S. contract law, the "existence of a letter of intent, even if its parties do not specifically undertake to negotiate, strengthens the case for a good faith obligation in specific pre-contractual situations."[132] A letter of intent is typically regarded in the U.S. to be a "nonbinding expression in contemplation of a future contract, as opposed to its being a binding contract."[133] Whether a letter of intent is considered to create binding pre-contractual duties depends upon whether the parties intended to be bound by the terms of the letter of intent, or whether either manifested intent not to be bound.[134] In determining the intent of the parties in the context of a letter of intent, New York courts have traditionally applied a four-factor test deriving from *Winston v. Mediafare Entertainment*:

> (1) whether there has been an express reservation of the right not to be bound in the absence of a writing; (2) whether there has been partial performance of the contract; (3) whether all of the terms of the alleged contract have been agreed upon; and (4) whether the agreement at issue is the type of contract that is usually committed to writing.[135]

While no single *Winston* factor is decisive in determining the intent of a party, "each provides significant guidance."[136] In addition, U.S. legal scholars and practitioners have noted that many courts are willing to interpret "letters of intent and their execution as imposing upon the parties a duty to negotiate in good faith."[137] Even if a letter of intent does not explicitly mention a duty to negotiate in good faith, courts have read an implied duty of good faith to both exist and have been

131. *See* Nedzel, *supra* note 121, at n. 13 (citing Kirke LaShelle Co., 263 N.Y. 79 (1933), and Wood v. Lucy, Lady Duff-Gordon, 222 N.Y. 88 (1917)).

132. *See* Draetta & Lake, *supra* note 113, at 839.

133. Rennick v. O.P.T.I.O.N. Care, Inc., 77 F.3d 309, 315 (9th Cir. 1996).

134. KLING & NUGENT, *supra* note 21, at § 6-10.

135. Winston v. Mediafare Entm't Corp., 777 F.2d 78, 81 (2d Cir. 1985).

136. R.G. Group, Inc. v. Horn & Hardart Co., 751 F.2d 69 (2d Cir. 1984).

137. KLING & NUGENT, *supra* note 21, at § 6-25.

breached when a party "insist[s] upon the inclusion of conditions to the transaction which were not set forth in the letter of intent . . . ."[138] While the Southern District of New York held in *Tribune Co.* that the duty of good faith functions to prevent a party from "renouncing the deal, abandoning the negotiations, or insisting on conditions that do not conform to the preliminary agreement,"[139] there is no bright-line test for determining "where the duty to negotiate in good faith ends and the ability to make a business decision concerning the transaction in question begins."[140]

B. *Application to Hypothetical Scenarios*

A hypothetical U.S. or European party who has commenced and broken off negotiations with a U.S. target without signing a letter of intent is generally free to walk away from negotiations insofar as the jurisdiction does not consider the withdrawal to amount to a case of bad faith that is subject to sanctions. In the event that the hypothetical transacting party withdraws from negotiations after entering into a letter of intent, the party will be subject to liability if (a) the party is held to have intended to be bound under the *Winston* factors, and/or (b) the withdrawal from negotiations is considered to amount to an act of bad faith. Given the variable extent to which negotiating parties can be held liable in U.S. courts under pre-contractual duties to negotiate in good faith that arise from letters of intent, practitioners unsurprisingly advise transacting parties not to sign letters of intent, and also "if they do not intend to be bound until a later stage of the negotiations . . . take every opportunity (written and oral) to set forth that fact."[141]

X.
CONCLUSION

While M&A transaction structuring between parties in an exclusively domestic U.S. setting is shaped around potential liability issues arising under U.S. law,[142] transaction structuring

138. 670 F. Supp. at 498; s*ee also* KLING & NUGENT, *supra* note 21, at § 6-26.
139. *Tribune Co.*, 670 F. Supp at 498.
140. KLING & NUGENT, *supra* note 21, at § 6-27.
141. *Id.* at § 6-2.
142. *See* CARNEY, *supra* note 5.

in a cross-border context is additionally shaped by applicable pre-contractual duties and liability rules under foreign law. Since the substantive law applicable to negotiations will determine whether pre-contractual duties to foreign counterparties will exist, knowledge of foreign law is of high relevance to transactional attorneys responsible for providing their clients with advice regarding the legal costs and benefits of cross-border investment transactions. Where transacting parties find that entering into a letter of intent is worth the investment of time and effort, they will find that the choice of applicable law will significantly influence the negotiations and terms of the final M&A agreement. Comparative legal knowledge will therefore serve as a pivotal toolkit for the transactional attorney advising its clients on the legal risks that affect business strategy in the ever-increasing world of cross-border M&A transactions.