OLIVIA LWABUKUNA
LWBOLI001
LLM: COMMERCIAL LAW
TOPIC: GOOD FAITH AND FAIR DEALING IN INTERNATIONAL COMMERCIAL CONTRACTS, A
QUEST FOR UNIFORMITY IN APPLICATION
SUPERVISOR: PROF RICHARD H CHRISTIE

RESEARCH DISSERTATION PRESENTED FOR THE APPROVAL OF SENATE IN FULFILLMENT OF PART OF THE REQUIREMENTS FOR THE MASTER OF LAWS DEGREE IN APPROVED COURSES AND MINOR DISSERTATION. THE OTHER PART OF THE REQUIREMENT FOR THIS QUALIFICATION WAS THE COMPLETION OF A PROGRAMME OF COURSES.

FEBRUARY 15, 2007
DECLARATION

I hereby declare that I have read and understood the regulations governing the submission of the Master of laws degree dissertations, including those relating to length and plagiarism, as contained in the rules of the University, and that this dissertation conforms to those regulations.
ACRONYMS

BGB- Buegerliches Gesetzbuch (German Civil Code)


UNCITRAL- United Nations Commission on International Trade Law

UPICC- Unidroit Principles on International Commercial Contracts

UCC- Uniform Commercial Code

PECL- Principles of European Contract Law

VCLT- Vienna Convention on the Law of Treaties

TLDB- Transnational Law Database

ULF- The Hague Conventions on the Formation of Contracts for the International Sale of Goods

ULIS- Uniform Law on the International Sale of Goods
ACKNOWLEDGEMENTS

Every now and then we have dreams, some we forget and some come to pass, this one lived on. It was a great task and each step a joyous challenge. To the Almighty, thank you, you always made my dreams come true, I owe it all to you. To my dear loving parents, you are the epitome of my success, the core of my life, I am blessed to be your daughter, you believe in me more than I do myself, thank you for being the strongest pillars of my life.

To all my friends from all walks of life, you were the reason getting here seemed easy, I am privileged to have met you, it was an adventurous journey with the greatest minds. My Cape Town, thanks for all those smiles and the time, thank you for the inspiration, you brought out the best in me, I will always remember the good times.

To the ever hard working and very helpful staff at UCT, you made it possible, always willing to give a hand, I am yet to meet such a friendly group of people, the librarians really did their work.

Last but not least I would like to thank Professor Christie, you were the most patient supervisor anyone could ever ask for, thank you for the guidance, the time, and most of all, the invaluable knowledge, I enjoyed every moment.
# Table of Contents

## Part I
1. Introduction
   1.1 Historical perspective  
   1.2 Recent notions on good faith  
   1.3 Interpretation  

2. International Instruments on Good Faith
      2.1.1 What is good faith?  
      2.1.2 Article 7(1)  
      2.1.3 Article 7(2)  
   2.2 Principles of European Contract Law (PECL)  
   2.3 The Uniform Commercial Code  

## Part II: Good Faith Under Domestic Legal Systems
3. The English Position
   3.1 Scope and definition of good faith in the English legal system  
   3.2 Walford v Miles [1992] 1 All ER 453  
   3.3 Reasons that have led England to reject good faith doctrine  
   3.4 Effect of good faith on present rules of English law of contract  
   3.5 The future of the doctrine in English law  

Chapter Four: Continental Europe
4.1 German Law
   4.1.1 Article 242  
   4.1.2 The Treu und Glauben  
   4.1.3 Function of doctrine in German law of contract  
   4.1.4 Causes of action judicially created
CHAPTER FIVE

5.1 THE UNITED STATES

5.1.1 The origins
5.1.2 The UCC Section 1-203
5.1.3 The Second Restatement of Contracts
5.1.4 What does good faith entail?
5.1.5 Current perspective

5.2 APPLICATION OF GOOD FAITH IN SOUTH AFRICA

5.2.1 Historical origins
5.2.2 Current notions
5.2.3 Past experiences and future lessons

CONCLUSION AND RECOMMENDATIONS

BIBLIOGRAPHY
GOOD FAITH AND FAIR DEALING IN INTERNATIONAL COMMERCIAL CONTRACTS: A QUEST FOR UNIFORMITY IN APPLICATION

Good faith is not a concept that can be adequately defined, it is generally regarded as a very wide doctrine. In fact it has only recently been adopted into various International Instruments and National Laws. It originally was regarded as a moral concept.

Abstract

This paper will cover the adoption of the concept in various instruments such as the Convention for the International sale of goods (CISG) in Article 7(1), the UCC of the United States, UNIDROIT in article 1.7, and the most important adoption on the European continent, the Principles of European Contract Law (PECL), specifically article 1: 202(1) and 1: 106 (1) of the principles.

The question that will be raised and probably answered in the course of this paper is whether, the adoption of the concept of good faith and fair dealing has made a difference in international commercial contracts, the extent of its contribution, the hindrances faced, whether such problems can be addressed, how they can be addressed and finally whether uniformity in interpretation and application of the doctrine is maintained.

Under domestic law, the adoption of good faith and fair dealing notion into various legal systems and its implementation and enforcement thereof will be looked into, an attempt will be made to determine the main reasons why some states refuse to adopt the doctrine, and whether adoption of the doctrine in such states would make a substantial impact on their legal systems.

Under the approaches adopted by various domestic legal systems in incorporating the doctrine into their laws, and in trying to deduce whether uniformity in interpretation and application of the doctrine can be attained, the jurisdictions that will be looked into are; German, which is a pioneer when it comes to the adoption of the doctrine
within the European Union. The German *Treu und Glauben* provides for such, and has been included in the BGB (German Civil Code). In the provisions of the BGB, one is not only required to act reasonably, but there must be a relationship of trust based on the commercial dealings of the parties in a particular transaction. It has been noticed that most European countries, for instance France and Italy have this similar approach towards the concept of good faith and fair dealing, of course there are always minor differences in every legal system, and these will be highlighted. England of course is an exception, and in this paper it will be considered separately. It is regarded different due to its historical background, thus the doctrine in England is approached differently, and there are limitations in its application.

In the United States the doctrine of good faith and fair dealing has been adopted through the Uniform Commercial Code, section 1-203. This section unfortunately does not apply to the formation or negotiation of the contract. Numerous other sections seem to refer to the doctrine, even the Second Restatement on Contracts does touch on the concept. In fact it is the most recent re-enactment of some of the provisions in the Uniform Commercial Code. In the United States the doctrine basically applies to performance and enforcement in contracts.

English law reluctantly recognizes a general duty to act in good faith, it arrives at similar results as those arrived at by other countries when it comes to the implementation of the doctrine, even though the avenues used are different. The starting point in English Law was the judgment of Justice Steyn in *Banque Financiere*¹ and of course the judgment of Sir Thomas Bingham in the *Interfoto* case.² The cause started by these judges was later fueled by the unwavering support of the European Community. Before long it had become accepted that the doctrine could not be ignored anymore in England, and slowly its inception began. Even though the concept is legally accepted, it has not yet managed to get complete acceptance from the English legal fraternity, it is still approached and applied with caution.³ This paper

---

¹ *Banque Financiere de la Cite SA v Westgate Insurance Co Ltd* [1987] 2 All ER 923 and subsequent appeals
² *Interfoto Pictures Library Ltd v Stiletto Visual Programmes Ltd* [1989] QB 433
intends to discuss the reasons for such slow progress of the concept in England, and further compare the position to that of other European states.

In South Africa the doctrine of good faith has existed for quite sometime, mostly referred to as *bonae fides*, a doctrine which played a great role in the development of Roman contract law, and further influenced the development of the principle of equity in civil law. But this did not give the doctrine of good faith formal acceptance in the South African legal system, it has over the years been regarded as an elusive concept which could only destabilize well established legal rules. Most judges regard the doctrine as a threat to their views on freedom of contract being an absolute basis of the law of contract.⁴

The concept was accepted in a couple of instances, for instance, in *Eerste Nasionale Bank van Suidelike Africa Bpk v Saayman* in 1997, it was later dismissed in *Brisley v Drotsky*, where it was held that the doctrine could not be accepted as a basis to set aside or enforce a contractual relationship. This was confirmed in *Afrox Healthcare Bpk v Strydom* in 2002, it is now settled that in South Africa, the concept of good faith cannot be used in dealing with cases involving contractual unfairness that cannot be handled by pre existing rules, but public policy can. This work intends to follow up on the development of the concept of good faith in South Africa, and the reasons for its subsequent dismissal in *Drotsky*, not forgetting to outline the doctrine’s future in the country’s legal system and the effects of dismissing such doctrine.

---

⁴ Ibid at 214.
1. INTRODUCTION

1.1 Historical perspective

The concept of good faith and fair dealing is not of recent origin, it has existed over a long period of time. The medieval jurists who wrote about Roman and Canon law also discussed the concept of good faith and equity in contract law, even then it was still regarded as a very wide concept, and there was no well set out definition of the concept.  

Medieval jurists, like modern jurists faced a similar problem of defining the concept, only Baldus de Ubaldis, tried to provide an almost coherent account of what the term meant. But the truth is that he also had adopted most of his ideas from Aristotle and Thomas Aquinas. For them good faith and equity meant that a party had to keep his word, refrain from fraud, overreaching and honour tacit obligations.

Before Baldus, the definition of the concept was generalized, at times the doctrine was identified with Christian morality and good conscience. For instance a Decree of the Fourth Lateran Council collected in the abandoned artifacts of Gregor IX at some point quoted St Paul on faith and condemned Roman rule that allowed somebody who has acquired possession in bad faith to get title by prescription. The morale behind this decision was that everything that is not done in good faith is a sin. It is obvious that the area of law was regarded as very tricky by civil lawyers, the Canonists realized this and thus decided not to venture into further definition.

The new thoughts brought in by Aristotle helped Baldus’ theory, at the same time they rendered recourse to his theories unnecessary. In the sixteenth and seventeenth century, the ‘late scholastics’ a school of jurists based in Spain tried to synthesize

---

6 Ibid 5 at 93.
7 Ibid 6 at 95.
Roman law with the moral theories of Aristotle and Aquinas on which Baldus had based his philosophy of good faith.  

By the nineteenth century Aristotle’s theories on good faith had been discarded for better ones. The French Code Civile which defined a contract in terms of the will of the parties, pleaded for the judges to refrain from disregarding the wills of the parties in favour of equity. The will of the parties had become a source of all their obligations and could not be superseded, criticized or supplemented.

The nineteenth century German jurists termed the contract Willenserklärungen, which meant the expression of the wills of the parties. The concept of equity was not used as much. It came as a surprise when the requirement of good faith was placed in section 242 of the German Civil Code. The concept of the wills of the parties being accorded priority was now replaced. Good faith no longer meant substantive fairness, it was way more than that, it was a general rule of interpretation, even though at the time it was thought to be simply a legal norm proclaiming a duty to carry out the contract.

Seeing how the problem was approached by jurists in the past might help us decide where the concept is going. Most modern jurists regard the concept as indefinable, but at the same time it excludes all forms of bad faith. This is almost the avenue that was adopted by medieval jurists. Before Baldus the concept of good faith was not exclusively defined, instead descriptions of circumstances in which it might be required were outlined. Baldus made an attempt to do such by relying on Aristotle and Aquinas, but these references are now outdated and cannot apply in modern times. Perhaps it will always be a problem when it comes to defining it. This does not mean that modern jurists have not attempted, they have with some success too. International instruments and domestic legal systems have adopted the concept, it is the procedures followed and the successes and obstacles of the process that we now will turn to.

---

8 Gordley supra 6 at 115.
9 Ibid at 116.
10 Ibid at 116.
11 Ibid.
12 Ibid at 117.
1.2 Recent notions on good faith

This principle is virtually the most common in legal systems of the world, it is one of the most widely accepted ‘general principles’ of law. Good faith can be defined as:

_The mental and moral state of honest, even if objectively unfounded conviction as to the truth or falsehood of a proposition or body of opinion, or as to the rectitude or depravity of a line of conduct. One who acts in good faith, so far as the violation of positive law, or even, in certain junctures, of natural law, is concerned, is said to labour under an invincible error, and hence to be guiltless. This consideration is not infrequently applied to determine the degree of right or obligation prevailing in the various forms of human engagements, such as contracts and the law of obligations. In the matter of prescription it is held to be an indispensable requirement whether there be question of acquiring dominion or freeing oneself from a burden._

In international relations, this universal acceptance of the principle of good faith, along with that of free consent and the _Pacta Sunt Servanda_ rule have been specifically recognized in the Vienna Convention on the Law of Treaties (VCLT), and other international conventions, such as the Convention on the International Sale of Goods in article 7 (1 and 2), The UNIDROIT Principles on International Commercial Contracts (UPICC), UNCITRAL Model Law on International Commercial Arbitration, The Principles of European Contract Law (PECL) and The Uniform Commercial Code of the United States of America.

Good faith is subjective in nature, which in turn makes it difficult to prove, its elements do not repeat themselves in each case. Honesty and fairness therefore, are two common important elements shaping the conduct of States in acting in good faith, and their policies must reflect a level of coherency towards this international law.

---


14 ‘Agreements (and stipulations) of the parties (to a contract) must be observed’ In Black’s Law Dictionary.

15 See Preamble paragraph 3 of the VCLT.

requirement.\textsuperscript{17} Thus, States acting in good faith are under the obligation, ‘to refrain from acts calculated to frustrate the objects of the treaty,’\textsuperscript{18} therefore, when contracting with each other, it is presumed that States will honour their obligations in good faith and will refrain from imposing unreasonable burdens on one another. Good faith is one generally accepted principle of law in public international law which touches on both the standard of conduct of States in their dealings with each other, and the settlement of disputes among them.

The principle of good faith, along with other principles of customary international law, is incorporated in the VCLT, which provides for its use in the following provisions:

- article 26 provides for the obligation of States to perform in good faith

- article 31 (1) provides for the interpretation in good faith of international agreements

- article 32 (b) provides for the recourse to supplementary means of interpretation when the interpretation under article 31 leads to a result which is absurd or unreasonable.

Based on these articles we see that good faith is an obligatory standard of performance for parties to an international convention (article 26), and a guiding principle in interpreting their obligations (articles 31 and 32). In this respect, the only possibility for justifying non performance of obligations under an international convention is when the application of a given treaty is contrary to \textit{jus cogens}, as per the terms of article 53 of the VCLT.\textsuperscript{19} Thus, good faith in performance and interpretation of States’ obligations highlights the need for a faithful behavior in the

\begin{flushright}
\textsuperscript{17} Dr. Roberto Rios-Herran ‘The Principle of Good Faith in the Law of the World Trade Organization’ pg 2 and 3.
\textsuperscript{18} YBILC Vol II 7-8 (1964).
\textsuperscript{19} Article 53 of the VCLT indicates that, ‘a treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law. For the purposes of the present Convention, a peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.’
\end{flushright}
achievement and enforcement of an agreed common purpose. Therefore, the principle of good faith regulates the application and implementation of international treaties.

For humans to co-exist, there must be a degree of tolerance, and the concept of good faith can be said to have emerged from this necessity for tolerance and cooperation. When it comes to commercial transactions, there is a requirement of trust and confidence that is a necessary basis of every contract. There exists a reciprocal duty for each party to act reasonably, honestly and in good faith, since none of them can afford to act in a manner that might discredit them in their commercial dealings, or worse, render the whole process of contracting difficult and inefficient.\(^\text{20}\)

In most cases in the business world there will be parties that nevertheless decide to act according to their own will, in most commercial contexts nowadays, such actions are controlled by establishing a set of trade customs combined with social values, and it is under such arrangements that the concept of good faith plays its best role.\(^\text{21}\)

### 1.3 Interpretation

The duty of good faith so far has raised various issues, especially when it comes to its interpretation, it generally is regarded as the duty of parties to act as reasonably as they would expect the other party to act. This definition is very close to standards of morality, and some Christian notions requiring one to treat others as he or she would like to be treated. This similarity goes to prove the existence of a link between the concept of good faith in commercial law and morality. The process of reconciling the two differs in various domestic jurisdictions when it comes to scope and application. In some countries the concept is accorded wider application, while in others its application is limited and it is regarded an ambiguous concept.\(^\text{22}\) Various international instruments have been adopted to try and reconcile this concept with other legal standards and to give it defined application.

---


\(^{21}\) Zaccaria EC ibid.

\(^{22}\) Zaccaria EC ibid at 1.
When article 7(1) of the CISG was adopted, the main purpose was to try and maintain uniformity in the application of the good faith doctrine. This was after serious debates between the civil law representatives who preferred a provision directly imposing a duty of good faith, and the common law representatives who wanted nothing to do with it. The adoption of the article was well outlined by Alejandro Garro who stated that:

*By relegating the relevance of good faith to the interpretation of the Convention, a hard-won settlement was reached between those who would have preferred a provision imposing directly on the parties the duty to act in good faith during formation, performance, and termination of the contract of sale, and those who were opposed to any explicit reference to the principle of good faith. This peculiar compromise, actually burying the principle of good faith, has been characterized as “uneasy”, “strange”, and as a “statesmanlike compromise. …”*[^23]

Is it possible for uniformity in application of good faith to be attained at a domestic level? Of course at an international level it has already been settled, but there are hints that uniformity is impossible at domestic level because the national laws differ immensely. Even instruments like Unidroit Principles of International Commercial Contracts (UPICC) and Transnational Law Database (TLDB) have introduced uniformity in international trade, but there is general acceptance in their application that national domestic laws do differ and it would be hard if not impossible to attain uniformity at that level.[^24] These of course are suppositions which can be proved by comparing various national legal systems.

The CISG on the other hand has aimed lower, its compromise through article 7(1) gives an option to interpret the good faith requirement whichever way states deem fit, the wording of the article does not impose any obligatory manner as to how interpretation is to be carried out. Of course the drafters of the Convention were trying

[^24]: Christie RH ibid at 4-5.
to get support from everyone, so it was drafted to cater for anyone’s domestic viewpoint, hence the compromise article.

Article 7(2) allows for the proper law of the contract to be applied where 7(1) fails to work, this provides the parties with an opportunity to depend on their domestic conflict of laws in interpretation where the Convention does not provide for a situation, these laws in most cases differ from country to country. This further puts doubt on the anticipation for uniformity in interpretation of the doctrine ever being achieved. A look at the various legal systems of key players in international trade will assist in determining whether this is possible.
2. INTERNATIONAL INSTRUMENTS ON GOOD FAITH


The adoption of the 1980 Vienna Convention marked the end of a process that had taken over 50 years of effort to establish uniform rules governing the international sales contracts, development of the final texts took three stages.

The process of drafting this law began initially in 1935, 1939, 1956 and 1958 in the form of drafts of proposed uniform sales by legal experts from Europe working under the auspices of the International Institute for the Unification of Private Law, these resulted in the Hague Conventions on the Formation of Contracts for the International Sale of Goods (ULF) and the International Sale of Goods (ULIS) in 1964. These conventions had international aspects, thus in 1968 the second stage began, and the United Nations set up UNCITRAL, which published the CISG in 1980. So far there are over 66 states that have adopted it.

The main purpose in drafting the CISG was to adopt a compromise instrument that would reconcile the moral aspect of good faith and the law. The starting point is article 7(1) which provides that:

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

It has been stated on more than one occasion that the adoption of the article was a compromise between advocates and critics of good faith. This mainly was an outcome of the rising debate at the time of the adoption of the convention relating to

26 Christie RH supra 16 at 1-2.
two factions divided up, one involving the common law delegates who opposed any reference in the Convention to the principle of good faith, the other, the civil law delegates who favoured imposing an obligation upon contracting parties to govern their conduct according to the principle of good faith. The adoption of the article was a way to provide internationality to the Convention. It made it possible for both factions to become signatories to the Convention without totally forfeiting their convictions, thus the Convention was adopted by as many nations as possible.

2.1.1 What is good faith?

The doctrine is wide, it has more than one meaning, depending on the context in which it is used. It has been on occasions, compared to unconscionability, fair conduct, and reasonable standards of fair dealing, decency, common ethical sense or a spirit of solidarity. One actually can say that the concept is versatile, it is this characteristic that affords it the uniqueness it carries. As Aristotle stated;

*There are some cases for which it is impossible to lay down a law, so that special ordinance becomes necessary, for what is itself indefinite cannot be measured by an indefinite standard.*

The good faith concept is too extensive to try and consign into a specific definition, but at the same time one cannot say it involves an obligation to act selflessly, one does not have to abandon his or her self interests to be regarded as having acted contractually in good faith, but the doctrine may be used where necessary to curb the abuse of contractual legal rights.

There have been differing opinions as to the real purpose of the doctrine within CISG, some academics rely on the literal meaning of the clause and say that it was

---

28 Although one cannot claim that all common law countries relied on this approach.
31 Keily T ibid at 3.
established as an additional principle to aid judges and arbitrators in interpreting the convention, thus it is a way of avoiding injustice. Others favour a broader interpretation and believe that the duty to observe good faith in international trade is also directed to the parties to each individual contract of sale. For one to understand the purpose, function and nature of the principle of good faith, article 7(1) of CISG has to be considered.32

2.1.2 Article 7(1)

The CISG Convention happens to be multilateral in nature, this means that its application demands uniformity. Article 7(1) deals with such, it emphasizes the importance of the Convention’s international character and the need to promote uniformity in its application. The main reason for such a provision was to counterbalance the risk of varying interpretations being given to it based on the judge’s domestic, cultural and legal backgrounds.33 The integrity of the Convention and its application will mostly depend on the way it is interpreted by the judiciary in a given country.

Some say that the provisions of this article are vague, but it has an advantage in that it has managed to state an up to date legal policy keeping up with the demands of world trade, which does not allow national law to be relied on in interpretation.34 The second reason for the adoption of the provision was as caution to rely on precedents at an international level, the first task to a certain level has been achieved, at times it proves hard to implement such principles, but domestic courts must adhere to these requirements in interpreting the provisions of the Convention.

The text of article 7(1) covers only the application of the Convention, rather than the parties’ rights and duties or performance thereof.35 The wording of the article was actually agreed upon after a lengthy discussion in the UNCITRAL Working Group

33 Kelly T supra 29 at 3.
35 Felemegas J supra 32 at 179.
and the Plenary Sessions of the Vienna Conference that later adopted the text of CISG. The adoption was meant to try and reject other preposterous proposals that were put forward concerning the application of the principle of good faith and fair dealing.

Within the CISG, there is no imposed obligation as in other instruments like the Uniform Commercial Code requiring parties to a contract to act in good faith. This limited application of the concept of good faith is even supported by the legislative history of the Convention, for instance, The Hague Uniform Law does not refer specifically to good faith, even within the CISG, reference to good faith is limited to matters of interpretation in article 7(1).\(^{36}\)

At times the limitation is seen as a rejection of the concept, consequently there have been challenges raised, some scholars have suggested that article 7(1) does in fact impose a general obligation upon the contracting parties to act in good faith, despite the literal language of the article and any legislative history of the Convention thereof. But the Convention seems to have been specifically drafted that way to possibly leave room for varying interpretation. The whole point of its internationality was that courts have a chance to interpret it distinctively, yet uniformly. At times the courts overextend this privilege and the purpose of the provision is defeated.

The definition of article 7(1) emphasizes its international character, its need to promote uniformity and the fact that it generally establishes that relevance should be given to observance of good faith in international trade. It is the last part of the definition that has raised speculation concerning its scope, meaning and function and turned out to be significant in the world of trade.\(^{37}\)

It is a well known fact that every legislative draft has issues in interpretation, even at domestic level where there are already set out foundations, the problem is amplified when it is an international instrument, for there is no legal culture, or well set out methods of interpretation. It is simply prepared at an international level and adopted

\(^{36}\) Felemegas J supra 32 at 197.

\(^{37}\) Felemegas J ibid at 226.
into the various domestic legal systems, thus interpretation becomes uncertain. The problem is accentuated when the legislative instrument is in the commercial law field, since there is an imbalance between the number of issues of interpretation of the Convention and the number of contracting states. Since there are various states, interpretation will depend on the law of the forum, or the law applied by virtue of rules of private international law, this in turn promotes diverse construction and implementation, as a result there is lack of uniformity, and this might defeat the sole purpose of the creation of the Convention.

On the other hand if uniformity in interpretation is achieved, this could satisfy the purpose of the creation of the Convention. That is why article 7(1) is so important, for it asserts that if the autonomous nature of the convention is maintained, anyone interpreting it will always keep in mind its international nature, and avoid involving any domestic legal practices or policies. If this can be done, then uniformity will be possible. For uniformity to be attained, it is necessary to accord the convention an international rather than national interpretation. The member states must maintain that the convention is read, understood and interpreted in the same uniform way, but this will be hard to achieve if a nationalistic approach is applied. This was illustrated in the English case of Scruttons Ltd v Midland Silicones Ltd [1962] AC 446 where it was stated:

*It would be deplorable if the nations, after protracted negotiations, reach agreement ...and that their several courts should then disagree as to the meaning of what they appeared to agree upon.*

Indeed it is self defeating for the states to come together, with various convictions, sit over a long period of time and come up with an instrument they meant to use to achieve the broadest degree of uniformity in the law of international sales transactions. Then courts in interpreting the Convention fail to achieve this uniformity, simply because they decide to apply nationalistic standards. It is compelling to believe that even though the CISG afforded a broad interpretation to article 7, it probably did not foresee such diverse interpretations ensuing.

---

38 Felemegas J supra 32 at 232.
39 Felemegas J ibid.
The most confusing part in the application of the concept of good faith in the Convention arises out of its double applications, on one hand it plays an interpretative role in article 7(1) and is regarded as a gap filling general principle in article 7(2). This interchangeable and indiscriminate application of the concept of good faith between the two related provisions of CISG has resulted in uncertainty regarding the exact nature of the concept. This is proven by the way various academics have differing opinions regarding the concept.\footnote{Felemegas J supra 32 at 198.} One really wonders what the purpose of the drafters was, why adopt such an open ended provision, while trying to strive for uniformity in application at the same time, and why go ahead and further extend application by drafting 7(2)?

**2.1.3 Article 7(2)**

The important words in article 7(2) limit its application to ‘questions concerning matters governed by this Convention which are not expressly settled in it’. This provision is similar to article 17 of the Uniform Law on the International Sale of Goods (ULIS), which also served a similar gap filling purpose, even though the word ‘gap’ does not appear in the Convention.\footnote{Eorsi G ‘General Provisions in International Sales: The United Nations Convention on Contracts for the International Sale of Goods’ Columbia University Galston MN and Smit H(ed), Juris 1999 pg 2-10.} The article provides for questions not covered by the Convention. What then are these questions?

This will obviously include questions expressly excluded by the Convention, for instance those excluded by article 2, 3(2), 4 and 5. There are also others which though governed by the Convention, are not clearly regulated by it, for instance in article 78 and 84 interest is called for but the rate to be paid is not settled, also article 1(b) specifies cases where one of the parties has a place of business in state A which has ratified the Convention, and another in state B which has not, but since article 10 does not cover such a case, it fails to provide for what should be done if such situation arises, and the issue is left to general principles.\footnote{Eorsi G ibid at 2-11.} To verify whether there is a gap or not interpretation has to take place, such step, may actually ‘call gaps in to being’ or totally get rid of them. For instance it is more favourable in common law systems for
restrictive interpretation to be applied, thus it is highly possible for common law tribunals to find more gaps than the civil law ones that are used to traditions of codification.  

When article 7(1) was being drafted no one envisaged a gap filling provision, but later it seemed necessary. The justification was that it would have been impossible for a diverse international group of people to draft such complicated legislation and manage to provide for each and every circumstance in detail. There had to be some omissions and gaps and these needed to be addressed. Of course, there have been arguments that the wording of the legislation could be interpreted in a way that would eliminate the omissions, but article 7(1) which provides for interpretation also has it vagueness and the idea of a separate provision seemed to have been a good one.

The question that arises is whether the two articles have satisfied the job they were created to deal with, and whether contracting states have applied them in necessary circumstances accordingly. The main reason for the adoption of the CISG and indeed article 7 was to promote uniform application, promote the international character of the CISG and the observance of good faith in international trade. But it should also be noted that the creation and adoption of the CISG was only a preliminary step towards attaining uniformity in international sales law. This process can only be concluded when uniformity in interpretation and application of the convention is achieved. It is only after this point is reached that it will be possible to determine whether the process of unification has failed or succeeded.

2.2 Principles of European Contract Law (PECL)

The process of adopting the principles began as far back as 1982 when the Commission on European Contract Law was formed. They were published in stages from 1995, part 1 dealt with performance, non performance and the remedies thereof,
in 1999 part 1 and 2 of PECL was published and then in 2003 the Commission under the chairmanship of Professor Ole Lando published the last set.46

The Principles may be compared to the American Restatement of the Law of Contract, which was published in its second edition in 1981. The Restatement consists of non-binding rules, ‘soft law’. They aim to restate the Common Law of the United States. The Principles of European Contract Law are also ‘soft law’, but their main purpose is to serve as a first draft of a part of the European Civil Code. Furthermore, a common law does not exist in the European Union. The Principles therefore have been established by a more radical process. They are not based on a specific single legal system. The Commission relied on all the legal systems of the Member States, but not each one of them influenced every issue that was dealt with. The rules of legal systems other than those in the Community have also been considered. So has the American Restatement on the Law of Contracts and other existing conventions, such as The United Nations Convention on Contracts for the International Sales of Goods (CISG).

Some of the Principles reflect ideas which are yet to materialize in the law of any state, one can actually say that the Commission has tried to establish those principles which it believes to be best under existing economic and social conditions in Europe. The Commission has made an effort to deal with those issues in contract which face the business community and which may advance trade, especially international trade. However, the Principles do not intend to apply exclusively to international transactions.47 Even transactions at a local level are dealt with only if they are contractual.

The object of the PECL is to try and restate the basis of the European Contract Law by harmonizing the contract rules of various European states and making sure they manage to function as one legal entity. The purpose was to eventually draft a Civil

Code, but in the meantime the Principles were aimed at acting as a text that could be adopted as a whole or part by contracting states.\textsuperscript{48}

The Principles specifically deal with the notion of good faith and fair dealing in parts I and II. First the concept is laid out as a rule of interpretation of the law in article 1:106 (1): which states that

*These principles should be interpreted and developed in accordance with their purposes. In particular regard should be had to the need to promote good faith and fair dealing, certainty in contractual relationships and uniformity of application.*

The Principles have also been established as a rule of behaviour in article 1:201 (1) which provides that ‘each party must act in accordance with good faith and fair dealing’.\textsuperscript{49} Article 1:201 (2) provides that ‘the parties may not exclude or limit this duty.’

This article establishes a basic principle to be observed when applying good faith and fair dealing. The whole concept must be observed in the formation of the contract, its performance, and enforcement of the parties’ duties thereof, and even in the exercise of their rights under the contract. The applications of these rules manifest themselves in specific provisions such as, the duty of a party not to negotiate contract with no real intention of reaching an agreement as per article 2:301, duty not to disclose confidential information provided by the other party in the course of negotiation, as per article 3:302, the duty not to take advantage of the other parties’ dependence, economic, financial weakness as per article 4:109. Good faith and fair dealing is also an important factor when implied terms of the contract are to be determined.\textsuperscript{50}

Within the PECL there are numerous articles that incorporate the concept of good faith and fair dealing. These are simply but a few provisions in the Principles dealing

\textsuperscript{48} Christie RH supra 3.
with the concept. But the concept\textsuperscript{51} is not limited to these specific obligations. It applies generally as a support to article 1:104 on usages. Its main purpose is to enforce community standards of decency, fairness and reasonableness in commercial transactions. The article supplements the principles and under circumstances where strict adherence to the general principles may result in miscarriage of justice, the article takes precedence.

Some say that the Principles do delimit the concept and definition of good faith, it has been stated on a number of occasions that the comments in article 1:202 are influenced by a substantive notion of good faith, this is done by imposing upon the parties a duty to observe reasonable standards of fair dealing and showing due regard to the interests of others, it may also at the same time have an objective notion. The concept of good faith and fair dealing in PECL is seen as a means to try and administer justice under circumstances where the law or an otherwise valid contract term would have a manifestly unjust outcome. In such cases the application of the good faith doctrine by the courts will depend upon the extent that certainty and unpredictability in contractual relations will be preferred over justice in a particular state.\textsuperscript{52}

\subsection*{2.3 The Uniform Commercial Code}

By 1979, the Uniform Commercial Code had become law in all states in the United States except Louisiana, the District of Columbia and the Virgin Islands. The Code is adopted in these jurisdictions by jurisdiction enactment. The Code is not enacted by the United States as a Federal Statutory Law. The Code was originally sponsored by the National Conference of Commissioners on Uniform State Laws. The Conference had initially ventured into other fields of commercial law but the code was one of its best endeavors.\textsuperscript{53}

So far the evolution of the Code has been subject to varying perceptions, yet it is still regarded as the most successful attempt of legal enactment in American commercial history.

\textsuperscript{51} Lando O and Beale H supra 50 at 113.
\textsuperscript{52} Storme EM supra 49 at 6.
\textsuperscript{53} White JJ and Summers RS \textit{Uniform Commercial Code} 2\textsuperscript{nd} edition West publishing 1980 pg 3.
Section 1-203 of the UCC provides that

_Every contract or duty within this Act imposes an obligation of good faith in its performance or enforcement._

This section does not support an independent remedy upon one’s failure to perform or enforce good faith, it means that such failure under the contract constitutes a breach of that contract, and or makes unavailable under the particular circumstances a remedial right or power. This goes to prove that the concept of good faith only directs the courts to interpret commercial contracts within the contexts in which they are made, carried out and enforced, and does not create an independent duty of fairness to be independently breached.  

Section 1-201 (11) defines good faith to at least include ‘honesty in fact in the conduct or transactions concerned’ Of course there have been academics who have argued that this definition was very narrow, for instance professor Farnsworth argued in the Chicago Law Review that this definition interfered with the functioning of section 1-203. Section 2-103(1) (b) also encompasses a broader definition of good faith especially when it comes to sales of goods. The section provides that

_In this article, unless the context otherwise requires... good faith in the case of merchant means honesty in fact and the observance of reasonable commercial standards of fair dealing in the trade._

But it can still be said that although the definition is broader, the application of the section is limited specifically to a situation where there is use of the phrase ‘good faith’ this means there will be limitation and in circumstances where there is no express reference to ‘good faith’ such will be excluded, this might at times result in the miscarriage of justice. The other limitation placed upon the section is that the provision applies only in cases involving merchants.

---


55 Summers RS ibid 54 at 122.

56 Anderson 'Uniform Commercial Code: Texts, cases and commentary’ 3rd edition CBC 1997 Vol 2A.
The operation of the concept of good faith in section 2-103(1) (b) operates to the extent that there are reasonable commercial standards of fair dealing in a given trade. In such cases the trade needs to be enquired into to determine whether the standards applied can be regarded as reasonable within its context, that is if it has standards at all. The application of good faith in the Code goes further than this, the text contains numerous official comments that are relied on seriously by the courts in construing its provisions. These comments also expressly require a certain degree of good faith in the contractual procedure and construction. Even the cases that have been brought in court regarding interpretation and application of the concept have mostly been decided in favour of conceptualization of the good faith doctrine in the code. So it would not be an assumption to say that in the United States the doctrine of good faith and fair dealing has been well provided for under the Uniform Commercial Code, and in situations where there is an omission, the 2nd Restatement on Contracts steps in.

57 Summers RS supra 54 at 123.
58 Ibid.
59 Summers RS ibid see also UCC Case Digest, vol 1-201 to 1-203, by Clark/Boardman/Callaghan (1997) 708- 831.
PART II: GOOD FAITH UNDER DOMESTIC LEGAL SYSTEMS

Whereas the law of contract of most legal systems like America, Germany and France explicitly requires that parties act in good faith, English law has declined to adopt an overriding principle of good faith in contracts. According to article 1134(3) of the French Code Civil, agreements are to be performed in good faith, section 242 of the German Burgerliches Gesetzbuch (BGB) also imposes a good faith requirement in contracts, so does the UCC.\textsuperscript{60}

It is evident at this point that the concept of good faith and fair dealing is much more acceptable in continental Europe, it does not seem peculiar to common law legal systems too, for instance article 1-203 of the American Uniform Commercial Code provides for the adoption of the good faith doctrine, but it is only a requirement in the performance and enforcement of contracts. English law nevertheless has maintained a cautious approach.

What does good faith really mean? Is it limited to parties’ conscience or are there external standards imposed by the commercial society and the general level of changing norms? Does its application relate only to performance or does it extend to enforcement or even cover negotiation too?

Does the idea of acting in good faith include pre-contractual agreements as well? Or is it only applicable in contractual negotiations? These and a lot of other questions will be discussed and answered in the following chapter.

\textsuperscript{60} Adams AJ and Brownsword R Understanding contract law 3\textsuperscript{rd} edition Sweet and Maxwell 19 pg 104.
3. CHAPTER THREE:

THE ENGLISH POSITION

The original principle for the observance of promises and agreements was first enforced on grounds of conscience in the Court of Chancery in England. Conscience was good faith clothed in a different term, when the Ecclesiastical Chancellors intervened in the legal process, they relied on this concept, which actually was an amalgamation of principles of Canon law, Christian philosophies, and Roman law principles adopted into civil law as *bonae fides*.  

In English law, the principle of good faith like other systems is also based on moral concepts, since somehow the principle originated in Roman law, one cannot avoid encompassing the *pacta sunt servanda* rule and the moral concepts of honesty, fairness and reasonableness. It is obvious that English law long accepted recourse to notions of good faith through the *Lex Mercatoria*, at the same time the rest of Western Europe did. This can be evidenced by Lord Mansfield’s dictum in *Carter v Boehm* when he stated that

*The governing principle is applicable to all contracts and dealings. Good faith forbids either party by concealing what he privately knows, to draw the other into a bargain, from his ignorance of the fact, and his believing the contrary.*

He further went on to justify circumstances under which either party to the contract could be unknowingly silent. The statement by Lord Mansfield has had significant impact on the recognition of the status of contracts of insurance *uberrimae fidei*. But the bases he set out for the principle of good faith for some reason never made into the modern English law of contract.

---

61 O’Connor JF Good faith in English law Dartmouth 1999 pg 99.
62 Ibid.
63 Ibid.
64 (1766) 3 Burr 1905, at 1910.
65 Zimmermann R and Whittaker S supra 54 at 6.
66 Zimmermann R and Whittaker S ibid at 42.
The rule of good faith is not specifically referred to in English law, it is referred to in a number of rules though. But unlike most codified civil law systems, there is no general principle of good faith that actually applies for particular areas of the English law. In *Banque Financiere de La Cite SA v Westgate Insurance Co Ltd*, Steyn J tried to introduce the concept when he held on trial that the insurers in that case were liable in damages to the bank, both on the basis that breach of the duty of utmost good faith owed by an insurer to its insured was actionable in damages, and also that it was just and reasonable to impose a duty of care on the insurers in the circumstances.

On appeal, Steyn’s argument was dismissed by the House of Lords and The Court of Appeal which stated that

> In the case of commercial contracts, broad concepts of honesty and fair dealing, however laudable, are a somewhat uncertain guide when determining the existence or otherwise of an obligation which may arise even in the absence of any dishonest or unfair intent.

This position was re-emphasized by Wills J in *Allen v Flood* when he stated that

> Any right given by a contract may be exercised as against the giver, by the person to whom it is granted, no matter how wicked, cruel, or mean the motive may be which determines the enforcement of the right.\(^68\)

In this case, the imposition of a duty to speak in the course of negotiations for an ordinary commercial contract was regarded as undermining the basic principles of the law of contract. It was stated that the fact that there were established business relationships between the parties, and the fact that the contract was one of utmost good faith, did not mean it could be used as a basis to establish a duty of care.\(^69\)

So, how does the concept function under English law?

---

\(^67\) [1987] 2 All ER 923 N. supra 1.

\(^68\) 1898 App Cas 1 at 46 (P.C 1897).

3.1 Scope and definition of good faith in the English legal system

Under English law good faith is defined as;

A fundamental principle derived from the pacta sunt servanda rule and other legal rules distinctively and directly related to honesty, reasonableness, and fairness, the application of which is determined at a particular time by the standards of honesty, fairness and reasonableness prevailing in the community, which are considered appropriate for formulation in new or revised legal rules.\(^70\)

The concept of good faith and fair dealing in English law has not been specifically defined to constitute a principle. The concept often exists to supplement or supersede existing rules where honesty, reasonableness or fairness call for such.\(^71\) English law basically developed through case law, and the fact that there was an effort to reconcile conflicting rules such as ‘rules of promissory estoppel’ and ‘consideration’ in the law of contract, shows that the concept did exist in a concealed manner.\(^72\) But still there are several principles that have developed on the basis of fairness, for instance ‘unconscionability in contract’.

The concept in such cases supersedes the normally applicable rules where moral norms of good faith seem so important that they cannot be ignored. Under such circumstances to decide otherwise would seem a total miscarriage of justice. The principle is also widely invoked in situations which demand fairness and reasonableness so that the interests of parties are balanced. The principle is still subject to limitations of the law, especially when political, legal or public considerations are involved, it may be overridden at times, but there are also circumstances in which even these considerations fail to override the principle.\(^73\)

Many commentators have raised the argument that good faith doctrine should be recognized, so far there are signs that this might be received by some members of the

\(^{70}\) O’Connor JF supra 61 at 102.
\(^{71}\) Ibid pg 100.
\(^{72}\) Ibid pg 101.
\(^{73}\) Ibid.
judiciary, but a major setback towards these attempts came with the decision of the House of Lords in the celebrated English case of *Walford v Miles*. The arguments for and against the adoption of the good faith doctrine were well discussed in this case.

### 3.2 Walford v Miles

[1992] 1 All ER 453

The defendants, the Miles owned a company, PNM Laboratories Ltd. They put the company up for sale in 1986. A third party offered to pay £1.9 million. The plaintiffs, the Walfords started negotiations. Both parties reached an agreement as to the terms of the contract, a letter was subsequently sent by plaintiffs recording that they had promised a comfort letter from their bank confirming that they were prepared to provide finance amounting to £2 million in order to enable them to acquire the company. The defendants in turn agreed that if such letter was received they would terminate negotiations with any third party and subsequently conclude negotiations with plaintiffs exclusively. The bank provided the required letter and defendants confirmed this and were prepared to sell the company to the plaintiffs, but for some reason plaintiffs received a letter to the effect that the company had been sold to a third party.

An action for damages for breach of contract was initiated, followed by a claim for damages for misrepresentation by defendants who disregarded the agreement and carried out a deal with a third party. The issue in contention in the House of Lords was whether the agreement to negotiate recorded in the defendant’s letter of March 18 was unenforceable.

In this case a more hostile attitude was adopted towards the good faith doctrine, the House of Lords reasserted the orthodox English position and held that an agreement to negotiate recorded in defendant’s letter fell short of a legally enforceable contract. In coming to this decision, Lord Ackner said:

---

The concept of a duty to carry on negotiations in good faith is inherently repugnant to the adversarial positions of the parties when involved in negotiations. Each party to the negotiations is entitled to pursue his or her own interests, so long as he avoids making misrepresentations … a duty to negotiate in good faith is unworkable in practice as it is inherently inconsistent with the position of the negotiating party.\(^75\)

In this case although the Walfords felt aggrieved by the action of the defendants, there seemed to be no evidence that the defendants had acted in bad faith, it obviously could not be proved that they either had stringed the Walfords, or broke negotiations to take a more lucrative offer. The main obstacle was that at the time there was generally no established good faith requirement in English law, and since bad faith could not be proved, the House of Lords was unsympathetic with the Walfords’ attempt to establish an enforceable lock-out agreement.\(^76\) This case has drawn attention to some issues in English contract law, for instance, it emphasizes that the adoption of the good faith doctrine might limit the pursuit of self interest in a manner beyond the classical contract law. Because classical law does take into account the fact that during negotiations a certain degree of selfishness is expected, since the whole point of negotiating is for one to get the most favorable terms in the contract.

The decision rendered in the case of Walford has constantly faced criticisms, the first ground related to the distinction that Lord Ackner drew between an obligation to use ‘best endeavors’ which is enforceable, and an obligation to negotiate in good faith which he said was not. He did not provide supporting reasons and over the years various cases that have been faced with this question have not provided an answer either.

The second ground of criticism was based on the fact that the case failed to impose sanctions on the party which negotiated in bad faith without making any misrepresentations. Lord Steyn also made a similar observation, when he stated

\textit{It is …surprising that the House of Lords in Walford v Miles held that an express agreement that parties must negotiate in good faith is unenforceable…as the}

\(^{75}\) Adams J and Brownsword R \textit{Key issues in contract} Butterworth 1995 pg 199.

\(^{76}\) Ibid at 206.
UNIDROIT principles make it clear it is obvious that a party is free to negotiate and is not liable for a failure to reach an agreement... 77

The third criticism is the fact that the parties’ freedom of contracting is undermined, their choices are not taken into consideration, it would be more acceptable that if the parties chose to negotiate or contract under the pretext of good faith then so be it, why should they be denied party autonomy? Parties have been known on many occasions to use such language to preserve flexibility and cooperation, to allow the contract to accommodate unforeseen circumstances, and in circumstances where they expressly did so, it was unforgivable for the court to undermine such agreement based on the argument that such an obligation was too uncertain to be enforced. 78 However, in time the case became a basis for rejection of the doctrine in English law, and the fears of Lord Steyn were eventually confirmed.

3.3 Reasons that have led England to reject good faith doctrine

English courts believe that the application of the doctrine might have some negative impacts. There have been objections raised on the basis that since the doctrine requires the parties to take into account each other’s legitimate expectations, this goes against the individualistic nature of English contract law.

Then there is the fact that good faith is regarded as a loose concept in commercial contracts. The main objection being raised is that it is not clear how far the restrictions on pursuit of self interests that the doctrine represents must be imposed. The issue is who sets the moral standards that parties are to be judged by?, this raises uncertainty as to whether the degree is just a matter of conscience, or a standard of fair dealing independent of one’s conscience. Further, there is the issue of scope of application of the doctrine, whether it applies to the whole contract, including pre-contractual relations, or it regulates only the conduct and content of the contract, that is, does it only deal with matters of procedure and process, or is contractual substance involved.

too?\textsuperscript{79} It is the growing number of such unanswered questions that has led English lawyers to treat the doctrine cautiously.

The third reason is that, in determining whether one acted in good faith, the other party’s state of mind would have to be taken into account, this is a very hard and uncertain step,\textsuperscript{80} and at times will call in for speculation, the outcomes usually differ to a large extent. This is actually one of the fundamental reasons for the hostility towards the principle, English lawyers seem to prefer ‘incremental reasoning’, or simply adjusting already existing rules such as ‘doctrines of frustration’ to achieve same end results as those achieved elsewhere under the doctrine of good faith, rather than adopting a new concept altogether, but who can blame them, in most legal fraternities, especially judges, old settled principles are given preference over new ideal ones. It is typical human tendency to rely more on what we are familiar with\textsuperscript{81}

There is also the argument raised to the effect that the whole doctrine fails to recognize that there are varying contracting contexts, and thus the doctrine cannot be applied to any contract law regardless of the context. The doctrine is a general principle and its application must take into account the various areas of commercial contract. There are some areas of English commercial contracts that by nature involve competition, hence opportunistic behavior is expected, for instance the commodities market. Most English courts do not believe that the doctrine can be controlled to the extent of accommodating such circumstances.\textsuperscript{82}

Most English lawyers do believe that adopting the doctrine of good faith would have adverse outcomes. But at the same time they claim that the difference English law has from other jurisdictions is not that much, they say the concept in other situations has been applied, without being really acknowledged. Most of the English contract law rules do conform to the requirements of good faith, and at times even the issues dealt with in other jurisdictions in accordance with the doctrine are resolved differently in

\textsuperscript{79} Brownsword R. \textit{Contract law: Themes from the Twenty First Century} Butterworth 2000 para 5.3- 5.9.
\textsuperscript{80} Brownsword R ibid para 5.3-5.9.
\textsuperscript{81} Forte A.D.M (ed) \textit{Good faith in contract and property} Hart publishing 1999 pg 168.
\textsuperscript{82} Mckendrick supra 78 at 555.
England but with similar outcomes. A similar view was expressed by Sir Thomas Bingham in *Interfoto Pictures Library Ltd v Stiletto Visual Programmes Ltd.*

**Facts**

The defendants had contracted to use some of the plaintiff’s pictures, the photographs were sent to the defendants accompanied by a delivery note specifying the date they were to be returned. The note further set out nine conditions, condition 2 outlined that charges would be incurred for late return of the photographs. The defendants returned the photographs two weeks late and subsequently incurred a charge of £3,783.50, they refused to pay, but the trial judge ruled in favour of the plaintiffs. On appeal defendants alleged that plaintiffs failed to act in good faith by not drawing the attention of the defendants to the level of the holding charges, which by the way happened to be way above comparable rates elsewhere.

Lord Bingham in coming to a decision stated that;

"In many civil law systems, and perhaps in most legal systems outside the common law world, the law of obligations recognizes and enforces an overriding principle that in the making and carrying out of contracts, parties should act in good faith. This does not simply mean that they should not deceive each other, a principle which any legal system must recognize; its effect is perhaps mostly aptly conveyed by a metaphor such 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... In such a forum it might, i think be held on the facts of the case that the plaintiffs were under a duty in all fairness to draw the defendant’s attention specifically to the high price payable if the transparencies were not returned in time..."

He however went on to point out the fact that this would have been a reasonable solution, but English law had, characteristically committed itself to no such overriding principle, instead piecemeal solutions were developed in response to demonstrated

83 Forte ADM supra 81 at 41.
84 Supra 2.
85 Adams J and Brownword R supra 75 at 105.
problems of unfairness. Thus it still succeeds in eliminating cases of unfair dealing by one means or the other.

These piecemeal solutions impose a certain degree of limitation on the freedom of action in the processes of bargaining. One of them is the rule of promissory estoppel, the other is offered by the law of restitution, it is usually available where some benefits have been transferred from one party to the other under the pretext that the contract will be concluded, since a restitutionary remedy cannot be used to redress expenses incurred during negotiations, the collateral contract theory is used, and it treats pre-contractual promises as contractual ones, sometimes even the contract rules themselves might be changed, this is a limitation of freedom of contract too, for instance postal acceptance rules.

This in a way is similar to the principle of good faith, the collateral contract and tort of negligence serve as tools for imposing pre-contractual liability. Usually the principle of good faith stands for limitations of freedom of action in the bargaining process and one is only exempted by excuses or justification, on the other hand, English law is different, it operates on the assumption of freedom in the bargaining process, subject to special rules, such as tort in negligence, or collateral contracts imposing liability. This is a deviation from the normal practice in the English law of contract, but it is one of the adaptations that have been developed to deal with those situations that the doctrine of good faith provides for in other jurisdictions.

Mckendrick recognizes the existence of English rules that conform with the doctrine, but he says this should not be taken to mean that English law should recognize a general doctrine of good faith, in short what he is saying is that if the individual rules can function on their own, then what is the point of adopting a broad general principle to replace them?

---

87 Ibid at 29.
88 Ibid at 30-31.
89 Mckendrick supra 78 at 556.
The fact that English law does not recognize good faith does not mean it is lenient on those who act in bad faith, so some debates have been raised to the effect that this renders some similarity between England and other jurisdictions. For instance a contract can actually be set aside on grounds of deceit, illegitimate pressure, exploiting other’s weaknesses, and abusing a position of confidence, without having to prove failure to act in good faith.  

At times non resort to the doctrine of good faith has been regarded as a strength. It has been argued that there are areas of English law that are developed to an extent that there is no need to resort to good faith. For instance, the legal system provides for those circumstances that arise after the formation of a contract, which might render the contract impossible, illegal or impractical, they are covered by the doctrine of frustration. On the other hand, other legal systems like the German one do not have such and thus have to rely on good faith to regulate such matters.

Eventually, the adoption of the doctrine of good faith and fair dealing into the English legal system will probably have more advantages than the set out drawbacks. Besides, the arguments set out do not expressly state that the legal system is as a whole better off without the doctrine, they simply lay out circumstances in which good faith has not been applied and yet solutions have been found. These are random scenarios and the arguments cannot be relied on to totally disregard the adoption of the doctrine.

### 3.4 Effect of good faith on present rules of English law of contract

An attempt to illustrate the potential of the inception of the doctrine was provided by the decision of the Privy Council in *Union Eagle Ltd v Golden Achievement Ltd.*

The plaintiff purchaser agreed to buy a flat in Hong Kong and paid 10 per cent of the purchase price HK$ 420,000 as a deposit. The agreement specified the date and time, and place of completion correctly. Clause 12 of the agreement stated that if purchaser failed to comply with any of the terms of the agreement, the contract would be

---

90 Forte ADM supra 81 at pg 42.
91 Ibid pg 42.
rescinded and deposit forfeited. The plaintiff did not comply with the agreement and he tendered the purchase price ten minutes after the agreed time. The vendors subsequently refused to accept late payment, rescinded and forfeited the deposit. This was an action by the plaintiff to enforce the contract.

Lord Hoffman in coming to a decision asked whether it would have been just for the court to ‘exercise an equitable power to absolve the purchaser from the contractual consequences of having been late and to decree specific performance,’ since the plaintiff was demanding that equity should intervene under the circumstances. He rejected the plaintiff’s argument and said it wouldn’t be just for such measures to be taken, saying it would be contrary to authorities and the needs of the business community and would spark uncertainty.

It has been questioned whether the recognition of the doctrine of good faith would change the outcomes of similar cases, how would such cases be decided? Is there a possibility that the outcomes might be different? It would at least enable parties to have a chance to re-litigate on points of law previously settled, but this does not mean the results of the case will necessarily have to be altered.\(^93\) It can actually be said that the adoption provides a better chance for the parties to be heard, it doesn’t necessarily mean that drastic outcomes have to follow, but it is a step indeed. In extreme cases the purchaser may even have a chance to obtain relief as Hoffman said.

The process has been aided by the European Community Directives on Commercial Agents which laid down reciprocal duties on the principal and agent to ‘act dutifully and in good faith’ in relation to one another’s interests.\(^94\) The Unfair Terms in Consumer Contracts Regulations of 1999 introduced the requirement of good faith in English law in the context of consumer contracts.\(^95\) Article 3(1) of the Directives implemented by Regulation 4(1) provides that

\(^{93}\) McKendrick E supra 78 at 561.


A term is unfair if, contrary to the requirement of good faith, it causes a significant imbalance in the parties’ rights and obligations arising under the contract to the detriment of the consumer.

Of course there was a serious debate as to the inception of the Regulations in 1994 on their enactment. English lawyers did not, and still do not recognize such requirement in English contract law. The main issue was how interpretation of the good faith requirement in the Regulations would take place when courts did not recognize the doctrine. So far the courts have recognized the European origin of the doctrine but they do not interpret it from a national perspective. The first time the courts dealt with such was in Director General of Fair Trading v First National Bank. In this case at pg 109, Judge Evans Lombe after realizing that the origin of the Regulations was a council directive stated

*It is clear, therefore that the words ‘good faith’ are not to be construed in the English sense of absence of dishonesty, but rather in the continental civil law sense.*

On appeal in the House of Lords, Lord Bingham observed that member states of the European Union have no common concept of fairness or good faith. This was an important observation, since it explains that in as much as civil law countries do accept the doctrine of good faith, they do not exercise its uniform application. At the same time he observed that English law might not accept the concept formally but it is not totally unfamiliar, it was introduced by Lord Mansfield in 18th century, and its traces can still be found in insurance contracts. Thus when comparing the two these observations should be taken into account. There might be a contrast between the two systems, but it is not that vast.

So far the enacting of the Regulations has resulted in questions being posed as to whether the concept of good faith referred to in the Directives touches only on the Regulations or whether it should extend to other commercial dealings outside the scope of the Regulations. Will these Regulations have an influence on the development of English law? Are they a sign that it is time good faith was recognized

---

96 [2000] 1 WLR 98.
97 Mckendrick E supra 78 at 543.
in the country? The answers to these questions can be found in observing how good faith doctrine has been adopted and how it has influenced other countries.

### 3.5 The future of the doctrine in English law

The introduction of the doctrine into English law is a possibility that has simply not been considered seriously by the English lawyers. But if the task were to be undertaken it wouldn’t be difficult. There are already many pre-existing contract rules which conform to the doctrine even though they are not yet developed into a single principle, these can be relied on as its basis. For instance the pre-existing recognition of good faith in insurance law in the form of *uberrimae fidei* contracts or contracts of the utmost good faith introduced by Lord Mansfield in *Carter v Boehm*, promissory estoppel, law applicable to fiduciaries, limited duty of disclosure, willingness of the courts to imply terms into a contract in particular situations and so forth. These principles may be used as a basis, the only hindrance existing so far is the attitude of the English lawyers.

English law still has a chance to go ahead and impose the duty to act in good faith upon parties, especially since most jurisdictions outside the United Kingdom recognize the obligation, the duty is also embedded in international instruments such as the UNIDROIT Principles, the Principles of European Contract law, and The United Nations Convention on Contracts for The International Sale of Goods (although here the role is strictly interpreting the Convention). Therefore to make it convenient for parties to these international contracts who might be contracting in England, it might be suitable for the legal system to be at par with other jurisdictions. This will also help the process of attaining uniformity in application of the doctrine, because in as much as uniformity is advocated, the principle needs to be part of the legal system, and at this point England stands out as a ‘sore thumb’.

As much as English law rejects good faith principle, it regulates events of bad faith, perhaps very harshly too, thus it would seem more rational for the issue to be

---

98 Supra 64, the concept was introduced in this case, even though nowadays it is limited to insurance contracts.
100 Forte AD.M supra 81 at 45.
101 Forte ADM ibid at 52.
addressed directly and openly by adopting a general principle of good faith instead of trying to address the issue indirectly, and perhaps unsuccessfully too. At the same time justice must not only be done, it must be seen to be done, refusal to adopt good faith as a principle creates an assumption that the law of contract is ill equipped to achieve fair results, since the judges on occasion are totally left to their own device to decide on some matters, in the absence of a general principle and where the law may lead to an unjust outcome, justice might lose face.\(^{102}\)

The introduction of the principle also might bring about some benefit, beyond the actual settlement of disputes. A good contractual environment would be created providing contracting parties greater security, subsequently greater flexibility about the ways in which people are ready to conduct their business. The parties would not have to worry about the risks of opportunism, and exploitation, this will render them more willing to optimize their interests and take risks in contracting, subsequently promoting cooperative thinking in contracting practice, maybe even in legal doctrines.\(^{103}\)

Thus it can be argued that good faith is an important doctrine in the future of English law. It will not only ensure that the issues involving bad faith are addressed openly and in a direct way, but will also allow judges to make decisions in a consistent, well set out, effective manner when it comes to cases of unfair dealings, thus attaining the uniformity required, at the same time the law is brought into alignment with societal expectations, which differ in every contractual situation. Lastly if the contractors can trust the system, this is important for the future of the economy.\(^{104}\) Although the English law of contract has refused to incorporate the doctrine, there is so much pressure requiring this step to be taken. Especially the development of model contracts of international trade which mostly incorporate good faith as a general clause, thus every party to an international contract finds themselves at the end of the day bound by the doctrine, hence the convenience of adopting it in England.\(^{105}\)

---

\(^{102}\) Mckendrick E supra 78 at 558.

\(^{103}\) Mckendrick ibid at 559.

\(^{104}\) Mckendrick E ibid.

\(^{105}\) Adams AJ and Brownsword R supra 60 at 106.
Finally in the common law jurisdictions there is an increasing tendency to receive the concept of good faith, this is not only in the case of the United States, but the commonwealth world too. The doctrine has been adopted in Canada, and recently Australia established its position in *Renard Constructions (ME) Property Ltd v Minister for Public Works*¹⁰⁶ where Priestley JA stated

*That people generally, including judges and other lawyers, from all strands of the community, have grown used to the courts applying standards of fairness to contract which are wholly consistent with the existence in all contracts of a duty upon the parties of good faith and fair dealing in its performance.*

¹⁰⁶ *(1992) 26 NSW LR 234, at 268 F.*
CHAPTER FOUR

CONTINENTAL EUROPE

While some common law countries have adopted a cautious approach towards the recognition of the doctrine of good faith and fair dealing, most European countries recognize the existence of a general duty for parties to negotiate and perform contracts in good faith.107

These countries have independent legal systems and each is quite different from the other. They share common traditions, the most common one being their tie to Roman law. The concept of *bonae fides* was carried on and it has become the basis of the doctrine of good faith in their contractual relations.108

Reference to the doctrine of good faith appears in various codes, in specific rules and in general clauses in different countries. The codes in these countries have a larger, more active role to play, in some countries, like Germany they have, with time evolved into important principles for the entire private law. Such inclusion of good faith within specific rules or within general clauses has given it a formal role.

107 Zaccaria E.C supra 20 at 2.
108 O’Connor JF supra 61 at 84.
4.1 GERMAN LAW

The German Civil Code (BGB) deals with many areas of the law, it incorporates contract, quasi contract and property law, it consists of five books: the general part (art 1-240), obligations (art 241-853), rights in rem (854-1296), family law (art 1297-1921) and finally succession (art 1922-2385). It is the most comprehensive code in Germany, and where possible, it has been amended by Statutes. The code was devised at the time when laissez-faire was prominent and took more than twenty years to be complete, it came into force on 1 January 1900. Recently the code has adjusted to changing circumstances and this has been achieved through the general interpretation clauses that the code contains, such as article 133, 157 and 242.

4.1.1 Article 242

In Germany the leading source on the concept of good faith is article 242 of the German Civil Code Burgerliches Gesetzbuch (BGB). It specifically refers to bad faith and good faith, but the interpretation and application of the code has resulted in a situation where good faith has to be regarded as a factor used to modify the application to individual cases of any other German rule of private law. The article provides that:

*The debtor is bound to effect performance according to the requirements of good faith, giving consideration to common usage.*

It has been stated that in early decades of the nineteenth century, article 242 was rarely used. After world war, there was a massive inflation of the German currency and other economic disorders, consequently there was relaxation of caution previously exercised by the judiciary. Since it was impossible to effect performance of contractual obligation according to the requirement of good faith relying on worthless

---

110 Foster N German legal system and laws 2nd ed Blackstone press Ltd 1993 pg 229.
111 O’Connor supra 61 at 85.
112 Dawson JP ‘Germany’s case law revolution’ The oracles of the Law (1968) in O’Connor JF ibid at 85.
currency, the German courts in most cases adjusted the obligations of the parties in a manner considered just and equitable depending on the circumstances of the parties involved.

For this reason new techniques and standards of fairness were adopted by German courts, relying on case law, these standards were generalized and applied in various situations. Since then the requirements of good faith have transformed the German law of contract and have burrowed the theory way into the whole system of German private law.\(^{113}\) When the code was first introduced there was no case law to aid it in interpretation, thus although it was comprehensive, it lacked flexibility to deal with changing situations. The function of paragraph 242 became simply justifying the judgments of the German judiciary, later it evolved into a route for notions of natural law and human rights to enter civil law. One can nowadays compare this article’s function to that of the English doctrine of equity, it has even succeeded in developing and converting principles from case law into general principles of law.\(^{114}\) It is used by courts to make sense out of contracts which otherwise might have been unworkable or totally unfair, or incomplete. It is used to interpret contracts and their provisions, expand them limit them or correct and re-construct them where necessary.

There are leading illustrations of such functions of the article, for cases on interpretation or expansion of contractual terms, \textit{Venusberg} seems appropriate. In this leading German case, a seller charged a very high price for a plot of land because it had an exceptional view. He was subsequently prevented from building on an adjacent plot which he owned, the reason was that this would destroy the view from the first plot. This was decided despite the fact that there had been no actual terms or a duty existing in the contract to this effect. In this case the court took it upon itself after consideration of the circumstances to create the duty, as it has done on several occasions in creating duties of care, supervision, information and explanation based on article 242 of the BGB.

In cases where contracts have demanded formal requirements, article 242 has helped to overcome such and saved the party that failed to comply with such from suffering,

\(^{113}\) O’Connor supra 61 at 86.

\(^{114}\) Foster N supra 237 at 229.
especially where the reason is undue hardship. In the case of *Eldemann*, an employee was promised a house as a Christmas bonus. No notarial authentication was made at the time, which is a normal practice if a promise relating to real estate is to be enforceable, but they assured him that the promise was good. When the employee claimed the conveyance of the house, the defense that was raised was that authentication as per article 313 was missing. It was held in that case that the defense was contrary to good faith and damages were allowed, but not the conveyance.¹¹⁵

### 4.1.2 The *Treu und Glauben*

This in German law is the closest description of the concept of good faith. Originally *bonae fides* could be conveniently merged with the traditional concept of *Treu und Glauben*,¹¹⁶ this concept was used in the same sense that good faith is used in commercial relations.¹¹⁷ That is how it finally found its way into section 242 of the German Civil Code (BGB). It is also referred to in section 157 of the code, where it is stated

*Contracts shall be interpreted according to the requirements of good faith, ordinary usages being taken into consideration.*

It seems clear from the wording of the section that it in fact deals with the determination of the contracts, in interpreting, the wording in section 242 might have been narrow, the section fails to deal exhaustively with how performance is to be effected, whether this was deliberate or not is a matter of opinion. Taken literally the section only seems to refer to how the debtor is to perform, it does not seem to extend to include whether a debtor in fact has an obligation to perform, or whether non performance might be excused, such is not expressly provided for.

German courts seem to have gone a step further than section 242, they do not seem to have had difficulty in recognizing that since good faith is a fundamental principle of contract law in the country, it does in fact regulate the debtor’s obligation to perform as well as the creditor’s right of performance. To get to this conclusion the courts had to rely on provisions of section 157 of the code too. Section 157 does determine the

---

¹¹⁵ Foster N supra 81 at 238.
¹¹⁶ Literally it could be taken to mean fidelity and faith.
¹¹⁷ Whittaker S and R Zimmerman supra 54 at 18.
content of the contract effectively, regulates it while regarding it as a matter of interpretation. Whether the draftsmen intended that the interpretation of good faith be limited or not is not very clear at this point.\textsuperscript{118}

There is a good number of German cases that have dealt with the doctrine of good faith in an unlimited manner, in 2001 The Federal Supreme Court dealt with such a situation when the defendant (a German company) sold to plaintiffs a Spanish corporation a used cutting machine. The confirmation order contained reference to standard terms which included an exemption for liability of defects for used equipment. Subsequently the machine developed faults and the buyers demanded reimbursement. On appeal the issue of good faith was brought into play when the court stated that there was a requirement for a party to disclose standard terms where the other party was unaware. The court went on to hold that if the seller had wished to rely on standard terms, it would have been a matter of good faith for such to be put at the disposal of the buyer, good faith placed an obligation on the seller to make such disclosure.\textsuperscript{119}

The doctrine of \textit{Treu und Glauben} (good faith) is now of common usage in German law of contract. It started as a simple legislative seed, and has subsequently turned into a major part of contracts, and at times even overshadows the contractual relationships of parties.\textsuperscript{120} The issue of freedom of contract that is supposedly the basis of the law of contract is in numerous cases afforded less precedence than the doctrine. Over the last decades, a number of theories have emerged based on the doctrine and they form the extensive extension of the doctrine into various areas of German private law. Case law has also not been spared, the doctrine has influenced the development of a vast body of case law.

\textsuperscript{118} Whittaker and Zimmerman supra 54 at 18.
\textsuperscript{119} Germany 31\textsuperscript{st} October 2001, Federal Supreme Court at http://cisg3.law.pace.edu/cases/011031gl.html.
\textsuperscript{120} Ebke WF and Steinhauer BM ‘The doctrine of good faith in German contract law’ Beatson J and Friedman D Good faith and fault in contract law Oxford 1995 supra 86 at 171.
4.1.3 Function of doctrine in German law of contract

The doctrine fulfills three functions; it acts as a legal basis for interstitial law-making by the judiciary, forms a legal basis for defenses in private law, which function at times seems to be a usurpation of the doctrine, and provides a statutory basis for reallocating risks in private contracts.\textsuperscript{121}

The doctrine has been used by courts in the country to create new causes of action in situations where there was no such under statutory law, the courts claim that the doctrine may also be invoked as a defense in circumstances where unforeseen by the parties, the basic assumptions underlying their contractual relationship have fundamentally changed between the time they entered the contract and the time that was agreed for performance to take effect.\textsuperscript{122}

The last function of the doctrine arises in cases where it is used by courts to reallocate the risks between parties in situations where applying the traditional provisions of the law strictly would lead to unjust outcomes. The standards to be applied in such cases are shifty, for instance who is to weigh the unjustness of the outcomes against the strict application of the law, and who decides which one should take precedence? This system confers upon the courts extra power, which at times might be misused and seems very uncertain, but if applied well the idea of justice being just is amplified.

Although the three functions of the doctrine are at the present settled in application, there are still some common issues in modern contract cases when it comes to determining the scope of the causes of action, such as the degree to which the defenses may be extended, and the risk allocation mechanisms based on section 242 and 157 of the BGB.\textsuperscript{123}

\textsuperscript{121} Ebke WF and Steinhauer BM supra 120 at 171.
\textsuperscript{122} Ibid at 172.
\textsuperscript{123} Ibid at 172.
4.1.4 Causes of action judicially created

Breach of contract
In German law, the doctrine of good faith is important in the process of the formation of the contract, the theory of *culpa in contrahendo* (pre contractual liability), is based in section 242 of the BGB. Where a party has been pre-contractually injured he or she is entitled to claim damages.

Under German law a creditor is entitled to specific performance as a general rule, actions for damages on the basis of non-performance are rather an exception. On the other hand under common law systems such actions both fall under breach of contract. The BGB provides that a creditor may claim damages if performance has become impossible (*Unmöglicheit*), or he may claim damages where performance has been delayed due to debtor’s fault (*Schuldnerverzug*), or if the goods delivered were defective, as long as the seller fraudulently concealed the defect or warranted the promised performance (*Gewährleistung*).\(^{124}\)

A new cause of action was innovated to deal with cases of non-performance that could not be dealt with under impossibility, delay or warranty. It was required to remedy wrongs that did not have statutory relief. It is nowadays known as the positive *Vertragsverletzung* (positive breach of contract). Such a breach gives an entitlement to claim damages or in a reciprocal contract, to totally rescind the contract, such right of rescission is limited in cases where enforcing the contract would be unreasonable.\(^{125}\)

As we have seen in the discussion above, article 242 of the BGB has been used by German courts as the statutory basis for deriving new general principles, in circumstances where the existing rules of law seem to lead to unjust outcomes, or are inadequate. Any imposed statutory limitations have been exceeded by courts if there was a chance that a just and equitable response to new social developments might not have been anticipated by the legislature, and that such need can only be achieved by

\(^{124}\) Ebke WF and Steinhauer BM supra 120 at 173.
\(^{125}\) Ibid at 175.
deviating from the classical law rules. The use of section 242 has been twofold, as a ‘sword’ it is used as a basis for the judicial invention of a new cause of action for breach of contract. As a ‘shield’ it has been used to invoke the doctrines of impracticability, frustration of purpose, and change in economic circumstances.

This goes to show that the judges in civil law systems are more involved in the formation of the law than those in common law. They further, have more freedom to intervene in circumstances where they feel that the enactments of the legislature might lead to unjust results, did not anticipate particular circumstances, or are outdated. For purposes of development of the law this is a good thing, but at the same time the law is supposed to be certain, this does not mean it should be rigid, but certainty might be hard to attain in a legal system where the judge at any point in time may invoke provisions of section 242 and come to a varying judgment. This further desecrates the doctrine of precedents on which the law is generally based.

4.2 FRENCH LAW

4.2.2 Contracts under French law

The Code Civile is the applicable code in France, it is the basis of whole codification of the French legal system. The civil code’s provisions on contracts reflect the philosophical and political attitude of post revolutionary France, as well as their Roman law origins. The starting point of all these attitudes is to be found in the first two elements of the Republic’s motto Liberte, Egalite (liberty and equality) which to an extent represent an individual’s freedom to govern oneself in contracts.

Sometimes parties to contractual negotiations make preliminary agreements before concluding the ultimate contract, the attitude of the French towards these contracts is more favorable than the English one. In cases where such agreements are not enforced by the contract they may be taken into account in determining whether delictual fault existed in the course of negotiations. In the absence of preliminary agreements, French law holds the parties to a degree of expected proper conduct, referred to
positively as good faith, or negatively as ‘abuse of rights’ to break off contract before negotiation is complete.\textsuperscript{126}

Mostly it has been used where one party seems to have acted maliciously or with intention to harm, but it is not limited to such. There have been cases where an abrupt withdrawal from negotiations without legitimate reasons was considered enough. For instance in a case where a supermarket buyer requested the owner to commence works on the property, but subsequently withdrew from the negotiations, it was held that the owner was entitled to damages to be compensated on his expenditure without necessarily having to prove intention to harm.\textsuperscript{127} But this application of good faith cannot in pre-contractual agreements be extended to recover profits to be made out of the putative contract.\textsuperscript{128} At this point one is justified in saying that the French do recognize the concept of good faith in pre contractual negotiations, a topic that is still a point of discussion for the English legal system, while the Germans have adopted the doctrine in every possible situation, and the Americans recognize it and apply it in performance and enforcement.

The French Code goes on to require that performances too must be in good faith, but this has been a subject of many debates. The traditional approach was that this was an addition to the classical basis of contracts being true agreements and that such was binding. Good faith was solely regarded as a requirement to keep one true to one’s agreement and it had to be interpreted in accordance with the parties’ true intentions rather than the wording used.\textsuperscript{129}

Some modern day jurists still do not accept its importance, and regard it a technical provision, refusing to afford it more substantial significance, fearing this would promote uncertainty, besides they believe article 1135 has provided the courts with an injunction to supplement the parties’ agreements with legal, customary and equitable obligations.\textsuperscript{130} This of course is a skeptical view regarding the doctrine in France, not

\textsuperscript{126} Whittaker S, Boyron S and Bell J \textit{Principles of French law} Oxford University press 1998 pg 313.
\textsuperscript{128} Whittaker S, Boyron S and Bell J ibid at 314.
\textsuperscript{129} V Markade, \textit{Explication theorique et pratique du Code Napoleon} 6\textsuperscript{th} edition (Paris, 1869) t IV 396; Whittaker S, Boyron S and Bell J ibid at 335.
\textsuperscript{130} Whittaker S, Boyron S and Bell J ibid at 335.
every jurist thinks like that, but for a civil law country the skepticism is a blind spot on the history of the doctrine in continental Europe.

There are those jurists who adopt a positive or at times neutral view towards the concept, because in as much as they favour using the idea of good faith, specifically as a basis for the creation of obligations on the parties to the contract, they recognize that the courts have been restricted in their use of the doctrine in developing the content of contracts, referring to it mainly only in respect of ‘duties involving loyalty’.\(^\text{131}\)

In practice attention seems to be directed more towards the effect of bad faith by a party to a contract. Deliberate bad faith, non-performance (\textit{inexecution dolosive}) of a contractual obligation may increase the liability in damage, in other cases courts may deny giving effect to the exercise of a right that was motivated by bad faith.

\subsection*{4.2.3 Article 1134 al 3}

The French legal system adopts a more minimalist approach when it comes to the adoption of the doctrine of good faith, compared to their German counterparts. Article 1134 paragraph 3 of the French Civil Code provides that:

\begin{quote}

\textit{Agreements lawfully formed take the place of law for those who have made them. They cannot be revoked except by mutual consent or on the grounds allowed by the law. They must be performed in good faith}.\(^\text{132}\)

\end{quote}

There are various articles in the French Civil Code, this one is simply one of them, and it only refers to good faith in performance of contracts, even though it has been asserted on a number of occasions that nowadays all contracts are made in good faith. There is a difference between good faith in the German and French system although they are both civil law countries. The adoption of good faith in France has not had a major impact on their law of contract, or on other areas of the law.

\(^{131}\) Whittaker S, Boyron S and Bell J supra 126 at 335.

\(^{132}\) O’Connor JF supra 61 at 94.
In German law article 242 has been used by German courts with utmost freedom, the judges could adapt the law of contract to changing economic and social circumstances and societal attitudes, for instance after the two world wars when there was a serious economic depression in the country and the currency lost value, the courts took this into consideration when reviewing contracts.\textsuperscript{133}

Article 1134 of the Code does not seem to have developed to a similar extent, even though the doctrine has been the subject of major discussions by French scholars and jurists over the years, they do not seem to have come to a specific well set out agreement as to its precise nature or function, neither do they seem to have managed to account for its lack of development in the French law.\textsuperscript{134}

There have been numerous cases in French courts that seemed to have required the invocation of article 1134, but it was never given effect. In one case a landlord was denied the right to invoke the forfeiture clause in a lease because he waited before giving notice until the tenant was likely to be on holiday, in another the client of the builder was denied the right to require correction of the defects when the cost of the corrections was not in proportion to the seriousness of the defects. In both cases the doctrine was disregarded, and the claims dismissed, an English court would have come to similar conclusion on the ground that remedies other than damages were equitable and thus discretionary. But in most civil law countries for instance German and some civil law scholars would actually have regarded these circumstances as requiring application of the doctrine of good faith. Therefore the fact that in France article 1134 was not invoked remains an anomaly.\textsuperscript{135}

Another occasion where the doctrine did not seem to have been afforded its usual application compared to other civil law countries, was when a special provision was created for specific cases like fraud. Most cases of unfair conduct are interpreted as falling within fraud in France, but in other civil law jurisdictions such as Germany and Switzerland, such instances are dealt with under the good faith provisions of the

\textsuperscript{133} Nichols B \textit{The French law of contract} 2\textsuperscript{nd} edition Clarendon press 1992 pg 153.
\textsuperscript{134} O’Connor JF supra 61at 95.
\textsuperscript{135} Nichols B ibid at 154.
codes. One cannot show the relationship between the provisions of article 1134 on good faith and this article on fraud, why misconduct had to be squeezed into the provision is a question that both writers and scholars have not managed to answer.

It has been stated on a number of occasions that article 1134 al 3 does not occupy the assertive role assigned to it, instead it assumes a reserve position or fall back position for the courts to resort to when dealing with unfair or dishonest conduct in cases where the parties’ choices or the law in general failed to provide for such. 136 A differing opinion was that most cases of misconduct especially when it comes to commercial contracts might actually require an objective review of commercial usages or interpretation of the contract itself, in which case there will be no need to apply general principles. 137

As much as the reasons for lack of development of the good faith doctrine in French law vary, it would not be too presumptuous to conclude that perhaps the main reason French lawyers do not attach much weight to the doctrine is because they are more likely to regard law as a system of legal rules used in practice and applied by courts, as opposed to it being a system governed by general principles and standards of ideal conduct. 138

The other reason might be based on the fact that the good faith doctrine was never required as much in France as for instance in Germany. They did not go through a similar state of economic crisis as the Germans did, thus the courts did not have to employ such dramatic resort to the doctrine. On the other hand, the English had a different reason for not attaching importance to the doctrine, in as much as they did not like the uncertainty it brought, they already had an established legal system with rules that provided for most circumstances that the doctrine provides for.

136 Planiol et Ripert, 6 Traite Pratique de Droit Civil Francais, 2nd ed (1952) pg 500; O’connor JF supra 61 at 95
137 O’Connor JF ibid at 95.
138 O’Connor ibid.
CHAPTER FIVE

THE UNITED STATES

5.1 The origins

It has been stated by Beatson and Friedman that the earliest trace of the doctrine of good faith might probably have been associated with the Insurance cases in 1766 when Lord Mansfield referred to good faith as a governing principle applicable to all contracts and dealings.\(^{139}\)

In the United States the doctrine can be said to have faced a couple of drawbacks since that introduction by Lord Mansfield. The doctrine was later re-introduced in the Uniform Commercial Code by Professor Karl Llewellyn who actually was not so much influenced by the ideals of Lord Mansfield, rather he was a great admirer of the Treu und Glauben, as a result of the time he spent at Leipzig.\(^{140}\)

Before this time a few references to the doctrine were made in some cases decided in New York and California, both cases were brought before the Court of Appeal in Market Street Associates Ltd v Frey\(^{141}\) where Posner J stated

*The contractual duty of good faith is …not some newfangled bit of welfare-state paternalism or …the sediment of an altruistic strain in contract law, and we are therefore not surprised to find the essentials of the modern doctrine well established in the nineteenth-century cases…*

In the United States the doctrine can be found in three different areas, the uniform commercial code, the 2\(^{nd}\) Restatement on contracts, and United Nations Convention on Contracts for the International Sale of Goods.

The Uniform Commercial Code was introduced in the 1960s, it included section 1-203 which provides that:

---

\(^{139}\) *Carter v Boehm (1766) 3 Burr 1905 at 910; ER 1162 at 1164.*

\(^{140}\) Beatson and Friedman supra 86 at 154-155.

\(^{141}\) *941 F 2 d  588, at 595 (7th circuit 1991).*
Every contract or duty within this Act imposes an obligation of good faith in its performance or enforcement.

This provision was subject to a limitation, it was applicable only to those contracts covered by the Code such as the sales of goods contracts, letters of credit and security agreements, it failed to include other contracts for instance those covering construction, land sale, real estate mortgage, and insurance. From 1979 up to 1981, after the official promulgation of the code, for the first time the doctrine of good faith gained an official acknowledgement in major contracts in American law of contract.\(^\text{142}\)

This acknowledgement was afforded to the doctrine through section 205 of the Second Restatement of Contracts, the section provides that:

\emph{Every contract imposes upon each party a duty of good faith in its performance and its obligation.}

The Restatement is a special type of law, it is not a statute as such, it is not common law either, or a restatement of the actual case law of each state, it is a representation of an attempt by the American Law Institute, a private organization of scholars, judges, and practitioners to formulate accurately, leading rules and principles in major fields of American law.\(^\text{143}\) Section 205 of the second restatement was based on accumulation of case law, section 1-203 of the Uniform Commercial Code and an article by Professor Allen Farnsworth of 1963.\(^\text{144}\)

With time, the process of inception of the doctrine was simplified, by late 1980s most courts and states had explicitly adopted or acknowledged a general obligation to act in good faith in the performance of contracts, even state legislatures in the country had adopted the Uniform Commercial Code especially section 1-203. It has been stated in the American Treatise of 1995 which deals exclusively with good faith that before

\(^{142}\) Zimmermann R and Whittaker S supra 54 at 119.

\(^{143}\) Zimmermann R and Whittaker S ibid at 120.

\(^{144}\) Farnsworth AE ‘Good faith performance and Commercial Reasonableness under the Uniform Commercial Code’ University of Chicago Law Review 666 ff.
1980, there were about 350 reported cases interpreting the general obligation to perform contracts in good faith, at the time of publication there were more than 600 cases reported. One can imagine how many cases are reported up to date, considering the ever-changing economic and social circumstances that demand general considerations to be made. \(^{145}\)

### 5.1.2 The UCC Section 1-203

It should be noted that this section deals with good faith performance, but it does not apply to negotiation or formation of the contract. In 1994 the Permanent Editorial Board of the Uniform Commercial Code promulgated an addition to the official comments on section 1-203. In the commentary it was stated that the section did not support an independent cause of action for one’s failure to perform or enforce in good faith, this meant that a failure to perform or enforce in good faith, a specific duty or obligation under the contract, constitutes a breach of that particular contract, or under the particular circumstances, makes unavailable a remedy or right or power. \(^{146}\)

This commentary served to elucidate on the fact that the doctrine of good faith simply directs courts to interpret contracts within the usual commercial contexts that they are created in, performed or enforced, and at no point in time does it create a distinct duty of fairness and reasonableness which is capable of being separately breached. The section is not the only provision for good faith in the Code, there are several other sections that deal with the issue of good faith, some giving it a wider application for instance section 2-103(1) (b) and others narrowing it down as in section 1-209(11). \(^{147}\)

### 5.1.3 The Second Restatement of Contracts

This is by far one of the most successful attempts of reporting the law in the United States. Section 205 specifically deals with good faith and fair dealing. The section does not only provide the definition of good faith, it goes on in subsections a, d and e

---

\(^{145}\) Whittaker S and Zimmermann R supra 54 at 120.  
\(^{146}\) Ibid at 123.  
\(^{147}\) Ibid at 122.
to elaborate. Subsection a) gives the meaning of good faith as provided in the Uniform Commercial Code in section 1-209(19) to include ‘honesty in fact in the conduct or transaction concerned’ ‘in the case of a merchant’ this section has been known to limit the doctrine to merchants, it also refers to section 1-103(1) (b) which provides that good faith means ‘honesty in fact and the observance of reasonable commercial standards of fair dealing in the trade.’

The subsection tries to explain that the phrase ‘good faith’ has been used in a variety of contexts, and its meaning does vary depending on the circumstances in which it is applied. Good faith in performance or enforcement requires faithfulness to an agreed common purpose and consistency with the expectations of the other party, and at times consistency with the standards set by society, it does not include conduct characterized as ‘bad faith’.

Subsection e) deals with good faith in enforcement, it is stated that the obligation of good faith and fair dealing extends to include assertion, settlement, and litigation of contract claims and defenses. The obligation is breached once there is dishonest conduct, it also includes conduct that is honest but unfair such as taking advantage of the other party’s needy circumstances to extort a modification of the contract without any legitimate reason. Other breaches of the doctrine have been outlined through case law.

Section 205 of the Restatement does not apply to the negotiation stage of the contract, it only deals with performance and enforcement of the contract. In fact as a general observation, the requirement of good faith in American law does not seem to apply to good faith negotiations. This does not preclude parties from contracting to act in good faith, there are some instances where the general requirement applies even at the negotiating stage.

148 Whittaker S and Zimmermann R supra 54 at 124-125.
149 Ibid at 124.
150 Ibid at 124.
5.1.4 What does good faith entail?

In the United States there has been a debate as to what the doctrine really means, the doctrine has been afforded too many meanings and it is hard to decide which one is the correct one.

The most appealing one is that good faith is simply a renaming of the fundamental principles of the law of contract. This was the description afforded to it by Justice Scalia in *Tymshare Inc v Covell*. On the other hand it seems that American scholars have a different attitude altogether, Professor Summers published an article on good faith in 1968 which later became one of the bases of the second Restatement of contracts, here he laid out his ‘excluder theory’ by suggesting that when there was doubt, a lawyer was likely to determine precisely what a judge meant by relying on the phrase ‘good faith’ if he asked what the phrase intends to rule out of its application, and not what it covers as such.

He went on to say ‘good faith’ was an ‘excluder,’ hence it had no general meaning of its own, except that attached to it by the forms of bad faith it excludes. He said that once the relevant form of bad faith is identified, the lawyer can assign a specific meaning to good faith by formulating an ‘opposite’ for the bad faith being out ruled. This theory of course faced criticisms, most of them based on the fact that judges were given too much discretion to decide what was good faith, it seemed like concluding that the good faith duty is breached whenever a judge decides that such has happened, and this is bad for the system of precedent, unless a case falls squarely within the facts. Some judges though did support it and said it was a workable concept and that it showed what really happened in the court.

On the other hand, his fellow scholar, Professor Burton came up with the ‘foregone opportunity analysis’ he claimed that good faith performance limits the exercise of discretion of one party conferred on it by the contract. He said good faith performance occurs when a party’s discretion is exercised for any purpose within the reasonable contemplation of the parties at the time of formation to capture opportunities that were

---

152 727 F 2d 1145, at 1152 (DC Cir 1984).
153 Beatson J and Friedman D supra 86 at 161.
154 Beatson J and Friedman ibid at 162.
preserved upon entering the contract. In short he was saying that one of the parties will always have a foregone opportunity. Thus he said bad faith is a breach of contract and any breach of contract is bad faith.\textsuperscript{155} Burton, unlike most writers who criticize the general requirements of good faith, does believe in them, and is determined to make them effective.\textsuperscript{156}

All views have been considered applicable on a number of occasions by courts, good faith can be a limitation on the exercise of one’s discretion, it also can be a basis for excluding behavior that offends public standards at the same time it may be used as a gap filling tool. So one cannot limit its meaning which tends to vary depending on the circumstances of application.\textsuperscript{157} Of course the writers have different views, these views are meant for different circumstances, thus the fact that there are varying theories should not be a problem, they all purport to promote justice, therefore depending on the context on which the doctrine of good faith needs to be applied, the views can each fit in a particular situation where they seem applicable. Of course some of the views, like those of judge Scalia are for narrow applications, while others like Burton’s can cover a wide range of circumstances, but this has not been a problem for the courts in application of the doctrine.\textsuperscript{158}

\subsection*{5.1.5 Current perspective}

As much as the concept has been applied, debated over and settled to a large extent, there are still some inconsistencies especially when it comes to litigation, some questions need to be answered. The idea of good faith is an ever-changing one, it cannot be settled at once, so there are frequently asked questions when the doctrine is brought up such as, is the test of good faith when it comes to performance a purely subjective one or does it have an objective requirement too? Does the duty of good faith in performance create an independent cause of action, and does this duty prevail over the explicit provisions of the contract?

\textsuperscript{155} Whittaker S and Zimmermann R supra 54 at 130.  
\textsuperscript{156} Beatson J and Friedman D ibid at 162.  
\textsuperscript{157} Beatson J and Friedman D ibid at 162.  
\textsuperscript{158} Beatson J and Friedman D ibid at 163.
As for the first question, it is a well known fact that good faith does indeed have a subjective character, this requires a party to ‘honestly’ believe that it is acting in good faith. The extent of the objectiveness of the doctrine is somewhat questionable because besides acting honestly, a party is supposed to act in a reasonable manner too. In the United States, for the objective test to be administered, the decision is usually left to the jury, they are the ones who decide the issue of good faith in terms of reasonableness. Whether good faith will be applied subjectively or objectively will depend on the interpretation of the particular provision and the circumstances. It is for the parties themselves to choose by using a very clear language to outline their wishes, and where they fail to do such, the court will step in. But there have been doubts as to whether a subjective standard is enough to test good faith, is making an honest judgment in accordance with self interest enough? In the case of Bak-A-lum Corp of America v Alcoa Building Products which was a distributorship termination case, it was held that a manufacturer is

selfish withholding from [a distributor] of its intentions seriously to impair its distributorship although knowing [that the distributor] was embarking on an investment substantially predicated upon its continuation constituted a breach of the implied covenant of dealing in good faith.

It was stated there that although a manufacturer had made an honest judgment, it was less than an objective component of good faith, which might have appropriately been regarded as fair.

The second current issue faced by United States when it comes to the doctrine, is whether the duty of good faith prevails over explicit contract provisions. This is a problematic area of the law, section 1-103 of the UCC provides that

The effects of the provisions of this Act may be varied by agreement, … except that the obligations of good faith, diligence, reasonableness and care prescribed by this Act may not be disclaimed by agreement, but the parties may by agreement determine the

standards by which the performance of such obligations is to be measured if such standards are not manifestly unreasonable.

This provision was taken to mean the duty of good faith imposed by the provision cannot be varied, but it can be altered by an explicit agreement of the parties where such provision was simply an implied one and the implication seemed uncertain. This provision has resulted in varying court decisions, each court applying a different interpretation to the provision.

It seems the doctrine of good faith in the United States has received better treatment than the one it got in England. It is more alive there and has been the subject of numerous debates by lawyers and resulted in a body of cases. On the other hand, academics have found the whole topic of good faith performance very interesting to the extent that each one has written his own ideas on it and this not only resulted in a span of never ending debates, but it has helped and some of these theories have been used by courts in various States in rendering judgments.161

It seems the doctrine is not only confined to civil law countries, a misconception that has existed for so long, it has managed to spill over to the common law world, influencing the creation of other doctrines too. In Canada and Australia, and various other developed and developing countries such as South Africa, the concept has been accepted and applied. One can actually say that the United States by accepting and applying the doctrine paved the way for other common law countries.

5.2 APPLICATION OF GOOD FAITH IN SOUTH AFRICA

South Africa is one of the developing countries south of the Sahara. The country has deep connections to Roman law, thus one would wonder how the doctrine of good faith and fair dealing has fared in the country. There is a strange blend of civil and common law, thus one cannot call it a civil or common law jurisdiction per se. It is

161 Beatson J and Friedman D supra 86 at 169.
made up of Dutch legal principles, while it relies heavily on the English system of
case law, and has even borrowed some English cases especially in the field of contract
law.

5.2.1 Historical origins
The concept of good faith has its roots in the Roman law concept of *bonae fides*, in
applying the doctrine, the judges could employ flexible standards such as good faith.
Good faith also played an important role when it came to consensual contracts such as
sale and lease, here the judge was expected to decide the matters according to the
requirement of good faith, that is, according to what the societal standards would
dictate as good faith.

In the later years of the development of the concept in Roman law, it became a
generally accepted norm that there was no need to prove good faith, since all contracts
were consensual and thus *bonae fides*. In South Africa the adoption of such notion
was rather confusing, it was initially agreed that it meant all contracting parties were
now ‘bound to do everything which good faith reasonably and equitably
demanded.’

This principle was adopted into the Dutch law, and even there the judges and the
courts still faced some uncertainty whether to resurrect it, some actually preferred to
stick closer to the actual intentions of the parties rather than relying on an abstract
equitable principle, a similar preference was expressed by renowned Dutch writer
Huber

Some think that the Supreme courts may base their judgment on this particular
equity, while the judges of the lower court have to adhere strictly to the words of the
law; but the truth is that neither superior nor inferior judges may depart from the
general law for reasons of equity peculiar to this or that case for all judges… have no
higher honour than to be servants of the laws. The laws would be entirely loose and

162 As was pointed out in the South African case of Bank of Lisbon and South Africa Ltd v De Ornelas 1988
(3) SA 580 (A), AT 601 G by Joubert JA.
uncertain if judges were allowed to decide each particular case whether they should be followed or not.\textsuperscript{163}

\textbf{5.2.2 Current notions}

As the concept of good faith was transplanted into the South African law, the uncertainty as to its existence and necessity came along too. The true meaning of the concept remained elusive for a while in South Africa, it raised a debate until an attempt to settle it by Olivier JA in the case of \textit{Eerste Nasionale Bank van Suidelike Afrika Beperk v Saayman}\textsuperscript{164} In this case the essential question raised was whether the bank could enforce a deed of surety-ship and a cession which had been signed by an ageing, 85 year old woman to secure the debts of a company owned by her son. The court opined not to allow such an act, the decision was unanimous but it was based on the fact that she lacked contractual capacity. The most interesting reasoning was given by Olivier JA and was based on the concepts of good faith and public policy. In short he outlined the fact that there was a close relationship between the concepts of good faith, public policy and public interest in contracting, he said this was because the function of good faith in contract has always been considered as a tool to give effect to what the society regarded as just, reasonable and fair, for him the concept could be equated to an extension of the public policy principle which is only invoked on demands of public interest.

He counter argued against the notion that equitable principles are of force only if they are a part of substantive law, outlining that this would mean the legal system was inflexible, and unable to adapt to the ever-changing demands and views of society, which would ultimately render law a rigid system of rules that could not solve the problems of society reasonably.

Therefore he went on to hold that in that particular case, the creditor bank must have been aware that an elderly surety was incapable of fully comprehending the terms of the contract, and chances are, she was acting under the influence of her son. In such circumstances, the bank should have told her to get independent advice or explained to her the consequences of her actions, but since it failed to do so, it was not in the

\textsuperscript{163} Brownsworth R, Hird NJ and Howells G supra 3 at 217.
\textsuperscript{164} [1997] 3 All SA 391 (SCA).
public’s interest to enforce such a contract, even good faith demanded that such contract should not be enforced.\textsuperscript{165}

His observations became the foundation for the new approach towards advocating the adoption of the concept of good faith in South Africa, there was a mass of cases that followed, some adopting and others rejecting the concept, most decisions in lower courts, especially the High Court did recognize the concept, but the Supreme Court has proved to be stubborn.

This stubbornness can be evidenced in the decisions that followed the one above, for instance in the case of \textit{Brisley v Drotsky},\textsuperscript{166} it was stated that the view in \textit{Saayman} was of a single judge and that good faith could not be accepted as an independent basis for setting aside or refusing to enforce provisions of contracts, but even then there was little support for the concept in the end in a short concurring judgment of Cameron JA which drew attention to the concept of public policy as a recognized basis:

\begin{quote}
\textit{In its modern guise, “public policy” is now rooted in our Constitution and the fundamental values it enshrines. These include, human dignity, the achievement of equality and the advancement of human rights and freedoms, non-racialism and non-sexism.}\textsuperscript{167}
\end{quote}

Later there was another attempt to persuade the Supreme Court of Appeal to set aside a contractual provision since it conflicted with the principle of good faith, the attempt was unsuccessful and Supreme Court confirmed the decision laid out in \textit{Brisley v Drotsky}, of course the appellant’s contention that the contractual provision was contrary to public policy was not dismissed in a similar way, but it simply failed on facts.\textsuperscript{168} In this case the court explained that although the concept of good faith serves as a foundation and justification for legal rules, the court cannot act on the basis of abstract ideas but only on the basis of established legal rules.

\textsuperscript{165} Brownsword R, Hird NJ, and Howells G supra 3 at 225-226.
\textsuperscript{166} 2002 4 SA 1 (SCA)
\textsuperscript{167} Christie RH \textit{The Law of contract in South Africa} 5\textsuperscript{th} edition Lexis Nexis Butterworth 2006 pg 16.
\textsuperscript{168} Afrox Healthcare Bpk v Strydom 2002 6 SA 21 (SCA).
The High Court seems to be keen on developing the common law, as Matlala stated, ‘… if the High Court had authority to overturn the decisions of the Supreme Court of Appeal the legal position would be different.’\textsuperscript{169} But this is not the case therefore the development of this branch of the law will take a slower pace. When one looks at the decisions of the High Court, the statement above makes sense.

An obiter from a case in the High Court showed that the courts were in line with the Constitution and were ready to develop common law in accordance with fairness, and equity, relying either on the values of the Constitution \textit{per se} or on the concept of good faith. Judge Davis‘ obiter in the case of \textit{Mort No v Henry Shields - Chiat}\textsuperscript{170} states that:

\begin{quote}
Parties to a contract must adhere at least to a minimum threshold of mutual respect in which “the unreasonable and one sided promotion of one’s own interests at the expense of the other infringes the principle of good faith to such a degree as to outweigh the public interest in the sanctity of contracts” … The task is not to disguise equity or principle but to develop contractual principles in the image of the constitution…
\end{quote}

The judge repeated a similar view on \textit{bonae fides} in the case of \textit{Shoprite Checkers Pty Ltd v Bumpers Shwarmas CC and others}\textsuperscript{171} where he stated that:

\begin{quote}
This concept of good faith is congruent with the underlying vision of our Constitution ... to the extent that our Constitution seeks to transform our society from its past, it is self-evident that apartheid represented the very opposite of good faith ... Our Constitution seeks to develop a community where each will have respect for the other and in which integrity in government as well as in the exercise of power will be of paramount concern. To rely on the strict written words of a contract and to ignore an underlying oral agreement which not only shaped the written agreement but which forms part of the essential consensus would be to enforce the very antithesis of integrity and good faith in contractual arrangements.
\end{quote}

\textsuperscript{170} 2001 1 SA 464 (C) at 475 C-F.
\textsuperscript{171} 2002 (6) SA 202(C).
It was highlighted that the criticism to the effect that public policy on the basis which the courts regularly rely, is as much an abstract idea as good faith, and the fact that sometimes courts establish new legal rules, does not matter. For after all these cases, it is safe for one to come to the conclusion that in South Africa, it has been settled by the supreme court that the doctrine of good faith does not exist, but public policy does, and can be applied to cases that involve contractual unfairness which might otherwise not have been satisfactorily addressed by the existing legal rules.  

5.2.3 Past experiences and future lessons

Of late there has been a debate as to whether the notion of good faith could be used to determine issues of public policy in contract. Originally the answer to this would be in the negative because it was settled that public policy would require the choices of the parties to be respected. But since the Supreme Court rejected the notion of good faith, and reaffirmed public policy as a tool to handle cases of contractual unfairness which aren’t provided for under existing rules, it has regained its importance. It even has the support of the Constitutional court which actually linked the concept to the requirements of the Constitution in Carmichele v Minister of safety and security.  

Therefore as Christie says

…it can be said with confidence that public policy is a sufficiently flexible and tested concept in South Africa to achieve all the results that could be achieved by the concept of good faith, and to achieve them in a more predictable way.  

As he afore-mentioned, that since, Afrox Healthcare Bpk Strydom, Brisley v Drotsky and South African Forestry Co Ltd York Timbers, good faith as an abstract value cannot be used to intervene in contractual relationships, but public policy still can. He said that to achieve just results, there were advantages in using the concept of public policy which the law had developed over the centuries and linked to the Constitution, rather than the less familiar concept of good faith. But then went on to say, it would

172 Christie RH ‘Our law of contract and the modern Lex Mercatoria’ supra 16 at 5.
173 2001 4 SA 938.
174 Christie The law of contract in South Africa supra 167 at 17.
be a mistake to regard the door as forever closed, and self-isolate South Africa from many other legal systems in which good faith plays a prominent part.\textsuperscript{175}

There are more views that exist to the effect that such isolation away from the rest of the world that has already adopted the doctrine should not be encouraged for long, there will come a time when the law will have to move on and adapt to the ever-changing needs of society. There will be a need for South Africa to conduct itself in international trade in accordance with rules that are becoming more accepted, for instance the CISG, which it is yet to adopt, the UNCITRAL Model law on International Commercial Arbitration, and other rules.\textsuperscript{176}

\textsuperscript{175} Christie’s preface to \textit{The law of contract in South Africa} supra 167 at 17.
\textsuperscript{176} Christie RH ‘Our law of contract and the modern \textit{Lex Mercatoria}’ supra 16 at 6.
CONCLUSION

At this point it seems the doctrine of good faith and fair dealing has been discussed in depth, and there are different opinions as to its existence. The existence of the doctrine can be traced far back into medieval legal systems like Roman and Canon laws. It was then an advanced approach to provide for those situations where the law had lacunae, but it was also regarded as an elusive concept, subject to so many uncertainties and without any specific definition imposed upon it.

In modern times this still seems to be a regular problem, the concept is still as elusive, but this does not mean that it has been neglected altogether, it has its advantages, and it is for this reason that at an international level it is well accepted by various international legal instruments. Of course under these instruments it is afforded diverse definitions, but the essence of the concept is the same, that fairness, honesty, and reasonableness should prevail.\textsuperscript{177}

Article 7 of the CISG provides for good faith to be observed in the course of applying the concept, it does not cover the parties’ rights and obligations or directly refer to exercise and performance of these rights. On the other hand, other international Instruments such as the UNIDROIT Principles expressly impose the duty of good faith upon parties to an international contract, article 1.7 binds the parties and they may not exclude or limit this duty. The commentary to these principles goes on to list a number of articles under the principles that actually expound on the duty of good faith, directly and indirectly. The Principles of European Contract Law impose the duty in article 1:106 where they require parties to an international contract not only to act in good faith when exercising their rights, but also when performing their duties and they cannot extricate themselves from such.\textsuperscript{178}

The application of the doctrine in these international instruments does not seem to raise a lot of problems. It is the adoption of the concept into various domestic legal

\textsuperscript{177} Schlechtriem ‘Good faith in German law and International uniform law’ Roma 1997 pg 3.
\textsuperscript{178} Schlechtriem ibid at 4.
systems that has stirred various debates. The doctrine is not found independently in these legal systems, most countries that apply it have adopted it, or exercise it by virtue of being signatories of certain conventions. The issue is not the adoption *per se*, rather it is the way the domestic courts in the signatory states sometimes resort to domestic oriented constructions, resulting in narrow and conflicting interpretation of the provisions of international instruments.  

At the beginning of this paper a question was posed as to whether in the course of interpreting and applying the concept of good faith and fair dealing in various legal systems, uniformity can be maintained. Arguments have been raised on whether it is possible for all the countries applying the doctrine to interpret it in a similar way.

The United Nations Convention for the International Sale of Goods (CISG) is the main proponent of the good faith doctrine, article 7(1) of the Convention was specifically created to deal with the application of the doctrine. It has been stated that the article was phrased in such a way as to allow the courts of the particular state to interpret the doctrine independently. There was no imposed obligation as to the manner in which the concept was to be interpreted by the local courts, and this might have resulted in misconceptions as to how application was to take place.

When drafting the CISG, the main purpose was to attain the broadest form of uniformity. The drafters provided the CISG an autonomous free standing nature, this meant that the courts in interpreting the article were supposed to take into consideration its international character and avoid interpreting it in accordance with domestic technique or rules.  

But this has not been the case, in different jurisdictions varying interpretations have been accorded to the doctrine, depending on local experiences and practices. In Germany the doctrine of good faith has been accorded the widest interpretation. The *Treu und Glauben* as it is referred to seems to be able to provide a solution for every imaginable situation as was stated by a prominent German writer. The doctrine has

---

179 Felemegas J supra 32 at 232-235.
180 Felemegas J ibid.
181 Franz Wiecker see Schlechtriem supra 177 at 7.
been used in giving new meanings to old concepts, it has managed to develop and imply new obligations and has created new remedies for circumstances that were not foreseen by contracting parties. At one stage it was stated that the *Treu und Glauben* is one single doctrine that probably deals with every issue arising in German private law, it can be applied to every possible situation governed by the BGB, and at times judges even have the audacity to use it in overriding the meanings of special provisions. New principles have been created as a result of the application of the doctrine, not to mention the mass of case law reported and immense scholarly writings. The doctrine is the single most written about concept in Germany.\textsuperscript{182}

The amount of cases tend to be confusing, and difficult to digest, the writings are numerous and even conflicting at times. The fact that the doctrine has been flexible means the judges apply it anyhow. Good faith is supposed to be subjective, but what is such standard? Eventually the judge’s values will be involved in this standard, and German judges may at times interpret, distinguish or extend the doctrine without necessarily promoting the justice, fairness and reasonableness that the doctrine is meant to achieve.\textsuperscript{183}

It has been suggested that the problem raised above can be sorted out if the cases and the scholarly articles are tamed into order. Franz Wiecker suggested that a good solution would be characterizing the doctrine and dividing its application into ‘function’ and ‘values’. This would help in managing the load of cases, opinions, and theories, and it would be easier for students and other scholars if the concept was assigned into manageable guides.\textsuperscript{184} ‘Functions’, to deal with questions as to where, and with what intent was the principle of good faith employed by the particular courts, and what it means in particular circumstances. While ‘values and standards’, deal with what is required of good faith and fair dealing in certain situations, settings or circumstances, these are standards accorded by people.\textsuperscript{185}

\textsuperscript{182} Example in the 11\textsuperscript{th} edition of the Staudinger Commentary, Dr Weber wrote on article 242 of the BGB in more than 2000 pgs; Schlechtriem P supra 177 at 7.
\textsuperscript{183} Schlechtriem P ibid at 8.
\textsuperscript{184} Schlechtriem P ibid at 8.
\textsuperscript{185} Schlechtriem P ibid at 17.
In France they have principles similar to those of Germany, they rely on the Civil Code, article 1134 provides for good faith and fair dealing in performance and enforcement of contracts. The rules in France of course differ although not extensively from those in Germany. In France the approach is limited, good faith is relied on but not extensively, modern jurists refuse to accord it significance avoiding uncertainty. Good faith in French law even exists at the level of pre-contractual negotiations, in the absence of preliminary agreements, if there seems to have been malicious intent. But the concept has not been developed, thus it does not have a major impact on the law of contract.\textsuperscript{186}

England, on the other hand, has a totally different approach. English lawyers regard the concept too wide, general, vague and untamable, they think that such would render the legal system uncertain and in time the public is bound to lose confidence in the law. They believe that every decision should be based on legal rules and the idea of introducing a general principle is unacceptable. As Goode puts it

\textit{It is necessary in a commercial setting that businessmen at least should know where they stand. The law may be hard, but foreigners who come to litigate in London - and many foreigners actually do so even where their contract is not governed by English law and has no contact with England - will at least know where they stand. We are worried that if our courts become too ready to disturb contractual transactions, then commercial men will not know how to plan their business life… The last thing that we want to do is to drive business away by vague concepts of fairness which make judicial decisions unpredictable, and if that means that the outcome of disputes is sometimes hard on a party we regard that as an acceptable price to pay in the interest of the great majority of business litigants.}\textsuperscript{187}

\textsuperscript{186} Nichols B \textit{The French law of contract} 2\textsuperscript{nd} edition Clarendon Press 1992.
There have been occasions when attempts have been made, for instance in *Carter v Boehm*\(^{188}\), Lord Mansfield made an effort to introduce the concept, this was followed by the attempt in *Bank Financiere de La Cite SA v Westgate Insurance Co Ltd*\(^{189}\) when Justice Steyn referred to the principle in his submission, even though his attempts were dismissed in the Court of Appeal and later in the House of Lords. There have been various other cases, but these attempts are outnumbered by those dismissing the doctrine.

The cases of *Walford v Miles*\(^{190}\) and *Interfoto Pictures Library Ltd v Stiletto Visual Programmes Ltd*\(^{191}\) managed to nail the concept into the ground. Through all this time it has been accepted that the concept or at least something similar does exist in the English legal system, but so far there is no established general principle of good faith in the English legal system.

Most English scholars argue that English legal rules are self sufficient and there is no need to adopt a new doctrine of good faith. They regard the doctrine as a very loose concept that cannot be easily tamed, and would in turn affect party autonomy which is a basis of the English law of contract. But at this point in time, when international trade is booming and international commercial contracts are increasing, it would be advantageous to English contractors for the doctrine to be adopted in England, because in as much as the doctrine has drawbacks, it has more advantages.

Besides, in the practice of international sales and transactions, the application of the doctrine requires uniformity, failure of the doctrine to be formally adopted in England means there is no consistent application, this intensely affects the strive for uniformity. The purpose of article 7(1) of CISG was to achieve uniformity in application and interpretation. How will England keep up with the rest of the international trade world if it has not only failed to recognize the doctrine formally, but it is one of the few developed countries that have not adopted the CISG Convention? This is proof that ‘uniformity cannot be achieved at the stroke of a pen’

---

\(^{188}\) Supra 64.
\(^{189}\) Supra 1.
\(^{190}\) Supra 74.
\(^{191}\) Supra 2.
as Christie pointed out,\textsuperscript{192} if developed countries like England are lagging behind, how are the rest of the developing countries expected to act. Discrepancies in the application of the doctrine, especially from the English legal system, are still too vast and rectifying or dealing with them will take some time, but change is not impossible if the people are willing.

The United States on the other hand, is one of the few countries that originally did not have the doctrine, went ahead and adopted it, and have attempted to apply it effectively. The concept was introduced, by Professor Karl Llewellyn, after spending time at Leipzig, it was the intricacies of the \textit{Treu und Glauben} that intrigued him, consequently, when the Uniform Commercial Code was being formed he introduced the doctrine. On introduction of the Second Restatement on contracts, the doctrine was carried on. The doctrine applies to performance and enforcement of contracts.

It is an accepted notion that the concept cannot be assigned one specific meaning. American courts in coming to decisions have adopted one of three definitions. The first one was introduced by Justice Scalia in his famous statement when he said that good faith was simply a rechristening of the fundamental principles of contract, this of course is the most restrictive interpretation. Summers’ ‘exclusionary theory’ introduced the second definition. He said that good faith had no meaning of its own, instead it was an exclusionary concept and it spelt out heterogeneous forms of bad faith, this analysis was later introduced into the second Restatement on Contracts. On the other hand Richard Burton introduced the ‘foregone opportunity analysis.’\textsuperscript{193} In the United States, courts have applied any one of the three theories where they have deemed appropriate. They have not actually noticed any potential conflict arising from this application. This is a good attempt considering the fact that good faith is applied to varying contexts, so each view might actually fit certain circumstances for which good faith is required.

The United States has succeeded in maintaining consistency in application of the doctrine more than even some European pioneers of the doctrine. It has become a

\textsuperscript{192} Christie RH ‘Our law of contract and the modern \textit{Lex Mercatoria}’ supra 16 at 5.
pioneer for other countries that are trying to adopt the concept, for instance the models in Canada and Australia were basically inspired by the efforts and successes of the doctrine in the United States. There hasn’t been much disagreement in the United States as to the application of the doctrine, or the fact that it is important. Maybe it is because it is a part of the Code, or simply because its advantages have been realized.

The United States model of adoption and application so far seems to be better than most discussed in this paper, besides that one in France which also seems to have made an attempt to balance the application of the concept, complementing the strive for parties’ self interest and the need for courts to render just decisions, thus certainty and justice have been evenly applied.

There is still a long way to go, for some countries like England, the Convention is not even yet adopted, not forgetting the rejection afforded to it by the jurists and scholars in that country. In France it is treated with caution and applied subjectively, they would rather try it out as bad faith. Germany imposes an objective standard, relying on a mass of case law and applying the concept in almost every known situation. On the other hand, South Africa does not recognize the concept, but it has formally adopted ‘public policy’, even though this is not good faith per se, it is a step forward, there have been several attempts to introduce the concept, and in the High Court some cases have actually been decided on the basis of good faith, but the Supreme Court has overruled most of them, and even though the Constitution hints on the concept, it does not expressly provide for it. As Christie said, the concept cannot be ignored in the country for long, time will come when the legal system will realize it is important to keep up with the rest of the international trade world.

When Lord Bingham was making his submission in *Director General of Fair Trading v First National Bank*194 he stated that:

---

194 [*2000*] 1 WLR 98.
There is no common concept of good faith and fairness in European countries, even though they do accept the doctrine of good faith, they do not exercise its uniform application.’

And he was right in making that observation, so far that position still stands, not only for European, and civil law states, but for all those states involved in international trade which happen to have adopted the concept. At this point it is evident that the various legal systems described above have different approaches towards the application of the good faith doctrine. In as much as the sole purpose of section 7(1) of CISG was to attain uniformity in application, the attempt has become elusive.

The main proponent of good faith internationally, that is, article 7(1) of CISG, was drafted in an open ended style, and did not impose an obligation as to the manner of interpretation and application of the principle of good faith, it left it to the interpreters. It seems the drafters of the article did not anticipate that the diversity in application would have been to the extent of affecting uniformity in application. They even included a demand that its international nature should be taken into consideration. This meant that even though domestic courts interpret it, they should give autonomy to its international nature. The courts have failed to do this and have imposed local techniques, and cultural backgrounds, subsequently failing to achieve uniformity and thus, defeating the sole purpose of article 7(1).

Most of these international instruments imposing good faith are in some countries being adopted, in others as we have seen, they are yet to be adopted. This shows that strive for uniformity will take time, ‘uniformity cannot be achieved at a stroke of a pen’\textsuperscript{195}. It will take time and patience. First of all states need to realize the importance of adopting the ‘good faith principle’ and the fact that giving it an international interpretation does not compromise national standards.

If an autonomous uniform interpretation could be achieved this would complete the process of unification and achieve the aims of the drafters of the uniform international

\textsuperscript{195} Christie RH ‘Our law of contract and the modern Lex Mercatoria’ supra 16 at 5.
instrument. In situations where the interpreters face ambiguities or feel uniformity will be defeated, they may consider case law and see the way the provision has been interpreted in other countries, resort to international precedents is not prohibited.\textsuperscript{196} UNCITRAL is also an important source for texts of past decisions, they even may resort to scholarly writings and commentaries\textsuperscript{197} which might provide more sight into the promotion of an autonomous and international interpretation. Even though the idea of relying on academic writings has never been given much authority in some countries, the need to promote uniformity has given it precedence, and it is nowadays commonly used.\textsuperscript{198}

The other way would be looking into the \textit{travaux prépatoires}, this is the legislative history of the CISG, it includes the acts, proceedings of the Vienna Conference and the summary of previous deliberations of UNCITRAL. This would be helpful in the process of interpretation. Otherwise an International Commercial Court may be established and afforded jurisdiction to preside over cases involving the CISG in supervisory position, or empowered to revise cases from national courts.\textsuperscript{199} An international tribunal can be established to deal with issues of conflicting interpretations arising from international instruments.\textsuperscript{200} Alternatively, an advisory Board may be created to render advisory opinion concerning the interpretation of the Convention upon request by parties, national bodies, or presiding institutional bodies.\textsuperscript{201}

\begin{flushright}
\footnotesize
\textsuperscript{196} Felemegas supra 32 at 248.
\textsuperscript{197} But the CISG did not recommend ways it could be revised, so far there is no official commentary.
\textsuperscript{198} Felemegas ibid pg 259; Fothergill v Monarch Airlines Ltd 1981 AC 251 (Eng H.L).
\textsuperscript{199} Sims D supra 187.
\textsuperscript{200} Felemegas ibid at 261.
\textsuperscript{201} Sim D ibid.
\end{flushright}
BIBLIOGRAPHY

Books


**Articles**


Journals

46. UNCITRAL Year book 76 no. 53 (1972): A/CN/9.SR.

47. UCC cases digest vol 1-201 to 1-203, by Clark/Boardman/Callaghan. (1997) 708-831.

Cases

*Allen v Flood* 1898 App, Cas. 1, at 46 (P.C 1897)

*Bak-A-lum Corp of America v Alcoa Building Products* 351 A2d 349, at 352 (NJ 1976)

*Bank of Lisbon and South Africa Ltd v De Ornelas* 1988 (3) SA 580 (A)

*Banque Financiere de la Cite SA v Westgate Insurance Co Ltd* [1987] 2 All ER 923 and subsequent appeals

*Banque Financiere de LA Cite SA v Westgate Insurance Co Ltd* [1987] 2 All ER 923 N; Unreported Court of Appeal of England, 28 July 1988

*Brisley v Drotsky* 2002 4 SA 1 (SCA)

*Carmichele v Minister of safety and security* 2001 4 SA 938

*Carter v Boehm* 1766) 3 Burr 1905, at 1910

*Director General of Fair Trading v First National Bank* [2000] 1 WLR 98

*Eerste Nasionale Bank van Suidelike Afrika Beperk v Saayman* [1997] 3 All SA 391 (SCA)

*Interfoto Pictures Library Ltd v Stiletto Visual Programmes Ltd* [1989] QB 433 at 439

*Market Street Associates Ltd v Frey* 941 F 2 d 588, at 595 (7th circuit 1991)

*Mort and No v Henry Shields –Chiat* 2001 1 SA 464C (at 475 C-F)
*Renard Constructions (ME) Property Ltd v Minister for Public Works (1992) 26 NSW LR 234, at 268 F*

*Scally v Southern Health and social Services Board [1992] 1 AC 294*

*Shoprite Checkers Pty Ltd v Bumpers Shwarmas CC and others 2002 (6) SA 202(CA)*

*Tymshare Inc v Covell 727 F 2d 1145, at 1152 (DC Cir 1984)*

*Union Eagle Ltd v Golden achievement Ltd [1997] AC 514*

*Walford v Miles [1992] 2 AC 128, House of Lords; 1992] 1 All ER 453*

**Statutes and Codes**


Uniform Commercial Code.

Second Restatement on Contracts.

Germany Civil Code of January 1, 1900.

French Civil Code of 1804.

Constitution of South Africa No 108 of 1996.
**International Instruments**


Principles of European Contract Law parts I and II.


**Websites**


http://cisc3.law.pace.edu/cases/011031gl.html.