The Role of Good Faith: A Case Study on the Application of Good Faith in the CISG

By

Mirco Sedki (SDKMIR 001)

Date of Submission 1 February 2018

Supervisor:

Professor Thalia Kruger
Professor Professor Graham Bradfield
(Department of Commercial Law)

DECLARATION

I, Mirco Sedki, hereby declare that the work on which this thesis is based in my original work (except where acknowledgements indicate otherwise) and that neither the whole work nor any part of it has been, is being, or is to be submitted for another degree in this or any other university.

I authorize the university to reproduce for the purpose of research either the whole or any portion of contents in any manner whatsoever,

SIGNATURE Signed by candidate

DATE 1 February 2018

1. Introduction

The work at hand discusses the role of 'good faith' in the meaning of Article 7 of the United Nations Convention on Contracts for International Sale of Goods (CISG).[1]

The CISG[2] is a sales convention developed by UNCITRAL[3] with the objective to provide a uniform and fair regime for the international sale of goods.[4]
As a consequence, the uniform application of the Convention is main concern of the CISG. Art. 7 provides a method to ensure that the Convention is applied in such uniform way. The provision lays down the three principles of interpretation of the CISG: 'its international character', 'uniformity in its application' and the 'observance of good faith in international trade'.[5]
However, with regard to the 'good faith' it must be recognised that there are analogous domestic concepts of good faith on domestic level. Since the Convention is applied by domestic courts, there is always the danger that courts rely on the domestic understanding of good faith when applying the CISG. Such application, however, contravenes the other two principles set forth in Art.7 (1) and eventually the main objective of the Convention: the uniform application of the CISG.
The following master thesis shall examine whether the courts of different jurisdictions apply the good faith under Art.7 (1) in respect to the principles of internationality and uniformity. For this purpose, jurisprudence from Germany as representative of a civil law country will be compared with jurisprudence of the Federal Courts of the State of New York and the Commonwealth of Australia as common law representatives. This is of particular interest since good faith is interpreted differently in the civil law and the common law.

In order to structure the information, this thesis is divided into two main parts: a theoretical and an analytical segment. The theoretical part encompasses the chapter 2, 3, 4, 5 and 6.
To begin with, this thesis will provide a brief overview over the legislative history and the current status of the Convention. Then, the next section 3 outlines the methodology in the case selection. This includes the approach towards the case selection as well as the comparative criteria. There are

[1] The articles which are not specifically designated are those of the 'CISG'.

[2] Hereinafter also referred to as the 'Convention'.

[3] United Nations Commission on International Trade Law, 'UNCITRAL'

[4] http://www.uncitral.org/uncitral/en/uncitral_texts/sale_goods/1980CISG.html, accessed on 15 December 2017

[5] Art. 7 (1) CISG

several databases that make search for international cases easily accessible for academic purposes. This dissertation includes cases from the CLOUT database,[6] established by the UNCITRAL Secretariat, the CISG Database at Pace University[7] as well as CISG-online[8].

In the following chapters, this thesis introduces the different approaches towards good faith in domestic law (chapter 4 and 5). In Germany good faith is a substantive doctrine, whereas in common law countries one cannot make a general assumption on the role of good faith. Historically, good faith merely has the role of an interpretative guide. However, in the United States good faith is an important principle of law.
Thereafter, section 6 depicts the provision of Art. 7 (1). To begin with, the principles of internationality and autonomous interpretation of the CISG are introduced. Then, the work at hand discusses the controversial role of good faith in the Convention. For a better understanding of good faith under the CISG, the thesis elaborates the legislative history of the term. Thereafter, this master's thesis discusses if good faith under the CISG complies with one of the introduced domestic approaches towards good faith.

Chapter 7 contains the case study. A total of 10 cases from Germany, the District of New York and the Commonwealth of Australia were selected in advance. The facts and the verdict of the cases are summarised and then analysed. These cases were selected and reviewed with particular regard to the application of good faith. The analysis of the verdict discusses whether the court respected the principles of internationality and autonomous interpretation of the CISG.
The work at hand concludes with an evaluation of the case study. In conclusion, it has been found that the international character – the uniformity of the interpretation – is generally maintained. However, it should be noted that in case 3 the German courts violate the principles of internationality and autonomous interpretation. Moreover, the study reveals that German courts apply good faith more often and more excessive than their common law pendants. This is insofar interesting Germany applies good faith generously in domestic law as well. Notwithstanding, it can be spoken of an autonomous interpretation of good faith under Article 7 (1).

---

[6] http://www.uncitral.org/uncitral/en/case_law.html, accessed on 15 December 2017

[7] http://iicl.law.pace.edu/cisg/cisg, accessed on 15 December 2017

[8] http://www.globalsaleslaw.org/index.cfm?pageID=28, accessed on 15 December 2017

2. Current Status and Legislative History and of the CISG

This section provides an introduction to the Convention. For this purpose, the legislative history as well as the current status of the CISG will be outlined in this chapter.

In 1980, the General Assembly of the United Nations held a conference to work on the United Nations Convention on Contract for the International Sale of Goods (CISG). The CISG was adopted on 10 April 1980 and entered into force on 1 January 1988.[9] Since then, eighty-nine countries became contracting states of the Convention.[10] All leading industrial nations – except for the United Kingdom – signed the Convention. It is, therefore, potentially applicable for almost 80% of the world's trade in goods.[11] Nowadays, the CISG is often honored as the 'most significant piece of substantive contract legislation in effect at the international level.'[12] The Convention is a substantive law treaty and has the objective to unify the international sales law.[13] Advantage of the CISG is that it offers a uniform set of substantive rules which are particularly drafted for international transactions.

The desire to unify international sales law goes back to the beginning of the last century, However, only in 1964 the first major step towards the unification of sales law was made. At that time the Hague Sales Convention was ratified. The 1964 Hague Sales Conventions, however, failed to gain acceptance and was of limited success. Therefore, in the 1970s UNCITRAL[14] took up on the subject of the unification of international sales law which resulted in the CISG. Sixty-two countries participated actively in the drafting process of the Convention. The records of the 1980 Vienna Conference (*Travaux préparatoires*) which drafted, discussed and ratified the Convention are publicly accessible.[15] The *Travaux préparatoires* constitute an importance source of interpretation of the CISG.[16]

---

[9] http://www.uncitral.org/uncitral/en/uncitral_texts/sale_goods/1980CISG.html, accessed on 10 January 2018

[10] http://www.uncitral.org/uncitral/en/uncitral_texts/sale_goods/1980CISG_status.html, accessed on 10 January 2018

[11] Stefan Kröll Loukas Mistelis & Pilar Perales in *UN-Convention on the International Sales of Goods* (*CISG)* (2011) at para 1

[12] Kröll CISG op cit note 11 at para 2

[13] Ingeborg Schwenzer *Schlechtriem Schwenzer Kommentar zum Einheitlichen UN-Kaufrecht* 6 ed (2013) at Präambel I

[14] United Nations Commission on International Trade Law

[15] http://www.uncitral.org/uncitral/en/uncitral_texts/sale_goods/1980CISG_travaux.html, accessed on 10 January 2018

[16] Kröll CISG op cit note 11 at para 2

3. Methodology

This master's thesis contains a case study. Cases from Germany, Australia and the District of New York were reviewed and analysed. For this purpose, ten cases were selected. It is worth mentioning that the author initially wanted to include cases from the United Kingdom instead of Australian cases. However, the author is not aware of any British case which deals with good faith under the CISG. Therefore, the United Kingdom eventually was excluded from the case study.

This section covers the criteria on the basis of which the cases were selected. As described earlier, the UNCITRAL Clout[17], the PACE University database[18] and the database of the University of Bern[19] served as sources. All selected cases deal with the application of good faith under Art. 7 (1). In order to find the selected cases the author used the search form provided by the three databases. The search parameters were the respective jurisdiction in combination with either Art. 7 (1) or the search term 'good faith'. By way of illustration, with this approach the results were narrowed down from more than three thousand cases in the PACE database to less than fifty cases. In a second step, these cases were analysed. In the process, the results were further narrowed down by excluding cases that only marginally touch the topic of good faith. With regard to Australia that meant that there were only two cases left. Both cases are included in this master's thesis. Then, in a last step the most 'interesting' cases were chosen. 'Interesting' were cases where the application of good faith was either very common in the respective jurisdiction or exceeding the domestic approach of good faith. By 'common application' the author is referring to certain case groups which have developed in Germany. In these cases good faith is applied quite regularly under Art. 7 (1) by German courts. Because of the abundance the author has selected one representative case for each respective group. For the most part, the highest court's decision which decided on the matter was selected. In one case, however, there was made an exception to this rule because of the poor presentability of the case.

In almost all cases, this master's thesis depicts the final court decision. However, once again there is one noteworthy exception: In case 3 the High Court and the German Federal Supreme Court come to different conclusions after the application of good faith. The author found that it is of particular

[17] http://www.uncitral.org/clout/index.jspx, accessed on 20 January 2018

[18] http://www.cisg.law.pace.edu/, accessed on 20 January 2018

[19] http://www.globalsaleslaw.org/index.cfm?pageID=28, accessed on 20 January 2018

interest to depict both views. Therefore, the decision of the High Court Karlsruhe is reflected as well.

Eventually, ten cases were selected. Six cases are German court decision. Two cases each are from the District of New York and Australia.The unequal allocation of cases is due to the gap in cases which deal with the subject of good faith under Art. 7 (1).

4. Good Faith in German National Law

4.1 General Remarks

'*An obligor has a duty to perform according to the requirements of good faith, taking customary practice into consideration*.'[20]

This wording of section 242 of the German Civil Code[21] – the 'good faith' provision – is misleading. According to a literal translation, section 242 GCC appears to regulate the way performance has to be rendered. However, the literal reading does not capture the (full) meaning of this provision. In fact, section 242 does not contain a detailed descriptive legal rule which legal consequences can be drawn from. Therefore, the provision is – in accordance with the intention of the legislator – an entrance gate to further development of the law by judicial decisions.[22] Hence, the term of good faith sometimes appears very broad and hard to capture. Nevertheless it is one of the most important legal principles in German law.[23]

An initial interpretation of the principle can be drawn from the wording of the provision. Good faith refers to the virtues of reliability and loyalty.[24] However, to ensure a detailed understanding of good faith within the meaning of section 242 GCC it is best to take a look at the historical development of the term.

4.2 Legislative History of Good Faith

The origin of good faith in the German Civil Code goes back to Roman law. Nonetheless, the development of this legal term was by no means linear. 'Good faith' is based on the 'bona fides' and 'aequitas' which were fundamental principles of Roman law.[25]

---

[20] Section 242 of the German Civil Code

[21] Hereinafter also referred to as GCC

[22] Holger Sutschet *BeckOK BGB* 43ed (2017) at 242 para 2

[23] Claudia Schubert *Münchener Kommentar zum BGB* 7ed (2016) at 242 para 2

[24] Heinz Peter Mansel *Jauernig Kommentar zum BGB* 16ed (2015) at 242 para 3

[25] Franz Wieacker 'Zum Ursprung der bonae fidei iudicia' in *Zeitschrift für Rechtsgeschichte* (1963)

In Roman law, the 'bona fides' principle had various functions. On the one hand, it created secondary obligations to the parties of a contract.[26] On the other hand, judges would interpret the contract under the 'bona fides' principle. Therefore, the 'bona fides' principle had a complementary impact on the content of the contract, as well as a monitoring effect.[27]
The 'aequitas' principle was mostly a doctrine of equal treatment. It was used as an objective benchmark for judicial evaluation of contractual obligations in order to avoid abuse of rights.[28]

The predecessors of the German Civil Code contained good faith as a general principle.[29] However, good faith was viewed as a principle that had its origin in the private autonomy. Therefore, for the determination of good faith, one had to take into consideration the (presumed) intentions of the parties.[30] This interpretation of the origin of the doctrine of good faith was as well predominant during the drafting rounds of the German Civil Code in the late nineteenth century.
However, after the German Civil Code came into effect in 1900, a fundamental change in the interpretation of the source of the principle of good faith took place: courts no longer viewed good faith as part of the private autonomy but as a social principle.[31] Such interpretation still prevails today. Thus, good faith became an objective standard and gateway of valuations of the constitutional rights and human rights.[32]
As a consequence, the objective principle of good faith has to be differentiated from the intention of the parties (in accordance with section 133, 157 GCC) which prevails over section 242 GCC: relevant for the application of section 157 is what the parties subjectively want; relevant for the application of section 242 is what the parties are objectively supposed to do.[33]
The principle of good faith is not only restricted to the application of private law. As a general doctrine it also applies – for instance – in procedural and public law.[34]

---

[26] Heinrich Honsell *Römisches Recht* (2015) at 86

[27] Schubert MüKo BGB op cit note 23 at 242 para 17

[28] Schubert MüKo BGB op cit note 23 at 242 para 17

[29] ie: Land Law of Baden (1810), the Rhenish Land Law (1814), the Civil Code of the Kingdom of Saxony (1863), the Civil Code of Bavaria (1861) or the French Code Civil (1807) which was effective in the western parts of today's Germany

[30] Konrad Schneider *Treu und Glauben im Recht der Schuldverhältnisse* 1902 at 48

[31] ie: German Federal Supreme Court (*Bundesgerichtshof*) BGH V ZR 108/53

[32] Schubert MüKo BGB op cit note 23 at 242 para 22

[33] German Federal Supreme Court (*Bundesgerichtshof*) BGH V ZR 11/67

[34] Sutschet BeckOK op cit note 22 at 242 para 4-12

Lastly, it should be noted that the legislator codified some case groups that have been developed with regard to good faith in the GCC[35] The so-called *culpa in contrahendo* is the most prominent codified good faith provision. Since the reform of the law of obligations in 2001, it is codified in section 311 GCC and will be introduced in the course of this chapter. Those specific provisions prevail section 242 GCC.[36] As a consequence, nowadays, section 242 GCC is used as a catch-all provision for the cases that are not recognised by a particular provision.

4.3 Detailed Remarks on the Requirements for the Application of Section 242 GCC

Even though, as depicted above, good faith is also applied in German Procedural and Public Law this chapter explicitly addresses good faith in accordance with section 242 GCC.

To begin with it has to be said that – even though rights and obligations are being extended by the principle of good faith – section 242 GCC is not directly the basis for potential claims.[37]

As mentioned earlier, the meaning of good faith reaches far beyond the literal reading of section 242 GCC. This can primarily be attributed to further development of law by the courts. This makes it, however, hard to make general statements regarding the general conditions of the application of section 242 GCC.

One of the counterarguments against the application of good faith by common law lawyers always has been that it is too vague and broad.[38] And in fact, good faith is a so-called indeterminate legal term and as such by nature very vague and broad.[39] As depicted above, section 242 GCCe describes good faith broadly as something that refers to the virtues of reliability and loyalty. Therefore, in order to ensure that the principle of good faith is not used in an excessive way it requires further specification. For this reason, courts developed specific case groups which the application of the

---

[35] ie: GTC review, consumer protection, the principle of valid subject matter or culpa in contrahendo

[36] Sutschet BeckOK op cit note 22 at 311 para 43

[37] Sutschet BeckOK op cit n note 22 at 242 para 40

[38] See Chapter 5.1 ‘The Historic Development of Good Faith in Common Law’

[39] Schubert MüKo BGB op cit note 23 at 242 para 1

doctrine is generally restricted to.[40] Such case groups will be introduced in detail in the next sub-chapter.

4.4 Case Groups Developed by the Courts

The development of law led to a differentiation in case groups to refine the doctrine and make it more tangible.[41] These groups are: The ascertainment of the obligations (specification function), the establishment of secondary contractual obligations (complementary function), the prevention of abuse of rights or rather the impermissible exercise of rights (barrier function) and the monitoring function (correcting function).[42]

4.4.1 The Specification Function

Closest to the wording of section 242 GCC is the application of good faith within the case group of the so-called specification function. This group is also the most direct implementation of the historical intention of the fathers of the German Civil Code.[43] The diversity of life and complex constellations of interests makes it impossible for the legislator to foresee all necessary obligations of the parties.[44] In many cases, additional modifications to the parties‘ obligations by further development of law by the courts are required. Therefore, the principled open wording of section 242 GCC offers high flexibility to meet this need. This case group offers the opportunity to modify a party’s obligation in each individual case.

Main application of the specification function is to encourage the parties to render their obligation in a thoughtful and faithful way.

For instance, this doctrine implies that the obligor has to perform his obligation in a purpose-driven way. But also the obligee has to show consideration for the justified and recognizable interests of the obligor.[45] In many cases, this consists no obligation for the obligee but a restriction of his

---

[40] Mansel Jauernig op cit note 24 at 242 para 34

[41] Schubert MüKo BGB op cit note 23 at 242 para 23

[42] Sutschet BeckOK op cit note 22 at 242 para 29

[43] Schneider Treu und Glauben op cit note 30 at 77

[44] Schubert MüKo BGB op cit note 23 at 242 para 180

[45] Reiner Schulze *Schulze BGB* 9ed (2017) at 242 para 15

rights.[46] The scope of these obligations follows from the constitutional rights which constitute an objective value system.[47]

4.4.2 The Complementary Function

Additionally, section 242 GCC is basis for the establishment of secondary contractual obligations. In some cases, this comprises performance-related obligations such as the requirement to provide information or reference. But partially, this also consists protection obligations such as the duty to refrain from something. For instance, after the acquisition of a company one can derive the restriction of competition from the good faith principle, even if the parties did not explicitly agree to competition restriction.[48] However, the dividing-line between the complementary case group and the above introduced specification function group is blurred.[49] Thus, some scholars even bundle both case groups as one.[50]

4.4.3 The Impermissible Exercise of a Right

The third case group of the application of the doctrine of good faith is the prevention of impermissible exercise of rights where the principle has a barrier function. This case group includes the assertion of actually existing rights which, however, contradicts the principle of good faith.[51] Good faith sets barriers where the utilization of a right leads to a result which is in an apparent way not compatible with law and justice.[52] Historically, the case group of the impermissible exercise of a right goes back to the Roman law where one could raise the objection of fraudulent intent (*exceptio doli praesentis*).[53] It is to be noted, however, that there is no ethical-legal obligation to waive a right just because it burdens the other party in an excessive way.[54]

---

[46] Mansel Jauernig op cit note 24 at 242 para 17

[47] Schubert MüKo BGB op cit note 23 at 242 para 189

[48] Sutschet BeckOK op cit note 22 at 242 para31

[49] Schubert MüKo BGB op cit note 23 at 242 para 140

[50] Schubert MüKo BGB op cit note 23 at 242 para 140

[51] Mansel Jauernig op cit note 24 at 242 para 32

[52] BGH NJW-RR 15 at 457 (459)

[53] Mansel Jauernig op cit note 24 at 242 para 37

[54] Schubert MüKo BGB op cit note 23 at 242 para 208

The case group of impermissible exercise of a right can be further subdivided: On the one hand, if the exercise of a right itself is unlawful a breach of the good faith doctrine is given (*exceptio doli praesentis*).[55] The special characteristic of these particular cases is the ethical-legal disapproval with the behaviour itself.[56] A prime example of this case group is the attempted enforcement of right of information with the objective to uncover business secrets.[57]

On the other hand, even previous behaviour can lead to the application of the good faith principle. The exercise of a right is an impermissible exercise of a right if the initial behaviour which established the right was unlawful (*exceptio doli praeteriti*).[58] The idea of this case group is that nobody should benefit from unlawful conduct.[59] For instance, if one concludes a contract by fraud, threat or other dishonest behaviour, one cannot refer to the owed performances thereafter.[60]

Lastly, also previous behaviour which itself does not constitute an abuse of rights can still be impermissible if the party acts contradictory thereafter (*venire contra factum proprium).*[61] General scope of application is that one party created a situation of trust. As a consequence, the counter party may rely on a consistent behaviour thereafter. For instance, if the obligator hints that he will not raise the objection of the limitation period he cannot raise the objection regardless.[62]

4.5 Culpa in Contrahendo

Culpa in contrahendo literally translated means 'fault in conclusion of a contract'.[63] In German law, the *culpa in contrahendo* constitutes – under certain circumstances – a pre-contractual relationship

---

[55] Schubert MüKo BGB op cit note 23 at 242 para 243

[56] BGH NJW-RR 1995 at 334 (336)

[57] Mansel Jauernig op cit note 24 at 242 242 Rn.38

[58] Schulze BGB op cit note 45 at 242 para 27

[59] BGH NJW 1989 at 1826 (1826)

[60] OLG München NJW-RR 2002 at 886 (888); However, in this case usually tthe special-law provision of section 123 GCC is applied.

[61] Schubert MüKo BGB op cit note 23 at 242 para 309

[62] BGH NJW 1988 at 265 (266)

[63] Sutschet BeckOK op cit note 22 at 311 para 37

between the parties.[64] Such circumstances are for example the initiation of contractual negotiations.[65] As a consequence, the doctrine of the culpa in contrahendo imposes specific duties on the involved parties. If a party violates those duties, one can claim contractual damages no matter if a contract eventually was concluded or not.[66] For instance, in a case where two parties negotiate and one of the parties obtains sensitive information during the negotiations and thereafter the party leaks the sensitive information. The other party can claim (contractual) damages on basis of the culpa in contrahendo even if the negotiations fail.

Historically, the doctrine of the culpa in contrahendo goes back to 1861. German scholar Rudolph von Jhering is considered as the founder of the *culpa in contrahendo*.[67] Thereafter, the *culpa in contrahendo* regularly was used by courts and therefore generally recognised.[68] It was directly derived from the good faith principle stated in section 242 GCC.[69] In 2001, the *culpa in contrahendo* was codified in section 311 paragraph 2 GCC. The specific provisions of section 311 GCC prevails section 242 GCC.[70]

4.6 General Requirements of Good Faith in Accordance with Section 242 GCC

Since the case groups differ so much, it is very hard to make statements about the general requirements of good faith. However, there are two things that all case groups share. Therefore, these can be considered as the requirements that always need to be fulfilled in order to apply good faith in accordance with section 242 GCC.

To begin with, the first requirement of good faith can be derived from the systematical position of section 242 GCC. The provision is located in the second book the German Civil Code – the 'Law of Obligations.' Therefore, it follows from a systematic interpretation that good faith requires some kind of contractual connection. This requirement, however, is traditionally interpreted widely: 'Any

---

[64] Sutschet BeckOK op cit note 22 at 311 para 40

[65] Emmerich MüKo BGB op cit note 23 at 311 para 42

[66] Emmerich MüKo BGB op cit note 23 at 311 para 36

[67] Rudolph v. Jhering *Jherings Jahrbücher für die Dogmatik des bürgerlichen Rechts, Vol.4* (1861)

[68] ie. in RGZ 78 (7.12.1911) at 239 (240)

[69] Emmerich MüKo BGB op cit note 23 at 311 para 36

[70] Sutschet BeckOK op cit note 22 at 311 para 43

kind of legal relation' is sufficient to meet the condition.[71] This recognises, inter alia, the contract initiation, tortious acts or the connection emerged from a void contract.[72] Notwithstanding, all case groups of good faith require some kind of contractual connection.

The second condition that all good faith case groups have in common is that they result from a comprehensive weighing of interests. By that, one has to take all circumstances of the individual case into account. For instance, one needs to consider what event triggered the obstacle or if on a subjective level one party abused their rights.[73] Additionally, one has to consider what assessments the value order of the constitutional rights makes.[74] The value order describes the different weighting which the German Constitution (*Grundgesetz*) attributes to the constitutional rights.[75] Eventually, these considerations lead to a risk allocation on which party has to bear the emerged disadvantages or advantages.[76]

4.7 Summary of the Understanding of Good Faith under German Law

The good faith principle is codified in section 242 GCC. As depicted above, good faith is a so-called indeterminate legal term and as such by nature very vague and broad. Therefore, it was specified by further development of law by the courts. The courts developed certain case groups which specify the scope of application of good faith.
In summary, good faith imposes duties and rights on the parties. It is considered to be one of the most important principles of German law.

---

[71] Goes back to the Reichsgericht in RGZ 160 (24.03.1939) at 349 (357)

[72] Sutschet BeckOK op cit note 22 at 242 para 14 and 15

[73] Schulze BGB op cit note 45 at 242 para

[74] Schulze BGB op cit note 45 at 242 para 13

[75] Ingrid Schmidt *Erfurter Kommentar zum Arbeitsrecht* 18ed (2017) para 2

[76] Sutschet BeckOK op cit note 22 at 242 para 18-28

5. The Concept of Good Faith in Common Law

The Commonwealth of Australia and United States (more specifically the District of New York) are both common law jurisdictions. For this reason, one could be fooled and think the concept of good faith is treated similarly in both jurisdictions. However, that is not the case. Australia and the United States differ significantly in their approach towards good faith. In a first step, this section will provide a introduction to the traditional understanding of good faith in the common law. Then, in a second step this section will show the differences in the approaches towards good faith in the United States as well as Australia. However, in order to capture the traditional understanding of good faith one has to start with the historic development and the understanding of good faith in the United Kingdom. The United Kingdom is the place where the origin of all common law systems lie.

5.1 The Historic Development of Good Faith in Common Law

As described in the previous chapter, most civil law countries do have a substantive obligation to act in good faith. In contrast, the common law has always rejected any attempts to introduce the concept of good faith – in a comprehensive and substantive sense – to contract law.[77] For instance, Lord Denning famously tried to establish a concept of 'unconscionability' in *Lloyds Bank Ltd v Bundy*[78] but was resolutely repudiated by his fellow judges. The reason for the reservations towards a general doctrine of good faith is deeply entrenched in common law. In common law, traditionally, the avoidance of uncertainty in law plays a much bigger role than in civil law countries. To put it in extreme terms, one might say that 'the predictability of the legal outcome of a case is more important than absolute justice.'[79] Abstract legal principles, and in particular the broad concept of good faith, do harm to the predictability of a case. And in fact, Lord Ackner regarded such a concept as 'too vague' in *Walford v Miles*.[80] Additionally, in common law countries, traditionally, the freedom of contract is of special importance. It is the parties duty to look after themselves.[81] As a consequence, common law countries have lesser desire to maintain strict fairness under all circumstances. Summarising, Great Britain does traditionally not have any concept comparable to

---

[77] Richard Stone *The Modern Law of Contract* 7ed (2007) at 24

[78] Lloyd Banks v Bundy [1975] QB 326

[79] Roy E. Goode 'The Concept of "Good Faith" in English law' in *Saggi, Conferenze e Seminari* (1993)

[80] Watford v Miles [1992] 2 AC 128

[81] Jill Poole *Textbook on Contract Law* 9ed (2009) at 25

the substantive principle of good faith found in civil law countries. From a civil law perspective it is, however, very much in doubt whether a legal system can overcome all legal obstacles without good faith. And in fact, even though British law is not familiar with a general concept of good faith, it does now exist in some parts of British law. The remarks of LJ Bingham in the case *Interfoto Picture Library Ltd v Stiletto Visual Programmes Ltd*[82] offer good access to the British conceptuality of good faith. Firstly, he defines good faith by using such metaphorical terms as 'playing fair', 'coming clean' and 'putting one's cards face upwards on the table'. In essence, according to LJ Bingham, good faith constitutes an 'overriding principle' of 'fair and open dealing'[83] which is an integral element of almost all civil law systems but not to common law countries. Notwithstanding, he concludes, British law has developed the so-called 'piecemeal approach' in respond to unfair dealing in contract law. Accordingly, good faith plays a role in particular situations. For instance, the piecemeal approach is applied in the contractual interpretation. Where the wording of a contract could result in an intolerable outcome, the court is ought to refer to the initial intention of the parties to reach a reasonable outcome.[84]

Furthermore, both, the Commercial Agents (Council Directive) Regulations 1993[85] and the Unfair Terms in Consumer Contracts Regulations 1999[86], impose obligations of good faith on the contractual parties. Interestingly, the Commercial Agents Regulations imposes a general duty for the commercial agent to act in good faith. The agent is obliged to keep his principal informed at all times and must not keep secret commissions. He is not allowed to promote his own advantage over that of his principal.[87]

Also, the British insurance law adopted the concept of good faith. Insurance contracts impose the duty of positive disclosure based on the principle of (utmost) good faith (*uberrimae fidei*).[88] Moreover, courts have imposed a duty of good faith in further contractual commitments such as employment[89], partnership or franchise agreements.

---

[82] Interfoto Picture Library Ltd v Stiletto Visual Programmes Ltd [1989] 1 QB 433

[83] Interfoto Picture Library Ltd v Stiletto Visual Programmes Ltd [1989] 1 QB 433 at 439

[84] AG v Wickman Machine Tool Sales Ltd [1974] AC 235

[85] http://www.legislation.gov.uk/uksi/1993/3053/contents/made, accessed on 7 January 2017

[86] http://www.legislation.gov.uk/uksi/1999/2083/contents/made accessed on 7 January 2017

[87] Goode Good Faith opt cit note 79

[88] Goode Good Faith opt cit note 79

[89] Robb v Green [1895] 2 QB 1

Nonetheless, it should not remain unmentioned that Australian law does not apply the *culpa in contrahendo* – a concept which recognises a clear duty to negotiate with care. This duty in precontractual relations is derived from the doctrine of good faith and plays – as previously described – an important role in most civil law countries.[90]

In summary, British law does not recognise a comprehensive substantive concept of good faith. As seen above, good faith is only applied sporadically for exceptional cases. As long as the parties are acting honestly, good faith allows the parties to be unreasonable and negligent.[91] To conclude, it should also be noted that British courts, in the absence of a principle of good faith, reach similar results as the common law countries that apply good faith on the basis of a doctrine of implied terms.[92]

5.2 Good Faith in American Law

Admittedly, the United States of America with its fifty different jurisdictions make it hard to find an encompassing statement on a legal topic. Nonetheless, one can state that good faith plays a much bigger role in the American law than in British law.

Historically, the American courts have always been more open to a requirement of good faith than the British courts. First considerations by American courts of an explicit good faith duty go back to the late nineteenth century.[93] The duty to perform a contract in good faith as a general principle was first recognised in 1932 by the New York Court of Appeal in the case *Kirke La Shelle Co. v Paul Armstrong Co.*[94]

Since then, the principle of good faith has been codified in the areas of sales and commercial law. Certainly, as well as United Kingdom, the USA are not regulated by a civil code or commercial code. However, America does have a Uniform Commercial Code (hereinafter UCC) and a Restatement of the Law Second Contracts which functions somewhat like a civil code.[95] Since an

---

[90] See Chapter 4.5 ‘Culpa in Contrahendo’

[91] Goode Good Faith opt cit note 79

[92] Steven J. Burton ‘History and Theory of Good Faith Performance in the United States’ (2017) in *University of Iowa Legal Studies Research Papers* 1

[93] such as Singerly v. Thayer, 108 Pa 291, 2 A 230 (Penn S Ct 1881) or Baltimore & O. Ry. Co. v. Brydon 65 Md 198, 3 A 306 (Md S Ct 1886)

[94] 263 NY 79, 188 NE 163 (NY Ct App 1933)

[95] Allan E. Farnsworth ‘The Concept of Good Faith in American Law’ (1993) in *Saggi, Conferenze e Seminari*

accurate classification of these papers is not always easy for readers with a foreign law background, the master's thesis at hand will hereafter quickly introduce both documents.

5.2.1 Introduction to the Restatement (Second) of Contracts

The Restatement of the Law refers to a set of treatise on legal topics which aim to instruct judges and lawyers about general principles of American law. In essence, they restate existing common law into a series of principles of law.[96] The Restatements were established in 1923 by the American Law Institute. The importance of said treatise cannot be stressed enough: Even though the Restatements are no primary source of law, they are considered to be a persuasive source of law by many courts.[97] Nowadays, the Restatements have been cited in almost 200.000 thousand court decisions and can therefore be called the most important source of secondary authority.[98] By now, there are four series of Restatements. The second series of Restatements deals with the field of contracts and commercial transactions and was published in 1981.[99]

5.2.2 Introduction to the Uniform Commercial Code

The most prominent act on commercial transactions in America is the UCC.[100] The code regulates commercial transactions with one single noteworthy exception which is property dealings.[101] It was first published in 1952 and contains a recommendation of laws that can be adopted by the Federal States.[102] Objective of the UCC was the harmonisation of sales law within the United States.[103] The UCC can be considered to be extremely successful in achieving this aim: These days, all Federal States have adopted the UCC.[104]

---

[96] Humphrey Humberto Pachecker NAFA's Blue Book: Legal Terminology, Commentaries, Tables and Useful Legal Information (2010) at 263

[97] Pachecker Blue Book op cit note 96

[98] Richard R. Orsinger *The Rise of Modern American Contract Law* (2015) at 64

[99] Orsinger Contract Law op cit note 98 at 65

[100] Orsinger Contract Law op cit note 98 at 57

[101] Amelia H. Boss 'The Future of the Uniform Commercial Code Process in an Increasingly International World' in *Ohio State Law Journal Vol.68* (2007) at 350

[102] Boss UCC op cit note 87 at 349

[103] Orsinger Contract Law op cit note 98 at 58

[104] Even though, Louisiana did not fully adopt the UCC.

5.2.3 Good Faith in the Restatement of the Law and the Uniform Commercial Code

Interestingly, the UCC's principal author Karl Llewellyn studied and taught in Germany and therefore, had a good knowledge of the German concept of good faith (*Treu und Glauben*).[105] Upon his urging good faith was adopted to the code. All in all, good faith is mentioned in more than fifty sections of the UCC.[106] On three occasions, the term 'good faith' is introduced explicitly. One being Section 1-304 UCC, in the General Provisions chapter, which reads as follows:

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

To begin with, the doctrine of good faith under the UCC ought to be non-dispositive for the parties which shows the importance of the concept within the UCC.[107] Indeed, this section imposes a general duty to perform in good faith for parties acting under the UCC. It should be noted that the good faith duty only refers to the performance and not to the formation of the contract.[108] Consequently, the UCC does not recognise any precontractual good faith obligations (*culpa in contrahendo*).[109]
The meaning of good faith under the UCC is then defined in Section 1-201 (20) UCC:

'"Good Faith" [...] means honestly in fact and the observance of reasonable commercial standards of fair dealing.'

One should also mention that the UCC applies a different definition of good faith in relation to merchants in Section 2-103 (1)(b):

---

[105] Farnsworth Good Faith USA op cit note 95

[106] Allan E. Farnsworth *Good Faith Performance and Commercial Reasonableness Under the Uniform Commercial Code* (1963) at 1

[107] Russel A. Eisenberg 'Good Faith under the Uniform Commercial Code - A New Look at an Old Problem' in *Marquette Law Review Vol.54* (1971) at 1

[108] Farnsworth Good Faith USA op cit note 95

[109] Farnsworth Good Faith USA op cit note 95

'"Good Faith" in the case of merchants means honestly in fact and the observance of reasonable commercial standards of fair dealing in trade.'

It should be noted that the definition of good faith remains very vague. By making a distinction between the general application and the application for merchants, the UCC appears to intend – even though the wording is almost identical – to apply good faith for the latter in a somewhat more limited way.[110] The key conclusion from the definition is that Section 1-201 (20) imposes an objective standard (reasonable commercial standards of fair dealing) as well a subjective element (honesty in fact).[111] In summary, it can be stated that the UCC imposes a general concept from which positive duties for the parties to act in good faith can be derived. However, the nebulous definition has been cause of ever-continuing controversies about the scope and exact meaning of the concept of good faith under the UCC.[112] As a consequence of the lack of clarity about the scope of the concept, courts tend to apply the duty to act in good faith generally cautiously.[113] For instance, scholars observe, courts tend to apply the concept in cases of intentional violations more regularly.[114] By doing so, they disregard the objective dimension of the good faith definition under the UCC.

Section 205 of the Restatement (Second) of Contracts, which was published in 1981, was inspired by the UCC:

'"Good faith" performance or enforcement of a contract emphasizes faithfulness to an agreed common purpose and consistency with the justified expectations of the other party; it excludes a variety of types of conduct characterized as involving "bad faith" because they violate community standards of decency, fairness or reasonableness.'

---

[110] Eisenberg good faith op cit note 107

[111] Farnsworth Good Faith USA op cit note 95

[112] ie: Robert S. Summers 'Good Faith' in General Contract Law and the Sales Provisions of the Uniform Commercial Code' in *Virginia Law Review Vol.54* (1968) 232 and Steven J. Burton 'Breach of Contract and the Common Law Duty to Act in Good Faith' in *Harvard Law Review* (1980) at 372

[113] Jay M. Feinman 'The Duty of Good Faith: A Perspective on Contemporary Contract Law' in *Hastings Law Journal Vol.66* (2015) at 937

[114] Feinman Good Faith op cit note 95

Moreover, Section 205 of the Restatement directly refers to Section 1-203 of the UCC, makes the distinction between good faith in performance and the formation of the contract and explicitly does not recognise precontractual duties of good faith. The doctrine of good faith in the Restatement is based on the UCC and a wide variety of court decisions that impose such concept.[115] As depicted above, the Restatements provide a very important reference book for judges and lawyers in the USA. For this reason, the impact of the recognition of a general concept of good faith is not to be underestimated.

In conclusion, the general substantive duty to act in good faith is recognised by the UCC and the Restatement (Second) of Contracts. Nevertheless, the scope of application of good faith is not always clear and courts lean towards a restrictive application of the concept.

5.3 Good Faith in the Commonwealth of Australia

The Commonwealth of Australia has nine different jurisdictions. For this reason, again the statement applies that it is hard to find an encompassing statement on good faith. As well as in United Kingdom, many Australian scholars have been skeptical about the adoption of a general principle of good faith: They argued that such principle undermines the freedom of contract.[116] Therefore, it was only in 1992 when a court mentioned the duty of good faith in contract law. The Court of Appeal in New South Wales applied good faith in the case *Renard Constructions Pty Ltd v Minister for Public Works*.[117] In this case, the court derived from good faith that 'reasonableness in performance' was implied in a sales contract. The court explicitly referred to concept of good faith in the CISG.
Some Australian scholars regarded this decision as 'groundbreaking'.[118] And indeed, since then, Australian courts have imposed a duty of good faith in the performance of contractual obligations.[119]

---

[115] Robert S. Summers 'The General Duty of Good Faith - Its Recognition and Conceptualization' (1981) in *Cornell Law Review* at 810

[116] Robert McDougall 'The Implied Duty of Good Faith in Australian Contract Law' (2006) in *Australian Construction Law 28*

[117] Renard Constructions (ME) Pty Ltd v Minister for Public Works [1992] NSWRL 234

[118] Lisa Spagnolo 'The Last Outpost: Automatic CISG Opt Outs, Missapplications and the Costs of Ignoring the Vienna Sales Convention for Australian Lawyers' (2009) in Melbourne Law Journal at 169 (170)

[119] ie: Burger King v Hungry Jack's Pty Ltd [2001] NSWCA 187 or Overlook Management BV v Foxtel Management Pty Ltd [2002] NSWCA 16

With regard to Australia as a whole, the Federal Court of Australia applied a general contractual duty of good faith was first mentioned in 1997 in the case *Hughes Aircraft Systems International v Air Services Australia.*[120] Thereafter, in the case *Pacific Brands Pty Ltd v Underworks Pty Ltd* the Federal Court explained that 'the duty of good faith is an incident [...] of every commercial contract unless [it] is either excluded expressly or by necessary implication.'[121] From this remarks one can derive that good faith generally functions as a principle in Australian contract law.

This leads to the question what such principle of good faith contains. The Federal Court simply defines good faith as not acting in bad faith.[122] This negative definition is extremely vague and has to date not been further defined by the Federal Court. The Supreme Court of New South Wales, however, defined good faith as 'acting in compliance with honest standards of conduct'.[123]

From the aforesaid it is obvious that there is no consistent standard with the regard to the application of a duty of good faith in Australian contract law. In addition, it should also not remain unmentioned that Australia's highest court, the High Court of Australia, has not yet decided if a general principle of good faith exists in Australian contract law. The court left this matter open in the case *Royal Botanic Gardens and Domain Trust v South Sydney City Council*.[124]

In conclusion, the Australian approach towards good faith appears to be closer to the American view than that in the United Kingdom.[125] However, the doctrine of good faith is still subject of an ongoing development process.

5.4 The Concept of Equitable Estoppel

Lastly, this dissertation briefly introduces the principle of estoppel. It is not derived from the good faith doctrine.[126] For this reason, this master's thesis will not go into details about the doctrine's scope or requirements. However, the principle is very similar to the *venire contra factum proprium* concept. Thus, it deserves at least a quick mention.

---

[120] Hughes Aircraft Systems International v Air Services Australia [1997] 76 FCR 151

[121] Pacific Brands Pty Ltd v Underworks Pty Ltd [2005] FCA 288

[122] Hughes Aircraft Systems International v Air Services Australia [1997] 76 FCR 151

[123] Tomlin v Ford Credit Australia [2005] NSWSC 540

[124] Royal Botanic Gardens and Domain Trust v South Sydney City Council [2002] 186 ALR 289

[125] Lisa Spagnolo in Melbourne Law Journal op cit note 118 at 169

[126] Peter Birks 'Konkurrierende Strategien und Interessen: Das Irrtumserfordernis im Bereicherungsrecht des common law' in *Zeitschrift für Europäisches Privatrecht* (1993) at 554

The principle of estoppel aims at the protection of a party as a consequence from the other party's contradictory behaviour.[127]

It goes back to the British case of *Montefiori v Montefiori* in 1762.[128] In this case, Montefiori claimed the relief of a promissory note from his brother. The promissory note was handed over in order to create the impression of wealth and facilitate the defendant's marriage. The court, however, argued that the plaintiff acted contradictory and denied the relief. Nowadays, it is applied in almost all common law countries and certainly in United Kingdom, the United States of America and the Commonwealth of Australia.[129]

[127] Birks EU Privatrecht op cit note 126 at 554

[128] Montefiori v Montefiori [1762] 1 W Black R 363

[129] Birks EU Privatrecht op cit note 126 at 554

6. Principles of Interpretation under the CISG

'In the interpretation of this Convention, regard is to be had to its international character and to the need to promote uniformity in its application and the observance of good faith in international trade.'[130]

6.1 General Structure of Art.7 CISG

The Preamble of the Convention considers that its objective is to '*eliminate barriers in international* trade.'[131] Bearing in mind that the CISG is applied by national courts and considering the differences between the legal systems of the participating member states, this aim is ambitious, to say the least. There is always the danger that the domestic courts might interpret the provisions of the CISG influenced by national rules.[132] Art. 7 tries to counter this threat and tries to ensure an autonomous and uniform application.[133] Therefore, many scholars regard Art. 7 as the key provision within CISG. However, in order to fully understand capture the importance of Article 7 one has to capture the structure of the provision from the scratch: Article 7 contains two paragraphs which mutually influence each other.

Art. 7 (1) contains a triumvirate of – in principle equally important – autonomous interpretative principles of the CISG: the international character, the uniformity in its application and the observance of good faith in international trade.[134] These general principles are the interpretative standard when the Convention leaves room for conflicting interpretation and the provision itself does not offer a specific interpretative standard.[135] For instance, the 'fundamental breach' under Art. 25 CISG, 'impediment' under Art.79 CISG or under Art.3 CISG the use of the terms 'substantial part' and 'preponderant part.'

---

[130] Art.7 (1) CISG

[131] CISG Preamble

[132] Franco Ferrari 'The 1980 Uniform Sales Law' (1994) in *Georgia Journal of International Comparative Law* at 279 (280)

[133] Johannes Bergsten 'Methodological Problems in Drafting the CISG' in Janssen, Meyer *CISG Methodology* (2009) at 131 (131)

[134] Franco Ferrari *Kommentar zum Einheitlichen UN-Kaufrecht* (2013) at Art.7 para.4

[135] Viscasillas Kröll CISG op cit note 11 at Art.7 para.10 to 12

Art.7 (2) draws a distinction between internal gaps (*lacunae praeter legem*) and external gaps (*lacunae intra legem*).[136] An internal gap is a matter that is governed by the Convention but not explicitly settled in it. These matters are decided by the general principles on which the Convention is based. This will be of significance for the subsequent considerations with regard to the principle of good faith. External gaps are matters that are not governed by the CISG. In this case, the Convention provides a recourse to domestic law determined by the conflict of law rules of the forum. However, the recourse to national law is the ultima ratio.[137]

6.2 The International Character and the Uniformity in the Application of the CISG as Foundations of the CISG

Objective of the CISG is to provide a uniform legislation for the international sale of goods.[138] The autonomous interpretative criteria in Article 7 (1) serve this goal and try to preserve the uniform application of the CISG. Accordingly, as mentioned above, many regard Art.7 (1) to be the most important provision of the Convention.

This view is supported by the structure of the CISG: The Articles one through six of the Convention do not deal with substantive matters. The first six Articles mainly address the matters of application and general scope of the CISG. Therefore, Art. 7 is the first provision with a substantive regulation.[139]

On the other hand, the importance of the provision can be derived from the legislative history of the Convention. The drafters of the CISG anticipated the problem of diverse connotations of legal terms and feared a domestic-oriented interpretation of the Convention.[140] For this reason, they tried to use a so-called '*lingua franca*' and to avoid the use of terms with domestic connotations within the CISG.[141] For instance, the drafters invented the term of 'fundamental breach' in Art. 25 which has no close equivalent on domestic level. However, a recourse to 'plain language' is hardly possible in

---

[136] Viscasillas Kröll CISG op cit note 11 at Art.7 para.7

[137] Franco Ferrari Schlechtriem Schwenzer op cit note 13 at Art.7 para. 57

[138] http://www.uncitral.org/uncitral/en/uncitral_texts/sale_goods/1980CISG.html, accessed on 30 December 2017

[139] John O. Honnold *Uniform Law for International Sales under the 1980 UN-Convention* 3 ed (1999) at para. 88

[140] See United Nations Conference on Contracts fpr the International Sale of Goods, Vienna, 10 March-11 April 1980, Official Records, Documents of the Conference and Summary Records of the Plenary Meetings and of the Meetings of the Main Commitees at 17

[141] Honnold Uniform Law op cit note 139 at para. 87

a consistent way and the use of terms with similar names on a domestic level is inevitable.[142] For this reason, the closely connected interpretative criteria of internationality and uniformity were invented in Art. 7 (1). As both principles serve the objective of the unification of sales law, they are 'functionally interrelated and interdependent.'[143]

The principle of internationality implies that the CISG is to be interpreted autonomously.[144] This means that, principally, the Convention is to be interpreted on the basis of itself.[145] A recourse to the rules and terms of the applicant's domestic legal system – generally – is to be avoided.[146] In fact, a recourse to domestic case law is the ultima ratio and merely an option when all other relevant interpretation and gap-filling techniques have been exhausted. The placement and clear wording are ought to stress the significance of focusing on the international character and the desire of the drafters to abandon domestic rules.[147]

The objective of uniformity 'aims to ensure that uniform rules will be considered the common denominator [...] independent from the nationality of the parties, the place of performance, or the kind of goods.'[148] Uniformity aims inter alia at the avoidance of so-called forum shopping which means that one party chooses a forum with a more favourable jurisprudence.[149] Nowadays, the principle of uniformity is widely understood as a call for the applicants of the Convention to seek for solutions that are likely to be recognised by the courts of other member states.[150] However, the principle of uniformity is not supposed to be understood as a tool to 'freeze the Convention in time.'[151] Like any other legislative system, the CISG is continuously subject to change. In order to achieve the aim of a uniform application of the Convention, UNCITRAL has to ensure that judges have access to CISG court decisions and arbitral awards. For instance, the existence of the CLOUT

---

[142] Ingo Saenger *Bamberger, Roth, Hau et al BeckOK BGB CISG* 43 ed (2017) at Art.25 para.1

[143] Viscasillas Kröll CISG op cit note 11 at Art.7 para.16

[144] Ingo Saenger *Ferrari Kieninger & Mankowski Internationales Vertragsrecht* 3 ed (2018) at Art.7 para.4

[145] Viscasillas Kröll CISG op cit note 11 at Art.7 para.19

[146] Ferrari Schlechtriem & Schwenzer op cit note 13 at Art.7 para.9

[147] Saenger Internationales Vertragsrecht op cit note 142 at Art.7 para.5

[148] US District Court for the Southern District New York (USA) 26 March 2002, St. Paul Guardian Insurance Co.,et al. v Neuromed Medical System & Support, et al

[149] Viscasillas Kröll CISG op cit note 11 at Art.7 para.3

[150] Schlechtriem Schlechtriem & Schwenzer op cit note 13 at Art.7 para.10

[151] Viscasillas Kröll CISG op cit note 11 at Art.7 para.17

(Case law on UNCITRAL texts) database can be directly derived from the principle of uniformity.[152]

In summary, it can be claimed that the importance of the principles of internationality cannot be stressed enough since the success of an international sales convention highly relies on preserving uniformity in its application. Scholars agree on the fact that the principles have proven to be very successful in practice.[153] However, the work at hand will show whether this is also the case for the application of good faith within the meaning of Art.7 (1).

6.3 The Observance of Good Faith in International Trade

For the work at hand it is of major importance to determine which role was assigned to good faith by the drafters of the Convention as there are many different views on 'how' good faith is to be applied. On the basis of the previous chapter, it is needless to say that a recourse to domestic rules in order to determine the principle of good faith is to be avoided. Firstly, one has to take into account the location of good faith within the CISG and the legislative history. Article 7 (1) names good faith as one of the three general principles of interpretation of the CISG. This is the only provision that mentions good faith within the Convention. On first glance, this might not appear notable. However, civil law and common law have fundamentally different approaches to legislative drafting and interpretation.[154] This is reflected by the controversies around the term of good faith during the drafting of the Convention. The concept of good faith was one of the most controversially discussed topics in the process of the drafting of the CISG.[155] On the one hand, representatives of mainly common law countries were in favour of leaving good faith out of the CISG. They argued that the concept of good faith itself is too broad and vague. As a consequence, the application of good faith by the courts might be influenced by the domestic legal systems which would then contradict the objective of uniformity in the application of the CISG.[156]

---

[152] Alexander E. Komarov Internationality, Uniformity and Observance of Good Faith as Criteria in Interpretation of CISG: some remarks on Article 7(1) in *Journal of Law and Commerce* 2005-2006 at 75 (75)

[153] Viscasillas Kröll CISG op cit note 11 at Art.7 para.3

[154] Komarov Internationality, Uniformity and Observance of Good Faith op cit note 152 at 75 (82)

[155] Komarov Internationality, Uniformity and Observance of Good Faith op cit note 152 at 75 (83)

[156] John O. Honnold *Documentary History of the Uniform Law for International Sales: The Studies, Deliberations and Decisions That Led to the 1980 United Nations Conventions with Introductions and Explanations* (1989) at 476

On the other hand, representatives of mainly civil law countries argued for the imposition of positive duties for the contractual parties to act in good faith.[157] These delegates tried to impose an application of good faith as a standard of conduct of the parties during the formation and performance of the contract.[158]
It appears implausible that a comprise could be negotiated between these two seemingly irreconcilable views. However, eventually, the delegates agreed to place good faith as a principle of interpretation in Article 7 (1).[159]

This raises the question of which conclusion could be drawn from the placement of good faith within the Convention. As one can easily note, the location and wording indicates that good faith is at least is one of the general principles of interpretation of the Convention.

However, it remains questionable if the doctrine of good faith is limited to its application as a tool of interpretation in relation to the Convention or if the agreement and the duties of the parties also have to be viewed in light of good faith.
Additionally one has to ask for the scope of the concept: Does the principle of good faith only apply for Art.7 or does it permeate the whole text of the CISG?

Some authors like Allan E. Farnsworth strictly follow the view that good faith only is a mere principle of interpretation.[160] Their main argument is based on the legislative history. They argue that Art. 7 (1) – as pointed out above – reaches a compromise between the civil law and common law approach towards good faith.
The wording of the Convention does not explicitly impose any positive duty for the contractual parties to act in good faith.[161] Moreover, the CISG only refers specifically to the Convention which should be interpreted in light of good faith. In contrast, an obligation to interpret the contract of sale

---

[157] see the Travaux préparatoires at http://www.uncitral.org/uncitral/en/uncitral_texts/sale_goods/1980CISG_travaux.html accessed on 2 January 2017

[158] John O. Honnold Documentary History op cit note 156 at 476

[159] Viscasillas CISG op cit note 11 at Art.7 para.22

[160] Allan E. Farnsworth 'Duties of Good Faith and Fair Dealing under the Unidroit Principles, Relevant International Conventions, National Law' in *Tulane Journal International Comparative Law* 1995 at 47 (54)

[161] Gary F. Bell 'How the Fact of Accepting Good Faith as a General Principle of the CISG will Bring More Uniformity# in *Review of the CISG 2005-2006* (2005) at 3 (14)

considering the doctrine of good faith remains unmentioned. Exceeding the wording of Art. 7 (1) would contradict the well documented compromise between the delegations.
Therefore, they conclude, good faith merely is a general principle of interpretation for the Convention (not the contract of sale).[162]

Nonetheless, other scholars like Franco Ferrari suggest a wider application of the principle of good faith instead of implementing the exact wording of Art. 7 (1). They argue that – as depicted above – it is a fact that the delegates agreed to not include a positive duty of good faith in the legislative text of the Convention. However, the text does not explicitly say that there is no substantive principle of good faith either. Therefore, good faith is not limited to the above mentioned strictly interpretational approach. Most proponents of a wider application of good faith use Art. 7 (2) to expand the principle.[163] Art. 7 (2) reads as follows:

'*Questions concerning matters governed by this Convention [...] are to be settled in conformity with the general principles on which it is based [...].*'

Art. 7 (2) invites to infer general principles for internal gap filling.[164] If the principle of good faith is a general principle on which the Convention is based, it is one of the principles that have to be used for internal gap filling. Eventually, the question might arise whether good faith is a general principle in accordance with Art. 7 (2).

To begin with, one could argue that good faith is only explicitly used in Art. 7 (1) which refers to the interpretation of the Convention. Hence, it seems inappropriate to give good faith the significance of a general principle.[165]
However, one has to bear in mind that specific manifestations of the principle of good faith are found all over the Convention.[166] For instance, specific manifestations of good faith as a standard of conduct are found in Art.8, 16(2)(b) and 29(2). Art.80 contains the *venire contra factum proprium*

---

[162] Farnsworth Duties of Good Faith op cit note 160 at 47 (56)

[163] ie: Saenger BeckOK CISG op cit note 22 Art.7 para.7; Ferrari Schlechtriem & Schwenzer op cit 7 at Art.7 para 49 or Viscasillas CISG op cit note 11 at Art.7 para.23

[164] See Chapter 6.3 'The Observance of Good Faith'

[165] Ferrari Schlechtriem & Schwenzer op cit note 11 at Art.7 para 49

[166] Andre Janssen and Sören Klaas Kiene 'The CISG and Its General Principles' in *CISG Methodology* (2009) at 261 (269)

principle which is one of the main application areas of good faith in German law.[167] The principle of good faith is also found in Art.40 which refers to bad faith and in the principle of mitigation of damages in Art.77. The amount of provisions that are based on the principle of good faith indicates that it is more than just a mere interpretative principle of the Convention but a substantive doctrine.[168] Accordingly, nowadays good faith is broadly recognised as a general principle on which the CISG is based. The prevailing view in jurisprudence[169] and literature[170] pleads for a wider application of the principle of good faith as a substantive doctrine through Art. 7 (2).

Subsequently, this leads to the question of the scope of the application of good faith as a general principle through Art. 7 (2) since the wording of Art. 7 (2) clearly limits the application of the general principles of Art. 7 (2) to '*[...] questions concerning matters governed by this Convention [...].*'[171] This ties in with Art. 4 which defines what matters are governed by the CISG:

'This Convention governs only the formation of the contract of sale and the rights and obligations of the seller and the buyer arising from such a contract. [...].'[172]

Consequently, matters within the scope of the CISG are the formation of the contract and rights and obligations of the parties. Accordingly, the principle of good faith does not extend to third parties or the validity of the contract.[173]
It is also broadly recognised that generally the doctrine of good faith is not applicable to pre-contractual liability (*culpa in contrahendo*) under the CISG.[174] The main argument against the application of good faith in these cases is based on the legislative history. Delegates of the former Democratic Republic of Germany made a proposal to regulate pre-contractual liability. However, this suggestion was rejected.[175]

---

[167] See chapter 4.4.3 'The Impermissible Exercise of a Right'

[168] Bell Good Faith Review of the CISG 2005-2006 op cit note 161 at 3 (19)

[169] ie: *Higher Regional Court Cologne NJW-RR 2006* 677

[170] ie. Janssen & Kiene General Principles in CISG Methodology op cit note 166 at 261 (272)

[171] Bell Good Faith Review of the CISG 2005-2006 op cit note 161 at 3 (19)

[172] Art.4 CISG

[173] Bell Good Faith Review of the CISG 2005-2006 op cit note 161 at 3 (19)

[174] Viscasillas CISG op cit note 11 at Art.7 para.31

[175] Honnold Documentary History op cit note 156 at 515

Lastly, it should also be mentioned that some scholars even go as far as to derive a substantive principle of good faith directly from Art.7(1).[176] Nevertheless, considering the legislative history and placement of the principle this seems to be a bit of a stretch.

In summary, it can be stated that the principle of good faith is more than a mere general principle of interpretation as it could be concluded by interpreting the wording of Art.7(1). The principle of good faith is rather a general principle on which the CISG is based. As such, it is applied as a substantive doctrine through Art.7(2). However, the application of Art.7(2) is limited to the formation of the contract and the rights and obligations of the parties. Therefore, one must be particularly careful to not use the doctrine of good faith in an excessive manner.

[176] Viscasillas CISG op cit note 11 at Art 7 para.24

7. Case Study

7.1 Case 1: German Federal Supreme Court (*Bundesgerichtshof*) BGH VIII 60 01

7.1.1 Abstract

In the present case, the German defendant (the 'seller') and the Spanish plaintiff (the 'buyer') concluded a contract for a used gear cutting machine. The contract contained the obligation to install the machine at the buyer's premises. The seller's written confirmation of the order comprised a reference to his standard terms and conditions. These standard terms included an exclusion from liability for any defects in used machinery. It is noteworthy that the terms were not attached to the order confirmation.

Subsequently, the installation of the gear cutting machine turned out to be problematic: The responsible mechanic was overstrained with setting up the machine and the machine could only be utilized operationally with assistance of an outside technician. The buyer claimed reimbursement for the delay and the additional costs of the installation. The seller, however, refused to pay and referred to the standard terms which excluded him from any liability.

The German Federal Supreme Court held that the claim should be decided in accordance with the CISG. Thereafter, the relevant question of the case is whether the standard terms became integral part of the contract. In order to answer this question, the court had to define the requirements for the incorporation of standard terms by reference into international sales agreements.

To begin with, the court observed that the Convention lacks specific rules on the inclusion of standard terms by reference. Therefore, the court set forth, the general rules on interpretation and formation of the contract (Art. 8, 14 and 18) are applicable. Then, the court stated that it is not enough to refer to the terms. Instead, the recipient must be given the opportunity to read the standard terms. The Federal Supreme Court derived such duty from the general principle of good faith.

The court argued that 'due to the difference between the many legal systems and traditions worldwide, standard terms used in one particular country often differ considerably from those used

in another.'[177] Thus, for the recipient the access to the country-specific standard terms and conditions is of great importance. Furthermore, it does not pose any difficulties for the offeree to simply attach the terms. In addition, if the recipient had to make an inquiry about the terms, it would lead to 'delay [...] which would be unnecessary and unwelcome for both parties.'[178]
This goes to say that the standard terms and conditions can only become part of the contract if the conditions are visibly attached. In the case at hand, the terms were apparently not incorporated into the contract. The court found that the claim of the buyer for reimbursement was justified.

7.1.2 Analysis of the Verdict in Light of Art.7

The German Federal Supreme Court determined the requirements for the incorporation by reference of standard conditions into sales contracts by interpreting Art. 8 in light of good faith in international trade in accordance with Art. 7 (1). The court imposed a duty to visibly attach such standard terms to the offer. In conclusion, it has to be said that the court uses good faith as a tool of interpretation since it correlates with the wording of Art.7 (1) as well as with the compromise found by the delegates in the 1980 Vienna Conference.[179] Hence, the court derives a positive duty from said interpretation. Eventually, notwithstanding the use as a tool of interpretation, good faith is used as a standard of conduct during the formation of the contract.

The court argues that such positive duty is derived from the loyalty principle and the obligation of the parties make required information accessible and cooperate. Both duties arise out of the principle of good faith and are well known within the Convention. The obligation to cooperate is the underlying principle in Art. 32 (3) and 60 (a).[180] Therefore, the loyalty principle and the obligation of the parties to give information and cooperate are generally accepted as standard of conduct within the CISG.[181] Nonetheless, as depicted earlier, it is nowadays generally accepted by courts and scholars that good faith is not only an interpretative tool but a standard of conduct.[182] Thus, the court does not exceed the use of good faith.

---

[177] German Federal Supreme Court (*Bundesgerichtshof*) BGH VIII 60 01

[178] German Federal Supreme Court (*Bundesgerichtshof*) BGH VIII 60 01

[179] See chapter 6.3 'The Obervance of Good Faith in International Trade'

[180] Viscasillas CISG op cit note 11 at Art. 7 at para.15

[181] Viscasillas CISG op cit note 11 at Art. 7 at para. 15

[182] See chapter 6.3 'The Obervance of Good Faith in International Trade'

In addition, the verdict of the court is in line with the principles of internationality and uniformity which are embodied in Art. 7(1): The court's solution for the duty of incorporating standard terms by reference is well suited to be recognised by the courts of other member states since it exclusively uses provisions and principles within the Convention. Therefore, it serves the objectives of the principle of internationality well.[183]

To mention one example: A Spanish court argued with the same cooperation duty derived from the good faith principle in a case from 2007.[184] Apparently, in said case it was questionable whether the standard terms in a foreign language were included to the agreement or not. It is, however, not recognisable from the English abstract in the CLOUT database if the Spanish court particularly referred to this decision by the German Federal Supreme Court. Moreover, it remains unclear if the Spanish court was even aware of this decision.

In summary, this decision of the German Federal Supreme Court throws light on the question of the requirements for the incorporation of terms and conditions in an autonomous way. Therefore the court pays the necessary attention to the principles of internationality and uniformity in the application of the CISG.

[183] See chapter 6.2 'The International Character and the Uniformity in the Application of the CISG'

[184] Audiencia Provincial de Navarra, sección 3 20071227 (Clout case 1039)

7.2 Case 2: High Court Munich (*Oberlandesgericht München*) 7 U 2959/04

7.2.1 Abstract

In the case at hand, the plaintiff (the 'seller') operated a leather tannery in Italy. The defendant (the 'buyer') was a German manufacturer of furniture. The parties concluded a contract for the purchase of leather. Before this agreement, the involved parties have had prior business relationships. In the instant case, the buyer refused to pay the full purchase price. He argued that the claim for payment of the purchase price is setoff against a counterclaim by the defendant. As a result of the refusal to pay, the seller claimed the outstanding purchase price on basis of Art. 53 before the court.

For background information, basis for the defendant's counterclaim is that the seller refused to perform his obligation to deliver leather in an earlier sales contract. As a consequence of the delivery refusal, the defendant had to buy more expensive goods in replacement of the plaintiff's performance. The reimbursement claim of the additional cost of the covering purchase is basis of the counterclaim.

With regard to the delivery refusal in the previous sales contract, the plaintiff argued that such contract was never concluded and, in any case, the BSE (*Bovine Spongiform Encephalopathy*) crisis, which took place at the time, impeded a performance of the contract.

Firstly, the High Court outlined that all contractual agreements subject to this case are governed by the CISG. Secondly, the court stated that the contract on which the counterclaim was based was concluded and the performance – in light of the BSE crisis – was reasonable.
Lastly, the court raised the question whether the defendant's counterclaim is legitimate. Basis for the counterclaim is Art. 76. This provision, however, requires that in order for the aggrieved party to claim damages under Art. 76, it has to declare the 'avoidance of the contract' before undertaking the substitute purchase.[185] The conditions of the declaration of avoidance are defined in Art. 49.
In the present case, the buyer did not declare the avoidance of the contract. However, the High Court stated, in order to maintain fairness under the principle of good faith, that the plaintiff could not rely on the requirement of a declaration of avoidance.

[185] Schwenzer Schlechtiem Schwenzer op cit note 13 Art.75 para.5 and Art.76 para.3

As a result, the High Court decided that the counterclaim of the defendant was justifiable and the plaintiff's claim for the purchase price was setoff.

7.2.2 Analysis of the Verdict in Light of Art. 7

The legal main issue is whether the requirement of the declaration of avoidance for a claim under Art. 75 or 76 is dispensable in certain situations. If yes, subsequently, one has to ask if the case at hand could be regarded as such situation. To begin with, it should be outlined that the explicit wording of the Convention does not recognise any exception to the requirement of the declaration of avoidance of the contract.[186] Notwithstanding, the court decided that the respondent could not rely on the declaration of avoidance if he 'seriously and finally refused to perform under the sales contract'.[187] In the present case, the plaintiff even denied the existence of any performance duty and therefore ultimately refused to perform. As depicted above, the High Court bases this view on the good faith principle in accordance with Art. 7. The High Court 's argument is easy to follow: Somebody who seriously and ultimately refuses to perform acts contradictorily if he later wants to rely on the requirement of avoidance. Such behaviour violates the *venire contra factum proprium* principle which is a particular form of the good faith doctrine. As mentioned earlier, the *venire contra factum proprium* principle is a well-established case group within the application of good faith under the German Civil Code.[188] And in fact, in damage claims under Section 280, 281 of the German Civil Code the prevailing view waives the requirement of declaration of avoidance by referring to the v*enire contra factum proprium principle*.[189] In such cases, it is argued that the declaration of avoidance would be unjustified formalism which is apparently the same argument the High Court used at the present case.[190]

One could argue that the court decision at hand was influenced by domestic law which would be a violation of the principles of internationality and uniformity of interpretation in accordance with Art.7 (1). However, as depicted in detail in chapter 6.3, the existence of a general substantive principle of good faith in the CISG is widely accepted nowadays. The recognition of good According to the prevailing view, Art.7 (2) is used to expand the application of good faith.

---

[186] Gontanda BeckOK CISG op cit note 22Art.75 para.8

[187] High Court Munich (*Oberlandesgericht München*) 7 U 2959/04

[188] See chapter 4.4.3 'The Impermissible Exercise of a Right'

[189] Unberath BeckOK BGB op cit note 22 Section 281 para.22

[190] German Federal Supreme Court BGH VI ZR 51/96

Admittedly, the High Court does not derive the existence of a doctrine of good faith in a strict dogmatic way. Notwithstanding, it has to be noted that the Convention recognises the principle of contradicting conduct. The *venire contra factum proprium* principle is found in Art. 8 (3) and 16 (2) (b). Therefore, it is widely recognised to be a general expression of good faith in the Convention.[191]

In conclusion, the court argues within the generally accepted scope of the good faith doctrine under the CISG. In addition, the court exclusively refers to the CISG and does not quote any of the court decisions which have been developed under the German Civil Code. Thus, the ruling of the court does not violate the principle of internationality and uniformity.
In the case at hand, the good faith principle is applied in accordance with the requirement of an autonomous interpretation of the Convention. It can be stated that all in all the court's decision is perfectly in line with the principles set out in Art. 7 (1).

On a side note, the court did not raise the question whether the setoff against a claim is governed by the Convention. This question is rather disputed. There will be detailed remarks on the question if a setoff claim is governed by the CISG in case 4.
Lastly, it should not remain unmentioned that previously in similar cases courts interpreted the declaration of avoidance in line with the ruling of the present case.[192]

[191] Sänger BeckOK CISG op cit note 22 Art.75 para.8

[192] High Court Hamburg, 1 U 167/95 (Clout case 277)

7.3 Case 3: High Court Karlsruhe (*Oberlandesgericht*) 1 U 280/96; German Federal Supreme Court (*Bundesgerichtshof*) VIII ZR 259/97

7.3.1 Abstract

This case was brought before the High Court Karlsruhe as Appellate Court and then reviewed by the German Federal Supreme Court. In this case, both courts address the principle of good faith and eventually come to different conclusions. For this reason, this master's thesis analyses both decisions.

The Austrian plaintiff (the 'buyer') was a producer of steel sheets. In order to protect the steel sheets during the transport the plaintiff used adhesive foil covers. The defendant (the 'seller') is a German company which produced adhesive foil covers. The plaintiff concluded a contract for the purchase of adhesive foil covers with the plaintiff.

Having said that, the adhesive foil covers were lacking the contractual agreed conformity as it was impossible to remove the foil after transport without damaging the steel sheets. Upon delivery, the buyer did not give notice to the seller of any defects of the foil. However, following a customer's complaint the buyer gave such notification twenty four days after delivery of the goods.

Subsequently, the plaintiff and the defendant negotiated for almost fifteen month on reimbursement for the sustained costs. During the negotiations the defendant did not raise the objection that the buyer failed to give timely notice of the defect. Eventually, the parties could not agree on reimbursement. The issue before the court was whether the plaintiff could claim reimbursement for all costs he sustained or not.

Firstly, the High Court held that the sales contract between the plaintiff and the defendant is governed by the CISG. Therefore, basis for the claim are the provisions of Art. 35, 74. Secondly, the High Court stated that the delivered adhesive foil covers did lack conformity with the contract in accordance with Art. 35, 36.

Then, the court addressed the question if the buyer had not given notice of the defects within reasonable time. In accordance with the provision of Art. 38 the buyer must examine the goods in as short as time as is practicable in the circumstances. Moreover, Art. 39 states that the buyer loses the right to rely on the lack of conformity if he does not notify the seller 'within reasonable time after

he ought to have discovered the defect.'[193] In the case at hand, the court held that even in the case of a long-term business relationship the plaintiff had an obligation to carry out a test performance of the adhesive foil covers. In this instance, the High Court concluded, a notification period of ten to eleven days was reasonable. The plaintiff gave such notice only twenty four days after the delivery of the adhesive foil covers. Thus, the plaintiff failed to give timely notification in accordance with Art. 38, 39.

Then, the court considered Art. 40 which states that the defendant cannot rely on the provisions of Art. 38, 39 if the lack of conformity relates to facts of which he knew. Clearly, the seller knew about the use of acrylic adhesive. In question is, however, if the seller knew or could have known that the use of acrylic adhesive constitutes a defect. This is to be proven by the buyer. In summary, the court held that the buyer did not proof that the seller knew or could have known. Therefore, the court concluded, Art. 40 is not concerned. Moreover, the court examined whether the exception of Art. 44 is given. This provision is concerned when the plaintiff is able to give a reasonable excuse for the failure to notify timely. However, that was not the case since improper examination is no reasonable excuse in accordance with Art. 44.

Lastly, the High Court considered if the defendant had waived his right to rely on the notification duty. The execution of rights, the court stated, always has to be examined in light of the principle of good faith. In the present case, the seller did not mention the breach of the notification duty during the negotiations between the plaintiff and the defendant. The conduct of the seller could constitute a contradictory behaviour. As a consequence, the *venire contra factum proprium* doctrine could be applicable. However, in the High Court's opinion this was not the case: 'The mere availability of the seller to reach a settlement agreement does not in itself imply a loss of the right to plead that the notice of lack of conformity was not timely. The intention to waive the defence must be clearly established.'[194] Additionally, the High Court pointed out, the idea of an implied waiver would have the effect that all willingness to negotiate would put the plaintiff in danger of losing the right to rely on the notification duty. Therefore, the defendant had not waived his right to rely on the notification duty.

Im summary, the High Court decided that the claim of the buyer was in-justified due to the breach of the notification duty in accordance with Art. 38, 39.

---

[193] Art. 39 CISG

[194] High Court Karlsruhe (*Oberlandesgericht*) 1 U 280/96

The German Federal Supreme Court, however, overruled the High Court's verdict. Unlike the High Court, in the Supreme Court's opinion the defendant waived his right to rely on the notification duty. The court pointed out that the defendant agreed without reservation with the plaintiff's notice of defects. Subsequently, the parties exclusively negotiated over the manner of settlement and the particular amount of damages. In fifteen months, the seller did not once mention the breach of the notification duty. All things considered, the Supreme Court stated that the 'idea of a mere arrangement must have been far from the [buyer]'s thoughts'.[195] The Supreme Court also addressed the consideration of the High Court that the idea of an implied waiver would have the effect that all willingness to negotiate would put the plaintiff in danger of losing the right to rely on the notification duty. In the case at hand, by mentioning the notification duty the plaintiff would have shown that the compensation offer is of obliging character.

For this reasons, the Supreme Court held that the seller had waived his right to rely on the notification duty. Therefore, the claim for damages was justified under Art. 35, 74.

7.3.2 Analysis of the Verdict in Light of Art.7 (1)

In the present case, the main question was whether the defendant had waived his right to rely on the notification duty in light of the general principle of good faith. Such exclusion of the notification duty because of contradictory behaviour is widely recognised by scholars[196] and courts[197] under the application of Art. 38, 39. In such cases, generally, the principle of good faith is applied restrictively.[198] Notwithstanding, the Supreme Court's line of arguments is conclusive. Especially the point that by mentioning the notification duty during the negotiations the seller would have highlighted the obliging character of the compensation offer even more. The Supreme Court convincingly showed that the seller's conduct during the negotiations was contradictory to the following raise of the objection. As a consequence, the seller had waived his right in light of the good faith principle.

In this case, however, it is much more interesting to focus on the principles of internationality and autonomous interpretation. The High Court, as well as the Supreme Court, refer to the German

---

[195] German Federal Supreme Court (*Bundesgerichtshof*) VIII ZR 259/97

[196] Kröll CISG op cit note 11 at Art.39 para 116

[197] Vienna International Arbitral Center (Internationales Schiedsgericht der Bundeskammer der gewerblichen Wirtschaft - Wien) SCH-4318 (Clout case 94)

[198] Kröll CISG op cit note 11 at Art.39 para 118

Commercial Code. With regard to the notification duty under section 377 of the German Commercial Code it is settled case law in Germany that entering negotiations over an alleged defect does not mean that the seller waives the objection to delay. The German Federal Supreme Court explicitly states: 'There are no reservations against applying these principles, developed for German national law, within the scope of the CISG.'[199] As a consequence, both courts apply the requirements developed for the German Commercial Code in the present case (even though they came to different conclusions on whether the requirements are fulfilled). However, as depicted earlier, the Convention is to be interpreted autonomously.[200] This means that, principally, the CISG is to be interpreted on the basis of itself. A recourse to the rules and terms of the domestic legal system is to be avoided. It is only possible to refer to domestic law when all other relevant interpretation and gap-filling methods have been exhausted.[201] A recourse to national law is the *ultima ratio*.

However, in this case there was no need to refer to domestic law as good faith is a substantive doctrine within the CISG. The courts could have applied the principle of good faith autonomously. Thus, the courts technically violated the principles of internationality and autonomous interpretation.

Having said that, as mentioned earlier, the Convention recognises the principle of contradicting conduct. The *venire contra factum proprium* principle is found in the Articles 8 (3) and 16 (2)(b). The courts could have made the exact same considerations under the CISG. For this reason, even though the courts referred to domestic law it is not unlikely that the court's considerations will be recognised by the courts of other member states in future decisions. Therefore, the violation of the principles internationality and autonomy are, if so to say, no 'serious breaches'.

---

[199] German Federal Supreme Court (*Bundesgerichtshof*) VIII ZR 259/97

[200] See chapter 6.2 'The International Character and the Uniformity in the Application of the CISG'

[201] Kröll CISG op cit note 11 at Art.7 para 19

7.4 Case 4: German Federal Supreme Court (*Bundesgerichtshof*) VIII ZR 394/12

7.4.1 Abstract

The defendant (the 'buyer') is a German company which is a supplier for the automotive industry. It mainly produces automotive components made of plastic. For this purpose, the defendant required customised moulds in which the liquid plastic gets poured with dimensional accuracy. The Hungarian plaintiff (the 'seller') supplied the defendant with such customised moulds since the beginning of 1998. The last two sales contracts between the parties were concluded in 2000 and 2001.

With regard to the sales contract concluded in 2001, the defendant gave notice that the delivered moulds were lacking the contractual agreed conformity. Thereupon, the plaintiff tried to remedy the defect by repair. However, the defendant was not satisfied with the result of the subsequent improvement. As a consequence, the defendant declared the contract avoided in accordance with Art. 49 (1)(a) and claimed damages.

With respect to the sales contract concluded in 2001, the defendant declared avoidance of the contract even before the goods were delivered. Notwithstanding, the plaintiff delivered the moulds which the defendant took. Again, the defendant gave notice about the lack of contractual conformity.

Subsequently, the defendant himself remedied the defects in all delivered moulds.

The plaintiff claimed payment of the purchase price under the sales contracts from 2000 and 2001 before the court. Contrarily, the defendant argued that he declared avoidance of both contracts. Additionally, the defendant argued that such claims for payment are setoff against a counterclaim by the defendant. Said counterclaim was based on the costs incurred for the subsequent improvement of the moulds by the defendant himself.

To begin with, the German Federal Supreme Court held that the sales contracts are governed by the CISG. Then, the court stated that two contracts were concluded. As a consequence, the plaintiff can

generally demand payment of the purchase price in accordance with Art. 53. However, an exception to this is made if the defendant successfully declared avoidance of the contract.
The prerequisite for declaring a contract avoided under Art. 49 (1)(a), in case of timely delivery, is a fundamental breach. Therefore, it has to be determined whether there was a fundamental breach of the contract or not. In accordance with Art. 25, a breach is fundamental if the defect results in such detriment to the other party that it deprives 'him of what he is entitled to expect under the contract [...].'[202] The court held that the delivered moulds in fact did not conform with the contract and therefore constitute a defect under Art. 35 (2). However, the court found that the defect was not fundamental. It argued that the avoidance of the contract is the *ultima ratio* under the Convention. Therefore, a fundamental breach requires a situation that the defect to a situation where the buyer is no longer interested in the contractual performance of the seller due to heavy defects.. In this case, the defendant was still interested in the performance which is reflected by the fact that he remedied the defects himself. For this reason, the defect was not considered to be fundamental under Art. 25.
As a consequence, the requirements for avoidance of the contract under Art.49 (1)(a) were not fulfilled. In summary, the plaintiff can still demand payment of the purchase price in accordance with Art. 53.

Then, the court considered the counterclaim of the defendant. In the present case, the defendant himself remedied the defects at his own expenses. For this reason, the defendant could possibly have a claim for reimbursement under Art. 45 (1)(b), (2), 74. The court held that, in general, the buyer himself can remedy the defect and thereafter claim the costs.

Having said that, in case of the 2001 sales contract, the plaintiff did not undertake an attempt to remedy the defect. By performing the rectification by himself, the defendant could have violated the plaintiff's right to remedy the defect. Art. 48 (1) gives the seller such right under certain circumstances. However, the court stated that Art. 48 (1) requires the seller to inform the buyer about his intention and willingness to remedy the defect. Such duty is not explicitly laid down in Art. 48 (1). However, such obligation can be derived from the general principle of good faith in Art. 7 (1). In the case of the 2001 sales contract, the plaintiff did not inform the buyer at all if he intends to remedy the defect. Therefore, the court held that he had no claim to remedy the defect under Art. 48 (1).

[202] Art. 25

Lastly, the court considered whether the set-off of the claim is governed by the Convention. The court held that when both claims arise from the same transaction governed by the CISG, they can be offset against each other.

The court decided that the plaintiff could successfully claim payment of the purchase price under Art. 53. However, the defendant could claim reimbursement for the incurred costs of the remedy of the defects in accordance with Art. 45 (1)(b), (2), 74.

7.4.2 Analysis of the Verdict in Light of Art. 7

The case at hand deals with two legal main issues: The requirements of a fundamental breach under Art. 25 and the prerequisite of the right of the seller to remedy the defect under Art. 48 (1). The remarks on Art. 25 do not contain observations with regard to the principle of good faith. Notwithstanding, this analysis will cover the remarks on the fundamental breach in detail in order to determine whether the principles of internationality and the autonomous interpretation is violated or not.

7.4.2.1 Fundamental Breach under Art. 25

In order for the defendant to declare avoidance of the contract under Art. 49 (1)(a), a fundamental breach of the contract is required. Condition of a fundamental breach is (*inter alia*) a substantial deprivation.[203] The definition of the fundamental breach under Art. 25 is 'less than precise.'[204] The court observed that this definition needs further clarification. Eventually, it came to the conclusion that the substantial deprivation is not only determined by the significance of the breach. In addition, it depends on whether the buyer is still interested in the contractual performance or not. The court derived this high standard to apply Art. 25 from the consideration that under the CISG the avoidance is the *ultima ratio*. The fact that the Convention gives primacy to the performance of contracts is widely recognised among scholars[205] and courts.[206] In conclusion, the German Federal

---

[203] Andrea Björklund Kröll CISG op cit note 11 at Art. 25 para 9

[204] Andrea Björklund Kröll CISG op cit note 11 at Art. 25 para 9

[205] Andrea Björklund *Kröll CISG* Kröll CISG op cit note 11 at Art. 25 para 2

[206] German Federal Supreme Court (*Bundesgerichtshof*) VIII ZR 51/96, Federal Supreme Court of Switzerland (*Schweizerisches Bundesgericht*) 4 A 68/2009

Supreme Court exclusively argues within the Convention. Additionally, it quotes two foreign judgements in order to determine the requirements of a fundamental breach.[207] In summary, it has to be concluded that the German Federal Supreme Court pays particular attention to the principles of internationality and autonomous interpretation.

7.4.2.2 The Seller's Right to Remedy the Defect under Art. 48 (1)

The defendant claimed reimbursement for the incurred costs of the remedy of the defects under Art. 45 (1)(b), (2), 74. As depicted above, the defendant could have violated the plaintiff's right to remedy the defect with regard to the 2001 sales contract. Art. 48 (1) states the seller's right to cure the breach when certain requirements are fulfilled. The court held that Art. 48 (1) requires the seller to give notice of his intention to remedy the defect. From the wording of Art. 48 (1) such requirement cannot be inferred. However, the court derives such prerequisite from the principle of good faith. It has to be noted that in this case a positive duty is derived from the principle of good faith. However, as depicted in detail in chapter 6.3, good faith is to be understood as a general substantive principle in the CISG. As such, the principle is suitable to impose positive duties. The seller's notification obligation under Art.48 (1) is widely recognised by scholars.[208] They argue that the buyer is left with the uncertainty if the seller will cure the breach or not. This uncertainty for the buyer can easily be decreased without putting a major strain on the seller.[209]

The recognition of good faith as a general principle in accordance with Art.7(2) is used to expand the application. It should be noted, however, that the court does not apply good faith as a substantive doctrine in a strict dogmatic way. The prevailing view among scholars applies the substantive principle of good faith via Art. 7 (2).[210]

---

[207] Federal Supreme Court of Switzerland (*Schweizerisches Bundesgericht*) 4 A 68/2009, Austrian Supreme Court (*Österreichischer Oberster Gerichtshof*) 4 Ob 199/11b

[208] Huber in MüKo CISG op cit note 1 at Art. 48 para 8a

[209] Huber in Kröll CISG op cit note 1 at Art. 48 para 15

[210] See Chapter 6.3 'The Observance of Good Faith'

7.4.2.2 Is the Setoff Claim Governed by the Convention?

Lastly, it should be analysed whether the setoff against a claim is governed by the CISG or not. Once more, this subject does not deal with the principle of good faith. However, again it has to be determined if the court's decision is in line with the principles of internationality and autonomous interpretation.

The question whether a setoff claim is governed by the Convention is a well-known controversy and was content of many court decisions.[211] To begin with, it is clear that the set-off is not expressly governed by the CISG.[212] At the same time, this does not automatically mean that it is excluded from the Convention.

Some courts believe that setoff claims are not governed by the Convention and therefore are to be determined by domestic law.[213] The main argument for this view is that this issue was not addressed during the drafting process of the CISG.[214]

On the other hand, some courts argue that where both claims arise from the same transaction governed by the CISG, they can be offset against each other.[215]

In the case at hand, the German Federal Supreme Court sets forth both views but favours the latter approach. The court argues that the general principles provide sufficient basis to deal with setoff claims. Additionally, Art. 81 (2), 84 (2) and 88 (3) deal with similar situations. Once again, the court refers back to previous court decisions.[216] In summary, the court once more pays particular attention to the principles of internationality and autonomous interpretation.

In conclusion, the remarks by the court are comprehensible and suitable to be recognised by the courts of foreign member states. Therefore, this decision by the German Federal Supreme Court applies the principles set out in Art.7(1) in an exemplary manner.

---

[211] See particular court decisions in the footnotes below.

[212] Djordjevic in Kröll CISG op cit note 1 at Art.4 para 38

[213] High Court Cologne (*Oberlandesgericht Köln*) 16 U 62/07 (Clout case 1231); High Court Düsseldorf (*Oberlandesgericht Düsseldor*f) I 17 U 20/02 or Federal Supreme Court of Switzerland (*Schweizerisches Bundesgericht*) 4C 314/2006

[214] Djordjevic in Kröll CISG op cit note 1 at Art.4 para 39

[215] High Court Munich (*Oberlandesgericht München*) 23 U 2421/05 (Clout case 826) or High Court Hamburg (*Oberlandesgericht Hamburg*) 1 U 31/99 (Clout case 348)

[216] ie: High Court Hamburg (*Oberlandesgericht Hamburg*) 14 U 169/99

7.5 Case 5: High Court Koblenz (*Oberlandesgericht Koblenz*) 2 U 108/13

7.5.1 Abstract

The plaintiff (the 'seller') is an Italian producer of natural stone tiles. The plaintiff concluded a contract with the German defendant (the 'buyer') for the sale of natural stone tiles. The defendant claimed that the tiles contained incorrect calibrations and therefore did not conform to the contract. Notwithstanding, the defendant installed 80% of the natural stone tiles in a sample space. Upon completion of the sample, the defendant discarded the tiles. The seller claimed payment of the purchase price under Art. 53 before the court. He argued that the buyer's notice of defects was unsubstantiated.

To begin with, the High Court found that the sales contract at hand is governed by the CISG.

In general, the court held that after delivery of the goods the seller was entitled to claim payment of the purchase price in accordance with Art. 53, 58 (1). The court stressed that the CISG does not explicitly contain the right to suspend the payment of the purchase price in the case of defective performance. Having said that, the court considered the option of an external gap-filling in accordance with Art.7 (2). The court, however, argued that this question is irrelevant if the defendant does not have a claim for substitute delivery in the present case which would be the ground for a right of retention. Therefore, the court eventually left the question if a right of retention exists with the aid of external gap-filling unanswered.

For this reason, the court then considered the possibility of a claim for substitute delivery under Art. 46 (2):

Firstly, such claim requires a defect under Art.35. Therefore, the court determined whether the natural stone tiles did conform to the contract or not. The court expressed its doubts on whether the deviation had the significance to constitute an unconformity with the contract. In conclusion, the court held that it is ultimately irrelevant for the present case whether the tiles do conform with the contract or not. For this reason, said question was not answered by the court.

Secondly, the claim for substitute delivery requires the notification of the defect in accordance with Art. 38, 39. In this context, the court addressed the question if the buyer had given notice of the defects within reasonable time. As described in detail in case 3, the buyer is obliged to examine the goods in as short as time as is practicable under the circumstances (Art. 38). In addition, Art. 39 states that the buyer loses the right to rely on the lack of conformity if he does notify the seller within reasonable time after he (ought to have) discovered the defect. The court expressed its doubts whether the notice nine days after delivery was still within reasonable time. It came to the conclusion that the defendant eventually failed to give notification within reasonable time. Once again, however, the court stated that this question ultimately is irrelevant for the present case.

Even if the notification would have been given in time, the defendant's claim of substitute delivery would have been unjustified:

The conduct of the defendant led to a waive of his claim for subsequent delivery. In light of the principle of good faith, one cannot install and discard 80% of the goods and thereafter demand on subsequent delivery. The court held that such behaviour contradicts the principle of *venire contra factum proprium* which is derived from Art.7 (1).

Therefore, the defendant has no claim for substitute delivery under Art. 46 (2). As a consequence, the defendant has, in any case, no right of retention. Thus, the plaintiff's claim for payment of the purchase price under Art. 53 is justified.

7.5.2 Analysis of the Verdict in Light of Art. 7

The case at hand contains two main legal subjects: On the one hand, it deals with the question whether the tool of external gap-filling under Art. 7 (2) opens the Convention up to a right of retention. On the other hand, the court applies the good faith principle with respect to the right of substitute delivery.

Firstly, with regard to the remarks on the right of retention the High Court outlines that the Convention does not recognise the right to suspend their own performance after defective delivery of the other party. The CISG only sets forth the conditions under which a party can suspend their performance before the goods were delivered (Art. 71). Therefore, the court considered the option of a right to suspend a party's own performance through external gap-filling under Art.7 (2) via domestic law. Eventually, the court did not provide any answer to whether the defendant could

suspend the payment of the purchase price or not. In summary, the court applied the CISG autonomously. This can not be taken for granted, since the German domestic law recognises a right of retention in such cases.[217]

Secondly, and this is the essence of the case, the court applied the principle of good faith. As depicted above, the court held that it is contradicting behaviour to notify the seller about a defect in the first place. And then, install most of the goods only to discard it afterwards. Such behaviour, the court stated, contradicts the *venire contra factum proprium* principle. In this case, the court uses good faith as a principle of interpretation. Once again, the court does not apply the principle in a strict dogmatic way (which would be the application via Art.7 (2)). Nevertheless, the court's remarks are perfectly in line with the 'spirit' of the Convention: As depicted earlier, Articles 8 (3) and 16 (2)(b) recognise the *venire contra factum proprium* principle. In addition, the court exclusively refers to the Convention. Therefore, it can be said that the court preserves the principles of internationality and autonomous interpretation. All things considered, the court's decision is perfectly in line with the principles set out in Art.7 (1).

[217] Section 320 GCC

7.6 Case 6: High Court Hamm (*Oberlandesgericht Hamm*) 13 U 102/01

7.6.1 Abstract

The defendant is German defendant (the 'seller') of computer memory modules. On 3 January 2000, the Chinese plaintiff (the 'buyer') and the seller agreed on the purchase of these memory modules by phone. The order was then confirmed by fax. The seller agreed to deliver the goods 'as soon as possible'. Before this order, the involved parties had been having prior business relationships. On 5 January 2000, the seller performed the order by handing the memory modules to a carrier. Subsequently, the goods arrived at the buyer's storage facilities on 7 January. At the same day, however, the buyer sent a cancellation fax to the seller and returned the goods to the customs warehouse of the carrier.

Later, the parties reached a partial settlement that obliged the buyer to accept delivery and pay the purchase price partially. Before the court, the seller claimed payment of the remaining purchase price plus interests and reimbursement of his attorney's fees.

The buyer, however, argued that he successfully avoided the contract because of late delivery under Art. 49 (2)(a) or (b). For this reason, there was no basis for the claim of the purchase price in the present case. With regard to the late delivery, the buyer went on to say that it was practice between the parties to delivery promptly.

The seller replied that the sales contract was still in effect because there was no agreement on a strict time limit for performance. Certainly, in previous cases deliveries were effected on very short notice. That was, however, only possible because in previous cases the credit line was not fully utilised. Such credit line was concluded between the parties in favour of the buyer. In the instant case the buyer owed payment of the purchase price from a previous contract. Therefore, the credit line was fully utilised. Delivery was only made after the purchase price from the previous contract was settled which was on 4 January 2000.

The High Court held that the CISG governed the legal relations between the parties. Under the CISG, the parties orally concluded a contract on 3 January 2000 which concluded the condition to

deliver the goods ‘as soon as possible’. A sales contract may be concluded in any form in accordance with Art. 11.

Then, the court addressed the question whether the buyer had successfully avoided the contract under Art. 49 (2) or not. The court quoted Art. 33 (a) which states that the time for effecting delivery must be derived from the interpretation of the contract. Therefore, one has to interpret the intent of the parties in accordance with Art. 8. The wording of the agreed ‘as soon as possible’ was vague. One could not determine the exact time for effective delivery from such wording. However, the parties ‘are bound by [...] any practices which they have established between themselves’ in accordance with Art. 9 (1).[218] Previous deliveries had been performed the latest at the following day. Such practice applied to the present contract under Art.9 (1). For this reason, the court found that the seller was obliged to perform the delivery of the memory modules ‘at the latest at the following day of the written order’.[219]

However, the buyer may not rely on the delayed delivery. The buyer acknowledged that delivery would only be made after the previous purchase price was settled and the granted credit line was not fully utilised. It was up to the buyer to create the prerequisite for a timely delivery. Therefore, the buyer acted contrary to his previous behaviour by avoiding the contract because of delayed delivery. Such behaviour violates the *venire contra factum proprium* principle which is derived from the good faith principle stated in Art.7 (1).

For this reason, the contract was not avoided under Art. 49 (2)(a) or (b). As a consequence, the buyer is obliged to pay the remaining purchase price in accordance with Art. 53. Moreover, the claim for reimbursement of the seller’s attorney’s fee is justified under Art. 61(1)(b), 74. Lastly, the seller is also entitled to claim interests in accordance with Art. 78.

7.6.2 Analysis of the Verdict in Light of Good Faith

The main issue of the present case is if the buyer can avoid the contract under Art. 49 (2). To begin with, the court states that the delivery is indeed delayed. However, the court decided that the seller may not rely on the delayed delivery with regard to the *venire contra factum proprium* principle. This principle is derived from the doctrine of good faith. It is, as described earlier, applicable in cases where a party’s behaviour is contradictory to its previous conduct. In the present case, the

[218] Art. 9 CISG

[219] High Court Hamm (*Oberlandesgericht Hamm*) 13 U 102/01

court's argument in favour of the application of this principle is easy to follow: It would be unreasonable to expect delivery of the goods with the consequence to exceed the granted credit line. Hence, it was reasonable to wait until the payment from the previous purchase contract was settled. Therefore, it was the buyer who was responsible for the delay. The following avoidance of the contract on basis of the delayed delivery contradicted the previous behaviour. As mentioned earlier, the *venire contra factum proprium* principle is well-established within the CISG. It is found in Art. 8 (3) and 16 (2)(b). Therefore, it is widely recognised to be a general expression of good faith in the Convention.[220] Additionally, it has to be said that the court applies the Convention in accordance with the principles of internationality and uniformity. All in all, the court's decision is perfectly in line with the principles set out in Art. 7 (1).

[220] Sänger BeckOK CISG op cit note 22 Art.75 para.8

7.7 Case 7: Geneva Pharmaceuticals Technology Corp. v Barr Laboratories, Inc., et al. US Court of the Southern District of New York 98 Civ. 861, 99 Civ. 3607

7.7.1 Abstract

The Canadian defendant produces a chemical substance (clathrate) for the manufacture of a medication (warfarin sodium). The plaintiff is an American pharmaceutical company that desired the production of such warfarin sodium. Therefore the plaintiff requested samples of the chemical substance from the defendant. The defendant supplied the plaintiff with the samples and confirmed that it would support the plaintiff's application for approval by the Food and Drug Administration (*FDA*). Hence, the defendant confirmed to the FDA that it would supply the plaintiff with the chemical substance.

However, shortly after the defendant concluded an exclusively agreement about the supply of clathrate with a third party. That contract would have been violated if the defendant were to proceed with the sale of the chemical substance to the plaintiff.
After the FDA gave permission for the production of the medication, the plaintiff submitted an order for the purchase of clathrate. The defendant refused such purchase order.

The plaintiff claims that, under the CISG, a contract for the sale of clathrate was concluded. By refusing to supply, the plaintiff states, the defendant violated the agreement and should be liable. The plaintiff argues that according to industry practice a contract was already concluded when the defendant agreed to support the plaintiff's application for approval by the FDA.

The Court of the District of New York found that the alleged purchase contract in the instant case was governed by the CISG. Therefore, the general rules on the formation of the contract Art. 14 and 18 are applicable. Subsequently, an agreement is concluded by offer and agreement of the contracting parties. According to Art. 14, for a proposal to be considered as an offer it must be 'sufficiently definite' and it must indicate an intent to be bound.
The court also recognised Art. 9 which states that usages and industry practices are automatically incorporated to an agreement, unless otherwise agreed. The court held that there was indeed the industry 'custom and the understanding of both the manufacturer and the supplier that, upon the

issuance of the Notice of Compliance, the supplier will supply the product.' In addition, the offer also met the requirements of definiteness as the good was to be indicated as clathrate in commercial quantities. In conclusion, the court stated, the conditions of an offer were fulfilled. With regard to the acceptance of the offer the court applied Art. 18 (3). Art. 18 (3) refers to the conduct of the parties:
'The offeree [...] indicate assent by performing an act'.[221] In the case at hand, the court held that by sending the reference letter to the FDA and supplying the plaintiff with samples the defendant accepted the offer by conduct. Therefore, the plaintiff's offer was accepted by the defendant. Accordingly, a sales contract was concluded.

The court explicitly stressed that it interpreted the statements and conduct of the parties with regard to the concept of good faith. According to the court, 'CISG Art. 7(1) embodies a liberal approach to contract formation and interpretation, and a strong preference for enforcing obligations [...].'

Lastly, the court also briefly also considered claims under US (state) law. These claims, however, were either preempted by the CISG or – in the case of tort claims – the requirements were not met.

In summary, a sales contract between the plaintiff and the defendant was concluded. By not supplying the plaintiff with clathrate, the defendant violated the contract. The defendant therefore owes performance to the plaintiff.

7.7.2 Analysis of the decision in light of Art. 7(1)

In the instant case, the main doubt concerned the formation of the contract. In this respect, it was noteworthy that the court chose a liberal approach towards the interpretation of the statements and the conduct of the parties. Those were interpreted widely. This is motivated, as the court stated, by the principle of good faith which is laid down in Art. 7 (1). According to the court, the principle of good faith puts emphasis on industry customs and shows a 'strong preference for enforcing obligations.'
On first glance, the court's application of good faith does not appear particularly noteworthy: The court used good faith as a tool of interpretation. This use of good faith is explicitly stated in Art.7 (1). The court refers to good faith explicitly as a 'general principle'. This is, however, nowadays

[221] Art.18(3) CISG

generally accepted and therefore not particularly remarkable. Having said that, when studied more closely, the court's ruling becomes more interesting. One has to bear in mind that neither the CISG nor the American law recognise the so-called *culpa in contrahendo* doctrine which is derived from the good faith principle.[222] The *culpa in contrahendo* doctrine imposes the duty to negotiate with care. As a consequence, a party can be held liable for the expectations it created during the negotiations. The German Civil Code codified the *culpa in contrahendo* doctrine in section 311 GCC. Under the German Civil Code, the plaintiff could most likely successfully claim reimbursement against the defendant subject to section 311 GCC. In the case at hand, however, the court comes to a similar result by assuming that the contract between the plaintiff and the defendant was concluded at a very early stage. The court uses the good faith principle and the industry practice to apply Art. 14 very widely.

Art. 14 requires an offer to be 'sufficiently definite'. In the present case, it is at least questionable if the proposal by the plaintiff complies this requirement. For a proposal to be considered an offer under Art. 14, it needs to indicate the goods as well as the quantity and the purchase prince.[223]

Although the good can clearly be identified as clathrate and the purchase price was also agreed, it remains unclear if the term 'industrial quantities' are sufficiently specified. It is, however, doubted that the similar amount of 'a larger quantity' meets the specificity requirement.[224] All things considered, the court applied Art. 14 – in light of the good faith principle – very widely with the objective to hold the defendant liable for the created expectations. Noteworthily, by creating a contractual link between the parties the court imposed obligations to the parties that exceed the duties under the *culpa in contrahendo* doctrine: Under the *culpa in contrahendo* doctrine the defendant would not owe performance but merely reimbursement.

Lastly, one has to question if the decision of the court is in line with the principles of internationality and uniformity stated in Art. 7 (1). Following these principles, it can be derived that the application of domestic rules and principles is the avoided. In the instant case, the court applies good faith in a way that exceeds the way good faith is used in American law. For instance, as mentioned earlier, the good faith duty under the UCC only refers to the performance and not to the

---

[222] See chapter 5 and 6

[223] Ferrari *Kröll CISG* Kröll CISG op cit note 11 at Art.14 para.18

[224] Austria Supreme Court 2 Ob 547/93; Although, one could argue that "industrial" is more specific than "a larger".

formation of the contract.[225] Actually, the court finds its decision exclusively within the Convention. As to domestic claims, the court held that the CISG mostly preempted such claims.

The decision of the court is therefore perfectly in line with the principle of internationality which is widely understood as a call for the courts to seek for solutions that are likely to be recognised by the courts of other member states.[226] In conclusion, the court did not violate the principles of internationality and uniformity.

[225] See Chapter 5.3.3 'Good Faith in the Restatement of the Law and the Uniform Commercial Code'

[226] See Chapter 6.2 'The International Character and the Uniformity in the Application of the CISG'

7.8 Case 8: TeeVee Toons, Inc. & Steve Gottlieb, Inc. v Gerhard Schubert GmbH
US Court of the Southern District of New York 00 Civ. 5189 (RCC)

7.8.1 Abstract

The plaintiff ('the buyer') is a US-company that developed and produced the so-called 'Biobox' which is an environmental friendly box for packaging cassettes. The defendant ('the seller') is a German manufacturer of packaging machinery. In February 1995, the seller and the buyer concluded a contract for the sale of a production system for the Biobox. In the sequel, the construction process of the packaging machinery was delayed by two years. Furthermore, after the packaging plant was finally delivered in August 1997, it often malfunctioned. The buyer notified the seller about these issues in the course of October 1997. The plaintiff claimed reimbursement for the sustained damages and lost profit before the court.

The New York Southern District Court found that the CISG is applicable in the present case. Therefore, basis of the claim by the buyer was Art. 74, 35. First requirement of such claim is the existence of a defect in accordance with Art. 35. The court held that the plant was not fit for its ordinary and particular purpose and therefore defect under Art. 35(2)(a)-(b).

Then, the court addressed the issue whether the buyer met the notification criteria set in Art. 38, 39. As described in an earlier case, the buyer loses the right to rely on the lack of conformity if he does not notify the seller within reasonable time after he discovered the defect.[227] The court found the two-month period between delivery and notification reasonable. As a consequence, the court stated, the notification was timely.

The seller argued that the terms and conditions attached to the sales agreement included a disclaimer of warranties. The buyer, however, brought up that the parties orally agreed that such clause of the terms and conditions would not apply to the agreed sales contract.
With regard to this issue, the court stated that the terms and conditions are only effective if both parties intended it to be part of the contract at the time of the conclusion of the contract. Therefore, one has to interpret the intent of the parties' statements in accordance with Art. 8. Additionally, one

[227] See remarks case 3 (BGH VIII ZR 259/97)

must interpret the intent in light of 'the general principles upon which [the CISG] is based.'[228] The court further stated that 'it often happens that parties use standard form contracts [...] to which they pay no attention such that [a] rule under which such a clause would always prevent a party from invoking prior statements or undertakings would be too rigid and often lead to results which were contrary to good faith.' The court stressed that 'the notion of good faith in international trade must underlie any CISG interpretation.'
Eventually, the court decided that at the time of the conclusion of the contract, the buyer's subjective intent was not to include the standard terms. For this reason, the seller could not rely on the disclaimer of warranties.

Lastly, the court noted that the foreseeability requirement under Art. 74 was identical to that provided by US law. Therefore, the court referred to US case law as a guideline. In conclusion, the court decided that the damage (including the lost profit) was foreseeable. The court decided that the buyer's claim for reimbursement of the damages under Art. 35, 74 was justified.

7.8.2 Analysis of the Verdict in Light of Art. 7 (1)

There are three remarks of the New York Southern District Court that are worth taking a closer look at. To begin with, the court held that the notification of the defect two months after delivery was timely. Art. 39 (1) simply states that notice is to be given 'within a reasonable time.'[229] Such term is indefinite and therefore requires further clarification. Having said that, the court found the two-month period between delivery and notification reasonable without any further remarks. However, the idea behind the provision of Art. 39 is to give the seller the opportunity to review and verify a claimed damage.[230] Hence, it is widely accepted among scholars[231] and by civil law courts[232] that the buyer is obliged to carry out test performances of the goods. This being said, the two-month notification period after delivery appears at least inappropriately long.

---

[228] TeeVee Toons, Inc. & Steve Gottlieb, Inc. v. Gerhard Schubert GmbH
US Court of the Southern District of New York 00 Civ. 5189 (RCC)

[229] Art. 39

[230] Kröll CISG op cit note 11 at Art. 39 para 54

[231] Saenger BeckOK BGB op cit note 22 at Art. 39 para 8

[232] German Federal Supreme Court (*Bundesgerichtshof*) VIII ZR 259/97 (Clout Case 270)

Then, one has to take a look at the court's remarks with regard to the issue whether the terms and conditions, which included a disclaimer of warranties, became part of the contractual agreement. As depicted above, the court interpreted the parties' intentions with particular regard to the principle of good faith. The use of good faith as a tool of interpretation is explicitly stated in Art. 7 (1) and therefore not very controversial. It should be noted that the court applies good faith with regard to the interpretation of the parties' intent. Some scholars take the view that good faith is limited to its application as a tool of interpretation exclusively in relation to the Convention.[233] However, as described earlier, the prevailing view among scholars and courts applies good faith with regard to the intent and conduct of the parties as well.

Lastly, the court decided if the damage was foreseeable which is required under Art. 74. The court held that the foreseeability prerequisite is identical to the one under US law. For this reason, the court referred to the English case *Hadley v Baxendale*[234] and the US case *Delchi Carrier SpA v Rotorex Corp.*[235] These references contravene the principles of international and autonomous interpretation of the Convention under Art. 7 (1). The reference to domestic law is the *ultima ratio*. Even though the requirement of foreseeability is identical to the requirement in the Convention, the CISG is to be interpreted out of itself. In conclusion, the court violated Art.7 (1).

[233] See Chapter 6.3 'The Observance of Good Faith in International Trade'

[234] *Hadley v. Baxendale,* [1854] EWHC J70

[235] *Delchi Carrier SpA v Rotorex Corp* 71 F.3d 1024, 1995

7.9 Case 9: Downs Investments Pty Ltd v Perjawa Steel SDN BHD, Supreme Court of Queensland (10680/1996)

7.9.1 Abstract

The plaintiff (the 'seller') is an Australian iron trading company. The seller entered into a contract with the Malaysian defendant (the 'buyer') for the purchase and shipment of scrap steel. The parties agreed inter alia that the buyer was obliged to provide an irrevocable letter of credit prior the shipment. In the sequel, the management structure of the buyer changed. Under this new management structure, the buyer needed permission from an executive committee before it could provide the letter of credit. The executive committee, however, could not communicate any instructions within a short period of time. For this reason, the buyer failed to provide the letter of credit. As a consequence, the seller terminated the contract. For the purpose of the shipment of the scrap steel, the seller leased a vessel at his expense. In addition, the seller had to store the scrap steel at his own expense The seller claimed reinbursement for the incurred costs before the court.

The Supreme Court of Queensland held that basis for the seller's claim was Art. 74, 75 because the contractual agreement between the parties was governed by the CISG. Art. 74, 75 require the avoidance of the contract. In accordance with Art. 64 the seller was permitted to declare the avoidance of the contract if the buyer failed to perform any of his obligations that amounted to a fundamental breach of the contract. For this reason, the court addressed the issue whether the failure to provide the letter of credit constitutes a fundamental breach under Art. 25 or not. In the court's view, the buyer's 'failure to establish a letter of credit in the circumstances of the case was a failure by the buyer to meet his obligation to pay the price of the goods'.[236] The court argued with the wording of Art. 54, which states that the obligation to pay the price 'includes taking such steps and complying with such formalities as may be required under the contract'.[237] Therefore, the court found that the issue of the letter of notice was a primary obligation of the buyer. The breach against the obligation constituted a fatal violation of the contractual agreement. Having said that, the court also addressed the question whether the seller had to show consideration for the new management

---

[236] *Downs Investments Pty Ltd v. Perjawa Steel SDN BHD* (Clout Case 631) Supreme Court of Queensland 17 November 2000 (10680/1996)

[237] Art. 54 CISG

structure with regard to the principle of good faith or not. However, the court concluded that the 'required executive management committee approval for a letter of credit, and the refusal of the committee was held to be no excuse at law'.[238] Therefore, the failure to provide a timely letter of credit was a fundamental breach of the contract under Art. 25.

Lastly, the court addressed the question whether the plaintiff fulfilled his duty to mitigate the damage in accordance with Art. 77. The plaintiff sold the scrap steel to another buyer within two months. In the court's view, this satisfied the mitigation duty under Art. 77. In conclusion, the court decided that the seller's claim for reimbursement of the sustained costs was justified under Art.74, 75.

7.9.2 Analysis of the Verdict in Light of Art. 7 (1)

Main issue of the instant case was the application of the fundamental breach under Art. 25 in a situation where the parties included additional obligations to the sales contract. In this context, the court had to determine how much importance the parties attributed to the additional obligation at the time of the conclusion of the contract. The requirement of a fundamental breach can only be fulfilled if the additional obligation was of significance to the parties. The court used the wording of Art. 54 to come to the conclusion that the issue of the letter of notice was a 'primary obligation.' The court argues within the Convention. Therefore, the court's arguments respect the principles of internationality and autonomous interpretation under Art.7 (1). Then, the court considered the question whether the seller had to show consideration for the new management structure with regard to the principle of good faith. In this context, the court uses good faith as some kind of corrective measure. However, the remarks of the court stay vague. It is unclear if the court considered the option to impose a duty of considerateness. This would be remarkable, since common law jurisdictions do not derive such duties from the concept of good faith.[239] The CISG, however, recognises good faith as a substantive doctrine from which generally duties of considerateness can be derived.[240] If this is the way the remarks of the court are to be understood, this would be the only case – discussed in this thesis – that considers the application of good faith in

---

[238] *Downs Investments Pty Ltd v. Perjawa Steel SDN BHD* (Clout Case 631) Supreme Court of Queensland 17 November 2000 (10680/1996)

[239] See Chapter 5 'The Concept of Good Faith in Common Law'

[240] See Chapter 6.3 'The Observance of Good Faith in International Trade'

a way that exceeds the domestic understanding of good faith. Having said that, the court eventually does not apply good faith as a corrective measure. It would have been interesting to see some more detailed remarks by the court with regard to the application of good faith. In conclusion, one can simply state that the court preserves all of the principle laid down in Art. 7(1).

7.10 Case 10: Castel Electronics Pty v Toshiba Singapore Pte Ltd, Federal Court of Australia (1080/2010)

7.10.1 Abstract

The plaintiff (the 'buyer') is an Australian distributor for electronic devices. The defendant (the 'seller') is a manufacturer of electronic products incorporated in Singapore. The parties concluded a contract of distributorship of so-called set-top boxes which the defendant produced. Set-top boxes are electronic devices that convert digital signals onto analogue television receivers. After the resale, the plaintiff received many customer complaints. It became apparent that the set-top boxes did not comply with the contractual agreed conditions. As a consequence, the buyer claimed reimbursement for the incurred damages before the court under Art. 74. The seller, however, denied the claims. In particular with regard to the amount of damages, the defendant claimed that Art. 74 was limited to the damages the defendant 'foresaw'. Therefore, in any case the claim was limited to a much smaller amount than the amount demanded by the plaintiff.

Firstly, the Federal Court of Australia confirmed the application of the CISG. Secondly, the court held that the set-top boxes did not conform to the contractual agreed terms. Therefore, they were defective under Art. 35. Then, the court confirmed the existence of the further prerequisites of Art. 74. Lastly, the court considered the objection of the seller that the claim under Art. 74 was limited to the amount which the defendant foresaw. The court stated that Art. 74 refers to the 'to consequences which [are], objectively speaking, foreseeable by the breaching party.'[241] For this reason, one has to ask whether a reasonable party in the same situation could expect the loss from its non-performance. In this context, a reasonable considerations of a party have to be viewed in light of the principle of good faith under Art. 7 (1). As a consequence, the court concluded that it was foreseeable at the time of the conclusion of each of the relevant sales contracts that 'failures, recalls and delays in supplying replacements of the [...] products would have had a repercussive effect in reducing [the distributor's] margins of profit'.[242] In conclusion, the limitation of damages with regard to the foreseeability under Art. 74 had no impact on the amount of the reimbursement. The plaintiff's claim was successful.

---

[241] Federal Court of Australia *Castel Electronics Pty v Toshiba Singapore Pte Ltd*, FCAFC 55 (Clout case 1132)

[242] Federal Court of Australia *Castel Electronics Pty v Toshiba Singapore Pte Ltd*, FCAFC 55 (Clout case 1132)

7.10.2 Analysis of the Verdict in Light of Art. 7

This case only briefly mentions the principle of good faith as a tool to interpretation of the Convention. In addition, the court used good faith to specify a term within the CISG and not to interpret the party's conduct. This use of good faith is explicitly stated in Art. 7 (1). Therefore, the application of the court is quite beyond dispute. It is noteworthy, however, that the court refers to the 'principle of good faith' and not explicitly to Art. 7 (1). These remarks by no means violate any of the principles set out in Art. 7 (1). However, these remarks do make it less appealing to foreign courts to refer to the judgement, since they stay vague and broad. Notwithstanding, also the principles of internationality and autonomous interpretation are preserved.

8. Conclusion

As depicted earlier, Art. 7 (1) contains three principles of interpretation: the internationality, the autonomous interpretation and the observance of good faith. One has to bear in mind that the principle of autonomous interpretation was of special importance to the drafters of the Convention For this reason, they tried to use a plain language – a so-called '*lingua franca*' – where is was possible. With regard to good faith, however, the opposite is the case: most domestic legal systems have their own understanding of good faith. Therefore, as depicted in earlier chapters, the scope and content of good faith under Art. 7 (1) was (and is) subject of ongoing discussions among scholars and courts.

This section summarises the essential findings of the cases. Thereafter, this chapter will draw conclusions on how the application of good faith under Art.7 (1) differs in Germany, Australia and the District of New York. Particular attention is paid on whether the application of good faith is in line with Art. 7's two accompanying principles (internationality and autonomous interpretation) or not.

Noteworthily, with the exception of case 1, all German court decisions contained the *venire contra factum proprium* principle which is derived from the good faith doctrine. In case 2, 3 and 6 the court applied the principle with the consequence that a party cannot rely on a right because it would contradict its previous behaviour. In case 4 and 5 the courts imposed an additional unwritten obligation with regard to good faith under Art. 7 (1). In all of these cases, the court applied good faith as a substantive principle. In case 1, which is the only case where the *venire contra factum proprium* doctrine is not applied, the court uses good faith as a tool of interpretation. This use is the original approach of good faith which can be directly derived from the wording of Art. 7 (1). In this case, however, the court derives the positive duty to attach the terms and conditions to the contract from such interpretation. Therefore, once again, the court eventually applies good faith as a substantive doctrine. As a result, one can conclude that all selected German cases apply good faith as a substantive principle.

There are a few more aspects one should note from the selected German cases: To begin with, the prevailing view among scholars is that good faith – as a substantive principle – is to be applied via

Art. 7 (2).[243] The wording of Art. 7 (1) and the legislative history do not leave room for a direct application of good faith as a substantive principle via Art. 7 (1). Contrarily, none of the courts follow this approach. Of course, one can argue that courts often choose more pragmatic and less dogmatic approaches. Nevertheless, it should be noted that the courts did not apply good faith via Art. 7 (2). In fact, the author of this thesis is not aware of any CISG cases of the three countries where a court applies the substantive principle of good faith via Art. 7 (2).

Then, it appears that specific case groups emerged from the principle of good faith. For instance, the duty to attach the terms and conditions to the contract (case 1) was applied in several (international) court decisions.[244] Same applies – to a lesser extend – to the application of good faith in the cases 2, 3 and 4. There are as well decisions on the elimination of the requirement of avoidance of the contract under Art. 74 when the seller ultimately and seriously refused to perform (case 2).[245] There are as well cases that deal with the notification under Art. 38, 39 in light of good faith. In addition, there are quite a few cases where the courts imposed the duty for the seller to notify the buyer about his intention to remedy the defects under Art. 48 (case 4).[246] Noteworthily, all of these similar cases come from civil law jurisdictions. However, that does not mean that the courts – with one exception – violated the principles of international and autonomous application of the Convention. As depicted above, the *venire contra factum proprium* doctrine is well established within the CISG. The *venire contra factum* principle is the underlying principle of Art. 8 (3) and 16 (2) (b). Therefore, it is widely recognised to be a general expression of good faith in the Convention. In case 1, the court derives the duty to attach the terms and conditions from the principles of cooperation and loyalty, which stem from the good faith doctrine. As shown earlier, both are found in Art. 32 (3) and 60 (a). They are therefore recognised as standard of conduct within the Convention.

However, there is one exception among the German cases. In case 3, the High Court Karlsruhe as well as German Federal Supreme Court violated the principles of internationality and autonomous interpretation under Art. 7 (1). In this case, the courts decided on whether it is contradictory behaviour not to mention the buyer's failure to meet the notification duty under Art. 38, 39 and then rely on it before the court. Both courts referred to case law regarding a similar provision under the

---

[243] See Chapter 6.3 'The Observance of Good Faith in International Trade'

[244] See Case 1 BGH VIII 60/01

[245] See Case 2 High Court Munich (*OLG München*) 7 U 2959/04

[246] See Case 4 BGH VIII ZR 3984/12

German Commercial Code. As depicted earlier, the reference to domestic law is to be avoided. In fact, it is the *ultima ratio*. In case 3, the courts could and should have referred to foreign court decisions in similar cases.[247] On this basis, they could have developed criteria without explicitly referring to German case law. In referring to German case law, however, the courts violated the principles of internationality and autonomous interpretation of the Convention.

The Australian case *Downs Investments Pty Ltd v Perjawa Steel SDN BHD* (case 10) is eye-catching. In this case, the court defines the fundamental breach under Art. 25. Then, in the end, the court considers applying good faith as a corrective measure. It raises the question whether a duty to show consideration for the other parties' new 'management structure' exists. Unfortunately, the court's remarks in this section stay vague. Therefore, one can only speculate if the court considered applying good faith as a corrective measure.
It is, however, to be noted that Australia does not use good faith as a corrective measure on a domestic level. For this reason, such application would exceed the domestic understanding of good faith. Since the CISG recognises such use of good faith, this decision is a potential role model for the application of the Convention apart from domestic understanding – a role model in the application of the principles of internationality and autonomous interpretation.

Contrarily, *Castel Electronics Pty v Toshiba Singapore Pte Ltd* (case 9) is not extremely exciting: In this case, the court only uses good faith as a tool of interpretation. The court applies good faith in order to define the requirement of foreseeability under Art. 74. The use of good faith as a tool for interpretation is explicitly stated in the wording of Art. 7 (1).

In both American cases , the courts use good faith as a tool of interpretation. As described earlier, the use of good faith as a tool of interpretation can directly be derived from the wording and is therefore not exciting. However, in *Geneva Pharmaceuticals Technology Corp. v Barr Laboratories* (case 7), the New York Southern District Court applied good faith in order to determine whether a contract was concluded or not. In *TeeVee Toons, Inc. & Steve Gottlieb, Inc. v Gerhard Schubert GmbH* (case 8), the New York Southern District Court applied good faith in order to determine whether terms and conditions became part of the contract or not. This is insofar remarkable as the UCC does not recognise good faith with regard to the formation of the contract. Good faith under

[247] ie: Vienna International Arbitral Center (Internationales Schiedsgericht der Bundeskammer der gewerblichen Wirtschaft - Wien) SCH-4318 (Clout case 94)

UCC only refers to the performance of the contract.[248] Therefore, in both cases the applied scope of good faith exceeds the understanding of good faith under domestic law. Hence, both decisions can be regarded as stellar examples of the autonomous interpretation of the CISG.

Apart from the findings in the common law cases, one should bear in mind that the common law jurisdictions applied good faith to a much smaller extend than Germany or other civil law jurisdictions. On the one hand, there are a total of 544 German decisions in the PACE database from which 23 apply good faith according to the search form.[249] On the other hand, there are 304 US cases from which 6 apply good faith. Admittedly, the search form is inaccurate but it is at least an indicator of the general application of good faith under Art. 7 (1). However, it should not be forgotten that the United States are one of the common law countries that lean more towards the use of the good faith principle.[250] Therefore, this impression is reinforced by a look at the application of good faith under the CISG in the United Kingdom and Australia. With regard to the United Kingdom, the author is not aware of any English litigation or arbitration case that applies good faith under the CISG. Moreover, the PACE database reflects only two Australian courts that directly apply good faith under the CISG. In conclusion one can state that German courts tend to apply good faith under Art. 7 (1) much more often than courts from the selected common law jurisdictions.

Furthermore, German courts do not only apply good faith more often, they also have a way more offensive approach towards the application of good faith. As described above, in five of the six cases the courts applied good faith as a general principle. It should be recalled that during the Vienna Conference it were for the most part civil law delegates that argued for a general principle of good faith.[251] In contrast, the common law courts exclusively applied good faith as a tool of interpretation.[252] Their representatives were in favour of leaving good faith out of the CISG.[253] Also, as shown earlier, German law has a more generous approach towards the application of good faith. [254] Therefore, it can be argued that the jurisdiction's approach towards good faith is reflected

---

[248] See Chapter 5 'The Concept of Good Faith in Common Law'

[249] http://www.cisg.law.pace.edu/cisg/search-cases.html, accessed on 27 January 2018

[250] See Chapter 5.2 'Good Faith in American Law'

[251] See Chapter 6.3 'The Observance of Good Faith'

[252] With the exception of Case 9; However, in this case good faith is only considered and eventually not applied.

[253] See Chapter 6.3 'The Observance of Good Faith'

[254] See Chapter 4 'The Concept of Good Faith in German National Law'

by their court's application of good faith. This holds true for the number of times good faith is applied as well as the way the doctrine is applied.

Lastly, it should be noted that the German courts do not deviate from the use of good faith under domestic law. In all cases, the application of good faith corresponds to a case group that was developed under domestic law. It seems as if the courts are oriented towards domestic case groups. In contrast, the New York District Courts applied good faith with regard to the formation of the contract. As depicted earlier, good faith is not applied in such way under the UCC.

In summary, it can be said that the courts applied good faith – with one exception – in line with the principles of internationality and autonomous interpretation under Art. 7 (1). However, as depicted above, there are differences in the application of good faith between the different jurisdictions. German courts apply good faith more often and as a general principle while the selected common law jurisdictions apply good faith to a lesser extend and less often. It can therefore be concluded that the domestic approach towards good faith influences the court's application of good faith but not to the extend that the principle of autonomous interpretation of the Convention is violated.

However, one main reason for the principles of internationality and autonomous interpretation of the CISG was the goal to achieve a uniform application of the Convention.[255] Uniform application includes the avoidance of so-called forum shopping. Forum shopping means 'choosing a forum with jurisprudence more favourable to one of the parties.'[256] Since the courts apply good faith differently within the different jurisdictions, it has to be said that with regard to good faith there are still incentives to choose a more favourable forum. For instance, it makes sense for a party which wants to rely on the general principle of good faith to claim before a German court.

In conclusions, there are differences in the application of good faith between the jurisdictions. Those differences are, however, to be expected since the Convention is applied by domestic courts. Violation of the principles of internationality and the principle of autonomous interpretation are the exceptions and not the rule. Therefore, all in all it can be spoken of an autonomous interpretation of good faith under Article 7 (1).

---

[255] See chapter 6.2 'The International Character and the Uniformity in the Application of the CISG'

[256] Viscasillas Kröll CISG op cit note 11 at Art. 7 para 2

9. Bibliography

Primary Sources:

Statutes

Commercial Agents (Council Directive) Regulations 1993

German Civil Code BGB (*Bürgerliches Gesetzbuch*)

Restatement of the Law Second Contracts

Unfair Terms in Consumer Contracts Regulations 1999

Uniform Commercial Code

United Nations Convention on Contracts for the International Sale of Goods

Cases

Audiencia Provincial de Navarra, sección 3 2007/1227 (Clout case 1039)

Austrian Supreme Court (*Oberster Gerichtshof*) 2 Ob 547/93 (Clout case 106)

Austrian Supreme Court (*Österreichischer Oberster Gerichtshof*) 4 Ob 199/11b

AG v Wickman Machine Tool Sales Ltd [1974] AC 235

Audiencia Provincial de Navarra, sección 3 2007/1227 (Clout case 1039)

Burger King v Hungry Jack's Pty Ltd [2001] NSWCA 187

Delchi Carrier SpA v Rotorex Corp 71 F.3d 1024, 1995

Federal Supreme Court of Switzerland (*Schweizerisches Bundesgericht*) 4A 68/2009

Geneva Pharmaceuticals Technology Corp. v. Barr Laboratories, Inc., et al. [2002] 98 Civ. 861, 99 Civ. 3607 (Clout case 579)

German Federal Supreme Court (*Bundesgerichtshof*) BGH V ZR 108/53

German Federal Supreme Court (*Bundesgerichtshof*) BGH V ZR 11/67

German Federal Supreme Court (*Bundesgerichtshof*) BGH VI ZR 51/96

German Federal Supreme Court (*Bundesgerichtsho*f) BGH VIII ZR 259/97 (Clout case 270)

German Federal Supreme Court (*Bundesgerichtsho*f) BGH VIII ZR 60/01 (Clout case 445)

German Federal Supreme Court (*Bundesgerichtshof*) VIII ZR 394/12

Hadley v. Baxendale, [1854] EWHC J70

High Court Hamburg (*Hanseatisches Oberlandsgericht*) 1 U 167/95 (Clout Case 277)

High Court Karlsruhe (*Oberlandesgericht Karlsruhe*) 1 U 280/96 (Clout Case 230)

High Court Koblenz (*Oberlandesgericht Koblenz*) V ZR 1/94

High Court Koblenz (*Oberlandesgericht Koblenz*) 2 U 108/13

High Court Munich (*Oberlandesgericht München*) 7 U 2959/04 (Clout Case 595)

High Court Munich (*Oberlandesgericht München*) 21 U 2188/02

Hughes Aircraft Systems International v Air Services Australia [1997] 76 FCR 151

Interfoto Picture Library Ltd v Stiletto Visual Programmes Ltd [1989] 1 QB 433

Kirke La Shelle Co. v. Paul Armstrong Co. [1933] 3 NY 79, 188 NE 163

Lloyd Banks v Bundy [1975] QB 326

Montefiori v Montefiori [1762] 1 W Black R 363

Overlook Management BV v Foxtel Management Pty Ltd [2002] NSWCA 16

Pacific Brands Pty Ltd v Underworks Pty Ltd [2005] FCA 288

Reichsgericht RGZ 78 (7.12.1911)

Reichsgericht in RGZ 160 (24.03.1939)

Renard Constructions (ME) Pty Ltd v Minister for Public Works [1992] NSWRL 234

Robb v Green [1895] 2 QB 1

Royal Botanic Gardens and Domain Trust v South Sydney City Council [2002] 186 ALR 289

Tomlin v Ford Credit Australia [2005] NSWSC 540

Vienna International Arbitral Center (*Internationales Schiedsgericht der Bundeskammer der gewerblichen Wirtschaft - Wien*) SCH-4318 (Clout case 94)

Watford v Miles [1992] 2 AC 128

Secondary Sources:

Bamberger, Heinz Georg Roth, Herbert, Hau, Wolfgang & Poseck, Roman *BeckOK BGB* 43ed (2017) Beck, Munich

Bamberger, Heinz Georg Roth, Herbert, Hau, Wolfgang & Poseck, Roman *BeckOK CISG* 43ed (2017) Beck, Munich

Bell, Gary F. 'How the Fact of Accepting Good Faith as a General Principle of the CISG will Bring More Uniformity' in *Review of the CISG 2005-2006* (2005), Sellier, Munich

Bergsten, Johannes 'Methodological Problems in Drafting the CISG' in
Janssen, Andre & Meyer, Olaf *CISG Methodology* (2009), Sellier, Munich

Birks, Peter 'Konkurrierende Strategien und Interessen: Das Irrtumserfordernis im Bereicherungsrecht des common law' in *Zeitschrift für Europäisches Privatrecht* (1993), Oxford

Boss, Amelia H. 'The Future of the Uniform Commercial Code Process in an Increasingly International World' in *Ohio State Law Journal Vol.68* (2007), Columbus (Ohio)

Burton, Steven J. 'Breach of Contract and the Common Law Duty to Act in Good Faith' in *Harvard Law Review* (1980), Cambridge (Massachusetts)

Burton, Steven J. 'History and Theory of Good Faith Performance in the United States' (2017) in *University of Iowa Legal Studies Research Papers*, Iowa City (Iowa)

Eisenberg, Russel A. 'Good Faith under the Uniform Commercial Code - A New Look at an Old Problem' in *Marquette Law Review Vol.54* (1971), Milwaukee (Wisconsin)

Farnsworth, Allan E. 'Duties of Good Faith and Fair Dealing under the UNIDROIT Principles, Relevant International Conventions and National Laws' (1995) in *Tulane Journal of International and Comparative Law*, New Orleans (Louisiana)

Farnsworth, Allan E. *Good Faith Performance and Commercial Reasonableness Under the Uniform Commercial Code* (1963), Chicago Law School, Chicago (Illinois)

Farnsworth, Allan E. 'The Concept of Good Faith in American Law' (1993) in *Saggi, Conferenze e Seminari*, Centro di studi e ricerche di diritto comparator e straniero, diretto da M.J. Bonell, Rome

Feinman Jay M. 'The Duty of Good Faith: A Perspective on Contemporary Contract Law' in *Hastings Law Journal Vol.66* (2015), San Francisco (California)

Goode, Roy E. ‘The Concept of “Good Faith” in English Law’ (1993) in *Saggi, Conferenze e Seminari*, Centro di studi e ricerche di diritto comparator e straniero, diretto da M.J. Bonell, Rome

Honnold, John O., Documentary History of the Uniform Law for International Sales:The Studies, Deliberations and Decisions That Led to the 1980 United Nations Convention, Deventer, Kluwer Law and Taxation Publishers (1989)

Honnold, John O. *Uniform Law for International Sales under the 1980 United Nations Conventions* 3ed (1999), Kluwer Law International, The Hague

Honsell, Heinrich *Römisches Recht* (2015), Springer, Hamburg

Janssen, Andre and Kiene, Sören Klaas ‘The CISG and Its Principles’ in
Janssen, Andre & Meyer, Olaf *CISG Methodology* (2009), Sellier, Munich

Jhering, Rudolph von and Gerber, Carl Friedrich von *Jherings Jahrbücher für die Dogmatik des bürgerlichen Rechts, Vol.4* (1861) Druck und Verlag von Breitkopf & Härtel, Jena

Komarov, Alexander S. ‘Internationality, Uniformity and Observance of Good Faith as Criteria in Interpretation of CISG: some remarks on Article 7(1)’ in *Journal of Law and Commerce 2005-2006*, University of Pittsburg, Pittsburg (Pennsylvania)

Kröll, Stefan, Mistelis, Stefan & Viscasillas, Pilar Perales *UN-Convention on the International Sales of Goods (CISG) (2011)* Beck, Munich

McDougall, Robert ‘The Implied Duty of Good Faith in Australian Contract Law’ (2006) in *Australian Construction Law Newsletter 28,* Sydney (New South Wales)

Müller-Glöge, Rudy, Preis, Ulrich and Schmidt, Ingrid *Erfurter Kommentar zum Arbeitsrecht* 18ed (2017) Beck, Munich

Orsinger, R. Richard *The Rise of Modern American Contract Law* (2015), Orsinger, Nelson, Downing & Anderson, L.L.P., San Antonio (Texas)

Pachecker, Humphrey Humberto *NAFA's Blue Book: Legal Terminology, Commentaries, Tables and Useful Legal Information* (2010), Xlibris, Bloomberg (Indiana)

Poole, Jill *Textbook on Contract Law* 9ed (2009), Oxford University Press, Oxford

Säcker, Franz Jürgen, Rixecker Roland, Oetker Hartmut & Limpberg, Bettina *Münchener Kommentar zum Bürgerlichen Gesetzbuch* 7ed (2015) Beck, Munich
Schlechtriem, Peter & Schwenzer, Ingeborg *Commentary on the UN Convention on the International Sale of Goods* (2016), Oxford University Press, Oxford

Schneider, Konrad *Treu und Glauben im Recht der Schuldverhältnisse des Bürgerlichen Gesetzbuchs* (1902), München

Schulze, Reiner *Schulze BGB* 9ed (2017), Nomos, Baden Baden

Spagnolo, Lisa 'The Last Outpost: Automatic CISG Opt Outs, Missapplications and the Costs of Ignoring the Vienna Sales Convention for Australian Lawyers' (2009) in Melbourne Law Journal, Melbourne (Victoria)

Stone, Richard *The Modern Law of Contrac*t 7ed (2007), Routledge Cavendish, London and New York

Stürner, Rolf *Jauernig Bürgerliches Gesetzbuch* 16ed (2015), Beck, Munich

Summers, Robert S. 'The General Duty of Good Faith - Its Recognition and Conceptualization' (1981) in *Cornell Law Review,* Ithaca (New York)

Summers, Robert S. 'Good Faith" in General Contract Law and the Sales Provisions of the Uniform Commercial Code' in *Virginia Law Review Vol.54* (1968), Charlottesville (Virginia)

Franz Wieacker ‘Zum Ursprung der bonae fidei iudicia’ in *Zeitschrift für Rechtsgeschichte Vol 80* (1963), Böhlau Verlag, Vienna and Cologne

Whitman, James ‘Commercial Law and the American Volk: A Note on Llewellyn’s German Sources for the Uniform Commercial Code’ in *Yale Faculty Scholarship Series Paper 658* (1987), New Haven (Connecticut)