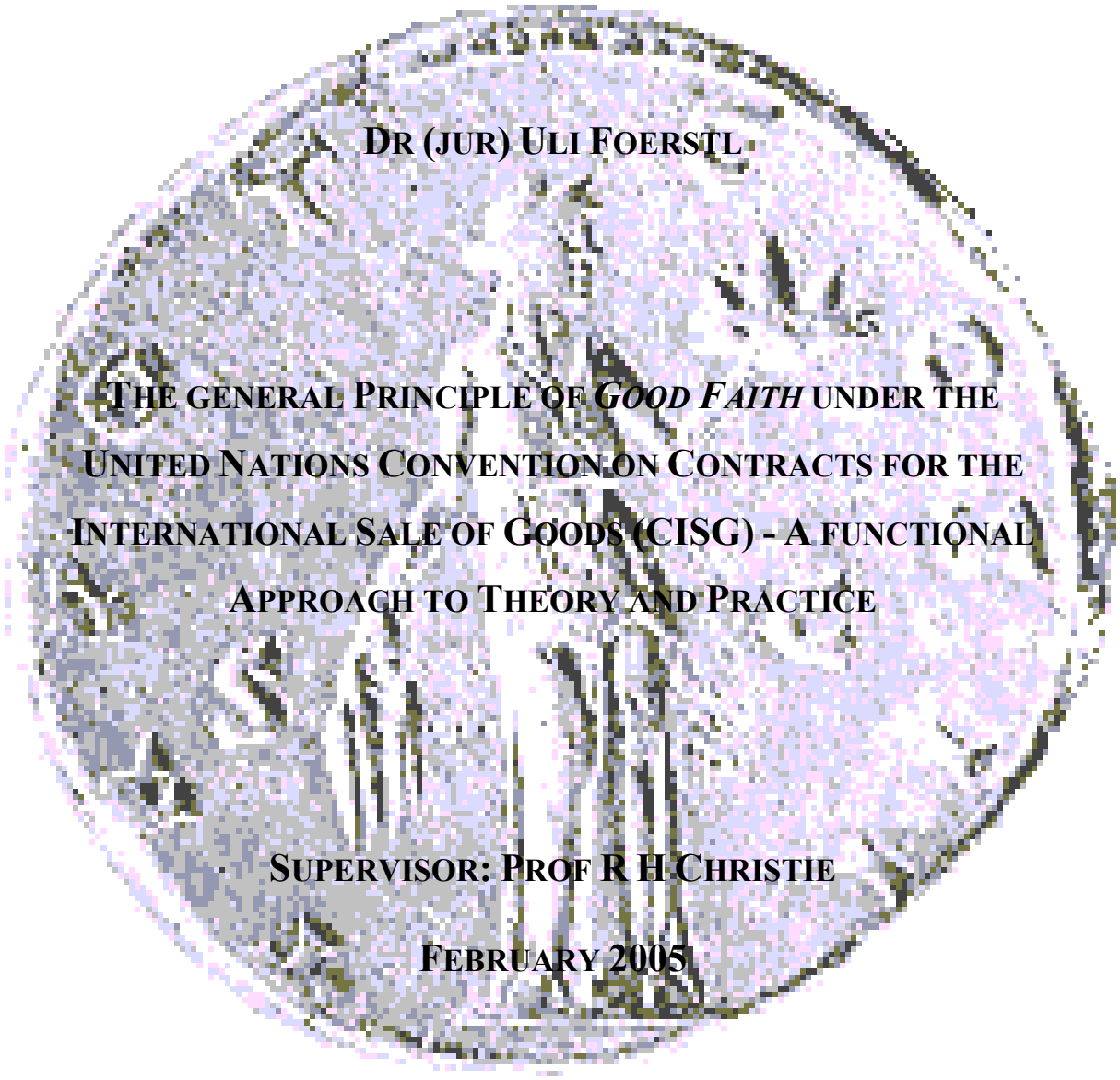
UNIVERSITY OF CAPE TOWN

SCHOOL FOR ADVANCED LEGAL STUDIES



DR (JUR) ULI FOERSTL

THE GENERAL PRINCIPLE OF *GOOD FAITH* UNDER THE UNITED NATIONS CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS (CISG) - A FUNCTIONAL APPROACH TO THEORY AND PRACTICE

SUPERVISOR: PROF R H CHRISTIE

FEBRUARY 2005

Research dissertation presented for the approval of Senate in fulfilment of part of the requirements for the Degree of Master of Laws (LLM) in Approved Courses and a Minor Dissertation. The other part of the requirement for this qualification was the completion of a programme of courses.

Name:	Dr Uli Foerstl	Address:	17 Bedford Mews
Student No.:	FRSULI001		Bedford Road
Telephone:	082 402 58 82		Vredehoek, 8801
Email:	ulifoerstl@aol.com		Cape Town, South Africa

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

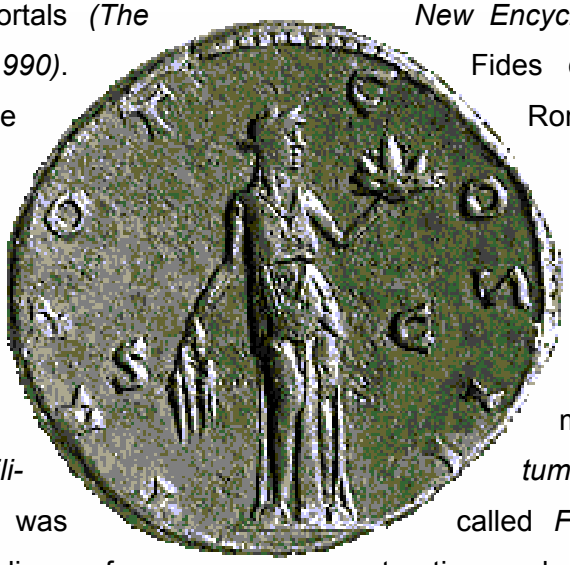
Cape Town, this 14 February 2005

_____

Dr Uli Foerstl

Preface

The English word 'faith' derives from the Latin word '*fides*' meaning trust and confidence *(Collins English Dictionary, 5th ed., Glasgow, 2000)*. The Latin word *fides* comes from the name of the Roman goddess Fides, the deification of: good faith and honesty, the oath, and that 'one must keep one's word'. Fides was honoured with a temple built near Capitol Hill in 254 BC where sacrificial offerings were presented in recognition of the secret, inviolable trust between gods and mortals *(The New Encyclopædia Britannica, Vol. 4, p. 762, 15th ed. 1990)*. Fides can be found on the backside of antique Roman coins in many variations. The civil variations show the goddess Fides holding ears of grain and a fruit basket. As a symbol of the reliance of Roman emperors on the Roman army, Fides was also shown with standards and other military insignia (*Fides Exercituum or Fides Militum*). In the later Roman period the goddess was called *Fides Publica.* She was considered the guardian of treaties and other state documents, which were placed for safekeeping in her temple *(Schermaier, p. 78)*. Over a period of time the idea of *fides*, i.e. good faith, was separated from the image of the goddess. Interlocked hands were used on Roman coins to symbolise the binding nature of a promise. This shows that the focus of *bona fides*, the Roman notion of good faith, was focused on the principle that 'one must keep one's word'. In modern contract law, this idea became independent from good faith, and today the parties' faith refers to the reliance that the other party will not act against the purpose of the contract.



I would like to thank Prof R H Christie for supervising this dissertation and for teaching me to look and learn beyond my own jurisdiction.

I would also like to thank Chenaz Adams who not only helped me with the manuscript but who is also what I like best about Cape Town.

Table of Contents

Table of Abbreviations

A.C.	English Law Reports - Appeal Cases [year, page]
Art.	Article
BGB	Bürgerliches Gesetzbuch (German Civil Code)
cf.	confer
CISG	United Nations Convention on Contracts for the International Sale of Goods, Vienna 1980
CLOUT	Case Law on UNCITRAL Texts
ed.	edition
e.g.	exempli gratia (for example)
et al.	et alia (and others)
et seq.	and following
f., ff.	and following page(s)
fn.	footnote
HGB	Handelsgesetzbuch (German Commercial Code)
ICAB	International Court of Arbitration Bulletin [volume, page]
i.e.	id est (which is)
JZ	Juristen Zeitung [year, page]
NIPR	Nederlands Internationaal Privaatrecht [volume, page]
NJW-RR	Neue Juristische Wochenschrift Rechtsprechungsreport [year, page]
p., pp.	page(s)
para	paragraph
RabelsZ	Rabels Zeitschrift für ausländisches und internationales Privatrecht [volume, page]
RGZ	Entscheidungssammlung des Reichsgerichts für Zivilsachen [volume, page]
s., sec.	section
SA	South African Law Reports [volume, page]
UNCITRAL	United Nations Commission on International Trade Law
UNIDROIT	International Institute for the Unification of Private Law
ULIS	Uniform Law of International Sales
ULF	Uniform Law on the Formation of Contracts for the International Sale of Goods
UCC	Uniform Commercial Code (United States)
VJ	Vindobona Journal of International Commercial Law & Arbitration [volume, page]

Introduction

A. The UN Convention on Contracts for the International Sale of Goods (CISG)

I. Early Attempts to Unify Sales Law

The law of the sale of goods, as most other areas of the law, is a predominantly national affair. This was not always the case: between the thirteenth and the eighteenth century, the *ius commune* was applicable throughout Europe and led to mostly uniform rules applicable across national borders.[1] Moreover, among the travelling merchants in Europe customary rules, applied by merchant courts, developed. It is said[2] that this *lex mercatoria* was based on the same fundamental rules throughout Europe.[3] With the nationalisation and codification of the civil law during the eighteenth and nineteenth century, the uniformity created by the *lex mercatoria* ceased to exist.[4]

Even after the decline of the *ius commune* and the *lex mercatoria* it was recognised that international trade needs uniform rules. In 1926 the International Institute for the Unification of Private Law (UNIDROIT) was founded on the initiative of the League of Nations.[5] The first step toward the unification of the law relating to the international sale of goods is attributed to the German scholar *Ernst Rabel*. He presented a first provisional report on the possibilities for unifying sales law to UNIDROIT.[6]

II. The 1964 Hague Conventions: ULIS and ULF

The efforts of UNIDROIT, interrupted by the Second World War, led eventually to the Hague Conference of 1964, which adopted two conventions: the Convention for the Uniform Law of International Sales (ULIS), and the Convention for the Uniform Law on the Formation of Contracts for the International Sale of Goods (ULF), also referred to as the '1964 Hague Conven-

---

1 See for good faith under the *ius commune* in detail Chapter 1, A, II below.

2 See critically with regard to the universality and consistency of the *lex mercatoria* Eiselen, 116 SALJ 323 at 333 with further references in Fn. 52.

3 Schlechtriem/Schlechtriem, *Commentary*, Introduction, sec. III. See for good faith under the old *lex mercatoria* in detail Chapter 1, A, III, below.

4 Cf. in detail e.g. Felemegas, p. 137 ff. But cf. Schlechtriem/Schlechtriem, *Commentary*, Introduction, sec. III who insists that the *lex mercatoria* did not cease to exists but only fell into oblivion. The practical effects are, however, the same.

5 Haase/Grimm/Versfeld, p. 1.

6 Schlechtriem/Schlechtriem, *Commentary*, Introduction, sec. I; Eiselen, 116 SALJ 323 at 334.

tions'.[7] With only nine states having ratified the Conventions,[8] ULIS and ULF were not considered a success in the unification of international trade law.[9] Despite the lack of their acceptance in practice, ULIS and ULF are not regarded as a complete failure as they played an important role in the process of drafting the CISG.[10] Moreover, ULIS and ULF led to a body of case law within the adopting states that can, with certain restrictions, serve as a starting point in the interpretation of CISG provisions.[11]

III. UNCITRAL and the CISG

In 1966 the United Nations Commission for International Trade Law (UNCITRAL)[12] was established as a Permanent Commitee of the United Nations, which started its work on the unification of sales law in 1968.[13] The UNCITRAL working group attempted to achieve a balance in the representation of the various regions of the world in order to avoid the lack of international acceptance which ULIS and ULF had suffered.[14] The UNCITRAL working group held nine sessions.[15] In 1978 it presented a draft convention on sales law, which built the basis for the Vienna Conference of 1980.[16] Forty two of the sixty two states that attended the Vienna Conference voted in favour of the presented draft of the CISG[17] (also called Vienna Convention and in the following referred to as 'the Convention').[18] The CISG came into force on 1 January 1988, one year after the tenth state ratified the convention.[19] By the end of the

---

7 The texts of ULIS and ULF are, amongst others, reprinted in English, French and German in Mertens/Rehbinder, pp. 25 - 80.

8 Cf. Schlechtriem/Schlechtriem, *Commentary*, Introduction, sec. I with a list of the ratifying states in fn. 7. Felemegas, p. 140 counts only eight adopting states, which might be due to the fact that the United Kingdom only ratified with the reservation that the uniform law must be chosen by the contracting parties.

9 Schlechtriem/Schlechtriem, *Commentary*, Introduction, sec. I; Felemegas, p. 140; Haase/Grimm/Versfeld, p. 1.

10 Eiselen, 116 SALJ 323 at 336; Schlechtriem/Schlechtriem, *Commentary*, Introduction, sec. I.

11 Bridge, sec. 2.08.

12 Cf. the UNCITRAL homepage www.uncitral.org for an overview over the history and functions of UNCITRAL as well as the texts of legal documents, their status of adoption as well as the *traveaux préparatoires*. Cf. furthermore Schlechtriem/Schlechtriem, *Commentary*, Introduction, sec. I with an overview of sources in German in Fn. 9.

13 Schlechtriem/Schlechtriem, *Commentary*, Introduction, sec. I.

14 As a result Africa received nine seats, Asia seven, Eastern Europe five, Latin America six and the 'Western States' nine, cf. Schlechtriem/Schlechtriem, *Commentary*, Introduction, sec. I.

15 Cf. for the documentation of the working group sessions, Schlechtriem/Schlechtriem, *Commentary*, Introduction, sec. I, Fn. 10.

16 Schlechtriem/Schlechtriem, *Commentary*, Introduction, sec. I; Felemegas, p. 142 f.; Haase/Grimm/Versfeld, p. 2.

17 Haase/Grimm/Versfeld, p. 2; Eiselen, 116 SALJ 323 at 337.

18 United Nations Convention on Contracts for the International Sale of Goods, Vienna 1980.

19 Cf. Eiselen, 116 SALJ 323 at 337.

year 2004 the CISG was adopted by sixty four states.[20] Almost twenty five years after its conclusion and more than fifteen years after its coming into force, the CISG was praised as a great success.[21] However, it is felt that this success is not always sufficiently reflected in publicity and popularity.[22]

IV. South Africa and the CISG

Due to its international isolation during the years of Apartheid, South Africa did not play an active role in the creation of the CISG, although it send observers to some events.[23] In contrast to other UNCITRAL instruments, such as the Model Law on Cross-border Insolvency, South Africa has not adopted the CISG. Ten years after South Africa re-entered the international community as a welcomed member, no visible steps toward an adoption of the CISG have been taken.[24] Scholarly writings have, however, strongly recommended the adoption of the CISG in order to stimulate international trade in South Africa, and to strengthen the role of South Africa as the leading economical force on the continent.[25]

V. Characteristics of the CISG

The CISG builds a uniform text of law for international sales of goods. It is a so called 'self-executing' Convention, which means that it does not have to be brought into force by an act of the domestic legislator.[26] This form of legislation guarantees the highest degree of uniformity, since changes cannot occur in the process of transformation into domestic law, as is often the case with other, 'normal' international conventions. The CISG combines the two subject matters of ULIS and ULF - the rules for formation of the sales contract and the substantive provisions - in one legal text. The Convention is divided into four parts: the general rules and scope of application (Part I); the formation of the contract (Part II); the substantive rules for the sales contract (Part III); and the final public international law provisions (Part IV).

---

20 For an up-to-date overview over the status of the CISG see www.uncitral.org.

21 See as only a few of many e.g.: Schlechtriem/Schlechtriem, *Commentary*, Introduction, sec. III; Eiselen, 116 SALJ 323 at 345;

22 Will, Part II, p. 5.

23 Eiselen, 116 SALJ 323 at 323 f.

24 Other that e.g. the Model Law on International Commercial Arbitration for which at least a draft for the transformation in South African Law exists.

25 Eiselen, 116 SALJ 323 at 367 ff.; Haase/Grimm/Versfeld, p. 61 f.

26 Schlechtriem/Schlechtriem, *Commentary*, Introduction, sec. II.

The CISG is drafted in a style closer to a civil law code than to common law legislation in that it contains more abstract terms and generalised rules instead of the detailed provisions and explicitly formulated legislation.[27] The fact that the CISG contains more indefinite legal concepts and terms is attributed to two factors: a compromise between irreconcilable conflicts of interests; and the necessity to obtain a certain degree of flexibility, because a revision of the text of the CISG would require the consent of all signature states.[28] The character of the CISG as an international body of law forbids it to simply import concepts from domestic law, or to interpret terms as they are known in domestic law.[29] This, together with the fact that there is no possibility to appeal to a highest judicial authority in order to obtain a definite interpretation of the CISG, build a challenge in maintaining uniformity in the day to day application of the CISG.[30]

B. The Scope and Methodology of the Dissertation

I. Good Faith and the CISG: the Problem

The term 'good faith' appears only once in the CISG - in Art. 7(1) CISG, which reads:

> 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.

The location of good faith within the provision about the interpretation of the Convention and the wording of Art. 7(1) CISG are the result of a difficult compromise the drafters of the CISG reached. This compromise was necessary because of the different opinions about the role, good faith should assume under the Convention. The divergence was mainly caused by the different attitudes domestic legal systems have toward good faith. Although the term 'good faith' is known in most jurisdictions, the substantive content of good faith as well as the context of its application vary so widely that it is said that a 'common core' cannot be deduced.[31]

The compromise reached with Art. 7(1) CISG, poses a great problem because it creates uncertainty with regard to the scope of application of good faith under the CISG. This dissertation approaches this problem from three angles. Firstly, the controversy surrounding the

---

[27] Eiselen, 116 SALJ 333 at 340.

[28] Schlechtriem/Schlechtriem, *Commentary*, Introduction, sec. II.

[29] Schlechtriem/Schlechtriem, *Commentary*, Introduction, sec. III.

[30] Schlechtriem/Schlechtriem, *Commentary*, Introduction, sec. III.

[31] Cf. e.g. Felemegas, p. 192

meaning of 'good faith' will be examined.[32] Secondly, the scholarly debate about good faith in the CISG will be analysed.[33] Thirdly, the application of good faith under the CISG in judicial practice will be discussed.[34]

II. The Structure of the Dissertation

This dissertation consists of three chapters. The first chapter provides an overview of the historical development of good faith,[35] the different approaches toward the concept of good faith in contemporary domestic legal systems,[36] and the developments with regard to good faith on an international level.[37] Finally, some general conclusions are drawn from the historical and domestic understanding of good faith, which are made in anticipation of the analysis of good faith within the CISG.[38]

The second chapter provides a theoretical analysis of good faith under the CISG, consisting of a discussion of the legislative provisions and their legislative history and the academic controversy following from the wording of Art. 7(1) CISG.[39] It will be shown that a deductive approach to good faith is even less promising under the CISG than under domestic systems of law.[40] Hence, the scope of good faith can only be determined by an inductive method, which has to consider the other means provided by the CISG in order to fulfil the functions of good faith.[41]

The third chapter discusses the existing case law with regard to good faith under the CISG and examines whether or not one can state that certain specific doctrines emerge under a general notion of good faith within the CISG.[42]

---

32 See Chapter 1.

33 See Chapter 2.

34 See Chapter 3.

35 See Chapter 1, sec. A below.

36 See Chapter 1, sec. B below.

37 See Chapter 1, sec. C below.

38 See Chapter 1, sec. D below.

39 See Chapter 2, section A below.

40 See Chapter 2, section B below.

41 See Chapter 2, section C and D below.

42 See Chapter 3 below.

Chapter 1: The Development of Good Faith

In order to understand the concept of good faith as well as the existing controversies surrounding good faith in the CISG, the following chapter briefly summarises the origin and the development of good faith in legal history.[43] It provides an overview of the different appearances of good faith (or its complete absence) in selected contemporary domestic legal systems,[44] and the UNIDROIT Principles of International Commercial Contracts.[45] It will be shown that the ideas of what good faith is and the purpose it ought to serve differ considerably from one jurisdiction to another. Hence, the different functions good faith is required to fulfil will be examined as well as some of the existing misconceptions about the substantive content of a general principle of good faith.[46]

A. The Historical Origins

I. Roman Law

The principle of good faith as a legal concept first emerged in Roman law as *bona fides*.[47] It was developed as a procedural standard clause, known as *exceptio doli*. Claims had to be adjudicated according to strict law (*iudicia stricti juris*) and the *exceptio doli* clause provided the judge with the necessary discretion in order to reach a just solution. *Bona fides* allowed him to decide the case in accordance of what he deemed fair and reasonable.[48]

Subsequently, *bona fides* was extended to a substantive principle within certain types of consensual contracts, such as partnerships, sales, land leases, tutelage, and the hire of a thing or services.[49] A special procedural device was not necessary here as the procedural formula already permitted the judge to apply the principle of good faith.[50]

---

43 See section A below.

44 See section B below.

45 See section C below.

46 See section D below.

47 The exact date is contentious. *Cicero* is the oldest written source mentioning *bona fides*. He refers to a case decided on the basis of *bona fides* around 100 BC, cf. Schermaier, p. 68. Estimations reach from third century BC to the second half of the second century BC as the time of origin, cf. Schermaier, p . 71 f. with further references.

48 Schermaier, p. 76; Zimmermann/Whittaker, p. 16.

49 Schermaier, p. 70; Klein, 15 Liverpool Law Review 115 at 116.

50 Zimmermann/Whittaker, p. 16 f.

Bona fides has been described as one of the most fertile agents in the development of Roman law.[51] Roman jurists did not develop a definition of good faith. Nevertheless, the use of this abstract term did not lead to arbitrariness or uncertainty in the judicial practice. This is attributed to the fact that there was a common understanding of *bona fides* within the Roman society, which recognised comprehensive duties of fidelity and faithfulness.[52]

At the core of the principle of good faith under Roman law was the rule that 'one must keep one's word' (*pacta sunt servanda*).[53] This is insofar remarkable as contemporary legal systems recognise *pacta sunt servanda* as an autonomous principle that is based on the recognition of contractual freedom and the free will of the parties to contract.[54] Hence, *pacta sunt servanda* builds the fundament of modern contract law, whereas the principle of good faith mainly serves to mitigate the harsh consequences caused by the strict application of *pacta sunt servanda*.[55] This development is also visible in the UNIDROIT Principles[56] where *pacta sunt servanda* is contained in Art. 1.3 (Binding character of contract) whereas Art. 1.7 stipulates the principle of good faith. This modern view of *pacta sunt servanda* is not entirely foreign to ancient Roman law. *Cicero* stated that faithfulness to one's word is a precondition of any legal intercourse, whereas good faith does not demand performance itself but influences the way performance is ought to be made.[57]

II. The Medieval *ius commune* and the *lex mercatoria*

Medieval jurists, in applying the *ius commune*, were confronted with the same problem as Roman lawyers - how to avoid results that were caused by the application of strict law and that were felt to be unjust? The problem was solved mainly under the broad notion of equity (*aequitas*). The principle of good faith was seen as part of equity.[58] With regard to contract

---

51 Zimmermann/Whittaker, p. 17.

52 Schermaier, p. 77.

53 Klein, 15 Liverpool Law Review 115 at 116.

54 See e.g. Christie, p. 14: *'The principle that the courts will enforce contracts, expressed in Latin as* pacta sunt servanda *is obviously necessary as a general principle'*. Furthermore, Veytia, 69 Tul. L. Rev. 1191 at 1201 f. There is a deviating opinion in English law that sees *pacta sunt servanda* as an area of application for a general principle of good faith in English law, cf. Klein, 15 Liverpool Law Review 115 at 116; O'Connor, p. 11. It should, however, be noted that the prevailing view that denies good faith a role in English law, of course, see *pacta sunt servanda* as the fundamental principle of the law of contracts.

55 Cf e.g. Veytia, 69 Tul. L. Rev. 1191 at 1206.

56 UNIDROIT Principles for International Commercial Contracts, see in detail section C below.

57 Schermaier, p. 78.

58 Zimmermann/Whittaker, p. 17.

law, Medieval jurists even identified good faith with equity.[59] Under the *ius commune*, as in Roman law, the term good faith was not defined. However, three main substantive features of good faith were distinguished: (i) keeping one's word; (ii) neither (a) deliberately deceiving the other party nor (b) driving an overly harsh bargain; and (iii) respecting those obligations which were not expressly undertaken but belonged to the contract as a matter of fair interpretation.[60]

Simultaneously, merchants developed their own commercial law. This law merchant or *lex mercatoria* consisted of customary rules which were uniformly applied across borders throughout Europe.[61] The rise of the merchant class in the eleventh and twelfth century influenced the development of an obligation to act in good faith in contractual relationships.[62] It was thought that the contractual relationship was governed by a general duty of the parties to act fairly.[63] As in Roman law, good faith under the *lex mercatoria* significantly contributed to the kind of flexibility, convenience, and informality required by the international community of merchants.[64]

B. The Common Law - Civil Law Divide

With the incorporation of the *lex mercatoria* into the emerging national codifications of civil law in Europe during the eighteenth and nineteenth century, the unified character of trade law, and with it the common understanding of the principle of good faith, disappeared.[65] Good faith, where it was still used, was tailored in order to comply with the specific requirements of the respective domestic body of law.[66] The nationalisation of the law in Europe led to a situation that is commonly referred to as the common law - civil law divide. This term implies that domestic legal systems that adopted the common law share a common understanding of basic principles of the law that separates them from the legal systems of continental European countries, which are said to be closer to the tradition of Roman law. The differences between these two major legal cultures are often described in explicit language. For example, the civil law systems are said to differ from the common law systems as much

---

59 Gordley, p. 95.

60 Gordley, p. 108.

61 Felemegas, p. 136.

62 Klein, 15 Liverpool Law Review 115 at 117.

63 Klein, 15 Liverpool Law Review 115 at 117.

64 Zimmermann/Whittaker, p. 18.

65 Cf. Felemegas, p. 137 with further references.

66 Schlechtriem, *Good Faith in German Law and in International Uniform Laws*, p. 6.

as rationalism differs from empiricism or deduction from induction.[67] This distinction is believed to be true in particular with respect to the principle of good faith. There seems to be a strong reluctance in common law jurisdictions to accept a general doctrine of good faith, whereas legal systems belonging to the civil law tradition are believed to have embraced good faith as an essential part of the law of contracts. More differentiating authors have observed that the generalising distinction between common and civil law is often misleading as the attitude toward good faith within the two groups of legal systems is far from unequivocal. On the one hand, there are common law jurisdictions where the principle of good faith is in operation, such as the United States where the UCC Section 1-203 as well as the Restatement (Second) of Contracts recognise a duty of the parties to a contract to act in good faith.[68] Other common law jurisdictions, which do not have legislative provisions dealing with good faith, are believed to be on the way to recognising a general doctrine of good faith, such as Australia and Canada.[69] Hence, it has been concluded that good faith is finding increasing favour across the common law world.[70]

In South Africa, a mixed jurisdiction,[71] the Supreme Court of Appeal held that the *exceptio doli generalis* - which was the nucleus of good faith in Roman law - does not form a part of the Roman-Dutch law,[72] and, thus, cannot provide a remedy against the enforcement of unfair contract terms.[73] Even after the demise of the *exceptio doli generalis*, South African courts have repeatedly stated that in modern South African law all contracts are *bonae fidei.*[74] However, the implications of this assertion are not clear. It seems, that the refusal of the enforcement of contracts on the grounds that they oppose public policy, is currently the most promising mechanism to 'keep the law in tune with the demands of equity',[75] until the problem is solved by the legislator.[76]

---

67 Cited by Veytia, 69 Tul. L. Rev. 1191.

68 For a discussion of good faith in American contract law cf. e.g. Summers, p. 122 ff.; Farnsworth, *Good Faith in Contract Performance*; Farnsworth, 3 Tul. J. Int'l & Comp. L. 47 at 51 ff.; Powers, 18 J.L. Com. 333 at 339 f.; Burton, 94 Harvard Law Review 369 ff.

69 Keily, 3 VJ 15 at 37 f. citing Priestley JA in *Renard Constructions (ME) Pty v. Minister of Public Works* (1992) 26 NSW LR 234 at 268; cf. furthermore Farnsworth, 3 Tul. J. Int'l & Comp. L. 47 at 53 f.

70 Juenger, 69 Tul. L. Rev. 1253 at 1257; Keily, 3 VJ 15 at 37; Felemegas, p. 184; more cautiously for English law Zimmermann/Whittaker, p. 47 f.

71 Mixed jurisdiction that applies (English) common law as well as civil law (in the case of South Africa Roman-Dutch law).

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

73 Christie, p. 15.

74 Zimmermann, *Good Faith and Equity*, p. 240 with reference to the relevant case law in fn. 167.

75 Zimmermann, *Good Faith and Equity*, p. 260.

76 See for the proposed Control of Unreasonableness, Unconscionableness or Opressiveness in Contracts or Terms Act, Christie, p. 15 f.

On the other hand, civil law systems do not build a group of legal systems as homogeneous as might be concluded from the term common law - civil law divide. With respect to the principle of good faith, there exist considerable differences in the acceptance and the use of good faith. The opposite ends of the scale within the civil law jurisdictions are Germany, with an extremely extensive use of good faith, and France and Italy with a considerable reluctance toward the acceptance of a general doctrine of good faith.[77]

However, an analysis of the position regarding good faith in selected domestic jurisdictions can help to understand the controversies surrounding the discussion of good faith on an international level. For the purpose of such a comparison, German law[78] and English law[79] are the most interesting, as these legal systems are considered to represent the two extreme positions under the common law - civil law divide.

I. *Treu und Glauben* in German Law

Germany is believed to have the most broadly developed general doctrine of good faith within, Western legal systems, *'Treu und Glauben'*.[80] It will be shown that, although the wording of the provisions dealing with the principle of good faith in the *BGB*[81] implies a rather narrow scope,[82] judicial practice has turned good faith into an overruling principle of law that reaches far beyond the wording of the provisions of the *BGB*,[83] and that builds an 'open' norm where general values of German law find their way into the civil law.[84] German scholars try to systematise the general doctrine of good faith in German law in an 'inner-system' of so called *Fallgruppen.*[85]From the body of case law that emerged under the principle of *Treu und Glauben*, different functions of *Treu und Glauben* can be distinguished.[86]

---

77 Zimmermann/Whittaker, p. 48 ff. See for a detailed comparision between good faith in French and German law Sonnenberger, *Treu und Glauben ein supranationaler Grundsatz?*, p. 703 ff.

78 See section I below.

79 See section II below.

80 Farnsworth, 3 Tul. J. Int'l & Comp. L. 47 at 50; Powers, 18 JLCOM 333 at 335.

81 *Bürgerliches Gesetzbuch* (German Civil Code), entered into force on 1 January 1900, commonly referred to by its abbreviation 'BGB'.

82 See section 1 below.

83 See section 2 below.

84 See section 3 below.

85 See section 4 below.

86 See section 5 below.

1. Legislative Provisions

In exercising jurisdiction, German courts are bound to apply the written law.[87] Hence, they depend on a *Rechtsgrundlage*, which is a norm that either creates, restricts, suspends, or extinguishes a right. The main provision of good faith is found at the beginning of the general provisions of the law of obligations: § 242 *BGB* stipulates that

> The debtor is bound to perform according to the requirements of good faith, ordinary usage being taken into consideration.[88]

The second provision that expressly mentions good faith is § 157 *BGB*:

> Contracts shall be interpreted according to the requirements of good faith, ordinary usage being taken into consideration.[89]

Section 242 *BGB* directly specifies the obligations of the parties to a contract, whereas § 157 *BGB* is directed to the judge who has to interpret the provisions of the contract. This distinction is not always followed in German court practice, and both provisions are often cited together as a reference to a general doctrine of good faith.[90]

2. The Scope of Application of § 242 *BGB*

Taken literally, § 242 *BGB* refers only to how the debtor must perform.[91] However, German courts extend the scope of § 242 *BGB* beyond its wording and impose an obligation on the creditor to exercise his rights under consideration of good faith.[92] Furthermore, the system-

---

87 German courts have also to apply customary law (*Gewohnheitsrecht)*. However, this refers mainly to customs created before the *BGB* came into force. Emerging new customary law, in order to become legally binding, is after the coming into force of the *BGB* also dependent on a *Rechtsgrundlage.* Some of the legal doctrines developed on the basis of *Treu und Glauben* are, today, recognised as *Gewohnheitsrecht* (e.g. the debtor's duty to disclose information in order to give the creditor the possibility to specify his claim, cf. v. Weichs/Foerstl, ZUM 2000, 897 at 898). However, § 242 *BGB* was necessary for their creation as there was no other *Rechtsgrundlage.*

88 [*Leistung nach Treu und Glauben: Der Schuldner ist verpflichtet, die Leistung so zu bewirken, wie Treu und Glauben mit Rücksicht auf die Verkehrssitte es erfordern*.] It should be noted that the term *Treu und Glauben*, literally tranlated, means 'fidelity and faith'. The translation 'faith and credit' is also used, cf. e.g. Farnsworth, 3 Tul. J. Int'l & Comp.L. 47 at 50 (fn. 16), and Powers, 18 JLCOM 333 at 337. Although *Treu und Glauben* is in substance the German equivalent to *bona fides* or good faith, German jurists are reluctant to use the translation 'good faith' in order to avoid confusion as the literal translation of good faith 'guten Glaubens' or 'gutgläubig' is used in the *BGB* exclusively for cases of a *bona fides* acquisition of a right or a title (*gutgläubiger Erwerb*) which is not connected in any way to the general doctrine of *Treu und Glauben*. Zimmermann/Whittaker, p. 30, refer, in order to avoid confusion, to 'objective good faith' meaning *Treu und Glauben* und 'subjective good faith' with respect to *guter Glaube*. Since it is, however, very unlikely that such confusions will emerge within the scope of this thesis, *Treu und Glauben* will nevertheless be translated generally with 'good faith' to show the close relation to *bona fides* and good faith.

89 [*Verträge sind so auszulegen, wie Treu und Glauben mit Rücksicht auf die Verkehrssitte es erfordern.*]

90 Ebke/Steinhauer, p. 171.

91 Ebke/Steinhauer, p. 171.

92 Larenz, p. 109; Ebke/Steinhauer, p. 171.

atic position of § 242 *BGB* within the general law of obligations implies that good faith requires the existence of a contract or another form of legal obligation. However, judicial practice applies § 242 *BGB* in order to impose duties on the parties in situations where there is no binding contract: before a legal obligation comes into existence,[93] after a contract has been performed *(post contractum finitum)*,[94] and where a contract was null and void from the beginning on.[95] Beyond the law of obligations, § 242 *BGB* is applied not only in the entire civil law, including the law of things, family law, labour law and law of corporations, but also, with alterations and specifications, in procedural law, public law and taxation law.[96]

Good faith according to § 242 *BGB* is peremptory, and therefore parties to a contract cannot limit or exclude duties deriving from the general principle of good faith.[97] Moreover, German courts do not regard § 242 *BGB* as a provision within the same hierarchy as other provisions of the *BGB*. Instead, it is seen as a superior legal principle that has the power to restrict the scope of other provisions if they lead to a result contradictory to good faith.[98]

3. Determining *Treu und Glauben*

§ 242 *BGB* is called a 'general clause' or 'open norm' *(Generalklausel)*, as there is no clear requirement of a norm *(Tatbestand)* that has to be fulfilled in order to cause a certain legal consequence stipulated by the norm once its requirements are fulfilled *(Rechtsfolge)*.[99] The legal consequences are, thus, to be determined on a case-to-case basis with consideration of the different interests of the parties, and can, with respect to contracts, reach from an alteration of the original contract provision to the complete invalidity of the contract.[100]

The wording of § 242 *BGB* implies that the norm is divided in a normative part (*Treu und Glauben)* and a factual part (*Verkehrssitte*, i.e. common usage). One would assume that both parts play a role in the application of good faith by German courts. However, a look at the

---

93 Zimmermann/Whittaker, p. 24; Larenz, p. 91 f.

94 Zimmermann/Whittaker, p. 24; Larenz, p. 117.

95 Roth, § 242, sec. 53.

96 Roth, § 242, sec. 56 - 82; Larenz, p. 107.

97 Larenz, p. 107.

98 Larenz, p. 107 f., citing the seminal decision of the *Reichsgericht* (German Imperial Court) RGZ 85, 108, 117.

99 Zimmermann/Whittaker, p. 31.

100 Cf. e.g. Larenz/Wolf, § 38, sec. 42 - 48. There seems to be a tendency in the German case law that shows similarities to the *favor contractus* rule that is said to be general principle under the CISG as the German courts in general try to maintain the contract through alteration as long as possible. The invalidation of the whole contract is seen as the *ultima ratio*.

judicial practice reveals that an empirical evaluation of existing usage is not conducted, and that, if the reasoning refers to usage at all, the experiences or beliefs of the deciding judge take the place of common usage.[101]

The fact that *Treu und Glauben* imposes a normative standard leads to the conclusion that subjective elements, such as intent, negligence, or knowledge are not requirements for the application of § 242 *BGB*. However, subjective elements can play a role where a balance of two legitimate interests must be reached.[102]

In deciding the specific case, the judge must try to identify distinctive values, or value judgements, made by the legislator in provisions connected with the case.[103] In particular, the way in which the legislator evaluates and solves a certain conflict may allow inferences as to more general values and standards which can be used to interpret *Treu und Glauben*.[104] An example is the right to terminate long-term contractual relationships with reference to an 'important reason' without the necessity to observe a (contractual or statutory) period of notice.[105] Although the doctrine was based on § 242 *BGB*, specific provisions granting such a right for certain types of contracts were used to deduce the general principle.[106] Furthermore, since the promulgation of the German democratic constitution, the *Grundgesetz*, after the second world war, the judge applying § 242 *BGB* is bound by the system of values stipulated in the constitution.[107] This refers predominantly to the catalogue of human and civil rights (Art. 1 - 19 *Grundgesetz*)[108] but also includes general principles such as the reference to Germany as a welfare state.[109] These constitutional values, and their interpretation by the German constitutional court are thought to represent the common system of values the best.[110] Hence, as there is no evaluation of the actual 'common usage' as is required by the

---

[101] Roth, § 242, sec. 6; *Schlechtriem, Good Faith in German Law and in International Uniform Laws*, p. 18.

[102] Roth, § 242, sec. 33 f.

[103] Roth, § 242, sec. 86 f.

[104] Schlechtriem, *Good Faith in German Law and in International Uniform Laws*, p. 18.

[105] Zimmermann/Whittaker, p. 26 f.

[106] These contracts comprised leases of accommodation (§ 554a *BGB*); contracts of services (§ 626 *BGB*), and partnership agreements (§ 723 *BGB*). With the reform of the law of obligations with effect from1 January 2002, this principle has been codified in § 314 *BGB* and is, therefore, an example for a legal doctrine that was originally developed by courts under the 'umbrella' of § 242 *BGB* and, subsequently, grew into a doctrine by its own with clear requirements, the latter to an extent that the legislator adopted the principles developed by judicial practice without alteration. *Cf.* to the role of § 242 *BGB* as the forerunner of statutory provisions section 5 below.

[107] Roth, § 242, sec. 36 ff.

[108] Roth, § 242, sec. 36.

[109] Roth, § 242, sec. 37.

[110] Roth, § 242, sec. 36.

wording of § 242 *BGB*. The basic constitutional values provide the civil judge with a set of criteria, he can, and must, fall back on in the absence of more specific guidelines.

Nevertheless, these ways of approaching good faith remain somewhat vague. Thus, it does not come as a surprise that attempts to define or specify its meaning with the use of other terms fail as they merely replace one unclear term with another.[111] Hence, attempts to define the term *Treu und Glauben* in a positive way are no longer seriously pursued [112] This shows that the deductive approach to good faith, i.e. to try to define a general principle and then to specify it with logical argumentation, does not lead to results. Consequently, it is presently common understanding that *Treu und Glauben* can only be determined with an inductive method: substantive doctrines within the general notion of good faith have to be developed on a case by case basis. Subsequently, generalisations with respect to a doctrine can be made form the existing case law.[113]

4. The 'Inner-System' of *Fallgruppen*

The development of *Treu und Glauben* by case law causes uncertainty. In order to promote predictability of justice doctrines of good faith are developed and systematised with the help of groups of cases, *Fallgruppen*.[114] From a number of single cases a common denominator is determined, sufficiently coherent to build a doctrine with requirements that are as specific as a legislative provision would be.[115] Different doctrines are then subsumed under a more general, overreaching principle. With the help of *Fallgruppen* an 'inner-system' of § 242 *BGB* is built. Read from the general to the detailed, the following example could be made: *Treu und Glauben* consists of three main sub-groups: supplementary obligations,[116] change of circumstances,[117] and abuse of rights.[118] Abuse of rights could be subdivided in *venire contra fac-*

---

[111] This problem is of course not limited to the German doctrine of *Treu und Glauben* but also applies to good faith in other jurisdictions, see e.g. Powers, *Defining the Undefinable: Good Faith and the United Nations Convention on the Contracts for the International Sale of Goods*, 18 JLCOM 333 *et seq.* who states that *'good faith can be defined as an expectation of each party to a contract that the other will honestly and fairly perform his duties under the contract in a manner that is acceptable in the trade community.'* and, in doing so, comes very close to the German § 242 *BGB* without adding much clarity. See for the methodological approach of the building of *Fallgruppen* section 5 below.

[112] Zimmermann/Whittaker, p. 30.

[113] Larenz, p. 109 f.

[114] There seems to be no adequate English translation and the German term *Fallgruppen* is, thus, consistently used in legal literature written in English in order to describe this method of systematisation.

[115] As specific as a provision from the *BGB*. It should be kept in mind, though, that the rules in codes in the civil law tradition are in general more abstract and far less detailed than legislation in common law systems.

[116] *[Nebenfplichten]*.

[117] *[Wegfall der Geschäftsgrundlage]*. After the reform of the law of obligations with effect from1 January 2002 codified in § 313 *BGB* and no longer part of *Treu und Glauben*.

tum proprium;[119] *dolo agit, qui petit, quod statim redditurus est*;[120] *unredlicher Erwerb der eigenen Rechtsstellung*;[121] *Verbot der vorsätzlichen Schädigung*;[122] and *Verwirkung.*[123] *Verwirkung* has the following requirements: (i) the owner of a right has not exercised the right over a certain period; (ii) due to this omission, the other party could reasonably rely on the fact that the owner will not exercise his right in the future; and (iii) this reliance led the other party to make certain (monetary) dispositions it would not otherwise have made.[124]

This way of systematising § 242 *BGB* is believed not only to facilitate the understanding of good faith, but also to increase the predictability of future decisions. This method to systematise case law is rather obvious, and it has been said that Anglo-American lawyers will note the parallels with their legal system, where the judges found 'organising principles' of equity or conscience and declared specific rules on doctrines, such as estoppel and frustration.[125] The main difference between the common law approach and the *Fallgruppen* method seems to be that the predictability under the *Fallgruppen* method is thought to derive from the generalisation, whereas the common law 'piecemeal solution' achieves predictability from the restriction of the legal doctrine to the factual set-up the decided case was based on.

5. Functions of *Treu und Glauben*

From the *Fallgruppen* that have been built within § 242 *BGB,* three functions of the principle of good faith in German law can be distinguished: (a) an interpretive function in order to close gaps of minor importance in the contract or the law *(minima non curat praetor)*; (b) a supplementary function in order to fill gaps left open by the legislator or the contracting parties; and (c) a corrective function that leads to an alteration or non-appliance of written rules or contract provisions by either restricting certain rights or by derogating from the written rules. It will be seen that this distinction can be helpful in order to understand the discussion about the scope of good faith within Art. 7 CISG.

---

[118] *[Rechtsmißbrauch]*.

[119] Prohibition of inconsistent behaviour.

[120] Prohibition to claim if the claimed would have to be given back immediately.

[121] Prohibition to exercise a right that, though valid, has been acquired fraudulently.

[122] Prohibition to exercise a right with the only intention to harm the other party.

[123] Suspension of a right because it was not exercised timely even before it is formally prescribed.

[124] See for the requirements of *Verwirkung* in detail e.g. Larenz/Wolf, § 16, sec. 57 ff.

[125] O'Connor, p. 88.

(a) Interpretative Function

As even the most detailed code or contract cannot deal with every eventuality, the details of minor importance can and must be left to the courts' interpretation *(minima non curat praetor)*. This is the function which the German legislator intended and is reflected by the wording of § 242 *BGB*, an example being whether the creditor must accept performance outside office hours.[126] In contrast to the supplementary function, under the interpretative functin the parties or the law made a decision in principle, but left the details of the modus of performance of the obligation open.

(b) Supplementary Function

Supplementary rights or duties are not expressly provided in the contract or the legislation. The supplementary function is concerned with gaps in the contract, where a solution was not even provided in principle, as neither the legislator nor the parties to the contract thought about the problem.[127] This supplementary function of good faith is not covered by the wording of § 242 *BGB* but was developed and is constantly applied by German courts.[128] From the German judicial practice typical ancillary and supplementary duties emerged.[129] These duties are imposed on the parties of the contract in order to ensure that the contractual purpose can be fulfilled.[130] Despite the fact that the parties to a contract have partly adverse interests, German courts require a party to co-operate and to act with consideration and care for the other party before, during and after the performance of the contractual obligations.[131] Hence, it can be said that the supplementary function of good faith is in substance a notion of equity.[132] It can also be said that the supplementary function complements the principle of *pacta sunt servanda* as it helps to maintain the contract where the gap would otherwise lead to failure.

---

[126] Schlechtriem, *Good Faith in German Law and in International Uniform Laws*, p. 9; Larenz, p. 109; Hartkamp, 3 Tul. J. Int'l & Comp. L. 65 at 67.

[127] Schlechtriem, *Good Faith in German Law and in International Uniform Laws*, p. 9 f.

[128] Zimmermann/Whittaker, p. 24.

[129] [*Vertragliche Nebenpflichten und Fürsorgepflichten*.] See for a comprehensive listing of different duties developed by German courts: Roth, § 242, sec. 142 – 223.

[130] Larenz, p. 115.

[131] Larenz, p. 115.

[132] Hartkamp, 3 Tul. J. Int'l & Comp. L. 65 at 67.

(c) Corrective Function

The most extensive function of good faith in German law is that § 242 *BGB* is used as a basis for new remedies that are not provided for in the code or the contract.[133] These remedies can lead to new legal doctrines of contract law, causing results the legislator could not or did not want to stipulate in the written law.[134] The most famous example being the introduction of the doctrine of *Wegfall der Geschäftsgrundlage*, a variation of the *clausula rebus sic stantibus,* despite the fact that the draftsmen of the *BGB* expressly abstained from inserting a provision dealing with the change of circumstances after the conclusion of the contract.[135] Doctrines were also developed to restrict the parties in exercising a right they have been expressly granted either by contract clauses or legislative provisions.[136] As examples, the doctrines of *Rechtsmißbrauch* ('abuse of rights') and *Verwirkung* (suspension of a right because it was not exercised timely) may be mentioned. Hence, the application of § 242 *BGB* by German courts goes beyond the mere 'completion of the legislative plan', and amounts to a correction of the law as laid down by the draftsmen of the *BGB*.[137] and *Treu und Glauben* is used to develop the law *praeter legem*. It is this direct interference with the declared intentions of the legislator that makes the third function of good faith in German law one of the most contentious in the discussion of good faith in international trade.[138]

It should be noted, however, that the German courts and writers try to avoid simply relying on the general provision of § 242 *BGB* when they develop a new legal doctrine. The preferred method is to isolate a common idea in a number of specific provisions and to deduce a general principle from them. This method of a *Gesamtanalogie* (general analogy) is believed to be closer to the 'legislative plan' as the reliance on general ideas of equity and fairness.[139]

---

[133] Schlechtriem, *Good Faith in German Law and in International Uniform Laws*, p. 15.

[134] Zimmermann/Whittaker, p. 26.

[135] Roth, § 242, sec. 471 f.

[136] Zimmermann/Whittaker, p. 26.

[137] Schlechtriem, *Good Faith in German Law and in International Uniform Laws*, p. 16; Zimmermann/Whittaker, p. 26.

[138] Hartkamp, 3 Tul. J. Int'l & Comp. L. 65 at 67.

[139] Cf. Larenz/Wolf, § 4, sec. 69.

II. Good Faith in English Law

1. The Absence of a General Doctrine of Good Faith

The discussion of good faith in contemporary English law usually starts with the assumption that there a general doctrine of good faith in English contract law does not exist.[140] The 'high watermark' of good faith in English contract law is seen in a frequently quoted[141] statement made by Lord Mansfield in 1766, still under the influence of good faith as it was understood in the *ius commune* and the *lex mercatoria*, that

> '[t]he governing principle is applicable to all contracts and dealings. Good faith forbids either party by concealing what the he privately knows, to draw the other into a bargain, from his ignorance of that fact, and his believing the contrary.'[142]

This position changed by the nineteenth century and the theory of the freedom of contract prevailed. In essence, freedom of contract meant that only the parties to the contract could define their rights and duties. Therefore, judicial supervision over contractual terms had to be restricted to a minimum in order to attain the highest degree of stability and predictability so that the parties could rely on the binding effect of their agreement.[143] Contractual justice was seen as honouring the parties' agreement without scrutinising its substantial content.[144] The predictability of the outcome of a court dispute over contractual terms was, and as the discussions about good faith in the CISG show, still is of the utmost importance. The German judicial practice endeavours to grant justice in every individual case (*Einzelfallgerechtigkeit*),[145] whereas the English concept of contractual justice seems to be a more general one, as it is believed that vague concepts of fairness can make judicial decisions unpredictable.[146] Even if the outcome of a dispute is sometimes hard on a party, this is regarded as an acceptable price to pay in the interest of the great majority of business litigants.[147] Due to the

---

[140] O'Connor, p. 18.; Zimmermann/Whittaker, p. 3 (with comprehensive references in footnote 200); Beatson/Friedman, p. 14; Felegemas, p. 180.

[141] Cf. e.g. Keily, 3 VJ 15 at 36; Zimmermann/Whittaker, p. 42; Farnsworth, *Good Faith in Contract Performance*, p. 154.

[142] *Carter v Boehm* (1766) 3 Burr 1905 at 1910.

[143] Beatson/Friedman, p. 9 f.

[144] Beatson/Friedman, p. 9.

[145] It might be worth noting that the German Civil Code *BGB* was drafted under the same prevailing influence of the theory of freedom of contract. However, German courts were willing to accept that the theory of freedom of contract did not comply with the realities of the early twentieth century. Moreover it is submitted that the 'birth defects' of the *BGB* with regard to the law of delict and the unwillingness of the legislator to react, thus, might have led to the fact that German courts were more readily and earlier willing to interfere with the contractual relations than their English counterparts.

[146] Felegemas, p. 186.

[147] Felegemas, p. 186.

prevailing influence of the principle of freedom of contract, the role of equity in English contract law is modest.[148]

However, English courts were faced with the same conflict between strict rules and justice as the courts in civil law systems, such as, unequal bargaining power, the change of circumstances after the conclusion of the contract, and the exercise of contractual rights that are contrary to the original purpose of the contract. Although the classical principles of equity with their discretionary remedies and the ability to subvert common law rules, do not apply to contracts,[149] equitable notions have found their way into contract law in the form of particular doctrines. These doctrines are used to correct harsh consequences deriving from a pure application of the principle of freedom of contract.[150] Rather than to rely on a general principle of 'good faith', 'reasonableness', or 'fair dealing and honesty in fact', more technical doctrines were invented in order to guarantee the maximum amount of predictability possible.[151] It will be seen that these doctrines serve the same functions which are attributed to *Treu und Glauben* in German law.

2. Implied Terms

As stated above, the theory of the freedom of contract relies on the responsibility of the parties to the contract. Hence, it seems to be a logical step to close the gaps in a contract by detecting the will of the parties. Where there are no expressed terms that can be interpreted, courts may imply 'terms in fact'.[152] To ask to what the parties agreed to expressly or tacitly, is a factual inquiry, as the actual intentions of the parties are examined. However, if there are no circumstances that could reveal the parties actual intentions, English courts resort to 'reasonable' expectations of the parties.[153] Although the courts will not imply a term simply to make the contract more fair than negotiated between the parties,[154] fairness and reasonableness have been invoked to imply terms in appropriate cases.[155] In doing so, the courts apply

---

[148] Zimmermann/Whittaker, p. 38; Beatson/Friedman, p. 10.

[149] Zimmermann/Whittaker, p. 44; Beatson/Friedman, p. 10.

[150] Zimmermann/Whittaker, p. 44 f.; Beatson/Friedman, p. 10.

[151] O'Connor, p. 19.

[152] Cf. Treitel, p. 184 ff.

[153] Zimmermann/Whittaker, p. 45 f.; O'Connor, p. 19. The terminology used varies and comprises the 'officious bystander' and standards of 'business efficacy' but in essence refer to what 'reasonable' parties would have agreed to if they had been aware of the problem at the time of the conclusion of the contract, cf. Treitel, p. 184 f.

[154] Beatson/Friedman, p. 8.

[155] O'Connor, p. 32.

a normative standard to the contract interpretation rather than a factual one, even if the implication of a term is justified with local customs or mercantile usage as a form of 'presumed consensus'.[156]

Moreover, English courts not only imply terms in fact but also 'terms in law'. The latter cannot be traced back to a presumed intention of the parties. Hence it was held that terms implied in law are '[b]ased on wider considerations, for a term which the law will imply as a necessary incident of a definable category of contractual relationship.'[157] This means that terms implied in law do not derive from the parties' agreement but are considered inherent to a certain type of contract.[158] Thus, one cannot help but notice the similarities between terms implied in law and the conduct of German courts - under the regime of § 242 - to impose supplementary legal duties on the parties to a contract, whether or not the parties intended to be bound by such duties.[159]

However, a term cannot be implied so as to supersede the express terms of the contract.[160] Consequently, the implication of contract terms cannot fulfil the corrective function of good faith as it is not possible to restrict a party to exercise contractual rights.

3. Promissory Estoppel

Promissory estoppel[161] is an equitable doctrine that may serve in order to restrict a party in the exercise of an existing contractual right,[162] it cannot, however, serve in order to create new obligations between the parties.[163] Promissory estoppel is closely linked with the doctrine of consideration in English law: where a promise is not legally binding due to a lack of consideration, the promisee can raise promissory estoppel as a defence with the effect that

---

[156] Zimmermann/Whittaker, p. 45 f.; O'Connor, p. 19.

[157] Cf. e.g. *Scally v Southern Health & Social Services Board* [1992] 1 A.C. 294 at 307; *Mahmud v B.C.C.I.* [1998] A.C. 20 at 45.

[158] Cf. in detail Treitel, p. 190 ff.

[159] See also Hartkamp, 3 Tul. J. Int'l & Comp. L. 65, who describes implied terms in common law as the equivalent to the supplementary function of good faith.

[160] O'Connor, p. 19 with reference to *Les Affreteurs Reunis S.A. v Leopold Walford (London) Ltd.* [1919] A.C. 801.

[161] The terminology for this doctrine is not consistent. In order to avoid confusion with the common law doctrines of estoppel by representation of fact, promissory estoppel is often referred to as 'equitable estoppel' or 'equitable forbearance', cf. in detail e.g. Wilken/Villiers, sec. 12.05. Furthermore, the point has been made that English courts sometimes use the expression 'waiver' as interchangeable with 'promissory estoppel', cf. Treitel, p. 109 with further references.

[162] Wilken/Villiers, sec. 11.01; Treitel, p. 100.

[163] Wilken/Villiers, sec. 12.10; Treitel, p. 105 f.

the promise will be upheld and the promisor will not be permitted to enforce his original contractual right.[164] The cumulative requirements of promissory estoppel are that: (i) in an existing legal relationship a party makes a clear and unequivocal representation to another party, (ii) the representation is that the promisor's legal rights will not be enforced or will be suspended, (iii) that the promisee relies on the promise and alters its position to its detriment and that (iv) the promisor seeks to withdraw the promise, and that this withdrawal is considered inequitable.[165] The promise can be made expressly, including by conduct, and even by silence provided that there is a duty to act.[166]

Two observations are of interest with regard to the general principle of good faith. Firstly, English courts seem to apply an objective standard in determining whether or not the promise was made clearly and unequivocally, as it is sufficient that the promise induces the promisee 'reasonably' to believe that the other party will not insist on its strict legal rights.[167] Secondly, the withdrawal of the promise must be 'inequitable', a test that requires the judge to consider all circumstances of the specific case, such as the commercial experience of the parties or other obligations they have to fulfil.[168]

Thus, the conclusion has been made that promissory estoppel should be seen as cases where fairness and reasonableness demand that strict legal rights and 'normal' legal rules can, and should, be overridden.[169] In this context, it is not so important whether or not the doctrine of promissory estoppel can be considered part of a general doctrine of good faith.[170] Instead, the pivotal point is that promissory estoppel in English law is used to resolve a conflict between strict law and justice. The same conflict is dealt with in German law, under the doctrine of good faith in the form of *venire contra factum proprium* (inconsistent behaviour) and *Verwirkung* (suspension of a right because it was not exercised timely).[171]

---

[164] Wilken/Villiers, sec. 12.08; Treitel, p. 109.

[165] Wilken/Villiers, sec. 12.03; Treitel, p. 101 ff.

[166] Wilken/Villiers, sec. 8.164 and 12.16 f.; Treitel p. 103.

[167] Treitel, p. 101 (with reference to the leading cases in fn. 67); Wilken/Villiers, sec. 12.14 (with reference to case law in fn. 56).

[168] Wilken/Villiers, sec. 12.51 with reference to the relevant case law.

[169] O'Connor, p. 32.

[170] So O'Connor, p. 32.

[171] It should, however, be noted that in cases of an expressed promise good faith is unlikely to play a role in German law: as the doctrine of consideration is not applicable, expressed promises are an alteration (variation) of the original contract, provided that the other party reasonably could have understood them to be made with *Rechtsbindungswillen* (intention to legally bind the promisor). Hence, *Verwirkung* normally deals with cases of conduct or silence. Moreover, it should be stated that the English view is contrary to the German doctrine of *Verwirkung* in that the mere failure to prosecute a claim timely cannot lead to the destruction of a contractual right, cf. Treitel, p. 103 with further references.

4. Economic Duress and Undue Influence

Implied terms can impose additional obligations on the parties of a contract, and promissory estoppel can restrict the exercise of a contractual right, however these doctrines cannot alter the substance of an expressed term of a contract even where such a term is felt to be grossly unfair. In order to be able to exercise a certain control over unfair contractual terms, English judges have extended the common law doctrine of 'duress' from mere 'physical duress' to the acceptance of 'economic duress' as a reason to avoid a contract.[172] Moreover, the equitable doctrine of undue influence was used in a number of cases in order to provide relief against unconscionable bargains.[173] However, the effort to introduce a general relief against inequality of bargaining power was never accepted by English courts.[174] Unlike other common law jurisdictions, England has not adopted a general doctrine of unconscionability was adopted but left the matter for the legislator and the introduction of the Unfair Contract Terms Act 1977. Hence, it is submitted that, although there are technical doctrines with respect to the control of unfair contractual terms, English courts were far more reluctant to rule into the actual contractual terms as agreed to by the parties than their German counterparts.

5. Statutory Provisions

The term 'good faith' is used in several statutes, particularly in the Sale of Goods Act 1979, but also the Bill of Exchange Act 1882, and the Marine Insurance Act 1906.[175] Unlike in civil law jurisdictions, good faith is not used in a normative sense. It does not refer to an objective standard, such as 'reasonableness'. Good faith in the listed statutes is used subjectively and means essentially 'honesty in fact'.[176] In referring to the subjective knowledge of a party to the contract, the party can act in good faith even if the conduct is objectively considered negligent.[177] This use of the term good faith reminds one more of the German principle of *gutgläubiger Erwerb* than of the principle of *Treu und Glauben*.[178]

---

[172] Treitel, p. 375 f.; Zimmermann/Whittaker, p. 47; O'Connor, p. 20; Birks/Chin Nyuk Yin, p. 64; Beatson/Friedman, p. 13.

[173] Treitel, p. 382.

[174] O'Connor, p. 20; Treitel, p. 384 f.

[175] Cf. O'Connor for a detailed discussion of the provisions in these Acts dealing with good faith.

[176] O'Connor, p. 39.

[177] O'Connor, p. 39.

[178] See section I, 2 above in fn. 38.

C. The UNIDROIT Principles for International Commercial Contracts

The scope of the UNIDROIT Principles for International Contracts ('the Principles') were finalised in the year 1994. The Principles are not restricted to the sale of goods but apply to all commercial contracts. Unlike the CISG, the Principles are not binding law. They can be seen as a restatement of principles of international contract law. The Principles were drafted exclusively by academic scholars and can, thus, not be seen as trade customs.[179] According to their Preamble, the Principles are thought to be applied: when the parties agree to them,[180] as a supplement if there is no choice of law, as a model for legislators, and to supplement international uniform law. The latter purpose becomes relevant in the discussion of good faith in the CISG.[181]

The Principles are influenced by the continental European tradition of civil law. Consequently, good faith plays an important role. As the Principles contain a number of provisions which refer to good faith, the principle of good faith is seen as one of the fundamental ideas underlying the Principles.[182] Article 1.7 of the Principles, which contains the general principle of good faith, states that

> (1) Each party must act in accordance with good faith and fair dealing in international trade.
> (2) The parties may not exclude or limit this duty.

This provision makes it clear that, even in the absence of special provisions, the behaviour of the parties must always be in accordance with good faith. The reference to 'international trade' indicates that the standard of the respective trade must be considered and that a domestic standard of good faith can only be applied if it is accepted among the various legal systems.[183]

The Principles were revised[184] in 2004 and the new version included a new Art. 1.8 (Inconsistent behaviour), which states that

---

[179] The arbitral practice seems, however, to be divided, cf. for an overview over the relevant case law Farnsworth, *The Role of the UNIDROIT Principles in International Commercial Arbitration,* p. 21 at 26.

[180] Be it expressly or by reference to the *lex mercatoria* or general principles of law.

[181] For a detailed analysis whether the UNIDROIT Principles can help to determine good faith the CISG see Chapter 2 below.

[182] Cf. Official Commentary to the UNIDROIT Principles, UNIDROIT, *Principles of International Commercial Contracts*, p. 16 f.

[183] Cf. Official Commentary to the UNIDROIT Principles, UNIDROIT, *Principles of International Commercial Contracts*, p. 18.

[184] Though it is also asserted that the focus was more on enlargement than on revision, cf. Bonell, Unif. L. Rev. 2004, p. 5 at 17.

> A party cannot act inconsistently with an understanding it has caused the other party to have and upon which that other party reasonably has acted in reliance to its detriment.

This manifestation of what in civil law jurisdictions is known as *venire contra factum proprium* is seen as part of the general principle of good faith.[185] It was this importance of inconsistent behaviour in practice which made it advisable to specify its requirements.[186]

D. Some general Conclusions about Good Faith

It is conceded that a common core of good faith can neither be deduced from the history of good faith, or from a comparative analysis, in order to determine the meaning of good faith under the CISG. However, some general conclusions can be made in order to avoid misunderstandings that are present in the debate about good faith in the CISG. It is submitted that good faith is not a substantive concept that provides solutions, but only a method to find solutions.[187] As the substantive solutions found with the help of good faith cannot be deduced from the principle of good faith itself, good faith does not dilute the predictability of justice.[188] As the solutions for a problem determined with the help of good faith are not inevitable, good faith as such does not constitute a threat to the sanctity of the contract.[189]

I. Good Faith: a Method not a Solution

It seems that the general principle of good faith in civil law jurisdictions is sometimes seen as a coherent legal principle from which lawyers can directly divert the solution of a case. Hence, it has been stated

> '[...] that while good faith expresses itself in many different rules, it does so quite unsystematically [...]. It might have been expected that a concept formally enshrined in the Code, and subjected to much judicial consideration would have by now manifested itself in a more coherent and systematic fashion.'[190]

However, the better view is that good faith is neither a 'norm' in the common understanding, nor a legal 'doctrine' or 'principle' with an inherent substantive content. The observation has been made that the three functions of good faith - interpretation, supplementation and correc-

---

[185] Bonell, Unif. L. Rev. 2004, p. 5 at 20.

[186] Bonell, Unif. L. Rev. 2004, p. 5 at 20.

[187] See section I below.

[188] See section II below.

[189] See section III below.

[190] O'Connor, p. 89.

tion - can be equated with the tasks and function of a judge, or a court in general.[191] Although an inner system of good faith provisions, in the form of *Fallgruppen*, has been developed, it becomes clear that the specification of the substantial content of this inner system can only be achieved by the development and analysis of judge-made case law. Thus, the content of good faith provisions cannot be determined by an inner system but must come from 'outside' the provision.[192]

On these grounds, it has been argued that good faith, even if contained in a written provision, is not a norm in the common meaning.[193] All the specific sub-doctrines and sub-rules, which were developed under one of the three functions of § 242 *BGB* could, in their substance, survive without alteration or dilution of their specific content even if § 242 *BGB* would be abolished.[194] It has also correctly been observed that doctrines and rules that were developed under § 242 *BGB* have no common denominator as they are concerned with a great variety of different problems. Therefore, it can often be regarded as arbitrary or as a matter of taste in legal reasoning whether a new doctrine is based on *Treu und Glauben* or on another general clause, or on an analogy with a number of specific provisions.[195]

The aforesaid, in connection with the fact that at no time a helpful definition of a general principle of good faith could be found, must lead to the conclusion that good faith is not so much needed in order to determine what justice, equity or reasonableness means with regard to a specific case, but in order to empower the judge to bring elements of justice into an, otherwise closed, system of a contract or a codification. Judges in civil law jurisdictions, officially, do not have the same power to create new law[196] or to set aside existing law and exercise equitable discretion *ex lege* as common law judges do.[197] Moreover, the civil codes do not leave express space for the common law in case a gap is discovered.[198] Hence, when it is stated that common law lawyers tend to read statutory instruments strictly and rely on case

---

[191] Hesselink, *The Concept of Good Faith*, p. 492.

[192] Hesselink, *The Concept of Good Faith*, p. 492.

[193] Hesselink, *The Concept of Good Faith*, p. 489 f.

[194] As far as these doctrines and rules are recognised as *Gewohnheitsrecht* (customary law) they could even survive technically as § 242 *BGB* as an 'anchor', 'mouthpiece' or 'cloak' of judge-made law is then no longer required.

[195] Cf. for the observation that the German courts try to exhaust other possibilities of creating new rule before they take resort to the most general way of taking § 242 *BGB* as *Ermächtigungsgrundlage*, Hesselink, *The Concept of Good Faith*, p. 496; Roth, § 242, sec. 20.

[196] Zimmermann/Whittaker, p. 22 with further references in fn. 79.

[197] See for the application of *ex lege* rules in modern English contract law e.g. Beatson/Freeman, p. 16.

[198] Cf. Honnold, 8 Journal of Law and Commerce 207 at 208.

law to plug omissions,[199] it must be stated that this alternative is not available to civil law judges. Consequently, a civil law judge, in the process of decision making and reasoning, looks for an existing rule of law that expressly grants the discretion or the possibility to create or correct the law.[200] Thus, if there is no other express rule of law,[201] good faith functions as a norm empowering the civil law judge not only to apply the law, but to create it.[202]

II. Good Faith and the Predictability of Justice

The aforesaid leads to the conclusion that good faith in civil law jurisdictions fulfils similar functions as equity in old English law or the *ius honorarium* in Roman law.[203] Consequently, if one wants to compare the common law with the civil law, it is appropriate to compare 'good faith' with 'equity' and not with specific technical rules, be it equitable doctrines or common law rules, which are applied in order to correct the strict rules of the contract.[204] If one wants to compare the technical rules of contract law in common law systems with good faith, then the object of the comparison must be an equally specific sub-doctrine, one of the *Fallgruppen*, under the 'umbrella' of good faith. Hence, one would compare promissory estoppel with *venire contra factum proprium*, or economical duress with *Wegfall der Geschäftsgrundlage*. In doing so, one will realise that doctrines, stored in textbooks under the label 'good faith', are neither more nor less precise or innovative than the technical rules in English contract law. Taking German law as an example, judiciary in close co-operation with academics, try to develop doctrines that emerge from a case-by-case basis into doctrines with requirements

---

[199] Sim, sec. IV, B, 2.

[200] There are different reasons for the limited power of judges in civil law jurisdictions. In Germany the *BGB* was drafted with the approach to create a closed system of rules that would provide the judge with an answer for every problem, cf. Larenz/Wolf, § 2, sec. 99. Today, the judge is, furthermore, bound by the constitution to apply the law (and not to decide beside or against it). In France, the Civil Code was designed to supersede the law of the *ancien régime*. To guard against back sliding, judges were required to anchor decisions in some article of the code, cf. Honnold, 1 Int'l Trade and Business L. J. 1 at 2.

[201] Such as e.g. contained in section 1 of the Swiss Civil Code: *'The Law must be applied in all cases which come within the letter or the spirit of any of its provisions. Where no provision is applicable, the judge shall decide according to existing Customary Law and, in default thereof, according to the rules which he would lay down if he had himself to act as legislator. [...]'*.

[202] With regard to § 242 *BGB* there remains of course the problem that the norm, according to its wording, only covers the performance of the debtor, and does not build an *Ermächtigungsgrundlage* for the judge to correct the law. Hence, the law (§ 242 *BGB*) was *contra legem* corrected by judges in order to provide other German judges with an *Ermächtigungsgrundlage* in order to correct the law in other cases.

[203] Hesselink, *The Concept of Good Faith*, p. 493. Cf. for old English law, as one of many, e.g. Felemegas, p. 185: 'It is sufficient to say that the rules of Equity - originally administered in the King's Court by the Chancellor - evolved in order to undo the injustices frequently caused by the rigidity of the old common law, either by restraining common law remedies, or by giving remedies which were not given by the old common law, such as specific performance or rescission of a contract for a non-fraudulent misrepresentation.'

[204] It has, correctly, been stated that, thus, *'[i]t does not make any more sense for a common law lawyer to fight the concept of good faith than it would have been to fight the whole of equity.'*, cf. Hesselink, *The Concept of Good Faith*, p. 498.

similar to those provided by written rules of the *BGB*. It is not unusual that a doctrine develops to a point where it, first, becomes independent of the § 242 *BGB*, and then, eventually, when it is specific enough and has proven to be workable, it is adopted by the legislator as a written rule of law.[205]

In contrast, the technical rules developed in modern English contract law, be it common law or equitable doctrines, are by no means as clear as pretended.[206] It has correctly been observed that the 'piecemeal' solutions of the common law can tempt one either to impose a unity to a doctrine that does not exist, or not to recognise links between individual cases.[207]

The question regarding the circumstances under which a new good faith doctrine emerges, and to what extent it interferes with contractual terms or existing law, is not determined by a principle or a general doctrine of good faith, but by the specific circumstances and shortcomings of the respective system of law. Hence, this decision is not made by the application of a substantive norm, but by the judges who exercise their discretion and determine what good faith means in order to exercise justice. Hence, the statement that

> '[T]he position of English courts is that vague concepts of fairness can make judicial decisions unpredictable. If that means that the outcome of disputes is sometimes hard on a party, then it is regarded as an acceptable price to pay in the interest of the great majority of business litigants.'[208]

may be true insofar as civil law judges might have a tendency to put more emphasis on *Einzelfallgerechtigkeit* (justice in the specific case), and that they are not willing to deny justice to an individual in order to serve the interests of a group. This, however, is not attributable to good faith but to the willingness of the courts to extend the interference with contract terms.[209]

It has been shown above that German courts develop specific doctrines under § 242 *BGB* to an extent that they are comparable in their precision to written provisions of the *BGB*. Thus, doctrines that were developed, using good faith as a 'mouthpiece', or as an 'anchor' do not

---

[205] This has recently been proven by the reform of the German law of obligations where the good faith doctrines of *Wegfall der Geschäftsgrundlage* (change of circumstances) and *Kündigung aus wichtigem Grund* (termination due to severe cause) as developed by the courts were almost unchanged included in the code, cf. §§ 313, 314 *BGB*

[206] See e.g. the preface to Wilken/Villiers, *Waiver, Variation and Estoppel,* p. xvii, stating that the book *'[...] has its origins in the frustration that is felt by practitioners and academics alike in tackling the doctrines [...] these doctrines are frequently relied on but less frequently analysed and understood'*.

[207] M. I. Mustill in the foreword to Wilken/Villiers, *Waiver, Variation and Estoppel*, p. xv.

[208] Felemegas, p. 186.

[209] See section III below.

affect predictability more than the technical rules developed under common law. It is of course true that it is sometimes hard to predict when a new doctrine under good faith starts to emerge. The same can be said, however, from the development of the technical doctrines in English law: the parties of the dispute were probably quite surprised when the English courts, for the first time, accepted economic duress as a defence, and did not anticipate this outcome of the proceedings during their contract negotiations.

III. Good Faith and the Sanctity of Contract

Within the common law tradition there is a widespread belief that a general principle of good faith would undermine the theory of freedom of contract as it would ignore the intentions of the parties.[210]

1. The Rule and the Exception from the Rule

It is true that good faith in civil law systems is, now, used to counterbalance the sometimes harsh results of *pacta sunt servanda*. Hence, it can be stated that in the continental European legal systems the emancipation of good faith occurred simultaneously with the decline of party autonomy.[211] However, this can be seen as a coincidence of legal history, as the contract law of most Western legal systems was heavily influenced by the concept of freedom of contract.[212] It has correctly been stated that, if the civil law will come under the influence of more social doctrines, good faith might in the future just as well be invoked by courts in order to reinforce the rule of *pacta sunt servanda.*[213] Hence, the question of what good faith is depends to a great extent on what is the rule and what is the exception. The answers to this question can change with time and political and social values, as law does not exist in a vacuum.

2. Good Faith and the Need for Protection

It is correct to say that German courts have intervened to a greater extent with the substantive obligations of the contract of the parties than English courts have. However, it should be noted that the intervention only took place if there was a typical imbalance of the bargaining

---

[210] Cf. Juenger, 69 Tul. L. Rev. 1253 at 1254: *'Such discretion, however, can hardly appeal to those who have been weaned on the notion that judges cannot make a contract for the parties.'*

[211] Hesselink, *The Concept of Good Faith*, p. 495 (fn. 146).

[212] See for German law e.g. Larenz/Wolf, § 2, sec. 37 - 99.

[213] Hesselink, *The Concept of Good Faith*, p. 495 f.

power. Thus, German courts considered whether or not a specific group typically involved in certain contracts, particularly 'consumers', were in need of protection.[214] Consequently, the interference was far less when both parties were traders and it had to be assumed that they could negotiate the terms of their contract 'at arms length'. This fact has to be considered in the discussion about good faith in the CISG, as the CISG does not apply to consumer contracts (Art. 2(a) CISG). Hence, when reference is made to the extensive interference with contract terms under good faith in German law, it should be born in mind that the interference is far less when both parties are deemed to be experienced traders.

E. The Functional Approach to Good Faith

The lesson that can be learned from this chapter is that there is no way to deduce the content and scope of a general principle of good faith from the provisions it is stated in. Good faith evades a meaningful definition. However, this does not lead to a lack of predictability or necessarily to an extensive interference with the contract terms agreed to by the parties, as there is no 'inner-system' of good faith that predetermines such a result.

The more promising approach to good faith seems to lie in the functions good faith can fulfil: the interpretation, the supplementation, and the correction of rules, be it legislation or contract provisions. Such a functional approach to good faith complies with the role good faith played throughout the centuries in all jurisdictions that used this device: to come to a just result where the written rules cannot achieve this task. Hence, the prediction can be made, that attempts to define a coherent substantive doctrine of good faith in the CISG will fail as they have failed before in domestic law and that, thus, only a functional approach can attribute a plausible meaning to good faith in the CISG.

Furthermore, it has been seen that good faith does not play a role at all in jurisdictions, such as England, where the functions of good faith are administered by other legal means. It can, thus, be said that the principle of good faith is subsidiary to other legal instruments. The South African example shows that, if good faith is nevertheless treated as part of the civil law, there exists great uncertainty about the tasks good faith should be used for. With regard to the CISG this means that the role of good faith will be determined by other possibilities which the CISG provides in order to fill gaps in the law, or to correct unjust rules.

---

[214] This applies e.g. to the control of standard terms and conditions which is much stricter if one party is a consumer (cf. § 310 *BGB*, the substantive rules of which were developed under § 242 *BGB*) and to the control of consumer credit clauses (§ 491 *BGB*).

Chapter 2: The CISG and the General Principle of Good Faith

The CISG uses the term 'good faith' in Art. 7(1). However, the functions, meaning and scope of good faith in the CISG are highly contentious. In the following chapter, an overview over the good faith provisions in the CISG is given,[215] and different ways of reasoning with regard to the acceptance of a general principle of good faith in the CISG are analysed.[216] The result of the analysis is that a coherent substantive concept of good faith cannot be deduced from the CISG provisions but that good faith can only be determined according to its functions (functional approach). Furthermore, it is submitted that good faith is subsidiary to other legal instruments. Thus, other possibilities which the CISG provides in order to enable courts and tribunals to exercise the three functions deduced from the principle of good faith in a domestic understanding will be examined.[217]

A. Manifestations of Good Faith in the CISG

The term good faith is mentioned exclusively in Art. 7(1) CISG, which deals with the interpretation of the Convention. However, it is argued that good faith is a tacit general principle of the Convention under Art. 7(2) CISG. Furthermore, specific provisions of the CISG are seen as a manifestation of good faith, even though they do not use the term 'good faith', as they impose an objective standard on the behaviour of the contract parties.[218]

I. Article 7 CISG

The CISG uses the term 'good faith' only in Art. 7(1). The complete Art. 7 CISG reads:

> (1) 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.
>
> (2) Questions concerning matters governed by this Convention which are not expressly settled in it are to be settled in conformity with the general principles on which it is based or, in the absence of such principles, in conformity with the law applicable by virtue of the rules of private international law.

At first site, the provision seems to be clear. The determination of the scope of good faith in the CISG is, however, made difficult by the fact that Art. 7(1) CISG had no predecessors in

---

[215] See section A below.

[216] See section B below.

[217] See section C below.

[218] Cf. UNCITRAL; *Commentary on the Draft Convention on Contracts for the International Sale of Goods*, Text of Secretariat Commentary on article 6 of the 1978 Draft, sec. 4.

the 1964 Hague Conventions; and that the wording of Art. 7(1) CISG is the result of a compromise between the opposing interests of common law and civil law systems.[219]

Relative unity exists about the fact that the wording of Art. 7(1) CISG contains two restrictions with regard to the scope of good faith. Firstly, Art. 7(1) CISG only requires the observance of good faith with regard to trade. It has been noted above, that the application of good faith in domestic law can lead to different standards depending on whether or not there is a typical imbalance between the contracting parties.[220] Consequently, there is a tendency to let the strict law or terms of the contract prevail to a greater extent if both parties are experienced in trade and it can be assumed that they negotiate at arm's length. Secondly, good faith is only relevant as far as it is considered internationally accepted.[221] Hence, it is not permissible to refer to domestic notions of good faith, even if there is a common understanding about good faith within the domestic legal systems of both contractual parties.[222]

II. The Legislative History of Art. 7 (1) CISG

The wording of Art. 7(1) CISG appears unfamiliar to lawyers from any domestic jurisdiction as good faith is normally not used as an interpretative device for a legal text.[223] Neither ULIS nor ULF, as predecessors to the CISG, contained a general principle of good faith.[224] The final version of Art. 7(1) CISG is a compromise between the diverging concepts of the delegates from common law and from civil law jurisdictions with regard to a general principle of good faith.

During the preparation of the CISG, the introduction of good faith was first proposed by the representative of Spain in 1972, but was apparently not further pursued.[225] In 1978 the Hun-

---

[219] See section II below.

[220] See Chapter 1, D, III, 2 above.

[221] Enderlein/Maskow, Art. 7, sec. 6.

[222] The compliance in both domestic systems can, however, become relevant once the court or tribunal decided to take resort to private international law under Art. 7(2), second alternative, CISG.

[223] Eörsi, § 2.03, p. 2-6.

[224] An explicit reference to a general principle of good faith was proposed during the preparation of the 1964 Hague Conventions but eventually rejected as it was believed that it would lead to divergent and arbitrary interpretations by national courts, and thus would impair uniformity, cf. Garro, 23 International Lawyer [1989], p. 443 ff., sec. II, B, 4 with further references in fn. 101. Despite the legislative history of Art. 17 ULIS, it was argued that good faith, in fact, was a general principle of ULIS, that could be deduced from numerous specific provisions implementing a standard of 'reasonableness', cf. Mertens/Rehbinder, Art. 17 EKG, sec. 22 with further references to German scholarly writing; Schlechtriem/Herber, *Commentary*, Art. 7, sec. 34 in fn. 54 with reference to a decision of the German *Oberlandesgericht Düsseldorf*. Note, however, that non-civil law commentaries did not refer to a general principle of good faith, cf. e.g. Graveson/Cohn, p. 61 - 63.

[225] Eörsi, § 2.03, p. 2-6; 3 UNCITRAL Yearbook 76 no. 52 [1972].

garian representative introduced good faith within the context contract formation, and proposed a formulation according to which 'in the course of the formation of the contract the parties must observe the principles of fair dealing and act in good faith.'[226] The introduction of good faith in the context of contract formation was considered unfortunate as it triggered immediate opposition from common law representatives. They stressed that the common law draws a distinct line between the phase of the negotiation and the actual conclusion of a contract.[227] Hence, the common law representatives wanted to avoid any notion of *culpa in contrahendo,* which, in common law systems,[228] is seen as a manifestation of good faith. The opposition to a general principle of good faith was, however, not restricted to concerns about the pre-contractual phase, but was also based on more general arguments. In particular, it was feared that a general principle of good faith: was 'vague and unnecessary', that its specification lacked a legal framework as it can be found in domestic systems of law, and that the variety of forums applying the CISG would make a uniform interpretation of good faith impossible.[229] Other objectors argued that good faith was adequately dealt with under domestic law, and that the proposal lacked substance as it failed to provide remedies for the breach of an obligation to act in good faith.[230]

The final version of Art. 7(1) CISG was adopted as a compromise between these two positions. Due to great uncertainty regarding the meaning of good faith within the final provisions, which dealt with the interpretation of the CISG, the wording of Art. 7(1) CISG was called unfortunate,[231] and good faith as a general principle of the CISG was considered 'buried'.[232]

The wording of Art. 6 of the 1978 draft of the CISG, which became Art. 7 of the final version, was the following:

---

[226] Garro, 23 International Lawyer (1989), p. 443 ff., sec. II, B, 4 in fn. 102; UNCITRAL Yearbook 61 no. 66 [1978].

[227] Garro, 23 International Lawyer (1989), p. 443 ff., sec. II, B, 4 with further references in fn. 103; Farnsworth, 3 Tul. J. Int'l & Comp. L. 47 at 57 f.

[228] Eiselen, 116 SALJ [1999] 333 at 358; Farnsworth, 3 Tul. J. Int'l & Comp. L. 47 at 58. It is thought that this association between good faith and *culpa in contrahendo*, a doctrine of fault in negotiations that was developed in German law, but based on an analogy with specific provisions of the German *BGB*, can be attributed to the article by F Kessler and E Fine, *Culpa in contrahendo, Bargaining in good faith: A comparative study*, 77 Harvard Law Review [1964] 401, cf. Zimmermann/Whittaker, p. 27 in fn. 115.

[229] Garro, 23 International Lawyer (1989), p. 443 ff., sec. II, B, 4 with further references in fn. 103.

[230] Cf. e.g. Klein, 15 Liverpool Law Review 115 at 121.

[231] Comments referred to 'uneasy', 'strange' and, ironically, 'statesmanlike', cf. Garro, 23 International Lawyer (1989), p. 443 ff., sec. II, B, 4 with further references. Cf. furthermore 'awkward compromise', and 'a rather peculiar provision' as cited by Farnsworth, 3 Tul. J. Int'l & Comp. L. 47 at 55 with further references; Bridge, sec. 2.32 'The application of this provision is something of a mystery.'

[232] Garro, 23 International Lawyer (1989), p. 443 ff., sec. II, B, 4.

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

The text of the UNCITRAL Secretariat Commentary refers to Art. 6 of the 1978 draft and not to Art. 7(1) of the final version. Thus, the text of the Commentary states that

> '[T]he principle of good faith is, however, broader than these examples and applies to all aspects of the interpretation *and application* of the provisions of this Convention.'[233] [emphasis added]

It has been argued that this particular change in the final version of the CISG is a mere editorial matter and that the change, thus, cannot serve in order to restrict the scope of the application of the principle of good faith in the CISG.[234]

III. Objective-Normative Standards in Specific CISG Provisions

The CISG contains a number of provisions that impose an objective standard of behaviour on the parties to the sales contract with regard to the performance of contractual obligations. The most common standard is the one of 'reasonableness',[235] however objective standards are also imposed by the terms 'normal',[236] or 'ought to have'.[237] Furthermore, the second sentence of Art. 29(2) CISG provides for a specific case of promissory estoppel, or *venire contra factum proprium*, as it protects the reliance of one party on the conduct of the other party, even if the conduct is contrary to the express terms of the contract.[238] All these objective standards are considered 'normative' as they do not refer to what the parties did or intended, but what the law sees as the appropriate conduct. These objective-normative standards are seen as specific manifestations of the requirement of the observance of good faith.[239] This view appears to be undisputed.[240] The contentious question is, however, which role the spe-

---

[233] Cf. UNCITRAL, *Commentary on the Draft Convention on Contracts for the International Sale of Goods*, Text of Secretariat Commentary on article 6 of the 1978 Draft, sec. 4.

[234] Schlechtriem/Herber, *Commentary,* Art. 7, sec. 16 and Schlechtriem/Junge, *Commentary,* Art. 8, sec. 9.

[235] Cf. Keily, 3 VJ 15 at 29 in fn. 70 and DiMatteo *et al.*, 24 NW. J. Int'l L. & Bus. 299 at 317 f. fn. 74 with a comprehensive list of CISG provisions using the term 'reasonable' or its derivatives. The authors counted 38 instances of 'reasonableness' in the CISG.

[236] Article 21(2) CISG 'if the transmission had been normal'; Art. 82(2), (c) CISG 'normal course of business' and 'course of normal use'.

[237] Article 39(1), Art. 49(2), (b), (i), Art. 64(2), (b), (i) CISG.

[238] Cf. Eiselen, 14 Pace Int'l L. Rev. 379 at 383; Magnus, 59 RabelsZ 469 at 480 f.; cf. Klein, Liverpool Law Review 115 at 129: *'While the words "good faith" are nowhere to be found in Art. 29, it is clear that the outcome in this scenario is grounded largely on the good faith obligation, for there is nothing [...] that would otherwise preclude the avoidance of the agreement as modified.'*

[239] Cf. UNCITRAL, *Commentary on the Draft Convention on Contracts for the International Sale of Goods*, the Secretariat Commentary on article 6 of the 1978 Draft, sec. 4.

[240] With the exception of Sim, sec. III, B, 2, c, (i), who, however, seems to be misled by the assumption that the

cific manifestations of good faith can play in the determination of a general principle of good faith under the CISG.[241]

B. Article 7 CISG and the General Principle of Good Faith

It will be seen that the general principle of good faith was, contrary to the judgements made after the acceptance of the final version of the CISG, not buried. However, due to the legislative history of Art. 7(1) CISG, and the compromise resulting from the different interests, 'almost everybody disagrees as to the impact, if any, that the principle of good faith may have on the behaviour the parties to an international contract for the sale of goods'.[242]

There are five views of the role good faith can play as a general principle within Art. 7 CISG: Art. 7(1) CISG can be read literally, and good faith would, thus, only be relevant for the adjudicator to interpret the convention;[243] Article 7(1) CISG could be interpreted beyond its wording and be understood as imposing a positive duty to act in good faith on the parties to the sales contract.[244] Furthermore, a duty of the contractual parties to act in good faith could be denied under Art. 7(1) CISG, but be seen as a general principle of the CISG according to Art. 7(2) CISG.[245] It is also argued that, beyond 'interpretation' in Art. 7(1) CISG, good faith is not covered by the CISG and, thus, domestic law has to be applied.[246] Finally, it is asserted that a general principle of good faith under the CISG should be interpreted in light of the UNIDROIT Principles and the *lex mercatoria*.[247]

I. Article 7(1) CISG as an Exclusively Interpretative Rule

The most restricted understanding of good faith in the CISG is the one which limits the scope of good faith to the interpretation of the provisions of the CISG. This means that there is no

---

standard of reasonableness in the specific provisions is equated or used synonymously with good faith, whereas the correct understanding is that these provisions are only a manifestation of particular situations where good faith has to be observed. It is admitted, and this seems to be Sim's main concern, that with the acknowledgement of specific rules of good faith nothing is said about their influence on a general principle of good faith.

[241] See in detail section B, III below.

[242] Garro, 23 International Lawyer, p. 443 ff., sec. II, B, 4.

[243] See section I below.

[244] See section II below.

[245] See section III below.

[246] See section IV below.

[247] See section V below.

general duty imposed on the parties to the contract of sale to act in good faith.[248] A duty of good faith would only be imposed on the judges and arbitrators applying the CISG. The supporter of this understanding of Art. 7(1) CISG have the advantage of the unequivocal wording on their side. In addition, the legislative history of Art. 7(1) CISG is also relied on,[249] though sometimes only as a supportive argument.[250]

It has, furthermore, been submitted that the word 'promote' in Art. 7(1) CISG refers exclusively to the requirement of uniformity and not to the observance of good faith.[251] Hence, according to this understanding, no preferential treatment of good faith in the interpretation is required, and uniformity would be the more important task to achieve.[252]

II. Article 7(1) CISG as an Obligation to Act in Good Faith

It has been noted above that the wording of Art. 7(1) CISG raises questions. On the one hand, it is unusual that the law expressly imposes a duty to act in good faith on judges and arbitrators. One would assume that adjudicators have an inherent duty to act impartially and according to the legal framework provided by the CISG. Hence, where discretion or space for interpretation exists, they must give consideration to the interests of both contract parties. Thus it seems, in fact, 'strange', 'awkward' and 'peculiar' to impose a duty to observe good faith on the judiciary, and not on the parties.

On the other hand, it is doubted that a distinct line can be drawn between the interpretation of the CISG's provisions, and the interpretation of the terms of the sales contract, as the former necessarily influences the latter.[253] Hence, it was concluded that, despite its wording,

---

[248] For such a restrictive role of good faith e.g. Farnsworth, 3 Tul. J. Int'l & Comp. L. 47 at 57 f.; Felemegas, p. 243 f.; Klein, 15 Liverpool Law Review 115 at 120; Sim, sec. III, B, 2, d.

[249] It does not lack a certain irony that common law lawyers use the intention of the legislator, an interpretative technique they normally encounter with suspicion as they consider it a civil law invention, in order to reject a the civil law doctrine of good faith, whereas civil lawyer neglect the intention of the legislator against their habit in order to promote 'their' doctrine of good faith.

[250] Farnsworth, 3 Tul. J. Int'l & Comp. L. 47 at 56: *'[A]s one of the delegates who opposed any reference to good faith, it strikes me as a perversion of the compromise to let a general principle of good faith in by the back door.'* This statement has been answered with equally strong language calling *it 'a lonely cry amidst a sea of support to the contrary'*, cf. Keily, 3 VJ 15 at 29.

[251] Cf. Keily, 3 VJ 15 at 23 in fn. 43; Powers, 18 J. L. & Com. 333 at 344.

[252] See however UNCITRAL, *Commentary on the Draft Convention on Contracts for the International Sale of Goods*, the Secretariat' Commentary on article 6 of the 1978 Draft, sec. 2 (article 7 of the final version), which states that the observance of good faith must be promoted, and, thus, seems to take the broader view on the wording.

[253] Cf. e.g. Eörsi, § 2.03, p. 2-8: *'[T]hus, interpretation of the Convention may indeed lead to application of the good faith clause. It might be argued that in such case it was not the Convention which was interpreted but the contract. In my humble opinion, however, interpretation of the two cannot separated since the Convention is*

good faith in Art. 7(1) CISG cannot be confined to the interpretation of the CISG's express rules but that it also imposes a general obligation on the contractual parties to perform their obligations in good faith.[254]

III. Good Faith as a General Principle under Art. 7(2) CISG

Another way to extend the scope of good faith beyond a merely interpretative function is to recognise good faith as a general principle underlying the Convention according to Art. 7(2) CISG. Such a principle could be deduced from the provisions which impose objective-normative standards on the behaviour of the parties.[255] This method has the advantage that the wording of Art. 7(1) CISG does not have to be overcome, as restricting Art. 7(1) CISG to the interpretation of the Convention does not necessarily exclude the existence of a more far-reaching principle of good faith that underlies the CISG. However, considering the legislative history of Art. 7(1) CISG the recognition of a general principle to act in good faith would, in effect, be a circumvention of the reached compromise. This would amount to an ignorance of the legislative history similar to extension of the scope of Art. 7(1) CISG beyond its wording. It can be argued that Art. 7(2) CISG only allows the application of principles that are not expressly settled in the Convention, and that good faith finds its expressed and restricted settlement in Art. 7(1) CISG. Thus, according to this argument, there would be no space for a more extensive general principle with regard to good faith.[256]

The supporters of a general principle of good faith under Art. 7(2) CISG argue that, as the wording of Art. 7(1) CISG is restricted to 'interpretation of the Convention', other functions of good faith are not expressly settled in the Convention and that there is, consequently, a pos-

---

necessarily interpreted by the parties also; after all the Convention constitutes the law of the parties insofar as they do not make use of Article 6 on freedom of contract."

[254] Eörsi, § 2.03, p. 2-8; Schlechtriem/Herber, *Commentary,* Art. 7, sec. 16; Magnus, 10 Pace Int'l L. Rev. 89 at 90: *'[T]he CISG, however does not contain an express provision providing that individual contracts must obey the maxim of good faith. It is common ground that under the CISG the good faith principle, in addition to the parties' contractual relationship, applies to the interpretation of the individual contract.'* Also: Rosett, 45 Ohio State Law Journal 265 at 289; cf. furthermore Schlechtriem, *Good Faith in German Law and in International Uniform Laws,* p. 3, who rather deduces a more far-reaching scope of good faith from Art. 7(2) CISG but refers in fn. 2 to the fact that almost the entire German commentary literature on the CISG extends the scope of Art. 7(1) CISG in a way similar to § 242 *BGB* (cf. references to the commentaries on the CISG of von Caemmerer/Schlechtriem/Herber, Staudinger/Magnus, Honsell/Melis, and Karolus).

[255] Schlechtriem, *Good Faith in German Law and in International Uniform Laws,* p. 3; Zeller, Chapter 4, sec. 4, b; Keily, 3 VJ 15 at 29; apparently also Klein, 15 Liverpool Law Review 115 at 141.

[256] Cf. Felemegas, p. 198: *'What is less, if all, legitimate is the subsequent catapulting of the concept of good faith as a "general principle" under Art. 7(2) into the interpretative mechanism of the CISG under Art. 7(1).'*

sibility for the application of a general principle.[257] Such a tacit general principle would stand alongside with the expressed interpretative notion of good faith under Art. 7(1) CISG.

IV. Good Faith as a Matter to be Resolved by Domestic Law

It is argued that it is not possible to deduce a general principle of good faith underlying the CISG, and that, since the matter is not resolved by the CISG, the answer has to be found in domestic law.[258] However, it has been shown in Chapter 1 that a good faith is usually used as an exception when the application of a strict rule is thought to be inappropriate.[259] To resort to domestic law would mean that the rule is located in the CISG but the exception to the rule, good faith, would be determined under domestic law. As an example: Article 75 CISG requires a party to give notice of avoidance of the contract to the other party, in order to claim damages caused by a substitute transaction. The question of, whether or not a party is exempted from the obligation to notify, is not regulated in the CISG and would, consequently, have to be determined according to the good faith rules of domestic law.[260] This cannot be the understanding of 'matters governed by this Convention which are not expressly settled in it', as stipulated in Art. 7(2) CISG. Otherwise, it would be possible to circumvent any of the provisions of the uniform law with exceptions found in domestic law. This, however, would undermine the primary objectives of the CISG - the international character, uniformity and predictability - more than a general principle of good faith under the CISG would.[261] Hence, the only acceptable interpretation is that if the exception of a rule cannot be found in the CISG, then there is no exception at all.

V. The Influence of UNIDROIT Principles and the *lex mercatoria*

The four suggestions examined above of how to apply a general principle of good faith under Art. 7 CISG have difficulty determining what good faith is and to what extent it is applicable.

---

[257] Schlechtriem, *Good Faith in German Law and in International Uniform Laws,* p. 3; Schlechtriem, *Uniform Sales Law*, p. 39.

[258] Sim, sec. III, B, 2, c, ii; the possibility is also mentioned, but not supported, by Farnsworth, 3 Tul. J. Int'l & Comp. L. 47 at 56.

[259] See Chapter 1, sec. D, III, 1 above.

[260] See for this question the decision of Oberlandesgericht Hamburg, 28 February 1997, 1 U 167/95, Chapter 3, D, II, 1 below, where good faith under the CISG, and not domestic law, was applied.

[261] This is completely overlooked by Sim, sec. III, B, 2, c, ii, when he submits that *'While the absence of a general principle of good faith may mean that decision-makers would have to turn to the rules of private international law to resolve an issue in so far as some other general principle in the CISG cannot be found to assist, this would still be preferable since it is likely that the domestic law would already have developed a response to the problem. In this way, domestic notions of good faith may be used to resolve a problem. Although this may produce different solutions, it is far better than having to contend with the "wild-card" of an uncertain general principle of good faith.'*

Even those writers who support a literal and, in their view, narrow understanding of good faith,[262] cannot deduce from Art. 7(1) CISG how an interpretation of the Convention has to be conducted.[263] This conclusion leads some writers to look for a 'concretisation' of good faith outside the CISG, particularly in the UNIDROIT Principles and accepted rules of the *lex mercatoria*.[264] It is argued that the good faith provisions of the UNIDROIT Principles, which are far more detailed than those of the CISG, can, to a certain extent, be equated with the understanding of good faith in the CISG.[265] The supporters of this view admit that two dogmatic obstacles exist: the fact that the UNIDROIT Principles drafted after the adoption of the CISG, and that the wording of Art. 7(2) CISG refers to general principles 'on which it [the CISG] is based'. However, considering that the CISG provides no mechanisms or authorities to develop the Convention,[266] the advantages of the UNIDROIT Principles are seen to prevail over the technical obstacles in the reasoning.[267] Recognising that Art. 7(2) CISG makes the CISG a closed system, which is not open for the import of legal doctrine from the outside, some writers require that there must be a manifestation of the idea in the CISG. Hence, only a reference to the UNIDROIT Principles or rules of the *lex mercatoria* can only be used to specify this idea.[268]

---

[262] It will be seen below that the interpretation of the CISG by a judge under 'the observance of good faith' might lead to a more extensive role of good faith than the mere interpretation of the contractual terms, see section VI, 2 below.

[263] Cf. e.g. Sim, sec. III, B, 2, d.

[264] See for an analysis and compilation of the *lex mercatoria* as applied by international arbitral tribunals Mustill, 4 Arbitration International 86 ff.

[265] The strongest statement is made by Magnus, 10 Pace Int'l L. Rev. 89 at 95, stating that *'[T]he differences between the CISG and the UNIDROIT Principles regarding the general concept of good faith in international contracts can be disregarded. The differences are in form not in substance.'*, references are made to his own writings in *Die allgemeinen Grundsätze im UN-Kaufrecht*, RablesZ 1995, 469 at 492 f. and his own contributions in *Staudinger Kommentar zum BGB*; c.f. also Bonell, *The UNIDROIT Principles as a Means of Interpreting and Supplementing International Uniform Law,* p. 30 with a self-referential citation of his own article 'Formation of Contracts and Precontractual Liability under the Vienna Convention on International Sale of Goods, ICC Publication No. 440/9, 1999, p. 157 at 166 ff.; more generally Garro, 69 Tul. L. Rev. 1149 at 1189 *'[T]he fact that many gaps in the CISG were intentional should not necessarily discourage the application of the UNIDROIT Principle because the Principles were adopted for the specific purpose of supplementing international instruments such as the CISG, thus complementing the terms of contracts and the usages of trade that govern international sales transactions.'*; equally vague but particularly in the context of good faith Powers, 18 J. L. & Com. 333 at 349: *'[H]owever, the UNIDROIT Principles are meant to be a culmination of international contract law and should assist one in interpreting the CISG. [...] The good faith provision of the European Principles are very similar to those in the UNIDROIT Principles. Taken together, these two documents strengthen the argument that good faith is an internationally recognized principle that should be found to be a requirement of the CISG.'*

[266] Cf. for this argument particularly Keily, 3 VJ 15 at 33.

[267] Magnus, 10 Pace Int'l L. Rev. 89 at 95; Bonell, *The UNIDROIT Principles as a Means of Interpreting and Supplementing International Uniform Law,* p. 30; Garro, 69 Tul. L. Rev. 1149 at 1189.

[268] Magnus, *Editorial Remarks*, sec. 2, b; Bonell, *The UNIDROIT Principles as a Means of Interpreting and Supplementing International Uniform Law,* p. 33.

VI. Analysis and Discussion

1. Interpreting Art. 7(1) CISG

The question or whether or not the application of 'good faith' in Art. 7(1) CISG is restricted to the wording, is a matter of interpretation. However, uncertainty exists regarding the interpretation of the CISG. Although Art. 7 CISG is the norm that should stipulate rules for the interpretation (para 1) and the gap-filling (para 2), only very vague and abstract guidelines are given. The extent to which methods, such as textual, systematic, historical and teleological interpretation, are applicable, is left open.

Relative unity exists about the fact that when interpreting a term within the Convention it is not appropriate to import a certain understanding of a term from a domestic system of law. The obligation provided by Art. 7(1) CISG to interpret the Convention with regard to its international character requires an autonomous determination of the content and scope of good faith. Thus, no resort can be taken to doctrines of good faith developed in a certain domestic jurisdiction.[269] However, the CISG does not provide guidance for how to interpret a term in the Convention autonomously.[270] Although much has been written about the gap-filling process under Art. 7 CISG, it appears that there is still great uncertainty of how to exercise more basic tasks of interpretation. It is, for example, the prevailing view that, other than under the common law tradition, the *traveaux préparatoires* can play a certain role in the interpretation of ambiguous provisions.[271] However, there is no consensus how the legislative history has to be weighed in relation to other methods of interpretation,[272] especially the wording and the teleological[273] interpretation.

These questions do not have to be answered definitively and conclusively, as there is a common understanding that the wording of a provision is the starting point, and that, if the wording is sufficiently clear an interpretation is neither necessary, nor permissible.[274] With regard to the clear and unambiguous wording of Art. 7(1), CISG in conjunction with its legis-

---

[269] Cf. e.g. Magnus, *Editorial Remarks,* sec. 2, a.

[270] Schlechtriem/Herber, *Commentary*, Art. 7, sec. 19.

[271] Schlechtriem/Herber, *Commentary*, Art. 7, sec. 20; Felemegas, p. 260 with further references to the traditional common law approach.

[272] See as one amongst many Felemegas, p. 260.

[273] The object and purpose of the rule. Also called 'effective approach' to interpretation, cf. Aust, p. 185.

[274] Schlechtriem/Herber, *Commentary*, Art. 7, sec. 20.

lative history, it is not possible to extend the scope of good faith beyond the task of interpreting the Convention and impose an obligation to act in good faith on the contract parties.

2. The General Principle under Art. 7(2) CISG

(a) Deducing an Underlying Principle

In order to accept good faith as a general principle under Art. 7(2) CISG it must be shown that an obligation for the contract parties to act in good faith is reflected in the CISG. A general principle is usually determined by deducing it from specific provisions in the CISG,[275] which must contain an idea which allows for generalization. Scholarly writers have defined a number of general principles which are in some domestic legal systems part of good faith, such as *venire contra factum proprium*; waiver; a general duty to co-operate to secure contract performance, and a general duty to inform the other party.[276] Some writers believe that beyond or above these specific doctrines there exists a general principle of good faith under Art. 7(2) CISG. Even those writers have, however, to admit that it is difficult to determine the scope and content of such a principle.[277] This does not come as a surprise, as good faith cannot be deduced from specific provisions of the CISG as long as there is no consensus of what good faith is. It appears that Art. 7(2) CISG, and a general principle of good faith share a common feature: both legal devices do not provide a substantive solution for specific problems, but are only methods to find such solutions. Once such a solution is found in a specific doctrine, to resort to a general principle of good faith would be redundant.

(b) The CISG as a Closed System

Article 7(2) CISG implements a closed system, which means that either a general principle can be found within the CISG, or the problem will have to be solved under domestic law. The only 'gates' through which rules from outside the CISG can find their way into the CISG is via trade usages, which were either established between the parties (Art. 8(3), 9(1) CISG), or which are being observed regularly in the trade (Art. 9(1) CISG). Hence, if the solution is neither found in the CISG nor in trade usage, it is not permissible to revert to rules outside the CISG, however reasonable they may be. Thus, if the solutions provided by the UNIDROIT Principles or the *lex mercatoria* do not comply with the principles of the CISG, they cannot be applied, however, if they do comply the reference to such solutions would be redundant. As it

---

[275] Ferrari 53 JZ 9 at 12.

[276] Magnus, 59 RabelsZ 469 at 481 f.; Schlechtriem/Herber, *Commentary,* Art. 7, sec. 17; Ferrari 53 JZ 9 at 12.

can be seen from the legislative history of Art. 7 CISG, the draftsmen of the Convention could not agree to assign good faith a role as extensive as in Art. 1.7, 1.8 of the UNIDROIT Principles. Consequently, the required compliance is not met and the UNIDROIT provisions cannot help specifying good faith within the CISG as they are based on an entirely different concept of good faith. The question that remains unanswered is, whether a general principle of good faith can be used as another 'gateway' to import external ideas into the CISG.[278]

3. The Scope and the Content of Good Faith in Art. 7(1) CISG

It can be concluded from the above that good faith as a general principle in the CISG is restricted to the interpretation of the Convention according to Art. 7(1) CISG. Therefore, the scope of application of good faith under Art. 7(1) CISG remains to be determined. It will be seen that good faith is more than a reference to morality,[279] the rule of *pacta sunt servanda* is not part of good faith,[280] and good faith and fair dealing must be understood as an objective-normative concept.[281] It will, however, become clear that a coherent substantive concept of good faith cannot be deduced, but that good faith must be understood functionally, i.e. as a methodological instrument.[282]

(a) The Legal vs Moral Concept

The CISG uses the reference to good faith in Art. 7(1) not merely in a moral, ethical or philosophical meaning.[283] The crucial argument is not that there is no common denominator of morality across the different nations and society,[284] but that an understanding of good faith, as a mere moral concept, does not add anything to a codification of rules. It has, correctly, been observed that rules of good faith are not more, or more equitable, or more moral than other rules.[285] The fact that a rule of law cannot be directly traced back to good faith does not mean that its content is not a manifestation of moral values or standards. One can go so far

---

[277] Magnus, 59 RabelsZ 469 at 481 f.

[278] See section C, III below.

[279] See section (a) below.

[280] See section (b) below.

[281] See section (c) below.

[282] See section (d) below.

[283] Cf. e.g. Zeller, Chapter 4, sec. 4, c with reference to the discussions during the drafting process of the CISG. For the contrary view cf. Sim, sec. IV, B, 2, c, i, discussing a general principle of good faith under Art. 7(2) CISG.

[284] Cf. for this argument however Zeller, Chapter 4, sec. 4, c.

[285] Hesselink, *The Concept of Good Faith*, p. 492 f.

as to see the principles of party autonomy and of *pacta sunt servanda*, which stipulates in essence that 'one must keep one's word', as a manifestation of a moral rule. Hence, it is put forward that the assertion that good faith is a moral standard, or opens a gateway for morality, does not lead to any helpful insights into the scope and content of good faith in the CISG. Consequently, the argument of morality can be neglected for the purpose of the following analysis.

(b) The Role of *pacta sunt servanda*

Some writers maintain the view that the principle of *pacta sunt servanda* constitutes a part of good faith in the CISG.[286] This view, that seems to derive from the understanding of *bona fides* in Roman law, is not appropriate for the CISG. The rule that contracts are binding is one of the principles which underlie the Convention according to Art. 7(2) CISG. In the event that the CISG made no reference to good faith, *pacta sunt servanda* would still apply. This can be seen from the many provisions which require the binding nature of the contract.[287]

(c) Objective-Normative vs Subjective-Descriptive Understanding

It has been noted above,[288] that good faith, when referred to as a general principle, doctrine, or concept, is used in an objective-normative sense.[289] This means that the good faith does not refer to the subjective state of mind of the contractual parties, but instead inquires as to what the parties ought to have done. Hence, the understanding of good faith as 'honesty in fact', as it is used in various common law legislation,[290] does not apply to the CISG.[291] The view that good faith in the CISG is to be understood descriptively instead of normatively, and merely seeks to describe good faith as it is currently used in international trade, must be rejected.[292] Article 7(1) CISG addresses the interpreting judge or arbitrator and not the contract parties. The interpretation of a norm is, however, not a factual, but a normative process. The contrary view confuses trade usage with good faith. It is admitted that the adjudicator might

---

[286] Klein, 15 Liverpool Law Review 115 at 116.

[287] See as only one example amongst many Magnus, 59 RabelsZ 469 at 480, referring to the exceptions from *pacta sunt servanda* contained in Art. 71-73, 79 CISG as indication that an implied rule must exist.

[288] Chapter 1, section D.

[289] Cf. UNCITRAL; *Commentary on the Draft Convention on Contracts for the International Sale of Goods*, Text of Secretariat Commentary on article 6 of the 1978 Draft, sec. 3 which refers to the specific provision of the CISG that impose objective normative standards and describes them as 'applications of good faith'.

[290] See for example section 61(3) of the English Sale of Goods Act 1979, and section 1-201(19) UCC, which defines good faith as *'[h]onesty in fact in the conduct or transaction concerned'*.

[291] Zeller, Chapter 4, sec. 3.

[292] So however Felemegas, p. 246.

have to consider trade practice by the parties. These cases are, however, expressly addressed in Art. 8(3), 9 CISG. Good faith, as a legal term, however, is not determined by the action of trading but by the adjudication of disputes that arise out of trade transactions.[293]

(d) Functional Method vs Coherent Substantive Principle

It has been stated above that it can be deduced neither form the wording of Art. 7(1) CISG, nor from the *traveaux préparatoires* what the requirement of 'interpretation with regard to the observance of good faith' means. Furthermore, an interpretation with regard to the object and purpose of the norm is difficult to achieve, since, due to last minute compromise, no documented intention of the legislator exists. This means that in essence it is not clear whether good faith in Art. 7(1) CISG is thought to fulfil one of the three functions identified for good faith in the domestic jurisdictions of the civil law tradition, i.e. (i) the interpretative function; (ii) the supplementary function; and (iii) the corrective (derogating / restrictive) function.[294]

The supporters of the position taken by the common law representatives seem to assume that the reached compromise, restricted the function of good faith to an absolute minimum. Firstly, good faith has a merely interpretative function, serving to close gaps which were to small for the legislator to regula, or where the wording is ambiguous and allows two different meanings.[295] Secondly, this function is also restricted to the rules of the CISG and cannot be extended to the terms of the sales contract. This restrictive understanding does not follow from the wording of Art. 7(1) CISG, and the *traveaux préparatoires* only allow for the conclusion that good faith should not be used in order to impose direct contractual duties on the parties to the contract. An interpretation of one or more provisions of the CISG can, however, comprise, not only minor matters, but also the derogation from a rule, or the restriction of the application of a rule granting one party certain rights.[296] This clearly amounts to the corrective function of good faith, which is generally considered to interfere with the legislative intentions the most.[297]

---

[293] To avoid confusion about the normative character of good faith, Art. 1.7 UNIDROIT Principles refers to 'fair dealing' making it clear that an objective standard is required, cf. Zeller, Chapter 4, section 2, b.

[294] See Chapter 1, D above.

[295] Cf. e.g. Sim, sec. III, B, 2, c, ii: *'[I]t is submitted that the most natural and ordinary meaning of "interpret" should be adopted i.e. "to explain or tell the meaning of" or "to make understandable".'*

[296] Sim, sec. III, B, 2, c, ii disapprovingly citing Honnold, *Uniform Law for International Sales,* sec. 101.

[297] See Chapter 1, B, I, 4 above.

It is argued that the function which good faith assumes in the CISG, cannot be deduced from the wording of Art. 7(1) CISG. Although everyone seems to agree that the CISG has to be interpreted autonomously, the use of terms in the Convention which are known from a domestic context raise the question of how much of the domestic preconception found its way into the CISG. It seems that most of the writers use a domestic preconception of good faith, at least as a starting point in their argumentation, a fact that certainly influences the result of their analysis. Hence, the same problems and questions about the role, function, and scope of good faith that have been discussed in Chapter 1 above, reappear on the level of international uniform law.

It has been show in Chapter 1 that the legal systems, which have developed a general principle of good faith use the principle in order to provide the judiciary with the necessary flexibility to solve the conflict between strict law and justice (fairness, equity) within a codified set of rules. For this reason good faith was suggested to be included in the CISG. For the same reason representatives from jurisdictions less familiar with the principle, and in favour of a more rigid application of the principle of party autonomy, objected against the introduction of good faith into the CISG. Thus, the common law - civil law divide with regard to good faith was with the compromise found in Art. 7(1) CISG, imported into the CISG. Although the CISG must be interpreted autonomously, and without imposing national solutions on the international uniform law, it is submitted that the understanding of good faith is not a completely new one, but that it is based on the historical development in domestic law, as examined in Chapter 1 above. Preconceptions about good faith in domestic law lead to misunderstandings in the academic debate regarding good faith. Consequently, the search for a coherent substantive core of good faith is given up in frustration, and often results in the conclusion that good faith does not play a decisive role in the CISG as its scope and content cannot be deduced.[298]

Hence, it should be remembered that the legal systems which used good faith extensively and developed it into a rather sophisticated body of rules, such as Germany, found three basic, cumulative prerequisites that lead them to resort to good faith: (i) courts had to apply a code that had either 'birth defects', or the provisions of the code were no longer appropriate as circumstances changed after the promulgation; (ii) the legislator was not willing or able to correct the resulting injustice; (iii) the courts needed a norm that could build an 'anchor' in the code as the *ex lege* development and application of rules parallel to the code was not permit-

[298] See e.g. Sim, sec. VI; Felemegas, p. 246 f.

ted. It is this factual set up that made good faith a welcomed means to fulfil the three functions that can be deduced from the existing doctrines that emerged under good faith: (i) interpretation, (ii) supplementation, and (iii) correction (restriction/derogation) of legislative provisions as well as contractual terms. Furthermore, it should not be forgotten, that these three functions of good faith, when applied, usually serve in order to perpetuate the contractual relation, as good faith leads rather to a change of the content of the contract than to a repudiation. This complies with the so called *favor contractus* principle, which is said to form a general principle of the CISG under Art. 7(2) CISG.[299]

It has also been shown in Chapter 1 above that judicial practice normally uses good faith only as a last resort. If flexibility in order to achieve just results is provided by other, more specific means, those means are typically preferred to the use of good faith. Hence, the extent to which the CISG provides other means to enable courts and tribunals to react with the necessary flexibility to changing circumstances and to achieve just (equitable, fair) results despite the strict letters of the law or the contract, must be examined. Provided these goals can be achieved by more specific means, there is no need for an, admittedly, open principle of good faith. Hence, good faith in the CISG is subsidiary. Where such means do not exist, it has to be discussed whether or not the CISG allows good faith to take over this function. It is admitted that this method is not free from preconceptions of good faith as known in domestic law. However, it appears that the drafters of the CISG were not free from such a preconception, as they did not opt to use a term without the burden of a domestic preconception.

C. Other Means to Fulfil the Functions of Good Faith

I. Interpretative Function

The only function of good faith in the CISG that is not contentious is the interpretation of ambiguous terms of provisions of the Convention. However, even in this respect, good faith is subsidiary and only plays a role when the accepted methods of interpretation do not lead to a clear result.

The question remains whether good faith can play a role in the interpretation of the contract provisions, as Art. 7(1) CISG is not applicable to the obligations of the parties. Article 8 CISG, which contains the provisions for the interpretation of the contract does not refer to

---

[299] Magnus, 59 RabelsZ 469 at 483.

good faith.[300] Furthermore, it has been shown that Art. 7(1) CISG does not apply directly to the contract terms.[301] However, it has been noted above that the CISG implements objective standards in a number of provisions which regulate the legal consequences of the behaviour of the parties. For this purpose 'open terms' such as 'reasonableness', are used more often than, for example, in the German civil code. The resort to a general principle of good faith is not necessary, wherever the CISG provides for such specific possibilities for courts and tribunals to consider all circumstances of the particular case.

II. Supplementary Function

It has been seen in Chapter 1 above that in German law the supplementary function of good faith is used to impose contractual duties on the parties that were neither expressly agreed to nor implied.[302] As the wording of Art. 7(1) CISG excludes the use of good faith in order to supplement contract terms, the question arises whether there are other possibilities for the adjudicator to close gaps in the contract.

1. The Limited Scope of the CISG

German law uses good faith to impose ancillary and supplementary duties on the parties. As with many doctrines which were developed under *Treu und Glauben*, the use of supplementary duties is in part caused by the weaknesses of the German law of delict.[303] The CISG codifies the law of sales exclusively and within this area is restricted to certain types of transactions.[304] Hence, the CISG does not have to provide answers with regard to other areas of the law, but can leave problems to be solved under domestic law. This reduces the potential impact of the supplementary function of good faith in the CISG.[305]

---

[300] Other than e.g. § 157 *BGB* in German law, cf. Chapter 1, section B, I, 1 above.

[301] See section VI, 1 above.

[302] It is admitted that the gap-filling *praeter legem* (see section III, 1 below) also has a supplementing function, not with respect to the contract terms but to the provisions of the code. However, the good faith function of supplementing the law is commonly seen as part of the corrective function.

[303] Schlechtriem, *Good Faith in German Law and in International Uniform Laws*, p. 14.

[304] See Art. 2 - 5 CISG.

[305] However, there remain areas of application. Supplementary duties derived from *Treu und Glauben* impose e.g. an obligation on the seller to deliver spare parts for a certain time after the termination of a long term sales agreement. If one follows the restrictive understanding of Art. 7(1) CISG, good faith cannot lead to such an result under the Convention, cf. ICC Court of Arbitration, *W. v R.*, 23 January 1997, 8611/HV/JK (UNILEX), Chapter 3, section C.

2. Interpretation of Contract Terms under Art. 8 CISG

It has been seen in Chapter 1 above that, on a domestic level, gaps in contracts are often filled by interpretation. In German law the method of supplementary interpretation (*ergänzende Vertragsauslegung)* under § 157 *BGB* and in English law, implied terms in fact and terms in law allow courts to impose contractual terms which the parties failed to include in their contract. The CISG regulates the interpretation of contract terms in Art. 8, a provision that does not refer to domestic methods of interpretation, but sets its own criteria. Article 8 CISG contains a hierarchy that has to be observed in the interpretation of the contract:[306] first, the common intent of the parties makes an interpretation superfluous. Second, the intent of one party has to be considered if the other party could have been aware of this intent (Art. 8(1)CISG). Third, the standard of a reasonable person has to be applied if the intent of one party could not have been known by the other party (Art. 8(2)CISG). Although Art. 8(2) is seen as a manifestation of good faith,[307] as it establishes an objective-normative standard, the prevailing view is that it cannot be used in order to fill gaps in the contract, and imply terms which the parties did not reach consensus on.[308] This view on Art. 8 CISG appears to rely on the fact that the object of the interpretation are the 'statements and conducts' of a party, and not the contract as a whole, as it is the case for example under § 157 *BGB*.[309] Furthermore, Art. 9 CISG, which deals with trade customs, is seen as the norm that has the function to supplement the contracts where the parties were silent.[310] Hence, it must be concluded that Art. 8 CISG cannot be used as a means to supplement the gaps in the contract left by the parties.[311]

---

[306] Eörsi, § 2.05, sec. 2-18.

[307] Schlechtriem, *Uniform Sales Law*, p. 39; Schlechtriem/Junge, *Commentary,* Art. 8, sec. 9: *'By focussing, in cases of objective interpretation, on the generally accepted view Article 8(2) is taking into account good faith and prevailing practice, as under § 157 of the German BGB and in conformity with Article 7(1).'*

[308] Schlechtriem/Junge, *Commentary,* Art. 8, sec. 3: *'Under German law the parties' 'hypothetical intention' (hypothetischer Parteiwille) is intended to be used to resolve issues which the parties did not consider when concluding their contract (or which they deliberately left open). In the international sale of goods it is not necessary to use such a test as a last resort, because practises and usages have been developed which can be used to interpret the contract.'*

[309] This is not expressly stated but can be concluded from Schlechtriem, *Uniform Sales Law*, p. 39; Schlechtriem/Junge, *Commentary,* Art. 8, sec. 9.

[310] Schlechtriem, *Uniform Sales Law*, p. 39; Schlechtriem/Junge, *Commentary,* Art. 8, sec. 9.

[311] It seems noteworthy that the application of the way common law courts imply terms in fact and in law is not extensively discussed with respect to the CISG as it is accepted that there is a general principle that favourites the perpetuation of the contract wherever it is possible and the implication of terms seems to be a convenient instrument to supplement a contract that would otherwise have to be considered frustrated.

3. Trade Usage as Implied Contract Terms, Art. 8(3), 9 CISG

Article 9(2) CISG provides that, unless otherwise agreed, trade usages form implied terms of the contract. This rule is considered to be a gap-filling provision.[312] However, it requires an existing usage in the respective trade, that must regularly be observed within the trade. Thus, Art. 9(2) CISG makes reference to existing rules outside the contract, rules which have to be evaluated by the judge or the arbitrator on a factual basis. It has been stated, however, that good faith as it is understood in the CISG, is a normative principle in order to provide justice. Good faith is, thus, independent from the factual question of whether or not an actual rule already exists. The fact that a usage exists, and is widely used in a trade does not comment on the fairness of the usage as the usage has the quality of an ordinary contract term. That means that a trade usage itself can be a strict rule that may require supplementation or correction by normative standards, such as good faith. Consequently, Art. 9(2) CISG, although having a supplementary function with regard to the contract, cannot fulfil the task of correcting the existing strict law or contract terms as it is attributed to the general principle of good faith.

4. General Duty to Co-operate under Art. 7(2) CISG

It has been argued by scholarly writers that a general duty of co-operation can be deduced from a number of specific provisions of the CISG, and that this duty forms a general principle of the Convention.[313] This duty can lead to implied terms in a sales contract.[314] It appears that a specific scope and content of such a duty has not yet evolved, and it is questionable whether the CISG provisions which were relied on can be generalised.[315] Once a general duty to co-operate has been established,[316] it could become a powerful device to supplement the parties' agreement, and would, thus, supersede the subsidiary principle of good faith. The guiding principle for a general duty to co-operate must be the principle of *favor contractus*:

---

[312] Schlechtriem, *Uniform Sales Law*, p. 39.

[313] Deduced from Art. 85, 86 (preservation of goods); Art. 34, 37, 48 (obligation to accept late delivery and replacements); and Art. 77 (mitigation of damages), cf. Magnus, 59 RabelsZ 469 at 484 with further references in fn. 59; Magnus, *Editorial Remarks,* section 2, b, ff.; Ferrari, 53 JZ [1998] 9 at 12 f.

[314] Magnus, *Editorial Remarks,* section 2, b, ff.

[315] Magnus, 59 RabelsZ 469 at 484 with regard to the fact that a party should be able to predict which obligation it is under (in the context whether or not a duty of information should build part of the duty to co-operate).

[316] The duty to co-operate as a general principle exists so far only in scholarly writing. There are two decisions where the duty might have played a role. However, Helsingin Hoviokeus (Finland), 26 October 2000, S00/82 (Pace Law School website), though mentioning a duty to co-operate, does not make it clear to what extent the decision is based on. ICC Court of Arbitration, *W. v R.*, 23 January 1997, 8611/HV/JK (UNILEX) applied trade usage under Art. 9 CISG but also cited Art. 7(2) CISG. As ICC awards are available in abstracts only, it cannot be determined whether tribunal relied on a duty to co-operate in addition to trade usage. Cf. in detail Chapter 3, C, II, below.

only if the maintenance of the contractual purpose requires co-operation, can a duty to co-operate be imposed on a party. As noted above, the limited scope of the CISG does not permit interference with the parties' agreement beyond the actual sales contract. For example, the question of whether or not a seller is under the obligation to supply spare parts even after the actual contractual relationship has ended, could be answered positively with reference to a general duty to co-operate.[317]

III. Corrective Function

1. Gap-filling *praeter legem*

(a) General Principles

Article 7(2) CISG refers to general principles of the Convention for the purpose of gap-filling. Scholarly writers have identified general principles under Art. 7(2) CISG which are under domestic law seen as part of good faith: (i) the prohibition of inconsistent behaviour (deduced from Art. 16(2)(b), 29(2) CISG),[318] (ii) the prohibition of the abuse of rights (deduced from Art. 29(2) CISG),[319] and (iii) the rule that a party shall not take advantage of its own wrong (deduced from Art. 80 CISG).[320]. All three doctrines go beyond the wording of Art. 7(1) CISG as they directly intervene with the contractual obligations of the parties.

Although it is argued that the three doctrines mentioned above are all derivatives of a general principle of good faith, they can under the CISG exist without the reference to good faith, as they can form independent general principles under Art. 7(2) CISG. It has been seen in Chapter 1 that the doctrines developed in German law under § 242 *BGB* have achieved the same degree of independence from a general principle of good faith but that the courts still need the general principle of good faith as an instrument to establish the doctrines within the system of the code. In the CISG, this function is exercised by Art. 7(2) CISG, which expressly permits the application of general principles in the absence of express rules. Hence, a reliance on good faith under the CISG is not necessary if a general principle can be deduced

---

[317] Such an obligation is in German law based on good faith. ICC Court of Arbitration, *W. v R.*, 23 January 1997, 8611/HV/JK (UNILEX) denied the application of Art. 7(1) CISG and relied on trade usage (Art. 9 CISG). In absence of trade usage, the same result might be achieved under Art. 7(2) CISG and a general duty to co-operate.

[318] Ferrari, 53 JZ [1998] 9 at 12; Magnus, 59 RabelsZ [1995] 469 at 481.

[319] Magnus, 59 RabelsZ [1995] 469 at 481.

[320] Enderlein/Maskow, Art. 7, sec. 9.1; Magnus, 59 RabelsZ [1995] 469 at 481.

from other CISG provisions. In this instance Art. 7(2) CISG takes over the role which the subsidiary principle of good faith plays in domestic jurisdictions.

(b) Solutions Outside the CISG

It must be noted, however, that specific good faith doctrines can only be deduced from the CISG itself, as Art. 7(2) CISG requires the general principle to be one of the Convention. If the matter is neither expressly nor tacitly settled by the Convention, a specific good faith doctrine cannot be imported from outside the CISG via Art. 7(2) CISG. It has been seen above that the CISG builds a 'closed system' and that, if a solution cannot be derived from the Convention, the matter is referred by Art. 7(2) CISG to domestic law.[321] With regard to the difficult procedures of amending the CISG, occasions may arise where a gap-filling with principles, which are outside the Convention, is the only alternative to maintain the workability of the CISG under changed circumstances. Although a situation where this would be necessary has to date not emerged, the probabilities increase with the age of a code,[322] and therefore, it cannot be excluded that, in the future, a resort to good faith under Art. 7(1) CISG might be the only possibility to keep the CISG operational.[323]

2. Contradictory Values within the CISG

The CISG does not provide an express mechanism to solve conflicts which are caused by two contradictory values or principles of the Convention. As an example, on the one hand, Art. 40 CISG does not allow the seller to rely on his rights if he knew that the goods lacked conformity. On the other hand, Art. 35(3) CISG states that the seller is not liable if the buyer knew in advance that the goods lacked conformity. The CISG does, however, not regulate situations where both, seller and buyer, knew or ought to have known about the lack of conformity. Good faith under Art. 7(1) CISG can lead to the conclusion that the degree of wrong is decisive and, hence, the CISG puts the interests of a merely negligent party above those of a fraudulent party.[324]

---

[321] See section B, VI, 2, b above.

[322] Cf. e.g. Schlechtriem, *Good Faith in German Law and in International Uniform Laws,* p. 10.

[323] This would, of course, require a certain extent of consensus about the values that are imported into the CISG. However, it will be seen from the case law analysed in Chapter 3 below that despite theoretical differences, the result is rarely questioned.

[324] See for this situation Oberlandesgericht Köln (Germany), 21 May 1995, 22 U 4/96 (CISG-Online) in detail Chapter 3, D, II, 2 below.

D. Filling the Gaps with an Inductive Approach to Good Faith

It can be concluded that the only undisputed function of good faith in the CISG - the interpretation of ambiguous terms in the CISG provisions - will have to be applied to a significantly lesser degree than in domestic law. This is due to the 'open' terms which are included in the specific provisions, and which provide space for discretion.

Good faith does not have a supplementing function with regard to the parties' obligations under the contract. As interpretation refers to the actual intentions of the parties and trade usages depend on factual set-ups, a general duty to co-operate as a principle under Art. 7(2) CISG could build a powerful instrument to take over a supplementary function and impose additional obligations on the contract parties as it is known in German law.

With regard to the corrective function, it has been shown that there exist various instruments to fill gaps *praeter legem* or restrict rights, such as interpretation, analogies and general principles. Furthermore, the limited scope of the provision does not force adjudicators to solve inconsistencies in other areas of the law, such as the law of delict, through good faith. Hence, the role of good faith appears to be far more restricted than is the case in German law. Thus, the role of a subsidiary general principle of good faith with regard to the corrective function is limited to two situations. Firstly, where two values of the CISG lead to contradictory results. Secondly, where values from outside the CISG have to be introduced to the Convention as a last resort in order to maintain its effectiveness.

It is stated that neither of these areas of application of good faith can be specified through a deductive analysis. It can be predicted from the experiences with good faith in domestic law, that the discovery of gaps in the CISG and the filling of these gaps with good faith, can only be achieved by the application of the Convention on a case by case basis in practice, and, thus, with an inductive method. It will be seen in Chapter 3 the extent to which the judicial practice has developed the scope of good faith in the CISG.

Chapter 3: Good Faith in the CISG Case Law

The previous chapter has examined the scope and content of good faith under the CISG from a theoretical point of view. It has been shown that the deductive approach, i.e. the attempt to 'concretise', or to determine the scope of a general principle by deducing particular doctrines or derivatives from the general term, are destined to fail. As in domestic systems of law, good faith in the CISG cannot be approached in a deductive way, reappeared under the CISG but only inductively.

It has been seen in Chapter 1, however, that a general principle can, nevertheless, be developed to a sophisticated system, which serves the purpose to provide certainty and predictability. This development has to be achieved on a case-by-case basis, accompanied by scholarly analysis, as it has been done, for example, in German law. Two observations can be made with regard to this inductive approach to developing 'open norms' or general principles in German law: firstly, the older a code becomes the more likely it is that there are gaps to be filled.[325] This is not only due to the fact that it normally takes some time to discover gaps inherent to the system of the code at the time of its drafting, but also to the change of circumstances that make an adoption of new rules or the alteration of old rules necessary.[326]

Secondly, there seems, under codes drafted in a civil law tradition, to be a tendency to look for possibilities to extend the scope of application, once a certain doctrine or principle has been identified.[327] In this regard, the concerns of common law lawyers that the mere existence of an 'open norm' or general principle will lead to the development of a body of case law that, sooner or later, overshadows the actual written rules of the CISG are not unjusti-

---

[325] Schlechtriem, *Good Faith in German Law and in International Uniform Laws,* p. 10.

[326] Schlechtriem, *Good Faith in German Law and in International Uniform Laws,* p. 10.

[327] The most striking example for this observation under German law is probably not the *Treu und Glauben* provision of § 242 *BGB* but the German law against unfair competition, a law of delict that is regulated in the *Gesetz gegen den unlauteren Wettbewerb* of 1896 and - until recently - based almost completely on the two *Generalklauseln* (general clauses) §§ 1, 3 *UWG* which prohibit every conduct that is against the *bona mores* (*gute Sitten*) of the trade. The term *bona mores* is understood not as a factual but as a normative term and is, hence, determined by the judges. This led over the one hundred years of application to the result that most of the methods of advertising and distribution which were permissible in other countries were considered illegal in Germany as there was a tendency to find always new doctrines or new areas of application for established doctrines. Although the consumer is, today, assumed to be more informed than hundred years ago, this development was not reflected in the development of German unfair competition law. It was only the pressure from European Community legislation and the case law of the European Court of Justice that led recently to a change in view within the thinking of the German legislative and the German Supreme Court. This example becomes even more striking if one looks for a comparison, again, to English law and the development of the passing off claim, which, as part of the piecemeal approach of the common law, has been extremely reluctant to forbid conducts that were established in a trade and did not amount to misrepresentation or fraud.

fied.[328] Even lawyers from civil law jurisdictions hope that case law relating to good faith in the CISG will not develop to the extent it has reached, for example, in German law.[329]

It will be examined in the following chapter whether the two observations with regard to German law are true for the CISG. It will be analysed to which extent courts and tribunals referred to good faith during the now more than fifteen years of the application of the CISG and how these references comply with the theories of good faith under the CISG as analysed in Chapter 2 above.

A. Introduction

Internet databases collecting case law with regard to the CISG contain currently approximately sixty reported decisions referring to good faith.[330] However, these decisions vary not only in the quality of reasoning,[331] but also in the importance of good faith for the findings of the decision.

There are five categories of decisions that are of no interest for this study, as they, though mentioning good faith in their reasoning, do not contribute to a development of the general principle of good faith. First, decisions which are decided under domestic law and the principle of good faith under the CISG is only used as a reference for the reasoning in a case that is actually not decided under the CISG.[332] These decisions may show that the CISG is an important legal instrument in commercial law, which may influence not only the international *lex mercatoria,* but also the developments under domestic law. They are, however, not helpful in determining good faith under the CISG.

---

[328] Cf. e.g. Sim, sec. IV, B, 2: *'Applying this to the problem of good faith in the CISG, it is thus likely that the civilians will continue to push for a more substantive role for good faith while their common law counterparts resist it. It is interesting to note, for example, that many of the cases that advocate a more substantive role for good faith emanate from civil law jurisdictions.'*

[329] Schlechtriem, *Good Faith in German Law and in International Uniform Laws,* p. 8.

[330] The three most important of which are: the UNILEX website available under http://www.unilex.info/case.cfm; the Pace Law School website available under http://cisg.law.pace.edu/cisgcases.html; and the database CISG-Online administered by the University of Basel, available under http:/www.cisg-online.ch. See for a description of these three databases Sim, sec. V, B.

[331] Cf. e.g. Sim, sec. IV, A: *'At times, these courts or tribunals issue their decisions without any recognition of the debate surrounding the concept of good faith in the Convention and without an examination of the ramifications of its findings on the role of good faith in the CISG.'*

[332] Cf. e.g. New South Wales Court of Appeal (Australia), *Renard Constructions v Minister for Public Works*, 12 March 1992 (UNILEX); Court of Appeals Wellington (New Zealand), 3 October 2001, CA 245/00 (UNILEX).

Second, decisions which rely upon good faith only in order to confirm a result that has previously been established based on different arguments.[333] In these decisions good faith is only used in a very unspecific way, and is more a statement of policy in order to reassure the adjudicators that they act on the side of justice. Such references do also not contribute to the development of good faith, and are, hence, redundant.[334]

Third, decisions that state that the CISG contains a general principle of good faith in an *obiter dictum* but then resolve the case not on the basis of good faith, and sometimes do not even apply the Convention at all.[335]

Fourth, decisions that mention good faith as a general principle under the CISG in such a broad and unspecific context that they are not of any help determining the scope or content of good faith.[336]

Fifth, there are a number of decisions where courts mention the principle of good faith, with or without a citation of Art. 7(1) CISG, while they are actually interpreting the contract and are, thus, applying Art. 8 CISG.[337] It seems that this is the result of a careless use of terminology. These decisions appear to confuse the specific objective standard of reasonableness in Art. 8(2) CISG with the general principle of good faith. A confusion that might be due to the fact that rules of interpretation in domestic law use the term 'good faith' instead of 'reasonable'.[338] This improper use of terminology does not contribute to the development of the general principle of good faith and is, consequently, of no interest for the following analysis.

---

[333] Cf. e.g. Arrondessementrechtsbank Zwolle (Netherlands), *CME v Bos Fishproducts*, 5 March 1997, HA ZA 95-640 (UNILEX); U.S. District Court, S. D., New York, *Geneva Pharmaceuticals v Barr Laboratories et al.*, 10 May 2002, 98 Civ. 861 and 99 Civ. 3607 (UNILEX); Hof van Beroep Ghent (Belgium), 15 May 2002 (UNILEX).

[334] Schlechtriem, *Good Faith in German Law and in International Uniform Laws,* p. 10.

[335] Cf. e.g. Bundesgerichtshof (Germany), 9 January 2002, VIII ZR 304/00; Oberster Gerichtshof (Austria), 22 October 2001, 1 Ob 49/01i (UNILEX); Oberlandesgericht Saarbrücken (Germany), 13 January 1993, 1 U 69/92 (CISG-Online).

[336] Cf. e.g. Federal Court of Appeal for the Fifth Circuit (U.S.A.), 11 June 2003, 02-20166, *BP Oil Int. et al. v PetroEcuador et al*. (UNILEX); cf. furthermore Hungarian Chamber of Commerce and Industry Court of Arbitration, 17 November 1995, VB/94124 (UNILEX), which cites Art. 7(1) CISG in conjunction with Art. 8(3) CISG and the possibility of existing trade customs; the tribunal then states with reference to commentary literature that good faith under Art. 7(1) also applies to the obligations of the parties, but does so in the context of a pure contract interpretation; thus Art. 8(2), (3) CISG would have been the exclusive provisions to solve the problem. Oberlandesgericht Köln (Germany), 8 January 1997, 27 U 58/95 (UNILEX) also cites good faith (*Treu und Glauben*) in a matter of contract interpretation without making clear whether it refers to Art. 7(1) CISG or to Art. 8(2) CISG.

[337] Cf. e.g. Cour de Cassation (France), 30 June 2004, Y 01-15.964 (UNILEX); Handelsgericht Zürich (Switzerland), 30 November 1998, HG 930634 (UNILEX); ICC Court of Arbitration, March 1995, No. 7645 (UNILEX); apparently also Bundesgerichtshof (Germany), 30 October 2001, VIII ZR 60/01 (UNILEX).

[338] Cf. e.g. Handelsgericht Zürich (Switzerland), 30 November 1998, HG 930634 (UNILEX*): 'Gemäss Art. 8 WKR*

The decisions of the third and fourth category are merely superfluous and pose no harm to the development of good faith. However, it should not be underestimated that decisions can serve as a reference for future cases, and set a 'precedent' for other decisions, even where the reasoning lacks consistency. Although the rules of *stare decisis* does not apply in the CISG, the general experience is that adjudicators feel as though they are on safer ground if they can rely on a previous decision. This danger exists, in particular, within the civil law tradition where lawyers are not equally trained to consider the precedents, but are more accustomed to generalising the findings of previous adjudicators. Hence, it must be feared that decisions, which adopt good faith as a general principle of the CISG without analysing the result, will be multiplied by successive decisions, and, eventually, become the 'prevailing view' without adding a substantial contribution to the development of the law.[339] For the subject of the following analysis, however, decisions of the third and fourth group are mainly irrelevant despite their rather unfortunate character.

The analysis of the case law complies with the three functions of good faith, as identified in Chapter 1 and Chapter 2. Hence, the positions taken by courts and tribunals with regard to the interpretative,[340] supplementary,[341] and corrective function[342] of good faith under the CISG will be examined.

B. The Interpretative Function

Surprisingly, good faith appears not to be used by courts and tribunals in the one meaning that is clearly covered by the wording of Art. 7(1) CISG, and, thus, is not contentious: good faith as an interpretative guide in cases of textual ambiguity of provisions of the Convention.[343] It is suggested that this lack of case law is not so much caused by the fact that the

---

ist nämlich bei der Auslegung von Willenserklärungen stets auch Treu und Glauben zu beachten; insofern unterscheidet sich das WKR kaum von der schweiz. Vertrauenstheorie' [According to Art. 8 CISG the principle of good faith has always to be observed in the interpretation of the statement of a party, so far, there is hardly a difference between the CISG and the Swiss theory of fidelity in interpretation]. See for the German rule of interpretation of § 157 *BGB*, Chapter 1, sec. C, I, 1 above.

339 An example is reiteration in decisions that good faith under Art. 7(1) CISG also applies to the contract interpretation without arguing why the scope of the norm is extended beyond its clear wording; cf. for respective decisions section C, I below. Other courts rely on these decisions, and, subsequently, a body of case law emerges without a seminal case, which would provide a legal reasoning for the alleged function of good faith.

340 See section B below.

341 See section C below.

342 See section D below.

343 This analysis can of course not claim to cover the complete published case law, due to the numerous possible sources of published decisions. Cf. however Sim, sec. IV, A, 6, who also seems not to have found an example for this function of good faith in the CISG as he, instead, discusses the award of Internationales

CISG does not contain textual ambiguities but, rather to the contrary, that the drafters included objective standards, such as 'reasonableness', directly in provisions where they thought that *minima* gaps could emerge. These objective standards provide sufficient flexibility to deal with detailed situations, which the parties did not regulate in their contract within the specific CISG provision itself. Thus, a resort to a general principle of good faith is, other than in German law, not necessary.

It has been noted in section A that the principle of good faith is cited with regard to the interpretation of the contract.[344] However, this function is regulated by Art. 8(2) CISG, which refers to the understanding of a 'reasonable person' where the parties' intention cannot be determined. Hence, Art. 8(2) CISG is yet another example where the objective-normative standard of the specific rule makes a reference to the general principle of good faith superfluous. Thus, the citation of Art. 7 CISG in cases of mere contract interpretation[345] does not contribute to the development of the general principle of good faith.

C. The Supplementary Function

With regard to whether or not good faith under the CISG can be a source of rights and duties of the parties to the sales contract, the case law is inconsistent. There have been decisions stating that Art. 7(1) CISG applies to the interpretation of the Convention only,[346] without, however, scrutinising whether another result could be reached in adopting good faith as a general principle under Art. 7(2) CISG. Other decisions have stated that there is a 'general duty of information and co-operation' with regard to the other contract party.[347] It has to be seen whether these decisions lead to actual legal duties for a contract party. Where they do, the relation between the general principle of good faith and these duties has to be examined.

Schiedsgericht der Bundeskammer der gewerblichen Wirtschaft Wien (Austria), 15 June 1994, SCH-4318 (UNILEX) that does not deal with the interpretation of the Convention under Art. 7(1) CISG but with gap-filling under Art. 7(2) CISG. See for a discussion of this award sec. D, I, 1 below.

[344] Cf. e.g. Cour de Cassation (France), 30 June 2004, Y 01-15.964 (UNILEX); Handelsgericht Zürich (Switzerland), 30 November 1998, HG 930634 (UNILEX); ICC Court of Arbitration, March 1995, No. 7645 (UNILEX); apparently also Bundesgerichtshof (Germany), 30 October 2001, VIII ZR 60/01 (UNILEX).

[345] The situation is different where the contract is not only interpreted but objectively supplemented. Art. 8 CISG does not help in these cases as there is no conduct or statement of the parties. Thus, a resort to good faith within Art. 7 CISG might be discussed, see section C below.

[346] Cf. e.g. ICC Court of Arbitration, *W. v R.*, 23 January 1997, 8611/HV/JK (UNILEX).

[347] See the cited cases in sections I and II below.

I. The Incorporation of Standard Terms in the Sales Contract

One of the issues that were recognised but not solved by the drafters of the CISG are the requirements that have to be fulfilled for standard terms and conditions to be included in the contract, particularly if each party wants to include their own standard terms ('battle of forms'). The issue has to be resolved with regard to the provisions about the formation of the contract (Art. 14 - 24 CISG), and the parties' statements and conduct have to be interpreted according to Art. 8 CISG. There are, however, decisions which seem to deduce from the general principle of good faith a duty requiring one party to inform the other party about the specific content of its standard terms. The German Supreme Court stated that '[i]t would be contradictory to the principle of good faith in international trade (Art. 7(1) CISG) as well as the general duty of co-operation and information with regard to the other party [...] to impose an obligation on the other party to ask for the transmission of the standard terms...'.[348] A Dutch court deduced from Dutch and French law as well as from the Principles of European Contract law a duty for a party to take reasonable steps to bring its standard terms to the other party's attention before or when the contract is concluded.[349] This case law led to the generalisation that a party that wishes to incorporate standard terms must show good faith efforts to communicate those terms to the other party.[350]

The question is, however, whether these decisions really impose a positive duty to act[351] in good faith on the contract parties.[352] Such a positive duty, since neither expressly agreed, nor implied by the parties, would be a supplement to the parties' contract terms. A legal duty, however, is that which one ought, or ought not to do.[353] The implication of the violation of a duty is that a correlative right is invaded.[354] Thus, if there was a legal duty of a party to inform about its the own standard terms and conditions, an omission of this information would

---

[348] Bundesgerichtshof (Germany), 30 October 2001, VIII ZR 60/01 (UNILEX): *[Es widerspräche daher dem Grundsatz des guten Glaubens im internationalen Handel (Art. 7 Abs. 1 CISG) sowie der allgemeinen Kooperations- und Informationspflicht der Parteien, dem Vertragspartner eine Erkundigungsobliegenheit hisichtlich der nicht übersandten Klauselwerke aufzuerlegen und ihm die Risiken und Nachteile nicht bekannter gegnerischer Allgemeiner Geschäftsbedingungen aufzubürden...']*.

[349] Hof 'S-Hertogenbosch (Netherlands), 16 October 2002 (UNILEX).

[350] DiMatteo *et al.*, 24 NW. J. Int'l L. & B 299 at 347.

[351] As opposed to the general requirement not to act in bad faith.

[352] In this sense apparently UNCITRAL Digest of case law on the United Nations Convention on the International Sale of Goods, document A/CN.9/SER.C/DIGEST/CISG/7, sec. 9, available on the UNCITRAL website www.uncitral.org.

[353] Hohfeld, *Fundamental Legal Conceptions,* 23 Yale Law Journal 16 at 32.

[354] Hohfeld, *Fundamental Legal Conceptions,* 23 Yale Law Journal 16 at 32.

amount to a breach of contract, with the effect that the other party could claim damages under Art. 74 CISG.

It is very unlikely that the cited decisions intended to imply these consequences. The more realistic understanding is that if one party does not inform the other party about its standard terms, it cannot be expected that the other party has tacitly accepted the standard terms.[355] The reason why the party cannot rely on an implied acceptance of its standard terms is that it cannot be assumed that a 'reasonable person', as required by Art. 8(2) CISG, would agree to terms it has no knowledge of. This, however, seems to be a confusion of the interpretation of the Convention under observance of good faith (Art. 7(1) CISG), and the standard of reasonableness in Art. 8(2) CISG. Hence, the cited decisions do not impose supplementary duties on the contract parties, but only specify the standard of reasonableness in Art. 8(2) CISG with regard to the incorporation of standard terms into the sales contract.

II. Duty to Continue Long-Term Contractual Relations

Good faith in the civil law tradition is based on the idea that parties who enter into a contractual agreement have a closer social relationship than other persons without contractual ties. Hence, duties of co-operation and consideration increase with the intensity of the contractual relation. This has led the German courts to state that in long term business relations the principle of good faith can lead to a duty of the seller to supply the buyer with goods even after the relationship has been terminated. This has been held in cases where the buyer depended on the delivery of spare parts or where the buyer relied on delivery of goods that belonged to a series of products. Such a duty to deliver amounts to a supplement of the parties' contract terms.

In one decision concerning the termination of an exclusive distribution agreement, the arbitral tribunal expressly referred to the German case law, but refused to accept a similar duty to deliver spare parts under Art. 7(1) CISG, as this provision only applies to the interpretation of

---

[355] It might be noteworthy that the German jurisprudence distinguishes between *Rechtspflichten* (legal duties) and *Obliegenheiten* (obligations in the meaning of a responsibility with regard to the party's own interest). *Obliegenheit* means that it is in the party's own best interest to act, as it otherwise loses rights or remedies, but an omission to act does not violate the other party's rights (cf. Larenz/Wolf, § 16, sec. 48). What is sometimes called a 'duty to inspect' under Art. 38(1) CISG is not a legal duty in the actual meaning, as the non-inspection by the seller does not lead to the violation of a right of the seller. It merely leads to the loss of the buyer's right to rely on the lack of conformity, Art. 39(2) CISG. According to the German terminology, Art. 38(1) CISG, thus, imposes an *Obliegenheit* on the buyer, not a *Rechtspflicht.* Consequently, the above cited decision Bundesgerichtshof (Germany), 30 October 2001, VIII ZR 60/01 (UNILEX) refers to an *Obliegenheit* ('*Erkundigungsobliegenheit')*, a distinction that gets lost in the English translation 'obligation [...] to ask'.

the Convention and could not be referred to as a source of the parties' obligations under the contract.[356]

Other decisions have not been so clear in rejecting a duty to deliver after the termination of long term business relations. In German court proceedings the buyer asserted, as an additional argument, that he could claim further delivery based on good faith, and that the seller was in breach of contract because he had failed to perform. The court did not have to definitively decide whether such a claim could be brought forward under the CISG. It held that even if such a right to demand further delivery existed, it would require that the buyer himself acts in accordance with the contract. As the buyer, however, refused to pay outstanding debts from previous deliveries without legal reason, the requirements of the asserted claim were not fulfilled.[357]

In a Finnish decision a court held that the seller was in breach of contract as he had the duty not to end the business relation abruptly. This duty derived not from the single sales transaction, but from a general framework agreement. The court cited a general duty to co-operate under the CISG as applicable law:

> '[T]he so-called principle of loyalty has been widely recognized in scholarly writings. According to this principle, the parties to a contract have to act in favor of the common goal; they have to reasonably consider the interests of the other party.'[358]

The court then held in its conclusions that

> '...during the existence of the import agreement [buyer] had committed itself to delivering goods to Company B and that [seller] was aware of this. The cancellation of the import agreement by [seller] has resulted in a failure to fulfil these commitments. This Court of Appeals agrees with the view of Witness P, that even though an importer by definition acts on his own behalf and at his own risk, the operations cannot be based on a risk of an abrupt ending of a contract. Consequently, [seller], in the manner described in and on the basis of the legal considerations of the judgment of the Court of First Instance, is under a duty to pay damages to [buyer] for loss resulting from liability to a third party, Company B.'[359]

---

[356] ICC Court of Arbitration, *W. v R.*, 23 January 1997, 8611/HV/JK (UNILEX), where such a duty to supply spare parts was, however, eventually based on a trade usage

[357] Oberlandesgericht Saarbrücken, 13 January 1993, 1 U 69/92 (UNILEX, full text in German only, problem not mentioned in English abstract): *'...wenn man eine Pflicht der Klägerin zur Weiterbelieferung der Beklagten unabhängig vom Bestehen eines Sukzessivlieferungsvertrages aus der sortimentsbedingten Angewiesenheit der Beklagten auf Ergänzungslieferungen nach Treu und Glauben herleiten wolle, eine solche Weiterbelieferungsverpflichtung der Klägerin jedenfalls im Hinblick darauf erloschen sei, daß die Beklagte die Zahlung des der Klägerin im angefochtenen Urteil zuerkannten Betrages zu Unrecht verweigert habe.'*

[358] Helsingin Hoviokeus (Finland), 26 October 2000, S00/82 (Pace Law School website).

[359] Helsingin Hoviokeus (Finland), 26 October 2000, S00/82 (Pace Law School website).

It is, however, not entirely clear from the reasoning whether the court based the duty to deliver on a general principle that the parties have to co-operate according to Art. 7(2) CISG, or on a trade usage or a tacit agreement of the parties deduced from an interpretation according to Art. 8(2) CISG.[360]

It seems that courts show a certain tendency to accept that if a buyer in a long term business relationship could reasonably rely on the expectation to be supplied in the future, the buyer has a right to demand supply even after the business relationship ended, provided the buyer was not himself in breach of contract. However, the case law is not consistent, and it cannot be said that a respective doctrine has emerged. Moreover, it is not clear what the pivotal argument in the legal reasoning is. It appears, however, that adjudicators prefer to argue with contract interpretation and trade usage, in other words on a factual basis, rather than to base the duty merely on the, normative, general principle of good faith.

D. The Corrective Function

It has been stated in Chapter 1 that the corrective function is seen as the most far-reaching function which the principle of good faith can fulfil, as the restriction of rights as well as the derogation from express rules are a direct interference with the legislator's intentions. To date, the use of the corrective function of good faith is rarely encountered within the case law under the CISG. A few examples exist and it will be seen that they import tried and tested solutions from domestic law into the CISG.

I. The Restriction of Rights

Within the restricting function of good faith, courts and arbitral tribunals refer to the underlying principles known from legal doctrines that were developed under domestic law in order to prevent parties from the unlimited exercise of their contractual rights, such as waiver, estoppel, *venire contra factum proprium*, and *Verwirkung*. As such doctrines are, in the German influenced jurisdictions, based on good faith, it does not come as a surprise that the leading cases were rendered by adjudicators from Germany, Austria and Switzerland.

---

[360] DiMatteo *et al.*, 24 NW. J. Int'l L. & B 299 at 317 seem to be very clear that the decisive argument was a general principle under Art. 7(2) CISG.

1. Inconsistent Behaviour

It has been stated in Chapter 2 above that in scholarly writing a general principle of the prohibition of inconsistent behaviour is deduced from Art. 16(2)(b) and Art. 29(2) CISG. The application of this principle, commonly referred to by *venire contra factum proprium* or estoppel, has been confirmed by the case law.[361] Furthermore, it can be stated that the prohibition of inconsistent behaviour is widely accepted in international trade. For example the 2004 Revision of the UNIDROIT Principles which, now, stipulate in Art. 1.8 the prohibition of inconsistent behaviour as an express rule due to its importance in practice, although the prohibition of inconsistent behaviour still considered part of the general principle of good faith as stipulated in Art. 1.7 UNIDROIT Principles.[362]

In German law, the notion of *venire contra factum proprium* is also seen as part of the general principle of good faith. Thus, it is not surprising that two German decisions subsume the prohibition of inconsistent behaviour under good faith in Art. 7(1) CISG:

> '[A]ccording to Article 7(1) and Article 80 of the CISG, principles of good faith are relevant to the legal process. Included in this is the interdiction of *venire contra factum proprium* (the principle of estoppel) (Herber, in v. Caemmerer/Schlechtriem, Kommentar zum Einheitlichen UN-Kaufrecht, 2d ed., Art. 7, margin no. 37), due to prior inadmissible exercise of legal rights.'[363]

A further example of this typically German approach to seeing inconsistent behaviour as a part of Art. 7(1) CISG is a decision concerned with the non-conformity of the goods under Art. 39 CISG:

> '[I]n the event that the buyer did examine the goods and that he expressly accepted the goods as being conform, then he can no longer rely on a lack of conformity - even if he gives notice within a reasonable time - with regard to deviations from con-

---

[361] Cf. e.g. Internationales Schiedsgericht der Bundeskammer der gewerblichen Wirtschaft Wien (Austria), 15 June 1994, SCH-4318 (UNILEX); ICC Court of Arbitration, January 1997, No. 8786, ICAB 11/2, p. 70 at 73 with further references to ICCCA cases No. 4381 and 5103, however requirements of application denied in the specific case; Oberlandesgericht Karlsruhe (Germany), 25 June 1997, 1 U 280/96 (UNILEX), however the requirements of the application of *venire contra factum proprium* were denied in the specific case.; Landgericht Mönchengladbach (Germany), 15 July 2003, 7 O 221/02, however not decisive as the case was eventually decided under Italian domestic law; Award of the Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry (Russia), 27 July 1999, 302/1996 (Pace Law School website), applying Art. 7(1) CISG and referring to 'estoppel', 'Verwirkung', and '*venire contra factum proprium*' as well as to the provisions of good faith in the Russian civil code.

[362] Bonell, Unif. L. Rev. 2004, p. 5 at 20.

[363] Oberlandesgericht Karlsruhe (Germany), 25 June 1997, 1 U 280/96 (UNILEX, English translation available on the Pace Law School website). A similar argumentation can be found in the decision of Landgericht Mönchengladbach (Germany), 15 July 2003, 7 O 221/02 (English abstract UINILEX, full text available, in German only, under http://www.cisg-online.ch/cisg/urteile/813.pdf), however, after having declared the CISG as applicable the court refers to the German good faith provision of § 242 *BGB* (and not as cited in the UNILEX abstract to Art. 7(1) CISG).

> formity that he could discover during the examination. Otherwise, the buyer acts contrary to the duty to observe good faith according to Art. 7(1) CISG.'[364]

An Austrian arbitral award gives a more detailed reasoning, and although coming from a legal background which considers *venire contra factum proprium* a part of the general principle of good faith, the tribunal sees the doctrine as an independent general principle under Art. 7(2) CISG, while still emphasising that it forms part of a general principle of good faith:

> '[A] given legal position (e.g. a right, a defence, etc.) can not only be intentionally waived but can also be objectively forfeited. This follows from the general principle of good faith and the closely related principle of estoppel (prohibition of *venire contra factum proprium*). Thus, a legal position of a party must be regarded as having been forfeited whenever that party's conduct could be construed as meaning that it no longer wished to exercise its right or its defence, and the other party acted in reliance on the new situation […]. The CISG expressly mentions in Article 7(1) the requirement of the observance of good faith in international trade. The exact significance to be attached to the general principle of good faith within the scope of the Convention may be disputed […]. However, at the least the principle of estoppel or, to use another expression, the prohibition of *venire contra factum proprium*, which represents a special application of the general principle of good faith, may without doubt be seen as one of the "general principles on which the Convention is based", which according to Article 7(2) of the CISG may be invoked to solve the question of a possible forfeiture of the defence of late notice, not expressly settled in the Convention […].[365]

It appears that the prohibition of inconsistent behaviour is generally seen as a good faith doctrine that is applicable under the CISG,[366] despite the disagreement of whether it should be located in para 1 or 2 of Art. 7 CISG. The most common way of deducing the principle is the reference to Art. 16(2)(b) and Art. 29(2) CISG. However, it must be noted that neither scholarly writing, nor the case law provide reasons as to why these two Articles of the CISG contain a rule that can be generalised, and not only two single provisions for specific cases. As with every generalisation, it can be asked why the legislator did not expressly stipulate a general prohibition of inconsistent behaviour if he saw it as a general principle. It can only be assumed that the prohibition of inconsistent behaviour is so deeply rooted in every domestic legal system that adjudicators do not feel the necessity of a detailed reasoning.

---

[364] *[Hat der Käufer die Ware untersucht und nimmt er sie dem Verkäufer gegenüber ausdrücklich als vertragsgemäß ab, dann kann er nicht mehr - auch nicht binnen angemessener Frist - solche Fehler rügen, die bei der Untersuchung feststellbar waren. Andernfalls setzte er sich mit dem eigenen Verhalten in Widerspruch und verstieße gegen das Gutglaubensgebot des Art. 7 Abs. 1 CISG (Staudinger-Magnus, a. a. O., Art. 39 CISG, Rd.-Nr. 20).]* Landgericht Saarbrücken, 26 March 1996, 7 IV 75/95 (UNILEX, full text in German only).

[365] Cf. e.g. Internationales Schiedsgericht der Bundeskammer der gewerblichen Wirtschaft Wien (Austria), 15 June 1994, SCH-4318 (UNILEX).

[366] There is, however, one decision that denies that estoppel is covered by the scope of the CISG, cf. Rechtsbank Amsterdam (Netherlands), 5 October 1994 as cited by UNCITRAL Digest of case law on the United Nations Convention on the International Sale of Goods, document A/CN.9/SER.C/DIGEST/CISG/7, sec. 10 (in Fn. 24), available on the UNCITRAL website www.uncitral.org.

2. Rights not Exercised timely (Waiver or *Verwirkung*)

A number of decisions appear to accept a general principle of the CISG, which states that a party who does not exercise its rights timely is not permitted to do so at a later stage if the other party has relied upon the conduct.[367] This principle is known in German law as *Verwirkung*, a doctrine based on *Treu und Glauben* under § 242 *BGB*. The consequences are that the creditor is suspended in the execution of his right. *Verwirkung* must be distinguished from *Verzicht*, which means that a party makes a unilateral statement, containing an express or implied declaration that it does not want to exercise its right any longer. *Verzicht* has the effect of a contract variation, and its legal consequence is that the right in question extinguishes. Hence the equation of *Verwirkung* with the common law doctrine of waiver might be misleading as the element of 'promise' or 'representation' shows similarities to the German doctrine of *Verzicht*, whereas the legal consequences of waiver are, usually, only suspensory.[368]

Moreover, in German law the prohibition of *venire contra factum proprium*, and the doctrine of *Verwirkung* are considered to be related in so far as both require an element of reasonable reliance on the conduct (that can also be seen in an omission to act) of the other party.[369] This relation is also present in the case law on the CISG, and it is not always entirely clear which doctrine the decisions are actually based on. This uncertainty seems to be amplified by the fact that English terms such as 'forfeiture', 'waiver', and 'forbearance', especially in cases where the adjudicators come from civil law jurisdictions, are far from being used consistently. An example of this confusion is the decision of the Appellate Court of Munich.[370] In this case the seller, first, wanted to deliver within the contractually agreed time frame but the buyer refused the acceptance of delivery due to problems with the currency rate. Subsequently, the buyer remained silent for more than two years, and then wanted to avoid the contract due to non-performance by the seller. The court held:

> '[I]n the light of such situation, it would be against the principles of good faith if the [buyer] were entitled to claim any rights with regard to the non-performance of the

---

[367] Cf. e.g. Oberlandesgericht München, 8 February 1995, 7 U 1720/94 (UNILEX); Internationales Schiedsgericht der Bundeskammer der gewerblichen Wirtschaft Wien (Austria), 15 June 1994, SCH-4318 (UNILEX) where the waiver was, however, denied due to lack of evidence; Handelsgericht Zürich (Switzerland), 30 November 1998, HG 930634 (UNILEX) where it was held that the mere readiness to discuss the issue is not a conduct the other party can reasonably rely on; Arrondissementrechtsbank Arnheim (Netherlands*), Kunsthaus Math. Lepertz v W. van der Geld,* 17 July 1997 (UNILEX), although only as an additional argument.

[368] Cf. in detail Treitel, p. 97 ff, and Chapter 1, section B, II, 3 above.

[369] Cf. Larenz/Wolf, § 16, sec. 46. Roth, § 242, sec. 323 classifies *Verwirkung* as a sub-category of *venire contra factum proprium.*

[370] Oberlandesgericht München, 8 February 1995, 7 U 1720/94 (UNILEX).

> sales contract. Since the [buyer] herself first affected the non-performance and waited approximately 2 ½ years before she claimed termination of the contract. According to an analogous application of the legal theory of Art. 80 CISG, any claim of damages, i.e., suffered loss of profits, has been forfeited under all circumstances (*see* v. Caemmerer/Schlechtriem, *op. cit.*, Art. 49 No. 35).'[371]

It is not entirely clear whether the court sees the decisive element in the fact that the buyer refused to accept delivery, a circumstance that would justify the reference to Art. 80 CISG, or in the two and a half years in which the buyer did not exercise its contractual rights, and, that is exclusively an element of time. The latter alternative can, if one chooses not to see it as a particular case of inconsistent behaviour, be based on a general principle of good faith.

The reference to the principle of good faith by the court has been criticised. First, the result as such was contested, as it was understood that the court had held that a general duty to act in good faith is a prerequisite to exercise rights under the Convention.[372] Such a general duty can, however, not be read out of the reasoning. It becomes clear from the wording that the court uses good faith as an exemption from the rule, Art. 49 CISG, which does not limit the time to claim performance. Good faith corrected a result that was deemed unjust because it was the buyer's conduct that led the seller to rely on the fact that performance would no longer be claimed. Good faith, thus, was used to fulfil a typically restrictive function.

Second, the reference to good faith was criticised as this could have been reached by analogy and a deduction of a general principle of the Convention according to Art. 7(2) CISG.[373] The problem is, however, that all the provisions of the CISG that provide for a timely exercise of a right refer to remedies in case of a breach of contract by the other party.[374] The case decided by the Appellate Court of Munich, however, involved a seller who acted in conformity

---

[371] *[Grund der Nichtauslieferung war somit eine zur Herbeiführung des Leistungserfolgs nötige Mitwirkungshandlung der Klägerin selbst. Daß sie in der Folgezeit die Beklagte zur Lieferung der Pkw aufgefordert hätte - etwa nach Stabilisierung der Währungsverhältnisse - hat sie nicht behauptet; dafür, daß die Beklagte die Lieferung endgültig verweigert hätte, bzw. - trotz der zwischenzeitlich erfolgten Abbestellung - völlig außerstande gewesen wäre, die Fahrzeuge dennoch der Klägerin innerhalb angemessener Frist zur Verfügung zu stellen, ergibt sich nichts. Angesichts dieser Situation würde es aber Treu und Glauben widersprechen, wenn die Klägerin nunmehr, nachdem sie zunächst selbst die Nichterfüllung verursacht und mit der Aufhebung des Vertrags eines weiteren Erfüllungsverlangen ca. 2 1/2 Jahre zugewartet hat, Rechte aus der Nichterfüllung herleiten würde. In entsprechender Anwendung des Rechtsgedanken des Art. 80 CISG wären Schadensersatzansprüche jedenfalls verwirkt (*v. Caemmerer/Schlechtriem *a. a. O. Art. 49 RdNr. 35)],* Oberlandesgericht München, 8 February 1995, 7 U 1720/94 (UNILEX).

[372] Sim, sec. IV, A, 3: *'The court's holding, therefore, must have been predicated on an unspoken assumption that all parties had to observe good faith before they could invoke the rights and remedies of the Convention. This amounts to the imposition of substantive obligations of good faith on the party and contradicts the express wording of Article 7(1)."*

[373] Sim, sec. IV, A, 3: *'[I]t is a pity that the court felt that it had to resort to the "blunt cleaver" of a good faith obligation when it could have availed itself of more specific principles that would have been more sensitive to the context.'*

[374] Cf. the examples of Art. 40(2), 39, 43 CISG as cited by Sim , sec. IV, A, 3.

with the contract. Hence, an analogy with the express CISG rules would not fit. However, it is felt that a seller who acts in conformity of the contract needs even more protection than a seller who committed a breach of contract. This *a majore ad minus* argument is a clear manifestation of a general principle of good faith.

3. The Forfeiture of Rights by the Conduct of a Party

It appears that the majority of decisions, which hold that a party may no longer rely on a right provided by the CISG or the contract, are based on not only a certain period of time that the other party failed to act within, but on a particular conduct. In one case the court stated that a seller can forfeit his right to rely on the fact that the buyer had not given the notice of lack of conformity timely (Art. 39 CISG), if the seller agreed to examine the goods himself even once a reasonable time has passed.[375] In another case the court denied the plaintiff the right of retention, with reference to good faith, as the defendant could rely on the fact that the plaintiff did not claim the right of retention previously in similar situations.[376] The German Supreme Court held that the German principles of *Verzicht* developed under the German Commercial Code can be applied without modification under the CISG.[377]

It is stated that these cases of forfeiture of a right are based on a variation of the original contractual agreement between the parties, and can, hence, be solved exclusively by the application of the interpretative rules of Art. 8 CISG, which expressly refer to the subsequent conduct of a party after the conclusion of the contract. Due to the principle of informality in the CISG (Art. 11 CISG), a variation of the contract does not require 'consideration'.[378] Hence, the resort to doctrines of estoppel or waiver can be avoided by a mere contract interpretation. Nevertheless, where the principle of good faith is mentioned by the courts, it might be due to a confusion of the terminology, as they obviously refer to the standard of reasonableness

---

[375] *[Schließlich kann der Verkäufer auch auf das Recht, sich auf die Nichteinhaltung der Mängelrügefrist zu berufen, verzichten [...] Ein solcher Verzicht kann sich auch aus dem Verhalten des Verkäufers ergeben, so wenn er sich auf eine verspätete Beanstandung ernsthaft, insbesondere durch Untersuchung der Ware durch einen Sachverständigen, einlässt.],* Handelsgericht Zürich (Switzerland), 30 November 1998, HG 930634 (UNILEX), in the particular case the court, however, denied a forfeiture as the facts did not comply with the requirements. Cf. furthermore Schlechtriem/Schwenzer, *Commentary*, Art. 39, sec. 33: *'[T]he seller may waive the objection that that notice was not or not correctly given; such a waiver may even be implicit. A waiver can always be assumed to have been made if the seller unreservedly acknowledges the lack of conformity, takes back the goods, states that he is willing to repair them or deliver substitute goods, or agrees without reservation to an examination of the notified defect.'*

[376] Oberlandesgericht Köln (Germany), 8 January 1997, 27 U 58/95 (UNILEX).

[377] Bundesgerichtshof (Germany), 28 November 1998, VIII ZR 259/97, (CISG-Online, http://www.cisg-online.ch/cisg/urteile/353.htm) with respect to Art. 39(1) CISG and § 377 HGB.

[378] See for the fact that promissory estopple in English law correlates to the English law doctrine of consideration, Chapter 1, section B, II, 3 above.

within Art. 8(2) CISG.[379] Thus, it can be stated that the forfeiture, in the meaning mentioned above, is not related to the general principle of good faith, but is strictly a matter of interpretation of the parties' statements and conduct.

II. Derogating from Express Rules

The restrictive function of good faith can be seen as a specific case where a derogation from express rules takes place - the exercise of a right is not admitted although the right is granted by the law or the contract terms. Thus, within the following paragraph the use of good faith is analysed where it does not lead to a restriction of a right, but to an improvement of a legal position, as compared to the strict rules of the law or the contract terms.

1. No Declaration Required if its Purpose can no Longer be Fulfilled

It was held by the Appellate Court of Hamburg[380] that although Art. 75 CISG requires a declaration of avoidance in the case of a substitute transaction, such a declaration is not necessary where the seller finally and definitely refuses to deliver. The seller had problems to deliver the agreed goods as his own supplier did not deliver. After an exchange of several faxes in which the parties negotiated with respect to the further proceedings, the buyer eventually bought replacement goods elsewhere. The buyer then sued for damages caused by the difference between the contract price and the market price of the replacement goods. The court accepted that the late delivery amounted to a fundamental breach of contract, however, doubts remained whether the fax letters of the buyer contained a declaration of avoidance (Art. 49(1) CISG).[381] The court did not have to decide the matter as it came to the conclusion

---

[379] See in particular Handelsgericht Zürich (Switzerland), 30 November 1998, HG 930634 (UNILEX); but also Oberlandesgericht Köln (Germany), 8 January 1997, 27 U 58/95 (UNILEX).

[380] Oberlandesgericht Hamburg, 28 February 1997, 1 U 167/95 (CISG-Online, German text only, English abstract in UNILEX).

[381] Oberlandesgericht Hamburg, 28 February 1997, 1 U 167/95 (CISG-Online, German text only): *'Dahingestellt bleiben kann, ob die Klägerin vor der Vornahme des Deckungskaufes die Aufhebung des Kaufvertrages erklärt hat, wie es Artikel 75 CISG an sich verlangt. Zweifel an einer Vertragsaufhebungserklärung vor Vornahme des Deckungskaufes rühren daher, daß das Fax vom 17. Januar 1995 nicht exakt belegt, wann die Klägerin die Beklagte von der Durchführung des Deckungskaufes und der damit einhergehenden konkludenten Aufhebungserklärung in Kenntnis gesetzt hat, und die zuvor von der Klägerin der Beklagten übersandten Schreiben, Fax vom 13. Dezember 1994, Fax vom 16. Dezember 1994 und Fax vom 29. Dezember 1994, nicht eindeutig erkennbar gemacht haben, daß die Klägerin endgültig von der Vertragsdurchführung Abstand nehmen wollte. Auch eine durch die Nichteinhaltung der Nachfrist aufschiebend bedingte Aufhebungserklärung, wie sie grundsätzlich zulässig ist (vgl. BGHZ 74, 193, 204 und* Schlechtriem-Huber *a.a.O. Art. 49 CISG Rdn. 31) wird man in den genannten Schreiben der Klägerin ebensowenig wie in ihrem Fax vom 3. November 1994 sehen können, weil dies voraussetzte, daß die Klägerin sich mit diesen Schreiben tatsächlich ihres Wahlrechts zwischen Vertragserfüllung und Sekundäransprüchen begeben wollte. Hiergegen spricht die vorgelegte Korrespondenz, weil die Klägerin weiterhin an ihrem Anspruch auf Vertragserfüllung ("performance of the contract") festhielt.'*

that a declaration of avoidance is not required where the seller finally and definitively refuses to deliver:

> '[A]n express declaration of avoidance by the plaintiff was, however, dispensable as the defendant repudiated the performance of the contract finally and definitively previous to the substitute transaction. Although the CISG does not provide an exception from the principle that a declaration of avoidance previous to the substitute transaction is a prerequisite, however, it follows from the requirement to 'observe good faith in international trade' (Art. 7(1) CISG) that a declaration of avoidance is not required if an avoidance of the contract is possible and it is certain, at the time of the substitute transaction, that the debtor will under no circumstances perform.'[382]

This case shows the far-reaching effects that a mere interpretation of the Convention, strictly within the wording of Art. 7(1) CISG, can have on the rights and duties of a contract party. The interpretation of Art. 75 CISG with regard to the observance of good faith has an immediate effect on the rights and duties of the parties, as only good faith leads to the result that one party can claim remedies that are not granted by the wording of the rule. It is, however, questionable whether the reference of good faith was indispensable to the achievement of this result. There is a parallel to German law[383] where the provision requiring a *Nachfrist* (grace period) in cases of late delivery, § 326 *BGB*, did not provide for exceptions.[384] The German courts held that insisting on the requirement of a *Nachfrist* in conjunction with the threat to repudiate the contract would be contrary to *Treu und Glauben* under § 242 *BGB*, as the purpose of the *Nachfrist*, to warn the seller and give him a last chance to perform, could no longer be achieved.[385] Although the result has not been challenged, the resort to good faith was said to be unnecessary as a mere interpretation with regard to the purpose of the norm would have led to the same result. The same can be said with regard to Art. 75 CISG, as the declaration of avoidance serves only to inform the other party about the consequences of non-performance in order to give it a chance to maintain the contractual relationship (consequence of the *favor contractus* principle). Once the seller no longer intends to

---

[382] Own translation of Oberlandesgericht Hamburg, 28 February 1997, 1 U 167/95 (CISG-Online, German text only): *'Eine ausdrückliche Aufhebungserklärung der Klägerin war aber deswegen entbehrlich, weil die Beklagte vor Durchführung des Deckungsgeschäftes die Erfüllung des Kaufvertrages endgültig und ernsthaft verweigert hatte. Eine Ausnahme vom Grundsatz der Erforderlichkeit der Aufhebungserklärung vor Vornahme des Deckungsgeschäftes ist im CISG zwar nicht vorgesehen, aus dem Gebot der "Wahrung des guten Glaubens im internationalen Handel" (Art. 7 Abs. 1 CISG) folgt aber, daß eine Vertragsaufhebungserklärung entbehrlich ist, wenn die Vertragsaufhebung grundsätzlich möglich ist und bei Vornahme des Deckungsgeschäftes feststeht, daß der Schuldner keinesfalls erfüllen wird (vgl.* Schlechtriem-Stoll *a.a.O. Art. 75 CISG Rdn. 5,* Staudinger-Magnus *a.a.O. Art. 75 CISG Rdn. 8 und* Stoll*, RabelsZ 52 Jhrg. [1988], 617, 635)."*

[383] Previous to the reform of the law of obligations with effect from 1 January 2002.

[384] As the equivalent norm, the first sentence of Art. 47(2) CISG, does. The reformed German law of obligations adopted the solution provided by the CISG in § 323(2), no.1 *BGB*.

[385] Cf. as only one example amongst many Bundesgerichtshof, NJW-RR 1997, 622, sec. 1, c: '*[M]uß sich der Schuldner bereits aufgrund der Vertragserklärungen darüber klar sein, daß er die Folgen auf sich nehmen muß, wenn er die Zeit nicht einhält, innerhalb der die Erfüllung vereinbart worden ist, ist eine Mahnung durch*

perform, the purpose of the declaration can no longer be fulfilled. The interpretation according to the object and purpose of the rule (teleological interpretation) is considered to be applicable to the Convention.[386] Consequently, the same objections to the use of good faith that have been raised in German law also apply to the CISG.

The exception to the requirement of a declaration of avoidance shows close relations to the prohibition of inconsistent behaviour as the buyer relied on the definitive and final repudiation of the contract by the seller. Furthermore, the principle contained in Art. 80 CISG, that a party shall not gain advantages from its own non-performance, could also be relied on in order to justify the result.

2. No Protection for the Fraudulent Party

The Appellate Court of Cologne decided the following case:[387] the parties concluded a contract about the sale of a used car. The buyer claimed non-conformity, as the car was neither of the specified licensing year, nor did it show the indicated mileage. The seller asserted that the buyer could not have been unaware of the non-conformity, a defence that was accepted by the lower court and led, consequently to the rejection of the claim of the buyer according to Art. 35(3) CISG. The Appellate Court, however, found that the seller acted fraudulently whereas the buyer acted merely with gross negligence. Subsequently, the Appellate Court held, with reference to the principle of good faith, that a party which acts merely with negligence deserves more protection by the law than a fraudulent party:

> '[I]t has to be inferred from the basic idea of Art. 40 CISG, whereby a seller is not entitled to rely on the conduct of the buyer if the seller is to blame more, in connection with Art. 7(1) CISG, that in case of a fraudulent conduct of the [seller], the [seller] has to accept responsibility even if the [buyer] could not be unaware of the non-conformity. Therefore, the statements of the [seller] pertaining to the supposed possibilities of perception of the [buyer]'s wife - which, as has to be pointed out supplementary, cannot be equated with the possibilities of perception of the [buyer] himself - are not relevant. Even a grossly negligent unknowing buyer appears to be more protection-worthy than a seller acting fraudulently [...]. Consequently, when there is fraudulent conduct of the seller, the inapplicability of Art. 35(3) CISG follows from Art. 40 in connection with Art. 7(1) CISG.'[388]

---

den Gläubiger nach Treu und Glauben entbehrlich, weil sie reine Förmelei wäre.'

386 See Chapter 2, section B, VI, 1 above.

387 Oberlandesgericht Köln (Germany), 21 May 1995, 22 U 4/96 (CISG-Online, English translation on the Pace Law School website):

388 Oberlandesgericht Köln (Germany), 21 May 1995, 22 U 4/96 (CISG-Online, English translation on the Pace Law School website): [*Bei Arglist des Verkäufers ist aus dem Grundgedanken des Artikel 40 CISG, wonach der Verkäufer sich nicht auf ein Verhalten des Käufers berufen kann, wenn ihn selber ein größerer Vorwurf trifft, in Verbindung mit Artikel 7 Abs. 1 CISG zu folgern, daß der Verkäufer selbst dann einzustehen hat, wenn*

This decision complies with the prevailing view in scholarly writing.[389] It appears that the problem cannot be solved by deducing a general principle from Art. 40 CISG, which states that a seller who is aware of the non-conformity does not require protection, as a similar general principle can be deduced from Art. 35(3) CISG with regard to the knowledge of the buyer. Neither of the provisions contain a statement regarding which party must be protected more in a where both parties had or could have had knowledge. It follows from a general principle of justice, fairness or equity, that the party that acted intentionally and in bad faith deserves less protection by the law than a party that only acted negligently. This notion of justice can, however, not be deduced from a specific provision of the CISG, but only be applied by reference to good faith.

3. The *tu quoque* or 'Unclean Hands' Defence

Whereas the previously discussed decision of the Appellate Court of Cologne had to decide the question of two parties who were both wrong but to a different degree, the question which remains to be answered is how to decide if both parties committed a similar severe breach of contract.

Under German law, it is acknowledged that there exists no general duty that a party must act in conformity of the contract in order to be able to exercise its contractual rights. Hence, even the extensive application of good faith in German law does not lead to a positive duty to act in good faith.[390] However, if a party has violated its own obligation under the contract severely, it is not allowed to claim remedies for a breach of contract by the other party. This exception based on good faith is known from Roman law as *tu quoque* defence, and is related to the English law doctrine of 'unclean hands'.[391]

---

der Käufer über den Mangel nicht in Unkenntnis sein konnte. Deshalb kommt es auf die Ausführungen der Beklagten zu den angeblichen Erkenntnismöglichkeiten der Ehefrau des Klägers die, worauf ergänzend hinzuweisen sei, nicht gleichzusetzen sind mit der Erkenntnismöglichkeit des Klägers selbst, nicht an. Selbst der grob fahrlässig unwissende Käufer erscheint schutzwürdiger als der arglistig handelnde Verkäufer. [...] Bei arglistigen Verhalten des Verkäufers folgt somit aus Artikel 40 i.V.m. Artikel 7 Abs. 1 CISG die Unanwendbarkeit des Artikel 35 Abs. 3 CISG.]

[389] Schlechtriem/Schwenzer, *Commentary*, Art. 35, sec. 37: *'In the case of a fraudulent concealment of a defect, it can be inferred from the principle underlying Article 40 (seller unable to rely upon the buyer's conduct if he is acting in bad faith), in conjunction with Article 7(1), that the seller is liable even where the buyer could not have been unaware of the defect. A buyer who is unaware of a defect merely on account of his gross negligence seems to be more worthy of protection than a seller who deliberately sets out to deceive the buyer.'*

[390] Larenz/Wolf, § 16, sec. 35.

[391] Larenz/Wolf, § 16, sec. 35.

In German arbitral proceedings the tribunal had to decide a claim for damages.[392] The parties had, *inter alia*, concluded a basic agreement about the delivery of goods on short notice. After a certain time the seller had problems to deliver and could not fulfil its obligations under the agreement. Consequently; the buyer terminated the basic agreement. However, the tribunal found that the buyer had not paid outstanding debts from previous deliveries, and that this amounted to a fundamental breach of contract that would have given the seller the right to terminate the contract. The tribunal held that

> '[I]t is true that in German private law, in the case of the termination of a long-term relationship on serious grounds, according to the legal principles of Sects. 326, 626 and 628 Civil Code, the damage caused by the termination (failure to perform) can in principle be asserted. However, this does not apply where a party failed to fulfil the contract and thereby gave the other contracting party serious grounds to terminate the relationship. It would be contrary to good faith if the non-terminating party were put in a worse position because he was ready to continue under the contract notwithstanding the contractual violation by the terminating party. The general principle of good faith also applies to international contracts for the delivery of goods by instalments.'[393]

The decisive idea underlying this ruling is that the award of damages 'cannot depend on a race of mutual declarations of termination'.[394] Otherwise the outcome of the legal proceedings would be determined by the random fact that the party who declares avoidance of the contract first, wins the case. The arbitrariness of this result that can hardly be seen in compliance with justice, fairness or equity. However, there seems to be no specific provisions in the CISG which could serve as an analogy to justify the result.[395]

It is conceded that the tribunal relied on German civil law in its reasoning, as it was of the opinion that the CISG did not provide specific rules and, thus, 'supplemented' the interpreta-

---

[392] Schiedsgericht der Handelskammer Hamburg, 21 March 1996, (Pace Law School website):

[393] Schiedsgericht der Handelskammer Hamburg, 21 March 1996 (UNILEX, English translation on Pace Law School website): *[Im übrigen ist das Schiedsgericht der Auffassung, daß die obige Schadenszurechnung nach Art. 74 CISG nicht anders beurteilt werden kann als im nationalen Recht, das mangels näherer supranationaler Erkenntnisse im Rahmen des Art. 7 CISG ergänzend herangezogen werden kann. Nach deutschem bürgerlichen Recht kann zwar grundsätzlich bei der Kündigung eines Dauerschuldverhältnisses aus wichtigem Grund (nach den Rechtsgedanken der §§ 326, 626, 628 BGB) der durch die Kündigung (Nichterfüllung) entstandene Schaden geltend gemacht werden. Ohne daß es auf die Voraussetzungen dieses Anspruchs noch ankommt, entfällt dieser aber, wenn mangels eigener Vertragstreue erst recht - die andere Vertragspartei zur Kündigung aus wichtigem Grund berechtigt war [...]. Es würde nämlich gegen Treu und Glauben verstoßen, wenn man den Empfänger der Kündigung deshalb schlechter stellen wollte, weil er seinerseits bereit war, trotz des vertragswidrigen Verhaltens des Kündigenden am Vertrag festzuhalten [...]. Auf einen Wettlauf bei der wechselseitigen Erklärung kann es nicht ankommen. Das Prinzip von Treu und Glauben gilt als allgemeines Prinzip auch bei internationalen Sukzessivlieferungsverträgen.]*

[394] Schiedsgericht der Handelskammer Hamburg, 21 March 1996 (UNILEX). This second last sentence of the cited paragraph was omitted in the English translation of the award provided by the Pace Law School website. For the German original, see the second last sentence in quote in the previous footnote.

[395] Art. 80 CISG, dealing with a situation where both parties are at fault, does not fit as it requires that the one party's failure to perform was caused by the other party. The rule in the present case, however, applies also

tion of Art. 74 CISG via the second alternative of Art. 7(2) CISG with, domestic, German law.[396] It has been stated above, that this method is incorrect because in matters that are governed by the Convention, the solution has be found primarily within the Convention. However, it is hard to see how an application of good faith under CISG, be it within Art. 7(1) or (2) CISG, could have led to a different conclusion.

III. Good Faith as a Basis for Damages? The 'Notorious Grenoble Case'

The cases above have in common that good faith was used as 'a shield', i.e. a defence, in order to either restrict the rights of a party or to correct rules that otherwise would lead to unjust results. The question remains whether the function of good faith can be taken one step further and be used as 'a sword' in order to create new rights. In a, much discussed, decision a French court seemed to have based a claim for damages on the principle of good faith.[397]

The case involved a contract between a French seller and an American buyer for jeans. It was specified that the jeans were to be sent to South America and Africa. During the negotiations and performance of the contract, the seller repeatedly insisted on knowing the destination of the goods as he had an interest in preventing parallel imports into Spain. It transpired, however, that the second delivery of jeans had been sent to Spain. The seller's subsequent termination of the contract led the buyer to commence court proceedings in order to claim for damages. The buyer's failure to respect the wishes of the seller was found to be a fundamental breach of the contract because he must have known from the contractual negotiations how important it was to the seller that the goods not be sent to Spain. Although it is not clearly stated, it must be assumed that the court, in interpreting the contract with respect to all circumstances according to Art. 8 CISG, found that the territorial exclusivity clause was a contract term which was implied by the parties.[398] Hence, the court rejected the claim of the buyer. Moreover, the court accepted the counterclaim of the seller for damages caused by the legal action of the buyer:

---

where the two breaches of the contract are not related to each other.

[396] Schiedsgericht der Handelskammer Hamburg, 21 March 1996, (Pace Law School website): *'[F]or the rest, the apportionment of damages according to Art. 74 CISG is not to be judged differently from national law, which law can be applied subsidiarily, under Art. 7 CISG, in the absence of more detailed supranational provisions.*'

[397] Cour d'Appel de Grenoble (France), 22 February 1995, 93/3275, *SARL Bri Production 'Bonaventure' v Société Pan African Export* (Bilingual text in English and French in Pace Law School website).

[398] It comes a bit as a surprise that the territorial exclusivity was not an express term of the contract if was so important to the seller. Though not stated in the decision, the reason was probably the fear that such a clause could be seen as a violation of antitrust legislation, in particular the European Community (EC) competition rules. The buyer, in fact, raised the objection that the implied term of a territorial exclusivity was void as it vio-

> 'Whereas, regarding the sum of 10,000 francs claimed by [the seller] for abusive and unjustified actions, the conduct of [the buyer], going against the principle of good faith in international trade promulgated by article 7 of the Vienna Convention, made worse by the judicial position taken by the plaintiff at trial constitutes an abuse of procedure; whereas the inconvenience caused by this trial to [the seller] justifies the sum requested'[399]

This ruling must be considered unfortunate as the abuse of proceedings is a matter that is not covered by the Convention. Good faith under Art. 7 CISG can, however, only reach as far as the Convention is applicable. Hence, the resort to domestic civil procedural law would be preferable.[400] A way to award damages under the CISG would be to regard the commencement of the legal proceedings as a consequence of the buyer's breach of contract, and the costs for the proceedings as a causal damage to be recovered according to Art. 74 CISG.[401] It is suggested that the court might have used the principle of good faith in order to describe a breach of contract, and that the court wanted to award damages under Art. 74 CISG. If this was the case, the decision was less far-reaching as the unfortunate wording suggests.

E. Conclusion

It can be concluded that decisions where the principle of good faith is the pivotal argument to justify the result of the case, are rarely encountered. The fear that a large body of case law with regard to good faith would emerge has not materialised.

The main area of application for a general principle of good faith in practice is the corrective function of good faith.[402] Doctrines that were developed as far back as in Roman law, such as *venire contra factum proprium* and *tu quoque*, seem to be so deeply rooted in the idea of justice, equity or fairness that they not only reappeared under the CISG, but will certainly become well established, be it with reference to good faith under Art. 7(1) CISG, or as an independent general principle of the Convention under Art. 7(2) CISG. This might be seen as a homeward trend. However, one should be aware that the CISG did not come into existence

---

lated EC rules. The court, however, rejected the objection due to a lack of evidence.

399 Cour d'Appel de Grenoble (France), 22 February 1995, 93/3275, *SARL Bri Production 'Bonaventure' v Société Pan African Export* (Bilingual text in English and French in Pace Law School website).

400 Schlechtriem, *Good Faith in German Law and in International Uniform Laws,* p. 11; Sim, sec. IV, A, 5.

401 For a contrary view cf. Sim, sec. IV, A, 5, who sees the decision as an award of punitive damages, which are, according to the prevailing view, not admissible under the CISG. The facts of the case are, however, not clear. The claimed sum might as well have been what defendant and court saw as 'reasonable' or 'foreseeable' legal costs.

402 This refers to decisions which contributes to the development of good faith only. If one considers all cases referring good faith, the predominant function appears to be the 'redundant function', see the five categories in section A above.

in a vacuum. The problems that emerge in international trade are to a great extent 'classics' under domestic law and it is not surprising that similar problems cause similar solutions.

Furthermore, it can be concluded that the application of good faith within the wording of Art. 7(1) CISG, i.e. the restriction to an interpretation of the Convention only, can lead to a far-reaching interference with the parties rights and duties under the contract.[403] That those decisions which enter new territory as far as good faith under the CISG is concerned, come from the German speaking countries is not surprising, as these countries do not only use good faith extensively in domestic law, but are also said to make the biggest contribution to the overall caseload of the CISG.[404] It should be noted, that none of the leading cases cited under section D above has yet been confirmed by subsequent decisions, and it will be interesting to see how adjudicators from common law jurisdictions react to these decisions.

It is disappointing, however, that none of the cases cited in this chapter refers to other decisions. Moreover, it is striking that almost none of the decisions refer to the fact that the scope and application of good faith under the CISG is highly contentious. Consistent case law with regard to a general principle of good faith as well as to specific good faith doctrines under Art. 7(2) CISG can only emerge if there is an interaction between the different courts and tribunals, identifying wrong or excessive decisions, and agreeing on a safe middle ground that can be used as basis for new developments. It can only be hoped that the future will bring some developments and that adjudicators, as well as counsel, will make more use of the easy ways to access cases and scholarly writing from other jurisdictions via the internet.

---

[403] If one wants to understand 'interpretation' in the narrowest possible sense as explaining the meaning of an ambiguous term, then the cases cited under section D are, of course, far beyond the wording of Art. 7(1), cf. Sim, sec. III, B, 2, d. It is, however, not a new insight that the interpretation of the law is always a development of old law and, thus, the creation of new rules of law, cf. as only a few amongst many Larenz/Wolf, § 4, sec. 72; Eörsi, § 2.05, sec. 2-16.

[404] At least as far as the published decisions are concerned, Germany is said to render the most decisions, cf. e.g. Will, p. 256 ff.

Summary

It has been shown that good faith in civil law jurisdictions fulfils three functions: to interpret unclear terms; to supplement contracts; and to correct the written rules by restricting rights or derogating from strict law. In jurisdictions where good faith is not used, other doctrines fulfil these tasks.

Good faith is used as a methodological instrument in order to exercise the three functions within a code. Hence, a coherent and substantive doctrine of good faith does not exist. The scope of application of good faith depends on the extent to which the three functions have to be applied (functional approach). Hence, good faith is subsidiary to other, more specific means that fulfil the functions of good faith.

Good faith in the CISG is unlikely to develop to an excessive extent. The scope of Art. 7(1) CISG does not permit the imposition of obligations on the parties. The functions of good faith in the CISG can to a great extent be fulfilled by other devices. Particularly, the general principles under Art. 7(2) CISG, and the presence of objective-normative standards in specific provisions let a resort to good faith appear superfluous. Areas of application of good faith can emerge where: the text of the CISG is ambiguous; two principles of the CISG lead to contradictory results; and solutions outside the CISG have to be imported into the CISG as a last resort.

The published case law confirms the limited need for a general principle of good faith in the CISG. In most decisions the reference to good faith is redundant. The main area of application is the restrictive role of good faith, although it is not always clear whether or not the respective decision relies on good faith, or on an specific general principle under Art. 7(2) CISG, or on a teleological interpretation of a specific CISG provision.

Bibliography

Aust, A.; *Modern Treaty Law and Practice*, Cambridge (U.K.), 2000

Beale, H., *Legislative Control of Fairness: the Directive on Unfair Terms in Consumer Contracts*, in Beatson, J.; Friedmann, D. (editors), *Good Faith and Fault in Contract Law*, Oxford, 1995, pp. 231 - 261

Beatson, J.; Friedmann, D, *From 'Classical' to Modern Contract Law,* in Beatson, J.; Friedmann, D. (editors), *Good Faith and Fault in Contract Law*, Oxford, 1995, pp. 3 - 21

Birks, P.; Chin Nyuk Yin, *On the Nature of Undue Influence*, in Beatson, J.; Friedmann, D. (editors), *Good Faith and Fault in Contract Law*, Oxford, 1995, pp. 57 - 97

Bonell, M. J., *UNIDROIT Principles 2004 - The New Edition of the Principles of International Commercial Contracts adopted by the International Institute for the Unification of Private Law*, Uniform Law Review (Unif. L. Rev.) 2004, pp. 5 - 40

Bonell, M. J., *The UNIDROIT Principles as a Means of Interpreting and Supplementing International Uniform Law,* The UNIDROIT Principles of International Commercial Contracts - Special Supplement 2002 ICC International Court of Arbitration Bulletin, pp. 29 - 38

Bridge, M., *The International Sale of Goods, Law and Practice,* Oxford, 1999

Burton, S. J., *Breach of Contract and the Common Law Duty to Perform in Good Faith*, 94 Harvard Law Review [1980], pp. 369 - 404

Christie, R. H., *The Law of Contract in South Africa,* 4th ed., Durban, 2001

DiMatteo, L. A.; Dhooge, L.; Greene, S.; Maurer, V., Pagnattaro, M., *The Interpretive Turn in International Sales Law: an Analysis of Fifteen Years of CISG Jurisprudence,* 24 Northwestern Journal of International Business Law [2004] (NW. J. Int'l L. & B), pp. 299 - 240 (cited as 'DiMatteo *et al.*')

Ebke, W. F.; Steinhauer, B. M., *The Doctrine of Good Faith in German Contract Law*, in Beatson, J.; Friedmann, D. (editors), *Good Faith and Fault in Contract Law*, Oxford, 1995, pp. 171 - 190

Eiselen, S., *Adoption of the Vienna Convention for the International Sale of Goods (the CISG) in South Africa*, 116 [1996] South African Law Journal (SALJ), pp. 323 - 370

Eiselen, S., *Remarks on the Manner in which the UNIDROIT Principles of International Commercial Contracts may be used to Interpret or Supplement Article 29 of the CISG,* 14 Pace International Law Review [2002], pp. 379 - 384

Enderlein, F.; Maskow, D., *International Sales Law*, St. Dobbs Ferry (N.Y.), 1992

Farnsworth, E. A., *Duties of Good Faith and Fair Dealing under the UNIDROIT Principles, relevant International Conventions, and National Laws*, 3 Tulane Journal of International and Comparative Law [1995] (Tul. J. Int'l & Comp. L.), pp. 47 - 63

Farnsworth, E. A., *The Role of UNIDROIT Principles in International Commercial Arbitration (2): A US Perspective on their Aims and Application,* The UNIDROIT Principles of International Commercial Contracts - Special Supplement 2002 ICC International Court of Arbitration Bulletin, pp. 21 - 28

Farnsworth, E. A., *Good Faith in Contract Performance*, in Beatson, J.; Friedmann, D. (editors), *Good Faith and Fault in Contract Law*, Oxford, 1995, pp. 153 - 170

Felemegas, J., *The United Nations Convention on Contracts for the International Sale of Goods: Article 7 and Uniform Interpretation*, in: Review of the Convention on Contracts for the International Sale of Goods 2000 - 2001, New York, The Hague, London, 2002, pp. 115 - 379

Ferrari, Franco, *Das Verhältnis zwischen den UNIDROIT Grundsätzen und den allgemeinen Grundsätzen internationaler Einheitsprivatrechtskonventionen* [The Relationship between the UNIDROIT Principles and the General Principles of International Conventions unifying Private Law], Juristen Zeitung (JZ) 1998 [53], pp. 9 - 17

Galston, N. M.; Smit, H. (editors), *International Sales: The United Nations Convention on Contracts for the International Sale of Goods*, New York, 1999

Garro, A. M., *The Gap-filling Role of the UNIDROIT Principles in International Sales Law: Some Comments on the Interplay between the Principles and the CISG,* 69 Tulane Law Review [1995] (Tul. L. Rev.), pp. 1149 - 1190

Garro, A. M., *Reconciliation of Legal Traditions in the U.N. Convention on Contracts for the International Sale of Goods*, 23 International Lawyer [1998], pp. 443 - 483

Gordley, J., *Good Faith in the Medieval Ius Commune*, in Zimmermann, R.; Whittaker, S. (editors), *Good Faith in European Contract Law,* Cambridge (U.K.), 2000, pp. 93 - 117

Graveson, R. H.; Cohn, E. J., *The Uniform Laws on International Sales Act 1967, A Commentary*, London, 1968

Guillemard, S., *A Comparative Study of the UNIDROIT Principles, the Principles of the European Law of Contracts, and some Dispositions of the CISG applicable to the Formation of International Contracts*, in: Review of the Convention on Contracts for the International Sale of Goods 2000 - 2001, New York, The Hague, London, 2002, pp. 83 - 113

Haase, J. W.; Grimm, N.; Versfeld, E., *International Commercial Law from a South African perspective, Uniform laws, CISG, E-commerce, Taxation, Arbitration,* Aachen, 2003

Hartkamp, A., *The Concept of Good Faith in the UNIDROIT Principles for International Commercial Contracts*, 3 Tulane Journal of International and Comparative Law [1995] (Tul. J. Int'l & Comp. L.), pp. 65 - 71

Hartkamp, A., in Hartkamp, A.; Hesselink, M. *et al.* (editors), *Towards a European Civil Code*, 3rd ed., Nijmegen, 2004, *Chapter 7, Principles of Contract Law*, pp. 125 - 144

Hesselink, M., in Hartkamp, A.; Hesselink, M. *et al.* (editors), *Towards a European Civil Code*, 3rd ed., Nijmegen, 2004, *Chapter 26, The Concept of Good Faith*, pp. 471 - 498

Hohfeld, W. N.; *Some fundamental legal Conceptions as applied in judicial Reasoning*, 23 Yale Law Journal [1913], pp. 16 – 59

Honnold, J. O., *The Sales Convention in Action - Uniform International Words: Uniform Application?*, 8 Journal of Law and Commerce [1988], pp. 207 - 212

Honnold, J. O., *Uniform Laws for the International Trade: Early "Care and Feeding" for Uniform Growth*, 1 International Business Law Journal [1995], pp. 1 - 10

Honnold, J. O., *Uniform Law for International Sales under the 1980 United Nations Convention,* 3rd ed., Deventer, Boston, 1999

Juenger, F. K., *Listening to Law Professors Talk about Good Faith: some Afterthoughts*, 69 Tulane Law Review [1995] (Tul. L. Rev.), pp. 1253 - 1257

Keily, T., *Good Faith & the Vienna Convention on Contracts for the International Sale of Goods (CISG)*, 3 Vindobona Journal of International Commercial Law & Arbitration [1999] (VJ), pp. 15 - 39

Klein, J., *Good Faith in International Transactions*, 15 Liverpool Law Review [1993], pp. 115 – 141

Larenz, K., *Lehrbuch des Schuldrechts, Band I, Allgemeiner Teil* [Textbook of the German Law of Obligations, Vol. 1: General Provisions], 12th ed., München, 1979

Larenz, K.; Wolf, M., *Allgemeiner Teil des Bürgerlichen Rechts* [General Part of the German Civil Law], 8th ed., München, 1997

Magnus, U., *Remarks on Good Faith: the United Nations Convention on Contracts for the International Sale of Goods and the International Institute for the Unification of Private Law, Principles of International Commercial Contracts*, 10 Pace International Law Review [1998], pp. 89 - 95

Magnus, U., *Die allgemeinen Grundsätze im UN-Kaufrecht* [The General Principles in the UN Sales Law], Rabels Zeitschrift für ausländisches und internationales Privatrecht (RabelsZ) 1995, pp. 469 - 494

Magnus, U., *Editorial Remarks*, in *Guide to Article 7 CISG*, available under www.cisg.law.pace.edu/cisg/principles/uni7.html (accessed on 20 January 2005)

Mertens, H. J.; Rehbinder, E., *Internationales Kaufrecht, Kommentar zu den Einheitlichen Kaufgesetzen* [International Sales Law, Commentary on the Uniform Sales Laws], Frankfurt am Main, 1975

Mustill, M. l., *The New Lex Mercatoria: The First Twenty-five Years*, 4 Arbitration International [1988] (Arb. Int.), pp. 86 - 119

O'Connor, J. F., *Good Faith in English Law*, Dartmouth, 1990

Powers, P. J., *Defining the Undefinable: Good Faith and the United Nations Convention on the Contracts for the International Sale of Goods*, 18 [1999] Journal of Law and Commerce (J. L. & Com.), pp. 333 - 352

Rosett, A., *Critical Reflections on the United Nations Convention on Contracts for the International Sale of Goods,* 45 Ohio State Law Journal [1984], pp. 265 - 305

Roth, G. H., in *Münchener Kommentar zum Bürgerlichen Gesetzbuch, Band 2: Schuldrecht Allgemeiner Teil, § 242 BGB* [Munich Commentary on the German Civil Code, Vol. 2: Law of Obligations, General Provisions, sec. 242], 2nd ed., München, 1985 (cited as *Roth, § 242, sec. ...*)

Schermaier, M. J., *Bona fides in Roman contract law*, in Zimmermann, R.; Whittaker, S. (editors), *Good Faith in European Contract Law,* Cambridge (U.K.), 2000, pp. 63- 92

Schlechtriem, P., *Uniform Sales Law - The UN-Conventions on Contracts for the International Sale of Goods*, Wien, 1986 (cited as 'Schlechtriem, *Uniform Sales Law*, p. ...)

Schlechtriem, P., *Good Faith in German Law and in International Uniform Laws,* Rome 1997, accessible through http://w3.uniroma1.it/idc/centro/publications/24 (accessed on 1 December 2004)

Schlechtriem, P. (editor), *Commentary on the UN Convention on the International Sale of Goods (CISG)*, 2nd ed. in translation, Oxford, 1998 (cited as Schlechtriem/Author*, Commentary*, Art. ..., sec. ...)

Sim, D., *The Scope and Application of Good Faith in the Vienna Convention on Contracts for the International Sale of Goods*, Master Thesis, 2001, accessible through http://www.cisg.law.pace.edu/cisg/biblio/sim1.html (accessed on 2 December 2004)

Sonnenberger, H. J., *Treu und Glauben ein supranationaler Grundsatz?* (Good Faith a supranational principle?), in *Festschrift für Walter Odersky zum 65 Geburtstag am 17.7.1996,* Berlin, New York, 1996, pp. 703 - 721

Summers, R. S., *The conceptualisation of good faith in American contract law: a general account,* in Zimmermann, R.; Whittaker, S. (editors), *Good Faith in European Contract Law,* Cambridge (U.K.), 2000, pp. 118- 141

Treitel, G. H., *The Law of Contract*, 10th ed. (International Student Edition), London, 1999

UNCITRAL Secretariat (editor), *Commentary on the Draft Convention on Contracts for the International Sale of Goods* (UN Doc. A/CONF. 97/5, 14.3.1979), in: *United Nations Conference on Contracts for the International Sale of Goods,* Official Records (UN Doc. A/CONF. 97/18), New York (United Nations), 1981, pp. 14-66

UNIDROIT (editor), *Principles of International Commercial Contracts*, Rome, 1994

Veytia, H., *The Requirement of Justice and Equity in Contracts,* 69 Tulane Law Review [1995] (Tul. L. Rev.), pp. 1191 - 1207

van Erp, J. H. M., in Hartkamp, A.; Hesselink, M. *et al.* (editors), *Towards a European Civil Code*, 3rd ed., Nijmegen, 2004, *Chapter 20, The Pre-Contractual Stage*, pp. 363 - 380

von Weichs, E.; Foerstl, U., *Der allgemeine Auskunftsanspruch im Urheberrecht* (The general claim for information in German copyright law), Zeitschrift für Urheber- und Medienrecht (ZUM) 2000, pp. 897 - 904

Wilken, S.; Villiers, T., *Waiver, Variation and Estoppel*, Chichester *et al.*, 1998

Will, M. R., *Twenty Years of International Sales Law Under the CISG,* The Hague, London, Boston, 2000

Williams, A. E., *Forecasting the potential impact of the Vienna Sales Convention on International Sales Law in the United Kingdom*, in: Review of the Convention on Contracts for the International Sale of Goods 2000 - 2001, New York, The Hague, London, 2002, pp. 9 - 57

Zeller, B., *Four-Corners - The Methodology for Interpretation and Application of the UN Convention on Contracts for the International Sale of Goods*, (Ph.D. Thesis, May 2003), accessible on www.cisg.law.pace.edu

Zimmermann, R.; Whittaker, S. (editors), *Good Faith in European Contract Law,* Cambridge (U.K.), 2000

Zimmermann, R., *Good Faith and Equity*, in Zimmermann R.; Visser, D. (editors), *Southern Cross, Civil Law and Common Law in South Africa*, Kenwyn, 1996, pp. 217 - 260

Table of Cases

UNILEX = http://www.unilex.info
CISG-Online = http://www.cisg-online.ch/cisg/cases.html
Pace Law School = http://www.cisg.law.pace.edu/cisg/search-cases.html

Country	Date	Court / Tribunal	Case No.	Parties / Case Name	Reference
Australia	1992/03/12	New South Wales Court of Appeal	- - -	Renard Constructions v Minister for Public Works	UNILEX
Austria	1994/06/15	Int. Schiedsgericht d. Bundeskammer der gewerblichen Wirtschaft Wien	SCH-4318	unknown	UNILEX
	2001/10/22	Oberster Gerichtshof	Ob 49/01i	unknown	UNILEX
Belgium	2002/05/15	Hof van Beroep Ghent	unknown	unknown	UNILEX
Finland	2000/10/26	Helsinggin Hoviokeus	S00/82	unknown	Pace Law School
France	1995/02/22	Cour d'Appel de Grenoble	93/3275	SARL Bri Production 'Bonaventure' v Société Pan African Export	Pace Law School
	2004/06/30	Cour de Cassation	Y 01-15.964	unknown	UNILEX
Germany	1914/05/26	Reichsgericht	unknown	unknown	RGZ 85, 108
	1993/01/13	Oberlandesgericht Saarbrücken	1 U 69/92	unknown	CISG-Online
	1995/02/08	Oberlandesgericht München	7 U 1720/94	unknown	UNILEX

Country	Date	Court / Tribunal	Case No.	Parties / Case Name	Reference
Germany	1996/03/21	Schiedsgericht der Handelskammer Hamburg	unknown	unknown	Pace Law School
	1996/03/26	Landgericht Saarbrücken	7 IV 75/95	unknown	UNILEX
	1996/05/21	Oberlandesgericht Köln	22 U 4/96	unknown	CISG-Online
	1996/12/17	Bundesgerichtshof	X ZR 74/95	unknown	NJW-RR 1997, 622
	1997/01/08	Oberlandesgericht Köln	27 U 58/95	unknown	UNILEX
	1997/02/28	Oberlandesgericht Hamburg	1 U 167/95	unknown	CISG-Online
	1997/06/25	Oberlandesgericht Karlsruhe	1 U 280/96	unknown	UNILEX
	1998/11/25	Bundesgerichtshof	VIII ZR 259/97	unknown	UNILEX
	2001/10/31	Bundesgerichtshof	VIII ZR 60/01	unknown	UNILEX
	2002/01/09	Bundesgerichtshof	VIII ZR 304/00	unknown	UNILEX
	2003/07/15	Landgericht Mönchengladbach	7 O 221/02	unknown	UNILEX
Hungary	1995/11/07	Hungarian Chamber of Commerce and Industry Court of Arbitration	VB/94124	unknown	UNILEX
ICC Arbitration	1995/03/?	ICC Court of Arbitration	7645	unknown	ICAB 11/2, p. 34
	1997/01/?	ICC Court of Arbitration	8786	unknown	ICAB 11/2, p. 70
	1997/01/23	ICC Court of Arbitration	8611/HV/JK	W v R	UNILEX
Netherlands	1994/10/05	Rechtsbank Amsterdam	H 93-2900	Tuzzi Trend v Keijzer-Somers	NIPR 13 [1995] 195, No. 231
	1997/03/05	Arrondessementrechtsbank Zwolle	HA ZA 95-640	CME v Bos Fishproducts	UNILEX
	1997/07/17	Arrondessementrechtsbank Arnheim	unknown	Lempertz v Van der Geld	UNILEX
	2002/10/16	Hof 'S-Hertogenbosch	unknown	unknown	UNILEX

Country	Date	Court / Tribunal	Case No.	Parties / Case Name	Reference
New Zealand	2001/10/03	Court of Appeals Wellington	CA 245/00	unknown	UNILEX
Russia	1999/08/27	Russian Federation Chamber of Commerce and Industry	302/1996	unknown	Pace Law School
South Africa	1988/03/30	Appellate Division	- - -	Bank of Lisbon and South Africa Ltd v De Ornelas	1988 (3) SA 580 (A)
Switzerland	1998/11/30	Handelsgericht Zürich	HG 930634	unknown	UNILEX
United Kingdom	1766/?/?	King's Bench Division	- - -	Carter v Boehm	3 Burr 1905
	1919/05/19	House of Lords	- - -	Les Affreteurs Reunis S.A. v Leopold Walford (London) Ltd.	[1919] A.C. 801
	1991/10/23	House of Lords	- - -	Scally v Southern Health & Social Services Board	[1992] 1 A.C. 294
	1997/02/27	House of Lords	- - -	Mahmud v B.C.C.I.	[1998] A.C. 20
United States	2002/05/10	District Court New York	98 Civ. 861, 99 Civ 3607	Geneva Pharmaceuticals v Barr Laboratories et al.	UNILEX
	2003/06/11	Federal Court of Appeal (5th Circuit)	02-20166	BP Oil et al. v PetroEcuador et al.	UNILEX