

**GOOD FAITH IN THE CISG:
THE INTERPRETATION PROBLEMS OF ARTICLE 7**

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ABSTRACT: This article examines the dispute concerning the meaning of Good Faith in the CISG. Although there are good reasons for arguing a more limited interpretation or more limited application of Good Faith, there are also good reasons for a broader approach. Regardless of the correct interpretation, however, practitioners and academics need to have a sense of where the actual jurisprudence is going. This article reviews every published case on Article 7 since its inception and concludes that while there is little to suggest a strong pattern is developing, a guided pattern while incorrect doctrinally is preferable to the current chaos.

1) INTRODUCTION

The Convention on the International Sale of Goods or the Vienna Convention¹ may well be the most important development in contract law of the 20th century. The CISG, as it is known,² was opened for signature on April 10 1980, and came into force on January 1, 1988 after ratification by eleven nations on December 11, 1986.³ It is comprised of 101 articles and has been used by decision makers around the world.⁴ The CISG is an implied term to all international contracts of businesses in signatory countries, unless it is specifically excluded.⁵ This default inclusion means that it will only increase in importance as international business increases.

One important but highly controversial article is Article 7, which 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

¹ 1498 UNTS 3 (No. 25567); ILM (1980), p. 671.

² CISG is the North American term for the Vienna Convention. Jacob Ziegel, and Claude Samson, *Report to the Uniform Law Conference of Canada on Convention on Contracts for the International Sale of Goods*, Introductory Comment 7.

³ China, Italy and the United States deposited instruments of ratification on December 11, 1986. Pursuant to Article 99(1), the Convention was to come into force “on the first day of the month following the expiration of twelve months after the date of deposit of the tenth instrument” after the tenth instrument is deposited.

⁴ Decisions in the countries of 32 of the signatories can be found on the Pace University Law School. <http://cisgw3.law.pace.edu/>

⁵ CISG Article 6.

(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.

Of particular concern is the reference in this article to “Good Faith.” While no one is advocating that contracts be conducted in “bad faith”, it is quite another thing to be advocating “Good Faith.” There are a variety of reasons for this controversy, no single one of which adequately explains the problem. First, it is a manifestly different concept in the common-law and civil law jurisdictions that make up the majority of the world’s legal systems. While traditionally, common-law systems have rejected it,⁶ in the civil law systems, it is a broad, general and far-reaching concept.⁷ Even within these considerably different systems there is considerable variation as to the meaning of the phrase in their differing jurisdictions. As examples, discussed in greater depth later, although both the UK and the USA have addressed the concept and accept the notion in a general sense, both countries have dealt with it quite distinctly. While the USA has included it in its Uniform Commercial Code,⁸ the UK has found it to be a sufficiently onerous obligation so as to make acceptance of the CISG unpalatable.⁹ In the civil law

⁶ Discussed in detail below p. 19 ff.

⁷ Discussed in detail below p. 22 ff.

⁸ UCC 85

⁹ Barry Nicholas, *The United Kingdom and the Vienna Sales Convention: Another Case of Splendid Isolation?*, Rome: Centro di Studi e Ricerche di Diritto Comparato e Straniero (1993) (visited May, 16, 2004) <http://www.cnr.it/CRDCS/nicholas.htm>

countries, France sees Good Faith as a broad principle without specifics;¹⁰ Germany sees it as having specific content and devotes about 500 pages to explicating the specifics.¹¹

The dispute grows as the difference between the positions widen concerning Good Faith.

Scholars, decision-makers and merchants ask:

1. Is it a principle or an interpretive guide or a substantive doctrine?
2. Is it a mere moral aspiration or “visionary”, or is it a mere a legal doctrine?
3. Is it to be negatively defined as in determining what does it rule out, or is it positive with its own content?
4. If it is a substantive doctrine, when is it triggered: in pre-contractual negotiation, in performance, or upon breach?
4. If it is a substantive doctrine, does it create an objective or subjective standard?
5. Does it get its substance from the common-law or from civil law? And
6. Is it a coherent concept?¹²

Pallets of paper and piles of toner cartridges have been expended on the topic with little advance being made toward any type of a consensus. A curious phenomenon has been noted—a majority of scholars and reported cases prefer a substantive role for Good Faith¹³ but the reason for this consensus is less than clear. It may simply be, as Dimisa

Sim has observed: “The concept of Good Faith has great normative appeal. It would be a

¹⁰ Disa Sim 2001. The Scope and Application of Good Faith in the Vienna Convention on Contracts for the International Sale of Goods. This is Sim’s LLM thesis at Harvard Law School. In Review of the Convention on Contracts for the International of Sale of Goods (2002). All references are to the electronic copy available at <http://cisgw3.law.pace.edu/cisg/biblio/sim1.html>

¹¹ Ibid.

¹² Sim above n. 18.

¹³ Ibid.

rare commentator who would deny that Good Faith has any role to play in the development of a legal system.”¹⁴ Nevertheless, the concept has been a thorn in the side of those involved with the CISG from its inception—as it sparked disagreement among its initial negotiators—to commentators and decision makers, and ultimately, the merchants who resort to it to resolve their disputes.

Although it is beyond both the scope of this paper to develop any definitive conclusions, the current discussion will be an effort to understand “Good Faith” in Article 7 of the CISG. In developing this understanding, access will be had to a variety of interpretations. Specifically, this paper will develop an interpretation by applying accepted approaches to interpretation of international instruments, by applying the *travaux preparatoires*, by a careful analysis of the text, and by examining the interpretations of commentators. Finally and perhaps most importantly, the paper will then turn to a detailed review of every CISG case in which Article 7 Good Faith has been addressed, and then move toward developing some type of conclusion.

2) CONCEPTUAL PROBLEMS OF GOOD FAITH

Aside from the problems of Good Faith in each of the traditions, commentators have broader issues to face. A commentator must decide if Good Faith is a mere moral principle or a legal principle.¹⁵ Once a commentator has come to prefer the view that

¹⁴ Ibid.

¹⁵ Ibid.

Good Faith is more than a moral principle and is in fact a legal principle,¹⁶ the commentator is confronted with the dilemma of identifying the content of the principle. While Good Faith can be advocated as a healthy reaction to formalism in contractual interpretation and give the adjudicators flexibility in ensuring that the spirit of the agreement is implemented, what and how such interpretations are to be developed and applied remains unclear.¹⁷ As Goode has observed, “one may acknowledge the power and attraction of a general idea but the idea may be so general that it is of no practical utility to the merchant.”¹⁸

The commentators who believe there is a duty of Good Faith on the parties to an agreement governed by the CISG have not come to any agreement as to the content of Good Faith. Is it to be interpreted positively imposing specific duties, or is it negative, merely precluding some behaviours? Some argue its obligations are to promote exchange of information, prevent the parties from benefiting from action taken to frustrate their own contracts, and mitigate damages.¹⁹ Others use the phrase consistently with fair dealing, as in “Good Faith and fair dealing,”²⁰ “fairness,”²¹ “reasonable,”²² an ethical sense, and “solidarity.”²³

¹⁶ Discussed in depth by Sim Ibid..

¹⁷ Ibid.

¹⁸ Roy E. Goode, “The Concept of ‘Good Faith’ in English Law” Centro di studi e ricerche di diritto comparato e straniero, Saggi, Conferenze e seminari. 2

¹⁹ See for example, these three discussed by John Klien, “Good Faith in International Transactions” (1993) 15 Liverpool Law Review, 115,124-5. Also noted by Thomas Carbonneau, “Rendering Arbitral Awards with Reasons: The Elaboration of a Common Law of International Economic Transactions,” (1985) 23 Columbia J. Transactional L, 580, 589. Kastley discusses these a general principles of “communication”, see Amy Kastely “A Rhetorical Analysis of the United Nations Sales Convention” (1988) 8 NW J. Int’l L & Bus 574.

²⁰ See for example, Schlechtriem, “Uniform Sales Law,” (1986).

²¹ Robert Hillman, Policing Contract Modifications under the UCC: Good Faith and the Doctrine of Economic Duress, (1979) 64 Iowa L. Rev., 849, 877.

In German law, the concept is considered so broad that some scholars have suggested it be abandoned altogether, because “you can find a source (be it a court decision or a scholarly theory) for every solution imaginable or wanted, 242 BGB [Good Faith] serving as the legal anchor to even the wildest propositions and results.”²⁴ In the UCC it is defined as “honesty fact and the observance of reasonable commercial standards of fair dealing in the trade,”²⁵ and although described as “Good Faith and fair dealing” in the Restatement, further definition is avoided simply stating that it excludes types of bad faith.²⁶

Some commentators note the ease with which the notion slips into the pure subjectivity of the justices and ends up relying on the intuition of a particular judge.²⁷ Schlechtriem observes that it ends up depending on “the personal, political or religious conviction that is alleged to be a general... standard of Good Faith.”²⁸

Further, the questions remain as to when Good Faith is triggered, what level of judicial activism it permits, whether it creates new rights and obligations, and whether there are additional liabilities or remedies tied to Good Faith.²⁹

²² Holmes, “A Contextual Study of Commercial Good Faith: Good Faith Disclosure in Contract Formation,” (1978) U. Pitt. L. Rev. 381, 442. The reasonable standard is advocated by Schlechtriem as applicable in the CISG, Schlechtriem, above n. 20, 39, cited in Sim, above n. 18.

²³ Roberto Unger, *Law in Modern Society*, (1976), 210, cited in Sim, above, n. 18.

²⁴ Schlechtreim, above n. 20.

²⁵ 1-201(19)

²⁶ Para 205.

²⁷ Sim, above n. 18.

²⁸ Schlechtriem, above n. 20.

More specifically in the CISG, a number of commentators point out provisions which can be read as specific duties of Good Faith.³⁰ For example: offers are non-revocable where it is reasonable for the offeree to rely upon the offer being held open and the offeree acted in reliance on the offer;³¹ late acceptance is good when sent by the deadline when in normal transmission it would have reached the offeror on time;³² a party is precluded from relying on a provision in a contract that modification or abrogation of the contract must be in writing;³³ broad seller's rights to remedy non-conforming goods;³⁴ and seller precluded from relying on technical non-conformity of notice, if the lack of conformity relates to facts which the seller knew or could not have been unaware and which he did not disclose to the buyer.³⁵ Even this list is not a comprehensive list, as depending upon how one views Good Faith and the terms of the CISG, one may find more or less provisions as dealing with Good Faith. We turn now to discussing the context of the CISG as a basis for developing a basis for interpretation of Article 7.

3) GENERAL INTERPRETATION OF INTERNATIONAL INSTRUMENTS

The Vienna Convention on the Law of Treaties is the law which guides interpretation of international treaties such as the CISG.³⁶ Curiously, the Vienna convention itself uses the term "Good Faith" in explaining both itself and the obligations on parties to treaties.³⁷ It

²⁹ The latter two matters are discussed in Sim, above, n. 18.

³⁰ Ibid.

³¹ Article 14(2)(b)

³² Article 19(2)

³³ Article 27(2)

³⁴ Articles 35 and 44

³⁵ Article 38.

³⁶ United Nations, *Treaty Series*, vol. 1155, p.331

³⁷ "Good Faith" occurs five times in the Vienna Convention: in the Preamble, Art. 26, 31, 46, and 69.

reads: “Every treaty in force is binding upon the parties to it and must be performed by them in Good Faith.”³⁸ Further, as a general rule of interpretation, the convention offers: “A treaty shall be interpreted in Good Faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.”³⁹ This provision, it would seem, should preclude reading Article 7 of CISG as merely requiring the CISG being interpreted with Good Faith on the basis that it is redundant to the general principle enunciated here.

Arguably, the Convention further allows the development of an understanding of a provision by subsequent interpretation. Article 31(3)(b) reads:

There shall be taken into account, together with the context:... (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation.

While clearly not establishing any form of *stare decisis*, this provision supports efforts at developing uniformity in application by observing the “gap filling” of the parties and permitting the gap-filling to attain a level of acceptance approaching international law. This provision becomes problematic, however, when there is no consistent application of the treaty.⁴⁰

Interpretation, as rather understated by the International Law Commission (ILC) is “to some extent an art, not an exact science.”⁴¹ The ILC has determined that of the choices:

³⁸ Article 26. This is the doctrine of *Pacta sunt servanda*.

³⁹ Article 31(1).

⁴⁰ Anthony Aust, *Modern Treaty Law and Practice* (2000), 194.

⁴¹ ILC Commentary, p. 218, cited in Aust, *ibid*, 184.

“literal”, “textual”, “intentions of the drafters”, or object and purpose—also referred to as “effective” or “teleological approach”—no one method should be preferred.⁴² As

Anthony Aust writes in his tome on treaties:

Placing undue emphasis on the text, without regard to what the parties intended; or on what the parties are believed to have intended, regardless of the text; or on the perceived object and purpose in order to make the treaty more ‘effective’, irrespective of the intentions of the parties is unlikely to produce a satisfactory result.⁴³

In other words, there is no precedence given to any one approach and treaty interpretation must be a balancing act or an inclusive reading of a text. Finally, one must consider the meaning of the word “interpretation” itself in the context of treaty interpretation. Is interpretation limited to finding the correct meaning of a word or passage, or does it refer to the correct application of a treaty provision to a problem at hand—often referred to as “gap filling” where the treaty itself does not adequately address the problem.

a) Application of International Interpretation Principles to the CISG

Article 7(1)⁴⁴ of the CISG can be read in at least three different ways.⁴⁵ Again, for ease of reference, it is quoted:

⁴² Ibid, 185.

⁴³ Ibid.

⁴⁴ I do not wish to include Article 7(2) in this part of the analysis, as I see it as unnecessarily complicating an already complex matter, and not adding any light on the CISG’s concept of Good Faith in the process.

⁴⁵ Various commentators note different ways of interpreting the convention; however, I do not find all distinctions helpful or particularly enlightening. Farnsworth views it being read correctly when it is read “literally” and without a duty of Good Faith as between the parties. E.A. Farnsworth, “Duties of Good Faith and Fair Dealing under the UNIDROIT Principles, Relevant International Conventions, and National Laws” Tulane University Law School, database, (hereinafter Farnsworth, Tulane) 56. A second way is literally, but having a duty of Good Faith “extracted from the general principles on which [the CISG] is based.” This position is advocated by M.J. Bonell, Interpretation of the Convention, in Commentary on the International Sales Law the 1980 Vienna Sales Convention, Art. 7, Dott. A. Guiffre ed. (1987) Fritz Enderlein, advocates it not being read literally but imposing the same duty on the parties to the contract as on the courts. In “Rights and Obligations of the Seller Under the UN Convention on Contracts for the International Sale of Goods” in International Sale of Goods: Dubrovnik Lectures 133, 136-7. Sim identifies six ways of reading the Article. Sim above n. 18. Paul Powers, “Defining the Undefinable: Good Faith and

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

It can be read as referring to Good Faith in interpreting the CISG itself. Second, it can be read as promoting Good Faith in international trade. Third, it can be read as a governing principle for contracts falling under its control. We will examine each of these interpretations just briefly.

If one focuses on the first part of the article “in the interpretation of this convention”, one comes to the view that Good Faith is limited to the interpretation of the convention itself. It appears not to expand the scope Good Faith beyond the act of interpreting the convention. While this may be the best and most obvious reading of the Convention for many,⁴⁶ as noted above, it is somewhat redundant to put this provision in when it already is a principle of interpretation of international treaties under the Vienna Convention. Further, as many scholars point out, Good Faith is a principle of the CISG itself.⁴⁷ Therefore, to add it in this manner adds nothing at all. It is a simple redundancy. Further, to attempt to limit it so, is as Zeller observes, “logically impossible.”⁴⁸ The view that it is

the United Nations Convention on Contracts for the International Sale of goods,” (1999) 18 J. of Law and Commerce, 333 also notes three; however, they are merely a reiteration of Farnsworth’s Theory.

⁴⁶ Sim, for example, see this as the only correct reading of the provision. above n. 18. John Honnhold, Uniform Law For International Sales Under the 1980 United Nations Convention 3rd ed., (1999) also takes this view 100.

⁴⁷ Sim, above n. 18.

⁴⁸ Bruno Zeller (2003) Four-Corners - The Methodology for Interpretation and Application of the UN Convention on Contracts for the International Sale of Goods, PhD Thesis at the University of Melbourne, hereinafter “Four Corners” 43. Troy Keily, “Good Faith and the Vienna Convention on Contracts for the International Sale of Goods, 3 Vindobona Journal of International Commercial Law and Arbitration, Issue 1 (1999) 15-40

not to be limited to the interpretation of the CISG itself is held by the majority of commentators.⁴⁹

If one parses the clauses of the article, one reads the CISG as looking “to promote... the observance of Good Faith in international trade.” Clearly on this reading, Good Faith is something between trading parties which should be promoted. It does not appear to be a legal principle to be applied to contracts between the parties. It is more a sentiment or “moral aspiration” as some commentators put it,⁵⁰ rather than anything substantive to which the courts or other decision makers need to pay particular attention.

Finally, one can interpret the text as saying in respect to instances of its application, i.e. “in the interpretation of this Convention, regard is to be had to ... promot[ing] ... and the observance of Good Faith in international trade.” Clearly the only way to fulfill the mandate where it is so read, is by applying the concept of Good Faith to the contracts which come under its control.⁵¹ The CISG does not provide any further guidance.⁵² This lack of guidance is one important driver of the on-going confusion concerning the interpretation and application of the Good Faith provision in the CISG. Furthermore, given the lack of guidance concerning effective or textual readings from the ILC noted above, no one reading has favour over the others. Interestingly, although the *travaux*

⁴⁹ See for example, Farnsworth, Tulane, above n, 45, 55, and noted as a general tendency by Schlechtreim, above n. 20, 3.

⁵⁰ Noted by Sim above n. 18, Kastely, above n. 19, 577.

⁵¹ This reading is noted by Phanesh Koneru, “The International Interpretation of the UN Convention on Contracts for the International Sale of Goods: An Approach Based on General Principles,” (1997) 6 Minnesota J. of Global Trade, 105, n. 148. He introduces a slight variant by which one could read a general promotion of Good Faith in international trade without a specific application to the case at bar.

⁵² Although one could argue that *ejusdem generic* may apply and so limit “Good Faith” to “international trade” to do so is awkward in the extreme.

preparatoire indicate that this interpretation was specifically rejected by the negotiators, it appears to be the favoured interpretation by arbiters of cases and commentators.

4) INTERPRETATION AND THE *TRAVAUX PREPARATOIRES*

The *travaux preparatoires* are a legitimate source of information on how to interpret uncertain texts. Article 32 of the Vienna Convention set out:

Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31: (a) leaves the meaning ambiguous or obscure⁵³

a) Application of the *Travaux Preparatoires* to the CISG

Clearly, as many commentators have done, to examine the *travaux preparatoires* for guidance is an appropriate way of making sense of the CISG's Good Faith provision. In the interpretation of the notion of Good Faith in the CISG, however, some commentators have made much of the compromise nature of the language of Art. 7.⁵⁴ The implication is that because it is a compromise, it is not the true intent, or an accurate reflection of the parties ideas and hence suspect as law. The idea is that if it is not a single, agreed, unified notion, it is somehow, not to be treated as law. Perhaps this approach is more of a resistance point amongst common law lawyers than a problem posed by civil law

⁵³ Article 32, Supplementary means of interpretation

⁵⁴ See for example, Thomas E. Carbonneau & Marc Firestone, "Transactional Law-Making: Assessing the Impact of the Vienna Convention and the Viability of National Adjudication" (1986) 1 Emory J. Int'l Dispute Reso, 51, 70. They are correct that it was clearly a difficult and less than satisfactory compromise. Nevertheless, it is as it is and the issue is how to move forward.

practitioners. But simply because an idea is new, or a doctrine consciously developed—as opposed to the common law view in which judges “find” pre-existent principles—does not make it any less legitimate or appropriate than any other doctrine.

Nevertheless, the *travaux préparatoires* for Art. 7 reveal a deep divide among the parties, and arguably, the compromise does not adequately straddle the two main positions. The negotiations concerning Article 7 are described as “hotly contested”⁵⁵ and “fierce.”⁵⁶ Scholars have variously described it as: “strange arrangement,”⁵⁷ “awkward compromise,”⁵⁸ and “a rather peculiar provision.”⁵⁹ Farnsworth, one of the negotiators describes it as having “a troubled history.”⁶⁰ Still, several versions and proposals were considered and it was considered adequate by a sufficient majority to make it into the treaty’s final form.⁶¹ As such, it has legitimacy and should be accorded the full weight of any other provision.

The result of this deep divide, however, has left an impact on the usefulness of the *travaux préparatoires*. As Bruno Zeller observed in his doctoral dissertation on the interpretation of the CISG, “The conclusion is that the *travaux préparatoires* must be

⁵⁵ Klien, above, n. 19, 121.

⁵⁶ Sim, describing the common law response to the Good Faith proposal. Above n. 18.

⁵⁷ Gyula Etirsi, “A Propos the 1980 Vienna Convention on Contracts for the International Sale of Goods,” (1983) 31, Am. J. Comp. Law. 333, 354, cited in E.A. Farnsworth, Tulane, above n. 45, n. 51.

⁵⁸ Thomas E. Carbonneau & Marc Firestone, above n. 54, 74 cited in E.A. Farnsworth, “Duties of Good Faith and Fair Dealing under the UNIDROIT Principles, Relevant International Conventions, and National Laws” Tulane University Law School, database, TLD n. 52. Disa Sim calls it “awkwardly drafted.” Sim above n. 18.

⁵⁹ Bonell, above, n. 45, 1.

⁶⁰ E.A. Farnsworth, Tulane above, n. 45, 55.

⁶¹ 17 in favour, 14 opposed, and 11 abstentions, noted in Bruno Zeller (2003) Four-Corners, 66.

treated with utmost caution.”⁶² But this finding is not unique to the usefulness of the *travaux préparatoires* vis-à-vis the CISG. A general caution concerning their use is common among international law commentators.⁶³ Zeller continues: “[because of the conflict the] *travaux préparatoires* arguably are predominantly of historical interest.”⁶⁴ The relegation of the *travaux préparatoires* to the ambit of historians where subsequent practice diverges from original intention is not unknown in treaty interpretation,⁶⁵ and thus may be appropriate here as well.

5) TEXTUAL INTERPRETATION OF THE CISG

Other commentators have done a broad, rhetorical analysis of the CISG.⁶⁶ My approach here is not to duplicate their work, but to focus on the text of Article 7. This independent approach, known among literary critics as New Criticism, has been dubbed the “Four-corner” method of interpretation for the CISG.⁶⁷ The CISG has a considerable amount to say on how it is to be interpreted and the nature of Article 7. The Preamble sets out the

⁶² Four Corners 66

⁶³ See for example, Aust, above n. 40, 199. Oppenheim’s International Law, 9th ed., (1992), and McNair A Law of Treaties, 2nd ed, (1961).

⁶⁴ Four Corners 46.

⁶⁵ Aust, above n. 40, 194 remarks that a reading of the *travaux préparatoires* indicates that the abstention in the UN’s Security Council was originally intended to function as a block, but subsequent practice did not bear it out. Aust, above n. 40, 195.

⁶⁶ Given the broad scope set out in the Preamble, and broad application, and the fact of the interpretative principles being contained in it, it may well be argued that the CISG was intended to be independent of any individual legal community, and indeed, that is apparently what its negotiators and drafters had in mind. For a thorough, interesting and helpful analysis of the rhetoric of the CISG, see Kastely, above n. 19. See also, Winship, P.P., “Commentary on Professor Kastely’s Rhetorical Analysis”, 8 Nw. J. Int’l L. & Bus. (1988), 623. An interesting article on the problems of textualism in good faith in USA law, is Michael Van Alstine, “Of Textualism, Party Autonomy, and Good Faith,” (1999) 40 *Wm. And Mary L. Rev.* 1223. his article is a good balance against the view that Good Faith is not substantive. He reminds readers that in the USA, good faith was essentially a basis for granting legal power to implied terms and that taking a too textual approach fails to acknowledge the underlying premises of limiting the use of discretion in performance of contractual duties.

⁶⁷ Four-Corners.

context. It states that is based in the “broad objectives of the General Assembly of the United Nations”⁶⁸ and refers to the “New International Economic Order.”⁶⁹ Its principle is to aid in “the development of international trade on the basis of equality and mutual benefit” for the political purpose of international peace.⁷⁰ It is not aligned with any particular system or approach to problem resolution, and specifies that its rules “take into account the different social, economic and legal systems.” In other words, it is not promoting a USA, or western, or any other hegemony. It is for the peaceful improvement of world trade for the purposes of enhancing the world as a whole.⁷¹

The structure of the Convention has a direct bearing on the understanding of Article 7.⁷² Prior to Article 7 there are no substantive matters dealt with. Articles 1 through 6 address only the matter of application, generally limiting its application to the purchase and sale, internationally, of non-consumer goods, and not applying to matters of product liability. Accordingly, the very first article dealing with anything substantive is Article 7, and as such, Article 7 sets out the basic principles for all that is to follow.

Article 7(1) 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.

⁶⁸ Preamble

⁶⁹ Ibid. Also noted by Sim, above n. 18.

⁷⁰ Ibid

⁷¹ This is the essence of the New International Economic Order.

⁷² Kastely, above n. 19.

Article 7 identifies three basic principles of interpretation. These principles are: that it is international in character and not a local text, promoting uniformity, and Good Faith. In other words, “Good Faith” is not a single doctrine or isolated principle to be considered on its own. It is but one part of a triumvirate of interpretive principles.⁷³

The matter of Good Faith becomes an even more problematic aspect of the CISG in

Article 7(2) which reads:

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.

The problem with this section is that it is not clear whether the “principles” referred to are those set out in 7(1) or those in the Preamble, or simply the general principles which can be discovered in the *travaux préparatoires*. Further, it is not clear which “rules of private international law” were to apply. There was considerable and acrimonious debate about these later “rules” between developed and developing nations, concerning the generally accepted terms of trade. Ultimately, as noted above, significant compromises had to be made to complete the text.⁷⁴

Nevertheless, it is clear from the placement of Article 7 at the head of all substantive sections—which deal respectively with the general topics of contract formation,

⁷³ Kastely notes four principles: 1) contractual commitment, 2) forthright communication, 3) Good Faith and trust, and 4) forgiveness of human error. Above, n. 19, 595-600. Koneru, above n. 51 notes the same principles.

⁷⁴ See discussion in Kastely above n. 19, 608-613 and n. 152-172 therein.

obligations of parties and remedies⁷⁵—and the generality of its wording, that it is to apply to all that follows. From this perspective, then, Good Faith, is not a discrete, single doctrine. It is rather, one of three interpretive principle, to guide in the interpretation of all of the CISG sections which follow, and a principle to be applied to specific instances. It is not a substantive doctrine then to be read into all contracts as an implied term, but a guide to thinking about whether and how other terms should be read in to a contract, or applied to a particular fact pattern.⁷⁶

6) INTERPRETATIONS OF COMMENTATORS

Despite the Convention’s specific statement, noted above, that

regard is to be had to its international character and to the need to promote uniformity in its application and [that] 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

commentators, perhaps inevitably, tend to look to their own systems in developing interpretations. This tendency shows up in both the types of comments made by commentators, and in the philosophical commitments of the commentators.

Nevertheless, the scholarly contribution to understanding GOOD FAITH is important. In particular, scholars have attempted to flesh out the notion of Good Faith from their bases

⁷⁵ Discuss as such by Kastely *ibid*, 592.

⁷⁶ See Kastely’s discussion on the rhetorical community of the CISG and its drafters’ intent. *Ibid*, 585-591, and 593-4. As Professor Gillies observes “Article 7(2) operates to maintain the status of the Convention as a self-contained law and to minimise unduly hasty resort to domestic law.” In “The UN Convention on Contracts for the International Sale of Goods,” Chapter 1 in Gabriel Moens, and Peter Gillies *International Trade and Business: Law, Policy and Ethics*, (1998) 12.

in both the common law and civil law traditions. Accordingly, as a further step toward developing an understanding of GOOD FAITH, we will briefly review the notions of Good Faith as discussed by various commentators of various legal regimes.⁷⁷

a) Common law

The common law subject to certain exceptions⁷⁸ has traditionally rejected a doctrine of Good Faith in contract law.⁷⁹ Although prior to merchants' courts being absorbed by the King's courts, there appears to have been a concept of Good Faith, it seems to have disappeared shortly thereafter.⁸⁰ The courts slowly redeveloped the idea, but not so much as a substantive doctrine as it was a means of dulling the most extreme injustices of the *caveat emptor* doctrine.⁸¹ In modern English law, so long as parties are acting honestly,

⁷⁷ This approach, of course, introduces all the problems of doing comparative law. For a helpful analysis see Farrar "In pursuit of an appropriate theoretical perspective and methodology for comparative corporate governance" (2001) 13 Australian Journal of Corporate Law 1. It is interesting to note, in this consideration of civil and common law systems, Duncan Kennedy's distinction between standards and rules. He observes that specific rules are more formalistic and are less flexible, whereas standards are more flexible and broadly applicable. "Form and Substance in Private Law Adjudication" (1976) 89 Harv. L. Rev. 1685. Good Faith is more problematic in the common law systems which focus on the rules from the doctrine of stare decisis, whereas the standards of the civil law system are more comfortable with the flexible standards.

⁷⁸ For example, insurance contracts and certain other contracts such as contracts governing agents and trustees.

⁷⁹ The concept is foreign to much of Anglo law. It was introduced into the USA's Uniform Commercial Code via the German *Treu und Glauben* doctrine known to one of its main influences, Professor Karl Llewellyn, Chief Reporter for the Uniform Commercial Code, and former professor at Leipzig. See E.A. Farnsworth, "Good Faith in Contract Performance," in Jack Beatson and Daniel Friedmann eds. *Good Faith and Fault in Contract Law* (1995), 3-24 (1994). 155, and Farnsworth Tulane, above n. 45, 51. It is not yet accepted in Canadian law: See Jacob S. Ziegel above n. 2, commentary on Article 7. Bruno Zeller, commenting on the law in Australia, however, finds Good Faith following the judgement of Priestly J. in *Renard Construction*, that it is indeed a solidifying concept with substantive content. Bruno Zeller, "Good Faith—The Scarlet Pimpernel of the CISG", Bruno Zeller "Good Faith - The Scarlet Pimpernel of the CISG" (2000) 7 International Trade and Business Law Annual, [<http://cisgw3.law.pace.edu/cisg/biblio/zeller2.html>] 2. A leading Australian contract scholar disagrees with Zeller, commenting "the status of Good Faith within the Australian law of contract is uncertain." Carter on Contract, 1.4.(2) 01-180. The main judgment in Australia on Good Faith is Judge Priestley's in the famous case of *Renard Constructions v. Minister for Public Works* Australia 12 March 1992, Appellate Court New South Wales.

⁸⁰ Goode, above n. 18, 2.

⁸¹ *Ibid.*

Good Faith allows parties to be both unreasonable and negligent.⁸² In other words, it is not a broad or comprehensive doctrine and does not have substantive aspect. English law never adopted the *culpa in contrahendo*.⁸³ As leading English commercial law scholar, Roy Goode observes that “[for the English] the predictability of the legal outcome of a case is more important than absolute justice.”⁸⁴

Other common law systems, although sharing the English heritage, have developed differently. Most notably, the United States has specifically included the concept of Good Faith, in substantive sense, in both its Uniform Commercial Code,⁸⁵ and its Restatement (Second) of Contracts.⁸⁶ The UCC contains over fifty references to Good Faith.⁸⁷ As the American commentator Farnsworth, when to speak on the subject of Good Faith after Roy Goode, humorously observed: “You might be fooled into thinking that... you were going hear many of the same thoughts that he [Goode] expressed but with an American accent” he continued, however, “Nothing could be farther from the truth.”⁸⁸ He went on to explain in detail the USA’s significant heritage of Good Faith observing how it was introduced into the USA’s Uniform Commercial Code via the German *Treu und Glauben* doctrine known to one of its main influences, Professor Karl

⁸² Ibid.

⁸³ Ibid.

⁸⁴ Ibid.

⁸⁵ 1-203 in contractual performance, and defined at 1-201(19).

⁸⁶ Para 205.

⁸⁷ Farnsworth, TLDB, p. 52.

⁸⁸ Allan E. Farnsworth, “The Concept of ‘Good Faith’ in American Law”, Centro di studi e ricerche di diritto comparato e straniero, Saggi, Conferenze e seminari. 10, 1.

Llewellyn, Chief Reporter for the Uniform Commercial Code, and former professor at Leipzig.⁸⁹

Still it is not a clear and simple matter. For example, in the USA there are three competing definitions, all of which carry some weight. Good Faith can be used in a restrictive sense, simply indicating the implied terms of the contract.⁹⁰ It can be defined as the “excluder principle” meaning that certain types of behaviour which can be characterized as bad faith are to be excluded.⁹¹ Yet a third view is that it limits the exercise of legal discretion where to so exercise it would undo the benefits surrendered in the development of the contract.⁹² Nevertheless, although historically there has been a rejection of the concept in the common law, outside of the UK it does appear to be gaining ground.⁹³

b) Civil law tradition

The German law, as previously noted offers 500 pages of discussion and one German commentator has expended 2,000 pages on the concept.⁹⁴ In rough terms, the German notion can be described as a legal obligation “to respect the trusting relationship between the parties, and to act reasonably in not breaching that relationship.”⁹⁵ The German civil

⁸⁹ See E.A. Farnsworth, “Good Faith in Contract Performance,” in Beatson and Friedman, above n. 79. (1994). 155, and Farnsworth Tulane, above n. 45, 51.

⁹⁰ Farnsworth Ibid, 59.

⁹¹ Robert Summer, “‘Good Faith’ in General Contract Law and the Sales Provisions of the Uniform Commercial Code,” (1968) 54 Va. L. Rev. 195.

⁹² Steven Burton, “Breach of Contract and the Common Law Duty to Perform in Good Faith,” 94 Harv. L. Rev. 369 (1980).

⁹³ Sim above n. 18.

⁹⁴ Dr. Weber’s edition of the Staudinger commentary. Noted in Schlechtriem, above, n. 20.

⁹⁵ Paul Powers, “Defining the Undefinable: Good Faith and the United Nations Convention on Contracts for the International Sale of goods,” (1999) 18 J. of Law and Commerce, 333, 336.

code s. 242, describes the duty as “*Treu und glauben*”—literally “truth and believing”—translated as “faith and credit.”⁹⁶ This duty is augmented with the duties of “*gute sitten*” (good morals), and “*Billigkeit*” (fairness), among others⁹⁷ and considered a pervasive duty throughout the code.⁹⁸

The Italian notion, however, is a broader ethical idea. It is like the German notion in serving to protect the relationship, but creates a legal obligation of “openness, diligent fairness, and a sense of social solidarity.”⁹⁹ In general, the civil law tradition looks at Good Faith as a broad, comprehensive principle which includes many concepts considered in the common law tradition to be discrete matters.¹⁰⁰ By way of contrast, the French civil code 1134 has been used with great restraint and its impact described as “shallow.”¹⁰¹

It is imperative, however, to note that neither of the two main traditions, has a single unified concept of Good Faith. [see Disa Sim “not a coherent concept.] the traditions are divided within themselves leaving Good Faith as a scattering of ideas and ideals which to

⁹⁶ The Civil Code of the German Empire, Walter Lowey trans., (1975), cited in E.A. Farnsworth, Tulane above, n. 45, n. 16.

⁹⁷ O'Connor, Good Faith in English Law, cited in John Klien, “Good Faith in International Transactions” (1993) 15 Liverpool Law Review, 115, 119.

⁹⁸ Peter Schlechtriem, comments that it “has become a legal principle of such pervasive influence that it is sometimes claimed the codified provisions could be dispensed with; the whole system of private law... might be taken as a mere embodiment of the principle and could in theory, be administered by reference to “*Treu und Glauben*” in “Good Faith in German Law and in International Uniform Laws” Centro di studi e ricerche di diritto comparato e straniero, Saggi, Conferenze e seminari. 24, 1.

⁹⁹ Nicola Palmeiri, “Good Faith Disclosures Required During Precontractual Negotiations,” (1993) 24 Seton Hall, L. Rev., 70, 204, cited in Powers, *ibid*, 337.

¹⁰⁰ Farnsworth, Tulane, above n, 45, 60.

¹⁰¹ M.G. Bridge, “Does Anglo-Canadian Contract Law Need a Doctrine of Good Faith?” (1984) 9 Can. Bus. L. J. 385, 414-415 cited in Sim, above n. 18.

some extent promote judicial activism, and as the common law advocates argue, undermining certainty.

7) INTERPRETATIONS IN THE CASE LAW

As previously noted, the reality of the development of the concept of Good Faith in the CISG is of critical importance to the on-going development and utility of the Convention, and in terms of guidance for commentators. In this section, every reported case¹⁰² that addresses Good Faith will be reviewed in an attempt to establish whether there is indeed a consensus developing among decision makers concerning the existence of a duty of Good Faith, and if so, what the substance of the duty may be.

The cases have been arranged in chronological order. They have been arranged thus because if there is an actual pattern developing, it would be most easy to see such a pattern in this order. The unfortunate corollary consequence of the ordering is that one gets the impression of history, once described eloquently by Henry Ford as “one damn thing after another.” To minimize this effect, the cases are dealt with as briefly as possible while still giving due attention to the matter of how Good Faith is treated by the decision maker in each one.

¹⁰² Every reported case here means every case accessible through the Pace University CISG database which cites Article 7. The manual search picked up four additional cases in comparison with the automatic search. Although the Pace University database identifies two additional cases, I have chosen not to discuss them as the cases—*Filanto v. Chilewich*—does not discuss Good Faith explicitly, and the decision of Germany 21, March 1996, does not discuss Good Faith except in reference to domestic law. I have relied on the translations of the Unilex database wherever possible.

1980-1992

No reported cases

1993

The only case in 1993 was *Eximin v. Textile and Footwear* a case involving Israeli and Belgian litigants.¹⁰³ Although the CISG was not directly applied, it referred to the CISG for purposes of its Good Faith provision. The court held that the joint decision of the buyer and the seller to make counterfeit Levi's boot jeans, was an act of bad faith and that accordingly, both parties should share the loss. Although not a CISG case, it is perhaps the clearest exposition of bad faith as a negative or foil for a determination of Good Faith.

1994

In 1994 two cases were decided that refer to Article 7 of the CISG. An arbitration required the arbitrator to consider what the obligations of the parties were with respect to notice of defective goods. The arbitrator opined, "at the least the principle of estoppel or, to use another expression, the prohibition of *venire contra factum proprium*, ... represents a special application of the general principle of Good Faith,"¹⁰⁴ as set out in the CISG. The arbitrator's idea is that Good Faith is a general principle with content that includes other principles such as estoppel, or alternatively, includes a substantive specific obligation which is "a special application" of Good Faith.

¹⁰³ *Eximin v. Textile and Footwear* Israel 22 August 1993 Supreme Court
<http://cisgw3.law.pace.edu/cases/930822i5.html>

¹⁰⁴ Austria 15 June 1994 Vienna Arbitration proceeding SCH-4318
<http://cisgw3.law.pace.edu/cases/940615a4.html>

Another arbitration held by the ICC in the same year considered Good Faith.¹⁰⁵ It involved a set of slightly convoluted facts in which payment by a Russian supplier in the form of leather hides were on-sold by the Yugoslav supplier firm to an Italian buyer. The buyer requested a reduction of price on the basis of a declining markets, and later, when the reduction was rejected, the buyer claimed a reduction on the basis of inferior quality hides. The parties had a meeting in Moscow concerning the situation and drafted a memorandum. The issue then became whether the agreement at the meeting amounted to a novation. The tribunal stated:

"[G]eneral principles of international commercial practice, including the principle of Good Faith, should govern the dispute. . . . [F]or the present dispute, such principles and accepted usages are most aptly contained in the [CISG]. . . . Applying the [CISG] to the present dispute is all the more appropriate since the [countries of the parties] are signatories to [this] convention. . . . [T]o the extent the [CISG] contains provisions relevant to the dispute, the tribunal shall consider [them]."

The doctrine of Good Faith, although alluded to, seems to have had no specific content to be applied to the situation. The arbitrator found that the buyer failed to give proper notice, failed to diligently mitigate damages and held for the seller on all counts.

1995

Seven cases in 1995 cited Article 7 of the CISG. In *BRI Production "Bonaventure" v. Pan African Export*,¹⁰⁶ a French seller had sold jeans to a USA buyer Pan Am but had insisted that the jeans be sold only in Africa and South America. The buyer had ignored the term and sold them in Spain. This action harmed the seller's business in Europe. The

¹⁰⁵ ICC Arbitration Case No. 7331 of 1994 [English text]
<http://cisgw3.law.pace.edu/cases/947331i1.html>

¹⁰⁶ *BRI Production "Bonaventure" v. Pan African Export* France 22 February 1995 Appellate Court Grenoble <http://cisgw3.law.pace.edu/cases/950222f1.html>

court used the concept of Good Faith to find against the buyer, Pan Am and to reprimand and punish Pan Am. The court held that Pan Am had harmed knowingly the business of the seller. This case has caused some concern because the courts held that Pan Am's seeking judicial remedy for BRI's refusal to sell more jeans was an abuse of process and contrary to Good Faith and awarded \$10,000 francs for breach of Good Faith in bringing the proceedings.

In the Dutch case, *Diepeveen-dirkson v Nieuwenhoven Veehandel*¹⁰⁷ the Court of Appeal approved of the lower court's decision to refuse a claim for a "reduced penalty" or liquidated damages clause on the basis of the CISG's Good Faith provision. The German seller of live lambs, claimed liquidated damages for late payment against the Dutch buyer. The Dutch buyer opposed the liquidated damages on the basis of Good Faith, claiming that the lambs were of insufficient weight and so non-conforming goods. The court stated the controversy surrounding liquidated damages clauses was good cause for reversion to domestic law, in this case at bar, German law. It is an odd use, or more properly avoidance, of the CISG since both countries are signatories to the CISG. The court gave no substance in the CISG provision of Good Faith, and refused to give it content. It substituted domestic law for CISG's international regime.

Another German case involved the quality of glass test-tubes ordered from an Italian supplier.¹⁰⁸ The Italian party alleged that in negotiations, the German party agreed to one

¹⁰⁷ *Diepeveen-Dirkson v. Nieuwenhoven Veehandel* Netherlands 22 August 1995 Appellate Court Arnhem <http://cisgw3.law.pace.edu/cases/950822n1.html>

¹⁰⁸ Germany 31 March 1995 Appellate Court Frankfurt <http://cisgw3.law.pace.edu/cases/950331g1.html>

type of glass. Upon delivery, the German party claimed that it had agreed to supply another type of glass. The court appears to understand Good Faith as importing an objective standard into reading correspondence of the parties at the time of formation of the contract. A failure to come to an agreement led to a judgement against the Italian seller/plaintiff precluding it from recovering money for test tubes made and delivered.

A Hungarian case also considered a Good Faith obligation.¹⁰⁹ In that case, a Hungarian supplier of mushrooms demanded a guarantee from an Austrian buyer. Where the buyer provided an outdated guarantee, the court held that to do so was a breach of the duty of Good Faith. The court specifically stated that in its view, Good Faith is not only an interpretive tool to be applied to the CISG itself, but a standard of behaviour to be observed by the parties too.

Another ICC arbitration¹¹⁰ in which a letter of credit for payment for crude steel was in dispute, the panel decided that Good Faith is a principle in all contracts, regardless of whether interpreted under domestic or international law. Despite a number of references to Good Faith, however, it is not clear that Good Faith amounted to anything but a general principle with no specific application, nor substance.

1996

¹⁰⁹ Hungary 17 November 1995 Budapest Arbitration proceeding Vb 94124
<http://cisgw3.law.pace.edu/cases/951117h1.html>

¹¹⁰ ICC Arbitration Case No. 7645 of March 1995 [English text]
<http://cisgw3.law.pace.edu/cases/957645i1.html>

In the year 1996, only two cases address Article 7. In one case, a German case,¹¹¹ the seller knowingly sold a motor vehicle which had a rolled back odometer. The seller resisted the buyer's claim for compensation, on the basis of an exclusion clause in the warranty. The court applied the CISG stating that for a party to avail itself of its provisions, it must come to the court having acted in Good Faith. In this instance, the seller could not rely on the exclusion of warranty because its actions with respect to the vehicle were not in Good Faith. Good Faith in this instance is substantive limiting the rights of the party to invoke other legal rights.

Another German case decided in 1995¹¹² which applied the CISG, although not finding Good Faith to be the pivotal point, did consider it in coming to its conclusion. A German buyer of Italian restaurant furnishings complained of the goods claiming that they were incomplete. The claim was made, however, a substantial time after receipt and inspection. The German court held that to permit the buyer to refuse payment on that basis would be to permit it to breach its duty of Good Faith. It is not clear why the court did not rely on the inspection provisions of the CISG and instead found it as a matter of Good Faith.

1997

¹¹¹ Germany 21 May 1996 Appellate Court Köln
<http://cisgw3.law.pace.edu/cases/960521g1.html>

¹¹² Germany 26 March 1996 District Court Saarbrücken
<http://cisgw3.law.pace.edu/cases/960326g1.html>

In 1997, seven cases were decided making reference to Article 7. The *Cooperative Maritime Etaploise v. Bos Fishproducts* case¹¹³ offers an interesting perspective as it deals with French and Dutch parties and the tribunal made specific comments concerning the French subjective view of Good Faith which it contrasted with that of the CISG. In this case, a French seller sold fish filets to the Dutch buyer. The buyer complained about the quality of the filets, and refused to pay claiming a right to set-off. The court held that the buyer did not notify the seller within a reasonable time after receiving the goods, and so decided in favour of the seller.

In the opinion of the court, the CISG demanded a notion that went further than the French notion and has an objective standard. In applying the notion of Good Faith, the court did not find an additional duty or further right; rather it simply held that Good Faith in this instance supported the conclusion it had reached by other means. Perhaps this is the best use of Good Faith—that where a conclusion can be reached by any other means, it should be, and only then once it has come to a tentative, legal decision, to hold up the tentative decision against the standard of Good Faith. In other words, the Good Faith standard should be a final test, to ensure that in the odd, difficult case, where law would require a less than just outcome, the arbiter be permitted to do what is just on the basis of Good Faith.

¹¹³ *Cooperative Maritime Etaploise v. Bos Fishproducts* Netherlands 5 March 1997 District Court Zwolle [<http://cisgw3.law.pace.edu/cases/970305n1.html>]

Another case in 1997 was German case involving the sale of altered plastic protective coatings.¹¹⁴ The parties had had a long-standing relationship, but due to a change in the seller's goods, an adhesive was used which reduced its utility to the buyer. As a result the buyer claimed against the seller. The buyer's action was delayed beyond the limitation period set out in the CISG and accordingly, the buyer was barred from recovery. The buyer argued that Good Faith required the bar to be avoided. The court held that the seller's Good Faith obligations did not preclude its reliance on the bar.

Another German case of the same year,¹¹⁵ the court held that requiring notice from the buyer to the seller that the seller's failure to deliver goods—in this case, iron molybdenum—was unnecessary. The failure to deliver was a fundamental breach and forcing the parties to rely on the notice provisions would have amounted to a lack of Good Faith where it was already evident that the contract had been breached. Good Faith in this instance avoids an overly technical or legalistic interpretation of the contract.

In yet another German case of that year,¹¹⁶ the court held that Good Faith required a seller to return goods which it had promise to return after a necessary mechanical adjustment. The seller had been permitted to take the goods on the promise that it would return them to the buyer after adjustment. The buyer was disputing the purchase price. The court held that the unconditional promise to return the goods required the party to

¹¹⁴ Germany 25 June 1997 Appellate Court Karlsruhe
<http://cisgw3.law.pace.edu/cases/970625g1.html>

¹¹⁵ Germany 28 February 1997 Appellate Court Hamburg
<http://cisgw3.law.pace.edu/cases/970228g1.html>

¹¹⁶ Germany 8 January 1997 Appellate Court Köln
<http://cisgw3.law.pace.edu/cases/970108g1.html>

perform that obligation as part of its duty of Good Faith. Again the courts here are finding Good Faith to be substantive, requiring parties to fulfill their obligations.

In yet another 1997 case a German seller was required to supply parts to a Spanish buyer/distributor.¹¹⁷ The arbitrator determined that the obligation of Good Faith in the CISG was limited to the internal interpretation of the text. In other words, it has no application to contracts decided under it. The seller was required to supply spare parts under a German duty of Good Faith, but that duty was only introduced into the CISG under the 7(2) permission of reference to domestic law when no other resources are available. While this interpretation of the CISG may be the narrowest interpretation and as such undoubtedly correct as far as it goes, it fails logical test of how to apply it to the CISG and not contracts, as noted above.

Another ICC arbitration¹¹⁸ the tribunal considered whether Article 7 permitted a Swiss seller of seasonal clothing to deliver its samples late. The court held that the buyer was entitled to cancel the contract as the seller's late shipment amounted to a fundamental breach. The court states that Good Faith does not require the buyer to accept what would be a late delivery of goods.

¹¹⁷ ICC Arbitration Case No. 8611 of 23 January 1997

<http://cisgw3.law.pace.edu/cases/978611i1.html>

¹¹⁸ ICC Arbitration Case No. 8786 of January 1997 [English text]

<http://cisgw3.law.pace.edu/cases/978786i1.html>

In *Kunsthaus Math. Lempertz v. Wilhelmina van der Geld*¹¹⁹ another 1997 CISG case, the Dutch seller ordered a German auctioneer to auction a painting, allegedly by a famous artist. The court held that the action for recovery by the German buyer who wanted redress because it turned out that the painting was by another painter was time barred. Good Faith in this context—which interestingly the courts identified as a principle—meant complying with the terms of the CISG.

1998

In 1998 six CISG cases dealt with Article 7. In the case of *Bielloni Castello v. EGO*¹²⁰ the Court of appeal, reversing the trial judge's decision, decided that Italian domestic law did not apply and that the CISG and the principle of Good Faith did apply. Bielloni was the plaintiff seller, who sold printing machinery to a French buyer. The buyer failed to pay the full amount of the invoice and failed to pick up the machinery. The buyer claimed that the building where the machinery was to be installed, had with no fault of its own, not been built. It claimed the seller agreed to postpone delivery, and in the suit, claimed for return of the down payment. The court of appeal, denied the buyer's claim that the Italian notion of Good Faith applied. The court specified that the CISG precludes the use of Italian law and that CISG Good Faith is an independent notion. The court of appeal notes the existence of Good Faith obligations as one factor to be considered in coming to a conclusion that the better behaviour—i.e. more even-handed—of the seller deserved to be rewarded.

¹¹⁹ Netherlands 17 July 1997 District Court Arnhem (<http://cisgw3.law.pace.edu/cases/970717n1.html>)

In an interesting Mexican case against a Korean company *Dulces Luisi v. Seoul International*,¹²¹ the Mexican Trade Tribunal decided that a Korean exporter of Mexican sweets had committed a fraud. In the case, the Korean company had a Letter of Credit issued with terms that ultimately contradicted the revised terms of the contract, with the apparent purpose of defrauding the Mexican company. The Mexican Trade Tribunal, perhaps in an effort to step into the gaps left by the Mexican legal system, accepted jurisdiction and applied the CISG to a party not signatory to the Convention. The tribunal stated:

It is the opinion of this Commission that the [buyer] companies acted in bad faith, thus causing a grave injustice to the [seller], but most importantly acted against one of the basic principles in international trade, that companies participating in international commercial transactions must observe Good Faith...

Certainly, one would have expected that another part of the law could have applied; however, what could have been is not relevant to what is, and what we have is an application of Good Faith as a means of penalizing civil fraud.

Another case in the 1998 CISG Article 7 cases is a Russian arbitration.¹²² The parties were domiciled in Russia and Uzbekistan, and so after determining that CISG applied, the panel held that a contract “fine”—presumably liquidated damages for delay—was payable to the seller. The buyer claimed that documents executed by the seller for the buyer’s accounting compliance records were determinative in exculpating the buyer from

¹²⁰ *Bielloni Castello v. EGO* Italy 11 December 1998 Appellate Court Milan
<http://cisgw3.law.pace.edu/cases/981211i3.html>

¹²¹ *Dulces Luisi v. Seoul International* Mexico 30 November 1998 Compromex Arbitration
<http://cisgw3.law.pace.edu/cases/981130m1.html>

¹²² Russia 18 December 1998 Arbitration proceeding 288/1997
<http://cisgw3.law.pace.edu/cases/981218r2.html>

obligations to pay more. The panel rejected the buyer's defence and in so holding, the panel explained that on an objective standard, the parties knew the fine was outstanding and that the documentation executed for purposes of bookkeeping did not accurately reflect the situation. Accordingly, the panel observed that in coming to its conclusion, "The general principle of Good Faith in international trade on which the Vienna Convention 1980 is based (Article 7) was also taken into account." Unfortunately, beyond this very general comment, one has no idea how it was applied to the case.

In another Russian arbitration of the same year,¹²³ a German seller and a Russian buyer were in a dispute concerning payment for goods. The Russian buyer claimed *force majeure*—being a permission from the Russian Central Bank regarding foreign currency payments—prevented it from paying on time. The seller rejected the *force majeure* claim and when the buyer reaffirmed its position and stated that the *force majeure* had lasted more than a month and thus permitted it to avoid the contract in its entirety, the seller demanded payment of liquidated damages. In an interesting twist, the seller assigned its rights to the damages to a third party domiciled in Russia. The panel held that failure to even attempt to fulfill or communicate non-fulfillment in a timely manner by the buyer was a failure to accord with the principle of Good Faith. Here the doctrine of Good Faith was given substantive content and specific consequences; however, it is evident that the principle is broad and general, and serves as a support for more specific application of rules of contract law.

¹²³ Russia 24 November 1998 Arbitration proceeding 96/1998
<http://cisgw3.law.pace.edu/cases/981124r1.html>

A Swiss arbitration between a German textile manufacturer and a Swiss buyer defendant also addressed the issue of Good Faith.¹²⁴ The issue was whether the payment provisions of the contract had been modified. The court held that the seller had consented to the change because Good Faith did not allow it to act in ways that indicated consent and then claim that it had not consented to the change. Good Faith in this case is substantive and derived from the general principle in Art. 7. The court stated that “so long as the sender was entitled under Good Faith to regard the silence as an acceptance” it could do so. In this case it appears to mean that a reasonable view of the matter must be taken.

In another 1998 Swiss case, *T. SA v. R. Établissement*¹²⁵ the Swiss seller of lamb skin coats sold the goods to a Lichtenstein buyer who without seeing the goods had on-sold them to Belarus. The Belarus client complained of quality problems and this complaint was passed on by the buyer to the Swiss seller about a month afterwards. The parties agree that the goods were not of sufficient quality. A similar procedure occurred on subsequent deliveries as the buyer took no additional care in inspecting these goods. The buyer did not raise any objections in a timely manner, but refused to pay for the 3rd and 4th shipments. Both the buyer and seller claimed against each other—the buyer for return of money paid and the seller for the balance of the contract.

The seller claimed the buyer’s claim was barred by its failure to provide timely notice.

The court decided that the buyer’s late notice was contrary to the principle of Good Faith.

¹²⁴ Switzerland 5 November 1998 District Court Sissach
<http://cisgw3.law.pace.edu/cases/981105s1.html>

The court appears to have seen the seller's action as commercially reasonable and not a waiver of any rights. In other words, Good Faith functioned as a standard against which behaviour can be judged objectively.

1999

There were four cases citing Article 7 of the CISG. A Russian arbitration,¹²⁶ in which the parties had had a relational contract, found that a Cypriot buyer could not avoid payment on a shipment of goods on the basis of the Russian seller's failure to deliver shipping documents in the exact manner stipulated by the buyer. Other than this minor deviation from the contractual terms, the seller delivered the goods as per contract. The panel found that the manoeuvrings of the buyer to avoid payment did not "fall within the principle of Good Faith in commercial relations." In other words, the principle of Good Faith is a standard for measuring the conduct of the parties in their performance of contractual duties.

In another Russian arbitration--this one involving a Russian buyer and a Swiss seller¹²⁷--the seller attempted to avoid a contract after considerable correspondence and a three-year delay. The panel held that the CISG's Art. 7 applied, and could be analogized to the Anglo doctrine of estoppel, and the German doctrine of *Verwirkung*. The panel also indicated that the seller's actions amounted to a breach of the law merchant which

¹²⁵ T. SA v. R. Établissement Switzerland 30 November 1998 Commercial Court Zürich
<http://cisgw3.law.pace.edu/cases/981130s1.html>

¹²⁶ Russia 10 June 1999 Arbitration proceeding 55/1998
<http://cisgw3.law.pace.edu/cases990610r1.html>

¹²⁷ Russia 27 July 1999 Arbitration proceeding 302/1996
<http://cisgw3.law.pace.edu/cases/990727r1.html>

prohibits parties from using the law in an unreasonable manner. This case, then, gives Good Faith a strong substantive legal content, including estoppel, and interprets it to mean “reasonable” denying one party’s efforts to assert its legal rights.

Another 1999 case was between a Belgian buyer and Italian seller, S.r.l. R.C. v. BV BA R.T. In this case a seller supplied defective floor tiles. The court held that the seller, in providing the defective tiles, did so knowingly. The court opined:

Article 40 CISG... is an application of the Good Faith principle.... the [seller] knew or at least could not have been unaware of the defects, while he did not disclose the defects to the buyer. Consequently, the [seller] has violated the principle of Good Faith by concluding the contract of sale.

The principle of Good Faith in this case is a broad principle here, informing specific doctrines and supporting fair findings.

In a Swiss arbitration of the same year,¹²⁸ a French seller had sold plastic granules to a Swiss corporation for many years. After a restructuring which included a merger of the Swiss corporation and its new parent corporation, the pre-merger corporation’s stationary was used to continue ordering from the French corporation. When presented with invoices, the restructured Swiss group refused to pay invoices based on pre-restructured stationery. The arbitration panel held that the principle of Good Faith did not permit it to refuse payment—apparently on the basis of who received the benefit of the contract. In

¹²⁸ Switzerland 11 June 1999 Commercial Court Aargau
<http://cisgw3.law.pace.edu/cases/990611s1.html>

other words, Good Faith is a general principle of justice that requires honesty or integrity in dealings.¹²⁹

2000

No cases reported.

2001

The year 2001 had five cases dealing with Good Faith. In a difficult Austrian case, the holding of which was reversed on appeal, and again subsequently by the Supreme Court, the issue of who the proper parties to the contract were was in dispute.¹³⁰ The defendant, who had been accepted by the plaintiff-supplier, argued that it did not authorize the actions of its subsidiary—who had been explicitly rejected by the plaintiff—and so should not be liable. At the appeal level, the court held that Good Faith in the CISG was applicable and that it meant that the parties to a commercial contract were not required to investigate the internal workings and organization of contracting parties. In common law jurisdictions this is referred to as the Indoor Management Rule.

¹²⁹ The UNICITRAL abstract identifies Good Faith as a factor; however, the unilex translation does not contain any reference to Good Faith.

¹³⁰ Austria 22 October 2001 Supreme Court [1 Ob 49/01i] <http://cisgw3.law.pace.edu/cases/011022a4.html> On 28 June 2000, the District Court of Feldkirch [Court of First Instance] dismissed the [seller's] claim (docket no. GZ 7 Cg 284/97b-107). Upon the [seller's] appeal, the Innsbruck Court of Appeals reversed the decision of the [Court of First Instance] on 14 November 2000 (docket no. GZ 7 Cg 284/97b-107).

The New Zealand case of *Bobux Marketing Ltd v. Raynor Marketing Ltd*¹³¹ also decided in 2001, addressed the termination of a contract for indefinite term. The case involved Bobux' right to terminate an exclusive supply contract to a distributor where the distributor wished to distribute, related but non-competing products. The court observed that the majority of contracts are in fact, relational contracts, and that the classical analysis of individual discrete contracts was not an appropriate paradigm for contract law. In the classical paradigm, it may be that Good Faith—i.e. honest, etc—has a lesser role; however, in the larger context of relational contracts, its import is much greater.

In coming to its judgment, the court held that Good Faith in the CISG was appropriately informed by the long standing doctrines of contract law. The court stated: “concept of Good Faith is the latent premise of much of the law of contract relating to the performance of contractual obligations,”¹³² and further “Good Faith is closely associated with notions of fairness, honesty and reasonableness which are already well recognised in the law.”¹³³

Thus, while in this case Good Faith was not an independent doctrine, the court viewed it as an umbrella concept, one which included a number of common law contract doctrines that made the “promise” aspect of relational contracts important.

In *Tai Hei Business Co. Ltd. v. Jiangsu Shun Tian International*, a Chinese case that can only be described as bizarre, the court held that the obligation of Good Faith precluded a

¹³¹ *Bobux Marketing Ltd v. Raynor Marketing Ltd* New Zealand 3 October 2001 Court of Appeal Wellington

<http://cisgw3.law.pace.edu/cases/011003n6.html>

¹³² 515

Japanese seller's recovery of some \$19.0 million yen for four pieces of heavy machinery which it delivered to China.¹³⁴ The case appears to involve an attempt to smuggle the machines into China and a dispute between two competing Chinese buyers. The selling Japanese company failed to fulfill its obligations of tendering original documents, and in so doing, appears to have created a loophole for the competing Chinese company to pick it up. The only application of "Good Faith" appears to be against the Japanese company, not the Chinese participants in the fraud. In obiter, the decision maker noted that the Chinese parties were punished under Chinese criminal law.

Another 2001 case from Germany case picked up on the notion of Good Faith.¹³⁵ That case involved the purchase of a rather complex piece of machinery that required substantial after sales instruction. The costs associated with instruction were the cause of the dispute. The case also dealt with the controversial issue of standard trade terms which brought in the Good Faith issue. The court stated that should the offeror wish to rely on standard trade terms, which in this case would have placed the burden for training on the purchaser, it should have, as a matter of Good Faith, placed the terms at the disposal of the offeree. In other words, in this instance, the court found that Good Faith placed a substantive obligation on the party to make a disclosure or provide information to the other party.

¹³³ 516

¹³⁴ *Tai Hei Business Co. Ltd. v. Jiangsu Shun Tian International Group Nantong Costume Import and Export Company* cited in the Pace University as China 19 February 2001 Jiangsu Higher People's Court [Appellate Court] (*Tai Hei v. Shun Tian*) <http://cisgw3.law.pace.edu/cases/010219c1.html>

¹³⁵ Germany 31 October 2001 Supreme Court <http://cisgw3.law.pace.edu/cases/011031g1.html>

In an Italian District Court case in which the CISG was determined to apply, an Italian supplier provided unworkable machinery to an Ecuadorian buyer.¹³⁶ The court, although not specifically citing Article 7 of the CISG, stated that the failure to grant a seller the opportunity to cure defects in goods is contrary to the duty of Good Faith of performance in contracts under international law. Good Faith in this context then, is simply the overarching principle set out in the specific provisions of the CISG.

2002

In 2002, three cases examined the Good Faith provision. In the Belgian case, *NVAR v NVI*,¹³⁷ the seller was unable to deliver pagers to the buyer on the schedule negotiated by the parties. The buyer then requested a refund of money and also made other alternative suggestions on how to resolve the situation. In response, the seller took an aggressive position that there was no contract. The court found that the seller's approach was not in Good Faith as intended by the CISG. The court in this instance found that the doctrine of Good Faith was substantive and precluded parties from capricious behaviour advancing self-interest to the detriment of the other party.

In another 2001 case, between a Spanish seller and a French buyer,¹³⁸ *Société T... diffusion v. Société M... SL* the French Court of Appeal decided that the seller was not responsible for delivering goods which infringed the intellectual property of third parties. The buyer alone, as a knowledgeable trader would certainly have known that it did not

¹³⁶ Italy 13 December 2001 District Court Busto Arsizio <http://cisgw3.law.pace.edu/cases/011213i3.html>

¹³⁷ Belgium 15 May 2002 Appellate Court Gent (*NV A.R. v. NV I.*)
<http://cisgw3.law.pace.edu/cases/020515b1.html>

have the intellectual property rights, must bear those consequences. This case is troubling as it is contrary to the highly similar fact pattern of the 1993 case of *Eximin v. Textile and Footwear* discussed above.

A Dutch case¹³⁹ between oil extractors and refiners brought the panel to consider the CISG. In that case, the refiners/buyers complained that the blend being provided by the extractor/sellers contained excessive mercury and refused to accept further shipment. The sellers therefore had to sell their product at lower costs elsewhere, and brought an arbitration proceeding to make up the difference. In its application of the CISG Article 7, the court held that standards (“average” standard, or “merchantability”) of the various legal systems do not apply, and that instead, it must be directed to the observance of Good Faith in international trade. The standard was determined to be a “reasonable” standard. As part of its determination of the matter, the panel decided that the buyer had to pay the seller for breach of contract, as Good Faith required that a reasonable standard is the fulfillment of the Good Faith requirement in international trade. In other words, Good Faith is a substantive doctrine meaning “reasonable.”

2003- present (May 30, 2004)

No cases reported

8) CONCLUSION

¹³⁸ France 19 March 2002 Supreme Court
<http://cisgw3.law.pace.edu/cases/020319f1.html>

¹³⁹ Netherlands 15 October 2002 Netherlands Arbitration Institute, Case No. 2319 [English text]
<http://cisgw3.law.pace.edu/cases/021015n1.html>

The CISG is clearly an independent international document. It is a survivor of a different era in which countries were working on a multi-lateral basis. The CISG was looking to establish a new law merchant, a commercial law independent of any and all systems of the world, including the best of many systems, but also reaching beyond the traditional injustices in world trade. In that sense it is a visionary treaty—an effort to realize more than any other treaty in force, the vision of a more just world. One way in which it does so, is imposing on parties contracting for the commercial sale of goods in the international arena, a duty of Good Faith, and imposing a legal duty on adjudicators world-wide to consider in a pragmatic way, what that duty requires in terms of specific behaviour.

As Zeller observes, perhaps somewhat optimistically, the current chaos in the case law “reveals that a ‘sophisticated grasp’ of the provisions of the CISG has not yet been achieved.”¹⁴⁰ Perhaps more realistically, Sim writes:

while some semblance of an international doctrine may finally emerge, this would be an extremely long time in coming and would undermine the certainty, predictability and stability of international transactions in the meantime...[minimizing its role] is far better than having to contend with the ‘wild-card’ of an uncertain general principle of Good Faith.¹⁴¹

The tangle of cases seems to be making the waters ever murkier as the various panels and courts continue to introduce patches of domestic law and cobble together resolutions using the term “Good Faith” without explaining its content or meaning in applications—it being variously described as a general principle, a principle with specific substance, or

¹⁴⁰ Zeller above n. 45, Four-corners “abstract”

simply one of many things that makes one party's position more favourable to the adjudicator than another. It may be that this mash of ideas more accurately reflects the reality of judicial reasoning, but it certainly makes the merchant and the legal advisor's job more difficult. Without a single unifying concept, arbitrary though it may be, the notion of Good Faith is a nebulous notion probably causing more grief than it resolves, introducing more uncertainty without the corollary benefit of improving justice or fairness.

In the cases reviewed, while often mentioned, it is only "applied" in a very few case, and seems more to be a tool indicating the decision maker's good intentions or efforts to strike at fairness over legalism. Nevertheless, one should be cautious in reading too much into the use of a Good Faith doctrine in the cases, for as Schlechtriem observes: "references by the courts to Good Faith and fair dealing so far are mostly of passing characters, if not superfluous."¹⁴²

As to the future, it is apparent that regardless of the desire of some scholars and what may well be the correct reading of the CISG, the case law has moved to adopting a broader application of Good Faith in the convention. That being the case, it behoves us to get ahead of the development and look for ways to guide it into a useful, sufficiently specific doctrine for the use and application in contractual problems where the contracts are subject to the CISG. One such suggestion has been made by Schlechtriem who has noted success in taking a two step approach toward teaching it: he suggests distinguishing

¹⁴¹ Sim, above n. 18.

¹⁴² Schlechtriem above n. 20.

between functions and values. Functions, as envisioned by Schlechtreim and his colleagues is an examination of where and with what intention the courts apply the notion.¹⁴³

Values, by way of expansion, are the underlying features of society, or rights that the parties are seeking to protect and advance by Good Faith.¹⁴⁴ Thus values include such things as rights and other important perspectives a society seeks to protect. Clearly, there is considerable room for disagreement as to what such values may be;¹⁴⁵ however, in the limited context of commercial relations, perhaps it is the hope that over time, these values can be brought into sufficient harmony to permit the concept of Good Faith to be readily identified and applied in the many cultures and contracts touched by the CISG.

As Simon Fisher has observed:

the business community desires as much uniformity in the content and operation of business laws as possible, so that there might be a seamless transition from one country to another. If the utopian idea of a seamless business border can be achieved, then international business transactions will be better facilitated.¹⁴⁶

And in advancing this goal we must take the CISG as it is, with the noted trends, and work furiously to formulate a workable concept of Good Faith and to educate decision makers about it. And in all this we must learn to live with the problem identified by Aristotle long ago: namely,

¹⁴³ Ibid.

¹⁴⁴ Ibid.

¹⁴⁵ Ibid.

¹⁴⁶ Simon Fisher “International Influences Affecting Australian Commercial Law” 5 Int’l. Trade & Bus. L. Ann. 49 (2000)

there are some cases for which it is impossible to lay down a law... For what is itself indefinite can only be measured by an indefinite standard.¹⁴⁷

¹⁴⁷ Aristotle., *The Nicomachean Ethics*, trans. H. Rackham, Harvard University Press, Cambridge, Mass., (1926), 315. Cited in Troy Keily, above n. 48, 15.